

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "C", PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND  
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.219/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

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| BMC Software India Private Limited,<br>Business Bay, Wing 1,<br>Tower B, 9 <sup>th</sup> Floor, Survey No.103,<br>Hissa No.2, Airport Road,<br>Yerwada, Pune – 411 016<br>PAN : AABCB6110E | Vs. | DCIT, Circle-1(1),<br>Pune |
| Appellant  |     | Respondent                 |

आयकर अपील सं. / ITA No.209/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

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| DCIT, Circle-1(1),<br>Pune | Vs. | BMC Software India Private Limited,<br>Business Bay, Wing 1,<br>Tower B, 9 <sup>th</sup> Floor, Survey No.103,<br>Hissa No.2, Airport Road,<br>Yerwada, Pune – 411 016<br>PAN : AABCB6110E |
| Appellant                  |     | Respondent   |

Assessee by

Shri Madhur Agarwal

Revenue by

Shri Shivraj More and  
Shri Mahadevan A.M. Krishnan

Date of hearing

15-01-2021

Date of pronouncement

18-01-2021

आदेश / ORDER

PER R.S.SYAL, VP :

These two cross appeals - one by the assessee and other by the Revenue – arise out of the final assessment order dated 31-12-2014 passed by the Assessing Officer (AO) u/s.143(3)

r.w.s.144C(13) of the Income-tax Act, 1961 (hereinafter called 'the Act') in relation to the assessment year 2010-11.

2. Briefly stated, the facts of the case are that the assessee is a domestic company engaged in providing Software Development services and Sales support services to BMC, US and BMC Software, Inc., which is a company based in Houston, Texas, US. The assessee is solely engaged in providing such services to BMC group entities. Return was filed declaring total income of Rs.3.02 crore. Certain international transactions were reported in Form No. 3CEB. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of the international transactions.

#### I. PROVISION OF SOFTWARE DEVELOPMENT SERVICES

3. The first issue raised in this appeal is against the transfer pricing addition of Rs.15,11,98,577/- made by the AO in the international transaction of "Software Development services". The facts anent to this are that the assessee declared value of the international transaction of 'Provision of Software Development services' at Rs.2,49,14,47,288/-. The assessee applied Transactional Net Margin Method (TNMM) as the most appropriate method for showing the international transaction at

ALP. The assessee initially selected 9 comparables on the basis of three years' data. On being pointed out by the TPO for considering data for the current year alone, the assessee excluded 3 companies from the existing list and also included fresh 3 companies thereby making a list of 9 comparables on the basis of single year data. The TPO retained 2 companies from the assessee's list and included 7 fresh companies. He, accordingly, determined the ALP of the international transaction of providing "Software Development services" at Rs.2,77,77,86,057/- by taking mean margin of comparables at 26.51%. This resulted into proposing a transfer pricing adjustment of Rs.28,46,97,425/-. The assessee assailed before the Dispute Resolution Panel (DRP) various aspects of the ALP determination by the TPO as incorporated by the AO in the draft order. The DRP excluded one company and inducted fresh 3 companies thereby making tally of comparables companies at 11. The AO, in the final assessment order, recomputed the amount of transfer pricing adjustment in Software Development services segment at Rs.15,11,98,577/-. Both the sides have come up in appeal on their respective stands.

4. We have heard the rival submissions through Virtual Court and gone through the relevant material on record. Admittedly, the

assessee applied the TNM method on transactional level which got accepted by the TPO. The dispute in the determination of the ALP in Software Development services segment is confined only to the comparability or otherwise of certain companies finally included or excluded by the DRP. In order to properly appreciate the comparability of a company, it is significant to first understand the functional profile of the assessee company under the Software Development services segment. The assessee provides Software Development services to its AEs which include new product development; and upgradation and modification of existing products. The assessee is required to provide the above software services in accordance with the specifications provided by BMC overseas entities from time to time. The IPRs in all the deliverables remain with BMC overseas entities. Conceptualization of the required software products is done by BMC overseas entity. The assessee, on the basis of the requirements of the clients and market, works on designing of the product in consultation with BMC overseas entities. Functional specification and requirement analysis for the Software Development is jointly undertaken by the assessee and BMC overseas entity. However, the assessee undertakes coding and

development of the software modules as per the functional specifications and requirement analysis. Thereafter, testing is done by the assessee. The overseas entities undertake coding and testing of the software in respect of modules which are not developed by the assessee. In certain cases, the assessee undertakes modifications of existing products on the basis of customized requirements. At times, the assessee directly liaises with the customers to understand their exact requirements.

5. The assessee entered into an Agreement with BMC, Houston; BMC, Singapore; and BMC, Netherlands effective from 01-04-2009 for rendering all the services, including the software development services. A copy of the Agreement has been placed at page 1812 onwards of the paper book. Nature of services to be provided by the assessee has been set out in clause 2.1 of the Agreement, which states that the assessee shall render some of the services to Users (i.e. BMC overseas entities) as listed in Appendix. Appendix-A to the Agreement sets out the services to be rendered by the assessee to BMC overseas entities. Insofar as the Software Development services are concerned, the relevant clauses in Appendix-A are (a) and (f). Clause (a) refers to “Production of computer software by way of architecting,

engineering, design, development, testing and support of software”. Clause (f) talks of `Website services`. Compensation has been fixed at certain mark up. On going through the relevant clauses of the Agreement and other attending details, it becomes apparent that the nature of services rendered by the assessee under this Agreement comprises of product development on the basis of specifications given by BMC overseas entities and also upgradation and modification of existing products. With the above understanding of the nature of services, we now proceed to determine the comparability or otherwise of certain companies challenged by both the sides before the Tribunal.

6. Before embarking upon the comparability analysis, it would be apt to take note of the final set of comparables under the Software Development services segment which has resulted after giving effect to the directions of the DRP, as under :

| Sr.No. | Name of the comparable                  | PLI margin<br>OP/OC<br>(%) |
|--------|---|----------------------------|
| 1      | Persistent Systems Private Ltd.         | 29.51                      |
| 2      | Sasken Communication Technologies Ltd.  | 17.54                      |
| 3      | Mindtree Ltd.                           | 16.69                      |
| 4      | Kals Information Technology System Ltd. | 24.56                      |
| 5      | Acropetal (Segmental)                   | 40.07                      |
| 6      | Thirdware Solution Ltd.                 | 32.63                      |
| 7      | Goldstone Technologies Ltd.             | 20.15                      |
| 8      | LGS Global Systems Ltd.                 | 11.95                      |
| 9      | R.S. Software India Ltd.                | 10.21                      |
| 10     | Thinksoft Global Services Ltd.          | 14.71                      |

|    |                         |       |
|----|-------------------------|-------|
| 11 | Silverline Technologies | 6.71  |
|    | Arithmetical Mean       | 20.43 |

7. Whereas the assessee has challenged inclusion of Kals Information Technology System Ltd; Acropetal (Segment); Thirdware Solution Ltd; and Persistent Systems Private Ltd; the Revenue has challenged the inclusion of R.S. Software India Ltd.; Thinksoft Global Services Ltd.; and Silverline Technologies.

8. We will first deal with the companies challenged by the assessee.

(a) Kals Information Technology System Ltd.:

9. The TPO included this company in the list of comparables despite the assessee's objections, *inter alia*, that the company was also a Software company since its inception. The assessee could not get any succor from the DRP on this count.

10. We have examined the Annual report of this company, whose copy has been placed at page 565 onwards of the paper book. Profit and Loss account is available at page 582 which shows "Sales, Servicing and Training" revenue at Rs.2,30,45,144/- besides "Other income". Schedule-10 gives break up of sales revenue. It comprises of 'Income from Software Development – Export' at Rs.2,16,92,935/-; 'Translation &

Interpretation’ at Rs.10,84,248/; and `Training receipts’ at Rs.2,67,961/-. Notes to the Financial statements indicate that: “The company is engaged in development of Software and Software Products since its inception’. The fact that the company is into Software products is further evidenced from the figure of “Inventories” in its balance sheet. Further, the list of operating expenses includes an item of “Software consumption from inventory” at Rs.11.00 lakh. The `Segmental revenue’ of this company has bifurcated total operational revenue into two parts, namely, `Application Software’ - Rs.2,16,92,935/- and `Training’ - Rs.13,52,209/-, which matches with the total revenue from operations. Thus it is manifest that insofar as the revenue from sale of products and development of software is concerned, the same has been combined under the segment “Application Software”. The above discussion deciphers that this company is engaged in software products as well as Software Development services, income from both of which streams has been clubbed under the segment of “Application Software”. Since the assessee in the instant case is involved only in rendering Software Development services to its AEs and is not into any software products, we hold that this company cannot be considered as a

comparable. We, therefore, direct to exclude it from the list of comparables.

(b) Acropetal (Segmental) :

11. The TPO included this company in the list of comparables despite the assessee's objections of the same being functionally different and also rendering on-site services. The TPO negated such objections by holding that on-site development expenses were less than 50% of total expenses and therefore, on-site expenditure was not a significant factor. The assessee remained unsuccessful before the DRP.

12. Having heard both the sides and gone through the relevant material on record, we find from the Annual report of the company, a copy of which has been provided at page 593 onwards of the paper book, that this company is rendering on-site development services to a greater extent. Out of total expenses of Rs.87.26 crore including operating and non-operating, this company incurred employees related on-site development expenses to the tune of Rs.55.85 crore, which includes a sum of Rs.42.32 crore towards on-site development expenses only. Thus, it emerges that roughly 50% of the total expenses incurred by this company are towards on-site development costs. As against that,

the assessee is not rendering any on-site development services. It goes without saying that on-site services business model entails its own risks and rewards, which are incomparable to the services rendered from the business model of rendering services from own premises. One cannot construe both as one and the same. The assessee under consideration is not rendering on-site services. Notwithstanding that, it is further seen that this company is also into Products, which is borne out from its balance sheet showing value of “Inventories and work in progress” at Rs.3.37 crore. It is still further noted that the company has clubbed both the Product Development services and on-site services in one overall segment of “Information Technology services”. Thus, it is overt that the IT services segment of this company, which has been construed by the TPO as comparable, cannot be so held as the assessee is neither rendering on-site services nor engaged in software products. We, therefore, direct to exclude this company from the list of comparables.

(c) Thirdware Solution Ltd.:

13. The TPO proposed to include this company in the list of comparables which was objected to by the assessee for functional

differences. The TPO did not accept the assessee's contention. No relief was allowed by the DRP as well.

14. After considering the rival submissions and perusing the relevant material on record, we find from the Annual report of this company, whose copy has been placed from page 1752 onwards of the paper book, that it has Sales revenue of Rs.67.56 crore. Break-up of such revenue is available at Schedule-12, giving figures of Exports from SEZ and STPI units; Revenue from subscription; Sale of license; and Software services. This indicates that this company, apart from rendering software services, is also engaged in software products. Segmental information has been given on the basis of geographical segments. Thus, it becomes crystal clear that no information regarding revenue from software services distinct from other activities is available on record. As the assessee is engaged only in rendering software development services, this company on the basis of figures available on record, cannot be considered as comparable. We, therefore, direct to exclude it from the list of comparables.

(d) Persistent Systems Private Ltd.:

15. The assessee included this company on the basis of three years' data. However, on single year data basis, the assessee excluded it on the basis of turnover filter, which did not find favour with the TPO, who continued with its inclusion without making any separate discussion in his order passed u/s.92CA(3) of the Act. The DRP also did not change the fortune of the assessee by observing that its turnover was only Rs.504 crore which was not materially different from that of the assessee.

16. The Id. AR contended that though the assessee initially did not include this company on the basis of turnover filter, however, later on it was realized that this company was not functionally similar. He did not emphasize on the turnover filter for the exclusion of this company before the Tribunal but submitted that his entire focus was on functional differences warranting exclusion from the list of comparables.

17. We observe from the material on record, as has also been accepted by the Id. AR, that the contention about the functional dissimilarity between the assessee and Persistent Systems Pvt. Ltd. was never raised before the authorities below. As such, neither the TPO nor the DRP could examine such a contention.

Since the assessee has abandoned before the Tribunal the basis of turnover filter as was originally taken and harped on a new base of functional differences for exclusion of this company for the first time, we, being an appellate authority, cannot straight away accept or reject such contention unless the authorities below apply their mind to the functional differences as has been sought by the assessee. Without going into the merits, we set aside the impugned order and remit the matter to the file of AO/TPO with a direction to examine the assessee's contention on functional dissimilarities and then decide the question of its inclusion.

18. Apart from the above exclusions, the assessee has also agitated the non-inclusion of two companies in the list of comparables. The first is Maveric Systems Limited and the second is Quintegra Solutions Limited.

(i) Maveric Systems Ltd.:

19. The TPO rejected this company from the list of comparables on the ground that its Annual report for the relevant financial year was not available in the public domain. In addition, the TPO also noticed that foreign exchange earnings of this company were less than 75%. The assessee submitted Annual report of the company

for the next year, which also contained figures for the year under consideration. The DRP echoed the order of the AO excluding Maveric Systems Ltd. from the list of comparables by noticing that not only the quantitative information but the qualitative information for the year was also required, which could depict business activities of the company for deciding the functional profile comparability, Related party transactions, happening of extraordinary events, reasons for high loss or profits and segmental working etc. In the absence of the availability of the Annual report of this company for the year under consideration, the DRP did not consider it appropriate to include the same in the list of comparables.

20. We have heard the rival submissions and gone through the relevant material on record. The assessee has placed on record a copy of the Annual report of the company for the year under consideration by claiming that the same is now available in the public domain. As regards the TPO's contention that the foreign exchange earnings of this company were less than 75%, we find from the Schedule 9 that it earned revenues from overseas at Rs.34.86 crore as against Domestic revenue at Rs.11.61 crore. Thus, it is evident that foreign exchange revenue of this company

is more than 75%. Since the comparability or otherwise of this company has not been examined on merits because of the non-availability of the Annual report for the year under consideration, which has now been placed on record, we direct the AO/TPO to examine whether this company is comparable on merits.

(ii) Quintegra Solutions Ltd.:

21. The TPO did not include this company in the list of comparables on the ground that it was engaged in rendering on-site activities. The DRP approved the exclusion of this company by also noticing that it was a loss making company and hence, could not be included in the list of comparables.

22. The reason given by the TPO for excluding this company is its engagement in rendering on-site activities. We are unable to corroborate this version from the material on record. We have examined the Annual report of this company which has been placed at 1335 onwards of the paper book. Page 1361 contains the details of 'Expenditure in foreign currency'. It enlists 'Travel Foreign' of Rs.13.31 lakh and 'Expenditure met by Branch offices' amounting to Rs.24.38 crore. It is this detail of the incurring of expenditure by foreign branches, which seems to have prompted the TPO to infer that the company earned on-site

revenue. In our view incurring of expenses in foreign currency by foreign branches cannot be equated with the rendering of on-site services. Moreover, the Id. DR also failed to point out anywhere from the Annual report of this company that it rendered any on-site services.

23. The DRP assigned another reason for its exclusion, being, loss incurred by this company for the year under consideration *vis-a-vis* the assessee's work on cost plus business model. In this regard, it is overt that no company can be excluded simply on the basis of loss or low profit margin registered in a year. When average of the profit margins of the otherwise functionally comparable companies is taken, differences due to a particular higher or lower profit margin are ironed out. This proposition is borne out from the judgment of the Hon'ble Delhi High Court in *ChrysCapital Investment Advisors (India) P. Ltd. VS. DCIT (2015) 376 ITR 183 (Del)*.

24. However, a company may call for exclusion if it is consistently posting losses due to exceptional reasons. The Hon'ble jurisdictional High Court in *CIT Vs. Goldman Sachs (India) Securities (P) Ltd. (2016) 290 CTR 236 (Bom)* did not treat a company as a persistent loss making company qualifying

for exclusion, which did not incur loss in the year of review and immediately two earlier years in a row.

25. The Id. AR stated that Quintegra Solutions Ltd. incurred losses only in this year and in the immediately preceding year. A year prior to that, it was not a loss making company. This was fortified by the respective Annual reports of this company. As this company did not persistently incur losses, we hold that it cannot be excluded on this criterion. This company is, therefore, directed to be included in the list of comparables.

26. The Revenue, in its appeal, is aggrieved by the exclusion of three companies from the list of comparables.

27. The TPO excluded RS Software India Ltd., Thinksoft Global Services Pvt. Ltd. and Silverline Technologies Ltd. by holding that they were engaged in rendering on-site services. The DRP did not find any merit in the view point of the TPO that rendering on-site services was any different from rendering services from one's own facility. On merits also, the DRP held that these companies were not involved in rendering on-site services.

28. Having heard the rival submissions, we find that the view point of the DRP that rendering on-site services does not affect

comparability with a company rendering services from its own facility/premises, is not correct. It has been held by the Tribunal in umpteen decisions that on-site services business model is altogether different, which distorts comparability with a company rendering services from its own facilities. We, therefore, disapprove, in principle, the view point taken by the DRP.

29. The DRP also found on merits that none of these three companies was actually engaged in rendering on-site services. We have perused the Annual report of RS Software, which is available at page 1062 onwards of the paper book. It is seen that except for incurring expenses in foreign currency, there is no mention of rendering on-site services. This company has also branches in certain countries outside India and the expenses in foreign currency were incurred by such branches. The Id. DR also could not point out from the Annual report of this company that it rendered any on-site services. In such circumstances, we direct to include this company in the list of comparables.

30. Now we turn to Silverline Technologies Ltd. The DRP gave the same reason that this company was not engaged in rendering on-site services. We have examined the Annual report of this company, whose copy is available at page 1270 of the

paper book. Page 1295 contains the figure of 'Expenditure in foreign currency' to the tune of Rs.26,13,74,026/-. As against that, total income from sales and service of this company stands at Rs.30.88 crore. Thus, it is evident that the expenses in foreign currency have resulted in earning income. This being a company chosen by the assessee, the onus is on it to show the comparability and prove the fact that it was not engaged in rendering on-site services. Unlike the other company discussed immediately hereinabove, the Id. AR could not point out from the Annual report that this company had any branches outside India and the 'Expenditure in foreign currency' related to such foreign branches. Since the expenses in foreign currency constitute a substantial percentage of its revenue and there is no reference to any foreign branch, it becomes evident that this company is engaged in rendering on-site services and the major component of its revenue is from such on-site services only. That being the position, this company loses its comparability tag with the assessee company. We, therefore, reverse the view of the DRP and direct to exclude it from the list of comparables.

31. Somewhat similar is the position regarding Thinksoft Global Services Pvt. Ltd. We have examined the Annual report of this

company which has been placed on record. The Id. DR invited our attention towards page 1147 of the Paper book categorically indicating that this company earned revenue from on-site services. The Id. AR accepted this position. We, therefore, direct to exclude this company also from the list of comparables and consequently reverse the view taken by the DRP on this issue.

## II. PROVISION OF I.T.E.S.:

32. The assessee declared an international transaction of 'Provision of IT enabled services' with transacted value of Rs.10,21,67,498/-. It applied the Transactional Net Marginal Method (TNMM) for demonstrating that the international transaction was at Arm's Length Price (ALP). The TPO made certain alterations to the list of comparables drawn by the assessee. The assessee challenged certain companies before the DRP. After giving effect to the direction of the DRP, the TPO drew a final list of comparables consisting of 10 companies vide his letter dated 31-12-2014 addressed to the AO for passing the assessment order. The assessee is aggrieved by the inclusion of four companies in the list of comparables: Accentia Technologies Ltd.; Coral Hubs Limited (earlier known as Vishal Information

Technologies Ltd.); Jeevan Softech (Segment); and Informed Technologies Ltd.

33. In order to appreciate the comparability or otherwise of the companies challenged by the assessee, it is *sine qua non* to first ascertain the true nature of services rendered by the assessee under the segment of Provision of IT enabled services. We have gone through the Agreement entered into by the assessee with its AE, namely, BMC Software Inc., under which the assessee rendered the services. In fact, it is a composite agreement for provision of Software Development services; ITES; and Sales Support services. We have referred to this Agreement in the earlier part of the order while discussing the nature of Software Development services. Insofar as the instant international transaction of the Provision of ITES is concerned, we find from Appendix-A that the services rendered by the assessee under this segment include:-

- b. Call centre and other support centre services, including IT support, financial applications support, human resource applications support, sales applications support and other internal IT business support applications.
- c. Remote maintenance
- d. Data processing services

- e. Back-office operations including payroll processing, receivables, accounting, tracking and general accounting work etc.
- g. Revenue accounting
- i. Procurement services
- j. Human resource support services
- k. Information Technology Enabled Support services

34. Having underscored the nature of services rendered by the assessee under this segment, we now proceed to examine the comparability or otherwise of these four companies *ad seriatim*.

(i) Accentia Technologies Ltd. :

35. This company was chosen by the TPO as comparable. The assessee objected to its inclusion. The TPO ordered to include it in the list of comparables by relying on the direction given by the DRP for the immediately preceding assessment year, 2009-10. No relief was allowed by the DRP.

36. Having heard the rival submissions and gone through the relevant material on record, we find that the TPO included this company in the list of comparables by relying on the direction given by the DRP for the assessment year 2009-10. The assessee assailed the final assessment order passed for such assessment year before the Tribunal. Vide its order dated 22-08-2019, the

Tribunal in ITA No.189/PUN/2014 has directed to exclude this company from the list of comparables. The DR fairly conceded that the facts and circumstances of this company for the extant year are *mutatis mutandis* similar to those of the preceding year. Following the precedent, we direct to exclude this company from the list of comparables.

(ii) Coral Hubs Ltd. (Vishal Technologies Ltd.) :

37. The assessee disputed the comparability of this company before the TPO but without success. The DRP also did not approve the objections of the assessee.

38. The Annual report of this company for the relevant year has been perused, a copy of which has been paced at page 1550 onwards of the paper book. Its Profit and loss account is available at page 1614 of the paper book. As against the Sales amounting to Rs.88.36 crore, this company incurred Operating expenses of Rs.54.47 crore and Personnel cost at Rs.1.89 crore. Details of Operating expenses are available at page 1620 of the paper book. It can be seen from Schedule 15 containing such details, that this company incurred Data entry charges, Vendor payments and Expenses on conversion of books into POD titles amounting to Rs.54.85 crore. After the adjustment of opening and closing work

in progress of IT enabled services, the net figure of Rs.54.47 has been ascertained and taken to the Profit and loss account. Thus, it is apparent that this company is mainly engaged in outsourcing its business activities which is further proved from the fact that the Personnel cost is only Rs.1.89 crore as against outsourcing cost of Rs.54.47 crore. It goes without saying that outsourcing services is an altogether different business model *vis-à-vis* rendering services by engaging one's own employees and facilities. It is further noticed that the Hon'ble Bombay High Court in *PCIT Vs. BNY Mellon International Operations (India) (P). Ltd. (2018) 255 Taxman 397 (Bom.)* has held that an assessee rendering BPO services cannot be compared with the companies providing KPO services. Coral Hubs Limited has been considered as non-comparable on this count also. In view of the foregoing discussion, we direct to exclude this company from the list of comparables.

(iii) Jeevan Softech (BPO segment) :

39. The assessee objected to the inclusion of this company which came to be jettisoned by the TPO. No succor was allowed by the DRP, against which the assessee has come up in appeal before the Tribunal.

40. We have examined the Annual report of this company whose copy is available at page 1643 onwards of the paper book. It is pertinent to mention that the TPO has considered only BPO segment of this company for the purposes of inclusion in the list of comparables. The Profit and loss account of this company indicates income under different sub-heads including IT Enabled Services to the tune of Rs.1,74,43,276/-. The Id. AR initially contended that ITES segment cannot be considered as comparable as the same includes not only income from BPO operations but also from ERP division and later on it was emphasized that if at all, its inclusion was to be made, then ITES segment as a whole should be included.

41. The first leg of the objection is not tenable. The break-up of ITES revenue has been given by the company under 'Segmental reporting' at page 1674 of the paper book, which has two parts, namely, BPO operations - Rs.141.10 lakh and ERP - Rs.33.33 lakh. Not only that, profit has also been given separately therein for both, with the figure of profit from BPO operations at Rs.52.99 lakh. The view point of the assessee that ITES segment is not comparable because of the inclusion of ERP revenue is, therefore, not sustainable because the figures of revenue and

profit from the BPO segment is separately available and the nature of work admittedly matches with that of the assessee.

42. The second leg of the Id. AR's argument that if at all this company is to be included, then its full ITES segment should be taken. Again, we do not find any merit in this contention as well.

The Directors' report unequivocally divulges that the nature of work under the ERP division is all in all different. It has been mentioned that: 'Your ERP division has also successfully completed the project implementation for various clients. For the current financial year, ERP division has chalked out new marketing strategies with a focused approach developing specialized vertical solutions for the prospects across India, standard horizontal markets and foray into the professional services segment for overseas clients'. Thus, it is palpable that the ERP division is not engaged in rendering any ITES. The same, therefore, cannot be clubbed with the BPO revenues of this company, for which separate figures are available in the 'Segmental reporting'. We, therefore, countenance the inclusion of the BPO segment of this company with Revenue of Rs.141.10 lakh and income of Rs.52.99 lakh.

(iv) Informed Technologies Ltd.

43. The assessee has challenged the inclusion of this company with the help of an additional ground. Inclusion of this company was not challenged either before the TPO or the DRP and the same has been assailed before the Tribunal for the first time.

44. Several orders have been passed by various Benches of the Tribunal holding that an assessee is entitled to challenge a comparable for the first time before the Tribunal notwithstanding the fact that it remained uncontested before the TPO or the DPO. In view of the fact that the comparability of this company has not been examined by the authorities below, we direct the AO/TPO to scrutinize the comparability of Informed Technology and then decide on its inclusion or otherwise in the final tally of comparables.

III SALES SUPPORT SERVICES :

45. The assessee reported an international transaction of 'Provision of Sales Support services' with transacted value of Rs.12,86,10,541/- It applied separate TNMM for showing that the international transaction was at the ALP. The TPO did not separately examine the international transaction but considered it along with the other segment.

46. Instantly, the assessee has challenged only the inclusion of ICRA Online Ltd. (Segment). The assessee's objection about functional differences was overturned by the TPO observing that this company was considered as comparable by the Pune Benches of the Tribunal in *Eaton Technologies Pvt. Ltd. Vs. DCIT (ITA No.1621/PUN/2011)* vide its order dated 11-01-2013 for the assessment year 2007-08. No relief was allowed by the DRP on the inclusion of ICRA online Ltd. in the list of comparables.

47. Nature of services under this international transaction can be culled out from the Agreement referred to hereinabove. It has been stated as "Sales Support services in relation to User's products sold in India and the Asia Pacific region either directly or through channel partners". Thus, primarily the assessee rendered Sales Support services to its AE.

48. Now we turn to examine the comparability of ICRA Online Ltd. Annual report of this company has been placed at page 1732 onwards of the paper book. The TPO has included Information Services segment of this company for the purpose of comparability. Nature of operations under this segment have been discussed at page 1735 by stating that: "The Information Services LOB reported a robust 42% growth in 2009-10 over the

previous fiscal, driven by the introduction of an upgraded version of its flagship product MFI Explorer and the launch of a new product MFI Impact, besides by the sharper focus that was brought into the domains of data, content and research”.

49. At this stage, it is pertinent to note that the international transaction under consideration is provision of Sales Support services. As against that, the selected segment of the company is Information Services segment, which is deriving revenue from its flagship product MFI Explorer and MFI Impact. As the revenue under this segment is from the Software products, the same, in our considered opinion, cannot be compared with the rendition of Sales Support services.

50. Qua the observation of the TPO that this company was considered as comparable by the Pune Benches of the Tribunal in *Eaton Technologies Pvt. Ltd.*, we find from the copy of such Tribunal order placed on record that the inclusion of this company along with three other companies has been restored by the Tribunal for a fresh consideration by the TPO. As the Directors' report of this company categorically declares that the income from the Information services segment pertains to the Software products, the same ergo does not qualify for inclusion. We,

therefore, direct to exclude this company from the list of comparables.

51. Ground No.12 of the assessee's appeal is against not allowing working capital adjustment.

52. We find from page 85 of the directions given by the DRP that the AO was directed to examine the computation of working capital adjustment worked out by the assessee. However, while giving effect to the directions of the DRP, this direction remained to be complied with. We, therefore, direct the AO/TPO to give effect to the direction given by the DRP as contained in para 2.14.3.

53. The only other ground is against not allowing the Risk Adjustment.

54. This is a recurring issue. The matter came up for consideration before the Tribunal in assessee's own case for the assessment year 2008-09. Following the order passed by the Tribunal for the assessment year 2006-07, the Tribunal restored the matter to the file of AO/TPO for computing risk adjustment after granting reasonable opportunity of hearing to the assessee. The relevant discussion has been made at para 15 of its order for the assessment year 2008-09. Following the consistent view

taken in assessee's own case for the earlier years, we remit the matter to the file of AO/TPO for computing the risk adjustment in the light of the directions given for earlier years.

55. To sum up, we set-aside the impugned order on the determination of the ALP in the three segments of the assessee, viz., Software Development services; IT enabled services; and Sales Support services and remit the matter to the file of AO/TPO for fresh determination of the ALP in the light of our observations made above. Needless to say, the assessee will be allowed reasonable opportunity of hearing before taken any decision.

56. In the result, both the appeals are partly allowed.

Order pronounced in the Open Court on 18<sup>th</sup> January, 2021.

Sd/-  
**(S.S.VISWANETHRA RAVI)**  
**JUDICIAL MEMBER**

Sd/-  
**(R.S.SYAL)**  
**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 18<sup>th</sup> January, 2021  
सतीश

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr.CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "सी" /  
DR 'C', ITAT, Pune;
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,****// True Copy //**Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

|     |  | Date       |       |
|-----|--|------------|-------|
| 1.  | Draft dictated on                                | 15-01-2021 | Sr.PS |
| 2.  | Draft placed before author                       | 18-01-2021 | Sr.PS |
| 3.  | Draft proposed & placed before the second member |            | JM    |
| 4.  | Draft discussed/approved by Second Member.       |            | JM    |
| 5.  | Approved Draft comes to the Sr.PS/PS             |            | Sr.PS |
| 6.  | Kept for pronouncement on                        |            | Sr.PS |
| 7.  | Date of uploading order                          |            | Sr.PS |
| 8.  | File sent to the Bench Clerk                     |            | Sr.PS |
| 9.  | Date on which file goes to the Head Clerk        |            |       |
| 10. | Date on which file goes to the A.R.              |            |       |
| 11. | Date of dispatch of Order.                       |            |       |

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