

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2638/Del/2016
(ASSESSMENT YEAR : 2009-10)**

ITO, Ward 6 (2), vs. M/s. Citi Financial Consumer Finance
New Delhi. India Ltd.,
3, Local Shopping Centre,
Pushpa Bhawan, Pushp Vihar,
New Delhi – 110 062.

(PAN : AABCA3223B)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri C.S. Agarwal, Senior Advocate
Shri Shailesh Gupta, Advocate
REVENUE BY : Shri H.K. Choudhary, CIT DR

Date of Hearing : 02.05.2019

Date of Order : 23.05.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, Income-tax Officer, Ward 6 (2), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal sought to set aside the impugned orders dated 23.05.2013 passed by the AO in consonance with the orders passed by Id. TPO/CIT (A) under section 143 (3)/144C of the Income-tax Act, 1961 (for short 'the Act) qua the Assessment Year 2009-10 on the grounds inter alia that :-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.22,73,49,911/- on account of disallowance of loan acquisition cost ignoring the facts that these expenses have a direct bearing in relation to the loan amounts and the period of the loan, hence the loan acquisition fee cannot be held relevant exclusively for the current year and same has to be spread over the period of the loan.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs.13,14,39,896/- on account of disallowance of 4/5th of NCD and commercial paper issue expenses ignoring the facts that the NCD and commercial paper issue expenditure incurred cannot be held relevant exclusively for the current year.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in excluding M/s Infosys Technologies Ltd. from the list of comparables ignoring the facts that the above comparables broadly performs functions similar to the assessee and are part of the same industry segment.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are :The assessee company, M/s. Citi Financial Consumer Finance India Ltd. (hereinafter referred to as ‘the taxpayer’) is a Non Banking Finance Company (NBFC), into the business of providing finance to customers for personal loans and mortgage (i.e. home loan and home equity). The assessee company is having its own corporate agency to act as insurance agent for sourcing life insurance policies. The assessee company during the year under assessment has incurred loan acquisition cost to the tune of Rs.34,10,24,866/-, which the AO sought to amortized over a period of three years. Declining the contentions raised by the assessee company, AO reached the conclusion that the loan acquisition fee being pertaining to the processing of loan has to be

spread over the tenure of the loan period and the assessee company has not claimed the entire expenditure in full in its books of account and thereby allowed the acquisition fee to the tune of Rs.11,36,74,955/- for the current year and remaining amount of Rs.22,73,49,911/- has been disallowed being allowable in the next two years and thereby made addition of Rs.22,73,49,911/-.

3. AO further noticed that the assessee has claimed expenses towards issue of Non-Convertible Debentures (NCD) and commercial papers to the tune of Rs.16,42,99,870/- and claimed the same as per computation of income filed along with return of income but treated the same as deferred revenue expenses as per company account. AO sought to explain by the assessee that as to why the expenditure should not be spread over five years. Declining the contention raised by the assessee that there is no concept of deferred revenue expenditure under the Income-tax Act, 1961 (for short 'the Act'), AO proceeded to spread the same over a period of five years and accordingly allowed 1/5th of the same amounting to Rs.3,28,59,974/- and remaining amount to be allowed in the next four years and thereby made addition of Rs.13,14,39,896/-.

4. During the year under assessment, assessee company also entered into international transactions qua provisions of software

services to the tune of Rs.6,36,74,000/- with its Associated Enterprises (AE) qua which the assessee claimed to have received a mark-up of 15% over cost. Assessee in order to benchmark its international transaction selected 14 comparables in its TP analysis out of which 10 comparables have been rejected and the Id. TPO has introduced 8 new comparables. TPO however has not disputed the appropriate method for benchmarking the international transactions adopted by the assessee in order to determine the Arm's Length Price (ALP) and thereby made an adjustment u/s 92CA of Rs.34,67,662/- qua provision of software development services. TPO however has not drawn any adverse inference in respect of other international transactions entered into by the assessee with its AE during the year under assessment.

5. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has deleted the additions by allowing the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1

7. AO declining the contentions raised by the assessee spread the loan acquisition fee expenses of Rs.34,10,24,866/- over the period of three years and after allowing the amount of Rs.11,36,74,955/- made an addition of Rs.22,73,49,911/- to be allowed in the next two years. Ld. AR for the assessee supporting the order passed by the Id. CIT (A) contended that there is no concept of deferred revenue expenditure and stated that this issue is covered by the order passed by the Tribunal in *assessee's own case for AY 2003-04, 2004-05, 2005-06 and 2006-07*. Ld. AR for the assessee further brought on record that in AY 2006-07, Revenue challenged the order of the Tribunal before the Hon'ble High Court who has dismissed the appeal vide *order dated 28.09.2015*, available at pages 517 to 520 of the paper book.

8. Coordinate Bench of the Tribunal in *assessee's own case for AYs 2003-04 to 2005-06 vide order dated 20.04.2012* decided the issue in controversy in favour of the assessee. Operative part of the order rendered by the coordinate Bench of the Tribunal is extracted for ready perusal as under :-

“26. Ground no.4 in the appeal of the Revenue for the AY 2003-04 and ground no.3 in their appeals for the AYs 2004-05 and 2005-06 relate to expenditure incurred in connection with advancing of loan to customers. The AO, during the course of assessment proceedings for the AY 2003-04, noticed that the

assessee company claimed loan acquisition cost of Rs.13,03,15,460/- as revenue expenditure and changed the accounting policy for accounting of loan acquisition fee and claimed the same on amortization basis. Total loan acquisition cost incurred during the year was Rs.13,03,15,460/- and amount shown in the profit and loss account was Rs.7,44,16,728/- whereas in the computation of income , the assessee claimed entire loan acquisition cost as deductible expenses. To a query by the AO, the assessee explained that in course of its money lending business, the assessee entered into loan agreements and hire purchase agreements with its customers and incurred cost such as credit verification of the borrower, front end processing fee etc.. These costs were booked as loan acquisition costs and were recognized as expenses over the tenor of the loan by applying the Internal Rate of return (IRR), implicit in the agreement on the diminishing balance of the financed amount so as to provide a constant periodic rate of return on the net investment outstanding on the contract. However, in case, the loan was foreclosed, the unamortized portion of the loan acquisition cost, being disclosed as part of loans and advances, was recognized as charge to the profit and loss account at the time of foreclosure. However, w.e.f April, 2002, the assessee company changed its policy for accounting of loan acquisition costs. The loan acquisition costs were earlier charged to the profit and loss account as and when incurred. In the year under consideration, in accordance with the changed accounting policy , the company amortized a part of the loan acquisition cost incurred during the year while the unamortized portion of Rs.55,899/- thousands was shown under loans and advances in the schedule 10 of the financials. However, in the return, the assessee claimed an amount of Rs.55,898,732/- being the unamortized amount of the loan acquisition fee actually incurred during the year, a practice of claiming the loan acquisition cost on actual basis being consistently followed by the assessee over the years and never questioned by the department, the assessee clarified. However, the AO did not accept the submissions of the assessee in the light of decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Limited Vs. CIT,225 ITR 802(SC) and allowed only 1/3rd of the expenditure and disallowed an amount of Rs.8,68,76,973/-.

26.1 Similarly, the AO allowed only 1/3rd expenditure and disallowed Rs.11,38,85,144/- out of total of Rs.17,08,28,717/- in the AY 2004-05 and allowed only Rs.14,33,75,323/- and disallowed remaining Rs.28,67,50,647/- out of total expenditure of Rs.43,01,25,970/- in the AY 2005-06.

27. On appeal, the ld. CIT(A) allowed the claim of the assessee in the AYs 2003-04 and 2004-05, holding as under:

"12. I have gone through the submissions given by the appellant and have examined the matter in details. The appellant has deferred both loan acquisition costs and loan processing fees in the books of accounts because of the accounting policy followed by the 44 ITA nos.3144&3145,5514 &5191,2687&2688/Del./2010 appellant. However for tax purposes, it has offered loan processing fees (Income) for tax and has claimed loan acquisition costs as expense in the year of accrual. The Assessing Officer has accepted the taxation of loan processing fees as income on upfront basis but at the same time has allowed loan acquisition costs on a deferred basis over a period of three years. This treatment by Assessing Officer is inconsistent. The Assessing Officer cannot take a different stand relating to income and expenditure on the same issue. It is also a well settled principle that treatment in books of accounts does not govern the tax treatment as the same is governed by the provisions of the Income-tax Act. Accordingly, loan acquisition costs are allowable in full in the year in which the same were incurred and cannot be spread over number of years. The disallowance made by the Assessing Officer in assessment orders amounting to Rs.8,68,76,973/- for assessment year 2003-04 and Rs.11,38,85,144/- for assessment year 2004-05 are, accordingly, deleted."

27.1 Following the view in the aforesaid decision, the ld. CIT(A) allowed the claim for the AY 2005-06 in the following terms:

"16. Judicial precedents demands that the order of my ld. Predecessor has to be followed by me unless there is change in facts or in position of law. I do not see any change in facts or in law. Thus, decision in ground of appeal No.4 and its part would have to go to the assessee. While, dissecting this ground of appeal, I observe that the assessee has been taking the stand that in assessment year 2001-02 and 2002-03, the ITAT has issued an order in its favour. On a close perusal of the said order, I do not see any such adjudication. In any case, I have already decided in favour of the assessee in ground of appeal No.4 and its parts."

28. The Revenue is now in appeal before us against the aforesaid findings of the ld. CIT(A). The ld. DR relied on the order of the AO while the ld. AR on behalf of the assessee supported the findings of the ld. CIT(A).

29. We have heard both the parties and gone through the facts of the case. Indisputably, the assessee offered loan processing fees (Income) for tax and claimed loan acquisition costs as expense in the year of accrual in accordance with, a practice being consistently followed by the assessee over the years and never questioned by the Revenue. However, the AO did not accept the submissions of the assessee in the light of decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Limited(supra) . On appeal , the Id. CIT(A) allowed the claim on the ground that the AO could not take a different stand relating to income and expenditure on the same issue and the treatment in books of accounts does not govern the tax treatment ,which is governed by the provisions of the Act. As already observed by us in para 25 to 25.7 while adjudicating ground no.3 in the appeal of the Revenue for the AY 2003-04 and ground no.7 in their appeal for the AY 2005-06 ,the concept of deferred revenue expenditure is essentially an accounting concept and alien to the Act. The relevant provisions of the Act recognise only capital or revenue expenditure. Indisputably, the amount claimed by the assessee in these three assessment years is revenue in nature. Deferred revenue expenditure denotes expenditure for which a payment has been made or a liability incurred, which is essentially revenue in nature but which for various reasons like quantum and period of expected future benefit etc., is written-off over a period of time e.g. expenditure on advertisement, sales promotion etc.. There is no material before us to infer that the aforesaid expenditure resulted in creation of any capital asset, tangible or intangible, and thus, the question of treating the same as capital expenditure does not arise. In fact, the Hon'ble Supreme Court itself in Madras Industrial Investment Corporation Limited(supra) while discussing the issue, in the said case, and distinguishing between various situations observed that

"ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books over a period of years".

29.1. In view of detailed reasons given in para 25 to 25.7 above, especially when the Revenue have not brought to our notice any contrary decision nor any other material so as to enable us to take a different view in the matter, we have no hesitation in upholding the findings of the Id. CIT(A). Therefore, ground no.4 in the appeal of the Revenue for the AY 2003-04 and ground no.3 in their appeals for the AYs 2004-05 and 2005-06, are dismissed."

9. So, following the decision rendered by the coordinate Bench of the Tribunal in assessee's own case qua the issue in controversy, we are of the considered view that since there is no concept of deferred revenue expenditure which have been incurred wholly and exclusively for the purpose of business, the same are entitled to be allowed in the year in which the same have been incurred. So, the Id. CIT (A) has rightly decided the issue in favour of the assessee, hence ground no.1 is determined against the Revenue.

GROUND NO.2

10. AO has spread the expenditure of Rs.16,42,99,870/- claimed by the assessee on account of non-convertible debentures issued by the company to fund its financing activities and on account of commercial papers, over a period of five years and accordingly allowed 1/5th thereof and remaining to be allowed in the next four years. However, the Id. CIT (A) has over turned the order passed by the AO and allowed the same in entirety in the year of its incurrence.

11. Ld. AR for the assessee contended that this issue has also been decided in favour of the *assessee in its own case for AYs 2003-04 to 2005-06 vide order dated 20.04.2012* by returning following findings :-

“25. We have heard both the parties and gone through the facts of the case. Indisputably, the aforesaid amount relates to expenditure in connection with the issue of non convertible debentures and commercial paper. The AO treated the same as deferred expenditure while the Id. CIT(A) allowed the claim in the light of decision in India Cements Ltd.(supra). It is well established that the concept of deferred revenue expenditure is essentially an accounting concept and alien to the Act. The relevant provisions of the Act recognise only capital or revenue expenditure. Deferred revenue expenditure denotes expenditure for which a payment has been made or a liability incurred, which is essentially revenue in nature but which for various reasons like quantum and period of expected future benefit etc., is written-off over a period of time e.g. expenditure on advertisement, sales promotion etc.. Though the nature of such expenditure is revenue, keeping in view the fact that the benefits arising therefrom are expected to be derived over a period of time, stretching sometimes over several accounting years, the taxpayers have been amortising the same over the expected time period over which the benefits are likely to accrue therefrom. Accordingly, only a proportion of such expenditure is amortised in the Profit and Loss Account but an appropriate adjustment is made in the computation of income, claiming the entire as allowable revenue expenditure in terms of provisions of [section 37\(1\)](#) of the Act. The expenditure which is treated as deferred revenue in the books almost in all cases comprises of items, the benefits derived wherefrom are ephemeral and transitory in nature in as much as these are incurred as a part of a continuous process and need to be expended in order to generate and increase the brand recall and sustain it in the minds of customers. Whether or not expenditure is of enduring nature, the Hon'ble Supreme Court in the case of [Alembic Chemical Works Co. Ltd. vs. CIT](#) (1989) 177 ITR 377 has itself observed that "The idea of "once for all" payment and "enduring benefit" are not to be treated as something akin to statutory conditions ; nor are the notions of "capital" or "revenue" a judicial fetish. What is capital expenditure and what is revenue are not eternal verities but must needs be flexible so as to respond to the changing economic realities of business. The expression "asset or advantage of an enduring nature" was evolved to emphasise the element of a sufficient degree of durability appropriate to the context."

25.1. Moreover, the deferred revenue expenditure is essentially revenue in nature and the decision to treat the same as deferred revenue only represents a management decision taken in view of the magnitude of the expenditure involved. For the purpose of allowability of any expenditure under the Act , what is material is the classification between the capital and revenue and the same does not recognise of any concept of deferred revenue

expenditure. That is why AO himself allowed the 1/5th of the amount.. In a number of judgments viz. Amar Raja Batteries Ltd. v. ACIT [(2004) 91 ITD 280 (Hyd)], JCIT v. Modi Olivetti Ltd. [(2005)4 SOT 859 (Delhi)], ACIT vs. Medicamen Biotech Ltd. [(2005) 1 SOT 347 (Delhi)], Hero Honda Motors Ltd. v. Joint Commissioner of Income Tax [(2005) 3 SOT 572 (Delhi)]; Charak Pharmaceuticals v. JCIT [(2005) 4SOT 393 40 ITA nos.3144&3145,5514 &5191,2687&2688/Del./2010 (Mumbai)], and ACIT vs. Ashima Syntex Ltd., 117 ITD 1(Ahd.)(SB) it has been affirmed that where any expenditure is treated as a deferred revenue expenditure, it presupposes that the concerned expenditure, creating benefit is in the revenue field and is a revenue expenditure, but considering its enduring benefits as well as the fact that it does not result in the creation of any new asset or advantage of enduring nature in the capital field, the same is required to be treated distinctly from capital expenditure. However, where any identifiable capital asset, tangible or intangible comes into existence as a result of the amount expended, the same will have to be treated as a capital expenditure and depreciation allowable thereon as per the prescribed rules and procedures under the Income-tax Act.

25.2. In the instant case, there is no material before us to infer that the aforesaid expenditure resulted in creation of any capital asset, tangible or intangible, and thus, the question of treating the same as capital expenditure does not arise. In fact, the Hon'ble Supreme Court itself in Madras Industrial Investment Corporation Limited (supra) while discussing the issue, in the said case, and distinguishing between various situations observed that "ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books over a period of years".

25.3. Another argument by the ld. DR is the variation and dichotomy between the accounting treatment of such expenditure in the books of account and its claim under the Act. As far as the entries in the books of account are concerned, it is well settled that they do not clinch the issue either way, and are not determinative of the allowability or otherwise of the expenditure. The decisions of the Hon'ble Supreme Court in the case of Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363 and in the case of CIT v. Indian Discounts Co. Ltd. [1970] 75 ITR 191 (SC) are clear on the issue. The accounting entries in the books of accounts are occasioned by a diverse set of considerations and issues such as compliance with statutory laws and mandatory accounting standards/principles and of course management decisions as to the treatment of a particular item which can be guided by considerations of reported profitability earning per

share, impact on share prices etc.. The Supreme Court in the case of [Kedarnath Jute Manufacturing Co. Ltd. vs. CIT](#) ((1971) 82 ITR 363) (SC) also affirmed the above view by observing that "whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter".

25.4. Subsequently the Hon'ble Court re-affirmed the said view in [Sutlej Cotton Mills. Ltd. Vs. CIT](#), 116 ITR 1(SC) " But it is now well settled that the way in which entries are made by an assessee in his books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. The assessee may, by making entries which are not in conformity with the proper accountancy principles, conceal profit or show loss and the entries made by him cannot, therefore, be regarded as conclusive one way or the other. What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee. "

25.5. Likewise, in the case of [Tuticorin Alkali Chemicals and Fertilizers Ltd vs. CIT](#), 227 ITR 172(SC), Hon'ble Supreme Court held that "It is true that this court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice. Accounting practice cannot override [section 56](#) or any other provision of the Act as was pointed out by Lord Russell in the case of [B. S. C. Footwear Ltd.](#) [1970] 77 ITR 857, 860 (CA), the income tax law does not march step by step in the footprints of the accountancy profession."

25.6. In a later decision in [CIT vs Secure Meters Ltd.](#), (2009 TIOL 93)(SC), Hon'ble Apex court taking note of their earlier decision in [India Cements Ltd.](#)(supra) held that expenditure on loan was allowable as revenue expenditure. The Revenue in this case contended that since the debentures were convertible and on conversion, it would add to the capital of the company, the expenditure should also be construed as capital expenditure. The Hon'ble Supreme Court rejected this contention and held that the debentures were loans and the object of a loan was not relevant. Accordingly, it was concluded that expenses on issue of debentures, whether convertible or not, is allowable as a deduction in computing the income of the assessee.

25.7 In view of the foregoing, especially when the Revenue have not brought to our notice any contrary decision nor any other material so as to enable us to take a different view in the matter, we have no hesitation in upholding the findings of the Id. CIT(A). Therefore, ground no.3 in the appeal of the Revenue for the AY 2003-04 and ground no.7 in their appeal for the AY 2005-06 are dismissed.”

12. Following the order passed by the coordinate Bench of the Tribunal in *assessee's own case* (supra), we are of the considered view that expenditure incurred by the assessee on issue of NCD is allowable in entirety in the year in which it was incurred and cannot be spread over number of years as has been done by the AO. So, the Id. CIT (A) has rightly decided this issue in favour of the assessee, hence ground no.2 is determined against the Revenue.

GROUND NO.3

13. Ld. TPO, after accepting the method applied by the assessee in order to benchmark its international transactions, finally selected 12 comparables with average OP/OC of 21.26% which are as under:-

Sl.No.	Comparable's Name	OP/OC
1.	<i>Akshay Software Technologies Ltd.</i>	12.41
2.	<i>Comp-U-Learn Tech India Ltd.</i>	28
3.	<i>Igate Global Solution Ltd</i>	21.26
4.	<i>Infosys Technologies Ltd.</i>	47.15
5.	<i>L G S Global Ltd.</i>	21.26
6.	<i>Larsen & Toubro Infotech Ltd.</i>	16.96
7.	<i>Mindtree Ltd.(Seg)</i>	5.98
8.	<i>R S Software (India) Ltd.</i>	9.82
9.	<i>Sasken Communication Technologies Ltd.</i>	15.99
10.	<i>Zylog Systems Ltd.</i>	15
11.	<i>Thirdware Solution</i>	22.28
12.	<i>Syntel Ltd.</i>	39.02
	AVG	21.26

and proposed the ALP adjustment of international transaction qua software development services as under :-

“14. The adjustments made in this case are tabulated below.

S. No.	Nature of international transaction	ALP determined by assessee (INR)	ALP determined by this office (INR)	Adjustment u/s 92CA (INR)
1.	Provision of software development services	63674000	6714 1662	3,467,662
Total				3,467,662

The Assessing Officer will accordingly enhance the income of the assessee by Rs.34,67,662/-. This shall be treated as the cumulative adjustment u/s 92CA.”

14. Before the Id. CIT (A), assessee company sought to exclude 7 comparables viz. (i) Igate Global Solutions Ltd.; (ii) Infosys Technologies Ltd.; (iii) Sasken Communication Technologies Ltd.; (iv) Zylog Systems Ltd.; (v) Thirdware Solution; (vi) Syntel Ltd.; and (vii) Comp-U-Learn Tech India Ltd. Assessee also sought to include one comparable, namely, SIP Technology & Export Ltd.. However, before Id. CIT (A), assessee challenged the inclusion of M/s. Infosys Technologies Ltd. only from the final set of comparables, which has been excluded by the Id. CIT (A) leading to the nil adjustment in view of the Safe Harbour Benefit.

15. Now, the Revenue has challenged the exclusion of Infosys Technologies Ltd. (Infosys) from the final list of comparables on the ground that Infosys broadly performs functions similar to the assessee and are part of the same segment.

16. Assessee company sought to exclude Infosys on the grounds inter alia that Infosys is having huge brand value and the profits derived by the Infosys during the year under assessment are predominantly due to its premium branding; that it has ownership of intangibles; that Infosys is into research & development activities expending significant amount on R&D for developing new functionalities; that Infosys deals in software products/tools and also owns IPRs of software tools development, and it is a substantial risk bearing entity; and that it has high profit margin.

17. Ld. CIT (A) by accepting the contentions raised by the assessee ordered to exclude the same from the final set of comparables.

18. We are of the considered view that when undisputedly assessee is a captive software development service provider being a non-risk bearing entity having no ownership of intangible nor having any expenditure in R&D activities nor having any brand value, Infosys cannot be a suitable comparable vis-à-vis taxpayer.

19. Hon'ble Delhi High Court in case cited as ***CIT vs. Agnity India Technologies Pvt. Ltd. – (2013) 36 taxmann.com 289 (Delhi)*** examined the comparability of Infosys vis-à-vis captive software service provider and found the same to be not a suitable comparable by returning following findings :-

“5. The tribunal has observed that the assessee was not comparable with Infosys Technologies Ltd., as Infosys Technologies Ltd. was a large and bigger company in the area of development of software and, therefore, the profits earned cannot be a bench marked or equated with the respondent, to determine the results declared by the respondent-assessee. In paragraph 3.3 the tribunal has referred to the difference between the respondent-assessee and Infosys Technologies Ltd. For the sake of convenience, we are reproducing the same:-

<i>“Basic Particular</i>	<i>Infosys Technologies Ltd.</i>	<i>Agnity India</i>
<i>Risk Profile</i>	<i>Operate as full-fledged risk taking entrepreneurs</i>	<i>Operate at minimal risks as the 100% services are provided to AEs</i>
<i>Nature of Services</i>	<i>Diversified-consulting, application design, development, re-engineering and maintenance system integration, package evaluation and implementation and business process management, etc. (refer page 117 of the paper book)</i>	<i>Contract Software Development Services.</i>
<i>Revenue</i>	<i>Rs.9, 028 Crores</i>	<i>Rs.16.09 Crores</i>
<i>Ownership of branded/proprietary products</i>	<i>Develops/owns proprietary products like Finacle, Infosys Actice Desk, Infosys iProve, Infosys mConnect, Also, the company derives</i>	

	<i>substantial portion of its proprietary products (including its flagship banking product suite 'Finacle')</i>	
<i>Onsite Vs. Offshore</i>	<i>- As much as half of the software development services rendered by Infosys are onsite (i.e., services performed at the customer's location overseas). And offshore (50.20%) (Refer page 117 of the paper book) than half of its service, income from onsite services.</i>	<i>The appellant provides only offshore services (i.e., remotely from India)</i>
<i>Expenditure on Advertising/Sales promotion and brand building</i>	<i>Rs.61 Crores</i>	<i>Rs. Nil (as the 100% services are provide to AEs)</i>
<i>Expenditure on Research & Development</i>	<i>Rs. 102 crores</i>	<i>Rs. Nil</i>
<i>Other</i>		<i>100% offshore (from India)</i>

6. *Learned counsel for the Revenue has submitted that the tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the tribunal has stated that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent-assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted.*

7. *Learned counsel for the appellant Revenue during the course of hearing, drew our attention to the order passed by the TPO and it is pointed out that based upon the figures and data made available, the TPO had treated a third company as comparable when the wage and sale ratio was between 30% to 60%. By applying this filter, several companies were excluded.*

This is correct as it is recorded in para 3.1.2 of the order passed by the TPO. TPO, as noted above, however had taken three companies, namely, Satyam Computer Service Ltd., L&T Infotech Ltd. and Infosys Technologies as comparable to work out the mean.

8. It is a common case that Satyam Computer Services Ltd. should not be taken into consideration. The tribunal for valid and good reasons has pointed out that Infosys Technologies Ltd. cannot be taken as a comparable in the present case. This leaves L&T Infotech Ltd. which gives us the figure of 11.11 %, which is less than the figure of 17% margin as declared by the respondent-assessee. This is the finding recorded by the tribunal. The tribunal in the impugned order has also observed that the assessee had furnished details of workables in respect of 23 companies and the mean of the comparables worked out to 10%, as against the margin of 17% shown by the assessee. Details of these companies are mentioned in para 5 of the impugned order.”

20. In view of what has been discussed above, we are of the considered view that Id. CIT (A) has rightly ordered to exclude the Infosys from the final set of comparable for benchmarking the international transactions entered into by the assessee qua software development service provider, hence ground no.3 is determined against the Revenue.

21. Resultantly, the appeal filed by the Revenue is hereby dismissed.

Order pronounced in open court on this 23rd day of May, 2019.

**Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 23rd day of May, 2019/TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-43, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.