

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

Before Sh. Sudhanshu Srivastava, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1431/Del/2016 : Asstt. Year : 2011-12

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| M/s Giesecke & Devrient India Pvt. Ltd., Corporate Office- Plot # 57, Sector 44, Gurgaon-122003, Haryana | Vs | Deputy Commissioner of Income Tax, Circle-10(1), New Delhi |
| (APPELLANT) | | (RESPONDENT) |
| PAN No. AABCG4223D | | |

**Assessee by : Sh. Harpreet Singh Ajmani &
Sh. Rohan Khare, Adv.**

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

Date of Hearing: 05.09.2019

Date of Pronouncement: 30.10.2019

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 29.12.2015 passed by the AO u/s 144C r.w.s. 143(3) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

**"A. Software Development Segment
[Rs.1,63,08,413]**

1. On the facts and in law, the Ld. TPO / AO and Hon'ble DRP erred in determining the adjustment of Rs.1,63,08,413/- to the value of international transactions pertaining to Software Development Services Segment.

2. That on facts and in law, the Hon'ble DRP and Ld. TPO/AO failed to appreciate the business model and

business realities of the Appellant and its Associated Enterprises ("AEs") while conducting the transfer pricing analysis and adopted an entirely flawed approach to reach a conclusion that the Appellant is not compensated at arm's length for its Software Development Services Segment.

3. On the facts and in law, the Ld. TPO erred in not discharging his statutory onus to establish that any of the conditions specified in clause (a) to (d) of section 92C(3) of the Income Tax Act, 1961 ("Act") have been satisfied before disregarding the arm's length price determined by the Appellant and proceeding to determine the arm's length price himself.

4. On the facts and in law, the Hon'ble DRP and Ld. TPO/AO have erred in rejecting the economic analysis undertaken by the Appellant without proper justification and conducting a fresh search using arbitrary filters for identifying companies comparable to the Appellant.

5. On the facts and in law, the Ld. TPO / AO and Hon'ble DRP grossly erred in not accepting the comparable companies proposed by the Appellant, as the said comparable companies met the FAR (functions performed, assets employed and risk assumed) test stated under Rule 10B(2) of the Income Tax Rules, 1962 ("the Rules").

6. On facts and in law, the Ld. AO/ TPO erred in violating the provisions of Rule 10B(2) of the Rules by introducing new comparables without considering the differences in the functions performed, assets employed and risks assumed by such companies vis-a-vis the Appellant, thereby resorting to cherry picking of comparables.

7. On facts and in law, the Ld. AO/ TPO erred in incorrectly computing the operating margins of the comparable companies by treating certain items as operating / non-operating.

8. *On facts and in law, the Ld. AO/ TPO and Hon'ble DRP erred in not providing the benefit envisaged under section 92C(2) of the Act.*

9. *On the facts and in law, the Ld. TPO and Ld. AO erred in not allowing a risk adjustment to the Appellant thereby contravening the provisions of Rule 10B(1)(e)(iii) and Rule 10B(3) of the Rules.*

10. *On facts and in law the Ld. TPO, Ld. AO and the Hon'ble DRP erred in using the data for the current year (i.e. financial year 2010-11) which was not contemporaneous and which was not available in the public domain at the time of preparing the TP documentation by the Appellant, thereby grossly misinterpreting the requirement of 'contemporaneous' data in the Rules to necessarily imply current year data, thereby breaching the principles of natural justice and 'impossibility of performance'.*

Corporate Tax Grounds

A. Disallowance u/s 40(a)(i) [Rs. 20,83,040]

11. *On the facts and in law, the Ld. DRP/AO have erred in disallowing Rs. 20,83,040 for non-deduction of tax at source under section 40(a)(i) of the Act by concluding that the reimbursement of expenses by the assessee to its overseas group companies was liable to withholding tax provisions u/s 195(1) of the Act.*

12. *On the facts and in law, the Ld. DRP/AO grossly erred in holding that the reimbursement of expenses were payments in the nature of Fee for Technical Services (FTS) / Fees for Included Service (FIS) and were thus sums chargeable to tax in the hands of the recipients.*

13. *On the facts and in law, the Ld. DRP/AO grossly erred in passing a non-speaking order, without granting sufficient opportunity of hearing.*

14. *On the facts and in law, the Ld. AO and the Hon'ble DRP erred in concluding that the payment of training expenses amounting to Rs. 4,28,377 out of*

the total reimbursement of Rs. 20,83,040 is liable to withholding tax provisions of S. 195(1) of the Act and failing to appreciate that payment of training expenses does not fall within the meaning of FIS under Article 12 of the India-Singapore tax treaty.

B. Other Grounds

15. On the facts and in the circumstances of the case, the Ld. AO erred in levying interest under section 234B and 234D of the Act.

16. On the facts and in law, the Ld. AO and the Hon'ble DRP erred on facts and in law in initiating penalty under section 271(1)(c) and 271AA of the Act.

3. G&D India was incorporated in 2001 as 100 percent subsidiary of G&D GmbH, with its corporate office located in Gurgaon. The company initially specialized in currency automation systems, later adding its business in the fields of telecommunications, electronic payment, transportation, health care and identification. G&D has enjoyed business relations with India since the 1990s and sold the first banknote processing systems to India in 1997. G&D India holds significant market share in the currency automation equipment segment, the Reserve Bank of India (RBI) being one of its major customers. The company is also a provider of SIM cards for mobile communications, credit and debit cards for banks as well as cards for various government projects such as driving licenses, vehicle registration and identification. The company provides the following products and services to its customers:

- Currency automation systems;
- Banknote processing systems;
- Banknote identification systems;
- Banknote cancelling and destruction systems;
- Banknote packing systems;
- Banknote quality inspection;
- Coin handling systems;
- Cash deposit terminals;

- Cash management software;
- Cards for mobile communications;
- Debit and credit cards for electronic payments;
- Internet banking and signature cards;
- Smart card services;
- Cards for transportation;
- Passport systems;
- ID card systems;
- Health card systems; and
- Card operating systems.

International Transactions

| <i>Sl.No.</i> | <i>International Transaction</i> | <i>Amount In Rs.</i> |
|---------------|---|----------------------|
| 1 | <i>Import of CVPS Machines and spare parts</i> | <i>1,179,731,026</i> |
| 2 | <i>Repair and maintenance</i> | <i>457,494</i> |
| 3 | <i>Import of Chips /Components /SIM / cards</i> | <i>117,020,244</i> |
| 4 | <i>License Fees</i> | <i>10,041,616</i> |
| 5 | <i>Provision of software development services</i> | <i>176,983,040</i> |
| 6 | <i>Service expenses</i> | <i>63,374,343</i> |
| 7 | <i>Reimbursement of expenses</i> | <i>2,247,411</i> |
| 8 | <i>Bank Charges</i> | <i>125,789</i> |
| 9 | <i>Sale of Fixed assets</i> | <i>50,578,615</i> |
| 10 | <i>Purchase of fixed assets</i> | <i>2,759,295</i> |
| 11 | <i>Guarantee fee paid</i> | <i>2,635,111</i> |
| 12 | <i>Recovery of expenses</i> | <i>4,309,493</i> |

Analysis of the assessee's transfer pricing approach

4. The international transactions that have been entered into by the assessee have been tabulated above. The international transaction of the assessee in relation to providing Software Development Services and assembly of Sim cards are examined in TP study. The functions of the assessee and its AE and the functions of the assessee as submitted in the TP report are found to be in order.

SOFTWARE DEVELOPMENT CHARGES:

5. The assessee has used TNMM as the method and Net Operating profit Margin based on Costs (NCP Margin) as the PLI. The assessee has arrived at a set of 12 companies with an average margin of 10.55%. The assessee has used multiple year data. The assessee's own margin is worked out to be 11.61% for Software Development Services. Based on the analysis, the assessee has concluded that its international transactions are at arm's length.

SIM CARD DISTRIBUTION:

6. The assessee has used TNMM as the method and Net Operating Profit Margin based on Costs (NCP Margin) as the PLI. The assessee has arrived at a set of 04 companies with an average margin of 0.14%. The assessee has used multiple year data. The assessee's own margin is worked out to be (6.78%) for Sim Card Distribution Segment. Based on the analysis, the assessee has concluded that its international transactions are at arm's length.

Transfer pricing analysis by the TPO:

7. As per the audit report, the assessee operates in the following primary business segments:

- Trading in bank note processing machines and related maintenance services
- Trading in sim/smart cards
- Software services

8. In the software development services segment, the TPO has used current year data and selected the following comparables. He has computed the PLI (OP/OC) at 22.92% and made an adjustment of Rs.1,79,43,149/-. In the sim card assembly segment, the TPO has

computed the PLI (NPM) at 0.03% and made an adjustment of Rs.7,53,88,809/-.

| Sl. No. | Company Long Name | OP/OC |
|---------|--|--------|
| 1 | Acropetal Technologies Limited | 36.69% |
| 2 | Akshay Software Technologies Ltd. | 0.16% |
| 3 | Evoke Technologies Pvt Ltd | 8.11% |
| 4 | E-infochips Limited | 56.44% |
| 5 | e-Zest Solutions Limited | 34.83% |
| 6 | Infosys Ltd | 43.53% |
| 7 | Kireeti Soft Technologies Ltd. | 3.63% |
| 8 | Larsen & Toubro Infotech Ltd. | 18.40% |
| 9 | Mindtree Limited (Segment) | 10.74% |
| 10 | Persistent Systems & Solutions Ltd. | 22.12% |
| 11 | Persistent Systems Ltd. | 23.08% |
| 12 | R S Software (India) Ltd. | 16.20% |
| 13 | Sasken Communication Technologies Ltd. | 24.36% |
| 14 | Tata Elxsi Ltd. (Segment) | 13.00% |
| 15 | Thirdware Solutions | 16.19% |
| 16 | Wipro Technologies Limited | 54.42% |
| 17 | Zylog Systems Ltd | 28.74% |
| 18 | CG-VAK Software and Exports Ltd. | 1.83% |
| AVERAGE | | 22.92% |

9. Before us the assessee has taken objection of selection of the following comparables:

| Sl. No. | Name of the company |
|---------|---------------------------------------|
| 1 | Acropetal Technologies Limited |
| 2 | E-infochips Limited |
| 3 | E-Zest Solutions Limited |
| 4 | Infosys Ltd. |
| 5 | Larsen & Toubro Infotech Ltd. |
| 6 | Persistent Systems and Solutions Ltd. |
| 7 | Persistent Systems Ltd. |

| | |
|----|--|
| 8 | Sasken Communication Technologies Ltd. |
| 9 | Wipro Technologies Services Limited |
| 10 | Zylog Systems Ltd. |

10. Further, the assessee sought to include the following two comparables namely,

1. R. Systems Ltd.
2. Vama Industries Ltd.

Acropetal Technologies Limited:

11. During the arguments, the assessee has taken primary objection as to the comparable fails TPO's own employees cost filter of 20%. We have gone through the filters taken up by the TPO. The TPO has taken up filter to reject companies having employee cost less than 25% of the total costs on the grounds that in the case of a software development company, employees are the main asset of the company and directly reflect the nature of business undertaken by the company. Extremely low expenditure on salary/employee cost is an indication that the company is either into further outsourcing of the work or is a software product developer or a software trading company. In view of these facts, filter of 25% of minimum salary expenditure was applied while examining the comparables selected by the taxpayer while searching for additional comparables.

12. The P&L account of the comparable showed the following:

Software development expenses

| | |
|--|----------------|
| Salaries and consultancy charges including bonus, Incentive, gratuity and leave encashment | Rs.135,160,463 |
| Contribution to provident fund | Rs.3,851,751 |
| Staff welfare expenses | Rs.1,395,789 |

| | |
|---|--------------------------------|
| Onsite Development Expenses – technical sub-contractors | Rs.557,762,834 |
| Third party items bought for service delivery to client | Rs.1,036,118 Rs.699,206,955 |

13. The turnover of the company excluding other income is Rs.141,65,28,000/-. Thus, we observe that the comparable selected by the revenue fails their own filter chosen by the TPO on account of employee cost less than 25% of the total cost. Hence, we hereby direct that the asset comparable be excluded from the TPO study.

E-infochips Limited:

14. The TPO held that this comparable passes all the filters. The Id. AR primarily argued that it fails the TPO's own filter of software revenues. We have gone through the filters taken up by the TPO. The TPO has applied filters so as to exclude companies whose revenues from software development services is less than 75% of the total operating revenues. The TPO held that this is an appropriate filter as this is the stage which determine the correct comparability. In respect of enterprises whose main source of income is from service segment, the companies whose income from software development services come to more than 75% of the operating revenues have only to be considered for the ALP study as other segment may not materially affect the financial results of the company. While disputing the contention of the assessee that filter should be 50% instead of 75%, the TPO reiterated his stand holding that the search criterion is basically to search for companies which are mainly engaged in IT industry or whose significant activities or functions relate to IT industry. Hence, it is appropriate to apply the filter that the comparable company should have at least 75% of its revenue from IT industry. He further held that even the OECD guidelines says that functional analysis is to identify and to compare economically significant activities undertaken by the

independent enterprises. Thus the filter of 75% revenues from IT industry is applied as this threshold would given independent companies whose economically significant activities pertain to IT industry and the revenues from other sources would not impact materially the profitability of the company at the enterprise level. The threshold applied by the taxpayer at 50% does not bring in comparables with IT industry as its significant activities.

15. We have gone through the financials of this comparable, the operating revenues gross are to the tune of Rs.26,03,84,251/- whereas the revenue from software development is Rs.19,21,09,661/- which is less than 75% hence, do not qualify for the comparable as per the TPO's own filter. Hence, it is directed that this comparable may be obliterated from the list of comparable.

Zylog Systems Ltd.:

16. Similarly in the case of this comparable, the revenues from the software solutions and products in the current year is 45.2% and in the earlier year 39.5% which is less than 75% hence, do not qualify for the comparable as per the TPO's own filter. Hence, it is directed that this comparable may be obliterated from the list of comparable.

e-Zest Solutions Limited:

17. It was argued for exclusion of E-Zest from the final list of comparables on the ground that the said company is functionally dissimilar to assessee, as it is engaged in providing e-Business Consulting services including product development services and technical services which they themselves characterize as Knowledge Process Outsourcing ('KPO') services. Whilst placing heavy reliance on the company's website handout along with the Annual Report, he submitted that the assessee being a

captive software development company cannot be compared with a KPO. Additionally, he took us through the annual report to evidence that no segmental data vis-à-vis the services and products was available. We find that cloud computing has been the major source of revenue of this company, hence, functionally not comparable. In the assessee's own case for the assessment year 2008-09, this comparable has been excluded by the Co-ordinate Bench of the Tribunal relying on the decision of Sunguard Solutions India Pvt. Ltd. in ITA No. 1487/Bang./2012. Hence, keeping in view the decision of the earlier year, we direct that this comparable may be excluded from the list of comparables.

Infosys Ltd.:

18. It was argued by the Id. AR that this comparable is functionally different as it is providing end to end solutions, technical consultancy, design development, re-engineering along with software products. He also argued that owing to the scale of operation and risk undertaken and owing to lack of segmental data this cannot be taken as a comparable. In the assessee's own case for the assessment year 2008-09, this comparable has been excluded by the Co-ordinate Bench of the Tribunal relying on the decision of Nokia Siemens Networks India Pvt. Ltd. Vs ACIT in ITA No. 333/Del/2013. Hence, keeping in view the decision of the earlier year, we direct that this comparable may be excluded from the list of comparables.

Larsen & Toubro Infotech Ltd.

19. It was argued by the Id. AR that this comparable is functionally different as it is engaged in software development and software products also. He also argued that owing to lack of segmental data, owing to insufficient segmental information and being earned more than 50% of the revenue from onsite operations, this cannot be taken as a comparable. He

also relied on the decision of the Co-ordinate Bench of the Tribunal in the case of Alcatel Lucent India Ltd. Vs DCIT in ITA N. 6856/Del/2015 and Parexel International India Pvt. Ltd. Vs ACIT in ITA No.1918/Hyd/2014. We find in the case of Alcatel Lucent India Ltd., the Co-ordinate Bench has held that L&T is functionally dissimilar to the functions of Alcatel Lucent. In the case of Parexel International India Pvt. Ltd., the Co-ordinate Bench held as under:

"It was the submission that once DRP has accepted the objections of Assessee whereas in Assessee's case DRP did not exclude L&T Infotech while excluding Infosys Technologies Ltd., it was the submission that similar facts exist for both the companies and DRP has excluded only Infosys Technologies and not L&T Infotech Ltd., 14.3. After considering the objections of Assessee and perusing the order of DRP in the case of M/s. Sumtotal Systems India Pvt. Ltd., (supra), as extracted above, we are of the opinion that this company cannot be selected as comparable by the same reasons which DRP in the above referred case accepted. Moreover, there are no segmental details and as seen from the annual report, revenues are reported from software development services and products, how much is from services and how much is from products could not be analysed. Even though TPO considered the software exports reported in earning in foreign currency as that of software development services, we are not sure whether the software exports reported therein exclusively pertain to services or products. As there are no segmental details, it is very difficult to analyse whether the incomes earned by the said company do really pertain to the similar services rendered by Assessee. As also seen from the income schedules, engineering services reported in earlier year were not there in this year, therefore, it is very difficult to analyse whether the company is functionally similar or not? Keeping in view of the above difficulties in analyzing the data and considering the reasons given by DRP in the case of M/s. Sumtotal Systems India Pvt. Ltd., (supra), we are of the opinion that L&T Infotech Ltd., cannot be selected as a comparable company. AO/TPO is directed to exclude the same from the list of comparables."

20. We find that the submissions of the Id. AR cannot be accepted as the assessee and the comparable, and the study of the TPO involves

determination of ALP on software development services. In the software development services, the overseas revenues do involve the similar functions. The assessee is also in the software development segment so as the comparable. Increase in turnover cannot entitle to exclude the comparable. The revenues have shown to be from the IT services. The case laws supported by the assessee are not applicable to the facts of this case. 93.56% of revenue is coming from the export of software development only. Functionally Infosys is on a different format whereas L&T is similar. Keeping in view, the judgment of Hon'ble Supreme Court in the case of Morgan Stanley and Company Inc. [292 ITR 416] regarding the functions and comparability thereof, we hold that this can be included an appropriate comparable.

Persistent Systems and Solutions Ltd.:

21. It was argued by the Id. AR that this comparable is functionally different as it is engaged in software development and software products also. He also argued that owing to lack of segmental data, owing to insufficient segmental information, this cannot be taken as a comparable. Placed reliance on the judgment of Alcatel Lucent India Ltd. (supra) and Broadcom India Research Pvt. Ltd. in ITA No. 348/Bang/2015. We find as per the audited account, the company provides support in software development, consultancy and systems integration. Regarding the description of products of services, they are into information technology software services. In the assessee's own case for the assessment year 2008-09, this comparable has been excluded by the Co-ordinate Bench of the Tribunal. Hence, keeping in view the decision of the earlier year, we direct that this comparable may be excluded from the list of comparables

Persistent Systems Ltd.:

22. It was argued by the Id. AR that this comparable is functionally different as it is engaged in diversified services including intellectual property led software solutions and software products focusing on cloud computing, business intelligence and analytics etc. and is hence functionally dissimilar. The company also owns significant intangibles. A perusal of the profit and loss account of the company that the company had revenue streams from software services and products. It is seen that the revenues and expenses have been shown in a consolidated manner and no segmented disclosure has been made. In the assessee's own case for the assessment year 2008-09, this comparable has been excluded by the Co-ordinate Bench of the Tribunal. Hence, keeping in view the decision of the earlier year, we direct that this comparable may be excluded from the list of comparables

Sasken Communication Technologies Ltd.:

23. It was argued by the Id. AR that this comparable is functionally different as it is engaged in diversified services software products. It was argued that in the absence of sufficient segmental data and acquisition taken up during the year, it cannot be taken as a comparable. It was also argued that the comparable spent extensive expenditure on R&D too. We hold that a comparable having a merger and acquisition would cease to be comparable only if it is shown that this has resulted in material dissimilarity and has affected its margins. This is particularly true in the ITES/software filed where mergers and acquisitions are the norm rather than an exception. Such mergers and acquisitions do not often result in a substantial change in the company's functional profile. We rely on the decision of the Co-ordinate Bench of ITAT in Willis Processing Services (I)

Pvt. Ltd. Vs DCIT 2013-TII-47-ITAT-Mum-TP wherein it was observed as under:

"18.3 We are also of the view that if extra ordinary events like merger and de-merger or amalgamation took place during the financial year relevant to the Assessment Year under consideration, and because of the merger/de-merger the company became functionally different then the said company should be excluded from the comparables. However, if the merger of the two functionally similar companies took place then the even of merger itself cannot be taken a factor for exclusion of the said comparable. Accordingly, we direct the AO/TPO to verify this fact and accordingly decide the comparability of this company namely Accentia Technologies Ltd."

24. The comparable is a provider of Tele-communication Software Services to Mobile Terminal Vendors, and Solutions to Network equipment manufactures. The restructuring reserve account and the diminution value of investment do not necessarily adversely affect this to be a comparable. The profits, EBITDA margins, software services, network engineering services do not change perceptibly. The company has enquired R&D charges on account of R&D centre at IIT Madras and incurred expense of Rs.8.94 lacs do not impact the profitability. Hence, we hold that this comparable may be included in the TP study.

Wipro Technologies Services Limited:

25. It was argued that this cannot be a comparable owing to dissimilar functionality and significant RPT, lack of segmental data. In addition, it is holding software intangibles of Rs.2.31 crores. The accumulated depreciation and amortization remained constant as at 1st April 2010 and as at 31st March 2011. Regarding the segmental information, the company reports that it is engaged in providing services which are considered as one segment. Since, there are no separate reportable segments, no segmental reporting was done in the audit report. The comparable was

rejected by the Tribunal in the case of Orange Business Service India Solution Pvt. Ltd. in ITA No. 869/Del/2016 on the ground that this company is a subsidiary of Wipro Ltd, which has a considerable brand name, and further that the entire revenue during the year in this company is covered by a master service agreement entered into by breakthrough with CITI group services. The coordinate bench of this Tribunal has rejected this comparable by holding as under:

"We carefully considered the rival contention regarding exclusion of this comparable. This company had agreed an agreement with CITI Technology Services Ltd, which is 100% subsidiary of Wipro Technology Ltd. The entire revenue during the year is covered by a master service agreement entered into by Wipro with CITI Group Services. Further, this company is also a subsidiary of Wipro Ltd., which company has a considerable brand name, therefore benefit accruing to this company from the brand name of Wipro cannot be denied. Therefore relying on the decision of the coordinate bench in the case of Agnity Technology Pvt. Ltd, in ITA No.955jDe1j2015 for Assessment Year 2010-11, wherein the Infosys owns of its brand name was held to be incomparable on the same analogy, brand value of 'Wipro' does help this comparable. Hence, we direct TPO to exclude this comparable, it is ordered accordingly."

26. Hence, we hereby direct that this may be excluded from the TP study.

R Systems Ltd.:

27. The assessee sought to include this company arguing that audited quarterly results are available in the public domain and different year financial data can be used for comparison. We hold that Rule 10B(4) requires that the data to be used in analyzing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction had been entered into. The comparability of an uncontrolled transaction can be

analyzed only with the "data relating to the financial year" in which the international transaction has been entered into. As the assessee follows the accounting year ending 31st March, the comparables must also have the data relating to the financial year ending 31st March. Since, this data is not available, such companies cannot be accepted as comparables.

Vama Industries Ltd.:

28. It was argued that this comparable may be included owing to availability of segmental data. The TPO rejected as the comparable fails the service income filter. Since, we have already held that the filter of less than 75% is to be excluded, this company does not pass the test of filter of service income laid down by the TPO. Hence, we hold that it is not an appropriate comparable for TP study.

29. Regarding the allowance on account of risk adjustment, the Assessing Officer did not accept the claim of the assessee. The DRP held that the assessee failed to substantiate the claim of risk. In the case of Ciena India (P) Ltd. 59 taxmann.com 92, the Co-ordinate Bench held that risk adjustment can be allowed provided the assessee places on record some appropriate material to demonstrate that risk undertaken by the comparable company were relatively more than it, warranting downward adjustment in their profit rates. It was held in the case of EXL Servie.com India Pvt. Ltd. Vs ACIT 2014-TII-313-ITAT-DeL-TP risk adjustment is allowed only when the differences have pointed out and the authorities can proceed to calculate the effect of such differences on the operating profits margins of the comparables. Hence, keeping in view, the provisions of Section 10B(2)(b), we direct the assessee to provide the detailed working of the risk assumed to the TPO so that they can verify the correctness of the working as given by the assessee and allow the same in accordance with the provisions of the Rules enforce.

Corporate Issues:**Disallowance u/s 40(a)(i)**

30. Brief facts of the case are that the Assessing Officer disallowed Rs.20,83,040/- as the assessee failed to deduct TDS on these payments. Before us it was brought to the notice that these amounts are paid on account of purchase of machinery, reimbursement of pension, reimbursement of travel expenses and training expenses. Other than this, it was argued that TDS was not applicable as reimbursement is on actual cost to cost basis on the expenses incurred. The DRP held that they are disallowable as the above payments are in the nature of FTS. On going to the expenses, we find that training expenses, purchase of materials, reimbursement of travel expenses and pension are not liable to the provisions of TDS. Regarding the other reimbursement, we have gone through the Circulars issued by the CBDT No. 3/2015 and 2/2014. We hold that amounts paid by way of reimbursement of expenses do not constitute income in the hands of the recipient. Consequently, the payer is under no obligation to deduct TDS u/s 194C and no disallowance of the expenditure can be made u/s 40(a)(ia). Since, it is the Assessing Officer who would be in a position to determine whether the payments are reimbursement are not, we hereby direct the assessee to produce the relevant details pertaining to reimbursements other than training expenses, purchase of materials, reimbursement of travel expenses and reimbursement pension. The Assessing Officer may take a decision after the examination of the details of the reimbursement.

31. Ground Nos. 15 & 16 are consequential in nature.

32. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 30/10/2019.

Sd/-

(Sudhanshu Srivastava)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 30/10/2019

Subodh

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