IT/ILT : Where assessee was providing research and information services and claimed that said services were BPO services, since assessee's functions were also inclusive of 'Knowledge management systems and infrastructure issues which encompass infrastructure support, application support, application operations group and survey development center', services rendered by it were specialized and required specific skill based analysis and research that is beyond rudimentary nature of services rendered by a BPO and, therefore, it would be incorrect to slot services provided by assessee into that of a BPO, when it was more akin to a KPO

[2018] 96 taxmann.com 237 (Delhi)

HIGH COURT OF DELHI

Mckinsey Knowledge Centre India (P.) Ltd.

v.

Principal Commissioner of Income-tax.

S. RAVINDRA BHAT AND A.K. CHAWLA, JJ.
IT APPEAL NOS. 461, 526, 590 OF 2017 & 82 OF 2018
AUGUST 9, 2018

Porus Kaka, **Divesh Chawla** and **Harpreet Singh Ajmani**, Advs. *for the Appellant.* **Rahul Chaudhary** and **Ms. Vibhooti Malhotra**, Advs. *for the Respondent.*

ORDER

S. Ravindra Bhat, J. - This judgment will dispose of four cross appeals (ITA 461/2017, ITA 590/2017 and ITA 82/2018, ITA 526/2017), two filed by M/s. McKinsey Knowledge Centre India Pvt. Ltd. (the Assessee), and the respective opposing two by the Revenue, as they address the same questions of law. The following question of law arises in ITA 461/2017 & ITA 526/2017:

> *(1) Did the ITAT commit an error in law in holding that the assessee was engaged in knowledge management systems and international transactions/activities in respect of one of the services rendered to its associated enterprises, i.e. AE."*

2. In ITA 461/2017 & ITA 526/2017, the other question urged with respect to the notional interest attributed to the assessee and for which adjustment was made by the Transfer Pricing Officer (TPO), was finally affirmed by the ITAT. By the order dated 07.02.2018, this Court considered the submissions of the parties and was of the opinion that having regard to the considered view in the case of *Pr. CIT v. Kusum Health Care Pvt. Ltd.* [ITA No.765/2016, decided on 25.04.2017], the matter requires further examination/scrutiny; the reasons for the credit or delay in payment needs to be examined.

3. The matter was, therefore, remitted to the ITAT with directions to file a report, if deemed necessary. All the rights of the parties were reserved.

The following question of law arises in ITA 590/2017 & ITA 82/2018:

> *"Did the ITAT fall into error in excluding the relative comparables which were held to be irrelevant for the purpose of ALP determination in the circumstances of the case?"*

4. The assessee is a company incorporated under the Companies Act, 1956 and is a wholly owned subsidiary of McKinsey Holding Inc., USA. The business operations of the Assessee can be broadly divided into two divisions, namely:

(*a*) Research and Information Services Division

The Research and Information (R&I) Services Division can be further divided into through 3 sub-groups- (a) Knowledge On Call Group - provides journalistic research information support. The services offered include financial analysis. (b) Practice Research Group - focuses on domain specific research support. The services provided include sector data and analysis, capital market insights, perspectives and industry trends and (c) Analytics Group - focuses primarily on time intensive analysis requiring expertise and analytical tools and techniques. The services provided include data analysis, model/tool development, proprietary database management, practice specialized analytics.

(*b*) IT Support Services Division

The IT Support Division provides services which include data-based administration support for maintenance of application infrastructure, unloading and correction of data on servers.

5. ITA 461/2017 (by the assessee), challenges an order of the Income Tax Appellate (ITAT) dated 15.12.2016, for assessment year (hereinafter referred to as "AY") 2011-12. The revenue's appeal ITA No. 590/2017 questions the same order. By the impugned order dated 15.12.2016, the ITAT partly allowed the assessee's appeal and directed exclusion of four comparables, namely Aditya Birla Capital Advisors Pvt. Ltd., Birla Sunlife Asset Management Company Limited, ICRA Limited and Ladderup Corporate Advisory Pvt. Ltd, by applying stringent standards of comparability analysis to comparables selected under the Transaction Net Margin Method (also referred to as "TNMM") to determine arms' length price ("ALP") in the transfer pricing process.

6. During the relevant previous year, the assessee entered into certain international transactions with its associated enterprises, in which TNMM was the chosen method used for determination of ALP. It filed return of income on 28.11.2011, which were picked up for scrutiny and notices under Sections 143(2) and 142(1) of the Income Tax Act, 1961 ("the Act") and questionnaires were issued on 06.08.2012 and 16.04.2013, respectively. The Assessing Officer (AO) referred the case to the Transfer Pricing Officer (TPO) for determination of ALP under section 92CA(3) of the Act. The TPO accepted TNMM as the most appropriate method for determining Arm's Length Price, selected by the assessee. Operating Profit (OP)/Operating Cost (OC) was accepted as the Profit Level Indicator (PLI) by the TPO. However, out of 16 companies selected by the assessee as comparable companies, the TPO rejected 14 (including non-Indian companies). A final list of 8 comparable companies, including two companies chosen by the Assessee was finally drawn up by the TPO. On 28.01.2015, the TPO passed an order under Section 92CA(3) of the Act proposing upward adjustment of Rs. l,02,66,664/- in respect of provision of IT Support Services and Rs. 27,33,96,137/- in respect of provision of Research and Information Services. Further, the TPO also proposed addition of Rs. 8,89,039/- in respect of account of receivables. The AO passed the Draft Assessment Order on 24.02.2015 after proposing an addition of Rs. 28,45,51,840/- on account of transfer pricing adjustment.

7. The assessee, being aggrieved, went before the Disputes Resolution Panel (DRP), which allowed part relief to the Assessee. The DRP by order, dated 02.11.2015, rejected the assessee's objection as regards functional comparability of (a) M/s Aditya Birla Capital Advisors Pvt. Ltd., (b) Birla Sunlife Asset Management Company Ltd, and (c) ICRA Ltd. selected by the TPO held as comparable for the Research

and Analysis Segment, and directed the TPO to apply the export filter and exclude the comparables which fail the export filter. As per the directions of the DRP, the TPO by its order dated 08.12.2015 revised the original adjustment down to ?25,94,83,195/-. On 10.12.2015, the AO passed the final assessment order making an addition of ?25,94,83,195/- on account of transfer pricing adjustment to the price determined by the Assessee. Aggrieved, both the assessee and the revenue appealed to the ITAT against the final assessment order passed by the AO. The ITAT by its order, dated 15.12.2015 directed the exclusion of the following comparables on the grounds of functional dissimilarity:

(*a*) Aditya Birla Capital Advisors Pvt. Ltd.

(*b*) Birla Sunlife Asset Management Company Ltd.

(*c*) ICRA Ltd.

(*d*) Ladderup Corporate Advisory Pvt. Ltd.

8. In its appeal the revenue impugns the ITAT's order on the ground that it erred by excluding (a) Aditya Birla Capital Advisors Pvt. Ltd., (b) Birla Sun life Asset Management Company Ltd., (c) ICRA LTD. and (d) Ladderup Corporate Advisory Pvt. Ltd. from the list of comparables on the grounds of functional dissimilarity by ignoring the fact that these companies were engaged in similar line of business and were functionally comparable under TNMM. Likewise, in ITA No. 82/2018, the revenue challenged the order dated 11.05.2017 passed by the ITAT for AY 2012-13 for the exclusion of (a) Aditya Birla Capital Advisors Pvt. Ltd., (b) Axis Private Equity Ltd., and, (c) Credit Information Bureau India Ltd. from the list of comparables on the grounds of functional dissimilarity by ignoring the functions performed, assets used and risk assumed (FAR), as the profiles of these comparables were similar to the Assessee.

9. The Assessee, in its appeal, ITA No. 526/2017 declared income of Rs. 31,91,40,070/-. Notices for scrutiny alongwith questionnaire were issued and served upon the assessee. During the relevant AY, the assessee submitted (by Form 3CEB) that it had entered into international transactions with its associated enterprises for provision of research and information to the tune of Rs. 1,78,84,76,202/- and IT support services to the tune of Rs. 64,77,91,811/-. The AO referred the case to the TPO for determination of ALP under section 92CA(3) of the Act. The TPO accepted TNMM as the most appropriate method for determining ALP. The TPO pursuant to examination of the transfer pricing documents passed order dated 29.01.2016 under section 92CA(3) of the Act and proposed an upwards adjustments of Rs. 34,19,39,145/- in respect of Provision for Research & Information Services. Further, the TPO also proposed an adjustment on account of outstanding receivables and interest thereon amounting to Rs. 14,90,875/-.

10. In respect of the research and information services, the assessee had selected 18 comparables companies whose average of adjusted operating margins was 14.50% on operating cost. According to it, the PLI was 15.17%, and was higher than the average of adjusted operating margins of the comparables. However, the TPO rejected foreign companies as comparables and finally selected 8 comparables computing average PLI of 36.48%. Accordingly, the TPO made an order dated 29.01.2016 under section 92CA(3) of the Act and proposed an upwards adjustments of Rs. 34,19,39,145/- in respect of provision for Research & Information Services.

Further, the TPO also proposed an adjustment on account of outstanding receivables and interest thereon amounting to Rs. 14,90,875/-.

11. The AO passed the Draft Assessment Order on 14.03.2016 determining the total income of the Assessee at Rs. 66,25,70,090/- against the returned income of Rs. 31,91,40,070/- proposing a transfer pricing adjustment amounting to Rs. 34,34,30,020/-. Aggrieved, the assessee preferred appeal to the DRP. The DRP by its order dated 29.09.2016, rejected the assessee's objection with respect to exclusion of the three comparable companies namely Aditya Birla Capital Advisors Pvt. Ltd., Axis Private Equity

Ltd., and Credit Information Bureau India Ltd. The DRP observed that the assessee had taken an objection before the DRP that the TPO had resorted to cherry picking of comparables, however, the assessee had failed to give any specific instance of in that regard.

12. Pursuant to DRP's directions, the TPO by its order, dated 10.11.2016 revised the original adjustment from Rs. 34,34,30,020/- down to Rs. 12,66,07,828/-. Consequently, the AO passed final assessment order under section 143(3) read with section 144C of the Act on 25.11.2016 wherein the returned income of the Assessee of Rs. 31,91,40,070/- was assessed at Rs. 44,57,47,898/- incorporating therein addition as per the transfer pricing adjustment of Rs. 12,66,07,828/-. Thus, being aggrieved, the assessee preferred an appeal before the Tribunal who by order dated 11.05.2017 directed for the exclusion of (a) Aditya Birla Capital Advisors Pvt. Ltd., (b) Axis Private Equity Ltd., and, (c) Credit Information Bureau India Ltd. from the list of comparables on the grounds of functional dissimilarity.

13. The Assessee challenges the ITAT's impugned order of 11.05.2017 in ITA No. 526/2017 assailing the order on the ground that the ITAT erred in concluding that nature of services provided by it under the R&I segment was in the nature of KPO services, whereas, according to their assertion, it functions more like a BPO.

Contention of parties

14. Learned senior counsel, Mr. Porus Kaka, on behalf of the Assessee assailed the impugned orders of the ITAT on the ground that the ITAT erred in concluding that the nature of services provided by the Assessee under the R&I segment are in the nature of KPO services which is contrary to the material on record. Mr. Kaka submitted that the McKinsey group of companies is engaged in providing management consulting services. These companies during the course of executing consultancy services with third parties seek assistance of the assessee for enabling them to service their clients. The Assessee carries out research from the internet based database or other source and then compiles the data, which is further customized according to the requirement of the requestor before transmission to the overseas group companies so that McKinsey group entities could consider them for providing consultancy services.

15. Further, it was submitted that under the R&I segment, it has rendered data processing services which are in the nature of Business Process Outsourcing (BPO). The assessee contests the ITAT's order stating that while holding it to be a KPO, it has overlooked the fact that it has established that to carrying on research from the internet based databases or other sources to compile data, which is then customized/processed in accordance with the requirements of the requesting party. The assessee also submitted that the ITAT in its previous case (in AY 2006-07) observed that the services rendered by it were in the nature of customization of data/data processing and that the assessee acts as a "back office" providing "support services" to its parent company, thereby, essentially accepting that the Assessee acts as a back office and provides support services; in light of its present position that is unchanged in terms of facts, the Assessee avers that it should be considered as a BPO and not a KPO.

16. On behalf of the Assessee, the cases of *Ameriprise India (P.) Limited* v. *ACIT* in ITA No. 2010/Del/2014, where on similar facts the ITAT had held that collection and processing of data received/sourced and sending reports to the AE after analyses, evaluation and processing of such data into specific formats is providing back office support services, and *Rampgreen Solutions (P) Ltd* v. *CIT* 60 Taxmann.com 255 (Del) wherein the Delhi High Court, in the context of distinguishing BPO and KPO services, held that "*...The expression "KPO" indicates the involvement of domain knowledge in providing ITeS. Typically, KPO includes involvement of advance skills; the services provided may include analytical services, market research, legal research, engineering and design services, intellectual management etc* ", were also cited. The assessee further submitted that the definition of BPO services has been provided by the Central Board of Direct Taxes by Notification dated 18.09.2013 under Rule 10TA of the Income Tax Rules, 1962, based on which the activities performed by the Assessee

under the R&I segment fall under the categories of back office operations/data processing/support center/data search, integration and analysis.

17. Moreover, with regard to the notional interest on overdue receivables, (where the ITAT held it to be separate and an international transaction), the assessee submitted that early or late realization of sale/service proceeds is incidental to the transaction of sale/service, and thus, if the ALP in respect of an international transaction is determined, then there can be no question to benchmark the interest separately. It was submitted that any separate adjustment on the pretext of outstanding receivables while accepting the comparables and transfer price of underlying transaction by application of TNMM was unjustified. To substantiate this point, the Assessee highlighted the amendment brought under Explanation to section 92B of the Act *vide* Finance Act, 2012, w.e.f. 01.04.2012 whereby clause (c) of the Explanation (i) to section 92B of the Act recognizes 'capital financing' as a deemed international transaction being an anti-abusive legislation deserves to be prospectively applicable. The Assessee is, thus, challenging the impugned order of the ITAT on the ground that the nature of services provided by the Appellant under the R&I segment are not in the nature of KPO services, and the ITAT order holding otherwise is contrary to the material on record and perverse in law.

18. The Assessee cited *Rushabh Diamonds* v. *ACIT, Mumbai* [2016] 48 ITR(T) 707 (Mumbai- Trib.), where it was held as follows:

> "*12. In our considered view, even if we proceed on the basis that Explanation to Section 92B is indeed retrospective in effect and it does cover delay in realization of debts, as long as sale is benchmarked on TNMM basis, as in this situation before us, there cannot be any occasion to make a separate adjustment for delay in realization of debts. The reason is that the interest income is an integral part of the PBIT inasmuch as interest income, in cases other than finance companies, is required to be included in the 'other income' and thus affects the profit before interest and taxes. While profit before interest and taxes does not take into account 'interest expenditure', it does take into account 'interest income' because the interest income is part of the 'other income', under preamended as well as post amended schedule VI to the Companies Act, which is duly taken into account into computation of PBIT. In a way PBIT is a misnomer, as while PBIT does not take into account interest expenditure, it does take into account interest income appearing in the other income. Once the profitability, as per PBIT, is found to be comparable, there cannot be a separate adjustment for interest income on delayed realization which is an integral part of the PBIT figure.*
>
> *13. It is in this background that we may refer to the observations made by a coordinate bench of this Tribunal, in the case of Micro Ink Ltd (supra), as follows:*
>
> *'7. We find that, as evident from audit report on form 3CEB (pages 39 to 52 of the paper-book), the arm's length price of exports to the AEs, including Micro USA, has been determined on the basis of the transactional net margin method (TNMM). By way of a note at page 51, it is specifically stated that "further, the said amount of Rs 2428.26 millions has also been determined/computed by the assessee having regard to the arm's length price on application of Transactional Net Margin Method (TNMM), on aggregation of transactions, as prescribed under section 92C of the Income Tax Act, 1961". In this backdrop, we can usefully refer to the decision of Hon'ble Delhi High Court, in the case of Sony Ericsson Mobile Corporation Pvt Ltd v. ACIT [(2015) 374 ITR 118 (Delj] wherein Their Lordships had, inter alia, observed as follows:*
>
> *"Where the Assessing Officer/TPO accepts the comparables adopted by the assessed, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. It would be incongruous to accept the comparables and determine*

or accept the transfer price and still segregate AMP expenses as an international transaction.

** ** **

36. It is very important to bear in mind the fact that right now we are dealing with amendment of a transfer pricing related provision which is in the nature of a SAAR (specific anti abuse rule), and that every anti abuse legislation, whether SAAR (specific anti abuse rule) or GAAR (general anti abuse rule), is a legislation seeking the taxpayers to organize their affairs in a manner compliant with the norms set out in such anti abuse legislation. An anti-abuse legislation does not trigger the levy of taxes; it only tells you what behaviour is acceptable or what IS not acceptable. What triggers levy of taxes IS noncompliance with the manner in which the anti-abuse regulations require the taxpayers to conduct their affairs. In that sense, all anti abuse legislations seek a certain degree of compliance with the norms set out therein. It is, therefore, only elementary that amendments in the anti-abuse legislations can only be prospective. It does not make sense that someone tells you today as to how you should have behaved yesterday, and then goes on to levy a tax because you did not behave in that manner yesterday.

** ** **

39. It is for this reason that the Explanation to Section 92B, though stated to be clarificatory and stated to be effective from 1st April 2002, has to be necessarily treated as effective from at best the assessment year 2013-14. In addition to this reason, in the light of Hon'ble Delhi High Court's guidance in the case of New Skies Satellite BV (supra) also, the amendment in the definition of international transaction under Section 92B, to the extent it pertains to the issuance of corporate guarantee being outside the scope of 'international transaction', cannot be said to be retrospective in effect. The fact that it is stated to be retrospective, in the light of the aforesaid guidance of Hon'ble Delhi High Court, would not alter the situation, and it can only be treated as prospective in effect i.e. with effect from 1st April 2012 onwards."

19. Ms. Vibhooti Malhotra, on behalf of the Revenue challenged the orders of the ITAT further, stating that it failed to appreciate that application of the TNMM does not require stringent standard of comparability analysis as required while applying the CUP method because under the TNMM methodology, net profit margin of the comparable are compared with the tested party. Accordingly, the method is more tolerant to small differences between comparable and tested party, thereby, not appreciating the relevant stipulations under the guidelines as extracted from Chapter-6 of United Nations Practical Manual on Transfer Pricing, Edition 2013, the relevant part of which reads as follows:

"6.3.9.1. Product comparability is most important in applying the CUP method, as differences in products will result in difference prices. The Cost Plus Method and the Resale Price Method are less dependent on product comparability and focus on functional comparability because differences in functions that are reflected in differences in operating expenses may lead to a broad range of gross margins.

However, the TNMM is even less dependent on product comparability and functional comparability than the traditional transaction methods, because net margins are less influenced by differences in products and functions. The TNMM focuses on broad product and functional comparability. **...**

6.3.11.1. The strengths of the TNMM include the following:

> *Net margins are less affected by transactional differences than price and less affected by functional differences than gross margins. Product and functional comparability are thus less critical in applying the TNMM"*

20. Ms. Malhotra contended that the impugned order of ITAT erred in law and on facts in rejecting high

profit margin comparables by disregarding broad similarity between functions performed, assets used and risk undertaken by the assessee and the comparables excluded by the Tribunal by ignoring the findings of facts recorded by the TPO. The decision of *Mumbai International Airport Private Limited* v. *Golden Chariot* [2010] 10 SCC 422 was also highlighted, wherein, it has been held by the Apex Court with regard to "doctrine of election" and "doctrine of approbation and reprobation" that the litigant cannot change and choose its stand to suit its convenience. In the facts of the present case, it was asserted that the assessee could not change their stand that stringent standards of comparability analysis should not be applied to low profit margin comparables while it should be applied to high profit margin comparables to suit its convenience. It was asserted that the Assessee, as well, as the companies selected by the TPO as comparables are engaged in the business of providing advisory services in various fields and these advisory services were in the form of knowledge services which required not only analysis but interpretation of various data, and hence in no way different from each other in terms of their functional profiles.

21. The Revenue also argued that, the assessee being a knowledge center is engaged in the business of high skilled advisory services which requires not only analysis of specialized data but also involves analysis, processing, customization, interpretation of data and creation of knowledge bank. Similarly, it was submitted that the companies selected by the TPO as comparables, engaged in the business advisory services were in the form of knowledge centers which required not only analysis but interpretation of various data and therefore, the Tribunal erred in holding that the functional profile of the comparables excluded by the Tribunal were different from the assessee.

Analysis and Conclusions

22. The assessee's primary contention is that it functions as, and hence seeks to be identified as a BPO and not as a KPO. Before examining this contention, it would be useful to look at the legislative history and purpose of introducing transfer pricing adjustment in the Income Tax Act, 1961 (the "Act"), as highlighted in *Rampgreen Sales Pvt. Ltd.* v. *CIT* (*supra*) as follows:

> *12. At the outset, it is necessary to bear in mind that the object and purpose of introducing provisions relating to transfer pricing adjustment in the Act. By virtue of Finance Act, 2001, Section 92 of the Act was substituted by Sections 92 to 92F of the Act with effect from 1st April, 2002. Section 92 of the Act, as was in force prior to 1st April, 2002, enabled the AO to bring the correct profits to tax in relation to certain cross-border transactions. However, with a large number of multi national companies establishing operations in India, either through their subsidiaries or through other related ventures, a need was felt to provide a statutory framework to ensure that there is no avoidance of tax by transfer of income from India to other tax jurisdictions. Circular no. 14 of 2001 issued by the CBDT indicates that the provisions of Section 92 to 92F of the Act were introduced "With a view to provide a detailed statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India".*
>
> *13. The heading of Chapter X also clearly indicates that it contains "special provisions relating to avoidance of tax". The object of Chapter X of the Act is not to tax any notional income but to ensure that the real income is brought to tax under the Act. This has also been explained by a Division Bench of this Court in Sony Ericsson Mobile Communications India Pvt. Ltd. and Ors. v. Commissioner of Income Tax-III and Ors. 374 ITR 118 in the following words:-*
>
> *"77. As a concept and principle Chapter X does not artificially broaden, expand or deviate from the concept of "real income". "Real income", as held by the Supreme Court in Poona Electricity Supply Company Limited versus CIT, [1965] 57 ITR 521 (SC), means profits arrived at on commercial principles, subject to the provisions of the Act. Profits and gains should be true and correct profits and gains, neither under nor over stated. Arm's length price seeks to correct distortion and shifting*

of profits to tax the actual income earned by a resident/domestic AE. The profit which would have accrued had arm's length conditions prevailed is brought to tax. Misreporting, if any, on account of non-arm's length conditions resulting in lower profits, is corrected."

14. The substratal rationale of the transfer pricing regulations is to ensure that the true income of an Assessee is brought to tax under the Act and there is no avoidance of tax by transfer of income from India to any other tax jurisdiction by virtue of the influence exercised by the associated enterprises. The aim of the provisions of Chapter X of the Act is to compute the income in relation to a controlled transaction between an Assessee and its associated enterprise having regard to ALP, in order to nullify the effect of transfer of income to a jurisdiction outside India, if any, in respect of the controlled transactions.

15. The exercise of determining the ALP in respect of international transactions between the related enterprises is aimed to determine the price, which would have been charged for products and services, as nearly as possible, in case such international transactions were not controlled by virtue of them being executed between related parties. The object of the exercise is, thus, to remove the effect of any influence on the prices or costs that may have been exerted on account of the international transactions being entered into between related parties. It is, at once, clear that for the exercise of determining ALP to be reliable, it is necessary that the controlled transactions be compared with uncontrolled transactions which are similar in all material aspects."

23. In light of the above objective of introduction of transfer pricing provisions in the law, this court will proceed to examine the nature of the assessee's activities to decide whether it is a KPO or a BPO. As discussed above, the computation of the income in relation to a controlled transaction between an assessee and its associated enterprise having regard to the ALP, is in order to nullify the effect of transfer of income to a jurisdiction outside India, if any, in respect of the controlled transactions. In the present case, the method used for determination of the ALP was the TNMM.

24. Section 92C (1) of the Act contains provisions in relation to various methods of calculation of ALP, it envisages five methods, namely (a) comparable uncontrolled price method, (b) resale price method, (c) cost plus method, (d) profit split method, (e) transactional net margin method, (f) any such other method as may be prescribed by the board, with regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the board may prescribe; read with Rule 10B of the Income Tax Rules, 1962 which provides for calculation/determination of ALP. Where more than one price is determined by the most appropriate method, the Arm's Length Price shall be taken to be arithmetical mean of such prices. Rule 10B(2) describes the grounds on which the comparability of an international transaction (or a specified domestic transaction) with an uncontrolled transaction should be based on. This sub-rule reads as follows:

"Determination of arm's length price under section 92C

10B(2) For the purposes of sub-rule (1), the comparability of an international transaction ***[****or a specified domestic transaction****]*** *with an uncontrolled transaction shall be judged with reference to the following, namely:—*

(a) *the specific characteristics of the property transferred or services provided in either transaction;*

(b) *the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;*

(c) *the contractual terms (whether or not such terms are formal or in writing) of*

the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d) *conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.*"

25. Therefore, it becomes crucial to see that the entities chosen as comparables are functionally similar to the assessee, in order to ensure a correct estimation of the ALP that serves the true purpose of transfer pricing legislation. This was also highlighted in *Rampgreen* (*supra*) [and further laid down in *Li & Fung India Private Limited* v. *CIT* 361 ITR 85 (Delhi)] as follows:

"*20. In order for the benchmarking studies to be reliable for the purposes of determining the ALP, it would be essential that the entities selected as comparables are functionally similar and are subject to the similar business environment and risks as the tested party. In order to impute an ALP to a controlled transaction, it would be essential to ensure that the instances of uncontrolled entities/transactions selected as comparables are similar in all material aspects that have any bearing on the value or the profitability, as the case may be, of the transaction. Any factor, which has an influence on the PLI, would be material and it would be necessary to ensure that the comparables are also equally subjected to the influence of such factors as the tested party. This would, obviously, include business environment; the nature and functions performed by the tested party and the comparable entities; the value addition in respect of products and services provided by parties; the business model; and the assets and resources employed. It cannot be disputed that the functions performed by an entity would have a material bearing on the value and profitability of the entity. It is, therefore, obvious that the comparables selected and the tested party must be functionally similar for ascertaining a reliable ALP by TNMM. Rule 10B(2) of the Income Tax Rules, 1962 also clearly indicates that the comparability of controlled transactions would be judged with reference to the factors as indicated therein. Clause (a) and (b) of Rule 10B(2) expressly indicate that the specific characteristics of the services provided and the functions performed would be factors for considering the comparability of uncontrolled transactions with controlled transactions.*"

26. Examining the analysis of the functions of the assessee in the ITAT orders, reference can be made to the Master Services Agreement entered into by the Assessee with McKinsey and Co. Inc., USA w.e.f. 1st April, 2010. It is a common agreement between the Assessee and McKinsey, USA for providing both the 'Research and information services' and also 'IT support services'. The preamble part of this agreement provides as follows:

"*WHEREAS:*

(A) The Client is in need of assistance in the development, maintenance and service software and information/research related products and services. Further, the Client requires assistance with respect to knowledge management systems and infrastructure related issues like server problems, hosting of Notes databases, problems with documents in the Notes databases."

27. From the Agreement, it appears that the assessee's functions are also inclusive of *'Knowledge management systems and infrastructure issueswhich would encompass infrastructure support, application support,application operations group and survey development center'.* Further, in context of assessing whether the Assessee is characterized as a KPO or a BPO, the ITAT observed as follows:

"*16. Now coming to the functional profile of research and information services provided by assessee, which is divided into 3 broad subgroups of knowledge on-call, practice research, and analytics. This is in terms of agreement dated 01/04/2010 titled as Master service agreement dated 01/04/2010 between assessee and its associated enterprise wherein assessee is responsible for providing research and information services to its associated enterprises.*

i. In first subgroup of knowledge on-call assessee provides research and information reports. The services offered includes financial analysis, fact packs, press search, document search etc by employing around hundred personnel with experience scale of 0 to 2 years.

ii. In practice research group assessee is focused on domain specific research support with team size of over 240 people, which provides sector data and analysis, capital market insights, perspectives and industry trends.

iii. In analytics group, assessee primarily focuses on data intensive analysis requiring expertise in analytical tools and techniques., database management, etc.

** ** **

Further, Ld. Transfer Pricing Officer made reference to McKinsey India website and noted what types of work and employees does and what type of skill he should possess to get employment with McKinsey India. Based on this he further looked at employee profile and held that that companies indulge in providing high-end services in terms of research and information segment assessee is offering knowledge-based services and hence it is required to be benchmarked with comparables engaged in research-based services."

28. *Rampgreen* (*supra*) examined the distinction between a KPO and a BPO observing as follows:

"*26. A Knowledge Process is understood as a high value added process chain wherein the processes are dependent on advanced skills, domain knowledge and the experience of the persons carrying on such processes.*

27. The Government of Rajasthan (Department of Information Technology & Communication) has also floated a scheme on 12th December, 2011 known as "The Rajasthan Incentive Scheme for BPO Centers and KPO Centers, 2011". The said scheme is for providing incentives to promote ITeS and to generate further employment opportunities. In terms of the said scheme, "Business Process Outsourcing (BPO)" is defined to mean "the transfer of an organization's entire noncore but critical business process/function to an external centre which uses an IT based service delivery" and "Knowledge Processing Outsourcing (KPO) "has been defined to mean "allocation of relatively high-level tasks to an outside organization or a different group (possibly in a different location) within the same organization. KPO is, essentially, high-end Business Process Outsourcing (BPO)".

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33. ...The Special Bench of the Tribunal held that even though there appears to be a difference between BPO and KPO Services, the line of difference is very thin. The Tribunal was of the view that there could be a significant overlap in their activities and it may be difficult to classify services strictly as falling under the category of either a BPO or a KPO. The Tribunal also observed that one of the key success factors of the BPO Industry is its ability to move up the value chain through KPO service offering. For the aforesaid reasons, the Special Bench of the Tribunal held that ITeS Services could not be bifurcated as BPO and KPO Services for the purpose of comparability analysis in the first instance. The Tribunal proceeded to hold that a relatively equal degree of comparability can be achieved by selecting potential comparables on a broad functional analysis at

ITeS level and that the comparables so selected could be put to further test by comparing specific functions performed in the international transactions with uncontrolled transactions to attain relatively equal degree of comparability.

34. ... the expression 'BPO' and 'KPO' are, plainly, understood in the sense that whereas, BPO does not necessarily involve advanced skills and knowledge; KPO, on the other hand, would involve employment of advanced skills and knowledge for providing services. Thus, the expression 'KPO' in common parlance is used to indicate an ITeS provider providing a completely different nature of service than any other BPO service provider. A KPO service provider would also be functionally different from other BPO service providers, inasmuch as the responsibilities undertaken, the activities performed, the quality of resources employed would be materially different…Rule 10B(2) (a) of the Income Tax Rules, 1962 mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service/product characteristics. This factor cannot be undermined by using a broad classification of ITeS which takes within its fold various types of services with completely different content and value. Thus, where the tested party is not a KPO service provider, an entity rendering KPO services cannot be considered as a comparable for the purposes of Transfer Pricing analysis. The perception that a BPO service provider may have the ability to move up the value chain by offering KPO services cannot be a ground for assessing the transactions relating to services rendered by the BPO service provider by benchmarking it with the transactions of KPO services providers. The object is to ascertain the ALP of the service rendered and not of a service (higher in value chain) that may possibly be rendered subsequently."

29. The ITAT, based on examination of the Master Service Agreement, sample copies of service requests, as well as the McKinsey India website (as quoted from, above), concluded that it was undeniable that the assessee was providing knowledge-based research and information services. There is clearly a form of knowledge intensive analysis that is rendered by the Assessee which is a more nuanced and involved service than that which is provided by a BPO. A similar conclusion was arrived at in *New RiverSoftware Services Pvt. Ltd.* v. *ACIT* Circle- 13(1) (27.03.2015 - ITAT Delhi), which ruled that:

"*…The employee actually undertaking these services was required to analyse various datas by employing his special knowledge and then only it could provide its AE with necessary support. It cannot be denied that these were high end services, requiring strategic decision making before arriving at final conclusion. We, therefore, are not inclined to accept the assessee's submissions that it was mere a BPO. The various decisions relied upon by ld. counsel for the assessee are primarily with reference to BPO and not KPO. The distinction elucidated in Safer Harbour Rules is also in same lines.*

30. Likewise, in *Maersk Global Centres (India) Private Limited* v. *ACIT* [2014] 161 TTJ 137, the term "knowledge process outsourcing services" has been examined as follows:

"*71. The term "knowledge process outsourcing services" is defined in clause (g) of10-TA (the Notification No. SO 2810(E) issued by the CBDT on 18th September, 2013 making Rules 10-TA to Rule 10-TG as Safe Harbour Rules) as under:*

-(9) "knowledge process outsourcing services" means the following business process outsourcing services provided mainly with the assistance or use of information technology requiring application of knowledge and advanced analytical and technical skills, namely:

*(*i*) geographic information system;*

*(*ii*) human resources services;*

(iii) *engineering and design services;*

(iv) *animation or content development and management;*

(v) *business analytics;*

(vi) *financial analytics; or*

(vii) *market research,*

but does not include any research and development services whether or not in the nature of contract research and development services."

31. Thus, a comparison of the assessee's functions in the context of previous decisions on what constitute the functions of a KPO as compared with a BPO, this court is unpersuaded by the assessee's assertion that it is merely a BPO; the services rendered by it are specialized and require specific skill based analysis and research that is beyond the more rudimentary nature of services rendered by a BPO. Therefore it would be incorrect to slot the services provided by the Assessee into that of a BPO, when it is more akin to a KPO.

32. Further, to address the contention of the Assessee that early or late realization of sale/service proceeds is incidental to the transaction of sale/service, and that there can be no question to benchmark the interest separately, in calculating the ALP in an international transaction, we refer to the amendment brought under Explanation to section 92B of the Act vide Finance Act, 2012, w.e.f. 01.04.2012. Clause (i) of this Explanation, gives meaning to the expression 'international transaction' in an inclusive manner. Sub-clause (c) of clause (i) of this Explanation, states as follows:

"*Explanation.--For the removal of doubts, it is hereby clarified that-*

(i) the expression "international transaction" shall include-

(a) to (*b*)** ** **

(c) capital financing, including any type of long-term or short- term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;...."

This explanation was explained in *Ameriprise India Pvt. Ltd.* v. *ACIT* (*supra*) as follows:

"*22. On going through the relevant part of the Explanation inserted with retrospective effect from 1.4.2002, thereby also covering the assessment year under consideration, there remains no doubt that apart from any long-term or short-term lending or borrowing, etc., or any type of advance payments or deferred payments, 'any other debt arising during the course of business' has also been expressly recognized as an international transaction. That being so, the payment/non payment of interest or receipt/non-receipt of interest on the loans accepted or allowed in the circumstances as mentioned in this clause of the Explanation, also become international transactions, requiring the determination of their ALP. If the payment of interest is excessive or there is no or low receipt of interest, then such interest expense/income need to be brought to its ALP. The expression 'debt arising during the course of business' in common parlance encompasses, inter alia, any trading debt arising from the sale of goods or services rendered in the course of carrying on the business. Once any debt arising during the course of business has been ordained by the legislature as an international transaction, it is, but, natural that if there is any delay in the realization of such debt arising during the course of business, it is liable to be visited with the TP adjustment on account of interest income short charged or uncharged. Under such circumstances, the contention taken by the assessee before the TPO that it is not an international transaction, turns out to be bereft of any force.*

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25. The foregoing discussion discloses that non-charging or undercharging of interest on the excess period of credit allowed to the AE for the realization of invoices amounts to an international transaction and the ALP of such an international transaction is required to be determined."

33. It was similarly held in *BT e-Serv (India) Pvt. Ltd.* v. *ITO, Ward- 5(2)* 2017(60)ITR(Trib)618(Delhi) as follows:

"*22…The argument that assessee is an interest free entity and does not pay any interest and therefore no interest shall be imputed in the outstanding invoices is also devoid of merit because it is not a case of allowance of interest expenditure in the hands of the assessee but an 'international transaction' to be benchmarked at arm's length. It is a case of determination of arm's length price of a transaction. Undoubtedly the receivable or any other debt arising during the course of the business is included in the definition of 'capital financing' as an 'international transaction' as per explanation 2 to section 92B of the Act w.e.f. 01.04.2002 inserted by the Finance Act 2012. Therefore, even the outstanding receivable partake the character of capital financing and consequently, overdue outstanding is an 'international transaction'. The natural corollary would be of imputing interest on such 'capital financing', if same is not charged at arm's length. Therefore, we reject the contention of the assessee that outstanding receivable is not an 'international transaction' and therefore, hence, according to us, interest on it requires to be imputed.*"

Thus, this is a redundant contention, because as has been highlighted by the ITAT, by a plain reading of the (retrospectively applicable) amendment that introduced the Explanation to section 92B of the Act by Finance Act, 2012, it is determinable that if there is any delay in the realization of a trading debt arising from the sale of goods or services rendered in the course of carrying on the business, it is liable to be visited with transfer pricing adjustment on account of interest income short charged/uncharged. Hence, the assessee's contention that the ITAT erred in concluding that charging of interest on delayed receipt of receivables is a separate international transaction which requires to be benchmarked independently, is incorrect.

34. In the revenue's appeals, it is important to notice that the significance of the similarity of comparables in the determination of the ALP was been highlighted in *Rampgreen* (*supra*) by citing the "*Organisation for Economic Co-operation and Development* (*OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*" (OECD Guidelines) published in 2010, that indicates the "comparability factors" which are important while considering the comparability of uncontrolled transactions/entities with the controlled transactions/entities. The relevant OECD Guidelines (which are not conclusive, but are only to be seen as guiding factors) as quoted in *Rampgreen* are as follows:

"*1.36 As noted above, in making these comparisons, material differences between the compared transactions or enterprises should be taken into account. In order to establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or enterprises that would affect conditions in arm's length transactions. Attributes or "comparability factors" that may be important when determining comparability include the characteristics of the property or services transferred, the functions performed by the parties (taking into account assets used and risks assumed), the contractual terms, the economic circumstances of the parties, and the business strategies pursued by the parties. These comparability factors are discussed in more detail at Section D.1.2 below.*

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1.39 Differences in the specific characteristics of property or services often account, at least in part, for differences in their value in the open market. Therefore, comparisons of these features may be useful in determining the comparability of controlled and uncontrolled transactions. Characteristics that may be important to consider include the following: in the case of transfers of tangible property, the physical features of the property, its quality and reliability, and the availability and volume of supply; in the case of the provision of services, the nature and extent of the services; and in the case of intangible property, the form of transaction (e.g. licensing or sale), the type of property (e.g. patent, trademark, or know- how), the duration and degree of protection, and the anticipated benefits from the use of the property.

1.40 Depending on the transfer pricing method, this factor must be given more or less weight. Among the methods described at Chapter II of these Guidelines, the requirement for comparability of property or services is the strictest for the comparable uncontrolled price method. Under the comparable uncontrolled price method, any material difference in the characteristics of property or services can have an effect on the price and would require an appropriate adjustment to be considered (see in particular paragraph 2.15). Under the resale price method and cost plus method, some differences in the characteristics of property or services are less likely to have a material effect on the gross profit margin or mark- up on costs (see in particular paragraphs 2.23 and 2.41). Differences in the characteristics of property or services are also less sensitive in the case of the transactional profit methods than in the case of traditional transaction methods (see in particular paragraph 2.69). This however does not mean that the question of comparability in characteristics of property or services can be ignored when applying these methods, because it may be that product differences entail or reflect different functions performed, assets used and/or risks assumed by the tested party. See paragraphs 3.18-3.19 for a discussion of the notion of tested party.

1.41 In practice, it has been observed that comparability analyses for methods based on gross or net profit indicators often put more emphasis on functional similarities than on product similarities. Depending on the facts and circumstances of the case, it may be acceptable to broaden the scope of the comparability analysis to include uncontrolled transactions involving products that are different, but where similar functions are undertaken. However, the acceptance of such an approach depends on the effects that the product differences have on the reliability of the comparison and on whether or not more reliable data are available. Before broadening the search to include a larger number of potentially comparable uncontrolled transactions based on similar functions being undertaken, thought should be given to whether such transactions are likely to offer reliable comparables for the controlled transaction.

D.1.2.2 Functional analysis

1.42 In transactions between two independent enterprises, compensation usually will reflect the functions that each enterprise performs (taking into account assets used and risks assumed). Therefore, in determining whether controlled and uncontrolled transactions or entities are comparable, a functional analysis is necessary. This functional analysis seeks to identify and compare the economically significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transactions. For this purpose, it may be helpful to understand the structure and organisation of the group and how they influence the context in which the taxpayer operates. It will also be relevant to determine the legal rights and obligations of the taxpayer in performing its functions.

1.43 The functions that taxpayers and tax administrations might need to identify and compare include, e.g. design, manufacturing, assembling, research and development, servicing, purchasing, distribution, marketing, advertising, transportation, financing and management. The principal

functions performed by the party under examination should be identified. Adjustments should be made for any material differences from the functions undertaken by any independent enterprises with which that party is being compared. While one party may provide a large number of functions relative to that of the other party to the transaction, it is the economic significance of those functions in terms of their frequency, nature, and value to the respective parties to the transactions that is important.

1.44 The functional analysis should consider the type of assets used, such as plant and equipment, the use of valuable intangibles, financial assets, etc., and the nature of the assets used, such as the age, market value, location, property right protections available, etc.

1.45 Controlled and uncontrolled transactions and entities are not comparable if there are significant differences in the risks assumed for which appropriate adjustments cannot be made. Functional analysis is incomplete unless the material risks assumed by each party have been considered since the assumption or allocation of risks would influence the conditions of transactions between the associated enterprises. Usually, in the open market, the assumption of increased risk would also be compensated by an increase in the expected return, although the actual return may or may not increase depending on the degree to which the risks are actually realised.

1.46 The types of risks to consider include market risks, such as input cost and output price fluctuations; risks of loss associated with the investment in and use of property, plant, and equipment; risks of the success or failure of investment in research and development; financial risks such as those caused by currency exchange rate and interest rate variability; credit risks; and so forth.

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1.51 In some cases, it has been argued that the relative lack of accuracy of the functional analysis of possible external comparables (as defined in paragraph 3.24) might be counterbalanced by the size of the sample of third party data; however quantity does not make up for poor quality of data in producing a sufficiently reliable analysis. See paragraphs 3.2, 3.38 and 3.46."

35. The Revenue had asserted that in the exercise of TNMM, the ITAT erred by concluding on the dissimilarity of the comparables, since this particular method of computing the ALP allows for a broader application as opposed to the stringent level of exactitude that the ITAT applied, while comparing the functional similarity of the Assessee with the (excluded) comparable companies. The revenue asserted that the ITAT erred by applying stringent standards of comparability analysis for selecting comparables under TNMM by ignoring the fact that TNMM is less dependent on product comparability and functional comparability because net margins are less influences by differences in products and functions; Revenue highlighted the relevant part under the United Nations guidelines as well, as quoted above.

36. At this juncture, it will be relevant to refer to the following parts from the decision in *Rampgreen* (*supra*):

"*42. Before concluding, there is yet another aspect of the matter that needs consideration. The Tribunal proceeded on the basis that while applying TNMM method, broad functionality is sufficient and it is not necessary that further effort be taken to find a comparable entity rendering services of similar characteristics as the tested entity. The DRP held that TNMM allows flexibility and tolerance in selection of comparables, as functional dissimilarities are subsumed at net margin levels, as compared to Resale Price Method or Comparable Uncontrolled Price Method and, therefore, the functional dissimilarities pointed out by the Assessee did not warrant rejection of*

eClerx and Vishal as comparables.

43. In our view, the aforesaid approach would not be apposite. Insofar as identifying comparable transactions/entities is concerned, the same would not differ irrespective of the transfer pricing method adopted. In other words, the comparable transactions/entities must be selected on the basis of similarity with the controlled transaction/entity. Comparability of controlled and uncontrolled transactions has to be judged, inter alia, with reference to comparability factors as indicated under rule 10B(2) of the Income Tax Rules, 1962. Comparability analysis by TNMM method may be less sensitive to certain dissimilarities between the tested party and the comparables. However, that cannot be the consideration for diluting the standards of selecting comparable transactions/entities. A higher product and functional similarity would strengthen the efficacy of the method in ascertaining a reliable ALP. Therefore, as far as possible, the comparables must be selected keeping in view the comparability factors as specified. Wide deviations in PLI must trigger further investigations/analysis.

44. Consideration for a transaction would reflect the functions performed, the significant activities undertaken, the assets or resources used/consumed, the risks assumed. Thus, comparison of activities undertaken/functions performed is important for determining the comparability between controlled and uncontrolled transactions/entity. It would not be apposite to ignore functional dissimilarity only for the reason that its impact may be reduced on account of using arithmetical mean of the PLI. The DRP had noted that eClerx was functionally dissimilar, but ignored the same relying on an assumption that the functional dissimilarity would be subsumed in the profit margin. As noted, the content of services provided by the Assessee and the entities in question were not similar. In addition, there were also functional dissimilarities between the Assessee and the two entities in question. In our view, these comparability factors could not be ignored by the Tribunal. While using TNMM, the search for comparables may be broadened by including comparables offering services/products which are not entirely similar to the controlled transaction/entity. However, this can be done only if (a) the functions performed by the tested party and the selected comparable entity are similar including the assets used and the risks assumed; and (b) the difference in services/products offered has no material bearing on the profitability."

37. However, even if the court notices the functional comparability of the Assessee with the comparable companies, it cannot be said that they are similar enough to serve the purpose of computing an accurate ALP, *arguendo* if a larger scope for allowing smaller dissimilarities is permitted. This observation arises from a close examination of each of the comparable companies by the ITAT in both the cases, where it scrutinized the nature of services and activities engaged in by these companies and categorically concluded how they are different from those engaged in by the Assessee. In this regard, the decision in *Li & Fung India Private Limited* v. *CIT* (*supra*) was also noted to emphasize on finding a comparable transaction where the functional analysis of both the associated enterprise and independent enterprise is required to be determined if the transactions are comparable. Further, it was submitted that even in case of TNMM, the standard of comparability for application is not less than application of any other transfer pricing method, hence, for transfer pricing analysis comparables should be selected who provide services of the same character performing similar functions and having similar levels of assets and risks. The relevant part from the decision in *Li & Fung India Private Limited* v. *CIT (supra)* is as follows:

"*34. The OECD Guidelines, which are instructive in such cases, clarify that any attempt to use the transactional net margin method should begin by comparing the net margin which the tested party makes from a controlled transaction with the net margin it makes from an uncontrolled one (an "internal comparable"). If this proves impossible, possibly if there are no transactions with uncontrolled parties, then the net margin that would have been made by an independent enterprise in a comparable transaction (an "external comparable") serves as a guide to determine the arm's*

length price. Here, the strict criterion is of an independent enterprise, carrying out a comparable transaction, with the caveat that this will be only a guide. Indeed, the emphasis is very clearly on finding a comparable transaction. In addition, a functional analysis of both the associated enterprise and the independent enterprise is required to determine if the transactions are comparable. It might of course be possible to adjust results for minor functional differences, provided that there is sufficient comparability to begin with. The standard of comparability for application of the transactional net margin method is not less than that for the application of any other transfer pricing method."

38. The ITAT's conclusions with respect to each of the comparables, in brief, is as follows:

Company	***ITAT Verdict on Comparability***
Aditya Birla Capital Advisors	*This comparable is not engaged in business of raising of funds but is engaged in advising functions of raising of funds and deploying same. Based on the work profile of Assessee and details of services provided, it cannot be stated that functions performed by the Assessee in research and information services are anywhere similar to functions of a fund manager.*
Axis Private Equity Ltd.	*It is apparent that this company has a different risk profile too. As per the balance sheet abstract of the company, services of the company are classified as asset management services. Based on the work profile of the Assessee and details of services provided, it cannot be stated that the functions performed by the Assessee in research and information services are anywhere similar to the functions of a fund manager. In view of our analysis of the functions and risk profile of the Assessee vis-à-vis the comparable, Axis Private Equity Limited should be excluded for comparibility analysis.*
Credit Information Bureau India Ltd	*This company is engaged in the business of credit rating and for this reason only, the functions of this company compared with the Assessee company are quite distinct. Therefore, in view of the combined facts of non-availability of the information of the relevant year, the order of the coordinate bench in earlier years holding a credit rating company dissimilar to the Assessee functionally, we do not have any option other than to direct the Ld. Transfer Pricing Officer to exclude this comparable.*
Sun Life Asset Management Company	*This company's operations mainly relate to providing asset management services and portfolio management services. Segment reporting is not required as the company's business is restricted to single segment, i.e., Asset Management Services. It is discernible from the Annual report of this company and the references made by the TPO in his order to its nature of business that there is no similarity whatsoever between its functional profile and the Assessee. This company is also directed to be eliminated from the list of comparables.*
ICRA Limited	*This company, provides 'rating services' comprising of credit rating, bank loan rating, corporate governance rating, stakeholder value and governance rating, rating of claims paying ability of insurance companies, project finance rating and also 'grading services' comprising of IPOs, micro financial institutions, construction entitles, real estate developers and projects, etc. The description of the nature of services rendered by this company makes it vivid that it has no proximity to the nature of services rendered by the Assessee under this segment, which is basically in the nature of carrying out research from the internet based databases for compiling the data, which is then customized/processed in accordance with the requirements of the requester and then organized into templates in excel, power point, etc., before transmitting outside India. There being no closeness with the functions performed by the assessee, this company is directed to be excluded from the list of comparables.*
Ladderup Corporate Advisory	*This company provides a one-stop financial advisory and fund raising*

Pvt. Ltd.	*solutions in Investment Banking, Capital Markets, Wealth Management Project Finance and Growth stage investing. On an overview of the nature of business carried out by this company, it is manifest that the same is absolutely different from the Assessee's.*

39. The revenue urged that a stringent application of the comparability test was unnecessary as was also provisioned in Chapter-6 of United Nations Practical Manual on Transfer Pricing, Edition 2013, and some flexibility in conducting this comparison was urged to be allowed. However, from the above analysis, in the present appeals, even if due consideration is given to a certain level of dissimilarity between the Assessee and the comparable companies, it can be observed that the nature of services provided by the abovementioned comparable companies do not demonstrate even a degree of similarity with the services rendered by the Assessee that would be sufficient to qualify under rule 10B(2) of the Income Tax Rules, since, as established above, the Assessee's services under its R&I segment are in the nature of services provided by a KPO and they are functionally dissimilar from the comparable companies, in terms of their services as well as their risk profiles. Relevantly reading what was highlighted in *Rampgreen* (*supra*) that while using TNMM, the search for comparables may be broadened by including comparables offering services/products which are not entirely similar to the controlled transaction/entity however, this can be done only if, *inter alia*, the difference in services/products offered has no material bearing on the profitability, and do not have functional differences or any differences in their risk profiles. Thus, it can be concluded that the ITAT was correct in excluding the abovementioned comparable companies.

40. The question of law framed in ITA 461/2017 & ITA 526/2017 is answered against the assessee; its appeals, therefore, have to fail. Likewise, the question of law framed in ITA 590/2017 & ITA 82/2018 is answered against the revenue and in favour of the assessee; the revenue's appeals, too, have to fail. All the appeals (ITA 461/2017, ITA 590/2017, ITA 82/2018 & ITA 526/2017) are consequently dismissed, without order on costs.

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