

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

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

IT(TP)A No.637/Bang/2016
Assessment Year : 2010-11

M/s. Dell International Services India Pvt. Ltd., 12/1A, 12/2A, 13/1A, Diyashree Greens, Challaghatta Village, varthur Hobli, Bengaluru-560 071. PAN : AAACH 1925 Q	Vs.	The Joint Commissioner of Income Tax (LTU), Bengaluru.
APPELLANT		RESPONDENT

IT(TP)A No.639/Bang/2016
Assessment Year : 2010-11

The Joint Commissioner of Income Tax (LTU), Bengaluru.	Vs.	M/s. Dell International Services India Pvt. Ltd., Bengaluru-560 071. PAN : AAACH 1925 Q
APPELLANT		RESPONDENT

Revenue by	:	Shri. Muzzafar Hussain, CIT(DR)(ITAT), Bangalore
Assessee by	:	Shri. T.Suryanarayana, Advocate

Date of hearing	:	29.07.2021
Date of Pronouncement	:	03.08.2021

ORDER

Per N. V. Vasudevan, Vice President:

IT(TP)A No.637/Bang/2016 is an appeal by the assessee while IT(TP)A No.639/Bang/2016 is an appeal by the Revenue. Both the appeals are directed against the final assessment order dated 29.01.2016 of JCIT, LTU Unit, Bengaluru, under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter called the ‘Act’) in relation to Assessment Year 2010-11.

2. The issues that arises for consideration in the above cross-appeals pertains to the aggregate Transfer pricing adjustment (“TP adjustment”) of **Rs. 1,26,90,33,692/-** made by the Transfer Pricing Officer (‘the TPO’ for short) towards the international transactions of provision of Software Development services (‘SWD services’ for short) and Information Technology Enabled services (‘ITES’ for short) by the Assessee to its Associated Enterprises (‘AE’ for short), which was subsequently reduced to **Rs. 1,11,82,20,792/-** on giving effect to the directions of the Dispute Resolution Panel (‘the DRP’).

3. The assessee is a wholly owned subsidiary of Dell International Inc. The assessee is primarily engaged in the business of providing IT support services / SWD services and IT Enabled services to its AEs. During the previous year relevant to the assessment year 2010-11, the international transactions that took place between the assessee and its AEs were the provision of SWD services and ITES by the assessee for which a TP adjustment was made by the TPO (vide rectified order dated 03.03.2015) totaling to Rs. 1,26,90,33,692/- i.e., Rs. 46,85,29,023/- in the SWD segment and Rs. 80,05,04,669/- in the ITES segment. Incorporating the said TP adjustment, the Assessing Officer (“AO”) passed a draft assessment order dated 30.03.2015. Aggrieved, the assessee filed its objections before the DRP, which, vide its directions dated 15.12.2015 granted partial relief to the assessee. Pursuant to the directions of the DRP, the AO passed the final assessment order dated 29.01.2016 in which the TP adjustment was reworked to Rs. 1,11,82,20,792/-. Aggrieved by the final assessment order to the extent it did not grant relief to the assessee, the assessee has preferred the appeal before this Hon’ble Tribunal. To the extent that the DRP’s directions granted relief to the assessee, the Revenue has filed the above appeal before this Hon’ble Tribunal.

4. During the pendency of the present appeals, the Assessee filed an application under Article 27 of the India-US Double Taxation Avoidance

Agreement ('DTAA' for short) for initiation of Mutual Agreement Procedure ('MAP' for short) before the Indian and the US Competent Authorities with respect to ITES provided to the AEs based in the United States of America ('US' for short). As the Assessee has accepted the terms of MAP, the grounds pertaining to the TP adjustment with respect to ITES transactions with the AEs based in the US are withdrawn by the Assessee vide letter dated 26.08.2020. Pursuant to the acceptance of MAP, as regards the ITE services rendered by the Assessee to its AEs situated other than in the USA, the adjustment stands at Rs. 18,44,80,061/-.

5. We shall first take up for consideration the dispute with regard to determination of Arm's Length Price (ALP) in respect of the International Transaction of providing SWD services by the assessee to its AE.

6. SOFTWARE DEVELOPMENT SEGMENT

Net mark-up on cost earned by the assessee as reflected in the TP Order:

Operating Income	Rs. 4,94,08,92,584/-
Operating Cost	Rs. 4,32,71,91,110/-
Operating Profit (Op. Income – Op. Cost)	Rs. 61,37,01,474/-
Operating/Net margin (OP/OC)	14.18%

7. The assessee selected the following companies as comparables to the assessee and their arithmetic mean:

Sl. No.	Name of the company	Average NPI (in %)
1.	R S Software India Limited	8.45
2.	L G S Global Limited	21.89
3.	Akshay Software Technologies Limited	8.59
4.	Thinksoft Global Services Ltd	17.52
5.	Quintegra Solutions Limited	9.07
6.	Helios & Matheson Information Technology Ltd.	23.33
7.	Silverline Technologies Limited	4.75
8.	Aarman Software Private Limited	0.58

9.	Sagarsoft India Private Limited	16.69
10.	Mindtree Ltd	11.13
11.	R systems International	15.13
12.	Compulink Systems Limited	8.39
Arithmetical Mean		12.13

Out of the 12 comparables selected by the assessee, the TPO accepted 2 comparables viz., Thinksoft Global Services Ltd. and Mindtree Ltd. and rejected the remaining 10 comparables.

8. The TPO selected the following comparables and their arithmetic mean was as follows:

Sl. No.	Name of the company	Margin Unadj. (%)	Margin - WC adjusted (%)
1.	ICRA Techno Analytics Ltd. (seg)	24.94	28.46
2.	Infosys Ltd	44.98	48.53
3.	Kals Information Systems Ltd. (seg)	34.41	34.22
4.	Larsen & Toubro Infotech Ltd.	19.33	23.25
5.	Mindtree Ltd. (seg)	14.83	16.55
6.	Persistent Systems & Solutions Ltd.	15.38	18.95
7.	Persistent Systems Ltd	30.35	31.87
8.	R S Software (India) Ltd.	10.29	14.28
9.	Sasken Communication Technologies	17.36	20.26
10.	Tata Elxsi (seg)	20.93	20.99
11.	Thinksoft Global Services Ltd.	17.05	17.77
Arithmetical Mean		22.71	25.01

9. The TPO computed ALP of the SWD services segment as follows:

Arm's Length Mean Margin	22.71%
Less: Working Capital Adjustment	-2.30%
Adjusted mean margin of the comparables	25.01%
Operating Cost	Rs. 4,32,71,91,110/-

Arm's Length Price – 125.01% of Operating Cost	Rs. 5,40,94,21,607/-
Price Received	Rs.4,94,08,92,584/-
Shortfall being adjustment u/S. 92CA	Rs. 46,85,29,023/-

10. Aggrieved by the draft Order of Assessment of the AO incorporating the shortfall in price as an addition to the total income, the assessee filed objection before the DRP.

11. The DRP issued directions whereby the following companies were directed to be excluded by accepting the contentions of the assessee:

- a. ICRA Techno Analytics Limited.
- b. Infosys Technologies Limited
- c. Kals Information Systems Ltd.
- d. Tata Elxsi Limited

The DRP rejected the contentions of the assessee that Sasken Communication Technologies Ltd. and Persistent Systems Ltd. ought to be excluded. The DRP *suo motu* directed exclusion of (a)

- a. R S Software (India) Ltd.
- b. Mindtree Ltd.
- c. Thinksoft Global Services Ltd.

The DRP did not adjudicate on the exclusion of Persistent Systems & Solutions Ltd.

On giving effect to the above directions issued by the DRP, the final list of comparables would be as follows:

Sl. No.	Name of the company
1.	Larsen & Toubro Infotech Ltd.
2.	Persistent Systems & Solutions Ltd.
3.	Persistent Systems Ltd
4.	Sasken Communication Technologies

12. Pursuant to the directions of the DRP, the TP adjustment was reworked to Rs. 40,62,17,470/- in the final Assessment Order dated 29.01.2016. Aggrieved by the order of the AO, the assessee has raised the following issues, viz., (i) that the DRP erred in *suo moto* excluding R S Software (India) Limited Mindtree Limited and Thinksoft Global Services Ltd. from the list of comparable companies. **(Ground No. 1.4)** and **(ii)** that the DRP ought to have directed exclusion of Larsen & Toubro Infotech Ltd., Sasken Communication Technologies Ltd. and Persistent Systems Ltd. as the said companies are not comparable to the assessee. **(Ground No. 2.10)**

Revenue in its appeal has projected the following grievances against the order of the AO. The grounds primarily urged by the Revenue are as under:

- i. That the DRP erred in excluding Mindtree Ltd., RS Software Pvt. Ltd. and Thinksoft Ltd. from the list of comparable companies by applying the onsite revenue filter. **(Ground No. 1)**
- ii. That the DRP erred in excluding ICRA Techno Analytics Ltd. and Tata Elxsi Ltd. from the list of comparables. **(Ground Nos. 2 and 4)**
- iii. That the DRP erred in excluding Infosys Technologies Ltd. on the ground that it is functionally different from the assessee. **(Ground No. 3)**
- iv. That the DRP erred in excluding KALS Information Systems Ltd on the ground that it is functionally different from the assessee. **(Ground No. 3)**

13. We shall take up the assessee's appeal for consideration first. In its appeal, the assessee has sought exclusion of 3 comparable companies that remain after the order of the DRP viz., (i) Larsen & Toubro Infotech Ltd. (ii) Sasken Communication Technologies Ltd. and (iii) Persistent Systems Ltd.

14. As far as exclusion of this Larsen & Toubro Infotech Ltd., (L & T) is concerned, the exclusion of this company was sought by the assessee for the reasons that (i) the turnover of the company was far in excess of that of the Assessee's and (ii) that the same was engaged in product development and infrastructure management services for which segmental details are unavailable. The DRP failed to adjudicate on the ground of the Assessee seeking exclusion of this company. It was submitted that L&T is not comparable to the Assessee on various counts. It is submitted that L&T is engaged in designing and developing high quality independent solutions and has income from sale of software products. Further, the company incurred significant expenses in foreign currency amounting to 47% of its total expenses. The said expenditure included 'overseas staff costs' of Rs. 548.84 crores and 'subcontracting expenses' of Rs. 74.50 crores which clearly shows that the company is engaged in provision of onsite services, which is different from the service model followed by the Assessee. Also, L&T has significant worth of intangibles amounting to Rs. 41,06,09,258/-

15. It was submitted that this company is being consistently excluded from final list of comparables in cases of companies placed similarly to that of the assessee. In this regard, reliance was placed on the decisions of this Tribunal in the case of *Cerner Healthcare Solutions (P.) Ltd. v. ITO* ([2017] 79 taxmann.com 64 (Bengaluru – Trib.)) wherein this company was directed to be excluded and *DCIT v. Electronics for Imaging India P. Ltd* [(2016) 70 taxmann.com 299 (Bang – Trib.)] wherein this company was remanded to the AO/TPO for verification as to whether the company's segmental details as regards its revenues from software development and product development were available, and to thereafter exclude it if the details were not available. The learned DR relied on the order of the TPO whereas the assessee accepted this company as a comparable company.

16. We have carefully considered the rival submissions. The assessee did not object to inclusion of this company before the TPO but objected to inclusion of this company before DRP. The DRP did not adjudicate the objection. In these circumstances, we are of the view that exclusion of this company from the list of comparable companies has to be examined by the TPO/ AO and we remand the issue to the TPO/AO. The law is well settled that the assessee is entitled to object to inclusion / exclusion of companies at the stage of appellate proceedings and there is no estoppel. The AO/TPO will afford opportunity of being heard to the assessee in the set aside proceedings.

17. Sasken Communication Technologies Ltd.:

As far as exclusion of this company is concerned, the assessee sought exclusion of this company on the ground that this company is functionally dissimilar, which the DRP rejected. The DRP held that this company passes the 75% revenue filter. It was submitted by the learned Counsel for the assessee that the company is engaged in high-end software products and services that are not similar to the services rendered by the assessee. The company develops and owns several patents and earns returns on the same while the assessee neither develops nor owns any patents. Moreover, the company incurs significant expenditure on research and development activities. The company is therefore not comparable to the Assessee. Reliance was placed on the decision of this Tribunal in *DCIT v. Electronics for Imaging India P. Ltd* [(2016) 70 taxmann.com 299 (Bang – Trib.)] and *ACIT v. Broadcom India Research (P.) Ltd* [2016] 72 taxmann.com 77 (Bangalore - Trib.), where the said company was directed to be excluded/exclusion upheld in the case of assesseees similar to the assessee herein. The learned DR relied on the order of the DRP.

18. We have carefully considered the rival submissions. In the case of Electronics for Imaging (supra), it was held that this company derives income from 3 segments viz., (i) software services; (ii) software products and (iii) other

services. The segmental operating margins are however not available. Therefore the operating margin for the SWD service segment of this company cannot be compared with that of the assessee. The decision referred to above also pertains to Assessment Year 2010-11 in the case of an assessee engaged in rendering SWD services such as the assessee in whose case also the same comparables were chosen by the TPO. The decision is therefore squarely applicable to the present case. Following the same, we direct at exclusion of this company from the list of comparable companies.

19. Persistent Systems Ltd.

As far as exclusion of this company from the list of comparable companies is concerned, the plea of the assessee for exclusion of this company was on the basis that this company is functionally dissimilar, which contention the DRP rejected. It is the plea of the assessee that the DRP has erred in not excluding the said comparable from the final list of comparables as this company was engaged in rendering outsourced product development as against software development services rendered by the assessee and is thus not comparable to the assessee. In this regard our attention was drawn to the annual report as well as the website extracts. As per the annual report of the company, income is shown as “sale of software services and products” and no break-up is available between sale of software services and sale of products. The company is thus functionally dissimilar. In any event, during FY 2009-10, the company acquired assets in Paxonic Inc and has been involved in merger / demerger activities and on account of this peculiar economic circumstance too, the company ought to be rejected. Reliance was also placed on the decision of this Tribunal in the case of *DCIT v. Electronics for Imaging India P. Ltd* [(2016) 70 taxmann.com 299 (Bang – Trib.)], *ACIT v. Broadcom India Research (P.) Ltd* [2016] 72 taxmann.com 77 (Bangalore - Trib.) and *ITO v. Interwoven Software Services (India) (P.) Ltd.* [2016] 74 taxmann.com 103 (Bangalore -

Trib.), where the said company was directed to be excluded/exclusion upheld in the case of assessees similar to the assessee herein. The learned DR relied on the order of DRP which rejected similar contention.

20. We have considered the rival submissions. We find the DRP in its order at page 8 has accepted that the Annual Report of this company and says that this company is both into SWD services and products. No segmental details are available so that the margins of the SWD segment can be compared with that of the assessee. Hence this company cannot be regarded as comparable. For the very same reason this company was regarded as not comparable with a SWD service provider in the case of Electronics for Imaging (*supra*).

21. The assessee in its appeal has also projected its grievance on the DRP *suo moto* directing the exclusion of Thinksoft Global Services Ltd., R S Software (India) Limited and Mindtree Limited from the list of comparables. The said companies were selected by the Assessee and subsequently included by the TPO in the final list of comparables. These companies pass all the filters applied by the TPO. The assessee is seeking inclusion of the aforesaid companies as comparables. The Revenue in its appeal also seeks inclusion of these companies as comparables. In this regard, we find that the DRP has excluded the said comparables by applying the onsite revenue filter that too without putting the Assessee on notice as regards the same. We therefore hold and direct that these three companies be included as comparable companies. The relevant grounds of appeal of the assessee and Revenue are accordingly allowed.

22. Now we will take up for consideration the grounds of appeal by the Revenue.

23. ICRA Techno Analytics Ltd ('ICRA')

As far as this company is concerned, the assessee's objection before the TPO was that the margins of this company computed by TPO were not correct. The said contention was not accepted by the TPO. The DRP excluded ICRA on the ground that the company has two diverse segments, in respect of which segmental details are unavailable.

24. In its ground of appeal, the stand of the Revenue is that there cannot be exact comparability. Thus the Revenue admits that there is no exact comparability. This company is engaged in software development & consultancy services, licensing and sub-licensing fee, engineering services, web development & hosting, business analytics, business process outsourcing services and product development and therefore, is functionally not comparable to the assessee. This Tribunal in *DCIT v. Electronics for Imaging India P. Ltd* [(2016) 70 taxmann.com 299 (Bang – Trib.)] and *ACIT v. Broadcom India Research (P.) Ltd.* [2016] 72 taxmann.com 77 (Bangalore - Trib.) directed this company to be excluded as a comparable in the case of assessees similar to the assessee herein. We therefore find no merit in ground No.2 raised by the Revenue.

25. Infosys Technologies Ltd. ("Infosys"):

In ground No.3, the Revenue has projected its grievance in the action of the DRP in escalating this company as a comparable company. This company was excluded by the DRP on the grounds that the company has significant onsite revenue at 48.7% and has incurred significant selling and marketing expenses and presence of intangibles for which no accurate adjustment can be made. The turnover of this company was Rs. 21,140 crores which is far higher than the turnover of the assessee. This company is a giant in the software development space while the assessee is a captive unit. The company also has high brand value and focusses on brand-building which occasions the high

profits. Infosys owns products and leverages on its premium banking solution Finacle® as evidenced from its annual report. The company also focusses heavily on R & D and thus the company is thus not comparable to the assessee.

26. The plea of the Revenue in ground No.3 is that functional comparability has to be seen broadly and not exactly and that for differences which are not material only adjustment to the margins is contemplated by the TP legislation.

27. We have considered the submission of the learned DR of the Revenue as repeated in ground No.3. We are of the view that the differentiating factors pointed out by the assessee cannot be said to be not material differences. Even if they are to be regarded as immaterial, the quantification of accurate adjustment to account for the differences is not possible. In such circumstances, it is safe to exclude the company as a comparable. This company is being consistently excluded from the list of comparables in similar cases. Reference may be made to the decision of this Tribunal in *DCIT v. Electronics for Imaging India P. Ltd* [(2016) 70 taxmann.com 299 (Bang – Trib.)] and *ACIT v. Broadcom India Research (P.) Ltd.* [2016] 72 taxmann.com 77 (Bangalore - Trib.) where the said company was directed to be excluded/exclusion upheld in the case of assesseees similar to the assessee herein. We therefore find no merit in ground No.3 raised by the Revenue.

28. Tata Elxsi Ltd:

As far as exclusion of this company is concerned, the grievance of the assessee projected in ground No.4 is same as projected in ground No.2. The DRP excluded this company as it was found to be functionally dissimilar. In the relevant Assessment Year, this company operated under two segments – (1) software development services and (2) systems integration and support. This company provides niche services which are not comparable to the low-end software development services rendered by the Assessee. Tata Elxsi has also invested heavily in R & D activities and has expenses amounting to nearly 3%

of its sales which demonstrates that the company is engaged in innovation of products and services such as animation, content creation for advertisements as well as hardware related activities such as network management, engineering services capabilities for broadcast technology players, products for wireless communication etc. The difference in functions is evident from the annual report of the company. This Tribunal in *DCIT v. Electronics for Imaging India P. Ltd* [(2016) 70 taxmann.com 299 (Bang – Trib.)] excluded this company as a comparable in the case of an assessee similar to the assessee herein for the same Assessment Year 2010-11. We therefore find no merit in Ground No.4 raised by the Revenue.

29. KALS Information Systems Ltd:

As far as exclusion of this company is concerned, the DRP excluded this company on the ground that this company is functionally dissimilar and that the segmental information are not reliable. Further, it is submitted that Kals is engaged in the development of software products and providing related services. It also provides implementation and maintenance of software products. It has developed a range of products such as Shine ERP software, Docuflo, Dac4Cast, CMSS, La Vision, Virtual Insure and Aldon. Website extracts demonstrating this are available in the submissions at pages 45-48 and 869-872 of the paperbook. The annual report also confirms that the company is engaged in development of software and software products. The company holds significant inventories which account for 27% of the total current assets which demonstrates that it is a product development company as against a pure software service provider like the assessee. The functions carried out by the two companies being substantially different, the company has been rightly rejected as a comparable.

30. The grievance projected in ground No.5 by the Revenue is similar to the grievance projected in ground No.3 regarding exclusion of Infosys Ltd. We

have already held that material differences cannot be ignored and that the difference if any should be capable of being quantified and adjustment to the margins be accounted for. Those reasons will equally apply to ground No.5 also. This Tribunal in *DCIT v. Electronics for Imaging India P. Ltd* [(2016) 70 taxmann.com 299 (Bang – Trib.)] and *ACIT v. Broadcom India Research (P.) Ltd.* [2016] 72 taxmann.com 77 (Bangalore - Trib.) directed to exclude this company on identical reasons in the case of assessees similar to the Assessee herein. We therefore find no merit in ground No.5 raised by the Revenue.

31. The TPO is directed to compute ALP in the SWD services segment in accordance with the directions as contained in this order in accordance with law, after affording opportunity of being heard. The arithmetical mean of the working capital adjusted margins of the above comparables would fall below the Assessee's NCP margin for provision of Software Development services. Consequently, the international transaction of provision of Software Development services by the Assessee to its AE in FY 2009-10 can be concluded as being at arm's length.

INFORMATION TECHNOLOGY ENABLED SERVICES (ITES)

32. As far as the ITES segment is concerned, the margins earned by the assessee was as follows:

Net mark-up on cost earned by the Assessee as reflected in the TP Order:

Operating Income	Rs. 7,23,48,38,888/-
Operating Cost	Rs. 6,65,42,36,668/-
Operating Profit (Op. Income – Op. Cost)	Rs. 58,06,02,220/-
Operating/Net margin (OP/OC)	15%

33. Comparables selected by assessee and their arithmetic mean:

Sl. No.	Name of the company	Average NPI (in %)
1.	Aditya Birla Minacs Worldwide Ltd.	8.76
2.	Cosmic Global Ltd.	32.38
3.	Informed Technologies India Ltd	10.89
4.	Nittany Outsourcing Services Pvt Ltd	19.38
5.	Datamatics Financial Services Ltd	-3.03
6.	Omega Healthcare Management Services Pvt Ltd	9.34
7.	Jeevan Softech Ltd	13.44
8.	R Systems International Limited	10.43
9.	Caliber Point Business Solutions Ltd.	21.16
10.	Ultramarine & Pigments Ltd	13.28
Arithmetical Mean		13.60

Out of the 10 comparables selected by the assessee, the TPO selected 1 comparable viz., Informed Technologies India Ltd. and rejected the remaining 9 comparables.

34. Comparables selected by TPO and their arithmetic mean:

Sl. No.	Name of the Company	Margin Unadj. (%)	Margin - WC adjusted (%)
1.	Accentia Technologies Ltd. (seg)	43.06	43.35
2.	Acropetal Technologies Ltd.	22.27	17.67
3.	E-Clerx Services Ltd	55.97	52.98
4.	Fortune Infotech Ltd	22.80	20.05
5.	ICRA Online Ltd. (seg.)	43.39	40.72
6.	Informed Technologies India Ltd	26.15	25.94
7.	Infosys BPO Ltd.	31.23	28.68
8.	Cosmic Global Ltd.	14.97	16.20
9.	Sundaram Business Services Ltd	-12.31	-13.28
10.	Jeevan Scientific Technology Ltd.	21.05	37.99
AVERAGE MARK-UP		26.86	27.03

35. Computation of arm's length price by the TPO and the adjustment made:

Arm's Length Mean Margin	26.86%
Less: Working Capital Adjustment	-0.17%
Adjusted mean margin of the comparables	27.03%
Operating Cost	Rs. 6,65,42,36,668/-
Arm's Length Price - 127.03% of Operating Cost	Rs. 8,45,28,76,839/-
Price Received	Rs.7,23,48,38,888/-
Shortfall being adjustment u/S. 92CA	Rs. 1,21,80,37,951/-

36. The addition on account of shortfall in price received as suggested by TPO was added to the total income by the AO in the draft Assessment Order. The assessee filed objections before the DRP against the draft Order of Assessment. The DRP directed exclusion of:

1. Accentia Technologies Ltd.
2. Acropetal Technologies Ltd.
3. E-Clerx Services Ltd
4. Infosys BPO Ltd.
5. Jeevan Scientific Technology Limited
6. Sundaram Business Services Ltd (*suo moto*)

On giving effect to the above directions issued by the DRP, the final list of comparables would be as follows:

Sl. No.	Name of the Company
1.	Fortune Infotech Ltd.
2.	ICRA Online Ltd. (seg)
3.	Cosmic Global
4.	Informed Technologies India Ltd.

Pursuant to the directions of the DRP, the TP adjustment was reworked to Rs. 71,20,03,322/- in the final assessment order dated 29.01.2016. Against the said

order both the assessee and the Revenue have preferred appeals before the Tribunal.

37. In its appeal, the assessee has raised the following issues with regard to the determination of ALP in the ITES segment. That the arm's length mark-up on cost arrived under the Mutual Agreement Procedure Resolution to be applied for transactions with Non-US based entities for the ITES segment. (**Additional Ground**). The DRP erred in *suo moto* excluding Sundaram Business Services Ltd. from the list of comparable companies. (**Ground No. 1.4**). The DRP erred in including Fortune Infotech Limited, ICRA Online Limited and Informed Technologies India Limited from the list of comparable companies. (**Ground No. 2.14**).

38. In its appeal, the Revenue has challenged the order of DRP in excluding certain comparables chosen by the TPO viz., Infosys BPO Ltd., E-Clerx Services Ltd., Acropetal Technologies Ltd., Jeevan Scientific Technology Limited and Accentia Technologies Ltd. (**Ground Nos. 1 to 5**)

39. The additional ground is a legal ground and has a bearing on determination of tax liability of the assessee and hence the same is admitted for adjudication.

40. As far as the additional ground is concerned, it is seen that subsequent to filing of the present appeal, the Assessee's AE located in the United States of America ("US") opted for the Mutual Agreement Procedure ("MAP") proceedings pursuant to Article 25 of the India-US Double Taxation Avoidance Agreement ("DTAA") with respect to the transfer pricing adjustment made to the ITES revenue earned by the Assessee from its AE located in the US. Thereafter, the Assessee has accepted the terms of the MAP resolution under Article 27 of the India-US DTAA on 13.07.2020 with respect to its ITES rendered to the AEs based in the US at a margin of 15.69%. Accordingly, the

Assessee has withdrawn the grounds in the appeal insofar as it related to the ITES provided by the Assessee to its AE based in the US.

41. It is the plea of the assessee in the additional ground of appeal filed along with application dated 24.02.2021 for admitting additional ground that the profit margin of the assessee adopted in MAP ought to be adopted as ALP mark-up for non-US based AE transactions also. It is submitted that the transactions entered by the Assessee with its US based AE is similar to the transactions entered into with the non-US based AEs and that no distinction has been made by the Assessee between the two in its TP study and while preparing its audited financial statements. It has further been submitted that no distinction has been made by the TPO also in the comparability analysis carried out by him. Therefore, the assessee prays that the Tribunal may adopt the same arm's length mark-up cost for the international transactions entered into with the Non-US AEs as well and, accordingly, dispose of the TP grounds with respect to the ITES revenue earned by the Assessee from its Non-US based AE transactions.

42. The learned Counsel for the assessee in this regard placed reliance on the decisions of this Tribunal in the case of *CGI Information System & Management Consultants (P.) Ltd v. DCIT* ([2017] 81 taxmann.com 169 (Bangalore - Trib.)) and the Hon'ble Tribunal – Mumbai Bench in *J.P Morgan Services (P.) Ltd. v. DCIT* ([2016] 70 taxmann.com 228 (Mumbai - Trib.)) wherein, the same margin as the US transactions was directed to be applied for the Non-US transactions. The learned Counsel for the assessee also pointed out that the Commissioner of Income-tax (Appeals) in its own case for the AYs 2005-06, 2007-08 and 2008-09, adopted the arm's length price determined in the MAP resolution for the international transactions entered into with the Non-US AEs. The learned DR could not point out any infirmity in the submissions on the additional ground of appeal made by the learned Counsel for assessee.

43. We have considered the rival submissions and find merit in the same. As pointed out by the learned Counsel for assessee, the assessee or TPO have not made any distinction between US and Non-US AE transactions. In such circumstances, the margin accepted in MAP in respect of US AE transaction has to be regarded as Arm's Length mark-up cost for the Non-US AE transaction in the ITES segment. We hold and direct accordingly. In view of the above conclusion, the other grounds raised by the Revenue and assessee in their appeals on determination of ALP in the ITES segment become infructuous and calls for no adjudication and are dismissed.

44. In ground No.4.2 of its appeal, the assessee has projected its grievance in the action of the TPO in not giving opportunity to assessee before making adjustment on account of negative working capital. In this regard, it was submitted that Working capital adjustment is made for the time value of money lost when credit time is given to the customers. The assessee however does not bear any risk and has no working capital contingencies. The assessee has not incurred any expenses for meeting the working capital requirement. The assessee is running the business without any working capital risk as compared to the comparables. The learned Counsel for assessee placed reliance on decision of this Tribunal in *Tivo Tech Private Limited v. DCIT* (order dated 12.06.2020 in IT(TP)A No. 1619/Bang/2017), *Lam Research India Pvt Ltd v. DCIT* (order dated 30.04.2015 in ITA No. 1473 & 1385/2014) and *DCIT v. Software AG Bangalore Technologies Pvt Ltd* (order dated 31.03.2016 in ITA No. 1628/2014) where it has been held that negative working capital adjustment shall not be made in case of a captive service provider as there is no risk and it is compensated.

45. We are of the view that this issue was not raised by the assessee before DRP and hence, we deem it appropriate to direct the TPO/AO to consider the same in the proceedings for giving effect to this order in the set aside proceedings.

46. In the grounds relating to Corporate Tax, the assessee has prayed for set off of brought forward loss. The assessee had filed its return of income claiming setting off of business loss of Rs. 2,92,41,160/- based on the actual loss incurred and brought forward as per the Return of Income. Although the DRP directed to AO to verify and allow set off of the same, it was not done by the AO in the final Assessment Order. The assessee has therefore prayed that the same be allowed to be set off against income. We deem it proper to direct the AO to consider the claim of the assessee in accordance with law.

47. In the Revenue's appeal in grounds relating to Corporate Tax, the Revenue has projected its grievance against the directions of the DRP whereby it directed that while computing deduction under section 10A of the Act, whatever is excluded from export turnover should also be excluded from the total turnover following the decision of the Hon'ble Karnataka High Court in the case of Tata Elxsi 249 ITR50 (Karn). The decision of the Hon'ble Supreme Court in the case of CIT Vs. HCL Technology Ltd., (2018) 93 taxmann.com 33 (SC) settles the issue and it has been held therein that while computing deduction under section 10A of the Act by applying the formula set out in the said section, whatever is excluded from export turnover should also be excluded from the total turnover. Since the order of the DRP is in consonance with the law laid down above, we find no merit in the ground of appeal of the Revenue.

48. In the result, both the appeals are partly allowed.

Order pronounced in the open court on this 3rd day of August, 2021.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(N. V. VASUDEVAN)
Vice President

Bangalore.

Dated: 03.08.2021.

/NS/*

Copy to:

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.