

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C”BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A Nos.627 & 651/Bang/2017
Assessment Years:2012-13

UL India Pvt. Ltd. Kalyani Platina, 3 rd Floor Block No.1, N.24, EPIP Zone, Phase-II, Whitefield Bangalore PAN NO :AAACU2468F	Vs.	Deputy Commissioner of Income-tax Circle 7(1)(1) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, A.R.
Respondent by	:	Shri Pradeep Kumar, D.R.

Date of Hearing	:	09.03.2021
Date of Pronouncement	:	11.03.2021

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

Both the appeals filed by the assessee are related to assessment year 2012-13.

2. At the time of hearing, the Ld. A.R. submitted that the A.O. had passed a rectification order u/s 154 of the Income-tax Act,1961 [‘the Act’ for short] after passing of the final assessment order for assessment year 2012-13. In the original assessment order, the AO did not give effect to the directions given by Ld Dispute Resolution Panel (DRP) and the same was given effect to in the rectification order passed u/s 154 of the Act. Hence, out of abandoned caution,

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the assessee has preferred appeals against both the orders. The appeal filed against the order dated 31.1.2017 passed u/s 154 of the Act is numbered as IT(TP)A No.651/Bang/2017. The appeal numbered as IT(TP)A No.627/Bang/2017 is directed against the final assessment order dated 31.1.2017 passed by the A.O. He submitted that the issues contested by the assessee in both the appeals are identical in nature.

3. In view of the above discussed facts, one of the appeals shall become infructuous. Since the demand has been enhanced in the order passed u/s 154 of the Act, we adjudicate the grounds urged therein and accordingly dismiss the appeal numbered as IT(TP)A No.627/Bang/2017 as infructuous.

4. The Ld. A.R. has furnished notes to arguments. According to the same, all the grounds urged by the assessee relate to the following issues:-

- a) Transfer Pricing adjustment under "Certification service segment".
- b) Transfer Pricing adjustment under "ITES segment".
- c) Addition on account of change in the method of revenue recognition
- d) Denial of TDS credit.
- e) Non-granting of depreciation on foreign exchange loss.

5. The assessee is an Indian company and is a subsidiary of M/s. Underwriters Laboratories Inc., U.S.A. The assessee herein provides product safety testing and certification services. The above said services have been titled as "Conformity Assessment Services". The functions performed by the assessee have been described as under by TPO:-

“Certification Services: The Conformity Assessment Services (“CAS”) Unit in UL India provides the product testing and quality and safety certification services to the manufacturers as an independent service provider. The contracts to provide services to Indian clients are entered into by UL India with the clients. In case, UL India does not have the requisite equipment and technical expertise, it subcontracts the functions of testing of product samples and undertaking audits according to prescribed guidelines and standards set by UL Inc., to another entity in UL Group, which has the necessary capability as well as capacity to conduct the testing and engineering review activity. UL India pays subcontracting charges to the respective UL entity at cost plus a mark-up of 5%. On successful completion of the testing services, UL India issues the certification to the client. UL India pays royalty at 5% of the revenue to UL Inc for the use of UL mark for certification purposes. However, based on the capability and capacity of UL India or other UL Group entities also subcontract the testing and certification work to UL India. In such cases, UL India gets compensated t cost plus a mark-up of 15%.”

6. Besides the above, the assessee has also provided IT enabled services to its Associated Enterprises. The A.O. made Transfer pricing adjustment of Rs.17.40 crores in respect of Certification service segment and Rs.26.14 lakhs in respect of ITES segment aggregating to Rs.17.66 lakhs. After the DRP’s direction, the aggregate amount of transfer pricing adjustment came to be enhanced to Rs.25.46 crores. The assessee is challenging above said TP adjustments made in both the segments.

7. With regard to Transfer Pricing adjustment made in respect of Certification Service Segment, the Ld A.R submitted that an identical issue was examined by the co-ordinate bench in the assessee’s own case in AY 2009-10 in IT(TP)A No.291/Bang/2014 dated 20-09-2019 and the matter was restored back to the file of AO/TPO with a set of directions for examining is afresh.

8. We heard Ld D.R on this issue and perused the record. We notice that the co-ordinate bench has restored an identical issue in AY 2009-10 to the file of AO/TPO with following observations:-

“14 We have heard the rival submissions. The Id. counsel for the assessee submitted that the law with regard to treating foreign exchange loss/gain as part of operating profit/loss has been well settled in several decisions and in this regard relied on the decision of ITAT Bangalore Bench in the case of *SAP Labs India (P) Ltd. (supra)*. He submitted that the TPO while computing Profit Level Indicator (PLI) of the assessee in the certification services segment, has included certain items of expenses, whereas the assessee has excluded those expenses as being extra-ordinary in nature and not having impact on the operating margin of the assessee. These objections, however, were not met by the DRP, despite submissions made by the assessee before the DRP. Thirdly, it was submitted that as far as Bangalore Benches of the Tribunal are concerned, the threshold limit for application of RPT filter for excluding comparable companies, should be 15% of the total revenue being with related parties and in this regard placed reliance on the decision rendered in 24/7 Customer Pvt. Ltd. (ITA No.227/Bang/2010), Sony India Private Ltd. reported in (2009) 315 ITR (80) 150 (Del.) wherein it has been held that comparables having RPT of up to 15% of total revenues can be considered as comparable company. Fourthly, it was submitted that the adjustment and addition to the total income should be made u/s. 92 of the Act only in respect of international transaction and not in respect of transactions with Non-AE. In this regard, the Id. counsel pointed out that out of the total revenue from certification services of Rs.30.57 crores, only 10.19 crores was transactions with AE and therefore the adjustment should be reflected only to the transactions of AE and not the entire transaction. Lastly, it was submitted that foreign exchange loss/gain to the extent it relates to the capital account, should not be included as part of the operating profit/loss.

15 The Id. DR submitted that no details of foreign exchange loss on account of capital or revenue items is available nor has the Id.

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counsel for the assessee pointed out any instance of foreign exchange loss/gain on account of capital transactions which was considered as operating expense. With regard to the RPT filter, the Id. DR submitted that the RPT filter has to be applied to all the comparable companies chosen ultimately and not only to the comparable companies the inclusion of which the assessee objects. As far as the plea of the assessee to restrict determination of ALP only to the comparables, the Id. DR pointed out that in carrying out the certification services the assessee had sub-contracted part of the work to the AE and paid Rs.3,60,48,227. It has to be examined as to whether such a payment will have any impact on the payments received by the assessee from AE for rendering certification services.

16 We have given a careful consideration to the rival submissions and are of the view that the issue with regard to determination of ALP in the certification services segment should be remitted back to the TPO. Accordingly, the issue is restored back to the TPO for fresh consideration with the following directions:-

- (1) The foreign exchange loss/gain to the extent it relates to revenue items and are directly related to certification services rendered by the assessee should be considered as part of the operating profit or loss, as the case may be. The law in this regard is well settled by the decision rendered by the ITAT Bangalore Bench in the case of *SAP Labs (supra)* and *Auto Desk India Pvt. Ltd. Vs. DCIT IT(TP)A.No.540 & 541/Bang/2013*.
- (2) The TPO should restrict the addition only in respect of international transactions with the AE. However, the submission made by the Id. DR with regard to a part of the certification services having been sub-contracted to the AE and receipt of sub-contracting charges from the AE to the extent the same will have impact on the consideration received from the AE for rendering the certification services should also be examined by the TPO.

- (3) Errors, if any, in the computation of margins of comparables should be looked into by the TPO in the set aside proceedings.
- (4) Threshold limit for applying RPT filter should be 15% or 25% of sales depending upon the availability of comparable companies after all exclusions as held by the Tribunal in the case of Auto Desk India Pvt. Ltd. Vs. DCIT [2018] 96 taxmann.com 263 (Bang.Trib.) [para 24 to 25].

17 The above directions will be sufficient to take care of the grievances projected by the assessee in ground Nos. 5 & 6 and additional grounds No.6 (d), 26 & 27. The TPO will afford opportunity of being heard to the assessee before deciding the issue.”

9. We also notice that the decision rendered by the co-ordinate bench in AY 2009-10 has been followed by another co-ordinate bench in the assessee’s own case in AY 2013-14 in IT(TP)A No.2/Bang/2018 dated 25.02.2021. Accordingly, following the decisions rendered by the co-ordinate benches, we restore this issue to the file of AO/TPO with similar directions.

10. The next issue contested by the assessee relates to the Transfer pricing adjustment made in respect of ITES segment. Rejecting the TP study of the assessee, the TPO selected following ten comparable companies:-

<i>Sl.No.</i>	<i>Name of the case</i>	<i>Operating income</i>	<i>Operating cost</i>	<i>OP/OC</i>
1	<i>Accentia Technologies Ltd.</i>	<i>126,38,02,000</i>	<i>112,89,16,000</i>	<i>11.75</i>
2	<i>Universal Print Systems Ltd. (Seg)(BPO)</i>	<i>6,17,67,000</i>	<i>3,87,49,000</i>	<i>52.46</i>
3	<i>Informed Technologies India Ltd.</i>	<i>1,96,36,431</i>	<i>1,82,45,770</i>	<i>6.08</i>
4	<i>Infosys BPO Ltd.</i>	<i>1316,75,11,974</i>	<i>962,91,06,964</i>	<i>36.30</i>
5	<i>Jindal Intellicom Ltd.</i>	<i>30,27,51,875</i>	<i>30,29,02,990</i>	<i>-0.05</i>
6	<i>Microgenetic Systems Ltd.</i>	<i>1,29,93,217</i>	<i>1,08,63,390</i>	<i>19.61</i>
7	<i>TCS E-Serve Ltd.</i>	<i>15,78,44,000</i>	<i>9,64,28,000</i>	<i>63.69</i>
8	<i>B N R Udyog Ltd. (Seg)(Medical Transcription)</i>	<i>1,47,04,000</i>	<i>97,87,000</i>	<i>41.58</i>
9	<i>Excel Infoways Ltd. (Seg)(IT/BVPO)</i>	<i>790,96,95,000</i>	<i>559,06,04,000</i>	<i>29.79</i>
10	<i>e4e Healthcare Services Pvt. Ltd.</i>	<i>89,50,04,209</i>	<i>74,59,23,078</i>	<i>19.85</i>
Average PLI				28.11%

11. Before Ld DRP, the assessee sought exclusion of following five comparable companies:-

- (a) Universal Print Systems Ltd
- (b) Infosys BPO Ltd
- (c) BNR Udyog Ltd
- (d) Excel Infoway Ltd
- (e) TCS E-serve Ltd

The Ld DRP did not accept the contentions of the assessee with regard to above said five comparable companies. Hence, the assessee seeks exclusion of above companies. The Ld A.R placed his reliance on the decision rendered by co-ordinate bench in the case of Kennametal Shared Services P Ltd (IT(TP)A No.185/Bang/2017 dated 14.08.2019) and submitted that the co-ordinate bench has held that the above said five comparable companies are not good comparables for a captive Software development service provider.

12. We heard Ld D.R and perused the record. We notice that the co-ordinate bench, in the case of Kennametal Shared Services P Ltd (supra) has followed the decision rendered by Bangalore bench of Tribunal in the case of Mobility Infotech India Pvt Ltd (IT(TP)A No.2055/Bang/2016 dated 08-08-2018). For the sake of convenience, we extract below the decision rendered by the co-ordinate bench in the case of Mobility Infotech India P Ltd (supra) in respect of above said five comparable companies:-

6. Universal Print Systems Ltd., (seg: BPO)

6.1 The ld AR for the assessee submitted that this company should be rejected as a comparable for the following reasons.

(i) Fails the employees cost Filter IT(TP)A No.2055/B/16 According to the ld AR, this company fails the employee filter of Rs.25% applied at the entity level. The employee cost filter of the assessee works out to 18.56% (viz. employee cost of Rs.5,27,11,884/- / by total operating revenue of Rs.28,40,79,094/-). It is

submitted that since details relating to employee cost allowable to specific segments is not available, the same is taken at entity level.

(ii) Functionally different The ld AR submits that as per page 69 of its Annual report, this company is engaged in pre-press services and as pre-press activity is connected to the printing industry/process, it is not comparable to call entire services rendered by the assessee. Therefore, it requires to be rejected as a comparable to the assessee since it is functionally different from companies providing ITES. In support of this proposition, the ld AR placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of M/s XL Health Corporation India Pvt. Ltd., in IT(TP)A No.2311/Bang/2016 for asst. year 2012-13.

6.2 The ld DR for Revenue supported the orders of the authorities below. According to the ld DR, in similar facts and circumstances a co-ordinate bench in the case of CGI Information Systems & Management Consultation Pvt. Ltd., in IT(TP)A No.183/Bang/2017 dated 11/4/2018 for asst. year 2012-13, at para 47 to 52 thereof has remanded back the issue of comparability analysis at the segmental level to the file of the TPO for examination and verification of the assessee's claim. It is prayed that the same be followed in this case also.

6.3.1 We have heard the rival contentions and perused and carefully considered the factual material on record; including the judicial pronouncements cited. In the facts and circumstances of the case, as narrated above, we are of the considered view that on similar facts, as in the case on hand a co-ordinate bench of this Tribunal in the case of CGI Information Systems and Management Consultation Pvt. Ltd., also for asst. year 2012-13 (Supra), has remanded the issue of comparability analysis at the segmental level to the file of the TPO for examination and verification, by holding as under at paras 47 to 52 as thereof:-

47. The next submission of the learned counsel for the Assessee was with regard to exclusion of 2 comparable companies from the list of 7 comparable companies that remain after the order of the DRP. The first comparable company sought to be excluded is Universal Print Systems Ltd. This company was chosen as a comparable company by the TPO. In reply to the proposal of the TPO to include this company as a comparable company, the Assessee vide its letter dated 22.12.2015 had pointed out its objections to including this company as a comparable company. A copy of the said objection is at page-785 of the Assessee's paper book. The Assessee pointed out that the OP/TC of this company as worked out by the TPO at 59.40% was wrong and unallocated costs as per the annual report should be IT(TP)A No.2055/B/16 allocated to BPO segment and if that is done then the OP/TC of this company will be only 51.80%. The Assessee further pointed out (Page764 of paper book) that the TPO had applied revenue filter of more than 75% being from non-financial service income. The Assessee pointed out that the percentage of income from ITES was only 21.63% of the total revenue from operations of this company as per its annual report. The Assessee also pointed out that in the Pre-press BPO segment this company was providing integrated print solutions to its

customers, which includes scanning, design/layout, trapping, hand-outlined clipping path and image masking and magazine and catalogue publishing. The Assessee submitted that the aforesaid services are not in the nature of ITES. The Assessee pointed out that as per the safe harbor rules introduced by the CBDT ITES has been defined as business process outsourcing services provided mainly with the assistance or use of information technology. It was also submitted that this company does not satisfy the definition of ITES as contained in Rule 10TA(e) of the Rules. Since use of information technology is absent in the various services provided by this company, it cannot be regarded as ITES company. The Assessee also submitted that this company fails the employee cost filter. The employee cost filter requires that the employees cost incurred by the company must be more than 25% of its revenue.

48. The TPO at page-20 of his order has dealt with the above objections by observing as follows:

(a) Pre-Press BPO unit provides back office support services.

(b) This company has four major segments viz., Repro, Label Printing, Offset Printing and Pre press BPO. The employee cost of pre press BPO was more than 25% of the revenue from pre press BPO and therefore the employee cost filter is satisfied in the case of this company. (c) On the service revenue filter viz., the requirement that a comparable company must have revenue from rendering services of more than 75% of its total revenue, the TPO again held that the pre-press BPO segment's entire income is from services and therefore this objection is not to be accepted.

49. On objections by the Assessee before the DRP, the DRP confirmed the action of the TPO. One of the objection before the DRP was that this company did not figure in the list of companies engaged in ITES. On this objection the DRP held that though this company did not figure in the list of companies in ITES in the main search of capital line and prowess database but on a segmental search these two companies satisfied the requirement of being considered as companies engaged in providing ITES.

50. Aggrieved by the directions of the DRP, the Assessee is in appeal before the Tribunal. The learned counsel for the Assessee reiterated submissions that were made before the TPO/DRP. In particular it was submitted that the service revenue filter was applied by the TPO himself at the entity level and on such search this company was not regarded as engaged in providing ITES. At this stage the TPO ought to IT(TP)A No.2055/B/16 have dropped this company as a comparable company because this filter has to be applied at the entity level and not at the segmental level. The learned DR submitted that if the service revenue filter is applied at the segmental level there can be no objection by the Assessee. She relied on the order of the DRP/TPO.

51. The requirements of Rule 10B (1) (2) & (3) of the Rules in the matter of comparability of companies under TNMM needs to be seen. The same reads as follows: "10B. (1) For the purposes of sub-section (2) of [section 92C](#), the arm's

length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :--

(a) to (d)

(e) transactional net margin method, by which,--

(i)the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii)the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii)the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the IT(TP)A No.2055/B/16 international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv)the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

(v)the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction.

(2) For the purposes of sub-rule (1), the comparability of an international transaction with an uncontrolled transaction shall be judged with reference to the following, namely:--

(a)the specific characteristics of the property transferred or services provided in either transaction;

(b)the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

(c)the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d)conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the

markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of IT(TP)A No.2055/B/16 competition and whether the markets are wholesale or retail.

(3) An uncontrolled transaction shall be comparable to an international transaction if--

(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or

(ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences."

52. There appears to be no bar in the Rules referred to above to considering segmental data under TNMM because the comparison is of "net profit margin realized by the enterprise from an international transaction" with the "net profit realized from a comparable uncontrolled transaction". Therefore comparison is of similar transaction. When segmental information is available and is not disputed, it cannot be argued that filters have to be applied at entity level. It cannot be argued that when the TPO himself applied the filters at the entity level he was not entitled to apply the filters at segmental level. As we have already stated if clear segmental information is available the filters can be applied at the segmental level in TNMM. Therefore the objection with regard to this company failing the employee cost filter and service revenue filter in our view was rightly rejected by the TPO and DRP. It is however seen that this company has four segments viz., Repro, Label Printing, Offset Printing and Pre press BPO.

Whether the label printing and offset printing segments supplement the functions performed in the Pre-press BPO segment has to be seen. We therefore set aside the order of the DRP in this regard and remand for fresh consideration by the TPO the comparability of this company. In terms of Rule 10B(3) of the rules the profit margins of Pre-Press BPO have to be adjusted taking into account the fact that two other segments supplement the pre-press BPO segment. If such adjustment cannot be reasonably or accurately made then this company has to be excluded from the list of comparable companies. The TPO for this purpose can use his powers u/s.133(6) of the Act to get required details from this company. As far as the argument that this company fails functional comparability, we find that none of the objections raised by the Assessee in this regard about lack of information about allied services performed by the pre-press BPO segment of this company and the break-up of the revenue from such allied services have been dealt with specifically by the TPO or DRP. Since the comparability of this company is being remanded to be TPO for consideration of adjustments as mentioned above, the objection with regard to functional comparability should also be looked into by the TPO in the remand proceedings on the basis of materials which he may gather

u/s.133(6) of the Act. The Assessee should be given opportunity of being heard by the TPO before the issue is decided by the TPO."

6.3.2 Respectfully following the decision of the co-ordinate bench in the case of CGI Information Systems and Management Consultants Pvt. Ltd., also for asst. year 2012-13, to which one of IT(TP)A No.2055/B/16 is party, we remand the issue of the comparability of this company; Universal Print Systems Ltd., back to the file of the TPO for examination and verification of issues raised by the assessee of functional comparability and employees cost filter of 25% at segmental level, which the AO may gather information u/s 133(6) of the Act. Needless to add the assessee shall be afforded adequate opportunity of being heard and to file details/submissions required, which shall be duly considered by TPO before deciding the issue.

7. Infosys BPO Ltd.,

7.1 The ld AR for the assessee submitted that this company, Infosys, BPO Ltd., should be rejected/excluded from the list of comparables for the following reasons:-

(i) Brand Value, intangibles, functionally different According to the ld AR, this company has its delivery centres around the globe, whereas the assessee renders services only from India. It is submitted that while the assessee only provides call centre services, Infosys BPO Ltd., has multiple lines of business and renders high end services in the nature of KPO services. It is also submitted that Infosys BPO Ltd., has huge intangible amounts and high brand value. As per the FAR analysis, Infosys BPO Ltd., bears full fledged risk, whereas the assessee operates at minimal risk. It is submitted that on the basis of the above facts, Infosys BPO Ltd., is functionally different and not comparable to the assessee and therefore should be rejected as a comparable.

(ii) Extraordinary event during the year The AR submitted that during the year, Infosys BPO Ltd., acquired the Portland Group PTY Ltd., which is an extraordinary event and could affect its comparability.

In support of assessee's claim for rejection/exclusion of M/s Infosys BPO Ltd., from the list of comparables, the ld AR placed reliance on, inter alia, the decision of the co-ordinate bench in the case of (i) CGI Information Systems & Management Consultation Pvt. Ltd., in ITA No.183/Bang/2017 dated 11/4/2018 for asst. year 2012-13.

7.2 Per contra, the ld DR for revenue supported the orders of the authorities below in including this company in the final set of comparables.

7.3 We have heard the rival contention and perused and carefully considered the material on record; including judicial pronouncement cited. We find that on similar facts, a co-ordinate bench of this Tribunal in the case of CGI Information Systems & Management Controls Pvt. Ltd., for asst. year 2012-13 (Supra) directed that Infosys BPO Ltd., be excluded from the final list of

comparables as it is not comparable with a company merely providing ITES, because of its brand value and extraordinary events in the previous years relevant to asst. year 2012-13 viz., the acquisition of an Australia based company which had effect on its profits. Following the aforesaid decision of the co-ordinate bench in the case of CGI Information Systems & Management Consultants Pvt. Ltd., for asst. year 2012-13, we hold and direct that M/s Infosys BPO Ltd., be excluded from the final set of comparables.

8. BNR Udyog Ltd., (Seg- Medical Transcription)

8.1 The ld AR for the assessee submitted that BNR Udyog Ltd., (Seg - Medical Transcription) ('BNR') should be rejected and excluded from the final set of comparables for the following reasons:-

(i) Functionally Different According to the ld AR for the assessee, this company 'BNR' is functionally different as it is engaged in multiple business lines, i.e IT & ITES, e-governance and construction activities.

(ii) Fails the RPT filter of 25% on entity basis as segmental transaction details of medical transcription are not available.

(iii) Incorrect Margin Computation Without prejudice, the ld AR submits that as per segmental information the medical transcription segment has earned revenues of Rs.147.40 lakhs whereas in Notes 2-19, sub schedule to the profit and loss account, revenue from medical transcription services is shown at Rs.138.55 lakhs The margins therefore need to be corrected.

8.2 The ld DR for Revenue supported the orders of the authorities below and submitted that in similar fact situation and on similar contentions by the assessee, a co-ordinate bench of this tribunal in the case of Indegene Pvt. Ltd., in its order in IT(TP)A No.591/Bang/2017 for asst. year 2012-13 dated 2/8/2017 had remanded the issue of comparability of this company 'BNR' to the file of the TPO for fresh examination.

8.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. From the details on record, it is seen that the contentions of the assessee that the company u/s BNR Udyog Ltd., is functionally different and fails the RPT filter at the entity level. We find from the record that the bench marking of 'BNR' has been done only at the medical transcription segment and issue of RPT has not been urged before the AO/DRP. From a perusal of the decision of the co-ordinate bench of this Tribunal in the case of Indegene Pvt. Ltd., in IT(TP)A No.591/Bang/2017 for asst. year 2012-13, we find that the issue of comparability of 'BNR' has been remanded to the file for the TPO for fresh consideration in tune with its observations at para 10.3.2 thereof, the relevant portion of which are extracted hereunder:-

"Since in the year under consideration, there are 3 segments, how much of the RPT expenses pertain to each of the segments requires examination and we

find that this aspect has not been analyzed by either the TPO or the assessee. While it is clear from the TPO's order that if the benchmarking is done only for the medical transcription segment, then the RPT pertaining to that segment only should be considered. However, since how much of the RPT pertain to the medical transcription segment has not been determined by either the TPO or the assessee, we deem it appropriate and proper to remand the matter of comparability of this company MIs BNR Udyog Ltd., to the file of the TPO for determination of the issue afresh in line with our observation above. Needless to add, the assessee shall be afforded adequate opportunity of being heard in the matter and to file submissions/details in this regard which shall be duly considered by the TPO before deciding the issue We hold and direct accordingly."

8.3.2 Following the above decision of the coordinate bench in the case of Indegene Pvt. Ltd., for A.Y. 2012-13 (Supra) to which one of us is party, and considering the factual matrix involved, that how much RPT pertains to the medical transcription has not been determined by either the TPO OR the assessee, we deem it appropriate and proper to remand the issue of comparability of this company, M/s BNR Udyog Ltd., to the file of the TPO for determination afresh in line with the observations above. Needless to add, the assessee shall be afforded adequate opportunity of being heard in the matter and to file details/submissions in this regard, which shall be duly considered by the TPO before deciding the issue. The TPO is accordingly directed.

9. TCS E-serve Ltd., ('TCS')

9.1 Before us, the ld AR for the assessee submitted that this company TCS E-Serve Ltd ('TCS') should be rejected and excluded from the final list of comparables for the following reasons:-

(1) Functionally different The assessee contends that this company deals with various verticals of business, ie., it renders BPO services to customers in the Banking, Financial services and Insurance domain, and also provides high end KPO services and therefore it is functionally different from the assessee in the case on hand. It is also contended that TCS bears full fledged risk, whereas the assessee bears only minimum risk. In support of the contention that this company is functionally different and therefore ought to be rejected as a comparable, the assessee, inter alia, placed reliance on the following ITAT decisions :-

(i) Baxter India Pvt. Ltd [TS-694-ITAT-2017(DEL)-TP] and

(ii) XL Health Corporation India P Ltd in IT(TP)A No.2311/Bang/2016.

9.2 The ld DR for revenue placed reliance on the orders of the authorities below. The ld DR submitted that, in all fairness in the facts and circumstances of the case, the matter ought to be remanded to the file of the TPO for fresh coordination, as was held in the decision of the co-ordinate bench in the case

of Indegene Pvt. Ltd., in IT(TP)A No: 591/Bang/2013 dated 2/8/2017 for AY 2012-13.

9.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited. From the details on record we observe that while the assessee has contended that the services rendered by this company, M/s TCS E-serve Ltd, are high end KPO services, it has not brought out as to which of these are the services that would come under Technical services. On the other hand, we also notice that the TPO has held all the services rendered by the assessee to be BPO services with any proper analysis. In this factual matrix of the case, we find that on similar facts, the co-ordinate bench of ITAT-Bangalore in the case of Indegene Pvt Ltd for A.Y. 2012-13 (supra) has remanded the matter of comparability of this company to the file of the TPO for fresh consideration. In view of the factual matrix of the case on hand, as laid out above and following the decision of the co-ordinate bench in the case of M/s Indegene Pvt Ltd., (Supra) which is also rendered on similar facts, we deem it appropriate to remand the matter of the comparability of this company, TCS E-serve Ltd., to the file of the TPO for fresh consideration in the light of our above observations. Needless to add, the TPO shall afford the assessee adequate opportunity of being heard and to file details/submissions in this regard.

10. Excel Infoways Ltd (Seg-IT/BPO) ('Excel')

10.1 The ld AR for the assessee submitted that this company, M/s Excel Infoways Ltd., ('Excel') should be rejected and excluded from the list of comparables for the following reasons:-

(i) Fails employee cost filter of 25% The ld AR submitted that in the segmental report, the details relating to employee cost allowable to each segment is not available and therefore the filter is to be applied at the entity level, where it fails the employee cost filter of 25% since its Employee Cost/Operating revenue is approx 13.05%.

(iii) Peculiar Economic Circumstances It is submitted that as per the Annual Report of this company, 'Excel', it has peculiar economic conditions impacting the earnings of the year under consideration and consequent abnormal volatility in profits.

In support of the assessee's contentions for exclusion of this company from the list of comparables, the ld AR placed reliance, inter alia, on the decisions of co-ordinate Bench of the tribunal in the case of CGI Information Systems & Management Consultations P Ltd., for AY 2012-13 (supra) and of ITAT Delhi in the case of M/s Baxter India P Ltd V ACIT in ITA No. 6158/Del/2016 for A.Y. 2012-13.

10.2 Per contra, the ld DR for Revenue supported the orders of the authorities below. Reliance was placed on the decision of the co-ordinate bench in the

case of XL Health Corporation India P Ltd., in IT(TP)A No. 2311/Bang/2016 dt 9/2/2018 for A.Y. 2012-13.

10.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decisions cited. The assessee seeks exclusion of this company M/s Excel Infoways Ltd., on grounds of failing the employee filter cost filter of 25% at the entity level in the absence of details of such transactions at the segmental level and also for the reason that there were abnormally high profit margins over the years. In the case of CGI Information Systems & Management Consultants Pvt. Ltd., for 2012-13 (supra), cited by the assessee, this company was rejected as a comparable on the grounds of consistent diminishing revenue and it was also engaged in the business of software testing, verification and validation of software at the time of implementation and data centre management activities. In the case of XL Health Corporation India P Ltd., also for A.Y. 2012- 13(Supra), relied on by the ld DR, this company was retained as a comparable since the coordinate Bench observed that the assessee in that case had not led or filed any evidence to support its contention that this company 'Excel' had failed the employee cost filter. These two decisions (supra), in our view, would not apply to the fact situation prevailing in the case on hand.

10.3.2 In the case on hand, from a careful perusal of the factual material before us, we find that the assessee's contentions that this company, 'Excel' had failed the employee cost filter of 25% has not been examined, either by the TPO or admittedly by the assessee, at the segmental level. Similar is the position with regard to volatility of profits/peculiarity of economic circumstances. In this view of the matter, we deem it appropriate to remand the issue of comparability of this company, M/s Excel Infoways back to the file of the TPO for examination and verification of the assessee's contentions on the issue of abnormality of profits and of failing of the employees cost filter of 25% at segmental level, for which the AO may gather information u/s 133(6) of the Act. Needless to add, the assessee shall be afforded adequate opportunity of being heard and to file details/submissions required, which shall be duly considered by the TPO before deciding the issue.

We notice that the co-ordinate bench has directed exclusion of M/s Infosys BPO Ltd and remanded the remaining four comparable companies to the file of AO/TPO. Consistent with the view taken in the above said case, we direct exclusion of M/s Infosys BPO Ltd and remand the remaining four comparable companies to the file of AO/TPO with similar directions.

13. Before Ld DRP, the assessee sought inclusion of six companies and said plea was rejected by Ld DRP. Though the

assessee has raised a ground seeking inclusion of six companies in Ground No.21, the Ld AR submitted that the assessee would seek inclusion of only one company, viz., M/s Crystal Voxx Ltd. He submitted that this company has been held to be a good comparable in the case of Kennametal Shared Services P Ltd (supra).

14. We heard Ld D.R on this issue and perused the record. The co-ordinate bench, in the case of Kennametal Shared Services P Ltd (supra) has directed inclusion of M/s Crystal Voxx Ltd as a comparable company. We notice that the co-ordinate bench in the above said case has followed the decision rendered in the case of FNF India P Ltd vs. ACIT (IT(TP)A No.459/Bang/2017 dated 03-07-2019), wherein it was discussed as under in respect of this company:-

“24. In ground No.13, the Assessee has prayed for inclusion of Crystal Voxx Ltd. as a comparable company. This company was not regarded as comparable company with the Assessee by the DRP for the reasons given in Para 2.15 of its order i.e., for the reason that in the financial results, the Auditors have mentioned that this company was predominantly a Business Process Outsourcing (BPO) company and therefore this company cannot be said to be an ITES company. The learned counsel for the Assessee brought to our notice that in the very same note, the auditors have also mentioned that the only reportable segment was BPO. Therefore this company was a BPO company and the results of the BPO which is the only segment ought to have weighed in the mind of the TPO to include this company as a comparable company.

25. We have considered the submission of the learned counsel for the Assessee and are of the view that the plea raised by the Assessee is correct and the TPO ought to have regarded this company as comparable IT(TP)A No. 195/Bang/2016 & 459/Bang/2017 company because the only reportable segment of this company was BPO. We direct the TPO to include this company as a comparable company.”

Following above said decisions of co-ordinate bench, we direct inclusion of M/s Crystal Voxx Ltd as a comparable company.

15. The next issue relates to the addition made rejecting the claim of change in method of revenue recognition. The Ld A.R fairly admitted that this issue has been decided against the assessee by the co-ordinate bench in AY 2009-10 (referred supra). We notice that this issue has been decided against the assessee by the co-ordinate bench in AY 2009-10 with the following observations:-

“36. We have considered the rival submissions and are of the view that the conclusion of the DRP in this regard deserves to be upheld. It is no doubt true that the Assessee is at liberty to change the method of accounting provided the change in the method of accounting is bonafide and is being consistently followed subsequently. But the method followed by the Assessee in the present case of postponing revenue recognition without postponing the cost incurred for earning the revenue cannot be said to be proper. There is no valid explanation for claiming expenses related to the CAS services rendered by the Assessee when recognition of income there from is postponed. The change in the method of accounting was therefore not bonafide and was rightly rejected by the revenue authorities. We find no merit in the claim of the Assessee in this regard. The cases cited by the learned counsel for the Assessee are with regard to the right of an Assessee to change the method of accounting provided it is bonafide and is followed subsequently. Therefore the case laws cited are not discussed. Suffice it to say that the principle laid down in those cases are not applicable to the present case in view of the finding that the change in the method of accounting was not bonafide and proper. Gr.No. 15 to 18 are therefore dismissed. As far as Gr.No.19 raised by the Assessee which is to the effect that if the income recognition which is postponed in this year is considered as revenue for the current year, then the AO should allow consequential benefit in the subsequent year in which the same income has been offered to tax, we are of the view that the Assessee is at liberty to pursue remedies available to it in law and the AO shall consider the same in accordance with law and in the light of the findings as above.”

Following the above said order of the co-ordinate bench, we decide this issue against the assessee. Accordingly, the addition made by the AO is confirmed.

16. The next issue relates to the non-granting of TDS credit. Since this issue requires factual verification, we restore the same to the file of AO for examining the claim of the assessee in accordance with law.

17. The next issue relates to non-granting of depreciation on Foreign Exchange Loss disallowed in 2009-10. The Ld A.R submitted that an identical issue was urged by the assessee in AY 2013-14 and the co-ordinate bench, vide its order dated 25.2.2021 passed in IT(TP)A No.2/Bang/2018 in the assessee's own case, has restored this issue to the file of the AO for examining it afresh. Accordingly, following the above said decision of the co-ordinate bench, we restore this issue to the file of the AO for examining it afresh in accordance with law.

18. In the result, the appeal of the assessee is treated as partly allowed.

Order pronounced in the open court on 11th Mar, 2021.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 11th Mar, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.