

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI G.MANJUNATHA, ACCOUNTANT MEMBER**

**IT(TP)A No.1845/Bang/2013
(Assessment year: 2009-10)**

M/s. e4e Business Solutions India Pvt Ltd.
Unit NO.1303-1304, 13th floor, ... Appellant
Prestige Meridian, II No.30, M.G.Road,
Bangalore-1.
PAN:AAAC16324A

Vs.

Deputy Commissioner of Income-tax,
Circle 11(3), Bangalore. ... Respondent

AND

**IT(TP)A No.1777/Bang/2013
(Assessment year: 2009-10)
(By the Revenue)**

Assessee by: Shri Ajit Jain, CA.
Revenue by: Shri Bijoy Kumar Panda, CIT(DR)

Date of hearing : 06 /10/2015.
Date of pronouncement: 10/11/2015.

O R D E R

Per VIJAY PAL RAO, JM :

These cross appeals are directed against the assessment order dated 31/10/2013 passed u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for

short] in pursuance to the directions of the DRP dated 8/10/2013
for the assessment year 2009-10.

2. The assessee has raised the following grounds:

Grounds of Appeal on Transfer Pricing matters

- 1 *That the learned Deputy Commissioner of Income Tax Circle- 11(3) ("Assessing Officer" or "learned AO") and the learned Dispute Resolution Panel ("Panel") erred in upholding the order passed by the learned Additional Commissioner of Income Tax (Transfer Pricing)-I ("Transfer Pricing Officer" or "TPO")) to the extent prejudicial to the Appellant which was bad in law and in violation of principles of natural justice;*
- 2 *That the learned Panel! AO erred in upholding the arm's length price as determined by the TPO and thereby;*
 - i *Conducting a fresh benchmarking analysis using non-contemporaneous data;*
 - ii *Rejecting the comparable companies arrived in the Transfer Pricing documentation;*
 - iii *Benchmarking transactions of captive service providers with fully fledged entrepreneurs without considering the differences in functions performed, assets employed and risks undertaken by the assessee;*
 - iv *Upholding the additional filters applied arbitrary during the course of a fresh comparability analysis for determining the arm's length price;*
 - v *accepting companies without considering the turnover and size of the assessee and comparables;*
 - vi *rejecting companies having export revenue less than 25% of total operating revenue;*

Page 3 of 31

- vii *rejecting companies with different year ending;*
 - viii *rejecting companies having revenue from Information Technology Enabled Services less than 75% of total operating revenue;*
 - ix *rejecting companies based on their financial results without considering the functional comparability;*
 - x *excluding the foreign exchange gain or loss while calculating the net margins of the comparable companies and that of the assessee;*
3. *That the learned Panel/AO erred in :*
- i *Upholding the TPO's approach in using data which was not contemporaneous and not available in public domain at the time of conducting transfer pricing study by the assessee;*
 - ii *Disregarding application of multiple year/prior year data as used to the appellant in the TP documentation and holding that current year (i.e. financial year 2008-09) data for companies should be used for comparability;*
4. *The learned Panel/AO erred in not providing any adjustments under Rule 10B towards the difference in the risk profile, depreciation, marketing expenditure and research and development expenditure adjustment between the Appellant and the entrepreneurial companies selected as comparables while determining the arm's length price;*
5. *The learned Panel/AO erred in upholding the learned TPO's approach of not granting the benefits of proviso to section 92C (2) of the Act to the Assessee.*
6. *The amount of Rs.80,00,000/- remitted for AY-2009-10, subsequent to the Order dated 31st October,2013, may be treated as Deposit.*

Corporate tax matters

That the craves leave to add to and/or to alter, amend, rescind, modify the grounds produced herein above in or produce further documents before or at the time hearing of this appeal.

That the learned Panel erred in upholding the AO approach of reducing the 'travel expenses incurred in foreign currency' of Rs. 2,138,709 from the 'export turnover' which is un-attributable to the delivery of export services while computing the deduction under section 10A of the Act;

3. Ground No.1 is general in nature and does not require any specific adjudication.

4. At the time of hearing, learned AR of the assessee has stated that the assessee does not press ground No.2(i), (vi), (vii) and (viii), ground No.3, 4 and 6 and pleaded that the same may be dismissed as not pressed.

5. The learned Departmental Representative has raised no objection if these grounds of the assessee are dismissed as not pressed. Accordingly, ground Nos.2(i), (vi), (vii) and (viii), ground Nos.3, 4 and 6 of the assessee's appeal are dismissed.

6. Ground No.2(ii) to (v), (ix) and (x) regarding transfer pricing adjustment made by the Transfer Pricing Officer (TPO) by selecting a different set of comparable. The assessee was incorporated in March 2000 and engaged in the business of end to end BPO services. The assessee has entered into service agreement dated 1/4/2005 with its Associated Enterprise (AE) to provide 24/7 contact centre outsourcing service. AE of the

Page 5 of 31

assessee M/s. ISPL, iSeva Inc. incorporated in November 1999 in United States of America and is holding company of the assessee. During the year under consideration, the assessee has reported the financial results and segmental results including international transactions as reported u/s 92C reproduced by the TPO at page 3 as under:

Financial Results for the F Y 2008-09

<i>Income (Excl'd other income)</i>	<i>759,115,479</i>
<i>Total Expenditure</i>	<i>717,227,484</i>
<i>Less : Interest</i>	<i>12,818,899</i>
<i>Operating Expenditure</i>	<i>704,408,585</i>
<i>Operating Profit</i>	<i>54,707,894</i>
<i>OP / OC</i>	<i>7.77%</i>

Segmental financials

Particulars	AE	Non-AE
Income from Services*	629,292,646	129,823,833
Operating Expenses	558,463,088	136,006,605
Profit	7,829,558	-6182,772
OP / OC	12.68%	-4.55%

International Transactions (as mentioned in the 92CE report)

<i>Description</i>	<i>Amount paid (Rs.)</i>	<i>Amount received (Rs.)</i>
<i>Technical support & financial services</i>	-	<i>568,959,962</i>
<i>Infrastructure Management Services</i>	-	<i>60,332,684</i>
<i>Reversal of Reimbursement of Expenses</i>	<i>1,085,913</i>	-

7. The TPO has recorded the business profile of the assessee at page 2 as under:

Business Profile

ISPL has established itself as a domain specific and industry focused company with significant expertise in industries including mortgage processing, banking and high technology. It provides Business Process Outsourcing ('BPO') services to clients in the United States, United Kingdom and India. ISPL is focused on providing services to iSeva Inc., in two verticals for US and UK based clients, namely:

- a) Financial services; and*
- b) Technical services.*

The assessee has computed its operating profit margin at 20.55% from the international transaction. However, the TPO recomputed the operating profit of the assessee at 12.68% from international transaction by excluding foreign exchange gain as well as other income to bench mark its international transaction, the assessee selected 11 comparables which are reproduced by the TPO in para.3.4 as under:

<i>Sl. No.</i>	<i>Name of the comparable</i>	<i>Remarks</i>
<i>1</i>	<i>Allsec Technologies Ltd.</i>	<i>The company qualifies all the filters applied by the TPO. Thus the company is considered as a comparable.</i>
<i>2</i>	<i>Caliber Point Business Solutions Ltd.</i>	<i>This company has year ending other than March. Reliable financial data will not be available for a 12 month period. This cannot be used as a comparable.</i>
<i>3</i>	<i>Cosmic Global Ltd.</i>	<i>The company qualifies all the filters applied by the TPO. Thus the company is considered as a comparable.</i>

Page 7 of 31

4	<i>Datamatics Financial Services Ltd.</i>	<i>Rejected: Income from Service to sales < Ltd. Service income to sales is 62.44%, hence rejected.</i>
5	<i>ICRA Techno Analytics Ltd.</i>	<i>The company is engaged in the software development & consultancy, engineering services, web development & hosting and subsequently diversified itself into the domain of business analytics and business process.</i>
6	<i>Informed Technologies India Ltd.</i>	<i>The company qualifies all the filters applied by the TPO. Thus the company is considered as a comparable.</i>
7	<i>Infosys BPO Ltd.</i>	<i>The company qualifies all the filters applied by the TPO. Thus the company is considered as a comparable.</i>
8	<i>Inhouse Productions Ltd.</i>	<i>Export to sales is just 0.09%, hence rejected.</i>
9	<i>KPIT Cummins Global Business Solutions Ltd.</i>	<i>RPT is 94.70%, hence rejected. Solutions Ltd.</i>
10	<i>NIIIT Smarserve Ltd.</i>	<i>Rejected: RPT > 25%.</i>
11	<i>R Systems International Ltd.</i>	<i>This company has year ending other than March. Reliable financial data will not be available for a 12 month period. This cannot be used as a comparable.</i>

The assessee arrived at the mean margin of the comparables at 9.30% in comparison to the operating margin of the assessee at 20.53%. Thus, the assessee claimed that the international transactions of the assessee are at arm's length. The TPO carried out the fresh search and selected 8 comparables as under:

Sl.No.	Name of the Company	Margin
1	<i>Infosys BPO Ltd.</i>	24.41%
2	<i>Aditya Birla Minacs Worldwide Ltd.</i>	23.86%

Page 8 of 31

3	<i>Microland Ltd,(both segments)</i>	1.53%
4	<i>Allsec Technologies Ltd.</i>	16.63%
5	<i>Accentia Technologies Ltd.</i>	46.40%
6	<i>Informed Technologies India Ltd.</i>	22.61%
7	<i>Cosmic Global Ltd.</i>	40.61%
8	<i>Eclerx Services Ltd</i>	57.50%
	AVERAGE PLI	25.04%

Thus the TPO has arrived at the mean margin of 25.04%. The TPO has also made an upward adjustment on account of working capital at the rate of 1.61% and finally computed the adjusted mean margin at 26.65%. Thus, by considering the assessee's operating margin at 12.68%, the TPO proposed upward adjustment of Rs.7,80,00,855/-. The assessee raised objections before D.R.P against the action of the TPO/AO in re-computing the operating profit of the assessee by excluding the foreign exchange gain and the comparable selected by the TPO while determining the arms length price (ALP). The DRP did not accept the objections raised by the assessee and confirmed the action of the AO/TPO in making the proposed adjustment on account of transfer pricing.

8. Before us, the assessee has basically raised two arguments – (i) regarding re-computation of the operating profit of the assessee by excluding foreign exchange gain and (ii) regarding functional comparability of the companies selected by the TPO.

9. First we will take up the issue of re-computation of the operating profit of the assessee by excluding foreign gain and

other income. The learned AR of the assessee has pointed out that in the computation of the operating margin, the assessee included foreign exchange gain on receipt against service provided to AE as well as other income comprising of interest. As far as the other income in the nature of interest, learned AR of the assessee submitted that the assessee does not press this issue and confined his argument only on exclusion of foreign exchange gain from operating profit margin of the assessee. Learned AR of the assessee has referred to profit and loss of the assessee at page 7 of the paper book and submitted that the TPO has excluded a sum of Rs.6,33,42,675/- while recomputing the profit margin of the assessee which has been shown by the assessee under the head other income in schedule 12. The learned AR of the assessee has referred to schedule 12 of the profit and loss account and submitted that out of this amount of Rs.6,33,42,675/- an amount of Rs.5,74,78,906/- pertains to net foreign exchange gain of sale proceeds received from the AE. Thus, the learned AR of the assessee has submitted that the foreign exchange gain received from AE is part of the income from service provider to the AE and therefore should be part of the profit margin of the assessee and cannot be excluded for the purpose of operating margin to be compared with the comparables . In support of his contention, he has relied upon the decision of the Mumbai Bench of the Tribunal dated 26/4/2013 in case of *Rusabh Diamonds vs. ACIT* ITA

Page 10 of 31

No.7217/Mum/2012 and submitted that that the Tribunal, while considering an identical issue of foreign exchange gain being part of the operating profit has held that if the foreign exchange gain is earned by the assessee in respect of the import/export activity, then the same will be treated as part and parcel of the operating profit.

On the other hand, learned Departmental Representative has referred to the finding of the DRP at page 64 of the directions and submitted that the DRP has considered the objections of the assessee and held that the foreign exchange gain is not dependent upon the operation carried out by the assessee but it is a result of various extraneous factors. Therefore, foreign exchange fluctuation is nothing to do with the business operation of the tax-payer. The DRP has further taken note of the fact that the foreign exchange fluctuations are determined by the market, RBI, Micro economic conditions, world market etc. and therefore, the gain or loss on foreign exchange fluctuation is not considered as part of the operating revenue or the income of the assessee. Foreign exchange gain or loss is dependent on the factors beyond the purview of the tax-payer and therefore, will not be considered as part of the operating revenue or income of the assessee. He has relied upon the orders of the authorities below.

10. We have considered the rival submissions as well as the relevant material on record. There is no dispute about the fact that as far as the amount of foreign exchange gain is concerned

Page 11 of 31

the same pertains to the income from service provided to the AE. Thus, it is clear that the foreign exchange gain has a direct nexus with international transaction and service provided by the assessee to the AE. As regards the contention of the learned Departmental Representative that the foreign exchange gain or loss depends on extraneous factors like market conditions, RBI policy, World market, micro economic conditions etc., the same factors are also affecting the business transactions and price determination between the parties and particularly when the transactions are cross-border transactions. Therefore, the extraneous factors which are taken as the reason for not considering foreign exchange gain as part of the operating revenue are also influencing the business activity of the assessee in respect of international transaction. Therefore, we do not agree with the contentions of the learned Departmental Representative that foreign exchange gain is not dependent on the operations of the assessee. It is pertinent to note that the foreign exchange gain has arisen only because of the export transactions in the nature of international transaction and therefore, it has a direct nexus and outcome of the transactions between the assessee and the AE. An identical issue has been considered by the Mumbai Benches of the Tribunal in the case of *Rusabh Diamonds* (supra) in paras.10 to 10.2 as under:

"10 We have considered the rival submissions as well as the relevant material on record. The assessee has entered into forward contracts for the purpose of

Page 12 of 31

hedging of foreign currency exposure on export and import of diamonds with AEs. Therefore, the hedging of foreign currency has nexus with the export and import activity of the assessee and the exposure of the assessee in relation to the export and import. The OECD guidelines in para 2.82 are as under;

"2.82 Whether foreign exchange gains and losses should be included or excluded from the determination of the net profit indicator raises a number of difficult comparability issues. First, it needs to be considered whether the foreign exchange gains and losses are of a trading nature (e.g. exchange gain or loss on a trade receivable or payable) and whether or not the tested party is responsible for them. Second, any hedging of foreign currency exposure on the underlying trade receivable or payable also needs to be considered and treated in the same way in determining the net profit. In effect, if a transactional net margin applied to a transaction in which the foreign exchange risk is borne by the tested party, foreign exchange gains or losses should be consistently accounted for (either in the calculation of the net profit indicator or separately)."

10.1 It is clear that in case of hedging of foreign currency exposure on the underlining trade receivable or payable the profit of loss will be treated in the same way in determining the net profit.

10.2 In view of the facts that the assessee has entered into forward contracts for the purpose of hedging of foreign currency exposure on the export and import of diamond, the gain or loss arising of the said, will be treated as part and parcel of the operating profit. "

In view of the above discussion as well as the decision of the co-ordinate bench of the Tribunal in the case of *Rusabh Diamonds* (supra), we hold that the foreign exchange gain/income from service provided to AE will be part of the operating revenue/income of the assessee and consequently it will be part

Page 13 of 31

of the operating profit of the assessee for the purpose of determining the ALP in respect of the international transaction. However, the related aspect on this issue is also to be kept in mind that while taking the margins of the comparables, the effect of foreign exchange in the margins of the comparables should also be taken into account. Therefore, we direct the AO/TPO to re-compute the margin of the assessee by including foreign exchange gain but exclude other incomes on account of interest etc and further to consider the operating margin of the comparable after giving effect to foreign exchange gain or loss in their respective margins to arrive at the mean margin. Accordingly, this issue of the assessee is partly allowed.

11. Now, we will take up the objections raised by the assessee against various companies selected by the TPO and included in the set of comparables. At the time of hearing, learned AR of the assessee has submitted that the assessee will confine its arguments only with respect to the 4 comparables viz: (1) Accentia Technologies (2) Comic Global Ltd. (3) Eclerx Services Ltd., and (4) Infosys BPO Ltd. The comparability of each of these companies are dealt with one by one as under:

11.1. Accentia Technologies Ltd.

The learned AR of the assessee has submitted that though the TPO has recorded the business profile of the assessee, however, the international transactions of the assessee are

Page 14 of 31

carried out only in respect of service of contact centre outsourcing to its AE as per the service agreement. The learned AR of the assessee has referred to Annual report of Accentia Technologies Ltd., and submitted that this company has acquired M/s.Oak Technologies Inc, USA during the year under consideration and therefore, there is an extraordinary event of acquisition of another company. He has thus submitted that in view of the extraordinary event of acquisition, this company cannot be considered as a good comparable of the assessee. Apart from this objection, learned AR of the assessee has submitted that even otherwise this company is not functionally comparable with the assessee so far as services provided to the AE. He has referred to various business transactions and services provided by Accentia Technologies Ltd., and submitted that this company is in the various segments of activities like medical transcription, medical coding, medical billing, etc. The activity of medical transcription and medical coding is entirely different from the service of contact centre service provided by the assessee to its AE and therefore, this company cannot be considered as functionally comparable with the assessee. The learned AR of the assessee has referred to the revenue earned by the said company and submitted that substantial revenue has been earned by the said company from the business activity of medical transcription apart from billing and collection as well as medical coding activity.

Page 15 of 31

i) On the other hand, learned Departmental Representative has submitted that this company satisfies the filter test applied by the TPO for selecting companies in the category of Information Technology Service (ITES) company. The assessee is also engaged in the activity of providing ITeS to its AE and therefore, both the assessee as well as Accentia Technologies Ltd., are engaged in the similar business activity. He has referred to the findings of the TPO and the DRP and submitted that the DRP has rejected the objections raised by the assessee against this company. Therefore, this company is a good comparable for determination of the ALP in respect of international transactions of the assessee.

i) We have considered the rival submissions as well as relevant material on record. The first objection has been raised by the learned AR of the assessee on account of extraordinary event of acquisition/purchase of business by Accentia Technologies Ltd., whereby M/s.Oak Technologies Inc, USA has been acquired by this company during the year under consideration. Though the extraordinary event of merger or acquisition, if influenced the business as well as the revenue of a company then said company is not considered as a good comparable for the purpose of determination of the ALP however, in this case, it is not clear from the Annual Report whether the business of M/s.Oak Technologies Inc has been acquired and merged with the said company during the year under

Page 16 of 31

consideration. It appears that Accentia Technologies Ltd., has purchased up to 96% of the share holding of M/s.Oak Technologies. If it is only a transaction of purchase of shares of the said company then it may be a case of purchase of ongoing business and may not be a case of merging the same with the business of Accentia Technologies Ltd. In the absence of the relevant fact that the business of the said company has been merged with Accentia Technologies Ltd., it may be a case of acquiring the shares and M/s.Oak Technologies still remains an independent entity and business activity. Therefore, in the absence of complete relevant facts, it cannot be held that the so-called acquisition of M/s.Oak Technologies can be considered as an extraordinary event having impact on the revenue as well as business activity of Accentia Technologies Ltd. Accordingly, this argument of the learned AR of the assessee is rejected for want of complete facts.

iii) As regards the functional dissimilarity, we note that Accentia Technologies Ltd is engaged in diversified activity of medical transcription, medical coding, billing, receivable management. Thus it is clear that the said company is engaged in the healthcare activity and providing BPO service in the healthcare sector, that too by providing specific services of medical transcription, medical coding, medical billing etc. We note that these activities are quite different from the service of contact centre provided by the assessee to its AE which is purely

Page 17 of 31

in the nature of call centre. Therefore, we are of the view that the company Accentia Technologies Ltd cannot be considered as a functionally comparable company with the services provided by the assessee to its AE. The TPO is directed to exclude this company from the set of comparables.

11.2. Eclerx Services Ltd.

The learned AR of the assessee has submitted that this company is engaged in the high-end services and therefore, this company is basically a KPO and not a BPO. He has referred to Annual Report of this company at page 26 of the paper book -II and submitted that as it is clear from the Annual Report that this company is a knowledge process outsourcing (K. P. O) providing data analytics and data process solutions to global enterprise clients. This company supports core and complex activities for its clients using proprietary processes and a scalable offshore delivery model. This company has access to the capital market and therefore, this company is a public listed KPO company in India. The company is also engaged in consulting services and process outsourcing as well as in the activity of process re-engineering and automation apart from middle office and back office support to capital market. Therefore, keeping in the diversified high-end services, this company cannot be considered as functionally comparable with the assessee. In support of his contention, he has relied upon the decision of the Special Bench

of the Mumbai Tribunal in the case of *Maersk Global Services* (147 ITD 83).

i) On the other hand, learned Departmental Representative has submitted that this company is undisputedly in the business of ITeS and therefore, the nomenclature that of KPO will not make it functionally different from the assessee. He has relied upon the orders of the authorities below.

ii) We have considered the rival submissions as well as relevant material on record. We find that the company Eclerx Services Ltd. is engaged in diversified activity of providing services including analytic services and data process solutions to its global clients. The service provided by Eclerx Services Ltd., is in various areas including capital market and therefore, the services are in the nature of consultancy and end to end support through trade centre including trade confirmation, settlement, transaction, maintenance and analytic and reporting. Thus it is apparent from the nature of the activity of this company that it is not providing a simple service of data processing but it is engaged in the activity of providing high-end services involving decision making analysis which requires thought process and evaluation of various facts and factors. Functional comparability of this company with that of simple BPO's service providing company has been examined by the Special Bench in the case of *Maersk Global Services* (supra) in paras.82 & 83 as under :

Page 19 of 31

"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 Pvt. 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 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.

Thus it is clear that the Special Bench found that this company is not comparable with BPO company which are engaged only in low end services of data processing. Accordingly, we direct the

AO/TPO to exclude Eclerx Services Ltd. from the list of comparables for the purposes of determining ALP.

11.3. Infosys BPO Ltd.

The learned AR of the assessee has referred to the Annual Report of this company at page 57 of the paper book and submitted that though this company was initially selected by the assessee, however, the assessee has raised objections against this company even before the TPO and further before the DRP. Therefore, this company, if found functionally different, has to be excluded from the list of comparables. The learned AR of the assessee has pointed out that this company is having more than 17000 employees in comparison to only 6 employees of the assessee. Therefore, even on the parameter of the scale and strength of employees, this company cannot be considered as functionally comparable with that of the assessee. Further, he has referred to the Annual Report of the company and submitted that during the year under consideration, there is amalgamation of PAN Financial Services India Pvt. Ltd. w.e.f. 1/4/2008. The scheme of amalgamation has been approved by the Hon'ble High Court on 6/4/2009 and 10/3/2009. Therefore, there is an extraordinary event of amalgamation during the year under consideration and hence this company cannot be considered as a good comparable for the purpose of determining the ALP. Apart from the above objections, learned AR of the assessee has further submitted that this company is engaged in providing business

Page 21 of 31

process management services to organizations with outsourcing their business process. Therefore, this company is in a different kind of business activity in providing the management service of business processes and is not directly providing any business process outsource services. Thus, this company cannot be considered as a functionally comparable.

i) On the other hand, the learned Departmental Representative has submitted that this company is in the business activity of providing ITeS and therefore, it satisfies all the tests and filters applied by the TPO. The functional comparability has been examined by the DRP and it was found that this company is in the same line of activity under the category of ITeS. He has relied upon the order of the authorities below.

ii) We have considered the rival submissions as well as relevant material on record. We note that in para 16.2.15 of the Annual Report of this company, it has been reported that there was amalgamation w.e.f 1/4/2008. The relevant part of the information provided in the Annual Report reads as under:

Amalgamation of PAN Financial Services India Private Limited

The Board of Directors in their meeting held on October 6, 2008, approved, subject to the approval of the Honorable High Courts of Karnataka and Chennai, a Scheme of amalgamation ("the Scheme") to amalgamate PAN Financial Services India Private Limited (-PAN Financial"), a wholly owned subsidiary of the Company engaged in providing business process management of services, with the Company with effect from April 1, 2008 ("effective

Page 22 of 31

date"). The approval of the High Court was received on April 6, 2009 and filed with the respective Registrar of Companies of Karnataka and Tamilnadu on April 6, 2009 and March 10, 2009 respectively. Accordingly on the scheme becoming effective, the financial statement of PAN Financial has been merged with the company.

It is clear that there was extraordinary event of amalgamation during the year under consideration. Therefore, in view of the extraordinary development of amalgamation of another company, this company cannot be considered as a good comparable for the assessment year under consideration. Apart from this, we further note that as per the segment reporting in para.16.2.21 this company is providing business process management services as under:

Segment reporting

The company's operations primarily relate to providing business process management services to organizations that outsource their business processes. Accordingly, revenues represented along industry classes comprise the primary basis of segmental information set out in these financial statements. Secondary segmental reporting is performed on the basis of the geographical location of customers.

The accounting principles consistently used in the preparation of the financial statements are also consistently applied to record income in individual segments. These are set out in the note on significant accounting policies.

Thus it is clear that the revenue earned by this company is from the activity inclusive of operation primarily relates to providing business process management services to other organization engaged in outsourcing business process. This company is not engaged in direct activity of BPO but it provides service to BPOs

Page 23 of 31

and that too management service to BPO. Therefore, in our considered view, this company is engaged in a different nature of activity to that of the assessee provided to its AE. Accordingly, we direct the AO/TPO to exclude this company from the list of comparables.

11.4 Cosmic Global Ltd.

The learned AR of the assessee submitted that the assessee raised objection against inclusion of this company in the list of comparables before the TPO on the ground that this company has major revenue from translation services. Therefore, this company is functionally different from the services provided by the assessee to its AE. The learned AR of the assessee has referred to the Annual report of this company and submitted that that out of the total revenue of Rs.7,37,02,584/-, this company has earned revenue from translation charges to the tune of Rs.6,99,35,756/-. Therefore, substantial part of the revenue has been earned from the activity of translation. The learned AR of the assessee has further pointed out that even otherwise this company is outsourcing the work of translation as it is evident from the profit and loss account of this company that an amount of Rs.3,00,25,326/- has been paid on account of translation charges. Thus, learned AR of the assessee has submitted that this company cannot be considered as functionally comparable with the assessee for the purpose of determining the ALP. In

Page 24 of 31

support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in the case of *Lam Research (India) Pvt. Ltd. vs. DCIT* in ITA No.1437/Bang/2014 dated 30/4/2015.

i) On the other hand, learned Departmental Representative has submitted that the comparability of this company has been examined by the TPO as well as by the DRP. The TPO has rejected the objections raised by the assessee in respect of this company by holding that the translation service are in the nature of ITeS and therefore, it qualifies all the filters applied by the TPO. He has relied upon the orders of the authorities below.

ii) We have considered the rival submissions as well as the relevant material on record. There is no dispute that this company is in the business of providing service of medical transcription and consultancy services, translations services and accounts BPO. The segmental revenue from the operations are given in schedule 8 to the Profit & Loss account which reveals that major revenue of Rs.6,99,35,756/- out of total revenue of Rs.7.37 crores has been earned by this company from the activity of translation services. We further note that the company has debited an expenditure of more than Rs.3 crore on account of translations charges paid. Thus it is clear that this company is outsourcing its services of translation work which is the main activity of this company yielding major revenue earned during the year. Thus it is manifest from the record that this company is in

the entirely different nature of activity and cannot be compared with the activity of providing contact centre of the assessee to its AE. In the case of *Lam Research (India) Pvt. Ltd.* (supra) the coordinate bench of this Tribunal had occasion to examine the comparability of this company in para. 34 as under:

"34. *With respect to Cosmic Global Ltd., Hyderabad bench of ITAT in the case of Capital IQ Information Systems (India) P. Ltd., in para 19 of its order, had held as under*

Cosmic Global Ltd.

19. The main objection of assessee with reference to the inclusion of this company is with reference to outsourcing of its main activity. Even though this company is in assessee's TP study, it has raised objection before the TPO that this company's employee cost is less than 21.30% and most of the cost is with reference to the outsourcing charges or translation charges, and as such this is not a comparable company. The TPO, though considered these submissions, rejected the same, on the reason that this does not impact the profit margin of the company. Opposing the view taken by the TPO, it is submitted that this company cannot be selected as comparable, as M/s. Capital IQ Information systems (India) Pvt. Ltd., Hyderabad similar issue was discussed by the coordinate Bench of the Tribunal(Delhi) in the case of Mercer Consulting (India) P. Ltd. (supra), vide paras 13.2 to 13.3 which read as under-

"13.2. Now coming to the factual matrix of this case, we find from the material on record that outsourcing charges of this case constitute 57.31% of the total operating costs. This does not appear to us to be a valid reason for eliminating this case from the list of comparables. On going through the Annual accounts of Cosmic Global Limited, a copy of which has been placed on record, we find that its total revenue from operations are at Rs. 7.37 crore divided into three segments,

Page 26 of 31

namely, Medical transcription and consultancy services at Rs. 9.90 lacs, Translation charges at Rs.6.99 crore and Accounts BPO at Rs.27.76 lac. The Id. AR has made out a case that outsourcing activity carried out by this company constitutes 57% of total expenses. The reason for which we are not agreeable with the Id. AR is that we have to examine the revenue of this case only from Accounts BPO segment and not on the entity level, being also from Medical transcription and Translation charges. When we are examining the results of this company from the Accounts BPO segment alone, there is no need to examine the position under other segments. The entire outsourcing is confined to Translation charges paid at Rs. 3.00 crore, which is strictly in the realm of the Translation segment, revenues from which are to the tune of Rs.6.99 crore. If this segment of Translation is not under consideration for deciding as to whether this case is comparable or not, we cannot take recourse to the figures which are relevant for segments other than accounts BPO. Thus it is held that this case cannot be excluded on the strength of outsourcing activity, which is alien to the relevant segment.

13.3. However, we find this case to incomparable on the alternative argument advanced by the Id. AR to the effect that total revenue of the Accounts BPO segment of Cosmic Global Limited is very low at Rs.27. 76 lacs. We have discussed this aspect above in the context of CG-VAK's case and held that a captive unit cannot be compared with a giant case and thus excluded CG-VAK with turnover from Accounts BPO segment at Rs.86.10 lacs. As the segmental revenue of BPO segment of Cosmic Global Limited at Rs.27. 76 lac is still on much lower side, the reasons given above would fully apply to hold Cosmic Global Limited as incomparable. This case is, therefore, directed to be excluded from the list of

comparables."

In view of the detailed analysis of the coordinate Bench of the Tribunal in the above referred case, in this case also we accept the contentions of assessee and direct the Assessing Officer/TPO to exclude this comparable for the same reasons.

Accordingly, we direct that Cosmic Global Ltd., also be excluded from the list of comparables. "

In view of the above discussion as well as the order of the coordinate bench of this Tribunal, we direct the AO/TPO to exclude this company from the list of comparables for the purpose of determining the ALP.

12. Since the assessee has not advanced any argument in respect of other comparables, therefore, we do not propose to decide the issue of comparability of other comparables selected by the TPO. Accordingly, the AO/TPO is directed to recompute the ALP after excluding the above 4 companies from the set of comparables. Further, the TPO has also to consider the benefit of tolerance range +/-5% as per the proviso to sec.92C.

13. The next ground raised by the assessee in respect of corporate tax matter is regarding reducing travel expenses incurred in foreign currency from the export turnover while computing deduction u/s 10A. We note that this ground of the assessee is common to the grounds in revenue appeal in ITA No.1777/Bang/2013 which are as under:

1. *The order of the DRP is opposed to law and the*

facts and circumstances of the case.

2. *The DRP erred in directing the AO to follow the ratio of the Hon'ble Court in the case of Tata Elxsi Limited 349 ITR 98 and exclude Rs. 1,31,56,646 being the telecommunication charges and travel expenses of Rs. 21,38,709 incurred in foreign currency from the total turnover also while computing the deduction u/s 10A of the I.T. Act as the decision of the High Court is binding, without appreciating the fact that there is no provision in section 10A that such expenses should be reduced from the total turnover also, as clause (iv) of the explanation to section 10A provides that such expenses are to be reduced only from the export turnover.*
3. *The DRP erred in not appreciating the fact that the jurisdictional High Court's decision in the case of Tata Elxsi Limited 349 ITR 98 has not been accepted by the department and an appeal has been filed before the Hon'ble Supreme Court.*
4. *For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the DRP be reversed and that of the Assessing Officer be restored.*
5. *The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.*

Thus it is clear from the grounds raised in the revenue's appeal as well as the corporate tax issue raised by the assessee that only common issue arises is in respect of the computation of deduction u/s 10A after reducing the travel expenses incurred in foreign currency from the export turnover. Therefore, we propose to

Page 29 of 31

dispose of the revenue's appeal as well as the ground raised by the assessee on this issue simultaneously.

14. The AO reduced travel expenses incurred in foreign currency of Rs.21,38,709/- from the export turnover while computing deduction u/s 10A. On appeal, the CIT(A) has directed the AO to reduce the said amount from export turnover as well for the purpose of computing deduction u/s 10A. The CIT(A) has followed the judgment of the Hon'ble jurisdictional High Court in the case of *ACIT vs. Tata Elxsi* (349 ITR 98). It is apparent that this issue is now covered by the judgment of the Hon'ble jurisdictional High Court in the case of *Tata Elxsi* (supra) wherein the Hon'ble High Court has held as under:

"From the aforesaid judgments, what emerges is that. there should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Sec. 10A is a beneficial section. It is intended to provide incentives to promote exports. The incentive is to exempt profits relating to exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of s. 80HHC, the export profit is to be derived from the total business income of the assessee, whereas in s. 10A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. The export turnover would be a component, or part of a denominator, the other component being the domestic turnover. In other words, to the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. In view of the commonality, the understanding should also be the same. In other words, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a

Page 30 of 31

component of total turnover in the denominator. The reason being the total turnover includes export turnover. 'The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'total turnover' in s. 10A, there is nothing in the said section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. Though when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to the same, the said ordinary meaning to be attributed to such word is to be in conformity with the context in which it is used. When the statute prescribes a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a 'component of total turnover, such an interpretation would run counter to the legislative intent and impermissible. If that were the intention of the legislature, they would have expressly stated so. If they have not chosen to expressly define what the total turnover means then, when the total turnover includes export turnover, the meaning assigned by the legislature to the export turnover is to be respected and given effect to, while interpreting the total turnover which is inclusive of the export turnover. Therefore, the formula for computation of the deduction under s. 10A, would be as under :

$$\frac{\text{Profits of the business of the undertaking} \times \text{Export turnover}}{(\text{Export turnover} + \text{domestic turnover}) \text{ total turnover}}$$

11. In that view of the matter, we do not see any error committed by the Tribunal in following the judgments rendered in the context of s. 80HHC in interpreting s. 10A when the principle underlying both these provisions is one and the same. Therefore, we do not see any merit in these appeals. The substantial question of law framed is answered in favour of the assessee and against the Revenue."

Following the judgment of the Hon'ble jurisdictional High Court in the case of *Tata Elxsi* (supra), we do not find any error or illegality in the directions of the CIT(A) qua this issue. Accordingly, the appeal of the revenue as well as the corporate tax grounds raised by the assessee are dismissed.

Page 31 of 31

15. In the result, the assessee's appeal is partly allowed and the revenue's appeal is dismissed.

Pronounced in the open court on 10th November, 2015.

sd/-
(G.Manjunatha)
ACCOUNTANT MEMBER
eksrinivasulu,sps

sd/-
(Vijay Pal Rao)
JUDICIAL MEMBER

Copy to:

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore