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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA No.153/Bang/2017
Assessment Year : 2012-13

Ocwen Financial Solutions Pvt. Ltd. Pritech Park, Survey No.51 to 64/4 Block No.12, 5th Floor of B Wing & 6th Floor of A Wing, Bellandur village, Marathahalli Ring Road, Bengaluru 560 103 **PAN NO : AAACO3764E**	**Vs.**	ACIT Circle-5(1)(2) Bengaluru
APPELLANT		**RESPONDENT**

ITA No.2292/Bang/2019
Assessment Year : 2010-11

Ocwen Financial Solutions Pvt. Ltd. Bangalore	**Vs.**	JCIT Spl.Range-5 Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri K.R. Vasudevan, A.R.
Respondent by	**:**	Ms. Neera Malhotra & Shri Kannan Narayanan, D.Rs

Date of Hearing	**:**	23.06.2021
Date of Pronouncement	**:**	12.07.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed these appeals relating to AY 2010-11 and 2012-13. The appeal filed for AY 2010-11 is directed against the order dated 30-08-2019 passed by Ld CIT(A)_10, Bengaluru. The appeal filed for AY 2012-13 is directed against the assessment order dated 23-11-2016 passed by the assessing officer u/s 143(3) r.w.s 144C(13) in pursuance of directions given by Ld Dispute Resolution Panel (DRP).

2. The assessee is engaged in the business of providing IT enabled services (ITES), i.e., providing backend operations like payroll processing, document imaging, loan accounting etc., to its Associated Enterprises (AE). The assessee herein is a wholly owned subsidiary of M/s Ocwen Asia Holdings Limited, Mauritius.

3. We shall first take up the appeal filed for AY 2010-11. Only issue urged in this appeal is whether the Ld CIT(A) was right in law in holding that the interest income earned from deposits kept in banks for availing bank guarantees is assessable under the head "Income from other sources".

4. This is second round of proceedings. In the earlier round, the Tribunal has restored this issue to the file of AO, vide its order dated 19-05-2017 passed in ITA No.863/Bang/2016. The Tribunal directed the AO to determine the purpose for which the deposits were kept in banks and decide the issue on the basis of ratio laid down in the case of Motorola India Electronics Ltd (2014)(225 Taxman 11) by Hon'ble Karnataka High Court. The relevant observations made by the Tribunal in the first round are extracted below:-

> *"…Thus in case if the interest income is earned from the deposits made in connection with the business activity of the undertaking then the same is eligible for deduction under Section 10A/10B of the Act. In the case of the assessee neither the Assessing Officer nor the CIT (Appeals) has verified this fact though the assessee in its reply before the Assessing Officer has mentioned that the interest income is earned on deposits made for securing Bank Guarantee. Accordingly, in view of the facts and circumstances of the case, the Assessing Officer is directed to verify the fact that the interest income in question has been earned from the deposits made for securing the Bank Guarantee and then decide the issue in the light of decision of Hon'ble Jurisdictional High Court in the case of CIT vs. Motorola India Electronics P Ltd (supra)."*

Accordingly, the impugned assessment order came to be passed by the AO.

5. Before the AO, the assessee submitted the details of bank guarantees, for which the deposits had been made as under:-

(a) Bank Guarantee in favour of Income tax department – Rs.7,95,85,318/-.

(b) Bank Guarantee for availing duty benefits under Customs Act – Rs.42,92,970/-

The assessee also submitted that it is having three undertakings viz., Mumbai undertaking, Bangalore undertaking and Goa undertaking. It further submitted that all the three units are availing deduction u/s 10A of the Act. Accordingly, it was submitted that there is nexus between the bank deposits and business of undertaking. The assessee placed its reliance on the decision rendered by Hon'ble Karnataka High Court in the case of Hewlett Packard Global Soft Ltd (ITA No.812/2007 dated 30-10-2017).

6. The AO did not accept the submissions of the assessee. He took the view that the deduction u/s 10A of the Act is given to the "profits and gains derived by an undertaking", where as the "income tax liability" is fastened upon the assessee, which owns those undertakings. He noticed that the interest income has accrued/received to/by the assessee from the deposits kept with bank for availing bank guarantees and those bank guarantees have been given in favour of Income tax department towards the income tax liability of the assessee. Accordingly, the AO took the view that the interest income is not related to any particular undertaking and hence it cannot be considered as income derived from "any one undertaking". The AO held that the decision rendered by Hon'ble Karnataka High Court in the case of Hewlett Packard Global Soft Ltd (supra) is not applicable to the facts of the present case. He also observed that, in the case before Hon'ble Karnataka High Court, the interest income was an incidental income earned from deposits made out of surplus funds of the undertaking and on advances given to

staffs. Hence it was related to the business of the undertaking, which was eligible for deduction u/s 10A of the Act.

7. The AO also observed that the present assessment has been done as per the order passed by the ITAT, which has restored the issue to his file with the limited purpose of examining the applicability of decision rendered in the case of Motorola India Electronics Ltd (supra) only. Hence the AO observed that the assessee could not rely upon the decision rendered in the case of Hewlett Packard Global Soft Ltd (supra). In spite of this legal position, the AO held that he has examined the above said decision and distinguished the same. Accordingly, the AO held that interest derived on the bank deposits made for availing bank guarantees cannot be considered as derived from the business of undertaking. Accordingly, the AO held as under:-

> *"7. In view of the above, the interest income of Rs.67,86,002/- earned on fixed deposits made with banks (which have majorly been used to make bank guarantees) is income from other sources."*

Accordingly, the AO rejected the claim for assessing the above said interest income under the head "income from business" and accordingly assessed the same under the head "Income from other sources". It is pertinent to note that the AO did not address the deposits relatable to bank guarantees given for Customs liability.

8. The Ld CIT(A) also confirmed the decision of the AO with the following observations:-

> *"5.6 As discussed earlier, fixed deposits were used by the appellant for giving bank guarantee to the extent of Rs.7,95,85,318/- to the income tax department for keeping recovery of tax in abeyance as well as availing duty benefits under Customs Act to the extent of Rs.42,92,970/-. Therefore, the AO has rightly held that fixed deposits were used for non-business purposes and for earning interest income. Hence, there is no infirmity in the order of the AO. Accordingly, the addition of Rs.67,86,002/- is confirmed."*

Aggrieved, the assessee has filed this appeal.

9. The Ld A.R submitted that the assessee is carrying on business through three undertakings and all of them are eligible for deduction u/s 10A of the Act. Accordingly he submitted that the bank deposits should be considered as related to all the three undertakings. Accordingly, he submitted that the decision rendered by Hon'ble jurisdictional Karnataka High Court in the case of Hewlett Packard Global Soft Ltd (supra) shall apply to the facts of the present case also.

10. The Ld D.R, on the contrary, supported the order passed by Ld CIT(A).

11. We heard rival contentions and perused the record. We have also gone through the decision rendered in the case of Hewlett Packard Global Soft Ltd (supra). As observed by the AO, the facts prevailing in the above said case were related to "incidental income" by way of interest income on the temporarily parked funds in Banks/ interest on staff loans. Hence the said income was intricately linked to the business of the undertaking, which is eligible for deduction u/s 10A of the Act.

12. In the instant case, the bank deposits have been made for availing bank guarantees to be given in favour of Income tax department and Customs department. So far as, the bank guarantees given in favour of income tax department is concerned, we agree with the view of the AO that the liability towards income tax arises upon the assessee, which owns eligible undertakings. The income tax liability arises upon the assessee on the profits already generated by the undertaking. Hence, the deposits made for availing such bank guarantees, in our view, cannot be linked with the

business carried on by the undertakings. Hence we agree with the view of the tax authorities that the interest income earned on bank deposits made for securing bank guarantees in favour of income tax department cannot be considered as "business income" of the eligible undertaking. Accordingly, the same has been rightly assessed under the head Income from other sources.

13. We have noticed that the bank guarantees have been given in favour of Customs department also. It is stated that the deposits to the extent of Rs.42,92,970/- was made for availing duty benefits under Customs Act. There should not any dispute that the transactions under the Customs Act could be linked to a particular undertaking, in which case, the interest income earned on the above said bank deposits could be linked to any particular "eligible undertaking". Since transactions under Customs Act are related to import/export activities carried on by the undertakings, we are of the view that the decision rendered by Hon'ble jurisdictional Karnataka High Court in the case of Hewlett Packard Global Soft Ltd (supra) can be applied on it. Accordingly, the interest income shall normally form part of business income of the undertaking. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to assess interest income from bank deposits for availing duty benefits under Customs Act as business income of the relevant undertaking. The assessee is directed to link the bank deposits with specific undertaking so that the AO could work out deduction u/s 10A accordingly.

14. Now we shall take up the appeal filed for AY 2012-13. The Ld A.R did not press ground no.II(3) relating validity of reduction of travelling & conveyance, legal & professional and other expenses incurred in foreign currency from Export turnover, while computing

deduction u/s sec. 10AA of the Act. The remaining grounds relate to following issues:-

(a) Transfer pricing adjustment made

(b) Whether Foreign exchange gain forms part of profit eligible for deduction u/s 10AA

(c) Whether brought forward losses are required to be set off from profits before computing deduction u/s 10AA of the Act.

(d) Disallowance of expenses incurred on buy back of shares

(e) Non-granting of brought forward MAT credit.

(f) Charging of interest u/s 234C on assessed income instead of returned income.

15. The first issue relates to the transfer pricing adjustment made in respect of ITES services. The assessee reported a turnover of Rs.216.78 crores from providing ITe services. The assessee selected TNM method as most appropriate method and Operating profit/Operating Cost (OP/OC) as Profit level indicator (PLI). The TPO noticed that the assessee has arrived at average margin of comparable companies by considering average margin of 3 years data. The TPO rejected the Transfer pricing study conducted by the assessee. The TPO selected following 10 comparable companies:-

Sl.No.	***Name of the Case***	***Operating income***	***Operating cost***	***OP/OC***
1.	*Accentia Technologies Ltd.*	*126,38,02,000*	*112,89,16,000*	*11.75*
2.	*Universal Print Systems Ltd. (Seg)(BPO)*	*6,17,67,000*	*3,87,49,000*	*52.46*
3.	*Informed Technologies India Ltd.*	*1,96,36,431*	*1,82,45,770*	*6.08*
4.	*Infosys BPO Ltd.*	*1316,75,11,974*	*962,91,06,964*	*36.30*
5.	*Jindal Intellicom Ltd.*	*30,27,51,875*	*30,29,02,990*	*-0.05*
6.	*Microgenetic Systems Ltd.*	*1,29,93,217*	*1,08,63,390*	*19.61*
7.	*TCS E-Serve Ltd.*	*15,78,44,000*	*9,64,28,000*	*63.69*

8.	*BNR Udyog Ltd. (Seg)(Medical Transcription)*	*1,47,04,000*	*97,87,000*	*50.61*
9.	*Excel Infoways Ltd. (Seg) (IT/BVPO)*	*790,96,95,000*	*559,06,04,000*	*29.79*
10.	*E4e Healthcare Services Pvt. Ltd.*	*89,50,04,209*	*74,59,23,078*	*19.85*
	Average PLI			*28.11%*

The average margin of above said companies worked out to 28.11%. After giving credit of 0.27% towards working capital adjustment, the TPO arrived at adjusted margin of 27.84%. Accordingly, he made transfer pricing adjustment of Rs.25.01 crores. The Ld DRP confirmed inclusion of all the comparable companies selected by the TPO. However, after the order passed by Ld DRP, Transfer pricing adjustment was made by the AO at Rs.11.31 crores in the final assessment order.

16. The Ld A.R submitted that the assessee seeks exclusion of five companies, viz., M/s Universal Print Systems Ltd, M/s Infosys BPO Ltd, M/s TCS E-serve Ltd, M/s BNR Udyog Ltd and M/s Excel Infoway Ltd. The Ld A.R further submitted that though the assessee has sought inclusion of three companies in ground no.11, yet he presses for inclusion of only one company named M/s Crystal Voxx Ltd.

17. With regard to the claim of exclusion of five companies, the Ld A.R submitted that the claim of the assessee is supported by the decision rendered by co-ordinate bench in the case of Indecomm Global Services (India) P Ltd vs. DCIT (IT(TP)A No.185/Bang/2018 dated 28-09-2019). With regard to the claim of inclusion of M/s Crystal Voxx Ltd, the Ld A.R submitted that the said claim is supported by the decision rendered by the co-ordinate bench in the

case of FNF India P Ltd (IT(TP)A Nos. 195/Bang/2016 & 459/Bang/2017 dated 03-07-2019.

18. We heard Ld D.R and perused the record. We notice that the co-ordinate bench has directed exclusion of above said five companies in the case of Indecomm Global Services (India) P Ltd (supra). For the sake of convenience, we extract below the decision taken by the co-ordinate bench in respect of five companies:-

"Comparables sought to be excluded:

1. Universal Print Systems Ltd (segmental) (BPO)

Assessee sought to exclude this comparable for the reason that, it fails employee cost filter and has insufficient company information. It is also been submitted that, functionally this company is providing integrated print solution to its customers and does not provides routine ITeS services like that of assessee. It has been submitted that this company is not a captive service provider like that of assessee and has products sale as well as services sale, which is evident from page 335 of paper book (Index for Annual Reports).

4.1 Ld.CIT DR placed reliance upon orders of authorities below and submitted that this comparable is functionally comparable with that of assessee.

5. We have heard submissions advanced by both sides in light of record placed before us. On perusal of annual report of this company placed in paper book, we are of considered opinion that this comparable is basically into sale of products and services unlike a captive service provider such as assessee, who works on cost plus basis, providing services only to its AE's. It is also observed that this comparable is basically providing BPO services from its Prepress units. In written submission filed, assessee placed reliance upon decision of this Tribunal in case of Zyme Solutions Pvt Ltd., vs ACIT reported in (2019) 101 taxman.com 292, wherein this comparable has been excluded by observing as under:

10.4 We heard rival submissions and perused the material on record. The issue of comparability of Universal Print Systems Ltd. with that of the assessee- company has been duly considered by TPO after referring to information contained in Annual Report. The relevant findings of the TPO had not been countenanced by learned AR of the assessee. However, the issue of comparability of Universal Print Systems Ltd. has also been considered by the co-ordinate bench of this Tribunal in the case of CGI Information Systems & Management Consultants Pvt. Ltd. (supra) wherein it was held as follows:

'47. The next submission of the learned counsel for the Assessee was with regard to exclusion of 2 comparable companies from the list of 7 comparable companies that remain after the order of the DRP. The first comparable company sought to be excluded is Universal Print Systems Ltd. This company was chosen as a comparable company by the TPO. In reply to the proposal of the TPO to include this company as a comparable company, the Assessee vide its letter dated 22.12.2015 had pointed out its objections to including this company as a comparable company. A copy of the said objection is at page-785 of the Assessee's paper book. The Assessee pointed out that the OP/TC of this company as worked out by the TPO at 59.40% was wrong and unallocated costs as per the annual report should be allocated to BPO segment and if that is done then the OP/TC of this company will be only 51.80%. The Assessee further pointed out (Page 764 of paper book) that the TPO had applied revenue filter of more than 75% being from non-financial service income. The Assessee pointed out that the percentage of income from ITES was only 21.63% of the total revenue from operations of this company as per its annual report. The Assessee also pointed out that in the Pre-press BPO segment this company was providing integrated print solutions to its customers, which includes scanning, design/layout, trapping, hand-outlined clipping path and image masking and magazine and catalogue publishing. The Assessee submitted that the aforesaid services are not in the nature of ITES. The Assessee pointed out that as per the safe harbour rules introduced by the CBDT ITES has been defined as business process outsourcing services provided mainly with the assistance or use of information technology. It was also submitted that this company does not satisfy the definition of ITES as contained in Rule IOTA(e) of the Rules. Since use of information technology is absent .in the various services provided by this company, it cannot be regarded as ITES company. The Assessee also submitted that this company fails the employee cost filter. The employee cost filter requires that the employees cost incurred by the company must be more than 25% of its revenue.

48. The TPO at page-20 of his order has dealt with the above objections by observing as follows:

(a) Pre-Press BPO unit provides back office support services.

(b) This company has four major segments viz., Repro, Label Printing, Offset Printing and pre-pre ss BPO. The employee cost of pre-press BPO was more than 25% of the revenue from pre- press BPO and therefore the employee cost filter is satisfied in the case of this company.

(c) On the service revenue filter viz., the requirement that a comparable company must have revenue from rendering services of more than 75% of its total revenue, the TPO again held that the pre-press BPO segment's entire income is from services and therefore this objection is not to be accepted

49. On objections by the Assessee before the DRP, the DRP confirmed the action of the TPO. One of the objection before the DRP was that this

company did not figure in the list of companies engaged in ITES. On this objection the DRP held that though this company did not figure in the list of companies in ITES in the main search of capital line and prowess database but on a segmental search these two companies satisfied the requirement of being considered as companies engaged in providing ITES.

50. Aggrieved by the directions of the DRP, the Assessee is in appeal before the Tribunal. The learned counsel for the Assessee reiterated submissions that were made before the TPO/DRP. In particular it was submitted that the service revenue filter was applied by the TPO himself at the entity level and on such search this company was not regarded as engaged in providing ITES. At this stage the TPO ought to have dropped this company as a comparable company because this filter has to be applied at the entity level and not at the segmental level. The learned DR submitted that if the service revenue filter is applied at the segmental level there can be no objection by the Assessee. She relied on the order of the DRP/TPQ.

51. The requirements of Rule 10B(1)(2) & (3) of the Rules in the matter of comparability of companies under TNMM needs to be seen. The same reads as follows:

"10B. (1) For the purposes, of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely:--

(a) to (d)

(e) transactional-margin method, by which,

(i) the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (if) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction.

(2) For the purposes of sub-rule (1), the comparability of an international transaction with an uncontrolled transaction shall be judged with reference to the following, namely:--

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

(c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail

(3) An uncontrolled transaction shall be comparable to an international transaction if--

(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market;

or

(ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences."

52. There appears to be no bar in the Rules referred to above to considering segmental data under TNMM because the comparison is of "net profit margin realized by the enterprise from an international transaction" with the "net profit realized from a comparable uncontrolled transaction". Therefore comparison is of similar transaction. When segmental information is available and is not disputed, it cannot be argued that filters have to be applied at entity level. It cannot be argued that when the TPO himself applied the filters at the entity level he was not entitled to apply the filters at segmental level. As we have already stated if clear segmental information is available the filters can be applied at the segmental level in TNMM. Therefore the objection with regard to this company failing the employee

cost filter and service revenue filter in our view was rightly rejected by the TPO and DRP. It is however seen that this company has four segments viz., Repro. Label Printing, Offset Printing and Pre-press BPO. Whether the label printing and offset printing segments supplement the functions performed in the Pre- press BPO segment has to be seen. We therefore set aside the order of the DRP in this regard and remand for fresh consideration by the TPO the comparability of this company. In terms of Rule 10B(3) of the rules the profit margins of Pre-Press BPO have to be adjusted taking into account the fact that two other segments supplement the pre- press BPO segment. If such adjustment cannot be reasonably or accurately made then this company has to be excluded from the list of comparable companies. The TPO for this purpose can use his powers u/s. 133(6) of the Act to get required details from this company. As far as the argument that this company fails functional comparability, we find that none of the objections raised by the Assessee in this regard about lack of information about allied services performed by the pre-press BPO segment of this company and the break-up of the revenue from such allied services have been dealt with specifically by the TPO or DRP. Since the comparability of this company is being remanded to be TPO for consideration of adjustments as mentioned above, the objection with regard to functional comparability should also be looked into by the TPO in the remand proceedings on the basis of materials which he may gather u/s. 133(6) of the Act, The Assessee should be given opportunity of being heard by the TPO before the issue is decided by the TPO.'

Respectfully following the decision, we remand this comparable to the file of the TPO/AO for fresh adjudication on the above lines."

Respectfully following aforesaid decision, we remand this comparable to file of Ld.AO/TPO, for fresh adjudication, on the basis of directions reproduced hereinabove. Needless to say that proper opportunity shall be granted to assessee as per law.

Accordingly we set aside this comparable back to Ld.TPO.

***2. Infosys BPO Ltd**.*

Assessee objected for inclusion of this comparable primarily on the basis of functional incompatibility and presence of intangibles. It has been submitted that this company owns huge brand and not a fit comparables for company like assessee, who provide captive service to its AE's.

Ld.CIT DR opposed the exclusion and placed reliance upon orders passed by authorities below.

6. We have perused submissions advanced by both sides in the light of the records placed before us. Assessee placed reliance upon decision of this Tribunal in case of Zyme Solutions Pvt Ltd., vs ACIT vide order dated 28/06/19 in ITA (TP) a No. 1661/Bang/2016, wherein this comparable has been excluded by observing as under:

'5. We have heard the rival submissions on the comparability of Infosys BPO as a comparable company. The Delhi ITAT in the case of Baxter India Pvt. Ltd. Vs. ACIT ITA No.6158/Del/2016 for AY 2012-13 in the case of a company rendering ITES such as the Assessee, vide order dated 24.8.2017 Paragraph 23 held that Infosys BPO is not comparable with a company rendering ITES for the following reasons:-

"23. In so far as exclusion of Infosys BPO Ltd. is concerned, we find from the submissions made by the assessee before the Assessing Officer/TPO/DRP is that Infosys BPO Ltd. is predominantly into areas like Insurance, Banking, Financial Services, Manufacturing and Telecom which are in the niche areas, unlike the assessee. Further it was also submitted that the Infosys BPQ Ltd. comprises brand value which will tend to influence its business operation and the pricing policy thereby directly impacting the margins earned by the Infosys BPO Ltd.. We find the submissions of the ld. counsel for the assessee before TPO/DRP that in order to maintain the brand image of Infosys BPQ Ltd. in the market, the company incurs substantial selling and marketing expenditure whereas the assessee being a contract service provider does not incur such expenses to maintain its brand has not been controverted by them. Further, Infosys BPO Ltd. being a subsidiary of Infosys has an element of brand value associated with it. This can be further confirmed by the presence of brand related expenses incurred by Infosys BPO Ltd. Further, Infosys BPO Ltd. has acquired Australian based company M/s Portland Group Pty Ltd. during financial year 2011-12. They provide sourcing and category management services in Sydney, Australia. Therefore, this company also failed the TPO's own filter of rejecting companies with peculiar circumstances. In view of the above i.e. functionally not comparable, presence of brand and extraordinary event that has taken place during the year on account of acquisition of Australian based company, we are of the considered opinion that Infosys BPO Ltd. should not be included in the list of comparables. We accordingly direct the Assessing Officer/TPO to exclude Infosys BPO Ltd. from the list of comparables for the purpose of computing the average margin."

It was also brought to our notice that the Hon'ble Delhi High Court in ITA No.260/2018 in the appeal filed by the Revenue against the aforesaid order dismissed the appeal at the admission stage observing that rationale given by the ITAT for exclusion was correct. In view of the aforesaid decision, we direct exclusion of Infosys BPO from the list of comparable companies chosen by the TPO.

From above, it is clear that this company is functionally not comparable with captive service provider.

Respectfully following the same we direct this company to be excluded from the list of comparables.

***3. TCS e-Serve Ltd**.*

Ld.AR submitted that this company has been objected by assessee for its functional dissimilarity as it renders both BPO and KPO IT(TP)A No.185(B)/2018 services without segmental reporting. It is submitted that this company owns huge brand of TATA group and has also incurred brand related expenses and therefore cannot be accepted to be compared with a captive service provider like assessee. Ld.CIT DR on the contrary opposed its exclusion and placed reliance upon orders passed by authorities below.

7. We have perused submissions advanced by both sides in light of records placed before us. Assessee placed reliance upon following decisions in support of its argument for exclusion of this comparable:

- *Zyme Solutions Pvt Ltd. vs ACIT (supra)*
- *Baxter India Pvt. Ltd vs ACIT reported in (2017) 85 Taxmann.com*
- *285 (Delhi-Trib)*
- *PCIT vs BC Management Services Pvt. Ltd. reported in TS-948- HC-*
- *2017 (Del)-TP*

It is observed that this comparable has been excluded by this Tribunal. Assessee placed reliance upon decision of this Tribunal in case of Zyme Solutions Pvt Ltd., vs ACIT reported in (2019) 101 taxman.com 292, by observing as under:

> *"11.3 We have heard rival submissions and perused material on record. The issue of comparability of this company was considered by the co-ordinate bench of Tribunal in the case of XLHealth Corpn. India (P.) Ltd. (supra). The relevant findings of the Tribunal are as under:*
>
> *" . . . We have heard the rival submissions and perused the material on record. From the perusal of the Annual Report of this entity placed at page Nos. 583 to 678 of paper book, at page No. 604 it is stated as under.*
>
> *"2. COMPANY OVERVIEW*
>
> *Your Company, along with its subsidiary companies - TCS e-Serve International Limited and TCS e-Serve America Inc., is primarily engaged in the business of providing Business Process Services (BPO) for its customers in Banking, Financial Services and Insurance domain. The Company's operations include delivering core business processing services, analytics & insights (KPO) and support services for both data and voice processes.*
>
> *Your Company is an integral part of the Tata Consultancy Services' (TCS) strategy to build on its 'Full Services Offerings' that offer global customers an integrated portfolio of services ranging from IT services to BPO services.*
>
> *The Company provides its services from various processing facilities, backed t) a robust and scalable infrastructure network tailored to meet clients'*

needs. A detailed Business Continuity Plan has also been put in place to ensure the services are provided to the customers without any disruptions."

Thus, this company is also stated to be a Knowledge Process Outsourcing and therefore for reasons stated by us while dealing with this issue of comparability of the company Infosys BPO Ltd. shall equally hold good and therefore we direct th e A O / T P O to e x c l u d e this company from : list of comparables.' Since the appellant company is into low end BPO, it cannot be compared with KPO service provider.

11.4 Respectfully following the decision of the co-ordinate bench of Tribunal, we direct for exclusion this company from the list of comparable".

It has been observed that this company is into high-end KPO services and an assessee rendering low end BPO services cannot be compared with it. Further, this company has been excluded due to absence of segmental information.

Respectfully following aforesaid decision, we direct Ld.TPO to exclude this company from the list of comparables.

5.BNR Udyog Ltd. (segmental)

Ld.AR submitted that this company fails RPT filter and also fails export filter applied by Ld.TPO. It is submitted that this company is into medical transcription, coding, business support services and e- governance projects and therefore functionally not similar with that of assessee.

Ld. CIT DR however contended that this company is compared only for segment of medical transcription and therefore should not be excluded. She placed reliance upon decision of this Tribunal in case of Mobily Infotech India (P) Ltd vs DCIT reported in (2018) 97 taxman.com 2 in support.

8. We have perused submissions advanced by both sides in the light of the records placed before us.

Assessee is challenging functional dissimilarity of this company with that of assessee as it is into medical transcription. We have our reservation to consider medical transcription services to be one of KPO services. In our considered opinion medical transcription services is basically back-office services provided by graduates who are trained for short period of 6 months to one year. These are short crash courses undertaken by graduates who are trained to understand and speak English. There is no value addition in the services rendered by people in medical transcription. To our understanding, basically these people who carry out medical transcription services are trained to understand language spoken by doctors, outside India to whom medical reports of patience are sent for expert opinion. Medical transcriptionist simply reproduces opinion expressed by Doctor, which is then communicated to the patients.

It is observed from annual report placed at page 223 of paper book (Index to Annual Reports) that this company has segmental information of medical transcription and revenue earned under this segment is Rs.147.40 Lacs. It is also been observed that various other decisions by co-ordinate Benches of this tribunal has remanded this comparable back to Ld.TPO, for proper analysis and fresh consideration. We draw support for same from Indegene (P) Ltd vs ACIT reported in (2017) 85 Taxmann.com 60, wherein it has been held as under:

> *"9.3.1. We have heard the rival contentions and perused and carefully considered the material on record including the judicial pronouncements cited. From the details on record we observe that while the assessee has contended that the services rendered by this company M/s TCS E-serve Ltd are high end KPO services, it has not brought out as to which of these are the services that would come under technical services. On the other hand, w also notice that that the TPO has held all the services rendered by the assessee to be BPO services with any proper analysis. In this factual matrix of the case, we find that on similar facts, the co-ordinate Bench o ITAT Bangalore in the case of Indegene (P) Ltd., (supra) has remanded the matter of comparability of this company to the file of the TPO for fresh consideration. In view of the factual matrix of the case on hand, as laid out above and following the decision of the co-ordinate Bench in the case of Indegene (P) Ltd. (Supra) which is also rendered on similar facts, we deem it appropriate to remand the matter of the comparability of this company, TCS E-serve Ltd. To the file of the TPO for fresh consideration in the light of out abov observations. Needless IT(TP)A No.185(B)/2018 to add, the TPO shall afford the assessee adequate opportunity of being heard and to file details/submissions in this regard. It is also been observed that similar view has been taken by decision of this Tribunal in case of M/s Nielson Sports India Pvt.Ltd., Vs ACIT in IT(TP)A No.196(B))/2017 vide order dated 28-06-2019.*

Respectfully following the same, we set aside this comparable back to Ld.TPO for considering it afresh. Needless to say that proper opportunity shall be granted to assessee as per law. Accordingly we set aside this comparable back to Ld.TPO

6. Excel Infoways Ltd. (segmental)

This comparable selected by Ld.TPO is alleged to be functionally not comparable with assessee, as it is handling business relations and managing customer relationships. It has been submitted by Ld.AR that this comparable fails employee cost filter.

Ld.CIT DR however contended that this company is compared only for segment of medical transcription and therefore should not be excluded. She placed reliance upon decision of this Tribunal in case of Mobily Infotech India (P) Ltd vs DCIT reported in (2018) 97 taxman.com 2 in support.

9. We have perused submissions advanced by both sides in light of records placed before us. Annual report of this company is placed at page 273 of paper book (Index

for Annual Reports). In the Significant Accounting Policies reported at page 308 of paper book, it is observed that these companies operating businesses are organized and managed separately, according to nature of business and services provided with each segment, representing different strategic business unit. Note 15 at page 312 to refers to revenues from operations under the head information technology/BPO related services separately. It is observed that the function performed by this company as reported at page 285 reveals that it is engaged in business of providing customer care services and handling client business relations on their behalf by maintaining relation with customers and also providing services by assisting in managing the workflow and updating the records. It is observed that this Tribunal in case of Zyme Solutions Pvt Ltd., vs ACIT vide order dated 28/06/19 in ITA (TP) a No. 1661/Bang/2016, this comparable is excluded by observing as under:

> *"The third and last company that is sought to be excluded from the list of comparable companies is Exclusion of Excel Info Ltd. The Tribunal had retained this company as a comparable company in its original order. The assessee sought exclusion of this company on the ground that this company was functionally different from the assessee company and the employee cost to the revenue was less than the threshold limit of 25% and that there were peculiar economic circumstances which impacted the profit margin of this company thereby rendering this company as not comparable company. The Tribunal while adjudicating of exclusion of this company in paragraph 14.3 of its order held that on application of employee cost filter that the Assessee has failed to show as to how the findings of the TPO and DRP are not correct.*
>
> *2. The assessee has pointed out certain facts with regard to employee cost and diminishing revenue of this company which takes it out of the comparability and these aspects have not been considered by the Tribunal in its order. On the above objections in the MA, the Tribunal held as follows:-*
>
> *"8. We have examined the contents in the misc. petition and we find that there has been omission to consider the application of employee cost filter by the Tribunal though attention of the Bench was invited to relevant pages pointed out in the misc. petition. We do not however agree with the assessee that functional comparability of this company has not been examined by the Tribunal in paragraph 14.4. The Tribunal has come to the conclusion that this company is a ITeS company and that cannot be reviewed in the misc. application. However there has been omission to adjudicated exclusion of this company on account of extraordinary events. We therefore recall the order of the Tribunal to the limited extent of examining of the employee cost filter and the presence of extraordinary events on warranty exclusion of this company."*
>
> *3. We have heard the rival submissions on the exclusion of this company on the basis of extraordinary events that occurred during the relevant previous year which had impact on the profit margin of this company and therefore rendering this company from being chosen as a comparable company. The Delhi ITAT in the case of BT e-Serve (India) Ltd. Vs. ITO ITA No.6690/Del/2016 for AY 2012-13 order dated 19.6.2018 considered the*

comparability of this company and came to the conclusion in paragraph 5.4 of its order that there was abnormal volatility of revenue of this company from 2009-10 to 2014-15 and therefore this company should not be regarded as comparable company. Respectfully following the aforesaid decision, we direct exclusion of the aforesaid company from the list of comparable companies chosen by the TPO.

It is observed from order passed by Ld.TPO at page 10 that assessee objected this company that employee cost filter being more than 25% has not been examined by Ld.TPO. It is observed that in decision of coordinate bench of Delhi Tribunal in case of Baxter India Pvt.Ltd vs ACIT reported in (2017) 85 Taxmann.com 285 this comparable failing employee cost filter has been analyzed as under:

> *Further, from the order of the TPO we find he has obtained the employee cost and the sale for the ITES segment by exercise of his powers u s. 133(6). wherein the said company has allocated entire employee cost to IT - BPO segment with no allocation to Infra Activity segment which accounts to 49% of Excel's total revenue. In our opinion. it is highly impractical that no employee has been hired by Excel for Infra Activity segment. We. therefore. find merit in the argument of the Id. counsel for the assessee that the information provided as per section 133(6) by Excel Infoways Ltd. is unreliable and should not be used to compute employ ee cost for ITES segment. The Delhi Bench of the Tribunal in the case of Motorola Solutions India (P.) Ltd. v. Assts. CIT[2014] 48 taxmann.com 24842015] 152 ITD 158 (Delhi) has held that a company should be rejected as comparable in case there is contradiction in the facts or data sourced from annual report and as per the information gathered u/s. 133(6). In view of above discussion, we hold that Excel Infoways Ltd. cannot be considered as comparable and should be excluded from the list of comparables. We hold and direct accordingly".*

From the above observation by coordinate bench, objection raised by Ld.CIT DR stands clarified, as this company for year under consideration made a statement under 133 (6) regarding allocating entire employee cost to IT-BPO segment, with no allocation to other segment, which amounts to almost 49% of its total revenue during the year under consideration. At this stage, we clarify that, we are not inclined to express our opinion regarding functional similarities/dissimilarity of this company with that of present assessee before us and the same is kept open to be considered in an appropriate case.

We therefore agree with contention raised by assessee regarding this comparable not satisfying employee cost filter. Respectfully following aforestated decision of Delhi Tribunal reproduced hereinabove, we direct Ld.TPO to exclude this comparable from the final list.

19. We notice that the co-ordinate bench has directed exclusion of M/s Infosys BPO Ltd, M/s TCS E-serve Ltd and M/s Excel Infoways Ltd. Following the above said decision, we direct exclusion of above

said three companies. The co-ordinate bench has remanded the matter to the file of AO/TPO M/s Universal Print Systems Ltd and M/s BNR Udyog Ltd. Following the same, we restore these two companies to the file of AO/TPO with similar directions.

20. With regard to the claim of inclusion of Crystal Voxx Ltd, the Ld A.R relied upon the decision rendered in the case of FNF India P Ltd (supra), wherein it was held as under:-

> *"24. In ground No.13, the Assessee has prayed for inclusion of Crystal Voxx Ltd. as a comparable company. This company was not regarded as comparable company with the Assessee by the DRP for the reasons given in Para 2.15 of its order i.e., for the reason that in the financial results, the Auditors have mentioned that this company was predominantly a Business Process Outsourcing (BPO) company and therefore this company cannot be said to be an ITES company. The learned counsel for the Assessee brought to our notice that in the very same note, the auditors have also mentioned that the only reportable segment was BPO. Therefore this company was a BPO company and the results of the BPO which is the only segment ought to have weighed in the mind of the TPO to include this company as a comparable company.*
>
> *25. We have considered the submission of the learned counsel for the Assessee and are of the view that the plea raised by the Assessee is correct and the TPO ought to have regarded this company as comparable company because the only reportable segment of this company was BPO. We direct the TPO to include this company as a comparable company."*

Following the above said decision, we direct the TPO to include this company as a comparable company.

21. In view of the foregoing discussions, we restore this issue to the file of AO/TPO for determining the ALP of the international transactions relating to ITe services to the file of AO/TPO in terms of discussions made supra.

22. The next issue urged by the assessee relates to the inclusion of foreign exchange gain as part of profits of undertaking for the purpose of computing deduction u/s 10AA of the Act. The Ld A.R submitted that this issue is covered in favour of the assessee by the

decision rendered by Hon'ble Karnataka High Court in the case of Wipro Ltd (ITA No.3202/2005) and also the decision rendered by the co-ordinate bench in the case of Sanyo LSI Technology India Pvt Ltd (ITA No.977/Bang/2010 dated 13-05-2011. The decision rendered by the co-ordinate bench in the case of Sanyo LSI Technology India P Ltd (supra) is extracted below:-

> *"8.1.4. Reverting back to the issue under consideration, on the facts and circumstances of the issue, we are of the considered view that the foreign exchange fluctuation gain was directly related to the export activity of the assessee. Assuming that the assessee had not ventured to do any export sales, the question of foreign exchange gain didn't arise. As such, the foreign exchange fluctuation had direct nexus with the STPI U/T of the assessee which has been rightly included by the assessee as part of profits of the U/T for the purpose of computation of deduction u/s 10A of the Act. Our finding is in consonance with various judicial precedents, a few of which are discussed, in brief, here-below:*
>
> *(i) The Hon'ble Madras High court in the case of CIT v. M/s. Pentasoft Technologies Ltd. reported in 2010-TIOL-525-HC-MAD-IT, had held that -*
>
> > *"The exchange value based on upward or downward of the rupee value is not in the hands of the assessee. The assessee does not determine the exchange value of the Indian rupee; that when the fluctuation in foreign exchange rate was solely relatable to the export business of the assessee and the higher rupee value was earned by virtue of such exports carried out by the assessee, there was no reason why the benefit of s.10A should not be allowed to the assessee."*
>
> *(ii) In the case of CIT v. Gem Plus Jewellery India Ltd. reported in (2010) 233 CTR (Bom) 248, the Hon'ble High Court of Bombay has ruled that -*
>
> > *"Gain from fluctuation of foreign exchange is directly related with the export activities and should be considered as income derived from export in the year in which the export took place for the purpose of deduction u/s 10A of the Act.*
>
> *(iii) With regard to the foreign exchange fluctuation is a part of 'profits from business and profession, the Hon'ble Apex Court in its ruling in the case of Sutlej Cotton Mills Ltd. v. CIT cited supra, had held thus - "The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is*

held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."

In consonance with the above ruling, the Hon'ble Supreme Court in its subsequent verdict in the cases of (i) CIT v. Woodward Governor India (P) Limited and (ii) in CIT v. Honda Siel Power Products Limited reported in (2009) 312 ITR 254 (SC) observed thus - "15. For the reasons given hereinabove, we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under s. 37(1) of the 1961 Act.

8.1.5. Taking into account the facts of the issue and also in conformity with the legal position of various judiciaries referred in the fore-going paragraphs, we observe that -

(i) the foreign exchange gain was income derived by export business of the assessee, and, hence, eligible for deduction u/s 10A of the Act; &
(ii) the foreign exchange gains has to be taxed under the head 'income from business and profession'.

It is ordered accordingly."

Following the above said decision, we direct the AO to consider foreign exchange gains realised on export proceeds as income derived from export and allow deduction u/s 10AA of the Act.

23. The next issue relates to the action of the AO in setting off of brought forward losses prior to computing deduction u/s 10AA of the Act. The ld A.R submitted that the Hon'ble Supreme Court has held in the case of Yokogawa India Ltd (2017)(77 taxmann.com 41) has held that the stage of deduction u/s 10A would be while computing gross total income of eligible undertaking under Chapter IV of the Act and not at stage of computation of total income.

24. We heard Ld D.R on this issue. The Hon'ble Supreme Court has held in the case of Yokogawa India Ltd (supra) that the deduction u/s 10A has to be made independently and immediately

after the stage of determination of its profits and gains. It further held that, at that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in sections 70, 72 and 74 of the Act would be premature for application. Accordingly, the Hon'ble Supreme Court held that the deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. In the present case, the deduction claimed by the assessee is under section 10AA, which is akin to the deduction allowed u/s 10A of the Act. Accordingly, the ratio laid down by Hon'ble Supreme Court in the above said case shall apply to the deduction claimed u/s 10AA of the Act. Accordingly, we direct the AO to allow deduction u/s 10AA without setting off of brought forward losses.

25. The next issue relates to the deduction of expenses incurred on buy back of shares. This issue has been decided in favour of the assessee by the co-ordinate bench in the assessee's own case relating to AY 2011-12 in IT(TP)A No.511 & 686/Bang/2016, vide its order dated 25.09.2020. Relevant discussions made and decision taken by the co-ordinate bench are extracted below, for the sake of convenience:-

> *"4.2 Buy-back of shares*
>
> *4.2.1 During the previous year relevant to assessment year, the assessee had spent a sum of Rs.8,90,961 on buy-back of shares and debited the same to Profit & Loss account. The expenditure was disallowed by the AO in his draft assessment order holding the same to be capital expenditure.*
>
> *4.2.2 The DRP in its directions confirmed the view of the AO. The relevant finding of the DRP reads as follows:-*
>
> > *"16.1 The assessee has made submissions on these objections and the same have duly been considered. When a Company buys back shares,*

it is generally returning the value of the shares in the form of face value as originally paid, accumulated reserves and value of assets like goodwill, etc. that is not recognized in the books. Such return can hardly be treated as business expenditure. The accounting treatment under accounting principles and also under Section 77A (and related provisions) of the Companies Act, 1956, clearly supports this. The face value of shares bought back is reduced from the paid up capital and the surplus (premium) is debited to reserves such as securities premium account or other reserves (other than revaluation reserve). These provisions do not permit debiting the amount paid to profit and loss account for the year. So there is no infirmity in the order of the AO and the objection of the assessee is not accepted."

4.2.3 Aggrieved by the directions of the DRP, the assessee is in appeal before the Tribunal.

4.2.4 The ld. AR submitted that the issue in question is decided in favour of assessee by the judgment of the Hon'ble jurisdictional High Court in the case of CIT v. Motor Industries Co. Ltd. - ITA No.1064/2008 judgment dated 31.10.2014 (Karnataka High Court).

4.2.5 The ld. DR supported the orders of income-tax authorities.

4.2.6 We have heard the rival submissions and perused the material on record. The Hon'ble High Court of Karnataka in the case of CIT v. Motor Industries Co. Ltd. (supra) has held as follows:-

"26. The increase in the capital results in expansion of the capital base of the company and incidentally that would help in the business of the company and may also help in the profit- making. The expenses incurred in that connection still retain the character of a capital expenditure since the expenditure is directly related to the expansion of the capital base of the company. Issue of bonus shares does not result in the expansion of capital base of the company.
It does not lead to any inflow of fresh funds into the company. The capital structure is not expanded. On the contrary the consequence of such buy-back of shares is the capital base of the company gets reduced and the capital structure will go down. It is not of an enduring effect so as to bring the expenditure incurred in this regard as capital expenditure. Where there is no flow of funds or increase in the capital employed, the expenditure incurred would be revenue expenditure. Therefore, rightly the Tribunal held that it is in the nature of revenue expenditure and allowed the same."

4.2.7 In view of the judgment of the Hon'ble High Court of Karnataka in the case of CIT v. Motor Industries Co. Ltd. (supra), we hold that the expenses incurred by the assessee for buy-back of shares amounting to RS.8,90,961 is allowed as a revenue expenditure. It is ordered accordingly."

Following the above said decision, we direct the AO to allow the expenses incurred on buy back of shares.

26. The next issue relates to the non-grant of brought forward MAT credit. Since this issue requires factual verification, we restore this issue to the file of the AO with the direction to examine the claim of the assessee in accordance with law.

27. The next issue relates to charging of interest u/s 234C of the Act. The Ld A.R submitted that the interest u/s 234C is chargeable on the returned income. He submitted that the AO has charged said interest on assessed income. We find merit in the submission of Ld A.R, since it is in accordance with the provisions of sec. 234C of the Act. Accordingly, we direct the AO to charge interest u/s 234C of the Act on the returned income.

28. In the result, appeal filed by the assessee for assessment year 2010-11 is treated as partly allowed and appeal for the assessment year 2012-13 is treated as allowed.

Order pronounced in the open court on 12th Jul, 2021.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(B.R. Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated 12th Jul, 2021.
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.