

IN THE INCOME TAX APPELLATE TRIBUNAL  
“J” BENCH, MUMBAI  
BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2303/Mum/2013

(A.Y: 2008-09)

Nomura Services India Pvt Ltd., 10 <sup>th</sup> Floor, Nomura, Off High Street, Hiranandani Business Park, Powai, Mumbai – 400076.	Vs.	DCIT – Circle 10(3) Aayakar Bhavan, MK Road, Mumbai – 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCL0053C		
Appellant	..	Respondent

Appellant by :	Mr.Faruk Irani & Mr Sumin Mehta.AR
Respondent by :	Mrs.Vatsala Jha. DR

Date of Hearing	23.11.2021
Date of Pronouncement	10.01.2022

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The assessee has filed the appeal against the order passed u/s 143(3) r.w.s 144C(13) of the Act in pursuance to directions of the Dispute Resolution Panel (DRP) u/sec144C(5) of the Act dated 07.09.2012.

2. The assessee has filed the following grounds of appeal as under:

1. *In making an upward adjustment of Rs 53,007,719 to the international transaction for provision of software development services by the Appellant on the following grounds*

a. *Rejecting the functional analysis, search process adopted and documentation maintained by the Appellant for this transaction.*

b. *Including additional companies which are not comparable to the Appellant,*

*inter-alladue to functional incomparability, super normal profits and exceptional year of operations.*

c. *Rejections of comparable companies selected by the assessee in the transfer pricing study, which intera/ia are functionally comparable.*

d. *Using non-contemporaneous data for calculating arm's length price (ALP) of the international transaction entered by the Appellant.*

e. *Rejecting the multiple year data and relying only on data for the year ended March 2008 for the comparable companies.*

f. *Not granting the working capital adjustment as determined by the Appellant and not considering the level of risk assumed in the case of Appellant vis-à-vis risk the identified comparable companies*

2. *In making an upward adjustment of Rs 265,164,076 to the international transaction for provision of information technology enabled services (ITeS) by the Appellant on the following grounds:*
  - a. *Rejecting the functional analysis, search process adopted and documentation maintained by the Appellant for this transaction.*
  - b. *Rejections of comparable companies selected by the assessee in the transfer pricing study, which inter-a/ia are functionally comparable.*
  - c. *Including additional companies which are not comparable to the Appellant,  
inter-a/iadue to functional incomparability, super normal profits and exceptional year of operations.*
  - d. *Using non-contemporaneous data for calculating ALP of the international transaction entered by the Appellant.*
  - e. *Rejecting the multiple year data and relying only on data for the year ended March 2008 for the comparable companies.*
  - f. *Not granting the working capital adjustment as determined by the appellant and not considering the level of risk assumed in the case of appellant vis-à-vis risk the identified comparable companies.*
  
3. *In passing the assessment order/ directions without considering the factual observations made by the Appellant and brought to the notice of the AO/ DRP, which are as follows:*
  - a. *Rejection of comparable companies on the basis that information is not available in the public domain, without considering the fact that the Appellant had provided copies/ extracts of annual reports from public domain as well as screenshot of the source from which the annual*

*reports of comparable  
companies were obtained.*

- b. Rejection of comparable companies based on the threshold of 25% related party transactions without considering the fact that the actual related party transactions are less than 25%.*
  - c. Acceptance of companies having turnover more than 100 times of the Appellant, without considering the fact that the DRP in its directions stated that the turnover range should not be more than 20 times the Appellant's turnover.*
  - d. Inadvertently including a comparable company namely Datamatics Financial Services as against Datamatics Technologies Limited for the purpose of computing the ALP of the international transaction for provision of ITeS, without considering the fact that the transfer pricing officer himself had stated that Datamatics Technologies Limited is a valid comparable in his comments that were provided to the DRP in the remand proceedings.*
- 4. In computing the ALP without considering the +/- 5% variation from the ALP as permitted to the Appellant under the provisions of Sec 92C(2) of the Act.*

3. The Brief facts of the case are that, the assessee company is earlier known as M/s. Lehman Brothers Services India Pvt Ltd a 100% owned captive business process outsourcing unit of Nomura Group in India. The assessee is engaged in the provision of software development services (SDS) and Information Technology Enabled Services (ITES) for business and technology process outsourcing to its Associated

Enterprises(AEs) outside India. The assessee has filed the return of income electronically for the A.Y 2008-09 on 30.09.2008 with a total income of Rs. 8,55,32,467/- and the return of income was processed u/s 143(1) of the Act. Subsequently the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act are issued. In compliance, the Ld. AR of the assessee appeared from time to time and submitted the details and information. The A.O has verified the information submitted and found that the assessee has international transactions exceeding Rs.15 crores therefore the matter was referred to the Transfer Pricing Officer(TPO) for determination of Arm's length price (ALP) in relation to international transactions with its Associate Enterprises (AE). The TPO perused the financial statements of the assessee on two segments (i) software development services (SDS) and (ii) Information Technology Enabled Services (ITES).

4.The assessee as per the Transfer pricing(TP) report has selected the comparables for software

development services (SDS) Segment relying on the data of F.Y 2005-06, 2006-07 and 2007-08 as under:

S.No.	Name of the Company	Weighted Average PII
1.	Accel Transmatic Ltd	29.24
2	Applabs Technologies Pl Ltd	18.10
3	Aurionpro Solutions Ltd	24.73
4	Axis IT & T	30.17
5	Aztecsoft Ltd	15.00
6	Bodhtree Consulting Ltd	26.01
7	CG-VAK Software & exports Ltd	3.71
8	CMS Ltd	19.90
9	Computech Intrnational Ltd	4.59
10	Indorama Software Sollutions Ltd	3.68
11	KLG Systel Ltd	20.42
12	Lanco global systems Ltd 10.74	10.74
13	L&T Infotech Ltd	14.88
14	Logix Micro Systems Ltd	33.60
15	Maars Software International Ltd	5.99
16	Mindtree consulting Ltd	5.99
17	Nucleus Software exports ltd	33.00
18	Onward Solutions Ltd	-0.53
19	Powersoft Powersoft Glbal Solutions Ltd	21.35
20	Quintegra Solutoins Ltd	13.01
21	R systems International	8.24
22	Saksoft Ltd	16.19
23	Sasken Communication Technologies Ltd	16.35
24	Software technology Gorup Ltd	38.23
25	Sonata Software ltd	6.54
26	TataElxsi	18.97
	Arithmetic Mean	17.33

5. The TPO find that the assessee has applied TNMM as Most Appropriate Method (MAM) and the operating margin/Profit Level Indicator (PLI) i.e operating profit to operating cost (OP/OC) @ 20%. The TPO has issued notice U/sec 92CA (2) of the Act and questionnaire to submit documents and details in support of Arms Length Price (ALP). The TPO on perusal of details and Form No.3CEB found that in respect of international transactions of SDS segment the assessee has selected 26 comparables companies in the TP report. The TPO has dealt and discussed on the functional profile, margins and applied the filters on these comparables and determined the Arithmetic Mean of Margin @33.19% as against (@20% margin of the assessee). Finally the TPO has selected final set of 28 comparables in the software development services (SDS) segment referred at page 9 of the TPO order as under:

<i>S.No.</i>	<i>Name of the comparable Company</i>	<i>PLI as per the TPO</i>	<i>Margins</i>
<i>1</i>	<i>Acropetal Technologies</i>	<i>40.03</i>	<i>TPO set</i>
<i>2</i>	<i>Aditya Birla Minacs IT Services</i>	<i>7.73</i>	<i>TPO set</i>
<i>3</i>	<i>Aditya Birla Minacs Tech. Ltd</i>	<i>6.04</i>	<i>TPO set</i>
<i>4</i>	<i>Avani Cincom Technologies</i>	<i>25.62</i>	<i>TPO set</i>

5	<i>Bodhtree Consulting Ltd</i>	19.14	Common
6	<i>Celestial Biolabs</i>	109.8	TPO set
7	<i>Cybermate Infotech</i>	141.71	TPO set
8	<i>E-zest solutions Ltd</i>	28.95	TPO set
9	<i>Flextonics</i>	8.07	TPO set
10	<i>iGate Global Solution Ltd</i>	14.77	TPO set
11	<i>Infosys</i>	40.41	TPO set
12	<i>Kals Information Systems</i>	41.94	TPO set
13	<i>LGS Global Ltd</i>	26.64	common
14	<i>Lucid</i>	16.5	TPO set
15	<i>Mindtree Ltd</i>	16.41	common
16	<i>Persistent Systems Ltd</i>	27.7	TPO set
17	<i>Quintegra Solution Ltd</i>	21.74	common
18	<i>R Systems International</i>	15.3	common
19	<i>RS. Software</i>	7.79	TPO set
20	<i>Sasken Communication Technologies Ltd</i>	13.44	common
21	<i>Tata Elxsi</i>	18.97	common
22	<i>Thirdware Solution Ltd</i>	18.01	TPO set
23	<i>Wipro Ltd</i>	28.45	TPO set
24	<i>Zenith Infotech 67.54</i>	67.54	TPO set
25	<i>3K Technologies Ltd</i>	28.9	TPO set
26	<i>Softso India Ltd</i>	42.15	TPO set
27	<i>3I Infotech Ltd</i>	67.35	TPO set
28	<i>Nucleus Software</i>	28.44	Assessee's
	<i>Arithmetic Mean</i>	33.19	

6. The TPO has computed the Arms Length Price (ALP) at page 10 of the TPO order as under:

*Calculation of the ALP:*

<i>Payment received on a/c of Software services(A)</i>	105,21,26,014
<i>Total Cost of Service B</i>	87,68,71,678
<i>ALP (Bx1.3319)</i>	116,77,72,198
<i>105% of the transaction Value</i>	110,47,32,314

*As the ALP lies outside the Limits of +/- 5% of the transactions value, an adjustment of Rs. 11,56,46,184/- (Rs. 116,77,72,198-Rs. 105,21,26,014)*

7. Whereas in respect of Information Technology Enabled Services (ITES) segment, the assessee provides services to AEs including income processing, reconciliations, MIS reporting, finance and accounting support, credit risk report generation, journal validation, posting of entries. The assessee has applied TNMM as Most Appropriate Method (MAM) and the operating margin/Profit Level Indicator (PLI) i.e. operating profit to operating cost (OP/OC) @ 18%. The assessee has identified 16 companies as comparables in the ITES segment referred at page 11 of the TPO as under:

<i>S.No.</i>	<i>Name of the Company</i>	<i>Margins</i>
<i>1</i>	<i>Cosmic Global</i>	<i>13.53</i>
<i>2</i>	<i>Caliber Point Business Solution</i>	<i>23.89</i>
<i>3</i>	<i>Spanco Ltd</i>	<i>17.03</i>
<i>4</i>	<i>Allsec Technologies Ltd</i>	<i>6.22</i>
<i>5</i>	<i>CG-Vak Software &amp; Exports Ltd</i>	<i>4.60</i>
<i>6</i>	<i>Flextronics Software Systems Ltd</i>	<i>12.25</i>
<i>7</i>	<i>R Systems Ltd</i>	<i>3.71</i>
<i>8</i>	<i>CSS Technergy Ltd</i>	<i>22.31</i>
<i>9</i>	<i>Datamatics Technology</i>	<i>6.58</i>
<i>10</i>	<i>Efunds International Ind Pvt ltd</i>	<i>17.95</i>
<i>11</i>	<i>Firstsource Solutions Ltd</i>	<i>13.17</i>
<i>12</i>	<i>HCL Technologies Ltd</i>	<i>19.81</i>
<i>13</i>	<i>Macmillan Ind Ltd</i>	<i>22.55</i>

14	<i>Transworks Information Services Ltd</i>	16.66
15	<i>Tutis Technologies Ltd</i>	32.25
16	<i>Vcustomer Services Ind Pvt Ltd</i>	17.48

8. Whereas, the TPO has dealt and discussed on the functional profile, margins and applied the filters on these comparables and determined the Arithmetic Mean Margin @29.29% as against (@15.63% margin of the assessee).The TPO has selected final set of 22 comparables in the ITES segment referred at page 17 of the TPO order as under;

<i>S.No.</i>	<i>Name of the Company</i>	<i>PLI(%)</i>
1	<i>Aditya Birla Minacs</i>	-0.55
2	<i>Coral Hub (Vishal Inf)</i>	50.72
3	<i>ICRA(Seg)</i>	10.42
4	<i>Infosys BPO</i>	20.03
5	<i>Maple</i>	20.03
6	<i>Mold Tek</i>	106.79
7	<i>Triton Corp</i>	23.44
8	<i>BNR Udyog (Seg)</i>	39.22
9	<i>Cosmic Global</i>	24.3
10	<i>Datamatics Financial</i>	34.87
11	<i>Eclerx</i>	44.5
12	<i>Accentia</i>	65.87
13	<i>Asit C Mehta</i>	8.55
14	<i>Caliber Point Business Solution</i>	10.7
15	<i>Crossdomin Solution P Ltd</i>	27
16	<i>Genesys International</i>	51.91
17	<i>I-Service Ind P Ltd</i>	10.92
18	<i>E4e</i>	17.23
19	<i>Spanco Ltd</i>	8.94
20	<i>HCL comnet Systems &amp; Services Ltd</i>	32.97

21	<i>Jindal Intellicom</i>	-8.66
22	<i>31 Infotech Ltd</i>	44.50
	<i>Arithmetic Mean</i>	29.29

9. The TPO has computed the ALP of ITES segment as under:

*Calculation of ALP:*

*Payment received on A/c of ITES Services 411,70,01,476*

*Total Cost of Services B 348,89,85,312*

*ALP (Bx1.2929) 451,09,09,110*

*105% of the Transaction value 432,28,51,550*

*95% of the transaction value 391,11,51,402*

*As the ALP lies outside the limits of +/- of the transaction value and adjustment of Rs 39,39,07,634 (Rs. 451,09,09,110 - 411,70,01,476) is made to the transaction.*

10. The Transfer pricing (TP) adjustment of SDS Rs.11,56,46,184 and ITES Rs. 39,39,07,634/- aggregating to Rs.50,95,53,818/- was determined and the TPO has passed the order u/s 92CA(3) of the Act dated 04.10.2011.

11. The Assessing Officer (A.O.) after receiving the TPO order dt 4.10.2011 has passed the Draft assessment order u/s 143(3) r.w.s 144C(1) of the Act dated 19.12.2011. Whereas, the assessee has filed the objections in Form no 35A against the draft assessment order with the Dispute Resolution Panel

(DRP).Whereas the DRP after considering the objections and the findings of the TPO has issued directions in respect of comparables and partly allowed the objections of the assessee and passed the order u/s 144C(5) of the Act dated 07.09.2012.The DRP has directed the TPO to rework the adjustments to the ALP. As per the directions of the DRP, the TPO has passed the order dated 24.01.2014 with reworking the adjustment to ALP at Rs 31,81,71,795/-The A.O. has determined the total income with TP adjustments Rs. 40,37,04,260/- and passed the final assessment order u/s 143(3) r.w.s 144C(13) of the Act dated 30-01-2013. Aggrieved by the final assessment order, the assessee has filed an appeal before the Hon'ble Tribunal.

12. At the time of hearing, the Ld. AR has restricted his submissions on the ground of appeal no 1 & 2 only and supported with the judicial decisions and the voluminous paper book. The Ld.AR submitted that in software development services (SDS) Segment two comparables (i) Infosys Ltd and (ii) Wipro Ltd have to be excluded in determining the ALP on turnover filter

criteria. The Ld. AR has not pressed the other sub grounds of appeal no 1, and therefore they are treated as not pressed and dismissed. Whereas in respect of Information Technology Enabled Services (ITES) segment, the Ld. AR submitted that three comparables (i)Eclerk Services Ltd(ii) Accentia Technologies Ltd and (iii)Vishal Information Technologies Ltd are to be excluded in determining the ALP . The Ld. AR has not pressed the other sub grounds of appeal no 2, and therefore they are treated as not pressed and dismissed. Further ground of appeal no 3 & 4 are not pressed and are dismissed. The additional grounds of appeal on the legal jurisdiction issue are treated as not pressed and are left open. Contra, the Ld. DR supported the orders of the lower authorities.

13. We have heard the rival submissions and perused the material on record. The Ld.AR contentions in respect of software development services (SDS) Segment two comparables (i) Infosys Technologies Ltd and (ii) Wipro Ltd are to be excluded in determining the ALP on turnover criteria and the assessee has

adopted TNMM and determined the PLI i.e OP/OC @20% and supported the submissions relying on the catena of judicial decisions. We find that

(i) Infosys Technologies Ltd: the company has a turnover of Rs.15,648 crores and is not functionally comparable and has global brand with the intangible assets and functional dissimilarity with diverse business operations. The company has huge economic differences in size and market pricing and position. The comparable has high risk profile operations, number of employees, asset base, and research & development works, very high brand values and does end to end business solutions. We find that the Infosys Technologies Ltd was excluded on the Turnover Filter/ Criteria by the coordinate bench of Bangalore Tribunal in M/s Kodiak Networks India Pvt Ltd vs ACIT. IT(TP)A 284/Bang/2017 dated 30.06.2020 at page 10 Para 6 of the order which is read as under:

*6. We find the co-ordinate Bench of the Tribunal in the case of UEI Electronics Pvt. Ltd. vs. DCIT. IT (TP) A No.2005/Bang/2016 dtlO.03.2017 has dealt on the issue of exclusion of 3 comparables at page 2, Para 3 & 4 of the order which is read as under*

3. The learned AR of the assessee submitted a chart in respect of the assessee's request for exclusion of 4 comparables on account of functional difference i.e. 1). Qenesys International Corporation Limited, 2) Infosys Limited, 3) Larsen & Toubro Infotech Limited and 4) Persistent Systems Limited. It was submitted that for the request of exclusion of the 1st company, reliance is placed on the tribunal order rendered in the case of Diologic Networks (India) Private Limited vs. DCIT in IT (TP) A No. 1324/Mum/2014 and for remaining 3 companies, reliance is placed on the tribunal order rendered in the case of Applied Material India Private Limited vs. ACIT in IT (TP) A No. 17/Bang/2016. At this juncture, a query was raised by the bench as to whether these companies are satisfying the turnover filter of 1/10<sup>th</sup> and 10 times of the turnover of the assessee company. In reply, learned AR of the assessee submitted that the first company is satisfying the turnover filter because the turnover of this company is Rs. 96 Crores as against the turnover of the assessee company of Rs. 18.45 Crores but the remaining 3 companies are not satisfying this filter because turnover of these companies at Rs. 31254 Crores, Rs. 2960 Crores and Rs. 810 Crores respectively is much in excess of 10 times of the turnover of the assessee company. He submitted that still, the assessee is requesting for exclusion of three companies also on the basis of functional dissimilarity and not on the basis of turnover filter. Regarding the claim in the chart for inclusion of 3 companies i.e. 1) R Systems international Limited, 2) Thinksoft Global Limited and 3) Cigniti Technologies Limited, he submitted that this request for inclusion of these 3 companies is not pressed. Learned DR of the revenue supported the orders of the lower authorities. He also placed on record written submissions as per which it is contended that before relying on any judgment as precedence, the AR of the assessee has to establish that the facts in the present case and the cited case is identical. In support of this contention, he placed reliance on the following tribunal orders:-

a) Virage Logic International India as reported in 72 [Taxmann.com](#) 11(2016) (Delhi).

b) P-Cl Telecom India (P) Limited as reported in 74 [taxmann.com](#) 107 (2016) (Mum).

C) Sony Mobile Communications India (P) Ltd. as reported in 43 [Taxmann.com](#) 108 (2014) (Delhi).

He submitted a copy of these 3 tribunal orders with the written submissions.

4. We have considered the rival submissions. We find that since, learned AR of the assessee has not pressed for inclusion of 3 companies as claimed in the chart, we have to decide about the claim of the assessee for exclusion of 4 companies apart from the claim for risk adjustment. Out of this, 3 companies are failing the turnover filter. Although the learned AR of the assessee submitted that he is not requesting for exclusion of these 3 companies by applying the turnover filter, we feel that these 3 companies having very high turnover cannot be considered as good comparable even if these are functionally comparable and therefore, we direct the AO/TPO to exclude these 3 companies for this reason that the turnover of these 3 companies is very high being much in excess of 10 times of the turnover of the assessee company and therefore, we do not examine the functional similarity aspect of these 3 companies being of academic interest.

Accordingly, we follow the judicial precedence, and direct the TPO/Assessing Officer to exclude the comparables on turnover filter criteria (i) Infosys Limited (ii) L & T InfoTech Limited and (iii) Persistent Systems Limited, from final list of comparables in determination of ALP in software development services segment

Accordingly, we direct the TPO/AO to exclude the Comparable Infosys Technologies Ltd on Turnover

filter criteria from final list of comparables in determining the ALP.

(ii) Wipro Ltd: the company has a turnover of Rs.17,493 crores and functionally different and no segmental data and stand alone financials are available. The company is a I T giant with significant intangibles and further we find that the comparable has three amalgamations/merger of companies in the financial year. We find that the comparable company was excluded on the Turnover Filter/ Criteria by the coordinate bench of Mumbai Tribunal in ITA No. 2254&2136/Mum/2012 in M/s DBOI Global Services Pvt Ltd Vs DCIT dated 30.06.2020 at page 8 Para 7.6 & 7.7 of the order which is read as under:

*Wipro Limited (Seg)*

*7.6 The assessee has sought exclusion of Wipro Limited (Seg) on the ground that it has exceptionally high turnover compared to assessee's turnover. On perusal of facts on record, we find, as against the turnover of the assessee at 114.12 crores, the turnover of Wipro Limited (Seg) for the year under consideration is Rs. 13,684 crores, almost 120 times of assessee's turnover. Notably, in assessee's own case in assessment year 2005-06, the Tribunal, while deciding the comparability of this company with the assessee in ITA No.812/Mum/2012 dated 24-08-2016, taking note of the excessively high turnover of the comparable in comparison to assessee has excluded it. Further in a number of decisions of the co-ordinate benches rendered in case of other assesses,*

*this company has been excluded not only because of high turnover but also because of its brand value, size, etc. In this context, we may refer to the following decisions:-*

- 1. DBOI Global Services Pvt Ltd (supra)*
- 2. Capgemini India Private Ltd vs ITO (supra)*
- 3. CIT vs Pentair Water India Pvt Ltd (supra)*
- 4. Stream International Services Pvt Ltd (supra)*
- 5. Pole to Win India Pvt Ltd vs Dy.CIT, Cir.11(3), Bangalore (supra)*
- 6. Calibrated Healthcare Systems India Pvt Ltd vs ACIT(OSD), cit-1, New Delhi (supra)*
- 7. Stream International Services Pvt Ltd vs The ADIT (International Taxation)-7(2), Mumbai (supra)*
- 8. Zavata India Private Limited vs The DCIT, Cir.3(3), Hyderabad (supra)*
- 9. Flextronics Technologies India (P) Ltd (supra)*
- 10. AOL Online India Pvt Ltd vs Dy.CIT, circle-11(1), Bangalore (supra)*
- 11. Capital IQ Information Systems Pvt Ltd vs Dy.CIT (Int.Taxation), Hyderabad (supra)*
- 12. Telcordia Technologies India Pvt Ltd vs ACIT (supra)*

*7.7 Thus, keeping in view the decisions of the co-ordinate benches in assessee's own case as well as in case of other assessee's, we exclude this company from the list of*

Accordingly, we direct the TPO to exclude the Comparable Wipro Ltd on Turnover filter criteria from final list of comparables in determining the ALP.

14. In the Information Technology Enabled Services (ITES) segment, the Ld. AR submitted that three comparables (i) Eclerk Services Ltd (ii) Accentia

Technologies Ltd and (iii) Vishal Information Technologies Ltd are to be excluded in determining the ALP .

We Find

(i) E Clerx services Ltd: The company is functionally different and is providing KPO services in the field of data analysis operation management. The company has made a super normal profit in the year. The services are usually delivered to the customers outside India. We find the said company was excluded as comparable in the case of M/s Deutche CIB Centre Private Limited Vs. ACIT in ITA No. 134/Mum/2013 for the A.Y 2008-09 dated 09.11.2020 dealt at page 14 Para 9 of the order read as under:

*9. Eclerx Services Ltd:*

*It is the claim of the ld. A.R before us that the aforementioned company had wrongly been included as a comparable by the TPO/DRP in the final list of the comparables. The ld. A.R had sought exclusion of the aforementioned company as a comparable primarily for three reasons, viz. (i). earning of abnormal profits due to the extraordinary event of acquisition of Igentica Travel Solutions Ltd. by the company in July, 2007; (ii) outsourcing of work to third party vendors by the company; and (iii) functional dissimilarity as in comparison to the assessee company. On the contrary, it was averred by the ld. D.R that the aforesaid company was selected as a comparable by the TPO on the basis of the search strategy conducted by his office for identifying comparables for the ITeS sector. It*

was thus submitted by the ld. D.R that as the aforesaid company was rightly selected as a comparable for benchmarking the International transactions of the assessee for the year under consideration, therefore, there was no merit in seeking of exclusion of the same from the final list of comparables.

9.1. On a perusal of the „annual report“ of the aforementioned company i.e Eclerx Services Ltd., we find that it is a matter of fact borne from the record that it had during the year under consideration acquired a U.K based company viz. Igentica Travel Solutions Ltd. on July, 2007. Further, as per the „annual report“ of the aforementioned company i.e Eclerx Services Ltd., the acquisition of Igentica Travel Solutions Ltd. had provided the aforementioned company with a set of 28 large customers primarily in Europe which had strengthened its presence in the said geographic region. Also, the acquisition of Igentica Travel Solutions Ltd. had given the company an entry platform in a new vertical - travel and hospitality besides consolidating its position in the retail and manufacturing space. As the aforesaid company pursuant to the acquisition of Igentica Travel Solutions Ltd. on July, 2007 had witnessed an abnormal profit of 65.88% during the year under consideration, therefore, in our considered view it could not have been selected as a comparable for benchmarking the International transactions of the assessee for the year under consideration.

9.2 Further, a perusal of the financial results of the aforesaid company, Page 12 of APB, therein reveals that it had outsourced services to third party vendors which therein constituted 20.39% of its total expenses. The aspect that when a company had outsourced its ITeS services, it cannot be said that its business results would be comparable to any other ITeS service provider rendering services entirely on its own, had been so held by a coordinate bench of the Tribunal in the case of Google India Pvt. Ltd. Vs. DCIT [ITA No. 1368/Bang/2010]. Considering the outsourcing of services to the extent of 20.39% of its total expenses by the aforesaid company, we are of the considered view that the said

company i.e Eclerx Services Ltd. on the said count also could not have been adopted as a comparable for benchmarking the international transactions of the assessee for the year under consideration.

9.3 Lastly, we find that even otherwise the aforesaid comparable viz. Eclerx Services Ltd. is functionally dissimilar to the assessee company. The factum of functional dissimilarity of the aforesaid comparable had been looked into by the „Special bench“ of the Tribunal in the case of Maersk Globle Centre (India) Pvt. Ltd. Vs. ACIT, Circle-6(3), Mumbai, [ITA No. 7466/Mum/2012, dated 07.03.2014]. It was observed by the Tribunal, that a perusal of the „annual report“ of the aforesaid company i.e Eclerx Services Ltd. for the year under consideration i.e F.Y.2007-08, therein revealed, that the said company was in the business of providing data analytics and data process solutions to some of the largest brands in the world and was recognized as experts in chosen markets-financial services, retails and manufacturing. It was observed by the Tribunal, that the aforesaid company was providing complete business solutions by combining people, process improvement and automation and had employed over 1500 domain specialists working for the clients. It was observed, that the aforesaid company was providing industry specialised services for meeting complex clients needs, data analytics KPO service provider specialising in two business verticals - financial services and retail and manufacturing. It was stated to be engaged in providing solutions that not only just reduced cost, but helped the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. Further, the aforesaid company was stated to have a scalable delivery model and offered solutions that included data analytics, operations management and report services. Also, it was providing tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. The aforesaid company had a team dedicated to developing automation tools to support service delivery which increased productivity and allowed customers

*to benefit from further cost saving and output gains with better control over quality. In the backdrop of the aforesaid functional profile of the abovementioned company i.e Eclerx Services Ltd, the Tribunal was of the view that as the said company was mainly engaged in providing high-end services involving specialised knowledge and domain expertise in the field, thus, it could not be compared that the assessee before them which was mainly into providing of low-end services to its group concerns. In the backdrop of the functional profile of the aforementioned company i.e Eclerx Services Ltd., we find that beyond any scope of doubt it is functionally dissimilar to the assessee before us, which is engaged in providing of business support services (ITeS) to its group entities across the world. Accordingly, due to the functional dissimilarity of the aforesaid company i.e Eclerx Services Ltd, the same could not have been included in the final list of comparables for benchmarking the assessee's International transactions.*

*9.4. On the basis of our aforesaid observations, we herein direct the A.O to exclude the aforementioned company i.e Eclerx Services Ltd. from the final list of comparables for the purpose of benchmarking the international transactions of the assessee for the year under consideration.*

We found there is a functional dissimilarity in comparison to assesses financial profile and we direct the TPO to exclude the E clerx Services Ltd from the final list for determination of ALP.

(ii) Accentia Technologies Ltd: The company is primarily engaged in the business of medical transcription works. During the year there was merger of certain companies and the business has diversified. The operating cost of the company is

incurred in foreign currency and substantial price difference between onsite and offshore projects and has functionally different revenue model. We find the company was excluded as comparable in the case of M/s Deutche CIB Centre Private Limited Vs. ACIT in ITA No. 134/Mum/2013 for the A.Y 2008-09 dated 09.11.2020 dealt at page 17-20 Para 10 to 10.6 of the order which is read as under:

*10. Accentia Technologies Limited: The ld. A.R had stated that the aforesaid company had wrongly been included by the TPO/DRP in the final list of the comparables, for the reason, viz. (i) that the profitability of the aforesaid company was substantially impacted pursuant to the amalgamation of Iridium Technologies and Geosoft Technologies, into the assessee company; (ii) that the aforesaid company unlike the assessee had developed and owned unique intangibles/intellectual property; (iii) the employee costs of the aforesaid company was lowly pitched at 12%; and (iv) the aforesaid company was functionally dissimilar to the assessee company. Accordingly, the ld. A.R had on the basis of his aforesaid contentions therein sought exclusion of the aforesaid company from the final list of comparables.*

*10.1 Per contra, the ld. Departmental Representative (for short „D.R“) had strongly supported the inclusion of the aforesaid company in the final list of comparables. It was submitted by the ld. D.R that as the aforesaid company being functionally comparable was rightly included by the TPO/DRP in the final list of comparables, therefore, the claim of the assessee for*

*exclusion of the same from the final list of comparables being devoid of any merit was thus liable to be dismissed.*

*10.2 We have heard the authorized representatives in context of the inclusion of the aforesaid company as a comparable by the lower authorities. On a perusal of the annual report" of the aforementioned company i.e Accentia Technologies Ltd., it transpires that it is a matter of fact borne from the records that two units in Trivandrum, viz. (i). Iridium Technologies; and (ii). Geosoft Technologies had amalgamated into the parent company i.e Accentia Technologies Ltd. (the aforesaid company), during the financial year 2007-08. In fact, as per the „annual report" the amalgamation of the aforesaid two units is stated to have been the launching pad for the company to consolidate its base in India and abroad through inorganic growth and project itself as a global player. Also, the aforesaid company had acquired three companies in USA, which therein had added a host of long standing clients to its portfolio. In the backdrop of the aforesaid facts, we are of the considered view that as the amalgamation of the aforesaid units into the aforementioned company i.e Accentia Technologies Ltd., being an extraordinary event during the year under consideration i.e A.Y. 2008-09, had had resulted in the enormous growth of the company and impacted its profitability, therefore, it could not have been selected as a comparable for benchmarking the international transactions of the assessee for the year under consideration.*

*10.3 Further, we find, that as per the „annual report" of the aforementioned company, i.e Accentia Technologies Limited, it had developed and owned unique intangibles/intellectual property/process i.e copyrighted products namely Iridium Medical Transcription Automation System (iMTAS); Iridium Real Time School (iRTS); Iridium Accounts Management System (iAMS); Iridium Inventory Management System (iIMS); Iridium Payroll Management System (iPMS); Iridium Business Transcription System (iBTS); and Iridium Hospital Management*

*System (iHMS). In our considered view, the owning of the aforesaid intangible property by the aforementioned company therein renders it incomparable to the assessee before us.*

*10.4 Insofar, the employee cost of the aforesaid company i.e Accentia Technologies Ltd. is concerned, we find, that a perusal of its financials for the year under consideration, Page 25 of APB, therein reveals that the same works out at 12% of its total cost. Keeping in view the low employee costs of the aforesaid company, we are of the considered view that it could not have been feasibility selected as a comparable for benchmarking the International transactions of the assessee.*

*10.5 As regards the claim of the ld. A.R that the aforementioned company is functionally dissimilar to the assessee, we shall for the purpose of adjudicating the same look into the functional profile of the company. On a perusal of the „annual report“ for the year under consideration, we find that the aforementioned company had ventured into areas of the health care sector viz. Medical Transcription, Medical Coding, Medical Billing, Receivables Management (Collections). In the backdrop of the aforesaid functional profile of the abovementioned company i.e Accentia Technologies Ltd, as can be gathered from its „annual report“ Page 26 – 29 of APB, we are of the considered view that the same can be held to be functionally dissimilar to the assessee which is into provision of business support services (ITeS) to its group entities across the world. 10.6 In the backdrop of our aforesaid observations, and reasons given above, we are of a strong conviction that the abovementioned company, i.e Accentia Technologies Ltd. also could not have been included in the final list of the comparables for the purpose of benchmarking the international transactions of the assessee for the year under consideration.*

Accordingly, we direct the TPO to exclude the Comparable Accentia Technologies Ltd from final list of comparables in determining the ALP

(iii) Vishal Information Technologies Ltd: the company is functionally different as it is engaged in the business of conversion of books into POD titles. The employee cost is only 4.39% of its operating cost and substantial current liabilities payable. The company has earned super normal profit on out sourcing of services. We find the company was excluded as comparable in DCIT Vs. DBOI Global Services Pvt Ltd in ITA No. 2126/Mum/2012 dated 11-08-2021 at page 7 Para 7.5 of the order read as under:

*7.5 This company was sought to be excluded primarily on the reasoning that the company has very low employee cost since it mostly outsources its activities to third party vendors. We have found that in assessee's own case in assessment year 2005-06 this company was rejected for the reason that it outsources its activities. We have also noticed, the DRP has excluded this company in assessee's own case for the very same reason in assessment years 2006-07 & 2008-09. In fact, in various other decisions cited before us, this company has been excluded for the reason that instead of performing the work itself, it outsources the work to third party vendors. The facts in the impugned assessment year are more or less*

*identical. In view of the aforesaid, we exclude this company from the list of comparables.*

Accordingly, we direct the TPO to exclude the Comparable Vishal Information Technologies Ltd from final list of comparables in determining the ALP.

15. In the result, the appeal filed by the assessee is partly allowed for statistical purposes..

Order pronounced in the open court on 10.01.2022.

Sd/-  
(PRAMOD KUMAR)  
**VICE PRESIDENT**

Sd/-  
(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 10.01.2022

KRK, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

( Asst. Registrar)  
ITAT, Mumbai