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

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER AND SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCING)
ITA No.6078/Del/2015
Assessment Year: 2011-12

Smart Cube India Pvt. Ltd. Tower-B, Windsor IT Park, A-1, Sector-125 Noida – 201 301 PAN No. AAHCS 8978 H	Vs.	ACIT, Circle – 24(1), New Delhi
(APPELLANT)		**(RESPONDENT)**

Appellant by	Shri Ajay Vohra, Sr. Advocate Shri Neeraj Jain, Advocate Shri Ramit Katiyal, Advocate
Respondent by	Shri M. Baranwal, Sr. D.R.

Date of hearing:	16/07/2020
Date of Pronouncement:	29/07/2020

ORDER

PER ANIL CHATURVEDI, AM:

This appeal filed by the assessee is directed against the order of the Assistant Commissioner of Income Tax (ACIT), Circle 24(1), New Delhi pursuant to the directions of DRP, passed u/s 143(3) r.w.s 144C of the Income-tax Act dated 22.01.2015 relating to Assessment Year 2011-12.

2. The relevant facts as culled from the material on records are as under:

3. Assessee is a company which is stated to be engaged in the business of providing Information Technology Enabled Services (ITES). Assessee filed its return of income for Assessment Year 2011-12 on 28.09.2011 declaring income of Rs.3,19,590/- and income of Rs.1,58,19,935/- under section 115JB of the Act. The case was selected for scrutiny and thereafter notices under section 143(2) & 142(1) were issued and served on the assessee. AO noted that during the year under consideration, assessee had undertaken International Transactions with its Associated Enterprises (AEs) exceeding Rs.15 crore. He therefore, referred the international transactions to TPO for determining the Arm's Length Price (ALP). Thereafter, TPO vide order dated 22.01.2015 passed under section 92CA(3) directed the AO to enhance the income of the assessee by Rs.5,52,01,139/- on account of ALP of international transactions relating to ITES services provided by the assessee to its AEs. In the draft assessment order, the AO proposed addition of Rs.5,52,01,139/- against which assessee filed objections before the DRP. The DRP vide directions issued u/s 144C(5) of the Act dated 14.09.2015 upheld the adjustments proposed by TPO. Consequently, an order was passed by the AO on 19.10.2015 u/s 143(3) r.w.s 144C wherein he determined the total taxable income of the Assessee at Rs.7,37,56,457/- and income under section 115JB at Rs.7,10,21,074/-. Aggrieved by

the aforesaid order of AO, assessee is now before us and has raised following grounds:

"1. That the assessing officer erred on facts and in law in completing assessment under section 144C read with section 143(3) of the Income-tax Act ("the Act") at an income of Rs. 7,37,56,457/- as against the returned income of Rs.3,19,590/-.

Transfer Pricing

2. That the assessing officer erred on facts and in law in making an adjustment of Rs.5,52,01,139/- to the arm's length price of the 'international transaction' of provision of IT enabled services on the basis of the order passed under section 92CA(3) of the Act by the TPO.

2.1 That the DRP/TPO error on facts and in law in re-characterizing the business of the appellant has "Knowledge Processing Outsourcing" service provider and accordingly, considering following companies as comparable to the appellant.

i. Acropetal Technologies Ltd (Seg)
ii. Eclerx Services Ltd.
iii. ICRA Techno Analytics Ltd.

2.2 That the DRP/TPO erred on facts and in law in applying export filter of 75% instead of 25%, applied by the appellant on the Transfer Pricing Documentation, and accordingly, rejecting Allsec Technologies Ltd. and Cyber Media Research Ltd., not appreciating that the companies were otherwise functionally comparable to the appellant and passing all other filters applied by the TPO.

2.3 That the DRP erred on facts and in law in upholding the contention of TPO for considering foreign exchange fluctuation as an item of non-operating nature for the computing operating profit margin of the appellant and the comparable companies, allegedly holding that the exchange fluctuation is a result of extraneous factors coming into existence due to market forces and factors like RBI, World markets, Macro-economic conditions.

2.4 That the DR[/TPO erred on facts and in law in incorrectly computing the operating profit margin of the appellant at 5.83% as against the correct operating profit margin of 7.83 % considering following incomes as non-operating income:

Sr. No.	Income	Amount (in Rs.)
1.	Foreign Exchange Fluctuation	2,687,705
2.	Miscellaneous incme	42,610
3.	Sundry Balances written back	1,002,338

2.5 That on facts and circumstances of the case and in law, the DRP/TPO erred in not allowing comparability adjustment on account of underutilization of capacity, arbitrarily holding that unless the specific details of abnormal factors in case of comparable companies are available in public domain, no comparability adjustment can be allowed to the appellant.

2.6 That the DRP/TPO erred on facts and in law in considering following companies in the final set of comparable companies without appreciating that companies with such high turnover does not satisfy the test of compatibility laid down under Rule 10B(2) of the Income-Tax Rules, 1962, for being operating in different market conditions and level of competition:

Sr. No.	Name of Comparable company	Turnover (crores)
1.	Infosys BPO Ltd.	1,129.11
2.	TCS E-serve Ltd.	1,443,.39

2.7 That the DRP/TPO erred on facts and in law in considering following companies as functionally comparable to the appellant for the purpose of benchmarking analysis, allegedly holding that under TNMM, the standard of compatibility are relatively relaxed and only broad similarities of functions are required.

2.8 That on facts and circumstances of the case and in law, the DRP/TPO erred in not allowing compatibility adjustment on account of underutilization of capacity, arbitrarily holding that adjustments are required to be carried out in the operating profit margin of the comparable companies and not the appellant.

2.9 That the DRP/TPO erred on facts and in law in not allowing appreciate risk adjustment to establish compatibility on account of the appellant being a low-risk-bearing captive service provider as opposed to the comparable companies who were independent IT enabled services provider.

2.10 That on the facts and in the circumstances of the case and in law the DRP/TPO erred in rejecting the contention of the appellant regarding risk adjustment, allegedly holding that "the assessee failed to present in quantitative terms what risks it bear, how they incurred and what the risks the comparables had and how the same was evaluated."

2.11 That on the facts and circumstances of the case the DRP/TPO erred in not appreciating that the international transaction of rendering IT enabled services are established to be at ALP applying Profit Split Method as the most appropriate method and no adjustment on account of the alleged difference in arm's length price would be warranted.

Corporate tax addition

3. That the assessing officer / DRP erred on facts and in law denying deduction of Rs.1,82,35,728/- claimed by the applicant under section 10B of the Act.

3.1 That the assessing officer / DRP erred on facts and in law in holding that the applicant was ineligible to claim deduction under section 10B of the Act on the ground that the applicant had received approval from the Director of Software Technology Park in India ('STPI') and not by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section-14 of Industrial Development and Regulation Act 1951.

3.2 That the assessing officer/DRP erred on facts and in law in not appreciating that the approval granted to the applicant by STPI, was under delegated powers from the inter-Ministerial Standing Committee in terms of Notification No.4 (RE-95/92-97) dated 30.04.1995, issued by the Director General of (Foreign Trade), Ministry of Commerce and Inter-Ministerial Communication letter No. D.O. No.4(1)/2006 IPHW dated March 23rd 2006, issued by the secretary of Ministry of Communications and Technologies.

3.3 Without prejudice, that the assessing officer / DRP erred on facts and in law in rejecting the claim of deduction under section 10B of the Act which has consistently been allowed since assessment year 2006-07.

3.4 Without prejudice to the above, the assessing officer / DRP erred on facts and in law in not allowing the alternative claim made by the applicant under section 10A of the Act.

3.5 That the assessing officer /DRP erred in not taking cognizance of the review orders passed by the Delhi High Court pursuant to the review petitions in case of Regency Creations and Valiant Communications, wherein the alternate claim under section 10A was held to be allowable.

4. That the assessing officer erred on facts and in law in levying interest under Section 234A, 234B and Section 234C of the Act.

The appellant craves leave to add, amend, alter or vary, any of the aforesaid grounds of appeal before or at the time of hearing of the appeal."

4. Subsequently Assessee vide application dated 29.10.2018 has also raised an additional ground of appeal which reads as under:

> *"The applicant craves leave to raise the following by way of additional ground of appeal:*
>
> > *"That on the facts and circumstances of the case and in law the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be caused."*
>
> *The aforesaid additional ground of appeal raises purely a legal issue. In view of the above, the aforesaid additional ground of appeal calls for being admitted and adjudicated on merits in terms of the discretion vested in your Honours under Rule 11 of the Income-Tax (Appellate Tribunal) Rules 1963 and the decision of the Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT : 229 ITR 383 and also the decision in the case of Jute Corporation of India vs. CIT : 187 ITR 688.*
>
> *The applicant trust that the request shall be acceded to.*
>
> *An opportunity of being heard is prayed for."*

5. Before us, at the outset, Learned AR submitted that he does not wish to press additional grounds raised by the assessee. In

view of the aforesaid submission of Ld AR, **the additional ground raised by the Assessee is dismissed**.

6. Ld AR thereafter submitted that though the assessee has raised various grounds in the grounds of appeal but broadly three issues needs adjudication. The first issue is with respect to Transfer Pricing issue. As far as the transfer pricing issues are concerned, the sole controversy which requires adjudication is with respect to adjustment of Rs.5,52,01,139/- to the arm's length price of international transaction of provision of Information Technology Enabled Services (ITES). The second issue is with respect to the corporate tax namely denying the claim of deduction under section 10B of the Act. The third issue is with respect to the levying of interest under section 234C. With respect to these issues, he has also filed a concise chart pointing out the issues involved.

7. We first proceed with adjudicating the transfer pricing issues.

8. TPO noted that the Assessee was incorporated on 08.01.2004 and was engaged in providing Information Technology Enabled Services (ITES) to its Associated Enterprises (AEs) and is a subsidiary of Smart Cube Ltd., UK. It was noted that during the year under consideration, assessee had entered into international transactions namely export of services to its AE's, the total

transaction value being Rs.21,46,32,278/- . Assessee had applied the Transactional Net Margin Method (TNMM) as the most appropriate method and the profit level indicator was Operating Profit/Operating Cost (OP by OC%) as the Profit Level Indicator (PLI) which was computed at 7.83%. Assessee had selected three comparables namely Allsec Technologies Ltd., Cyber Media Research Ltd. and ICRA Online Ltd. as comparable companies. As per the Assessee, the average mean profit margin of the comparable companies worked out at Rs. 3.74% as against its profit margin of 7.83%. Since the profit margin of the Assessee was higher than the average profit margin of comparable companies, Assessee considered the international transactions undertaken by it with its AEs to be at arm's length. TPO did not accept the contentions of the Assessee. TPO re-characterized the business of the assessee and held it to be Knowledge Process Outsourcing (KPO) as against the characterization by the assessee of its business as Information Technology Enabled Services (ITES) provider. He thereafter, considering the assessee to be a 'KPO', considered the following companies to be comparable with that of the Assessee and the margin were worked out as under:

Sr. No.	**Name of the Company**	**WCA Adjusted OP/OC (%)**
1.	Acropetal Technologies Ltd. (Seg)	14.20%
2.	Eclerx Services Ltd.	58.75%
3.	ICRA Techno Analytics Ltd.	26.20%
	Average	**33.05%**

9. TPO also in the alternative held that if the activities of the assessee are considered to be a non KPO, then the comparable companies and the profit margin worked out by him were as under :

Sr. No.	**Name of the Company**	**WCA Adjusted OP/OC (%)**
1.	Accentia Technologies Ltd.	29.30
2.	Acropetal Technologies Ltd. (Seg)	14.20
3.	E4e Healthcare Business Services Pvt. Ltd.	13.92
4.	Eclerx Services Ltd.	58.75
5.	ICRA Techno Analytics Ltd.	26.20
6.	Infosys BPO Ltd.	21.74
7.	Jindal Intellicom Ltd.	16.95
8.	Mecrogenetic Systems Ltd.	0.99
9.	TCS E-serve Ltd.	72.18
	Average	**28.25**

10. TPO thereafter, after considering the assessee to be a KPO (vide para 22.2 of the order) worked out the adjustment to the transfer pricing at Rs.5,52,01,139/-. Aggrieved by the order of TPO/AO, Assessee carried the matter before the DRP who upheld the order of TPO. Aggrieved by the order of AO consequent to the directions of DRP, assessee is now before us.

11. Before us, learned AR on the transfer pricing issues, firstly submitted that the TPO has incorrectly re-characterized the business of the assessee as KPO. To substantiate the business model, he pointed to the stepwise process undertaken between the assessee and the associated enterprises which is as under:

(i) "Third party customer approaches the associated enterprises for identifying vendors supplying products that meet the client requirements.
(ii) The associated enterprises enters into an agreement with the customers
(iii) The associated enterprises outsource the work to the appellant for supplier identification which involves two processes, viz., secondary and primary processes. This involves a combination of secondary and primary processes to meet the project/ client requirements. Below are the steps followed by the appellant while executing the work:

SECONDARY PROCESS	
Steps	*Work undertaken by the appellant*
I	*Understanding the objective of the request through a client call*
II	*Scoping out the data and listing the potential data sources, which involves Identifying the required data through TSC subscribed databases*
III	*Culling out suppliers from the TSC Internal Database (searching for vendors providing services as per the client's requirements)*
IV	*Identifying Potential Suppliers*
PRIMARY PROCESS	
I	*Calling suppliers to verify their contact details such as telephone number, email address, etc.*
II	*Issuing questionnaires to the vendors*
III	*Follow-up to get the responses from the listed companies*
IV	*Sharing product specifications over the email and a brief discussion of the product requirements of the customer*
V	*Collate the responses and questionnaires received from the vendors*
VI	*Communicating the details of the vendors to the associated enterprises*

12. He pointing to the steps involved, submitted that the Assessee is merely restricted to entering the databases with contact details, email ids of vendors in India and verifying the

same through phone calls and emails and thus the Assessee is providing routine ITES services.

13. He thereafter, submitted that Co-ordinate Bench of Tribunal in assessee's own case in assessment year 2010-11 and on identical facts had characterized the assessee to be a high-end ITES services provider and not as a KPO and in support of which he pointed to the order in ITA No.1103/Del/2015 dtd 27.4.2018 which is placed at pages 186 onwards in the paper book of case laws Volume 1. He thereafter, submitted that in subsequent year i.e. A.Y. 2013-14, the DRP vide directions dated 12.05.2017 has rejected the TPO's contention of considering the assessee as a KPO service provider and has held that the assessee to be a routine ITES company and to support the contention, he pointed to the copy of the order of the DRP for A.Y. 2013-14 which is placed in Volume-2 of the paper book.

14. He thereafter, submitted the TPO has arbitrarily held that the assessee to be a KPO service provider allegedly holding that during the course of assessment proceedings, assessee failed to place on record the details of the nature of services provided by the assessee. He submitted that during the course of hearing before TPO, assessee had placed on record before the TPO the sample copies of questionnaires issued to the vendors and the various reports therein. He thus reiterated that the assessee is merely performing collation of data and communication of the same in the form of a report/output to its associated enterprise

and accordingly, the assessee should be characterized as a routine ITES company.

15. He thereafter, submitted that the TPO in the impugned order while computing the operating margins of the Assessee @ 5.83%, considered incomes on account of Foreign exchange fluctuation (Rs. 26,87,705/-), Miscellaneous income (Rs. 42,610/-) and Sundry Balances written back (Rs.10,02,338/-) as non-operating income. He submitted that the aforesaid incomes have arisen during the normal course of business and are in the nature of operating income and therefore it should be considered while working out the operating margin. With respect to income on account of Foreign exchange fluctuation, he submitted that it is income of operating nature and for which he placed reliance on the following decisions:

- Fiserv India Pvt. Ltd. vs. DCIT in ITA No.1822/Del/2014.
- Agilis Information Technologies International Pvt. Ltd. vs. ITO in ITA No.786/Del/2015
- PCIT vs. B. C. Management Services Pvt. Ltd. in ITA Nos. 1064 & 1083 of 2017.

16. He submitted that against the order of the Tribunal in the above cases, Revenue had preferred appeals before the Hon'ble High Court and the High Court had dismissed the appeals of revenue in all the aforesaid three cases. He pointed to the copies of the decisions placed in the paper book.

17. With respect to considering the sundry balances written back as operating income, he submitted that the write back of liabilities are related to the core operation of the assessee and therefore, should have been taken into consideration while computing the margin of the assessee and in support of which he placed reliance on the decision in the case of Sony India Pvt. Ltd. 114 ITD 448 (Del) and Suessen Asia Pvt. Ltd. in ITA No. 1629/PUN/2011, the copies of which are placed in the paper book.

18. He submitted that if the aforesaid incomes are considered to be part of an operating income, the operating margin of the assessee would workout to 7.64%, and will be within the +/- 5% range of the margin of comparables and therefore, no adjustment will be called for.

19. On the issue of the comparables that have been selected by the TPO, he submitted that the TPO has selected 9 companies as being comparable to that of the Assessee. He submitted that the companies selected by the TPO do not satisfy the criteria of functional comparability as laid down under Rule 10B(2) of the IT Rules. He then proceeded to point out individually as to why those companies cannot be considered to be a comparable with that of Assessee.

20. With respect to the **Accentia Technologies Ltd.**, which was considered to be a comparables by the TPO, he submitted that it

is functionally not comparable with the assessee as it provides services to healthcare industry in the nature of medical transcription, medical coding, billing and receivable management etc. and it earns more than 75% of its revenue from the aforesaid services. He further submitted that its Annual report reveals that it also owns proprietary software products such as instaKare, InstaEMR, instaweb etc. He further submitted that it also owns significant intangible assets amounting to Rs. 21.94 crores in the form of goodwill/brands and IPR etc. He further submitted that though it is engaged into two businesses segment, i.e., medical transcription and development of software products but the segmental profitability for those segments is not available in the financial statements. He submitted that the aforesaid company was held to be not a comparable company by Hon'ble Delhi Bench of Tribunal in the case of E-Valueserve SEZ (Gurgaon) P. Ltd. Vs. ACIT (ITA No.5147/Del/2017) for A.Y. 2011-12. While arriving at the aforesaid conclusion, the Hon'ble Tribunal had held that it was engaged in medical transcription, medical coding and billing. He submitted that the aforesaid order of Tribunal has been upheld by Hon'ble Delhi High Court (ITA No 241/2018). He submitted that the aforesaid company has also been held not comparable on account of functional dissimilarity by the Delhi High Court in a number of decisions. He further relying on the decision of Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. Vs. CIT (ITA NO.102/2015) submitted that Hon'ble Court has held that in terms of provision of Rule 10B(2)(a), comparability of controlled and uncontrolled

transactions shall be judged with reference to specific service/product characteristics.

21. With respect to **Eclerx Services Ltd**., which has been considered by TPO to be a comparable company, Learned AR submitted that it is engaged in the business of providing Knowledge Process Outsourcing (KPO) services namely web analytics, business intelligence, competition benchmarking and pricing etc and therefore cannot be considered to be a comparable with that of Assessee. He submitted that the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. (supra) has clearly made a distinction between BPO and KPO companies and it was held that Eclerx Services Ltd. being a company engaged in provision of KPO services cannot be regarded as an appropriate comparable for the purpose of benchmarking the international transaction of provision of BPO services. He further submitted that Delhi High Court has also upheld its exclusion in the case of Evalueserve SEZ (Gurgaon) Private Limited (supra) and B. C. Management Service Ltd. (supra). He further stated that the aforesaid company has been held to be a KPO service provider and therefore, not comparable to a BPO service provider in various cases decided by the Tribunal. He pointed to the list of such cases in the synopsis.

22. With respect to **ICRA Techno Analytics Ltd**. which was considered by the TPO to be a comparable company, he submitted that it is functionally not comparable to the Assessee

as it is engaged in diverse set of activities like business of software development and consultancy, engineering services as well as business analytics. He submitted that that Hon'ble Delhi Tribunal in the case of B.C. Management Services P Ltd. (supra) for AY 2011-12 had held it to be engaged in the business of business intelligence and analytics services, software development, consultancy services, engineering services, web development and hosting services and therefore not comparable to a BPO. He submitted that against the order of Tribunal, Revenue carried the matter before Hon'ble Delhi High Court, who dismissed the appeal of Revenue (ITA No 1064 & 1083 for AY 2011-12). He therefore relying on the decision of Delhi High Court in the case of PCIT vs. B.C. Management Services Pvt. Ltd. (supra) submitted that it cannot be considered to be a comparable to that of Assessee.

23. With respect to **TCS E-Serve Ltd**. which was considered by TPO to be comparable to Assessee, Ld AR submitted that it exploits the brand 'TATA' and therefore enjoys the goodwill and recognition associated with the 'TATA' brand leading to higher volume of business and premium pricing. He further submitted that it is engaged in provision of ITES services as well as technical services involving software testing, verification and validation of software but however the segmental information with respect to ITES and technical services is not available in the annual report of the company. He however submitted that the Hon'ble Tribunal in assessee's own case in AY 2010-11 has had held TCS E-server

to be valid comparable. He submitted that despite the fact that the Tribunal has held it to be valid comparable to the Assessee in AY 2010-11 but however subsequently, the Hon'ble Delhi High Court in the case of Avaya India Private Limited (ITA No. 532/2019) has held TCS E-serve Ltd. to be not a comparable to a company rendering ITES services for the reasons namely that it has close connection with 'TATA' group of companies, it leverages large client base of TCS, it has high brand value and therefore commands greater profit, the effect of 'TATA' brand on performance of the company cannot be overlooked, the huge turnover as compared to the captive service providers cannot be overlooked. He therefore submitted that though the Tribunal in assessee's own case for A.Y. 2010-11 had held TCS E-serve to be a valid comparable but in view of the latest decision of Delhi High Court in the case of Avaya India Pvt. Ltd. (supra) TCS E-serve Ltd. to be rejected as valid comparable. He further submitted that Hon'ble Delhi High Court in the case of PCIT vs. Oracle (OFSS) BPO Services Pvt. Ltd. (ITA No.124/2018) has held that companies having significant brand presence cannot be regarded as appropriate comparable for the purpose of benchmarking the international transactions undertaken by a captive service provider. He therefore submitted that the company be held to be not comparable to the Assessee.

24. With respect to **Infosys BPO Ltd**. which was considered by TPO to be a comparable company to the Assessee, learned AR submitted that it cannot be considered to be a comparable with

the assessee in view of the fact that it is a part of the Infosys group which is a giant in the field of IT services, it enjoys the benefits of the use of brand 'Infosys', availability of skilled manpower and technical knowhow etc. He further submitted it also exploits a valuable and internationally well recognized brand of 'Infosys' which leads to be a higher profitability. He further submitted that the Tribunal in various decisions cited in the synopsis has rejected it as a comparable company on account of high brand value as compared to a captive service provider. He further submitted that in assessee's own case for A.Y. 2010-11, the Hon'ble Tribunal held it to be not a comparable company with the Assessee.

25. With respect to the **Acropetal Technologies Limited (Seg),** which has been considered by TPO to be a comparable company, he submitted that it cannot be considered to be a comparable company with the assessee as it is engaged in providing KPO services and owns significant IPR. Further, the activities in which it is engaged are knowledge intensive activities, which requires higher level of skill and application of intellectual property and its annual report for F.Y. 2011-12 also reveals that it has developed and owns intellectual property related to the healthcare segment. He relying on the decision of the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. (supra) submitted that the Hon'ble High Court has held that a company engaged in provision of KPO services cannot be regarded as an appropriate comparable for the purpose of benchmarking the international transaction of

provision of BPO services. He submitted that the various benches of Tribunal have held it to be not a comparable company with a company which is engaged in provision of BPO services.

26. Learned AR submitted that if the companies (i.e Accentia Technologies Ltd, Eclerx Services Ltd, Icra Techno Analytics Ltd, TCS E Serve Ltd, Infosys BPO Ltd, Acropetal Technologies Ltd (Seg)) which have been considered by the TPO are excluded for the reasons stated by him, then the final set of comparable companies as selected by TPO and which is not disputed by Assessee, will be E4e Healthcare Business Services Pvt. Ltd., Jindal Intellicom Ltd., Microgenetic Systems Ltd. He submitted that the average margin of these three companies work out to 10.62% as against the assessee's margin of 7.64% (after including the incomes excluded by TPO as as non operational income). He submitted that since the margin of assessee at 7.64% falls within +/- 5% range of the margin of comparable companies at 10.62%, therefore, no adjustment as made by TPO will be sustainable.

27. Ld AR thereafter submitted that no comparability adjustment on account of idle capacity was granted to the Assessee. He submitted that if further adjustment on account of idle capacity due to (increase in head count ratio by 33%) is allowed, the profit margin of the assessee will work to 18.50% (the details of which are worked out on Page 19 of the synopsis) and therefore, no adjustment would be called for. He submitted that the Tribunal in assessee's own case for A.Y. 2008-09 had

allowed the adjustment on idle capacity. In support of his contention of granting adjustment on account of idle capacity, he pointed to the various decisions listed in the synopsis.

28. He therefore, to summarize submitted that if the incorrect re-characterization of the business of the assessee of being the KPO is set aside and if the comparable companies which have been held by the TPO to be the comparable companies and which are objected to by the Assessee are excluded, and if the adjustment on account of idle capacity is granted to the assessee, no adjustment on account of transfer pricing adjustment would be called for.

29. Second issue is with respect to the denying deduction u/s 10B of the Act.

30. AO noted that the assessee had claimed exemption of Rs1,82,35,728/- u/s 10B of the Act. Assessee was asked to show-cause as to why the deduction u/s 10B of the Act not be denied as it had taken approval from Software Technology Park of India ('STPI'). According to AO, STPI was not a competent authority to give approval for exemption u/s 10B of the Act. Assessee made detailed submissions for its claim and in the alternate submitted that if the Assessee is denied the claim u/s 10B of the Act then the assessee be allowed deduction u/s 10A of the Act. The submissions made by the assessee were not found acceptable to the AO. The AO was of the view that assessee has not provided

any notification or document suggesting that the inter ministerial committee or the director of STPI were nominated to perform the duties in accordance with section 14 of IDR Act for the purpose of approval u/s 10B of the Act and accordingly denied the claim of deduction. The alternate claim of deduction u/s 10A was also denied by the AO. When the matter was carried by the assessee before the DRP, DRP following the order of earlier year upheld the order of AO. Aggrieved by the order of AO, assessee is now before us.

31. Before us, Ld AR reiterated the submissions made before lower authorities and further submitted that identical issue arose in Assessee's own case in AY 2010-11 before the Tribunal. The Hon'ble Tribunal has restored the matter to the AO for examining the alternate claim of deduction u/s 10A of the Act. He pointed to the relevant findings of Tribunal. He therefore, submitted that following the order of Tribunal in assessee's own case for AY 2010-11, and with similar directions, the matter be restored to AO.

32. With respect to the charging of interest u/s 234C, Learned AR submitted that interest u/s 234C is for deferment of advance tax and is on the basis of the returned income. He submitted that the AO be directed to charge interest on the basis of returned income and not assessed income.

33. Learned DR with respect to the transfer pricing issues and on the challenge of re-characterization of the business submitted that assessee is engaged in the business of providing research and analysis services and it itself had characterized its business as "KPO" in the TP study report. He submitted that in the TP study report it is stated that assessee is engaged in the research and analysis services and is managed by a team of professionals that are specialized in delivering high value and customized research & analysis to its AE. He submitted that assessee at various places in the TP report has indicated to its functions performed which clearly suggest that it is a 'KPO'. He further submitted that the TPO during the course of assessment proceedings had asked the assessee to provide list of employees with details like nature of service rendered, copy of self appraisal submitted by top two employees for each designation type, comments of the supervisory officers to examine the characterization of business as BPO vis-à-vis KPO. He submitted that assessee only provided the list of employees without the requisite detail like nature of services, copy of self appraisal, comments of supervisory staff. He further submitted that the CBDT vide its Notification No.73/2013 dated 18.09.2013 wherein Safte Harbour Rules have been notified, has in the definition of "KPO" services included the services rendered by the assessee as "KPO". He therefore submitted that the re-characterization of the business has been correctly done by the TPO and upheld by DRP and therefore the order of the authorities be upheld.

34. With respect to the assessee's submission that the DRP for A.Y. 2012-13 has accepted the assessee to be an ITES company. He submitted that the findings of the DRP for A.Y. 2012-13 may not be taken to have been accepted by the Revenue in view of the fact that after removal of sub-section 2A of section 253 by Finance Act, 2016, Revenue is precluded from filing any further appeal against the order of DRP. He further submitted that the principles of *res judicata* are not applicable to the Income-tax proceedings.

35. With respect to the companies for which the assessee is seeking its exclusion as comparable companies, he pointed to the findings of TPO, DRP and submitted that the authorities after taking into account the submissions of the assessee, have held the companies to be comparable to the assessee.

36. With respect to the treatment of certain components of income which has been considered by the TPO as non-operating income, he submitted that the TPO after considering the issue in detail and for the reasons stated therein has rightly held those incomes to the non-operating. He therefore submitted that no interference to the order of TPO is called for on that aspect.

37. With respect to the adjustment on account of idle capacity, sought by the assessee, he submitted that it is assessee's submission that head count of employees have gone up by 33% and the employee compensation cost by 34% but at the same

time it is also seen that the total revenue have also increased from Rs.18.68 Crores to Rs 22.24 Crores. He submitted that increase in employee compensation cost vis-à-vis increase in total revenue is comparable and quite normal. He submitted that the adjustment, if any, can be considered in the hands of the comparable companies for the purpose of comparability under 'TNMM' method in the case of the assessee but no details or documentary evidence have been provided by the assessee. He submitted that in the absence of any reliable data, assessee could not show that the comparables are not having any excess employee expenses and therefore no adjustment on this account should be granted.

38. With respect to the claim of deduction u/s 10A/10B of the Act, he submitted that assessee is making two contradictory statements. On one hand assessee claims in the approval granted by STPI to be a 100% EOU engaged in manufacturing of 'Computer Software' for which deduction u/s 10B is claimed and on the other hand it is claiming that assessee is into the business of 'merely data processing/ data feeding'.

39. He further submitted that the reliance placed by the assessee on the decision of Regency Creations and Valiant Communications, wherein the alternate claim u/s 10A was held to be allowable are distinguishable on facts and therefore not applicable to the Assessee's case. He submitted that in the case of Regency creations, assessee had obtained approval u/s 10A and

had made claim u/s 10B. He submitted that the benefit of deduction u/s 10B is radically different from the one envisioned u/s 10A of the Act and two provisions are separate and distinct from each other.

40. With respect to allowing the claim on the basis of the decision of Tribunal for A.Y. 2010-11, he submitted that the principles of *res judicata* are not applicable in income tax proceedings. He further submitted that the alternate claim of deduction u/s 10A was not claimed either in the original ITR or by filing revised return of income and therefore in view of decision of Hon'ble Apex Court in the case of Goetze (India) Ltd vs. CIT reported in 284 ITR 323 the claim of the assessee was rightly denied. He thus supported the order of AO of lower authorities.

41. We have heard the rival submissions and perused the relevant materials available on record. The first issue is with respect to Transfer Pricing Adjustment of Rs.5,52,01,139/-. We find that in TP study report assessee had considered itself to be in the business of providing Information Technology Enables Services (ITES) in the field of data processing to its associated enterprises. TPO re-characterized the business of the assessee and held the assessee to be a KPO service provider. TPO thereafter, after considering the assessee to be a KPO services provider, considered certain companies to be comparables with that of the assessee as a KPO and thereafter worked out the adjustments at Rs.5,52,01,139/-. The TPO in the alternate noted

that if the assessee is to be characterized as IT enabled services provider then on that basis after taking into consideration the nine comparable companies worked out the average margin of those companies at 28.25%.

42. Before us, Learned AR has pointed to the step wise process of the business model of the assessee and from there it is submitted that the assessee is merely entering the contact details, email id's of vendors in India in the data base and verifying through phone calls and Mails and details of the vendors collected by the assessee are communicated to the associated enterprises, and these details are in turn provided to the final customers. From the details of service provided by the Learned AR, it appears that assessee is providing routine processing of routine data to its AEs which can be termed as ITES services.

43. We do not agree with the act of re-characterization of the assessee to be a KPO by the TPO in view of the fact that Hon'ble Delhi High Court in the case of Rampgreen Solutions P Ltd (supra) has observed that the expression "knowledge process outsourcing" indicates the involvement of domain knowledge in providing ITeS. Typically, knowledge process outsourcing includes involvement of advance skills; the services provided may include analytical services, market research, legal research, engineering and design services, intellectual management, etc. We further find that Co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2010-11 has held the characterization of the nature of

service rendered by the assessee to be "high-end ITES services". We further find that the DRP while deciding the issue for A.Y. 2013-14 has rejected the TPO's contentions of considering the assessee as the KPO service provider and held assessee to be a routine ITES company. Before us, Learned DR has supported the re-characterization made by the TPO and submitted that though the business of the assessee would have been characterized as ITES in earlier and subsequent year but in view of the principle of *res* judicata being not applicable to income tax proceedings and each assessment year being distinct and different, the order of TPO needs to be upheld. We are aware of the principles that *res judicata* principle is not applicable to the income tax matters but at the same time it is also a settled law that there ought to be uniformity in treatment and consistency when facts and circumstances are identical. In the present case, as noted above, the business of the Assessee has been held to be in ITES segment in AY 2010-11 by the co-ordinate Bench of Tribunal and by DRP in AY 2013-14. Before us, no material has been placed by the Revenue to demonstrate that the characterization of the assessee as ITES service provider as held by the Tribunal in earlier years has been set aside/ stayed or overruled by higher judicial forum. Further no distinguishing feature in the activities undertaken by the assessee in the year under consideration or in earlier/ subsequent year has been pointed out by Revenue. In view of these facts and following the principle of consistency, we hold that TPO was not justified in re-characterizing the assessee to be

a KPO service provider. We therefore, hold that the assessee to be an ITES company.

44. As far as the computing of operating margins is concerned, we find that while computing the operating margin of the assessee TPO has considered the income arising out of foreign exchange fluctuation, miscellaneous income and sundry balances written back to be non-operating and worked out the margin accordingly. As far as the issue of Foreign exchange fluctuation to be operating income is concerned, before us, it is Ld AR's contention that it is an integral part of revenue receipts and is directly connected to it. The aforesaid contention of the Ld AR has not been controverted by Revenue. We find that the Co-ordinate Bench of Tribunal in the case of Fiserv India Pvt. Ltd. vs. DCIT (ITA No.1822/Del/2014) after considering that various decisions cited in the order has held the foreign exchange gain/loss to be an operating item and therefore could not be excluded from the computation of the operating margins. We further find that against the order of Tribunal in the case of Fiserv India (supra), the matter was carried by the Revenue before the Hon'ble Delhi High Court. Delhi High Court vide order dated 06.01.2016 in ITA No.17/2016 dismissed the appeal of the Revenue. We further find that the similar view was taken in the case of Agilis Information Technologies International Pvt. Ltd. vs. ITO by the Co-ordinate bench of Tribunal and order of the Tribunal has also been upheld by the Hon'ble High Court. In view of the aforesaid facts, we direct the TPO/ AO to consider foreign fluctuation income to be

operating in nature while working out the profit margin of the assessee.

45. With respect to sundry balances written back as part of operating income, We find that the Co-ordinate Bench of the Tribunal in the case of Suessen Asia Pvt. Ltd. (supra) after relying on the various decisions cited in the order, has held that the sundry balances written back to the part of operational item. Before us, Revenue has not pointed out any contrary binding decision in its support. Further, Revenue has also not placed any material to demonstrate that the liabilities written back pertain to capital expenditure. We therefore hold that the income arising out of sundry balances written back needs to be considered an operating item. The AO/TOP is therefore directed to consider the same as part of operating income while working out the margins of the Assessee.

46. Now we take up the issue of selection of various comparable companies. With respect to Accentia Technologies Ltd., it is seen that it provides service to healthcare industry in the nature of medical transcription, medical coding etc. and revenue's earning from those fields are more than 75%. Before us, Learned AR has pointed to the fact that it owns significant intangible assets in form of goodwill etc. amounting to Rs.21.94 crores and it also owns proprietary software products. Further, he has also pointed out to the fact that though it is engaged in the medical transcription and development of software products but the

segmental profitability is not available in the financial statements. The aforesaid contentions of the Learned AR have not been controverted by the Revenue. We find that the Delhi Bench of Tribunal in the case of E-Valueserve SEZ (Gurgaon) P. Ltd. for AY 2011-12 had rejected it to be a comparable company to an ITES service for the reason that it is engaged in the business of medical transcription, medical coding and billing. The order of the Tribunal has also been upheld by the Hon'ble High Court. Similar view has also been taken by the Tribunal in other cases. We are therefore of the view that Accentia Technologies Ltd cannot be considered to be a comparable to Assessee. In view of these facts, we direct the AO to exclude it on account of functional dissimilarity.

47. With respect to Exlerx Services Ltd., we find that Learned AR has pointed to its business which is in the nature of knowledge processing outsourcing (KPO) namely web analytics, business intelligence, competition benchmarking and pricing, consulting etc. We find that the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. (supra) has held it to be a company engaged in the provision of KPO service and therefore cannot be regarded as an appropriate comparable for benchmarking the international transactions of provision of BPO services. We also find that in various other decisions, the Co-ordinate bench of Tribunal has held it to be providing KPO services and therefore not comparable to the BPO services. In

view of these facts, we direct the AO to exclude it on account of functional dissimilarity.

48. As far as the Ld AR's plea of exclusion of ICRA Techno Analytics Ltd as a comparable company is concerned, learned AR has pointed that it is engaged in a diverse set of activities. As per its annual report, the company is engaged in the business of software development and consultancy, engineering services as well as business analytics. The aforesaid contentions of the Ld AR has not been controverted by Revenue. We find that the Co-ordinate Bench of Tribunal in the case of B. C. Management Services (P.) Ltd. (supra) for AY 2011-12 has held it to be not a comparable on account of functional dissimilarity and on account of non availability of segmental data. Against the order of Tribunal, the matter was carried by the Revenue before the Delhi High Court. Hon'ble Delhi High Court dismissed the appeal of Revenue [(2018) 89 Taxmann.com 68 (Del)]. Before us, Ld DR has not placed any contrary binding decision to support the action of AO/TPO. In view of these facts, we direct the AO/TPO to exclude ICRA Techno Analytics Ltd on account of functional dissimilarity.

49. As far as the Ld AR's contention for excluding Infosys BPO Ltd as a comparable company is concerned, we find that the aforesaid company was rejected as a comparable company in assessee's own case by Co-ordinate Bench of Tribunal in A.Y. 2010-11. We further find that it was rejected as a comparable in

the case of E-Valueserve SEZ (Gurgaon) P. Ltd. and against the order of Tribunal, the matter was carried before the Hon'ble Delhi High Court and the appeals of the Revenue were dismissed. Further the aforesaid company was also rejected as a comparable company in other decisions rendered by the Tribunal. In view of these facts, we hold that Infosys BPO Ltd cannot be considered to be a comparable company and therefore direct its exclusion.

50. As far as Ld AR's contention of excluding Acropetal Technologies Ltd (Seg) as a comparable company is concerned, before us, Learned AR has pointed out that it is providing KPO services and owns significant IPR, requiring high level of skill and application of intellectual property. The aforesaid contentions of the Learned AR not been controverted by DR. We further find that Hyderabad Bench in the case of TNS India Pvt. Ltd. (ITA No.1875/Hyd/2012) had directed to its exclusion by holding that the services provided by it in the nature of high end services coming within the category of Knowledge Process Outsourcing (KPO) and it cannot be compared with a low end service provider. We further find that Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. (supra) has held that a company engaged in the KPO services cannot be a appropriate comparable for the purpose of benchmarking international transaction of BPO services. In view of these facts, we are of the view that the aforesaid company needs to be excluded as a comparable company and accordingly direct its exclusion.

51. As far as exclusion of TCS E- serve Ltd as being a comparable company is concerned, before us, Learned AR has vehemently submitted that it exploits the brand name of 'TATA' and enjoys the goodwill and recognition of TATA group and therefore it cannot be considered to be a comparable. We find that the Co-ordinate Bench of the Tribunal while deciding the issue in assessee's own case for A.Y. 2010-11 has held it to be a valid comparable. Before us, Learned AR submits that subsequent to the decision of the Tribunal in Assessee's own case for AY 2010-11, the Jurisdictional High Court in the case of Avaya India Pvt. Ltd. (supra) has rejected TCS E-serve to be a comparable to a BPO for the reasons stated therein and therefore having regard to the latest decision of the Jurisdictional High Court, he seeks its exclusion. We though find that the Hon'ble Delhi High Court in the case of Avaya India Pvt. Ltd. (supra) has rejected TCS E-serve as a comparable but at the same time it is also a fact that in assessee's own case for A.Y. 2010-11, the co-ordinate bench of Tribunal has held it to be a valid comparable. Before us no material has been placed by the Learned AR to demonstrate that the order of Tribunal in Assessee's own case in AY 2010-11 holding it to be a valid comparable has been set aside/overruled/stayed by higher judicial forum. In view of the settled law that even if the principle of res judicata does not apply to tax matters, but consistency and certainty of law would require that a uniform position be taken in the absence of change in facts and/or law. In view of the aforesaid facts, we are of the view that the TCS E-serve should be considered to be a comparable

company. Thus, we are upheld the order of the TPO in considering it to be a comparable company.

52. Before us, assessee has sought the adjustment on account of idle capacity. We find that the co-ordinate Bench of Tribunal in assessee's own case in AY 2009-10 has granted the adjustment on account of idle capacity. Following the decision of Co-ordinate Bench of Tribunal in assessee's case for A.Y. 2009-10, we direct the AO to grant the adjustment on account of idle capacity.

53. We thus direct the AO/TPO to compute the Arms Length price of the international transactions entered into by the Assessee with its AEs keeping in view the observations made by us in the preceding paragraphs. **Thus the grounds of assessee are partly allowed.**

54. As far as the issue of granting of deduction u/s 10A/10B is concerned, we find that the claim of deduction u/s 10B was denied to the assessee and alternate claim of deduction u/s 10A was also not allowed. We find that identical issue arose in Assessee's own case in AY 2010-11. The Co-ordinate Bench of Tribunal, will deciding the issue in assessee's own case for A.Y.2010-11 (ITA No 1103/Del/2015 order dtd 27.04.2018) had restored the matter to the file of the AO for examining the claim of the assessee by observing as under :

"4.3 We have heard the rival submission and perused the relevant material on record. In assessment year 2007-08, the assessee made alternative claim for deduction under section 10A of the Act in proceedings under section 147 of the Act. The Assessing Officer denied the alternative claim of deduction under section 10A of the Act. In appeal having ITA No. 5473/Del/2016 for assessment year 2007-08, the Ld. DR contended that proceeding under section 147 of the Act are for the benefit of the Revenue and not for the assessee, whereas the Ld. AR submitted that it is open for the assessee to contend that the items sought to be brought to tax by initiating proceeding under section 147 of the Act, are non-taxable at all under section 10A of the Act. The Tribunal (supra) permitted the assessee to agitate the ground which rendered the escaped income as non-taxable and restored the matter to the file of the Assessing Officer to examine the allowability of deduction under section 10A of the Act. The relevant finding of the Tribunal (supra) is reproduced as under:

> *"12. Now coming to the submission of the learned AR basing on the decision of the jurisdiction High Court in review petitions in Regency Creations Ltd. (supra) and Valiant Communications (supra), we find that the Regency Creations, the Hon'ble jurisdictional High Court held as follows:*
>
> > *"We have carefully considered the records and submissions. It appears that the assessee had claimed the benefit of Section 10A. Therefore, AO must in fairness consider the documents on the basis of the claim and ascertain whether they are proper and after verifying them, pass appropriate order as to whether the benefit of Section 10A can be granted."*

Almost similar was the finding of the Hon'ble Jurisdictional High Court in the case Valiant Communications Ltd. (supra).

13. In the preceding paragraphs, while following the decisions of the Hon'ble High Court, we held that it is open to the assessee to put forth claim for non-taxability of the escaped income in view of Section 10A of the Act, while respectfully following the decision of Hon'ble jurisdictional High Court in Regency Creations Ltd. and Valiant Communications Ltd. (supra), we deem it just and proper to direct the learned AO to examine the claim of the assessee for deduction u/s 10A of the Act by affording an opportunity to the assessee. Accordingly, we set aside the matter to the fine of the AO to consider the case of the assessee u/s 10A of the Act."

4.4 Since in the year under consideration also the assessee has made alternative claim for allowing deduction under section 10A of the Act, we, therefore, respectfully following the above finding of the Tribunal, restore the matter to the file of the Assessing Officer for examining the claim of the assessee for allowing deduction under section 10A of the Act. It is needless to mention that assessee shall be afforded adequate opportunity of being heard. Accordingly, relevant grounds of the appeal are allowed for statistical purposes."

55. Since the issue involved in the year under appeal is identical to that of AY 2010-11, we therefore for similar reasons and similar directions restore the issue back to the file of the AO to allow the claim of deduction u/s 10A after considering the submissions of the assessee and in accordance with law. Needless

to state that assessee shall be granted adequate opportunity of hearing. **Thus ground of appeal of the assessee is allowed for statistical purposes.**

56. With respect to the charging of interest u/s 234C, we direct the AO to charge the interest u/s 134C in accordance with law. **Thus, ground of appeal allowed for statistical purposes.**

57. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 29.07.2020

Sd/- **Sd/-**

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Priti Yadav, Sr.PS

Date:- 29.07.2020
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI