

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI
BEFORE SHRI B. R. R. KUMAR, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR US, JUDICIAL MEMBER
I.T.A. No. 508/DEL/2017 (A.Y 2012-13)
(THROUGH VIDEO CONFERENCING)

Headstrong Services India Pvt. Ltd. Delhi Information Technology Park, Shastri Park, New Delhi PAN: AABCT7650D (APPELLANT)	Vs	DCIT Cicle-11(1) New Delhi (RESPONDENT)
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Appellant by	Sh. Nageshwar Rao, Adv & Ms. Deepkia Aggarwal, Adv
Respondent by	Sh. Surender Pal, CIT DR

Date of Hearing	03.02.2022
Date of Pronouncement	17.03.2022

ORDER

PER YOGESH KUMAR U.S., JM

The present appeal preferred by the assessee for the Assessment Year 2012-13 against the final assessment order dated 25/11/2016 passed u/s 143(3) r/w Section 144C(13) of Income tax Act, 1961 ('Act' for short), by DCIT, New Delhi, consequent to the directions of DRP issued u/s 144C(5) of the Act dated 18/10/2016.

2. The grounds of appeal are as under:-

On the facts and circumstances of the case and in law, the learned Deputy Commissioner of Income-tax, Circle-11(1), New Delhi ("AO") has erred in passing the assessment order under Section 143(3) of the Income-tax Act, 1961 ("the Act") after considering the adjustments proposed by the Deputy Commissioner of Income-tax, Transfer Pricing Officer 2(3)(2) ("TPO") in his order passed under Section 92CA(3) of the Act and subsequently confirmed by the Hon'ble Dispute Resolution Panel ("DRP").

Each of the ground is referred to separately, which may kindly be considered independent of each other and without prejudice to each other.

That on the facts and circumstances of the case and in law,

Transfer Pricing grounds:

1. *The learned AO / TPO / DRP have erred in making an addition of INR 13,050,397 to the total income of the Appellant on account of adjustment in the arm's length price ("ALP") of the international transactions related to IT enabled services entered into by the Appellant with its associated enterprises ("AEs") and notional interest on outstanding inter-company receivables.*
2. *The learned AO / TPO / DRP have erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("the Rules") and modifying the same for determination of arm's length price ("ALP") of the impugned transaction to hold that the same are not at arm's length.*

3. *The learned AO / TPO / DRP have erred in*
 - a. *Not accepting the use of multiple year data, as adopted by the Appellant in its Transfer Pricing (“TP”) documentation; and*
 - b. *Determining the arm’s length margins / prices using data pertaining only to FY 2011-12 which was not available to the Appellant at the time of complying with the Transfer Pricing (“TP”) documentation requirements.*
4. *The learned TPO has applied filters which are not justified in the facts and circumstances of the case.*
5. *The learned AO / TPO/ DRP have erred by rejecting certain comparable companies identified by the Appellant for having different accounting year (i.e. having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months).*
6. *The learned AO / TPO / DRP have erred in rejecting certain identified by the Appellant using “Export earnings less than revenues” as a comparability criterion.*
7. *The learned AO / TPO / DRP have erred in rejecting certain comparable companies identified by the Appellant using “Turnover less than INR 1 Crore” as a comparability criterion.*
8. *The learned AO / TPO / DRP have erred in rejecting certain comparable companies identified by the Appellant using employee cost greater than 25 percent of the total cost as a comparability criterion.*
9. *The learned AO / TPO / DRP have erred in rejecting certain companies which are comparable to the Appellant and adding certain functionally dissimilar companies to the final set of comparable companies.*

10. *The learned AO / TPO / DRP have erred by considering loss/ gain arising on account of foreign exchange fluctuation as non-operating items while computing the margins of the assessee as well as comparable companies.*
11. *The learned AO / TPO / DRP have erred by considering provision for doubtful debts and bank charges as non-operating items while computing the margins of the assessee as well as comparable companies.*
12. *The learned AO / TPO / DRP have erred by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis comparable companies.*
13. *The learned AO / TPO / DRP have erred in holding inter-company receivables arising from provision of software development services and provision of IT-enabled services to constitute a separate international transaction under section 92B of the Act.*
14. *The learned TPO / AO / DRP have further erred in proceeding to benchmark the said transaction pertaining to inter-company receivables by rejecting economic analysis carried out in TP documentation and purported application of Comparable Uncontrolled Price ("CUP") method.*
15. *The learned AO has erred in not granting credit for foreign taxes claimed by the Appellant in its return of income and has accordingly computed the tax demand incorrectly.*
16. *The learned AO has erred in not granting Minimum Alternate Tax ("MAT) credit as claimed by the Appellant in its return of income and has accordingly computed the tax demand incorrectly.*
17. *The learned AO has erred in charging interest under section 234C of the Act.*

18. *The learned AO has grossly erred in initiating penalty proceedings under section 271 (1)(c) of the Act.*

3. The brief facts of the case: The assessee company is wholly owned subsidiary of Headstrong Services LLC USA, engaged in the business of development of computer software, providing IT enabled services, which are in the nature of accounting support, quality, human resource services, etc.

4. The assessee filed its return of income on 30.09.2012 declaring an income of Rs. 71,47,41,550/- under normal provisions and Rs. 80,48,91,544/- u/s 115JB of the IT Act. The case was selected for scrutiny and notice under section 143(2) of the Act was issued. In response to the notices, Assessee filed the requisite details.

5. The assessee has applied Transactional Net Margin Method ('TNMM') being most appropriate method for benchmarking international transaction of BPO Services considering itself to be tested party and operating profit to operating cost as the profit level indicator. Operating profit margin earned by the appellant in ITES segment was computed at 21.51% considering foreign exchange fluctuation as operating income. Assessee has considered set of 9 companies as being comparables. Weighted average operating profit margin of these 9 companies was determined at 15.82%. Considering assessee's operating margin being higher than the weighted average operating profit margin of the comparable companies, international transaction of provision of BPO services was claimed to be at arm's length price.

6. The TPO passed an order u/s 92CA(3) of the Act on 29.01.2016 by making transfer pricing adjustment of Rs. 2,56,39,878/- in respect of international transaction made with its AE's. The draft assessment order was passed on 14.03.2016, wherein the income of the assessee was computed at Rs. 77,03,81,430/- after making addition on account of transfer pricing adjustment of Rs. 2,56,39,878/-.

7. As against the addition proposed to be made in the Draft Assessment Order, the assessee filed objections before the DRP-I. The DRP-I passed order u/s 144C(5) of the Act on 18.10.2016, by giving following directions to the TPO/AO;

(a) To adopt a 6 months LIBOR + 400 basis point for benchmarking receivables.

(b) To rectify the margins of comparables in ITES segment.

Consequent upon the above directions issued by the DRP, the TPO vide letter dated 11.11.2016 recomputed the ALP adjustment u/s 92CA of the Act and reduced the transfer pricing adjustment from Rs. 2,56,39,878/- to Rs. 1,30,50,397/-. The Final Assessment Order (Order impugned in the present Appeal) came to be passed on 25-11-2016 by computing the income as follows:

<i>Particulars</i>	<i>Amount (In Rs.)</i>
<i>Income as per ITR</i>	<i>74,47,41,550/-</i>
<i>Additions</i>	
<i>1. Addition on account of transfer pricing adjustment</i>	<i>1,30,50,397/-</i>
<i>Total Income</i>	<i>75,77,91,947/-</i>
<i>Rounded off</i>	<i>75,77,91,950/-</i>

8. Aggrieved by the order impugned dated 25-11-2016, the Assessee preferred the present Appeal on the grounds mentioned above. The Assessee has confined the present appeal to determination of arm's length price of provision of BPO services amounting to Rs. 7,74,83,517/- and submitted that no dispute in relation to other international transactions.

9. The Ld. Counsel appearing for the assessee submitted that, the appellant is seeking for inclusion of two Companies viz., Caliber Point Business Solution and R. System International (Appeal Ground No. 5 to 8) and further seeking exclusion of four Companies viz., BNR Udyog Ltd., E-Clerx Services Ltd., Infosys BPO Ltd., TCS E-serve Ltd (Ground No. 9). The Ld. Counsel further submitted that, if the Grounds No. 5 to 9 are accepted, the other grounds will become academic ones.

10. We have heard the Ld. Counsel appearing for the assessee and also the Ld. DR for the Revenue, verified the records and gave our thoughtful consideration.

11. In so far as Appeal **Ground No. 1** is concerned, the same is general in nature, hence need not be adjudicated.

12. The **Grounds No. 2 to 4** are not pressed by the assessee since the same are only academic in nature.

13. The **Ground No. 5 to 8** are in respect of seeking for inclusion of two comparables Companies which are:

(i) Caliber Point Business Solutions Ltd.

(ii) R. Systems International Ltd.

14. The Ld. Counsel for the Assessee submitted that, both the above Companies have been excluded from the comparables on the ground that, the Companies are having an accounting year different from financial year for which financials of assessee company are being considered, the same has been excluded as the profit and revenues/expenses pertain to different period other than current year, which is of FY 2011-12.

15. Ld. Counsel further contended that, if the comparable is functionally same as that of the tested party, then the comparable cannot be rejected merely on the ground that data for the entire year is not available. Further contended that if based on the available data on record, the results for financial year can reasonably extrapolated, then the comparable cannot be excluded solely on the ground that comparables have different financial year endings. In order to substantiate the said contentions, the Ld. Counsel relied on the Judgment of the Hon'ble Jurisdictional High Court in CIT Vs. Mckinsely Knowledge Centre India Pvt. Ltd. (ITA No. 217/2014 dated 27/03/2015) and taken us through the following observation made in the said Judgment by the Hon'ble High Court:-

“14. The Revenue is in appeal before this Court questioning the admissibility of the above mentioned comparables while computing Arm’s Length Price regarding the IT Support services after the TPO and AO rejected the above mentioned companies but was later allowed by the CIT (A) and ITAT. While the AO had confirmed the findings of the TPO, the Ld. CIT(A) after considering the Assessee’s submissions accepted all the four companies rejected by the TPO. The revenue submits that Fortune Infotech Ltd. was correctly rejected by TPO because the company had different financial year ending on December, 2006, whereas Assessee’s financial year ended on March, 2006. There is nothing shown to the court that supports the revenue’s argument that the ITAT fell into error in holding that if a comparable is following different financial year then the same cannot be included in the list of comparables selected for benchmarking the international transaction. Therefore, the ITAT has held that if the comparable is functionally same as that of tested party then same cannot be rejected merely on the ground that data for entire financial year is not available. If from the available data on record, the results for financial year can reasonably be extrapolated then the comparable cannot be excluded solely on the ground that the comparables have different financial year endings.”

16. The Ld. Counsel for the Assessee has also relied on the Order of the Coordinate Bench of this Tribunal in the case of BT-eserv India Ltd. Vs. ITO (ITA No. 6690/Del/2016 dated 19/06/2018) and emphasized on the following paragraphs:-

“5.6 The assessee has also prayed for inclusion of one comparable i.e. R Systems Ltd which, although selected by the assessee, was rejected by the AO/TPO on the ground of different financial year ending. We find that this comparable was directed to be included by the ITAT Delhi Bench in assessee’s own case for AY 10-11 in ITA No 565/Del/2015 and the same was followed by the ITAT in AY 11-12 also in ITA No 99/Del/2016. The relevant observations of the ITAT in its order for assessment year 10-11 are contained in Para 13 and 14 of the order and the same are being reproduced as under:

“13. Another comparable M/s R Systems was included by the assessee in its transfer pricing study; however, the ld. TPO rejected the same stating that it has a different financial year compared to the appellant. The Id DRP upheld the action of the Id TPO. Before us the Id AR submitted that different year end is not an appropriate filter, anyway, he submitted that audited results of R System for the comparable period are available. Ld DR did not state that this company is functionally not comparable with the functions of the assessee but stated that only reason for its exclusion is unavailability of the audited accounts.

14. We have carefully considered the rival contentions. Undisputedly the R Systems Ltd is having different financial year. However, this company is listed company and quarter to quarter its financial results are available in public domain. Such financial results are also produced by the Id AR before us. In view of this

we are of the opinion that once a comparable is found functionally similar and further authentic and reliable financial data are available relevant to the accounting period of the appellant then merely the comparable has different financial year, it cannot be excluded. In view of this we direct the assessee to produce this information and demonstrate before ld TPO that relevant, authentic and reliable information with respect to the comparable is available in public domain and the ld Transfer Pricing Officer to verify the same, if found appropriate, to include the above comparable.”

The Ld. Counsel for the Assessee contended that the issue in respect of inclusion of above said two Companies are covered by the principles laid down in the above cited decisions.

17. The Ld. DR has taken us though the findings of the TPO/DRP/AO and submitted that, the authorities bellow have assigned valid reasoning in excluding the above said companies and justified the Order of the TPO/DRP/AO.

18. In the present case, Caliber Point Business Solution Ltd. has been held to be not comparable by the TPO on the ground that, said Company is having different financial ending, further the assessee has failed to produce the data pertaining to the said Company, that following the different accounting year can be used for comparability and analysis. In such cases, there are yearend expenses which cannot be allocated on the basis of available information to different quarters. In practically, some expenses are debited only at the end of the year and a prorate allocation is not accurate enough. Further, the assessee has failed to show how the available data pertaining to the above Company following a different accounting year can be used for comparability analysis.

19. In so far as, R System International, the said company has been held to be not comparable on the ground that, the comparability of an uncontrolled transaction can be analyzed only with the “data relating to financial year” in which the international transaction has been entered into. As the assessee follow the accounting year ending 31st March, the comparables must also have the data relating to the financial year ending 31st March, since the said data is not available, such company cannot be accepted as comparable. The Company having different financial endings has been rejected from the final set of comparables while calculating the average margins of the comparables.

20. In order to deal with the above issue regarding exclusion of the above said companies from comparables, it is inevitable to visit the relevant Rules framed under the Income Tax Rules 1962 (“the Rules” for short).

21. The Rule 10B of the Rules deals with the Determination of Arm’s length price, which is read as follows:

“Determination of arm's length price under section 92C .

10B . (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [*or a specified domestic transaction*] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :—

- (a) comparable uncontrolled price method, by which,—
 - (i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;
 - (ii) such price is adjusted to account for differences, if any, between the international transaction [*or the specified domestic transaction*] and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;
 - (iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction [*or the specified domestic transaction*];
- (b) resale price method, by which,—
 - (i) the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified;
 - (ii) such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;
 - (iii) the price so arrived at is further reduced by the expenses incurred by the enterprise in

- connection with the purchase of property or obtaining of services;
- (iv) the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction [*or the specified domestic transaction*] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;
 - (v) the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise;
- (c) cost plus method, by which,—
- (i) the direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined;
 - (ii) the amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled transaction, or a number of such transactions, is determined;
 - (iii) the normal gross profit mark-up referred to in sub-clause (ii) is adjusted to take into account the functional and other differences, if any, between the international transaction [*or the specified domestic transaction*] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect such profit mark-up in the open market;
 - (iv) the costs referred to in sub-clause (i) are increased by the adjusted profit mark-up arrived at under sub-clause (iii);
 - (v) the sum so arrived at is taken to be an arm's length price in relation to the supply of the property or provision of services by the enterprise;
- (d) profit split method, which may be applicable mainly in international transactions [*or specified domestic transactions*] involving transfer of unique intangibles or in multiple international transactions [*or specified domestic transactions*] which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction, by which—
- (i) the combined net profit of the associated enterprises arising from the international transaction [*or the specified domestic transaction*] in which they are engaged, is determined;
 - (ii) the relative contribution made by each of the associated enterprises to the earning of such combined net profit, is then evaluated on the basis of the functions performed, assets employed or to be employed and risks assumed by each enterprise and on the basis of reliable external market data which indicates how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances;
 - (iii) the combined net profit is then split amongst the enterprises in proportion to their relative contributions, as evaluated under sub-clause (ii);
 - (iv) the profit thus apportioned to the assessee is taken into account to arrive at an arm's length price in relation to the international transaction [*or the specified domestic transaction*]:

Provided that the combined net profit referred to in sub-clause (i) may, in the first instance, be partially allocated to each enterprise so as to provide it with a basic return appropriate for the type of international transaction [*or specified domestic transaction*] in which it is engaged, with reference to market returns achieved for similar types of transactions by independent enterprises,

and thereafter, the residual net profit remaining after such allocation may be split amongst the enterprises in proportion to their relative contribution in the manner specified under sub-clauses (ii) and (iii), and in such a case the aggregate of the net profit allocated to the enterprise in the first instance together with the residual net profit apportioned to that enterprise on the basis of its relative contribution shall be taken to be the net profit arising to that enterprise from the international transaction [*or the specified domestic transaction*];

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

- (i) the net profit margin realised by the enterprise from an international transaction [*or a specified domestic 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 international transaction [*or the specified domestic 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 [*or the specified domestic transaction*];

[(f) *any other method as provided in rule 10AB.*]

(2) For the purposes of sub-rule (1), the comparability of an international transaction [*or a specified domestic 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 competition and whether the markets are wholesale or retail.

(3) An uncontrolled transaction shall be comparable to an international transaction [*or a specified domestic 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.

(4) The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction [*or a specified domestic transaction*] shall be the data relating to the

financial year [(hereafter in this rule and in rule 10CA referred to as the 'current year')] in which the international transaction [or the specified domestic transaction] has been entered into :

Provided that data relating to a period not being more than two years prior to [*the current year*] may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared:

[Provided further that the first proviso shall not apply while analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction, entered into on or after the 1st day of April, 2014.]

[(5) In a case where the most appropriate method for determination of the arm's length price of an international transaction or a specified domestic transaction, entered into on or after the 1st day of April, 2014, is the method specified in clause (b), clause (c) or clause (e) of sub-section (1) of section 92C, then, notwithstanding anything contained in sub-rule (4), the data to be used for analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction shall be,—

- (i) the data relating to the current year; or
- (ii) the data relating to the financial year immediately preceding the current, if the data relating to the current year is not available at the time of furnishing the return of income by the assessee, for the assessment year relevant to the current year:

Provided that where the data relating to the current year is subsequently available at the time of determination of arm's length price of an international transaction or a specified domestic transaction during the course of any assessment proceeding for the assessment year relevant to the current year, then, such data shall be used for such determination irrespective of the fact that the data was not available at the time of furnishing the return of income of the relevant assessment year.]”

The Rule 10B (4) of the Rules mandates that, the data to be used in analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction, shall be the 'data relating to the financial year' (hereafter in this rule and in rule 10CA referred to as the 'current year') in which the international transaction or the specified domestic transaction has been entered into. Therefore, even if the comparable is functionally same as that of the tested party, in the absence of data relating to the financial year in which the international transaction or the specified domestic transaction has been entered into, the same cannot be taken into consideration.

22. Rule 10 C of the Rules deals with 'Most appropriate method', which reads

hereunder:

“Most appropriate method.

10C. (1) For the purposes of sub-section (1) of section 92C, the most appropriate method shall be the method which is best suited to the facts and circumstances of each particular international transaction [*or specified domestic transaction*], and which provides the most reliable measure of an arm's length price in relation to the international transaction [*or the specified domestic transaction, as the case may be*].

(2) In selecting the most appropriate method as specified in sub-rule (1), the following factors shall be taken into account, namely:—

- (a) the nature and class of the international transaction [*or the specified domestic transaction*];
- (b) the class or classes of associated enterprises entering into the transaction and the functions performed by them taking into account assets employed or to be employed and risks assumed by such enterprises;
- (c) **the availability, coverage and reliability of data necessary for application of the method;**
- (d) the degree of comparability existing between the international transaction [*or the specified domestic transaction*] and the uncontrolled transaction and between the enterprises entering into such transactions;
- (e) the extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction [*or the specified domestic transaction*] and the comparable uncontrolled transaction or between the enterprises entering into such transactions;
- (f) the nature, extent and reliability of assumptions required to be made in application of a method.”

As per Rule 10C(2)(c) of the Rules, it is mandatory that in selecting the Most Appropriate Method as specified in sub-rule (1), one of the factors **shall be taken in to account is the availability, coverage and reliability of data necessary for application of the method;** In other words if there is no availability and reliability of the data, the same shall not be taken into consideration for determination of Arm's Length Price of the international transaction.

23. By going though the Rule 10 B(4) and 10C(2)(c) of the Rules, there are 2 conditions are to be required to be fulfilled while Determination of arm's length

price under section 92C of the Act and applying most appropriate method, i.e. the data relating to the entire financial year (*'current year'*) to be taken into account and there should be availability, coverage and reliability of data necessary for application of the method.

24. Further, the OECD guidelines and the provisions of the Income Tax Act with specific reference to Section 92D(1) and Rule 10D(1) and Rule 10D(4) of the Rules direct that, the comparison should be based on contemporaneous data. It needs to be appreciated that requirement of the existence of information and documentation doesn't override the provisions of Rule 10B(4) of the Rules regarding the mandatory use of current financial year data. For conducting comparability analysis, multiple year data cannot be encouraged as a matter of rule and only can be used under well documented circumstances, which is missing in the case of the two comparables sought to be included by the assessee. Otherwise, the TPO is bound to determine the ALP using the current financial year data in the comparability analysis.

25. The benefit of comparing with the similar financial year will rule out effect of difference in economics and market conditions prevailing at different time and period and also reveals the overall economic conditions of the industry, any specific changes in the provisions of the taxation, environment conditions in which the industry being operated, any events whether extraordinary or not viz., merger in the amalgamation, infusion of capital, market capitalization, depreciation of the last quarter or any other such event. The assessee has to demonstrate that no such events have occurred which could distort the profitability from year to year. The partial financial comparison especially on the transfer pricing matter can give rise skewed results, which needs to be avoided to come to a correct and accurate conclusion with regard to the comparable.

26. We have gone through the judgment of the Hon'ble High Court Delhi in CIT Vs. Mckinsely Knowledge Centre India Pvt. Ltd. (ITA No. 217/2014 dated

27/03/2015). We find that, the Hon'ble High Court of Delhi has made observations and come to the above conclusion in para 14 of the Judgment since "*there is nothing shown to the court that supports the revenue's argument that the ITAT fell into error in holding that if a comparable is following different financial year then the same cannot be included in the list of comparables selected for benchmarking the international transaction*". On the other words, nothing has been shown to the Hon'ble High Court which supports the revenue's argument that, if a comparable is following a different financial year then the same cannot be included in the list of comparable selected for bench marking the international transaction. Further, we find the Rule 10B(4) and Rule 10C(2)(c) of the Rules were not brought to the notice of Hon'ble High Court in the said Judgment cited by the Assessee.

27. We have also gone though the Order of the Co-ordinate bench of this Tribunal in BT-eserv India Ltd. Vs. ITO (ITA No. 6690/Del/2016 dated 19/06/2018), wherein the Rule 10B(4) and Rule and Rule 10C(2)(c) of the Rules have not been discussed or examined.

28. The various High Courts and the Supreme Court time and again held that, a decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect on the other courts or the subordinate courts or Tribunals and such judgment is not the ratio decidendi. This is the rule of *sub-silentio*, in the technical sense when a particular point of law was not consciously determined.

29. We place the reliance of the Hon'ble Supreme Court's Judgment reported in (1989)1 SCC101 (Municipal Corporation of Delhi Vs. Guranam Kaur), wherein it is held:

“11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das case (Writ Petition Nos. 981-82 of 1984) and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P. J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th edn. explains the concept of sub silentio at p. 153 in these words.

A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.

12. *In Gerard v. Worth of Paris Ltd. (k). ((1936) 2 All ER 905 (CA)), the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremith Ltd. ((1941) 1 KB 675), the court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."*

30. As the question regarding applicability of Rule 10B(4) and Rule and Rule 10C(2)(c) of the Rules and also the OECD guidelines having not been even referred to, much less considered by the Hon'ble High Court in the case of CIT Vs. Mckinsely Knowledge Centre India Pvt. Ltd. (ITA No. 217/2014 dated 27/03/2015) and also the co-ordinate bench of this Tribunal in BT-eserv India Ltd. Vs. ITO (ITA No. 6690/Del/2016 dated 19/06/2018), on applying the principle of *sub-silentio*, we hold that the above Judgment and the Order are not binding and applicable under the facts and circumstances of the present case.

31. The issue relating to use of current year data is very well settled in view of the decision of Special Bench of Bangalore Tribunal in Aztee Software and Technology Services Ltd. 2007 294 ITR (AT) 32, which has been reaffirmed by the Co-ordinate Bench of this Tribunal in the case of Mentor Graphics Pvt. Ltd. (2007)109 ITD (101), which stipulates the comparability analysis to be conducted on the basis of current year data. Apart from the same, in the following cases the similar view has been taken i.e.

- i. Honeywell limited 2009-TIOL-104-ITAT-Pune
- ii. Customer Services India Pvt limited 2009-TIOL-424-ITAT-Delhi
- iii. Schefenacker motherson limited 2009-TIOL-376-ITAT-Delhi
- iv. Panasonic India Pvt limited 2010-TII-47-ITAT-Del-TP
- v. Geodis Overseas P Limited 2011-TII-34-ITAT-Del-TP
- vi. Haworth India Pvt limited ITA No. 5341/Del/2010
- vii. TNT India Pvt limited 2011-TII-39-ITAT-BANG-TP
- viii. NGC Network India Pvt Limited 2011-TII-45-ITAT-Mum-Intl
- ix. ADP Private Limited 2011-TII-44-ITAT-Hyd-TP
- x. Deloitte Consulting India Pvt Ltd. 1082 and 1084/Hyd/2010.

32. Further, the expression of “shall” used in Rule 10B(4) of the Rules is abundantly clear that, the current year data of an uncontrolled transaction is to be used for the purpose of comparability while examining international transaction with the associate enterprises. We have also placed reliance on the following case laws with regard to stern use of Financial Year to Financial Year comparison.

- i. ACIT vs Birlasoft Ltd. 47 SOT 437, wherein it is held that, expression employed in Rule 10B(4) of the Rules makes it abundantly clear that the current year data of an uncontrolled transaction is to be used for the purpose of comparability while examining international transaction with the associate enterprises.

ii. ACIT Vs. Exxon Mobil Company India (P) Ltd. Vs. DCIT 46 SOT 294, wherein it is held that, the data relating to the current year has to be considered for determining transfer pricing. If an assessee wants to take previous years data, then burden is on the assessee to demonstrate that previous year's data contained certain facts which would influence determination of transfer pricing.

iii. Symnetac Software Solutions Pvt. Ltd. 46 SOT 48, wherein it is held that Rule 10B(4) manifest that generally data of financial year in which international transaction has been entered into to be used for analyzing comparability of uncontrolled transaction in order to determine ALP. Using data of comparables pertaining to the same period during which international transaction took place because it will rule out effect of difference in economic and market conditions prevailing/exist different time period and, therefore, there is no error or illegality by taking into consideration only data of financial year in which international transaction has been entered into.

33. The above said Companies i.e: Caliber Point Business Solutions Ltd. and R. Systems International Ltd. have been excluded on the ground that, the Companies are having different financial ending and also non availability of coverage and reliability of data necessary for application of the method. In our opinion, the said exclusion has been done by the TPO/DRP/AO in strict compliance with Rule 10B (4) and Rule 10C (2) (c) of the Rules and based on the settled principles of law, therefore the same requires no interference. Accordingly we reject the Assessee's Appeal Grounds No. 5 to 8.

34. **Ground No. 9** is in respect of seeking exclusion of 4 companies.

- (i) BNR Udyog Ltd.
- (ii) E-Clerx Services Ltd.
- (iii) Infosys BPO Ltd.
- (iv) TCS E-serve Ltd.

35. **(i) BNR Udyog Ltd.**

The BNR Udyog Ltd. has been included by the TPO/DRP/AO as comparable while computing ALP on the ground that the Company is into healthcare receivable cycle management predominantly which is in ITeS Sector and the high turnover does not have any co-relation to high profits earned by any of the comparable companies.

36. On verifying the annual report of the BNR Udyog Ltd., it is found that the said Company has undertaken substantial related party transaction of 49.6% during the year under consideration, therefore, fails related party filter.

37. Further, the Coordinate Bench of this Tribunal in BT India Pvt. Ltd. vs. ITO in ITA No. 6690/Del/2019 dated 19/06/2018 excluded the said Company from the comparables while computing the ALP, holding that it provides medical transcription services, which is not comparable to ITeS Service Provider. The relevant portions are as follows:-

“5.1.1 Respectfully following the order of the co-ordinate Bench, on identical facts, we direct the AO/TPO to exclude BPO Infosys Ltd from the final set of comparables. BNR Udyog Limited Apart from assessee's objections regarding BNR Udyog Ltd having substantial RPT and application of the RPT filter at the segmental level by the TPO, it is also the assessee's contention that that this company was functionally dissimilar to the assessee company as this company was providing medical transcription service. We ITA 6690/Del/2016 Assessment year 2012-13 find that, undisputedly, BNR Udyog Ltd is carrying out medical transcription, medical billing and coding whereas the assessee is a captive service provider. ITAT Delhi Bench had the occasion to consider the comparability of another company providing medical transcription service i.e. Accentia Technologies Ltd. with the assessee company

in assessee's own case for AY 11-12 in ITA No. 99/Del/2016 by holding that the functions of medical transcription are not at all comparable to the functional profile of the assessee company. The relevant observations of the co- ordinate Bench in assessee's own case for AY 11-12 are as under:

"12. We have carefully considered the rival contentions and perused the annual accounts of the Accentia Technologies Limited submitted at page No. 1 to 108 of the paper book. As per page no 42 of the annual report the nature of services performed by this company are functions of medical transcription. 'Medical transcription' services are IT enabled services that require specialized skills in utilizing information technology in converting the voice data of the doctors who are located anywhere across the globe, consisting of patient history "and medical advices into electronic documents. Such confidential information is converted in to a written text document by medical transcription. This written text may be printed and hand placed in the patient's record, archived and/or retained only as an electronic medical record. The medical transcription can be performed in a hospital via remote transmission to the hospital or directly to the actual providers of services i.e. doctors etc. Medical transcription is still the primary mechanism for physician to clearly communicate with other health care providers accessing the patient's records to advise ITA 6690/Del/2016 Assessment year 2012-13 them on the state of the patient's health and past, current treatment and assure continuity of care. Further it is mentioned that a medical transcriptionist must be aware of the

latest drugs introduced in the concerned market. This can be done with the pharmacology reference books which should always be part of its library. It is further mentioned that because of the diverse nature of the activities concerned the medical transcription profession is considered a skilled work which can be done only after undergoing 6 to 8 months of rigorous training. The next service that is being provided by this company is medical coding. The above company has already developed a sizeable number of certified coders deployed in outsourced medical coding work. It is further mentioned that as the margin from medical coding is on a higher side compared to medical transcription, medical coding is also known as insurance coding because it is assigning codes to diagnose and procedures which help in financial reimbursement from insurance companies and other government organizations, consulting firm, software companies etc. The next service area of the above company is medical billing which is a medical practice management and the doctor's key to getting paid and it maintains patient's financial accounts for collecting money. On looking at the income stream of the assessee on perusal of the profit and loss accounts, it is apparent that its earnings are from medical transcription, billing and collection and coding. On looking at the functional profile of medical transcription which is required to be carried out by well-trained persons who must be knowledgeable in the field of pharmacology. Further the comparable company has considered all the 3 segments as one segment. On perusal of page No. 78 of the annual report of the company it is noted that w.e.f. 1st April

2008 the company which is engaged in the similar line of business has been amalgamated with this company.

However, we do not find any reason to exclude this company for the reasons of amalgamation because the functions performed by the amalgamated company and amalgamating company are similar. But on comparison ITA 6690/Del/2016 Assessment year 2012-13 of the functional profile of the comparable with assessee company, which provides corporate services, marketing and business development services etc which are of routine administrative nature, we find that functions of the assessee company are not at all comparable with the medical transcription function of the comparable company. But same cannot be said with respect to the medical coding and medical billing activities of the comparable company which are almost similar to the support functions performed by the assessee. However, in absence of segmental information available in case of comparable company with respect to the medical transcription business and medical coding and medical billing, it deserves to be rejected. It is apparent that financial results of the comparable company include profits of medical transcription business as well as medical coding and billing activities. As the functions of the medical transcription are not at all comparable with the functions performed by the company as already stated by us above, the above comparable company is required to be excluded on account of functional dissimilarity and non availability of segmental results, with the assessee. In view of this, we direct the

Ld. Transfer pricing officer to exclude the Accentia technologies from the comparability analysis."

5.1.2 On similar reasoning, we direct the AO/TPO to exclude BNR Udyog Ltd. from the final set of comparables."

38. Therefore, BNR Udyog Ltd. becomes non comparable while computing the ALP by applying the principal laid down in the above case.

39. (ii) **E-Clerx Services Ltd.**

The E-Clerx Services Ltd. has been held to be suitable comparable by considering the functional profile of the assessee, the services offered by the said Company in 'Data Analytic and Process Outsourcing' are part and parcel of ITeS Segment, the assessee is also engaged in KPO Services and outsourcing of work is not a criteria to reject any Company.

40. In our opinion, since the E-Clerx Services Ltd. had a different revenue recognition policy outsourcing expenditures having different business models and the same is non-comparable by applying principal laid down in the case of Rampgreen [2015] 377 ITR 533 wherein Hon'ble Delhi High Court held as follows:-

*"33. The Special Bench of the Tribunal in **Maersk Global Centers (India) Pvt. Ltd. (supra)** struck a different cord. The Special Bench of the Tribunal held that even though there appears to be a difference between BPO and KPO Services, the line of difference is very thin. The Tribunal was of the view that there could be a significant overlap in their activities and it may be difficult to classify services strictly as falling under the category of either a BPO or a KPO. The Tribunal also observed that one of the key success factors of the BPO Industry is its ability to move up the value chain through KPO service offering. For the aforesaid reasons, the*

Special Bench of the Tribunal held that ITeS Services could not be bifurcated as BPO and KPO Services for the purpose of comparability analysis in the first instance. The Tribunal proceeded to hold that a relatively equal degree of comparability can be achieved by selecting potential comparables on a broad functional analysis at ITeS level and that the comparables so selected could be put to further test by comparing specific functions performed in the international transactions with uncontrolled transactions to attain relatively equal degree of comparability.”

41. Further, the above Company has been excluded as Eclerx holding it to be a KPO Company which is not comparable to ITeS Services Provider in BT-eserv India Vs. ITO (ITA No. 6690/Del/2016 dated 19/06/2018 wherein it is held as follows:-

“5.2 Eclerx Services Limited With respect to this company, it has been again submitted that this company was functionally different from the assessee company as this company was engaged in Knowledge Process Outsourcing (KPO) services and was engaged in providing financial services like trade processing, reference data services ITA 6690/Del/2016 Assessment year 2012-13 like web content management and merchandising execution, web analytics, social media etc. It has also been submitted that this company was held to be KPO service provider by the Hon'ble Delhi High Court in Rampgreen Solutions Private Ltd. in ITA 102/2015. We note that this company was directed to be excluded as a comparable by the Delhi Bench of the ITAT in assessee's own case for Assessment Year 11-12 in ITA No. 99/Del/2016 with the following observations:

"38. We have carefully considered the rival contentions and also perused the orders of the lower authorities with respect to his comparable. With respect to this comparable coordinate bench in ITA No. 2010/Del/2014 for assessment year 2009 - 10 in case of Ameriprise India private limited (who is also an ITES company) was excluded this comparable holding as under.:-

"14.2 After considering the rival submission and perusing the relevant material on record, we find that it is a knowledge process outsourcing (KPO) company providing data analytics and data process solutions to global clients. This company provides end to end support through trade life cycle including trade confirmation and settlements etc. it also provides sales and marketing support services to leading global manufacturing, retail, travel and leisure companies through its pricing and profitability services. From the above narration of the nature of business carried on by e-Clerx Services Ltd, it is manifest that the same being a KPO company is quite different from the assessee, providing only IT enabled services to it AE. Apart from that, it is further observed that this company has significant intangible which it uses in rendering KPO services, against which the assessee does not have any ITA 6690/Del/2016 Assessment year 2012-13 intangibles. As such, e-Clerx Services ltd. cannot be considered as comparable. The same is directed to be eliminated."

39. We also find that assessee is also engaged in this appeal in ITES industry and therefore the judgment of the coordinate bench cited by the Ld. authorized representative appropriately applies to the facts of this case also. In the

above decision, it has been held that the e- Clerx services Ltd. is a knowledge process outsourcing company providing data analytics and data process solutions to global clients. It is further held that it is a KPO company and is quite different from the assessee providing only IT enabled services. Therefore, respectfully following the decision of the coordinate bench we direct the Ld. transfer pricing officer/assessing officer to exclude the above comparable from the comparability analysis."

5.3.1 In view of the above and respectfully following the order of the co-ordinate Bench in assessee's own case, we direct the AO/TPO to exclude this company from the final set of comparables."

42. For the discussion above made, we found that the E-Clerx Services Ltd. becomes non comparable while computing ALP by applying the principal laid down in the above case.

43. (iii) **Infosys BPO Ltd.**

The Infosys BPO Ltd. has been held to be suitable comparable, though there was a difference in risk profile, but the assessee could not show how any such difference affected profitability so as to make a material difference, brand value in a service industry may drive its revenues but may not affect the profitability of a company. Further the TPO has observed that, any brand come with the cost i.e. huge expenses are required to be incurred to build brand value.

44. On verification of the P& L of the Infosys BPO Ltd., would show that, the Company has incurred subcontracting charges attracting the same disqualification as detailed in the context of Eclerx as the business model is different and would result in different FAR. The above company has also earned income from consultancy, which has a different FAR.

45. Further, the above company is having higher brand value and engaged in areas like insurance, banking, financial services, manufacturing and telecom which are in the niche areas unlike the assessee. The Coordinate Bench of this Tribunal in the case of BT-eserv India Vs. ITO (ITA No. 6690/Del/2016 dated 19/06/2018 held as follows:-

“5.1 Infosys BPO Limited it is the assessee's contention that this company was functionally dissimilar to the assessee company as this company was engaged in providing high-end integrated services. It has been submitted and demonstrated from the annual report of BPO Infosys Ltd that this company is rendering a wide array of BPO services in the nature of business platforms, customer service outsourcing, finance and accounting, human resources outsourcing, legal process outsourcing, sales and fulfillment sourcing and procurement outsourcing etc. On the other hand, it ITA 6690/Del/2016 Assessment year 2012-13 is seen that the assessee provides only back office support services in the nature of IT enabled services and it is essentially a captive service provider. Although, the assessee has pleaded for exclusion of BPO Infosys Ltd. on other grounds also, it is our considered opinion that the wide functional dissimilarity between the two companies is sufficient to accept the assessee's plea for exclusion of this company from the final set of comparables. We also find that BPO Infosys Ltd. was directed to be excluded by ITAT Delhi Bench in the case of [Baxter India Pvt. Ltd vs. ACIT](#) in ITA 6158/Del/2016 which also provided captive IT Enabled Services to its AE. The year under consideration before the ITAT in the case of Baxter India (P) Ltd was also AY 2012-13. The relevant observations are contained in Para 23 of the said order and the same are being reproduced for a ready reference:

"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 Id. counsel for the assessee before TPO/DRP that in order to maintain the brand image of Infosys BPO Ltd. in the ITA 6690/Del/2016 Assessment year 2012-13 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, his 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."

5.1.1 Respectfully following the order of the co-ordinate Bench, on identical facts, we direct the AO/TPO to exclude BPO Infosys Ltd from the final set of comparables. BNR Udyog Limited Apart from assessee's objections regarding BNR Udyog Ltd having substantial RPT and application of the RPT filter at the segmental level by the TPO, it is also the assessee's contention that that this company was functionally dissimilar to the assessee company as this company was providing medical transcription service. We ITA 6690/Del/2016 Assessment year 2012-13 find that, undisputedly, BNR Udyog Ltd is carrying out medical transcription, medical billing and coding whereas the assessee is a captive service provider. ITAT Delhi Bench had the occasion to consider the comparability of another company providing medical transcription service i.e. Accentia Technologies Ltd. with the assessee company in assessee's own case for AY 11-12 in ITA No. 99/Del/2016 by holding that the functions of medical transcription are not at all comparable to the functional profile of the assessee company. The relevant observations of the co-ordinate Bench in assessee's own case for AY 11-12 are as under:

"12. We have carefully considered the rival contentions and perused the annual accounts of the Accentia Technologies Limited submitted at page No. 1 to 108 of the paper book. As per page no 42 of the annual report the nature of services

performed by this company are functions of medical transcription. 'Medical transcription' services are IT enabled services that require specialized skills in utilizing information technology in converting the voice data of the doctors who are located anywhere across the globe, consisting of patient history "and medical advices into electronic documents. Such confidential information is converted in to a written text document by medical transcription. This written text may be printed and hand placed in the patient's record, archived and/or retained only as an electronic medical record. The medical transcription can be performed in a hospital via remote transmission to the hospital or directly to the actual providers of services i.e. doctors etc. Medical transcription is still the primary mechanism for physician to clearly communicate with other health care providers accessing the patient's records to advise ITA 6690/Del/2016 Assessment year 2012-13 them on the state of the patient's health and past, current treatment and assure continuity of care. Further it is mentioned that a medical transcriptionist must be aware of the latest drugs introduced in the concerned market. This can be done with the pharmacology reference books which should always be part of its library. It is further mentioned that because of the diverse nature of the activities concerned the medical transcription profession is considered a skilled work which can be done only after undergoing 6 to 8 months of rigorous training. The next service that is being provided by this company is medical coding. The above company has already developed a sizeable number of certified coders deployed in outsourced medical coding work. It is further mentioned that as the margin from medical coding is on a higher side compared to medical transcription, medical coding

is also known as insurance coding because it is assigning codes to diagnose and procedures which help in financial reimbursement from insurance companies and other government organizations, consulting firm, software companies etc. The next service area of the above company is medical billing which is a medical practice management and the doctor's key to getting paid and it maintains patient's financial accounts for collecting money. On looking at the income stream of the assessee on perusal of the profit and loss accounts, it is apparent that its earnings are from medical transcription, billing and collection and coding. On looking at the functional profile of medical transcription which is required to be carried out by well-trained persons who must be knowledgeable in the field of pharmacology. Further the comparable company has considered all the 3 segments as one segment. On perusal of page No. 78 of the annual report of the company it is noted that w.e.f. 1st April 2008 the company which is engaged in the similar line of business has been amalgamated with this company.

However, we do not find any reason to exclude this company for the reasons of amalgamation because the functions performed by the amalgamated company and amalgamating company are similar. But on comparison ITA 6690/Del/2016 Assessment year 2012-13 of the functional profile of the comparable with assessee company, which provides corporate services, marketing and business development services etc which are of routine administrative nature, we find that functions of the assessee company are not at all comparable with the medical transcription function of the comparable company. But same cannot be said with respect to the medical

coding and medical billing activities of the comparable company which are almost similar to the support functions performed by the assessee. However, in absence of segmental information available in case of comparable company with respect to the medical transcription business and medical coding and medical billing, it deserves to be rejected. It is apparent that financial results of the comparable company include profits of medical transcription business as well as medical coding and billing activities. As the functions of the medical transcription are not at all comparable with the functions performed by the company as already stated by us above, the above comparable company is required to be excluded on account of functional dissimilarity and non availability of segmental results, with the assessee. In view of this, we direct the Ld. Transfer pricing officer to exclude the Accentia technologies from the comparability analysis."

46. By respectfully following the above order of the Coordinate Bench, we are of the opinion that the TPO has committed an error by including Infosys BPO Ltd. as comparable while computing ALP.

47. (iv) **TCS E-serve Ltd.**

The TCS E-Serve Ltd. has been held to be suitable comparable on the ground that, the services offered by the said company are in the nature of IT enabled services only as the same falls within the list of services published by the CBDT. As per the audited financials, the company has stated that, it is engaged in BPO (transaction processing) services to the banking and financial services industries which are considered as single segment. Further, the TPO opined that high turnover doesn't have any co-relation to the high profit earned by any of the comparable company.

48. The above Company deserves to be excluded, which provides KPO Services in the nature of core business processing services analytics and insides as well as support service for both data and voice process, therefore, the same is not a comparable. We placed reliance on the order of the Cr-ordinate Bench in the case of BT-eserv India Ltd. Vs. ITO (ITA No. 6690/Del/2016 dated 19/06/2018), wherein it is held as under:-

“5.4 TCS e- Serv Ltd.

With respect to TCS e Serve Ltd., it has been submitted that this company is also functionally dissimilar to the assessee company as this company provides KPO services to banking and financial services industry in the form of core business processing services, analytics and insights as well as support services for ITA 6690/Del/2016 Assessment year 2012-13 both data and voice processes. It has also been submitted that service wise segmental details were not available in the case of this company. It has also been submitted that this company was excluded by the ITAT in assessee's own case for assessment year 2011-12 and had also been excluded by the Ld. DRP in assessment year 2010-11 on account of it being functionally dissimilar to the assessee company. We find that the averment of the Ld. AR with respect to the exclusion of this company from the final set of comparables in assessee's own case is correct. ITAT Delhi Bench in assessee's own case for AY 11-12 in ITA No. 99/Del/2016 has directed exclusion of TCS -serve. The relevant observations of the co-ordinate Bench are contained in Para 40, 41 and 42 which are being reproduced as under:

"40. Now we come to the next comparable contested by the assessee by the name of TCS e-serve Ltd., The Ld. authorised representative submitted that above

comparable has a margin of 69.06 percentage and same was not included in the transfer pricing study report of the assessee, but it is included by the Ld. transfer pricing officer stating that it is functionally comparable to the assessee and does not own any significant intangibles. The contentions of the Ld. transfer pricing officer for inclusion of the above company were also upheld by the Ld. dispute resolution panel. Before us. The Ld. authorized representative submitted that this company is functionally different as it earns revenue from 4 different activities such as financial information processing, customer contract voice services, business process management and analytics. It was further stated that during ITA 6690/Del/2016 Assessment year 2012-13 the year it was taken over by the TCS Ltd and therefore it has an exceptional year of operation. It was further contested that it be high risk and also earns super normal profit and further it has insufficient segmental information. He further held that this comparable has been excluded by the Ld. dispute resolution panel in assessment year 2010 - 11 on account of being functionally dissimilar to the assessee. He further relied on the decision of the coordinate bench in case of Capita India private limited versus ACIT and Actis global services private limited versus ITO.

41. The Ld. departmental representative vehemently contested the arguments of the Ld. authorized representative and submitted that above comparable is functionally carrying on the same activities and therefore

has rightly been included by the Ld. transfer pricing officer for comparability analysis.

42. We have carefully considered the rival contention and also perused the orders of the lower authorities with respect to this comparable. We also perused the direction given by the Ld. dispute resolution panel for assessment year 2010 - 11 in case of the assessee dated 30-11-2014 at page No. 26 of the direction with respect to this comparable. It has been held by the Ld. dispute resolution panel in case of the assessee that the comparable companies is involved in both high end services including transaction processing, technical services involved software testing, verification and validation of software at the time of implementation and management activities and also low and services. Therefore it can be seen that such a high-end service which require personnel with those set of technical expertise cannot be compared to the simple back-office support and procurement support services provided by the taxpayer. Therefore, the Ld. dispute resolution panel directed the Ld. transfer pricing officer to exclude the above company from the list of comparable for that year. Before us the Ld. departmental representative could not point out that how the finding of the Ld. dispute resolution panel given in assessment year 2010-- 2011 are not pertinent with respect to the functional profile of the assessee as well as the comparable company for this year. In view of this we direct the Ld. transfer pricing ITA 6690/Del/2016 Assessment year 2012-13 officer/assessing officer to exclude the above comparable

for the similar reasons given by the Ld. dispute resolution panel for this year also."

5.5.1 On identical facts and respectfully following the order of the co-ordinate Bench in assessee's own case as above mentioned, we direct the AO/TPO to TCS e-serve from the final list of comparables."

49. By respectfully following the above order of the Coordinate Bench, we are of the opinion that the TPO has committed an error including TCS-eserv Ltd. as comparable while computing ALP.

50. In view of the above discussions, we direct the AO/TPO to exclude the four companies ie: BNR Udyog Ltd., E-Clerx Services Ltd., Infosys BPO Ltd., TCS E-serve Ltd. from the final set of comparables for determining the Arm's Length Price in the international transaction. Accordingly we allow the Grounds of Appeal No.9.

51. The **Grounds of Appeal No. 10 to 12** have not been pressed by the Ld. Counsel for the Assessee as the same are academic in nature, therefore the said grounds are not adjudicated.

52. In so far as **Grounds No. 13 and 14** are concerned, the Ld. Counsel for the Assessee submitted that, the early or late realization of sale/service proceeds is incidental to the transaction of sale/service and not a separate transaction in itself and the same is consequence of an international transactions and not an international transaction per-se. Further contended that, if the ALP in respect of the international transaction of sale is determined, then there can be no question of treating non receipt of interest in such transaction as separate international transaction warranting any further adjustment and once ALP is determined in respect of the sale/service transaction, it would be deemed to be covering all the elements and consequences of such transaction of sale/services.

53. The above issue has been already settled in the various judicial pronouncements and apart from the same, as removal a of doubt, by way of Finance Act, 2012 an Explanation to Section 92B has been inserted to the Income Tax Act with retrospective effect from 01.04.2002, which clarifies the expression 'international transaction' as follows:

Explanation.—For the removal of doubts, it is hereby clarified that—

- (i) the expression "international transaction" shall include—
 - (a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;
 - (b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;
 - (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

The above explanation clarifies and also justifies the adjustment made by the TPO towards interest on receivables, which is well within the definition of international transaction. Therefore, we are not agreeing with the submission of the Ld. Counsel for the assessee.

54. In so far as direction of the DRP to the TPO to impute interest at LIBOR plus 400 bps is concerned, the Ld. Counsel for the Assessee without prejudice to the above contention on existence of international transaction, submitted that the DRP has not assigned any reason for such direction to the TPO and prayed for deletion of additional 400BPS which was considered while imputing interest on outstanding receivables.

55. We have verified the records and found that, the DRP has considered the US\$/INR exchange rate ranged from Rs.43.810/\$ to Rs.47.740/\$ showing

difference of Rs. 3.930/\$ in FY 2010-11 and also monthly variation in the exchange rate ranged from 0.17% in June 2010 to -5.30% in Sept, 2010.

56. The Delhi Tribunal in case of Kusum Healthcare Pvt. Ltd. vs. ACIT (ITA No. 6814/Del/2014) order dated 31.03.2015 held that, the working capital adjustment takes into account impact of outstanding receivables and no further adjustment required if the margin of the assessee is higher than working capital adjusted margin of comparable. The Delhi Tribunal in case of Ameriprise India P. Ltd. vs. ACIT (ITA No. 2010/Del/2014) [order dated 14.08.2015] considered the decision of coordinate bench in the case of Kusum Healthcare and held that, the allowing working capital adjustment in the international transaction of rendering services can have no impact on the determination of ALP of the international transaction of interest on receivables from AEs. Further, the Delhi Tribunal in the case of McKinsey Knowledge Centre Pvt. Ltd. Vs. DCIT [ITA No. 154/Del/2016] (order dated 15.12.2016) followed their finding in the case of Ameriprise India (supra).

57. In the meanwhile, the Hon'ble Delhi High Court, vide order dated 25.04.2017 in the case of Kusum Healthcare, dismissed the appeal of the revenue against the decision of the Tribunal and that (i) The inclusion in the Explanation to Section 92B of the Act of the expression "receivables" does not mean that de hors the context every item of "receivables" appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterized as an international transaction and (ii) With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterized the transaction. In the appeal filed by the assessee in the case of Mckinsey Knowledge, the Hon'ble High Court vide order dated 07.02.2018, while admitting the appeal on the other issue, remitted the issue of interest charged

on outstanding receivables to ITAT, following their decision in the case of Kusum Healthcare.

58. However, vide order dated 09.08.2018, the Hon'ble High Court in the case of Mckinsey Knowledge, while deciding the appeal of the assessee on other issue, also referred to the decision of the Hon'ble Delhi Tribunal in case of Ameriprise India P. Ltd. vs. ACIT (ITA No. 2010/Del/2014) on issue of interest charged on outstanding receivable and concluded that "the assessee's contention that, the ITAT erred in concluding that charging of interest on delayed receipt, of receivables is a separate international transaction which requires to be benchmarked independently, is incorrect."

59. Aggrieved, the taxpayer (Mckinsey Knowledge) filed Review Petition before the Hon'ble High Court against the order dated 09.08.2018 and the Hon'ble High Court, vide order dated 16.04.2019 in Review Pet. No. 360/2018, was pleased to recall/correct their order dated 09.08.2018, holding as under:

"9. As far as the first argument by the review petitioner, i.e., the answer to the question of bringing to tax the interest amounts goes, this Court is of the opinion that the fact that the order of 07.02.2018 referred to Kusum Health Care had expressly remitted the matter for consideration to the ITAT supports the assessee's submission. All that the court had stated on 07.02.2018 was that the matter required re-examination by the ITAT in the light of the Kusum Health Care (supra). For these reasons, the judgment to the extent it deals with adjustments made by the TPO, and regarding interest on delayed receipt of receivables, is a clear error. The court also furthermore notes the submissions made with respect to inapplicability to Explanation of Section 92B and its prospective operation. As the order of 07.02.2018 reserved by contentions, this Court does not propose to disturb the effect of that matter. The matter will be considered by the ITAT on its own merits."

60. In view of the aforesaid sequence of events, it would be noted that the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare is still the binding precedent on the issue of interest on outstanding receivables. Ergo, Assessee's Grounds of Appeal No. 13 and 14 are being allowed.

61. In so far as **Ground No. 15** is concerned, we direct the AO to grant foreign taxes credit in accordance with law, after verifying the records.

62. In so far as **Ground No.16** is concerned, we direct the AO to appropriate MAT credit in accordance with law after verifying the records.

63. The **Ground No. 17** which is in respect of charging interest u/s. 234C of the Act, is consequential and mandatory in nature, which does not requires adjudication.

64. The **Ground No. 18** in respect of the penalty proceedings u/s. 271(1)(c) of the Act, which is preposterous at this stage.

65. In the result, the appeal of the assessee stands partly allowed for statistical purposes in terms of our observations contained in the preceding paragraphs.

Order pronounced in the Open Court on this 17th Day of March, 2022

Sd/-
(B. R. R. KUMAR)
ACCOUNTANT MEMBER

Sd/-
(YOGESH KUMAR US)
JUDICIAL MEMBER

Dated: 17/03/2022
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI