

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

BEFORE SHRI N V VASUDEVAN, VICE PRESIDENT  
AND SHRI G MANJUNATHA, ACCOUNTANT MEMBER

IT(TP)A No.2217/Bang/2016 & IT(TP)A No.189/Bang/2018
Assessment year : 2012-13

M/S. Syniverse Technologies Services (India) Pvt. Ltd. (Formerly known as Syniverse Teledata Systems Pvt.Ltd.) Embassy Tech Park, Block “B” Delta, 3rd Floor, Sarjapur-Marthahalli Outer Ring Road, Bangalore-560 103. <b>PAN: AAAC1 6297A</b>	Vs.	The Deputy Commissioner of Income Tax, Circle 6(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	S/Shri P.K. Prasad & Uma Shankar Gautam, Advocates
Respondent by	:	Shri C.H. Sundar Rao, CIT(DR-I), ITAT, Bangalore.

Date of hearing	:	24.10.2019
Date of Pronouncement	:	25.10.2019

**ORDER**

*Per N V Vasudevan, Vice President*

ITA No.2217/Bang/2016 is an appeal by the Assessee against the final order of assessment dated 14.10.2016 of Deputy Commissioner of Income-Tax, Circle-6(1)(2), Bengaluru, passed u/s.143(3) read with Sec.144C(13) of the Income Tax Act, 1961 (the Act) relating to AY 2012-13. The Assessee had filed this appeal in time. Consequent to merger of Syniverse Teledata Systems Pvt. Ltd., with Syniverse Technologies

Services (India) Pvt. Ltd., the Assessee filed a revised Form No.36B before the Tribunal incorporating the name of the new entity. The Registry treated this form No.36-B so filed by the Assessee as a new appeal and assigned the number IT(TP)A No.189/Bang/2018. The Assessee by his letter 15.5.2018 pointed out to the Registry the aforesaid mistake. In view of the above, the revised form No.36-B filed on 18.1.2018 is taken on record. Consequently, IT(TP) A.No.189/Bang/2018 is dismissed as superfluous and infructuous and hence dismissed as such. IT(TP)A No.2217/Bang/2016 is taken up for consideration.

2. The Assessee is a company engaged in the business of providing Information Technology Enabled Services (ITES) to its Associated Enterprises (AE) MACH S.a.r.l, Luxembourg and the said transaction was an international transaction. The Assessee received a sum of Rs.27,63,60,922/- as consideration for rendering such services from the AE. According to the provisions of Sec.92 of the Act, any income arising from an international transaction has to be determined having regard to Arm's Length Price (ALP). Hence the question of determination of ALP of the sum received by the Assessee from the AE was referred to the Transfer Pricing Officer (TPO) by the AO u/s.92CA of the Act.

3. It is not in dispute between the Assessee and the revenue that the Transaction Net Margin Method (TNMM) was the Most Appropriate Method (MAM) for determination of ALP and that the profit level indicator to be adopted for comparison of the Assessee's profit with that of comparable companies was Operating Profit/Total Cost (OP/TC). The OP/TC of the Assessee was 15%. The Assessee in its TP study selected 7 comparable companies whose arithmetic mean of OP/TC was arrived at 11%. Since the profit margin of the Assessee was more than the arithmetic mean of OP/TC of the 7 comparables selected by the Assessee, it was claimed by

the Assessee that the price charged by it in the international transaction was at Arm's Length.

4. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred by the AO, accepted 2 out of the 7 comparable companies suggested in the TP study by the Assessee as comparable with the Assessee (e4e Healthcare Business Services Private Limited and Jindal Intellicom Ltd.). The TPO on his own selected 8 other companies as comparable companies with the Assessee. Thus, a final set of 10 comparable companies was chosen by the TPO as comparable companies. The arithmetic mean of profit margin of these companies after and before adjustment towards working capital adjustment was as follows:-

**Comparables selected by TPO and their arithmetic mean:**

<b>Sl. No.</b>	<b>Name of the Company</b>	<b>Mark-up on Total Costs (WC-unadj) (in %)</b>
1	Accentia Technologies Ltd.	11.75
2	Universal Print Systems Ltd. (Seg) (BPO)	52.46
3	Informed Technologies India Ltd.	6.08
4	Infosys BPO Ltd.	36.30
5	Jindal Intellicom Ltd.	-0.05
6	Microgenetic Systems Ltd.	19.61
7	TCS E-Serve Ltd.	63.69
8	BNR Udyog Ltd. (Seg) (Medical Transcription)	41.58
9	Excel Infoways Ltd. (Seg) (IT/BVPO)	29.79
10	e4e Healthcare Business Services Pvt. Ltd.	19.85
<b>AVERAGE MARK-UP</b>		<b>28.11</b>

5. On the basis of the comparable companies, the TPO computed arm's length price (ALP) of the international transaction of rendering of ITES by the Assessee to its AE and the consequent addition to total income by way of adjustment to ALP as follows:-

Arm's Length Mean Mark-up	28.11%
Less: Working Capital Adjustment (As per Annexure C)	-1.71%
Adjusted mean mark-up of the comparables	29.82%
Operating Cost ('OC')	Rs.24,13,96,538
Arm's Length Price ('ALP') = 129.82% of OC	Rs.31,33,80,985
Price Received	Rs. 27,63,60,922
<b>Shortfall being adjustment U/S. 92CA</b>	<b>Rs. 3,70,20,063</b>

6. The difference between the price charged by the Assessee and the ALP determined by the TPO viz., Rs.3,70,20,063/- was added to the total income by the AO in his drat assessment order dated 11.2.2016 as addition on account of shortfall being adjustment u/s.92CA of the Act.

7. The Assessee filed objections before the DRP against the addition made on account of adjustment to ALP. The DRP gave the following directions:-

- (i) The DRP accepted the Assessee's contentions that Accentia Technologies Ltd. is not comparable to its ITE service segment and accordingly, directed its exclusion from the list of comparables.
- (ii) The DRP, however, rejected the Assessee's contentions that Universal Print Systems Ltd., Infosys BPO Ltd., TCS E-Serve Ltd., BNR Udyog Ltd., and Excel Infoways Ltd. are not comparable to it and consequently upheld their inclusion in the list of comparables.
- (iii) The DRP also *suo moto* excluded Informed Technologies India Ltd. and Jindal Intellicom Ltd. from the list of comparables to the

Assessee although it had not objected to their inclusion before the DRP.

- (iv) In addition, the DRP directed the TPO to recompute the margins of the Assessee and the comparables after treating foreign exchange fluctuations as being operating in nature.

8. On giving effect to the DRP's directions, the list of comparables is as follows:-

SI. No.	Name of the Company
1.	Universal Print Systems Ltd. (Seg) (BPO)
2.	Infosys BPO Ltd.
3.	Microgenetic Systems Ltd.
4.	TCS E-Serve Ltd.
5.	BNR Udyog Ltd. (Seg) (Medical Transcription)
6.	Excel Infoways Ltd. (Seg) (IT/BVPO)
7.	e4e Healthcare Business Services Pvt. Ltd.

9. Pursuant to the directions of the DRP, the AO passed the final assessment order wherein the TP adjustment stood reworked at a lesser figure than what was originally suggested by the TPO viz., Rs.3,38,81,907. The AO passed a fair order of assessment making the addition on account of determination of ALP by the TPO as modified by the DRP. Aggrieved by the addition made in the fair order of assessment, the Assessee has raised several grounds of appeal challenging the addition on several counts. The revised grounds of appeal filed by the Assessee are as follows:-

- “1. The Ld. AO in pursuance of the order of the Ld. TPO and the directions of the Ld. DRP erred on facts and law while including **Universal Print Systems Limited** as a comparable whereas the same should have been excluded for the reason that it is functionally dissimilar to the Appellant. [corresponding to ground no. 3(d) of original grounds].

Also, the Ld. AO in pursuance of the order of the Ld. TPO and the directions of the Ld. DRP erred on facts and law in not considering certain expenses/income while computing the operating mark-up on total cost of the comparable companies on the premise that these are not routine operating costs/income. In doing so, the Ld. TPO and the Ld. Panel failed to provide any cogent reason to substantiate their findings. [corresponding to ground no. 4 of original grounds]

2. The Ld. AO in pursuance of the order of the Ld. TPO and the directions of the Ld. DRP erred on facts and law while including **TCS E-Serve Ltd.** as a comparable whereas the same should have been excluded for the reasons of functional dissimilarity. [corresponding to ground no. 3(d) of original grounds]
3. The Ld. AO in pursuance of the order of the Ld. TPO and the directions of the Ld. DRP erred on facts and law while including **BNR Udyog Ltd.** as a comparable whereas the same should have been excluded for the reason that it fails RPT filter of 25% and that it is functionally dissimilar to the Appellant. [corresponding to ground no. 3(d) of original grounds and ground no. 6 of the additional grounds]
4. The Ld. AO in pursuance of the order of the Ld. TPO and the directions of the Ld. DRP erred on facts and law while including **Excel Infoways Ltd. (Segmental)** as a comparable whereas the same should have been excluded for the reason that it is functionally dissimilar to the Appellant. [corresponding to ground no. 3(d) of original grounds]
5. The Ld. AO in pursuance of the order of the Ld. TPO and the directions of the Ld. DRP erred on facts and law while including Infosys BPO Ltd. as a comparable whereas the same should have been excluded for the reason that it is functionally dissimilar to the Appellant. [corresponding to ground no. 3(d) of original grounds]
6. The Ld. AO in pursuance of the order of the Ld. TPO and the directions of the Ld. DRP erred on facts and law while

excluding **Jindal Intellicom Pvt. Ltd.** as a comparable whereas the same should have been included for the reason that it is functionally similar to the Appellant **[corresponding to ground no.3(d)]**

That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal.”

10. The learned counsel for the Assessee submitted before us that the Assessee seeks the following relief from the Tribunal:-

- (i) Exclude 5 companies from the final list of comparable companies post DRP directions viz., Universal Print Systems Ltd., Infosys BPO Ltd., TCS E-Serve Ltd., BNR Udyog Ltd., and Excel Infoways Ltd. from list of comparable companies on the ground that functionally these companies are not comparable with the Assessee.
- (ii) Include Jindal Intellicom Ltd., in the list of comparable companies. The submission was that this company was selected by TPO and Assessee and the TPO never objected to inclusion of this company in the final list of comparables. It is the stand of the Assessee that the DRP cannot suo moto exclude or include a comparable company which the parties do not want to include or exclude.

11. The learned counsel for the Assessee submitted before us that 3 out of the 5 companies which the Assessee seeks to exclude from the list of comparable companies viz., Infosys BPO Ltd., TCS E-service Ltd. and Excel Infoway Ltd., were considered for exclusion by the Tribunal in the case of a similar Assessee such as the Assessee engaged in providing ITES in the case of *Baxter (I) Pvt.Ltd. Vs. ACIT (2017) 85 Taxmann.com 285 (Delhi-Trib.)*. The learned DR relied on the order of the DRP/TPO.

12. We have considered the rival submissions. In the case of *Baxter (I) Pvt.Ltd.*, (*supra*) the Delhi ITAT Bench considered comparability of the aforesaid three companies with a company engaged in providing ITES such as the Assessee. The functional profile of the Assessee and the Assessee in the case of *Baxter (I) Pvt.Ltd. (supra)* are identical in as much as 7 out of the 10 companies chosen by the TPO in the case of the Assessee were chosen as comparable in the case of *Baxter (I) Pvt.Ltd. (supra)*. The Tribunal held on the comparability of the three companies Infosys BPO Ltd., TCS E-serve Ltd. and Excel Infoway Ltd., as follows:-

- (i) In paragraph 16 of its order the Tribunal held that Infosys BPO Ltd., is not comparable with a company providing ITES because of brand value and extraordinary events in the previous year relevant to AY 2012-13 viz., acquisition of an Australia based company which had effect on its profits.
- (ii) In paragraphs 24 & 25 of its order the Tribunal held Excel Infoway Ltd., as not comparable because of consistent diminishing revenue. The figures of diminution revenue are given in paragraph 24 of its order.
- (iii) In paragraphs 14 of its order the Tribunal held that TCS E-serve Ltd., was liable to be excluded because 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.

13. Respectfully following the decision of the Tribunal we hold that the aforesaid 3 companies be excluded from the final list of comparable companies for the purpose of arriving at the arithmetic mean of comparable companies for the purpose of comparison with the profit margins.

14. The learned counsel for the Assessee prayed for exclusion of Universal Print Systems Ltd. from the list of comparable companies chosen by the TPO and retained by the DRP. This company was chosen as a comparable company by the TPO. The objection of the Assessee before

the DRP for exclusion of this company was 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.

15. The DRP dealt with only the objection regarding export revenue filter not having been satisfied in the case of this company (vide Page-14 of the DRP's direction). The DRP held 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 DRP held that the pre-press BPO segment's entire income is from services and therefore this objection is not to be accepted.

16. Aggrieved by the directions of the DRP, the Assessee is in appeal before the Tribunal. The learned counsel for the Assessee submitted that

the comparability of this company with ITES company such as the Assessee was considered by this Tribunal in the case of *M/s. Societe Generale Global Solutions Global Centre Pvt.Ltd. Vs. DCIT* in IT(TP) A.No.2297/Bang/2016 order dated 22.2.2019 and the Tribunal in Paragraph-12 excluded from the list of comparable companies. We have perused the aforesaid decision and we find that the Tribunal has followed *CGI Information Systems & Management Consultants (P) Ltd. Vs. ACIT* (2018) 94 taxmann.com 97 (Bang-Trib) (Para-52). In the decision rendered in the case of *CGI Information Systems & Management Consultants (P) Ltd., (supra)*, the comparability of this company with an ITES company was remanded to the TPO for fresh consideration and therefore exclusion of this company as observed in the end of Paragraph-12 of the order in the case of *M/s. Societe Generale Global Solutions Global Centre Pvt.Ltd. Vs. DCIT* (*supra*) appears to be a mistake. For the sake of clarity, we reproduce paragraph-51 and 52 of the order of the Tribunal in the case of *CGI Information Systems & Management Consultants (P) Ltd., (supra)*:-

“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.”

17. Following the aforesaid decision, we remand to the TPO, the question of exclusion of this company for fresh consideration in the light of the directions given in the case of CGI Information Systems & Management Consultants (P) Ltd., (supra).

18. The learned counsel for the Assessee pleaded for exclusion of BNR Udyog Ltd., which is a company chosen by the TPO and retained after the order of the DRP. As far as this company is concerned, it was the objection of the Assessee before the TPO that the TPO ought not to have selected this company as comparable company for the reason that the related party transaction of this company at the entity level was 49.60% of the total revenue and that this company has less than 75% of its revenue from providing ITES. The TPO rejected the above contentions by holding that this company has 3 major business segments and the segmental results of medical transcription business which is providing ITES alone was considered for the purpose of comparison. When the segmental results are considered the related party transaction is nil. 100% of the segmental income was from providing ITES i.e., medical transcription and therefore 75% revenue is from providing ITES and therefore the company passes the

test of income from providing ITES being more than 75% of the total income. The DRP accepted the view of the TPO.

19. The submission of the learned counsel for the Assessee was identical as were made before the TPO and DRP. He relied on the decision of the ITAT Bangalore in the case of *Zyme Solutions Pvt.Ltd. Vs. ACIT IT(TP) A.No.1661/Bang/2016* for AY 2012-13 order dated 28.6.2019 wherein this company was held to be functionally not comparable with ITES company. The learned DR however relied on the decision rendered in the case of *CGI Information Systems & Management Consultants (P) Ltd., (supra)* wherein this company was retained as a comparable vide paragraph-53 of the order which reads as follows:-

“53. The submissions of the learned counsel for the Assessee was identical as were made before the TPO and DRP. We have while deciding the objection with regard to excluding Universal Print Systems Ltd., already held that when clear segmental information is available then there is no bar in applying filters at the segmental level. The reasons given while coming to the above conclusion will equally apply to including BNR Udyog Ltd., as a comparable. Since this company passes RPT filter as well as income from providing ITES being more than 75% of its revenue, this company has to be regarded as comparable company. No other arguments were advanced for exclusion of this company. Hence this company is held to be comparable with that of the Assessee.”

20. We have given a careful consideration to the rival submissions and we find that functional comparability of this company was not considered in the case of *CGI Information Systems & Management Consultants (P) Ltd., (supra)* and this aspect was dealt with in the case of *Zyme Solutions Pvt.Ltd. (supra)* in paragraph 7 & 8 as follows:-

“6. The next company that is sought to be excluded by the assessee from the list of comparable companies chosen by the

TPO is BNR Udyog Ltd. In original order passed by the Tribunal this company was retained as a comparable company. In the M.P. filed by the Assessee it was pointed out that the chart filed at the time of hearing before the Tribunal, the assessee company sought to exclude this company on the ground that the turnover of this company was only 1.7 cores and it cannot be compared with turnover of assessee which was 30.6 crores. It was also submitted on behalf of the assessee that this company has related party transaction (RPT) over and above the threshold limit of 15% and is also functionally different. The assessee in this regard at the time of hearing placed reliance on the decision of ITAT Bangalore Bench in the case of Indegne Pvt. Ltd., Vs. ACDIT in IT(TP)A No.591/Bang2017 for asst. year 2012-13 order dated 2/8/2017 wherein at page 10 of this order in para 10.3.2 the Tribunal remanded the matter of comparability of this company with ITES company. Decision in the case of M/s e4e Business Solution India Pvt. Ltd., Vs. ITO in IT(TP)TP No.451/Bang/2017 was also filed in support of assessee's claim for remand on functional comparability. The Tribunal in the impugned order however in paragraph 13 to 13.2 followed the decision rendered in the case of CGI Information Systems and Management Consultation Ltd., Vs. ACIT-TS-320-ITAT-2018(Bang) wherein this company was considered as comparable with ITeS company. The tribunal however did not render any decision on functional comparability of this company. On the above objections in the MP, the Tribunal recalled the original order for analysis the comparability of this company afresh, with the following observations:

“7. We have considered the submissions of the Ld. counsel for the assessee and are of the view that the contention in the MA that this company was sought to be excluded by the assessee on functional comparability and that the tribunal's order in the case of CGI Information Systems (supra) did not consider functional comparability or application of RPT filter of this company is correct. Therefore there is error in the order of the Tribunal in as much as functional comparability of this company with ITeS company has not been considered by the Tribunal. We, therefore recall the order of the Tribunal for the limited purpose of examining the functional comparability of this company with the assessee company.”

7. We have heard the rival submissions on the comparability of the aforesaid company. The Delhi ITAT in the case of BT e-Service (India) Ltd. Vs. ITO ITA No.6690/Del/2016 for AY 2012-13 order dated 19.6.2018 considered the comparability of this company and came to the conclusion that this company was carrying out medical transcription, medical billing and coding whereas the Assessee was a captive service provider. The Tribunal followed its own ruling in the same Assessee's case in AY 2011-12 in ITA No.99/Del/2016 reported in (2017) 87 taxmann.com 251 (Del) in BT e-Servie (India) Pvt.Ltd. Vs. ITO giving identical reasons for excluding BNR Udyog Limited from the list of comparable companies in the field of companies rendering ITES such as the Assessee. Respectfully following the aforesaid decision, we direct exclusion of the aforesaid company from the list of comparable companies chosen by the TPO.”

21. We however find that the Assessee has not raised the functional comparability of this company in the grounds of appeal nor has any submissions been made on functional comparability of the Assessee with that of BNR Udyog Ltd. In these circumstances, we are of the view that the decision rendered in the case of CGI Information Systems & Management Consultants (supra) would apply and therefore this company is retained as a comparable company.

22. The next grievance of the Assessee is exclusion of Jindal Intellicom Pvt.Ltd., as a comparable company *suo motto*, by the DRP. In this regard it was argued that this company was held to be comparable companies by the TPO and the Assessee did not object before the DRP to inclusion of this company as comparable company. The DRP (vide para 6.3 of its directions) *suo motto* excluded this company on the ground that there were extraordinary circumstances viz., the clients of the Assessee were in USA and due to peculiar problems the USA market did not source ITES from India at that point of time which lead to a decrease of 21% revenue and 59% profitability. It was contended by the learned counsel for the Assessee that when functionally this company was found to be comparable

with the Assessee, the DRP ought not to have excluded this company on a ground which is not relevant while performing FAR analysis. The learned counsel also placed reliance on the decision of the ITAT Bangalore Bench in the case of CGI Information Systems & Management Consultants (P) Ltd., (supra), wherein this company was directed to be included in the list of comparable companies. The Tribunal dealt with this issue as follows (vide Paragraph 56 of its order):-

“56. The same reasoning given for including Informed Technologies India Ltd., would apply for including Jindal Intellicom Ltd., also. This company was selected by the Assessee in its TP study and accepted by the TPO as being comparable to it (pages 16-17 of the TP order). Since it passed all the filters applied by the TPO, as subsequently upheld by the DRP, it was rightly included in the list of comparables. In the proceedings before the DRP, the Assessee did not object to its inclusion in the list of comparables. However, despite the above, the DRP on its own directed its exclusion on the premise that since it catered only to customers in USA, where there was allegedly an adverse business climate for outsourcing work, its profitability was impacted. According to the DRP the Assessee’s AE was in Netherlands where there was no adverse market conditions and therefore Jindal Intellicom Ltd., was liable to be excluded from the list of comparable companies. The DRP did not put the Assessee on notice as to its proposed action of excluding this company. We find that the Assessee does not merely provide services to its AE in Netherlands. It also provides ITE services to its AE’s in UK, Finland, Germany, Sweden, Belgium, Denmark, Norway and USA. A perusal of its Form 3CEB for the instant assessment year which is produced at pages 1035-1046 of the paper book, shows that it provided services to AE’s at USA also. Therefore, the entire basis for its exclusion is wholly misconceived and erroneous and, accordingly, its suo moto exclusion by the DRP is not proper. The functions performed by this company are comparable to the services provided by the Assessee and have not been disputed whatsoever by the DRP. That apart, Jindal has been selected by the TPO as a comparable to the Assessee for the assessment years 2008-09, 2011-12 and

2013-14 and its inclusion for those assessment years has not been objected to by the Assessee either. Moreover, it is consistently figuring in the list of comparables in companies providing ITES. We therefore direct inclusion of this company in the list of comparable companies.”

23. The learned DR relied on the order of the CIT(A) and further submitted that the decision rendered in the case of CGI Information Systems & Management Consultants (P) Ltd., (supra) will not apply to the facts of the Assessee's case because, the Assessee caters to clients in USA market whereas in the case of CGI Information Systems & Management Consultants (P) Ltd. (supra), the clients were found to be negligible in USA. He drew our attention to Page-1448 of the paper book to highlight the fact that this company because of peculiar economic circumstances earned negative profit. He also placed reliance on the decision of ITAT Bangalore in the case of M/S.e4e Business Solutions India Pvt.Ltd. Vs. The ITO IT(TP)A.No.451/Bang/2017 for AY 2012-13 order dated 3.11.2017 (vide Paragraph-17) wherein the issue was remanded to TPO for fresh consideration for the reason that no opportunity of hearing was given by the DRP to the parties before excluding this company suo motto.

24. We have carefully considered the rival submissions. The decision of the Tribunal rendered in the case of CGI Information Systems & Management Consultants (P) Ltd., (supra) will not apply to the facts of the present case because, the clients of the Assessee in this case are in USA and admitted position is that there were difficulties in the matter of business with clients in USA at the relevant point of time due to adverse foreign exchange rates vis-à-vis US dollars. The comparability criteria laid down in Rule 10B(2)(d) of the Income Tax Rules, 1962 (Rules) contemplate taking into considerations 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.

Rule 10B(3) lays down as follows:-

“(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.”

25. It is clear from the rules that if there are material differences between the Assessee and the comparable company in terms of Rule 10B(2)(d) and 10B(3) and if reasonably accurate adjustments cannot be made to eliminate the material effects of such differences, then the company has to go out of comparability. In the given facts and circumstances of the case, we are of the view that Jindal Intellicom Ltd., was rightly excluded by the DRP from the list of comparable companies. We find no grounds to interfere with the order of the DRP.

26. The TPO is directed to compute the ALP after considering the directions in this order and recompute the ALP in the ITES segment, after affording Assessee opportunity of being heard. No submissions were made on the other grounds raised in the appeal in relation to its transaction of provision of ITE services.

27. In the result, IT(TP) A.No.189/Bang/2018 is dismissed, while IT(TP)A.No.2217/Bang/2016 is partly allowed.

Pronounced in the open court on this 25<sup>th</sup> day of October, 2019.

Sd/-

( G MANJUNATHA )  
ACCOUNTANT MEMBER

Sd/-

( N V VASUDEVAN )  
VICE PRESIDENT

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

/ Desai Smurthy /

Copy to:

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

By order

Assistant Registrar,  
ITAT, Bangalore.