

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH '1-2' NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 512 & 511/Del/2016
Assessment Years: 2010-11 & 2011-12**

JCIT, Spcl. Range-8,
New Delhi.

vs. Steria India Pvt. Ltd.,
Sea View Special Economic
Zone, Building-4, Plot 20-21,
Sector 135, Gautam Budh Nagar,
Noida.

PAN : AAACX0385L
(Appellant)

(Respondent)

Appellant by : Sh. Anupam Kant Garg, CIT/DR

Respondent by: Sh. Neeraj Jain, Advocate &
Sh. RamitKatyal, Advocate

Date of hearing: 19/10/2020

Date of order : 17/11/2020

ORDER

PER K. NARASIMHA CHARY, J.M.

Challenging the final assessment orders dated 30.11.2015 u/s. 143(3) read with section 144C and directions of DRP dated 20.10.2015 in the case of M/s. Steria India Pvt. Ltd. ("the assessee"), Revenue filed these appeals for assessment years 2010-11 and 2011-12. Since identical issues are involved in both these appeals, we deem it just and convenient to dispose of these appeals by way of this common order.

2. Brief facts of the case, as could be culled out from the record are that, the assessee is a subsidiary of Steria UK Corporate Ltd., UK, an I.T. service company in the United Kingdom. The assessee provides both

software and ITES services to its associated enterprises. For the assessment years under consideration, the assessee reported international transactions inter-alia on account of provision of IT enabled services and software services.

3. During the financial year relevant for AY 2010-11, the assessee entered into the international transaction of provision of IT enabled services amounting to Rs. 1,298,559,298 with its associated enterprises. Assessee considered the FOREX Fluctuation as operating income/expense the Transactional Net Margin Method (TNMM) was selected as the most appropriate method for the purpose of benchmarking the international transaction of ITES, and on that score the OP/OC of the assessee was 18.10% whereas the average OP/OC of the comparable companies selected by the assessee was 11.79%. Assessee, accordingly, treated that the international transaction of provision of IT enabled services was at arm's length price.

4. Ld. TPO, however, computed the operating margin of the assessee at 1.90% considering FOREX Fluctuation as non-operating income/expense, and after conducting a fresh search for comparable companies, Ld. TPO arrived at the following set of comparables:

S. No.	Company Name	(Adjusted OP/OC) (%)
1.	Accentia Technologies	42.94%
2.	Cosmic Global Ltd.	22.94%
3.	E4e Healthcare	34.23%

4.	Fortune Infotech Ltd	24.09%
5.	I_Gate Global Ltd	26.79%
6.	Infosys BPO Ltd.	32.87%
7.	Jindal Intellicom Ltd.	17.60%
8.	Omega Healthcare	17.43%
9.	TCS E Serve International Ltd	58.08%
10.	TCS E Serve Ltd	67.92%
11.	Microland Ltd.	0.38%
	Arithmetic Mean	31.39%

5. Ld. TPO, accordingly, proposed an adjustment of Rs. 37,57,42,930 on account of the difference in the arms length price of the international transaction of provision of IT Enabled Service segment.

6. Assessee filed objections before the Ld. DRP and prayed for exclusion of certain companies from the list of comparables. Ld. DRP, after considering the submissions made on behalf of the assessee, vide order dated 20.10.2015, directed the TPO to consider FOREX fluctuation as operating income/expense and to exclude the following companies from the set of comparables:

- a) Infosys BPO Ltd.
- b) TCS E-Serve Ltd.
- c) TCS E-Serve International Ltd
- d) Accentia Technologies Ltd.

7. Pursuant to the directions of the Id. DRP, Ld. Assessing Officer passed the final assessment order considering the following companies as comparables:

S. No.	Company Name	(Adjusted OP/OC FOREX as operating) (%)
1.	Cosmic Global Ltd.	22.94%
2.	E4e Healthcare	35.87%
3.	Fortune Infotech Ltd	20.91%
4.	I_Gate Global Ltd	20.46%
5.	Jindal Intellicom Ltd.	18.17%
6.	Omega Heatlhcare	17.43%
7.	Microland Ltd.	0.38%
	Arithmetic Mean	19.45%

Transfer Pricing adjustment was accordingly reduced to Rs 22,35,90,000.

8. The Revenue is, therefore, in appeal in ITA No. 512/Del/2016 challenging this adjustment in appeals before us and during the course of arguments Id. DR contended that the Id. DRP erred in excluding the Infosys BPO Ltd.; TCS E-Serve Ltd.; TCS E-Serve International Ltd; and Accentia Technologies Ltd. from the list of comparables.

9. So also, during the financial year relevant for the AY 2011-12, the assessee entered into the international transaction of provision of IT enabled services amounting to Rs. 136,32,59,529 with its associated enterprises. Assessee treated the FOREX Fluctuation as operating income/expense and applied the Transactional Net Margin Method (TNMM) as the most appropriate method for the purpose of benchmarking the international transaction of ITES, on application of which, the OP/OC of the assessee was 15.37% whereas the average OP/OC of the comparable companies at 17.13%, and, therefore,

according to the assessee, their profit level indicator lies within the arm's length range of (+/-) 5% of the international transaction of provision of IT enabled services, and consequently was considered to be undertaken at arms length price. Ld. TPO, however, computed the operating margin of the assessee at 6.02% considering FOREX Fluctuation as non-operating income/expense, and after conducting a fresh search for comparable companies, Ld. TPO arrived at the following set of comparables:

S. no.	Company Name	AdjustedOP/OC(%)
1.	Accentia Technologies Ltd.	28.17 %
2.	E4e Healthcare Business Services Pvt Ltd.	12.79 %
3.	Eclerx Services Ltd.	57.62 %
4.	ICRA Techno Analytics Limited	25.07 %
5.	Infosys BPO Ltd.	20.61 %
6.	Jindal Telecom Ltd.	15.82 %
7.	Microgenetic Systems Ltd	-0.14 %
8.	TCS e-serve Ltd.	71.05 %
9.	Acropetal Technologies Ltd.(seg.)	13.06 %
	Average	27.12 %

10. Ld. TPO accordingly proposed an adjustment of Rs. 27,13,56,000 in the impugned order, on account of the difference in the arm's length price of the international transaction of provision of IT Enabled Service segment.

11. When the assessee filed objections disputing the proposed upward adjustment on the ground that certain companies were to be excluded, for this year also Id. DRP, vide order dated 20.10.2015, directed the TPO to to consider FOREX fluctuation as operating income/expense, and also to exclude ICRA Techno Analytics Ltd.; TCS E-Serve Ltd.; Eclerx Services Ltd; and Accentia Technologies Ltd. from the final set of comparables **in respect of** the international transaction of provision of IT Enabled Service segment. Post the directions of the Id DRP, Id. TPO considered the following companies,

S. no.	Company name	WC Adjusted Margin/Cost
1.	E4e Healthcare Business Services Pvt. Ltd.	16.60 %
2.	Infosys BPO Ltd.	21.30 %
3.	Jindal Intellicom Ltd.	15.90 %
4.	Microgenetic Systems Ltd.	-0.64 %
5.	Acropetal Technologies Ltd. (Seg)	13.07 %
		13.25 %

and reduced the adjustment to Rs 9,30,02,000.

12. Aggrieved by such reduction in the adjustment proposed by the Id. TPO, Revenue preferred appeal in ITA No. 511/Del/2016 and during the course of arguments Id. DR contended that the Id. DRP erred in excluding the ICRA Techno Analytics Ltd.; TCS E-Serve Ltd.; Eclerx Services

Ltd; and Accentia Technologies Ltd. from the final list of comparables in respect of the international transaction of provision of IT Enabled Service segment.

13. Vide ground No 3 in the appeals for both the years, Revenue challenged the order of Id. DRP in directing that forex fluctuations and provision for doubtful debt should be considered part of operating margin calculation. We, therefore, before proceeding to decide the comparability of the entities directed to be excluded by the Id. DRP in the ITES segment, deal with the issue of forex fluctuations and provision for doubtful debt.

14. At the outset, as stated above, assessee has considered forex as operating in nature. the Ld. TPO rejected, but accepted by the Id. DRP. According to the Revenue, the amount of Forex loss /gain and hedging cost/premium will vary depending upon the Risk management Policy of each company, e.g., some of the companies do not hedge themselves while others may hedge their forex exposure wholly/partially, i.e., someone may hedge its three months receivables/payables or 50% of 6 months receivables/payables and so on and so forth; that the Risk management policy of each company is its internal matter and it has got nothing to do with transactions entered by it with its AEs; that there is a wide variation between the profits and earned depending upon whether the enterprise has hedged its forex exposure; that as far as the consideration of provision for doubtful debt and provisions written back its operating is concerned, provision for doubtful debt is in the nature of unascertained liability as it is made of estimate basis and at the time of provision, accounts of debtors have not with a certain amount; that,

therefore, the expense is still uncertain and ad hoc expense; that the creation of provision is dependent on the risk perception of the business operation by the management; that for the same risk some comparable may create provision at the rate of X% while another comparable may create the provision at Y%; that the sales price is adjusted to include the effect of such provisions; that different risk perception would lead to different quantum of provisions leading to inaccurate comparability, in case such provisions are treated as operating; that safe Harbour rules provide for treatment of unascertained liability to be treated as non-operational; and that to eliminate uncertainty and be in line with safe Harbour Rules, this item is required to be treated as non-operational; that the same treatment is being given to item is the assessee's case and, therefore, no prejudice is caused to the assessee, which position is in accordance with the safe harbor rules.

15. With reference to the request of the assessee to treat the forex gain /loss as an operating in nature, it is submitted that as far as the consideration of foreign exchange fluctuation as operating is concerned. Foreign exchange gain/loss is not dependent upon the operations carried out by the company, but is a result of various extraneous factors; that the Foreign exchange fluctuation has nothing to do with the business operations of the assessee; that the foreign exchange fluctuations are determined by the markets, RBI, macro economic conditions, world markets etc; and that, therefore, the gain or loss on foreign exchange fluctuations is not considered part of operating revenues or income.

16. Though the Id. AR placed reliance on various decisions in support of his argument that FOREX fluctuation has to be held to be in the nature

of operating income/expenses, he specifically brought to our notice the decision of the Tribunal in appellant's own case for AY 2015-16. A copy of the order dated 01.05.2020 in the case of M/s Steria India Ltd. vs ACIT in ITA No. 6687/Del/2019 is produced before us.

17. We have gone through the order in ITA No. 6687/Del/2019 and find that the Tribunal dealt with this aspect as under:

5.6 With respect to the ITES Segment, it is the plea of the Ld. Authorized Representative that foreign exchange fluctuation should be treated as an operating item. In this regard reliance has been placed on the judgments of the Hon'ble Delhi High Court in the case of Pr. CIT vs. BC Management Services Pvt. Ltd. in Appeal No.1064/2017 and Pr. CIT Vs. Ameriprise India Pvt. Ltd. in Appeal No.206/2016. The Hon'ble Delhi High Court in the case of Pr. CIT vs. Ameriprise India Pvt. Ltd. (supra) has held that in respect of foreign exchange gains earned by the assessee which is in relation to trading items and emanating from international transactions, direct value derived from it cannot be treated as non-operating losses and gains. Similar view was taken by the Hon'ble Delhi High Court in the case of Pr. CIT Vs. Cashedge India Pvt. Ltd. in Appeal No.279/2016 as well as in case of Pr. CIT vs. BC Management Services Pvt. Ltd. (supra). Therefore, we agree with the contentions of the AR that foreign exchange fluctuations gains/losses should be treated as operating item if the same are in relation to the trading items emanating from the international transactions. It only remains to be verified as to whether the foreign exchange fluctuations incurred by the assessee relate to the trading items emanating from the international transactions or not. Therefore, for the limited purposes of verifying that the foreign exchange fluctuations of the assessee relate to the trading activities of the assessee, the issue is restored to the file of the Assessing Officer/Ld. TPO to verify the same and if it is found that the foreign exchange fluctuation relate to trading with the associate enterprises the Assessing Officer/Ld. TPO is directed to treat the same as operating item. Thus, this issue stands allowed for statistical purposes.

18. Since the Tribunal dealt with this issue in assessee's own case for the AY 2015-16 with the above observations and no change of circumstances are brought to our notice to take any different view, while

respectfully following the above view taken by the Tribunal in assessee's own case, we restore the issue to the file of the Id AO/Id TPO to comply with the above directions in respect of the AY 2010-11 and 2011-12 also.

19. After the issue relating to the forex fluctuation, what remains to be decided is the comparability of the entities under challenge. From the arguments on either, referred to above, it clear that the Revenue is challenging the exclusion of Infosys BPO Ltd., and TCS E-Serve International Ltd for the AY 2010-11; ICRA Techno Analytics Ltd. and Eclerx Services for the AY 2011-12 and TCS E-Serve Ltd. and Accentia Technologies Ltd. for both the AYs. in respect of the international transaction of provision of IT Enabled Service segment. Now we shall deal with comparability of these companies selected by the TPO and rejected by the DRP for adjustment for both the years in IT enables services are discussed hereunder:

20. Functional profile of the assessee as described in the transfer pricing documentation, in respect of the ITES segment, shows that the assessee being a subsidiary of Steria UK Corporate Limited, a software service company in the United Kingdom ("UK"), provides IT enabled services (ITES) to the clients of its associated enterprises; that the marketing function including client acquisition is performed by the associated enterprise and the assessee performs ITES activity in relation to work outsourced /sub-contracted by the associated enterprise to the assessee; that it provides back office process outsourcing and inbound and outbound voice-based services; and that the delivery centers of the assessee are located in Noida, Chennai and Pune, from where Steria India delivers work on behalf of Seteria UK for Clients.

1. Infosys BPO Ltd.

21. It could be seen from the record that Infosys BPO Ltd is a part of the Infosys group, a giant in the field of IT services; that according to the information at page 150 of the paper book containing the Annual Report of this company in respect of the ITES Segment, it is stated that the company provides business process management services to organizations that outsource their business processes, the information at page 118 shows that the company leverages Infosys Technologies client relationship to cross sell services, whereas at page 157 thereof, it is reported that the parent company namely Infosys Technologies Ltd has issued performance guarantee on behalf of the company.

22. According to the Id. TPO the brand value may not affect the profitability of a company and a brand may generate revenue, but there is a cost associated with development of such brand, and that the supernormal profit and high revenue is not a criteria for selection of comparable companies. Reason for the Id. DRP to direct the Id. TPO to exclude the company is that it is a giant in the industry and enjoys the benefits associated with such size.

23. On this, aspect, learned DR invited our attention to certain extracts of annual report of this comparable, wherein, in respect of the Segment reporting at page No 56 of the Annual report, it was stated that the company's operations primarily relate to providing business process management services to organizations that outsource their business processes, and the Services Offered are Contact Centre, Data

Capture/Management, Human Resource Services, Technical Support, Equity Research, Fixed Income Research, Financial Analysis, Market Research & Analysis, Retail Analytics, Legal Research, Litigation, Strategy Consulting Service Lin. He, therefore, submitted that the assessee's argument in respect of functionally different is not acceptable .

24. Ld. DR further submitted that this comparable was proposed by the assessee itself in TP documentation. According to him, though the DRP by relying on the judgment of Hon'ble High Court of Delhi in the case of Aginity India Ltd has observed that the court had directed exclusion of industry giant in view of the economic advantage conferred to them on account of sheer size and enormity, fact remains that the turnover of the comparable is Rs. 1120 crore while the turnover of the assessee company is 169 crore for ITeS segment and a total turnover of Rs. 577 Crs. and that there is no disproportionate difference in the size of the assessee and the comparable. Further according to him, in the case of Aginity, the Hon'ble High Court was examining the comparability of Infosys technologies Ltd and in that context, the following table was reproduced in the order:-

Basic Particulars	Infosys Technologies Ltd	Aginity India
Risk Profile	Operate as full fledged risk taking enterprises	Operate at minimal risks as the 100% services are provided to AEs.
Name of the services	Diversified consulting, application design development re-engineering and maintenance system integration package evaluation and implementation	Contract software Development services

	and business process management etc. (refer page 117 of the paper book)	
Revenue	Rs. 9.028 crores	Rs. 16.09 Crores
Ownership of branded/proprietary [products	Develops/owns proprietary products like finacle Infosys Active desk, Infosys iprowe, Infosys mConnent, Also, the company derives substantial portion of its proprietary products (including its flagship banking product suite 'Finacle')	
Onsite Vs Offshore	As much as half of the software development services rendered by Infosys are onsite (i.e. services performed at the customer's location overseas). And offshore(50.20%)(Refer page 117 of the paper book than half of its service, income from onsite services)	The appellant provides only offshore services(i.e. remotely from India)
Expenditure on advertising/sales promotion and brand building	Rs. 61 crores	Rs. Nil (as the 100% services are provide to AEs)
Expenditure on Research & Development	Rs. 102Crores	Rs. Nil
Other		100% offshore(from India)

25. He further submitted that the difference in risk profile applies to even those comparables selected by the assessee; that Infosys BPO Ltd is not engaged in carrying out different kind of activities; that there is not much difference in the turnover of the assessee and the comparables as was in that case; that the Hon'ble Delhi High Court on the issue of super

normal profits and turnover, in case of Chrys Capitaql Investment advisors(India) Pvt. Ltd rejected the taxpayers arguments by holding that once the comparables are found to functionally similar to the assessee, they would be required to be included as comparable, notwithstanding their high profit margins or turnover; that in case of Infosys BPO Ltd. there are no propriety products as were in the case of Infosys Technologies Ltd.; that the TPO has also mentioned that the intangible expenditure incurred was only 0.06% of revenue; and that, therefore, it is seen that the fact of Infosys BPO Ltd are different from Infosys Technologies Ltd . He, therefore, submitted that the argument of the **assessee** is not tenable.

26. Per contra, Id. AR submitted that a coordinate Bench of this Tribunal in assessee's own case for AY 2015-16 in ITA No. 6687/Del/2019, considered all the contentions on behalf of the Revenue and rejected this company on account of brand presence. Further reliance in this regard was also placed on the decision of the Hon'ble Delhi High Court in the case of New River Software Services Pvt Ltd in ITA No 924/2016, wherein the Hon'ble Court relying on the decisions in the case of Pentair Water India Pvt Ltd and Agnity Technologies Pvt Ltd. (ITA No.124/2011), approved the exclusion of Infosys BPO Ltd from the list of comparable companies.

27. We have gone through the record in the light of the submissions made on either side. In the case of Pr CIT vs Oracle (OFSS) BPO Services Pvt Ltd in ITA No 124/2018, the Hon'ble jurisdictional High Court upheld the exclusion of an entity on the basis of significant brand presence and brand value of an entity has a significant role in the ability to garner

profits and negotiate contracts and such a decision of the Hon'ble High Court has been upheld by the Hon'ble Supreme Court in SLP (CC) No. 32469/2018. In the case of Avaya India Pvt Ltd (ITA No. 532/2019) too the Hon'ble Delhi High Court rejected companies having high brand value as comparable to captive service provider.

28. Though the Id. AR placed reliance on several decisions of the Hon'ble Delhi High Court, namely, in Pr. CIT vs Symphony Marketing Solutions (ITA No 414/2018, Pr. CIT vs M/s. Sanvih Info Group Pvt. Ltd (ITA No. 420/2019) and Pr. CIT vs Evalueserve SEZ (Gurgaon) Pvt Ltd (241/2018), and the decision of the Hyderabad Bench of the Tribunal in the case of Hyundai Motors Engineering India Pvt Ltd vs ITO (ITA No 1850/Hyd/2012) wherein the exclusion of Infosys BPO as comparable to a captive service provider was directed, the fact remains that in assessee's own case for AY 2015-16 in ITA No. 6687/Del/2019, **the Tribunal** considered all the contentions on behalf of the Revenue and rejected this company on account of brand presence.

29. No change of facts and circumstances from those involved for the AY 2015-16 to the assessment year under consideration are brought to our notice. In these circumstances, we do not find any reason not to follow the view taken by the Tribunal in assessee's own case for the AY 2015-16 and also the consistent view taken by the Hon'ble jurisdictional High Court in the decisions referred to above. We, therefore, in the light of these facts, accept the finding of the Id. DRP in excluding this company from the list of comparables.

2. TCS E Serve International Ltd.

30. Information given at page 336 of the annual report paper book in respect of ITES segment for the relevant year, shows the broad range of process management services rendered by this company to various industries and that this company is a part of TATA group and is backed by TCS's scale and large client base. So also the information at page 336 of the annual report paper book speaks that the association with TATA group has enhanced the company's services offerings and as a result the company has started serving new clients during the year under consideration. Ld. TPO with reference to the contents of the annual report observed that the company is engaged in provision of BPO services to banking and financial industry and tourism and hospitality, and therefore, the company is functionally comparable to the assessee. According to the Ld. DRP, the company needs to be excluded on account of difference in FAR profile.

31. Ld. DR submitted that in the economic analysis between Infosys BPO Limited and TCS E-Serve it could be seen that there is no disproportionate difference in the size of the assessee and the comparable, and further that the analysis made in the case of Infosys BPO Limited may apply to this comparable also to prove that the size and brand does not impact the profitability of the comparable.

32. Ld. AR, however, submitted that this company exploits the brand 'TATA' and therefore, enjoys the goodwill and recognition associated with the said brand leading to higher volume of business and/or premium pricing, and as per the information given at page No. 8 of the Annual Report the company acknowledges that backed by TCS' scale and large client base the company has enhanced its service offerings and has also

started servicing new clients during the relevant year. He placed reliance on the decision of the Hon'ble Delhi High Court in the case of PCIT vs Evalueserve SEZ (Gurgaon) Pvt. Ltd (ITA 241/2018), Avaya India Pvt Ltd (ITA No. 532/2019), PCIT vs B.C. Management Services (P.) Ltd (ITA No. 1064 & 1083 of 2017) and Pr. CIT vs Oracle (OFSS) BPO Services Pvt Ltd (ITA No 124/2018) and the decision of a coordinate Bench of this Tribunal in Smart Cube India Pvt Ltd. (ITA No. 1178/Del/2019) and also the appellant's own case for AY 2015-16 (ITA No. 6687/Del/2019).

33. We have considered the contentions of the parties in the light of the case law cited by the Id. AR. In PCIT vs Evalueserve SEZ (Gurgaon) Pvt. Ltd (ITA 241/2018), the Hon'ble Delhi High Court while upholding the finding of the ITAT held that there is a close connection between functional similarity between TCS E-Serve International Ltd and TATA Consultancy Service Ltd which was high brand value and that distinguished it and marked it out for exclusion. In the case of Avaya India Pvt Ltd (ITA No. 532/2019) also the Hon'ble High Court rejected TCS E Serve International Ltd on account of high brand value as comparable to captive service provider. In the case of Pr. CIT vs Oracle (OFSS) BPO Services Pvt Ltd (ITA No 124/2018), Hon'ble Delhi High Court held that companies having significant brand presence cannot be regarded as appropriate comparable for the purpose of benchmarking the international transactions undertaken by a captive service provider, and such a decision of the Hon'ble High Court is upheld by the Hon'ble Supreme Court in SLP (CC) No. 32469/2018. Further, the Hon'ble Delhi High Court in the case of PCIT vs B.C. Management Services (P.) Ltd (ITA No. 1064 & 1083 of 2017) for AY 2011-12, upheld the ITAT finding of

exclusion of the company on account of the brand value associated with TCS consultancy **reflected/ impacted** TCS E-Serve profitability in a very positive manner.

34. Apart from that, a coordinate Bench of this Tribunal in appellant's own case for AY 2015-16 (ITA No. 6687/Del/2019) rejected Infosys BPO Ltd. on account of brand presence. There is no explanation as why the decisions of Hon'ble High Court and the view taken by the Tribunal in assessee's own case should not be followed this year also. We therefore, agree with the Id. DRP that TCS E-Serve International Ltd. too deserves to be excluded from the final list of comparable companies.

3. TCS E Serve Ltd.

35. As could be found from page 295 of the annual report paper book in respect of ITES segment, the profile of this company is that the company is engaged in providing technical services such as software testing, verification and validation of software and data centre management activities. According to the Ld. TPO, the company provides a broad range of services to cater to the process management requirements for delivery of wide range of financial products and enterprise support functions which include Financial information processing customer contact services and functional testing services, and that the company is engaged in business process outsourcing (Transaction processing services). Ld. TPO, accordingly held this company as a comparable. Ld. DRP, however, held that the company needs to be excluded on account of difference in FAR profile.

36. On the issue of functional dissimilarity, Id. DR submitted that, a perusal of the annual report of the company shows that this company along with its subsidiary companies i.e. TCS e-serve International Ltd. and TCS e-Serve America, Inc., (collectively referred to as "TCS e-Serve") maintained its leadership position in providing information Technology enables Services (ITeS) or Business Process Outsourcing Services (BPO) in the Banking and Financial Services Industry domain (BFSI) with City group entities being its largest customers since 1998; that the services offered by this company are in the nature of IT Enabled Services only; that the Technical services which assessee is referring here is actually services provided by the company to its customers under 'Industry Vertical' which is actually BPO services only; and that, therefore, non availability of segmental data has no relevance in this case and this comparable may be taken as entity level.

37. He further submitted that the turnover of the comparable is Rs.1440 Crs while the turnover of the company is 169 Crs for ITES segment and a total turnover of Rs. 577 Crs., as such there is no disproportionate difference in the size of the assessee and the comparable; that the analysis made in the case of Infosys BPO Limited may apply to this comparable also; and therefore, assessee's argument for excluding the comparable TCS E-serve Ltd by relying on the judgment of Hon'ble High Court of Delhi in the case of Agility India Ltd. wherein the Court had directed exclusion of industry giant in view of the economic advantage conferred to them on account of sheer size and enormity, is untenable.

38. His further contention is that this company owned significant intangibles and brand value but the argument that brand has helped in better margins is also not correct; that the brand name may have helped TCS E-Serve in increasing its number of clients & retention of existing clients and thus an increase in its market share, but it has not necessarily resulted in better profit margins, because Brand may bring more revenues but not necessarily higher margins, whereas conversely some companies despite having brand name have earned lower margins. Further according to him, any brand comes with a cost i.e. huge expenses are required to be incurred to build brand value, which shows that a brand may generate revenue but with a cost compensating any extra benefit, if any derived from such effort. He placed reliance on the decision of the Visakhapatnam Bench of Tribunal in the case of LG Polymers India Pvt. Ltd. (2011-TII-97-ITAT-vizag-TP) wherein it was held that brand name is only one of the factors but not the only factor which affects profitability, and several other factors go into the profitability of a concern. He submits that in this case, the assessee has also failed to establish that the payment of TATA brand equity and ownership of intangibles is leading to high profit margin earned by the company and these kinds of intangibles are available in almost all the comparables.

39. Per contra, while supporting the findings of the Id. DRP, Id. AR argued that this company is not functionally similar to the assessee since it is engaged in providing technical services such as software testing, verification and validation of software and data centre management activities which services are not comparable with routine transaction processing services provided by the assessee. Further, according to him,

this company exploits the brand 'TATA' and therefore, enjoys the goodwill and recognition associated with the said brand leading to higher volume of business and/or premium pricing. Companies owning/exploiting intangibles such as brand etc cannot be compared with a routine captive service provider such as the appellant.

40. He placed reliance on the decision of the Hon'ble Delhi High Court in PCIT vs B.C. Management Services (P.) Ltd (ITA No. 1064 & 1083 of 2017), PCIT vs Evalueserve SEZ (Gurgaon) Pvt. Ltd (ITA 241/2018), Avaya India Pvt Ltd (ITA No. 532/2019 and Pr. CIT vs Oracle (OFSS) BPO Services Pvt Ltd (ITA No 124/2018) in support of his contention that TCS E-Serve Ltd. too, deserves to be excluded from the final list of comparable companies on account of association with brand TATA company. He also placed reliance on a decision of the coordinate Bench of this Tribunal in the case of Smart Cube India Pvt Ltd. in ITA No. 1178/Del/2019 and also in appellant's own case for AY 2015-16 in ITA No. 6687/Del/2019.

41. In the case of PCIT vs B.C. Management Services (P.) Ltd (ITA No. 1064 & 1083 of 2017) Hon'ble Delhi High Court upheld the ITAT finding of exclusion of the company on account of the brand value associated with TCS consultancy which impacted TCS E-Serve profitability in a very positive manner. Hon'ble Delhi High Court in the case of PCIT vs Evalueserve SEZ (Gurgaon) Pvt. Ltd (ITA 241/2018) upheld the ITAT finding that there is a close connection between functional similarity between TCS E-Serve and TATA Consultancy Service Ltd which was high brand value that distinguished it and marked it out for exclusion. Further, in the case of Avaya India Pvt Ltd (ITA No. 532/2019) too Hon'ble High Court rejected TCS E Serve Ltd on account of high brand value as comparable to

captive service provider. So also, in the case of Pr. CIT vs Oracle (OFSS) BPO Services Pvt Ltd (ITA No 124/2018) Hon'ble Jurisdictional High Court held that companies having significant brand presence cannot be regarded as appropriate comparable for the purpose of benchmarking the international transactions undertaken by a captive service provider and the said decision is upheld by the Hon'ble Supreme Court in SLP (CC) No. 32469/2018.

42. This company was directed to be excluded by the Hon'ble Delhi Bench of the Tribunal in the case of Smart Cube India Pvt Ltd. (ITA No. 1178/Del/2019) on account of its association with the Brand name of TATA's. Pertinently, a coordinate Bench of this Tribunal in the appellant's own case for AY 2015-16 (ITA No. 6687/Del/2019) rejected Infosys BPO Ltd. which stands on the same footing of TCS E-Serve Ltd. on account of brand presence. In this set of facts, we are of the considered opinion that the decisions of the Hon'ble High Court are applicable to the facts of this case for this year on all fours and renders this company non comparable to the assessee. We, therefore, direct the exclusion of this company from the final list of comparable companies for both the AYs 2010-11 and 2011-12 on account of association with brand TATA.

4. Accentia Technologies Ltd.

43. According to the information furnished in the annual report Accentia Technologies Ltd. is engaged in providing ITES services as well as provision of software services and in providing Medical Transcription and Medical Coding services as well as legal process outsourcing services. Ld. TPO held that the company has not generated any revenue from sale of

computer software and since the company is engaged in provision of medical transcription activity it is acceptable as a comparable while applying TNMM which requires broad comparability. Ld. DRP, however, held otherwise and rejected this company on account of merger during the year.

44. Ld. DR brought to our notice the relevant extracts of the TPO order wherein the Id. TPO observed that the assessee has argued that the company is functionally different as it operates in the segment of "Healthcare Receivable Management", but profit and loss account of the company shows that its income is from three sources like "Medical Transcription", "Billing and Collections" and "Income from Coding" and that the main activities of the Accentia is medical transcription, which is different from the activity of the taxpayer. Ld. TPO observed that assessee has raised the issue of functional dissimilarity while taking note of the submission on behalf of the assessee that Accentia has amalgamated with Asscent Infoserve Private Limited, and the resulting figures are not comparable to those of the previous year of the company itself besides the company has significant intangibles in the form of goodwill and is also engaged in development of proprietary software products. Ld. DR submitted that on a perusal of the Annual Report of this company, Id. TPO found that the company is into Healthcare receivable cycle management predominantly which is in ITES, of which Health Receivable Cycle Management is a term encompassing medical transcription, coding and billing and collection and it is one complete segment earning income through various sub-segments which in a way are closely related to each other and complement each other. Ld. TPO

observed that medical transcription is defined as transcribing or converting voice recorded reports as dictated by physicians and/or other health care professionals to text format; that Medical coding is defined as assigning codes to diagnosis and procedure which help in financial reimbursements from insurance companies and others; that Medical billing is a billing on insurance companies by hospitals for and on behalf of the patients' medical care expenses; that all these services are inter-linked and are just extensions of the work done in the medical transcription segment; that medical transcription from which Accentia earns maximum revenue is an ITES service; whereas the taxpayer has defined only one segment i.e., Health Care Receivable Management. Id. TPO maintained that there is no distinction between the transcription services and coding services, and, even if a distinction is made between the transcription services and coding services, it is clear that more than 86 % of the receipt is from ITES services and a small portion (12.56%) is from the coding activity.

45. While drawing our attention to the margins of Accentia from FY 2007-08 to F.Y 2009-10, Id. DR submitted that the merger has not significantly influenced the business of Accentia.

46. With reference to the website of the company where assessee contends that it is developing proprietary software products, Id TPO observed that there is no reference of the same in the annual report relevant to the period under consideration and the company has shown its revenues during the year to accrue from Medical Transcription, Billing & Coding and income from Coding. No revenues are generated from sale of such software.

47. Ld. TPO rejected the argument of the assessee that the company is different because of presence of goodwill in its fixed assets, stating that the ratio of such intangibles to its turnover is around 5% only, which is not material enough for influencing the pricing or the profitability of the company and this company is having consistent profits over the years and even the acquisition of goodwill during the year did not have much effect on the pricing or the performance of the company, contrary to which, the profitability has only decreased in the F.Y 2009-10 as compared to FY 2008-09.

48. Per contra, in respect of provision of software services, it is the submission of the Id. AR, that the company apart from providing ITES services is also engaged in provision of software services and segmental profitability statement w.r.t income for ITES services is not available, and, therefore, this company cannot be regarded as comparable for the purpose of benchmarking the international transaction of provision of ITES services undertaken by the assessee. He further submitted that in the annual report it is stated that the company is engaged in providing Medical Transcription and Medical Coding services and since the company is providing IT as well as ITES services, it cannot be regarded as a comparable to the assessee for benchmarking the ITES segment. He further submitted that as per the information furnished in the annual report within the domain of IT enabled services, the company inter-alia provides legal process outsourcing services and therefore, cannot be regarded as comparable to the assessee, engaged in provision of routine transaction

49. Next submission of the Id. AR is that during the year the company was amalgamated with Asscent Infoserve Pvt. Ltd. (subsidiary of the Accentia) as approved by the Hon'ble High Court vide order dated 25.04.2009 and the financial results of the company for the year ending 31.03.2010 are inclusive of the figures of the amalgamating company. Yet another contention on behalf of the assessee is that the company owns significant intangible assets in the form of Goodwill amounting to Rs. 219,449,287/-.

50. Reliance is placed on the decisions of the Hon'ble Delhi High Court in the case of Evalueserve SEZ (Gurgaon) Pvt Ltd (ITA No 241/2018) (for AY 2010-11), and the decisions of the coordinate benches of this Tribunal in Smart Cube India Pvt Ltd (ITA No. 6078/Del/2015), Cognizant Technology Services Pvt. Ltd. vs. ACIT (ITA No. 2106 & 1864/Hyd/2011) and ACIT vs. NIT Ltd. [ITA no. 1844/Del/2009].

51. We have carefully considered the submissions on behalf of either side. From the material papers on record, we notice that in respect of the argument of the assessee that Accentia has undertaken extraordinary events namely, amalgamation with Asscent Infoserve Private Limited during the year, Id. TPO observed that the acquisitions are made by companies to benefit from each other's strengths, but the acquisitions in themselves do not become extraordinary events, except when the company's functions change substantially after an acquisition the same may become non-comparable; also that when the acquisitions have abnormal impact on normal operations of the business, it will be considered a peculiar circumstance. According to the Id. TPO, assessee failed to point out how acquisition has affected the operations of the

company. However, there is no denial of the fact of amalgamation taking place during the year. As a matter of fact, it is not clinched before us that the acquisitions have no or insignificant impact on normal operations of the business. So also, there is no denial of the fact that M/s. Accentia Technologies Ltd. owns significant intangible assets in form of goodwill etc., it also owns proprietary software products and though it is engaged in the medical transcription and development of software products but the segmental profitability is not available in the financial statements. These aspects were considered by the Hon'ble jurisdictional High Court and a coordinate Bench of this Tribunal in various cases in the context of M/s. Accentia Technologies Ltd. to hold that those are significant facts rendering M/s. Accentia Technologies Ltd. incomparable with the companies like assessee.

52. Hon'ble Delhi High Court in the case of Evalueserve SEZ (Gurgaon) Pvt Ltd (ITA No 241/2018) (for AY 2010-11) upheld the exclusion of Accentia Technologies Ltd. on the basis that segmental accounts are not available. Finding with regard to exclusion of this company is that, -

6. The ITAT noted that M/s. Accentia Technologies Ltd. was mainly performing medical transcription services. It was of the opinion that its service was similar to the one that the assessee was engaged in. However, it also noted that there was no segmented data and on that account, directed the exclusion of that entity from the list of comparables.

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7. All the reasons given by the ITAT, in the opinion of the Court, are justified and supported by the judgment in B.C. Management (supra)

53. In the case of ACIT vs. NIT Ltd. [ITA no. 1844/Del/2009], a coordinate Bench of this Tribunal, while providing a list of filters to be applied during benchmarking of a transaction, has held that:

“While making afresh transfer pricing order, the TPO shall take into account the annual reports or database of the aforesaid companies now submitted before us and shall also decide the point as to whether all the comparables selected by the assessee are proper comparables for the purpose of determining Arm’s Length Price after considering the following factors as per law:

- (i) Whether the companies have large volume of related party transactions.*
- (ii) Whether companies have abnormally high profits or losses.*
- (iii) Whether companies have gone for business re-structuring.*
- (iv) Whether companies have shown high growth.*
- (v) Whether companies are having high turnover.*
- (vi) Whether companies are having larger inventory.*
- (vii) Whether companies are having high marketing expenses.”*

54. This company was also directed to be excluded by by a coordinate Bench of this Tribunal in the case of Smart Cube India Pvt Ltd (ITA No. 6078/Del/2015) on the basis that it is engaged in provision of medical transcription services and sale of software and therefore cannot be regarded as comparable to a ITES service provider. It is pertinent to note that these observations are in respect of the AY 2011-12. We find it necessary and convenient to extract the relevant observations of the Tribunal:

46. Now we take up the issue of selection of various comparable companies. With respect to Accentia Technologies Ltd., it is seen that it provides service to healthcare industry in the nature of medical transcription, medical coding etc. and revenue’s earning from those fields are more than 75%. Before us, Learned AR has pointed to the fact that it owns significant intangible assets in form of goodwill etc. amounting to Rs.21.94 crores and it also owns proprietary software products. Further, he has also pointed out to the fact that though it is engaged in the medical transcription and development of software products but the segmental profitability is not available in the financial

statements. The aforesaid contentions of the Learned AR have not been controverted by the Revenue. We find that the Delhi Bench of Tribunal in the case of E-Valueserve SEZ (Gurgaon) P. Ltd. for AY 2011-12 had rejected it to be a comparable company to an ITES service for the reason that it is engaged in the business of medical transcription, medical coding and billing. The order of the Tribunal has also been upheld by the Hon'ble High Court. Similar view has also been taken by the Tribunal in other cases. We are therefore of the view that Accentia Technologies Ltd cannot be considered to be a comparable to Assessee. In view of these facts, we direct the AO to exclude it on account of functional dissimilarity.

55. In the case of Cognizant Technology Services Pvt. Ltd. vs. ACIT (ITA No. 2106 & 1864/Hyd/2011), Hyderabad Bench of the Tribunal directed to exclude the companies having extra-ordinary event like mergers/acquisitions which will have an effect on the profitability of the company in the financial year in which event takes place. In the case of Global Logic India Ltd. vs DCIT (ITA No. 4740/Del/2018) a coordinate Bench of this Tribunal rejected a company on account of restructuring activity during the year.

56. The observations of the Hon'ble Delhi High Court in the case of Evalueserve SEZ (Gurgaon) Pvt Ltd (ITA No 241/2018) (for AY 2010-11) and a coordinate Bench of this Tribunal in the case of Smart Cube India Pvt Ltd (ITA No. 6078/Del/2015) for the AY 2011-12 go undisputed clinch the Issue. In the light of these observations of the higher fora, observations of the Id. DRP in respect of M/s. Accentia Technologies Ltd. cannot be found fault with. We, therefore, uphold the findings of the Id. DRP as to the exclusion of this comparable in the final list of comparables **for both the years under consideration.**

5. ICRA Techno Analytics Ltd

57. Assessee argued for the exclusion of this company on the ground of functionally dissimilarity, company's engagement in provision of KPO services and sale of software products. According to the assessee this entity is engaged in providing software development services. Ld. TPO examined this contention and found not to be acceptable on the ground that the services offered by this company are broadly very much similar to that of assessee. In this regard Ld. DR placed reliance on the CBDT notification SO 2810(E) dated 19.9.2013, and submitted that this notification gave a detailed list of products or services and that assessee's functions and this comparable company functions falls under one segment only.

58. Ld. AR submitted that this company is functionally different, engaged in provision of KPO services and sale of software products. He submitted that the company is engaged in provision of KPO services such as Business Intelligence and Analytics and also trades in computed software and on that ground, it cannot be regarded as an appropriate comparable for benchmarking the transaction of routine BPO services provided by the assessee. With reference to the contents of the Annual Report, he demonstrates that the revenue of the company comprises of software development & consultancy, licensing & sub-licensing fee, annual maintenance charges for software support, web development and hosting. He therefore, submitted that this company cannot be regarded as an appropriate comparable for benchmarking the international transaction of provision of IT enabled services.

59. He placed reliance on the decision of the Hon'ble Delhi High Court in the case of B.C. Management Services Pvt Ltd 302 CTR 167 and the decisions of the Tribunal in Smart Cube India Pvt Ltd vs ACIT (ITA No. 6078/Del/2015) for the AY 2011-12, NI Systems India Pvt Ltd (ITA No. 155/Bang/2017), and CSG Systems International (India) Pvt Ltd (ITA No. 2026/Bang/2017).

60. We have gone through the record in the light of these submissions made on either side. The company was directed to be excluded byin the case of B.C. Management Services Pvt Ltd 302 CTR 167 wherein the exclusion of "...comparable ICRA Techno Analytics Ltd. was on the basis that it had engaged itself in processing and providing software development and consultancy and engineering services/web development services and the reasons for execution were functional dissimilarities and that segmental data were unavailable. Again the findings of the ITAT are reasonable and based on record. The third comparable that the AO/TPO excluded is TCS E-serve. The ITAT observed that though there is a close functional similarity between that entity and the assessee, however, there is a close connection between TCS E-serve and TATA Consultancy Service Ltd. which was high brand value; that distinguished it and marked it out for exclusion. The ITAT recorded that the brand value associated with TCS Consultancy reflected impacted TCS E-serve profitability in a very positive manner. This inference too in the opinion of Court, cannot be termed as unreasonable. The rationale for exclusion is therefore upheld. The assessee was aggrieved by the inclusion of Accentia a Software Development Company. The Revenue is aggrieved by the exclusion of Accentia from the TP analysis. The DRP had

directed its deletion. We observe that the ITAT has noticed the unavailability of the segmental data so far as these comparables are concerned. Furthermore, the functionality of this entity was concerned, it is different from that of the assessee; Accentia was engaged in KPO services in the healthcare sector.”

61. In respect of this ICRA Techno Analytics Ltd, observations of the coordinate Bench in Smart Cube India Pvt Ltd vs ACIT (ITA No. 6078/Del/2015) for AY 2011-12 held that the company is engaged in the business of software development and consultancy, engineering services as well as business analytics and due to non availability of segmental data, it is not a good comparable with the assesseees who are merely captive service providers. Relevant observations are as follows:

48. As far as the Ld AR's plea of exclusion of ICRA Techno Analytics Ltd as a comparable company is concerned, learned AR has pointed that it is engaged in a diverse set of activities. As per its annual report, the company is engaged in the business of software development and consultancy, engineering services as well as business analytics. The aforesaid contentions of the Ld AR has not been controverted by Revenue. We find that the Co ordinate Bench of Tribunal in the case of B. C. Management Services (P.) Ltd. (supra) for AY 2011-12 has held it to be not a comparable on account of functional dissimilarity and on account of non availability of segmental data. Against the order of Tribunal, the matter was carried by the Revenue before the Delhi High Court. Hon'ble Delhi High Court dismissed the appeal of Revenue [(2018) 89 Taxmann.com 68 (Del)]. Before us, Ld DR has not placed any contrary binding decision to support the action of AO/TPO. In view of these facts, we direct the AO/TPO to exclude ICRA Techno Analytics Ltd on account of functional dissimilarity.

62. ICRA Techno Analytics Ltd was considered for AY 2011-12 by the Bangalore Bench of Tribunal in NI Systems India Pvt Ltd (ITA No. 155/Bang/2017) and after considering the similar arguments as are raised

in this case, it was excluded on the ground that this company is engaged in diversified activities of software development for which segmental reporting has not been provided. It was observed that this company derives its revenue from services consisting of revenues earned from software development and consultancy, licensing and sublicensing fees, Web development and hosting which is recognised to the extent of service performed; that in profit and loss account, it is observed that income has been received from services and sales, without there being bifurcation in order to understand component of income earned by this company from software development exclusively; and that it is amply clear that this company is engaged in diversified activities of software development for which segmental reporting has not been provided.

63. Yet another instance where this company fallen for judicial scrutiny is in the case of CSG Systems International (India) Pvt Ltd (ITA No. 2026/Bang/2017) wherein after considering the profile of this entity, the Tribunal found that this company is engaged in diversified activities of software development and consultancy, engineering services, web development & hosting and substantially diversified itself into domain of business analysis and business process outsourcing, and therefore, this cannot be regarded as functionally comparable with that of assessee who is rendering software development services to its AEs. On this basis, it was held that ICRA Techno Analytics Ltd. is not a good comparable.

64. A perusal of the profile of the assessee, ICRA Techno Analytics Ltd in the light of the decisions supra makes it clear that this company is engaged in diversified activities of software development, derives its revenue from services consisting of revenues earned from software

development and consultancy, licensing and sublicensing fees, Web development and hosting which is recognized to the extent of service performed, for which segmental reporting is not available; that in profit and loss account, income has been received from services and sales, without there being bifurcation in order to understand component of income earned by this company from software development exclusively. It further makes it clear that since this company is engaged in diversified activities of software development for which segmental reporting are available, this company is not a good comparable with the companies which are captive service providers like the assessee. Hence, we decline to interfere with the findings of the Id. DRP in excluding this comparable.

6. Eclerx Services Ltd.

65. Assessee's contention for rejection of **this company** was based on the functional dissimilarity and its engagement in provision of KPO services. Annual Report of this company reveals that the Company's Income from operations consist of revenue from data analytics services and process solutions which comprises of both time/unit price and fixed fee based service contracts. In respect of the Segmental reporting, the Annual Report says that the Company operates under a single primary segment i.e. data analytics and process outsourcing services. Since the company is engaged in providing analytics services which are the same as being provided by the assessee, this company is being considered as comparable.

66. According to the Revenue, as far as the issue of functional comparability is concerned, the assessee and Eclerx Services Ltd. are in ITES services and as per the notification of CBDT dt 26.9.2010, the various products or services are notified in the category of ITES, one of which falls under the category of ITES, then there is no sub classification of segment and consequently there can't be any further differentiation on the basis of KPO or BPO; that under 'Functional Similarity under TNMM' neither Taxpayer not TPO has distinguished between various service lines and verticals, and therefore, it does not matter so long the services of the company are ITES services.

67. Ld. DR submitted that similar issue was considered by the Hon'ble Mumbai Tribunal in the cases of Vodafone India Services Pvt Ltd in [2013]36 taxman.com 127 and Willis Processing Services India Pvt Ltd [2013] 30 taxmann.com 350 in which the same arguments were rejected. In the light of the decision in Willis processing Services India Pvt Ltd [2013] 30 taxmann.com 350, he submitted that it has been held therein that Eclerx Services Ltd. provides data processing and data analytical services which is similar to the services of the assessee and therefore, it cannot be said that the business activity of the assessee and this company are materially and substantially different, which cannot be compared, specifically when services of both are in the nature of ITES .

68. With reference to the decision in the case of Vodafone India Services (P.) Ltd. (Supra), he submitted that it has been held that KPO was a term given to a branch of BPO in which apart of processing data, knowledge is also applied. KPO could not be excluded from the comparability list since ITES / BPO services could not be bifurcated in high

end and low-end services. He also submitted that certain extracts of the annual report make it clear that the entity is engaged in data processing activities, which are considered to be ITES Services even if the contention of the assessee regarding safe harbor rule definition is considered. He, therefore, prayed to reject the objection of the assessee and reverse the finding of the Id. DRP in respect of this comparable.

69. Assessee's prayer for rejection of this company is again based on functional dissimilarity and that it is engaged in provision of KPO services. Id. AR submitted that Page No 6 of annual report of eClerx Services Ltd. reveals that this company is engaged in the business of providing Knowledge Process Outsourcing ('KPO') services, namely, providing data analytics, search engine analytics, competitive intelligence, channel analytics, etc. making it clear that the specific characteristics of KPO services rendered by eClerx Services and characteristics of ITES services rendered by the assessee are not similar and do not satisfy the test of comparability as provided in clause (a) of sub rule (2) of rule 10B of the Rules.

70. He placed reliance on the decisions of the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. vs. CIT (ITA No. 102/2015), PCIT vs. Evalueserve SEZ (Gurgaon) Pvt Ltd (ITA No 241/2018), PCIT vs B.C. Management Services (P.) Ltd (ITA No. 1064 & 1083 of 2017) for AY 2011-12 in support of his request for exclusion of this company on account of high value financial services relating to consultancy business and solution testing besides the web content management merchandising execution, web analytics, etc. which reflect functional

dissimilarity and absence of segmental data led to its exclusion as a comparable.

71. There is no dispute as to the functional profile of the assessee and that of the eClerx Services Ltd. However, the dispute is whether with the given functional profile, the eClerx Services Ltd. is a good comparable to the assessee. In the case of PCIT vs B.C. Management Services (P.) Ltd (ITA No. 1064 & 1083 of 2017) for AY 2011-12 Hon'ble Delhi High Court upheld the finding of the Tribunal for exclusion of the company on account of high value financial services relating to consultancy business and solution testing besides the web content management merchandising execution, web analytics, etc., and this functional dissimilarity and absence of segmental data led to its exclusion as a comparable.

72. In the case of Rampgreen Solutions Pvt. Ltd. vs. CIT (ITA No. 102/2015) the Hon'ble High Court held that eClerx Services Ltd, is into KPO services and drawing a clear distinction between the BPO and KPO companies it was held that this company shall be excluded from the final set of comparable companies as engaged in providing KPO services. In PCIT vs. Evalueserve SEZ (Gurgaon) Pvt Ltd (ITA No 241/2018) Hon'ble Jurisdictional High Court approved the finding of the Tribunal that eClerx Services Ltd. is providing KPO services and upheld the finding of ITAT for exclusion of the said company in AY 2010-11 on account of being a KPO company.

73. Quite a good number of decisions of the Tribunal, namely, Maersk Global Centres Pvt. Ltd. vs. ACIT (ITA No. 7466/Mum/2012)– Special

Bench; HSBC Electronic Data Processing India P. Ltd. vs DCIT (ITA. No. 247/Hyd/2014); Mindcrest (India) Pvt. Ltd. vs DCIT (ITA No. 7289/Mum/2012); C3i Support Services Private Limited vs. DCIT (ITA No. 435/Hyd/2014); Parexel International (India) Private Limited (ITA No. 144/Hyd/2014); United Health Group Information Services Ltd. vs. ACIT (ITA No. 6312/Del/2012); Capital IQ Information Systems (India) Pvt. Ltd. vs ACIT (ITA No. 124/Hyd/2014) ; Avineon India Pvt. Ltd. vs DCIT (ITA No. 1989/Hyd/2011), to name a few, are brought to our notice in support of the contention of the assessee that eClerx Services Ltd provides KPO services and it was also directed to be excluded from the list of comparables on that basis.

74. On a perusal of all these decisions in the light of the profiles of the assessee and eClerx Services Ltd. in juxtaposition, the irresistible inference is that eClerx Services Ltd is providing KPO services and on that ground, it is not a good comparable to the assessee who is a captive service provider to its AEs. We, therefore, find that the finding of the Id. DRP is proper and does not invite any interference by this Tribunal.

75. This brings our discussion to an end in respect of the sustainability of the exclusion of comparables by the Id. DRP in the segment of ITES. We shall now proceed to deal with a similar question in respect of Software Services Segment.

76. During the financial year relevant for the AY 2010-11, assessee entered into the international transaction of provision of software development services with its associated enterprise amounting to Rs. 3,31,67,83,807. The functional profile of the company as could be

gathered from page 60 of the paperbook is that the software services are provided by the assessee in relation to end customer contracts entered into by the associated enterprises. Part execution of contracts is sub contracted by the associated enterprise to the assessee. It is stated that the marketing function and client acquisition is performed by the associated enterprise and the assessee is responsible for execution of contracts. Considering FOREX Fluctuation as non-operating income/expense, assessee computed its operating margin at 4.47% and by selecting the Transactional Net Margin Method as the most appropriate method for the purpose of benchmarking the aforesaid international transaction, assessee computed the average OP/OC of the comparable companies at 11.43%. Since the OP/OC of the assessee at 12.48% was higher than the average OP/OC of the comparable companies at 11.43%, assessee concluded that the international transaction of provision of software development services is to be considered at arm's length price. Ld. TPO, however, considered FOREX Fluctuation as non-operating income/expense and computed the operating margin of the assessee at 4.47%. Ld. TPO conducted a fresh search for comparable companies and selected the following companies as comparable:

S. no.	Company Name	Adjusted OP/OC(%)
1.	Akshay Software Technologies Ltd.	3.19
2.	EInfochips Bangalore Ltd	69.75
3.	Evoke Technologies Pvt. Ltd	23.28

4.	E-Zest Solutions Ltd	18.42
5.	Infinite Data Systems Pvt. Ltd	88.34
6.	Infosys Ltd.	50.00
7.	Larsen & Toubro Infotech Ltd.	24.58
8.	LGS Global Ltd	12.06
9.	Mindtree Ltd.	19.10
10.	Persistent Systems Ltd.	32.45
11.	RS Software (India) Ltd	14.78
12.	Sasken Communication	22.47
13.	Tata Elxsi Ltd.	21.64
14.	Thinksoft Global Services Ltd	18.22
15.	Thirdware Solution Ltd	42.65
16.	Wipro Technology Services Ltd.	74.28
	Average	33.45

77. Consequently, Ld. TPO, proposed an adjustment of Rs. 93,53,35,000/- on account of the difference in the arms length price of the international transaction of provision of software development services and draft assessment order was passed accordingly. When the assessee, aggrieved by the said action of the upward adjustment, filed objections before the Id. DRP, by order dated 20.10.2015, Id. DRP directed the TPO to exclude four companies, Persistent Systems Ltd.; Infosys Technologies Ltd.; Infinite Data Systems Ltd; and Wipro Technologies Services Ltd from the set of comparables. Following the said directions, Ld. TPO recomputed the adjustment and reduced the same to Rs 75,47,44,000/-.

78. Challenging the directions of the DRP, Revenue is in appeal, and during the course of arguments, Ld. DR prayed the inclusion of Persistent Systems Ltd.; Infosys Technologies Ltd.; Infinite Data Systems Ltd; and Wipro Technologies Services Ltd in the list of comparables rejected by the DRP for adjustment in software segment.

79. So also, during the financial year relevant for AY 2011-12, the assessee entered into the international transaction of provision of software development services with its associated enterprise amounting to Rs. 3,276,026,399/-. By considering the FORX fluctuation as non-operating, assessee calculated their operating margin at 6.23%. Selecting the TNMM as the most appropriate method, assessee computed the average OP/OC of the comparable companies at 13.60%, and since the OP/OC of the assessee at 15.37% was higher than the average OP/OC of the comparable companies at 13.60%, assessee concluded that the international transaction of provision of software development services was considered to be undertaken at arm's length price. The TPO however, considered the FORX fluctuation as non-operating and calculated the operating margin of the assessee at 6.23%. Ld. TPO conducted fresh survey, added certain comparables and reached the following Companies as comparable to the assessee in Software segment.

S. no	Company	Adjusted OP/OC (%)
1.	Akshay Software Tech Ltd.	3.42 %
2.	E Infochips Limited	55.21 %
3.	Evoke Technologies Pvt Ltd	10.02 %

S. no	Company	Adjusted OP/OC (%)
4.	E- Zest Solutions Limited	37.98 %
5.	Infosys Limited	44.90 %
6.	Larsen & turbo infotech ltd.	21.01 %
7.	LGS Global Ltd.	13.37 %
8.	Persistent Systems and Solutions Limited	22.59 %
9.	Persistent Systems Ltd.	23.89 %
10.	R S Software (India) Ltd.	17.86 %
11.	Sasken Communication Tech Ltd.	26.46 %
12.	Wipro Technology Services Limited	55.16 %
13.	Celstream Technologies	15.06 %
14.	Acropetal Technologies Ltd. (segmental)	21.13 %
15.	Mindtree Ltd. (segmental)	11.01 %
16.	Sankhya Infotech Limited (Segmental)	23.92 %
17.	Tata Elxsi Limited	13.13 %
18.	Thirdware Solutions Ltd.	19.33 %
19.	Zylog Systems Limited	27.35 %
	Average	24.41 %

On this basis, Id. TPO made an adjustment of Rs. 56,05,77,000 on account of the difference in the arm's length price of the international transaction

of provision of software development services, and a draft assessment order was proposed on the same lines.

80. Aggrieved by said proposed adjustment, assessee filed objections and the Id. DRP vide order dated 20.10.2015 held that DRP directed the TPO to consider the FOREX fluctuation as operating in nature directed the TPO to exclude Persistent Systems Ltd.; Infosys Technologies Ltd.; E Infochips Ltd; Wipro Technologies Services Ltd; E Zest Solutions; and Acropetal Technologies Ltd. from the set of comparables. Ld. DRP also directed the TPO to include Thinksoft Global Services Ltd. in the final set of comparables. While giving effect to the directions of the Id. DRP, Id. TPO reduced the adjustment to Rs 29,90,52,000/-.

81. Revenue, therefore, challenges the exclusion of Persistent Systems Ltd.; Infosys Technologies Ltd.; E Infochips Ltd; Wipro Technologies Services Ltd; E Zest Solutions; and Acropetal Technologies Ltd. from and the inclusion of Thinksoft Global Services Ltd. in the set of comparables.

82. It is, therefore, clear that the entire dispute in respect of Software segment revolves around exclusion of Infinite Data Systems Pvt. Ltd for the AY 2010-11, E Infochips Limited, E- Zest Solutions Limited and Acropetal Technologies Ltd. for the AY 2011-12, and Infosys Ltd., Persistent Systems Ltd., and Wipro Technology Services Ltd. for both the years, and inclusion of Thinksoft Global Services Ltd. for AY2011-12. Now we shall proceed to deal with the question of comparability of these entities with the assessee.

1. Infinite Data Systems

83. Annual Report of this company describes the profile of this company stating that the company is engaged in providing a diverse set of services which inter-alia include technical consulting and infrastructure management services, and according to the note on Revenue Recognition the company derives its revenue primarily from technical support and infrastructure management services.

84. According to the TPO even though this company is providing services to a single customer, it is not a related party and the assessee is also providing services to a single customer its associated enterprises and that the technical services rendered by this company are in the nature of software services. The DRP rejected this company on account of functional dissimilarity.

85. On the aspect of functionally dissimilarity, Id. DR submitted that on perusal of the annual report of the company it is seen that this company is providing the services like technical consulting, design and development of software, maintenance, system integration, implementation, testing and infrastructure management service, and these services, except infrastructure management services, are also referred as 'Technical support services' in Revenue Recognition portion and as 'software technical Consultancy services' in Segment Reporting portion of the annual report. Further, as per company website, company is providing IT Services, Application Services, IT Infrastructure Services, Product Engineering Solutions, Mobility & Messaging Solutions & Platforms", and all the services are referred primarily as IT services. He, therefore, submitted that this company is functionally similar to the assessee. Further according to him, this company have exceptional sales

growth in business operation over the last four years i.e. 908% growth rate in sales over previous year, which belies the argument of the assessee. He argued that since the company sales for F.Y. 2008-09 were 4.74 cr. and for F.Y. 2009-10, it was 38.31 Cr. and, therefore, the actual company sales growth was only of Rs. 33.57 Cr. (38.31 – 4.74), which is a very normal growth pattern for a software development company and percentage (%) growth in sales is not presenting true and logical growth pattern in this case. He submits that in various cases, the judicial authorities held that a comparable cannot be eliminated just because it is a loss making unit and similarly a higher profit making company or higher sales growth company cannot also be automatically eliminated just because the comparable company earned higher profits than the average or having exceptional sales growth. According to him, as per the annual report of the company, the company was not having any peculiar activities during the year under consideration and the company sales growth is result of company strategy and its self efforts. Basing on all these, he argued that in comparability analysis, loss/higher growth or so called higher margin is not a determining factor unless there are any peculiar economic circumstances in a case making it functionally not comparable; that interestingly in favour of loss making companies it is generally argued that such companies should not be rejected simply because they have incurred losses in a single year as loss making companies is as much part of industry as are profit making companies and the Department agrees with the aforesaid contention, but at the same time the logic is required to be applied to the case having exceptional growth also.

86. Next contention of the Id. DR is that the turnover/ principles of economies of scale etc, have no relevance more particularly when TNMM has been selected as the most appropriate method and as per the Act/ Rules/ UN Guidelines/ OECD Guidelines, only those comparability factors are to be considered which have effect on prices and profits. Both UN & OECD Guidelines mention 'economies of scale' as comparability factors. However in this industry turnover does not play any significant role as far as the margins are concerned. There is no linkage whatsoever between the sales and the margins. He placed reliance on the decision of the Tribunal in the case of M/s ST Microelectronics India Ltd. [2011-TII-63-ITAT-DEL-TP] and M/s Symantec Software Solutions Pvt. Ltd. (2011-TII-60-ITAT-MUM-TP) where it was held that turnover is not a comparability factor unless it is proved that it actually affects prices, cost or profit arising from international transactions. He submitted that on the application of TNMM method, sales growth is not relevant and this position is in conformity with the relevant OECD guidelines which suggest that broad comparability of functions should be done for TNMM.

87. Next, he argued on the issue of High Related Party Transactions that the assessee has stated that the company is providing services to one sole customer, namely, Fujitsu Services Ltd. but a perusal of record reveals that Fujitsu Services Ltd is a unrelated entity and the assessee company is also providing services primarily to one customer, i.e. its AE, and to that extent the company is comparable to the assessee company.

88. Submissions of assessee in support of exclusion of this company are three-fold, namely, High Related Party Transactions, Extra-ordinary year of operation and Functional dissimilarity. Ld. AR invited our

attention to the annual report of this company for financial year 2008-09, wherein it is informed that the company was formed to execute the contract entered into by the parent company with Fujitsu Service Ltd. and submitted that Fujitsu Service Ltd. is an associated enterprise of Infinite Data Systems Ltd in terms of section 92B(2) of the Act. He, therefore, argues that since the company has provided the entire services to Fujitsu Services Ltd., Infinite Data Systems cannot be regarded as an uncontrolled comparable for the purpose of benchmarking analysis.

89. His next contention is that the company is not comparable to the assessee because of the incomparable financial results arising out of the exceptional circumstances in the financial year ending on 31st March, 2010 and succeeding financial years resulting in the company earning abnormal profits during the financial year 2009-10 and succeeding financial years. He further submitted that during the year ending March 31, 2010, the turnover of the company increased by 708%, i.e. from Rs. 47,407,301 to Rs. 383,160,901 in the preceding year, increasing the operating profit margin from 28.35% to 88.25%. It is brought to our notice that the TPO has also rejected companies incurring persistent losses as well as companies having exceptional year of operations and also noted that the software industry is growing at 20% and therefore, Infinite Data Systems which has grown multifold (a growth of 708% in the revenue) cannot be regarded as comparable for the purpose of benchmarking analysis. Basing on this, it is submitted that this company cannot be considered as comparable to the assessee, not being representing the normal industry trend and operating in a different market condition.

90. On the aspect of this company being functionally different from the assessee, Ld. AR submitted that the company is engaged in providing a diverse set of services which inter-alia include technical consulting and infrastructure management services; that the note on Revenue Recognition states that the company derives its revenue primarily from technical support and infrastructure management services; and that, therefore, this company cannot be regarded as comparable to the assessee, engaged in providing software development services.

91. He placed reliance on Kaplan India Pvt Ltd. vs ITO (ITA No 1481/Del/2015), Labvantage Solutions vs DCIT (ITA No. 599/Kol/2015), Freescale Semiconductor India vs DCIT (ITA No. 1263/Del/2015 and Lime Labs India Pvt Ltd vs ITO (ITA No. 1703/Del/2015) in support of his contentions.

92. We have gone through the profile of both the assessee and the comparable company, in the light of the decided cases touching the aspect of comparability. In Labvantage Solutions vs DCIT (ITA No. 599/Kol/2015), the profile of Infinite Data Systems Pvt Ltd (Merged) for the AY 2009-10 and 2010-11 is succinctly delineated in the following lines:

We find that this company had reported NCP of 88.25% . It is not in dispute that the assessee is engaged in software development. Hence comparable should also be in the companies engaged in the similar sector. We find that this company is having a different business model and engaged in providing entire gamut of solutions comprising of technical consulting, design and development of software, maintenance, system integration, implementation, testing and infrastructure management services. We find from the paper book that the revenue is primarily derived from technical support and infrastructure management services. We find that Infinite Data Systems Pvt Ltd commenced its operations on 1st January 2009 and as per segment

reporting disclosure, the company's operations predominantly relate to providing software technical consultancy services to its sole customer Fujitsu Services Limited. Further, as per the Annual Report of 2009, at Page 1, it is stated that the Holding Company M/s Infinite Computer Solutions (India) Limited signed an agreement (Build, Operate and Transfer - BOT Model) with Fujitsu Services Limited to set up Global Delivery Centers in India to provide offshore delivery capabilities to Fujitsu & Fujitsu's associated companies. We find that these facts have also been acknowledged by the Id TPO at page 77 of his order. The Id AR stated that it would be worthwhile to note that Infinite Data Systems Pvt Ltd completed its three years contract with Fujitsu, post which, the business was transferred to Fujitsu and thus the company has been merged with its Holding Company - Infinite ITA No. 599, 1051 & 617/Kol/2015 Labvantage Solution Pvt. Ltd. AY 2009-10 & 2010-11 Computer Solutions (India) Ltd during the financial year 2011-12. We are inclined to agree with the submissions of the Id AR that this Comparable Infinite Data Systems Pvt Ltd was created for purposes of transfer of business. Hence the nature of services and business model of assessee company and comparable company are entirely different. Apart from this, we also find that there exist abnormal circumstances in the said comparable. During the last 3 years, variations in margins earned show an abnormal circumstances leading to huge fluctuations and supernormal profit, the margin earned by Infinite is 88.25% which is abnormally high. It was argued that such companies which are making more than twice the arithmetical mean margin as computed by the Id TPO should not be considered as comparable. The Id AR referred to page 591 of the Paper Book where the details of the fluctuation in the revenue, profit and margins has been provided. It is true that where company in which extraordinary events had taken place during the year like major acquisitions which had impact on profits of company, it could not be selected as comparable to assessee engaged in software development.

93. InKaplan India Pvt Ltd. vs ITO (ITA No 1481/Del/2015), a coordinate Bench of this Tribunal considered the profile of this company with reference to the information furnished in the Annual Report and found that Infinite Data Systems Private Limited provides solutions that encompass technical consulting, design and development of software, maintenance, system integration, implementation, testing and

infrastructure management services besides providing software technical consultancy services. A Coordinate Bench of this Tribunal considered this comparable for the AY 2010-11 in Freescale Semiconductor India vs DCIT (ITA No. 1263/Del/2015) and recorded that, -

12. comparable company is providing services of technical consulting, design and development of software, maintenance system integration, implementation, testing and infrastructure management services. These services except infrastructure management services have also been referred to a technical support services in revenue recognition portion and has a software technical consultancy services in segment reporting portion of the annual report. According to the assessee all the services are in the nature of the software development services. The Ld. transfer pricing officer as well as the Id. DRP panel has rejected the objection of the assessee stating that this is functionally comparable with the assessee. Assessee neither design and develop a software but is providing a low end chip services where infrastructure and architect everything is provided by the group company. It does not have any research and development activities whereas in the case of the comparable company it provides that services to Fujitsu services Ltd and also maintains and design and develop a software. In view of this this comparable company cannot be said to be in the same functions as it is performed by the assessee.

94. Infinite Data Systems Private Ltd is rejected to be a good comparable for the AY 2010-11 to the assessee who provides captive software services to its AEs, in Lime Labs India Pvt Ltd vs ITO (ITA No. 1703/Del/2015) by observing that:-

13. This is TPO's comparable. The taxpayer sought exclusion of Infinite on two grounds - one, it is functionally different; and two, Infinite is earning abnormal profit to the tune of 1496%. Perusal of annual report of Infinite, available at page 56 of the paper book, shows that Infinite is a global service provider of Application Management Outsourcing, Remote Infrastructure Management Services, R&D and Intellectual Property Leveraged Solutions and related IT Services. Furthermore, when we examine revenue recognition of Infinite it shows that primarily it derives its revenue from technical support and infrastructure management services whereas the taxpayer is deriving its revenue from software development support services. Infinite is also into rendering

technical consultation, design & development of software, maintenance system integration, implementation, testing & infrastructure, management services and its segmental information is not available, whereas the taxpayer is into providing routine software development support services to its AE.

14. The taxpayer placed reliance on decision rendered by coordinate Bench of the Tribunal in DCIT vs. Exchanging Technology Services India Ltd. (ITA No.121/Del/2015) wherein Infinite was ordered to be excluded being not a valid comparable vis-à-vis Exchanging Technology which was a routine software development support services provider.

15. Furthermore, it is brought on record by the taxpayer that the profitability of Infinite is increased by 1496% as compared to the preceding year despite the fact that for computation of OP/OC, foreign exchange loss has been excluded from OC. So, we are of the considered view that super-normal profit to the tune of 1496% certainly affects OP/OC but, in this case, even foreign exchange loss has been excluded from the OC by the TPO and as such, it makes the Infinite not a valid comparable vis-à-vis the taxpayer. So, we are of the considered view that because of functional dissimilarity of Infinite vis-à-vis the taxpayer and earning super-normal profit by 1496% as compared to preceding years makes Infinite as invalid comparable. So, we direct the AO/ TPO to exclude Infinite from the final set of comparables.

95. Further, a coordinate Bench of this Tribunal under similar circumstances in the case of Saxo India Pvt. Ltd. vs. ACIT (ITA No. 6148/Del/2015) directed to exclude the companies having undertaken significant related party transactions under section 92B(2) of the Act during the year, which finding in respect of such company was not challenged by the Revenue in appeal before the Hon'ble Delhi High Court while preferring appeal in ITA No. 682/2016. In the case of NEC Technologies India Pvt Ltd (ITA No. 6283/Del/2015) also a coordinate Bench rejected a company on the basis that it was providing services to an associated enterprise in terms of section 92B(2) of the Act. In the case of Sapient Corporation Pvt Ltd vs DCIT (ITA No 5263/Del/2010) it was

held that in cases where loss making companies are being rejected, in order to perform an objective and unbiased benchmarking analysis it is imperative that high profit companies should also be rejected.

96. There is no dispute in respect of the volume of Related Party Transactions, Extra-ordinary year of operation and Functional profile of the assessee as spoken by the assessee and Infinite Data Systems Pvt Ltd as delineated from the judicial findings. The discussion in the decisions relied upon by the assessee, on the business model and the functional profile of Infinite Data Systems Pvt Ltd speaks volumes on the comparability of this entity with any other captive software development service provider like the assessee and renders it incomparable with the assessee. We therefore, uphold the findings of the Id. DRP on this aspect.

2. E-Infochips Ltd.

97. Next comparable in dispute is E-Infochips Ltd. Assessee prayed for its exclusion from the set of comparables on the ground that it is functionally different from the assessee company. Functional profile of this company, as submitted by the Id. DR is that EInfochips Limited (e-Infochips) is an IP design services company, engages in providing ASIC/Chip/SoC, embedded system, and software services and solutions; this company offers software development services, such as product lifecycle management, application development, maintenance and support, re-engineering/migration, quality assurance and testing, CRM/package implementation, and business intelligence; and embedded system design services, including turnkey product development, board design, BSP and RTOS design, codecs/stacks design, sustenance engineering, and product reengineering. The company also provides

Chip/ASIC/SoC design and verification services and solutions through verification methodologies and hardware verification languages, physical design and verification; ASIC prototyping on FPGA, post-silicon validation, system-level validation, FPGA based system design services, and industry-standard design and verification IP development. The company operates in India, Germany, Canada, the United Kingdom, and the United States. E-infochips is headquartered in Ahmadabad, India. Ld. DR, therefore pleaded that the assessee and this company are functionally similar inasmuch as TNMM requires broad similarity but not identical functional profile for the selection of comparable.

98. Per contra, according to the Id. AR this company is engaged in 3 business segments, namely, software development, ITES and products, but the segmental data is not available in the annual report of the company and on that score this company cannot be regarded as an appropriate comparable for benchmarking the international transaction of software services undertaken by the assessee. Ld. AR placed reliance on the decisions in Alcatel Lucent India Pvt Ltd (ITA No 6856/Del/2015) (AY 2011-12), Cadence Design Systems (I) Pvt Ltd vs ACIT (ITA No. 6315/Del/2015) and ACIT vs Mobileum (India) Pvt Ltd (ITA No. 945/Mum/2016) to say that when segmental information is not available, comparability cannot be resorted to.

99. From the contentions of the parties, it is clear that the bone of contention is only in respect of availability or non-availability of segmental data of E-Infochips Ltd. It is only a matter of fact to be demonstrated with reference to the Annual report for the AY 2011-12 for which year this dispute is concerned. However, unfortunately no

attempt is made to establish this fact with reference to the Financials/Annual report of this company. No such material is produced. Only reliance on the decisions where this comparable is discussed is made. Though the discussion on this comparable in Alcatel Lucent India Pvt Ltd (ITA No 6856/Del/2015) (AY 2011-12) and Cadence Design Systems (I) Pvt Ltd vs ACIT (ITA No. 6315/Del/2015) does not clinch the issue, Tribunal recorded in ACIT vs Mobileum (India) Pvt Ltd (ITA No. 945/Mum/2016) that on perusal of the financials, it was found that the quantum of the ITeS and other services is more than 25%, however, segmental data is not available and so recorded in Cadence Design Systems (I) Pvt Ltd (supra).

100. Be that as it may, it is noticed by adjudicatory authority in Mobileum (India) Pvt Ltd (supra) that for the AY 2011-12, though the E-Infochips Ltd was doing diversified business, no segmental information was available and that was the ground for excluding the same from the set of comparables in the Software development segment. These circumstances justify the findings of the Id. DRP and we confirm the same.

3. E Zest Solutions

101. As could be gathered from the annual report, this Company's activities predominantly revolve around computer Software Development services, considering the nature of Company's business and operations, there is only one reportable segment - business and/or geographical in accordance with the requirements of the Accounting Standard 17 -Segment Reporting/1 notified in the Companies (Accounting Standards) Rules 2006.", and as per the further information furnished in

the annual report e-Zest is an SEI-CMMi Level-3 & . ISO 9001:2008 certified Product Engineering and Software Development Company, having special expertise in emerging technologies such as Cloud, SciaS, Business Intelligence and Mobility.

102. Assessee's resistance to include this company in the final set of comparables is based on the ground that this company is engaged in development and sale of software products and cannot be regarded as an appropriate comparable for benchmarking the international transaction of provision of software services undertaken by the assessee and is having expertise in emerging technologies such as cloud computing, business intelligence, mobility etc., therefore, it renders the company and in appropriate comparable for benchmarking the routine software services rendered by the assessee. Ld. TPO noted that the assessee canvassed the broader portfolio of services (diversified services) as the basis for the non-comparability of this company.

103. Ld. TPO, however, observed that it is possible that this company is providing specialised services within the field of software development services, but the diesel services which are being provided to the software product developers and companies not earning Revenue is from the development of products for its own use and, therefore, this entity is developing software for clients and not selling products. On this score, Ld. TPO rejected the contention of the assessee that this entity is not a good comparable with the assessee.

104. Ld. DRP, however, did not agree with the findings of the Ld. TPO and held that the FAR of this company is different from the assessee and, therefore, this entity needs to be excluded from the list of comparables.

105. Ld. DR heavily relied on the reasoning and findings of the Ld. TPO in respect of this company. He placed reliance on the decisions in Cadence Design Systems (I) Pvt Ltd vs ACIT (ITA No. 6315/Del/2015), ACIT vs Mobileum (India) Pvt Ltd (ITA No. 945/Mum/2016) and Clear 2 Pay India Pvt Ltd vs ITO (ITA No. 2788/Del/2017) (AY 2011-12).

106. Insofar as the profile of E Zest Solutions is concerned, it is a matter of record and borne by the annual report of the company. Further it is noted in the decisions relied upon, **that** E Zest Solutions is engaged into diversified range of software activities and its annual report shows that this company is an SEI-CMMi level III and ISO 9001:2008 certified product engineering and software development company, having special expertise in emerging technologies such as cloud, SAAS, business intelligence and mobility, and predicate it has been serving clients in more than eight industries across the globe with over 2000 software professionals on-board. The product engineering services/outsourced product development services of this company include the product design and development, product feature enhancement, product platform migration, software product testing, product maintenance and support, product release and license management, SAAS/SOA services, web 2.0 services etc ; enterprise application development services include customer relationship management, enterprise resource planning, business intelligence, knowledge management, enterprise application integration, consulting etc; ID services include global on-

site/offshore software development, custom software development/bespoke software development, independent software testing, RIA/Ajax application development etc and technology expertise of this company includes the technology competency centers in relation to Microsoft competency Centre, Sun Java competency Centre, open source competency Centre, Cloud computing practice, mobility practice and BI practice.

107. By no stretch of imagination can anyone say that the e-Zest Solutions Ltd which is rendering product development services and high-end technical services which come under the category of KPO services would be comparable with a captive software development company like the assessee and on the ground is not comparable with a company which is into software development services. We consequently find that the Ld. DRP is justified in excluding this company from the final set of comparables to benchmark the international transaction of software development.

4. Acropetal Technologies Ltd

108. As could be found from the annual report of Acropetal Technologies Ltd, this company is into the engineering design service, information technology service, and healthcare and this company employees cost is less than 25% of the total cost and also that this company is engaged in significant R&D activities and incurring significant advertisement, marketing and promotion expenses as a percentage of sale.

109. Assessee objected its inclusion in the comparables on the grounds of functional dissimilarity and the company being engaged in significant R&D activities also. Ld. TPO observed that the assessee had not provided the data for carrying out working capital presumably since the adjustment is adverse in its case, but for carrying out the adjustment the average working capital is calculated and the same is allocated to IT segment in the ratio of the turnover. Ld. DRP in their order observed that this company needs to be excluded due to a different FAR.

110. Ld. DR placed reliance on the observations of the Ld. TPO and while **inviting** our attention to the order of the Ld. TPO submitted that the inclusion of this entity is justified; whereas it is the contention of the Ld. AR that company is engaged in development and sale of software products; that the employee cost of this company of Rs 13.51 crores which constitutes only 9.53% of the turnover of this company of 141.66 crores, that the company does not satisfy the filters applied by the TPO and therefore, deserves to be excluded from the list of comparable companies. He further submitted that from schedule 9 of the annual report of this company it is clear that the company has outsourced significant portion of its business and has paid an amount of Rs 55.77 crore to outside technical sub-contractors. Since this company has outsourced a major part of its business, it cannot, therefore, be regarded as an appropriate comparable for the purpose of benchmarking the international transactions of the assessee.

111. We have gone through the record in the light of the submissions made on either side. In the case of Rampgreen Solutions Pvt. Ltd. vs. CIT (ITA No. 102/2015) the Hon'ble Delhi High Court held that companies

outsourcing significant portion of their business cannot be regarded as appropriate comparable. Further this company was directed to be excluded as comparable by a coordinate Bench of this Tribunal in the case of Omniglobe Information Technology (ITA No 1380/Del/2016) as comparable for AY 2011-12 to the companies like assessee who do not outsource the significant portion of their business.

Similar exclusion was made by the Bangalore Bench of the Tribunal in the case of ACIT vs. Flextronics Technologies (India) (P.) Ltd. — (2019) 101 taxmann.com 348.

112. We have also gone through the observations of the Tribunal in respect of the Acropetal Technologies Ltd, wherein the arguments similar to the ones advanced in this matter are considered and this comparable is excluded. All these additions have application to the facts involved in this case for this assessment year, in such decisions we hold that Acropetal Technologies Ltd is not a proper comparable to the assessee and its exclusion by the Ld. DRP cannot be found fault with. Such an exclusion is accordingly confirmed.

5. and 6. Infosys Technologies Ltd. and Wipro Technologies Services Ltd

113. Coming to the objection of the assessee to include Infosys Technologies Ltd. and Wipro Technologies Services Ltd. and Wipro Technologies Services Ltd in the final list of comparables, such objections are similar and are based on Ownership of intangibles/brand. No doubt, these two companies owned significant intangibles and brand value. Ld. TPO, however, rejected the submission on behalf of the assessee that brand has helped in better margins is not correct, stating

that the brand name may have helped Infosys Technologies Ltd. and Wipro Technologies Services Ltd in increasing its number of clients & retention of existing clients and thus an increase in its market share, but it has not necessarily resulted in better profit margins. According to Ld. TPO Brand may bring more revenues but not necessarily higher margins; that conversely some companies despite having brand name have earned lower margins. Further, Ld. TPO contended that, any brand comes with a cost i.e. huge expenses are required to be incurred to build brand value, that, therefore, a brand may generate revenue but with a cost compensating any extra benefit, if any derived from such effort. Ld. DR submitted that the ITAT, Vizag in the case of LG Polymers India Pvt. Ltd. (2011-TII-97-ITAT-vizag-TP) has held that brand name is only one of the factors but not the only factor which affects profitability, several other factors go into the profitability of a concern. He therefore submits that since the assessee has also failed to establish that the payment of TATA brand equity and ownership of intangibles is leading to high profit margin earned by the company and these kinds of intangibles are available in almost all the comparables.

114. Per contra, in respect of the ownership of intangibles/brand, Ld. AR submitted that the company owns and exploits a valuable trade mark namely 'Infosys' and therefore, cannot be regarded as an appropriate comparable for the purpose of benchmarking the international transactions undertaken by a captive service provider; that companies owning/exploiting valuable intangibles such as patents, brand etc cannot be compared with a routine captive service provider such as the assessee; that companies owning and exploiting valuable intangibles such

as patents, brands etc. enjoys significant competitive advantage in the form of premium pricing and/or higher volume of business leading to higher profitability. He further submitted that abnormal margins are usually a result of abnormal circumstances or availability of intangible asset as a distinct advantage to the company which is not available to its competitors operating in the same industry and that the assessee does not own such similar intangible assets to enable it to earn higher margins.

115. It is an undeniable fact that Infosys Ltd is inter-alia engaged in development and sale of software products. The software products developed by the company includes Finacle TM, Finacle core banking solution. In the case of Agnity India Technologies Pvt. Ltd vs. ITO (ITA No. 3856/Del/2010), wherein it was held as under:

“It is argued that the case of the assessee is not comparable with Infosys Technologies Ltd., the reason being that the latter is giant in the area of development of software and it assumes all risks, leading to higher profit. On the other hand, the assessee is a captive unit of its parent company in the USA and it assumes only limited currency risk. Having considered these points, we are of the view that the case of aforesaid Infosys and the assessee are not comparable at all as seen from the financial data etc. of the two companies mentioned earlier in this order”

Appeal filed by the Revenue was dismissed by the Hon’ble Delhi High Court in ITA No. 1204/2011.

116. Hon’ble Delhi High Court in the case of PCIT vs. New River Software Services (P.) Ltd. IT APPEAL NO. 924 OF 2016 following the decision in case of Agnity (supra) upheld the exclusion of Infosys BPO Ltd. from the set of comparable companies on this score.

117. Apart from that a coordinate Bench of this Tribunal in the

appellant's own case of AY 2015-16 (ITA No 6687/Del/2019) rejected Infosys BPO Ltd. on the basis that the company enjoys the benefits associated with brand Infosys. Accordingly, it is submitted that Infosys Ltd. too, cannot be regarded as an appropriate comparable for the purpose of benchmarking the international transactions undertaken by the appellant.

No change in the facts and circumstances from those involved in the assessment year 2015-16 to the present assessment year are brought to our notice and there is no reason as to why a different conclusion could be reached for this assessment year. While respectfully following the view taken in assessee's own case for the assessment year 2015-16, we hold that Infosys Technologies Ltd. And Wipro Technologies Services Ltd are not at all a proper comparable with the assessee and their exclusion by the Ld. DRP is justified. We declined to interfere with the same.

7. Persistent Systems Ltd

118. Persistent systems pvt. Ltd is predominantly in outsourced product development services for independent software vendors and enterprises. OPD services include research, engineering services such as development, testing quality assurance, performance tuning, usability engineering, porting, documentation services, deployment, services including on-site professional services, pre-sales and after services including support maintenance etc

119. Stating that this company is functionally dissimilar and is engaged in the sale of software products assessee **prayed** to exclude this company

from the final list of comparables. Ld. DR submits that the TPO has discussed in great detail about the contention of the assessee regarding the entity being engaged on development of software products, and concluded that the entity had product revenue only to the extent of 7.2%. Basing on this the Ld. TPO concluded that the entity was a software service provider. Ld. DR further submitted that the assessee has considered itself this company as a comparable in the transfer pricing study report.

120. Ld. DR further submitted that the company was considered as a comparable by the assessee itself in its own TP report. At that time there was no reason to consider this entity as a non comparable. However, the assessee has objected to inclusion of this entity, ostensibly because the entity has a high margin.

121. Per contra it is the submission on behalf of the assessee that Persistent Systems Ltd. is engaged in the business of development and sale of software products and therefore, cannot be regarded as comparable to the assessee, a captive software service provider. It is further submitted that in terms of business description given in the Annual report of this company, it is stated that the company specializes in software products, services and technology innovations. Ld. AR lastly submitted that the segmental profitability of this company from provision of software services is not available in the annual report and accordingly, Persistent Systems Ltd cannot be regarded as an appropriate comparable for the purpose of benchmarking analysis. Ld. AR placed reliance on various decisions in support of his contentions.

122. We have gone through the material placed before us in support of respective contentions. It is submitted on behalf of the assessee that the companies like Saxo India Pvt. Ltd., Cash Edge India (Pvt.) Ltd. ,Pyramid IT Consulting Private, Equant Solutions India Pvt. Ltd and NEC Technologies India Pvt Ltd are on the same footing as that of the assessee and the functions performed, assets deployed and risk undertaken by these companies is identical to the assessee. In the case of these companies, in Saxo India Pvt. Ltd. vs. ACIT (ITA No. 6148/Del/2015), ash Edge India (Pvt.) Ltd. vs. ITO (ITA No. 64/Del/2015), Pyramid IT Consulting Private vs. ITO (ITA No. 5401/Del/2012), Equant Solutions India Pvt. Ltd. vs. DCIT (ITA No. 1202/Del/2015), and NEC Technologies India Pvt Ltd (ITA No 6283/Del/2015) respectively the coordinate Bench of this Tribunal considered the comparability of these entities with Persistent Systems Ltd, and rejected the Persistent Systems Ltd as a good comparable.

123. On a careful consideration of these decisions, we find that there is no dispute that the functions performed by Persistent systems pvt. Ltd include outsourcing of product development services for independent software vendors and enterprises, and such OPD services include research, engineering services such as development, testing quality assurance, performance tuning, usability engineering, porting, documentation services, deployment, services including on-site professional services, pre-sales and after services including support maintenance etc which are nowhere comparable to the functions performed by the assessee. Further, there is no dispute that the segmental profitability of Persistent systems pvt. Ltd from provision of software services is not available. As a matter of facton these two

grounds, namely, functional dissimilarity and non-availability of segmental figures is a good ground to reject this entity from the list of comparables and, therefore, we find every justification for the Ld. DRP in their conclusion. We accordingly uphold the same.

Thinksoft Global Services Ltd.

124. According to the annual report, Thinksoft Global Services Ltd. is engaged in provision of software verification and validation services which is a subset of software services; that software validation is a part of software development life cycle and the skills required for software validation and similar to those required for software development; and that as per the website softwaretestingmentor.com (a comprehensive website for software testing) a software tester requires knowledge of requirement analysis, design and coding.

125. According to the assessee Thinksoft Global Solutions Ltd., being a company engaged in provision of Software validation services is functionally comparable to the assessee, engaged in provision of software services.Ld. TPO , however, rejected Thinksoft Global Services Ltd. on the basis that it is engaged in provision of software validation and verification services and therefore cannot be regarded as an appropriate comparable to the assessee. Ld. DRP, however held that the company is functionally comparable to the assessee and therefore ought to have been included in the final set of comparable companies.

126. Ld. DR placing reliance on the findings of the Ld. TPO; whereas Ld. AR submitted that the DRP rightly directed the TPO to include Thinksoft Global Services Ltd. in the final set of comparable companies for the

reasons of functional comparability. Ld. AR placed reliance on the decisions in the case of ST Ericsson India Private Limited, Marvel India Private Limited and Cadence Design Systems, similarly placed companies.

127. On a perusal of the decisions in the cases of similarly placed companies and relied upon by the assessee, we find that in ST Ericsson India Pvt Ltd (ITA No. 6247/Del/2015) for AY 2011-12 a coordinate Bench of this Tribunal while rejecting similar contention of the TPO held that Thinksoft Global Solutions Ltd is functionally comparable to a software service provider. Similar is the finding in the cases of ACIT vs Marvel India Pvt Ltd (IT(TP) A NO. 384&471/Bang/2016) for AY 2011-12 and Cadence Design Systems (I) Pvt Ltd vs ACIT (ITA No. 6315/Del/2015). No specific parameter is brought to our notice to render the Thinksoft Global Services Ltd is not comparable to a software service provider. In the circumstances while following the ratio of the decisions relied upon by the assessee for the assessment year 2011-12, we find that Thinksoft Global Services Ltd is a comparable to the software service provider. Findings of the Ld. DRP are therefore, upheld.

128. In the result, both the appeals of the Revenue are allowed in part for statistical purpose.

Order pronounced in the open court on 17th day of November, 2020.

Sd/-

(N.K. BILLAIYA)
ACCOUNTANT MEMBER
Dated: 17/11/2020
'aks'

Sd/-

(K. NARASIMHA CHARY)
JUDICIAL MEMBER