

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-2': NEW DELHI
(Through Video Conferencing)
BEFORE
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
ITA No.3779/Del/2017
(ASSESSMENT YEAR-2011-12)**

Asst. CIT, Circle-24(1), New, Delhi.	Vs.	M/s Smart Analyst India Pvt. Ltd. 14 th Floor, Tower-D, DLF Phase-III, Gurgaon, Haryana-122002 PAN: AAICS 6117P
(Appellant)		(Respondent)

**ITA No.3989/Del/2017
(ASSESSMENT YEAR-2011-12)**

M/s Smart Analyst India Private Limited. 90/31B 1 st Floor, Malviya Nagar, New Delhi-110017 PAN: AAICS 6117P	Vs.	Dy. CIT Circle-24(1) New Delhi.
(Appellant)		(Respondent)

**C.O. No.181/Del/2017
Arising out of ITA No.3779/Del/2017
(ASSESSMENT YEAR-2011-12)**

Asst. CIT, Circle-24(1), New Delhi.	Vs.	M/s Smart Analyst India Private Limited. 90/31B 1 st Floor, Malviya Nagar, New Delhi-110017 PAN: AAICS 6117P
(Appellant)		(Respondent)

ITA No.2745/Del/2018
(ASSESSMENT YEAR-2012-13)

M/s Smart Analyst India Private Limited 90/31B 1 st Floor, Malviya Nagar, New Delhi-110017 PAN: AAICS 6117P	Vs.	Asst. CIT Circle-24(1) New Delhi.
(Appellant)		(Respondent)

Appellant By	Sh. Rahul Yadav, Adv. Sh. Suyash Sinha, Adv.
Respondent by	Ms. Maimun Alan, Sr.DR
Date of Hearing	16.10.2020
Date of Pronouncement	27.10.2020

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER:

ITA No. 3779/Del/2017 is Department's appeal preferred against the order passed by the Ld. Commissioner of Income Tax (Appeals)-44, New Delhi {(CIT (A)} vide order dated 22.12.2016 whereas ITA No.3989/Del/2017 is the assessee's Cross Appeal against the said order and Cross Objection No.181/Del/2017 is preferred by the assessee in support of the order of Ld. CIT (A). These two appeals and the Cross Objection pertains to Assessment Year: 2011-12 and ITA No.2745/Del/2018 is preferred by the

assessee against order dated 31.01.2018 passed by the Ld. CIT (A)-44, New Delhi for Assessment Year: 2012-13. The three appeals and the Cross Objection were heard together and they are being disposed through this common order for the sake of convenience.

2.0 The brief facts of the case are that the assessee is an Indian Company and during the two years under consideration it was a wholly owned subsidiary of Smart Analyst Inc., USA ("SA Inc."). As per the records, the assessee is back end captive-service provider to Smart Analyst Inc. and renders back office research support services for the client engagements owned by Smart Analyst Inc. The services provided are in the nature of ITES/BPO services and include services such as organizing the data into a convenient and navigational format, distilling and synthesis of information into user friendly formats, developing briefs from online databases and public domain internet, and related support services to Smart Analyst Inc. The services also include addressing queries raised by Smart Analyst Inc., analyzing data and statistics, review of key players, comparison of business and product strategies, preparing briefing reports for business decision support

and periodic updates to Smart Analyst Inc. The provision of services by the assessee is pursuant to a service agreement dated 31.05.2010 effective from 01.04.2009 for both the Assessment Years under consideration. In view of its services the assessee is remunerated at cost plus mark-up of 15%. The services provided by the assessee as per the functional analysis are as under:

- Organizing the data into a convenient and navigational format;
- Distilling and synthesis of information into user friendly formats;
- Developing briefs from online databases and public domain internet;
- Developing charts/tables and other graphics from the data after analysis;
- Assisting in developing focused intelligence briefing;
- Assisting in developing variety of reports, models and databases;

2.1 For Assessment Year: 2011-12, the assessee filed its return of income declaring an income of Rs.11,43,608/- under the normal provisions of the Income Tax Act, 1961 (hereinafter called as 'the Act') and of Rs.1,58,38,247/- under the provisions of section 115JB of the Act. The return of income was revised the declaring

the same figures of income. The case was selected for scrutiny under CASS. Since the assessee had entered into international transactions during the year under consideration, a reference u/s 92CA (1) of the Act was made by the Assessing Officer (AO) to the Transfer Pricing Officer (“TPO”) for determination of Arm’s Length Price (‘ALP’) in respect of the following international transactions:

International transaction	Value (Rs. in Crores)	Method	Arms Length results (as per transfer pricing documents)
Provision of Back Office Research Support Services	13.4	Transactional Net Margin Method (“TNMM”)	-Net Profit Margin based on costs (“NCP”), being OP/OC for 6 comparables:6.65% -PLI of Assessee 14.81%
Recovery of cost incurred towards maintaining extra floor area	0.55	cost-to cost	N.A.
Reimbursement of expenses (Received/Receivable)	0.05	cost-to-cost	N.A.

2.2 The assessee selected six comparables to benchmark its transaction with respect to ITeS/BPO services with Arithmetic Mean average of 6.65% whereas the margin earned by the assessee was shown at 14.81%. Since the margin earned by the assessee

company was higher than the average margin of the six comparables, the assessee declared that the transaction of provision of ITeS/BPO services to Smart Analyst Inc. was at arms' length. The following chart depicts comparables selected by the assessee, their margins and the margin earned by the assessee:

S. No.	Name of the Company	Unadjusted 3 years Average (OP/OC)
1.	Datamatics Financial Services Ltd.	-2.61%
2.	Caliber Point Business Solution Ltd.	21.65%
3.	Cosmic Global Ltd.	24.79
4.	Informed Technologies India Limited	19.87%
5.	E4E Healthcare Business Services Pvt. Ltd.	9.14%
6.	R Systems International Limited	-6.61%
Average [Arithmetic Mean]		6.65%
OP/OC Margin Earned by assessee		14.81%

2.3 As per the transfer pricing study (TP Study) of the assessee, the assessee was performing low end back office research support services for Smart Analyst Inc. and it bore very limited risk in connection with the same. However, the TPO was of the opinion that the assessee was engaged in providing services that were not merely routine services but also provided a whole

range of IT Enabled Services to carry out the main work of its Associated Enterprises (AE). The TPO proceeded to reject 5 out of 6 comparables and retained only E4E Health Care Business Services Pvt. Ltd. out of the assessee's six comparables and included 8 additional comparable companies based on a fresh search. Order u/s 92CA(3) of the Act was passed by the TPO proposing Transfer Pricing Adjustment of Rs.2,10,42,834/-. This adjustment was subsequently revised to Rs.1,88,99,953/- by passing a rectification order u/s 154 of the Act on account of certain errors apparent from the record. Thereafter, the Assessing Officer passed the assessment order incorporating this Transfer Pricing Adjustment.

2.4 Aggrieved, the assessee approached the Ld. First Appellate Authority who was pleased to confirm the Transfer Pricing Adjustment in principle but granted partial relief in terms of the following directions:

- To exclude comparable companies, viz. E-clerx Services Ltd., ICRA Techno Analytics Ltd. and Infosys BPO Ltd. from the final set of comparables.

- To include only the Healthcare Segment of Acropetal Technology Ltd. (and not Engineering Design Services Segment) in the final set of comparables.

2.5 The TPO passed order dated 23.06.2017 giving effect to the First Appellate Authority's order and computing the PLI (OP/OC) margin of the remaining comparables as under:

S. No.	Name of the Company	PLI% (after working capital adjustment)
1.	Accentia Technology Ltd.	27.93
2.	Acropetal Technology Ltd. (Segmental)	13.56
3.	E4E Healthcare Business Services Pvt. Ltd.	11.30
4.	Jindal Intellicom Ltd.	16.61
5.	Mastiff Tech Pvt. Ltd.	20.25
6.	TCS Systems International Limited	71.44
7.	R Systems International Limited	-3.80
Arithmetic Mean		22.47

2.5.1 Thus the Transfer Pricing Adjustment was revised to Rs.1,06,06,685/-.

2.6 Now the Department is in appeal before the ITAT in ITA No.3779/Del/2017 by raising the following grounds of appeal:

1. *"Whether Ld. CIT (A) was justified to direct the TPO for inclusion of Acropetal Technology Ltd. as comparable with Health Care Segment only disregarding his own decision in the case. M/s Synopsis India Ltd. (ITA No.41/2016-17(CIT(A)-44) for the same Assessment Year i.e. AY 2011-12."*
2. *"Whether on the facts and circumstances of the case, the Ld. CIT (A) was justified to direct the TPO for exclusion of M/s Eclerx Services Ltd. as comparable when the assessee and M/s Eclerx Services Ltd. both are in same ITES segment?"*
3. *"Whether on the facts and circumstances of the case, the Ld. CIT (A) was justified to direct the TPO for exclusion of M/s ICRA Techno Analytics Ltd. as comparable when the assessee and M/s ICRA Techno Analytics Ltd. both are in same ITES segment?"*
4. *"Whether Ld. CIT(A) was justified on the facts and in law by excluding Infosys Ltd. from the final list of comparables by wrongly relying on other cases, when the facts and circumstances are totally different?"*
5. *"The appellant craves leave to add, alter or amend any of the ground(s) of appeal before or during the course of hearing of the appeal."*

2.7 The assessee has also filed Cross Objections bearing C.O. No.181/Del/2017 and the grounds raised in the memorandum of cross objections are as under:

"Based on the facts and circumstances of the case, the respondent company respectfully craves to prefer a memorandum of cross-objections before your lordships

against the appeal by the appellant on the following grounds.

Correct inclusion of certain companies as comparable

1. That on facts and circumstances of the case, the learned CIT (Appeals) was justified by correctly including 'Aeropetal Technology Limited' as comparable, in the final set of comparables.

Correct exclusion of certain companies as comparable

2. That on facts and circumstances of the case, the learned CIT (Appeals) was justified by correctly excluding 'eClerx Services Limited' as comparable, in the final set of comparables.
3. That on facts and circumstances of the case, the learned CIT (Appeals) was justified by correctly excluding 'ICRA Techno Analytics Limited' as comparable, in the final set of comparables.
4. That on facts and circumstances of the case, the learned CIT (Appeals) was justified by correctly excluding 'Infosys Limited' as comparable, in the final set of comparables.

General

5. The above grounds of cross-objections are without prejudice to each other and the respondent (cross-objector) craves leave to add, alter, vary, omit, substitute or amend the above grounds of cross-objections, at any time before or at the time of hearing of the appeal.”

2.8 The assessee's Cross Appeal for Assessment Year 2011-2012 is captioned ITA No.3989/Del/2017 and the grounds raised by the assessee are as under:

“Based on the facts and circumstances of the case, the appellant company respectfully craves to prefer an appeal before your lordships against the appellate order issued by the Commissioner of Income Tax (Appeals) - 44, New Delhi (hereinafter referred to as the 'CIT - Appeals') under section 250 of the Income-tax Act, 1961 ('the Act') on the following grounds:

No intention of reducing tax incidence in India

- 1. The learned CIT (Appeals) has erred both on facts and in law in upholding the adjustment to the value of the international transaction made by AO/TPO without establishing that there was any intention of reducing tax incidence in India.*

Erroneous application of 'turnover filter'

- 2. The learned CIT (Appeals) has erred both on facts and in law in not applying the Turnover Filter correctly and thereby the companies with huge turnover have been incorrectly accepted in the final set of comparables.*

Wrongly considering 'exchange fluctuation' as operational

- 3. The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of the AO/TPO by considering the 'exchange fluctuation loss/gain' as operational item.*

Erroneous exclusion of certain companies as comparable

- 4. The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by including 'Accentia Technologies Limited', in the final set of comparables.*
- 5. The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by including 'Mastiff Tech Private Limited', in the final set of comparables.*

6. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by including 'TCS e-Serve Limited', in the final set of comparables.*

Erroneous exclusion of certain companies as comparable

7. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by not including 'Caliber Point Business Solution Limited', in the final set of comparables.*

8. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by not including 'Cosmic Global Limited', in the final set of comparables.*

9. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by not including 'Informed Technologies India Limited', in the final set of comparables.*

Not Granting of Risk Adjustment

10. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by not allowing the risk adjustment.*

General

11. *The above grounds of appeal are without prejudice to each other and the appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal.”*

3.0 The Ld. Authorized Representative (AR) submitted that ground No. 3 of the assessee's appeal challenged the action of the Ld. CIT (A) in considering the 'foreign exchange fluctuation

gain/loss as 'non-operating'. It was submitted that foreign exchange gains or loss arising directly from the normal course of business transaction of import/export should be taken as operating income/expenditure but the TPO had erroneously considered the same as non-operating item resulting in changing the PLI of the assessee from 14.81% to 9.59%. It was also submitted that the TPO had also placed reliance on the safe harbor rules while holding that the foreign exchange gain/loss was non-operating. It was also submitted that the Ld. CIT (A) had held that the determination of operating revenue/expenses should be as prescribed in Rule 10TA of the Income-Tax Rules, 1962 ignoring the fact that Rule 10TA was effective from 18.09.2013 and was not applicable for Asst. Year 2011-12. It was also submitted that this issue was squarely covered in favour of the assessee by the order of the ITAT in assessee's own case for Assessment Year 2009-10 in ITA No.410/Del/2014 vide order dated 20.02.2015 wherein it was held that foreign exchange fluctuation gain/loss was operational item.

3.1 With respect ground No.4 of the assessee's appeal challenging the inclusion of Accentia Technology Ltd. ("Accentia"),

the Ld. AR submitted that the TPO considered this company as a comparable erroneously holding that this company was not engaged in development of software products and the only activities during the year were “Medical transcription”, ‘Billing’ and ‘coding’ which were ITES/BPO activities. The Ld. AR submitted that this was an incorrect observation by the TPO. The Ld. AR also submitted that the TPO wrongly recorded in his order that this company was selected by the assessee as a comparable whereas this company had been rejected by the assessee on account of functional dissimilarity. The Ld. AR further submitted that it was evident from the annual report of Accentia Technology Ltd. that this company was functionally dissimilar to the assessee as it rendered KPO services in the healthcare sector by way of offering software as a service (“SaaS”) and is also engaged in development and sale of software products. It was further submitted that on the other hand the assessee is engaged in providing low-end routine ITeS Services whereas the Accentia offered complete healthcare documentation as well as receivables management services including installation and maintenance of all software, hardware and bandwidth

infrastructure, which were in the nature of software support services and not ITeS. It is also engaged in development and sale of software products. It was also submitted that segmental information was not available in respect of 4 streams of revenue of this company viz. Medical Transportation, Billing & Collection, coding and fixed Deposits. It was also highlighted that this company had acquired 16% stake in software development company, Strategic Tangent Corporation but the Ld. CIT (A) had rejected the assessee's arguments and had included this company on the ground that 16% stake acquisition was not an extraordinary event but in subsequent Assessment Year: 2012-13, the Ld. CIT (A) himself had excluded Accentia on the ground that there was an extraordinary event since it had acquired 17.85% in Accentia Physician Services. The Ld. AR also placed his reliance on numerous case laws wherein Accentia had been excluded on ground of functional dissimilarity.

3.2 With respect to Ground No.5 challenging the inclusion of the company Mastif Tech Pvt. Ltd. ("Mastif"), It was submitted that the order of the TPO and the Ld. CIT (A) were non-speaking in as

much as the TPO had not dealt with the objection of the assessee against inclusion of this company. It was submitted by the Ld. Authorized Representative that this company was not functionally comparable with the assessee as this company was an emerging consulting service provider in consumer internet product domain. It was submitted that this company was a complete online media solution provider providing end-to-end services and was engaged in online content sharing, content delivering and social networking domain as compared to the assessee's activity of providing low-end ITeS Services. It was also submitted that during the year under consideration, 100% of the shares of this company were sold to Tricom India Ltd. on 13.08.2010 resulting in change in management of the company. It was also submitted that this company had been excluded by the ITAT Hyderabad Bench for the same Asst. Year on account of huge influence in profit margins due to uncertainty of receivables in the case of *S&P Capital IQ India Pvt. Ltd.* [TS-564-ITAT-2016 (HYD)-TP].

3.3 With respect of ground No.2 & 6, the Ld. AR submitted that these grounds challenged the erroneous application

of 'turnover filter' and inclusion of TCS e-Serve Limited ("TCS") respectively. It was submitted that TCS e-Serve Limited was included erroneously in the final set by the TPO on the reasoning that the service filter turnover does not have a bearing on the margins. The Ld. AR submitted that TCS e-Serve Limited's turnover was more than 107 times of the assessee company. It was submitted that this company was not comparable to the assessee company because this company was functionally different as it was engaged in providing technical services which included software testing, verification and validation, data centre management activities, etc. in addition to ITES. It was also submitted that the Ld. CIT (A) had held that this company was to be included as a comparable on the ground that this company had single segment of high end ITES/BPO Services and was functionally comparable to the assessee which was factually incorrect. The Ld. AR also pointed out that although the Ld. CIT (A) had held that the assessee provided high end services, he had rejected E-clerx which also provided high end services and hence was not comparable to the assessee. The Ld. AR also submitted that the segmental data

between ITES/Software Development Services was not available with respect to the company TCS e-Services Ltd. It was submitted that the presence of brand value of the Tata brand in the case of TCS e-Serve Limited influenced the pricing policy directly impacting the margins earned by TCS which provided support in terms of large scale operations and clientele. It was submitted that this company was taken over by TCS Ltd in this year and, thus, there was an abnormal profitability trend post acquisition. The Ld. AR placed reliance on numerous judicial precedents from the ITAT wherein TCS e-Serve Ltd. had been directed to be excluded from the final set of comparables.

3.4 With respect of ground No.7 challenging the exclusion of Caliber Point Business Solutions Limited (“Caliber”), it was submitted by the Ld. AR that the TPO rejected this company on the ground of different financial year ending although the TPO had disputed the comparable on the basis of functional comparability. It was submitted that the quarterly financial statements for March, 31, 2011 were available on company’s website and, therefore, functionally comparable company should not be rejected merely on

the ground that it had a different financial year ending. Reliance was placed on numerous case laws wherein the Tribunal had directed that such companies need to be included which were functionally similar although having a different financial year ending if the quarterly data was available.

3.5 With respect to Ground No.8 challenging the exclusion of Cosmic Global Limited (“Cosmic”), it was submitted by the Ld. AR that the TPO had excluded this company on the ground that it failed export turnover filter of 75% but the TPO had not raised any objection regarding the functionally similarity. It was also submitted that there was no consistency in the approach of the TPO during different years in the assessee’s own case as in Asst. Year 2009-10 the TPO had applied an export turnover filter of 25% whereas in this year 75% export turnover filter had been applied. It was also submitted that the ITAT, in assessee’s own case for Asst. Year 2009-10, had held that the export turnover filter of 25% was not an appropriate filter. It was also submitted that the assessee has used foreign exchange filter which, which automatically eliminates all companies not having foreign exchange earnings.

3.6 With respect to ground No.9, it was submitted that this ground challenged the exclusion of the company Informed Technologies India Limited (“ITIL”). The Ld. AR submitted that the TPO had excluded this company and the Ld. CIT (A) had affirmed the action of the TPO by erroneously applying a turnover filter of Rs. 5 Crores. It was submitted that that the TPO and the Ld. CIT (A) have not disputed that this company is otherwise comparable to the assessee company because this company is also operating as a back-end ITES provider in the BPO segment. The Ld. AR also submitted that in assessee’s own case for Asst. Year 2009-10, the turnover filter of Rs. 5 Crores had been rejected by the ITAT.

3.7 With respect to ground No.10 challenging the non-providing of Risk Adjustment, the Ld. AR submitted that this ground was not being pressed.

3.8 With respect to ground Nos.1 & 11, the Ld. AR submitted that they were general in nature and did not require any specific argument or adjudication.

4.0 In response to the extensive arguments of the Ld. AR, the Ld. Sr. Departmental Representative (DR) placed extensive reliance on the orders of the Ld. CIT (A) and the TPO. She read out from the relevant paragraphs of the assessment order, the Transfer Pricing Order and the order of the Ld. CIT (A) and submitted that there was no error in orders of the authorities below in respect of inclusion/exclusion of the comparables as well as in application of filters and not in considering the foreign exchange loss/gain as operational.

5.0 With respect to the Department's appeal bearing ITA No.3779/Del/2017, the Ld. DR submitted that the Department's appeal challenged the action of the Ld. CIT (A) in directing the TPO for including the company Acropetal Technologies Ltd. ("Acropetal") as a comparable with only the 'healthcare segment'. It was also submitted that the Department was also challenging the action of the Ld. CIT (A) in directing the TPO for excluding M/s E-Clerx Services Ltd. as a comparable when the assessee as well as M/s E-Clerx Services Ltd were both in the same ITES segment. It was also submitted that the Department was challenging the action of the

Ld. CIT (A) in directing the TPO for exclusion of M/s ICPA as a comparable when the assessee as well this company were both in the same ITES segment. The Ld. Sr. DR also submitted that the Ld. CIT (A) had erred in directing the exclusion of Infosys BPO Ltd. from the final list of comparables by wrongly placing reliance of those cases where the facts and circumstances were totally different. The Ld. SR. DR placed extensive reliance on the order of the TPO/Assessing Officer and submitted that the Ld. CIT (A) had wrongly directed inclusion of M/s ICRA Techno Analytics Ltd. with healthcare segment only and had erroneously directed exclusion of E-clerx Services Ltd. and in support of her contention she quoted from the observations and findings of the TPO and the Assessing Officer and prayed that the errors committed by the Ld. CIT (A) be set right.

6.0 In response to the arguments advanced by the Ld. Sr. DR, the Ld. AR submitted that as far as the inclusion of Acropetal Technology Ltd. concerned, the TPO had considered the company's Engineering Design Services' (EDS) segment as a comparable segment whereas the Ld. CIT (A) had correctly held that

this segment was not functionally comparable with the assessee. It was submitted that engineering design services are high-end KPO Services and involve research and development activities which results in creating intangibles. For this proposition, the Ld. AR placed reliance on numerous judicial precedents from the Coordinate benches of the Tribunal.

6.1 With respect to the Department's ground challenging the exclusion of E-clerx Service Limited, the Ld. AR also submitted that this had been erroneously included as a comparable by the TPO on the ground that once a service falls under the ITES, there cannot be any further differentiation based on KPO vs. BPO. It was submitted that this company has been correctly directed to be excluded as this company was not functionally comparable as it provided services through two business segments, Financial Services and Sales and marketing services. It was submitted that segmental data for financial services segment and marketing segment were not available. It was also submitted that this company was engaged in data analytics and process outsourcing, computer-aided design, etc. and as per its annual report it was

providing high-end KPO services. It was also submitted that there were extraordinary profits earned by this company from acquisitions in F.Y.2007-08, 2008-09, 2009-10 & 2010-11 which was also a reason for exclusion. The Ld. AR also highlighted that this company had been rejected in Asst. Year: 2012-13 by the Ld. CIT (A) and the Department had not preferred any appeal against such exclusion. The Ld. AR placed reliance on numerous judicial precedents in support of his contention that this company had been correctly excluded.

6.2 With respect to ground No.3 in the Department's appeal challenging the exclusion of company M/s ICRA Techno Analytics Ltd. ("ICRA"), the Ld. AR submitted that this company had been erroneously included by the TPO by holding that this company was functionally similar to the assessee ignoring the assessee's contention that this was engaged in software development services. The Ld. AR submitted that this company cannot be taken as a comparable because this was engaged in software development as well as in consultancy, engineering services, web development and hosting services, business analytics and BPO services and further

segmental information in respect of BPO services was not separately available. It was highlighted that this company also deals in purchase and re-sale of branded computer software and therefore, this company had been rightly excluded.

6.3 With respect to Department's Ground No.4 challenging the exclusion Infosys BPO Ltd. ("Infosys"), it was submitted that this had been excluded by the TPO on the ground that high turnover and presence of brand value does not affect the profit margin. It was submitted that this company cannot be taken as a comparable in view of the fact that this company had a turnover which was more than 87 times of the assessee company. It is also submitted that this company was functionally not comparable since it provided service in the niche areas and has presence of brand and high turnover. It was submitted that this company is an established market leader, enjoying huge brand value with huge economies of scale, diversity and geographical distribution of customers. The Ld. AR also highlighted the fact that this company was rejected as a comparable in Asst. Year 2012-13 also by the Ld. CIT (A) and the Department had not filed any appeal

against such rejection. Reliance was placed on numerous judicial precedents in support of the contention that this company deserves to be excluded.

7.0 With respect to Cross Objection No.181/Del/2017, the Ld. AR submitted that the Cross Objection preferred by the assessee broadly supported the order of the Ld. CIT (A) as was evident from the grounds raised in the memorandum of cross objections and, therefore, the arguments advanced by the Ld. AR would cover the grounds of Cross Objections also. It was submitted that no separate arguments were required to be made in this regard.

ITA 2745/Del/2018:

8.0 This appeal has been preferred by the assessee's for Asst Year: 2012-13.

8.1 The brief facts for this year are that the return of income was filed declaring income at Rs.1,20,55,020/-. The case was selected for scrutiny under CASS. Reference was made to the Transfer Pricing Officer as the assessee had

entered into international transactions during the year under consideration. The following transactions, amongst others transactions, were entered into during the year under consideration:

International transaction	Value (Rs.in crores)	Method	Arm's length result (as per transfer pricing documentation)
Provision of Back Office Research Support Service	13.09	Transactional Net Margin Method ("TNMM")	-Net Profit Margin based on costs ("NCP"), being OP/OC for 6 comparables: 11.78% -PLI of assessee:15.40%
Recovery of cost incurred towards maintaining extra floor area	0.39	cost-to-cost	N.A
Reimbursement of expenses (Received/receivable)	0.008	cost-to-cost	N.A

8.2 The final set of comparables of the assessee had six comparables as under:

S. No.	Name of the Company	Unadjusted 3 years average margin (OP/OC)	Current Year (OP/OC) updated margins vide submission dated 21.12.2015 before TPO
1.	Informed Technologies India Limited	14.14%	6.59%
2.	Jeevan Scientific Technology Ltd	14.75%	14.64%
3.	Jindal Intellicom Limited	13.19%	1.72%

4.	Cosmic Global Ltd.	11.52%	10.50%
5.	Caliber Point Business Solution Ltd. (Segmental)	16.10%	-4.29%
6.	R Systems International Limited (Segmental)	-6.61%	41.53%
Average [Arithmetic Mean]		10.51%	11.78%
OP/OC Margin Earned by SAIPL		15.40%	

8.3 The TPO rejected 4 out of 6 comparables and included certain additional comparable companies based on his own quantitative filter arriving at a set of 11 comparables and proposed a Transfer Pricing Adjustment of Rs.1,36,72,619/-. Thereafter, after the passing of the draft assessment order and the final assessment order, the assessee approached the Ld. First Appellate Authority and the Ld. CIT (A) directed the TPO to exclude the companies Accentia Technology Ltd., Acropetal Technologies Ltd, E-clerx Services Ltd., and Infosys BPO Ltd., from the final set of comparables. Accordingly, the TPO passed order dated 03.05.2018 giving effect to the directions of the Ld. CIT (A) and computed the margins of the remaining comparables as under:

S. No.	Particulars	Adjusted Margin (OP/OC)%
1	e4e Healthcare Services Pvt. Ltd.	17.12
2	Informed Technologies India Ltd.	23.68
3	R System International Ltd.	2.65
4	Microgenetic Systems Ltd.	10.59
5	TCS e-Serve Ltd.	67.91
6	BNR Udyog Ltd. (Medical Transcription Segment)	34.85
7	Jindal Intellicom	5.46
Average [Arithmetic Mean]		23.18%

8.3.1 Thus, the Transfer Pricing Adjustment came to be revised at Rs.88,64,407/-.

8.4 Now, the assessee is in appeal before us and has raised the following grounds of appeal:

by raising the following grounds of appeal:

“Based on the facts and circumstances of the case, the appellant company respectfully craves to prefer an appeal before your lordships against the appellate order issued by the Commissioner of Income Tax (Appeals)-44, New Delhi (hereinafter referred to as the 'CIT - Appeals') under section 250 of the Income-tax Act, 1961 ('the Act') on the following grounds:

No intention of reducing tax incidence in India

- 1. The learned CIT (Appeals) has erred both on facts and in law in upholding the adjustment to the value of the international transaction made by AO/TPO without establishing that there was any intention of reducing tax incidence in India.*

Erroneous application of 'turnover filter'

2. *The learned CIT (Appeals) has erred both on facts and in law in not applying the inappropriate application of the 'turnover filter' by the AO/TPO; and consequently, the companies with huge turnover have been incorrectly accepted in the final set of comparables.*

Erroneous application of 'export to turnover filter'

3. *The learned CIT(Appeals) has erred both on facts and in law in upholding the inappropriate application of the 'export to turnover filter' by the AO/TPO; and consequently, certain companies viz. 'ICRA Online Limited' and 'Datamatics Financial Services Limited' have been incorrectly rejected in the final set of comparables.*

Erroneous inclusion of certain companies as comparable

4. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by including 'TCS e-Serve Limited', in the final set of comparable.*

Erroneous exclusion of certain companies as comparable

5. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by not including TCRA Online Limited', in the final set of comparables.*
6. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by not including 'Datamatics Financial Services Limited', in the final set of comparables.*
7. *The learned CIT (Appeals) has erred both on facts and in law in upholding the contention of AO/TPO by not including 'Ace BPO Services Limited', in the final set of comparables.*

General

8. *The above grounds of appeal are without prejudice to each other and the appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal.*

9.0 The Ld. Authorized Representative argued for the exclusion/ inclusion of comparables which are as under:

(i) TCS e-service Limited. –It was submitted that this comparable was objected to in Asst. Year, 2011-12 also. It was submitted that this company should not be excluded because of high turnover and functional dissimilarity. It was submitted that the Ld. CIT (A) has not given any independent finding in this regard and has simply followed his order for Asst. Year: 2011-12. The Ld. AR submitted that the Ld. CIT (A) has had excluded Infosys BPO Ltd. on account of high turnover, presence of goodwill and functional dissimilarity but had disregarded identical reasoning in the case of this company and had directed that this company should remain included. It was also submitted that the company had earned super normal profits in this year and it had a turnover which was 106 times more than that of the assessee's company. It was also highlighted that this company enjoys a very high brand value due to the Tata brand which tends to influence the pricing policy and directly impacts the margin earned by this company. It was prayed that this company be

excluded and reliance was placed on numerous judicial precedents wherein this company was ordered to be excluded.

(ii) ICRA Online Ltd.- It was submitted that the assessee had used foreign exchange filter while selecting comparables and had already rejected companies which were not having any foreign exchange earnings and, therefore, limiting export earnings to 75% was not warranted by the Lower Authorities given that the nature of services rendered did not change. It was submitted that if at all there was a change between the comparable and the tested party it was on account of risk undertaken in respect of the services rendered. It was submitted that in the absence of detailed information on the geographical markets where exports were made, application by this filter was meaningless. It was also submitted that the ITAT in Asst. Year: 2009-10 in assessee's own case had remitted the use of this filter to the TPO but in that year the TPO had applied the filter of 25% to export turn over whereas in this year it was enhanced to 75% without any basis.

(iii) Datamatics Financial Services Ltd.:- It was submitted that this company is engaged in Transaction Processing and back-office

out sourcing offering customer care services. It was also submitted that it is the leading provider of business research transformational outsourcing of services and hence, functionally comparable and the TPO has not objected to the functional similarity but it was excluded because it failed the 75% export turnover filter. It was submitted that use of this turnover filter was not warranted and that this comparable deserved to be included.

(iv) ACE BPO Services Limited- The Ld. AR submitted that the Ld. CIT (A) has erroneously excluded the company even though he accepted that this company is functionally comparable to the assessee. For this he drew our attention to page No.83 of the Ld. CIT (A)'s order. It was also submitted that this company is a health care focused ITES Provider promoted by healthcare and management professionals and since the company provided ITES, segmental information was not required. It was submitted that even the TPO has not objected to the functional comparability. It was prayed that this company be included in the final set of comparables.

10.0 In response, the Ld. SR. DR placed reliance on the order of the Ld. CIT (A) and submitted that the Ld. CIT (A) had adjudicated the appeal by giving well reasoned findings after having duly considered the submissions of the assessee and, therefore, no interference with the order of the Ld. CIT (A) was warranted.

11.0 We have heard the rival submissions and have also perused the material on record. First of all, we take up the issues raised by both the parties in Assessment Year 2011-12 for our consideration. We take up the assessee's appeal bearing No. ITA No.3989/Del/2017 first:

11.1 Ground No.1 in assessee's appeal being general in nature does not call for any separate adjudication.

11.2 Ground Nos. 2 & 6 of the assessee's appeal challenge the action of the Ld. CIT (A) in upholding the inclusion of TCS e-Serve Ltd. in the final set of comparables. The ground also challenges the application of turn-over filter. It is the contention of the assessee that TCS e-Serve Ltd. was included on the erroneous reasoning that the service turnover filter does not have a bearing on the margins. The Ld. CIT (A) has held that this company was to be

included in the final set of comparables on the ground that this company was functionally comparable to the assessee and also because this company had single segment of high end ITES/BPO Services. The assessee has challenged the inclusion of this company on the ground of functional comparability as well as on the ground of having a huge turn over, presence of brand value as well as non availability of segmental data. We have gone through the annual report of the company TCS e-Serve Ltd. and as per the annual report this company is engaged in providing technology services including software testing, verification and validation, data center management activities etc. in addition to ITES. On the other hand the assessee company is engaged in providing ITES Service and is a back end captive service provider. We note that this company was excluded by the Delhi Bench of ITAT in the case of B. C. Management Service Pvt. Ltd. vs. DCIT for Assessment Year 2011-12 reported in [2017] 83 Taxaman.com 346 (Delhi Trib.). While rejecting this company as a comparable in the case of B.C. Management Service Pvt. Ltd. which was providing IT and Financial Back Office Support Services to various entities, the Co-ordinate

Bench of the Tribunal held that the operation of TCS e-Serve Ltd. broadly comprised of transaction processing and technology services including software testing, verification and validation for which no segmental bifurcation was available. The Co-ordinate Bench held that in absence of such vital information of the margins of the various segments, the company could not be considered a good comparable because of the difficulty in bench marking the correct profit margin. The Co-ordinate bench also noted that the presence of high brand value of the Tata brand also made TCS e-Serve Ltd. not a good comparable. The Relevant observations of the Tribunal are contained in paragraph -18 of the said order and the same are being reproduced herein under for a ready reference:

"18. We have heard the rival submissions, perused the relevant finding giving in the impugned orders as well as the material placed on record. One of the main points of distinction which is quite ostensible is that the TCS E-Serve' is a subsidiary of Tata Consultancy Services Limited', which is one of the leading and giant company in the world and has an inherent element of very high brand value associated with it. Such a high brand value definitely has an impact on the pricing policy, niche market, contractual terms, etc. and thereby affecting the profit margins. Annual report of this company reflects that huge payments have been made by TCS E-Serve to TCS Limited' for the use of the brand as a "royalty". This fact itself shows the effect of brand value in the pricing mechanism. On a further analysis it is seen that

the employee cost base is more than 64 times than the assessee and even the turnover is also more than 67 times as compared to the assessee. This only goes to suggest that assets employed by TCS E-Serve" alongwith huge intangibles in the form of brand value definitely has a huge effect in PLI and vitiates the comparability under FAR analysis with a company like assessee which is a captive service provider without much intangibles and risks. Another important thing which has been pointed out by learned counsel is that, the operation of TCS E-Serve' broadly comprise of transaction processing and technical services including software testing, verification and validation for which no segmental bifurcation is available. In absence of such vital information of the margins of such varied segments it becomes quite difficult to put such company in the comparability basket so as to bench mark the correct profit margin. All the aforesaid factors have been held so in various decisions of this Tribunal in several cases as relied upon by the Ld. Counsel, including the decision of Ameriprise India (P.) Ltd. {supra}. Thus, in our opinion TCS E-Serve' cannot be held to be a good comparable for the purpose of bench marking the assessee's PLI and accordingly, we direct the Ld. AO/TPO to exclude TCS E-Serve from the comparability list."

11.2.1 Therefore, respectfully following the adjudication by the Co-ordinate Bench as above and on the facts of this case for the same Assessment Year, TCS e-Serve cannot be held to be a good comparable for the purposes of bench marking the assessee's PLI. Accordingly, we direct that this company be excluded from the final set of comparables.

11.3 Ground No.3 of the assessee's appeal challenges the action of the Ld. CIT (A) in considering the foreign exchange gain/loss as non-operational. The Ld. Authorized Representative has argued at length for the proposition that foreign exchange gain/loss in the assessee's case accrues directly from the normal course of business transactions on import/export and, therefore, the same should be taken as operating income/expenditure. It has also been brought to our notice that this issue was decided by a Co-ordinate Bench of the Tribunal in Assessment Year 2009-10 in assessee's own appeal in assessee's favour. We have gone through the order of the Tribunal in Assessment Year 2009-10 in assessee's own case in ITA No.410/Del/2014 vide order dated 20th Feb.,2015. We find that the contention of the Ld. Authorized Representative is correct in this regard in as much as the Co-ordinate Bench of the Tribunal, in paragraph 20 of the said order has held that foreign exchange fluctuation cannot be seen as independent of the operating income. Respectfully following the same, on identical set of facts, without the Department having pointed out any distinguishing factor on the facts, we direct that the foreign

exchange/fluctuation (loss or gain) we treated as being operational in nature and PLI should be computed accordingly after giving effect to the treatment of foreign exchange/loss as operational.

11.4 Ground No.4 of the assessee's appeal challenges inclusion of Accentia Technologies Ltd. as a comparable company. It is the assessee's contention that this company is functionally dissimilar to the assessee company as it renders KPO Services in the healthcare sector by way of offering software as a service ("SaaS) model and is also engaged in development and sale of software products. We have perused the annual report of this company and we note that Accentia Technologies Ltd. offers complete healthcare documentation as well as receivables management services including installation and maintenance of all software, hardware and bandwidth infrastructure. It is also seen that this company is engaged in development and sale of software products. On the other hand, the assessee is undisputedly a low end captive service provider. We also note that during the year under consideration this company acquired 16% stakes in software development company, Strategic Tangent Corporation having expertise in development of

software related to EMR and SaaS. We note that this company was directed to be excluded by a Co-ordinate Bench of this Tribunal in the case of Agilent Technologies (International Pvt. Ltd.) vs. ITO [2018] 91 taxmann.com 59 (Delhi-Trib.) In this case Agilent Technologies (International Pvt. Ltd) was providing back office support service to its AEs and Accentia had been included as a comparable by the TPO. However, the Tribunal held that this company rendered key services in the healthcare sector from the software as a service (“SaaS”) Model and enabled it for managing of health care documentation needs, receivable managements needs, performance tracking and reporting etc. While enumerating the multifarious functions being carried out by Accentia Technologies Pvt. Ltd., the Tribunal held that these functions cannot be held to be similar with those of the functions carried out as part of back office support service by the assessee. The Tribunal also noted that merger by way of amalgamation was also a ground for exclusion of this company for the purposes of comparability analysis. A similar view was taken by the Delhi Bench of the ITAT in the OKS Span Take Pvt. Ltd. vs. DCIT in ITA No.1551/Del/2015 vide order dated

23.08.2018. A similar direction for exclusion of Accentia Technology Ltd. was given by the Delhi Bench of the ITAT in the case of Orange Business Service India Solutions Pvt. Ltd. vs. DCIT in ITA No.869/Del/2016 vide order dated 31.05.2016. Accordingly, in our considered view the functional profile of the assessee being different from the functional profile of Accentia Technologies Pvt. Ltd., this company cannot be considered a good comparable. Accordingly, we direct the exclusion of this company from the final set of comparables.

11.5 Ground No.5 of the assessee's appeal challenges inclusion of the company Mastif Tech Pvt. Ltd. It is the submission of the assessee that this company is functionally dissimilar to the assessee company. It has also been contended by the Ld. Authorized Representative (AR) that the objections of the assessee against inclusion of this company in the final set of comparables has not been dealt with either by the TPO or by the Ld. CIT (A). In such a situation, it is our considered view that in the interest of substantial justice, the TPO should consider the objections of the assessee against the inclusion of this company

and thereafter pass a speaking order after giving due opportunity to the assessee to present its case. Thus, Ground No.5 stands allowed for statistical purposes.

11.6 Ground No.7 of the assessee's appeal challenges the TPO's action of exclusion of the comparable Caliber Point Business Solution Ltd. on the ground that it had a different financial year ending. It is the argument of the Ld. Authorized Representative that all the quarterly financial statements for the year ending 31st March, 2011 were available on the company's website and, therefore, this company being a functionally comparable company should not be rejected merely on the ground that it had a different financial year ending. We agree with the contention of the Ld. Authorized Representative in this regard. We note that the issue of exclusion of a comparable company only on the basis of a different financial year ending is a settled issue and the Tribunal has time and again held that companies having different a financial year ending but being otherwise similar on functionality, cannot be excluded. We note that the Hon'ble Delhi High Court in the case of CIT vs. Mckinsey Knowledge Centre India Pvt. Ltd. vide order dated

27.03.2015 in ITA No.217/2014 has upheld the order of the ITAT holding that if the comparable is functionally the same as that of the tested party, then the same cannot be rejected merely on the ground that data for the entire financial year was not available. The Hon'ble Delhi High Court went to hold that if from the available data, the results for financial year can be compiled, the comparable cannot be excluded solely on the ground that the comparable was having a different financial year ending. A perusal of the order of the TPO as well as of the Ld. CIT (A) shows that only basis for the exclusion of Caliber Point Business Solution Ltd. is that it was having a different financial year ending. There is no comment by either of the Lower Authorities on the issue of functional similarity or otherwise. In such a situation, respectfully following the order of the Hon'ble Delhi High in the case of CIT vs. Mckinsey Knowledge Centre India Pvt. Ltd., we direct the TPO to reconsider the inclusion of this comparable after duly considering as to whether the data for the financial year ending can be easily compiled and after duly considering and verifying whether Caliber Point Business Solution Ltd. can be considered functionally similar to the assessee

company. The TPO shall given proper opportunity to the assessee before adjudicating this issue in accordance with law. Accordingly, Ground No.7 of the assessee's appeal stands allowed for statistical purposes.

11.7 Coming to Ground No.8 of assessee's appeal which challenges the exclusion of Cosmic Global Ltd., it is the submission of the Ld. Authorized Representative that the TPO has excluded this company on the ground that it fails the export turnover filter of 75% although the TPO has not raised any objection regarding functional similarity. It has also been submitted that in Assessment Year 2009-10, the TPO had applied an export turnover filter of 25% whereas in this year 75% export turnover filter has been applied. It has also been submitted that the ITAT had agreed with the assessee's contention in Assessment Year 2009-10 that export turn over filter of 25% was not an appropriate filter. We note that the TPO has excluded this company solely on the ground that it fails the export turn over filter of 75%. The TPO has, however, not commented on the functional aspect of this company. It is also a fact on record that the ITAT had rejected the export turn over filter

of 25% in assessee's own case in Assessment Year 2009-10 by following the Tribunal's order in *Bharti Airtel Ltd. vs. ACIT* [2014]161 TTJ 428 (Del.) and had remanded the issue to the TPO for fresh examination. In this year under appeal, the TPO has not specified any reason for applying the export turnover filter of 75% as compared to export turn over filter of 25% applied in Assessment Year 2009-10. Therefore, it is our considered view that this comparable needs to be examined afresh by the TPO and the TPO is directed to do so after considering the arguments of the assessee with respect to the functional similarity of this company as well as after duly considering the objections of the assessee against the application of export turn over filter and also the fact that the ITAT had found the turnover filter of even 25% as inappropriate in assessee's own case in assessment year 2009-10. The TPO shall provide proper opportunity to the assessee prior to passing a speaking order on this comparable in accordance with law. Thus, Ground No.8 of assessee's appeal stands allowed for statistical purposes.

11.8 Ground No.9 of assessee's appeal challenges the exclusion of company Informed Technologies India Ltd. ("ITIL"). It is seen that the TPO has excluded this company by applying a turnover filter of Rs. 5 Crores and the Ld. CIT (A) has upheld the exclusion. It is the assessee's contention that this company is otherwise comparable to the assessee's company because this company is also operating as a back-end ITES provider in the BPO Segment. We note that in assessee's own case for Assessment Year 2009-10, a Co-ordinate Bench of Tribunal has rejected the turnover filter of Rs.5 Crores in Para 15 of the said order. Therefore, on a similar reasoning and on identical facts, we also hold that the turnover filter of Rs.5 Crores cannot be applied in the case of the assessee. What only remains to be seen is whether the company Informed Technologies India Limited is functionally comparable to the assessee or not. Accordingly, this comparable is restored to the file of the TPO for examining the assessee's claim of functional similarity with the company Informed Technologies India Ltd. The TPO shall give adequate opportunity to the assessee to present its arguments in favour of the inclusion of this company in the final set

of comparables. Thus, Ground No.9 stands allowed for statistical purposes.

11.9 It has been submitted by the Ld. Authorized Representative that Ground No.10 challenging not providing the benefit of risk adjustment is not being pressed. Accordingly, Ground No.10 of the assessee's appeal stands dismissed as being not pressed.

11.10 Ground No.11 is general in nature not requiring any specific adjudication.

12.0 In the result, the assessee's appeal bearing ITA No.3989/Del/2017 for Assessment Year 2011-12 stands partly allowed.

13.0 Coming to the Department's appeal bearing ITA No.3779/Del/2017, the Department is contesting the direction of the Ld. CIT (A) for including the company Acropetal Technologies Ltd. as a comparable with only the financials of 'healthcare segment'. The Ld. Authorized Representative while supporting the order of the Ld. CIT (A) has argued that Acropetal Technologies Ltd. is engaged in 'software development' and 'Engineering Design

Services' (EDS) and that the EDS segment of the company was not functionally comparable to the assessee because this segment involves Research and Development activities resulting in creation of intangibles. It is seen that the Delhi Bench of ITAT in the case of ITO vs. Omniglobe Information Technologies (India) Pvt. Ltd. in ITA No.1380/Del./2016, vide order dated 15.04.2019, relying on another order of Co-ordinate Bench in the case of Swiss Re Shared Services (India) Pvt. Ltd. observed that the engineering design services segment of Acropetal Technologies Ltd. is functionally different and hence cannot be considered as a good comparable to the assessee which provides only ITES Services to its AEs. A perusal of the annual report of Acropetal Technologies Ltd. for Assessment Year 2010-11 shows that the major source of income from this company is from providing engineering design services and information technologies services. Engineering Design Services are essentially in the nature of providing high end service amongst the BPO whereas the services performed by the assessee are routine low end ITeS Services. Therefore, we are of the considered opinion, that the Ld. CIT (A) was correct in directing that only the ITeS

Segment of this company be included for the purposes of comparability analysis and that the engineering design services segment to be excluded. Accordingly, we dismiss the Ground No.1 of the Department's appeal while upholding the directions of the Ld. CIT (A) in this regard.

13.1 Ground No.2 of the Department's appeal challenges the action of the Ld. CIT (A) in directing the TPO to exclude E-Clerx Services Ltd. as a comparable. It is the Department's contention that the assessee as well as M/s E-Clerx Services Ltd is providing high-end ITeS namely KPO services. However, the Ld. CIT (A) directed the exclusion of this company on the ground that E-Clerx Services Ltd. provided high end ITeS Services which was not comparable to the assessee which was providing only low-end services. Undisputedly, the assessee is providing low end back office services to its AE whereas E-Clerx Services Ltd. is providing KPO related services as has been held by the Hon'ble Delhi High Court in the case of Rampgreen Solution Pvt. Ltd. vs. CIT reported in 377 ITR 533 (Delhi). The relevant observations of the Hon'ble Delhi High Court are contained in

paragraph 37 of the said order which is reproduced hereunder for a ready reference:

“37. Applying the aforesaid principles to the facts of the present case, it is once again clear that both Vishal and eClerx could not be taken as comparables for determining the ALP. Vishal and eClerx, both are into KPO Services. In Maersk Global Centers (India) Pvt. Ltd. (supra), the Special Bench of the Tribunal had noted that eClerx is engaged in data analytics, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management. In addition, eClerx also offered financial services such as real time capital markets, middle and back-office support, portfolio risk management services and various critical data management services. Clearly, the aforesaid services are not comparable with the services rendered by the Assessee. Further, the functions undertaken (i.e. the activities performed) are also not comparable with the Assessee. In our view, the Tribunal erred in holding that the functions performed by the Assessee were broadly similar to that of eClerx or Vishal. The operating margin of eClerx, thus, could not be included to arrive at an ALP of controlled transactions, which were materially different in its content and value. In Maersk Global Centers (India) Pvt. Ltd. (supra), the Special Bench of the Tribunal had noted the same and had, thus, excluded eClerx as a comparable. It is further observed that the comparability of eClerx had also been examined by the Hyderabad Bench of the Tribunal in M/s. Capital Iq Information Systems (India) (P.) Ltd. v. Additional Commissioner of Income-tax (supra), wherein, the Tribunal directed the exclusion of eClerx as a comparable for the reason that it was engaged in providing KPO Services and further that it had also returned supernormal profits.”

13.1.1 Therefore, respectfully following the judgment of Hon'ble Delhi High Court, we find no reason to interfere with the findings of the Ld. CIT (A) in directing the exclusion of the company E-Clerx Services Ltd. Thus, Ground No.2 of the Department's appeal also stands dismissed.

13.2 Ground No.3 of the Department's appeal challenges the action of the Ld. CIT (A) in directing the exclusion of ICRA Techno Analytics Ltd. The TPO had included this company as a comparable on the ground that this company was broadly functionally similar to the assessee company whereas the assessee's contention was that this company was also engaged in software development services. The Ld. CIT (A) directed the exclusion of this company on the ground that it was engaged in software development services and segmental data of ITeS and software development services was not available. We have gone through the annual report of this company and we note that as per the annual report it is engaged in software development and consultancy, engineering services, web development and hosting services, business analytics and BPO services. We also note that segmental

information in this respect of BPO Services is not separately available. It is also to be noted that this company also deals in purchase and re-sale of branded computer software as is evident from the annual report. The Delhi Bench of ITAT in the case of CIT vs. B.C. Management Services Pvt. Ltd., [2018] 403 ITR 45 (Delhi) has held that this company was engaged in software development and consultancy, engineering services, web development and providing business process outsourcing services whereas B.C. Management Services Pvt. Ltd. was a company providing only back office services. The ITAT went on rule that on functional level itself this cannot be held to be a comparable. The Tribunal also noted that there was no segmental information and bifurcation between ITeS and Software Development Segments. For this reason, this company was directed to be excluded from the final set of comparables. On similar reasoning, we uphold exclusion of this company by the Ld. CIT (A). Thus, Ground No.3 of the Department's appeal stands dismissed.

13.3 Ground No.4 of the Department's appeal challenges action of the Ld. CIT (A) in directing the exclusion of the company

Infosys BPO Ltd. on the ground that it was a giant in the area of software development. The Ld. CIT (A) also noted that this company had substantial intangibles in the form of goodwill and had a different functional and risk profile. We have perused the annual report of Infosys BPO for the year under consideration and note that this company has a sales turnover Rs.1129 Crores i.e., more than 87 times of that the assessee company which was a mere 13.48 Crores. The Hon'ble Delhi High Court, while upholding the order of the Tribunal, in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856/Del/2010 vide order dated 10th July, 2013 has held that Infosys BPO Ltd. had been rightly excluded from the list of comparables for the reason that it was a giant company in the area of development of software and it assumed all risks leading to higher profits whereas the respondent assessee was a captive unit of the parent company and assumed only a limited risk. Apart from this, Infosys BPO Ltd. has also been excluded by the Bangalore Bench of ITAT in the case of e4e Business Solutions India Pvt. Ltd. [TS-13-ITAT-2017 (Beng)-TP] for Assessment Year 2011-12, on the ground that it was functionally different being an established

market leader, enjoying huge brand value with huge economies of scale, diversity and geographical distribution of customers. We also note that this company was excluded by the Ld. CIT (A) in Assessment Year 2012-12 also and it has been accepted by the Department and the same has not been agitated before this Tribunal. Accordingly, for the reasons as stated above, we uphold the findings of the Ld. CIT (A) in directing the exclusion of Infosys BPO Ltd. from the final set of comparables. Ground No.4 of the Department's appeal, thus, stand dismissed.

14.0 In the result, the appeal of the Department bearing ITA No.3779/Del/2017 stands dismissed.

15.0 Cross Objection No.181/Del/2017 for Assessment Year 2011-12 broadly supports the order of the Ld. CIT (A) and no fresh ground has been agitated in the said Cross Objection. In view of our upholding the order of the Ld. CIT (A) in terms of the issues challenged by the Department in ITA No.3779/Del/2017 and in view of the dismissal of the said appeal of the Department, the Cross Objection No.181/Del/2017 preferred by the assessee becomes *in fructuous*.

16.0 In the result, the Cross Objection of the assessee is dismissed as having become *in fructuous*.

17.0 Coming to the assessee's appeal bearing ITA No.2745/Del/2018 for Assessment Year 2012-13, it is seen that the assessee is challenging the inclusion of TCS e-Services Ltd. in grounds No. 2 & 4, application of export turnover filter and exclusion of ICRA Online Ltd. and Datamatics Financial Services Ltd. in Ground Nos.3,5,6. The assessee is also challenging exclusion of ACE BPO Services Ltd. in Ground No.7.

17.1 Ground No.1 is general in nature not requiring any separate adjudication.

17.2 In Ground Nos. 2 & 4, the assessee has challenged the inclusion of the comparable TCS e-Service Ltd. We have already directed the exclusion of this company from the final set of comparables for Assessment Year 2010-11 in the preceding paragraphs of this order. On similar reasoning, for Assessment Year 2012-13 also, this company is directed to be excluded from the final set of comparables.

17.3 The assessee has challenged the exclusion of the comparable ICRA Online Ltd. It is seen that this company has been excluded by the TPO by applying export turnover filter of 75%. It is the assessee's contention that this company is functionally comparable to the assessee's company and that the assessee had already applied foreign exchange filter while selecting comparables and, therefore, restricting export earnings to 75% was not warranted as the nature of services were identical. It has also been brought to our notice that the Tribunal in assessee's own case for Assessment Year 2009-10 had remitted the use of this filter to the TPO wherein in that year the export turnover filter of 25% had been applied. We note that in this year the export turnover filter has been enhanced to 75% by the TPO without assigning any reason and there is no finding by either of the Lower Authorities on the aspect of the functional similarity of the assessee company with this company. We also note that the ITAT in Assessment Year 2009-10, in assessee's own case, had remitted the issue of this filter to the TPO by following the order of the Co-ordinate Bench in the case of *Bharti Airtel Ltd. vs. ACIT [2014] 101 ITR Tribunal 121.*

Accordingly, it will be in the fitness of things to restore this comparable to the file of the TPO for fresh adjudication after considering the assessee's arguments supporting functional similarity and also after duly considering the necessity of application of export turnover filter given the fact that the assessee has already used foreign exchange filter.

17.4 Similarly, Datamatics Financial Services Ltd. has been excluded on the ground that it fails the 75% export turnover filter. For this comparable also, it is the assessee's contention that this company is functionally comparable to the assessee company and, therefore, the same should have been included in the final set of comparables and that the use of export turnover filter was not warranted. The observations, we have made in respect of ICRA Online Ltd. would also apply to this comparable and we restore this comparable also to the file of the TPO for considering the arguments of the assessee for its inclusion on the basis of functional similarity while duly considering the assessee's objections against application of export turnover filter of 75%. Needless to say, the TPO shall give proper opportunity to the

assessee while considering the two comparables i.e. ICRA Online Ltd. and Datamatics Financial Services Ltd. afresh. Thus, Ground Nos. 3, 5, 6 stand allowed for statistical purposes.

17.5 Ground No.7 challenges the action of the Ld. CIT (A) in directing the exclusion of BPO Service Ltd. It is the assessee's contention that this company was functionally similar to the assessee's company as it is a healthcare focused ITES provider promoted by healthcare management professionals. It is also been submitted that neither the TPO nor the Ld. CIT (A) have objected to its inclusion on the ground of functional comparability. It is our considered opinion that this comparable should also be re-examined by the TPO for the purpose of inclusion/exclusion from the final set of comparables after duly examining the assessee's claim of functional similarity. The TPO is directed to give adequate opportunity to the assessee while deciding on the inclusion/exclusion of this comparable. Thus, Ground No.7 also stands allowed for statistical purposes.

18.0 In the result, the assessee's appeal bearing ITA No.2745/Del/2018 for Assessment Year 2012-12 stands allowed for statistical purposes.

19.0 In the final result, ITA No.3989/Del/2017 stands partly allowed, ITA No.3779/Del/2017 stands dismissed, C.O. No.181/Del/2017 stands dismissed, whereas ITA No.2745/Del/2018 stands allowed for statistical purposes.

Order pronounced on 27/10/2020

Sd/-

(N.K.BILLAIYA)
ACCOUNTANT MEMBER

Dated: 27/10/2020

PK/PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
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