

IN THE INCOME-TAX APPELLATE TRIBUNAL “K” BENCH MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.970/Mum/2017 (Assessment Year 2012-13)

M Modal Global Services Private Ltd. (Formerly known as CBay System (India) Pvt. Ltd.), 3 rd Floor, Bldg. No.3, Mindspace – Airoli, Plot No.3, Kalwa TTC Industrial Area MIDC, Thane Belapur Road, Airoli, Navi Mumbai-400708. PAN: AAACC9165F	Vs.	ACIT Circle-15(2)(2) 480, Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by : Ms. Karishma R. Phatarphekar with
Shri Harsh Shah & Shri Punit
Bothra (AR)

Respondent by : Shri Nitin Shivraj K. Patil (Jt. CIT)

Date of Hearing : 10.10.2019

Date of Pronouncement : 16.10.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the assessment order under section 143(3) rws 144C (13) dated 12.12.2016, passed in pursuance of direction of Dispute Resolution Panel-3 (DRP), Mumbai dated 30.09.2016 for assessment year 2012-13. The assessee has raised following grounds of appeal:

1. On the facts and in circumstances of the case, the Learned AO and the Learned TPO under the directions of the Hon'ble DRP erred in making a

transfer pricing addition of INR 4,73,88,068/- to the total income of the Appellant.

2. On the facts and in circumstances of the case, the Learned AO and the Learned TPO under the directions of the Hon'ble DRP erred in selecting Infosys BPO Limited, Zylog Systems Limited and Excel Infoways Limited as companies comparable to the Appellant.

3. On the facts and in circumstances of the case, the Learned AO and the Learned TPO under the directions of the Hon'ble DRP erred in computing the profit level indicator of Jindal Intellicon Limited.

4. On the facts and in circumstances of the case, the Learned AO and the Learned TPO under the directions of the Hon'ble DRP erred in rejecting the transfer pricing documentation of the Appellant and resorting to cherry picking of comparables in order to arrive at a set of companies comparable to the Appellant.

5. On the facts and in circumstances of the case, the Learned AO and the Learned TPO under the directions of the Hon'ble DRP erred in disregarding the multiple year data analysis undertaken by the Appellant in accordance with Rule 10B(4) of the Income Tax Rules, 1962 ('Rules') for computing the margins of comparable companies.

6. On the facts and in circumstances of the case, the Learned AD and the Learned TPO under the directions of the Hon'ble DRP erred in not providing appropriate adjustments to margins of the companies finally selected as comparable as required by Rule 10B(1)(e)(iii) of the Rules.

7. On the facts and in circumstances of the case, the Learned AD and the Learned TPO under the directions of the Hon'ble DRP erred in not granting set off of brought forward losses against the income of the current year.

8. On the facts and in circumstances of the case, the Learned AO and the Learned TPO under the directions of the Hon'ble DRP erred in levying interest under Section 234B and 234C of the Act.

9. On the facts and in circumstances of the case, the Learned AO and the Learned TPO under the directions of the Hon'ble DRP erred in proposing to initiate penalty under Section 271(1)(c) of the Act.

The Appellant claims relief on the above grounds and thereby deleting the adjustments made by the Learned AO in the final assessment order.

1. Brief facts of the case are that the assessee-company is a subsidiary of MModol Inc engaged in the business of medical transcription services, Information Technology (IT) services and quality assurance, technology support back office co-ordination, training and consultation. The assessee-company filed its return of income for Assessment Year 2012-13 on 28.11.2012 declaring total income at Rs. 55,11,390/-. Along with the return of income, the assessee furnished report under Form 3CEB. The assessee selected Transaction Net Margin Method (TNMM) as most appropriate method to bench mark provision of Information Technology & quality Assurance/ support services. The profit level indicator (PLI) selected was operating profit/ total cost (OP/TC). The assessee has shown ist margin at 15.02%.
2. The assessee bench marked its ALP under Transaction Net Margin Method (TNMM),the assessee selected 21 company as comparable and computed the margin on the basis of two years and average margin in the following manner:

Sr.No.	Name of the Company	Average NPI (%)	NPI for FY 2011-12 (%)
1	Allied Digital Services Ltd. (seg.)	4.24	(6.22)
2	Cadence Design Systems (India) Pvt. Ltd.	16.49	10.82

3	Cameo Corporate Services Ltd.	10.06	7.57
4	Cosmic Global Ltd.	12.96	40.73
5	e4e healthcare business services	13.78	13.45
6	E-Zest Solutions Ltd.	29.15	18.79
7	Helios & Matheson Information Technology Ltd.	16.04	16.96
8	IDBI Intech Ltd.	4.58	2.33
9	Ideavata Solutions Pvt. Ltd.	31.47	22.96
10	In House Productions Ltd. (Seg.)	13.27	2.94
11	Jindal Intellicom Ltd.	13.12	1.40
12	L G S Global Ltd.	13.58	19.34
13	Melstar Information Technologies Ltd.	(5.13)	2.36
14	Mindtree Ltd.	16.41	14.39
15	Omega Healthcare mgmnt services Pvt Ltd.	12.96	13.78
16	Persistent Systems and solution Ltd.	16.30	27.09
17	Proteans Software Solutions Pvt. Ltd.	1.90	NA
18	Savi Infoservices India Pvt. Ltd.	9.44	1.61
19	Sparsh B P O Services Ltd.	1.56	(26.66)
20	Synetairios Technologies Ltd.	15.13	17.53
21	Visesh Infotecncis Ltd. (seg.)	15.14	36.02
	Arithmetic Mean	12.52	11.86

3. The margin on comparable based on average of was 12.52% and the assessee's margin for international transaction was 15.02%. 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 accepted 4 comparable and further added 4 additional comparable. The TPO carried out its own research and included the said 4 comparable:

4. The TPO after including 4 comparable worked out Arithmetic mean of Profit Level Indicator (PLI) of 8 comparable company and arrived at margin of 23.27 % against PLI of 15.02% of the assessee and worked out difference between ALP of sales and value of international transaction and made adjustment of Rs. 54297825/- in the following manner:

Sr.No.	Name of the Company	NCP Margin (%)
1	Cadence design systems India Pvt. Ltd.	10.82
2	e4e healthcare business services	14.59
3	Jindal Intellicon Ltd.	6.08
4	Omega Healthcare mgmnt services Pvt ltd.	13.78
5	Persistent Systems and solution Ltd.	26.94
6	Infosys BPO Ltd.	33.92
7	Zylog Systems Limited	30.68
8	Excel Infoways Ltd.	49.38
	Arithmetic Mean	23.27
	Margin of assessee	15.02

5. On receipt of report of TPO, the Assessing Officer made upward adjustment/addition of Rs. 5,42,97,825/- in the draft assessment order passed under section 143(3) r.w.s. 144C(1) dated 23.03.2016. The assessee

filed its objections before DRP. The DRP after considering the objection of assessee rejected one comparable company selected by TPO i.e. Zylog System Ltd. and upheld the order of DRP on other comparable. The average margin on the basis of final set of comparable was 22.22% and accordingly an addition of Rs. 4,73,88,068/- was made to the total income of assessee on the following set of comparable:

Sr.No.	Name of the Company	Post DRP
1	Cadence design systems India Pvt. Ltd.	10.82
2	e4e healthcare business services	14.59
3	Jindal Intellicon Ltd.	6.08
4	Omega Healthcare mgmnt services Pvt ltd.	13.78
5	Persistent Systems and solution Ltd.	26.94
6	Infosys BPO Ltd.	33.92
7	Excel Infoways Ltd.	49.38
	ALP Margin	22.22

6. Further, aggrieved by the direction of DRP, the assessee has filed present appeal before the Tribunal.
7. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and perused the material available on record.
8. On the various grounds of appeal raised by the assessee. The Id. AR of the assessee submits that Ground No. 1 to 6 relates to TP Adjustment and the Id. AR of the assessee is pressing only the exclusion of Infosys BPO and Excel

Infosys BPO Ltd. It was further submitted that in case both these comparable are excluded the assessee's margin would be within tolerance range. For exclusion of Infosys BPO Ltd., the ld. AR of the assessee submits that this comparable is not functionally comparable due to Brand Value and high turnover of Rs. 1312.41 crore and extraordinary events during the year under consideration as its acquiring an Australian based company namely Portland Group Pty. Ltd. Function undertaken, asset employed and risk assumed (FAR) of Infosys BPO Ltd. is different from the assessee, who operates on minimum risk. Infosys BPO Ltd. provides end to end outsourcing services and enterprise-wise services to clients across various industry segments like banking, manufacturing, rental and energy sector. It also provides Legal Process outsourcing Services (LPO) which is different from assessee. It also provides Knowledge Processing Outsource (KPO) Activities like analytics, financial planning and analysis. It has diversified activity and owns intellectual property. It enjoys brand value being a part of Infosys Group, which make its not comparable. In support of his submission relied upon the following decision:

- a. Cases wherein Tribunal rejected Infosys BPO Ltd. for A.Y. 2012-13.
 - i. Maersk Global Service Centre India Pvt. Ltd. vs. ACIT [ITA No. 653/Mum/2017],
 - ii. International Specialty Products (India) Pvt. Ltd. vs. ACIT [ITA No. 1279/Mum/2017].
 - iii. Indegene (P.) Ltd. vs. ACIT [2017] 85 taxmann.com 60 (Bangalore-Trib.)
 - iv. E4e Business Solutions India Pvt. Ltd. vs. ITO [IT(TP) A No. 451/Bang/2017]

- v. XLHealth Corporation India (P.) Ltd. vs. ACIT [2018] 91 taxmann.com 310 (Bangalore Trib.).
- vi. Exevo India Pvt. Ltd. vs. DCIT [ITA No. 20/Del/2017] &
- vii. Sun Life India Services Centre Pvt. Ltd. vs. ACIT [ITA No. 468/Del/2017]

b. Cases wherein Bombay High Court held that companies having high turnover should be excluded.

- i. CIT vs. Pentair Water India (P.) Ltd. [2016] 381 ITR 216 (Bombay).
- ii. CIT vs. Principal Global Services (P.) Ltd. [2018] 95 taxmann.com 315 (Bombay).
- iii. Hapag-Lloyd Global Services (P.) Ltd. vs. DCIT [2017] 80 taxmann.com 56 (Mumbai-Trib.) and
- iv. Hinduja Global Solutions Ltd. vs. DCIT [2017] 78 taxmann.com 199 (Mumbai Trib.).

9. For exclusion of Excel Infoways Ltd., the ld. AR of the assessee submits that it provides IT/BPO services wherein it receives fees from clients for handling the clients customer, managing their work flow process in accordance to their requirement as per agreement and upto their satisfaction and infra activities. Such services cannot be compared with assessee, which is in low end IT/BPO services. The Directors of this comparable considered closing of its IT/BPO segment and diversify its business in new area of construction, development of property and real estate. The IT/BPO services of this comparable are employee oriented activity and therefore involved high employee cost. As per annual report of Excel Infoways, the ratio of total employee cost to the total operating cost is 15.44%, whereas such ratio in case of assessee is 17.80%. This comparable company has two business segment i.e. IT/BPO segment and infra segment. Infra segments accounts for 49% of its total revenue. Segmental details are provided in the annual report but no bifurcation or breakup of employee cost has been provided. In

absence of such details, the contention of DRP that bulk of the employees cost is attributable to ITeS is unreliable. Further, merely because IT/BPO segment is employee oriented, it does not mean that the infra segment did not incur employee cost or incur very less employee cost. Thus, a company having low employee cost cannot be comparable to the assessee. It cannot be considered as comparable due to fluctuating margin and diminishing revenue trend. The operating margin of this company has shown drastic fluctuation ranging from 247.74% in F.Y. 2008-09 to 2% in A.Y. 2014-15. The ld. AR furnished the fluctuating margin of this comparable from F.Y. 2008-09 to 2014-15. In support of her submission, the ld. AR relied on the following decisions:

a. Cases wherein Tribunal excluded Excel Infosys Ltd. for A.Y. 2012-13.

- i. Clear Info Analytics Private Limited vs. ACIT [IT(TP)A No. 2299/Mum/2017].
- ii. GTS E-Services Private Ltd. v. ITO [ITA No. 1231/Mum/2017].
- iii. Emerson Comate Technologies (India) Pvt. Ltd. vs. DCIT [ITA No. 359 & 2847/PUN/2016].
- iv. Ocwen Financial Solutions Private Limited vs. ACIT [ITA No. 2669/PUN/2016]
- v. Cummins Turbo Technologies Limited vs. DCIT [ITA No. 388/PUN/2017]
- vi. BT e-Serv (India) (P.) Ltd. vs. ITO [2019] 101 taxmann.com 275 (Delhi-Trib.).
- vii. International Specialty Products (India) Pvt. Ltd. vs. ACIT [ITA No. 6335/Mum/2018] and
- viii. DCIT vs. Swiss Re-services India (P.) Ltd. [2018] 98 taxmann.com 180 (Mumbai-Trib.).

10. On the other hand, the ld. DR for the revenue relied upon the order of TPO/DRP.

11. We have considered the rival submission of the parties and have gone through the orders of lower authorities. We have also deliberated on various

case law relied by Id. AR of the assessee. We have noted that the assessee while benchmarking the ALP with regard to international transaction of assessee, the assessee selected 21 comparables, the TPO accepted only 5 comparable, the TPO included 4 additional comparable in the final set of comparable. However, on further objection before DRP one of the comparable i.e. Zylog System Ltd., added by TPO was excluded. Before us, the Id. AR of the assessee disputed only the inclusion of 2 additional comparable i.e. Infosys BPO Ltd. and Excel Infoways Ltd. only.

12. Before TPO, the assessee objected to the inclusion of Infosys BPO Ltd. The TPO concluded that this comparable while adding Infosys BPO Ltd. concluded that this company is engaged in similar service to those rendered by assessee. The use of brand name neither signifies any brand value nor does it have any impact on its functionality. Acquisition of company by way of investment does not have any impact on the functionality or its profitability. The DRP confirmed the inclusion of this comparable holding that Infosys BPO Ltd. is a BPO, falls under the definition of ITeS provider as per Safe Harbour Rules. TNMM requires establishing comparability at broad function level. Turnover of this comparable falls under filter fixed in this company is 25 times and cannot be rejected. On the objection of brand value, DRP concluded that unless the assessee demonstrate how brand or intangibles have impacted profitability and also quantifies the difference in profitability, this comparable cannot be rejected. For acquisition of other

entity, the DRP concluded that acquisition will impact only on the consolidated accounts of the company and its subsidiary and will not affect the account on stands alone basis. The co-ordinate bench of Mumbai Tribunal in Maersk Global Services vs. ACIT(supra) while considering the comparability/exclusion of Infosys BPO Ltd. held as under:

“10. We have considered rival submissions and perused materials on record. From the material on record, it is evident that the assessee is not only a captive service provider, but the nature of service provided by the assessee can be categorized as simple BPO services. Even, the DRP has also accepted that the nature of service provided by the assessee will not come within the purview of High End BPO or KPO services. It is relevant to observe, the Transfer Pricing Officer while examining the functional profile as well as skill set employed by the assessee has observed that 97% of the employees are simple graduates. Whereas, only three per cent are professionals. Thus, from the aforesaid fact, it appears that the assessee is providing simple voice and data services to its A.Es. Whereas, the same cannot be said about Infosys BPO Ltd. which apart from its brand value being part of Infosys Group, is not comparable to the assessee in various other aspects also. Notably, while considering the issue relating to acceptability of Infosys BPO Ltd. as a comparable in assessee’s own case for assessment year 2010–11, the Tribunal in ITA no.1082/ Mum./2015, dated 29th July 2016, has held that this company cannot be treated as comparable to the assessee and accordingly, excluded it from the list of comparables. The same view was again expressed by the Tribunal while deciding assessee’s appeal for assessment year 2011–12, in ITA no.944/Mum./2016, dated 19th April 2018. It is very much clear, the Transfer Pricing Officer has included this company as comparable simply relying upon his decision in assessment year 2010–11. Therefore, respectfully following the consistent view of the Tribunal with regard to this company as expressed in assessee’s own case in the orders referred to above, we exclude this company as a comparable.”

13. Further, the co-ordinate bench of Mumbai Tribunal in International Specialty Products (India) Pvt. Ltd. vs. ACIT (supra) while considering the

turnover filter and extraordinary event for acquisition of foreign entity excluded Infosys BPO Ltd. by holding as under:

“3.6.3 Infosys BPO Ltd.

It has been submitted that the operating income of this entity is more than 138 times than that of the assessee and therefore, it could not be termed as good comparable in terms of the decision of Hon'ble Bombay High Court in CIT V/s Pentair Water India (P.) Ltd. [2016 69 taxmann.com 180] as followed by Mumbai Tribunal in Integreon Managed Solutions India Pvt. Ltd. Vs ACIT [2019 101 Taxmann.com 289]. Further reliance has been placed on the decision of Delhi Tribunal in Baxter India Pvt. Ltd. V/s ACIT [2017 85 Taxmann.com 285]. It has further been submitted that there was on extraordinary event in this entity since it acquired an Australian based Company namely M/s Portland Group Pty. Ltd. as noted by Bangalore Tribunal in Mobily Infotech India Pvt. Ltd. Vs DCIT [2018 97 Taxmann.com 2].

Applying the ratio of decision of Hon'ble Bombay High Court in CIT V/s Pentair Water India (P.) Ltd. [supra], in similar manner, we direct for exclusion of this entity. This is further fortified by the decision of Delhi Tribunal in Baxter India Pvt. Ltd. V/s ACIT [supra], for same AY, wherein the co-ordinate bench directed for exclusion of this entity on account of functional dissimilarity and extra-ordinary events which took place during the year. Similar is the view of Bangalore Tribunal in Mobily Infotech India Pvt. Ltd. Vs DCIT [supra].”

14. The Hon'ble Bombay High Court in CIT vs. Principle Global Services (P.) Ltd. while considering the question of law whether Tribunal was right in excluding on turnover basis held as under:

“8. Re Question (d):—

- (i) M/s. Infosys BPO Ltd., was excluded by the Tribunal from the list of comparable to determine ALP in respect of International Transaction of the Respondent's activity of rendering of back office support services to its AE.
- (ii) The impugned order of the Tribunal noted the facts that turnover of the

comparable was to the tune of R.9028 Crores while the turnover of the Respondent-Assessee, as noted by the TPO was only Rs.18 Crores.

- (iii) The impugned order further records that in view of the difference in turnover between M/s. Infosys BPO Ltd., and the Assessee, the two are not comparable. In fact, the impugned order placed reliance upon the decision of the Delhi High Court in *CIT v. Agnity India Technologies (P.) Ltd.* [2013] 36 taxmann.com 289/219 Taxman 26 wherein, it was held that the huge turnover difference between the comparable in that case, M/s. Infosys Technologies Ltd., with the Assessee therein, coupled with the fact that the Assessee therein was providing only services to its AE while M/s. Infosys Technologies (P) Ltd., provided services to outsiders, make it not comparable. These facts are identical to the present facts and would make Infosys BPO Ltd., not comparable. No difference is shown to us which would warrant a different view in the present facts. Moreover, this Court in *CIT v. Pentair Water India (P.) Ltd.* [2016] 69 taxmann.com 180/381 ITR 216 has taken a view that huge difference in turnover between the tested party and the comparable would necessarily require the proposed comparable to be excluded from the list of comparables.
- (iv) We find that the view taken on the aforesaid finding of fact is a possible view.
- (v) Therefore, the question No.(d) as proposed does not give rise to any substantial question of law. Thus, not entertained.

15. Considering the aforesaid factual and legal discussion, this comparable i.e.

Infosys BPO Ltd. due to high turnover and extraordinary event of acquisition as well as brand value, is not comparable with the assessee, who is providing medical transcription services, information technology quality assurance in the nature of back office support services to its AE. Therefore, we direct the Assessing Officer/TPO to exclude this comparable.

16. So far as exclusion/inclusion of Excel Infoways Ltd. is concerned, the TPO

included this comparable by taking view that assessee ignored the fact that he has adopted IT segment of this comparable. The assessee has computed the employee percentage without excluding the purchase of stock-in-trade, which is for its infra segment and not IT segment. The assessee has not demonstrated how difference in asset profile of the assessee and the

comparable impact on comparability. The DRP rejected the objection of assessee by taking view that this company is comparable with assessee as it is engaged in the business of BPO and/or and ITeS provider and development of infrastructure facility. On the employee cost filter, the DRP concluded that out of total salary cost of Rs. 2.02 crore, bulk of this will be attributable to ITeS/BPO as it is universally acknowledged that ITeS/BPO is more work force intensive as compare to infra activity. Therefore, allocation of manpower expenses on the basis of ITeS/BPO segment and infra segment is not correct. On asset turnover ratio, the DRP concluded that once company is functionally comparable, is cannot be rejected on the ground of difference of fixed asset to operating income, low employee cost, unless the assessee demonstrate how these factors have impacted profitability and also quantify the difference in profitability. The Id. AR of the assessee vehemently submitted that this comparable cannot be comparable as its Director were considering closing of its ITeS/BPO segment and diversify in new area of construction, development of property and real estate. The Id. AR also demonstrated that the fluctuating margin of this comparable in different Financial Year in the following manner:

Financial Year	OP/TC (%)	Revenue (Rs.)
2008-09	247.74%	1,86,040.74
2009-10	267.31%	2,04,161.34
2010-11	238.71%	2,03,526.40
2011-12	41.48%	79,096.95

2012-13	75.70%	76,098.54
20013-14	30%	52,972.12
2014-15	2%	22,994.38

17.The Id. AR for the assessee strongly relied on the decision of co-ordinate bench in Clear Info Analytics Private Ltd. vs. ACIT (supra) wherein this comparable was held to be not comparable with captive service provider holding as under:

“6. We have heard rival contentions and perused the record. We noticed that the Pune Bench of the Tribunal examined the comparable company, M/s. Excel Infoways Ltd., in the case of M/s. Ocwen Financial Solutions Private Limited Vs. ACIT in ITA No. 2669/PUN/2016, dt. 21-01-2019. For the sake of convenience, we extract below the relevant discussions made by the Pune Bench of the Tribunal in the above said case:

“12. With regard to Excel Infoways Limited, we find that the Co-ordinate Bench of the Tribunal in the case of Emerson Climate Technologies (India) Pvt. Ltd. Vs. DCIT (supra.) has decided whether Excel Infoways Limited can be comparable company or not by observing as under:

"18. We have heard rival contentions and perused the record. The limited issue which arises is against benchmarking of ALP of the IT(TP)A No. 2299/Mum/2017 international transactions on account of provisions of Oracle Support Services (JT-enables services) by assessee to its associated enterprise and for benchmarking of ALP of the international transactions to the said concern ie. Excel Infoways Ltd. which has been finally selected by the DRP, is to be excluded since it is showing fluctuating margins. It is further observed that the operating margin of the company had shown drastic fluctuations ranging from 247.74% in F.Y. 2008-09 to 2% in FY 2014-15. The assessee has pointed out the margins shown by the said concern were as under:

Financial Year	OP/TC margin
2008-09	247.74%
2009-10	267.31%
2010-11	238 .71%.
2011-12	41.48%
2012-13	75.70%
2013-14	30%
2014-15	2%

19. We find that the Tribunal in assessee's own case in assessment years 2011-12 & 2012-13 vide para 16 & 17 of the order of Tribunal has excluded Excel infoways Ltd., because of its fluctuating margins shown by the said concern. The Tribunal held that the said concern i.e. Excel Infoways Limited which is in the process of closing down its ITES segment and also because of the factum of fluctuating margins, could not be selected as functionally comparable to the assessee. Following the same parity of the reasons, we hold that the said concern i.e. Excel Infoways Limited, because of different factors and also fluctuating to be excluded from final set of comparables. Accordingly, we hold The Assessing Officer is directed to recompute mean margin of the comparables and determine ALP of the international transactions of provision of Oracle support services (ITes) by the assessee to its AEs after affording reasonable opportunity of hearing to the assessee. Thus, ground No. 3 raised in appeal by assessee is allowed."

In the case of Excel Infoways Limited, a chart provided before us wherein we have seen that there is fluctuating profit margins and IT(TP)A No. 2299/Mum/2017 following the same parity of reasoning, Excel Infoways Limited because of fluctuating profit margin, is to be excluded from the final set of comparables.

13. Further, the TPO has applied diminishing revenue filter to exclude the companies from the comparable set whereas, the revenue of Excel Infoways Limited also clearly demonstrated diminishing revenue trend. In such situation, we refer to the decision of Co-ordinate Bench of the Tribunal, Delhi in the case of Baxter India Pvt. Ltd. Vs. ACIT (supra.) where the Tribunal has held as follows: "24. So far as exclusion of Excel Infoways Ltd. is concerned, we also find merit in the submissions of the Id. counsel for the assessee that the above company should be excluded from the list of comparables. This company fails TPO's own filter of diminishing revenue and abnormal volatility in revenue and margins. We find from the order of the TPO at para 7.5 (page 24 - 25 of the TPO order) where the TPO has observed that the department has applied consistent diminishing revenue/ loss making filter wherein the companies with losses/ diminishing revenue for the last three years upto and including the financial year 2010-11 were rejected as comparables. The department has excluded such companies with consistent losses/ diminishing revenue in an environment where Indian economy is growing at consistent rate. Having held so, the Assessing Officer included Excel Infoways Ltd. as a comparable without considering the fact that the said company does not pass the diminishing ITA No.6158/Del/2016 revenue filter. From the submissions of the assessee before the TPO (at page 232 of Volume -1 of the Paper Book) we find the details of the operating margin of the company from financial years 2009-10 to 2014-15 are as under:-

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.....

25. From the above, it is clear that above company does not pass the diminishing revenue filter as adopted by the TPO himself since its revenue has decreased consistently from financial years 2009-10

to IT(TP)A No. 2299/Mum/2017 2011-12 ie. including the year under consideration. Further, the above company has super normal profits. We further find the submissions of the assessee that Excel Infoways Ltd. has super normal profits during the current year has not been controverted by the Revenue. We find the Mumbai Bench of the Tribunal the case of [DCIT vs. Willis Processing Services \(India\) Pvt. Ltd.](#) vide ITA No.2152/Mum/2014 has upheld the order of the DRP rejecting Excel Infoways Ltd. as comparable company on the ground that the company has a super normal profit of 203.80% and low employee cost 10.02%. We, therefore, find merit in the submissions of the Id. counsel for the assessee that Excel Infoways Ltd. should be excluded from the list of comparable on account of super normal profit of the said company in the preceding year.

25.1 Further, from the order of the TPO we find he has obtained the employee cost and the sale for the ITES segment by exercise of his powers u/s. 133(6), wherein the said company has allocated entire employee cost to IT - BPO segment with no allocation to Infra Activity segment which accounts to 49% of Excels total revenue. In our opinion, it is highly impractical that no employee has been hired by Excel for Infra Activity segment. We, therefore, find merit in the argument of the Id. counsel for the assessee that the information provided as per [section 133\(6\)](#) by Excel Infoways Ltd. is unreliable and should not be used to compute employee cost for ITES segment The Delhi Bench of the Tribunal in the case of Motorola Solutions India Private Limited vide ITA No.5637/Del/2011 has held that a company should be rejected as comparable in case there is contradiction in the facts or data sourced from annual report and as per the information gathered u/s. 133(6). In view of above discussion, we hold that Excel Infoways Ltd. cannot be considered as comparable and should be excluded from the list of comparables. We hold and direct accordingly."

Therefore, it is examined that both, Universal Print Systems Limited and Excel Infoways Limited cannot be considered as comparable companies with that of the assessee company. Hence, ground No. 4 is, thus, allowed".

7. We notice that M/s Excel Infoways Ltd was not considered as a comparable company for the reason that the profits of the company was declining and it was having super normal profits. The year-wise profit percentage would show IT(TP)A No. 2299/Mum/2017 that the same was consistently declining from 364.14% in FY 2009-10 to 0.43% in FY 2014-15. In view of the fluctuating profit, i.e., diminishing profit, the above said company was not taken as a comparable. Even though the Ld D.R contended that the decision in the case of Emerson Climate Technologies (India) Pvt. Ltd, which was followed by the Pune bench of Tribunal in the case of Ocwen Financial Solutions P Ltd (supra) was related to different assessment year and further the functions of M/s Emerson Climate Technologies (India) Pvt. Ltd. were different, yet we are of the view that the principle laid down in the above said case with regard to diminishing revenue and fluctuating profit can be adopted in the instant case. Further the Ld A.R has pointed out that there is difference in the functions

performed between the assessee company and M/s Excel Infoways Ltd. In view of the above, we agree with the contentions of the assessee that M/s Excel Infoways Ltd cannot be considered as a comparable company in the hands of the assessee.”

18.The co-ordinate bench of Delhi Tribunal in BT e-Services (India) (P.) Ltd. vs. ITO (supra) while considering this comparable with the assessee-company who is providing IT, ITeS, back office support and other related services to its group entity excluded this comparable holding as under:

5.3 Excel Infoways Limited With respect to this company, it has been submitted that this company was also functionally dissimilar as it was engaged in IT enabled BPO services and development of infrastructure facility. It has also been submitted that this company fails the employee cost filter as well as the diminishing revenue filter. We find that Excel Infoways Ltd was directed to be excluded by ITAT Delhi Bench in the case of [Baxter India Pvt. Ltd vs. ACIT](#) in ITA ITA 6690/Del/2016 Assessment year 2012-13 6158/Del/2016 which also provided captive IT Enabled Services to its AE. The year under consideration before the ITAT in the case of Baxter India (P) Ltd was also AY 2012-13. The relevant observations are contained in Para 24 and 25 of the said order and are being reproduced for a ready reference:

"24. So far as exclusion of Excel Infoways Ltd. is concerned, we also find merit in the submissions of the Id. Counsel for the assessee that the above company should be excluded from the list of comparables. This company fails TPO's own filter of diminishing revenue and abnormal volatility in revenue and margins. We find from the order of the TPO at para 7.5 (page 24 - 25 of the TPO order) where the TPO has observed that the department has applied consistent diminishing revenue/loss making filter wherein the companies with losses/diminishing revenue for the last three years upto and including the financial year 2010-11 were rejected as comparables. The department has excluded such companies with consistent losses/diminishing revenue in an environment where Indian economy is growing at consistent rate. Having held so, the Assessing Officer included Excel Infoways Ltd. as a comparable without considering the fact that the said company does not pass the diminishing revenue filter. From the submissions of the assessee before the TPO (at page 232 of Volume - 1 of the Paper Book) we find the details of the operating margin of the company from financial years 2009-10 to 201-15 are as under :-

.....
.....

25. From the above, it is clear that above company does not pass the diminishing revenue filter as adopted by the TPO himself since its revenue

has decreased consistently from financial years 2009-10 to 2011-12 i.e. including the year under consideration. Further, the above company has super normal profits. We further find the submissions of the assessee that Excel Infoways Ltd. has super normal profits during the current year has not been controverted by the Revenue. We find the Mumbai Bench of the Tribunal the case of Willis Processing Services (India) Pvt. Ltd. (supra) has upheld the order of the DRP rejecting Excel Infoways Ltd. as comparable company on the ground that the company has a super normal profit of 203.80% and low employee cost 10.02%. We, therefore, find merit in the submissions of the Id. counsel for the assessee that Excel Infoways Ltd. should be excluded from the list of comparable on account of super normal profit of the said company in the preceding year."

5.4.1 Respectfully following the order of the co-ordinate Bench, on identical facts, we direct the AO/TPO to exclude Excel Infoways Ltd from the final set of comparables."

19. In view of the aforesaid discussion and following the decisions of co-ordinate bench on similar set of fact, we direct the AO/TPO to exclude Excel Infoway Ltd. from the final set of comparable. Considering the fact that we have directed to exclude the Infosys BPO Ltd. and Excel Infoways Ltd., therefore, the AO/TPO is directed to recompute the ALP of IT support services with its AE as per direction/ observation hereinabove. In the result, Ground Nos.1 to 6 are allowed.

20. Ground No.7 relates to not granting set off of brought forward losses and unabsorbed depreciation against the income of current years. The Id. AR of the assessee submits that the assessee has filed an application under section 154 before the Assessing Officer, however, the assessee Assessing Officer has not disposed off the application. The Id. AR of the assessee prayed for appropriate direction be given to the Assessing Officer to decide the application under section 154. The Id. AR further submits that the Assessing

Officer must grant the set off of business loss and unabsorbed depreciation except the years, qua which the A.Y. is in dispute.

21. On the other hand, the Id. DR for the revenue supported the orders of lower authorities.

22. We have considered the submission of both the parties and considering the submission of Id. AR of the assessee, the Assessing Officer is directed to decide the application of assessee filed under section 154 in seeking the set off of brought forward business loss and unabsorbed deprecation in accordance with law. Needless to order that before passing the order, the Assessing Officer shall grant opportunity to the assessee. In the result, this ground of appeal is allowed for statistical purpose.

23. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 16/10/2019.

Sd/-
SHAMIM YAHYA
ACCOUNTANT MEMBER

Mumbai, Date: 16.10.2019

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