

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.3399/Bang/2018
Assessment Year : 2014-15

EIT Services India Pvt. Ltd., Digital Park, 39/40, Electronic City, Phase-II, Hosur Road, Bengaluru-560 100.	Vs.	The Jt. Commissioner of Income-tax, Special Range-2, Bengaluru.
PAN - AAACD 4078 L		
APPELLANT		RESPONDENT

Assessee by	:	Shri Padamchand Khincha, C.A
Revenue by	:	Ms. Neera Malhotra, CIT(DR)

Date of Hearing	:	19-08-2021
Date of Pronouncement	:	28-09-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against order dated 29/10/2018 passed by the Ld. ACIT circle 2 (1) (2), Bangalore for assessment year 2014-15 on following grounds of appeal:

“Transfer pricing adjustment of INR 1,65,84,24,000

1. *The Assessment Order dated 29 October 2018 (received on 31 October 2018), issued by the learned Joint Commissioner of Income-tax, Special Range - 2, Bangalore ("learned AO"), the Directions issued by the Hon'ble Dispute Resolution Panel ("Hon'ble DRP") and the Order*

of the learned Transfer Pricing Officer ("learned TPO") issued under Section 92CA of the Act are not in accordance with the law, made in violation of the principles of equity and natural justice and are contrary to the facts and circumstances of the present case.

2. The Hon'ble DRP and the learned AO/TPO have erred in law and on facts in making Transfer Pricing ("TP") adjustment of INR 1,65,84,24,000 to the returned income of the Appellant and in holding that the international transactions between the Appellant and its Associated Enterprises ("AEs") were not at arm's length.

3. Rejection of TP Study of the Appellant

3.1. The Hon'ble DRP and the learned AO/TPO have erred in law and on facts by rejecting the Transfer Pricing Documentation ("TP Study") which has been prepared by the Appellant with respect to IT Services Segment, in the manner contemplated under the relevant provisions of Income-tax Act, 1961 ("The Act") and the Income tax Rules, 1962 ("the Rules").

3.2. The Hon'ble DRP and the learned AO/TPO have erred in law in stating that the data used in computation of the ALP is "not reliable or correct", under section 92C(3) of the Act.

3.3. The Hon'ble DRP and the learned AO / TPO have erred, in law and on facts in holding that the transactions between the Appellant and its AE were not at ALP as defined under section 92F(ii) of the Act and upholding the adjustment to the TP made by the learned TPO.

4. Erroneous computation of the operating profit margins

4.1. The Hon'ble DRP and the learned AO/TPO have erred in law and on facts by ignoring the detailed submission of the Appellant to consider 'Miscellaneous income' and 'Provision written back' as operating in nature in computing the margin of Appellant and has passed the Order treating the same as non-operating without giving adequate reasons.

4.2. The Hon'ble DRP and the learned AO/TPO have erred in law and on facts by ignoring the detailed submission of the Appellant to consider 'Provision for doubtful debts' as operating in nature in computing the margin of comparable companies and has passed the TP Order treating the same as 'non-operating' without providing adequate reasons.

5. Use of multiple year data

5.1. The Hon'ble DRP and the learned TPO have erred in rejecting the use of previous two years of data used by the Appellant in the TP

Study despite Rule 10B(4) of the Rules providing for the use of such data and selected single year data of the companies for the year ended March 31, 2014 in determining the ALP.

5.2. With regard to the use of contemporaneous data, the Hon'ble DRP and the learned TPO have erred in not accepting the submission of the Appellant that at the time of preparation of TP Study the latest available data was considered for the comparability analysis.

5.3. The Hon'ble DRP and the learned TPO not appreciated the fact that if the proposed approach of using the margins of comparable companies during the FY 2013-14 is adopted, which was not available to the Appellant during the TP Study requirements, then it may lead to an anomaly that could never have been intended by the Legislature.

5.4. The Hon'ble DRP and the learned TPO have erred in not accepting the fact that current year data were not available in the public domain to calculate the margins of comparable companies at the time of preparation of TP Study.

6. Use of Different FY ending

6.1. The Hon'ble DRP and the learned AO/TPO have erred in rejecting companies having different FY ending or whose data does not fall within the 12 month period of 1 April 2013 to 31 March 2014.

6.2. The Hon'ble DRP and the learned AO/TPO have failed to appreciate that disregarding companies that have a FY ending other than March, 2014 would lead to having a limited set of comparable companies and would have bearing on the comparability analysis.

6.3. The Hon'ble DRP and the learned AO/TPO have erred in rejecting certain comparable companies based on the aforementioned criteria.

1. R Systems International Limited; and

2. Helios and Matheson Information Technology Limited.

7. Employee cost filter

7.1. The Hon'ble DRP and the learned AO / TPO have erred in rejecting the comparable companies having ratio of employee cost to sales less than 25 percent.

8. Export sales filter

8.1. The Hon'ble DRP and the learned AO / TPO have erred in law and facts in applying the threshold limit of 75 percent in respect of export sales made by the comparable companies.

9. *Companies sought by the Appellant for exclusion*

9.1. *The Hon'ble DRP and the learned AO / TPO have erred in law and on facts, in determining the ALP based on following companies which are not comparable to the Appellant due to various factors such as functionally dissimilar, product / intangible led revenues, inadequate financial information, non-availability of segmental financials, engaged in R&D, etc, without considering the detailed submissions of the Appellant:*

1. *Infosys Limited;*
2. *Larsen &Toubro Infotech Limited;*
3. *Mindtree Limited;*
4. *Persistent Systems Limited; and*
5. *Thirdware Solution Limited.*

10. *Companies sought by the Appellant for inclusion*

10.1. *The Hon'ble DRP and the learned AO / TPO have erred in law and on facts in rejecting the following comparable companies of the Appellant from its TP study and the companies sought for inclusion before the learned TPO stating varied reasons like functionally different, data not available, diversified activities, fails learned TPO's filter without considering the detailed submission of the Appellant provided:*

TP Study comparable:

1. *Akshay Software Technologies Limited;*
2. *R Systems International Limited;*
3. *Helios & Matheson Information Technology Limited; and*
4. *Sasken Communication Technologies Limited*
5. *Evoke Technologies Limited;*
6. *Exilant Technologies Private Limited;*
7. *Daffodils Software Limited;*
8. *12T2 India Limited;*
9. *Sankhya Infotech Limited;*
10. *Avani Cimcon Technologies Limited;*
11. *Cat Technologies Limited and*

12. Acropetal Technologies Limited.

11. Information gathered under Section 133(6) of the Act is inappropriate for the purposes of disturbing the TP Study undertaken by the Appellant

11.1. The Hon'ble DRP and the learned AO / TPO have erred in law and in facts by gathering information from various companies under section 133(6) of the Act, which were not available with the Appellant at the time of preparing its TP study.

11.2. The Hon'ble DRP and the learned AO / IPO have erred in law by relying upon the information not available in public domain while carrying out the benchmarking analysis under the Act.

11.3. The Hon'ble DRP and the learned AO / TPO have erred in law and on facts by misinterpreting the Organization for Economic Cooperation and Development ("OECD") guidelines in the context of use of confidential information. The Hon'ble DRP and learned TPO have erred in law by adopting the comparables which were rejected by the Appellant on account of non-availability of adequate information in public domain.

12. Not granting of working capital adjustment and risk adjustment

12.1. The Hon'ble DRP and the learned AO / TPO have denied the benefit of working capital adjustment without considering the law that appropriate adjustments are to be made to account for the differences in the controlled and uncontrolled transaction which could affect the prices of charged / profitability in open market conditions and thereby ignoring the provisions of Rule 108(3) of the Rules. Further, The Hon'ble DRP and the learned AO / TPO has erred in law and on facts in ignoring the Transfer Pricing guidance issued by Institute of Chartered Accountants of India ("ICAI"), 2017, principles of Transfer Pricing Guidelines for Multinational Enterprises and Tax

Administration issued in July 2017 issued by OECD and United Nations ("UN") Practice Manual for Developing Countries Model Convention.

12.2. The Hon'ble DRP and the learned AO / TPU have erred in law and facts in not providing for working capital adjustment by erroneously stating that Appellant failed to demonstrate the working capital differences had impacted the Appellant's profits without considering the detailed submission of Appellant demonstrating with computation the impact of such differences on profits of comparable companies

12.3. *The Hon'ble DRP and the learned AO / TPO have erred in not appreciating that the Appellant, being a captive service provider operates at lower risk levels as compared to comparable companies, which carry higher risks and accordingly erred in not granting appropriate risk adjustments to the margins of the comparable companies.*

12.4. *The Hon'ble DRP and the learned AO / TPO have erred in concluding that there exists a single customer risk and that such a risk nullifies any risk adjustment that could be provided. Further, the learned AU / TPO has erred in concluding that there is no reliable method to compute the risk adjustment.*

13. *Not providing for economic adjustment for high foreign exchange fluctuations*

13.1. *The Hon'ble DP.P and the learned AO / TPO have erred in law and in facts in not carrying out economic adjustment on account of foreign currency fluctuations to the margins earned by comparable companies' vis-à-vis that of the Appellant which is immune from forex risk, being a captive service provider.*

14. *Other TP related grounds*

14.1. *The Hon'ble DRP and the learned AO / TPO have failed to appreciate the Appellant's commercial judgment about the application of arm's length principle which is tied to the business realities.*

14.2. *The Hon'ble DRP and the learned AU / TPO have erred in law and on facts, in making several observations and findings which are based on incorrect interpretation of law and contrary to facts of the case.*

14.3. *The Hon'ble DRP and the learned AO / TPO have erred by not carrying out the determination of ALP as required under section 92C of the Act read with rule 10U of the Rules.*

15. *Other matters*

a. *The learned AO has erred in law in computing interest under section 234B of the Act at Rs.30,25,19,250/-*

b. *The learned AO has erred, in law and on facts, in initiating penalty proceedings under section 271(1)(c) of the Act.*

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds, at any time before or at the time of hearing of the appeal. Each of the above objections is independent and without prejudice to the other grounds preferred by the appellant.

Brief facts of the case are as under:

2. The assessee is a company engaged in the business of software development, technical services and other related services. It filed its return of income for year under consideration on 27/11/2014 declaring income of Rs.6,55,63,26,840/-. The case was selected for scrutiny and notice under section 143 (2) of the Alp was issued along with 142 (1) of the Act. On receipt of notices, representatives of assessee appeared before the Ld.AO and, filed requisite details as called for. On verification of the details, the Ld.AO observed that assessee had international transaction exceeding Rs. 15 crores. He thus referred the case to the Ld.TPO.

2.1 Upon receipt of the reference under section 92CA of the Act, the Ld.TPO called upon assessee to file requisite details in respect of international transaction in Form 3 CEB. The Ld.TPO observed that assessee had following international transactions with its associated enterprise.

Received/ receivable	As per Form No. 3CEB	As per TP
Provision of IT	24,802,117,443	24,802,117,443
Provision of TES	5,410,376,393	5,410,376,393
Paid/ payable	As per Form No. 3CEB	As per TP
Purchase of computer software,	1,095,002,215	1,095,002,215
Reimbursement of expenses	450,882,406	450,882,406

2.2 The Ld.TPO observed that, the assessee used 6 comparables of software development service segment by

using TNMM as most appropriate method and OP/OC as PLI having arithmetic mean of 11.02%. Assessee computed its own margin to be at 21.14% for software development service segment and thus held its transaction to be at arms length. Comparables selected by assessee for software development service segment are as under:

S.No.	Comparables	Margin
1.	Akshay Software Technologies Ltd.	5.97%
2.	CG-VAK Software and exports Ltd.	2.61%
3.	Hallios and Matheson Information Technology Ltd.	18.16%
4.	R.S.Software (India) Ltd.	24.23%
5.	Sasken Communications Tech Ltd.	21.01%
6.	R.S.Systems International Ltd.	13.58%
	Average margin	11.02%

2.3 The TPO issued show cause notice by rejecting the Transfer Pricing study of assessee under software development service segment. The Ld.TPO applied certain filters and finalised following 6 comparables with an average margin of 30.29%:

SL NO.	Comparables	Margin
1	Infosys B P 0 Ltd.	27.43%
2	Microgenetic Systems Ltd.	-
3	Microland Ltd.	20.07%
4	Eclerx Services Ltd.	70.26%
5	B N R Udyog Ltd. (Seg)	24.85%
6	Crossdomain Solutions Pvt Ltd	21.05%
	Average margin	30.29%

2.4 The Ld.TPO also rejected the working capital adjustment in respect of the comparables. He thus proposed an adjustment of Rs.200,81,52,000/-, being shortfall under section 92CA of the Act

2.5 The Ld.TPO found ITES segment to be at arms length and therefore no adjustment was proposed.

2.6 On receipt of the Transfer Pricing order, the Ld. AO passed draft assessment order by making an addition in the hands of assessee equal to the proposed adjustment under section 92CA of the Act.

2.7 Against the draft assessment order assessee preferred appeal before the DRP in respect of the comparables objected by assessee. The DRP rejected all the objections. It also rejected additional comparables sought for inclusion by assessee. However the DRP directed the Ld.AO to compute the working capital adjustment.

2.8 On receipt of the DRP directions, the Ld.AO passed final assessment order making addition at Rs.165,84,24,000/-.

2.9 Aggrieved by the final assessment order passed, assessee is in appeal before us now.

2.10 At the outset the Ld.AR submitted that amongst the grounds filed, assessee is seeking exclusion of 4 comparables alleged in Ground 9.1 and 1 comparable in ground 10.1 for inclusion.

2.11 It has been submitted by the Ld.AR that, assessee also seeks directions respect of considering the foreign exchange fluctuation to be an operating income for computing working capital adjustment.

2.12 Except for these grounds, assessee do not wish to argue any other grounds.

Accordingly all other grounds stands dismissed as not pressed.

2.13 Before we undertake the comparability analysis, it is *sine qua non* to understand the functions performed, assets owned and risks assumed by assessee under this segment.

Functions performed:

2.14 In the TP study it has been submitted that assessee was formerly known as Hewlett Packard Global Soft Pvt.Ltd.,

and is a part of Hewlett Packard group. It has been submitted that assessee renders application development services, maintenance support services and network management services to its AE's and is involved in only performing coding quality assurance/testing and documentation and localisation on behalf of its AE's. Assessee also provides post implementation support and maintenance.

Assets owned:

2.15 The assessee do not own intangible assets except for tangible assets like computers office equipments furniture fixtures etc.

Risk assumed:

2.16 Except for foreign exchange risk, assessee do not undertake any other risk in performing its activities for its AE's.

2.17 Assessee has been compensated on cost plus basis for all direct and indirect cost of operation.

2.18 Based on the above be characterised to be a captive service provider that rendered services only to its associated enterprises.

Ground No. 9.1

3. The assessee seeks exclusion of following 4 comparables:

Infosys Ltd.

Larsen and Toubro Infotech Ltd.

Persistent Systems Ltd.

Thirdware solutions Ltd.

3.1 The Ld.AR submitted all these comparables have been considered by coordinate bench of this *Tribunal* for same assessment year in *Goldman Sach Services Pvt.Ltd Vs.JCIT* reported in (2020) 115 *Taxmann.com* 286. The Ld.AR submitted that assessee before coordinate bench was also a captive service provider and was only catering to its AEs under software development service segment. He submitted that these comparables were excluded by coordinate bench of this tribunal by considering various aspects of annual reports.

3.2 On the contrary the Ld.CIT.DR placed reliance on orders passed by authorities below.

3.3 We have perused submissions advanced by both sides in light of records placed before us.

3.4 We note that this *Tribunal* in case of *Goldman Sach Services Pvt.Ltd Vs.JCIT (supra)* observed as under:

5.1.1 Infosys Ltd:

This comparable was upheld by authorities below and has been objected by assessee for its inclusion. Ld.AR submitted that this company is functionally not comparable with that of assessee as it is engaged in providing diversify activities like business consulting, technology,

engineering and outsourcing services. It has been submitted that this company is a market leader in software development segment and provides IP-based solutions. It has also been submitted that this company owns huge intellectual properties and revenues from licensing of software products which is not at all akin to the functions performed and assets owned by assessee. Ld.AR submitted that, this company is a huge brand value and expenses of brand building is high. Referring to page 1860 of paper book volume 3 Ld.AR submitted that this company owns prod and are also involved in research and development activities.

Ld. CIT DR placed reliance upon orders of authorities below.

We have perused submissions advanced by both sides in light of records placed before us.

From the annual report of this company placed in the paper book relied upon by Ld.AR, it is observed that this company is not comparable to the profile of assessee. Further it is an accepted position that this company is a giant risk-taking company and is engaged in development and sale of software products and own intangible assets. Under such circumstances we deem it fit and proper to exclude this comparable from the finalist.

Accordingly Ld. AO/TPO is directed to exclude this company.

5.1.2. Larsen and Toubro Infotech Ltd

This comparable was upheld by authorities below and has been objected by assessee for its inclusion. Ld.AR submitted that this company is functionally not comparable with that of assessee and is engaged in providing consultancy and testing services. Further it has been submitted that there is no segmental information available in the annual reports of this company. Ld.AR submitted that this company owns its own brand and have products and are engaged in trading activity. This company also has R&D services and presence of huge intangibles and brands.

On the contrary, Ld.CIT DR submitted that, this company should be remanded by following the view taken by coordinate bench of this Tribunal in case of CGI Information Systems and management consultants (P) Ltd. vs DCIT reported in (2019) 101 Taxmann.com 294.

We have perused submissions advanced by both sides in light of records placed before us.

Ld.CIT DR placed reliance on decision of CGI Information Systems and management consultants (P) Ltd. vs DCIT (supra), wherein this Tribunal observed and decided as under:

"9. In respect of the applicability of this Tribunal order for exclusion of Larsen & Toubro Infotech Ltd, this has been submitted by ld. AR of assessee in the chart submitted before us that on page no. 698 of

Annual Report paper book, this company has debited an amount of Rs. 27,10,89,274/- as cost of bought-out items for resale. But this fact was not brought to the notice of the Tribunal in the case of Advice America Software Development Center (P.) Ltd. (supra). It has also been submitted that on page no. 706 of Annual Report paper book, this has been reported that this company is engaged in sale of services to its related parties and this fact was also not brought to the notice of Tribunal in case of Advice America Software Development Center (P.) Ltd. (supra). When we examine paras 14 to 20 of this Tribunal order where there is discussion regarding inclusion/exclusion of Larsen & Toubro Infotech Ltd, we find that there is no discussion on these two aspects that this company is having significant amount of cost of bought-out items for resale and it is engaged in sale of services and products to its related parties and hence, in our considered opinion, this Tribunal order cannot be considered as a binding precedence because this Tribunal order is silent on these two important aspects as to this aspect that this company is having sizeable amount of bought out items for resale and have related party transactions in respect of sales of services and products. We also find that in the case of remaining three Tribunal orders i.e. Microsoft Research Lab India Pvt. Ltd.'s case (supra), WM Global Technology Services (India) (P.) Ltd. (supra) and in the case of Tecnotree Convergence Pvt. Ltd. (supra), the matter was remanded to the TPO for fresh decision. Hence, we feel it proper that in the present case also, this issue should go back to the file of TPO for fresh decision after providing adequate opportunity of being heard to the assessee and while deciding the issue afresh, all the available Tribunal orders on this issue should be considered by the TPO in proper perspective."

It is observed that the decision in case of CGI Information Systems Management Consultants Pvt.Ltd VS. DCIT(supra) was in respect of assessment year 2013-14. On perusal of annual report of this comparable placed at page 2012 of paper book volume 5, it is observed that during the year this company has not derived any revenue from sale of products. The only revenue earned by this comparable during the relevant year under consideration is from sale of services. It is observed at page 2022 that this company incurred overseas staff costs at Rs.15,46,46,82,017/-, reveals that revenue earned from software services is mainly from offshore services. In the present case of assessee, there is no such expenses incurred for overseas staff costs. At page 2022 of paper book Volume 5, it is clear that export revenue from software services amounts to Rs.44,14,84,25,372/- out of gross income of Rs.46,43,94,03,178/-. In view of the aforesaid observations for year under consideration,

the issue of comparability of this company should be examined by Ld.AO/TPO afresh.

Accordingly, we set aside this comparable back to Ld. AO/TPO.

5.1.3. Persistent Systems Ltd.,

This comparable was included by Ld.TPO and opposed by assessee. Ld.AR submitted that this company is functionally different with that of assessee, as it is involved in providing complete product life cycle service to its clients. It has been submitted by Ld.AR that this company specializes in software products, services and technology innovations. He referred to the information furnished by this company under section 133(6), which is placed at page 3020 of paper book wherein this company is identified to be carrying out services in telecom to telecom and wireless clients, life science and health care, infrastructure and systems.

On the contrary, Ld.CIT DR submitted that, this company should be remanded by following the view taken by coordinate bench of this Tribunal in case of CGI Information Systems and management consultants (P) Ltd. vs DCIT reported in (2019) 101 Taxmann.com 294.

We have perused submissions advanced by both sides in light of records placed before us.

The decision relied upon by Ld.CIT DR in case of CGI Information Systems & Management Consultants (P) Ltd. vs DCIT has not considered details that has been obtained under 133 (6) in respect of this company for year under consideration. Therefore, in our opinion this decision cannot be of any help to revenue.

Coming to information received under section 133 (6) of the Act, it is observed that this company has acquired certain intellectual property products and generate revenue from licensing and support of such products. It is also observed that this company is involved in the entire life-cycle of software development which is not similar to what assessee caters to its associated enterprises. Assessee carries out only such functions which are required by associated enterprise under its supervision and guidance.

Accordingly, we direct Ld. AO/TPO to exclude this comparable from the finalist.

5.1.4. Thirdware Solutions Ltd

This comparable has been considered by Ld.TPO which has been objected by assessee. Ld.AR submits that this company is functionally different and earned revenues from export of services, subscription and training and sale of licensing. Ld.AR submitted that there are no segmental details in respect of this comparable.

Ld.CIT DR however placed reliance upon decision of Hon'ble Delhi High Court in case of Steria India Ltd vs DCIT reported in (2018) 92 Taxmann.com 120. She submitted that Hon'able Delhi High Court held this comparable to be a good company.

We have perused submissions advanced by both sides in light of records placed before. From the annual report of this company placed at page 2334-2444, it is observed that at page 2413, segment reporting of this company is set to be comprised of software development, implementation and support services. Further it has been submitted therein that primary segment reporting is based on geographical areas, viz Domestic = India (products and services) and International = rest of the world (exports-software services). It is also been submitted therein that this company maintains separate books of account for the reported segments. In profit and loss account at page 2431, it is observed that during the year under consideration, this company earned revenue from sale of products whereas, revenue from sale of services is shown to be at 'nil'. Ld.TPO while considering this comparable only considered footnote at page 2433, wherein bifurcations of revenue from sale of products has been given as; export of software services has been recorded to be at Rs.20194.37, software services from local units amounting to Rs.414.07, revenue from subscription and training amounting to Rs.59.32 and sale of licenses amounting to Rs.7.98. We therefore reject the contention of assessee that segmental details are not available in respect of this comparable. In our view Ld.TPO has considered the export of software service segment for purposes of comparability with that of assessee (refer computation of margin for this comparable at page 55 of order passed by Ld.TPO).

Respectfully following decision of Hon'ble Delhi High Court in case of Steria India Ltd vs DCIT (supra) we do not find any infirmity in the view of authorities below in including this company.

Accordingly, we uphold the inclusion of this comparable to the finalist.

3.5 Respectfully following the above view we direct exclusion of Infosys Ltd., persistent systems Ltd. We direct inclusion of hardware solutions Ltd. and remand Larsen and Toubro Ltd. for verification as directed in the paragraphs hereinabove.

Accordingly this ground raised by assessee stands partly allowed.

4. Ground No. 10.1:

The assessee seeks inclusion of 1 comparable being I2 T2 India Ltd. We note that this *Tribunal* in case of *Goldman Sach Services Pvt.Ltd Vs.JCIT (supra)* observed as under:

“6.4. I2T2 India Ltd

Ld.AR submitted that authorities below rejected this comparable only for the reason that details regarding related party transaction in case of this company was not available. Further it has been observed by authorities below that this company is operating in ITES industry.

Ld.AR however submitted that this company undertakes various IT services, but its Indian company is engaged in undertaking software development services in India in the nature of executing software projects in India. It is also submitted that this company undertakes software consultancy services which forms a wherein miniscule part of the revenue base and therefore it can be said that this company is predominantly engaged in the business of software development services. He placed reliance upon decision of coordinate bench of this Tribunal in case of LG Soft India Pvt. Ltd., in ITA (TP) A No. 3122/Bang/2018.

On the contrary Ld.CIT DR placed reliance upon orders of authorities below.

We have perused submissions advanced by both sides in the light of the records placed before us.

The only reason for excluding this comparable by the authorities below is for the reason that RPT transactions have not been reported in the annual report. We have perused the decision of this Tribunal in case of LG soft India private limited (supra) wherein on similar reasoning Ld. TPO had excluded this comparable therein and this Tribunal observed as under:

“12. We find force in the contentions of Ld. ar. If the annual report of this company does not mention about related party transactions, then the assessee cannot be held responsible to prove a fact relating to a 3rd party, which may or may not exist. We notice from auditors report of M/s.I2T2 India Ltd., that the auditor in paragraph 5 (b) of Annexure to the auditors report has mentioned as under:-

“There are no transactions that are made enterprises exceeding Rs. 5 Lacs in respect of any part who is covered under section 301 of the Act during the financial year.”

Hence, in the absence of any specific information, there is merit in the contentions of the assessee that the above said company might not have had related party transactions during the year under consideration.

Accordingly we do not agree with the reasoning given by Ld. DRP for excluding this company as a comparable. Accordingly we direct the Ld. AO/U.S. include this company.”

It is observed that DRP in present case objected for inclusion of this comparable because this company is operating in ITES industry.

Annual report of this comparable has been placed at page 593 of paper book volume 2. It is observed functionally it is providing export of software and services. Annual report placed in paper book does not contain functions performed by this comparable in order to ascertain whether this company is rendering SWD services or not. We therefore, set aside this issue to Ld.AO/TPO for verification. Ld.AO/TPO shall call for requisite information from this company, a copy of which shall be provided to assessee also. Comparability of this company with assessee shall then be considered by giving proper opportunity to assessee.

Accordingly, this comparable is set aside to Ld.AO/TPO.

4.1 Respectfully following the above view we remand this comparable back to Ld.AO/TPO for due verification of FAR of assessee with the comparable and to consider it in accordance with law.

4.2 It has been submitted by Ld.AR that working capital and risk adjustment was denied to assessee on the ground that assessee failed to demonstrate such differences could have any impact on assessee's profit. It has been submitted by Ld.AR that the submissions advanced by assessee demonstrating computational impact has not been considered by the Ld.AO/TPO. Before us, Ld.AR submitted that it is an accepted principle upheld in various decisions of this Tribunal that working capital adjustment should be allowed on actuals. It has been submitted that all relevant details for computation of working capital adjustments was provided to the Ld.AO/DRP which was not considered. He placed reliance upon the decision

of coordinate bench of this *Tribunal* in case of *Huawei Technologies India (P.) Ltd. v. Jt. CIT [2019] 101 taxmann.com 313*, wherein it has been held that the working capital has to be granted in actual.

4.3 On the contrary, Ld.CIT DR placed reliance upon orders passed by authorities below.

4.4 We have perused submissions advanced by both sides in light of records placed before us including the decision relied upon by Ld.AR in case of *Huawei Technologies India Pvt. Ltd. (supra)*.

4.5 A reading of Rule 10B(l)(e)(iii) of the Rules read with sec. 92CA of the Act, would clearly shows that the net profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, which could materially affect the amount of net profit margin in the open market.

4.6 Chapters I and III of OECD Transfer Pricing Guidelines contain guidelines on comparability analyses for transfer pricing purposes. Guidelines on adjustments to be provided is found in paragraphs 3.47-3.54 and in the Annex to Chapter III. The guidelines must be followed for computing arm's length principle, and for comparing comparable uncontrolled transactions.

Reasonably accurate adjustments should be made to eliminate effect of any such differences.

Accordingly we direct Ld.AO/TPO to grant working capital adjustment in accordance with law.

In the result appeal filed by assessee stands partly allowed as indicated hereinabove.

Order pronounced in the open court on 28th Sept, 2021

Sd/-
(CHANDRA POOJARI)
Accountant Member
Bangalore,
Dated, the 28th Sept, 2021.
/Vms/

Sd/-
(BEENA PILLAI)
Judicial Member

Copy to:

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

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-9-2021		Sr.PS
3.	Draft proposed & placed before the second member	-9-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-9-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-9-2021		Sr.PS/PS
6.	Kept for pronouncement on	-9-2021		Sr.PS
7.	Date of uploading the order on Website	-9-2021		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-9-2021		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS