

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'I-1, NEW DELHI

BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 1810/Del/2014

AY: 2009-10

Qualcomm India Pvt. Ltd. Unit No.201 2 nd Floor 15 Tolstoy Marg New Delhi 110 001 PAN: AAACQ0231C	vs.	DCIT, Circle 14(1) C.R.Building New Delhi
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(Appellant)

(Respondent)

Assessee by : Sh. Naveen K. Aggarwal &
Sh. Ravi Bharadwaj, CAs.

Department by : Sh. Sanjay I Bara, CIT, DR

Date of Hearing : 02/05/2019

Date of Pronouncement: 03/06/ 2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against final assessment order dated 28/01/14 passed by Ld. DCIT, Circle 14 (1), New Delhi for Assessment Year 2009-10 on following grounds of appeal:

“Each of the ground given below is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

On the facts and in the circumstances of the case,

1. The Deputy Commissioner of Income Tax, Circle 14(1), New Delhi (‘the AO’) erred in making an addition of Rs. 42,50,47,081/- to the total income of the Appellant after considering the adjustments proposed by the Additional Director of Income Tax (Transfer Pricing)-II(1), New Delhi (‘the TPO’) in his order issued after giving effect to the directions of the Dispute Resolution Panel-II, New Delhi (‘the DRP’).

2. Rejection of the transfer pricing documentation

The DRP and the TPO erred in rejecting the transfer pricing documentation undertaken by the Appellant u/s 92C(3)(c) of the Income-tax Act, 1961 (‘the Act’) and undertaking a fresh analysis.

3. Rejection of use of multiple year data

The DRP erred in upholding the action of the TPO of rejecting use of multiple year data and using data for the Financial Year (‘FY’) 2008-09 only.

4. Eligibility under section 10A of the Income-tax Act, 1961

The DRP and the TPO erred in not appreciating that the Appellant is eligible for tax holiday under section 10A of the Act for the software development services and hence, there is no incentive for shifting of profits.

5. Use of additional/modified filters

The DRP erred in upholding the TPO’s action of using the following additional/modified filters.

- i. Diminishing Revenue/Persistent Loss Filter – Rejection of comparables having diminishing revenues or persistent losses;*
- ii. Use of turnover filter – Rejection of comparables using minimum turnover criteria. Without prejudice, the DRP*

erred in not adjudicating on the Appellant's contention of usage of turnover range on the basis of factor of 5 times;

- iii. Different Financial Year-end Filter – Rejection of comparables having financial year other than March 31, 2009;*
- iv. 75% Export Revenue Filter – Rejection of comparables having export sales less than 75% of the sales;*
- v. Employee cost filter – Rejection of comparables having employee costs less than 25% of total costs.*

6. Selection of functionally different companies as comparable companies to software development services

The DRP erred in upholding the TPO's action of not undertaking an objective comparative analysis and inter alia selecting the following companies as comparable to the software development services rendered by the Appellant, which are functionally different:

- i. Tata Consulting Services Limited;*
- ii. Cat Technologies Limited;*
- iii. Tata Elxsi Limited;*
- iv. Thirdware Solutions Limited; and*
- v. Infosys Limited*

7. Rejection of companies selected as comparable to the software development services

The DRP erred in upholding the TPO's action of not undertaking an objective comparative analysis and inter alia rejecting the following companies as comparable to the software development services rendered by the Appellant:

- i. CG – VAK Software & Exports Limited;*
- ii. Indium Software (India) Limited;*
- iii. Quintegra Solutions Limited;*
- iv. SIP Technologies and Exports Limited; and*
- v. Zylog Systems Limited.*

8. Selection of functionally different companies as comparable companies to business support services

The DRP erred in upholding the TPO's action of not undertaking an objective comparative analysis and inter alia selecting the following companies as comparable to the business support services rendered by the Appellant, which are functionally different:

- i. Apitco Limited;*
- ii. Cameo Corp Services;*
- iii. Global Procurement Consult Limited;*
- iv. HCCA Business Services Private Limited;*
- v. Killick Agencies & Marketing Limited;*
- vi. Orient Engineering & Commercial Co. Limited; and*
- vii. TSR Darashaw Limited*

9. Rejection of companies selected as comparable to the business support services

The DRP erred in upholding the TPO's action of the undertaking an objective comparative analysis and inter alia rejecting the following companies as comparable to the business support services rendered by the Appellant:

- i. Educational Consultants (India) Limited;*
- ii. India Tourism Development Corporation Limited; and*
- iii. Overseas Manpower Corporation Limited.*

10. Non-inclusion of comparable companies in the final set

The DRP erred in upholding the TPO's action of not including Technicom Chemie India Ltd. and Ma Foi Management Consultants Limited as comparable to business support services though these companies qualify all the filters adopted by the TPO.

11. Carving out of technical support services from business support services

The DRP erred in upholding the TPO's action of carving out technical support services from the business support services rendered by the

Appellant and not appreciating that primarily the technical support services would fall within the ambit of business support services.

12. Selection of functionally different companies as comparable companies to technical support services

The DRP erred in upholding the TPO's action of not undertaking an objective comparative analysis and inter alia selecting the following companies as comparable to the technical support services rendered by the Appellant, which are functionally different:

- i. Archohm Consultant Private Limited;*
- ii. Engineers India Limited;*
- iii. IBI Chematur Engineering & Consultancy Ltd;*
- iv. Indus Technical & Financial Consultants Ltd.;*
- v. L&T Ramboll Consulting Engineers Ltd.;*
- vi. Mahindra Consulting Engineers Ltd.;*
- vii. MN Dastur & Company Private Ltd.;*
- viii. Rites Ltd.;*
- ix. Semac Ltd.;*
- x. TCE Consulting Engineers Ltd.;*
- xi. Wapcos Ltd.; and*
- xii. Zipper Trading Enterprises Ltd.*

13. Deviation in the approach adopted for computation of working capital adjusted margin

The TPO erred in deviating from the consistent method being followed for computation of working capital adjusted margin and sourcing the data from the databases over the annual reports of the comparable companies.

Further, the TPO erred in not considering 'Loans and advances recoverable in cash or kind' as trade receivable while computing the working capital adjusted margin.

14. Adjustment of risk differences

The DRP and the TPO erred in not adjusting the net margins of the comparable companies taking into account the functional and risk

differences between the international transaction of the Appellant and the comparable transactions in accordance with the provisions of rule 10B(1)(e) of the Income-tax Rules, 1962 ('the Rules').

15. Adjustment of differences in depreciation policy

The DRP erred in not adjudicating on the adjustment to be made for differences in the depreciation policy followed by the Appellant and the comparable companies.

16. Applicability of proviso to section 92C(2) of the Act

The DRP and the TPO erred in not allowing the option under the proviso to section 92C(2) of the Act in limiting the adjustment at a variation of 5 percent to the arm's length price determined.

The Appellant craves for leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case."

2. Brief facts of the case are as under:

Assessee filed its return of income declaring Rs.3,61,88,970/-, for year under consideration. The case was selected for scrutiny and notice under section 143(2) was issued to assessee along with notice under section 142(1), questionnaire accompanied by it. In compliance to statutory notices, representative of assessee appeared before Ld.AO and filed requisite details/documents as called for from time to time.

2.1. As assessee had entered into international transactions during year under consideration, reference under section 92C was made by Ld.AO. Ld.TPO upon receipt of reference issued notice u/s 92C (2) of the Income Tax Act, 1961 (the Act) read with 92D (3) of

the Act and called upon assessee to submit documents maintained in terms of transaction entered into by assessee with its AE.

Ld.TPO observed that assessee is wholly owned subsidiary of QUALCOMM group and provides following services to the group:

- R&D services in new technologies for enhancements and improvement of groups existing and new products;
- Development of wireless communications and application software, firmware and hardware for QUALCOMM group products; and
- Business support and market research services to QUALCOMM group.

Ld.TPO further observed that assessee during year entered into following international transaction of software development service and chip design services amounting to Rs.5,45,65,79,588/-, and business support services amounting to Rs.39,97,42,791/-. Transactions were benchmarked by assessee, using TNMM as most appropriate method with OP/OC as PLI as under:

No.	Nature of transaction	Approach of Taxpayer Method	Approach of Tax payer PLI	Value of transaction-Rs.
1.	Provision of software design, development and testing services	TNMM	OP/OC	4,105,115,692
2.	Provision of CDMA chipset design and development services	TNMM	OP/OC	1,351,463,896
3.	Provision of Business support & technical support services	TNMM	OP/OC	399,742,791
4.	Reimbursement to AEs	BNR	NA	330,020,8212
	Total			6,186,343,191

The results submitted by assessee in its 2 segments are as under:

Nature of transaction	Sales	Operating Cost (OC)	Operating profit (OP)	OP/OC (%)
Provision of software development services & chip design services	5,458,035,380	4,770,801,369	687,234,011	14.41%
Provision of business support services	399,750,791	367,243,484	32,507,307	8.85%

2.2. It was also observed that assessee computed arm's length price of international transaction in software development services and arrived at margin of 14.41%, whereas average PLI of comparables selected by assessee was at 15.01%. It was thus concluded that transaction entered into by assessee under software development service segment was at arm's length price. Ld.TPO called upon assessee to give margins of comparables selected by it, based on current year data for which margin was computed at 3.07%.

2.3. Similarly, under Business Support Service Segment, assessee shown margin of 8.85% vis-a-vis 10.49%, earned by comparables. It was thus submitted to be at arm's length price. Ld.TPO in respect of Business Support Service segment, called upon assessee to give margins of comparables selected based upon current year data, which was determined at 6.49%.

2.4. Ld.TPO thus issued show cause notice to assessee under these 2 segments. He objected for various filters adopted by assessee as assessee used multiple year data instead of current year data, Ld. TPO objected for not correctly analysing functions of comparables. He thus rejected comparables selected by assessee and used following set of comparables with an average margin of 28.74% by applying PLI as OP/TC under software development service segment:

No.	Company Name	OP/TC	OP/TC (W/o Fx)
1.	Akshay Software	12.38	8.16
2.	Aztecsoft	6.98	27.37
3.	Bodhtree Consult.	68.63	69.80
4.	Cat Tech.	41.69	34.43
5.	Goldstone Tech.	51.08	10.28
6.	Infosys	44.46	40.74
7.	L&T Infotech	16.96	21.33
8.	LGS Global	21.27	18.79
9.	Mindtree	4.24	27.36
10.	Persistent Sys	11.73	37.77
11.	RS Software (I)	9.87.35.05	10.15
12.	Sasken Comm. Tech.	16.89	51.44
13.	Tata Elxsi	27.76	16.88
14.	TCS	19.33	31.44
15.	Thinksoft	23.09	16.56

	Global Services Ltd.		
16.	Thirdware Solutions Ltd.	25.71	37.27
			28.74

2.5. While analysing functions of transaction under business support service segment, Ld.TPO bifurcated it into business/market support services and technical support services. Ld. TPO was of opinion that, assessee was engaged in marketing, promotional and technical support activities in India on behalf of its AE. He thus selected comparables under business service segment and technical service segment separately.

Ld.TPO thus proposed following adjustment:

Rs.68,38,94,302/- for software development service segment;
 Rs.4,48,12,762/- under business support segment; and
 Rs.67,97,051/- under technical support segment.

For determining approximate margin for technical support service segment Ld.TPO after analysing total employee profile and salary cost in hands of assessee, was of opinion that salary cost of employees for engineering service group under Business Support Segment is 1.19 crore, and therefore technical services can be taken to be approximately 10% of total services. Ld.TPO thus bifurcated 10% of total business support services to be technical support service provided by assessee to the AE.

3. Aggrieved by proposed adjustment, assessee raised objections before DRP. DRP while analysing software support service segment, excluded Bodhtree Consultants from list of comparables selected by Ld.TPO, direction was issued to exclude bank charges and Fringe Benefit Tax for computation of margin, DRP also directed for corrections of margins in respect of assessee and certain comparables and to allow working capital adjustment for software support service segment, business support service segment and technical support service segment.

However, in respect of carving out of technical support service from business support service segment, and comparables used for computing arm's length price, DRP upheld approach adopted by Ld.TPO.

3.1. Subsequent to DRP directions, Ld.AO passed final assessment order by making an adjustment as under:

- software service segment-Rs. 36, 28, 80, 568/-
- business support service segment-2, 14, 30, 624/-
- technical support service segment 54, 93, 157/-.

4. Aggrieved by final assessment order, assessee is in appeal before us now.

5. Ld.AR at the outset submitted that, **Ground No.1** is general in nature and therefore do not require any adjudication.

5.1. **Ground No. 4** has been submitted to be as not pressed by Ld.AR.

Accordingly Ground No.1 and Ground No.4 stands dismissed.

5.2. It has been submitted by Ld.AR that **Ground No.3, Ground No.5, Ground No.6** can be considered together for purposes of deciding comparables under Software Development Service Segment. Ld.AR submitted that Ld.TPO rejected Transfer Pricing study filed by assessee. It has been submitted by Ld.AR that comparability analysis undertaken by assessee was based on well accepted TP principles, and in absence of any information to the contrary, it was inappropriate to reject comparability analysis undertaken by assessee. Ld.AR submitted further that in case of *Sony India (P.) Ltd. v. CBDT* reported in [\(2006\) 157 Taxman 125 \(Delhi\)](#), it has been held that acceptance of Arm's Length Price declared by assessee is the rule and its rejection is the exception based on the presence of factors enumerated in Section 92C (3) (a) to (d) of the Act. The Ld. A.R thus submitted that Ld.TPO should have accepted assessee's analysis, since it was in accordance with law, and it was undertaken by an external agency. Ld.AR thus submitted that Ld.TPO had no reason nor has recorded reasons to believe that transactions were not at the Arm's Length.

6. We have perused specific objection raised by the Ld.AR regarding rejection of Transfer Pricing study by Ld.TPO. However it is observed that Ld.TPO objected various filters applied by assessee like use of multiple year data etc. To this we observe that as per Rule 10 B (4) of Income Tax Rules, Rule 10B(4) stipulates that, contemporaneous information and documents should be considered, as far as possible for purpose of comparing

uncontrolled transactions with international transactions for determination of Arm's Length Price. Thus, such comparability needs to be tested by using current year's data. It is only when current year's data does not give a true picture of affairs and results of comparables due to existence of some abnormal circumstances, use of multiple year data may be considered. If there be no such abnormal or exceptional circumstances/facts, existing for year under consideration which could influence results as well as determination of transfer pricing, then data relating to financial year in which international transaction has been entered into shall be used.

6.1. Accordingly, we reject this argument advanced by Ld.AR. However on perusal of TP order, it is observed that Ld.TPO has rectified filters used by assessee and has also used comparables selected by assessee for computing the ALP of transaction.

6.2. Ld.TPO by applying separate filters, shortlisted 15 comparables under software development service segment, wherein 10 comparables are selected by assessee and 5 comparables by Ld. TPO as under:

S.No.	Name of the Company	Margins as per Final order	Assessee's submission	Scenario 1
A	Comparables selected by TPO			
1	Akshay Software Technologies Limited	7.00%	7.00%	7.00%
2	Aztecsoft Limited	26.36%	26.36%	26.36%
3	Godstone Technologies Limited	9.31%	9.31%	9.31%
4	Larsen & Toubro Infotech	20.31%	20.31%	20.31%

	Limited			
5	LGS Global Limited (Lanco Global Systems Limited)	12.87%	12.87%	12.87%
6	Mindtree Limited	26.29%	26.29%	26.29%
7	Persistent Systems Private Limited	36.25%	36.25%	36.25%
8	R S Software (India) Limited	9.74%	9.74%	9.74%
9	Sasken Communication Technologies Limited (Segmental)	26.03%	26.03%	26.03%
10	Thinksoft Global Services Ltd.	12.80%	12.80%	12.80%
	Average of A	18.70%	18.70%	18.70%
B	Uncomparable Companies selected by TPO			
11	Tata Consultancy Services Limited	30.47%		
12	Infosys Technologies Limited	38.38%		
13	Cat Technologies Limited	32.96%		
14	Tata Elxsi Ltd. (Segmental)	17.80%		17.80%
15	Thirdware Solutions Limited	34.62%		34.62%
	Average of B	30.85%	DIV/0	26.21%
	Arithmetic mean of all companies	22.75%	18.70%	19.95%

He submitted that from above list, even if following comparables are considered for exclusion, then assessee would fit into +/-5% range:

- I. Tata consulting services Ltd
- II. Cat technologies Ltd
- III. Tata LXE Ltd
- IV. Thirdware solutions Ltd
- V. Infosys Ltd

6.3. Before we take up comparability analysis, it is *sine qua non* to analyse functions, assets involved and risk assumed by assessee under this segment.

Provision of software development and chip design service segment

While providing software support development service to the AE, assessee has entered into following international transaction as per TP documentation:

S.No.	Nature of transaction	Method	Value of transaction
1.	Provision of software design, development and testing services	TNMM	4,105,115,692
2.	Provision of CDMA chipset design and development services	TNMM	1,351,463,896
3.	Provision of business support services	TNMM	399,742,791
4.	Reimbursement to AEs	BNR	330,020,812

(A) Functions performed:

From TP study it has been observed that Assessee entered into separate research and development agreement (the agreements) with its associated enterprises being QUALCOMM Global Trading and QUALCOMM (parent company).

Hyderabad Unit of QUALCOMM India Pvt. Ltd., is engaged in business of conducting research and development ("R&D") in field of wireless communications and applications software, and hardware Business Support Service and other services as requested by QUALCOMM and its group companies. Assessee is remunerated with actual cost incurred plus markup of 15% for its services. For purposes of research and development, AEs will provide assessee

with information, documentation, software, source code and other proprietary intellectual property to be used in performing service under the agreements. It is also agreed between the parties that all intellectual property rights including patents, software, trade secrets, related documentation etc. lead by assessee in performing services under the agreement shall fully vested with the AE's. Thus assessee jointly develops software by the virtual terms across the globe and communicate regularly with other development teams through video and audio conferencing facilities. This helps in synchronising the code being developed.

It has been submitted in the TP study that assessee undertakes training of employees, limited quality controls, limited testing of software. It does not involve integration and implementation of post-same services.

(B) Risks assumed:

The key risk which has been identified as applicable to assessee in relation to software service segment are:

Market risk: It has been reported in TP study that assessee undertakes limited market risk since it provides services only to its AE and does not approach 3rd parties to render services. Assessee would be any ways compensated for work done, even if final product is unsuccessful, or other substantial reworking is required, to make the final product to meet the market requirement. Assessee also undertakes foreign exchange risk, as consideration is received in US Dollars, and therefore it bears

foreign exchange fluctuation. Other risks such as Product Development Risk, Credit and Collection Risk, Utilisation Risk, Service Liabilities Risk, IP Address are borne by AE.

Thus in TP study assessee has been categorised to be operating at minimal risk, since 100% services are provided to its AE, developing of software is carried out along with AE for AE. And the intangibles that get generated out of such software developed jointly by assessee and AE, is entirely owned by the AE. Thus assessee has been characterised as captive service provider with absolutely minimal risks.

7. Now with the above background of assessee in terms of functions performed and risk assumed, we shall examine comparability of assessee with the comparables disputed before us.

Tata Consultancy Services Ltd (TCS)

Assessee objected inclusion of this company proposed to be used in the final set of comparables by Ld.TPO by contending that it was not functionally comparable. Ld.AR submitted that this comparable does not give segmental details of product and services. It has been submitted that this company is a leading global brand, having huge intangibles and significant expenses on R&D and that it is a giant risk taking company and has also undergone various acquisition and divestment during year under assessment. Ld.AR thus prayed for its exclusion.

7.1. On the other hand, Id. DR relied upon orders passed by authorities below.

8. We have perused submissions advanced by both sides in light of records placed before us.

8.1. Annual report of this comparable has been placed before us and on perusal of the same, it goes to prove that this company is into providing diversified operations viz. TCS into IT Infrastructure services, BPO, ITES, Engineering and Industrial services. It is also observed that this company is into sale of equipment and software licence with wide client base and has been conferred with numerous awards/recognition and is having income from IT and consultancy services, sale of equipment and software licence but having no segmental data.

8.2. Ld.AR submitted that comparability of Tata has been examined by the Coordinate Bench of the Tribunal in *St-Ericsson India (P.) Ltd. (supra)* wherein it was ordered to be excluded as a comparable *vis-à-vis* ST-Ericsson India (P.) Ltd., a captive software development provider by relying upon *Sony Mobile Communications International AB v. Dy.DIT [2016] 69 taxmann.com 404 (Delhi - Trib.)* for AY 2009-10, wherein it was ordered to be excluded on account of acquisition and merger having total income of Rs.21535.75 crores and payment of sale of equipment and software licence at Rs. 668.25 crores. Tata has also expended Rs.42.31 crores on its R&D and a highly risk bearing company and as such, cannot be a suitable comparable *vis-à-vis* taxpayer which is a

captive software provider being remunerated on cost plus mark up basis for rendering 100% services to its AE.

Respectfully following the same, we direct Ld. TPO to exclude this company from final set of comparables.

8.3. Infosys Ltd.

The assessee objected inclusion of this company proposed to be used in final set of comparables by Ld.TPO by contending that it was not functionally comparable.

It is submitted by Ld.AR that Infosys Technologies is engaged in providing development and maintenance of computer software and it also produces and sells software, being engaged in other diverse activities. It has been submitted that this company faces competition from consulting, offshore technology, BPO firms etc. Ld.AR further submitted that this company enjoys high market ranking in terms of its ownership of brands and it offers its product to banking industry (Finance) while assessee is only a captive service provider to its AEs.

He further submitted that in assessee's own case for assessment year 2011-12, 2013-14 and 2014-15, DRP excluded this company by following decision of *Hon'ble Delhi High Court* in case of *Agnity India Technologies Pvt. Ltd.* for the reason that, Infosys being a giant operating full-fledged risk leading to maximum profit having huge revenues and expanding, its turnover on R&D having huge

intangibles is not a suitable comparable with the assessee, who is only a captive provider operating on a minimum risk.

8.3.1. On the contrary Ld.DR submitted that it is incorrect to say that Infosys is a giant company, because giantness is a comparative factor. He submits that assessee is also a giant with sizable magnitude of its turnover and as a matter of fact, this argument was advanced before Ld. TPO but Ld.TPO with reasons rejected the same. According to Ld.CIT DR, reasons recorded by the authorities below are cogent and convincing and cannot be interfered with.

8.3.2. We have perused submissions advanced by both sides in light of records placed before us.

8.3.3. Undisputedly, assessee before us is a captive service provider that provides 100% services to its AEs only, as desired by its AE. Annual Report of Infosys placed before us shows that this company is into providing diversified services like providing end-to-end business solutions that leverage technology thereby enabling clients to enhance business performance. The solutions span over entire software life cycle encompassing technical consulting, design, development, reengineering, maintenance, systems integration, package evaluation and implementation, and testing and infrastructure management services. In addition, this company offers software products for banking industry.

9. Further assessee is a captive service provider providing services exclusively to its AEs on cost plus basis having minimum

risk and absolutely no intangibles. Whereas, this company is found to be having high turnover and huge intangibles as per annual report. It is also observed that this company is expanding in the areas of R&D for developing and creating new functionalities which is to the tune of 1.3% of the total revenue. Furthermore, it is also not in dispute that Infosys owns product "Finacle", which is submitted to be a universal banking solution empowering banking sector across the globe. Perusal of P&L account, available in annual report reveals that this company has income of Rs. 15648 crores from software services and product of which segmental information is not available.

This company has been ordered to be excluded by the Hon'ble Delhi High Court in case cited as *CIT v. Agnity India Technologies (P.) Ltd.* reported in (2013) 36 Taxmann.com 289. Hon'ble High Court has observed that this Tribunal while examining comparability of this company with Agnity India Technologies which was also a captive service provider operating on minimal risk providing software development service has excluded this company from list of comparables for reason that it is a giant company in area of development of software, assumption of risk leading to high profits etc. Hon'ble High Court upheld view expressed by this Tribunal for excluding Infosys from list of comparables.

9.1. We, therefore, direct Ld.TPO/AO to exclude this company from final list of comparables for benchmarking international transactions.

10. Cat Technologies Ltd. (standalone)

Ld.AR objected for inclusion of this company proposed to be used in the final set of comparables by Ld.TPO by contending that it was not functionally comparable.

It has been submitted by Ld.AR that this company derives its income from training, software development and medical transcription and has no segmental information. Further, it is submitted that during year under consideration, this company had entered into field of job placement portal and also plans to expand such operations. It is also submitted that management has accepted that this company is well placed in the market as a leading HR BPO service provider.

10.1. On the other hand Ld.CIT DR submitted that, services rendered by assessee, are similar to services rendered by this company which is very much evident from annual report placed before us under the sub heading "Outlook of the company". He further submitted that in so far as running of job portal is concerned, it is just like Naukri.com and does not know whether anything is charged from the user of such website without which information is not safe to exclude this company from list of comparables.

10.2. We have perused submissions advanced by both sides in light of records placed before us.

10.3. It is observed that this company is running both software development and maintenance support services. Further, Schedule IX of the Profit and loss account of this company at page 36 of the annual report shows that this company is deriving a sum of Rs.8,49,39,375/- from out of software development and consulting services. However no segmental data is available and as stated by Note No.7 of Notes on Account that the company's exclusive business is medical transcription and training software development and consulting services which should be treated as the only reportable segment.

We, therefore, direct Ld.TPO to exclude this company from the final list of comparables.

11. Thirdware Solutions Ltd.

The assessee objected inclusion of this company proposed to be used in final set of comparables by Ld.TPO by contending that it was not functionally comparable.

It was submitted by Ld.AR that this company is involved in application implementation, management & development services, and therefore cannot be compared with assessee, who is 100% captive software developer and company engaged in diversified business including software products and hence cannot be treated as comparable with the assessee at all, as it is not possible to work out and exclude receipts and expenditure of different categories of

income not related to software development. Besides this, Ld.AR submitted that there is no information relating to segmental break up in annual report of this company for the Asst. Year 2009-10 providing information on revenue and expenditure from software services and hence, segmental margin cannot be computed for benchmarking international transaction of providing software development services.

11.1. On the contrary it has been submitted by Ld.CIT DR that this company is involved in software development and other services. He also relied upon observations and findings of authorities below.

11.2. We have perused submissions advanced by both sides in light of records placed before us.

11.3. It is observed that that this company derives income of Rs.77,03,21,375/- from sales whereas other income is Rs.2,30,48,603/-Schedule XII relates to sales shows that this company is deriving income of Rs.2,32,37,588/- from sales of licences, Rs.8,91,77,023/- from software services, Rs.47,85,72,420/- from export of SEZ unit, Rs.16,29,00,630/- from export from STPUI unit and a sum of Rs.1,64,33,744/- from subscriptions. No segmental information is available.

We accordingly direct Ld.AO to exclude this company from the final list of comparables.

12. Tata Elxsis Ltd (segmental)

The assessee objected inclusion of this company proposed to be used in final set of comparables by Ld.TPO, by contending that it was not functionally comparable. It has been submitted by Ld.AR that this company is into diversified business activities deriving income from sale of software as well as products.

12.1. On the contrary Ld. DR submitted that like assessee Tata Elxsi is a software developer, and they are involved in product design services. Ld.CIT DR contended that in profit and loss account, there is no break up, however, referring to observations of Ld.TPO, he submitted that this company is providing software services but only with its verticals, and therefore is comparable with functions carried out by assessee. Ld. CIT DR argued that R&D expenses of this company is only 3.26% of its revenue which is not at all substantial.

12.2. We have perused submissions advanced by both sides in light of records placed before us.

12.3. It is observed that this company is engaged in software development services, product designing services, Innovation Design Engineering, Visual Computing Lab Division (animation and special effects) etc. Further under product design services, this company is developing operating software on a wide variety of software ranging from automotive systems, VLSI design, embedded systems, networking, digital signal processing and multimedia

systems. They serve sectors such as automotive, aerospace, consumer products, networking, semiconductors, multimedia, telecom and instrumentation with cost effective product engineering services. Under the head "Visual Computing Labs" they deliver 3D computer graphics, animation and special effects in the pre-production, production and post-production of content for the film, television, gaming and advertising industry. It is also further stated that during year VLC successfully completed first fully animated commercial film.

12.4. This company is stated to be involved in designing technology products including hardware, software across the product lifecycle in industries such as Automotive, consumer electronics, networking, semiconductor, storage and telecom. In profit and loss account of assessee for year ended March 31, 2009, revenue from sales and services are shown at Rs.41,851 lacs and revenue from sales support is shown at Rs.2352.41 lacs. Item No.7 of the schedules to the financial statements show that income from sales of goods is recognized upon passage of risk and rewards of ownership to the goods.

12.5. Thus in our view this company cannot be considered to be a mere software developer and over and above, it is involved in products and Innovative functions like visual computing labs.

We, therefore, direct Ld. AO/TPO to exclude this company from final list of comparables.

13. Accordingly Ground No. 6 raised by assessee stands allowed as indicated above.

14. Ground No. 7: Ld.AR does not wish to press this ground at this moment and seeks liberty to raise the issue in any other assessment years for the purposes of comparability analysis.

14.1. Accordingly we dismiss this ground as 'not pressed' with liberty to raise the issue at appropriate circumstances.

15. Before arguing **Ground No. 8-10**, Ld.AR submitted that, it would be pertinent to decide **Ground No.11**, as assessee is challenging carving out technical support services from business support services by Ld. TPO without any basis.

15.1. Ld.AR submitted that assessee is engaged in rendering routine business support services to its AEs like identifying business opportunities, marketing AE's products/solutions in Indian market, sharing information on local market conditions etc. He submitted that Ld. TPO carved out a separate segment called technical support service segment from business support service segment on footing that assessee was engaged in rendering technical services. He submitted that such carving out without any basis is inappropriate as technical support services provided by assessee to its AEs form an integral part of marketing support services performed by it under business support service segment. He submitted that Ld.TPO has accepted the approach adopted by assessee in preceding and subsequent assessment years. It has

been vehemently contended by Ld.AR that it is only for year under consideration that Ld.TPO has carried out this segregation which is based on employee cost that the Ld. TPO has attributed to engineering services provided by assessee under the larger segment of business support. He submitted that 10% basis is also an ad-hoc basis. Ld.AR submitted that no separate agreement exists for rendering technical support services. It has been submitted that no separate payment has been received by assessee for alleged technical support services. Placing reliance upon principle of consistency, Ld.AR submitted that for assessment year 2008-09 and assessment years 2012-13, 2013-14 Ld.TPO has accepted benchmarking of transaction under head business support service segment and functions performed by assessee during year under consideration vis-a-vis immediately preceding assessment years and subsequent assessment years has been identical and similar. He submitted that there exists no reason to disregard approach adopted by assessee which admittedly has been accepted by Department. He thus vehemently opposed separate benchmarking of technical support service segment.

15.2. On perusal of aforesaid facts vis-a-vis records placed before us, we observe that Ld. TPO/AO/DRP has not provided any cogent reason for this segregation of technical support services from business support service segment. It is also not disputed by revenue authorities that technical support service segment is also

rendered under same agreement entered into by assessee and there is no separate payment that has been received by assessee.

15.3. In our view segregation of abundant transaction must be done only if exceptions laid down by *Hon'ble Delhi High Court* in case of *Sony Ericson Mobile Communication India Pvt.Ltd. vs CIT* reported in *55 Taxmann.com 240* are met with.

15.4. It is well settled that although closely related transactions can be aggregated, but, unrelated transactions cannot be clubbed for determining ALP on a combined basis. The relevant criteria to determine whether certain transactions be considered as one international transaction or not is to see if such transactions were entered into a package deal or were intended to be simultaneously accepted or these are so closely linked that one cannot at all stand without the other. If above criteria is satisfied, then, two or more related transactions can be considered as one international transactions for purpose of determining their ALP.

15.5. On the contrary, if above criteria is not satisfied, then, these transactions are to be viewed separate from each other and, accordingly, their ALP should also be determined in a distinct manner as if these are two separate independent transactions. The mere fact that both intra-group services and goods are utilized by assessee for manufacture of the final product, cannot be treated decisive to consider such separate transactions as a single transactions.

15.6. Coordinate Bench of this Tribunal in case of Gurner India Pvt. Ltd. vs DCIT reported in 70 Taxmann.com 240 has observed as under:

"5.2 The key question which, therefore, falls for our consideration is whether the segregation of these two transactions of payment of Royalty and Fees for technical services from the other international transaction, is justified?"

5.3 The Hon'ble jurisdictional High Court in Sony Ericson Mobile Communication India (P.) Ltd. v. CIT [\[2015\] 374 ITR 118/231 Taxman 113/55 taxmann.com 240 \(Delhi\)](#), has dealt with the circumstances in which aggregation can be done in the context of AMP expenses. The principles laid down in this case are universally applicable and are not confined to the peculiar facts of that case alone. It has been held that 'transactions includes the number of closely linked transaction.' Dealing with AMP expenses, it held vide paras 80 and 81 that inter-connected international transactions can be aggregated and section 92(3) does not prohibit the set off. Further, in paras 91, 121 and others, it held that the ALP of AMP expenses should be determined preferably in a bundled manner with the distribution activity. Vide paras 194 (i), (ii), (viii) and others it held that for determining the ALP of these transactions in a bundled manner, suitable comparables having undertaken similar activities of distribution of the products and also incurring of AMP expenses should be chosen. It still further held in paras 100, 121, and 194 (iii), (vi) and (xi) that if adjustment is not possible or comparables are not available, then, TNMM on entity level should not be applied and the international transaction of AMP should be viewed in a debundled or a segregate manner. In separately determining the ALP of the AMP expenses, the Hon'ble High Court held that the TPO is free to choose any other suitable method and in making TP adjustment on account of AMP expenses, appropriate set off/purchase price adjustment should be allowed from the other transaction of distribution of the products. The Hon'ble High Court also held in page 92 of its judgment that 'it would not be proper and appropriate to apply the TNMM method in case the Indian assessed is engaged in manufacturing

activities and distribution and marketing of imported and manufactured products as interconnected transactions. Import of raw material for manufacture would possibly be an independent transaction viz., marketing and distribution activities or functions.' A careful perusal of the judgment of the Hon'ble jurisdictional High Court divulges that though a number of closely linked transactions can be aggregated, but, the transactions which are not closely related to each other would require determination in a segregated manner.

5.4. The Hon'ble Punjab & Haryana High Court in *Knorr-Bremse India (P.) Ltd. v. Asstt. CIT* [\[2016\] 380 ITR 307/\[2015\] 236 Taxman 318/63 taxmann.com 186](#), has held that in case of a package deal where each item is not separately valued, but, all are given a composite price, this should be considered as one international transaction and processed accordingly for the transfer pricing purpose. It further held that where a number of transactions are priced differently, but, on the understanding that the pricing was dependent upon the assessee accepting all of them together (i.e., either take all or leave all), then also, the separate transactions be considered as one international transaction. In such circumstance, burden has been placed on the assessee to prove that although each transaction is priced separately, but, they were provided under one common understanding. It further laid down emphatically that : 'the contention that as the services and goods are utilized by the assessee for the manufacture of the final product they must be aggregated and considered to be a single transaction and the value thereof ought to be computed by the TNMM is not acceptable. Merely because the purchase of each item and the acceptance of each service is a component leading to the manufacture/production of the final product sold or service provided by the assessee, it does not follow that they are not independent transactions for the sale of goods or provision of services. The end product requires several inputs. The inputs may be acquired as part of a single composite transaction or by way of several independent transactions. In the latter case, the sale of certain goods and/or the provision of certain services from out of the total goods purchased or services availed of by an assessee together can form part of a separate

independent international transaction. In such an event, the AO/TPO must value this group of sale or purchase of goods and/or provision of services as separate transaction.'

5.5 When we consider the ratio decidendi of the above referred two judgments, the picture which emerges is that although closely related transaction can be aggregated, but, unrelated transaction cannot be clubbed for determining ALP on a combined basis. The relevant criteria to determine whether certain transaction be considered as one international transaction or not is to see if such transactions were entered into a package deal or were intended to be simultaneously accepted or these are so closely linked that one cannot at all stand without the other. If the above criteria is satisfied, then, two or more related transactions can be considered as one international transaction for the purpose of determining their ALP. On the contrary, if the above criteria is not satisfied, then, these transaction are to be viewed separate from each other and, accordingly, their ALP should also be determined in a distinct manner as if these are two separate independent transactions. The mere fact that both the intra-group services and goods are utilized by the assessee for the manufacture of the final product, cannot be treated decisive to consider such separate transactions as a single transaction."

15.7. It is observed that, in facts of present case Ld.TPO arbitrarily, without any basis, segregated transaction without analysing agreement under which such services has been applied along with business support service. Further in preceding as well subsequent assessment years revenue has accepted approach adopted by assessee. Under such circumstances we are inclined to set aside this issue back to Ld.TPO to be analysed on basis of equipment entered into by assessee actual nature of transaction being interlinked with each other in the light of aforesaid principles laid down by *Hon'ble High Courts and Coordinate bench of*

this Tribunal reproduced hereinabove. Needless to say that, proper opportunity shall be granted to assessee as per law.

15.8. Accordingly we set aside Ground No. 11 back to Ld.TPO for fresh adjudication.

16. As we have set aside ground No. 11, we decline from expressing our view in respect of ground No. 8-10 and ground No. 12-13 raised by assessee, as these are also to be decided afresh.

16.1. Accordingly these grounds are also set aside to Ld.TPO to be decided afresh.

17. In the result appeal filed by assessee stands allowed for statistical purposes.

Order pronounced in open court on/06/2019.

**Sd/-
(N.S. SAINI)
ACCOUNTANT MEMBER**

**Sd/-
(BEENA A PILLAI)
JUDICIAL MEMBER**

Dt. 03rd June, 2019

- *gmv*

Copy forwarded to: -

Appellant
Respondent
CIT
CIT(A)
DR, ITAT

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By Order,

ASSISTANT REGISTRAR

ITAT Delhi Benches

	Date
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