

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

IT(TP)A No.1559/Bang/2012
Assessment year : 2008-09

Flextronics Technologies (India) Private Ltd., Plot No.3, Phase II, SIPCOT Industrial Park, Sandavellure C Village. 602 106. Sriperumbudur Taluk, Kancheepuram District. Tamil Nadu. PAN: AAACF 5248E	Vs.	The Deputy Commissioner of Income Tax, Circle 11(3), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Ajit Kumar Jain, CA
Respondent by	:	Shri G.R. Reddy, CIT-I (DR)

Date of hearing	:	05.10.2015
Date of Pronouncement	:	23.10.2015

ORDER

Per Asha Vijayaraghavan, Judicial Member

This order is against the assessment order dated 27.09.2012 passed u/s. 143(3) r.w.s. 144C of the Income-tax Act, 1961 ["the Act"].

2. The assessee company is engaged in the manufacture of Printed Circuit Board Assembly which has application in the telecom, industrial electronics and consumer products segment. It also operated a shared services division for providing back office services relating to accounts payable processing and human resources record maintenance.

3. In the TP study of the taxpayer it has been stated that the search of the databases yielded a set of 7 comparables with an average profit margin @ 7.56% on cost. The mark-up on total cost of the taxpayer is arrived at 8.30% on cost. As the profit margin earned by the taxpayer is more than the arithmetical mean margin, the price charged by the taxpayer was treated as at arm's length.

4. The TPO selected the final set of comparables as follows:-

Sl. No.	Name of the company	OP/TC %
1	Accentia Technologies Ltd. (Seg)	41.77
2	Acropetal Technologies Ltd. (Seg)	35.30
3	Aditya Birla Minacs Worldwide Ltd. (Earlier known as Transworks Information Services Ltd.)	- 4.00
4	Asit C Mehta Financial Services Ltd. (Seg.)	9.42
5	Caliber Point Business Solutions Ltd.	10.97
6	Coral Hubs Ltd. (Earlier known as Vishal Information Technologies Ltd.)	50.68
7	Cosmic Global Ltd.	23.30
8	Crossdomain Solutions Ltd.	27.03
9	Datamatics Financial Services Ltd. (Seg.)	29.11
10	e4e Healthcare Solutions Ltd. (formerly known as Nittany Outsourcing Services Pvt. Ltd.)	18.54
11	Eclerx Services Ltd.	58.80
12	Genesys International Corporation Ltd.	47.40
13	Infosys BPO Ltd.	19.66
14	IServices India Pvt. Ltd.	10.77

15	Jindal Intellicom Pvt. Ltd.	- 10.29
16	Mold-Tek Technologies Ltd.	96.66
17	R Systems International Ltd. (Seg.)	4.30
18	Spanco Ltd. (Seg.) [Earlier known as Spanco Telesystems & Solutions Ltd.]	8.81
19	Wipro Ltd. (Seg.)	30.05
20	Allsec Technologies Limited	- 13.29
	AVERAGE	24.75

5. The TPO also held that out of comparables selected by the assessee, the following 5 comparables are found to be suitable for comparison after detailed analysis, which are as follows:-

Sl. No.	Name of the company	Operating Margin to Cost (FY 2007-08)
1	Datamatics Financial Services Ltd. (Seg.)	29.11
2	Cosmic Global Ltd.	23.30
3	Allsec Technologies Ltd.	- 13.29
4	R Systems International Ltd. (Seg.)	4.30
5	Aditya Birla Minacs Worldwide Ltd. (Earlier known as Transworks Information Services Ltd.)	- 4.00

6. The average of 20 comparables selected by the TPO worked out 24.75. The TPO computed the working capital adjustment at 2.28%. The arm's length margin was worked out at 122.47% of the operating cost. The TPO treated the shortfall of Rs.8,38,77,257 as transfer pricing adjustment u/s. 92CA of the Act in the software segment.

7. Aggrieved by the order of the TPO, the assessee preferred appeal before the DRP.

8. The Assessing Officer while passing the order u/s. 143(3) r.w.s. 144C of the Act held as under:-

COMPUTATION OF TOTAL INCOME

Income from Domestic Unit	(-) Rs. 16,79,73,284
Income from SEZ Unit	(-) Rs. 61,83,93,228

	(-) Rs.78,63,66,512
Less: Profit of 10A Unit	Rs. 6,08,92,020

	(-) Rs.72,54,74,492
Less: Profit of SEZ Unit	Rs. 1,56,95,405

	(-) Rs.70,97,79,087
Add: Adj. u/s. 92CA	Rs. 8,38,77,257
Income from Other Sources	Rs. 3,21,878

Total Income	(-) Rs.62,55,79,952

Tax thereon	Rs. Nil
Less: TDS	Rs.59,46,764

Refund Due	Rs.59,46,764
Add: Int. u/s 244A	Rs.12,43,973

Refundable	Rs.71,90,737
Less: RO already issued	Rs.71,90,737

9. Aggrieved, the assessee is in appeal before us.
10. The assessee has filed concise grounds of appeal and the same are taken up for consideration. Ground Nos. 1, 3.1 & 3.2 are general in nature. Ground Nos. 2, 3.3, 3.4, 3.5, 3.7 & 3.8 are not pressed. Ground Nos.3.9 and 4 are consequential grounds.

11. Ground No.3.6 reads as follows:-

“3. The Honourable DRP and the learned AO have erred in law and on facts in confirming the action of the Transfer Pricing Officer (“TPO”) in making an adjustment amounting to Rs.83,877,257 to the total income of the Appellant, and upholding the Arm’s Length Price (“ALP”) margin of 22.47 percent as determined by the TPO as against the ALP of 7.56 percent as determined by the appellant. In doing so, the Honourable DRP and learned AO have erred in upholding the following action of the TPO:

3.6 finalizing the transfer pricing order by applying certain filters for selection of comparable companies and in the process selecting comparable companies which fail the test of comparability as per the TP regulations;”

12. The Id. counsel for the assessee, Shri Ajay Jain, submitted a chart and stated that Accentia Technologies Ltd. is uncomparable as its financial results are arising out of amalgamation. He relied on the decision of the coordinate Bench of the Tribunal in the case of *Symphony Marketing Solutions India Pvt. Ltd. v. ITO*, IT(TP)A No.1316/Bang/2012, order dated 14.08.2013 (AY 2007-08), wherein it has been held as follows:-

“(1) Accentia Technologies Ltd. (Seg.)

10. This was considered as a comparable by the TPO and listed at Sl.No.1 of the comparable companies chosen by the TPO. The Id. counsel for the assessee drew our attention to the fact that there are extra ordinary events that occurred during the previous year in this company. Our attention was draw to the annual report of this company for the A.Y. 2007-08 wherein the fact that this company had acquired Thunga Software Pvt. Ltd., GSR Physicians Billing Services Inc., GSR Systems Inc. and Denmed Inc. is mentioned. Our attention was also drawn to the decision of the Hyderabad ITAT Bench in the case of *Capital IQ*

Information Systems India Pvt. Ltd. v. DCIT [2013] 32 Taxman.com 21 (Hyd. Trib). In the aforesaid decision, the Hyderabad Bench of the Tribunal had to deal with a case of determination of ALP in the case of an assessee who was providing ITES business support services for the A.Y. 2007-08. The TPO had considered Accentia Technologies Ltd. as a comparable. The DRP however held that the said company cannot be compared as a comparable owing to extra ordinary events that took place during the previous year. The Tribunal upheld the order of the DRP observing as follows:-

“I. Accentia Technologies Ltd.

10. It is the submission of the assessee that this company cannot be treated as a comparable because of uncomparable financial results arising out of amalgamation in the company. In this regard, the assessee has relied upon the order of the DRP for the assessment year 2008-09 in assessee's own case. It is seen that the DRP while considering similar objection placed by the assessee in the case of another company, viz. Mold Tek Technologies Ltd., in the proceedings relating to the assessment year 2008-09, has observed in the following manner-

"17.5. In addition to the above, the Director's Report of the company for the FY 2007-08 revealed the merger and the demerger. A company known as Techmen Tools Pvt. Ltd. had amalgamated with Mold-tek Technologies Ltd. with effect from 1st October, 2006. There was a de-merger of Plastic Division of the company and the resulting company is known as Moldtek Plastics Limited. The de-merger from the Moldtek Technologies took place with effect from 1st April, 2007. The merger and the de-merger needed the approval of the Hon'ble High Court of Andhra Pradesh and also the approval of the shareholders. The shareholders of the company gave approval for the merger and the de-merger on 25.01.2008 and the Hon'ble High Court of Andhra Pradesh had approved the merger and de-merger on 25th July, 2008. Subsequently, the accounts of Moldtek Technologies for FY 2007-08 were revised. On a perusal of the annual report it is noticed that

Teckmen Tools Pvt. Ltd. and the Plastic Division of the company were demerged and the resulting company was named as Moldtek Plastics Ltd. The KPO business remained with the company. A perusal of the Annual report revealed that to give effect to the merger and demerger, the financial statements were revised and restated after six months from the end of the financial year 31.3. 2008. The assessee filed Form No.21 under the Companies Act with the Registrar of Companies on 26th August, 2008. Thus the effective date of the scheme of merger and demerger was 26th August, 2008. The Annual Report supported the argument of the assessee that there were merger and demerger in the financial year and it was an exceptional year of performance as financial statements were revised by this company much after the closure of the previous year. The Panel agrees with the contention of the assessee that it is an exceptional year having significant impact on the profitability arising out of merger and demerger."

11. On careful consideration of the matter, we also agree with the aforesaid view of the DRP that extraordinary event like merger and de-merger will have an effect on the profitability of the company in the financial year in which such event takes place. It is the contention of the assessee that in case of the aforesaid company, there is amalgamation in December, 2006, which has impacted the financial result. This fact has to be verified by the TPO. If it is found upon such verification that the amalgamation in fact has taken place, then the aforesaid comparable has to be excluded."

11. We have considered the submissions of the Id. counsel for the assessee and are of the view that the ratio laid down by the Hyderabad Bench of the ITAT is squarely applicable to the present case also. It is clear that during the previous year there were extra ordinary events that took place in this company which warrants exclusion of this company as a comparable. We therefore hold that this company cannot be considered as a comparable."

13. With respect to Acropetal Technologies Ltd., the Id. counsel for the assessee again relied on the decision of the coordinate Bench of this Tribunal in *Symphony Marketing Solutions India Pvt. Ltd. (supra)* wherein it has been held this company is not functionally comparable at para 12 & 13 of its order:-

“(2) Acropetal Technologies Ltd. (Seg.)

12. This company is listed at Sl.No.2 of the comparables chosen by the TPO. As far as this company is concerned, the objection of the assessee is that this company is not functionally comparable. The assessee is a BPO company that provides market analytics and data management services. To provide market analytics solutions, the assessee gives strategies that impact on client revenue including data based marketing strategies for customer acquisition, devising customer retention strategies and excluding loss mitigation strategies through cutting edge forecasting tools. The data management services provided by the assessee include routine business data reporting and management, website management, marketing data analysis and top line reporting. As far as Acropetal Technologies Ltd. is concerned, this company does the business of export of software services. It is also seen from the segmental revenue of this company (Note 15 to the notes on accounts to Annual Report for 07-08) that it derives income from engineering design services and software development services. It is also pertinent to point out that before the TPO, the assessee raised an objection that this company performs different functions and mainly engaged in the area of software development services and engineering design services. The TPO in his order has observed that the services rendered by this company fall in the definition of ITES.

13. We have considered the submissions of the learned counsel for the Assessee. On a perusal of the Note No.15 of notes to accounts which gives segmental revenue of this company, it is clear that the major source of income for this company is from providing Engineering Design Service and

Information Technology Services. The functions performed by the Engineering Design Services segment of the company cannot be considered as comparable to the ITES/BPO functions performed by the Assessee. The performance of Engineering Design Services is regarded as providing high end services among the BPO which requires high skill whereas the services performed by the Assessee are routine low end ITES functions. We therefore hold that this company could not have been selected as a comparable, especially when it performs engineering design services which only a Knowledge Process Outsourcing [KPO] would do and not a Business Process Outsourcing [BPO].”

14. Regarding Coral Hubs Ltd. (earlier Vishal Information Technologies Ltd.), the ld. counsel for the assessee submitted that it fails employee cost filter and functionally not comparable relying on the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India Pvt. Ltd. (supra)*, where in was held at paras 14 to 17 of its order as under:-

(3) Coral Hubs Ltd.

14. This company is listed at Sl.No.6 of the list of comparable companies chosen by the TPO. As far as this company is concerned, it is seen that this company was earlier known as Vishal Information Technologies Ltd. The comparability of this company in the case of an ITES company by name 24 x 7 Customer.com Pvt. Ltd. was considered by the Tribunal in ITA No.227/Bang/2010 and by order dated 09.11.2012 the Tribunal held that this company is not functionally comparable with ITES for the following reason:-

“17.3 Vishal Information Technologies Ltd. (VIT) - In the case of this comparable, we find that the Mumbai Tribunal in the case of Mearsk Global Services (I) Pvt Ltd in ITA No.3774/Mum/2011 by order dt.9.11.2011 has held that since Vishal Information Technologies Ltd is outsourcing most of its work it has to be excluded from the list whereas the assessee in the cited case was carrying out the work by itself. In the instant case of the

assessee also the assessee was carrying out its work by itself whereas in the case of VITL, it is outsourcing most of its work. We are therefore of the considered opinion that the decision of the ITAT, Mumbai in the cited case on the issue of excluding VITL as a comparable squarely applies. This decision was followed by the decision of the co-ordinate bench of this Tribunal in the case of Netlinx India(P) Ltd in ITA No.454/Bang/2011 dt.19.10.2012 wherein it was held that Vishal Information Technologies Ltd cannot be considered as a comparable. We, therefore, respectfully following the decision of the Mumbai Tribunal in the case of Mearsk Global Services (I) Pvt Ltd, direct the Assessing Officer / TPO to exclude Vishal Information Technologies Ltd. from the list of comparables.”

15. Following the decision of the Tribunal referred to above, we hold that Coral Hubs Ltd. cannot be considered as a comparable. It may also be relevant to point out that the TPO in his order has observed that this company is retained as a comparable on the basis of detailed discussion in the TP order for the A.Y. 2007-08. In fact in A.Y. 2007-08, there was no determination of ALP and therefore there was no occasion for any order being passed by the TPO. It is also seen that this company entered into an area of business known as New Vertical Digital Library & Print on Demand in F.Y. 2007-08. In the case of *Capital IQ Information Systems India Pvt. Ltd. (supra)*, the ITAT Hyderabad Bench in the case of ITES company considered the comparable of this company as an ITES company and held as follows:-

“IV. Coral Hub Limited (Earlier known as Vishal Information Technologies Ltd.):

16. The assessee has objected for this company being taken as comparable mainly on the ground that the activities of the company is not only functionally different, but the business model of the company is also different as it sub-contracts majority of its ITES works to third party vendors and has also made significant payments to those vendors. The payments made to vendors towards the data entry charges also supports the fact that the company outsources its works. In the circumstances, it cannot be taken as a comparable to the ITES functions performed by the assessee. Since this company is acting

as agent only by outsourcing its works to the third party vendors. In this context, the assessee relied upon the order of the DRP in assessee's own case for the assessment year 2008-09, wherein the DRP, after taking into consideration, the aforesaid aspect, has accepted the claim of the assessee. The assessee further submitted that the Income-tax Appellate Tribunal Mumbai Bench in the case of *Asstt. CIT v. Maersk Global Service Centre (India) (P.) Ltd.* [2011] 133 ITD 543/16 taxmann.com 47 (Mum.), a copy of which is submitted before us, has also directed for the exclusion of the aforesaid company since it has outsourced a considerable portion of its business.

17. After considering the submissions of the learned Authorised Representative for the assessee, we find that the DRP, in the proceedings for the assessment year 2008-09 in assessee's own case, after taking note of the composition of the vendor payments of Coral Hub for the last three years, and the fact that it has also commenced a new line of business of Printing on Demand(POD), wherein it prints upon clients request, concluded as follows-

"18.4. In view of this major difference in functionality and the business model, this Panel is of the view that 'Coral Hub' is not a suitable comparable to the taxpayer and hence needs to be dropped from the final list of comparables."

In case of *Maersk Global service Centre India (P.) Ltd.* (*supra*), the ITAT Mumbai Bench has also directed for exclusion of the aforesaid company, by observing in the following manner-

"Insofar as the cases of tulsyan Technologies Limited and Vishal Information Technologies Limited are concerned, it is noticed from their annual accounts that these companies outsourced a considerable portion of their business. As the assessee carried out entire operations by itself, in our considered opinion, these two cases were rightly excluded."

In view of the observations made by the DRP as well as the decision of the ITAT Mumbai in the case of Maersk

Global Service Centre, (supra), we accept that this company cannot be taken as a comparable.”

16. It is also further noticed that the employee cost/operating sales of this company is a mere 3%, whereas the threshold limit for acceptance as a comparable on the basis of employee cost to sales should be at least 25%. This Tribunal in the case of *First Advantage Offshore Services Ltd. v. CIT, IT(TP)A No.1086/Bang/2011, order dated 30.4.2013*, has taken the following view:-

“36. Having heard both the parties and having considered their rival contentions and the material on record, we find that this issue had arisen in the assessee’s own case for the assessment year 2006-07. This Tribunal has held that employee cost filter is to be the same even for ITES segment also. The learned DR’s argument that the employee cost filter is applicable only to software development segment and not to ITES segment is not acceptable. Though it is without any dispute that the software development would require skilled employees and, therefore, the employee cost would definitely be more than 25% of the total expenses, it cannot be said that the said filter is not applicable to ITES segment, where comparably less skilled employees are employed. In the ITES segment, the entire work is to be done by the employees and, therefore, even though they may be less skilled compared to software development segment, the number of employees would definitely be more and thus the employee cost would be high and thus application of employee cost filter to the ITES sector is also justified. In view of the same, we direct the TPO to apply the employee cost filter to exclude companies with employee cost of less than 25% from the list of comparables for the computation of ALP.”

17. Applying the aforesaid decisions, we are of the view that Coral Hubs Ltd. cannot be considered as a comparable.”

15. As regards Cross Domain Solutions Ltd., the Id. counsel for the assessee submitted that it is functionally not comparable relying on the decision of the coordinate Bench decision of this Tribunal in the case of

Symphony Marketing Solutions India Pvt. Ltd. (supra), where in was held at paras 18 to 19 of its order as under:-

“(4) **Crossdomain Solutions Ltd.**

18. This company was considered as a comparable and listed at Sl.No.8 of the comparables chosen by the TPO. It is the stand of the assessee that this company is not functionally comparable. As observed in the case of Coral Hubs Ltd., the TPO rejected the plea of the assessee on the basis of a non-existent TP order passed for the A.Y. 2007-08. It is seen that the business profile of this company is re-engineered payroll service. This company is also engaged in the development of information systems. These activities are totally different from the activities of the assessee which perform very limited/low end functions back office services. The review and business functions of Cross Domain is as follows:-

“With a decade of experience in Payroll Outsourcing, Crossdomain has created a **re-engineered payroll service** EFFIPAY – that processes and delivers accurate payroll to clients with headcount up to 1000 employees in just 4 hours*. With **Effipay Lite and Effipay Lite Plus**, our bouquet of services cover end to end payroll, retrials, reimbursement, tax proof verifications upto issue of Form 16 for employees of our clients across different industry verticals. Our processes are highly scalable **and provide end to end payroll solutions to clients** with headcount ranging from 5 to 65,000.”

“Crossdomain’s IT knowledge and domain competence has provided the edge to **develop information systems to implement process innovation** and continuously increase efficiency and turn-around-time for business critical processes.”

Source: <http://www.cross-domain.com>

As can be seen from the above, the business of Cross Domain ranges from high end KPO services, development of product suites and routine low end ITES service. However, there is no bifurcation available for such verticals of services. Therefore the

assessee contends that Cross Domain cannot be compared to a routine ITES service provider.

19. We are of the view that in the absence of any reasons given to the contrary either by the TPO or the DRP for regarding this company as a comparable, this company should be excluded from the list of comparables, accepting the plea of the Assessee. We hold accordingly.”

16. As far as Eclerx Services Ltd. is concerned, the Id. counsel for the assessee submitted that it had super normal profit and is functionally not comparable with the assessee company relying on the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India Pvt. Ltd. (supra)*, where in was held at paras 20 & 21 of its order as under:-

“(5) **Eclerx Services Ltd.**

20. This company is listed at Sl.No.11 in the list of comparable companies chosen by the TPO. It is the stand of the assessee that this company offers solutions that include data analytics, operations management, audits and reconciliation and therefore has to be classified as high end KPO. In support of the stand of the assessee, extracts from the annual report of this company have been pointed out. It has further been submitted that extra ordinary events and peculiar circumstances prevail in the case of the assessee in as much as this company acquired a UK based company which has significantly contributed to the increase in the customer and revenue base of the company. This Tribunal in the case of *Capital IQ Information Systems India Pvt. Ltd. (supra)* had an occasion to deal with comparability of this company in the case of an ITES company such as the Assessee and the Tribunal held as follows:-

“14. The assessee has objected for this company being taken as comparable mainly on the ground that it was having a supernormal profit of 89%, and as such it cannot be taken as a comparable in view of the decision of the Mumbai Bench of the tribunal in the case *M/s.*

Teva India Ltd. (supra). That apart, relying upon the annual report of the company, the learned Authorised Representative for the assessee has contended that that the concerned company is engaged in providing Knowledge Process Outsourcing(KPO) Services.

15. On considering the objections of the assessee in relation to this company, we accept the contention of the assessee that this company cannot be taken as a comparable both for the reasons that it was having supernormal profit and it is engaged in providing KPO services, which is distinct from the nature of services provided by the assessee.”

21. We are of the view that in the light of the decision of the Hyderabad Bench referred to above, this company cannot be regarded as a comparable for the reason that it was functionally different.”

17. With regard to Genesys International Corporation Ltd., the Id. counsel for the assessee submitted that it is not comparable with the assessee company relying on the decision of the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India Pvt. Ltd. (supra)*, where in was held at paras 22 to 23 of its order as under:-

“(6) **Genesys International Corporation Ltd.**

22. This company is listed at Sl. No.12 in the list of comparable companies chosen by the TPO. As far as this company is concerned, the stand of the assessee has been that this company is functionally not comparable and that it has a different employee skill set and that this company performs R&D services and also owns intangibles. This company is a geospatial services content provider specialising in land based technologies. From the notes to accounts of this company, it is seen that this company is engaged in providing geographical information services comprising of photogrammetry, remote sensing cartography, data conversion related computed based services and other related

services. Further the business of this company requires skilled manpower and scientists, civil engineers, etc. The assessee is a routine ITES provider who does not require such highly skilled employees. Besides the above, this company also carries out R&D services and own intangibles. The aforesaid facts, in our view, will take this company out of the list of comparables. We may also point out that the objection of the assessee in this regard has been disregarded by the TPO by mere observation that it cannot be rejected on the basis that it is into different functional line within ITES. In this regard, we may refer to the decision of the ITAT Bangalore Bench in the case of *First Advantage Offshore Services Ltd. (supra)*, wherein it was observed as under:-

“39. Having heard both the parties and having considered their rival contentions, we find that the assessee had raised elaborate objections to each of the comparables in group 3 before the TPO. The TPO has also reproduced the said objection in his order para 6.5.1. of page 178 of his order. He has rejected the contention of the assessee by holding that every function within BPO sector can be from low end to high end and the activities of the assessee such as accounting, web management, network management are BPO services using technology but these services are not categorized as KPO. He held that a call centre may offer support services like telemarketing to high end services like technical support services, where not only the level of knowledge, skill required would be high, but the technical knowledge as well would be high. According to him, back office transaction process services may be as remarkable and as complicated as insurance/market transaction processing services. He, therefore, rejected the contention of the assessee and treated the BPO as equivalent to KPO services.

40. We have to now consider whether a BPO and KPO are functionally similar and are comparable to each other. BPO is a sub-set of outsourcing and involves the contracting of the operations and responsibilities of specific business functions or process to a third party services provider. Often business processes outsourcing are information technology based and referred to as ITES-BPO. KPO is one of the sub-segment of the BPO industry. It involves outsourcing of core information

related business activities which are competitively important or form an integral part of a company's value chain. It thus requires advanced analytical and technical skills as well as a high degree of specialist expertise. The KPO services include all kinds of research and information gathering. Thus it can be seen that even though both BPO and KPO are offering information Technology based services, the skill and expertise and may be even the tools required are different which may result in different economic results of both the segments. Thus, in such circumstances, we are of the opinion that they cannot be compared with each other and have to be excluded from the list of comparables.”

23. It is thus clear from the aforesaid decision of the Tribunal that among the ITES companies there is a hierarchy in terms of skill required to provide services. It ranges from providing routine services where no skills and required and providing services where highly professionalized skills are required. Depending on the skills required to perform ITES the comparability has to be done. In view of the above, we are of the view that this company cannot be regarded as a comparable and deserves to be excluded from the list of comparables.”

18. As regards Infosys BPO Ltd., the ld. counsel for the assessee submitted that it had a different scale of operations on account of brand value of the parent company and relied on the decision of the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India Pvt. Ltd. (supra)*, where in was held at para 24 of its order as under:-

“(7) **Infosys BPO Ltd**

24. This company is listed at Sl.13 in the list of comparable companies chosen by the TPO. As far as this company is concerned, it is the submission of the ld. counsel for the assessee that this company has a brand value and therefore there would be

significant influence in the pricing policy which will impact the margins. Schedule 13 to the profit & loss account of this company for the F.Y. 2007-08 shows that this company incurred huge selling and marketing expenses. Page 133 of the annual report of this company for the F.Y. 2007-08 shows that this company realizing its brand value has chosen to value the same on the basis of its earnings and that of Infosys. The brand value of the Assessee and Infosys has been valued at Rs.31,863 Crores. Infosys BPO, being a subsidiary of Infosys, has an element of brand value associated with it. This is also clear from the presence of brand related expenses incurred by this company. Presence of a brand commands premium price and the customers would be willing to pay, for the services/products of the company. Infosys BPO is an established player who is not only a market leader but also a company employing sheer breadth in terms of economies of scale and diversity and geographical dispersion of customers. The presence of the aforesaid factors will take this company out of the list of comaparables. We therefore accept the contention of the assessee that this company cannot be regarded as a comparable.

19. Regarding Mold-tek Technologies Ltd., the Id. counsel for the assessee submitted that it is not functionally comparable to that of the assessee company and relied on the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India Pvt. Ltd.* (*supra*), where in was held at para 25 of its order as under:-

“(8) **Mold-tek Technologies Ltd.**

25. This company is listed at Sl.No.16 of the list of comparable companies chosen by the TPO. As far as this company is concerned, the submission of the assessee before us is that it is in the business of Knowledge Process Outsourcing and cannot be considered as a comparable. The functional profile of this company is as follows:-

As per the annual report for the F.Y. 2007-08, the company primarily operates in two business segments:

Plastic division: The plastic division is engaged in the manufacture of tube & oils, paints, pet products, consumer products, etc. The company demerged the said segment effective 1 April, 2007 and transferred the business unit to the Company Plastics Lt. The extract from the annual report confirms the fact that the Company had restructured its operations resulting in demerging the plastic segment business.

Information Technology (IT) division: The IT division (also referred to as the KPO division by the company) of the company specializes in providing structural design and detailing services which can be categorized as structural engineering services. The structural engineering services provided by the IT division of the company cannot be classified as falling with the scope and ambit of ITES services. On the contrary, the said services would fall under the category of engineering services.

Excerpts from the Annual Report of the company

Page 10 of the Annual Report for the FY 2007-08 contains the following observation regarding the KPO division of the Company:

*'The Company has achieved about 56.49% growth in 2007-08 to register a turnover of Rs.17.86 crore. The company having established its credentials in **structural engineering services** to US clients is devising aggressive marketing strategy to achieve rapid growth.'*

This company is also engaged in providing a host of engineering services like civil and structural engineering services, mechanical product design, plant engineering, IT services and GIS services. As we have already seen, this company is to be classified as KPO and cannot be compared with the assessee. The decision of the Bangalore Bench of the ITAT in the case of *First Advantage Offshore Services Ltd. (supra)* which we have referred to in the earlier part of this order will clearly apply to this company. We therefore direct this company to be excluded from the list of comparables."

20. With regard to Wipro Ltd. (Seg), the Id. counsel for the assessee submitted that it is distinguishable for different scale of operations on account of brand value of parent company and not comparable with the assessee relying on the decision of the coordinate Bench decision of this Tribunal in the case of *Symphony Marketing Solutions India Pvt. Ltd.* (*supra*), where in was held at para 26 of its order as under:-

“(8) **Wipro Ltd.**

26. This company is listed at Sl.No.18 in the list of comparable companies chosen by the TPO. As far as this company is concerned, the discussion made while deciding Infosys BPO Ltd. as a comparable will equally apply to this company also. This company owns substantial intellectual property on software products. This company cannot therefore be regarded as a comparable. For the reasons given while disregarding Infosys BPO Ltd. as a comparable, this company is also directed to be excluded from the list of comparables.”

21. The Id. counsel for the assessee submitted that the scenario on exclusion of the comparables as pointed out above would result in 7.97% determined by the TPO as against 8.30% declared by the assessee and since it is within the range of +/- 5%, the assessment order dated 27.9.2012 passed by the AO pursuant to the directions of the DRP is not in accordance with law.

22. As far as Aditya Birla Minacs Worldwide Ltd., Cosmic Global Ltd., Datamatics Financial Services Ltd. (Seg), e4e Healthcare Solutions Ltd.

(formerly Nittany Outsourcing Services Pvt. Ltd.), Iservices Ltd., Jindal Intellicom Pvt. Ltd., R. Systems International Ltd. (Seg), Spanco Ltd. (Seg), Allsec Technologies Ltd. [assessee's comparables], Asit C. Mehta Financial Services Ltd. (Seg.) and Caliber Point Business Solutions Ltd. [TPO's comparables], the Id. counsel did not agitate the issue.

23. We have heard both the parties on the issue of comparables and we are of the opinion that in the present case if there is exclusion of the comparables made by the TPO following the decision of coordinate Bench of this Tribunal in the case of *Symphony Marketing Solutions India Pvt. Ltd. (supra)*, the assessee will be within +/- 5% range and hence the DRP/AO have erred in making TP adjustment of Rs.83,877,257. Ground No.3.6 raised by the assessee is therefore allowed.

24. The next issue is with regard to corporate tax and the grounds No.5 & 6 raised by the assessee are as follows:-

“5. The Honourable DRP has erred in law and on facts in upholding the AO's action of setting-off the losses incurred by the domestic unit against the income earned by the unit eligible for relief under section 10A of the Act. The Honourable DRP has erred in law by not relying on the submission made by the assessee in this regard and not following the decision of Hon'ble jurisdictional Karnataka High Court in the case of ACIT, 12(3) Vs Yokogawa India Ltd. (341 ITR 385) and ITO, Ward 12(2) Bangalore Vs SCT Software Solutions (India) Private Limited (ITA No.1014/Bang/2004).

6. The Honourable DRP has erred in law and on facts in upholding the AO's reasoning in re-computing the relief u/s. 10A of the Act and thereby computing the relief under section 10A of

the Act at NIL (as against the amount of Rs.60,892,020 claimed by the Appellant in its return of income).”

25. Since the issue is covered by the judgment of Hon'ble jurisdictional High Court in the case of ACIT, 12(3) v. Yokogawa *India Ltd.*, 341 ITR 385 (Karn), we are of the view that the DRP has erred in upholding the AO's reasoning in recomputing the relief u/s 10A and thereby computed the relief u/s. 10A at Nil as against the amount of Rs.60,892,020 claimed by the assessee in its return of income. This ground of appeal is allowed.

26. The 7th ground is an alternate ground and since we have decided ground Nos.5 & 6, the same is not adjudicated upon.

27. In the result, the assessee's appeal is allowed.

Pronounced in the open court on this 23rd day of October, 2015.

Sd/-

(JASON P. BOAZ)
Accountant Member

Sd/-

(ASHA VIJAYARAGHAVAN)
Judicial Member

Bangalore,
Dated, the 23rd October, 2015.

/D S/

Copy to:

1. Appellant
2. Respondents
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.