

CAPITAL IQ INFORMATION SYSTEMS (INDIA) PVT. LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)

ITAT, HYDERABAD BENCH 'A'

Chandra Poojari, AM & Saktijit Dey, JM.

ITA No. 1961/Hyd/2011

23rd November, 2012

(2012) 34 CCH 0410

(2013) **57 SOT 0014** (URO) : (2013) 25 ITR (Trib) 0185 (Hyderabad)

Legislation Referred to

Section 92C, 144C

Case pertains to

Asst. Year 2007-08

Decision in favour of:

Assessee (Partly)

Transfer Pricing—Arms' Length Price (ALP)—Computation of—Selection of comparables—Assessee a wholly owned subsidiary of USA company was engaged in the business of providing IT-enabled Services and Business Support Services, such as financial reports/related documents, technical service for development of software and other similar services to its AE on a 'cost plus mark up' basis—Since assessee received payment on account of international transaction, matter was referred by AO to TPO—For computing ALP, TNMM method was adopted and assessee selected 15 comparables with an average profit margin of 21.15 percent on cost—Margin earned by assessee at 15.90 percent on operating cost was treated as at Arm's Length as margin was within plus/minus 5 percent range—TPO rejected transfer pricing study of assessee because of use of earlier years' data in exclusion of current year data—TPO held that some of filters applied by assessee was not acceptable and therefore, applied his own filters for selecting comparables—11 comparables were selected from list of comparables selected by assessee and TPO selected 28 companies as final set of comparables and made upward adjustment—In an appeal assessee raised objections to selection of comparables by TPO—DRP rejected assessee's contention and upheld order passed by TPO—Held, Companies with extra-ordinary circumstances, like those which suffered events like merger/de-merger, impacting the financial results, Companies having supernormal profit and companies which were functionally different, Companies acting merely as intermediary having outsourced its activity, Companies whose directors were involved in fraud, Companies, who are industrial giants and market leaders having substantially high turnover exceeding Rs.200 crores, whereas assessee's turnover was mere Rs.60 crores, cannot be taken as comparables—It was also held that though assessee made detailed arguments, specifically objecting to selection of comparables by TPO,

DRP has not properly considered contentions raised by assessee and passed a very cryptic orders bereft of detailed reasons in support of conclusions drawn—Order of DRP set aside—Matter remitted to TPO

Held:

The assessee raised objections to the comparables selected by the TPO. Tribunal dealt with each of the comparables disputed to by the assessee.

Accentia Technologies Ltd: Assessee submitted that this company cannot be treated as a comparable because of uncomparable financial results arising out of amalgamation in the company. Tribunal held that extra-ordinary event like merger and de- merger will have an effect on the profitability of the company in the financial year in which such event takes place. In case of this company the amalgamation in fact had taken place, same was thus excluded from list of comparables.

(Para 10, 11)

Mold Tek Technologies Ltd: The assessee has objected for this company being taken as comparable mainly on the ground that since there is a merger from 1st October, 2006, the financial results of the company cannot be taken as a comparable. The DRP in the proceedings for the assessment year 2008-09 had accepted the assessee's contention that this company cannot be treated as comparable because of exceptional financial result due to merger/de-merger. In view of the aforesaid the assessee's contention was accepted that this company cannot be treated as comparable. That apart, it is also a fact that this company has shown super normal profit working out to 113 percent. Thus the companies showing supernormal profit cannot be treated as comparable.

(Paras 12, 13)

Eclerx Services Ltd.: This company cannot be taken as a comparable for the reasons that it was having supernormal profit and it is engaged in providing KPO services, which is distinct from the nature of services provided by the assessee.

(Para 15)

Coral Hub Limited (Earlier known as Vishal Information Technologies Ltd.): The assessee has objected for this company being taken as comparable mainly on the ground that the activities of the company is not only functionally different, but the business model of the company is also different as it sub-contracts majority of its ITES works to third party vendors and has also made significant payments to those vendors. The payments made to vendors towards the data entry charges also supports the fact that the company outsources its works. It cannot be taken as a comparable to the ITES functions performed by the assessee. The DRP, in the proceedings for the assessment year 2008-09 in assessee's own case, after taking note of the composition of the vendor payments of Coral Hub for the last three years, and the fact that it has also commenced a new line of business of Printing on Demand(POD), wherein it prints upon clients request, concluded that 'Coral Hub' is not a suitable comparable to the taxpayer and hence needs to be dropped form the final list of comparables. This company cannot be taken as a comparable.

(Paras 16, 17)

Maple e-Solutions Ltd. and Tricom Corp Ltd.: The assessee has objected for these companies being taken as comparables mainly on the ground that the directors were

involved in fraud and hence financials are unreliable. In this regard, learned Authorised Representative for the assessee has relied upon and order of the ITAT Delhi Bench in the case of ITO V/s. CRM Services India (P)Ltd., New Delhi(ITA No.4068/Del/2009 for assessment year 2004-08 dated 30.6.2011, wherein it was held that the financial results of these very companies, which have been taken as comparable in the cited case also, cannot be accepted as comparables. In view of the order of the Delhi Bench of the Tribunal, wherein the comparability of these very same companies was examined, tribunal agreed with the contentions of the assessee and hold, that these two companies cannot be accepted as comparables.

(Paras 18, 19)

6. HCL Comnet Systems & Services Limited & Infosys BPO Limited, Wipro Limited: The assessee has objected for these three companies being taken as comparables mainly on the ground that these companies are industrial giants considering their turnover compared to that of the assessee, whose turnover is only Rs.60 crores. and since these companies assume all risks, they earn higher amount of revenue resulting in higher profit, whereas the assessee being a captive unit of its parent company in the USA, it operates in a risk mitigated environment. Therefore, the margin of profit is also less. The TPO has excluded the companies whose turnover is less than Rs.One Crore, on the ground that they may not be representing the industry trend. That very logic also applies to the companies having high turnover of over Rs.200 crores as against the assessee's turnover of only Rs.60 crores, and therefore, it would be fair enough to exclude those companies also.

(Paras 20, 21)

Though the assessee made detailed arguments, specifically objecting to the selection of the aforesaid companies as comparables, the DRP has not properly considered the contentions raised by the assessee and has passed a very cryptic orders bereft of detailed reasons in support of the conclusions drawn.

(Para 22)

The Tribunal concluded as follows:

(a) Companies with extra-ordinary circumstances, like those which suffered events like merger/de-merger, impacting the financial results, could not be treated as comparables.

(b) Companies having supernormal profit cannot be considered as comparable;

(c) Companies which are functionally dissimilar cannot be taken as comparables.

(d) Companies acting merely as intermediary having outsourced its activity cannot be considered as comparable.

(e) Companies whose directors were involved in fraud cannot be taken as comparable, as their financial results are not reliable.

(f) Companies, who are industrial giants and market leaders having substantially high turnover exceeding Rs.200 crores cannot be taken as comparables.

Thus orders of the DRP as well as the assessment order passed under S.143(3) read with S.144C was set aside, and the matter was restored to the file of the TPO for determining the ALP afresh. M/s. Teva India P.Ltd. V/s. DCIT (2011-TII-28 ITAT- Mum-

TP); ITO V/s. CRM Services India (P)Ltd., New Delhi(ITA No.4068/Del/2009 for assessment year 2004-08 dated 30.6.2011; Triniti Advanced Software Labs(P)Ltd.(2011-TII-92- ITAT-HYD-TP); M/s. Genesys Integrating System(India) P. Ltd. (2011) 64 DTR 225; Agnity India Technologies P. Ltd. V/s. ITO in ITA No.3856/Del/2010 dated 4th November, 2010, relied on.

(Para 23)

Conclusion:

Companies with extra-ordinary circumstances, like those which suffered events like merger/de-merger, Companies having supernormal profit and functionally different, Companies acting merely as intermediary having outsourced its activity, Companies whose directors were involved in fraud, Companies, who are industrial giants, to be excluded from list of comparables while determining ALP.

DRP required to pass reasoned orders after considering the objections raised by assessee.

In favour of:

Matter remitted

Transfer Pricing—Arms’ Length Price (ALP)—Computation of—Gain/loss on account of foreign exchange fluctuation—TPO had not considered foreign exchange fluctuation gain/loss while determining ALP—Order of TPO confirmed by DRP—Held, gain or loss on account of exchange rate fluctuation arises in the normal course of business transaction, thus while computing the margin for determining the ALP, the foreign exchange gain/loss has to be taken as part of the operating margin— Allow the ground of the assessee on this issue

Held:

The gain or loss on account of exchange rate fluctuation arises in the normal course of business transaction, thus while computing the margin for determining the ALP, the foreign exchange gain/loss has to be taken as part of the operating margin. Sap Labs India Pvt. Ltd.(2010) 6 ITR 81; Four Soft Ltd. V/s. DCIT (2011-TII-92-ITAT-HYD-TP), applied.

(Para 27, 28)

Conclusion:

The gain or loss on account of exchange rate fluctuation should be considered while computing the net margin for the international transactions with the associated enterprises of the assessee for determining ALP.

In favour of:

Assessee

Case referred to

Teva India P.Ltd. vs. DCIT (2011-TII-28 ITAT- Mum-TP)

ITO vs. CRM Services India (P)Ltd., New Delhi(ITA No.4068/Del/2009
Sap Labs India Pvt. Ltd.(2010) 6 ITR 81
Deutsche Bank A.G. vs. DCIT reported in 86 ITD 431

Counsel appeared:

G. C. Srivastava for the Appellant.: V. Srinivas for the Respondent

ORDER

SAKTIJIT DEY, JM. :

1. This appeal by the assessee arises out of the assessment order dated 11.10.2011 passed under S.143(3) read with S.144C of the Act, on the directions of the Dispute Resolution Panel(DRP). The appeal pertains to the assessment year 2007-08.

2. The factual matrix as emanates from the record are the assessee is a wholly owned subsidiary of Capital IQ Inc., the Associated Enterprise (AE), being a company based in USA. The assessee is engaged in the business of providing IT-enabled Services(ITES) and business support services, such as financial reports/related documents, technical service for development of software and other similar services to its AE on a 'cost plus mark up' basis. For the impugned assessment year, the assessee filed a return of income declaring the total income at Rs.8,29,06,660. During the relevant financial year, the assessee had the following international transactions with its AE.

(a) Provision of IT enabled services Rs.56,32,13,**579**

(b) Provision of business support services Rs. 4,19,34,643

For computing the Arm's Length Price (ALP) of the international transaction, the assessee adopted the Transactional Net Margin Method (TNMM). In the course of assessment proceedings under S.143(3), the Assessing Officer noticing that the assessee has received payment from international transactions undertaken with its AE made a reference to the transfer Pricing Officer(TPO) under S.92CA of the Act, to determine the ALP. On receiving the reference, the TPO issued a notice under S.92CA(2) calling upon the assessee to submit the documents maintained in terms of S.92B. After receiving the compliance of the assessee, the TPO issued another letter requiring the assessee's compliance on various issues raised therein. The TPO noticed that though the assessee in its Transfer Pricing Document claimed the ITES and Business Support Services to be two separate segments, in the Profit & Loss Account receipt from both have been aggregated and shown as income from 'IT Enabled and Business Support Services'. Expenditure with regard to both the services have also been aggregated. In response to the query made by the Assessing Officer, the assessee explained that services pertaining to provision of ITES and provision of Business Support Services are different. The Assessing Officer however, was of the view that the business support service rendered by the assessee is nothing but providing office space and other amenities for performance of business, which is incidental to the ITES rendered by the assessee to its AE. The TPO noticed that as per the Functions, Assets, Risks (FAR) Analysis done by the assessee, main function of the assessee with its AE is provision of ITES and provision of Business Support Services. During the relevant financial year, the AE purchased software licences in bulk for use by various group entities including the assessee. The cost pertaining to these licences was cross-charged by the AE to various group companies, including the assessee at cost. The assessee also deployed well qualified work-force in its business. The assessee also owns computers, server, etc. which are essential to the business of a company providing ITES. The assessee has claimed that being a captive contract service provider, it operates in a risk mitigated environment on a cost plus

basis. On examining the TP Study Report submitted by the assessee, the TPO noted that the assessee has selected itself as the tested party and has adopted TNMM as the most appropriate method for arriving at the ALP. The assessee has selected uncontrolled comparables by using information as available on the Prowess Data Base till 10.8.2007 and Capitaline Plus Data Base updated till 3.8.2007. The assessee has considered the financial results of the selected comparables for the period ending between 1.4.2005 and 30.6.2007. Where data for the financial year 2005-06 are not available earlier year's data was considered. While searching for the comparables, the assessee has applied the following filters.

"1. Companies for which sufficient financial information is not available to undertake analysis were excluded

2. Companies for which sufficient descriptive information is not available to perform analysis were excluded.

3. Companies that have ceased business operations or are currently inactive were excluded.

4. Companies that are undertaking different functions compared to the tax payer were excluded.

5. Companies that do not have significant (

6. Companies which have been making pertinent operating losses were excluded.

7. Companies that have substantial (>25 percent) transactions with related parties were excluded

8. Companies which have been in their first year of operations and have incurred operating losses and

9. Companies that are duplicated in the data base with different names or merged to form another company."

4. On the basis of the search of data base, the assessee selected 15 comparables with an average profit margin of 21.15 percent on cost. Therefore, the margin earned by the assessee at 15.90 percent on operating cost was treated as at Arm's Length as the margin is within plus/minus 5 percent range. After analyzing the TP study report of the assessee, the TPO found the following defects/deficiencies-

(a) The assessee has eliminated overwhelming number of companies by not applying the quantitative filters (such as, related party transactions, insignificant foreign exchange etc.), but by applying so called qualitative filters. Out of 800 companies in the data base, 420 companies have been eliminated by applying 'functionally different' filter. Such approach of the assessee raised doubts about the objective nature of the analysis as the comparables finally selected by the assessee were involved in domestic operations, substantial related party transactions. The assessee has not filed any details in the TP report as to what were the qualities which were compared and on what basis.

(b) There is disconnection between the search for comparable and the comparability analysis. The assessee has approached in a mechanical manner in selecting the comparables from the data base without examining the comparability factors contained in Rule 10B(2) of the I.T. Rules.

(c) The assessee has not used the data pertaining to financial year 2006-07. In case of all the fifteen comparables, which has led to use of incorrect data and also does not fulfil the condition of Rule 10B(4). Assessee's approach in applying the related party transaction filter is selective. Though the assessee while applying the aforesaid filters has rejected comparable companies where related party transactions with its AE exceeded 25 percent of the operating Revenues, it has itself adopted the following comparables which exceeded 25 percent of the operating cost.

(i) BNR Udyog Ltd.	83.73 percent
(ii) Fortune Infotech Ltd.	67 percent
(iii) Tricom India Ltd.	69.28 percent

(d) Assessee has taken companies as comparables, even if they do not work in the same economic circumstances. As per Rule 10B(2), uncontrolled transactions should be judged not only with specific characteristics of the services, rendered by the assessee (ITES), functions performed (FAR Analysis), and contractual terms, but also with reference to conditions prevailing in the market in which the respective parties to the international transactions operate, including geographical locations and size of market, the laws and government orders in force, cost of labour and capital in the market, overall economic development and level of competition etc. As major attributes of economic circumstances in comparability was ignored by the assessee, the department has to apply additional quantitative criteria such as export earning filters, diminishing revenue filter, etc. to make the economic circumstances comparable.

(e) Most of the assessee's comparables do not stand scrutiny of FAR Analysis. The assessee has not selected on proper comparability analysis.

The TPO on the basis of deficiencies pointed out as above proposed to reject to reject the TP study of the assessee and determine the ALP. The assessee objected to the proposed rejection of the TP study done by it vide its letter dated 25.6.2010 which has been summarized by the TPO as below-

(i) The ALP in the case of international transaction has been determined by applying the prescribed method in accordance with sub-section (1) and (2) of S.92C of the Act.

(ii) All the relevant information and the documents relating to the international transactions have been maintained as prescribed and provided to the department.

(iii) The data used in the computation of ALP has been taken from widely recognised commercial information data-bases for obtaining publicly available financial information in India, namely Prowess and Capitaline. The very same data base is also used by the Department. Contemporaneous data has been used for computation of ALP as on the date of filing of return of income accordance with Rule 10D(4) and the data used for computation of ALP is reliable and correct.

(iv) The transfer pricing documentation and the detailed workings of the economic analysis and all the other documents as required by the department were submitted. The assessee submitted that the comparability analysis undertaken in the TP Study report being based on well accepted Transfer Pricing Principles and in accordance with the provisions of the Act and rather it can not be rejected without any information to the contrary.

The TPO however, considering the data used by the assessee in the TP study report to

be unreliable as it ignored the use of relevant financial year data, use of enterprise with uncontrolled parties, functionally and economic circumstances.

5. The assessee had stated before the Assessing Officer that data for the financial year 2006-07 was not available at the time of documentation, and therefore, the assessee has used multiple year data considering the fact that using single year data of comparable companies may not adequately capture the market and business cycle reflected in the industry. The assessee also stated that Rule 10B(2)(d) allows use of multiple year data and Rule 10B(4) warrants use of earlier year data. The TPO rejecting the contention of the assessee concluded that the TP report submitted by the assessee is erroneous because of use of earlier years' data in exclusion of the current year data. The TPO also found some of the filters applied by the assessee to be not acceptable. The TPO, therefore, applied his own filters for selecting the comparables. The filters applied by the TPO also included filters applied by the assessee and accepted by the TPO. The filters adopted by the TPO are-

- Companies whose data is not available for the FY 2006-07 were excluded and the data for the FY 2006-07 has been considered for the period from 01-04 2005 to 31-03-2006
- Companies whose IT enabled service income
- Companies whose IT enabled service revenue is less than 75 percent of the total operating revenues were excluded.
- Companies who have more than 25 percent related party transactions (sales as well as expenditure combined) of the sales were excluded
- Companies who have less than 25 percent of the revenues as export sales were excluded
- Companies who have distinguishing revenue/persistent losses for the period under consideration were excluded
- Companies having different financial year ending (i.e. not March 31, 2006) or data of the company does not fall within 12 months period i.e. 01.04.2005 to 31.03.2006, were rejected.
- Companies that are functionally different from that of tax payer or working in peculiar economic circumstances after giving valid reasons, were excluded

By applying the aforesaid filters, the TPO selected 11 out of the 15 comparables selected by the assessee and rejected four comparables. The comparables accepted are-

Sl. No.	Name of the company	Margin adopted by the tax payer based on multiple year data	Operating margin to Cost (FY 2006-07)
1.	Allsec Technologies Ltd.	26.41 percent	27.31 percent
2.	Apex Advanced Technology P. Ltd.	16.96 percent	39.89 percent
3.	Cosmic Global Ltd	15.72 percent	12.40 percent
4.	Flextronics Software Systems Ltd.	1.81 percent	8.62 percent
5.	Genesys International Ltd.	-11.31 percent	13.35 percent
6.	Maple E-Solutions Ltd.	33.93 percent	34.05 percent

7.	R-Systems International Ltd.	9.44 percent	20.18 percent
8.	Spanco Telesystems and Solutions Ltd. (Seg) (now known as Spanco Ltd.)	16.47 percent	25.81 percent
9.	Transworks Information Services Ltd. (Now known as Aditya Birla Minacs Worldwide Ltd)	13.36 percent	11.98 percent
10.	Triton Corp Ltd.	17.11 percent	34.93 percent
11.	Vishal Information Technologies Ltd.	39.23 percent	51.19 percent
	Arithmetical mean margin	16.30 percent	25.43 percent

Even after accepting the aforesaid comparables selected by the assessee, the TPO searched for additional companies from Prowess and Capitaline Data base and proposed a set of 25 comparables and invited assessee's objections. The assessee objected to the following companies to be taken as comparables on various grounds-

- a. Accentia Technologies Ltd.
- b. Apex Knowledge Solutions Pvt. Ltd.
- c. Apollo Health Street Ltd.
- d. Asit C. Mehta Financial Services Ltd.
- e. Bodhtree Consulting Ltd.
- f. Caliber Point Business Solutions Ltd.
- g. Eclerx Services Ltd.
- h. HCL Comnet Systems & Services Ltd.
- i. ICRA Techno Alaytics Ltd.
- j. Informed Technologies India Ltd.
- k. Infosys BPO Ltd.
- l. I Services India Pvt. Ltd.
- m. Mold Tek Technologies Ltd.
- n. Wipro Ltd.

After considering the assessee's objections, the Transfer Pricing Officer selected 28 companies as final set of comparables, the details of which are as follows-

SI No	Company Name	Sales (Rs. cr.)	OP 'fatal Cost (Rs. cr.)	to RPT (Rs. cr.)	percento Exp(Rt percento Mktg. percent Data	percento Exp(Rt percento Mktg. percent Data	percento Exp(Rt percento Mktg. percent Data	percento Exp(Rt percento Mktg. percent Data
1	Accentia Technologies Ltd (Seg.)	16.57	30.61	0	0.00	16.57	100.00	4.7
			percent		percent			percent

2	Aditya Minacs Worldwide (Earlier ;sworks Information Services Ltd)	Birla 6 Ltd Tra;	197.0	11.98 percent	8.35	4.24 percent	191.19	97.02 percent	3.38	1.72 percent	p
3	Allsec Technologies Ltd		113.28	27.31 percent	13.48	11.90	109.36	96.54 percent	5.91	5.22 percent	p
4	Apex Knowledge Solutions Ltd	Pvt Ltd	6.64	12.83 percent	0	0.00 percent	6.64	100.00 percent	0.01	0.15 percent	P (Soft)
5	Appollo Healthstreet Ltd		47.84	-13.55 percent	8.5	17.77 percent	47.8	99.92 percent	0.53	1.11 percent	P (Soft)
6	Asit C. Mehta Financial Services Ltd.		6.09	24.21 percent	0.96	15.76	4.18	68.64 percent	0.33	5.42 percent	P Seg
7	Bodhtree Consulting (Seg.)	Ltd	2.94	29.58 percent	0	0.00 percent	2.94	100.00 percent	0.01	0.34 percent	P (Soft)
8	Caliber Business Solutions Ltd	Point	39.3	21.26 percent	5.38	13.69	36.77	93.56 percent	0.24	0.61 percent	P (Soft)
9	Cosmic Ltd	Global	4.28	12.40 percent	0	0.00 percent	2.72	63.55 percent	0	0.00 percent	P
10	Datamatics Financial Services (Seg.)	Ltd	2.92	5.07 percent	0.23	7.88 percent	2.92	100.00 percent	0.13	4.45 percent	P
11	Eclerx Ltd	Services	86.12	89.33 percent	7.85	9.12 percent	79.54	92.36 percent	8.37	9.72 percent	P
12	Flextronics Software Systems (See:.)	Ltd	12.93	8.62 percent	0	0.00 percent	10.61	82.06 percent	0.11	0.85 percent	PSeg
13	Genesys International COM>Oration Ltd :		19.11	13.35 percent	1.12	., '5.84 percent	18.86	98.38 percent	0.13	0.68 percent	CSeg
14	H C L Systems Services (SeR.)	Comnet & 8 Ltd	260.1	44.99 percent	55.99	21.52 percent	260.18	100.00 percent	1.7	0.65 percent	PSeg
15	I C R A Analytics (SeR.)	Techno Ltd	7.23	12.24 percent	(*)0.17	(*) 1.85 percent	(*) 7.7	(*) 83.64-	0.02	0.28 percent	P (Soil)
16	Informed Technologies India Ltd		4.08	35.56 percent	0.65	15.93 percent	4.08	100.00 percent	0.61	14.95 percent	P
17	Infosys Ltd	B P 6	649.5	28.78 percent	48.3	7.44 percent	608.81	93.74 percent	41.49	6.39 percent	P

18	IServices Pvt Ltd	India	16.29	49.47	0	0.0001	16.29	100.00	02	1.23	C
			percent	percent				percent		percent	
19	Maple Esolutions Ltd		12.21	34.05	0	0.00	12.21	100.00	0.02	0.16	P
			percent	percent		percent		percent		percent	
20	Mold-Technologies Ltd (Seg.)	Tek	11.4	113.49	0.12	1.05	11.31	99.21	(**)0.85	7.46	P
			percent	percent		percent		percent		percent	(Seg.)
21	R Systems International Ltd (Seg.)		17.34	20.18	0.1	0.58	17.34	100.00	0.12	0.69	PSeg
			percent	percent		percent		percent		percent	
22	Spanco (Seg.)	LId	35	25.81	1.76	5.03	35	100.00	0.61	1.74	PSeg
			percent	percent		percent		percent		percent	
23	Triton Corp Ltd		53.37	34.93	0	0.00	47.5	89.00	0.08	0.15	C
			percent	percent		percent		percent		percent	
24	Vishal Information Technologies LId		30.6	51.19	0	0.00	30.6	100.00	0	0.00	P
			percent	percent		percent		percent		percent	
25	Wipro LId (Seg.)		939.78	29.70	21.41	2.28	920.98	98.00	(*)427.4	(*)0.31	PSeg
			percent	percent		percent		percent		percent	
26	Nittany Outsourcing Services Pvt Ltd		23.23	11.50	0.8	3.44	23.23	100.00	0.1	0.43	C
			percent	percent		percent		percent		percent	
27	Accurate Converters LId	Data	4.33	50.68	0.05	1.18	4.33	-100.00	0	0.00	C
			percent	percent		percent		percent		percent	(Soft)
28	Apex Advanced Technology LId	Pvt	7.93	39.89	0	0.00	7.93	100.00	0.01	0.13	Laxpa)
			percent	percent		percent		percent		percent	'er IS
Arithmetical Mean				30.55		5.23o/0...		95.26		3.33	
			percent	percent				percent		percent	

Note: The working o/profit margins o/the above companies is enclosed as Annexure-B to this order. * At the enterprise level

6. The TPO accepted the operating profit to operating revenue as chosen by the assessee to be the profit Level Indicator(PLI). The TPO considered the profit before interest and tax for computing operating margins. The TPO considered only the incomes and expenditure related to the operations of relevant financial year for computing operating margins of comparables and in the process excluded non-operating nature of income like interest, dividend, provisions no longer written back, gain on sale of assets/investments, foreign exchange gain, income from investments, gain on revaluation of assets. Similarly, expenses and provisions which are non- operating were excluded form operating expenses. These included provisions other than provisions for bad debts, loss on sale of assets/investments, foreign exchange loss, loss on revaluation of assets. The TPO computed the ALP of the ITES rendered by the assessee to its AE in the following manner-

Arithmetic Mean PLI	30.55 percent
Less: Working capital adjusted	2.84 percent
Adjusted Arithmetic Mean PLI	27.71 percent
Arm's Length Price:-	
Operating Cost ...	Rs.52,24,11,557
Arm's Length Margin ...	27.71 percent of the Operating Cost
Arm's Length Price	
at 127.71 percent of operating cost	Rs.66,7171,799
Price charged for the international transactions	Rs.60,51,48,222
Short fall being adjusted under S.92CA	Rs. 6,20,23,577

Incorporating the adjustments of ALP made by the TPO, a draft assessment order was passed by the Assessing Officer, which was challenged by the assessee before the DRP. The DRP having confirmed the order of the TPO and directed the Assessing Officer to finalise the draft assessment order, the assessee is in appeal before us.

7. The assessee has raised as many as ten grounds before us. Ground No.1 is general in nature and ground No.6 is not pressed. So far as other grounds are concerned, the learned Authorised Representative for the assessee at the time of hearing as well as in his written submissions has restricted his arguments to ground No.2 and ground No.8, which respectively relates to certain comparables selected by the TPO and not taking into consideration foreign exchange fluctuation gain/loss. The submissions of the learned Authorised Representative for the assessee with regard to each of the objected comparable companies, as tabulated by the assessee in the written submissions read as follows-

S. No.	Company Name	Reason for comparability rejection	non-Page and paper-book (which was also before DRP)	No. of Case law/document relied upon
1.	Accentia Technologies Ltd. (Seg).	<ul style="list-style-type: none"> Uncomparable financial results as there is amalgamation in company in Dec. 2006 	272	<ul style="list-style-type: none"> DRP order of Appellar for AY 2008-09. In the case of the Mold Tek also merger has taken place in Oct 2006.
2.	Mold Tek Technologies Limited	<ul style="list-style-type: none"> Uncomparable financial results as there is merger from 1 Oct 2006 Supernormal profit of 113 percent Non-comparable services as it is into KPO 	282	<ul style="list-style-type: none"> DRP order of Appellar for AY 2008-09 Mumbai ITAT Judgment in Teva India Private Limited V/s DCIT, Mumbai (IT No.6107/Mum/2009) holding that companies with supernormal profit should be excluded at para 32.
3.	Eclerx Services Limited	<ul style="list-style-type: none"> Supernormal profit of 89 percent Non comparable services of KPO business 	278	<ul style="list-style-type: none"> Mumbai ITAT Judgment in Teva India Private Limited V/s. DCIT, Mumbai (IT No.6107/Mum/2009) holding that companies with supernormal profit should be excluded .

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| <p>4. Coral Hub Limited (Earlier known as Vishal Information Technologies Limited)</p> | <p>• Difference in functionality and business model as company outsources its activities</p> | <p>in 284</p> | <ul style="list-style-type: none"> • DRP order of Appellant for AY 2008-09 where DRP rejected this as comparable company • Mumbai ITAT Judgment in the case of ACIT V/s. Maersk Global Service Centre India Private Limited where this company is rejected as comparable to ITES for assessment year 2007-08.. |
| <p>5. Maple eSolutions Limited</p> | <p>• Directors involved in fraud and hence financials are unreliable</p> | <p>The ITAT Judgment is delivered post judgment in the case of ITO V/s. CRM Services India Private Limited dated 29 June 2011)</p> | <p>• Delhi Income-tax Appellate Tribunal holding that the financials of these companies are unreliable.</p> |
| <p>6. Triton Corp Limtied</p> | | | <p>• Delhi ITAT judgment in the case of Agnity India Technologies Pvt Ltd. at para 5</p> |
| <p>7. HCL Comnet Systems & Services Limited</p> | <p>• Industrial giants cannot be compared to captive service providers</p> | <p>280</p> | |
| <p>8. Infosys Limited</p> | <p>• Turnover grater than 287</p> | <p>282</p> | |
| <p>9. Wipro Limited</p> | <p>BPO INR 200 crores whereas turnover of CIQ India is Rs.60 Crores</p> | | <p>• Hyderabad ITAT T judgment in the case of Triniti Advanced Software Labs (P)Ltd.</p> <p>• Bangalore Income-tax Appellate Tribunal judgment sin the case of Genisys Integrating Systems (India) Pvt. Ltd. at para 9</p> |

8. The learned Departmental Representative submitted before us that the TP Study report of the assessee cannot be said to be showing the correct results as he has not used the current year's data in case of the comparables selected by him. The learned Departmental Representative submitted that even in case of the relevant comparables selected by the assessee, which are also accepted by the TPO, if data for financial year 2006-07 is taken, the average profit shown by them is 26 percent. Replying to the argument of the learned Authorised Representative for the assessee that Mold Tek Technologies Ltd. and Accentia Technologies Ltd. cannot be treated as comparables due to uncomparable financial results arising out of amalgamation. The learned Departmental Representative submitted that the fact of amalgamation was never placed before the TPO. The learned Departmental Representative submitted that the DRP's order relied upon by the assessee was for the assessment year 2008-09 and does not relate to the assessment year under dispute. However, the learned Departmental Representative submitted that the matter can go back to the TPO for examining the impact of merger on financial affairs for the assessment year under dispute. So far as the issue of functional dissimilarity of Mold Tek Technologies Ltd. is concerned, the learned Departmental Representative submitted that the observation made by the DRP in its order for the

assessment year 2008-09 cannot apply to the present assessment year. Replying to the objections of the assessee in cases of HCL Comnet Systems and Services Ltd., Infosys BPO Ltd. and Wipro Ltd., the learned Departmental Representative submitted that in case of these comparables, the TPO has considered only the margin, but not the turnover. Therefore, these comparables cannot be rejected on the ground of high turnover. So far as Maple e-Solutions Ltd. and Triton Corps Ltd. are concerned, the learned Departmental Representative submitted that the assessee had not objected to selection of these comparables before the DRP. In case of Coral Hub Ltd. (earlier known as Vishal Information Technologies Ltd.) and Apex Technologies Ltd., the assessee itself has selected them as comparables and it never objected even when it got opportunity to do so before the TPO. The learned Departmental Representative, supporting the reasoning of the TPO, submitted that the comparables selected by the TPO cannot be rejected for the reasons put forth by the learned Authorised Representative for the assessee.

9. We have considered rival submissions and perused the materials on record, which includes the papers submitted by the assessee in the form of paper-book. We have also examined the decisions cited at the bar. It is seen from the order of the TPO that he has accepted the method, i.e. TNMM applied by the assessee as the most appropriate method. The TPO also has not disputed the fact that the assessee has maintained document in accordance with the statutory provisions. The TPO has also accepted the two data bases used by the assessee for selecting the comparables. The TPO has even accepted as many as eleven out of fifteen comparables selected by the assessee. As is clear from the submissions of the parties before us, the dispute lies within the narrow compass of the comparables selected by the TPO, which have been objected to by the assessee. We shall deal herein below with each of the comparables disputed to by the assessee.

I. Accentia Technologies Ltd.

10. It is the submission of the assessee that this company cannot be treated as a comparable because of uncomparable financial results arising out of amalgamation in the company. In this regard, the assessee has relied upon the order of the DRP for the assessment year 2008-09 in assessee's own case. It is seen that the DRP while considering similar objection placed by the assessee in the case of another company, viz. Mold Tek Technologies Ltd., in the proceedings relating to the assessment year 2008-09, has observed in the following manner-

"17.5. In addition to the above, the Director's Report of the company for the FY 2007-08 revealed the merger and the demerger. A company known as Techmen Tools Pvt. Ltd. had amalgamated with Mold-tek Technologies Ltd. with effect from 1st October, 2006. There was a de-merger of Plastic Division of the company and the resulting company is known as Moldtek Plastics Limited. The de-merger from the Moldtek Technologies took place with effect from 1st April, 2007. The merger and the de-merger needed the approval of the Hon'ble High Court of Andhra Pradesh and also the approval of the shareholders. The shareholders of the company gave approval for the merger and the de-merger on 25.01.2008 and the Hon'ble High Court of Andhra Pradesh had approved the merger and de-merger on 25th July, 2008. Subsequently, the accounts of Moldtek Technologies for FY 2007-08 were revised. On a perusal of the annual report it is noticed that Teckmen Tools Pvt. Ltd. and the Plastic Division of the company were demerged and the resulting company was named as Moldtek Plastics Ltd. The KPO business remained with the company. A perusal of the Annual report revealed that to give effect to the merger and demerger, the financial statements were revised and restated after six months from the end of the financial year 31.3. 2008. The assessee filed Form No.21 under the Companies Act with the Registrar of Companies on 26th August, 2008. Thus the effective date of the scheme of merger and demerger was 26th August, 2008. The

Annual Report supported the argument of the assessee that there were merger and demerger in the financial year and it was an exceptional year of performance as financial statements were revised by this company much after the closure of the previous year. The Panel agrees with the contention of the assessee that it is an exceptional year having significant impact on the profitability arising out of merger and demerger."

11. On careful consideration of the matter, we also agree with the aforesaid view of the DRP that extra-ordinary event like merger and de- merger will have an effect on the profitability of the company in the financial year in which such event takes place. It is the contention of the assessee that in case of the aforesaid company, there is amalgamation in December, 2006, which has impacted the financial result. This fact has to be verified by the TPO. If it is found upon such verification that the amalgamation in fact has taken place, then the aforesaid comparable has to be excluded.

II. Mold Tek Technologies Ltd.

12. The assessee has objected for this company being taken as comparable mainly on the ground that since there is a merger from 1st October, 2006, the financial results of the company cannot be taken as a comparable. The assessee, relying upon the observations of the DRP, in the case of this particular company, in the proceeding for the assessment year 2008-09, which has been extracted in para 10 hereinabove, has submitted that the assessment year under dispute also, is an exceptional year of performance as there is impact of amalgamation of a company, namely, Techman Tools P. Ltd., with effect from 1st October, 2006 and the concerned company also revised its financial statement, after closure of the previous year. It has been submitted by the Authorised Representative for the assessee that the amalgamation was also approved by the shareholders on 25.1.2008 and the High court has also approved the same on 25.7.2008. IN this context, the assessee relied upon the annual report of the company for the financial year 2007-08. The assessee has further submitted that the activity of the company is also functionally different since it is engaged in providing High End Engineering Consulting Services and Structural Engineering Consulting Services, which are in the nature of Knowledge Process Out-sourcing (KPO) services . The Authorised Representative for the assessee has submitted that the aforesaid company is providing highly technical and specialized engineering services, and use of information technology is only incidental. Lastly, it has been submitted that the company was having supernormal profit at 113 percent. Therefore, it cannot be taken as a comparable. In support of his contentions, learned Authorised Representative year 2008-09 and the orders of the ITAT Mumbai Bench in the case of M/s. Teva India P.Ltd. V/s. DCIT (2011-TII-28 ITAT- Mum-TP).

13. On careful consideration of the submissions of the assessee we find that the DRP, as already stated earlier, in the proceedings for the assessment year 2008-09 has accepted the assessee's contention that this company cannot be treated as comparable because of exceptional financial result due to merger/de-merger. In view of the aforesaid, we accept the assessee's contention that this company cannot be treated as comparable. That apart, it is also a fact that this company has shown super normal profit working out to 113 percent. The Income-tax Appellate Tribunal, Mumbai Bench in the case of Teva India Pvt. Ltd.(supra) has observed that companies showing supernormal profit cannot be treated as comparable. The relevant observations of the Tribunal in that case are extracted hereunder for convenience-

"32. We have heard the arguments of both the sides and also perused the relevant material on record. It is observed that although a detail submission was made on behalf of the assessee before the learned CIT(A) on the basis of FAR analysis to show that the selection of M/s. Vimta Labs as comparable is not justified, the learned CIT(A) has not accepted the stand of the assessee on the issue without giving any cogent or convincing

reasons. In its recent decision rendered in the case of Adobe Systems India Pvt. Ltd. (ITA No.5043/Del/2000 dtd. 21.01.2011) + (2011-TII-13-ITAT-DEL-TP), Delhi Bench of ITAT has held that exclusion of comparables showing supernormal profits as compared to other comparable is fully justified. We, therefore set aside the impugned order of the Id. CIT(A) on this issue and restore the matter to the file of the A.O. with a direction to decide the same afresh after taking into consideration the submissions made by the assessee before the learned CIT(A) and keeping in view the Delhi Bench of ITA in the case of Adobe Systems India Pvt. Ltd. (supra).

In this view of the matter, we accept the contentions of the assessee that this company cannot be treated as a comparable.

III. Eclerx Services Ltd.

14. The assessee has objected for this company being taken as comparable mainly on the ground that it was having a supernormal profit of 89 percent, and as such it cannot be taken as a comparable in view of the decision of the Mumbai Bench of the tribunal in the case M/s. Teva India Ltd. (supra). That apart, relying upon the annual report of the company, the learned Authorised Representative for the assessee has contended that that the concerned company is engaged in providing Knowledge Process Outsourcing(KPO) Services.

15. On considering the objections of the assessee in relation to this company, we accept the contention of the assessee that this company cannot be taken as a comparable both for the reasons that it was having supernormal profit and it is engaged in providing KPO services, which is distinct from the nature of services provided by the assessee.

IV. Coral Hub Limited (Earlier known as Vishal Information Technologies Ltd.):

16. The assessee has objected for this company being taken as comparable mainly on the ground that the activities of the company is not only functionally different, but the business model of the company is also different as it sub-contracts majority of its ITES works to third party vendors and has also made significant payments to those vendors. The payments made to vendors towards the data entry charges also supports the fact that the company outsources its works. In the circumstances, it cannot be taken as a comparable to the ITES functions performed by the assessee. Since party vendors. In this context, the assessee relied upon the order of the DRP in assessee's own case for the assessment year 2008-09, wherein the DRP, after taking into consideration, the aforesaid aspect, has accepted the claim of the assessee. The assessee further submitted that the Income-tax Appellate Tribunal Mumbai Bench in the case of ACIT V/s. M/s. Maersk Global Service Centre(India)Pvt. Ltd. (supra), a copy of which is submitted before us, has also directed for the exclusion of the aforesaid company since it has outsourced a considerable portion of its business.

17. After considering the submissions of the learned Authorised Representative for the assessee, we find that the DRP, in the proceedings for the assessment year 2008-09 in assessee's own case, after taking note of the composition of the vendor payments of Coral Hub for the last three years, and the fact that it has also commenced a new line of business of Printing on Demand(POD), wherein it prints upon clients request, concluded as follows-

"18.4. In view of this major difference in functionality and the business model, this Panel is of the view that 'Coral Hub' is not a suitable comparable to the taxpayer and hence needs to be dropped from the final list of comparables."

In case of ACIT V/s. M/s. Maersk Global service Centre (supra), the ITAT Mumbai Bench

has also directed for exclusion of the aforesaid company, by observing in the following manner-

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

In view of the observations made by the DRP as well as the decision of the ITAT Mumbai in the case of Maersk Global Service Centre, (supra), we accept that this company cannot be taken as a comparable.

V. Maple e-Solutions Ltd.

&

VI. Tricom Corp Ltd.

18. The assessee has objected for these companies being taken as comparables mainly on the ground that the directors were involved in fraud and hence financials are unreliable. In this regard, learned Authorised Representative for the assessee has relied upon and order of the ITAT Delhi Bench in the case of ITO V/s. CRM Services India (P)Ltd., New Delhi(ITA No.4068/Del/2009 for assessment year 2004-08 dated 30.6.2011, wherein it was held that the financial results of these very companies, which have been taken as comparable in the cited case also, cannot be accepted as comparables, with the following observations.

"17.5 We have considered the facts of the case and submissions made before us. The admitted facts in respect of Galaxy Commercial are that it is carrying on three lines of business and segment profitability is not available. Obviously, overall profitability of the company cannot be applied in the case of the assessee as it will amount to comparing incomparable cases. Further, the business reputation of Rastogi group, owning Maple E. Solutions and Triton Corporation, is under serious indictment. They are also carrying on the business of data processing services and ITES services apart form BPO services. In view of a question mark on the reputation of the owner, albeit for earlier years, it would be unsafe to take their results for comparison of the profitability of the assessee. ... Accordingly, it is held that none of these cases can be taken to be comparable case."

It was submitted by the learned Authorised Representative for the assessee that since the above decision of the Delhi Bench of the Tribunal was delivered subsequent to the impugned order of the DRP, it could not have been relied upon by the assessee before the DRP.

19. We have considered the submissions of the assessee in relation to these two companies. In view of the aforesaid order of the Delhi Bench of the Tribunal cited above, wherein the comparability of these very same companies was examined, we agree with the contentions of the assessee and hold, that these two companies cannot be accepted as comparables.

VII. HCL Comnet Systems & Services Limited:

VIII. Infosys BPO Limited

&

IX Wipro Limited

20. The assessee has objected for these three companies being taken as comparables mainly on the ground that these companies are industrial giants considering their turnover compared to that of the assessee, whose turnover is only Rs.60 crores. In this context, the assessee has referred to the annual turnover of these three companies, which are as below-

Company	Turnover (in Rs.Crores)
(1) HCL Comnet Systems & Services Limited	260.19
(2) Infosys BPO Limited	649.57
(3) Wipro Limited	939.78

It is the contention of the assessee that these three companies are industrial giants in the area of software development and since these companies assume all risks, they earn higher amount of revenue resulting in higher profit, whereas the assessee being a captive unit of its parent company in the USA, it operates in a risk mitigated environment. Therefore, the margin of profit is also less. In this context, the learned Authorised Representative for the assessee relied upon the decision of the ITAT Delhi Bench in the case of Agnity India Technologies P. Ltd. V/s. ITO in ITA No.3856/Del/2010 dated 4th November, 2010 and in the case of Trinitri Advanced Software Labs(P)Ltd.(2011-TII-92- ITAT-HYD-TP). The Authorised Representative for the assessee further contended that when the TPO has rejected companies with turnover of less than Rs.one crore, by stating that these companies may not be representing the industry trend, by applying the very same logic, he should not have also considered the companies having turnover of more than Rs.200 crores. In this context, the learned Authorised Representative for the assessee has relied upon the decision of the ITAT Bangalore Bench in the case of M/s. Genesys Integrating System(India) P. Ltd. (2011) 64 DTR 225.

21. On considering the submissions of the assessee in relation to these three companies, we find that the TPO has excluded the companies whose turnover is less than Rs.One Crore, on the ground that they may not be representing the industry trend. That very logic also applies to the companies having high turnover of over Rs.200 crores as against the assessee's turnover of only Rs.60 crores, and therefore, it would be fair enough to exclude those companies also. In the case of Agnity India Technologies P. Ltd. (supra), the Delhi Bench of the Tribunal, while considering the comparability with companies which are market leaders in their field, and having substantially high turnover, observed as follows-

"5.2. Various arguments, as stated earlier, were taken before the DRP which inter-alia included rejection of comparable cases; application of arbitrary filter of wage to sales ratio; ignoring that the assessee is a limited risk company; inclusion of Infosys Technologies Ltd.; and inclusion of Satyam Computers Services Ltd. in spite of the fact that its data is not reliable as publicly known. On the basis of these arguments, the DRP excluded the case of Satyam Computers Services Ltd., thereby reducing the arm's length margin to 25.6 percent. It is argued that the case of the assessee is not comparable with Infosys Technologies Ltd., the reason being that the later is giant in the area of development of software and it assumes all risks, leading to higher profit. On the other hand, the assessee is a captive unit of its parent company in the USA and it assumes only limited currency risk. Having considered these points, we are of the view that the case of the aforesaid Infosys and the assessee are not comparable at all as seen from the financial data etc. of the two companies mentioned earlier in the order. Therefore, we are of the view that this case is required to be excluded."

Similar view has also been expressed by the Hyderabad Bench of the Tribunal in the case of Trinity Advanced Labs P. Ltd. (supra). In the case of M/s. Genesys Integrating India P. Ltd. (supra), the Bangalore Bench of the Tribunal has observed in the following manner-

"9. Having heard both the parties and having considered the rival contentions and also the juridical precedents on the issue, we find that the TPO himself has rejected the companies which are making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain for the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various benches of the Tribunal when companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet and NASSCOM has given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs.1.00 crore to 200 crores have to be taken as a particular range and the assessee being in the range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study."

In view of the aforesaid consistent decisions of the Tribunal, we accept the contention of the learned Authorised Representative for the assessee that the aforesaid three companies cannot be treated as comparable, considering their substantially high turnover as compared to that of the assessee. We also agree that the turnover filter of Rs.1 crore to Rs.200 crore as applied by the ITAT Bangalore Bench in the aforesaid decision, should also apply to the facts of the present case, considering the assessee's turnover of mere Rs.60 crores. We therefore, hold that companies having turnover of Rs.1 crore to Rs.200 crore alone can be considered as comparable, in the case of the assessee.

22. We find from the orders of the DRP that though the assessee has made detailed arguments, specifically objecting to the selection of the aforesaid companies as comparables, the DRP has not properly considered the contentions raised by the assessee and has passed a very cryptic orders bereft of detailed reasons in support of the conclusions drawn.

23. To sum up, our conclusions are -

(a) Companies with extra-ordinary circumstances, like those which suffered events like merger/de-merger, impacting the financial results, could not be treated as comparables.

(b) Companies having supernormal profit cannot be considered as comparable;

(c) Companies which are functionally dissimilar cannot be taken as comparables.

(d) Companies acting merely as intermediary having outsourced its activity cannot be considered as comparable.

(e) Companies whose directors were involved in fraud cannot be taken as comparable,

as their financial results are not reliable.

(f) Companies, who are industrial giants and market leaders having substantially high turnover exceeding Rs.200 crores cannot be taken as comparables.

In the aforesaid view of the matter, we set aside orders of the DRP as well as the assessment order passed under S.143(3) read with S.144C of the Act, and restore the matter to the file of the TPO, who shall determine the ALP afresh in the light of our observations/directions hereinabove.

24. So far as the ground No.8 is concerned, the issue relates to non- consideration of gain/loss on account of foreign exchange fluctuation. The TPO has not considered the foreign exchange fluctuation gain/loss while determining the ALP, by observing that they do not relate to the business operation of the assessee, which has also been confirmed by the DRP.

25. It is the contention of the learned Authorised Representative for the assessee that the foreign exchange loss/gain should not be excluded while computing the margin of the assessee as well as the comparable companies, as the same is arising in the normal course of business of the assessee. The learned Authorised Representative for the assessee has submitted that in assessee's own case for the assessment year 2008-09, the gain/loss on account of foreign exchange fluctuation has been taken into account by the TPO, while computing the margin of comparable companies, which has also been affirmed by the DRP. In this context, the learned Authorised Representative for the assessee has also relied upon the decision of the Bangalore Bench of the Tribunal in the case of Sap Labs India Pvt. Ltd.(2010) 6 ITR 81, and the order of the Hyderabad Bench of the Tribunal in the case of Four Soft Ltd. V/s. DCIT (2011-TII-92-ITAT-HYD-TP).

26. The learned Departmental Representative on the other hand, supported the orders of the lower authorities.

27. We have considered the submissions of the parties in this regard. The Bangalore Bench of the Tribunal in the case of SAP Labs India P. Ltd. (supra), while considering a dispute of similar nature, observed as follows-

"The foreign exchange fluctuation gains is nothing but an integral part of the sales proceeds of an assessee carrying on export business. The Courts and Tribunals have held that foreign exchange fluctuation gains form part of the sale proceeds of exporter-assessee. The foreign exchange fluctuations income cannot be excluded from the computation of the operating margin of the assessee company....."

Following the aforesaid decision of the Bangalore Bench of the Tribunal, the Hyderabad Bench of the Tribunal held in the case of Four Soft Ltd. (supra) in the following manner-

"16. With regard to the exclusion of gain on account of foreign exchange fluctuation while computing the net margin, as claimed by the assessee, we find that the exchange fluctuation gains arise out of several factors, for instance, realisation of export proceeds at higher rate, import dues payable at lower rate. Since the gain or loss on account of exchange rate fluctuation arises in the normal course of business transaction, the same should be considered while computing the net margin for the international transactions with the associated enterprises of the assessee. Our view in this behalf is fortified by the decisions of the Bangalore Bench of the Tribunal in the case of SAP Labs India Ltd. supra and Bombay bench of the Tribunal in the case of Deutsche Bank A.G. V/s. D. CIT reported in 86 ITD 431....."

Respectfully following the aforesaid decisions of the Tribunal, and considering the contention of the assessee that for the assessment year 2008-09 foreign exchange fluctuation gain/loss has been considered as operating margin while computing the margin of comparable companies, we hold that even for the year under appeal also the same principle should be applied, and while computing the margin for determining the ALP for the assessment year under appeal, the foreign exchange gain/loss has to be taken as part of the operating margin. Consequently, we allow the ground of the assessee on this issue and direct the Assessing Officer to treat the foreign exchange fluctuation gain/loss as part of the operating margin of the comparable company.

28. In view of our decision in relation to grounds No.2 and 8, we are not inclined to go into the merits of the other grounds, which are accordingly rejected.

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