

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,  
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**

ITA No. 222/DEL/2016  
[A.Y 2011-12]

M/s Aircom International [India]  
Pvt Ltd, M-12, Balrama House  
Karampura, Commercial Complex  
New Delhi

Vs.

The Dy. C.I.T  
Circle - 2 (1)  
New Delhi

PAN: AADCA 0915 A

(Applicant)

(Respondent)

Assessee By : Shri Nageshwar Rao, Adv  
Department By : Shri Sanjay I Bara, CIT-DR

**Date of Hearing : 07.03.2019**  
**Date of Pronouncement : 15.03.2019**

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER,**

This appeal by the assessee is preferred against the order dated 27.11.2015 framed u/s 143(3) r.w.s 144C(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] pertaining to A.Y 2011-12.

2. The substantive grievance of the assessee is two-fold :

(a) firstly, the assessee is aggrieved by the addition of Rs. 6,53,52,184/- relating to corporate tax matters, being disallowed by the Assessing Officer, treating the same as capital expenditure.

(b) Second grievance of the assessee relates to the Transfer Pricing matter confined adjustment of Rs. 4,87,99,150/- made to international transaction of software deployment services and intra group services [referred to as management service fees].

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused

2. Briefly stated, the facts of the case are that the appellant-company is a wholly owned subsidiary of Aircom International Ltd., UK and part of Aircom Group. The appellant-company is engaged in the business of provision of software development services, software deployment services, consultancy services, software sub-licensing and AMC activities.

3. Return for the year under consideration was selected for scrutiny assessment and on finding that there were international transactions, the matter was referred to the TPO, who proceeded to make an upward adjustment to the international transaction for provisions of software development services and software deployment services and also proceeded to bench-mark the appellant's international transaction of provisions of intra-group services received from its AEs.

4. Pursuant to the rectification application, the TPO passed rectification order dated 19.09.2018 u/s 154 of the Act, whereby the TPO deleted the adjustment pertaining to software development services considering effect of tolerance range +/- 5% of the price received.

5. The subject matter of the present appeal relates to the transfer pricing addition confined to adjustment of Rs. 4.87 crores made to international transaction of software deployment services and intra group services.

6. Before proceeding further, let us understand the segmental accounts of the appellant which is as under:

Particulars	Software Development	Consultancy		Product Delivery	Software-Sub-Licensing	Total as per Segmental
	Category 1	Category 2		Category 2A	Category 3	
	AE	Non-AE	AF	AE	AF	
other funds:						
Staff welfare	662,951	536,615	75,051	1,134,521	97,565	2,506,704
<b>Operating and other administration expenses</b>						
Rent & hire charges	5,059,665	4,095,465	572,792	8,658,710	744,630	19,131,262
Travelling & conveyance	5,668,410	4,588,204	641,707	9,700,468	834,219	21,433,008
Sub contractor fee		37,429,790				37,429,790
Recruitment & training expenses	664,089	537,536	75,180	1,136,469	97,734	2,511,008
Legal and professional charges	800,038	647,578	90,570	1,569,122	117,742	3,025,050
Repairs and maintenance						
- Building (Leased Premises)	1,370,107	1,109,011	155,106	2,344,692	201,638	5,180,554
- Others	1,228,241	994,180	139,046	2,101,914	180,760	4,644,141
Communication expenses	916,186	741,592	103,719	1,567,888	134,835	3,464,220
Electricity	459,201	371,693	51,985	785,840	67,580	1,736,299
Insurance	361,659	292,739	40,942	618,914	53,225	1,367,479
Business promotion expenses	192,285	155,642	21,768	329,062	28,299	727,056
Printing and stationery	116,884	94,610	13,232	200,026	17,202	441,954
Management fee	9,442,612	7,643,171	1,068,975	16,159,338	1,389,667	35,703,763
Bad debts written off		3,206,663				3,206,663
Miscellaneous expenses	809,215	655,006	91,609	1,384,827	119,092	3,059,749
Depreciation	11,817,843	233,106	8,363,371	776,570	448,601	21,639,490
<b>Operating Cost</b>	<b>82,536,593</b>	<b>115,673,337</b>	<b>18,055,322</b>	<b>101,558,420</b>	<b>79,469,961</b>	<b>397,293,634</b>

## 7. The operating profit of the segments is as under:

	Software development	Consultancy	Product Delivery	Software sub licencing	
Particulars	Category 1	Category 2	Category 2A	Category 3	Total as per segmental
	AE	Non AE	AE	AE	

Operating Profit	14,735,003	7135061	3115546	15286042	5363388	4565040
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Add -Other  
Non operating  
income

interest on fixed deposits						204.583
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profit of sale of asset						11.981
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Other income						2341329
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Less Non-  
operating  
expenses

loss on account of exchange rate fluctuation (net)						5131855
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interest on secured loans						288514
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Finance charges						140334
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Profit/loss Before tax						42632230
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OP/TC	17.85%	6.17%	17.26%	15.05%	6.75%	11.49%
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OP/Sales	15.15%	5.81%	14.72%	13.08%	6.32%	10.30%
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8. From the aforementioned chart, it can be seen that the management fee amounting to Rs. 3,57,03,763/- has been apportioned proportionately amongst the segments. At this juncture, it would be pertinent to mention that the management fee apportioned to the segment software as margin shown under this segment has been accepted by the TPO, as no adjustment has been made in respect of this segment. This means that the margin of profit has been accepted in one of segments after absorption of proportionate management fee. In other words, if apportionment of Rs. 1,61,59,338/- is also accepted in the segment software deployment [product delivered], then, there is no question of making any adjustment in so far as intra group services is concerned.

9. Our view is fortified by the decision of the Hon'ble High Court of Delhi in Sony Ericsson Mobile Communication India Pvt. Ltd 374 ITR 118 and the relevant findings of the Hon'ble High Court read as under:

*"(v) Where the Assessing Officer/TPO accepts the comparables adopted by the assessed, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. It would be incongruous to accept the comparables and determine or accept the transfer price and still segregate AMP expenses as an international transaction."*

10. In the light of the above, we will now consider the following comparables used by the TPO for making the upward adjustment in respect of software deployment services:

- (i) WIPRO Technology Limited
- (ii) Persistent Systems Limited
- (iii) Persistent Systems and Solutions Ltd
- (iv) Zylog Systems Ltd.

(i) WIPRO TECHNOLOGY LIMITED

11. The assessee raised strong objection for the inclusion of this comparable on the ground that it is a functionally different company. However, on perusal of the Annual Report of this company, the TPO was convinced that this company is engaged in providing software related support services, primarily information technology software solutions/maintenance and technology, infrastructure support services to Citigroup entities globally which is considered as one segment and there are no separate reportable segments. Therefore, WIPRO Technology Services Limited is a good comparable. The assessee also raised objection that this company cannot be used as a comparable as it has very high related party transaction. This objection was also dismissed by the TPO holding that

WIPRO Technology and City Group are unrelated entities hence transaction between the two is at Arm's length.

12. Objections were raised before the DRP but without any success.

13. Before us, the ld. AR straightaway drew our attention to the decision of the co-ordinate bench in the case of Saxo India Pvt Ltd ITA No. 6148/DEL/2015 order dated 05.02.2016 and pointed out that for the same A.Y, i.e. 2011-12, Wipro Technology Services has been excluded from the final list of comparables because of the high related party transactions.

14. We have given a thoughtful consideration to the orders of the authorities below and the decision of the co-ordinate bench in the case of Saxo India Pvt Ltd [supra]. We find merit in the submissions urged by the ld. AR. On similar conditions, the co-ordinate bench excluded Wipro Technology Services from the final list of comparables. The relevant findings read as under:

"16.2. We have heard the rival submissions. Page 57 of the TPO's order is reproduction of the assessee's contention about the related party transactions as under :-

"Wipro Technology Services Limited (formerly Citi Technology Services Limited) ('the Company') was incorporated on 15 September,

2004. The entire share capital of the Company was held by Citicorp Banking Corporation, a company incorporated under laws of Delaware, USA, upto 20 January, 2009.

Wipro Limited (Wipro) executed an agreement with Citigroup Inc. for acquiring all of Citigroup interest in the Company w.e.f. 21 January 2009. On 21 January 2009, Wipro signed a master service agreement (MSA) with Citigroup Inc. for the delivery of technology infrastructure services and application development and maintenance services for the period of six years. The MSA provides for the delivery of at least \$500 million in service revenues over the period of the contract. After the acquisition by Wipro, the name of the Company was changed to Wipro Technology Services Limited ('WTS' or 'the Company') on 16 March 2009."

16.3. It is observed from the above contention reproduced in the TPO's order that Wipro Technology Services Ltd., which was earlier Citi Technology Services Ltd., was held by Citi Corp. Banking Corporation, USA upto 20th January, 2009. Wipro Ltd., parent company of the assessee, executed an agreement with Citi Group Inc., for acquiring Citi Technology Services Ltd., now called Wipro Technology Services Ltd. On 21.1.2009, Wipro Ltd. signed a master agreement with Citi Group Inc., for the delivery of technology Infrastructure Services and application development and maintenance services for the period of six years, which also includes the year under consideration. This shows that income from software development support and maintenance services was earned by Wipro Technology Services Ltd., from Citi Group Inc., by means of master service agreement entered into between Wipro Ltd., its parent company and Citi Group Inc., a third person.

16.4. We have noticed above from the language of Rule 10B(1)(e)(ii) that it is the net profit margin realized from a comparable uncontrolled transaction, which is considered for the purposes of benchmarking. The epitome of 'comparable uncontrolled transaction' is that the companies or transactions in order to fall within the ambit of sub-clause (ii) of rule 10B(1)(e), should be both comparable as well as uncontrolled. 'Uncontrolled transaction' has been defined in Rule 10A(a) to mean: 'a transaction between enterprises other than associated enterprises, whether resident or non-resident.' This shows that in order to be called as an uncontrolled transaction, it is sine qua non that the same should be between the enterprises other than the associated enterprises. [Section 92B\(2\)](#) provides that: 'A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise'. On going through the prescription of sub-section (2) of [section 92B](#), it is clearly borne out that a transaction with a non-AE shall be deemed to be a transaction entered into between two AEs if there exists a prior agreement in relation to the relevant transaction between the third person and the AE or the terms of the relevant transaction are determined in substance between the third person and the AE. When we consider [section 92B\(2\)](#) in combination with Rule 10A(a), it follows that the transaction between non-AEs shall be construed as a transaction between two AEs, if there exists a prior agreement in relation to the relevant transaction between third person and the AE.

If such an agreement exists, the third person is also considered as an AE and the transaction with such third person becomes international transaction within the meaning of [section 92B](#). Once there is a transaction between two associated enterprises, it ceases to be an 'uncontrolled transaction' and, thereby, goes out of reckoning under Rule 10B(1)(e)(ii).

16.5. Adverting to the facts of the instant case, we find that Wipro Technology Services Ltd. earned a revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services. This agreement was, in fact, executed between the assessee's AE, Wipro Ltd., and Citigroup Inc., a third person. This unfolds that the transaction of earning revenue from software development support and maintenance services by Wipro Technology Services Ltd., is an international transaction because of the application of [section 92B\(2\)](#) i.e., there exists a prior agreement in relation to such transaction between Citigroup Inc. (third person) and Wipro Ltd. (associated enterprise). In the light of this structure of transaction, it ceases to be uncontrolled transaction and, hence, Wipro Technology Services Ltd., disqualifies to become a comparable uncontrolled transaction for the purposes of inclusion in the final list of comparables under Rule 10B(1)(e)(ii). We, therefore, direct removal of this company from the list of comparables."

15. It would not be out of place to refer to the decision of the Hon'ble Jurisdictional High Court of Delhi when the Revenue approached the Hon'ble High Court against the said decision of the Tribunal in the case of Saxo India

Pvt Ltd 682/2016 CM Appeal ...35744 to 35746/2016 wherein the Hon'ble High Court held as under:

7. As far as Wipro Technology Services Limited is concerned, it is submitted that the revenue has not articulated any ground in its appeals nor indicated precisely why the exclusion of Wipro Technology Services Limited is erroneous. The narrow question which requires determination is whether the exclusion of the four comparables which were taken into consideration while carrying out the ALP determination by the TPO was erroneous."

16. In the light of the above, respectfully following the findings of the co-ordinate bench, read with the observations of the Hon'ble High Court [supra], we direct for exclusion of Wipro Technology Services Ltd from the list of comparables.

(ii) PERSISTENT SYSTEMS AND SOLUTIONS LTD

17. A perusal of the Notes to the Annual Accounts of this company at page 887 of the paper book shows that under the head "Income from Software Services" it is mentioned that the Revenue from licensing of products is recognised on delivery of products and revenue from royalty is recognised on sale of products in accordance with terms of relevant agreement. Exhibit 881 is the Profit and Loss Account of this company, which reveals that under the head 'Income', sale of software services and products is at Rs.

18,94,90,457/- and the schedule of this head of income at page 885 does not show any segmental accounts.

18. Before us, the ld. DR stated that more than 80% of the revenue is not from contribution of products and since the significant part of the revenue is from sale of software services, there is no need for any segmental accounts. The ld. DR relied upon the findings of the DRP.

19. We do not find any merit in the contention of the ld. DR. Even if there is a miniscule element of some revenue from other segments, it would necessitate the segmental data because, in the absence of accuracy, result could be widely off the mark. In our understanding of the law, the transfer pricing exercise in the profit and loss filter to be adopted invariably is premised upon accuracy as opposed to approximation with respect to operating cost and operating profits. It would not be out of place to mention here the observations of the Hon'ble High Court of Delhi in the case of Saxo India Limited [supra] which read as under:

"The TNMM method depends on accurate data with respect to all the three elements - wherever they apply. In the Comparable Uncontrolled Price (CUP) method - which is premised upon the elements in Rule 10B(1)(a), the methodology adopted is the price charged or paid for property transfer or services provided in the Comparable Uncontrolled transaction. Therefore, the nature of the

transaction and the appropriate filter determines the elements that are to be considered in TNMM. Therefore, the costs, sales and assets employed wherever relevant are to be applied. From this perspective, the revenue's contention that segmental data was available, cannot be accepted. The mere availability of proportion of the turnover allocable for software product sales *per se* cannot lead to an assumption that segmental data for relevant facts was available to determine the profitability of the concerned comparable.

11. For the above reasons, no substantial question of law arises.

The appeal is accordingly dismissed alongwith pending applications."

20. In the light of the above and in the absence of segmental information, this company is directed to be excluded from the final set of comparables.

(iii) PERSISTENT SYSTEMS LTD

21. The Profit and loss account at page 1005 of the paper book shows that under the head 'Income', sale of software services and products is shown at 6101.27 million and schedule 11 which gives details of sale of software services and products is devoid of any segmental reporting. For our detailed reasons given in the case of Persistent Systems and Solutions Ltd, this company is also directed to be excluded from the final list of comparables.

22. Moreover, in assessee's own case for A.Y 2008-09 in ITA No. 6402/DEL/2012, the Tribunal has directed for exclusion of this company from the list of comparables.

(iv) ZYLOG SYSTEMS LIMITED

23. The Annual Account of this company at page 1159 of the paper book shows that under the head 'Income', the software development services and products is shown at Rs. 9,18,24,45,549/- and in the schedule of fixed assets at pages 1163, product development cost has been shown as eligible for depreciation because intangible assets have been amortized as is evident from page 1170 of the paper book and in the schedule of Notes to accounts at clause X, it is mentioned that since the company operates in I.T. services there are no other business segments.

24. A perusal of the Annual Accounts shows that no specific data is available to consider this company as a good comparable.

25. In the case of Agilis Information Technologies International Pvt Ltd 1063/DEL/2016 for A.Y 2011-12, this comparable was excluded from the list

of comparables. The relevant findings of the co-ordinate bench read as under:

"4.6. We have heard both the parties and perused the records. The segmental data was not available for the assessment year under question of this company. The company is earning revenue from two business segments, namely, software services and software products. However, separate segmental data with respect to the aforesaid two segments is not available in the financial statement. The assessee company cannot be compare with this company as there is not segmental data available. Besides, this there was extra-ordinary events occurred during the year as the company has acquired M/s. Brainhunter Inc., Canada. Thus, as held by this Tribunal in various decisions companies having extra-ordinary event has to be excluded.

Therefore, we direct TPO to exclude this company from comparables."

26. Respectfully following the findings of the co-ordinate bench in the absence of segmental data, we direct for exclusion of htis company from the list of comparables. To avoid repetition, observations made by us highlighting the findings fo the Hon'ble Delhi High Court while considering the comparable Persistent Systems Solution Ltd are also applicable in toto here also.

27. Having excluded the aforementioned four comparables, we are of the opinion that the margin of profit of the segmental software deployment services would be at Arm's length.

28. This brings us now to the adjustment made towards intra group services. As mentioned elsewhere, the management fee of Rs. 3,57,03,763/- has been apportioned amongst the segments and one of the segment is software deployment segment [product delivery]. Since the apportionment matches the ALP in respective segments, in the light of the findings of the Hon'ble High Court of Delhi in the case of Soni Ericsson Mobile Communication Ltd [supra] we do not find any reason for making any adjustment under this segment intra group services. We accordingly direct for deletion of the same. Accordingly, Ground No. 3 with all its sub-grounds is allowed.

29. Regarding the ground relating to addition on account of corporate tax matter, an identical issue was considered and decided by the Tribunal in assessee's own case for A.Ys 2007-08 to 2010-11. The relevant findings of the co-ordinate bench read as under:

*"16. The last issue raised in this appeal is against the addition of Rs.67,52,517/- made by the Assessing Officer towards Licence expenses. The factual matrix of this issue is that the assessee debited a sum of Rs.90.03 lac in its Profit & Loss Account as licence*

*expenses. On being required to furnish the details of such expenses, the assessee ITA No.5743/Del/2011 submitted that as per the agreement with its AE, the ITP charges were to be paid by the subsidiary to the parent company @ 45% of the total sale value of software and support and maintenance charges. Treating this amount paid by the assessee to its AE as an intangible asset, the Assessing Officer allowed depreciation @ 25% and made addition for the remaining sum of Rs.67.52 lac, against which the assessee has come up in appeal before us.*

*17. After considering the rival submissions and perusing the relevant material on record, it is noticed that Aircom, UK, offers solution for network engineering requirements with its software, namely, 'ENTERPRISE suite', which is a solution for all aspects of network engineering. Apart from directly licensing ENTERPRISE suite by Aircom, UK, the assessee also sells the software in the domestic market. Since the intellectual property rights relating to ENTERPRISE suite vest in Aircom, UK, the assessee entered into contract with Aircom, UK to sell this Product directly in the domestic market. As a quid pro quo, the assessee agreed to share a percentage of sale price to Aircom, UK.*

*ITA No.5743/Del/2011 Clause (1) of the Agreement provides that: "ITP charges to be paid by the subsidiary to the parent company @ 45% of the total sale value of software and support and maintenance charge." Pursuant to this Agreement, the assessee raised invoices on certain customers in India including Idea Cellular Ltd. for upgradation of Aircom Tools. Copies of some of the invoices have been placed on pages 779 to 783 of the paper book. The invoice value has been shown as its income and the amount paid to its AE has been shown as Licence*

*fee in its Annual accounts. We are at loss to appreciate as to how the assessee can be said to have created an 'Intangible asset' by paying the Licence fee to its AE in respect of sales made. Such payment @ 45% of the invoice value was the obligation of the assessee ab initio without which it could not have procured the licence of ENTERPRISE suite for sale in India. This amount can be loosely characterized as cost of goods transferred to the customers in India, which has necessarily to be allowed as a revenue expenditure. We, therefore, overturn the impugned order on this score and direct the deletion of addition of Rs.67.52 lac made by the Assessing Officer."*

30. Respectfully following the findings of the co-ordinate bench, this ground is also allowed.

31. In the result, the appeal of the assessee is allowed.

**The order is pronounced in the open court on 15.03.2019.**

**Sd/-**

**[SANDEEP GOSAIN]  
JUDICIAL MEMBER**

**sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 15<sup>th</sup> March, 2019

VL/

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	