IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

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<tr><th>ITA No.</th><th>A.Y.</th><th>Appellant</th><th>Respondent</th></tr>
<tr><td>200/Hyd/16</td><td rowspan="2">2011-12</td><td>S&P Capital IQ (India) Private Limited, Hyderabad [PAN: AACCS8657G]</td><td>Deputy Commissioner of Income Tax, Circle-3(1), Hyderabad</td></tr>
<tr><td>435/Hyd/16</td><td>Deputy Commissioner of Income Tax, Circle-3(1), Hyderabad</td><td>S&P Capital IQ (India) Private Limited, Hyderabad [PAN: AACCS8657G]</td></tr>
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Stay Application No. 22/Hyd/2016
(Arising out of ITA No. 200/Hyd/2016)
Assessment Year : 2011-12

S&P Capital IQ (India) Private Limited, Hyderabad [PAN: AACCS8657G] **(Applicant)**	Vs.	Deputy Commissioner of Income Tax, Circle-3(1), Hyderabad **(Respondent)**

For Assessee : Shri G.C. Srivastava, AR
For Revenue : Shri K. Devarathna Kumar, DR

Date of Hearing : 20-07-2016
Date of Pronouncement : 27-07-2016

O R D E R

PER B. RAMAKOTAIAH, A.M. :

These are cross-appeals by assessee and Revenue on the order passed by the Assessing Officer (AO) u/s. 143(3) r.w.s. 144C(5) r.w.s. 92CA(3) of the Income Tax Act [Act], consequent to the directions of the Dispute Resolution Panel [DRP], Bangalore dated 02-12-2015.

2. Briefly stated, assessee is wholly owned subsidiary of Capital IQ, Inc and has its unit registered under STP of India Scheme at Hyderabad. Assessee is providing IT Enabled Services (ITES) to the Associated Enterprise [AE] which includes updating database, processing annual reports, quarterly financial reports, press releases of various companies, extracting data from financial statements and audit reports etc., and preparation of business descriptions, biographies of key executives and track key developments in the companies. For the year under consideration, assessee admitted income of Rs. 32,61,91,953/- under normal provisions of the Act and Rs. 32,43,92,789/- under the provisions of Section 115JB. As assessee has international transactions with its AE, AO made a reference to the TPO as per the provisions of Section 92CA for determination of Arm's Length Price [ALP]. Assessee provides the services to its AE on cost+15% mark up. However, assessee chooses Transactional Net Margin Method [TNMM] as the most appropriate method and PLI was determined at 15.04% by taking OP/OC. Assessee in its TP study used Prowess and Capitaline + database and selected certain comparable companies and arrived at ALP of 14.81%. Since that is less than margin of assessee, assessee submitted that transactions are within Arm's Length. Assessee had 248.14 Crores receipts from its AE. Its operating cost was taken at 215.70 Crores and Operating Profit at Rs. 32.44 Crores. The TPO in his study was of the opinion that the method of search process suffers from defects which resulted in selection of inappropriate comparables and

rejection of certain appropriate comparables. Further, multiple year data was also taken. The TP document of assessee was rejected and an independent analysis has been made by the TPO. After giving show cause letter and obtaining objections from assessee, the TPO adopted the following filters which were accepted by assessee.

i. Companies whose data is not available for the FY. 2010-11 were excluded;
ii. Companies whose IT Enabled services income <Rs. 1 cr. were excluded;
iii. Companies whose IT Enabled services is less than 75% of the total operating revenues were excluded;
iv. Companies who have more than 25% related party transactions (sales as well as expenditure combined) of the sales were excluded;
v. Companies who have export sales less than 25% of the sales were excluded;
vi. Companies that are functionally different from the taxpayer were excluded;
vii. Companies that are having peculiar economic circumstances were excluded;

In addition, certain filters are proposed by TPO, were objected to by assessee, but TPO adopted the same in the final order. Those are :

a. Companies having different financial year ending;
b. Companies who have persistent losses;

By adopting the above filters, the TPO has selected some fresh comparables also and ultimately he has short listed the following thirteen companies as comparables and arrived at an arithmetic mean of 25.73 as the PLI of the comparable companies. The details are as under:

S.No	Name of the company	OR in Rs. Crores	OP/OC
1.	Accentia Technologies Ltd.,	107.22	29.29
2.	Acropetal Techologies Ltd (Seg)	49.48	15.57
3.	Cosmic Global Ltd.,	6.24	9.81
4.	Crossdomain Solutions P Ltd	44.11	25.04
5.	e4e Healthcare	63.61	16.60
6.	eClerx Services Ltd.,	341.91	69.78
7.	Informed Technologies Ltd	1.75	9.24
8.	Infosys BPO	1138.30	18.85
9.	Jeevan Scientific Technologies Ltd.,	1.73	28.93
10.	Jindal Intellicome Ltd.,	39.06	13.54
11.	Mastiff Tech P. Ltd.,	1.57	21.78
12.	Microgentic Systems Ltd	1.27	-0.22
13.	TCS E-serve Ltd	1504.55	76.28
	Total:		334.49
	Arithmetic Mean		25.73

3. After arriving at the arithmetic mean, the TPO has allowed working capital adjustment of 0.86% to arrive at adjusted Arm's Length margin at 24.87%. On an Operating Cost of 215.70 Crores, the TPO proposed adjustment u/s. 92CA at Rs. 21,20,42,235/- in his order u/s. 92CA. The AO following the order of the TPO, proposed a draft order incorporating the above adjustment vide order dt. 09-03-2015.

4. Assessee objected to various filters and also various comparables selected by the TPO and also requested for inclusion of certain comparables rejected by the TPO. The DRP vide its order

dt. 02-12-2015, accepted the objections of assessee on certain comparables and rejected assessee's request for inclusion and also *suo motto* excluded some companies and consequently, directed the TPO/AO to re-work out the ALP.

5. The DRP has decided various comparables as under:

S.No.	Companies	DRP Decision
1.	Accentia Technology Limited	It is noticed by us, that the assessee itself has selected this company as comparable in its TP study and now since some low margin cases selected by the assessee have been rejected by the TPO, it is now objecting against this comparables, which is not proper. Further, the Hon'ble ITAT Hyd Bench for the AY 2007-8 & 2009-10 excluded the above company as there were extraordinary events during that period, and the assessee has not brought to our notice any such extra ordinary event during the year and therefore, we are of the view that this company cannot be excluded from the comparables.
2.	Acropetal Technologies Limited	Having considered the submissions, on perusal of the annual report, it is noticed by us that the assessing officer has considered the revenue from the engineering design segment. Hon'ble ITAT, Bangalore in IT(TP)/A/1678/Bang/2012 in the case of Global E Business Operations, directed to exclude the above company by observing that 'we have considered the submission of the learned counsel for the assessee, on perusal of note no.15 of notes to accounts, which gives segmental revenue of this company, it is clear that the major source of the income for this company is from providing engineering design services and information technology services. The function performed by the engineering design services of the company cannot be considered as comparable to the ITES /BPO function performed by the assessee. The performance of the engineering

		design services is regarded as providing high end services amongst the BPO which require high skill whereas the services performed by the assessee are routing low end ITES function. We therefore hold that this company could not have been selected as comparable, especially when it performs engineering design services which only a knowledge processing outsourcing- (KPO) would do and not a business processing outsourcing (BPO).' Similar View was taken by Hon'ble Bangalore ITAT in the case of - Symphony Marketing Solutions India Pvt. Ltd. vs. ITO (IT (TP) A No. 1316/Bang/2012), held that Acropetal cannot be considered as comparable as it performs engineering design services accordingly we direct the assessing officer to exclude the company from the comparables.
3.	eClerx Services Limited	Having considered the submission, respectfully following the decision of Hon'ble the ITAT for the AY 2009·10 in assessee's own case, as the functional profile of the assessee company and the above company remain the same, we direct the AO to exclude the above company from comparables.
4.	Infosys BPO Limited	Having considered the submission, respectfully following the decision of Hon'ble the ITAT for the AY 2009·10 in assessee's own case, as the functional profile of the assessee company and the above company remain the same, we direct the AO to exclude the above company from comparables.
5.	TCS e-Serve Limited	Having considered the submissions, on perusal of annual report, it is noticed by us from the schedule to the financial statement that the company is engaged in the business of providing information technology – enabled services/business processing outsourcing service, primary to the Citi group companies introduced globally the transaction processing include the broad spectrum of activities involving the processing, collections, customer care and payments in relation to the services offered by Citi group to its corporate and retail clients. As per the annual report,

		the company also provide technical services involving software testing, verification and validation of software at the time of implementation and data centre management activities, which makes the company functionally incomparable with the assessee, accordingly, we direct the assessing officer to exclude the above company from comparables.
6.	Crossdomain Solutions Pvt. Ltd.,	Having considered the submissions, we examined the annual report produced by the assessee in which there is no indication that the company is engaged in providing knowledge process outsourcing. On page 2 of the Director's Report, it is only mentioned that 'India continues to be a high quality and low cost destination for outsourcing in health care business services and your Directors are confident of capturing the sizeable business in the coming year.' In our view, the functional comparability need to be decided on the basis of information available in the annual report and not based on the web site information which may not be reliable. The Hon'ble ITAT, Hyderabad, in the case of M/s Excellence Data Research Pvt Ltd (ITA No.159/Hyd/2015) rejected the objection of the assessee for exclusion of the above company from the comparables by observing that "we have seen the annual report and most of the revenue of this company is from service only. The company is in the pay roll service activity. Therefore, we are of the opinion that the company is functions similar to the activities of the assessee company, which is in the ITeS field. In view of this, we are not inclined to exclude this company on the basis of functional disabilities." In our view, there is no change in the functional profile of the above company during the year and therefore, is comparable with the function of the assessee. Accordingly, we do not find any infirmity in selection of the above company as comparable.
7.	Mastiff Tech P Ltd.,	Having considered the submission it is noticed by us that provision for doubtful debts has been made on year to year basis,

		such provision in F.Y. 2009-10 was Rs. 59,65,702/- and in the current year it is Rs. 22,89,927/- which indicates that the company is facing extraordinary situations. Further, due to this provision, if the margin comes down from 21.78 % to 2.28%. indicates that there is a huge influence in the margin due to uncertainty of the receivables. In such circumstances, in our view, it is appropriate to exclude the above company from the comparables.

Further, there are certain companies which were *suo motto* excluded by the DRP as are found to be functionally not comparable.

S.No.	Companies	DRP Decision
1.	Cosmic Global Ltd.,	Having perused the Annual Report, that the expenses on sub contracting is to the extent of 41%; which suggests a different working model, which may have significant effect on the margin and therefore, the company cannot be retained as comparable. This view finds support from the decision of the Han Delhi High Court in the case of Rampgreen Solutions Pvt Ltd (ITA 102/2015) in paragraph 38 of the decision wherein it is held that "plainly, a business model where services are rendered by own employees and using one's own infrastructure would have a different cost structure as compared to a business model where services are outsourced. There was no material for the Tribunal to conclude that the outsourcing services by ………..would have no bearing on the profitability of the said entity.' And also, from the decision of the Hon'ble A.P & Telengana High Court in the case of SA Continuum India Private Limited (ITTA 440 of 2014), Further on the same rationale, the company was directed to be excluded by the Hon'ble Hyderabad ITAT in the case of M/s Excellence Data Research Pvt Ltd in ITA No.159/Hyd/2014 and assessee's own case

		for the Year 2009-10, We direct the Assessing Officer to exclude the above company from comparables.
2.	Informed Technologies	Having perused the Annual Report, it is noticed from page no.6 that the company is operating as IT enabled services, knowledge based back office processing. It is also noticed by us that out of the gross revenue of Rs. 4,07,73,057/-, the sales and service income is only Rs. 1,75,39,223/- and therefore, it fails the service revenue filter of 75% applied by the TPO. The company has earned the rental/business centre charges to the extent of Rs. 2,02,80,000/-, there is no breakup of the expenses related to such income is available in the annual report and therefore, in absence of the segmental information, it will not be appropriate to retain the above company as comparable. The assessee himself sought for exclusion of the company engaged in the KPO, on that rationale also, this company cannot be retained as comparable. Therefore, we are of the view that the company cannot be retained as comparable.
3.	Microgenetics Systems	Having considered the submission, on perusal of annual report, it is noticed by us that out of the total expenses of Rs. 1,07,91,015/- debited in P&L etc, the expenses to the extent of Rs. 24,98,323/- has been incurred as medical transcription charges, which indicates that the expenses to the extent of Rs. 23% has been incurred in outsourcing of the medical transcription activity. Therefore, in our view, it will not be appropriate to retain the above company as comparable, we accordingly direct to exclude the above company from comparables. On exclusion of the above company from the comparables, the issue in regard to computation of margin become academic in nature.
4.	e4e Health Care	In respect of e4e Health Care from the Annual Report, it is noticed by us that the company is engaged in the forward contracts on that account, the amount outstanding as on 31.03.2011 is USD 11.85 million, such forward contracts have influence on the margin of the assessee company, it is also

		noticed that there is no consistent approach in regard to accounting of the bad debts which is evident that in the financial year 2009-10, the provision for bad and doubtful debts is created to the extent of Rs. 3,30,69,141/- as against which there is no provision during the year. Further, as against the bad debt written off of Rs.29,87,000/- in the preceding year, during the year the bad debt written off are to the extent of Rs. 1,62,09,146/-, in such inconsistency of accounting, in our view, it is appropriate to exclude the above company from the comparables.

6. DRP rejected the other objections of assessee and directed the AO/TPO to make the adjustments accordingly. In the result, the arithmetic mean of four companies finally approved by the DRP stood at 24.20% and after giving working capital adjustment as originally proposed, the arm's length margin was determined at 23.34% and final adjustment was made at Rs. 17,90,40,176/-. Revenue is aggrieved on exclusion of nine comparables, whereas assessee is aggrieved on not accepting its objections.

6.1. Revenue in its appeal is mainly contesting the four grounds as under:

"2. The learned DRP erred in rejecting companies on the ground of functional difference when the tax payer has not considered the vertical & horizontal (categorizing companies into BPO and KPO) of the ITES sector while selecting the comparables.

3. The learned DRP erred in not considering that the main search strategy of the tax payer as well as the TPO has been to identify the companies which are engaged in the ITES.

4. The learned DRP erred in not considering the fact that the forward contracts are part and parcel of operations of the company and gain or loss arising out of the same is operational in nature and it does not influence profit origin.

5. The learned DRP erred in not considering the fact that the company which outsources a part of its work can be held to be functionally different and has a different model".

7. In assessee's appeal, assessee has raised as many as eleven grounds. Out of which, Ground Nos. 1, 2, 3, 9, 10 & 11 are not pressed. The material grounds in assessee's appeal are as under:

"4. The learned AO/TPO/DRP have erred in applying inappropriate comparability criteria such as diminishing revenues trend and difference in accounting year for rejecting certain comparable companies selected by the appellant.

5. The learned AO/TPO/DRP erred in exercising powers assigned under section 133(6) of the Act to obtain information which was not available in the public domain and relying upon the same for comparability purposes.

6. The learned AO/TPO/DRP have erred in passing an order which has computational errors in the margin of the comparable companies used in determination of arm's length margin for the impugned transaction.

7. The learned AO/TPO/DRP have erred in wrongly rejecting certain companies from and adding certain companies to the final set of comparables for the impugned transaction on an ad-hoc basis, thereby resorting to cherry picking of comparable to determine ALP thereof.

8. The learned AO/TPO/DRP have erred in selecting certain companies (which are earning super normal profits) as comparable to the appellant".

8. Initiating the arguments, Ld. DR submitted that DRP was not correct in segregating BPO and KPO as TP Officer has not

considered the verticals in ITES business. All of them are categorised as ITES and accordingly, segregation as was done by the DRP was not correct. He relied on the cases of:

i. Acropetal Technologies Limited (Seg);
ii. Willis Processing Services (I) (P) Ltd., Vs. DCIT (ITA Nos. 4429 & 4547/Mum/2012;
iii. Vodafone India Services (P.) Ltd., Vs. DCIT;

And finally, relied on the Special Bench decision in the case of Maersk Global Centres (India) (P) Ltd., Vs. ACIT [31 ITR (Trib) 0001] to submit that exclusion of KPO companies is not correct. Accordingly, he suggested that Acropetal Technologies Limited, eClerx Services Limited., should not have been excluded by the DRP. Further, it was submitted that exclusion of Infosys BPO Limited and TCS e-Serve Ltd., on the reason of high turnover is also not correct as upper turnover filter was not incorporated by the TPO. He referred to the order of the TPO to explain that in the business of ITES, turnover does not have any effect on the profitability and accordingly, he argued that these companies should not have been excluded by the DRP. With reference to the three companies excluded by the DRP, ie. Cosmic Global Limited, Informed Technologies India Limited and Microgenetics systems ltd, he referred to the TPO's order to submit that these three companies are assessee's own comparables and therefore, should not have been excluded by the DRP. He also made submissions that e4e Healthcare Systems Limited should not have been excluded on the basis of forward contracts, the fact of which is not correct as it has no effect on the profitability of the company. He defended the order of the TPO in including the various companies as was done by him.

9. In reply, Ld. Counsel filed various charts and submitted that the argument of the Ld. DR that analysis on vertical basis as BPO and KPO is not correct as it is a business norm and in fact the department is relying on this argument on the basis of Circular issued for the purpose of Section 10B deduction which categorises software development services into one catogory in which ITES is categorised as one service. He relied on the decision of the Hon'ble High Court of Delhi in the case of Rampgreen Solutions Pvt. Ltd., Vs. CIT in ITA No. 102/2015 dt. 10-08-2015, wherein, Hon'ble High Court held as under:

"33. The Special Bench of the Tribunal in Maersk Global Centers (India) Pvt. Ltd. (supra) struck a different cord. The Special Bench of the Tribunal held that even though there appears to be a difference between BPO and KPO Services, the line of difference is very thin. The Tribunal was of the view that there could be a significant overlap in their activities and it may be difficult to classify services strictly as falling under the category of either a BPO or a KPO. The Tribunal also observed that one of the key success factors of the BPO Industry is its ability to move up the value chain through KPO service offering. For the aforesaid reasons, the Special Bench of the Tribunal held that ITeS Services could not be bifurcated as BPO and KPO Services for the purpose of comparability analysis in the first instance. The Tribunal proceeded to hold that a relatively equal degree of comparability can be achieved by selecting potential comparables on a broad functional analysis at ITeS level and that the comparables so selected could be put to further test by comparing specific functions performed in the international transactions with uncontrolled transactions to attain relatively equal degree of comparability.

34. We have reservations as to the Tribunal's aforesaid view in Maersk Global Centers (India) Pvt. Ltd. (supra). As indicated above, the expression 'BPO' and 'KPO' are, plainly, understood in the sense that whereas, BPO does not necessarily involve advanced skills and knowledge; KPO, on the other hand, would involve employment of *advanced skills and knowledge for providing services. Thus, the expression 'KPO' in common parlance is used to indicate an ITeS provider providing a completely different nature of service than any other BPO service provider. A KPO service provider would also be functionally different from other BPO service providers, inasmuch as the responsibilities undertaken, the activities performed, the quality of resources employed would be materially different. In the circumstances, we are unable to agree that broadly ITeS sector can be used for selecting comparables without making a conscious selection as to the quality and nature of the content of services. Rule 10B(2)(a) of the Income Tax Rules, 1962 mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service/product characteristics. This factor cannot be undermined by using a broad classification of ITeS which takes within its fold various types of services with completely different content and value. Thus, where the tested party is not a KPO service provider, an entity rendering KPO services cannot be considered as a comparable for the purposes of Transfer Pricing analysis. The perception that a BPO service provider may have the ability to move up the value chain by offering KPO services cannot be a ground for assessing the transactions relating to services rendered by the BPO service provider by benchmarking it with the transactions of KPO services providers. The object is to ascertain the ALP of the service rendered and not of a service (higher in value chain) that may possibly be rendered subsequently.*

35. As pointed out by the Special Bench of the Tribunal in Maersk Global Centers (India) Pvt. Ltd. (supra), there may be cases where an entity may be rendering a mix of services some of which may be functionally comparable to a KPO while other services may not. In such cases a classification of BPO and KPO may not be feasible. Clearly, no straitjacket formula can be applied. In cases where the categorization of services rendered cannot be defined with certainty, it would be apposite to employ the broad functionality test and then exclude uncontrolled entities, which are found to be materially dissimilar in aspects and features that have a bearing on the profitability of those entities. However, where the controlled transactions are clearly in the nature of lower-end ITeS such as Call Centers etc. for rendering data processing not involving domain knowledge, inclusion of any KPO service provider as a comparable would not be warranted and the transfer pricing study must take that into account at the threshold".

9.1. It was submitted that the argument that BPO and KPO are similar is not correct and DRP has excluded certain companies on functionally different basis. It was his submission that two companies, which are accepted by the DRP as well, but objected to by assessee are Accentia Technologies Ltd., and Crossdomain Solutions Private Limited which are required to be excluded on the basis of the factors which Ld. Counsel in detail submitted. In addition to exclusion of the above two companies, Ld. Counsel also argued for inclusion of following companies:

i. R Systems Limited (Seg.)
ii. CG-VAK Software & Exports Limited (Seg.)
iii. Datamatics Financial Services Limited
iv. Microland Limited
v. Caliber Point Business Solutions Limited

9.2. Ld. Counsel also argued that DRP *suo motto* rejected certain companies which were neither objected to by assessee when TPO included them. It was the contention that these are to be included. Ld. Counsel placed on record various annual reports and made detailed submissions on the issue.

10. We have considered the rival contentions and perused the detailed submissions including the Paper Books placed on record. Each of the comparables are considered as under for the sake of record.

<u>i. Accentia Technologies Ltd., :</u>

11. TPO included this company stating that the company earns income from medical transcription, billing and collections and coding. All these activities fall under the category of ITES and there is no income from sale of products or SAAS. Assessee contended that the company is functionally different as it is a

diversified KPO providing high end software services which cannot be compared to the functions performed by assessee. It is the health care receivable cycle management company engaged in providing services in developing products. Accentia Technologies Ltd., has ventured into providing HRCM Services of an integrated end to end SAAS model.

11.1. It was submitted that there was no segmental information available and as can be seen from the annual report, assessee is engaged in KPO services, development of software products (Iridium and its variants) which are used to render such services. It was submitted that it has significant intangible assets like IP rights, brands and goodwill and it has adopted an arithmetic growth strategy in its business operations in earlier years. On that basis, it was excluded in earlier years by the various Benches of ITAT in the case of M/s. Cognizant Technology Services P. Ltd., in ITA No. 459/Hyd/2015; Headstrong Services (India) Pvt. Ltd., in ITA No. 714/De1/2015 on the KPO business model. It was submitted that in assessee's own case, the ITAT excluded in AYs. 2007-08 and 2009-10, whereas DRP itself has excluded in AY. 2010-11, copy of which was placed on record. It was further submitted that Hon'ble Delhi Bench of ITAT in the case of Orange Business Services India Solutions Pvt. Ltd., in ITA No. 869/Del/2016 for AY. 2011-12 itself has excluded the same by stating as under:

> "*4.3 We have perused the orders of the authorities below and the submissions made by both the parties. We have perused the order of this tribunal for assessment year 2010-11(supra) in assessee's own case. It is observed that there is no difference in the functional profile of the assessee for the year under consideration*

with that of the assessee for assessment year 2010-11. As rightly contended by the Ld.AR, this company has been excluded from the list of comparables by this Tribunal for assessment year 2010-11 for the reasons reproduced hereinabove. Respectfully following the decision of this Tribunal in assessee's own case, for the Assessment Year 2010-11(supra), we are inclined to exclude this company from the final list of comparable".

11.2. We have considered the issue and examined the above arguments. As seen from the annual report of assessee-company placed on record, assessee is engaged in high end KPO services and these services are not similar to assessee's BPO services where it only compiles data and submits the excel sheets and other forms of data in various structures but does not give any analytical imputs. Data Base Management is not based on any knowledge based services. Therefore, the company, Accentia Technologies Ltd., is functionally different from assessee's functions. In view of the principles laid down by the Hon'ble Delhi High Court in Rampgreen Solutions Pvt. Ltd., Vs. CIT in ITA No. 102/2015 (supra), and also on the fact that this company is excluded in earlier years not only by the ITAT but also by the DRP in later year and in this year itself by the Co-ordinate Bench at Delhi as stated above, we are of the opinion that this company is functionally different and has to be excluded from the list of comparables.

<u>ii. Acropetal Techologies Ltd (Seg):</u>

12. This company is included by TPO but excluded by DRP for the following reasons:

"Having considered the submissions, on perusal of the annual report, it is noticed by us that the assessing officer has considered the revenue from the engineering design segment. Hon'ble ITAT, Bangalore in IT(TP)/A/1678/Bang/2012 in the case of Global E Business Operations, directed to exclude the above

company by observing that 'we have considered the submission of the learned counsel for the assessee, on perusal of note no.15 of notes to accounts, which gives segmental revenue of this company, it is clear that the major source of the income for this company is from providing engineering design services and information technology services. The function performed by the engineering design services of the company cannot be considered as comparable to the ITES /BPO function performed by the assessee. The performance of the engineering design services is regarded as providing high end services amongst the BPO which require high skill whereas the services performed by the assessee are routing low end ITES function. We therefore hold that this company could not have been selected as comparable, especially when it performs engineering design services which only a knowledge processing outsourcing- (KPO) would do and not a business processing outsourcing (BPO).' Similar View was taken by Hon'ble Bangalore ITAT in the case of - Symphony Marketing Solutions India Pvt. Ltd. vs. ITO (IT (TP) A No. 1316/Bang/2012), held that Acropetal cannot be considered as comparable as it performs engineering design services accordingly we direct the assessing officer to exclude the company from the comparables".

12.1. We do not see any reason to differ from the findings of DRP as it is providing high end KPO services and is functionally different. The order of exclusion is therefore, upheld.

iii. Cosmic Global Ltd.,:

13. This company is also excluded by DRP for the following reasons:

"Having perused the Annual Report, that the expenses on sub contracting is to the extent of 41%; which suggests a different working model, which may have significant effect on the margin and therefore, the company cannot be retained as comparable. This view finds support from the decision of the Han Delhi High Court in the case of Rampgreen Solutions Pvt Ltd (ITA 102/2015) in paragraph 38 of the decision wherein it is held that "plainly, a business model where services are rendered by own employees and using one's own infrastructure would have a different cost structure as compared to a business model where services are outsourced. There was no material for the Tribunal to conclude that the outsourcing services by ....would have no bearing on the profitability of the said entity.' And also, from the decision of the Hon'ble A.P &

> *Telengana High Court in the case of SA Continuum India Private Limited (ITTA 440 of 2014), Further on the same rationale, the company was directed to be excluded by the Hon'ble Hyderabad ITAT in the case of M/s Excellence Data Research Pvt Ltd in ITA No.159/Hyd/2014 and assessee's own case for the Year 2009-10, We direct the Assessing Officer to exclude the above company from comparables".*

13.1. We do not see any reason to differ from the findings of DRP as it is providing high end KPO services and is functionally different. The order of exclusion is therefore, upheld.

iv. Crossdomain Solutions P Ltd.,:

14. This was included by the TPO as it provides for ITES services. Assessee's objection that it provides high end KPO services was rejected by the DRP. It was the submission that it is engaged in development of product suites, KPO services (in insurance, healthcare, HR and accounting domains), market research and data analytics and IT services. Further, it was submitted that no segmental information was available.

14.1. Assessee contends that this was excluded in the following cases:

i. Hyundai Motors Engineering (ITA No. 1850/Hyd/2012);
ii. Market Tools Research (ITA No. 1811/Hyd/2012);
iii. Cummins Turbo Technologies (ITA No. 784/PN/2014);
iv. Global e-Business Operations (ITA No. 1678/BAN/2012); and
v. Symphony Marketing Solutions (ITA No. 1316/BAN/2012);

14.2. We have keenly perused the annual report placed on record and business profile of the company. It is also considered in earlier year in the case of Hyundai Motors Engineering (ITA No. 1850/Hyd/2012). The relevant para of the order is as under:

"III. CROSSDOMAIN SOLUTIONS LTD. :

This company was considered as a comparable and listed at Sl.No.7 of the comparables chosen by the TPO. It is the stand of the assessee that this company is not functionally comparable. It is seen that the business profile of this company is re-engineered payroll service. This company is also engaged in the development of information systems. The review and business functions of Cross Domain is as follows:-

> *"With a decade of experience in Payroll Outsourcing, Crossdomain. has created a re-engineered payroll service EFFIPAY - that processes and delivers accurate payroll to clients with headcount up to 1000 employees in just 4 hours*. With Effipay Lite and Effipay Lite Plus, our bouquet of services cover end to end payroll, retrials, reimbursement, tax proof verifications upto issue of Form 16 for employees of our clients across different industry verticals. Our processes are highly scalable and provide end to end payroll solutions to clients with headcount ranging from 5 to 65,000. "*
>
> *"Crossdomain's IT knowledge and domain competence has provided the edge to develop information systems to implement process innovation and continuously increase efficiency and turn-a round-time for business critical processes. "*

Source: http:/ www.cross-domain.com

As can be seen from the above, the business of Cross Domain ranges from high end KPO services, development of product suites and routine low end ITES service. However, there is no bifurcation available for such verticals of services. Therefore the assessee contends that Cross Domain cannot be compared to a routine ITES service provider.

III. I. We are of the view that in the absence of any reasons given to the contrary either by the TPO or the DRP for regarding this c9mpany as a comparable, this company should be excluded from the list of comparables, accepting the plea of the Assessee. Similar view was also taken in the case of Symphony Marketing Solutions India(p) Ltd (supra) by the Bangalore Bench. We hold accordingly".

14.3. Facts are being similar in this year, the same has to be excluded. Moreover the web report placed indicates that this company is in market research and analysis and IT services which include software development and maintenance. There is no segmental information. In the absence of segmental data, it cannot be stated that the company is functionally similar. In view of the order in earlier year and based on annual report and web data of this year, it is better the same is excluded. We accordingly direct the TPO/AO to exclude the same.

v. e4e Healthcare:

15. This company is included by TPO but excluded by DRP on the reason of inconsistency of accounting. It was contended that the DRP has disregarded the financial statements and not sustained its arguments. It was further submitted that the TPO has accepted in AY. 2012-13. Even the Revenue wants it to be included as can be seen from the grounds raised and arguments of DR. Even as per the annual report, the company provides health care outsourcing services to its AE and there are no other activities. The foreign exchange forward contracts are noted in Schedule-16 notes to accounts at page 14 and the accounting policy is same. There is no inconsistency as felt by DRP. However, assessee objected to the profit margin worked out by TPO as noted in page 13 of DRP order. Assessee contends that miscellaneous income was taken as operational income. This requires verification. So to that extent of verification of PLI of this company, we restore the same to TPO/AO while DRP order of excluding the same is set aside. TPO/AO is directed to include the same. Revenue's ground on this is allowed as well as assessee ground.

vi. eClerx Services Ltd.,:

16. This company is included by TPO but excluded by DRP for the following reasons:

> *"Having considered the submission, respectfully following the decision of Hon'ble the ITAT for the AY 2009·10 in assessee's own case, as the functional profile of the assessee company and the above company remain the same, we direct the AO to exclude the above company from comparables".*

16.1. We do not see any reason to differ from the findings of DRP as it is providing high end KPO services and is functionally different. The order of exclusion is therefore, upheld.

vii. Informed Technologies Ltd:

17. This was included by the TPO out of the assessee own comparables. DRP, however, excluded *suo motto* on the reason that it fails revenue filter, non availability of segmental information and being KPO. In fact, assessee wanted it to be excluded before DRP and we also find no reason to differ from the findings of DRP. We affirm the decision of DRP to exclude the above company.

viii. Infosys BPO

18. TPO included the same in the list of comparables on the reason that the turnover does not have any effect on profitability. DRP excluded the same being functionally different. Even though, Ld. DR has argued vehemently for inclusion, we do not see any reason to include as Infosys BPO is functionally different and being excluded in many cases in earlier years as well being unique in its functionality.

ix. Jeevan Scientific Technologies Ltd.,:

19. No objection from either of the parties.

x. Jindal Intellicome Ltd.,:

20. No objection from either of the parties.

xi. Mastiff Tech P. Ltd.,:

21. Excluded by DRP for the reasons stated in their order and we do not see any reason to differ from this. This company is excluded.

xii. Microgentic Systems Ltd:

22. This was included by TPO but excluded by DRP *suo motto* on the reason that the company has outsourced its activity. Even though assessee wants it to be included, we do not find that this company satisfies the filters placed. Moreover, the turnover of company is only 1.2 Crores which is too small to consider it as functionally comparable when compared to assessee activities. This company is to be excluded and we affirm the order of DRP.

xiii. TCS E-serve Ltd:

23. TPO included the same in the list of comparables on the reason that the turnover does not have any effect on profitability. DRP excluded the same by stating as under:

> *"Having considered the submissions, on perusal of annual report, it is noticed by us from the schedule to the financial statement that the company is engaged in the business of providing information technology – enabled services/business processing outsourcing service, primary to the Citi group companies introduced globally the transaction processing include the broad spectrum of*

> *activities involving the processing, collections, customer care and payments in relation to the services offered by Citi group to its corporate and retail clients. As per the annual report, the company also provide technical services involving software testing, verification and validation of software at the time of implementation and data centre management activities, which makes the company functionally incomparable with the assessee, accordingly, we direct the assessing officer to exclude the above company from comparables".*

Even though, Ld. DR has argued vehemently for inclusion, we do not see any reason to include as this company is functionally different and being excluded in many cases in earlier years as well being unique in the functionality.

24. Assessee wants these companies to be included which were excluded by TPO and DRP. Each of these are considered as under:

i. R. Systems International Limited:

25. TPO excluded this company on the reason of different financial year ending. DRP also confirmed the same and further opined that it is a leading provider of software and BPO services and segmental information was not available. It was argued that different financial year ending is not an appropriate filter. It was further argued that, financials for March 2011 can be obtained using audited quarterly results which are available in public domain. It relied on the following case law to support the contentions:

i. Techbooks International (ITA No. 240/Del/2015);
ii. McKinsey Knowledge Centre (ITA No. 217/Del/2014); and
iii. Sun Life India Service Centre (ITA No. 750/Del/2015);

25.1. We have considered the contentions and perused the annual report and compiled data for the year ending March 2011 by assessee. The assessee operates in two business segments software development & commission services are being major. There are unallocated expenditures which are categorized as corporate expenditure. Even though the compiled data is on the basis of quarterly reports, the actual segmental data can not be verified. For the above reasons, we are of the opinion that the company is excluded validly.

<u>ii. CG-VAK Software & Exports Limited</u>:

26. TPO did not include this company on the reason that the segmental turnover from ITES is less than Rs. 1 Crore and fails the lower turnover filter. DRP while accepting assessee's objection that the filter is not validly applied, however, rejected on the reason that there is no employee cost, indicating outsourcing of services.

26.1. It was the contention that the company has shown employee cost as 'Cost of Services' and thus, DRP's observation is incorrect and relied on the following :

i. Agilis Information Technologies (ITA No. 786/Del/2015);
ii. Tata McGraw Hill Education (ITA No. 6114/Del/2014);
iii. SIAC India (ITA No. 6464/Del/2012); and
iv. Kenexa Technologies (ITA No. 243/Hyd/2014);

26.2. We have examined the contentions and noted that the BPO Services rendered by this company is meager 63 lakhs, compared to assessee turnover too small. Moreover, the segmental profits are difficult to arrive in the absence of complete details. The company mainly operates in software development and so functionally different as well. For the reasons, the exclusion is upheld.

iii. Datamatics Financial Services Limited:

27. TPO did not select this company as it did not appear in search matrix. DRP rejected the same on the reason that no clear segmental information is available.

27.1. It was the submission that search process carried out by TPO is defective. Assessee had carried out a broad search and identified a domain of 1,599 companies (as against TPO's domain of only 154 companies). It was also submitted that DRP has not demonstrated that there are functional differences in international and domestic ITeS [Included as comparable by TPO himself in AY. 2012-13 (subsequent year)]. Further, it was submitted that the company passes 25% export earnings filter applied by TPO.

27.2. We have examined the annual report placed on record to examine the functionality. As seen from the annual report, there is no information about nature of work undertaken by company. The operation seems to be from ITES but the expenditure and receipts includes 'printing'. Segmental data is unavailable. The reasoning of DRP is as under:

> *"Having considered the submission, it is noticed by us that out of the total revenue of Rs. 18.40 Crore, revenue from international ITeS is only Rs. 8.49 Crores, further, there is no clear segmental information in regard the expenses attributable to various segments are available. In such circumstances, in addition to*

reason given by TPO. In our view, the company cannot be retained as comparable".

Assessee is also in Issue management work as Registrar and so, the functional profile is different. We agree with the findings of TPO and DRP to exclude for the reasons stated above.

iv. Microland Limited:

28. Since the company is persistently in operating losses, TPO did not select this company as comparable. DRP rejected the same on the reason that this company fails service revenue filter.

28.1. It was the submission that the company is not incurring persistent operating losses, as per the table given below:

Particulars	FY. 2010-11	FY. 2009-10	FY. 2008-09
Operating revenue	16,20,426	13,41,567	14,37,065
Operating expenses	16,77,226	13,70,980	12,76,025
Operating profit	-56,800	-29,413	1,61,040
OP/OC (%)	-3.39%	-2.15%	12.62%

It was also submitted that, the company passes service revenue filter, as it derives revenue from functionally similar activities (BPO and IT infrastructure remote maintenance). It was submitted that alternately ITeS segment only be allowed to be taken as comparable.

28.2. We have keenly perused the annual report placed on record. The company is mainly engaged in rendering software services comprising of net working and infrastructure management services and IT enabled services. ITES seems to be incidental to Infrastructural Management Services which is its core business. The web profile indicates that they are in KPO services and may not be rendering similar services to assessee. On functionality, this company is rightly excluded. We approve the opinion of TPO/DRP.

v. Caliber Point Business Solutions Limited:

29. The TPO and DRP did not select the above company on the reason that it has a different financial year ending. Assessee is contesting that different financial year ending is not an appropriate filter. It relied on the decisions of the Co-ordinate Bench in the following cases:

i. Techbooks International (ITA No. 240/Del/2015);

ii. McKinsey Knowledge Centre (ITA No. 217/Del/2014); and

iii. Sun Life India Service Centre (ITA No. 750/Del/2015);

29.1. We have considered the contentions and examined the documents placed on record. Even though, Co-ordinate Benches have held that different financial year ending cannot be a reason to exclude when data can be obtained for entire year, for the reasons best known to assessee, it has not placed any information on record. In the case of R. Systems Limited(discussed above), assessee not only took pains to include the data of annual report, but also prepared/compiled data from the quarterly reports and placed it on record. This aspect was discussed above. However, as far as this company is concerned, no data has been placed on record by assessee. Therefore, even though in principle the Co-ordinate Bench decisions are to be accepted, in the absence of any data available, we are unable to include this company as a comparable to the assessee's functions. The company is therefore excluded.

29.2. The AO/TPO is directed to rework out the PLI accordingly. Assessee's grounds and the Revenue grounds are partly allowed.

30. Before parting, we would like to note that both the parties have given incomplete information with reference to certain comparables. Even though Revenue has placed a Paper Book on record vide letter dt. 19-07-2016, it has placed on record only the orders of assessment, DRP and TPO's orders including a corrigendum stated to have been passed on the name of company. We are unable to understand the logic in filing Paper Book of only the orders which are part of appeal memo itself. No data in support of Revenue contentions has been placed on record in Revenue's Paper Book. Assessee is also equally responsible for not furnishing complete data with reference to certain comparables. When it wants to exclude a company, assessee has placed the data even from the web portals (update information) to submit that the company is not comparable but with reference to certain other companies it has not filed any data even if it want them to be included. Not only that, as seen from the Paper Books filed running to pgs. 882, some of the orders of Co-ordinate Benches are

not complete but they were certified to be true copies. As a doubt has arisen whether there was any mistake in uploading the orders to the web-site by the ITAT, we have downloaded the relevant orders for the sake of verification and found that the orders available in ITAT website are complete in all respects, whereas, the orders placed in the Paper Book are not complete. This shows that assessee has not taken any efforts in examining the data/ documents which it placed in the Paper Books while certifying that *they are true copies and documents are available and the records of the lower authorities.* Since we have given this judgment of inclusion and exclusion of certain comparables on the basis of the data placed on record, we make it clear that this order should not be taken as precedent in inclusion or exclusion of comparables in similarly placed companies for this assessment year. Even the chart submitted in the course of arguments indicate about few companies which are not even considered by the TPO, nor assessee wants them to be included. Those are Coral Hub Limited, Fortune Infotech Ltd., and Aditya Birla Minacs Worldwide Limited. Why these companies are included in the chart submitted to us, when neither TPO nor assessee are interested in considering the above companies as comparables is best known to the assessee. This indicates that neither of the parties is interested in furnishing complete data and relied on selectively placed information. Be that as it may, to the best of our ability the data furnished is examined and issues are decided. With these observations, both assessee's appeal as well as Revenue's appeal are partly allowed.

<u>Stay Application No. 22/Hyd/2016:</u>

31. Since the both the appeals are disposed-off, Stay Application becomes infructuous. Hence, the same is dismissed.

32. To sum up, both the appeals of assessee and Revenue are partly allowed and Stay Application is dismissed.

Order pronounced in the open Court on 27th July, 2016

Sd/-	Sd/-
(LALIET KUMAR)	**(B. RAMAKOTAIAH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated 27th July, 2016

TNMM

Copy to :

1. S&P Capital IQ (India) Private Limited, Survey No. 12P, Kondapur Village, Serilingampally Mandal, R.R. District, Hyderabad.

2. Deputy Commissioner of Income Tax, Circle-3(1), Hyderabad.

3. Dispute Resolution Panel (DRP), Hyderabad.

4. The Director of Income Tax, International Taxation, Income Tax Towers, Hyderabad.

5. The Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.

6. D.R. ITAT, Hyderabad.

7. Guard File.