IN THE INCOME TAX APPELLATE TRIBUNAL
"C'' BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(TP)A No.186/Bang/2022
Assessment Year: 2017-18

Eurofins IT Solutions India Pvt. Ltd. #504/1, Doddanakundi Industrial Area 2 Graphite India Road Hoodi, Whitefield Bangalore 560 048 **PAN NO : AACCE9691A**	**Vs.**	Deputy Commissioner of Income-tax Circle-2(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri Nageswar Rao, A.R.
Respondent by	**:**	Sri Sreenivas T. Bidari, D.R.

Date of Hearing	**:**	03.01.2023
Date of Pronouncement	**:**	05.01.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by the assessee is directed against final assessment order passed u/s 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income-tax Act,1961 ['the Act' for short] by the CIT(A), NFAC Delhi dated 24.1.2022 for the AY 2017-18. The assessee has following grounds of appeal:-

Grounds of appeal relating to transfer pricing matter

i. ***Grounds of appeal applicable to both Software Development Services Transaction and IT enabled Services transaction:***

1. *The learned Transfer Pricing Officer ("TPO")/ learned AO/ have erred, in law and in facts, in not appreciating the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("Rules"), conducting a fresh economic analysis for the determination of the arm's length price ("ALP") in connection with the impugned international transaction and holding that the Appellant's international transaction is not at arm's length;*

2. *The learned TPO/ learned AO have erred, in law and in facts, by rejecting certain comparable companies identified by the Appellant using the foreign earnings less than 75% of the Net sales as comparability criterion.*

3. *The learned TPO/ learned AO have erred, in law and in facts, by rejecting certain comparable companies identified by the Appellant using the employee cost greater than 25% of the sales as comparability criterion.*

4. *The learned TPO/learned AO have erred, in law and in facts, by rejecting certain comparable companies identified by the appellant using the related party transactions more than 25% of the sales as a comparability criterion.*

5. *The learned TPO/ learned AO have erred, in law and in facts, by rejecting certain comparable companies using income from core services (i.e., SWD and ITeS) of less than 75% of the sales as comparability criterion;*

6. *The learned TPO/ learned AO have erred, in law and in facts, by not applying a higher threshold while applying turnover filter;*

7 *The learned TPO/ learned AO have erred, in law and in facts, by selecting the comparable companies only if the data pertaining to FY 2016-17 is available in the public database, which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements;*

8. *The learned TPO/ learned AO have erred, in law and in facts, by applying the filter of companies having different accounting year for rejecting the comparable companies (i.e., companies having different accounting year other than March 31 or companies whose financial statements were for a period other than 12 months);*

The learned TPO/ learned AO have erred, in law and in facts, by rejecting the filter adopted by the Appellant for rejecting companies owning significant intellectual property or developing proprietary products;

10. *The learned TPO/ learned AO have erred, in law and in facts, by rejecting the filter adopted by the Appellant for rejecting companies who have reported extra ordinary events like mergers and acquisitions, in its financial statements;*

11. *The learned TPO/learned AO have erred in law and in facts, by accepting/rejecting certain companies based on unreasonable comparability criteria;*

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

13. *The learned TPO/ learned AO have erred, in law and in facts, 'by not making an adjustments to account the difference in working capital of the Appellant vis-a-vis the cornparables.*

Grounds specifically for IT enabled Services Segment

14. *The learned TPO/ learned AO have erred, in law and in facts, by accepting certain companies based on unreasonable comparability criteria listed* ***glow:***

Microland Limited

- *Datamatics Business Solutions Limited*
- *Infosys BPM Services Private Limited'*
- *Vitae International Accounting Services Private Limited*
- *Manipal Digital Systems Private Limited*
- *CES Limited*
- *SPI Technologies India Private Limited*
- *Inteq BP0 Services Private Limited*
- *Tech Mahindra Business Services Limited*

15. *The learned TPO/ learned AO have erred, in law and in facts, by rejecting certain companies based on unreasonable comparability criteria listed below:*

Allsec Technologies Limited
Cosmic Global Limited

iii. Grounds specifically for Software Development Services Segment

16. *The learned TPO/ learned AO have erred, in law and in facts, by accepting certain companies based on unreasonable comparability criteria listed below:*

- *Larsen and Toubro Infotech Limited*
- *Great Software Laboratory Private Limited*
- *Persistent Systems Limited*
- *Tata Elxsi Limited*
- *Infobeans Technologies Limited*
- *Aptus Software Labs Private Limited*
- *Nihilent Limited*
- *Cygnet Infotech Private Limited*
- *Infosys Limited*
- *Cybage Software Private Limited*
- *Consilient Technlogies Private Limited*
- *Threesixty Logica Testing Services Private Limited*
- *OFS Technologies Limited*
- *Mindtree Limited*
- *R Systems International Limited*

17. *The learned TPO/ learned AO have erred, in law and in facts, by rejecting certain companies based on unreasonable comparability criteria listed below:*

Evoke Technologies Private Limited
Sasken Technologies Limited

B. Other Grounds

18. *The learned AO has erred. in law and on facts, in levying interest under section 234A of the Act amounting to* ***INR 3,10,896*** *without considering the fact that the Appellant had filed its original return of income within the time limit prescribed under section 139(1) of the Act:*

19. *The learned AO has erred, in law and facts, by levying interest under section 234B of the Act amounting to* ***INR 1,80,31,968.*** *The levy of interest is consequential in nature:*

2. At the time of hearing, the assessee has pressed only ground Nos.14, 16, 18 & 19 of the grounds of appeal and other grounds are not pressed. Accordingly, we confine to the adjudication of ground Nos.14, 16, 18 & 19 only. Other grounds are dismissed as not pressed.

IT Enabled Services Segment:

3. At the time of hearing, the assessee confined for exclusion of following 3 comparables in ground No.14 on the basis of turnover filter. Accordingly, other comparables are not considered for adjudication.

Sl.No.	Name of the company	Turnover (in Crores)
1	Infosys BPM Services Pvt. Ltd.	2940
2	SPI Technologies India Pvt. Ltd.	344.39
3	Tech Mahindra Business Services Ltd.	707.60

Software Development Service Segment:

4. At the time of hearing, the assessee is confined his arguments in ground no.16 with reference to following 8 comparables:

Sl.No.	Name of the company	Turnover (Rs. in crores)
1	L&T Infotech Limited	6182.90
2	Mind Tree Limited	4752.06
3	Persistent Systems Ltd.	1760.84
4	Infosys Ltd.	59840
5	Cybage Software Ltd.	758.86
6	Tata Elxi Ltd.	1166.45
7	Nihilent Technologies Ltd.	259.38
8.	R. Systems Ltd.	215.33

4.1 The ld. A.R. submitted that operating revenue of the assessee in ITeS segment is only Rs.54.57 crores and the above 3 companies' turnover revenue from the said IT enabled services segment exceeds Rs.200 crores and therefore, the said companies cannot be comparable to the assessee's case and are to be excluded.

4.2 The Ld. A.R. further submitted that the turnover of assessee company from software development segment is Rs.79.56 crores and as such, the above 8 companies are to be excluded.

5. We have heard the rival submissions and perused the materials available on record. Admittedly, on turnover filter, we are consistently holding that companies having above Rs.200 Crores turnover from the specified segment cannot be considered as comparables to assessee whose turnover in the said segment is less than Rs.200 crores. In the present case, there is no dispute that the turnover of the above companies is above Rs.200 crores as against the turnover of assessee company from the said segment is Rs.64.71 crores. In similar circumstances, the Tribunal in the case of ACIT Vs. ACI Worldwide Solutions (P) Ltd. in IT(TP)A No.106/Bang/2022 dated 13.5.2022 for the AY 2017-18 held as under:

"4.2 We have heard rival submissions and perused the material on record. Admittedly, the assessee's turnover in the software development segment is Rs.45.35 crore. The turnover of for Larsen & Toubro Infotech Limited, Mindtree Limited, Persistent Systems Limited, Tata Elxsi Limited, Nihilent Limited, Infosys Limited and Cybage Software Private Limited, are far exceeding Rs.200 crore for the relevant assessment year. The TPO/DRP has excluded the companies having turnover of less than Rs.1 crore, however, the TPO / DRP has not put upper limit of the turnover for exclusion of comparables having high turnover. The Bangalore Bench of the Tribunal in the case of Autodesk India (P) Ltd. v DCIT, Circle 11(1), Bangalore (supra) has held as follows:-

> *"17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015 judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we*

respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra)."

5.1 In view of the above, taking a consistent view applying the turnover filter, we direct the AO/TPO to exclude above 3 comparables in ITeS segment and 9 comparables in software development segment

as the turnover of the above companies are over Rs.200 crores. Ordered accordingly.

5.2 The assessee wants exclusion of following comparables on the basis of functionality since the assessee is engaged in the provision of IT development services and IT Enabled services to its AEs. The company is to build competency and provide world class, high quality IT solutions and services with a special focus on next generation Laboratory Information, Management System (LIMS). The assessee company works on development of various applications for the Eurofins Group such as e-commerce, Middleware, ERP, Invoicing, CRM, Website, Mobile applications. The entire revenue of Eurofins India is generated from services rendered to Eurofins Group companies as software development and maintenance services. The company is also engaged in providing IT Infra Support Services.

1) Datamatics Business Solutions Ltd.
2) Manipal Digital Systems Pvt. Ltd.
3) CES Limited

Datamatics Business Solutions Ltd.

6. The ld. A.R. submitted that this company fails export earnings filter in last two years. Moreover, it is functionally different and engaged in KPO services providing B2B intelligence, sales and marketing, business process transformation and technology outsourcing solutions to its clients. Further, the company is engaged in rendering wide array of high-end services such as business research and analytics, content moderation solutions, registrar and transfer agent and other services. The key products and services it deals include (i) Business research and analytics (ii) content moderation solutions (iii) registrar and transfer agents (iv) market intelligence, innovation and technology intelligence. No segmental information – Aforementioned services do not fall within the ambit of

ITES/BPO and the annual report does not provide either the segmental details or the broad classification of the income.

6.1 The CIT(A), NFAC observed that as per the Form No. MGT-9 forming part of the annual report, the principal activity of the company is described as IT enabled Services and BPM Service providers deriving income around 87.29%. Therefore, the company is functionally similar to the assessee as it is being predominantly into ITES company. As regards, the export revenue as given in Note No. 18, the revenue is around Rs.50.43 crores as on 31.03.2017 as against total revenue of Rs.62.70 crores which comes to 80.43%. As the company is functionally similar and satisfies the filters adopted by the TPO including export revenue filter of more than 75%, the company is considered as comparable. Therefore, the action of the TPO considering the company was upheld by the NFAC.

6.2 In this case as the NFAC has pointed out earlier that difference in various segments i.e. low end to high end in ITES services is mainly on account of differences in the skill/qualification and pay structure of employees and, therefore, the main point to be considered is whether such differences between employees is going to materially affect the margin of the comparables. On the basis of billing rates / skills no conclusion could be drawn that margins in different segments of ITES services is also different. This is because if the billing rate is high in the high end services, the cost of the employees who are highly qualified/skilled also goes up steeply and, therefore, the margins are not much affected. In fact, no evidence has been produced before NFAC to show that margins in the high end segments of ITES services is high compared to low end services. Therefore, NFAC was unable to accept the argument advanced by learned AR that the comparables belonging to high end segments

such as KPO etc. should be excluded from the comparability list on this ground alone. In fact, KPO is a term given to a branch of BPO in which apart from processing data, knowledge is also applied. In view of the above, NFAC concluded that ITeS services cannot be further classified as BPO and KPO services for the purpose of comparability analysis. Under the TNMM, functional similarity is more relevant than product similarity. Accordingly, the NFAC rejected this plea of the assessee. As regards lack of segmental information, the comparable company derives the whole revenue from sale of services and hence, NFAC decided that there is no need of segmental reporting as per AS 17. In view of the above, the pleas of assessee were rejected and selection of this company was upheld by the CIT(A), NFAC.

7. We have heard the rival submissions and perused the materials available on record. Similar issue was considered in the case of Morgan Stanley Advantage Services P. Ltd. in ITA No.6523/Mum/2014 dated 23.7.2020 for the AY 2008-09, wherein held as under:

10. We have carefully considered the submissions and perused the records. The assessee in the present case is a subsidiary of Morgan Stanley International Holdings Incorporated USA. The assessee provides back office support functions to its associated enterprises. The transactions of IT Enabled Support Services to its associated enterprises and the arms length price computed by the assessee was accepted by the revenue in A.Y. 2005 – 06 and A.Y. 2006-07. The same was also upheld by the ITAT for assessment year 2007 – 08. For the current assessment year, the Transfer Pricing Officer characterized the assessee's functions as knowledge process outsourcing KPO. Thereafter, the Transfer Pricing officer made general comments on the selection systems adopted by the assessee. He proceeded to reject the same. He did not specify as to which of the comparables is being rejected for which specific reasons thereof. Thereafter, the transfer pricing officer mentioned his own criteria and proceeded to select comparables and accordingly made the transfer pricing adjustment.

11. Upon the assessee's appeal, the ld. CIT(A) has accepted that the characterization by the transfer pricing officer of the assessee's functions as knowledge process outsourcing was not correct. Thereafter, the ld. CIT(A) contradicted himself by stating that the functions of the assessee are in alignment with the knowledge process outsourcing comparable dealt with by the transfer

pricing officer. In this regard, the learned CIT appeals relied upon the ITAT decision in the case of Maersk Global Centers (India)(P) Ltd . Thereafter, the learned CIT (A) upheld the assessing officer's action of selection of four of the comparables and accepted the assessee's contention in rejection of two the comparables.

12. Now in appeal before us, the submission of the learned counsel of the assessee is that assessee's functions are that of ITES which has been duly accepted by the revenue as well as by the ITAT in earlier years. Hence, the re-characterisation of the assessee's functions as knowledge process outsourcing is not sustainable. We are in full agreement with this contention. Furthermore, we find that the ld. CIT(A) has clearly contradicted himself by stating both that assessee is not a KPO and at the same time accepting the comparables selected by the Transfer Pricing Officer from the database for knowledge process outsourcing companies.

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

> *32. As noted earlier the Id AR for the assessee submitted that the assessee submits that Eclerx Services Ltd. has not considered as a comparable in earlier years. Eclerx Services Ltd. is a Knowledge Process Outsourcing (KPO) Service provider which is not comparable to assessee; assessee is engaged in providing back office support services. In support of his submission, the Id. AR of the assessee relied upon the decision of Delhi High Court in Rampgreen Solution P Ltd Vs CIT (2015) ITR 533 (Delhi). The TPO included this comparable by taking his view that this company is in date process and analytical services. The Id CIT(A) confirmed the action of the TPO by taking his view that this comparable company is into the health care receivable management and therefore renders ITeS services. The Hon'ble Delhi Court in Rampgreen Solution (P) Ltd (supra) held entities rendering voice call center services for customer support and a KPO service provider employ IT-based delivery systems, but characteristics of services, functional aspects, business environment, risks and quality of human resource employed are materially different; and therefore, benchmarking international transactions on basis of comparison of PLI of high-end KPO service providers with PLI of Voice Call Centers, would be unreliable. Further, Mumbai Tribunal in Wills Processing Services (India) Ltd. vs. ACIT (supra) on considering similar contentions excluded this comparable.*
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> *38. The Id. AR submitted as we recorded earlier that Coral Hubs Ltd. was outsourcing its significant part of its operation as evident from its low employee cost and have substantial different business model compared to assessee and prayed for exclusion. The ld. DR has supported the inclusion.*

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

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

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

As regards the other comparables namely Crossdomain Solutions and Datamatics Financial Services, we find that the Transfer Pricing officer and the ld. CTI(A) have found their functions to be similar to that of KPO and that of E-clerx and Vishal technologies. Since, the ITAT has duly upheld the rejection of the aforesaid companies, i.e., these two companies are also liable to be rejected. Furthermore, Datamatics Financial Services also fails the export filter of 75%

which has been adopted by the transfer pricing officer. Hence, in the background of aforesaid, we hold that following comparable are to be rejected:

- *Eclerx Services Ltd.*
- *Vishal Information Technologies Ltd*
- *Crossdomain Solutions*
- *Datamatics Financial Services."*

7.1 Accordingly, we direct the AO to exclude this company M/s. Datamatics Business Solutions Ltd. from the list of comparables as this company is a KPO company and not comparable to assessee company.

Manipal Digital Systems Pvt. Ltd.

8. The ld. A.R. submitted that this company is functionally different. He submitted that apart from ITES services Manipal Digital is also engaged in providing multiple other services such as pre-media services, web-development services and e-book distribution and various publishing services and no segmental information is available. It is engaged in multiple high end services including conceptualization, designing, analytics, etc., which could not be compared with the low end BPO support services provided by the assessee.

8.1 The CIT(A), NFAC having considered issue observed that it was crystal clear from the annual report that the principal business activity of the company is given as IT enabled services which contributes 100% turnover of the company (page 13 of the annual report). On perusal of the breakup of the revenue given at page 41 of the annual report, the revenue earned from IT enabled services is Rs. 23.63 crores out of total revenue of Rs.24.34 crores which comes to around 97.08%. The other activities like pre-media work, e-distribution contributes around Rs.0.70 crores which is a minor revenue. The assessee, based on the website information, argued that the company is into diversified activities that can be

classified as KPO services as per the definition of safe harbour rules. At the outset, the CIT(A) noted that the information put in website cannot be given complete credence, as they are mere forward looking information and statements with the motive of advertisement and other promotional gains. The functional aspect has to be determined by the information in the annual report which is based on audited financial statements and management reports, for qualitative analysis of comparability. The fact that the company is into ITES segment is corroborated by the corporate information given at page 45 of the annual report where it is lucidly stated that "the main business of the company is to provide information technology enabled services that means pre-press activities mainly to overseas as well as domestic customers". Therefore, the ld. CIT(A), NFAC observed that the pleas raised based on information said to be available in the website are liable to be rejected is *in limine in view of the* information given in the annual report on the functional aspect.

8.2 Further, the ld. CIT(A) observed that this company operates under a single primary segment. The profit margins of various comparables will be averaged and a variation of 3% is also permitted. These aspects take care of some differences which are bound to be there between various comparables. In view of the above, ITeS services cannot be further classified as BPO and KPO services for the purpose of comparability analysis. Under the TNMM, functional similarity is more relevant than product similarity. It is a fact that this company falls in the category of IteS. Hence, the objection on the functional dissimilarity of the company was rejected by the ld. CIT(A).

8.3 As regards lack of segmental information, the ld. CIT(A) observed that the comparable company derives the whole revenue from sale of services and hence, there is no need of segmental

reporting as per AS 17. As stated above while discussing the functional profile the company derives its total revenue from the ITES activities only. This is further supported by the clarificatory note No. 27 at page 52 of the annual report that "the company was operating under one reportable geographical segment and one business segment. Therefore, disclosure as prescribed under AS 17- segment reporting is not applicable. Hence, the objection on lack of segmental information is not valid and not acceptable by the ld. CIT(A).

8.4 On perusal of the annual report by the ld. CIT(A), it was observed that M/s. Manipal Technologies Limited is the promoter and holding company of the assessee. As per the information given under share holding pattern, it was seen by the ld. CIT(A) that there is no change shown under the head Change in Promoter's holding. On the other hand, during the year under review, Manipal Venture Gmbh and Medien Fabrik GmbH has been merged and named as Medienfabrik GMbH. Under the head material changes and commitments affecting financial position of the company, it was reported as under:-

> No material changes and commitments affecting the financial position of the Company has occurred between the end of the financial year to which this financial statement related and the date of this report

8.5 In view of the above, the ld. CIT(A) observed that the assessee has wrongly mentioned about new share holding pattern of the company instead of the above information reported in the annual report. In fact, there are no material changes affecting the financial position of the company. Further, the assessee also could not point to any information to show, that on account of such acquisition, merger or change in the share holding pattern materially affected

the profit margin of this company. Thus, the ld. CIT(A) was of the view that there are no material changes affecting the financial position of the company as per the information in the annual report. Hence, the plea raised by the assessee was rejected by the ld. CIT(A).

9. We have heard the rival submissions and perused the materials available on record. Similar issue was considered by this Tribunal in IT(TP)A No.174/Bang/2022 dated 16.11.2022 for the AY 2017-18 in the case of M/s. Global E-Business Operations Pvt. Ltd. wherein it was held as under:

12.1.8 We have heard the rival submissions and perused the materials available on record. As per the annual report of the company, it is also in end-to-end content services across the value chain. From the website and annual report, it is clearly evident that the company is also engaged in web development, mobile application development. The company also provides publishing editorial & composition services, which includes creating layout & artwork for advertisements and brochures, typesetting services and proof reading. As per revenue from operations, it includes "Revenue from web development and other services" (INR 2.18 Cr) and "income from e-book Distribution" (INR 69 lakhs), without providing the segmental revenue and profitability with respect to ITES segment. Advertising and sales promotion expenses at 6.50%, 7.19% & 8.78% of total expenditure in FY 2016-17, FY 2015-16 & FY 2014-15 respectively.

12.1.9 Further, the Tribunal in the case of Iron Mountain Services Ltd. in IT(TP)A No.307/Bang/2022 dated 20.9.2022 has held as under:-

16. "The next company the assessee seeks to exclude is Manipal Digital Systems Pvt. Ltd. In this regard, it was submitted that this company is engaged in provision of multiple high-end services including KPO activity like Design Services, Animation. It was submitted that no segmental details were available in the financial statements on the variety of services provided by this company like Design Services, Animation. Reliance was placed on the decision of the ITAT, Pune Bench in the case of Credence Resource Management Pvt. Ltd., (supra) wherein this company was excluded by the Pune Bench with the following observations:

> *"8. The assessee submits that the Manipal Digital Systems Private Limited is functionally different from the assessee which is involved in provision of ITes services. As per the annual report of the company, the activity undertaken by the company is in the nature of pre-press activities*

which is not comparable to the assessee. That further in the website of the company, it is engaged in the diversified set of activities which involves graphic solutions, packaging brand management, digital publishing and digital content solutions. Therefore, the assessee submits that this company should be rejected from the final set of comparables companies.

9. The TPO was of the opinion that in this company i.e. Manipal Digital Systems Private Limited, 90% of the revenue is earned from ITes which is similar to that of the assessee company. The TPO further observed that most of the information provided by the assessee was from website and it cannot be said reliable source of information as any company while projecting itself in public domain tries to shows its diverse functioning and range of products so as to create a brand image of itself. With these observations, the contention of the assessee was rejected and the company was taken as comparable company.

10. That before the Ld. DRP, objections have been raised by the assessee which are at running Page No.34 of the appeal memo and therein, apart from reiterating the submissions made before the TPO, the assessee has stated that as per the online advertising laws and guidelines provided by the Advertising Standard Council of India, advertisements are based on principle of truthfulness and honesty of representation and there cannot be any misleading advertisement. That further, since the audited financial statements do not provide detailed description of operations/products in which the company deals, the website can be referred to for the analysis of functions performed by the company. The Ld. DRP vide Para (c) of Page No.67 to 70 of its order and as per reasoning therein, had upheld the findings of the TPO and included Manipal Digital Systems Private Limited in the final set of comparables companies. That again the prime observation of the Ld. DRP in this regard was that more than 90% of the total revenue of the operation of the company comes from ITes.

11. At the time of hearing, the Ld. Counsel for the assessee took us through the annual report of the company at Volume –II, Page 1279 onwards, Page 1302 having notes of accounts. The Ld. Counsel vehemently submitted that on perusal of the annual report, notes of accounts, nothing can be stated whether at all this company i.e. Manipal Digital Systems Private Limited is engaged in the business of call center or not. The realm of ITes involves various activities and on general principle the Revenue cannot say that since majority of the earning of the said company comes from ITes, it is comparable company with that of the assessee company.

12. Placing strong reliance on the decision of the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. Vs. CIT, ITA No.102/2015 dated 10.08.2015 copy of which is placed before us, the Ld. Counsel brought to our notice at Para 31 wherein the Hon'ble Delhi High Court observed that the Tribunal had held that once a service falls under the category of ITes then there is no subclassification of segment.

Thus, according to the Tribunal, no differentiation could be made between the entities rendering ITes. The Hon'ble Delhi High Court rejecting such view of the Tribunal had held that such a view, if upheld, would be contrary to the fundamental rationale of determining ALP by comparing controlled transactions/entities with similar uncontrolled transactions/entities. ITes encompasses a wide spectrum of services that use Information Technology based delivery. Such service could include rendering highly technical services by qualified technical personnel involving advanced skills and knowledge, such as engineering, design and support. While, on the other end of the spectrum ITes would also include voice based call centers that render routine customer support for their clients. The relevant portion of the judgment is extracted as follows for the sake of completeness:

".....Clearly, characteristics of the service rendered would be dissimilar. Further, both service providers cannot be considered to be functionally similar. Their business environment would be entirely different, the demand and supply for the services would be different, the assets and capital employed would differ, the competence required to operate the two services would be different. Each of the aforesaid factors would have a material bearing on the profitability of the two entities. Treating the said entities to be comparables only for the reason that they use Information Technology for the delivery of their services, would, in our opinion, be erroneous.

32. It has been pointed out that whilst the Tribunal in Willis Processing Services (India) Pvt. Ltd. v. DCIT (supra) held that no distinction could be made between KPO and BPO service providers, however, a contrary view had been taken by several benches of the Tribunal in other cases. In Capital IQ Information System India (P.) Ltd. v. Dy. CIT, (IT) [2013] 32 taxmann.com 21 and Lloyds TSB Global Services Pvt. Ltd. v. DCIT, (ITA No. 5928/Mum/2012 dated 21th November 2012), the Hyderabad and Mumbai Bench of the Tribunal respectively accepted the view that a BPO service provider could not be compared with a KPO service provider.

33. The Special Bench of the Tribunal in Maersk Global Centers (India) Pvt. Ltd. (supra) struck a different cord. The Special Bench of the Tribunal held that even though there appears to be a difference between BPO and KPO Services, the line of difference is very thin. The Tribunal was of the view that there could be a significant overlap in their activities and it may be difficult to classify services strictly as falling under the category of either a BPO or a KPO. The Tribunal also observed that one of the key success factors of the BPO Industry is its ability to move up the value chain through KPO service offering. For the aforesaid reasons, the Special Bench of the Tribunal held that ITeS Services could not be bifurcated as BPO and KPO Services for the purpose of comparability analysis in the first instance. The Tribunal proceeded to hold that a relatively equal degree of comparability can be achieved by selecting potential comparables on a broad functional analysis at ITeS level and

that the comparables so selected could be put to further test by comparing specific functions performed in the international transactions with uncontrolled transactions to attain relatively equal degree of comparability.

34. We have reservations as to the Tribunal's aforesaid view in Maersk Global Centers (India) Pvt. Ltd. (supra). As indicated above, the expression 'BPO' and 'KPO' are, plainly, understood in the sense that whereas, BPO does not necessarily involve advanced skills and knowledge; KPO, on the other hand, would involve employment of advanced skills and knowledge for providing services. Thus, the expression 'KPO' in common parlance is used to indicate an ITeS provider providing a completely different nature of service than any other BPO service provider. A KPO service provider would also be functionally different from other BPO service providers, inasmuch as the responsibilities undertaken, the activities performed, the quality of resources employed would be materially different. In the circumstances, we are unable to agree that broadly ITeS sector can be used for selecting comparables without making a conscious selection as to the quality and nature of the content of services. Rule 10B(2)(a) of the Income Tax Rules, 1962 mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service/product characteristics. This factor cannot be undermined by using a broad classification of ITeS which takes within its fold various types of services with completely different content and value. Thus, where the tested party is not a KPO service provider, an entity rendering KPO services cannot be considered as a comparable for the purposes of Transfer Pricing analysis. The perception that a BPO service provider may have the ability to move up the value chain by offering KPO services cannot be a ground for assessing the transactions relating to services rendered by the BPO service provider by benchmarking it with the transactions of KPO services providers. The object is to ascertain the ALP of the service rendered and not of a service (higher in value chain) that may possibly be rendered subsequently.

35. As pointed out by the Special Bench of the Tribunal in Maersk Global Centers (India) Pvt. Ltd. (supra), there may be cases where an entity may be rendering a mix of services some of which may be functionally comparable to a KPO while other services may not. In such cases a classification of BPO and KPO may not be feasible. Clearly, no straitjacket formula can be applied. In cases where the categorization of services rendered cannot be defined with certainty, it would be apposite to employ the broad functionality test and then exclude uncontrolled entities, which are found to be materially dissimilar in aspects and features that have a bearing on the profitability of those entities. However, where the controlled transactions are clearly in the nature of lower-end ITeS such as Call Centers etc. for rendering data processing not involving domain knowledge, inclusion of any KPO service provider as a comparable would not be warranted and the transfer pricing study must take that into account at the threshold.

36. As pointed out earlier, the transfer pricing analysis must serve the broad object of benchmarking an international transaction for determining an ALP. The methodology necessitates that the comparables must be similar in material aspects. The comparability must be judged on factors such as product/service characteristics, functions undertaken, assets used, risks assumed. This is essential to ensure the efficacy of the exercise. There is sufficient flexibility available within the statutory framework to ensure a fair ALP."

13. The Ld. Counsel for the assessee further submitted therefore, it is clear that merely because two companies are doing ITes services, on general categorization comparability is not permitted and one has to look into the specific services rendered in the spectrum of ITes and for this reason, the said company i.e. Manipal Digital Systems Private Limited is not a comparable company with that of the assessee company since absolutely functionally different. The Ld. Counsel also submitted that the TPO should have specifically stated why he has selected this company as comparable with that of the assessee company since the onus is on him to give reason for such inclusion. The logic was shown from the decision of the Pune Bench of the Tribunal in the case of ***M/s. Tasty Bite Eatables Limited Vs. ACIT, ITA No.1823/PUN/2018 for the assessment year 2014-15 dated 03.06.2021*** *wherein it was held that since the comparable chosen by the assessee, the onus is upon it to prove the functional comparability of this company. Extending the same logic, the Ld. Counsel submitted that it was also for the TPO to explain the reasons for inclusion of this company i.e. Manipal Digital Systems Private Limited since it was chosen as comparable by him.*

14. We are of the considered view on going through the order of the TPO, findings of the Ld. DRP and the various judicial pronouncements placed on record, first of all the Revenue has selected Manipal Digital Systems Private Limited as comparable to that of the assessee company based on the earning of the company from ITes. However, there is no segmental specification provided neither by the TPO nor by the Ld. DRP for the reason of such inclusion of this company in the final set of comparable companies with that of the assessee company. In the decision of the Hon'ble Delhi High Court (supra.), it is very much clear in the wide spectrum of ITes if two companies are to be comparable one has to look into the characteristic of service or business provided under ITes by them. This exercise was not done by the Department in this case. We also opine that as per Indian Council for Advertising, the online advertising has to be published on true and honest disclosure basis and therefore, when proper documentation of activities are not physically available, in such scenario, referring the website for information is correct option and the information therein cannot be doubted. These are all multi-national companies and certain amount of honesty has to be attributed to them since all are functioning as per

relevant rules and laws. With these observations and respectfully, following the judgment of the Hon'ble Delhi High Court (supra.) we direct the AO/TPO to exclude this company i.e. ***Manipal Digital Systems Private Limited*** *from the final set of comparables with that of the assessee company."*

17. Learned DR submitted that the aforesaid decision was in relation to Assessment Year 2016-17 whereas the case of the assessee in this appeal is in reference to Assessment Year 2017-18. Learned Counsel for the assessee submitted that the functional profile of the comparable company as well as the assessee remains the same for both Assessment Years 2016-17 and 2017-18 and therefore the decisions cited above are applicable to Assessment Year 2017-18 also.

18. We have given a careful consideration to the rival submissions and are of the view that it would be just and appropriate to set aside the question of comparability of Manipal Digital Systems Pvt. Ltd., to the TPO/AO to examine as to whether the functional profile of the assessee and the assessees in the decisions cited by the learned AR remains the same in Assessment Year 2017-18 as it was in Assessment Year 2016-17."

12.1.10 Accordingly, the above comparable i.e. Manipal Digital Systems Pvt. Ltd. is directed to be excluded from the list of comparables.

9.1 In view of the above, taking a consistent view, we direct the AO/TPO to exclude Manipal Digital Systems Pvt. Ltd. as comparable on the similar lines.

CES Limited:

10. The ld. A.R. submitted that this company is functionally different and engaged in KPO services. It is engaged in diversified services including IT services and solutions, KPO services and no merely routine software support services. It is also engaged in providing high-end IT services such as product engineering, cloud and infrastructure, data analytics, Enterprise applications and digital e-commerce services. It also provides state of the art IT and business solutions. It also owns intangibles, earns more returns commensurate to functions performed and risks assumed unlike

the assessee. No segmental information available with reference to BPO & KPO services.

10.1 The ld. CIT(A)/NFAC having considered the submissions found that the principle business activity of the company is IT enabled services-BPO/KPO (pg. No. 42 of AR). As per the details of business segment given at page 112 of the annual report, the revenue derived from IT enabled services out of the total revenue of 67.1 crores is 56.8 crores which comes to 84.64% of the total revenue. This clearly shows that the companies operations predominantly relate to IT enabled services, through it has minor IT services segment (10.29 crores - 15.33%). The assessee's argument that the comparable is into different activities is based on the website information. It is seen that the assessee has raised pleas against functional comparability of the company, with reference to certain information said to be available in the company's website. At the outset, we note that the information put in website cannot be given complete credence, as they are mere forward looking information and statements with the motive of advertisement and other promotional gains. Further, the information in website are dynamic and cannot be related to a particular period. There is no way to verify whether the said information has any relevance for the year under scrutiny or it totally related to subsequent current year developments. There is no way to verify the correctness of this information and the relevant period to which they may pertain to. Therefore, the information in the annual report which is based on audited financial statements and management reports is more reliable and authentic, for qualitative analysis of comparability. Therefore, the ld. CIT(A) observed that the pleas raised based on information said to be available in the website are liable to be rejected is *in limine.* In view of the above, factual information, the contention of the assessee that the comparable company is functionally different is not

correct. Therefore, the selection of the comparable by the TPO on the functional aspect was upheld by the NFAC.

10.2 In this case as the ld CIT(A) has pointed out earlier that difference in various segments i.e. low end to high end in ITES services is mainly on account of differences in the skill/qualification and pay structure of employees and, therefore, the main point to be considered is whether such differences between employees is going to materially affect the margin of the comparables. On the basis of billing rates / skills no conclusion could be drawn that margins in different segments of ITES services is also different. This is because if the billing rate is high in the high end services, the cost of the employees who are highly qualified / skilled also goes up steeply and, therefore, the margins are not much affected. In fact, no evidence has been produced before ld. CIT(A) to show that margins in the high end segments of ITES services is high compared to low end services. Therefore, ld. CIT(A) was unable to accept the argument advanced by learned AR that the comparables belonging to high end segments such as KPO etc. should be excluded from the comparability list on this ground alone. In fact, KPO is a term given to a branch of BPO in which apart from processing data, knowledge is also applied. In view of the above, ITeS services cannot be further classified as BPO and KPO services for the purpose of comparability analysis. Under the TNMM, functional similarity is more relevant than product similarity. Accordingly, the ld. CIT(A) rejected this plea of the assessee.

11. We have heard the rival submissions and perused the materials available on record. Similar issue came for consideration in the case of Transperfect Solutions India Pvt. Ltd in ITA No.331/Pun/2021 dated 29.7.2022 for the AY 2016-17 wherein held as under:

8.1 This comparable was also chosen by the TPO. The assessee's objection that this company was engaged in rendering KPO services as well was not approved by the TPO, who went with its inclusion.

8.2 The Annual report of this company shows that it is engaged in both the IT and IT enabled services. As the company has segmental accounts, the TPO has considered only IT enabled services segment for the purposes of comparability. However, what is important to note in the instant context is that the assessee is rendering only translation services etc., which fall within the overall domain of the BPO services. As against this, CES Limited is engaged in providing both BPO and KPO services as has been reported by it to the Registrar of companies in the requisite form. The Pune Benches of the Tribunal in Credence Resource Management Pvt. Ltd. Vs. ACIT (ITA No.133/PUN/2021) vide its order dated 18-06-2021 has noted that CES Limited is rendering both BPO and KPO services, discussing this issue at page 19 of the order. In view of the fact that the assessee is engaged in rendering only BPO services, CES Limited providing both BPO and KPO services, cannot therefore be held as comparable. We, therefore, direct to delete this company from the list of comparables.

11.1 In view of the above order of the Tribunal, we direct the AO/TPO to exclude CES Limited from the list of comparables.

12. The last grounds in this appeal in ground Nos.18 & 19 are with regard to charging of interest u/s 234A & 234B of the Act. According to the ld. A.R., the assessee filed return of income on 30.11.2017 within the time stipulated in section 139(1) of the Act and as such there was no delay in filing the return of income. The levy of interest u/s 234A of the Act is bad in law. In our opinion, this requires to be verified at the end of the AO if the return has been filed within the due date prescribed u/s 139(1) of the Act, there cannot be any levy of interest u/s 234A of the Act. With regard to levy of interest u/s234B of the Act, which is consequential and mandatory in nature and to be computed accordingly.

14. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 5th Jan, 2023.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(Chandra Poojari)**
Vice President	**Accountant Member**

Bangalore,
Dated 5th Jan, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.