**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"K" BENCH, MUMBAI**

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**
**SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 1837/MUM/2014**
**(Assessment Year: 2009-10)**

| | | |
|---|---|---|
| **M/s Deutsche Investor Services Private Limited,**<br>Block No. B-1, Nirlon Knowledge Park,<br>Western Express Highway,<br>Goregaon (East), Mumbai - 400063<br>[PAN: AACCD3788M] | ..... | **Appellant** |
| **The Deputy Commissioner of Income Tax – 6(2), Mumbai** | Vs<br>..... | **Respondent** |

**ITA No. 1157/MUM/2015**
**(Assessment Year: 2010-11)**

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| **M/s Deutsche Investor Services Private Limited,**<br>Block No. B-1, Nirlon Knowledge Park,<br>Western Express Highway,<br>Goregaon (East), Mumbai - 400063<br>[PAN: AACCD3788M] | ..... | **Appellant** |
| **The Assistant Commissioner of Income Tax – 12(2)(1), Mumbai** | Vs<br>..... | **Respondent** |

**ITA No. 1900/MUM/2017**
**(Assessment Year: 2012-13)**

| | | |
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| **M/s Deutsche Investor Services Private Limited,**<br>3rd Floor Block No. B-1, Nirlon Knowledge Park, Western Express Highway,<br>Goregaon (East), Mumbai - 400063<br>[PAN: AACCD3788M] | ..... | **Appellant** |
| **The Deputy Commissioner of Income Tax – 12(2)(1), Mumbai,**<br>Room No. 223/262, 2nd Floor,<br>Aayakar Bhavan, M.K. Marg,<br>Mumbai - 400020 | Vs<br>..... | **Respondent** |

**Appearance**

| | | |
|---|---|---|
| For the Appellant/Assessee | : | Shri Jehangir D Mistri, Sr. Advocate<br>Ms. Nikhila Bhalla |
| For the Respondent/Department | : | Ms. Samruddhi Hande |

**Date**

| | | |
|---|---|---|
| Conclusion of hearing | : | 15.02.2023 |
| Pronouncement of order | : | 11.05.2023 |

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**O R D E R**

**Per Rahul Chaudhary, Judicial Member:**

1. These are three appeals pertaining to Assessment Year 2009-10, 2010-11 & 2012-13 preferred by the Assessee. Since the appeals involved common issues, the same were heard together and are, therefore, being disposed by way of a common order.

**ITA No. 1837/MUM/2014 (Assessment Year 2009-10)**

2. We would first take up appeal for the Assessment Year 2009-10 which is directed against the Assessment Order dated, 08/01/2014, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 02/12/2013, issued by the Dispute Resolution Panel-1, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act.

3. The Appellant has raised the following grounds of appeal:

> *"1. On the facts and in the circumstances of the case and in law, the learned Transfer Pricing Officer (TPO) and the learned Assessing Officer ('AO') under directions issued by the Hon'ble Dispute Resolution Panel ('DRP'), erred in making an addition of Rs. 1,45,07,583 to the Appellant's total income based on the provisions of Chapter X of the Act.*
>
> *Support Services in relation to Product Development*
>
> *2. On the facts and in the circumstances of the case and in law,*

*the learned TPO erred and the Hon'ble DRP further erred in arbitrarily equating the low end support services rendered by the assessee with the high end Knowledge Process Outsourcing ("KPO") services.*

3. *On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO of disregarding the benchmarking analysis and comparable companies selected by the Appellant (which were engaged in providing system integration, software testing and IT Infrastructure Management etc.) based on the contemporaneous data in the Transfer Pricing Study Report maintained as per section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 (the Rules') and the various submissions made by the Appellant.*

4. *On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding confirming the action of the TPO of applying a set of inappropriate additional filters without finding any deficiency in the filters applied by the Appellant.*

5. *On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding / confirming the action of the learned TPO of benchmarking /comparing the Support Services of the Appellant with:*

   a) *Functionally non-comparable companies;*

   b) *Companies engaged in rendering high-end services such as knowledge processing services, engineering design services, etc;*

   c) *Companies having different business model,*

   d) *Companies whose data is not available; and*

   e) *Companies having peculiar economic circumstances.*

6. *On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding / confirming the action of the learned TPO of using data, not available in public domain as on specified date (as defined in Section 92F(iv) of the Act read with Rule 10B(4) of the Rules) or during the course of the assessment proceedings.*

7. *On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in*

*upholding / confirming the action of the TPO in rejecting the without prejudice contention of the Appellant to consider the correct margin of alleged comparable companies computed based on the annual report available in the public domain.*

*Registrar & Transfer Agency and Fund Accounting Services*

8. *On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in rejecting Datamatics Financial Services Limited on the ground that this company has incurred losses during two out of three years which is in violation of Rule 10B(2) of the Rules.*

9. *On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in rejecting MCS Limited on the ground that this company is showing diminishing revenue pattern and has incurred extra ordinary loss.*

10. *On the facts and in the circumstances of the case and in law, the learned AO erred in ignoring the segmental profit and loss account submitted by the Appellant to the DRP and thereby arbitrarily splitting the cost for the transaction with Indian associated enterprises vis-à-vis overseas associated enterprises based on the turnover.*

*General*

11. *On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO in not allowing risk adjustment in accordance with Rule 10B(1)(e)(iii) of the Rules, to account for difference in the net profit margins realised by the Appellant vis-a-vis alleged comparable uncontrolled transactions selected by the learned AO/TPO.*

12. *On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO in rejecting the without prejudice contention of the Appellant to compute the margin of alleged comparable companies based on multiple year financial data.*

13. *On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO in denying the benefit / reduction of 5 percent from the arithmetic mean as provided in proviso to Section 92C(2) of the Act, while*

*computing the adjustment to the total income of the Appellant.*

*14. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in confirming the action of the TPO in not stating any reasons to show that either of the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied before making an adjustment to the income of the Appellant*

*The Appellant prays that the adjustment in relation to transfer pricing matters made by the learned AO/ TPO and upheld by the Hon'ble DRP be deleted.*

*The Appellants pray that the AO be directed suitably in the matter.'*

4. The relevant facts in brief are that the Appellant is a private limited company incorporated under the provisions of Companies Act, 1956 holding a valid registration with Securities & Exchange Board of India (SEBI) as Category-1 Registrar. The Appellant filed Return of Income for the Assessment Year 2009-10 on 27.09.2009 declaring 'NIL' income and claiming current year losses of INR 4,13,95,470/-. The Return of Income was processed under Section 143(1) of the Act and refund of INR 5,11,35,060/- was issued to the Appellant. Subsequently, the case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Appellant has entered into the international transactions with its Associated Enterprises (AEs) and therefore, a reference was made under Section 92CA(1) to the Transfer Pricing Officer (TPO) for the determination of Arm's Length Price (ALP) of the international transactions.

5. The TPO noted that the Appellant has provided (a) marketing support services for Direct Security Services (DSS) product suite Deutsche Bank AG, India Branch (for short 'DB India'), (b) Registrar & Transfer Agency (RTA) and Fund Accounting (FA) services to Associated

Enterprises (AEs), and (c) support services to AEs for customization of application system for RTA business in relation to software being developed by a third party Indian vendor. The TPO, vide order, dated 15.01.2013 passed under Section 92CA(3) of the Act, proposed transfer pricing adjustment aggregating to INR 5,40,74,689/- consisting of the following:

(a) Transfer Pricing Adjustment of INR 1,00,08,521/- in respect of Marketing Support Services

(b) Transfer Pricing Adjustment of INR 3,07,22,311/- in respect of FA Services

(c) Transfer Pricing Adjustment of INR 1,33,43,857/- in respect of Support Services for product development

6. The above transfer pricing adjustments were incorporated in the Draft Assessment Order, dated 14.03.2013. The Appellant filed objections to the aforesaid transfer pricing adjustments proposed in the Draft Assessment Order, dated 14.03.2013, before DRP. The DRP, vide order dated 02.12.2013, disposed off the aforesaid objections and issue certain directions. The DRP deleted the Transfer Pricing Adjustment of INR 1,00,08,521/- in respect of Marketing Support Services. In relation to Transfer Pricing Adjustment of INR 3,07,22,311/- in respect of FA Services, the DRP rejected the challenge to exclusion of Datamatics Financial Services Limited and MCS Limited from the list of comparables. However, the DRP found merit in the contention on behalf of the Appellant that the Revenues earned by DB India were taxable in India at a higher rate of 43.23% and therefore, the DRP concluded that the Appellant would be entitled to release in respect of Transfer Pricing Adjustment proposed by the TPO in relation to sums received from DB India. Therefore, DRP directed the Assessing Officer to verify the claim of the Appellant in this regard and calculate the Transfer Pricing Adjustment

on the basis of sums received from other AEs. In relation to the Transfer Pricing Adjustment of INR 1,33,43,857/- pertaining to Support Services for product development, the DRP rejected the objections raised by the Appellant regarding selection of the final set of five comparables consisting of (i) eClerx Services Limited, (ii) Accentia Technologies Limited, (iii) Cosmic Global Limited, (iv) Coral Hub Limited (Formerly Vishal Information Technologies Limited), and (v) Crossdomain Solutions Private Limited. Further the DRP also did not find any merit in the objections raised by the Appellant against the rejection of the set of six comparables selected by the Appellant consisting of (i) Firstobject Technologies Limited, (ii) Thinksoft Global Services Limited, (iii) KPIT Cummins Global Business Solutions Limited, (iv) Dynacons Systems and Solutions Private Limited, (v) Maveric System Limited, and (vi) Microland Limited. On the basis of the aforesaid direction issued by the DRP, the Assessing Officer passed the Final Assessment Order, dated 08.01.2014, computing the loss for the Assessment Year 2009-10 at INR 2,68,87,880/- (as opposed to the returned loss of INR 4,13,95,466/-) after making upward Transfer Pricing Adjustment of INR 1,45,07,583/- which consisted of the following:

| Sr.No. | Particulars of Transfer Adjustment | Amount (INR) |
|---|---|---|
| 1. | Marketing Support Services | Nil |
| 2. | FA Services | 11,63,726/- |
| 3. | Support Services for product development | 1,33,43,857/- |
| | Total | 1,45,07,583/- |

7. Being aggrieved, the Appellant is now in appeal before us challenging the Final Assessment Order, dated 08.01.2014, on the grounds reproduced in paragraph 3 above. Ground No. 1 & 11 to 14 raised by

the Appellant is general in nature, Ground No. 2 to 7 are directed against Transfer Pricing Adjustment in respect of Support Services in relation to Product Development, and Ground No. 8 to 10 are directed against Transfer Pricing Adjustment pertaining to FA Services. We have considered the rival contention/submissions advanced by the Learned Senior Counsel and the Learned Departmental Representative and perused the material on record including the judicial precedents cited during the course of hearing.

Ground No. 2 to 7

8. The facts relevant to the adjudication of grounds under consideration are that during the relevant previous year the Appellant had provided Support Services to AEs in relation to customization/development (third party) of application system for RTA business. According to the Appellant the nature of services provided by the Appellant were liaisoning and other support services. The Appellant benchmarked the aforesaid international transaction using Transaction Net Margin Method (TNNM) as the most appropriate method with 'net profit/total operating cost' as Profit Level Indicator (PLI). The Appellant select a set of six comparables and computed the PLI as under:

| **Sr. No.** | **Particulars** | **2007 NCP %** | **2008 NCP %** | **2009 NCP %** | **Weighted Average** |
|---|---|---|---|---|---|
| 1 | Dynacons Systems and Solutions Private Limited | 2.81 | 2.76 | 4.12 | 3.23 |
| 2 | Firstobject Technologies Limited | 9.58 | 5.09 | 8.52 | 7.32 |
| 3 | KPIT Cummins Global Business Solutions Limited | 31.99 | (9.02) | NA | 6.79 |
| 4 | Maveric Systems Limited | 28.02 | 24.31 | 15.14 | 20.88 |
| 5 | Microland Limited | (0.87) | 1.10 | 1.80 | 0.85 |
| 6 | Thinksoft Global Services Limited | 19.71 | 16.94 | NA | 18.12 |
| | Arithmetic Mean | | | | 9.53 |

9. On the basis of above, the Appellant computed arithmetic mean of the weighted average 'net profit/total operating cost' at 9.53% and concluded that 'net profit/total operating cost' of 7.6% earned by the Appellant in respect of Support Services Product Development was within the permitted variation of +/- 5% of the arms length price and therefore, no Transfer Pricing Adjustment was warranted.

10. However, TPO took into consideration only companies whose data for the Financial Year 2008-09 was available as according to the TPO the Appellant was not able to justify the reason for using data for preceding two Financial Years. In addition to the filter applied by the Appellant which were found appropriate, the TPO applied addition filters to come up with the list of six comparables out of which one comparable (i.e. Genpact India Pvt. Ltd.) was excluded by accepting the objection raised by the Appellant on account of failure to qualify the related party transaction filter. Thus, the TPO arrived at the final set of five comparables and computed the PLI, ALP and amount of Transfer Pricing Adjustment as under:

| **Sr. No.** | **Name of the Company** | **NCP** |
|---|---|---|
| 1 | Cosmic Global Limited | 40.61 |
| 2 | Coral Hub Limited (Formerly Vishal Information Technologies Limited) | 35.48 |
| 3 | Crossdomain Solutions Private Limited | 29.40 |
| 4 | eClerx Services Limited | 57.34 |
| 5 | Accentia Technologies Limited | 52.50 |
| | Arithmetical Mean/Arms Length Margin | 43.07 |

| S.No. | Particulars | Amount (INR) |
|---|---|---|
| A. | Operating Cost | 3,76,20,128 |
| B. | ALP (100+43.07)% of Operating Cost | 5,38,23,117 |
| C. | Price Charged | 4,04,79,260 |
| | Shortfall/Transfer Pricing Adjustment | 1,33,43,857 |

11. Thus, the TPO proposed Transfer Pricing Adjustment of INR 1,33,43,857/- in respect of Support Services for product development which was incorporated in the Draft Assessment Order. The objections against the aforesaid proposed Transfer Pricing Adjustment were rejected by the DRP and therefore, the Assessing Officer made an addition Transfer Pricing Addition of INR 1,33,43,857/- in the Final Assessment Order.

12. Being aggrieved, the Appellant has challenged the above Transfer Pricing Adjustment in appeal before us by way of Ground No. 2 to 7 reproducing Paragraph 3 above.

13. On perusal to Ground No. 2 to 7 can be seen that the Appellant has, in effect, sought exclusion of the final set of five comparables selected by the TPO for the purpose of benchmarking support services in relation to product development and the inclusion of the set of six comparables originally selected by the Appellant. The Ld. Senior Counsel appearing on behalf of the Appellant submitted that the grievance of the Appellant would be addressed in case of the contention of the Appellant regarding rejection of the set of five comparables selected by the TPO and the inclusion of two comparables selected by the Appellant are accepted as the same

would result in 'Nil' Transfer Pricing Adjustment in the hands of the Appellant. In this regard, he referred to the *'Transfer Pricing Synopsis'* for the Assessment Year 2009-10 placed on record showing the impact of rejection/inclusion as aforesaid on the Transfer Pricing Adjustment. Accordingly, we proceed to examine issue of inclusion/exclusion the aforesaid comparables.

eClerx Services Limited

14. During the Appellate proceedings before us the rejection of eClerx Services Limited (for short 'eClerx') was sought by the Appellant, inter alia, on the ground that eClerx, was engaged in providing data analytics & data processing solutions, and also on account of non-availability of the segmental data. On perusal of annual report of eClerx for 2008-09 (placed at Page 1055 to 1150 of the paper-book), we find that eClerx was providing data analytics and data process solutions to its clients by using proprietary processes. The income from operations consisted of revenues from data analytics services and process solutions arising from time/unit price and fixed fee based service contracts. As per Note 3 – Segment Reporting of the Notes to Accounts forming part of Schedule-O to the Financial Statements eClerx operated under single primary segment i.e. data analytics and process outsourcing services and therefore, the relevant segmental data was not available. Further, while the Appellant was providing support services, eClerx was providing data analytics and data process solutions to its clients by using proprietary processes. Therefore, in the facts and circumstances of the present case we are not inclined to accept the contention of the Revenue that eClerx should be selected as a comparable as it is providing services in the nature of ITeS which are broadly

comparable with the support services provided by the Appellant. In view of the aforesaid, we direct exclusion of eClerx from the list of comparables and re-computation of ALP/Transfer Pricing Adjustment accordingly.

Accentia Technologies Limited

15. During the Appellate proceedings before us, the Appellant has sought rejection of Accentia Technologies Limited (for short 'ATL'), inter alia, on the ground that ATL, was engaged in providing medical transcription, medical billing, receivable management, practice management consulting, coding and software products, and also on account of non-availability of the segmental data. On perusal of the 18th annual report - 2008-09 of ATL *(placed at Pages 779 to 869 of the paper-book)* consisting of standard alone financial statements of ATL (at Page 828 to 846) and consolidated financial statements (at Page 847 to 861), we find that ATL's income from operations aggregating to INR 80,14,40,931/- consisted of income from medical transcription (INR 48,90,20,303/-), billing & collection (INR 16,01,79,905/-), income from coding (INR 13,80,07,444/-) and interest on Fixed Deposit (INR 1,42,33,279/-). However, as per 'Note 12 – Segment Information' of Notes to Accounts forming part of the financial statements ATL had only one segment of activity namely healthcare receivable management and therefore, segment reporting was not done. While ATL was planning to diversify into data process outsourcing and legal process outsourcing in non-healthcare BPO space, no such activity was under taken by ATL during the relevant previous year. On perusal of consolidated Profit & Loss Account, we find that 'Schedule 8 – Income' reflects Income from Software Development & Sales of INR 2,43,07,997/-. However, again the

segmental reporting has not been done. Therefore, in the facts and circumstances of the present case we hold that in absence of relevant segmental data ATL cannot be selected as a comparable. Accordingly, we direct exclusion of ATL from the list of comparables and re-computation of ALP/Transfer Pricing Adjustment accordingly.

Cosmic Global Limited

16. During the Appellate proceedings before us the rejection of Cosmic Global Limited (for short 'CGL') was sought by the Appellant, inter alia, on the ground that CGL was engaged in Translation, Location and Voiceovers, Multi lingual Desktop publishing, Accounts processing and Transcription was not functionally comparable with the Appellant as 95% of its revenue came from translating business. Further, 57% of its total operating cost consists of 'translation charges' which shows that CGL outsources services to a third party vendor whereas the appellant under take services on its own. We have perused the annual report of CGL for Financial Year 2008-09 placed at Page 870 to 887 of the paper-book. We find that the averments made by the Appellant are factually correct. Out of total revenue of INR 7,37,02,584/- earned by CGL, revenues of INR 6,99,35,756/- are from translation charges earned. Further, we find merit in the contention on behalf of the Appellant that CGL outsources translation work to third parties as out of the total expenditure of INR 5,24,15,463/-, around 57% of the expenses (i.e. INR 3,00,25,326/-) have been incurred on translation charges. Thus, 95% of the revenues and 57% of the expenditure relate to translation business under taken by CGL. The revenues from BPO services are disclosed that INR 27,76,090/- whereas the corresponding break up of expenses is not available. In our view,

given the aforesaid differences in the business and the business models of CGL and the Appellant, CGL cannot be considered to be comparable. Our aforesaid view draws strength from the decision of Mumbai Bench of the Tribunal in the case of VFS Global Services Pvt. Ltd. vs. DCIT, Range-1(2), Mumbai, (1847/Mum/2014, 27.04.2016 reported in [2017] 82 taxmann.com 110 (Mumbai - Trib.) wherein it has been held that CGL being engaged in providing translation services and medical transcription business is not a comparable to ITES providers. Accordingly, we direct exclusion of CGL from the list of comparables and re-computation of ALP/Transfer Pricing Adjustment.

Coral Hub Limited (Formerly Vishal Information Technologies Limited)

17. In the Appellate proceedings before us exclusion of Coral Hub Limited (Formerly Vishal Information Technologies Limited) [for short 'CHL'] was sought to be excluded as a comparable on the ground that it was functionally different as it was engaged in Data Capture & Digitization, Data Conversion, E-publishing, Digital Library Solutions, Fund Accounting Services, etc. On perusal of the 15th Annual Report: 2008-09 of CHL (placed at Page 896 to 1033 of paper-book) we find that CHL was primarily engaged in ITeS and had following subsidiaries: (a) Basiz Fund Services Pvt. Ltd., (b) Coral Hub Online Services Pvt. Ltd. (formerly known as Tutis Digital Publishing Pvt. Ltd.) engaged in the business of selling books through online stores, (c) Digital Contents Solution Ltd., UK involved in participation of tenders which specialize in providing financial reporting services and NAV support services to third party administrators and fund managers. Therefore, the consolidated Profit & Loss Account reflected income as under:

"Schedule 13 – Income

| | |
|---|---|
| Income from IT enabled services | 61,08,57,165 |
| Income from Sale of books | 39,87,321 |
| Preparation of Financial Statements | 2,74,76,696 |
| NAV Accounting for International funds | 60,54,141 |
| Liquidity Monitoring Services | 21,08,506 |
| xx | xx ……." |

18. Thus, on a consolidated basis CHL along with its subsidiaries was engaged in Data Capture & Digitization, Data Conversion, E-publishing, Digital Library Solutions, Fund Accounting Services, etc., whereas on a standalone basis CHL was only involved in IT enabled services Profit & Loss Account of CHL shows sales of INR 61,08,57,165/- only. As per 'Schedule 13 – Income'' forming part of standalone financial statements of CHL (at page 969 of the paper-book), the aforesaid consists of income from ITeS only. However, we find merit in the contention advanced by the on behalf of the Appellant that CHL outsources services to third party whereas the Appellant undertakes services on its own. As per 'Schedule 14 – Operating Expenses' [placed at Page 970 of the paper-book] the data entry charges and vendor payments made by CHL constitute around 89% of the total Operating Expenses. Further, the 'Personnel Cost' of INR 1,22,28,432/- incurred by the CHL is around 3% of the Operating Expenses. In our view, given the aforesaid differences in the business models of CHL and the Appellant, CHL cannot be considered to be comparable. Our aforesaid view draws strength from the decision of Mumbai Bench of the Tribunal in the case of VFS Global Services Pvt. Ltd. vs. DCIT, Range-1(2), Mumbai, (1847/Mum/2014, 27.04.2016 reported in [2017] 82 taxmann.com 110 (Mumbai - Trib.) wherein it has been observed that CHL (formerly Vishal Technologies Ltd.), having outsourced substantial

part of its business to third party vendors cannot be held as a comparable to a company which does the work itself. Accordingly, we direct exclusion of CGL from the list of comparables and re-computation of ALP/Transfer Pricing Adjustment accordingly.

Crossdomain Solutions Private Limited

19. It was contended before us that Crossdomain Solutions Pvt. Ltd. (for short 'CSPL') should be rejected as a comparable on account of non-availability of profit and loss data from the relevant period in public domain. The TPO had erred in computing profitability based upon the limited information available in the Director's report. Further, the TPO has, for Assessment Year 2010-11, rejected CSPL as a comparable for the aforesaid reasons. We have perused the order dated 30.11.2013 passed by the TPO under Section 92CA(3) of the Act for the Assessment Year 2010-11 and find that CSPL has been rejected as data regarding Profit & Loss Account was not available in public domain. We have perused the Annual Report of CSPL placed at Page 1034 to 1053 of the paper-book and find that only the Balance Sheet position has been disclosed. The contention of the Appellant that the Profit & Loss Account for Financial Year 2008-09 was not available in public domain has not been controverted and gets support from the order passed by TPO for the Assessment Year 2010-11. Therefore, we hold that on account of non-availability of the Profit & Loss Statement, CSPL be excluded from the list of comparables and direct re-computation of ALP/Transfer Pricing Adjustment accordingly.

Firstobject Technologies Limited

20. Firstobject Technologies Limited (for short 'FTL') was selected by the

Appellant as a comparable. However, the TPO rejected the same on the ground that FTL offered ITeS services, however, the major chunk of its activities consisted of re-engineering services, data migration services, testing services and performance testing. Therefore, FTL was not functionally comparable with the Appellant. However, on perusal of Annual Report of FTL for the Financial Year 2008-09 we find that as per Note 8 of Notes to Accounts forming part of the Schedule 10 to the Financial Statements, during the relevant period, FTL only data entry work. The relevant extract of Notes to Accounts reads as under:

> *" 8. The Company is engaged primarily in the business of software development, but during the current financial year the company did only data entry works and accordingly there are no separate reportable segments as per Accounting Standard – AS 17 – Segment Reporting issued by ICAI."*

Thus, the services provided by FTL can be considered broadly similar to Support Services in relation to product development carried on by the Appellant during the relevant period. Further, as per order dated 30.11.2013 passed under Section 92CA(3) of the Act, the TPO has accepted FTL as functionally comparable to the Appellant for the Assessment Year 2010-11.

21. Accordingly, in view of the above we direct the Assessing Officer to include FTL in the list of comparables and re-computation of ALP/Transfer Pricing Adjustment accordingly.

Thinksoft Global Services Limited

22. Thinksoft Global Services Limited (for short 'TGS') was selected by the Appellant as a comparable. However, the TPO rejected TDS on the ground that it was an independent business assurance and

testing specialties. On perusal of standalone financial for Financial Year 2008-09 forming part of the Annual Report of TGS (placed at Page 535 to 580 of the paper-book) we find that TGS engaged in providing software validation verification services to the Banking and Financial Services Industry. The Software Services Income earned by the TGS consists of revenue from software testing and constitutes the only primary reportable segment. Therefore, we find merit in the contention on behalf of the Appellant that services provided by TGS are comparable to the Support Services in relation to product development provided by the Appellant. Our aforesaid view draw strength from the fact that as per order dated 30.11.2013 passed under Section 92CA(3) of the Act for the Assessment Year 2010-11 TGS has been accepted as an comparable by the TPO. Further, the contention of the Appellant that for Assessment Year 2011-12 the DRP has accepted TGS as a comparable and that there is no change in the functions performed during the Assessment Year 2009-10, 2010-11 & 2011-12 has not been controverted by the Revenue. Therefore, in view of the aforesaid, we hold TGS to be functionally comparable for benchmarking the support services in relation to product development provided by the Appellant and accordingly, direct the Assessing Officer to include TGS in the list of comparables and re-computation of ALP/Transfer Pricing Adjustment accordingly.

23. We have accepted the contention of the Appellant seeking exclusion of five comparables (i.e. eClerx, ATL, CGL, CHL, & CSPL) and inclusion of 2 comparables (i.e. FTL & TGS) from the final list of comparables. Therefore, according to the Appellant the issue relating to inclusion of the balance four comparables (i.e. KPIT Cummins Global Business Solutions Limited, Dynacons Systems and Solutions Private Limited, Maveric System Limited & Microland Limited) has

become academic. Accordingly, we are not required to examine/adjudicate upon inclusion of the same. In terms of the aforesaid, Ground No. 2 to 7 raised by the Appellant are partly allowed.

Ground No. 8 to 10

24. Ground No. 8 to 10 pertain to Transfer Pricing Adjustment of in relation to FA Services. The TPO had proposed Transfer Pricing Adjustment of INR 3,07,22,311/- in respect of FA Services which was incorporated in the Draft Assessment Order. However, the DRP granted partial relief to the Appellant. While on one hand the DRP rejected the challenge to exclusion of Datamatics Financial Services Limited and MCS Limited from the list of comparables, on the other hand, the DRP found merit in the contention on behalf of the Appellant that the Revenues earned by DB India were taxable in India at a higher rate of 43.23% and therefore, the DRP concluded that the Appellant would be entitled to release in respect of Transfer Pricing Adjustment proposed by the TPO in relation to sums received from DB India. Therefore, DRP directed the Assessing Officer to verify the claim of the Appellant in this regard and calculate the Transfer Pricing Adjustment on the basis of sums received from other AEs. While implementing the aforesaid directions of the DRP the Assessing Officer made Transfer Pricing Adjustment of INR 11,63,726/- in the Final Assessment Order.

25. The Ld. Senior Counsel for the Appellant pressed into service Ground No. 10 raised by the Appellant and submitted that the Assessing Officer has erred in ignoring the Segmental Profit & Loss Account submitted by the Appellant while implementing the directions of the DRP at the time of passing the Final Assessment Order to incorrectly

arrive at Transfer Pricing Adjustment of INR 11,63,726/- in respect of FA Services. The Transfer Pricing Adjustment has been recomputed by the Assessing Officer by arbitrarily splitting the cost for the transactions with Indian AEs vis a vis overseas AEs on the basis of turnover. He submitted that the grievance of the Appellant would be addressed in case the Assessing Officer is directed to implement the directions issued by DRP by taking into account the segmental Profit and Loss Account filed by the Appellant before the DRP. The Ld. Departmental Representative did not dispute that the DRP had, taking into account the fact that revenues earned by DB India were taxable in India at a higher rate of 43.23%, directed Assessing Officer to verify the claim of the Appellant in this regard and re-calculate the Transfer Pricing Adjustment. Accordingly, accepting the aforesaid contention advanced on behalf of the Appellant, we direct the Assessing Officer to implementing the direction issued by DRP and re-compute the quantum of Transfer Pricing Adjustment, if any, by taking into consideration the Segmental Profit & Loss Account furnished by the Appellant before the DRP. In terms of the aforesaid Ground No. 10 raised by the Appellant is allowed for statistical purposes while Ground No. 8 & 9 raised by the Appellant are, as agreed by both the sides, dismissed as being infructuous.

Ground No. 1 & 11 to 14

26. Both the sides agreed that Ground No. 1 & 11 to 14 do not require adjudication. Accordingly, Ground No. 1 & 11 to 14 are dismissed.

In result, the present appeal preferred by the Appellant is partly allowed.

**ITA No. 1157/MUM/2015 (Assessment Year 2010-11)**

27. We would now take up appeal for Assessment Year 2010-11 which is directed against the Assessment Order dated, 23/12/2014, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 12/11/2014, issued by the Dispute Resolution Panel-1, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act.

28. The Appellant has raised the following grounds of appeal:

> *"1. On the facts and in the circumstances of the case and in law, the learned Assessing Officer (AO) under directions issued by the Hon'ble Dispute Resolution Panel ('DRP'), erred in making an addition of Rs. 1,08,89,958 to the Appellant's total income based on the provisions of Chapter X of the Act.*
>
> *2. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in disregarding the detailed functional, asset and risk analysis carried out by the assessee and arbitrarily classifying the services rendered by the Assessee as Information Technology enabled Services.*
>
> *3. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO of disregarding the benchmarking analysis and comparable companies selected by the Appellant (which were engaged in providing system integration, software testing and IT Infrastructure Management etc.) based on the contemporaneous data in the Transfer Pricing Study Report maintained as per section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ("the Rules") and the various submissions made by the Appellant.*
>
> *4. On the facts and in the circumstances of the case and in law, the learned AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO of applying a set of inappropriate additional filters without finding any deficiency in the filters applied by the Appellant.*

*5. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO in cherry picking the set of comparables engaged medical transcription services / engineering designing services/translation services without demonstrating the functional comparability of the such companies with the Appellant and without conducting a systematic and detailed search process.*

*6. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding confirming the action of the learned TPO of benchmarking /comparing the Support Services (liasioning, system testing, data migration and other support services) of the Appellant with companies rendering medical transcription, translation and engineering design services.*

*7. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding / confirming the action of the learned TPO of benchmarking the Support Services of the Appellant with companies having different business model and / or companies having peculiar economic circumstances.*

*8. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO in disregarding the multiple year analysis undertaken by the assesse in accordance with rule 10B(4) of the rules for computing the margins of the comparables.*

*9. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO in not providing appropriate adjustments as per Rule 10B(1)(e)(iii) of the Rules.*

*10. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in confirming the action of the TPO in not stating any reasons to show that either of the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied before making an adjustment to the income of the Appellant.*

*The Appellant prays that the adjustment in relation to international transaction of provision of Support Services made by the learned AO/ TPO and upheld by the Hon'ble DRP be deleted.*

*The Appellants pray that the AO be directed suitably in the matter."*

29. On perusal of grounds of appeals raised by the Appellant for Assessment Years 2009-10 & 2010-11, we find that (a) Ground No. 1 is general in nature, (b) the contention raised in Ground No. 2 to 7 of the appeal for Assessment Year 2010-11 are identical to the contention raised in Ground No. 2 to 7 of the appeal for the Assessment Year 2009-10, and (c) the contention raised in Ground No. 8 to 10 of the appeal for Assessment Year 2010-11 are identical to the contentions raised in Ground No. 11, 12 & 14 of appeal for the Assessment Year 2009-10. Both the sides agreed that the facts and circumstances prevailing in the Assessment Year 2010-11 are identical to Assessment Year 2009-10 and therefore, our findings/adjudication in respect of issues raised in appeal for the Assessment Year 2009-10 shall apply mutatis mutandis to the corresponding issues raised in appeal for the Assessment Year 2010-11. In the aforesaid background we proceed to examine the issue raise in appeal for Assessment Year 2010-11.

30. The relevant facts in brief are that the Appellant filed Return of Income for the Assessment Year 2010-11 on 08.10.2010 declaring 'NIL' income after setting off income of INR 18,43,38,663/- with the brought forward losses. The Return of Income was processed under Section 143(1) of the Act and refund of INR 1,65,46,700/- was issued to the Appellant. Subsequently, the case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Appellant has entered into the international transactions with its Associated Enterprises (AEs) and therefore, a reference was made under Section 92CA(1) to the Transfer Pricing Officer (TPO) for the determination of Arm's Length

Price (ALP) of the international transactions.

31. The TPO noted that during the relevant previous year the Appellant had provided Support Services to AEs in relation to customization/development (third party) of application system for RTA business as was the case in Assessment Year 2009-10. The Appellant benchmarked the aforesaid international transaction using Transaction Net Margin Method (TNNM) as the most appropriate method with 'net profit/total operating cost' as Profit Level Indicator (PLI). The Appellant select a set of 6 comparables and computed the PLI as under:

| **Sr.No.** | **Particulars** | **2009-10 NCP(%)** |
|---|---|---|
| 1 | Dynacons Systems and Solutions Private Limited | 3.57 |
| 2 | Firstobject Technologies Limited | 24.48 |
| 3 | Indium Software (India) Limited | 3.73 |
| 4 | Maveric Systems Limited | 14.60 |
| 5 | Microland Limited | 0.46 |
| 6 | Thinksoft Global Services Limited | 11.82 |
| | Arithmetic Mean | 9.78 |

32. On the basis of above, the Appellant computed arithmetic mean of the weighted average 'net profit/total operating cost' at 9.78% and concluded that 'net profit/total operating cost' of 7.6% earned by the Appellant in respect of Support Services Product Development was within the permitted variation of +/- 5% of the arms length price and therefore, no Transfer Pricing Adjustment was warranted.

33. However, TPO, by applying filters in addition to the filters applied by

the Appellant which were considered by the TPO to be appropriate, the TPO accepted two comparables proposed by the Appellant (i.e. Firstobject Technologies Ltd. and Thinksoft Global Services Ltd.). Further, the TPO included Accentia Technologies Ltd., Acropetal Technologies Limited (Segmental) and Cosmic Global Ltd. as comparable to arrive at the final set of five comparables computed the PLI, ALP and amount of Transfer Pricing Adjustment as under:

| Sr. No. | Name of the Company | NCP |
|---|---|---|
| 1 | Accentia Technologies Limited | 43.85 |
| 2 | Acropetal Technologies Limited (Segment) | 33.92 |
| 3 | Cosmic Global Limited | 14.97 |
| 4 | Firstobject Technologies Limited | 24.48 |
| 5 | Thinksoft Global Services Limited | 11.82 |
| | Arithmetical Mean/Arms Length Margin | 25.80 |

| S.No. | Particulars | Amount (INR) |
|---|---|---|
| A. | Operating Cost | 5,98,34,932 |
| B. | ALP (100+25.80)% of Operating Cost | 7,52,72,344 |
| C. | Price Charged | 6,43,82,386 |
| | Shortfall/Transfer Pricing Adjustment | 1,08,89,958 |

34. Thus, TPO, vide order, dated 30.11.2013 passed under Section 92CA(3) of the Act, proposed a Transfer Pricing Adjustment of INR 1,08,89,958/- in respect of Support Services for product development. In addition, the TPO also proposed Transfer Pricing Adjustment of INR 37,09,756/- in respect of Marketing Support

Services. The aggregate transfer pricing adjustments of 1,45,99,714/- proposed by the TPO was incorporated in the Draft Assessment Order, dated 11.02.2014.

35. The Appellant filed objections to the aforesaid Transfer Pricing Adjustments proposed in the Draft Assessment Order, dated 11.02.2014, before DRP. The DRP, vide order dated 12.11.2014, disposed off the aforesaid objections and issue certain directions. The DRP deleted the Transfer Pricing Adjustment of INR 37,09,756/- in respect of Marketing Support Services by following the order passed by DRP for the Assessment Year 2009-10. In relation to the Transfer Pricing Adjustment of INR 1,08,89,958/- pertaining to Support Services for product development, the DRP rejected the objections raised by the Appellant regarding selection Accentia Technologies Limited (for short 'ATL'), and Cosmic Global Limited (for short 'CGL') by following the DRP order for the Assessment Year 2009-10. Further the DRP also did not find any merit in the objections raised by the Appellant against the inclusion of Acropetal Technologies Limited (for short 'Acropetal') as a DRP concluded that the TPO had selected only engineering design service segment for benchmarking the transactions.

36. On the basis of the aforesaid direction issued by the DRP, the Assessing Officer passed the Final Assessment Order, dated 23.12.2014, computing the assessed income for the Assessment Year 2009-10 at 'Nil' after making upward Transfer Pricing Adjustment of INR 1,08,89,958/- in respect of Support Services for Product Development and setting off brought forward losses.

37. Being aggrieved, the Appellant preferred appeal before the Tribunal

challenging the Final Assessment Order, dated 23.12.2014, on the grounds reproduced in paragraph 26 above.

Ground No. 1

38. Ground No. 1 raised by the Appellant is general in nature and does not require any adjudication. Accordingly, Ground No. 1 is dismissed.

Ground No. 2 to 7

39. On perusal to Ground No. 2 to 7 we find that the Appellant has, in effect, sought exclusion of the 3 comparables included by the TPO and inclusion of 4 comparables selected by the Appellant but rejected by the TPO for the purpose of benchmarking support services in relation to product development. The Ld. Senior Counsel appearing on behalf of the Appellant submitted that the grievance of the Appellant would be addressed in case of the contention of the Appellant regarding exclusion of three comparables selected by the TPO, (i.e. ATL, CGL & Acropetal) are accepted as the same would result in 'Nil' Transfer Pricing Adjustment in the hands of the Appellant. In this regard, he referred to the *'Transfer Pricing Synopsis - Support Services in relation to product development'* for the Assessment Year 2010-11 placed on record showing the impact of rejection as aforesaid on the Transfer Pricing Adjustment. Thus, the Appellant has pressed for the exclusion of the three comparables selected by the TPO (i.e. ATL, CGL & Acropetal) from the final set of five comparables used by the TPO for the purpose of benchmarking support services in relation to product development. Accordingly, we proceed to examine issue of exclusion the aforesaid comparables.

Accentia Technologies Limited and Cosmic Global Limited

40. As regards, exclusion of ATL & CGL are concerned both the sides

agreed that the facts and circumstances prevailing in Assessment Year 2009-10 and 2010-11 are identical, and therefore, our findings/adjudication for the Assessment Year 2009-10 in relation to the exclusion of ATL & CGL from the list of comparables shall apply mutatis mutandis for Assessment Year 2010-11 as well. Accordingly, in view of our reasoning, findings and adjudication in Paragraph 15 & 16 above, we direct the Assessing Officer/TPO to exclude ATL & CGL from the list of comparables and direct re-computation of ALP/Transfer Pricing Adjustment accordingly.

Acropetal Technologies Limited

41. As regards, exclusion of Acropetal, on perusal of Annual Report – 2010 (placed at page 283 to 325 of the paper-book), we find merit in the contentions advanced on behalf of the Appellant that Acropetal cannot be selected as a comparable on account of non-availability of reliable segmental data for the Financial Year 2009-10. As per Segmental Data reported in Note 17 of Notes to Accounts forming part of the Schedule No. 13 to Financial Statements, Acropetal operated in three business segments – Engineering Design Service, Information Technology Service & Heath Care. The Segmental Operating Income was arrived after deduction from Income, the Expenditure & Allocated Expenses. However, there are un-allocable expenses of INR 17,43,82,682/- which have not been allocated to any of the aforesaid three segments including Engineering Design Services Segment taken by the TPO. No information is available about the nature of these un-allocable expenses. In view of the aforesaid, the segmental data as reported by Acropetal for Engineering Design Service Segment cannot be used for benchmarking purposes. Accordingly, we direct exclusion of

Acropetal from the list of comparables and re-computation of ALP/Transfer Pricing Adjustment accordingly. Our aforesaid view is in line with the decision of the Mumbai Bench of the Tribunal in the case of DCIT, Circle-3(3)(1), Mumbai vs. Reliance Corporate IT Park Limited (ITA 1195/Mum/2020, dated 05.09.2022).

42. In view of the above, Ground No. 2 to 7 raised by the Appellant are partly allowed.

Ground No. 8 to 10

43. The contention raised in Ground No. 8 to 10 of the appeal for Assessment Year 2010-11 are identical to the contentions raised in Ground No. 11, 12 & 14 of appeal for the Assessment Year 2009-10. Both the sides agreed that Ground No. 8 to 10 do not require adjudication and therefore, the same are dismissed.

In result, the appeal preferred by the Appellant for Assessment Year 2010-11 is partly allowed.

**ITA No. 1900/MUM/2017 (Assessment Year 2012-13)**

44. We would now take up appeal for Assessment Year 2012-13 which is directed against the Assessment Order dated, 25/01/2017, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 22/11/2016, issued by the Dispute Resolution Panel-1, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act.

45. The Appellant has raised the following grounds of appeal:

*"(1) The Deputy Commissioner of Income-tax-12(2)(1), Mumbai [hereinafter referred to as the AO] while passing the order dated 25th January 2017 under section 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 ("the Act") in pursuance of directions of Dispute Resolution Panel I. Mumbai [hereinafter referred to as the DRP] erred in disallowing termination charges of Rs.5,00,00,000 by upholding that the appellant was not obliged to pay such termination charges under the Agreement during the year under appeal.*

*(2) The AO, in pursuance of directions of DRP erred in upholding that the obligation to pay the compensation charges of Rs.5,00,00,000 would arise only on or after 11.06.2012 and cannot be claimed as deduction in the year under appeal.*

*(3) Without prejudice to the above, and consistent with the directions of the DRP, the appellants submit that deduction for termination charges of Rs.5,00,00,000 should be allowed in computing the taxable income for the financial year 2012-13 relevant to the Assessment Year 2013-14.*

*(4) On the facts and in the circumstances of the case and in law, the learned Transfer Pricing Officer (TPO) and the learned AO, under the directions issued by the Hon'ble DRP, erred in making the transfer pricing adjustment of Rs. 47,31,452 to the Appellant's total income based on the provisions of Chapter X of the Act.*

*a) The learned TPO and the Hon'ble DRP erred in disregarding the benchmarking analysis and comparable companies selected by the Appellant basis the contemporaneous data in the Transfer Pricing Report maintained as per section 92D of the Act read with Rule 10D of the Rules and the various submissions made by the Appellant;*

*b) The learned TPO and the Hon'ble DRP erred in applying a set of inappropriate additional filters without finding any deficiency in the filters applied by the Appellant;*

*c) Without prejudice to above, the learned AO and the Hon'ble DRP erred in not relaxing the criteria of additional filters adopted by the TPO which resulted in elimination of the functional comparable companies.*

*d) The learned TPO and the Hon'ble DRP erred in cherry picking companies from the search process of the Appellant, thereby violating the principles of natural*

*justice with a pre-determined mind set of making an adjustment;*

*e) The learned TPO and the Hon'ble DRP erred in selecting functionally non-comparable companies ignoring the criteria laid down in Rule 10B(2) and (3) of the Rules;*

*f) The learned TPO and the Hon'ble DRP erred in selecting Acropetal Technologies Limited as a comparable despite the fact that it fails the export filter as applied by the TPO.*

*g) Without prejudice, the learned AO erred in not considering the correct net cost plus mark up of Acropetal Technologies Limited and Jindal Intellicom Limited as per the directions of the Hon'ble DRP.*

*h) Without prejudice, the TPO erred in not providing appropriate adjustments as per Rule 10B(IXC)(iii) of the Rules for differences in working capital position and risk profile of the Appellant and the companies selected by the TPO, and*

*i) Without prejudice, the learned TPO and Hon'ble DRP erred in disregarding the multiple year analysis undertaken by the Appellant in accordance with rule 10B(4) of the Rules for computing the margins of the comparables.*

*(5) The learned AO/TPO, on facts and in law, erred in not recording any reasons to show that conditions mentioned in clause (a) to (d) of section 92C(3) of the Act were satisfied before disregarding the arm's length price computed by the Appellant and in referring the computation of the arm's length price to the TPO without granting the Appellant an opportunity of being heard.*

*The Appellant prays that the adjustment in relation to the corporate tax and transfer pricing matters made by the learned AO/TPO and upheld by the Hon'ble DRP be deleted.*

*The Appellants pray that the AO be directed suitably in the matter."*

46. The relevant facts in brief are that the Appellant filed Return of Income for the Assessment Year 2012-13 on 30.11.2012 declaring

loss of INR 2,63,72,027/-. The case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Appellant has entered into the international transactions with its Associated Enterprises (AEs) and therefore, a reference was made under Section 92CA(1) to the Transfer Pricing Officer (TPO) for the determination of Arm's Length Price (ALP) of the international transactions.

47. The TPO, vide order, dated 25.01.2016 passed under Section 92CA(3) of the Act, proposed Transfer Pricing Adjustment aggregating to INR 47,31,452/- in respect of Support Services for product development which incorporated in the Draft Assessment Order, dated 28.03.2016. Further, the Assessing Officer also proposed disallowance of deduction of INR 5,00,00,000/- claimed by the Appellant on account of Termination Charges to Deutsche Asset Management India Pvt. Ltd. (DAMIPL) on the ground that the same were penal in nature.

48. The Appellant filed objections to the aforesaid Transfer Pricing Adjustments proposed in the Draft Assessment Order, dated 28.03.2016, before DRP. The DRP, vide order dated 22.11.2016, disposed off the aforesaid objections and issue certain directions. The DRP rejected the objections raised by the Appellant challenging disallowance of deduction of INR 5,00,00,000/- claimed by the Appellant in respect of Termination Charges. Further, in respect of the Transfer Pricing Adjustment of INR 47,31,452/- pertaining to Support Services for product development, the DRP rejected the objections raised by the Appellant regarding inclusion of the following five comparables selected by the TPO in the final set of six comparables - (i) Acropetal Technologies (Healthcare Segment), (ii)

E4e Healthcare Business Service Private Ltd., (iii) Informed Technologies Ltd., (iv) Excel Infoways Ltd., and (v) Jindal Intellicom Ltd. However, the DRP directed the Assessing Officer to examine the records of the Appellant and allowing the claim of set off in respect of brought forward losses and unabsorbed depreciation as per law.

49. On the basis of the above directions issued by the DRP, the Assessing Officer passed the Final Assessment Order, dated 25.01.2017, at 'Nil' assessed income after (a) making Transfer Pricing Addition of INR 47,31,452/-, (b) making disallowance of Termination Charges of INR 5,00,00,000/- and (c) allowing set off of brought forward losses unabsorbed depreciation to the extent of taxable profit of INR 2,83,89,425/- so computed after the aforesaid transfer pricing addition and disallowance.

50. Being aggrieved, the Appellant is now in appeal before us challenging the Final Assessment Order, dated 25.01.2017, on the grounds reproduced in paragraph 44 above. Ground No. 1 to 3 are directed against disallowance of deduction claimed by the Appellant for Termination Charges of INR 5,00,00,000/- whereas Ground No. 4 (a) to 4 (i) and Ground No. 5 pertain to Transfer Pricing Adjustment of INR 47,31,452/- made in the Final Assessment Order.

Ground No. 1 to 3

51. The facts relevant to the adjudication of the issue before us that for the Assessment Year 2012-13, the Appellant had debited to the Profit & Loss Account Termination Charges of INR 5,00,00,000/- under the head 'Other Expenses'. During the assessment proceedings the Appellant was asked to furnish information/details in relation to the aforesaid expenses. In response, the Appellant vide letter dated

26.02.2016 submitted as under:

*"It was also submitted as under:*

*"This amount has been booked as termination charged in the P&L for year ended 31.03.2012. This termination charges, being in respect of the business of DISPL, are revenue in nature and therefore, tax deductible. This is in line with the decision of Hon'ble Calcutta High Court in case of Commissioner of Income Tax vs. Todi Tea Co. Ltd. (involving similar kind of charges wherein it is held that the compensation paid for breach of contract in due course of business is allowed as deduction. Relevant extract provided below:*

> *"When the facts are not in dispute that assessee entered into contract with M/s Taurus Foundry (P) Ltd. and on breach of contract assessee has created liability of Rs. 10 Lakhs and ultimately paid that amount, the amount of compensation which is payable by the assessee to M/s. Taurus Foundry (P) Ltd. should be allowed as deduction when the amount has been paid for the purpose of business or in due course of business"*

*The appellants submit that the termination charges were incurred considering the commercial benefit envisaged by the appellants as it was not commercially viable to provide RTA service to one local client. This is was especially since RTA front office network requires significant cost and there were no plans to expand business in domestic market. Therefore, the termination of RTA agreement would have lead to reduction in fixed costs of the Company and hence was commercially expedient to incur.*

*2. Section 37(1) of the Income tax Act, 1961 (the Act) provides that any expenditure which is not an expenditure of the nature described in section 30 to 36; not in the nature of capital expenditure or personal expenses of the assessee; laid out or expended wholly or exclusively for the purposes of the business or profession of the assesse, is an allowable expenditure,*

*Explanation 1 to section 37 of the Act provides that-"For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."*

*3. The Service Agreement dated 8 March 2010 (copy enclosed at pages 1133 to 1156 of the paper-book filed with DRP objections) does not classify the payment to be made under clause 3(1) as*

*penal charges. Termination of service agreement prior to the expiry of minimum lock in period is a right given to DISPL whereupon a sum of money became payable to DAMIPL These charges are compensatory in nature and not penal in nature Penalty for infraction of law is not allowable as an expenditure. However such charges paid are not penalty for infraction of law and even if considered as penal in nature should be allowable as deduction"*

52. However, the Assessing Officer was not convinced with the explanation/submission furnished by the Appellant. According to the Assessing Officer the Termination Charges were penal in nature and therefore, the Assessing Officer proposed disallowance of deduction of INR 5,00,00,000/- claimed by the Appellant in respect of Termination Charges in the Draft Assessment Order. The DRP also decline to grant any relief to the Appellant on this issue while disposing the objections filed by the Appellant against the Draft Assessment Order holding as under:

*"2.6 We have considered the facts of the case and the submissions of the assessee. We have also perused the agreement as well as the documents submitted by the assessee in support of its contentions. As per clause 3(r) of the agreement, the Company undertakes not to exit the line of business under the agreement for a minimum period of 3 years from the date of agreement, i.e., 8.03.2010. As per this clause, if the business line is exited during the lock in period of 3 years, the Company is obligated to pay compensation of INR 5,00,00,000/- to DAMIPL.*

*2.7 As per clause 26 of the agreement, either party may terminate the agreement by serving upon the other party 3 months written notice of its intention to terminate the agreement. However, if DISPL intends to terminate the agreement on account of its decision to exit the business, the notice length will be 6 months from DISPL's side unless Deutsche Asset Management India Pvt. Ltd (DeAM) agrees for a shorter duration of not less than 3 months. It is obvious from this clause that the assessee was required to give 6 months notice if the notice of termination was on account of the its decision to exit the business. However, it is seen that the "Termination Notice" dated 12.03.2012 was given by the assessee intimating DeAM that the agreement shall terminate on June 11, 2012. The notice of termination does not mention anywhere that the agreement was being terminated on account of the assessee's*

*decision to exit the business. The notice period is merely 3 months. Hence, in view of clause 26 of the agreement, the only conclusion that can be drawn is that the termination notice was guided by the first part of the clause 26, i.e., "either party may terminate the agreement by serving upon the other party 3 months written notice of its intention to terminate the agreement" and not by the second part of the clause, i.e., "if DISPL intends to terminate the agreement on account of its decision to exit the business, the notice length will be 6 months from DISPL's side unless Deutsche Asset Management India Pvt. Ltd (DeAM) agrees for a shorter duration of not less than 3 months." As per clause 3(r), DISPL is under obligation to pay the compensation of Rs. 5 crores only and only if the business line is exited during the lock in period of 3 years. Since, no material has been brought on record by the assessee to show that the agreement was sought to be terminated by the assessee on account of its decision to exit the business, we are of the opinion that the assessee was under no obligation to pay any termination charges to DeAM in terms of the Agreement. The claim of deduction to the termination charges of Rs. 5 crores, therefore, cannot be allowed.*

*2.8 It is further pertinent to note that the assessee has itself admitted in its submissions before us that it gave-notice dated 12.03.2012 to terminate the service with effect from 11.06.2012. If such is the case, the obligation of the assessee to pay the compensation of Rs.5 crores would arise only on or after 11.06.2012, i.e., on the termination of the service, and not any time before such date. Even assuming (but not holding) that the expenditure in question is an allowable business expenditure, such expenditure would accrue only in the F.Y. 2012-13 relevant to the A.Y. 2013-14 and not in the A.Y. 2012-13 as claimed by the assessee. Therefore, we are of the opinion that the expenditure cannot be claimed as deduction in the A.Y. 2012-13 at all. The claim, if at all, can only be made in the A.Y. 2013-14 and the Assessing Officer would be well within its right to examine its allowability in the said assessment year.*

*2.9 In view of the aforesaid reasons, the amount of Rs. 5 crores on account of termination charges cannot be allowed as deduction. The objection filed by the assessee is dismissed."*

53. According to the above directions issued by DRP, the Assessing Officer disallowed the claim of deduction of INR 5,00,00,000/- in respect of Termination Charges in the Final Assessment Order.

54. The Appellant now is in appeal before us challenging the above disallowance.

55. The Ld. Senior Counsel appearing on behalf of the Appellant, referring to Registrar and Transfer Agent Agreement dated 08.03.2010 between the Appellant and DAMIPL (Hereinafter referred to as 'the Agreement'), submitted that the Appellant was appointed as Registrar and Transfer Agent to all the existing scheme of the Deutsche Mutual Fund. As per Clause 3(r) of the Agreement the Appellant given an undertaking according to which the Appellant would not exit the line of business required for the assignment envisaged under the said Agreement for a period of 3 years from the date of the Agreement failing which the Appellant would be liable to pay INR 5,00,00,000/- to DAIMPL as compensation. During the relevant previous year the Appellant had only two local clients, namely, J. P. Morgan Mutual Fund & Deutsche Mutual Fund managed by DAIMPL to whom the Appellant was providing Registrar and Transfer Agency Services. In December 2011 J.P. Morgan Mutual Fund terminated the services of the Appellant and therefore, running the local registrar and transfer agency business with only one local client was not feasible. Therefore, vide notice dated 12.03.2012, the Appellant invoked provisions of Clause 26 a. of the Agreement and put DAIMPL to notice about termination of the Agreement w.e.f. 11.06.2012. Since the Appellant had breached the undertaking given in Clause 3(r) of the Agreement by exiting the registrar and transfer agency business within a period of 3 years from the date of the Agreement, the Appellant was liable to pay INR 5,00,00,000/- as compensation to DAIMPL. Accordingly, the Appellant booked termination charges of INR 5,00,00,000/- in the Profit & Loss Account for the year ended 31.03.2012 since the liability had accrued

during the relevant previous year by virtue of the issuance of termination notice, dated 12.03.2012. In view of the aforesaid, he submitted that the Appellant was entitled to claim deduction in respect of Termination Charges of INR 5,00,00,000/- pertaining to ascertained accrued liability and debited to the Profit & Loss Account for the relevant previous year.

56. Per contra, the Ld. Departmental Representative relied upon the order of DRP (relevant extract reproduced in Paragraph 52 above), and submitted that even as per notice, dated 12.03.2012, the Agreement was to be terminated w.e.f. 11.06.2012. Meaning thereby that the liability to pay compensation as per Clause 3(r) of the Agreement would have crystallized during the Financial Year 2012-13 relevant to the Assessment Year 2013-14. Therefore, the Appellant was not entitled to claim deduction for the Termination Charges of INR 5,00,00,000/- during the Assessment Year 2012-13. He further submitted that the termination notice issued by the Appellant was in violation of the terms contained in Clause 26 b. of the Agreement which provided for six months notice by the Appellant in case of termination of the Agreement by the Appellant whereas the Appellant has only given three months notice. Further, the notice itself did not specify that the Appellant had decided to terminate the Agreement on account of its decision to exit the registrar and transfer agency business.

57. In rejoinder the Ld. Senior Counsel for the Appellant submitted that, even if the contention of the Revenue that the liability to INR 5,00,00,000/- to DAIMPL crystallized due on 11.06.2012 is accepted, the Appellant would still be entitled to claim deduction for the aforesaid amount for the reason that the contractual liability to pay

the DAIMPL INR 5,00,00,000/- as Termination Charges would qualify as an 'ascertained liability'. It is settled legal position that an assessee is entitled to claim deduction for provision created for an ascertained liability. Therefore, the Appellant would, in any case, be entitled to deduction of INR 5,00,00,000/- debited to the P&L Account for the relevant previous year.

58. We have considered the rival submission and perused the material on record. As per Clause 3(r) of the Agreement the Appellant had undertaken not to exit the line of business required for undertaking the assignment envisaged in the Agreement for a period of three years. Thus, the purport of Clause 3(r) of the Agreement was to ensure continuous provision/supply of services including registrar and transfer agency services by the Appellant to DAIMPL. The Appellant had, qua the DAIMPL, exited the line of business (i.e. registrar and share transfer of business) and issue notice, dated 12.03.2012, to DAIMPL for termination of contract w.e.f. 11.06.2012. The issuance of the aforesaid notice by the Appellant resulted in breach of the undertaking given by the Appellant in Clause 3(r) of the Agreement, and giving rise to the liability on the part of the Appellant to pay compensation of INR 5,00,00,000/- as Termination Charges to DAIMPL in terms of the aforesaid Clause. The contention of the Appellant is that the liability to pay Termination Charges accrued on 12.03.2012 when the Termination Notice was issued clearly expressing the intention of the Appellant to not comply with the undertaking content in Clause 3(r) of the Agreement, whereas the contention of the Revenue is that the liability to pay DAIMPL accrued/crystallized on the date of the effective termination of the contract (i.e. on 11.06.2012). In this regard, it would be to refer to the judgment of Full Bench of the Hon'ble Punjab & Haryana High

Court in the case of Jamna Auto Industries vs. CIT, Rohtak: [2008] 299 ITR 92 (Punjab & Haryana) and the judgment of Hon'ble Supreme Court in the case of Bharat Earth Movers vs. CIT: [2000] 245 ITR 428 (SC) cited by the Ld. Senior Counsel appearing on behalf of the Appellant.

59. In the case of Jamna Auto Industries (supra), the Full Bench of Punjab and Haryana High Court, highlighting the difference between the penalty for infraction of law and damages for breach of contract in the context of deduction under section 37(1) of the Act, held that where an assessee has to pay damages to other party as per the terms of the contract entered by such assessee for the purpose of its business and in the ordinary course of business, such damages are to be allowable as deduction if the same is not opposed to public policy. The relevant extract of the aforesaid judgment reads as under:

> *"23. It may now be apposite to refer to the judgment in Baldev Singh Kanwar's case (supra) where the question that arose before the Division Bench was, whether the payment made by way of damages for breach of contractual obligations is an allowable expenditure, or not. The assessee therein was a rosin contractor who had taken contract for the extraction of rosin of Arnas Range during the assessment year. The assessee was required to pay Rs. 54,638 on account of damages caused by blazes. According to terms of the agreement, the assessee was required to extract rosin by placing blazes of a standard size and shape. The assessee-contractor while performing its part of the contract had failed to keep these standards and norms scrupulously. The assessee was held liable to pay damages to the other side in those circumstances. This Court while following its earlier judgment in Himalaya Rosin-Turpentine Mfg. Co. Ltd.'s case (supra) had held that the assessee was not entitled to claim damages. The issue before the Division Bench was regarding payment of damages for breach of contract as the assessee therein had violated the terms of the contract and was held liable for damages. That occurrence because of which the*

*assessee was held liable for damages, being an ordinary incident of business, the amount paid on that account was an allowable expense as a business loss/expenditure. However, by taking the payment of damages for breach of agreement as penalty for infraction of law the same had been disallowed. The Division Bench had, therefore, incorrectly decided the issue and we are not in a position to subscribe the said view. Accordingly we overrule the judgment in Baldev Singh Kanwar's case (supra) which does not decide the controversy in its right perspective." (Emphasis Supplied)*

60. In the case of Bharat Earth Movers (supra), it was held by the Hon'ble Supreme Court that deduction should be allowed for a liability in praesenti though it may be discharged at a future date. The relevant extract of judgment of the Hon'ble Supreme Court reads as under:

*4. The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied, the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain.*

*5. xx xx*

*6. So is the view taken in Calcutta Co. Ltd. v. CIT [1959] 37 ITR 1, wherein this Court has held that the liability on the assessee having been imported, the liability would be an accrued liability and would not convert into a conditional one merely because the liability was to be discharged at a future date. There may be some difficulty in the estimation thereof but that would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case.*

*Applying the above-said settled principles to the facts of the case at hand, we are satisfied that the provision made by the appellant-company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date, is entitled to deduction out of the gross receipts for the accounting year during which the provision is made for the liability. The liability is not a contingent liability. The High Court was not right in taking a view to the contrary." (Emphasis Supplied)*

61. On application of the ratio laid down by the above judgments to the facts of the present case, we are of the view that the Appellant was entitled to claim deduction for Translation Charges of INR 5,00,00,000/- debited to the Profit & Loss Account for the following reasons. The compensation of INR 5,00,00,000/- were payable by the Appellant to DAIMPL for breach of the terms contended in Clause 3(r) of the Agreement and was, therefore, in the nature of damages for breach of contract and not in the nature of penalty for infraction of law. The liability to pay the aforesaid compensation accrued on 12.03.2012 as it was certain that w.e.f. 11.06.2012 the Agreement shall stand terminated at the instance of the Appellant resulting in breach of contract terms contained in Clause 3(r) of the Agreement. Thus, the liability to pay compensation was a liability in *'in praesenti'* though it will be discharged at a future date (i.e., on or after the effective termination of the Agreement on 11.06.2012). The amount of compensation to be paid as Termination Charges could be reasonably estimated to be INR 5,00,00,000/- as per Clause 3(r) of the Agreement. Accordingly, we delete the disallowance of INR 5,00,00,000/- and allow the Appellant's claim in respect of Translation Charges of INR 5,00,00,000/- to Profit & Loss Account during the relevant previous year. Ground No. 1 to 3 raised by the

Appellant are, thus, allowed.

Ground No. 4 to 5

62. Ground No. 4(a)-(i) and Ground No. 5 pertain to Transfer Pricing Adjustment of INR 47,31,452/- made in the Final Assessment Order.

63. As was the case in the Assessment Year 2009-10 and 2010-11, for the Assessment Year 2012-13 also the Appellant provided support services in relation to product to its AE during the relevant previous year and charged aggregate price of INR 3,63,38,625/. The Appellant benchmarked the aforesaid international transaction using Transaction Net Margin Method (TNNM) as the most appropriate method with 'net profit/total operating cost' as Profit Level Indicator (PLI). The Appellant select a set of 6 comparables and computed the PLI at 4.22% by taking three year weighted average arithmetic mean of the NCP mark-up for the comparables. Since the Appellant had earned NCP mark-up at 7.6% it was contended by the Appellant that the transactions were at arm's length and therefore, requiring no transfer pricing adjustment. However, the TPO rejected five comparables selected by the Appellant accepting only Indium Software Limited as a comparable. Further, after examining the accept-reject matrix of the search processes applied by the Appellant, the TPO selected eight comparables and after taking into consideration the submissions dated 23.12.2015 & 08.01.2016, the TPO arrive at the final set of six comparables computed the PLI, ALP and amount of Transfer Pricing Adjustment as under:

| Sr. No. | Name of the Company | NCP |
|---|---|---|
| 1 | Acropetal Technologies Limited (Healthcare Segment) | 29.78 |
| 2 | E4e Healthcare Business Services Pvt. Ltd. | 13.45 |
| 3 | Excel Infoways Limited (BPO Segment) | 49.38 |
| 4 | Informed Technologies Limited | 8.39 |
| 5 | Jindal Intellicom Limited | 6.08 |
| 6 | Indium Software India Limited | 22.56 |
| | Arithmetical Mean/Arms Length Margin | 21.61 |

| S.No. | Particulars | Amount (INR) |
|---|---|---|
| A. | Operating Cost | 33,71,956 |
| B. | Arms Length Mean Margin (@21.61%) | 72,98,120 |
| C. | Actual Margin (@7.6%) | 25,66,668 |
| | Shortfall/Transfer Pricing Adjustment | 47,31,452 |

64. Thus, TPO, vide order, dated 25.01.2016 passed under Section 92CA(3) of the Act, proposed a Transfer Pricing Adjustment of INR 47,31,452/- in respect of Support Services for product development which was incorporated in the Draft Assessment Order, dated 11.02.2014.

65. The Appellant filed objections to the above transfer pricing adjustments proposed in the Draft Assessment Order, dated 11.02.2014, before DRP. The DRP, vide order dated 22.11.2016 dismiss the objections raised by the Appellant in relation to the Transfer Pricing Adjustment. Therefore, in the Final Assessment Order, dated 25.01.2017, the Assessing Officer made upward

Transfer Pricing Adjustment of INR 47,31,452/- in respect of Support Services for product development.

66. Being aggrieved, the Appellant preferred appeal before the Tribunal challenging the above Transfer Pricing Adjustment.

67. On perusal to Ground No. 4(a)-(i) and 5 we find that the Appellant has, in effect, sought exclusion of the five comparables included by the TPO and inclusion of five comparables selected by the Appellant but rejected by the TPO for the purpose of benchmarking support services in relation to product development. The Ld. Senior Counsel appearing on behalf of the Appellant submitted that the grievance of the Appellant would be addressed in case of the contention of the Appellant regarding rejection of two comparables selected by the TPO, (i.e. Acropetal Technologies Limited & Excel Infoways Limited) are accepted as the same would result in 'Nil' Transfer Pricing Adjustment in the hands of the Appellant. In this regard, he referred to the *'Transfer Pricing Synopsis - Support Services in relation to product development'* for the Assessment Year 2012-13 placed on record showing the impact of rejection as aforesaid on the Transfer Pricing Adjustment. Accordingly, we proceed to examine issue of inclusion/exclusion the aforesaid comparables.

<u>Acropetal Technologies Limited</u>

68. As regards, exclusion of Acropetal, is concerned both the sides agreed that the facts and circumstances prevailing in Assessment Year 2010-11 & 2012-13 are identical, and therefore, our findings/adjudication for the Assessment Year 2010-11 in relation to the exclusion of Acropetal from the list of comparables shall apply mutatis mutandis for Assessment Year 2012-13 as well. In 2010-11

Acropetal was rejected as a comparable on account of unreliable segmental data after taking into consideration the substantial amount of un-allocable expenses disclose in the segmental reporting. As per the decision of Mumbai Bench of the Tribunal in the case of DCIT, Circle-3(3)(1), Mumbai vs. Reliance Corporate IT Park Limited (ITA 1195/Mum/2020, dated 05.09.2022, Assessment Year 2012-13), Acropetal had un-allocable expenses of INR 23,76,51,122/- during the relevant financial year, which has not been allocated to any of the 3 segments i.e. engineering design services, information technology services and healthcare services. Therefore, we direct exclusion of Acropetal from the list of comparables and re-computation of ALP/Transfer Pricing Adjustment accordingly.

Excel Infoways Limited (Segmental)

69. The Appellant has sought exclusion of Excel Infoways Limited (Segmental) [for short 'EIL'] on the ground of functionally dissimilarity, whereas the contention of the Revenue is that EIL as rightly been included as a comparable by the TPO as it is engaged in ITeS and therefore, fulfilling the requirement of broad comparability for TNMM. On perusal of the Annual Report 2011-12 of EIL placed at Page B304 to B365 of the paper-book The Revenues from Operation (as reflected in Note 15 of notes to Financial Statement) consist of revenues from Information Technology/BPO related services of INR 7,99,55,260/- and other sales from Infra Activities of INR 7,58,24,080/-. The TPO has considered the BPO Segment for benchmarking purposes. On perusal of the annual report we find that the EIL is engaged in providing customer care services and handling client's business relation on their behalf by maintaining with their customers and also providing them service by assisting them in

managing their work flow and updating their records. On perusal of the extract of the website of the EIL we find that EIL (now known as Excel Realty N Infra Ltd.) provides telecom fulfillment solution including (a) outbound telemarketing campaigns, (b) inbound telemarketing services for order taking, customer service, voice mail services, reservation desk etc., (c) financial services in relation to collection and customer relation services, and (d) healthcare services connected with medical billing, transcription and claim adjudication. Thus, we find merit in the contention advanced by the Appellant that EIL is not functionally comparable to the Appellant - providing limited support services for product development only to its AEs, whereas EIL is engaged in the business of providing Voice based BPO Services in the areas of collection, telly-marketing and customer care to its clients. Further, as per Page 10 of the Annual Report, Excel undertakes various business risks – macro-economic risk, currency risk, competition risk, employee cost risk, market risk, etc. whereas the Assessee, being a captive service provider in relation to the Support Services is free from all entrepreneurial risks. Thus, the difference in risk profile, though not quantified by the Appellant in terms of the impact on profitability, when considered along with the corresponding activities undertaken does suggest difference in the business model followed by the Appellant and EIL. In view of the aforesaid, we direct exclusion of EIL/Excel Infoways Limited (BPO Segment) from the list of comparables and re-computation of ALP/Transfer Pricing Adjustment accordingly.

70. In view of above Ground No. 4 (a) to (i) and 5 raised by the Appellant are partly allowed.

71. In result, the appeal preferred by the Appellant for Assessment Year

2012-13 is partly allowed.

72. In conclusion all the three appeals preferred by the Appellant are partly allowed.

73. Order pronounced on 11.05.2023.

| | |
|---|---|
| ***Sd/-*** | ***Sd/-*** |
| **(Prashant Maharishi)** | **(Rahul Chaudhary)** |
| **Accountant Member** | **Judicial Member** |

मुंबई Mumbai; दिनांक Dated : 11.05.2023
*Tanmay, Sr. PS*

**<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai