

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH: BANGALORE**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER  
AND  
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.476/Bang/2016
Assessment Year: 2011-12

Deputy Commissioner of Income-tax Circle -2(1)(1) Bangalore  <b>PAN NO : AACCN1140K</b>	<b>Vs.</b>	M/s. Synamedia India Pvt. Ltd. (Earlier known as M/s. Cisco Video Technologies India Pvt. Ltd.) Block 9A & 9B, Pritech Park Special Economic Zone Survey No.51-64/4, Sarjapur Outer Ring Road, Bellandur Village Bangalore-560 103
<b>APPELLANT</b>		<b>RESPONDENT</b>

IT(TP)A No.597/Bang/2016
Assessment Year: 2011-12

M/s. Synamedia India Private Limited (Formerly known as Cisco Video Technologies India Pvt. Ltd.)	<b>Vs.</b>	Deputy Commissioner of Income-tax Circle-2(1)(1) Bengaluru
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Padamchand Khincha, A.R.
<b>Respondent by</b>	:	Shri Muzaffar Hussain, D.R.

Date of Hearing	:	22.10.2020
Date of Pronouncement	:	05.11.2020

**ORDER**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

These cross appeals are directed against the assessment order dated 18-01-2016 passed by the assessing officer for assessment year 2011-12 u/s 143(3) r.w.s 144C of the Act in pursuance of directions given by Ld Dispute Resolution Panel (DRP).

2. The grounds urged by the assessee relate to the following issues:-

- (a) Whether the expenses incurred in foreign currency should be reduced from “export turnover” or not.
- (b) Addition made towards transfer pricing adjustment
- (c) Non-granting of TDS as claimed by the assessee.

3. The revenue is in appeal in respect of following issues:-

- (a) Whether foreign exchange gains/loss are operating in nature or not?
- (b) Whether the Ld DRP was justified in directing the AO to follow the decision of Karnataka High Court rendered in the case of Tata Elxsi Ltd, i.e., exclusion of expenses incurred in foreign currency from both export turnover and total turnover.
- (c) Relief granted by Ld DRP in respect of addition made on account of transfer pricing adjustment.

4. The facts relating to the case are discussed in brief. The assessee company is now known as M/s Synamedia India Private Limited. Earlier, it was known as M/s Cisco Video Technologies India P Ltd and prior to that, it was known as M/s NDS Services Pay TV Technology P Ltd. It is providing following support services to its AE, M/s NDS UK, as narrated by Transfer Pricing Officer (TPO):-

**Software research and development services:-**

NDS India primarily operates as a delivery R & D centre which is a sub-division of the global R & D division of NDS group. NDS India undertakes software research and development activities according to the functional specifications provided by NDS UK for existing clients. The delivery R & D teams are focused on developing the existing technologies NDS UK for direct customer application.

**Pre-sales and marketing support services:-**

NDS India is primarily involved in marketing the products of NDS Group, identifying potential customers in India for further business development and information both to and from the customers and NDS UK.

5. The international transactions entered by the assessee during the year under consideration are
- (a) Purchase of fixed assets,
  - (b) Provision of Software development services,
  - (c) Provision of pre-sales and marketing services and
  - (d) reimbursement of expenses.

The TPO has made transfer pricing adjustment in respect of Provision of software development services only.

6. Both the parties are in appeal in respect of addition relating to Transfer pricing adjustment. The facts relating to the same are discussed in brief. The assessee has provided software development services to its Associated Enterprises (AEs). The turnover of the assessee in the segment of Provision of software development services was Rs.333.56 crores. The assessee adopted Transactional Net Margin Method (TNMM) as most appropriate method. It adopted

Operating Profit/Operating Cost (OP/OC) as the Profit level indicator (PLI). The assessee declared a margin of 15.01% in the software development segment.

6.1 The assessee had selected 20 comparable companies in its transfer pricing study. The TPO rejected the transfer pricing study of the assessee and he finally selected following 13 comparable companies, whose average margin worked out to 24.82%:-

<i>Sl. No.</i>	<i>Name</i>	<i>Sales</i>	<i>Cost</i>	<i>PLI</i>
1	<i>Acropetal Technologies Ltd. (seg)</i>	<i>814,016,893</i>	<i>616,754,876</i>	<i>31.98%</i>
2	<i>E zest solutions (from Capitaline)</i>	<i>112866098</i>	<i>93255341</i>	<i>21.03%</i>
3	<i>E-infochips Ltd</i>	<i>260384251</i>	<i>166447527</i>	<i>56.44%</i>
4	<i>Evoke (from Capitaline)</i>	<i>144869912</i>	<i>133996568</i>	<i>8.11%</i>
5	<i>ICRA Techno Analytics Ltd. (in 000)</i>	<i>158401000</i>	<i>126894000</i>	<i>24.83%</i>
6	<i>Infosys Ltd.</i>	<i>253850000000</i>	<i>177,030,000,000</i>	<i>43.39%</i>
7	<i>Larsen &amp; Toubro Infotech Ltd.</i>	<i>23318122096</i>	<i>19,764,861,289</i>	<i>19.83%</i>
8	<i>Mindtree Ltd. (seg)</i>	<i>8,783,000,000</i>	<i>7,937,143,242</i>	<i>10.66%</i>
9	<i>Persistent Systems &amp; Solutions Ltd.</i>	<i>189,490,457</i>	<i>155,172,089</i>	<i>22.12%</i>
10	<i>Persistent Systems Ltd.</i>	<i>6,101,270,000</i>	<i>4,971,860,000</i>	<i>22.84%</i>
11	<i>R.S. Software (India) Ltd.</i>	<i>1,882,638,471</i>	<i>1,617,804,170</i>	<i>16.37%</i>
12	<i>Sasken Communication Technologies Ltd.</i>	<i>3,941,962,000</i>	<i>3,175,616,000</i>	<i>24.13%</i>
13	<i>Tata Elxsi Ltd. (seg)</i>	<i>3,581,985,000</i>	<i>2,962,533,352</i>	<i>20.91%</i>
	<b><i>AVERAGE MARGIN</i></b>			<b><i>24.82%</i></b>

After making negative working capital adjustment, the TPO arrived at adjusted margin of 25.44%. Accordingly, he made transfer pricing adjustment of Rs.30.24 crores.

6.2 The Ld DRP directed the AO/TPO to exclude following ten companies:-

- (a) Acropetal Technologies Limited
- (b) E-Zest Solutions Limited
- (c) E-infochips Limited
- (d) ICRA Techno Analytics Limited
- (e) Infosys Limited
- (f) Evoke Technologies Limited
- (g) R S software (India) Ltd
- (h) Mindtree Limited
- (i) Tata Elxsi Ltd (seg)
- (j) Larsen & Toubro Infotech

The Ld DRP upheld the selection of following two companies:-

- (a) Persistent Systems & Solutions Limited
- (b) Persistent Systems Limited

However, there was no discussion in the DRP order on M/s Sasken Communication Technologies Ltd and the assessee has submitted that the above said company is also included as a comparable company.

6.3 In the appeal of the assessee, grounds B-2 to B-14 relate to the transfer pricing adjustment. On perusal of those grounds, we notice that the assessee has raised only general contentions and hence they do not require adjudication. In modified grounds of appeal, the assessee seeks exclusion of following companies:-

- (a) Persistent Systems & Solutions Limited
- (b) Persistent Systems Limited
- (c) Sasken Communication Technologies Ltd
- (d) Acropetal Technologies Limited
- (e) E-Zest Solutions Limited
- (f) E-infochips Limited

Page 6 of 18

- (g) ICRA Techno Analytics Limited
- (h) Infosys Limited
- (i) Tata Elxsi Ltd (seg)
- (j) Larsen & Toubro Infotech

The assessee seeks inclusion of following companies:-

- (a) Akshay Software Technologies Limited
- (b) Goldstone Technologies Ltd
- (c) CG – VAK Software & Exports Ltd
- (d) Thinksoft Global Services Limited
- (e) Maveric Systems Ltd

The assessee has also raised additional grounds, which read as under:-

“The Honourable DRP erred in excluding the following companies, which were accepted by both the appellant and the TPO for the purpose of making TP adjustments:-

- (a) R S Software (India) Limited
- (b) Evoke Technologies Private Limited
- (c) Mindtree Limited (seg.)”

6.4 At the time of hearing, the Ld A.R submitted that

- (a) The three companies referred in additional ground have been excluded by Ld DRP. However, they are eligible to be considered as comparable companies.
- (b) All the three companies retained by Ld DRP are also liable to be deleted.
- (c) The revenue is contesting the decision of Ld DRP in deleting the ten companies. The assessee seeks inclusion of three companies, out of the ten, in the additional ground. The remaining seven were rightly deleted by Ld DRP.

Page 7 of 18

6.5 At the time of hearing, the Ld A.R did not press the modified ground on inclusion of following companies:-

- (a) Akshay Software Technologies Limited
- (b) Goldstone Technologies Ltd
- (c) CG – VAK Software & Exports Ltd
- (d) Thinksoft Global Services Limited
- (e) Maveric Systems Ltd

Hence, the ground relating to five companies is not adjudicated.

6.6 He submitted that all his submissions are supported by the decision rendered by co-ordinate bench of Tribunal in the case of

- (i) M/s AMD India Private Limited vs. ACIT (IT(TP)A No.1487/Bang/2015
- (ii) M/s Applied Materials India Pvt Ltd vs. ACIT (IT(TP)A No.17/Bang/2016)
- (iii) M/s L G Soft India P Ltd vs. DCIT (IT(TP)A No.52/Bang/2016 dated 05<sup>th</sup> August, 2020)

6.7 The Ld D.R, on the contrary, submitted that the assessee has accepted many comparable companies selected by the TPO in the proceedings before him. He invited our attention to page no.10 of TPO's order, wherein the assessee had accepted Larsen & Toubro Infotech Ltd; Mindtree Ltd, Persistent Systems & Solutions Ltd, Persistent Systems Ltd, R.S. Software (India) Ltd, Sasken Communications Ltd. Hence these companies should be taken as comparable companies. The three companies retained by Ld DRP are Persistent Systems & Solutions Ltd, Persistent Systems Ltd and M/s Sasken Communications Ltd are included in the list of companies accepted by the assessee before TPO. Accordingly, he submitted that the assessee cannot go back on its stand and now contend that the companies retained by Ld DRP should also be excluded.

6.8 The Ld D.R further submitted that the assessee has accepted inclusion of M/s Larsen & Toubro Infotech Ltd, Mindtree Limited, R.S Software (India) Ltd in the list of comparable companies by the TPO. However, the assessee has objected inclusion of above said three companies before Ld DRP and the Ld DRP has also directed exclusion of above said three companies without giving opportunity to the TPO to examine these companies. Since the assessee had accepted this companies as good comparable companies, there was no occasion for the TPO to examine the objections of the assessee. Accordingly, he submitted that these three companies should be included as comparable companies.

6.9 With regard to M/s Sasken Communications Ltd, the Ld D.R submitted that the assessee has not challenged this company before Ld DRP. However, the assessee is seeking exclusion of the same, which should not be permitted.

6.10 The Ld A.R, in the rejoinder, submitted that the assessee is now accepting for inclusion of M/s R.S. Software (India) Ltd, M/s Evoke Technologies Ltd and M/s Mind Tree Ltd. He further submitted that the remaining companies have been held to be not good comparable companies by hosts of case laws. He submitted that there is no bar in objecting to a company before DRP or Tribunal, even if it had been accepted before TPO. He submitted that this proposition has been laid down by Chandigarh Special bench of Tribunal in the case of Quark Systems Pvt. Ltd. **(Taxpayer) [2010-TIOL-31-ITAT-CHD-SB]**.

6.11 In the appeal of the revenue also, we notice that ground nos. 3 to 6 deal with relief granted by Ld DRP. However, there is no

Page 9 of 18

specific ground with regard to comparable companies excluded by the Ld DRP. Both the parties agreed that the revenue is aggrieved by the decision of Ld DRP in excluding ten comparable companies.

6.12 Out of the ten comparable companies excluded by Ld DRP, the assessee now seeks inclusion of three companies, viz., M/s Evoke Technologies Ltd, M/s R S Software (India) Ltd and M/s Mindtree Limited. Hence the grievance of revenue now remains with regard to the following seven companies only:-

- a) Acropetal Technologies Limited
- (b) E-Zest Solutions Limited
- (c) E-infochips Limited
- (d) ICRA Techno Analytics Limited
- (e) Infosys Limited
- (f) Tata Elxsi Ltd (seg)
- (g) Larsen & Toubro Infotech

6.13 We have heard rival contentions and perused the record. The Ld A.R submitted that all the above said companies have been directed to be excluded by the co-ordinate bench in the case of Applied Materials India P Ltd (supra) and also in the case of M/s LG Soft India P Ltd (IT(TP)A No.52/Bang/2016 and IT(TP)A No.97/Bang/2016 dated 05-08-2020. We notice that the co-ordinate bench, in the case of M/s LG soft India P Ltd (supra) has followed the decision rendered by another co-ordinate bench in the case of Electronic for Imaging (I) Pvt Ltd (2017)(85 taxmann.com 124). For the sake of convenience, we extract below the discussions made and the decision taken by the Tribunal in the case of L G Soft India P Ltd (supra):-

Page 10 of 18

“10. With regard to the other 7 comparable companies, whose exclusion is challenged by the revenue in ground No.2 of its appeal, we find that exclusion of these comparables from the list of companies selected by the TPO had come up for consideration before the Bangalore ITAT in the case of *Electronic for Imaging (I) Pvt. Ltd. v. DCIT* [2017] 85 taxmann.com 124 [Bang. Trib]. ; *Symantech Software & Services (I) Pvt. Ltd. v. DCIT*, ITA No.614/Mds/2016; *DCIT v. Ikanos Communication Pvt. Ltd.* in ITA 137/Bang/2015; *Ness Technologies (I) Pvt. Ltd. v. DCIT* in ITA No.696/Mum/2016 which are also decisions rendered in relation to AY 2011-12 in the case of a companies providing SWD services such as the assessee in the present appeal. It is also relevant to point out that the very same comparable companies chosen by the TPO in the present appeal IT(TP)A Nos.52 & 97/Bang/2016 had been chosen by the TPO as comparable companies in the case of *Electronic for Imaging (I) Pvt. Ltd.* (supra). The Tribunal in its order dated 14.7.2017 in the aforesaid case dealt with the comparability of these companies.

11. As far as **Acropetal Technologies Ltd.** is concerned, vide para 8 of the order of Tribunal in *Electronics for Imaging (I) Pvt. Ltd.* (supra), exclusion of Acropetal was upheld on the ground that this company was into development of computer products. The Tribunal also held that **L&T Infotech Ltd.** had RPT at 18.66% and since the RPT was beyond the threshold limit of 15%, this company was directed to be excluded from the list of comparable companies. The Tribunal further excluded **Tata Elxsi Ltd.** from the list of comparables on the ground that this company was engaged in diversified activities and was not a pure SWD services provider such as the assessee. In para 9 of the aforesaid order, the Tribunal held **e-Infochips Ltd.**, was earning revenue both from the software services and software products and though the break-up of revenue from the two segments were available, but the break-up of Operating Cost and Net Operating revenue and segmental details were not available.

12. As regards **e-Zest Solutions Ltd.**, in the case of *Symantech Software & Services (I) Pvt. Ltd. v. DCIT*, ITA No.614/Mds/2016, this company was held to be engaged in Knowledge Process Outsourcing (KPO) and cannot be regarded as a SWD services company.

13. The Tribunal in the case of *DCIT v. Ikanos Communication Pvt. Ltd.* in ITA 137/Bang/2015 excluded the company, **ICRA Techno Analytics Ltd.**, on the ground that it was engaged in engineering and consulting services, besides licensing and sub-licensing and no segmental information was available to compare the margins of SWD services segment.

14. The Mumbai Tribunal in the case of *Ness Technologies (I) Pvt. Ltd. v. DCIT* in ITA No.696/Mum/2016 held **Infosys Ltd.** to be not comparable for the reason that this company was engaged in

Page 11 of 18

*manufacturing of software products and was a giant company assuming various risks. As far as **Larsen & Toubro Infotech Ltd.**, is concerned, vide paragraph-8 page-16 of the order in the case of **Electronics for imaging India Pvt. Ltd.**, (supra) this tribunal excluded this company on the ground of presence of onsite revenue of more than 50% and that the related party transaction was more than 15% (18.66%).*

*15. Respectfully following the aforesaid decisions, we uphold the exclusion of the aforesaid 7 companies from the list of comparable companies and ground No.2 raised by the assessee to this extent is dismissed. We may add that the other grounds raised by the revenue in its appeal are purely supportive of ground No.2 and are general grounds with no specific reference to instances of comparables excluded and hence dismissed.”*

6.14 Following above said order of co-ordinate bench, we confirm exclusion of above said seven companies. Since the assessee has sought for inclusion of three companies out of the ten companies excluded by Ld DRP, viz., M/s Evoke Technologies Ltd, R.S software India Ltd, Mindtree Limited, the ground of revenue in respect of above said three companies are allowed.

6.15 In the appeal of the assessee, the assessee seeks exclusion of all the three companies retained by Ld DRP, viz., M/s Persistent Ltd, M/s Persistent Systems & Solutions Ltd and M/s Sasken Communications Ltd. It is the submission of Ld DR that the assessee did not plead to the exclusion of M/s Sasken Communications Ltd before Ld DRP. Further, the assessee has accepted remaining two comparable companies before TPO. Accordingly, the Ld DR strongly opposed this plea of the assessee. The Ld A.R, on the contrary, submitted that the assessee is not barred from raising contention for exclusion of any comparable company, which had earlier been accepted before the tax authorities. In this regard, he has placed his reliance on the decision rendered by Chandigarh Special bench of Tribunal in the case of Quark Systems Pvt. Ltd. (supra). We notice that, in the above said case, the Special bench has addressed an

identical issue and held that the assessee cannot be barred to raise contentions for exclusion of companies, which had earlier been accepted by it. The relevant discussions are extracted below:-

*“30. Learned Special counsel for the revenue Shri Kapila has vehemently argued that "Datamatics" was taken as one of the comparables by the taxpayer and no objection to its inclusion was raised before the TPO or before the learned CIT (Appeals) in appeal. Therefore, the taxpayer should not be permitted to raise additional ground and ask for exclusion of the above enterprise in the determination of the average margins. We are unable to accept above contention. In the first place, these are initial years of implementation of Transfer Pricing Legislation in India and taxpayers as well as tax consultants were not fully conversant, with this new branch of law when proceedings were initiated or even at appellate stage. Besides, revenue authorities, including TPO were required to apply statutory provisions and consider for purposes of comparison functions, assets and risks (turnover), profit and technology employed by the tested party and other enterprises taken as comparable statutory duty is cast on them to undertake above exercise. This has not been done in this case. We would only say that prima facie, as per the material, to which reference has been drawn by Shri Aggarwal. Datamatics does not appear to be comparable. Even if the taxpayer or its counsel had taken Datamatics as comparable in its I P audit, the taxpayer is entitled to point out to the Tribunal that above enterprise has wrongly been taken as comparable. In fact there are vast differences between tested party and the Datamatics. The case of Datamatics is like that of "Imercius Technologies" representing extreme positions. If Imercius Technologies has suffered heavy losses and, therefore, it is not treated as comparable by the tax authorities, they also have to consider that the Datamatics has earned extraordinary profit and has a huge turnover. Besides differences in assets and other characteristics referred to by Shri Aggarwal. The Income-tax Appellate Tribunal is a fact-finding body and, therefore, has to take into account all the relevant material and determine the question as per the statutory regulations.*

**31.** *In the case of CIT v. Bharat General Reinsurance Co. Ltd. [1971] [81 ITR 303](#), the Hon'ble Delhi High Court observed as under :*

*"It is true that the assessee itself had included that dividend income in its return for the year in question but there is no estoppel in the Income-tax Act and the assessee having itself challenged the validity of taxing the dividend during the year of assessment in question it must be taken that it had resiled from the position which it had wrongly taken while filing the return. Quit apart from it, it is incumbent on the Income-tax Department to find out whether a particular income was assessable in the particular year or not. Merely because the assessee wrongly included the income in its return for a particular year, it cannot confer jurisdiction*

*on the department to tax that income in that year even though legally such income did not pertain to that year."*

**32.** *In the case of R.B. Jessaram Fatehchand v. CIT [1971] [81 ITR 409](#) (All.), it has been found and observed as under:*

*"Mr. Brijlal Gupta appearing for the department pointed out that the assessee itself filed separate returns for the two parts of a single accounting period. The assessee applied for registration for the first period only. The assessment for the second period proceeded as against an unregistered firm. It was, therefore, urged by Mr. Gupta that it is not open to the assessee to urge now that a single assessment under section 26(1) ought to have been made. Now, there cannot be an estoppel against statute. If in fact the procedure adopted by the Income-tax Officer was incorrect, the defect is not cured by the attitude taken up by the assessee."*

**33.** *In the case of CIT v. C. Parakh & Co. (India) Ltd. [1956] [29 ITR 661](#), Their Lordships of Supreme Court made the following observations:*

*"On the question of the admissibility of the deduction of Rs. 1,23,719, the contention of the appellant is that as the respondent had itself split up the commission of Rs. 3,12,699 paid to the managing agents, and appropriated Rs. 1,23,719 thereof to the profits earned at Karachi and had debited the same with it, it was not entitled to go back upon it, and claim the amount as a deduction against the Indian profits. We do not see any force in this contention. Whether the respondent is entitled to a particular deduction or not will depend on the provision of law relating thereto, and not on the view which it might take of its rights, and consequently, if the whole of the commission is under the law liable to be deducted against the Indian profits, the respondent cannot be estopped from claiming the benefit of such deduction, by reason of the fact that it erroneously allocated a part of it towards the profits earned in Karachi. What has, therefore, to be determined is whether, notwithstanding the apportionment made by the respondent in the profit and loss statements, the deduction is admissible under the law."*

**34.** *In the case of CIT v. V.M.R.P. Firm, Muar [1965] [56 ITR 67](#), the following observations of Their Lordships of Supreme Court are as under :*

*"The decision in Amarendra Narayan Roy v. CIT AIR 1954 Cal. 271 has no bearing on the question raised before us. There the concessional scheme tempted the assessee to disclose voluntarily all his concealed income and he agreed to pay the proper tax upon it. The agreement there related to the quantification of taxable income but in the present case what is sought to be taxed is not a taxable income. The assessee in such a case can certainly raise the plea that his income is not taxable under the Act. We, therefore, reject this plea."*

35. In para 4.16 of latest report, the OECD provides the following guidelines :

*"In practice, neither countries nor taxpayers should misuse the burden of proof in the manner described above. Because of the difficulties with transfer pricing analysis, it would be appropriate for both taxpayers and tax administrations to take special care and to use restraint in relying on the burden of proof in the course of the examination of a transfer pricing case. More particularly, as a matter of good practice the burden of proof should not be misused by tax administrations or taxpayers as a justification for making groundless or unverifiable assertions about transfer pricing. A tax administration should be prepared to make good faith showing that its determination of transfer pricing is consistent with the arm's length principle even where the burden of proof is on the taxpayer, and the taxpayers similarly should be prepared to make good faith showing that their transfer pricing is consistent with the arm's length principle regardless of where the burden of proof lies."*

36. The aforesaid decisions and guidelines may not be exactly on identical facts before us but they emphatically show that taxpayer is not estopped from pointing out a mistake in the assessment though such mistake is the result of evidence adduced by the taxpayer.

37. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. For the other side cannot claim to have a vested right in injustice being done due to some mistakes on its part.

38. Accordingly, on facts and circumstances of the case, we hold that taxpayer is not estopped from pointing out that Datamatics has wrongly been taken as comparable. While admitting additional ground of appeal raised by the assessee to require us to consider whether or not Datamatics should be included in the comparable, we make no comments on merit except observing that assessee from record has shown its prima facie case. Further claim may be examined by the Assessing Officer. This course we adopt as objection to the inclusion of Datamatics as comparable has been raised now and not before revenue authorities. Therefore, we deem it fit and proper to remit the matter to the file of the Assessing Officer for consideration of claim of the taxpayer and make a de novo adjudication of the arm's length price after providing reasonable opportunity of being heard to the assessee. We order accordingly."

Following the decision rendered by Special bench of Tribunal (referred supra), we hold that the assessee cannot be precluded from

Page 15 of 18

challenging the inclusion of comparable companies, which had been accepted earlier by the assessee.

6.16 The above said three companies, viz., M/s Persistent Ltd, M/s Persistent Systems & Solutions Ltd and M/s Sasken Communications Ltd have been dealt by the co-ordinate bench in the case of LG Soft India P Ltd (supra) as under:-

*“16. Now we shall take up the appeal of the assessee. The assessee in ground No.13 seeks exclusion of 3 companies viz., Persistent Systems & Solutions Ltd., Sasken Communication Technologies Ltd. and Persistent Systems Ltd. Exclusion of these 3 companies was considered by the Tribunal in the case of Electronics for Imaging (I) Pvt. Ltd. (supra). In para 8 of the order, this Tribunal held that Persistent Systems & Solutions Ltd. was a company engaged in SWD services and products with no segmental details and excluded it. Similarly, Persistent Systems Ltd. was also excluded on the ground that it was engaged in diverse activities with no segmental break-up. As far as Sasken Communication Technologies Ltd. is concerned, this Tribunal in the case of Symantech Software & Services (I) Pvt. Ltd. (supra) has excluded this company on the ground of functional IT(TP)A Nos.52 & 97/Bang/2016 dissimilarity viz., dealing with multimedia products and R&D activities with no break-up of segmental information.*

*17. Following the aforesaid decisions, we direct exclusion of the aforesaid 3 comparable companies. The TPO is directed to compute the ALP of the international transaction in accordance with the directions given above in this order, after affording Assessee opportunity of being heard.”*

6.17 Consistent with the view taken by the co-ordinate benches in the above said cases, we direct exclusion of aforesaid three comparable companies.

6.18 Accordingly, we direct the AO/TPO to compute the ALP of the international transaction in accordance with the directions given above, after affording adequate opportunity of being heard to the assessee.

7. The assessee has raised a ground as to whether the expenses incurred in foreign currency are required to be reduced from export

Page 16 of 18

turnover while computing deduction u/s 10A of the Act. The revenue has raised a ground as to whether the Ld DRP was justified in directing the AO to follow the decision of Karnataka High Court rendered in the case of Tata Elxsi Ltd, i.e., exclusion of expenses incurred in foreign currency from both export turnover and total turnover while computing deduction u/s 10A of the Act. The Ld A.R submitted that the assessee would be satisfied, if parity is given in respect of deduction from both export turnover and total turnover.

7.1 The Hon'ble Supreme Court has settled this issue in the case of CIT vs. HCL Technologies Ltd (TS – 218 – SC -2018). The relevant observations made by Hon'ble Supreme Court are extracted below:-

*“20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.*

*21. On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover.”*

Accordingly, following the decision rendered by Hon'ble Supreme Court, we uphold the order passed by Ld DRP on this issue.

8. The assessee has raised a ground relating to non-granting of TDS credit as claimed. Since this matter requires verification, we restore this issue to the file of the AO.

9. The revenue is assailing the decision of Ld DRP in holding that the gain/loss arising on account of fluctuation in foreign exchange is operating income/expenses. We notice that the Ld DRP has followed

Page 17 of 18

the decision rendered by the Tribunal in the case of Sap Labs India (P) Ltd (2011)(44 SOT 156) and Cisco Systems Services BV (IT(TP)A No.270/Bang/2014) and accordingly held that the foreign exchange fluctuation gain/loss arising to the assessee on realization of trade debtors, payment to creditors etc were nothing but operation income. Accordingly, the Ld DRP has directed the AO to consider the foreign exchange fluctuation gain/loss on revenue account in respect of assessee company and also in respect of comparable companies while determining the margin in the case of the assessee company, if in the earlier years, the foreign exchange fluctuation was treated as operating in nature for the purpose of consistency. Since the ld DRP has followed the decision rendered by the Tribunal in this regard, we do not find any infirmity in its decision rendered on this issue.

10. In the result, the appeal of the assessee is treated as allowed and the appeal of the revenue is treated as partly allowed.

Order pronounced in the open court on 5<sup>th</sup> Nov, 2020

**Sd/-**  
**(George George K.)**  
**Judicial Member**

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 5<sup>th</sup> Nov, 2020.  
VG/SPS

**Copy to:**

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.