

**IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, PUNE**

**SHRI R.S. SYAL, VICE PRESIDENT AND  
SHRI PARTHA SARATHI CHAUDHUR, JM**

**ITA No. 640/PUN/2021: A.Y. 2016-17**

M/s. Schlumberger India Technology  
Centre Private Ltd.,  
Office No. 701, 7<sup>th</sup> floor, Building No. 6,  
Commercezone, Survey No. 144/145  
Samrat Ashok Path,  
Off Airport Road, Yerawada,  
PUNE – 411 006  
PAN; AALCS 4945 G

Appellant

Vs.

The Dy. C.I.T. Cir. 5, Pune.

Respondent

**ITA No. 653/PUN/2021: A.Y. 2016-17**

The Dy. C.I.T. Cir. 5, Pune

Appellant

Vs.

M/s. Schlumberger India Technology  
Centre Private Ltd.,  
Office No. 701, 7<sup>th</sup> floor, Building No. 6,  
Commercezone, Survey No. 144/145  
Samrat Ashok Path,  
Off Airport Road, Yerawada,  
PUNE – 411 006  
PAN; AALCS 4945 G

Respondent

Assessee by : S/Shri S/Shri Ajit Jain & Siddesh Chaugule  
Department by : Shri Shishir Srivasta

**PER PARTHA SARATHI CHAUDHURY, JM**

These cross Appeals preferred by the Assessee as well as by the Revenue emanates from the order of the learned CIT(A)-13, Pune, dated 28-09-2021 for the A.Y. 2016-17 as per the grounds of appeal on record. Both the parties, at the time hearing submitted that the facts and circumstances and the issues involved are identical and similar, therefore, these cases were heard together and are disposed of by this consolidated order. We would adjudicate Revenue's Appeal in ITA No. 653/PUN/2021 for A.Y. 2016-17.

2. The brief facts of this case are that the assessee company incorporated under the Indian Laws, is a wholly owned subsidiary of Schlumberger Oilfield (S) Pte. Ltd., Singapore (ultimate parent is Schlumberger Limited, Curacao). The assessee company is engaged in the business of designing, building and documenting systems to be deployed on production sites and provision of software development services. The assessee company filed its return of income on 30-11-2016, declaring total income of Rs. 17,34,52,853/- for A.Y. 2016-17. The case was selected for scrutiny through CASS and accordingly, notices u/s 143(2) and 142(1) of the Income-tax Act, 1961 (hereinafter referred as "the Act" for short) were issued and served upon the assessee by the A.O. Further the case was also referred to the T.P.O u/s 92CA of the Act to determine the Arm's Length Price of the international transactions entered by the assessee. The T.P.O/DCIT, TP-2(2), Pune, had passed the Transfer Pricing Order u/s 92CA(3) of the Act on 31-10-2019 wherein the TPO made total adjustment of Rs. 13,48,29,893/- to the international transaction of the assessee which included, Rs. 7,05,77,623/- related to Software Development Services (SDS) and Rs. 6,42,66,270/- related to Technical Support Services (ITES). Further, the A.O incorporated this adjustment in the assessment order u/s 143(3) r.w.s. 144C(3) of the Act passed on 13-02-2020. With the result, the assessee's total income was assessed at Rs. 30,82,82,750/- by the A.O.

3. The Id. D.R submitted that the Revenue is disputing software development and software support services. At page 56, Vol. I, (refer 5.2), the nature of transaction in respect of software development support services are annexed. The Id. .D.R submitted that ground No. 1 is general. In Ground No. 2, the Revenue is aggrieved with the direction by the Id. CIT(A) to exclude Bhilwara Infotechnology Ltd. From the final set of comparables for software development services segment. The Revenue wants its inclusion. This company was selected by the T.P.O and he has discussed the issue at page

128 para 11.6 of his order, whereas the Id. CIT(A) has discussed this issue at para 2.4 in his order at page 63 whereby he has ordered exclusion of this company from the final set of comparables by holding as follows:

*“2.4 I have carefully considered the facts of the case and voluminous submission filed by the appellant. First, I will take up comparables in Software Development Services (SDS) segment. The appellant has objected to the inclusion of ‘Bhilwara Infotechnology Ltd (Segmental) on the ground that it fails export filter applied by the Id. TPO. This is slightly stranger as this comparable has been introduced by the Id. TPO after a search done by him. The appellant had raised the same ground regarding this comparable in last AY 2015-16 as well. The relevant extract of the annual report of the above comparable for relevant FY 2015-16 is as follows:*

Segment Information

i. Entity wide disclosure required by IND AS 108 are made as follows:

	For the year ended 31st March, 2017			For the year ended 31st March, 2016		
	Medical Transcription	Software & IT Related Services	Total	Medical Transcription	Software & IT Related Services	Total
Segments Revenue						
Sales	109185885	313696902	422882787	107954632	311669226	419623858
<b>Total Revenue</b>	<b>109185885</b>	<b>313696902</b>	<b>422882787</b>	<b>107954632</b>	<b>311669226</b>	<b>419623858</b>
Segment results (profit(+)/ loss(-) before tax and interest						
Profit before tax	8776022	53261235	62037257	11812189	77500704	89312894
Less: Provision for taxation						
Current tax			24260122			30310124
Deferred tax			(2303750)			(1004505)
Profit after tax			40080885			60007275
Other Information						
Segment Assets	92056475	243258051	335314526	72774718	213110780	285885498
<b>Total Assets</b>	<b>92056475</b>	<b>243258051</b>	<b>335314526</b>	<b>72774718</b>	<b>213110780</b>	<b>285885498</b>
Segment Liabilities	16390381	22768739	39159120	14977214	21342056	36319270
<b>Total Liabilities</b>	<b>16390381</b>	<b>22768739</b>	<b>39159120</b>	<b>14977214</b>	<b>21342056</b>	<b>36319270</b>
Capital Employed (Segment Assets - Segment Liabilities)	75666094	220489312	296155407	57797504	191768723	249566228
There is no geographical reporting segment of the company						
Based on Location of the Customer						
Domestic	-	313,696,902	313,696,902	-	311,669,226	311,669,226
Export	109,185,885	-	109,185,885	107,954,632	-	107,954,632

*It is clear from the above extract that the entire earnings from Software & IT related segment is from domestic market and thus it fails export filter applied by the TPO. This was brought to the attention of the learned TPO during the TP proceedings. The Id. TPO in para 11.6 page 28 of his TP order has brushed aside the objection by incorrect factual details. It is clear from the extract of the annual report that “Software & IT segment” is 100% domestic. Hence, Bhilwara Info technology Ltd. (Segmental) is removed as a comparable in the SDS segment of the appellant.”*

4. In the aforesaid observation, the learned CIT(A) holds that this company earns its entire revenue from software and its related segment from the domestic market. The extract of the annual report clearly specifies that “Software Development Services (SDS) segment is 100% domestic. Therefore, this company was rightly removed as a comparable in the software development service segment by the Id. CIT(A). **Ground No. 2 of the Revenue’s appeal is dismissed.**

5. In ground No. 3, the Revenue wants inclusion of Aspire Systems (India) Pvt. Ltd. in the final set of comparables for software development services segment. The Id. CIT(A) has directed exclusion of this company. This company has been selected as comparable by the T.P.O as per his order at para 11.9 at page 30. The Id. CIT(A) has dealt with this issue at page 64 in para 2.4.1 as follows:

*2.4.1: ASPIRE SYSTEMS (INDIA) Pvt. Ltd. The appellant has raised objections that this comparable fails "Related Party Transactions (RPT) filter. The appellant has submitted the computations as well as in the final submissions extracted above in page 53. As per the computation the RPT is 37% and above the 25% threshold adopted in the TP order. This objection was taken before the Id. TPO and he has discussed this in para 11., page 30 of his TP order. It is seen that he has segregated "related party income" and "related party expenses" and taken their ratio to operating income and operating expenses, computed separately two RPT ratios and concluded that this comparable passes the RPT filter. I am afraid this is not acceptable way of calculating RPT ratio. The RPT ratio calculated by the appellant is incorrect and thus the AO/TPO is directed to remove this comparable from the final set of comparables.*

6. Further, the Id. A.R referred to paper book Vol. II a page 772 where the annual report of this company has been placed and he demonstrated that the company is functionally different since this company is into creation of innovative project products whereas the assessee is manufacturing software. The Id. A.R further submitted bringing to our notice at paper book Vol. II page 603 wherein the application for amalgamation of this company has been given and the scheme of amalgamation is annexed at paper book Vol. 2 at page 773. This amalgamation got effected on 1-4-2015 i.e. in financial year 2015-16 relevant to A.Y. 2016-17. Therefore, the amalgamation has taken place during the year under consideration. The Id. A.R further referred to the decision of Coordinate Hyderabad Bench in the case of Infor (India) Pvt. Ltd. Vs. DCIT Cir. 2(1) for A.Y. 2016-17, order dated 06-10-2021 wherein at para 4.4 the Tribunal, regarding Aspire Systems (India) Pvt. Ltd. held as follows:

*"4.4 Coming to M/s. Aspire Systems (India) Private Ltd., we note from a perusal of the DRP's directions in page 56 para 2.17.4 that amalgamation had taken place w.e.f. 01-04-2015 and therefore, the Id. Lower authorities have erred in including it as a comparable in light of PCIT Vs. JH.P. Morgaon India (P) Ltd. (2019) 102 taxmann.com. 335 (Bombay)."*

7. The above referred judgment of the Co-ordinate Bench of Hyderabad pertains also to same A.Y. 2016-17 which is the relevant assessment year before us and in the aforesaid judgment also, the facts mentioned that amalgamation has taken place w.e.f. 01-04-2015 and in view of the judgment of Hon'ble Jurisdictional High Court in the case of PCIT Vs. J.P. Morgaon India (P) Ltd. (2019) 102 taxmann.com 335 (Bom), this company was excluded from the final list of comparable companies. Considering the totality of the facts and circumstances, the finding of the Id. CIT(A) does not call for any interference and the same is upheld. **Ground No. 3 of the revenue's appeal is dismissed.**

8. Ground No. 4 is with regard to IT Enabled Services segment and the Revenue wants exclusion of Jindal Intellicom Ltd., from the final set of comparables in IT Enabled Services segment. This company has been selected by the assessee as a comparable which the T.P.O has rejected. The T.P.O at page 107 of his order has rejected this comparable due to foreign exchange less than 75%. The learned CIT(A) on the other hand has discussed this issue at para 2.5.2 of his order and has directed inclusion of this company as a comparable. It is the contention of the assessee before us that the learned T.P.O has not disputed the functional comparability of this company. The T.P.O has accepted as functionally comparable company for the A.Y. 2014-15. This company was also accepted as functionally comparable by the learned CIT(A) in the A.Y. 2013-14 and 2011-12. There has been no change in the business profile and therefore, this company should be considered as comparable. Considering the totality of the facts and circumstances and the order passed by the subordinate authority, we find that the view taken by the learned T.P.O is taken to reject this company from the list of comparable due to foreign exchange less than 75%. In the case of this company, its export turnover ratio is 70.80% and it cannot be said that there is only a minor

deviation from the percentage of filter of 75% as applied by the Id. T.P.O. Therefore, in the given facts and circumstances the reliance placed by the assessee on the decision of Hon'ble Punjab & Haryana High Court in the case of Mercer Consulting is misplaced. Even going by spirit by the aforesaid decision what is minor deviation and what is major deviation, it all depends on the facts of each case. In our considered view in this case, failure regarding export filter at 70.8% instead of 75% is not a minor deviation. Therefore, we uphold the order of the T.P.O directing rejection of this company as comparable. **Ground No. 4 of the Revenue is allowed.**

9. In ground No. 5 the Revenue is aggrieved with the decision of the Id. CIT(A) in excluding MPS Ltd. from the final set of comparables for ITes segment. The T.P.O dealt with this issue at page 145 of his order. The Id. CIT(A) has directed exclusion of MPS Ltd. vide para 2.5.3.1 by placing reliance in the Pune Tribunal decision in the case Credence Resource Management Pvt. Ltd. Vs. ACIT Cir. 1(1) in ITA No. 133/PUN/2021 dt. 18-06-2021. We find that this decision of the Tribunal pertains to same assessment year i.e. 2016-17. Regarding MPS Ltd. it has been held that functional difference from that of the assessee company in more-so that high end activities of MPS Ltd. Is akin to IT services and not ITes. The relevant paras are as follows:

*"C. MPS Limited :- 20. The assessee contends that MPS Limited is functionally different from the assessee which involves in provision of ITes services. That as per the annual report of MPS Limited, MPS Limited is engaged in the business of providing publishing solutions viz. type setting and data digitalization services for overseas publishers and supports international publishers through every stage of the author to reader publishing process and provides a digital first strategy for publishers across content production, enhancement and transformation, delivery and customer support. The assessee further contends that this company is engaged in research and development activities and there has been several acquisitions leading to extraordinary events and also MPS Limited has an fluctuation margin ranging from 8.23% in FY 2011- 12 to 67.08% in FY 2015-16. The detailed submissions of the assessee are at running Page No.188 of the TPO's order and thereafter, the TPO has given his detailed findings running Page No.189 to 191 of his order.*

*21. The Ld. DRP while upholding the findings of the TPO at running Page 58 to 62 of its order and as per reasoning given therein had found the company to be functionally comparable with that of the assessee company.*

*22. The Ld. Counsel for the assessee at the time of hearing took us through the annual report of this company i.e. MPS Limited specifically at Page No.1134 of the*

*paper book wherein products of the company has been enumerated and submitted that they are functionally different with that of the assessee company. This fact was not disputed by the Ld. DR. The Ld. Counsel for the assessee also submitted that the high end activities performed by MPS Ltd. are akin to IT services and not ITes.*

23. *The Ld. Counsel for the assessee heavily relied on the decision of the Pune Bench of the Tribunal in the case of Symantec Software India Private Limited Vs. DCIT, ITA No.1824/PUN/2018 for the assessment year 2014- 15 dated 17.02.2020 wherein the Tribunal in respect of MPS Limited has held and observed as follows :*

*“20. We have perused the case records and heard the rival contentions. We find from the annual report of MPS Limited is engaged in high end activity i.e. type-setting, data digitization, content and product development for learners which is in the nature of „knowledge processing outsourcing services. From the various functions performed by MPS Limited, we find that the said comparable is predominantly in the business of digital publishing which cannot be treated at par with ITes which is in the name of the assessee in ITes segment. In this regard, we find in the case of Emerson Electric Company (India) Private Limited Vs. ACIT (supra.) wherein the Co-ordinate Bench of the Tribunal, Mumbai held the MPS Limited as functionally not comparable by observing as follows:*

*“9.3. From the perusal of the annual report for the year ended 31/03/2014 of the said comparable, we find from page 707 of the paper book that the said comparable had incurred outsourcing cost of Rs.1078.76 Crores which is included under the head "miscellaneous expenses" which goes to prove that it has got a different business model. From the various functions performed by MPS Ltd., we find that the said comparable is predominantly in the business of digital publishing which cannot be treated at par with ITes which is the case of the assessee in ITes segment. In this regard, we find that the reliance placed by the Id.AR on the Co-ordinate Bench decision of Bangalore Tribunal in the case of M/s. Google (India) Pvt. Ltd., vs. DCIT in ITA No.1368/Bang/2010 for A.Y.2006-07 dated 19/10/2012 is well founded wherein it was held asunder:-*

*16. As far as (4) Apex Knowledge Solutions Pvt. Ltd., is concerned, we find that the assessee had taken objections before the TPO that it is functionally different, as it provides services such as E-publishing knowledge based services etc. But TPO has rejected the objection on the ground the assessee has not considered the verticals or functional lines during the search process conducted by it and, therefore, it is not proper to make any objection on this basis now. We are not able to agree with the finding of the TPO as confirmed by the DRP on this issue. Merely because, the assessee itself has not considered the said filter while making its TP study; it cannot be said that it cannot raise such an objection before the TPO. It is the TPO who has adopted this company as comparable. On such adoption, the assessee has every right to raise the objections as regards the functional differences between the assessee and comparable. It is the bounden duty of the TPO to consider the said objections in accordance with law. As brought out by the assessee, the assessee is in the TT enabled services, whereas the said company Apex Knowledge Salutation Pvt. Ltd., is in the business of E-publishing which cannot be said to be in the same line of business. The functional differences are likely to affect the profit marking capacity of both the companies. In view of the same, we are of the opinion that this company is also to be excluded from the list of comparables.*

*9.3. In view of the above, we hold that the comparable chosen by the Id. TPO, M/s. MPS Ltd., is functionally not comparable with that of the assessee and accordingly, we direct the Id. TPO to exclude the same from the list of comparables.”*

21. We further observe in the case of *United Health Group Information Services Pvt. Ltd. Vs. ACIT (supra.)* wherein with regard to *Vishal Informatics* which is engaged in e-publishing business like the company in the instant case i.e. *MPS Limited*, on same issue, the Coordinate Bench of the Tribunal, Delhi has held as follows:

*“Vishal Informatics*

12.1. The TPO included this company in the list of comparables by noticing that it was engaged in providing BPO services. The assessee failed to convince him and the DRP that it was incomparable.

12.2. Having heard the rival submissions and perused the relevant material on record, we find from the Annual report of this company that it is mainly engaged in e-publishing business. It has more than 10,000 classic books to its credit which are also converted into large font titles for visually challenged. Apart from e-publishing, this company is also engaged in Documents scanning & Indexing. It can be seen from the financial results of this company that both the segments viz., e-publishing and Documents scanning etc. have been combined and there are no separate financial results in respect of Documents scanning work, which may be comparable with the assessee to some extent. As the assessee is not engaged in any e-publishing business and the financials given by this company are on consolidated basis, we direct to exclude this company from the list of comparables. The assessee succeeds.”

22. We further observe that the Ld. DRP held *MPS Limited* as BPO Company and is engaged in ITes only. In this regard, the Pune Bench of the Tribunal in the case of *Macom Technology Solutions (India) Private Limited Vs. DCIT in ITA No.2393/PUN/2017 for A.Y.2013-14* vide its order dated 08.08.2019 discussed the definitions as provided under Rule 10TA of Part-II DB wherein the definition of Information Technology Enabled Services are provided the business process outsourcing is defined under clause (e) which provides mainly with assistance or use of Information Technology which as back office operations, call centre, data processing or insurance claim processing. Further, the definition of KPO is provided under clause (g) of Rule 10TA to mean certain business process outsourcing services (BPO) services provided mainly with the assistance or use of information technology requiring application of knowledge and advanced analytical and technical skills such as geographic information system, human resource services, business analytical services, financial services or engineering and design services, therefore, the Tribunal held being a KPO, it cannot be compared with that of company which is into business of BPO. The revenue recognition note states that the company is deriving revenue from website design and development and website hosting which is not similar to ITes. Further, *MPS Limited* underwent typesetting, data digitization, content and product development for learner which as per Safe Harbour Rules issued by Central Board of Direct Taxes qualifies to be in the nature of KPO.

*In view of the above, respectfully following the decisions of the Tribunal as mentioned hereinabove, we are of the considered view, high end activities of the MPS Limited is akin to IT services and not ITes. The activities of the MPS Limited i.e. typesetting, data digitization, content development and product development are in the nature of “Knowledge Processing Outsourcing Services (KPOs) and not BPO. Accordingly, MPS Limited cannot be treated as comparable company and the AO/TPO is directed to exclude MPS Limited from final list of comparable companies with regard to its technical support service segment.”*

24. Having gone through the annual report of the company, findings of the Subordinate Authorities and the submissions of the assessee placed on record along with judicial pronouncements, it is evident that *MPS Limited* is functionally different from that of the assessee company in more-so that high end activities of *MPS Ltd* is akin to IT services and not ITes. Respectfully following the decision of

*the Co-ordinate Bench of the Tribunal (supra.) we direct the AO/TPO to exclude MPS Limited from final list of comparable companies.”*

10. The Id. D.R could not bring out any contrary decision of these facts and could not demonstrate any relevant evidences to contradict the present facts and circumstances involved in the case. Respectfully following our decision for the same assessment year on same parity of reasoning, we do not find any reason to interfere with the findings of the Id. CIT(A) and the relief provided to the assessee is sustained. **Ground No. 5 of the Revenue’s appeal is dismissed.**

11. Ground No. 6 is with regard to ITes segment. The Revenue wants inclusion of M/s. Domex E-Data Pvt. Ltd., CES Ltd. and Manipal Digital Systems Pvt. Ltd. in the final set of comparables. The Id. CIT(A) at para 2.5.3.2 placing reliance on the decision of Pune Tribunal in the case of Credence Resource Management Pvt. Ltd. (supra) provided relief to the assessee directing exclusion of these companies from the final set of comparables. The relevant paragraphs pertaining to the aforesaid companies is discussed in the Tribunal order in the case of Credence Resource Management Pvt. Ltd. (supra) as follows:

*D. Domex E-Data Pvt. Ltd. :-*

*25. The assessee submits that as per the annual report of the company for FY 2015-16, Domex E-Data Pvt. Ltd. is engaged in the business of providing export of IT, KPO and BPO services (note (ii) of Annexure to Auditor’s Report for FY 2014-15.). Further it has diverse range of activities without sufficient segmental details and earns super normal profits. Website of the company reveals that Domex E-Data Pvt. Ltd. is a KPO company. The Domex E-Data Pvt. Ltd. is engaged in high end research and IT activities which is distinguished from low end back office activities of the assessee and therefore, both these companies are completely different and should not be considered as comparable with that of the assessee company.*

*26. The submissions of the assessee were not accepted by the TPO which is evident at running Page No.192 of the order and the main reason again is that the company earns most of the revenue from export of ITes. The TPO has however not dealt specifically with the objection of the assessee that Domex E-Data Pvt. Ltd. is primarily a KPO company. The Ld. DRP as per their observation at running Page No.66 on their order has given reasoning for upholding the findings of the TPO and making this company as comparable with that of the assessee company. Therein the Ld. DRP has emphasized again on the revenue earned from ITes services and regarding the objections of the assessee company i.e. Domex E-Data Pvt. Ltd. being KPO company, the Ld. DRP was of the opinion that since information was available in the website that cannot be relied on since the*

company has provided information in website which they intend to carry out but however at the present moment they may not be dealing with those activities.

27. *Per contra, the Ld. Counsel for the assessee took us through the annual report, P & L account and reiterated the submissions placed before the Revenue Authorities. Here again as per facts placed on record, this company is primarily a KPO company as per Note-II of Annexure to Auditor's report for FY 2014-15. Here again the Revenue Authorities have not specifically stated the reason why this company is made comparable to that with the assessee company. That as per the logical principle following from the decision in the case of M/s. Tasty Bites Eatables Limited Vs. ACIT(supra.), it is for the TPO to explain the reason for inclusion of this company since it was chosen as comparable by him. That even the Ld. DRP had emphasized on the revenue earning of this company from ITes. Here also, the decision of the Hon'ble Delhi High Court (supra.) is clear that if two companies performing ITes are to be considered as comparable then the specific business of the said two companies has to be analysed and then decide upon whether they are at all comparable or not. In this case, we do not find such exercise was conducted neither by TPO nor by the Ld. DRP. Therefore, we are of the considered view that in the given set of facts, this company is functionally not comparable with that of the assessee company. We, therefore, direct the AO/TPO to exclude this company i.e. Domex E-Data Pvt. Ltd. from the final set of comparables"*

#### **B. CES Limited :-**

15. *The contention of the assessee are that as per the annual report of CES Limited for FY 2015-16, the company is engaged in providing IT and ITes services. The Director's report has further provides the detailed disclosure of activities carried out under ITes segment which describes that the revenue under this segment is generated from BPO as well as KPO activities for which the bifurcated information is not available. Therefore it cannot be comparable to the business of the assessee which is engaged in BPO services. Further the assessee contended that as per the website of the company the BPO segment is engaged in providing varied activities which includes fraud prevention and process automation. Thus, CES Limited is engaged in high end activities which are distinguished from low end back office activities of the assessee.*

16. *The TPO has observed that CES limited is engaged in the business of ITes only. The TPO even referred the annual report of this company at Page 39 where IT enabled services are comprising of BPO and KPO and still the TPO was of the opinion that since at Page 12 of the annual report of this company, there are ITes activities which formed 79% of the revenue and therefore, it is functionally comparable with that of the assessee company and hence, it was retained.*

17. *The Ld. DRP while upholding the observation of the TPO at running Page 70 of its order observed that the company derives revenue mainly from provision of ITes which works out to 79.75% of its total operational revenue for the year. Therefore, this company is very much functionally comparable with that of the assessee company. In respect of the submissions of the assessee that ITes comprises two services i.e. BPO & KPO services, referring to the Director's report, the Ld. DRP observed that they have only made reference in the ITes segment only and whether it is BPO or KPO services has nowhere been referred to. That further, the Ld. DRP also observed that most of the information was gathered from website of the company which may not always be reliable and relevant.*

18. *The Ld. Counsel for the assessee at the time of hearing reiterated the submissions made in respect of exclusion of Manipal Digital Systems Private Limited, for this company also. He took us through the annual report of the 12 ITA No. 133/PUN/2021 A.Y.2016-17 company, P & L account, notes of financial accounts and segmental information and therein, it is evident that companies operations predominantly relate to providing IT services in two primary business segments viz. IT services and IT Enables Services (ITes). The company considered the business segment as the primary segment and Geographical segment based on the location of the customers as the secondary segment.*

19. Having perused the relevant documents on record, analyzing the facts and circumstances, we find that the Revenue Authorities have not clearly stated regarding involvement of BPO/KPO ITeS services as evident from Page 39 of the annual report of the company where principal business activities of the company has been given. Both the Revenue Authorities TPO as well as DRP have gone into the revenue generation aspect from ITeS which is at around 79%. That however, they have not specifically given reasons why this company should be included in the final set of comparables. The inclusion of KPO along with BPO is also not disputed by the Department and in respect thereof, following the decision of the Hon<sup>ble</sup> Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. Vs. CIT, ITA No.102/2015 dated 10.08.2015, it is an undisputed fact therefore that the assessee in the present case is involved in ITeS services which is primarily a call center. However, CES Ltd is doing both BPO and KPO services. The principle involved in the judgment of the Hon<sup>ble</sup> Delhi High Court (supra.) is crystal clear that segregation of ITeS services has to be categorically conducted before classifying as functionally comparable with another. In this case Revenue Authorities have only looked into the revenue earning from ITeS segment and included this company as comparable. The facts remains both these companies are functionally different. We therefore, direct the AO/TPO to 13 ITA No. 133/PUN/2021 A.Y.2016-17 exclude CES Limited from the final set of comparables with that of the assessee company.

**Manipal Digital Systems Private Limited:-**

8. The assessee submits that the Manipal Digital Systems Private Limited is functionally different from the assessee which is involved in provision of ITeS services. As per the annual report of the company, the activity undertaken by the company is in the nature of pre-press activities which is not comparable to the assessee. That further in the website of the company, it is engaged in the diversified set of activities which involves graphic solutions, packaging brand management, digital publishing and digital content solutions. Therefore, the assessee submits that this company should be rejected from the final set of comparables companies.

9. The TPO was of the opinion that in this company i.e. Manipal Digital Systems Private Limited, 90% of the revenue is earned from ITeS which is similar to that of the assessee company. The TPO further observed that most of the information provided by the assessee was from website and it cannot be said reliable source of information as any company while projecting itself in public domain tries to shows its diverse functioning and range of products so as to create a brand image of itself. With these observations, the contention of the assessee was rejected and the company was taken as comparable company.

10. That before the Ld. DRP, objections have been raised by the assessee which are at running Page No.34 of the appeal memo and therein, apart from reiterating the submissions made before the TPO, the assessee has stated that as per the online advertising laws and guidelines provided by the Advertising Standard Council of India, advertisements are based on principle of truthfulness and honesty of representation and there cannot be any misleading advertisement. That further, since the audited financial statements do not provide detailed description of operations/products in which the company deals, the website can be referred to for the analysis of functions performed by the company. The Ld. DRP vide Para (c) of Page No.67 to 70 of its order and as per reasoning therein, had upheld the findings of the TPO and included Manipal Digital Systems Private Limited in the final set of comparables companies. That again the prime observation of the Ld. DRP in this regard was that more than 90% of the total revenue of the operation of the company comes from ITeS.

11. At the time of hearing, the Ld. Counsel for the assessee took us through the annual report of the company at Volume –II, Page 1279 onwards, Page 1302 having notes of accounts. The Ld. Counsel vehemently submitted that on perusal of the annual report, notes of accounts, nothing can be stated whether at all this company i.e. Manipal Digital Systems Private Limited is engaged in the business of call center or not. The realm of ITeS involves various activities and on general principle the Revenue cannot say that since majority of the earning of the said company comes from ITeS, it is comparable company with that of the assessee company.

12. *Placing strong reliance on the decision of the Hon<sup>ble</sup> Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. Vs. CIT, ITA No.102/2015 dated 10.08.2015 copy of which is placed before us, the Ld. Counsel brought to our notice at Para 31 wherein the Hon<sup>ble</sup> Delhi High Court observed that the Tribunal had held that once a service falls under the category of ITeS then there is no sub-classification of segment. Thus, according to the Tribunal, no differentiation could be made between the entities rendering ITeS. The Hon<sup>ble</sup> Delhi High Court rejecting such view of the Tribunal had held that such a view, if upheld, would be contrary to the fundamental rationale of determining ALP by comparing controlled transactions/entities with similar uncontrolled transactions/entities. ITeS encompasses a wide spectrum of services that use Information Technology based delivery. Such service could include rendering highly technical services by qualified technical personnel involving advanced skills and knowledge, such as engineering, design and support. While, on the other end of the spectrum ITeS would also include voice based call centers that render routine customer support for their clients. The relevant portion of the judgment is extracted as follows for the sake of completeness:*

*“.....Clearly, characteristics of the service rendered would be dissimilar. Further, both service providers cannot be considered to be functionally similar. Their business environment would be entirely different, the demand and supply for the services would be different, the assets and capital employed would differ, the competence required to operate the two services would be different. Each of the aforesaid factors would have a material bearing on the profitability of the two entities. Treating the said entities to be comparables only for the reason that they use Information Technology for the delivery of their services, would, in our opinion, be erroneous.*

32. *It has been pointed out that whilst the Tribunal in Willis Processing Services (India) Pvt. Ltd. v. DCIT (supra) held that no distinction could be made between KPO and BPO service providers, however, a contrary view had been taken by several benches of the Tribunal in other cases. In Capital IQ Information System India (P.) Ltd. v. Dy. CIT, (IT) [2013] 32 taxmann.com 21 and Lloyds TSB Global Services Pvt. Ltd. v. DCIT, (ITA No. 5928/Mum/2012 dated 21th November 2012), the Hyderabad and Mumbai Bench of the Tribunal respectively accepted the view that a BPO service provider could not be compared with a KPO service provider.*

33. *The Special Bench of the Tribunal in Maersk Global Centers (India) Pvt. Ltd. (supra) struck a different cord. The Special Bench of the Tribunal held that even though there appears to be a difference between BPO and KPO Services, the line of difference is very thin. The Tribunal was of the view that there could be a significant overlap in their activities and it may be difficult to classify services strictly as falling under the category 8 ITA No. 133/PUN/2021 A.Y.2016-17 of either a BPO or a KPO. The Tribunal also observed that one of the key success factors of the BPO Industry is its ability to move up the value chain through KPO service offering. For the aforesaid reasons, the Special Bench of the Tribunal held that ITeS Services could not be bifurcated as BPO and KPO Services for the purpose of comparability analysis in the first instance. The Tribunal proceeded to hold that a relatively equal degree of comparability can be achieved by selecting potential comparables on a broad functional analysis at ITeS level and that the comparables so selected could be put to further test by comparing specific functions performed in the international transactions with uncontrolled transactions to attain relatively equal degree of comparability.*

34. *We have reservations as to the Tribunal's aforesaid view in Maersk Global Centers (India) Pvt. Ltd. (supra). As indicated above, the expression 'BPO' and 'KPO' are, plainly, understood in the sense that whereas, BPO does not necessarily involve advanced skills and knowledge; KPO, on the other hand, would involve employment of advanced skills and knowledge for providing services. Thus, the expression 'KPO' in common parlance is used to indicate an ITeS provider providing a completely different nature of service than any other BPO service provider. A KPO service provider would also be functionally different from other BPO service providers, inasmuch as the*

*responsibilities undertaken, the activities performed, the quality of resources employed would be materially different. In the circumstances, we are unable to agree that broadly ITeS sector can be used for selecting comparables without making a conscious selection as to the quality and nature of the content of services. Rule 10B(2)(a) of the Income Tax Rules, 1962 mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service/product characteristics. This factor cannot be undermined by using a broad classification of ITeS which takes within its fold various types of services with completely different content and value. Thus, where the tested party is not a KPO service provider, an entity rendering KPO services cannot be considered as a comparable for the purposes of Transfer Pricing analysis. The perception that a BPO service provider may have the ability to move up the value chain by offering KPO services cannot be a ground for assessing the transactions relating to services rendered by the BPO service provider by benchmarking it with the transactions of KPO services providers. The object is to ascertain the ALP of the service rendered and not of a service (higher in value chain) that may possibly be rendered subsequently.*

*35. As pointed out by the Special Bench of the Tribunal in Maersk Global Centers (India) Pvt. Ltd. (supra), there may be cases where an entity may be rendering a mix of services some of which may be functionally comparable to a KPO while other services may not. In such cases a classification of BPO and KPO may not be feasible. Clearly, no straitjacket formula can be applied. In cases where the categorization of services rendered cannot be defined with certainty, it would be apposite to employ the broad functionality test and then exclude uncontrolled entities, which are found to be materially dissimilar in aspects and features that have a bearing on the profitability of those entities. However, where the controlled transactions are clearly in the nature of lower-end ITeS such as Call Centers etc. for rendering data processing not involving domain knowledge, inclusion of any KPO service provider as a comparable would not be warranted and the transfer pricing study must take that into account at the threshold.*

*36. As pointed out earlier, the transfer pricing analysis must serve the broad object of benchmarking an international transaction for determining an ALP. The methodology necessitates that the comparables must be similar in material aspects. The comparability must be judged on factors such as product/service characteristics, functions undertaken, assets used, risks assumed. This is essential to ensure the efficacy of the exercise. There is sufficient flexibility available within the statutory framework to ensure a fair ALP.”*

*13. The Ld. Counsel for the assessee further submitted therefore, it is clear that merely because two companies are doing ITeS services, on general categorization comparability is not permitted and one has to look into the specific services rendered in the spectrum of ITeS and for this reason, the said company i.e. Manipal Digital Systems Private Limited is not a comparable company with that of the assessee company since absolutely functionally different. The Ld. Counsel also submitted that the TPO should have specifically stated why he has selected this company as comparable with that of the assessee company since the onus is on him to give reason for such inclusion. The logic was shown from the decision of the Pune Bench of the Tribunal in the case of M/s. Tasty Bite Eatables Limited Vs. ACIT, ITA No.1823/PUN/2018 for the assessment year 2014-15 dated 03.06.2021 wherein it was held that since the comparable chosen by the assessee, the onus is upon it to prove the functional comparability of this company. Extending the same logic, the Ld. Counsel submitted that it was also for the TPO to explain the reasons for inclusion of this company i.e. Manipal Digital Systems Private Limited since it was chosen as comparable by him.*

*14. We are of the considered view on going through the order of the TPO, findings of the Ld. DRP and the various judicial pronouncements placed on record, first of all the Revenue has selected Manipal Digital Systems Private Limited as comparable to that of the assessee company based on the earning 10 ITA No. 133/PUN/2021 A.Y.2016-17 of the company from ITeS. However, there is no segmental specification provided neither by the TPO nor by the Ld. DRP for*

*the reason of such inclusion of this company in the final set of comparable companies with that of the assessee company. In the decision of the Hon<sup>ble</sup> Delhi High Court (supra.), it is very much clear in the wide spectrum of ITes if two companies are to be comparable one has to look into the characteristic of service or business provided under ITes by them. This exercise was not done by the Department in this case. We also opine that as per Indian Council for Advertising, the online advertising has to be published on true and honest disclosure basis and therefore, when proper documentation of activities are not physically available, in such scenario, referring the website for information is correct option and the information therein cannot be doubted. These are all multi-national companies and certain amount of honesty has to be attributed to them since all are functioning as per relevant rules and laws. With these observations and respectfully, following the judgment of the Hon<sup>ble</sup> Delhi High Court (supra.) we direct the AO/TPO to exclude this company i.e. Manipal Digital Systems Private Limited from the final set of comparables with that of the assessee company. “*

12. Respectfully following our decision in respect of the aforesaid company, the order of Id. CIT(A) is upheld. **Ground No. 6 of the Revenue's appeal is dismissed.**

13. Now we would take up assessee's appeal in **ITA No. 640/PUN/2021 for A.Y. 2016-17**. At the outset, the Id. A.R submitted in respect of ground No. 7 of assessee's appeal that it should be remitted back to the file of the A.O/T.P.O for re-adjudication as per law. The Id. D.R did not raise any objection if this ground is restored to the file of the A.O/T.P.O.

14. Having heard the parties, we remand this ground of appeal of the assessee to the file of the A.O./T.P.O for proper adjudication as per law complying with the principles of natural justice. **Ground No. 7 of assessee's appeal is allowed for statistical purposes.**

15. Thereafter, the Id. A.R submitted that the only effective ground would be Ground No. 5 and they are not pressing the other grounds.

16. Having heard the submissions of the Id. A.R., except grounds No. 5 and 7 rest of the other grounds in the assessee's appeal memo are dismissed as not pressed.

17. With regard to Ground No. 5, the assessee wants exclusion of One Touch Solutions (India) Pvt. Ltd. In this regard, it is submitted by the assessee that M/s. One Touch Solutions is into providing entire spectrum of BPO

services including inbound and outbound call centre services, staffing/outsourcing, documentation, asset management etc.

18. The Id. T.P.O did not accept the submissions of the assessee and held this company to be comparable with that of the assessee. The Id. CIT(A) has dealt with this issue at page 74 para 2.5.3.3 of his order by observing as under:

*“2.5.3.3 One Touch Solutions (India) Pvt. Ltd. The appellant has raised the objection that this company is engaged in entire spectrum of BPO services including inbound and outbound call centre services etc. and thus not functionally comparable to the appellant. This objection is frivolous as this comparable is into ITES activities as defined under rule 10TA(e) Accordingly the Id. TPO’s inclusion of this comparable is confirmed.”*

19. It has been analysed by the Id. CIT(A) that this company is into ITES activity and therefore, it is included as comparable in the final set of comparables. Taking the totality of the facts and circumstances and the functional spectrum of the assessee, we are in conformity with the view taken by the Id. CIT(A) and we uphold the inclusion of this company in the final set of comparables in respect of the assessee. **Ground No. 5 of the assessee’s appeal is dismissed.**

20. In the combined result, Revenue’s appeal in **ITA No. 653/PUN/2021 is partly allowed** while assessee’s appeal in **ITA No. 640/PUN/2021 is partly allowed for statistical purposes.**

Order pronounced on this 20<sup>th</sup> \_\_\_\_ day of July 2022.

Sd/-  
**(R.S. SYAL)**  
**VICE PRESIDENT**

sd/-  
**(PARTHA SARATHI CHAUDHURY)**  
**JUDICIAL MEMBER**

Pune; Dated, this 20<sup>th</sup> day of July 2022  
Ankam

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The C.I.T. (A)-13, Pune.
4. The Pr. CCIT Pune
5. The D.R. ITAT C' Bench, Pune.
5. Guard File

BY ORDER,

Sr. Private Secretary  
ITAT, Pune.

		Date	
1	Draft dictated on	11-07-2022	Sr.PS
2	Draft placed before author	18-07-2022	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS		Sr.PS
6	Kept for pronouncement on	20-07-2022	Sr.PS
7	Date of uploading of order	20-07-2022	Sr.PS
8	File sent to Bench Clerk	20-07-2022	Sr.PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		