

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "I-1": DELHI

BEFORE R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA.No.3840/Del./2018
Assessment Year 2010-2011

MD Everywhere India (P) Limited, C-53, Sector-58, Noida, Uttar Pradesh PIN – 201 301 PAN AAECM2671G	vs.	The DCIT, Circle-6(1), Room No.318, Central Revenue Building, I.P. Estate, New Delhi. PIN – 110 002
(Appellant)		(Respondent)

ITA.No.3967/Del./2018
Assessment Year 2010-2011

The DCIT, Circle-6(1), Room No.318, Central Revenue Building, I.P. Estate, New Delhi. PIN – 110 002.	vs.	MD Everywhere India (P) Limited, C-53, Sector-58, Noida, Uttar Pradesh PIN – 201 301 PAN AAECM2671G
(Appellant)		(Respondent)

For Assessee :	Shri Rohit Tiwari, Advocate
For Revenue :	Shri Mrinal Kr. Das, Sr. DR

Date of Hearing :	07.03.2022
Date of Pronouncement :	30.03.2022

ORDER**PER R.K. PANDA, A.M.**

These are cross appeals. ITA.No.3840/Del./2018 is filed by the assessee and ITA.No.3967/Del./2018 is filed by the Revenue and are directed against the order dated 20.03.2018 of the Ld. CIT(A)-44, New Delhi, for the A.Y. 2010-2011. For the sake of convenience, the cross appeals were heard together and are being disposed of by this common order.

ITA.No.3840/Del./2018 – A.Y. 2010-11 [Assessee's Appeal] :

2. Facts of the case, in brief, are that the assessee company is a private limited company and subsidiary of MDE USA. The assessee is engaged in the business of providing of technology based healthcare reimbursement solutions and other business and information management services to physicians, physician networks and ambulatory care centres. The assessee company is functioning as captive business process outsourcing (BPO) unit of its Parent Company (MDE USA). The assessee company filed its

return of income on 11.10.2010 declaring total income of Rs.1,85,411/-. Since the assessee company, during the impugned assessment year, had entered into certain international transactions amounting to Rs.17,50,33,942/- with the Associated Enterprises covered under section 92CA of the Income Tax Act 1961, the A.O. referred the matter to the Transfer Pricing Officer [“TPO”] for determination of the Arms Length Price [“ALP”] of the international transaction.

2.1. During the course of T.P. assessment proceedings, the TPO noted that the assessee has entered into international transactions with its A.Es in respect of ITES Services amounting to Rs.17,50,33,942/-. The assessee has used Transaction Net Margin Method [“TNMM”] as the method and OP/TC as the Profit Level Indicator [“PLI”]. The assessee has arrived at a set of 15 companies with an average margin of 18.07%. The assessee’s own margin is worked-out to be 2.75%. Based on the analysis, the assessee has concluded that its international transactions are at arm’s length.

2.2. After going through the various details furnished by the assessee, the TPO rejected certain comparables, added certain new comparables and retained some comparables and finally took the following 07 comparables with an average profit margin of 30.40%, the details of which are as under :

S. No.	Company Name	OP/OC
1.	Accentia Technologies Limited	42.52%
2	Igate Global Solutions Limited	24.54%
3.	Fortune Infotech Limited	22.80%
4.	Acropetal Technologies Limited (segmental)	44.46%
5.	ICRA Techno Analytics Limited (segmental)	28.77%
6.	Cosmic Global Ltd.,	18.28%
7.	Infosys BPO Limited	31.44%
	Average	30.40%

2.3. Based on the above mean margin of comparables, the TPO proposed adjustment of Rs.1,90,03,738/- by computing as under :

Operational cost	148,801,902
Arm's Length Price at a Margin of 30.40 %	194,037,680
Price Received	175,033,942
105% of the Price Received	183,785,639
Proposed Adjustment u/s 92CA	19,003,738

2.4. The A.O. accordingly issued the Draft Assessment Order on 10.03.2014 with a request to the assessee to take action as per provisions of Section 144C(2) of the I.T. Act, within 30 days of the receipt of the Draft Order. Since the assessee company did not file any response to the same, the A.O. held that assessee is not willing to avail the option of filing objection as per provisions of section 144C(2) of the I.T. Act, 1961 before the DRP and accepted the variations. The A.O. accordingly made addition of Rs.1,90,03,732/- to the total income of the assessee on account of T.P. adjustment. The A.O. also made certain other additions / disallowances. However, since these are not under challenge before us, therefore, we are not concerned with the same.

3. In appeal, the Ld. CIT(A) directed the A.O. to exclude (1) Accentia Technology Limited (2) Fortune Infotech Limited (3) Igate Global Solutions Limited (4) Infosys BPO Limited and (5) ICRA Techno Analytics Ltd., (Segmental).

3.1. He further rejected the claim for inclusion of Acropetal Technologies Limited (Segmental), Informed Technologies India Limited and inclusion of C.G.-VAK Software and Export Limited and R System International Limited.

4. Aggrieved with such part relief granted by the Ld. CIT(A), the Assessee as well as the Revenue are in appeal before the Tribunal by raising the following grounds :

ITA.No.3840/Del./2018 [Assessee's Appeal] :

1. *“On the facts, in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals) - 44 [‘CIT (A)’] erred in upholding the order of the Ld. Assessing Officer [AO]/ Ld. Transfer Pricing Officer [TPO] dated 28.04.2014 & 23.01.2014 respectively to the extent prejudicial to the appellant, is bad in law and liable to be rejected.*
2. *On the facts, in the circumstances of the case and in law, the Ld. CIT(A) grossly erred in confirming adjustments*

made by the Ld. TPO to the arm's length price of international transactions entered into by the appellant with overseas associated enterprises ('AEs').

2.1 Approving comparables selected by the Ld. TPO on arbitrary ground even though such comparable functionally dissimilar to appellant.

2.2 Rejecting comparables selected by the appellant in the economic analysis in Transfer Pricing Study misconceived and arbitrary ground even though such comparable functionally similar to appellant.

2.3 Not granting an adjustment to the appellant for working capital and capacity utilization adjustments in the margins of the appellant or comparables.

3. That the Ld. CIT(A) grossly erred on facts and in law by not appreciating the fact that in the relevant assessment year the appellant was entitled to a tax holiday on its profits from provision of IT-enabled services to the AEs and therefore did not have any untoward motive of deriving

any tax advantage by manipulating the transfer prices of its international related party transactions.

- 4. That the Ld. CIT(A) grossly erred in law and on facts by confirming the action of the Ld TPO/AO of denying the benefit of (+/ -) 5 percent [as mentioned in the proviso to section 920(2) of the Act] to the appellant.*
- 5. On the facts, in the circumstances of the case and in law, the Ld. AO erred in levying consequential interest under section 234B of the Act on the disallowance made in the assessment order.*

That the above grounds of appeal are mutually exclusive and without prejudice to each other.

That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal. Any consequential relief to which the Appellant may be entitled under law in pursuance of the aforesaid grounds of appeal, or otherwise may be granted.”

4.1. So far as the appeal of the assessee is concerned, the Learned Counsel for the Assessee confined his arguments for exclusion of the comparable namely Acropetal Technologies Ltd., inclusion of C.G. Vak Software and Export Ltd. And R. System International Ltd. and requested for correct computation of profit margin of Cosmic Global. He strongly challenged the order of the Ld. CIT(A) in rejecting the various comparables selected by the assessee company.

4.2 So far as Acropetal Technologies Limited (Segmental) is concerned, the Learned Counsel for the Assessee submitted that the above company is functionally different since it is engaged in Engineering Design services, it has incurred significant expenditure on Research and Development and significant expenditure on Advertisement, Marketing and Promotion. Further it had done significant outsourcing of work. He submitted that the assessee company is engaged in delivering of Technology based Healthcare Reimbursement Solutions and other business and Information Management Services to physicians' networks

and ambulatory Care Centres. Further it can be considered as a captive Business Process Outsourcing [“BPO “] unit of its parent company MD USA. Therefore, this company cannot be compared with that of the assessee company and, therefore, the same should be excluded.

4.3. Referring to the decision of the Coordinate Bench of the Tribunal in the case of JCIT vs., Steria India (P.) Ltd., [2021] 123 taxmann.com 264 [Delhi-Trib.], he submitted that Acropetal Technologies Limited (Segmental) was excluded from the list of comparables on account of outsourcing of significant work.

4.3.1. Referring to the decision of Bangalore Bench of the Tribunal in the case of ACIT vs., Flextronics Technologies (India) Pvt. Ltd., reported in 101 taxmann.com 348 (Bang.Tribu.), he submitted that Acropetal Technologies Limited (Segmental) was excluded due to the functional difference as it is providing Engineering Design Services, whereas assessee was providing ITES Services.

4.3.2. Referring to the decision of Coordinate Bench of the Tribunal in the case of Bechtel India (P.) Ltd., vs., DCIT reported in [2019] 101 taxmann.com 385 (Delhi-Trib.), he submitted that Acropetal Technologies Limited (Segmental) was excluded as it fails employee cost filter i.e., Outsourcing of Significant work.

4.3.3. So far as the observation of the Ld. CIT(A) that assessee has not submitted the annual report of the abovementioned company is concerned, the Learned Counsel for the Assessee referring to Page-40 of the order of the Ld. CIT(A), drew the attention of the Bench to the submissions made before him wherein copy of the annual report was given and the Ld. CIT(A) has reproduced certain paragraphs such as Notes on Accounts etc., from the Annual Report. Therefore, to say that assessee has not submitted the annual report of the said company is factually incorrect. Even otherwise also, the same is available in public domain.

4.4. So far as Cosmic Global is concerned, the Learned Counsel for the Assessee referring to Pages 7 and

32 of the order of the TPO submitted that the TPO while calculating profit margin of the comparable has included the miscellaneous income as operating income. However, for the computation of profit margin of the assessee, the miscellaneous income was not considered as operating income. He, accordingly submitted that a suitable direction may be given to the TPO/A.O. for correct computation of profit margin.

4.5. So far as inclusion of CG -VAK Software and Export Limited is concerned, the Learned Counsel for the Assessee referring to Page-59 of the order of the Ld. CIT(A) submitted that both the TPO as well as the Ld. CIT(A) held that this company is not a suitable comparable as it has very low turnover.

4.6. Referring to the decision of Coordinate Bench of the Tribunal in the case of Ameriprise India Pvt. Ltd., vs., DCIT ITA.No.7014/Del./2014 order dated 19.01.2016, he submitted that the Tribunal relying on the decision of Hon'ble Delhi High Court in the case of Chrys Capital

Investment Advisors (India) P. Ltd., vs., DCIT vide Judgment dated 27.04.2015 has held that high turnover or high profit and low turnover or low profit cannot be a reason for inclusion or exclusion of any company as comparable.

4.7. So far as inclusion of R System International Limited is concerned, the Learned Counsel for the Assessee submitted that the TPO and the Ld. CIT(A) both held that this company is not a suitable comparable as its financial year ending is December and the finances of year ending 31 March are not available.

4.8. Referring to the decision of Hon'ble Delhi High Court in the case of CIT-II vs., Mckinsey Knowledge Centre India Pvt. Ltd., ITA.No.217/2014 order dated 27.03.2015, he submitted that the Hon'ble Delhi High Court in the said decision has held that different financial year ending cannot be the sole basis of rejection of comparable. He accordingly submitted that the Acropetal Technologies Limited (Segmental) should be excluded, CG-VAK Software and Export Limited and R System International Limited should

be included and correct profit margin of Cosmic Global as well as the assessee should be re-computed.

5. The Ld. D.R. on the other hand heavily relied on the order of the Ld. CIT(A). He submitted that Acropetal Technologies Limited (Segmental) was rightly excluded by the Ld. CIT(A) on account of dissimilar functional profile and the assessee has not submitted the annual report of the abovementioned company.

5.1. So far as the exclusion of CG- VAK Software and Export Limited is concerned, the Ld. D.R. submitted that it fails the turnover filter of Rs.5 crores average by the TPO and, therefore, the turnover of CG- VAK Software and Export Limited being Rs.82.78 lakhs this company was rightly excluded by the TPO and the Ld. CIT(A).

5.2. So far as R System International Ltd., is concerned, the Ld. D.R. submitted that this company has different financial year ending and, therefore, it was rightly excluded by the TPO and the Ld. CIT(A).

5.3. So far as Cosmic Global is concerned, the Ld. D.R. submitted that assessee has not raised any such ground in the grounds of appeal for inclusion of miscellaneous income as operating income in assessee's own case, therefore, the argument of the assessee should be rejected outrightly.

5.3.1. The Learned Counsel for the Assessee in his rejoinder submitted that once assessee has challenged determination of the ALP of the international transaction entered into by the assessee with overseas Associated Enterprises, the same takes care of everything and the Ld. D.R. cannot say that assessee has not raised any specific ground. Referring to Rule 27 of ITAT Rules, he submitted that the respondent though he may not have appealed, may support the order appealed against on any of the grounds decided against him. He accordingly submitted that the assessee cannot be precluded from making an argument which has been decided against him.

6. We have considered the rival arguments made by both the sides, perused the orders of the A.O. and the Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. So far as the exclusion of Acropetal Technologies Limited (Segmental) as argued by the Learned Counsel for the Assessee is concerned, we find the Ld. CIT(A) rejected the claim of assessee by observing as under :

“(v) (a) The main contention of the appellant is that the company had dissimilar functional profile. The appellant has not submitted the annual report of the above mentioned company therefore, the submission of the appellant cannot be verified. Hence, the contention of the appellant is rejected.”

6.1. However, on perusal of page-40 of the Ld. CIT(A)'s order shows that assessee in his submissions had argued regarding the functional dissimilarity along with notes on accounts in the annual report which has been reproduced by

the Ld. CIT(A). Even otherwise also it is available in the public domain and, therefore, the Ld. CIT(A) is not justified in stating that the submissions of the assessee cannot be verified in absence of filing of the annual report of the said company. We find the assessee during the course of appellate proceedings before the Ld. CIT(A) has categorically stated that Acropetal Technologies Limited (Segmental) is engaged in the development of computer software and the production and sale of such items cannot be expressed at any generic term. It had earned foreign exchange into the business of exporting software services and 100% of its revenue comprises of export earnings. The company identifies scope for huge business in the Middle East, Europe and U.S. From the various details furnished by the assessee we find Acropetal Technologies Limited (Segmental) has incurred significant expenditure on Research and Development and Advertising and Marketing and Sales Promotion. Further it has significant outsourcing of work. Therefore, we find merit in the submissions of the Learned Counsel for the Assessee that Acropetal Technologies

Limited (Segmental) cannot be included in the list of comparables.

6.2. We find the Coordinate Bench of the Tribunal in the case of JCIT vs., Steria India (P) Ltd., (supra), while upholding the order of the DRP in excluding Acropetal Technologies Limited (Segmental) has observed as under :

“Acropetal Technologies Ltd.

108. *As could be found from the annual report of Acropetal Technologies Ltd, this company is into the engineering design service, information technology service, and healthcare and this company employees cost is less than 25% of the total cost and also that this company is engaged in significant R&D activities and incurring significant advertisement, marketing and promotion expenses as a percentage of sale.*

109. *Assessee objected its inclusion in the comparables on the grounds of functional dissimilarity and the company being engaged in significant R&D activities also. Ld. TPO observed that the assessee had not provided the data for*

carrying out working capital presumably since the adjustment is adverse in its case, but for carrying out the adjustment the average working capital is calculated and the same is allocated to IT segment in the ratio of the turnover. Ld. DRP in their order observed that this company needs to be excluded due to a different FAR.

110. *Ld. DR placed reliance on the observations of the Ld. TPO and while inviting our attention to the order of the Ld. TPO submitted that the inclusion of this entity is justified; whereas it is the contention of the Ld. AR that company is engaged in development and sale of software products; that the employee cost of this company of Rs. 13.51 crores which constitutes only 9.53% of the turnover of this company of 141.66 crores, that the company does not satisfy the filters applied by the TPO and therefore, deserves to be excluded from the list of comparable companies. He further submitted that from schedule 9 of the annual report of this company it is clear that the company has outsourced significant portion of its business and has paid an amount of Rs. 55.77 crore to outside technical sub-contractors. Since this company has*

outsourced a major part of it's business, it cannot, therefore, be regarded as an appropriate comparable for the purpose of benchmarking the international transactions of the assessee.

111. *We have gone through the record in the light of the submissions made on either side. In the case of Rampgreen Solutions (P.) Ltd. {supra} the Hon'ble Delhi High Court held that companies outsourcing significant portion of their business cannot be regarded as appropriate comparable. Further this company was directed to be excluded as comparable by a coordinate Bench of this Tribunal in the case of [TO v. Omniglobe Information Technology (I) (P.) Ltd. [IT Appeal No. 1380 (Delhi) of 2016, dated 15—1-2019] as comparable for AY 2011-12 to the companies like assessee who do not outsource the significant portion of their business.*

Similar exclusion was made by the Bangalore Bench of the Tribunal in the case of Asstt. CIT v. Flextronics Technologies (India) (P.) Ltd. [2019] 101 taxmann.com 348.

112. *We have also gone through the observations of the Tribunal in respect of the Acropetal Technologies Ltd, wherein*

the arguments similar to the ones advanced in this matter are considered and this comparable is excluded. All these additions have application to the facts involved in this case for this assessment year, in such decisions we hold that Acropetal Technologies Ltd is not a proper comparable to the assessee and its exclusion by the Ld. DRP cannot be found fault with. Such an exclusion is accordingly confirmed.”

6.3. We find the Bangalore Bench of the Tribunal in the case of ACIT vs., M/s. Flextronics Technologies (India) Pvt. Ltd., (supra) dismissed the appeal filed by the Revenue against the order of the DRP in excluding Acropetal Technologies Limited (Segmental) from the list of comparable companies by observing as under :

“8. In the grounds of appeal, the revenue has challenged the exclusion of only one of the 8 comparables excluded by the order of DRP. The companies exclusion by the DRP which is challenged by the revenue in grounds 1 to 10 is M/s. Acropetal

Technologies Ltd. For excluding this company, the DRP gave the following reasons :

“Acropetal Technologies Limited

Having considered the submissions, on perusal of the annual report, it is noticed by us that the assessing officer has considered the revenue from the engineering design segment. Hon'ble ITAT, Bangalore in IT(TP)/A/1678/Bang/2012 in the case of Global E Business Operations, directed to exclude the above company by observing that 'we have considered the submission of the learned counsel for the assessee, on perusal of note no. 15 of notes to accounts, which gives segmental revenue of this company, it is clear that the major source of the income for this company is from providing engineering design services and information technology services. The function performed by the engineering design services of the company cannot be considered as comparable to the ITES /BPO

function performed by the assessee. The performance of the engineering design services is regarded as providing high end services amongst the BPO which require high skill whereas the services performed by the assessee are routing low end ITES function. We therefore hold that this company could not have been selected as comparable, especially when it performs engineering design services which only a knowledge processing outsourcing (KPO) would do and not a business processing outsourcing (BPO).'

Similar View was taken by Hon'ble Bangalore ITAT in the case of - Symphony Marketing Solutions India Pvt. Ltd. vs. ITO (IT (TP) A No. 1316/Bang/2012), held that Acropetal cannot be considered as comparable as it performs engineering design services accordingly we direct the assessing officer to exclude the company from the comparables The above company was directed

to be excluded by the Hon'ble ITAT in assessee's own case for AY 2008-09.”

9. *It is the plea of the revenue before us that there is no difference between the KPO and BPO and the reasons given by the DRP for excluding the company cannot be accepted.*

10. *The Id. Counsel for the assessee, on the other hand, submitted that the exclusion of this company by the DRP is fully justified and in this connection drew our attention to the Annual Report of this company which is at page 492 of PB-II filed by the assessee. Perusal of the Annual Report shows that this company has 4 divisions viz., Engineering Design Services, Healthcare, Enterprise Solutions and Infrastructure Solutions. Perusal of the order of TPO at page 25 shows that the TPO has considered engineering design services segment profit margin of this company for the purpose of comparison with the profit margins of the assessee company. The functions performed by the Engineering Design Services of this company are as follows:-*

“Architectural, Structural, Electrical, Plumbing, Steel Detailing, External Utilities, Design Engineering.”

11. *The functions performed by the assessee, as we have already seen is back office services relating to finance and human resource functions, including accounts payable to assessee, remote server access, maintenance and management services, payroll processing, credit analysis, ledger maintenance, etc. for its affiliates worldwide. It is thus clear that the information technology services provided by the assessee cannot be compared with Engineering Design Services provided by Acropetal Technologies Ltd. Therefore, the conclusion that this company is not functionally comparable is found to be correct. We also find that this Tribunal in the case of Novo Nordisk (I) P. Ltd. in ITA 247/Bang/2016 has held that in the case of a company which was rendering similar ITeS as that of assessee it was held that Acropetal Technologies Ltd. cannot be considered as a comparable in ITeS segment.*

Following were the relevant observations of the Tribunal in this regard.

“8.3.1. We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. We find that a co-ordinate bench of this Tribunal in the case of Swiss Re Shared Services (India) Pvt. Ltd., for asst, year 2011-12 (Supra) has examined in detail the comparability of this company as a comparable to that of a service provider of ITES services to its AE's and at6 para 21 to 24 thereof held as under:-

“21. Arguing exclusion of Acropetal Technologies Ltd, (seg), Ld. AR submitted that Acropetal Technologies Ltd, was rendering service in the field of engineering design fin-health-care enterprise solutions and IT infrastructure solutions. As per the Ld. AR, AO took the engineering design services done by Acropetal Technologies Ltd, as a

comparable segment with ITES services of the assessee. Ld. AR pointed out that engineering design services rendered by M/s. Acropetal was entirely different from the type of services done by the assessee. Further according to him Hyderabad bench of the Tribunal in the case of Excellence Data Research P. Ltd v. ITO [17'A.159/1-Iyd120i4, dt.31.07.2014 had held that Acropetal Technologies Ltd, was not a good comparable in the BPO segment. As per the Ld. AR M's. Excellence Data Research P. Ltd, was rendering back office data creation, content development and support services which were not comparable to what assessee was doing. Though the decision of the Hyderabad Bench was for A.Y. 2009-10, as per the Ld. AR, M/s. Acropetal Technologies Ltd, was doing the very same business during the

relevant previous year also and therefore it could be considered as a good precedent.

22. *Per contra, Ld. DR submitted that TPO had considered the argument of the assessee that BPO and KPO had to be distinguished. According to him, Acropetal Technologies Ltd, was giving engineering design services and the assessee was rendering insurance support services. Though these services did not fit in the same mould, the level of expertise required stood more or less on the same pedestal. According to him, applying the yardsticks laid down by Hon'ble Delhi High Court in the judgment of Rampgreen Solutions P. Ltd (supra), Acropetal Technologies Ltd. could be taken as a good comparable.*

23. *We have perused the orders and heard the rival contentions. There is no dispute that M/s. Acropetal was having at*

least three segments, namely, engineering design services, IT service and health care. TPO had taken engineering design service as a good comparable with that of the services done by the assessee. Engineering Design Sendees that were being rendered by Acropetal Technologies Lid, appears at page 8 of its annual report. It comprised of architectural, structural, electrical, plumbing, steel detailing, and utilities designing. Its revenue model appears at page 9 of its annual report. It is mentioned that the said company was providing comprehensive offerings using its deep domain understanding of infrastructural healthcare, engineering design and enterprise solutions. In our opinion, the type of services that was being provided by Acropetal Technologies Ltd, was not at all comparable with the type of services that the assessee was providing. It is

also mentioned in the annual report of the said company that it was providing high end services in the engineering design services. No doubt as mentioned by the Ld DR, it may not be feasible to have comparables which fit in the exact mould as that of an assessee in TP analysis. However, when one company is giving sophisticated set of services which involves higher level of skill sets, and the other is doing it on a lower level, we cannot say that the former should be considered as a comparable to the latter. Though for a different year, comparability of Acropetal Technologies Ltd, (seg) had come up More Hyderabad bench of the Tribunal in the case of Excellence Data Research P. Ltd (supra). Observations of the Tribunal as it appears at para 18.1 reads as under :

18.1. After considering the rival contentions, we agree with the

objections raised by assessee. As seen from the Annual Report, this company is involved in engineering design services and has products also, which makes it functionally not comparable. Even at the segmental level, it provides engineering design services, which was considered as high end, by the coordinate bench of the Tribunal in the case of Hyundai 'Motors India Engineering' (supra) in earlier year. Therefore, we are of the opinion that this company cannot be selected as a comparable. We accordingly direct the Assessing Officer/TPO to exclude this company.

24. *Considering all these, we are constrained to take a view that engineering design services segment of M's. Acropetal Technologies Ltd, (seg.), cannot be considered as a proper comparable for the TP study of the assessee.*

8.3.2 Taking into consideration the facts and circumstances of the case and respectfully following the aforesaid decision of the co-ordinate bench of this Tribunal in the case of Swiss Re Shared Services (India) Pvt. Ltd., for asst, year 2011-12 (Supra), we hold that the engineering design services segment of Acropetal Technologies Ltd., is functionally different and hence cannot be considered as a good comparable to the assessee in the case on hand who is providing only ITES services to its AE's. The AO/TPO are, therefore, directed to exclude this company from the list of comparables in the case on hand."

12. For the reasons stated above, we uphold the order of DRP excluding Acropetal Technologies Ltd. from the list of comparable companies. Consequently ground Nos. 1 to 10 raised by the revenue are dismissed."

6.4. Similar view has been taken in various other decisions relied on by the Learned Counsel for the Assessee.

Under these circumstances, we hold that Acropetal Technologies Limited (Segmental) cannot be held as comparable on account of different functionality, significant expenditure on Research and Development and Advertising and Marketing and Sales Promotion Expenses and significant Outsourcing of Work. We, therefore, set aside the order of the Ld. CIT(A) on this issue and direct the A.O./TPO to exclude Acropetal Technologies Limited (Segmental) from the list of comparables.

6.5. So far as inclusion of R System International Limited is concerned, we find the Ld. CIT(A) rejected the contention of assessee by observing as under :

“(iii) R System International Limited:

(a) The above mentioned company has been rejected by the TPO on the ground that the financial year of the company did not end in March. While the contention of the appellant is acceptable in principle, the appellant has not demonstrated how data from earlier or subsequent a financial year followed by the above

mentioned company may be used to construct data in such a way that it covers the period April 2009 to March 2010 ie the year under reference. In view of the same, the contention of the appellant is rejected.”

6.6. A perusal of the above shows that the TPO rejected the inclusion of the above comparable on account of different financial year. However, the Hon'ble Delhi High Court in the case of CIT vs., Mckinsey Knowledge Centre India Ltd. (supra), has held that if the comparable is functionally same as that of the tested party, then the same cannot be rejected merely on the ground that data for entire financial year is not available. It is held that 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 comparable has different financial year ending. We, therefore, set aside the order of the Ld. CIT(A) and restore the issue to the file of A.O./TPO with a direction to extrapolate the result for the F.Y. 2009-10 from the available data and accordingly consider the same as comparable. Needless to say the A.O./

TPO should give due opportunity of being heard to the assessee while extrapolating the data for the F.Y. 2009-10.

6.7. So far as incorrect computation of profit margin of the comparable in the case of Cosmic Global is concerned, we find from the various details furnished by the assessee that while the TPO considered the miscellaneous income as operating income while computing the profit margin of Cosmic Global, however, for the computation of profit margin of the assessee, the miscellaneous income was not considered as operating income. We, therefore, direct the A.O./TPO to consider the miscellaneous income of the assessee as operative income and accordingly compute the profit margin.

6.8. So far as inclusion of CG-VAK Software and Export Limited is concerned, we find the TPO and the Ld. CIT(A) held that this company is not a suitable comparable on account of very low turnover. The relevant observation of the Ld. CIT(A) reads as under :

“(ii) CG-VAK Software and Export Limited :

(a) The above mentioned company has been rejected by the TPO on the ground that its revenue from ITES was only Rs.82.78 Lakhs and hence it fails the turnover filter of Rs.5 crore applied by the TPO. I agree with the reasons given by the TPO for the application of the said filter. The contention of the appellant is rejected.”

6.9. We find the Coordinate bench of the Tribunal in the case of Ameriprise India Private Limited vs. DCIT (supra), following the decision of Hon'ble Delhi High Court in the case of Chrys Capital Investment Advisors (India) P. Ltd. vs. DCIT (supra), has held that CG-VAK Software and Export Limited cannot be excluded on account of low turnover as long as the said company is functionally comparable with that of the assessee company. The relevant observations of the Tribunal at para15.2 read as under :

15. CG-VAK Software and Exports Ltd. (Segd

15.1 The assessee included the segmental figures of this company in the list of comparables. The TPO

eliminated this company on the ground that it was providing software services and ITES and its turnover from ITES was only 0.83 crore, which was less than the requisite turnover.

15.2 *Having heard both the sides on this issue, we find that the TPO has accepted the functional comparability of this company on segmental level. The Id. DR was also fair enough to candidly accept the functional similarity of the relevant segment of this company. In such circumstances, the question arises as to whether the relevant segment of this company can be excluded from the list of comparables merely on the ground that the revenue from this segment is only Rs.83 lacs? In our considered opinion, the quantum of turnover can be no reason for the exclusion of a company which is otherwise comparable. We find that Hon'ble jurisdictional High Court in the case of Chrys Capital Investment Advisors (India) P. Ltd. Vs. DCIT has held, vide its judgment dated 27.4.2015, that high turnover or high profit can be no reason to eliminate an otherwise*

comparable company. The same applies with full force in the converse manner as well to a low turnover/low profit company. We, therefore, hold that a company cannot be excluded from the list of comparables on the ground of its low turnover. In principle, we direct the inclusion of the relevant segment of this company in the list of comparables. The TPO is directed to include the operating profit/operating costs of the ITES segment of this company in the list of comparables, after due verification of the necessary figures for determination of the operating profit margin etc.”

6.10. Respectfully following the decision of the Coordinate Bench of the Tribunal and considering the fact that the above company is otherwise functionally similar, therefore, merely on account of low turnover, the same cannot be rejected. We, therefore, set aside the order of the Ld. CIT(A) and direct the A.O./TPO to include CG-VAK Software and Exports Ltd., (Segmental) as comparable.

7. In the result, appeal of the Assessee is partly allowed.

ITA.No.3967/Del./2018 – Revenue Appeal :

8. The Revenue has raised the following grounds in its appeal :

“1. Whether on the facts and circumstances of the case, the Ld. CIT(A) is legally justified in characterizing the Accentia Technologies Limited, Fortune InfoTech Limited, Igate Global Solutions Limited and Infosys BPO Limited as functionally dissimilar to the assessee, even when they are actually functionally similar comparables under TNM Method?

2. Whether on the facts and circumstances of the case, the Ld. CIT(A) is legally justified in rejecting high margin comparables contested by the assessee and allowing to retain other low margin comparables in the final set of the TPO’s order unopposed by the assessee, which were discharging in similar nature of functions and also by ignoring the decision of the Hon’ble Supreme Court in the

case of Mumbai International Airport Pvt. Ltd. vs. Golden Chariot Airport with regard to the “Doctrine of Elector and the “Doctrine of Approbation and Reprobation”, wherein it has been laid down that a litigant is not altered to change and choose its stand to suit its convenience ?

3 Whether on the facts and circumstances of the case, the Ld. CIT(A) is legally justified in laying down very stringent standards of comparability and attempting to identify exact replica of the assessee for comparability analysis by ignoring the fact that the Indian Law and the International jurisprudence recognizes the reality that there cannot be exact comparables in a given situation without any differences and without appreciating the fact that such stringency will defeat the purpose of flexibility provided in comparability analysis for determination of ALP under TNM Method ?

4 That the appellant craves leave to add, amend, alter or forgo any ground/(s) of appeal either before or at the time of hearing of the appeal.”

8.1. The Revenue in the grounds raised by it has basically challenged the order of the Ld. CIT(A) in directing the A.O. to exclude the following comparables :

- i. Accentia Technologies Limited
- ii. Fortune Infotech Limited
- iii. Igate Global Solutions Limited
- iv. Infosys BPO Limited

8.2. So far as Accentia Technologies Limited is concerned, we find the Ld. CIT(A) while directing the A.O. to exclude the above company from the final set of comparables has observed as under :

“(i) Accentia Technologies Limited :

(a) The main contention of the appellant is that the company has a dis-similar functional profile; it develops software products; owns significant brands, IPR and goodwill; segmental information not available; strategic acquisitions and business restructuring during the year; abnormally high margins; rejected by DRP in AY 2011-12.

(b) The Hon'ble Delhi Tribunal in the case of Vertex Customers Services in ITA No.1508/Del/2015 for AY 2010-11 has held the above mentioned company to be incomparable on the ground that it had undergone extra ordinary activities during the year; had earned super normal profits; made investment in foreign entities; had significant goodwill and intangibles; was engaged in different and diversified activities; separate segmental information was not available.

(c) In view of the above, Accentia Technologies Limited is not comparable to the appellant which is a low end BPO company. In accordance with the principle of consistency and respectfully following the order of Hon'ble ITAT in the case of Vertex Customers Services (supra) the AO/TPO is directed to exclude Accentia Technologies Limited from the final set of comparables."

8.3. We do not find any infirmity in the order of the Ld. CIT(A) on this issue. From the various details furnished by the assessee in the paper book, we find Accentia Technologies Limited has diversified business operations

and, therefore, it is functionally dissimilar. It has significant intangible assets whereas the assessee has no intangibles. Further during the A.Y. 2010-11 extraordinary events have taken place i.e., acquisitions/amalgamation whereas no such acquisition/amalgamation has taken place in the case of the assessee and Accentia Technologies Limited has shown abnormal high profit margin.

8.4 We find the Coordinate Bench of the Tribunal in the case of JCIT vs., Steria India (P.) Ltd., (supra) has dismissed the appeal filed by the Revenue challenging the direction of the DRP in excluding Accentia Technologies Limited from the list of comparables by observing as under :

“51. We have carefully considered the submissions on behalf of either side. From the material papers on record, we notice that in respect of the argument of the assessee that Accentia has undertaken extraordinary events namely, amalgamation with Asscent Infoserve Private Limited during the year, Id. TPO observed that the acquisitions are made by companies to benefit from each other's strengths, but

the acquisitions in themselves do not become extraordinary events, except when the company's functions change substantially after an acquisition the same may become non-comparable; also that when the acquisitions have abnormal impact on normal operations of the business, it will be considered a peculiar circumstance. According to the Id. TPO, assessee failed to point out how acquisition has affected the operations of the company. However, there is no denial of the fact of amalgamation taking place during the year. As a matter of fact, it is not clinched before us that the acquisitions have no or insignificant impact on normal operations of the business. So also, there is no denial of the fact that M/s. Accentia Technologies Ltd. owns significant intangible assets in form of goodwill etc., it also owns proprietary software products and though it is engaged in the medical transcription and development of software products but the segmental profitability is not available in the financial statements. These aspects were considered by the Hon'ble

jurisdictional High Court and a coordinate Bench of this Tribunal in various cases in the context of M/s. Accentia Technologies Ltd. to hold that those are significant facts rendering M/s. Accentia Technologies Ltd. uncomparable with the companies like assessee.

52. *Hon'ble Delhi High Court in the case of Evalueserve SEZ (Gurgaon) (P.) Ltd. (supra) (for AY 2010-11) upheld the exclusion of Accentia Technologies Ltd. on the basis that segmental accounts are not available. Finding with regard to exclusion of this company is that, —*

6. *The ITAT noted that M/s. Accentia Technologies Ltd. was mainly performing medical transcription services. It was of the opinion that its service was similar to the one that the assessee was engaged in. However, it also noted that there was no segmented data and on that account, directed the exclusion of that entity from the list of comparables.*

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xxx

7. All the reasons given by the ITAT, in the opinion of the Court, are justified and supported by the judgment in B.C. Management (supra).

53. In the case of NIT Ltd. (supra), a co-ordinate Bench of this Tribunal, while providing a list of filters to be applied during benchmarking of a transaction, has held that:

"While making afresh transfer pricing order, the TPO shall take into account the annual reports or database of the aforesaid companies now submitted before us and shall also decide the point as to whether all the comparables selected by the assessee are proper comparables for the purpose of determining Arm's Length Price after considering the following factors as per law:

- (i) Whether the companies have large volume of related party transactions.*

- (ii) Whether companies have abnormally high profits or losses.*
- (iii) Whether companies have gone for business re-structuring.*
- (iv) Whether companies have shown high growth.*
- (v) Whether companies are having high turnover.*
- (vi) Whether companies are having larger inventory.*
- (vii) Whether companies are having high marketing expenses."*

54. This company was also directed to be excluded by a co-ordinate Bench of this Tribunal in the case of Smart Cube India (P.) Ltd. (supra) on the basis that it is engaged in provision of medical transcription services and sale of software and therefore cannot be regarded as comparable to a ITES service provider. It is pertinent to note that these observations are in respect of the AY

2011-12. We find it necessary and convenient to extract the relevant observations of the Tribunal :

46. Now we take up the issue of selection of various comparable companies. With respect to Accentia Technologies Ltd., it is seen that it provides service to healthcare industry in the nature of medical transcription, medical coding etc. and revenue's earning from those fields are more than 75%. Before us, Learned AR has pointed to the fact that it owns significant intangible assets in form of goodwill etc. amounting to Rs.21.94 crores and it also owns proprietary software products. Further, he has also pointed out to the fact that though it is engaged in the medical transcription and development of software products but the segmental profitability is not available in the financial statements. The aforesaid contentions of the Learned AR have not been controverted by the Revenue. We find that the Delhi Bench of Tribunal in the case of E-Valueserve SEZ (Gurgaon) P. Ltd.

for AY 2011-12 had rejected it to be a comparable company to an ITES service for the reason that it is engaged in the business of medical transcription, medical coding and billing. The order of the Tribunal has also been upheld by the Hon'ble High Court. Similar view has also been taken by the Tribunal in other cases. We are therefore of the view that Accentia Technologies Ltd cannot be considered to be a comparable to Assessee. In view of these facts, we direct the AO to exclude it on account of functional dissimilarity.

55. *In the case of Cognizant Technology Services (P.) Ltd. (supra), Hyderabad Bench of the Tribunal directed to exclude the companies having extra-ordinary event like mergers/acquisitions which will have an effect on the profitability of the company in the financial year in which event takes place. In the case of Global Logic India Ltd. v. Dy. CIT r20201 117 taxmann.com 39 a co-ordinate Bench of this Tribunal rejected a company on account of restructuring activity during the year.*

56. *The observations of the Hon'ble Delhi High Court in the case of Evalueserve SEZ (Gurgaon) (P.) Ltd. (supra) (for AY 2010-11) and a coordinate Bench of this Tribunal in the case of Smart Cube India (P.) Ltd. (supra) for the AY 2011-12 go undisputed clinch the Issue. In the light of these observations of the higher for a, observations of the Ld. DRP in respect of M/s. Accentia Technologies Ltd. cannot be found fault with. We, therefore, uphold the findings of the Id. DRP as to the exclusion of this comparable in the final list of comparables for both the years under consideration.”*

8.5. Similar view has been taken in various other decisions relied on by the Learned Counsel for the Assessee filed in the case law compilation. In absence of any contrary material brought to our notice by the Ld. D.R. against the various decisions holding that Accentia Technologies Ltd. has diversified business operation, significant intangible assets, abnormal high profits, occurring of extraordinary events, functional dissimilarity and absence of segmental details and, therefore, cannot be considered as a good

comparable. We, therefore, uphold the order of the Ld. CIT(A) and the ground raised by the Revenue on this issue is dismissed.

8.6. So far as Fortune Infotech Limited is concerned, we find the Ld. CIT(A) while directing the TPO to exclude the above company from the final set of comparables has observed as under :

“(ii) Fortune Infotech Limited:

(a) The main contention of the appellant is that the above mentioned company has a dis-similar functional profile and that it owned unique intangibles.

(b) The Hon’ble Delhi Tribunal in the case of Vertex Customers Services in ITA No. 1508/Del/2015 for AY 2010-11 has held the above mentioned company to be incomparable on the ground that it was offering onsite and offsite services to various clients and was also into web designing services; that its revenue had diminished by 54.52% as compare to the previous year which showed presence of peculiar economic circumstances;

owned software called 'Finetran' and 'Image Index' for performing specialized services in medical transcription.

(c) In view of the above, Fortune Infotech Limited is not comparable to the appellant which is a low end BPO company. In accordance with the principle of consistency and respectfully following the order of Hon'ble ITAT in the case of Vertex Customers Services (supra) the AO/TPO is directed to exclude Fortune Infotech Limited from the final set of comparables."

8.7. We do not find any infirmity in the order of the Ld. CIT(A) on this issue. From the various details furnished by the Learned Counsel for the Assessee in the paper book, we find the above company has different revenue recognition model and functionally dissimilar since it has diversified business operations. Since the Ld. CIT(A) while excluding this company from the list of comparables has relied on the decision of Coordinate Bench of the Tribunal in the case of M/s. Vertex customer Services India Private Limited, Gurgaon vs., DCIT, Circle-28(1), New Delhi vide ITA.No.1508/Del./2015 order dated 28.11.2017, therefore,

in absence of any distinguishable features brought before us by the Ld. D.R, we do not find any infirmity in the order of the Ld. CIT(A) in excluding Fortune Infotech Limited from the list of comparables. Accordingly the order of the Ld. CIT(A) on this issue is upheld and the ground raised by the Revenue challenging the exclusion of this company is dismissed.

8.8. So far as Igate Global Solutions Limited is concerned, we find the Ld. CIT(A) while directing the A.O. to exclude this company from the final set of comparables has observed as under :

“(iii) Igate Global Solutions Limited:

(a) The main contention of the appellant is that the company had dis-similar functional profile; segmental information was not available; business restructuring showed presence of extra ordinary circumstances; that it had high turnover.

(b) The 'Hon'ble Delhi Tribunal in the case of Vertex Customers Services in ITA No. 1508/Del/2015

for AY 2010-11 has held the above mentioned company to be incomparable on the ground that the company had undergone amalgamation; was engaged in providing IT and ITES but no segmental information was available in annual report; had huge turnover of Rs. 932.18 crores.

(c) In view of the above, Igate Global Solutions Limited is not comparable to the appellant which is a low end BPO company. In accordance with the principle of consistency and respectfully following the order of Hon'ble ITAT in the case of Vertex Customers Services (supra) the AO/TPO is directed to exclude Igate Global Solutions Limited from the final set of comparables.”

8.9. We do not find any infirmity in the order of the Ld. CIT(A) on this issue. From the various details furnished by the Learned Counsel for the Assessee in the paper book, we find this company is functionally different and insufficient segmental information respect of IT and ITES services are available. Further this is an exceptional year of operation on account of amalgamation. Apart from M/s. Vertex Customer Services India Private Limited (supra)

relied on by the Ld. CIT(A), we find the Coordinate Bench of the Tribunal in various decisions has also directed to exclude Igate Global Solutions Limited from the list of comparables on account of exceptional year of operation on account of amalgamation. In absence of any contrary material or distinguishable feature brought to our notice by the Ld. D.R, we do not find any infirmity in the order of the Ld. CIT(A) in directing the A.O./TPO to exclude Igate Global Solutions Limited from the final set of comparables. We, therefore, uphold the order of the Ld. CIT(A) on this issue. The ground raised by the assessee on this issue is accordingly dismissed.

8.10. So far as ICRA Techno Analytics Limited (Segmental) is concerned, we find the Ld. CIT(A) directed the A.O./TPO to exclude this company from the list of comparables by observing as under :

(vi) ICRA Techno Analytics Limited (segmental):

(a) The main contention of the appellant is that the company had dissimilar functional profile;

*segmental information was not available; rejected by
DRP in AY 2011-12.*

*(b) The Hon'ble Delhi Tribunal in the case of
Evalueserve SEZ (Gurgaon) Private Limited in ITA.No.
1467/Del/2017 for AY 2010-11 has held the above
mentioned company as incomparable on the ground that
the company was engaged a number of diversified
activities like business intelligence and analytics space,
software development and consultancy, engineering
services, web development and hosting services. It was
also noted that the two income segments of services and
sales did not have complete segmental information as
fixed assets and services were used inter-changeably.*

*(c) In view of the above, ICRA Techno Analytics
Limited (segmental) is not comparable to the appellant
which is a low end BPO company. In accordance with
the principle of consistency and respectfully following
the order of Hon'ble ITAT in the case of Evalueserve SEZ
(Gurgaon) Private Limited (supra) the AO/TPO is*

directed to exclude ICRA Techno Analytics Limited from the final set of comparables.”

8.11. We do not find any infirmity in the order of the Ld. CIT(A) on this issue. From the various details furnished by the Learned Counsel for the Assessee in the paper book, we find no segmental details are available in respect of this comparable and this company is functionally dissimilar since it is engaged in business intelligence and ideologies.

8.12. We find the Coordinate Bench of the Tribunal in the case of JCIT vs., Steria India (P.) Ltd., (supra), while directing the TPO to exclude the above comparable has observed as under :

“16. The next comparable contested by the Id AR is ICRA Techno Analytics Ltd stating that this company is functionally not comparable as it is engaged in business intelligence and analytics.

17. The Id DR contested the argument of the assessee and submitted that the assessee is engaged in such high end services.

18. We have carefully considered the rival contentions. This company as per its annual accounts placed at Page No.1210 shows that it is engaged in the business intelligence and analytics space. It is also engaged in software development and consultancy, engineering services, web development and hosting services. It is also noted that it has two income segments of services and sales and it does not have the complete segmental information with respect to both the segments of services and sales as fixed assets and services are used inter-changeability. In view of this we find that this company is functionally not comparable as well as it does not have complete segmental information with respect to the sales and service segments. In the result we direct the Transfer Pricing Officer to exclude the above comparable.”

8.13. Similar view has also been taken in other cases by the Coordinate Benches of the Tribunal. We, therefore, uphold the order of the Ld. CIT(A) on this issue and the

grounds raised by the Revenue challenging the exclusion of ICRA Techno Analytics Limited (Segmental) is dismissed.

8.14. So far as the order of the Ld. CIT(A) in the case of Infosys BPO Limited is concerned, we find the Ld. CIT(A) while directing the A.O./TPO to exclude this company from the list of final set of comparables has observed as under :

(iv) Infosys BPO Limited:

(a) The main contention of the appellant is that the company had dis-similar functional profile and that the company had a high turnover.

(b) The Hon'ble Delhi Tribunal in the case of Evalueserve SEZ (Gurgaon) Private Limited in ITA.No. 1467/Del/2017 for AY 2010-11 has held the above mentioned company to be incomparable on the ground that the company owned goodwill; had income stream of Rs. 1126.63 crores; derived leverage from the clients of Infosys Technologies Limited for cross selling the BPO services.

(c) In view of the above, Infosys BPO Limited is not comparable to the appellant which is a low end BPO company. In accordance with the principle of consistency and respectfully following the order of Hon'ble ITAT in the case of Evalueserve SEZ (Gurgaon) Private Limited (supra) the TPO is directed to exclude Infosys BPO Limited from the final set of comparables.

8.15. We do not find any infirmity in the order of the Ld. CIT(A) on this issue. From the various details furnished by the Learned Counsel for the Assessee in the paper book, we find Infosys BPO Limited has high brand value and intangibles (goodwill) whereas the assessee has no such goodwill. Infosys BPO Limited derives benefits being part of Infosys group whereas the assessee does not belong to any reputed group. We further find Infosys BPO Limited has incurred substantial selling and marketing expenses. It has incurred significant expenditure on account of employee salary and advertising expenses, whereas the assessee has no such expenditure. It has also made certain acquisitions during the year, for which, this is an exceptional year for

Infosys BPO Limited, whereas the assessee company has not made any acquisitions.

8.16 We find the Coordinate Bench of the Tribunal in the case of Steria (India) Ltd., vs., ACIT (supra) has directed the A.O./TPO to exclude BPO Infosys Limited from the list of final comparables by observing as under :

“5.3. Having gone through the submissions of the assessee as well as the annual report of BPO Infosys Ltd. and the judicial precedents relied upon by the Ld. Authorized Representative, we are of the considered opinion that Infosys BPO Ltd. cannot be considered as a comparable to the assessee company for the simple reason that the assessee company is engaged in rendering system integration, enterprise solutions and software development services to the clients of its Associated Enterprises (AE) and also to independent customers in the United Kingdom, the United State of America and others countries in Europe as well as India while being a subsidiary of Steria (UK). On the other hand Infosys BPO Ltd. is a part of the

Infosys Group, a giant in the field of Information Technologies Services and being a part of the Infosys Group, 'Infosys', it thus enjoys significant brand presence and brand value plays a significant role in its ability to generate profit. The- Hon'ble Delhi High Court in the case of Oracle (OFSS) BPO Services (P.) Ltd. (supra) upheld the exclusion of entity on the basis of significant brand presence on entity on the basis of significant brand presence and brand value of an entity. This decision of the Hon'ble High Court of Delhi was later upheld by the Hon'ble Apex Court in Oracle (OFSS) BPO Services (P.) Ltd. (supra). On identical lines, the Hyderabad Bench of ITAT in the case of Hyundai Motors India Engineering. (P.) Ltd. v. ITO [2014] 44 taxmann.com 34/[2015] 152 ITD 112 directed the exclusion of Infosys BPO Ltd. from the final set of comparables by holding that, "...presence of a brand commands premium price and the customers would be willing to pay, for the services/produced of the company. Infosys BPO is a established player who is

not a only a market lead but also a company employing sheet breath in terms of economies of scale and diversity and geographical dispersion of customers. The presence of the aforesaid factories will take this company out of the list of comparables. We therefore accept the contention of the assessee that this company cannot be regarded as a comparable. Similar view was also taken in case of Symphony Marketing Solution India (Pvt.) Ltd. (supra) by the Banglorc Bench Therefore, we direct the Assessing Officer/TPO to exclude the same."

5.4. *Accordingly, in view of the judicial precedents cited above we direct the AO/Ld. TPO to exclude BPO Infosys Ltd from the final set of comparables."*

8.17. Similar view has been taken in various other decisions relied on by the Learned Counsel for the Assessee which are as under :

1. Evalueserve SEZ (Gurgaon) Private Ltd
(Assessment Year 2010-11) ITA No. 1467/Del/
2017.
2. M/s. Vertex Customer Services vs. India Private
Limited (Assessment Year 10-11) ITA
No.1508/Del./2015.
3. Delhi High Court PCIT vs. Amen) India P. Ltd. -
ITA No.461/16.
4. Equant Solutions India P. Ltd.(IT/1202/D/2015).
5. Techbooks International Pvt. Ltd. No.
240/Del/2015).
6. Ameriprise India Pvt Ltd. (ITA No.
7014/Del/2014).
7. Sun Life India Service Centre P. L (ITA No.
750/2015).
8. PCIT v Symphony Marketing Solutions India
[(2020) 113 taxmann.com 77 (Delhi)].
9. PCIT v. Open Solutions Software Services (P) Ltd.
[2020] 113 taxmann.com 77 (Delhi).

10. Steria (India) Ltd. v. ACIT[2020] 116
taxmann.com 738 (Delhi - Trib.).

11. Swiss Re Global Business Solutions India (P.) Ltd.
v. DCIT [2020] 116 taxmann.com 716 (Bangalore
- Trib.).

8.18. In view of the above discussion, we uphold the order of the Ld. CIT(A) on this issue and the ground raised by the Revenue challenging the order of the Ld. CIT(A) in excluding the Infosys BPO Limited is dismissed.

9. In the result, appeal of the Assessee is partly allowed and appeal of the Revenue is dismissed.

Order pronounced in the open Court on 30.03.2022

Sd/-
(MS. ASTHA CHANDRA)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

Delhi, Dated 30th March, 2022

VBP/-

Copy to :