

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

BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER

And

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA.NO. 7603/MUM/2012 (A.Y: 2008-09)

M/s. Crisil Limited 8 th Floor, Central Avenue Road Hiranandani Business Park Opp. D-Mart, Powai Mumbai- 400076 PAN: AACT3151E	v.	Addl. CIT - 8(1) Aayakar Bhavan, M.K. Road Mumbai- 400020
(Appellant)		(Respondent)

ITA.NO. 1564/MUM2014 (A.Y: 2009-10)

M/s. Crisil Limited Central Avenue Road Hiranandani Business Park Opp. D-Mart, Powai Mumbai- 400076 PAN: AACT3151E	v.	Dy. CIT (OSD) – 8(1) Aayakar Bhavan, M.K. Road Mumbai- 400020
(Appellant)		(Respondent)

ITA.NO. 1114/MUM/2015 (A.Y: 2010-11)

M/s. Crisil Limited Central Avenue Road Hiranandani Business Park Opp. D-Mart, Powai Mumbai- 400076 PAN: AACT3151E	v.	Asst. CIT – Range-9(2)(2) Aayakar Bhavan, M.K. Road Mumbai- 400020
(Appellant)		(Respondent)

ITA.NO. 997/MUM/2016 (A.Y: 2011-12)

M/s. Crisil Limited Central Avenue Road Hiranandani Business Park Opp. D-Mart, Powai Mumbai- 400076 PAN: AA ACT3151E	v.	Dy. CIT–Range 9(2)(2) Aayakar Bhavan, M.K. Road Mumbai- 400020
(Appellant)		(Respondent)

ITA.NO. 1345/MUM/2017 (A.Y: 2012-13)

M/s. Crisil Limited Central Avenue Road Hiranandani Business Park Opp. D-Mart, Powai Mumbai- 400076 PAN: AA ACT3151E	v.	Asst.CIT –Range-9(2)(2) Aayakar Bhavan, M.K. Road Mumbai- 400020
(Appellant)		(Respondent)

ITA.NO. 1180/MUM/2014 (A.Y: 2009-10)

Dy. CIT, Range (OSD) - 8(1) Room No. 204, 2 nd Floor Aayakar Bhavan, M.K. Road Mumbai- 400020	v.	M/s. Crisil Limited Plot No. 121/122, Andheri (E) Mumbai- 400072 PAN: AA ACT3151E
(Appellant)		(Respondent)

ITA.NO. 843/MUM/2015 (A.Y: 2010-11)

Asst. CIT – Range -9(2)(1) Room No. 204, 2 nd Floor Aayakar Bhavan, M.K. Road Mumbai- 400020	v.	M/s. Crisil Limited 121/122, Andheri (E) Mumbai – 400072 PAN: AA ACT3151E
(Appellant)		(Respondent)

ITA.NO. 824/MUM/2016 (A.Y: 2011-12)

Dy. / Asst. CIT - 9(2)(2) Room No. 665A, 6 th Floor Aayakar Bhavan, M.K. Road Mumbai- 400020	v.	M/s. Crisil Limited Central Avenue Road Hiranandani Business Park Opp. D-Mart, Powai Mumbai- 400076 PAN: AA ACT3151E
(Appellant)		(Respondent)

Assessee Represented by	:	Shri. Dhanesh Bafna, Ms. Chandni Shah, Ms. Kinjal Patel & Shri. Amol Mahajan
Department Represented by	:	Shri Vachashpati Tripathi
Date of Conclusion of Hearing	:	28.11.2023
Date of Pronouncement	:	10.01.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

- 1.** The appeals relating to A.Y. 2008-09 and 2012-13 are filed by assessee against final Assessment Order and directions of the Learned Dispute Resolution Panel – 1, Mumbai [hereinafter in short “Ld.DRP”] dated 26.09.2012 and 25.11.2016 for the A.Y.2008-09 and 2012-13 respectively, passed u/s. 144C(5) of Income-tax Act, 1961 (in short “Act”).
- 2.** Assessee and revenue have filed cross appeals for the A.Y. 2009-10, 2010-11, 2011-12 challenging the Final Assessment order and directions of the Ld. DRP.
- 3.** Since the issues raised in all these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal relating to Assessment Year 2008-09 as a lead appeal.

ASSESSMENT YEAR 2008-09

ITA.No. 7603/MUM/2012 (A.Y. 2008-09) (ASSEESSEE APPEAL)

4. Aggrieved with the Final Assessment order and directions of the Ld.DRP, assessee filed appeal before us raising following grounds in its appeal: -

- "1. determining the arm's length price of the Appellant's international transaction of provision of back end support for data analysis at Rs. 62,37,32,345 instead of Rs. 53,33,43,789 determined by the Appellant;*
- 2. disregarding the appellant's Transfer Pricing documentation and conducting his own comparability analysis (and in this regard, obtaining the financial data of certain potential comparables using his powers under Section 133(6) of the Act) which is not in accordance with the contemporaneous documentation requirement of the Indian TP regulations;*
- 3. requiring financial data of only the current year (FY 2007-08) of the comparable companies to be used for benchmarking the Appellant's international transactions;*
- 4. not granting a risk adjustment to the Appellant to account for the differences in the risk profile of the comparables vis-a vis the Appellant;*
- 5. arbitrarily restricting the working capital adjustment to 2.00% to account for the differences in the working capital position of the comparables vis-a vis the Appellant;*
- 6. the learned AO be directed to grant (+/-) 5% benefit as available under proviso to Section 92C(2) of the Act.*

7. *Reducing expenses incurred in foreign currency, not being expenses in providing technical services or in the nature of freight, telecommunication charges or insurance attributable to delivery of article or things or computer software, from "export turnover" and "Total turnover" while computing deduction under section 10A of the Act*

8. *Not giving credit in full for the amount of tax deducted at source of Rs. 16,08,00,850 claimed in the revised return of income filed under section 139(5) of the Act.*

9. *Not considering advance tax payments of Rs. 25,000 and Rs. 3,75,00,000 paid on 14th June 2007 and 14th March 2008 respectively and dividend distribution tax of Rs. 1,70,54,108 while calculating the total tax liability.*

10. *Considering the date of credit of the advance tax to the government treasury as the date of payment instead of the date of tendering of the cheque of advance tax while calculating the interest u/s 234C of the Act."*

5. Further, assessee has raised additional ground, which is reproduced

below: -

"On the facts and circumstances of the case and in law, the draft assessment order dated 28 December 2011 passed by the Additional Commissioner of Income Tax under section 144C(1) read with section 143(3) of the Act is illegal, bad in law and without jurisdiction as he failed to establish that he possessed the legal and valid powers of performing functions of an Assessing Officer to pass the assessment order and therefore be quashed."

6. At the time of hearing, Ld.AR of the assessee submitted that additional ground relating to technical issue are not pressed at this stage. Accordingly, the additional ground is dismissed as not pressed.

7. Therefore, proceeded to dispose of this appeal on merits. Brief background of the case are, Assessee has two business divisions namely (i) Ratings and (ii) Research. Under the Ratings segment, the Assessee is engaged in rendering back-end support for data analysis services to its associated enterprises through the Global Analytical Centre (GAC) which is the transaction under dispute. The Assessee had undertaken, inter-alia, international transactions of provision of back-end support for data analysis services from the GAC to its associated enterprises for ₹.53,33,43,789/-. The Assessee adopted the Transactional Net Margin Method (TNMM) to determine the arm's length of the said international transactions. It earned a margin of operating profit to total cost (hereinafter referred to as 'margin') of 28.03% (OP/TC). In relation to this transaction, CRISIL had entered into a Master Services Agreement, dated 30 June 2004 with its associated enterprise, Standard & Poor (S&P), whereby S&P would

outsource services to CRISIL in accordance with the Statement of Work (SOW). These services are provided by CRISIL based on inputs from S&P.

8. The sample copies of SOW entered into with S&P (copies placed at Page No. 245 to 288 of the Paper book and a brief snapshot of SOWs attached at Annexure 1) which demonstrates that the services provided by CRISIL to S&P are broadly in the nature of back-end data support services. CRISIL's data analysis team works together to make data and information efficiently available for analytical activities to S&P. The various services broadly provided by CRISIL are as under:

- *Understanding of the data provided by S&P and retrieving of data from various databases as per the requirement of S&P*
- *Inputting of data in the databases/formats prescribed by S&P*
- *Verification and sanitization of data*
- *Maintaining a list of queries to be sent to S&P for resolution*
- *Maintaining MIS*
- *Sending information and data to S&P at pre-agreed intervals*

9. It was submitted before the authorities that depend upon the terms of each assignment agreed upon as per the SOW, CRISIL assigns their employees to provide services to S&P. These employees process the data

and put them in appropriate structures/ form as required by CRISIL's AE i.e., S&P. These services are akin to back-office data support services. Therefore, these services have been compared to service providers who are primarily involved in providing such back-end data processing support services.

10. The functions performed by the Assessee for the above-mentioned transaction is provided on page 8 to 10 of the TP Study report (placed at pages 43 to 45 of the Paper book).

11. The relevant facts are, the case of the Assessee was selected for scrutiny assessment and a reference was made to the Transfer Pricing Officer to determine the Arm's Length Price of the international transactions. During the course of the Transfer Pricing (TP) assessment proceedings, the Transfer Pricing Officer rejected the characterisation of routine service provider / back-office service provider (BPO) and observed that the Assessee is engaged in providing high-end Knowledge process outsourcing (KPO) services. Consequently, rejected the study submitted by the assessee and he conducted a fresh search for comparables and

proposed a final set of 6 companies which are engaged in provision of KPO Services like engineering and design services, financial analytical services etc. computing an arm's length margin at 49.73% (after allowing ad-hoc working capital adjustment of 2%). Thus, the TPO made a TP adjustment amounting to ₹.9,03,88,556/- in relation to the international transaction of provision of back-end support for data analysis services.

12. Aggrieved with the above order of Transfer Pricing Officer, assessee preferred objection before Dispute Resolution Panel and filed detailed submissions. After considering the submissions of the assessee, Ld. DRP upheld the order of the Transfer Pricing Officer and affirmed the Transfer Pricing addition.

13. Aggrieved with the above directions of Ld. DRP, assessee is in appeal before us.

14. At the time of hearing, Ld.AR of the assessee brought to our notice relevant facts relating to the Transfer pricing adjustments and contended the additions proposed by the Ld. DRP. Further, Ld.AR of the assessee filed

its written submissions in support of his contentions, for the sake of clarity

it is reproduced below: -

"3.2 At the outset, the Appellant wishes to submit that the TPO/DRP have erred in determining the nature of Appellant's functions by placing reliance on certain ad-hoc information available in the public domain about CRISIL instead of the detailed documentary evidences submitted by the Appellant during the course of the proceedings before the TPO/DRP. The Appellant submits that the TPO/DRP have grossly erred in recharacterizing the Appellant's functions to be in the nature of KPO services by relying on online job advertisements by CRISIL, job profile of employees working in CRISIL, biography of Ms. RoopaKudva and certain other information in the public domain. The TPO/DRP have not taken cognizance of the functions of the Appellant as borne out from the Master agreement, SOWs and the TP Study undertaken by the Appellant.

3.3 Further, the Appellant humbly submits that the TPO erred in concluding that the Appellant is engaged in high end KPO services by reading the annual report of the Appellant in isolation without considering the SOWs and TP study of the Appellant. The TPO has misread the annual report which states that GAC supports S&P in its Global Resource management initiative by providing S&P the resources to improve workflow efficiencies, handle end-to-end analytical services and executes modelling assignments.

3.4 The Appellant humbly submits that the Appellant only provides back-end support services to S&P that enable S&P in its business operations, data analytics and financial modelling assignments. The role of the GAC is to be read in conjunction with the SOWs submitted on record which clearly demonstrate that the Appellant's role is limited to providing services based on inputs, instructions and formats provided by S&P only.

3.5 It is pertinent to note that as per the research report relied upon by the TPO himself, the fundamental differences between the KPO and a BPO can be established based on some critical characteristics (Refer pg. 8 of the TPO Order).

- *KPO's involve exercise of judgment rather than being rule-driven: The Appellant submits that the work of a KPO requires a lot of insight and analysis based on skills, experience and Judgment. However, on perusal of the above documents, it is evident that the work carried out by the Appellant is very rule-based and process driven, rather than being an exercise of judgment.*
- *KPOs typically have complex processes requiring many steps vis-à-vis BPOs which have simple rules and processes: In this regard, the Appellant humbly submits that as discussed above it is engaged in retrieving of data, inputting of data in the databases/formats prescribed by S&P, verification and sanitization of data, maintaining a list of queries to be sent to SAP for resolution, maintaining MIS, vending Information and data to S&P at pre-agreed intervals. These activities are comparatively simple and therefore the Appellant cannot be considered as a KPO.*
- *Educational / Technical Qualifications: For an activity to be considered as a KPO, the number of employees holding professional/technical qualifications as a proportion of total employees would have to be large as this would probably indicate services to be in the nature of KPO. In the instant case, it is pertinent to note that a majority of the workforce (-79%) employed by the Appellant comprises of graduates, under graduates and diploma holders. Thus, the workforce is on the lower end of the technical spectrum, which further demonstrates that the Appellant is engaged in providing low-end support services and therefore cannot be characterised as a KPO*

3.6. *Based on the above, the Appellant has classified itself as a provider of low-end support services and not High-end services as contended by the Ld. TPO.*

3.7 *Without prejudice to the above, even if it is assumed that the Appellant is providing high-end services akin to a KPO, the Appellant humbly submits that even KPOs cannot be compared to each other in case of substantial differences in functionality. In support of the same, the Appellant relies on the decision of PCIT vs. Actis Global Services Pvt. Ltd.*

(ITA no. 417/2016 - Del. HC) which held that the functionality is the sine-qua-non while determining the comparability of a certain company and therefore, even KPOs inter-alia would need to satisfy the same before being considered as a valid comparable. The Hon'ble Delhi HC went on to hold that the functional profile of the two KPOs in the said case could not be said to be similar as Actis Global services was catering to the capital and financial services markets, whereas the comparable Eclerx was in the area of sales, marketing and supporting financial services and therefore the Hon'ble Delhi HC held that Eclerx was liable to be excluded. It is pertinent to note that the said decision of the Hon'ble Delhi HC was rendered in the context of evaluating the suitability of Eclerx Services Ltd. itself as a comparable and therefore the findings of the Hon'ble Delhi HC would be squarely applicable to the Appellant.

The relevant extract of the decision is reproduced hereunder for Your Honours ready reference -Para no. 26, Pg. nos, 28-29:

"4. As far as the exclusion of ESL is concerned, the ITAT appears to have relied upon para 31 of the decision of this Court in Rampgreen Solutions Pvt Ltd u. Commissioner of Income Tax (2015) 377 ITR 533 (Del). The ITAT has extracted para 31 of the said decision where inter alia the Court pointed out that:

"We find it difficult to accept this view as it is contrary to the fundamental rationale of determining ALP by comparing controlled transactions/entities with similar uncontrolled transactions/entities. ITeS encompasses a wide spectrum of services that use Information Technology based delivery. Such services could include rendering highly technical services by qualified technical personnel, ITA 102/2015 Page 31 of 42 involving advanced skills and knowledge, such as engineering, design and support. While, on the other end of the spectrum ITeS would also include voice based call centers that render routine customer support for their clients. Clearly, characteristics of the service rendered would be dissimilar. Further, both service providers cannot be considered to be functionally similar. Their business environment would be entirely different, the demand and

supply for the services would be different the assets and capital employed would differ, the competence required to operate the two services would be different. Each of the aforesaid factors would have a material bearing on the profitability of the two entities. Treating the said entities to be comparables only for the reason that they use Information Technology for the delivery of their services, would, in our opinion, be erroneous."

5. It is urged by Mr Sanjay Kumar, learned counsel for the Revenue, that the ITAT ought not to have excluded ESL as a comparable because both ESL and the assessee were KPOs and both were catering to high-end clients.

6. The above submission overlooks what ITAT itself has noted in its impugned order, that the function profile of the two companies were different. While the Assessee is catering to the capital and financial services markets, ESL works in the area of sales, marketing and supporting financial services. The financial profile of the two KPOs could not be said to be similar from the point of view of the type of businesses they were catering to.

7. This now virtually the third appeal. What the Court has to examine is whether the view taken by the ITAT is a plausible one and whether the impugned order gives rise to any substantial question of law. The Court is not persuaded to hold that the view taken by the ITAT is not a plausible one to take. No substantial question of law arises for consideration.

(emphasis supplied)

3.8 Based on the above factual and legal submissions, the assessee humbly prays that even in the case of a KPO or a high-end services provider, the functionality has to be examined of the comparable companies vis-à-vis the functions carried out by the Appellant while carrying out the comparability analysis. In furtherance to the above submission, the Appellant requests for the exclusion of 2

comparables along with working capital adjustment on actuals. The detailed submission in support of the same is as under:

3.9 Our submissions with respect to aforesaid grounds of appeal no. 1 and 2 relating to the transfer pricing adjustment, in seriatim, are given below:

4. *Mold-Tek Technologies Ltd. ('Mold-Tek')*

Functionally Different:

4.1. Mold-Tek is engaged in providing structural engineering KPO services to various clients such as PEB, Rebar, etc. (Refer page no. 429 of the paperbook). The Appellant wishes to submit that structural engineering services are a branch of civil engineering services that deal with the planning, design and the construction of large structures especially modern buildings and such similar structures. Such engineering services are incomparable to that of the Appellant which is engaged in provision of support services for financial data analysis. Accordingly, the Appellant submits that Mold-tek ought to be excluded from the final set of comparables on account of functional dissimilarity.

Extra-ordinary events.

4.2. Further, the Appellant submits that FY 2007-08 was a unique year for Mold-Tek as the scheme of arrangement involving amalgamation between Teck-men Tools Pvt. Ltd. and Mold-Tek Technologies Ltd. and demerger of the Plastics division of Mold-Tek Technologies Ltd to Moldtek Plastics Limited simultaneously was sanctioned by the Hon'ble AP High Court on 25th July, 2008 with the appointed date for amalgamation and demerger being 1st October, 2006 and 1st April, 2007 respectively (refer Pg. nos. 456-457 of the paper book).

4.3. Accordingly, the said Scheme of Arrangement was given effect to in the financial statements as reflected on page no. 457 of the paperbook. Therefore, there is an extra-ordinary event during the year under consideration and for this reason as well, Mold-Tek cannot be considered as a comparable to the Appellant.

4.4 In addition to the above, Mold-Tek has also completed the acquisition of the Crossroads Detailing Inc., a USA based company during the year w.e.f. 28 April 2007. The acquisition of Crossroads Detailing Inc. USA has enabled Mold-Tek to enter into high rise buildings and commercial buildings space, which has resulted in about 56.49% growth in Financial Year 2007-08. This is an extra-ordinary event during the year under consideration and for this reason also, Mold-Tek cannot be considered as a comparable to the Appellant. (refer pg. nos. 426 and 429 of the paper book)

Provision for loss on derivatives of Rs. 6.43 crores

4.5 It is also pertinent to note that the company has created a provision for loss on derivatives of Rs. 6.43 crores (approx. 36% of its total revenue) which is of abnormal nature. The TPO has treated the same as non-operating expense, which has resulted in a high margin of 96.6%. If the same were to be considered as operating in nature, the margin would drop down to 14.14%. This itself shows the abnormality in the accounts of the said company. Thus, the financials of the Mold-Tek are unreliable and therefore for the aforementioned reason also, the company is liable to be excluded.

4.6. To support the above submissions of the assessee, reliance is placed on the decision of the Hon'ble Mumbai Tribunal in Deutche CIB Centre (P.) Ltd. vs. ACIT IT (TP) Appeal no. 134 of 2013 (Mum. Trib.) for the same Assessment Year 2008-09 (Para no. 8-8.3, Pg. no. 10-14).

The relevant extract of the decision is reproduced hereunder for Your Honors' ready reference -Para no. 26, Pg. nos. 28-29:

"8.2 We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. On a perusal of Page No. 1 of assessee's paper book (for short APB) to which our attention was drawn by the Id. A.R, we find, that as per the annual report of the aforementioned company i.eMold-Tek Technologies Ltd, it is a

matter of fact borne from the record that the acquisition of Crossroads Detailing Inc., USA, an engineering services KPO, in April, 2007, had paved the way for the aforementioned company to enter into high rise buildings and commercial buildings space which had high growth potential. For the said reason, the aforementioned company ie Mold-Tek Technologies Ltd had achieved about 56.49% growth during the year under consideration and registered a turnover of 17.86 crore. In fact, we find, that a coordinate bench of the Tribunal i.e ITAT, Delhi Bench in the case of M/s H & S Software Development and Knowledge Management Centre Pvt. Ltd. Vs. DCIT, Circle 10(1), new Delhi [ITA No. 436/Del/2013, dated 20.03.2018], had after inter alia considering the abnormal growth of 56% of the aforesaid comparable i.e Mold-Tek Technologies Ltd. directed exclusion of the same as a comparable for the purpose of benchmarking the International transactions of the assessee before them. Further, the annual report of the aforementioned company i.e, Mold- Tek Technologies Ltd reveals that a scheme of arrangement involving Tekmen Tools Put. Ltd., ie the transferor company and Mold-Tek Technologies Ltd, the transferee company (the aforementioned company) AND the demerger between Mold-Tek Technologies Ltd, ie the demerged company (the aforesaid company) and Mold-Tek Plastics Ltd, resulting company was sanctioned by the Hon'ble High Court of Andhra Pradesh, vide its order dated 2th July, 2008. The appointed date for amalgamation and the demerger were 1st October, 2006 and 1st April, 2007, respectively, and the effective date of the scheme was 26th August, 2008. In our considered view, pursuant to the aforesaid restructuring of the aforementioned company ie Mold-Tek Technologies Ltd., the same could not have been adopted as a comparable for benchmarking the international transactions of the assessee for the year under consideration. In fact, we find, that a similar view had been taken by the ITAT, Mumbai, in the case of Dialogic Networks (1) P. Ltd. Vs. ACIT, Circle 3(3). Mumbai [ITA No. 7280/Mum/2012, dated 27.07.2018]. In the aforesaid case, the Tribunal had concluded that pursuant to the restructuring of the aforesaid company ie Mold-TekTechnologies Ltd. in A.Y 2008-09, it could not have been considered as a comparable. Also, we find that

the aforementioned comparable is even otherwise functionally dissimilar as in comparison to the assessee before us. On a perusal of its annual report for the year under consideration, we find, that the aforesaid company i.e., Mold-Tek Technologies Ltd. was providing structural engineering services and had also ventured into rebar detailing for concrete buildings in the recent past. In fact, the functional profile of the aforesaid comparable had come up before the Special bench of the ITAT, Mumbai, in the case of Maersk Global Centres (1) Put. Ltd. Vs. ACIT, Circle 6(3), Mumbai, ITA No.7466/tum/2012, dated 07.03.2014. It was observed by the Tribunal that the aforesaid company during the year under consideration was pioneer in structural engineering KPO services and its entire business comprised of providing only structural engineering services to its various clients. Further, as observed by the Tribunal, from the information available on the website, it stood revealed that the aforesaid company was a leading provider of engineering and design services with specialization in civil, structural and mechanical engineering services, and had a strong team of skilled resources with world class skill sets. As therein observed, the aforesaid comparable was stated to have consistently helped the clients to cut down design and development costs of civil, structural mechanical and plant design by 30%-40% and had delivered technologically superior outputs to match and exceed expectations. Further, it is stated that the aforesaid company had in-house software development team, quality control training and troubleshooting facilities. As observed by the Tribunal, the aforementioned company was also rendering web design and development services with experience in turning them into an effective graphic design representation and creating dynamic and graphic rich web application from IT specs, design prints etc. In the backdrop of its aforesaid observations, it was observed by the Tribunal that as per the information available in the annual report of the aforementioned company ie MoldTek Technologies Ltd, as well as from the details available on its website, it could safely be concluded that the company was involved in providing high-end services to its clients involving higher special knowledge and domain expertise in the field and, thus, the same could not be

taken as a comparable to the assessee before them which was mainly involved in providing low-end services. On the basis of our aforesaid observations, we are of a strong conviction that in the backdrop of the high-end services provided by the aforementioned company i.e Mold-Tek Technologies Ltd, it could safely be held to be functionally dissimilar to the assessee company, which was providing business support services (ITCS) to its group entities across the world. Accordingly, we find ourselves to be in agreement with the claim of the Id. A.R. that in the backdrop of the functional dissimilarity also the aforementioned company ie Mold-Tek Technologies Ltd., could not have been included in the final list of the comparables for the purpose of benchmarking international transactions of the assessee company for the year under consideration.

8.3 On the basis of our aforesaid observations and the reasons given hereinabove, we are of a strong conviction that the aforesaid company i.e Mold-Tek Technologies Ltd could not have been selected as a comparable for benchmarking the International transactions of the assessee company. Accordingly, we herein direct the A.O to exclude the aforesaid company ie Mold-Tek Technologies from the final list of comparables for the purpose of benchmarking the international transactions of the assessee for the year under consideration.

(emphasis supplied)

4.7 Further, the above contention of the Appellant to exclude Mold-Tek is also fortified by the decision of the Special Bench of the Hon'ble Mumbai ITAT in Maersk Global Centres (India) (P.) Ltd. vs. ACIT-ITA No. 7466/Mum/2012 for the same AY 2008-09.

4.8. The relevant extract of the decision is reproduced hereunder for Your Honors' ready reference - Para no. 81 and 83. Pg. nos. 50-51:

"81. In so far as the case of Mold-Tek Technologies Ltd. is concerned, it is observed from the annual report of the said company for the financial year 2007-08 placed at page 139 to 151

of the paper book that the said company was pioneer in structural engineering KPO services and its entire business comprised of providing only structural engineering services to various clients. Further information of Mold-Tek Technologies Ltd. available on their Website is furnished in the form of printout et page 158 to 165 of the paper book and a perusal of the same shows that it is a leading provider of engineering and design services with specialization in civil, structural, and mechanical engineering services. It is stated to have a strong team of skilled resources with world class resources and skill sets. It is also stated to have consistently helped the clients to cut down design and development costs of civil, structural, mechanical and plant design by 30-40% and delivered technologically superior outputs to match and exceed expectations. It is claimed to have in-house software development team, quality control training and troubleshooting facilities. M/s Mold-Tek is also rendering web design and development services with experience in turning them into an effective graphic design representation and creating dynamic and graphic rich web applications from IT specs, design prints etc. Keeping in view this information available in the annual report of Mold-Tek as well on its website, we are of the view that the said company is mainly involved in providing high-end services to its clients involving higher special knowledge and domain expertise in the field and the same cannot be taken as comparable to the assessee company which is mainly involved in providing low-end services. It may be pertinent to note here that the financial year 2007-08 was a unique year for Mold-Tek Technologies Ltd. as the scheme of arrangement involving amalgamation between Tekmen Tool Pvt. Ltd. and Mold-Tek Technologies Ltd. and demerger between Mold-Tek Technologies Ltd. simultaneously was sanctioned by the Hon'ble AP High Court by 15th July, 2008 with the appointed date for amalgamation and de-merger being 1 October, 2007 and 1st April, 2007 respectively. It is also pertinent to note that while working out the operating margin of the said company, provision for derivative loss of Rs. 6.43 crores made by Mold-Tek technologies Ltd. was excluded by the A.O. treating the same as non-operating expenses whereas in the ease of Rushabh Diamonds(supra), it was held by the Division Bench of this Tribunal that the gain or loss arising from the forward contract entered into for the purpose of foreign currency exposure on the export and import has to be taken into consideration while computing the operating profit.

82.

83. *For the reasons given above, we are of the view that if the functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Pvt. Ltd. and Mold-Tec Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparables for the purpose of determining ALP of the transactions of the assessee company with its AEs. We, therefore, direct that these two entities be excluded from the list of 10 comparables finally taken by the AO/TPO as per the direction of the DRP*

(emphasis supplied)

4.9. *The said decision of the Hon'ble Mumbai Tribunal has also been followed in the case of Goldman Sachs Services (P.) Ltd. Vs. ITO - ITA No. 6969/Mum/2012 (Para nos. 8-Pg nos. 5-6) (AY 2008-09)*

4.10. *Based on the above factual and legal submissions, the Appellant humbly prays that Mold-Tek be excluded from the set of comparable companies.*

5. Eclerx Services Ltd. ('Eclerx')

Functionally Different:

5.1. *The Business review in the annual report of the company describes the company as under: (Refer page no. 375 of the paper book)*

"eClerx Services Limited (eClerx) is a leading Indian provider of Knowledge Process Outsourcing (KPO) services. Established in 2001, the Company today provides data analytics and customized process solutions to a host of global clients. Head quartered in Mumbai, the Company delivers data solutions to complex business needs through a cost effective combination of people, processes and technology."

5.2. *The company offers diversified services such as sales and marketing support, pricing analytics, bundling optimization, content operations, product data management, revenue management and data*

analytics to its Retail and Manufacturing clients; and services such as real-time capital markets, middle and back-office support, portfolio risk management services and various critical data management services to its Financial Services clients. (Kindly refer Pg. 364, 365 & 375 of the paper book)

5.3 Further, Page 368 & 369 of the annual report states as under:

"Eclerx is a very different company with industry specialized services for meeting complex client needs. We are sometimes compared to a BPO or an IT offshoring company, which we are not.

We are a data analytics KPO service provider specializing in two business verticals- Financial Services and Retail and Manufacturing. We provide solutions that do not just reduce cost, but help our clients increase sales and reduce risk, by enhancing efficiencies and by providing valuable insights that empower better decisions....

We devise innovative and relevant solutions that address common pain points for the industry, and implement these solutions through our scalable delivery model..."

5.4 In view of the above, it can be seen that Eclerx is a Knowledge Processing Outsourcing company providing a unique blend of consulting services along with process outsourcing. It provides consulting services, devises innovative solutions for its clients and uses a scalable delivery model which makes it efficient and cheaper for them to deliver. In comparison, the Appellant is engaged only in providing support services for financial data analysis and does not do consulting services or provide complete business solutions like that of Eclerx and therefore, Eclerx is functionally different than the Appellant and therefore cannot be considered as a comparable to the Appellant.

5.5 As evident from the extracts reproduced above, Eclerx provides a diversified set of services for which no segmental data is available and, hence, in the absence of said segmental data, Eclerx cannot be said to be comparable to the assessee. (Kindly refer Pg. 408 of the paperback)

High proportion of Outsourcing of work:

5.6 Without prejudice to the above, the Appellant submits that in the case of Eclerx, substantial work has been outsourced to various other parties as compared to the Appellant wherein the entire support services for financial data analysis have been provided by the Appellant itself. The Appellant submits that as per Eclerx Financials for the year, outsourced services to other vendors therein constituted 20.46% of its total expenses and therefore to that extent the business model of Eclerx is completely different to the Appellant and for this reason also, Eclerx should be excluded. (Kindly refer Pg. 399 & 405 of the paperbook)

Extra-ordinary Event

5.7 Eclerx has acquired Igentica Travel Solutions Ltd. (Igentica) during FY 2007-08. The said acquisition of Igentica has provided Eclerx with a set of 28 large customers primarily in Europe which had strengthened its presence in the said geographic region. Further, it is also evident from the Financials, that the acquisition of Igentica enabled Eclerx to venture into a totally new business vertical during the year-travel and hospitality besides consolidating its position in the retail and manufacturing vertical. Therefore, there is an extra-ordinary event during the year under consideration and for this reason as well, Eclerx cannot be considered as a comparable to the Appellant. (Kindly refer pg. no. 376 of the paper book). Therefore, Eclerx should be excluded from the list of comparables selected by the TPO.

5.8. To support the above submissions of the assessee, reliance is placed on the decision of the Hon'ble Mumbai Tribunal in Deutche CIB Centre (P.) Ltd. vs. ACIT IT (TP) Appeal no. 134 of 2013 (Mum. Trib.) for the same Assessment Year 2008-09 (Para no. 9-9.4, Pg. no. 14-17).

The relevant extract of the decision is reproduced hereunder for Your Honors' ready reference:

"9.1. On a perusal of the annual report of the aforementioned company ie Eclerx Services Ltd., we find that it is a matter of fact borne from the record that it had during the year under consideration acquired a UK based company viz. Igentica Travel Solutions Ltd. on July, 2007. Further, as per the annual report of

the aforementioned company ieEclerx Services Ltd., the acquisition of Igentica Travel Solutions Ltd. had provided the aforementioned company with a set of 28 large customers primarily in Europe which had strengthened its presence in the said geographic region. Also, the acquisition of Igentica Travel Solutions Ltd. had given the company an entry platform in a new vertical travel and hospitality besides consolidating its position in the retail and manufacturing space. As the aforesaid company pursuant to the acquisition of Igentica Travel Solutions Ltd. on July, 2007 had witnessed an abnormal profit of 65.88% during the year under consideration, therefore, in our considered view it could not have been selected as a comparable for benchmarking the International transactions of the assessee for the year under consideration.

9.2 Further, a perusal of the financial results of the aforesaid company, Page 12 of APB, therein reveals that it had outsourced services to thirdparty vendors which therein constituted 20.39% of its total expenses. The aspect that when a company had outsourced its ITeS services, it cannot be said that its business results would be comparable to any other ITeS service provider rendering services entirely on its own, had been so held by a coordinate bench of the Tribunal in the case of Google India Pvt. Ltd. Vs. DCIT [ITA No. 1368/Bang/2010]. Considering the outsourcing of services to the extent of 20.39% of its total expenses by the aforesaid company, we are of the considered view that the said company ie Eclerx Services Ltd. on the said count also could not have been adopted as a comparable for benchmarking the international transactions of the assessee for the year under consideration.

9.3 Lastly, we find that even otherwise the aforesaid comparable viz. Eclerx Services Ltd. is functionally dissimilar to the assessee company. The factum of functional dissimilarity of the aforesaid comparable had been looked into by the Special bench of the Tribunal in the case of Maersk Globle Centre (India) Put. Ltd. Vs. ACIT, Circle- 6(3), Mumbai, (ITA No. 7466/Mum/2012, dated 07.03.2014]. It was observed by the Tribunal, that a perusal of the annual report of the aforesaid company i.e, Eclerx Services Ltd. for

the year under consideration ie F.Y.2007-08, therein revealed, that the said company was in the business of providing data analytics and data process solutions to some of the largest brands in the world and was recognized as experts in chosen markets-financial services, retails and manufacturing. It was observed by the Tribunal, that the aforesaid company was providing complete business solutions by combining people, process improvement and automation and had employed over 1500 domain specialists working for the clients. It was observed, that the aforesaid company was providing industry specialized services for meeting complex clients needs, data analytics KPO service provider specialising in two business verticals - financial services and retail and manufacturing. It was stated to be engaged in providing solutions that not only just reduced cost, but helped the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. Further, the aforesaid company was stated to have a scalable delivery model and offered solutions that included data analyties, operations management and report services. Also, it was providing tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. The aforesaid company had a team dedicated to developing automation tools to support service delivery which increased productivity and allowed customers to benefit from further cost saving and output gains with better control over quality. In the backdrop of the aforesaid functional profile of the abovementioned company ie Eclerx Services Ltd, the Tribunal was of the view that as the said company was mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field, thus, it could not be compared that the assessee before them which was mainly into providingof low-end services to its group concerns. In the backdrop of thefunctional profile of the aforementioned company i.e Eclerx Services Ltd., we find that beyond any scope of doubt it is functionally dissimilar to the assessee before us, which is engaged in providing of business support services (ITES) to its group entities across the world. Accordingly, due to the functional dissimilarity of the aforesaid

company i.e., Eclerx Services Ltd, the same could not have been included in the final list of comparables for benchmarking the assessee's International transactions.

9.4. On the basis of our aforesaid observations, we herein direct the A.O to exclude the aforementioned company ie Eclerx Services Ltd. from the final list of comparables for the purpose of benchmarking the international transactions of the assessee for the year under consideration.

(emphasis supplied)

5.9. Further, the above contention of the Appellant to exclude Eclerx is also fortified by the decision of the Special Bench of the Hon'ble Mumbai ITAT in Maersk Global Centres (India) (P.) Ltd. vs. ACIT for the same AY 2008-09. ITA No. 7466/Mum/2012 (Para nos. 82-83, Pg nos. 51-52)

5.10. The relevant extract of the decision is reproduced hereunder for Your Honors' ready reference:

"82. In so far as M/s eClerx Services Limited is concerned, the relevant information is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets-financial services and retail and manufacturing. It is claimed to be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery

model and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality. Keeping in view the nature of services rendered by M/s eClerx Services Pot. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns.

83. For the reasons given above, we are of the view that if the functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Pot. Ltd. and Mold-Tec Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparables for the purpose of determining ALP of the transactions of the assessee company with its AEs. We, therefore, direct that these two entities be excluded from the list of 10 comparables finally taken by the AO/TPO as per the direction of the Ld. LD. DRP."

(emphasis supplied)

5.11. The Hon'ble Delhi ITAT in case of Copal Research India Pvt. Ltd. vs. ITO in itano. 1713/Del/2014 also has held that Eclerx is not comparable as it provides complete business solutions as compared to the Appellant which provides raw data. The relevant extract of the decision is reproduced hereunder for Your Honors' ready reference (Para no. 11-12, Pg. no. 8-16):

"11. We have considered the submissions of both the parties and have perused the record of the case. We find that in the case of

Maersk Global Centres (India) Put. Ltd., which company was, inter alia, engaged in the business as shared service centre and rendering transaction processing, data entry, reconciliation of statements, audit of shipping documents and other similar support services; and also rendering I.T. services such as process support, process optimization and technical support services, the Tribunal in para 82 of its order observed as under:

"In so far as M/s eClerx Services Limited is concerned, the relevant formation is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets- financial services and retail and manufacturing. It is claimed to be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model and solutions offered that included data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost

saving and output gains with better control over quality, Keeping in view the nature of services rendered by M/s eClerx Services Put. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns."

11.1. We find that the assessee also cannot be said to have relatable degree of comparability because primarily assessee was engaged in providing primary data for various field of activities but not complete business solutions. Therefore, this company could not be treated as comparable for the purpose of determining ALP of the transactions between the assessee company with its AEs. We, accordingly, direct that this company be excluded from the list of comparables finally taken by the AO/ TPO as per the direction of the DRP.

(emphasis supplied)

5.12. The aforesaid decision of the Hon'ble Tribunal has been affirmed by the Hon'ble Delhi High Court in ITA. No. 894/2015 vide order dated 23.11.2015 (Para 2, Pg. no. 2)

5.13. The said decision of the Hon'ble Mumbai Tribunal has also been followed in cases cited below:

- PCIT vs. B.C. Management Services P. Ltd. [2018] 89 taxmann.com 68 (Del HC) (Para no. 10-12, Pg no. 2)*
- Goldman Sachs Services (P.) Lid. Vs. ITO - ITA No. 6969/Mum/2012 (Para nos. 7- Pg nos. 5) (AY 2008-09)*

5:14. Based on the above factual and legal submissions, the assessee humbly prays that Eclerx be excluded from the set of comparable companies.

6. Working Capital Adjustment (At Actuals)

6.1 The Appellant humbly submits that differences in working capital between the Appellant and the comparable companies ought to be adjusted for appropriate comparability analysis. The Appellant had submitted the working capital adjusted margins of the comparable companies with the TPO (Refer page no. 292 of the Paperbook). However, the TPO allowed an ad-hoc adjustment of 2% instead of granting the working capital adjustment on actual basis. The Appellant prays that the working capital adjustment be granted to the Appellant on actuals.

7. Conclusion:

7.1. If these contentions of the Appellant praying for the exclusion of Mold-Tek and Eclerx along with grant of working capital adjustment at actuals are accepted, then the Appellant's margin would fit within the range as provided under of the section 92C(2) of the Act read with the Rules thereto and thus, the entire transfer pricing addition would stand deleted.

7.2. The Appellant submits that it had also raised certain legal grounds vide its Additional ground petition dated 08 January 2019 filed on 17 January 2019. The Appellant humbly submits that in case the above grounds on merits are decided in favour of the Appellant, the entire addition would get deleted and therefore additional grounds would become academic and therefore may be left open.

15. On the other hand, Ld. DR objected to the submissions made by the assessee and submitted that Transfer Pricing Officer treated the assessee as a KPO not BPO. In this regard he brought to our notice Page No. 8 of the Transfer Pricing Officer order. Further, he submitted that assessee itself has not submitted any document substantiating that assessee is BPO

and submitted that the services offered by the assessee are high-end services, it is to be treated similar to that of KPO not as BPO. He heavily relied on the orders of the lower authorities.

16. In the rejoinder, Ld.AR of the assessee objected the submissions of the Ld. DR and in support of his contentions he relied on the decision of Hon'ble Delhi High Court in the case of PCIT v. Actis Global Services Pvt. Ltd., in ITA No. 417/2016 dated 05.08.2016 (Copy of the order is placed on record).

17. Considered the rival submissions and material placed on record, we observe that the assessee a group concern of the S&P, which also does the similar nature of business in the line of financial ratings to the various establishments. S&P does the rating in the global level with the back office assistance of the assessee. The assessee itself does the similar rating in the Indian market. The nature of providing services are similar and however the assessee has provided the relevant SOW to demonstrate that the nature of work involved is based on the structured and process oriented. There is no involvement of human intelligence or technical skill. It

is mere data compilation and submission to its AE. This will not fall within the category of KPO. After careful consideration, we are of the view that there is fine line difference between the BPO and KPO. It is difficult to determine the involvement of human intelligence or skills in the set of process or activities. It is subjective and need proper analysis of process of work and in this case, the activities carried on by the assessee and the parent company are similar. It is difficult to evaluate how much skills or intelligence are applied in providing support services by the assessee. However, the assessee has submitted the SOW to substantiate the extent of support services provided by it. Still the assessee made an alternate plea that mere determination of BPO or KPO is not enough, there has to be functional similarities in the comparables selected to bench mark the transactions. In this regard, it was submitted that the 6 comparables selected by the TPO, out of which two are not having similar functions carried on by the assessee even, in case, we consider the assessee as a KPO. In this regard assessee has relied on the case laws and made submissions by highlighting the functional dissimilarities as well as there are extra ordinary events taken place during the impugned assessment

year under consideration in the comparables selected by the TPO. On careful consideration we observe as under:

18. In the case of Mold-Tek, we observe that it is engaged in the business of providing structural engineering and rendering Web Design and Development services whereas the assessee is engaged in providing financial ratings. The functions involved in providing various services are completely different and needs different set of skills. Further, it was brought to our notice the reasons for abnormal growth in the business of the Mold-Tek due to extra ordinary events during the impugned assessment years like it completed the acquisition of the Crossroads Detailing Inc., a USA based company during the year w.e.f. 28 April 2007. The acquisition of Crossroads Detailing Inc. USA has enabled Mold-Tek to enter into high rise buildings and commercial buildings space. Therefore, the substantial growth due to acquisition of two companies and its impact cannot be ignored while selecting the comparables.

19. Further we observe that Mold-Tek has provided derivative losses during the year and this is foreign currency exposure, which has to be

considered while comparing the results before it can be selected. It is held by the coordinate bench of this tribunal in the case of Maersk Global Centres (India) (P.) Ltd. (supra) that it may be pertinent to note here that the financial year 2007-08 was a unique year for Mold-Tek Technologies Ltd. as the scheme of arrangement involving amalgamation between Tekmen Tool Pvt. Ltd. and Mold-Tek Technologies Ltd. and demerger between Mold-Tek Technologies Ltd. simultaneously was sanctioned by the Hon'ble Andhra Pradesh High Court by 15th July, 2008 with the appointed date for amalgamation and de-merger being 01st October, 2007 and 01st April, 2007 respectively. It is also pertinent to note that while working out the operating margin of the said company, provision for derivative loss of ₹.6.43 crores made by Mold-Tek technologies Ltd. was excluded by the Assessing Officer treating the same as non-operating expenses whereas in the case of Rushabh Diamonds (supra), it was held by the Division Bench of this Tribunal that the gain or loss arising from the forward contract entered into for the purpose of foreign currency exposure on the export and import has to be taken into consideration while computing the operating profit. Therefore, respectfully following the above decision, we

are inclined to direct the TPO/AO to remove the above company from the final list of comparables.

20. Coming to the next comparables i.e., M/s Eclerx, we observe that the Coordinate Bench of this Tribunal in the case of Deutche CIB Centre (P.) Ltd. v. ACIT IT (TP) Appeal No. 134 of 2013 dated 09.11.2020 held as under: -

"9.1. On a perusal of the annual report of the aforementioned company ie Eclerx Services Ltd., we find that it is a matter of fact borne from the record that it had during the year under consideration acquired a UK based company viz. Igentica Travel Solutions Ltd. on July, 2007. Further, as per the annual report of the aforementioned company ie Eclerx Services Ltd., the acquisition of Igentica Travel Solutions Ltd. had provided the aforementioned company with a set of 28 large customers primarily in Europe which had strengthened its presence in the said geographic region. Also, the acquisition of Igentica Travel Solutions Ltd. had given the company an entry platform in a new vertical travel and hospitality besides consolidating its position in the retail and manufacturing space. As the aforesaid company pursuant to the acquisition of Igentica Travel Solutions Ltd. on July, 2007 had witnessed an abnormal profit of 65.88% during the year under consideration, therefore, in our considered view it could not have been selected as a comparable for benchmarking the International transactions of the assessee for the year under consideration.

9.2 Further, a perusal of the financial results of the aforesaid company, Page 12 of APB, therein reveals that it had outsourced services to third party vendors which therein constituted 20.39% of its total expenses. The aspect that when a company had outsourced its ITeS services, it cannot be said that its business results would be comparable to any other ITeS service provider rendering services entirely on its own, had been so held

by a coordinate bench of the Tribunal in the case of Google India Pvt. Ltd. Vs. DCIT [ITA No. 1368/Bang/2010]. Considering the outsourcing of services to the extent of 20.39% of its total expenses by the aforesaid company, we are of the considered view that the said company ie Eclerx Services Ltd. on the said count also could not have been adopted as a comparable for benchmarking the international transactions of the assessee for the year under consideration.

9.3 Lastly, we find that even otherwise the aforesaid comparable viz. Eclerx Services Ltd. is functionally dissimilar to the assessee company. The factum of functional dissimilarity of the aforesaid comparable had been looked into by the Special bench of the Tribunal in the case of Maersk Globe Centre (India) Put. Ltd. Vs. ACIT, Circle- 6(3), Mumbai, (ITA No. 7466/Mum/2012, dated 07.03.2014]. It was observed by the Tribunal, that a perusal of the annual report of the aforesaid company Le Eclerx Services Ltd. for the year under consideration ie F.Y.2007-08, therein revealed, that the said company was in the business of providing data analytics and data process solutions to some of the largest brands in the world and was recognized as experts in chosen markets-financial services, retails and manufacturing. It was observed by the Tribunal, that the aforesaid company was providing complete business solutions by combining people, process improvement and automation and had employed over 1500 domain specialists working for the clients. It was observed, that the aforesaid company was providing industry specialized services for meeting complex clients needs, data analytics KPO service provider specialising in two business verticals - financial services and retail and manufacturing. It was stated to be engaged in providing solutions that not only just reduced cost, but helped the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. Further, the aforesaid company was stated to have a scalable delivery model and offered solutions that included data analyties, operations management and report services. Also, it was providing tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. The aforesaid company had a team dedicated to developing automation tools to support service delivery which increased productivity and allowed customers to benefit from further cost saving and output gains with better

control over quality. In the backdrop of the aforesaid functional profile of the abovementioned company ie Eclerx Services Ltd, the Tribunal was of the view that as the said company was mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field, thus, it could not be compared that the assessee before them which was mainly into providing of low-end services to its group concerns. In the backdrop of the functional profile of the aforementioned company i.e Eclerx Services Ltd., we find that beyond any scope of doubt it is functionally dissimilar to the assessee before us, which is engaged in providing of business support services (ITES) to its group entities across the world. Accordingly, due to the functional dissimilarity of the aforesaid company i.e., Eclerx Services Ltd, the same could not have been included in the final list of comparables for benchmarking the assessee's International transactions.

9.4. On the basis of our aforesaid observations, we herein direct the A.O to exclude the aforementioned company ie Eclerx Services Ltd. from the final list of comparables for the purpose of benchmarking the international transactions of the assessee for the year under consideration.

(emphasis supplied)

21. Further, we observe that Special Bench of the Mumbai ITAT in the case of Maersk Global Centres (India) (P.) Ltd. v. ACIT [2014] 43 taxmann.com 100 (Mumbai Tribunal) for the same A.Y.2008-09 in ITA No.7466/Mum/2012 dated 07.03.2014 and observed as under: -

"82. In so far as M/s eClerx Services Limited is concerned, the relevant information is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets-financial services and retail and manufacturing. It is claimed to be providing complete business solutions

by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality. Keeping in view the nature of services rendered by M/s eClerx Services Pot. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns.

83. For the reasons given above, we are of the view that if the functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Pot. Ltd. and Mold-Tec Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparables for the purpose of determining ALP of the transactions of the assessee company with its AEs. We, therefore, direct that these two entities be excluded from the list of 10 comparables finally taken by the AO/TPO as per the direction of the Ld. Ld. DRP.”

22. The Coordinate Bench in the case of Copal Research India Pvt. Ltd. v. ITO in ITA No. 1713/Del/2014 also has held that Eclerx is not comparable as it provides complete business solutions as compared to the assessee which provides raw data. The relevant extract of the decision is reproduced below: -

"11. We have considered the submissions of both the parties and have perused the record of the case. We find that in the case of Maersk Global Centres (India) Put. Ltd., which company was, inter alia, engaged in the business as shared service centre and rendering transaction processing, data entry, reconciliation of statements, audit of shipping documents and other similar support services; and also rendering I.T. services such as process support, process optimization and technical support services, the Tribunal in para 82 of its order observed as under:

"In so far as M/s eClerx Services Limited is concerned, the relevant formation is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets- financial services and retail and manufacturing. It is claimed to be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model

and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality, Keeping in view the nature of services rendered by M/s eClerx Services Put. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns."

11.1. We find that the assessee also cannot be said to have relatable degree of comparability because primarily assessee was engaged in providing primary data for various field of activities but not complete business solutions. Therefore, this company could not be treated as comparable for the purpose of determining ALP of the transactions between the assessee company with its AEs. We, accordingly, direct that this company be excluded from the list of comparables finally taken by the AO/ TPO as per the direction of the DRP."

23. Further, Hon'ble Delhi High Court in the case of PCIT v. Actis Global Services Pvt. Ltd., in ITA No. 417/2016 dated 05.08.2016 held as under: - -

"4. As far as the exclusion of ESL is concerned, the ITAT appears to have relied upon para 31 of the decision of this Court in Rampgreen Solutions Pvt Ltd v. Commissioner of Income Tax (2015) 377 ITR 533 (Del). The ITAT has extracted para 31 of the said decision where inter alia the Court pointed out that:

"31.....We find it difficult to accept this view as it is contrary to the fundamental rationale of determining ALP by comparing controlled transactions/entities with similar uncontrolled transactions/entities. ITeS encompasses a wide spectrum of services that use Information Technology based delivery. Such services could include rendering highly technical services by qualified technical personnel, ITA 102/2015 Page 31 of 42 involving advanced skills and knowledge, such as engineering, design and support. While, on the other end of the spectrum ITeS would also include voice- based call centers that render routine customer support for their clients. Clearly, characteristics of the service rendered would be dissimilar. Further, both service providers cannot be considered to be functionally similar. Their business environment would be entirely different, the demand and supply for the services would be different, the assets and capital employed would differ, the competence required to operate the two services would be different. Each of the aforesaid factors would have a material bearing on the profitability of the two entities. Treating the said entities to be comparables only for the reason that they use Information Technology for the delivery of their services, would, in our opinion, be erroneous...."

5. *It is urged by Mr Sanjay Kumar, learned counsel for the Revenue, that the ITAT ought not to have excluded ESL as a comparable because both ESL and the assessee were KPOs and both were catering to high-end clients.*

6. *The above submission overlooks what ITAT itself has noted in its impugned order, that the function profile of the two companies were different. While the Assessee is catering to the capital and financial services markets, ESL works in the area of sales, marketing and supporting financial services. The financial profile of the two KPOs could not be said to be similar from the point of view of the type of businesses they were catering to.*

7. *This now virtually the third appeal. What the Court has to examine is whether the view taken by the ITAT is a plausible one and whether the impugned order gives rise to any substantial question of law. The Court is*

not persuaded to hold that the view taken by the ITAT is not a plausible one to take. No substantial question of law arises for consideration.

8. The appeal is dismissed."

24. The Hon'ble Delhi High Court in the case of B.C. Management Services Pvt. Ltd., v. PCIT (supra) held as under: -

"10. So far as question no. 1 with respect to exclusion of four comparables is concerned, we notice that E-clerx was excluded on two grounds i.e. no segmental data was available, and it was functionally different as it was providing high end/BPO services.

11. This Court further notes that E-clerx is to provide financial services such as consultancy business solution and testing.

12. The Assessee provides IT abled services in infrastructure development and testing, system and performance operations management and support etc. The ITAT excluded E-clerx as comparable after noticing that it provided high value financial services relating to consultancy business and solution testing besides the web content management merchandising execution, web analytics, etc. This functional dissimilarity, and absence of segmental data led to its exclusion as a comparable. Those are findings of facts based upon record. Consequently, exclusion of E-Clerx was in order and cannot be interfered with."

25. Respectfully following the above decisions, we are inclined to direct the AO/TPO to eliminate the Eclerx from the final comparables list. Accordingly, we allow the grounds raised by the assessee in this regard.

26. In respect of restricting working capital adjustment, we observe that TPO has adopted the adhoc 2% for finalizing the WCA without assigning any reasons for adopting the above said percentage. We are inclined to remit this issue back to the file of TPO to adopt the reasonable percentage on actual basis based on the data available on record. Accordingly, this ground of appeal is allowed for statistical purpose.

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

ASSESSMENT YEAR 2009-10

ITA No.1564/MUM/20214 (A.Y. 2009-10)(ASSESSEE APPEAL)

28. Assessee has raised following grounds in its appeal: -

"1. On the facts and circumstances of the case and in law the Deputy Commissioner of Income Tax (OSD)-B(1), Mumbai ('The AO')/ Joint Commissioner of Income tax, Transfer Pricing-1(4). Mumbai (The TPO) under the direction of Dispute Resolution Panel (DRP) erred in upholding the action by including certain companies which were functionally not comparable and excluding/ rejecting certain companies which were functionally comparable and thereby making a transfer pricing adjustment of Rs. 8,10.51,139 to the Appellant's international transaction of provision of financial data analysis services.

2. *On the facts and circumstances of the case and in law the AO/ TPO under the direction of DRP erred in:*

a. disregarding the Appellant's Transfer Pricing documentation and conducting his own comparability analysis (and in this regard, obtaining the financial data of certain potential comparables using his powers under Section 133(6) of the Act) which is not in accordance with the contemporaneous documentation requirement of the Indian TP regulations,

b requiring financial data of only the current year (FY 2008-09) of the comparable companies to be used for benchmarking the Appellant's international transactions:

not granting a working capital and risk adjustment to the Appellant to account for the differences in the risk profile of the comparables vis-a vis the Appellant,

d not allowing the benefit of +5% range as per Section 92C(2) of the Act, in respect of the aforesaid adjustments made under Transfer Pricing

It is prayed that the aforesaid adjustment should be deleted.

3. *On the facts and in the circumstances of the case and in law, the AO under the directions of the DRP erred in reducing expenses incurred in foreign currency, not being expenses incurred in providing technical services outside India or in the nature of freight, telecommunication charges or insurance attributable to delivery of article or things or computer software, from "export turnover" and "Total turnover" while computing deduction under section 10A of the Act*

The assessee prays that expenses incurred in foreign currency not be reduced from "export turnover" and "total turnover" while computing deduction under section 10A of the Act

4. *On the facts and in the circumstances of the case and in law, the AO erred in not giving full credit for the amount of tax deducted at source*

of Rs. 25,19,64,586 claimed in the revised return of income filed under section 139(5) of the Act.

The assessee prays that the AO be directed to allow credit of the entire amount of tax deducted at source of Rs. 25,19,64,586 claimed in the revised return of income.

5. On the facts and in the circumstances of the case and in law, the AO erred in levying interest under section 234B and 234C of the Act.

The assessee prays that the AO be directed to re compute interest under section 234B and 234C of the Act as a consequence of the above grounds

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

29. At the time of hearing, Ld.AR of the assessee submitted that facts in relation to the international transactions are similar to A.Y 2008-09. Further, he submitted that Transfer Pricing Officer has also made the TP addition on similar lines as that of A.Y. 2008-09 and therefore in furtherance to the above submissions, the assessee requests for the exclusion of 2 comparables along with working capital adjustment for AY2009-10. Ld.AR of the assessee filed his written submissions challenging the directions of the Ld. DRP, for the sake of clarity it is reproduced below:-

"Eclerx Services Ltd. ('Eclerx')

10.1 The Appellant submits that the contentions of the Appellant vis-à-vis AY 2008-09 would be applicable for the current year, AY 2009-10 also and therefore, the Appellant prays that on account of the reasons as mentioned above, Eclerx be excluded from the list of comparable companies. (Kindly refer pgs. 471-474, 508, 516 and 519 of the paper book)

11. Accentia Technologies Ltd. (Accentia)

Functionally different:

11.1 Accentia is engaged into provision of Healthcare Receivables Cycle Management (HRCM) services and software products for business process outsourcing. (Kindly refer pg. 594-596 of the paper book). It provides the following HRCM services Medical transcription, medical coding, medical billing, receivables management. Further, the Appellant now aims to offer services like Data Process Outsourcing services and Legal Transcription services comprising of legal transcription, legal coding, legal claims processing, legal document review, legal research and writing, drafting of pleadings and briefs etc. (Kindly refer pg. 566 and 598-600 of the paper book).

11.2. Further, the total revenue of the company also includes income from sale of products/ coding to the extent of Rs. 13.80 crore apart from revenue from medical transcription and billing & collection, for which no segmental details are available. (Kindly refer pgs. 622, 625 of the paperbook).

11.3 Based on the above, the Appellant submits that the services provided by Accentia are nowhere comparable to the Appellant and therefore the company is liable to be excluded on functional dissimilarity.

Extra-ordinary events:

11.4. During the year, the company has completed the acquisition of M/s Oak Technologies Inc., and further, there has been an amalgamation during the year, in accordance with the scheme sanctioned by the Hon'ble

Bombay as well as Karnataka High Court w.e.f. 01 April 2008. Therefore, the comparable is liable to be excluded on account of extraordinary event. (Kindly refer pgs. 591 & 593 of the paper book)

11.5 To support the above submissions of the assessee, reliance is again placed on the decision of the Hon'ble Delhi Tribunal in Exchanging Technology Services I. P. Ltd vs. DCIT (ITA No. 1897/Del/2014) for the same AY as under consideration i.e., AY 2009-10 wherein it was held that Accentia was not a good comparable.

11.6. The relevant extract of the decision is reproduced hereunder for Your Honours' ready reference-Para no 9.2. Pg 8:

"9.2. We have heard the rival submissions and perused the relevant material on record. We have also gone through the Annual report of this company for the year in question, which has been placed in the paper book. It can be noticed from page 31 of the Annual report that during the year under consideration this company completed the acquisition of 96% of M/s Oak Technologies Inc., a healthcare back-office processing company engaged in medical billing, coding and transcription activities and having substantial global work force. The Mumbai Bench of the Tribunal in Petro Araldite (P) Ltd. Vs. DCIT (2013) 154 TTJ (Mum) 176, has held that a company cannot be considered as comparable because of exceptional financial results due to mergers/demergers. Similar view has been taken by the Delhi Bench of the Tribunal in several cases including Ciena India Pvt. Ltd. Vs. DCIT (ITA No.3324/Del/2013) vide its order dated 23.4.2015. In view of the fact that there was merger of some entity with Accentia Technologies Ltd., we hold that this company cannot be considered as comparable. Accordingly, the same is directed to be excluded from the final list of comparables"

(emphasis supplied)

11.7. The aforesaid decision of the Hon'ble Delhi Tribunal has been affirmed by the Hon'ble Delhi High Court in ITA No. 813/2015 vide order dated 20 October 2015 (Para 3-4. Pg. no. 2). Further, the Hon'ble Bombay High Court in CFT vs. PTC Software Bom HC-ITA 598/2016 has also upheld that Accentia cannot be considered as a good comparable.

11.8. Reliance is placed on the following decisions to support the aforesaid submission of the assessee:

- *DCIT vs. Swiss Re-services India P. Ltd. Mum Trib. ITA Nos. 1465 & 1493/Mum/2014 (Para no. 8(e), Pg. nos. 7-8)*
- *BNY Mellon International Operations (India) (P.) Ltd. vs. DCIT [2015] 55 taxmann.com 386 (Pune -Trib.) (Para 11, Pg. no. 6) upheld by the Hon'ble Bombay High Court in ITA No. 1226/ 2015 vide order dated 23.04.2018 (Para 5, Pg. no. 2)-AY 2009-10*

11.9. Based on the above factual and legal submissions, the assessee humbly prays that Accentia be excluded from the set of comparable companies.

12. Working Capital Adjustment

12.1. The Appellant humbly submits that differences in working capital between the Appellant and the comparable companies ought to be adjusted for appropriate comparability analysis. The Appellant had submitted the working capital adjusted margins of the comparable companies with the lower authorities (Refer page no. 296 of the paperbook). However, the TPO/ DRP did not grant working capital adjustment. The Appellant prays that the working capital adjustment be granted to the Appellant.

13. Conclusion:

13.1. If these contentions of the Appellant praying for the exclusion of Eclerx and Accentia along with grant of working capital adjustment are accepted, then the Appellant's margin would fit within the range as provided under of the section 92C(2) of the Act read with the Rules thereto and thus, the entire transfer pricing addition would stand deleted.

30. On the other hand, Ld. DR relied on the orders of the lower authorities.

31. Considered the rival submissions and material placed on record. We have considered the submissions of both parties while adjudicating the similar issues in the AY 2008-09, we have already directed the AO/TPO to eliminate the Eclerx from the final list of comparables.

32. In respect of comparable Accentia Technologies Ltd., the ITAT Delhi Benches, in the case of Exchanging Technology Services I.P. Ltd v. DCIT (ITA No. 1897/Del/2014) for the same assessment year as under consideration i.e., AY 2009-10 held as under: -

"9.2. We have heard the rival submissions and perused the relevant material on record. We have also gone through the Annual report of this company for the year in question, which has been placed in the paper book. It can be noticed from page 31 of the Annual report that during the year under consideration this company completed the acquisition of 96% of M/s Oak Technologies Inc., a healthcare back-office processing company engaged in medical billing, coding and transcription activities and having substantial global work force. The Mumbai Bench of the Tribunal in Petro Araldite (P) Ltd. Vs. DCIT (2013) 154 TTJ (Mum) 176, has held that a company cannot be considered as comparable because of exceptional financial results due to mergers/demergers. Similar view has been taken by the Delhi Bench of the Tribunal in several cases including Ciena India Pvt. Ltd. Vs. DCIT (ITA No.3324/Del/2013) vide its order dated 23.4.2015. In view of the fact that there was merger of some entity with Accentia Technologies Ltd., we hold that this company cannot be considered as comparable. Accordingly, the same is directed to be excluded from the final list of comparables"

33. The aforesaid decision of the Delhi Tribunal has been affirmed by the Hon'ble Delhi High Court in ITA No. 813/2015 vide order dated 20.10.2015. Further, the Hon'ble Bombay High Court in CFT v. PTC Software (I) Pvt. Ltd., in ITA 598/2016 has also upheld that Accentia Technologies Ltd., cannot be considered as a good comparable.

"1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 31st October, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 31st October, 2014 is in respect of Assessment Year 2009-10.

2. Revenue urges only the following questions of law, for our consideration:

"(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal erred in excluding KALs Information Solutions Ltd., from the list of comparables on the basis of previous years documentations of the assessee without verifying the functions performed by the comparables in the year under consideration?

(b). Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in ignoring the comparable company on the ground that the assessee company is functionally not comparable, has accepted Bodhtree Consulting Ltd., as comparable company and also that the said company was selected as a comparable by the assessee itself for the A. Y. 2008-09?

(c). Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in excluding Vishal Information Technology Ltd., and Cosmic Global Ltd., from the list of comparable companies without appreciating the fact that both the companies operate only in ITES segment and functionally comparable to the assessee's ITES segment?

(d). Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in excluding Accentia Technologies Ltd. from the list of comparables?

(e). Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in excluding Eclerx Services Ltd., from the list of comparable?"

....

....

5. Re. Question (c):-

(i). The impugned order of the Tribunal has excluded M/s. Accentia Technologies Ltd., from the list of comparables to determine the ALP of the Respondent's transactions.

(ii). The impugned order renders a finding of fact that the nature of activities carried out by M/s. Accentia Technologies Ltd., are different from that carried out by Respondent. M/s. Accentia Technologies Ltd., develops its own software and rendered Medical transcription services while the Respondent is providing BPO Services. Besides, the impugned order of the Tribunal held that high profit margins of M/s. Accentia Technologies Ltd., was attributable to amalgamation which took place in the previous years relevant to subject Assessment Year. Therefore, not comparable.

(iii). In fact, this Court in CIT v/s. Aptara Technology Ltd., (Income Tax Appeal No. 1209 of 2015) has upheld the view of the Tribunal in not accepting the Accentia Technologies Ltd., as comparable, inter alia, on account of fact that extra ordinary event such as merger/ amalgamation would affect the profitability of M/s. Accentia Technologies Ltd., Thus, making it incomparable.

(iv). Further, in that case, as in this case, the Tribunal has also recorded a finding of fact that the activities of M/s. Accentia Technologies Ltd., and the Respondent are different. Thus, not comparable. The above finding of fact is not shown to be perverse.

(v). In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.”

34. Respectfully following the above decisions, we are inclined to allow the grounds raised by the assessee and direct the TPO to eliminate the comparables, Eclerx Services Ltd., and Accentia Technologies Ltd., from the final list comparables for this assessment year.

35. With respect of working capital adjustment, the facts in this assessment year also similar to AY 2008-09, accordingly we direct TPO to determine the WCA based on the actual data available on record. Accordingly, this ground of appeal also allowed for statistical purpose.

36. With regard to Ground No.3 which is in respect of adjustment of expenses incurred in foreign currency reduced from export turnover and total turnover while computing deduction under section 10A of the Act, Ld.AR of the assessee submitted that this ground is not pressed, accordingly, the same is dismissed as not pressed.

37. With regard to Ground No. 4 which is in respect of non-grant of TDS Credit, considering the overall merits on the submissions made by the assessee we are inclined to remit this issue back to the file of Assessing Officer with a direction to verify the records submitted by the assessee on merit as per law. It is needless to say that assessee may be given a proper opportunity of being heard. In the result, the issue under consideration is remitted back to the file of Assessing Officer for statistical purpose.

38. With regard to Ground No. 5 which is in respect of levy of interest under section 234B and 234C, we observe that this ground is consequential in nature, accordingly, this ground is dismissed.

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

ITA NO. 1180/MUM/2014 (A.Y. 2009-10) (REVENUE APPEAL)

40. Revenue has raised following grounds in its appeal:-

"(i) "Whether on the facts and circumstances of the case and in law, the Hon'ble DRP was correct in directing the Assessing Officer to exclude expenses incurred in foreign currency from total turnover as well, for the purpose of deduction u/s 10A by placing reliance on the decision of Gem Plus Jewellery India Ltd.?"

(ii) "Whether on the facts and in the circumstances of the case and in law, the Hon'ble DRP was correct in directing the Assessing Officer to exclude expenses incurred in foreign currency from total turnover for the purpose of deduction u/s 10A, without appreciating the fact that the said decision has been contested by the Revenue before the Hon'ble Apex Court?"

41. Ld. DR brought to our notice relevant facts relating to the grounds raised by them and relied on the order of the Transfer Pricing Officer.

42. On the other hand, Ld.AR of the assessee submitted that Hon'ble Supreme Court in the case of HCL Technologies Ltd. [(2018) 404 ITR 719] has affirmed the Hon'ble Bombay High Court's decision in the case of Gem Plus Jewellery India Ltd. and held that the expenses excluded from the export turnover have to be excluded from the total turnover as well while computing deduction u/s 10A of the Act.

43. Considered the rival submissions and material placed on record, we observe that in the similar facts on record, the Hon'ble Supreme Court in the case of HCLTechnologies Ltd. (supra) held as under: -

*"17. The similar nature of controversy, akin this case, arose before the Karnataka High Court in **CIT vs. Tata Elxsi Ltd.** (2012) 204 Taxman 321/17. The issue before the Karnataka High Court was whether the Tribunal was correct in holding that while computing relief under Section 10A of the IT Act, the amount of communication expenses should*

be excluded from the total turnover if the same are reduced from the export turnover? While giving the answer to the issue, the High Court, inter-alia, held that when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to it, the said ordinary meaning is to be in conformity with the context in which it is used. Hence, what is excluded from 'export turnover' must also be excluded from 'total turnover', since one of the components of 'total turnover' is export turnover. Any other interpretation would run counter to the legislative intent and would be impermissible.

18. Accordingly, the formula for computation of the deduction under Section 10A of the Act would be as follows:

Export Profit = total Profit of the Business X Export turnover as defined in Explanation 2 (IV) of Section 10A of IT Act / Export turnover as defined in Explanation 2(IV) of Section 10A of the IT Act + domestic sale proceeds

19. In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under Section 10A of the IT Act are allowed only in Export Turnover but not from the Total Turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the Respondent which could have never been the intention of the legislature.

20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.

21. On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover.

22. *In view of above discussion, we are of the considered view that these instant appeals are devoid of merits and deserve to be dismissed. Accordingly, all the connected matters and interlocutory applications, if any, are disposed of with no order as to costs."*

44. Respectfully following the above decision, we hold that the expenses excluded from the export turnover have to be excluded from the total turnover as well while computing deduction under section 10A of the Act. Accordingly, ground raised by the revenue is dismissed.

45. In the result, appeal filed by the revenue is dismissed.

ASSESSMENT YEAR 2010-11

ITA No. 1114/MUM/2015 (A.Y. 2010-11) (ASSESSEE APPEAL)

46. Assessee has raised following grounds in its appeal : -

"1. *On the facts and circumstances of the case and in law the Assistant Commissioner of Income Tax-9(2)(2), Mumbai ("The AO')/ Joint Commissioner of Income tax, Transfer Pricing- 1(4), Mumbai (The TPO) under the direction of Dispute Resolution Panel ('DRP') erred in making a transfer pricing adjustment of Rs. 7,84,61,590 to the Appellant's international transaction of provision of financial data analysis services.*

2 *On the facts and circumstances of the case and in law the AO/ TPO under the direction of DRP erred in:*

- a. *upholding the action by including certain companies which were functionally not comparable,*
- b. *excluding/rejecting certain companies which were functionally comparable*
- c. *disregarding the Appellant's Transfer Pricing documentation and conducting his own comparability analysis (and in this regard, obtaining the financial data of certain potential comparables using his powers under Section 133(6) of the Act) which is not in accordance with the contemporaneous documentation requirement of the Indian TP regulations;*
- d. *requiring financial data of only the current year (FY 2009-10) of the comparable companies to be used for benchmarking the Appellant's international transactions;*
- e. *not granting a working capital and risk adjustment to the Appellant to account for the differences in the risk profile of the comparables vis-a vis the Appellant;*

It is prayed that the aforesaid adjustment should be deleted.

3. *On the facts and in the circumstances of the case and in law, the Ld. AO under the directions of the Dispute Resolution Panel ('DRP') erred in reducing expenses incurred in foreign currency, not being expenses incurred in providing technical services outside India or in the nature of freight, telecommunication charges or insurance attributable to delivery of article or things or computer software, from "export turnover" and "total turnover" while computing deduction under section 10A and section 10AA of the Act. This has resulted in disallowance of Rs.24,77,892.*

The appellant prays that the disallowance of Rs.24,77,892 made under section 10A and section 10AA of the Act is erroneous, unwarranted and be deleted.

4. *On the facts and in the circumstances of the case and in law, the Ld. AO under the directions of the DRP erred in disregarding the suo-moto disallowance of Rs.9,33,000 made by the appellant under section 14A of*

the Act and in applying Rule 8D(2)(iii) of the Income-tax Rules, 1962 ('the Rules') to disallow an additional amount of Rs.92,30,548 under section 14A of the Act.

The appellant prays the additional disallowance of Rs.92,30,548 made under section 14A of the Act is erroneous, unwarranted and be deleted.

Without prejudice to the above, on the facts and in the circumstances of the case and in law, the AO under the directions of the DRP has legally erred in computing the disallowance under section 14A of the Act read with Rule 8D(iii) of the Rules as one-half percent of the average value of total investments as against one-half percent of the average value of the investments, income from which does not or shall not form part of the total income.

Accordingly, the appellant prays that the AO be directed to re-compute the disallowance under section 14A of the Act read with Rule 8D(iii) of the Rules excluding the value of the following investments made by the appellant:

(a) In foreign companies; and

(b) Strategic investments in the shares of its Indian subsidiaries.

5. On the facts and in the circumstances of the case and in law, the Ld. AO erred in not giving full credit for the amount of tax deducted at source of Rs.22,44,85,774 claimed in the return of income filed by the appellant under section 139(1) of the Act.

The appellant prays that the AO be directed to allow credit of the entire amount of tax deducted at source of Rs. 22,44,85.774 claimed in the return of income.

6. On the facts and in the circumstances of the case and in law, the Ld. AO legally erred in levying interest under section 234A of the Act.

The appellant prays that the AO be directed to delete the interest under section 234A of the Act as the same is erroneous and unwarranted.

7. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest under section 234B and 234C of the Act.*

The appellant prays that the AO be directed to re-compute interest under section 234A, 234B and 234C of the Act as a consequence of the above grounds."

47. Ground Nos. 1 and 2 are similar to Ground Nos. 1 and 2 of grounds of appeal raised by the assessee for the A.Y. 2009-10 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2010-11. We order accordingly.

48. With regard to Ground No. 3, at the time of hearing, Ld.AR of the assessee submitted that this ground is not pressed, accordingly, the same is dismissed as not pressed.

49. With regard to Ground No. 4 which is in respect of disallowance under section 14A of the Act, brief facts relating to the ground are, for the assessment year under consideration, assessee has earned a dividend income of ₹.1,77,31,980/-. However, out of the above, Dividend income amounting to ₹.7,47,500/- has been received from Gas Strategies Group Limited, a foreign company and the same has been offered to tax by the

Assessee. Therefore, it is stated that only the balance income of ₹.1,69,84,480/- (1,77,31,980/- Less 7,47,500/-) be considered as exempt income for the purpose of section 14A of the Act. In this connection, the assessee had suo-motu made a disallowance of ₹.9.33,000/- while filing its return of income.

50. At the time of hearing, Ld.AR of the assessee submitted that during the assessment proceedings, the Assessing Officer invoked Rule 8D of the Rules without recording his satisfaction having regard to the Accounts of the assessee and worked out an additional disallowance under Rule 8D(2)(ii) amounting to ₹.92,30,548/-. In this regard, Ld.AR of the assessee submitted that Assessing Officer erred in invoking Rule 8D of the Rules, without recording his satisfaction and therefore on this ground itself, the additional disallowance made by the Assessing Officer is liable to be deleted and placed reliance on the following case law: -.

- *Maxopp Investments Ltd. v. CIT [(2018) 402 ITR 640 (SC)]*
- *Wanbury Limited v. DCIT [ITA No.2587 of 2019 dated 25 April 2022 (Mumbai Tribunal)]*

51. Without prejudice to the above, the Ld.AR of the assessee submitted that only those investments which have yielded exempt income during the year be considered while computing the disallowance under section 14A of the Act r.w. Rule 8D and not the total investments as computed by the Assessing Officer. He relied on the following case law : -

- *ACB India Ltd. v. ACIT [(2015) 235 Taxman 22 (Delhi HC)]*
- *ACIT v. Vireet Investments (P.) Ltd. [(2017) 58 ITR (T) 313 (Delhi Tribunal) (SB)]*

52. On the other hand, Ld. DR relied on the orders of the lower authorities.

53. Considered the rival submissions and material placed on record, we observe that the assessee has earned dividend income from domestic and foreign companies and the 14A disallowance applicable only on the dividend earned by the assessee from domestic companies. Further, the assessee has made submissions that the Assessing Officer has not recorded satisfaction before invoking rule 8D. It is fact on record that the AO has invoked rule 8D considering the fact that the rule 8D is applicable for this year and instead of going into this aspect, we are inclined to direct

the Assessing Officer to make disallowances based on the settled position of law, in the following cases, the Hon'ble High Courts and coordinate benches has given clear findings that the disallowance u/s 14A is restricted only to the extent of exempt income earned and the investments to be considered for making disallowances are only on those investments which has actually earned the dividend. So far as disallowance of other administrative expenditure is considered, it is observed that Hon'ble Delhi ITAT in the case of Vireet Investment Pvt. Ltd. [165 ITD 27] has held as under:

"Section 14A of the Income-tax Act, 1961 read with rule 8D of the Income-tax Rules, 1962 - Expenditure incurred in relation to exempt income not includible in total income - Assessment year 2008-09 - Whether only those investments are to be considered for computing average value of investment which yielded exempt income during year - Held, yes [Para 11.16]

54. The above referred decision has been followed by co-ordinate Bench in the case of DCIT v. Shree Global Trader in Ltd. in ITA No. 1374/Mum/2022 dated 22nd December, 2022 has held as under:

"11. Having heard the rival submissions and perused the materials available on record. It is observed that the assessee has made a suo moto disallowance of Rs.1,263/- for which the assessee contends that

the A.O. ought not to have applied Rule 8D on the ground that suo moto disallowance has been made by the assessee. The assessee further contends that without prejudice, the disallowance should be restricted only to the investments which have yielded an exempt income for the assessee during the impugned year. It is also pertinent to point out that since the assessee had not borrowed funds during the relevant year, no disallowance as per Rule 8D(2)(i) of the Income Tax Rules was warranted. It is also observed that the A.O. has recorded his satisfaction that the correctness of the assessee's claim of expenses of disallowance was not to the satisfaction of the A.O., thereby entitling the A.O. to invoke the provisions of Rule 8D and the decision of the Hon'ble Apex Court in the case of Maxopp Investment Ltd. (supra) holds good in the present case. We are also of the considered opinion that the Id. CIT(A) has rightly held that the assessee has not made bifurcation of the expenses claimed under 'other expenses' and in case of which the A.O. had to invoke Rule 8D of the Income Tax Rules. The suo moto disallowance of the assessee does not disentitle the A.O. from invoking the said provision. In this regard, we find justification in the order of the Id. CIT(A) in upholding the A.O.'s action in invoking the provision of Rule 8D(2)(ii) by rejecting the assessee's contention that suo moto disallowance by the assessee warrants no further disallowances. The assessee's alternate claim is that the disallowance u/s. 14A read with Rule 8D(2)(iii) should be restricted only to those investments on which exempt income was earned by the assessee during the impugned year, by placing reliance on the decision of Vireet Investments Pvt. Ltd. (supra). We also find justification in the order of the Id. CIT(A) in holding that the disallowance u/s. 14A read with Rule 8D(2)(iii) of the Act should be invoked for calculation of disallowance pertaining to only investment from which exempt income is earned by the assessee by placing reliance on the decision of the Special Bench of the Tribunal in the case of Vireet Investments Pvt. Ltd. (supra). We find no infirmity in the order of the Id. CIT(A).

12. By respectfully following the above mentioned decisions, we uphold the order of the Id. CIT(A) in directing the A.O. to recompute

the disallowance only to the investments which have yielded exempt income during the impugned year."

55. Considering the finding given by Coordinate Benches, the Assessing Officer is directed to re-work disallowance u/s.14A under rule 8D(2)(iii) by adopting only those investments which has yielded exempt income. The assessee gets the relief accordingly. This ground of appeal is partly allowed.

56. With regard to Ground Nos. 5, 6 and 7, we observe that these grounds are consequential in nature, accordingly, these grounds are dismissed as such.

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

58. ITA No. 843/MUM/2015 (A.Y. 2010-11) (REVENUE APPEAL)

59. Revenue has raised following grounds in its appeal: -

1. "Whether, on the facts and circumstances of the case and in law, the Hon'ble DRP was justified in holding that for the purpose of deduction/exemption u/s 10A, the expenses incurred in foreign currency in providing technical services outside India do not have an element of

turnover and these expenses have to be excluded from the total turnover particularly in the absence of a legislature prescription to the contrary?

The appellant prays that the order of the DRP-II, Mumbai on the above grounds be set aside and that of the ITO/AC/DCIT be restored."

60. Coming to the revenue appeal relating to A.Y. 2010-11, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y. 2009-10 in revenue appeal are applicable to this assessment year also. Accordingly, the ground raised by the revenue is dismissed.

61. In the result, appeal filed by the revenue is dismissed.

ASSESSMENT YEAR 2011-12

ITA NO. 997/MUM/2016 (A.Y. 2011-12) (ASSESSEE APPEAL)

62. Assessee has raised following grounds in its appeal : -

"1. On the facts and circumstances of the case and in law the Deputy Commissioner of Income Tax-9(2)(2), Mumbai (The AO)/ Joint Commissioner of Income tax, Transfer Pricing- 2(3), Mumbai (The TPO)" under the direction of Dispute Resolution Panel (DRP)" erred in making a transfer pricing adjustment of Rs. 9,41,36,833 to the Appellant's international transaction of back end support for financial data analysis services.

2. *On the facts and circumstances of the case and in law the AO/ TPO under the direction of DRP erred in:*

- a. upholding the action by including certain companies which were functionally not comparable;*
- b. excluding/ rejecting certain companies which were functionally comparable;*
- c. disregarding the Appellant's Transfer Pricing documentation and conducting his own comparability analysis which is not in accordance with the contemporaneous documentation requirement of the Indian TP regulations;*
- d. not providing the information gathered by exercising powers vested u/s. 133(6) of the Act with respect to ICRA Online Limited;*
- e. requiring financial data of only the current year (FY 2010-11) of the comparable companies to be used for benchmarking the Appellant's international transaction; and*
- f. not granting a working capital and risk adjustment to the Appellant to account for the differences in the risk profile of the comparables vis-a vis the Appellant.*

It is prayed that the aforesaid adjustment should be deleted.

3. *On the facts and in the circumstances of the case and in law, the AO under the directions of the DRP erred in reducing expenses incurred in foreign currency, not being expenses incurred in providing technical services outside India or in the nature of freight, telecommunication charges or insurance attributable to delivery of article or things or computer software, from "export turnover" and "total turnover while computing deduction under section 10A and section 10AA of the Act. This has resulted in disallowance of Rs. 15,71,878.*

The appellant prays that the disallowance of Rs. 15,71,878 made under section 10A and section 10AA of the Act is erroneous, unwarranted and be deleted.

4. *On the facts and in the circumstances of the case and in law, the AO under the directions of the DRP erred in disregarding the suo motu disallowance of Rs. 414,324 made by the appellant under section 14A of the Act, in applying Rule 8D(2)(iii) of the Income-tax Rules, 1962 (the Rules).*

The appellant prays that the additional disallowance be deleted.

Without prejudice to the above, on the facts and in the circumstances of the case and in law, the AO under the directions of the DRP has legally erred in computing the disallowance under section 14A of the Act read with Rule 8D(iii) of the Rules as one-half percent of the average value of total investments as against one-half percent of the average value of the investments, income from which does not or shall not form part of the total income.

Accordingly, the appellant prays that the AO be directed to re-compute the disallowance under section 14A of the Act read with Rule 8D(iii) of the Rules excluding the value of strategic investments in the shares of its Indian subsidiaries.

5. *On the facts and in the circumstances of the case and in law, the AO erred in not granting credit for tax deducted at source of ₹.3,47.03,106.*

6. *On the facts and in the circumstances of the case and in law, the AO erred in levying interest under section 234B of the Act.*

The appellant prays that the AO be directed to re-compute interest under section 234B of the Act as a consequence of the above grounds."

63. Ground Nos. 1 and 2 are similar to Ground Nos. 1 and 2 of grounds of appeal raised by the assessee for the A.Y. 2009-10, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y.2009-10 are applicable to this assessment year also. We order accordingly.

64. With regard to Ground No. 3, at the time of hearing, Ld.AR of the assessee submitted that this ground is not pressed, accordingly, the same is dismissed as not pressed.

65. With regard to Ground No. 4 which is in respect of disallowance under section 14A of the Act, we observe that this ground is similar to Ground No. 4 raised by the assessee for the A.Y. 2010-11, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y.2010-11 is applicable to this assessment year also. Accordingly, this ground is allowed for statistical purpose.

66. With regard to Ground No. 5 which is in respect of non-grant of TDS credit, considering the overall merits on the submissions made by the assessee we are inclined to remit this issue back to the file of Assessing Officer with a direction to verify the records submitted by the assessee and allow the credit on merit and as per law. It is needless to say that assessee may be given a proper opportunity of being heard. In the result the issue under consideration is remitted back to the file of Assessing Officer for statistical purpose.

67. With regard to Ground No. 6 which is in respect of levy of interest under section 234B of the Act, we observe that this grounds is consequential in nature, accordingly, this ground is dismissed.

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

ITA NO. 824/MUM/2016 (A.Y. 2011-12) (REVENUE APPEAL)

69. Revenue has raised following grounds in its appeal: -

i) "Whether on the facts and in the circumstances of the case and in law, the Hon'ble DRP was justified in holding that for the purpose of deduction/exemption u/s. 10A, the expenses incurred in foreign currency in providing technical services outside India do not have an element of turnover and these expenses have to be excluded from the total turnover particularly in the absence of a legislature prescription to the contrary?"

70. Coming to the appeal relating to A.Y. 2011-12, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y. 2009-10 in revenue appeal are applicable to this assessment year also. Accordingly, appeal filed by the revenue is dismissed.

71. In the result, appeal filed by the revenue is dismissed.

ASSESSMENT YEAR 2012-13

ITA No. 1345/MUM/2017 (A.Y. 2012-13) (ASSEESSEE APPEAL)

72. Assessee has raised following grounds in its appeal: -

"1. *On the facts and circumstances of the case and in law, the Hon'ble Dispute Resolution Panel (DRP) erred in upholding the action of the Ld. Assistant Commissioner of Income Tax-9(2)(2), Mumbai (AO)/ Joint Commissioner of Income tax, Transfer Pricing- 1(1), Mumbai (TPO) in making an adjustment of Rs. 13,65.09,673 to the provision of back end support for financial data analysis services by the Appellant to its associated enterprise (AE).*

2. *On the facts and circumstances of the case, the Hon'ble DRP erred in upholding the action of the Ld.AO/ Ld. TPO in characterizing the provision of back end support for financial data analysis services to by the Appellant to its AE as that of Knowledge Process Outsourcing services ('KPO services).*

The Appellant prays that it be held that the services provided by the Appellant be not characterised as KPO services.

3. *On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding the action of the Ld. AO/Ld. TPO in:*

3.1. *rejecting the Transfer Pricing documentation which was maintained in good faith and with due diligence;*

3.2. *disregarding the search process carried out by the Appellant in Transfer Pricing documentation and conducting his own comparability analysis which is not in accordance with the contemporaneous documentation requirement of the Indian TP regulations;*

3.3 *not applying multiple year data for comparable companies and using data for the financial year 2011-12;*

3.4 *including companies in the comparability analysis which are different from the Appellant in functions, asset base and risk profile;*

3.5 *not considering companies similar to the Appellant in functions, asset base and risk profile while performing comparability analysis; and*

3.6 *not granting a working capital and risk adjustment to the Appellant to account for the differences in the risk profile of the comparables vis-a vis the Appellant.*

The Appellant therefore prays that the aforesaid transfer pricing adjustment of Rs. 13,65,09,673 be deleted.

4. *On the facts and in the circumstances of the case and in law, the AO under the directions of the DRP erred in reducing expenditure incurred in foreign currency from 'export turnover' while computing deduction under section 10AA of the Income Tax Act, 1961 (Act') thereby reducing the claim by Rs. 32,10,125.*

Without prejudice to above, assuming but not admitting that the expenditure in foreign currency is to be reduced from the 'export turnover, the AO under the directions of the DRP erred in not reducing the same from the total turnover' while computing the deduction u/s. 10AA of the Act.

It is prayed by that the claim of the Appellant rejected by the Ld. AO and the Hon'ble DRP be accepted.

5. *On the facts and in the circumstances of the case and in law, the AO erred in not granting credit of tax deducted at source of Rs. 28,09,064.*

6. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest under section 234B of the Act.*

7. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest under section 234C of the Act."*

73. Ground Nos.1 to 3 are relating to Transfer Pricing Adjustment in relation to financial data analysis services, we observe that this ground is similar to Ground Nos. 1 to 6 of grounds of appeal raised by the assessee for the A.Y. 2009-10 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2012-13.

74. Further, Ld.AR of the assessee submitted that for the year under consideration, there is a new comparable selected by the TPO i.e, TCS E-Serve and prayed to exclude from the final list of comparables. He relied on the decision of the Coordinate Bench in the case of Integreon (India) Pvt. Ltd., v. DCIT in ITA No. 1277/Del/2017 dated 31.08.2020.

75. On the other hand, Ld. DR relied on the order of the lower authorities.

76. Considered the rival submissions and material placed on record, we observe that on similar facts the Coordinate Bench in the case of Integreon (India) Pvt. Ltd., v. DCIT (supra) has excluded the comparable from the final list. The relevant ratio of the decision is reproduced below: -

"8. We have heard the rival contentions and perused the record. The assessee is subsidiary of Integreon Managed Solution (Mauritius) Ltd. which holds 99% share of the assessee company. The assessee provides Information Technology enabled Services (in short "ITeS") and is mainly engaged in research support for a broad array of business challenges, including competitive intelligence, customer experience and branding customer analytics, investment and due diligence, market entry and product launch. During the year, the assessee had provided services to G Rail Research LLC (G Rail, USA). The assessee had selected Transactional Net Margin Method as the most appropriate method to benchmark its international transaction of providing ITeS services. The margins shown by the assessee were 17.11% which were compared with the mean margins of the comparables selected using current year data at 17.4%. However, the

TPO rejected some of the comparables and also modified the filters and proposed Transfer Pricing adjustment of Rs.23,600,763/-. The said adjustment was upheld by the DRP and the Assessing Officer passed final assessment order. The Ld.AR for the assessee before us has pointed out that the limited issue which needs to be adjudicated is the final selection of comparables by the Assessing Officer/DRP/TPO. It was suggested by the Ld.AR for the assessee that in case 02 concerns i.e. TCS eServe Ltd. and Infosys BPO Ltd. are excluded from the final list of the comparables, then the margins shown by the assessee would be within +/-5% of mean margins of comparables shown by the assessee.

9. *We find that the issue of exclusion of TCS e-Serve Ltd. from the final list of comparables on the ground of the said concern having both brand value and high turnover was agitated before the Tribunal (supra) in assessee's own case in Assessment Year 2011-12. The Tribunal in turn relied on the ratio laid down by the Delhi Bench of Tribunal in B.C. Management Services P.Ltd. 83 Taxmann.com 346. The relevant finding of the said case are reproduced by the Tribunal in para 14 and are being referred, but not being reproduced for the sake of brevity. It may further be pointed out that against the said order in B.C. Management Services P.Ltd.(supra), the Revenue filed an appeal before the Hon'ble High Court and the question of law raised was as under:-*

1. *"Whether the exclusion of four comparables i.e. e-ClerxPvt.ltd., M/s ICRA Techno Analytics Ltd., M/s. TCS E-Serve Ltd. and M/s. Accentia Technologies Pvt.ltd., are sustainable and not erroneous?"*

10. *The Hon'ble Jurisdictional High Court dismissed the appeal of the Revenue observing as under:-*

"The third comparable that the AO/TPO excluded is TCS E-serve. The ITAT observed that though there is a close functional similarity between that entity and the assessee, however, there is a close connection between TCS E-serve and TA T A Consultancy Service Ltd. which was high brand value; that distinguished it and marked it out for exclusion. The ITAT recorded that the brand value associated with TCS Consultancy reflected impacted TCS E-serve profitability in a very positive manner. This inference too in the opinion of Court, cannot be termed as unreasonable. The rationale for exclusion IS therefore upheld."

11. *The Hon'ble High Court thus was of the view that where TCS e-serve Ltd. has high brand value then it cannot be selected as comparable with a concern whose brand value is less. The Ld.DR for the Revenue stressed that the global entity of which the assessee is the subsidiary has high brand value. We find no merit in the stand of the Revenue in this regard. Even on the second issue of high turnover, the said concern i.e. TCS e-Serve Ltd. cannot be selected as comparable. The total turnover of the assessee during the year is Rs.30.92 crores. On the other hand, the turnover of the TCS e-Serve Ltd. is Rs.1578 crores. Accordingly we hold that the TCS e-Serve Ltd. is to be excluded from the final list of comparables. Similarly, Infosys BPO Ltd. which has both brand value and high turnover of Rs.1312 crores cannot be selected as a comparable to the assessee whose total turnover is only Rs.31 crores (approx.). Accordingly, we hold so.*

12. *In view of the our excluding the two concerns i.e. TCS e-Serve Ltd. and Infosys BPO Ltd. from the final list of comparables and as per the submissions of the assessee, no other grounds of appeal needs to be adjudicated as the margins shown by the assessee would be within +/-5% in the comparables, thus other grounds of appeal raised by the assessee are not taken up for adjudication."*

77. From the above, it is clear that the comparable TCS e-serve is distinguishable on the basis of high turnover and brand value not on the basis of functionality test. In our view, whether the turnover makes the difference. We observe that the Turnover of TCS is ₹.1578 crores in this segment, whereas the Turnover of the assessee is ₹.114 Crores, there is significant difference and it is about 14 times. Respectfully following the above decision, we direct the Transfer Pricing Officer to exclude the comparable TCS e-serve from the final list of comparables. We order accordingly.

78. With regard to Ground No. 4, Ld.AR of the assessee submitted that this ground is not pressed, accordingly, this ground is dismissed as not pressed.

79. However, Ld.AR of the assessee submitted that on a without prejudice basis, the assessee submits that the expenses excluded from the export turnover should have to be excluded from the total turnover as well. The Ld. AR submitted that the same is squarely covered in favour of the assessee by the Hon'ble Supreme Court in the case of HCL Technologies Ltd. [(2018) 404 ITR 719] which has affirmed the Bombay High Court's decision in the case of Gem Plus Jewellery India Ltd. (Supra) and held that the expenses excluded from the export turnover have to be excluded from the total turnover as well while computing deduction u/s 10A of the Act.

80. Considered the rival submissions and material placed on record, we observe from the record that Assessing Officer has not followed the directions of Ld DRP in granting the benefit to the assessee that the foreign currency expenses which are excluded from Export turnover and not excluded from Total turnover. In our view, it is settled position of law that

the expenses which are excluded from the export turnover has to be excluded from the total turnover also as held in the case of HCL Technologies Ltd (supra). Accordingly, we direct the Assessing Officer to exclude the expenses from the Total turnover also while determining the exemption u/s 10A of the Act.

81. With regard to Ground No. 5, which is in respect of non-grant of TDS credit, considering the overall merits on the submissions made by the assessee we are inclined to remit this issue back to the file of Assessing Officer with a direction to verify the records submitted by the assessee on merit and as per law. It is needless to say that assessee may be given a proper opportunity of being heard. In the result the issue under consideration is remitted back to the file of Assessing Officer for statistical purpose.

82. Ground Nos. 6 and 7 which are relating to levy of interest under section 234B of the Act and are consequential in nature, accordingly, these grounds are dismissed.

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

84. In the nut shells, the appeals are decided as under: -

Sr.No.	Appeal No.	Result
1.	ITA.No. 7603/MUM/2012 (A.Y. 2008-09) (Assessee Appeal)	Partly Allowed
2.	ITA No. 1564/MUM/2014 (A.Y. 2009-10) (Assessee Appeal)	Partly Allowed
3.	ITA NO. 1180/MUM/2014 (A.Y. 2009-10) (Revenue Appeal)	Dismissed
4.	ITA No. 1114/MUM/2015 (A.Y. 2010-11) (Assessee Appeal)	Partly Allowed
5.	ITA No. 843/MUM/2015 (A.Y. 2010-11) (Revenue Appeal)	Dismissed
6.	ITA NO. 997/MUM/2016 (A.Y. 2011-12) (Assessee Appeal)	Partly Allowed
7.	ITA NO. 824/MUM/2016 (A.Y. 2011-12) (Revenue Appeal)	Dismissed
8.	ITA No. 1345/MUM/2017 (A.Y. 2012-13) (Assessee Appeal)	Partly Allowed.

Order pronounced in the open court on 10th January, 2024

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Mumbai / Dated 10.01.2024
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum