

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, AM

IT(TP)A No.212/Bang/2021 : Asst.Year 2016-2017

M/s.Global E-Business Operations Private Limited 1 st Floor, Hewlett Packard Enterprises, Sy No.192, Whitefield Road, Mahadevpura Post Bangalore – 560 048. PAN : AABCG2843D.	v.	The Deputy Commissioner of Income-tax, Circle 3(1)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.P.C.Kincha, CA
Respondent by : Sri.Manjunath Karkihalli, CIT-DR

Date of Hearing : 26.09.2022	Date of Pronouncement : 27.09.2022
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ORDER

Per George George K, JM :

This appeal at the instance of the assessee is directed against final assessment order dated 30.03.2021 passed u/s 143(3) r.w.s. 144C(13) of the I.T.Act. The relevant assessment year is 2016-2017.

2. The brief facts of the case are as follows:

The assessee is a company engaged in the business of providing IT enabled services. For the assessment year 2016-2017, the return of income was filed on 30.11.2016 declaring total income of Rs.286,32,76,090. The return of income was selected for scrutiny and notice u/s 143(2) of the I.T.Act was issued on 28.09.2017. During the course of assessment proceedings, it was noticed that the assessee had entered into

several international transactions with its Associate Enterprises (AEs). The Assessing Officer (AO) referred the matter to the TPO to determine the Arm's Length Price (ALP) of the international transactions undertaken by the assessee with its AEs. The Transfer Pricing Officer (TPO) passed an order u/s 92CA of the I.T.Act on 24.10.2019 suggesting the transfer pricing adjustment of Rs.64,81,44,230 in respect of the international transactions entered by the assessee with its AEs during the previous year. The draft assessment order was passed on 16.12.2019 incorporating the above transfer pricing adjustment suggested by the TPO and also making corporate tax addition to the extent of Rs.7,28,99,000 (disallowance u/s 37 of the I.T.Act).

3. Aggrieved by the draft assessment order, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide order dated 25.02.2021 granted partial relief to the assessee, whereby the transfer pricing adjustment was reduced to Rs.30,29,80,250. The DRP, however, confirmed the A.O.'s view on corporate tax disallowance. Pursuant to the DRP's directions, the impugned final assessment order was passed on 30.03.2021 computing the total income as under:-

Computation of Income			
	Returned income		286,32,76,090
Add	TP adjustment	30,29,80,250	
:			
Add:	Disallowance u/s 37	7,28,99,000	
	Total taxable income		323,91,55,340

4. Aggrieved by the final assessment order, the assessee has filed this appeal before the Tribunal, raising grounds with regard to the transfer pricing adjustment as well as corporate tax disallowance. However, during the course of hearing,, as regards the transfer pricing adjustment is concerned, the learned AR had only pressed ground 1.12, namely, for exclusion of three companies as comparables and ground 1.13 for inclusion of three companies as comparables. The surviving grounds, namely, ground 1.12, 1.13 and corporate tax grounds, read as follows:-

“1.12 The learned AO / learned TPO / Hon’ble DRP has grossly erred in not rejecting the following companies;

- *Infosys BPO Limited;*
- *SPI Technologies India Private Limited; and*
- *Eclerx Services Limited.*

1.13 The learned AO / learned TPO / Hon’ble DRP has grossly erred in rejecting companies that ought to have been accepted as comparables:

- *Ace BPO Services Private Limited*
- *Informed Technologies India Limited*
- *Cyrstal Voxx Limited.*

B. Corporate Tax

2. Incorrect disallowance with respect to expenditure on Employee Stock Option Plan ("ESOP") under section 37 of the Act INR 7,28,99,000

2.1. The Learned AO and Honorable DRP has erred in law and on facts, in disallowing the expenditure on ESOP of INR 7,28,99,000 under section 37 of the Act without appreciating the submissions furnished by the Appellant.

2.2. The Learned AO and Honorable DRP has erred in law, in disregarding the decision of Jurisdictional Karnataka High

Court in the case of Biocon Limited, [2020] 121 taxmann.com 351 (Kar.) and Bangalore Tribunal in the case of Novo Nordisk, [2014] 42 taxmann.com 168 wherein it was held that discount on issuance of ESOP is an allowable business expenditure under section 37 of the Act

2.3. The learned AO and Honorable DRP has erred in law and on facts by stating that there is no outflow of money resulting in an expense whereas the fact is that there is a clear outflow of economic resources/cash in the hands of the appellant, which is wholly and exclusively used for the purpose of business in India.

2.4. The learned AO and Honorable DRP has erred in law and on facts by not appreciating that the difference between the market value and the purchase price of shares is being taxed as perquisite in the hands of the employees.

2.5. The Learned AO and Honorable DRP has erred in law and- on facts, in disregarding the sample debit note/invoices, Employee listing, Sample Form 16, cost reimbursement agreement, sample RSU agreement and scheme document submitted during the DRP proceedings by the Appellant.

2.6. The Learned AO and Honorable DRP has erred in law and on facts, in considering the ESOP expenditure as fictitious expenditure and making false allegation that the ESOP expenditure is a colorable device adopted for avoidance of tax which is totally inappropriate and misdirected. Further, learned AO/Honorable DRP has considered the ESOP cross charge by the Ultimate holding company as fictional and notional in nature which is totally misplaced.

2.7. The Honorable DRP has erred in law and on facts by placing reliance on the case laws decided in different context and not applicable to the facts of the Appellant.

2.8. The Honorable DRP has erred in law and on facts by stating that the ESOP is uncertain by not appreciating the fact that the ESOP expenses are actual expenses claimed by the Appellant, based on actual invoices issued and actual payments made.

Non-Applicability of section 195 of the Act

2.9. The learned AO has erred in law and on facts by disregarding that the ESOP expense is liable to TDS under section 192 of the Act as perquisite in the hands of the

employees and appropriate taxes are deducted and remitted by the Appellant, which is evidenced by sample Form 16 copies furnished before the honorable DRP.

2.10. The learned AO has erred in law and on facts by stating that the provisions of section 195 of the Act shall be applicable on the remittance of reimbursement towards ESOP without taking cognizance of the fact that there was no income element arising to the recipient of such remittances.

2.11. The learned AO has erred in law and on facts by stating that the provisions of section 195 of the Act has not been complied with and consequently reimbursement towards ESOP shall suffer disallowance under section 40(a)(i) of the Act without evaluating the fact that the provision of section 195 of the Act is prima facie not applicable on such remittances.

2.12. The learned AO has erred in law and on facts by relying on decision of Danfoss Industries P Ltd (2004) 268 ITR 1 pronounced by the Hon'ble Authority for Advance Ruling ("AAR") as the same is very specific to the given transaction of that Assessee. The transaction covered by the said decision is very different on facts as compared to the Appellant and the same cannot be applied here.

2.13. The learned AO has erred in law and on facts, in disregarding that the remittance towards recovery of ESOP charges is not taxable under the provisions of India-USA Double Taxation Avoidance Agreement.

2.14. The learned AO has erred in law and on facts by contending that the said ESOP cross charge is liable to TDS under section 192 of the Act as perquisite in the hands of the employees and same is also liable to TDS under section 195 of the Act on the reimbursement to the Ultimate Holding Company thereby resulting in double taxation of same amount.

2.15. The learned AO has erred in law and on facts by contradicting his own statement by stating that in one hand there is an element of income included in the reimbursement made to the Ultimate Holding Company for the expenditure on ESOP whereas on the other hand the learned AO states that the said expenditure is notional/fictitious in nature.

3. Other Corporate Tax related grounds

3.1. *The learned AO have erred in law and on facts, in not granting deduction in respect of amount paid towards leave encashment INR 7,59,06,267 during the Assessment Year ("AY") 2016-17 under the provisions of section 43B(f) of the Income Tax Act,1961 ("the Act"), after having denied the Appellant's claim of provision for leave encashment on accrual basis for AY 2007-08 and AY 2013-14.*

3.2. *The Learned AO have erred in law and on facts, in not appreciating the fact that the Appellant was eligible for the deduction towards leave encashment although the same was not claimed in the return of income filed by the Company for the AY 2016-17, owing to its claim of deduction of provision for leave encashment made in AY 2007-08 and AY 2013-14 (based on the decision of Hon'ble Calcutta High Court in the case of Exide Industries Limited v. Union of India [2007] (164 taxman 9)), which was subsequently rejected.*

3.3. *The Learned AO while assessing the total income of the Appellant for the year under consideration, have erred in not allowing a deduction for education cess and secondary & higher education cess (collectively known as "education cess"), although not claimed as a deduction by the Appellant in its return of income.*

4. Other matters

4.1. *The Learned AO has erred, in law and on facts, in initiating penalty proceedings under section 271(1)(c) of the Act.*

4.2. *The Learned AO has erred in law and on facts, in erroneous consideration of taxable income in assessment order vis a vis Computation sheet while calculating the taxable income and tax thereon.*

The appellant craves leave to add, alter, vary, omit substitute or amend the above grounds, at any time before or at the time of hearing of the appeal. Each of the above objections is independent and without prejudice to the other grounds preferred by the appellant."

We shall first adjudicate the transfer pricing adjustment.

Transfer Pricing Issue (Ground 1.12 & Ground 1.13)

5. The learned AR submitted that, as regards ground 1.12 is concerned, the issue in question is squarely covered by the order of the Tribunal in assessee's group cases in the case of EIT Services India Pvt. Ltd. v. DCIT in IT(TP)A No.210/Bang/2021 (order dated 22.08.2022). It was stated that the Tribunal in the case of EIT Services India Pvt. Ltd. v. DCIT (supra) had for assessment year 2016-2017, directed the TPO to exclude (i) Infosys BPO Limited, (ii) SPI Technologies India Private Limited and (iii) Eclerx Services Limited, since they are not functionally comparable to the company which are engaged in ITES segment. As regards ground 1.13 is concerned, the learned AR submitted that the Tribunal order in the case of EIT Services India Pvt. Ltd. v. DCIT (supra) had directed the TPO to examine whether Informed Technologies India Limited and Crystal Voxx Limited can be included as a comparable. With regard to Ace BPO Services Private Limited is concerned, the learned AR had submitted that the TPO for the assessment year 2015-2016 had considered Ace BPO Services Private Limited as a comparable company. It was contended that the same needs to be taken as a comparable since it is functionally comparable with that of the assessee.

6. The learned Departmental Representative supported the orders of the TPO / DRP.

7. We have heard rival submissions and perused the material on record. The profile of the assessee as described by the TPO is that of providing IT enabled services (refer para 2.1 to 2.4 of the TPO's order) The final set of comparable as per the TPO's order and their percentile median are as follows:-

Sl. No.	Company name	Financial Year wise (OP/OC (%))			
		2014.15	2013-14	2012-13	Average
1	Bhilawara Infotechnology Limited (Seg)	12.32%	7.95%	20.57%	13.39%
2.	One Teoch Solutions (India) Private Limited	12.23%	14.87%	18.29%	15.33%
3.	Tech Mahindra Business Services Limited	19.71%	29.53%	13.33%	20.44%
4.	Infosys BPM Ltd	25.34%	26.80%	27.43%	26.44%
5.	SPI Technologies India Pvt.Ltd.	40.70%	32.18%	42.48%	37.77%
6.	Eclerx Services Ltd.	57.75%	44.39%	70.72%	56.44%
	35 th Percentile				20.44%
	Median				23.44%
	65 th Percentile				26.44%

8. The determination of the ALP and the TP adjustment proposed by the TPO are as follows:-

ITeS segment		
Particulars	Formula	Amount (in Rs.)
Tax payers operating revenue	OR	13,554,203,000
Taxpayers operating cost	OC	11,505,466,000
Taxpayers operating profit	OP	20,48,737,000
Taxpayers PLI	PLI=OP/OC	17.80%
35 th percentile margin of comparable set		20.44%
Adjustment required		Yes

(if PLI<35 th percentile)		
Median Margin of comparable set	M	23.44%
Arm's Length Price	ALP=(1+M)8OC	14,202,347,230
Price Received	OR	13,554,203,000
Shortfall being adjusted	ALP-OR	64,81,44,230

9. As per the DRP's directions, Microland Limited was included in the final list of comparables. Further, the DRP directed the TPO to re-compute the PLI of Eclerx Services Limited in the ITES segment. The final list of comparables and its PLI consequent to the DRP's order and the ALP computation are as under:-

List of comparables consequent to DRP's order:

S. No.	Company name	PLI (OP/OC) (%)
1.	BNR Udyog Limited	4.40
2.	Microland Limited	14.92
3.	One Touch Solutions (India) Ltd.	15.33
4.	Tech Mahindra Business Services Ltd.	20.44
5.	Infosys BPM Ltd.	26.44
6.	S P I Technologies India Pvt.Ltd.	37.77
7.	Eclerx Services Ltd.	56.28
	35 th Percentile	15.33
	Median	20.44
	65 th Percentile	26.44

ALP adjustment

ITeS Segment		
Particulars	Formula	Amount (in Rs.)
Taxpayers operating revenue	OR	1355,42,03,000
Taxpayers operating cost	OC	1150,54,66,000
Taxpayers	OP	204,87,37,000

operating profit		
Taxpayers PLI	PLI=OP/OC	17.80
Median Margin of comparable set	M	20.44%
Arm's Length Price	ALP=(1+M)*OC	1385,71,83,250
Price Received	OR	1355,42,03,000
Shortfall being adjustment	ALP-OR	30,29,80,250

10. As mentioned earlier, the limited submission of the assessee before the Tribunal as per ground 1.12 is seeking exclusion of three companies from the list of comparable companies, namely, (i) Infosys BPO Limited, (ii) SPI Technologies India Private Limited, and (iii) Eclerx Services Limited. We find in the case of assessee's group company namely EIT Services India Pvt. Ltd. v. DCIT (supra), the above three companies were excluded from the list of comparables on account of functional dissimilarities. We find that profile of the assessee in the instant case and that of the assessee in case of EIT services India Pvt. Ltd. are identical. Moreover, the assessment year is the same. The relevant finding of the Tribunal in the case of EIT Services India Pvt. Ltd. v. DCIT (supra) reads as follows (For exclusion of (i) Infosys BPO Limited, (ii) SPI Technologies India Pvt. Ltd. and (iii) Eclerx Services Limited) :-

"13. Further, the assessee wants exclusion of following comparables in IT enabled services.

- i. Infosys BPO Ltd.*
- ii. SPI Technologies Pvt. Ltd.*
- iii. Eclerx Services Ltd.*

i. Infosys BPO Ltd.

13.1 The Ld. A.R. submitted that that Infosys BPO offers business process outsourcing solutions to its global clients by leveraging process, domain and people management expertise. The

nomenclature in the profit and loss account indicates that the income is earned from 'Revenue from business process management services' which suggests that the company is engaged in consultancy and management services unlike the Appellant which is involved only in providing ITES as a captive service provider entity.

13.2 Further, Infosys BPO Limited has been excluded in the case of Swiss Re Global Business Solutions India (P.) Ltd. [2022] 137 taxmann.com 417 (Bangalore - Trib.) AY 2016-2017 (He referred Page 162-163 of the Case Law Compilation, Para 11 - 21). Below is the relevant extract from the order for ready reference:

11. The Id. AR submitted that Infosys BPM Ltd. should be rejected as a comparable because it is functionally not comparable, has diversified activities and lack of segmental data, different business model, brand profits, various revenue models, presence of intangibles, outsourcing costs, marketing expenses and turnover. It offers business outsourcing solutions to several clients and span across multiple industry segments. The company's catering to a variety of industries does not change the nature of functions carried out as it is committed to provide best in class services to both horizontal and vertical focus areas.

12. The DRP was of the view that just because the company is providing cloud based services over various mainframe computers, the company would not be functionally different as claimed by the assessee and rejected this plea of the assessee.

13. Regarding the plea of the assessee that this company is into high end ITES service provider, and hence not comparable, the DRP held that under TNMM, there is no requirement that the comparables should render the same or identical services. It would be sufficient, if the services fall under the broad industry segment ITES. In this regard the DRP relied on the Bangalore Tribunal decision in the case of GE India Technology Centre (P.) Ltd. v. Dy. DIT [2013] 30 taxmann.com 249/141 ITD 245 and other decisions wherein it was observed that TNMM requires only broad comparability.

14. The contention of the assessee that Infosys BPO has various Revenue Models and its revenues are generated principally on time and material basis, transaction basis and fixed price contracts and therefore, it should not be compared with the assessee, the DRP observed that as the assessed failed to demonstrate as to how the different methods of billing would affect the Functional comparability or impact the profitability. Unless the same is demonstrated with credible evidence, it remains a theoretical argument without any backing with facts and figures and hence rejected it.

15. The assessee pointed out that this company has reported an amount of Rs. 136 crore as 'cost of Technical sub-contractors' which constitutes about 4.45% of total revenue of the company during the year. The DRP observed that the annual report mentions that these sub-contractors are used for operational activities. This is a common practice in almost all the companies to give a small portion of the work to some other sub-contractors for a variety of reasons. This may allow the company to focus on its core activities. Sometimes it may be to meet the mismatch in certain skill-sets that are required in various projects. These expenses are incurred in the routine course of business. This cannot be held to be a criteria to affect the functional comparability of a company and more so in the facts of this case, wherein the sub-contracting expenses are about 4.45% only. This objection was accordingly rejected.

16. Regarding the lack of segment data to reject it as a comparable, the DRP was of the view that when it has been held that all the services being done by this company falls in the category of ITeS, then the absence of segmental information remains a theoretical argument.

14. The assessee has also argued that this company has significant intangibles and brand and hence not functionally comparable. The DRP noted that the expenditure incurred towards brand was just Rs. 19 crore which is meagre considering its operating revenue of Rs. 3050 crores. Further, the assessee could not point to any information from the annual report to indicate brand has contributed to the revenue growth or profitability. Therefore, the presence of brand, as such, has not affected comparability. Further, there is no information in the annual report to indicate that the company has undertaken any major R&D initiatives & own intangibles. Therefore, the presence of intangible in the form of goodwill, which is also insignificant, as the value is only Rs. 19 crore compared to the revenue from operations of Rs. 3050 crores do not have any impact on the profits of the company. Hence, these pleas were rejected by the DRP.

18. The assessee's contention that this comparable has incurred significant selling and marketing expense was also not accepted by the DRP, since from the perusal of the annual report, the DRP noted that the expenses on this count is only 4.56% of the total expenditure and which is not at all significant to affect the profitability of the comparable.

19. Thus, in view of the discussions held above, all the grounds raised by the assessee were rejected and the action of the AO/TPO was upheld by the DRP.

20. We have heard both the parties and perused the material on record. This comparable has been considered as not comparable in *SwissRe Global Business Solutions India (P.) Ltd. v. Dy. CIT [2020] 116 taxmann.com 716 (Bang. - Trib.)* wherein it was observed as under :—

"We have perused submissions advanced by both sides in light of records placed before us. We note that this company is providing services in various areas of sourcing and procurement, customer services, finance and accounting legal process outsourcing, sales and fulfilment, analytics, business platforms, business transformation services, human resource outsourcing and technology solution optimisation. It is noted that this comparable also provides services in financial services and insurance, manufacturing, energy utilities communications and services and retail, consumer packaged foods, logistics and life services. Further in the annual report it has been mentioned that this comparable provides services that are different from routine back-office services. This noting itself makes this comparable not functionally similar with that of assessee.

Accordingly we direct this comparable to be excluded from finalist."

21. In view of the above order of the Tribunal, we are inclined to hold that this company should be excluded from the list of comparables.

13.3 The company has also been excluded in the case of ADP (P.) Ltd. [2022] 135 taxmann.com 44 (Hyderabad - Trib.) AY 2016-2017 by the Hyderabad Tribunal.

13.4 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to exclude this comparable from the final list of ITeS Segment.

13.5 Ld. D.R. relied on the order of Ld. DRP.

13.6 We have heard the rival submissions and perused the materials available on record. This company has been considered as in the case of ADP Pvt. Ltd. cited (supra) and held that this company cannot be included by observing as under:-

"16.1 Infosys BPO Ltd.: The Id. AR submitted that this company may be excluded from the final set of comparables for the reason that this company has incurred outsourcing costs for FY 2013-14, FY 2014-15 and FY 2015-16 and the outsourcing cost incurred by this company reflects a different operating model and hence cannot be compared with the assessee company. Further, he submitted that while this company operates under various revenue model as per the assignments i.e., proportional completion method on rendering services, whereas the assessee charges a mark-up on the cost incurred to provide the services. Further, he submitted that since the cost structure and revenue model of this company is different with that of the assessee, this company ought to be rejected as a comparable company. He relied on the decision of the co-ordinate bench in assessee's own case ADP (P.) Ltd. (supra) wherein the co-ordinate bench excluded this company as comparable.

16.2 The Id. DR, on the other hand, submitted that presence of outsourcing cost/subcontracting cost does not affect functional comparability. Further, it reduces the operating margin of the company, which is beneficial to the assessee. He, therefore, submitted that the TPO/DRP has rightly included this company as comparable.

16.3 We have considered the rival submissions and perused the material on record as well as the orders of TPO/DRP. We find that the co-ordinate bench in assessee's own case ADP (P.) Ltd. (supra) has excluded this company as comparable by observing as under:

'38. Having regard to the rival contentions and the material on record, we find we find that the Co-ordinate Bench of this Tribunal in the assessee's own case not only for the A.Ys 2009-10 for the A.Y 2010-11 has also considered this issue at Paras 6 to 9 in ITA No. 221/Hyd/2015 which reads as under:

"6. The TPO has selected many comparables and among them M/s. Infosys BPO Ltd., TCS E-serve Ltd., and Eclerx Services Ltd., were objected to on the reason of high turnover and functionally different. With reference to Infosys BPO, the objection was that the said company renders wide array of services and has high brand value and turnover is also very high. With reference to TCS E-serve Ltd., there was exceptional event as the company was taken over by Tata Consultancy Services in the year 2008-09 and heavy turnover is due to its takeover. Further, it was submitted that the company was functionally different as it has three different services and segmental information was not arrived. As far as E-clerx Services Ltd., it was submitted that this company caters to high end KPO services and cannot be compared to routine BPO services provided by assessee. The DRP vide para 3.10 has accepted the assessee's objections and accordingly, directed the TPO to exclude the above three companies. There are other directions of the DRP on TP adjustments on which neither party has raised grounds, except the Revenue on the above exclusion of three companies.

7. Referring to the order of the TPO, it was the contention of Ld.DR that DRP was not correct in excluding them on the basis of the turnover, whereas Ld. Counsel submitted that DRP has followed the decisions of the Co-ordinate Benches in excluding the above three comparables.

8. We have considered the rival submissions and perused the order of the DRP and Co-ordinate Benches. As far as M/s. TCS E-Serve Ltd., is concerned, the Co-ordinate Bench of ITAT in the case of M/s Hyundai Motors India Engineering P. ltd in ITA Nos. 1743/Hyd/2014 (AY.2010-11) & ITA No. 1917/Hyd/2014 (AY.2010-11) dt. 13-11-2015, has decided the issue as under:

ITA No 2233 of 2018 ADP Private Ltd Hyderabad "TCS e-SERVE LIMITED 11.2.1. As regards TCS e-Serve Limited is concerned, we find that it possesses brand value as is evident from the Schedule-N (Operation and Other expenses) to the P & L A/c of the annual report for the financial year 2009-10 of Rs. 46,065 thousands and also that it possesses intangibles in the form of software licenses which have not been taken note of by the authorities below while adopting its margin. It is also the case of the assessee that this company has a turnover of Rs. 1405.10 crores which is 25 times of the turnover of the assessee and hence, is not comparable to the assessee. The Ld. Counsel for the assessee had also placed reliance upon the TPO's order in the case of M/s. IGS Imaging Services India Ltd., to hold that there are exceptional circumstances during the relevant financial year due to which this company is not comparable to the assessee. The Ld. Counsel for the assessee also submitted that the segmental details of this company are not available and hence, has to be excluded on this count also.

11.2.2 We find that the assessee's contentions about the presence of 'brand value' and owning of 'intangibles' is supported by the evidence on record. However, as regards the extraordinary event or exceptional circumstance there is no material placed before us by the Ld. Counsel for the assessee. Therefore, merely because the TPO in another case has held that there is an extraordinary event for which this company has to be excluded from the list of comparables, it cannot be excluded. Such claim has to be supported by evidence on record. As regards the functional dissimilarity and huge turnover and brand value is concerned, we find that this Tribunal in assessee's own case for A.Y.2009-10 while considering the comparability of the assessee with Infosys BPO Ltd., has taken note of the possession of the brand value and intangibles which influenced the financial results of this company. The Hon'ble Delhi High Court in the case of CIT v. Agnity India Technologies (P.) Ltd., [2013] 219 Taxman 26 (Del.), held that huge turnover companies like Infosys and Wipro cannot be considered as comparable to smaller companies like assessee therein. In the case before the Hon'ble High Court (supra), the turnover of the assessee was about Rs. 15.79 crores as against the turnover of Rs. 1016 crores of the Infosys. Considering these facts, the Hon'ble High Court had directed for exclusion of Infosys BPO because of its brand value and also on the grounds of functional dissimilarity and huge turnover. Though, the company before us is TCS e-Service Ltd., and not Infosys BPO, we find that the turnover of the assessee company for this assessment year is around Rs. 50 crores as against the turnover of TCS EServe Limited of Rs. 1405.10 crores. Therefore, following the turnover filter as well as taking note of the fact that it owns and possesses brand value and intangibles as compared to the assessee which does not own such assets, we direct

that this company be excluded from the list of final comparables. Accordingly, assessee's grounds of appeal No. 6 is partly allowed.

8.1 Respectfully following the above decision of the Coordinate Bench, we confirm the order of DRP excluding the above company from the list of comparables.'

We observe from the financial statements of this company, that this company is functionally dissimilar and use robotics automation and diversified activities. Therefore, following the decision of the coordinate bench, we direct the AO/TPO to exclude this company as comparable for determining ALP.

13.7 In view of the above order of the coordinate bench of Hyderabad, we direct the AO/TPO to exclude this company viz. Infosys BPO Ltd. from the list of comparables from the final list of ITeS segment.

ii. SPI Technologies Pvt. Ltd.

14. The Ld. A.R. submitted that the company is into diversified business activities. The Company is engaged in data processing and related services, primarily in the typesetting business, including transformation of unedited manuscripts into final print-ready files, supply of structured data for electronic publishing and providing end-to-end project management services.

14.1 SPI Technologies India Private Limited has been excluded in the case of Entercoms Solutions Private Limited [TS-548-ITAT-2021(PUN)-TP] Page 10 of the order – AY 2015-2016.

Below is the relevant extract from the order for ready reference:

“10. We, place reliance on the afore-stated judicial precedents where there is an emerging consistent view in this regard that if an extraordinary event has taken place by way of amalgamation that company cannot be considered as a comparable one and following the same parity of reasoning, we direct the Assessing Officer/TPO to exclude SPI Technologies India Pvt. Ltd. from the final set of comparables while computing international transactions in respect of the Assessee in ITes segment.”

14.2 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to exclude this comparable from the final list of ITes Segment.

14.3 Ld. D.R. relied on the order of Ld. DRP.

14.4 We have heard the rival submissions and perused the materials available on record. This company has been considered

as not a comparable in the case of Entercoms Solutions Pvt. Ltd. in assessment year 2015-16 in ITA No.1826/Pune/2019 dated 25.10.2021 wherein held as under:-

8. We find the Hon'ble Jurisdictional High Court in the case of Pr. Commissioner of Income Tax Vs. PTC Software (I) (P) Ltd. (2019) 101 taxmann.com 117 (Bombay) has held that in case the assessee rendering ITES services to AE, a company in whose case extraordinary event of amalgamation took place during relevant year, could not be accepted as comparable and was decided in favour of the assessee. Similarly in the case of Pr. Commissioner of Income Tax Vs. J.P Morgan India (P) Ltd. (2019) 102 taxmann.com 335 (Bombay) , the Hon'ble Jurisdictional High Court on the same issue has held as follows:

“(iv) Mr. Percy Pardiwalla, learned senior counsel appearing on behalf of the respondent invited our attention to the final decision of this Court in Pr. CIT v. Aptara Technology (P.) Ltd. [2018] 92 taxmann.com 240 and Pr. CIT v. PTC Software (I) (P.) Ltd. [2019] 101 taxmann.com 117 (Bom.). In both the above decisions this Court has taken a view that merger/amalgamation is an extra ordinary event and would have an impact /effect on the financial results of the company. Thus, in both the aforesaid decisions, this Court upheld the view of the Tribunal that where merger/amalgamation have taken place and it is not a normal event then such a company would cease to be comparable. This of course is subject to the Revenue being able to show that amalgamation/merger did not have any effect of the profitability of the company. This has not been shown by the Revenue either to the Tribunal or before us. Therefore, this issue stands covered by the decision of this Court in Aptara Technology (P.) Ltd.'s case (supra) and PTC Software (I) (P.) Ltd.'s case (supra) in favour of the respondent. This more particularly in view of the absence of the Revenue even attempting to show that the merger and amalgamation that took place in the case of comparable M/s. Keynote Corporate Securities Limited was such that it would not have any impact on its profitability. It is true that in case of PTC Software (I) (P.) Ltd. case (supra) this question has been admitted, however, the admission was on the facts and circumstances of that case. In any case the issue now stands concluded by final orders of this Court in case of Aptara Technology (P.) Ltd. (supra) and PTC Software (I) (P.) Ltd.'s case (supra) and it is being followed.

(v) In view of the above, as the proposed question is covered by the decision of this Court, no substantial question of law arises. Thus, not entertained.”

9. That even the Pune Bench of the Tribunal in the case of Brintons Carpets Asia (P) Ltd. Vs. Deputy Commissioner of Income Tax, ITA

No.1312 & 1349/PN/2015 dated 29th March, 2019 observed that the assessee before the Tribunal had first claimed that Accentia Technologies Ltd. cannot be selected in the final list of comparables as during the year under consideration, there was an extraordinary event of amalgamation. Thereafter, the Tribunal has analyzed how and what extraordinary event took place in that case and in such scenario, the company cannot be considered as comparable one and the relevant extracts in this regard are as follows:

"13.The learned Authorized Representative for the assessee has pointed out that though the CIT (A) says that there is no such amalgamation but his finding is totally incorrect. In this regard, reliance was placed on the ratio laid down by Pune Bench of Tribunal in *Dover India (P.) Ltd. v. Dy. CIT* [2017] 88 taxmann.com 115 (Pune - Trib.), wherein for assessment year 2010-11 itself, the said concern Accentia Technologies Ltd. was excluded being high end KPO service provider. Further, the Tribunal in *BNY Mellon International Operations (India) (P.) Ltd. (supra)* have noted the extraordinary event of acquisition and also amalgamation of another concern and held that the said concern could not be selected as comparable. The relevant findings of Tribunal are in paras 12 and 13, which read as under:—

'12. The next concern against which the assessee has raised objections is Accentia Technologies Ltd. on the ground of extraordinary events during the year under consideration. The said concern had acquired IQ group of companies in the United Kingdom and there was amalgamation of Asscent Infoserve Pvt. Ltd. with the said concern and because of these extraordinary events, the margins of said companies should not be included in the final set of comparables. The Pune Bench of Tribunal in *Aptara Technologies Pvt. Ltd. v. ACIT* (2016) 72 taxmann.com 352 (Pune - Trib) and *Cummins Turbo Technologies Ltd. v. DCIT* (2017) 79 taxmann.com 260 (Pune - Trib) has held that the said concern cannot be accepted as comparable. The Tribunal in *Aptara Technologies Pvt. Ltd. v. ACIT* (supra) held as under:—

"14. We find that the Tribunal in assessee's own case in assessment year 2008-09 in *ITA No.2235/PN/2012*, order dated 02.02.2015 had held that the said concern could not be considered as comparable because of certain extraordinary events. The said ratio was also applied in assessee's own case while benchmarking the international transaction of assessee with its associate enterprises in assessment year 2009-10 in *ITA No.267/PN/2014*, order dated 29.04.2015. The Tribunal vide order dated 02.02.2015 had held that the concern Accentia Technologies Ltd. could not be included in the final set of comparables holding as under:—

"13. Next, assessee had contended that Accentia Technologies Ltd. has been wrongly included by the TPO as a comparable concern. As per the assessee, the said concern was engaged in functionally different activities. It was pointed out that the said concern is engaged in providing medical transaction, billing and coding services, application development & customization (segmental data not available). Moreover, it was contended that the sales/turnover of the said concern was more than Rs. 50 crores for the year under consideration which did not meet with turnover filter applied by the assessee. On this point, it was pointed out that the assessee had selected sales/turnover filter of 1-50 crores i.e. any concerns having a turnover exceeding Rs. 50 crores were excluded. Thirdly, it was pointed out that the activities of the said concern were not comparable to the activities of the assessee.

11. The TPO has noted the aforesaid objections of the assessee in para 18.1 of his order and has rejected the same by merely noticing that 75% of the revenue/income of the said concern is from ITES and therefore it is to be considered as a comparable. Before us, the Ld. Representative for the assessee has reiterated the submissions put-forth before the TPO in order to justify exclusion of the said concern from the list of comparables. In particular, it has been pointed out that for the very same assessment year, the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. v. ITO, (2013) 38 taxmann.com 55 (Bang.) has excluded the said concern from the list of comparables in a similar situation following the decision of the Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) Private Limited v. DCIT, (2013) 32 taxmann.com 21 (Hyd.).

15. We have considered the submissions of the Ld. Representative for the assessee and also the stand of the Revenue as emerging from the order of the TPO. In our view, the ratio laid down by the Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) Private Limited (supra) and by the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) is squarely applicable to the present case also. The aforesaid Benches of the Tribunal found that during the year under consideration there were extraordinary events that took place in the said concern which warranted exclusion of this company as a comparable. We therefore hold that the said concern cannot be considered as a comparable."

15. Further, similar proposition has been laid down by different Benches of Tribunal while deciding the appeals relating to assessment year 2010-11 and it has been held that because of extraordinary events during the year, the concern Accentia Technologies Ltd. was not comparable to the entities engaged in ITES. Following the same parity of reasoning, we hold that

Accentia Technologies Ltd. is to be excluded from the final set of comparables."

13. Following the same parity of reasoning as in Aptara Technologies Pvt. Ltd. v. ACIT (supra) and Cummins Turbo Technologies Ltd. v. DCIT (supra), we hold that Accentia Technologies Ltd. cannot be compared as comparable because of extraordinary events of acquisition and amalgamation during the year. Accordingly, we direct the Assessing Officer/TPO to exclude Accentia Technologies Ltd. from final list of comparables."

10. We, place reliance on the afore-stated judicial precedents where there is an emerging consistent view in this regard that if an extraordinary event has taken place by way of amalgamation that company cannot be considered as a comparable one and following the same parity of reasoning, we direct the Assessing Officer/TPO to exclude SPI Technologies India Pvt. Ltd. from the final set of comparables while computing international transactions in respect of the assessee in ITes segment."

14.5 In view of the above order, we direct the AO/TPO to exclude SPI Technologies Pvt. Ltd. from the list of comparables selected for ITes segment.

iv. Eclerx Services Ltd.

15. Ld. A.R. submitted that the company offers solutions in the nature of Knowledge Process Outsourcing (KPO) Services. The Appellant submits that the nature of the high end KPO services demanding presence of different skillsets performed by the Company cannot be compared to the low end ITES functions performed by the Appellant.

15.1 Further, Eclerx Services Limited has been excluded in the case of Swiss Re Global Business Solutions India (P.) Ltd. [2022] 137 taxmann.com 417 (Bangalore - Trib.) AY 2016-2017 (Refer Page 163 of the Case Law Compilation, Para 22-30). Below is the relevant extract from the order for ready reference:

22. Regarding exclusion of Eclerx Services Ltd., the assessee argued that this company is a KPO company and hence, it is not a good comparable. The DRP observed that there is a thin line of difference between BPO and KPO services. KPO is termed as an upward shift of the BPO industry in the value. chain. Thus, BPO trying to upgrade itself as KPO is likely to render both BPO as well as KPO services in the process of evolution and therefore, such an entity cannot be considered strictly as either BPO or KPO. In view of the above, ITes service's cannot be further classified as BPO and KPO services for the purpose of comparability analysis. Under the TNMM, functional

similarity is more relevant than product similarity. The DRP noted that the functional profile of this company was similar to the assessee.

23. Regarding the amalgamation of wholly owned subsidiary Agilyst Consulting Pvt. Limited has taken place with effect from 1-4-2015, the DR observed that the assessee has not demonstrated any increase in profits due to this amalgamation. Therefore, this amalgamation has no impact on comparability. Accordingly, the plea was rejected.

24. With regard to acquisition resulting in inorganic growth, the DRP noted that the company has acquired entire shareholding of CLX Europe SPA, Italy, as on 22nd April 2015 and this acquisition was made by the company's overseas subsidiary e-Clerx Investments (UK) Ltd. Therefore, there is no merit of the objection, as the stand alone financials of this company are considered for comparability.

25. The assessee also raised the objection that there is increase in revenue, but according to the DRP, it has failed to bring on record any evidence to suggest that this abnormal inorganic growth has impacted the profit margin of the company. It is observed that the profit margin of this company has been consistently at the same level during the last few years. The ALP margin is determined with reference the average profit margin of a comparable for three years and also taking into account the defined median value of the PLIs of the comparable. These will even out such differences. The DRP was of the opinion that it will not be proper to reject a comparable only on account of inorganic growth of top line, which otherwise is functionally comparable.

26. The DRP further observed that it was consistently held that high profit margin as such cannot be reason for exclusion when it is otherwise functionally comparable. Accordingly, there is no need to reject a functionally comparable company on account of having super profits.

27. The Assessee submitted that Eclerx suffers business concentration risk unlike the Assessee, who operates as a risk-free entity. The DRP observed that as far as the limited risk in the case of captive service providers is concerned, if this argument is accepted then it cannot be compared to any company as most of the companies will be independent companies. Rather it should be compared to independent companies only as the price received for the services by them will be determined by market forces, which is not the case of the assessee. The assessee itself can be characterized as a contract service provider, which means that it operates on a cost plus model. Therefore, this argument was also rejected.

28. Thus, the DRP upheld the rejection of this company as a comparable.

29. We have heard both the parties on the issue. This company has also been considered as not comparable in assessee's own case for A.Y. 2014-15 in IT(TP)A No. 3181/Bang/2018 dated 21-5-2020 wherein it was observed as under :—

"It is noted that this company is involved in high-end KPO services whereas assessee is providing IT enabled services by rendering remote data processing in the field of reinsurance. In our opinion functions performed by this company is not similar to that of assessee even though assessee before us also carries out certain services on contract basis. Ld. AR has placed reliance upon decision of Hon'ble Delhi High Court in case of Rampgreen Solutions (P.) Ltd. v. CIT [2015] 60 taxmann.com 355/234 Taxman 573/377 ITR 533 Hon'ble Court had held that once a company falls into the category of high-end KPO, it cannot be functionally comparable with a BPO service provider like that of assessee.

Applying this reissue in the present case, we direct Ld.AO to eliminate this comparable from final list."

30. In view of the above order of the Tribunal, we are inclined to direct that Eclerx Services Ltd. be excluded from the list of comparables.

15.2 The company has also been excluded in the case of ADP (P.) Ltd. [2022] 135 taxmann.com 44 (Hyderabad - Trib.) AY 2016-2017 by the Hyderabad Tribunal.

15.3 In view of the above-mentioned reasons, the Ld. A.R. requested to direct the TPO to exclude this comparable from the final list of ITeS Segment.

15.4. Ld. D.R. relied on the order of Ld. DRP

15.5 We have heard the rival submissions and perused the materials available on record. This company is not considered as comparable in the case of ADP Pvt. Ltd. cited (supra) in assessment year 2016-17, wherein they excluded the comparable ground No.7 of that order vide para 17 to 17.4 wherein held as under:-

"17. Eclerx Services Ltd.: The ld. AR of the assessee submitted that this company may be excluded as comparable from the final set of comparables as this company is engaged in providing KPO services, different to low end BPO services provided by the assessee. He submitted that Safe Harbor Rules recognizes ITeS activities under tow distinct categories i.e., BPO and KPO and activities of this company falls under KPO services. He submitted that the services provided by this company of following:

(a) Contract Risk Review,

- (b) Margin Exposure Management,
- (c) Online Operations and web analytics,
- (d) CRM and business intelligence,
- (e) Content creation,
- (f) business process consulting.

17.1 He further submitted that as per NIC code provided in the annual report, this company has been classified as KPO and has been awarded as leading KPO's in India, basis award and accolades received. He submitted that this company has undertaken the following extraordinary transactions thereby impacting the operating margins:

- (a) Acquisition of CLX Europe
- (b) Amalgamation of Agilest consulting (P.) ltd.

17.2 He relied on the decision of the co-ordinate bench in assessee's own case ADP (P.) Ltd. (supra) wherein the co-ordinate bench excluded this company as comparable.

17.3 The ld. DR, on the other hand submitted that this company is engaged in rendering ITeS, therefore, functionally comparable to assessee. He submitted that amalgamation has no impact on the profits of the company. He, therefore, submitted that TPO/DRP has rightly included this company as comparable to assessee company.

17.4 We have considered the rival submissions and perused the material on record as well as the orders of TPO/DRP. We find that the co-ordinate bench in assessee's own case for AY 2014-15 cited supra has excluded this company as comparable by observing as under:

38. Having regard to the rival contentions and the material on record, we find we find that the Co-ordinate Bench of this Tribunal in the assessee's own case not only for the A.Ys 2009-10 for the A.Y 2010-11 has also considered this issue at Paras 6 to 9 in ITA No. 221/Hyd/2015 which reads as under:

"6. The TPO has selected many comparables and among them M/s. Infosys BPO Ltd., TCS e-serve Ltd., and Eclerx Services Ltd., were objected to on the reason of high turnover and functionally different. With reference to Infosys BPO, the objection was that the said company renders wide array of services and has high brand value and turnover is also very high. With reference to TCS E-serve Ltd., there was exceptional event as the company was taken over by Tata Consultancy Services in the year 2008-09 and heavy turnover is due to its takeover. Further, it was submitted that the company was functionally different as it has three different services and segmental information was not arrived. As far as E-clerx Services Ltd., it was submitted that this company caters to high end KPO services and cannot be compared to routine BPO services provided by assessee. The DRP vide para 3.10 has accepted the assessee's objections and

accordingly, directed the TPO to exclude the above three companies. There are other directions of the DRP on TP adjustments on which neither party has raised grounds, except the Revenue on the above exclusion of three companies.

7. Referring to the order of the TPO, it was the contention of Ld.DR that DRP was not correct in excluding them on the basis of the turnover, whereas Ld. Counsel submitted that DRP has followed the decisions of the Co-ordinate Benches in excluding the above three comparables.

8. We have considered the rival submissions and perused the order of the DRP and Co-ordinate Benches. As far as M/s. TCS e-Serve Ltd., is concerned, the Co-ordinate Bench of ITAT in the case of M/s Hyundai Motors India Engineering P. ltd in ITA Nos. 1743/Hyd/2014 (AY.2010-11) & ITA No. 1917/Hyd/2014 (AY.2010-11) dt. 13-11-2015, has decided the issue as under:

ITA No 2233 of 2018 ADP Private Ltd Hyderabad "TCS eSERVE LIMITED 11.2.1. As regards TCS e-Serve Limited is concerned, we find that it possesses brand value as is evident from the Schedule-N (Operation and Other expenses) to the P & L A/c of the annual report for the financial year 2009-10 of Rs. 46,065 thousands and also that it possesses intangibles in the form of software licenses which have not been taken note of by the authorities below while adopting its margin. It is also the case of the assessee that this company has a turnover of Rs. 1405.10 crores which is 25 times of the turnover of the assessee and hence, is not comparable to the assessee. The Ld. Counsel for the assessee had also placed reliance upon the TPO's order in the case of M/s. IGS Imaging Services India Ltd., to hold that there are exceptional circumstances during the relevant financial year due to which this company is not comparable to the assessee. The Ld. Counsel for the assessee also submitted that the segmental details of this company are not available and hence, has to be excluded on this count also.

11.2.2 We find that the assessee's contentions about the presence of 'brand value' and owning of 'intangibles' is supported by the evidence on record. However, as regards the extraordinary event or exceptional circumstance there is no material placed before us by the Ld. Counsel for the assessee. Therefore, merely because the TPO in another case has held that there is an extraordinary event for which this company has to be excluded from the list of comparables, it cannot be excluded. Such claim has to be supported by evidence on record. As regards the functional dissimilarity and huge turnover and brand value is concerned, we find that this Tribunal in assessee's own case for A.Y.2009-10 while considering the comparability of the assessee with

Infosys BPO Ltd., has taken note of the possession of the brand value and intangibles which influenced the financial results of this company. The Hon'ble Delhi High Court in the case of CIT vs. Agnity India Technologies P. Ltd., (2013) 219 Taxman 26 (Del.), held that huge turnover companies like Infosys and Wipro cannot be considered as comparable to smaller companies like assessee therein. In the case before the Hon'ble High Court (supra), the turnover of the assessee was about Rs. 15.79 crores as against the turnover of Rs. 1016 crores of the Infosys. Considering these facts, the Hon'ble High Court had directed for exclusion of Infosys BPO because of its brand value and also on the grounds of functional dissimilarity and huge turnover. Though, the company before us is TCS E-Service Ltd., and not Infosys BPO, we find that the turnover of the assessee company for this assessment year is around Rs. 50 crores as against the turnover of TCS e-Serve Limited of Rs. 1405.10 crores. Therefore, following the turnover filter as well as taking note of the fact that it owns and possesses brand value and intangibles as compared to the assessee which does not own such assets, we direct that this company be excluded from the list of final comparables. Accordingly, assessee's grounds of appeal No. 6 is partly allowed.

8.1 Respectfully following the above decision of the Co-ordinate Bench, we confirm the order of DRP excluding the above company from the list of comparables.

We observe from the financial statements that this company is functionally dissimilar and engaged in KPO and BPO services and amalgamation of Agilest Consulting Pvt. Ltd., vide page No. 23 of paper book volume -1 para 8 and acquisition of CLX Europe which impacts on the profits of the company. From the financial statements of the Chairman's message placed at page No. 18 of paper book volume - 1, it has been categorically stated that after acquisition of CLX Europe, the revenue has grown by 30%, which clearly shows that it impacts on the profitability of the company. These are extraordinary events. Therefore, If an extraordinary event has taken place by way of amalgamation in a company, that company cannot be considered as a comparable as held by the co-ordinate bench of ITAT, Pune, in the case of Entercoms Solutions (P.) Ltd. (supra). Accordingly, we direct the AO/TPO to exclude this company as comparable from the list of comparables.”

15.6 In view of the above order of the Tribunal, we direct the AO/TPO to exclude this company viz. Eclerx Services Ltd. from the list of comparables.”

11. In view of the above order of the Tribunal, which is a group company of the assessee, and having same profile of the assessee, we direct the TPO to exclude (i) Infosys BPO Limited, (ii) SPI Technologies India Private Limited, and (iii) Eclerx Services Limited from the list of comparables and re-compute the ALP of the international transaction.

Ground No.1.13 (assessee is seeking inclusion of three companies)

12. Insofar as Informed Technologies India Limited and Crystal Voxx Limited are concerned, we find that the Tribunal in assessee's group case in the case of EIT Services Private Limited v. DCIT (supra), had restored the matter to the TPO to examine whether the above two companies can be considered as comparable company. The relevant finding of the Tribunal in this regard reads as follows:-

“16. Assessee wants inclusion of Informed Technologies India Ltd.Ld. A.R. submitted that the Ld. TPO has alleged that the business of the company is not purely in ITES service and that the company is engaged in the diversified business (page 16 of TP order). However, upon perusal of the Annual report of Informed, it is seen that the Company is into business process outsourcing services, content development and data management techniques and caters to the securities and financial research industry. These services would classify under the nature of ITeS and therefore it is submitted that Informed is engaged in providing ITeS and is comparable to the Assessee. (He referred page 2062 of the paper book). Also, the comparable qualifies all the quantitative filters applied by the learned TPO.

16.1 Further, Informed Technology has been included in the case of Ocwen Financial Solutions (P.) Ltd. [2019] 108 taxmann.com 306 (Bangalore - Trib.) AY 2014-2015 (He referred Page 178-179 of the Case Law Compilation, Para 10). The company has the same

functional profile in AY 2014-15 and AY 2016-17. The Ld. A.R. therefore requested to include this company.

16.2 The relevant extract from the Tribunal's order is reproduced below for ready reference:

“10. Informed Technologies Ltd., ('Informed')

10.1 This company 'Informed' was selected by the assessee as a comparable company in its TP study. The TPO in his order rejected this company stating that since 'Informed' is being primarily engaged in the business of Business Process Outsourcing, it fails the service income filter. On the objections filed by the assessee, the DRP concurred with the finding of the TPO by observing that the Annual Report shows that the sale of services is Rs. 2,58,53,362/- as against the total revenue of Rs. 3,81,86,665/- which comes to only 67.7% and therefore fails the service income filter applied by the TPO.

10.2 Before us, the learned AR for the assessee contended that this company 'Informed' is functionally comparable to the assessee as it is an ITES provider and qualifies the service income filter of 75% applied by the TPO. It was submitted that the entire service income of 'Informed' at Rs. 2,58,53,362/- is from rendering of ITES only and the TPO/DRP have wrongly considered "other income" of Rs. 1,22,85,303/- as "Service Income". In support of this contention, the learned AR drew the attention of the Bench to the relevant portion of the Annual Report of 'Informed' (placed at pages 391 to 443 of Paper Book). In this regard, reliance was placed on the decision of the Coordinate Bench of this Tribunal in the case of CGI Information Systems & Management Consultants (supra) wherein this company 'Informed' was held to be comparable to companies rendering ITES. It was prayed that, in the light of the above, this company 'Informed Technologies Ltd.,' be included in the final set of comparables in the case on hand.

10.3 Per contra, the learned DR for Revenue supported the orders of the authorities below.

10.4.1 We have considered the rival submissions and carefully perused the material on record. On a perusal of the Annual Report of this company 'Informed', it is seen that at page 12 thereof it is stated that this company is engaged in and operating as an ITES provider. A perusal of the TPO's order also indicates that the TPO has not disputed that this company is functionally comparable to the assessee in the case on hand; which is rendering back office ITES. From a perusal of the profit and loss account at page 30 of the Annual Report of 'Informed' it is seen that the total revenue is shown as Rs. 3,81,38,665/-and 'other income' of Rs. 1,22,85,303/-. As can be seen from Schedule 19 on page 40 of the Annual Report, the 'other income' comprises of non-operating income, interest, dividend, sale

of current investments and miscellaneous income and evidently these incomes cannot be considered as operating income. The percentage of 67.7% worked out by the TPO is after considering these "other income" as service income; which is factually incorrect. It is evident from a perusal of the profit and loss account of 'Informed' that the service income is Rs. 2,58,53,362/- which is entirely the revenue from operations and therefore in our considered view, the service income filter of 75% of service income to be from ITES as applied by the TPO, is satisfied in this case. In view of this factual finding rendered in the matter, we hold that this company 'Informed Technologies Ltd.,' satisfies the service income filter and is therefore to be included in the final set of comparables. We hold and direct the AO/TPO accordingly.

16.3 In view of the above-mentioned reasons, Ld. A.R. requested to direct the TPO to include this comparable to the final list of ITES Segment.

16.4. Ld. D.R. relied on the order of Ld. DRP.

16.5 We have heard the rival submissions and perused the materials available on record. The contention of Ld. A.R. is that this has been considered in the case of Ocwen Financial Solutions Pvt. Ltd. (2019) 108 Taxmann.com 36 (Bang- Trib.) for the AY 2014-15, wherein it was held as under:-

“10. Informed Technologies Ltd., ('Informed')

10.1 This company 'Informed' was selected by the assessee as a comparable company in its TP study. The TPO in his order rejected this company stating that since 'Informed' is being primarily engaged in the business of Business Process Outsourcing, it fails the service income filter. On the objections filed by the assessee, the DRP concurred with the finding of the TPO by observing that the Annual Report shows that the sale of services is Rs. 2,58,53,362/- as against the total revenue of Rs. 3,81,86,665/- which comes to only 67.7% and therefore fails the service income filter applied by the TPO.

10.2 Before us, the learned AR for the assessee contended that this company 'Informed' is functionally comparable to the assessee as it is an ITES provider and qualifies the service income filter of 75% applied by the TPO. It was submitted that the entire service income of 'Informed' at Rs. 2,58,53,362/- is from rendering of ITES only and the TPO/DRP have wrongly considered "other income" of Rs. 1,22,85,303/- as "Service Income". In support of this contention, the learned AR drew the attention of the Bench to the relevant portion of the Annual Report of 'Informed' (placed at pages 391 to 443 of Paper Book). In this regard, reliance was placed on the decision of the Co-ordinate Bench of this Tribunal in the case of CGI Information

Systems & Management Consultants (supra) wherein this company 'Informed' was held to be comparable to companies rendering ITES. It was prayed that, in the light of the above, this company 'Informed Technologies Ltd.,' be included in the final set of comparables in the case on hand.

10.3 Per contra, the learned DR for Revenue supported the orders of the authorities below.

10.4.1 We have considered the rival submissions and carefully perused the material on record. On a perusal of the Annual Report of this company 'Informed', it is seen that at page 12 thereof it is stated that this company is engaged in and operating as an ITES provider. A perusal of the TPO's order also indicates that the TPO has not disputed that this company is functionally comparable to the assessee in the case on hand; which is rendering back office ITES. From a perusal of the profit and loss account at page 30 of the Annual Report of 'Informed' it is seen that the total revenue is shown as Rs. 3,81,38,665/-and 'other income' of Rs. 1,22,85,303/-. As can be seen from Schedule 19 on page 40 of the Annual Report, the 'other income' comprises of non-operating income, interest, dividend, sale of current investments and miscellaneous income and evidently these incomes cannot be considered as operating income. The percentage of 67.7% worked out by the TPO is after considering these "other income" as service income; which is factually incorrect. It is evident from a perusal of the profit and loss account of 'Informed' that the service income is Rs. 2,58,53,362/- which is entirely the revenue from operations and therefore in our considered view, the service income filter of 75% of service income to be from ITES as applied by the TPO, is satisfied in this case. In view of this factual finding rendered in the matter, we hold that this company 'Informed Technologies Ltd.,' satisfies the service income filter and is therefore to be included in the final set of comparables. We hold and direct the AO/TPO accordingly.

16.6 In view of this, we remit this issue to the file of AO/TPO to examine this issue in the light of above findings of the Tribunal cited (supra) to decide afresh, after giving an opportunity of hearing to assessee.

Crystal Voxx Ltd.:-

17. Assessee wants for inclusion of Crystal Voxx Ltd. in the list of comparables.

17.1 In this regard, Ld. A.R. submitted that the learned TPO has rejected Crystal Voxx by stating that data is not available in the public database. The Ld. A.R. highlighted that the annual reports are available in the public database. The Appellant submits that Crystal Voxx is engaged in the business of providing medical

billing, coding, transcription, software and other enabled services. These said services would fall under the category of ITeS and therefore, the Appellant submits that Crystal Voxx is comparable to the functional profile of the Appellant.

17.2 Further, the Appellant submits that Crystal Voxx is functionally comparable and qualifies all the quantitative filters applied by the learned TPO and the Appellant.

17.3 The comparable has been accepted by the Ld. DRP in AY 2017-18 in Appellant's own case (He referred Page 72 of the Case Law Compilation).

17.4 Further, Crystal Voxx has been included in the case of Ocwen Financial Solutions (P.) Ltd. [2019] 108 taxmann.com 306 (Bangalore - Trib.) AY 2014-2015 (He referred Page 178-179 of the Case Law Compilation, Para 11). The relevant extract is reproduced below for ready reference:

“11. Crystal Voxx Ltd., ('Crystal')

11.1 This company, 'Crystal' was proposed by the assessee before TPO as an additional comparable to be included in the final set of comparables. The TPO, however, rejected the assessee's proposal on the ground that this company had not reported any earnings from export of services and therefore it is not possible to determine as to whether 'Crystal' has exports/foreign earnings more than 75% of total sales/turnover. The DRP concurred with the finding of the TPO; observing that while it is stated that "income from foreign currency" is Rs. 3,23,08,386/-, it is not clear whether this relates to export of services as this information is not available and therefore this company 'Crystal' is rejected.

11.2 Before us, it was contended that this company 'Crystal' is functionally comparable to the assessee in the case on hand as it is operating as a BPO Company which is a ITES provider. According to the learned AR, it is very evident from a perusal of the Annual Report of this company 'Crystal' that the income in foreign currency amounting to Rs. 3,23,08,386/- is out of export of services. In support of this contention, the learned AR took us through the relevant pages of the Annual Report of this company, 'Crystal', which is placed at pages 474 to 497 of the paper book.

11.3 Per contra, the learned DR for Revenue supported the orders of the authorities below in not including this company, Crystal Voxx Ltd., in the final set of comparables.

11.4 We have considered the rival contentions/submissions and perused the material on record. We have carefully perused the Annual Report of this company, 'Crystal'. At Note 3 of the Notes forming part of the accounts, at page 491 of the paper book, it is stated that the operations of the company predominantly relate to a single segment, namely "BPO

Activity". At note 6, the income in foreign currency is shown as Rs. 3,23,08,386/-. In the Director's Report, at page 480 of the paper book, the foreign exchange earnings is given as Rs. 3,23,08,386/-. In the factual matrix of the matter, as laid out above, we are of the considered opinion that the reason ascribed by the TPO and DRP for exclusion of this company, 'Crystal' is factually incorrect. Taking into consideration that the company 'Crystal' is otherwise comparable to the assessee in the case on hand as it is operating as a BPO company which is a provider of ITES, we direct that this company, Crystal Voxx Ltd., be included as a comparable company in the final set of comparables in the case on hand. The AO/TPO are accordingly directed."

17.5 In view of the above-mentioned reasons, we humbly request the Hon'ble Tribunal to direct the TPO to include this comparable to the final list of ITeS Segment.

17.6 Ld. D.R. relied on the order of Ld. DRP.

17.7 We have heard the rival submissions and perused the materials available on record. This company has been considered as not comparable in the case of Ocwen Pvt. Ltd. vide para 11 of that order, which is extracted as follows:-

"11. Crystal Voxx Ltd., ('Crystal')

11.1 This company, 'Crystal' was proposed by the assessee before TPO as an additional comparable to be included in the final set of comparables. The TPO, however, rejected the assessee's proposal on the ground that this company had not reported any earnings from export of services and therefore it is not possible to determine as to whether 'Crystal' has exports/foreign earnings more than 75% of total sales/turnover. The DRP concurred with the finding of the TPO; observing that while it is stated that "income from foreign currency" is Rs. 3,23,08,386/-, it is not clear whether this relates to export of services as this information is not available and therefore this company 'Crystal' is rejected.

11.2 Before us, it was contended that this company 'Crystal' is functionally comparable to the assessee in the case on hand as it is operating as a BPO Company which is a ITES provider. According to the learned AR, it is very evident from a perusal of the Annual Report of this company 'Crystal' that the income in foreign currency amounting to Rs. 3,23,08,386/- is out of export of services. In support of this contention, the learned AR took us through the relevant pages of the Annual Report of this company, 'Crystal', which is placed at pages 474 to 497 of the paper book.

11.3 Per contra, the learned DR for Revenue supported the orders of the authorities below in not including this company, Crystal Voxx Ltd., in the final set of comparables.

11.4 We have considered the rival contentions/submissions and perused the material on record. We have carefully perused the Annual Report of this company, 'Crystal'. At Note 3 of the Notes forming part of the accounts, at page 491 of the paper book, it is stated that the operations of the company predominantly relate to a single segment, namely "BPO Activity". At note 6, the income in foreign currency is shown as Rs. 3,23,08,386/-. In the Director's Report, at page 480 of the paper book, the foreign exchange earnings is given as Rs. 3,23,08,386/-. In the factual matrix of the matter, as laid out above, we are of the considered opinion that the reason ascribed by the TPO and DRP for exclusion of this company, 'Crystal' is factually incorrect. Taking into consideration that the company 'Crystal' is otherwise comparable to the assessee in the case on hand as it is operating as a BPO company which is a provider of ITES, we direct that this company, Crystal Voxx Ltd., be included as a comparable company in the final set of comparables in the case on hand. The AO/TPO are accordingly directed.”

17.8 Accordingly, in view of the above order, we remit this issue to the file of AO/TPO to examine it in the light of above findings of the Tribunal.”

13. In the light of the above order of the Tribunal, we direct the AO / TPO to examine afresh whether the above two companies, namely, Informed Technologies India Limited and Crystal Voxx Limited can be included as comparable companies.

14. Insofar as Ace BPO Services Private Limited is concerned, the learned AR had placed on record the TPO's order passed u/s 92CA of the I.T.Act (order dated 26.10.2018) for assessment year 2015-2016, wherein the TPO accepted the above company as a comparable company, since according to the TPO, for the said assessment year the company has passed all the TPO's filter and the FAR analysis are similar.

15. In view of the order of the TPO for assessment year 2015-2016, we restore the comparability of Ace BPO Services Private Limited to the files of the TPO. The TPO shall consider the issue afresh in accordance with law. It is ordered accordingly.

16. In the result, ground 1.12 is allowed and ground 1.13 is partly allowed for statistical purposes.

Corporate Tax Issues (Grounds 2.1 to 2.15)

17. Grounds 2.1 to 2.15 relate to disallowance of ESOP expenses u/s 37 of the I.T.Act. The employees of the assessee was eligible to participate in share based compensation scheme of the ultimate holding company, whereby the shares of the ultimate holding company are granted to the employees of the assessee on satisfying certain conditions. As per Note 28 of the financial statement, the assessee had two types of share based compensation scheme operational, namely, Employee Stock Purchase Plan (ESPP) and Employee Stock Incentive Plan (ESIP) (hereinafter referred to as ESOP Scheme). It was stated that the shares were issued below market price and the discounted value was treated as perquisite u/s 17(2) of the I.T.Act in the hands of the employees and assessee had deducted appropriate TDS u/s 192 of the I.T.Act. It was stated that to the extent of discount, the holding company had cross charged the assessee. It was stated that it is in respect of cross charges incurred towards options exercised and shares purchased by employees of the

assessee, the same was claimed as deduction u/s 37 of the I.T.Act. The A.O., however, held that ESOP expenditure booked by the assessee and reimbursed to the holding company is a fictitious expenditure and notional in nature. Though the A.O. had mentioned about the violation of the provisions of section 195(1) of the I.T.Act and consequent disallowance u/s 40(a)(i) of the I.T.Act, the A.O. held that the assessee has not satisfied conditions specified u/s 37 of the I.T.Act for claiming such expenditure. The objections filed before the DRP was rejected and the DRP agreed by the conclusions drawn by the A.O.

18. Aggrieved, the assessee has raised this issue before the Tribunal. The learned AR submitted that the issue raised is squarely covered by the order of the Tribunal in assessee's group case in EIT Services India Pvt. Ltd. v. DCIT (supra). It was stated that the Tribunal in the above mentioned case, had followed the dictum laid down by the Hon'ble jurisdictional High Court in the case of CIT v. Biocon Limited reported in 121 taxmann.com 351 (Karnataka), wherein it was categorically held that ESOP expenditure is deductible u/s 37 of the I.T.Act.

19. The learned DR was unable to controvert the submissions of the learned AR.

20. We have heard rival submissions and perused the material on record. In assessee's group case, namely, EIT Services India Pvt. Ltd. v. DCIT (supra), had held that the

ESOP expenditure is to be allowed as a deduction u/s 37 of the I.T.Act. The Tribunal had followed the judgment of the Hon'ble jurisdictional High Court in the case of CIT v. Biocon Limited (supra). The relevant finding of the Tribunal in assessee's group case, reads as follows:-

"20.27 We have heard the rival submissions and perused the materials available on record. This issue came up for consideration before the Hon'ble Karnataka High Court in the case of CIT Vs. Biocon Ltd. cited (supra) wherein it was held as under:-

"From a perusal of section 37(1) of the Income-tax Act, 1961 it is evident that the provision permits deduction of expenditure laid out or expended and does not contain a requirement that there has to be a payout. If an expenditure has been incurred, section 37(1) of the Act would be attracted. Section 37 does not envisage incurrence of expenditure in cash.

An assessee is entitled to claim deduction under the provision if the expenditure has been incurred. It is well settled in law that if a business liability has arisen in the accounting year, it is permissible as deduction, even though, the liability may have to be quantified and discharged at a future date.

Section 2(15A) of the Companies Act, 1956, defines "employees stock option" to mean option given to whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future rate to securities offered by the company at a pre-determined price. In an employees stock option plan a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at a discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vests with the employees.

The expression "expenditure" also includes a loss and therefore, issuance of shares at a discount where the assessee absorbs the

difference between the price at which they are issued and the market value of the shares would be expenditure incurred for the purposes of section 37(1). The primary object of the exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, it cannot be construed as short receipt of capital.

Held, dismissing the appeal, that the deduction of the discount on the employees stock option plan over the vesting period was in accordance with the accounting in the books of account, which had been prepared in accordance with Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999. For assessment year 2009-10 onwards the Assessing Officer had permitted the deduction of the employees stock option plan expenses. The Revenue could not be permitted to take a different stand with regard to the assessment year 200405. The expenses were deductible.”

21. In view of the above judgement of Hon’ble Karnataka High Court in the case of Biocon Ltd., we are in agreement with the contention of assessee’s counsel in principle on this issue. However, we make it clear that the AO has to verify whether the said amount has been subject to TDS in the assessment year under consideration u/s 192/195 of the Act as argued by the Ld. A.R. before us. Accordingly, this issue is remitted to AO for fresh consideration in the light of above.”

21. The assessee has raised grounds with regard to the issue that the assessee is not liable for TDS u/s 195 of the I.T.Act (refer grounds 2.9 to 2.15). We are of the view that these grounds need not be adjudicated, since, on perusal of the final assessment, it is clear that the disallowance of ESOP expenses has made under the provisions of section 37 of the I.T.Act (though there was some discussion in the draft assessment order with reference to disallowance u/s 40(a)(i) of the I.T.Act). Therefore, grounds 2.1 to 2.8 are allowed and ground 2.9 to 2.15 is not adjudicated.

Grounds 3 to 3.3 (Corporate Tax Issues)

22. The facts pertaining to grounds 3 to 3.3 are that during the Financial Year 2015-2016, it is claimed that the assessee had made payment towards leave encashment of Rs.7,59,06,267 and the same was disclosed as part of Clause 26 of Tax Audit Report ("TAR") filed in Form 3CD for the said FY. Though the assessee was eligible to claim Rs.7,59,06,267 under section 43B of the Act, the assessee had not claimed the payment towards leave encashment in the return of income by the assessee for the reason that during the FY 2006-07 to FY 2012-13, the assessee by placing reliance on the judgment of Hon'ble Calcutta High Court in case of Exide Industries v. Union of India [2007] [164 taxman 9], had claimed deduction towards provision of leave encashment on accrual basis despite specific provisions of section 43B(f) of the Act which provides for deduction only on the basis of actual payment. Accordingly, the payments made in subsequent years were not claimed since the claim of accrual was already made and the litigations were pending, as detailed below.

23. The A.O. during the assessment proceedings did not accept the claim in FY 2006-07 and FY 2012-13 relevant to the assessment years 2007-08 and 2013-14. Accordingly, the AO made an adjustment of INR 6,83,81,220 and INR 11,66,67,733 -respectively, to the total income in the assessment order under section 143(3) of the Act, for the said AY's. The ITAT in case of assessee for AY 2007-08 and AY

2013-14, has remitted the issue back to the file of the AO through order dated 16 January 2017 in I.T(TP).A No. 1092/Bang/2011 and order dated 25 October 2019 in ITA No. 368(Bang)/2018 respectively to decide the issue based on the outcome of the Hon'ble Supreme Court's decision in the case of Exide Industries.

24. Subsequently on 24.04.2020, the Hon'ble Supreme Court vide Civil Appeal 3545/2009 overruled the judgment of the Hon'ble Calcutta High Court in the case of Exide Industries and upheld the constitutional validity for deduction of leave encashment on payment basis under section 43B(f) of the Act. In view of the Hon'ble Supreme Court decision, the deduction on account of provision for leave encashment cannot be sustained. However, the assessee raised grounds 3 to 3.3 for allowing the deduction under section 43B(f) of the Act on the payments made towards leave encashment in AY 2016-17 which has not been claimed in the Return of Income for the year (the assessee also could not file the claim u/s 43B(f) of the I.T.Act before the DRP, since the Hon'ble Apex Court rendered the judgment subsequent to the DRP's directions).

25. We have heard rival submissions and perused the material on record. In the light of the decision of the Hon'ble Supreme Court in the case of Exide Industries (supra), the assessee will not be entitled to claim deduction on leave encashment on the basis of the provision. Taking into

consideration the circumstances under which the assessee did not claim a sum of Rs.7,59,06,267 being leave encashment actually being paid during the previous year relevant to Assessment Year 2016-2017 we are of the view that the assessee should be allowed leave encashment actually paid as per provisions of section 43B(f) of the Act. We remit the issue to the AO to verify the claim of the assessee and allow deduction to the assessee as per law after affording assessee opportunity of being heard. It is ordered accordingly.

Ground 4

26. No arguments were raised with reference to ground 4, hence, the same is rejected.

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

Order pronounced on this 27th day of September, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 27th September, 2022.

Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The DRP-1, Bangalore
4. The Pr.CIT-3, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore