IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

ITA No.2386/Hyd/2018		
Assessment Year: 2014-15		
Facebook India Online Services Private Limited, 12th Floor, Building No.20, Unit 1203 & 1204, Hitech City, Madhapaur, Hyderabad. PAN : AABCF5150G.	Vs.	The Deputy Commissioner of Income Tax, Circle – 17(1), Hyderabad.
(Appellant)		(Respondent)
Assessee by:	Shri Dhanesh Bafna & Chandni Shah	
Revenue by:	Shri Rajendra Kumar – CIT-DR	
Date of hearing:	20.07.2022	
Date of pronouncement:	19.09.2022	

O R D E R

Per Laliet Kumar, J.M.

The appeal of the assessee for A.Y. 2014-15 arises from the order of Deputy Commissioner of Income Tax, Circle 17(1), Hyderabad dated 31.10.2018 involving proceedings under section 143(3) r.w.s. 92CA(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short, "the Act") raising the following grounds :

“Transfer pricing grounds - IT enabled services segment

1. On the facts and in the circumstances of the case and in law, the Learned Dispute Resolution Panel ('Ld. DRP') erred in upholding the action of the Ld. AO / Transfer Pricing Officer ('Ld. TPO') in making a transfer pricing adjustment of Rs. 11,81,52,927 to the total income pertaining to the international transaction of provision of IT enabled services to the associated enterprise.

2. On the facts and in the circumstances of the case and in law, Ld. AO / DRP / TPO erred in disregarding the separate transfer pricing benchmarking for IT enabled services and business support services segments maintained by the Appellant and aggregating the said segments for benchmarking the international transaction of provision of IT enabled services.

3· On the facts and in the circumstances of the case and in law, Ld. AO / DRP / TPO erred in:

a. rejecting the transfer pricing study which was maintained in good faith and with due diligence;

b. rejecting the search process followed by the Appellant for each segment and carrying out fresh comparability analysis for determining the Arm's Length Price of the IT enabled services segment as the only segment;

c. rejecting the use of multiple year data and applying only single year data for comparability analysis which were not available at the time of preparation of transfer pricing study; and

d. rejecting/ modifying certain filters as applied by the Appellant in selection of the comparable companies at the time ofTP documentation and applying certain additional filters while undertaking comparability analysis.

4· On the facts and in the circumstances of the case and in law, Ld. AO / DRP/TPO erred in including the following companies in the comparable set which are not comparable to the Appellant's functions, asset base and risk profile in the IT enabled services segment:

- *Infosys BPO Limited*

- *Microland Limited*

- *Eclerx Services Limited*

• Crossdomain Solutions Private Limited

• MPS Limited

5. On the facts and in the circumstances of the case and in law, Ld. AO / DRP / TPO erred in excluding following companies in the comparable set which are comparable to the Appellant's

functions, asset base and risk profile in the IT enabled services segment:

• Informed Technologies India Limited

• Allsec Technologies Limited

• Caliber Point Business Solutions Limited

• Datamatics Financial Services Limited

• Jindal Intellicom Limited

• R Systems International Limited

• Ace BPO Services Private Limited

• Hartron Communications Limited (Seg)

6. On the facts and circumstances of the case and in law, the Ld. AO /DRP / TPO erred in:

a. not treating provision for doubtful debts as part of operating cost while computing the operating mark-up on total cost of the comparable companies and not treating provision written back as part of operating income while computing the operating revenue of the comparable companies; and

b. considering miscellaneous income as part of operating income while computing the operating mark up on total cost of the comparable companies.

7. On the facts and in the circumstances of the case and in law, Ld. AO / DRP / TPO erred in:

a. not granting working capital adjustment; and *b. not granting risk adjustment.*

It is therefore prayed that the Appellant's international transactions be held to satisfy the arm's length principle and the Ld. AO be directed to delete the aforesaid transfer pricing adjustment.

Corporate tax ground :

8. On the fact and in the circumstance of the case and in law, the Ld. AO erred in upholding the action of the Ld. AO in adding income of Rs. 10,10,372 to the total income as appearing in Form 26AS, disregarding the fact that such income does not belong to the Appellant and no credit of taxes on such income was claimed by the Appellant.

It is therefore prayed that the Ld. AO be directed to delete the aforesaid addition of Rs.10,10,372.

9. On the facts and in the circumstances of the case and in law, the Ld. AO erred in initiating the penalty proceedings under Section 271(1)(C) of the Act.

It is prayed that the Ld. AO be directed to drop the penalty proceedings initiated u/s 271(1)(C) of the Act."

2. The brief facts of the case are that assessee company is engaged in the business of Service Sector, IT Enabled Services and BPO Providers, back office support services to its associated enterprise (`ITeS'). The assessee company filed its return of income for A.Y. 2014-15 on 25.11.2014 declaring total income of Rs.6,65,62,890/- and a book profit of Rs.15,40,31,493/-. The return of income was processed u/s 143(1) of the Act and the case was selected for scrutiny under CASS and required notices along with a questionnaire were issued to the assessee calling for information. The Asst. Commissioner of Income Tax, Circle – 17(1), Hyderabad has referred the assessee company u/s 92CA(1) of the Act for determination of Arm's Length Price in respect of the international transactions for the financial year 2013-14.

2.1 During F.Y 2013-14, assessee had entered into various international transactions with its AE. The assessee had received Rs.70,62,54,006/- for providing Information Technology enabled services and Rs.27,03,44,180/- for providing business support services. The assessee had conducted TP study for ITeS after applying certain filters and has short listed 11 comparables, with arithmetical mean PLI (OP/OC) as 9.70% as against 18.60% PLI of assessee. Similarly, for business support services assessee had short listed 10 comparable with PLI of 4.99% as against the PLI of 19.19% of assessee. As per audited statements of account, assessee company has earned an operating margin (OP/OC) of **18.76%** at the entity level .

2.2 After going through TP documents of the assessee, TPO had rejected the TP study of assessee and had given show cause notice to the assessee dated 20.10.2017 as he had found that transactions were not at arm's length. Thereafter, Transfer Pricing Officer (TPO) carried out a fresh search for appropriate comparable companies and also applied additional/modified filters for the selection of comparable companies.

2.3 After perusal of reply of assessee company and after applying margins of the comparables to the financials, arm’s length price at Rs.109,47,51,113/- and the shortfall of Rs.11,81,52,927/- was treated as adjustment u/s 92CA of the Act and the total income was enhanced as per 92CA(3) of the Act.

Particulars	**Appellant's margin as per TPSR**	**ALP Margin as per TPO TPO**
Operating Income	70,62,54,005/-	1,09,47,51,113/-
Operating Cost	59,54,95,073/-	82,23,17,369/-
Operating Profit (Op. Income — Op. Cost)	11,07,58,932/-	27,24,33,744/-
OP. Profit/Op. Cost (OP/TC)	18.60%	33.13%

3. In respect of receivables, it was seen that receivables had been realized in time as per the credit period provided in the intercompany agreement, and the same was accepted. Subsequently, the Assessing Officer, by incorporating the order of TPO, passed draft assessment order u/s 143(3) r.w.s. 92CA(3) of the Act on 21.12.2017 proposing an addition of Rs.11,81,52,927/- on account of transfer pricing adjustment considering entity level margins of the assessee company i.e. including assessee company's business support services segment also, which is separately benchmarked by the assessee company in its TP Study.

4. Against the draft assessment order dt.22.12.2017, assessee company filed objections before DRP, Bengaluru on 19.01.2018, who issued directions dt.05.09.2018. Later, the TPO, in compliance of DRP directions, passed order dt.25.10.2018 revising the transfer pricing adjustments. During the course of scrutiny

proceedings u/s 143(3) r.w.s. 92CA(3) of the Act, an amount of Rs.10,10,327/- was treated as undisclosed income and added to the returned income. Though, assessee raised an objection for the same but failed to produce the necessary evidence before the DRP in this regard. The DRP has upheld the companies selected by the TPO in his final set of comparables and the same are listed below :

Particulars
1. Microgenetics Systems Ltd
2. Infosys'BP0 Ltd
3. Microland Ltd.
4. Eclerx Services Ltd
5. BNR Udyog Ltd.
6. Crossdomain Solutions Private Limited
7. MPS Limited

5. Feeling aggrieved by the order passed by the Assessing Officer / DRP, the assessee is in now in appeal before us. At the outset, the ld.AR for the assessee has submitted that the assessee is seeking the exclusion of the 5 comparable out of total 7 comparable selected by the lower authority namely, **Infosys BPO Ltd, Microland, Eclerx Services Limited, Crossdomain and MPS Ltd** and seeking the inclusion of Allsec Technologies Limited. With respect to the Transfer Pricing additions, no other grounds are pressed by the ld.AR.

6. We are considering the exclusion / inclusion of the above said comparable companies in the following paragraphs :

I. <u>ECLERX SERVICES LIMITED.</u>

7. The ld.AR for the assessee has submitted that Eclerx Services Limited is required to be excluded from the list of comparables as OP/OC of this company was 70.75% as against the OP/OC of the assessee of 18.60%. Our attention was drawn to page 28 of the order passed by the TPO, wherein the objections of the assessee with respect to Eclerx Services Limited were dealt by the officer in the following manner :

> *"It can be seen from above that the assessee is not merely acting as BPO but also providing some KPO functions like portfolio management analytics and all these services are included in the definition of IteS given in the Rule 10TA of Income Tax Rules. Hence, the objection of the taxpayer is not acceptable. Therefore, it is functionally comparable to the assessee."*

8. Before us, the ld.AR has reproduced the same submissions raised before the TPO / DRP. The submissions made by the assessee before the TPO read as under :

1. **Functionally not comparable**

eClerx is an India-based knowledge and business process outsourcing company. It provides operational support, data management and analytics solutions to companies, including financial services firms, online retail and distributors, interactive media, luxury brands and entertainment, high tech and industrial manufacturing, travel and leisure and software vendors. It further, provides financial solutions, such as middle office services, back office services, finance and accounting, ancillary services and asset class coverage. Its digital services include creative production, computer generated images, digital production, analytics and insights, and FLUiiD4. Its cable and telecom services and solutions include technical operations and dispatch, customer interaction monitoring and analytics, end user chat support, support services and reporting and analytics.[12]

Knowledge Process Outsourcing (KPO) service provider

Further, on perusing the annual report of Eclerx, it has come to light that Eclerx cannot be considered as comparable since it is involved in the provision of KPO services in addition to Business Process Outsourcing (BPO) services. The following extracts from the Annual Report of Eclerx for FY 2013-14 and the company's website reflect the same:

About eClerx

WHO WE ARE

eClerx is a specialist Knowledge and Business Process Outsourcing ("KPO" / "BPO") company providing operational support, data management, and analytics solutions to over 50 Global Fortune 1000 clients, including many of the world's leading High Tech, and Industrial Manufacturing, Financial Services, E-Commerce, Retail and Distribution, Broadband, Cable & Telco, Interactive Media and Entertainment, Travel and Leisure, and Software Vendor companies. Incorporated in 2000, eClerx is India's first publicly listed KPO company and is today traded on both the BSE Ltd. and National Stock Exchange of India Ltd.

9. Further it was submitted that this company / comparable had been excluded by the Tribunal holding being functionally dissimilar and our attention was drawn to the following decisions :

1) *Infor India Pvt. Ltd. Vs. DCIT (2019) 109 taxmann.com.*
2) *Hyundai Motor India Engineering Pvt. Ltd. Vs. ACIT (2009) 109 taxmann.com 429.*
3) *Rampgreen Solutions Pvt. Ltd Vs. CIT (2015) 60 taxmann.com 355.*
4) *PCIT Vs. PTC Software India Pvt. Ltd (2019) 101 taxmann.com 117 (Bom High Court)*
5) *PCIT Vs. BNY Mellon International Operations (India) Pvt. Ltd. (2018) taxmann.com 363.*

6) *Agilent Technologies Pvt. Ltd. Vs. ACIT (ITA No.6047/Del/2012)*
7) *NTT Data Global Delivery Services Ltd. Vs. ITO (ITA No.46/Del/2013).*

10. On the other hand, ld.DR for the Revenue had submitted that Eclerx Services Limited is into ITeS services as held by the various Tribunals. More particularly, our attention was drawn to the decision of the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd Vs. CIT (2015) 60 taxmann.com 355 and Hyundai Motor India Engineering Pvt. Ltd. Vs. ACIT (2009) 109 taxmann.com 429 (both relied upon by the assessee to emphasize with respect to ITeS (Information Technology enabled Services), as defined under Rule 10TA of the Safe Harbour Rule is to the following effect :

> *"In this regard, reference is drawn from Rule 10TA of the Rules - Safe Harbor Rules for International Transaction - which define KPO service as:*
>
> *'the following business process outsourcing services provided mainly with the assistance or use of information technology requiring application of knowledge and advanced analytical and technical skills, namely:-*
>
> *(i) Geographic information system; (ii) Human resources services;*
> *(iii) Engineering and design services;*
> *(iv) Animation or content development and management; (v) Business' analytics;*
> *(vi) Financial analytics; or*
> *(vii) Market research*
>
> *but does not include any research and development services whether or not in the nature of contract research and development services'*
>
> *It can be clearly identified from the extract of the annual report of Eclerx below that it is involved in the functions of financial services analytics and sales and marketing services which clearly fall within the ambit of KPO."*

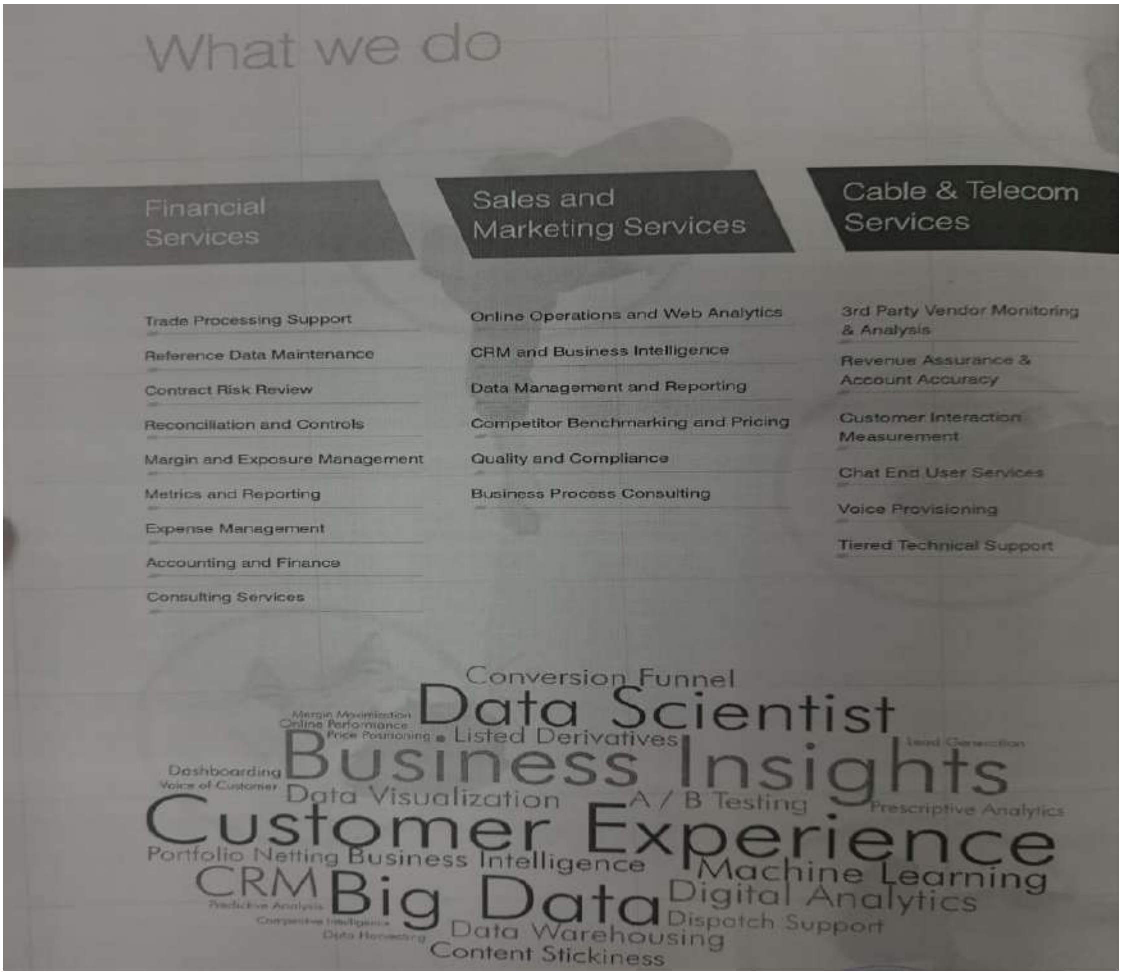
11. It was submitted that as per the Safe Harbour Rule, the services rendered by the assessee would fall within the broader spectrum of KPO/ ITeS as defined under the Safe Harbour Rule. He has drawn our attention to the functions performed by the assessee during the financial year 2013-14 at page 517 of the paper book, which is mentioned as under :

> *"FB India provides IT enabled services and business support services to its associated enterprise on a cost plus basis. The detailed note on the IT enabled services as well as the business support services have been provided vide letters dated September, 21, 2017, October, 18, 2017 and October 23, 2017 respectively. FB India has been characterized as routine contract IT enabled service provider and contract business support service provider."*

11.1. Ld.DR has submitted that the assessee itself had charactarized as routine contract (ITeS) and contract business service provider. He submitted that if the above profile of the assessee is read with Schedule I of the Support Service Agreement and Business Support Agreement, then it is clear that assessee is not into low end service provider rather it will squarely fall within the realm of Knowledge processing /ITeS as per broader guidelines provided by the CBDT while providing the Safe Harbour Rule.

12. We have heard the rival contentions and perused the material available on record. The profile of the Eclerx Services Limited for the A.Y. 2014-15 has been captured by the co-ordinate Bench of the Tribunal in the case of Hyundai Motor India Engineering Pvt. Ltd (supra) and the co-ordinate Bench of the Tribunal on page 19 at para 17 has held as under :

"17. As far as E-Clerx Ltd is concerned, according to its Annual Report, it performs the following services:



12.1 If we compare the profile and services rendered by the assessee with Eclerx Services Limited, then it is clear that both had provided similar services and both will fall within the same broad spectrum of IteS Services. It is a matter of fact that Eclerx Services Limited and assessee are rendering services with the help of trained workforce and are also into sales and marketing services providing sales at the space usage and also providing various other specialized services.

13. For the purpose of ascertaining the comparability of a company as per rule 10B, it is to be seen whether company is performing similar functions as that of the assessee or not. From the services rendered (service agreement and business agreement part of Paper Book of the assessee and services mentioned hereinabove by Eclerx Services Limited, it is clear that both are falling in the same category. Hence, in our view, both are comparable. With respect to the objection of the assessee that there was inorganic growth and profit, during the year, in our view, this objection of ld.DR is devoid of any merit and is not sustainable for the simple reason that the Eclerx Services Limited has acquired the shareholding in Agilyst w.e.f. 05.04.2012, which had not taken place during the year and hence relevant and further assessee has failed to demonstrate how the acquisition of the Agilyst from 05.04.2012 had affected the profitability of the assessee for F.Y. 2013-14 (Relevant to A.Y. 2014-15). Law is fairly settled that no company can be excluded on the basis of high or low profit earned by it, if it is otherwise comparable with the assessee company on the yardstick of FAR analysis. Nonetheless, the Eclerx Services Limited has only noticed a growth of 48.98% during the assessment year under consideration and merely because it has higher growth in comparison to the assessee is no reason to discard this comparable. For the above said purposes, we may fruitfully rely upon the order of DRP wherein the other decisions were referred at 5.1.3.6 on Pages 14 and 15.

"5.1.3.6 Again in the case of Trilogy E-Business Software India Private Limited Vs. DCIT (2013) 29 taxmann.com 310 the Bangalore Tribunal held that there is no bar to considering companies with either abnormal profits or abnormal losses as comparable to tested parties as long as they are functionally comparable; and it is for the taxpayer to demonstrate the existence of any abnormal factors that would have caused the high profit margin. Similar views followed in the case of Autodesk (India) Pvt. Ltd. Vs, DCIT in ITA No.1108/Bang/2010 and Yodlee Infotech Pvt. Ltd. Vs. ITO (2013) 31 taxmann.com 230 (ITAT BNG). In the case of ITO Vs. Next India Pvt. Ltd TS-722-ITAT-2012-Bng TP, the Hon'ble ITAT Bangalore upheld the company with profit margin of 40% holding that in ITES sector this would not constitute extraordinary or super profits."

14. Further, the argument of the assessee that the business mode of Eclerx Services Limited was not matching with that of the assessee as Eclerx Services Limited as this company is providing onsite services to its consumers and therefore, this company should be excluded from the list of comparable, is also required to be rejected, as by providing onsite services, the company would be incurring significant onsite expenditure, which in turn resulted into increase in cost of services and reduction of profit of the company. In that view, this comparable could not be excluded, as this company/comparable is otherwise comparable on the parameters laid down for FAR analysis. In this connection, assessee placed reliance on the decision of ITAT Hyderabad Bench in the case of Infor India Pvt. Ltd. Vs. DCIT wherein at Paras 54 – 56, it was held as under :

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

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

56. Having regard to the rival contentions and the material on record, we find that this company has been held to be a KPO service provider whereas the assessee has been categorised as a BPO by the TPO & DRP. Having held so, the said company cannot be treated as a comparable to the assessee. Further, in the assessee's own case for the earlier A.Y (to which both of us are signatories), we have held that this company cannot be a ITA Nos 161 and 2307 of 2018 Infor India P Ltd Hyderabad comparable to the assessee. Since there is no change in the activities of the said company, we do not find any reason to take any other view and therefore, we direct the AO/TPO to exclude this company from the final list of comparables."

15. If we look into the profile of Infor India Pvt. Ltd., then it is clear that the Tribunal has held it to be a BPO. Whereas in the present case, assessee is a routine contract IT-Enabled service provider and contract business support service provider. The reason for excluding the Eclerx services limited from the list of comparable in the case of Infor (supra) will not hold good for excluding it in the case of assessee, as profile of the assessee cannot be compared with BPO service provider, namely, Infor India Pvt. Ltd. Similarly, if we look into the case of Hyundai Motor India Engineering Pvt. Ltd (supra) in para 32, the Tribunal has held as under :

"32. Thus, on a comparison of the functions of the assessee and other companies reproduced above, we find that E-Clerx Ltd is not only into ITeS services, but is also rendering KPO services and therefore, it cannot be compared to the assessee. In the decisions of the ITAT where it has been held to be a comparable to the assessee, we find that ITAT has held that the services provided by the assessee company and E-Clerx Ltd are similar and that the extra-ordinary event of winding up of the subsidiary company has not been proved to have any bearing on the assessee's profits and that super normal profit may not be a basis for exclusion of

this company. However, we find that the Coordinate Benches of the Tribunal nor the Revenue Officers have not brought out functions which are similar to both the companies. The decision of the ITAT for year AY 2011-12 was followed in the AY 2012-13. Therefore, we are of the opinion that these decisions cannot exactly be binding on this Tribunal for the relevant AY, where the AO/TPO have considered the assessee as an ITeS service provider and not as a KPO. Further, as pointed out by the ld Counsel for the assessee, The TPO has 21 himself has not taken E-Clerx Ltd as a comparable for the AY 2013-14. Therefore, we direct the TPO/AO to exclude this company from the final list of comparables to the assessee."

16. The Tribunal in the case of Hyundai Motor India Engineering Pvt. Ltd (supra) has held that Hyundai Motor India Engineering Pvt. Ltd (supra) was into low end ITeS service provider and therefore, it cannot be compared with the Eclerx Services Limited. However, we had pointed out that the Tribunal in the case of Hyundai Motor India Engineering Pvt. Ltd (supra) for A.Y. 2011-12 and 2012-13 had upheld the inclusion of Eclerx Services Limited as a comparable. In our view, the profile of the assessee in the said case, as analyzed by the Tribunal for that year, does not match its functions. However, in the present case, the profile of the assessee matches with the profile of Eclerx Services Limited. Therefore, we have no hesitation to conclude that the Eclerx Services Limited is functionally comparable with that of the assessee. In this regard, assessee has relied upon the decision in the case of Rampgreen Solutions Pvt. Ltd (supra) and the decision of the Hon'ble Bombay High Court in the case of PCIT Vs. BNY Mellon International Operations (India) Pvt. Ltd. (2018) taxmann.com 363. In our respectful understanding, all these case laws are not applicable to the facts of the present case, as all

the decisions in the said cases pertain to A.Ys. 2008-09 and 2009-10 only. As mentioned hereinabove, the Tribunal in the case of Hyundai Motor India Engineering Pvt. Ltd (supra) had categorically mentioned in para 32 that Eclerx Services Limited is a good comparable with Hyundai Motor India Engineering Pvt. Ltd (supra). However, for the reasons mentioned, the Tribunal has excluded the same for A.Y. 2014-15. In our view, once we have analyzed in details the functional profile of Eclerx Services Limited and compared with assessee then we are left with no doubt that the functions performed by the Eclerx Services Limited are similar to that of assessee. Therefore, both the lower authorities have rightly upheld the inclusion of Eclerx Services Limited with the assessee. Therefore, we reject the contention of the assessee that Eclerx Services Limited cannot be a comparable.

II. MICROLAND LIMITED (MICROLAND)

17. In this regard, the contention of the assessee before the lower authorities was that the company was engaged into business segments consisting of infrastructure management services and IT enabled services. Ld.AR submitted that segmental information of both i.e., infrastructural management services and IT enabled services were required, and in the absence thereof this company can not be compared with the assessee. He has drawn our attention to the objection raised by the assessee on page 574 of the paper book, wherein it was mentioned as under :

"3.2.5. Segmental Reporting.

The company is currently organized by business segments, comprising of infrastructure management services and IT enabled services, business segments have been determined based on the system of internal financial reporting to the board of directors and are considered to be primary segments. The secondary segment is identified based on the geographic location of the customer.

Segment revenue, segment results, segment assets and segment liabilities include the respective amounts identifiable to each of the segment. Segment revenue resulting from business with other business segments are on the basis of market determined prices and common costs are apportioned on a reasonable basis.

The segment information for the year ended March 31, 2014 and 2013 is as follows :

Particulars	***Infrastructure Management Services***		***IT enabled Services***		***Total***	
	2014	***2013***	***2014***	***2013***	***2014***	***2013***
Revenues	*32,512*	*22,354*	*1959*	*1884*	*34471*	*24,238*
Operating expenses	*20880*	*16087*	*1392*	*1566*	*22272*	*17653*
Allocated expenses	*1149*	*904*	*69*	*76*	*1218*	*980*
Unallocable expenses	-	--	--	--	*6001*	*3973*
Segmental operative income.	*10483*	*5363*	*498*	*242*	*4980*	*1633*

18. Per contra, the ld.DR has submitted that from Annual Report of the Microland, it is seen that the assessee has categorized the infrastructural management and IT enabled services under IT enabled services, therefore, merely providing classification for the purpose of business understanding, it was not wise to exclude this company merely on that basis. Hence, both the lower authorities had rightly retained it.

19. We have heard the rival contentions of both the parties and perused the material available on record. From the perusal of Page 841 of the paper book (financials of the Microland) under the head Revenue Recognition, it is clearly mentioned that this company only derives its revenue from Information Technology Services. Microland has divided its Information Technology Services into two parts namely, infrastructural management and IT enabled services. However, the fact remains that both were treated as Information Technology Services and it is further clear from para 2.6 reproduced hereunder :

> *"2.6 Revenue recognition*
>
> *Services*
>
> *The company derives* ***its revenues primarily from Information Technology (IT) services.*** *Revenue from IT services on time-and material basis is recognized as the related services are rendered.*
>
> *Revenue from fixed price contracts is recognized using the proportionate completion method, which is determined by relating the actual project cost of work performed to date to the estimated total project cost for each contract. Provision for estimated losses, if any, on incomplete contracts are recorded in the period in which such losses become probable based on the current contract estimates.*
>
> *Revenue from device management is recognized ratably over the period of the contract and is recognized on basis of devises serviced at the rate applicable for such respective devices.*
>
> *Revenue from maintenance contract is recognized ratably over the period of the maintenance contract and is recognized on a straight-line basis over the specified period.*
>
> *Unbilled revenue, disclosed in the financial statements under other current assets, represents earnings in excess of billings as at the balance sheet date. Unearned income, disclosed on the financial statements under other current liabilities, represents billings in excess of earnings.*
>
> *Amount received towards services are reported as advances from customers under current liabilities until all the conditions of revenue recognition are met.*

> *Provision for discounts is recognized on an accrual basis in accordance with contractual terms of agreements with customers. Revenue are stated net of discount.*
>
> *Other Income*
>
> *Interest is recognized using the time-proportion method, based on rates implicit in the transaction. Dividend income is recognized when the company's right to receive dividend is established."*

20. Services rendered by Microland with respect to infrastructural management services were in the nature of IteS, albeit these pertain to infrastructural management, therefore, these infrastructural management services cannot be excluded being predominantly in the nature of IT enabled services.

21. From the perusal of various cases, it is clear that if a company is using the knowledge and advanced analytical skills while using the information technology for the purpose of catering to geographical information, human resources and engineering and design services etc., then it will be termed as KPO/ITeS. If we closely examine the services rendered by Microland, then it is clear that this company is providing only the IT enabled services in the infrastructural management services (geographical information and financial analytics), which in our view, falls within the IT enabled services. Therefore, the services rendered by Microland are similar to that of assessee which is also into the processing of various information as clear from the scope of customer support services and business support agreement. Therefore, both the assessee as well as Microland falls under same category. Hence, we find no error in the conclusion drawn by the lower authorities. Accordingly, the contention of the assessee to

exclude the Microland is rejected. However, we may point out that there is a distinction between a company having verticals of ITeS and a company having various verticals including one as ITeS vertical. Admittedly, assessee is also having two ITeS verticals /segments namely, business support services and IT enabled services. Though, both have been clubbed together by the TPO / DRP under one head "ITeS" being inherently of same nature, however, the same was not objected to by assessee before us. Similarly, merely dividing one set (IteS) into two sub-sets (Infrastructural management services and IT enabled services) will not make the company as non ITeS. In view of the above, the contention of the assessee that Microland is not a comparable company is rejected.

III. <u>CROSSDOMAIN SOLUTIONS PRIVATE LIMITED.</u>

22. In this regard, the assessee has drawn our attention to the order of the TPO wherein the TPO held that this company is primarily into IT enabled services in insurance, healthcare, HR and accounting domains which are included in the design of ITeS under Rule 10TA of the I.T Rules. However, the assessee has submitted that besides this company being the KPO, this company is also having high profitability and therefore, this company cannot be considered as a comparable. Our attention was drawn

to the decision of the Tribunal in the case of Infor India Pvt. Ltd. Vs. DCIT (2019) 109 taxmann.com (supra).

23. Per contra, the ld.DR had submitted that the financial planning of both the assessee as well as Crossdomain are identical and therefore, this company should not be excluded from the list of comparables. Ld.DR further submitted that the contention of Ld.AR that the financial information of this company were not available in the public domain is not correct. Lastly, it was submitted that the decision in the case of Infor India Pvt. Ltd. Vs. DCIT (supra) was distinguishable on facts and for that purpose, he has drawn our attention to Para 58 of said decision, wherein it was held as under :

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

Based on above finding of the Tribunal, Ld.DR submitted that the facts of case of Infor India Pvt. Ltd. (supra) is not applicable to the present facts of the case, as Infor India Pvt. Ltd. was a BPO service provider, whereas the assessee before us is a high-end IT-Enabled service provider.

24. We have heard the rival submissions and perused the material on record. If we go through page 23 of the TPO order where, TPO referred to the Annual Report of Crossdomain, then it can safely be inferred that financials of Cross domain were available in public domain, however, despite the objection of the ld.AR about insufficient / non-availability of financial information of this company, neither the TPO nor the ld.DR had proved to the contrary. Contrary to the submission of Ld.AR that no financials are available in public domain, the assessee has mentioned that OP/OC of this company was 20.07%. With the statement of the assessee, it can be presumed that there exists the financial information of this company in the public domain, however, both Ld.AR and Ld.DR had failed to bring the same to our notice. In this regard, we may point out that all the companies, as per Companies Act and Income Tax are bound to maintain and file their, respective financials including balance sheets, annual reports etc., delineating functions performed by it and revenue earned thereof before competent authority. Further, these public listed companies are also required to publish their quarterly and annual results in terms of listing requirements of SEBI Laws. Therefore, the contention of Ld.AR that there was insufficient financial information including Balance Sheet in the public domain does not inspire confidence. Hence, this comparable cannot be excluded merely on the basis of this objection raised by the assessee. At this stage, we may point out that the decision of Hon'ble Bombay High Court relied upon by the assessee i.e., PCIT Vs. Aptara Technology Pvt. Ltd. (2018) 92 taxmann.com 240

was for A.Y. 2008-09 and therefore, the same cannot be applied to the current assessment year, as availability of financial information varies from year to year. Suffice to say, in the case of Aptara Technology Pvt. Ltd (supra), the Hon'ble Bombay High Court has merely upheld the decision of the Tribunal in the A.Y. 2008-09 for the reasons mentioned as under :

> *"(a) The impugned order of the Tribunal excluded M/s. Crossdomain Solutions Ltd. from the list of comparable. This after having rendered finding of fact that it was engaged in distinct activities such as payroll activity, 'Knowledge Process Outsourcing' (KPO) service, development of products and routine IT services. Further, the impugned order indicates that differences between the E-learning service and Knowledge Process Outsourcing' which would clearly establish that the activities are not comparable. The impugned order also records that M/s. Crossdomain Solutions Ltd. was engaged in payroll outsourcing on a substantive scale. Besides, there was no bifurcation available of profits earned individually on the various diversified activities being carried by M/s. Crossdomain Solutions Ltd. Thus, it held that comparison on an entity level of M/s. Crossdomain Solutions Ltd with the Respondent's AE transaction is not correct.*
>
> *(b) The Revenue has not been able to show that the finding of the fact arrived at by the Tribunal is perverse*
>
> *(c) In the above view, there is no reason to interfere with the above finding of the Tribunal in respect of Crossdomain Solutions Ltd."*

25. In our view, each assessment year is a different assessment year and facts of each year are different. Another contention of the assessee was that the functions performed by Crossdomain were different to the functions performed by it. In fact, under the TNMM method, a broad comparison / estimation is required to be undertaken by the authorities below. Merely based on some dissimilarities, comparable company i.e., Crossdomain can not be excluded from the list of comparables. As

mentioned hereinabove, the assessee as well as Crossdomain are high-end IT enabled services provider.

However as the financials of the Crossdomain for the assessment year were not been examined by the lower authorities, therefore, we deem it appropriate to remand the issue of exclusion / inclusion of this company to the file of TPO for passing appropriate order after supplying the copy of financials to the assessee in accordance with the law, including examining the officials of this company if deemed necessary. Accordingly, this ground is allowed for statistical purposes.

IV. <u>MPS LIMITED.</u>

26. In this regard, the ld.AR for the assessee has submitted that this company is required to be excluded from the list of comparables as the company provides end-to-end print and digital publishing solutions to its partners across the entire value chain from content production, enhancement and transformation to delivery and customer support, making it a trusted partner to the biggest publishers in the world. Ld.AR for the assessee further submitted that the company is also engaged in website designing, development and website hosting. He had drawn our attention to page 1041 of the paper book to show that this company is functionally dissimilar to that of assessee company. It was submitted that this company is required to be excluded from the list of comparables. In support of his contentions, he relied upon the following decisions :

1) *Emerson Electric Company (India) Pvt. Ltd. (Mumbai Tribunal) (ITA No.6098 & 531/Mum/2018) (Assessment Year 2014-15)*

2) *Symantec Software India Pvt. Ltd Vs. DCIT (Pune Trib) ITA No.1824/Pun/2018) (Assessment Year 2014-15)*

3) *FIS Solutions Software India Pvt. Ltd. Vs. ITO (Pune Trib) (ITA No.1756/Pun/2018) (Assessment Year 2014-15)*

27. On the other hand, the ld.DR relied upon the order passed by lower authorities. Our attention was drawn to the remarks of the TPO, which are to the following effect :

"TPO's Remarks:

It is objection of the taxpayer that MPS Ltd is functionally different. Business process outsourcing (BPO) is a subset of outsourcing that involves the contracting of the operations and responsibilities of a specific business process to a third-party service provider. Often the business processes are information technology-based, and are referred to as ITES-BPO, where ITES stands for Information Technology Enabled Service. MPS Ltd is providing service to publishing houses located in North America by way of dig!tization of books, content design, helping in designing of books, prepress etc by using its manforce like any other BPO. Indian BPOs [bUsiness process outsourcers] offer a range of services for STM publishers, ranging from data conversion, digitization, and copy-editing, to complete project management. MPS Ltd is one among them. Therefore argument of the assessee that MPS is functionally different can't be accepted.

It is argument of assessee that MPS Ltd has developed automated solutions such as Digi Track, MPS DIGI Comp, Automated solutions. Digi Track is nothing but nomenclature given by MPS Limited for stepwise procedure followed by the company in content creation. Digi Comp is nothing but customized templates for page layouts provided by company in case of books. These are the services expected of service provider.

It primarily consists of software used for provision of software solutions. Every company uses software including the operating system, office tools, development tools, testing tools, etc., for their routine operations. It is not any unique intangible like trade secret or process or brand name whose benefits are exclusively available to

MPS Ltd which will benefit its business to such a level that its scale of operations and profit margin become uncomparable. Hence, this argument of the assessee is not accepted.

Another objection of the taxpayer is that the company operates in single segment of outsourced publishing solutions and which is different from the assessee's business operation of providing IT Enabled services. As long as both companies operate in ITES segment it should not matter how many types of ITES services are provided by each company.

Further, the taxpayer argued that MPS Ltd witnessed extra ordinary increase in profits compared to last year. There was 65% increase in profit compared to last year. It appears factually incorrect. Verification of annual report of MPS Ltd shows that EBDTA % during Financial Year 2012-13 is 29.21%. For Financial Year 2013-14 it has increased to 35.29% which is not steep increase as there is increase of only 6%. In view of the above, the contentions of the taxpayer are rejected and this company is retained as comparable.

28. We have heard the rival contentions of the parties and perused the material available on record. The profile of MPS Limited and exclusion thereof have been discussed in the case of Emerson Electric Company (India) Pvt. Ltd. (Mumbai Tribunal) (ITA No.6098 & 531/Mum/2018) for A.Y. 2014-15 given in Para 7.1 of order, it was mentioned as under :

"7.1. The brief facts of this issue are that assessee is engaged in providing ITeS services for the in-house consumption of the AEs, primarily in the nature of database management, administration and help desk support services. In order to benchmark the international transactions of ITeS, TNMM was selected as the most appropriate method. The margin of the assessee under ITeS segment is determined as follows:

....

7.1.1.

The arithmetic mean of the margins of the 11 comparable companies selected by the assessee in TPSR is 13.85% and accordingly, it was concluded that the international transaction of ITeS were at arm's length.

7.2. The ld. TPO made a TP adjustment in ITeS division to the tune of Rs.6,03,56,767/- as under:-

….

7.3. The action of the ld. TPO was upheld by the ld. DRP.

8. Aggrieved, the assessee is in appeal before us.

9. We have heard rival submissions. We find that the ld. AR before us did not contest all the comparables of the assessee which were rejected by the ld. TPO. The ld. AR only prayed for exclusion of two of the comparables selected by the ld. TPO i.e., MPS Ltd., having margin of 48.56% and Excel Infoways Ltd., having margin of 12.10%. Now, let us examine as to whether the assessee is entitled for seeking exclusion of these two comparables individually.

9.1. Exclusion of MPS Limited We find from the annual report of MPS Ltd., for the year ending 31/03/2014, the said comparable provides end to end print and digital publishing solutions to its partners across the entire value chain from contained provision, enhancement and transformation to delivery and customer support, making it a trusted partner to the biggest publishers in the world. The Director's report under the heading "Management Discussion and Analysis" reflect that MPS Ltd., has developed end to end cloud based publishing platform, MPS Digicore, which addresses the need for an integrated work flow that publishers have started to ask for. As such, MPS Ltd., has a first mover advantage in exploiting the market and establishing it as a premier technology solutions provider for publishers. The same market forces have also created immense opportunities for MPS Digitrack, the production targeting system developed by MPS Ltd., and MPS Digicamp, automated composition. Similar other solutions are being developed at MPS Ltd., as research and development (R&D) continues based on the market requirement. The assessee stated before the ld. TPO that MPS Ltd., is functionally not comparable by stating various functions performed by MPS Ltd., as under:-

> *a) As per the Corporate information disclosed in the financial statements for the year ending 31/03/2013, MPS Ltd., the company is engaged in the business of providing publishing solutions viz., typesetting and data digitization services for overseas publishers. The company has a 100% Export Oriented Unit in Bengaluru, and units registered under the Software Technology Park of India (STPL) scheme that are located in Chennai, Delhi, Gurgaon and Dehradun. The Company also operates through its branch in United States of America. The company provides publishing services relating to typesetting of books and journals, composing of yellow page advertisements and catalogues, data coding, conversion, indexing, editing, copy*

> *editing, editorial services, software development, maintenance and support to global publishers.*
>
> *b) MPS Ltd. is engaged in developing of software projects such as Digicore and Digitrack. c) MPS Ltd. has incurred outsourcing costs which indicate that it follows different business model.*
>
> *d) From the annual report of the said comparable it is noted as under:- —*
>
> > *MPS Ltd., provides content creation production, transformation and technology services to global academic, scientific and educational publishers. The company has a team of more than 2,860 employees based in offices in Bengaluru, Chennai, Gurgaon, Noida and Dehradun in India and at Portland, Oregon, Orlando, Florida, Durham, North Carolina and Effingham, Ittinos in the United States. Established as an Indian subsidiary of Macmillan (Holdings)Ltd., in 1979, the company had evolved over its forty five year history to become one of the most experienced and dominant players in the publishing services outsourcing space.*

9.2. We find that the ld. TPO however did not appreciate the contentions of the assessee and held that this comparable is functionally comparable with that of the assessee in ITeS segment. The ld. DRP on perusal of the annual report of the MPS observed that the said comparable operates in only one segment of providing publishing solutions and it does not sell any software based services to its customers. The ld. DRP further observed that software forms part of its intangible assets and it is more of a tool to offer ITeS to customers.

9.3. From the perusal of the annual report for the year ended 31/03/2014 of the said comparable, we find from page 707 of the paper book that the said comparable had incurred outsourcing cost of Rs.1078.76 Crores which is included under the head "miscellaneous expenses" which goes to prove that it has got a different business model. From the various functions performed by MPS Ltd., we find that the said comparable is predominantly in the business of digital publishing which cannot be treated at par with ITeS which is the case of the assessee in ITeS segment. In this regard, we find that the reliance placed by the ld. AR on the Co-ordinate Bench decision of Bangalore Tribunal in the case of M/s. Google (India) Pvt. Ltd., vs. DCIT in ITA No.1368/Bang/2010 for A.Y.2006-07 dated 19/10/2012 is well founded wherein it was held as under:- —

> *16. As far as (4) Apex Knowledge Solutions Pvt. Ltd., is concerned, we find that the assessee had taken objections before the TPO that it is functionally different, as it is provides services such as E-publishing knowledge based services etc. But TPO has rejected the*

> *objection on the ground the assessee has not considered the verticals or functional lines during the search process conducted by it and, therefore, it is not proper to make any objection on this basis now. We are not able to agree with the finding of the TPO as confirmed by the DRP on this issue. Merely because, the assessee itself has not considered the said filter while making its TP study; it cannot be said that it cannot raise such an objection before the TPO. It is the TPO who has adopted this company as comparable. On such adoption, the assessee has every right to raise the objections as regards the functional differences between the assessee and comparable. It is the bounden duty of the TPO to consider the said objections in accordance with law. As brought out by the assessee, the assessee is in the TT enabled services, whereas the said company Apex Knowledge Salutation Pvt. Ltd., is in the business of E-publishing which cannot be 23 said to be in the same line of business. The functional differences are likely to affect the profit marking capacity of both the companies. In view of the same, we are of the opinion that this company is also to be excluded from the list of comparables.*

9.3. In view of the above, we hold that the comparable chosen by the ld. TPO, M/s. MPS Ltd., is functionally not comparable with that of the assessee and accordingly, we direct the ld. TPO to exclude the same from the list of comparables."

29. We observe that the co-ordinate Bench of Mumbai Tribunal in the case of Emerson Electric Company (supra) had examined the profile of Emerson (supra) with the profile of MPS Ltd and thereafter, the coordinate Bench had excluded this company as comparable. However, if we examine the functions performed by the assessee with MPS Limited, we find both fall in the same bandwidth of ITeS with minor difference. Both are into digital publishing of data, besides that assessee is also monitoring and enforcing its policy with the help of Artificial Intelligence and its specialized software designed for said purposes. In fact, the assessee is publishing information, advertisement, and messaging with the help of its unique software and technology, these

activities/ functions performed were very much akin to the activities of MPS Ltd.

30. In our view, even outsourcing of some of the work done by MPS Ltd will not affect the functions and profitability of MPS Ltd, for the reasons mentioned elsewhere. We are also of the opinion that MPS Ltd is not a product-based company as claimed by the assessee, as it is only developing software for its in-house consumption. Moreover, there is no inventory of the products in the accounts of MPS Ltd. There is no cavil that there is a stark difference between a company which is into the development of products and a company which is providing the services with the help of developing and designing its own products as that of assessee.

31. In case a company is into developing of product, then it will be reflected in its inventory / Balance - Sheet etc. But in this case, the inventory / Balance – Sheet of the company shows that there are no tangible / intangible products available with the assessee which shows that assessee has developed some products for the purposes of sale / marketing. As MPS Ltd is developing product or platform for effectively rendering its services, then it cannot be said to be a product-based company. MPS Digi Track and MPS Digi Comp are nothing but working tools of MPS Ltd., which are essential for rendering its services. In the light of the above, if we examine the functions performed by the assessee then

it is clear that the assessee is using various software products for marketing, designing, advertising, loading and uploading content, communication, and platforms for interactions with the user, advertiser etc. which are very similar to that of MPS Ltd. We are of the opinion that under the TNMM, the broad similarity is required to be ascertained while including the company in the list of comparables.

31.1. The other two judgments relied upon by the assessee i.e. Symantec Software India Pvt. Ltd Vs. DCIT (supra) and FIS Solutions Software India Pvt. Ltd. Vs. ITO (supra) are not applicable to the facts of the present case as the profile of the assessee is different to the said companies. Hence, we are of the opinion that MPS Ltd is a suitable comparable as it is functionally similar to that of the assessee. **Thus, the challenge for exclusion of this company is not sustainable, and we uphold the order of TPO / DRP.**

V. ALLSEC TECHNOLOGIES LIMITED.

32. With respect to the inclusion of Allsec Technologies Limited, ld.AR had submitted that the ld. TPO has wrongly excluded this company on account of the persistent loss-making company and the learned DRP has also not included this company on account that this company fails on export turnover.

33. The ld.DR relied upon the order of lower authorities.

34. We have heard the rival contentions of the parties and perused the material available on record. We have perused the order of the lower authority. TPO has not examined the functional profile of this company with that of the assessee and the TPO had merely rejected it on account of a persistent loss-making company. The paper book shows that the assessee has earned profit during the year under consideration (Page 1165 of the paper book) and further, this company also satisfies the export turnover filter of 25%. In view of this, we remand the issue of inclusion of this comparable to the file of TPO/Assessing Officer with a direction to find out whether this company is functionally comparable with that of assessee or not. While doing so, the TPO shall keep in mind the financials of the company, the profit earned during the year and also the export turnover. Needless to say, the AO shall give one opportunity of being heard to the assessee and decide the issue as per fact and law.

VI. <u>INFOSYS BPO LIMITED</u>

35. With respect to the exclusion of Infosys BPO Ltd., ld.AR submitted that it is a large company operating at high economics of scale with turnover of 2323 crores as compared to the assessee's turnover of approx. 70 crores. Ld.AR further submitted that it has diversified activities as it provides end-to-

end outsourcing services to customers relating to Financial Services and Insurance, Manufacturing enterprises in Energy and Utilities, Communications and services and Retail, Consumer Packaged Goods and Logistics, Life Sciences and healthcare. The company's website shows that the company provides integrated IT and business process management solutions across industries and service lines. Ld.AR further submitted that this company has also incurred brand building, selling and marketing expenses and has substantial value in intangible assets which contribute to generating business. As this company is functionally different to that of assessee, it must be excluded from the list of comparables. In support of his contentions, ld.AR relied upon the following decisions :

1) *Infor India Pvt. Ltd. Vs. DCIT (2019) 109 taxmann.com.*
2) *Hyundai Motor India Engineering Pvt. Ltd. Vs. ACIT (2009) 109 taxmann.com 429.*
3) *CIT Vs. Principal Global Servicdes Pvt. Ltd. (2018) 95 taxmann.com 315 (Bom High Court) (AY 2009-10)*
4) *CIT Vs. Visual Graphics Computing Services India Pvt. Ltd. TCA No.44 of 2018 (Mad High Court) (AY 2012-13)*
5) *Agilent Technologies Pvt. Ltd. Vs. ACIT (ITA No.6047/Del/2012)*
6) *NTT Data Global Delivery Services Ltd. Vs. ITO (ITA No.46/Del/2013).*

36. On the other hand, the ld.DR relied upon the order passed by lower authorities. Our attention was drawn to the remarks of the TPO which are to the following effect :

"Remarks of the TPO :

• Functionally dissimilar:-

The taxpayer has pointed that Infosys BPO in a variety of verticals including banking, capital markets, communication, media, manufacturing, insurance, retail, healthcare, energy etc.

The fact that the company is engaged in different verticals across the industry does not change the nature of functions carried out. The functions are basically in the nature of business process out sourcing which can be classified as ITES. The company has earned revenues from business process management services offered to its global clients as evident from the annual report.

The taxpayer has further pointed out that Infosys BPO is providing cloud based services. A cloud service is any resource that is provided over the Internet. Use of internet over the conventional telecommunication systems is very common in ITES industry. Just because cloud is used as a platform over various mainframe computers, the company would not become functionally dissimilar.

The taxpayer has pointed out that Infosys BPO provides services to Government of India. The Government of India is like any other customer which contracts out work on a competitive bidding.

• ***Research & development activity:***

From the perusal of the annual report of the company it is observed that there is no R&D expense incurred by the company during the year. The taxpayer in his submission has merely quoted some general excerpts from the annual report related to research activities of the company. It has not been demonstrated how this research has had a material impact on the operating profits of the company during the year. Hence, the objection of the taxpayer is not acceptable.

Presence of Brand& access to proprietary products and IP led solutions:

The taxpayer has contended that Infosys BPO has significant Brand presence in the market and access to proprietary products and IP which drives its business. In this context, it is important to note that the taxpayer is itself part of a multinational group, which has its own brand presence and which incurs significant expenses towards brand building exercise. By virtue of the same reason, the taxpayer also has access to proprietary products and IPs developed by its own group. Hence, objection of the taxpayer is not acceptable.

In view of the above, the contentions of the taxpayer are rejected and this company is retained as comparable."

37. We have heard the rival submissions and perused the material available on record. We have perused the orders of the lower authorities. TPO had rejected the submissions of assessee for exclusion of this company from the list of comparables contending that this company engaged in different verticals across the industry does not change the nature of functions carried on by it and the functions of this company are classified as ITeS only as that of assessee. This company is also earning revenues from business process management services by offering services to its global clients like assessee company. TPO further contended that using the cloud as a platform will not make this company functionally dissimilar to assessee company as it is very common in ITeS industry. DRP also rejected assessee's contentions and held that comparables cannot be distinguished based on the cloud-based services as the same is common in ITeS industry.

38. Though, both companies are earning good revenue from the huge scale of operations and are using cloud service and incurring expenses for brand building, and marketing of advertisements, however, considering the decisions relied upon by the assessee, Infosys BPO Limited is required to be excluded from the list of comparables being not comparable on account of huge turnover difference and on other aspects. Hence, we direct the TPO/AO to exclude the Infosys BPO Limited from the list of comparables.

CORPORATE GROUND

39. The learned Assessing Officer has noted that there is a mismatch of the income shown by the assessee and the entries shown in Form 26AS. In this regard, the Assessing Officer has added Rs.10,10,372/- to the income of the assessee, treating the same as undisclosed income and the finding of the Assessing Officer was mentioned at Para 11 of the assessment order, which reads as under :

> "*11. During the course of scruting proceedings u/s 143(3) r.w.s. 92 CA(3) of the IT Act, 1961, it was observed that there are credits in form 26AS to the extent of Rs.10,10,327/- but the same are not offered to tax. When asked to explain the same, assessee claimed that the credits does not belong to the company and hence same are not accounted for in books of accounts. But no documentary evidence in support of its claim is produced by the assesse. In view of this, an amount of Rs.10,10,327/- is treated as undisclosed income and added to the returned income. The assessee company has raised objection before DRP on this issue. The Hon'ble DRP vide its order dt. 05.09.2018 directed the assessee company to submit the necessary evidence before the AO to prove that whatever appearing in 26AS is not its income within 10 days of receipt of this order. However, the assesse company failed to furnish any such evidence in support of its claim. In view of the above discussion, an amount of Rs.10,10,327/- is treated as undisclosed income and added to the returned income.*"

40. The ld.AR for the assessee submitted that assessee could account only for the income which has been received by it, and in this case, the assessee has not received any income corresponding to the amount mentioned in form 26AS. It was submitted before the learned AO to make sufficient enquiries from the persons whose details along with PAN numbers are mentioned

in 26AS and find out whether the said credits pertain to assessee company or not.

41. On the other hand, the ld.DR submitted that he has no objection to remand the matter for verification to the Assessing Officer.

42. We have heard the rival submissions and perused the material available on record. The disagreement between the Assessing Officer and the assessee with respect to the income received by the assessee or vis-à-vis the amount shown in 26AS can only be resolved by making necessary enquiries from the persons who had deducted the TDS amount. The details of the persons i.e., Names, PAN numbers and addresses, are all available in form 26AS. Therefore, we deem it appropriate to restore the issue to the file of the Assessing Officer with the direction to verify once again the claim of the assessee by using powers conferred under the Act and find out whether the said income pertains to assessee company or not from the said persons who had allegedly deducted the tax as reflected in 26AS. Needless to say, the AO shall decide the issue as per fact and law after giving one opportunity of being heard to the assessee. We hold and direct accordingly. Thus, this ground is allowed for statistical purposes.

43. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the Open Court on 19th September, 2022.

Sd/-	**Sd/-**
(RAMA KANTA PANDA) **ACCOUNTANT MEMBER**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 19th September, 2022.
TYNM/sps

Copy to:

S.No	Addresses
1	Facebook India Online Services Private Limited, 12th Floor, Building No.20, Unit 1203 & 1204, Hitech City, Madhapaur, Hyderabad.
2	The DCIT, Circle 17(1), Hyderabad.
3	DRP- 1, Bengaluru.
4	Director of Income Tax (IT & TP), Hyderabad.
5	Addl.CIT (Transfer Pricing), Hyderabad.
6	DR, ITAT Hyderabad Benches
7	Guard File

By Order