INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "I-1": NEW DELHI

BEFORE

SHRI R.K. PANDA, ACCOUNTANT MEMBER

AND

MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 5736/Del/2011

Asstt. Year : 2007-08

Hewitt Associates (India) Private Limited, Hewitt Tower, Sector-42, DLF City, Gurgaon, Haryana PAN AABCH1559D	Vs.	ACIT Circle-12(1) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Atul Jain & Shri Arpan Khanna, CA
Department by :	Shri Surender Pal, CIT-DR
Date of Hearing	08.03.2022
Date of pronouncement	31.05.2022

O R D E R

PER ASTHA CHANDRA, JM

The appeal of the assessee is preferred against the order of Ld. Asstt. Commissioner of Income Tax, Circle-12(1), New Delhi **("AO")** dated 31.10.2011 pertaining to assessment year **("AY")** 2007-08.

2. The assessee, Hewitt Associates (India) Private Limited (now known as Aon Consulting Private Limited, successor entity of Aon Services India Private Limited) is primarily engaged in providing support services to its

associated enterprises **("AEs")**. The services are in the nature of - (1) software development support services; and (2) Business Process Outsourcing (BPO) services (also referred to as ITeS).

2.1 During AY 2007-08 the assessee had entered into international transactions with its AEs in respect of provision of software development services and BPO/ITeS with its AEs. The assessee's case was thus referred to the Ld. Transfer Pricing Officer **("TPO")**. Vide order dated 29.10.2010 the Ld. TPO proposed an adjustment of Rs. 22,11,60,596/- in respect of BPO services/ ITeS segment and Rs. 19,08,53,709/- in respect of software development support services segment totalling to Rs. 41,20,14,305/-.

Software support services segment

3. During the A.Y 2007-08, the assessee entered into international transactions related to software support services of Rs. 2,16,32,36,787/-. The assessee used transactional net margin method **("TNMM")** and Operating Profit/Total Cost or Net Cost Plus **("OP/TC or "NCP")** as the profit level indicator **("PLI")**. The assessee arrived at a set of 55 comparables with an average weighted average margin of 14.64% using multiple year data. The assessee's own margin worked out at 14.94%. This is how the assessee demonstrated that its international transaction with its AE under this segment is in compliance with the transfer pricing regulations.

3.1 During the transfer pricing proceeding, the Ld. TPO after analysing the data bases, annual reports, application of filters and considering objections raised by the assessee, modified the search to arrive at the following final set of 26 comparable companies with arithmetical mean of 25% and arm's length price **("ALP")** pertaining to provision of software development support services segment (page 142 to 144 and page 170 of the Paper Book):

S. No.	Comparable	NCP (%) Unadjusted Single year
1.	Geometric Software Solutions Co. Ltd.	10.71
2.	Helios & Matheson Information Technology Ltd.	36.63
3.	Infosys Technologies Limited	40.3
4.	KALS Information Systems Ltd.	30.55
5.	Lanco Global Systems Ltd. (LGS Global Limited)	15.75
6.	R.S. Software (India) Ltd.	13.47
7.	R Systems International Ltd. (Seg.)	15.07
8.	Sasken Communications Tech. Ltd. (Seg.)	22.16
9.	Tata Elxsi Ltd. (Seg)	26.51
10.	Wipro Ltd. (Seg)	33.48
11.	Accel Transmatic Ltd. (Seg)	20.9
12.	Avani Cimcon Technologies Ltd.	50.29
13.	Celestial Labs Ltd.	58.35
14.	E-Zest Solutions Ltd.	35.63
15.	Ishir Infotech LTd.	30.12
16.	Lucid Software Ltd.	19.37
17.	Mediasoft Solutions Ltd.	3.66
18.	Megasoft Ltd.	60.23
19.	Thirdware Solutions Ltd.	25.12
20.	Datamatics Ltd.	1.38
21.	Flextronics Software Systems Ltd. (Seg.)	25.31
22.	Igate Global Solutions Limited	7.49
23.	Mindtree Ltd.	16.90
24.	Persistent Systems Ltd.	24.18
25.	Quintegra Solutions Ltd.	12.56
26.	SIP Technologies & Exporters Ltd.	13.90
Arithmetic mean		**25%**

Arm's Length Price (ALP)

Particulars	Amount (Rs.)
Operating cost	1,88,32,72,397
Arm's length margin	25.00%
ALP	2,35,40,90,496
Price charged by the Assessee	2,16,32,36,787
Difference / adjustment	**19,08,53,709**

BPO/ ITeS Segment

4. The assessee provides ITeS services to its AEs which includes – (i) accounts reconciliation, pension plans, health benefits etc.; and (ii) HR services including payroll, maintenance of employee databases etc. For rendering these services, the assessee is remunerated on a cost plus 12% basis.

4.1 During AY 2007-08, the assessee had entered into international transactions related to ITeS of Rs. 1,39,19,31,635 and employed TNMM and OP/TC as the PLI. The assessee arrived at a set of 22 comparable companies in its transfer pricing document with an average weighted average margin 12.51%. The assessee's own margin worked out at 12.82% under this segment. This is how the assessee demonstrated that the international transaction with its AE under this segment is at ALP.

4.2 During transfer pricing proceedings, The Ld. TPO after the detailed search process, the accept/reject matrix of companies considered for analysis and application of filters, modified the search to arrive at the following final set of 25 comparable companies with arithmetical mean of 30.07% and ALP:

S.No.	**Comparable**	**NCP(%) unadjusted Single year**
1.	Datamatics Financial Services Ltd. (Seg.)	5.07%
2.	Eclerx Services Ltd	89.33%
3.	Informed Technologies India Ltd.	34.32%
4.	Infosys B P O Ltd.	28.78%
5.	Vishal Information Technologies Ltd.	51.19%
6.	Asit C Mehta Financial Services Ltd. (Nucleus Netsoft and GIS (India) Limited	24.21%
7.	Flextronics Software Systems Ltd. (Seg.)	8.62%
8.	HCL Comnct Systems & Services Ltd. (Seg.)	44.99%
9.	Mold-Tek Technologies Ltd.	113.49%
10.	R.Systems International Ltd. (Seg.)	20.18%
11.	Accentia Technologies Ltd.(Seg.)	30.61%
12.	IServices India Pvt. Ltd.	49.47%

13.	Genesys International Corporation Ltd.	13.35%
14.	Apex Knowledge Solutions Pvt. Ltd.	12.83%
15.	Appollo Healthstreet Ltd.	-13.55%
16.	Bodhtree Consulting Ltd. (Seg.)	29.58%
17.	Caliber Point Business Solutions Ltd.	21.26%
18.	I.C.R.A. Techno Analytics Ltd. (Seg.)	12.24%
19.	Allsee Technologies Ltd.	27.31%
20.	Cosmic Global Ltd.	12.40%
21.	Maple Esolutions Ltd	34.05%
22.	Spanco Telesystems & Solutions Ltd. /Spanco Ltd. (Seg.)	25.81%
23.	Transwork Information Services Ltd.(now known as Aditya Birla Minaces Worldwide Ltd.)	11.98%
24.	Triton Corp. Ltd.	34.93%
25.	Wipro Ltd. (Seg.)	29.30%
Arithmetic Mean		**30.07%**

Arm's Length Price (ALP)

Particulars	**Amount (Rs.)**
Operating cost	1,240,172,385
Arm's length margin	30.07&
ALP	1,613,092,221
Price charged by Appellant	1,391,931,625
Difference/ adjustment	**22,11,60,596**

5. The Ld. AO in his final assessment order dated 31.10.2011 enhanced the income of the assessee by making addition of Rs. 41,20,14,305/- proposed by the Ld. TPO.

6. The Hon'ble Dispute Resolution Panel **("DRP")** vide its order dated 20.9.2011 confirmed the transfer pricing adjustment of Rs. 41,20,14,305/- supporting the order of the Ld. TPO.

7. Aggrieved, the assessee filed an appeal before the Tribunal.

8. The assessee has taken the following grounds of appeal :-

"The addition amounting to Rs. 412,014,305 undertaken by the Learned Assistant Commissioner of Income-tax, Circle 12 (1), New Delhi ("the Ld. AO")

vide final assessment order dated October 31, 2011 (received by the Appellant on October 31, 2011) passed under section 143 (3) read with section 144C (13) of the Income Tax Act, 1961 ("the Act") is not in accordance with the law and therefore not sustainable.

Transfer Pricing ("TP") Adjustment – Rs. 412,014,305

That the Hon'ble Dispute Resolution Panel, New Delhi ("the DRP") has erred both in law and on facts by summarily rejecting the Appellant's objections to the draft order dated December 30, 2010 passed by the Ld. AO under section 143(3) read with section 144C(1) of the Act. The Hon'ble DRP while issuing directions under section 144C(5) of the Act did not consider the facts and merits of Appellant's objections to the proposed adjustments, and merely relied on the reasoning given by the Additional Commissioner of Income-tax, Transfer Pricing Officer - I (2) vide order under section 92CA(3) of the Act dated October 29, 2010 ("TP Order"). On the facts and in the circumstances of the case, the Ld. TPO and the Ld. AO have erred in proposing and the Hon'ble DRP has further erred in confirming the transfer pricing adjustment of Rs. 412,014,305 without due application of mind and without affording a reasonable opportunity of being heard in the matter to the Appellant on the following grounds:

1. ***Prima facie errors in the final assessment order issued by the Ld. AO***

   With respect to the software development and BPO services, the Appellant wishes to submit that there are prima facie errors in the final assessment order issued by the Ld. AO. In this connection, we have re-iterated below the relevant extracts from the rectification application filed before the Ld. AO on November 25, 2011:

   Quote

   In your order, your goods elf has not provided the benefit of working capital adjustment as directed by the Dispute

Resolution Panel ("DRP"). In this regard, we have reproduced below the relevant extract from the DRP's directions:

*"...**Now that data is furnished, the** AO/ TPO is therefore directed to verify the same and grant working capital adjustment **based on the OECD formula and by taking 10.25% as the PLR. The aforesaid rate is adopted as the State Bank of India which is the leading bank in India has charged this rate in the year under reference for working capital loans.**"*

***(Note:** Emphasis supplied)*

***In view of the above, and based upon the fact that the direction issued by the DRP is binding on the assessing officer under the purview of sub-section (10) of Section 144C of the Act**, we request your goodself to allow us the benefit of working capital adjustment.*

Based on the above submission, we request your goodself to rectify the above- mentioned defects by passing a suitable order under section 154 of the Act and accordingly issue the revised assessment order.

Unquote

2. *In addition to the above-mentioned prima facie errors, the DRP has grossly erred in confirming the addition of Rs. 412,014,305:*

2.1 *By summarily rejecting/disregarding the comparability analysis without giving any cogent basis and without demonstrating the inadequacy or infirmity in the economic analysis so conducted by the Appellant. In this regard, the Ld. TPO erred in demonstrating correctness of the presumption/hypothesis so framed to reject the comparability analysis of the Appellant and has accordingly misconstrued the provisions of Section 92C (3) (c) of the Act.*

2.2 *By making modification to the set of comparable companies identified by the Appellant by rejecting comparables on grounds of functional dissimilarity. In this regard, the Ld. TPO/ DRP have rejected comparables on erroneous basis without following a cogent economic basis.*

2.3 *By substituting the comparability analysis conducted by the Appellant for its software development services and BPO services function with a fresh comparability analysis based on his own conjectures and surmises. Specifically, the Ld. TPO erred by using an approach that had an inherent upward bias and employed erroneous filters, that were designed to select only high margin comparable companies. Accordingly, the fresh search conducted by the Ld. TPO is liable to be quashed.*

2.4 *By not appreciating the replies filed by the Appellant against the first show-cause notice (SCN1) dated July 22, 2010 and without appreciating the same, issued another show- cause notice (SCN2) dated August 24, 2010. In this regard, the Ld. TPO followed an unjustified approach by issuing two show-cause notices in a single assessment without providing appropriate responses against the replies filed by the Appellant in response to the first show-cause notice. Accordingly, the change in the approach followed by the Ld. TPO clearly demonstrates a biased state of mind.*

2.5 *By relying upon data of the comparables for financial year 2006-07 only for determination of the arm's length price, disregarding the multiple year data approach followed by the Appellant. Further, by relying upon updated data of the comparables which was not available to the Appellant at the time of maintenance of Transfer Pricing Documentation within the time-frame mentioned in Rule 10D(4) of the Income Tax Rules, 1962 ("the Rules").*

2.6 By misconstruing the risk profile of the Appellant and not allowing risk adjustments.

2.7 By using data called pursuant to issuance of notice under Section 133(6) of the Act which was not available to the Appellant at the time of maintenance of Transfer Pricing Documentation. Further, by not providing the complete information which was called pursuant to issuance of notice under Section 133(6) of the Act and by conducting the assessment based on unfair analysis.

2.8 By applying the wages-to-sales ratio based upon conjectures and surmises and further, applying an arbitrary filter of 25 percent without following a cogent economic basis and without establishing any statistical veracity of the presumption/ hypothesis framed. Further, by juxtaposed application of two or more methods to conclude a single benchmarking analysis as application of wages-to-sales screen tantamount to adoption of the cost-plus method.

2.9 By making modification to the set of comparable companies identified by the Appellant in relation to software development services by applying the screen of related party transactions, disregarding the fact that the Appellant considered consolidated financials of the comparables which eliminates the potential impact of any related party transactions.

2.10 By misconstruing Rule 10B (1) of the Rules and disregarding independent legal status accorded to an overseas branch of an Indian company in view of the provision of clause (iii) of Section 92F of the Act.

2.11 By using an incorrect computation of Net Cost Plus ("NCP") margin of selected comparable companies and accordingly erred in computing the amount of adjustment on account of transfer price.

2.12 By not allowing the benefit of (+/-) 5% as provided in the proviso to Section 92C (2) of the Act, while determining the arm's length price of the international transactions of the Appellant.

2.13 By not appreciating that there was no intention whatsoever on the part of the Appellant to shift profits outside India by under-reporting revenue since the Appellant was eligible to claim 100 percent of such profits as tax exemption under section 10A of the Act.

3. In the facts and circumstances of the case and in law, the Ld. AO has erred in not adjusting available unabsorbed depreciation against income from other source amounting to Rs. 9,727,864 as per the provision of section 32(2) read with Section 72 of the Act. Accordingly, the Ld. AO has erred on facts and in law in restricting set off of brought forward loss and unabsorbed depreciation under section 72 of the Act to the extent of profits and gains from business."

9. At the outset, the Ld. AR brought to our notice that the AE (i.e. Avon Corporation) of the assessee in the United States of America (USA) filed an application under Mutual Agreement Procedure **("MAP")** with the Competent Authority of the US under Article 27 of the US-India Double Tax Convention. The settlement in the said case has been arrived at between the Competent Authority of USA and the Competent Authority of India vide order dated 21.12.2017 with respect to the adjustment on account of transfer pricing issues relating to the US transactions which is tabulated below :-

S. No.	**Adjustments**	**Amount (in Rs.)**
1.	Transfer Pricing adjustment- US transactions	383,008,498
2.	Transfer Pricing adjustment – Non-US transactions (UK)	29,005,807
	Total amount of adjustment	**412,014,305**

9.1 The Ld. AR submitted that the assessee has consented to the MAP resolution which has been intimated to the Ld. AO vide its letter dated 27th December, 2017. In view of this, the assessee vide its letter dated 24th

January, 2018 has requested the Hon'ble Tribunal to allow the assessee to continue the captioned appeal on the grounds arising out of transfer pricing adjustment relating to non-US transactions amounting to Rs. 2,90,05,807/- out of the total transfer pricing adjustment of Rs. 41,20,14,305 and filed the revised grounds of appeal omitting the US related transactions. The MAP resolutions are summarised below :-

Particulars	**US transactions (92.96%)**
	ALP-MAP resolution
Software segment	16.01%
ITeS segment	14.99%

The following transfer pricing adjustments on Non-US related transactions is before the Hon'ble Tribunal.

Particulars	**Non-US transactions (7.04% of total transactions)**
Software segment	1,34,36,101
ITeS segment (BPO)	1,55,69,706
Total	**2,90,05,807**

10. In the nutshell, the grievance of the assessee relates to the benefit of working capital adjustment not allowed by the Ld. AO; addition of Rs. 2,90,05,807/- to the income of the assessee on account of adjustment in ALP of the international transaction pertaining to software support segment and BPO/ ITeS segment; inclusion and exclusion of certain comparable companies from the final list of comparables and not adjusting unabsorbed depreciation against income from other sources amounting to Rs. 9,727,864/-. All the revised grounds of appeal and sub-grounds relate thereto.

<u>Working capital adjustment</u>

11. With respect to working capital adjustment not allowed by the Ld. AO the Ld. AR submitted that the Hon'ble DRP vide its order dated 20.09.2011 directed the Ld. AO to grant working capital adjustment. However, the Ld.

AO failed to do so while passing his final assessment order. He further submitted that the Ld. TPO has granted working capital adjustment to the assessee in the subsequent A.Y 2008-09 (page 116 of the Paper Book- TPO's order for AY 2008-09). The Ld. DR relied on the order of the Ld. AO.

11.1 We have perused the order of the Hon'ble DRP. The relevant extract of the Hon'ble DRP's direction is reproduced below:-

"The issue of working capital adjustment has been examined by DRP. For the purposes of proper comparability differences in the prices charged by the assessee and the comparables arising on account of different levels of working capital are required to be eliminated. The OECD guidelines also support this view. In a competitive environment the price should include an element to reflect the different payment and receipt terms and compensate for the timing effect. Guidelines further say that making a working capital adjustment is an attempt to adjust for the differences in time value of money between the tested party and potential comparables with an assumption that the difference should be reflected in profits. Though guidelines say that as a matter of routine such adjustment should not be made but also state that the same should be resorted to if it improves the comparability. The provisions contained in Rule 10B(3) also mandate adjustments wherever there are material differences in the situations of comparables and the taxpayer. The different benches of the ITATs have upheld such adjustment [Vedaris Technology ITAT (Del); Sony India [114ITD448(Del)J, Mentor Graphics, E Gain communication 2008-TIOL-282-ITAT-PUNE, Global Vantedge 2010-TOP;-24-ITAT-DEL, TNT India P Ltd 201l-TII-39-ITAT-BANG-TP,etcj. ***Now that data is furnished, the AO/ TPO is therefore directed to verify the same and grant working capital adjustment based on the OECD formula and by taking 10.25% as the PLR.*** *The aforesaid rate is adopted as the State Bank of India which is the leading bank in India has charged this rate in the year under reference for working capital loans."* ***[Emphasis supplied]***

11.2 It is clear from the above that the finding of the Hon'ble DRP is based on cogent reasons and judicial precedents. The Ld. TPO has also provided working capital adjustment in subsequent AY 2008-09. We, therefore, direct the Ld. AO/ TPO to provide working capital adjustment as per the directions of the Hon'ble DRP.

<u>Inclusion / exclusion of comparables</u>

12. The assessee has objected to the inclusion/ exclusion of certain comparable companies by the Ld. DRP/AO/TPO in software support service segment as well as ITeS segment.

A. SOFTWARE SUPPORT SERVICES SEGMENT

<u>Comparable rejected by the Ld. TPO</u>

VMF Softech Limited

13. During the transfer pricing assessment, the Ld. TPO sought information from VMF Softech Limited under section 133(6) of the Income Tax Act, 1961 **("Act")**. The Ld. TPO by referring to the response received from VMF Softech Limited excluded this company from the list of final set of comparable companies on the ground that this company is predominantly engaged in outsourcing the work. Hence, this company is functionally dissimilar to that of the assessee. The Hon'ble DRP has not made any specific observation with respect to this comparable.

13.1 The Ld. AR submitted that as per information received under section 133(6) from VMF Softech Limited, no work was being outsourced by this company. In fact this company received work from foreign clients. Information obtained from VMF Softech Limited was therefore misinterpreted by the Ld. TPO. Our attention was drawn to the information received from VMF Softech Limited (page 371 and 372 of Paper Book), the relevant extract of which is reproduced below :-

"The major portion of the companies activity for the FY 2006-07 and FY 07-08 is outsourcing receipts from clients. The clients are charged on cost margin basis. The company being a software development centre assignments are undertaken on a case to case. No work has been outsourced by the company but we have received works from foreign clients as their outsourcing."

The Ld. AR further submitted that this company meets all other filters applied by the Ld. TPO as tabulated below :-

Filters applied by TPO	**VMF Softech Limited**
Companies whose software development service revenue is less than 75% of the total operating revenue were excluded	VMF earns 100% of its revenue from software development service
Companies whose software development services revenue is less than INR 1 cr.	VMF has revenue of INR 1.03 crores
Companies who have less than 25% of the revenues as export sales were excluded.	VMF has an export sales to sales ratio of 93.08%
Companies whose employee cost to revenue is less than 25% of the revenues	VMF has an employee cost ratio of 54.9%
Companies who have more than 25% related party transactions of the operating revenues were excluded.	No related party transactions
Companies having different financial year	VMF has financial year ending 31 March 2007
Companies whose onsite income is more than 75% of the export revenues were excluded.	No onsite income

13.2 In support of the above contention, the Ld. AR relied on the decision of the Hon'ble Delhi ITAT in the case of Kaplan India Pvt. Ltd. (ITA No. 2907/Del/2014) wherein it was held as under :-

"5.6 ...further rejected VMF Softech limited by citing information received under section 133(6) of the Act, which according to the TPO's order was the company was functioning on job work basis and that the employee cost of

VMF Softech Limited was 53% which according to Ld. Counsel shows that the presumption of the TPO was incorrect. Ld. Counsel relied on Para 37 of the Coordinate Bench's decision in NXP Semiconductor (supra) wherein the coordinated bench had remanded VMF Infotech to the TPO for fresh consideration taking into account all available information. The Ld. Counsel prayed for similar relief and for consideration of these companies for inclusion on merits."

13.3 The Ld. DR relied upon the order of the Ld. TPO and submitted that this company be excluded on the ground that it does not meet the employee cost filter.

13.4 We have considered the submissions of the Ld. Representatives of the parties and perused material on records. We note that the information received from VMF under section 133(6) has been misquoted by the Ld. TPO. The assesee has also demonstrated that this company's functional profile is similar to that of the assessee and all the other filters applied by the Ld. TPO are being met. Relying on the decision of the Hon'ble Delhi ITAT in the case of Kaplan India (supra), we remand this comparable to the Ld. AO/ TPO to consider it afresh taking into account the material available on record after giving reasonable opportunity of being heard to the assessee.

<u>Comparables selected by the Ld. TPO</u>

Ishir Infotech Private Limited

14. The Ld. TPO included this company in the final list of comparables on the ground that this company qualifies 25% of employee cost filter and outsourced its work. The relevant extract of TPO's order is reproduced below:-

"12.12 ...Notice issued u/s 133(6), the company qualifies 25% of employee cost filter...Further the company is paying professional fees, these professional fee are paid to persons working on the premise of the company thus the conclusion of the taxpayer that the company outsourced its activity is

not based on facts...Hence, the company is retained as a comparable.” (Page 129 to 131 of Paper Book).

14.1 The Hon’ble DRP in its order dated 20.09.2011 recorded that the assessee has contended that Ishir Infotech fails wages to sales filter of 25% as its ratio is 3.96%. The Hon’ble DRP thus directed the Ld. TPO to verify and if objection is correct to exclude it as a comparable.

14.2 The contention of the assessee is that this company fails the 25% employee cost to sales filter applied by the Ld. TPO himself. This company seems to have outsourced its work. Employee cost to sales ratio of this company comes out to be 5.3% as tabulated below :- (pages 1–3 of the Annual Report Compendium)

Particulars	**Amounts (in Rs.)**
Salary + Staff Welfare	2,935,065
Directors Salary	1,000,000
Revenue from Services	74,209,887
Employee cost to sales (%)	**5.3%**

Whereas in assessee’s case, the employee cost to sales ratio is more than 50% which is evident from the table below :- (page 708 of the Paper Book)

Particulars	**Amounts (in INR)**
Personal expenses	1,100,717,818
Revenue from software development services	2,163,236,787
Employee cost to sales (%)	**50.88%**

14.3 In support of its contention, the Ld. AR relied on the decision of the Hon’ble Bangalore Tribunal in the case of Hewlett-Packard (India) GlobalSoft P Ltd. vs. DCIT (IT(TP)A No. 1031/Bang/2011) wherein the Hon’ble Tribunal held as under :-

“23....Similarly, as regards Ishir Infotech Ltd. the Tribunal has considered the decision of the Tribunal in the case of 24/7 Co. Pvt. Ltd. to ***hold that Ishir***

Infotech is also out-sourcing its work and, therefore, has not satisfied the 25% employee cost filter and thus has to be excluded from the list of comparables. *As the facts of the case before us are similar, respectfully following the decision of the co-ordinate bench, we hold that these two companies are also to be excluded.* ***21…Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to exclude the aforesaid companies from the final list of comparable companies for the purpose of determining ALP."*** [Emphasis supplied]

14.4 The Ld. DR supported the order of the Ld. AO/ TPO. According to Ld. TPO, the facts on record do not support the case of the assessee that it is simpliciter a captive service provider and not engaged into product development. The assessee has a wide spectrum of functions which is evident from its business and functional profile provided in Transfer Pricing Review for the FY ended 31.03.2007 (pages 643-648, 653-654 of Paper Book). He further submitted that TNMM applied by the TPO which has been accepted by the assessee takes care of minor differences in functional profile etc. and hence this company be retained as a comparable company.

14.5 We have heard the Ld. Representatives of both the parties and perused the records. Upon careful consideration, we do not find the arguments of the Ld. DR convincing. We note that the Ld. TPO was directed by the Hon'ble DRP to verify the objection of the assessee that this company does not satisfy 25% of the employee cost filter. This has been duly demonstrated by the assessee before us. Therefore, in light of the directions of the Ho'ble DRP and relying on the decision of the Hon'ble Tribunal in the case of Hewlett-Packard (supra), we set aside this comparable to the file of the Ld. AO/ TPO for verification and accordingly decide afresh on inclusion/ exclusion of this company based on outcome of his verification after giving reasonable opportunity to the assessee.

Helios & Matheson Information Technology Ltd.

15. The Ld. TPO included this comparable on the ground of functional similarity to that of the assessee and that it qualifies employee cost filter. The relevant extract of the TPO's order is reproduced below :-

"12.9 As per information submitted by the company, it is into software development services and qualifies employee cost filter applied by the TPO. Thus, is it considered as a comparable."

15.1 The Hon'ble DRP in its order dated 20.09.2011 observed that the assessee has objected to the inclusion of this company since it fails the filter of employee cost being more than 25% of total sales applied by the Ld. TPO. According to assessee its employee cost is 1.04%. The Hon'ble DRP thus directed the Ld. TPO to verify and if objection of the assesee is found to be correct then exclude this company as a comparable.

15.2 The Ld. AR for the assessee contended that this comparable does not satisfy the 25% employee cost to sales filter applied by the Ld. TPO himself. Employee cost to sales ratio of this company is 1.02% (page 5-7 of the Annual Report Compendium)

Particulars	**Amounts (in Rs.)**
Staff Welfare	18,643,728
Income from sales & services	1,835,095,054
Employee cost to sales (%)	**1.02%**

Whereas, in the case of the assessee the employee cost to sales ratio is more than 50% as demonstrated in para 14.2 above.

15.3 The Ld. AR placed reliance on the decision of the Delhi Tribunal in the case of Kaplan India Pvt. Ltd. (ITA No. 2907/Del/2014) wherein it has been held as under :-

*"**5.2 Helios...the employee cost filter of 25% as Helios Mathesan's employee cost is only 1.07% of sales.** We notice that employee cost filter is*

one of the filters adopted by the TPO himself at Para 8 of his order. The totality of above facts and circumstances as noticed in the above facts and circumstances as noticed in the above paragraphs clearly shows that FAR and, therefore, the margin earned by Helios Mathesan is totally different in comparison to the FAR of the assessee. ***It is, therefore, directed that Helios Mathesan be excluded from final list of comparable companies.****"* [Emphasis supplied]

15.4 The Ld. DR supported the order of the Ld. AO/ TPO and reiterated his submissions stated in para 14.4 for this comparable as well.

15.5 In our considered view, though there seems to be a functional similarity between this comparable and that of the assessee, the fact that the employee cost to sales ratio of this company is very low in comparison to the assessee, is of significance. The Hon'ble DRP had directed the Ld. TPO to verify this contention of the assessee but the Ld. TPO failed to do so. Thus, relying on the decision of Kaplan India Pvt. Ltd. (supra) and in view of the DRP's directions, we set aside this company to the file of the Ld. AO/ TPO. The Ld. AO/ TPO is directed to verify the objection of the assessee and decide afresh on inclusion/ exclusion of this comparable based on the outcome of his verification after giving reasonable opportunity to the assessee.

Celestial Labs Ltd.

16. The Ld. TPO included this company on the ground of functional similarity to that of the assessee. The relevant extract of the Ld. TPO's order is reproduced below :-

"12.4 The company was issued notice under section 133(6) ... As per the reply received by the company, it is mainly a software development service company for FY 2006-07 and it qualifies all the filters applied by the TPO. Thus the company is proposed as a comparable...The business/services mentioned in DRHP are the services or business that would be started by

utilizing the funds garnered though IPO and thus in no way connected with its business operations... Thus the company is retained as a comparable as its predominant revenues (>75% of revenues) for FY 2006-07 are from rendering software development services..."

16.1 The Hon'ble DRP observed that the assessee has also objected to the inclusion of this company as it has a wages to sales ratio of 23.3% and fails TPO's own filter. The Hon'ble DRP thus directed the Ld. TPO to verify and if objection of the assesee is found to be correct then exclude this company as a comparable.

16.2 The Ld. AR for the assessee submitted that this company is functionally dissimilar as it is engaged in clinical research and manufacture of bio products. The Ld. AR submitted that there is no finding of the Hon'ble DRP on functional comparability of this company to that of the assessee which is the main contention of the assessee for exclusion of this comparable. The assessee pleaded for exclusion of this company before the Hon'ble DRP mainly on account of its functional dissimilarity which has not been taken into account by the Hon'ble DRP (page 377 of Paper Book). Facts on record shows that this company filed the copyright/patent for its drug design tool 'CELSUITE' which is used to provide research services for drug discovery, prediction modelling, design and development of drug molecules etc. It also developed a biomolecule to treat Vitiligo and multi cancer. This company has incurred research and development (R&D) expenditure of 8.28%, product development expenditure of 46.16% and business promotion expenses 6.69% of sales. Its intangibles account for of 57% of total assets (pages 8-18 of the Annual Report Compendium). In contrast, the assessee is neither involved in development of drugs nor provides any drug discovery related services nor does not it use any proprietary tool for providing software support services to its AEs. The assessee has not incurred any R&D expenses, product development expenses, sales promotion expenses during the relevant AY. Further, the intangibles of the assessee account for only 0.38% of its total assets. (page 578 of Paper Book)

16.3 The Ld. AR submitted that in the case of Hewlett-Packard (India) Globalsoft P. Ltd. vs. CIT (ITA No. 1031/Bang/2011), the Hon'ble Bangalore Tribunal excluded this company by recording the following finding :-

"23. iii) Celestial Labs Ltd.....We are of the view that in the light of the submissions made by the Assessee and ***the fact that this company was basically/admittedly in clinical research and manufacture of bio products and other products,*** *there is no clear basis on which the TPO concluded that this company was mainly in the business of providing software development services.* ***We therefore accept the plea of the Assessee that this company ought not to have been considered as comparable".*** [Emphasis supplied]

16.4 The Ld. DR supported the order of the Ld. AO/ TPO and reiterated his submissions stated in para 14.4 for this comparable as well.

16.5 Based on the above, we find that this company is functionally dissimilar to that of the assessee. Relying on the decision Hewlett-Packard (India) Globalsoft P. Ltd. (supra), we direct the Ld. TPO/AO to exclude this company from the list of final comparables.

Megasoft Ltd.

17. The Ld. TPO issued a notice under section 133(6) to Megasoft Ltd. Based on the information made available, this company was selected by the Ld. TPO as a comparable. The relevant extract of the Ld. TPO's order is as follows :-

"12.17....The company has a different accounting year ending with December 2006. Thus, the company was asked u/s 133(6) to submit the audited financials based on 12 month data for the period from 01.04.2006 to 31.03,2007... As per the information submitted by the company, its consulting division is into software development services and its SWD segment qualifies all the filters applied by the TPO."

17.1 The Hon'ble DRP has not made any specific observation in respect of this comparable company selected by the Ld. TPO.

17.2 The Ld. AR submitted that assessee's contention in respect of this comparable is that though the Ld. TPO proposed this company to be considered at segmental level, he erred in considering the margin at entity level @ 60.23% (page 143 of the Paper book) instead of segmental OP/TC margin of consulting division which comes out to be 23.11% (page 239 of the Paper Book). Further, this company had an extraordinary event in the form of acquisition of Visual Software Technologies Limited and hence is not a suitable comparable company (page 20 of the Annual Report Compendium). Also, this company is functionally dissimilar to that of the assessee as Blue-Ally Division of this company deals in both product and services with focus to invent and mange products and applications for other product companies. However, the assessee is only engaged in provision of services and does not sell any software products.

17.3 The Ld. AR submitted that this company is directed to be excluded from the final set of comparable companies by the Hon'ble Delhi Tribunal in the case of Kaplan India Pvt. Ltd. (ITA No. 2907/Del/2014). The relevant extract of the Hon'ble Tribunal's order is reproduced below :-

"We are inclined to agree with the submission of the Ld. Counsel for the Assessee as ***this company is clearly engaged in multifarious activities including sale of software products****. Further, the* ***impact of extraordinary event of amalgamation is also not possible to be quantified and adjusted...We direct exclusion of this company*** *from the final set of comparable companies."* [Emphasis supplied]

17.4 The Ld. DR relied upon the order of the Ld. AO/ TPO.

17.5 We find force in the contention of the assessee that this company is functionally dissimilar to that of the assessee and also there is an extraordinary event of amalgamation which renders this company as a non-comparable. This finding is duly supported by the decision of the coordinate bench in Kaplan India Pvt. Ltd. (supra). Hence, we direct the Ld. AO/TPO to exclude this company from the final list of comparable companies.

Avani Cimcon Technologies Ltd.

18. The Ld. TPO included this company as a comparable on the ground that it qualifies all the filters applied by him. The relevant extract of the TPO's order is reproduced below :-

"12.2...Thus 133(6) notice was issued to the company to get complete information. As per the reply received from the company, it qualifies all the filters applied by the TPO. As it qualifies all the filters applied by the TPO, the same was proposed as a comparable vide this office show cause notice."

18.1 The Hon'ble DRP has not made any specific observation in respect of this comparable company.

18.2 The Ld. AR contested the functional similarity of this company to that of the assessee by submitting that this company is engaged in development and sale of software product by the name 'DXchange' in addition to provision of software services. However, the segmental information is not available in public domain (page 27-30 of Annual Report Compendium). The assessee on the other hand, does not sell or license any proprietary software products but is only engaged in providing software development support services.

18.3 The Ld. AR relied on the decision of the Bangalore Tribunal in the case of HCL EAI Services Ltd. vs. DCIT (IT(TP)A No. 1348/Bang/2011) wherein it has been held as under :-

*"Based on the information available in the company's website, **which reveals that this company has developed a software product by name "DXchange", it was submitted that this company would have revenue***

from software product sales apart from rendering of software services and therefore is functionally different from the assessee*. It was further submitted that the Mumbai Bench of the Tribunal to the decision in the case of Telecordia Technologies Pvt. Ltd. vs. ACIT–ITA 7821/Mum/2011 wherein the Tribunal accepted the assessee's contention that this company has revenue from software product and observed that in the absence of segmental details,* ***Avani Cincom cannot be considered as comparable to the assessee who was rendering software development services only."*** [Emphasis supplied)

18.4 The Ld. DR relied upon the order of the Ld. AO/ TPO.

18.5 Thus, respectfully following the decision of the Hon'ble Bangalore Tribunal in HCL EAI Services Ltd. (supra) and in consideration of the functional dissimilarity of this company to that of the assessee, which is evident from the material on record, we hold that this company be excluded from the list of comparable companies. The Ld. AO/ TPO is directed accordingly.

E-Zest Solutions Limited

19. The Ld. TPO included this company for the reasons recorded in his order which is reproduced below :-

"12.6.... The Annual Report is available for FY 2006-07. But, the functionality is not clear from the AR and also RPT information was not available in the AR. 133(6) notice was issued to the company. As per the reply received the company, it is engaged in software development services and qualifies all the filters applied by the TPO including RPT filter. Thus, the company is proposed as a comparable to the tax payer vide this office show cause notice."

19.1 The Hon'ble DRP has not made any specific observation in respect of this comparable company.

19.2 The assessee has contested the inclusion of this company on the ground that this company is into provision of software development services as well as sale of software and that the segmental details for sale of products and services are not available. This company is engaged in services such as product engineering, manage cloud, technology operations as per its website. The services provided by this company are KPO services as these are high-end technical services (pages 31-34 of the Annual Report Compendium). However, these activities are not carried out by the assessee. The assessee does sell any software products and earn any revenue from sale of software products. It is engaged only in provision of software development support services.

19.3 The Ld. AR submitted that the Bangalore Tribunal in the case of Hewlett-Packard (India) GlobalSoft P. Ltd. vs. DCIT (IT(TP)A No. 1031/Bang/2011) held that this company be excluded from the list of final comparable. The relevant extract is reproduced below :-

"14.3.... It appears that the TPO has not examined the services rendered by the company to give a finding whether the services performed by this company are similar to the software development services performed by the assessee. ***From the details on record, we find that while the assessee is into software development services, this company i.e. e-Zest Solutions Ltd., is rendering product development services and high end technical services which come under the category of KPO services ...we hold that this company, i.e. e-Zest Solutions Ltd. be omitted from the set of comparables for the period under consideration in the case on hand. The AO/TPO is accordingly directed."*** [Emphasis supplied)

19.4 The Ld. DR relied on the order of the Ld. TPO.

19.5 On careful consideration of the submissions of the assessee, material on records as well as the decision of the Hon'ble Bangalore Bench in Hewlett-Packard (India) GlobalSoft P. Ltd. (supra), we direct the Ld. AO/ TPO to exclude this company from the final set of comparables.

Infosys Technologies Limited

20. The Ld. TPO has included this company on the grounds of functional similarity and qualification of all the filters applied by him. The relevant extract of the TPO's order is reproduced below :-

"12.11 The Annual Report is available for FY 2006-07. As per the AR, it is into software development services and qualifies all the filters applied by the TPO. Thus, it is considered as a comparable. The taxpayer has not offered any comments."

20.1 The Hon'ble DRP has not made any specific observation in respect of this comparable company.

20.2 The Ld. AR submitted that Infosys Technologies Limited is a huge giant company as compared to the assessee; that it has a huge brand value viz-a-viz 'nil' brand value of the assessee; that it has significant intangibles as opposed to intangibles (off the shelf software applications to total assets) of the assessee which merely accounts for 0.38%; and that there is a huge difference in scale of operations of this company and the assessee which is evident from the fact that for the year under consideration this company earned 13,149 crores viz-a-viz 216 crores earned by the assessee i.e. 61 times of the revenue earned by the assessee. He further demonstrated the functional dissimilarity of this company by submitting that this company acts as a full-fledged entrepreneur engaged in consulting, application services, system integration, product engineering, re-engineering and IT infrastructure services. It has incurred brand building, sales and marketing expenses and R&D expenses whereas no such expenditure has been incurred by the assessee (pages 36 to 42 of Annual Report Compendium).

20.3 In support thereof, the Ld. AR relied on the Delhi High Court's decision in the case of Agnity India Technologies Pvt. Ltd. (ITA No. 1204/2011) wherein the Hon'ble Delhi High Court held that this company should be excluded from the list of comparable companies. The relevant extract is reproduced below :-

"Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk." [Emphasis supplied]

20.4 The Ld. DR relied upon the order of the Ld. AO/ TPO.

20.5 Upon careful consideration of the above submissions of the assessee and respectfully following the Hon'ble Delhi High Court's judgment in the case of Agnity India Technologies Pvt. Ltd. (supra), we direct the Ld. AO/ TPO to exclude this company from the final list of comparable companies.

Wipro Limited

21. The Ld. TPO has included this company for the reasons recorded in para 12.27 of his order which is reproduced below :-

"12.27.....Annual report is available for FY 2008-07. It has IT service segment consisting of both software development and ITES. But, segmental details in respect of software development services are available on consolidated basis but the same were not available on standalone basis. Thus, the company was asked information u/s 133(6) to submit segmental details. As the segmental details are available for software development segment on standalone basis, the same is considered as a comparable..."

21.1 The Hon'ble DRP has not made any specific observation in respect of this comparable company.

21.2 The contention of the assessee is that this company is functionally dissimilar as it owns significant intangibles which is evident from the fact that it has filed more than 13 patents across product engineering, enterprise business and quality and 11 patents in pipeline; that it has invested 8.5% of revenue towards R&D expenses; and that it has incurred selling expenses which constitutes 3.12% of the total revenue. Also, there is a vast difference in scale of operations as compared to that of the assessee which is evident from the fact that its revenue is 64 times of the revenue earned by the assessee (page 44-46 of the Annual Report compendium). On the other hand, the assessee company acts as rather simpler software support service provider to its AEs; does not perform any R&D and marketing functions and does not hold any significant intangibles as well.

21.3 The Ld. AR further submitted that in the case of Hewlett-Packard (India) Globalsoft P. Ltd. (IT(TP)A No. 1031/Bang/2011), the Hon'ble Bangalore Tribunal after duly considering this company as a comparable directed the AO/TPO to omit this company from the set of comparable companies holding as under :-

"13.4.1 ***.......It is seen that this company is engaged both in software development and product development services. There is no information on the segmental bifurcation of revenue from sale of product and software services.***

13.4.2 ***We also find that this company owns intellectual property in the form of registered patents and several pending applications for grant of patents.*** *In this regard, the coordinate bench of this Tribunal in the case of 24/7 Customer. Com Pvt. Ltd. (ITA No.227/Bang/2010) has held* ***that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any such intangible and hence does not have an additional advantage in the market. As the Assessee in the case on hand does not own any intangibles,*** *following the aforesaid decision of the co-ordinate bench of the Tribunal i.e. 24/7 Customer.Com Pvt. Ltd. (supra), we hold that this company cannot be considered as a comparable to the assessee.* ***We, therefore, direct the Assessing Officer/TPO to omit this company from the set of comparable companies"*** [Emphasis supplied]

21.4 The Ld. DR relied upon the order of the Ld. AO/ TPO.

21.5 Upon careful consideration of the contentions of the ld. Representatives of the parties and perusal of records, we find merit in the submissions of the assessee. Even though the segmental information for software segment as per TPO's comments was made available to him, the fact remains that this company has vast differences on functional comparability with the assessee. We also note the finding of the Bangalore Tribunal in respect of this company in the case of Hewlett-Packard (India) Globalsoft P. Ltd. (supra) and respectfully following the same, we direct the Ld. AO/TPO to exclude this company from the final list of comparable companies.

Kals Information Systems Limited

22. The Ld. TPO included this company for the reason that this company is into two segments i.e. software development and training and the segmental details for both are available and that it qualifies all filters applied by him. The relevant extract of the Ld. TPO's order is reproduced below :-

"12.13 The company is into software development and training. As per the information submitted by the company, in response to 133 (6) notice, it is into two segments i) software development services and ii) training. The segmental details are also submitted. It qualifies all filters applied by the TPO...The software product constitutes only 3% of its revenues and training constitutes only 8.56% of its revenues for FY 2006-07... Hence, it is proposed as a comparable."

22.1 The Hon'ble DRP has not given any specific observation/ finding in respect of this comparable.

22.2 The assessee's contention is that the Ld. TPO considered the applications software segment for TNMM analysis. The application software segment comprises of sale of software products and services. Hence, the same cannot be considered as segmental information only for software services (pages 48 to 50 of the Annual Report Compendium). The Ld. AR further submitted that this company is engaged in sale of software products namely Virtual Insure and La Vision and related inventory constitutes 52.47% of the total current assets and 48.42% of total revenue of this company which is evident from records placed on pages 51 to 53 of the Annual Report Compendium. In contrast, the assessee neither sells any software products nor does it hold any inventory.

22.3 The Ld. AR relied on the case of Hawlett-Packard (India) Globalsoft P. Ltd. (IT(TP)A No. 1031/Bang/2011) wherein the Hon'ble Bangalore Tribunal in respect of this comparable held as under :-

"47. We have given a careful consideration to the submission made on behalf of the Assessee. We find that the TPO has drawn conclusions on the basis of information obtained by issue of notice u/s. 133(6) of the Act. This information which was not available in public domain could not have been used by the TPO, when the same is contrary to the annual report of this company as highlighted by the Assessee in its letter dated 21.6.2010 to the TPO. ***We also find that in the decision referred to by the learned counsel for the Assessee, the Mumbai Bench of ITAT has held that this company was developing software products and not purely or mainly software development service provider. We therefore accept the plea of the Assessee that this company is not comparable"*** [Emphasis supplied]

22.4 The Ld. DR relied upon the order of the Ld. AO/ TPO.

22.5 Thus, considering the fact that this company is functionally different than the assessee company and also holds huge percentage of inventory. We, relying upon the decision of the Hewlett-Packard (India) Globalsoft P Ltd. (supra) direct the Ld. TPO/AO to exclude this company from the final list of comparable companies.

Tata Elxsi Limited

23. The Ld. TPO included this company for the following reasons:

"12.24 Annual report is available for FY 2006-07. It has two segments i) Systems integration and support segment, Segment details are available. The company satisfied all the filters. The TPO has considered the software development & Service segment of the company as a comparable."

23.1 The Hon'ble DRP has not given any specific observation/ finding in respect of this comparable.

23.2 The contention of the assessee is that this company is functionally dissimilar to that of the assessee since within the software development and service segment, it is engaged in designing and development of hardware and software, industrial designing/engineering as well (page 55,56 of the Annual Report Compendium). Further, this company holds inventory based on which it can be concluded that it is also engaged in software products (page 58 of the Annual Report Compendium). It has incurred expenditure towards cost of goods sold which is 14% of total cost of the company based on which it can be concluded that the company is engaged in trading activities apart from providing services. The assessee however does not hold any inventory nor does any trade activities and not engaged in any hardware designing activities as in the case of this company.

23.3 In support thereof, the Ld. AR relied on the decision of the Hon'ble Tribunal in the case of Kaplan India Private Limited (ITA No. 2907/DEL/2014). The finding of the Hon'ble Tribunal is reproduced below :-

"Coordinate benches have come to the conclusion that the ***activities carried out under software development segment by Tata Elxsi are not simply software development services but are complex in nature. The IPR in the form of software researched and developed were used as a tool for further development of software yielding higher margins.*** *It was rightly*

concluded in such decisions that the ***segment of software development services in Tata Elxsi includes Design services including hardware design and hence is not comparable to simple software development services...we direct exclusion of this company from the final set of comparable companies."*** [Emphasis supplied]

23.4 The Ld. DR relies upon the order of the Ld. AO/TPO.

23.5 From the above submissions and perusal of the material on records the factual differences between the assessee and this company are evident. Thus, relying on the decision of the Hon'ble ITAT in the case of Kaplan India Private Limited (supra) we direct the Ld. AO/TPO to exclude this company from the final set of comparable companies.

B. ITeS SEGMENT (BPO SERVICES)

Comparables selected by the Ld. TPO

24. In the ITeS segment, the assessee has disputed the inclusion of 11 comparable companies selected by the Ld. TPO. The Hon'ble DRP's order has no specific adjudication on any of the 11 comparables selected by the Ld. TPO.

24.1 In respect of all the 11 comparable companies, the Ld. DR relied upon the findings of the Ld. TPO in his order for inclusion of these companies in the final set of comparables. It is the say of the Ld. DR that the assessee is not simply a BPO company engaged in providing BPO services but is also providing after sales and upgradation services and hence the functions of the assessee extend to that of a KPO. Also, the assessee belongs to a big group of companies which has subsidiaries located across the country and hence comparable to giant/huge companies.

24.2 We have dealt with each of these 11 disputed comparable companies in the subsequent paragraphs.

Mold-Tek Technologies Ltd.

25. The Ld. TPO selected this company on the ground that it qualifies all filters applied by him. The Ld. TPO's finding in para 14.20 of his order is reproduced below :-

"14.20 As per the information and Annual report submitted by the company, the IT Division of the company is mainly engaged in ITES. IT qualifies all filters applied by the TPO. Thus, the IT Division of the company is proposed as comparable".

25.1 The contention of the assessee is that this company is functionally dissimilar to that of the assessee as this company renders structural engineering KPO services viz-a-viz assessee who is engaged in provision of HR related outsourcing service in the nature of payroll processing, HR record maintenance, accounts reconciliation etc. Further, unlike assessee this company uses design tools like CAD/CAM, Stadd Pro and engages high skilled engineers. It also has a low employee cost to sales ratio of 7.59% as against the assessee which has significantly high employee cost of about 46%. (pages 61-64 of the Annual Report Compendium).

25.2 In support thereof, the assessee relied on the decision of the Special Bench of the Hon'ble Tribunal in the case of Maersk Global Centre (India) Private Limited (ITA No. 7466/MUM/2012) wherein it has been held as under :-

"81. In so far as the case of Mold-Tek Technologies Ltd. is concerned, it is observed from the annual report of the said company for the financial year 2007-08placed at page 139 to 151 ***of the paper book that the said company was pioneer in structural engineering KPO services and its entire business comprised of providing only structural engineering services to various clients.*** *Further information of Mold-Tek Technologies Ltd. available on their Website is furnished in the form of printout at page 158 to 165 of the paper book and a perusal of the same shows that it* ***is a***

leading provider of engineering and design services with specialization in civil, structural and mechanical engineering services. *It is stated to have a strong team of skilled resources with world class resources and skill sets. It is also stated to have consistently helped the clients to cut down design and development costs of civil, structural, mechanical and plant design by 30-40% and delivered technologically superior outputs to match and exceed expectations. It is claimed to have in-house software development team, quality control training and troubleshooting facilities. M/s. Mold-Tek is also rendering web design and development services with experience in turning them into an effective graphic design representation and creating dynamic and graphic rich web applications from IT specs, design prints etc.* ***Keeping in view this information available in the annual report of Mold-Tek as well on its website, we are of the view that the said company is mainly involved in providing high-end services to its clients involving higher special knowledge and domain expertise in the field and the same cannot be taken as comparable to the assessee company which is mainly involved in providing low-end services.*** *"* [Emphasis supplied]

25.3 Upon consideration of the submissions made by the assessee, material available on record and the decision of the Special Bench of Tribunal in Maersk Global Centre (India) Private Limited (supra), we arrive at a conclusion that this company is not a suitable comparable to the assessee. Hence, we direct the Ld. TPO/AO to exclude this company from the final list of comparable companies.

Vishal Information Technologies Limited

26. The Ld. TPO selected this company on the ground that it qualifies all filters applied by him. The Ld. TPO's finding in para 14.24 of his order is reproduced below :-

"14.24 Annual Report is available for FY 2006-07. 133(6) was issued to the company to submit other relevant information. As per the annual report of the

company and the information submitted by the company, it is into IT enabled services and qualifies all filters. 133(6) notice was issued on specific point - outsourcing/utilizing its own resources. As per the reply received from the company, it is using its own assets and resources for rendering IT enabled services. Thus the company is considered comparable."

26.1 The contention of the assessee is that this company outsources its services to third party vendors which constitutes 64% of the total expenses. The employee cost to sales ratio is merely 2.30%. This company holds inventory which is 13.33% of total sales indicative of the fact that it is also engaged in trading of products (page 65-70 of the Annual Report Compendium). As far as the assessee is concerned, the assessee does not outsource any of its activities instead AEs outsource their functions to the assessee. Being a BPO service provider the employees cost is quite significant in assessee's case which constitutes around 46% in the year under consideration. The assessee also does not hold any inventory as it is not into trading activities.

26.2 The Ld. AR placed reliance on the decision of Mumbai Tribunal in the case of ACIT vs. Maersk Global Services Centre (India) P. Ltd. (ITA No. 3774/MUM/2011 – CO111/MUM/2011) wherein the Hon'ble Tribunal held as under :-

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

26.3 We find force in the contention raised by the assessee. Relying on decision of the Hon'ble Mumbai Tribunal (supra), we direct the Ld. AO/ TPO to exclude this company from the list of final comparables.

Accentia Technologies Ltd.

27. The Ld. TPO selected this company for the reason that it qualifies all filters applied by him. The Ld. TPO's finding is reproduced below:-

"The annual report is not available for FY 2006-07. 133(6) notice was issued. As per the reply received from the company, it has ITeS segment which is into medical transcription services and qualifies all the filters applied by the TPO."

27.1 The assessee has prayed for exclusion of this company on account of extraordinary events in the form of acquisition/ merger that took place during the relevant AY. The Ld. AR submitted that this company acquired 51% stake in Geosoft Technologies (Trivandrum) Ltd. and plans to merge its subsidiary companies to strengthen its business (page 80 of the Annual Report Compendium). Further, this company has incurred considerable marketing and business promotion expenses constituting 28% of total revenue (page 79 of the Annual Report Compendium). This company is also into product development and develops its own products such as iridium real time school, iridium accounts management etc. (page 73 of the Annual Report Compendium). It is thus functionally dissimilar to the assessee.

27.2 In support thereof, the Ld. AR relied on the decision of the Bangalore ITAT in AOL Online India Private Limited (IT(TP)A No.1036/Bang/2011) wherein the Hon'ble Tribunal for the same assessment year 2007-08 observed as under :-

"1. Extraordinary events during the year — Amalgamation of subsidiary resulting in growth of revenues by 75.33% Amalgamated the company Iridium Technologies which is a software product company. 2. Functionally not comparable - The activity of medical transcription (considered by TPO), billing and coding and software development and implementation is not comparable to the services provided by the Appellant. 3. Business promotion expenses constitutes 28.34% of the total operating revenue earned by the company".

27.3 Keeping in view the fact that an extraordinary event in the form of acquisition took place in this company in the year under consideration, the other facts on record which clearly establishes the functionally dissimilarity between this company and the assessee and respectfully following the decision of the Hon'ble Bangalore Tribunal we hold this company to be not a suitable comparable company. Accordingly, we direct the Ld. TPO/ AO to exclude this company from the list of comparables.

Eclerx Services Ltd.

28. The Ld. TPO selected this company on the ground that it qualifies all the filters applied by him. The Ld. TPO's finding in para 14.11 of his order is reproduced below :-

"14.11 Annual report is available for the FY 2006-07. 133(6) notice was issued to the company. As per the information submitted by the company, it qualifies all the filters applied by the TPO. Thus, the same is considered as a comparable."

28.1 The Ld. AR for the assessee submitted that this company is functionally dissimilar to that of the assessee for the reason that it outsources its services to third party vendors which constitutes around 18.83% of the total expense (page 84-85 of the Annual Report Compendium); that it is engaged in KPO/ highly specialised domain services involving customer operations services, digital service and financial services (page 81-82 of the Annual Report Compendium). On the other hand, the assessee is a simplicitor captive BPO service provider, does not outsource any activities and renders services such as accounts reconciliation, payroll, maintenance of employee database etc. as and when requested by its AE, under the ITeS segment.

28.2 The Ld. DR relied upon the decision of the Special Bench of the Hon'ble Tribunal in the case of Maersk Global Centre (India) Private Limited (ITA No. 7466/Mum/2012) wherein it has been held as under :-

"....Keeping in view the nature of services rendered by M/s eClerx Services Pvt. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns."

28.3 Based on the above submissions, we are of the considered view that this company is functionally dissimilar to the assessee. Hence, respectfully following the finding of the Hon'ble Tribunal in the case of Maersk Global Centre (India) Private Limited (supra) we hold that this company be excluded from the final list of comparable companies. We direct the Ld. AO/ TPO accordingly.

Infosys BPO Ltd.

29. The Ld. TPO selected this company on the ground that it qualifies all the filters applied by him. The Ld. TPO's finding in para 14.17 of his order is reproduced below :-

"14.17 The annual report was not available for FY 2006-07. The company was issued a notice u/s 133(6) to submit annual report other information. As per the annual report submitted by the company, it is into ITeS and qualifies all the filters applied by the TPO."

29.1 The contention of the assessee is that this company is engaged in diversified services involving in end-to-end voice, data, KPO services and helping customers in transforming their businesses (page 87 of the Annual Report Compendium); owns significant brand value in the name of "Infosys" and has also incurred substantial expenditure on selling and marketing expenses i.e. 6.38% of the total revenue (page 88 of the Annual Report Compendium). The assessee company, however is engaged in rendering services such as accounts, reconciliation, payroll services etc. to its AEs ;

does not have any IPR/brand name to leverage on and also does not perform any sales and marketing functions as in case of this company.

29.2 The Ld. AR submitted that in the case of NTT Data Global Delivery Services Ltd. vs. ITO (ITA No. 5339/Del/2011), the Hon'ble Delhi Tribunal directed this company to be excluded from the list of comparables by holding as under :-

"5.8.2. We have perused the submissions advanced by both the sides in the light of the records placed before us. From TP study placed at page 539-638 of the paper book, it is observed ***that this company has huge turnovers, owns IPR and brand value on products and provides services to vast clientele. Under such circumstances this company cannot be accepted to be a fit comparable in case of Assessee who is a captive service provider providing services only to its group concerns.***
5.8.3. Accordingly, we direct this company to be excluded from the list of comparables." [Emphasis supplied]

29.3 Considering the functional distinction brought out by the Ld. AR between this company and the assessee and respectfully following the decision of the Delhi Tribunal in NTT Data Global Delivery Services Ltd. (supra), we direct the Ld. AO/ TPO to exclude this company from the list of comparables.

Informed Technologies India Ltd.

30. The Ld. TPO selected this company by recording the following finding in para 14.16 of his order reproduced below :-

"14.16 Annual Report is available for FY 2006-07. The company qualifies all the filters applied by the TPO. Thus, the company is considered as a comparable."

30.1 The main argument of the assesee for exclusion of this company is that this company has fluctuating/ abnormal financial results over the years which is evident from the fact that it earned a loss of (23.4%) in FY 2005-06, high profit of 35.65% in FY 2006-07 and a marginal profit of 3.9% in FY 2007-08 The Ld. AR further submitted that this company has incurred marketing and business promotion expense constituting 14.94% of total revenue (page 90–92 of the Annual Report Compendium). However, the assessee company's margins are consistent over years as it is being remunerated on cost plus basis and also the assessee does not perform any sales and marketing functions.

30.2 Placing reliance on AOL Online India Private Limited (IT(TP)A No. 1036/Bang/2011), the Ld. AR submitted that in this case the Hon'ble Bangalore Tribunal in respect of this company held as under :-

"16. Informed Technologies India Ltd: 4. Functionally not comparable - The company is engaged in collecting and analyzing the data on financial fundamentals, corporate governance, director executive compensation and capital market. ***5. The Company earns fluctuating margins – FY 2006-07 has been unique since it has made a margin of more than 35% in this year as compared to losses incurred in the previous years and marginal profit in the next year. (-44.51% in FY 2005-06 & 3.63% in FY 2007-08). 6. Abnormal growth -171% growth in sales over previous year. 7. Business promotion expenses -14.95 % of sales****."* [Emphasis supplied]

30.3 Relying on the submissions of the assessee and the findings of the Hon'ble Bangalore Tribunal in AOL Online India Private Limited (supra), in our considered view this company is not a fit comparable owing to its abnormal margins/ significant fluctuations in margins of profit. We accordingly direct the Ld. AO/ TPO to exclude this company from the list of final comparables.

Iservices India Private Limited

31. The Ld. TPO selected this company by recording the following finding in para 14.18 of his order reproduced below :-

"14.18 The Annual Report was not available for FY 2006-07, RPT information was not available. Thus notice 133(6) notice was issued to the company. As per the reply received by the company and the annual report submitted, it is seen that the company is into IT enabled services and qualifies all filters applied by the TPO."

31.1 The Ld. AR for the pleaded for exclusion of this company on the ground of functional dissimilarly owing to the fact that this company is engaged in rendering high end diversified services like web hosting, email services, spam filtering, domain names and DNS hosting services which is clearly not done by the assessee company. He also submitted that this company has a different business model which involves payment of commission on sales to other parties though the nature of such payments is not clear from the information/records available in public domain. (page 95-96 of the Annual Report Compendium).

31.2 The Ld. AR submitted that in the case of DCIT vs. M/s. Everest Business Advisory India Private Limited (ITA No. 41/Del/2013 & ITA No. 1191/Del/ 2013) for AY 2007-08, the Hon'ble Delhi Tribunal considered the functionally profile of this company in detail and arrived at the following conclusion :-

"72. The taxpayer sought to exclude Iservice on ground of functional dissimilarity as it is into internet service and consulting services. When we examine the functional profile of ***Iservice from website provided by the taxpayer, the Iservice is into web hosting, email services, spam filtering, domain names and DNS hosting.***

74. When we examine the arguments addressed by the Id. AR for the taxpayer in the light of the Rampgreen Solutions (P.) Ltd. (supra) only *functional comparability is the hallmark for benchmarking the international transaction.* ***Business profile of Iservice shows that the same is into high end diversifying services vis- a-vis the taxpayer who is into divergent high end services like web hosting, email services, spam filtering, domain names and DNS hosting, web hosting, email services, spam filtering> domain names and DNS hosting is also providing web design services, domain management services and email management services which makes it functionally dissimilar to the taxpayer. The contention of the Id. DR that this argument has not been addressed before the TPO is not sustainable because the TPO in its analysis has to compare functional profile of comparable company with the taxpayer at the very outset before going into further detail. So, we are of the considered view that Iservice is also not a suitable comparable for benchmarking the international transaction."*** [Emphasis supplied]

31.3 In view of the functional dissimilarity of this company to that of the assessee which is evident from material placed on records and respectfully following the findings of the coordinate bench in Everest Business Advisory India Private Limited (supra), we direct the Ld. AO/ TPO to exclude this company from the list of final comparables.

HCL Comnet Systems & Services Ltd.

32. The Ld. TPO selected this company for the reason that it qualifies all filters applied by him. The Ld. TPO's finding in para 14.14 of his order is reproduced below :-

"14.14. The company's accounting year ends with June, 2007. The company was issued 133(6) notice to submit the data for 12 month period from 01-04-2006 to 31-03-2007. As per the data submitted, the ITeS segment qualifies all the filters applied by the TPO. Thus, the ITeS segment is considered as a comparable."

32.1 The assessee has contended for exclusion of this company on the ground that this company is engaged in provision of high end KPO services comprising of data centre management services, end user computing services, networking services, remote data infrastructure management services viz-a-viz. simple BPO services provided by the assessee to its AEs under the ITeS segment. Further, the Ld. AR submitted that this company owns intangible constituting 3.83% of total revenue as against the assessee who does not own or employ any intangible assets for the provision of the BPO services. (page 98-99 of the Annual Report Compendium)

32.2 The Ld. AR placed reliance on the decision of the Hon'ble Delhi Tribunal in ICC India Pvt. Ltd. vs. DCIT (ITA No. 25/Del/2012) wherein the Hon'ble Tribunal held as under:-

"(V) HCL Comnet Ltd. (Seg)
The Assessee has objected to the inclusion of this company on the ground that the ***company is into remote IT infrastructure management services, data centre management and user computing services, managed security services, networking services, tools and process consulting services and is therefore functionally dissimilar.*** *The other objections to the inclusion are that the company runs a highly capital-intensive industry, it operates 24/7 in 3 shifts,* ***it has a significant brand value and a huge assets base. It is also the assessee's plea that the company is a full risk bearing entrepreneur whereas the assessee is a Captive Service Provider to its AE.***
Having considered all the aspects, it is our considered opinion that the assessee's contention about being functionally dissimilar is correct... Accordingly, we direct for the exclusion of the company from the final list of comparables." [Emphasis supplied]

32.3 In view of the functional dissimilarity brought out between the assessee and this comparable company in the above submissions and relying on decision of the coordinate bench in ICC India Pvt. Ltd. (supra), we direct the Ld. AO/ TPO to exclude this company from the list of comparables.

Bodhtree Consulting Limited

33. Ld. TPO selected this company as it qualifies all filters applied by him. The Ld. TPO's finding in para 14.7 of his order is reproduced below :-

"14.7 Annual report is available for FY 2006-07 133(6) notice was issued to the company regarding functionality i.e. whether its e-paper solutions related to SWD or ITeS. As per information submitted by the company, the revenue from e- paper solutions is of INR 44.20 Lakhs and data cleansing is of INR 2.95 crores on the total operating revenue of INR 10.53 Crore i.e 32% of the revenue The company was again issued notice u/s 133(6) regarding the nature of data cleansing services. The company in its reply stated that data cleansing activities are in the form of IT enabled services and submitted segmental details regarding ITeS. Thus, ITeS segment is considered as a comparable."

33.1 The assessee's contention is that this company provides open and end-to-end web solutions, software consultancy, design and development of solutions which cannot be compared to a BPO company like the assessee. This company also provides data cleansing services to those companies for which they have developed the software (page 103 of the Annual Report Compendium). This company has reported 91.63% growth in the revenues compared to the previous year (page 101-102 of the Annual Report Compendium). The Ld. AR further submitted that this company hived of expenses to different entities which has resulted in an improved net profit for the year which stood at Rs. 244.98 lakhs compared to the net profit of Rs. 3.70 lakhs for the previous year. The Ld. AR submitted that this peculiar economic circumstance has been taken into account by the Hon'ble Bangalore Tribunal in AOL Online India Private Limited vs. DCIT (IT(TP)A No. 1036/Bang/2011) as under :-

"Functionally not comparable – provides open and end to end web solutions, software consultancy, design and development of solutions which cannot be compared to a BPO company (refer Management Discussion Analysis on 133(6) and considered the data cleansing segment to be in the nature of IT enabled services. The company provides data cleansing services to those companies for which they have developed the software (as per reply u/s. 133(6). Thus, the two segments are inextricably linked to each other since data cleansing also includes an element of software development in the upgradation process. Further the TPO had selected this company as comparable for the IT Segment in the Appellant's own case for AY. 2006-07. ***However for AY. 2007-08, the TPO rejected this company for the IT segment citing peculiar economic circumstances (appropriate adjustments cannot be made for IT(TP)A No. 1036/Bang/2011 the expenses transferred by Bodhtree to other companies which related to the entity as a whole and which resulted in the improved profitability for the company including the ITes Segment) (Pg 1162-1163 of PB...*** *5). Thus, the TPO ought to have rejected Bodhtree as a comparable for AY. 2007-08 for the ITeS segment as well."* [Emphasis supplied]

33.2 Based on the above submissions of the assessee, perusal of records and relying on the decision of the Bangalore Tribunal in AOL Online India Private Limited (supra), we are of the considered view that this company ought to have been rejected by the Ld. TPO. Accordingly, we direct the Ld. AO/ TPO to exclude this company from the list of the comparable companies.

Maple Esolutions Ltd. & Triton Corp Ltd.

34. The Ld. TPO selected this comparable by recording the following finding reproduced below :-

"14.19 Maple E Solutions Limited. Annual Report is available for FY 2006-07. The company qualifies all the filters applied by the TPO. Thus, the company is accepted as a comparable.

14.23 Triton Corp Ltd....The company satisfies all the filters applied by the TPO, the same is considered as a comparable."

34.1 The Ld. AR submitted that this company is functionally dissimilar to the assessee as it holds inventory indicating that it is engaged in the sale of products whereas the assessee does not hold any inventory and is pure BPO/ ITeS service provider (page 105, 108 of the Annual Report Compendium). Further, the financials of these companies are unreliable as the business reputation of Rastogi group owning these companies was under serious indictment.

34.2 The Ld. AR submitted that in AOL Online India Private Ltd. vs. DCIT (IT(TP)A No. 1036/Bang/2011), the Hon'ble Bangalore Tribunal directed for exclusion of these companies as comparables holding as under :-

"19.Maple Esolutions Ltd., -

1. Unreliable financials - The business reputation of Rastogi group, owning Maple E Solutions and Triton Corporation was under serious indictment. In view of a question mark on the reputation of the owner for earlier years, it would be unsafe to take their results for comparison of the profitability of the Appellant.

2. Functionally not comparable - Voice - Outbound, Voice - Inbound data

3. Peculiar economic circumstances - Merger with Triton

4. Extraordinary growth - more than 64% growth in sales over previous year.

23. Triton Corp Ltd.

1. Unreliable financials - The business reputation of Rastogi group, owning Maple E Solutions and Triton Corporation was under serious indictment. In view of a question mark on the reputation of the owner

for earlier years, it would be unsafe to take their results for comparison of the profitability of the Appellant.

2. Functionally not comparable – Trading of IT Peripherals, providing of call centre services and support services; Absence of segmental information.

……Since the facts are similar and assessee's business is also similar and TPO has selected the same comparables, we are of the opinion that the said comparables listed above cannot be considered as suitable for inclusion in the list for TP analysis. AO/TPO is directed to exclude the above comparables." [Emphasis supplied]

34.3 Upon careful consideration of the facts on record establishing the functional dissimilarity of these two comparable companies to that of the assessee and findings of the Hon'ble Bangalore Tribunal in the case of AOL Online India Private Ltd. (supra), we direct the Ld. AO/ TPO to exclude this company from the final list of comparables.

Wipro Limited

35. The Ld. TPO selected this company on the ground that it qualifies all filters applied by him. The Ld. TPO's finding in para 14.25 of his order is reproduced below :-

"14.25 Annual report is available for FY 2006-07. It has IT service segment consisting of both Software development services and ITES. But, the annual report did not contain segmental information on standalone basis. Thus, the company was asked information u/s 133(6) to submit segmental details. The company submitted segmental information on standalone basis. The BPO segment qualifies all the filters applied by the TPO. Thus, it is considered as a comparable."

35.1 The main contention of the assessee is that this comparable is a giant company as compared to that of the assessee. It has earned revenue of Rs. 939 crore vis-a-vis Rs. 139.1 crore earned by the assessee (i.e. 7 times the revenue earned by the assessee) (page 111 of the Annual Report Compendium and page 724 of the Paper Book). The Ld. AR further submitted that this company has invested 8.5% of revenue towards R&D expenses but the assessee does not incur any R & D expenses (page 114 of the Annual Report Compendium). This company owns intangibles in the nature of marketing related intangible, technology based intangible, customer related intangible and has filed over 13 patents across product engineering, enterprise business and quality, 11 patents in pipeline (page 112 of the Annual Report Compendium) unlike the assessee who owns software which are only 0.38% of its total fixed assets (page 574 of the Paper Book). This company has also acquired various companies with a strategy to invest in niche areas (page 113 of the Annual Report Compendium)

35.2 In support thereof, the Ld. AR placed reliance on the decision of the Delhi Tribunal in the case of H&S Software Development and Knowledge Management Centre Pvt. Ltd. (ITA No. 6455/Del/2012) wherein it has been held as under :-

"39. This is TPO's comparable in which segmental details has been obtained u/s 133(6) of the Act. However, assessee has sought its exclusion on grounds of significantly higher turnover, abnormal margins, presence of intellectual property, diversified business, brand value and turnover and relied upon Calibrated Health Systems Ltd. (supra), available at pages 853 to 862 of the paper book.

40. Coordinate Bench of ITAT, Delhi examined the comparability of WIPRO with Calibrated Health Systems Ltd., engaged in providing ITES services to its foreign entity as in the case of Assessee and ordered its exclusion on the ground that this is a giant entity with marked differences as regards risk profile, nature of services, ownership of IP rights, expenditure on R&D, etc. So, following the decision rendered by coordinate bench as well as the fact that the assessee company is a captive service provider taking minimum risk

having no intangibles cannot be compared with WIPRO which is having diversified business, ownership of significant intangibles and huge expenditure on R&D etc. So, we hereby order to exclude this company from the final list of comparables." [Emphasis supplied]

35.3 In view of the vast difference in the operations/ functions of this company and that of the assessee and placing reliance on the Delhi Tribunal's decision in H&S Software Development and Knowledge Management Centre Pvt. Ltd. (supra), we direct the Ld. AO/ TPO to exclude this company from the final list of the comparables.

36. The last grievance of the assessee is that the Ld. AO erred in not adjusting available unabsorbed depreciation against income from other source amounting to Rs. 97,27,864/- as per the provisions of section 32(2) of the Act read with section 72 of the Act. The Ld. AO has thus restricted the set off of brought forward losses and unabsorbed depreciation under section 72 of the Act to the extent of profits and gains from business.

36.1 The Ld. AR submitted before us that while allowing the brought forward loss and unabsorbed depreciation the Ld. AO did not consider the provisions of section 32(2) which carve out the exception that unabsorbed depreciation from business can be set off against any other source of income in the absence of business income and can be carried forward indefinitely.

36.2 The Ld. AR in support of its above contention relied on the following judgments :-

(i) Commissioner of Income Tax Chennai vs. SPEL Semi Conductor [Tax case (appeal) No. 2490 of 2006] wherein the Hon'ble High Court held as under :-

"6....However, what is contended by the Revenue is that Section 72(2) controls the operation of Section 32(2) to have the set off of unabsorbed depreciation against the income from other sources. We do not agree

with this line of reasoning. What is spoken to under Section 72(2) is as regards set off of business loss as against the income from profits and gains of business or profession and if there is loss as well as unabsorbed depreciation, the set off shall be first on the business loss as against the business income and then on unabsorbed depreciation. What is spoken to under Section 32(2) is as regards set off of unabsorbed depreciation as per clause (ii) of sub section (1) and when the unabsorbed depreciation could not be set off as against the income from business or profession by reason of there being no income available under the said heads and where there is income from other sources, effect must be given to Section 32(2) of the Act for that assessment year."

(ii) Deputy Commissioner of Income-tax Ernakulam vs. Akay Flavours & Aromatics (P.) Ltd. [ITA No. 930 (Coch.) of 2008 & Co. No. 07 (Coch.) of 2009] wherein the Hon'ble ITAT held as under:

"9....... A combined reading of the relevant provisions of law and the applicable decisions of the Hon'ble Courts, I have no hesitation to hold that the unabsorbed depreciation would be set off with business income or under any other head of income including "income from other sources" and accordingly the question referred to him is answered in favour of the assessee and against the revenue."

36.3 The Ld. AR therefore submitted that this issue may be remanded back to the file of the Ld. AO to allow the set off of unabsorbed depreciation against income from other source as per law. The Ld. DR had no objections to the above submissions of the Ld. AR.

36.4 We have carefully considered the submissions of the Ld. AR, perused the records and the judicial precedents relied upon by the Ld. AR. We find merit in the contention of the assessee. Accordingly, we remand this issue to the file of the Ld. AO to verify the claim of the assesee and allow the set-off of unabsorbed depreciation in accordance with law after giving reasonable opportunity of being heard to the assessee.

37. In the result, the appeal of the assesee is treated as allowed for statistical purposes.

Order pronounced in the open court on 31st May, 2022.

sd/-	sd/-
(R.K. PANDA)	**(ASTHA CHANDRA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 31/05/2022

Veena

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

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	