

आयकर अपीलीय अधिकरण "K" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.944/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2011-12)

ACIT 15(2)(2) R.No. 403, 4 th floor, Aaykar Bhavan, M.K Road, Mumbai-400020	बनाम/ v.	Maersk Global Services Centre (I) P. Ltd. 4 th & 5 th Floor, Prudential Bldg, Central Avenue Road, Hiranandani Business Park, Powai, Mumbai-400076
स्थायी लेखा सं./PAN : AADCM7786M		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

CO. No.50/Mum/2016

arising out of आयकर अपील सं./I.T.A. No.944/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2011-12)

Maersk Global Services Centre (I) P. Ltd. 4 th & 5 th Floor, Prudential Bldg, Central Avenue Road, Hiranandani Business Park, Powai, Mumbai-400076	बनाम/ v.	Addl.CIT , Range 15(2)(2) R.No. 403, 4 th floor, Aaykar Bhavan, M.K Road, Mumbai- 400020
स्थायी लेखा सं./PAN : AADCM7786M		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri. Porus Kaka
Revenue by :	Shri. V. Jenardhanan,DR

सुनवाई की तारीख / **Date of Hearing** : 19-01-2018

घोषणा की तारीख / **Date of Pronouncement** : 19-04-2018

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

The appeal is filed by Revenue, being ITA No. 944/Mum/2016 for assessment year (A.Y.) 2011-12, and Cross Objections bearing no. 50/Mum/2016 arising out of appeal in ITA No. 944/Mum/2016 for AY 2011-12 are filed by the assessee and both the appeal as well CO are directed against assessment Order dated 29-12-2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s. 143(3) r.w.s. 144C(1) of the Income-tax Act, 1961 (hereinafter called "the Act"), which was passed by the AO in pursuance of directions dated 27-11-2015 issued by Dispute Resolution Panel-3, Mumbai (hereinafter called "the DRP") for assessment year 2011-12.

2. The grounds of appeal raised by Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") in ITA no. 944/Mum/2016, reads as under:-

1. *"On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel has erred in directing to reject M/s. Accentia Technologies Ltd (in respect of ITes Service) as comparable for benchmarking ALP of International Transaction of the assessee with the AEs.*

2. *On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel has erred in directing to include M/s. R. System International Ltd and Caliber Point Business Solutions Ltd as the comparables for benchmarking ALP of International Transaction of assessee with the AEs.*

3. *The appellant craves leave to add, amend, or alter any grounds or add a new ground which may be necessary.*

4. *The appellant prays that the direction of the DRP, Mumbai on the above directions be set-aside and that of the assessing officer be restored."*

3. The assessee has raised following grounds of Cross Objections filed with the tribunal in CO No. 50/Mum/2016 arising out of appeal in ITA no. 944/Mum/2016 for AY 2011-12 :-

"The Grounds stated here under are independent of, and without prejudice to one another as well as the favourable findings of the Hon'ble Dispute Resolution Panel ('DRP');

1. On the facts and in the circumstances of the case and in law, the learned Assessing Officer ('AO') has erred by filing inappropriate Grounds of Appeal as the same refers to different entity i.e. M/s Pipal Research Analytics and Information Service India Pvt. Ltd. and not the Assessee. The Assessee submits that tax department's appeal (ITA 944/Mum-2016) ought to be dismissed.

2. On the facts and in the circumstances of the case and in law, the Hon'ble DRP has rightly decided and directed the AO / Transfer Pricing Officer ('TPO') to reject Accentia Technologies Limited as comparable. The Assessee submits the said company ought not to be taken as comparable.

3. On the facts and in the circumstances of the case and in law, the Hon'ble DRP has rightly decided and directed the AO / TPO to accept R Systems International Limited and Caliber Point Business Solutions Limited as comparables. The Assessee submits the said companies ought to be taken as comparables.

4. Functional profile of the Assessee

4.1. On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in not appreciating that the Assessee is mainly a low end back office support service provider thereby ignoring the findings of Hon'ble Income Tax Appellate Tribunal ('Tribunal') - Special Bench (I.T.A. No.7466/Mum/2012) in Assessee's own case.

4.2. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in not considering the observations of the Hon'ble Tribunal - Special Bench (I.T.A. No.7466/Mum/2012) in Assessee's own case wherein it had stated that the principal functions performed by the Assessee should be identified and the same should be compared with the principal functions performed by the comparable companies selected to find out the relatively equal degree of comparability in accordance with Rule 10B(3) of the Income-tax Rules, 1962 ('the Rules').

5. Incorrect selection of comparables by the learned TPO

5.1 On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of TPO in selection of two companies namely Acropetal Technologies Limited and Infosys BPO Limited as comparables. The Assessee submits the said companies ought not to be taken as comparables.

6. Additional filters are unwarranted in the comparability analysis

6.1. On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in applying additional filter of rejecting companies with less than 75 percent earnings from exports, which is unwarranted in the comparability analysis.

6.2. On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in

applying additional filter of rejecting companies with losses / diminishing revenue, which is unwarranted in the comparability analysis.

The learned AO / TPO erred and the Hon'ble DRP further erred in not following the principles laid down by the jurisdictional Mumbai Tribunal (Special Bench) in Assessee's own case for AY 2008-09 (I.T.A. No.7466/Mum/2012), wherein it is principally held that further investigation should be made to ascertain whether losses reflects normal business conditions and the company satisfies the comparability aspects.

6.3. *On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in applying additional filter of rejecting companies with turnover less than INR 5 crores, which is unwarranted in the comparability analysis.*

6.4. *On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO in rejecting Spanco Limited merely on the basis of different accounting period despite the same being functionally comparable.*

7. Incorrect rejection of the Assessee's benchmarking analysis and comparables

7.1. *On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned AO / TPO of disregarding some of the comparable companies selected by the Assessee i.e. Allsec Technologies Limited, Cosmic Global Limited, Informed Technologies Limited, Spanco Limited, Datamatics Financial Services Limited, Inhouse Productions Limited and Microland Limited based on the contemporaneous data in the transfer pricing study report maintained as per Section 92D of the Income-tax Act, 1961 ('the Act') read with Rule 10D of the Rules and the various submissions made by the Assessee. The Assessee prays that the said companies be included as comparables.*

Erred in using single year data for margin computation

8.1. *On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in not considering the requirement of proviso to Rule 10B(4) of the Rules while analyzing the data for comparability of companies.*

9. Risk adjustment disallowed

9.1. *On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned AO / TPO in not allowing risk adjustment in accordance with the Rules to account for difference between international transactions and the alleged comparable uncontrolled transactions selected by the learned AO / TPO.*

The Assessee craves leave to add, amend, delete, rectify, substitute and modify any of the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing the appeal.”

4. The assessee is captive service provider engaged in IT enabled services such as back office support services. The assessee filed its return of income on 26.11.2011, which was selected for scrutiny by Revenue . The assessee had entered into international transaction and had filed reports in form no. 3CEB u/s. 92E r.w.r. 10E of the Income-tax Rules,1962 on 29.11.2011 . A reference u/s. 92CA(1) was made by the AO to Transfer Pricing Officer(hereinafter called “ the TPO”) who made adjustments to the tune of Rs. 20,12,29,190/- in the value of Arm Length Price(ALP) of transactions and the said order was passed by TPO u/s. 92CA(3) , dated 27.01.2015. In pursuance to the aforesaid order passed by TPO , the draft assessment order was passed by the AO u/s. 143(3) r.w.s. 144C(1) of the 1961 Act on 20.02.2015 . The assessee filed objections with DRP which were disposed of by DRP vide directions issued u/s. 144C(5) of the 1961 Act on 27.11.2015.

5. Now , being aggrieved by the directions issued by DRP which finally culminated into an assessment order passed by the AO u/s. 143(3) r.w.s. 144C(1) of the 1961 Act, dated 29.12.2015, the Revenue has come in an appeal before the tribunal.

The first grievance of the Revenue is as to rejection of Accentia Technologies Limited as comparable for bench marking of ALP of international transaction of the assessee with its AE's by the DRP which comparable was included by TPO in its order. While including the Accentia Technologies Limited as one of the comparable , TPO observed that the assessee did not applied following filters which were applied by TPO and the said comparable passed all the filters and also for AY 2010-11 the same were also upheld by DRP , which are as under:-

“• Rejected companies with turnover less than 5 crores. The companies with very small turnover cannot be taken as comparables. The turnover of assessee Company in ITES and IT support segment Rs. 286.48 crores.

- Rejected companies with export turnover less than 75%;*
- Rejected companies with related party transactions more than 25 percent;*
- Rejected companies with different financial year ending;*

- *Rejected functionally non-comparable companies: Not all functionally non-comparable companies have been rejected by the assessee.*
- *Rejected companies not having financial data for FY 2010-11 as mandated under rule 10B(4)”*

The DRP rejected the said comparable Accentia Technologies Limited, by holding as under:-

“Accentia Technologies Ltd

This company is said to be functionally not comparable on the ground of high end medical transcriptions activity, medical billing and coding and software development etc. and that segmental data are, not given.

Accentia was considered as comparable by the DRP in AY 2009-10 and AY 2010-11 to the functions of the Assessee. However, Accentia has been specifically rejected as comparable by Hon'ble' Mumbai Tribunal in Assessee's own case of AY .2009-10.

Findings :

In view of the decision of Hon'ble ITAT in the assessee's own case for A.Y.2009-10, this company, is not considered as .a comparable. The TPO is directed accordingly.”

Both the parties have advanced their arguments before us for inclusion as well as rejection of the said comparable. Before we proceed further it is pertinent to mention at this stage that Special Bench of ITAT was constituted at Mumbai in the case of the assessee itself for AY 2008-09, and Special Bench had pronounced its order in ITA no. 7466/M/2012, dated 07-03-2014 wherein at para 80, it was held as under:-

“80. A perusal of the functional profile of the assessee company shows that although the services claimed to be provided by it to the AEs as IT services such as process support, process optimization and technical support are not in the nature of low end services such as voice or data processing as they require some degree of special knowledge and domain expertise in the concerned field, the revenue generated from these services was only about 10% of the total revenue generated during the year under consideration. There were also some other services rendered by the assessee company to its AEs as IT enabled services such as reconciling the difference between equipment management system and transfer plan in global custom services study, contract drafting, various audit functions based on different business strategy, tender handling etc. which, as rightly submitted by the Id. D.R., cannot be strictly considered as low-end services as they involved some degree of special knowledge and expertise in the relevant field. However, these services again were only incidental to the main services rendered by the assessee involving information collation from shipper/customer/AE and populating the same into various processes and systems provided by the AE. These main services rendered by the

assessee to its AEs thus involved primarily data entry, transcription, consolidation, co-ordination, preparation, processing and review of shipping documents and such other similar support services which were mainly comprising of back office support services rendered by the assessee to its AEs in the nature of low-end services. The profile of work-force employed by the assessee during the year under consideration comprised of 96% of graduates and postgraduates whereas only 4% work-force was professional such as CA, B.Tech etc. which again goes to show that the functions performed by the assessee company to its AEs were mainly in the nature of providing back office support services of low-end nature. Going by the functions performed by the assessee to its AEs during the year under consideration, we are of the view the assessee was a captive contract service provider mainly rendering back office support services and such services rendered by it to its AEs involving some degree of special knowledge and expertise formed only small portion of the services rendered by it which essentially were in the nature of incidental services.”

The crux of these findings of the Special Bench of the tribunal is that the assessee is engaged in the business of being a captive contracts services provider rendering services to its AE's which are in the nature of providing back office support services which are low end in nature and the services rendered by it to its AE involving some degree of special knowledge and expertise which form only small portion of services rendered by it and hence the assessee could be said to be engaged in the business of being a captive contracts services provider rendering services to its AE's which are in the nature of providing back office support services which are low end in nature. It is not brought on record by Revenue that there is any significant change in nature of business of the assessee during the impugned year under consideration warranting any interference by us to the aforesaid finding of the tribunal . In the impugned year also 98% of the work force is graduate and post graduate , while only 2% of the work force constitute professionals. The TP study report detailing FAR analysis for the year under consideration also stipulates assessee to be in the back office support services which are low end in nature. Thus, in our considered view finding of the Special Bench of the tribunal for AY 2008-09 will continue to apply to impugned assessment year i.e. AY 2010-11 under consideration before us as nothing has been brought on record by the Revenue as to any change in the nature and characteristic of the functions performed, assets deployed and risks assumed by the assessee during the year under consideration vis-a-vis AY 2008-09.

The tribunal in the case of the assessee itself while adjudicating appeal for AY 2010-11 in ITA no. 1082/M/2015 vide its orders dated 29.07.2016 had rejected Accentia Technologies Limited as a comparable and hence finding of DRP in this year has virtually being confirmed by tribunal , albeit for AY 2010-11 , by holding as under:-

“ACCENTIA TECHNOLOGIES LTD.

9. Objecting to the selection of this company, learned Sr. Counsel submitted, the assessee is a back office service provider to its A.E., whereas Accentia Technologies Ltd. is a parent company. It takes all the risks. He submitted, the company is providing high end service in the nature of KPO service which is not comparable to routine ITES service. Further, segmental information is also not available. He submitted, during the relevant previous year, there is also a merger of Asscent Infoserve which is in healthcare service. Learned Sr. Counsel submitted, the business of this company is highly diversified including software development and related service which require specialized skill. It has also goodwill, brand name and IPRs. He submitted, the margin of medical coding is on higher side when compared to medical transcription. Medical coding constitutes 15% of operating revenue. He submitted, the information contained in the website of the company reveals that most of the key persons are engineer and highly qualified people whereas assessee's work force consists of mostly graduates with no special skills / training. Learned Authorised Representative submitted, for the reason that this company has diversified activity and is into high end KPO services, it was rejected as a comparable in assessee's own case for assessment year 2009-10. He submitted, relying upon the aforesaid decision of the Tribunal, the DRP also rejected this company as a comparable to assessee in assessment year 2011-12 and the Transfer Pricing Officer himself relying upon the decision of the Tribunal and direction of DRP rejected Accentia Technologies Ltd. as comparable in assessment year 2012-13. He also submitted, in various Benches of the Tribunal also holding that Accentia Technologies Ltd., being a KPO service provider, has rejected it as comparable in case of routine BPO service provider.

10. Learned Departmental Representative justifying the selection of this company submitted, captive service provider filter has not been applied either by the assessee or Transfer Pricing Officer. Referring to the Full Bench decision of the Tribunal in Mearsk Global Service Centre India Pvt. Ltd., learned Departmental Representative submitted, the Tribunal itself has held that the BPO segment again cannot be further divided into high end and low end service. Learned Departmental Representative submitted, as all the functions of this company is similar to assessee, it is to be treated as comparable. Referring to the financials of the company, he submitted, all income has been reported under single segment and the software development, if any, is for own use of the company.

11. We have considered the submissions of the parties and perused the material available on record. Though, the Transfer Pricing Officer

has categorized the assessee as a KPO service provider, however, as could be seen from the extracted portion from the order of the Tribunal, Special Bench decision in assessee's own case in Para-3.13 of the DRP's direction, the Special Bench has specifically observed that work force employed by the assessee comprised of 96% of graduates and post graduates and only 4% workforce was professional such as Chartered Accountant, B. Tech., etc., which goes to show that function performed by the assessee to its A.E. were mainly in the nature of providing back office support service of low end nature. Thus, the aforesaid observation by the Special Bench leaves no room for doubt that the nature of service provided by the assessee to its A.E. is low end BPO service and cannot be considered as KPO service. Whereas, on a perusal of the information contained in the annual report of Accentia Technologies Ltd., a copy of which has been placed in the paper book, we have noticed that the company is into diversified activities like development of software, legal process out sourcing, health care management, etc. A reference to the Profit & Loss account of the company for the relevant financial year indicates that there is no segment-wise data maintained by this company. Further, Schedule-I forming part of the Balance Sheet indicates that during the relevant previous year, there was amalgamation of Asscent Infoserve. with the company. The Tribunal, Mumbai Bench while considering the comparability of Accentia Technologies Ltd. to the assessee in assessment year 2009-10 in ITA no.2594/Mum./2014 and Anr., dated 16th January 2015, has held as under:-

"12. Now coming to the Accentia Technologies Ltd., as pointed out by the Ld. Counsel, it is seen from the annual report of the said company, it is a parent company providing high end management solutions in health care. It is mainly medical transcription company doing medical coding, medical billing and receivables management services. The BPO services has not been started in this year that is in the F.Y. 2008-09. The TPO has included this company mainly on the ground that it is a KPO and is providing high end ITES related services in the field of health care. Once it is evident from the annual report for the A.Y. 2008-09 that it has not started its data processing outsourcing or KPO services, it cannot be held to be a good comparable for bench marking the assessee's margin for the F.Y. 2008-09, that is, for A.Y. 2009-10. Moreover this company has substantial goodwill being a parent company and therefore, cannot be held to be comparable with the company which is mainly a captive service provider. Therefore, we are of the opinion that this company cannot be considered to be comparable in the present year for bench marking the margin of the assessee's company. Accordingly, the same is rejected.

13. Now coming to the two comparables included by the assessee. So far as R. System International Ltd. (Segmental) is concerned, it has been pointed out by the learned senior counsel that this company was accepted as a comparable by the TPO in assessee's own case in the A.Y. 2007-08 and also by the DRP in A.Y. 2008-09. The TPO has rejected this comparable in this year, simply on the ground that it is not purely a KPO service provider

and having calendar year ending. On the contrary the BPO segment of R. System is functionally comparable to the assessee and simply because it is following calendar year accounting it cannot be rejected. In A.Y. 2008-09, the DRP in the light of functions performed by the assessee as well as BPO segment of R. System International, has accepted the same to be comparable company. This fact has also been noted by the Special Bench in para 12 of the order.”

12. We have also noted, considering the aforesaid order of the Tribunal, the DRP in assessee’s own case in assessment year 2011–12 and the Transfer Pricing Officer himself in assessment year 2012–13 have rejected Accentia Technologies Ltd. as a comparable. The Tribunal, Delhi Bench in Equant Solutions India Pvt. Ltd. v/s DCIT, in ITA no.1202/Del./2015 dated 21st January 2016 for the very same assessment year 2010–11, while examining the functionality of this company found that it provides KPO service, LPO and DPO besides operating software service. The Tribunal also found that this company was having substantial amount of Brands, IPRs and goodwill, hence, it cannot be compared to a low end ITES service provider. The Hon'ble Delhi High Court in Rampgreen Solutions Pvt. Ltd. v/s CIT, ITA no.102/2015 dated 10th August 2015, in fact, disagreed with the view expressed by the Tribunal, Mumbai Special Bench in Mearsk Global Centers India Pvt. Ltd., that ITES services cannot further be bifurcated to the BPO and KPO service for the purpose of comparative analysis. The Hon'ble High Court held that even though KPO may be coming under the broad category of ITES but the nature of service provided by KPO is completely different from the nature of service provided by a BPO service provider. The Hon'ble High Court held while the KPO is on the higher end of the spectrum involving employment of advanced skills and knowledge for providing service, BPO does not necessarily involve advanced skill and knowledge. Therefore, BPO service provider cannot be functionally comparable to a KPO. Reverting back to the facts of the present case, there is no discernible difference in the functional profile of the assessee and Accentia Technologies Ltd. in the impugned assessment year compared to the earlier assessment years.

Therefore, applying the ratio laid down by the Hon'ble Delhi High Court in the above referred decision as well as different benches of the Tribunal including the Tribunal, Mumbai Bench, in assessee’s own case for assessment year 2009–10 and also considering the fact that the DRP as well as Transfer Pricing Officer following the aforesaid decision of the Tribunal in assessee’s own case have excluded Accentia Technologies Ltd. in assessment year 2011–12 and 2012–13, we hold that this company cannot be a comparable to the assessee. Accordingly, we direct the Assessing Officer / Transfer Pricing Officer to exclude it from the stage of comparables.”

We have carefully gone through the orders of the authorities below and also gone through copy of the financial statements of the assessee for the impugned assessment year which is placed by the assessee in paper book and we do not find any significant variation in the functions performed by

the assessee vis-a-vis preceding year for which the tribunal has passed the above order dated 29-07-2016 for AY 2010-11 . We have also gone through the financial statements of Accentia Technologies Limited which are placed by the assessee in paper book and we also found that there is no variation in the functions performed by the said company in the impugned year i.e. AY 2011-12 vis-a-vis earlier years. We do not find any reason to deviate from the afore-said decision of the tribunal in ITA no. 1082/M/2015 dated 29.07.2016 for AY 2010-11. Thus we uphold the decision of the DRP and dismiss the appeal of the Revenue on this ground. Revenue fails on this ground. We order accordingly.

6. Ground no. 2 raised by the Revenue is to challenge the decision of DRP wherein it directed TPO/AO to include R System International Ltd. and Caliber Point Solutions Ltd. as comparable. The TPO vide its order u/s. 92CA(3) had rejected R System International Ltd. and Caliber Point Solutions Ltd. on the ground that financial year of these two companies have ended in December while assessee is following financial year ending 31st March. The TPO rejected these comparables namely R System International Ltd. and Caliber Point Solutions Ltd , by holding as under:

“Caliber Point Business Solutions Ltd.

The BPO segment is involved in process management, outsourcing and transitioning services in respect of HR solutions and sales & marketing solutions. The activities of this company are low end as compared to the assessee because the assessee is involved in high end activities. The year ending for this company is December. Also company has diminishing returns. Therefore, this company is rejected as comparable.

R Systems International Ltd.

After going through the information available in the public domain and the annual report for FY 2010-11, it is seen that it is a leading provider of outsourced product development and customer support services. Other companies entered into multiple year contracts with this company to develop, sustain and support their products using onsite, offshore and onshore modules. On going through the annual report, it is observed that the financials of the company is year ended December, 2010, thus the data cannot be considered contemporaneous. Hence, this company is rejected as comparable.”

The DRP directed to include these two companies namely R System International Ltd. and Caliber Point Solutions Ltd. as comparable by holding

that difference in accounting period of three months can be ignored as the companies are functionally comparable. While accepting R System International Limited as comparable, the DRP noted the decision of the tribunal for AY 2009-10 wherein tribunal directed to include R System International Limited as comparable.

We have heard rival contentions and perused the material on record. We have observed that the tribunal has in assessee's own case already adjudicated w.r.t. comparable R System International Ltd. in 1082/M/2015 dated 29.07.2016 for AY 2010-11 for inclusion of this comparable, by holding as under:-

“ 19. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. We find from the record that the Transfer Pricing Officer rejected this company as a comparable on the ground that the assessee is a KPO service provider whereas this company is into low end BPO service. However, the aforesaid objection of the Transfer Pricing Officer was not accepted by the DRP in assessee's own case for assessment year 2008-09 and, in fact, DRP held R. Systems International Ltd. as comparable to the assessee. Taking note of the aforesaid observations of the DRP, the Transfer Pricing Officer himself in assessment year 2007-08, accepted R. Systems International Ltd. as a comparable. It further appears from record that in assessment year 2009-10, the Assessing Officer again rejected R. Systems International Ltd. as comparable on the ground that it is not comparable to KPO service provider like assessee and secondly it has a different accounting period. However, the Tribunal while deciding assessee's appeal for assessment year 2009-10, ITA no.2594/Mum./2014 dated 16th January 2015, accepted R. Systems International Ltd. as comparable to the assessee observing as under:-

“13. Now coming to the two comparables included by the assessee. So far as R. System International Ltd. (Segmental) is concerned, it has been pointed out by the learned senior counsel that this company was accepted as a comparable by the TPO in assessee's own case in the A.Y. 2007-08 and also by the DRP in A.Y. 2008-09. The TPO has rejected this comparable in this year, simply on the ground that it is not purely a KPO service provider and having calendar year ending. On the contrary the BPO segment of R. System is functionally comparable to the assessee and simply because it is following calendar year accounting it cannot be rejected. In A.Y. 2008-09, the DRP in the light of functions performed by the assessee as well as BPO segment of R. System International, has

accepted the same to be comparable company. This fact has also been noted by the Special Bench in para 12 of the order.

14. Thus, consistent with the fact that in A.Y. 2007-08, TPO himself has accepted R. System as a good comparable and DRP in A.Y. 2008-09 has also accepted the same to be comparable, which has been upheld by the Special Bench, therefore, we do not find any reasons to deviate from such a precedence of the earlier years, so as to come to a different conclusion without any material difference on record for this year. Thus, we direct the TPO/AO to include R. System International Ltd. in the list of final comparables for bench marking the assessee's margin."

20. Following the aforesaid decision of the Tribunal, the DRP also in assessee's own case for assessment year 2011-12 has accepted R. Systems International Ltd. as a comparable. As could be seen from the impugned order of the DRP, the only reason on which the company was rejected is on account of different financial year. As already stated while assessee is following financial year as accounting period this company follows calendar year as it's accounting year. However, there is no dispute that contemporaneous data relating to nine months i.e., April to December is available in public domain. Therefore, the data available for nine months in public domain can be extrapolated to make a reasonable comparability analysis. This view was expressed by the Hon'ble Delhi High Court in Mckinsey Knowledge Centre India Pvt. Ltd. (supra) while approving the decision of the Tribunal. Therefore, this company having been found to be functionally similar to the assessee thereby accepted as a comparable by the Tribunal as well as the Departmental Authorities in assessee's own case in earlier and subsequently assessment years, we do not find any reason to exclude the same as a comparable. Accordingly, accepting assessee's plea, we direct the Assessing Officer / Transfer Pricing Officer to consider R. Systems International Ltd. as a comparable. Thus, ground no.6, is partly allowed."

The assessee has also relied on the following case laws to contend that merely because the financial year of the comparable is ending on different date falling within the same financial year as that of the assessee, the comparable will not be liable to be rejected on this short ground only. The assessee relied upon following decision:-

" Hon'ble Delhi High Court in case of Mckinsey Knowledge Centre India Private Limited (ITA 217/2014) (Page no. 264 of PB II) confirming Hon'ble Delhi Tribunal decision (ITA No. 2195/ Del/2011) (Page no. 286 of PB II)

Hon'ble Punjab and Haryana High Court in the case of Mercer Consulting (India) Pvt Ltd [TS-664-HC-2016(P & H)-TPJ (Page no. 246ofPB II)

Hon'ble Mumbai Tribunal in the case of Aegis Limited (ITA No. 7694/Mum/2014) - (Page no. 309 of PB II)

Hon'ble Mumbai Tribunal in the case of Pangea3 & Legal Database Systems Pvt. Lid [ITA Nos.2128 &1958/M/2014]

The Revenue on the other hand has relied upon decision of Hon'ble Bombay High Court in the case of CIT v. PTC Software India P. Ltd.(2017) 395 ITR 176(Bom.) , wherein Hon'ble Bombay High Court held as under:-

“(a) The Assessing Officer on the basis of the order of the TPO included M/s. Transworks Information Services Ltd. (Transworks Ltd.) in his comparability analysis. The grievance of the respondent assessee before the Tribunal was that Transwork Ltd. cannot be a comparable as the respondent assessee's financial period is from 1st April, 2006 to 31st March, 2007 while the financial period in respect of the comparable is from 1st July, 2006 to 30th June, 2007. This grievance based on fact was not disputed by the Revenue before the Tribunal or even before us. In terms of Rule 10B(4) of the Income Tax Rules, 1962, the analysis for comparison shall be on the data relating to the financial year in which the international transaction has been entered into. In the above view, the Tribunal held that as the financial period during which the international transaction was entered into is different, M/s. Transwork Ltd. could not be treated as comparable and thus not includable.

(b) We find that the provisions of Section 10B(4) of the Rules are clear in as much as it obliges that the data to be used for comparability analysis should be of the same financial year in which the international transactions were entered into by the tested party. In fact, this principle/mandate was applied by the TPO while considering M/s. Power Soft Global Services Ltd. as a comparable because it has a financial year ending in September, 2006 and not 31st March, 2007 as in the case of respondent assessee. The same yardstick ought to have been applied by the TPO while considering whether Transwork Ltd. was comparable. The submissions on behalf of the mandate of Rule 10B of the Rules can be ignored as the difference is only of three months is without any basis. No such liberty is granted in terms of Rule 10B(4) of the Rules.

(c) The findings of the Tribunal being on the basis of the unambiguous mandate of Rule 10B(4) of the Rules, question (iii) as proposed does not give rise to any substantial question of law. Thus, not entertained.”

We have observed that Hon'ble Bombay High Court has not entertained the said question of law as the finding of the fact was recorded by the tribunal

which was affirmed by Hon'ble Bombay High Court in the said decision keeping in view mandate of Rule 10B(4) of the Income-tax Rules, 1962. In the instant case , we have observed that no prejudice shall be caused to Revenue by inclusion of these comparables having financial year ending on 31st December vis-a-vis assessee closing its financial year on 31st March, which falls within the same financial year as that of the assessee . The data for nine months is common for both the comparable and the assessee , and if the same can be extra-polated with credible accuracy on the basis of data available on record then there is no reason why the said comparable should be rejected. The assessee has also placed reliance on case laws which are detailed above which we have duly taken note of. The tribunal has also accepted R System International Limited as comparable for AY 2009-10 in ITA no. 2594/Mum/2014 vide orders dated 16-01-2015 and also accepted said comparable R System International Limited as comparable for AY 2010-11 and rejected contention that merely because financial year is ending on 31st December vis-a-vis assessee's financial year ending on 31st March, the comparable cannot be accepted. Thus, we direct for inclusion of R System International Ltd. and Caliber Point Solutions Ltd. as comparable for computing ALP of international transactions entered into by the assessee with its AE. Revenue also fails on this ground. We order accordingly.

7. The assessee has filed CO and now the main grievance of the assessee is with respect to inclusion of Infosys BPO Ltd. as comparable. The assessee has submitted that assessee is into low end back office support services to its AE . The TPO included this comparable Infosys BPO Ltd. as comparable to the assessee by holding as under:-

“ 13 Comments of the TPO on functional comparability of companies objected by the assessee:

(i) *Infosys BPO Ltd.*

This comparable has been taken by the TPO in A.Y. 10-11. DRP has confirmed this comparable in A.Y. 10-11. The objection of the assessee is regarding scale of operations and brand value associated with the company. The ITAT's have examined all these issues in earlier years. In the case of Wills Processing Services India Pvt. Ltd. Vs. DCIT (TS 49 ITAT 2013)(MUM)(TP A.Y. 2007-08), ITAT observed that the turnover and size of an entity may have impact on economical cost of production in the manufacturing industry due to huge cost of fixed asset but not in service sector. Accordingly Infosys BPO Ltd was accepted as comparable. In the case of Vodafone India Services Vs. DCIT (TS 95 ITAT 2013 (Mum) TP). (A.Y. 2007-08), held that brand is an asset which

can bring in more business and can give more turnover but there was no evidence to show that it results in higher margin. In view of this, the arguments of the assessee for exclusion of Infosys BPO are not acceptable.”

Similarly, DRP included Infosys BPO Ltd. as comparable by holding as under:

“ 2.7 (b)Infosys BPO Ltd (Infosys BPO) –

The assessee has submitted that the company is functionally different as under:

Infosys BPO is leveraging on the brand name of its holding company, Infosys Limited for its business as is apparent from its very name. The relevant cost attributable to such brand building can significantly influence the profitability of Infosys BPO.

Infosys BPO is a giant company owning intangibles, reputation and having substantial brand value. Infosys BPO owns significant Goodwill in its asset base.

It is also pertinent to note that Mumbai Tribunal in Maersk GSC India's case in FY 2004-05 has held that companies having high brand value and turnover as functionally not comparable to Maersk GSC India.

Findings:

The assessee is a BPO. The comparable company is also into BPO activities and therefore both are functionally comparable. The assessee has also contended that Infosys BPO, is a giant company as compared to the assessee company. In this regard, it is relevant to note that the turnover of this company is Rs.1129 crores which is only about 4 times that of the assessee company's turnover. Thus, the difference in turnover is not so huge so as to call this company a giant company vis-a-vis the assessee. In this context, the decision of ITAT, Bangalore in the case of Genesys .Integrating System P. Ltd.(ITA No.1231/Bang/2010) becomes relevant wherein the assessee having turnover of Rs.8.15 crs. was held as comparable to a company of turnover upto Rs.200-crs. i.e. around 25 times.

Regarding the other arguments taken by the assessee, it may be mentioned that comparability of Infosys was considered by ITAT in the case of Willis Processing case (ITA No.4547/Mum/2012) and it has been held that comparability has to be decided strictly on functionality and these arguments are not relevant. Accordingly, Infosys BPO is held as valid comparable.”

The assessee has also relied upon several decisions of the Hon'ble Courts/tribunal so as to support its contention with respect to rejection of the Infosys BPO Ltd. , as under:-

“ *Infosys BPO is specifically rejected as comparable by Hon’ble Mumbai tribunal in Assessee’s own case of AY 2010-11 (Page No 124 of PB II)*

-Infosys BPO is not comparable to back office support services also upheld by:

- Hon'ble Delhi High Court in case of Agnity India Technologies Pvt. ltd. [ITA 1204/2011](Page no. 329 to 331 of PB II);

- Hon'ble Bombay High Court in case of CIT vs. Pentair Water India Pvt. Ltd.[TS-566-HC-2015(BOM)-TP];

- Hon'ble Mumbai Tribunal in case of Aegis Limited [ITA No. 7694/Mum/2014 and ITA No. 1209./Mum/2015] (Page no. 305 and 306 of PB II)

- Hon'ble Delhi Tribunal in case of Orange Business Services India Solutions Private Limited [ITA No. 1202/Del/2015 and ITA.No.869/Del/2016] (Page no. 368 of PB II).

- Hon'ble Bangalore Tribunal in case of Siemens Technology [2017 79 taxmann.com 190] (Page no. 404 & 405 of PB II)

- Hon'ble Bangalore in case of Pole to Win India (P.) Ltd [2016 70 taxmann.com 318] (Page no. 432 of PB II)”

The assessee also relied upon the decision of tribunal in its own case in ITA no. 1082/Mum/2015 for AY 2010-11 , orders dated 29-07-2016 . wherein the tribunal held in favour of the assessee and directed to exclude this company Infosys BPO Limited as comparable while computing ALP of its international transactions with its AE, by holding as under:

“Infosys BPO Limited

13. Objecting to this company, the learned Authorised Representative submitted, this company provides business process management service to organizations that outsource their business process unlike the assessee which broadly provides back office support service. He submitted, as per the information provided in the website of the company it applies business excellence frameworks to significantly reduce costs, enhance effectiveness and optimize business process of its clients. Learned Authorised Representative submitted, this company is a giant in the field owning significant goodwill and has substantial brand value of the Infosys Group. He submitted, the assets and risks of this company is totally different from the assessee. Specifically referring to the director’s report forming part of the annual report of the company, a copy of which is submitted in the paper book, learned Authorised Representative submitted during the relevant previous year this company had made acquisition by acquiring membership interest of an

overseas company viz. Mccamish Systems LLC which provides premier business process outsourcing service to the insurance, retirement and financial service industry and has a large client base. Therefore, this company having operated in different geographic and market conditions cannot be a comparable to the assessee. Further, referring to Schedule-12 to the Profit & Loss account of the company for the year ended 31st March 2010, learned Sr. Counsel submitted that the company has incurred selling and marketing expenses which signifies that it has taken marketing risk unlike the assessee. Further, referring to Schedule-13 of Profit & Loss account, learned Sr. Counsel submitted, the provisions made for bad and doubtful debt signifies the risk taken by the assessee. Learned Authorised Representative submitted, because of its high turnover, brand value, etc., the Hon'ble Jurisdictional High Court in Pentair Water India Pvt. Ltd., Tax Appeal no.18 of 2015 dated 16th September 2015, has held that it cannot be comparable with a low turnover company. The learned Sr. Counsel submitted, the Tribunal Delhi Bench in Equant Solutions India Pvt. Ltd. (supra) for the very same assessment year has excluded Infosys BPO Ltd. as a comparable. Finally, learned Sr. Counsel submitted, Infosys BPO Ltd. was never considered as a comparable in the earlier year nor in the subsequent assessment year. Therefore, applying the rule of consistency this company should be excluded from the list of comparables.

14. Learned Departmental Representative submitted, Transfer Pricing Officer while selecting comparables has not applied any high turnover filter. He submitted, if companies having turnover of more than ten times are to be excluded, as pleaded by the assessee, then applying the same logic companies having turnover ten times lesser than the assessee should also be excluded. Learned Departmental Representative submitted, high turnover has no impact on profitability. Therefore, only because a company has high turnover for that reason alone, it cannot be rejected if functions of the company are similar. As far as brand value is concerned, learned Departmental Representative submitted, there is no discussion on the issue by the DRP. Learned Departmental Representative submitted, the company being functionally similar to assessee should be treated as comparable.

15. We have considered the submissions of the parties and perused the material available on record in the light of relevant case laws cited by the assessee. Undisputedly, this company belongs to Infosys Group thereby carries the goodwill and brand value of the Group. Moreover, the turnover of Infosys BPO Ltd. is equally high. However, apart from the fact that the turnover of this company is high, it is even otherwise functionally different from the assessee because of advantage of goodwill and brand value it gained being part of Infosys Group. Further, incurring of marketing and selling expenses as well as provisions for bad and doubtful debt indicates that this company has taken marketing risk, therefore, functions performed assets employed and risk undertaken by this company being different from the assessee it cannot be treated as comparable. For the aforesaid reasons, the company has not been treated as comparable to a captive BPO service provider in the decisions referred to earlier. In view of the aforesaid, we exclude this company as a comparable.”

We do not find any reason to deviate from the aforesaid decision of the tribunal for AY 2010-11 directing for exclusion of Infosys BPO Limited as comparable for computing ALP of the assessee's international transactions with its AE. We have also gone through the financial statement of Infosys BPO Ltd. and that of the assessee which are placed in paper book and we do find any reasons to deviate from the decision already arrived at by the tribunal for earlier year i.e. AY 2010-11. The turnover of Infosys BPO Limited during the previous year relevant to the impugned assessment year was Rs. 1129.11 crores and it continued to be part of Infosys group. Thus, the contention of the assessee are allowed and we direct the AO to exclude this company Infosys BPO Limited as comparable for computing ALP of international transactions entered into by the assessee with its AE. We order accordingly.

8. The assessee is also aggrieved by the inclusion of the Acropetal Technologies Ltd. as comparable for computing ALP of the assessee's international transactions with its AE . The assessee has contended that this company is primarily engaged in development and exporting of software products and offering integrated enterprise solution. The TPO included Acropetal Technologies Ltd. by holding as under:-

“13. Comments of the TPO on functional comparability of companies objected by the assessee:

(iii). Acropetal Technologies

The objection of regarding Acropetal Technologies is that it is engaged in diversified, activities. It needs to be mentioned here that Acropetal Technologies has three segments, namely engineering design services, information technology services and health care segments. The TPO has taken only Health care Service, which is into Hospital Management System, Electronic Medical Record, Workflow Management Services, therefore the objection of the assessee regarding diverse activities is not tenable. The company has been considered as comparable in the previous year also. Reliance is placed in this regard on the decisions of ITAT Delhi in the case .of Agilent Technologies Limited reported in TS-165-ITAT- 2013(Del) TP for A.Y. 08-09, Where objection of assessee that company is involved in software development activities is not found tenable.”

Similarly DRP had included the same by holding as under:-

“Acropetal Technologies Limited :

The assessee has submitted that the company is functionally different as under:

Acropetal is primarily engaged in the development of computer software.

While the segmental information is available and Healthcare segment is considered as comparable by the TPO it primarily provides niche IT solutions/ software development services to cater to the needs of hospitals and health care centres.

The Assessee submits that Acropetal has incurred around 65 percent of total operating expense for software development.

Findings:

We have perused the details submitted in case of Acropetal Technologies and conclude that the healthcare segment is functionally comparable to the Assessee. As could be seen from the annual report, separate segmental information is available for the Healthcare segment which is into hospital management system, electronic medical records and workflow management services. In view of the above, the acceptance of this company by the TPO does not need any interference.

The assessee contended that this company Acropetal Technologies Ltd. is engaged in business of development of computer software products offering integrated enterprise solution . It is submitted that this company Acropetal Technologies Ltd. is offering cost effective solutions and created niche presence in BFSI, Health and Energy and is primarily an Engineering Design Services Company . It is claimed that the ratio of software expenses to total operating expenses is 65% and it was submitted that this company cannot be included as comparable because the assessee is in low end back office support services. The assessee has also contended that out of software development expenses to the tune of Rs. 69.92 crores , the amount allocated to healthcare segment is Rs. 4.8 crores. It is claimed that even in segmental analysis, the major expenditure including software development are allocations and not actual and hence the segmental result would require further investigation/analysis. The assessee relied upon the following case laws to contend that the companies carrying out business of software /product development cannot be compared with the assessee , as detailed hereunder:-

“ *Hon'ble Mumbai Tribunal in Assessee's own case of AY 2005-06 (Page no. 156 of PB II)*

Hon'ble Mumbai Tribunal in Assessee's own case of AY 2009-10 (Page no. 100 & 101 of PB II)

Hon'ble Bangalore Tribunal in case of Siemens Technology & Services (P.) Ltd. vs. Assistant Commissioner of Income-tax [(2017) 79 taxmann.com/190/ (Page no. 409 of PB II)

Hon'ble Bangalore Tribunal in case of Pole to Win India (P.) Ltd. vs. Deputy Commissioner of Income-tax [(2016) 70 taxmann.com 318] (Page no.431 of PB II)

Hon'ble Mumbai Tribunal in case of DBOI Glahal Services (P.) Ltd. vs. Assistant Commissioner of Income-tax [(2016) 74 taxmann.com 83] (Page no. 443 of PB II)

Hon'ble Delhi Tribunal in case of Ameriprise India Pvt. Ltd. vs. A.C.IT [2015] 62 taxmann.com 237]

The assessee contended that this company Acropetal Technologies Ltd.ought not to have been included as comparable , while the learned DR relied upon orders of the authorities below.

9. We have considered rival contentions and perused the material on record. We have observed that the contention of the assessee that this company Acropetal Technologies Ltd. is into different field being engaged in business of development of computer software products offering integrated enterprise solution and is offering cost effective solutions and created niche presence in BFSI, Health and Energy and is primarily an Engineering Design Services Company wherein ratio of software expenses to total operating expenses is 65% needs verification. The claim of the assessee that out of software development expenses to the tune of Rs. 69.92 crores , the amount allocated to healthcare segment is Rs. 4.8 crores and even in segmental analysis, the major expenditure including software development are allocations and not actual needs verification by the AO , and hence the segmental result would require further investigation/analysis by the AO . In view of above, in our considered view, this matter need to be set aside and restored to the file of the AO/TPO for fresh adjudication after considering all the submissions of the assessee/evidences filed by the assessee which shall be admitted in the interest of justice and thereafter adjudicated on merits in accordance with law. Needless to say that proper and adequate opportunity of being heard be granted to the assessee adhering to the principles of natural justice in accordance with law. We order accordingly.

10. The other grounds raised by the assessee in CO are dismissed as the same are not pressed before us by the learned counsel for the assessee. We order accordingly.

11. In the result, the appeal of the Revenue is dismissed and CO of the assessee is partly allowed as indicated above.

Order pronounced in the open court on 19.04.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 19.04.2018 को की गई ।

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 19.04.2018

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, C
6. Master File

// Tue copy//

BY ORDER
DY/ASSTT. REGISTRAR
ITAT, MUMBAI