

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

**BEFORE MS SUSHMA CHOWLA, JUDICIAL MEMBER
AND SHRI R.K. PANDA, ACCOUNTANT MEMBER**

**ITA No.267/PN/2014
Assessment Year: 2009-10**

Maximize Learning Private Limited,
Basement No.34,
ADM-166SQT BU, Lower Floor,
East Street, Galleria Premises CHSL,
House No.2421, Camp,
Pune – 411001

.... Appellant

PAN: AAACC7416K

Vs.

The Asst. Commissioner of Income Tax,
Circle 11(2), Pune

.... Respondent

Appellant by	:	S/Shri Ketan Ved & Rugved Apte
Respondent by	:	Shri Mukulesh Dube, CIT
Date of hearing	:	09-04-2015
Date of pronouncement	:	29-04-2015

ORDER

PER SUSHMA CHOWLA, JM:

This appeal filed by the assessee is against the order of ACIT, Circle-11(2), Pune dated 27.01.2014 relating to assessment year 2009-10 passed under section 143(3) r.w.s. 144C of the Income-tax Act, 1961.

2. The assessee has raised the following grounds of appeal:-

The Appellant objects to the order dated January 27, 2014 passed by the learned Assistant Commissioner of Income Tax, Circle 11(2), Pune ["ACIT"] under section 143(3) r.w.s. 144C of the Income-tax Act, 1961 ["the Act"] in pursuance of the directions of the learned Dispute Resolution Panel, Pune ["DRP"] dated December 17, 2013 for the assessment year 2009-10 on the following among other grounds:

1. Transfer Pricing adjustment

1.1 *The learned ACIT pursuant to the directions of the learned DRP erred in law and on the facts and in circumstances of the case in making an adjustment amounting to Rs.3,36,97,885/- to the value of international transactions entered into by the Appellant with its Associated Enterprise in respect of provision of Information Technology Enabled Services ["ITES"],*

2. Rejection of benchmarking done by the Appellant

2.1 The learned ACIT pursuant to the directions of the learned DRP erred in law and on the facts and in circumstances of the case in rejecting the benchmarking approach and methodology followed by the Appellant for benchmarking the international transaction of provision of ITES.

3. Binding directions of the DRP not followed

3.1 The learned ACIT pursuant to the directions of the learned DRP erred in law and on the facts and in circumstances of the case in not following the binding directions of the DRP with respect to exclusion of Crossdomain Solutions Limited from list of comparable companies.

4. Erroneous selection of comparable companies

The learned ACIT pursuant to the directions of learned DRP has erred in law and on the facts and in circumstances of the case in selecting the following comparable companies.

- 4.1 Accentia Technologies Ltd.
- 4.2 Coral Hub Ltd.
- 4.3 Cosmic Global Ltd.
- 4.4 Crossdomain Solutions Ltd.
- 4.5 E4e Healthcare Business Solutions Pvt. Ltd.

5. Benefit of the risk adjustment

5.1 The learned ACIT pursuant to the directions of learned DRP has erred in law and on the facts and in circumstances of the case in not granting the risk adjustment.

6. Benefit of the variation / reduction of 5 percent from the arithmetic mean

6.1 The learned ACIT pursuant to the directions of learned DRP has erred in law and on the facts and in circumstances of the case in not granting the benefit of +/- 5 percent as per proviso to section 92C (2) of the Act.

7. Initiation of penalty proceedings

7.1 The learned ACIT erred on the facts and in law in initialing penalty proceedings section 271(1) (c) of the Act.

8. Levy of interest obligation on account of transfer pricing adjustment

8.1 The learned ACIT has erred on the facts and in law by levying interest under section 234B of the Act on account of the unanticipated adjustments made by the learned TPO.

- 8.2 *The Appellant pleads that the shortfall in advance tax has resulted in view of the adjustments which have been objected in the grounds above and accordingly is consequential in nature.*
9. *Each one of the above grounds of appeal is without prejudice to the other.*
10. *The Appellant reserves the right to amend, alter or add to the grounds of appeal.*

3. The Ld. Authorized Representative for the assessee, at the outset, pointed out that the issue of transfer pricing arising in the present appeal is similar to the issue raised by the assessee before the Tribunal in assessment year 2008-09. It is, further, pointed out by the Ld. Authorized Representative for the assessee that in case the ground of appeal No.4 is adjudicated and the comparables selected by the TPO are excluded as has been found to be non-comparable by the Tribunal in the earlier year, then the margin of the comparables would be 16.17% as against the assessee's margin of 15.36% and hence the same would be within +/- 5% range and hence at arm's length. It is, further, pointed out by the Ld. Authorized Representative for the assessee that the DRP had followed its order of earlier year in upholding that an adjustment needs to be made to the value of international transactions entered by the assessee with its associated enterprises in view of the assessee's margin being not comparable with the margin of the said comparables selected by the TPO.

4. The Ld. Departmental Representative for the Revenue placed reliance on the orders of the authorities below.

5. We have heard the rival contentions and perused the record. The assessee in the present appeal has raised multiple grounds of appeal but the grievance of the assessee is with regard to an addition of Rs.3,36,97,885/- made to the value of international transaction entered into by the assessee with its associated enterprise in respect of Provision of Information Technology Enabled Services (in short "ITES").

6. Briefly, in the facts of the case the assessee had rendered ITES to its associated enterprise i.e. Apatara Inc.. During the year under consideration, assessee had provided E-learning and content management services (including IT enabled services) to its associated enterprises. The dispute arising in the present appeal is with regard to determination of arm's length of the aforesaid international transactions of providing IT enabled services to its associated enterprise. Admittedly, the assessee had applied Transactional Net Margin (TNM) Method for the determination that the services provided to its associated enterprise was at arm's length. The TPO had also applied the TNM Method to determine the margins of the comparables and after selecting the set of comparable had computed the PLI of the comparables at 30.56% as against the PLI of the assessee 15.36%. The TPO, thus, proposed an adjustment of Rs.3,96,39,195/- to be made to the international transaction pertaining to IT enabled services of the assessee. The DRP revised the determination of adjustment to be made under section 92CA(3) of the Act and subsequently the Assessing Officer re-worked the adjustment at Rs.3,36,97,885/-, and added the same to the income of the assessee, against which assessee is in appeal. The TPO had selected the following set of comparables :-

<i>Sr.No.</i>	<i>Name of the company</i>	<i>OP/OC</i>
1	<i>R Systems International Ltd. (BPO Segment)</i>	<i>14.08</i>
2	<i>Accentia Technologies Ltd.</i>	<i>43.42</i>
3	<i>Cross Domain Solutions Ltd.</i>	<i>29.40</i>
4	<i>E4e-health Solutions Ltd. (Formerly Nittany Outsourcing)</i>	<i>33.31</i>
5	<i>Cosmic Global Ltd.</i>	<i>40.75</i>
6	<i>Eclerx Services Ltd.</i>	<i>46.92</i>
7	<i>Vishal Information Technologies Ltd.</i>	<i>35.48</i>
8	<i>Microgenetics</i>	<i>1.13</i>
	<i>Average</i>	<i>30.56</i>

7. Before us, the plea of the assessee was that the TPO had erred in including (i) Accentia Technologies Ltd.; (ii) Cross Domain Solutions Ltd.; (iii)

Cosmic Global Ltd.; and, (iv) Coral Hub Ltd.. The assessee by way of ground of appeal No.4 has objected to the selection of the following comparables :-

- “4.1 *Accentia Technologies Ltd.;*
- 4.2 *Coral Hub Ltd.;*
- 4.3 *Cosmic Global Ltd.;*
- 4.4 *Crossdomain Solutions Ltd.; and,*
- 4.5 *E4e Healthcare Business Solutions Pvt. Ltd.”*

8. However, while arguing the appeal, the submissions were against selection of four comparables i.e. (i) Accentia Technologies Ltd.; (ii) Coral Hub Ltd.; (iii) Cosmic Global Ltd.; (iv) Crossdomain Solutions Ltd. and no submissions were made in respect of the comparable E4e Healthcare Business Solutions Pvt. Ltd.. The case of the assessee before us was that the said four comparables were selected by the TPO while benchmarking the international transaction of the assessee in assessment year 2008-09 and the Tribunal after elaborating upon the assessee had directed that the said four comparables be excluded from benchmarking the international transaction of the assessee for assessment year 2008-09.

9. We find that the Tribunal in ITA No.2235/PN/2012 relating to assessment year 2008-09 vide order dated 02.02.2015 had deliberated upon the aforesaid issue which is raised in the present appeal. The issue before the Tribunal was in respect of exclusion of four comparables (i) Accentia Technologies Ltd.; (ii) Coral Hub Ltd.; (iii) Cosmic Global Ltd.; (iv) Crossdomain Solutions Ltd. and also in respect of inclusion of two comparables in the final set of comparables. However before us, in the year under appeal the limited issue is in relation to exclusion of four comparables and there is no issue raised in respect of inclusion of any comparables.

10. The first aspect of the issue is that the TPO had selected final set of comparables which have been referred to by us in the paras hereinabove. From

the perusal of the said data, it appears that the TPO had selected M/s Coral Hub Ltd. (formerly known as Vishal Information Technology Ltd.) as a comparable while determining the PLI of the comparables for the year under consideration. The Tribunal in assessee's own case for assessment year 2008-09 (supra) vide paras 16 to 18 has given a finding that Coral Hub Ltd. could not be selected as a comparable. The Relevant findings of the Tribunal are as under :-

"16. The second concern, which is sought to be excluded from the list of comparables is Coral Hubs Ltd. (formerly Vishal Information Technologies Ltd.). In para 18.3 of the order of the TPO, the submissions of the assessee for excluding the said concern from the list of comparable have been elucidated. The plea of the assessee is that the said concern is functionally not comparable to the assessee as it is engaged in IT enabled services particularly selling and purchasing of products and goods whereas assessee is engaged into e-learning and content development activity. Secondly, it was canvassed on the basis of the Annual report of the said concern that it outsources its work to sub-vendors and therefore the business operating model of the said concern was different from that of the assessee. Consequently, the margins earned by the said concern are reflective of the functions performed by it, which are not akin to the functional profile of the assessee. The aforesaid submissions of the assessee were considered by the TPO, but rejected. The solitary ground of rejection by the TPO was that the activities of the said concern are more or less in the field of IT enabled services which is similar to that of assessee. The point made out by the Revenue on this aspect is that the similarity has to be seen on a broad perspective and that no two concerns can be replica of each other.

17. Before us, the Ld. Representative for the assessee vehemently pointed out that the difference in the operating model of the said concern from that of the assessee has to be appreciated by various decisions of the Tribunal, which are as under :-

- (i) Capital IQ Information Systems (India) Private Limited (supra);*
- (ii) Symphony Marketing Solutions India Pvt. Ltd. (supra);*
- (iii) Brigade Global Services Private Limited vs. ITO, (2013) 33 taxmann.com 618 (Hyd.); and,*
- (iv) Cognizant Technology Services Pvt. Ltd. vs. ACIT, (ITA No.1624/Hyd/2010).*

18. We have considered the submissions of the Ld. Representative for the assessee as also the stand of the Revenue as emerging from the order of the TPO. We find that the inclusion of the Coral Hubs Ltd. as a comparable concern was a subject-matter of consideration by the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) in circumstances which are similar to those before us. The Bangalore Bench of the Tribunal, as per the discussion in paras 14 to 17 of the order found it fit to

exclude the said concern from the final set of comparables. The following discussion is relevant :-

"14. This company is listed at Sl.No.6 of the list of comparable companies chosen by the TPO. As far as this company is concerned, it is seen that this company was earlier known as Vishal Information Technologies Ltd. The comparability of this company in the case of an ITES company by name 24 x 7 Customer.com Pvt. Ltd. was considered by the Tribunal in ITA No.227/Bang/2010 and by order dated 09.11.2012 the Tribunal held that this company is not functionally comparable with ITES for the following reason:—

"17.3 Vishal Information Technologies Ltd. (VIT) - In the case of this comparable, we find that the Mumbai Tribunal in the case of Mearsk Global Services (I) Pvt Ltd in ITA No.3774/Mum/2011 by order dt.9.11.2011 has held that since Vishal Information Technologies Ltd is outsourcing most of its work it has to be excluded from the list whereas the assessee in the cited case was carrying out the work by itself. In the instant case of the assessee also the assessee was carrying out its work by itself whereas in the case of VITL, it is outsourcing most of its work. We are therefore of the considered opinion that the decision of the ITAT, Mumbai in the cited case on the issue of excluding VITL as a comparable squarely applies. This decision was followed by the decision of the co-ordinate bench of this Tribunal in the case of Netlinx India (P) Ltd in ITA No.454/Bang/2011 dt. 19.10.2012 wherein it was held that Vishal Information Technologies Ltd cannot be considered as a comparable. We, therefore, respectfully following the decision of the Mumbai Tribunal in the case of Mearsk Global Services (I) Pvt Ltd, direct the Assessing Officer / TPO to exclude Vishal Information Technologies Ltd. from the list of comparables."

15. Following the decision of the Tribunal referred to above, we hold that Coral Hubs Ltd. cannot be considered as a comparable. It may also be relevant to point out that the TPO in his order has observed that this company is retained as a comparable on the basis of detailed discussion in the TP order for the A.Y. 2007-08. In fact in A.Y. 2007-08, there was no determination of ALP and therefore there was no occasion for any order being passed by the TPO. It is also seen that this company entered into an area of business known as New Vertical Digital Library & Print on Demand in F.Y. 2007-08. In the case of Capital IQ Information Systems India (P.) Ltd. (supra), the ITAT Hyderabad Bench in the case of ITES company considered the comparable of this company as an ITES company and held as follows:-

'IV. Coral Hub Limited (Earlier known as Vishal Information Technologies Ltd.):

16. The assessee has objected for this company being taken as comparable mainly on the ground that the activities of the company is not only functionally different, but the business model of the company is also different as it sub-contracts majority of its ITES works to third party vendors and has also made significant payments to those vendors. The payments made to vendors towards the data entry charges also supports the fact that the company outsources its works. In the circumstances, it cannot

be taken as a comparable to the ITES functions performed by the assessee. Since this company is acting as agent only by outsourcing its works to the third party vendors. In this context, the assessee relied upon the order of the DRP in assessee's own case for the assessment year 2008-09, wherein the DRP, after taking into consideration, the aforesaid aspect, has accepted the claim of the assessee. The assessee further submitted that the Income-tax Appellate Tribunal Mumbai Bench in the case of Asstt. CIT v. Maersk Global Service Centre (India) (P.) Ltd. [2011] 133 ITD 543/16 taxmann.com 47 (Mum.), a copy of which is submitted before us, has also directed for the exclusion of the aforesaid company since it has outsourced a considerable portion of its business.

17. After considering the submissions of the learned Authorised Representative for the assessee, we find that the DRP, in the proceedings for the assessment year 2008-09 in assessee's own case, after taking note of the composition of the vendor payments of Coral Hub for the last three years, and the fact that it has also commenced a new line of business of Printing on Demand (POD), wherein it prints upon clients request, concluded as follows-

"18.4. In view of this major difference in functionality and the business model, this Panel is of the view that 'Coral Hub' is not a suitable comparable to the taxpayer and hence needs to be dropped from the final list of comparables."

In case of Maersk Global service Centre India (P.) Ltd. (supra), the ITAT Mumbai Bench has also directed for exclusion of the aforesaid company, by observing in the following manner-

"Insofar as the cases of tulsyan Technologies Limited and Vishal Information Technologies Limited are concerned, it is noticed from their annual accounts that these companies outsourced a considerable portion of their business. As the assessee carried out entire operations by itself, in our considered opinion, these two cases were rightly excluded."

In view of the observations made by the DRP as well as the decision of the ITAT Mumbai in the case of Maersk Global Service Centre, (supra), we accept that this company cannot be taken as a comparable.'

16. It is also further noticed that the employee cost/operating sales of this company is a mere 3%, whereas the threshold limit for acceptance as a comparable on the basis of employee cost to sales should be at least 25%. This Tribunal in the case of First Advantage Offshore Services Ltd. v. CIT IT(TP)A No.1086/Bang/2011, order dated 30.4.2013 has taken the following view:—

"36. Having heard both the parties and having considered their rival contentions and the material on record, we find that this issue had arisen in the assessee's own case for the assessment year 2006-07. This Tribunal has held that employee cost filter is to be the same even for ITES segment also. The learned DR's argument that the employee cost filter is applicable only to software development segment and not to ITES segment is not acceptable. Though it is without any dispute that the software

development would require skilled employees and, therefore, the employee cost would definitely be more than 25% of the total expenses, it cannot be said that the said filter is not applicable to ITES segment, where comparably less skilled employees are employed. In the ITES segment, the entire work is to be done by the employees and, therefore, even though they may be less skilled compared to software development segment, the number of employees would definitely be more and thus the employee cost would be high and thus application of employee cost filter to the ITES sector is also justified. In view of the same, we direct the TPO to apply the employee cost filter to exclude companies with employee cost of less than 25% from the list of comparables for the computation of ALP."

17. *Applying the aforesaid decisions, we are of the view that Coral Hubs Ltd. cannot be considered as a comparable."*

11. Further, the Tribunal in the case of PTC Software (India) Private Limited vs. DCIT in ITA No.336/PN/2014 relating to assessment year 2009-10 vide order dated 31.10.2014 had also rejected M/s Coral Hub Ltd. (formerly known as Vishal Information Technologies Ltd.) as a comparable. The relevant finding of the Tribunal vide order dated 31.10.2014 (supra) is as under :-

"45. We have heard the rival contentions and perused the record. In the TP study carried out by the TPO in the ITES segments, fresh search criteria were applied by the TPO and list of comparables which were not selected by the assessee were picked up in the TP study and the margins of the said comparables were applied to determine the arm's length price of the transactions of the assessee in ITES segments. The assessee was aggrieved by the selection of the said comparables and the plea of the assessee was that in case said comparables were not included in the TP study, the margins shown by the assessee would be at arm's length. The first comparable referred to by the learned Authorized Representative for the assessee was M/s. Vishal Information Technologies Ltd. The said company was providing IT enabled services and was also engaged in other diversified activities. Further, it has outsourced its services to third party vendor and acted as intermediary between the final customer and the vendor. The assessee on the other hand was engaged in the running of a call centre and was providing technical support to its AEs. We find that the Tribunal in assessee's own case relating to assessment year 2006-07 in ITA No.1346/PN/2010 and in assessment year 2007-08 in ITA No.1605/PN/2011 had excluded the said comparables observing as under:

"30. The next point raised by the assessee is against the inclusion of Vishal Information Technologies Ltd., appearing at Item (10) in the Tabulation in para 25 as a comparable case. The TPO has discussed the issue in para 6.9.6. of the order. As per the TPO, the said concern is functionally comparable to the IT-Enabled services segment of the assessee and for that reason, the said concern has been included as a comparable for the purposes of comparability analysis. In this connection, the plea set up by the assessee is that the said concern is

engaged in not only IT-Enabled services, but also in providing quality products and in the creation of animated films and books. It has also been ascertained by referring to the Annual Report of the said concern that it is engaged in providing agency services by way of outsourcing the services to third party vendors and acting as an intermediary between the final customer and the vendor. The assessee furnished detailed submissions in this regard before the lower authorities, copies of which have been placed in the Paper Book at pages 420.8 to 420.31. By referring to the written submissions, it is also sought to be pointed out that the intermediary functions performed by the said concern can be compared to that of a distributor which takes title to service/product for resale to the customers. The aforesaid assertion is sought to be substantiated by the details of payments made by the said concern for data entry and vendor payments, personnel costs and sales. It is, therefore, contended that the said concern is functionally dissimilar to that of the IT-Enabled services segment of the assessee. It has also been argued that the said concern has earned supernormal profits as high as 59.19% and therefore, the same is not includible in the list of comparables so as to avoid skewing of the comparability analysis. On the other hand, the stand of the Revenue as brought out by the TPO in para 6.9.6. of the order is to the effect that the said concern being categorized as an IT-Enabled services concern, the same is liable to be included.

31. We have carefully considered the rival submissions on this aspect. At the outset, we may refer to page 810 of the Paper book, wherein the Notes to Accounts for the year ended 31.3.2007 of the said concern have been placed. As per the available information, the said concern has related party transactions as reported by the concern at para 7 of the said Notes at 86.92%, which breaches the RPT filter. Furthermore, the functional profile of the said concern brought out by the assessee also reveals differentiation in the activity profile. The TPO, in our view, has not appreciated the qualitative difference in the functions performed by the said concern as sought out to be brought out by the assessee. Considering the aforesaid, we therefore, find that the assessee was justified in ascertaining that the said concern be excluded from the list of comparables for the reasons canvassed. Thus, on this aspect assessee succeeds.”

46. The Tribunal in the assessee’s own case had held that the said concern was found to be operating in different functional environment and the same was excluded for the purpose of comparability analysis. Following the ratio laid down by the Tribunal in assessee’s own case in assessment years 2006-07 and 2007-08 (supra), we uphold the plea of the assessee in excluding the margins of the said concern M/s. Vishal Technologies Ltd.”

12. Further, the Pune Bench of the Tribunal in BNY Mellon International Operations (India) Private Limited vs. DCIT in ITA No.23/PN/2014 relating to assessment year 2009-10 vide order dated 11.02.2015 had also held that M/s Coral Hub Ltd. is to be excluded from the final set of comparables. Following the

above said precedents, we hold that M/s Coral Hub Ltd. is to be excluded from final set of comparables.

13. Now, coming to the next contention of the assessee vis-à-vis M/s Accentia Technologies Ltd. that the same has been wrongly included by the TPO as a comparable concern. The Tribunal in assessee's own case vide paras 13 to 16 had held that the said concern could not be considered as a comparable. The relevant findings of the Tribunal are as under :-

"13. Next, assessee had contended that Accentia Technologies Ltd. has been wrongly included by the TPO as a comparable concern. As per the assessee, the said concern was engaged in functionally different activities. It was pointed out that the said concern is engaged in providing medical transaction, billing and coding services, application development & customization (segmental data not available). Moreover, it was contended that the sales/turnover of the said concern was more than Rs.50 crores for the year under consideration which did not meet with turnover filter applied by the assessee. On this point, it was pointed out that the assessee had selected sales/turnover filter of 1-50 crores i.e. any concerns having a turnover exceeding Rs.50 crores were excluded. Thirdly, it was pointed out that the activities of the said concern were not comparable to the activities of the assessee.

14. The TPO has noted the aforesaid objections of the assessee in para 18.1 of his order and has rejected the same by merely noticing that 75% of the revenue/income of the said concern is from ITES and therefore it is to be considered as a comparable. Before us, the Ld. Representative for the assessee has reiterated the submissions put-forth before the TPO in order to justify exclusion of the said concern from the list of comparables. In particular, it has been pointed out that for the very same assessment year, the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. vs. ITO, (2013) 38 taxmann.com 55 (Bang.) has excluded the said concern from the list of comparables in a similar situation following the decision of the Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) Private Limited vs. DCIT, (2013) 32 taxmann.com 21 (Hyd.).

15. We have considered the submissions of the Ld. Representative for the assessee and also the stand of the Revenue as emerging from the order of the TPO. In our view, the ratio laid down by the Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) Private Limited (supra) and by the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) is squarely applicable to the present case also. The aforesaid Benches of the Tribunal found that during the year under consideration there were extraordinary events that took place in the said concern which warranted exclusion of this company as a comparable. We therefore hold that the said concern cannot be considered as a comparable."

14. We find that the Tribunal in PTC Software (India) Private Limited vs. DCIT (supra) and BNY Mellon International Operations (India) Private Limited vs. DCIT (supra) and also in M/s Capital IQ Information Systems (India) Pvt. Ltd. vs. Addl.CIT in ITA No.124/Hyd/2014 relating to assessment year 2009-10 vide order dated 31.07.2014 had held that M/s Accentia Technologies Ltd. was not a comparable in IT segment for having extra-ordinary circumstances i.e. amalgamation. The relevant finding of the Tribunal in PTC Software (India) Private Limited vs. DCIT (supra) is as under :-

“47. The next objection of the learned Authorized Representative for the assessee was with regard to the inclusion of M/s. Accentia Technologies Ltd. which admittedly was engaged in developing its own software products and was rendering medical transcription services. Further, the said company during the year under consideration had made certain acquisitions which in turn affected the margins of the year of the acquisition. We find that Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) Pvt. Ltd. (supra) had rejected Accentia Technologies Ltd. for having extra-ordinary circumstances i.e. amalgamation. Following the parity of reasoning as adopted by the Hyderabad Bench of the Tribunal, we hold that the said company had different functional profile as compared to the assessee, which in turn explained the abnormally high profit margins earned by the said company as compared to the assessee. Accordingly, we accept the plea of the assessee and hold that the said company is not to be used as comparable in ITES segments of the assessee.”

15. In view thereof, we hold that M/s Accentia Technologies Ltd. is to be excluded from the final set of comparables.

16. Similarly, the third concern i.e. Cosmic Global Ltd. was held to be not comparable by the Tribunal in its order dated 02.02.2015 (supra) in the hands of the assessee because the said concern was operating in a different business model. The relevant findings of the Tribunal are as under :-

“21. The third concern, which is sought to be excluded by the assessee is Cosmic Global Ltd.. The assessee has contended before the TPO that the said concern needs to be rejected on the ground that it was engaged in BPO and Translation services whereas assessee was an ITES provider, and therefore concern was functionally dissimilar. However, the TPO rejected the pleas of the

assessee and considered the said concern as a comparable on the ground that export income of the said concern was more than 50%.

22. Before us, Ld. Representative for the assessee referred to the objections raised before the DRP to point out that the said concern was liable to be excluded from the final set of comparables. Firstly, it is pointed out that the said concern was offering Accounts processing services and transcription services and was not comparable to the activities of the assessee as the said concern was into BPO and Translation services. It was also pointed out by referring to the website of the said concern that it was engaged in the diversified business activity. It was also pointed out that though the activities of the said concern are in medical transcription, consultancy, translation and Accounts BPO services but there was no segmental information available in the Annual accounts of the said concern. Apart therefrom, it has been pointed out that the said concern has incurred a substantial expenditure of Rs.2,86,29,348/- towards translation charges as is evident from the Annual Report of the said concern. The said translation charges are approximately 60.17% of the total cost incurred by the said concern and the employee cost comprises of merely 17.32% of the total cost. It was therefore contended that the aforesaid facts justify an inference that the said concern was not adopting the normal and routine business model for an otherwise normal ITES provider. The proportion of expenditure incurred on outsourcing and employee costs show that the said concern seems to have outsourced the functions to different vendors. The aforesaid was highlighted to point out that the operating business model of Cosmic Global Ltd. was totally different from that of the assessee. In this context, the Ld. Representative pointed out that the TPO had rejected the Ace Software Exports Limited from the list of comparables and one of the reasons ascribed was that the said concern was incurring major expenditure on software sourcing charges. The TPO in the context of Ace Software Exports Limited came to conclude that the said concern was not a service provider but a recipient of the services and therefore it was rejected as a comparable. The Ld. Representative emphasized that if Ace Software Exports Limited was rejected by the TPO for having substantial software outsourcing charges then M/s Cosmic Global Ltd. also needs to be rejected for incurring a high proportion of expenditure on outsourced translation charges.

23. The Ld. CIT-DR appearing for the Revenue has primarily reiterated the stand of the TPO wherein the said concern was rejected on the ground that its export income was more than 50%. The Ld. CIT-DR reiterated that primarily the said concern was also engaged in ITES activities and the TPO was justified in including the same in the list of comparables.

24. We have carefully considered the rival submissions. The pertinent point made out by the Ld. Representative for the assessee is that the said concern is operating in a different business model wherein much of its activities are outsourced whereas the business model of the assessee is different. In an outsourcing business model obviously the expenditure incurred on employee costs would be low in comparison to the expenditure incurred on outsourcing. Ostensibly, where IT enabled services are outsourced to a third party vendor then the margin derived by the said concern would be attributable to services rendered by the outsourced vendor. Per contra, where IT enabled services are being rendered by a concern through its own employees, the margins from rendering of services by the said concern would be attributable to its own employees. Obviously, the level of margins in the two business models would not be comparable. The Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) Private Limited (*supra*) has held that concerns

who act as intermediaries having outsourced its activity cannot be said to be comparable with a concern who is rendering services through its own employees. The said proposition has also been upheld by the Hyderabad Bench of the Tribunal in the case of Brigade Global Services Private Limited (supra). Having regard to the aforesaid discussion, in our view, the said concern is not a good comparable to be included for the purposes of comparability analysis as it operates under a different business model which impacts operating margins. As a consequence, we direct the Assessing Officer to exclude the said concern from the final set of comparables.”

17. We further find that the Tribunal in PTC Software (India) Private Limited vs. DCIT (supra) and BNY Mellon International Operations (India) Private Limited vs. DCIT (supra) and also in M/s Capital IQ Information Systems (India) Pvt. Ltd. vs. Addl.CIT (supra) while deciding the appeals of the relevant assessees in assessment years 2009-10 had held that M/s Cosmic Global Ltd. is not to be considered as a comparable. The relevant observations of the Tribunal in BNY Mellon International Operations (India) Private Limited vs. DCIT (supra) are as under :-

“16. The third concern, which is sought to be excluded by the assessee is Cosmic Global Ltd.. Before the TPO also, assessee had canvassed that the said concern was functionally not comparable to the assessee. It was pointed out that the said concern is engaged into translation, transcription of data which is entirely different from the functions being performed by the assessee. The TPO has rejected the plea of the assessee by merely noticing that in the preceding assessment year 2008-09, the stated concern was selected by the assessee as a comparable concern.

17. Before us, the Ld. Representative for the assessee pointed out that the plea of the assessee for exclusion of Cosmic Global Ltd. is supported by the decision of the PTC Software (India) Private Limited (supra), which has also been rendered in the context of a concern rendering similar services as the assessee. The following discussion in the order of the Tribunal dated 31.10.2014 is relevant in this regard :-

“50. The next company as per the assessee which should not be taken as comparable is Cosmic Global Ltd. Admittedly, the assessee had not objected to its inclusion either before the TPO or DRP. However, the assessee challenged the exclusion of the said company as comparable before the Tribunal.

51. We find that the Special Bench of Chandigarh Tribunal in the case of Quark Systems Pvt. Ltd. (supra) had held that even if the assessee had not challenged the inclusion of the comparable before the authorities below, the same could be challenged before the Tribunal for the first time. Accordingly, we hold that the assessee at this point can raise the said issue. Now, the second part of the objection was that the company had outsourced its vendor and was making high vendor

payments as compared to the sales and hence was not comparable. While adjudicating the exclusion of M/s. Vishal Information Technologies Ltd., we have in paras hereinabove already considered this aspect of the companies outsourcing to vendors and held M/s. Vishal Information Technologies Ltd. to be not functionally comparable. Following the same parity of reasoning, we hold that M/s. Cosmic Global Ltd. is not functionally comparable.”

18. *Apart from the decision in the case of PTC Software (India) Private Limited (supra), the decision of Hyderabad Bench of the Tribunal in the case of M/s Capital IQ Information Systems (India) Pvt. Ltd. vs. Addl.CIT vide ITA No.124/Hyd/2014 dated 31.07.2014 has also been relied upon by the assessee to justify the exclusion of M/s Cosmic Global Ltd. from the final set of comparables. The Hyderabad Bench of the Tribunal considered an earlier decision of the Delhi Bench of the Tribunal in the case of M/s Mercer Consulting (India) P. Ltd. vs. DCIT vide ITA No.966/Del/2014 dated 06.06.2014 wherein also the said concern was found to be incomparable with an ITES provider. The following discussion in the order of the Hyderabad Bench of the Tribunal is worthy of notice :-*

“19. The main objection of assessee with reference to the inclusion of this company is with reference to outsourcing of its main activity. Even though this company is in assessee's TP study, it has raised objection before the TPO that this company's employee cost is less than 21.30% and most of the cost is with reference to the outsourcing charges or translation charges, and as such this is not a comparable company. The TPO, though considered these submissions, rejected the same, on the reason that this does not impact the profit margin of the company. Opposing the view taken by the TPO, it is submitted that this company cannot be selected as comparable, as similar issue was discussed by the coordinate Bench of the Tribunal(Delhi) in the case of Mercer Consulting (India) P. Ltd. (supra), vide paras 13.2 to 13.3 which read as under-

"13.2. Now coming to the factual matrix of this case, we find from the material on record that outsourcing charges of this case constitute 57.31% of the total operating costs. This does not appear to us to be a valid reason for eliminating this case from the list of comparables. On going through the Annual accounts of Cosmic Global Limited, a copy of which has been placed on record, we find that its total revenue from operations are at Rs.7.37 crore divided into three segments, namely, Medical transcription and consultancy services at Rs.9,90 lacs, Translation charges at Rs.6.99 crore and Accounts BPO at Rs.27.76 lac. The Id. AR has made out a case that outsourcing activity carried out by this company constitutes 57% of total expenses. The reason for which we are not agreeable with the Id. AR is that we have to examine the revenue of this case only from Accounts BPO segment and not on the entity level, being also from Medical transcription and Translation charges. When we are examining the results of this company from the Accounts BPO segment alone, there is no need to examine the position under other segments. The entire outsourcing is confined to Translation charges paid at Rs.3.00 crore, which is strictly in the realm of the Translation segment, revenues from which are to the tune of Rs.6.99 crore. If this segment of Translation is not under consideration for deciding

as to whether this case is comparable or not, we cannot take recourse to the figures which are relevant for segments other than accounts BPO. Thus it is held that this case cannot be excluded on the strength of outsourcing activity, which is alien to the relevant segment.

13.3. However, we find this case to incomparable on the alternative argument advanced by the Id. AR to the effect that total revenue of the Accounts BPO segment of Cosmic Global Limited is very low at Rs.27.76 lacs. We have discussed this aspect above in the context of CG-VAK's case and held that a captive unit cannot be compared with a giant case and thus excluded CG-VAK with turnover from Accounts BPO segment at Rs.86.10 lacs. As the segmental revenue of BPO segment of Cosmic Global Limited at Rs.27.76 lac is still on much lower side, the reasons given above would fully apply to hold Cosmic Global Limited as incomparable. This case is, therefore, directed to be excluded from the list of comparables. "

In view of the detailed analysis of the coordinate Bench of the Tribunal in the above referred case, in this case also we accept the contentions of assessee and direct the Assessing Officer/TPO to exclude this comparable for the same reasons."

19. The aforesaid discussion made by the respective Benches of the Tribunal reveals that in relation to the financial year under consideration, the business model in which M/s Cosmic Global Ltd. has functioned is quite dissimilar to the business model of the assessee while carrying out the activity of an ITES provider. Moreover, none of the objections raised by the assessee have been met by the TPO on the basis of any cogent reasoning. On that count also, we find that the plea of the assessee to exclude M/s Cosmic Global Ltd. from the final set of comparables is justified. The objection of the TPO that the said concern was found comparable by the assessee in earlier year cannot be the sole basis to include the said concern in the list of comparables, in view of the aforesaid discussion. Thus, assessee succeeds on this aspect."

18. Since the said concern, M/s Cosmic Global Ltd. was operating in different business model than the assessee in the year under consideration also, the same needs to be excluded from the final set of comparables and accordingly we direct the Assessing Officer to exclude the same from the final set of comparables. Following the same parity of reasoning, we hold that M/s Cosmic Global Ltd. is to be excluded from the final set of comparables.

19. The last plea raised by the assessee was for exclusion of Crossdomain Solutions Ltd. from the list of comparables. The said comparable was part of the final list of comparables selected by the TPO for benchmarking the international

transaction of the assessee in assessment year 2008-09. The said comparable was engaged in high end KPO services and hence were claimed to be not a comparable with the assessee which was a normal ITES provider. The Tribunal accepting the said plea of the assessee in assessment year 2008-09 held the said concern was to be excluded from the final list of comparables by observing as under :-

“25. The last plea of the assessee is to exclude from the list of comparables Crossdomain Solutions Ltd.. In this context, before the TPO assessee submitted that the said concern was not comparable with the assessee. It was pointed out that the said concern was engaged in the payroll activity apart from being engaged in KPO services. The assessee also referred to the website of the said concern to point out that the said concern was identified as a Knowledge Process Outsourcing services provider (KPO) and not a simple business process outsourcing services provider. Before the DRP, it was also contended that the said concern was engaged in high end KPO services which varies from a routine low end ITES provider in terms of skill set used and nature of services provided. It was also contended that the said concern has developed products for effectively servicing its customers and the same was entirely different than that of the assessee’s business of rendering routine IT enabled services. At the time of hearing before us, the Ld. Representative for the assessee has referred to the following Tabulation which brings out the difference between e-learning activities carried out by the assessee and the KPO activities carried out by the said concern :-

E-learning	KPO
<i>The assessee provides low-end IT enabled services in the form of e-learning solutions.</i>	<i>KPO is a form of outsourcing, in which knowledge-related and information-related work is carried out by the service providers.</i>
<i>E-learning solutions services provided by the assessee are not very complex in nature and thus do not require highly skilled professionals to perform the functions.</i>	<i>Unlike the outsourcing of manufacturing or routine software services, this typically involves high-value work carried out by the highly skilled staff.</i>
<i>E-learning solution provides cannot earn high margins of profits since they primarily derive their revenue from performing functions that are not exclusively provided by them and have close substitutes in the market.</i>	<i>Most firms providing Knowledge processing possess exclusive information, knowledge and experience which cannot be found in most of their competitors. Thus, they tend to command higher margins of profits.</i>
<i>Low-end IT enabled service</i>	<i>KPO firms earn extraordinary</i>

<i>providers employ workers who have the basic knowledge and can be trained to perform the necessary functions.</i>	<i>profits due to the highly skilled resources they employ in the form of highly-qualified professionals.</i>
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26. On the other hand, the Ld. CIT-DR appearing for the Revenue contended that the TPO as well as the DRP have rejected the plea of the assessee as the submissions were on a wrong footing. It was reiterated that the nature of services rendered by the said concern were falling in the category of IT enabled services which is also broadly the category of the services being rendered by the assessee. Therefore, the said concern was rightly included by the TPO in the list of comparables.

27. We have carefully considered the rival submissions. Ostensibly, the reason advanced by the TPO to reject the plea of the assessee are too general and are not justified. Even where two concerns may be undertaking activities which can be broadly categorized as ITES in common parlance but where an assessee is able to establish that intrinsically the activities are not comparable, such a concern would not be included for the purposes of comparability analysis. In the context of the present case, the plea of the assessee is that the business of M/s Crossdomain Solutions Ltd. ranged from high end KPO services, development of products and routine low and IT enabled services. For instant, the website extract and also the Annual report of the said concern shows that it was engaged in payroll outsourcing on a substantive scale. The Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) for the very assessment year found that there was no bifurcation available for various diversified activities being carried out by the said concern and therefore on an entity level the said concern could not be compared to a normal ITES provider. In our view, following the decision of the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) which was also followed by the Hyderabad Bench of the Tribunal in the case of Market Tools Research Pvt. Ltd. vs. ACIT (ITA No.1811/Hyd/2012 dated 24.10.2013, the aforesaid concern is liable to be excluded from the list of comparables.”

20. Further, the Tribunal in BNY Mellon International Operations (India) Private Limited vs. DCIT (supra), in assessment year 2009-10 had excluded the said concern as comparable by observing as under :-

“12. Another plea raised by the assessee is for exclusion of Crossdomain Solutions Ltd. from the final set of comparables. In this regard, assessee canvassed before the TPO that the said concern was functionally not comparable to the activity of IT enabled services being carried out by the assessee. It was pointed out by the assessee before the TPO that the said concern was involved in various activities which involved outsourcing, human resources, insurance, healthcare/accounting and consulting, business excellence, market research/analysis and IT services. It was pointed out that the above functions being performed by the said concern were not comparable to the activity of an IT enabled service provider undertaken by the assessee. It was also canvassed that there was no segmental profitability available from the Annual financial statement of the assessee and the said concern was not a comparable concern

on the entity level. The TPO has rejected the plea of the assessee on similar grounds as taken by him for rejecting the assessee's plea for exclusion of Accentia Technologies Ltd..

13. Before us, the Ld. Representative has relied upon the decision of the Mumbai Bench of the Tribunal in the case of DCIT vs. M/s Willis Processing Services (India) Pvt. Ltd. vide ITA No.2152/Mum/2014 dated 10.10.2014 in order to justify the exclusion of Crossdomain Solutions Ltd..

14. We find that M/s Wills Processing Services (India) Pvt. Ltd. (supra) was a concern where the tested party was providing IT enabled services to its various group concerns and activities were quite similar to the activity of IT enabled services rendered by assessee to its affiliates. In this context, the concern, M/s Crossdomain Solutions Ltd. was found to be functionally not comparable by the DRP and such decision was affirmed by the Tribunal by making the following discussion :-

“3. M/s Crossdomain Solutions Ltd.

This company has been rejected by the DRP on the ground that it is indulged in high skill IT services which are not comparable to the routine I.T. Enabled services. The Tribunal Hyderabad Bench in the case of M/s Market Tools Research Pvt. Ltd. in ITA No.1811/Hyd/2012 has held that this company is providing services which are in the nature of KPO. Further, the company is engaged in providing Niche services as well as developed its own brand 'Exdion' to target the insurance industry in US. The Tribunal followed the findings of the Bangalore Bench in the case of M/s Symphony Marketing Solutions India Pvt. Ltd. in ITA No.1316/Bang/2012 while rejecting the issue of this company in the final set of comparables. Respectfully following the findings of the co-ordinate bench, we uphold the directions of the DRP for the rejection of this company from the final list of comparable.”

15. Following the aforesaid precedent, which has been rendered in the context of the same assessment year, we uphold assessee's plea for exclusion of Crossdomain Solutions Ltd. from the final set of comparables. We hold so.”

21. The business activity carried on by the said comparable being at variance with business of the assessee before us and following the parity of reasoning laid down by the Tribunal vide various orders of different assessees, we hold that the said comparable is to be excluded from the final set of comparables. Following the same parity of reasoning, we hold that M/s Crossdomain Solutions Ltd. is to be excluded from the final set of comparables.

22. The Assessing Officer is thus directed to re-compute the margin of the comparables after excluding the four concerns i.e. (i) Coral Hub Ltd.; (ii) Accentia Technologies Ltd.; (iii) Cosmic Global Ltd.; and, (iv) Crossdomain Solutions Ltd.

and determine the arm's length price of the international transactions in the hands of the assessee.

23. Apart from making submissions with regard to the ground of appeal No.4 no other plea has been raised by the assessee in respect of other grounds of appeal and hence grounds of appeal raised by the assessee are partly allowed.

24. The ground of appeal No.8 raised by the assessee against the levy of interest under section 234B of the Act being consequentially is dismissed.

25. The ground of appeal No.7 raised by the assessee against the initiation of penalty proceedings being pre-mature is also dismissed.

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

Order pronounced on this 29th day of April, 2015.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
JUDICIAL MEMBER

Pune, Dated: 29th April, 2015

Sujeet

Copy of the order is forwarded to: -

- 1) The Assessee;
- 2) The Department;
- 3) The DRP, Pune;
- 4) The DIT (International Taxation), Pune;
- 5) The DR "A" Bench, I.T.A.T., Pune;
- 6) Guard File.

By Order

//True Copy//

Assistant Registrar
I.T.A.T., Pune