

आयकर अपीलिय अधिकरण  
मुंबई पीठ "के", मुंबई  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री राजेश कुमार, लेखा सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "K", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER  
आअसं. 7592/मुं/2014 (नि. व.2010-11)  
ITA NO.7592/MUM/2014 (A.Y.2010-11)  
आअसं. 865/मुं/2016 (नि. व. 2011-12)  
ITA NO.865/MUM/2016 (A.Y.2011-12)

Atos India Pvt. Ltd.,  
Godrej & Boyce Complex,  
Plat No 5, Pirojshanagar, LBS Marg,  
Vikhroli (West), Mumbai 400 079

PAN: **AAACO 2461J**

..... अपीलार्थी /Appellant

बनाम Vs.

Dy. Commissioner of Income Tax-9(1)(2)  
Aaykar Bhavan, M.K. Road,  
Mumbai 400 020

..... प्रतिवादी/Respondent

आअसं. 1212/मुं/2016 (नि. व. 2011-12)  
ITA NO.1212/MUM/2016 (A.Y.2011-12)

Dy. Commissioner of Income Tax-14(1)(1),  
Room No.460, 4<sup>th</sup> Floor,  
Aaykar Bhavan, M.K. Road,  
Mumbai 400 020

..... अपीलार्थी /Appellant

Vs.

Atos India Pvt. Ltd.,  
Godrej & Boyce Complex,  
Plat No 5, Pirojshanagar, LBS Marg,  
Vikhroli (West), Mumbai 400 079

PAN: **AAACO 2461J**

..... प्रतिवादी/Respondent

Assessee by : Shri Dhanesh Bafna with Shri Arpit Agarwal  
Revenue by : Shri Anand Mohan

सुनवाई की तिथि/ Date of hearing : 15/02/2021  
घोषणा की तिथि/ Date of pronouncement : 06 /05/2021

आदेश/ ORDER

**PER VIKAS AWASTHY, JM:**

In ITA No.7592/Mum/2014, the assessee has assailed assessment order dated 13/11/2014 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'the Act') for assessment year 2010-11. ITA No.865/Mum/2016 by the assessee is directed against the assessment order dated 01/01/2016 passed under section 143(3) r.w.s. 144C(13) of the Act for the assessment year 2011-12. The Revenue has filed cross appeal in ITA No.1212/Mum/2016 assailing the assessment order for assessment year 2011-12. Since, the issues involved in these appeals are identical, these appeals are taken up together for adjudication and are decided by this common order.

**ITA No.7592/Mum/2014- A.Y.2010-11:**

2. **In ground No.1 of appeal, the assessee has assailed Transfer Pricing (TP) adjustment in relation to provision of software development services.** The assessee is engaged in the business of development and maintenance of computer software, development, sale and export of software services and provision of technical consultancy. The assessee is wholly owned subsidiary of Atos Origin BV, Netherlands. During the period relevant to assessment year under appeal, the assessee entered into various international transactions including provision of software development services. Since, the dispute before us relates to software development services segment, we would confine our focus on international transaction with respect to software development services only. The assessee provides software development services to Atos Origin Group. The operating margin of the assessee from provision of software development services is 12.19%. To benchmark Arm's Length Price (ALP)

of the transactions with Associated Enterprise (AE), the assessee selected sixteen companies as comparables and arrived at an arithmetic mean of 12.28%. The assessee applied Transactional Net Margin Method (TNMM) as most appropriate method to benchmark the transactions. The Transfer Pricing Officer(TPO) rejected eight comparables selected by the assessee and introduced five new comparables. Thus, the final set of 13 comparable as per TPO are as under:-

S. No.	Name of Comparable	Margins % OP/TC
1.	Akshay Software Technologies Ltd.	-3.19
2.	FCS Software Solutions Ltd.	31.15
3.	LGS Global Ltd.	10.03
4.	Mindtree Ltd.	22.79
5.	Sasken Communications Technologies Ltd.	24.53
6.	Synetairos Technologies Ltd.	18.02
7.	Thirdware Solutions Ltd.	28.79
8.	Infosys Ltd.	45.01
9.	Sonata Software Ltd.	31.63
10.	Thinksoft Global Services Ltd.	11.82
11.	Larsen & Toubro Infotech Ltd.	19.78
12.	Persistent Systems Ltd.	30.41
13.	Tata Elxsi Ltd.	15.47
	<b>Mean</b>	<b>22.01</b>

Since, arithmetic mean of new set of comparables was beyond the range of tolerance limit of 5%, the TPO made adjustment of Rs.34,40,59,413/- in the Arm's Length Price (ALP) of international transactions qua software development services, with AE. The assessee assailed inclusion of some of the comparables before the Dispute Resolution Panel (DRP), but was unsuccessful. Now, in the present appeal the assessee has assailed the adjustment made by TPO in the international transactions with respect to software development service segment

3. Shri Dhanesh Bafna appearing on behalf of the assessee submitted that the assessee is assailing inclusion of four companies as comparables viz. Infosys Ltd., Sonata Software Ltd, Persistent Systems Ltd. and Thirdware Solutions Ltd. The Id. Authorized Representative of the assessee submitted that if these four companies

are excluded from the list of comparables and working capital adjustment is allowed to the assessee, the margins of the assessee would be within +/- 5% limit, hence, no adjustment would be required. The Id. Authorized Representative of the assessee for exclusion of aforesaid four companies from the list of comparable submitted as under:-

(1) Infosys Technology Ltd. (Infosys)

The Id. Authorized Representative of the assessee submitted that Infosys is not comparable to the assessee because of its large scale of operations. The said company is market leader and has element of brand value associated with it. As against the revenue of Rs.474.56 crores of the assessee, Infosys is having revenue of Rs.21,143 crores for the same period. The said company owns products and leverages on its premium banking solution-'Finacle'. Infosys has its own R&D facility and has spent Rs.440 crores on R&D in the financial year 2009-10. The said company operates as full fledge risk taking entrepreneur. On the other hand, the assessee is not a product company and has no R&D segment. The assessee company is a captive service provider and operates at minimum risk level. Further, the assessee is functionally different from Infosys. Infosys provides end to end business solutions that span the entire software life cycle encompassing consulting, design, development, re-engineering, system integration and package valuation and implementation. Whereas, the scope of work of assessee is limited to software development services for its group companies primarily. The Id. Authorized Representative of the assessee submitted that the Tribunal in assessee's own case for assessment year 2009-10 in ITA No.1467/Mum/2014 decided on 30/06/2016 has held that Infosys is not comparable to the assessee. To further support his submissions the Id. Authorized Representative of the assessee placed reliance on the following decisions:

1. PCIT vs. Fiserv India P Ltd. decided by Hon'ble Delhi High Court in ITA No. 602/2016 vide order dated 07/110/2016;

2. Lionbridge Technologies Pvt. Ltd. vs. ITO, ITA No.668/Mum/2014 decided on 18/11/2015;
3. Open Solutions Software Services (P) Ltd. vs. DCIT, 81 taxmann.com 177 (Delhi Trib.).

(2) Sonata Software Ltd. (Sonata):

The Id. Authorized Representative of the assessee submitted that the TPO has applied Related Party Transaction (RPT) filter of 25%. The RPT of the said company is more than 25%, therefore, the TPO/DRP have erred in including the said company in the list of comparables. The Tribunal in assessee's own case in assessment year 2009-10 (supra) had restored the examination of RPT in the case of Sonata to the Assessing Officer. The Assessing Officer in order giving effect for AY 2009-10, after de novo examination as per the directions of the Tribunal excluded the company from the list of comparables on account of RPT more than 25%.

(3) Persistent Systems Ltd.(Persistent):

The Id. Authorized Representative of the assessee submitted that the said company is predominantly engaged in outsourced software product development services. The activities of the company are different from IT Services provided by the assessee. Persistent has released 3000 plus products in the last five years and has earned revenue from sale of software services and products. No segmental turnover from products and services are available in public domain. The revenue from royalty is recognized on sale of products. Thus, the said company is liable to be excluded from the list of comparables on account of functional difference. The assessee relied on following decisions to contend that Persistent is not comparable to software development service provider on account of functional differences:

1. PCIT vs. Cashedge India Pvt. Ltd., ITA No.279/2016 decided on 04/5/2016 decided by Hon'ble Delhi High Court;
2. PCIT vs. Fiserv India P Ltd. decided by Hon'ble Delhi High Court in ITA No. 602/2016 vide order dated 07/11/2016;
3. Lionbridge Technologies Pvt. Ltd. vs. ITO, ITA No.668/Mum/2014 decided on 18/11/2015

(4) Thirdware Solutions Ltd. (Thirdware):

The Id. Authorized Representative of the assessee submitted that Thirdware is a product company and earns revenue from sale of licences, subscriptions and software services. No segmental between software services, licence revenue and subscription revenue is available. The Id. Authorized Representative of the assessee referred to the financial results of Thirdware at page 464 and 496 of the Paper Book. The Id. Authorized Representative of the assessee further pointed that no details with regard to nature of exports made by the company is detailed in the results. The Id. Authorized Representative of the assessee relied on following decisions to contend that the company is functionally different from software development service provider:

1. Open Solutions Software Services (P) Ltd. vs. DCIT, 81 taxmann.com 177 (Delhi Trib.);
2. Ciena India Pvt. Ltd. vs. DCIT, 80 taxmann.com 372 (Delhi Trib.);
3. Bristlecone India Ltd. vs. ACIT, ITA No.1670/Mum/2015 decided on 24/1/2018 for AY 2010-11.

3.1. The Id. Authorized Representative of the assessee further submitted that the Assessing Officer may be directed to grant working capital adjustment. The Co-ordinate Bench of Tribunal in assessment year 2009-10 after examining the facts has allowed working capital adjustment to the assessee.

4. On the other hand Shri Anand Mohan representing the Department vehemently defended the assessment order and the directions of the DRP. The Id. Departmental Representative submitted that the objections raised by the assessee against inclusion of Infosys, Sonata, Persistent and Thirdware are after thought and thus, not sustainable. The Id. Departmental Representative vehemently supporting the findings of TPO/DRP on inclusion of these companies submitted that Sonata was included in the list of comparables after verifying that RPT is less than 25%. Before DRP the assessee had raised similar objections against inclusion of Sonata, the DRP

rejected assessee's objection by passing a reasoned directions. In respect of Persistent, the Id. Departmental Representative submitted that the said company was included on the basis of RPT filter, no objection was raised by the assessee either before the TPO or DRP on the ground of functional difference. The assessee has taken fresh arguments that the company is a product company and segmental profits are not available. Since, it is a fresh argument and the details were not examined by TPO/DRP this may be restored to the file of Assessing Officer for re-examination. In respect of Thirdware, the Id. Departmental Representative submitted that for assessment year 2010-11, the Hon'ble Delhi High Court in the case of Steria (India) Ltd. in ITA No.403/2017 decided on 09/04/2018 has held the company is comparable to IT Service Company. The Id. Departmental Representative submitted that for re-examination this comparable may be restored back to the Assessing Officer to consider segmental report of overseas sales.

5. We have heard the submissions made by rival sides in respect of exclusion of the companies from the list of comparables and grant of working capital adjustment. Our findings on exclusion of disputed comparables are as under:

**(1) Infosys Technology Ltd.**

The assessee is seeking exclusion of Infosys on the ground of functional disparity and substantial variance in the scale of operations. We find that in the immediate preceding assessment year i.e. assessment year 2009-10 the assessee had assailed inclusion of Infosys on similar set of facts. The Co-ordinate Bench after considering the decision of Hon'ble Delhi High Court in the case of CIT vs. Agnity India Technologies Pvt. Ltd. in ITA No.1204/2011 and the decision of Hyderabad Bench of Tribunal in the case of OSI Systems Pvt. Ltd. vs. DCIT directed to exclude Infosys from the list of comparable. Infosys was held to be giant company, engaged in development of software with high risk. It was further observed that Infosys is functionally different being a product company and no segmental data was available.

For the aforesaid reasons Infosys is not comparable to a captive service provider, having limited scale of operation and limited exposure to risk.

We find that in the case of Open Software Services P Ltd. vs. DCIT (supra), the Tribunal directed to exclude Infosys from the list of comparable for AY 2010-11, being incomparable to captive service provider. The Tribunal observed that Infosys is functionally different from IT Service provider as it is a product company. The Tribunal further observed that Infosys is not comparable on account of profits from its brand value and giant scale of operation.

In light of the facts of the case and the aforesaid decisions, we find merit in the submissions of assessee. The Assessing Officer is directed to exclude Infosys from the list of comparables for the reasons recorded by the Co-ordinate Bench in the immediately preceding year in assessee's own case.

## **(2) Sonata Software Ltd.**

The assessee is seeking exclusion of Sonata from the list of comparables as it breaches the RPT filter of 25%. We find that the assessee had raised similar objection before the DRP. The DRP after examining the documents on record concluded that it cannot be said with certainty that RPT in this case on revenue account exceeds 25%. Thus, the findings of DRP were inconclusive. In the immediately preceding assessment year i.e. assessment year 2009-10, the assessee had assailed inclusion of Sonata in the list of comparables before the Tribunal. The Co-ordinate Bench after examining the facts restored this issue back to the file of Assessing Officer to compute total percentage of RPT. The Tribunal directed the Assessing Officer to exclude Sonata from the list of comparables if, the ratio of RPT to sales is found to be more than 25%. The Assessing Officer has passed order giving effect on 28/3/2018 (at page 71 of the paper book) excluding Sonata from the list of comparable on account of high RPT. In the impugned assessment year the assessee

has pointed that the ratio of RPT to sales is 59.88%. The assessee has furnished computation of RPT in the case of Sonata, the same is reproduced herein below:

**Computation of Related Party Transaction in Sonata Software Limited.**

Particulars	Amount	Amount
Sonata Information Technologies Ltd.		299,867,198
- Purchases	24,293,864	
- Deputation Expenses	110,782,495	
- Service charges	130,664,264	
- Interest on Intercorporate deposit given	12,332,468	
- Others	21,794,107	
Sonata Software North America Inc.		665,528,575
- Services rendered	566,232,408	
- Living/Subsistence allowable	43,555,884	
- Travelling expenses	6,542,614	
- Others	49,197,669	
Sonata Software GmbH		56,175,331
- Services rendered	53,346,999	
- Reimbursement of expenses	2,828,332	
Sonata Europe Limited		14,659,668
- Services rendered	14,659,668	
TUI Info Tec GmbH		298,226,324
- Services rendered	295,740,182	
- Others	2,486,142	
Sonata Software FZ LLC		79,179,105
- Services rendered	75,215,687	
- Reimbursement of expenses	3,963,418	
Total Related Party Transactions		1,413,636,201
Sales		2,360,942,195
RPT as a % of Sales		59.88%

We deem it appropriate to send this comparable for re-examination to the file of Assessing Officer. The Assessing Officer after examining the above computation of

RPT if comes to the conclusion that the RPT in the case of Sonata is more than 25%, he shall exclude Sonata from the list of comparable.

(3) **Persistent Systems Ltd.**

The assessee is seeking exclusion of Persistent from the list of comparables on the ground that it is a product company and segmental data is not available in public domain. We find that the Hon'ble Delhi High Court in the case of PCIT vs. Cashedge Pvt. Ltd. (supra) while adjudicating the appeal by Revenue for AY 2010-11, considered inclusion/exclusion of Persistent in the list of comparable in respect of a company engaged in software development. The Hon'ble Delhi High Court concurring with the Tribunal held:

*“6. As far as the first company, i.e. Persistent Systems Ltd. is concerned, the material on record – as found by the ITAT – shows that **this company was involved in software development, software products and marketing. Furthermore and perhaps more importantly published segmental data was not available. In these circumstances, having regard to the specificity of the Transfer Pricing Rules under Rule 10(b) to 10 (e) of the Income Tax Rules, the data of the said firm, i.e. Persistent Systems Ltd. could not have been included.**”*

Similar view was expressed by the Hon'ble Delhi High Court in the case of PCIT vs. Fiserv India P Ltd. (supra) for excluding Persistent from the list of comparable of a company engaged in software development and maintenance services for AY 2010-11. No contrary decision was brought to our notice by the Revenue. Thus, in view of the established fact that Persistent is a product company and no segmental data is available, the said company cannot be considered as good comparable to a company engaged in IT services, being functionally different. The Assessing Officer is directed to exclude Persistent from the list of comparables in the present case.

(4) **Thirdware Solutions Ltd.**

The assessee is seeking exclusion of Thirdware from the list of comparable being functionally different. The contention of the assessee is that Thirdware is a product company and no segmental details of revenue from software product and

software services is available. The assessee has drawn our attention to page 464 (i.e. Balance Sheet & Profit and Loss a/c.) and page 479 (i.e. Notes to accounts) of the Paper Book. A perusal of the same reveals that in Schedule 12- Sales, the company has disclosed its Revenue generated from Exports, from subscription, sale of licence and software services. In notes to accounts there is no segmental details of foreign exchange earnings. The consolidated income from software, development services and software services is given. Thus, it is evident that the said company has income from software products and software services but no segmental data revenue is available.

We find that Delhi Bench of Tribunal in the case of Open Solutions Software Services Pvt. Ltd vs. DCIT (supra) has excluded Thirdware from the list of comparables of a company engaged in IT services on the ground that the said company has substantial revenue from software development and software products. No segmental data is available with regard to IT services rendered by the company, therefore, in the absence of segmental data for IT services it would not be proper to select a company for comparable analysis. The Hon'ble Delhi High Court in the case of Open Solutions Software Services Pvt. Ltd. vs. DCIT (supra) upheld the order of Tribunal in excluding Thirdware. For similar reasons in AY 2010-11, Thirdware was excluded by the Tribunal from the list of comparables in the case of Ciena India (P) Ltd vs. DCIT (supra) and Bristlecone India Ltd. vs. ACIT (supra). We find merit in the contention of the assessee and direct the Assessing Officer to exclude Thirdware from the list of comparables for parity of reasons.

**Working capital adjustment:**

The assessee is seeking direction for allowing working capital adjustment. We find that the Co-ordinate Bench in assessee's own case for assessment year 2009-10 in ITA No. 1467/Mum/2014 (supra) in principle held that working capital adjustment should be allowed to the assessee as the assessee has furnished necessary details in

Transfer Pricing Report in this regard, however, the co-ordinate Bench restored the issue to the Assessing Officer/TPO for verification of the details furnished in the light of decision rendered in the case of Mercer Consulting India Ltd. vs. DCIT. The relevant extract of the observations of the Tribunal in AY 2009-10 are reproduced herein below:

*“8.1. We have gone through the orders of the lower authorities and submissions made before us by both the sides. During the course of hearing it has been shown to us that assessee had given proper working in the Transfer Pricing Report as well as subsequent proceedings before the lower authorities. Our attention was drawn on various pages of the paper book showing that requisite details were supplied to the lower authorities but no specific query or doubt was raised by any of the authorities. It is noted by us that Hon’ble Delhi Bench of the Tribunal in the case of Mercer Consulting India Ltd. vs. DCIT (ITA No.966/Del/2014 for A.Y. 2009-10 order dated 06.09.2014 observed with regard to granting of working adjustment as under:*

*“16.1. The next issue raised by the Id. AR is against non granting of working capital adjustment claimed by the assessee for the first time before the TPO. The assessee requested the TPO to grant working capital adjustment. The assessee’s claim was jettisoned on the ground that the assessee failed to demonstrate that there was a difference in the levels of working capital employed by it vis-a-vis the comparables. The TPO further observed that: “The claim of working capital adjustment is not a matter of right.” He further went on to add that the issue of working capital can be relevant when there is a situation of inventory remaining tied up or receivables being held up and such situation will not be relevant to the service industry. That is how the assessee’s contention on this issue was repelled. The DRP also followed the suit by noticing that the working capital adjustment is difficult to apply due to the lack of accurate and reliable data. It also held that the issue of working capital would be relevant only when there is a situation of inventory remaining tied up or receivables being held up. The assessee contests the non-granting of the working capital adjustment.”*

*8.2. We find that this issue has been aptly addressed by the Hon’ble Bench in the case of Mercer Consulting India Ltd. (supra). This issue could not have been brushed aside by the lower authorities in the manner as has been done in this case. We find that ample details have already been filed by the assessee before lower authorities, therefore, in all fairness and justice we send this issue to the file of the AO/TPO who shall consider this decision and shall give an adequate opportunity of hearing to the assessee to file further details and evidences as may be required and considered appropriate by the assessee and shall decide this issue afresh on objective basis after considering the details and evidences as may be placed on record by the assessee.”*

The Assessing Officer vide order dat28/3/2018 in pursuance to the directions of the Tribunal has allowed working capital adjustment to the assessee after examination of

the details furnished by the assessee. We deem it appropriate to restore this issue to the Assessing Officer/TPO to consider assessee's claim of working capital adjustment in similar terms.

**In the result, ground No.1 of the appeal is partly allowed in the terms aforesaid.**

6. **In ground No.2 of appeal, the assessee has assailed TP adjustment in relation to interest on overdue debtors.** The Id. Authorized Representative of the assessee submitted that the DRP has erred in directing the Assessing Officer to make an adjustment of Rs.1,68,82,949/- on account of notional interest on the alleged overdue receivables from AEs. The Id. Authorized Representative of the assessee submitted that similar adjustment in respect of interest on overdue debtors was made in assessment year 2007-08, 2008-09 and 2009-10. The issue travelled to the Tribunal. The Tribunal in appeal of the assessee in ITA No.1778/Mum/2012 for assessment year 2007-08 decided on 13/01/2016 fixed the interest rate at LIBOR + 200 points for the delayed payments received by the assessee from its AEs for the period mentioned in the agreements. In subsequent assessment years i.e. assessment year 2008-09 and 2009-10, the Tribunal followed the order of assessment year 2007-08. The Id. Authorized Representative of the assessee submitted that the issue can be decided in similar terms.

7. The Id. Departmental Representative fairly admitted that the issue raised in ground No.2 of appeal is identical to the one decided by Tribunal in assessee's own case in the preceding assessment years.

8. Both sides heard. We find that TP adjustment in relation to interest on overdue debtors is recurring since assessment year 2007-08. The Tribunal in ITA No.1778/Mum/2012 (supra) after examining the facts concluded as under:-

*"3.3.We have heard the rival submissions and perused the material before us. We find that while recommending upward adjustment for charging interest for the delayed receipts the TPO had considered the terms and conditions of the agreement*

*entered in to by the assessee with its AEs., that the agreement stipulates that for delayed payment(beyond a period of one month) the AEs had to pay interest @2%,that the AO had called for details in that regard about the period of delay and as per the AO the assessee did not provide the necessary information, that as per the direction of the AO the assessee had calculated the interest amount for the delayed receipts from its AEs. In our opinion, the transaction in question is an international transaction and not a result of a transaction as argued by the AR. The assessee had provided specific services to its AEs, therefore the series of events cannot be termed a result of international transaction. Once it has been decided that issue before us is a Transfer Pricing issue then the value of the transaction has to be determined. It is a case where the TPO has relied upon on the agreement entered into by the assessee with its AE and has treated it as a Benchmark. We find that no independent source was searched or relied upon by him. It is a fact that the agreements with the third parties did not contain any clause for charging interest for delayed payment. Thus, the matter has its own peculiarities. The assessee has entered in to agreement with the AEs and value of the transaction will have to be decided. The arguments of factoring of delayed payment in the value of service cannot be brushed aside especially when it is found that the OPTC margin earned by the assessee was 29.41 % and it was quite higher than the parties compared with i.e.app.15%.The TPO had not considered these vital issues and had applied the flat rate of 2%, as mentioned in the agreement. **In our opinion the alternate argument advanced by the assessee of adopting LIBOR rate is worth considering, if the facts of the case under appeal are deliberated upon. We are of the opinion that in the interest of justice interest rate should be fixed at LIBOR+200 points for the delayed payments received by the assessee from its AEs for the period as mentioned in the agreements.AO is directed to recalculate the interest amount accordingly.** Ground no.4-5 are decided in favour of the assessee, in part.”*

Both sides are unanimous in stating that the facts in impugned assessment year are identical. The Tribunal has taken a consistent view in AY 2008-09 and 2009-10 on same set of facts. Therefore, we see no reason to take a different view in the impugned assessment year. Following the order of Co-ordinate Bench, the ground No.2 of the appeal is partly allowed in similar terms.

9. **In ground No.3 of appeal, the assessee has assailed disallowance of project risk expenses Rs.2,28,32,392/-.** The Id. Authorized Representative of the assessee stated at the outset that this issue is squarely covered by the decision of Tribunal in assessee’s own case for assessment year 2007-08 in ITA No.1778/Mum/2012, in ITA

No.4815/Mum/2015 for assessment year 2008-0909 decided on 02/01/2019 and in ITA No.1467/Mum/2014 for assessment year 2009-10 decided on 30/06/2016.

10. The Id. Departmental Representative fairly admitted that this issue was subject matter of appeal before the Tribunal in preceding assessment years in assessee's own case. The Id. Departmental Representative pointed that in assessment year 2009-10 the Tribunal has restored the issue back to the file of Assessing Officer for fresh adjudication. The issue in present assessment year under appeal can be decided on same lines and can be restored to the Assessing Officer.

11. Both sides heard. The assessee claimed project risk expenses Rs.2,28,32,392/- pertaining to HPCL project. The Assessing Officer disallowed the same holding it to be contingent liability inadmissible u/s.37 of the Act. We find that the assessee has been claiming project risk expenses pertaining to HPCL project in the past and the Assessing Officer has been consistently disallowing the same. In the impugned assessment year, the Assessing Officer has again disallowed project risk expenses for the similar reasons. In assessment year 2007-08 in ITA No.1778/Mum/2012, the Tribunal has decided the issue in favour of assessee by following the decision rendered by Hon'ble Supreme Court of India in the case of Bharat Earth Movers Ltd. reported as 245 ITR 425 (SC). In the subsequent assessment years i.e. AY 2008-09 and AY 2009-10, the Tribunal has allowed assessee's claim in similar terms. We find that in the impugned assessment year facts are identical, however, the claim of the assessee has been rejected out rightly by the Assessing Officer without examining the extent of expenses admissible. We deem it appropriate to restore this issue back to the file of Assessing Officer with a direction to verify assessee's claim and allow the same in accordance with the order of Tribunal in ITA No.1778/Mum/2012 (supra). Needless to say, the Assessing Officer shall re-examine the issue after allowing reasonable opportunity of hearing to the assessee, in accordance with law. The ground No.3 of appeal is allowed for statistical purpose, in the terms aforesaid.

12. **In ground No.4 of appeal, the assessee has assailed denial of deduction under section 10A of the Act in respect of Bangalore unit.** The Id. Authorized Representative of the assessee submitted that the assessee's claim of deduction u/s 10A of the Act qua Bangalore Unit was denied by the Assessing Officer in assessment year 2009-10. The assessee assailed the same before the Tribunal. The Tribunal decided the issue in principal in favour of the assessee, however, it was restored to the file of Assessing Officer for verification of necessary documents. The Assessing Officer has passed order giving effect on 28/3/2018 and has allowed deduction in the assessment year 2009-10.

13. The Id. Departmental Representative fairly admitted that the assessee's claim of deduction under section 10A of the Act was subject matter of appeal before the Tribunal in the preceding assessment year and the Tribunal restored the issue back to the Assessing Officer for re-verification of relevant documents.

14. Both sides heard. We find that the assessee's claim of deduction under section 10A in respect of Bangalore Unit was denied by the Assessing Officer on the ground that Bangalore unit is not a newly established undertaking and was acquired by the assessee by virtue of slump sale. The Tribunal in appeal of the assessee for assessment year 2009-10 held that the assessee is eligible to claim deduction in respect of Bangalore Unit. The deduction cannot be denied merely on the ground that the unit was acquired under slump sale. The issue was restored back to the file of Assessing Officer for re-examination of the facts and necessary documents on record. The ground no.4 of appeal is restored back to the file of Assessing Officer for de-novo adjudication in accordance with the direction of the Tribunal in assessee's own case for AY 2009-10 and allow benefit of deduction u/s.10A of the Act to the assessee in respect of Bangalore Unit, in accordance with law. The ground No.4 of appeal is thus, allowed for statistical purpose.

15. **In ground No.5 of appeal, the assessee has assailed computation of deduction under section 10A of the Act in respect of other eligible units.** The Id. Authorized Representative of the assessee submitted that the Assessing Officer while computing deduction under section 10A of the Act has reduced foreign currency expenses from export turnover only and not from the total turnover. It is a well settled legal proposition that the foreign currency expenses should be reduced from export turnover, as well as, total turnover. The Id. Authorized Representative of the assessee submitted that this issue has been decided by the Hon'ble Bombay High Court in assessee's own case for assessment year 2003-04 to 2006-07. Thereafter, the Tribunal in assessee's appeal for assessment year 2007-08, 2008-09 and 2009-10 has decided this issue in favour of the assessee.

16. We find that the Assessing Officer while computing deduction under section 10A of the Act has reduced foreign currency expenses only from numerator (i.e. export turnover) and not from denominator (i.e. total turnover). It is no more res integra that while computing deduction under section 10A of the Act, foreign expenditure that has been reduced from numerator should also be reduced from denominator. We find that the Hon'ble Jurisdictional High Court while dismissing the appeals filed by the Revenue in assessee's case for assessment year 2003-04 to 2006-07 has relied on the decision rendered in the case of CIT vs. Gem Plus Jewellery India Ltd., 330 ITR 175(Bom). The Hon'ble Jurisdictional High Court held that while computing deduction under section 10A of the Act, the expenditure towards freight and insurance should be excluded from the total turnover, as well as export turnover. The aforesaid judgment has been upheld by the Hon'ble Supreme Court of India in the case of CIT vs. HCL Technologies Ltd. reported 404 ITR 719 (SC). In view of settled legal position, the Assessing Officer is directed to reduce foreign expenses from export turnover and also from total turnover. The ground No.5 of the appeal is thus, allowed.

17. **In ground No.6 of appeal, the assessee has assailed grant of short credit of advance tax.** The Id. Authorized Representative of the assessee submitted that the Assessing Officer has erred in granting short credit of advance tax to the extent of Rs.1,02,00,000/-. The Id. Authorized Representative of the assessee prayed that a direction may be given to the Assessing Officer for allowing full credit of the advance tax paid by the assessee.

18. The short issue in ground No.6 is with respect to allowing credit of advance tax paid. The Assessing Officer is directed to re-examine the facts and grant the benefit of advance tax paid by the assessee. The Assessing Officer shall grant reasonable opportunity of hearing to the assessee, in accordance with law. The ground No.6 of appeal is allowed for statistical purpose.

19. **In ground No.7 of appeal, the assessee has assailed excess levy of interest under section 234B & 234C of the Act.** Charging of interest under section 234B & 234C of the Act is consequential and mandatory, therefore, this ground of appeal requires no separate adjudication.

20. **In ground No.8 of appeal, the assessee has assailed initiation of penalty proceeding under section 271(1)(c) of the Act.** Challenge to penalty at this stage is premature, accordingly this ground of appeal is dismissed.

21. The assessee has raised an **additional ground assailing charging of Education Cess and Higher Secondary Education Cess on Income Tax.** The Id. Authorized Representative of the assessee submitted that the additional ground raised is legal in nature and requires no additional evidence. The issue raised in additional ground is squarely covered by the decision of Hon'ble Jurisdictional High Court in the case of Sesa Goa Ltd. vs. JCIT , 423 ITR 426 and the judgment of Hon'ble Rajasthan High Court in the case of Chambal Fertilizers and Chemicals Ltd. vs. JCIT, 107 taxamann.com 484 (Raj).

22. Per contra, the Id. Departmental Representative vehemently opposed admission of additional ground raised by the assessee at belated stage.

23. Both sides heard. The assessee by way of additional ground has assailed charging of Education Cess and Higher Secondary Education Cess on Income Tax during the impugned assessment year. The assessee raised this additional ground based on the decision of Hon'ble Jurisdictional High Court rendered in the case of Sesa Goa Ltd. vs. JCIT (supra). The ground raised by the assessee is purely legal and no additional evidence is required to be adduced for adjudication of this ground. In so far as the objection of Id. Departmental Representative against raising of this ground at belated stage, we observe that the judgment was rendered by the Hon'ble Jurisdictional High Court in the case of Sesa Goa (supra) recently in Februarys 2020. The assessee/appellant had no occasion to agitate this ground before the authorities below. Moreover, the legal ground can be agitated at any stage [Re. NTPC vs CIT, 229 ITR 383(SC)]. The additional ground raised by assessee is thus, admitted for adjudication on merits.

24. We find that the Hon'ble Bombay High Court in the case of Sesa Goa Ltd. vs. JCIT (surpa) has held that Education Cess and Higher Secondary Education Cess are liable for deduction in computing income chargeable under the head profits and gains of business or profession. Since, the assessee has raised this issue for the first time before the Second Appellate Authority, we deem it appropriate to restore the issue back to the file of Assessing Officer for deciding this issue after examining the facts in line with the decision rendered in the case of Sesa Goa (supra). Consequently, the additional ground of appeal is allowed for statistical purpose.

25. **In the result, appeal by the assessee is partly allowed.**

**ITA NO.865/MUM/2016 A.Y. 2011-12:**

26. In ground No.1 of appeal, the assessee has assailed TP adjustment in relation to provision of software development services. The Id. Authorized Representative of the assessee submitted that the assessee is seeking exclusion of Infosys, Wipro Technology Ltd. (Wipro) and Thirdware. The Id. Authorized Representative of the assessee submitted that in so far as submissions for excluding Infosys and Thirdware from the list of comparables is concerned, the submissions made in assessment year 2010-11 would equally apply to assessment year 2011-12. The Id. Authorized Representative of the assessee placed reliance on the following decisions for the corresponding assessment year i.e. assessment year 2011-12 to buttress his contentions that these two companies are not fit for comparable analysis with a company engaged in IT services:

- (1) Clear 2 Pay India Pvt. Ltd. vs. ITO, ITA No.2788/Del/2017;
- (2) BNP Paribas India Solutions Private Ltd. vs. DCIT, IT(TP)ANo.2046/Mum/2016; and
- (3) Nomura Research Institute Financial Tech (I)(P) Ltd. vs. DCIT, 101 taxmann.com 4 (Kolkata – Trib.)

27. The Id. Authorized Representative of the assessee submitted that Wipro Technologies Ltd. is not comparable to the assessee as it is a giant company with a very high turnover and diversified activities. The said company has huge brand value and intangibles. Wipro is in the same league as Infosys, therefore, the said company is not a good comparable and therefore, should be excluded from the list of comparables for similar reasons. To support his contentions, the Id. Authorized Representative of the assessee placed reliance on the following decisions:

- (1) Clear 2 Pay India Pvt. Ltd. vs. ITO (supra); and
- (2) BNP Paribas India Solutions Private Ltd. vs. DCIT (supra)

The Id. Authorized Representative of the assessee further prayed for allowing working capital adjustment.

28. On the other hand Id. Departmental Representative vehemently supported the findings of TPO and DRP for inclusion of these companies in the list of comparables.

29. Both sides heard. In the impugned assessment year, the assessee is seeking exclusion of Infosys, Wipro and Thirdware from the list of comparables. While adjudicating the appeal of assessee for assessment year 2010-11, we have held that Infosys and Thirdware are not good comparable being functionally different. Since, the facts in the impugned assessment year are identical and there has been no change in the scale of operation and the nature of activities carried out by the assessee, the findings given in assessment year 2010-11 to exclude these companies from the list of comparable, would apply *mutatis mutandis* to the impugned assessment year. However, we would also like to record that in the case of Clear 2 Pay India Pvt. Ltd. vs. ITO (supra), the Delhi Bench of Tribunal for assessment year 2011-12 has excluded Infosys from the List of comparables on the ground of functional disparity, scale of operation, high brand value, having own research and development centre, huge intangibles, etc.

**Thirdware:**

In case of Nomura Research Institute Financial Tech (I)(P) Ltd. vs. DCIT(supra), the Tribunal excluded Thirdware from the list of comparable in assessment year 2011-12 on the ground that the company is engaged in software outsources activities and is functionally not comparable to company engaged in software development services. Thus, in view of our above observations, we direct the Assessing Officer to exclude Infosys and Thirdware from the list of comparables.

**Wipro Technologies Ltd.:**

The contention of the assessee is that Wipro is not comparable to the assessee on account of disparity in functions and scale of operation. The said company is having substantial brand value. We find that Delhi bench of Tribunal in the case of Clear 2

Pay India Pvt. Ltd. vs. ITO(supra) has excluded Wipro from the list of comparables of a company engaged in software services on account of functional disparity. In the case of BNP Paribas India Solutions Private Ltd. vs. DCIT (supra), the Tribunal excluded Wipro from the list of comparables on account of functional dissimilarities and non-availability of segmental data. No contrary decision was placed before us by the Revenue, therefore, in the facts of the case and the decisions relied by the assessee, we direct the Assessing Officer to exclude Wipro from the list of comparables.

### **Working Capital Adjustment**

The Assessing Officer is further directed to consider assessee's claim of working capital adjustment in line with our directions given while deciding the appeal of assessee for assessment year 2010-11.

Thus, ground No.1 of appeal is partly allowed in the terms aforesaid.

30. In ground No.2 of appeal, the assessee has assailed TP adjustment in relation to interest on overdue debtors. Both sides are unanimous in stating that the ground No.2 of appeal and the facts germane to the said ground are identical to the ground No.2 of the assessee's appeal for assessment year 2010-11. Since, the facts are alike in both impugned assessment years, the findings given by us while adjudicating ground No.2 of the appeal in assessment year 2010-11 would *mutatis mutandis* apply to ground No.2 in the present appeal. In the result, ground No.2 of appeal is partly allowed in similar terms.

31. In ground No.3 of appeal, the assessee has assailed disallowance of liquidated damages in respect of HPCL project. The Id. Authorized Representative of the assessee stated at Bar that the assessee is not pressing this ground. Consequently, ground No.3 of appeal is dismissed as not pressed.

32. In ground No.4 of appeal, the assessee has assailed denial of deduction under section 10A of the Act in respect of Bangalore Unit. Since, the ground of appeal and the facts giving rise to the said ground are identical to the ground decided by us in the appeal of assessee for assessment year 2010-11. The ground No.4 of appeal is allowed for statistical purpose, in similar terms.

33. In ground No.5 of appeal, the assessee has assailed non-granting of adjustment of refund while computing total demand. The Id. Authorized Representative of the assessee submitted that the Assessing Officer has erred in not adjusting refund of Rs.1,37,04,824/-. The said refund has neither received by the assessee nor adjusted against the outstanding demand. Taking into consideration the facts pleaded before us, we deem it appropriate to restore this issue back to the file of Assessing Officer for verification of facts and decide the issue, in accordance with law. The ground No.5 of appeal is allowed for statistical purpose.

34. In ground No.6 of the appeal, the assessee has assailed excess levy of interest under section 234B & 234D of the Act. Charging of interest under section 234B & 234C of the Act is consequential and mandatory, therefore, this ground require no separate adjudication.

35. In ground No.7 of appeal, the assessee has assailed initiation of penalty under section 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature. This ground of appeal is dismissed, accordingly.

36. The assessee has raised additional ground of appeal challenging charging of Education Cess and Higher Secondary Education Cess. Identical additional ground was raised by the assessee in assessment year 2010-11. The findings given by us while deciding the said ground in AY 2010-11 would *mutatis mutandis* apply to the additional ground raised in assessment year 2011-12. Thus, the additional ground raised in the appeal is allowed for statistical purpose in similar terms.

**37. In the result, appeal of the assessee is partly allowed.**

**ITA No.1212/Mum/2016, A.Y: 2011-12:**

38. The solitary ground raised by the Revenue in appeal is against reducing the foreign expenses from export turnover, as well as, total turnover while computing deduction under section 10A of the Act. This issue has been laid to rest by Hon'ble Apex Court. For computing deduction under section 10A of the Act, foreign expenditure has to be reduced from export turnover, as well as, total turnover. This issue has also been decided the by the Hon'ble Jurisdictional High Court in favour of assessee in an appeal by the Revenue. We find no merit in the ground raised by the Revenue, hence, the same is dismissed. **In the result, appeal of Revenue is dismissed.**

39. **To sum up, appeal of the assessee for assessment years 2010-11 and 2011-12 are partly allowed and cross appeal by the Revenue in assessment year 2011-12 is dismissed.**

Order pronounced in the open court on Thursday the 06<sup>th</sup> day of May, 2021.

Sd/-

( RAJESH KUMAR )

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 06/05/2021  
Vm, Sr. PS(O/S)

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**