

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad**

**Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member**

ITA No.91/Hyd/2016		
Assessment Year: 2011-12		
M/s. International Speciality (India) Pvt.Ltd. Divya Sree Omega Campus Block C, 7 th floor, Survey No.13, Vill. Kondapur, Mdl. Serilingampally Hyderabad-500 032 PAN: AABCI8200Q (Appellant)	Vs.	DCIT, Circle-2(1) Hyderabad. (Respondent)
Assessee by:	Shri P.V.S.S.Prasad, CA	
Revenue by:	Shri Rajendra Kumar, CIT-DR	
Date of hearing:	20.07.2022	
Date of pronouncement:	10.08.2022	

ORDER

Per Shri Laliet Kumar, J.M.

This appeal is filed by the assessee, feeling aggrieved by the order passed by the Learned Dispute Resolution Panel-1, Bengaluru, dated 16.11.2015 for the AY 2011-12, on the following grounds :

"1. The learned(d) Assessing Officer (AO)/Ld Dispute Resolution Panel(DRP) are erroneous in law and on the facts of the case.

Corporate BPO Services:

2. *The Ld DRP/ Ld AO ought to have accepted the Profit margin of 8.46% adopted by the appellant as having complied with the arm's length principle.*

3. *The Ld DRP/ Ld AO are not justified in law in considering wrong comparables and consequently arriving at a high arithmetic mean of 18.96% as a ratio of OP/OC as against the margin of 8.46% of the appellant.*

4. *The Ld DRP /Ld AO is not justified in law in making an adjustment u/s 92CA of Rs 69,04,270/- to the price received by the appellant.*

5. *The Ld DRP erred in not accepting the assessee's contention to reject Crossdomain solutions P Ltd, on the grounds of functional dissimilarity.*

6. *The Ld DRP ought to have accepted the following companies, i.e., Cosmic Global Limited, E4e Healthcare, Microgenetics System Limited and Informed Technologies Ltd, when the same were accepted by both the assessee and the TPO and ought not to have rejected them.*

R&D Services:

7. *The Ld DRP/ Ld AO ought to have accepted the Profit margin of 8.46% adopted by the appellant as having complied with the arm's length principle.*

8. *The Ld DRP/ Ld AO are not justified in law in considering wrong comparable and consequently arriving at a high arithmetic mean of 16.30% as a ratio of OP/OC.*

9. *The Ld DRP /Ld AO is not justified in law in making an adjustment u/s 92CA of Rs 50,29,184/-to the price received by the appellant*

10. *The Ld DRP erred in rejecting Vimta Labs Limited as a comparable when the same was accepted by both the appellant as well as the TPO. The same maybe included with correct operating margin which the Ld TPO did not do.*

11. *The Ld AO erred in imposition of interest u/s 234B of the Act on the transfer pricing adjustment.*

12. Any other ground that may be urged at the time of hearing with in the prior approval o the Hon'ble Tribunal.

Brief facts :

2. M/s. International Specialty Products (India) Private Limited (ISP India) is a company registered in India under the Companies Act, 1956 and is engaged in business of Trading, R&D and Corporate support services. In the trading division it is engaged in distribution of Specialty chemicals (including agrochemicals, biocides, food ingredients, beverage, performance enhancing products, advance materials and industrial products). The group is recognized globally for developing, manufacturing & supplying innovative Specialty ingredients that enhance product performance.

3. ISP India has international transactions with its associated enterprises ISP Sales UK Ltd, ISP Investments Inc, ISP Asia Pacific Pte Ltd, ISP (Australasia) Pty Ltd and ISP Asia Pacific Pte Ltd.

4. The Assessee company filed its Return of Income for the AY 2011-12 on 25.11.2011 declaring an income of Rs. 1,83,02,160/-.

5. During the relevant assessment year, the assessee had entered into the following international transactions :

Name of the AE	Nature of the Transaction	Amount in (Rs.)
<i>ISP Sales UK Ltd.</i>	<i>Purchase of Industrial Specialty chemicals for resale/distribution</i>	<i>14,41,49,612</i>
<i>ISP Investments Inc</i>	<i>Provision for R& D services</i>	<i>6,95,98,190</i>
<i>ISP Investments Inc</i>	<i>Provision for corporate support services</i>	<i>7,13,87,635</i>
<i>ISP Sales UK Ltd</i>	<i>Reimbursement of sales</i>	<i>1 49,47 630</i>

	<i>related expenses received on agreed basis</i>	
<i>ISP Asia Pacific Pte Lte</i>	<i>Reimbursement of support service expenses received on actual basis</i>	<i>22,76,769</i>
<i>ISP(Australasia) Pte Ltd.</i>	<i>Payment of management fees</i>	<i>5,63,501</i>
<i>ISP Asia Pacific Pte Ltd.</i>	<i>Payment of management fees</i>	<i>3,24,02,559</i>
	<i>Total</i>	<i>33,53,25,896</i>

6. The assessee company applied Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for benchmarking transactions relating to provision of corporate support services, R&D services and Management Fees. For transactions relating to purchase of Industry Specialty Chemicals the assessee company has chosen CUP as the MAM.

7. The Operating Profit /Operating Cost (OP/OC) was used by the assessee company as the Profit Level Indicator (PLI) to test the assessee company's OP/OC with respect to the international transactions with AEs with reference to uncontrolled comparables identified as a result of searches carried out in external databases.

Corporate Support Services

8. The assessee company used Prowess and Capita line databases to search for the comparables. The assessee company identified 14 comparable and arrived at the arithmetic mean of 10.95% as against its own margin 8.46%. The assessee company's margin being within +5/-5% range, it was concluded that the international transactions with its AE were at Arm's Length. The list of comparable selected by assessee company in TP documentation is as under:

<i>S. No</i>	<i>Name of the Company</i>	<i>Weighted average OP/OC (%)</i>
1	<i>Accentia Technologies Limited</i>	<i>38.18%</i>
2	<i>Aditya Birla Minacs Worldwide Limited</i>	<i>-2.65%</i>
3	<i>CG-Vak Software & Exports Limited (Seg.)</i>	<i>-7.83%</i>
4	<i>'Caliber Point Business Solutions Limited (Seg.)</i>	<i>12.84%</i>
5	<i>Cepha Imaging Private Limited</i>	<i>-6.15%</i>
6	<i>Coral Hub Limited</i>	<i>23.40%</i>
7	<i>Cosmic Global Limited</i>	<i>21.42%</i>
8	<i>Fortune Infotech Limited</i>	<i>2.66%</i>
9	<i>Informed Technologies India Limited</i>	<i>15.26%</i>
10	<i>Infosys BPO Limited</i>	<i>21.33%</i>
11	<i>Jeevan Softech Limited (Seg)</i>	<i>34.66%</i>
12	<i>Jindal Intellicom Private Limited</i>	<i>2.99%</i>
13	<i>Micro genetics Systems Limited</i>	<i>-2.90%</i>
14	<i>R Systems International Limited (Seg.)</i>	<i>0.02%</i>
	<i>Arithmetic Mean</i>	<i>10.95%</i>

9. The ld.TPO was not convinced with the TP study carried out by the assessee and therefore, he rejected the same. The ld.TPO carried out fresh search under Information technology enabled services (ITes) and arrived at an arithmetic mean of 25.73% (OP/OC) by considering 13 companies and after making working capital adjustment of -2.13% the adjusted arms length margin was arrived at 23.60%. The List of 13 Com parables selected by the Ld TPO are as under:

S. No	Name of the Company	Operating Revenue	OP/OC
1	Accentia Technologies Limited	107,2296,564	29.29
2	Acropetal Technologies Ltd (Seg.)	49,48,44,353	15.57
3	Cosmic Global Limited	6,24,96,615	9.81
4	Crossdomain Solutions P Ltd	4,41,13,0975	25.04
5	E4e Healthcare	63,61,78,908	16.60
6	Eclerx Services Ltd	341,91,10,000	69.78
7	Informed Technologies Ltd	1,75,39,223	9.24
8	Infosys BPO	1138,30,86,300	18.85
9	Jeevan Scientific Technologies Ltc	1,73,08,878	28.93
10	Jindal Intellicom Ltd.	39,0642,997	13.54
11	Mastiff Tech P Ltd.	1,57,09,945	21.78
12	Microgenetics Systems Limited	1,27,74,116	-0.22
13	TCS E-serve Ltd	1504,55,59,000	76.28
	Total		334.49
	Average		25.73
	Less:WCA		-2.13
	Average after WCA		23.60

10. Out of the 13 companies as mentioned above selected by the Ld TPO 7 companies were in common which were selected by the assessee company during its initial TP Study i.e., **Accentia Technologies Limited, Cosmic Global Limited, Informed Technologies Ltd, Infosys BPO, Jeevan Scientific Technologies Ltd, Jinda Intellicom Ltd & Microgenetics Systems Limited.**

11. The assessee company objected 5 out of balance 6 companies selected by Ld. TPO. The assessee company accepted e4e Healthcare as comparable which was selected by Ld TPO during assessment proceedings. The assessee raised the objection for exclusion of five comparable selected by the TPO, before the DRP.

S. No	Name of the Company	Operating Revenue	OP/OC	Reasons
1	Acropetal Technologies Ltd (Seg.)	49,48,44,353	15.57	Functionally Dissimilar
2	Crossdomain Solutions P Ltd	44,11,30,975	25.04	Functionally Dissimilar
3	Eclerx Services ltd	3,41,91,10,000	69.78	High turnover/Super Profit
4	Mastiff Tech P Ltd 1	1,57,09,945	21.78	Functionally dissimilar
5	TCS E-serve Ltd	15,04,55,59,000	76.28	High turnover/Super Profit

12. In addition to the above 5 comparable selected by the Ld TPO the assessee company objected before the Ld DRP to exclude 3 comparable which were originally selected during the TP Study by the assessee. The list of the comparable which were objected by the assessee before the DRP in addition to the above five comparables are as under:-

Sl.No.	Company name
1	Accentia Technologies Limited
2	Infosys BPO
3	Jeevan Softech Limited (Seg) Jeevan Scientific Technologies

13. Thus, in total, the assessee sought the exclusion of eight comparable out of thirteen comparable selected by the TPO before the DRP.

14. Upon the submissions made before the Ld DRP, the Ld DRP vide its order dated 16/11/2015 (Pg.509 to 509 of Paper Book) has directed the Ld TPO to exclude 11 out of 13 Comparable by Ld.TPO. The list of 11 comparable excluded by the DRP are as under:-

Sl. No	Name of the Company	Objections made by Appellant company for exclusion of comparable	DRP Directions
1	Accentia Technologies Limited	Yes	Exclude
2	Acropetal Technologies Ltd (Seg.)	Yes	Exclude
3	Cosmic Global Limited	No	Exclude
4	E4e Healthcare	No	Exclude
5	Eclerx Services Ltd	Yes	Exclude
6	Informed Technologies Ltd	No	Exclude
7	Infosys BPO	Yes	Exclude
8	Jeevan Scientific Technologies Ltc	Yes	Exclude
9	Mastiff Tech P Ltd.	Yes	Exclude
10	Microgenetics Systems Limited	No	Exclude
11	TCS E-serve Ltd	Yes	Exclude

15. After issuance of the direction of the DRP, the Assessing Officer has passed the final assessment order against the assessee. Now, the assessee is in appeal before us for the grounds mentioned hereinabove.

16. The Id.AR for the assessee, at the outset had submitted after giving the effect to the direction of the DRP, following two comparable remained :

Sl.No.	Name of the Company	Operating Margin (%)
1	Crossdomain Solutions Pvt Ltd	25.04
2	Jindal Intellicom Ltd	13.54
	Average	19.29
	Less: Working Capital adjustment	0.34
	ALP	18.96

17. Now, the assessee is in appeal before us. The ld.AR had submitted that the assessee seeking exclusion of one comparable and also seeking the inclusion of 5 comparables. We will first deal with the exclusion.

CROSS DOMAIN SOLUTIONS

18. The assessee has sought the exclusion of Cross Domain Solutions, which was selected and upheld by the lower authorities. In this regard, the submissions of the assessee are read as under :

“the Company Crossdomain Solutions P Ltd is functionally dissimilar to that of appellant company. The Ld. DRP ought to have accepted the contentions of appellant company. The activities of the company Crossdomain Solutions P Ltd ranges from high end KPO services, development of product suites and routine low end ITES service. Cross domain is into Outsourcing, consulting and IT services. The company though specifies that it is into business processing, upon detail analysis of services provided, it can be said that the company is more than just business process management. The services of the company are varied and also include market research. Even the outsourcing services are diversified and include many industries. The company conducts it's own analysis and provides services with innovation. On comparison with Crossdomain, the Assessee is only into back end office support and does not innovate any product. It's services are provided to only one client and does not cover various industries like that of Crossdomain. It was the contention of the ld.AR that for the Assessment Year 2011-12, the jurisdictional coordinate Bench of this Tribunal in case Proseed India Ltd. (Formerly Greenfire Fire Agri Commodities Limited) v. ACIT [2017] ITA No.209/Hyd/2016 has held that-

"14.1. Ld. AR submitted that this company is into outsourcing} consulting and IT services. The company though specifies that it is into business processing} upon detail analysis of services provided} it can be said that company is more than just business process management. The services of the company are varied and also include market research. Even the outsourcing services are diversified and include many industries. The company conducts its own analysis and provides services with innovation. He submitted that on comparison with the Crossdomoin, Northgate India is only into Back end office support and does not innovate any product. Its services are provided to only one client and do not cover various industries like that of Crossdomain. He relied on the following cases to submit that the tribunal this company from the list of comparables in these cases:

1. S&P Capital IQ (India) Ltd. Vs. oac, [2016] 72 Taxmann.com 326 (Hyd. Trib.).
2. Global e business Operations Pvt. Ltd. Vs. DCOIT)TA No. 1678/Bang/2012
3. Symphony marketing solutions [2013] 38 Taxmann.com 55 (Bang. Trib).
4. Market Tools} [2013] 40 Taxmann.com 390 (Hyd. Trib.)

10.2 AS regards cross Domain Solutions ltd. the coordinate bench has held as under:

14.2. We have keenly perused the annual report placed on record and business profile of the company. It is also considered in earlier year I the case of Hyundai Motors engineering (ITA No. 1850/Hyd/2012). The relevant Para of the order is as under:

III. CROSSDOMAIN SOLUTIONS LTD;

This company was considered as a comparable and listed at SL.NO.7 of the comparables chosen by the TPO. it is the stand of the assessee that this company is not functionally comparable. It is seen that the business profile of this company is re-engineered payroll service. This company is also engaged in the development of information systems. The review and business function of Crossdomain is as follows:-

"With a decade of experience in Payroll Outsourcing Crossdomain has created a re-engineered payroll service EFFIPA Y - that process and delivers accurate payroll to clients with headcount up to 1000 employees in just 4 hours. With Effipay lite and Effipay lite plus} our bouquet of services cover end-to-end payroll} retrials} reimbursements} tax proof verifications up to issue of form 16 for employees of our clients across different industry verticals. Our processes are highly scalable and provide end to end payroll solutions to clients with headcount ranging from 5 to 65000. II*

"Crossdomain's IT knowledge and domain competence has provided the edge to develop information systems to implement process innovation and continuously increase efficiency and turn-a-round-time for business critical process. I

As can be seen from the above, the business of cross domain ranges from high end KPO services development of product suites and routine low end ITES services.

However, there is no bifurcation available for such verticals of services. Therefore the assessee contends that cross Domain cannot be compared to a routine ITES service provider.

III. I. we are the view that in the absence of any reasons given to the contrary either by the TPO or the DRP for regarding thus company as a comparable, this company should be excluded from the list of compo robes, accepting the plea of the assessee. Similar view was also taken in the case of Symphony Marketing Solutions India(p) Ltd (supra) by the Bangalore Bench. We had accordingly".

14.3. *Facts are being similar in this year; the same has to be excluded. Moreover the web report indicates that this company is in market research and analysis and IT services which include software development and maintenance. There is no segmental information. In the absence of segmental data, it cannot be stated that the company is functionally similar. In the view of the order in earlier year and based on annual report and web data of this year, it is better the same is excluded. We accordingly direct the TPO/AO to exclude the same"*

10.4 Following the observations of the coordinate bench, we direct the AO TPO to exclude the aforesaid companies as comparable and rework the PLI accordingly. This ground of the assessee is allowed. "

Similarly in the case of Global e Business Operations Pvt. ltd v. DCIT [2015J 63 taxmann.com 282 (Bangalore - Trib.) the Hon'ble Bangalore held

"As can be seen from the above, the business of Cross Domain ranges from high end KPO services, development of product suites and routine low end ITES service. However, there is no bifurcation available for such verticals of services. Therefore the assessee contends that Cross Domain cannot be compared to a routine ITES service provider. "

The ld. AR had submitted that the similar view has been taken by the Hon'ble tribunal in the following cases Excellence Data Research (P.) Ltd. v. ACIT [2016] 74 taxmann.com 13 (Hyderabad Trib.), Symphony Marketing Solutions [2013] 38 taxmann.com 55 (Bangalore - Trib.) and Market Tools [2013] 40 taxmann.com 390 (Hyderabad - Trib.) hence, it was submitted that Crossdomain Solutions Pvt Ltd is to be rejected as comparable as the company's activity is in different line compared to the activities of the assessee company.

19. On the other hand, the ld.DR for the revenue relied upon the order passed by the DRP. The DRP in the operative paragraph has held as under:-

*(iii) **Crossdomain Solutions P Ltd:** We examined the annual report produced by the assessee in which there is no indication that the company is engaged in providing knowledge process outsourcing, On page' 2 of the Director's Report, it is only mentioned that 'India continues to be a high quality and low cost destination for outsourcing in health care business services and your Directors are confident of capturing the Sizeable business in the coming year. In our view. the functional comparability need to be decided on the basis of Information available in the annual report and not based on the web site information which may not be reliable. The Hon'ble ITAT, Hyderabad, in the case of M/s Excellence Data Research Pvt Ltd (ITA No,159/Hyd/2015) rejected the objection of the assessee for exclusion of the above company from the comparables by observing that "we have seen tile annual report and most of the revenue of this company is from service only. The company is in the pay rollservice activity. Therefore, we are of the opinion that the company is functions similar to the activities of the assessee company, which is in the ITeS filed in view of this, we are not inclined to exclude this company on the basis of functional disabilities." In our view, there is no change in the functional profile of the above company during the year and therefore, is comparable with the function of the assessee. Accordingly, we do not find any infirmity in selection of the above company as comparable.*

20. We have heard the rival contentions of the parties and perused the material available on record. The profile of the assessee as captured by the TPO in paragraph 3 of his order mentioned that assessee is engaged in trading, R&D and corporate services. The TPO in the order at page No.31 has mentioned that this company, as per the website of the company falls under the category of ITes. However, the DRP, in its order has mentioned that the issue of the comparability was examined by the ITAT, Hyderabad in the case of **Excellence data research**

and thereafter, concluded that this company is comparable with the function of the assessee. There is no analysis whatsoever was made by the DRP/TPO with respect to the functional profile of the assessee and without bringing on record the functional similarity between the assessee and Crossdomain Solutions Pvt Ltd., DRP had held this company was comparable with that of the assessee. Though, the assessee had relied upon various decisions for the purposes of proving that this cross domain solutions is into high end KPO services and therefore is not functionally comparable with that of assessee who is into back end office support, but nothing has been brought on record by way of the admitted profile of cross domain, services provided by it and the revenue received by this company from its operation vis-a-vis various services provided by it.

21. In our view, detailed analysis is required to be done by the DRP before retaining this company as comparable with the assessee company. Needful was not done, therefore, we are constrained to remand the inclusion/exclusion of cross domain to the file of the DRP with the direction to decide the issue afresh. In view of the above, we are of the opinion that the functional profile of the assessee is required to be tested on the basis of FAR analysis with that of crossdomain solutions. Based on that outcome the Id.DRP shall decide the inclusion/exclusion of this comparable. In the result, the ground of the assessee is allowed for statistical purposes.

22. Now, we deal with the inclusion of the following companies :

- 1 Microgenetics System Limited
- 2.Cosmic Global Limited,
3. Informed Technologies Ltd, and
4. E4e Healthcare,

Microgenic Systems Ltd

23. The Ld.AR for the assessee had submitted that Ld. DRP has rejected this company on the ground that it has incurred medical transcription charges which is 23% of total cost. The Ld.DRP ought to have appreciated the fact that outsourcing activity did not exceed 25% of the total cost. Further the Ld. DRP ought to have appreciated that it satisfied all the filters applied by Ld.TPO. Hence it was selected as comparable. Further the turnover of Microgenic systems ltd is Rs. 1.20 Crores which is more than 1 Crore filter applied by the Ld. TPO. In addition to the above the appellant company turnover from Corporate Support Services is Rs.7.13 Crores which is comparable to Microgenic Systems Ltd. And the same company has been included by Id. DRP in the subsequent year i.e. for the AY 2012-13.

24. On the other hand ld.DR had drawn our attention to the order of DRP to the following effect:

(viii) Microgenetics System Ltd.: On perusal of annual report, it is noticed by us that out of the total expenses of Rs.1,07,91,015/- debited in P&L a/c, the expenses to the extent of Rs.24,98,323/- have been incurred as medical transcription charges, which indicates that the expenses to the extent of Rs.23% have been incurred in outsourcing of the medical transcription activity. Therefore, in our view, it will not be appropriate to

retain the above company as comparable, we accordingly direct to exclude the above company from comparables.

25. We have heard the rival contentions of the parties and perused the material available on record. Admittedly there is no change in the profile of this comparable for the subsequent assessment year, and it is the case of the assessee that this comparable has been retained by the DRP in the subsequent assessment year. In view of the above we are of the opinion that this matter is required to be remanded back to the file of the Assessing Officer/TPO with the direction to retain this comparable subject to verification that Microgenetics system Ltd was selected by the DRP in the subsequent assessment year. In the result the assessee ground is allowed for statistical purposes.

Cosmic Global:

26. The Ld.AR for the assessee had submitted that Cosmic global limited is engaged in IT Enabled translation services. The company derives its revenue from translation charges and accounts BPO. Hence above company shall be included as comparable.

27. On the other hand ld.DR had drawn our attention to the order of DRP to the following effect

Cosmic Global Ltd: *It is noticed by us that the expenses to the extent of 41% on sub contracting suggest a different working model which may have significant effect on the margin and therefore, the company cannot be retained as comparable. This view finds support from the decision of the Hon'ble DelhiHgh court in the case of Rampgreen Solutions Pvt.Ltd.(ITA 102/2015) in paragraph 38 of the decision wherein it is held that" plainly, a business model where services are rendered by 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 services by.....would have no bearing on the profitability of the said entry.' And also, frail, the decision of the Hon'ble AP & Telangana High Court In the case of BA, Comntinuum India Private Limited (ITTA 440 of 2014), Further on the same rationale, the company was directed to be excluded by the Hon'ble Hyderabad ITAT in the case of M/s. Excellence Data Research Pvt Ltd in ITA No 159/Hyd/2014 and **also in assessee's own case for AY 2009-10,** Accordingly, we direct the Assessing Officer to exclude the above company from comparables.*

28. We have heard the rival contentions of the parties and perused the material available on record. As noted by the DRP that this comparable was excluded in the case of the assessee in the immediately preceding assessment year 2009-10, therefore we are of the opinion that this comparable is not required to be included, as claimed by the assessee. The principle of consistency, is required to be applied not only against the revenue but also against the assessee as well. In view of the above the ground raised by the assessee for the inclusion of Cosmic Global is rejected.

Informed Technologies:

29. The Ld.AR for the assessee had submitted that Ld. DRP has excluded the above company on the ground that it is knowledge based office processing. However, it is seen from the annual reports of the company which says that company is engaged in BPO. And for the subsequent assessment year i.e. for the AY 2012-13, Ld.DRP specifically mentioned in its order that the Informed Technologies shall be included as comparable. Ld.AR had further drawn our attention to the case of Temasek Holdings Advisors India (P.) ltd. v. Deputy Commissioner of

Income tax [2017] 87 taxmann.com 168 (Mumbai - Trib.), for the AY 2011-12, wherein the Hon'ble Tribunal held as under :

"11. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material produced before us. We have given a thoughtful consideration to the facts of the case and find that in the case of the assessee for the immediately preceding year, i.e A Y. 2010-11, the aforesaid comparable had been accepted by the TPO as a good comparable, and was consequently included in the final list of comparables. We find ourselves to be in agreement with the contention of the Id. AR that now when the aforesaid comparable had been accepted by the TPO in immediately preceding year, i.e A Y. 2010-11, therefore, without pointing out any substantial variance, either functionally or otherwise, it would be absolutely impermissible on the part of the TPO to whimsically reject the said comparable during the year under consideration. We are further persuaded to subscribe to the contention of the Id. AR that though 'declining turnover' filter may be appropriate in scale based operations, but the same cannot be applied to the exclusion of the other relevant factors for drawing of adverse inferences in the case of a service entity, as margins in the latter case are not dependent on the scale or size of operations. Thus in the backdrop of our aforesaid observations, we are of the considered view that now when the comparable, viz. Informed Technologies Limited had been considered as a good comparable qua the functions performed by the assessee in A Y. 2009-10 and A Y. 2010-11, therefore, in the absence of any material change, there is no reason as to why the same is to be rejected as a comparable during the year under consideration. We thus in the backdrop of our aforesaid observations are not persuaded to subscribe to the contentions of the Id. D.R who had tried to impress upon us that in light of certain facts in respect of the aforesaid comparable, which were not there before the Tribunal in the preceding years, it could safely be concluded that the same was functionally different as in comparison to the assessee. We thus are of the considered view that the aforesaid comparable, viz. Informed Technologies Limited had rightly been selected by the assessee as a comparable therefore set aside the order of the AO / TPO and direct that the same be included in the final list of the comparable.

30. On the other hand Id.DR had drawn our attention to the order of DRP to the following effect :

VI Informed Technologies: *On perusal of the annual report, It is noticed from page no.6 that the company is operating as IT enabled services, knowledge based back office processing. It is also noticed by us that out of the gross revenue of Rs.4,07,73,057/-, the sales and service income is*

only Rs.1,75,39,223/- and therefore, it fails the service revenue filter of 75% applied by the TPO. The company has earned the rental/business center charges to the extent of Rs.2,02,80,000/-, there is no breakup of the expenses related to such income is available in the annual report and therefore, in absence of the segmental information, it will not be appropriate to retain the above company as comparable. The assessee himself sought to exclusion of the company engaged in the KPO, on that rationale also, this company cannot be retained as comparable. Therefore, we are of the view that the company cannot be retained as comparable. We accordingly direct the Assessing Officer to exclude the above company from comparables.

31. We have heard the rival contentions of the parties and perused the material available on record. The TPO at page 33 of his order mentioned the list of six comparable which were proposed by the TPO and accepted by the taxpayer. In the said list, present comparable namely “informed technologies Limited” is mentioned at serial No. 3. However when this finding of fact is compared with the finding of fact mentioned by the DRP in the above noted paragraph, then it appears that DRP has miscarried by saying that the assessee has sought the exclusion of this comparable being KPO. The assessee has not sought the exclusion of this comparable in the TP study or before the TPO, therefore the finding of fact wrongly recorded by the DRP is required to be set right. In our view this comparable is required to be included as comparable being functionally similar with the assessee. Even otherwise the coordinate bench in the case of Temasek Holdings Advisors India (P.) Ltd. had decided the issue in favour of assessee by treating it as good comparable. Therefore respectfully following the decision of the coordinate bench we allow the ground raised by the assessee. Accordingly Assessing Officer/TPO is directed to include the above noted comparable namely “informed technologies Limited”, while computing the ALP.

E4e Healthcare:

32. The ld.AR for the assessee submitted that the ld. DRP has excluded this company on ground that it has inconsistency of accounting. However there is no inconsistency as seen from the financials therefore the Company has to be included in final list of comparables. Ld.AR relied upon the decision in the case of Global e-business Operations Private Ltd. ITA no 418/Bang/2016.

33. On the other hand ld.DR had drawn our attention to the order of DRP, the DRP noticed that the company is engaged in the forward contracts, on that account the amount outstanding as on 31.03.2011 is USD 11.85 million, such forward contracts have influence on the margin of the assessee company. Further there is no consistent approach in regard to accounting of the bad debts which is evident that in the financial year 2009-10, the provision for bad and doubtful debts is created to the extent of 3,30,69,141/- as against which there is no provision during the year. As against the bad debt written off of 29,87,000/- in the preceding year, during the year the bad debt written off are to the extent of 1,62,09,146/-, in such inconsistency of accounting. Instead of modification of computation of margin, the DRP was of the view that it was appropriate to exclude the above company from the comparables.

34. We have heard the rival contentions of the parties and perused the material available on record. Undoubtedly the inclusion/exclusion of any comparable is required to be tested on the touchstone of FAR analysis to be carried out in accordance with Rule 10 B, of the Income Tax Rules 1962. The DRP, had

succinctly brought on record the dissimilarity in the functional profile of this comparable with that of the assessee, on account of doubtful debts and on account of bad debts written off during the year under consideration. Therefore, the asset employed by this company and the financials do not match with the assessee companies, therefore this comparable cannot be considered as comparable with the assessee in the eyes of law. No doubt the bench had included as comparable in the appeal of the revenue, however the concession given by the assessee in the said appeal cannot be treated as the admission against the revenue that this comparable is functionally similar with the assessee. In our view the said decision in Global e-business Operations Private Ltd. ITA No.418/Bang/2016 is not applicable and is distinguishable on account of the above said reasons. Accordingly, the ground raised by the assessee for inclusion of e4e is rejected.

Contract Research & Development Services

35. The assessee company used Prowess and Capitaline databases to search for the comparable. The assessee company identified 05 comparables and arrived at the arithmetic mean of 12.05% as against its own margin 8.46%. The assessee company's margin being within +5/-5 % range, it was concluded that the international transactions with its AE were at Arm's length.

36. The list of comparables selected by assessee company in TP documentation is as under:

S. No	Name of the Company
1	Actimus Biosciences Pvt Ltd
2	Jubilant Chemsys Limited
3	Max Neeman Medica/International
4	Research Support International Pvt Ltd
5	Syngene International Pvt Ltd Arithmetic Mean

37. The ld TPO carried out fresh search under Contract R&D and arrived at an arithmetic mean of 19.16% (OP/OC by considering 06 companies.

38. The list of 6 Comparables selected by the Ld TPO are as under:

S. No	Name of the Company
1	Choksi laboratories ltd
2	Jubilant Chemsys Limited
3	Max Neeman Medical International
4	Vimta Labs ltd
5	TCG life Sciences ltd
6	Syngene International Pvt ltd

39. Out of the 6 companies as mentioned above selected by the Ld TPO 3 comparable were in common which were selected by the assessee company during its initial TP Study i.e Jubilant Chemsys limited, Max Neeman Medical International & Syngene International Pvt ltd.

40. The appellant company made submissions before the Ld. DRP that the RPT of Jubilant Chemsys Ltd is 32.06%, hence, the same has to be rejected. The ld. DRP accepted the contentions of appellant company.

41. The Appellant Company submitted the list of comparables along with margins to be selected as comparables. The list is as under:

<i>S.No</i>	<i>Name of the Company</i>	<i>Margin computed by assessee</i>
1	<i>Choksi laboratories Ltd</i>	<i>20.29 %</i>
2	<i>TCG life Sciences ltd</i>	<i>10.63 %</i>
3	<i>Virnta labs ltd</i>	<i>-2.29%</i>
4	<i>Max Neeman Medical International</i>	<i>18.81%</i>
5	<i>Syngene International Pvt ltd</i>	<i>17.84%</i>
	<i>Total</i>	<i>65.28%</i>
	<i>Average</i>	<i>13.06%</i>
	<i>Working Capital Adjustment</i>	<i>0.72%</i>
	<i>Adjusted Margin</i>	<i>12.34%</i>

42. However, the Id DRP has rejected the Comparable Vimta labs ltd from the final list of comparable on the ground that it is loss making and had during the year started commercial activity of its pre-clinical facilities.

43. The Id.AR had submitted that the Id.DRP erred in rejecting Vimta Labs Limited from the final list on the ground that it is loss making. The Id. DRP ought to have appreciated the fact the company is not persistent loss making. He had submitted that as per annual report at (Pg.492 of Paper book) it is clearly evident that the company was in profits during last year i.e., F.Y 2009-10. The PBT was 4.89 crores during that year. Further, the Id.DRP ought to have appreciated that it satisfied all the filters applied by the Id.TPO and then selected as comparable. Since the functions

of Vimta labs Limited are comparable to that of appellant company it has to be retained as comparable. He relied upon the order of the Tribunal in the case of Asahi Glass Ltd 69 Taxman.com 32. Tribunal in para 9.1 and 9.2, it was held as under :

(ii) Triveni **GlassLtd.**

9.1 It has been noticed in para 5.10 of the TPO's order that Triveni **GlassLtd.** suffered loss from operations. The TPO has further recorded that this company was persistent loss making company and, hence, was not a good comparable. The assessee is aggrieved against the exclusion of this company.

9.2 After going through the relevant material, we find that the TPO excluded this company from the list of comparables simply on the ground that there was loss from operations during the year and it was consistently in red in earlier years as well. We have gone through the Annual report of this company and the assessee's submissions before the TPO qua this company, a copy of which is available on page 259 of the paper book. The assessee stated that there was profit of Rs.14.89 crore earned by this company, after considering write back of interest and transfer of debenture redemption reserves to its Profit & Loss Account and if the exclusion of these extraordinary items was made, there would be loss from operations to the tune of Rs.1.69 crore. There is no reference to any consistent losses incurred by this company, as has been recorded by the TPO in his order. In so far as the profit for this year is concerned, we find that Triveni **GlassLtd.** earned profit of Rs.14.89 crore which was after write back of interest and transfer of debenture redemption reserves to the Profit & Loss Account. While discussing the comparability of Bharat **Glass Tube Ltd.** above, we have observed that the Hon'ble jurisdictional High Court has held that a lower or a higher profit rate/turnover cannot be a criteria for exclusion of a company. Unless it is shown that there were losses due to extraordinary circumstances which were only case specific, a probable comparable company cannot be excluded from the list of comparables. As there are no extraordinary reasons for incurring of loss of Triveni **GlassLtd.** for the year and this company is not a consistent loss making company, we hold that the same cannot be excluded. We order accordingly.

44. On the other hand ld.DR had drawn our attention to the order of DRP.

“During the hearing, it is noticed by us that all other comparables selected by the TPO are showing margin ranging between 13% to 43% except in the case of Vimta Labs Ltd of which the margin according to TPO is (-) 0.66% and according to the assessee, it is (-) 2.29%. It is a well established principle that for transfer pricing analysis, a company which has significant high or low margins should not be retained as comparables unless on probe it is found that there are no abnormalities/peculiar circumstances due to which the margin has been influenced. The Hon’ble Delhi High Court in the case of Rampgreen Solutions Pvt.ltd (ITA No.102/2015 observed that.....A wide deviation in the PLI amongst selected comparables could be indicative that the comparables selected are either materially dissimilar or the data used is not reliable.....This exercise would fail, if a factor, which has a material bearing on the value of profitability, as the case may be depending on method used is ignore. Therefore, it was brought to the notice of AR during the hearing that due to abnormal losses, unless comparability is examined based on the annual report, it will not be appropriate to retain the company as comparable. The annual report is furnished by the assessee, on perusal of which it is noticed from page 5 annual report that the company during the year stated commercial activity of its pre-clinical facilities consequent to which various costs gone up, which resulted in net loss during the year. This facts indicates that extraordinary circumstances resulting in loss. In such circumstances, we are of the view that the above company need to be exclude from the comparable. Accordingly, we direct the Assessing Officer to exclude the above company from comparable.”

45. We have heard the rival contentions of the parties and perused the material available on record. We have gone through the balance sheet of Vimta Labs Limited at page 17, where the income expenditure of this company is provided. As per the balance-sheet, the income from testing services for the year ended on 31.03.2010 was Rs.89,95,70,861/-. Whereas, the income form testing as on 31.03.2011 was Rs.99,98,69,398/-. Thus, there is increase in income of the comparable during the year under consideration. However, there is abnormal increase in claim of depreciation to the tune of Rs.3,01,98,353/-. The relevant portion from Page 5 of Annual Report is mentioned as under :

“During the first quarter of the year under review, your Company has started commercial activities at its pre-clinical facility. Consequently the costs towards manpower, administrative expenses and depreciation have gone up as compared to the previous fiscal resulting net loss for the year. Further, during this year, your Company had to charge off certain non-recurring i.e. one time expenses to profit and loss account in line with the applicable Accounting Standards. Your Directors are confident that in the coming years, the Company would make adequate profits. With better control over logistics. The Pathology Testing activities of Noida were moved back to Genome Valley facility during the third quarter of the year under review.

Earnings before interest, depreciation, taxes and amortization (EBIDTA) for the year are Rs.1,569.43 lakhs as compared to the previous year earnings of Rs.2145.33 lakhs. Loss after tax (including deferred tax) stood at Rs.466.50 lakhs as against a profit of Rs.265.86 lakhs in the previous year.”

46. Besides that if we look at Page 19 of the Annual Report then it shows there is a huge addition of lab building for Rs.21,11,65,329/- and further there is an addition of Plant and Machinery for Rs.4,85,45,942/-. On account of the addition, there is an increase in depreciation. In the preceding year, it was Rs.69,10,16,109/-, whereas, in this year it was claimed at Rs.85,46,07,173/-. Thus, more than Rs.16.52 crores towards depreciation have been additionally claimed by the Vimta Labs on account of addition to plant and machinery and other assets. On the basis of the above said reason, Vimta Labs has suffered losses. In our view, if the addition of huge Plant and Machinery, claiming of depreciation, claiming of high payment of wages and benefit to the employees are considered in the light of the report of the directors, then it is crystal clear that the results of this company have been adversely affected on account of all the above said extraordinary reasons. Though this company is not a persistent loss making company, however, this company is not comparable on the basis of FAR analysis on account of extraordinary events mentioned hereinabove which had adversely

affected the profitability of this comparable. The analysis done by the ld.DRP in our opinion is in accordance with the principles laid down in Rule 10B of the Income Tax Rules, 1962. For the above said reason, we find that the reasoning given by the ld.DRP is correct and accordingly, Vimta Labs had been rightly deleted by the ld.DRP. In the result, the ground by the assessee is rejected.

47. No other grounds have been argued and pressed by the ld.AR for the assessee.

48. In the result, the appeal of the assessee is partly allowed to the extent indicated in this order.

Order pronounced in the Open Court on 10th August, 2022.

Sd/-

Sd/-

(RAMA KANTA PANDA) ACCOUNTANT MEMBER	(LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 10th August, 2022.

Thirumalesh/sps

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2	DCIT, Circle 2(1), Hyderabad.
3	DRP – 1, Bengaluru.
4	Director of Income Tax (IT & TP),
5	Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
6	DR, ITAT Hyderabad Benches
7	Guard File

By Order