

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

**BEFORE SHRI N.S.SAINI, ACCOUNTANT MEMBER
&
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.-1481/Del/2015
(Assessment Year: 2010-11)**

Kaplan India Pvt. Ltd. 226, Tribhuvan Complex, Ishwar Nagar, Friends Colony (west) New Delhi PAN : AAICS9919F	Vs.	ITO Ward -14(2) New Delhi
Appellant		Respondent

**Assessee by : Sh. Nageshwar Rao & Sandeep S. Karhail, Adv.
Revenue by: Shri Sandeep Kr. Mishra, Sr. DR**

Date of Hearing	29.01.2019
Date of Pronouncement	02.04.2019

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.:

This appeal is preferred by the assessee against the Final Assessment Order dated 31.12.2014 passed by the Assessing Officer (AO) under section 143 (3) r.w.s. 144 C of the Income Tax Act, 1961 (hereinafter called 'the Act') and pertains to Assessment Year (AY) 2010-11.

2.0 The brief facts of the case are that the assessee Kaplan India Private Limited (KIPL) was incorporated in April 2005 as a

subsidiary of Kaplan Mexico Holdings LLC. KIPL is engaged in providing captive software development and maintenance services to its Associated Enterprise (AE). The assessee filed its return of income declaring taxable income of Rs. 5,55,564/- taxable income. During the year under consideration, the international transactions entered into by the assessee related to provision of software maintenance and support services amounting to Rs. 15,20,04,973/-. During the period relevant to present appeal, the assessee rendered the following software maintenance and support services to its group entities:

Software maintenance and support services;

Engineering activities – enhancement and customization of supporting platforms and applications, database cleanup and maintenance services, supporting application platforms within Kaplan businesses, bug fixing and maintenance;

Quality assurance activities;

Other IT services;

2.1 Pursuant to a reference made by the Assessing officer, the Transfer Pricing Officer (TPO) passed order dated 21.01.2014 under section 92CA of the Act. The TPO accepted the Functions Assets and Risk analysis (FAR) as described in the Transfer Pricing (TP) study

filed by the assessee. There is no dispute between the parties that the most appropriate method is Transactional Net Margin Method (TNMM) and the Profit Level Indicator (PLI) is OP/TC. The assessee had selected 18 companies with an average margin of 10.04 % and had reported that its international transactions are at Arm's Length Price (ALP) considering its own margin at 11.08%. The TPO requested substitution of multiyear data with single year data, upon which the assessee selected 13 comparables with mean margin of 8.82 % and, thus, claimed that its international transactions are at arm's length. The TPO recorded that the TP study has not been rejected and that it has been only modified by use of current year data and some appropriate filters. The TPO issued show cause notice modifying some of the filters applied in the transfer pricing study and accepted 10 out of the 13 comparables. The TPO also added another 6 comparables as detailed in the TP order. After a detailed discussion, accepting and rejecting some comparables, the TPO arrived at the final set of 17 comparables with average margin of 25.78%. Further, the TPO opined that working capital adjustment was not relevant for service industry and hence refused to allow any working capital adjustment. Similarly, the TPO rejected the assessee's claim for risk adjustment pointing to absence of reliable and robust data. Initially, an adjustment of Rs.

2,01,10,731/- was determined, however, vide rectification order dated 25.07.2014 this adjustment was reworked to Rs. 1,77,46,170/-.

2.1 The Draft assessment order dated 14.2.2014 was objected to before the Ld. Dispute Resolution Panel (DRP), where the assessee was not successful in securing any major relief except direction to grant working capital adjustment as per the methodology given in OECD guidelines. The TPO recomputed the TP adjustment at Rs. 177,16,054/- which is incorporated as part of impugned final order passed by AO on 31.12.2014.

2.2 Aggrieved, the assessee is now before this Tribunal (ITAT) and has raised the following grounds of appeal:

1. *The learned TPO/AO/DRP have erred in making addition of INR 17716054 to the total income of appellant in respect of international transactions pertaining to provision of software maintenance and support services by the appellant to its associated Enterprises (AEs).*
2. *The learned TPO/AO/DRP have erred in not accepting the economic analysis undertaken by the appellant in accordance with provisions of the act read with income tax rules, 1962 ("the rules") in modifying the same for the determination of arm's length price(ALP) of the impugned transaction to hold that the same are not at arm's length without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of sub-section 92 C of the act.*
3. *The learned TPO/AO/DRP have erred in:*

- a. *Not accepting the use of multiyear data, as adopted by the appellant in its transfer pricing (TP) documentation and*
 - b. *determining the arm's length margins/prices using data pertaining only to financial year 2009-10 which was not available to the appellant at the time of complying with the Indian TP documentation requirements*
4. *The learned TPO/AO/DRP have erred in rejecting certain comparable companies selected by the appellant by applying inappropriate comparability criteria such as:*
 - a. *Turnover less than INR 5 crores*
 - b. *export turnover less than 75% of operating revenues*
 - c. *different accounting year and*
 - d. *employee cost less than 25% of total cost*
 5. *The learned TPO/AO/DRP have erred in erroneously rejecting the comparable companies selected by the appellant and adding certain companies to the final set of comparable companies on an ad hoc basis, thereby resorting to cherry picking of comparables to determine ALP.*
 6. *The learned TPO/AO/DRP have erred in selecting certain companies (which are earning supernormal profits) as comparable to the appellant.*
 7. *The learned TPO/AO/DRP have erred in passing an order which has computation errors in the margin of comparable companies used in determination of arm's length margin.*
 8. *The learned TPO/AO/DRP have erred in treatment of operating and non operating items while computing margins of the appellant and comparable companies.*
 9. *The learned TPO/AO/DRP have erred in not acting in conformity of directions passed by Hon'ble DRP and thereby*

not granting benefit of working capital adjustment to the appellant.

- 10. The learned TPO/AO/DRP have erred in not making suitable adjustment to account for differences in risk profile of the appellant vis-a-vis the comparable companies.*
- 11. The learned AO is grossly erred in initiating penalty proceedings under section 271(1)©.*
- 12. The learned AO is erred in living interest under section 234 B and 234 C of the act while completely disregarding the provisions affecting the judicial precedence.*

3.0 It is seen that although several grounds of appeal have been raised in the appeal memorandum, the assessee is mainly aggrieved by transfer pricing adjustment made to software development services segment and denial of working capital and Risk Adjustments.

3.1 Submissions by the Learned Authorised Representative (Ld. AR) for the assessee/appellant centred around ground nos. 1,2,5,9 and 10. While application of filters in the context of specific comparables was raised and is discussed in subsequent paragraphs ground numbers 3 and 4 were not specifically argued. Similarly, no specific submissions were made in connection with ground nos. 6,7 and 8. Ground numbers 11 and 12 are premature or consequential and hence do not require adjudication at this stage.

4.0 Firstly, Ground no. 5 relating to inclusion and exclusion of companies from the final set of comparables is taken up for consideration. Broadly, the Ld. Counsel for the assessee requested for exclusion of Sonata Software Limited, E Infochips Bangalore Limited, Infinity Data Systems Private Limited and Infosys Limited from the final set of comparables. The Ld. Counsel filed a detailed chart containing orders by the coordinate Benches of the Tribunal for the same Assessment year in the context of very same comparable companies. Detailed submissions by both the parties and findings are discussed in following paragraphs:

(i) Sonata Software Ltd:

Seeking exclusion of Sonata Software Limited, the learned counsel submitted that the TPO himself had applied the related party transactions filter of 25%. Inviting our attention to pages 247 and 302 of the paper book it was submitted that the details of the related party transactions in case of Sonata as reported in the annual report were brought to notice of both the TPO and the Ld. DRP. As per the same, the related party transactions, as a percentage of sales, in the case of Sonata Software Limited was worked out at 55.95%. Our attention was invited to paragraph 9.5 of the Transfer Pricing Order and it was contended that the TPO committed serious error in considering data for only one of

the related parties and, perhaps inadvertently, ignoring the related party transactions reported with other entities appearing on the very same page of the annual report for the purposes of applying the Related party transactions filter. Drawing our attention to page 173 of the paper book containing the annual reports of the comparable companies, it was pointed out that Sonata Software Limited reported related party transactions with several Associated Enterprises. It was submitted by the Ld. AR that the TPO inadvertently appears to have considered data relating to some of the entities but failed to consider the complete information. Thus, it was submitted that the conclusion reached by the TPO that this company had related party transactions less than 25% was not correct. The learned counsel also relied on the decision of the coordinate bench of Tribunal in case of Freescale Semiconductors India (P) Ltd (ITA No 1263/DEL/2015), wherein at paragraph 18, the coordinate bench set aside the matter to the TPO for testing related party transaction filter. The Ld. Counsel submitted that in the case of Freescale Semiconductors India (P) Ltd a remand may have been justified as no details of whether such contention was raised before the lower authorities is forthcoming from the order. However, in the present case, this very information was

submitted before both the lower authorities. The Learned counsel prayed for a clear direction to exclude this company from the final set of comparables on the ground that multiple innings cannot be allowed to the tax authorities. He relied on the judgment of the Hon'ble Gujarat High Court in Rajesh Babhubhai Damania reported in 251 ITR 541 (Guj) and also contended that this principle was applied in a series of decisions by this Tribunal.

In response, the Ld. Departmental Representative (DR) contended that the breakup of some of the figures mentioned in pages 247 and 302 of the Paper Book were not provided.

At this stage, the learned counsel for the assessee/appellant explained in detail the figures with reference to page 173 of the paper book containing annual reports *vis-a-vis* the information filed on pages 247 and 302 of paper book I.

We have heard the rival contentions of the parties and have considered the material placed on record. Related party transactions, as reported in the annual report by Sonata Software Limited, is indeed more than 50% of sales and therefore, this company does not pass the related party filter applied by the TPO. Accordingly, we direct the TPO to exclude the same from the final set of comparables.

(ii) E Infochips Bangalore Ltd:

Next coming to E Infochips Bangalore limited, the ld. submitted that this company also needs to be excluded from the final set of comparables. Our attention was invited to the profit and loss account of E Infochips Bangalore Limited which was placed at page 8 of the paper book containing the Annual Reports. It was submitted that income from software services was shown at Rs. 43,04,66,481/-. Further break up of income was shown to be contained in schedule 7 to the balance sheet on page 12 of the paper book containing the annual reports. It was pointed out by the Ld. AR that income from software services was Rs. 37,13,88,107/- (86%) and the balance income of Rs. 5,90,78,374/- (14%) was earned from consultancy charges. Our attention was further invited to note 16 on page 16 of the paper book containing annual reports wherein under the head 'segmental information' it is stated that "*the company is primarily engaged in software development and IT enabled services which is considered the only reportable business segment.....*". It was the contention of the Ld. Counsel that as the segmental profitability details were not available, this company is not comparable to Kaplan India Private limited. The Ld. Counsel further invited our attention to schedule 8 on page

12 of the paper book containing Annual reports of comparables, wherein technical subcontractors' cost is reported. It was the contention of the learned counsel that E Infochips Bangalore engages sub-contractors and, hence, the business model was different as compared to the business model of a captive service provider like the assessee/appellant. Our attention was also drawn to paragraph 9.1 of the Transfer Pricing order and it was submitted that though all these contentions were raised before the TPO, the same were rejected without even obtaining any information under section 133 (6) of the Act. By drawing our attention to page 152 of paper book volume 1, wherein objections filed before the Ld. DRP were placed, it was contended by the learned counsel that though all these aspects were also brought to the notice of the Ld. DRP, the same were rejected as a matter of routine. Lastly, the learned counsel invited our attention to paragraphs 13 to 15 of the coordinate Bench's decision in Freescale Semiconductors India (P) Ltd (ITA 1263/Del/2015) relating to same assessment year, and contended that for these very same reasons, the coordinate Bench directed exclusion of E Infochips Bangalore Limited from the final set of comparables for benchmarking software development services.

The Ld DR objected to the exclusion of companies relying on coordinate bench's decisions. In this context, the Ld DR invited our attention to the judgment of the Hon'ble Delhi High Court in ST Micro (IT 913/2017). It was his contention that the business of Freescale Semiconductors India (P) Ltd related to IC's and, therefore, according to him the coordinate bench found E Infochips as not comparable in that case. He, accordingly, contended that in the present case involving software development services, the decision of the coordinate bench in the case of Freescale Semiconductors India (P) Ltd does not help the case of the assessee.

We have carefully considered the rival contentions as well as the relevant details from the annual report. We have also taken into consideration the reasons cited by the TPO for rejecting the contentions of the assessee. We find merit in the contentions raised by learned counsel that E Infochips Bangalore appears to derive income from software services as also from consultancy charges which E Infochips Bangalore itself describes as ITES segment in the audited financials. While *prima facie*, the Ld. DR's contention that coordinate bench decisions should not be blindly followed cannot be faulted, well-reasoned orders of the coordinate benches of the Tribunal for

very same assessment year 10-11, more so dealing with Software development services segment deserve respectful consideration and cannot be lightly ignored unless factual differences or developments in law which have a bearing on the issue in dispute are pointed out. This is more so when in the present case, broad characterisation of international transactions as Software development services and application of TNMM as the most appropriate method is not disputed by both the parties. In such factual background decisions, excluding or including companies on basis of generic disqualifications like software product revenue being earned in case of certain companies and segmental data not being available or conclusion that a certain company fails identical filter in such decided case, deserve to be followed. We note that Para 13 to 15 of the order of the ITAT in Freescale Semiconductors (supra) also support the case of the assessee. The same are extracted here in below for a ready reference:

“13. The Ld. AR has also objected against the inclusion of the Einfo chips Bangalore Ltd. Assessee has objected before the Ld. transfer pricing officer that this company is functionally not comparable, segmental data are not available, it has abnormal supernormal profits, it has the fluctuating trends, it has a significant intangibles and fails

10% RPT Filter, the Ld. transfer pricing officer rejected the claim of the assessee stating that annual report of the above comparable company shows that it is functionally comparable as it develops software for its clients and do not perform any IT enabled services. The Ld. dispute resolution panel also confirmed the action of the Ld. transfer pricing officer. The Ld. authorised representative reiterated the same arguments which were raised before the Ld. lower authorities. Over and above ld AR relied up on decision of the coordinate bench in ITA No. 1051/KOL/2015 for assessment year 2009 - 10 dated 19 - 10 - 2016 wherein in para No. 8.2 the above comparable company was excluded.

14. *The Ld. departmental representative vehemently submitted that the Ld. transfer pricing officer and the Ld. dispute resolution panel has given enough reasons for inclusion of the above comparable and the Ld. authorised representative could not state anything further that how the order of the Ld. transfer pricing officer and the Ld. dispute resolution panel is erroneous but merely citing a decision does not help the case of the Ld. authorised representative as it was compared with the functions of the that appellatant in that case.*

15. *We have carefully considered the rival contention. From the business profile of the above company it is evident that it is engaged in the IT and IT enabled services. Further as stated in the order of the coordinate bench at para No. 8.2 in ITA No. 1051/Kol/2015 that*

segmental information is not available in case of IT and ITES services provided by the above comparable. The assessee has further stated that it is providing the wide range of services such as software, firmware, hardware, field programmable gate array, application specific integrated circuits quality assurance and testing. The Ld. transfer pricing officer himself has stated that the reference to the website of the company is not of much help as it may not have information which pertain to the assessment year 2010 - 11. We have carefully perused the balance sheet of the E info chips Bangalore Ltd provided to us at page No. 637 - 654 of the paper book wherein it was noted that at page No. 651 the earnings of the assessee was shown to be software development services and consultancy charges. In item No. 9 it is stated that the company is engaged in development and maintenance of computer software, production and sale of software. At page No. 652 while giving the segmental information, it was also maintained that the company is primarily engaged in software development and IT enabled services which is considered as the only one reportable segments and therefore there is no segmental information available with respect to the software development activities as well as IT enabled services. In view of this the above comparable is required to be excluded from the comparability analysis of the software development service segment of the assessee. Accordingly we direct the Ld. transfer pricing officer to exclude E info chips Bangalore Ltd.”

Therefore, in absence of any other information being brought on record by the TPO to support an alternate view and respectfully following decision of the coordinate bench in the case of Freescale Semiconductors India (P) Ltd (supra), we direct the TPO to exclude E Infochips Bangalore Ltd. from the final set of comparable companies.

(iii) Infinite Data Systems Private Limited:

The next comparable which was requested to be excluded is Infinite Data Systems Private Limited. The Learned counsel invited our attention to schedule 17 on page 37 of the paper book containing annual reports of the comparable companies and submitted that Infinite Data Systems Private Limited provides solutions that encompass technical consulting, design and development of software, maintenance, system integration, implementation, testing and infrastructure management services. Further, our attention was also invited to Para 17.2.14 on page 41 of the paper book containing annual reports, wherein under the heading “Segmental Reporting” it is stated that *“the company’s operations are predominantly related to providing software technical consultancy services to its sole customer Fujitsu Services Limited.....”*. The Ld. Counsel, therefore, contended that the business and FAR of Infinite Data systems

Private Limited were totally different from FAR of a captive service provider like the assessee. The Ld. Counsel also drew our attention to schedule 13 on page 34 wherein foreign exchange gain of Rs. 61,61,087/- is indicated and in the very next page under schedule 15 relating to administrative and other expenses foreign exchange loss of Rs. 2,19,40,908/- is reported. It was the contention of the learned counsel that the details to clarify such apparently contradictory statements were not available. Lastly, our attention was drawn to Para 10 to 12 of the decision of the coordinate bench in Freescale Semiconductors India (P) Ltd (ITA 1263/DEL/2015), wherein the coordinate bench has, after a detailed discussion, directed the exclusion of this company from the final set of comparables. Our attention was also drawn to the detailed chart of comparables filed at the time of hearing, wherein details of other coordinate bench decisions on similar lines for the very same year were provided. The Ld. Counsel requested for similar relief.

The Ld DR invited our attention to paragraph 9.3 of the TPO's order. It was contended that the objections of the assessee were dealt with in detail and that the TPO had rightly concluded that this comparable was primarily engaged in IT services. The

Learned DR objected to placing reliance on the coordinate bench's decision for excluding any comparable.

We have carefully considered the rival contentions as also the detailed arguments summarized hereinabove. It is apparent that Infinite Data Systems Private Limited is engaged in a wide variety of services including software technical consultancy services etc. It is our considered opinion that these services cannot be compared with software development services provided by a captive service provider like the assessee in the absence of segmental information. FAR of Infinite Data Systems Private Limited is clearly different from that of the assessee. We also note that the assessee's case is covered in assessee's favour by the order of the Delhi Bench of the Tribunal in Freescale Semiconductors India (P) Ltd. (supra). The relevant observations of the Bench are contained in Para 10 to 12 of the said order and the same are being reproduced here in under for a ready reference:

“10. With respect to Infinite data systems private limited assessee objecting it on functional dissimilarity, services to single customer, abnormal supernormal profits, fluctuating trends and significant intangibles. The above objection of the assessee was rejected by the Ld. transfer pricing officer stating that assessee has not demonstrated how

the services to a single customer is not comparable to it as assessee services are also to its single associated enterprise only. With respect to the functional dissimilarity same was also rejected. Other issues with respect to abnormal margins, supernormal growth have also been rejected. He also rejected the contention of the assessee that company owns significant intangibles in the form of software. Similar arguments were also advanced before us by the Ld. authorised representative stating that the Infinite data systems private limited should be excluded from the comparability analysis. For this he relied on the decision of the coordinate bench in ITA No. 1051/KOL/2015 for assessment year 2009-10 dated 19-10-2016 wherein at para No. 8.3 the above comparable was excluded from the comparability analysis in case of a Labvantage solutions private limited.

11. *The Ld. departmental representative vehemently objected to the claim of the Ld. authorised representative about exclusion of the above comparables stating that Ld. transfer pricing officer as well as the Ld. DRP has given adequate reasons for inclusion of the above comparable. It was further stated that Ld. authorised representative has not challenged it on the functional analysis with of comparable as well as of the assessee and therefore the above comparable cannot be excluded.*

12. *We have carefully considered the rival contentions and also perused the functional profile of the assessee as well as of the comparable with respect to the software*

development services which has been mentioned earlier. According to the assessee , comparable company is providing services of technical consulting, design and development of software, maintenance system integration, implementation, testing and infrastructure management services. These services except infrastructure management services have also been referred to a technical support services in revenue recognition portion and has a software technical consultancy services in segment reporting portion of the annual report. According to the assessee all the services are in the nature of the software development services. The Ld. transfer pricing officer as well as the ld. DRP panel has rejected the objection of the assessee stating that this is functionally comparable with the assessee. Assessee neither design and develop a software but is providing a low end chip services where infrastructure and architect everything is provided by the group company. It does not have any research and development activities whereas in the case of the comparable company it provides that services to Fujitsu services Ltd and also maintains and design and develop a software. In view of this this comparable company cannot be said to be in the same functions as it is performed by the assessee. In view of this we direct the Ld. transfer pricing officer/AO to exclude the above comparable company as its functions are quite different with the functions performed by the assessee.”

Respectfully following the decision of the coordinate bench in the case of Freescale Semiconductors India (P) Ltd (supra), we direct exclusion of Infinite Data Systems Private Limited from the final set of comparable companies.

(iv) Infosys Ltd.:

Lastly, the Ld. Counsel for the assessee contended that Infosys Limited is not comparable to the assessee company. By inviting our attention to page 73 of the paper book containing annual reports, it was argued that Infosys Limited earned Rs. 925 crores from sale of software products, with reference to page 74 it was submitted that Infosys Limited incurred huge amount of selling and marketing expenditure and owned valuable brand which enabled it to earn higher margins. It was contended that segmental information was not available in the audited financials so as to enable determination of margins earned for software development services and sales of software products. The Ld. Counsel, therefore, contended that in absence of segmental information, Infosys cannot be compared to a captive service provider like the assessee. Our attention was invited to the decision of the coordinate bench in Freescale Semiconductors India (P) Ltd (ITA 1263/Delhi/2015), wherein at paragraphs 16 and 17, the coordinate bench has directed

exclusion of Infosys Limited from the final set of comparables for similar reasons.

The Ld. DR invited our attention to paragraph 9.4 of the TPO's order. It was his contention that the very same objections were already raised and considered by the TPO.

We have considered the rival submissions. We notice that the TPO has rejected the assessee's contention on the understanding that the difference between the assessee-taxpayer and the so-called giant companies like Infosys was that the latter had more number of teams than the assessee-taxpayer to render software development services. We find merit in the contention of the Ld counsel that Infosys Limited is not comparable to a captive service provider like the assessee for more than one reason viz., Infosys Limited has income from sale of software products and segmental information to enable determination of margin earned from software development services is not available in the financials, Infosys Limited has the benefit of huge brand value, which is a valuable asset, clearly impacting its margins, the functional profile and scale of Infosys Limited are also different and not comparable to Assessee. We also note that this company was excluded by the Tribunal in the case of Freescale Semiconductors India (P) Ltd (supra). The

relevant observations of the Bench are contained in Para 16 and 17 of the Tribunal's order and the same are being reproduced here in below for a ready reference:

“16. *The 3rd comparable is contested by the Ld. authorised representative is with respect to the Infosys limited which has already been excluded in the case of the assessee for earlier years following the decision of the Hon'ble Delhi High Court. The assessee reiterated the same submission with respect to exclusion of the above comparable as submitted before ld Transfer Pricing Officer. It was the contention of the assessee that it has a huge brand value, it has huge turnover, and its Finacle' Software is a leading product in banking industry. Therefore, it was submitted that it is functionally different and has significant R&D. The ld Transfer Pricing Officer and the ld Dispute Resolution Panel rejected the above contention. Before us, the ld AR submitted that this comparable should be excluded in view of the decision of Hon'ble Delhi High Court in case of CIT v. Agnity India Technologies Ltd.262 CTR 291. He further stated that this comparable has been excluded in the case of the assessee for AY 2007-08 by the coordinate bench.*

17. *The ld DR relied upon the orders of the lower authorities. The ld DR could not point out that why we should not follow the decision in the assessee's own case without there being any change pointed out, hence, we respectfully follow the decision of the coordinate bench in*

assessee's own case for AY 2007-08 and directs the ld Transfer Pricing Officer to exclude the above comparable.”

Therefore, respectfully following the decision of the coordinate bench in Freescale Semiconductors India (P) Ltd (supra) we direct exclusion of Infosys from the final set of comparables.

4.1.0 In relation to Ground no 9, our attention was invited to paragraph 12 of the Transfer Pricing order, wherein the TPO has rejected the claim for working capital adjustment on the ground that such adjustment was not relevant to service industry. By drawing attention to paragraphs 16.6 and 16.7 of the Ld. DRP's directions, it was submitted that although the Ld. DRP directed grant of working capital adjustment, the same was not allowed to the assessee. Accordingly, it was prayed that appropriate directions be given to the AO/TPO to grant benefit of working capital adjustment as directed by Ld. DRP.

4.1.1 We find that it is necessary to allow working capital adjustment for better comparability. Accordingly, we direct the AO/TPO to grant working capital adjustment on the final set of comparables. Thus, this ground stands allowed for statistical purposes.

4.2.0 In the context of grounds of appeal nos. 1, 2 and 10, the ld. counsel drew our attention to pages 15 and 16 of written submissions dated 31.10.2018, filed on behalf of the Department/Respondent. The Ld. AR drew our attention to the observations made in this written submission in the context of risk adjustment that *“in the present case except giving proportion of various risks borne, the taxpayer has not shown with evidence as to whether each of the risk was actually undertaken or not by the comparables and if so, how the service affected each of them and whether such adjustment would improve the comparability”* and a further observation that *“all this requires a robust and reliable data, both for the assessee and the comparables, in the absence of which risk adjustment cannot be considered for enhancing comparability”*. The learned counsel relied on the observations made in the written submissions filed by the department/respondent as extracted above, to contend that in the absence of reliable information to make risk adjustment it is clear that information relating to one of the critical parameters viz., risk in FAR is not available. It was the contention of the learned counsel that on such facts TP adjustment can be made in a given case. It was further argued that provisions of Chapter X cannot be interpreted to mean that in every case involving international transactions, transfer pricing adjustment to arm's

length price of was compulsorily to be made irrespective of level and robustness of the comparable data.

4.2.1 In response, the learned DR invited our attention to Rule 10B (3) of the Income Tax Rules, 1962 and contended that risk adjustment, if any, can only be allowed in case of comparables and that no such adjustment would be permissible to the margin of the tested party.

4.2.2 Responding to this objection, the learned counsel invited our attention to a recent decision of the coordinate Bench “B”, Bengaluru, in case of IKA India Pvt. Ltd (IT(TP) A No 2192/Bang/2017) wherein, at paragraph 31, the coordinate bench returned a categorical finding that *“the regulations do not restrict or provide that adjustments cannot be made on the results of tested party. Therefore, keeping in mind the aforesaid objective the net profit margin of tested party drawn from its financials can be suitably adjusted to facilitate its comparison with other uncontrolled entities”*.

4.2.3 We have considered the rival contentions. The Ld. AR has fairly accepted that in the present case it is not necessary to give any directions on the issue of risk adjustment. We note that the contentions of the Ld. AR on risk adjustment in the present case have been rendered academic as the entire TP adjustment gets deleted consequent to the exclusion of the 4 companies as directed above and

upon grant of the working capital adjustment. We, therefore, feel that it is not necessary to return any findings on the above issue.

5.0 In the final result, the appeal of the assessee stands partly allowed.

Order pronounced in the open court on 02.04.2019.

-Sd-

(N.S.SAINI)
ACCOUNTANT MEMBER

-Sd-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 02.04.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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Date of dictation	Dictated on dragon
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	