

IN THE INCOME-TAX APPELLATE TRIBUNAL “K” BENCH MUMBAI
BEFORE SHRI R.C. SHARMA ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.483/Mum/2013 (Assessment Year 2008-09)

ITA No.1808/Mum/2014 (Assessment Year 2009-10)

M/s. Teleperformance Global Services Private Limited, (Earlier Known as “Intel Global Services Private Limited”), Teleperformance Towers, Plot CST No. 1406-A/28, Mindspace, Malad, (West) Mumbai-400090 PAN: AAACI 7387 P	Vs.	ACIT, Circle 1(2), Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by : Shri J.D. Mistry Sr Advocate
a/w Sh. Madhur Agarwal Advocate

Revenue by : Sh. Anand Mohan CIT-DR

Date of Hearing : 02.03.2020

Date of Pronouncement : 16.06.2020

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These two by assessee are directed against the assessment order passed in pursuance of directions of Dispute Resolution Penal (DRP) for assessment years 2008-09 and 2009-10. In both the appeals the assessee has raised certain common grounds of appeal, therefore, both the appeals were clubbed, heard together and are decided by common order.

2. The assessee in its appeal for AY 200-08-09 has raised as raised as many years 7 grounds of appeal and various sub- grounds of appeal, which are narrative or argumentative. We have summarized the ground of appeal in the following manner.

I Transfer Pricing

(1) General

- 1.1 The learned AO/Dispute Resolution Panel (DRP) erred in upholding the upward adjustment of ₹ 47.28 crore towards provision of call centre and data processing services, ₹ 1,09,738/-towards interest received on provision of loan to associated enterprises and ₹ 2.47 crore towards provision of guarantee made by the learned transfer pricing officer (TPO).*
- 1.2 The learned AO/DRP erred in confirming that the learned TPO has not violated the principle of res-judicata in making the transfer pricing adjustment.*
- (2) Transfer pricing adjustment as regards provision of call centre and data processing services to the AE.*
- (3) Transfer pricing adjustment as regards provision corporate guarantee to the AE.*
- (4) Transfer pricing adjustment as regard provision of law to AEs.*

II Direct tax

- (5) Income from sub-lease treated as 'Income from Other Sources'.*
- (6) Rent expenditure not allowed as deduction from "income from other sources".*
- (7) General, for initiating penalty proceeding under section 271(1)©.*
3. Brief facts of the case are that the assessee-company is engaged in providing Business Process Services (Information technology enabled services) and claiming to be a leader in its business. The assessee-

company filed its return of income for Assessment Year 2008-09 on 23.09.2009 declaring total income at Rs. Nil after claiming deduction under section 10A. Along with the return of income, the assessee furnished report under Form 3CEB and reported international transaction with its associated enterprises (AEs). The return was selected for scrutiny. The assessing officer consequent on reporting international transaction made reference to the transfer pricing officer (TPO) for computation of arms length price (ALP) of international transaction. The TPO on receipt of reference noted that the assessee in the report under Form 3CEB reported the following international transactions:

Sr. No.	International Transaction	Name of AE	Amount (Rs.)
1	Call centre and data processing services	Barclays Bank	136,02,09,196/-
2	Business outsources expenses	Intelnet America Inc	7,37,80,817/-
		Intelnet Inc USA	5,85,923/-
		Intelnet UK Ltd	52,48,014
3	IT enabled services	Intelnet Inc USA	53,60,26,559/-
4	IT enabled services	Intelnet (UK) Ltd	14,85,01,089/-
5	Interest received from Short Term loan	Intelnet America Inc	215,637/-
		Snow Holding Co. Ltd	958,949/-
	Total		212,55,26,184/-

4. The assessee bench marked its ALP under Comparable uncontrolled Price Method (CUP) with regard to the transaction for provisions of call center and data processing activities. The TPO rejected the CUP method and applied Transaction Net Margin Method (TNMM) as most appropriate method for computation of ALP with regard to the transaction for provisions of call center and data processing activities. The TPO selected 22, following comparable company for benchmarking the transaction.

1. Mold Tek Technologies,
2. EClerck Services ltd
3. Accentia Technologies Ltd. (seg)
4. Accropetal Technology Ltd (seg),
5. Datamatics financial Ltd, (seg)
6. HCL Comnet Systems & Services Ltd (seg),
7. Wipro Ltd. (seg),
8. Crossdomain Solution Ltd,
9. Triton Capital Ltd,
10. Cosmic Global Ltd.
11. Maple Esolutions Ltd,
12. Infosys BPO Ltd.
13. e4e Healthcare Business Services Ltd,
14. Spenco Ltd,
15. Caliber Point Business Solutions Ltd.,
16. I Services India Pvt. Ltd.
17. Asit C Mehta Financial Services Ltd, (seg),
18. R Systems International Ltd. (seg),
19. Aditya Birla Minacs Worldwide
20. Jindal Intellicom Pvt Ltd.

21. Coral Hubs Ltd and
22. Genesys International Corporation Ltd.
5. The TPO after including/ selecting 22 comparable worked out Arithmetic mean of margin of 27.53% and worked out difference between ALP of sales and value of international transaction and made adjustment of Rs. 47.28 Crore in the following manner:

1	Operating Cost	Rs. 360,34,63,527/-
2	Arms length mean margin	27.53% of operating cost
3	ALP @ 127.53 % of operating cost	Rs. 459,54,97,036/-
4	Price received	Rs. 412,26,26,719/-
5	Shortfall being adjustment u/s 92CA	Rs. 47,28,70,317/-

6. The TPO also noted that the assessee has extended Corporate Guarantee for secured loan granted by ICICI Canada and Performance Guarantee for its AE in Canada and UK. The TPO after issuing show cause notice charged 3% interest on such guarantee and suggested adjustment of Rs. 2.47 Crore on such Corporate Guarantee and Performance Guarantee. Besides that the assessee provided loan to its AE's and charged interest @ Libor plus 200 bps. The TPO rejected the working analysis of the assessee and charged interest @ 14.39% on the basis of information obtained from Crisil under section 133(6) and suggested upward

adjustment of Rs.109,378/-. On receipt of report of TPO, the Assessing Officer made upward adjustment/addition suggested by TPO. The assessing officer further noted that the assessee has claimed deduction under section 10A of Rs. 89,55,93,571/- against business income. The assessee also credited a sum of Rs. 6,53,13,864/- by sub-leasing the property taken on lease. The assessing officer treated the said income of Rs. 6,53,13,864/- as income from other sources and passed the draft assessment order.

7. The copy of draft assessment order was served on the assessee. The assessee exercised its option to file objection before Dispute Resolution panel (DRP). The ld. DRP after considering the objections of the assessee, on the issue of TP adjustment on account of provisions of call center and data processing activities directed the AO/TPO to recompute the adjustment after excluding two comparable i.e. Coral Hubs Ltd and Genesys International Corporation Ltd, from set of comparables and upheld the inclusion of remaining 20 comparables. However, on the issue of Corporate Guarantee the interest rate was restricted to 1.5%, thus granted partial relief. On the objection / issue of interest on loan to AE the AP/TPO was directed to adopt the domestic cost of borrowing. And the treatment of income from sub-lease was upheld. On receipt of the

directions of the DRP the assessing officer passed the final assessment order dated 8.11.2012 under section 143(3) rws 144C(13) and made addition/ adjustment. Thus, further aggrieved the assessee has filed this appeal before this Tribunal.

8. We have heard the submission of Id. Authorized Representative (AR) of the assessee and the learned Departmental Representative (CIT-DR) for the revenue and perused the material available on record. The Id. AR for the assessee submits that Ground No.1 is general and needs no specific adjudication, therefore dismissed. Grounds No. 2 relates to TP adjustment regarding provisions of Call centre and data processing activities. The Id AR for the assessee submits that he is making limited submissions only to examine the comparability of 8 comparable namely; Mold-teck Technology, Eclerx Services Limited, Accentia Technology Limited, Wipro Limited, Accropetal Technology Limited, Infosys BPO Limited, HCL Comnet System & Services Ltd and Cross Domain Solution Ltd, which are not comparable with the assessee. The Id. AR for the assessee further submits that exclusion of each comparable for benchmarking the international transaction in case of a company engaged in similar ITes/ BPO segment has been considered by Tribunal for same assessment year (AY) that is 2008-09. And in case, if these eight

comparable are excluded the margins of the assessee would be within the tolerance range. The ld AR for the assessee filed the following case law compilation;

- WNS Global Services Pvt Ltd Vs ITO (ITA No. 7378/Mum/2012),
- Flextronics Technologies Ltd (India) (P) Ltd (ITA No. 1559/M/Bang/2012,
- Dialogic Network (India)(P) Ltd (ITA No. 7280/M/2012 and
- Goldman Sach (I) Securities (P) Ltd (ITA No. 6912/Mum/2012.

9. On the other hand the ld. DR for the revenue submits that the TPO and the ld. DRP has given detailed reasoning for inclusion of the comparability of various comparable and he rely of their order.

10. We have considered the submissions of the learned representatives of the parties and have gone through the orders of the lower authorities and also deliberated on the case laws relied by ld. AR for the assessee. The TPO in para 5 of his order as accepted that primary function of the assessee is to provide business process outsourcing services (BPO), consisting of inbound customer services, outbound collections, transaction processing, financing and accounting services, knowledge management of complex technologies, telemarketing and invoice processing. The assessing officer has also recorded the nature of business activities of the assessee as information technology enabled services (ITeS). Though, the assessee

benchmarked its transaction by adopting most appropriate method as CUP. The TPO not accepted the method adopted by assessee. The TPO applied TNMM method as appropriate method for benchmarking the transaction relating to provision of call centre and that a processing activities. Before us the learned AR of the assessee made his Limited submission only for seeking exclusion of 8 comparable, which is according to learned AR of the assessee are not comparable with the assessee. For exclusion of those 8 comparable the learned AR of the assessee mainly relied upon the four case laws referred above and would submit that those comparable are not at all comparable with the assessee as held by coordinate bench of Tribunal, with that assessee(s) engaged in similar business activities (BPO/ITeS) as undertaken by assessee. We have noted that Mumbai Tribunal in WNS Global Services Pvt Ltd (supra) for same AY i.e. 2008-09, considered the exclusion of HCL Comnet System and Services Ltd and passed the following order;

“ COMPARABLES UNDER ITES SEGMENT

i) HCL COMNET SYSTEMS AND SERVICES LTD. (SEGMENT)

79. Objecting to the selection of the aforesaid company, the learned Sr. Counsel for the assessee submitted, the Transfer Pricing Officer while selecting / rejecting comparables has applied related party transaction (RPT) filter and has rejected all companies which has RPT of more than 25% of the Revenue. He submitted, applying the aforesaid filter the Transfer Pricing

Officer has rejected some of the comparables selected by the assessee. He submitted, applying the same logic, this company has to be rejected as the RPT of the company is more than the threshold limit of 25% applied by the Transfer Pricing Officer. He submitted, the RPT of this company as a percentage of the revenue works out to 28.19%. Therefore, it cannot be treated as a comparable. In support of such contention, he relied upon the decision of the Tribunal, Delhi Bench, in H&S Software Development and Knowledge Management Centre Pvt. Ltd., ITA no.436 and 496/Del./2013, dated 20th March 2018. Without prejudice to the aforesaid contention, the learned Sr. Counsel submitted, the company's accounting year ends on 30th June, whereas, assessee's accounting year ends on 31st March. Thus, he submitted, the company cannot be treated as a comparable due to different accounting year ending. For such proposition, he relied upon the decision of the Tribunal, Mumbai Bench, in Dialogic Network India Pvt. Ltd. v/s ACIT, ITA no.7280/Mum./2012, dated 27th July 2018.

80. The learned Departmental Representative relied upon the observations of the DRP and the Transfer Pricing Officer.

81. We have considered rival submissions and perused material on record. As could be seen from Para-7 of the order passed by the Transfer Pricing Officer, for selecting / rejecting comparables independently he has applied certain filters which include rejection of companies having RPT of more than 25% of the operating revenue as well as companies having different financial year ending. In other words, he has rejected companies which do not have their financial year ending on 31st March 2008. It is the specific contention of the learned Sr. Counsel before us that not only the RPT of this company as a percentage of operating revenue works out to 28.19% thereby exceeding the threshold limit of 25% fixed by the Transfer Pricing Officer, but, the company has a different accounting year ending which is 30th June. It is noticed that in case of H&S Software Development and Knowledge Centre Pvt. Ltd. (supra), the Tribunal, Delhi Bench, taking note of the fact that the RPT of the company

exceeds the threshold limit of 25% fixed by the Transfer Pricing Officer himself and further it has a different financial year ending has held that it cannot be treated as a comparable. The Tribunal, Mumbai Bench, in Dialogic Network India Pvt. Ltd. (supra) has also rejected this company as a comparable since it has a different financial year ending. Since, the aforesaid decisions of the Tribunal pertain to the very same assessment year, respectfully following the ratio laid down therein, we exclude this company from the list of comparables.”

11. We have further noted that Bangalore Tribunal in Flextronics Technologies (India) (P) Ltd (supra) while considering the exclusion of Mold-teck Technology, Eclerx Services Limited, Accentia Technology Limited, Wipro Limited, Accropetal Technology Limited, Infosys BPO Limited, and Cross Domain Solution Ltd for same AY i.e. 2008-09, passed following order;

“ 12. The Id. counsel for the assessee, Shri Ajay Jain, submitted a chart and stated that Accentia Technologies Ltd. is uncomparable as its financial results are arising out of amalgamation. He relied on the decision of the coordinate Bench of the Tribunal in the case of *Symphony Marketing Solutions India (P.) Ltd. v. ITO* [[2013](#)] 38 taxmann.com 55 (Bang.-Trib.), wherein it has been held as follows:—

'(1) Accentia Technologies Ltd. (Seg.)

10. This was considered as a comparable by the TPO and listed at Sl. No.1 of the comparable companies chosen by the TPO. The Id. counsel for the assessee drew our attention to the fact that mere are extraordinary events that occurred during the previous year in this company. Our attention was drawn to the annual report of this company for the A.Y. 2007-08 wherein the fact that this company had acquired Thunga Software Pvt. Ltd., GSR Physicians Billing Services Inc., GSR

Systems Inc. and Derafied Inc. is mentioned. Our attention was also drawn to the decision of the Hyderabad ITAT Bench in the case of *Capital IQ Information Systems India Pvt. Ltd. v. DCIT* [\[2013\] 32 Taxman.com 21 \(Hyd. Trib\)](#). In the aforesaid decision, the Hyderabad Bench of the Tribunal had to deal with a case of determination of ALP in the case of an assessee who was providing ITES business support services for the A.Y. 2007-08. The TPO had considered Accentia Technologies Ltd. as a comparable. The DRP however held that the said company cannot be compared as a comparable owing to extraordinary events that took place during the previous year. The Tribunal upheld the order of the DRP observing as follows:—

"I. Accentia Technologies Ltd.

10. It is the submission of the assessee that this company cannot be treated as a comparable because of uncomparable financial results arising out of amalgamation in the company. In this regard, the assessee has relied upon the order of the DRP for the assessment year 2008-09 in assessee's own case. It is seen that the DRP while considering similar objection placed by the assessee in the case of another company, viz. Mold Tek Technologies Ltd., in the proceedings relating to the assessment year 2008-09, has observed in the following manner—

"17.5. In addition to the above, the Director's Report of the company for the FY 2007-08 revealed the merger and the demerger. A company known as Techmen Tools Pvt. Ltd. had amalgamated with Mold-tek Technologies Ltd. with effect from 1st October, 2006, There was a de-merger of Plastic Division of the company and the resulting company is known as Moldtek Plastics Limited. The de-merger from the Moldtek Technologies took place with effect from 1st April, 2007. The merger and the de-merger needed the approval of the Hon'ble High Court of Andhra Pradesh and also the approval of the shareholders. The shareholders of the company gave approval for the merger and the de-merger on 25.01.2008 and the Hon'ble High Court of Andhra Pradesh had approved the merger and de-merger on 25th July, 2008. Subsequently, the accounts of Moldtek Technologies for FY 2007-08 were revised. On a perusal of the annual report it is noticed that Teckmen Tools Pvt. Ltd. and the Plastic Division of the company were demerged and the resulting company was named as Moldtek Plastics

Ltd. The KPO business remained with the company. A perusal of the Annual report revealed that to give effect to the merger and demerger, the financial statements were revised and restated after six months from the end of the financial year 31.3.2008. The assessee filed Form No. 21 under the Companies Act with the Registrar of Companies on 26th August, 2008. Thus the effective date of the scheme of merger and demerger was 26th August, 2008. The Annual Report supported the argument of the assessee that there were merger and demerger in the financial year and it was an exceptional year of performance as financial statements were revised by this company much after the closure of the previous year. The Panel agrees with the contention of the assessee that it is an exceptional year having significant impact on the profitability arising out of merger and demerger."

11. On careful consideration of the matter, we also agree with the aforesaid view of the DRP that extra-ordinary event like merger and demerger will have an effect on the profitability of the company in the financial year in which such event takes place. It is the contention of the assessee that in case of the aforesaid company, there is amalgamation in December, 2006, which has impacted the financial result. This fact has to be verified by the TPO. If it is found upon such verification that the amalgamation in fact has taken place, then the aforesaid comparable has to be excluded."

11. We have considered the submissions of the Id. counsel for the assessee and are of the view that the ratio laid down by the Hyderabad Bench of the ITAT is squarely applicable to the present case also. It is clear that during the previous year there were extraordinary events that took place in this company which warrants exclusion of this company as a comparable. We therefore hold that this company cannot be considered as a comparable.'

13. With respect to **Acropetal Technologies Ltd.**, the Id. counsel for the assessee again relied on the decision of the coordinate Bench of this Tribunal in *Symphony Marketing Solutions India (P.) Ltd.'s case (supra)* wherein it has been held that this company is not functionally comparable at paras 12 & 13 of its order:—

"(2) Acropetal Technologies Ltd. (Seg.)

12. This company is listed at Sl.No. 2 of the comparables chosen by the TPO. As far as this company is concerned, the objection of the assessee is that this company is not functionally comparable. The assessee is a BPO company that provides market analytics and data management services. To provide market analytics solutions, the assessee gives strategies that impact on client revenue including data based marketing strategies for customer acquisition, devising customer retention strategies and excluding loss mitigation strategies through cutting edge forecasting tools. The data management services provided by the assessee include routine business data reporting and management, website management, marketing data analysis and top line reporting. As far as Acropetal Technologies Ltd. is concerned, this company does the business of export of software services. It is also seen from the segmental revenue of this company (Note 15 to the notes on accounts to Annual Report for 07-08) that it derives income from engineering design services and software development services. It is also pertinent to point out that before the TPO, the assessee raised an objection that this company performs different functions and mainly engaged in the area of software development services and engineering design services. The TPO in his order has observed that the services rendered by this company fall in the definition of ITES.

13. We have considered the submissions of the learned counsel for the Assessee. On a perusal of the Note No. 15 of notes to accounts which gives segmental revenue of this company, it is clear that the major source of income for this company is from providing Engineering Design Service and Information Technology Services. The functions performed by the Engineering Design Services segment of the company cannot be considered as comparable to the ITES/BPO functions performed by the Assessee. The performance of Engineering Design Services is regarded as providing high-end services among the BPO which requires high skill whereas the services performed by the Assessee are routine low-end ITES functions. We therefore hold that this company could not have been selected as a comparable, especially when it performs engineering design services which only a Knowledge Process Outsourcing [KPO] would do and not a Business Process Outsourcing [BPO]."

14. -----

15. As regards **Cross Domain Solutions Ltd.**, the Id. counsel for the assessee submitted that it is functionally not comparable relying on the decision of the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India (P.) Ltd. (supra)*, wherein it was held at paras 18 to 19 of its order as under:—

'(4) Cross Domain Solutions Ltd.

18. This company was considered as a comparable and listed at Sl. No. 8 of the comparables chosen by the TPO. It is the stand of the assessee that this company is not functionally comparable. As observed in the case of Coral Hubs Ltd., the TPO rejected the plea of the assessee on the basis of a non-existent TP order passed for the A.Y. 2007-08. It is seen that the business profile of this company is re-engineered payroll service. This company is also engaged in the development of information systems. These activities are totally different from the activities of the assessee which perform very 'limited/low-end functions back office services. The review and business functions of Cross Domain is as follows:—

"With a decade of experience in Payroll Outsourcing, Cross Domain has created a re-engineered payroll service EFFIPAY - that processes and delivers accurate payroll to clients with headcount up to 1000 employees in just 4 hours*. With Effipay Lite and Effipay Lite Plus, our bouquet of services cover end to end payroll, retrials, reimbursement, tax proof verifications upto issue of Form 16 for employees of our clients across different industry verticals. Our processes are highly scalable and provide end to end payroll solutions to clients with headcount ranging from 5 to 65,000."

"Cross Domain's IT knowledge and domain competence has provided the edge to develop information systems to implement process innovation and continuously increase efficiency and turn-around-time for business critical processes."

Source: <http://www.cross-domain.com>

As can be seen from the above, the business of Cross Domain ranges from high-end KPO services, development of product suites and routine low-end ITES service. However, there is no bifurcation available for such verticals of services. Therefore the assessee contends that Cross Domain cannot be compared to a routine ITES service provider.

19. We are of the view that in the absence of any reasons given to the contrary either by the TPO or the DRP for regarding this company as a comparable, this company should be excluded from the list of comparables, accepting the plea of the Assessee. We hold accordingly.'

16. As far as **Eclerx Services Ltd.** is concerned, the Id. counsel for the assessee submitted that it had super normal profit and is functionally not comparable with the assessee company relying on the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India (P.) Ltd. (supra)*, wherein it was held at paras 20 & 21 of its order as under:—

'(5) Eclerx Services Ltd.

20. This company is listed at Sl. No. 11 in the list of comparable companies chosen by the TPO. It is the stand of the assessee that this company offers solutions that include data analytics, operations management, audits and reconciliation and therefore has to be classified as high-end KPO. In support of the stand of the assessee, extracts from the annual report of this company have been pointed out. It has further been submitted that extraordinary events and peculiar circumstances prevail in the case of the assessee inasmuch as this company acquired a UK based company which has significantly contributed to the increase in the customer and revenue base of the company. This Tribunal in the case of *Capital IQ Information Systems India (P.) Ltd. (supra)* had an occasion to deal with comparability of this company in the case of an ITES company such as the Assessee and the Tribunal held as follows:—

"14. The assessee has objected for this company being taken as comparable mainly on the ground that it was having a supernormal profit of 89%, and as such it cannot be taken as a comparable in view of the decision of the Mumbai Bench of the tribunal in the case *M/s. Teva India Ltd. (supra)*. That apart, relying upon the annual report of the company, the learned Authorised Representative for the assessee has contended that the concerned company is engaged in providing Knowledge Process Outsourcing (KPO) Services.

15. On considering the objections of the assessee in relation to this company, we accept the contention of the assessee that this company cannot be taken as a comparable both for the reasons that it was having

supernormal profit and it is engaged in providing KPO services, which is distinct from the nature of services provided by the assessee."

21. We are of the view that in the light of the decision of the Hyderabad Bench referred to above, this company cannot be regarded as a comparable for the reason that it was functionally different.'

17. -----

18. As regards **Infosys BPO Ltd.**, the Id. counsel for the assessee submitted that it had a different scale of operations on account of brand value of the parent company and relied on the decision of the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India (P.) Ltd. (supra)*, wherein it was held at para 24 of its order as under:—

"(7) Infosys BPO Ltd

24. This company is listed at Sl. 13 in the list of comparable companies chosen by the TPO. As far as this company is concerned, it is the submission of the Id. counsel for the assessee that this company has a brand value and therefore there would be significant influence in the pricing policy which will impact the margins. Schedule 13 to the profit & loss account of this company for the F.Y. 2007-08 shows that this company incurred huge selling and marketing expenses. Page 133 of the annual report of this company for the F.Y. 2007-08 shows that this company realizing its brand value has chosen to value the same on the basis of its earnings and that of Infosys. The brand value of the Assessee and Infosys has been valued at Rs. 31,863 crores. Infosys BPO, being a subsidiary of Infosys, has an element of brand value associated with it. This is also clear from the presence of brand related expenses incurred by this company. Presence of a brand commands premium price and the customers would be willing to pay, for the services/products of the company. Infosys BPO is an established player who is not only a market leader but also a company employing sheer breadth in terms of economies of scale and diversity and geographical dispersion of customers. The presence of the aforesaid factors will take this company out of the list of comaparables. We therefore accept the contention of the assessee that this company cannot be regarded as a comparable."

19. Regarding **Mold-tek Technologies Ltd.**, the Id. counsel for the assessee submitted that it is not functionally comparable to that of the assessee company and relied on the coordinate Bench decision of this Tribunal in the case of

Symphony Marketing Solutions India (P.) Ltd. (supra), wherein it was held at para 25 of its order as under:—

"(8) Mold-tek Technologies Ltd.

25. This company is listed at Sl. No. 16 of the list of comparable companies chosen by the TPO. As far as this company is concerned, the submission of the assessee before us is that it is in the business of Knowledge Process Outsourcing and cannot be considered as a comparable. The functional profile of this company is as follows:—

As per the annual report for the F.Y. 2007-08, the company primarily operates in two business segments:

Plastic division: The plastic division is engaged in the manufacture of tube & oils, paints, pet products, consumer products, etc. The company demerged the said segment effective 1 April, 2007 and transferred the business unit to the Company Plastics Ltd. The extract from the annual report confirms the fact that the Company had restructured its operations resulting in demerging the plastic segment business.

Information Technology (IT) division: The IT division (also referred to as the KPO division by the company) of the company specializes in providing structural design and detailing services which can be categorized as structural engineering services. The structural engineering services provided by the IT division of the company cannot be classified as falling with the scope and ambit of ITES services. On the contrary, the said services would fall under the category of engineering services.

Excerpts from the Annual Report of the company

Page 10 of the Annual Report for the FY 2007-08 contains the following observation regarding the KPO division of the Company:

The Company has achieved about 56.49% growth in 2007-08 to register a turnover of Rs.17.86 crore. The company having established its credentials in structural engineering services to US clients is devising aggressive marketing strategy to achieve rapid growth.

This company is also engaged in providing a host of engineering services like civil and structural engineering services, mechanical product design, plant engineering, IT services and GIS services. As we have already seen, this

company is to be classified as KPO and cannot be compared with the assessee. The decision of the Bangalore Bench of the ITAT in the case of *First Advantage Offshore Services Ltd. (supra)* which we have referred to in the earlier part of this order will clearly apply to this company. We therefore direct this company to be excluded from the list of comparables."

20. With regard to **Wipro Ltd. (Seg)**, the Id. counsel for the assessee submitted that it is distinguishable for different scale of operations on account of brand value of parent company and not comparable with the assessee relying on the decision of the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India (P.) Ltd. (supra)*, wherein it was held at para 26 of its order as under:—

"(8) Wipro Ltd.

26. This company is listed at Sl. No. 18 in the list of comparable companies chosen by the TPO. As far as this company is concerned, the discussion made while deciding Infosys BPO Ltd. as a comparable will equally apply to this company also. This company owns substantial intellectual property on software products. This company cannot therefore be regarded as a comparable. For the reasons given while disregarding Infosys BPO Ltd. as a comparable, this company is also directed to be excluded from the list of comparables."

***(bold and underline is in the quoted decisions is made by us)**

12. In view of the above discussions and respectfully following the decisions of coordinate bench, we direct the AO/TPO to exclude the 8 comparable namely; Mold-teck Technology, Eclerx Services Limited, Accentia Technology Limited, Wipro Limited, Accropetal Technology Limited, Infosys BPO Limited, HCL Comnet System & Services Ltd and Cross Domain Solution Ltd and recompute the APL as per direction/

observation hereinabove. In the result the Ground No. 2 of the appeal is partly statistically.

13. Ground No.3 relates to adjustment on account of provision of Corporate and performance guarantee. The ld. AR for the assessee submits that provision of corporate guarantee does not lead to any income generation for the assessee and hence, does not fall within the ambit of section 92 of the Act. The guarantee arrangement is a bank formality. Similarly there is no risk as regards the performance guarantee and it is the assessee who is guaranteeing its own performance. In support of his submissions the ld AR for the assessee relied on the following case laws;

- Bharti Airtel Limited Vs Add CIT [2014] 43 taxmann.com 150(Delhi Trib),
- Videocon Industries Ltd Vs ACIT [2015] 55 taxmann.com 263 (Mum Trib),
- Marico Ltd Vs ACIT [2016] 70 taxmann.com 214 (Mumbai Trib),
- Redington (India) Ltd (ITA 513 & 516(MDS)/2014 and
- M Suresh Company Private ltd (ITA 1853/Mum/2016)

14. In alternative the ld AR for the assessee submits that in any case the adjustment on this issue should not exceed .5% of total amount of guarantee and also furnished the working thereof.

15. On the other hand the Id. DR for the revenue supported the order of the authorities below. The Id. DR for the revenue submits that .5% of the amount of the would be reasonable as held by Hon'ble Bombay High Court in CIT Vs Everest Kanto Cylinders' Ltd [2015] 58 taxmann.com 254 (Bombay).
16. We have considered the submissions of the parties and have gone through the orders of the lower authorities. We have also deliberated on the various case laws relied by the assessee. The Id. AR for the assessee vehemently submitted that mere extending corporate and performance guarantee does not lead to any income generation for the assessee and hence, does not fall within the ambit if section 92of the Act and relied on the decisions of coordinate bench(supra). However, the Hon'ble Jurisdictional High Court in the case of Everest Kento Cylinders Ltd. Vs DCIT (supra), while considering a similar situation, where in the matter of guarantee commission fee the adjustment made by the income-tax authorities was based on instances of commercial banks providing guarantees. The Hon'ble High Court has explained that instances of commercial banks providing guarantees could not be compared to instances of issuance of corporate guarantee. As per Bombay High Court, when commercial banks issue bank guarantees, the same is quite distinct

in character than the situation where a corporate issues guarantee to the effect that, if a subsidiary associated enterprise does not repay a loan, the same would be made good by such corporate. Keeping the aforesaid ratio of the Bombay High Court, it is quite clear that the manner in which the Transfer Pricing Officer has proceeded to determine the arm's length rate based on the probable rate being charged by the commercial banks is not justified. In this view of the matter, three per cent rate of guarantee commission fee determined as arm's length rate by the income-tax authorities cannot be approved, though the ld. DRP in its direction has already restricted it to 1.5%. In the alternative, the addition that is required to be sustained is the position canvassed by the assessee before the Transfer Pricing Officer *i.e.* adoption of 0.50 per cent as arm's length rate for the purpose of determining the arm's length income on account of guarantee commission fee in the instant case. Considering the entirety of facts and circumstances of the case and on the basis of the material available on record, the rate of 0.50 per cent is to be upheld for the purpose of determining the arm's length rate of the guarantee commission fee. In the result this ground of appeal is partly allowed.

17. Ground No. 4 relates to adjustment on account of provision of loan to AE's. The ld. AR for the assessee submits that the assessee provided

loans to its AEs viz; USD 3,000,000/- unsecured loan to AE in Mauritius at LIBOR plus 200 vide agreement dated 25.01.2008 and loan of USD 500,000/- AE in America at LIBOR plus 2% vide agreement dated 23.03.2009, effective from January 2008. The TPO made adjustment based on third party domestic rate i.e. Crisil taking the rate @ 14.39%. The DRP rejected the TPO's approach and directed to made adjustment based on domestic cost of borrowing + 3% markup, which resulted in to total rate to 8.8%. The Id AR for the assessee submits that interest rate for loan advanced to foreign company should be computed based on market determined interest rate applicable to currency and the country in which the loan is to be repaid. In support of his submission the Id AR for the assessee relied on the following case laws;

- CIT Vs Cotton Naturals (P) Ltd [2015] 55 taxmann.com 523 (Delhi),
- Ion Exchange (I) Ltd (ITA No. 5109/Mum/2013)
- Hinduja Global Solutiona Ltd (2013) taxmann.com 348 (Mum Tri),
- Aurinpro Solution Ltd [2013] 33taxmann.com 187(Mum Trib),
- Tata Autocomp System Ltd (ITA No. 7354/Mum/2011)

18. On the other hand the Id. DR for the revenue supported the order of the lower authorities.

19. We have considered the submissions of the parties and have gone through the orders of the lower authorities. We have also deliberated on the various case laws relied by the assessee. The TPO made adjustment on account of loan based on third party domestic rate i.e. Crisil taking the rate @ 14.39%. The DRP after considering the submissions on the objections of the assessee and directed to made adjustment based on domestic cost of borrowing + 3% markup. The Id. AR for the assessee vehemently submitted that direction of Id. DRP resulted in to total rate of interest at 8.8%. The Hon'ble Delhi High Court in CIT Vs Cotton Naturals (I) (P) Ltd (supra) while considering the question of law whether the Income-Tax Appellate Tribunal was right in holding that the interest @ 4% p.a. charged by the respondent assessee from its subsidiary i.e. the Associated Enterprise was arm's length rate of interest and the adjustment made in the Assessment Order determining the arms' length rate of interest at 12.20% was unwarranted, held that Arm's length interest rate for loan advanced to foreign subsidiary by Indian company should be computed based on market determined interest rate applicable to currency in which loan has to be repaid.
20. Further, the Hon'ble Jurisdictional High Court in CIT Vs Tata Autocomp System Ltd (supra) also held that where assessee advanced loans to its

AE situated in Germany, rate of interest was to be determined on basis of rate prevailing in Germany where loan had been consumed. Considering the aforesaid decisions of Hon'ble High Courts, we direct the AO/TPO to recompute the adjustment of interest on loan by following the decision of CIT Vs Tata Autocomp System Ltd (supra). The assessee is directed to provide necessary details to AO/TPO. In the result this Ground of appeal is allowed for statistical purpose.

21. Ground No. 5 relates to treating the income from sub-lease as income from other sources. The ld. AR for the assessee submits that during the relevant period under consideration the assessee had taken a lease of property from Magnus Properties Private Limited. Since, the assessee could not use the entire premises for the purpose of its business and in order to avoid excessive expenditure, the assessee subleased the part of aforesaid property to Hong Kong and Shanghai Bank Corporation (HSBC) at the same rate at which it had taken the premises on lease. The assessee provided the copy of lease agreement with the lesser and the copy of sublease with the HSBC to the lower authorities, the copy of leased deed and sublease is filed on record. As the property was taken on lease for the purpose of business, and it was only because it would not be used for the purpose of business and to avoid excessive expenditure, the

assessee had sublease the property at the same rate. The income from subletting is business income and not to be taxed as income from other sources. In alternative submission the learned AR of the assessee submits that even if it is held that income has to be taxed under the head income from other sources, then requested deduction follies expenses to have been given to the assessee interim of section 57(iii) of the Act.

22. On the other hand the ld. DR submits that the DRP has already passed the order on the application for rectification application moved by the assessee and has given direction to the AO/TPO to grant deduction under section 57, vide order dated 21.12.2012, thus, the assessee is already granted relief on this ground of appeal.

23. We have considered the submissions of the parties and have gone through the orders of the lower authorities. During the assessment the assessing officer noted that the assessee has claimed deduction under section 10 A against the business income list of the assessee also credited a rental income of ₹ 6.53 crore in its profit and loss account and the same was included in the head of income from business on which the assessee claimed deduction under section 10A. The assessing officer took his view that the rental income is not eligible for deduction under section 10A. The DRP affirm the action of assessing officer as the same is not

qualified for deduction under section 10A. Before us, the learned AR of the assessee failed to bring any convincing fact to treat the said rental income as a business income of the assessee.

24. We have noted that the DRP on the application of assessee for seeking rectification for its direction dated 07/09/2012, vide order dated 21st December 2012 has already directed the assessing officer/TPO to allow expenditure incurred in earning such income. Therefore, in our considered view no further direction is required. However the AO/TPO is directed to give effect to the order of DRP dated 21 December 2012. In the result the ground No. 5 of the appeal is partly allowed.

25. In the result the appeal of the assessee is partly allowed.

ITA 1808/Mum/2014 by assessee for AY 2009-10

26. The assessee has raised following grounds of appeal;

(1) Adjustment of Rs. 3,08,50,500/- as regards provision of guarantee.

(2) Adjustment of Rs. 2,47,46,270/- as regards provision of loans.

(3) Short Credit of TDS has been allowed to the extent of Rs. 2,07,96,985/-

27. We have noted that the Ground No. 1 is identical to the Ground No. 3 in appeal for AY 2008-09, which we have partly allowed, therefore, the AO/TPO is directed to recompute the adjustment by following the aforesaid directions. In the result this ground of appeal is partly allowed.

28. Ground No. 2 is identical to the ground No.4 in appeal for AY 2008-09, which we have allowed for statistical purpose, therefore, the AO/TPO is directed to recompute the adjustment by following our aforesaid direction. In the result this ground of appeal is also allowed for statistical purpose.
29. Ground No. 3 relates to short credit of TDS. The ld AR for the assessee submits that the AO allowed credit of TDS of Rs. 7,40,94,166/-, instead of Rs. 9,48,91,151/-. No opportunity was given to the assessee while granting credit of TDS. The ld. AR for the assessee prayed to allow the credit of the entire TDS.
30. On the other hand the ld. DR for the revenue fairly submits that the AO may be directed to verify the details of TDS and to allowed credit to the assessee.
31. We have considered the submissions of the parties and find that in tax computation form the AO has given credit of TDS of Rs. 7,40,94,166/-. However, before us the ld AR for the assessee vehemently submitted that the assessee is entitled for the credit of TDS of Rs 9,48,91,151/- and that before granting credit of TDS no opportunity was given to the assessee. Thus, considering the facts and circumstances of the case we direct the AO to verify the facts and grant credit of TDS to the assessee in

accordance with law. The assessee is also directed to provide necessary detail and evidence to the AO. Needless to order that before passing the order the AO shall grant opportunity of hearing to the assessee.

32. In the result the appeal for AY 2009-10 is partly allowed.

Order pronounced in the open court on 16/06/2020.

Sd/-
R.C. SHARMA
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 16.06.2020

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

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai