

2. *disregarding the Appellant's Transfer Pricing documentation and conducting his own comparability analysis which is not in accordance with the contemporaneous documentation requirement of the Indian TP regulations;*
3. *requiring financial data of only the current year (FY 2009-10) of the comparable companies to be used for benchmarking the Appellant's international transactions;*
4. *not granting the benefit of working capital adjustment and risk adjustment though the working capital adjustment was allowed in Appellant's own case for AY 2008-2009;*
5. *disregarding the Appellant's claim of exclusion of the cost relating to retirement benefits of the Appellant's employees which were seconded to the AE's.*
6. *disregarding the concept of base erosion and raising the income of the Appellant by adjustment with regards to services rendered to BP Exploration (Alpha) Limited – India Project office.*

It is prayed that the learned AO be directed to consider the international transaction of the Appellant as arm's length and accordingly the transfer pricing adjustment of Rs.13,73,67,595 should be deleted."

3. The brief facts of the case are as follows. The assessee is engaged in providing back office support services to its associated enterprises ('AEs'). The assessee computed its margin at 10.31% on total operating cost after making *suo moto* transfer pricing adjustment of Rs.6,16,00,440/-. The assessee chose Transactional Net Margin Method (TNMM) to benchmark the transaction of support services and adopted 'operating profit/total operating cost' as profit level indicator. The assessee chose a set of 9 comparables and arrived at a mean of 10.92%. Since the assessee's margin was within $\pm 5\%$ of the arm's length price, the international transaction of provision of back office support services to AEs was held at arm's length. The learned Transfer Pricing Officer

(TPO) rejected all the 9 comparables selected by the assessee and carried out fresh search strategy and chose the following 4 comparables :-

Sr. No.	Particulars	Margin %
1	E4E Healthcare Ltd.	19.46%
2	Cosmic Global Ltd.	14.97%
3	Accentia Technologies Ltd.	43.06%
4	Infosys BPO Ltd.	31.20%
	Average	27.17%

Accordingly, the TPO made an upward adjustment of Rs.13,73,67,595/-. The learned CIT(A) confirmed the transfer pricing adjustment made by the TPO. Against this, assessee is in appeal before the Tribunal.

4. We have heard both the counsels and perused the records. The learned counsel for the assessee submitted that as regards the issue of transfer pricing adjustment, he shall be confining his argument to the exclusion of following comparables :-

- i) Infosys BPO Ltd.
- ii) Accentia Technologies Ltd.

The learned counsel submitted that he shall be pleading for inclusion of Omega Healthcare Management Services Ltd. as a comparable. For exclusion of Infosys BPO Ltd as a comparable, the learned counsel contended that this Tribunal in assessee's own case for assessment year 2009-10 has held that this company is not comparable to the assessee. The relevant para reads as under:-

"8(iii) This company too has been directed to be excluded by the Tribunal on the ground that, it has a huge brand value and is an established player and is also a market leader having huge difference in economics of scale and

diversity of geographical dispersion of customers. From the main difference as pointed out in the chart reproduced above, it is seen that, its expenditure on advertisement and brand building is Rs.63.64 crore as against the “nil” of the assessee, because the assessee is risk mitigating company providing 100% services to its AE. Thus, this comparable is also directed to be excluded following earlier years precedence and there being no change in the facts and circumstances in this year. Accordingly, this company is directed to be excluded.”

5. The learned counsel further submitted that in several case laws, this company was held to be not comparable on account of intangibles, brand value and marketing intangibles.

6. As regards exclusion of Accentia Technologies Ltd., the learned counsel for the assessee submitted that this company has been amalgamated with the assessee w.e.f. 1st April, 2008. He further stated that the financials of the assessee are inclusive of figures of the amalgamating company and hence margin of this are affected on account of this extraordinary activity. Therefore, he submitted, it cannot be accepted as a comparable. He also pleaded that this company is providing license to customers with respect to software. That this company is also using third party as well as proprietary software and that the company has developed various software products. The learned counsel further submitted that in assessee’s own case for assessment year 2009-10, the Tribunal has held this company to be not comparable to the assessee. The relevant para of the said order reads as under :-

“8(iv) Regarding this company, it has been submitted before us that it is engaged in providing high end health care management services such as medical transcription, medical coding, billing and receivable management, that apart, this company is also dealing in software products for BPO for which no segment details are available. As pointed out, the BPO services which can be said to be comparable with the assessee, has not been started

in this year and this company has undertaken certain acquisition, therefore, due to such extra ordinary activities and non-supporting of BPO services, this company cannot be held to be comparable atleast in the assessment year. The Id. Counsel has also relied upon certain decisions as corroborated above, wherein, for the same assessment year, it has been held to be not comparable with the companies providing BPO/ITES services and further, the BPO services of its company had not been started in AY 2009-10. The relevant observations of the Tribunal in the aforesaid decisions have already been reproduced above. Thus, this company too is directed to be excluded from the list of comparability analysis.”

7. It was further submitted that in several case laws for the said assessment year, this company was excluded on account of extraordinary activities and functional differences as engaged in software products.

8. As regards the reasons for inclusion of Omega Healthcare Management Services Pvt. Ltd., it was submitted that the TPO rejected this company on the basis that the financials are not available in the public domain. It is submitted that this company is functionally comparable to the assessee and has been so accepted by the TPO for assessment year 2009-10.

9. As regards the working capital adjustment, it has been submitted that assessee relies upon the decision of the Tribunal in assessee's own case for assessment year 2009-10, wherein the Tribunal has directed to grant working capital adjustment to the Assessing Officer/TPO observing as under :-

“10. Now coming to assessee's plea for working capital adjustment, we direct the TPO to examine the same as in the earlier years the TPO himself has granted such an adjustment. In the paper book the assessee has filed working capital adjustment which are appearing at pages 107, 108 & 109-A. The TPO shall examine the same and decide this issue accordingly.”

10. Upon careful consideration we direct as under :-

- i) Infosys BPO Ltd. and Accentia Technologies Ltd. be excluded from the list of comparables as already found incomparable in assessee's own case by ITAT as above;
- ii) Omega Healthcare Management Services be included as comparable as the financials are now available and in assessee's own case for assessment year 2009-10, Revenue has accepted the same as comparable;
- iii) As regards assessee's plea of working capital adjustment, we follow the direction of the Tribunal in assessee's own case as above. The TPO is directed to follow the same.

11. As regards ground nos. 5 and 6, the learned counsel for the assessee submitted that he shall not be pressing the same. Hence, these grounds are dismissed as not pressed.

12. In the result, assessee's appeal is partly allowed.

Order pronounced in the open court on 21st November, 2019.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai, Date : 21st November, 2019

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "K" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai