IT/ILT: Giant companies bearing high risks would not be comparable to risk insulated captive software service provider

IT/ILT: Where assessee sought exclusion of a comparable on ground of functional dissimilarities, however said dissimilarities had not been examined by TPO as well as DRP, matter was to be remanded back for adjudication afresh

IT/ILT: Where a company satisfied export filter as applied by TPO, it had rightly been selected as a comparable

IT/ILT: High end software service provider which had undergone extraordinary event of acquisition during year would not be comparable to a routine software ITES service provider working on cost plus markup and fully risk insulated company

IT/ILT: Company engaged in translation business would not be comparable to assessee providing insurance claim processing services to its AE under ITES segment

IT/ILT: Company providing data analytics and customized process solution to diversifying global clients and also providing services to banking, manufacturing, retail, travel and hospitality verticals in absence of segmental details would not be functionally comparable to assessee engaged in providing ITES services to its AE

IT/ILT: Company having different financial year in comparison to assessee but having functional similarities, could not have been excluded merely on account of different accounting year

IT/ILT: Company which failed on ground of RPT filter applied by TPO had rightly been rejected from list of comparables

IT/ILT: Where high or low profit margin of a company is due to abnormal circumstances only then fluctuating profit margin is a ground to reject company as a suitable comparable

IT/ILT: Company engaged in job portal services would not be comparable to assessee engaged in software development services

IT/ILT: Company engaged in e-publishing, documents scanning and indexing having no separate financials would not be comparable to assessee engaged in providing ITES services to its AE

IT/ILT: Foreign exchange gain/loss cannot be treated as non-operating item while calculating margin of assessee as well as comparables

[2018] 90 taxmann.com 423 (Delhi - Trib.)

IN THE ITAT DELHI BENCH 'I-1'

United Health Group Information Services (P.) Ltd.

v.

Deputy Commissioner of Income Tax, Circle 18(1), New Delhi*

R. S. SYAL, VICE-PRESIDENT
AND KULDIP SINGH, JUDICIAL MEMBER
IT APPEAL NOS. 419 AND 825 (DELHI) OF 2014
[ASSESSMENT YEAR 2009-10]
FEBRUARY 9, 2018

I.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Assessee was a captive service provider to its AE providing software development services - Whether giant companies in area of development of software assuming full-fledged risk, leading to higher profit, having huge intangibles and R&D activities would not be suitable comparable to assessee being a captive software development service provider working on cost plus basis having no R&D activities and being a risk insulated company - Held, yes [Paras 17, 21, 29 and 30][In favour of assessee]

II.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Assessee was a captive service provider to its AE providing software development services - Whether where assessee sought exclusion of a comparable on ground that it was outsourcing its services; it was also engaged in development of products with no segmental data available and that it was expending around 1 per cent of its total income on R&D activities, however said comparable had not been contested by assessee before TPO as well as DRP, matter was to be remanded back for adjudication afresh - Held, yes [Para 18][Matter remanded]

III.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Whether where 95.06 per cent of export revenue of a company was from software services, it satisfied export filter of 75 per cent as applied by TPO and was thus comparable - Held, yes [Para 32][In favour of assessee]

IV.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Whether a company engaged in diversifying activities viz. Knowledge Process Outsourcing (KPO), Legal Process Outsourcing, Data Process Outsourcing, high end software services which had undergone extraordinary event of acquisition during year would not be comparable to assessee a routine software ITES service provider working on cost plus markup and fully risk insulated company - Held, yes [Paras 39 to 41][In favour of assessee]

V.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Whether a company engaged in translation business would not be comparable to assessee providing insurance claim processing services to its AE under ITES segment - Held, yes [Para 45][In favour of assessee]

VI.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment

year 2009-10 - Assessee-company was engaged in providing ITES services to its AE - Whether a company providing data analytics and customized process solution to diversifying global clients and also providing services to banking, manufacturing, retail, travel and hospitality verticals in absence of segmental details would not be functionally comparable to assessee - Held, yes [Paras 49 and 51][In favour of assessee]

VII.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Assessee-company was engaged in providing ITES services to its AE - It had accounting year from April to March - Whether a company having different financial year in comparison to assessee but having functional similarities, could not have been excluded from list of comparables merely on account of different accounting year - Held, yes [Para 54][In favour of assessee]

VIII.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparables/RPT Filter) - Assessment year 2009-10 - Whether a company which failed on ground of Related Party Transaction (RPT) filter applied by TPO, it had rightly been rejected from list of comparables - Held, yes [Para 76][In favour of assessee]

IX.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Whether no doubt, high or low profit margin of company is not a ground for treating it as uncomparable but in case high or low profit is due to abnormal circumstances then certainly fluctuating profit margin is a ground to reject company as a suitable comparable - Held, yes [Para 82][In favour of assessee]

X.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Whether a company engaged in job portal services would not be comparable to assessee engaged in software development services - Held, yes [Para 85][In favour of assessee]

XI.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Comparable - Illustrations) - Assessment year 2009-10 - Assessee-company was engaged in providing ITES services to its AE - Whether a company engaged in e-publishing and documents scanning and indexing having no separate financials would not be comparable to assessee and had rightly been excluded from final set of comparables - Held, yes [Paras 88 and 89][In favour of assessee]

XII.Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Adjustment - Foreign exchange gain/loss) - Assessment year 2009-10 - Whether foreign exchange gain/loss cannot be treated as non-operating item while calculating margin of assessee as well as comparables - Held, yes [Para 61][In favour of assessee]

Circulars and Notifications: CBDT Notification No. 73 of 2013, dated 18-9-2013

FACTS

- The assessee-company UHG India was into providing IT Enabled Health care services to UHG Group companies as a captive service provider. The assessee had two segments concerning international transactions *viz.* Information Technology Enabled Services (ITES) and Software Development services. In its Transfer Pricing Study the assessee used TNMM as Most Appropriate Method (MAM) for both the segments and computed its margin at 13.83 per cent and 13.23 per cent in ITES and Software Development services respectively.
- The TPO after examining the TP study made by the assessee and on the basis of various filters, made its own TP analysis by selecting 8 comparables for ITES segment and 18 comparables in software development segment and calculated their margin at 34.29 per cent and 28.88 per cent respectively and computed the cumulative adjustment in both the segments.
- The DRP gave partial relief by excluding Bodhtree Consulting, CAT Technologies and Aricent Technologies from the final set of comparables *qua* software development services and by excluding Coral Hub *qua* ITES segment for benchmarking the international transaction.
- On appeal to the Tribunal the assessee sought exclusion of 5 comparables and 3 comparables *qua* software development services and ITES segment respectively and also sought inclusion of 3 comparables *qua* ITES segment. The revenue also challenged exclusion of Bodhtree, CAT Technology *qua* software development segment and Coral Hub in ITES for benchmarking the international transaction.

HELD

SOFTWARE DEVELOPMENT SEGMENT

COMPANIES SOUGHT TO BE EXCLUDED

Infosys Technologies Ltd., (Infosys)

- Perusal of annual reports goes to prove that Infosys is providing end to end solutions *inter alia* include business and technology consulting, custom application development, infrastructure maintenance services, maintenance and production support, package enabled consulting and implementation including enterprise solutions, product engineering solutions and product lifecycle management, systems integration, valuation solutions and Software as a Service (SaaS) related solutions. Infosys has developed Finacle universal banking solution empowering 114 banks across 62 countries helping them serve 25,000 branches 244 million customers 297 million accounts and 2 lakhs million users. Finacle has also emerged as one of the most scale-able core banking solution in the world by achieving an unparallel performance benchmark of 104 million effective transactions per hour. [Para 15]
- Furthermore, Infosys is incurring 1.3 per cent of the total revenue on R&D and is having significant intangibles duly detailed in the annual report compendium. Perusal of the director's report, available in the annual report compendium, also shows that Infosys is a giant company having gross profit of Rs. 9119 crores. [Para 16]
- On the other hand, the assessee is providing services on cost plus basis having minimum risk and having no intangibles. Infosys has been ordered to be excluded as a comparable by the Delhi High Court in case of *CIT* v. *Agnity India Technologies* (*P.*) *Ltd.* [2013] 219 taxman 26/36 taxmann.com 289 being a giant company having

huge intangibles and incurring substantive amount on R&D and is a full-fledged risk taking company. More so, Infosys was ordered to be excluded in assessee's own case for assessment year 2008-09. In these circumstances, Infosys is not a suitable comparable *vis-à-vis* the taxpayer for benchmarking the international transactions; hence it is ordered to be excluded. [Para 17]

Persistent Systems Ltd., (Persistent)

- The assessee sought exclusion of Persistent on the grounds *inter alia* that it is outsourcing its services; that it is also engaged in development of products with no segmental data available; and that it is expending around 1 per cent of its total income of Rs. 56.1 million on R&D activities. Undisputedly, Persistent has not been contested by the assessee before the TPO as well as the DRP. In the given circumstances, if something new is to be examined let it be examined by the TPO first as the assessee has preferred not to contest Persistent before the TPO as well as DRP. So, this issue is set aside to the TPO to examine afresh after providing an opportunity of being heard to the assessee. [Para 18]

Tata Consultancy Services Ltd., (Tata)

- Annual report of Tata goes to prove that Tata is into providing diversified operations *viz.* Tata is into IT Infrastructure Services, BPO, ITES, Engineering and Industrial services; that it is into sale of equipment and software licence with wide client base and has been conferred with numerous awards/recognition. Perusal of the annual report compendium shows that it is having income from IT and consultancy services, sale of equipment and software licence but having no segmental data. The comparability of Tata has been examined by the coordinate Bench of the Tribunal in *St-Ericsson India* (*P.*) *Ltd.* v. *Addl. CIT* [2017] 79 taxmann.com 207 (Delhi-Trib.) wherein it was ordered to be excluded as a comparable *vis-à-vis* ST-Ericsson India (P.) Ltd., a captive software development provider by relying upon *Sony Mobile Communications International AB* v. *Dy.DIT* [2016] 69 taxmann.com 404 (Delhi - Trib.) for assessment year 2009-10, wherein it was ordered to be excluded on account of acquisition and merger having total income of Rs. 21535.75 crores and payment of sale of equipment and software licence at Rs. 668.25 crores. Tata has also expended Rs. 42.31 crores on its R&D and a highly risk bearing company and as such, cannot be a suitable comparable *vis-à-vis* taxpayer which is a captive software provider being remunerated on cost plus markup basis for rendering services to its AE. So, it is ordered to exclude Tata from the final set of comparables. [Para 21]

Thirdware solutions Ltd., (thirdware)

- The coordinate Bench of the Tribunal in case of *St. Ericsson India* (*P.*) *Ltd.* (*supra*) while examining the comparability of Thirdware ordered to exclude Thirdware as a comparable *vis-à-vis* St. Ericsson from a routine captive software development provider working on cost plus basis on the ground that the substantial revenue of this company is from sales and operating sales of licence, software services, export from SEZ unit, export from STPI unit and revenue from subscription. [Para 24]
- All these facts are available in the annual report of the annual report compendium. So, in these circumstances, the TPO is to be directed to examine the comparability of the Thirdware in the light of the decision of the coordinate Bench of the Tribunal in *St. Ericsson India* (*P.*) *Ltd.* (*supra*) as well as *SunLife India Services Centre* (*P.*) *Ltd.* v. *Dy. CIT* [2017] 88 taxmann.com 371 (Delhi - Trib.) [Para 25]

Wipro Limited (Wipro)

- The assessee has sought the exclusion of Wipro before the TPO/DRP who have rejected the argument on the ground that the margin of the stand-alone entity is higher than the consolidated level. However, on examination of the annual report of Wipro, it is a leading global information technology, or IT, services company, headquartered in Bangalore, India providing a comprehensive range of IT services, software solutions and research and development services in the areas of hardware and software design to leading companies worldwide; using its development centers located in India and around the world, quality processes and global resource pool to provide cost effective IT solutions and deliver time-to-market and time-to-development advantages to its clients. It also provides business process outsourcing, or BPO, services and is a leader in the Indian IT market and focuses primarily on meeting requirements for IT products of companies in India and the Middle East region and have a notable presence in the markets for consumer products and lighting and infrastructure engineering. [Para 27]
- Furthermore, in form B to the Director's Report, specific area in which R&D is being carried out by the Wipro is to strengthen the portfolio of Centres of Excellence (CoE), Solution Acceleration and Software Engineering Tools & Methodologies. [Para 28]
- Moreover, Wipro is having huge intangibles to the tune of Rs. 28213 million. So keeping in view the functions, assets and risk profile of Wipro and which is a fully risk bearing company, it is not a suitable comparable *vis-à-vis* the assessee which is a routine captive software development service provider working on cost plus markup model of business. Thus, Wipro being a giant company in the area of development of software assuming full-fledged risk leading to higher profit, having huge intangibles and R&D activities is not a suitable comparable to the taxpayer being a captive software development service provider working on cost plus basis having no R&D activities and is a risk insulated company. So, it is ordered that Wipro be excluded from the final set of comparables.[Paras 29 and 30]

COMPANIES SOUGHT TO BE INCLUDED

Quintegra Solutions (Quintegra)

- Primarily, the TPO has rejected Quintegra as a comparable on the ground that this company fails the export filter of 75 per cent. The TPO applied export filter of 75 per cent of the total income to select a company as comparable, as is evident from the TP order. However, the assessee has raised objection before the DRP that Quintegra passes the export filter but the DRP has not dealt with this issue. [Para 31]
- Perusal of the profit & loss account shows that Quintegra's export revenue is 95.06 per cent and as such, passes the assessee's export earning filter applied by the TPO. So, the TPO is directed to consider the Quintegra accordingly when he has not disputed the functional profile of Quintegra and it has also not failed in other filters applied by the TPO. [Para 32]

INFORMATION TECHNOLOGY ENABLED SERVICES (ITES) SEGMENT

COMPANIES SOUGHT TO BE EXCLUDED

Accenture Technologies Ltd. (Accenture)

- The taxpayer raised objection for inclusion of Accenture before the TPO that it is

functionally dissimilar and is into diversified business and has acquired Oak Technologies Inc. and, therefore, fails the filter of some peculiar circumstances but TPO has not discussed the objection of functional dissimilarity and has retained Accenture as comparable on the ground that its acquisition was completed by 31-3-2009 and it has no impact on the revenue of the company during the year under assessment. The DRP retained Accenture by simply agreeing with the TPO and without considering the objections raised by the taxpayer. [Para 38]

- Annual report of the Accenture, shows that Accenture is into the diversifying activities *viz.* Knowledge Process Outsourcing (KPO), Legal Process Outsourcing, Data Process Outsourcing, high end software services, whereas the assessee is a routine software ITES service provider working on cost plus markup and fully risk insulated company. [Para 39]
- Furthermore, Accenture has undergone extraordinary event during the year under assessment as it has acquired Oak Technologies Inc. with consideration of US $ 9 million excluding during the cost of acquisition and as on 31-3-2009, completed purchase of 96 per cent of the outstanding equity shares of Oak Technologies Inc. which has certainly impacted the profitability of the taxpayer which is routine service provider. In view of the decision rendered by the Delhi High Court in *Rampgreen Solutions* (*P.*) *Ltd.* v. *CIT* [2015] 60 taxmann.com 355, KPO cannot be compared with routine BPO. [Para 40]
- Accenture has also been ordered to be excluded by the coordinate Bench of the Tribunal in taxpayer's own case for assessment year 2010-11 in IT Appeal No. 1038 of 2015 dated 26-8-2016. Consequently, it is ordered that Accenture be excluded from the final set of comparables for benchmarking the international transactions. [Para 41]

Cosmic Global Ltd., (Cosmic)

- Bare perusal of the balance sheet and profit & loss account of Cosmic shows that financial results are available only on entity level. On examination of profit & loss account showing revenue from operation, it is clear that income from medical transcription and consultancy which is akin to assessee is only Rs. 9.91 lakhs whereas the major chunk of the business are from translation charges *i.e.* Rs. 6.99 crores and income from BPO is Rs. 27.76 lakhs. [Para 44]
- Moreover, perusal of the profit & loss account further shows that the assessee has outsourced 56 per cent of its activities and its outsourcing expenses are 56 per cent of its revenue which makes its business model different from the assessee. So, it can safely be concluded that Cosmic is into translation business which is not comparable to the assessee which is providing insurance claim processing services to its AE under ITES segment. [Para 45]
- Cosmic was examined as a comparable in assessee's own case for assessment year 2008-09 and was ordered to be excluded being functionally dissimilar *vide* order dated 28-8-2014 passed in IT Appeal No.6312 of 2012. Cosmic was also ordered to be excluded as a comparable by the coordinate Bench of the Tribunal in *Macquaire Global Services* (*P.*) *Ltd.* v. *DCIT* [2015] 153 ITD 488/55 taxmann.com 259 (Delhi - Trib.) *vis-a-vis* Macquarie Global Services (*P.*) Ltd. which was also into providing ITES services to its AE on ground of its functional dissimilarity by relying upon *Mercer Consulting* (*India*) (*P.*) *Ltd.* v. *Dy. CIT* [2014] 47 taxmann.com 84/150 ITD 1 (Delhi - Trib.) on the ground that Cosmic outsources its major activities. So,

Cosmic is ordered to be excluded from the final set of comparables. [Para 46]

E-Clerx Services (E-Clerx)

- E-Clerx is into providing data analytics and customized process solution to diversifying global clients and is also providing services to banking, manufacturing, retail, travel and hospitality verticals. So, its functional profile is not matched with taxpayer particularly when segmental detail is not available. So, the sole argument advanced by the revenue that the assessee is also a KPO, is not acceptable. E-Clerx has been excluded as a comparable in assessee's own case for assessment year 2008-09 by the coordinate Bench of the Tribunal in IT Appeal No.6312 of 2012 dated 28-8-2014 and since then there is no change in the business profile of the assessee till today. [Para 49]
- E-Clerx was also ordered to be excluded as a comparable in *Macquaire Global Services* (*P.*) *Ltd.* (*supra*) which was also into providing ITES services to its AE on the ground that E-Clerx is a KPO and is providing end to end support through trade life cycle including trade confirmation including settlement *etc*. and cannot be compared with *Macquaire Global Services* (*P.*) *Ltd.* (*supra*) which is also a captive unit rendering services to its AE without any intangibles. [Para 50]
- So, in view of the matter, E-Clerx is not a suitable comparable *vis-à-vis* the assessee who is ordered to be excluded. [Para 51]

COMPARABLES SOUGHT TO BE INCLUDED

Microland Limited (Microland)

- Undisputedly, Microland was taken as a comparable first time by the assessee before the DRP. The assessee submitted that Microland passes all the filters applied by the TPO. The DRP have not given any finding on this comparable. In the given circumstances, when Microland passes all the filters applied by the TPO, the TPO is directed to examine its comparability for the purpose of benchmarking the international transactions. [Para 52]

CG Vak Software & Exports Ltd., & R. Systems (CG Vak) (R. Systems)

- The TPO rejected CG Vak Software & Exports Ltd., as a comparable on the ground that significant income of this company is from 'software development' and that income from BPO operation is only Rs. 86 lakhs. The TPO has applied segment while examining the comparable. Perusal of segmental analysis shows that data is sufficient. In assessment year 2010-11, CG Vak Software & Exports Ltd. was examined as a comparable in assessee's own case and the issue was set aside to the TPO to reconsider in the light of the decision rendered in *Techbook International* (*P.*) *Ltd.,* v. *Dy. CIT* [2015] 63 taxmann.com 114 (Delhi-Trib.) and *Ameriprise India* (*P.*) *Ltd.,* v. *Asstt. CIT* IT Appeal No.7014 of 2014. In case, data is sufficient, CG Vak Software & Exports Ltd., may be included in the final set of comparables in the light of the decisions rendered by the coordinate Bench of the Tribunal in *Techbook International* (*P.*) *Ltd.* (*supra*) and *Ameriprise India* (*P.*) *Ltd.* (*supra*). [Para 53]
- R. Systems has been rejected by the TPO as a comparable on the ground that it is having different ending year than March and as such, reliable financial data is not available for 12 months period. Undisputedly, R. Systems has different financial year *vis-à-vis* the assessee which has accounting year from April to March but in case functional similarities are there, any comparable cannot be excluded merely on

account of different accounting year. So, in case assessee provides reliable data to examine the profitability, the TPO may consider it for inclusion of the same. [Para 54]

CASE REVIEW - I

CIT v. *Agnity India Technologies* (*P.*) *Ltd.* [2013] 219 taxman 26/36 taxmann.com 289 (Delhi) (para 30) *followed.*

CASES REFERRED TO

CIT v. *Agnity India Technologies (P.) Ltd.* [2013] 36 taxmann.com 289/219 taxman 26 (Delhi) (para 17), *SunLife India Services Centre Pvt. Ltd.* v. *Dy. CIT* [2017] 88 taxmann.com 371 (Delhi - Trib.) (para 19), *St. Ericsson India (P.) Ltd.* v. *Addl. CIT* [2017] 79 taxmann.com 207 (Delhi - Trib.) (para 19), *Sony Mobile Communications International AB* v. *Dy. DIT* [2016] 69 taxmann.com 404 (Delhi - Trib.) (para 21), *Toluna India (P.) Ltd.* v. *Asstt. CIT* [2014] 151 ITD 177/50 taxmann.com 24 (Delhi - Trib.) (para 26), *Ameriprise India (P.) Ltd.* v. *Asstt. CIT* [2015] 62 taxmann.com 237 (Delhi - Trib.) (para 36), *Capital IQ Information Systems* v. *Asstt. CIT* [2014] 49 taxmann.com 313 (Hyd. - Trib.) (para 36), *Macquarie Global Services (P.) Ltd.* v. *Dy. CIT* [2015] 153 ITD 488/55 taxmann.com 259 (Delhi - Trib.) (para 36), *Rampgreen Solutions (P.) Ltd.* v. *CIT* [2015] 60 taxmann.com 355 (Delhi) (para 40), *Mercer Consulting* (*India*) *(P.) Ltd.* v. *Dy. CIT* [2014] 47 taxmann.com 84/150 ITD 1 (Delhi - Trib.) (para 42), *Techbook International (P.) Ltd.* v. *Dy. CIT* [2015] 63 taxmann.com 114 (Delhi - Trib.) (para 53), *Ameriprise India (P.) Ltd.* v. *Asstt. CIT* [IT Appeal No.7014 (Delhi) of 2014] (para 53), *Pr. CIT* v. *Cashedge India (P.) Ltd.* [IT Appeal No.279 of 2016, dated 4-5-2016] (para 59), *Westfalia Separator India (P.) Ltd.* v. *Asstt. CIT* [2014] 52 taxmann.com 381 (Delhi - Trib.) (para 60), *Riviera Home Furnishing* v. *Additional CIT* [2016] 65 taxmann.com 287/237 Taxman 520 (Delhi) (para 67), *Birlasoft* (*India*) *Ltd.* v. *Dy. CIT* [2011] 44 SOT 664 (Delhi) (para 69), *Ciena India (P.) Ltd.* v. *ITO* [2015] 59 taxmann.com 92 (Delhi - Trib.) (para 81) and *Infinera India (P.) Ltd.* v. *ITO* [2016] 72 taxmann.com 68 (Bang. - Trib.) (para 81).

Nageshwar Rao and **S. Chakraborty**, Advs. *for the Appellant.* **Kumar Pranav**, Sr. DR *for the Respondent.*

ORDER

Kuldip Singh, Judicial Member - Present cross appeals filed by the assessee as well as by the revenue are being disposed of by way of consolidated order to avoid repetition of discussion.

2. The Appellant, United Group Information Services Private Limited (hereinafter referred to as 'the taxpayer') by filing the present appeal being ITA No.825/Del/2014 sought to set aside the impugned order dated 20.12.2013, passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') *qua* the assessment year 2009-10 on the grounds *inter alia* that :—

"1. That, the impugned order of assessment framed by the learned Deputy Commissioner of Income-tax, Circle 18(1), New Delhi (hereinafter referred to as 'the learned AO') pursuant to the directions of the Hon'ble Dispute Resolution Panel - II (hereinafter referred to as 'the Hon'ble DRP') under section 143(3) read with section 144C of the Income-tax Act, 1961 ('Act'), is a vitiated order having been passed in violation of principles of natural justice and is otherwise arbitrary and is thus bad in law and is *void ab-initio*.

2. That, without prejudice, the learned AO has grossly erred in making a transfer pricing addition of Rs. 277,999,266/- and a corporate tax addition of Rs. 14,857,889 while computing the income of the Appellant. The addition made to the returned income is highly unjustified and also suffers from mistakes apparent from record.

3. That the Hon'ble DRP has committed gross errors in confirming the order passed u/s 92CA(3) of the Act by the learned Transfer Pricing officer (the learned TPO') proposing a transfer pricing adjustment to the actual value of the international transactions of the Appellant with its associated enterprises and only granting a partial relief thereof.

4. That on the facts and in law, the learned TPO has grossly erred in treating foreign exchange gain/ loss as non-operating item while determining the arm's length price of the international transactions of the Appellant without considering the terms & conditions of the inter-company transactions of the Appellant.

5. The learned AO/TPO/DRP has erred by not making appropriate adjustments on account of working capital differences between the Appellant *vis-a-vis* the comparables companies, without appreciating the fact that the similar adjustment has been allowed to the Appellant in the assessment year 2007-08 & assessment year 2010-11. Thus, in the absence of any substantial change in the functional profile of the Appellant and following the principle of *res judicata*, the benefit of working capital adjustment should be allowed for AY 2009-10 as well.

6. That without prejudice, on the fact and the circumstances of the case and in law, the learned TPO/Hon'ble DRP has erred in not allowing a risk adjustment to the Assessee on account of the fact that the Appellant is a captive service provider for its associated enterprises and is remunerated on a cost plus basis irrespective of the outcome of the services provided and hence undertakes no market risk, service liability risk, credit and collection risk as against comparable companies that are the full fledged risk taking entrepreneurs.

7. That, in framing the impugned assessment, the reference made by the learned AO u/s 92CA (1) of the Act suffers from jurisdictional error, as the learned AO had not recorded any reasons nor he had any material whatsoever on the basis of which he could even reach a prima-facie opinion, that it was 'necessary or expedient' to refer the matter to the learned TPO for computation of ALP.

8. That without prejudice, on the facts and circumstances of the case and in law, the learned AO/TPO/Hon'ble DRP has erred in not allowing the benefit of downward adjustment of 5 percent, as provided in the Proviso to section 92C of the Act, from the ALP of the international transactions as determined by them .

9. That on the fact and the circumstances of the case and in law, the learned TPO/Hon'ble DRP has erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Rules, and conducting a fresh economic analysis for the determination of the ALP of the Appellant's international transactions and

holding that the international transactions are not at arm's length.

10.1 That on the facts and circumstances of the case and in law, the learned TPO/Hon'ble DRP has erred in rejecting the Appellant's claim to use multiple year data for computing the arm's length price and, instead, has adhered to the use of single year updated data to conclude the ALP of the international transactions.

10.2 Even as otherwise, on the assumption adopted by the learned TPO and without prejudice to Ground 10.1 above, even if single year updated data of the comparables selected in the transfer pricing documentation is considered, then also no transfer pricing adjustment could have been made to the income of the Appellant.

10.3 That on the facts and the circumstances of the case and in law, the learned TPO/ Hon'ble DRP has erred in selection of functional non comparable companies and application of arbitrary filters for the purpose of determination of arm's length price of the international transactions pertaining to provision of IT and IT enabled services by the Appellant to associated enterprises.

10. That on the facts and the circumstances of the case and in law, the learned TPO/Hon'ble DRP ignored the fact that the Appellant is entitled to a tax holiday under section 10A of the Act on its profits and therefore does not have an ulterior motive of shifting profits outside India.

11. That on the facts and circumstances of the case and in law, the learned AO/ Hon'ble DRP has erred in not allowing deduction under section 10A of the Act on interest income of Rs. 12,571,932 and miscellaneous income of Rs. INR 1,543,188.

11.1 On the facts and circumstances of the case and in law, the learned AO has erred in not allowing deduction under section 10A of the Act on 'Excess provision written back', amounting to INR 742,769, despite directions from the Hon'ble DRP to allow the same.

12. That on the facts and circumstances of the case and in law, the learned AO has erred in not granting credit for Tax deducted at source ('1DS') of INR 58,922.

13. 'That on the facts and circumstances of the case and in law, the learned AO has erred in not granting credit for Advance tax of INR 27,500,000 deposited by the Appellant for the subject year.

14. That on the facts and circumstances of the case and in law, the learned AO has erred in not granting set off of Minimum Alternate Tax ('MAT) credit of INR 21,654,947 brought forward in the subject year, as per section 115JAA of the Act.

15. That on the facts and circumstances of the case and in law, the learned AO has erred in levying consequential interest under section 2348 and 234C of the Act.

15.1 That on the facts and circumstances of the case and in law, the learned AO has erred in levying interest under section 234C of the Act on assessed income since interest under section 234C of the Act can be levied on returned income only.

16. That on the facts and circumstances of the case and in law, the learned AO

has erred in initiating penalty proceedings under section 271 (1)(*c*) of the Act."

3. The Appellant, Deputy Commissioner of Income-tax, Circle 18 (1), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal being ITA No.419/Del/2014 sought to set aside the impugned order dated 20.12.2013, passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') *qua* the assessment year 2009-10 on the grounds *inter alia* that :—

'i. That the Ld. DRP-II erred in law and facts in allowing part relief of Rs. 4,24,45,874/- to the assessee in the computation of Arm Length Prices of the International Transactions pertaining to the "Provision of ITES" and "Software Development Services".

ii. That the Ld. DRP-II erred in law and facts in accepting the contention of the assessee regarding exclusion of M/s. Aricent Tech., M/s. Bodhtree Consulting and M/s. Cat Technologies (Provision for Software Development Services) without appreciating the reasons given by TPO and without considering that the TPO had selected the comparables keeping in view the broad comparability under TNMM.

iii. That the Ld. DRP-II erred in law and facts in accepting the contention of the assessee regarding exclusion of M/s Coral Hub (Provision tor ITES) without appreciating the reasons given by TPO and without considering that the TPO had selected the comparables keeping in view the broad comparability under TNMM.

iv. That the Ld. DRP-II erred in law and facts in not appreciating the fact that the assessee had clubbed the two International Transactions - "Provision of Claim Processing Services" and "Provision of Data Analytics Services" together, as Provision for ITES, for benchmarking under TNMM in the TP Study Report which was followed by the assessee despite the fact that "Provision of Claim Processing Services" come under the category of BPO and "Provision of Data Analytics Services" come under the category of KPO and thus the comparables were selected by the assessee as well by the TPO from the entire spectrum (High End services as well as Low End Services) of ITES.

v. That the Ld. DRP-II erred in law and facts in not appreciating the fact that when the two International Transactions - "Provision of Claim Processing Services - BPO Services" and "Provision of Data Analytics Services - KPO Services" are clubbed together, as Provision for ITES, for benchmarking under TNMM by the assessee (in TP Study Report) and TPO then only the broad functional comparability between the comparables and assessee can be compared.

vi. That the order of the DRP-II is erroneous and is not tenable on facts and in law.

vii. That the grounds of appeal are without prejudice to each other.'

4. Briefly stated the facts necessary for adjudication of the controversy at hand are : United Health Group Insurance Company Limited (UHG India) is into providing IT Enabled Health care (claim processing, data analytics & clinical research support services) (hereinafter collectively referred to as "IT Enabled Services" and "IT Software Development") to UHG Group Companies as a captive service

provider. During the year under assessment, the taxpayer entered into international transactions with its Associated Enterprises (AE) as under :—

Nature of International Transaction	*Method Selected*	*Amount (In INR)*
Provision of Claim Processing Services (ITES)	TNMM	864,954,341
Provision of data analytics services	TNMM	81,347,775
Provision of software development services (IT Services)	TNMM	1,279,079,702
Provision of Clinical Research Support Services	TNMM	54,559,250
Purchase of Fixed Assets (Reversal)	-	442,915
Reimbursement of expatriate's salaries	-	6,627,466
Reimbursement of expenses received by UHG India	-	5,636,108
Advance against expenses	-	12,326,620
Grant of RSU/SAR	-	Nil

5. The taxpayer has two segments concerning international transactions *viz.* Information Technology Enabled Services (ITES) and Software Development services. The taxpayer in its Transfer Pricing Study used Transactional Net Margin Method (TNMM) as Most Appropriate Method (MAM) for both the segments and computed its margin at 13.83% and 13.23% in ITES and Software Development services respectively.

6. Ld. Transfer Pricing Officer (TPO), after examining the TP study made by the taxpayer and on the basis of various filters, described in para 3.2 of the TP order made its own TP analysis by selecting 8 comparables for ITES segment and 18 comparables in software development segment and calculated their margin at 34.29% and 28.88% respectively and computed the cumulative adjustment in both the segments to the tune of Rs. 32,04,45,140.

7. Ld. DRP who has given part relief by excluding Bodhtree Consulting, CAT Technologies and Aricent Technologies from the final set of comparables *qua* software development services and by excluding Coral Hub *qua* ITES segment for benchmarking the international transaction. Feeling aggrieved, the taxpayer has come up before the Tribunal seeking exclusion of 5 comparables and 3 comparables *qua* software development services and ITES segment respectively and the taxpayer also sought inclusion of 3 comparables *qua* ITES segment. The Revenue also challenged exclusion of Bodhtree, CAT Technology *qua* software development segment and Coral Hub in ITES for benchmarking the international transaction

8. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

TAXPAYER'S APPEAL (ITA NO.825/DEL/2014)

9. Undisputedly, post DRP directions, the ld. TPO passed order dated 29.11.2013 making total adjustment in both the segments at Rs. 27,79,99,260/- as under :—

"2. Software Segment

S. No.	*Company Name*	*OP/TC%*
1.	Goldstone Technologies (Seg)	10.28
2.	Infosys Ltd.	40.74
3.	Akshay Software Technologies Ltd.	8.24
4.	Larsen & Turbo Infotech	21.33
5.	Mindtree Ltd.	27.36
6.	Persistent Systems Ltd.	37.77
7.	LGS Global	18.88
8.	Tata Consultancy Services Ltd (Consolidated)	31.44
9.	Tata Elxsi Ltd. (Seg)	16.88

10.	Sasken	21.76
11.	Wipro Ltd. (Seg.)	25.78
12.	Thirdware	37.27
13.	Aztecsoft	27.37
14.	CG-VAK Software and Exports Ltd.	2.7
15.	R S Software India Pvt. Ltd.	10.15
	Average	22.53

The computation of adjustment amount based on the above arm's length margin is as follows:

Total cost	*Rs. l,12,95,89,650*
Arm's length price at a margin of 22.53%	*Rs. l,38,40,86,198*
Price received	*Rs.1,27,90,79,702*
Proposed adjustment u/s 92CA	*Rs. 10,50,06,496*
% of difference with ALP	*7.58%*

Based on this analysis, adjustment amount Rs. 10,50,06,496 is proposed for SWD Segment.

3. *ITES Segment*

S.No.	*Company Name*	*OP/TC%*
1.	Accentia Technologies Ltd.	52.52
2.	Cosmic Global Ltd.	50.70
3.	Crossdomain Solution Pvt. Ltd.	25.63
4.	Infosys BPO	24.28
5.	Eclerx Services Ltd.	66.01
6.	Aditya Birla Minac Worldwide Ltd	11.95
7.	Fortune lnfotech Ltd.	6.27
	Average	33.90

The computation of adjustment amount based on the above arm's length margin is as follows :

Operating Cost(A)	86,20,69,892
OP/TC	33.90%
Margin (B)	29,22,41,693
Arm's Length Price(A+B)=C	1,15,43,11,585
Price Charged by the assessee(D)	98,13,18,815
Difference (C-D)	17,29,92,770
% of difference with ALP	14.98%
Adjustment proposed	17,29,92,770

Based on this analysis, adjustment amount Rs. 17,29,92,770 is proposed for ITES Segment.

Total Adjustment Amount : Rs. 27,79,99,266"

TRANSFER PRICING ISSUES

10. Undisputedly, there is no dispute as to the TNMM used by the taxpayer as MAM for benchmarking the international transactions. It is also not in dispute that the taxpayer is a captive service provider to its AE to provide software development services and ITES services. There is also no change in the business model of the taxpayer as compared to the preceding years.

11. The ld. AR for the taxpayer to cut short the controversy sought exclusion of 5 comparables, *viz., Infosys Technologies Ltd., Persistent Systems Ltd., Tata Consultancy Services Ltd. (Consolidated), Thirdware Solutions Ltd. & Wipro Ltd.* for benchmarking the international transactions *qua* software development and inclusion of *Quintegra Solutions Ltd. qua* software development and sought exclusion of *Accentia Technologies Ltd., Cosmic Global Ltd. & eClerx Services* and sought inclusion of *Microland Ltd., R Systems & CG Vak Software & Exports Ltd.* for benchmarking the international transactions *qua* ITES segment.

12. We would examine the exclusion/inclusion of the aforesaid comparables sought by the taxpayer one

by one in the light of the arguments addressed by ld. AR for the taxpayer and ld. DR for the Revenue.

SOFTWARE DEVELOPMENT SEGMENT INFOSYS TECHNOLOGIES LIMITED (INFOSYS)

13. The taxpayer sought exclusion of Infosys on grounds *inter alia* that it is functionally dissimilar and incurring significant R&D expenses having significant intangibles and a giant company having fully risk bearing profile and relied upon the decision rendered by the coordinate Bench of the Tribunal in *taxpayer's own case in ITA No.6312/Del/2012 for AY 2008-09 order dated 28.08.2014*.

14. However, on the other hand, ld. DR for the Revenue relied upon the orders passed by the AO/DRP.

15. Perusal of page 1045 of annual reports compendium Vol.IV goes to prove that Infosys is providing end to end solutions *inter alia* include business and technology consulting, custom application development, infrastructure maintenance services, maintenance and production support, package enabled consulting and implementation including enterprise solutions, product engineering solutions and product lifecycle management, systems integration, valuation solutions and Software as a Service (SaaS) related solutions. Infosys has developed Finacle universal banking solution empowering 114 banks across 62 countries helping them serve 25,000 branches 244 million customers 297 million accounts and 2 lakhs million users. Finacle has also emerged as one of the most scale-able core banking solution in the world by achieving an unparallel performance benchmark of 104 million effective transactions per hour.

16. Furthermore, Infosys is incurring 1.3% of the total revenue on R&D and is having significant intangibles duly detailed at page 1138 of the annual report compendium. Perusal of the director's report, available at page 1016 of the annual report compendium, also shows that Infosys is a giant company having gross profit of Rs. 9119 crores.

17. On the other hand, the ld. Taxpayer is providing services on cost plus basis having minimum risk and having no intangibles. Infosys has been ordered to be excluded as a comparable by Hon'ble Delhi High Court in case of *CIT* v. *Agnity India Technologies (P.) Ltd.* [2013] 36 taxmann.com 289/219 taxman 26 (Delhi) being a giant company having huge intangibles and incurring substantive amount on R&D and is a full-fledged risk taking company. More so, Infosys was ordered to be excluded in taxpayer's own case for AY 2008-09 (*supra*). In these circumstances, Infosys is not a suitable comparable *vis-à-vis* the taxpayer for benchmarking the international transactions, hence we order to exclude it.

PERSISTENT SYSTEMS LTD. (PERSISTENT)

18. The taxpayer sought exclusion of Persistent on the grounds *inter alia* that it is outsourcing its services; that it is also engaged in development of products with no segmental data available; and that it is expending around 1% of its total income of Rs. 56.1 million on R&D activities. Undisputedly, Persistent has not been contested by the taxpayer before ld. TPO as well as ld. DRP. In the given circumstances, we are of the considered view that if something new is to be examined let it be examined by the ld. TPO first as the taxpayer has preferred not to contest Persistent before the ld. TPO as well as DRP. So, this issue is set aside to the ld. TPO to examine afresh after providing an opportunity of being heard to the taxpayer.

TATA CONSULTANCY SERVICES LTD. (TATA)

19. The taxpayer sought exclusion of Tata on ground of functional dis-similarity; that it is providing IT and consultancy services with no segmental details of product and services; that it is a leading global brand having huge intangibles and significant expenses on R&D and that it is a giant risk taking

company and has also undergone various acquisition and divestment during the year under assessment; that Tata has been ordered to be excluded as a comparable in AY 2007-08 and 2008-09 in identical cases by the coordinate Bench of the Tribunal *viz.*, *SunLife India Services Centre (P.) Ltd.* v. *Dy. CIT* [2017] 88 taxmann.com 371 (Delhi - Trib.) & *St. Ericsson India (P.) Ltd.* v. *Addl. CIT* [2017] 79 taxmann.com 207 (Delhi - Trib.).

20. However, on the other hand, ld. DR for the Revenue relied upon the orders passed by the AO/DRP.

21. Annual report of the Tata, available at pages 1341 to 1363 of annual report compendium, goes to prove that Tata is into providing diversified operations *viz.* Tata is into IT Infrastructure Services, BPO, ITES, Engineering and Industrial services; that it is into sale of equipment and software licence with wide client base and has been conferred with numerous awards/recognition. Perusal of Page 1420 of the annual report compendium shows that it is having income from IT and consultancy services, sale of equipment and software licence but having no segmental data. The comparability of Tata has been examined by the coordinate Bench of the Tribunal in *St-Ericsson India (P.) Ltd.* (*supra*) wherein it was ordered to be excluded as a comparable *vis-à-vis* ST-Ericsson India *(P.)* Ltd., a captive software development provider by relying upon *Sony Mobile Communications International AB* v. *Dy.DIT* [2016] 69 taxmann.com 404 (Delhi - Trib.) for AY 2009-10, wherein it was ordered to be excluded on account of acquisition and merger having total income of Rs. 21535.75 crores and payment of sale of equipment and software licence at Rs. 668.25 crores. Tata has also expended Rs. 42.31 crores on its R&D and a highly risk bearing company and as such, cannot be a suitable comparable *vis-à-vis* taxpayer which is a captive software provider being remunerated on cost plus mark up basis for rendering services to its AE. So, we order to exclude Tata from the final set of comparables.

THIRDWARE SOLUTIONS LTD. (**THIRDWARE**)

22. The taxpayer sought exclusion of Thirdware on ground of functional dis-similarity on the ground that its segmental information is not available and that company is also into sale of user licence for software application and relied upon *SunLife India Services Centre (P.) Ltd.* (*supra*) & *St. Ericsson India (P.) Ltd.* (*supra*).

23. However, the ld. DR for the Revenue opposed the exclusion of Thirdware on the ground that the taxpayer has not contested Thirdware either before the ld. TPO or before ld. DRP.

24. The coordinate Bench of the Tribunal in case of *St. Ericsson India (P.) Ltd.* (*supra*) while examining the comparability of Thirdware ordered to exclude Thirdware as a comparable *vis-à-vis* St. Ericsson from a routine captive software development provider working on cost plus basis on the ground that the substantial revenue of this company is from sales and operating sales of licence, software services, export form SEZ unit, export from STPI unit and revenue from subscription.

25. All these facts are available in the annual report page 1537 of the annual report compendium. So, in these circumstances, we are of the considered view that let the TPO examined the comparability of the Thirdware in the light of the decision of the coordinate Bench of the Tribunal in *St. Ericsson India (P.) Ltd.* (*supra*) as well as *SunLife India Services Centre (P.) Ltd.* (*supra*).

WIPRO LIMITED (**WIPRO**)

26. The taxpayer sought exclusion of Wipro on grounds of functional dissimilarity; being engaged in R&D activities having significant intangibles and it is a giant company with differences in risk profile, nature of services, expenditure on R&D etc. and relied upon *Toluna India (P.) Ltd.* v. *Asstt. CIT* [2014] 151 ITD 177/50 taxmann.com 24 (Delhi - Trib.) *and Agnity India Technologies (P.) Ltd.* (*supra*). However, on the other hand, ld. DR for the Revenue relied upon the orders passed by the AO/DRP.

27. The taxpayer has sought the exclusion of Wipro before the ld. TPO/DRP who have rejected the argument on the ground that the margin of the standalone entity is higher than the consolidated level. However, when we examine annual report of Wipro at page 1604 of the annual report compendium, Wipro is a leading global information technology, or IT, services company, headquartered in Bangalore, India providing a comprehensive range of IT services, software solutions and research and development services in the areas of hardware and software design to leading companies worldwide; using its development centers located in India and around the world, quality processes and global resource pool to provide cost effective IT solutions and deliver time-to-market and time-to-development advantages to its clients. It also provides business process outsourcing, or BPO, services and is a leader in the Indian IT market and focuses primarily on meeting requirements for IT products of companies in India and the Middle East region and have a notable presence in the markets for consumer products and lighting and infrastructure engineering.

28. Furthermore, in form B to the Director's Report, specific area in which R&D is being carried out by the Wipro is as under :—

> *"Wipro's R&D focus is to strengthen the portfolio of Centres of Excellence* (*CoE*), *Solution Acceleration and Software Engineering Tools & Methodologies. In financial year 2008-09, your Company incubated Applied Research group to investigate & analyze potential impact and business prospect of technologies which are in the early stage of adoption."*

29. Moreover, Wipro is having huge intangibles as is evident from consolidated balance sheet schedule V, available at page 1659 of the annual report compendium, to the tune of Rs. 28213 million.

30. So keeping in view the functions, assets and risk profile of Wipro and which is a fully risk bearing company, we are of the considered view that it is not a suitable comparable *vis-à-vis* the taxpayer which is a routine captive software development service provider working on cost plus mark up model of business. Applying the ratio of the decision rendered by Hon'ble High Court in *Agnity India Technologies (P.) Ltd.* (*supra*), we are of the considered view that Wipro being a giant company in the area of development of software assuming full-fledged risk leading to higher profit, having huge intangibles and R&D activities is not a suitable comparable to the taxpayer being a captive software development service provider working on cost plus basis having no R&D activities and is a risk insulated company. So, we order to exclude Wipro from the final set of comparables.

COMPANIES SOUGHT TO BE INCLUDED QUINTEGRA SOLUTIONS (**QUINTEGRA**)

31. Primarily, the ld. TPO has rejected Quintegra as a comparable on the ground that this company fails the export filter of 75%. The ld. TPO applied export filter of 75% of the total income to select a company as comparable, as is evident from para 2.2(*v*) of the TP order. However, the taxpayer has raised objection before ld. DRP that Quintegra passes the export filter but the ld. DRP has not dealt with this issue.

32. Perusal of the submissions made by the taxpayer before ld. DRP are available at pages 413 & 414 of the paper book II. However, perusal of the profit & loss account, available at pages 1747 and 1750 of annual report compendium and schedule forming part of the balance sheet to Quintegra shows that Quintegra's export revenue is 95.06% and as such, passes the taxpayer's export earning filter applied by the ld. TPO. So, ld. TPO is directed to consider the Quintegra accordingly when he has not disputed the functional profile of Quintegra and it has also not failed in other filters applied by the ld. TPO.

INFORMATION TECHNOLOGY ENABLED SERVICES (**ITES**) **SEGMENT**

33. Method and functional profile of the taxpayer is not in dispute. All the international transactions carried out by the taxpayer during the year under assessment are as per agreement dated 01.01.2007

which is continuing in nature as were applicable in AY 2008-09. To benchmark international transactions, ld. TPO has selected 8 comparables having average mean of 34.29% and proposed the adjustment of Rs. 17,63,54,842/-. The comparables finally selected by the ld. TPO are as under :—

S. No.	*Company Name*	*OP/TC%*
1.	Accentia Technologies Ltd.	52.52
2.	Cosmic Global Ltd.	50.70
3.	Crossdomain Solution *(P.)* Ltd.	25.63
4.	Infosys BPO	24.28
5.	Eclerx Services Ltd.	66.01
6.	Coral Hub	37.03
7.	Aditya Birla Minac Worldwide Ltd	11.95
8.	Fortune Infotech Ltd.	6.27
	Average	34.29

34. Out of aforesaid 8 comparables for benchmarking the international transactions *qua* ITES services, the taxpayer has sought exclusion of *Accenture Technologies Ltd., Cosmic Global Ltd. & Eclerx Services Ltd.* The taxpayer has also sought inclusion of *Microland Ltd., R Systems & CG Vak Software & Exports Ltd.*

35. Now, we would examine the comparability of the aforesaid companies *vis-à-vis* the taxpayer one by one.

COMPANIES SOUGHT TO BE EXCLUDED BY THE TAXPAYER

ACCENTURE TECHNOLOGIES LTD. (**ACCENTURE**)

36. The taxpayer sought to exclude Accenture on grounds of its functional dis-similarity; that Accenture has undergone extraordinary events during the year under assessment and that its segmental data is not available in the public domain and relied upon the *taxpayer's own case in ITA No.1038/Del/2015 for AY 2010-11, Ameriprise India (P.) Ltd.* v. *Asstt. CIT* [2015] 62 taxmann.com 237 (Delhi - Trib.), *Capital IQ Information Systems (India) (P.) Ltd.* v. *Addl. CIT* [2014] 49 taxmann.com 313 (Hyd. - Trib.) and *Macquarie Global Services (P.) Ltd.* v. *Dy. CIT* [2015] 153 ITD 488/55 taxmann.com 259 (Delhi - Trib.)

37. However, on the other hand, ld. DR for the Revenue relied upon the orders passed by the AO/DRP.

38. The taxpayer raised objection for inclusion of Accenture before the ld. TPO that it is functionally dis-similar and is into diversified business and has acquired Oak Technologies Inc. and, therefore, fails the filter of some peculiar circumstances but TPO has not discussed the objection of functional dis-similarity and has retained Accenture as comparable on the ground that its acquisition was completed by 31.03.2009 and it has no impact on the revenue of the company during the year under assessment. Ld. DRP retained Accenture by simply agreeing with ld. TPO and without considering the objections raised by the taxpayer.

39. Annual report of the Accenture, available at pages 605 to 692, shows that Accenture is into the diversifying activities *viz.* Knowledge Process Outsourcing (KPO), Legal Process Outsourcing, Data Process Outsourcing, high end software services, whereas the taxpayer is a routine software ITES service provider working on cost plus mark up and fully risk insulated company.

40. Furthermore, Accenture has undergone extraordinary event during the year under assessment as it has acquired M/s. Oak Technologies Inc. with consideration of US $ 9 million excluding during the cost of acquisition and as on 31.03.2009, completed purchase of 96% of the outstanding equity shares of M/s. Oak Technologies Inc. which has certainly impacted the profitability of the taxpayer which is routine service provider. In view of the decision rendered by Hon'ble Delhi High Court in *Rampgreen Solutions (P.) Ltd.* v. *CIT* [2015] 60 taxmann.com 355, KPO cannot be compared with routine BPO.

41. Accenture has also been ordered to be excluded by the coordinate Bench of the Tribunal in *taxpayer's own case for AY 2010-11 in ITA No.1038/Del/2015 order dated 26.08.2016*. Consequently, we order to exclude Accenture from the final set of comparables for benchmarking the international transactions.

COSMIC GLOBAL LTD. (**COSMIC**)

42. The taxpayer sought exclusion of Cosmic on the grounds *inter alia* that it is functionally dis-similar; that under BPO segment, no segmental detail of operating cost is available; that Cosmic's outsourcing expenditure is 56% of the turnover and relied upon *taxpayer's own case for AY 2008-09 and Mercer Consulting* (*India*) *(P.) Ltd.* v. *Dy. CIT* [2014] 47 taxmann.com 84/150 ITD 1 (Delhi - Trib.), *Capital IQ Information Systems (India) (P.) Ltd. (supra)* and *Macquarie Global Services (P.) Ltd. (supra)*.

43. However, on the other hand, ld. DR for the Revenue relied upon the orders passed by the AO/DRP.

44. Bare perusal of the balance sheet and profit & loss account of Cosmic, available at pages 701 & 702 of the annual report compendium, shows that financial results are available only on entity level. When we examine Schedule VIII to the profit & loss account showing revenue from operation, it is clear that income from medical transcription and consultancy which is akin to taxpayer is only Rs. 9,90,737/- whereas the major chunk of the business are from translation charges *i.e.* Rs. 6,99,35,756/- and income from BPO is Rs. 27,76,090/-.

45. Moreover, perusal of the P&L account further shows that the taxpayer has outsourced 56% of its activities and its outsourcing expenses are 56% of its revenue which makes its business model different from the taxpayer. So, we can safely conclude that Cosmic is into translation business which is not comparable to the taxpayer which is providing insurance claim processing services to its AE under ITES segment.

46. Cosmic was examined as a comparable in taxpayer's own case for AY 2008-09 and was ordered to be excluded being functionally dissimilar *vide* order dated 28.08.2014 passed in ITA No.6312/Del/2012. Cosmic was also ordered to be excluded as a comparable by the coordinate Bench of the Tribunal in *ITA No.6803/Del/2013 vide order dated 22.01.2015* vi-a-vis Macquarie Global Services *(P.)* Ltd. which was also into providing ITES services to its AE on ground of its functional dis-similarity by relying upon *Mercer Consulting (India) (P.) Ltd.* (*supra*) on the ground that Cosmic outsources its major activities. So, we ordered to exclude Cosmic from the final set of comparables.

E-CLERX SERVICES (**E-CLERX**)

47. The taxpayer sought to exclude E-Clerx for benchmarking its international transaction on the grounds *inter alia* that it is functionally dis-similar; that it has only one segment and has ordered to be excluded in taxpayer's own case for AY 2008-09 and also relied upon *Ameriprise India (P.) Ltd.* (*supra*), *Capital IQ Information Systems (India) (P.) Ltd.* (*supra*) *and Macquarie Global Services (P.) Ltd.* (*supra*).

48. A perusal of pages 715 & 716 of the annual report compendium shows that E-Clerx is Knowledge Process Outsourcing (KPO) providing data analytics and data process solutions to global enterprise clients, providing end to end support through trade lifecycle including trade confirmation, settlements, transaction, maintenance, risk analytic and reporting over the last year and also providing unique blend of services, process reengineering and automation. Furthermore, perusal of page 763 of annual report compendium shows that it is having no segmental details rather company operates under single primary segment *i.e.* data analytics and process outsourcing services. Ld. DR for the Revenue contended that the taxpayer is also a KPO providing KPO services under data analytics.

49. However, we are of the considered view that E-Clerx is into providing data analytics and customized process solution to diversifying global clients and is also providing services to banking, manufacturing, retail, travel and hospitality verticals. So, its functional profile is not matched with taxpayer particularly when segmental detail is not available. So, the sole argument advanced by ld. DR that the taxpayer is also a KPO, is not acceptable. E-Clerx has been excluded as a comparable in taxpayer's own case for AY 2008-09 by the *coordinate Bench of the Tribunal in ITA No.6312/Del/2012 order dated 28.08.2014* and since then there is no change in the business profile of the taxpayer till today.

50. E-Clerx was also ordered to be excluded as a comparable in *Macquaire Global Services (P.) Ltd.* (*supra*) which was also into providing ITES services to its AE on the ground that E-Clerx is a KPO and is providing end to end support through trade life-cycle including trade confirmation including settlement etc. and cannot be compared with *Macquaire Global Services (P.) Ltd.* (*supra*) which is also a captive unit rendering services to its AE without any intangibles.

51. So, in view of the matter, we are of the considered view that E-Clerx is not a suitable comparable *vis-à-vis* the taxpayer who is ordered to be excluded.

COMPARABLES SOUGHT TO BE INCLUDED BY THE TAXPAYER

MICROLAND LIMITED (MICROLAND)

52. Undisputedly, Microland was taken as a comparable first time by the taxpayer before the ld. DRP. The ld. AR for the taxpayer submitted that Microland passes all the filters applied by the TPO. The ld. DRP have not given any finding on this comparable. In the given circumstances, when Microland passes all the filters applied by the TPO, the TPO is directed to examine its comparability for the purpose of benchmarking the international transactions.

CG VAK SOFTWARE & EXPORTS LTD. & R. SYSTEMS (CG VAK) (R. SYSTEMS)

53. The ld. TPO rejected CG Vak Software & Exports Ltd. as a comparable on the ground that significant income of this company is from "software development" and that income from BPO operation is only Rs. 86,00,000/-. TPO has applied segment while examining the comparable. Perusal of segmental analysis, available at page 879 of the annual report compendium, shows that data is sufficient. In AY 2010-11, CG Vak Software & Exports Ltd. was examined as a comparable in taxpayer's own case and the issue was set aside to the TPO to reconsider in the light of the decision rendered in *Techbook International (P.) Ltd.* v. *Dy. CIT* [2015] 63 taxmann.com 114 (Delhi - Trib.) and *Ameriprise India (P.) Ltd.* v. *A. CIT ITA No.7014/Del/2014.* In case, data is sufficient, CG Vak Software & Exports Ltd. may be included in the final set of comparables in the light of the decisions rendered by the coordinate Bench of the Tribunal in *Techbook International (P.) Ltd.* (*supra*) *and Ameriprise India (P.) Ltd.* (*supra*).

54. R. Systems has been rejected by the TPO as a comparable on the ground that it is having different ending year than March and as such, reliable financial data is not available for 12 months period. Undisputedly, R. Systems has different financial year *vis-à-vis* the taxpayer which has accounting year from April to March but we are of the considered view that in case functional similarities are there, any comparable cannot be excluded merely on account of different accounting year. So, in case taxpayer provides reliable data to examine the profitability, the ld. TPO may consider it for inclusion of the same.

GROUND NOS.1, 2 & 3

55. Ground Nos.1, 2 & 3 are general in nature more specifically elaborated in the subsequent grounds, need no adjudication.

GROUND NO.4

56. The ld. TPO has treated foreign exchange gain/loss as non- operating items in both the segments *i.e.* ITES services and Software Development services while determining the arm's length price of the international transactions, which are now under challenge before the Tribunal. The ld. DRP by relying upon "Safe Harbour Rule" as per CBDT Notification dated 18.09.2013 upheld the findings returned by ld. TPO that foreign exchange gain/loss is a non-operating item while determining the arm's length price of international transaction.

57. However, the ld. AR for the taxpayer contended that the taxpayer being a captive service provider passes the foreign exchange loss/gain to the respective AE on case to case basis without any mark up in order to make suitable compensation of the margin earned by the taxpayer *vis-à-vis* comparable companies.

58. Undisputedly, the Revenue has not treated foreign exchange gain/loss as non-operating item while operating arm's length price of international transaction of the taxpayer in AYs 2008-09 and 2010-11.

59. Hon'ble High Court of Delhi in case cited as *Pr. CIT-2* v. *Cashedge India (P.) Ltd. in ITA 279/2016 order dated 04.05.2016* while upholding the decision rendered by the Tribunal held that Safe Harbour Rule is not applicable to AY 2008-09 as it came into force w.e.f. 18.09.2013 since the ld. DRP has primarily relied upon Safe Harbour Rule while upholding the decision of ld. DRP in treating the foreign exchange fluctuation gain/loss as non- operating item, the findings are not sustainable.

60. The coordinate Bench of the Tribunal decided the identical issue in case of *Westfalia Separator India (P.) Ltd.* v. *Asstt. CIT* [2014] 52 taxmann.com 381 (Delhi - Trib.) by returning following findings :—

> "We have heard the rival submissions and perused the relevant material on record. The forex gain or loss is the difference between the price at which an import or export transaction was recorded in the books of account on the basis of rate of foreign exchange then prevailing and the amount actually paid or received at the rate of foreign exchange prevailing at the time of actual payment or receipt. Since such forex loss or gain is a direct outcome of the purchase or sale transaction, it partakes of the same character as that of the transaction to which it relates. The Special Bench of the Tribunal in the case of ACIT v. Prakash I. Shah [2008] 115 ITD 167 (Mum) (SB) has held that foreign exchange fluctuation gain is a part of export turnover. Though such decision was rendered in the context of section 80HHC, but the same logic applies generally as well. The essence of the matter is that any gain or loss arising out of change in foreign currency rate in respect of transaction for import or export of goods is nothing, but inherent part of the price of import or the value of export. The Hon'ble Supreme Court in Sutlej Cotton Mills Ltd. v. CIT 116 ITR 1 (SC) has held that : 'where profit or loss arises to an assessee on account of appreciation or depreciation ITA Nos.4446 & 4447/Del/2007 in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business'. When we read the ratio of the case of Sutlej Cotton (SC) (*supra*) in juxtaposition to that of the Special Bench in case of Prakash I Shah (*supra*), there remains no doubt that forex gain or loss from a trading transaction is not only an item of revenue nature, but is, in fact, a part of the price of import or value of export transaction, as the case may be. Operating expense is ordinarily an expense that a business incurs as a result of performing its normal business operations. As the business of 'Assembly' done by the assessee under this segment is not possible without purchases and forex gain is in relation to such purchase transactions, we have no hesitation in holding that it is an item of operating cost." 16 We find that the aforesaid basis that foreign exchange gain/loss should be treated as non- operating item is based on the notification of CBDT issued on 18.9.2018 on safe harbour. However, such a contention has been rejected in the aforesaid order of the

coordinate bench wherein it was held as under: "4.8. The ld. AR relied on Rule 10T(*j*) to contend that loss arising on account of foreign currency fluctuations cannot be included in the operating expense. We are not persuaded to give any mileage to the ld. AR on this count for the simple reason that Rule 10T is a part of Safe harbor rules notified on 18.09.2013 which are not applicable to the assessment year under consideration."

61. So, we are of the considered view that foreign exchange gain/loss cannot be treated as non-operating items while calculating the margin of the taxpayer as well as comparables. So, we direct to treat the foreign exchange gain/loss as non-operating margin as non-operating items while benchmarking the international transactions. Consequently, ground no.4 is determined in favour of the taxpayer.

GROUND NO.5

62. Ld. AO/TPO/DRP have not made appropriate adjustment on account of working capital differences between the taxpayer vis-à- vis comparable companies, which are under challenge before the Tribunal. Ld. DRP denied appropriate adjustment on account of difference in working capital employed on the ground that the onus is on the taxpayer to demonstrate the reason and calculation of working capital adjustment and the ld. TPO has rightly denied the same to the taxpayer.

63. Identical issue has come up before the coordinate Bench of the Tribunal in taxpayer's own case for AY 2008-09, operative part of which is reproduced as under for ready perusal :—

"13.1. Now, we espouse the next contention raised by the ld. AR about the denial of working capital adjustment, which was claimed before the TPO. The DRP echoed the TPO's order on this score by noticing that the assessee took the average of the amount of working capital deployed by the comparables on the first and last day of accounting period to compute the working capital adjustment and there were no means to ascertain the working capital deployed by the comparables throughout the year on daily basis. The assessee is aggrieved.

13.2. Having heard the rival submissions and perused the relevant material on record, it is manifest that the working capital adjustment is required with reference to stock, trade receivable and trade payables. By carrying the high trade receivables, a company allows its customers a relatively longer period to pay their accounts, which results into higher interest cost and lower profit. By carrying high trade payables, a company benefits from a relatively longer period available to it for paying back its suppliers, which results into its lower interest cost and higher profit. Similarly, high stock means blockage of funds and the resultant lower profit. These three ingredients directly impact the working capital and resultant profit of comparables *vis-à-vis* the assessee. A working capital adjustment is required to be effected for bringing the comparables and the assessee at the same pedestal. The ld. DRP upheld the denial of such adjustment by noticing that there were no means to ascertain the working capital deployed by the comparables throughout the year on daily basis. If the contention of the ld. DRP is taken to a logical conclusion, then there can never be a working capital adjustment, because in no case, the daily figures of comparables would come to the fore. Since, the authorities below have denied working capital adjustment to the assessee on flimsy ground, we vacate their action and hold in principle that the grant of working capital adjustment, if otherwise available, cannot be jeopardized. However, as regards the quantum of working capital adjustment, we direct the AO/TPO to vet the correctness of the amount of working capital adjustment claimed by the assessee and then decide its allowability as per law."

64. Following the decision rendered by the coordinate Bench of the Tribunal, we are of the considered view that the taxpayer is entitled for working capital adjustment to be on the same page with the comparables. So, the taxpayer is entitled for working capital adjustment, the quantum of which is to be checked by the ld. TPO who has to proceed on the lines of the decision rendered by the coordinate

Bench of the Tribunal in taxpayer's own case for AY 2008-09, Consequently, Ground No.5 is determined in favour of the taxpayer.

GROUND NOS. 6, 7, 8, 9 &10

65. Ground Nos.6, 7, 8, 9 &10 are general in nature more specifically elaborated in the subsequent grounds, need no adjudication.

GROUND NOS.11 & 11.1

66. The AO in the draft order, available at pages 140 to 147, denied the deduction of Rs. 125,71,932/- and Rs. 22,85,957/- claimed u/s 10A of the Act being the interest on FDR and misc. income respectively on the ground that the same is not related to exports. Ld. DRP also upheld the findings of the AO by observing that the interest income cannot be termed as profit derived from an undertaking and has also not followed the decision rendered by the coordinate Bench in AY 2008-09 on identical issue.

67. Undisputedly, identical issue has come up before the Tribunal in taxpayer's own case for AY 2010-11 and has been decided in favour of the taxpayer by relying upon the decision rendered by the *Hon'ble Delhi High Court in Riviera Home Furnishing* v. *Addl. CIT* [2016] 65 taxmann.com 287/237 Taxman 520 (Delhi). Operative part of the finding returned by Hon'ble Delhi High Court in *Riviera Home Furnishing* (*supra*) is reproduced for ready perusal as under :—

> "9. The question as to what can constitute as profits and gains derived by a 100% EOU from the export of articles and computer software came for consideration before the Karnataka High Court in *CIT* v. *Motorola India Electronics (P.) Ltd.* [2014] 46 taxmann.com 167/225 Taxman 11 (Mag.). The said appeal before the Karnataka High Court was by the Revenue challenging an order passed by the ITAT which held that the interest payable on FDRs was part of the profits of the business of the undertaking and therefore includible in the income eligible for deduction Sections 10A and 10B of the Act. There the Assessee had earned interest on the deposits lying in the EEFC account as well as interest earned on inter-corporate loans given to sister concerns out of the funds of the undertaking. There was a restriction on the Assessee in that case from making pre- payment of its external commercial borrowings ('ECB'). It could repay only to the extent of 10% of the outstanding loan in a year. This made the Assessee temporarily park the balance funds as deposits or with various sister concerns as inter corporate deposits until the date of repayment. The Assessee contended that the interest derived from the business of the industrial undertaking was eligible for exemption within the meaning of Section 10B and applied the formula under Section 10B(4) of the Act for determining the profits from exports. The Assessee's contention that the expression "profits of the business of the undertaking" in Section 10B(4) was wider than the expression "profits and gains derived by" the Assessee from a 100% EOU occurring in Section 10B(1) was accepted by the ITAT. The ITAT noticed that unlike Section 80HHC, where there was an express exclusion of the interest earned from the 'profits of business of undertaking', there was no similar provision as far as Sections 10A and 10B were concerned.
>
> 10. In Motorola India Electronics *(P.)* Ltd. (*supra*) reference was made to the decision of the Supreme Court in *Pandian Chemicals Ltd.* v. *CIT* [2003] 262 ITR 278/129 Taxman 539 which dealt with Section 80HH and *Liberty India* v.

CIT [2009] 317 ITR 218/183 Taxman 349 (SC), which interpreted Section 801B of the Act. Reference was also made to the decision of *CIT* v. *Sterling Foods* [1999] 237 ITR 579/104 Taxman 204 (SC), which interpreted Section 80HH and the decision of the Madras High Court in *CIT* v. *Menon Impex (P.) Ltd.* [2003] 259 ITR 403/128 Taxman 11 which interpreted Section 10A of the Act. The Karnataka High Court in *Motorola India Electronics (P.) Ltd.* (*supra*), after noticing the above decisions, held that "it is clear that, what is exempted is not merely the profits and gains from the export of articles but also the income from the business of the undertaking". Specific to the question of interest earned by the EOU on the FDRs placed by it and interest earned from the loans given to sister concerns, it was held that although it did not partake the character of profit and gains from the sale of an article "it is income which is derived from the consideration realized by export of articles."

11. The decision of the Karnataka High Court in *Motorola India Electronics (P.) Ltd.* (*supra*) was followed by this Court in its decision in *CIT* v. *Hritnik Exports (P.) Ltd.* (decision dated 13th November 2014 in ITA Nos. 219 and 239 of 2014). This Court also referred to its earlier decision dated 1st September 2014 in ITA No. 438 of 2014 (*CIT* v. *XLNC Fashions*). While declining to frame a question of law in the Revenue's appeal, this Court inHritnik Exports *(P.)* Ltd. (*supra*) quoted with approval the observations of the Special Bench of the ITAT in *Maral Overseas Ltd.* v. *Addl. CIT* [2012] 136 ITD 177/20 taxmann.com 346 (Indore) on the interpretation of Section 10B(4) of the Act as under:

'79. Thus, sub-section (4) of section 10B stipulated that deduction under that section shall be computed by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, not-withstanding the fact that sub-section (1) of section 10B refers the profits and gains as are derived by a 100% EOU, yet the manner of determining such eligible profits has been statutorily defined in sub-section (4) of section 10B of the Act. As per the formula stated above, the entire profits of the business are to be taken which are multiplied by the ratio of the export turnover to the total turnover of the business. Sub-section (4) does not require an assessee to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking. Thus, once an income forms part of the business of the eligible undertaking, there is no further mandate in the provisions of section 10B to exclude the same from the eligible profits. The mode of determining the eligible deduction u/s 10B is similar to the provisions of section 80HHC inasmuch as both the sections mandates determination of eligible profits as per the formula contained therein. The only difference is that section 80HHC contains a further mandate in terms of Explanation (baa) for exclusion of certain income from the "profits of the business" which is, however, conspicuous by its absence in section 10B. On the basis of the aforesaid distinction, sub-section (4) of section 10A/10B of the Act is a complete code providing the mechanism for computing the "profits of the business" eligible for deduction u/s 10B of the Act. Once an income forms part of the business of the income of the eligible undertaking of the assessee, the same cannot be

excluded from the eligible profits for the purpose of computing deduction u/s 10B of the Act. As per the computation made by the Assessing Officer himself, there is no dispute that both these incomes have been treated by the Assessing Officer as business income. The CBDT Circular No. 564 dated 5th July, 1990 reported in 184 ITR (St.) 137 explained the scope and ambit of section 80HHC and the mode of determination of profits derived by an assessee from the export of goods. I.T.A.T., Special Bench in the case of *International Research Park Laboratories* v. *ACIT*, 212 ITR (AT) 1, after following the aforesaid Circular, held that straight jacket formula given in sub-section (3) has to be followed to determine the eligible deduction. The Hon'ble Supreme Court in the case ofP.R. Prabhakar; 284 ITR 584 had approved the principle laid down in the Special Bench decision in International Research Park Laboratories v.ACIT (*supra*). In the assessee's own case the I.T.A.T. in the preceding years, after considering the decision in the case of Liberty India held that provisions of section 10B are different from the provisions of section 80IA wherein no formula has been laid down for computing the eligible business profit.'

12. Recently, in a decision dated 6th October 2015 in ITA NO. 392 of 2015 (Principal *CIT* v. *Universal Precision Screws*), this Court had occasion to again consider whether interest earned on fixed deposits kept by an Assessee which was eligible under Section 10B of the Act, as a condition for utilization of letter of credit and bank guarantee limits, would qualify for deduction. That question was decided in favour of the Assessee and against the Revenue. The Court held as under:

'9. On the question of interest on the FDRs, the ITAT has referred to Section 10B(4) which states that for the purposes of Section 10B(1), the profits derived from export of articles or things or computer software "shall be the amount which bears to the profits of the business of the undertaking", the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.' As noted by this Court in *CIT* v. *Hritnik Exports (P.) Ltd.* (decision dated 13th November, 2014 in ITA No. 219 & 239 of 2014), Section 10B(4) mandates the application of the formula for determining the profits derived from exports for the purposes of Section 10B(1). In other words, the formula would read thus:

Profits derived from export = Profits of the business of the undertaking

9A. In terms of the above formula, the question that would arise is whether the interest on the FDRs could form part of the 'profits of the business of the undertaking'. The attention of the Court has been drawn to the decision of the Karnataka High Court in *CIT* v. *Motorola India Electronics (P.) Ltd.* [2014] 46 Taxmann.com 167 (Kar.) which held that there was a direct nexus between the interest received from the FDRs created by a similarly placed Assessee from the amounts borrowed by it. The High Court approved the order of the ITAT in that case which held that the entire profits of the business of the undertaking should be taken into consideration while computing the eligible deduction under Section 10B of the Act by ITA 392/2015 applying the mandatory formula.

10. In the present case, the Assessee has stated that the interest on FDRs was received on "margin kept in the bank for utilization of letter of credit and bank guarantee limits". In those circumstances, the decision of the ITAT that such interest bears the requisite characteristic of business income and has nexus to the business activities of the Assessee cannot be faulted. In other words, interest earned on the FDRs would form part of the "profits of the business of the undertaking" for the purposes of computation of the profits derived from export by applying formula under Section 10B(4) of the Act.'

13. Mr. Ashok Manchanda, learned Senior standing counsel for the Revenue, urged that none of the earlier decisions of the High Courts have considered the effect of Sections 80I, 801A and 801B of the Act which occur in Chapter VIA of the Act. He referred in particular to Section 80A(4) of the Act, which reads as under:

'4) Notwithstanding anything to the contrary contained in section 10A or section 10AA or section 10B or section 10BA or in any provisions of this Chapter under the heading "C—Deductions in respect of certain incomes", where, in the case of an assessee, any amount of profits and gains of an undertaking or unit or enterprise or eligible business is claimed and allowed as a deduction under any of those provisions for any assessment year, deduction in respect of, and to the extent of, such profits and gains shall not be allowed under any other provisions of this Act for such assessment year and shall in no case exceed the profits and gains of such undertaking or unit or enterprise or eligible business, as the case may be.'

14. Mr. Manchanda's attempt was to show that Section 80A(4), which *inter alia* stated that any deduction allowable under Section 10B cannot in any case "exceed the profits and gains of such undertaking or unit or enterprise or eligible business, as the case may be" made it clear that a unit seeking deduction under Section 10B would be eligible to do so only insofar as such income was directly attributable to the business of export. Any income that might be merely incidental to the business of the undertaking, not directly related to the activity of export, would not be eligible for such deduction. He also took the Court again through the decision of the Supreme Court in *Liberty India* (*supra*) and submitted that the earlier decisions of this Court in *Hritnik Exports (P.) Ltd.* (*supra*) and *Universal Precision Screws* (*supra*) might require to be reconsidered. When a question was posed to him as to whether the Revenue had challenge the aforementioned decisions of this Court, and of the ITAT in the present case to the extent it has allowed the plea of the Assessee as regards 'deemed export drawback', Mr. Manchanda stated that the Revenue ought to have challenged the above decisions as well as the impugned order of the ITAT in the present case and perhaps he would advise it to do so hereafter. He has also handed over a written note of submissions, reiterating the above submissions.

15. In the considered view of the Court, the submissions made on behalf of the Revenue proceed on the basic misconception regarding the true purport of the provisions of Chapter VIA of the Act and on an incorrect understanding of Section 80A(4) of the Act. The opening words of Section 80A(4) read "Notwithstanding anything to the contrary contained in section 10A or section 10AA or section 10B or section 10BA or in any provisions of this Chapter".

What is sought to be underscored, therefore, is that Section 80A, and the other provisions in Chapter VIA, are independent of Sections 10A and 10B of the Act. It appears that the object of Section 80A(4) was to ensure that a unit which has availed of the benefit under Section 10B will not be allowed to further claim relief under Section 80IA or 80IB read with Section 80A(4). The intention does not appear to be to deny relief under Section 10B(1) read with Section 10B(4) or to whittle down the ambit of those provisions as is sought to be suggested by Mr. Manchanda. Also, he is not right in contending that the decisions of the High Courts referred to above have not noticed the decision of the Supreme Court in Liberty India. The Karnataka High Court in Motorola India Electronics *(P.)* Ltd. (*supra*) makes a reference to the said decision. That decision of the Karnataka High Court has been cited with approval by this Court in Hritnik Exports *(P.)* Ltd. (*supra*) and Universal Precision Screws (*supra*). In Hritnik Exports *(P.)* Ltd. (*supra*) the Court quoted with approval the observations of the Special Bench of the ITAT in Maral Overseas Ltd. (*supra*) that "Section 10A/10B of the Act is a complete code providing the mechanism for computing the 'profits of the business' eligible for deduction u/s 10B of the Act. Once an income forms part of the business of the income of the eligible undertaking of the assessee, the same cannot be excluded from the eligible profits for the purpose of computing deduction u/s 10B of the Act."

16. This then brings us to the questions framed for consideration in the present case and the decision of the ITAT in not accepting the Assessee's plea in regard to 'customer claims' 'freight subsidy' and 'interest on fixed deposit receipts' even while it accepted the Assessee's case as regards 'deemed export drawback'.

17. The contention of the Assessee as regards customer claims was that it had received the claim of Rs. 28,27,224 from a customer for cancelling the export order. Later on the cancelled order was completed and goods were exported to another customer. The sum received as claim from the customer was nonseverable from the income of the business of the undertaking. The Court fails to appreciate as to how the ITAT could have held that this transaction did not arise from the business of the export of goods. Even as regards freight subsidy, the Assessee's contention was that it had received the subsidy in respect of the business carried on and the said subsidy was part of the profit of the business of the undertaking. If the ITAT was prepared to consider the deemed export draw back as eligible for deduction then there was no justification for excluding the freight subsidy. Even as regards the interest on FDR, the Court has been shown a note of the balance sheet of the Assessee [which was placed before the AO] which clearly states that "fixed deposit receipts (including accrued interest) valuing Rs. 15,05,875 are under lien with Bank of India for facilitating the letter of credit and bank guarantee facilities." In terms of the ratio of the decisions of this Court both in Hritnik Exports *(P.)* Ltd. (*supra*) and Universal Precision Screws (*supra*), the interest earned on such FDR ought to qualify for deduction under Section 10B of the Act."

68. So, following the findings returned by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2010-11 based on the decision of Hon'ble High Court in *Riviera Home Furnishing* (*supra*), we are of the considered view that the taxpayer is entitled for deduction u/s 10A on the interest earned on

fixed deposit receipts to the tune of Rs. 125,71,932/- and Rs. 22,85,957/-.

69. Similar view as to allowing the deduction u/s 10A of the Act on excess provision returned back amounting to Rs. 7,42,769/- has been expressed by the coordinate Bench of the Tribunal in *Birlasoft (India) Ltd.* v. *Dy. CIT* [2011] 44 SOT 664 (Delhi). Following the decision rendered by the coordinate Bench of the Tribunal, we are of the considered view that notice pay recoveries from the employees is also part of the business profit of the taxpayer on which the taxpayer is also eligible for deduction u/s 10A of the Act. Consequently, grounds no.11 & 11.1 are also determined in favour of the taxpayer.

GROUND NO.12

70. The AO has not given credit of tax deducted at source of Rs. 58,922/- to the taxpayer. AO is directed to provide the credit to the taxpayer *qua* the tax deducted at source after due verification.

GROUND NO.13

71. The AO has also not given credit of advance tax of RS.27,50,000/- deposited by the taxpayer during the year under assessment. The taxpayer is entitled for credit of advance tax subject to verification by the AO. So, the AO is directed to proceed accordingly.

GROUND NO.14

72. AO has also not granted set off of Minimum Alternate Tax (MAT) credit of Rs. 216,54,947/- brought forward during the year under assessment u/s 115JAA of the Act. When it is not in dispute that the taxpayer has claimed the credit of Rs. 216,54,947/- being brought forward figure, the taxpayer is entitled for set off of MAT credit of the same. So, the AO is directed to proceed accordingly after due verification.

GROUND NO.15 & 15.1

73. Grounds No.15 & 15.1 *qua* levy of interest u/s 234B and 234C of the Act need no specific finding being consequential in nature.

REVENUE'S APPEAL (ITA NO.419/DEL/2014) GROUND NO.i

74. Grounds No. 1 is general in nature and need no adjudication being more specifically elaborated in the subsequent grounds.

SOFTWARE DEVELOPMENT SERVCIES SEGMENT

GROUND NO.II READ WITH GROUND NOS. IV & V

75. The Revenue has challenged the order passed by ld. DRP to the extent of excluding *M/s. Aricent Tech, M/s. Bodhtree Consulting and CAT Technologies* for benchmarking the international transactions *qua* services provided by the taxpayer to its AE in software development services segment. We would examine the comparability of the aforesaid 3 comparables *vis-à-vis* the taxpayer one by one.

ARICENT TECH (ARICENT)

76. Perusal of para 3.1 of the TP order apparently shows that Aricent was rejected by the TPO itself on ground of Related Party Transactions (RPT) which are to the tune of 33.61%, but somehow again Aricent find place in final set of comparables for benchmarking the international transactions. This factual position has not been controverted by the ld. Senior DR. So, we are of the considered view that there is no scope for further deliberations on the comparability of Aricent as it fails RPT filter applied by the TPO himself. So, ld. DRP has rightly rejected Aricent as a comparable *vis-à-vis* taxpayer.

BODHTREE CONSULTING (BODHTREE)

77. Before the ld. TPO, the taxpayer sought to reject Bodhtree on the grounds *inter alia* that it has only ONE segment *i.e.* software development in FY 2006-07 being engaged in providing open and end to end web solutions, software consultancy, design and development of solutions, using the latest technologies and besides specialized IT and data management services, the company had developed and spun off its strategic business units in e-publishing (e-paper solution), E-Learning (Web based assessment services) and Mobile Classified space (mobile search and classified advertising platform for the used car industry in Malaysia) into Pressmart Media Limited, Learn Smart (India) (P.) Ltd. and Trylah SDN Bhd respectively. It is also mentioned that the company has software solutions of its own (Hygia 2.3 - Enterprise Data Quality Solution, Busin Essence 4.0 - Business Intelligence Dashboard Solution, DigiDoc - Document Management framework) and Sevices (Web Services and Customized IT Professional Services.

78. However, TPO retained Bodhtree as a comparable on the ground that the company has shown fixed assets in the form of computer software of Rs. 96,03,610/- only which is insignificant and there is no capitalized expenditure on software development on software products and as such, it does not have any significant product business.

79. However, the ld. DRP excluded Bodhtree on the ground of abnormal results during this year by tabulating the margin of this company of earlier and subsequent years as under :—

Company Name	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
	OP/TC Margin					
Bodhtree Consulting Limited	14.66%	33.20%	20.86%	64.04%	34.39%	-29.65%

80. The ld. DR for the Revenue challenging the impugned order passed by ld. DRP by relying upon *Chrys Capital Investment Advisors (India) (P.) Ltd.* v. *DCIT* [2015] 56 taxmann.com 417 (Delhi) contended that functionally similar comparables cannot be excluded only on the ground of super normal profit.

81. However, ld. AR for the taxpayer relied upon decisions of the coordinate Bench of the Tribunal in *Ciena India (P.) Ltd.* v. *ITO* [2015] 59 taxmann.com 92 (Delhi - Trib.) *and Infinera India (P.) Ltd.* v. *ITO* [2016] 72 taxmann.com 68 (Bang. - Trib.) wherein Bodhtree has been ordered to be excluded on the basis of fluctuating profit margin.

82. No doubt, high or low profit margin of the company is not a ground for treating it as uncomparable but in case high or low profit is due to abnormal circumstances then certainly fluctuating profit margin is a ground to reject the company as a suitable comparable. Coordinate Bench of the Tribunal in *Ciena India (P.) Ltd. for AY 2009-10* (*supra*) examined the issue at length and treated fluctuating profit margin of Bodhtree as a ground for rejecting as a comparable by returning following findings :—

> "9.6. Coming back to the facts of the instant case, we find from Schedule 12 that there is a mention of Significant accounting policy at Sl. no.3, which provides that: "Revenue from software development is recognized based on software development and billed to clients." If some software development project is incomplete at the end of the year, this Note may entail two situations, *viz.*, the first, in which the expenses incurred in respect of such software development may be capitalized, which appears to be a more rational manner of depicting the true and fair view of the profitability of the enterprise; and the second, in which such expenses may be straightway taken as revenue cost for the year of its incurring itself, which may not reflect a true and fair view of the profits on year to year basis. The contention of the ld. AR is that whereas Bodhtree fell into the second situation, the assessee was in the first situation. Though this contention about Bodhtree accounting for expenses in the year of incurring but considering income only on the conclusion of the project in the subsequent year sounded a little awkward, we attempted to find out the amount of

capitalized expenses in respect of incomplete projects at the end of the year. Apparently, we could not find out any such capitalized value of work-in- progress in the balance sheet of the company on standalone basis. We directed the ld. DR to examine the Annual report of this company and point out the amount of expenses capitalized in respect of incomplete work at the end of the year. On the next date of hearing, the ld. DR failed to specifically point out any amount of such capitalized expenses with the opening or closing balance. This prima facie shows that the expenses incurred in respect of incomplete projects of software development at the end of the year, but billed in the subsequent year, were, in fact, treated as expenses for the current year alone. In the same manner, expenses incurred in the preceding year for the contracts of software development remaining incomplete at the end of the year, also must have been included in the expenses of the last year alone, but, the income getting recognized on the raising of bills in the current year. This albeit, patently deforms the correct profitability on year to year basis, yet, but we cannot help the situation. When the position of accounts of Bodhtree is such that it does not properly match expenses with revenue, it loses its credibility for making a logical comparison with a company that accounts for expenses matching with the revenue. Once it is held that the profits of Bodhtree Consulting Ltd. do not represent fair profitability on year to year basis, this company loses its tag of an effective comparable. We, therefore, order for the exclusion of this company from the final list of comparables."

83. Perusal of annual report, available at page 1798 of the paper book Vol.V, also goes to prove that the company is engaged in both software solution and software services. Moreover, as discussed by the coordinate Bench of the Tribunal in *Ciena India (P.) Ltd.* (*supra*), "*When the position of accounts of Bodhtree is such that it does not properly match expenses with revenue, it loses its credibility for making a logical comparison with a company that accounts for expenses matching with the revenue"*, it cannot be a suitable comparable. So ld. DRP has rightly excluded Bodhtree as unsuitable comparable *vis-à-vis* taxpayer.

CAT TECHNOLOGY

84. Before the ld. TPO, taxpayer has sought exclusion of CAT Technology on ground of functional dis-similarity because the company is exclusively in the business of Medical Transcription, Training, Software Development and Consulting Services. Perusal of annual report, available at page 1871, also shows that CAT Technology is engaged in job portal services.

85. Ld. DR contended that the CAT Technology is only into software development as discussed by the TPO. However, as per data available in the annual report at page 1871, it is categorically mentioned that during the year under assessment, the company launched job portal *viz.* Logtalent.com which was instant success with job aspirants. Encouraged with success of this portal company proposed to launch 3 to 4 portal during the current financial year in the different fields. So, in the given circumstances, contention made by ld. Senior DR is misplaced and ld. DRP has rightly excluded CAT Technology from the final set of comparables.

ITES SEGMENT

GROUND NO.iii READ WITH GROUNDS NO.iv & v

86. The Revenue has challenged the exclusion of *Coral Hub* by ld. DRP on the ground that the same has been excluded without any valid reason. Before the ld. TPO, the taxpayer has sought exclusion of Coral on ground of functional dis-similarity and low employee cost ratio. Both these objections have been overruled by the ld. TPO.

87. However, the ld. DRP rejected Coral Hub as a comparable on ground of its outsourcing activities.

Perusal of annual report, available at page 945 (P&L account for the year ending June, 2010), shows that Coral has outsourced its activities to the extent of 90% and its operating expenses on account of data entry charges, vendor payment and expenses on conversion of books into POD titles is to the tune of about Rs. 56 crores.

88. Coral Hub has been ordered to be excluded on ground of functional dis-similarity by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2008-09. The relevant findings returned by the coordinate Bench of the Tribunal are reproduced as under:—

> "12.2. Having heard the rival submissions and perused the relevant material on record, we find from the Annual report of this company that it is mainly engaged in e-publishing business. It has more than 10,000 classic books to its credit which are also converted into large font titles for visually challenged. Apart from e-publishing, this company is also engaged in Documents scanning & Indexing. It can be seen from the financial results of this company that both the segments *viz.*, e-publishing and Documents scanning etc. have been combined and there are no separate financial results in respect of Documents scanning work, which may be comparable with the assessee to some extent. As the assessee is not engaged in any e-publishing business and the financials given by this company are on consolidated basis, we direct to exclude this company from the list of comparables. The assessee succeeds."

89. So, keeping in view the functional dis-similarity of Coral Hub (Vishal Informatics) *vis-à-vis* the taxpayer, the ld. DRP has rightly excluded the Coral from the final set of comparables

GROUNDS NO.vi & vii

90. Grounds No.vi & vii are general in nature, hence need no specific adjudication.

91. Resultantly, the appeal of the taxpayer stands allowed for statistical purposes and the appeal of the Revenue is dismissed.

jyoti

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*Partly in favour of assessee.