INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I": NEW DELHI
BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER
AND
SHRI A. T. VARKEY, JUDICIAL MEMBER

ITA No.1222/Del/2015
(Assessment Year: 2010-11)

Xchanging Technology Services India Private Limited, Rectange-1, D-4, District Centre, Saket, New Delhi-110 019	Vs	DCIT, Circle-27(2), New Delhi
(Appellant)		**(Respondent)**

Appellant by	:	S/Shri Nageshwar Rao, Ankit D. Aggrawal & Sandeep S. Karhail, Advocates
Respondent by	:	Sh Vivek Wadekar, CIT DR & Ms. Yasyasaini Kakkar, Senior DR

Date of Hearing	12.06.2015
Date of pronouncement	08.09.2015

ORDER

PER A. T. VARKEY, JUDICIAL MEMBER

This appeal, at the instance of the assessee, is directed against the final assessment order dated 26.12.2014, under section 143(1) read with section 144C of the Income-tax Act, 1961 (hereinafter 'the Act') in pursuance to the directions of Disputes Resolution Panel (DRP) dated 05.11.2014 for the Assessment Year 2010-11.

2. In this appeal, the following grounds have been raised :-

> *"1. Without prejudice to the above, the order of the learned AO and directions of the Hon'ble DRP are based on incorrect interpretation of law and therefore are bad in law.*
>
> *2. On the facts and in the circumstances of the case and in law and based on the directions of DRP, the learned AO erred in assessing the total income of the Appellant at Rs. 16,65,79,490 as against returned income of Rs. 12,61,73,755 computed by the Appellant.*
>
> *3. The learned AO / Transfer Pricing Officer ("TPO") erred in making an addition of Rs. 2,14,03,620 and Rs. 1,90,02,115 to the total income of the Appellant on account of adjustment in the arm's length price with respect to the IT enabled services and software development services transaction respectively entered into by the Appellant with its associated enterprise.*
>
> *4. The learned TPO and the learned AO have erred, in law and in facts, by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Rules, and conducting a fresh economic analysis for the determination of the ALP in connection with the impugned international transaction and holding that the Appellant's international transaction is not at arm's length.*

5. The learned TPO and the learned AO have erred, in law and in facts, by determining the arm's length margin/ price using only FY 2009-10 data which was not entirely available to the Appellant at the time of complying with the transfer pricing documentation requirements.

6. The learned TPO and the learned AO have erred, in law and in facts, by accepting / rejecting companies based on unreasonable comparability criteria.

7. The learned TPO and the learned AO have erred, in law and facts, by not making suitable adjustments to account for differences in the working capital position of the Appellant vis-a-vis the comparables.

8. The learned TPO and the learned AO have erred, in law and facts, by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparables.

9. The learned AO erred, in law and in facts, in initiating penalty proceedings u/s 271(l)(c) of the Act."

3. In this matter Ground Nos.1 & 2 are general in nature and do not require adjudication.

4. Ground No.5 is regarding multiple year data which is no longer res-Integra and now the settled position of law is that only the contemporaneous year data is to be taken into consideration for the purposes of bench marking purposes as per Rule 10B (4) of the Income-tax Rules, 1962 (hereinafter 'the Rules'). This position is now well

settled by the decision of Hon'ble jurisdictional High Court in the case of ChrysCapital Investment Advisors (I) Pvt. Ltd. Vs. DCIT dated 27.04.2015. More so, it is admitted by the parties that the current appeal will not fall within the exception provided under the Proviso to Rule 10B (4).

5. Ground Nos.3, 4 & 6 challenge the various facets of adjustments made/upheld in the instant case by the TPO/DRP.

6. Brief facts of the case are that Xchanging Technology Services India Private Limited ('Xchanging India') is a subsidiary of Xchanging Resourcing Services Limited, UK and engaged in the business of rendering contract software development as well as Information Technology Enabled Services (ITES) to Xchanging Group companies. The assessee is registered as a 100% export oriented unit under the Software Technology Parks of India (STPI) scheme. The assessee is currently assessed to tax by DCIT, Circle 18 (1), New Delhi. The assessee's case was referred to the Additional Director of Income-tax (Transfer Pricing)-II (4) (TPO) for determination of the Arm's Length

Price (ALP) for the international transactions entered into by the assessee during the financial year 2009-10. The assessment proceedings were initiated by the ld. TPO for determining the arm's length nature of the international transactions of the assessee. The ld. TPO requested for certain information/documents which were duly furnished by the assessee. Subsequently, the ld. TPO passed an order dated 16.01.2014 making certain adjustment to the ALP of the international transactions of the assessee.

6.1 The assessee operates in two segments i.e. software development segment and ITES segment. During the FY 2009-10, the assessee had following international transactions with Associated Enterprises (AEs) which were picked-up for scrutiny by the TPO :-

S. No.	Particulars	Method Adopted	PLI	Total Value (Rs.)
1.	Provision of software development services	TNMM (Segmental)	OP/TC	33,51,548/-
2.	Provision of IT enabled services			40,02,92,121/-

6.2 In respect of the Assessee's impugned international transaction of provision of IT services and ITES, the transfer pricing analysis was undertaken in the following manner :-

6.3 The Assessee had undertaken analysis selecting the Transactional Net Margin Method ("TNMM") as the most appropriate method. In order to identify companies which are comparable to the Assessee, search was conducted on Prowess (a database compiled and managed by The Centre for Monitoring Indian Economy) and Capitaline (a database compiled and managed by Capital Market Publishers) for obtaining publicly available financial information of companies in India engaged in similar business activity as the Assessee. For the companies identified as com parables, weighted average of operating profit earned on operating costs were computed using the financial data pertaining to FY 2007 -08, FY 2008-09 and FY 2009-10, which was available to the Assessee at the time of complying with the transfer pricing documentation requirements. In connection with the international transaction of provision of IT services, the arithmetic mean of the unadjusted net margins of the comparable companies was13.18 percent on operating cost. As the Assessee's net margin of 15.48 percent was higher than the arm's length margin of comparable companies, the price charged by the Assessee in respect of the IT services transaction was considered to be at arm's length in accordance with the Indian transfer pricing regulations. In connection with the international transaction of provision of ITES, the arithmetic mean of the unadjusted net margins of the comparable companies was 14.27 percent on operating cost. As the Assessee's net margin of 24.96 percent was higher than the arm's length margin of comparable companies, the price charged by the Assessee in respect of the ITES transaction was considered to be at arm's length in accordance with the Indian transfer pricing regulations.

6.4 Per contra to the above approach of the assessee, in the TP order dated 16.01.2014, the ld. TPO has computed the average net margin of the comparable companies for the IT services and ITES transactions as 28.06% and 31.81% on operating cost respectively as against 13.18%

and 14.27% originally computed by the assessee in its TP documentation report.

6.5 Based upon the discussion in the TP order, TPO selected following comparables for bench-marking software development and ITES segment as under:-

FIRST ITES SEGMENT

S.No.	Company Name	Adjusted OP/OC (%)
1.	Accentia Technologies Ltd.	40.20
2.	Cosmic Global Ltd.	20.29
3.	E4e Healthcare	31.55
4.	Fortune Infotech Ltd.	21.38
5.	I-gate Global Ltd.	24.09
6.	Infosys B P O Ltd.	30.17
7.	Jindal Intellicom Ltd.	14.95
8.	Omega Healthcare	13.11
9.	T C S E-Serve International Ltd.	55.43
10.	T C S E-Serve Ltd.	65.27
Average		31.81

7. Accordingly, the arm's length price of the international transaction related to proviso of ITES is calculated as below :-

Operating Cost (A)	32,03,40,125
Arm's Length Margin (%)	31.81%
Margin (B)	10,19,00,194

Arm's Length Price (A+B) = C	42,22,40,319
Price charged by the assessee (D)	40,02,92,121
Proposed Adjustment	**2,19,48,198**

8. The comparables that shall be used in the Software Development Services are as under :-

S.No.	Company Name	OP/OC (%)	Adjusted OP/OC (%)
1.	Akshay Software Technologies Ltd.	-1.04	-0.42
2.	Cat Technologies Ltd.	11.48	4.49
3.	E-Infochips Bangalore Ltd.	72.69	65.99
4.	Evoke Technologies Pvt. Ltd.	19.02	19.67
5.	E-Zest Solutions Ltd.	18.66	16.36
6.	Infinite Data SYstems Pvt. Ltd.	84.65	84.65
7.	Infosys Ltd.	45.08	46.41
8.	KulizaTech	18.85	17.66
9.	Larsen & Toubro Infotech Ltd.	20.48	20.97
10.	LGS Global Ltd.	12.79	8.36
11.	Maveric Systems Ltd.	16.17	15.68
12.	Mindtree Ltd.	16.62	15.46
13.	Persistent Systems Ltd.	30.50	28.80
14.	Sasken Communication Technology Ltd.	17.54	18.87
15.	Tata Elxsi Ltd.	19.82	17.98
16.	Thinksoft Global Services Ltd.	17.35	14.55
17.	Thirdware Solution Ltd	41.63	38.98
18.	Wipro Technology Services Ltd.	70.60	70.60
Average		**29.96**	**28.06**

9. Accordingly, the arm's length price of the international transaction related to provision of IT Services was calculated as below :-

Total cost	Rs.29,02,24,261
Arm's Length price at a margin of 28.05%	Rs.37,16,60,657
Price received	Rs.33,51,58,550
Proposed adjustment u/s 92CA	Rs.3,65,02,107

10. The TPO's bench-marking approach has been principally upheld by the DRP barring exclusion of few comparables in the original set adopted by the TPO, post- DRP order following TP adjustment has been recalculated by TPO by order dated 18.12.2014 as under :-

S.No.	Nature of International Transaction	Adjustment u/s 92CA (Rs.)
1.	Provision of IT Enabled services	2,14,03,620
2.	Provision of Software Development services	1,90,02,115
Total		**4,04,05,735**

11. Before us, as regards software development segment, Ld. AR objected only to the factum of M/s. Infosys & M/s. Wipro being included in the final set of comparables adopted by the TPO. He also objected to exclusion of M/s. Calibra & M/s. R Systems. Let us take up each of these comparables individual as under :-

M/S. INFOSYS

12. Vis-à-vis this comparable, before the lower authorities it was submitted by the assessee as under :-

> *"In this regard and without prejudice to the TP documentation maintained by the Assessee, it wishes to submit that, Infosys should be rejected on account of the difference in levels of functions performed and levels of risk assumed vis-a-vis the assessee, huge revenues derived from software services in comparison to the Assessee and the fact that it is a market leader owning significant amount of intangible assets and incurring huge expenditure on research and development. The functional difference of the assessee with Infosys is evident from the annual report of the company and the relevant extracts are reproduced for your goodself's ease of reference:*
>
> > *Infosys owns patents and has also filed numerous patent applications which are pending approvals. These have been filed by Software Engineering and Technology Labs (SETLabs) which is the center for applied technology research in software engineering and enterprise technology created by Infosys. The relevant extract contained in Page 15 of the annual report is produced below :*
>
> *During the, year SET Labs' IP Cell filed 31 patent applications in the United States Patent and Trademark Office (USPTO) and Indian*

PATENT Office. We now have an aggregate of 224 patent applications pending in India and the U.S. and the USPTO has granted nine patents.

Page 27 of the annual report suggests that Infosys earns revenue from software products.

1.b Software products

The revenue from software products grew 9.1% compared to 42% in the previous year. Of the software products revenue, 82.1% came from exports compared to 75.7% in the previous year.

The company has incurred huge research and development expenditure and the same is evident from the page 58 of the annual report:

24 .2.6. Research and development expenditure

Particulars	Year ended March 31,	
	2010	2009
Capital	3	31
Revenue	435	237

The fixed assets schedule of the company suggests that it owns intangibles in the form of intellectual property rights. The same is contained on page 50 of the annual report:

3. FIXED ASSETS

Particulars	Original Cost			Depreciation and amortization				Net Book value		
	As at April 1, 2009	Addi-tions/ Adjust-ments	Deletions/ Retire-ment/ Adjust-ments	As at March 31, 2010	As at April 1, 2009	For the year	Deletions/ Adjust-ments	As at March 31, 2010	As at March 31, 2010	As at March 31, 2009
Goodwill	689	227	-	916	-	-	-	-	916	689
Land :										
Freehold	172	6	-	178	-	-	-	-	178	172
Leasehold	113	36	-	149	-	-	-	-	149	113
Buildings	2913	387	-	3300	535	210	-	745	2555	2378
Plant and machinery	1183	213	133	1263	521	259	132	648	615	662
Computer equipment	1233	204	186	1251	960	272	186	1046	205	273
Furniture and fixture	720	99	109	710	359	151	107	403	307	361
Leasehold improvements	54	2	1	55	28	12	3	37	18	26
Vehicles	4	1	-	5	1	1	-	2	3	3
Intellectual property rights	12	-	-	12	12	-	-	12	-	-
	7093	1175	429	7839	2416	905	428	2893	4946	4677
Previous Year	5439	1999	345	7093	1986	761	331	2416	4677	

Also, the annual report indicates that "Infosys" brand is one of the most important intangible assets owned by the company. Page 15 of the annual report supports the statements:

Branding : We believe that the 'Infosys' brand is one of the most important intangible assets that we own. During this fiscal year, we have been appreciated by the following bodies as a recognition of how we operate and conduct business :

- *Ranked as the most admired company in India according to the Wall Street Journal survey*

- *Ranked among the 50 most respected companies in the world by Reputation Institute's Global Reputation Pulse 2009*
- *Ranked among the top 25 companies in Business Week's InfoTech 100*
- *Ranked among the top 25 companies in the world for developing leaders by Fortune / Hewitt*
- *Ranked as the best company to work for in India by Business Today's ninth survey of 'Best Companies to Work For'.*

From the above it is evident that Infosys is functionally not comparable. Infosys operates as a full-fledged risk bearing entrepreneur, undertaking functions and bearing risks which are far greater than the assessee which is risk mitigated captive service provider.

The functional difference of the assessee with Infosys is captured in the table below for your goodself's case of reference:

Particulars	*Infosys Technologies Limited*	*XTSI*
Risk profile	*Operates as a full-fledged risk bearing entrepreneur*	*Operates at minimal risks as the 100% services are provided to AEs*
Nature of services	*Earns revenue from software development services and products*	*Pure contract software development service provider*
Revenue	*Rs.21,140 Crore*	*Rs.73.54*
Ownership of intangibles/ products	*Owns 9 patents and has 224 patents applications pending in India and US. Also owns*	*Does not own any intangibles in any form*

	software products (which includes its flagship banking product suite "Finacle")	
Onsite Vs Offshore	*More than 50% of the income is from onsite services*	*Most of the revenue composition is offshore*
Expenditure on advertising sales promotion	*Has incurred selling and marketing expenditure to the tune of 974 crore. Has 65 marketing offices in total.*	*Does not undertake any expenditure on advertising/ sales promotion as entire services revenue is from AEs.*
Expenditure on research and development	*Rs.440 crore*	*Does not undertake product development, merely provides software development services to AEs.*

He has referred to following decision:

a) *Aginity Technologies ITA No. 3856/D/2010*

b) CIT v. Aginity Technologies 262 CTR 291 (Del)

c) Atrenta (India) Pvt. Ltd.

d) Toluna India Pvt. Ltd. vs. ACIT (formerly Greenfield Online (P) Ltd. 166 TTJ 128 (Del)

e) Cordys R&D (India) Pvt. Ltd. ITA N. 1092/Hyd/2010 dated 3.1.2014 wherein the ITAT excluded Infosys Technologies as it is not functionally different but is a giant company in the field of software development services having considerable brand value and assumed all risks related to business. Further, appeal of Revenue against this order has been dismissed by the Hon'ble Andhra Pradesh High Court vide an Order dated 18.06.2014 in ITA No. 371/2014."

13. On the other hand the ld. DR relied on findings of DRP.

14. We have considered rival submissions, perused the material on the record. In the case of Agnity Technologies, ITA No.3856/Del/2010, a coordinate Bench has held as under:-

> *"It is argued that the case of the assessee is not comparable with Infosys Technologies Ltd., the reason being that the latter is giant in the area of development of software and it assumes all risks, leading to higher profit. On the other hand, the assessee is a captive unit of its parent company in the USA and it assumes only limited Currency risk. Having considered these points, we are of the view that the case of aforesaid Infosys and the assessee are not comparable at all as seen from the financial data etc. of the two companies mentioned earlier in this order. Therefore, we are of the view that this case is required to be excluded"*

15. The aforesaid order was upheld by the Hon'ble Delhi High Court after taking note of the chart as given below:

Basic Particular	Infosys Technologies Ltd.	Assessee
Risk Profile	Operate as full-fledged risk taking entrepreneurs	Operate at minimal risks as the 100 percent services are provided to AEs
Nature of services	Diversified-consulting, application design, development, re-engineering and maintenance system integration, package evaluation and implementation and business process	Contract software development services

	management, etc. (refer page 117 of the Paper Book)	
Turnover	20,264 crores	209.83 crores
Ownership branded/proprietary products	Develops/owns proprietary products like Finacle, Infosys Actice Desk, Infosys iProwe, Infosys mConnect. Also the company derives substantial portion of its proprietary products (including its flagship banking product suite 'Finacle')	
Onsite vs. Offishore	As much as half of the software development services rendered by Infosys are onsite (i.e. services performed at the customer's location overseas). And offshore (50.20 per cent) Refer p. 117 of the Paper Book) than half of its service, income from onsite services	The appellant provides only offshore services (i.e. remotely from India)
Expenditure on advertising/sales promotion and brand building	Rs. 80 crores	Rs. Nil (as the 1-percent services are provided to AEs)
Expenditure on Research and Development	Rs. 236 crores	Rs. Nil
Other		100 per cent offshore (from India)

16. On the basis of the above chart, the Hon'ble High Court affirmed the conclusion that a captive unit of a comparable company which assumed only a limited risk cannot be compared with a giant company in the area of development of software who assumes all types of risks leading to higher profits. The facts of the appellant are akin and the comparative chart of assessee vis –a-vis M/s Infosys clearly depicts the same and therefore, do not warrant any different conclusion. The appellant is also captive service provider to its AE and as such, M/s. Infosys Ltd. is not a valid comparable with the appellant and we direct it's exclusion from the comparables.

<u>M/S. WIPRO TECHNOLOGY SERVICES LIMTIED</u>

17. As regards this comparable, the assessee had the following objections taken before the lower authorities :-

> *" In this regard, the Assessee wishes to submit that Wipro should be rejected on the ground that there is insufficient financial information in the annual report to conclude on its comparability.*

As per the profit and loss account of FY 2009-10, 100% income is from 'Revenue' and no further break up is provided, as depicted in the extract of Page 5 below:

	Schedule	2010	2009
Income			
Revenue		3,993,928,222	3,643,586,896
Other Income	13	111,817,731	208,593,516
		4,105,745,953	3,852,180,412

No revenue or segmental break up is available between software services and infrastructure support services and no information about the nature of business is available in the annual report. Further, the 'Balance Sheet Abstract and the Company's General Business Profile' section on Page 14 does not provide any information regarding the type of products/ services the company deals in as shown below:

V. Generic names of the three Products/Services of the Company(as per monetary terms)

(i) Item Code No (ITC Cod.)
Product Description

(ii) Item Code No (ITC Code)
Product Description

(iii) Item Code No (ITC Code)
Product Description

Your goodself has also discussed the point on Citigroup Technology Services (now known as Wipro Technology Services Limited) being taken over for a cash consideration of $127 million by Wipro

Limited as a result of which Wipro Technology Services Limited would now be providing information technology services and solutions to Citi entities worldwide. The same has also been provided in the annual report on Page 1 as shown below:

Operations

Wipro Limited (Wipro) has reached an agreement with Citigroup Inc. for acquiring all of Citigroup interest in CTS w.e.f. 21 January 2009. On 21 January 2009, Wipro signed a master service agreement (MSA) with Citigroup Inc. for the delivery of technology infrastructure services and application development and maintenance services for the period of six years. The MSA provides for the delivery of at least $500 million in service revenues over the period of the contract. After the acquisition by Wipro, the name of CTS was changed to Wipro Technology Services Limited ('WTS' or 'the Company') on 16 March 2009.

In this regard, the Assessee wishes to submit that accepting Wipro Technology as a comparable would contradict your own views on the filters to be adopted, since your goodself has accepted in the show cause notice itself that companies that are affected by factors like mergers and acquisitions or such other factors which affect the operations of the company substantially should not be used as comparables as they will not prove to be good benchmarks. The relevant extract as on Page 5 has been provided below for your easy reference:

8.	*Select companies based on an analysis of the nature of operations undertaken by each of the companies.*	*The rationale for excluding companies that are affected by factors like persistent losses, declining sales, extraordinary income or expense, mergers and acquisitions or other such factors which affect the operations of the company substantially should not be used as comparables as they will not prove to be good benchmarks, is discussed subsequently. An analysis of companies in the accept/reject matrix has also been done by this office with respect to the nature of function/operations.*

And the extract regarding the same point has also been stated on Page 7 of the show cause notice issued by your goodself :

viii ***Companies that are affected by some peculiar economic circumstances:***

Companies that are affected by factors like persistent losses, declining sales, extraordinary Income or expense, mergers and acquisitions or other such factors which affect the operations of the company substantially should not be used as comparables as they will not prove to be good benchmarks.

The relevant extracts from the annual report are enclosed as item 5 in the supporting booklet attached to the submission.

Company should be rejected as it is earning super-profits

The Assessee submits that Wipro Technology has posted an operating margin of more than 70% and under the circumstances when the software industry was facing recession. Hence Wipro

Technology has earned super profits and such companies should be rejected while arriving at the ALP. The Assessee wishes to bring to your goodself's notice the following judicial decisions in support of this contention:

- *eGain Communication Private Limited (ITA No. 1885/PN/2007)*
- *Philips Software Centre Private Limited Vs. ACIT (119 TTJ 721)*
- *DCIT Vs. M/s Quark Systems Private Limited (ITA No.100/CHD/ 2009)*
- *ITO, Mumbai vs. M/s Saunay Jewels Private Limited [ITA No. 5758/Mum/2007]*
- *M/s SAP Labs India Private Limited vs. ACIT, Bangalore [ITA No. 398/Bang/2008]*
- *M/s Adobe Systems India Private Limited Vs. ACIT, Noida (ITA No. 5043/De1/2010)*
- *M/s NIT Ltd Vs. ACIT (2011-TII-16-ITAT-DEL-TP)*
- *Sapient Corporation Private Limited (ITA No. 5263/De1/2010)*

Considering the above facts, it would be incorrect to accept Wipro Technology as a comparable on the grounds that there is lack of sufficient financial information in public domain as well as the fact that the company is affected by peculiar economic circumstances. "

18. Ld. DR relied upon the order of the DRP.

19. We have carefully considered the submissions of the rival parties and have gone through the records. The arguments of the ld. AR that only on account of super normal profit this comparable should be excluded is not tenable in the light of the Hon'ble jurisdictional High Court decision in the case of ChrysCapital.(supra) Before the DRP, the assessee raised the other objections as were raised before us i.e. this company is rendering different services, there is insufficient segmental information, it fails RPT filter and there is an extra ordinary event during the year. The DRP observation on the aforesaid objection is as under:-

> "*DRP has considered the objection of the assessee. DRP is of the opinion that the event is not extraordinary in the sense that this is going to affect the profit margin of the comparable company. So called extraordinary event is that this company acquired 100% holding of City Technology Services Ltd. This is typically a share holder activity using the resources of reserves or surplus. Therefore, this cannot be taken as affecting the functions performed by the assessee resulting into affecting its profitability. Therefore, DRP rejects the arguments of the assessee and justifies the action of the TPO.*"

We concur with the finding of DRP while repelling the objection regarding extra-ordinary event taking place for this comparable, but for a different reason, i.e. the relevant extra ordinary event took place in the preceding Financial Year i.e. FY 2008-09. However, we concur with the submissions advanced by Ld AR that the Director's Report and Notes to Account for this comparable are not available in public domain. Ld. DR has not been able to controvert this fact. Since sufficient information for this comparable is not available, we direct exclusion of this company as a comparable.

CALIBER POINT BUSINESS SOLUTIONS LTD. & R SYSTEMS INTERNATIONAL LTD.

20. We find that the lower authorities have merely rejected these comparables on the ground that these companies have different financial year ending 31st December 2009. We find that this issue is no longer *res integra.* In the case of M/s. Mercer Consulting (India) Pvt. Ltd. in ITA No.966/Del/2014, ITAT by order dated 06.06.2014, dealt a similar issue as under :-

> "11.7. We find that R. Systems International Ltd. has been excluded by the TPO solely for the reason that its financial year is different without considering that the data for the financial year adopted by the assessee can be easily compiled from the audited statements of such company. We, therefore, set aside the impugned order on this issue and remit the matter to the TPO/AO for including the case of R. Systems International Ltd. in the list of comparables by working out the figures relevant to the financial year ending 31.3.09 from the audited accounts of R. Systems International Ltd."

Respectfully following the same, we direct the TPO to re-examine these comparables by reworking their margins as on 31st March 2010 as aforestated in the order.

ITES SEGMENT

ACCENTIA TECHNOLOGIES LTD.

21. As regards this comparable, it has been brought to our notice during the year under consideration. There has been an extra ordinary event in the details of which are given at page 78 of Annual Report as under :-

> ***"(B) NOTES TO ACCOUNTS***

1. ***Amalgamation of Asscent Infoserve Private Limited with the company.***

Pursuant to the scheme of amalgamation of the erstwhile Asscent lnfoserve Private Limited (subsidiary of the company) with the company as approved by the shareholder in the court convened meeting held ON the 25th day of April, 2009 and subsequently sanctioned by the honorable high court of Judicature at Mumbai vide order dated 21st August 2009 and Honorable high court of Karnataka at Bangalore vide order dated 6th February 201 0, the assets and liabilities of the erstwhile company was transferred and vested in the company with effect from 1st Apr, 2008 and the scheme has been given effect to in the accounts of the year.

Asscent lnfoserve Private Limited was engaged in the business of Medical Transcription and Coding and has the softwares which are being used by the Accentia Technologies Ltd in serving the end to end results.

As a consequence of amalgamation:

- *The assets, liabilities and accumulated reserves of the erstwhile Asscent Infoserve Private Limited (as at 1st Apr 2008) have been incorporated in the books of accounts of the company as per "pooling of interest" method as prescribed by AS14 notified under Companies auditing standards 2006. The resultant Goodwill as specified in the scheme of amalgamation has been* *incorporated in the books of the accounts of the company and same will be amortized over the period of 10 years .*

- *The financial results of the company for the year ended 31st March, 2010 are inclusive of the figures of the amalgamating company.*

- *11,88,313 equity shares (8.84% of the Company's increased share capital) have been issued to the shareholders of the Asscent Infoserve Private Limited in the ratio of one equity share in Accentia Technologies Ltd for every 1.6 equity shares held in Asscent Infoserve Private Limited.*

Pending completion of the relevant formalities of transfer of certain assets and liabilities acquired pursuant to the scheme, such assets and liabilities remain in the name of the erstwhile amalgamating companies.

In view of the above amalgamation being effective the figures for the year ended 31st Mar, 2010 are inclusive of the figures relating to the amalgamating company and thus are not comparable with those of the previous year.

2. ***Conversion of Share warrants to Equity shares:***

The Company has issued 400000 Equity shares during the year at the rate of Rs.135.99 per share including the share premium of Rs.125.99 per share as part of conversion of share warrants. These *shares would be entitled for the full dividend for the year, in accordance with the terms of the issue. The earnings per share has been calculated considering the pro-rata increase in the equity capital. Amount received Rs 2,710,000 during the year 2007-08 towards 5hare warrants have been forfeited and adjusted in the capital reserve account.*

3. The company has bought another 13% stake in Trans Service Inc making a total investment of 23%. During the year, Company invested USD One and Half Million for 260 equity shares of Trans Service INC, USA."

22. In the light of the aforesaid amalgamation, which is having an impact on the figures disclosed as of 31st March 2010, we find force in the contention of the ld. AR, this company should be excluded from the comparable and we order accordingly.

<u>TCS E – SERVE INTERNATIONAL LTD. & TCS E-SERVE LTD.</u>

23. We find that for both these comparables, the following objections were raised before us :-

"TCS E-Serve International Ltd. ('TCS International')
Why TCS International should be rejected?

- *Exceptional year of Operation - First full-year of operation since its acquisition by TCS [Pg. 8 of Annual Report],a company with a huge brand name; three-fold increase in turnover and huge profits earned during the year vis-a-vis preceding year when the Company was making losses [Pg. 21 of Annual Report].*

- *Earning Super-normal profits due to exceptional year of operation - reliance placed on Maersk Global Service Centres (India) Private Limited vs. ACIT (ITA No. 7466/Mum/2012) (SB) (AY 2008-09) - para 99*

- *Insufficient Segmental Information: Broad range of ITES services comprising of 'Financial Information Processing', 'Customer Contact' and 'Functional Testing Services'; IT services comprise of software testing, verification and validation of software at the time of implementation and data centre management activities. [Pg. 32 of Annual Report] No break-up of segmental details in Annual Report [Pg. 40 of Annual Report] - reliance placed on Carlyle India Advisors Pvt. Ltd. vs. DCIT (ITA No.7367/Mum/2012) (AY 2008-09) - Para 12, pg. 9 and Telechordia Technologies India P. Ltd. vs. ACIT (ITA No.7821/Mum/2011) (AY 2007-08) - Pg.17.*

3. TCS E-Serve Limited ('TCS Limited')"

Why TCS Limited should be rejected?

- *Exceptional year of Operation - First full-year of operation since its acquisition by TCS [Pg. 13 of Annual Report], a company with a huge brand name; more than two- fold increase in PBT vis-a-vis preceding year [Pg. 92 of Annual Report].*

- *Earning Super-normal profits due to exceptional year of operation - reliance placed on Maersk Global Service Centres (India) Private Limited vs. ACIT (ITA No.7466/Mum/2012) (SB) (AY 2008-09) - para 99*

- *Insufficient Segmental Information: Broad range of ITES services comprising of processing, collections, customer care and payments in relation to the services offered by Citigroup to its corporate and retail clients; and IT services comprise of software testing, verification and validation of software at the time of implementation and data centre management activities. [Pg. 106 of Annual Report] No break-up of segmental details available in Annual Report [Pg.118 of Annual Report] - reliance placed on Carlyle India Advisors (supra) and Telechordia Technologies (supra)".*

24. The TPO's observation is as under :-

"As regards the functional profile, both these cases of TCS E Serve and TCS E serve International Ltd., are functionally similar to the case of the assessee as both are providing services in the IT enabled services segments. The relevant extracts from the respective annual reports are given as under :-

TCS E-Serve International Ltd.	As per P-39/AR:-"The Company is engaged in Business Process Outsourcing (transaction processing) services to the Banking &Financial Services Industry (BFSI) and Travel, Tourism and Hospitality (TTH) , which are considered as industry segment. Geographic segments of the Company are Americas, Europe and others."
TCS E-Serve Ltd.	As per P-33/AR:-"Company provides a broad range of services that cater to the Ltd. process management requirements for delivery .of wide range of financial products and enterprise support functions, which include- Financial Information Processing (data processing): Customer Contact (voice based) Functional Testing Services" As per P-74/AR:-"The Company is engaged in Business Process Outsourcing (transaction processing) services to the Banking &Financial Services Industry (BFSI) and Travel, Tourism and Hospitality (TTH), which are considered as industry segment. Geographic segments of the Company are India, Americas, Europe and others." As per P-105/AR:-"TCS e-Serve Limited is engaged in the business of providing Information Technology - Enabled Services (ITES) / Business Process Outsourcing (BPO) services, primarily to Citigroup entities globally. The Company's operations broadly comprise of transaction processing and technical services. Transaction processing includes the broad spectrum of activities involving the processing, collections, customer care and payments in relation to the services offered by Citigroup to its corporate and retail clients. "

In view of the above discussion, both TCS E serve and TCS E serve International Ltd. shall be used as comparables for benchmarking the international transaction relating to provision of ITES using TNMM."

25. We have carefully considered the contention raised by both the parties and perused the material on record. We find that the argument of super normal profit and exceptional year of operations, is not a valid ground in the light of decision in ChrysCapital (supra). As regards the objection in respect to insufficient segmental information is concerned, we find no merit in the same. On a perusal of the annual report of TCS E-serve Ltd., it is observed that the company is engaged in BPO activities under a single segment. Note 8 at page 117 of Annual accounts state as under :-

> ***"8. Segment information***
>
> *Consequent to reorganisation of its global organisation with the objective of making industry Practice its focal point for performance evaluation and internal1inancial reporting and decision making, the Company has reviewed and revised the manner in which it views the business risks and returns and monitors its operations. Accordingly as required under Accounting Standard 17 "Segment Reporting" (AS-17), the format of reporting primary segment information has been changed to Business Segments and secondary segment information has been changed to geography.*

The Company is engaged in Business Process Outsourcing (transaction processing) services to the Banking & Financial Services Industry (BFSI), which is considered as a single segment.

Geographic segments of the Company are India, Americas, Europe and Others."

26. Moreover, the principal source of revenue of this comparable is only one i.e. transaction processing and other services of Rs.1.35 crores credited in the P&L account (page 91 of the Annual Reports). The ld. AR has not been able to substantiate that the other services element is having a different nature or class vis-à-vis transaction processing receipt of this comparable. Contrary to this, the audited annual accounts, certify that both, these receipts are rank *parri passu* and have the same nature and function. Similar is the position with M/s. TCS E-serve International Ltd. so therefore we uphold the inclusion of these two comparables.

27. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on this 8th day of September, 2015.

sd/-	**sd/-**
(R.S. SYAL) **ACCOUNTANT MEMBER**	**(A. T. VARKEY)** **JUDICIAL MEMBER**

Dated: the 8th day of September, 2015
TS

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi