

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2810/DEL/2014
[A.Y 2009-10]

Nokia Solutions and Networks India Pvt Ltd
7th Floor, Building No. 9A
DLF Cyber City, Sector 25A
Gurgaon - Haryana

Vs. The A.C.I.T.
Circle - 13(1)
New Delhi

PAN No: AACCN 3871 F

[Appellant]

[Respondent]

Date of Hearing : 22.08.2019
Date of Pronouncement : 23.08.2019

Assessee by : Shri Deepak Chopra, Adv
Shri Amit Srivastava, Adv
Shri Ankul Goyal, Adv

Revenue by : Shri Sanjay I Bara, CIT-DR

ORDER

PER N.K. BILLAIYA, AM:-

This appeal by the assessee is preferred against the order dated 14.02.2014 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] pertaining to assessment year 2009-10.

2. The substantive grievances of the assessee relates to the T.P. adjustment made on account of the following:

- i) Software Development Segment;
- ii) Marketing Support Services Segment;
- iii) Technical Support Services Segment; &
- iv) ITES Segment [remote network management services]

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

BUSINESS PROFILE OF THE APPELLANT COMPANY

4. The appellant company is a company incorporated in India under the provisions of the Companies Act, 1956. For the subject assessment year under consideration, the assessee was engaged in the business of manufacturing and trading of telecommunication network equipment and provision of related services such as network design, installation and commissioning. The company also provided support services to

major telecom operators and IP service providers in India and to customers of its associated enterprises (“AEs”).

5. Further, the company also provided software development and certain network management support services. Further, NSN India rendered certain marketing support services to its AEs, such as, providing information on potential customers, providing assistance in marketing products of its AE. Other support services rendered by NSN India to its AEs include warranty support services.

6. During the course of assessment proceedings, the A.O referred the matter to the TPO. The TPO made the transfer pricing adjustment in relation to following international transactions entered into by the appellant vide order dated 30 January 2013:

International transactions	Amount (INR)
Software development segment	92,51,77,900
Market support services segment	13,15,27,301
Technical support service	1,01,23,623
ITeS Segment (“Remote network management services”)	31,74,61,300
Total	138,42,90,124

7. The AO passed the draft assessment order dated 22 March 2013. The appellant filed its objections under section 144C(2)(b) of the Act with the DRP against the transfer pricing adjustment proposed by the TPO/AO. The DRP provided certain relief (i.e. rejected certain non-comparable companies selected by TPO, corrected computational errors committed by TPO and allowing the benefit of working capital adjustment) to the appellant which resulted in reduction of quantum of transfer pricing adjustment. The AO passed the final assessment order dated 14 February 2014 in conformity with the DRP directions wherein the transfer pricing adjustment was INR 129,47,16,038/-.

8. Summary of the international transactions analyzed in the TP study report is as under:

1.02. Summary of International transactions analysed

A summary of the International transactions analysed in this report is tabulated below:

Type of International transaction	Method selected	NSM India (Tested party)		Comparables		
		Total value of transaction	Price/ margin	Type of companies	Findings Arithmetic Mean Price/Margin	Within 5 percent range of transfer price
Networks division						
Purchase of network equipment		Rs.12,960,336,520				
Export of network equipment		Rs. 2,825,230,940				
Import of capital goods		Rs. 15,065,342				
Provision of marketing support services	TNMM using Operating Profit as a PLI	Rs. 598,908,578	5.85 percent	Indian companies engaged in similar activities	(-) 3.34 percent	NA
Provision of services	Operating Revenue	Rs. 42,805,139				
Payment of royalty		Rs. 47,354,824				
Reimbursement of expenses to AEs		Rs. 1,111,597,309				
Reimbursement of expenses by AEs	No benchmarking required	Rs. 113,048,814	Cost reimbursement	NA	NA	NA

Type of International transaction	Method selected	NSN India (Tested party)		Comparables		
		Total value of transaction	Price/margin	Type of companies	Findings Arithmetic Mean Price/Margin	Within 5 percent range of transfer price
Research and development ("R&D") division						
Provision of software development services	TNMM using Operating Profit as a PLI Operating Cost	Rs. 2,571,824,628	5 percent	Indian companies engaged in providing similar services	8.86 percent	Yes
Network management division						
Provision of network management services	TNMM using Operating Profit as a PLI Operating Cost	Rs. 323,520,526	10 percent	Indian companies engaged in providing similar services	6.94 percent	NA

TNMM: Transactional Net Margin Method;
 PLI: Profit Level Indicator; and
 NA: Not applicable

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9. We will first take up the Transfer Pricing adjustment in respect of Software Services Segment.

10. At the very outset, the ld. counsel for the assessee stated that similar comparables were used by the TPO in assessment year 2008-09 and the Tribunal excluded 7 comparables out of the bouquet of comparables selected by the TPO. It is the say of the ld. counsel for the assessee that for similar reasons, all the comparables excluded in assessment year 2008-09 should be excluded in assessment year under consideration also.

11. The ld. DR vehemently opposed to these submissions of the ld. counsel for the assessee by stating that in the earlier assessment year, there were two companies namely, Nokia Siemens Networks Pvt Ltd and Nokia Solutions and Networks India Pvt Ltd whereas during the year under consideration, there is only one amalgamated company i.e. Nokia Solutions and Network India Pvt Ltd. It is the say of the ld. DR that since the business profile of the assessee has changed, the comparables excluded in earlier years need not be excluded for the year under consideration.

12. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We have also pursued the order of the co-ordinate bench in assessment year 2008-09 in ITA No. 332/DEL/2013. We find that in assessment year 2008-09, Nokia Siemens Networks Pvt Ltd was assessed pre amalgamation and Nokia Siemens Network India was assessed post-amalgamation. While deciding appeal in ITA No. 332/DEL/2013, the co-ordinate bench observed as under:

"The Ld. AR submitted that the assessee is also engaged in providing software development services to its AEs. Thus, it is an undisputed position that assessee's functional profile qua the software development service division is identical to that of the erstwhile entity which has been considered by the Tribunal in M/s Nokia Siemens Networks India (supra). The TPO selected 25 comparables to benchmark the transaction pertaining to software development services division. Subsequently, DRP deleted one of the comparables selected by TPO and thus the final set of comparables comes to 24. Out of these 24 comparables, the assessee wants to exclude 18 comparables and further wants inclusion of three comparables. Thus, the Ld. AR submitted that all the comparables under challenge were considered by this Tribunal in case of M/s Nokia Siemens Networks India (supra) for the same business and same Assessment Year. "

13. As the contentions of the ld. DR are as considered by the Tribunal in 2008-09 [supra], we do not find any merit in the objections raised by the ld. DR.

14. The ld. counsel for the assessee has pleaded for exclusion of the following comparables similar in line of exclusion in assessment year 2008-09:

- i) CAT Technologies Ltd
- ii) Infosys Technologies Ltd
- iii) Larsen & Toubro Infotech
- iv) LGS Global
- v) Mindtree Ltd
- vi) Persistent Systems
- vii) R.S. Software
- viii) Tata Elxsi

15. A perusal of the order of the co-ordinate bench in ITA No. 333/DEL/2013 shows that the aforementioned comparables were excluded from the final set of comparables. The relevant findings of the co-ordinate bench in respect of each comparable reads as under:

i) CAT TECHNOLOGIES LTD

47. This company was objected by the assessee on the ground that it is engaged in diversified set of services and also that the segmental data is not available, but the Ld. that TPO included this company in the set of comparables.

48. From page No. 94 of the paper book where the segmental reporting is mentioned, we found that the company is dealing in Medical Transcription, Training software development and consultancy services. Further vide Note No. 7 to the notes on accounts it is stated that the company considered whole of India as a single geographical segment. Vide page No. 94 at schedule No. 9, the software development and consulting services are clubbed together. No separate credentials are available. It's also argued that the annual report of the comparable also does not disclose sufficient related party disclosures.

49. Inasmuch as the company is dealing with software development and consulting services as well as medical transcription and no separate financials in respect of the software development from consulting services are available, we are of the considered opinion that this company is not a good comparable with the assessee.

ii) INFOSYS TECHNOLOGIES LTD

78. This company is undoubtedly a corporate giant with its large scale of operations vis-à-vis the Assessee company; that it had a brand impact to determine the premium pricing; that it has a different model of revenue recognition. It is submitted on behalf of the assessee that this comparable has been rejected in Assessee's own case in immediately preceding year, i.e. AY 2007- 08 by the Tribunal on account of different risk profile, scale, nature of services, revenue ownership of branded/ proprietary products, onsite and offshore services etc. This fact is not contradicted by the revenue.

79. Further, the Assessee has placed reliance on Aircom (supra), in order to exclude this comparable company on the basis of its magnitude. The coordinate bench has rejected this comparable by making following observations:-

"17.2. We have considered the rival submissions and perused the relevant material on record. It can be seen that the TPO has included this company in the list of comparables by rejecting the assessee's contentions. The assessee is providing and assigning software services to its AE alone without acquiring any intellectual property rights in the work done by it in the development of software. The Hon'ble Delhi High Court in [CIT vs. Agnity India Technologies \(P\) Ltd.](#) (2013) 219 Taxmann 26 (Del) considered the giantness of Infosys Ltd., in terms of risk profile, nature of services, number of employees, ownership of branded products and brand related profits, etc. in comparison with

such factors prevailing in the case of Agnity India Technologies Pvt. Ltd., being, a captive unit providing software development services without having any IP rights in the work done by it. After making comparison of various factors as enumerated above, the Hon'ble Delhi High Court held Infosys Ltd. to be non-comparable with Agnity India Technologies Pvt. Ltd. The facts of the instant case are similar to the extent that the extant assessee is also not owning any branded products and having no expenditure on R&D etc. When we consider all the above factors in a holistic manner, there remains absolutely no doubt that Infosys Technologies Ltd. is not comparable with the assessee company. Respectfully following the judgment of the Hon'ble jurisdictional High Court in Agnity India (supra), we hold that Infosys Technologies Ltd., cannot be treated as comparable with the assessee company. This company is, therefore, directed to be excluded from the list of comparables."

80. The diversified activities of business, its deployment of capital, resources and the brand name make this company not comparable with the assessee and, therefore, this company has to be excluded from the final set of comparable companies for benchmarking international transaction related to software segment.

iii) LARSEN & TOUBRO INFOTECH

89. This company also was originally offered as a comparable by the assessee itself but now the assessee is challenging the said company before us. Undoubtedly this company is also a corporate giant and a

reading of the annual report of this company incorporated from page No. 824 of the paper book shows that this company is into the manufacturing and product engineering services, besides which dealing with banking, financial services, insurance, energy and petrochemicals etc. Note No. 18 of the Notes on Account under the heading segmental reporting shows that segmental reporting of revenues of this company are on the basis of geographical location of the customers, but not on the functional segmental. Profit and loss account at page No. 838 of the paper book shows that the revenue is bifurcated under the head software development services and products on geographical basis like overseas and domestic.

90. In view of the huge capital base, resources and other factors this company cannot be a comparable to the assessee and has to be excluded from the final list of comparable companies for benchmarking international transaction related to software segment.

iv) LGS GLOBAL

85. Initially the assessee offered this company as a comparable, but the assessee claims to have found that this company is not a comparable and wrongly included in the final list of comparable companies. Inasmuch as the key determinative factor as far as the inclusion/exclusion of any company from the list of comparables is the functionality of an entity, we are of the considered opinion that this

company has to be considered on the parameters of functionality and assessee cannot be prevented from challenging the same.

86. Page No. 26 of the 9th annual report 2007-08 of this company can be found at page No. 935 of the paper book clearly establishes that this company is engaged in a multifarious activities including an end to end service provider and offers variety of services. It is involved in product evaluation, design & development etc. of the products. Further, it also renders BPO services in the field of Human Resources, Life Sciences, Legal Services, Supply Chain Management, Sales, and Customer Support etc. Further, the financial statements lacks in providing the segmental results as well.

87. Further reading of the notes forming part of the accounts vide schedule 14 incorporated at page No. 971 of the paper book coupled with entries in scheduled 5 at page No. 966 thereof show that there is an exceptional circumstances during the year, i.e. the company has written off Goodwill, which arose on account of merger of Lanco Global Systems Inc.

88. In view of the vast functional diversity of this company as is evident from the "offerings of the LGS service and solution" to be found at page No. 935 of its annual report coupled with the fact of the exceptional circumstance occurred during the year, we are of the considered opinion that this company is not a good comparable with the assessee and on that score it has to be excluded from the final set of comparable companies for the present year under consideration.

v) MINDTREE LTD

91. Assessee sought the exclusion of this company on the ground of functional dissimilarity. However Ld. TPO included it on the ground that this company is deriving revenue from both software as well as ITES and sufficient segmental information is not available in the financial statements. Under the head "the business performance", at page No. 1010 of the paper book it is revealed that this company is structured into two business units that focus on software development R&D services, and IT services. It also offers IT Strategic Consulting, Application Development, Data Warehousing and Business Intelligence, Application Maintenance, Package Implementation, Product Architecture, Design and Engineering, Embedded Software, Technical Support, Testing and Infrastructure Management Service.

92. Further at page No. 27 of the annual report incorporated at page No. 1027 of the paper book it is mentioned that on 17/12/2007 the company acquired hundred percent of the outstanding equity shares of TES PV and Projects Solutions Private Limited which was subsequently renamed as Mindtree Technologies Private Limited at a total consideration of Rs. 259.7 million equivalent to USD 6.55 million. It is further stated that as a consequence of this, the revenues of this company as on 31st March 2008 of Rs. 64.80 millions has been included in the above revenues for that year.

93. Needless to say the vast functional dissimilarity coupled with the extraordinary event of acquisition of equity shares stated above suggests that this company is not a good comparable with the assessee and consequently is liable to be excluded from the list of comparables.

vi) PERSISTENT SYSTEMS

94. The Assessee claims to have excluded this company from the list of comparables while preparing its TP study on the ground that this company was functionally different from the assessee. However, This company was selected as comparable by the TPO and the assessee, during the course of TP proceedings, opposed the inclusion of this comparable on ground of functional dissimilarity but the TPO selected it as the final comparable by rejecting the argument of the Assessee and holding that this company is deriving revenue from both software as well as products and insufficient segmental information is available in the financial statements.

95. It is evident from a reading of page numbers 1085, 1090, 1136, 1140, 1154, 1162 & 1183 of the paper book containing the Annual Report of this company, that the company is engaged into software product development with complete life cycle and is functionally dissimilar to that of the Assessee. Further the profit and loss account at page No. 1154 of the paper book shows that the income from the sale of software services and products is bundled up, the schedule No. 11 forming part of profit and loss account at page No. 1160 shows the

segmentation on the basis of overseas and domestic. Item number 'L' at page No. 1166 under the heading "segment reporting policies" reads that the company has disclosed the segment information only on the basis of the consolidated financial statements which shall be presented together with the unconsolidated inertial statements.

96. Further, in support of their plea that a company which is engaged in software development services, but, at the same time is also a software product company, is not a good comparable with the assessee, assessee placed reliance on Aircom (supra), in order to exclude this comparable company. The coordinate bench has rejected this comparable by making following observations:-

"19.2. We have heard the rival submissions and perused the relevant material on record. It can be seen from the information supplied by this company u/s 133(6) of the Act, a part of which has been reproduced in the TPO's order, that this company 'has developed a few of its own products in the area of identity management connectors.' Revenue from product licences stands at Rs.288.93 million as against the revenue from software development services at Rs.4829.57 millions. Though this company is more engaged in software development services, but, at the same time is also a software product company, which is evident from the information supplied by it to the TPO. Thus, the total revenue of the company on entity level also, inter alia, includes revenue from product licences. There is no information available from the Annual report of this company or the data collected by the TPO u/s 133(6) of the Act to divulge the amount of revenue

from software development services alone to the exclusion of revenue from product licences. In such circumstances, it is not possible to ascertain the impact of such revenue on the total revenue of this company. As the assessee is not engaged in the sale of any software products, this company on entity level, cannot be considered as comparable. The Delhi Bench of the Tribunal in the case of Toluna India Pvt. Ltd. Vs. ACIT (ITA No.5645/Del/2011, vide its order dated 26.8.2014 has held Persistent Systems Ltd. to be incomparable with Toluna India Pvt. Ltd., also a company engaged in providing software development services to its related parties alone. Similar view has been taken by the Tribunal in Lear Automotive India Pvt. Ltd. Vs. ACIT (ITA No.5612/Del/2011) vide its order dated 22.12.2014. The Id. DR could not point out any distinguishing feature in the factual matrix of the assessee in question and Toluna India Pvt. Ltd., and Lear Automotive India Pvt. Ltd. Respectfully following the precedents, we order for the exclusion of this company from the list of comparables."

97. In view of the functional dissimilarity coupled with the fact of nonavailability of the segmental information, while respectfully following the decision in Aircom (supra), we hold that this company is liable to be excluded from the list of comparables.

vii) R. SYSTEMS . SOFTWARE

"103. Assessee objected the inclusion of this company in the set of comparables on the ground that this company was functionally different from the assessee. However, this company was selected as a comparable by the TPO and the assessee has argued for its exclusion on the ground that it functionally dissimilar to that of the Assessee as this company is engaged in the Outsourced Product Development and Customer Support Services. Further, it also offers low end BPO Services. Page No. 9 of the annual report of this company establishes this fact.

104. Having regard to the information furnished in the annual report of this company vide page numbers 1356, 1362, 1366, 1371, 1378 and 1380 of the paper book, we are convinced that that this company is not a pure software service provider but is engaged in development and sale of products and on the ground excludable from the final set of comparable companies for benchmarking international transaction related to software segment."

viii) TATA ELXSI

108. At the outset it is brought to our notice that in assessee's own case for the assessment year 2007-08, a coordinate bench of this Tribunal considered the functional similarity of this comparable with

the assessee and found that this company is not a suitable comparable in view of its different functions.

109. On a perusal of the order dated 18/05/2016 in ITA No. 5837/Delhi/2011 in assessee's own case, we found that this aspect of suitability of this company and its functional similarity was considered by this Tribunal. Vide paragraph No. 51 to 53 this Tribunal reached a conclusion that this comparable company is developing hardware and software for embedded products, such as, multimedia and other electronics etc and is also making some programs developing technology in the form of intellectual property, as such the functional profile of the assessee company is not comparable to this company.

110. Further, the Appellant has placed reliance on Aircom (supra), in order to exclude this comparable company. The coordinate bench has rejected this comparable by making following observations:-

"22.2. After considering the rival submissions and perusing the relevant material on record, we find that the TPO has adopted 'Software development and services' segment which, in turn, consists of three sub-segments, namely, Product design services (design and development of hardware and software), Innovation design and engineering (mechanical design with a focus on industrial design) and Visual Computing Labs (Animation and Visual Effects). Since this company offers integrated hardware and packaged software solutions, the same cannot be considered as comparable with the assessee company, which is simply providing software related services. The Tribunal in Toluna India Pvt. Ltd. VS. ACIT (2014) 151 ITD 177 (Delhi)

and Motorola Solutions India Pvt. Ltd. (supra), both of which were rendering software development services, has treated this company as functionally not comparable. We, therefore, order for the exclusion of this company from the list of comparables."

111. No change of circumstances is brought to our notice either by the assessee or by the revenue, as such, by respectfully following the reasoning of this Tribunal in assessee's own case for the immediately preceding year, we conclude that this company is not a suitable one to be continued in the set of comparables. We therefore direct the exclusion of this company from the final set of comparable companies for benchmarking international transaction related to software segment."

16. As no new facts have been brought to our notice, except the fact of amalgamation, which has been taken care of by the Tribunal in its order in ITA No. 333/DEL/2013, we find no reason to interfere with the findings of the co-ordinate bench. Respectfully following the same, we direct the TPO to exclude the aforementioned comparables from the final set of comparables.

17. The ld. counsel for the assessee further stated that the following comparables should also be excluded from the list of final set of comparables:

- i) Tata Consultancy Services
- ii) Thinksoft Global Services Ltd
- iii) Thirdware Solutions Ltd

and inclusion of :

- i) CG-VAK Software & Exports Limited.

18. We will now consider each comparable one by one.

Tata Consultancy Services

19. The ld. counsel for the assessee stated that this company is functionally dissimilar as it provides wide array of services as, I.T. Solutions and Services, Enterprises Solutions, I.T. Infrastructure Services and BPO, etc. The ld. counsel for the assessee further pointed out that this company has received only 70% of revenue from software development and, therefore, fails service revenue filter. It is the say of the ld. counsel for the assessee that this company has undertaken significant R & D activities and has substantial brand value with a different revenue recognition model. Being a giant industry with huge turnover and insufficient segment information and there being acquisition during the year which affects the profitability of the

company, this company is not a good comparable and should be excluded.

20. Per contra, the ld. DR stated that the filters proposed by the TPO have been accepted by the assessee as the same were never objected. The ld. DR further stated that all the points raised by the ld. counsel for the assessee have been factually taken care of by the TPO. It is the say of the ld. DR that the assessee has failed to demonstrate the impact in the margin of profit by R & D activities and acquisition by this company.

21. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We have also perused the Annual Report of this company. From the Annual Report of the company, we find that out of total sales of Rs. 27,385 crores, only Rs. 1,719 crores is from BPO, Rs. 225 crores from I.T. Infrastructure services, which means that these segments constitute only 15% of the total revenue. Further, sale of equipment and software licence constitute only 3.76% of total sales. With these factual datas, it can be safely concluded that this company is predominantly a software development service provider. The R & D

expense is only 0.20% of the revenue and there is no demonstrative evidence on record to suggest that the revenue expenses have substantially impacted the profit margin of this company. The intangibles as per fixed asset schedule in the balance sheet shows that they have been fully depreciated during the year.

22. The acquisition mentioned in the Annual Report also does not show any substantial impact in the profit margin of this company. Keeping in mind that TNMM has been accepted as the most appropriate method, it is difficult to find exact replica of the comparable with tested party. In our considered opinion, the TPO has rightly included this company in the final set of comparables and we do not find any error or infirmity in that. Accordingly, TCS stands included in the final set of comparables.

THINKSOFT GLOBAL SERVICES LTD

23. Pleading for exclusion of this company, the ld. counsel for the assessee argued that this company is engaged in the software validation and verification services to the banking and financial industry worldwide and, therefore, is functionally dissimilar. The ld.

counsel for the assessee further stated that for software testing, revenue is recognised based on software tested and billed to clients as per the terms of specific contracts. For fixed price contracts, revenue is recognised on proportionate completion method on basis of work completed.

24. It is the say of the ld. counsel for the assessee that no adjustment can be made for different revenue recognition model. Further, this company has incurred significant marketing and selling expenses. The ld. counsel for the assessee pointed out that because of the functional dissimilarity, this company was excluded by the Tribunal in the case of Conexant Systems Pvt Ltd in ITA No. 384 and ITA No. 453/HYD/2014 and Planet Online in ITA No. 464 and 608 of 2014.

25. The ld. DR submitted that the software validation and verification services are different verticals of software development services and, therefore, the same cannot be construed as functionally dissimilar. The ld. DR strongly placed reliance on the findings of the TPO.

26. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We have also perused the Annual Report of this company. It is not in dispute that this company is engaged in the software validation and verification services to the banking and financial industry worldwide. It is also not in dispute that the revenue recognition of this company is such that no adjustment can be made. The undisputed fact is that the assessee is recognising its revenue on cost +5% basis. In our considered opinion, this company cannot be considered as a good comparable. We, accordingly, direct the TPO to exclude this company from the final set of comparables.

THIRDWARE SOLUTIONS LTD

27. Once again, the ld. counsel for the assessee stated that this company is totally functionally dissimilar as it is into implementation and consulting services of software, based on ERP and business intelligence. The ld. counsel for the assessee further stated that this company has insufficient segment information and has earned supernormal profits in the year under consideration. Further, the revenue recognition for software testing is based on software tested

and billed to clients as per the terms of specific contracts. For fixed price contracts, revenue is recognised on proportionate completion method on basis of work completed. Strong reliance was placed on the decision of the Tribunal in the case of St Ericsson India Pvt Ltd 79 Taxmann.com 207 [Del-Trib] 207.

28. It is the say of the ld. DR that this company is primarily into software development services and, therefore, functionally similar and placed reliance on the findings of the TPO.

29. On careful consideration of the Annual Report of this company, we are of the considered opinion that it is functionally dissimilar. Our view is fortified by the decision of the co-ordinate bench in the case of St Ericsson India Pvt Ltd. Further, revenue recognition model of this company cannot be accepted, as there is no room for any adjustment for different revenue recognition model. As mentioned elsewhere, the assessee recognises its revenue at cost +5%. Therefore, this company cannot be accepted as a good comparable. The same is directed to be excluded.

CG-VAK SOFTWARE & EXPORTS LIMITED

30. We find that the issue relating to this company was remanded by the Tribunal in assessee's own case for assessment year 2008-09 and the ld. counsel for the assessee pointed out that while giving appeal effect, the TPO has accepted to include this company.

31. The ld. DR fairly conceded to this submission of the ld. counsel for the assessee.

32. Considering the past history of the assessee, qua the inclusion of this company, we restore this matter to the file of the TPO to decide the inclusion or otherwise of this company as per the findings given in assessment year 2008-09 and after affording sufficient opportunity of being heard to the assessee. Thus, Ground No 4 with all its sub grounds is partly allowed.

TP ADJUSTMENT IN RESPECT OF MARKET SUPPORT SERVICES SEGMENT.

33. The business profile of the assessee has already been explained elsewhere. The appellant company also provides the following services to its AEs:

- i) Marketing support services
- ii) Network management services
- iii) Support services, and
- iv) Software services

34. Under the head ‘Marketing and business development’ Marketing strategy functions are those activities that determine the positioning of a firm's product – in a market and that establish marketing techniques that bring the products to the customers' attention. NSN India conceptualises the marketing strategy for the sale of its products and services and undertakes functions such as customer lead identification, marketing and securing the orders for its products. NSN India conducts marketing activities such as performing market research, monitoring market demand, formulating marketing strategies and budgets. NSN India is responsible for deciding the types of marketing activities performed and the timing of these activities in India. NSN India employs a sales force that is responsible for both identifying and developing new business opportunities, and maintaining the existing customer base in India. The sales force is also responsible for negotiating with customers in relation to product purchases and pricing. NSN India is responsible for training its local sales force on

both technical and product related issues. PT NSN India also undertakes marketing activities for its AEs. It is responsible for identifying potential customers for its AEs. However, NSN India does not have the authority to enter into contracts on behalf of its AEs. Further, in respect of goods exported to its AEs, the AEs are responsible for marketing the products in their respective jurisdiction.

35. The TPO has made an upward adjustment under this segment. Before us, the ld. counsel for the assessee explained that this being part of the main network division, the assessee has adopted aggregated approach to benchmark the international transactions.

36. The TPO, during the course of TP assessment proceedings observed that the assessee has not bench-marked these services separately and combined with other operations of network division. The TPO dismissed the claim of the assessee that all these transactions are integral to each other and cannot be separated.

37. A show cause notice was issued to the assessee to explain how these transactions are intricately connected with each other. In its reply, the assessee once again contended that the support services

were integral and intricately connected to the net work division. Rejecting this contention of the assessee, the TPO observed that from the TP report, it can be seen that the transactions are not intricately inter-connected. The TPO further observed that these support services are being provided to AEs and contracts executed by AEs in India for various clients. The TPO was of the opinion that it is not the case of the assessee that these services are being provided only in respect of contracts executed by it or sales made by it.

38. According to the TPO, support services provided by the assessee are separate and distinct from the contract and sales being made by the assessee. The TPO further observed that the cost basis in respect of transaction of purchase and sale and that of providing services are very different. According to the TPO, cost base in respect of transaction of purchase and sale included mainly cost of material and there is little value addition. However, in respect of support services, the main cost itself comprises of salaries of employees and therefore, involves significant value addition. Accordingly, the TPO selected the following comparables to bench mark the market/business support services:

Company Name	Sales	NW	Int/TC%	Service%	Emp%	RPT%	OP/OC	OP/OC (w/o Fx)
Apitco Ltd.	11.03	12.4	0.00	96.33	28.35	WA	37.70	37.70
3asiz Fund Service Pvt. Ltd.	3.74	4.30	0.32	84.62	35.50	2.94%	46.75	39.17
Cameo Corp.Serv.	24.37	3.42	5.35	100.00	63.19	0.00	14.95	14.95
Cyber Media Research Ltd.	16.85	4.90	1.39	99.65	26.96	12.34%	10.44	10.89
Global Procurement Consult. Ltd.	3.41	4.03	0.00	90.69	34.73	NA	35.89	30.37
H CCA Business Serv. P. Ltd.	20.89	8.47	0.00	100.00	51.36	13.88%	20.12	20.12
Killick Agencies & Mktg. Ltd.	1.39	0.48	0.83	99.29	38.66	NA	29.48	29.48
Orient Engineering & Commercial Co. Ltd.	1.41	3.77	0.00	87.55	44.44	N/A	34.47	34.47
TSR Darashaw	18.71	19.6	0.45	100.00	50.80	0.00	26.98	26.98
Average							28.5	27.13

39. In light of the above, support services transactions were separately bench marked.

40. Before us, the ld. counsel for the assessee vehemently stated that both the TPO and the DRP grossly erred in understanding the true nature of business support services. It is the say of the ld. counsel for the assessee that marketing support services is an integral part of main network division and the assessee has adopted the best approach of aggregating transaction for bench marking. The ld. counsel for the assessee further pointed out that the AE has reimbursed the cost with mark up of 3% and in doing so, the AE has reimbursed the entire marketing cost incurred by the assessee for its domestic market also. The ld. counsel for the assessee further stated that since the stock

incurred by the assessee to its own market support services has gone to reduced margin, the same should be excluded for the purposes of bench marking the transactions with the AE.

41. The ld. counsel for the assessee further brought to our notice that the TPO has failed to appreciate that the cost of service to AE was only Rs. 36.32 crores ,which reflected in the operating margin Rs. 64.89 crores on operating cost to the assessee, which is far in excess of operating margin from the company selected by the TPO.

42. The ld. counsel for the assessee further drew our attention to the fact that this issue was raised before the DRP and arguments were made but could not be supported by any documentary evidence and hence the DRP did not give any direction to the TPO. The ld. counsel for the assessee pointed out that now the documentary evidences are available. Therefore, this issue should be remitted to the file of the TPO for fresh consideration as per working supported by certificate from the Chartered Accountant.

43. The ld. DR strongly supported the findings of the TPO though agreed for remittance to the file of the TPO for fresh consideration in the light of documentary evidences brought on record.

44. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. It is an undisputed fact that the assessee has recharged the total cost of marketing team alongwith markup of 3% from the AE, which means that the AE not only compensated the cost of marketing, team attributable towards the provision of marketing support services to AE by the assessee but also compensated the cost of marketing team attributable to the support provided by the marketing team to the assessee itself. This is not warranted as per the inter company agreement. In our considered opinion, considering the attribution to the services provided to the AE, vis a vis actual revenue realised from the AE, margin of the assessee from the provision of marketing support services has to be higher than 3%. We find that now the assessee has obtained certain documentary evidence and, accordingly, wishes to submit the same in respect of the claim.

45. In view of the above, we are of the considered opinion that cost of marketing team should be bifurcated based on revenue of AE from its operations in India vis a vis revenue generated by the assessee from its sales to third party vendors. We, accordingly, restore this issue to the file of the Assessing Officer/TPO. The assessee is directed to submit the India Specific Profit and Loss Account, network equipment sales to Indian telecom operators of the AE duly certified by an authorised public accountant of Finland. The TPO is directed to examine the same and decide the issue afresh after giving reasonable and sufficient opportunity of being heard to the assessee.

TP ADJUSTMENT IN RESPECT OF TSS [WARRANTEE SUPPORT SERVICES]

46. NSN India provides technical support and other related services to its customers. AEs provide documentation, technical assistance, Spare log and training to NSN India in order to ensure that the company can carry out the services. NSN India also provides repair and replace services. Where products break down, these are repaired on site by NSN India. In case the same cannot be repaired, the same are replaced and the faulty parts, if purchased from the AE are sent back to the respective associated enterprise to be repaired. Once

repaired, the product is then made available for use at a different customer site. The functions performed by NSN India and its AEs are summarized in the table below:

Type of Functions	NSN India	AEs
Product Strategy and design	Limited	Yes
Purchase function	Yes	Yes
Production scheduling	Yes	Yes
Technical assistance	No	Yes
Pricing	Yes	Yes
Marketing and business development	Yes	Yes
Installation and commissioning	Yes	No
Quality control	Yes	Yes
Post sales support	Yes	No

47. During the TP assessment proceedings, the TPO found that the assessee has not bench-marked these services separately and combined them with other operations of network division. Being not satisfied with the action of the assessee, the TPO used the following set of comparables for bench marking of this segment:

No	Company Name	Sales	NW	IntTTC %	Service%	Emp%	RPT%	OP/O C	OP/OC (w/o Fx)
1	Archohm Consulta	1.94	0.64	3.33	100.00	28.67	0.00	29.79	29.79
2	Engineers India	1532.46	1375.34	0.17	100.00	31.29	0.32	59.16	59.16
3	IBI Chematur	13.54	7.39	0.00	100.00	43.94	0.00	20.99	20.66
4	Indus Technical & Financial Consultants Ltd.	1.45	0.83	0.72	98.62	27.74	WA	6.78	6.78
5	L&T Ramboll Cons	24.46	16.94	0.39	100.00	51.52	0.00	41.79	41.79
6	Mahindra Consulting Engineers Ltd	8.48	3.50	0.00	99.07	38.62	0.08	25.67	25.75
7	MN Dastur	162.82	99.75	0.00	100.00	42.14	9.49	7.42	7.42
8	Rites	582.84	609.75	0.19	100.00	40.37	6.12	24.83	24.83
9	Semac Ltd.	34.68	14.60	0.22	97.31	43.22	WA	25.22	25.22
10	TCE Consulting Engineers Ltd.	319.05	116.47	0.66	98.29	50.10	0.05	27.20	27.20
11	WAPCOS Ltd	223.92	75.21	0.41	100.00	27.92	0.00	25.57	25.57
12	Zipper Trading Enterprises	1.02	1.04	1.16	93.58	62.35	WA	34.11	34.11
								27.38	27.36

48. After considering the objections/submissions of the assessee, final set of comparables considered by the TPO for TSS is as under:

No.	Company Name	Sales	NW	Int/TC%	Service%	Emp%	RPT%	OP/OC	OP/OC (w/o Fx)
1	Archohm Consulta	1.94	0.64	3.33	100.00	28.67	0.00	29.79	29.79
2	Engineers India	1532.46	1375.34	0.17	100.00	31.29	0.32	59.16	59.16
3	IBI Chematur	13.54	7.39	0.00	100.00	43.94	0.00	20.99	20.66
4	Indus Technical & Financial Consultants Ltd.	1.45	0.83	0.72	98.62	27.74	#N/A	6.78	6.78
5	L&T Ramboll Cons	24.46	16.94	0.39	100.00	51.52	0.00	41.79	41.79

6	Mahindra Consulting Engineers Ltd.	8.48	3.50	0.00	99.07	38.62	0.08	25.67	25.75
7	MN Dastur	162.82	99.75	0.00	100.00	42.14	9.49	7.42	7.42
8	Rites	582.84	609.75	0.19	100.00	40.37	6.12	24.83	24.83
9	Semac Ltd.	34.68	14.60	0.22	97.31	43.22	#N/A	25.22	25.22
10	T C E Consulting Engineers Ltd.	319.05	116.47	0.66	98.29	50.10	0.05	27.20	27.20
11	WAPCOS Ltd	223.92	75.21	0.41	100.00	27.92	0.00	25.57	25.57
12	Zipper Trading Enterprises Ltd.	1.02	1.04	1.16	93.58	62.35	#N/A	34.11	34.11
								27.38	27.36

49. Based on the above, an adjustment of Rs. 1,01,23,623/- was made, which was confirmed by the DRP.

50. Before us, the ld. counsel for the assessee vehemently stated that TSS segment is an integral part of network division and hence the assessee has rightly bench marked the same by adopting aggregated approach. The assessee has received cost + mark up of 5%. The ld. counsel for the assessee further drew our attention to the Advance Pricing Agreement u/s 92CC of the Act dated 28.03.2016. It is the say of the ld. counsel for the assessee that though this agreement shall apply to five consecutive years commencing from the previous year 2013-14 and also apply to four consecutive roll back years commencing from the previous assessment year 2009-010 but the same has persuasive value for the year under consideration also. The ld. counsel for the assessee further pointed out that under Appendix 1A, details of

cover transaction between the assessee and the AE relate to the network division has been mentioned at Item VIII.

51. It is the say of the ld. counsel for the assessee that the same view should be adopted for the year under consideration also as there is no change in the business model of the assessee. In support of its contention the ld. counsel for the assessee placed reliance on the decision of the Tribunal in the case of Ranbaxy Laboratories 68 Taxmann.com 322.

52. Per contra, the ld. DR strongly supported the findings of the TPO and it is the say of the ld. DR that the TPO has rightly segregated the transaction and has used the comparables as per filters accepted by the assessee and, therefore, no interference should be made with the findings of the TPO.

53. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We have also accordingly perused the advance pricing agreement u/s 92CC of the Act between the CBDT and the assessee which is exhibited at pages 18

to 76 of the paper book. It is true that the agreement is applicable to 4 consecutive rollback years commencing from the previous year 2009-10 to previous year 2012-13. However, we find that the FAR analysis of the year under APA applicable from assessment year 2010-11 can also be used for the year under consideration since the TP adjustment is of a very small amount being 1.01 crores. Considering the facts in totality, we direct the TPO to accept the TSS segment as part of network division for bench marking the international transaction which means that this segment should be taken with the main network division of aggregated approach for bench marking.

TP adjustment in respect of Remote Network Management Services
[ITES Segment]

54. In this segment, NSN India has entered into an Agreement for Support Service ("Support Agreement"), with NSN Finland for provision of network management services. Summarized below is a brief analysis of the nature and terms of the identified international transaction:

Associated	Terms & conditions
Nokia Siemens Networks Oy	<p>NSN India provides data processing, data customisation and other remote support services in nature of network support to its AEs.</p> <ul style="list-style-type: none"> ▶ NSN India is reimbursed by NSN Finland on a cost plus 10% mark up basis for provision of services; <p>NSN India invoices NSN Finland on a monthly basis; and</p> <ul style="list-style-type: none"> ▶ The invoices are denominated in US Dollars.

As per the Support Agreement, NSN India, at the request of its AEs, provides following services to it AEs:

- Data processing and customization services including analysis of global business data and customization of data/information required for bid preparation;
- Network operations support services to AEs/its customers through operation of the global networks operation center;
- Technical and operational software support, including troubleshooting, problem diagnostics and resolution;

- Back-office data support for facilitating cost-effective sourcing and delivery of telecommunication infrastructure products / spares for AEs;
- Network remote integration services through operation of the global network integration center;
- Service product development for use by AEs; and
- Other remote delivery services as may be agreed from time to time

55. For bench marking this transaction, the assessee has used the following comparables in its TP Study Report:

No.	Name of the Company	Weighted Average OP/ OC (%)
1	Himachal Futuristic Communications Ltd	15.78
2	ORG Informatics Ltd	-3.5
3	Telecommunications Consultant India Ltd	5.17
	Average	6.94%

56. The assessee used TNMM as the most appropriate method with operating profit to total cost as profit level indicator and PLI of the assessee is arrived at 10% on cost whereas operating PLI of the comparables mentioned hereinabove at 6.94% and hence the

transaction was treated as Arm's length. During the TP proceedings, the TPO was not satisfied with the bench marking made by the assessee and used final set of comparables for ITES segment.

S No.	Company Name	Sales	NW	Service%	Fx%	RPT%	OP/OC (w/o)
1	Accentia Tech.	80.14	120.37	100	98.23%	0.00	52.52
2	Aditya Birla Minacs Worldwide Ltd.	231.49	255.51	100	85.33	4.47	11.95
3	Coral Hub Ltd.	61.09	254.38	100	100	0.18	37.03
4	Cosmic Global Ltd.	7.37	2.67	100	85.07	#N/A	50.70
5	Crossdomain	33.76	17.93	100	88.60%	#N/A	25.63
6	Eclerx Services Ltd.	197.09	165.25	100	91.54	13.76	66.01
7	Genesis International Corporation Ltd.	83.18	71.25	100	115.14	0	59.21
8	Igate Global	900.88	509.3	100	102.87	12.12	22.58
9	Infosys BPO Ltd.	1081.53	661.94	100	96.81	8.41	24.28
10	Omega Healthcare	57.53	21.82	100	99.91%	#N/A	16.74
	Average						36.67

57. Taking arm's length margin at 36.67%, adjustment of Rs. 31,74,61,300/- was made which was confirmed by the DRP.

58. Before us, the ld. counsel for the assessee vehemently stated that the assessee is a low end service provider and cannot be compared with high end service providers in this segment. It is the say of the ld. counsel for the assessee that without prejudice, since the

assessee has started its business in this segment from February 2009 and has done effective business for only two months in the year under consideration, margin cannot be compared with the comparables whose financials are for the entire F.Y. The ld. counsel for the assessee further drew our attention to Rule 10TA(e) of the ITAT Rules and pointed out that the Rule itself has distinguished ITES from the knowledge process of outsourcing services and, therefore, most of the comparables used by the TPO have to be rejected.

59. Per contra, though the ld. DR strongly supported the findings for the TPO but accepted that Rule 10TA specifically distinguished between the two services.

60. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. Rule 10TA(e) read as as under:

"Information technology enabled services" means the following business process outsourcing services provided mainly with the assistance or use of information technology, namely:-

(i) back office operations;

(ii) call centres or contact centre services;

- (iii) data processing and data mining;*
- (iv) insurance claim processing;*
- (v) legal databases;*
- (vi) creation and maintenance of medical transcription excluding medical advice;*
- (vii) translation services;*
- (viii) payroll;*
- (ix) remote maintenance;*
- (x) revenue accounting;*
- (xi) support centres;*
- (xii) website services;*
- (xiii) data search integration and analysis;*
- (xiv) remote education excluding education content development; or*
- (xv) clinical database management services excluding clinical trials, but does not include any research and development services whether or not in the nature of contract research and development services;*

61. We find that under clause (g), knowledge process outsourcing services has been defined. This means that even the Legislature accepts that two segments cannot be mixed up, which means that most of the comparables used by the TPO have to be rejected. In all fairness, we deem it fit to restore the matter to the file of the TPO with a direction to use only those comparables which fit in Rule 10TA(e) of the Rules and decide the issue afresh after giving reasonable and fair opportunity of being heard to the assessee. The assessee shall be at liberty to bring any new comparables which fit into

Rule 10TA(e) of the Rules. Ground No. 5 to 5.5 is allowed for statistical purposes. Ground No. 6 is allowed in part for statistical purposes.

62. In the result, the appeal filed by the assessee in ITA No/2810/DEL/2014 is allowed in part for statistical purposes.

The order is pronounced in the open court on 23.08.2019.

**Sd/-
[PAVAN KUMAR GADALE]
JUDICIAL MEMBER**

**Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 23th August, 2019

VL/

Copy forwarded to:

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

Asst. Registrar
ITAT, New Delhi

Date of dictation	22.08.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	23.08.2019
Date on which the final order is uploaded on the website of ITAT	26.08.2019
Date on which the file goes to the Bench Clerk	26.08.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	