IN THE INCOME TAX APPELLATE TRIBUNAL
“K” Bench, Mumbai

Before Shri Pramod Kumar, Vice President
and Shri Ravish Sood, Judicial Member

IT (TP)A No.134/Mum/2013
(Assessment Years: 2008-09)

Deutche CIB Centre Private Limited, Block B-7, Nirlon Knowledge Park, Western Express Highway, Mumbai – 400 063 PAN – AACCG6204D	Vs.	ACIT, Circle-6(3), Room No. 522, Aayakar Bhavan, M.K. Road, Mumbai 400 020
(Appellant)		**(Respondent)**

Appellant by: Shri Jehangir D. Mistri, Senior Advocate
Respondent by: Shri Sunil Jha, D.R

Date of Hearing: 20.10.2020
Date of Pronouncement: 09.11.2020

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the A.O under Sec. 144C(13) r.w.s 143(3) of the Income Tax Act, 1961 (for short ‘Act’), dated 31.10.2012 for A.Y. 2008-09. The assessee has assailed the impugned order on the following effective grounds of appeal before us:

“**GROUNDS OF APPEAL**

1. On the facts and in the circumstances of the case and in law, the learned TPO and the learned AO under directions issued by the Hon'ble DRP, erred in making an addition of Rs.121,593,156 to the Appellant's total income based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act").

2. On the facts and in the circumstances of the case and in law, the learned AO erred and the Hon'ble DRP further erred in confirming the action of the learned TPO in not stating any reasons to show that either of the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied before making an adjustment to the income of the Appellant.

3. On the facts and in the circumstances of the case and in law, the learned AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO of disregarding the benchmarking analysis and comparable companies selected by the Appellant based on the contemporaneous data in the transfer pricing study report maintained as per section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ("the Rules") and the various submissions made by the Appellant.

4. On the facts and in the circumstances of the case and in law, the learned AO erred and the Hon'ble DRP further erred in upholding/confirming the action of the learned TPO of conducting a fresh benchmarking analysis using non-contemporaneous data and substituting the Appellant's analysis with fresh benchmarking analysis on his own conjectures and surmises. Thus, the Appellant prays that the fresh benchmarking analysis conducted by the learned TPO is liable to be quashed or alternatively ignored.

5. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding/confirming the action of the learned TPO of selecting companies using information gathered under section 133(6) of the Act.

6. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding/confirming the action of the learned TPO of disregarding the Appellant's contention with respect to the functional non-comparability of the alleged comparables selected by the learned TPO.

7. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding the action of the learned TPO of considering companies engaged in rendering high-end services such as knowledge processing services, engineering design services etc as comparable to the Appellant.

8. On the facts and circumstances of the case the learned AO erred and Hon'ble DRP further erred in upholding/confirming the action of the learned TPO in considering companies earning supernormal profits as comparable without appreciating / comparing the functions, asset and risk undertaken by such alleged comparables.

9. On the facts and in the circumstances of the case and in law, the learned AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO in not demonstrating that the motive of the Appellant was to shift profits outside of India by manipulating the prices charged in its international transactions which is a pre - requisite condition to make any adjustment under the provision of Chapter X of the Act.

10. On the facts and circumstances of the case and in law, the learned AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO in ignoring the provisions of Rule 10B(4) of the Rules which authorizes usage of multiple year data of comparable companies for

the purpose of determination of the arm's length price as defined under Sec.92F(ii) of the Act.

11. On the facts and in the circumstances of the case and in law, the learned A.O erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO in not allowing working capital and risk adjustment in accordance with Rule 10B(1)(e)(iii) of the Rules, to account for difference in the net profit margins realised by the Appellant *vis-* a-vis alleged comparable uncontrolled transactions selected by the learned TPO.

12. On the facts and in the circumstances of the case and in law, the learned AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO in denying the benefit of 5 percent from the arithmetic mean as provided in proviso to Section 92C(2) of the Act, while computing the adjustment to the total income of the Appellant

13. The AO erred in not granting credit for the tax deducted at source of INR 467,629, without assigning any reasons thereto. The Appellant prays that the AO be directed to grant credit for the balance tax deducted at source of INR 467,629."

2. Briefly stated, the assessee company which is a subsidiary of Deutsche Knowledge Services Pte. Ltd., Singapore and engaged in the business of Global Processing Centre for undertaking back office processing/support services mainly to support the various business lines of its overseas group entities, had e-filed its return of income for A.Y 2008-09 on 30.09.2008, declaring its total income at Rs.70,59,620/-. The assessee had declared a 'book profit' of Rs.13,48,51,798/- under Sec. 115JB of the Act and paid taxes on it. Subsequently, the assessee had filed a revised return of income on 31.03.2010, declaring its total income at Rs.70,59,620/- and a 'book profit' of Rs.13,48,51,798/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings, the A.O made a reference under Sec. 92CA(1) of the Act to the Transfer Pricing Officer-1(3), Mumbai (for short "TPO") for benchmarking the International transactions of the assessee. The TPO vide his order passed under Sec. 92CA(3), dated 31.10.2011, on the basis of a detailed reasoning given in his order suggested an adjustment of Rs.17,13,58,467/- to the Arm's Length Price (for short "ALP") of the International transactions of the assessee. After receiving the order

passed by the TPO under Sec. 92CA(3), dated 31.10.2011, the A.O passed a draft assessment order under Sec. 144C r.w.s 143(3), dated 28.12.2011, and proposed an adjustment of Rs.17,13,58,467/- to the returned income of the assessee.

4. Aggrieved, the assessee filed objections against the adjustment which was proposed by the A.O before the Dispute Resolution Panel-1, Mumbai (for short “DRP”). The DRP vide its order under Sec. 144C(5), dated 27.09.2012 issued certain directions to the TPO for recomputing the ALP of the International transactions of the assessee. In compliance to the directions of the DRP the TPO, vide his order dated 25.10.2012 recomputed the ALP of the international transactions and suggested an adjustment of Rs.12,15,93,156/- to the value of the International transactions of the assessee. On the basis of the aforesaid order passed by the TPO under Sec.92CA(4), dated 25.10.2012, the A.O vide its order passed under Sec. 144C(13) r.w.s 143(3), dated 31.10.2012 made an addition of Rs.12,15,93,156/- to the returned income of the assessee. The A.O while culminating the assessment observed, that in view of the *proviso* appended below Sec. 92CA(4) of the Act, the assessee company would not be entitled for deduction under Sec.10A of the Act on the amount by which its total income was enhanced after computation of its income under the aforesaid statutory provision. In the backdrop of his aforesaid deliberations the A.O restricted the assessee’s entitlement towards deduction under Sec. 10A to an amount of Rs.18,15,92,931/-. Accordingly, the A.O worked out the net taxable income of the assessee at Rs.12,86,52,782/- under the normal provisions. Further, the ‘book profit’ of the assessee was determined under Sec. 115JB at Rs.13,48,51,798/-.

5. The assessee being aggrieved with the order passed by the A.O under Sec. 144C(13) r.w.s143(3), dated 31.10.2012 has carried the matter in appeal before us. The ld. Authorized Representative (for short ‘A.R’) for the assessee Shri Jehangir D. Mistri, Senior Advocate, at the very outset of the hearing of the appeal took us through the facts of the case. It was submitted by the ld.

A.R that pursuant to the directions given by the DRP, vide its order passed under Sec.144C(5), dated 27.09.2012, the TPO vide his order passed u/s 92CA(4), dated 25.10.2012 had reworked out the ALP adjustment of the International transaction of the assessee at Rs.12,15,93,156/-. Pursuant thereto, the A.O had vide his order passed under Sec. 144C(13) r.w.s 143(3), dated 31.10.2012 had assessed the income of the assessee at Rs. 12,86,52,580 under the normal provisions and determined its 'book profit' u/s 115JB at Rs. 13,48,51,798/-. Adverting to the nature of the International transactions of the assessee, it was submitted by the ld. A.R that the controversy involved in the present appeal is confined to the benchmarking of the business support services (ITeS) of Rs. 135.83 crores that were inter alia provided by the assessee to its group entities across the world. It was averred by the ld. A.R that in case if three comparable companies viz. (i). Mold Tek Technologies Ltd.; (ii). Eclerx Services Ltd.; and (iii). Accentia Technologies Ltd that were wrongly included by the TPO/DRP as comparable in the final list of 20 comparables for benchmarking the business support services (ITeS) of Rs. 135.83 crores that were inter alia provided by the assessee to its group entities during the year under consideration were excluded from the list of comparables, then, the international transactions of the assessee would be within the tolerance limit +/- 5% and thus would be within arm's length.

6. Per contra, the ld. Departmental representative (for short "D.R") supported the orders of the lower authorities. It was submitted by the ld. D.R that as the aforementioned comparable companies were rightly selected by the TPO by adopting the search strategy for identifying comparables for ITeS industries, therefore, the claim of the ld. A.R for exclusion of the aforesaid comparable did not merit acceptance

7. Before dealing with the contentions of the authorised representatives for both the parties we shall briefly cull out the facts involved in the case before us. As is discernible from the records, the assessee was remunerated at cost plus 13.24%. Adopting the Transactional Net Margin Method (TNMM) for

benchmarking its International transactions and Operating Profit/Total Cost (OP/TC) as the PLI the assessee had justified the arm's length nature of the controlled transactions with reference to the profit realized by 11 comparable independent companies. Accordingly, the assessee had justified the arm's length nature of its international transactions of provision of business support services to its group entities with reference to the profit margin that was realised by 11 comparable Indian companies based on figures of three years i.e F.Y. 2005-06, F.Y. 2006-07 and F.Y. 2007-08 (to the extent available), as under:

Sr. No.	Company name	Weighted average NCP (in %)
1.	Allsec Technolgoies Limited	6.22
2.	CMC Limited	19.64
3.	C.S Software Enterprises Limited	24.04
4.	Cosmic Global Limited	17.66
5.	CRISIL Limited	22.98
6.	Datamatics Technologies Limited	5.36
7.	ICRA Management Consulting Services Limited	10.90
8.	ICRA Online Limited	16.35
9.	IDC (India) limited	14.66
10.	Mphasis BFL Limited	12.46
11.	R Systems International Limited	10.47
	Arithmetical Mean (%)	**14.61**

However, in order to establish the comparability between the margins earned by the aforesaid comparable companies an economic adjustment was carried out by the assessee in the TP study report to the returns of the comparable companies, pursuant whereto the margins submitted by the assessee to justify the ALP of the international transactions was as under:

Sr. No.	Company Name	2006	2007	2008	Average
		In %	In%	In %	In %
1.	Allsec Technologies Limited	20.88	8.55	7.62	14.71
2.	CMC Limited	6.35	29.42	14.20	17.88
3.	CS Software Enterprises Limited	8.73	12.57	18.86	10.65
4.	Cosmic Global Limited	12.17	7.44	21.00	9.80
5.	CRISIL Limited	6.35	12.55	14.64	9.45
6.	Datamatics Technologies Limited	6.35	7.01	7.62	12.79
7.	ICRA Management Consulting Services Limited	16.80	8.77	7.62	12.79

8.	ICRA Online Limited	6.98	32.66	7.62	19.82
9.	IDC (India) limited	11.49	11.64	11.65	11.56
10.	Mphasis Limited	6.35	7.01	10.55	6.68
11.	R. System International Limited	6.35	7.01	7.62	6.68
	Overall Arithmetic Mean	9.89	13.15	11.73	**11.52**

As the arithmetic mean margin of the aforesaid comparables worked out at 11.52%, it was, thus, claimed by the assessee that as its operating margin was more than the arithmetic mean of the aforesaid comparable companies, its International transactions were therefore at arm's length price.

6. The TPO after necessary deliberations did not find favour with the adoption of 2-3 years data by the assessee to work out the weighted average margin for computing the PLIs of the comparable companies. Being of the view that the aforesaid methodology adopted by the assessee was not in conformity with Rule 10D(4) of the Income Tax Rules which prescribed adoption of the current year financials, the TPO rejected the same. As regards the selection of the comparables companies by the assessee it was observed by the TPO that many of the said companies in the selected set were not comparable for the following reasons:

Sr. No.	Name of the Comparable	Remarks
1.	Allsec Technologies Ltd.	The company in into IT enabled services and qualifies all the filters applied by the TPO. Thus the same is considered as a comparable .
2.	R. Systems International (Segmental)	The Company's BPO segment is into IT enabled services and qualifies all the filters applied by the TPO. Thus the same is considered as a comparable.
3.	C.S. Software Enterprises	This company is also engaged in software services. In the assessee was asked to provide a copy of the annual report of the company which the assessee has failed to provide. The assessee is not taken segmental data instead services. As the extent of revenue from software services has not been excluded in calculating the margin this is not a good comparable. Hence, rejected.
4.	Crisil Ld.	Te company is engaged in providing credit rating and research services. Functionally, different, not engaged in ITES area hence not a good comparable, rejected.
5.	Cosmic Global Ltd.	The company is into IT enabled services and qualifies all the filter applied by the TPO. Thus the same is considered as a comparable.
6.	Datamatics Technologies Ltd.	The company is providing different kinds of business solutions like billing and payment solutions, e-retail

		solutions, publishing solutions, research and analysis, service automation, document processing and web enablement. The business profile does not match with assessee company, functionally different. Hence, rejected.
7.	ICRA Management Consulting Services Ltd	The company is engaged in mainly in advisory services. Functionally different, not a good comparable, hence rejected.
8.	IDC India Ltd.	The company is engaged in research and information services, functionally different not a good comparable hence, rejected.
9.	CMC Ltd.- ITES	The company fails 25% RPT filter applied by the TPO. Thus the company is not considered as a comparable.
10.	Mphasis Limited	The company is providing application development and maintenance services, infrastructure outsourcing services and BPO solutions. The assessee has not considered segmental data. Entity level data has been taken as a comparable which is not correct accordingly this is not a good comparable and hence rejected.
11.	ICRA Online Ltd. - BPO Services	The company is a subsidiary of ICRA Ltd. As per the information submitted by the company, its ITES segment fails 25% RPT filter. In this regard, the annual report of the company 9Contained in AR for ICRA Ltd) and reply received from the company are enclosed herewith as a soft copy.

Accordingly, the TPO being of the view that the benchmarking carried out by the assessee was erroneous in view of Sec. 92C(3)(a) of the Act, rejected the same. Further, the TPO confronted the assessee with a list of 22 comparables with a mean margin of 27.53% along with the search strategy that was adopted for identifying them as comparables for the ITeS sector, as under:

Sr. No.	Name of the comparable	Sales	Total Cost	Op. Profit	OP/TC
1.	Accentia Technologies Ltd (Seg.)	407293974	287301205	119992769	41.76%
2.	Acropetal Technologies (Seg.)	208000505	153737300	54263205	35.30%
3.	Aditya Birla Minacs Worldwide Ltd.	1881373000	1840860000	40513000	2.20%
4.	Asit C Mehta Financial Services ltd. (Seg.)	42434946	38782844	3652102	9.42%
5.	Caliber Point Business Solutions Ltd.	531355282	478836110	52519172	10.97%
6.	Coral Hubs Ltd. (Formerly Vishal Information Technologies ltd.)	380784348	252713811	128070537	50.68%
7.	Cosmic Global Ltd.	58663285	47577163	11086122	23.30%
8.	Crossdomain Solutions ltd.	265981723	209497067	56484656	26.96%
9.	Datamatics Financial Services Ltd. (Seg)	61925019	45915837	16009182	34.87%
10.	E4e Healthcare Solutions Ltd.	258185816	221205351	36980465	16.72%

11.	Eclerx Services Ltd.	1221990000	736670000	48532000	65.88%
12.	Genesys International Corporation Ltd.	471943198	320181048	151762150	47.40%
13.	HCL Comnet Systems & Services ltd. (Seg.)	3886156998	2924114030	962042968	32.90%
14.	Infosys BPO Ltd.	8275563629	6895526075	1380037554	20.01%
15.	Iservices India Pvt. Ltd.	133954773	122242652	11712121	9.58%
16.	Jindal Intellicom Pvt. Ltd.	199036101	217904764	-18868663	-8.66%
17.	Maple eSolution Ltd.	337938987	280611090	57327897	20.43%
18.	Mold Tek Technologies LTd.	178458000	90743000	87715000	96.66%
19.	R Systems International (Seg.)	213305585	204518285	8787300	4.30%
20.	Spanco Ltd. (Seg.)	416992585	375547040	41445545	11.04%
21.	Triton Corp Ltd.	1460342806	1179500427	280842379	23.81%
22.	Wipro Ltd. (Seg.)	11572000000	8898000000	2674000000	30.05%
	Average				
					27.53%

In reply, the assessee objected to the adoption of the aforesaid companies as comparable for the purpose of benchmarking of its international transactions, which however were met out by the TPO as per his observations recorded at Para 8.2 of his order u/s 92CA(3), dated 31.10.2011. Accordingly, the TPO adopting the mean margin of 27.53% of the aforesaid comparable companies worked out the ALP of the international transactions of the assessee at Rs.152,96,90,467/- and suggested an adjustment of Rs.17,13,58,467/-. Disposing off the objections filed by the assessee, the DRP directed the A.O to re-compute the ALP after considering the following 20 comparables:

Sr. No.	Company Name	NCPT
1.	Accentia Technologies Ltd. (seg)	41.76
2.	Acropetal Technologies (Seg)	35.30
3.	Aditya Birla Minacs Worldwide Ltd.	2.20
4.	Asit C Mehta Financial Services Ltd. (Seg.)	9.42
5.	Caliber Point Business solutions Ltd.	10.97
6.	Cosmic Global Ltd.	23.30
7.	Crossdomain Solutions Ltd	26.96
8.	Datamatics Financial Services (Seg.)	34.87
9.	E4e Healthcare Solutions Ltd.	16.72
10.	Eclerx services LTd.	65.88
11.	HCL Comnet Systems & Services Ltd. (seg.) (if it is within the R ? T filter of 25%)	32.90
12.	Infosys BPO Ltd.	20.01
13.	Jservices India Pvt. Ltd.	9.58
14.	Jindal Intellicom Pvt. Ltd.	-8.66
15.	Maple e solutionLtd.	20.43

16	Mold Tech Technologies Ltd.	96.66
17.	R Systems International (Seg.)	4.30
18.	Spanco Ltd. (Seg.)	11.04
19.	Triton Corp. Ltd.	23.81
20.	Wipro Ltd (Seg.)	30.05

The TPO giving effect to the aforesaid directions of the DRP, therein vide his order passed under Sec. 92CA(4) scaled down the adjustment to an amount of Rs.12,15,93,156/-. In fact, a perusal of the order of the DRP reveals that the latter by directing the AO to work out the mean margin by considering the aforementioned 20 comparables had arrived at a mean margin of 24.98% (OP/TC) of the said comparables.

7. We shall now advert to the contentions of the ld. Senior counsel on the basis of which he had tried to impress upon us that the aforementioned three comparable companies had wrongly been included in the final list of comparables by the TPO/DRP, as under:

8. **Mold-Tek Technologies Ltd:**

It is the claim of the ld. A.R that the aforementioned comparable company, viz. Mold-Tek Technologies Ltd. was wrongly included by the TPO/DRP in the final list of comparables for the purpose of benchmarking the International transactions of the assessee for the year under consideration. In order to drive home his aforesaid claim, it was submitted by the ld. A.R that the aforesaid company had acquired Crossroads Detailing Inc., an engineering services KPO, in April, 2007, and as a result thereof had witnessed an abnormally high growth of 56% in its I.T. division. Apart from that, it was submitted by the ld. A.R that the aforesaid company had during the year earned an abnormal profit of 95.71%. It was further submitted by him that the aforesaid company had during the year under consideration witnessed a scheme of arrangement involving amalgamation between Tekmen Tool Pvt. Ltd. and the said company AND a merger between the said company and Mold Tek Plastics Ltd., which was sanctioned by the Hon'ble High Court of Andhra Pradesh vide its order dated 25.07.2008. It was thus the claim of the ld. A.R that as the aforesaid company had witnessed extraordinary events during the year under consideration, it thus, could not have been selected as a comparable for benchmarking the International transactions of the assessee. Further, it was averred by the ld. A.R that the aforesaid company viz. Mold-Tek Technologies Ltd. was also functionally incomparable to the assessee company. In support of his aforesaid contention it was submitted by the ld. A.R that unlike the assessee company which as a captive entity was providing business support service (ITeS) to its group entities across the world, the aforesaid company was rendering engineering and design KPO services to its clients, which was being used in construction of buildings. Further, it was submitted by the ld. A.R that the aforesaid company was using design tools like CAD/CAM, Stadd Pro and its employees unlike those of the assessee company were highly skilled software engineers. By drawing support from the aforesaid facts, it was submitted by the ld. A.R that the abovementioned company being differently placed in comparison to the assessee company was thus liable to be excluded from the final list of comparables.

8.1 Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that as the aforementioned company was functionally comparable and was selected by the TPO by adopting the search strategy for identifying comparables for ITeS industries, therefore, the claim of the ld. A.R for exclusion of the said company did not merit acceptance.

8.2 We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. On a perusal of Page No. 1 of assessee's paper book (for short 'APB') to which our attention was drawn by the ld. A.R, we find, that as per the 'annual report' of the aforementioned company i.e Mold-Tek Technologies Ltd, it is a matter of fact borne from the record that the acquisition of Crossroads Detailing Inc., USA, an engineering services KPO, in April, 2007, had paved the way for the aforementioned company to enter into high rise buildings and commercial buildings space which had high growth potential. For the said reason, the aforementioned company i.e Mold-Tek Technologies Ltd had achieved about 56.49% growth during the year under consideration and registered a turnover of 17.86 crore. In fact, we find, that a coordinate bench of the Tribunal i.e ITAT, Delhi Bench in the case of **M/s H & S Software Development and Knowledge Management Centre Pvt. ltd. Vs. DCIT, Circle 10(1), new Delhi [ITA No. 436/Del/2013, dated 20.03.2018**], had after inter alia considering the abnormal growth of 56% of the aforesaid comparable i.e Mold-Tek Technologies Ltd. directed exclusion of the same as a comparable forthe purpose of benchmarking the International transactions of the assessee before them. Further, the 'annual report' of the aforementioned company i.e Mold-Tek Technologies Ltd reveals that a scheme of arrangement involving Tekmen Tools Pvt. Ltd., i.e the transferor company and Mold-Tek Technologies Ltd, the transferee company (the aforementioned company) AND the demerger between Mold-Tek Technologies Ltd, i.e the demerged company (the aforesaid company) and Mold-Tek Plastics Ltd, resulting company was sanctioned by the Hon'ble High Court of Andhra Pradesh, vide its order dated 2th July, 2008. The appointed data for amalgamation and the demerger were 1st October, 2006 and 1st April, 2007, respectively, and the effective date of the scheme was 26th August, 2008. In our considered view, pursuant to the aforesaid restructuring of the aforementioned company i.e Mold-Tek Technologies Ltd., the same could not have been adopted as a comparable for benchmarking the international transactions of the assessee for the year under consideration. In fact, we find, that a similar view had been taken by the ITAT, Mumbai, in the case of **Dialogic Networks (I) P. Ltd. Vs. ACIT, Circle 3(3), Mumbai [ITA No. 7280/Mum/2012, dated 27.07.2018].** In the aforesaid case, the Tribunal had concluded that pursuant to the restructuring of the aforesaid company i.e Mold-Tek Technologies Ltd. in A.Y

2008-09, it could not have been considered as a comparable. Also, we find that the aforementioned comparable is even otherwise functionally dissimilar as in comparison to the assessee before us. On a perusal of its 'annual report' for the year under consideration, we find, that the aforesaid company i.e Mold-Tek Technologies Ltd. was providing structural engineering services and had also ventured into rebar detailing for concrete buildings in the recent past. In fact, the functional profile of the aforesaid comparable had came up before the 'Special bench' of the ITAT, Mumbai, in the case of **Maersk Global Centres (I) Pvt. Ltd. Vs. ACIT, Circle 6(3), Mumbai, ITA No.7466/Mum/2012, dated 07.03.2014**. It was observed by the Tribunal that the aforesaid company during the year under consideration was pioneer in structural engineering KPO services and its entire business comprised of providing only structural engineering services to its various clients. Further, as observed by the Tribunal, from the information available on the website, it stood revealed that the aforesaid company was a leading provider of engineering and design services with specialization in civil, structural and mechanical engineering services, and had a strong team of skilled resources with world class skill sets. As therein observed, the aforesaid comparable was stated to have consistently helped the clients to cut down design and development costs of civil, structural mechanical and plant design by 30%-40% and had delivered technologically superior outputs to match and exceed expectations. Further, it is stated that the aforesaid company had in-house software development team, quality control training and trouble shooting facilities. As observed by the Tribunal, the aforementioned company was also rendering web design and development services with experience in turning them into an effective graphic design representation and creating dynamic and graphic rich web application from IT specs, design prints etc. In the backdrop of its aforesaid observations, it was observed by the Tribunal that as per the information available in the 'annual report' of the aforementioned company i.e Mold Tek Technologies Ltd, as well as from the details available on its website, it could safely be concluded that the company was involved in providing high-end services to its clients involving higher special knowledge and domain expertise in the field and, thus, the same could not be taken as a comparable to the assessee before them which was mainly involved in providing low-end services. On the basis of our aforesaid observations, we are of a strong conviction that in the backdrop of the high-end services provided by the aforementioned company i.e Mold-Tek Technologies Ltd, it could safely be held to be functionally dissimilar to the assessee company, which was providing business support services (ITeS) to its group entities across the world. Accordingly, we find ourselves to be in agreement with the claim of the ld. A.R, that in the backdrop of the functional dissimilarity also the aforementioned company i.e Mold-Tek Technologies Ltd., could not have been included in the final list of the comparables for the purpose of benchmarking international transactions of the assessee company for the year under consideration.

8.3 On the basis of our aforesaid observations and the reasons given hereinabove, we are of a strong conviction that the aforesaid company i.e Mold-Tek Technologies Ltd could not have been selected as a comparable for benchmarking the International transactions of the assessee company. Accordingly, we herein direct the A.O to exclude the aforesaid company i.e Mold-Tek Technologies from the final list of comparables for the purpose of benchmarking the International transactions of the assessee for the year under consideration.

9. **<u>Eclerx Services Ltd:</u>**

It is the claim of the ld. A.R before us that the aforementioned company had wrongly been included as a comparable by the TPO/DRP in the final list of the comparables. The ld. A.R had sought exclusion of the aforementioned company as a comparable primarily for three reasons, viz. (i). earning of abnormal profits due to the extraordinary event of acquisition of Igentica Travel Solutions Ltd. by the company in July, 2007; (ii) outsourcing of work to third party vendors by the company; and (iii) functional dissimilarity as in comparison to the assessee company. On the contrary, it was averred by the ld. D.R that the aforesaid company was selected as a comparable by the TPO on the basis of the search strategy conducted by his office for identifying comparables for the ITeS sector. It was thus submitted by the ld. D.R that as the aforesaid company was rightly selected as a comparable for benchmarking the International transactions of the assessee for the year under consideration, therefore, there was no merit in seeking of exclusion of the same from the final list of comparables.

9.1. On a perusal of the 'annual report' of the aforementioned company i.e Eclerx Services Ltd., we find that it is a matter of fact borne from the record that it had during the year under consideration acquired a U.K based company viz. Igentica Travel Solutions Ltd. on July, 2007. Further, as per the 'annual report' of the aforementioned company i.e Eclerx Services Ltd., the acquisition of Igentica Travel Solutions Ltd. had provided the aforementioned company with a set of 28 large customers primarily in Europe which had strengthened its presence in the said geographic region. Also, the acquisition of Igentica Travel Solutions Ltd. had given the company an entry platform in a new vertical - travel and hospitality besides consolidating its position in the retail and manufacturing space. As the aforesaid company pursuant to the acquisition of Igentica Travel Solutions Ltd. on July, 2007 had witnessed an abnormal profit of 65.88% during the year under consideration, therefore, in our considered view it could not have been selected as a comparable for benchmarking the International transactions of the assessee for the year under consideration.

9.2 Further, a perusal of the financial results of the aforesaid company, Page 12 of APB, therein reveals that it had outsourced services to third party vendors which therein constituted 20.39% of its total expenses. The aspect that when a company had outsourced its ITeS services, it cannot be said that its business results would be comparable to any other ITeS service provider rendering services entirely on its own, had been so held by a coordinate bench of the Tribunal in the case of **Google India Pvt. Ltd. Vs. DCIT [ITA No. 1368/Bang/2010]**. Considering the outsourcing of services to the extent of 20.39% of its total expenses by the aforesaid company, we are of the considered view that the said company i.e Eclerx Services Ltd. on the said count also could not have been adopted as a comparable for benchmarking the international transactions of the assessee for the year under consideration.

9.3 Lastly, we find that even otherwise the aforesaid comparable viz. Eclerx Services Ltd. is functionally dissimilar to the assessee company. The factum of functional dissimilarity of the aforesaid comparable had been looked into by the 'Special bench' of the Tribunal in the case of **Maersk Globle Centre (India) Pvt. Ltd. Vs. ACIT, Circle-6(3), Mumbai, [ITA No. 7466/Mum/2012, dated 07.03.2014]**. It was observed by the Tribunal, that a perusal of the 'annual report' of the aforesaid company i.e Eclerx Services Ltd. for the year under consideration i.e F.Y.2007-08, therein revealed, that the said company was in the business of providing data analytics and data process solutions to some of the largest brands in the world and was recognized as experts in chosen markets-financial services, retails and manufacturing. It was observed by the Tribunal, that the aforesaid company was providing complete business solutions by combining people, process improvement and automation and had employed over 1500 domain specialists working for the clients. It was observed, that the aforesaid company was providing industry specialised services for meeting complex clients needs, data analytics KPO service provider specialising in two business verticals - financial services and retail and manufacturing. It was stated to be engaged in providing solutions that not only just reduced cost, but helped the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. Further, the aforesaid company was stated to have a scalable delivery model and offered solutions that included data analytics, operations management and report services. Also, it was providing tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. The aforesaid company had a team dedicated to developing automation tools to support service delivery which increased productivity and allowed customers to benefit from further cost saving and output gains with better control over quality. In the backdrop of the aforesaid functional profile of the abovementioned company i.e Eclerx Services Ltd, the Tribunal was of the view that as the said company was mainly engaged in providing high-end services involving specialised knowledge and domain expertise in the field, thus, it could not be compared that the assessee before them which was mainly into providing of low-end services to its group concerns. In the backdrop of the functional profile of the aforementioned company i.e Eclerx Services Ltd., we find that beyond any scope of doubt it is functionally dissimilar to the assessee before us, which is engaged in providing of business support services (ITeS) to its group entities across the world. Accordingly, due to the functional dissimilarity of the aforesaid company i.e Eclerx Services Ltd, the same could not have been included in the final list of comparables for benchmarking the assessee's International transactions.

9.4. On the basis of our aforesaid observations, we herein direct the A.O to exclude the aforementioned company i.e Eclerx Services Ltd. from the final list of comparables for the purpose of benchmarking the international transactions of the assessee for the year under consideration.

10. **<u>Accentia Technologies Limited:</u>**

The ld. A.R had stated that the aforesaid company had wrongly been included by the TPO/DRP in the final list of the comparables, for the reason, viz. (i) that the profitability of the aforesaid company was substantially impacted pursuant to the amalgamation of Iridium Technologies and Geosoft Technologies, into the assessee company; (ii) that the aforesaid company unlike the assessee had developed and owned unique intangibles/intellectual property; (iii) the employee costs of the aforesaid company was lowly pitched at 12%; and (iv) the aforesaid company was functionally dissimilar to the assessee company. Accordingly, the ld. A.R had on the basis of his aforesaid contentions therein sought exclusion of the aforesaid company from the final list of comparables.

10.1 Per contra, the ld. Departmental Representative (for short 'D.R') had strongly supported the inclusion of the aforesaid company in the final list of comparables. It was submitted by the ld. D.R that as the aforesaid company being functionally comparable was rightly included by the TPO/DRP in the final list of comparables, therefore, the claim of the assessee for exclusion of the same from the final list of comparables being devoid of any merit was thus liable to be dismissed.

10.2 We have heard the authorized representatives in context of the inclusion of the aforesaid company as a comparable by the lower authorities. On a perusal of the 'annual report' of the aforementioned company i.e Accentia Technologies Ltd., it transpires that it is a matter of fact borne from the records that two units in Trivandrum, viz. (i). Iridium Technologies; and (ii). Geosoft Technologies had amalgamated into the parent company i.e Accentia Technologies Ltd. (the aforesaid company), during the financial year 2007-08. In fact, as per the 'annual report' the amalgamation of the aforesaid two units is stated to have been the launching pad for the company to consolidate its base in India and abroad through inorganic growth and project itself as a global player. Also, the aforesaid company had acquired three companies in USA, which therein had added a host of long standing clients to its portfolio. In the backdrop of the aforesaid facts, we are of the considered view that as the amalgamation of the aforesaid units into the aforementioned company i.e Accentia Technologies Ltd., being an extraordinary event during the year under consideration i.e A.Y. 2008-09, had had resulted in the enormous growth of the company and impacted its profitability, therefore, it could not have been selected as a comparable for benchmarking the international transactions of the assessee for the year under consideration.

10.3 Further, we find, that as per the 'annual report' of the aforementioned company, i.e Accentia Technologies Limited, it had developed and owned unique intangibles/intellectual property/process i.e copyrighted products namely Iridium Medical Transcription Automation System (iMTAS); Iridium Real Time School (iRTS); Iridium Accounts Management System (iAMS); Iridium Inventory Management System (iIMS); Iridium Payroll Management System (iPMS); Iridium Business Transcription System (iBTS); and Iridium Hosptial Management System (iHMS). In our considered view, the owning of the aforesaid intangible property by the aforementioned company therein renders it incomparable to the assessee before us.

10.4 Insofar, the employee cost of the aforesaid company i.e Accentia Technologies Ltd. is concerned, we find, that a perusal of its financials for the year under consideration, Page 25 of APB, therein reveals that the same works out at 12% of its total cost. Keeping in view the low employee costs of the aforesaid company, we are of the considered view that it could not have been feasibility selected as a comparable for benchmarking the International transactions of the assessee.

10.5 As regards the claim of the ld. A.R that the aforementioned company is functionally dissimilar to the assessee, we shall for the purpose of adjudicating the same look into the functional profile of the company. On a perusal of the 'annual report' for the year under consideration, we find that the aforementioned company had ventured into areas of the health care sector viz. Medical Transcription, Medical Coding, Medical Billing, Receivables Management (Collections). In the backdrop of the aforesaid functional profile of the abovementioned company i.e Accentia Technologies Ltd, as can be gathered from its 'annual report' Page 26 – 29 of APB, we are of the considered view that the same can be held to be functionally dissimilar to the assessee which is into provision of business support services (ITeS) to its group entities across the world.

10.6 In the backdrop of our aforesaid observations, and reasons given above, we are of a strong conviction that the abovementioned company, i.e Accentia Technologies Ltd. also could not have been included in the final list of the comparables for the purpose of benchmarking the international transactions of the assessee for the year under consideration.

13. As observed by us hereinabove, we are of the considered view that the abovementioned three companies which were included by the TPO/DRP in the final list of comparables for benchmarking the International transactions of the assessee, viz. (i). Mold-Tek Technologies Ltd.; (ii). Eclerx Services Ltd.; and (iii). Accentia Technologies Ltd., in terms of our observations recorded hereinabove, cannot be held to be comparable to the assessee. Accordingly, we herein direct the A.O/TPO to exclude the aforesaid three companies from the final list of comparables for the purpose of benchmarking the International transactions of the assessee for the year under consideration. Before parting, we may herein observe, that the assessee had furnished before us a "Chart", wherein it is stated that in case if the aforementioned three companies are excluded from the final list of comparables, then, its International transactions of provision of support services to its AEs would meet the arms length standard and no adjustment would be warranted. It is stated by the assessee that as the value of its International transactions i.e provision of ITeS services amounting to Rs.135,83,32,000/- is higher than the tolerance limit of +/- 5% as per the erstwhile Sec. 92C(2) of the Act of Rs.133,19,63,011/- [Rs. 140,20,66,327/- X 95%], therefore, no adjustment would be warranted. As we have excluded the aforementioned three companies from the final list of comparables, the A.O is therefore directed to verify the aforesaid claim of the assessee. In case the value of the International transactions of the assessee is found higher than the value of the tolerance band of +/- 5%, then, no adjustment shall be therein be made by the A.O.

14. As the TP adjustment made in the hands of the assessee had been vacated by us in terms of our aforesaid observations, we, therefore, refrain from adverting to the alternative contentions raised by the assessee before us in context of the said issue, which thus are left open. The **Grounds of appeal Nos. 1 to 12** are allowed in terms of our aforesaid observations.

15. The assessee has further assailed the order of the A,O, on the ground, that he had erred in not allowing credit for TDS of Rs. 4,67,629/-, despite the fact that the same was claimed in the return of income. As the aforesaid claim of the assessee would require verification of the facts from the records, we therefore, direct the A.O to look into the said issue. In case if the claim of the assessee is found to be correct then the A.O shall allow the credit of the amount of the tax deducted at source. The **Ground of appeal No. 13** is allowed for statistical purposes.

16. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 09.11.2020

Sd/-	Sd/-
Pramod Kumar	Ravish Sood
(VICE PRESIDENT)	(JUDICIAL MEMBER)

Mumbai, Date: 09.11.2020
Ps: R. Kumar

<u>Copy of the Order forwarded to</u> :
1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR “G” Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai