

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : FRIDAY I-2 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No.6247/Del/2015  
Assessment Year: 2011-12

ST-Ericsson India Pvt. Ltd.,  
D-28, South Extension Part I,  
New Delhi.

Vs ACIT,  
Circle-24(2),  
New Delhi.

PAN: AAMCS1022K

(Appellant)

(Respondent)

Assessee by	:	Shri S.D. Kapila, Advocate & Shri R.R. Mourya, Advocate
Revenue by	:	Shri Sarabjeet Singh, Sr. DR
Date of Hearing	:	28.02.2019
Date of Pronouncement	:	28.05.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 30.09.2015 passed u/s 143(3) r.w. section 144C of the IT Act, 1961 relating to assessment year 2011-12.

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of development of integrated circuit design and other activities related to wireless business. It filed its return of income on 28.11.2011 declaring the total

income at Rs.27,38,53,917/-. Since the assessee had undertaken international transactions with its AE which exceeds more than Rs.15 crores, the Assessing Officer referred the matter to the Transfer Pricing Officer (TPO) under the provisions of section 92CA of the IT Act for determining the ALP of the international transaction. The TPO, vide order dated 6<sup>th</sup> January, 2015, proposed upward adjustment of Rs.35,31,33,463/- to the value of the international transactions entered into by the assessee company. The Assessing Officer, accordingly passed the draft order making addition of the same. The assessee filed objections against the draft order passed by the Assessing Officer. The DRP, vide order dated 12<sup>th</sup> August, 2015, directed the TPO to verify the correctness of the computation of the operating margin of the comparable companies and the assessee for determining the ALP of the international transaction of the assessee in accordance with the provisions of the Act. Subsequently, the TPO, vide order dated 14<sup>th</sup> September, 2015, rectified the computation as per the corrected margin of the comparables as per the direction of the DRP and made an upward adjustment of Rs.26,32,08,740/-. The Assessing Officer accordingly made addition of the same in the final assessment order. The Assessing Officer further held that the purchase of time licence of computer software of Rs.69,45,581/- is a capital expenditure as against the claim as revenue expenditure made by the assessee. After allowing depreciation @ 60% on the same which comes to Rs.41,67,348/-, the Assessing Officer made addition of Rs.27,78,233/- in the draft assessment order which was upheld by the DRP. The Assessing Officer accordingly made addition of the same in the final assessment order. Similarly, the training expenses of Rs.9,85,574/-

claimed by the assessee as revenue expenditure was disallowed by the Assessing Officer treating the same as capital expenditure in the draft assessment order which was upheld by the DRP. The Assessing Officer accordingly made addition of the same to the total income of the assessee. The Assessing Officer accordingly determined the total income of the assessee at Rs.54,08,26,460/- as against the returned income at Rs.27,38,53,917/-.

3. Aggrieved with such order of the Assessing Officer/TPO/DRP, the assessee is in appeal before the Tribunal by raising the following grounds:-

“1. That on the facts and in circumstances of the case and in law, the assessment order passed by the Assistant Commissioner of Income Tax, Circle 24(2), New Delhi (“Ld. AO”) based on the directions given by the learned Dispute Resolution Panel - 2 (“Ld. DRP”) making a Transfer Pricing adjustment of Rs. 26,32,08,740/- and Corporate Tax adjustment of Rs. 37,63,807 to the returned income is bad in law and void-ab-initio.

### **Transfer Pricing Grounds**

2. The Ld. DRP erred in confirming the Ld. AO/Ld. Transfer Pricing Officer (“TPO”) approach of determining the arm’s length price (“ALP”) of the international transaction pertaining to provision of Integrated Circuit (IC) design and software development services wherein, the Ld. AO/Ld. TPO has grossly erred in:

2.1 disregarding the use of multiple year data, as adopted by the Appellant in its Transfer Pricing (TP) documentation and determining the ALP using data pertaining only to financial year (‘FY’) 2010-11 which was not available to the Appellant at the time of preparing TP documentation;

2.2 disregarding the ALP determined by the Appellant in the TP documentation maintained by it in terms of section 92D of the Income Tax Act, 1961 (“the Act”) by not accepting the economic analysis undertaken by the Appellant and conducting a fresh economic analysis and in particular modifying/rejecting the filters applied by the Appellant;

2.3 Not appropriately considering the functions, assets and risk profile of the companies used for comparison with the Appellant, thereby including in the final comparable set certain companies with completely different functional profile;

2.4 erroneously introducing companies having abnormal margins in the final comparable set that signify high element of entrepreneurial risk as opposed to the Appellant who is a captive service provider bearing limited risk;

2.5. excluding certain comparables considered by the Appellant in its TP documentation/ fresh search on arbitrary/frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;

2.6 resorting to arbitrary rejection of loss making companies based on erroneous and inconsistent reasons on account of declining revenue/ persistent loss;

2.7 the Ld. DRP erred in confirming the Ld. AO/TPO's approach in relying on completely new facts without giving the Appellant any opportunity of being heard.

3. Ld. DRP erred in confirming the Ld. AO/Ld. TPO's approach of considering bank charges, provision for doubtful debts and Provision no longer required written back as non-operating expenditure/income while computing the operating margins of the Appellant and comparable companies.

4. The Ld. DRP erred in not appreciating the difference in the risk profile of the Appellant for rendering services to its AEs vis-a-vis that of the comparables and not allowing the risk adjustment to the Appellant;

### **Corporate Tax Grounds**

5. The Ld. AO/ Ld. DRP has erred in law and on the facts and circumstances of the case in treating the software expenses amounting to Rs. 69,45,581 as capital in nature and allowing depreciation thereon and making an addition of Rs. 27,78,233.

6. Without prejudice to the above and assuming without accepting the above software expenditure is to be capitalized, the Ld. DRP/Ld. AO has erred on facts and in law in not allowing depreciation on the written down value of the amount expended on software expenses capitalized in the assessment order passed for the assessment year 2009-10 and assessment year 2010-11.

7. That the Ld. AO/ Ld. DRP has erred in law and on the facts and circumstances of the case in treating the expenditure on training of employees amounting to Rs. 985,574 leads to enduring benefit to the Appellant and is capital in nature.

8. Without prejudice to the above and assuming without accepting that the above training expenditure is to be capitalized, the learned AO has erred in not allowing depreciation on the same.

9. Without prejudice to the above and assuming without accepting the above training expenditure is to be capitalized, the Ld. DRP/Ld. AO has erred on facts and in law in not allowing depreciation on the written down value of the amount expended on training expenses capitalized in the assessment order passed for the assessment year 2009-10 and assessment year 2010-11.

10. Ld. AO/ Ld. DRP has erred in law and on the facts and circumstances of the case in not granting depreciation on goodwill amounting to Rs 24,501,457 which was claimed by the Appellant during the course of assessment proceedings in accordance with the decision of Hon'ble Supreme Court in the case of Smifs Securities Ltd. [2012] 24 taxmann.com 222 (SC)

### **General Grounds**

11. That on facts of the case and in law, the Id. A.O. has erred in levying interest under section 234B and 234D of the Act while completely disregarding the provisions of the Act and the judicial precedence in this regard.

12. Without prejudice to the above and assuming without accepting the levy of interest under section 234D, the Ld. AO has erred in the facts and in law in computing excess interest under section 234D of the Act of Rs. 56,805.

13. That on facts of the case and in law, the Ld. AO has grossly erred in initiating penalty proceedings under section 271(l)(c) of the Act.

The above grounds of appeal are mutually exclusive and without prejudice to each other. The Appellant craves leave to add, alter, amend, vary or rescind any of the above grounds either before or at the time of hearing in the interest of natural justice.”

4. The assessee has also filed an application under Rule 11 of the ITAT Rules for filing an additional ground. The additional ground reads as under:-

“On the facts and in the circumstances of the case the Id.A.O./DRP were not correct in including the following entities in the list of appropriate comparable:-

- i) Larsen & Toubro Infotech Limited;
- ii) Sasken Communications Technologies Limited;
- iii) Persistent Systems Limited;
- iv) Persistent Systems and Solutions Limited;
- v) Thirdware Solutions Limited; and
- vi) Tata Elxsi Limited.”

5. The ld. counsel for the assessee, relying various decisions, submitted that it is the settled law that there is no estoppel against the statute. For the above proposition, he relied on the following decisions:-

- i) Kedarnath Jute Mfg. Co. Ltd. vs. CIT, 82 ITR 363 (SC);
- ii) CWT vs. Meattles (P) Ltd., 156 ITR 569;
- iii) CIT vs. Mrs. V. Chandra, 245 ITR 619;
- iv) Director of Inspection of Income-tax (Inv.) vs. Pooran Mall & Sons, 96 ITR 390
- v) PV Doshi vs. CIT, 113 ITR 22 (Guj)
- vi) CIT vs. Continental Commercial Corp., 110 ITR 170 (Mad)
- vii) Pullangode Rubber Produce Co. Ltd vs. State of Kerala, 91 ITR 18
- viii) CIT VS. Mahalaxmi Textile Mills, 66 ITR 710 (SC);
- ix) NTPC vs. CIT, 229 ITR 383 (SC)
- x) Stream International Services (P) Ltd. vs. ADIT, ITA No.8997/Mum/2010
- xi) GE BE (P) Ltd. (2014) 164 TTJ 40 (Bang.)
- xii) Navisite India Private Ltd. (ITA No.5329/Del/2012)
- xiii) Panasonic AVC Networks India Co. Ltd. (ITA No.4620/Del/2011);
- xiv) Verizon India Pvt. Ltd. (ITA no.2766/Del/2010)
- xv) Lubrizol Advanced Materials India Pvt. Ltd. (ITA No.3320/Ahd/2010)
- xvi) MCI Com India Pvt. Ltd. (ITA No.4187/Del/2010)
- xvii) NTT Data Global Delivery Services Ltd. ITA No.1382/Del/2012

6. After hearing the rival arguments made by both the sides and considering the fact that the material facts are already available on record and no further investigation is needed for adjudicating the same, the additional ground raised by the assessee is admitted.

7. The ld. counsel for the assessee did not press grounds of appeal Nos.11,12 and 13 for which the ld. DR has no objection. Accordingly, the above grounds are dismissed as not pressed.

8. Ground of appeal No.1 being general in nature is dismissed.

9. So far as grounds of appeal Nos.2 to 2.7 are concerned, these all relate to the addition on account of transfer pricing adjustment. The ld. counsel for the assessee did not press grounds of appeal Nos.2.1 and 2.7 of the transfer pricing grounds for which the ld. DR has no objection. Accordingly these grounds are dismissed as not pressed.

10. So far as the remaining grounds are concerned, i.e., grounds of appeal Nos.2 and 2.2 to 2.6, the ld. counsel for the assessee submitted that the assessee during the impugned assessment year has entered into international transaction with its AE in respect of provision of IC design and software development services totaling to Rs.2,14,75,27,845/-. The assessee had adopted TNMM as the most appropriate method and the PLI was determined by OP/OC. The assessee used 23 comparables and the average arithmetic mean of the comparables was 8.68% whereas the arithmetic mean of the assessee was 5.43%. It was accordingly submitted before the TPO that the

ALP of the international transaction is at arm's length price. However, the TPO disregarded the same and used 19 comparables with average OP/OC at 21.49% and determined an adjustment of Rs.35,31,33,463/-. The assessee objected the comparables before the DRP and the DRP, vide order dated 7<sup>th</sup> August, 2015, directed the TPO to treat the foreign exchange loss/gain as operating item, directed amortization of goodwill to be treated as non-operating item, directed the exclusion of Infosys Ltd. and Zylog Systems Ltd. from the list of comparable companies and directed the TPO to verify and rectify net margins of the company. The rest of the filters applied by the TPO were upheld by the DRP. Accordingly, as per the directions issued by the DRP, the following 17 companies were finally considered as comparables:

	<b>Particulars</b>	<b>Working Capital OP/TC (%)</b>
1	Acropetal Technologies Limited (Segmental)	18.21%
2	Akshay Software Technologies Limited	0.46%
3	Celstream technologies Pvt. Limited	11.70%
4	E-Infochips Limited	59.43%
5	Evoke Technologies Pvt. Ltd	7.10%
6	E-Zest Solutions Limited	36.93%
7	Larsen & Toubro Infotech Limited	17.46%
8	LGS Global Limited	10.30%
9	Mindtree Limited (seg)	9.19%
10	Persistent Systems & Solutions Ltd	19.67%
11	Persistent Systems Ltd	24.57%
12	R S Software India Limited	14.92%
13	Sankhya Infotech Limited (seg)	21.00%
14	Sasken Communication Technologies Limited	26.02%
15	Tata Elxsi Ltd. (Seg)	10.98%

16	Thirdware Solution Ltd (Seg)	16.25%
17	Wipro Technology Services Limited	53.28%
<b>Average</b>		<b>21.03%</b>
<b>Appellant's margin</b>		<b>7.82%</b>

11. The Assessing Officer accordingly determined the adjustment of Rs.26,32,08,740/- the details of which are as under:-

Particulars	Post DRP directions
	(Page 439/Vol-I)
Operating Cost	2,02,81,19,445
Arms Length Margin(%)	21.03%
Arms Length Margin(Rs.)	42,65,13,519
Arms Length Price (ALP)	2,45,46,32,964
Price charged by the Appellant	2,18,66,31,535
International Transaction	2,14,75,27,845
Difference between ALP and price charged	26,80,01,429
Percentage of service to AE to total revenue	98.21%
Proportionate Adjustment	26,32,08,740

12. The Id. counsel for the assessee submitted that ST-Ericsson India Private Limited (STE) is engaged in provision of services of intermediate stage of design and development of software of parts of integrated circuits (ICs) involving implementation, verification, maintenance services. The assessee company works as per the specification provided by the Group on a cost plus basis as per the Master Service Agreement dated 3 August 2008 with ST-Ericsson SA (Pg 350/Vol-I). It performs the limited functions in the intermediate stage of the design and software development for the associated enterprises (AEs).

13. Referring to the orders of the Tribunal for assessment years 2009-10, 2010-11 & 2013-14 the ld. counsel drew the attention of the Bench to the relevant paras of the orders of the Tribunal which reads as under:-

ITA No.1672/Del/2014 for A.Y. 2009-10 (P.B. page 1922, Vol.V)

“30..., a captive service provider involved at the design and development stage only with a limited scope of work and is not involved in the process of conceptualization of any products or works and works only on the specification provided by the STE Group for the implementation of 1C design, its maintenance, verification and software development. So, the role of STE is that of a contract captive design centre and as such, the findings of the TPO in this regard cannot be interfered with..”

ITA Nos.609& 168/Del/2015 for A.Y. 2010-11 (P.B. page 1861, Vol.V)

“9. Undisputedly the facts of the case under consideration are identical to that of AY 2009-10. In an order passed by the Tribunal in assessee’s own case in 1TA No.1672/Del/2014 for AY 2009-10 order dated 22.02.2017, available at pages 1966 to 2001 of Vol. 5 of the paper book, relevant page 1982, assessee has been treated as a captive service provider involved at the design and development stage only with a limited scope of work and is not involved in the process of conceptualization of any product or works and works only on the specification provided by the STE Group for the implementation of 1C design, its maintenance, verification and software development. So, for the purpose of benchmarking the international transactions, the assessee is to be treated as a contract captive design centre.”

14. He submitted that the functional profile of the assessee is also same during this year as it was in assessment years 2009-10, 2010-11 and 2013-14.

15. So far as the inclusion of Thirdware Solutions Ltd. as a comparable is concerned, he submitted that this company was rejected by the Tribunal in assessee’s own case in assessment year 2010-11 and 2013-14. Referring to the decision of the Hon'ble Delhi High Court, he submitted that this company was rejected by the Tribunal during Assessment year 2009-10 in assessee’s own case and on appeal by the

Revenue, the Hon'ble High Court in *ITA No.821/2017, order dated 31<sup>st</sup> January, 2018*, dismissed the appeal filed by the Revenue. He accordingly submitted that Thirdware Solutions Ltd. be excluded from the list of comparables.

16. So far as Wipro Technology Services and E-Zest Solutions Ltd. are concerned, he submitted that the Tribunal, in assessee's own case for assessment year 2010-11 has excluded these companies from the list of comparables. Therefore, these two companies should be excluded from the list of comparables.

17. So far as the Tata Elxsi Ltd. is concerned, he submitted that the Tribunal in assessee's own case for assessment year 2009-10 had excluded this company from the list of comparables and on appeal by the Revenue, the Hon'ble High Court vide *ITA No.821/2017, order dated 31<sup>st</sup> January, 2018*, has upheld the action of the tribunal. Therefore, he submitted that the above five companies should be excluded from the list of comparables.

18. So far as Acropetal Technologies Ltd. (Acropetal) is concerned, he submitted that this company should be rejected since it has got diversified business operations such as provision of engineering design services, information life cycle, IT Infrastructure management, cloud service enterprise software solutions, etc., which can be verified from the annual report of the company, copy of which is placed in the paper book. Further, this company fails employee cost filter since the same is 13.74% for this year. It has also incurred expenditure on R&D expenses and has unreliable segment information. Relying on various decisions, he submitted that this company

was excluded by the Bangalore Bench of the Tribunal in the case of M/s Electronic Imaging India Pvt. Ltd. vide *ITA No.1506/Bang/2015, order dated 14<sup>th</sup> July, 2017* for assessment year 2011-12. This company has also been excluded as a comparable in the case of Philips India Ltd. vide *ITA No.863 & 539/Kol/2016, order dated 15<sup>th</sup> December, 2017* and also by the Madras Bench of the Tribunal in the case of M/s Symantec Software & Services India Pvt. Ltd. vide *ITA No.614/Mds/2016, order dated 20<sup>th</sup> January, 2017*. Referring to the various other decisions of the Tribunal, he submitted that this company was excluded from the list of comparables.

19. So far as E-infochips Limited is concerned, he submitted that this company should also be excluded since it operates as a full-fledged risk taking entrepreneur whereas the assessee company operates at minimal risk as 100% services are provided to its AEs only and is a captive unit and is remunerated on a cost plus basis. He submitted that E-infochips has income from the following:-

- a) Software Services;
- b) Hardware; and
- c) Consultancy charges.

20. However, the assessee is mainly engaged in provision of software development services related to design, implementation, maintenance with respect to ICs as per the specifications prescribed by the AEs. Further, E-infochips bears entrepreneurial risks and other business risks whereas no risk is undertaken by the assessee in this behalf. He submitted that the TPO himself in assessment year 2012-13 and 2013-14 has

accepted the rejection of this company in the transfer pricing study report. Relying on the decision of the Tribunal in the case of *Alcatel-Lucent India Ltd. vs. DCIT*, vide ITA No.6856/Del/2015, order dated 24.08.2016, he submitted that this company was excluded from the list of comparables by the Tribunal on the ground that it earns income from software products and services and no segmental data is available. He submitted that the above decision was upheld by the Hon'ble Delhi High Court vide ITA No.515/2017, order dated 18<sup>th</sup> July, 2017. He also relied on the following decisions where E-Infochips was excluded from the list of comparables:-

- a) Ness Technologies (India) Pvt. Ltd. vs. DCIT, ITA No.696/Mum/2016, order dated 11.11.2016;
- b) Philips India Limited vs. DCIT and vice versa vide ITA No.893 & 539/Kol/2016, order dated 15<sup>th</sup> December, 2017, for assessment year 2011-12;
- c) M/s Electronic Imaging India Pvt. Ltd. vs. DCIT, ITA No.1506/Bang/2015, order dated 14<sup>th</sup> July, 2015 for assessment year 2011-12; and various other decisions. He accordingly submitted that this company should be rejected from the list of comparables.

21. So far as Sankhya Infotech Limited is concerned, he submitted that this company also should be excluded from the list of comparables as it is functionally dissimilar. It provides end to end simulation solutions which are customized to the end user and the company has developed customizable products for imparting training which can cater to any industry. During this year, Sankhya Infotech Ltd. has recorded

a successful execution of its SILICON suite of products for the Indian Army for which the company owns the following products:-

- i) Learning Management Products;
- ii) Training Management Products;
- iii) Simulator Products;
- iv) Knowledge based Content;
- v) Optimization Products;
- vi) Sage CRM Server 200;
- vii) Service Capture;
- viii) Tally 9 Gold Multi User;
- ix) Teamprise / Eclipse 3.0;
- x) Vstudio Team Ed (5 Users);
- xi) Adobe Nog Elixir with Media Kit;
- xii) Device Lock Software; and
- xiii) Logitek G 25 Maming Wheel.

22. He submitted that the segments of Sankhya Infotech are unreliable since expenses such as depreciation and interest which form a significant component of total expenses, are not specifically allocable to specific segment as the underlying services are used interchangeably. The company has also research and development activities whereas the assessee does not have such R&D. He submitted that the TPO himself did not select this company as a comparable for assessment year 2012-13 and 2013-14 and accordingly had accepted the assessee's approach of rejection of this company in its TP studies. Referring to the decision of the Delhi Bench of the Tribunal in the case of Alcatel-Lucent India Ltd. (supra), he submitted that this company was excluded from the list of comparables and on appeal by Revenue, the Hon'ble High Court upheld the order of the Tribunal on this issue.. He accordingly submitted that this company should be excluded from the list of comparables.

23. So far as Larsen & Toubro Infotech Limited (L&T) is concerned, he submitted that there is material difference in the FAR analysis between the two companies. While L&T operates as a full-fledged risk taking entrepreneur, the assessee company operates at minimal risk as the 100% services are provided to AEs and is remunerated on a cost plus basis. L&T has got software development services and products whereas the assessee is mainly engaged in software development related design, implementation and maintenance as per specifications provided by AE. The assessee does not have any brand/proprietary products while L&T earns significant revenue from onshore (53%) and offshore (47%) services. The assessee has no onsite operations. L&T holds intangible assets such as software, business right, capital work-in-progress amounting to Rs.103.83 crore whereas the assessee does not own any brand. He submitted that L&T during the impugned financial year has strengthened its business in Canada by acquiring a transfer agency business for Canadian \$ 62.3 million from a globally reputed bank servicing local clients represented by Asset Management Companies, banks, insurance companies, etc., whereas the assessee has no such acquisition. Further L&T bears entrepreneurial risk and other business risks whereas the assessee has not undertaken any risk. Referring to the decision of the Tribunal in assessee's own case for assessment year 2010-11, he submitted that this company was excluded from the list of comparables. Further, the Hon'ble Delhi High Court in the case of *Alcatel-Lucent (supra)* has upheld the order of the Tribunal in excluding this company from the list of comparables. Relying on

various other decisions placed in the synopsis, he submitted that this company was excluded from the list of comparables on account of functional dissimilarities. He accordingly submitted that this company also should be excluded from the list of comparables.

24. So far as Persistent Systems and Solutions Ltd. is concerned, he submitted that this company also ought to be rejected on account of functional dissimilarity, huge research and development expenditure and abnormal year of operations.

25. Referring to the decision of the Delhi Bench of the Tribunal in the case of *Alcatel-Lucent India Limited (ITA No.6856/Del/2015)*, he submitted that this company was excluded from the list of comparables on account of functional dissimilarity and on further appeal by the Revenue, the Hon'ble High Court in *ITA No.515/2017*, has upheld the action of the Tribunal in excluding this company from the list of comparables.

26. So far as inclusion of Persistent Systems Ltd. (Persistent) is concerned, he submitted that here also this company is functionally dissimilar. While Persistent operates as a full-fledged risk taking entrepreneur, the assessee company operates at minimal risk as 100% services are provided to AEs and is remunerated on a cost plus basis. Persistent Systems Ltd. is predominantly engaged in outsourced software development services. It has got income from sale of software services and products whereas the assessee is mainly engaged in software development related to design, implementation and maintenance with respect to ICs as per specifications provided by

the AE. He submitted that Persistent had entered into acquisition of OPD business of Infospectrum India Pvt. Ltd. and has entered into JV with Sprint Nextel Corporation which has benefitted the company to grow its operations. However, the assessee company has not entered into any such extraordinary activity during the year. Therefore, on this issue alone, this company should be excluded from the list of comparables. He submitted that Persistent has huge intangibles whereas the assessee does not own brand/proprietary products. While Persistent bears entrepreneurial risk and other business risk, the assessee has not undertaken any risk in this behalf. Referring to the decision of the Tribunal in assessee's own case for assessment year 2013-14 and 2010-11, he submitted that this company was excluded from the list of comparables. Referring to the decision of the Hon'ble Delhi High Court in the case of Alcatel-Lucent (supra), he submitted that the Hon'ble High Court has upheld the action of the Tribunal in excluding Persistent Systems Ltd. from the list of comparables. He accordingly submitted that this company should be excluded from the list of comparables.

27. So far as Sasken Communication Technologies Ltd. (Sasken) is concerned, he submitted that this company also has to be excluded from the list of comparables on account of functional dissimilarities. While Sasken operates as a full-fledged risk taking entrepreneur, the assessee company operates at minimal risk as the 100% of the services are provided to AEs and is remunerated on a cost plus basis. Sasken has revenue earning from software services and software products and no segmental information is available and holds inventory of 0.95 crore as on 31<sup>st</sup> March, 2011

whereas the assessee is mainly engaged in software development related to design, implementation and maintenance with respect to ICs. The assessee does not own any brand or proprietary products. He submitted that Sasken has invested in R&D during the year in multi-media wireless and broadband and mobile value added services whereas the assessee has not incurred any expenditure on R&D. While Sasken bears entrepreneurial risk and other risks, the assessee has not undertaken any risk in this behalf. Referring to the decision of the Bangalore Bench of the Tribunal in the case of M/s Electronic Imaging India Pvt Ltd., he submitted that Sasken was excluded from the list of comparables. Relying on various other decisions copies of which are placed in the paper book, he submitted that Sasken was excluded from the list of comparables.

28. So far as exclusion of certain companies by the TPO/DRP is concerned, the ld. counsel for the assessee objected to the exclusion of the following companies from the list of comparables by the TPO/DRP:-

- i) R. Systems International Limited
- ii) CG-VAK Software & Exports Ltd.
- iii) CAT Technologies Ltd.
- iv) Thinksoft Global Services Ltd.
- v) Caliber Point Business Solutions Ltd.
- vi) Maveric Systems Ltd.

29. So far as R. Systems International Ltd. is concerned, he submitted that this has been excluded by the TPO solely on the ground of its financial year being calendar year. Referring to the decision of the Tribunal in assessee's own case for assessment year 2010-11, he submitted that the Tribunal in the said decision has held that the comparables cannot be rejected merely on the ground that financial year followed is different. Referring to the decision of the Hon'ble Delhi High Court in the case of *Mckinsey Knowledge in ITA No.217/2014, order dated 27<sup>th</sup> March, 2015* and in the case of *Baxter India Pvt. Ltd., ITA 260/2018, order dated 27<sup>th</sup> February, 2018*, he submitted that this company was directed to be included on the ground that if from the available data on record, the results for financial year can reasonably be extrapolated, then, the companies cannot be excluded. He accordingly submitted that R. Systems International Ltd. should be directed to be included in the list of comparables.

30. So far as CG VAK Software & Exports Ltd. is concerned, he submitted that the TPO has rejected this company as it is making persistent losses in software services segment. He submitted that this company is not making persistent losses and has earned profit in one of the two preceding years. Further, this company was accepted by the TPO as a comparable for assessment years 2009-10 and 2013-14.

31. So far as CAT Technologies Ltd. is concerned, he submitted that the company earned revenue from information technology services and, therefore, should be accepted as a comparable. Referring to the decision of the Tribunal in assessee's own case for assessment year 2009-10, he submitted that this company was accepted as a

comparable by the Tribunal. On appeal by the Revenue, the Hon'ble High Court has upheld the order of the Tribunal. Further, the company is also selected as a comparable by the TPO for assessment year 2010-11. He accordingly submitted that this company should be included in the list of comparables.

32. So far as Thinksoft Global Services Ltd. is concerned, he submitted that the TPO rejected the same on the ground that it is functionally dissimilar as it provides software validation and verification services which is part of software development services whereas the functions of the assessee are high in functional hierarchy. He submitted that the assessee is not engaged in high end activity and is a routine and intermediary as it provides software development and design services as per the specifications provided by the AE. Therefore, this company should be considered as a comparable. Referring to the decision of the Bangalore Bench of the Tribunal in the case of Finastra Software Solutions Ltd. vide *IT(TP)A No.529/Bang/2016*, he submitted that this company was accepted as a comparable. Similar view has been taken by the Bangalore Bench of the Tribunal in the case of *M/s Marvell India Pvt. Ltd., ITA No.384/Bang/2016, order dated 28<sup>th</sup> June, 2017 for assessment year 2011-12*. He submitted that this company is accepted by the TPO as a comparable for assessment year 2010-11. He accordingly submitted that this company should be retained as a comparable.

33. So far as Caliber Point Business Solutions Ltd. is concerned, he submitted that the TPO rejected this company from the list of comparables on the ground that it

provides BPO services and, therefore, is not comparable. Further, this company does not pass the different financial year ending filter. He submitted that the Tribunal in assessee's own case for assessment year 2010-11 has held that the comparable cannot be rejected merely on the ground that financial year followed is different. Referring to the various decisions including that of Hon'ble Delhi High Court in the case of *Mckinsey Knowledge Centre India (P) Ltd., ITA No.217/2014*, he submitted that this company should be retained as a comparable since from the available data on record, the results for F.Y. can reasonably be extrapolated.

34. So far as Maveric Systems Ltd. is concerned, he submitted that the TPO rejected the same on the ground that this company has incurred higher indirect cost in this year and also incurred cost on establishing delivery mechanisms. He submitted that the TPO has not demonstrated that any indirect cost is involved and its impact on the net margin. He submitted that the revenue of the company has increased in the year over the previous year. Further, the company passes all the filters applied by the TPO himself and, therefore, this company should be taken as a comparable. He submitted that the TPO himself in assessee's own case for assessment year 2010-11 has accepted Maveric Systems Ltd. as a comparable. He accordingly submitted that this company should be accepted as a comparable company.

35. So far as benefit of risk adjustment is concerned as per ground of appeal No.4, he submitted that the Tribunal in assessee's own case for assessment year 2010-11 has granted the benefit of risk adjustment for assessment year 2010-11 and 2013-14.

Further, the Delhi Bench of the Tribunal in the case of *Hyundai Rotem Company vide ITA No.510/Del/2016, order dated 22.11.2017*, has held that the assessee is entitled for risk adjustment to the net margin of comparables for bringing them at par with the tax payer. Relying on various other decisions, he submitted that the assessee is entitled to risk adjustment. He, however, submitted that he has no objection if the matter is restored to the file of the Assessing Officer with similar directions as per assessment year 2010-11 and 2013-14.

36. So far as ground of appeal No.5 is concerned, the ld. counsel for the assessee submitted that the Tribunal in assessee's own case for assessment year 2009-10 and 2010-11 has decided on the treatment of time based software licence in favour of the assessee holding that the expenses of time based software licence are revenue in nature which are incurred for the purpose of business. Further, the Tribunal has also held that the aforesaid one time expenditure cannot be deferred as such and are revenue expenses to run the business. He submitted that if the ground of appeal No.5 is decided in favour of the assessee, then, ground of appeal No.6 become infructuous.

37. So far as ground of appeal No.7 is concerned, he submitted that the Tribunal in assessee's own case for assessment year 2009-10 and 2010-11 has decided the issue of allowability of training expenses as revenue in nature. While doing so, the Tribunal has relied upon the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Munjal Showa Ltd. reported in 329 ITR 449*. He accordingly submitted that the expenditure on training of employees amounting to Rs.9,85,574/- should be allowed as

revenue expenditure. He submitted that if the same is allowed as revenue expenditure, then, grounds of appeal No.8 and 9 become infructuous.

38. So far as ground of appeal No.10 is concerned, he submitted that the assessee had claimed depreciation on goodwill amounting to Rs.2,45,01,457/- during the course of assessment proceedings, in accordance with the decision of the Hon'ble Supreme Court in the case of *Smifs Securities Ltd. reported in 24 taxmann.com 222*. He submitted that the DRP following the decision of Hon'ble Supreme Court in *Goetze (India) Ltd. reported in 284 ITR 323*, rejected the claim of the assessee on the ground that the assessee did not claim such depreciation on goodwill in its return of income. He submitted that the Tribunal in assessee's own case for assessment year 2009-10 and 2010-11, has decided the issue regarding the non-applicability of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd.* and has restored the issue to the file of the Assessing Officer with a direction to re-examine the issue afresh after providing an opportunity of being heard. He accordingly submitted that he has no objection if the issue is restored to the file of the Assessing Officer with similar directions.

39. The Id. DR, on the other hand, strongly supported the order of the Assessing Officer/TPO/DRP. He submitted that the DRP, after considering the various arguments advanced by the assessee during the course of hearing has given categorical findings as to why certain comparables are to be included or to be excluded. So far as the other issues are concerned, the Id. DR heavily relied on the order of the DRP and submitted that they have given justifiable reasons for rejecting various contentions

raised by the assessee which is self explanatory. He accordingly submitted that the grounds raised by the assessee should be dismissed.

40. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. We find the assessee during the impugned assessment year has entered into international transaction with its AE amounting to Rs.2,14,75,27,845/- being provision of IC design and software development services. The assessee adopted TNMM as the most appropriate method and the PLI was determined at Operating Profit (OP)/Operating Cost (OC) of 8.68% whereas OP/OC of the assessee was at 5.43%. Accordingly, it was argued that the ALP of the international transaction is at arm's length. However, the TPO, rejecting the various arguments of the assessee applied certain other filters and excluded certain comparables for benchmarking the international transaction and arrived at an average of 21.49% and accordingly proposed an adjustment of Rs.35,31,33,463/- being the ALP of the international transaction. We find the DRP gave certain directions based on which the Assessing Officer finally took 17 comparables with average margin of 21.03% and after considering the margin of the assessee at 7.82% finally made adjustment of Rs.26,32,08,740/- to the ALP of the international transaction. It is the submission of the Id. counsel for the assessee that the assessee company works as per the specification provided by the group on a cost plus basis as per the master service agreement dated 31<sup>st</sup> August, 2008 with ST-Ericsson SA. It performs the limited

functions in the intermediate stage of the design and software development for the AEs. Since the functional profile of the assessee company has been accepted by the coordinate Benches of the Tribunal in assessee's own case for assessment year 2009-10 and 2010-11 and since the facts of the impugned assessment year are identical to the facts of the assessee for assessment year 2009-10, therefore, in view of the decision of the Tribunal, certain comparables included by the Assessing Officer/TPO/DRP should be excluded. Similarly, it is also his argument that certain comparables which were excluded by the TPO/DRP should not have been excluded and should be retained.

41. With the above background, we will consider each comparable.

42. So far as Persistent Systems Ltd. is concerned, we find from the details produced by the assessee in the paper book that this company operates as a full-fledged risk taking entrepreneur and is predominantly engaged in outsourced software product development services. It has got income from sale of software services and products and the company has disclosed segment information only on the basis of the consolidated financial statements which are presented together with the unconsolidated financial statements. Further it has acquired the OPD business of Infospectrum India Pvt. Ltd. and has entered into JV with Sprint Nextel Corporation. The above company further holds huge intangibles and also bears entrepreneurial risk and other business risks. However, the assessee company operates at minimal risk as the 100% services are provided to AEs and is remunerated on a cost plus basis. Further, the assessee is mainly engaged in software development related to design,

implementation and maintenance with respect to ICs as per specifications provided by the AE. It has not entered into any extraordinary activity and does not own any brand or proprietary products. Further, no risk has been undertaken by the assessee during the year. In view of the above, we are of the considered opinion that Persistent Systems Ltd. cannot be considered as a comparable. We further find the Tribunal in assessee's own case for assessment year 2013-14 and 2010-11 has directed the Assessing Officer/TPO/ to exclude this company from the list of comparables. The Hon'ble Delhi High Court in the case of Alcatel Lucent India Ltd. has also upheld the action of the Tribunal in excluding Persistent Systems Ltd. as a comparable for the purpose of determination of the ALP of the international transaction on account of functional dissimilarities when compared with the assessee. In view of the above, we direct the TPO/Assessing Officer to exclude Persistent Systems Ltd. from the list of comparables.

43. So far as Thirdware Solutions Ltd. is concerned, a perusal of the Schedule-12 – Sales, copy of which is placed at page 1510, Volume III of the paper book, shows the following details:-

“Schedule 12: SALES

<i>Export from SEZ Unit</i>	<i>617,464,837</i>	<i>475,840,447</i>
<i>Export from STPI Unit</i>	<i>70,626,764</i>	<i>112,090,633</i>
<i>Revenue from Subscription</i>	<i>19,602,931</i>	<i>15,313,736</i>
<i>Sale of Licence</i>	<i>33,814,861</i>	<i>15,138,618</i>
<i>Software Services</i>	<i>47,509,261</i>	<i>57,223,072</i>

44. This company is engaged in implementation and consulting services of software based on ERP and business intelligence. We find under identical circumstances this

company was excluded by the Tribunal in assessee's own case for assessment year 2010-11 by observing as under:-

“THIRDWARE SOLUTIONS LTD. (THIRDWARE)

47. The taxpayer sought exclusion of Thirdware on ground of functional dissimilarity being engaged into sale of software products and on the ground that Thirdware has been ordered to be excluded by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2009-10 (supra). Undisputedly, there is no change in the functional profile of the taxpayer since AY 2009-10. Coordinate Bench of the Tribunal in taxpayer's own case for AY 2009-10 ordered to exclude Thirdware by returning following findings :-

"47. This is again TPO's own comparable and assessee sought to exclude this company from the list of comparables on the ground of non-comparable services i.e application implementation, management and development services. TPO rejected objections raised by the assessee by observing that software development, implementation and support services are various sub-segments of software development services only and require employment of software engineers and retained this company as a comparable for benchmarking international transactions.

48. However, perusal of the annual report of this company, available at page 1735 to 1782 of the Paper Book Vol.IV, goes to prove that the substantial revenue of this company is from sales and operating sales of licence; software services, export from SEZ unit, export from STPI unit and revenue from subscription. It is also apparently clear that software services segment accounts for Rs.8.91 crores out of the total sales of Rs.77 crores whereas segmental results are not available. So, when this company's substantial revenue is from other various business segments like sale of licence, software services and segmental results are not available, this company cannot be a valid comparable for benchmarking the international transaction, hence ordered to be excluded."

48. In view of what has been discussed above, in the face of the fact that Thirdware is having substantial revenue from sales and operating sales of licence; software services; export from SEZ Unit; export from STPI Unit; and revenue from subscription and its segmental results are not available, it is functionally incomparable, so it cannot be taken as a valid comparable. Hence, we order to exclude the same.”

45. Respectfully following the decision of the Tribunal in assessee's own case, we hold that Thirdware Solutions Ltd. cannot be considered as a comparable. We accordingly direct the TPO to exclude the same from the list of comparables.

46. So far as Wipro Technology Services Ltd. is concerned, we find this company was rejected by the Tribunal in assessee's own case for assessment year 2010-11 by observing as under:-

“WIPRO TECHNOLOGY SERVICES LTD. (WIPRO)

36. The taxpayer sought exclusion of Wipro on the ground that it involved in providing software related services to its sole customer Citi Group entities which were acquired by Wipro and has signed a Master Service Agreement with Citi Group for the delivery of services for a period of six years; that Wipro's transaction with Citi Group falls within the ambit of [section 92B](#) (2) and as such, is deemed international transaction and has relied upon the decision of Hon'ble Delhi High Court in Cashedge India Pvt. Ltd. in ITA 279/2016 order dated 04.05.2015, decisions rendered by the Tribunal in Open Solutions Software Services Pvt. Ltd. for AY 2010-11 (ITA No.7078/Del/2014) and Equant Solutions India Pvt. Ltd. for AY 2010-11.

37. Bare perusal of the annual report of Wipro, available at page 1545 of Paper Book-III, shows that Wipro is providing software related services to its sole customer Citi Group as per Master Service Agreement (MSA) dated 21.01.2009. MSA provides for the delivery of at least \$ 500 million in service revenues over the period of the contract. So, the Wipro is into controlled transactions with its sole customer. Furthermore, when we examine business transactions between Wipro and Citi Group companies in the light of the MSA, such transactions are deemed international transactions u/s 92B (2) of the Act.

38. Hon'ble Delhi High Court in case of Cashedge India Pvt. Ltd. (supra) confirmed the findings returned by coordinate Bench of the Tribunal directing to exclude Wipro as a comparable vis-à- vis Cashedge which is also into business of software development by returning following findings :-

"6. ....as far as the Wipro Technology Services goes, it was part of the Citi Group and was during the financial year in question acquired on 21.01.2009 by the Wipro Ltd. as a subsidiary. As a part of the arrangement, the existing contracts pertaining to the work of the Citi Group continued to be with the newly created entity, i.e., Wipro Technology Services. Equally importantly, is that there

was no published segmented data as far as software development or its finances were concerned with respect to Wipro Technology Services. In these circumstances, the findings of the ITAT are purely factual and cannot be gone into as no substantial question of law arises for consideration."

39. Similarly, coordinate Bench of the Tribunal in case cited as Open Solutions Software Services Pvt. Ltd. (supra) examined the comparability of Wipro avis-avis Open Solutions Software Services Pvt. Ltd. engaged in software development, research and other related services and found the same to be invalid comparable in the light of the provisions contained u/s 92B(2) of the Act by returning following findings :-

"The aforesaid provision clearly envisages that, if a transaction has been entered into by an enterprise with unrelated party, then for the purpose of [Section 92B\(1\)](#) it is deemed to be transaction entered into between related parties (two A.Es) if there exists prior agreement in relation to the relevant transaction between third party and the A.E. In other words, as per terms of [Section 92B\(2\)](#), even if the transaction is between unrelated party and an enterprise, then, it would be deemed to be an international transaction if there was any prior agreement between the related parties on the basis of which present transaction is being undertaken."

40. So, when Wipro has received the revenue by virtue of MSA with Citi Group on account of pre-arrangement, it is deemed to be international transactions and in these circumstances, Wipro fails RPT filter applied by the TPO.

41. Ld. DR for the Revenue in order to repel the arguments addressed by the Id. AR for the assessee contended that in the annual report in the related party transactions, nowhere the name of Citi Group entities have been mentioned as related party and as such, this comparable does not fail RPT filter by virtue of provisions of [section 92B\(2\)](#) of the Act.

42. However, this contention of the Id. DR is not sustainable because this issue has already been examined at length by the coordinate Bench of the Tribunal in Open Solutions Software Services Pvt. Ltd. (supra) and in the light of the MSA entered into between Wipro and Citi Group w.e.f. 21.01.2009, related party transaction is proved and provisions contained u/s 92B(2) are attracted. So, there is no cogent factual and legal reason to depart from the decision rendered by the coordinate Bench of the Tribunal in Open Solutions Software Services Pvt. Ltd. (supra).

43. So, when the entire Revenue is received by the taxpayer by virtue of MSA entered into with Citi Group services which is also its subsidiary, the benefit accruing to this company on the basis of brand name of Wipro cannot be denied. So, in these circumstances, we find Wipro as unsuitable comparable for benchmarking the international transactions and exclude the same from the final set of comparables."

47. Since Wipro Technology Services Ltd. is engaged in software related support services, primarily information technology software solutions/maintenance and technology infrastructure support services to Citi group entities globally, therefore, this company, in our opinion, cannot be considered as a comparable. Further, the Hon'ble Delhi High Court in the case of *Agnity India Technologies Pvt. Ltd. vide ITA No.447/2018, order dated 13.04.2018*, has observed as under:-

“The question of law urged by the Revenue with respect to the exclusion of a comparable i.e. Wipro Technology Services Limited in the Arm's Length Price (ALP) determination, of the assessee is that the said entity reported abnormally high profits and had a large turnover and had the benefit of strong brand presence. It is also found that the entity (Wipro Technology) had undergone restructuring which had a significant impact upon its return and profitability. Learned counsel sought to rely upon the decision of this Court in *Chryscapital Investment Advisors (India) Pvt. Ltd. v. Deputy Commissioner of Income Tax (2015) 376 ITR 183 Del.* This Court is of the opinion that the ITAT conclusions were reasonable and justified. A strong brand presence and unusual events such as amalgamation, merger, etc. – which can have a miserable impact and are discerning from the record, are reasonable grounds for excluding a particular comparable; which was a case of Wipro Technology. The Tribunal also noted that in such cases the issue of comparable has to be seen from the robust market practice as well.

48. In view of the above discussion, we hold that Wipro Technology Service Ltd. cannot be considered as a comparable.

49. So far as E-Zest Solutions Ltd. is concerned, we find this company was rejected as a comparable by the Tribunal in assessee's own case for assessment year 2010-11 on account of functional dissimilarities. Since during the impugned assessment year also E-Zest Solutions Ltd. deals in software products and holds inventory of Rs.1.64 crores and has diversified services, therefore, this company, in our opinion, cannot be considered as a comparable as there is no change in the facts of E-Zest for assessment

year 2011-12 vis-à-vis assessment year 2010-1. We find, the Tribunal, while excluding E-Zest Solutions Ltd. for assessment year 2010-11 has observed as under:-

“E-ZEST SOLUTIONS LTD. (E-ZEST)

55. The taxpayer sought exclusion of E-Zest on ground of functional dissimilarity being into broad portfolios of services (diversified services) with no segmental reporting. Perusal of Profit & Loss account for the year ending 31.03.2010, available at page 1946 of the Paper Book - IV shows that the E-Zest has substantial income from operations whereas it has three business segments viz. Product engineering services/ outsourced product development services, Enterprise application development and IT services. However, no segmental information is available.

56. Comparability of E-Zest was examined by the coordinate Bench of the Tribunal in case of ST Microelectronics Private Ltd. (formerly Genesis Microchip (India) Pvt. Ltd. in IT (TP) A.No.949/Bang./2011 order dated 06.01.2017, available at page 2459 of Paper Book - V vis-à-vis ST Microelectronics Private Ltd., a software development service provider and ordered to exclude the same by returning following findings :-

"14.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the list of comparables only on the basis of the statement made by the company in its reply to the notice under [section 133\(6\)](#) of the Act. It appears that the TPO has not examined the services rendered by the company to give a finding whether the services performed by this company are similar to the software development services performed by the assessee. From the details on record, we find that while the assessee is into software development services, this company i.e. e-Zest Solutions Ltd., is rendering product development services and high end technical services which come under the category of KPO services. It has been held by the co-ordinate bench of this Tribunal in the case of Capital IQ Information Systems (India) (P) Ltd. Supra) that KPO services are not comparable to software development services and are therefore not comparable. Following the aforesaid decision of the co-ordinate bench of the Hyderabad Tribunal in the aforesaid case, we hold that this company, i.e. e-Zest Solutions Ltd. be omitted from the set of comparables for the period under consideration in the case on hand. The A.O. / TPO is accordingly directed."

57. In view of what has been discussed above, we are of the considered view that E-Zest cannot be a valid comparable on ground of functional dissimilarity being into three segments with no segmental information available. So, we ordered to exclude E- Zest from the final set of comparables.

50. In view of the above discussion, we are of the considered opinion that E-Zest solutions Ltd. cannot be considered as a comparable on account of functional dissimilarity and absence of segmental details. The various other decisions relied on by the Id. counsel for the assessee in the paper book also supports his case. Accordingly, E-Zest Solutions Ltd. is directed to be excluded from the list of comparables.

51. So far as Tata Elxsi Ltd. is concerned, we find this company was excluded by the Tribunal in assessee's own case for assessment year 2009-10 as well as for assessment year 2010-11 on account of functional dissimilarities. On further appeal by the Revenue, the Hon'ble High Court in assessee's own case for assessment year 2009-10 dismissed the appeal filed by the Revenue. Since this company is engaged in high end services, therefore, it cannot be compared with that of the assessee company. In view of the above and in view of the consistent view of the Tribunal in assessee's own case for assessment year 2009-10, 2010-11 and 2011-12, we direct the TPO to exclude this company from the list of comparables.

52. So far as Acropetal Technologies Limited (Seg.) is concerned, we find this company is engaged in diversified operations such as provision of engineering design services, information life cycle, IT infrastructure management, cloud services enterprise software solutions, etc. which is verifiable from the annual report. Its employee cost ratio for the impugned assessment year is at 13.74% and, therefore, it fails the employee cost filter. We find this company was excluded as a comparable by

the Kolkata Bench of the Tribunal in the case of *Philips India Limited vs DCIT vide ITA No.8963 & 539/Kol/2016, order dated 15<sup>th</sup> December, 2017* for assessment year 2011-12. Similarly, Madras Bench of the Tribunal in the case of *M/s Symantec Software & Services India Pvt. Ltd. (supra)* has also directed to exclude this company from the list of comparables on account of functional dissimilarity. The various other decisions relied on by Id. counsel also supports his case. In view of the above discussion, we hold that Acropetal Technologies Ltd. cannot be considered as a comparable and, therefore, the same has to be excluded from the list of comparables. We hold and direct accordingly.

53. So far as E-Infochips is concerned, we find this company operates as a full-fledged risk taking entrepreneur and has revenue from software services, hardware and consultancy charges. It bears entrepreneurial risks and other business risks whereas the assessee company operates at minimal risk as the 100% services are provided to AEs only. The assessee is a captive unit and is remunerated on a cost plus basis. Further, the assessee is mainly engaged in provision of software development services related to design, implementation, maintenance with respect to ICs as per the specifications prescribed by the AEs. The assessee also does not undertake any business risk. Further, the TPO himself has not selected this company as a comparable for assessment year 2012-13 and 2013-14 and accepted the rejection of the company in the transfer pricing study report. We find the Delhi Bench of the Tribunal in

*Alcatel-Lucent India Ltd. vs. DCIT vide ITA No.6856/Del/2015, order dated 24<sup>th</sup>*

*August, 2016 for assessment year 2011-12 has observed as under:-*

"11.1 As far as ground no. 3.6 of the assessee's appeal is concerned, the comparables are being taken up one by one as under –

(ii) E-Infochips Ltd. - The Id. AR has submitted that E-Infochips is engaged in diversified services like IT Enabled Services, Development of Software Products and Solutions for Product Design and Development, Quality Assistance and Certification, reengineering, sustenance and volume production, Software Consulting and manufacturing EVM and VDB Electronic Board etc and is functionally dissimilar. The Id. AR has relied on the decision rendered by the ITAT Delhi Bench in Saxo India Private Limited (ITA No. 6148/Del/2015), wherein the ITAT Delhi Bench has held that E-Infochips is to be rejected as a comparable on the ground that it earns income from software products and services and no segmental data is available. We do find from the FAR analysis that assessee company is functionally dissimilar to E- Infochips and hence finding support from the decision rendered by the ITAT Delhi Bench in Saxo India Private Limited (ITA No. 6148/Del/2015), we direct the TPO to exclude this comparable. ”

54. We find the Hon'ble Delhi High Court upheld the order of the Tribunal by holding as under:-

“2.The question urged by the Revenue is whether the ITAT erred in directing the TPO to exclude M/s. E-Infochips Ltd., M/s. Larsen & Toubro Ltd., M/s. Persistent Systems Ltd., M/s. Infosys Limited, Saxo India Ltd. and Zylog Ltd. from the list of comparables for the purposes of determination of the arms length price of the international transaction on account of functional dissimilarity when compared with the Assessee?

3. Having heard the learned counsel for the parties, the Court find that the ITAT has assigned clear and cogent reasons that the above entities should be excluded from the list of comparables. The findings are factual and based on proper analysis and does not give rise to any substantial question of law”

55. The various other decisions relied on by the Id. counsel for the assessee also supports its case that this company has to be excluded from the list of comparables on account of non-availability of segmental report and huge expenditure incurred on

account of Research & Development activities. In view of the above discussion, we hold that E-Infochips cannot be considered as a comparable. Accordingly, we direct the Assessing Officer/TPO to exclude the same from the list of comparables.

56. So far as Larsen & Toubro Infotech Ltd. (L&T) is concerned, we find this company operates as a full-fledged risk taking entrepreneur and has income from software development and services products. L&T earns significant revenue from on shore (53%) and offshore (47%) and it holds intangible assets such as software business right, capital work-in-progress amounting to Rs.103.83 crore. The company during the current financial year has acquired a transfer agency business for Canadian Dollar 62.3 million from a globally reputed bank servicing local clients represented by asset management companies, banks, insurance companies, etc. However, we find the assessee does not bear entrepreneurial risk and other business risks. Further, the assessee company operates at a minimal risk as the 100% services are provided to AEs and is remunerated on a cost plus basis. The assessee is mainly engaged in software development related to design, implementation and maintenance as per specifications provided by AE. The assessee does not own any brand or proprietary produces and has no on site operations. The assessee company has not acquired any business during the impugned assessment year nor has undertaken any risk. We find the Tribunal in assessee's own case for assessment year 2010-11 has discussed the issue of exclusion of L&T as a comparable and has restored the issue to the file of Assessing Officer/TPO for deciding the issue afresh. Respectfully following the decision of the

Tribunal in assessee's own case for the immediately preceding assessment year, we deem it proper to restore this issue to the file of the TPO for considering the exclusion of this company from the list of comparables. The Assessing Officer shall keep in mind the various decisions relied on by the assessee including the decision of Hon'ble Delhi High Court in the case of Alcatel-Lucent (supra) and the FAR analysis and decide the issue as per fact and law after giving due opportunity of being heard to the assessee.

57. So far as Persistent Systems Ltd. is concerned, we find the company operates as a full-fledged risk taking entrepreneur and is predominantly engaged in outsourced software product development services. It has income from sale of software services and products and also entered into acquisition of OPD business of of Infospectrum India Pvt. Ltd. and has entered into JV with Sprint Nextel Corporation which has benefitted the company to grow its operations. It owns huge intangibles and also entrepreneurial risk and other business risks. However, the assessee company operates at minimal risk as the 100% services are provided to AEs and is remunerated on a cost plus basis. It is mainly engaged in software development related to design, implementation and maintenance with respect to ICs as per specifications provided by the AE. It has not entered into any extraordinary activity during the year and does not own any brand or proprietary products. Further, no entrepreneurial or business risk has been undertaken by the assessee during the year. We further find that this company was excluded by the Tribunal from the list of comparables in assessee's own

case for *assessment year 2013-14 vide ITA No.4434/Del/2018 and for assessment year 2010-11 vide ITA No.609/Del/2015*. We further find the Hon'ble Delhi High Court in the case of Alcatel-Licent India Ltd. (supra) has upheld the decision of the Tribunal in directing the TPO to exclude Persistent Systems Ltd. from the list of comparables. The various other decisions relied on by the Id. counsel for the assessee in the case law citations also supports its case. We, therefore, direct the Assessing Officer/TPO to exclude this company from the list of comparables on account of FAR differences.

58. So far as Persistent Systems and Solutions Ltd. is concerned, we find this company is functionally different since it provides support in software development, consultancy and systems integration services to Persistent group of companies and also enjoys the benefit being a part of the Special Economic Zone Scheme in India. It has incurred huge expenditure on account of Research & Development activities and has abnormal profit during the year since its turnover has increased by 184% and the net profit has increased by 250% for the year ending 2011. This company was excluded by the Delhi Bench of the Tribunal in the case of Alcatel-Lucent India Ltd. by observing as under:-

“10.9 We heard both the parties and perused the records. This company is engaged in software product and is dealing in outsourcing of Software Product Development. But, the assessee company is engaged in the business of digital switching equipment and related software, cellular exchange / transmission equipment and provides related services, intelligent network and broadband solutions, equipment and related services. Thus, the functions of both the companies are different. In fact in earlier Assessment Year the ITAT already excluded this company as comparable in assessee's own case on account of functional difference which was confirmed by the Hon'ble High Court. This company was merged with its parent company Persistent Solutions Limited in

this year which was an extra ordinary event. Therefore, this company has to be excluded. We, therefore, direct TPO to exclude this company from comparable.”

59. We find the Hon'ble Delhi High Court has upheld the decision of the Tribunal on this issue. Further the Bangalore Bench of the Tribunal in the case of Electronic Imaging India Pvt. Ltd. has also excluded this company from the list of comparables on account of functional dissimilarities. The various other decisions relied on by the ld. counsel for the assessee which are placed in the paper book also supports the case that Persistent Systems and Solutions Ltd. cannot be considered as a comparable. We accordingly direct the Assessing Officer/TPO to exclude this company from the list of comparables.

60. So far as Sankhya Infotech Ltd. is concerned, we find this company also is functionally different from that of the assessee company. The company overview as mentioned in the Notes to Accounts forming part of the accounts for the year ending 31<sup>st</sup> March, 2011 reads as under:-

“Sankhya Infotech Ltd. ("Sankhya") and its 100% owned and controlled subsidiaries, Sankhya US corporation, Sankhya SARL, France and Mahasena Info Technologies India Pvt. Ltd. (formerly known as Sankhya Information Technologies India Pvt Ltd) is a leading Simulation and training company”. Sankhya provides end to end simulation solutions which are customized to the end user and the company has developed customizable products for imparting training which can cater to any industry. ”

61. Further, this company has signed a Memorandum of Understanding with defense Public Sector company Bharat Electronics Limited to collaborate in the field of Simulation and virtual training and has also recorded a successful execution of its

SILICON suite of products for the Indian Army. We further find the company owns various products such as

- i) Learning Management Products;
- ii) Training Management Products;
- iii) Simulator Products;
- iv) Knowledge based Content;
- v) Optimization Products;
- vi) Sage CRM Server 200;
- vii) Service Capture;
- viii) Tally 9 Gold Multi User;
- ix) Teamprise / Eclipse 3.0;
- x) Vstudio Team Ed (5 Users);
- xi) Adobe Nog Elixir with Media Kit;
- xii) Device Lock Software; and
- xiii) Logitek G 25 Maming Wheel.

62. We further find the expenses such as depreciation and interest which form a significant component of total expenses, are not specifically allocated to specific segment as the underlying services are used interchangeably. It has incurred huge research and development expenses. Further, the TPO himself has not selected this company as a comparable for assessment year 2012-13 and 2013-14 and accordingly has accepted the assessee's approach of rejection of this company in the TP study report. The Delhi Bench of the Tribunal in the case of Alcatel-Lucent India Ltd. (supra), has excluded this company from the list of comparables by observing as under:-

“(vii) Sankhya Infotech Limited (Service Segment) - It is seen that this company is a leading simulation and training solutions provider which provides end to end simulation solutions. This company also develops customizable products for training purposes. It is further seen that the schedule pertaining to segment reporting in the annual report, to which the TPO has also referred to, is incomplete because depreciation and interest have not been specifically allocated to any specific segment as the underline services are used interchangeably. Thus,

this segmental information is incomplete and cannot be considered for comparability purposes. It is also seen that Sankhya Infotech Limited has been rejected on the ground that it owns software products in the following cases - Colt Technology Services India Private Limited [(TS-774-ITAT- 2012(Del)), Integrated Decisions & Systems India (Private) Limited [(TS-629-ITAT-2011(JPR)], NTT Data India Enterprise Application Services Private Limited [IT-293-ITAT-2013(HYD-TP), Adaptech India (Private) Limited (ITA No. 481/Hyd./2011), Sunquest Information Systems (TS-299-ITAT-2015 (Bang)-TP).Further, non availability of segmental information in case of diversified operations renders a company not comparable, has been held in the following decisions - Telcordia Technologies India P. Ltd. (ITA No. 7821/Mum/2011), Trilogy E-Business Software India Pvt. Ltd. vs. DCIT (ITA No. 1054/Bang/2011, Transwitch India P. Ltd. vs. DCIT [ITA No. 948/Bang/2011, TS-105- ITAT-2012(Bang)-TP], First Advantage Offshore Services Pvt. Ltd. (ITA No. 1252(Bang)/2010), CSR India (P) Ltd. vs. ITO [IT(TP)A (reference no. No. 1119/Bang/2011)], IntotoSoftware India Pvt. Limited, Hyderabad (ITA No. 233 of 2014). Respectfully following these judicial precedents, we direct the TPO to exclude this company from the final set of comparables. ”

63. This decision of the Tribunal has been upheld by the Hon'ble Delhi High Court in ITA No.515/Del/2017. In view of the above discussion, we hold that Sankhya Infotech Ltd. has to be excluded from the list of comparables.

64. So far as Sasken Communication Technologies Ltd. (Sasken) is concerned, this company operates as a full-fledged risk taking entrepreneur and has revenue from software services and software products. No segmental information is available and the company also holds inventory of 0.95 crore as on 31<sup>st</sup> March, 2011. The company continue to invest in R&D during the year in multi-media wireless and broadband and mobile value added services. The company bears entrepreneurial risk and other risks. However, the assessee company operates at minimal risk as the 100% services are provided to AEs and is remunerated on a cost plus basis. The assessee is mainly engaged in software development related to design, implementation and maintenance

with respect to ICs and it does not own any brand or proprietary products. It has not incurred any R&D and does not bear any entrepreneurial risk and other business risks. The various benches of the Tribunal has excluded Sasken from the list of comparables on account of material FAR differences. In view of the above discussion we hold that Sasken cannot be considered as a comparable with that of the assessee company and has to be excluded from the list of comparables. We hold and direct accordingly.

65. The next grievance of the assessee is regarding exclusion of certain comparables by the A.O./TPO/DRP which were considered as comparable by the assessee.

66. So far as R. Systems International Ltd. is concerned, we find that this has been excluded by the TPO solely on the ground of its financial year being calendar year. We find the Tribunal in assessee's own case for assessment year 2010-11, has held that the comparables cannot be rejected merely on the ground that financial year followed is different. The Hon'ble Delhi High Court in the case of *Mckinsey Knowledge in ITA No.217/2014, order dated 27<sup>th</sup> March, 2015* and in the case of *Baxter India Pvt. Ltd., ITA 260/2018, order dated 27<sup>th</sup> February, 2018*, directed to include this company as comparable on the ground that if from the available data on record, the results for financial year can reasonably be extrapolated, then, the companies cannot be excluded. We, therefore, restore this issue to the file of A.O./TPO with a direction to include R. Systems International Ltd. in the list of comparables after extrapolation of the financial results. While doing so the TPO shall give due opportunity of being heard to the assessee.

67. So far as CG VAK Software & Exports Ltd. is concerned, we find the TPO rejected this company as it is making persistent losses in software services segment. It is the submission of the Id. counsel that this company is not making persistent losses and has earned profit in one of the two preceding years. Further, this company was accepted by the TPO as a comparable for assessment years 2009-10 and 2013-14. We, therefore, restore this issue to the file of the A.O./TPO to examine the record and decide the issue afresh and as per law after giving due opportunity of being heard to the assessee.

68. So far as CAT Technologies Ltd. is concerned, we find the company earned revenue from information technology services and, therefore, should be accepted as a comparable. We find the Tribunal in assessee's own case for assessment year 2009-10, has accepted this company as a comparable. On appeal by the Revenue, the Hon'ble High Court has upheld the order of the Tribunal. Further, the company is also selected as a comparable by the TPO for assessment year 2010-11. We, therefore, direct the A.O./TPO to include this company as a comparable.

69. So far as Thinksoft Global Services Ltd. is concerned, we find the TPO rejected the comparable on the ground that it is functionally dissimilar as it provides software validation and verification services which is part of software development services whereas the functions of the assessee are high in functional hierarchy. It is the argument of the Id. counsel for the assessee that the assessee is not engaged in high end activity and is a routine and intermediary as it provides software development and

design services as per the specifications provided by the AE. Therefore, this company should be considered as a comparable. We find the Bangalore Bench of the Tribunal in the case of *Finastra Software Solutions Ltd. vide IT(TP)A No.529/Bang/2016*, has accepted this company as a comparable. Similar view has been taken by the Bangalore Bench of the Tribunal in the case of *M/s Marvell India Pvt. Ltd., ITA No.384/Bang/2016, order dated 28<sup>th</sup> June, 2017 for assessment year 2011-12*. Further, this company is accepted by the TPO as a comparable for assessment year 2010-11. In view of the above discussions, we direct the A.O./TPO to include this company as a comparable.

70. So far as Caliber Point Business Solutions Ltd. is concerned, we find the TPO rejected this company from the list of comparables on the ground that it provides BPO services and, therefore, is not comparable. Further, this company does not pass the different financial year ending filter. We find the Tribunal in assessee's own case for assessment year 2010-11 has held that the comparable cannot be rejected merely on the ground that financial year followed is different. We find the Hon'ble Delhi High Court in the case of *Mckinsey Knowledge Centre India (P) Ltd., ITA No.217/2014*, has held that this company should be retained as a comparable since from the available data on record, the results for F.Y. can reasonably be extrapolated. We, therefore, restore this issue to the file of the A.O./TPO to decide the issue afresh by extrapolating the result after giving due opportunity of being heard to the assessee.

71. So far as Maveric Systems Ltd. is concerned, we find the TPO rejected this company on the ground that this company has incurred higher indirect cost in this year and also incurred cost on establishing delivery mechanisms. It is the submission of the ld. counsel for the assessee that the TPO has not demonstrated that any indirect cost is involved and its impact on the net margin. It is his submission that the revenue of the company has increased in the year over the previous year. Further, the company passes all the filters applied by the TPO himself and, therefore, this company should be taken as a comparable. It is also his submission that the TPO himself in assessee's own case for assessment year 2010-11 has accepted Maveric Systems Ltd. as a comparable. We, therefore, restore this issue to the file of the A.O./TPO with a direction to adjudicate the issue afresh as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly.

72. Ground of appeal Nos.2 to 2.6 are accordingly allowed as indicated above.

73. So far as ground of appeal No.3 is concerned, it is case of the ld. counsel for the assessee that bank charges, provision for doubtful debts and provision no longer required written back cannot be considered as non-operating expenditure/income while computing the operating margin of the assessee and comparable companies.

74. After hearing both the sides, we find the TPO held that bank charges are usually not separately reported by the company and are clubbed along with the interest charges and, hence, these are to be treated in the same manner as interest. Similarly,

provision for bad debt being in the nature of unascertained liability, has to be treated as non-operating income. The DRP simply upheld the action of the Assessing Officer/TPO. It is the submission of the ld. counsel for the assessee that bank charges and interest can be separately computed. Relying on various decisions it is his submission that the lower authorities have not given any valid reason to negate the claim of the assessee. We find the facts are not coming out clearly from the orders of the TPO/DRP. We, therefore, remit this issue back to the file of the Assessing Officer/TPO with a direction to adjudicate the issue afresh after giving due opportunity of being heard to the assessee. The Assessing Officer/TPO shall decide the issue as per fact and law. We hold and direct accordingly. Ground of appeal No.3 of the assessee is accordingly allowed for statistical purposes.

75 Ground of appeal No.4 relates to risk adjustment. After hearing both the sides, we find identical issue had come up before the Tribunal in assessee's own case for assessment year 2010-11 and the issue was restored to the file of the TPO with the following directions:-

*"21. So, following the decision rendered by the coordinate Bench of the Tribunal, we are of the considered view that the assessee is entitled for risk adjustment to the net margin of the comparables for bringing them at par with the taxpayer on supplying the complete data by the assessee. So, ground no. 12 is determined in favour of the assessee for statistical purposes."*

76. Respectfully following the decision of the Tribunal in assessee's own case for the immediately preceding assessment year, this ground is restored to the file of the A.O./TPO for deciding this issue afresh and in accordance with the law, after giving

due opportunity of being heard to the assessee. The ground raised by the assessee is accordingly allowed for statistical purposes.

77. Ground of appeal No.5 relates to treatment of software expenses of Rs.69,45,581/- as capital expenditure and thereby making addition of Rs.27,78,233/- after allowing depreciation.

78. After hearing both the sides, we find the TPO/A.O. treated the software expenses amounting to Rs.69,45,581/- as capital in nature and after allowing depreciation on the same, made addition of Rs.27,78,233/- which was upheld by the DRP. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2009-10 and 2010-11 and the Tribunal has decided the issue on the treatment of time based software licence in favour of the assessee holding that the expenses on time based software licence are revenue in nature which are incurred for the purpose of business. The Tribunal further held that the one time expenditure so incurred cannot be deferred as such and are revenue expenses to run the business. The relevant observation of the Tribunal from para 55 of the order reads as under:-

“55. Assessee in the profit and loss account has debited an amount of Rs.3,84,651/- being expenditure on time based licences. AO treated the software time based licence expenses of Rs.3,84,651/- as capital in nature and thereby disallowed the same. However, the AO allowed the assessee to depreciation thereon @ 60% which is Rs.2,30,791/- and added back the remaining amount of Rs.1,53,860/- to the returned income. DRP also affirmed the decision rendered by AO.

56. Ld. AR for the assessee contended that since one time revenue expenditure has been incurred by the assessee the same cannot be deferred and relied upon the judgment of Hon'ble Delhi High Court in case of [Director of Income-tax vs.](#)

[Infrasoft Ltd.](#) - (2013) 39 taxmann.com 88 (Delhi). However, on the other hand, Id. DR for the revenue by relying upon the order passed by AO/DRP contended that since 60% depreciation has already been given to the assessee, the contention of the assessee is not sustainable.

57. Assessee has brought on record that assessee has incurred an amount of Rs.3,84,651/- for running the licence only and annual maintenance charges for operating, trouble shooting of the software and not for purchase/acquisition of the software and the period for running of these licences / AMC was mostly one year or less than one year.

58. In the given circumstances, when the aforesaid fixed licences were rented for a limited period only which is less than one year, no enduring benefit accrues to the assessee nor any ownership right vests in the assessee. Issue in controversy has already been dealt with by the Hon'ble jurisdictional High Court in [Director of Income-tax vs. Infrasoft Ltd.](#) (supra), the ratio of which is that :-

"what is transferred is neither the copyright in the software nor the use of the copyright in software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the right in the copyright which is too for only limited period."

59. So, these expenses, to our mind, are in the nature of revenue expenses incurred for the purpose of business. Moreover, one time expenditure to purchase time based software licenses cannot be deferred and as such, are revenue expenses to run the business. So, the AO is directed to re-examine the issue accordingly and as such, this ground is determined in favour of the assessee.

79. We find, following the above decision, the Tribunal in assessee's own case for assessment year 2010-11 has treated the software expenses as revenue in nature. Therefore, following the decision of the Tribunal in assessee's own case for assessment year 2009-10 and 2010-11 and in absence of any distinguishable feature brought before us by the Revenue, we direct the Assessing Officer to treat the expenses on rental of time based software licence as revenue in nature. The ground raised by the assessee is accordingly allowed. In view of our above decision, ground of appeal no.6 becomes infructuous.

80. Ground of appeal No.7 relates to expenditure on training of employees amounting to Rs.9,85,574/- as capital in nature.

81. After hearing both the sides, we find the Assessing Officer/TPO/DRP have treated the expenditure of Rs.9,85,574/- claimed by the assessee as expenditure on training of employees as capital in nature being giving enduring benefit to the assessee. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2010-11 and the Tribunal *vide ITA No.609/Del/2015, order dated 3<sup>rd</sup> July, 2018*, has decided the issue in favour of the assessee by observing as under:-

"72. AO/DRP have treated expenditure of Rs.13,84,084/- claimed by the taxpayer as expenditure on training of employees as capitalized in nature being of enduring benefit to the taxpayer. The Id. AR for the taxpayer contended that this issue has already been decided in favour of the taxpayer in its own case for AY 2009-10 (supra). Operative part thereof is extracted as under:-

"60. Assessee debited an amount of Rs.38,09,220/- in his profit & loss account on account of training expenses and claimed the same as revenue expenditure. However, AO being not satisfied with the explanation given by the assessee came to the conclusion that these expenses have been incurred for providing various training which is in the nature of giving enduring benefit to the assessee and treated the same as capital expenditure and then added to the income of the assessee.

61. However, Id. AR for the assessee contended that the payment of training expenses is in the nature of revenue expenses and relied upon the decision rendered by Hon'ble High Court of Delhi in judgment cited as [Commissioner of Income-tax-II vs. Munjal Showa Ltd.](#) - (2010) 329 ITR 449 (Delhi).

62. The ratio of the judgment in case of [Commissioner of Income-tax-II vs. Munjal Showa Ltd.](#) (supra) rendered by Hon'ble Delhi High Court is that :-

"when the training of the personnel of the assessee was imperative to run the business and is in the nature of technical support to the assessee it will certainly enhance the profit of the company on which it will pay the taxes, such

expenditure cannot be treated as capital in nature rather they are revenue in nature."

63. We are of the considered view that in the light of the judgment in case of [Commissioner of Income-tax-II vs. Munjal Showa Ltd.](#) (supra), the AO is directed to re-examine the issue afresh after providing an opportunity of being heard to the assessee."

73. Since, undisputedly, the taxpayer has not undergone any change in its business model and the issue is identical, the expenses of Rs.13,84,084/- are ordered to be treated as revenue in nature by following the decision of the coordinate Bench of the Tribunal rendered in taxpayer's own case in AY 2009-10 (supra). Hence, ground no.18 is determined in favour of the taxpayer."

82. Respectfully following the decision of the Tribunal in assessee's own case and in absence of any contrary material brought to our notice against the order of the Tribunal, this ground of the assessee is allowed.

83. In view of the above discussion grounds of appeal Nos.8 and 9 of the assessee become infructuous.

84. Ground of appeal No.10 relates to depreciation on goodwill amounting to Rs.2,45,01,457/-

85. After hearing both the sides, we find the assessee claimed depreciation on goodwill amounting to Rs.2,45,01,457/- during the course of assessment proceedings, in accordance with the decision of Hon'ble Supreme Court in the case of Smifs Securities Ltd. We find the Id. DRP, relying on the decision of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd* (supra) rejected the claim of the assessee on the ground that the assessee has not made such claim in the return of income. We find this issue had come up before the Tribunal in assessee's own case for the assessment year

2010-11 and the Tribunal has restored the issue to the file of the A.O. for deciding the issue afresh by observing as under:-

“75. Ld. AO/DRP have denied the depreciation on goodwill amounting to Rs.2,64,53,670/- claimed by the taxpayer during the course of proceedings by relying upon the decision rendered by Hon'ble Supreme Court in Goetze India Limited - (2006) 284 ITR 323 (SC). However, the identical issue has already been decided by remanding the case back to the AO after providing an opportunity of being heard to the taxpayer in taxpayer's own case for AY 2009-10 by returning following findings :-

"64. Assessee claimed depreciation on goodwill amounting to Rs.1,38,93,062/- during the course of assessment proceedings by relying upon decisions rendered by Hon'ble Supreme Court in case of Smifs Securities Ltd. - (TS-639-SC-2012) (Supreme Court) but the AO remained silent on this issue.

65. However, DRP by applying the decisions rendered by Hon'ble Supreme Court in Goetze (India) Ltd. - (2006) 284 ITR 323 (SC) rejected the claim of the assessee on the ground that assessee did not claim such depreciation on goodwill in its return of income. However, it has not been disputed by both the Id. Representatives of the parties that the judgment cited as Goetze (India) Ltd. as relied upon by DRP is not applicable to the facts and circumstances of the case and when the issue has been raised during assessment proceedings, though no depreciation was claimed in the return of income, AO was duty bound to decide this issue. So, we hereby restore this ground to the AO to decide afresh after providing an opportunity of being heard to the assessee. Accordingly, this ground is determined in favour of the assessee."

76. Following the findings returned by the coordinate Bench of the Tribunal in AY 2009-10 (supra), this issue is ordered to be remanded back to the AO to decide afresh after providing an opportunity of being heard to the taxpayer in the light of the directions issued in AY 2009-10.”

86. Respectfully following the decision of the Tribunal in assessee's own case for assessment year 2010-11, we restore this issue to the file of the Assessing Officer with a direction to decide the issue afresh and in accordance with law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. This ground of the assessee is allowed for statistical purposes.

87. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

The decision was pronounced in the open court on 28.05.2019.

Sd/-

(BEENA A. PILLAI)  
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)  
ACCOUNTANT MEMFBER

Dated: 28<sup>th</sup> May, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi