

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. 1956/Del/2015

AY: 2012-13

&

ITA No. 7682/Del/2017

AY: 2013-14

Aircom International (India) Pvt.Ltd. M-12, Balrama House Karampura Commercial Complex New Delhi 110 015 PAN: AADCA0915A	vs.	ACIT, Circle 2(1) New Delhi
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(Appellant)

(Respondent)

Assessee by : Sh. Salil Kapur, Adv.
Department by : Sh. Sanjay I Bara, CIT, D.R.

Date of Hearing : 01/05/2019

Date of Pronouncement: 20/06/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeals have been filed by assessee against orders passed by Ld.DCIT, Circle 2(1), New Delhi dated 25.01.2017 for Assessment Year 2012-13 and dated 30/10/2017 for A.Y. 2013-14, on following grounds of appeal:

ITA 1956/Del/17 : A.Y. 2012-13

The Appellant submits that each of the grounds is independent and without prejudice to one another.

In facts and the circumstances of the case, impugned order is invalid and bad in law inter- alia on the following grounds :

1. Impugned order passed by AO pursuant to directions of Id. Dispute Resolution Panel(DRP) proceeds on extraneous , irrelevant presumptions / considerations in making unjustified adjustments under chapter x of the act and further in disallowing software license fee and management fees by ignoring to consider relevant and complete facts, hence the same deserves to be modified and the additions made to returned income deserve to be deleted being contrary to law, unjustified and bad in law.

1.1 That, on facts and circumstances of the case and in law, while passing the assessment order, the learned AO has erred in assessing the total income of the Appellant at Rs 14,91,21,844 as against returned income of Rs. 4,91,40,840/-.

2 Grounds relating to Corporate Tax Matters:

That, on the facts and circumstances of the case and in law:

2.1. The Ld. AO/DRP erred in disallowing Rs. 1,49,65,459/- as capital expenditure.;

2.2. Ld. AO/DRP erred in holding that expenditure of Rs. 1,99,53,945/- was of nature and completely failed to appreciate the real and relevant facts.

2.3. Without prejudice to our contentions that the aforesaid expenditure is reverse nature, the Ld. AO has failed to provide us with the depreciation on capitalization of software license fees in earlier years.

2.4. Ld. AO/DRP erred in disallowing valid claim of Appellant on relevant and unjustified considerations without appreciating true and complete facts.

2.5. The Ld AO / Hon'ble DRP has erred in holding that management fees of Rs.3,12,74,397 paid by Appellant is not wholly and exclusively for the purpose of the business.

2.6. Without prejudice to the above, the Ld. AO has erred in law and on facts making the addition of management fees which has already been added by the Ld.TPO while making the adjustment u/s 92CA of the Act.

2.7. The Ld. AO / Hon'ble DRP has failed in not conclusively deciding that management fees is neither excessive nor unreasonable and thus not covered under provisions of section 40A(2)(a) of the Act.

2.8. Without prejudice to the grounds above, the Ld. AO has failed to grant us the foreign tax credit of INR 1,00,98,225/- claimed by the appellant in the return of income.

3 Grounds relating to Transfer Pricing Matters:

That, on the facts and circumstances of the case and in law:

3.1. Ld. AO/DRP/TPO has erred in making an addition of Rs. 5,37,41,148 under section 92CA of the Act to the total income of the Appellant on account of adjustment in the arm's length price ("ALP") of the international transactions, pertaining to provision of software development services, provision of software deployment services and availing of intra-group services, entered into by the Appellant with its associated enterprises ("AEs").

3.2. Ld.AO/DRP/TPO have erred in rejecting the economic analysis undertaken by the Appellant by conducting a fresh economic analysis for impugned international transaction pertaining to provision of software development services and provision of software deployment services.

3.3. Ld. AO/DRP/TPO have erred in rejecting certain valid companies and adding certain invalid companies to the final set of comparable companies on irrelevant, unlawful and unjustified reasons.

3.4. Ld. AO/DRP/TPO have erred in conducting a fresh economic analysis by using arbitrary filters and irrelevant criteria for identifying companies comparable to the Appellant.

3.5. Ld. AO/DRP/TPO have erred in using single year data for financial year (FY) 2011-12 of alleged comparable companies without considering the fact that the same was not available to Appellant at the time of complying with transfer pricing documentation requirements and disregarding the Appellant's claim for use of multiple year data for computing the arm's length price.

3.6. Ld. AO/DRP/TPO have failed to make appropriate adjustments to account for differences in risk profile of the Appellant and further erred in considering certain expenditure as operational/ non-operational in nature without valid basis.

3.7. Ld.AO/DRP/TPO has erred in disregarding elaborate documentation and evidence submitted as part of assessment proceedings and assuming that 'no benefit' has conferred to the Appellant and that there was no need for international transaction pertaining to availing of intra-group services from its AE.

3.8. AO/DRP/TPO has erred in applying the Comparable Uncontrolled Price CUP") method and determining the ALP of the international transaction pertaining to availing of intra-group services as 'NIL' based on extraneous considerations and by not appreciating the material on record.

3.9. Without prejudice to our ground that payment for intra-group services should not be disallowed, the Ld. AO/DRP/TPO have erred in not excluding management fees while computing the operating margin of the assessee in respect of software development services and software deployment services, thereby adopting position contrary to previous assessment years.

3.10. Ld.AO/DRP/TPO has erred, in law and facts, in computing the adjustment in respect of software development segment without giving the benefit of +/- 5 percent range as provided in second proviso to section 92C(2) of the Act.

4. The Ld. AO has erred in charging interest under section 234A and 234B of the Act.

5. The Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The Appellant submits that each of the above grounds is independent and without prejudice to one another."

The Appellant craves 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.

ITA 7682/Del/17 : A.Y. 2013-14

The Appellant submits that each of the grounds is independent and without prejudice to one another.

In facts and the circumstances of the case, impugned order is invalid and bad in law inter- alia on the following grounds :

1. Impugned order passed by AO pursuant to directions of Id. Dispute Resolution Panel(DRP) proceeds on extraneous , irrelevant presumptions / considerations in making unjustified adjustments under chapter X of the act and further in disallowing software license fee and management fees by ignoring to consider relevant and complete facts, hence the same deserves to be modified and the additions made to returned income deserve to be deleted being contrary to law, unjustified and bad in law.

1.1 That, on facts and circumstances of the case and in law, while passing the assessment order, the learned AO has erred in assessing the total income of the Appellant at Rs.15,27,28,980 as against returned income of Rs. 8,87,27,609/-.

2 Grounds relating to Corporate Tax Matters:

That, on the facts and circumstances of the case and in law:

2.1. The Ld. AO/DRP erred in disallowing Rs.1,38,89,412/- as capital expenditure.;

2.2. Ld. AO/DRP erred in holding that expenditure of Rs. 1,85,19,216/- was of enduring nature and completely failed to appreciate the real and relevant facts.

2.3. Without prejudice to our contentions that the aforesaid expenditure is reverse nature, the Ld. AO has failed to provide us with the depreciation on capitalization of software license fees in earlier years.

2.4. Ld. AO/DRP erred in disallowing valid claim of Appellant on relevant and unjustified considerations without appreciating true and complete facts.

2.5. The Ld AO / Hon'ble DRP has erred in holding that management fees of Rs.9,79,877 incurred by Appellant towards advances and debts written off during the captioned year.

2.6. Without prejudice to the grounds above, the Ld. AO has failed to grant us the foreign tax credit of INR 1,24,96,695/- claimed by the appellant in the return of income.

3 Grounds relating to Transfer Pricing Matters:

That, on the facts and circumstances of the case and in law:

3.1. Ld. AO/DRP/TPO has erred in making an addition of Rs. 4,91,32,078 under section 92CA of the Act to the total income of the Appellant on account of adjustment in the arm's length price ("ALP")

of the international transactions, pertaining to provision of software development services, provision of software deployment services and availing of intra-group services, entered into by the Appellant with its associated enterprises ("AEs").

3.2. Ld.AO/DRP/TPO have erred in rejecting the economic analysis undertaken by the Appellant by conducting a fresh economic analysis for impugned international transaction pertaining to provision of software development services and provision of software deployment services.

3.3. Ld. AO/DRP/TPO have erred in rejecting certain valid companies and adding certain invalid companies to the final set of comparable companies on irrelevant, unlawful and unjustified reasons.

3.4. Ld. AO/DRP/TPO have erred in conducting a fresh economic analysis by using arbitrary filters and irrelevant criteria for identifying companies comparable to the Appellant.

3.5. Ld. AO/DRP/TPO have erred in passing an order which has computational errors in the margin of comparable companies used in the determination of the ALP for software development service segment.

3.6. Ld. AO/DRP/TPO have erred in not following the directions issued by the Hon'ble DRP, thereby acting in contradiction to the provision of section 144C(13) of the Act.

3.7. Ld.AO/DRP/TPO has erred in using single year data for FY 2012-13 of alleged comparable companies without considering the fact that the same was not available to appellant at the time of complying with transfer pricing documentation requirements and disregarding the appellant's claim for use of multiple year data for computing arm's length price.

3.8. Ld.AO/DRP/TPO have failed to make appropriate adjustments to account for differences in risk profile of the Appellant and further erred in considering certain expenditure as operational/ non-operational in nature without valid basis.

3.9. Ld.AO/DRP/TPO has erred in disregarding elaborate documentation and evidence submitted as part of assessment proceedings and assuming that 'no benefit' has conferred to the Appellant and that there was no need for international transaction pertaining to availing of intra-group services from its AE.

3.10. AO/DRP/TPO has erred in applying the Comparable Uncontrolled Price CUP") method and determining the ALP of the international transaction pertaining to availing of intra-group services as 'NIL' based on extraneous considerations and by not appreciating the material on record.

3.11. Without prejudice to our ground that payment for intra-group services should not be disallowed, the Ld. AO/DRP/TPO have erred in not excluding management fees while computing the operating margin of the assessee in respect of software development services and software deployment services, thereby adopting position contrary to previous assessment years.

4. The Ld. AO has erred in charging interest under section 234A and 234B of the Act.

5. The Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves 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."

It is observed from records that A.Ys under consideration have similar facts, and there is no change in functional profile of assessee. Further A.Y. 2013-14 is a stay granted matter and, therefore, we take up assessment year 2013-14 first.

A.Y.2013-14

2. Brief facts of case are as under

Assessee filed its return of income on 29/11/13 declaring total income of Rs.8,87,27,609/-. The case was selected for scrutiny and subsequently, statutory notices were issued along with questionnaire to assessee to furnish relevant information. In response to statutory notices, representatives of assessee appeared

before Ld.AO and filed requisite details as called for. Ld.AO observed that, assessee is engaged in business of software solutions and consultancy services in area of telecommunication. For year under consideration, Ld. AO observed that assessee declared gross turnover of Rs.54,18,97,277/-, and after making various adjustment/disallowances, net taxable income of Rs.8,87,27,610/- was returned.

2.1. As per Form 3 CEB, it was observed by Ld.AO that, assessee during year, undertook international transaction with its associated enterprises, valuing more than 15 crores, and accordingly reference was made to Transfer Pricing Officer (TPO), to determine arm's length price of international transactions in accordance with provisions of section 92 CA of the Income Tax Act, 1961 (the Act).

2.2. On receipt of reference, Ld.TPO issued notice to file documentation as prescribed under Rule 10 D of Income Tax Rules, and other details.

2.3. Ld.TPO observed that assessee is engaged in business of provision of software equipments services, software deployment services, consultancy services, software sub-licensing and AMC activities. It was observed that, in TP study, assessee was broadly held to be carrying out activities under following business segment:

Sl. No.	International Transaction	Amount (in Rs.)
2.	Provision of software deployment services	19,39,79,084
3.	License fees paid	1,85,19,216
4.	Provision of software deployment services	9,13,59,014

5.	Services received	4,60,78,357
6.	Provision Consultancy services	2,10,76,854
7.	Reimbursement of expenses received	1,86,48,612
8.	Reimbursement of expenses paid	2,41,56,487

2.4. It was observed that assessee used TNMM as most appropriate method and OP/OC as PLI, with 11 comparables, having average margin of 4.51% for computing international transactions entered into by assessee with its AE to be at arm's length price. Ld.TPO issued notice, calling upon assessee to establish:

- as to how transactions entered into by assessee under all 3 segments were at arm's length price;
- details regarding intra-group services received by assessee from its AE during year and to justify need for receipt of such services for which payment has been made to AE.

Ld.TPO after verifying all details filed by assessee, proposed adjustment of Rs.4,91,32,078/- in respect of international transactions entered into by assessee.

3. Aggrieved by proposed adjustment, assessee filed objection before DRP, DRP issued certain directions to Ld.TPO regarding adjustment proposed.

4. On receipt of directions issued by DRP, Ld.TPO again passed an order under section 92CA (5) wherein, adjustment was made as under:

S. No.	Description	Amount - Rs.
1.	Software Development Services	30,53,721
2.	Interest on Receivables	4,60,78,357
	Total Adjustment	4,91,32,078

Ld.AO thereafter issued notice to assessee regarding software license fees paid to AE amounting to Rs.1,85,19,216/-. Upon going through details filed by assessee, Ld.AO rejected contentions of assessee and disallowed expenditure claimed. However, Ld.AO granted depreciation at 25%.

4.1. Ld.AO also observed that assessee had shown amount of Rs.9,79,877/- on account of advances and written off under the head 'other expenses' in P&L account. He accordingly called for assessee to provide details to prove income relating to transaction with concerned parties, during any of preceding years with documentary evidence. Ld.AO recorded that since assessee did not furnish any reply in respect of same, addition amounting to Rs.9,79,877/- was made on account of advances and bad debts written off as disallowed.

5. Aggrieved by additions made by Ld.AO, assessee is in appeal before us now.

6. Ld.Counsel submitted that **Ground No. 1** is general in nature and, therefore, do not require any adjudication.

7. In respect of **Ground No. 2.1-2.4**, it has been submitted that issue stands squarely covered by decision of this Tribunal for Assessment Year 2007-08 placed at page 1-22 and order for

Assessment Year 2008-09 placed at page 23-67 of paper book volume-1. Ld.Counsel referring to para 16 of order dated 27/07/17 passed by this Tribunal for Assessment Year 2007-08, submitted that addition made by Ld.AO towards license expenses has been dealt with as under:

"17. After considering the rival submissions and perusing the relevant material on record, it is noticed that Aircom, UK, offers solution for network engineering requirements with its software, namely, 'ENTERPRISE suite', which is a solution for all aspects of network engineering. Apart from directly licensing ENTERPRISE suite by Aircom, UK, the assessee also sells the software in the domestic market since the intellectual property rights relating to ENTERPRISE suite vest in Aircom, UK, the assessee entered into contract with Aircom, UK to sell this product directly in the domestic market. As a quid pro quo, the assessee agreed to share a percentage of sale price to Aircom, UK, Clause (1) of the Agreement provides that: "ITP charges to be paid by the subsidiary to the parent company @ 45% of the total sale value of software and support and maintenance charges." Pursuant to this Agreement, the assessee raised invoices on certain customers in India including Idea Cellular Ltd. For upgradation of Aircom Tools. Copies of some of invoices have been placed on pages 779 to 783 of the paper book. The invoice value has been shown as its income and the amount paid to its AE has been shown as Licence fee in its Annual accounts. We are at loss to appreciate as to how the assessee can be said to have created an

“Intangible Asset” by paying the Licence fee to its AE in respect of sales made. Such payment @ 45% of the invoice value was the obligation of the assessee ab initio without which it could not have procured the licence of ENTERPRISE suite for sale in India. This amount can be loosely characterized as cost of goods transferred to the customers in India, which has necessarily to be allowed as a revenue expenditure. We, therefore, over turn the impugned order on this score and direct the deletion of addition of Rs.67.52 lacs made by the Assessing Officer.”

7.1. It has been submitted by both parties that facts and circumstances of this issue are similar with that of Assessment Year 2007-08 relied upon by Ld.Counsel.

7.2. Ld.CIT DR placed reliance upon orders of authorities below. However, could not controvert aforesaid observations by this Tribunal in immediately preceding assessment year in assessee's own case.

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

8.1. It is observed that assessee made payment of Rs.1,85,19,216/- for software licenses purchased from parent entity. Ld.AO disallowed, considering it to be capital expenditure, and provided corresponding depreciation at 25%. On perusal of order for assessment year 2007-08, it is observed that similar disallowance was made by Ld.AO on license expenses, and factual matrices of this issue as submitted by both parties are similar with that of

assessment year 2007-08. DRP has also recorded that this Tribunal in assessee's own case for assessment year 2007-08 and 2008-09 deleted such disallowance made by Ld.AO, against which revenue has not filed any appeal before *Hon'ble High Court*. Thus the issue has attained finality.

8.2. Respectfully following the view taken by this tribunal in assessee's own case for assessment in 2007-08, we are of considered opinion that, addition made by Ld.AO deserves to be deleted.

8.3. Accordingly these grounds raised by assessee stands allowed.

9. Ground No. 2.5 raised by assessee is in respect of disallowing a sum of Rs.9,79,877/-.

9.1. Ld.Counsel submitted that, assessee had written off certain advance and debts during year under consideration, which the DRP directed Ld.AO to delete addition after verification of claim. He submitted that assessee had filed necessary documentary evidences vide letter dated 12/10/17 for verifying which has not been carried out by Ld.AO. He submitted that advances were claimed under section 37, details of which are available at page 89 of paper book volume-1. As regards bad debts, details are available at page 88.

9.2. Ld.CIT DR on the contrary submitted that opportunity was granted to assessee by Ld.AO but no details were filed. He supported the view taken by authorities below.

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

It is observed that details has been furnished, however, Ld.AO has not verified same. While taking a look at details of advances to vendors, it is observed that these are small payments all made on one single day in the month of May, 2012 totalling to Rs.1,75,895/-, which is difficult for AO to verify. Upon a query being raised to Ld.Counsel regarding same, he submitted that, what is necessary to be verified is details of bad debts for which invoices have been placed at page 90-95 of paper book.

10.1. There is no dispute that sum of Rs.8,03,982/- has been written off by assessee in its books of accounts. From invoices placed at page 90-94, it is apparent that they pertain to preceding assessment years. Thus assessee satisfies requirements specified under section 36 (1) (vii) of the Act.

10.2. We are inclined to allow claim of assessee and delete addition made by Ld.AO to extent of Rs.8,03,982/-.

10.3. Accordingly this ground raised by assessee stands allowed partly.

11. Ground No. 3 are in respect of transfer pricing adjustments made by Ld. TPO.

11.1. Ld.Counsel submitted that following are transfer pricing adjustment disputed by assessee in these grounds:

software development services – Rs.30,53,721/-

interest on receivables - Rs.4,60,78,357/-.

11.2. Ground No.3.1-3.8 are in respect of adjustment made to arm's length price of international transaction pertaining to provision of software development service segment.

11.3. Ld.Counsel submitted that **Ground No. 3.1** is general in nature and therefore do not require any adjudication.

11.4. Ground Nos. 3.2-3.8 are in respect of rejecting economic analysis undertaken by assessee, rejecting comparables selected by assessee and including certain companies which were functionally dis-similar to that of assessee. He submitted that Ld.TPO for year under consideration disputed arm's length determination by assessee under software development service segment.

11.5. He submitted that in **Ground No. 3.5** assessee raises certain computational errors in margins of comparable companies used for determining ALP of transaction under the segment.

12. Before dealing with these issues, it is necessary to understand functions performed, assets involved and risk assumed by assessee under software development service segment.

The transfer Pricing study has been placed at page 179-274 of paper book volume 2.

(A) Functions

Ld.Counsel at the outset submitted that under software development service segment assessee templates software as per requirements of it's AE. It has been submitted that development of software does not require any input except for trained software professionals and software developed by assessee acts as one of

inputs of enterprise solely of products which is sold/licensed by Aircom group worldwide.

He submitted that in the process of software development assessee does the code writing and sends it to Aircom UK for validation. Then Aircon UK identifies bugs in products and inform assessee which is then fixed by quality control department in India and sends product back to Aircom, UK for approval. Subsequently Aircon UK adds further functionalities and once product director satisfied with product, then product is considered final.

(B) Assets:

In the form of assets assessee has routine tangible assets like office equipments, computers, furniture and fixtures. It has been recorded in TP study that all valuable intellectual property rights and other intangibles which are required for business are owned by Aircom UK which is primarily related to enterprise suit of products. Thus it has been submitted in TP study that assessee does not own any non-routine intangibles and accordingly does not own trade secrets or undertake research and development activities on its own that would lead to development of non-routine intangibles.

(C) Risk assumed:

It has been submitted that except for foreign exchange risk assessee does not have to undertake any other risks like customer credit risk, market risk, price risk, manpower risk, R&D risk, service liability risk.

Thus, assessee has been characterised as a routine service provider that assumes limited risk for software development services.

It is observed that there is no dispute regarding method applied and PLI at opted for determination of ALP.

12.1. Ld.Counsel submitted that assessee seeks to exclude only 2 comparables which has been included by Ld.TPO as under:

- Infosys Ltd
- Larsen and Toubro Infotech Ltd

(a) Infosys Ltd.

It has also been observed that this company was owning brand and having substantial intangible assets which cannot be held to be suitable comparable for assessee who was only providing software deployment services. It has been submitted that functions of assessee, assets and risk profile has not undergone any change for the year under consideration. Ld.Counsel has also submitted that this company is not functionally comparable to assessee inasmuch as, it is also engaged in software development services and generate substantial revenue from the sale of its own products. Ld. counsel placed reliance upon the decision of *CIT vs. Agnity India Technologies Pvt. Ltd* in ITA No. 1204/Del/2011, wherein this Tribunal vide order dated 10/07/11 upheld exclusion of this company from list of comparables, after taking into consideration its operations as full-fledged risk taking enterprise in diversified field such as application design, development, re-engineering and maintenance integration etc cannot be equated with non-risk

bearing companies. It has been submitted that this view of *Agnity India technologies Pvt.Ltd.*, has been upheld by *Hon'ble Delhi High Court* in ITA No. 3856/2010.

Ld. CIT DR placed reliance upon the order of Ld. TPO.

We have considered various distinguishing features submitted by Ld.Counsel on the basis of records placed before us. Since all the distinguishing features exist even in the year under consideration, respectfully following the order of this Tribunal in assessee's own case, we direct this company to be excluded from the final list of comparables.

(b) Larsen and Toubro Infotech Ltd.

The Ld.Counsel submitted that segmental data is not available. As per the annual report, the company is IT BPO service provider. The Ld.Counsel relied upon order decision of *Delhi Bench Tribunal* in case of *Saxo India Pvt. Ltd. vs. ACIT (ITA No. 6148/Del/2015)*, wherein, L&T Infotech Ltd. was directed to be excluded, holding that this company is engaged in business of software product and segmental information is not available. Subsequently, appeal filed by Revenue was dismissed by *Hon'ble Delhi High Court* in *ITA No 682/2016*. The Ld.Counsel further submitted that *Delhi Bench Tribunal* in case of *Alcatel-Lucent India Ltd, vs. DCIT (ITA No. 6856/Del/2015)* directed to exclude Larsen & Toubro on account of functional dissimilarity and unavailability of segmental data. The Ld.Counsel relied upon following decisions, wherein, Larsen &

Toubro was directed to be excluded on account of unavailability of segmental data:

- *Peegasystems Worldwide India Pvt. Ltd vs. ACIT (ITA No. 1758/Hvd/2014)*
- *Cerner Healthcare Solutions P Ltd vs ITO (ITA No, 44/Bana/2015)*
- *Invensys Development Centre India Pvt, Ltd. vs DCIT (ITA No 383/Hvd/2014)*
- *M/s Broadcom India Research Pvt. Ltd. vs, DCIT (ITA No, 62/Bang/2014)*

Ld.CIT DR though objected for its exclusion, however, could not controvert regarding unavailability of segmental data.

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

It is observed that *Hon'ble Delhi High Court* in case of Saxo India Pvt.Ltd., (supra) rejected this comparable for nonavailability of segmental data. Further year under consideration Ld.Counsel submitted that segmental data is are unavailable for year under consideration, because of which, comparability cannot be drawn. We therefore, respectfully following *Hon'ble Delhi High Court*, direct Ld.TPO to exclude this comparable from the list.

Accordingly this ground raised by assessee stands allowed.

13. Ground no.3.9-3.11:

He submitted that assessee benchmarked international transaction of receipt of intra-group services by aggregating same with other international transaction for which Ld. TPO was of opinion that

sufficient and contemporaneous documentary evidence to show that services have actually been received in respect of each segment was not furnished by assessee. He placed reliance upon order dated 15/03/19 passed by this Tribunal for assessment year 2011-12 in assessee's own case wherein it has been held as under:

"8. From the aforementioned chart, it can be seen that the management fee amounting to Rs.3,57,03,763/- has been apportioned proportionately amongst the segments. At this juncture, it would be pertinent to mention that the management fee apportioned to the segment software as margin shown under this segment has been accepted by the TPO, as no adjustment has been made in respect of this segment. This means that the margin of profit has been accepted in one of segments after absorption of proportionate management fee. In other words, if apportionment of Rs.1,61,49,338/- is also accepted in the segment software development (product delivered), then, there is no question of making any adjustment in so far as intra group services is concerned."

13.1. Ld.Counsel submitted that assessee provided nature and details of evidence in support of IGS. He pointed out that for assessment year 2011-12, Ld.TPO disputed arm's length price determined for Software Deployment Services Segment, whereas for year under consideration dispute has been raised in Software Development Services Segment. Ld.Counsel submitted that adjustment has been proposed by Ld.TPO only in respect of Software Development Service Segment. Ld.Counsel relying upon

preceding assessment year, submitted that this Tribunal granted relief on basis that management fee paid by assessee was proportionately apportioned amongst 4 segments, which Ld.TPO accepted while analysing arm's length price of individual segments. He further relying on decision of *Hon'ble Delhi High Court in case of Sony Ericson Mobile Communications India Pvt. Ltd.*, reported in 374 ITR 118, submitted that segregation cannot be made as they are interlinked with each other.

13.2. He submitted that management fees paid by assessee to its AEs are for support provided by AE under each segment and therefore they are interlinked with each other. Ld.Counsel thus submitted that, as transaction have been held to be at arm's length price by Ld.TPO in respect of other segment, it is not appropriate to dispute and benchmark management fees paid by assessee to its AE separately.

13.3. On the contrary, Ld.CIT DR through written submission dated submitted that assessee made payment of Rs.4.60 crores to its AE towards IGS services received. He submitted that assessee apportioned management fees paid to its AE under four segments, for which there is no basis. Opposing argument advanced by Ld.Counsel regarding acceptance of arm's length price in respect of remaining 3 segments, he submitted that, under each segment, assessee received remuneration for services rendered by it from the AE, whereas management fees been paid by assessee is separately benchmarked as international transaction by assessee itself in its

TP study. Ld. CIT DR further submitted that services received from AE for which payment has been made by assessee, is based upon agreement entered into between assessee and Aircom UK, which is placed at page 398-423 of paper book Volume 3. Ld. CIT DR thus submitted that agreement does not categorise services rendered by AE under each of 4 segments. He submitted that apportionment of services under each Segment is not as per the agreement and therefore aggregation of services received from AE cannot be done with services provided by assessee to its AE under these 4 separate segments. Further Ld.CIT-DR placing reliance on services received by assessee from AE as described in the agreement submitted that, none of IGS received could be linked with any of the segment. He thus submitted that Ld.TPO was right in holding that, assessee failed to provide contemporaneous documentary evidence to establish kinds of services rendered by AE under each segment. He also submitted that IGS has been rendered by assessee under separate agreement and payment made by assessee is as per terms of agreement. He submitted that this itself categorises IGS to be an independent International Transaction which has been rightly bench marked by Ld.TPO separately.

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

14.1. Ld.Counsel has been immensely placed reliance upon order passed by this tribunal for assessment year 2011-12 in assessee's own case wherein identical issue has been determined. On perusal

of order passed by this Tribunal in assessee's own case for assessment year 2011-12, it is observed that facts brought out by Ld.CIT DR before us has not been referred to therein. We are therefore of considered opinion that there is factual difference for the years under consideration *vis-a-vis* assessment year 2011-12.

We are therefore unable to hold that facts based upon which this Tribunal in assessment year 2011-12 has expressed its view to be similar to fact that has been brought out before us, which is verifiable from records placed before us.

14.2. The agreement under which AE provided services to assessee is dated 23/10/08. From order passed by Ld.TPO observed that assessee produced following evidences:

Nature of services	Nature of the documents and the benefits to the company	Type of documents attached
	1. Announcement relating to launch of a new product, Capesso for ASSET 2. Announcement relating to the appointment of new Senior Commercial Contracts Manager	
General management services	3. Announcement relating to the appointment of new Chief Finance Officer 4. Announcement of Change in the organizational structure 5. Announcement of changes in Global Operations Senior Management	E-mails

	6. Announcement of availability of Capesso for ASSET	
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14.3. At this juncture we refer to Rule 10 D which reads as under:

Rule 10D. (1) Every person who has entered into an international transaction shall keep and maintain the following information and documents, namely:—

.....

*(d) the nature and terms (including prices) of international transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction:
 (/) a description of the methods considered for determining the arm's length price in relation to each international transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case;*

14.4. It is observed from TP study that assessee has been provided with following services and based upon certain allocation keys, management fees paid has been allocated amongst various subsidiaries of Aircom, UK:

S. No.	Nature of service	Quantum (in GBP)	Basis of allocation	Percentage
1.	IT	177,786	IT People splits	31%
2.	Finance	33,526	Turnover	6%
3.	Sales & Marketing	34,160	Turnover	6%
4.	Service solutions	40,000	Turnover	6%
5.	General Management	53,554	Turnover	6%
6.	Human Resources	24,946	Turnover	6%

7.	Legal	12,757	Turnover	6%
8.	Insurance	11,091	Turnover	6%
9.	Project Executive	23,264	Turnover	6%
10.	Computer Licensing	155,129	IT Licences and products	27%
	Total	566,213		100%

Thus, it can be inferred from above that Aircom UK (AE) allocated its remuneration on percentage basis in respect of each services rendered by it to all its group concerns. And based upon the above, Aircom(UK) entered into agreement with each group concerns.

Thus, it is the duty cast upon assessee to establish basis of allocation of services received from AE under each segment and to show, how they are interlinked with each other. It is observed that assessee has not established any basis of apportioning management expenses under all four segments.

14.5. Ld.TPO upon verifying details filed by assessee was of opinion that:

- Assessee could not establish whether such services were needed by assessee (i.e. Need Test)
- Whether such services are rendered to assessee by AE (i.e. Rendition test)
- Whether assessee has derived any economic or commercial benefit from these services (i.e. Benefit test)
- Basis of allocation keys
- These services are duplicative in nature

- There is only incidental benefit from these services.

14.6. Ld.TPO thus determined ALP at NIL by applying CUP, *vis-à-vis*, ALP determined by assessee at Rs.4,60,78,357/-. Ld. TPO thus held that assessee did not obtain any benefit out of such services and that such services provided by AE were not required, as, assessee failed to provide evidence regarding received of services alleged to be rendered by the AE, necessitating any payment. It is observed that, Ld.TPO thus held that, as there is no benefit from services for which payments has been made, he determined ALP of this international transaction at Nil, without carrying out any FAR analysis of this intra-group services.

14.7. The income tax act provides computation of arms length price of any international transaction as under:

Computation of income from international transaction having regard to arm's length price.

92. (1) Any income arising from an international transaction shall be computed having regard to the arm's length price.

Explanation.—For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.

(2) Where in an international transaction [or specified domestic transaction], two or more associated enterprises enter into a mutual

agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.

According to the above provisions following principles emerge:-

- i. An international Transaction is entered in to between two or more associated enterprises for jointly acquiring or developing some property or for obtaining services.
- ii. The parties to transaction enter in to mutual agreement or arrangement to share cost or expenses incurred or to be incurred in respect of joint property.
- iii. The cost or expenses incurred should be in connection with a benefit or services of facility provided or to be provided to any one or more of such enterprise. The expectation of mutual benefit is important consideration for the acceptance of arrangement for pooling of resources by the enterprises.
- iv. The enterprises would require that each participant's proportionate share of the contribution is consistent with the proportionate share of overall benefits expected to be received from the arrangement.

v. Transfer price of cost or expenses allocated or apportioned to such enterprise or contributed by such enterprise shall be determined having regard to Arm's length price of such benefit, service or facility received by the enterprise. In order to satisfy the arm's length price a participant's contributions must be consistent with what an independent enterprise would have agreed to contribute under comparable circumstances considering the benefits it expects to derive from the agreement.

14.8. It is pertinent to note that requirement of services should be judged from viewpoint of assessee as a businessman. Therefore in this regard we are of view that assessee has to substantiate that these services are required by it. Since assessee, as service receiver received certain services as per agreement dated 23/10/2008, proves that such services were required by assessee. Further, assessee belongs to MNE organization and that Aircom UK provided service to its group companies across the globe. It is observed that all companies are situated in different countries, operating in different geographies have also received and used these services which is evident from allocation list submitted by assessee reproduced hereinabove. Therefore this itself proves that, for assessee to remain competitive in its business such services are required. Therefore, in our considered opinion, assessee stands satisfied need test, which is alleged by Id.TPO to have not been satisfied by assessee.

We therefore reject this view of Ld. TPO and Id. DRP.

14.9. *Hon'ble Delhi high court in case of Cushman Wakefield Limited reported in 46 taxmann.com 317 has held that:*

"34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India (P.) Ltd. v. Addl. CIT [2011] 47 SOT 423/13 taxmann.com 82 (Mum.):

"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an Assessee and what is not. An Assessee may have any

number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an Assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on

gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement. We have also noted that the stand of the revenue authorities in this case is that no services were rendered by the AE at all, and that since there is No. evidence of services having been rendered at all, the arm's length price of these services is 'nil'."

14.10. Another aspect that was made clear by coordinate bench of this Tribunal in *Delloite Consulting India (P.) Ltd. v. Dy. CIT/ITO* reported in [2012] 137 ITD 21/22 taxmann.com 107 (Mum) is that:

'37. On the issue as to whether the Transfer Pricing Officer is empowered to determine the arm's length price at "nil", we find that the Bangalore Bench of the Tribunal in Gemplus India (P.) Ltd. v. Asstt. CIT [IT Appeal No. 352 (Bang.) of 2009, dated 20-10- 2010] held that the assessee has to establish before the Transfer Pricing Officer that the payments made were commensurate to the volume and quality service and that such costs are comparable. When commensurate benefit against the payment of services is not derived, then the Transfer Pricing Officer is justified in making an adjustment under the arm's length price."

14.11. Placing reliance upon aforesaid decisions, we are of considered opinion that for these services, assessee has to demonstrate and satisfy Evidence Test or rendition test and benefit

test, as envisaged u/s 92 (2) of the Act, and that, services provided by AE are neither duplicative nor shareholder's activity. Ld. AO/TPO is then directed to determine Arm's length price of these services based on documents submitted by assessee by determining "most appropriate method" and Comparability analysis.

Accordingly we set aside this issue to Ld. AO.

15. Assessment year 2012-13

ITA No. 1956/Del/2012

15.1. Brief facts of the case are as under:

Assessee filed its return of income of Rs.4,91,40,840/-, on 30/11/12. Case was selected for scrutiny, and notice under section 143 (2) along with questionnaire, and notice under section 142 (1) was issued to assessee. In response to statutory notices, representative of assessee appeared before Ld.AO and filed requisite details as called for. As we have already discussed hereinabove while dealing with Assessment Year 2013-14, assessee is engaged in business of software solution and consultancy services in area of telecommunication. As it entered into international transactions with its Associated Enterprises, Ld.AO referred case of assessee to Transfer Pricing officer. Transfer Pricing Officer upon receipt of reference issued notice under section 92C of the Act, read with Rule 10 B of Income Tax Rules, and directed assessee to file economic

analysis in respect of international transaction entered into by it with its AE for year under consideration.

15.2. Ld.TPO from TP study, filed by assessee observed that assessee has entered into following international transaction:

Sl. No.	International Transaction	Amount (in Rs.)
1.	Purchase of fixed assets	59,935
2.	Provision of software deployment services	9,64,61,432
3.	License fees paid	1,99,53,945
4.	Provision of software deployment services	5,80,05,001
5.	Services received	3,72,70,540
6.	Consultancy services provided	2,25,07,087
7.	Reimbursement of expenses received	1,37,69,836
8.	Reimbursement of expenses paid	2,01,27,308

Ld.TPO, accordingly issued notice to assessee in respect of all 3 segments, being provision of software development services, software deployment and intra-group services.

15.3. Software development services

Ld.TPO observed that for software development services, assessee used TNMM as most appropriate method and OP/OC as PLI. Assessee arrived at set of 10 comparables, with an average margin of 11.01% whereas, margin worked out of its own was 11.84%. The international transaction entered into by assessee was thus concluded to be at arm's length price.

15.4. Assessee used following comparables for benchmarking its international transaction:

Sl. No.	Name of the Company	Remarks
1.	Acropetal Technologies Ltd. (segmental)	Accepted
2.	Akshay Software Technologies Ltd.	Accepted
3.	Cat Technologies Ltd.	Different functional profile. Hence rejected.
4.	Helios & Matheson Information Technology Ltd.	RPT less than 25% to total sales: Hence Rejected.
5.	Maveric Systems Ltd.	Different functional profile. Hence rejected.
6.	R.S.Software (India) Ltd.	Accepted.
7.	Silverline Technolgoies Ltd.	Different functional profile. Hence rejected.
8.	Cherrytec Intelisolve Ltd.	Different functional profile. Hence rejected.
9.	Cigniti Technologies Ltd. (formerly known as Cigniti)	Accepted.
10.	Mindtree Ltd. (segmental)	Accepted.

15.5. Ld.TPO on analysis of the same, selected following comparables from the list submitted by assessee:

Sl. No.	Name of the Company
1.	Acropetal Technologies Ltd. (segmental)
2.	Akshay Software Technologies Ltd.
3.	R.S.Software (India) Ltd.
4.	Cigniti Technologies Ltd. (formerly known as Cigniti)
5.	Mindtree Ltd. (segmental)

15.6. At the conclusion of exercise of selecting list of comparables, following were final list of comparables proposed to be used by Ld. TPO:

Sl. No.	Name of the Company	OP/OC (%)
1.	Acropetal Technologies Ltd. (segmental)	65.92
2.	Akshay Software Technologies Ltd.	7.77
3.	R.S.Software (India) Ltd.	15.43
4.	Cigniti Technologies Ltd. (formerly known as Cigniti)	8.28
5.	Mindtree Ltd. (segmental)	19.19
6.	Evoke Technology	11.57
7.	E-Zest Solution	17.51
8.	Infosys Ltd.	42.15
9.	Larsen & Toubro Infotech Ltd. (seg.)	27.16
10.	Lucid Software Ltd.	11.10
11.	Persistent Systems Ltd.	26.92
12.	Sankhya Infotech Ltd.	5.68
13.	Sasken Communication Technolgoies Ltd.	14.58
14.	Spry Resources Pvt.Ltd.	33.59
15.	Tata Elxsi	14.32
16.	Thirdware Solution Ltd. (Overseas segment)	11.10
17.	Zylog Systems Ltd.	33.01
	Average	21.49

Ld.TPO accordingly proposed adjustment of Rs.50,03,220/-.

16. Software deployment services:

Ld.TPO observed that assessee used TNMM as most appropriate method and OP/OC as PLI for computing arm's length price of international transaction. It was observed that margin computed in case of 8 comparables selected by assessee was at 9.84% *vis-a-vis* 6.27% of assessee. A fresh search was again carried out and margin

of comparables then selected was at 11.74%. Thus, assessee held transaction to be at arm's length price. Following 8 comparables were selected by assessee:

Sl. No.	Name of the Company	Remarks
1.	Cigniti Technologies Ltd. (formerly known as Cigniti).	Different functional profile. Hence rejected.
2.	First Object Technologies Ltd.	Different functional profile. Hence rejected.
3.	Indium Software (India) Ltd.	Different functional profile. Hence rejected.
4.	L. C. C. Infotech Ltd.	Different functional profile. Hence rejected.
5.	Saven Technologies Ltd.	Different functional profile. Hence rejected.
6.	Softech Infinium Solution Ltd.	Different functional profile. Hence rejected.
7.	Zylog Systems Ltd.	Accepted.
8.	Asap Automation India pvt.Ltd.	Different functional profile. Hence rejected.

16.1. Based upon analysis carried out by Ld.TPO, following were selected:

Sl. No.	Name of the Company
1.	Zylog Systems Ltd.
2.	Cigniti Technologies Ltd. (formerly known as Cigniti).

16.3. Thereafter Ld.TPO proposed following list of comparables which were used for determining arm's length price of international transaction under this segment:

Sl. No.	Name of the Company	OP/OC (%)
1.	Acropetal Technologies Ltd. (segmental)	65.92
2.	Akshay Software Technologies Ltd.	7.77
3.	R.S.Software (India) Ltd.	15.43
4.	Cigniti Technologies Ltd. (formerly known as Cigniti)	8.28
5.	Mindtree Ltd. (segmental)	19.19
6.	Evoke Technology	11.57
7.	E-Zest Solution	17.51
8.	Infosys Ltd.	42.15
9.	Larsen & Toubro Infotech Ltd. (seg.)	27.16
10.	Lucid Software Ltd.	11.10
11.	Persistent Systems Ltd.	26.92
12.	Sankhya Infotech Ltd.	5.68
13.	Sasken Communication Technolgoies Ltd.	14.58
14.	Spry Resources Pvt.Ltd.	33.59
15.	Tata Elxsi	14.32
16.	Thirdware Solution Ltd. (Overseas segment)	11.10
17.	Zylog Systems Ltd.	33.01
	Average	21.49

Ld.TPO thus proposed adjustment of Rs.1,87,73,526/-, under this segment.

17. Intragroup services

Ld.TPO issued notice to assessee to furnish details in respect of services received by assessee from its AE. After considering submissions advanced by assessee, Ld.TPO computed the arm's length price of alleged services at 'nil' on application of CUP and proposed adjustment of Rs.1,99,53,945/-, in hands of assessee.

18. Aggrieved by proposed adjustment, assessee raised objections before DRP who agreed with view expressed by Ld.TPO.

18.1. On receipt of directions from DRP, Ld.AO passed final assessment order, giving effect to DRP directions. Ld.AO made addition in hands of assessee, on account of license fee paid to its AE.

18.2. In the meanwhile, assessee preferred application before Ld.TPO, under section 154 of Act, post-DRP direction, in respect of Software Development Service Segment, for rectification of mistake, that crept in, while computing margin. Ld.TPO vide order dated 08/11/2017 considered said application and provided benefit of +/- 5% margin to transaction, thereby deleting proposed adjustment made under Software Development Service Segment.

18.3. Thus, adjustments disputed by assessee before us is only in respect of Software Deployment Service segment and IGS.

19. Aggrieved by order passed by Ld.AO, assessee is in appeal before us now.

20. Ld.Counsel submitted, that facts and circumstances for year under consideration are similar with that of assessment year 2013-14 which has already been decided in foregoing paragraphs of this order.

21. Ld.Counsel submitted that **Ground No. 2.1-2.3** is in respect of disallowance made on account of license fees paid by assessee to its AE.

21.1. He submitted that this ground stands squarely covered in favour of assessee by decision of this Tribunal for assessment year 2007-08 and 2008-09. We have already referred to and relied upon

these orders passed by Co-Ordinate Bench hereinabove while deciding identical issues on similar facts for assessment year 2013-14 in ground Nos. 2.1-2.4. Admittedly, as there is no change in the facts and therefore, we are inclined to follow our view *mutatis mutandis*.

Accordingly these grounds raised by assessee stands allowed.

22. Ground No. 2.4-2.8

22.1. Ld.Counsel in written submission as well as while arguing submitted that assessee do not wish to press these grounds.

Accordingly these grounds stands dismissed as not pressed.

23. Ground No. 3.1 is general in nature and therefore do not require any adjudication.

24. Insofar as **Ground No. 3.2** is concerned Ld.TPO since rectified margins vide his order dated 08/11/17, led to deletion of adjustment proposed for software development service segment.

Accordingly, this ground becomes infructuous and therefore dismissed.

25. Ground No. 3.3-3.6 raised by assessee is in respect of usage of comparables, which according to assessee were not functionally similar to that of assessee under the software deployment service segment.

25.1. He submitted that assessee under Software Deployment Service Segment, provides personnel to other AEs on requisition made by Aircom UK. He submitted that authorities below included comparables, without considering functional profile of assessee, and wrongly included comparables that were performing contract Software Development Services. Ld.Counsel alleged inclusion of following comparables for determining arm's length price of international transaction under Software Deployment Service Segment:

- Mindtree Ltd
- E-Zest Solutions Ltd
- Infosys technologies Ltd
- Larsen and Toubro Infotech Ltd
- persistent systems Ltd
- spray resources private limited
- Zylog systems Ltd

25.2. Before undertaking comparability analysis, it is *sine qua non* to analyse functions performed, assets owned and risks assumed by assessee under software deployment service segment.

(A) Functions:

In TP study, it has been submitted that under this segment, employees of assessee are sent outside India for purposes of software deployment. Assessee receives product support request through calls, e-mails or UTS based upon which it provides product

support services to any AE or to any customer of AE. It has also been submitted that assessee has specialised team consisting of internal and external product team dedicated to product support activities. The external team deals with AEs or other customers in providing product support services while internal team provides assistance to external team. Assessee in TP study has also submitted that it provides personnel to other AEs on requisition made by Aircom UK and such personnel provided by assessee continue to remain the employees of assessee. It has been submitted that it is the sole discretion of assessee to provide personnel and where assessee is of the opinion that provision of personnel is not profitable, it can decline the same.

It has been submitted that assessee employs personnel who have qualities requisite skills essential for deployment of software and all functions necessary for recruitment are performed by assessee itself. TP study also expresses that under the deployment of software products services assessee charges on its AE is a markup. The cost for this purpose is the salary of the employee working on respective projects.

(B) Assets owned

It has been submitted that assessee owns routine intangible assets for its operations like office equipments, computers, furniture and fixtures etc. All valuable intellectual property rights and other intangibles which are required for purposes of business are owned by Aircom UK. These intellectual property rights primarily relate to

the ENTERPRISE suite of products. Thus assessee do not own any non-routine intangibles and accordingly does not own trade secrets or undertake research and development activities on its own that would lead to the development of non-routine intangibles.

(C) Risks assumed

(a) Foreign exchange risk

Risks, undertaken by assessee is in respect of foreign exchange risk as assessee is remunerated in foreign currency against invoices raised.

(b) Manpower risk

As success depends upon quality personnel with superior technical knowledge, such risk is faced by assessee in competent of market forces to lose its trained personnel. However such risk is mitigated by fact that AE pays all costs associated with acquiring and training new personnel on cost plus basis. It has been submitted that it is the AEs which are indirectly exposed to this risk for Indian operations.

(c) Service liability risk:

This risk arises when assessee fails to perform project as expected or stated standards. It has been submitted that in case of any re-work due to test failure and quality issues, charges are borne by assessee, however, in case of re-work since assessee is remunerated on cost plus basis, service liability risk of assessee is nil.

Thus in TP Study, assessee has been characterised as a routine service provider that assumes limited risk under this segment.

26. Based upon the above FAR analysis, we shall now undertake comparability of assessee with that of comparables disputed hereinabove.

26.1. Mindtree Ltd

It has been submitted that this comparable is functionally different with that of assessee and is engaged in provision of comprehensive range of services and software solutions. Ld.Counsel submitted that this company also undertakes significant research and development activities and owns patents in respect of the same. Further during year under consideration, this company underwent a process of amalgamation.

26.2. On the contrary Ld.CIT DR placed reliance upon orders of authorities below.

26.3. We have heard both sides on basis of records placed before us.

26.4. From the annual report it is observed that this company is engaged in development and sale of software product and owns patents being intangible assets. In present case of assessee under segment of software deployment, it is more of an outsourcing of employees to the customers being its AEs or customers off AEs. Assessee does not own any patents. Ld. Counsel placed reliance upon decision of :

- *Agilis information technologies international private Ltd reported in TS-995-ITAT-2017 (del)-TP*

- *Merry prise India private limited, decision of orderable Delhi High Court in ITA No. 461/2016*

It has also been submitted that during year this company has acquired 100% equity shares of Mind Tree Wireless Pvt. Ltd. *Hon'ble Delhi High Court* in case of *Ameriprise India Pvt. Ltd., (supra)* has held that comparable having extraordinary event during year should be excluded.

26.5. Respectfully following the same we direct this comparable to be excluded from the finalist.

27. E-Zest solutions Ltd

Ld.Counsel submitted that annual report placed at page 932 of paper book reveals that, this company is engaged in to diversified range of software activities such as product engineering services/outsourced product development services. This company is also listed amongst the top 10 mobile application development companies as per, **si100**, and it has achieved technological expertise in **Web 2.0 Revolution technologies** such as **SOA SaaS, XML, Ajax etc.** He placed reliance upon decision of this Tribunal in case of *Alcatel Lucent India Pvt.Ltd., in ITA No. 1112/del/2017, Clear to Pay India Pvt. Ltd., in ITA No. 2744/del/2017.*

27.1. On the contrary Ld. CIT DR placed reliance upon view expressed by authorities below.

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

27.3. On perusal of segmental reports in respect of this company, it is observed that, it has only one reportable segment, with such diversified and value-based activities, that is being carried out. This itself culls out this comparable from the list of comparability. Further, activities carried out by this comparable gives rise to a lot of intellectual property rights/intangible assets, whereas work carried out by assessee under this segment is simple deployment of employees to the customers on request from its AE's.

27.4. We therefore do not find any reason to include this comparable as they are functionally dissimilar with each other, and cannot be compared in terms of risks as well as assets owned.

Accordingly we direct this comparable to be excluded from the finalist.

28. Infosys Ltd

Ld.Counsel submitted that annual report of this comparable has been placed at page 1340 of paper book volume 3 and it is functionally dissimilar with that of assessee as it is engaged in R&D activities, owns significant intangible assets. It has also been submitted that this comparable has exceptionally high turnover. Ld. Counsel placed reliance upon assessee's own case for assessment year 2008-09, wherein this comparable has been excluded being functionally dissimilar with that of assessee under this segment. He also placed reliance upon the decision of this *Tribunal in case of Alcatel Lucent India Ltd in ITA No. 1112/del/2017* which has been

approved by Hon'ble Delhi High Court in ITA No. 515/2017, Agilis information technologies international Private Limited (supra), Ajilent Technologies International Pvt.Ltd by Hon'ble Delhi High Court in ITA No. 1620/2015, 477 and 6420/2016, Bangalore Tribunal in case of CGI Information Systems in ITA No. 586/BAG/2015.

28.1. On the contrary Ld. CIT DR placed reliance upon observations of authorities below.

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

28.3. It is observed that this company is functionally dissimilar with that of assessee and is engaged in R&D activities owning significant intangibles. Under software deployment service segment, assessee is rendering deployment services of its skilled employees to the AE, is or their customers, which is remunerated on cost plus basis. It is also peculiar to note that the cost is determined to be salary earned by such employee who is put on the project. The working module of assessee is quite dissimilar with that of this company and the functions performed by this company is entirely different with that of assessee.

Accordingly, in our considered opinion this is not to be included in the final list of comparables.

29. Larsen and Toubro Infotech Ltd

The Ld.Counsel submitted that segmental data is not available. As per the annual report, the company is IT BPO service provider. The

Ld.Counsel relied upon order decision of *Delhi Bench Tribunal* in case of *Saxo India Pvt. Ltd. vs. ACIT (ITA No. 6148/Del/2015)*, wherein, L&T Infotech Ltd. was directed to be excluded, holding that this company is engaged in business of software product and segmental information is not available. Subsequently, appeal filed by Revenue was dismissed by *Hon'ble Delhi High Court* in *ITA No 682/2016*. The Ld.Counsel further submitted that *Delhi Bench Tribunal* in case of *Alcatel-Lucent India Ltd, vs. DCIT (ITA No. 6856/Del/2015)* directed to exclude Larsen & Toubro on account of functional dissimilarity and unavailability of segmental data. The Ld.Counsel relied upon following decisions, wherein, Larsen & Toubro was directed to be excluded on account of unavailability of segmental data:

- *Peegasystems Worldwide India Pvt. Ltd vs. ACIT (ITA No. 1758/Hvd/2014)*
- *Cerner Healthcare Solutions P Ltd vs ITO (ITA No, 44/Bang/2015)*
- *Invensvs Dvelopment Centre India Pvt, Ltd. vs DCIT (ITA No 383/Hvd/2014)*
- *M/s Broadcom India Research Pvt. Ltd. vs, DCIT (ITA No, 62/Bang/2014)*

Ld.CIT DR though objected for its exclusion, however, could not controvert regarding unavailability of segmental data.

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

It is observed that *Hon'ble Delhi High Court* in case of *Saxo India Pvt.Ltd., (supra)* rejected this comparable for nonavailability of

segmental data. Further year under consideration Ld.Counsel submitted that segmental data is are unavailable for year under consideration, because of which, comparability cannot be drawn. We therefore, respectfully following *Hon'ble Delhi High Court*, direct Ld.TPO to exclude this comparable from the list.

30. Persistent systems Ltd (SCG) & Zylog systems Ltd (SCG)

It has been submitted by Ld.Counsel that these comparables were excluded by this Tribunal in assessee's own case for assessment year 2011-12 by observing as under:

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

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

(iv) ZYLOG SYSTEMS LIMITED

23. The Annual Account of this company at page 1159 of the paper book shows that under the head 'Income', the software development services and products is shown at Rs. 9,18,24,45,549/- and in the schedule of fixed assets at pages 1163, product development cost

has been shown as eligible for depreciation because intangible assets have been amortized as is evident from page 1170 of the paper book and in the schedule of Notes to accounts at clause X, it is mentioned that since the company operates in I.T. services there are no other business segments.

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

25. In the case of Agilis Information Technologies International Pvt Ltd 1063/DEL/2016 for A.Y 2011-12, this comparable was excluded from the list of comparables. The relevant findings of the co-ordinate bench read as under:

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

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

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

30.1. On the contrary Ld.CIT DR placed reliance upon observations of authorities below.

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

30.3. It is observed that functions performed by assessee and that these comparables for assessment year 2011-12 and 2012-13 are similar and identical and has not been disputed by both parties. Under such circumstances activities carried on by these comparables has been held to be functionally dissimilar with that of assessee in assessee's own case for preceding assessment years. We therefore do not wish to differ from the aforestated view taken by this Tribunal as there is nothing brought on record to establish a new fact that could lead to a deviation.

30.4. Respectfully following the same, we direct Id.TPO to exclude theses comparables from the finalist.

31. Spry Resources Pvt. Ltd. :

The Ld. AR submitted that the audited financial statement for the Financial Year 2011-12 is not available.

31.1. The Ld. DR relied upon order of the TPO and the DRP.

31.2. We have heard both parties and perused records. Since audited financial statement for Financial Year 2011-2 was not available to assessee, the same can be seen in TPO's order para 12 (F) wherein, assessee had asked for annual report of this company which was not given to assessee.

31.3. We fail to understand the reason, why Ld.TPO even used this comparable, without there being financial reports of this comparable. In our view at the out set this comparable deserves to be eliminated as FAR analysis has not been carried out by Ld. TPO in regards to this comparable with that of assessee.

Accordingly we direct Ld.TPO to exclude this comparable from the finalist.

32. Accordingly, these grounds raised by assessee stands allowed.

33. Ground No. 3.7-3.10 has been raised in respect of addition made on account of intra-group services received by assessee from its AE.

33.1. We have already dealt with this issue at length for assessment year 2013-14 in foregoing paragraphs. It is observed that agreement under which assessee has received such services for year under consideration are identical to that considered for assessment year 2013-14. Under such circumstances we do not find any reason to differ with our view expressed therein. The issue therefore being *mutatis mutandis*, referring to and relying upon our

observations expressed hereinabove in respect of the same, we are inclined to set aside this issue back to Ld.TPO with a specific direction to determine ALP of international transaction as per section 92B of Income Tax Act and Rule 10 B of Income Tax Rules.

34. In the result, these grounds raised by assessee stands allowed for statistical purposes.

35. Accordingly appeal filed by assessee stands allowed as indicated hereinabove.

36. In the result assessee's appeals for both the A.Ys. 2012-13 and 2013-14 are partly allowed for statistical purposes.

Order pronounced in Open Court on June, 2019.

Sd/-

(N.S. SAINI)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 20th June, 2019

- GMV

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Appellant
Respondent
CIT
CIT(A)
DR, ITAT

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By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

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