

[2019] 109 taxmann.com 435 (Hyderabad - Trib.) [06-08-2019]

TRANSFER PRICING: Where in case of a comparable company, current year was an exceptional year of operation with an increase in revenue from BPO business, said company was to be excluded as a comparable

TRANSFER PRICING: Where a company was operating under different business model as it had incurred significant cost on outsourcing of medical transcription activity and it did not change its activities in current AY, it was to be excluded from final list of comparables to assessee ITES provider

TRANSFER PRICING: Where a company even though satisfied functionality test did not qualify turnover filter of less than Rs. 1 crore, it was to be excluded as a comparable to an ITES provider

TRANSFER PRICING: Where a company was into ITES and its entire revenue was from BPO services only, rejection of said company as a comparable to an ITES provider by DRP on ground that it failed filter of income from ITES not being less than 75 per cent of total operating revenue filter was incorrect

TRANSFER PRICING: Where details with regard to Related Party Transactions (RPT) of a comparable company was reported in its Annual Report, findings of TPO and DRP that complete information as to RPT filter was unavailable was incorrect

TRANSFER PRICING: Where a company was into diversified activities and it also had brand value and huge turnover as compared to assessee, it was to be excluded from final list of comparables

TRANSFER PRICING: Where TPO and DRP held a company to be a KPO service provider whereas assessee was categorised as a BPO, said company could not be treated as a comparable to assessee

TRANSFER PRICING: Where a company was into R & D activities and had achieved abnormal growth and, further, in case of S & P Capital IQ (India) Ltd. v. Dy. CIT [2019] 55 CCH 449 (Hyd. - Trib.) it was excluded as a comparable to an ITES provider, same decision was to be followed in impugned assessment year

TRANSFER PRICING: Where a comparable was a publishing company and was totally into a different business model as compared to assessee-ITES

provider, but in a similar case said company had described itself as an ITES provider and was held to be a comparable to assessee, thus, following said case it was to be held as a comparable

TRANSFER PRICING: Where a company was functionally similar to assessee-software development service provider but failed R & D filter of less than 3 per cent of turnover, it could not be taken as a comparable to assessee

TRANSFER PRICING: Where certain companies had huge turnover as compared to assessee, said companies were to be excluded as comparables to assessee

TRANSFER PRICING: Where assessee was a software development service provider, a company engaged in product development and product design services was to be excluded from final list of comparables to assessee

TRANSFER PRICING: A company engaged in various activities including development of niche product and development services was to be excluded from final list of comparables to assessee-software development service provider

TRANSFER PRICING: Where assessee was a software development service provider, a company engaged/involved in development of software products and trading in software licenses was to be excluded from final list of comparables to assessee

TRANSFER PRICING: Mere mention of products in Annual Report of a company without any products in effect could not make it a product company



[2019] 109 taxmann.com 435 (Hyderabad - Trib.)

IN THE ITAT HYDERABAD BENCH 'A'

Infor (india) (P.) Ltd.

v.

Deputy Commissioner of Income Tax, Circle 2(1)*

**SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
IT APPEAL NOS. 161 & 2307 (HYD) OF 2018
[ASSESSMENT YEARS 2013-14 AND 2014-15]
AUGUST 6, 2019**

I. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Others) - Assessment year 2013-14 - Whether in case of a comparable company, current year was an exceptional year of operation with an increase in revenue from BPO business, said company was to be excluded as a comparable - Held, yes [Para 21][In favour of assessee]

II. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Medical transcription services) - Assessment year 2013-14 - Assessee-company was an ITES provider - It was submission of assessee that a comparable company was operating under different business model as it had incurred significant cost on outsourcing of medical transcription activity - Whether since, said company did not change its activities in current year, it was to be excluded from final list of comparables to assessee - Held, yes [Para 24][In favour of revenue]

III. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Turnover filter) - Assessment year 2013-14 - Assessee-Company was an ITES provider - Whether where a company even though satisfied functionality test but did not qualify turnover filter of less than Rs. 1 crore, it was to be excluded as a comparable - Held, yes [Para 26][In favour of revenue]

IV. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Revenue filter) - Assessment year 2013-14 - Assessee-company was engaged in providing ITES services - DRP rejected a company as a comparable to assessee on ground that it failed filter of income from ITES not being less than 75 per cent of total operating revenue filter - Whether where said company was into ITES and its entire revenue was from BPO services only, findings of DRP was not correct - Held, yes [Para 29][Matter remanded]

V. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Related party transactions) - Assessment year 2013-14 - Whether where details with regard to Related Party Transaction (RPT) of a comparable company was reported in its Annual Report, findings of TPO and DRP that complete information as to RPT filter was not available was incorrect - Held, yes [Para 32][In favour of assessee/Matter remanded]

VI. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Turnover filter) - Assessment year 2014-15 - Whether where a company was into diversified activities and it also had brand value and huge turnover as compared to assessee, it was to be excluded from final list of comparables - Held, yes [Para 53][In favour of assessee]

VII. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of

arm's length price (Comparables, functional similarity - BPO/Call centre) - Assessment year 2014-15 - Whether where TPO and DRP held a company to be a KPO service provider whereas assessee was categorised as a BPO, said company could not be treated as a comparable to assessee - Held, yes [Para 56][In favour of assessee]

VIII. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - R & D filter) - Assessment year 2014-15 - Assessee-company was an ITES provider - Comparable company was into R & D activities and had achieved abnormal growth during current assessment year - Further, in case of S & P Capital IQ (India) Ltd. v. Dy. CIT [2019] 55 CCH 449 (Hyd. - Trib.), said company was directed to be excluded - Whether, following aforesaid decision, exclusion of said company for impugned assessment year was to be directed - Held, yes [Para 62][In favour of assessee]

IX. 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 2014-15 - Assessee-company was engaged in providing ITES services - On other hand, comparable company was a publishing company and was totally into a different business model - In a similar case, said company had described itself as an ITES service provider and it was held to be functionally similar to assessee by Tribunal - Whether following that similar case, said company was to be held as a comparable to assessee - Held, yes [Para 66][In favour of revenue]

X. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - R & D filter) - Assessment year 2014-15 - Assessee was a software development service provider - Whether where a company was functionally similar to assessee but failed R & D filter of less than 3 per cent of turnover, it could not be taken as a comparable to assessee - Held, yes [Para 72][In favour of revenue]

XI. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Turnover filter) - Assessment year 2014-15 - Assessee-company was a software development service provider - Its turnover was less than that of comparable companies - Further, in case of CIT v. Aginity India Technologies (P.) Ltd. [2013] 36 taxmann.com 289/219 Taxman 26 (Delhi), said companies were held to be not comparables as they were giant company in area of software development - Whether, in view of facts, said companies were to be excluded as comparables to assessee on account of huge turnover - Held, yes [Para 76][In favour of assessee]

XII. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Software consultancy/development services) - Assessment year 2014-15 - Whether a company engaged in product development and product design services was to be

excluded from final list of comparables to assessee-software development service provider - Held, yes [Para 78][In favour of assessee]

XIII. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Software consultancy/development services) - Assessment year 2014-15 - Whether a company engaged in various activities including development of niche product and development services was to be excluded from final list of comparables to assessee-software development service provider - Held, yes [Para 78][In favour of assessee]

XIV. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Software consultancy/development services) - Assessment year 2014-15 - Assessee-company was a software development service provider - On other hand, comparable company was involved in development of software products and trading in software licenses - Whether said company was to be excluded from final list of comparables to assessee - Held, yes [Para 78][In favour of assessee]

XV. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Software consultancy/development services) - Assessment year 2014-15 - Assessee-company was a software development service provider - To say that a company was into products, it relied upon Annual Report of said company wherein under head 'revenue from operations', there was a mention of 'sale of software' and under head 'earning in foreign exchange', 'goods/export of services' was mentioned - Revenue pointed out there was no sale of any products and said company was involved in export of software services only - Whether mere mention of products in Annual Report without any products in effect could not make said company a product company - Held, yes - Whether, therefore, said company need not be excluded as a comparable to assessee - Held, yes [Para 83][In favour of revenue]

CASE REVIEW

S & P Capital IQ India (P.) Ltd. v. Dy.CIT [2019] 55 CCH 449 (Hyd. - Trib.) (paras 21 and 62); *Avineon India (P.) Ltd. v. Dy.CIT* [2017] 84 taxmann.com 243 (Hyd. - Trib.) (para 24) and *Infor Global Solutions India (P.) Ltd. v. Dy.CIT* [2019] 102 taxmann.com 58 (Mum. - Trib.) (para 78) followed.

CASES REFERRED TO

S&P Capital IQ India (P) Ltd. v. DyCIT [2019] 55 CCH 449 (Hyd. - Trib.) (para 18), *Avincon India (P) Ltd. v. Dy. CIT* [2017] 84 taxmann.com 243 (Hyd. - Trib.) (para 23), *Cameron Manufacturing India (P.) Ltd. v. Dy. CIT* [2018] 95 taxmann.com 24 (Chennai - Trib.) (para 25), *Microsoft India (R & D) (P) Ltd. v. Dy. CIT* [2018] 97 taxmann.com 360 (Delhi - Trib.) (para 25),

Maersk Global Service Centers (India) (P) Ltd. v. ITO [IT Appeal No. 1082 (Mum.) of 2015, dated 29-7-2016] (para 25), *CIT v. Aginity India technologies (P) Ltd.* [2013] 36 taxmann.com 289/219 Taxman 26 (Delhi) (para 53), *Infor Global Solutions India (P) Ltd. v. Dy.CIT* [2019] 102 taxmann.com 58 (Mum-trib) (para 78) and *Pubmatic India (P) Ltd. v. Asstt. CIT* [2018] 91 taxmann.com 356 (Pune - Trib.) (para 82).

Sunil Moti Lala for the Appellant. **Y.V.S.T. Sai**, CIT DR for the Respondent.

ORDER

Smt. P. Madhavi Devi, Judicial Member. - Both are assessee's appeals for the A.Y 2013-14 and 2014-15 respectively against the final assessment orders passed u/s 143(3) r.w.s. 144C (15) of the Act.

A.Y 2013-14

2. Brief facts of the case for the A.Y 2013-14 are that the assessee is a captive service provider to its AE, Infor Global Solutions Inc. During the relevant A.Y, the assessee has entered into following international transactions with its AE:

<i>Name of the international Transaction</i>	<i>Amount (INR)</i>	<i>MAM</i>	<i>PLI</i>	<i>Margin of taxpayer (%)</i>	<i>Margin of comparables (%)</i>
Software distribution and related services (product supply fee, one point support, customer support and management fee)	54,09,98,363	RPM	GP/Sales	69.98%	16.20%
Software development services	34,03,33,789	TNMM	OP/OC	15.33%	10.39%
Related IT Services	69,73,50,295	TNMM	OP/OC	15.17%	10.39%
Shared services	25,12,89,099	TNMM	OP/OC	11.01%	11.13%
Recovery of expenses	2,00,437	CUP method	NA	NA	NA
Reimbursement of expenses	56,59,352	CUM method	NA	NA	NA

3. Therefore, the determination of the Arms' Length Price (ALP) of these transactions was referred to the TPO u/s 92CA of the Act. The TPO in Para 5 of his order recorded the assessee's submissions as under:

"5. Examination of TP study conducted by taxpayer:

In the TP documentation, the taxpayer has benchmarked the transactions under three segments namely; software distribution, software development (including related IT services)

and shared services (ITES). As per the taxpayer analysis, the PLI of the taxpayer is higher than the comparable companies' results for the transactions pertaining to software development and software distribution segments. No adjustment has been proposed to the transactions pertaining to software distribution and software development segments as the same meets the arm's length price".

4. As regards the ITeS segment, the TPO observed that the assessee has shortlisted 7 companies as comparable to the assessee, whose arithmetic mean PLI (OP/OC) was 11.13% as against the assessee's PLI of 11.01% and therefore, the assessee treated this transaction to be at Arms' Length.

5. The TPO analysed the transactions and observed that the transaction of Software Development Services was at ALP because the margin of the assessee was higher than the average margin of the comparables and hence no adjustment was required.

6. As regards Software Distribution Services, the TPO rejected the RPM method adopted by the assessee and applied TNMM as the most appropriate method and arrived at 9 companies as comparable to the assessee whose average margin was 1.37% as against the margin of the assessee at -6.44%. Therefore, he proposed an adjustment of Rs.4,22,90,359/- u/s 92CA of the Act.

7. As regards the ITeS segment, the TPO observed that the assessee's TP analysis suffers from various defects which has resulted in selection of inappropriate comparables and rejection of appropriate comparables. Therefore, the TPO rejected the assessee's TP study and made an independent analysis by aggregating all the transactions under TNMM. On the selection of filters by the assessee and the additional filters adopted by the TPO, it is held as under:

<i>Sl.No</i>	<i>Particulars</i>	<i>Remarks of the TPO</i>
1	Companies having financials at least 2 out of 3 years were selected	This is not an appropriate filter. This office has used the contemporaneous data which is subsequently discussed
2	Companies with positive networth	A company can have negative net worth due to many other reasons not relating to the factors and economic circumstances prevalent during the financial year 2012-13. If a company satisfies the functional analysis and also is working in comparable economic circumstances, then the same is comparable even though such company has negative net worth due to the influence of earlier year factors like losses in the earlier years etc. Hence, this may not be appropriate filter. This filter is to be applied and seen on case by case basis. More appropriate filter of consistent losses of the last three years is applied by the TPO. This is discussed in detail in later part of this notice.
3	Companies reporting net	This is an appropriate filter

	sales Rs.1 crore	
4	Companies reporting manufacturing + trading sales/net sales < 25% i.e. predominantly into rendering of services	This is an appropriate filter which similar to the filter of service income used by this office
5	Companies with foreign exchange earning >25%	This is an appropriate filter
6	Select companies having RPT<25%	This is an appropriate filter
7	Companies with similar nature of operations	This is an appropriate filter

As per the provisions of section 92C(3) r.w.s. 92CA where during the course of any proceeding, the TPO, on the basis of material or information or documents in the possession is of the opinion that the information or data used in computation of the arm's length price is not reliable or correct, the TPO may proceed to determine the arm's length price in relation to the international transactions in accordance with Sec. 92C(1) and 92C(2) on the basis of such material or information or document available with him.

After rejecting the filters applied by the taxpayer, the TPO has used the following filters or criteria, which lead towards selecting proper comparables functionally similar to that of the taxpayer, apart from the above filters or criteria accepted by the department:—

- i. Companies Whose data is not available for the FY 2012-13 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 (soles as well as

expenditure combined) of the soles were excluded

- v. Companies whose employee cost is less than 25% of the soles were excluded
- vi. Companies who have export soles less than 75% of the soles were excluded.
- vii. Companies who have diminishing revenues/persistent losses for the last three years up to and including FY 2012-13 were excluded
- viii. Companies having different financial year ending (i.e. not March 31, 2013) or data of the company does not fall within 12 month period i.e. 01-04-2012 to 31-03-2013~ were rejected
- ix. Companies that are functionally different from the taxpayer were excluded.
- x. Companies that are having peculiar economic circumstances were excluded".

8. Applying the above filters, the TPO rejected the comparables selected by the assessee by observing as under:

<i>Sl.No</i>	<i>Name of the comparable</i>	<i>Remarks</i>
1	Caliber Point Business Solutions Ltd (Seg.)	Rejected as turnover is less than 1 crore
2	Cosmic Global Ltd	Rejected as fails > 75% export revenue filter
3	Datamatics Global Services Ltd	Rejected - functionally different
4	Informed Technologies Ltd	Rejected as insufficient financial information
5	Ace BPO Services (P) Ltd	Rejected as insufficient financial information
6	Jindal Intellicom Ltd	Rejected as insufficient financial information
7	Omega Healthcare Management Services P Ltd	Fails employee cost filter

9. Thereafter, based on the search of Prowess and Capitaline databases, the TPO proposed the following 7 companies as comparable to the assessee:

<i>Sl.No</i>	<i>Name of the company</i>	<i>OR</i>	<i>OC</i>	<i>OP</i>	<i>OP/OC</i>
1	Acropetal Technologies Ltd (Seg.)	34839744	28061362	6778382	24.17
2	Microgenetics Ltd	19211589	16513486	2698103	16.34
3	Infosys BPO Ltd	18313654987	14136657182	4176997805	29.55
4	Microland Ltd	2423900000	2231500000	192400000	8.62

5	Capgemini Business Services (India) Ltd	5181918537	4087308886	1094609651	26.78
6	E4e Healthcare Business Services P Ltd	1091819827	931110730	160709097	17.26
7	Hartron Communications Ltd (Seg.)	184308416	138132416	46176000	33.43
					22.30

10. The assessee submitted its objections to the above companies except Microland Ltd. The TPO rejected the assessee's objections and computed the Average Mean Margin of these companies at 22.30% and after allowing working capital adjustment, he proposed the adjustment of Rs.2,09,93,894/-.

11. The TPO further observed that the assessee has trade receivables which was not reported in its form 3CEB. Observing that with retrospective amendment of section 92B of the Act, receivables form part of international transaction, he proposed to charge interest @14.45% p.a. The assessee objected to the same by submitting that "outstanding receivables are consequent to the international transactions of provision of ITES and not in the nature of any advance/loans. Since these are closely linked with the sale of services, they have been aggregated with the principle transaction of sales for the purpose of economic analysis. It is fully funded entity and the sales and receivables are running accounts and WCA duly considered the impact of outstanding receivables. The taxpayer has relied on various case laws of various Tribunals in this regard. In this regard, on going through the submissions made it is seen that the taxpayer has projected that receivables at the end of year are forming part of the WCA computation and as such the interest is already impacted therein. However, the receivables are off-set by payables also and in case to case differ. However, there may be a situation where the taxpayer does not receive the amounts due throughout the year but the entire payment is received in March itself then in this case the receivable at the end of the year would be almost nil and it would give a favourable WCA to the taxpayer. Also, the WCA takes into account the payables as well as receivables at the end of the year but does not take into account the receivables within the year. Therefore, the contention of the taxpayer is not acceptable".

As per the intercompany agreements filed by the assessee, we have noticed that the payment terms is 60 days from the end of the relevant quarter and in some agreements it is 90 days from the end of the relevant quarter etc. We have considered the due date as 60 days from the end of the relevant quarter as an uniform due date for the sale of consistency. In view of the above, interest is charged @ 14.45% on the receivables received beyond the due date for the invoices raised during the year under consideration".

12. He accordingly determined the ALP interest on the receivables at Rs.5,59,43,523/-.

13. In accordance with the TP order, the draft assessment order dated 5.12.2016 was passed, against which the assessee preferred its objections before the DRP, which granted partial relief to the assessee by directing the TPO to exclude Acropetal Technologies Ltd from the final list of comparables; and to exclude Capgemini Business Services if it fails RPT Filter after cross-

verification of the same; and to exclude Infosys BPO if it fails Export Revenue filter.

14. The DRP, however, rejected the assessee's request for inclusion of the companies selected by it.

15. As regards the ALP adjustment on trade receivables, the DRP held that it is an international transaction requiring TP adjustment. However, the AO was directed to apply the applicable interest rates instead of 14.45% applied by the TPO according to the number of days delay. In accordance with the DRP order, the final assessment order dated 31.10.2017 was passed, against which the assessee is in appeal before us by raising the following grounds of appeal:

"Based on the facts and circumstances of the case, Infor (India) Private Limited (hereinafter referred to as 'the Appellant') respectfully craves to prefer an appeal against the Assessment order passed under Section 143(3) read with Sections 92CA(3) and 144C (13) of the Income-tax Act, 1961 ('the Act') by the Deputy Commissioner of Income-tax Circle 2(1), Hyderabad (hereinafter referred to as the 'Assessing Officer' or 'Ld. AO') in pursuance of the directions issued by the Hon'ble' Dispute Resolution Panel - I, Bengaluru (hereinafter referred to as the Hon'ble ORP) on the following grounds which are without prejudice to one another:

ADDITION TO TOTAL INCOME OF Rs. 42,957,746

I. On the facts and in the circumstances of the case and in law, the Learned Transfer Pricing Officer i.e. the Deputy Commissioner of Income-tax (Transfer Pricing Officer)-2, (hereinafter referred to as 'the Ld. TPO') and the Ld. AO under the directions issued by Hon'ble ORP, erred in making an addition to the Appellant's total income of Rs. 42,957,746 (based on the provisions of Chapter X of the Income-tax Act, ('the Act') and the said addition being wholly unjustified are liable to be deleted.

TRANSFER PRICING

Incorrect selection of comparables

2. Hartron Communications Limited

2.1 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in selecting Hartron Communications Limited as a comparable.

2.2 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble ORP further erred in upholding/confirming the action of the Ld. TPO in selecting Hartron Communications Limited as a comparable, without appreciating that the said company renders diversified activities - business process outsourcing, legal process outsourcing, Back office, Software Development, Tech Solutions and Medical Billing services without any segmental data.

2.3 Without prejudice to above ground of appeal, the Ld. TPO and the Ld. AO erred in not following the directions of the Hon'ble DRP in considering the correct margin of Hartron Communications Limited.

3. Microgenetics Systems Limited

3.1 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DR? further erred in upholding/confirming the action of the Ld. TPO in selecting Microgenetics Systems Limited as a comparable.

3.2 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DR? further erred in upholding/confirming the action of the Ld. TPO in selecting Microgenetics Systems Limited as a comparable, without appreciating that the said company is engaged in the business of providing back-office services to health sector which are in the nature of medical transcription services.

3.3 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DR? further erred in upholding/confirming the action of the Ld. TPO in selecting Microgenetics Systems Limited as a comparable without appreciating that it operates under a different business model i.e. outsources its activities.

4. E4e Healthcare Business Services Private Limited

11.1 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DR? further erred in upholding/confirming the action of the Ld. TPO in selecting E4e Healthcare Business Services Private Limited as a comparable.

11.2 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DR? further erred in upholding/confirming the action of the Ld. TPO in selecting E4e Healthcare Business Services Private Limited as a comparable, without appreciating that the said company is engaged in the business of providing health care outsourcing services for health care industry.

11.3 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in selecting E4e Healthcare Business Services Private Limited as a comparable, without appreciating that E4e Healthcare Business Services Private Limited is engaged in the forward contract and hedging activities which have an impact on the margin of E4e Healthcare Business Services Private Limited.

Incorrect rejection of comparables

5. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in rejecting the following companies as a comparables, without appreciating that the said companies were functionally comparable to the Appellant:

- ◆ Caliber Point Business Solutions
- ◆ Informed Technologies Private Limited
- ◆ ACE BPO Services Private Limited

- ◆ JindalIntellicom Limited
- ◆ Techprocess Solutions Limited

Incorrect rejection of Appellant's Transfer Pricing study/Incorrect benchmarking analysis by TPO

6. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in rejecting the transfer pricing analysis/study prepared by the Appellant, without appreciating that none of the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied.

7. On the facts and in the circumstances of the case and in law, the Ld. AO, Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in classifying the Appellant as being engaged in providing a mix of high end and low end services without appreciating that the Appellant was a captive service provider, providing shared services (i.e. low end services) to its Associated Enterprises and consequently all KPO companies/companies providing high end services (whether selected by the Appellant or the TPO) ought to have been rejected.

8. On the facts and in the circumstances of the case and in law, Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in conducting a fresh benchmarking which was erroneous and liable to be rejected since the Ld. TPO:

- i. Used lower turnover filter without the application of an upper turnover filter, thereby disregarding the importance of turnover in the benchmarking of comparables
- ii. Selected certain companies wherein peculiar economic circumstances/extra-ordinary events had occurred during the relevant year
- iii. Selected companies which were not comparable to the Appellant
- iv. Selected companies earning abnormal profits
- v. Used Related Party transaction filter of 25 percent as against 10-15 percent
- vi. Used arbitrary filter of export sales applying a threshold limit of 25 percent
- vii. Rejected of companies having a different Financial Year ended without appreciating that the results for the relevant financial year could be reasonably extrapolated from the Financials of the impugned companies, available in public domain
- viii. Rejected the multiple year data adopted by the Appellant

Incorrect computation of Profit Level Indicator ('PLI')

9. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in considering provision for bad and doubtful debts as a non- operating expenditure while computing the

PLI.

Risk Adjustment

10. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. TPO in not allowing risk adjustment in accordance with the provisions of Rule 10B of the Income-tax Rules, 1962 to account for differences between the international transactions undertaken by the Appellant, being a captive unit, and those undertaken by the alleged comparables.

Interest on outstanding receivables

11. Interest on outstanding receivables

11.1 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred by not following the favourable directions given by the Hon'ble ORP for assessment year 2011-12 and also confirmed by the Hon'ble Income Tax Appellate Tribunal in Appellant's own case appeal no. bearing ITA No. I 13/Hyd/2016, wherein the interest on outstanding receivables was deleted on the ground that delay in receivables and payables are adjusted in the working capital adjustment as computed by the Ld. TPO.

11.2 On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble ORP further erred in considering outstanding receivables, which is an outcome of the principal international transaction, as a separate and distinct international transaction and further erred in confirming a transfer pricing adjustment in the nature of interest on receivables amounting to Rs. 25,164,907.

11.3 On the facts and in the circumstances of the case and in law, the Ld. AO erred in not considering the fact that the working capital adjustment evaluates the outstanding receivable in a controlled scenario vis-a-vis uncontrolled scenario and that differential impact of working capital of the Appellant vis-a-vis its comparables has already been factored in the pricing! profitability of the Appellant. And hence, levying interest on receivables amounts to double adjustment.

Without prejudice to the fact that no arm's length determination and consequential transfer pricing adjustment is warranted on outstanding receivables, the Appellant would like to raise the following grounds against the computation methodology of the Ld. AO:

11.4 On the facts and in the circumstances of the case and in law, the Ld. AO erred in applying the credit period available to the Appellant, as per the intercompany agreement, as benchmark for computing the transfer pricing adjustment since credit period based on intercompany agreement defies transfer pricing provisions.

5. On the facts and in the circumstances of the case and in law, the Ld. TPO and the Ld. AO erred in bringing notional interest to tax without considering the fact that neither the AE nor the Appellant charges any interest in case of delay in payment

LEVY OF INTEREST UNDER SECTION 234(3) OF THE ACT:

12. On the facts and in the circumstances of the case and in law, the Ld. AO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld. AO in levying interest u/s 234B of the Act and the said levy of interest being Wholly Unjustified, ought to be deleted.

The Appellant craves leave to add, alter, vary, omit substitute or amend the above grounds of appeal. at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Members" to decide this appeal according to law.

16. At the time of hearing, the Counsel for the assessee submitted that the assessee is not seeking exclusion of e4e Healthcare Business Services Pvt Ltd from the final set of comparables and is also not seeking inclusion of Jindal Intellicom Ltd and Techprocess Solutions Ltd in the final list of comparables Therefore, the grounds on these comparables are rejected as not pressed.

17. As regards the interest on trade receivables, the learned Counsel for the assessee, while reiterating the submissions made before the authorities below, submitted that working capital adjustments factor in the impact of outstanding receivables on the profitability of the assessee and therefore, no separate/further adjustment was required to be made. It is further submitted that the assessee is a debt free company and since it has not charged interest on the outstanding receivables from AE as well as non-AEs, there can be no TP adjustment on account of notional interest.

18. As regards the exclusion of Hartron Communications Ltd, the learned Counsel for the assessee submitted that Hartron Communications is functionally dissimilar to the assessee as it undertakes diversified business activities when compared to the assessee and also that it evidenced abnormal revenue pattern in the last 5 years because Hartron Communications revenue grew from Rs.3.81 crores to Rs.18.43 crores compared to earlier year. Therefore, he submitted that it fails peculiar circumstances filter. Without prejudice to this ground, he submitted that the TPO has erred in not computing the correct margin of Hartron Communications i.e. 19.41%. In support of his contention that the said company should be excluded from the final list of comparables, the learned Counsel for the assessee relied upon the decision of the Coordinate Bench of the Tribunal in the case of *S&P Capital IQ India (P) Ltd v. Dy. CIT* [2019] 55 CCH 0449 HydTrib.

19. The learned DR, on the other hand, supported the orders of the authorities below and submitted that Hartron Communications is also engaged in ITeS and that it passes all the filters applied by the TPO. It was held that as per page No.20 of the Annual Report of Hartron Communications Ltd, which gives segmental revenue break up, revenue of office back up operations is Rs.1084.083 lakhs and the said segment falls under ITeS. He also relied upon the orders of the TPO & DRP. The learned DR further submitted that the assessee also is into rendering high end BPO services. He submitted that as seen from its profile, assessee is also rendering high end BPO services like Hartron Communications Ltd and therefore, both the companies are comparable to each other. He also submitted that the extra ordinary/peculiar circumstances filter should be proved to have effect on the operational income of the assessee and without any such evidence, the peculiar circumstances filter cannot be applied.

20. Having regard to the rival contentions and the material on record, we find that the assessee is

rendering various activities which have been reproduced by the TPO in the TP order. However, the TPO has considered the assessee to be rendering ITeS services. As seen from the Annual Report of the Hartron Communications Ltd at page 477, 481, 482 and 522 of the paper book, we find that it is in the business of both export and domestic BPO services and is also entered into an MOU with Vector for construction of a modern multistorey building and a new building is under construction. From para 19 of its Annual Report, it is seen that Hartron Communications has revenue from three business segments namely rental income, office back up operations and real estate. It is also rendering medical bill services and is earning huge income therefrom. As regards ITeS export filter is concerned, we find that the Hartron Communications is earning income both from export as well as domestic transactions and the segmental details of the same are available. At page 482 of the Paper Book, the revenue from rent, export earning from BPO, domestic earning from BPO and sale of flats are separately given. Further, from page 478 of the Paper Book, we find that the company has reported total revenue for the year to be at Rs.33.12 crores as compared to previous year where it was Rs.21.38 crores which shows an increase in overall revenue to the extent of 154.8% over the last year. It is mentioned that the income from BPO services both export and domestic for the current year is Rs.18.34 crores as against previous year's Rs.3.81 crores which shows an increase to the tune of Rs.483.72% over the last year. Therefore, there is an abnormal increase in the revenue of the company. As seen from the margin of the said company taken by the TPO, we find that the TPO has only taken the segmental results and not the total income of the assessee which includes the rental income and income from sale of land etc. Therefore, though the said company is into diversified activities, only segmental results have taken by the TPO and therefore, the said results cannot be said to be not comparable with the assessee as the revenue from both the companies is from ITeS services only. As regards the argument that it has evidenced abnormal revenue pattern, we agree with this argument of the assessee, because as reported by the said company, it is into BPO services and has shown increase to the tune of 483.72% over the last year. In the case of *S&P Capital IQ India (P.) Ltd. (supra)*, the Coordinate Bench of the Tribunal (to which both of us are signatories) for the very same A.Y i.e. 2013-14, has held that this company has to be excluded on account of exceptional year of performance. For the sake of clarity and ready reference, the relevant paras are reproduced hereunder:

"8. As regards, Hartron Communications Ltd is concerned, the argument of the assessee is that it is functionally different because it includes both ITES as well as other services like software services and the segmental results/information is not available. He also submitted that it is an exceptional year of operation with an increase in revenue from BPO business to the tune of 483.72% over the last year and there is a huge fluctuation in the financial results of the company in the earlier and subsequent A.Ys. He also submitted that the fluctuation is on account of difference in treatment of income and expenditure. He submitted that the said company, on one hand, recognizes exceptional revenue on cash basis and the expenditure on accrual basis and thus it violates the concept of mercantile system of accounting. Therefore, it cannot be held as a comparable. The assessee also referred to the decisions of the Tribunal at Delhi in the case of *Ciena India* in ITA No.1453/Del/2014 wherein it was held that companies whose financial results are not based on mercantile system of accounting, should not be taken as a comparable. In support of this contention, the learned AR referred to the Annual Report

of the said company.

9. On the other hand, the learned DR relied upon the orders of the authorities below and submitted that sufficient information with regard to the revenue from ITES is available and has been taken by the TPO in his order. He submitted that the said company is also following mercantile system of accounting except for a few items and therefore, it is not correct to say that the said company is following cash system of accounting which is not allowed to be followed after it was made mandatory to maintain books of account on mercantile system of accounting. Therefore, according to him, Hartron Communications Ltd is also a comparable company.

10. Having regard to the rival contentions and the material on record, we find that Hartron Communications Ltd has reported income from both the export and domestic sales. As seen from the auditor's report, the assessee has maintained proper books of account as required by law and there is no qualification by the auditors. At para 1.6 of the notes forming part of the accounts for the year ending 31.03.2013, it is mentioned that all the revenues are accounted from accrual basis, except for processing charges (export income), interest on calls arrears, listing fee and leave encashment which are accounted for on cash basis. At Para 12 of the said report, it is stated that the income from BPO services is Rs.17,99,52,212 which has been booked on the basis of Indian currency realized. At note 17, the revenue from operations is reported, we find that the export income has been reported at Rs.17,99,52,211/-. Further, from the data published by the assessee, this year is an exceptional year of operation. The financial results of Hartron Communications Ltd cannot be considered for the preceding and succeeding financial years is as under:

F.Y 2009-10 (-) 22.07%

F.Y 2010-11 (-) 97.56%

F.Y 2011-12 (-) 37.15%

F.Y 2012-13 25.05%

F.Y 2013-14 (-) 2.52%

F.Y 2014-15 (-) 26.02%

Therefore, it can be seen that this year has been an exceptional year for the said company. Therefore, we are of the opinion that Hartron Communication Ltd cannot be considered as a comparable company to the assessee. In this view of the matter, without commenting on the other objections of the assessee, against this company, we direct the AO/TPO to exclude this company from the final list of comparables only for the ground of exceptional performance during the relevant year".

21. Respectfully following the same, we direct that Hartron Communications Ltd be excluded on account of exceptional year of performance i.e. peculiar circumstances filter.

22. As regards the comparability of Microgenetics Systems Ltd is concerned, the learned Counsel for the assessee submitted that it operates under different business model as it has incurred

significant outsourcing cost. We find that the TPO has held that the Revenue from operations of this company is on account of sale of medical transcription services which also falls under ITeS and that it passes all the filters applied by the TPO. The DRP has confirmed the findings of the TPO.

23. The learned DR, therefore, supported the orders of the authorities below and also he drew our attention to page 489 of the paper book wherein the medical transcription charges are shown at Rs.1,92,11,588/-. He submitted that unless and until it is shown that the revenue from outsourcing of the services has an impact on the operating margin of the said company, the same should not be excluded as long as it is functionally similar to the assessee. The learned Counsel for the assessee had relied upon the decision of the ITAT in the case of *Avineon India (P.) Ltd. v. Dy. CIT* [2017] 84 taxmann.com 243 wherein this company was directed to be excluded. We have gone through the said order which is for the A.Y 2011-12 wherein at Paras 9 to 11, the Tribunal has held as under:

"9. As regards Ground No.5, though the assessee has sought inclusion of 3 companies as comparable, the learned Counsel for the assessee submitted that the assessee is now seeking inclusion of only 'Microgenetics Systems Ltd' as comparable to the assessee. According to the learned Counsel for the assessee, the TPO, himself has taken this company as a comparable in his TP study but the DRP has directed its exclusion on the ground that in the case of Microgenetics Systems Ltd which is engaged in the activity of Medical Transcription, the expenses to the extent of 23% have been incurred on outsourcing of medical transcription activity. Therefore, according to him, when the TPO himself has accepted the said company as a comparable and the assessee has not challenged its inclusion, the DRP ought not to have directed its exclusion.

10. The learned DR, however, relied on the order of the DRP and submitted that the P&L a/c of the Microgenetics Systems Ltd and Schedule-F thereof shows the expenditure incurred towards medical transcription activity which is nothing but for outsourcing of medical transcription activity and though it may not be exactly 23% of the expenses, it is evidently incurred on outsourcing of the medical transcription activity.

11. Having regard to the rival contentions and the material on record, and after going through the P&L A/c of the comparable Microgenetics Systems Ltd and particularly Schedule-F thereof placed in Paper Book filed by the assessee relating to production expenses, we find that during the relevant previous year the assessee has incurred Rs.22,03,823 towards medical transcription charges. Though, it is not 23% of the expenses incurred by the assessee as observed by the DRP, the payments were for outsourcing of the activity and hence is involved in a different functional model as compared to the assessee. In view of the same, we do not find any reason to interfere with the direction of the DRP. Thus, assessee's ground of appeal No.5 is rejected".

24. We find that Microgenetics Systems Ltd has not changed its activities in the A.Y 2013-14. Therefore, respectfully following the decision of the Coordinate Bench in similar set of facts, this company is directed to be excluded from the final list of comparables. Thus, the assessee's grounds for exclusion of Microgenetics Systems Ltd are allowed.

25. As regards inclusion of Caliber Point Business Solutions Ltd is concerned, the learned Counsel for the assessee submitted that though it satisfies all the filters applied by the TPO and is functionally comparable to the assessee, the TPO & DRP have excluded the same on the ground that it applied different financial year. He placed reliance upon following decisions for inclusion of the said company:

- (i) *Cameron Manufacturing India (P) Ltd v. Dy. CIT* [2018] 95 taxmann.com 24 (Chennai - Trib.)
- (ii) *Microsoft India (R&D) (P) Ltd. v. Dy. CIT* [2018] 97 taxmann.com 360 (Delhi - Trib.)
- (iii) *Maersk Global Service Centers (India) (P) Ltd. v. ITO* [IT Appeal No. 1082 (Mum.) of 2015, dated 29-7-2016]

26. The learned DR, on the other hand, supported the orders of the authorities below and submitted that this company has been excluded because its turnover was less than Rs.1.00 crore. The learned Counsel for the assessee did not rebut this argument of the learned DR. Therefore, even though it satisfies the functionality test, because it does not qualify the turnover filter of less than Rs.1.00 crore, we confirm the order of the TPO.

27. As regards Infosys Technologies Ltd, the learned Counsel for the assessee submitted that it satisfies all the filters applied by the TPO and is functionally comparable, but the TPO summarily rejected it on the ground that sufficient financial information is not available. The learned Counsel for the assessee also drew our attention to the DRPs findings that it fails the filter of income from ITeS not being less than 75% of the total operating revenue filter. He submitted that this findings of the DRP is factually incorrect. He also drew our attention to the annual report of the Infosys Technologies Ltd wherein at para 5 of page 498 of the Paper Book, it is clearly mentioned that it has only one segment and the entire revenue is from export of services.

28. The learned DR, however, submitted that though it is admitted that Infosys Technologies Ltd is also into ITeS services and is only into one segment, it has also shown non-operating income of Rs.1.64 crores in the Annual Report and therefore, it does not give the correct picture/correct figure of the operating revenue of company and therefore, has been rightly excluded.

29. After hearing both the parties, we find that Infosys Technologies Ltd is into ITeS and its entire revenue is from BPO services only. Therefore, factual findings of the DRP that it falls income of less than 75% of the total operating revenue filter is not correct. Therefore, we remand this issue of comparability of this company to the TPO for reconsideration of the issue by considering only the operating revenue.

30. As regards inclusion of Ace BPO Services Ltd is concerned, it is the case of the assessee that this company satisfies all the filters applied by the TPO and therefore, is functionally comparable to the assessee company. He pointed out that the TPO and the DRP have rejected this company on the ground that no information as to the RPT filter has been reported in its Annual Report and therefore, complete information is not available. The learned Counsel for the assessee has drawn our attention to page 507 and 508 of the paperbook wherein details of the RPT transactions are given.

31. The learned DR was also heard who relied upon the orders of the authorities below.

32. Having regard to the fact that the details with regard to the RPT transaction of the company have been given, we are of the opinion that the findings of the DRP & TPO are factually incorrect. Therefore, we remand the comparability of this company also to the AO/TPO for reconsideration. Needless to mention that the assessee should be given a fair opportunity of hearing.

A.Y 2014-15

33. During the financial year relevant to A.Y 2014-15, the assessee has entered into the following international transactions:

<i>AE</i>	<i>Nature of transaction</i>	<i>Amount (In Rs.)</i>
Software Distribution and related services	Software distribution and related services	26,59,18,189
Software development services	Software development services	41,90,07,650
Related IT Services	Related IT Services	74,40,98,080
Shared services	Shared services	26,57,72,035

34. The taxpayer has carried out the economic analysis and has summarized the international transactions as under:

<i>Nature of transaction</i>	<i>Amount (Rs.)</i>	<i>MAM</i>	<i>PLI</i>	<i>Margin of taxpayer</i>	<i>Margin of companies</i>
Software Distribution and related services	26,59,18,189	RPM	GPM	51.79%	4.77%
Software development services	41,90,07,650	TNMM	OP/OC	14.68%	11.02%
Related IT Services	74,40,98,080	TNMM	OP/OC	15.29%	
Shared services	26,57,72,035	TNMM	OP/OC	10.74%	6.04%

35. The TPO also observed that the assessee has not reported the trade receivables of Rs.75,05,40,379/- as an international transaction in its form 3CEB.

36. The TPO accepted the RPM method adopted by the assessee as the most appropriate method to benchmark the transactions under software distribution segment and therefore, no adjustment was proposed. However, he rejected the assessee's TP study with regard to software development segment and ITES segment. As regards the software development segment, the TPO observed the following defects in its choice of filters:

<i>Sl.No</i>	<i>Filters used y the taxpayer</i>	<i>Remarks of the TPO</i>

1	Use of multiple year data	This is not an appropriate filter
2	Companies for which sufficient financial or descriptive information is not available to undertake analysis are rejected	This is an appropriate filter
3	Companies that have been declared sick or have persistent negative net worth are rejected	This is an appropriate filter
4	Companies having financials for at least 2 out of 3 years	This is not an appropriate filter
5	Companies that have substantial (excess of 25%) transactions with related parties are rejected/	This is an appropriate filter
6	Companies that have exceptional years of operations	This is not an appropriate filter
7	Selection of companies engaged in distribution of software products	This is an appropriate filter

37. The TPO therefore, adopted the following filters:

Stage-1 Adoption of appropriate filters

- a. Use of current year data
- b. Companies having different financial year ending (i.e. not March 31, 2014) or data of the company which does not fall within 12 month period i.e. 01-04-2013 to 31-03-2014 were rejected.
- c. Companies whose income was less than Rs.1 crore were excluded
- d. Companies whose software development service income is less than 75% of its total operating receives were excluded.
- e. Companies who have more than 25% related party transactions were excluded.
- f. Companies who have export service income less than 75% of the sales were excluded.
- g. Companies with employee cost less than 25% of turnover were excluded.

38. Applying the above filters, the TPO rejected 9 companies out of 11 companies selected by the assessee as comparables for the following reasons:

<i>Sl. No</i>	<i>Name of the company (M/s.)</i>	<i>Margin (%)</i>	<i>Remarks</i>
1	Akshay Software	6.09%	Akshay Software Technologies Ltd (the parent) is engaged in providing professional services, procurement, installation,

	Technologies Ltd		implementation, support and maintenance of ERP products and services, in India and overseas. As reported in Note 27 of the annual report, the company has incurred Foreign Branch Expenditure of Rs.19.32 cr against total expenditure of Rs.22.73 cr during the year (85%). Hence operating model of the company is different from the taxpayer. Functionally different. Hence rejected
2	CG-VAK Software & Exports Ltd	2.49%	The company is engaged in the development of computer software providing services in IT and ITES (page 38 of AR) and no segmental information available
3	Cigniti Technologies Ltd	19.83%	Accepted as comparable
4	Goldstone Technologies	9.97%	Fails export sales/sales >75% filter. Hence rejected
5	R.S. Software (India) Ltd	19.59%	Accepted as comparable
6	Sankhya Infotech Ltd (Seg.)	4.73%	Fails forex filter
7	Ajel Ltd	10.16%	Fails forex filter
8	DCM Ltd (Seg.)	0.13%	Fails forex filter
9	Prism Informatics Ltd	7.28%	Fails forex filter
10	Spry Resources India P Ltd	27.33%	Information not available
Arithmetic mean	11.02%		

39. Thereafter, the TPO conducted fresh analysis and selected 13 companies as comparables including the two companies selected by the assessee and accepted by the TPO. The assessee objected to the companies selected by the TPO. However, the TPO rejected the assessee's objections and selected the following 12 companies as final comparables:

<i>Sl.</i>	<i>Company name</i>	<i>OR</i>	<i>OC</i>	<i>Operating</i>	<i>OP/OC</i>
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No.				profit	%
1	SQS India BFSL Ltd	2006078494	1640933805	365144689	22.25
2	Mindtree Ltd	30434000000	2837111000	5415000000	21.64
3	RS Software (India) Ltd	3518820000	2837111000	681709000	24.03
4	e-Infochips Ltd	2056112437	1135989199	920123238	81.00
5	Larsen & Toubro Infotech Ltd	45480371882	36665102339	8815269543	24.04
6	Cigniti Technologies Ltd	556298162	435838603	120459559	27.64
7	Infosys Ltd	446500000000	327410000000	1190400000000	36.36
8	Persistent Systems Ltd	11851170000	8710090000	3141080000	36.06
9	Infobeans Tech Ltd	330156390	232374867	97781523	42.09
10	Thirdware Solutions Ltd	2067574000	1373708000	693866000	50.51
11	Tech Mahindra (Seg.)	170139000000	1373935000000	327455000000	23.83
12	Tata Elxsi Ltd (Seg.)	6827022000	5582594000	1244428000	22.29
	Average				34.31

40. Thus, the average mean margin of the final set of comparables was arrived at 34.31% as against the assessee's margin of 14.68%. Thereafter, the TPO also considered the additional comparables proposed by the assessee, but rejected all of them and also rejected the assessee's request for working capital adjustment. He proposed the adjustment of Rs.19,44,89,544/- in respect of software development services of the assessee's international transactions.

41. Further, with regard to ITES segment, the TPO rejected the assessee's TP study and adopting the following filters, he conducted fresh search for comparables:

- (i) Companies whose data is not available for the financial year 2013-14 were excluded.
- (ii) Companies whose revenue from IT Enabled service is less than Rs.1.cr. are excluded.
- (iii) Companies whose revenue from IT enabled service is less than 75% of the total operating revenues are excluded.
- (iv) Companies who have more than 25% related party transactions (sales as well as expenditure combined) of the sales were excluded.
- (v) Companies which have export sales less than 25% of the sales were excluded.
- (vi) Companies who have diminishing revenues/persistent losses for the last three years upto and including financial year 2013-14 were excluded.

- (vii) Companies having different financial year ending (*i.e.* no March 31, 2013) or data of the company does not fall within 12 month period *i.e.* 01-04-2013 to 31.03-2014 were rejected.
- (viii) Companies that are functionally different from the taxpayer were excluded.
- (ix) Companies that are having peculiar economic circumstances were excluded.
- (x) Companies that are having negative networth were excluded.

42. Thus, he rejected the assessee's comparables for the following reasons:

<i>Sl.No</i>	<i>Name of the company (M/s.)</i>	<i>Margin (%)</i>	<i>Remarks</i>
1	ACE BPO Services P Ltd	2.87%	Complete set of financials are not available in public domain
2	Caliber Point Business Solutions Ltd (Seg.)	4.74%	Different financial year compared to that of taxpayer. Hence rejected
3	Tata Business Support Services	10.25%	Fails forex earnings filter
4	Informed Technologies India Ltd	5.96%	The company has high non-current investments. Hence, rejected
5	Ultramarine & Pigments Ltd	11.74%	This company is functionally different and is not engaged in ITES
6	Jindal Intellicom P Ltd	2.34%	The company is into software development, data analytics in a big way than operating as call centre and no segmental information is available. Hence rejected.
7	R. Systems International Ltd (Seg.)	9.61%	Different financial year compared to that of taxpayer. Hence rejected.

43. Thereafter, he adopted 8 companies as comparable to the assessee. The assessee submitted its objections to the said comparables. The TPO rejected the assessee's objections and arrived at the following 7 companies as final set of comparables to the assessee:

<i>Sl.No</i>	<i>Company name</i>	<i>OR</i>	<i>OC</i>	<i>Operating profit</i>	<i>OP/OC %</i>
1	Microgenetics Systems Ltd	22596701.58	19140553.44	3456148.14	18.06
2	Infosys BPO Ltd	23470000000	18120000000	53500000000	29.53

3	Microland Ltd	3447100000	2870900000	5762000000	20.07
4	Eclerx Services Ltd	7152910000	4189020000	2963890000	70.75
5	B N R Udyog Ltd	142590 00	11421000	2838000	24.85
6	Crossdomain Solutions P Ltd	746275406	616399666	129875740	21.07
7	MPS Ltd	1882921000	1275935000	606986000	47.57
	Average				33.13

44. Thus, he arrived at the average margin of the comparables at 33.13% as against the assessee's margin of 10.74% and rejecting the Working Capital Adjustment and risk adjustment, he proposed an adjustment of Rs.5,37,30,633/-.

45. Further, the TPO also proposed ALP adjustment of Rs.1,81,13,140/- towards interest on trade receivables after allowing credit period of 30 days and by applying the applicable SBI interest rates as short term deposits. In accordance with the directions of the DRP, the AO passed the draft assessment order, against which the assessee preferred its objections to the DRP, which confirmed the draft assessment order and accordingly final assessment order was passed against which the assessee is in appeal before us by raising the following grounds of appeal.

46. As far as ALP of ITeS segment is concerned, we find that the assessee is seeking exclusion of the following companies:

- (i) Infosys BPO Services Ltd
- (ii) e Clerex Services Ltd
- (iii) Cross Domain Solutions Ltd
- (iv) Microgenetics Systems Ltd
- (v) Microland Ltd
- (vi) NPS Ltd.

47. The assessee is seeking inclusion of the following companies:

- (i) Caliber Point Business Solutions Ltd
- (ii) Ace BPO Services Ltd
- (iii) Allsec Technologies Ltd
- (iv) Jindal Intellicom Ltd
- (v) Informed Technologies Ltd.

48. At the time of hearing, the learned Counsel for the assessee submitted that the assessee is not pressing for inclusion of Allsec Technologies Ltd and Jindal Intellicom Ltd. Therefore, grounds

relating to these two companies are rejected as not pressed.

49. As regards the other companies which are sought to be included, we find that the comparability of these companies have been considered by us in the earlier A.Y 2013-14 in the above paragraphs and for the detailed reasons given therein, these companies are directed to be considered by the TPO afresh. Therefore, the grounds relating to these companies are treated as allowed for statistical purposes.

50. As regards the exclusion of companies from the final list of comparables companies is concerned, we find that the comparability of Microgenetics Systems Ltd had arisen in the A.Y 2013-14 also and for the detailed reasons given above, this company is directed to be excluded.

51. As regards the comparability of Infosys BPO Services Ltd is concerned, the learned Counsel for the assessee submitted that it is a large company operating at high economies of scale with turnover of INR 2023 crores compared to the assessee having turnover of Rs.26.25 crores only. Further, it is submitted that it has a brand value and it employs substantial portion of its fixed assets in intangible assets. He submitted that the comparability of the said company had come up for consideration in the assessee's own case for the earlier A.Y 2011-12 and also in 2013-14. In A.Y 2011-12, the Tribunal had directed its exclusion while in 2013-14, the DRP itself had directed its exclusion and the Revenue has not filed any appeal as against the same. He placed reliance upon the decision of the Hon'ble Delhi High Court in the case of *Aginity India Ltd. (supra)* wherein the said company has been directed to be excluded.

52. The learned DR, on the other hand, relied upon the orders of the authorities below. He also submitted that the assessee is also into diversified activities and until and unless it proves that the existence of brand or high turnover has an impact on its operating margin, Infosys BPO Services Ltd, should not be excluded.

53. Having regard to the rival contentions and the material on record, we find that this company is into diversified activities and it also has brand value and huge turnover of Rs.2023 crores. The Hon'ble Delhi High Court in the case of *CIT v. Aginity India Technologies (P) Ltd.* [2013] 36 taxmann.com 289/219 Taxman 26 has held that such a company cannot be compared with any other company in the market. Therefore, respectfully following the same, we direct the AO/TPO to exclude this company from the final list of comparables.

54. As regards eClerex Services Ltd is concerned, the learned Counsel for the assessee submitted that it is rendering KPO services, such as, data management and analytics solutions and has earned super normal profit during the year under assessment i.e. 70.26%. He also relied upon the assessee's own case for the A.Y 2011-12 wherein the Tribunal had held it to be a KPO and not comparable to the assessee.

55. The learned DR however, submitted that the assessee is also doing high end BPO services which are akin to KPO services and therefore, the said company should be retained as a comparable.

56. Having regard to the rival contentions and the material on record, we find that this company has been held to be a KPO service provider whereas the assessee has been categorised as a BPO

by the TPO & DRP. Having held so, the said company cannot be treated as a comparable to the assessee. Further, in the assessee's own case for the earlier A.Y (to which both of us are signatories), we have held that this company cannot be a comparable to the assessee. Since there is no change in the activities of the said company, we do not find any reason to take any other view and therefore, we direct the AO/TPO to exclude this company from the final list of comparables.

57. As regards Cross Domain Solutions Ltd is concerned, the case of the assessee is that it is functionally dissimilar as it renders KPO services. The learned DR, however, supported the orders of the TPO & DRP.

58. As regards the services rendered by this company, we find that at Page 172 of the Paper Book which is the Website printout, it is shown as a "knowledge center". The learned DR had submitted that if the contents of a Website given by a company is taken into consideration, then even the assessee would be falling in the same category i.e. Knowledge Process Outsourcing. The learned DR, except for relying upon his argument that the assessee is also into high-end BPO services, has not been able to point out that Cross Domain Solutions Ltd is not a BPO. Therefore, we direct exclusion of this company also from the final list of comparables.

59. As regards Microgenetics Systems Ltd is concerned, we have already considered the comparability of this company with the assessee in the earlier A.Y 2013-14 and we have directed its exclusion on the ground of its outsourcing activities. For the same reasons given, this company is directed to be excluded.

60. As regards Microland Ltd is concerned, the case of the assessee is that it is into business of rendering hybrid IT Infrastructure and it also undertakes R&D activities and has achieved abnormal growth of 149% during the current A.Y. Without prejudice to the above, the assessee also submitted that the correct margin of this company should be considered.

61. The learned DR, however, submitted that this company was taken up by the assessee itself as comparable before the TPO and further that in the earlier A.Y 2013-14 this company has been accepted as a comparable. Therefore, he submitted that it should be retained as a comparable.

62. Having regard to the rival contentions and the material on record, we find that this company is into R&D activities and has achieved abnormal growth during the current A.Y. In the case of S&P Capital IQ (India) Ltd, we have considered the comparability of this company to ITeS Company and has directed its exclusion. Respectfully following the same, we direct its exclusion for this A.Y as well.

63. As regards comparability of MPS Ltd is concerned, it is a case of the assessee that this company is a publishing company and is totally into a different business model and therefore, cannot be considered as a comparable to the assessee company.

64. The learned DR supported the orders of the authorities below.

65. Having regard to the rival contentions and the material on record, we find that the comparability of this company to an ITeS company had arisen for the very same A.Y in the case of Hyundai Motor India Engineering (P) Ltd. In the said case, we have held this company to be comparable to the assessee therein. Relevant paragraphs are reproduced hereunder for ready

reference:

"34. As regards MPS Ltd, though we find that it has huge Plant & Machinery and has incurred huge expenses towards Repairs and Maintenance, we also find that it has described itself as an ITeS service provider, and that its outsourcing cost is Rs.10.78 crores only. Therefore, it is functionally similar to the assessee and therefore, cannot be excluded.

66. Respectfully following the same, we hold this company to be comparable to the assessee.

67. In the result, grounds relating to the exclusion of comparables are treated as allowed.

68. As regards SDS segment is concerned, the assessee is seeking exclusion of the following comparables from the final list of comparables:

- (i) Infosys Ltd
- (ii) Larsen & Toubro Infotech Ltd
- (iii) Infobeans Technologies Ltd
- (iv) RS Software (India) Ltd
- (v) Tata Elxsi Ltd
- (vi) E-Infochips Ltd
- (vii) Thirdware Solutions Ltd
- (viii) Persistent Systems Ltd
- (ix) Mindtree Ltd

69. The assessee is also seeking inclusion of the following companies as comparable to the assessee:

- (i) iSummation Technologies P Ltd
- (ii) Maveric Systems Ltd
- (iii) Akshay Software Technologies Ltd
- (iv) Evoke Technologies P Ltd
- (v) E-Zest Solutions Ltd
- (vi) Goldstone Technologies Ltd
- (vii) Sankhya Infotech Ltd

70. However, at the time of hearing, the learned Counsel for the assessee submitted that the assessee is not pressing for inclusion of iSummation Technologies Pvt Ltd, Akshay Software Technologies Ltd, E-Zest Solutions Ltd, Goldstone Technologies Ltd and Sankhya Infotech Ltd.

Therefore, the grounds of appeal for inclusion of these companies in the final list of comparables are rejected. Now only two companies remain for inclusion. They are Maveric Systems Ltd and Evoke Technologies Ltd. As far as Maveric Systems Ltd is concerned, the TPO and DRP have rejected this company on the ground that it incurred significant R&D expenses (6% of its turnover). The learned Counsel for the assessee argued that this company satisfies all the filters adopted by the TPO and hence is functionally comparable to the assessee.

71. The learned DR, on the other hand, relied on the orders of the authorities below as well as the Annual Report of Maveric Systems Ltd, wherein, it is reported that 6% of the turnover has been spent towards R&D.

72. Having regard to the rival contentions and the material on record, we are satisfied that though this company is functionally similar, it fails the R&D filter of less than 3% of the turnover and hence cannot be taken as a comparable to the assessee.

73. As regards Evoke Technologies is concerned, the contentions of the assessee are that this company is functionally similar to the assessee, whereas the TPO & DRP have held that the financials of this company include the revenue of one branch outside India which are unaudited and hence are not reliable. The learned Counsel for the assessee however, drew our attention to page 963 of the Paper Book, which is part of the Annual Report of Evoke Technologies Ltd wherein the revenue of Indian Branch of assessee is separately shown. Taking the same into consideration, we direct the AO/TPO to reconsider the comparability of this company by taking the revenue from Indian Branch only. Thus, the ground for Maveric Systems Ltd is rejected and for Evoke Technologies Ltd is allowed for statistical purposes.

74. As regards exclusion of Infosys Ltd, Larsen & Toubro Infotech Ltd and Mindtree Ltd, the common ground of the assessee is that they have huge turnover of Rs.42,531 crores, Rs.4,648.38 crores and Rs.3,031.6 crores respectively as against the assessee's turnover of Rs.116.00 crores only. The learned Counsel for the assessee also argued that they are functionally dissimilar and own intangibles etc.

75. The learned DR argued that unless the assessee demonstrates as to how the huge turnover impacts the margin of the said companies, they should not be excluded from the final list of comparables.

76. Having regard to the rival contentions and the material on record, we find that the Hon'ble Delhi High Court in the case of *Agnity India Technologies (P). Ltd. (supra)* has held Infosys Ltd as not comparable as it is a giant company in the area of development of software. The same ratio applied to both L&T and Mindtree as well. Thus, we direct exclusion of all these three companies on account of huge turnover.

77. As regards Tata Elxsi Ltd, Thirdware Solutions Ltd and Persistent Systems Ltd are concerned, we find that their comparability to the assessee has been considered in the assessee's own case for the A.Y 2007-08 and it is submitted that there is no change of activities of either the assessee or the comparables during the relevant A.Y before us i.e. A.Y 2014-15.

78. The learned DR has not rebutted this contention of the assessee. Therefore, respectfully

following the decision of the Coordinate Bench at Mumbai in the case of *Infor Global Solutions India (P.) Ltd. v. Dy.CIT* [2019] 102 taxmann.com 58 (Mum. - Trib.) we direct the exclusion of these three companies from the final list of comparables. For the sake of ready reference, the relevant paras are reproduced hereunder:

"29. We have considered rival submissions and perused materials on record. The primary and fundamental reason on the basis of which assessee seeks rejection of the aforesaid comparable is, it is also engaged in the development of product and segmental details are not available. Notably, in case of *LSI Technologies India (P.) Ltd. (supra)*, the Co-ordinate Bench while examining the comparability of the aforesaid company to a software development service provider, has rejected this company as a comparable considering the fact that it is engaged in product development and product design services. The same view has been reiterated by the Tribunal in the other decisions cited by the learned Authorised Representative. Since, many of these decisions pertain to the impugned assessment year, respectfully following the aforesaid decisions of the Tribunal, we direct the Assessing Officer to exclude this company from the list of comparables.

35. We have considered rival submissions and perused materials on record. On a perusal of the documents placed in the paper book it appears that this company is engaged in various activities including development of niche product and development services. Thus, the company is functionally different from the assessee. Considering the aforesaid aspect, the Co-ordinate Bench in case of *Telcordia Technologies India (P.) Ltd. (supra)*, which is for the very same assessment year, has excluded this company as a comparable. Similar view has also been expressed in the other decisions cited by the learned Authorised Representative. Thus, keeping in view the decisions of the Tribunal referred to above, we hold that this company cannot be a comparable to the assessee.

38. We have considered rival submissions and perused materials on record. Though, it may be a fact that the assessee may not have objected to selection of this company before the Transfer Pricing Officer, however, the assessee raised objections against selection of this company before the DRP as well as before us. The grievance of the assessee is, the company being involved in development of products and since no segmental details are available in the annual report, it cannot be treated as comparable. The Co-ordinate Bench in *Tech Mahindra Ltd. (supra)* having found this company to be involved in development of software product and trading in software licenses has held that it cannot be a comparable to a software development service provider. Similar view has been expressed in the other decisions cited before us by the learned Authorised Representative. Since, many of these decisions relate to very same assessment year, following the ratio laid down in these decisions, we hold that this company cannot be a comparable to the assessee".

79. As regards Infobeans Technologies Ltd, the argument of the assessee is that it is functionally diversified, but does not give the segmental information for products and services. The findings of the TPO and DRP are that the entire revenue of this company is only from software services and that the assessee has not established that this company is functionally dissimilar.

80. As regards Infobeans Technologies Ltd is concerned, the argument of the assessee is that it

renders high end services like automation engineering which cannot be considered as comparable to the assessee rendering software development services only to its AEs. It is also submitted that it does not have segmental information for products and services and that it has earned abnormal profits during the year under consideration i.e. 42.08%. Without prejudice to these arguments, it is also submitted that the TPO has erred in not computing the correct margin of Infobeans Technologies Ltd i.e. 41.85%.

81. The learned DR, however, supported the orders of the authorities below and submitted that there is no error in the computation of margin of the company and that it passes all filters and hence cannot be rejected merely due to high margin. He also drew our attention to the DRPs finding that the entire revenue derived by this company was from software services only and that there are no products as contended by the assessee.

82. The learned Counsel for the assessee however, placed reliance upon the decision of the Pune Bench of the Tribunal in the case of *PubMatic India (P) Ltd v. Asstt. CIT* [2018] 91 taxmann.com 356 wherein this company was directed to be excluded.

83. Having regard to the rival contentions and the material on record, we find that the assessee is relying upon the Annual Report of the said company wherein under the head "revenue from operations", it is mentioned as "sale of software" and under the head "earning in foreign exchange", there is a mention of goods/export of services, to impress upon us that this company is also into products. However, as rightly pointed out by the learned DR, there is no sale of any products and this company is involved in export of software services only. Mere mention of products in the annual report without any products in effect cannot make this company a product company. Therefore, this company is comparable to the company and need not be excluded. The assessee's ground with regard to this company is rejected.

84. As regards R S Software (India) Ltd, the assessee is seeking its exclusion on the ground that its onsite expenditure is 57.80% of the total sales and that it is engaged in the licensing activity i.e. it has employed intangible such as software services and thus, it is also product based company. The TPO and DRP have rejected the assessee's contention on the ground that this company is functionally comparable to the assessee and that onsite and offsite expenditure are not determining factors for comparability of this company with the assessee. As regards the licensing activity, it was held that the said licenses are used for development of software solutions and licenses and it does not amount to rendering of any other activities. Though the learned Counsel for the assessee has relied upon two case law, we are not inclined to accept that this company is a product development company as claimed by the assessee. Though the said company allegedly possesses brand value and is alleged to be focusing on innovation and R&D activities, we agree with the findings of the TPO that this R&D activities are only to make service delivery more efficient and there is no specific debit towards R&D in the P&L A/c. Therefore, the assessee's objections to this company are rejected.

85. As regards E-Infochips Ltd is concerned, the contention of the assessee is that it is functionally different as it is engaged to software development of software products and ITeS and that there is no segmental data. The TPO & DRP have rejected the objections of the assessee. The learned Counsel for the assessee has referred to the disclosure of segments explanatory wherein the

company has disclosed itself as primarily engaged in software development and ITeS services and products, as reportable as per AS17. Further, at page 897, there is an inventory in the balance sheet and at page 899 there is classification of inventories. However, we do not find any revenue from sale of products. Therefore, it cannot be accepted that this company is into product development. The other objection of the assessee is that it has abnormal profit of 79.76% during the relevant A.Y and therefore, it has witnessed super normal profit of 38% on a year on year basis. This objection of the assessee is acceptable because, in the other cases of Infosys Ltd, L&T Infotech Ltd and Mindtree Ltd, we have held that not only high turnover but even where the comparables have earned super normal profit, they also have to be excluded. Respectfully following the same, we direct the TPO to exclude this company from the final list of comparables. Thus, the assessee's grounds of appeal on exclusion of the companies are partly allowed.

86. The common grounds of appeal for the A.Ys 2013-14 and 2014-15 are against the ALP adjustment of interest on trade receivables. Though the learned Counsel for the assessee has relied upon the assessee's own case for the A.Y 2011-12, we find that after the amendment to section 92B of the Act, the interest on trade receivables has become an international transaction and therefore, the ALP adjustment is required to be made. The assessee's contention that it has not paid any interest on outstanding payables and therefore, the interest should not be charged on the trade receivables is not sustainable for these A.Ys. The argument that it is a debt free company and therefore, no interest is also to be charged is not acceptable.

87. The learned Counsel for the assessee has placed reliance upon various case law. However, we find that they are relating to the A.Ys prior to the amendment of section 92B of the Act. However, the interest on trade receivables should be calculated at the interest rate applicable for the relevant period as is charged by SBI on the short term deposits. The AO has allowed the credit period of 60 to 90 days as per the agreement for A.Y 2013-14 but for the A.Y 2014-15 he has allowed only 30 days as credit period. This action of the AO cannot be upheld. If there is a clause in the agreement about credit period, the interest should be calculated only on the period exceeding such credit period in the agreement, but if there is no credit period specified in the agreement, then the credit period of 90 days or the industry average credit period should be considered with the assessee's own credit period and any deviation alone should be considered for ALP adjustment. The AO/TPO is directed accordingly. The assessee's grounds of appeal for both the A.Ys 2013-14 and 2014-15 are treated as allowed for statistical purposes accordingly.

88. The other grounds of appeals are against non allowance of risk adjustment and working capital adjustment to the assessee. We find that the TPO/AO himself has allowed working capital adjustment for the A.Y 2013-14 but has disallowed the same for the A.Y 2014-15. We find that all the necessary adjustments to bring the assessee and the comparables at par have to be made by the AO/TPO. The working capital adjustment is also to be made accordingly. AO/TPO are therefore, directed to grant working capital adjustment to the assessee.

89. The learned Counsel for the assessee did not press the grounds with regard to treating the provisions for bad and doubtful debt as part of the operating income. Therefore, the said ground is rejected as not pressed.

90. In the result, the assessee's appeals for the A.Ys 2013-14 and 2014-15 are partly allowed.

*Partly in favour of assessee.