IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1', NEW DELHI
(Through Video Conferencing)

BEFORE,
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.1889/Del/2015
(ASSESSMENT YEAR-2010-11)

M/s Microsoft Corporation (India) Pvt. Ltd., DLF Epitome, Building No.5, DLF Cyber City, Phase-3, Gurgaon, Haryana-122 002. PAN:AAACM 5586C	Vs.	Dy.CIT, Circle-16(2), New Delhi
(Appellant)		**(Respondent)**

ITA No.1760/Del/2015
(ASSESSMENT YEAR-2010-11)

DCIT, Circle-16(2), New Delhi.	Vs.	M/s. Microsoft Corporation (India) Pvt. Ltd., DLF Epitome, F-40, NDSE, Part-1, New Delhi-110049. PAN:AAACM 5586C
(Appellant)		**(Respondent)**

C.O. No.308/Del/2015
Arising out of ITA No.1760/Del/2015
(ASSESSMENT YEAR-2010-11)

DCIT, Circle-16(2), New Delhi.	Vs.	M/s. Microsoft Corporation (India) Pvt. Ltd., 807, New Delhi House, Barakhamba Road, New Delhi-110 001 PAN:AAACM 5586C
(Cross Objector)		**(Respondent)**

Appellant By	**Sh. Nageshwar Rao, Adv.**
Respondent by	**Sh. Surendra Pal Singh, CIT-DR**
Date of Hearing	**16.07.2020**
Date of Pronouncement	**12.10.2020**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

ITA No.1760/Del/2015 is the appeal of the Department against the final assessment order dated 29.01.2015 passed in pursuance to the directions of the Ld. Dispute Resolution Panel (DRP) vide directions dated 28.11.2014 for Assessment Year 2010-11. ITA No.1889/Del/2015 is the assessee's appeal for the same year. Also Cross Objection No.308/Del/2015 has been preferred by the assessee.

2.0 The brief facts of the case are that the assessee company was incorporated in July, 1988 as a wholly owned subsidiary of Microsoft Corporation, US. The company is primarily engaged in rendering Marketing Support Services ('MSS") to its Associated Enterprises (AEs) i.e. Microsoft Corporation and Microsoft Operations Pvt. Ltd., Singapore. It also provides Microsoft Consultancy Services and Product Support Services. For the provisions of these services, the assessee is remunerated on cost plus 15 % by the AEs.

2.1 The return of income for the captioned year was filed declaring a total income of Rs.20,63,87,027/- after claiming deduction u/s 80G amounting to Rs.1,08,62,475/-. Subsequently, the assessee revised the return of income disclosing total income at Rs.20,81,82,464/-. Since, the assessee had entered into international transactions during the year under consideration, a reference was made to the Transfer Pricing Officer (TPO) and the TPO passed the order u/s 92CA (3) of the Income Tax Act, 1961 (hereinafter called 'the Act') proposing an adjustment of

Rs.58,49,85,516/- on account of difference in Arm's Length Price (ALP). The summary of adjustments proposed by the TPO is as under:

(i) Marketing Support Services- Rs.53,68,71,251/-

(ii) Management Consulting Services and Project Consulting Services - Rs.4,81,14,265/-

2.2 The draft assessment order was passed computing the total taxable income of the assessee company at Rs. 1,51,70,12,290/- after incorporating the adjustment proposed by the TPO.

2.3 The assessee filed its objections against the draft assessment order before the Ld. DRP and the DRP subsequently issued directions after which the final assessment order was passed computing the total income of the assessee at Rs.26,37,51,463/- after making the Transfer Pricing Adjustment of Rs.3,77,75,992/-, apart from this the Assessing Officer also made a disallowance of Rs.2,24,50,124/- out of Car hiring expenses and also disallowed claim of excess reversal of Rs. 25,453,475/-.

2.4 Aggrieved with the final assessment order, the assessee as well as the Department is now before this Tribunal. The respective grounds raised by the parties are as under:

2.4.1 The following grounds have been filed by the assessee in ITA No.1889/Del/2015:

> *1. On the facts and circumstances of the case and in law, the Appellant respectfully craves to prefer an appeal against the assessment order passed under section 143(3) r.w.s. 144C of the Income-tax Act, 1961 ("the Act") by Deputy Commissioner of Income-tax - Circle 16(2), New Delhi ("Ld. AO"), after considering the adjustment proposed by the Additional Commissioner of Income Tax, Transfer Pricing Officer- ll(2), New Delhi ("Ld. TPO") for the international transaction pertaining to provision of Microsoft Consultancy Services & Premier Support Services ("MCS/PSS" or "impugned transaction") in his order passed under section 92CA(3) of the Act on the following grounds:*
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> *Each of the ground is referred to separately, which may kindly be considered independent of each other.*
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> > 1. *The order passed by Ld. TPO, draft assessment order passed by Ld. AO and the final assessment order passed, on the directions of the Hon'ble Dispute Resolution Panel ("Hon'ble DRP"), by the Ld. AO are bad in law and void ab-initio.*
> >
> > 2. *The Ld. AO has erred on facts and in law in determining the total income of the Appellant at Rs. 26,37,51,463/- as against a returned income of Rs. 20,81,82,464/-*
> >
> > *Part I - Transfer Pricing Grounds*
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> *3. That on facts and in law, the Hon'ble DRP and the Ld. TPO/AO erred in making an adjustment of INR 3,77,75,992 to*

the returned income of the Appellant in respect of the international transaction pertaining to provision of MCS IPSS.

4. That on facts and in law, the Hon'ble DRP and the Ld. TPO/AO have erred by not following the principle of consistency while determining the arm's length price ("ALP") of the impugned transaction by ignoring the fact that no transfer pricing adjustment has been made for impugned transactions in past years and neither the functional profile of Appellant nor the methodology adopted by the Appellant to benchmark the same has changed from past years.

5. That on facts and in law, the Hon'ble DRP and the Ld. TPO/AO have erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the IT Rules, and conducting a fresh economic analysis for the determination of the ALP for the impugned transaction and holding that it is not at an arm's length.

6. That on facts and in law, the Ld. AO/TPO/DRP have erred by

6.1 Using single year data of companies to determine the arm's length price of the impugned transaction and disregarding the Appellant's claim for use of multiple year data for computing the arm's length price; and

6.2 Rejecting the data used by the Appellant which was available to it at the relevant time and proceeding to use the data which was available only at the time of transfer pricing audit.

7. That on facts and in law, the Hon'ble DRP and the Ld. TPO/AO erred in rejecting certain comparables identified by the Appellant and performing a fresh comparability analysis by applying arbitrary filters without any rationale:

a) Rejection of companies having different financial year

ending (i.e. not March 31, 2010) or if data of the company did not fall within 12 month period i.e. 01-04-2009 to 31 03-2010;

b) *Rejection of companies having turnover less than INR 5 Crore;*

c) *Rejection of companies having export sales less than 75 percent of total sales;*

d) *Rejection of companies having employee cost less than 25% of total costs; and*

e) *Rejection of companies having diminishing revenue/persistent losses trend and peculiar economic circumstances*

8. That on facts and in law, the Hon'ble DRP and the Ld. TPO/AO erred by wrongfully rejecting certain companies and adding certain companies to the final set of comparables for the impugned transaction of the Appellant on an adhoc basis. The Hon'ble DRP and the Ld. TPO/AO have resorted to cherry picking of comparables to determine ALP for the impugned transaction.

9. That on facts and in law, the Hon'ble DRP and the Ld. TPO/ AO erred in law and in facts by selecting certain companies which are earning super normal profits, as being comparable to the Appellant.

10. That on facts and in law, the Hon'ble DRP and the Ld. TPO/AO erred by not making suitable adjustments to account for differences in the working capital employed by the Appellant vis-a-vis the comparables.

11. That on facts and in law, the Hon'ble DRP and the Ld. TPO/ AO erred by ignoring that the Appellant, being only a captive service provider and a risk free entity, is entitled to suitable adjustments to account for differences in its risk profile vis-a-vis the comparables.

12. That on facts and in law, the Ld. AO erred in making a reference to the Ld. TPO despite the absence of requisite preconditions being met in law.

13. The Ld. TPO has erred, in law and in facts, by not discharging the statutory onus to establish that the conditions specified in clause (a) to (d) of Section 92C(3) of the Act have been satisfied before disregarding the ALP determined by the Appellant and proceeded to determine the ALP himself.

Part II- Corporate Tax Grounds

14. That on facts and in law, the Ld. DRP and Ld. AO have erred in disallowing 50% of running and maintenance expenditure amounting to INR 22,450,124 on ad hoc basis with respect to the vehicles that were used by its employees for the purpose of the business of the Appellant.

14.1 That on the facts and circumstances of the case and in law, the Ld. DRP and Ld. AO have erred in disregarding the fact that reimbursement by the Appellant to employees on account of running and maintenance expenditure is an actual expenditure incurred by the Appellant wholly and exclusively for the purpose of its business.

14.2 That on the facts and circumstances of the case and in law, the Ld. DRP and Ld. AO have erred in disregarding the submission made by the Appellant and in stating that no specific argument has been extended for justifying the claim to be wholly and exclusively for the business purposes.

15. That on facts and in law, the Hon'ble DRP has erred in not granting the relief in respect of excess income of INR 25,453,475 offered for taxation in the subject year erroneously on account of automatic reversal of year end provisions in the accounting system of Appellant.

15.1 That on the facts of case and in circumstances of the case in law, the Ld. AO and the Ld. DRP have erred in not appreciating that claim made by Appellant should be allowed as per the matching concept

15.2 That on facts and circumstances of the case in law, the Ld. AO and the Ld. DRP have erred in appreciating principle laid down by various judicial precedents that all the rightful claims made by the Appellant should be allowed irrespective of whether any entries are made in books of accounts or not

15.3 That on the facts and in the circumstances of the case and in law, the Ld. AO and Ld. DRP have grossly erred by ignoring Circular No. 14 dated April 11, 1955 issued by Central Board of Direct Taxes ("CBDT") which clearly provides that the Income tax officers must not take advantage of ignorance shown by the Appellant and all the legitimate claims made by the Appellant should be allowed.

15.4. That on the facts and in circumstances of the case and in law, the Ld. DRP grossly erred in confirming the disallowance of enhanced claim without appreciating that additional claim made before the Appellate authority should be admitted.

16. That on the facts and in law, the Ld. AO has erred in not allowing the entire TDS credit of INR 85,118,067 duly claimed by the Appellant in the return of income.

17. That on the facts and in law, the Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act consequent to the additions made in the assessment order passed u/s 143(3)/ 144C(5) of the Act.

The above grounds of appeal are mutually exclusive and without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute, withdraw any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

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

2.4.2 The following Grounds have been raised by the Department in ITA No.1760/Del/2015:

"1. *Whether on the facts and circumstances of the case and in law, the DRP erred in allowing the payment of Rs. 70 crores as a deduction u/s 43B of the Act without appreciating that this was to meet out the contingent liability and not towards any ascertained liability.*

2. Whether on the facts and circumstances of the case and in law, the DRP erred in not adjudicating on the AO's finding that if the deduction u/s 43B of the Act amounting to Rs. 70 crores is allowed, the income of the assessee would be correspondingly enhanced by Rs. 80.50 crore as per the terms of agreement of the assessee with its parent company as the assessee cannot claim expenditure without recognizing corresponding revenue.

3. That the order of the DRP is erroneous and is not tenable on facts and in law.

4. That the appellant craves leave to add, alter, amend or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.

2.4.3 The assessee has also filed Cross Objections by raising the following grounds:

1. That the Ld. Assessing Officer ('AO') has erred on facts and in law in proposing enhancement of income of the respondent by INR 80.50 crores without appreciating that the respondent cannot recover the service tax liability paid under protest as per the agreement with the parent entity.

2. That the Ld. AO has erred on facts and in law in proposing enhancement of the income by INR 80.50 crores without appreciating that there is no income accrued to the respondent on payment of statutory liability of service tax under protest.

3. That the Ld. AO has not made any such specific proposal for enhancement either while conducting the assessment proceedings under section 143(3) of the Act read with section 144C of the Act or during the proceedings conducted before the Ld. Dispute Resolution Panel.

4. That the Ld. AO has erred of facts and in law in not appreciating the order of the Hon'ble CESTAT (Customs, Excise, Sales tax Appellate Authority) passed on 23 September 2014 holding that the services rendered to parent entity are export of services and quashed the service tax demand raised by service tax authorities.

That the above grounds of cross objections are without prejudice to each other.

That the respondent reserves its right to add, alter, amend or withdraw any ground of cross objections either before or at the time of hearing of this appeal.

3.0 The Ld. Authorized Representative submitted that the assessee was challenging the Transfer Pricing Adjustment of Rs.37,75,992/- as well as additions relating to Corporate Tax issues. It was submitted that with respect to the Transfer Pricing Adjustment, the assessee was praying for inclusion of two comparables viz. R Systems International Limited and Helios & Matheson Information Technology Ltd. which had been rejected on

the ground of different financial year ending. It was further submitted that the assessee was also praying for exclusion of Sonata Software Limited on the ground that it had high related party transactions. It was further submitted that the assessee was also requesting granting of working capital adjustment. Further, it was submitted that with respect to Corporate Tax ground, the assessee was praying for deletion of disallowance made on account of running and maintenance of Motor Cars and also for deletion of addition made on account of alleged accounting error.

3.1 Arguing for the inclusion of two comparables viz. R System International and Helios & Matheson Information Technology Limited, the Ld. Authorized Representative argued that different financial year ending is not a relevant basis for exclusion of a particular comparable. It was submitted that the Hon'ble High Court of Delhi in the case of *CIT vs. Mckinsey Knowledge Centre India Pvt. Ltd., vide order dated 27.03.2015, in ITA No.217/2014* had upheld the order of the ITAT holding that if the comparable is functionally the same as that of the tested party, then, the same cannot be rejected merely on the ground that data for entire

financial year is not available. It was submitted that the Hon'ble Delhi High Court had held that if from the available data on record, the results for financial year can be reasonably compiled, then the comparables cannot be excluded solely on the ground that the comparables have a different financial year ending. Apart from this order of the Hon'ble Delhi High Court, the Ld. Authorized Representative also placed reliance on numerous order of this Tribunal for the proposition that a different financial year ending cannot be the sole basis for rejecting a comparable if the comparable is otherwise functionally similar.

3.2 With respect to the comparable Sonata Software Ltd., the Ld. Authorized Representative submitted that the related party transactions of this company were 53.83% whereas the TPO himself had applied the RPT Filter of 25%. It was submitted that, thus, evidently, the TPO himself had failed to correctly apply the filter in the case of this company. It was further submitted that the Ld. DRP had routinely upheld the order of the TPO and, therefore, the assessee was praying for exclusion of this company from the final list of comparables. The Ld. Authorized

Representative placed reliance on numerous orders of this Tribunal wherein this company was directed to be excluded. The Ld. Authorized Representative harped on the fact that this company had consistently been directed to be excluded by the Tribunal.

3.3 The Ld. Authorized Representative submitted that Ground Nos.10 & 11 of the assessee's appeal pertain to denial of working capital adjustment which has not been granted to the assessee company. It was submitted that working capital adjustment was allowed to the assessee company in Assessment Year 2007-08. It was submitted that while denying the working capital adjustment, the TPO had held that the working capital adjustment was not relevant in the case of a service company and the Ld. DRP had upheld the action of the TPO in this regard. It was submitted that it has been the consistent view of this Tribunal that working capital adjustment was necessary for an objective comparability analysis.

3.4.1 Coming to the Corporate Tax grounds, the Ld. Authorized Representative submitted that the Assessing Officer

had made an *ad hoc* disallowance of Rs.2,24,50,124/- out of running and maintenance of Motor Cars. It was submitted that an identical issue has arisen in Assessment Year 2007-08 and this Tribunal had deleted such disallowance in ITA No.6417/Del/2012 vide order dated 09.02.2016 and which was followed by the Tribunal in succeeding assessment years as well. It was further submitted that the Hon'ble Delhi High Court had refused to even frame a substantial question of law on the issue in the appeal filed by the Department vide order dated 18.11.2016 in ITA No.33/2016.

3.4.2 Coming to the other issue relating to Corporate Tax, the Ld. Authorized Representative submitted that the assessee had claimed a deduction of Rs.2,54,53,475/- on account of an accounting error. The facts leading to the dispute are that in Financial Year 2008-09, relevant to Assessment Year 2009-10, the assessee company had booked year ending provision/accruals of Rs.31,180,867/- in its Profit & Loss Account and out of such accruals/provisions, the statutory auditors of the company had reversed the accruals of Rs.2,54,53,475/- being excess in nature

at the time of finalization of the accounts and, thus, only net expenses of Rs.57,27,392/- had been debited in the profit and loss account and had been claimed as deduction in the return of income. It was further submitted that subsequently in Financial Year 2009-10, i.e., relevant to the year under appeal, the entire amount of Rs.3,11,80,867/- was automatically reversed in the accounting system (SAP) of the company instead of reversing only Rs.57,27,392/- which had been debited in the immediate preceding years. Thus, an additional amount of Rs.2,54,53,473/- (being the difference between the two amounts) had been offered to tax erroneously. It was further submitted that in Financial Year 2012-13 i.e., Assessment Year 2013-14, the assessee had reversed this additional income of Rs.25,45,53,475/- to square up the accounts and expenses of Rs.2,54,53,475/- had been debited to the Profit & Loss Account. The Ld. Authorized Representative submitted that relief with respect to the additional amount of Rs.2,54,53,475/- offered to tax should be allowed to the assessee. It was submitted that an identical issue had arisen before this Tribunal in assessee's own case in Assessment Year 2008-09 also

and the ITAT in ITA No.6417/Del/2012 had restored this matter to the file of the Assessing Officer for allowing the assessee's claim after due verification. The Ld. Authorized Representative submitted that on such remand by the ITAT, the Assessing Officer had allowed the assessee's claim after verification. The Ld. Authorized Representative submitted that the assessee prays for similar relief on the issue.

4.0 In response to the arguments advanced by the Ld. Authorized Representative with respect to the assessee's appeal, on the issue of inclusion of R System International and Helios and Metheson Information Technology Ltd, the Ld. Sr. Departmental Representative (DR) submitted that the Ld. DRP had duly considered assessee's objections and had, thereafter, rejected the same. It was submitted that the Ld. DRP had found the approach of the TPO correct in not including these two comparables. It was submitted that reliance was placed on the directions of the Ld. DRP for excluding these two comparables.

4.1 With respect to the assessee's prayer for exclusion of Sonata Software Ltd., the Ld. Sr. DR again submitted that the Ld.

DRP had taken the correct view that the objections of the assessee for exclusion of this company were incorrect. Attention was invited to the observations of the Ld. DRP in this regard wherein the Ld. DRP had held that it was of the view that the calculation of RPT by sales was correct.

4.2 With reference to the assessee's prayer for working capital adjustment, the Ld. Sr. DR submitted that the issue of working capital was relevant only where there was a situation of inventory remaining tied up or receivables being held up. It was submitted that the Ld. DRP had directed that such situation was not present in the case of a service industry Company and that the working capital adjustment was required only when the varying levels of capital deployed made difference to the margins earned by the taxpayer and the comparables.

4.3 With respect to the corporate tax ground regarding the disallowance on account of Motor Car Expenditure, reliance was placed on the concurrent observations of the Assessing Officer and the Ld. DRP. With reference to the accounting error claimed by the

assessee and the related relief claimed, the Ld. SR. DR submitted that the assessee had not claimed such error through a revised return and the Assessing Officer had no power to entertain such claim. It was submitted that therefore, in view of the settled judicial precedent in the case of *Goetze (India) Ltd. vs. CIT reported in [2006] 284 ITR 323 (SC)*, the action of Assessing Officer was valid in law.

5.0 Coming to the appeal of the Department, the Ld. Sr. DR argued that the sole issue in the Department's appeal was the issue of Rs.70 Crores of service tax which had been paid by the assessee under protest and the Ld. DRP had erred in directing that the same was an allowable deduction u/s 43B of the Act. It was submitted that the assessee had received a show cause notice from the Service Tax Department alleging non-payment of service tax vide notice dated 24.04.2008 and on 23rd September, 2008 relevant to Assessment Year 2009-10, the Ld. CIT of Service Tax had passed an order confirming demand of service tax on service provided to Overseas AEs for which consideration was received in foreign exchange. It was submitted that during the pendency of

the assessee's appeal against demand of service tax, the CESTAT directed the deposit of Rs.70 Crores and when the matter was carried to the Hon'ble Delhi High Court, the Hon'ble Delhi High Court confirmed the requirement of such pre-deposit which was complied by the assessee and deduction was claimed u/s 43B of the Act. It was submitted that the Assessing Officer had added this amount to the income of the assessee but the Ld. DRP had held that the amount was deductable under provisions of Sec.43B of the Act on payment basis which was incorrect in law, as this amount was in the nature of contingent liability and, n therefore, the same should not have been allowed as a deduction. Reliance was placed on the detailed observations of the Assessing Officer in this regard as contained in Para 6.4 of the final assessment order and it was argued that even if the assessee was to be allowed the benefit of deduction u/s 43B of the Act, the income of the assessee should also be enhanced by 80.50 Crores on cost plus 15% markup as per the terms of agreement of the assessee with its parent company as the assessee cannot claim expenditure without recognizing corresponding revenue.

6.0 In response to the arguments of the Ld. Sr. DR, the Ld. Authorized Representative submitted that the amount of Rs.70 Crores was subsequently was refunded by the Service Tax Department vide order dated 5th May, 2015 relevant to Assessment Year 2016-17 and the assessee had already offered to tax this amount in Assessment Year 2016-17 as was evident from the computation of income filed before the Tribunal in the Paper Book filed by the assessee. It was submitted that, therefore, on the facts and circumstances of the case, the Ld. DRP had rightly directed that this amount deserves to be allowed in terms of provisions of Sec.43B of the Act.

7.0 It was submitted by the Ld. AR that if the department's appeal on this sole issue was dismissed, the assessee's Cross Objection will become academic in nature and would not require any arguments or adjudication.

8.0 We have heard the rival submissions and have also perused the material on record. First, we take up appeal of the assessee bearing ITA No.1889/Del/2015 wherein the assessee has prayed for inclusion of two comparables viz. R System

International and Helios & Matheson Information Technology Limited. It is seen that these two comparables have been excluded by the TPO on the ground that these two companies had a different financial year ending. It is now a consistent view of the various Hon'ble High Courts as well as of this Tribunal that if a company is otherwise functionally similar, then, it cannot be excluded only on the ground of having a different financial year ending. For this, we agree with the reliance placed by the Ld. Authorized Representative on the order of the Hon'ble Delhi High Court in the case of *CIT vs. Mckinsey Knowledge Centre India Pvt. Ltd. in ITA No.217/2014*. We note that the Ld. DRP has noted that these companies were using multiple year data and, therefore, these companies were to be excluded. However, a perusal of the paper book filed by the assessee shows that this observation of the Ld. DRP is incorrect as, evidently, the assessee is using a single year data. We also note that the only ground for exclusion, as propounded by the TPO, is the ground that these companies were having a different financial year ending. As we have already mentioned that now it is settled law that if the data is available in

the public domain which can be compiled and collated so as to arrive at financial results corresponding to the financial year ending of the tested party and where there are no other factors which would otherwise distort the results, then such companies would have to be included in the final set of comparables. From the order of the TPO and the observations of the Ld. DRP no such factors are evident. Therefore, we restore these two comparables to the file of Assessing Officer/TPO for the purpose of including these two comparables after due verification as per law and after giving proper opportunity to the assessee to present its case.

8.1 The assessee is also praying for exclusion of the company Sonata Software Limited on the ground that although the TPO had himself applied the related parties transactions filter of 25%, in case of this company, the related party transactions as a percentage of sales was 53.83%. We have gone through the annual accounts of this company and we agree with the contention of the Ld. Authorized Representative that the related party transactions in this company case are more than 50% of sales. Accordingly, this company does not pass the related party

filter as applied by the TPO. Accordingly, we direct the TPO to exclude this company from the final set of comparables.

8.2 The assessee has also prayed for granting of working capital adjustment. Although it is the view of the lower authorities that working capital adjustment is not be allowed in case of service industries, we are of the considered view that this is not the correct view. We find that this issue has been dealt at length by the Bangalore Bench of ITAT in the case of Goldman Sachs Services Pvt. Ltd. in IT (TP)A 3244/Bang/2018 and relevant observations of the Tribunal are contained in Paragraph 7.1 to 7.9 wherein the Co-ordinate Bench at Bangalore had granted working capital adjustment on actuals. The relevant paragraphs are produced herein under for a ready reference:

> *"7.1 We have perused submissions advanced by both sides in light of records placed before us including the decision relied upon by Ld.AR in case of Huawei Technologies India Pvt.Ltd vs JCIT (supra).*
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> *A reading of Rule 10B (l)(e)(iii) of the Rules read with Sec. 92CA of the Act, would clearly shows that the net profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, which could materially affect the amount of net profit margin in the open market.*

7.2. Chapters I and III of OECD Transfer Pricing Guidelines contain guidelines on comparability analyses for transfer pricing purposes. Guidlines on adjustments to be provided is found in paragraphs 3.47-3.54 and in the Annex to Chapter III. The guidelines must be followed for computing arm's length principle, and for comparing comparable uncontrolled transactions. Reasonably accurate adjustments should be made to eliminate effect of any such differences

7.3. Paragraphs 13 to 16 of OECD guidelines, emphasizes need for working capital adjustment in terms of receivables and payables as under:

> *"13. In a competitive environment, money has a time value. If a company provided, say, 60 days trade terms for payment of accounts, the Price of the goods should equate to the price for immediate payment plus 60 days of interest on the immediate payment price. By carrying high accounts receivable a company is allowing its customers a relatively long period to pay their accounts. It would need to borrow money to fund the credit terms and/or suffer a reduction in the amount of cash surplus which it would otherwise have available to invest. In a competitive environment, the price should therefore include an element to reflect these payment terms and compensate for the timing effect.*
>
> *14. The opposite applies to higher levels of accounts payable. By carrying high accounts payable, a company is benefitting from a relatively long period to pay its suppliers. It would need to borrow less money to fund its purchases and/or benefit from an increase in the amount of cash surplus available to invest. In a competitive environment, the cost of goods sold should include an element to reflect these payment terms and compensate for the timing effect.*

15. A company with high levels of inventory would similarly need to either borrow to fund the purchase, or reduce the amount of cash surplus which it is able to invest. Note that the interest rate July 2010 Page 6 might be affected by the funding structure (e.g. where the purchase of inventory is partly funded by equity) or by the risk associated with holding specific types of inventory)

16. Making a working capital adjustment is an attempt to adjust for the differences in time value of money between the tested party and potential comparables, with an assumption that the difference should be reflected in profits. The underlying reasoning is that:

- *A company will need funding to cover the time gap between the time it invests money (i.e. pays money to supplier) and the time it collects the investment (i.e. collects money from customers)*
- *This time gap is calculated as: the period needed to sell inventories to customers + (plus) the period needed to collect money from customers - (less) the period granted to pay debts in suppliers"*

7.4 The reverse applies to huge accounts payable. By having high accounts payable, a company is benefitting from a relatively long period to pay its suppliers. It would need to borrow less money to fund its purchases and/or benefit from an increase in the amount of cash surplus available to invest. In a competitive environment, the cost of goods sold should include an element to reflect these payment terms and compensate for the timing effect. A company with high levels of inventory would similarly need to either borrow to fund the purchase, or reduce the amount of cash surplus which it is able to invest. Making a working capital adjustment is an attempt to adjust for the differences in time value of money between the tested party and potential comparables, with an assumption that the difference should be reflected in profits. Methodology to compute working capital adjustment is given in Paragraphs 13 to 16 of the

aforesaid OECD Guidelines (supra). These guideline also indicate factors that needs to considered like;

7.5 The point in time at which the Receivables, Inventory and Payables should be compared between tested party and comparables, and whether it should be the figures of receivables, inventory payable at the yearend or beginning of the year or average of these figures that should be considered;,

7.6. In the matter of determination of Arm's Length Price, it cannot be said that the burden is on the Assessee or the Department to show what is the Arm's Length Price. The data available with Assessee and Department should be the starting point and depending on the facts and circumstances of a case, further details can be called for. As far as Assessee is concerned, the facts and figures with regard to its business must be furnished. In so far as applying inventory, receivables and payables for computing working capital adjustment alledged by DRP/TPO in case of certain comparables, ITAT Delhi Bench in case of ITO v E Value Servc.com, reported in [2016] 75 taxmann.com 195 held that, insisting on daily balances of working capital requirements to compute working capital adjustment is not proper, as it will be impossible to carry out such exercise and that working capital adjustment has to be based on the opening and closing working capital deployed.

7.7 It must not be forgotten that transfer pricing analysis is estimation and not an exact science. One has to see that, reasonable adjustment must be made where ever it is needed, so as to bring both comparable and test party on same footing. In present facts of case, DRP may be correct in denying working adjustment due to unavailablity required data, however there is no merit in observations of DRP/TPO as supported by Ld.CIR DR, in denying working capital adjustment due to absence of details for working out adjustments in comparable companies chosen. If we appreciate the argument advanced by Ld.CIT DR, there would remain no comparables for the purpose of

comparibility analysis to determine ALP of an international transaction, and this would be fatal to entire exercise of transfer pricing analysis.

7.8 Regarding comparable companies, one has to fall back upon only on information available in public domain. If that information is insufficient, it is beyond the power of Assessee to produce correct information about comparable companies. Revenue on the other hand has sufficient powers u/s. 133(6) to compel production of required details from comparable companies. If this power is not exercised to find to get information required, then it is no defense to say that Assessee has not furnished required details to deny any adjustment on account of working capital differences. Therefore this objection of DRP is not sustainable. Therefore in, endeavor should be made to bring in comparable companies for the purpose of broad comparison and working capital adjustment claimed by Assessee should be analysed, keeping in mind, OECD guidelines (supra).

7.9. Based on the above discussions, and respectfully following decision of coordinate Bench of this Tribunal in the case of Huawei Technologies India (P.) Ltd. {supra), we direct working capital adjustment to be computed and to allow as per actuals, after considering exclusion/inclusion of comparable companies in the final set of comparables as discussed hereinabove.

Accordingly this ground raised by assessee stands allowed."

8.2.1 Respectfully following the decision of the Co-ordinate Bench in the case of Goldman Sachs Services Pvt. Ltd. (supra) and after duly noting that working capital adjustment had been allowed to the assessee in assessment year 2007-08, we direct the working capital adjustment to be computed and to be

allowed as per actuals after considering exclusions/inclusions of comparables companies in the final set of comparables as discussed herein above.

8.3 Coming to the Corporate Tax grounds in the assessee's appeal we find that on the issue of *ad hoc* disallowance with respect to Motor Car running expenditure, the ITAT in assesee's own case, for Assessment Year 2008-09 in ITA No. 6417/Del/2012 vide order dated 09.02.2016 had directed the deletion of this disallowance. The relevant observations are reproduced herein under for a ready reference:

> *"6. Ground No.1 is general in nature and ground No.5 is a pre-matured one. Ground to related to the disallowance of 50% of car running and maintenance expenses whereas grounds 3 & 4 related to the excess income of Rs. 2,04,88,369/-offered for taxation in the subject year erroneously on account of automatically worsen of year-end provisions in the accounting system of MCIPL.*
>
> *7. In respect of ground No. 3 it is the finding of the Ld. AO that the freedom to use car was with the employee and the company only monitors it by putting an overall ceiling on the amount that can be claimed by the employee, for all practical purposes the vehicle is under the full control and command of the employee as such the possibility of employee making use of the vehicle for non-business purposes cannot be ruled out. By observing that the car policy of the company does not keep an eye on the purpose of use of car use but only on quantum of car use, Ld. AO found that in the absence of any record, 50% of*

running and maintenance expenses that is Rs. l,74,94,518/- had to be disallowed being expenditure incurred for non-business purposes.

8. Ld. DRP recorded that the facts of this case are similar to the facts as in AY 2008-09 and for AY 2008-09 the Ld. DRP held that inasmuch as the issue was pending before the ITAT and has not reached finality, following the earlier year order declined to interfere with the order of the Ld. AO. By following the same, Ld. DRP declined to interfere with the order of the Ld. AO for this AY also.

9. It is brought to our notice that this issue is decided in favour of the assessee by the ITAT in respect of the assessment years 2006-07 vide order dated 18/12/2014 in ITA No. 5855/Del/2010, and for assessment year 2007-08 by order dated 30/06/2015 in ITA No. 5766/Del/2011. We have gone through the order dated 09/02/2016 in ITA No. 6417/Del/2012 for the assessment year 2008-09 wherein after referring to the orders relating to the earlier assessment years, the Tribunal reached the very same conclusion in favour of the assessee. Insofar as the continuity of these facts over the years is concerned, revenue does not dispute the same. When the facts continue to be similar, we do not find any reason to take a different view. We, therefore, respectfully following the consistent view taken by the tribunal for the assessment years 2006-07 to 2008-09 answer the issue in favour of the assessee and a direct the Ld. AO to delete the addition made on account of disallowance of car running and maintenance expenses.

8.3.1 Respectfully following the above, we direct the deletion of this disallowance.

8.4 So far as the issue of deduction being claimed towards accounting error of Rs. 25,453,475/- is being claimed, we note that

this issue also had arisen in Assessment Year 2008-09 and the ITAT in ITA No. 6417/Del/2012, vide order dated 09.02.2016 had restored this issue to the file of the for verification and allowing relief to the assesee if the assessee's claim was found correct. The relevant directions of the Tribunal are being reproduced here in under:

> *10. Now coming to grounds No. 4 and 5, it is submitted by the Ld. AR that in the financial year 2007-08, the assessee company has been booking year-end provisions in its profit and loss account and out of such provisions the statutory auditors of the company had reversed half the amount being excess in nature at the time of finalisation of the books of accounts and claimed only the remaining half as deduction in the return of income. However, subsequently in the financial year 2008-09 the entire amount of provision was automatically reversed in the accounting system of the company as a normal industry practice instead of reversing the amount that was debited to the profit and loss account in financial year 2007-08, resulting in an additional amount being offered to tax in the written of income erroneously.*
>
> *11. He further submitted that in the financial year 2012-13 the assessee had reversed the above additional income to square up the account and an expense has been debited to the profit and loss account. In the return of income for the financial year 2012-13 filed by the assessee such an amount was not claimed, and has been added back while computing the taxable income on and as emption that the same shall be allowed in the subject proceedings of financial year 2008-09. Assessee was of the view that it is more appropriate to claim this expense or reversal of income in the same financial year in which the additional income was offered, by booking the same as*

"advances and deposits written off" in note 17 to the financial statements of financial year 2012-13.

12. Ld. AR submitted that an additional ground on this aspect was raised against the draft assessment order before the Ld. DRP, but the Ld. DRP has not considered the same in the directions passed on 31/12/2013.

13. On a careful consideration of the matter we find force in the submission of the Ld. AR. Inasmuch as factual verification is necessary on this aspect, we direct the Ld. AO to verify whether the assessee had reversed the provision to the extent of Rs. 2,04,88,269/-in the financial year 2007-08 itself, but by mistake of the automatically procedures reversed the entire amount of Rs. 4,09,81,176/-thereby an additional amount of rupees Rs. 2,04,88,269/-was offered to tax erroneously, and to pass order in accordance with law. These grounds are, accordingly are restored to the file of the Ld. AO for the purpose of verification and passing orders a fresh."

8.4.1 It is also the submission of the assessee that this amount has finally been reversed in Assessment Year 2013-14. Accordingly, in view of the order of the ITAT in AY 2008-09 on identical issue, we restore this issue to the file of the Assessing Officer with the direction to allow the assessee's claim if on verification it is found to be correct.

9.0 Thus, the appeal of the assessee stands allowed for statistical purposes.

10.0 Coming to the Department's appeal, the sole issue is the addition of Rs.70 Crores paid as a service tax by the assessee and allowed by the Ld. DRP in terms of provisions of Sec.43B of the Act. It is the submission of the assessee that this amount was actually paid and the Ld. DRP has allowed it on payment basis u/s 43B. It is also being submitted that when this amount was finally refunded by the Department in Assessment Year 2016-17, the same has been offered to tax. We agree with the contention of the Ld. Authorized Representative in this regard that the amount was deductible on actually payment basis irrespective of whether the same has been deposited under protest or voluntarily. The Department could not show a cogent reason before us as to why the directions of the Ld. DRP were incorrect in this regard. We not are not agreeable with the contention of the Department that this amount represents contingent liability. Therefore, we find no reason to interfere with the directions of the Ld. DRP in this regard and we uphold the same. Thus, grounds raised by the Department on the issue are dismissed.

11.0 In the result, the appeal of the Department stands dismissed.

12.0 In view of our dismissing the Department's appeal and as already accepted by the Ld. Authorized Representative, the Cross Objection of the assessee becomes academic in nature and does not need any adjudication, thus, it is dismissed as having become *in fructuous.*

13.0 In the final result, the appeal of the assessee stands allowed for statistical purposes, the appeal of the Department stands dismissed and the Cross Objection filed by the assessee stands dismissed as having become *in fructuous* and not requiring any adjudication.

Order pronounced on 12/10/2020.

Sd/-	Sd/-
(ANIL CHATURVEDI) **ACCOUNTANT MEMBER**	**(SUDHANSHU SRIVASTAVA)** **JUDICIAL MEMBER**

Dated:12/10/2020
PK/Ps
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI