

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“J” BENCH, MUMBAI**

**BEFORE SHRI C. N. PRASAD, JM&  
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 158/Mum/2018  
(निर्धारणवर्ष / Assessment Year: 2013-14)

M/s M. Model Global Services Pvt. Ltd. (Known as Aquity Solutions India Pvt. Ltd.), 1 <sup>st</sup> floor, Unit no. 103, Reliable Plaza, Plot No. K-10, Kalwa Industrial Area, Village-Elthen, Taluka & Dist-Thane, Airoli, Navi Mumbai-400 708	<b>बनाम/ Vs.</b>	ACIT 15(2)(2), Room No. 357, 3 <sup>rd</sup> floor, AayakarBhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AAACC9165F		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Ms. Karishma Phatarpekar, AR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Uodal Raj Singh, DR
सुनवाईकीतारीख/ Date of Hearing	:	22.06.2020
घोषणाकीतारीख / Date of Pronouncement	:	15.09.2020

आदेश / ORDER

**Per S. Rifaur Rahman, Accountant Member:**

The present appeal filed by the assessee is against the final order of assessment passed u/s 143(3) r.w.s. 144C(1) of I.T. Act,

1961 in pursuance of the directions issued by the Dispute Resolution Panel (in short 'DRP') u/s 144C(5) of the Act vide order dated 29.06.2017 for AY 2013-14.

2. The brief facts of the case are, assessee filed its return of income on 29.11.2013 declaring total income of Rs. 35,27,99,210/-. The case was selected for scrutiny under CASS and accordingly, notice u/s 143(2) and 142(1) of the Act were issued and served on the assessee. In response, assessee filed the relevant information as called for. On verification, it is noted that company had International transactions with its associated concerns and accordingly, matter was referred to transfer pricing officer (TPO) - 3(2), Mumbai u/s 92 CA(3) of the Act.

3. The TPO observed that M/s M. Model Global Services Pvt. Ltd. provides IT services such as maintenance of software, management of servers, provision of technical support, documentation of software code and ITES service and Back Office services such as quality assurance, vendor management and investor relationship, etc.

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4. M/s M. Modal Systems and Services Inc. (referred M. Modal US) is a group company of the assessee. M. Modal India and M Modal US are owned by a common set of shareholders. M. Modal US is engaged in servicing the contracts entered into with the existing customers, providing front-end and maintaining customer relationship. M. Modal India and M. Modal US are associated enterprises under the Indian Transfer Pricing Regulations and assessee has entered into the following international transactions with its AE during the year:-

Sr. No.	Transaction	Amount (Rs.)	Method adopted
1	Provision of IT and Quality Assurance-' Support Services	44,45,79,632	TNMM
2	Provision of Medical Transcription Services	251,75,40,207	CUP
3	Reimbursement of expenses (Receipts)	6,09,14,308	CUP

5. The assessee has made a detailed bench marking analysis in transfer pricing and selected 17 companies as comparable company whose average single year margin is 5.79%. Out of the 17 comparables, TPO rejected 15 comparables and retained 2

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companies as comparable companies. Further, TPO proposed and included two additional companies and arrived at average margin of 28.14, which is given below:-

<b>Name of Company</b>	<b>TPO's Set</b>
Jindal Intellicom Ltd	1.83
R. S. Software (India) Ltd	17.48
E4e Healthcare Business Services Pvt. Ltd.	17.35
Excel Infoways Ltd	75.90
Average Margin	28.14

And TPO determined the Arms length price for the international transaction and proposed transfer price adjustment of Rs. 4,59,35,558/- to the arm's length price declared by the assessee.

6. Further, AO observed that in the 3CD report, the auditor declared in column 168 that employee contribution of PF and ESI were not deposited by the assessee before the due date specified in the relevant Act/rule/order or notification issued therein. The show cause notice issued to the assessee to submit the reason why the disallowance u/s 36(1)(5)(a) r.w.s. 2(24) of

the Act should not be made. Assessee filed relevant information and submission before AO. AO rejected the submissions of the assessee and made addition of Rs. 73,45,335/- u/s 36(1)(5)(a) r.w.s. 2(24) of the Act. Accordingly, AO passed draft order u/s 143(3) r.w.s. 144C(1) of the Act.

7. Aggrieved with the above order, assessee preferred to file the objections before DRP and made the detailed submission against the transfer pricing adjustments made by the TPO. After considering submission of the assessee, the DRP rectified the margin in Jindal Intellicom (margin of 3.00 in place of 1.83 considered by TPO). Further, DRP relaxed the turnover filter to 25 times and included 2 more companies as comparables. The final set of companies after giving effect to the directions of the DRP are as under:-

Name of company	Post DRP
Jindal Intellicom Ltd	3.00
R. S. Software (India) Ltd	17.48
Ace BPO services Pvt. Lt.d	2.16
Spry Resources India Pvt. Ltd.	9.81

Excel Infoways Ltd.	75.70
E4 Healthcare Ltd	17.35
<b>Average margin</b>	<b>19.92</b>

8. The AO after considering the directions from DRP made an addition of Rs. 1,44,69,701/- on account of TP adjustment and retained the disallowance u/s 36(1)(5)(a) on delayed deposit of PF and ESI.

9. Further, assessee made objections before DRP that AO did not allow any set off of brought forward losses and depreciation which he ought to have allowed. Since the DRP while passing the draft assessment order, observed that the draft assessment order has noted that total loss available for any set off in the current year on the basis of assessment orders passed in earlier years is NIL. The set off of brought forward losses has to be given on the basis of assessment orders passed i.e. the assessed income and therefore, no interference is called for.

10. Against the above order of DRP, assessee is in appeal before us raising the following grounds of appeal:-

*1. On the facts and in the circumstances, and in law the learned AO and the learned Transfer Pricing Officer ('TPO') under the directions of the Hon'ble Dispute Resolution Panel ('DRP') have erred in making a Transfer Pricing adjustment of Rs. 1,44,69,701/- under chapter X of the Act in the hands of the Appellant.*

*2. On the facts and in the circumstances, and in law the learned AO and the learned TPO under the directions of the Hon'ble DRP have erred in rejecting the transfer pricing documentation of the Appellant on the ground that contemporaneous data, i.e. comparable data for AY 2013-14, was not available.*

*3. On the facts and in the circumstances, and in law the learned AO and the learned TPO under the directions of the Hon'ble DRP have erred in selecting comparable companies, which are in-fact not comparable to the Appellant.*

*4. On the facts and in the circumstances, and in law the learned AO and the learned TPO under the directions of the Hon'ble DRP have erred in rejecting comparable companies, which are in-fact comparable to the Appellant.*

*5. On the facts and in the circumstances, and in law the learned AO and the learned TPO under the directions of the Hon'ble DRP have erred in determining the arm's*

*length price in violation of section 92C(1) and 92C(2) by resorting to cherry picking of two comparable companies.*

*6. On the facts and in the circumstances, and in law the learned AO and the learned TPO under the directions of the Hon'ble DRP have erred in incorrectly computing the margin of Excel Infoways Ltd.*

*7. On the facts and in the circumstances, and in law the learned AO and the learned TPO under the directions of the Hon'ble DRP have erred in disregarding multiple year data analysis undertaken by the Appellant in accordance with Rule 10B(4) for computing the margins of comparable companies.*

*8. On the facts and in the circumstances, and in law the learned AO and the learned TPO under the directions of the Hon'ble DRP have erred in not granting appropriate adjustments as mandated by Rule 10B(1)(e)(iii) to the margins of the companies finally selected as comparable to the Appellant.*

*9. On the facts and in the circumstances and in law the learned AO under the directions of the Hon'ble DRP have erred in disallowing the employee's contribution to provident fund (PF) and employee's state insurance scheme (ESIC) in disregard of the fact that the same was*

*deposited with the relevant authorities before the due of filing the return of income.*

*10. On the facts and in the circumstances, and in law the learned AO under the directions of the Hon'ble DRP have erred in not allowing deduction under section 10AA in respect of the disallowance of the employee's contribution to provident fund (PF) and employee's state insurance scheme (ESIC).*

*11. On the facts and in the circumstances, and in law the learned AO under the directions of the Hon'ble DRP have erred in not granting set-off of brought forward losses of previous years against the returned income of the current year.*

*12. On the facts and in the circumstances, and in law the learned AO has erred in levying interest under section 234B and 234C of the Act and initiating penalty proceedings under section 271(1)(c) of the Act.*

*The Appellant prays that the transfer pricing adjustment be deleted and relief may be granted accordingly.*

*The Appellant craves leave to add, alter, amend or withdraw all or any of the grounds of appeal herein above and to submit such statements, documents and papers as*

*may be considered necessary either at or before the hearing of this appeal as per law.*

11. At the time of hearing, Ld AR submitted that assessee presses only ground no 6 relating inclusion of Excel Infoways Ltd as the comparable company and ground nos 9, 10 and 11. Therefore, we **dismiss** all other grounds as not pressed.

12. with regard to ground No. 3, Ld. AR brought to our notice the observation of TPO and direction of DRP on inclusion of Excel Infoways Ltd as comparable to the assessee company. She further submitted the reasons for objection in treating the above company as comparable to assessee company in the form of chart, which is reproduced below:

- *Foreign exchange earning of Excel Infoways Ltd. Is 21.77%, which is less than 75% of the total sales, hence fails the filter adopted by the TPO.*
- *Employee cost ratio of Excel Infoways Ltd. After excluding purchases from total cost is 6.67% whereas that of the Assessee is 75.81%. Even after including purchases in total cost the ratio is 37.11% whereas that of the Assessee is 75.81%. Thus clearly indicating*

*difference in functional profile, may be due to outsourcing.*

- *Fixed Asset turnover ratio of Excel Infoways Ltd. is 104.65% which is substantially higher than the Assessee 11.80%. Thus demonstrating difference in asset profile.*
- *Excel Infoways Ltd. Undertakes various business risks such as macroeconomic risk, global demand risk, market risk etc. whereas the assessee is free from all entrepreneurial risk. Thus demonstrating difference in risk profile.*
- *In AY 2013-14, Excel Infoways Lt. has earned an abnormally high margin of 75.90%. Even the year –on-year trend of operating margin of this company reveals abnormal fluctuations.*

13. Further she submitted, the DRP held that it is in agreement with the TPO's order in as much as Excel Infoways Ltd was selected as a comparable company. Further, the DRP relied on its own directions for AY 2012-13 wherein it had held as under:

- *Excel was engaged in the business of BPO and /or an ITeS provider and development of infrastructure facility. As per Annual Report, separate segmental*

*information of BPO/ITeS has been provided. Hence, functionally comparable with the Assessee.*

- *Bulk of the total salary cost, will be attributable to ITeS/BPO segment, as it is universally acknowledged that ITeS/BPO is more work force intensive as compared to infra activity. Therefore, allocation of manpower expenses on the basis of turnover of ITeS/BPO segment & infra segment is not correct. Also, in the absence of relevant data related to employee cost of ITeS/BPO segment, the claim of the assessee that comparable frails employee cost is unsubstantiated & accordingly rejected.*
- *Once the company is functionally comparable, it cannot be rejected on the ground of difference in fixed assets to operating income, low employee cost etc. unless assessee demonstrates how these factors has impacted profitability and also quantifies the difference the profitability.*

14. Further, Ld. AR submitted that Excel Infoways Ltd. cannot be taken as a comparable company for the following reasons:

***Covered by Hon'ble ITAT order for AY 2012-13***

- *The Hon'ble ITAT in the Assessee Company's own case for AY 2012-13 has rejected Excel Infoways Ltd. The said decision is squarely applicable to this case, as the DRP too has merely relied on its order for AY 2012-13.*

***Fails TPO's own filter of 75% export earnings:***

- *Foreign exchange earnings of Excel Infoways Ltd. is 21.77% which is less than 75% of the total sales, hence fails the filter adopted by the TPO. (Refer Handy Document-3)*

***Widely fluctuating margins:***

- *Excel Infoways cannot be considered as a comparable company due to widely fluctuating margins and diminishing revenue trend. The operating margin of the company has shown drastic fluctuations ranging from 247.74% in F.Y 2008-09 to 2% in FY 2014-15. In addition to that the revenue of the Excel Infoways is also diminishing.*

<b><i>Financial Year</i></b>	<b><i>OP/TC (%)</i></b>	<b><i>Revenue* ('000)</i></b>	<b><i>Paper Book ref.</i></b>
<b><i>2009-10</i></b>	<b><i>228%</i></b>	<b><i>2,04,161.34</i></b>	<b><i>PB Pg. 165</i></b>
<b><i>2010-11</i></b>	<b><i>253%</i></b>	<b><i>2,03,526.40</i></b>	<b><i>PB Pg. 166</i></b>
<b><i>2011-12</i></b>	<b><i>51.42%</i></b>	<b><i>79,096.95</i></b>	<b><i>PB Pg. 167</i></b>
<b><i>2012-13</i></b>	<b><i>71.17%</i></b>	<b><i>76,098.54</i></b>	<b><i>PB Pg. 168</i></b>
<b><i>2013-14</i></b>	<b><i>29.99%</i></b>	<b><i>52,972.12</i></b>	<b><i>PB Pg. 169</i></b>
<b><i>2014-15</i></b>	<b><i>2.02%</i></b>	<b><i>22,494.38</i></b>	<b><i>PB Pg. 170</i></b>

\*BPO Segment

***Closure of BPO segment to focus on Infra***

- *Excel Infoways had considered it reasonable to close down its BPO segment in the FY 2011-12 on account of global recession and had planned to diversify its business into new areas like construction, development of property, real estate etc. The above diminishing revenue trend also confirms this point.*
- *During the year, the income from IT segment declined & on contrary income from infra activity showed exponential growth of 200% (PB pg. 181)*
- *Excel Infoways changed its name in the FY 2014-15 from Excel Infoways Ltd. To Excel Reality N Infra Ltd. indicating its intention of diversifying its activities into real estate infrastructural development business & getting out from segment. (Refer pg. 8 Annual report for FY 2014-15 Handy Document-2)*
- *It may be noted that Excel Infoways in FY 2014-15 altered its main object clause & shifted Infr & Real Estate activities from other objects to main object. (Refer pg. 1 of .. report for FY 2014-15)*

***Difference in activities:***

- *Excel Infoways provides IT/BPO services wherein it receives fees from clients for handling the client's customer, managing their workflow process in accordance to their requirement as per agreement and up-to their satisfaction and Infra activities. Such services cannot be*

*compared with Appellant's low-end IT/BPO services.  
(BPPg. 81)*

***Low employee cost percentage:***

- *IT/BPO services are employee oriented activities and therefore involves high employee cost. Employee cost ratio of excel Infoways Ltd. After excluding purchases from total cost is 6.67% whereas that of the Assessee is 75.81%. Even after including purchases in total cost, the ratio is 37.11% whereas that of the Assessee is 75.81%. Thus clearly indicating difference in functional profile, may be due to outsourcing.*
- *Excel Infoways has two business segments i.e. IT/BPO segment and infra segment. Infra Segment accounts for 75% of Excel's total revenue. Segmental details are provided in the Annual report but no bifurcation or break up of employee cost has been provided. In the absence of such details, the contention of the DRP in the previous year that bulk of the employee 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 incurred very less employee cost. Thus, a company having such low employee cost to total operating cost ratio (6.67%) cannot be said to be*

*comparable, in the absence of employee cost break up for IT/BPO segment.*

***Difference in asset profile:***

- *Fixed asset turnover ratio of excel Infoways Ltd. is 104.65% which is substantially higher than the Assessee 11.80%. thus demonstrating difference in asset profile. (Refer Handy document -4)*

***Difference in risk profile***

*Excel Infoways Ltd. undertakes various business risks such as macro-economic risk, global demand risk, market risk, etc. whereas the assessee is free from all entrepreneurial risks. Thus demonstrating difference in risk profile.*

15. With regard to ground no. 9 & 10 in respect of disallowance u/s 36(1)(va) of the Act, Ld. AR submitted that Employee's contribution to provident fund & ESIC deposited before the relevant authorities prior to the due date of filing the return of income u/s 139 of the Act. Ld. Therefore, such amount cannot be disallowed. Ld. AR further submitted that without prejudice to above, if the above expenses are disallowed then it shall be eligible to claim deduction u/s 10AA of the Act in respect of the expenses which related to SEZ units.

16. She brought to our notice the contention of the AO, assessee did not credit the sum to the employees account in the relevant fund on or before the due date mentioned in explanation in section 36(1)(va) . therefore, no deduction shall be allowed in computing the income referred to the section 28 of the Act.

17. Further, she brought to our notice to the submission before DRP, which is mentioned below:-

- *Section 36(1)(va) was introduced to merely curb the defaulting employees from misutilising the employee's PF fund without depositing the same to the credit of employees fund & at the same time claiming as tax deductible expenditure.*
- *Assessee further submitted that employees & employers contribution to EPF are covered by amendment to section 43B. therefore, employee's contribution to PF & ESIC deposited before the due date specified in the relevant state need to be allowed as business expenditure.*
- *In response to Ld. AO's reliance on the decision of Gujarat HC in case of Gujarat State Road Transportation Corporation & CBDT circular no. 22 of 2015, Assessee submitted that when there are two contrary decisions, the*

*decision of jurisdiction HC is binding & if there is any conflict between jurisdictional HC is binding on Revenue.*

- *Without prejudice to above, if the above expenses are disallowed then it shall be eligible to claim deduction us/10AA of the Act in respect of the expenses disallowed in so much as it related to the SEZ units.*

18. With regard to ground no. 11 in respect of granting setoff of brought forward losses against the income of current year, Ld. AR submitted that the Assessee claimed set off of brought forward losses amounting Rs. 16,51,19,294/-. Ld. AR further submitted that AO disallowed brought forward losses on the ground that on perusal of assessment order passed for the earlier years, total loss available for set off in the current year is NIL.

19. She brought to our notice the submission of assessee before Ld. DRP that the assessee is eligible to claim the setoff of the brought forward losses & unabsorbed depreciation amounting to Rs. 16,51,19,294/- as the Assessee has disputed the adjustment made by DRP/AO in AY 2009-10 & 2012-13. She further submitted, DRP did not considered the objections filed by assessee and merely relied on the draft order.

Further, she brought to our notice the chart as under:-

<i>Assessment Year</i>	<i>Business Losses</i>	<i>Unabsorbed Depreciation</i>	<i>Total</i>
<i>2008-09</i>	-	<i>3,63,968</i>	<i>3,63,968</i>
<i>2009-10</i>	-	<i>1,07,29,670</i>	<i>1,07,29,670</i>
<i>2010-11</i>	-	<i>4,33,84,991</i>	<i>4,33,84,991</i>
<i>2011-12</i>	<i>4,95,38,284</i>	<i>6,11,02,381</i>	<i>11,50,84,385</i>
<i>TOTAL</i>	<i>4,95,38,284</i>	<i>11,55,81,010</i>	<i>16,95,63,014</i>

20. She submitted that as per the below chart, in the respective year, the following amounts of business losses/ unabsorbed depreciation were carried forward and available for set-off.

21. Further she submitted that assessee has filed an application under section 154, providing all the relevant details in connection with above set-off of brought forward losses (**refer Pages 309-312 of paper book**). However, the AO is yet to dispose of the same. Further she relies on the decision of the coordinate bench decision in the Assessee's own case for AY 2012-13 whereby the bench has directed AO to decide the application of Assessee filed u/s 154 in seeking the setoff of brought forward business loss & unabsorbed depreciation in accordance with law.

22. On the other hand, Ld DR submitted that the Excel Infoways Ltd functions are similar to assessee company and

relied on the findings of TPO/DRP. With regard to employee contribution deposits, he relied on the findings of AO and with regard to issue of set off of unabsorbed business losses and unabsorbed depreciation, he submitted that the direction may be given to AO to consider the application filed by assessee u/s 154 and may direct similar directions as per earlier assessment year.

23. Considered the submissions of both counsels and material on record. We notice from the record that the coordinate bench has considered the issue of inclusion of Excel Infoways Ltd and held that it is not comparable company. The relevant extract of the decision is reproduced below:

*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 ld. 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 ld. AR also demonstrated that the fluctuating margin of this comparable in different Financial Year in the following manner:*

<b>Financial Year</b>	<b>OP/TC (%)</b>	<b>Revenue (Rs.)</b>
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

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2012-13	75.70%	76,098.54
2013-14	30%	52,972.12
2014-15	2%	22,994.38

17. The ld. 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

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*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:*

<b>Financial Year</b>	<b>OP/TC margin</b>
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*

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*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*

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*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:-*

.....  
 .....

*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*

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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

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*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 ld. Counsel for the assessee that the above company*

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*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*

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*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.*

24. Respectfully following the above decision, we are inclined to delete this company as comparable to the assessee company. Accordingly, ground raised by assessee is **allowed**.

25. With regard to ground nos 9 & 10, regarding disallowance of employee contribution of PF and ESI, we notice that the Hon'ble Bombay HC held in favour of assessee in the following cases:

i) **CIT vrs Hindustan Organics Chemical Ltd. (2014) 48 taxmann.com 274 (Bom HC)**

ii) **CIT vrs. Ghatge Patil Transports Ltd. (2015) taxmann.com 141 (Bom).**

26. Considering the above decision, which is from the Hon'ble jurisdictional high court and the revenue relies on Hon'ble Gujarat High court decision. Following the Vegetable product decision of Apex court, we are inclined to follow the jurisdictional High Court decision. Accordingly, the grounds raised by the assessee are **allowed**.

27. With regard to ground no 11, we notice that the assessee has filed application u/s 154 before AO that it has substantial carry forward losses and unabsorbed depreciation, which the AO has not disposed off yet. Following the decision of the coordinate

bench in the AY 2012-13, the bench gave the direction to AO to dispose off the application as per law. Similarly, we are directing the AO to consider the submissions of the assessee and remitting this issue to his file to pass the rectification application as per law. Accordingly ground raised by the assessee is **allowed for statistical purpose.**

28. In the result, appeal filed by the assessee is **partly allowed.**

*Order pronounced in the open court on 15.09.2020.*

<p><i>Sd/-</i> (C. N. Prasad) न्यायिकसदस्य / Judicial Member मुंबई Mumbai; दिनांक Dated : <i>Sr.PS. Dhananjay</i></p>	<p><i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 15.09.2020</p>
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**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File  
**आदेशानुसार/ BY ORDER,**

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**