

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No.2301/Bang/2016
Assessment Year : 2012-13

Kronos Systems India Pvt. Ltd., Tridib, Level 02, Unit 01, Bagmane Tech Park, C.V Ramannagar, Bangalore-560093. PAN - AADCK 1052 G	V s.	The Asst. Commissioner of Income-tax, Circle-4(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri T Suryanarayana Advocate,
Revenue by	:	Ms. Neera Malhotra, CIT(DR)

Date of Hearing	:	19-08-2021
Date of Pronouncement	:	29-09-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against the final assessment order dated 21/10/2016 passed by the Ld.ACIT Circle-4(1)(1), Bangalore for assessment year 2012-13 on following grounds of appeal:

*“The grounds stated here-under are independent of and without prejudice to one another. The Appellant submits as under:
Assessment and reference to Transfer Pricing Officer are bad in law
a) The final order issued by the Assistant Commissioner of Income Tax, Circle - 4(1)(1) [Ld. AU], is bad on facts and in law, and is in violation of the principles of natural justice.*

b) The Ld. AU has erred in law in making a reference to the Assistant Commissioner of Income-Tax, Transfer Pricing —2(1)(1)[Ld. TPO], *inter alia*, since he has not recorded an opinion that any of the conditions in section 92C(3) of the Act, were satisfied in the instant case.

c) The directions issued by the Dispute Resolution Panel [Hon'ble DRP or Ld. Panel] and the order passed by the Ld. AO/ Ld. TPO is without jurisdiction, *inter alia*, in so far as it purports to give effect to an invalid order of the Ld. TPO.

d) On the facts and in circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP also erred in upholding / confirming the action of the Ld. TPO in not demonstrating that the motive of the Appellant was to shift profits outside of India by manipulating the prices charged in its international transactions which is a pre - requisite condition to make any adjustment under the provision of Chapter X of the Act.

2 Determination of arm's length price / Erroneous data used by the Ld. TPO

a) The Ld. TPO erred in rejecting the value of international transactions relating to Information Technology Enabled Services (ITeS Services) as recorded in the books of accounts, as the arm's length price. The Hon'ble DRP erred in upholding the actions of the Ld. AO/ Ld. TPO.

b) The Ld. Panel and Ld.AO/Ld.TPO erred in determining a new transfer price in substitution of the arm's length price as determined by the Appellant.

c) The Ld. AO/ Ld. TPO erred on facts and in law in conducting a fresh benchmarking analysis using non-contemporaneous data and substituting the Appellant's analysis with fresh benchmarking analysis on his own conjectures and surmises and in doing so determined a new transfer price. Thus, the Appellant prays that the fresh benchmarking analysis conducted by the Ld.AO/Ld.TPO is liable to be quashed. The Hon'ble DRP erred in upholding the actions of the Ld. AO/ Ld. TPO.

d) The Ld. AO/Ld.TPO has erred in law and the Hon'ble DRP further confirmed in using data, which was not contemporaneous and not available in the public domain at the time of conducting the transfer pricing study by the Appellant.

e) The Ld. AO/ Ld. TPO erred in law and the Hon'ble DRP further erred in confirming non- application of multiple-year data while computing the margin of alleged comparable companies.

3 Comparability analysis adopted by the Ld.TPO for determination of arm's length price

a) The Ld. AU / Ld. TPO grossly erred on facts and in law in rejecting the filters, search process and comparable companies selected by the Appellant in the Transfer Pricing Study without considering the Appellants facts. Further, the Ld. AO/Ld. TPO also erred on facts and in law by conducting a fresh benchmarking analysis in respect of ITeS

services provided by the Appellant and wrongly comparing the Appellant's activities with companies operating as full-fledged entrepreneurs without considering the differences in size, turnover, functions performed, assets employed and risks assumed by the Appellant vis-à-vis alleged comparable companies.

b) The Ld. AO/Ld. TPO and the Ld. Panel have erred, in law and in facts, by rejecting certain comparable companies identified by the Appellant for having different accounting year (i.e. companies having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months)

c) The Ld. AU, Ld. TPO and the Ld. Panel have erred, in law and in facts, by rejecting certain comparable companies identified by the Appellant using employee cost greater than 25% of the total revenues.

d) The Ld. AO, Ld. TPO and the Ld. Panel have erred, in law and in facts, by rejecting certain comparable companies identified by the Appellant using export sales less than 75% of the total sales.

e) The Ld. AO/ Ld. TPO, while applying the turnover filter at the lower limit so as to reject companies having turnovers less than Rs.1 crore in financial year 2011-12, erred in not applying the said filter at the upper end so as to reject high turnover companies as well. The Ld. Panel also erred in confirming the same.

f) The Ld. AO/Ld.TPO erred in excluding Ace BPO Services Private Limited as a comparable, despite the said company being functionally comparable to the Appellant.

g) The Ld. AO/Ld.TPO have erred, in law and in facts, by undertaking a negative working capital adjustment without appreciating the fact that the company does not bear any working capital risks with respect to transactions with the Associated Enterprises. The Ld. Panel also erred in confirming the same.

4 Non-allowance of appropriate adjustments to the comparable companies, by the TPO.

The Ld. AO/Ld. TPO and the Ld. Panel have erred in law and on facts in not allowing risk adjustments under Rule 10B. Further, the Ld. AO/Ld. TPO and the Ld. Panel ought to have considered adjustments for (a) accounting practices, (b) marketing expenditure, (c) research and development expenditure between the Appellant and the comparable companies.

5 Variation of 5% from the arithmetic mean

The Ld. AO/Ld.TPO and Ld. Panel have erred in law in not granting the benefits of proviso to section 92C(2) of the Act available to the Appellant.

6 Interest under section 234B of the Act

The Ld. AO erred in levying interest under section 234B of the Act.

7 Directions issued by the DRP

a) The Hon'ble DRP has erred in law and facts in not taking cognizance of the objections filed by the Appellant in relation to the draft assessment order issued by the Ld. AO/Ld.TP order.

b) The Hon'ble DRP erred in facts and law in confirming the draft order of the Ld.AO/Ld.TPO.

Relief

a) The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal.

b) The Appellant submits that the above grounds are independent and without prejudice to one another.”

Brief facts of the case are as under:

2. The assessee is a wholly owned subsidiary of Kronos U.S. This network systems distributor on workforce management software and hardware development by Kronos U.S. and also provides back-office support service to Chronos U.S. which primarily involves application implementation upgrades configuration changes and monitoring of the WFC suit of applications. For the year under consideration assessee filed its return of income on 30/11/2012 declaring total income of Rs.1,69,30,710/-.

2.2 The Ld.AO issued notice under section 143(2) along with 142(1). On receipt of the notice representative of assessee appeared before the Ld. AO and, filed requisite details as called for.

2.3 The Ld.AO observed that, the assessee has international transactions with its associated enterprises exceeding Rs. 15 crores. Accordingly reference was made to the Transfer Pricing officer for determining arms length price of the transaction between assessee and its associated enterprise.

2.4 On receipt of reference under section 92CA of the Act, the Ld. TPO called upon assessee to file economic details of the international transactions entered between assessee and its associated enterprises in Form 3 CEB. The Ld.TPO on perusal of various information/details filed observed that, assessee had its following international transaction with its associated enterprise:

Particulars	Amount
Purchase of Hardware Terminals	10894221/-
Rendering of Marketing Support Services	88105907/-
Rendering of IT enabled services	45847370/-
Reimbursement of expenses	5308069/-
Total	150155567/-

2.5 The Ld.TPO accepted international transaction in respect of import of hardware and software products, marketing support services and reimbursement of expenses to AE. The only transaction that was disputed was in respect of provision of back-office support services/income received from ITES segment is.

2.6 The Ld.TPO observed that assessee used OP/OC as PLI to compute its margin at 16%. It used following 11 comparables with an average margin of 17.35% and by using TNMM as most appropriate method and held the transaction to be at arms length.

Step	Description
1.	Companies whose data is not available for FY 2012-13 - excluded.
2.	Companies having different financial year ending (i.e. not March 31, 2012) - excluded
3.	Companies whose service income < Rs. 1 Cr - excluded.
4.	Companies whose information technology enabled services income is less than 75% of the total operating revenues- excluded.
5.	Companies which have more than 25% RPT to sales- excluded.
6.	Companies which have export service income less than 25% of the sales- excluded.
7.	Companies with employee cost < 25% of turnover- excluded

2.7 Dissatisfied with the comparables selected by assessee, assessee used fresh filters and finalised set of following 10 comparables with average margin of 28.11%:

Sl. No.	Name of the Company	Mark-up on Total Costs (WC-unadj) (in %)	Mark-up on Total Costs (WC-adj) (in %)
1	Accentia Technologies Ltd.	11.75	9.81
2	Universal Print Systems Ltd. (Seg) (BPO)	52.46	55.52
3	Informed Technologies India Ltd.	6.08	7.11
4	Infosys BPO Ltd.	36.30	38.36
5	Jindal Intellicom Ltd.	-0.05	1.11
6	Microgenetic Systems Ltd.	19.61	20.76
7	TCS E-Serve Ltd.	63.69	63.73
8	BNR Udyog Ltd. (Seg) (Medical Transcription)	50.61	48.22
9	Excel Infoways Ltd. (Seg) (IT/BVPO)	29.79	35.88
10	e4e Healthcare Business Services Pvt. Ltd.	19.85	18.74
AVERAGE MARK-UP		28.11	29.96

2.8 After making negative working capital adjustment, the Ld.TPO computed proposed adjustment at Rs.55,17,251/- being the shortfall.

2.9 On receipt of the Transfer Pricing order, the Ld.AO passed draft assessment order by disallowing certain miscellaneous expenses under section 37 of the Act and depreciation on computers claimed by assesseees.

2.10 Against the draft assessment order, the assessee preferred objections before DRP.

2.11 The DRP accepted certain objections raised by assessee in respect of comparables. However suo moto excluded Accentia Technologies Ltd.

2.12 After the DRP directions, following were the comparables that were retained:

Arm's Length Mean Mark-up	28.11%
Less: Working Capital Adjustment	-1.85%
Adjusted mean mark-up of the comparables	29.96%
Operating Cost ('OC')	Rs.3,95,23,595 /-
Arm's Length Price ('ALP') = 129.96% of OC	Rs. 5,13,64,621/-
Price Received	Rs. 4,58,47,370/-
Shortfall being adjustment u/S. 92CA	Rs. 55,17,251/-

2.13 On receipt of the DRP directions, the Ld.AO computed the addition in the hands of assessee making the TP adjustment at Rs.50,47,163/-. The Ld.AO deleted the corporate tax additions made in draft assessment order.

2.14 Aggrieved by the order of the Ld.AO, assessee is in appeal before us now.

2.15 At the outset, the Ld.Counsel submitted that assessee wish to argue only the comparables sought for exclusion in Ground 3(a) and making negative working capital adjustment raised in ground 3(g).

Accordingly all other grounds raised by assessee in the grounds of appeal stands dismissed as not pressed.

2.16 Before we undertake the comparability analysis, it is sine qua non to understand the functions performed, assets owned and risk assumed by assessee.

Functions performed:

(i) Kronos Systems does not perform strategic functions. Kronos Systems primarily performs the tactical managerial functions relating to day to day management of its business.

Administration

(ii) With respect to human resources, financial management, routine administration etc., Kronos Systems is responsible for arranging the necessary resources. it is responsible for managing its own cash flows, accounts payable, accounts receivables, employee management, management information system and training and hiring employees.

Product development functions

(iii) Kronos Systems is only engaged in distribution of Kronos products and it does not undertake any functions attributable to manufacturing. The functions relating to product development such as product strategy ad design, research & development, assembly etc. are not undertaken by Kronos Systems.

Procure functions

(iv) Kronos Systems procures Kronos products from Kronos US on receiving confirmed orders from end Customers. Kronos US in turn outsources the order to Kronos Mexico (contract

manufacturing entity of Kronos Group) which provides the products requested by Kronos Systems to Kronos US, who in turn delivers the product to Kronos Systems for distribution in India.

Sourcing & Scheduling

(v) Kronos Systems is responsible for managing the procurement schedule with respect to the sale of Kronos products in India and plan the product orders in order to meet the customer delivery requirements.

Kronos Systems places purchase order with Kronos US and communicates regarding the requirement of products. Kronos US is responsible for providing the required quantity to Kronos Systems, subject to availability of products demanded.

Move Functions

(vi). Kronos Systems places an order with Kronos US for delivery of products only after obtaining 'confirmed orders from end customers. Hence, Kronos Systems does not hold any inventory of Kronos products.

Once an order has been placed with Kronos US, Kronos Systems tracks order fulfilment including handling customer queries on the status of orders.

Logistics

(vii). Kronos Systems imports Kronos products from Kronos US on a CIF basis. The logistics activities 'undertaken by Kronos Systems are supervising customs clearance, freight forwarding on all product sales, clearance of products imported etc.)

Warehousing

(viii). Kronos Systems places an order with Kronos US for delivery of products only after obtaining confirmed orders from end customers. Hence, Kronos Systems does not hold any inventory of Kronos products and hence no warehousing of products is maintained.

Sales and Marketing**Marketing strategy/Business Development**

(ix) Kronos Systems within the overall marketing strategy developed by Kronos US is responsible for identifying prospective customers and distribution of Kronos products in India. Kronos Systems is provided with a reasonable amount of sales and marketing literature relating to Kronos products. Kronos Systems acts as front-end contact for the customers, it undertakes lead generation, marketing and sales activity for the solutions/services provided to the customers. It maintains and develops relationship with its customers and is therefore responsible for expanding the business. Kronos Systems adopts the marketing strategy and operates in selected industries out of the globally set industries and globally available marketing strategy.

Customer Identification

(x). Kronos Systems is responsible for identifying customers for the sale of Kronos products in India. Kronos Systems also educates the prospective customers about the various Kronos products. Kronos Systems is responsible for liaising with potential and existing customers to identify business

opportunities. Kronos Systems regularly interacts with the customers to understand their requirements.

Pricing policy

(xi) Kronos Systems is directly involved in price negotiations with the customers. However, ronos Systems quotes only those prices as specified in the standard price list provided by Kronos US to which price adjustments are made to meet the Indian market conditions. However, in few instances discussions are undertaken with Kronos US If the prices are below the standard price list less discounts which could be provided to the customers.

Assets owned:

Except for Routine tangible assets like computers, furniture and fixtures and office space, assessee do not own any intangible assets.

Risks assumed:

In the process of rendering the above functions, assessee assumes risks pertaining to Market, credit and collection, Foreign exchange risk and scheduling risk.

Ground No.3(g)

3. The assessee seeks exclusion of Universal Print Systems Ltd.,

Infosys BPO Ltd.,

TCS e-serve Ltd.,

BNR Udyog Ltd. and

Excel info ways Ltd.

3.1 It was submitted by the Ld.Counsel that, these comparables are functionally not similar with that of assessee.

3.2 On the contrary the Ld.Sr.DR placed reliance on observations passed by authorities below.

We have heard submissions advanced by both sides in light of record placed before us. On perusal of annual report of this company placed in paper book, we are of considered opinion that this comparable is basically into sale of products and services unlike a captive service provider such as assessee, who works on cost plus basis, providing services only to its AE's.

3.3 We note that under identical circumstances coordinate bench of this *Tribunal* by order dated 20/09/2019 in case of *VWR Labs Products Pvt. Ltd. vs ACIT* reported in [2020] 116 *taxmann.com* 244 observed and held as under:

7. (a) *UniversalPrintSystems Ltd (segmental) (BPO)*

Assessee sought to exclude this comparable for the reason that, it fails employee cost filter and has insufficient company information. It is also been submitted that, functionally this company is providing integrated print solution to its customers and does not provides routine ITEs services like that of assessee. It has been submitted that this company is not a captive service provider like that of assessee and has products sale as well as services sale, which is evident from page 1360 of paper book volume 1 (Index for Annual Reports).

Ld.CIT DR placed reliance upon orders of authorities below and submitted that this comparable is functionally comparable with that of assessee.

*We have heard submissions advanced by both sides in light of record placed before us. On perusal of annual report of this company placed in paper book, we are of considered opinion that this comparable is basically into sale of products and services unlike a captive service provider such as assessee, who works on cost plus basis, providing services only to its AE's. It is also observed that this comparable is basically providing BPO services from its Prepress units. In written submission filed, assessee placed reliance upon decision of this Tribunal in case of *Zyme Solutions (P.) Ltd. v. ACIT* [2019] 101 *taxmann.com* 292 (Bang. - Trib.), wherein this comparable has been excluded by observing as under:*

10.4 We heard rival submissions and perused the material on record. The issue of comparability of UniversalPrintSystems Ltd. with that of the assessee-company has been duly considered by TPO after referring to information contained in Annual Report. The relevant findings of the TPO had not been countenanced by learned AR of the assessee. However, the issue of comparability of UniversalPrintSystems Ltd. has also been considered by the co-ordinate bench of this Tribunal in the case of CGI Information Systems & Management Consultants Pvt. Ltd. (supra) wherein it was held as follows:

"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 UniversalPrintSystems 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 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 (Page 764 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 21.6% 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 harbour 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 IOTA(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 1TES 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.

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 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/TPQ.

50. 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-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 (if) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the 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 an arm's length price in relation to the international transaction.*
- 2. For the purposes of sub-rule (1), the comparability of an*
- (a) the specific characteristics of the property transferred or services provide: 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 specific characteristics of the property transferred or services provide: either transaction*
 - (d) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions*
 - (e) 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 competition and whether the markets are wholesale retail*

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

(i) none of the differences, if any, between the transactions being compared or between the enterprises entering into such transactions are likely 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."

5.2 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 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.'

Respectfully following the decision, we remand this comparable to the file of the TPO/AO for fresh adjudication on the above lines.

Respectfully following aforesaid decision, we remand this comparable to file of Ld.AO/TPO, for fresh adjudication, on the basis of directions reproduced hereinabove. Needless to say that proper opportunity shall be granted to assessee as per law.

Accordingly we set aside this comparable back to Ld.TPO.

8. (b) Infosys BPO Ltd.

Assessee objected for inclusion of this comparable primarily on the basis of functional incompatibility and presence of intangibles. It has been submitted that this company owns huge brand and not a fit comparables for company like assessee, who provide captive service to its AE's.

Ld. CIT DR opposed the exclusion and placed reliance upon orders passed by authorities below.

We have perused submissions advanced by both sides in the light of the records placed before us. Assessee placed reliance upon decision of this Tribunal in case of Zyme Solutions (P.) Ltd. v. Asstt. CIT [2019] 108 taxmann.com 495 (Bang. - Trib.), wherein this comparable has been excluded by observing as under:

'5. We have heard the rival submissions on the comparability of Infosys BPO as a comparable company. The Delhi ITAT in the case of Baxter India Pvt. Ltd. v. ACIT ITA No.6158/Del/2016 for AY 2012-13 in the case of a company rendering ITES such as the Assessee, vide order dated 24.8.2017 Paragraph 23 held that Infosys BPO is not comparable with a company rendering ITES for the following reasons:—

"23. In so far as exclusion of Infosys BPO Ltd. is concerned, we find from the submissions made by the assessee before the Assessing Officer/TPO/DRP is that Infosys BPO Ltd. is predominantly into areas like Insurance, Banking, Financial Services, Manufacturing and Telecom which are in the niche areas, unlike the assessee. Further it was also submitted that the Infosys BPO Ltd. comprises brand value which will tend to influence its business operation and the pricing policy thereby directly impacting the margins earned by the Infosys BPO Ltd.. We find the submissions of the ld. counsel for the assessee before TPO/DRP that in order to maintain the brand image of Infosys BPO Ltd. in the market, the company incurs substantial selling and marketing expenditure whereas the assessee being a contract service provider does not incur such expenses to maintain its brand has not been controverted by them. Further, Infosys BPO Ltd. being a subsidiary of Infosys has an element of

brand value associated with it. This can be further confirmed by the presence of brand related expenses incurred by Infosys BPO Ltd. Further, Infosys BPO Ltd. has acquired Australian based company M/s Portland Group Pty Ltd. during financial year 2011-12. They provide sourcing and category management services in Sydney, Australia. Therefore, this company also failed the TPO's own filter of rejecting companies with peculiar circumstances. In view of the above i.e. functionally not comparable, presence of brand and extraordinary event that has taken place during the year on account of acquisition of Australian based company, we are of the considered opinion that Infosys BPO Ltd. should not be included in the list of comparables. We accordingly direct the Assessing Officer/TPO to exclude Infosys BPO Ltd. from the list of comparables for the purpose of computing the average margin."

2. It was also brought to our notice that the Hon'ble Delhi High Court in ITA No.260/2018 in the appeal filed by the Revenue against the aforesaid order dismissed the appeal at the admission stage observing that rationale given by the ITAT for exclusion was correct. In view of the aforesaid decision, we direct exclusion of Infosys BPO from the list of comparable companies chosen by the TPO.

From above, it is clear that this company is functionally not comparable with captive service provider.

Respectfully following the same we direct this company to be excluded from the list of comparables.

9. (c) TCS e-Serve Ltd.

Ld. AR submitted that this company has been objected by assessee for its functional dissimilarity as it renders both BPO and KPO services without segmental reporting. It is submitted that this company owns huge brand of TATA group and has also incurred brand related expenses and therefore cannot be accepted to be compared with a captive service provider like assessee.

Ld.CIT DR on the contrary opposed its exclusion and placed reliance upon orders passed by authorities below.

We have perused submissions advanced by both sides in light of records placed before us. Assessee placed reliance upon following decisions in support of its argument for exclusion of this comparable:

- ◆ *Zyme Solutions (P.) Ltd. (supra)*
- ◆ *Baxter India (P.) Ltd v. ACIT [2017] 85 taxmann.com 285 (Delhi - Trib)*
- ◆ *Pr. CIT v. BC Management Services (P.) Ltd. [2018] 89 taxmann.com 68/(Delhi)*

It is observed that this comparable has been excluded by this Tribunal. Assessee placed reliance upon decision of this Tribunal in case of Zyme Solutions (P.) Ltd. (supra), by observing as under:

"11.3 We have heard rival submissions and perused material on record. The issue of comparability of this company was considered by the co-ordinate bench of Tribunal in the case of XLHealth Corpn. India (P.) Ltd. (supra). The relevant findings of the Tribunal are as under:

'. . . We have heard the rival submissions and perused the material on record. From the perusal of the Annual Report of this entity placed at page Nos. 583 to 678 of paper book, at page No. 604 it is stated as under.

"2. COMPANY OVERVIEW

Your Company, along with its subsidiary companies - TCS e-Serve International Limited and TCS e-Serve America Inc., is primarily engaged in the business of providing Business Process Services (BPO) for its customers in Banking, Financial Services and Insurance domain.

The Company's operations include delivering core business processing services, analytics & insights (KPO) and support services for both data and voice processes.

Your Company is an integral part of the Tata Consultancy Services' (TCS) strategy to build on its 'Full Services Offerings' that offer global customers an integrated portfolio of services ranging from IT services to BPO services.

The Company provides its services from various processing facilities, backed t) a robust and scalable infrastructure network tailored to meet clients' needs. A detailed Business Continuity Plan has also been put in place to ensure the services are provided to the customers without any disruptions.

Thus, this company is also stated to be a Knowledge Process Outsourcing and therefore for I' - reasons stated by us while dealing with this issue of comparability of the company Infosys BPO Ltd. Shall equally hold good and therefore we direct the AO/TPO to exclude this company from list of comparables Since the appellant company is into low end BPO, it cannot be compared with KPO service provider.

11.4 Respectfully following the decision of the co-ordinate bench of Tribunal, we direct for exclusion this company from the list of comparable".

It has been observed that this company is into high-end KPO services and an assessee rendering low end BPO services cannot be compared with it. Further, this company has been excluded due to absence of segmental information.

Respectfully following aforesaid decision, we direct Ld.TPO to exclude this company from the list of comparables.

10. (d) BNR Udyog Ltd. (segmental)

Ld.AR submitted that this company fails RPT filter and also fails export filter applied by Ld.TPO. It is submitted that this company is into medical transcription, coding, business support services and e-governance projects and therefore functionally not similar with that of assessee.

Ld. CIT DR however contended that this company is compared only for segment of medical transcription and therefore should not be excluded. She placed reliance upon decision of this Tribunal in case of Mobily Infotech India (P) Ltd. v. Dy. CIT [2018] 97 taxman.com 2 (Bang. - Trib.) in support.

We have perused submissions advanced by both sides in the light of the records placed before us.

Assessee is challenging functional dissimilarity of this company with that of assessee as it is into medical transcription. We have our reservation to consider medical transcription services to be one of KPO services. In our considered opinion medical transcription services is basically back-office services provided by graduates who are trained for short period of 6 months to one year. These are short crash courses undertaken by graduates who are trained to understand and speak English. There is no value addition in the services rendered by people in medical transcription. To our understanding, basically these people who carry out medical transcription services are trained to understand language spoken by doctors, outside India to whom medical reports of patients are sent for expert opinion. Medical transcriptionist simply reproduces opinion expressed by Doctor, which is then communicated to the patients.

It is observed from annual report placed at page 745 of paper book Volume (Index to Annual Reports) that this company has segmental information of medical transcription and revenue earned under this segment is Rs.147.40 Lacs. It is also been observed that various other decisions by co-ordinate Benches of this tribunal has remanded this comparable back to Ld.TPO, for proper analysis and fresh consideration. We draw support for same from Indegene (P.) Ltd. v. Asstt. CIT [2017] 85 taxmann.com 60 (Bang. - Trib.), wherein it has been held as under:

"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 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 (P) Ltd., (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 Indegene (P) 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 out above observations. Needless to add, the TPO shall afford the assessee adequate opportunity of being heard and to file details/submissions in this regard.

It is also been observed that similar view has been taken by decision of this Tribunal in case of Nielson Sports India (P.) Ltd. v. ACIT [IT(TP) Appeal No.196(Bang.) of 2017, dated 28-06-2019].

Respectfully following the same, we set aside this comparable back to Ld.TPO for considering it afresh. Needless to say that proper opportunity shall be granted to assessee as per law.

3.4 Nothing has been placed before us by the Ld.Sr.DR contrary to the above observations by coordinate bench of this *Tribunal*. Further it is observed that this Tribunal considered the above comparables in case of a captive service provider like the assessee before us. Respectfully following the same we direct exclusion of Universal Print, TCS e-serve and Infosys BPO from the list of comparables and remand BNR Udyog Ld. AO/TPO to consider it afresh in light of the observations made by coordinate bench of this *Tribunal* reproduced hereinabove.

4. In **Ground No.3(g)** assessee is aggrieved by negative working capital computed by the Ld.TPO, without appreciating the fact that assessee is a captive service provider.

The grievance of the assessee is with regard to negative working capital adjustment computed by the Ld.TPO and confirmed by the DRP. It was submitted that Working capital adjustment is made for the time value of money lost when credit time is given to

the customers. The Assessee however does not bear any risk and has no working capital contingencies. The Assessee has not incurred any expenses for meeting the working capital requirement. The Assessee is running the business without any working capital risk as compared to the comparables. The Assessee does not bear any market risk as the services are provided only to Tavant US. Therefore, requirement for adjustment of negative working capital does not arise.

4.1. The Ld.AR placed reliance on decision of coordinate bench of this *Tribunal* in assessee's own case reported in (2020) 120 com 122 and *Lam Research India (P.) Ltd. v. Dy. CIT in [IT Appeal Nos. 1473 & 1385 (Bang) of 2014, dated 30-4-2015]*, *Tivo Tech (P.) Ltd. v. Dy. CIT [2020] 117 taxmann.com 259*, and *Dy. CIT v. Software AG Bangalore Technologies (P.) Ltd. [IT Appeal No. 1628 of 2014, dated 31-3-2016]*, where it has been held that negative working capital adjustment shall not be made.

4.2. The Ld.CIT DR placed reliance on orders passed by authorities below.

4.3. We have considered the rival submissions. We find that in the case of *Lam Research India (P.) Ltd. (supra)* and *Software AG Bangalore Technologies (P.) Ltd. (supra)* passed by this *Tribunal*, it has been held that negative working capital adjustment shall not be made in case of a captive service provider as there is no risk and it is compensated on a total cost plus basis.

4.4. We therefore direct Ld.TPO to compute the ALP in accordance with the directions contained in this order after affording assessee opportunity of being heard.

Accordingly ground No.3(g) raised by assessee stands allowed for statistical purposes.

In the result this ground raised by assessee stands partly allowed.

Order pronounced in the open court on 29th Sept, 2021

Sd/-

(CHANDRA POOJARI)
Accountant Member

Bangalore,

Dated, the 29th Sept, 2021.

/Vms/

Sd/-

(BEENA PILLAI)
Judicial Member

Copy to:

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

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-9-2021		Sr.PS
3.	Draft proposed & placed before the second member	-9-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-9-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-9-2021		Sr.PS/PS
6.	Kept for pronouncement on	-9-2021		Sr.PS
7.	Date of uploading the order on Website	-9-2021		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-9-2021		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS