IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-2' NEW DELHI

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND
SH.L.P.SAHU, ACCOUNTANT MEMBER

I.T.A .No.-6779/Del/2015
(ASSESSMENT YEAR-2011-12)

Bechtel India Pvt.Ltd., 418, Narang House, 21, K.G.Marg, New Delhi-110001. PAN-AAACB0298A **(Appellant)**	vs	DCIT, Circle-4(2), New Delhi. **(Respondent)**

Appellant by	Sh. Rahul K.Mitra, CA & Sh. Vinay Verma, CA & Sh. Aditya Anand, CA
Respondent by	Sh. A.M. Govil, CIT(DR)

Date of Hearing	21.04.2016
Date of pronouncement	14.07.2016

O R D E R

PER DIVA SINGH, JUDICIAL MEMBER

By the present appeal filed by the assessee the correctness of the order dated 30.11.2015 passed by the Assessing Officer u/s 143 (3) r.w.s 144C of the Income Tax Act, 1961 has been assailed on the following grounds:-

1. "That on facts and circumstances of the case and in law, the Ld. AO/ Ld. Transfer Pricing Officer ("TPO")/ Ld. Dispute Resolution Panel ("DRP") erred in making an addition of INR 25,92,72,701/- to the returned income of the Appellant by re-computing the arm's length price of the international transactions pertaining to all three segments of the Appellant, viz. engineering design and related services ("EDS"), financial accounting support services ("FAS") and IT infrastructure support services ("IT Infra"), under section 92 of the Act. Thus, in passing the order, the Ld. AO / Ld. TPO / Ld. DRP erred in:

1.1. Rejecting the comparable companies selected by the Appellant in its transfer pricing documentation on the basis of additional/modified quantitative filters which lacked valid and sufficient reasoning;

1.2. Accepting companies which were functionally not comparable to the Appellant;

1.3. Including government held enterprises and enterprises associated with government as comparables to the Appellant;

1.4. Not considering the correct computation of/operating margins of certain comparables;

1.5. Denying the benefit of economic adjustments on account of difference in risk profile in arriving at the arm's length margin;

1.6. Accepting high turnover companies and thereby ignoring the impact of economies of scale; and

1.7. That on facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO/Ld. DRP erred in selecting the current year (i.e. financial year 2010-11) data for comparability despite the fact that at the time of preparation of transfer pricing documentation by the Appellant, the complete data for financial year 2010-11 was not available within the public domain.

2. That without prejudice to the above, if comparables selected the Ld. AO/ Ld. TPO/Ld. DRP that do not meet the parameters of functional comparability are accepted, then on ground of consistency the comparables selected by the Appellant that are rejected by Ld. AO/ Ld. TPO/Ld. DRP on account of functional comparability; must also be accepted.

3. That the Ld. AO/ Ld. TPO/Ld. DRP grossly erred in rejecting the segmental accounts furnished by the Appellant in its TP Documentation. In doing so, Ld. AO/ Ld. TPO/Ld. DRP has erred in:

3.1. considering liabilities written back and provisions as non-operating in nature;

3.2. not considering the fact that there was no service rendered by the Appellant to the AEs in relation to its international transaction for 'reimbursement of expenses received1;

3.3. by routing the reimbursement received through the segmental accounts (both as revenue and expense) disregarding the fact that the same is not part of Profit & Loss account of the Appellant; and

3.4. disregarding the allocation undertaken by the Appellant in the respective segments and allocating the same based on an inappropriate allocation key (revenue base).

4. That the Ld. AO/Ld. TPO erred in not following the directions of the Ld. DRP that segmental margins must be applied and considered consistently across all segments (i.e. EDS, FAS and IT Infra segments) of the Appellant.

4.1. that without prejudice to the above, if the segmental accounts were to be redrawn by the Ld. TPO / Ld. AO in line with the direction of the Ld. DRP, the adjustments in the segments FAS and IT Infra would be reduced to NIL.

5. That the Ld. AO/Ld. TPO/Ld. DRP erred in enhancing the income of the Appellant by INR 10,58,456 by imputing interest on receivables *from the AEs beyond the credit period of the Appellant on an ad hoc basis. In doing so, the Ld. AO/ Ld. TPO/Ld. DRP has grossly erred in:*

5.1. selecting an ad hoc credit period and interest rate while computing the addition; and

5.2. completely disregarding the detailed submissions explaining that such adjustments are not mandated under the facts and circumstances of the case.

6. That the Ld. AO has erred in charging interest under section 234B and 234C of the Act amounting to INR 5,16,24,544 and INR 10,61,745 respectively.

7. That on the facts and in the circumstances of the case and in law, the Ld.AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The Appellant craves leave to add, amend, alter, delete, rescind, forgo or withdraw any of the above grounds of appeal either before or during the course of the proceedings before the Hon'ble Income Tax Appellate Tribunal in the interest of the natural justice. The aforesaid grounds are mutually exclusive and without prejudice to each other."

2. The relevant facts of the case are that the assessee incorporated on 21.04.1994 is a wholly owned subsidiary of Bechtel Corporation USA. During the year, the assessee company was engaged in the business of export of customized electronic data in the form of designs, drawings, calculations and other relevant datasheet relating to Project Engineering and Commercial Solutions for power plant, refinery, petrochemical plant etc.

2.1. The following international transactions were disclosed by the assessee in the year under consideration :-

No.	*Nature of transaction*	*Method*	*Value of transaction*
1.	*Provision of engineering design and related services*	*TNMM*	*1,31,40,40,147*
2.	*Provision of financial and accounting support services*	*TNMM*	*5,05,29,404*
3.	*Provision of IT infrastructure support services*	*TNMM*	*14,98,35,385*
4.	*Reimbursement of Expenses (paid)*	*TNMM*	*5,07,26,046*
5.	*Reimbursement of Expenses (received)*	*CUP*	*10,78,45,266*

2.2. For these segments, the assessee submitted the following results:-

Particulars	*Provision of Engineering design and related services*	*Provision of Financial support services*	*Provision of IT infrastructure support services*
Sales/Operating Income	*1,315,983,754*	*50,643,980*	*150,096,464*
Less: Operating Expenses	*1,187,312,426*	*45,823,336*	*131,290,369*
Operating Profit	*128,671,328*	*4,820,644*	*18,806,095*
Average PLI	*10.84%*	*10.52%*	*14.32%*

3. The three segments were considered by the TPO separately. Qua the **Engineering Design Segment**, he accepted the assessee's selection of TNMM as the most appropriate method and also the PLI of OP/TC. The PLI of the company arrived at 9.12% by the assessee was recalculated by the TPO at 8.98% on cost. The average PLI of the 11 comparables at 12.57% in its TP study was not accepted by the TPO and a show cause notice was issued to the assessee.

3.1. Considering the reply, the Transfer Pricing Officer discarded the approach followed by the assessee and required the assessee to carry out a fresh search. Rejecting 7 out of the 11 comparables offered by the assessee in the fresh search he introduced a few more and considering the average OP/TC of 30.19% of the following 18 comparables held that the adjustment for arm's length price was warranted:-

S. No.	***Company Name***	***OP/ TC (%)****
1.	*Acropetal Technologies Ltd (Engineering Design Services seg)*	*14.26%*
2.	*Ashok Leyland Project Services Limited*	*24.70%*
3.	*Bengal SREI Infrastructure Development Ltd*	*42.14%*
4.	*Cades Digitech Pvt. Ltd.*	*5.78%*
5.	*Certification Engineers international Ltd*	*78.45%*
6.	*Global Procurement Consultants Limited*	*30.86%*

7.	*Gujarat Industrial & Technical Consultancy Org Ltd*	*7.89%*
8.	*IBI Chematur (Engineering & Consultancy) Ltd*	*25.96%*
9.	*Indus Technical & Financial Consultants Ltd*	*14.78%*
10.	*Kitco Ltd*	*27.48%*
11.	*Mahindra Consultants Engineers Ltd*	*30.92%*
12.	*Mitcon Consultancy & Engineer Services Ltd*	*40.19%*
13.	*NTPC Electric Supply Company Ltd*	*18.01%*
14.	*Pallavan Transport Consultancy Services Ltd*	*25.59%*
15.	*REC Power Distribution Co. Ltd.*	*39.44%*
16.	*Rites Ltd*	*58.27%*
17	*T C E Consulting Engineers Ltd*	*29.29%*
18	*Usha Hydro Dynamics Ltd*	*29.45%*
	Mean	*30.19%*

4. In the **Financial and Accounting Support Service Segment** the TPO accepted selection of TNMM as the most appropriate method as well as the selection of OP/TC as the PLI. The assessee's PLI was re-computed and its claim of the transaction being at arm's length on the basis of the average PLI of the 9 comparables at 11.10% was faulted with requiring the assessee to carry out a fresh search.

4.1. In the fresh search the assessee offered 9 comparables out of which 4 were rejected by the TPO on the grounds of failing the filter applied and functional dissimilarity. The average OP/TC margin of 25.98% of the following 8 comparables which included companies introduced by the TPO was worked out: -

S.No.	***Company Name***	***OP/TC (%)****
1.	*Accentia Technologies Ltd.*	*29.18%*
2.	*Acropetal Technolgoies Ltd. (Engineering design service seg)*	*14.36%*
3.	*E4e Healthcare Business Services Pvt.Ltd.*	*9.77%*
4.	*Eclerx Services Ltd.*	*56.82%*
5.	*Infosys BPO Ltd.*	*17.86%*
6.	*Jindal Intellicom Pvt.Ltd.*	*13.70%*
7.	*TCE E-serve Ltd.*	*69.31%*

8.	*Microgenetics Systems Ltd*	*-3.20%*
	Mean	***25.98%***

5. Considering the benchmarking of **Infrastructure Support Service Segment** the TPO accepting the assessee's approach of taking TNMM as the most appropriate method and also accepting the PLI of OP/TC rejected the assessee's claim that the transaction was at arm's length price. The TP study in regard to average PLI of 12.57% of the 5 comparables selected when compared to assessee's OP/TC of 18.32% was rejected. The assessee's OP/TC margin was again re-calculated and the assessee was required to carry out a fresh search.

5.1. Rejecting all the 5 comparables so offered in the fresh search, the TPO selected the following final list of comparable having OP/TC of 23.55% to hold that the transaction was not at arm's length: -

S.No.	***Company Name***	***OP/TC (%)****
1.	*Acropetal Technologies Ltd. (Information Technology services segment)*	*22.06%*
2.	*Akshay Software technologies Ltd.*	*0.86%*
3.	*Celstream Technologies Private Ltd.*	*13.20%*
4.	*e-Infochips India Private Ltd.*	*56.44%*
5.	*Evoke Technologies Private ltd.*	*8.11%*
6.	*E-zest Solutions Ltd.*	*39.98%*
7.	*Igate Global Solutions Ltd.*	*23.71%*
8.	*Infosys Ltd.*	*43.39%*
9.	*Larsen & Turbo Infotech Ltd.*	*18.40%*
10.	*LGS Global ltd.*	*14.11%*
11.	*Mindtree Ltd.*	*10.29%*
12.	*Persistent Systems & Solutions Ltd.*	*21.51%*
13.	*Persistent Systems Ltd.*	*23.08%*
14.	*R S Software (India) Ltd.*	*16.20%*
15.	*Sankhya Infotech Ltd. (software development service segment)*	*26.20%*
16.	*Sasken Communications Technologies Ltd.*	*24.33%*
17.	*Tata Elxsi ltd.*	*12.94%*
18.	*Thirdware Solution Ltd.*	*18.30%*
19.	*Wipro Technology Services Ltd.*	*54.42%*
	Mean	***23.55%***

6. The assessee carried these issue before the DRP not only on the grounds of comparability but also on the ground that working capital adjustment were not provided. The TPO was also assailed on the ground that contrary to facts he redrew the segmental on the following grounds:-

- *treating reimbursement of expenses received as part (i.e. part of both expense and income) of Profit & Loss ('P&L');*
- *reallocation of certain expenses (which were not actuals) based on the revenue of each segment; and*
- *treating provision/liabilities written back as non-operating in nature.*

6.1. The argument was put up that if the TPO's stand is accepted then following position would emerge:-

S.No.	*Nature of international transaction*	*Tested Party's margin as per segmental redrawn by The Ld.TPO*	*Arm's length margin determined by ld.TPO*	*Adjustment u/s 92CA*
1.	*Provision of EDS*	*8.98%*	*30.19%*	*27,39,32,965*
2.	*Provision of FAS services*	*10.52%*	*25.98%*	*70,84,259*
3.	*Provision of IT Infra services*	*14.32%*	*23.55%*	*1,21,12,787*
4.	*Receivables*	*N.A.*	*N.A.*	*33,16,088*
	Total			*29,64,46,099*

6.2. It was submitted that the above computation has not been computed by the TPO, as it has been computed on the basis of the margins of the other 2 segments. The said issue was stated to be pending before the Assessing Officer by way of rectification application. By way of the synopsis filed in the present proceedings, it has been submitted that the direction of the DRP holding that the margin results must be considered consistently across the segments has not been carried out. The TPO has also been faulted for not considering the revised margin from the redrawn segmental accounts. His *suo moto* action of passing rectification order under section 154 wherein selective correction of margins of Engineering Division Segment has been assailed. The resultant increase to 21.57% and 18.06% in the Financial Account Segment and IT infrastructure it has been assailed has been ignored by the TPO.

6.3. The TPO was also assailed on the ground that the benefit of economic adjustments (working capital and risk adjustments) was not granted to the assessee while computing the arm's length margins of the respective segments of the company. The fact that it was requested for it was submitted is evident from internal pages 85 to 87 of the TPO.

6.4. Addressing the order of the TPO it was further submitted that the TPO at internal pages 88 to 100 and 113 made an adjustment on account of period of delay in receipt of payments from AEs by imputing an Indian based interest at the rate of 10.84% per annum for the period of delay in receipt of payments from AEs beyond 60 days.

6.5. As a result of these actions, it has been submitted that the following adjustments were proposed in the transfer pricing order post rectification under section 154:-

S.No.	*Nature of international transaction*	*Tested Party's margin as per segmental redrawn by The Ld.TPO*	*Arm's length margin determined by ld.TPO*	*Adjustment u/s 92CA*
1.	*Provision of EDS*	*8.98%*	*30.19%*	*27,39,32,965*
2.	*Provision of FAS services*	*10.52%*	*25.98%*	*70,84,259*
3.	*Provision of IT Infra services*	*14.32%*	*23.55%*	*1,21,12,787*
4.	*Receivables*	*N.A.*	*N.A.*	*33,16,088*

	Total			*29,64,46,099*

6.6. These issues it was submitted were carried before the DRP. Inviting attention to the synopsis filed it was submitted that the DRP qua the **EDS segment** directed the exclusion of the following comparables:-

- *Ashok Leyland Project Services Ltd.*
- *Bengal SRE1 Infrastructure Development Ltd.*
- *NTPC Electric Supply Company Ltd.*
- *Pallavan Transport Consultancy Services Ltd.*

6.7. The DRP also directed the inclusion of a comparable selected by the assessee -*Arvind Accel Limited.*

6.8. Considering the **FAS and IT infra support services:** it was submitted the DRP accepted the approach and the comparable selected by the TPO .

6.9. It was submitted that the DRP also directed the TPO to provide working capital adjustment. However, risk adjustment was denied to the assessee.

6.10. Referring to internal page 37 of the DRP's order it was submitted that the DRP directed the TPO to consistently apply the segment results for all the three segments which direction has not been carried out. The relevant extract relied upon is reproduced hereunder:-

> ***4.7. ALLOCATION OF OVERHEAD COSTS***
>
> *"In his order, the TPO has reproduced the show cause notice which also has the calculation for the asessee's PLI (OP/OC). For the engineering design segment, this calculation is given on page 6 of the TPO's order. The assessee has contended that the TPO has allocated overhead expenses across different segments, on the basis of segmental revenue, whereas the assessee had allocated these expenses on the basis of allocation keys, such as total hours spent by personnel, payroll cost, etc. The assessee argued that the TPO had followed an inconsistent approach because the same revenue based allocation was not done by the TPO for the other segments-FAS segment and IT infra*

segment. The submissions of the assessee and the facts have been carefully considered. The assessee has not produced any evidence in support of its allocation keys and the basis for allocation of overhead costs across different segments. The assessee has failed to substantiate its claim and controvert the basis of allocation used by the TPO. Considering the facts, the TPO's decision to allocate these expenses on the basis of segmental revenue is justified and is upheld. There is no reason for not applying this consistently across different segments, and the TPO is directed to apply this allocation consistently in the other segments-FAS segment and IT infra segment, also."

6.11. Referring to page 74 to 81 of the DRP's order it was submitted that the DRP directed the TPO/AO to use 6 month LIBOR plus 300 basis points as the interest rate while computing the interest on intercompany receivables.

7. Pursuant to the DRP's direction it was submitted the AO in the final order qua **Engineering Design Segment** adopted the following 15 comparables companies:-

S.No.	Company Name	WC adjusted OP/TC
1.	Acropetal Technologies Ltd (Engineering Design Services)	14.26%
2.	**Kitco Ltd**	**28.79%**
3.	**T C E Consulting Engineers Ltd**	**28.97%**
4.	Cades Digitech Pvt Ltd.	2.83%
5.	**Certification Engineers International Ltd**	**71.97%**
6.	**Global Procurement Consultants Limited**	**29.32%**
7.	Gujarat Industrial & Technical Consultancy Org Ltd	8.67%
8.	**IBI Chematur (Engineering & Consultancy) Ltd**	**26.87%**
9.	Indus Technical & Financial Consultants Ltd	10.63%
10.	Mahindra Consultants Engineers Ltd	30.32%
11.	**Mitcon Consultancy & Engineer Services Ltd**	**43.58%**
12.	**REC Power Distribution Co. Ltd.**	**31.00%**
13.	**Rites Ltd.**	**58.27%**
14.	**Usha Hydro Dynamics Ltd**	**25.40%**
15.	Arvind Accel Ltd.	2.47%
	Mean	**27.56%**

7.1. The grievance of the assessee in the present proceedings, it was submitted persists qua 9 of the comparables which have been mentioned at serial No. 2, 3, 5, 6, 8, 11, 12, 13 and 14 in the above table.

7.2. In the said background, inviting attention to Ground No. 1, it was submitted that with respect to the **Engineering Design and Related Services Segment** the assessee acts as a captive service provider and is required to carry out the detailed engineering design and drawing on the basis of specifications and requirements provided by the AEs. The assessee is also involved in the internal project planning, scheduling, project management, monitoring progress, reporting etc. for the scope of work outsourced by AEs. Exclusion of the above comparables it was submitted has been requested on the basis of the following settled broad parameters by way of consistent orders of the ITAT in assessee's own case as per orders in 2004-05, 2005-06 & 2009-10 and 2010-11 AYs, copies of which have been placed in the Paper Book filed:-

> **(a)** 'government owned enterprises' or 'the enterprises affiliated with government projects' are not comparable and must be rejected for determining the arm's length margins; and
>
> **(b)** Comparables which are functionally different to the business of the Appellant must be rejected."

7.3. Accordingly on the basis of these parameters the exclusion of the following 5 following comparables was sought. Apart from that specific facts supporting the prayer are also brought out in the following chart-

S.No.	*Companies selected in the final order*	*Appellant's contentions*
1.	*Certification Engineering International Ltd.*	- ***Rejected in Appellant's own case for AY 2009-10 (ITA No.882/Del/2014)*** *[refer para 32 on page no.575 of the paper book for order of Hon'ble ITAT]*

	(OP/TC=71.97%) *(refer page no.290 and 291 of the appeal set for Ld.DRP directions)*	- *Significant reliance on projects from the government and government undertaking* - ***Functionally dissimilar**-related to certification, re-certification, safety audit and HSE management systems for offshore and onshore oil & gas facilities.* *(refer page nos.100 to 104 of the appeal set for submission filed before the Ld.DRP).*
2.	*Rites Ltd.* *(OP/TC=58.27%)* *(refer page no.293 of the appeal set for Ld.DRP directions)*	- ***Rejected in Appellant own case for AY 2004-05 and AY 2005-06 (ITA No.1476/Del/2015 and ITA No.1477/Del/2015)** (refer page 521 and 522 for AY 2004-05; 535 and 536 for AY 2005-06 of the paperbook for order of the Hon'ble ITAT)* - *Government undertaking* - ***Functionally dissimilar**-provides consultancy in various areas such as airport, transport, highways, industrial engineering, port and water resources, among others.* - *Cost of sales includes cost of finished goods.* *(refer page nos.125 to 132 of the appeal set for submission filed before the Ld.DRP).*
3.	*Kitco Ltd.* *(OP/TC=28.79%)*	- ***Rejected in Appellant own case for AY 2010-11 (ITA No.1478/Del/2015)** [refer page 614 to 616 of the paper book for order of the Hon'ble ITAT]* - *Government undertaking.* - *The company is rendering services majorly to the government or government owned enterprises.*
4.	*TCE Consulting Engineering Ltd.* *(OP/TC=28.97%)* *(refer page no.293 of the appeal set for Ld.DRP directions)*	- ***Rejected in Appellant's own case for AY 2010-11 (ITA No.1478/Del/2015)**{refer page no.617 of the paper book for order of the Hon'ble ITAT}.* - *Involved in activities beyond engineering design which BIPL provides.* - *Engaged in activities that extends from concept to commissioning whereas BIPL provides services under the aegis of its overseas. The diversified functions of this company include pre-project activities, procurement assistance, project management, commissioning and coordination, inspection, construction and supervision.* - *No segmentation available in the annual report of the Company which provides profitability for the engineering design segment.* *(refer page nos.117 to 121 of the appeal set for submission filed before the Ld.DRP).*
5.	*IBI Chematur (Engineering &*	- ***Rejected in Appellant's own case for AY 2010-11 (ITA No.1478/Del/2015)***

	Consultancy) Ltd. *(OP/TC=26.87%)* *(refer page no.291 of the appeal set for Ld.DRP directions)*	*[refer page no.617 of the paper book for order of the Hon'ble ITAT].* - *Involved in activities beyond engineering design which BIPL provides.* - *Also provides project planning, management services, procurement assistance, project management, commissioning and coordination, inspection, construction and supervision etc.* - *No segmentation available in the annual report of the Company which provides profitability for the engineering design segment.* - *Undertakes substantial R&D activities (R&D expenses approximately 4% of turnover)* *(refer page nos.122 to 125 of the appeal set for submission filed before the Ld.DRP)*

7.4. In the case of **Rites Ltd.** mentioned at Sl.No.13 it was submitted that the directions of the DRP directing the TPO to consider the correct margin have not been complied with. The exclusion of this comparable was also sought on the basis of past precedent in assessee's own case.

7.5. Apart from the above six comparables as having been wrongly selected by the TPO and retained by the DRP, the exclusion of **REC Power Distribution Company Limited** it was submitted is sought on similar reasoning namely that it is a wholly owned subsidiary of REC Ltd. a **Navratna CPSE under Ministry of Power**. REC Ltd. it was submitted 60% holding therein was by the state and central governments as per information available on the site of (www.moneycontrol.com). Referring to the Objections before the DRP and the synopsis filed it was submitted it is not only functionally dissimilar but even the annual report would show that qua the activities of **develop, construct, own, operate, distribute and maintain 66 KV** and below voltage class electrification/distribution electric supply lines/Distribution System. No segmentation was available -

(http://www.indiamart.com/recpower-distribution/aboutus.html) & (annual report). The said company it was submitted has no segmentation for the "services of Inspection" and "Consultancy" provided. The services provided range from Third party Inspection of works and materials as well as projects in High Voltage Distribution Segments and various State Electricity Boards. Accordingly it was submitted that exclusion of RITES is supported not only by the fact that it renders services largely to Government/government enterprises and not in the free market but it also derives benefit out of its parental relation with the Government in getting contracts from the (state or centre) derives government itself and other government undertaking and thus is getting the benefit of an implicit guarantee leading to a preferential treatment in obtaining contracts from government/government undertakings. This protection and preferential treatment it was submitted inevitably impacts the profit margins of the said comparable and it cannot be said to be indicative of a free market economy where the other comparables and the assessee operates. Reliance accordingly was placed on **Chemtex Global Engineering Private Limited ITA No. 3590/Mum/2010** where government owned companies have been rejected due to this specific reason:-

> *25. "Even with regard to the comparable companies which are taken into consideration by the AO/TPO the learned CIT(A) has correctly held that **Rites Limited is a Government of India enterprise** and considering the nature of the contracts and the implicit guarantee provided by the Government of India, etc. Rites Limited cannot be taken as a comparable case and hence the learned CIT(A) was justified in excluding the same."*
>
> *[Emphasis Supplied]*

7.5.1. Relying on the same, it was submitted the nature of contracts and the implicit guarantee, the comparable (in this case Rites Limited) cannot be accepted.

The said reasoning it was submitted is equally true for **REC Power Distribution Ltd.** which has most of its contracts from Government of India thus impacting the revenue and profitability. Apart from that REC Power Distribution is a 100% government owned undertaking. Thus it was argued that this case squarely covers the assessee's contentions that these comparables ought be excluded.

7.5.2. Rendering services majorly to Government/government enterprises it was submitted is a principle followed in assessee's own case for AY 2009-10 (supra), wherein the Tribunal has rejected a comparable on this issue. Accordingly REC Power Distribution, (being an indirect government owned undertaking) it was submitted deserves to be excluded. Reliance was also placed on the ruling of **M/s ThyssenKrupp Industries India Private Limited ITA No. 6460/Mum/2012** where the following was held:

> *"We find it as undisputed that Engineers India Limited is a Government company. It has several segments which also include 'Turnkey project', page 700 of the paper book is a copy of annual report of Engineers India Limited on turnkey project. It can be seen that the revenue has arisen from completing paraxylene plant of IOCL and further that company is engaged in execution of other unit of IOCL's Panipat Naphtha cracker project. In our considered opinion' this case should not have been included in the list of final comparables for two reasons. First reason is that profit motive is not a relevant consideration in case of Government undertakings. Many Government Undertakings even operate on losses in furtherance of the social obligations of the government.* ***The second reason is that Engineers India Limited earned income from turnkey project by successfully completing the project of IOCL and other Public Sector Undertakings. In that sense of the matter, the related party transactions are much more than the filter of 25%. We, therefore order for the exclusion of this case from the list of comparables."***
>
> *(Emphasis Supplied)*

7.5.3. Accordingly relying on the said order it was submitted that the comparable being considered namely (Engineers India Limited) had been rejected on the ground that it was working for government / public sector undertakings and since - RFC Power Distribution's transactions were also largely with other government owned enterprises, the transactions tantamount to related party transactions. Accordingly it was argued that the said comparable cannot be accepted as the transactions are not uncontrolled.

7.6. Apart from seeking the exclusion of the above 6 comparables the inclusion of the following 2 companies was sought on the ground that they were functionally similar and have been wrongly rejected by the TPO. Even in the earlier years the TPO it was submitted had rejected these comparables and only on the direction of the ITAT/and/or the DRP have been included :-

S.No.	***Company rejected in the final order***	***Appellant's contentions***
1.	*UB Engineering Ltd.* *(OP/TC=8.43%)* *(refer page no.297 and 298 of the appeal set for Ld.DRP directions)*	- ***Functionally similar****-provides services pertaining to EPC projects, infrastructure, on-site fabrication of structure, installation, testing and commissioning of electrical and mechanical equipment.* *(refer page nos.91 to 94 of the appeal set for submission filed before the Ld.DRP)* - *For AY 2004-05, AY 2005-06 & AY 2010-11 the Ld.DRP accepted this company as a comparable which is palpably evident from the order of the Hon'ble Tribunal.* *(refer page 518 & 519 of the paperbook for the ITAT order for AY 2004-05)* *(refer page 532 and 534 of the paperbook for the ITAT order for AY 2005-06)* *(refer page 532 and 534 of the paperbook for the ITAT order for AY 2010-11)*
2.	*Accuspeed Engineering Services India Ltd.* *(OP/TC=11.29%)* *(refer page no.296 to 298 of the appeal set*	- ***Accepted in Appellant own case by the Hon'ble Tribunal for AY 2010-11 (I.T.A.No.1478/Del/2015)*** *(refer page no.618 of the paperbook for order of the Hon'ble ITAT).* - *Engaged in providing cost effective engineering solutions and services covering design, detailed engineering, project construction & management to the clients.* *(refer page nos.87 to 89 of the appeal set for*

	for Ld.DRP directions)	*submission filed before the Ld.DRP)*

7.7. The exclusion of the following 3 comparables companies was sought on the ground that these companies were palpably different from the Engineering Design Segment of the assessee:-

S.No.	***Company selected in the final order***	***Appellant's contentions***
1.	*Usha Hydro Dynamics Ltd.* *(OP/TC=25.40%)* *(refer page no.293 of the appeal set for Ld.DRP directions)*	- *Engaged in the business of* ***cleaning of various machines and equipment*** *for various industries* - *Also engaged in trading activities.* *(refer page no.122 of the appeal set for the submission filed before the Ld.DRP).*
2.	*Mitcon Consultancy & Engineering Services Ltd.* *(OP/TC=43.58%)* *(refer page no.292 of the appeal set for Ld.DRP directions)*	- ***Functionally dissimilar:*** *Renders vocational trainings, IT trainings and laboratory services from which it earns 40% (approx.) of its revenue.* - *Government affiliate company* - ***Qualified financials:*** *annual accounts of the company were qualified in relation to balances of sundry debtors, loans and advances and sundry creditors and strengthening of the internal audit system for the year under consideration.* - *Non availability of segmental profitability.* *(refer page nos.111 to 114 of the appeal set for the submission filed before the Ld.DRP)*
3.	*Global Procurement Consultants Limited* *(OP/TC=29.32%)* *(refer page no.291 of the appeal set for the Ld. DRP directions)*	- *Government affiliate company* - ***Functionally dissimilar:*** *Engaged in diversified assignments related to valuation, consultancy and financial advisory services.* *(refer page nos.104 to 107 of the appeal set for the submission filed before the Ld.DRP)*

7.8. Accordingly it was submitted that in case the assessee succeeds in its prayer then the final list of compatibles would be as under**:-**

S.No.	**Company Name**	**WC adjusted OP/TC**
1.	*Acropetal Technologies Ltd. (Engineering Design Services)*	*14.26%*
2.	*Arvind Accel Ltd.*	*2.47%*
3.	*Cades Digitech Pvt.Ltd.*	*2.84%*
4.	*Gujarat Industrial & technical Consultancy Org Ltd.*	*8.67%*
5.	*Indus Technical & Financial Consultants Ltd.*	*10.63%*
6.	*Accuspeed Engineering Services India Ltd.*	*11.29%*
7.	*UB Engineering Limited*	*8.43%*
8.	*Mahindra Consulting Engineers Limited*	*30.32%*
	Mean	***11.11%***

8. The Ld. Sr. DR on the other hand vehemently argued for retaining the comparables. It was his submission that in the method like TNMM as long as broad comparability is established then exclusion on micro differences cannot be argued. The selectively picking apart the list of comparable it was submitted should not be allowed.

8.1. Addressing the specific objections it was his submission that government owned enterprises or enterprises affiliated with government projects should not be excluded. It was his argument that admittedly the government companies are entrusted with works in areas where due to huge unprofitable costs the private enterprise does not want to enter thus the argument for their exclusion it was submitted is without any basis. The work entrusted to these government companies it was submitted admittedly is not profit driven as the aim is development and social benefits. Thus the inclusion of these companies where their creation and functioning is only motivated by development agenda and if, even then they are able to show a profit then by no standards they should be considered for exclusion. The assessee it was submitted has no such laudable aims and is operating purely for profits thus it cannot claim to say that it is earning less profit than the companies who are guided by noble aims of social and economic development. Accordingly it was his submission that a comparable should not be excluded on this count.

8.2. It was also his argument that when a method like TNMM is accepted then the assessee cannot argue on the basis of these micro minor differences in the profiles of the companies and pray for their exclusion. The exercise of selecting comparable whose OP/TC margin admittedly was higher than what was acceptable to the assessee for exclusion was strongly opposed especially keeping in mind that for some of the comparable as in the case of **Kitco Ltd**, it was his submission that the issue is agitated for the first time before the ITAT. Objecting to the prayer for its exclusion it was his strong objection that firstly this prayer was never before the TPO; secondly no Objections were raised for its exclusion even before the DRP; and thirdly even before the ITAT the assessee has not made any effort to point out that the prayer is being made before the ITAT the first time. Further it was also his Objection that the assessee has not cared to pray for admission of any additional ground as no such prayer has been made. Accordingly it was his prayer that the generalistic arguments of removing comparable on past precedence or some decision in some other case may not be accepted. The selection of comparables wherein the assessee has fully participated it was submitted cannot be outrightly changed at the appellate stage merely relying on precedent accepting arguments where even the similarity of facts has not been cared to be established by the assessee. The arguments it was submitted cannot be accepted as the facts may differ from year to year in the case of the assessee or the comparable or in the precedent cited and the prayer for exclusion of a comparable it was submitted would presume that the same level of hair splitting is done vis-à-vis the assessee as the tested party and the assessee in the precedent cited. No such effort it was submitted has been made to establish these facts qua each comparable. The issues it was submitted have been decided on the basis of facts on record and the consistent findings on record in regard to the comparables was heavily relied upon.

9. The Ld. AR in reply fairy conceded that the exclusion of **Kitco Ltd.** was requested for, for the first time before the ITAT in the facts of the present case. However, inviting attention to the order of the ITAT in 2010–11 assessment year order dated 21.12.2015 in ITA No. 1478/Del/2015, it was submitted that the position was identical in the facts of that case also. Inviting attention to the copy of the said order filed in the paper book, it was submitted that the exclusion of the said comparable was sought for the first time before the ITAT and it was allowed. Accordingly it is only on the basis of the said precedent that this prayer has been made. The relevant extract from the order of the Co-ordinate Bench at internal page 9 to 11 of 2010-11 AY is reproduced hereunder for ready-reference:-

> ***KITCO LTD.***
>
> *12.1. "The company was established in 1972 by Industrial Development Bank of India, other national and state level financial institutions, Government of Kerala and 7 public sector banks for rendering services to government departments, public sector undertakings ("PSU's"), local*

bodies, entrepreneurs, etc. The company's main functions are to render professional technical consultancy assistance to banks (appraisal of projects in priority sectors) and to entrepreneurs operating in SME sector (preparation of project report, market studies and conducting training program's). However, over the years Kitco has evolved into a multifunctional and multi-disciplinary organization and has started offering consultancy service from 'concept to commissioning'. As portfolio of services offered by Kitco currently includes the following:

- *Project consultancy;*
- *Detailed design engineering and project execution;*
- *Technical services;*
- *Environmental Engineering; and*
- *HRD consultancy*

12.2. The assessee fairly submits that Kitco is a 100% government owned undertaking, rendering services primarily to central/state government undertaking and PSUs. It is not in dispute that most of the clients or projects undertaken by this company are either for state government or government run institutions. The majority revenue (and profitability) of this company comes from government (state or center) run projects and that the company derives benefit out of its parental relation with the Government in getting contract. In other words, the company is getting the benefit of preferential treatment in obtaining contracts from government/government undertakings. This inevitably impacts the profit margins of the said comparable and cannot be said to be indicative of a free market economy where the other comparables and the assessee operates.

12.3. In this regard the assessee placed its reliance on the ruling of M/s ThyssenKrupp Industries India Private Limited ITA No. 6460/Mum/2012 wherein it has been held asunder:

> *"We find it as undisputed that Engineers India Limited is a Government company. It has several segments which also include 'Turnkey project' page 700 of the paper book is a copy of annual report of Engineers India Limited on turnkey project. It can be seen that the revenue has arisen from completing paraxylene plant of IOCL and further that company is engaged in execution of other unit of IOCL's Panipat Naphtha cracker project. In our considered opinion' this case should not have been included in the list of final comparables for two reasons. First reason is that profit motive is not a relevant consideration in case of Government undertakings. Many Government Undertakings even operate on losses in furtherance of the social obligations of the government. The second reason is that Engineers India Limited earned income from turnkey project by successfully completing the project of IOCL and other Public Sector Undertakings. In that sense of the matter, the related party transactions are much more than the filter of*

> *25%. We, therefore, order for the exclusion of this case from the list of comparables."*
>
> *[Emphasis Supplied]*
>
> *12.5. In the above ruling, the comparable M/s. Engineers India Limited was rejected primarily on the ground that it was working for government/public sector undertakings and since the company also being a government owned enterprise; the transactions tantamount to related party transactions. The same is true for the said comparable as Kitco Ltd., transactions are primarily with government owned enterprises. Applying the preposition laid down in the case of M/s ThyssenKrupp Industries India Private Limited (supra), we hold that Kitco Ltd., cannot be accepted as a comparable company. Hence the same is directed to be eliminated."*

10. Not convinced with the argument the Ld.CIT DR submitted that the fact that its exclusion was agitated before the ITAT for the first time is not coming out of this order and the prayer for exclusion of the said comparable *de horse* the ground was objected to.

11. In view of the fact that the hearing in the appeal spilled over on 3 different dates. The Ld. AR sought permission to raise an additional ground and on the next date the Ld.AR filed a petition seeking admission of additional ground requesting for exclusion of Kitco Ltd on the reasoning that an identical prayer had been accepted by the Co-ordinate Bench in 2010–11 assessment year.

11.1. The prayer was opposed by the Ld.CIT DR.

12. We have heard the rivals submissions and perused the material available on record. It is seen that the transfer pricing approach of the assessee was set aside by the Transfer Pricing Officer not only on the grounds that the taxpayer had used multiple your data but also on the grounds of the filters applied etc. were considered to be inappropriate filters and after identifying the correct filters according to him a fresh search was required to be carried out and after modifying the outcome of the same resulted in the passing of the TPO's order dated 29.01.2015. Pursuant to the draft order being passed by the Assessing Officer, the assessee filed its objections before the DRP and also Rectification petition u/s 154 before the TPO. In pursuance to the DRP's order dated 28.10.2015, the final assessment order under section 143(3)/144C dated 30.11.2015 has been passed. It is the correctness of this order which is under challenge in the present proceedings on the basis of the grounds raised.

12.1. Before we address the comparables selected whose retention and exclusion has been challenged, we consider it appropriate to first address the functional profile considered by the DRP which has not been challenged in the present proceedings before us by way of any ground or argument. The DRP as per internal page 22 to 25 qua this segment has held the assessee to be engaged in providing high-end engineering design services and procurement and construction management services described as EPC (Engineering Procurement Construction Company). The relevant extract from the DRP's order is reproduced hereunder:-

> ***4.3 FUNCTIONAL PROFILE***
>
> *1) "Before considering the appropriateness of the comparables used, it is necessary to consider the functional profile of the assessee. The assessee was asked to file a copy of the agreements with its AEs regarding the services rendered. The assessee has filed a copy of its Global Masters Services Agreement. This agreement contains the following information regarding services rendered:*
>
> > *Scope of Services means the description of the Services to be performed and the deliverables to be provided by BIPL as set out in a Work Order and any agreed variations.*
> >
> > *Services means the services provided or to be provided by BIPL as set out in the Scope of Services of a Work Order and any agreed variation.......*
> >
> > *Work Order means a project-specific agreement under which BIPL will perform Services for a Bechtel Company, containing a Scope*

of Services, Schedule of Charges, schedule of performance, and other applicable terms as executed by BIPL and BCorp in accordance with the provisions of clause 2 thereof,

2. WORK ORDERS *-*

2.1 When a Bechtel Company wishes to engage BIPL to perform certain engineering design services in connection with a particular project, such Bechtel Company will submit to BIPL a description of the desired Services and applicable Prime Contract requirements in sufficient detail so that BIPL can prepare a Work Order.

2.2 Further, when a Bechtel Company wishes to engage BIPL to perform other services, such Bechtel Company will submit to BIPL a description of the desired Services in sufficient detail so that BIPL can prepare a Work Order.

2.3 BIPL will present the proposed Work Order to the requesting Bechtel Company, BIPL and the requesting Bechtel Company will discuss and finalize the terms of the Work Order, including a Scope of Services, Schedule of Charges, schedule of performance, and other applicable terms. Each Work Order will be governed by the terms and conditions of this Agreement except to the extent otherwise expressly agreed in the Work Order to accommodate the requirements of the particular project. When the Work Order has been finalized by BIPL and the requesting Bechtel Company, BIPL and BCorp (as administrative agent of the requesting Bechtel Company) shall execute the Work-Order.

2) The assessee failed to furnish any further details such as Work Order, etc. regarding the nature of services rendered.

3) The assessee's TP study gives the following information about the assessee:

(i) BIPL was formed to:

- *Carry on engineering design, drafting, project monitoring and control, project support, procurement services and construction services;*
- *Create a multidiscipline engineering center for the Group's projects and to provide administration and processing services to group entities;*
- *Establish a strong local engineering presence for projects in India;*
- *Provide financial and management accounting services;*
- *Develop a cost-effective resource base for projects worldwide through associations with major Indian producers and equipment manufacturers and also providing procurement services for other group entities; and*
- *Provide out-sourced services to overseas group entities.*

(ii) Over the last 15 years, BIPL has been associated with a number of international and national projects. BIPL has serviced power, petroleum, chemicals, mining and metal projects

worldwide. In India, it has provided support to projects like Reliance Refinery and the Dabhol Power Project.

BIPL has developed its expertise in such services by engaging engineers. The work relating to preparation of engineering designs, drawings, etc is based on customized/ specific project requirements of the associated group companies engaged in different projects.

Engineering personnel work in a completely automated environment using the latest Computer Aided Design ('CAD') and 3D modeling software, integrating the Group's global, and multi-business engineering expertise through dedicated WAN link. BIPL is an ISO 9001: 2OOO company.

BIPL primarily provides technical support services in respect of engineering design and drawings to other group entities both within and outside India. It also provides IT infrastructure and financial and accounting support services to its group entities.

(iii) As a part of its business operations, BIPL provides engineering design and related services which are closely linked with the performance of engineering, construction and turnkey project execution industry. Companies seeking finance to build large facilities such as power plants, refineries, and steel mills are generally required by the debt providers or equity investors to obtain a lump sum turnkey engineering, procurement, and construction contract with a credit-worthy contractor having satisfactory industry-related experience and capabilities. Such a contractor is an EPC company. The EPC contractor is required to provide single source process and schedule guarantees to minimize the risks to the client and its investors.

In the EPC industry, a different market environment exists from many other industries. EPC companies are responsible for designing, constructing and managing all issues associated with major projects including chemical plants, power plants and other large facilities. In the global market, risk is pushed onto the EPC industry via fixed price contracts. The facility owners want a lower cost, but want the EPC contractor to assume more risk and meet a tighter schedule.

EPC companies derive revenues from executing projects for clients on a cost- reimbursable, or lump sum basis.

They complete entire work from initial feasibility studies, to detailed engineering, and construction and operations management of the actual project facilities.

Engineering

1. *Determine all facility, equipment, and material requirements*
2. *Produce all technical deliverables required to execute the project*
3. *Review vendor proposals*
4. *Ensure safety design.*

Procurement:
1. Globally source material & equipment from proven manufacturers
2. Manage logistics of delivering material & equipment to site
3. Expediting delivery to ensure project is completed as scheduled
Construction:
1. Ensure facility is completed on time, in budget and to specification
2. Provide a range of services from overall construction management to actual construction and commissioning services

4) It is apparent from the above that the assesses is engaged in providing high-end engineering design services and procurement and construction management services. Companies providing these services are commonly referred to as EPC (Engineering Procurement Construction) companies. It is with this background that the functional similarity of comparables is required to be examined.

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12.2. Addressing the grounds raised and the submissions of the parties before the Bench, we are of the view that the prayer of the assessee made in support of

Ground No.1.3 considering the precedent cited deserves to be allowed. We find that though the arguments advanced by the Ld.CIT DR appear to be convincing however in the face of the facts and submissions considered in the precedent cited, we find that the assessee has established that those comparables which had Government holdings/affiliated or controlled enjoyed preferential treatment in obtaining contracts or benefits derived out of the parental relation which fact successfully establishes the impact of these facts on the net profitability of the government owned/controlled or affiliated companies. Thus these companies cannot be said to indicative of a comparable operating in a free market economy. Thus, there is strong justification for their exclusion from the list of comparable companies. Accordingly the exclusion of such comparable companies from the list of comparable companies on facts is found to be justified.

12.3. Having so said, we find that when out of the total 15 comparables considered post DRP, exclusion of six is sought on the grounds of past precedent and on the ground that these companies affiliated/owned or controlled by the government need to be excluded it castes a doubt on the process of selection and retention of the comparables companies. When this fact is read alongwith the fact that when seven out of the eleven comparables offered by the assessee are rejected by the TPO and eleven more introduced by him totaling 18 in all are reduced by 4 on the directions of the DRP on the prayer of the assessee and one comparable is directed to be included again at the instance of the assessee the doubt converts into a certainty. The certainty is further converted into a hard reality when it is coupled with the prayer to further include two comparable companies which had been excluded by the TPO in the earlier years as in the present year and on the strength of the precedent available by way of directions in earlier years by the appellate authorities the comparables it is pleaded may be included. The entire gamut of facts and events uninhibitedly demonstrate that in the process of selection of comparables both the tax payer as well as the tax authorities have faulted. However, we find that even if these corrections so requested are considered even then the grievance remains qua this list of 15 comparables post DRP as there still exists a prayer for further request for reducing this list by excluding the following 3 comparables on the grounds of being "palpably different from EDS" namely Usha Hydrodynamics Ltd; Mitcom Consultancy & Engineering Services Ltd. and Global Procurement Consultant Ltd. The request prima facie does not appear to be maintainable because as opposed to "EDS" the profile of the tax payer as on record in the present proceedings has been accepted as "EPC" and as observed there is no challenge to this finding either by any argument on facts nor by way of any ground. However, the prayer in view of the subsequent finding is not relevant as we find that in the peculiar facts of the present case the entire exercise of selection of comparables has to be done again. As considering the arguments of the assessee in support of its prayer and the departmental stand thereon, we find that there can be no two opinions on the fact that it is unequivocally demonstrated on the face of the record that the exercise of proposal and selection process of comparables by the assessee and the tax authorities has not been carried out as per settled legal precedents. Namely government related, protected/affiliated/favoured companies rendering "Certification/Inspection" services etc. cannot be said to be companies comparable to an assessee who operates in free market conditions. Thus, ideally such companies should never have been selected. Similarly companies trading in products and goods or providing vocational training as government affiliates also cannot be said to be functionally similar to EPC. These issues are well settled by now and selection contrary to this settled position admittedly either by way of proposal by the assessee or by way of retention/selection by the TPO was not correct. In support of the parties, we take note of the fact that at the time of preparation of the Transfer Pricing study or passing of the TPO's order on 29.01.2015 the assessee and the TPO did not have the benefit of the judicial precedent in assessee's own case which is heavily relied upon by the Ld.AR. Let alone the TPO even the DRP or the AO at the stage of final assessment order did not have the benefit of these orders as the order of the ITAT in 2004–05 AY is dated 20.11.2015; in 2005–06 AY it is dated 23.09.2015 and the order for 2009–10 AY is dated 14.10.2015 and in 2010-11 AY it is pronounced on 27.12.2015. The order of the TPO on the other hand is dated 29.01.2015 and the order of the DRP is dated 28.10.2015. Accordingly, we deem it appropriate to not attempt a patch work exercise at this stage where admittedly the entire exercise has been misguided in the peculiar facts and circumstances of the case by addressing the comparable selected or left out and restore the issue back to the file of the TPO to consider the issue *denovo* and pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

12.4. The decision to restore is further supported by the fact that as per the stand of the parties the Rectification Petition dated 14.12.2015 is still pending before the AO.

12.5. We further find that qua this segment the DRP's direction to the TPO to apply the segment results for all the 3 segments consistently has also admittedly not been carried out leading to the grievance of the assessee expressed by Ground No. 3 and 4 alongwith their sub-grounds. For the said purposes, reliance has been placed on **Lummus Technology Heat Transfer BV ITA No.6227/Del/2012.** The prayer of the assessee being that segmental P&L account has been prepared using reasonable and specific allocation basis by the assessee.

12.5.1. Without prejudice to the above prayer on the said issue it is also requested that if the revised segmental margins are considered the margins in the EDS segment would meet the arm's length standard if the grievance qua the comparables are accepted; and the margins in the other two segments i.e. FAS and IT infra would meet the arm's length criterion even after considering the comparables considered by the TPO/DRP and the rectification application. Accordingly in the light of these facts and submissions it has been requested that should the segmentation of the TPO be accepted and consider the margins of the assessee in all the three segments satisfies the arm's-length criteria. The said argument has been raised without prejudice to the fact that certain comparable is in the other 2 segments i.e. FAS and IT Infra are functionally stated to be dissimilar and have been rejected by the Tribunal in assessee's own case in 2010-11 assessment year.

12.6. It is also seen that the taxpayer has also requested for working capital adjustment, risk adjustment in the comparables relying on past precedent. Although, we find that no working thereof has been placed before us but even otherwise, we find in the peculiar facts of the case that in view of the decision taken the issue is not required to be addressed at this stage. Suffice it to say that if it all any working capital adjustments or risk adjustments in the comparables proposed by the TPO is warranted the taxpayer should be able to support its claim by way of justifying the extent of adjustments requested as the law contemplates that adjustment is to be requested for by the assessee and supported by way of placing necessary justification in support of its prayer.

12.7. Accordingly, in view of the above detailed reasoning on facts addressing the various peculiar facts and circumstances of the case it is deemed appropriate to restore the issue back to the TPO to decide the same afresh by way of a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

13. Addressing the **Financial Accounting Support Service Segment**, we find that the TPO rejected 4 out of the 9 comparables proposed by the taxpayer and ultimately adopted 8 comparables having an OP/TC of 25.98% which compared with the recomputed OP/TC of 21.57% compared to assessee's original OP/TC of 21.80% was considered to be warranting adjustment for arms length price. The DRP it is submitted did not make any changes in the comparables selected by the TPO.

13.1. The assessee seeks exclusion of **Accentia Technologies Ltd.** on the ground that it has been rejected in assessee's own case for 2010-11 assessment year. Reliance has been placed upon the decision of the Hon'ble High Court in the case of **Rampgreen Solutions (TS – 387–HC– 2015 (Del) – TP (specific Paras 29, 31, 33 to 35)** for the proposition that the KPO i.e. Knowledge Process Outsourcing company cannot be compared to a low-ended IT enabled service provider. It has also been urged that it has significant amount of brands; IPR and Goodwill and the lack of segmental information has further been cited as a ground for its exclusion.

13.2. Exclusion of **Eclerx Services Ltd** has been requested on the grounds of functional dissimilarity. The prayer it is submitted is also supported by the decision of the Hon'ble jurisdiction High Court in the case of Rampgreen solutions (cited supra) amongst various other orders of the ITAT.

13.3. The exclusion of **TCSE Serve Limited** has been sought on the grounds that it has been rejected in assessee's own case in 2010-11 assessment year, reliance is placed on the order of the ITAT.

13.4. The Ld.AR submits that if these 3 comparables are excluded then the OP/TC of the 5 comparables which remained would work out to 10.20%. When it is compared with the margins of the assessee of 10.29% (or 21.57%, if redrawn segmental account is considered), the transaction it was submitted would satisfy the arm's-length criteria. In support of the said prayer the following chart has been placed before us:-

S.No.	***Company Name***	***WC adjusted OP/TC***
1.	*Acropetal Technolgoies Limited (EDS segment)*	*12.68%*

2.	*Infosys B P O Ltd.*	*17.15%*
3.	*Jindal Intellicom Pvt.Ltd.*	*12.61%*
4.	*E4e Healthcare Business Services Pvt.ltd.*	*10.21%*
5.	*Microgenetics Systems Ltd.*	*-1.60%*
	Mean	***10.20%***

14. The Ld. CIT DR relies upon the order of the authorities below, no distinguishable fact or circumstance was brought to the notice of the Bench.

15. Considering the submission of the parties before the Bench, we deem it appropriate to first address the functional profile of the assessee on the basis of record. We find that the same has been addressed in internal pages 38 and 39 of the DRP holding that the assessee is a high end KPO in this segment. The relevant extract is reproduced hereunder:-

5.1 FUNCTIONAL PROFILE

1) "Before considering the appropriateness of the comparables used, it is necessary to consider the functional profile of the assessee, The assessee's TP study gives the following information about the assessee in this segment:

BIPL is also engaged in providing financial and accounting support services to its Group entities. Within this segment, the company primarily performs services related to accounts payable management, payroll processing, invoice processing, making payment to suppliers and the handling of related queries. Its functions are broadly outlined as under:

- *Invoice processing: Under this process, scanned invoices raised on Bechtel Group Companies are provided to BIPL. The financial and accounting support services team at BIPL is responsible for uploading the information presented in the scanned invoices on the in-house database of the Bechtel Group. This team also provides support in processing employee payroll processing and reimbursements for the BIPL employees.*
- *Help desk support: Under this function, BIPL provides query management and troubleshooting support to the Group Companies with respect to their supplier management functions.*
- *Account Closing and Management Reporting: The function supports general ledger accounts management, analysis and closure, reporting, bank reconciliations, inter-office reconciliations and billing and collection processes.*

> - *Tax advisory services: This function involves providing advice to the Group entities with respect to effective and efficient tax management.*
> - *Management of funds: Under this function, BIPL advises Bechtel group entities on potential investment opportunities. It also monitors the performance of investments with a view to protect the assets of BIPL as well as the group entities. The ultimate decision making authority with respect to investments lies with the group entities. It is also responsible for-managing the finance, insurance and treasury functions for some of the Bechtel group, entities.*
>
> *2) The assessee is engaged in providing engineering design and other services. In this segment it provides financial services including the following:*
>
> - *Tax advisory services: This function involves providing advice to the Group entities with respect to effective and efficient tax management.*
> - *Management of funds: Under this function, BIPL advises Bechtel group entities on potential investment opportunities. It also monitors the performance of investments with a view to protest the assets of BIPL as well as the group entities. The ultimate decision making authority with respect to investments lies with the group entities. It is also responsible for managing the finance, insurance and treasury functions for some of the Bechtel group entities.*
>
> *3) Considering the facts and the description of services given above, it is clear that the assessee is a high-end KPO in this segment."*

15.1. We find that in the precedent relied upon the discussion on the functional profile does not bring out whether the segment was held to be a high end KPO:-

> *13.2. "In the FA segment, the functions of the appellant company are, invoice processing, help desk support, account closing and management reporting, tax advisory services, management of fund. The assessee contended that the Ld.TPO/DRP has accepted certain comparables, which perform altogether different functions as compared to assessee's FAS and IT infra segment, and have extra-ordinary circumstances based on which they should not be included."*

15.2. Accordingly we find that reliance placed on the following finding is of no relevance:-

> *13.3. "We would now examine each of the comparable company in dispute to arrive at a conclusion.*

<u>Comparables included by *the Ld.TPO/DRP but disputed by the assessee:*</u>

<u>1) TCS E-Serve International Limited & TCS E-serve Limited</u>

This company has been selected by the ld.TPO as a comparable. This company undertakes, customer service, transaction processes, collections, risk management, and analytics, and has created a lot of applications which are in the nature of intellectual property in terms of reconciliation software, fund transfers, etc. The company also undertakes software testing and validation activities. Possession of intellectual property rights has to be factored if such a company is to be taken as comparable. This cannot be done unless there is appropriate data. Further, from the TP study we observe that, this company is a wholly owned subsidiary of TCS E serve International Ltd. During the year under consideration, this company has made payments towards use of Tata brand. Consequentially ***use of the TCS brand has substantially increased the operating profits post acquisition.*** *Hence we are of the opinion that this company cannot be taken as a comparable. We therefore direct to exclude this comparable.*

(emphasis provided)

<u>2) Accentia Technologies Limited</u>

This company has been included by the ld.TPO as a comparable. Functionally, Accentia Technologies Ltd., is into development of software products for healthcare. It is submitted by the ld.AR that Accentia Technologies Ltd is also engaged into diversified activities such as Knowledge Process outsourcing(KPO), Legal process outsourcing(LPO), Data process Outsourcing(DTO), high end software services. ***It is also submitted by the ld.AR that segmental information in respect of this company is not available.*** *It has been further brought to our notice that this company has been rejected by the Ld.TPO in the earlier year.* ***The company has also had business restructuring during the year under consideration thereby giving rise to extraordinary circumstances.*** *For all these reasons we direct the Assessing Officer to exclude this company as a comparable.*

(emphasis provided)

15.3. Accordingly in the light of the findings available on record, we find that the prayer to exclude **Accentia Technologies Ltd.** on these facts cannot be allowed as functional profile as per record has been held to be that of a KPO. The judicial precedent as laid down in the case of Rampgreen Solutions which holds that a KPO cannot be said to be comparable to a low end IT enabled service provider is not of any help to the assessee as per facts on record. The fact that the assessee's Financial and Accounting Support Service Segment as per record has been held to be a high end KPO has not been assailed by any argument or ground in the present proceedings as the Ld.AR has straight away proceeded to address the comparables without first addressing the functional profile. Reliance placed on precedent where the assessee's profile was taken as low end ITeS and not a high end KPO as in the case at hand is of no help. The finding of facts arrived at on record has not been assailed by way of any argument.

15.4. Similarly we find that the arguments for exclusion of **Eclerx Services Ltd.** in the face of the functional profile qua this segment of the assessee as that of a high end KPO remaining unassailed on record. We find that reliance placed on the decision of the Jurisdictional High Court in the case of Rampgreen Solutions is not of much help. A KPO is understood as the higher end of ITeS in terms of value addition. ITeS encompasses a wide spectrum of services that use Information Technology based delivery which could include rendering highly technical services by qualified technical personnel involving advanced skills and knowledge, such as engineering, design and support. Whereas on the other end of the spectrum ITeS would also include voice based call centres that render routine customer support for their clients as were the facts before the Hon'ble High Court. In view thereof, we find that the prayer of the assessee cannot be allowed.

15.5. Considering the arguments for and against the exclusion of **TCSE Service Ltd.** we find that nothing has been brought on record by the Revenue in order to rebut the precedent that the association of the said comparable with Tata brand has impacted its bargaining power to negotiate premium contracts and thus established functional dissimilarity. In the absence of any rebuttal on facts and considering the judicial precedent cited and considering the copy of the Annual Reports which are found on record the comparable is directed to be excluded.

16. Addressing **IT infrastructure Support Services Segment** the Ld. AR has submitted that the assessee is stated to be a captive service provider and engaged in provision of various services in the nature of software and hardware support services, network services, infrastructure management, routine software development and monitoring and managing various IT components such as servers, networks, storage equipment, messaging etc for the requirements of AEs.

16.1. The original search carried out by the taxpayer in its TP study by using multiple year data was objected to by the TPO. The assessee was required to carry out a fresh search wherein all the 5 comparables proposed by the assessee were rejected on the grounds of functional dissimilarity. The TPO accordingly proposed 19 comparables having average OP/ TC of 23.55%.

17. The comparables selected by the TPO were retained by the DRP leading to the grievance posed before the Tribunal seeking exclusion of the following 7 comparables :-

(i) Infosys Ltd.;
(ii) Wipro Technolgoy Services Limited;
(iii) Acropetal Technologies Limited (Information Technology Service);
(iv) Sankya Infotech Ltd.(seg);
(v) Sasken Communication Technologies Ltd.;
(vi) E-Infochips India Pvt. Ltd.; and
(vii) E-Zest Solutions Ltd.

18. A perusal of the synopsis filed shows that the inclusion of **Sankya Infotech Ltd.(seg)** and **Sasken Communication Technologies Ltd.** is objected to before the ITAT for the first time as no reference to the objections before the DRP has been made. The exclusion of the remaining 5 has been sought on the grounds which we propose to address separately hereunder:-

(i) Infosys Ltd is sought to be excluded on the grounds that it has brand profits and owns significant tangibles; that there is significant expenditure on research and development for developing new products and innovative technology; that there is significant advertisement and marketing expenditures resulting in non-routine marketing intangibles; ownership of branded/proprietary products like Finacle; Infosys Active Desk, ;Infosys iProwe; Infosys mConnect and diversify product portfolio; incomparable scale of operations the various grounds on the basis of which the said comparable has been rejected in various rulings of the ITAT.

(ii) The exclusion of **Wipro Technologies Services Ltd.** is sought on the grounds of extraordinary circumstances resulting on account of an overall business deal when Citi Technology Services Ltd was acquired by Wipro Ltd during January 2009 as a result of which Wipro Ltd signed a Master Service Agreement with Citigroup for the delivery of services for a period of 6 years with guaranteed Revenue of US dollars 500 million. Accordingly, it has been argued that regardless of the cost incurred/services performed by WTI is minimum guaranteed revenue of US dollars 500 million has to flow from Citigroup companies to WTS which it has been stated can lead to abnormally high profit margins for WTS. Accordingly the business model of WTS was stated to be very different from that of the taxpayer and hence it was stated to be in comparable. Reliance has been placed on various decisions of the ITAT for its exclusion.

(iii) Acropetal Technologies Ltd.'s exclusion has been sought on the ground that it fails employee cost to total cost filter which is stated to be less than 25% and employee cost ratio in this case is 15.30%. The said prayer it has been stated was before the DRP also.

(iv) Exclusion of **Sankhya Infotech Ltd** is sought on the grounds that it is functionally different as it is engaged in e-learning activities and training solutions and it is also stated that the company is engaged in development as it is engaged in development of simulation and virtual training products. Reliance again has been placed upon **Integral Decision and Systems India (P.) Ltd. vs DCIT [TS-629-ITAT-2011 (Jpr)]; and NTT Data India Enterprise Application Services Pvt.Ltd. vs ACIT [TS-293-ITAT-2013 (Hyd.)].** However, no effort to demonstrate that facts qua the precedent and the assessee were *pari-materia* were made.

(v) Exclusion of **Sasken Communications Technologies Ltd**, reliance was placed again on the orders of the ITAT including Motorola's Solutions India Private Limited versus ACIT (48 taxman.com 248) on the grounds that it was functionally different as the company is engaged in rendering testing, satellite communication and different services. Further the company was stated also to be engaged in production of software products and also incurring significant marketing and advertisement expenses unlike the assessee.

(vi) Exclusion of **E-InfoChips India Private Limited** was sought on the ground that it had diversified services which included application software; e-commerce; mobility; BI and visualisation; firmware and system software; broad design; ASIC/SOC/FPGA services; mechanical and industrial design. It was also stated that segmental data was also not available, these submissions were stated to be filed before the DRP also.

(vii) Exclusion of **E-Zest solutions** has been requested on the ground that it is functionally dissimilar having diversified services like product engineering services outsourced product development services which includes product designing and development product feature enhancement, product platform migration software product testing license and judgement etc. The exclusion of the said comparable was also supported by placing reliance on various orders of the ITAT and the submissions filed before the DRP.

18.1. The Ld. AR has submitted that in case the prayer of the assessee is accepted and the 7 comparables as requested are excluded then the OP/TC of the following remaining 12 comparables would be 15.50% and would be well within the OP/TC of 14.14% or 18.06% if redrawn segmental account is considered:-

Sl.No.	***Company Name***	***WC adjusted OP/TC***
1.	*Akshay Software Technologies Limited*	*2.68%*
2.	*Celstream Technologies Private Limited*	*14.35%*
3.	*Evoke Technologies Private Ltd.*	*9.36%*
4.	*Igate Global Solutions LTd.*	*23.93%*
5.	*Larsen & Turbo Infotech Ltd.*	*19.50%*
6.	*LGS Global Ltd.*	*12.42%*
7.	*Mindtree Ltd.*	*10.29%*
8.	*Persistent Systems & Solutions Ltd.*	*22.24%*
9.	*Persistent Systems Ltd.*	*22.82%*
10.	*R S Software (India) Ltd.*	*17.16%*
11.	*Tata Elxsi Ltd.*	*12.94%*

12.	*Thirdware Solution Ltd.*	*18.30%*
	Mean	***15.50%***

19. The Ld.CIT DR relies upon the orders of the tax authorities and his stand that micro differences in the comparables in a TNMM cannot be a ground for exclusion. It was also his stand that TNMM pre-supposed a broad comparability and a selection of fairly large number of comparable companies would address the micro difference, if any.

20. We have heard the rival submissions and perused the material available on record. We find that before we address the specific request it is appropriate to first address the functional profit of the assessee qua the segment as per record. The DRP as per internal page 47 and 48 have held the assessee to be a KPO engaged in software development. The relevant finding standing unassailed on record is reproduced hereunder:-

6.1 FUNCTIONAL PROFILE

1) "Before considering the appropriateness of the comparables used, it is necessary to consider the functional profile of the assessee. The assessee's TP study gives the following information about tine assessee in this segment;

Functions performed by BIPL

BIPL has set up an offshore centre at Gurgaon. Presently, BIPL has a team of 600 people approximately who are engaged in providing IT infrastructure support services. The centre is used to monitor and manage various IT infrastructure components such as servers, networks, storage equipment, messaging etc. The centre is integrated with the Group Companies centre to ensure seamless delivery operations between the two locations. The IT Infrastructure support services typically involve performing the following services:

- *Data centre and systems management,*
- *Infrastructure management,*
- *Web hosting and internet access,*
- *Desktop solutions,*
- *Messaging services,*
- *Program management,*

- *Hard-ware and software maintenance and monitoring,*
- *Network management, including VPN services,*
- *Service desk capabilities,*
- *Physical security,*
- *Network security,*
- *Risk management, 'and*
- *Regular administration.*

For this function, the Group Companies specify the basic requirements and BlPL is responsible for undertaking the routine activities in line with the same.

The details of the services performed by BIPL with respect to IT infrastructure support services are given below:

- *Monitoring Services: Remote monitoring and management of the Windows based servers and machines,*
- *Network Services: Remote monitoring and management of the various network components like routers, switches, firewalls;*
- *Messaging Services: Managing the mailboxes and user accounts including the servers like Lotus Notes, etc;*
- *Base Administration: Maintaining the various databases and carrying out administration activities;*
- *Net-work Services: BIPL provides a-*variety of network services to help Group Companies share information more effectively. It enables the Group Companies to enjoy greater mobility and real-time data access, extend and leverage existing infrastructure and enhance service delivery with the help of wireless services. It also provides technology expertise pertaining to new infrastructure implementation, an upgradation or expansion, or continuing support.*
- *Service desk: Taking incoming voice calls from the Group Companies. The Group Companies can call up and log in their complaints for any problems at the help desk/ service desk.*

In addition to the above, it is also involved in software development/ enhancement of software. This involves routine development of the software for use-within the Bechtel Group. Software development involves steps like requirement analysis, testing, modification to the existing software and maintenance and enhancement of the software.

2). The assessee is engaged in providing engineering design and other services. As per TP study, in this segment, the assessee provides IT services including the following:

it is also involved in software development/ enhancement of software. This involves routine development of the software for use within the Bechtel Group. Software development involves steps like requirement analysis, testing, modification to the existing software and maintenance and enhancement of the software.

> *3) Considering the facts and the description of services given above, it is clear that in segment, the assessee is a KPO and is also engaged in software development."*

20.1. No challenge to this finding is available either by way of any ground or argument.

20.2. We find that the prayer for exclusion of **Sankhya Infotech Ltd.** and **Sasken Communications Technologies Ltd** by the assessee has not been agitated before the DRP and the arguments are being advanced by the assessee for the first time. Accordingly in the absence of any objection from the Revenue for agitating the issue for the first time, we deem it appropriate to restore the issue back to the TPO to consider the objections on the basis of facts and evidences and pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

20.3. Addressing the arguments advanced for exclusion of the remaining 5 comparables, we find that the issue has been agitated before the DRP. We find that the judicial precedent justifying the exclusion of **Infosys Ltd.** now is a settled issue as ownership of brands and proprietary products makes the said comparable an incomparable as the bargaining power for higher profits stands accepted. No rebuttal either on facts or law qua the prayer for exclusion of the said company has been advanced by the Revenue. Considering the facts and arguments this comparable is directed to be excluded.

20.4. We find that exclusion of **Wipro Technologies Ltd.** has been requested on the basis of judicial precedent wherein a Master Service Agreement between CITI group with Wipro Technology guaranteeing minimum Revenue of US dollars 500 million for six years has been cited. The Ld.CIT DR has put up a spirited defense so as to argue how the guarantee of minimum Revenue of 500 million US dollars can be said to impact net profits as it only guarantees minimum work upto the extent agreed. It has been his argument that minimum guarantee of a specific amount of Revenue is a matter of fact and how it can impact pricing so as to impact net profitability has to be established and without the said exercise it can not be excluded in a method like TNMM. This facet it was argued needs to be established. Considering the overall factual matrix and the precedent cited, we deem it appropriate to restore the issue to the TPO the assessee may demonstrate its claim on facts as whether the aspect has been considered in its entirety in the precedent cited has not been addressed by the parties.

20.5. The exclusion of **Acropetal Technologies**, we find has also been agitated before the DRP. The assessee has argued high turnover as a ground for its exclusion. The DRP relying on the decision of the Hon'ble Delhi High Court in Chrys Capital has held that the Hon'ble high Court explaining the decision rendered in Agnity India Technologies Pvt.Ltd. has concluded that profits are not dependent on high turnover and the said position has not been controverted. Before us the exclusion, we find is not sought on this ground and exclusion of the said comparable has been sought on the ground that it fails the employee cost filter of 25% as the employee cost ratio is stated to be 15.30%. We find that this factual aspect has not been argued before the DRP. Accordingly it is deemed appropriate to restore the issue back to the TPO to consider the facts on record qua the fresh line of argument advanced by the assessee as admittedly the correctness of the facts relatable to this argument have not been tested either by the TPO or the DRP. Since the argument has not been advanced the occasion to consider the correctness of the same obviously had not arisen. The issue is restored back to the TPO for fresh adjudication.

20.6. The exclusion of **E-Infochips India Pvt.Ltd.** we find was sought before the DRP on the ground that it failed the service income filter. The said claim on facts was found to be incorrect. Annual Report was referred to by the DRP which showed that sale from software product was only 15% and the financials of the company were thus taken at the entity level as the filter of 25% was found to be not crossed. Accordingly, we find that the assertions made in the synopsis that segmental data is not available is found to be incorrect. On facts no argument establishing that facts in the judicial precedent cited are identical have been advanced. The comparable is directed to be retained.

20.7. The facts for exclusion of **E-Zest Solutions** show that the DRP at pages 315 to 316 (internal pages 53 & 54) has upheld the finding of the TPO and held that the said company is predominantly engaged in software development services. This finding has not been rebutted by the assessee and nothing in support of the argument that it is functionally dissimilar has been placed before us. The comparable accordingly is directed to be retained.

21. The conclusions arrived at have been based on the facts and arguments as placed before the Bench. The conclusions arrived at have been based on admitted facts on record and the specific reasoning for agreeing or disagreeing with the arguments of the parties have been addressed as the issues are fact driven and judicial precedent referred to where facts are not identical though have been considered but reference thereto is refrained from as the conclusions on the issues are fact based, fact driven and fact-ridden.

22. Although, we have already addressed the issue of redrawing the segmental and the issue considering the submissions of the parties has been restored. However, we note that the assessee before us has argued that the reimbursement of expenses received has been routed through the P&L account. It has been submitted that the assessee has merely acted as an intermediary between the AEs and the service providers for the administrative convenience and no services have been provided by the assessee in this respect. Reliance has been placed upon the judicial precedent that service providers need not apply a mark-up on reimbursement of expenses received, which are paid to third parties:-

- *NTT Data FA Insurance Systems (India) Private Limited (I.T.(TP).A No.1311/Bang/2010)*
- *M/s FCG Software Services (India) Pvt.Ltd. [IT(T.P)A No.1242/Bang/2012]*
- *M/s Cognizant Technology Solutions India PVt.Ltd. [ITA No.114 & 2100/Mds/2011]*
- *HSBC Electronic Data processing India Ltd. [ITA No.247/Hyd/2014]*
- *LG Soft India Pvt.Ltd. [IT(TP) No.1121/Bang/2011]*
- *Tesco Hindustan Service Centre Pvt.Ltd. [IT(TP).A. No.1317/Bang/2010]*

22.1. Without prejudice to the main argument that segmental account prepared in the TP study is appropriate the assessee has requested that the TPO may be directed in the alternate if the assessee fails in its main prayer to consider the revised allocation methodology in the case of IT Infra and FAS segment. According to the chart placed in the synopsis page 27, it should be modified as under:-

S.No.	Particulars	EDS segment	FAS segment	IT Infra support service segment
1.	*As per TP study* - *Considering provisions & liabilities written back as operating item*	*10.84%*	*10.52%*	*14.32%*
2.	*As per TP study* - *Considering provisions & liabilities written back as non-operating item*	*10.69%*	*10.29%*	*14.14%*
3.	*Revised segmental profitability as per Ld.TPO* - *Reallocating the expenses on the basis of revenue;* - *Including reimbursements in the revenue as well expenses; and* - *Considering provisions written back as non-operating item*	*8.98%*	*21.57%*	*18.06%*

22.2. As observed the issue stands restored in the light of the request of the parties as the TPO is found to have not carried out the direction of the DRP for which purpose the Ld.CIT DR requested that it may be restored. The Ld.AR has canvassed that the TPO may be directed to consider both the main as well as the alternate arguments before 'him'. In view of the above the TPO is directed to consider the issue afresh and pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

23. The assessee has also requested for economic adjustments on account of risk adjustment across the comparables vide Ground No.1.5. The said prayer it has been stated has been accepted in the case of assessee by the ITAT in 2004-05 and 2005-06 assessment years. The said issue accordingly is also restored to the TPO directing him to consider the calculation's which the taxpayer may provide for the comparables which are ultimately selected in the fresh search carried out by the parties in the EDA segment and qua the comparables retained in the remaining two segments.

24. Addressing the issue on account of receivables qua which Ground No. 5 read with No. 5.1 and 5.2 has been raised by the taxpayer, we find that reliance has been placed upon the precedent as is available in assessee's case in 2010 – 11 assessment year. Relying on the same it has been argued that the adjustment on account of receivables has been stated to be deleted. It has been submitted that the ITAT has held that the assessee is a debt free company and that it is not justifiable to presume that borrowed funds would have been utilized to pass on the facility to its AEs. It has been argued that the ITAT relying on **Kusum Healthcare Private Limited TS – 129 – ITAT 2015 (Del – TP)** has held that no separate adjustment is warranted on account of interest on receivables. Accordingly, the taxpayer has placed the following contentions before the ITAT:-

- *"The Appellant humbly submits that working capital adjustment undertaken takes into account the impact of outstanding receivables on the profitability and accordingly no separate adjustment is warranted on account of outstanding receivables.*
- *The Appellant would also like to submit that the interest component is embedded in the sale price and commercial considerations needs to be appreciated i.e. to ensure a healthy relationship and to maintain a long business transaction, such compensation or charging of interest are being ignored commonly by business.*
- *In this regard, the Appellant would like to place reliance on the recent ruling passed by Hon'ble Delhi ITAT in the case of Kusum Healthcare Private Limited (supra), wherein it was held that if the impact of the credit period was duly factored in the "working capital adjustment", while determining the arm's length price, then no separate or further adjustment for interest on the receivables, was warranted in the hands of the tested party."*

24.1. It has also been submitted that:-

- *"Further, in the case of Information Systems Resource Centre Private Limited [TS-252-ITAT-2015 (Mum)-TP and Goldstar Jewellery Ltd. vs JCIT [ITA No.6570/Mum./2012] order dated 14.1.2015, the Hon'ble Mumbai Tribunal has followed the ruling of the Hon'ble Delhi Tribunal in the case of Kusum Healthcare Private Limited (supra) in relation to adjustment made on accounts of receivable outstanding from AEs.*
- *No interest charged by the AEs from the Appellant and accordingly interest charged by Appellant to the AEs does not make business sense."*

25. The Ld.CIT DR relies upon the orders of the authorities below.

26. Before considering the submissions of the parties, we first propose to address the facts. It is seen that the issue has been considered by the TPO at external page 88 to 113 and the issue has been summed up by the DRP's internal pages 75 to 81 para 8.3 to 8.3.3. The DRP relying upon the decision of the Jurisdictional High Court in CIT vs Cotton Naturals (I) Pvt. Ltd. (2015-TII-09-HC-DEC-TP) on facts has restored the issue holding that neither the currency in which the receivables is to be paid nor the computations of the receivables have been provided. The TPO was directed to examine the facts and ascertain the currency and consider the Agreement entered into by the assessee with its AE in terms of the direction given at pages 80 and 81 of the order. In view of the same, the issue is restored to the TPO to consider the same and the facts as argued by the assessee before the ITAT in 2010-11 assessment year may be demonstrated to be in existence in the year under consideration also before the TPO as reliance placed on Kusum Healthcare Pvt.Ltd. qua the facts in the year under consideration also needs to be established. Accordingly the issue is restored back with the above direction.

27. In the result, the appeal of the assessee is partly allowed for statistical purposes.

The order is pronounced in the open court on 14th of July, 2016.

Sd/-	**Sd/-**
(L.P.SAHU) **ACCOUNTANT MEMBER**	**(DIVA SINGH)** **JUDICIAL MEMBER**

Amit Kumar
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
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