

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

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.204/Bang/2021
Assessment Year : 2016-17

M/s. Capco Technologies Private Limited, SJR i-Park, Ground Floor, Tower 2, Block PHI, Ramagondanahalli, Whitefield S.O, Bengaluru. PAN : AADCC 4204 G	Vs.	The Deputy Commissioner of Income Tax, Circle -2(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri. Sandeep Huilgol, Advocate
Respondent by	:	Shri. Srinivas T Bidari, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	16.11.2021
Date of Pronouncement	:	18.11.2021

ORDER

Per N. V. Vasudevan, Vice President:

This appeal by the assessee is directed against the final Order of Assessment dated 26.04.2021 by the National E-Assessment Centre, Delhi, (hereinafter referred to as the Assessing Officer, “AO” in short) passed u/s.143(3) read with Section 144C(13) of the Income Tax Act, 1961 (Act) in relation to AY 2016-2017.

2. The assessee is engaged in the business of provision of Software Development Services (SWD services), to Capco Group. The assessee is a wholly owned subsidiary of Capco Belgium BVBA, Belgium. In terms of the provisions of Sec.92-A of the Act, the assessee and its

wholly owned holding company were Associated Enterprises ("AEs"). In terms of Sec.92B(1) of the Act, the transaction of providing SWD Services to Capco Group companies was an "international transaction" i.e., a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. In terms of Sec.92(1) of the Act, the any income arising from an international transaction shall be computed having regard to the arm's length price. In this appeal by the assessee, the dispute is with regard to determination of Arms' Length Price (ALP) in respect of the international transaction of rendering SWD services to the AE.

3. As far as the provision of Software Development services are concerned, the assessee filed a Transfer Pricing Study (TP Study) to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining ALP. The assessee selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for the purpose of comparison of the assessee's profit margin with that of the comparable companies. The OP/OC of the assessee was

arrived at 16.31 % by the assessee in its TP study. The operating income was Rs. 93,02,61,671/- and the Operating Cost was Rs.79,98,02,919/-. The Operating profit (Operating income – Operating cost was Rs.13,04,58,752/-. Thus, the OP/TC was arrived at 16.31 %. The assessee chose companies who are engaged in providing similar services such as the assessee. The assessee identified 7 companies whose average arithmetic mean of profit margin was 12.52% and was comparable with the Operating margin of the assessee. The assessee therefore claimed that the price it charged in the international transaction should be considered as at Arm's Length.

4. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/OC. He also selected comparable companies from database. The TPO accepted some companies chosen by the Assessee as comparable companies. The TPO on his own identified some other companies as comparable with the Assessee company and arrived at a set of 13 comparable companies. The PLI was reworked by the TPO at 24.83%. The TPO worked out the average arithmetic mean of their profit margins of the 13 comparable companies as follows:

Sl. No.	Company Name	Average
1.	Kals Information Systems Pvt. Ltd.	8.60%
2.	Rheal Software Pvt. Ltd.	14.50%
3.	C G-V A K Software & Exports Ltd.	18.50%
4.	R S Software (India) Ltd.	20.87%

5.	Larsen & Toubro Infotech Ltd.	24.83%
6.	Nihilent Ltd.	26.36%
7.	Inteq Software Pvt. Ltd.	28.20%
8.	Persistent Systems Ltd.	30.89%
9.	Infobeans Technologies Ltd.	32.42%
10.	Thirdware Solution Ltd.	36.90%
11.	Infosys Ltd.	38.61%
12.	Aspire Systems (India) Pvt. Ltd.	39.28%
13.	Cybage Software Pvt. Ltd.	66.45%
	35 th Percentile	24.83%
	Median	28.20%
	65 th Percentile	32.42%

5. The TPO computed the Addition to total income on account of adjustment to ALP as follows:

“21.4. Computation of Arm's Length Price:

21.4.1 The median of the weighted average Profit Level Indicators is taken as the arm's length margin. Please see Annexure A for details of computation of PLI of the comparables. Based on this, the Arm's Length Price of the services rendered by the Taxpayer to its AE(s) is computed as under:

SWD SEGMENT		
Particulars	Formula	Amount (in Rs.)
Taxpayers Operating Revenue	OR	93,02,61,671
Taxpayers Operating Cost	OC	79,98,02,919
Taxpayers Operating Profit	OP	13,04,58,752
Taxpayers PLI	PLI=OP/OC	16.31%
35th Percentile Margin of		24.83%

comparable set		
Adjustment Required (if PLI < 35th Percentile)		Yes
Median Margin of comparable set	M	28.20%
Arm's Length Price	$ALP=(1+M)*OC$	1,02,53,47,342
Price Received	OR	93,62,61,671
Shortfall being adjustment	ALP-OR	9,50,85,671

21.4.2 *The above shortfall of Rs.9,50,85,671/- is treated as Transfer Pricing adjustment u/s 92CA in respect of software development segment of the Taxpayer's International Transactions."*

Thus, a sum of Rs.9,50,85,671/- was added to the total income of the assessee on account of determination of ALP for provision of SWD services by the assessee to its AE.

6. The assessee filed objections before the Disputes Resolution Panel (DRP) against the draft assessment order passed by the AO wherein the addition suggested by the TPO as adjustment consequent to determination of ALP was added to the total income of the assessee by the AO. The DRP gave certain directions. Based on the directions of the DRP, the AO passed the final order of assessment. To the extent the assessee did not get relief from the DRP, the assessee has preferred appeal before the Tribunal.

7. At the time of hearing, the learned Counsel for the assessee restricted his arguments to adjudication of only the following issues:

(i) choice of comparable companies chosen by the TPO which was affirmed by the DRP, which the assessee seeks exclusion viz.,

- (a) *Infosys Ltd.*
- (b) *Larsen & Toubro Infotech Ltd*
- (c) *Persistent Systems Ltd*
- (d) *Aspire Systems (India) Pvt Ltd*
- (e) *Thirdware Solution Ltd.*
- (f) *Cybage Software Pvt Ltd.*
- (g) *Nihilent Ltd.*
- (h) *Infobeans Technologies Ltd.,*
- (i) *Inteq Software P. Ltd.,*

(ii) non acceptance of Assessee's claim regarding inclusion of certain companies comparable companies : (a) Sasken Communication Technologies Ltd., (b) Sagarsoft (India) Ltd., (c) Akshay Software Tehnologies Ltd., and (d) Evoke Technologies Ltd.

(iii) Non grant of working capital adjustment (Grd.No.9).

(iv) Recomputation of profit margins of KALS Information Systems (P) Ltd., and CG Vak Software and Exports Ltd.,

(v) Risk Adjustment claim in computing ALP

8. As far as exclusion of companies chosen by the TPO and confirmed by DRP is concerned, the relevant provisions of the Act in so far as comparability of international transaction with a transaction of similar nature entered into between unrelated parties, provides as follows:

Determination of arm's length price under section 92C .

10B . (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [*or a specified domestic transaction*] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :—

(a) to (d).....

(e) transactional net margin method, by which,—

- (i) the net profit margin realised by the enterprise from an international transaction [*or a specified domestic transaction*] entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;
- (ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;
- (iii) the net profit margin referred to in sub-clause (i) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [*or the specified domestic transaction*] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;
- (iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

- (v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction [*or the specified domestic transaction*];

(f).....

(2) For the purposes of sub-rule (1), the comparability of an international transaction [*or a specified domestic transaction*] with an uncontrolled transaction shall be judged with reference to the following, namely:—

- (a) the specific characteristics of the property transferred or services provided in either transaction;
- (b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;
- (c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;
- (d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

(3) An uncontrolled transaction shall be comparable to an international transaction [*or a specified domestic transaction*] if—

- (i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or

- (ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences.

9. A reading of Rule 10B(1)(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.

10. Chapters I and III of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereafter the “TPG”) contain extensive guidance on comparability analyses for transfer pricing purposes. Guidance on comparability adjustments is found in paragraphs 3.47-3.54 and in the Annex to Chapter III of the TPG. A revised version of this guidance was approved by the Council of the OECD on 22 July 2010. In paragraph 2 of these guidelines it has been explained as to what is comparability adjustment. The guideline explains that when applying the arm’s length principle, the conditions of a controlled transaction (i.e. a transaction between a taxpayer and an associated enterprise) are generally compared to the conditions of comparable uncontrolled transactions. In this context, to be comparable means that:

- None of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or
- Reasonably accurate adjustments can be made to eliminate the effect of any such differences. These are called “comparability adjustments.

11. As far as comparability of companies listed as (a) to (g) which the assessee seeks exclusion is concerned, the admitted factual position is that the turnover of these companies is more than Rs.200 Crores and the assessee's turnover is only Rs.93,02,61,671/-. The TPO excluded from the list of comparable companies chosen by the assessee in its TP study companies whose turnover was less than Rs.1 Crore. The contention of the assessee before the DRP was that while the TPO excluded companies with low turnover, he failed to apply the same yardstick to exclude companies with high turnover compared to the assessee. The reason for excluding companies with low turnover was that such companies do not reflect the industry trend as their low cost to sales ratio made their results less reliable. The contention of the assessee was that there would be effect on profitability wherever there is high or low turnover and therefore companies with high turnover should also be excluded from the list of comparable companies. The DRP primarily relied on the decision rendered by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors India Pvt. Ltd Vs. DCIT 82 Taxmann.com 167(Del), wherein it was held that high turnover ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded and that the effect of such high turnover on the margin should be seen. The DRP therefore held that a company which is otherwise functionally comparable cannot be excluded only on the basis of high turnover. The assessee has raised Grd.No.4 before the Tribunal challenging the aforesaid view of the DRP.

12. On the issue of application of turnover filter, we have heard the rival submissions. The parties relied on several decisions rendered on the

above issue by the various decisions of the ITAT Bangalore Benches in favour of the Assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. Vs. DCIT (2018) 89 Taxmann.com 44 (Bang-Trib) order dated 13.10.2017, took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software Pvt.Ltd. Vs. DCIT (2016) 67 Taxmann.com 243 (Bangalore-Trib) wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of Chryscapital (supra) and the decision to the contrary in the case of CIT Vs. Pentair Water India Pvt.Ltd., Tax Appeal No.18 of 2015 dated 16.9.2015 wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of Pentair Water (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International (supra):

“41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of *Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010*, relying on Dun and Bradstreet's analysis, held grouping of companies having turnover of Rs. 1 crore to Rs.200 crores as comparable with each other was held to be proper. The following relevant observations were brought to our notice:-

“9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which are (sic) making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In

such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various benches of the Tribunal, when companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs.1.00 crore to 200 crores have to be taken as a particular range and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study.”

42. The Assessee's turnover was around Rs.110 Crores. Therefore the action of the CIT(A) in directing TPO to exclude companies having turnover of more than Rs.200 crores as not comparable with the Assessee was justified. As rightly pointed out by the learned counsel for the Assessee, there are two views expressed by two Hon'ble High Courts of Bombay and Delhi and both are non-jurisdictional High Courts. The view expressed by the Bombay High Court is in favour of the Assessee and therefore following the said view, the action of the CIT(A) excluding companies with turnover of above Rs.200 crores from the list of

comparable companies is held to correct and such action does not call for any interference.”

13. The Tribunal in the case of Autodesk India Pvt.Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Bangalore-Tribunal), took note of all the conflicting decision on the issue and rendered its decision and in paragraph 17.7. of the decision held as that high turnover is a ground for excluding companies as not comparable with a company that has low turnover. The following were the relevant observations:

17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of *obiter dictum*. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of *CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015* judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies

chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).

14. In view of the aforesaid decision, we hold that companies listed in Sl.No.(a) to (g) in paragraph 7 (i) above, which the assessee seeks exclusion and whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies.

15. We shall now deal with the remaining two companies listed as Sl. No. (h) and (i) in paragraph-7(i) of this order, which the assessee seeks exclusion from the list of comparable companies,viz., (a) Inteq Software Private Limited and (b) Infobeans Technologies Ltd.

16. As far as exclusion of Inteq Software Private Limited is concerned, the first objection of the learned counsel for the Assessee was that this company is functionally not comparable because it is engaged in the business of computer programming, consultancy and related activities. The objections of the assessee in this regard are based on contents in the website of this company. The DRP has dealt with this objection in paragraph 2.4.25.1 of its order, which reads thus:

“2.4.25.1 Having considered the submissions, we note that as per information in the Director's report of the company, the company's principal activity is software development services (NIC code 620), which is 100% of its total turnover (Annexure-A to the Boards Report). The independent Audit report states that the company Is a service company primarily rendering software services. As per Revenue Recognition Policy (Note 20(F)), there is mention relating to revenue from software development and there is no information about product sales. We also note that this company satisfies the various filters adopted by the TPO. The assessee has not disputed or rebutted any of these'

information stated in the annual report. Instead, the assessee has merely argued. that this company is functionally different with reference to certain information in the website. We have already discussed that the information in the website cannot be given credence as they are generally forward looking statements with advertisement and promotional motives. In view of these, we do not find any merit in the assessee's pleas. As we find that this company is engaged in software development services, we hold that it is functionally comparable to the assessee and accordingly, the objection is rejected.”

We find no grounds to take a view different from the view taken by the DRP on this aspect of comparability of this company.

17. The next argument for exclusion of this company is on the ground that there are significant presence of intangibles. The computation of total value of intangible assets as a percentage of total value of assets for the last 3 years was given by the Assessee in this regard, which is tabulated below:

FY	Intangible Assets (a)	Total Assets (b)	Percentage (%) (a/b)
2015-16	28,51,793	62,73,068	45.46%
2014-15	62,88,994	1,13,92,014	55.20%
2013-14	1,01,76,689	1,70,81,419	59.58%

Therefore, the total value of assets derives substantial value from intangible assets is which is peculiar and unusual. We are of the view that by merely pointing out that there is a substantial increase in value of intangible assets, the assessee cannot seek to exclude this company from the list of comparable companies, unless the assessee is able to show that

the presence of intangibles is owing to factors which can affect the functional comparability of this company with the assessee.

18. As far as the plea of the assessee for exclusion of Infobeans Technologies Ltd., is concerned, the first plea of the learned counsel for the assessee is that this company is functionally dissimilar to a SWD service provider and there are no segmental details available for varied activities carried out by this company. As far as AY 2016-17 is concerned, the DRP has observed that this company was in the business of rendering SWD services in para 2.4.21.3 of its order, which reads thus:

“2.4.21.3 In this regard, it is relevant to note that as per information submitted by this company in response to 133(6), this company is engaged in customized software development services and has not earned revenue from any service activity other than customized software development services. The relevant extract of the reply submitted is as under:

That our company is engaged in the Customized Software Development Services and the expertise/qualifications of the employees belongs to the same field of software development.

That the company has not earned from any services other than from the Customized Software Development Services.

4 (a) (1)] Since no software product and that no "off the shelf software product was manufactured by the company, thus this point is not applicable.

4 (a) (2)] Likewise no sale of software product was made during the assessment year 2016-17, details of revenue generated from Software services is mentioned in the Audited Profit & Loss A/c.

4 (a) (3)] That the company owned intangible assets (Software) which is also mentioned in Note no. 10 of the Audited Balance Sheet. As regard "whether the same represent software licenses acquired for its own use or if it is an inbuilt software product which generate revenue for company", it is submitted that no such software is owned by the company. The software represents mainly Utility Software for the purpose of its efficient operation of the business and coding software's for providing software services.

our company is not engaged in technology innovation activity; thus this point is not applicable."

19. Based on the above reply, the DRP upheld inclusion of this company as a comparable company. The DRP also held that this company is primarily engaged in SWD services and earns revenue from this activity and there is no need for providing segmental details as per AS17. Another argument for exclusion of this company was that this company has incurred considerable selling and marketing expenses. On this objection the DRP held that the expenses on selling and marketing was just 0.46% of the total expenses which cannot be said to be significant. The above conclusions of the DRP have not been countered by the assessee. The learned counsel for the Assessee placed reliance on a decision of the Hon'ble ITAT Hyderabad Bench in the case of Infor (India) Pvt.Ltd. Vs. DCIT ITA TP No.198/Hyd/2021 for AY 2016-17 order dated 6.10.2021 wherein in paragraph 4.7 of the aforesaid order, the Tribunal remanded the question of comparability of the aforesaid company for fresh consideration to verify the plea of the Assessee regarding existence of diversified activities of this company. As far as the present appeal is concerned, the activities of the said company have already been verified by the TPO in the form of replies to notices

u/s.133(6) of the Act. Therefore the aforesaid decision is not of any assistance to the plea of the Assessee.

20. The next ground that needs adjudication is with regard to the grievance of the assessee that no adjustment towards working capital has been allowed to the assessee. In this regard though the ground of appeal makes a reference to risk adjustment also, the point that was pressed for adjudication was only with regard to grant of working capital adjustment. On the issue of non granting of working capital adjustment, the DRP gave its decision by observing that (i) The Assessee has not demonstrated with any data or information as to the impact of working capital on the costs, price or profit. (ii) working capital requirements and impact depends on various factors such as business cycle, the nature of business activity with its correlation on the general economic trends, the fund and capital position of the company, its marketing strategies, its market share etc., all of which cannot be captured in the year end receivable or payable position. (iii) the year end receivables and payable may not reflect as to whether it arises from transactions relating to revenue account or capital account as there is no uniformity in the accounting or reporting requirements and an intermixing is generally possible. (iv) Cost of capital would be different for different companies and therefore working capital adjustment made disregarding this different based on broad approximations, estimations and assumptions may not lead to reliable results.

21. The learned counsel for the assessee submitted that the conclusions of the DRP are identical to the conclusions arrived at by the

revenue authorities in the case of *Huawei Technologies India Pvt. Ltd. v. JCIT [2019] 101 taxmann.com 313 (Bang. Trib.)*. In the aforesaid decision on an identical issue, the Tribunal held that working capital adjustment has to be given. The tribunal reasoned in the aforesaid decision that a reading of Rule 10B(1)(e)(iii) of the Rules read with Sec.92CA of the Act, would clearly show 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. The tribunal referred to Chapters I and III of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereafter the "TPG") contain extensive guidance on comparability analyses for transfer pricing purposes. Guidance on comparability adjustments is found in paragraphs 3.47-3.54 and in the Annexure to Chapter III of the TPG. A revised version of this guidance was approved by the Council of the OECD on 22 July 2010. The Tribunal referred to Paragraphs 13 to 16 of the aforesaid OECD guidelines, wherein the need for working capital adjustment has been explained as follows:

"13. In a competitive environment, money has a time value. If a company provided, say, 60 days trade terms for payment of accounts, the price of the goods should equate to the price for immediate payment plus 60 days of interest on the immediate payment price. By carrying high accounts receivable a company is allowing its customers a relatively long period to pay their accounts. It would need to borrow money to fund the credit terms and/or suffer a reduction in the amount of cash surplus which it would otherwise have available to invest. In a competitive environment, the price should

therefore include an element to reflect these payment terms and compensate for the timing effect.

14. The opposite applies to higher levels of accounts payable. By carrying high accounts payable, a company is benefitting from a relatively long period to pay its suppliers. It would need to borrow less money to fund its purchases and/or benefit from an increase in the amount of cash surplus available to invest. In a competitive environment, the cost of goods sold should include an element to reflect these payment terms and compensate for the timing effect.

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

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

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

22. The tribunal observed that examples of how to work out adjustment on account of working capital adjustment is also given in the said

guidelines. The guideline also expresses the difficulty in making working capital adjustment by concluding that the following factors have to be kept in mind (i) The point in time at which the Receivables, Inventory and Payables should be compared between the tested party and the comparables, whether it should be the figures of receivables, inventory and payable at the year end or beginning of the year or average of these figures, (ii) the selection of the appropriate interest rate (or rates) to use. The rate (or rates) should generally be determined by reference to the rate(s) of interest applicable to a commercial enterprise operating in the same market as the tested party. The tribunal observed that the guidelines conclude by observing that the purpose of working capital adjustments is to improve the reliability of the comparables. The Tribunal further observed that the data available with the assessee and the Department would be the starting point and depending on the facts and circumstances of a case further details can be called for. As far as the assessee is concerned, the facts and figures with regard to his business has to be furnished. Regarding comparable companies, one has to fall back upon only on the information available in the public domain. If that information is insufficient, it is beyond the power of the assessee to produce the correct information about the comparable companies. The Revenue has on the other hand powers to compel production of the required details from the comparable companies. If that power is not exercised to find out the truth then it is no defence to say that the assessee has not furnished the required details and on that score deny adjustment on account of working capital differences. One has to see that reasonable adjustment is being made so as to bring both comparable and test party

on same footing. Therefore working capital adjustment has to be allowed.

23. We are therefore of the view that the issue with regard to the grant of working capital adjustment should be directed to be examined by the TPO/AO afresh in the light of the decision of the tribunal referred to above, after affording the Assessee opportunity of being heard.

24. The next issue that requires adjudication is the grievances of the assessee with regard to non-inclusion of 4 companies in the list of comparable companies viz., Sasken Communication Technologies Ltd., Sagarsoft (India) Ltd., Akshay Software Technologies Ltd. and Evoke Technologies Ltd.,

25. As far as Sasken Communication Technologies Ltd., is concerned, the turnover of this company is more than 200 Crores and therefore this company cannot be included by reason of application of turnover filter. As far as Sagarsoft (India) Ltd., is concerned, the claim of the Assessee was that this company passes all filters applied by the TPO and is functionally comparable. Detailed submissions (Page 182 to 194 were filed by the Assessee before the DRP. The DRP however held that since the TPO has not selected this company as a comparable company and since the accept and reject matrix had not been placed by the Assessee, the company cannot be regarded as a comparable. We are of the view that the reasons so assigned by the DRP in paragraph 2.4.29.1 are vague and cannot be sustained. We are of the view that it would be fit and proper to remand to the TPO/AO for consideration, the comparability of this company. We direct accordingly.

26. The inclusion of the remaining 2 companies needs to be considered now. As far as Akshay Software Technologies Ltd., is concerned, it has been the submission of the learned Counsel for the assessee that in assessee's own case for Assessment Year 2013-14 in IT(TP)A No.1981/Bang/2017 dated 21.03.2018, this Tribunal remanded the question of comparability of this company to the TPO for fresh consideration with some observations in para 19 of this order. Even in respect of the comparable company Evoke Technologies Ltd., in the very same order in para 22, the issue was remanded to the TPO for fresh consideration. We are of the view that in line with the decision of the Tribunal referred to above, the issue should be remanded to the TPO/AO for fresh consideration, after affording assessee opportunity of being heard. We hold and direct accordingly.

27. The next grievance of the assessee which needs to be adjudicated is the grievance with regard to incorrect computation of margins of 2 companies viz., Kals Information Systems Pvt. Ltd., and CG Vak Software and Exports Ltd. The submissions made in this regard were that the objection in this regard is on the basis that in computing the operating margins foreign exchange gain/loss were regarded as part of the operating gain or loss as the case may be. In this regard, we find that the DRP in coming to the above conclusion has rightly followed the decision of the ITAT Bangalore Bench in the case of Sap Labs India Pvt.Ltd. (2011) 44 SOT 156 (Trib.-Bang.) wherein it has been held that foreign exchange fluctuation to the extent it relates to the business of the Assessee which is subject matter of the TP adjustment should be

regarded as operating in nature. We find no grounds to take a different view and refuse to interfere with the order of the DRP.

28. The last issue which was argued before us is with regard to not granting risk adjustment. The submissions made in this regard were that Rule 10B(3) of the IT Rules provides that an adjustment ought to be provided for any differences in the economic factors between the tested party and the comparables. A risk adjustment is one such adjustment which is to be applied in order to adjust for the differences between the risk undertaken by the tested party vis-a-vis the comparable companies. Being a low risk service provider, the Assessee is devoid of any significant risks relating to its business operations whereas the comparable companies operate under uncontrolled conditions bearing risks, as a result of which the companies earn a risk premium which is not earned by a contract service provider like the assessee. Therefore, the profits of a contract service provider would be lesser than the companies selected as comparables, and in that view of the matter, it is humbly submitted that an adjustment to minimise the risk differential would be warranted. Reliance in this regard was placed on this Hon'ble Tribunal's decisions in Analog Devices India P. Ltd. v. DCIT [TS-816-ITAT-2016-Bang] and Intellinet Technologies India P. Ltd. v. /TO [TS-228-ITAT-2012(Bang)] where, in the cases of similar placed assesseees, this Hon'ble Tribunal directed that a risk adjustment be granted. The Assessee has prayed for a direction to the TPO/AO to recompute the margins of the companies selected as comparables after taking into account the differences in the risks assumed by the Assessee

and the said companies on the basis of the material that is and that may additionally be placed on record.

29. We find that the DRP has primarily rejected the plea of the Assessee in this regard on the ground that quantification of risk adjustment has not been given and in the absence of such quantification, the plea cannot be accepted. Besides the above, the DRP has also placed reliance on judicial pronouncements holding that risk adjustment cannot be allowed in the absence of proper and reliable computation of risk adjustment. We are in agreement with the conclusions of the DRP in this regard and find no grounds to interfere with its conclusions.

30. As already stated, no other grounds were pressed for adjudication. The TPO/AO are accordingly directed to compute the ALP for the international transaction in accordance with the directions contained in this order after affording the assessee opportunity of being heard.

31. In the result, appeal of the assessee is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(B. R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(N. V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated : 18.11.2021.
/NS/*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.