

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

I.T.A No. 857/Kol/2011  
Assessment Year : 2007-08

M/s Philips India Limited (formerly Philips Electronics India Ltd.) Kolkata [PAN : AABCP 9487 A] (Appellant)	-vs.-	A.C.I.T., Circle-12(2), Kolkata  (Respondent)
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I.T.A No. 1894/Kol/2012  
Assessment Year : 2007-08

M/s Philips India Limited (formerly Philips Electronics India Ltd.) Kolkata [PAN : AABCP 9487 A] (Appellant)	-vs.-	A.C.I.T., Circle-12(2), Kolkata  (Respondent)
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For the Appellant : Shri Arvind Sonde, Advocate  
For the Respondent : Shri G.Mallikarjuna, CIT(DR)

Date of Hearing : 10.01.2018.  
Date of Pronouncement : 02.02.2018.

**ORDER**

**Per N.V.Vasudevan, JM**

I.T.A. No.857/Kol/2011 is an appeal by the Assessee against the order 07.04.2011 of D.C.I.T-Circle-11, Kolkata passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (Act) in relation to A.Y.2007-08.

I.T.A. No.1894/Kol/2012 is an appeal by the Assessee against the order 30.10.2012 of D.C.I.T-Circle-11, Kolkata passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (Act) in relation to A.Y.2008-09.

Both the appeals were heard together and involve a common issue. We deem it convenient to pass a common order.

2. The assessee has filed a revised form No.36B in both the appeals in which the assessee has shown the change of name of the assessee and the change of jurisdiction of the AO which has been incorporated in the cause title of this order.

**ITA No.857/Kol/2011 (A.Y.2007-08) :**

3. The first issue that arises for consideration in this appeal by the assessee is with regard to determination of Arms Length Price in respect of an international transaction of rendering software development services by the assessee to its Associated Enterprises. (AE). The assessee rendered software development services to Koninklijke Philips Electronics N.V., Netherlands (KPE NV). As per the agreement the assessee charged KPE NV 10% mark up on cost for rendering software development services. The value of the international transaction with the associated enterprises was a sum of Rs.329.9 crores. Since the transaction between the assessee and its AE was a international transaction, income from the same has to be determined having to arms length price (ALP) in view of the provision of section 92 of the Act. The assessee to substantiate the price charged by it in international transaction was at arm's length, filed a Transfer Pricing Study (TP Study). The Assessee in its transfer pricing study adopted the Transaction Net Margin Method (TNMM) as the most appropriate method for determining arm's length price. The assessee chose operating margin to operating cost as Profit Level Indicator (PLI) for comparison of its margin with that of the Comparable companies. The assessee selected 18 companies as comparable companies. The arithmetic mean of the profit margin of these comparable companies was 9.75%. The assessee's profit margin was 10.23%. The assessee therefore claimed that the transactions with the AE was at arm's length. The computation of PLI as done by the assessee was as follows :-

Philips Electronics India Ltd	
Assessment year 2006-07	Rs in Mln
Software Division	
Turnover	3,299
Total Expenses	2,992
Operating Profit	306
Operating profit % on total cost	10.23

4. The computation of arithmetic mean of profit margin of the comparable companies chosen by the assessee in its TP study was arrived at as per Annexure-A to this order.

5. The AO referred the issue of determination of ALP to the Transfer Pricing Officer (TPO) in terms of section 92C(A)(1) of the Act. The TPO accepted some of the comparable companies chosen by the assessee as comparable with the Assessee and rejected some of the comparable companies chosen by the Assessee in its TP study. The TPO on his own selected some comparable companies and arrived at a total set of nine comparable companies and the arithmetic mean of the profit margin of these comparable companies was arrived at by the TPO at 18.61%. The TPO by his order 28.10.2010 passed u/s 92CA(3) of the Act, suggested an adjustment on account of arms length price at Rs.25.08 crores for the following reasons :-

“12. Based on the above, the comparables mentioned in notice u/s 92CA(2) of the Act dated 22.09.2010 are found to be appropriate. Based on the availability of Annual Reports, the three companies suggested by the assessee are also being included in the comparability analysis and figures are taken from consolidated financials. This presents the following picture :

Sl.No.	Name of the Company	FY 2006-07 OP/TC(%)
1.	Aftek Ltd.	32.27
2.	Aztec Software Ltd.	17.06
3.	KPIT Cummins Infosystems Ltd.	12.92
4.	Prithvi Information Systems Ltd.	12.50
5.	Zylog Systems Ltd.	15.54
6.	Megasoft Ltd.	19.98
7.	Subex Azure Ltd.	18.41
8.	Sasken Communications Technologies Ltd.	13.37
9.	3i Infotech Ltd.	25.47
	Arithmetic mean	18.61

13. The arithmetic mean of the operating profit on operating cost comes to 18.61% as Compared to the operating margin on operating cost of the software division of the assessee company which is 10.23%. Thus the arm's length price is more than 5% of the price at the international transaction was undertaken. Hence, by taking the operating profit on operating cost percentage as 18.61% as the benchmark, the arm's length price of international transactions representing provision of software development services by the assessee company to its AEs during the assessment year 2007-08 is re-determined as under: - .

Operating margin declared by the assessee at 10.23% operating margin percentage	Rs.30.60 crores
Operating profit margin taking the operating Margin percentage at 18.61%	Rs.55.68 crores
Arm's Length Price Adjustment	Rs.25.08 crores

Hence, an upward adjustment of Rs.25.08 crores is to be made to the total income of the assessee company.”

6. Aggrieved by the addition proposed by the TPO which was incorporated in the draft assessment order by the AO, the Assessee filed objections before the Dispute Resolution Panel (DR). The DRP in its directions dated 17.03.2011 confirmed the action of the TPO. The AO passed a fair assessment order dated 07.04.2011 making addition of Rs.25.08 crores as suggested by the TPO in his order. Aggrieved by the

aforesaid addition made by the AO the assessee has raised ground nos. 1 to 5 before the Tribunal. Ground Nos. 1 to 5 raised by the assessee read as follows :-

***“1 Orders bad in law and on facts***

*The Dispute Resolution Panel ('the DRP') erred in not holding that the order of the Transfer Pricing Officer ('TPO'), and the draft order of the Deputy Commissioner of Income-tax ('DCIT') (in so far as it relates to transfer pricing proceedings), are invalid and void ab initio as the conditions of section 92C(3) have not been satisfied.*

*2. Determination of arm's length price by the DCIT, TPO and DRP for Management Support services received by the Appellant*

*2.1. The DRP and the TPO erred in law and on facts in not granting the adjustment on account of the differences in the working capital position.*

*2.2 The DRP erred in not taking cognizance of the submissions made on 11 March 2011 and in reaching a conclusion that the Appellant did not provide any specific computation of the working capital adjustment.*

***3 Variation of 5% from the arithmetic mean***

*The TPO, DCIT and the DRP erred in law in not granting the benefit of +/- 5 per cent variance as per proviso to section 92C(2) of the Act.*

***4 Determination of arm's length price***

*4.1 The DRP and the DCIT erred in reaching a conclusion that a transfer pricing adjustment needs to be made in the hands of the Appellant.*

*Without prejudice to the generality of the above, the DRP and the DCIT erred in making a transfer pricing adjustment on the basis that the Appellant should have made operating margin! total cost margin of 18.61 % with respect to its software development activities.*

*4.2 The TPO, DCIT and DRP erred in facts and in law while rejecting the value of the international transactions as recorded in the books of account as being at arm's length.*

*4.3 The DRP and TPO erred in rejecting the transfer pricing study conducted by the Appellant.*

*4.4 The DRP and the TPO erred in arbitrary selection of certain comparable companies which were functionally dissimilar to the Appellant.*

*4.5 The DRP and the TPO erred in law and on facts in rejecting certain comparable companies based on application of arbitrary turnover filters.*

*4.6 The DRP and the TPO erred in computing the operating margin! total cost margin of 3i Infotech Limited in the benchmarking analysis.*

*4.7 The DRP and the TPO erred in law in using data, which was not contemporaneous and which was not available in the public domain at the time of conducting the transfer pricing study by the Appellant.*

*4.8 The DRP and the TPO erred in law and on facts in not considering the application of multiple-year data while computing the margins of the comparable companies, having regard to the provisions of Rule 10B(4).*

***5 Rejection of adjustments in terms of Rule 10B***

*The DRP and TPO erred in law and on facts in not granting appropriate adjustments under Rule 10B of the Rules for, inter alia, differences in (a) marketing expenditure, (b) research and development expenditure, (c) risk profile, and (d) depreciation charge; etc.”*

7. At the time of hearing the Id. Counsel for the assessee submitted before us that if two of the comparable ultimately chosen by the TPO are excluded and if proper working capital adjustment is given to the profit margins of the Assessee and the comparable companies ultimately chosen as comparable companies, then the price charged by the assessee would be at Arm’s length, after giving the benefit of second proviso to section 92C of the Act.

8. The two comparable companies chosen by the TPO as comparable companies which was confirmed by DRP and which the assessee seeks to exclude now before the Tribunal are (i) 3i Infotech Ltd and (ii) Aftek Ltd. (earlier known as Aftek Infosys Ltd.). As far as 3i Infotech Ltd is concerned, the assessee in its TP study had chosen it as a comparable company. Even before DRP the limited contention of the assessee was with regard to the computation of the profit margin of his company. The contention of the assessee before DRP which was rejected by DRP in para 6.14.5 of its order was as follows:-

“6.14.5 The assessee's next objection is that the PLI of the comparable named "3i Infotech Limited" has been computed incorrectly by the TPO at 25.47% .

According to the assessee, the correct PLI is n.25% as mentioned on page 22 of the application before the Panel. It is seen from the records that in computing the PLI the TPO has utilized the Annual Report of '3i Infotech Limited' for the year ended March, 2007. On page 35 of the Annual Report, the 'Management Discussion & Analysis of Financial Conditions and Results of Consolidated Operations' have been highlighted. It is observed that the company has for the first time charged 'Software Development Cost' to its P&L account with the remark that "We started writing off the Software Development costs, which till FY2006 used to be capitalized". Accordingly, in computing the PLI, the TPO has removed this item being extraordinary in nature for the relevant Financial Year. The Panel has considered this carefully and is of the view that this item is extraordinary in nature given the fact that in earlier years the comparable company was capitalizing this amount. In these circumstances, the Panel is of the view that no interference in this regard in the action of the TPO is called for."

9. As far as Aftex Ltd is concerned this was also a company chosen by the assessee in its TP study as a comparable company. As far as this company is concerned, the assessee had objected to inclusion of this company as a comparable company even before the TPO and the TPO rejected the claim of the assessee with the follows :

"10.2. The assessee has requested to remove Aftex Ltd from the list of comparables. It is interesting to note that this company was included in the list of comparables provided in its Transfer Pricing Documentation Report not only for FY 2006-07 but also for 2005-06. Thus, its Report for FY 2006-07 mentions with approval that this company "is a full spectrum technology service provider company which provides IT services to design and deliver projects, products and implements end-to-end solutions to customers in a variety of industries". No functional dissimilarities have been pointed out for consecutive years."

10. When inclusion of this company was objected before DRP, the DRP held that the TPO's finding were correct and did not call for any interference.

11. Before us the assessee has filed an application raising the following additional grounds of appeal :-

*1. Re.: The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, Aftex Infosys Ltd. cannot be considered as a comparable company while benchmarking the international transactions in relation to software development services rendered by the Appellant to its*

*Associated Enterprise ("AE") for the following specific reasons amongst other reasons:*

- 1.1. It owns significant intangible assets which the Appellant does not own/possesses.*
- 1.2. It is functionally not comparable with the Appellant as it is engaged in the business of software services, software products and embedded solutions;*
- 1.3. No segmental data is available vis-a-vis its activities of sale of software products and rendering of software services;*
- 1.4. During the year under consideration, 2 companies (viz., 'Elven Micro Circuits Private Limited' and 'C2Silicon Software Solutions Private Limited') merged with it.*

*2. Re.: The Appellant submits that, notwithstanding the fact that it had not challenged the inclusion of '3i Infotech Ltd.' as a comparable company before the lower authorities, considering the facts and circumstances of its case and the law prevailing on the subject, the said '3i Infotech Ltd.' cannot be considered as a comparable company while benchmarking the international transactions in relation to software development services rendered by the Appellant to its AE, for the following specific reasons amongst other reasons:*

- 2.1. It has entered into transactions with related parties;*
- 2.2. It is functionally not comparable with the Appellant as it offers wide range of software products, software development and consulting services, IT enabled service activities, IT infrastructure services and Business Process Outsourcing software services, software products and embedded solutions;*
- 2.3. No segmental data is available vis-a-vis its various activities;*
- 2.4. It owns significant intangible assets which the Appellant does not own/possesses*
- 2.5. It was engaged in significant research and development activities;*
- 2.6. During the year under consideration it has acquired various companies."*

12. It has been mentioned in the application for admitting the additional ground that though these two companies were included as comparable companies in the TP study done of the assessee, it later transpired that these companies were not comparable companies and therefore the same should not be regarded as a comparable company. The assessee has also placed reliance on ITAT Chandigarh Special Bench in the case of Qua Systems Pvt. Ltd. (2010) 4 ITR (Trib) 606 (SB)(Chandigarh). The Special Bench

took the view that Transfer Pricing law in India was still an evolving legislation and the judicial trend is being set into motion by decisions and therefore the assessee should not be denied the opportunity of showing as to how a company chosen by it as a comparable company was not comparable. The Special Bench took the view that when the cause of substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred. The Id. DR however opposed the prayer for admission of the additional ground. According to him the assessee having chosen the aforesaid companies as comparable companies cannot be allowed to take a stand that these companies were not comparable.

13. We have given a very careful consideration to the rival submissions. We have also perused the reasons given by the assessee as to why the aforesaid two companies should not be regarded as comparable companies. It transpires from the reasons given by the assessee for seeking exclusion of these two companies from the list of comparable companies that these two companies have been regarded in several decisions rendered by the tribunal as not comparable with a purely software development company such as the assessee. These decisions have been rendered in the context of the very same assessment year involved in the present appeal. These decisions were rendered at a later point of time when the assessee filed its TP study. We are therefore of the view that in the light of the decision of the Special Bench in the case of Quark Systems Pvt. Ltd.(supra) the additional ground should be permitted to be raised by the assessee. We therefore admit the additional ground for adjudication.

14. As far as exclusion of the company 3i Infotech Ltd is concerned the assessee seeks exclusion of this company on the following basis :-

<b>3i Infotech Limited – Margin as per TPO = 25.47% (Corrected Margin by Assessee – 13.25%</b>	<b>Page No. of Annual Report of 3 i Infotech Ltd.</b>
<b>Summary of Assessee’s Objections :</b>	
<b>-Has Significant Related Party Transactions – 56.14% : 3i Infotech was rejected in the Appellant own case of AY 2009-10</b>	[Page – 116 & 117)

on the basis of related party transaction (RPT) . In AY 2007-08, 3i Infotech has RPT amounting to 56.14% on sales. Hence the company should be rejected	
<b>-Functionally not comparable</b> – diversified activities : The company derives majority of its income from software products as compared to software services. This company offers wide range of software products, software development and consulting services, IT enabled service activities, IT infrastructure services and Business Process Outsourcing (BPO). Also the company is engaged in banking & financial services. It also has IPR driven solutions for Bank9ing, Insurance, Mutual Funds and Capital Markets. Also from the Annual Report, it is evident that the company has 50: 50 mix of services and product.	[Page 102,104,110,58,119]
<b>-No segment data available</b> : The company derives income from software products and software services. However no disclosure on segmental information is available in the standalone financial statements of the company.	[Page 119]
<b>-Significant Research &amp; Development activity</b> – 11.02% : The company is also involved in significant R & D activities. During the FY 2006-07 the R & D expenditure amounted to 11.02% of the total revenue of the company.	[Page- 11 & 5]
<b>-Significant Intangibles</b> – 23.80% : The company has intangible assets in the form of goodwill and Business & Commercial rights. The total amount of intangibles is 23.90% of total fixed assets.	[Page 95 & 104]
<b>-Acquisitions during the year</b> : During the year under consideration the company has taken multiple acquisitions. The company acquired Datacons private limited, Stex Software private limited and others.. Also the company has acquired 51% stake in each US based PA	[Page 4]

15. In the following decisions rendered by several Benches of the ITAT (including in Assessee's own case for AY 2009-10), this company has been regarded as not comparable with a software development company such as the Assessee.

Sl.No.	Relevant case law	Assessment Year	Broad Reason for Rejection	Citation	Para & Page No.
1.	Philips India Limited	2009-10	Functionally different &	ITA No.1141/Kol/2019	Para 5.5 (Pg no.37,38/42)

RPT					
<b>On Account of Related Party Transactions</b>					
1.	E4e Business Solutions India Pvt. Ltd.	2007-08	[2016]69 taxman.com 73 (Bangalore-Trib)	Para 17, (Pg. No.6/11)	4
2.	M/s Obopay Mobile Technology India Private	2010-11	[2016]66 taxman.com 119 (Bangalore-Trib)	Para 21, (Pg. No.2,14/17)	5
3.	FCG Software Services (India) Pvt. Ltd.	2006-07	[2016]66 taxman.com 296 (Bangalore-Trib)	Para 8, (Pg. No.6/17)	6
4.	Tesco Hindustan Service Centre Pvt.Ltd.	2007-08	[2017]77 taxman.com 48 (Bangalore-Trib)	Para 30, (Pg. No.25/34)	7
5.	Starent Networks (India)Pvt. Ltd.	2007-08	[2016]66 taxman.com 238 (Pune-Trib)	Para 13, (Pg. No.8/13)	8
6.	Hewlett-Packard (India) Software Operation P. Ltd.	2006-07	TS-433-ITAT-2015(Bang)-TP	Para 14.4.1.(Pg no.29/35)	9
7.	Sun Gard Solutions (India) P.Ltd.	2008-09	[2015]63 taxman.com 323 (Bangalore-Trib)	Para 16.3.1, (Pg. No.21/25)	10
<b>On account of Segmental Information not available</b>					
1.	Witness Systems Software India (P)Ltd.	2007-08	[2013]34 taxman.com 183 (Bangalore-Trib)	Para 15, (Pg. No.16/19)	20
2.	AMD India (P)Limited	2008-09	61 taxmann.com 35 (Bangalore-Trib)	Para 17.4, (Pg. No.29/30)	21
3.	Mis. Radisys India P.Ltd.	2010-11	TS-489-ITAT-2015 (Bang)	Para 20, (Pg. No.9 & 10/15)	22
4.	M/s ARM Embedded Technologies Pvt. Ltd.	2006-07 & 2007-08	TS-669 ITAT-2015(Bang)-TP	Para 7.2, (Pg. No.13/77 )	23
5.	Telcordia Technologes India (P)Ltd.	2007-08	[2012]22 taxmann.com 96 (Mum)	Para 7.2, (Pg. No.3/16 )	24
6.	M/s NTT Data	2007-08	TS-39 ITAT-2016	Para-7.4, (Pg	25

	India Enterprises Application Services Private Limited Hyderabad		(HYD)-TP	no.9/23)	
7.	M/s. Polaris Consulting & Services Ltd.	2007-08	TS-3 ITAT-2017(CHNY)-TP	Para -8.3, (Pg No.20/44)	26
8.	Sharp Software Development India P.Ltd.	2007-08	[2016]76 taxman.com 340 (Bangaluru-Trib)	Para 17.3, (Pg. No.17/23)	27
9.	CSR India (P)Ltd.	2007-08	[2013]31 taxman.com 265 (Bangaluru-Trib)	Para 3.4.2., (Pg. No.3 & 11)	28
<b>On account of Research &amp; Development Activities</b>					
1	Caliberated Healthcare Systems India Pvt. Ltd.	AY 2007-08	TS-413-ITAT-2014(DEL)-TP	Para-5, (Pg no.4/10)	29
2	Element K India Private Ltd.	AY 2007-08	[2015]54 taxman.com 296 (Delhi-Trib)	Para 18 (Pg. No.12 & 13/19)	30
3	Principal Global Services Limited	AY 2007-08	[2016]69 taxman.com 210 (Pune-Trib)	Para 21., (Pg. No.14&15/16 )	31
<b>On account of Significant Intangibles</b>					
1	Tesco Hindustan Service Centre Pvt. Ltd.	2007-08	[2017]77 taxman.com 48 (Bangalore-Trib)	Para 12.4 (Pg. No.13/34)	7
2	Marlabs Software Pvt Ltd	2007-08	TS-922-ITAT-2016(Bang)-TP	Para 14.3 (Pg no.17/36)	11
3	Global e-Business Operations Pvt. Ltd.	2007-08	TS-35-ITAT-2017(Bang)-TP	Para 3/7 (Pg no.7,13)	12
4.	H&S Software Development and Knowledge Management Centre Pvt. Ltd.	2007-08	TS-31-ITAT-2017(DEL)-TP	Para 34 & 40 (Pg no.17/21)	13
5.	Broadcom India Pvt. Ltd.	2006-07	TS-1010-ITAT-2016(Bang)-TP	Para 18.3.1 (Pg no.25/34)	14
<b>On account of Mergers/Acquisitions</b>					

1.	M/s Cashedge India Pvt. Ltd.	2010-11	TS-262-HC-2016(DEL)-TP	Para 6, (Pg no.3/4)	15
2.	Xchanging Technology Services India Pvt. Ltd.	2009-10	TS-555-HC-2015(DEL)-TP	Para-3,(Pgno.2/2)	16
3.	CES Pvt. Ltd.	2006-07	TS-338-HC-2014(AP)-TP	Para-4, (Pg no.2/5)	17
4.	M/s ISG Novasoft Technologies Ltd.	2007-08	TS-485-ITAT-2015(Bang)-TP	Par 5, (Pg no.5/10)	18
5.	Tesco Hindustan Service Centre (P)Ltd.	2007-08	[2017] 77 taxmann.com 48 (Bangalore – Trib.)	Para 23, (Pg no.24/34)	7
6.	TNS India Private Limited	2007-08	[2017] 77 taxmann.com 356 (Hyderabad – Trib.)	Para 10.3, (Pg no.7/17)	19
7.	Global e-Business Operations P.Ltd.	2007-08	TS-35-ITAT-2017(Bang)-TP	Par:7; Page:13/17	12

16. As far as exclusion of Aftek Ltd., as a comparable Company is concerned, the assessee seeks exclusion of this company on the following grounds :-

<b>Aftek Infosys Limited – Margin as per TPO/Assessee = 32.27%</b>	<b>Page No. of Annual Report</b>
<b>Summary of Assessee’s Objections :</b>	
<b>-Rejected by Hon’ble ITAT in Assessee’s own case for AY 2006-07 :</b> Aftek Limited was rejected in the Appellant own case of AY 2006-07 on the basis of Significant Intangibles.	
<b>-Significant Intangibles – 93.74% :</b> In the AY 2007-08, Aftek has Intangibles amounting to 91.90% of the gross block of fixed assets and 93.74% of net block of fixed assets. Hence the company should be rejected.	[Page – vi,vii,ix,41)
<b>-Functionally not comparable :</b> The company is engaged in software services, software products and embedded solutions. It is mainly engaged in product engineering services which is different from the software development services provided by the Appellant. Further, from the annual report, it is evident that the company earns revenue from both software services and products. Hence the Company is functionally not similar to the	[Page vi, 45,47]

Appellant.	
- <b>No Segment data available</b> : The company is involved in both sale of products and services. However, there is no segmental information available for the same	[Page- 56]
<b>Merger during the year</b> : During the year under consideration, the company has undergone merger with Eleven Micro Circuits Private Limited (EMPL) and C2Silicon Software Solutions Private Limited (C2Silicon)	[Page 9,10]

15. In the following decisions rendered by several Benches of the ITAT (including in Assessee's own case for AY 2009-10), this company has been regarded as not comparable with a software development company such as the Assessee.

Sl.No.	Relevant case law	Assessment Year	Broad Reason for Rejection	Citation	Para & Page No.
1.	Philips India Limited	AY 2006-07	Functionally different	[2017]78 taxmann.com 271(Kolkata-Trib.)	Para – 18 Pag no.13/15
2.	Qualcomm India Pvt. Ltd.	AY 2006-07	Functionally different & significant intellectual property rights	[2017]37 taxmann.com 271(Delhi-Trib.)	Para – 34&35 (Pg no.14 of 25)
3.	Alcatel-Lucent Technologies	AY 2003-04 & AY 2004-05	Functionally different	[2015]62 taxmann.com 303(Delhi-Trib.)	Pra 5 (Pg No.3&10)
4.	Mentor Graphics (Noida) P.Ltd.	AY 2003-04	Holds intellectual property rights & segmental not available	TS-83-ITAT-2015(DEL)-TP	Para 7.4 (Pg no.6&7)

Sl.No.	Relevant Case Law	Assessment Year	Citation	Para & Page No.	Sr.No.
<b>On account of Significant Intangibles</b>					
1	Tesco Hindustan Service Centre Pvt. Ltd.	2007-08	[2017]77 taxman.com 48 (Bangalore-Trib)	Para 12.4 (Pg. No.13/34)	7
2	Marlabs Software Pvt Ltd	2007-08	TS-922-ITAT-2016(Bang)-TP	Para 14.3 (Pg no.17/36)	11
3	Global e-Business Operations Pvt. Ltd.	2007-08	TS-35-ITAT-2017(Bang)-TP	Para 3/7 (Pg no.7,13)	12
4.	H&S Software Development and Knowledge Management Centre Pvt. Ltd.	2007-08	TS-31-ITAT-2017(DEL)-TP	Para 34 & 40 (Pg no.17/21)	13
5.	Broadcom India Pvt. Ltd.	2006-07	TS-1010-ITAT-2016(Bang)-TP	Para 18.3.1 (Pg no.25/34)	14

<b>On account of Segmental Information not available</b>					
1.	Witness Systems Software India (P)Ltd.	2007-08	[2013]34 taxman.com 183 (Bangalore-Trib)	Para 15, (Pg. No.16/19)	20
2.	AMD India (P)Limited	2008-09	61 taxmann.com 35 (Bangalore-Trib)	Para 17.4, (Pg. No.29/30)	21
3.	Mis. Radisys India P.Ltd.	2010-11	TS-489-ITAT-2015 (Bang)	Para 20, (Pg. No.9 & 10/15)	22
4.	M/s ARM Embedded Technologies Pvt. Ltd.	2006-07 & 2007-08	TS-669 ITAT-2015(Bang)-TP	Para 7.2, (Pg. No.13/77 )	23
5.	Telcordia Technologes India (P)Ltd.	2007-08	[2012]22 taxmann.com 96 (Mum)	Para 7.2, (Pg. No.3/16 )	24
6.	M/s NTT Data India Enterprises	2007-08	TS-39 ITAT-2016 (HYD)-TP	Para-7.4, (Pg no.9/23)	25

	Application Services Private Limited Hyderabad				
7.	M/s. Polaris Consulting & Services Ltd.	2007-08	TS-3 ITAT-2017(CHNY)-TP	Para -8.3, (Pg No.20/44)	26
8.	Sharp Software Development India P.Ltd.	2007-08	[2016]76 taxman.com 340 (Bangaluru-Trib)	Para 17.3, (Pg. No.17/23)	27
9.	CSR India (P)Ltd.	2007-08	[2013]31 taxman.com 265 (Bangaluru-Trib)	Para 3.4.2., (Pg. No.3 & 11)	28

<b>On account of Mergers</b>					
1.	M/s Cashedge India Pvt. Ltd.	2010-11	TS-262-HC-2016(DEL)-TP	Para 6, (Pg no.3/4)	15
2.	Xchanging Technology Services India Pvt. Ltd.	2009-10	TS-555-HC-2015(DEL)-TP	Para-3,(Pgno.2/2)	16
3.	CES Pvt. Ltd.	2006-07	TS-338-HC-2014(AP)-TP	Para-4, (Pg no.2/5)	17
4.	M/s ISG Novasoft Technologies Ltd.	2007-08	TS-485-ITAT-2015(Bang)-TP	Par 5, (Pg no.5/10)	18
5.	Tesco Hindustan Service Centre (P)Ltd.	2007-08	[2017] 77 taxmann.com 48 (Bangalore – Trib.)	Para 23, (Pg no.24/34)	7
6.	TNS India Private Limited	2007-08	[2017] 77 taxmann.com 356 (Hyderabad – Trib.)	Para 10.3, (Pg no.7/17)	19
7.	Global e-Business Operations P.Ltd.	2007-08	TS-35-ITAT-2017(Bang)-TP	Par:7; Page:13/17	12

17. The Id. DR submitted that the contentions as above are put forth by the assessee for the first time before the ITAT and the same requires examination by the TPO and

cannot be accepted without such examination. He submitted that the issue should be set aside to the AO for consideration of the above said objections. The Id. Counsel for the assessee however pointed out that in the case of 3i Infotech Ltd in assessee's own case in A.Y.2009-10 the Hon'ble ITAT has held that this company was not comparable with the assessee. As far as Aftek Ltd. is concerned this tribunal in A.Y.2006-07 in Assessee's own case held this company is not comparable with the assessee company.

18. We have given a very careful consideration to the rival submissions. We are of the view that prima facie the contentions put forth by the assessee show that both the aforesaid companies are not comparable companies either on account of an application of the related party transaction or ownership on intangibles, non availability of segmental data and extraordinary events occurring during the relevant previous year. This has been accepted by several decisions of the tribunal filed by the Id. Counsel for the assessee. Nevertheless since these details have not been examined by the TPO, we deem it fit and proper to restore this issue to the TPO to enable him an opportunity of examining the claim of the assessee. The TPO shall decide on the comparability of these two companies in accordance with law and in the light of the various contentions put by the assessee before us and in the light of the decisions rendered by the tribunal cited by the Id. Counsel for the assessee before us. We make it clear that the factual details given on the comparability alone should be examined and factually if the data is found correct, then the aforesaid two companies should be excluded from the list of comparable companies.

19. The next grievance of the assessee is with regard to the action of the TPO and DRP in not giving appropriate adjustments to the profit margin of the comparable companies and of the Assessee on account of working capital adjustment. On the question of working capital adjustment the DRP in its order has made the following observations :-

“The assessee also had with it the data required for computation of working capital adjustment but it did not make any such computation. The OECD Guidelines of May 2006, have been cited profusely by the assessee in respect of its arguments pertaining to use of data and various aspects of comparability but the assessee has neither furnished any details in this regard nor used this guidelines for computing the working capital adjustment and therefore it is not allowable. “

20. The Id. Counsel pointed out that the observations of the DRP that the assessee does not give the required data for computation of working capital adjustment was incorrect. In this regard, our attention was drawn to the assessee's letter dated 08.10.2010 addressed to the TPO in which the assessee has made the following submissions :

**'Working Capital Adjustment**

Without prejudice to the submissions made above, it would be relevant to note that the Assessee is a captive service provider rendering software services to its Associated Enterprises (' A Es'). Since, the Assessee is rendering services to its AEs, the latter takes utmost care so that the former's working capital requirements are taken care of, in a timely manner, Accordingly, once an invoice is raised by the Assessee, the payment for the same is made well in time. On the other hand, the comparable companies are full-fledged entrepreneurial companies undertaking all functions of a typical businessman. These functions undertaken by the comparables include managing the working capital cash-flow requirements of the company. Thus, the comparable companies bear the risk of managing its debtors-creditors which is not applicable in case of the Assessee. In view of the above, this difference in the working capital position between the Assessee and the comparable companies needs to be adjusted for a fair and equitable comparison.”

21. The assessee has also given the working capital adjustment before the DRP which is placed at page 463 of the assessee's paper book.

22. The Id. Counsel also pointed out that in assessee's own case for A.Y.2006-07 this Tribunal directed that 2% adjustment towards working capital adjustment should be given. The following are the relevant observations of the Tribunal in ITA No.1068/Kol/2015 order dated 08.02.2017.

*“21. The last and final submission of the Id. Counsel for the assessee is with regard to the adjustment towards working capital and risk adjustment. In this*

*regard it was pointed out by the ld. Counsel for the assessee that the TPO again in A.Y.2004-05 in its order dated 15.05.2006 has himself allowed working capital and risk adjustment at 2% and similar allowance of such adjustments in the present assessment year should be done. The following are the relevant observations of the TPO in A.Y.2004-05 :-*

*“Taking all these into account, the computation provided by the tax payer cannot be accepted as reliable. However it is not fair to deny the benefit of adjustment altogether. Hence, an overall adjustment of (-2%) is given towards working capital level differences and also towards risk level differences. “*

*22. After considering the submissions of the learned counsel for the Assessee, we are of the view that similar adjustments should also be allowed in the present assessment year. We hold and direct accordingly. We also observe that the principle reasons assigned by the DRP in the present assessment year was lack of details furnished by the assessee. In this regard we find that all the details have been given by the assessee in its transfer pricing study and we find that the observations of the DRP in this regard cannot be sustained. We accordingly direct that adjustment of 2% towards working capital adjustment and risk adjustment should be allowed to the assessee as was done in A.Y.2004-05. We hold and direct accordingly.”*

23. The ld. DR submitted that the working capital adjustment should be based on the formula usually employed in computing the working capital adjustment. His submissions was that the working capital adjustment may be directed to compute by the assessee based on the formula and the TPO should be directed to consider the same.

24. We have considered the rival submissions and are of the view that the submission made by the ld. DR is acceptable. We accordingly direct the assessee to give computation of working capital adjustment as per the formula for calculating the working capital adjustment. The TPO is directed to examine the working capital adjustment so given in accordance with law.

25. In view of the aforesaid conclusion we are of the view that other issues raised in ground nos. 1 to 5 does not require any consideration and are left open. This issue with regard to transfer pricing adjustment is treated as allowed for statistical purposes.

26. Ground No.6 raised by the assessee reads as follows :

*“ 6 Entrance fees, subscription and cost of facilities paid to clubs  
The DRP and DCIT erred in law and on facts in disallowing Rs. 6,49,790 being  
payments made to clubs.”*

27. The issue raised in ground no.6 is with regard to disallowance of a sum of Rs.6,49,790/- made to clubs towards entrance fee, subscriptions and cost of facilities availed in clubs on the ground that the aforesaid expenses had no nexus with the business of the assessee. It is not disputed that the membership in question was a corporate membership which enable the directors and executives to socialize and develop contact for promoting the business interest of the assessee. An identical issue had come up for consideration before the Hon'ble ITAT in assessee's own case for A.Y.2006-07 and this tribunal in ITA No.1787/Kol/2010 order dated 19.06.2013 held that similar expenses are allowable as deduction. The following are the relevant observations of the tribunal:

*“8. In regard to ground no.6, being in respect of the payment made to clubs as it is noticed that this issue is now squarely covered by the decision of the Hon'ble Supreme Court in the case of United Glass Manufacturing Co. Ltd. referred to supra, the addition made on account of club fee payment stands deleted.”*

28. The tribunal following the decision of the Hon'ble Supreme Court in the case of United Glass Manufacturing Co. Ltd. In C.A.No.6447 of 2012 dated 12.09.2012 wherein it was held that club expenses of employees was business expenditure allowable u/s 37 of the Act, allowed the claim of the assessee. Respectfully following the decision of the tribunal in assessee's own case we direct the AO to allow the claim of the assessee for deduction.

29. Ground No.7 raised by the assessee reads as follows :-

*“ 7 Provision for replacement guarantee*

*The DRP and DCIT erred in law and on facts in disallowing Rs. 1,45,98,000 being the excess of provision for replacement Guarantee over actual payment.”*

30. The facts with regard to ground no.7 are that during the relevant assessment year the assessee has made provision for replacement guarantee amounting to Rs.29,12,44,000/- and actually paid amounting to Rs.27,66,46,000/-. The Assessee is mainly engaged in the manufacture and sale of durable consumer electronics goods like television sets, domestic appliances etc. These products carry a warranty period. The warranty period varies from product to product. During the warranty period, the cost of repairs is to be borne by the Assessee including the cost of spare parts to be replaced. The methodology for computation of warranty provision in the case of consumer electronics was furnished by the Assessee. The same is given as **Annexure-B** to this order.

31. The AO has disallowed the excess of Provision for Replacement Guarantee over actual payment amounting to Rs. 1,45,98,000/- treating the same as excess provision. The assessee has contested the view of the AO relying on the decision of the Apex Court in case of Rotork Controls India (P) LLD reported in 314 ITR 0062. The Assessee pointed out that similar issue also came up before the DRP in the assessee's case for the AY 2006-07. For the AY 2006-07, the Panel directed the AO to examine specifically the record of the assessee in respect of Provision for Replacement Guarantee to ascertain whether the following three conditions laid down by the Hon 'ble Apex Court in the case of Rotork Controls India (P) Ltd. (supra) were satisfied in the assessee's case or not and then pass the order accordingly.

1. There is present obligation as a result of a past event.
2. There is probability of outflow of resources for settling the obligation
3. A reliable estimate can be made of the amount of the obligation.

32. The AO held that the decision of Hon'ble supreme court in case of Rotork Controls India P Ltd reported 111 (2009) 314 ITR 0062 is not applicable in the Assessee's case. The computation of the Provision for this year is based on the same method as applied by the assessee in AY 06-07 and as the AO found it unacceptable after carrying out the examination as directed by the DRP of that year, the DRP in this AY i.e., AY 2007-08 was of the view that the Provision for this year is also disallowable.

33. At the time of hearing the Id. Counsel for the assessee brought to our notice the order of the DRP for A.Y.2006-07 was the subject matter of the appeal before the Hon'ble ITAT in 1787/Kol/2007. This tribunal allowed the claim of the assessee. Following the coordinate bench decision in assessee's own case for A.Y.2003-04 in ITA No.1075/Kol/2009m an 948/Kol/2009 dated 11.10.2011. The parties agreed that this issue is covered by the aforesaid decisions. Respectfully following the same we direct the AO to allow the claim of the assessee as made in ground no.7.

34. In the result the appeal of the assessee is partly allowed.

**ITA No.1894/Kol/2012 (A.Y.2008-09)**

35. Ground Nos. 1 to 7 raised by the assessee is with regard to determination of arms length price in respect of an international transaction carried out by the assessee with its Associated Enterprises (AE) Kaninklijke Philips Electronics NV, Netherlands. The facts for A.Y.2008-09 are identical to the facts as it prevailed in A.Y.2007-08. The method of determination of arms length price and the PLI chosen by the assessee were identical as in A.Y.2007-08. The assessee chose nine comparable companies whose arithmetic mean of operating margin was 3.1%. The assessee's PLI was 13.76% computed in the following manner :-

Philips Electronics India Ltd Assessment year 2008-2009 P/L details for Software Division		Rs in Mln
Particulars		Amount
Turnover		2,512
Less: Expenses		
Depreciation	166	
Salaries, Wages, Bonus, Comm.	999	
Contrb to Pension & Prov Fund	53	
Staff Welfare	66	
Rent	72	
Power & Fuel	37	
Insurance	14	
Repairs/Maint: Buildings	24	
Travelling & Conveyance	209	
Reimbur. of Motor Car Exps	8	
Postage/Stationery/Office Exps	113	
Packing, Freight & Transport	4	
Consultant Fees	200	
Miscellaneous	243	
Transfer from corporate		
Total Expenses		2,208
Operating Profit		304
Operating profit % on total cost		13.76

The assessee claimed that the price charged in the international transaction was at arms length as it was higher than the arithmetic mean of profit margin of comparable companies.

36. The Transfer Pricing Officer (TPO) on a reference by the AO chose seven comparable companies whose arithmetic mean of profit margin was 23.18%. The TPO accordingly computed the addition to the total income on account of adjustment of arm's length price as follows :

“15. Based on the above, the following comparables are being used on the basis of comparables mentioned in notice u/s 92CA(2) of the Act dated 19.10. on the basis of availability of Annual Reports. This presents the following picture :

Sl.No.	Name of the Company	FY 2007-08 OP/TC(%)
1.	Aftek Ltd.	25.34
2.	3i Infotech Ltd. (standalone)	40.04
3.	KPIT Cummins Infosystems Ltd.	18.60

4.	L G S Global Ltd (consolidated)	16.04
5.	Persistent Systems Ltd.(consolidated)	23.18
6.	Megasoft Ltd.	22.23
7.	Sasken Communications Technologies Ltd.	16.88
	Arithmetic mean	23.18

6. The arithmetic mean of the operating profit on operating cost comes to 23.18% as Compared to the operating margin on operating cost of the software division of the assessee company which is 13.76%. Thus the arm's length price is more than 5% of the price at the international transaction was undertaken. Hence, by taking the operating profit on operating cost percentage as 23.18% as the benchmark, the arm's length price of international transactions representing provision of software development services by the assessee company to its AEs during the assessment year 2008-09 is re-determined as under: - .

Operating margin declared by the assessee at 13.76% operating margin percentage	Rs.30.40 crores
Operating profit margin taking the operating Margin percentage at 23.18%	Rs.51.20 crores
Arm's Length Price Adjustment	Rs.20.80 crores

Hence, an upward adjustment of Rs.20.80 crores is to be made to the total income of the assessee company.”

37. In respect of the objections of the assessee before DRP, the DRP confirmed the order of the TPO. The AO incorporated the adjustment suggested by the TPO and made an addition of Rs.20.80 crores to the total income of the assessee in the fair assessment order as addition on account of adjustment to arms length price. The assessee has raised ground nos. 1 to 7 against the fair assessment order of the AO before the Tribunal :

*“1. Orders bad in law and on facts*

*1.1. order passed by the Learned AO under section 143(3) read with section read with the order passed by the Learned Transfer Pricing Officer (hereinafter referred to ‘TPO ‘), under section 92CA(3) of the Act is bad in law and facts and void ab-initio .*

*1. 2. That Learned DRP erred in not holding that the order of TPO and the draft order of the AO (in so far it relates to transfer pricing proceedings) are invalid and void ab initio as the conditions of 92C(3) of the Act have not been satisfied.*

## **2. Determination of arm's length price**

2.1. *The Learned AO, TPO and DRP erred in making an adjustment to the Arm's Length Price (hereinafter referred as 'ALP') of international transaction relating to software development services rendered by the Appellant and in not accepting the ALP of the international transaction as recorded in the books of account by the Appellant.*

2.2. *Without prejudice to the generality of the above, the Learned AO, DRP and the TPO erred in making a transfer pricing adjustment on the basis that the Appellant should have made operating margin/ total cost margin of 23.18% with respect to its software development services.*

## **3. Selection of comparable companies**

3.1. *The Learned AO, DRP and the TPO erred on facts and in law in rejecting transfer pricing study conducted by the Appellant and the comparables selected by the Appellant.*

3.2. *The Learned AO, DRP and the TPO erred on facts and in law in selecting inappropriate comparable companies which are functionally dissimilar to the Appellant.*

3.3. *The Learned AO, DRP and the TPO erred on facts and in law in rejecting certain comparable companies based on the application of arbitrary turnover filters.*

3.4. *The Learned AO, DRP and the TPO erred in computing the operating profit/ total cost margin of one of the comparable company M/s 3i Infotech Limited.*

## **4. Disregard of Rule 10B(2) and Rule 10B(3) of the Income Tax Rules, 1962 ("the rules")**

4.1. *The Learned AO, DRP and TPO have erred in law and facts in disregarding the comparability factors specified under Rule 10B(2) of the Rules and the provisions contain the Rules that specify that an adjustment should be made to account for differences between the transactions that may materially affect the price of such transactions.*

4.2. *Without prejudice to the generality of the above, the Learned TPO, AO and the DRP have erred on facts in comparing the transactions of the captive software services of the Appellant with companies operating as full-fledged risk-bearing companies without considering the differences in the risks undertaken by the comparable companies vis. a vis the Appellant, the adjustments of which, in any case ought to have been allowed. Similarly, there has been failure to allow economic adjustments on account of differences in working capital between the Appellant and the companies selected as comparables.*

**5. Use of contemporaneous data**

*The Learned AO, DRP and the TPO erred in facts and in law in using data, which was not contemporaneous and which was not available in the public domain at the time of conducting the transfer pricing study by the Appellant.*

**6. Disregard of Rule 10B(4) of the Income Tax Rules, 1962 ("the rules")**

*The Learned AO, DRP and the TPO erred in law and on facts in not considering the application of multiple-year data while computing the margins of the comparable companies, having regard to the provisions of Rule 10B(4) of the Rules.*

**7. Variation of 5% as per second proviso to section 92C(2) of the Act**

*Without prejudice to the aforesaid grounds, the Learned AO, DRP and the TPO erred in law in of +/-5 percent variance as per proviso to section 92C(2) of the Act."*

38. We have heard the rival submissions. As in earlier A.Y.2007-08, the assessee seeks exclusion of three comparable companies out of the seven comparable companies ultimately chosen by the TPO in A.Y.2008-09. The three companies which are sought to be excluded by the assessee in this appeal before the Tribunal are Aftek Ltd , 3i Infotech Ltd and Persistent System Ltd.

39. As far as 3i Infotech Lt and Aftek Ltd are concerned these companies were not chosen as comparable companies by the assessee in its TP study. Persistent System Ltd has been chosen as a comparable company by the assessee in its TP study. As far as Aftek Ltd. And 3i Infotech Ltd is concerned the DRP accepted the order of the AO without any discussion. In para-12 of the TPO's order the objection of the assessee for including these three companies in the list of comparable companies has been set out. As far as Aftek Lt the objection of the assessee was that this company owned substantial intangibles and the assessee did not own any intangible and therefore this company should not be regarded as a comparable company. As far as 3i Infotech Ltd is concerned this was also sought to be excluded on the ground of functional dissimilarity. The TPO

rejected the claim of the assessee on the basis that these two companies has been selected as comparable companies by the assessee in its TP study in A.Y.2007-08.

40. Before us the Id. Counsel for the assessee has made the following submissions with regard to exclusion of Aftek Ltd from the list of comparable companies and 3i Infotech Ltd from the list of comparable companies.

<b>Aftek Infosys Limited – Margin as per TPO/Assessee = 25.34%</b>	<b>Page No. of Annual Report</b>
<b>Summary of Assessee’s Objections :</b>	
<b>-Rejected by Hon’ble ITAT in Assessee’s own case for AY 2006-07 :</b> Aftek Limited was rejected in the Appellant own case of AY 2006-07 on the basis of Significant Intangibles.	
<b>-Significant Intangibles – 95.56% :</b> In the AY 2008-09, Aftek has Intangibles amounting to 93.84% of the gross block of fixed assets and 95.56% of net block of fixed assets in the current year. Hence the company should be rejected.	[Page – iv,vi,39,49]
<b>-Functionally not comparable :</b> Aftek Limited is not functionally similar to the Appellant as according to the information available in the annual report, the company is engaged in software services, software products and SDP. Further, the Company’s SDP group has expanded its business during the year. The services provided by the company includes engineering services which are different from the services provided by the appellant.	i., i,43,47,55]
<b>-No Segment data available :</b> The company is involved in both sale of products and services. However, there is no segmental information available for the same	[Page- 57]

Sl.No.	Relevant case law	Assessment Year	Broad Reason for Rejection	Citation	Para & Page No. of Case Law
1.	M/s Philips India Limited	AY 2006-07	Functionally different	[2017]78 taxmann.com 271(Kolkata-Trib.)	Para – 18 Pag no.13/15
2.	Chryscapital	AY 2008-09	Supernormal	[2015]56	Para –

	Investment Advisors (India) (P.) Ltd.		profit	taxmann.com 417(Delhi.)	24.12 Pg no.17/30
3.	Qualcomm India Pvt.Ltd.	AY 2006-07	Functionally different & Significant intellectual property rights	[2013]37taxmann.com 306(Delhi-Trib.)	Pra 34 & 355 (Pg No.14 of 25)
4.	Mentor Graphics (Noida) P.Ltd.	AY 2003-04	Holds intellectual property rights & segmental not available	TS-83-ITAT-2015(DEL)-TP	Para 7.4 (Pg no.6&7)

Sl.No	Relevant case Law	Assessment Year	Citation	Para & Page No.	Sr.No.of Case Law Binder
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On account of Significant Intangibles					
1	BA Continuum India Private Limited	2008-09	[2017]79taxman.com 85 (Hyderabad-Trib)	Para 14.2 (Pg. No.12/13)	20
2	Tektronix Engineering Development India Pvt. Ltd.	2008-09	[2016]75taxman.com 276 (Hyderabad-Trib)	Para 9.4.1, (Pg no.11/20)	21
3		2007-08	TS-220-ITAT-2017(Delhi)-TP	Para 31.2,31.3(Pg no.55,56/64)	22
4.	MSC Software Corporation India Pvt. Ltd.	2008-09	TS-226-ITAT-2017(PUN)-TP	Para 28, (Pg no.16/18)	23
5.	Tesco Hindustan Service Centre Pvt.Ltd.	2007-08	[2017]77 taxmann.com 48 (Bangalore-Trib.)	Par 12.4, (Pg.no.13/34)	7
6.	Marlabs Software Pvt.	2007-08	TS-922-ITAT-2016(Bang)-TP	Para 14.3(Pg no.17/36)	11

	Ltd.				
7.	Global e-Business Operations Pvt. Ltd.	2007-08	TS-35-ITAT-2017(Bang)-TP	Para3/7(Pg no.7,13)	12
8.	H&S Software Development and Knowledge Management Centre Pvt. Ltd.	2007-08	TS-31-ITAT-2017(DEL)-TP	Para 34&40 Page 17/21	13

<b>On account of Segmental Information not available</b>					
1.	Avaya India Pvt.Ltd.	2008-09	TS-452-HC-2017(DEL)-TP	Para 2,3, (Pg. No.1,2/2)	28
2.	Adidas Technical Services P.Ltd.	2010-11	[2016]69 taxman.com 401 (Delhi-Trib)	Para 12.8, (Pg. No.11/13)	29
3.	Open Solutions Software Services	2010-11	[2017]81 taxmann.com 177 (Delhi-Trib.)	Para 11, (Pg. No.8/9)	5
4.	BC Management Services Pvt. Ltd. Dy.CIT, Circle 4(1)	2011-12	TS-438 ITAT-2017(DEL)-TP	14, (Pg. No.15/36 )	30
5.	Stryker Global Technology Centre Pvt.Ltd.	2008-09	TS-450-ITAT-2015(DEL)-TP	Para 12, (Pg. No.13,14/19)	31
6.	Bearing point Property Services Private Limited	2008-09	[2014]52 taxmann.com 96(Bangalore – Trib.)	Para-13.63,14, (Pg 12/23)	7
7.	Sonus Networks India Private Limited	2008-09	[2015] 59 taxmann.com 474(Bangalore-Trib)	Para -17.3, (Pg No.21/25)	32
8.	FCG Software Services (India) Pvt.Ltd.	2008-09	[2014]51 taxman.com 75 (Bangaluru-Trib)	Para 15.3, (Pg. No.23/27)	33
9.	3DPLM Software Solutions Ltd.	2008-09	[2014]42 taxman.com 333 (Bangaluru-Trib)	Para 17.4, (Pg. No.25/28)	2
10.	AMD India(P)	2008-09	61 taxmann.com (Bangalore	Para 17.4, Pge	21

Limited	- Trib)	29/30)
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<b>3i Infotech Limited – Margin as per TPO = 40.04%</b>	<b>Page No. of Annual Report</b>
<b>Summary of Assessee's Objections :</b>	
Functionally not comparable – Engaged in products	[Page-iv,v,viii,4,34,35,39,41,103]
<b>Functionally not comparable – diversified activities :</b> The company is engaged in diversified activity. Moreover, the company offers wide range of software products, software development and consulting services, IT enabled service activities, IT infrastructure services and Business Process Outsourcing(BPO).Also the company is engaged in banking & financial services. It also has IPR driven solutions for Banking, Insurance, Mutual Funds and Capital markets. Thus, the company is functionally not comparable to the Appellant.	[Page iii,xi,xii,36,60,105,121,125]
<b>No segment data available :</b> The company derives income from Software Development Consultancy, software products and software services. However no disclosure on segmental information is available in the standalone financial statements of the company. Hence in view of the same, 3i Infotech cannot be considered as a comparable.	[Page 121]
<b>Has Significant Related Party Transactions – 15% :</b> In the AY 2008-09, 3i Infotech has RPT amounting to 15% on Sales.	[Page- 119]
<b>Rejected by the Hon'ble ITAT in the Appellant's own case for AY 09-10 :</b> 3i Infotech was rejected in the Appellant's own case of AY 2009-10 on the basis of related party transaction (RPT)	
<b>Significant Research &amp; Development activity – 8.76% :</b> The company is also involved in significant R & D activities. During the FY 2007-08 the R & D expenditure amounted to 8.76% of the total revenue of the company.	[Page 11]
<b>-Significant Intangibles – 45.29% :</b> The company has intangible assets in the form of goodwill and Business & Commercial rights. The total amount of intangibles is 43.29%% of total fixed assets.	[Page – 97]
<b>- Merger &amp; Acquisitions during the year :</b> During the year under consideration the company has completed	[Page 5]

merger with SDG Software Technologies Limited and Datacons private limited, Further the company has also acquired stakes in various companies.	
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Sl.No.	Relevant case law	Assessment Year	Broad Reason for Rejection	Citation	Para & Page No.
1.	Philips India Limited	2009-10	Functionally different & RPT	ITA No.1141/Kol/2019	Para 5.5 (Pg no.37,38/42)

Sl.No	Relevant case Law	Assessment Year	Citation	Para & Page No.	Sr.No.of Case Law Binder
<b>On account of Segmental Information not available</b>					
1.	Avaya India Pvt.Ltd.	2008-09	TS-452-HC-2017(DEL)-TP	Para 2,3, (Pg. No.1,2/2)	28
2.	Adidas Technical Services P.Ltd.	2010-11	[2016]69 taxman.com 401 (Delhi-Trib)	Para 12.8, (Pg. No.11/13)	29
3.	Open Solutions Software Services	2010-11	[2017]81 taxmann.com 177 (Delhi-Trib.)	Para 11, (Pg. No.8/9)	5
4.	BC Management Services Pvt. Ltd. Dy.CIT, Circle 4(1)	2011-12	TS-438 ITAT-2017(DEL)-TP	14, (Pg. No.15/36)	30
5.	Stryker Global Technology Centre Pvt.Ltd.	2008-09	TS-450-ITAT-2015(DEL)-TP	Para 12, (Pg. No.13,14/19)	31
6.	Bearing point Property Services Private Limited	2008-09	[2014]52 taxmann.com 96(Bangalore Trib.)	Para-13.63,14, (Pg 12/23)	7
7.	Sonus Networks India Private Limited	2008-09	[2015] 59 taxmann.com 474(Bangalore-Trib)	Para -17.3, (Pg No.21/25)	32
8.	FCG Software Services (India)	2008-09	[2014]51 taxman.com 75	Para 15.3, (Pg. No.23/27)	33

	Pvt.Ltd.		(Bangaluru-Trib)		
9.	3DPLM Software Solutions Ltd.	2008-09	[2014]42 taxman.com 333 (Bangaluru-Trib)	Para 17.4, (Pg. No.25/28	2
10.	AMD India(P) Limited	2008-09	61 taxmann.com (Bangalore – Trib)	Para 17.4, Pge 29/30)	21

<b>On Account of Related Party Transactions</b>					
1.	Sun Gard Solutions (India)(P) Ltd.	2008-09	[2015]63 taxman.com 3233 (Bangalore-Trib)	Para 16.3.1, 16.3.2 (Pg no.21/25)	10
2.	Cypress Semiconductors Technology Pvt. Ltd.	2008-09	TS-144-ITAT-2017(Bang.)-TP	Para:24 Page no.13/14	14
3.	3DPLM Software Solutions Ltd.	2008-09	[2014]42 taxman.com 333 (Bangalore-Trib)	Para 19.3 (Pg. No.27/28)	2
4.	Hewlett – Packard (India) Software Operation P. Ltd.	2008-09	TS-443-ITAT-2015(Bang)-TP	Para 40(14,41.1,14 ,4.2)Page No.29/35	15
5.	Financial Objects Software (India)Pvt.Ltd.	2008-09	TS-292-ITAT-2015(Bang)-TP	Para 11.3.1 Page No.19/22	16
6.	AT & T Global Business Services India	2008-09	[2015] 60 taxmann.com217 (Bangalore-Trib]	Para:4 (xii) Page No.10/10	17
7.	FCG Software Services (India)Private Limited	2006-07	[2016]66 taxman.com 296 (Bangalore-Trib)	Para 8, , (Pg. No.6/17)	6
8.	Tektronix Engineering Devt. India P.Ltd.	2006-07	[2015]56 taxman.com 223 (Bangalore-Trib)	Para-7.2, 7.3 Pag No.11	18
9.	Agile Software Enterprise Private Limited, C/o Oracle India Pvt. Ltd.	2006-07	[2014] 52 taxmnn.com 517 (Bangalore Trib.)	Para-8.11 Pg.no.12	19

<b>On account of Research &amp; Development Activities</b>					
1	Caliberated Healthcare Systems India Pvt. Ltd.	AY 2007-08	TS-413-ITAT-2014(DEL)-TP	Para-5, (Pg no.4/10)	29
2	Element K India Private Ltd.	AY 2007-08	[2015]54 taxman.com 296 (Delhi-Trib)	Para 18 (Pg. No.12 & 13/19)	30
3	Principal Global Services Limited	AY 2007-08	[2016]69 taxman.com 210 (Pune-Trib)	Para 21., (Pg. No.14&15/16 )	31

<b>On account of Significant Intangibles</b>					
1	BA Continuum India Private Limited	2008-09	[2017]79taxman.com 85 (Hyderabad-Trib)	Para 14.2 (Pg. No.12/13)	20
2	Tektronix Engineering Development India Pvt. Ltd.	2008-09	[2016]75taxman.com 276 (Hyderabad-Trib)	Para 9.4.1, (Pg no.11/20)	21
3	Corporate Executive Board India Pvt. Ltd.	2008-09	TS-220-ITAT-2017(Delhi)-TP	Para 31.2,31.3(Pg no.55,56/64)	22
4.	MSC Software Corporation India Pvt. Ltd.	2008-09	TS-226-ITAT-2017(PUN)-TP	Para 28, (Pg no.16/18)	23
5.	Tesco Hindustan Service Centre Pvt.Ltd.	2007-08	[2017]77 taxmann.com 48 (Bangalore-Trib.)	Para 12.4, (Pg.no.13/34)	7
6.	Marlabs Software Pvt. Ltd.	2007-08	TS-922-ITAT-2016(Bang)-TP	Para 14.3(Pg no.17/36)	11
7.	Global e-Business Operations Pvt. Ltd.	2007-08	TS-35-ITAT-2017(Bang)-TP	Para3/7(Pg no.7,13)	12
8.	H&S Software Development and Knowledge Management Centre Pvt. Ltd.	2007-08	TS-31-ITAT-2017(DEL)-TP	Para 34&40 Page 17/21	13

<b>On account of Mergers/Acquisitions</b>					
1.	FISERV INDIA PVT. LTD.	2008-09	TS-262437-HC-2016(DEL)-TO6(DEL)-TP	Para, (Pg no.4,6/6)	24
2.	M/s Cashedge India Pvt. Ltd.	2008-09	TS-262-HC-2016(DEL)-TP	Para 6, (Pg no.3/4)	15
3.	CES Pvt. Ltd.	2006-07	TS-338-HC-2014(AP)-TP	Para-4, (Pg no.2/5)	17
4.	Xchanging Technology Services India Pvt. Ltd.	2009-10	TS-555-HC-2015(DEL)-TP	Par 3, (Pg no.2/2)	16
5.	Century Link Technologies India Pvt.Ltd.	2008-09	TS-555-ITAT-2017(Bang)-TP	Para 18.5, (Pg no..22,28/29)	25
6.	Lubroiizol Advnced Materials India Private Limited (Formerly known as Indiamalt Private Limited.)	2008-09	TS-1025-ITAT-2016(Ahd)-TP	Para 8,, (Pg no4/6)	26
7.	Unisys India Private ALtd..	2009-10	[2015] 64 taxmnn.com 459 (Bangalore – Trib)	Para: 50,51 Page:16,17/17	27
8.	M/s ISG Novasoft Technologies Ltd.	2007-08	TS-485-ITAT-2015(Bang)-TP	Par 5, (Pg no.5/10)	18
9.	Tesco Hindustan Service Centre (P)Ltd.	2007-08	[2017] 77 taxmann.com 48 (Bangalore – Trib.)	Para 23, (Pg no.24/34)	7
10.	TNS India Private Limited	2007-08	[2017] 77 taxmann.com 356 (Hyderabad – Trib.)	Para 10.3, (Pg no.7/17)	19
11.	Global e-Business Operations P.Ltd.	2007-08	TS-35-ITAT-2017(Bang)-TP	Par:7; Page:13/17	12

41. As far as exclusion of Persistent System Ltd is concerned the assessee has for the first time before the Tribunal sought exclusion of this company. In this regard the assessee has filed the following additional grounds of appeal :

*“1. Re.: The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, Aftel Infosys Ltd. cannot be considered as a comparable company while bench marking the international transactions in relation to software development services rendered by the Appellant to its Associated Enterprise ("AE") for the following specific reasons amongst other reasons:*

*1.1. It owns significant intangible assets which the Appellant does not own/possesses.*

*1.2. It is functionally not comparable with the Appellant as it is engaged in the business of software services, software products and embedded solutions;*

*1.3. No segmental data is available vis-a-vis its activities of sale of software products and rendering of software services.*

*2. Re.: The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, '3i Infotech t.td.' cannot be considered as a comparable company while bench marking the international transactions in relation to software development services rendered by the Appellant to its Associated Enterprise ("AE") for the following specific reasons amongst other reasons: -*

*2.1. It is functionally not comparable with the Appellant as it offers wide range of software products, software development and consulting services, IT enabled service activities, IT infrastructure services and Business Process Outsourcing software services, software products and embedded solutions;*

*2.2. No segmental data is available vis-a-vis its various activities;*

*2.3. It owns significant intangible assets which the Appellant does not own/possesses*

*2.4. It was engaged in significant research and development activities;*

*2.5. During the year under consideration it has acquired various companies.*

*2.6. It has entered into transactions with related parties.*

*3. Re.: The Appellant submits that, notwithstanding the fact that it had considered 'Persistent Systems Ltd.' as a comparable company before the lower authorities, considering the facts and circumstances of its case and the law prevailing on the subject, 'Persistent Systems ltd.' cannot be considered as a comparable company while benchmarking the international transactions in relation to software*

*development services rendered by the Appellant to its AE, for the following specific reasons amongst other reasons:*

*3.1. It is functionally not comparable with the Appellant as it is engaged In the business of software services and software products;*

*3.2. No segmental data is available vis-a-vis its activities of sale of software products and rendering of software services;*

*3.3. It was engaged in significant research and development activities.*

42. For the reasons given for admitting given in A.Y.2007-08, we admit the additional grounds for adjudication as the reasons for seeking to raise the additional ground are same as given in AY 2007-08.

43. The reasons given by the assessee for considering Persistent System Ltd as not comparable was as follows :

<b>Persistent System Limited – Margin as per TPO Assessee = 23.18%</b>	<b>Page No. of Annual Report</b>
<b>Summary of Assessee’s Objections :</b>	
- <b>Functionally not comparable</b> – Persistent System Limited is not functionally similar to the Appellant as it is engaged in provision of outsourced product development services for independent software vendors and enterprises, wherein the company offers complete product life-cycle services. The company derives income from both software services and software products. It develops products and application for wide variety of customers.	[Page 7,17,53,57,79,81] –
- <b>No segment data available</b> : The company derives income from both software development and products. However segmental information in relation to software products & software services is not separately available.	[Page 83, 124]
<b>Research &amp; Development activity</b> : The company undertakes research and development activity, whereas the Appellant does not engage in any R&D activity.	[Page 25]

Sl.No	Relevant case law	Assessment Year	Broad Reason for	Citation	Para & Page No.
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			<b>Rejection</b>		
1.	3 DPLM Software Solutions Ltd.	2008-09	Functionally different & segmental not available	[2014] taxmnn.com (Bangalore-Trib)	42 333 Para-17.4 (Pg No.25/28)
2.	Agnity India Technolgies Pvt. Ltd.	2008-09	Functionally different	[2016]73 taxmann.com (Delhi-Trib.)	102 Para-13.2, 13.3(Pg No.17,18/20)
3.	Pyramid IT Consulting Private Limited	2008-09	Functionally different & segmental not available	TS-425-ITAT-2014(DEL)-TP	Para-34,50,(Pg No.22,33/34)
4.	Open Solutions Software Services	2010-11	Functionally different & segmental not available	[2017]81 taxmann.com (Delhi-Trib.)	177 Para – 9, (Pg No.7/9)
5.	NXP Semi Conductors India Pvt. Ltd.	2008-09	Functionally different	[2015]56 taxmann.com (Bangalore-Trib.)	140 Para – 19.3.2 (Pg No.23/27)
6.	Bearing point Property services Private Limited	2008-09	Segmental not available	[2014]52 taxmann.com (Bangalore-Trib.)	96 Para – 15, 16 (Pg No.13/23)
7.	Ciena India Pvt. Ltd.	2008-09	Segmental not available	[2015]57taxmann.com (Delhi Trib.)	329 Para – 9.2, (Pg No.-9/13)
8.	Global Logic India Pvt. Ltd.	2008-09	Functionally different	[2015] taxmann.com (Delhi-Trib.)	59 433 Para-16,(Pg No.11/12)
9.	GXS India Technology Centre Pvt. Ltd.	2008-09	Functionally different	[2015] taxmann.com (BangaloreTrib.)	62 276 Para-13.3,(Pg No.20/28)
10.	PMC – Sierra India Pvt. Ltd.	2008-09	Segmental not available	[2015] taxmann.com (Bangalore Trib.)	74 110 Para-17.3,(Pg No.26/30)
11.	Trilogy E-Business	2008-09	Functionally different &	[2016] taxmann.com	70 378 Para-17.3,(Pg

	Software India Pvt.Ltd.		Signmental not available	(BanglaoreTrib.)	No23, 24/32)
12.	Agnity India Technologies Pvt Ltd.	2009-10	Functionally different	16,17	Para-13.3,(Pg No.7/10)

<b>On account of Research &amp; Development Activities</b>					
1	Caliberated Healthcare Systems India Pvt. Ltd.	AY 2007-08	TS-413-ITAT-2014(DEL)-TP	Para-5, (Pg no.4/10)	29
2	Element K India Private Ltd.	AY 2007-08	[2015]54 taxman.com 296 (Delhi-Trib)	Para 18 (Pg. No.12 & 13/19)	30
3	Principal Global Services Limited	AY 2007-08	[2016]69 taxman.com 210 (Pune-Trib)	Para 21., (Pg. No.14&15/16 )	31

44. The Id. DR submitted that since the issue has not been examined in the light of the submissions made by the assessee before the tribunal the issue may be set aside to the AO for fresh consideration.

45. The Id. DR submitted that the contentions put forth by the assessee for the first time requires examination by the TPO and cannot be accepted without such examination. He submitted that the issue should be set aside to the AO for consideration of the above said objection. The Id. Counsel for the assessee however pointed out that in the case of 3i Infotech Ltd in assessee's own case in A.Y.2009-10 the Hon'ble ITAT has held that this company was not comparable with the assessee. As far as Aftek Ltd is concerned this tribunal in A.Y.2006-07 as this company is not comparable with the assessee company.

46. We have given a very careful consideration to the rival submissions. We are of the view that prima facie the contentions put forth by the assessee show that both the aforesaid companies are not comparable companies either on account of an application of the related party transaction or ownership on intangibles non availability of segmental data and extraordinary events occurred during the relevant previous year. This has been accepted by several decisions of the tribunal filed by the Id. Counsel for the assessee. Nevertheless since these details have not been examined by the TPO we deem it fit and proper to restore this issue to the TPO to enable him an opportunity of examining the claim of the assessee. The TPO shall decide on the comparability of these companies in accordance with law and in the light of the various contentions put forth by the assessee before us and in the light of the decisions rendered by the tribunal cited by the Id. Counsel for the assessee before us. The TPO will also follow directions given in AY 2007-08 in the earlier part of this order.

47. The next grievance of the assessee is with regard to the action of the TPO and DRP in not giving appropriate adjustments to the profit margin of the comparable companies and of the Assessee on account of working capital adjustment. On the question of working capital adjustment the DRP in its order in para-13 rejected the request for adjustment on account of working capital by following its order in Assessee's case for AY 2007-08.

48. We have heard the rival submissions on this issue which is identical to the submissions made in AY 2007-08 which we have discussed in the earlier part of this order. As decided in AY 2007-08, we are of the view that the issue should be set aside to the AO for fresh consideration. The Assessee should file computation of working capital adjustment as per formula for calculating the working capital adjustment before the TPO. The TPO is directed to examine the working capital adjustment in accordance with law.

49. In view of the aforesaid conclusion we are of the view that other issues raised in ground nos. 1 to 5 does not require any consideration and are left open. This issue with regard to transfer pricing adjustment is treated as allowed for statistical purposes.

50. Ground No.8 and 9 raised by the assessee read as follows :-

**“8. Entrance fees, subscription and cost of facilities paid to clubs**

*The Learned AO and DRP erred in law and on facts in disallowing Rs. 1,332,749 being Pymment made to clubs.*

**9. Provision for replacement guarantee**

*The Learned AO and DRP erred in law and on facts in disallowing Rs. 22,172,000 being the excess of provision for replacement guarantee over actual payment.”*

51. These grounds are identical to grounds no.6 and 7 raised in ITA No.857/Kol/2011 for A.Y.2007-08. For the reasons stated while deciding these grounds we allow ground nos. 8 and 9 raised by the assessee.

52. Ground Nos. 10 and 11 raised by the assessee read as follows :

**“10. Lease Rental**

*10.1 The Learned AO and DRP erred in law and on facts in disallowing Rs. 36,964,000 being the lease rent paid in respect of cars treating the same as capital expenditure.*

*10.2 Strictly without prejudice to the above, the Learned AO and DRP erred in law and on facts in not allowing depreciation on total payment towards lease transactions including interest.*

**11. Double disallowance of lease rental**

*The Learned AO and DRP erred in law and on facts in disallowing total amount of Rs. 36,964,000 without appreciating that Rs. 2,400,000 was already offered to tax in the computation of total income on account of non-deduction of tax.”*

53. As far as ground no.10 is concerned the facts are that during the relevant previous year under consideration, the Assessee paid lease rent of Rs.36,964,000 for vehicles which was claimed as deduction. The AO disallowed the claim for deduction. The assessee's contention before the DRP was that

i)the AO erred in appreciating the fact that the vehicle under lease was sole and exclusive property of the lessor and the Assessee had no right therein except the right to use the same in accordance with the lease agreement and that the vehicles at all times remained the property of the lessor.

ii)Further, it was pointed out that the AO disallowed the total sum of Rs.36,964,000 disregarding the fact that the Assessee had already disallowed Rs.2,400,000 on account of non-deduction of tax, and thereby leading to double disallowance to the extent of Rs. 2,400,000.

Without prejudice to the above contention, it was submitted that if the lease rentals are regarded as capital expenditure then the AO ought to have allowed depreciation on such lease rent payment.

54. The DRP rejected the plea of the Assessee on the ground that in AY 2003-04, on similar facts the disallowance of lease rentals claimed on vehicles was confirmed by the ITAT too. The ITAT then upheld that the disallowance on the logic that the payments were not revenue in nature. The AO has made the disallowance as facts are identical to facts in A Y 2003-04. Hence, the DRP rejected the objection relating to the allowance of lease rentals. In so far as the question of allowance of depreciation is concerned, the DRP held that since the claim of depreciation was not made before the A O, the same cannot be allowed.

55. Before us it was agreed by the parties that similar issue raised in assessee's own case was considered and decided by the tribunal in ITA No.1141/Kol/2016 for A.Y.2009-10 order dated 05.04.2017 and ITA No.505/Kol/20156 and ITA

No.2408/Kol/2016 for A.Y.2009-10 order dated 27.06.2017. For A.Y.2009-10 the tribunal dealt with this issue in the following manner :

**“Ground Nos. 6 to 6.3**

*The brief facts of this issue is that the assessee claimed lease rental paid for motor car taken on finance lease from Citi Corp amounting to Rs. 5,50,99,000/-. The same was treated as capital expenditure by the ld AO based on the reliance placed in assessee’s own case for the Asst Year 2003-04 which got confirmed by this tribunal. The ld DRP observed as under:-*

*The lease rentals paid by the assessee for the year 2003-04 were disallowed and the action was upheld by the ITAT. Subsequent matters have been pending / though this adjustment has been allowed in 2011-12 , the panel upon consideration of the facts is not inclined to allow relief to the assessee.*

*Aggrieved, the assessee is in appeal before us on the following grounds :-*

**6. Lease Rental**

*6.1. The Learned AO and DRP erred in law and on facts in disallowing Rs. 55,099,000 being the lease rent paid in respect of cars treating the same as capital expenditure.*

*6.2. The Learned AO and DRP erred in law and on facts in disallowing the lease rent paid without taking cognizance of the decision of the Supreme Court in the case of ICDS Ltd. vs. CIT (2013) 350ITR 527 (SC).*

*6.3. Strictly without prejudice to the above, the Learned AO and DRP erred in law and on facts in not allowing depreciation on total payment towards lease transactions including interest.*

*6.1. The ld AR argued that this issue is covered by the decision of the Hon’ble Supreme Court in the case of ICDS Ltd vs CIT reported in (2013) 350 ITR 527 (SC) wherein it was held that :-*

*‘the lessor i.e the assessee is the owner of the vehicles. As the owner, it used the assets in the course of its business, satisfying both requirements of section 32 of the Act and hence, is entitled to claim depreciation in respect of additions made to the trucks, which were leased out.’*

*The ld AR stated that the assessee herein is a lessee and is entitled for deduction towards lease rentals paid towards cars taken on finance lease. He also stated that the lessor had confirmed that it had claimed depreciation in the relevant Asst year on the said cars which were leased out to the assessee. He further placed reliance on the decision of the Hon'ble Rajasthan High Court in the case of Rajshree Roadways vs UOI reported in 263 ITR 206 (Raj) wherein it was held that the lessee would be entitled to the deduction of rent paid by him and the benefit of the depreciation shall be available to owner of the asset. Further the Special Leave Petition (SLP) filed by the department against the said decision before the Hon'ble Supreme Court has been dismissed. He further placed reliance on the co-ordinate bench decision of this tribunal in the case of The Royal Bank of Scotland N.V. vs DDIT in ITA No. 1738/Kol/2009, 1926/Kol/2010, 519/Kol/2011 and 1805/Kol/2012) dated 13.4.2016 wherein on identical matter, the issue was decided in favour of the assessee. In response to this, the ld DR fairly conceded that the issue is covered by the decision of the Hon'ble Supreme Court in the case of ICDS Ltd supra.*

*6.2. We have heard the rival submissions. We find that the issue under dispute is covered by the decision of the Hon'ble Supreme Court in the case of ICDS Ltd supra in favour of the assessee. Hence respectfully following the same, we allow the Ground No. 6 raised by the assessee.*

56. Respectfully following the decision of the Tribunal referred to above we direct the AO to allow the lease rent paid as deduction. In view of the aforesaid decision in ground no.10 ground no.11 does not require any adjudication.

57. Ground No.12 raised by the assessee reads as follows :-

***“12. Short credit of tax deducted at source***

*The Learned AO erred in granting credit of tax deducted at source of Rs. 77,591,338 instead of Rs. 122,752,607.*

58. Ground No.12 raised by the assessee is with regard action of the AO in not granting credit of tax deducted at source. The AO is permitted to waive the claim of the assessee and allow appropriate credit for TDS.

59. Ground No.13 and 14 raised by the assessee is with regard to charging of interest u/s 234B and 234C which are purely consequential and the AO is directed to give consequential relief. The appeal of the assessee is partly allowed.

60. In the result both the appeals of the assessee are partly allowed.

**Order pronounced in the Court on 02.02.2018.**

Sd/-  
[Waseem Ahmed]  
Accountant Member

Sd/-  
[ N.V.Vasudevan ]  
Judicial Member

Dated : 02.02.2018.

[RG Sr.PS]

Copy of the order forwarded to:

1. M/s Philips India Ltd., DLF IT Park, Tower-A, 3<sup>rd</sup> Floor, 08-Major Arterial Road, Block-AF, New Town (Rajarhat) , Kolkata-700156.
2. D.C.I.T., Circle-11, Kolkata.
3. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary  
Head Of Office/ D.D.O., ITAT Kolkata Benches