

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष  
**BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM**

**आयकर अपील सं. / ITA No.577/PUN/2015**  
**निर्धारण वर्ष / Assessment Year : 2010-11**

The Asst. Commissioner of Income Tax,  
Circle-14, Pune ..... अपीलार्थी/Appellant

Vs.

M/s. MSC Software Corporation of India Pvt. Ltd.,  
6<sup>th</sup> Floor, Amar Apex,  
Near Baner Telephone Exchange,  
Baner Road, Pune - 411045 ..... प्रत्यर्थी / Respondent

PAN: AAECM0862H

**आयकर अपील सं. / ITA No.592/PUN/2015**  
**निर्धारण वर्ष / Assessment Year : 2010-11**

M/s. MSC Software Corporation of India Pvt. Ltd.,  
6<sup>th</sup> Floor, Amar Apex,  
Near Baner Telephone Exchange,  
Baner Road, Pune - 411045 ..... अपीलार्थी/Appellant

PAN: AAECM0862H

Vs.

The Asst. Commissioner of Income Tax,  
Circle-14, Pune ..... प्रत्यर्थी / Respondent

Assessee by : Shri Rajendra Agiwal  
Revenue by : Shri Rajeev Kumar, CIT

सुनवाई की तारीख / <b>Date of Hearing : 09.08.2018</b>	घोषणा की तारीख / <b>Date of Pronouncement: 24.10.2018</b>
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**आदेश / ORDER****PER SUSHMA CHOWLA, JM:**

The cross appeals filed by Revenue and assessee are against order of ACIT, Circle-14, Pune, dated 26.02.2015 relating to assessment year 2010-11 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals filed by Revenue and assessee were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The Revenue in ITA No.577/PUN/2015 has raised the following grounds of appeal:-

01. *The Hon'ble Dispute Resolution Panel erred in excluding the comparables without analyzing FAR of the company only on the ground of higher turnover and having higher assets.*
02. *The Hon'ble Dispute Resolution Panel erred by accepting assessee's contention that comparables selected by it after conducting TP study should be considered when Rule 10D(4) maintains that documents and information should exist latest by the 'specified date' specified in s.92F(4) i.e. the due date for filing the ROI.*
03. *For the facts and such other reasons as may be urged at the time of hearing, the order of the Hon'ble Dispute Resolution Panel may be vacated and that of the Assessing Officer be restored.*

4. The assessee in ITA No.592/PUN/2015 has raised the following grounds of appeal:-

*On the facts and in the circumstances of the case and in law, the Hon'ble DRP and consequentially the learned Assessing Officer have:*

1. *General ground challenging the transfer pricing adjustment of Rs 2,00,61,662*

*Erred in making transfer pricing adjustment to the international transactions of the Appellant in connection with payment for expenses towards management fees, meeting expenses and communication cost and not accepting the analysis undertaken by the Appellant to determine the arm's length price of aforesaid international transactions.*

2. *Adjustment on account of payment for management fees, meeting expenses and communication cost*

*Erred in making transfer pricing adjustment by disallowing genuine operating expenses incurred by the Appellant to the amount of Rs 2,00,61,662 pertaining to payment towards management fees, meeting expenses and communication cost and valuing aforementioned expenses as NIL by erroneously concluding that the Appellant has not proved the receipt of services and benefit derived.*

3. *Initiation of penalty proceedings under section 271(1)(c) of the Act*

*Erred in initiating penalty proceedings under section 271(1)(c) without considering the fact that transfer pricing adjustments has been made on account of difference of opinion, interpretation of provisions of law, etc and not due to concealment of or furnishing of inaccurate particulars of income.*

4. *Erroneous levy of interest under section 234B of the Act*

*Erred in law and on facts in levying interest under section 234B of the Act to the extent addition is made to the total income of the Appellant on account of transfer pricing adjustment without considering the fact that shortfall in advance tax resulted in view of the addition to total income, which are unanticipated in nature.*

5. The issue raised in cross appeals is against transfer pricing adjustment made by Assessing Officer, part of which was deleted by Dispute Resolution Panel (DRP).

6. The appeal of Revenue is filed after delay of one day, against which the Revenue has filed an affidavit and in view of the facts and circumstances, there is merit in the plea raised by Revenue and delay of one day is thus, condoned.

7. Briefly, in the facts of the case, the assessee had furnished return of income declaring total income of ₹ 4,04,01,599/-. The return of income was processed under section 143(1) of the Act. The assessee company was

engaged in the business of software development. Since the assessee had entered into international transactions with its associated enterprises, the Assessing Officer made reference under section 92CA(1) of the Act for determination of arm's length price of international transactions undertaken by the assessee, to the Transfer Pricing Officer (TPO). The TPO noted that the assessee was subsidiary of MSC Software Corporation, USA (MSC US) and provides software development services to MSC US. It also had Research & Development Centre, located at Pune, which primarily provided various software development and testing services to MSC US. The assessee was involved in various facets of MSC's operations i.e. Development of Software, Testing Software, Technical Support, etc. The assessee had selected TNM method as the most appropriate method to benchmark its international transactions relating to the provision of software development services and provision of sales support services to its associated enterprises. In TNM analysis, PLI was worked out on Operating Profit / Operating Cost. The assessee had identified certain comparable companies on the basis of FAR analysis and had selected 10 companies as comparable. The assessee had worked out average PLI of comparables at 2.75%, whereas PLI margins of assessee company was 16.22% and hence, claimed that international transactions were at arm's length price. The TPO perused various documents and information filed by assessee during TP proceedings and issued show cause notice to the assessee, which raised objections against use of contemporaneous data. Consequently, certain companies identified by assessee were rejected and additional comparable companies were selected both by TPO and assessee. There were other filters which were also applied i.e. on account of acceptance of companies having super normal profits and

correction of PLI. The margins of certain comparables selected by the TPO and adjustment for working capital and risk assuming were asked, which was objected to by the assessee. The TPO after analyzing the objections of assessee, finally selected 11 concerns as comparable and the arithmetic mean of margins of said concerns worked out to 24.97% and after working capital adjustment, it was 27.04%. The assessee had also asked for risk adjustment of 5.5%, which was not accepted. In this regard, reliance was placed on various decisions of different Benches of Tribunal. The second aspect noted by TPO was the adjustment in connection with payment of management fees, communication / internet expenses and meeting expenses and it was observed that unless it was shown that tangible and direct benefit was derived by such payment or that the payment made commensurated with the benefit that was derived or expected to be derived, when the parties deal with each other at arm's length, he held that arm's length price of such payment for intra-group services would be treated either Nil or to the extent it is shown that the benefit actually derived from such payment. The TPO also noted that similar adjustment of ₹ 14,88,134/- was made on account of intra-group services in assessment year 2008-09 and following the same parity of reasoning, the TPO proposed an upward adjustment of ₹ 2,00,61,662/-. The assessee also raised an issue that management fees expenses may be reduced from operating cost to arrive at the PLI margins. Then applying directions of DRP in assessment year 2008-09, intra-group cost was reduced from the operating expenditure and revised operating profit as percentage of revised operating cost was determined at 46.78%. The TPO noted that revised PLI margins of assessee were 46.78%, whereas margins of comparables were 26.04% after allowing working capital adjustment. He further observed that PLI margins of assessee

were more than that of comparables, no adjustment was to be made to international transactions of provision of software development services. However, if the adjustment made on account of management fees and related services was deleted at appellate stage, then the adjustment to software development services segment would have to be made adopting PLI margins mentioned in para 7(i). Hence, total adjustment of ₹ 2,00,61,662/- was made to international transactions relating to payment of management fees and communication expenses. The Assessing Officer issued draft assessment order proposing the said adjustment, against which the assessee filed objections before the DRP.

8. The DRP in turn, gave directions i.e. it was directed to adopt the turnover filter of ₹ 1 crore to 300 crores and hence, certain companies were rejected from the final set of comparables. Further, the DRP also directed to include certain additional companies identified by the assessee during TP proceedings totaling No.3. The DRP also directed the Assessing Officer to examine computation of working capital and to adopt the method as provided in Annexure to Chapter III of OECD Transfer Pricing Guidelines, 2002. In view of the directions of DRP, the Assessing Officer / TPO drew up revised final set of comparables along with margins numbering 9, wherein arithmetic mean of margins of comparables worked out to 20.66% and after working capital adjustment at 15.30%, the assessee's operating margins were 46.78%. In view thereof, the Assessing Officer held that operating margins earned by assessee satisfied the test. However, transfer pricing adjustment of ₹ 2,00,61,662/- in relation to payment of management fees, meeting expenses and communication cost was upheld and the same was added to total income.

9. The assessee is in appeal against order of Assessing Officer.

10. The learned Authorized Representative for the assessee at the outset pointed out that the issue raised in the present appeal stands squarely covered by the order of Tribunal in assessment years 2008-09 and 2009-10. It was also pointed out that the TPO had also relied on order of DRP in assessment year 2008-09 while making adjustment on account of meeting expenses, etc. He further pointed out that the appeal filed by the Revenue is against application of higher turnover and higher assets. He stated that the issue raised in ground of appeal No.1 is against directions of DRP in holding that the concerns to be selected as between ₹ 1 crore to 300 crores and companies failing the turnover, were to be excluded. The second issue was against addition of comparables selected by the assessee, wherein it was alleged whether such new comparables could be selected. In this regard, the learned Authorized Representative for the assessee placed reliance on the decision of Pune Bench of Tribunal in M/s. Vishay Components India Pvt. Ltd. Vs DCIT in ITA No.133/PUN/2011, relating to assessment year 2006-07, order dated 16.05.2016.

11. The learned Departmental Representative for the Revenue placed reliance on the order of Assessing Officer and fairly admitted that the issues raised in assessee's appeal have been decided by Tribunal. He also relied on the orders of Assessing Officer / TPO in respect of Revenue's appeal.

12. We have heard the rival contentions and perused the record. The issue raised in ground of appeal No.1 by assessee is general and hence, the same is

dismissed. The issue raised vide ground of appeal No.2 by the assessee is against adjustment on account of payment of management fees, meeting expenses and communication cost. The TPO had made aforesaid adjustment after valuing the said expenditure at Nil on the ground that the assessee had not proved the receipt of services and benefit derived therefrom. It may be pointed out herein itself that no TP adjustment has been made in the hands of assessee on account of provision of software development services to its associated enterprises, since the margins shown by the assessee were higher than the margins of comparables selected. However, the TPO made the aforesaid adjustment on account of intra group services relying on earlier directions of DRP in assessment year 2008-09. He further went on to note that the DRP had also directed to exclude intra-group cost from operating expenditure in case arm's length price of same was taken at Nil. So, sum of ₹ 2,00,61,662/- was excluded from operating cost and revised PLI margins of assessee worked out to 46.78%. The PLI margins of comparables finally selected numbering 11 were 27.04% after allowing working capital adjustment and since the PLI of assessee was more than comparables, no adjustment was made to international transactions of provision of software development services. The TPO further pointed out that if the adjustment made on account of intra-group cost is deleted at appellate stage, then the adjustment to software development services segment will have to be made adopting PLI margins of assessee. The assessee thus, raised objections before the DRP both in the segment of provision of software development services and also in the segment of provision for intra-group services. In the segment of provision of software development, the assessee was aggrieved by inclusion of certain concerns as comparables and the assessee wanted their exclusion on the

ground of their higher turnover. The concerns were Mindtree Ltd. having turnover of ₹ 1,233 crores, Infosys Technology Ltd. having turnover of ₹ 22,050 crores, Larsen & Turbo Infotech Ltd., turnover of ₹ 1,776 crores, Persistent Systems Ltd., turnover of ₹ 504 crores and Sasken Communication Tech Ltd., turnover of ₹ 401 crores. The DRP accepted the plea of assessee and the Assessing Officer in final assessment order had excluded above five concerns. The Revenue is in appeal against said directions of DRP.

13. The issue of selection of suitable turnover to be applied has been adjudicated in series of cases and following the same parity of reasoning, we uphold the directions of DRP in applying turnover of ₹ 1 crore to 300 crores while selecting the concerns as comparables. Accordingly, we find no merit in the ground of appeal No.1 raised by the Revenue in this regard. Hence, five concerns are to be excluded from final set of comparables.

14. The second aspect of application of transfer pricing provisions to the segment of provision of software development services by the assessee to its associated enterprises was in respect of selection of three new concerns by the assessee during TP proceedings. The TPO rejected the plea of assessee. However, the DRP directed that the said concerns i.e. Maveric Systems Ltd., Silverline Technologies Ltd. and Evoke Technologies Pvt. Ltd. should be included in final set of comparables. The Revenue is in appeal against directions of DRP.

15. We find that similar issue of selection of fresh concerns during TP proceedings which were functionally comparable, arose before the Tribunal in

the case of M/s. Vishay Components India Pvt. Ltd. Vs DCIT (supra), wherein the Tribunal held as under:-

*“13. Now, coming to the stand of assessee with regard to fresh search undertaken at the time of assessment proceedings.*

*14. Under section 92D of the Act, it is provided that every person who has entered into an international transaction is to keep and maintain such information and documents in respect thereof as may be prescribed. Rule 10D of the Rules prescribes the information and documents to be kept and maintained under section 92D of the Act. It is not any ones' case that the assessee has not maintained such documents as prescribed under Rule 10D of the Rules. The plea of the assessee before us is that by way of maintenance of such information and documents, the assessee is to keep a record of its international transactions and by way of clause (1) to also prepare the details of adjustments, if any, made to the transfer prices to align them with arm's length prices determined under these Rules and consequent adjustments made to the total income for tax purposes. The proviso under sub-rule (2) to Rule 10D of the Rules provides that the assessee shall be required to substantiate, on the basis of material available with him, that income arising from international transaction entered into by him has been computed in accordance with section 92 of the Act. Further, information which is specified in sub-rule (1) is to be supported by authentic documents which include various publications, reports and financial statements as per sub-rule (3) to the said Rule 10D of the Rules. Under sub-rule (4), it is provided that the information and documents specified under sub-rules (1) and (2) as far as possible be contemporaneous and should exist latest by specified date referred to in clause (4) of section 92F of the Act .*

*15. Under the provisions of section 92F(4) of the Act, the specified date is the same as assigned to due date in Explanation (2) sub-section (1) of section 139 of the Act. In other words, the data which is to be used by the assessee in relation to its international transaction vis-à-vis transfer pricing provisions should be such which is available by the due date of filing the return of income. First onus is upon the assessee to justify that the international transaction entered into by it with its associate enterprises is at arm's length price, in case it is compared with uncontrolled transactions i.e. transactions entered into by other concerns in similar circumstances. This documentation is to be compiled by the assessee by way of transfer pricing report in order to justify the arm's length price of its international transactions.*

*16. Under section 92C of the Act, it is provided that arm's length price in relation to international transaction shall be determined by following any of the methods prescribed therein which is the most appropriate method, having regard to the international transaction or class of transactions or class of associated persons or functioned performed by such persons or such other relevant entities as the Board may prescribe. Sub-section (2) therein provides that the most appropriate method shall be applied for determination of arm's length price in the manner as may be prescribed. Section 92C(3) of the Act reads as under:-*

*“92C. (1).....*

*(2).....*

*(3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—*

(a) the price charged or paid in an international transaction [or specified domestic transaction] has not been determined in accordance with sub-sections (1) and (2); or  
 (b) any information and document relating to an international transaction [or specified domestic transaction] have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or  
 (c) the information or data used in computation of the arm's length price is not reliable or correct; or  
 (d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,

the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction [or specified domestic transaction] in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him."

17. Under the said sub-section, the Assessing Officer during the course of any proceedings for assessment of income, on the basis of material or information or documents in his possession, is of the opinion that the conditions laid in clauses (a) to (d) are not fulfilled, then the Assessing Officer may proceed to determine the arm's length price in relation to such international transaction in accordance with sub-section (1) and (2), on the basis of material or information or documents available with him. The said exercise of power by the Assessing Officer is after affording an opportunity of hearing to the assessee to show cause as to why the arm's length price should not be so determined on the basis of material or information or documents in the possession of Assessing Officer.

18. Under section 92CA of the Act, where the assessee had entered into international transaction in any previous year and where the Assessing Officer considers it necessary or expedient, he may with previous approval of the Commissioner refer the computation of arm's length price in relation to the said international transaction under section 92C of the Act to the TPO. Under section 92CA(3) of the Act, the TPO is empowered to determine the arm's length price in relation to the international transaction in accordance with sub-section (3) of section 92C of the Act. For doing so, the TPO is to serve notice upon the assessee requiring him to produce or cause to be produced, any evidence on which he may rely upon in support of computation made by him of the arm's length price in relation to international transaction. After hearing such evidence including any information or documents referred to in section 92C(3) of the Act and after considering such evidence as the TPO may require on specified date and also taking into account relevant material which he has gathered and confronted to assessee, the TPO has to pass an order in writing. Hence, under the provisions of the Act, the machinery to pass an order for determination of arm's length price of an international transaction entered into by any person is so provided. It is not only the evidences which are relied upon by the assessee in support of its computation of arm's length price of its international transaction but also any other evidence which the TPO may require on some specified points or the information which may be gathered by the TPO can be used by the TPO to determine the arm's length price of international transaction. Undoubtedly, the assessee is the first person who is to collect the information and documents in respect of its international transaction which are enlisted under Rule 10D of the Rules. But mere collections of documents and compilation of data is not the only responsibility of

*the assessee, who can be asked to produce such other evidence as the TPO may require on any points. Further, the TPO is also empowered to take into account such material which he has gathered i.e. the data. However, there is a restriction in the section itself that such data should be available in public domain. Such material collected to be used against assessee should be put to the assessee to explain. Further, as decided by us in the paras hereinabove in view of Rule 10B(4) of the Rules, the data should be relatable to the financial year in which the international transaction has been entered into. Thus, it is incumbent upon the TPO to ensure that all the conditions provided under the Act and as per the Rules are fulfilled.*

19. *In the facts of the present case itself, we have noted that the assessee had prepared its transfer pricing report and computed the PLI of comparables by adopting the data for preceding two years. The assessee in its transfer pricing report had not used the data of the year in which the international transaction had taken place to benchmark its international transaction to be at arm's length price or not. During the course of transfer pricing proceedings, the TPO show caused the assessee as to why instant year's data should not be used and further computed the arithmetic mean of PLI of comparables on the basis of data relating to assessment year 2006-07. The data compiled by the TPO relates to assessment year 2006-07 of the listed companies which were picked up by the assessee itself as being comparables. However, while doing the search process for benchmarking the international transaction, the TPO included two further companies i.e. DEKI Electronics Ltd. and Tibrewala Electronics Ltd., data of which was confronted to the assessee. The objection of assessee to the inclusion of above said concerns was that the data relating to the said concerns was not available at the time of complying with the documentation requirements and had come into public domain much later. We find no merit in the claim of the assessee that the data of companies which were not available in public domain at the time of complying with documentation requirements cannot be considered. The companies which are picked up by the TPO are functionally comparable to the assessee and the data which has been compiled by the TPO relates to assessment year 2006-07, and was confronted to the assessee and merely because the data came into public domain at a later date, the same cannot be ignored. The TPO has power to use any data which comes into his possession and Section has not provided any fetters to the collections of data on a particular date or otherwise and use of such data; in the absence of which, there could not be curtailment of powers to be exercised by the TPO for determining arm's length price of international transaction. Merely because, the financial results of a concern which were functionally similar to the assessee came into public domain on a later date, but relate to the year in which the international transaction had been undertaken, cannot be rejected on the surmise that they were not available on the date of compilation of documentation and / or came in the public domain later. The argument of learned Authorized Representative for the assessee before us is that if the TP proceedings of a particular case had been taken up on an earlier date when no such data was available, would put such a person on an advantageous position as compared to person whose TP proceedings were taken up on a later date when information in respect of such comparables were recently published. The search process is to be carried out by the TPO who in turn, has to determine the arm's length price of international transaction on the basis of information available with him and once such information is made available to him, then the same can be applied by the TPO after confronting the same to assessee, to compute the transfer pricing adjustment, if any, in the hands of the assessee. Accordingly, the TPO under the Act is fully justified in carrying out the fresh search, if needed, for identifying the*

comparable companies, may be additional and proceed with transfer pricing proceedings. Such data collected by the TPO cannot be called as non-contemporaneous, where the concerns picked up by the TPO are functionally comparable and the data for the relevant year was available.

20. We find support from the ratio laid down by the Bangalore Special Bench in *Aztec Software and Technology Vs. ACIT* (supra), wherein the Tribunal while considering the statutory provisions for determination of arm's length price of a taxpayer observed that the burden to establish the transaction to be at arm's length price was upon the taxpayer, who had to furnish comparable transactions, apply appropriate method for determination of arm's length price and justify the same by producing the relevant material and documents before the Revenue authorities. Where the Revenue authorities were not satisfied with the arm's length price and supporting documents / information furnished by the taxpayer, the Tribunal held that the authorities had an ample power to determine the same and make suitable adjustment. In such case, the responsibility of determination of arm's length price is shifted to the Revenue authorities who are to determine the same in accordance with statutory regulations. The Tribunal further while concluding the issue had considered the burden of proof on the taxpayer and the Revenue authorities and had observed as under:-

“132. A dispassionate study of provisions of various countries on Burden of Proof, would show, the following fundamental features:

(i) That the burden to establish that international transaction is carried at ALP, is on the taxpayer who is to disclose all the relevant information and documents relating to prices charged and profit earned with related and unrelated customer.

(ii) If the Assessing Officer has determined an ALP, other than the price declared by the assessee, Assessing Officer has to prove that the price determined by him is reliable and reasonable and confirms the statutory requirement unless the case is covered by situation No. (iii) below.

(iii) In case of failure on the part of the taxpayer to comply with the statutory provisions, the tax authorities would have to determine the ALP. In such a situation, burden of proof on tax authorities is much reduced.”

21. Thereafter, the conclusion of the Tribunal was that the taxpayer had to cooperate with the tax authorities by furnishing relevant information. Further, where the authorities were of the view that arm's length price was not correctly determined by taxpayer, then the same could be substituted by arm's length price on the basis of material or information furnished by the assessee or collected by the Revenue authorities. It was further held that such arm's length price had to be determined by keeping in mind the provisions of the Act and also the principles of natural justice and be fair and reasonable to the taxpayer and any material collected to be used against the taxpayer was to be put to the taxpayer to explain. It was further held that the adjustments made on account of arm's length price by tax authorities could be deleted in appeal only if appellate authorities are satisfied and records a finding that arm's length price submitted by the assessee was fair and reasonable. The relevant findings of the Tribunal are as under:-

“133. Having regard to the statutory provisions, particularly the mandate of sections 92(1) and 92D read with relevant rules, we hold that it is obligatory on the part of the taxpayer to furnish information relating to controlled international transactions, select a suitable method for

determination and furnish ALP of such international transactions carried by it and give basis and supporting authentic evidence of ALP and adjustments made. The taxpayer has further to cooperate in the determination of the ALP by the tax authorities by furnishing all relevant information. The tax authorities in cases where they are of the opinion that ALP has not been correctly determined by the taxpayer, can substitute their own ALP on the basis of material or information furnished by the assessee or collected by them. However, such ALP has to be determined having in mind provisions of sections 92 and 92C and other rules and regulations. While determining ALP, tax authorities are bound to follow principles of natural justice and be fair and reasonable to the taxpayer. Any material collected to be used against the taxpayer is to be put to taxpayer to explain. Having regard to the purpose of the legislation and application of similar enactment world over, it must further be held that adjustments made on account of ALP by tax authorities can be deleted in appeal only if the appellate authorities are satisfied and records a finding that ALP submitted by the assessee is fair and reasonable. Merely by finding faults with the transfer price determined by the revenue authorities (AO/TPO), addition on account of "adjustments" cannot be deleted. This is because the mandate of section 92(1) is that in every case of international transaction, income has to be determined having regard to ALP. Therefore, unless ALP furnished by the taxpayer is specifically accepted, the appellate authorities on the basis of material available on record has to determine ALP itself. Subject to statutory provisions, Appellate authorities can direct lower revenue authorities to carry this exercise in accordance with law. The matter cannot be left hanging in between. ALP of international transaction has to be determined in every case."

22. The above said proposition has been laid down by the Special Bench of Bangalore Tribunal while interpreting the transfer pricing provisions and the principle laid down by the Special Bench of Tribunal is applicable to the issue before us. The learned Authorized Representative for the assessee before us has placed reliance on the ratio laid down by Hon'ble Bombay High Court in *Scindia Steam Navigation Co. Ltd. Vs. CIT (supra)*, wherein the issue was the applicability of amended provisions of the Act. The question arising before the Hon'ble Bombay High Court was that in case any provision has been amended later, were such amended provisions to be applied while completing assessment of the year which was pending as on the date, on which the amendment was brought in or as per the provisions which were applicable to the relevant year. The Hon'ble Bombay High Court did not accept the contention of the learned Departmental Representative for the Revenue in this regard as it would cause startling results. The said proposition laid down by the Hon'ble Bombay High Court is not applicable to the facts of the present case before us, where under the provisions of the Act itself, the TPO is empowered to substitute the arm's length price on the basis of material or information furnished by the assessee or collected by him. In case, such an authority has been delegated to the TPO and in exercise of such authority, certain information is collected by the TPO, which in turn, is confronted to the assessee and thereon applied to determine the arm's length price of international transaction, the said exercise of the jurisdiction by the TPO cannot possibly be questioned. Accordingly, we find no merit in the reliance placed upon by the learned Authorized Representative for the assessee. The learned Authorized Representative for the assessee further relied upon on other decisions which are factually different from the issue before us. Accordingly,

*we find no merit in the claim of assessee in this regard and upholding the action of TPO, the grounds of appeal No.2 and 3 raised by the assessee are dismissed.”*

16. In view of said proposition laid down by the Tribunal in the case of M/s. Vishay Components India Pvt. Ltd. Vs. DCIT (supra), which has been followed in ITO Vs. Dar Al-Handasah Consultants (Shair And Partners) India Pvt. Ltd. in ITA No.1711/PUN/2014 along with CO No.32/PUN/2016, relating to assessment year 2009-10, order dated 30.08.2017, we hold that the concerns which were found to be functionally comparable though selected during TP proceedings, then the same need to be considered in case they fulfill all the other filters, by the TPO. Accordingly, we uphold the directions of DRP in this regard and dismiss the ground of appeal No.2 raised by Revenue.

17. It is the case of assessee that in case five concerns on the basis of their turnover are excluded and three new concerns selected by assessee during TP proceedings are selected, then the margins shown by assessee in the provision of software development services would be at arm's length price of margins shown by comparables, even if revised PLI is adopted i.e. intra-group cost is not excluded from operating expenditure.

18. Now, we shall also address ground of appeal raised by assessee which is against adjustment made to provision of intra-group cost. The adjustment has been made by TPO by taking intra-group cost at Nil and hence, adjustment of ₹ 2,00,61,662/- was made by TPO / Assessing Officer. However, the said amount was reduced from the operating expenditure and revised operating profit as percentage of revised operating cost was determined. The DRP

however, has further directed that revised PLI of assessee would further be revised in case no adjustment is to be made to the segment of provision of intra-group cost.

19. We find that similar adjustment on account of management fees, communication cost i.e. intra-group cost was made in assessment years 2008-09 and 2009-10. The case of TPO was that the assessee had not furnished evidence to prove services and benefit derived from such services with supporting evidences and relying on directions of DRP in assessment year 2008-09, the TPO adopted intra-group cost at Nil. The Tribunal in assessment year 2008-09 in ITA No.46/PUN/2013, vide order dated 22.03.2017 had remitted this issue back to the file of Assessing Officer/TPO to decide the issue afresh. The case of assessee before us was that these costs had been recovered on cost plus markup from associated enterprises and hence, there is no merit in adopting the same at Nil. The Tribunal in assessment year 2009-10 in ITA No.379/PUN/2014, vide order dated 31.05.2018 had also remitted the issue back to the file of TPO. Accordingly, we remit this issue to the file of TPO/Assessing Officer to adjudicate the issue after affording reasonable opportunity of hearing to the assessee in line with directions of Tribunal in earlier years. The TPO/Assessing Officer shall also consider the plea of assessee in recovering intra-group cost at cost plus markup and decide the issue in accordance with law. The ground of appeal No.2 raised by assessee is thus, allowed for statistical purposes.

20. The issue in ground of appeal No.3 raised by assessee is against initiation of penalty proceedings is premature, hence the same is dismissed.

21. The issue in ground of appeal No.4 raised by assessee against levy of interest under section 234B of the Act is consequential, hence the same is also dismissed. The grounds of appeal raised by assessee are thus, partly allowed.

22. In the result, appeal of Revenue is dismissed and appeal of assessee is partly allowed.

Order pronounced on this 24<sup>th</sup> day of October, 2018.

<b>Sd/-</b> <b>(ANIL CHATURVEDI)</b>	<b>Sd/-</b> <b>(SUSHMA CHOWLA)</b>
लेखा सदस्य / <b>ACCOUNTANT MEMBER</b>	न्यायिक सदस्य / <b>JUDICIAL MEMBER</b>

पुणे / Pune; दिनांक Dated : 24<sup>th</sup> October, 2018.

GCVSR

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :**

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune