

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-1 : NEW DELHI

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

ITA No.6047/Del/2012
Assessment Year: 2008-09

Agilent Technologies
(International) Pvt. Ltd.,
Plot No.CP-11,
Sector-8, Manesar,
Gurgaon.

Vs ACIT,
Circle-1(1),
Gurgaon.

PAN: AADCA4115C

(Appellant)

(Respondent)

Assessee by	:	S/Shri Rohit Tiwari & Shrey Chakarborty, Advocates
Revenue by	:	Shri Surender Pal, CIT-DR
Date of Hearing	:	16.03.2022
Date of Pronouncement	:	05.05.2022

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 25th October, 2012 passed u/s 144C/143(3) of the IT Act, 1961 for the assessment year 2008-09.

2. Facts of the case, in brief, are that the assessee, Agilent Technologies (International) Private Limited is a 100% subsidiary of Agilent Technologies

International Europe, BV which in turn is a wholly subsidiary of Agilent Technologies, Inc. The assessee is engaged in the provision of Software Development (IT) services and Information Technologies Enabled Services (ITES). It filed its return of income on 29th September, 2008 declaring the taxable income of Rs.90,31,260/-. Since the assessee has entered into certain international transactions with its AE, the AO referred the matter to the TPO u/s 92CA of the IT Act for determination of the ALP of the international transaction entered into by the assessee with its AEs. During the course of TP assessment proceedings, the TPO noted that the assessee has entered into the following international transactions as mentioned in the TP study report:-

Nature of transaction	Value of international transaction
Provision of IT Enabled services	1,694,155,070
Provision of Software Development Services	363,519,061
Cost Recharges	8,766,863

2.1 The TPO observed that the financial results of the tax payer and the method of benchmarking as reported in the transfer pricing report is as under:-

Particulars	Software	ITES
Operating Revenues	363,519,061	1,694,228,110
Operating Expenses	321,015,223	1,544,710,632
Operating Profit	42,503,838	149,517,478
NCP (percent)	13.24	9.68
Method used	TNMM	TNMM
PLI	NCP(%)	NCP(%)
No of Comparables	16	07
Mean Margin of Comparables	13.06	14.62
No. of Comparables for which data used for F.Y. 2005-06	15	07
No. of Comparables for which data used for F.Y. 2006-07	16	07
No. of Comparables for which data used for F.Y. 2007-08	10	04

2.2 So far as the Software Development Segment is concerned, the TPO noted that the tax payer has applied the following filters in the search of comparables:-

Sl. No	Particulars
1	Companies, for which financial data was available only up to March, 2005 were excluded.
2	Companies having zero sales or sales less than Rs. 1 Crore in the latest year for which the financial data available were rejected.
3	Companies whose manufacturing sales were equal to or greater than 50% of their total sales in the latest year for which financial data was available were rejected Companies whose trading sales were equal to or greater than 50% of their total sales in the latest year for which the financial data was available were rejected.
4	Companies having substantial related party transaction were rejected
5	Restructuring sick companies, Abnormal Financials/operations were rejected
6	Scale of operations not comparable to the tested party was rejected.

3. Accordingly, the assessee has selected 16 comparables with an average profit margin @ 13.06% on cost. Hence, the margin earned by the taxpayer @ 13.24% on operating cost was treated as at arm's length. However, the TPO, during the course of TP assessment proceedings, did not accept the method adopted by the assessee. After accepting certain filters applied by the assessee and applying certain further filters, the TPO retained some of the comparables selected by the assessee and added certain new comparables and proposed an upward adjustment of Rs.3,87,45,115/- under the Software Development Segment and

Rs.27,86,76,309/- under ITES Segment. The assessee approached the DRP, who, vide order dated 24th September, 2012, directed the TPO to recompute the ALP of the TP adjustment. In the said order, the DRP has given directions for exclusion of M/s Celestial Biolabs from the list of comparables and exclude the income and rental expenses for calculating the margin in respect of M/s Softsol India Ltd. in the Software Development Segment. So far as the ITES is concerned, the DRP directed to exclude M/s Mold Tek Technologies (P) Ltd. from the list of comparables.

4. Accordingly, in the final order passed by TPO, he computed the ALP of the international transaction in respect of the Software Development Segment at Rs.2,56,47,695/- by retaining the following revised list of 18 comparables whose average OP/OC was at Rs.21.85%:-

S.No.	Name of the Company	OP/OC (%)
1.	Avani Cimcon	21.65
2.	Bodhtree Consulting Limited	19.14
3.	e-zest Solution Limited	28.95
4.	Flextronics (Ancient Technologies Limited)	8.07
5.	Igate Global Solution Limited	13.9
6.	Infosys	40.41
7.	LGS Global Limited	41.94
8.	Kals Information System Limited (Seg)	26.64
9.	Mindtree Limited (Segment)	15.51
10.	President System Limited	27.23
11.	Quintegra International Limited (Seg)	21.74
12.	R System International Limited (Seg)	15.3
13.	R.S. Software	6.46
14.	Sasken Communications Technologies Limited (Seg)	13.44
15.	Tata Elxsi	18.97
16.	Thirdware Solutions Limited	18.01
17.	Wipro Limited (Seg)	28.38

18.	Sofitel India Limited	25.59
	Average	21.85

4.1 After allowing the working capital adjustment at 0.62%, the arm's length margin was determined at 21.23%. The operative para of the AO at page 3 of his order reads as under:-

Total Operating Cost (A)	321,015,223
Arm's Length Operating Profit @21.23%	389,166,755
Price charged in International transaction	363,519,061
105% of International Transaction	381,695,014
Shortfall being adjustment u/s 92CA	25,647,694

4.2 So far as the ITES segment is concerned, the TPO took the following 19 comparables whose average profit margin is 25.61%:-

S. No.	Name of the Company	OP/OC (%)
1	Accentia	44.50
2	Aditya Birla Minacs	-0.55
3	Asit C Mehta	9.42
4	Caliber Point Business solutions (Segment)	10.97
5	Coral Hub (Vishal Inf)	51.84
6	Cosmic Global	24.30
7	Crossdomain solution Pvt. Ltd.	26.96
8	Datamatics Financial (BPO Dvision)	34.87
9	e4e (earlier known Nitanny)	16.87
10	Eclerx	66.50
11	Genesys International	48.15
12	HCL Comnet Systems & Services Ltd. (Seg)	32.97
13	ICRA (Seg)	11.22
14	Infosys BPO	20.03
15	i-service India Private Limited	9.73
16	Spanco Limited (Seg)	8.94
17	Acropetal Technologies Limited (Seg)	35.30
18	Wipro BPO	30.23
19	R System International Limited (Seg)	4.30
AVERAGE		25.61

4.3 After allowing working capital adjustment of 1.28%, he computed the arm's length margin at 24.33 and made an addition of Rs.22,63,10,619/-, the details of which are as under:-

Total Operating Cost	1,544,710,632
Arms Length Operating Profit @ 14.33%	1,920,538,729
Price Charged in International Transaction	1,694,228,110
105% of International Transaction	1,778,939,516
Shortfall being adjustment u/s 92CA	226,310,619

4.4 Against the order of the AO, the assessee approached the Tribunal by raising the following grounds:-

“ The learned Assessing Officer ('AO') has erred in passing the assessment order dated 25 October 2012 under section 143(3) read with section 144C of the Income-tax Act, 1961 ('the Act') after considering the initial adjustments proposed by the learned Transfer Pricing Officer ('TPO') in his order passed under section 92CA(3) of the Act and the directions of the Hon'ble Dispute Resolution Panel ('DRP') in that respect.

Each of the ground is referred to separately, and may kindly be considered independent of each other.

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

1. the AO / DRP has erred in making an addition of Rs. 251,958,313 to the total income of the Appellant on account of adjustment in the arm's length price (ALP) of the international transactions related to contract IT-enabled services and contract software developments services entered into by the Appellant with its associated enterprises (collectively referred to as 'impugned transactions').
2. the DRP has erred in concurring with findings of the AO/ TPO and disregarding, without appropriate justification, the economic analysis undertaken by the Appellant for establishing the ALP of the impugned transactions.
3. the AO/ TPO has erred in conducting a fresh economic analysis for determination of the ALP of the impugned transactions and holding that the

Appellant's international transaction pertaining to provision of contract software development services and contract IT-enabled services are not at arm's length.

4. the AO/ TPO has erred by:
 - a) not accepting the use of multiple year data, as adopted by the Appellant in its TP documentation; and
 - b) determining the arm's length margins / prices using data pertaining only to financial year ('FY') 2007-08 which was not available to the Appellant at the time of complying with the Indian TP documentation requirements.
5. the AO/ TPO has erred, by wrongly rejecting certain comparable companies and adding functionally dissimilar companies to the final set of comparables for the impugned transactions.
6. the TPO/AO has erred by rejecting certain comparable companies identified by the Appellant on the ground that they do not meet the filter of employee cost greater than 25 percent of revenue.
7. the AO/ TPO has erred, by selecting certain companies which are earning super normal profits as comparable to the Appellant.
8. the TPO/AO has erred by rejecting certain comparable companies identified by the Appellant on the ground that they do not meet the filter of onsite revenue greater than 75 percent of export revenues.
9. the AO/ TPO has erred by exercising his powers under section 133(6) of the Act to obtain information which was not available in public domain and relying upon the same for comparability purposes.
10. the AO/ TPO has erred by excluding companies with turnover less than Rs. 1 Crore but not applying a similar filter to exclude oversized companies.
11. the AO/ TPO has erred, by rejecting certain comparables identified by the Appellant as having economic performance contrary to industry behavior.
12. the AO/ TPO has erred, by rejecting certain comparables identified by the Appellant for having different accounting year than the Appellant (i.e. companies having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months).

13. the TPO has passed an order under section 92CA (3) which has computational errors in the margin of certain comparables used in determination of ALP.

14. the AO/ DRP has erred, by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparables.

15. the AO/ DRP has erred in not providing the benefit of the arm's length range as provided under proviso to Section 92C of Act for purposes of computing the arm's length price under Section 92F of the Act.

16. the AO has erred by disallowing freight charges and hotel expenses under section 40(a)(ia) of the Act without appreciating the fact that the Appellant was not required to deduct tax on the payment of such expenses. Without prejudice to this fact, AO has erred by not enhancing the deduction under section 10A of the Act to the extent of the above disallowances as the same increased the income of the STP undertaking, despite clear directions from DRP in this regard.

The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays for appropriate relief based on the said grounds of appeal and facts and circumstances of the case.”

5. The Tribunal, vide order dated 14th June, 2013, partly allowed the appeal of the assessee for statistical purposes. Against the order of the Tribunal, the assessee went to the Hon'ble High Court. The Hon'ble High Court, vide order dated 2nd July, 2015, restored the issue to the file of the Tribunal for fresh adjudication by observing as under:-

“1. This is an appeal against the order of the Tribunal dated 14.06.2013 rendered in an appeal against the order of the Dispute Resolution Panel.

2. Learned counsel appearing on behalf of the appellant reframed the questions of law as under:-

“1) Whether on the facts and circumstances of the case, the order of the Tribunal was perverse and it fell into error while giving open-ended, capricious/arbitrary directions to the AO/TPO to reconsider certain comparable companies afresh, placing reliance on the Special Bench constituted in the case of Giesecke & Devirent on application of turnover filter, which was pending adjudication and subsequently disbanded?

2) Whether on the facts and circumstances of the case, the Tribunal erred in law in upholding the inclusion of comparable companies chosen by the TPO, which were functionally not comparable. Further was the order of the Tribunal perverse as it erred in not considering the decisions of the coordinate benches upholding exclusion of such comparable companies?

3) Whether on the facts and circumstances of the case, the order of the Tribunal was perverse and non-speaking owing to non-adjudication of certain grounds raised by the Appellant in the appeal memo filed before the Tribunal and further erred in not appreciating that the same were never withdrawn / conceded by the Appellant during the course of hearing?

3. As far as the first question is concerned, the matter has, in fact, not been decided finally by the Tribunal. The Tribunal noted that it had come to its notice that a Special Bench has been constituted to consider the impact of turnover on comparability and further observed that in view thereof, it would not be appropriate for it to adjudicate the issue. The Tribunal, therefore, remitted the issue of comparison on these comparables to the files of the Transfer Pricing Officer (in short 'TPO) and directed the TPO to consider the same afresh after the decision of the Special Bench.

We are informed that the Special Bench has been dissolved on account of that matter, being ITA No. 5924/DEL/2012, having been withdrawn by the assessee. Obviously, therefore, the Tribunal would have to decide the matter either itself or by having the same referred to another Special Bench. The application in this regard must, in the first instance, be made by the appellant before the Tribunal.

4. As regards the third question, learned counsel for the appellant contended that the Tribunal had wrongly recorded that the assessee's counsel had confined the grievance on behalf of the assessee to the inclusion of four comparables in software service segment and that it had only been argued that the comparables mentioned therein had been wrongly included by the TPO. Learned counsel for the appellant has invited our attention to the written submissions filed before the Tribunal.

This contention must at least, in the first instance, be raised by the appellant before the Tribunal. The appellant is at liberty to do so. In the event of the Tribunal not entertaining the application, the appellant is at liberty to adopt appropriate proceedings including in any appeal that may be filed against the main order.

5. The second issue has been decided against the appellant. We clarify that we are not considering the same at this stage. The matter before the Tribunal remains inconclusive at this stage in view of what we have mentioned regarding the first question namely that the order of the Tribunal is not capable of being implemented on account of ITA No. 5924/DEL/2012 having been withdrawn and the Special Bench in that matter having been dissolved. In our view, it would be appropriate that the matter is finally decided by the Tribunal and the appellant be granted liberty to challenge the order if necessary including on question no. 2 in an appeal against the final order. There would be no question of limitation, in such a case. The limitation would begin only after the final decision of the Tribunal.

6. It is also clarified that it would be open to the Tribunal to decide whether or not to permit the appellant to make any further arguments on the second question. It is also clarified that all the contentions raised in this appeal regarding question no. 2 can also be raised in the appeal that the appellant may file after the final order of the Tribunal.

7. The appeal accordingly stands disposed of.”

6. Grounds of appeal No. 1 to 15 relate to TP addition relating to ITES and IT addition. The ld. Counsel for the assessee submitted that the adjustment in question in the appeal before the Tribunal is regarding IT and ITES segments wherein the following additions have been made post the directions of the DRP:-

- i) On account of ITES : INR 22,63,10,619/-
- ii) On account of IT : INR 2,56,47,694/-

6.1 So far as the ITES segment is concerned, the Id. Counsel for the assessee submitted that the assessee is requesting for exclusion of the following comparables:-

1. Eclerx Services Limited
2. Genesys International Corporation Limited
3. Infosys BPO Limited
4. Wipro Limited (BPO Segment)
5. Acropetal Technologies Limited
6. Accentia Technologies Limited
7. HCL Comnet Systems and Services Limited
8. Coral Hub Limited

7. So far as Eclerx Services Limited is concerned, the Id. Counsel for the assessee submitted that this company should be excluded from the list of comparables on account of non-comparable services since it is engaged in operations, management and audit and reconciliation services. It has engaged high skilled set of employees which is evident from pages 191-192 of the paper book. Further, it has earned super normal profit since its profit range is 66.50%. Referring to the decision of the Tribunal in assessee's own case for AY 2011-12 and 2012-13, he submitted that Eclerx Services Limited was excluded by the Tribunal vide ITA Nos.477 & 6420/Del/2016 from the list of comparables.

Referring to the following decisions, he submitted that Eclerx Services Limited has been excluded from the list of comparables on account of various reasons:-

- i) Appellant own case AY 2011-12 and 2012-13 (ITA Nos. 477 & 6420 Del/2016);
- ii) Rampgreen Solutions Pvt. Ltd. v. CIT (ITA No. 102/2015) - Delhi High Court;
- iii) Mercer Consulting (India) Pvt. Ltd. (ITA No. 101/HC/Pun & Har/ 2015) - Punjab and Haryana High Court;
- iv) John Deere India Pvt. Ltd. (ITA No. 63/Mum/ 2017) - Mumbai High Court;
- v) BC Management Services (P.) Ltd. v. DCIT Circle 4(1), New Delhi (ITA Nos. 5829/Del/2015, 6134/Del/2015 and 6572/Del/2016); &
- vi) Mercer Consulting (India) Pvt. Ltd. (ITA No.101/2015) - Punjab and Haryana High Court.

8. He submitted that Eclerx Services is not comparable to the assessee which is a captive service provider which by itself performs merely back office support functions. He submitted that the ITAT had sought to include this comparable on the basis of the decision of the coordinate Bench of the Tribunal in the case of Rampgreen Solutions Pvt. Ltd. Vs. CIT, ITA No.6286/Del/2012. However, the decision of the Tribunal in the case of Rampgreen Solutions Pvt. Ltd. has been set aside by the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt.

Ltd. Vs. CIT vide ITA No.102/2015. Therefore, the basis of inclusion does not stand today.

8.1 He also drew the attention of the Bench to the decision of the Hon'ble Punjab & Haryana High Court in the case of Mercer Consulting (India) Pvt. Ltd., where the Hon'ble High Court has discussed the issue of outsourcing.

8.2 He drew the attention of the Bench to the decision of the Mumbai Bench of the Tribunal in the case of John Deere India Pvt. Ltd., vide ITA No.2236/PN/2012 where the Tribunal has held that when both the companies have different operating models, there cannot be any comparison between the two entities having different business spheres and distinct mode of operation.

9. The ld. Counsel for the assessee accordingly submitted that Eclerx is not comparable to the assessee as it follows a different business model, i.e., the outsourcing model. The two models are very different and have a significant impact on the FAR of the companies and hence, companies following an outsourcing model cannot be compared with the assessee which performs its functions through its own employees. He accordingly submitted that Eclerx should be excluded from the list of comparables.

10. So far as Genesys International Corporation Limited is concerned, the ld. Counsel for the assessee submitted that this company also is not a valid comparable as it is engaged in rendering geographical information services which

require high skill set of employees. The company is engaged in rendering geographical services including photogrammetry, remote sensing, cartography, data conversion, related computer based services and other related services during the year under consideration. Further, during the impugned assessment year, there is an extraordinary event i.e., the company has acquired 100% stake in Ladya Systech Limited. As a result, there has been a substantial increase in the revenue of the company. Further, this company has intangibles of Rs.1.26 crores during the year. Referring to the following decisions, he submitted that Genesys International Corporation Limited should be excluded from the list of comparables:-

- i) Mercer Consulting (India) Pvt. Ltd. (ITA No. 101/HC/Pun & Har/ 2015) - Punjab and Haryana High Court
- ii) John Deere India Pvt. Ltd. (ITA No. 63/Mum/ 2017) - Mumbai High Court
- iii) IHG IT Services (India) Pvt. Ltd. (ITA No. 6381/Del/ 2012)
- iv) Cengage Learning India Pvt. Ltd. (ITA No. 6484/Del/ 2012)
- v) Amba Research (India) P. Ltd. (ITA No. 622/Bang/2012); and
- vi) Flextronics Technologies (India) Private Limited (ITA No.1559/Bang/2012)

11. So far as Infosys BPO is concerned, the Id. Counsel for the assessee submitted that Infosys BPO Limited is a giant company with huge turnover. The revenue of Infosys is 5 times that of the assessee company. Further, the assessee company has a brand value which has a significant role on its profits. The Id.

Counsel for the assessee referred to the amount of revenue, expenditure on brand building along with the asset base the details of which are as under:-

<i>PARTICULARS</i>	<i>AGILENT INTERNATIONAL</i>	<i>INFOSYS BPO</i>
	<i>FY 2007-08/AY 2008-09</i>	<i>FY 2007-08/AY 2008-09</i>
<i>TURNOVER</i>	<u>INR 169.41 crores</u> <i>@ pg 42 of</i> <i>Appeal set</i>	<u>INR 825 crore</u> <i>@ pg 20 of Annual Report</i>

BRAND EXPENSE	NIL @pg 319 of PB II	INR 78.32 lacs (@ pg 25 of Annual Report
ASSET BASE	INR 54 crore @pg 315 of PB II	INR 130.8 crore @pg 19 of Annual report

12. Referring to the decision of the Tribunal in Assessee's own case vide ITA No.1084/Del/2016 for AY 2007-08 order dated 18.11.2019, copy of which is placed at pages 1-55 of the case law compilation, he submitted that the coordinate Bench of the Tribunal, following the decision of the Hon'ble Delhi High Court in case of Avaya India Pvt. Ltd. has excluded this company from the list of comparables. Relying on various decisions, filed in the case law compilation, he submitted that Infosys BPO Limited should be excluded from the list of comparables.

13. So far as Wipro Limited (BPO Segment) is concerned, the Id. Counsel for the assessee submitted that this company is also not a valid comparable due to incomparable scale of operations and presence of huge intangibles and brand value of Wipro. He submitted that the turnover of Wipro for the impugned assessment year is Rs.1,058 Crores where as that of the assessee company is only Rs.169.41 crores. Further, the Tribunal, in Assessee's own case for AY 2007-08, following the decision of the Hon'ble Delhi High Court in H & S Software Development and Knowledge Manager Centre Pvt. Ltd. has excluded this company from the list of comparables. Referring to various other decisions filed in the case law compilation, he submitted that this company should be excluded from the list of comparables.

14. So far as Acropetal Technologies Limited is concerned, the Id. Counsel for the assessee submitted that for the year under assessment, the income from Engineering Design Services is INR 21.80 crores out of total income of INR 60.31 crores which can be verified from page 21 of the annual report of the said company. Thus, the income from engineering design services is 36.13% of the total income. Thus, it is amply clear that the income from ITeS services is less than 75% of total revenues and consequently this company does not satisfy the filter of ITeS services revenue being more than 75% of total revenues, applied by the TPO himself. Relying on the decision of the coordinate Bench of the Tribunal in the case of IHG IT Services (India) Pvt. Ltd. and various other decisions filed in

the case law compilation, he submitted that Acropetal Technologies Limited cannot be included in the list of comparables.

15. So far as Accentia Technologies Limited is concerned, he submitted that this company is also not comparable as an extraordinary event happened during the subject assessment year. The company was merged with two other companies which can be verified from the annual accounts of the said company placed at paper book Volume-I. Referring to the order of the Tribunal in Assessee's own case for AY 2007-08, vide ITA No.1084/Del/2016 order dated 18.11.2019 he submitted that the Tribunal has held that Accentia is not a suitable comparable on the ground of amalgamation of subsidiaries resulting into growth of revenue by 100683% and on ground of functional dissimilarity. The Id. Counsel for the assessee, referring to the following table, drew the attention of the bench to the effect of extraordinary event on the profitability of the company:-

Accentia Technologies Limited	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
Particulars	Amount (INR)	Amount (INR)	Amount (INR)	Amount (INR)
-	(Refer page 51 of FY 06-07 annual report)	Refer page 51 of FY 07-08 annual report)		Refer page 69 of FY 09-10 annual report
Revenue	285,000.00	287,231,664.00	509,346,944.00	801,440,931.00
		100683.04%	77.33%	57.35%
Profit/Loss as per financials	43,164,681.00	66,771,702.00	152,336,854.00	252,670,608.00
		54.69%	128.15%	65.86%

16. He submitted that the Tribunal in the first round of litigation had remanded the matter back to the file of TPO to verify facts whether the merger has an effect on the comparability of this company.

17. So far as exclusion of HCL Comnet is concerned, he submitted that this company was already remanded back by the Tribunal before the TPO/AO for verifying the RPT/ sales computation of the company. Therefore, he has no objection if this comparable is restored to the file of the AO/TPO for verification of the RPT filter.

18. So far as Coral Hub is concerned, he submitted that Coral Hub should be excluded from the list of comparables as it follows outsourcing model of business whereas the assessee is a captive service provider which by itself performs its back office support functions. The two models are very different and have a significant impact on the FAR of the companies and, hence, companies following an outsourcing model cannot be compared with the assessee which itself performs its functions. Referring to the following decisions, he submitted that Coral Hub should be excluded from the list of comparables:-

- i) Mercer Consulting India Pvt. Ltd. (101/2015) - Punjab and Haryana High Court;
- ii) New River Software Services Pvt. Ltd. v. Pr. CIT Income Tax(l), New Delhi (ITA Nos. 924/ 2016) - Delhi High Court;
- iii) Rampgreen Solutions Limited (ITA No. 102/2015);

- iv) UT Starcom Inc. (India Branch) (ITA No.5848/Del./2011) has been upheld by the Hon'ble Delhi High Court vide its order dated 25.09.2017 in ITA 767/2017;
- v) John Deere India Pvt. Ltd. (ITA No. 63/Mum/2017 of HC);
- vi) Copal Research India Pvt. Ltd. (ITA No. 6410/Del/2016);
- vii) IHG IT Services (India) Pvt. Ltd. (ITA No. 638 1/Del/2012); and
- viii) Corporate Executive Board India Pvt. Ltd. (ITA No. 6328/Del/2012)

19. The Id. Counsel for the assessee, accordingly, submitted that if the aforementioned comparables are excluded from the list of comparables, the assessee would be at arm's length as the margin of the assessee is 9.68% while the average of the margin of the comparables is 14.28% and it will be within (+)/(-) 5%.

20. So far as Software Development Segment is concerned, the Id. Counsel for the assessee requested for exclusion of the following comparables:-

- i) Infosys Technologies Ltd.;
- ii) Wipro Limited;
- iii) Kals Info System Limited (Seg);
- iv) Persistent Systems Ltd.,
- v) Avani Cimcon Technologies Limited;
- vi) LGS Global Limited; &

vii) Quintegra Solutions Limited.

21. So far as Infosys Technologies Limited is concerned, the ld. Counsel for the assessee submitted that Infosys is not comparable as it is a huge company with very high turnover having diversified software services and products and having substantial intangibles, etc. It is a product development company which incurs R&D and marketing expenditure. It is a super normal profit making company. Referring to the decision of the Tribunal in assessee's own case for AY 2007-08 vide ITA No. 1084/Del/2016 and ITA No. 477/Del/2016 for AY 2011-12, he submitted that Infosys Technologies Ltd., was excluded from the list of comparables by following the decision of the jurisdictional High Court in the case of Agnity India Technologies Pvt Ltd. Further, coordinate Bench of the Tribunal in the case of Alcatel Lucent India Limited vide ITA No. 6856/Del/2015) has excluded Infosys Technologies Ltd., from the list of comparables on account of high turnover and the decision has been upheld by the Hon'ble jurisdictional High Court. He accordingly submitted that Infosys Technologies Ltd., should be excluded from the list of comparables. He also relied on the following decisions:-

- 1) Pentair Water India Pvt. Ltd. v. CIT (ITA No. 18/2015) - Mumbai High Court
- 2) Alcatel Lucent India Limited (ITA No. 6856/Del/2015) has been upheld by the Hon'ble Delhi High Court vide its order dated 18.07.2017 in ITA 515/2017

- 3) UT Starcom Inc. (India Branch)(ITA No.5848/Del./2011) which has been upheld by the Hon'ble Delhi High Court vide its order dated 25.09.2017 in ITA 767/2017

22. So far as Wipro Limited is concerned, he submitted that Wipro Ltd. is engaged in the business of IT services and trading of IT products to its clients and there is no breakup of revenue between IT Service and Products. Further, the company has also undergone an amalgamation which has resulted in an exceptional performance of the company during the year. He submitted that grounds like unreliable segmental information and super normal profits were also brought to the notice of the lower authorities. However, the same were not considered. Referring to the decision of the Tribunal in assessee's own case for AY 2007-08 vide ITA No.1084/Del/2016, order dated 18.11.2019 copy of which is placed in the paper book, he submitted that this company was excluded from the list of comparables on the ground that Wipro is a product company having sold goods under IT segment of Rs.6,313 crores and being a giant company cannot be a suitable comparable vis-a-vis the taxpayer with a captive SDS provider. Referring to the following decisions, he submitted that Wipro Limited has been excluded from the list of comparables. He accordingly submitted that Wipro Ltd., should be excluded from the list of comparables:-

- i) AVL India Software (P.) Ltd. v. DCIT (ITA 6454/Del/2012 & 279/Del/2013);

- ii) Toluna India (P.) Ltd. v. ACIT, Circle 12 (1), New Delhi (ITA 5645/Del/2011);
- iii) Agnity India Technologies Pvt. Ltd. v. CIT (ITA No. 1204/2011);
- iv) AVL India Software (P.) Ltd. v. DCIT (ITA 6454/Del/2012 & 279/Del/2013);
- v) Toluna India (P.) Ltd. v. ACIT, Circle 12 (1), New Delhi (ITA 5645/Del/2011);
- vi) Pentair Water India Pvt. Ltd. v. CIT (ITA No. 18/2015);
- vii) Alcatel Lucent India Limited, Delhi High Court ITA 515/2017;
- viii) Aircom International (India) Pvt. Ltd. (ITA No.6402/Del/2012)

23. So far as Kals Info Systems Limited (seg) is concerned, the ld. Counsel for the assessee submitted that Kals is a functionally different company mainly engaged in Software Development, training, consulting, and Equipment development. Referring to the following decisions, he submitted that Kals Info Systems Ltd. (Seg) has been excluded from the list of comparables:-

- 1) Aircom International (India) Pvt. Ltd. (ITA No.6402/Del/2012);
- 2) UT Starcom Inc. (India Branch) (ITA No.5848/Del./2011) has been upheld by the Hon'ble Delhi High Court vide its order dated 25.09.2017 in ITA 767/2017; &
- 3) AVL India Software (P.) Ltd. v. DCIT (ITA 6454/Del/2012 & 279/Del/2013)

24. He further submitted that Kals Info Systems Ltd., has shown inventory of INR 85 lacs which can be verified from page 13 of the annual report). He

submitted that this company is engaged in trading function as a pure software services provider will not have inventory in its books of accounts. The annual report of the company also states that it is engaged in production and supply of software product. Even the segmental accounts does not provide the bifurcation of software services and products separately. Therefore, this company should not be included in the final comparable list.

25. So far as Persistent Systems Limited is concerned, he submitted that Persistent is a functionally different company, engaged in Software Development and software products with no segment at financials available. The Annual report of the above company which is placed in the paper book provides that the company's revenue comprises of sale of products and services . The company also maintains the segmental accounts on consolidated basis only which can be verified from page 83 of the annual report. Further, the major revenue is from outsourced product development. Referring to the decision of the Tribunal in assessee's own case for AY 2007-08 vide ITA No. 1084/Del/2016, order dated 18.11.2019 he submitted that this company was rejected from the final list of comparables on account of Persistent being a product company with no separate segmental accounts, has undergone merger during the year under assessment and having revenue from the outsources product development; having R&D expenditure and having revenue from licence of products and is also earning royalty from the sale of products.

26. The ld. Counsel for the assessee further submitted that for the same AY, Persistent has been held to be incomparable to the Software Development Services companies due to an extraordinary event, i.e. a merger w.e.f. AY 2007-08 in the case of AVL India Software (P.) Ltd. v. DCIT vide ITA 6454/Del/2012 & 279/Del/2013. He also referred to the decision of the Tribunal in Alcatel Lucent India Limited vide ITA No. 6856/Del/2015 which has been upheld by the Hon'ble Delhi High Court vide its order dated 18.07.2017 in ITA 515/2017.

27. So far as Avani Cimcon Technologies Limited is concerned, the ld. Counsel for the assessee submitted that Avani is not a comparable as the information is unreliable and there is non-availability of information in public domain. Further, there are super natural profits of the company in the respective year. Referring to the decision of the Tribunal in assessee's own case in the first round, he submitted that the Tribunal had remanded the matter back to the file of the TPO to verify the facts whether the company is a product company or not Referring to the decision of the coordinate Bench of the Tribunal in the case of Aircom International (India) Pvt. Ltd. Vide ITA No.6402/Del/2012,he submitted that the Tribunal has excluded this comparable by observing as under:-

“This company clearly described its business activity as: “providing software development and consulting IT services” to its international clients. It is obvious from the reply tendered by this company that it is engaged in providing software development and also consulting IT services. In opposition, the assessee company is engaged in providing software development services alone and is not rendering consulting IT services. The effect of the revenue from consulting IT services in the

overall financials of the company is not available. As this company is also providing consulting IT services, which is an essential ingredient of its revenues from 'Software development services', we cannot treat it as comparable, with the assessee company, which is not providing any consulting IT services. The same is, therefore, directed to be excluded. ”

28. Referring to the decision of the Tribunal in the case of ABB Global Industries & Services Limited vide ITA No. 1612/Bang/2012, he submitted that ABB Global Industries & Services Ltd., was held to be incomparable to the assessee due to functional dissimilarity and non-availability of segmental details. Referring to the decision of the Bangalore Bench of the Tribunal in the case of ST Microelectronics Pvt Ltd. Vide IT(TP)A No.949/Bang/2011, he submitted that the Tribunal had excluded Avani Cimcon from the list of comparables on the ground that this company is engaged in software products where there is no bifurcation of revenue from sale of export and services. Relying on various other decisions, he submitted that Avani Cimcon should be excluded from the list of comparables.

29. So far as LGS Global Limited is concerned, the Id. Counsel for the assessee submitted that LGS Global Limited is not comparable as the company is engaged in rendering diversified services like product evaluation design and development, business process outsourcing (“BPO”) and other activities which are different from that of the assessee which is a captive services provider rendering software services. The business description of the LGS is available at page 26 of the Annual Report of the company placed in the paper book. Further, the company does not have separate segmental accounts and operates under one segment only which is

verifiable from page 26 of the Annual Report of the company. Referring to page 57 of the Annual Report of the company, the Id. Counsel for the assessee submitted that LGS Global Limited has intangible in the nature of goodwill amounting to INR 3.67 crores where as the assessee does not have any goodwill nor it has any other intangibles. Referring to the decision of the coordinate Bench of the Tribunal in the case of Cash Edge India Pvt. Ltd. v. ITO vide ITA No. 5848/Del/2012, he submitted that this company was excluded from the list of comparables. Referring to the following decisions, he submitted that LGS Global Limited was excluded from the list of comparables on account of non-comparable services: diversified services like product evaluation, design and development, business process outsourcing and intangibles:

- i) Saxo India Private Limited (ITA No.6148/Del/2015) which has been upheld by the Delhi High Court (ITA No. 682/2016);
- ii) Mentor Graphics (India) Private Limited (ITA No. 2587/Del/2014); &
- iii) Novell Software Development India Private Limited (ITA No. 1287/Bang/2011)

30. He accordingly submitted that LGS Global Limited should be excluded from the list of comparables.

31. So far as Quintegra Solutions Limited (“Quintegra”) is concerned, the Id. Counsel for the assessee submitted that Quintegra is engaged in rendering

diversified services like product engineering, development of proprietary software products, and infrastructure managements services which are different from that of the assessee which is a captive services provider rendering software services. The company does not have separate segmental accounts for rendering software services. Referring to the decision of the Bangalore Bench of the Tribunal in the case of AMD India Pvt. Ltd., vide ITA No. 437/Bang/2013, he submitted that Quintegra Solutions Ltd., was excluded from the list of comparables on the ground that it is engaged in proprietary software products and have its own intangibles. Referring to the Bangalore Bench of the Tribunal in the case of 3DPLM Software Solutions Limited, vide ITA No.1303/Bang/2012, he submitted that Quintegra was excluded from the list of comparables on the ground that it is engaged in proprietary software products and owns its own intangibles. He accordingly submitted that the above comparable should be excluded from the list of final set of comparables.

32. So far as Softsol India Limited is concerned, the ld. Counsel for the assessee only requested to consider the correct margin. He submitted that the TPO while giving effect to the DRP directions has computed the margin of Softsol India Limited at 25.59% as against the correct margin of 15%. He submitted that for computation of margin, the assessee has relied upon the Safe Harbor Rules notified by CBDT, which specifies the operating and non-operating items while

computing the margin. He submitted that if the above companies are excluded, then, the adjustment shall be nil.

33. The Id. DR, on the other hand, heavily relied on the orders of the AO/TPO/DRP.

34. We have considered the rival arguments made by both the sides, perused the orders of the AO/TPO/DRP and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. First of all, we take up the grounds challenging the inclusion of the comparables on account of ITeS.

35. So far as the exclusion of Coral Hub Limited is concerned, we are of the considered opinion that Coral Hub is not comparable as it follows an outsourcing model of business while the assessee is a captive service provider which by itself performs its back office support functions. The two models in our opinion are very different and have a significant impact on the FAR of the companies and hence, companies following an outsourcing model cannot be compared with the assessee which itself performs its functions. (Page 189 of the PB I)

36. We find the issue of outsourcing has been dealt with by the Hon'ble Punjab & Haryana High Court in the case of Mercer Consulting India Pvt. Ltd. (101/2015) wherein it was held that:

“ The next question is whether Coral Hub Limited ought to be included in the list of comparables. The ground on which the assessee contends that Coral Hub Limited ought to be excluded from the list of comparables is also well founded. Coral Hub Limited outsources a significant portion of

its work. The finding is that the outsourcing charges constitute 90% of the total operating costs. It is admitted by the department that the assessee on the other hand conducts its activities itself without outsourcing any part of it. There can be no comparison between an enterprise that conducts its business activities itself with one that outsources its activities although the activities pertain to the same field. The entire administrative set up of such enterprises would be different. An entity that outsources most of its work is not required to maintain a large establishment. For instance, it would be necessary for such an enterprise to have large premises and a large number of employees. Even the material it uses and the equipment that it installs from minor items such as stationery and telephones to electrical fittings and even machinery are bound to be far less than the material and equipment that an enterprise which conducts its activities itself would of necessity be required to maintain.

38. This in turn would also have consequences upon the legal requirements to be fulfilled by the two enterprises. There are several enactments that bring within its ambit, establishments or undertakings that employ a certain number of persons. There are enactments that also bring within their ambit enterprises that use power. This in turn would require an enterprise carrying on its own activities to maintain staff along with attendant facilities to ensure compliance with such legislation. The financial difference between such enterprises is bound to be enormous.

39.

40. The Tribunal's decision not to consider this case is, therefore, correct."

37. We find the issue of comparability of Coral Hub to captive back-office service providers is also covered in the favour of the appellant for the same AY by the decision dated 25.05.2017 of the High Court in IT A Nos. 924/2016 in the case of New River Software Services Pvt. Ltd. v. Pr. CIT Income Tax(1), New Delhi] wherein it has been held as under:

"As far as exclusion of Coral Hub Ltd. (earlier known as Vishal Information Technology Ltd.), the 1TAT has, in the impugned order, given the following reasons therefor:

"8.3. Coral Hub (Vishal Information Technologies Ltd.): The annual report of this company is contained at page 476 to 525 of the PB. However, the actual operations carried out by assessee have not been specified. The

assessee's main contention is that this company was outsourcing a considerable portion of their business as is evident from the outsourcing cost to total cost which was 85.58% as noted earlier. Therefore, the business model of this company cannot be compared with the business model of assessee where salary cost was 54.67% of the total cost. When the business operations are out sourced, the profit margins are bound to increase substantially as compared to a business which is carried on through employees. Therefore, this company cannot be included in the list of comparables, though it might be carrying on the similar functions which assessee was carrying on. The functional profile no doubt is one of the major criteria but not the sole criteria for deciding whether the said company can be included in the list of comparables or not. The assets and risk profile also has to be taken into consideration. This company was selected by TPO and, therefore, the submissions of Id. Standing Counsel on the ground of functional profile cannot be accepted. Moreover, we note that Id. Counsel has pointed out that data entry charges were 84.5% of total expenditure and, therefore, this cannot be compared to assessee which was primarily imparting high end services. We, accordingly, direct for exclusion of this company from the list of comparables. ”

38. We find, for the same AY, the Hon'ble High Court in the case of Rampgreen Solutions Limited (ITA No. 102/2015) rejected the comparable on having different business model as the company outsource its work. The relevant extract is as under:-

"38. In our view, even Vishal could not be considered as a comparable, as admittedly, its business model was completely different. Admittedly, Vishal's expenditure on employment cost during the relevant period was a small fraction of the proportionate cost incurred by the Assessee, apparently, for the reason that most of its work was outsourced to other vendors/service providers. The DRP and the Tribunal erred in brushing aside this vital difference by observing that the outsourcing was common in ITeS industry and the same would not have a bearing on the profitability. Plainly, a business model where services are rendered by employing own employees and using one's own infrastructure would have a different cost structure as compared to a business model where services are outsourced. There was no material for the Tribunal to conclude that the outsourcing of services by Vishal would have no bearing on the profitability of the said entity.

38.1 We find in the case of Maersk Globed Centers (India) Pvt. Ltd. (supra), the DRP itself had accepted the objection of the Assessee and had excluded Vishal as a comparable for the reason as quoted below:-

“... that it had a very low employment cost and very high cost on account of venture payment, which suggested that its business model was that of an outsourcing company and in view of this functional difference, Vishal Ltd. could not be considered as a comparable. ”

39 We further find during the subject year, the comparable company has an inventory of INR 8.05 crore (as per internal page 9 of the annual report) whereas Agilent does not have any such inventory (page 311 of the PB). This implies that the company is also engaged in trading activities as a pure service provider will not have such inventory in its books of accounts and therefore, cannot be compared with the assessee company which is a pure service provider company and therefore has to be excluded from the list of comparables. The various other decisions relied on by the Id. Counsel for the assessee also supports his case for exclusion of Coral Hub Ltd. In view of the above discussions, we are of the considered opinion that Coral Hub Limited cannot be considered as a comparable.

40. So far as exclusion of Eclerx Services Limited is concerned, this in our opinion has also to be excluded. In our opinion Eclerx is not comparable to the appellant which is a captive service provider which by itself performs merely back office support functions. We find, the Tribunal in first round included this comparable on the basis of the decision of the coordinate Bench of the Tribunal in the case of Rampgreen Solutions Pvt. Ltd. Vs. ACIT (ITA No.6286/Del/2012).

However, the decisions of the Tribunal in Rampgreen Solutions has been set aside by the Hon'ble Delhi High Court in Rampgreen Solutions Pvt. Ltd. v. CIT (ITA No. 102/2015). The relevant observations of the Hon'ble High Court reads as under:-

“37. Applying the aforesaid principles to the facts of the present case, it is once again clear that both Vishal and eClerx could not be taken as comparables for determining the ALP. Vishal and eClerx, both are into KPO In Maersk Global Centers (India) Pvt. Ltd. (supra), the Special Bench of the Tribunal had noted that eClerx is engaged in data analytics, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management. In addition, eClerx also offered financial services such as real-time capital markets, middle and back-office support, portfolio risk management services and various critical data management services. Clearly, the aforesaid services are not comparable with the services rendered by the Assessee. Further, the functions undertaken (i.e. the activities performed) are also not comparable with the Assessee. In our view, the Tribunal erred in holding that the functions performed by the Assessee were broadly similar to that of eClerx or Vishal. The operating margin of eClerx, thus, could not be included to arrive at an ALP of controlled transactions, which were materially different in its content and value. In Maersk Global Centers (India) Pvt. Ltd. (supra), the Special Bench of the Tribunal had noted the same and had, thus, excluded eClerx as a comparable. It is further observed that the comparability of eClerx had also been examined by the Hyderabad Bench of the Tribunal in M/s Capital IQ Information Systems (India) (P.) Ltd. v. Additional Commissioner of Income-tax (supra), wherein, the Tribunal directed the exclusion of eClerx as a comparable for the reason that it was engaged in providing KPO Services and further that it had also returned supernormal profits”

41. We find, the Hon'ble High Court of Punjab and Haryana in the case of Mercer Consulting (India) Pvt. Ltd. (ITA No. 101/HC/Pun & Har/2015), held as under:-

“25. The TPO relied upon a CBDT circular dated 26.09.2000 which furnishes a list of products or services that may be considered as Information Technology Enabled Products/Sendees (ITES) for the purpose

of sections 10-A and 10-B of the Income Tax Act, 1961. The circular enumerates fifteen categories. As rightly observed by the Tribunal these categories refer to products and services which are entirely different in description and functions. The manufacture of such products and the provision of such services also have entirely different financial requirements and consequences. The instances cited by the Tribunal are apposite. Geographical Information Systems Services and the assessee's services are included in the circular and therefore, fall within the category of ITES. It does not follow that they are comparable to each other for the purpose of determining the ALP in respect of the assessee's international transactions. The circular is issued for entirely different reasons viz to enable an assessee to avail deductions in respect of certain activities. The sections do not contemplate or even remotely indicate that the activities referred to therein are comparable to each other. Much less do these provisions indicate that the activities included therein have any relevance to the transfer pricing mechanism for the purpose of determination of the ALP of international transactions.

26. The tribunal rightly rejected this case from the list of comparables.”

42. We find the Mumbai Bench of the Tribunal in the case of John Deere India Pvt. Ltd. (ITA No.2236/PN/2012) which was upheld by the Mumbai HC (ITA No. 63/Mum/2017), has observed as under:-

“We are of the considered view that the assessee company is functionally different from Coral Hub Limited. Both the companies have different operating models, thus there cannot be any comparison between two entities having different business spheres and distinct mode of operation. Accordingly, we direct the TPO/AO to exclude the company from the list of comparable entities. ”

43. Further, we find merit in the argument of the Id. Counsel for the assessee that Eclerx is not comparable to the appellant as it follows a different business model, i.e., the outsourcing model. The two Models are very different and have a significant impact on the FAR of the companies and hence, companies following an outsourcing model cannot be compared with the appellant which performs its functions through its own employees, the details of which are as under:-

PARTICULARS	AGILENT INTERNATIONAL	ECLERX
	FY 2007-08/AY 2008-09	FY 2007-08/AY 2008-09
Other Total Expenses	INR 82.99 Cr @pg 319 of PB II	INR 276.62 Cr @pg 37 of Annual Report
Outsourcing (Contract for Services)	NIL @pg 319 of PB II	INR 142.43 Cr @pg 43 of Annual Report (to be handed over by the counsel)

44. We further find that the issue of comparability of Eclerx to captive back-office service providers is covered in assessee's own case for AY 2011-12 & 2012-13 by the decision dated 17.02.2018 of the co-ordinate Bench of the Tribunal vide ITA Nos. 477 & 6420Del/2016 wherein, it has been held as follows:

“ 34. We have heard the rival contentions and also perused the relevant findings given in the impugned order on the inclusion of E-clerx. On perusal of the financial statement as pointed out by the learned counsel, we find that E-clerx out of total expenses of Rs.66.01 crores has spent Rs.43.71 crore for outsourcing its contract for services, whereas in the case of the assessee, the entire expenditure has been done through its own human resources. The major operation of this company seems to be based on outsourcing model and in an outsourcing model the assets deployed in the form of human resources, infrastructure and other intangibles differs from an entity which operates from its own human resources. In the case of the assessee, the entire back of its support have been provided by the assessee, and therefore, following the judicial precedents in the case of B.C. Management Services (supra), we hold that E-clerx should not be included for the comparability and analysis and accordingly same is directed to be excluded.”

45. We find the issue of comparability of Eclerx to captive back-office service providers is also covered in favour of the assessee in the decision of the coordinate Bench of the Tribunal vide ITA Nos. 5829/De//2015, 6134/Del/2015 and 6572/Del/2016 in the case BC Management Services (P.) Ltd. v. DCIT Circle

4(1), New Delhi under similar circumstances where the Tribunal has observed as under:-

“12. However without entering into the semantics of arguments as to what kind of functions constitutes low-end ITeS service provider or high-end ITeS or KPO service provider, we would like to confine our finding on FAR analysis. Because, at times when host of services are performed under ITeS, likes of assessee's, there becomes very thin line distinction between functions performed by the low-end ITeS service provider and high-end ITeS service provider and it is quite difficult to analyse in such situations as to how much value additions are there in deliverables in rendering of such kind of host of services. At the outset, on a perusal of the Financials and annual report of E-clerx for the relevant financial year as pointed out to us during the course of the hearing, we find that the E-clerx has outsourced most of its services to outsiders which is evident from the fact that the expenses under the head 'contract for the services' is more than Rs. 43.71 Crores during the year out of total expenses debited to profit & loss account of Rs. 91.29 Crores. The major operations appears to be based on outsource model, which is evident from the quantum of expenditure and notes to the financial account (the copy of which is appearing at page 840 of the assessee's paper book). In an outsourcing model, the assets deployed in the form of human resources, infrastructure and other intangibles differ from an entity which operates from its own resources. Whence, in the case of E-clerx, substantial work has been outsourced to various parties, as compared to the assessee, where the entire back office support services have been provided by the assessee itself, then on this ground alone, it would be very difficult to put E-clerx in the comparable basket. Another important fact which is borne out from the annual accounts is that, E-clerx is performing financial services as well as sales and marketing services for which there is no separate segmental information. It reflects only one primary segment which is data analytics and process outsourcing services. Sales and marketing activities again is a different function altogether which cannot be compared with the assessee which is performing purely back office support services. Under these circumstances also it would be very difficult to find out as to what is the profit margin from the sales and marketing services which is entirely a different from the functions carried out by the assessee. Further before us, the learned counsel has relied upon catena of decisions of this Tribunal and also High Courts, wherein E-clerx has been held to be incomparable with the companies providing purely back office support services. In view of aforesaid cumulative factors, we hold that E-clerx cannot be held to be a good comparable for bench marking the assessee's margin to arrive at ALP and accordingly, we direct the AO/TPO to remove this comparable.”

46. We also note that in relation to the point of outsourcing, the Punjab & Haryana High Court in the case of Mercer Consulting (India) Pvt. Ltd. (ITA No.101/2015) has stated that an outsourcing company has a different business model and cannot be compared to a company undertaking normal business activity. The relevant observations of the Hon'ble High Court are as under:-

“37. The next question is whether Coral Hub Limited ought to be included in the list of comparables. The ground on which the assessee contends that Coral Hub Limited ought to be excluded from the list of comparables is also well founded. Coral Hub Limited outsources a significant portion of its work. The finding is that the outsourcing charges constitute 90% of the total operating costs. It is admitted by the department that the assessee on the other hand conducts its activities itself without outsourcing any part of it. There can be no comparison between an enterprise that conducts its business activities itself with one that outsources its activities although the activities pertain to the same field. The entire administrative set up of such enterprises would be different. An entity that outsources most of its work is not required to maintain a large establishment. For instance, it would be necessary for such an enterprise to have large premises and a large number of employees. Even the material it uses and the equipment that it installs from minor items such as stationery and telephones to electrical fittings and even machinery are bound to be far less than the material and equipment that an enterprise which conducts its activities itself would of necessity be required to maintain.

38. This in turn would also have consequences upon the legal requirements to be fulfilled by the two enterprises. There are several enactments that bring within its ambit, establishments or undertakings that employ a certain number of persons. There are enactments that also bring within their ambit enterprises that use power. This in turn would require an enterprise carrying on its own activities to maintain staff along with attendant facilities to ensure compliance with such legislation. The financial difference between such enterprises is bound to be enormous.

.....

40. The Tribunal's decision not to consider this case is, therefore, correct.”

47. Further Eclerx is also not comparable to the assessee since the appellant is a captive service provider while Eclerx is a full risk bearing entity. In view of the above discussion, we hold that E-clerx is not a valid comparable. We, therefore, direct the AO/TPO to exclude the same.

48. So far as exclusion of Genesys International Corporation Limited is concerned, we find Genesys is engaged in rendering geographical information services which require high skill set (page 192-195 of the paperbook I). The Company is engaged in rendering Geographical Information services including Photogrammetry, Remote Sensing, Cartography, Data Conversion, related Computer based Services and other related services during the year under assessment (page 23 of Annual Report for FY 2007-08)

49. We find for the same AY, the Mumbai Bench of the ITAT in the case of John Deere India Pvt. Ltd. (ITA No. 2236/PN/2012) which was upheld by the Mumbai HC (ITA No. 63/Mum/2017), has observed as under:-

“10. With respect to Genesys International, the Tribunal noted that the same Company was engaged in providing geo-spatial services. The activities of the assessee were therefore, at variance from that of Genesys. It was on this count that the Tribunal held that the said Company was functionally different from the assessee. No question of law therefore, arises.”

50. We find, for the same AY, the co-ordinate Bench of the Tribunal in the case of IHG IT Services (India) Pvt. Ltd. (ITA No.6381/Del/2012), has observed as under:-

“29. We have heard both the parties, have gone through the records and gone through the Annual Report of Genesys International Corporation Ltd. We find that the assessee is engaged in the back office support ITES system for its AE in respect of accounting support for hotels and its corporate offices whereas we find that Genesys International Corporation Ltd. is into mapping business and it provides geographical information services comprising Photogrammetry, Remote Sensing, Cartography, Data Conversion, related Computer based Services and Information Technology enabled and other related services, which cannot be by any stretch of imagination be said to be comparable to that of the assessee. Since Genesys International Corporation Ltd. is functionally dis-similar with that of the assessee, we direct the TPO to exclude the said company from the list of comparables.”

51. Similarly, the co-ordinate Bench of the Tribunal in the case of Cengage Learning India Pvt. Ltd. (ITA No. 6484/Del/2012), while excluding Genesis has observed as under:-

“(iv) Genesis International Corp. Ltd.

This company has been selected by Ld.TPO in the final list of comparables. Ld. Counsel submits that it is functionally different with that of assessee as it is mainly engaged in the area of Geographical Information Systems services company provides services in the field of Cadastral Mapping, Navigation Maps, 3-D Mapping, Photogrammetry/remote sensing services, power, etc. In our view these services are highly skilled and knowledge-based services which cannot be compared with a back-office support service as that of assessee.

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

52. We further find during the subject year, is an extraordinary event has taken place i.e. the company has acquired 100% stake in Ladya Systech Limited. As a result, there has been a substantial increase in the revenue of the company, the details of which are as under:-

Genesys International Corporation Limited	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
Particulars	Amount (INR)	Amount (INR)	Amount (INR)	Amount (INR)
		Refer internal page 29 for FY 2006-07 Annual Report	Refer internal page 33 of FY 08-09 Annual Report	
Revenue as per financials	139,681,688.00	191,750,101.00	471,630,415.00	831,753,876.00
		37.28%	145.96%	76.36%

53. A perusal of the above would show that the company's financials will not reflect the correct picture due to impact of the acquisition. Therefore, we find merit in the argument of the Id. Counsel that the subject comparable should not be selected in the final comparable list. In addition to above, it is also provided that during the subject year, the company has intangibles of INR 1.26 crore (page 34 of the annual report) whereas Agilent does not have any such intangibles (page 311 of the Paper book). In view of the above discussion, we are of the considered opinion that Genesys International Corporation Ltd., should be excluded from the list of comparables.

54. So far as exclusion of Infosys BPO Limited is concerned, we find it is an undisputed fact that Infosys BPO is a giant company with huge turnover. (page 196 of the paper book I). It is mentioned that the revenue of Infosys BPO Limited is 5 times of Agilent. Further, the company has a brand value which has a significant role on its profits. From the details, we find the amount of revenue, expenditure on brand building along with the asset base is as under:-

PARTICULARS	AGILENT INTERNATIONAL	INFOSYS BPO
	FY 2007-08/AY 2008-09	FY 2007-08/AY 2008-09
TURNOVER	INR 169.41 crores (@ pg 42 of Appeal set	INR 825 crore (@ pg 20 of Annual Report
BRAND EXPENSE	NIL @pg 319 of PB II	INR 78.32 lacs @pg 25 of Annual Report
ASSEST BASE	INR 54 crore @pg 315 of PB II	INR 130.8 crore @pg 19 of Annual report

55. We find the co-ordinate Bench of the Tribunal in Assessee's own case for AY 2007-08 (ITA No. 1084/Del/2016) has observed as under:-

“23. Undisputedly, there is no change in the business model of the taxpayer. Moreover, when we examine scale of business of Infosys BPO vis-a-vis the taxpayer, it is a giant company with huge turnover and having significant intangibles because as per annual report, relevant page 1239 of the paper book, Infosys BPO is having a turnover of Rs.649 crores whereas turnover of the taxpayer is Rs. 142 crores. Moreover, Infosys BPO has brand expenditure of Rs. 56 lakhs as against nil expenditure of the taxpayer.

24. Moreover, ratio laid down by Hon'ble Delhi High Court in case of Avaya India Pvt. Ltd. (supra) is applicable to the facts and circumstances of the case that scale of operation of comparable vis-a-vis tested party is a factor requires to be kept in mind. So, keeping in view the size and scale of Infosys BPO vis-a-vis the taxpayer, it is not a suitable comparable.

.....

26. In view of the facts and circumstances of the case discussed above and following the decision rendered by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2014-15 (supra) and decisions supra rendered by Hon'ble Delhi High Court, we are of the considered view that Infosys BPO is not a suitable comparable vis-a-vis the taxpayer, hence ordered to be excluded”

56. In relation to the point of asset base, we find that Hon'ble Delhi High Court in the case of Avuya India Pvt. Ltd. (ITA No. 532/2019) after considering the

impact of assets has given due consideration for excluding a comparable. The relevant observations of Hon'ble High Court is as under:-

“27. There is merit in the contention of the Assessee that the scale of operations of the comparables with the tested entity is a factor that requires to be kept in view. TCS E-Serve has a turnover of 'Rs. 1359 crores and has no segmental revenue whereas the Assessee 's entire segmental revenue is a mere 24 crores. As observed by this Court in its decision dated 5th August 2016 in ITA 417/2016(PCIT v. Act is Global Services Private Limited) “Size and Scale of TCS” s operation makes it an inapposite comparable vis-a-vis the Petitioner. ”As already pointed out earlier there is a closer comparison of TCS E-Serve Limited with Infosys BPO Limited with each of them employing 13,342 and 17,934 employees respectively and making Rs.37 crores and Rs. 19 crores as contribution towards brand equity. When Rule 10(B) (2) is applied i.e. the FAR analysis, namely, functions performed, assets owned and risks assumed is deployed then brand and high economic upscale would fall within the domain of “assets” and this also would make both these companies as unsuitable comparables.”

57. So far as brand is concerned, we find the co-ordinate Bench of the Tribunal in assessee's own case for AY 2014-15 (ITA No. 4191/Del/2018) has removed the comparable by observing as under:-

“17. We have carefully considered the rival contention and perused the orders of the lower authorities wherein the reasons given for inclusion of the above comparable company for the purpose of benchmarking of the arm 's-length price of the international transaction of the ITeS segment of the assessee. The assessee has also placed before us the annual report of Infosys BPO Ltd for 2013 - 14. On looking at the annual report itself it is clear that the company has an imprint of Infosys brand all over it. In the companies overview at page number 4 of the annual accounts as mentioned that this company is the business process outsourcing subsidiary of Infosys and is engaged as outsourcing service provider. In the management discussion and analysis placed at page number 14 of the annual report, it is stated that Infosys BPO provides business process management services to organizations that outsource their business processes and Infosys BPO is majority owned and controlled subsidiary of Infosys Ltd. Rich industry experience held the company to understand the evolving needs of the clients better and provided them with the ability to offer appropriate solution across different industry verticals and horizontals , quickly. Further in paragraph number 1 it is stated that the company is committed to

providing best-in-class services to both horizontal and vertical focus areas. The horizontal solutions comprise of sourcing and procurement, customer services, finance and accounting, legal process outsourcing, sales and fulfillment, analytics, business platform, business transformation services, human resources outsourcing, technology solution optimization. While vertical solution included financial services and insurance, manufacturing, energy utilities, communication and services, retail, consumer packaged goods, logistics and life sciences. On looking at the horizontal services, which comparable company provides it is apparent that on this ground itself the same is not comparable with the assessee company. On looking at page number 64 of the annual accounts, it is apparent that comparable company has contributed INR 50,000,000 towards brand building and advertisement expenditure. Admittedly the company does not have any goodwill which can impact the profitability of the price of the business of its services because the goodwill is recorded on amalgamation in the nature of purchase only. This is mentioned at page number 51 in paragraph number 1.5 of the annual report and corroborated by page number 58 of the fixed assets schedule in paragraph number 2.6 of the report. Based on the above analysis, it is apparent that Infosys BPO Ltd has a huge brand backing of the Infosys group behind it which can definitely impact the revenue as well as the profitability of the comparable company, therefore in absence of any such assets available to the assessee company, Infosys BPO Ltd is required to be excluded from the comparability analysis of ITeS segment. Accordingly we direct the learned TPO/AO to exclude the above comparable and then compute the arm's-length price of the ITeS segment of the assessee."

58. We further find the ground of incomparable scale and size has been upheld by the Delhi High Court in the case of Sanvih Info Group Pvt. Ltd. (ITA No. 420/Del/2019) wherein it has been held as under:-

"8. It appears that the comparable discussed in Agnity India Technologies Pvt. Ltd. (supra) which was sought to be excluded was an Infosys Group Company which undoubtedly was 'a giant corporation'. On the other hand, in Chrys Capital Investment Advisors India (P.) Ltd. the three comparables included were Brescon Corporate Advisors Limited, Keynote Corporate Services Limited and Khandwala Securities Limited and the rejected comparables were IDFC Investment Advisors Ltd., Sumedha Fiscal Services Limited and Future Capital Holdings Limited. Clearly therefore none of the comparables involved was a 'giant corporation' like Infosys. Consequently, this Court is not persuaded that the ITAT erred in the present case in excluding Infosys BPO Limited relying on the decision of this Court in Agnity India Technologies Pvt. Ltd. (supra)"

59. We find Infosys BPO has been rejected by the co-ordinate Bench of the Tribunal in the same AY, in the case of IHG IT Services (India) Pvt. Ltd. (ITA No. 6381/Del/2012), wherein it has been held as under:-

“We take note that the aforesaid extra ordinary event of amalgamation during the year has helped Infosys BPO in acquiring domains skill sets in the finance, administration space as well as enhanced its global presence with centers at Thailand and Poland. In view of the said extra ordinary event brought to our notice, we exclude Infosys BPO from the list of comparables. ”

60. We further find the co-ordinate Bench of the Tribunal in the case of IHG IT Services (India) Pvt. Ltd. (ITA No. 397/Del/2017) has observed as under:-

“We have considered the submissions of both the parties and have perused the record of the case. In assessment year 2008-09, this comparable was excluded as an extraordinary event took place that year. Infosys BPO Limited acquired skill sets in the finance, administration space as well as enhanced its global presence with centers at Thailand and Poland. In course of hearing, Id. counsel for the assessee filed the news item in the Economic Times, wherein, as regards the acquisition of Australia-based Portland Group for AUD 37 mn, it is pointed out that the deal would essentially enable Infosys BPO to have a reach into the Australian market and will enhance their sourcing and procurement capabilities. It is further stated that Infosys' focus on value-added services and this will add to it. Further, it was stated that Portland Group has over 100 employees with a reported revenue of approximately A\$31.3 million for the fiscal year ended June 30, 2011. Further, Portland Group has over 100 procurement specialists with domain expertise and some 40-odd clients. Thus, the deal certainly helped Infosys BPO to intensify its services offerings and took sourcing and procurement functions to a higher level. Thus, it cannot be said that though the deal was struck in January, 2012 but could not impact the profitability of assessee particularly when the Portland Group had substantial presence over area and had specialized skills. Therefore, this event definitely affected the profitability of Infosys BPO which increased substantially. Further, Id. counsel has also demonstrated various aspects, noted earlier, which clearly distinguished Infosys BPO from assessee and, therefore, we direct this comparable to be excluded from the list of comparables. ”

61. The various other decisions relied on by Id. Counsel for the assessee also support his case for exclusion of Infosys BPO Limited from the list of comparables. We therefore direct the AO/TPO to exclude Infosys BPO Ltd. from the list of comparables.

62. So far as exclusion of Wipro Limited (BPO segment) is concerned, we are of the considered opinion that Wipro BPO is not comparable to the appellant due to incomparable scale of operations and presence of huge intangibles and the brand value of Wipro. We find the turnover of the company is very high vis-a-vis the appellant. The company has a turnover which is more than 6 times of the appellant which can be verified from the details filed in the paper book.

PARTICULARS	AGILENT INTERNATIONAL	WIPRO BPO
	FY 2007-08/AY 2008-09	FY 2007-08/AY 2008-09
TURNOVER	INR 169.41 crores @pg 42 of Appeal set	INR 1,058 crores @pg 212 of standalone Annual Report

63. We find the co-ordinate Bench of the Tribunal in Assessee's own case for AY 2007-08 (1TA No. 1084/Del/2016) has observed as under:-

“22. Similarly, Hon'ble Delhi High Court in H & S Software Development and Knowledge Manager Centre Pvt. Ltd. (supra) has confirmed the exclusion of Wipro by the Tribunal on ground of significant brand presence for profits at large corporate size. So, in view of the facts and circumstances of the case and following the law laid down by Hon'ble Delhi High Court in the cases supra, we are of the considered view that Wipro is not a suitable comparable vis-a-vis taxpayer, hence ordered to be excluded.”

64. In relation to the point of asset base, we have already reproduced the findings of Hon'ble Delhi High Court in the case of Avuyu India Pvt. Ltd. (ITA No. 532/2019) wherein the impact of assets has been given due consideration for excluding a comparable.

65. We find the Hon'ble Delhi High Court in the case of New River Software Services Pvt. Ltd. (ITA No. 924/2016) has observed as under:-

“Wipro BPO is more or less on the same footing as Infosys BPO as far as the size and scale are concerned. Consequently the Court finds no legal infirmity in the impugned order of the ITAT, which has, apart from excluding the above comparables, remanded the matter to the TPO on the question of working capital adjustment. ”

66. In view of the above discussion and considering our findings while excluding Infosys BPO whose facts are more or less similar to that of Wipro BPO, we hold that Wipro BPO is not a valid comparable. We, therefore, direct the AO/TPO to exclude Wipro BPO from the list of comparables.

67. In so far as exclusion of Acropetal Technologies Ltd., is concerned, we find for the year under assessment, the income from Engineering Design Services of Acropetal Technologies is INR 21.80 crores out of total income of INR 60.31 crores (page 21 of annual report) which is 36.13%. Therefore, it is amply clear that the income from ITeS services is less than 75% of total revenues and consequently this company does not satisfy the filter of ITeS services revenue being more than 75% of total revenues, applied by the TPO himself. We, therefore, are of the opinion that this company is not a valid comparable.

68. We find the co-ordinate Bench of the Tribunal in the case of IHG IT Services (India) Pvt. Ltd. (ITA No. 6381/Del/2012), has observed as under:-

“34. We have heard both the parties and perused the records. We find from a perusal of the said letter dated 08.03.2011 to the TPO that Acropetal is into software development also and since the segmental information is not available, it would not be safe to rely on the finance of this company. Therefore, we order exclusion of this comparable from the set of comparables.”

69. In view of the above discussion and in view of various other decisions relied on by Id. Counsel for the assessee, we are of the considered opinion that Acropetal Technologies is not a valid comparable. We, therefore, direct the AO/TPO to exclude this company from the list of comparables.

70. Now, coming to exclusion of Accentia Technologies Limited is concerned, we find Accentia is not comparable as an extraordinary event has taken place during the subject assessment year. The company was merged with two other companies (page 187 of the paperbook I). We find the co-ordinate Bench of the Tribunal in Assessee’s own case in AY 2007-08 (ITA No. 1084/Del/2016) has held as under:-

“33. So, in view of the facts and circumstances of the case and following the decision (supra) rendered by the coordinate Bench of the Tribunal, we are of the considered view that Accentia is not a suitable comparable on ground of amalgamation of subsidiaries resulting into growth of revenue by 100683% and on ground of functional dissimilarity, hence ordered to be excluded.”

71. The relevant details regarding the effect of extraordinary event on the profitability of the company is reproduced as under:-

Accentia Technologies Limited	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
Particulars	Amount (INR)	Amount (INR)	Amount (INR)	Amount (INR)
-	(Refer page 51 of FY 06-07 annual report)	Refer page 51 of FY 07-08 annual report)		Refer page 69 of FY 09-10 annual report
Revenue	285,000.00	287,231,664.00	509,346,944.00	801,440,931.00
		100683.04%	77.33%	57.35%
Profit/Loss as per financials	43,164,681.00	66,771,702.00	152,336,854.00	252,670,608.00
		54.69%	128.15%	65.86%

72. We find, the Tribunal in the first round has remanded the matter back to the file of the TPO to verify the facts whether the merger has any effect on the comparability of this company. Since it is seen that due to amalgamation of subsidiaries there is growth of revenue by 100683% and there is financial dissimilarities, we hold that Accentia Technologies Ltd., is not a valid comparable. We, therefore, direct the AO/TPO to exclude this company from the list of comparables.

73. So far as exclusion of HCL Comnet is concerned, we find the subject comparable has already been remanded back by the Tribunal before the TPO/AO for verifying the RPT/ sales computation of the company. We, therefore, deem it proper to restore the issue to the file of the AO/TPO for verifying the RPT/sales

computation and decide the issue as per fact and law after giving due opportunity of being heard to the assessee.

74. The AO/TPO shall recompute the ALP in ITeS segment on the basis of exclusion of these comparables.

75. Now, we are taking up the exclusion of comparables in the IT Segment. So far as the exclusion of Infosys Technologies Limited is concerned, we are of the opinion that Infosys is not comparable as it is a huge company with very high turnover. It also has a brand associated with it which impacts the profitability of the company. Further, it is a product development company which incurs R&D and marketing expenditure.

76. We find, the Tribunal in Assessee's own case for AY 2007-08 (ITA No. 1084/Del/2016), has rejected Infosys Technologies Ltd. From the list of comparables by observing as under:-

“40. So, by following the ratio laid down by the Hon'ble High Court in Agnity India Technologies Pvt Ltd. (supra) and order passed by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2011-12 (supra), we are of the considered view that Infosys Technologies having turnover of Rs.13,149 crores with asset base of Rs.2150 crores having brand expenditure of Rs. 69 lakhs as against turnover of Rs. 32 crores of taxpayer with nil brand expenditure and asset base of Rs.29 crores; and that Infosys Technologies has also incurred Rs.49 crores on the R&D expenditure and its revenue from the software product has increased to 67.6% whereas segmental financials are not available, so Infosys is not a suitable comparable. So, in these circumstances, we are of the considered view that Infosys Technologies is not a suitable comparable vis-a-vis taxpayer, hence ordered to be excluded. ”

77. We find the Tribunal in Appellant's own case for AY 2011-12 (ITA No. 477 /Del/2016), has rejected this comparable from the list of comparables by observing as under:-

“7.4 If we apply the aforesaid comparative criteria as laid down by Jurisdictional High Court, we find that the same would be applicable on the facts of the present case also and therefore, respectfully following the judgment of the Hon'ble Delhi High Court (supra), we hold that Infosys Technologies Limited cannot be compared with the assessee-company, which is operating at minimal risk and is a contract software development service provider. Accordingly, we direct the TPO to exclude Infosys Technologies Limited from the comparable list.”

78. We also find the comparability of Infosys Technologies Limited to captive ITeS providers is covered in the favour of the assessee on the ground of huge size and scale by the decision of the jurisdictional High Court in the case of Agnity India Technologies Pvt. Ltd. v. CIT (ITA No. 1204/2011).

79. We find the Hon'ble Delhi High Court vide ITA No.515/2017 upheld the decision of the Tribunal excluding Infosys Ltd. from the list of comparables in the case of Alcatel Lucent India Ltd. where the Tribunal vide ITA No.6856/Del/2015 has held as under:-

“We find that Infosys has been rejected as a comparable by the ITAT in the case of assessee's predecessor company Alcatel — Lucent Technologies India P. Ltd. for AY 2003-04 and 2004-05 in ITA No. 2297/Del/2008 and 2298/Del/2008. The Hon 'ble Delhi High Court in the case of M/s Agnity India Technologies P. Ltd. (ITA No. 1204/2011) has held that companies with high turnover have to be rejected. Respectfully following the ratio, we direct the TPO to exclude this company from the final list of comparables.”

80. We find the decision in Agnity India Technologies (P) Ltd. has been relied upon by the co-ordinate Bench of the Tribunal in the case of UT Starcom Inc.

(India Branch) vide ITA No.5848/Del./2011 which has been upheld by the Hon'ble Delhi High Court vide its order dated 25.09.2017 in ITA 767/2017 wherein it was held that the Tribunal in its order has given clear and cogent reason for rejection of Infosys Limited. The relevant observations of the Tribunal are as under:-

“15. When we examine the profile of the assessee company vis-avis Infosys Technologies Limited in the light of the judgment in CIT vs. Agnity India Technologies Pvt. Ltd. (supra), there is no comparability for benchmarking the international transactions for the reasons inter alia that Infosys Technologies Limited is a giant risk taking company whereas, on the other hand, the assessee is a captive unit of its parent company and 'prone to minimum/ limited risk; that the Infosys Technologies Limited is having huge significant intangibles and having huge assets leading to the exorbitant turnover; that it is not in dispute that functional profile of assessee company and CIT vs. Agnity India Technologies Pvt. Ltd. is similar; that moreover, in the SDS segment, numerous companies are available for comparability. So, in the given circumstances, we are of the considered view that Infosys Technologies Limited is not a valid comparable in this case, hence ordered to be excluded. ”

81. We find the facts in the relevant AY are similar which was demonstrated by the Id. Counsel for the assessee as under:-

PARTICULARS	AGILENT INTERNATIONAL	INFOSYS TECHNOLOGIES LIMITED
	FY 2007-08/AY 2008-09	FY 2007-08/AY 2008-09
TURNOVER	INR 36.35 crores @pg 42 of Appeal set	INR 15,648 crores @pg 67 of Annual Report
EMPLOYEE COST	INR 100.18 crores @pg 312 of PB II	INR 7,259 crores @pg 71 of Annual Report
BRAND EXPENDITURE	NIL @pg 319 of PB II	INR 55 crores @pg 71

82. We find, the ground of incomparable scale and size has been upheld by the Hon'ble Delhi High Court in the case of Sanvih Info Group Pvt. Ltd., vide ITA No. 420/Del/2019 wherein it has been held as follows:

“8. It appears that the comparable discussed in Agnity India Technologies Pvt. Ltd. (supra) which was sought to be excluded was an Infosys Group Company which undoubtedly was ‘a giant corporation’. On the other hand, in Chrys Capital Investment Advisors India (P.) Ltd. the three comparables included were Brescon Corporate Advisors Limited, Keynote Corporate Services Limited and Khandwala Securities Limited and the rejected comparables were IDFC Investment Advisors Ltd., Sumedha Fiscal Services Limited and Future Capital Holdings Limited. Clearly therefore none of the comparables involved was a ‘giant corporation’ like Infosys. Consequently, this Court is not persuaded that the ITAT erred in the present case in excluding Infosys BPO Limited relying on the decision of this Court in Agnity India Technologies Pvt. Ltd. (supra)”

83. In view of the above discussions, we hold that Infosys Technologies Ltd., should be excluded from the list of comparables. We hold and direct accordingly.

84. Now, coming to exclusion of Wipro Limited we find Wipro is engaged in the business of IT services and trading of IT products to its clients and there is no breakup of revenue between IT Service and Products. Further, the company has also undergone an amalgamation which has resulted in an exceptional performance of the company during the year. We find, Wipro is a product company having sold goods under IT segment of Rs.6,313 crores and being a giant company cannot be a suitable comparable vis-a-vis the taxpayer who is a captive SDS provider. We find merit in the argument of Id. Counsel for the assessee that Wipro Limited is not comparable to the appellant due to

incomparable scale of operations and presence of huge intangibles and the brand value of Wipro. We find Wipro has been excluded, in the same assessment year, on the basis of incomparable size and scale by the co-ordinate Bench of the Tribunal in AVL India Software (P.) Ltd. v. DCIT (ITA 6454/Del/2012 & 279/Del/2013) and Toluna India (P.) Ltd. v. ACIT, Circle 12 (1), New Delhi (ITA 5645/Del/2011). While doing so the co-ordinate Bench has followed the decision of the Hon'ble Delhi High Court in the case of Agnity India Technologies Pvt. Ltd. V. CIT (ITA No. 1204/2011).

85. We find the Tribunal in the case of AVL India Software (P.) Ltd. v. DCIT (ITA 6454/Del/2012 & 279/Del/2013) has observed as under:-

“41. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

“41. After considering the rival submissions and perusing the relevant material on record, we have absolutely no doubt in our mind that this company cannot be considered as comparable to the assessee inasmuch as it is a giant company in terms of parameters discussed above while dealing with the case of Infosys Ltd. The Hon 'ble Delhi High Court in the case of Agnity India Technologies Pvt. Ltd. (supra) has upheld the exclusion of this company also from the list of comparables on the basis of certain parameters, which are fully applicable to the instant assessee as well. It is, therefore, directed to exclude this company from the list of comparables. The assessee succeeds.

42. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed to be excluded from the list of comparables.”

86. We find the coordinate Bench of the Tribunal in the case of Toluna India (P.) Ltd. v. ACIT, Circle 12 (I), New Delhi vide ITA 5645/Del/2011, has observed as under:-

“41. After considering the rival submissions and perusing the relevant material on record, we have absolutely no doubt in our mind that this company cannot be considered as comparable to the assessee inasmuch as it is a giant company in terms of parameters discussed above while dealing with the case of Infosys Ltd. The Hon’ble Delhi High Court in the case of Agnity India Technologies Pvt. Ltd. (supra) has upheld the exclusion of this company also from the list of comparables on the basis of certain parameters, which are fully applicable to the instant assessee as well. It is, therefore, directed to exclude this company from the list of comparables. The assessee succeeds.”

87. We further find the turnover of the company is very high vis-a-vis the assessee. The company has a turnover which is 345 time of the appellant the details of which are as under:-

PARTICULARS	AGILENT INTERNATIONAL	WIPRO LTD
	FY 2007-08/AY 2008-09	FY 2007-08/AY 2008-09
TURNOVER	INR 36.35 crores @pg 42 of Appeal set	INR 12,569 crores @pg 212 of Annual Report

88. We find, the Hon'ble Supreme Court has dismissed the special leave petition file by the Revenue against the decision of Hon’ble High Court in the case of Oracle (OFSS) BPO Services Pvt. Ltd.. The Hon’ble High Court vide ITA No. 124/2018 has observed as under:-

“As to the exclusion of M/s Wipro Limited, here too, the Court is of the opinion that the brand value of an entity has a significant role in its ability to garner profits and negotiate contracts. Thus, while considering the comparables, the likelihood of profits derived or attributable to the brand having regard to the consistency of the quality of services that an entity is

able to offer would be relevant; although functionally, the two entities may be similar in terms of the services or products they offer, brand does play its own role in price or cost determination. If this singular aspect is kept in mind, the ITA T's approach cannot be faulted with."

89. In view of our above discussion, we hold that Wipro cannot be compared with that of the assessee company. We, therefore, direct the AO/TPO to exclude Wipro from the list of comparables.

90. So far as Kals Info Systems Limited (seg) is concerned, we find Kals is a functionally different company mainly engaged in Software Development, training, consulting, and Equipment development. We find the co-ordinate Bench of the Tribunal in the case of Aircom International (India) Pvt. Ltd. vide ITA No.6402/Del/2012 has observed as under:-

"The TPO's inclusion of this company in the list of comparables is that the software products and training constitute only 4.24% of its revenue. This inference has been drawn on the basis of the information supplied by this company stating: "the use of readymade object laboratories is only to the tune of about (3.4 to 6.96) % in the year 2007-08 to 2008-09 ". We fail to comprehend as to how the above line conveys that the software products' revenue stands at 4.24%. What has been written is that the company's use of the readymade object laboratories is only to the tune of maximum 4.24%. By no imagination this can be construed as revenues from software products. When we peruse the Annual report of this company, which is available in the paper book, it can be seen that there is no such mention of software products revenue limited to 4.24%. On the contrary; it has been mentioned in the Notes to the financial statement that: "the company is engaged in development of software and software products since its inception. " The company consisting of STP1 unit is engaged in software products and development of software and is also undertaking training activity of software professionals on online projects. Not only the revenues of the segment considered by the TPO also include the revenue from software products, but also from training imparted on commercial basis we hold that Kals Information Systems Ltd. (Seg.) should be expunged from the set of comparables. "

91. We find the company has shown inventory of INR 85 lacs (page 13 of the annual report). The company is also engaged in trading function as a pure software services provider will not have inventory in its books of accounts. The company also states that it is engaged in production and supply of software product (page 19 of annual report). Even the segmental accounts do not provide the bifurcation of software services and products separately. We, therefore, are of the opinion that this company should not be included in the final comparable list. We find, the coordinate Bench of the Tribunal in case of UT Starcom Inc. (India Branch) vide ITA No.5848/Del./2011, has directed exclusion of Kals Info System Ltd. by observing as under:-

“17.KALS has undisputedly drawn its income from software product and is engaged in executing end to end project through the entire value chain of software development life cycle and this issue has been determined by the coordinate Bench in the order (supra).

18. Moreover, when KALS has not prepared segment-wise data to prove its customized software development services and sale of proprietary products, it is difficult to fathom as to what extent the overall profit of this company have been impacted by the revenue from software products. So, we are of the considered view that KALS is also not a valid comparable, hence ordered to be excluded from the final list of comparables.”

92. We find the above decision of the Tribunal has been upheld by the Hon'ble High Court vide ITA No.767/2017 order dated 25.9.2017.

93. We find the above comparable has also been excluded in the case of AVL India Software (P.) Ltd. v. DCIT (ITA 6454/De//2012 & 279/Del/2013) which is

involved in software development services as the appellant herein for the same

AY. It has been held as under:-

“33. We find that in the case of Toluna India (P.) Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

’27.1. The TPO observed that this company was engaged in Software development and training. As the software products constituted only 3% of its revenue and training revenue constituted 8.56%, the TPO held that this segment of KALS Information Systems Limited was rightly includible.

27.2. After considering the rival submissions and perusing the relevant material on record, it is an admitted position that the TPO adopted Software development segment of this company by noticing that this- segment also included revenues from software products and training. In view of the fact that the assessee is not engaged in imparting any training on commercial basis or selling its software products, we hold that the financials of this company under this segment cannot be compared with the assessee. The contribution by the sale of software products or training to the overall revenue of this segment cannot be precisely ascertained to determine the question of its comparability. As such, this case is directed to be excluded. The assessee succeeds.”

94. In view of the above discussion, we hold that Kals Info System Ltd., cannot be considered as a comparable. We, therefore, direct the AO/TPO to exclude the company from the list of final comparables.

95. So far as Persistent Systems Ltd., is concerned, we find this company is a functionally different company, engaged in Software Development and software products with no segment at financials available. The extract of the Annual report for the subject assessment year provides that the company’s revenue comprises of sale of products and services (internal page 71 of annual report). The company also maintains the segmental accounts on consolidated basis only (internal page 83

of annual report). Further, the major revenue is from outsourced product development (page 118 of Annual report). The segmental reporting policy of the company reads as under:-

“L : Segment Reporting Policies

In accordance with paragraph 4 of Notified Accounting Standard 17 (AS-17) “Segment reporting”, the company has disclosed segment information only on the basis of the consolidated financial statements which shall be presented together with the unconsolidated financial statements.”

96. We further find the Tribunal in assessee’s own case for AY 2007-08 (ITA No. 1084/Del/2016), has rejected this comparable from the list of final comparables by observing as under:-

“54. So, in view of the matter, we are of the considered view that Persistent being a product company with no separate segmental accounts, has undergone merger during the year under assessment and having revenue from the outsources product development; having R&D expenditure of Rs.2.71 crores as against nil of the taxpayer, having revenue from licence of products and is also earning royalty from the sale of products, is not a suitable comparable vis-a-vis taxpayer which is a routine SDS provider, hence ordered to be excluded. ”

97. We find, for the same AY, Persistent has been held to be incomparable to the Software Development Services companies due to an extraordinary event, i.e. a merger w.e.f. AY 2007-08 as held in the case of AVL India Software (P.) Ltd. v. DCIT (ITA 6454/Del/2012 & 279/Del/2013). The relevant extract of the judgement is reproduced below:

“36. We find that in the case of Toluna India Pvt. Ltd. (supra), the Tribunal has excluded this comparable from the list of comparables by observing as under:

"33. After considering the rival submissions and perusing the relevant material on record, we hold that this company also cannot be considered as comparable because of merger of another company into it, which fact is evident from page 196, of @ the paper book. It can be seen that a subsidiary company was merged into this company pursuant to judgment of Hon'ble Bombay High Court w.e.f 1.4.06. Because of the merger of subsidiary into this company, we hold that the financial position of this company cannot be construed as normal capable of a good comparison. Following the Mumbai Bench decision in Petro Araldite (P) Ltd. (supra), we direct the exclusion of this company from the list of comparables. The assessee succeeds

38. Keeping in view the functional profile of Toluna India Pvt. Ltd. (supra) vis-a-vis the assessee, respectfully following the decision of coordinate Bench, this comparable is directed to be excluded from the list of comparables.

.....

Persistent Systems Ltd.

63. For the very same reasons as in AY 2007-08, we exclude this comparable from the list of comparables. Assessee succeeds.”

98. We find the co-ordinate Bench of the Tribunal in case of Alcatel Lucent India Limited vide ITA No. 6856/Del/2015 which has been upheld by the Hon’ble Delhi High Court vide its order dated 18.07.2017 in ITA 515/2017 has observed as under:-

“The Ld. AR referred to the profit and loss account of the company and submitted that it shows that the company had revenue streams from software services and products. He further pointed out that the revenues and expenses have been shown in a consolidated manner and no segmented disclosure has been made. He further pointed out to the relevant pages in the annual report, wherein it has been stated that this company has acquired ownership of intangibles of around 50 crores. The Ld. AR submitted that since the company is engaged both in rendering software development services as well as sale of software products, in absence of segmental details, this company could not be selected as a comparable. The Ld. AR also submitted that this company has made significant acquisitions during the year thereby failing TPO’s peculiar economic circumstances filter. The Ld. AR submitted that this company has been rejected on the ground that it earns income from software products and services and that no segmental data is available in the following cases - Saxo India Private Limited (ITA

No. 6148/DeI/2015), Ciena India Pvt. Ltd. (ITA No. 3324/Del/2013), Planet Online Pvt. Ltd. (ITA No. 464 and 608/Hyd./2014), 3D PLM Software Solutions Ltd. (ITA No. 13 03/Bang/2 012). ”

99. In view of the above discussion, we hold that Persistent System Ltd. is not a good comparable. We, therefore, direct the AO/TPO to exclude this comparable from the list of final comparable.

100. So far as exclusion of Avani Cimcon Technologies Limited is concerned, we find Avani is not a comparable as the information is unreliable and there is non-availability of information in public domain. Further, there are super normal profits of the company in the respective year. We find the Tribunal in the first round has remanded the matter back to the file of the TPO to verify the facts whether the company is a product company or not. We find the co-ordinate Bench of the Tribunal in the case of Aircom International (India) Pvt. Ltd. (ITA No.6402/Del/2012) has observed as under:-

“This company clearly described its business activity as: “providing software development and consulting IT services” to its international clients. It is obvious from the reply tendered by this company that it is engaged in providing software development and also consulting IT services. In opposition, the assessee company is engaged in providing software development services alone and is not rendering consulting IT services. The effect of the revenue from consulting IT services in the overall financials of the company is not available. As this company is also providing consulting IT services, which is an essential ingredient of its revenues from ‘Software development services’, we cannot treat it as comparable , with the assessee company, which is not providing any consulting IT services. The same is, therefore, directed to be excluded. ”

101. We find the Bangalore Bench of the Tribunal in the case of ABB Global Industries & Services Limited (ITA No. 1612/Bang/2012) directed to exclude this

company from the list of comparables due to functional dissimilarity and unavailability of segmental data by observing as under:-

“7.6.2 We also find substantial merit in the contention of the learned Authorised Representative that this company has been selected by the TPO as an additional comparable only on the ground that this company was selected in the earlier year. Even in the earlier year, it is seen that this company was not selected IT(TP)A 1380/Bang/2012 Page 7 of 34 on the basis OQ any search process carried out by the TPO but only on the basis of information collected under section 133(6) of the Act. Apart from placing reliance on the judicial decision cited above, including the assessee's own case for Assessment Year 2007-08, the assessee has brought on record evidence that this company is functionally dissimilar, and different from the assessee and hence is not comparable. Therefore the finding excluding it from the list of comparables rendered in the immediately preceding year is applicable in this year also. Since the functional profile and other parameters by this company have not undergone any change during the year under consideration which fact has been demonstrated by the assessee, following the decisions of the coordinate benches of this Tribunal in the- assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 dt. 22.2.2013, and in the case of Triology E-Business Software India Pvt. Ltd. (ITA No. 1054/Bang/2011), we direct the A.O./TPO to omit this company from the list of comparables.”

102. Further, in the case of ST Microelectronics Pvt Ltd. (IT(TP)A No.949/Bang/2011) the Bangalore bench of the Tribunal has rejected this comparable on the ground of being a company engaged in software product where there is no bifurcation of revenue from sale of export and services. The relevant extract of the decision reads as under:-

“39. As far as this company is concerned, the plea of the Assessee has been that this company is functionally different from the assessee. Based on the information available in the company's web site, which reveals that this company has developed a software product by name ",DXchange", it was submitted that this company would have revenue from software product sales apart from rendering of software services and therefore is functionally different from the assessee. It was further submitted that the Mumbai Bench of the Tribunal to the decision in the case of Telcordia Technologies Pvt. Ltd. v. ACIT - ITA No.78211Mum12011 wherein the Tribunal accepted the

assessee's contention that this company has revenue from software product and observed that in the absence of segmental details, Avani Cincom cannot be considered as comparable to the assessee who was rendering software development services only.

.....

41. We have given a careful consideration to the submissions made on behalf of the Assessee and are of the view that the same deserves to be accepted. The reasons given by the Assessee for excluding this company as comparable are found to be acceptable. The decision of ITAT (Mumbai) in the case of Telcordia Technologies Pvt. Ltd. v. ACIT (supra) also supports the plea of the assessee. We therefore accept the plea of the Assessee to reject this company as a comparable.”

103. The various other decisions relied on by the Id. Counsel for the assessee also support his case for the proposition to exclude Avani Cimcon Technologies on account of functional dissimilarities and insufficient segmental details. We, therefore, direct the AO/TPO to exclude this company from the list of final comparables.

104. So far as exclusion of LGS Global Limited (“LGS”) is concerned, we are of the considered opinion that LGS is not comparable as the company is engaged in rendering diversified services like product evaluation design and development, business process outsourcing (“BPO”) and other activities which are different from the appellant which is a captive services provider rendering software services. The business description of the LGS is given on internal page 26 of the Annual Report of the company.. Further, the company does not have separate segmental accounts and operates under one segment only. (page 26 of the Annual Report of the company)

105. We further find the company has intangible in the nature of goodwill amounting to INR 3.67 crores. However, the Appellant does not have any goodwill nor it has any other intangible. (page 57 of the Annual Report of the company)

106. We find the issue of comparability of LGS to captive service provider is covered in the favour of the appellant for the same AY by the co-ordinate Bench of the Tribunal vide ITA Nos. 5848/Del/2012 in the case of Cash Edge India Pvt. Ltd. v. ITO Ward 3(2), New Delhi wherein it has been held as follows:

“18similarly, Assessing Officer will only take segmental results relating to services only for comparing the companies M/s Kals Information Systems, Avani Cincon, LGS Global Ltd. and Bothtree Consulting Systems as the consolidated results of these companies cannot be compared with the assessee, as assessee is admittedly into service providing activities. It is further directed that if segmental results of the above companies relating to similar services as being provided by assessee are not available, then these companies will have to be excluded as comparables as held in various judicial pronouncements relied upon by Ld. A.R.. ”

107. We find the decision of the co-ordinate Bench of the Tribunal in the case of Saxo India Private Limited (ITA No.6148/Del/2015) has been upheld by the Hon’ble Delhi High Court vide ITA No. 682/2016. The relevant extract of the Hon’ble High Court reads as under:-

“10. On a comparison with the data available and made available, undoubtedly, the object of the statute is to “pull in transactions which otherwise escaped the radar of tax assessment under one head or the other. The transfer pricing methodology - shorn of its details is an attempt by each nation to locate the incidents of income which would be subjected to levy within its jurisdiction where international transactions are involved. This exercise does not compare with other income assessments where the methodology adopted in their domestic jurisdiction will differ ”. The

TNMM method depends on accurate data with respect to all the three elements - wherever they apply. In the Comparable Uncontrolled Price (CUP) method - which is premised upon the elements in Rule 10B(1)(a), the methodology adopted is the price charged or paid for property transfer or services provided in the Comparable Uncontrolled transaction. Therefore, the nature of the transaction and the appropriate filter determines the elements that are to be considered in TNMM. Therefore, the costs, sales and assets employed wherever relevant are to be applied. From this perspective, the revenue's contention that segmental data was available, cannot be accepted. The mere availability of proportion of the turnover allocable for software product sales per se cannot lead to an assumption that segmental data for relevant facts was available to determine the profitability of the concerned comparable."

108. In view of the above discussion, we direct the AO/TPO to exclude LGS Global Ltd. from the list of comparables.

109. So far as Quintegra Solutions Limited ("Quintegra") is concerned, we find this company is engaged in rendering diversified services like product engineering, development of proprietary software products, and infrastructure managements services which are different from the assessee which is a captive services provider rendering software services. The business description of the Quintegra is given on page 15 of the Annual Report of the company. Further, the company does not have separate segmental accounts for rendering software services. (page 17 of the Annual Report of the company)

110. We find during FY 06-07 (page 10 of annual report) and 07-08 (page 8 of the annual report) the company has made acquisitions due to which the revenue of the company has increased substantially. The relevant extract of the same is as under:-

Quintegra Solutions Limited	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
Particulars	Amount (INR million)	Amount (INR million)	Amount (INR million)	Amount (INR million)
	Refer internal page 37 for FY 2006-07 Annual Report		Refer internal page 35 for FY 2007-08 Annual Report	Refer internal page 21 for FY 2008-09 Annual Report
Revenue as per financials	202,990,361.00	627,216,924.00	881,093,586.00	772,009,878.00
		208.99%	40.48%	-12.38%

111. We find the Bangalore Bench of the Tribunal in the case of AMD India Pvt.

Ltd., vide ITA No.437/Bang/2013 has observed as under:-

“18.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details brought on record that this company i.e. Quintegra Solutions Ltd. is engaged in product engineering services and is not purely a software development service provider as is the assessee in the case on hand. It is also seen that this company is also engaged in proprietary software products and has substantial R&D activity which has resulted in creation of its IPRs. Having applied for trade mark registration of its products, it evidences the fact that this company owns intangible assets. The co-ordinate bench of this Tribunal in the case of 24/7 Customer. Com Pvt. Ltd. (ITA No.227/Bang/2010 dt. 9.11.2012) has held that if a company possesses or owns intangibles or IPRs then it cannot be considered as a comparable company to one that does not own intangibles and requires to be omitted from the list of comparables, as in the case on hand.

18.5 We also find from the Annual Report of Quintegra Solutions Ltd. that there have been acquisitions made by it in the period under consideration. It is settled principle that where extraordinary events have taken place, which has an effect on the performance of the company, then that company shall be removed from the list of comparables.

18.6 Respectfully following the decision of the co-ordinate bench of the Tribunal in the case of 24/7 Customer. Com Pvt. Ltd. (supra), we direct that this company i.e. Quintegra Solutions Ltd. be excluded from the list of comparables in the case on hand since it is engaged in proprietary software products and owns its own intangibles unlike the assessee in the case on hand who is a software service provider.”

112. We find the Bangalore Bench of the Tribunal in the case of 3DPLM Software Solutions Limited vide ITA No. 1303/Bang/2012, has observed as under:-

“18.3.3 Respectfully following the decision of the co-ordinate bench of the Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (supra), we direct that this company i.e. Quintegra Solutions Ltd. be excluded from the list of comparables in the case on hand since it is engaged in proprietary software products and owns its own intangibles unlike the assessee in the case on hand who is a software service provider.”

113. In view of the above discussions, we hold that Quintegra Solutions Ltd. should be excluded from the list of comparables. We hold and direct accordingly.

114. So far as arguments for corrected margin computation of Softsol India Limited is concerned, we find it is the submission of the Id. Counsel for the assessee that the TPO while giving effect to the DRP directions has erred in computation of the margin of Softsol India Limited. The correct margin of the comparables is 15% as given in submission filed before the Ld. DRP (page 144 of the PB I). However, the TPO has computed the margin as 25.59%. For computation of margin, the Appellant has relied upon the Safe Harbor Rules notified by CBDT which specifies the operating and non-operating items while computing the margin. We therefore remit this issue to the file of the AO/TPO for computing the correct margin after giving the opportunity of being heard to the assessee. We hold and direct accordingly. The AO/TPO shall recompute the ALP

of the international transactions in the light of our above directions. The grounds raised by the assessee are accordingly partly allowed.

115. So far as ground of appeal No.16 is concerned, the same relates to the disallowance of expenses on non-deduction of tax.

116. Facts of the case, in brief, are that a TDS survey was conducted on 17th February, 2010 and order dated 25th March, 2010 was passed u/s 201 of the Act by the ITO, TDS. Following the order of the ITO, TDS, the AO held that the assessee failed to deduct TDS on expenses of Rs.7,07,962/- debited to P&L Account, the details of which are as under:-

Freight charges – Sec.194C – INR 104,599

Expense on hotel accommodation – Sec.194I – INR 603,363

117. The AO, accordingly, disallowed the above expenses under the provisions of section 40(a)(ia) of the IT Act for which the assessee is in appeal before the Tribunal.

118. The Id. Counsel for the assessee submitted that the AO has grossly erred both on facts and in law in proposing to disallow freight charges and hotel expenses under section 40(a)(ia) of the Act without appreciating the fact that the assessee was not required to deduct tax on the payment of such expenses. So far as expenses on freight - Rs. 104,599 is concerned, he submitted that during the subject year, the assessee incurred expenses of Rs. 104,599 on account of freight

charges payable to Dell Pacific SDN ('Dell') (company situated in Malaysia). The payment of freight charges to a non-resident does not qualify as royalty or fee for technical services under section 9(1)(vi) and 9(1)(vii) of the Act. Further, in the absence of permanent establishment ('PE') of Dell in India in terms of Article 5 of Double Tax Avoidance Agreement ('DTAA') between India and Malaysia, payment to Dell on account of freight charges would not be taxable as business profits in India. He submitted that in absence of taxability of the above payment in the hands of Dell in India as FTS/royalty and there being no PE in India, the assessee is not under an obligation to withhold taxes while making such payment to Dell. For the above proposition, he relied on the decision of Hon'ble Supreme Court in case of GE India Technology Centre Private Limited (Civil Appeal Nos. 7541-7542 of 2010).

119. So far as expenses on hotel accommodation of Rs. 603,363 is concerned, he submitted that during the subject year, the assessee incurred expenses of Rs. 603,363 on account of expenses on hotel rooms hired by its employees payable to Park Residency and Lamba's House. As per explanation to section 194I of the Act, the term "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement for use of specified assets. The assessee has not entered into any agreement (other than generally agreed rate for the bookings from the assessee) with Lamba's House and Park Residency for them to provide specified rooms to the employees of the assessee for any specified

period. The rooms used by the employees are not earmarked and the same are provided to the employees of the assessee company only on availability basis. There is no obligation on these vendors to provide for any room and the stay at the hotel was casual and not on regular basis.

120. The Id. Counsel for the assessee referred to the circulars issued by the Central Board of Direct Taxes ('CBDT'): i) Circular No. 715 dated August 8, 1995 and 13 Circular no. 5/2002 dated July 30, 2002 and submitted that the provisions of section 194C and 194I of the Act would not apply and hence no disallowance is warranted u/s 40(a)(ia).

121. Without prejudice to the above, he submitted that even if the amount of Rs.7,07,962/- is not allowed as deduction while computing the business income, the same needs to be taken into account for computation of profits of the business eligible for deduction u/s 10A of the IT Act. Referring to the following decisions, he submitted that deduction u/s 10A of the Act shall be computed on the assessed income after considering all the allowances/disallowances made by the AO during the assessment proceedings:

- i) ITO Vs Sahasra Electronics Private Limited (2010-TIOL-89- ITAT-Del);
- ii) Gemplus Jewellery India Limited (2009-TIOL-212-ITAT-MUM);
- iii) DCIT vs. Planet Online Pvt. Ltd (2008) (ITA No. 1016/Hyd/07) (Hydrabad ITAT);

iv) ACIT vs. Zavala India Private Limited (2010) (ITA No. 1100/Hyd/2009)
(Hydrabad ITAT); &

v) CIT vs Virinchi Technologies Ltd (2011) (ITA No. 209/Hyd/2010)
(Hydrabad ITAT)

122. The ld. DR, on the other hand, heavily relied on the orders of the AO/TPO/DRP.

123. We have considered the rival arguments made by both the sides perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the AO, on the basis of the TDS Survey, conducted on 17th February, 2010 and order passed by the ITO, TDS on 25th March, 2010, made addition of Rs.7,07,962/- on account of Freight charges (Rs. 1,04,599/-) and expense on hotel accommodation (Rs.6,03,363/-) by invoking the provisions of section 40(a)(ia) of the Act. Without going into the merit of the addition, we find the alternate argument of the ld. Counsel for the assessee acceptable according to which once the assessee is entitled to deduction u/s 10A of the IT Act, then, such higher assessed income on account of disallowance made by the AO is eligible for deduction u/s 10A. Since the assessee is entitled to deduction u/s 10A of the Act, therefore, the assessee is entitled to deduction u/s 10A of the Act on such enhanced assessed income due to disallowance of the expenditure on account of freight charges and expenses on

hotel accommodation. We, therefore, allow the ground of appeal 16 by the assessee.

124. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 05.05.2022.

Sd/-

(ASTHA CHANDRA)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 05th May, 2022.

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi