

[2021] 133 taxmann.com 488 (Mumbai - Trib.)[10-05-2021]

TRANSFER PRICING : A company engaged in business of Medical Transcription and Translation services could not be considered as a comparable to appellant engaged in providing information technology enabled services and thus ought to be excluded from list of Comparables

TRANSFER PRICING : Where assessee was providing information technology enabled services to its AEs, company engaged in rendering KPO services could not be recharacterized by TPO to make it comparable with that of assessee



[2021] 133 taxmann.com 488 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'J'

Morgan Stanley Advantage Services (P.) Ltd.

v.

Deputy Commissioner of Income-tax*

SAKTIJIT DEY, JUDICIAL MEMBER

AND S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

IT APPEAL NO. 625 (MUM.) OF 2014

[ASSESSMENT YEAR 2009-10]

MAY 10, 2021

Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Information technology enabled services (ITESs)) - Assessment year 2009-10 - Whether a company engaged in business of Medical Transcription and Translation services could not be considered as a comparable to appellant engaged in providing information technology enabled services and thus ought to be excluded from list of Comparables - Held, yes [Para 12] [In favour of assessee]

Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Information technology enabled services (ITESs)) - Assessment year 2009-10 - Whether where assessee was providing information technology enabled services its Associated Enterprise, company engaged in rendering KPO services could not be recharacterized by TPO

to make it comparable with that of assessee - Held, yes [Para 12] [In favour of assessee]

CASE REVIEW

Dy. CIT v. Morgan Stanley Advantage Services (P.) Ltd. [2019] 109 taxmann.com 101 (Mum. - Trib.) (para 12) *followed*.

CASES REFERRED TO

CIT v. Morgan Stanley Advantage Services (P.) Ltd. [2019] 109 taxmann.com 101 (Mum. - Trib.) (para 3), *BNY Mellon International Operations (India) (P.) Ltd. v. Dy. CIT* [2015] 55 taxmann.com 386 (Pune - Trib.) (para 3), *Pr. CIT v. BNY Mellon International Operations (India) (P.) Ltd.* [2018] 93 taxmann.com 363/255 Taxman 397 (Bom.) (para 3), *Morgan Stanley Advantage Services (P.) Ltd. v. Dy. CIT* [2020] 118 taxmann.com 112 (Mum. - Trib.) (para 3), *CIT v. Tata Power Solar Systems Ltd.* [2017] 77 taxmann.com 326/245 Taxman 93 (Bom.) (para 3), *Pr. CIT v. Visteon Engineering Centre (India) (P.) Ltd.* [2020] 113 taxmann.com 161 (Bom.) (para 3), *Pr. CIT v. Lionbridge Technologies (P.) Ltd.* [IT Appeal No. 1815 of 2016, dated 18-3-2019] (para 3), *Jute Corpn. of India Ltd. v. CIT* [1990] 53 Taxman 85/[1991] 187 ITR 688 (SC) (para 3), *National Thermal Power Co. Ltd. v. CIT* [1998] 97 Taxman 358/229 ITR 383 (SC) (para 3) and *Ahmedabad Electricity Co. Ltd. v. CIT* [1993] 66 Taxman 27/199 ITR 351 (Bom.) (FB) (para 3).

Sunil Lala for the Appellant. **A. Mohan** for the Respondent.

ORDER

S. Rifaur Rahman, Accountant Member. - The aforesaid appeal has been filed by the assessee challenging the impugned order dated 31st October 2013, passed under section 144C(5) r/w section 143(3) of the Income-tax Act, 1961 (for short "the Act") in pursuance to the directions of the Dispute Resolution Panel-1, Mumbai, ("the DRP") pertaining to the assessment year 2009-10.

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

- "1. On the facts and circumstances of the case, the learned AO, based on the directions of the DRP, erred in making an upward adjustment of Rs. 17,60,16,346 in determining the arm's length price (ALP) of the international transaction of Information Technology Enabled Services (hereinafter referred to as ITES) rendered by the Appellant.
2. On the facts and circumstances of the case, the learned AO, based on the directions of the DRP, erred on the following grounds :
 - 2.1 In rejecting the transfer pricing (TP) analysis undertaken by the Appellant for computing the ALP in relation to the ITES provided by the Appellant and applying the knowledge process outsourcing (hereinafter referred to as KPO) search to arrive at the ALP;
 - 2.2 In not accepting the economic analysis undertaken by the Appellant in accordance with

the provisions of the Act read with the Income-tax Rules, 1962 (hereinafter referred to as the Rules) and holding that the Appellant's international transaction is not at arm's length;

- 2.3 Further erred in conducting a fresh economic analysis for the determination of the ALP in connection with the impugned international transaction without providing the selection criteria adopted by him;
- 2.4 In ignoring the fact that since the Appellant is availing tax holiday under section 10A of the Act, there is no motive or reason to shift profits out of India, or curbing of taxes which is the basic intention of introducing the transfer pricing provisions;
- 2.5 By determining the ALP by using only single year data for Financial Year (FY) 2008-2009 which was not available to the Appellant at the time of complying with the TP documentation requirements *i.e.* using non-contemporaneous data for calculating the ALP of the international transaction;
- 2.6 By applying certain inappropriate filters and in rejecting the companies selected as comparable by the Appellant in the TP report on the basis of certain inappropriate filters;
- 2.7 In using data obtained by him from his own sources against the Appellant, without furnishing the complete details of the same to the Appellant;
- 2.8 In identifying comparable companies in determining the ALP of the impugned international transaction, without specifying the selection matrix on the basis of which the companies were identified by him;
- 2.9 Without prejudice to the Grounds, in considering the profit/loss on account of foreign exchange fluctuation and miscellaneous/other income as non-operating in nature while computing the operating margin of the Appellant and of the comparable companies;
3. Without prejudice to the above Grounds, the learned AO erred in not granting working capital adjustment to the average Profit Level Indicator of identified comparable companies;
4. Without prejudice to the above Grounds, the learned AO erred by not allowing the adjustment for difference in the level of risks assumed by the Appellant *vis-a-vis* the risk of identified comparable companies.
5. Without prejudice to the above Grounds, the learned AO erred in not adopting the ALP after considering an amount varying by 5 percent of the arithmetic mean of the margins of identified comparable companies.
6. The learned AO erred in relying on material obtained by him without furnishing copies of the same to the appellant, and thus violating the principle of natural justice.
7. The learned AO erred in not granting the credit of taxes deducted at source claimed by

the Appellant in its income to the extent of Rs. 258,940."

2.1 The leaned Counsel for the assessee has also filed additional ground of appeal with a prayer to admit the additional ground and adjudicate the same on merit. The additional ground raised is reproduced below :—

"On the facts and in the circumstances of the case and in law, Cosmic Global Limited *engaged in the business of Medical Transcription and Translation services* has wrongly been *considered as a comparable to the appellant engaged in providing ITES Services and thus ought to be excluded from the list of comparables*. It is submitted that the Hon'ble Tribunal in appellant's own case for AY. 2007-08 has held that the said company is not comparable to the Appellant."

3. Before us, the leaned Counsel for the assessee submitted that Cosmic Global Ltd., is earning revenue from Medical Transcription and Translation charges has wrongly been considered as comparable to the assessee which is engaged in ITES services. The fact that Cosmic Global Ltd. is in the business of Medical Transcription and Translation and thus not comparable to the assessee which is evident from the extract of its annual report placed as Annexure-4 in paper book-1 at Page-847 as well as the order of the Tribunal dated 10th July 2019 decided in assessee's own case for the assessment year 2007-08 *Dy. CIT v. Morgan Stanley Advantage Services (P.) Ltd.* [2019] 109 taxmann.com 101 (Mum. - Trib.), wherein the Tribunal has relied upon the order of the Co-ordinate Bench in *BNY Mellon International Operations (India) (P.) Ltd. v. Dy. CIT* [2015] 55 taxmann.com 386 (Pune - Trib.) which is upheld by the Hon'ble Jurisdictional High Court in *Pr. CIT v. BNY Mellon International Operations (India) (P.) Ltd.* [2018] 93 taxmann.com 363/255 Taxman 397 (Bom.). The leaned Counsel for the assessee submitted that in the light of the above, the assessee do not wish to press for inclusion of the said comparable *i.e.*, Cosmic Global Ltd. for the assessment year 2008-09 and consequent to which the said comparable was excluded/rejected from the final set of comparables as evident from the order of the Tribunal for the assessment year 2008-09 *Morgan Stanley Advantage Services (P.) Ltd. v. Dy. CIT* [2020] 118 taxmann.com 112 (Mum. - Trib.). He further submitted that the Hon'ble Bombay High Court in *CIT v. Tata Power Solar Systems Ltd.* [2017] 77 taxmann.com 326/245 Taxman 93, *Pr. CIT v. Visteon Engineering Centre (India) (P.) Ltd.* [2020] 113 taxmann.com 161 (Bom.) and *Pr. CIT v. Lionbridge Technologies (P.) Ltd.* [IT Appeal No. 1815 of 2016, dated 18-3-2019] has held that a party is not barred in law from withdrawing from its list of comparables, a company, if the same is found to have been included on account of mistake as on facts, as it is not comparable. In support of these submissions, the learned Counsel for the assessee placed reliance on the following case laws wherein it has been held that the additional ground of appeal can be raised if the facts are on record :—

- i. *Jute Corpn. of India Ltd. v. CIT* [1990] 53 Taxman 85/[1991] 187 ITR 688 (SC);
- ii. *National Thermal Power Co. Ltd. v. CIT* [1998] 97 Taxman 358/229 ITR 383 (SC);
- iii. *Ahmedabad Electricity Co. Ltd. v. CIT* [1993] 66 Taxman 27/199 ITR 351 (Bom.) (FB).

4. The learned Departmental Representative, on the other hand, made following submissions on the issue of "additional ground" raised by the assessee.

"On 12-2-2021 assessee has filed a copy of 'additional ground' filed before the bench. It was followed up by a written note on 15-2-2021.

On the day of hearing I would like to present that the 'additional ground' is not as such an additional ground (a ground has to be something fundamental). It is submitted that what is filed as 'additional ground' is at best an 'additional evidence', since assessee seeks to rely on a preexisting document, which would have been relevant for assessment. For consideration of additional evidence the assessee has to follow procedure prescribed. This is not followed by the assessee."

5. Considered rival submissions and perused the material on record. In view of the detailed submissions made by the learned Counsel for the assessee on the issue of admitting the additional ground raised by the assessee, we hereby admit the same for adjudication on merit.

6. Insofar as the regular grounds of appeal raised by the assessee are concerned, during the course of hearing before us, the learned Counsel for the assessee, at the outset, submitted that out of the aforesaid grounds of appeal, he wishes to press only ground no. 2, as well the additional ground of appeal. The learned Counsel for the assessee submitted that the assessee is a captive service provider providing Information Technology Enabled Service (ITES) to its Associated Enterprises (A.E) globally and the assessee's margin from the said international transaction for the assessment year 2009-10 is 23.07%. The assessee is providing only ITES services to its A.Es and is not a KPO consequent to which classified as KPO companies cannot be considered as comparable to the assessee, which is evident from the order passed by the Tribunal in assessee's own case in assessment year 2007-08 and 2008-09 respectively. The learned Counsel for the assessee had filed a chart pressing only exclusion of comparables *viz* Cosmic Global Ltd., Coral Hubs Ltd. Cross-domain Solution Ltd. and E-clerx Services Ltd. and further prayed that following companies may be included for transfer pricing study *i.e.*, Allsec Technology Ltd. and R. System International Ltd. The learned Counsel brought to our notice that the issue arising out of ground no. 2, has now been settled by the decisions of the Co-ordinate Bench in assessee's own case for the preceding assessment years 2007-08 and 2008-09, wherein identical issue has been decided in favour of the assessee and against the Revenue.

7. The learned Departmental Representative on the other hand made following submissions :—

"Notwithstanding the above, in respect of 4 cases sought to be excluded and 2 cases sought to be included, it is pleaded that merely on the fact that a particular entity is held as a comparable in another AY, ipso facto, that entity does not become a comparable in every AY. The functional comparability for each AY is to be independently analysed for functional comparability, meeting criteria specified in filters and PLI is to be worked including/excluding abnormal/non operational items. Hence it is pleaded that merely on case decisions for earlier AY it may kindly be not held that the comparables sought to be included/excluded by assessee may not be accepted without assessee demonstrating through acceptable evidence on business profile, annual report and financial statements of those comparables sought to be included/excluded that the entities are comparable/non-comparable."

8. The learned Departmental Representative also relied upon the orders passed by the

DRP/Transfer Pricing Officer.

9. Considered the rival submissions and perused the material on record. Insofar as the issue arose from ground no. 2 is concerned, as it transpires from the record available before us, we notice that during the relevant assessment year 2009-10, the Transfer Pricing Officer has re-characterized the assessee as KPO as was done by him in the assessment year 2008-09 and consequently, the Transfer Pricing Officer rejected/excluded the comparables selected by the assessee (being non KPO) and further wrongly selected/included KPO companies as comparable to the assessee. Exclusion of four comparables namely E-clerx Services Ltd., Coral Hubs Ltd. (earlier known as Vishal Information Technologies Ltd.), Crossdomain Solution Ltd. and Cosmic Global Ltd. has been decided by the Tribunal in assessee's own case in *Morgan Stanley Advantage Services (P.) Ltd. (supra)*, for the assessment year 2007-08 the relevant portion of the finding of the Tribunal is reproduced below for ready reference :—

"E-clerx Services Ltd.

32. As noted earlier the Id AR for the assessee submitted that the assessee submits that Eclerx Services Ltd. has not considered as a comparable in earlier years. Eclerx Services Ltd. is a Knowledge Process Outsourcing (KPO) Service provider which is not comparable to assessee; assessee is engaged in providing back office support services. In support of his submission, the Id. AR of the assessee relied upon the decision of Delhi High Court in *Rampgreen Solution (P.) Ltd. (supra)*. The TPO included this comparable by taking his view that this company is in date process and analytical services. The Id CIT(A) confirmed the action of the TPO by taking his view that this comparable company is into the health care receivable management and therefore renders ITeS services. The Hon'ble Delhi Court in *Rampgreen Solution (P.) Ltd. (supra)* held entities rendering voice call center services for customer support and a KPO service provider employ IT-based delivery systems, but characteristics of services, functional aspects, business environment, risks and quality of human resource employed are materially different; and therefore, benchmarking international transactions on basis of comparison of PLI of high-end KPO service providers with PLI of Voice Call Centers, would be unreliable. Further, Mumbai Tribunal in *Willis Processing Services (India) Ltd. (supra)* on considering similar contentions excluded this comparable holding as under :

"(5) We have heard the Ld. Representatives of both the parties, perused the orders of the lower authorities and the records made available before us. We have given a thoughtful consideration to the facts of the case and are of the considered view that though we find ourselves to be in agreement with the contention of the Ld. D.R and have not found favor with the contention of the assessee that as the aforesaid comparable had carried out an acquisition of a U.K based company, therefore simpliciter on the said count, without establishing that such acquisition had rendered the aforesaid comparable functionally different, could not be accepted as a factor for exclusion of the said comparable, but then we are of the considered view that the fact as averred by the Ld. A.R before us that the aforesaid comparable, viz. Eclerx Services Limited was providing high end data analytics and customized process solution and was a leading Indian provider of KPO services, which

substantially varies from a low end ITES service provider, while for the assessee was engaged in providing BPO services, viz-processing of insurance claims and insurance premiums and data processing service for which it employed ordinary graduates, therefore the aforesaid comparable, viz. Eclerx Services Limited was functionally different from the assessee company, and as such could not be selected as a comparable. We find that the DRP had *vide* its order dated 27-11-2015 passed in the case of assessee for AY 2011-12 had accepted the contention of the assessee and rejected the aforesaid comparable company, viz. Eclerx Services Limited on the basis that it was engaged in KPO service, and the department by accepting the said order of the 'DRP' for A.Y. 2011-12 by not carrying the matter in further appeal before the Tribunal, had thus allowed it to attain finality. We further find that in the assessee's own case for the immediately succeeding year, i.e A.Y 2009-10, the DRP as well as the Tribunal had held that companies engaged in KPO services cannot be compared to the routine BPO services provided by the assessee. That still further the Tribunal while disposing of the appeal of the assessee for AY 2010-11 had held that as the assessee was a routine BPO service provider, therefore it cannot be compared to high end KPO service providers such as Eclerx Service Limited. We further find that the 'Special bench' of the Tribunal in the case of *Maersk Global Centres (India) (P.) Ltd. (supra)*, had specifically rejected the aforesaid comparable, viz. Eclerx Services Limited, on the basis that companies predominantly engaged in KPO services cannot be considered as a comparable to a company predominantly engaged in BPO activities. We are thus of the considered view that in the backdrop of the view taken by the Tribunal while disposing of the appeals of the assessee for A.Y(s): 2009-10 & 2010-11, therein concluding that the aforesaid comparable, viz. Eclerx Services Limited which was a KPO could not be taken as a comparable as against the assessee company which is providing BPO services, coupled with the fact that in the assessee's own case for A.Y 2011-12 the exclusion by the DRP of the aforesaid comparable, viz. Eclerx Services Limited from the list of comparables had been accepted by the department, and last but not the least the 'Special bench' of the Tribunal in the case of *Maersk Global Centres (India) (P.) Ltd. (supra)* had therein held that the aforesaid comparable, viz. Eclerx Services Limited which is a KPO cannot be compared as against the assessee which is providing BPO services, we thus finding no reason to take a different view and being of the considered view that the aforesaid comparable, viz. Eclerx Services Limited was functionally different from the assessee company, therefore hold that it cannot be accepted as a comparable and hence is directed to be excluded from the list of comparables."

33. Considering the decision of Delhi High Court in *Rampgreen Solution (P.) Ltd. (supra)* and Tribunal in *Willis Processing Services (India) (P.) Ltd. (supra)*, we direct to exclude Eclerx Services from the comparables.

Coral Hubs Ltd.

38. The Id. AR submitted as we recorded earlier that Coral Hubs Ltd. was outsourcing its significant part of its operation as evident from its low employee cost and have substantial different business model compared to assessee and prayed for exclusion. The Id. DR has supported the inclusion. The TPO while making benchmarking taking his view that this comparable company is in the business of IT enabled services to overseas markets and

included in the list of comparable. The Id. CIT(A) confirmed the action of TPO holding that the TPO conducting benchmarking after calling information under section 133(6) and is benchmarking analysis are correct. We have noted that, though the Id. AR has relied upon a number of decisions of Tribunal/co-ordinate bench. We have noted that in a recent decision of Tribunal in *Willis Processing Services (I) Pvt. Ltd. (supra)* on comparability, the Tribunal held as under :

We though in light of our aforesaid observations had partly disagreed with certain grounds as had been averred by the Ld. A.R to facilitate exclusion of the aforesaid comparable, however as observed by us hereinabove that the aforesaid comparable viz. Coral Hub Limited (earlier known as Vishal Information Technology Limited) had a business model where services are outsourced, as against the business model of the assessee where services are rendered by employing own employees and using one's own infrastructure, on the basis of which we are of the considered view that it can safely be concluded that the said comparable was functionally different, and as such was liable to be excluded from the final list of comparables. That our aforesaid view stands fortified by the aforesaid order passed by the Tribunal while disposing of the appeal of the assessee's own appeal for A.Y. 2005-06, as well as the judgment of the Hon'ble High Court of Delhi in the case of : *Rampgreen Solutions (P.) Ltd. (supra)*. Thus as there has been no material shift in the facts involved in the case of the assessee for the year under consideration, as observed by us hereinabove, we are thus of the considered view that as the business model of the aforesaid comparable, viz. *Coral Hub Ltd. (supra)* is substantially different from that of the assessee, therefore the same cannot be accepted as a comparable and hence is directed to be excluded from the list of comparables.

39. Considering the decision of co-ordinate bench on similar submission, we direct for exclusion of Coral Hubs (Vishal Information) from the comparable.

Cosmic Global Ltd.

40. The Id. AR of assessee prayed for exclusion of comparable on the ground that in earlier years and in A.Y. 2008-09, the TPO has excluded this company from comparable. The function of this company is dissimilar to the business model of assessee. Assessee's capital cost is merely 15.15% as against 58.49% and most of the cost is with reference to outsourcing or translation charges. On the other hand, the Id. DR supported the inclusion. The Id. TPO while making bench marking took his view that this comparable is engaged in IT enabled Translation Services. The Id. CIT(A) confirmed the action of TPO holding that benchmarking was conducted after seeking information under section 133(6). We have noted that Delhi Tribunal in *United Health Group Information (P.) Ltd. (supra)* while considering this comparable held that revenue of this company from medical transcription services is hardly 1% of total revenue. The major part is the income from translation charges at Rs. 5.59 Crore out of the total revenue of Rs. 5.89 Crore, which is totally dissimilar to that assessee. Further, Pune Tribunal in *BNY Mellon International Operation (India) (P.) Ltd. (supra)* held that a company indulged in high skill IT services is non-comparable to a routine IT enabled service provider.

41. Considering the fact that major part of income of this comparable is from translation

charges and function of this comparable is different to the assessee-company, therefore, we direct the exclusion of Cosmic Global from the list of comparable. Similar view was taken by Pune Tribunal in *BNY Mellon International Operations (India) Pvt. Ltd. (supra)* holding that this comparable company had outsourced its vendor and was making high vendor payments as compared to sales and hence was not comparable.

42. Considering the decision of Tribunal, wherein this comparable was held as not comparable and particularly the TPO himself excluded it from the list of comparable in A.Y. 2008-09. Therefore, we direct for exclusion of this comparable."

10. With regard to Cross-Domain Solutions Ltd., we find that the Tribunal in assessee's own case in *Morgan Stanley Advantage Services (P.) Ltd. (supra)* for the assessment year 2008-09, has directed for exclusion of these comparables including E-clerx Services Ltd., Coral Hubs Ltd. along with Crossdomain Solution Ltd.

E-clerx Services Ltd., Coral Hubs Ltd. and

Crossdomain Solution Ltd.

"13. As regards the rejection of four companies, it is the submission of learned counsel of the assessee that the functions of Eclerx Services Ltd. and Vishal Information Technologies Ltd. (earlier Coral Hub Ltd.) has been held to be not comparable to the assessee by the ITAT for the assessment year 2007-08. In this regard, we find that ITAT in the aforesaid order has observed as under:

'32. As noted earlier the Id. AR for the assessee submitted that the assessee submits that Eclerx Services Ltd. has not considered as a comparable in earlier years. Eclerx Services Ltd. is a Knowledge Process Outsourcing (KPO) Service provider which is not comparable to assessee; assessee is engaged in providing back office support services. In support of his submission, the Id. AR of the assessee relied upon the decision of Delhi High Court in *Rampgreen Solution (P.) Ltd. v. CIT* (2015) 377 ITR 533 (Delhi). The TPO included this comparable by taking his view that this company is in date process and analytical services. The Id. CIT(A) confirmed the action of the TPO by taking his view that this comparable company is into the health care receivable management and therefore renders ITeS services. The Hon'ble Delhi Court in *Rampgreen Solution (P.) Ltd. (supra)* held entities rendering voice call center services for customer support and a KPO service provider employ IT-based delivery systems, but characteristics of services, functional aspects, business environment, risks and quality of human resource employed are materially different; and therefore, benchmarking international transactions on basis of comparison of PLI of high-end KPO service providers with PLI of Voice Call Centers, would be unreliable. Further, Mumbai Tribunal in *Wills Processing Services (India) Ltd. v. ACIT (supra)* on considering similar contentions excluded this comparable.

38. The Id. AR submitted as we recorded earlier that Coral Hubs Ltd. was outsourcing its significant part of its operation as evident from its low employee cost and have substantial different business model compared to assessee and prayed for exclusion. The Id. DR has supported the inclusion. The TPO while making benchmarking taking his view that this

comparable company is in the business of IT enabled services to overseas markets and included in the list of comparable. The Id. CIT(A) confirmed the action of TPO holding that the TPO conducting benchmarking after calling information under section 133(6) and is benchmarking analysis are correct. We have noted that, though the Id. AR has relied upon a number of decisions of Tribunal/co-ordinate bench. We have noted that in a recent decision of Tribunal in *Wills Processing Services (I) (P.) Ltd. (supra)* on comparability, the Tribunal held as under :

We though in light of our aforesaid observations had partly disagreed with certain grounds as had been averred by the Ld. AR to facilitate exclusion of the aforesaid comparable, however as observed by us hereinabove that the aforesaid comparable viz. Coral Hub Limited (earlier known as Vishal Information Technology Limited) had a business model where services are outsourced, as against the business model of the assessee where services are rendered by employing own employees and using one's own infrastructure, on the basis of which we are of the considered view that it can safely be concluded that the said comparable was functionally different, and as such was liable to be excluded from the final list of comparables. That our aforesaid view stands fortified by the aforesaid order passed by the Tribunal while disposing of the appeal of the assessee's own appeal for A.Y. 2005-06, as well as the judgment of the Hon'ble High Court of Delhi in the case of *Rampgreen Solutions (P.) Ltd. (supra)*. Thus as there has been no material shift in the facts involved in the case of the assessee for the year under consideration, as observed by us hereinabove, we are thus of the considered view that as the business model of the aforesaid comparable, viz. *Coral Hub Ltd. (supra)* is substantially different from that of the assessee, therefore the same cannot be accepted as a comparable and hence is directed to be excluded from the list of comparables.'

14. Accordingly, following the aforesaid decision of the tribunal, we hold that the Eclerx Services Ltd. and Vishal Information Technologies Ltd. (earlier Coral Hub Ltd.) are liable to be rejected as invalid comparable.

As regards the other comparables namely Crossdomain Solutions and Datamatics Financial Services, we find that the Transfer Pricing officer and the Id. CIT(A) have found their functions to be similar to that of KPO and that of Eclerx and Vishal technologies. Since, the ITAT has duly upheld the rejection of the aforesaid companies, i.e., these two companies are also liable to be rejected. Furthermore, Datamatics Financial Services also fails the export filter of 75% which has been adopted by the transfer pricing officer. Hence, in the background of aforesaid, we hold that following comparable are to be rejected:

Eclerx Services Ltd.

Vishal Information Technologies Ltd.

Crossdomain Solutions

Datamatics Financial Services."

11. The comparables which are to be included has been directed by the Tribunal by observing as under:-

"15. Now we deal with the following comparables which were selected by the assessee, but have been rejected by the Transfer Pricing officer :

Allsec Technologies

R Systems International Ltd.

CG Vak Software & Exports Ltd.

16. The Transfer Pricing Officer has not mentioned the specific reasoning in rejecting the above comparable. While discussing his general reasoning for election/rejection, the transfer pricing officer mentioned that he is only accepting comparables where the current year data are available. In this regard, we note that though initially the assessee had submitted two-year data, subsequently, it has duly submitted the current year data. The transfer pricing officer has also mentioned that he is rejecting the persistent loss making companies. Though some of these companies have suffered loss in the current assessment year the average of two years showed the robust positive figure. Hence, it cannot be said that these are persistently loss making company. Furthermore, we note that these comparables have been duly accepted as comparable in earlier assessment year by the officer himself. Hence, taking a contrary stand by the transfer pricing officer without giving a specific reasoning is not sustainable. Accordingly, we direct for inclusion of these comparables."

12. Even in this assessment year, the Transfer Pricing Officer has rejected the above companies holding that they are not fit to be considered in the category of KPO and treated it as ITES. Since the aforesaid issues are squarely covered by the decision of the Tribunal rendered in assessee's own case for the assessment years 2007-08 and 2008-08, as indicated above, consistent with the view taken therein, ground no. 2 and additional ground are disposed off *protanto* and consequently, the other grounds of appeal became academic in nature, hence, left un-adjudicated. Therefore, ground no. 2, and additional ground raised by the assessee are accordingly allowed.

13. In the result, appeal is partly allowed.

RITESH

*In favour of assessee.