

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-2', NEW DELHI**

**Before Sh. Saktijit Dey, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 1460/Del/2014 : Asstt. Year : 2009-10**

Serco India Pvt. Ltd., 6 <sup>th</sup> Floor, Tower-B, Building No. 8, DLF Cyber City, Phase-II, Gurgaon	Vs	DCIT, Circle-2, Gurgaon
(APPELLANT)		(RESPONDENT)
<b>PAN No. AAJCS6704P</b>		

**Assessee by : Sh. Suraj Bhan Nain, CA**

**Revenue by : Sh. M. Baranwal, Sr. DR**

<b>Date of Hearing: 04.01.2022</b>	<b>Date of Pronouncement: 10.01.2022</b>
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**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order dated 07.01.2014 passed by the AO u/s 144C(13) of the Income Tax Act, 1961.

2. The assessee company has filed its original return of income for A.Y. 2009-10 on 29.09.2009 at income of Rs.2,76,12,264/-, which was revised on 31.03.2011 declaring income of Rs.2,04,76,953/-. The assessee company has entered international transactions with its associated enterprises during the year. The Assessing Officer made a reference to the Transfer Pricing Officer (TPO) to determine the arm's length price and the Ld. TPO proposed upward adjustment in transfer pricing. Against the draft assessment order, the assessee filed objections before the Ld. DRP. Having regard to the directions of Ld. DRP, the assessment u/s 143(3)/144C was completed by

the Ld. Assessing Officer vide order dated 07.01.2014 determining total income at Rs.6,49,70,860/-; by making addition on account of TP adjustment of Rs.3,62,50,269/- and disallowance of deduction 10A to the extent of Rs.72,175/-. Subsequently, the TPO rectified the mistake in calculation and determined TP adjustment at Rs.1,52,15,920/- and accordingly, the A.O. has also rectified the assessment order vide order dated 17.02.2014 determining income at Rs.3,57,65,050/-.

3. Aggrieved with the assessment order, the assessee filed this appeal taking the following grounds of appeal:

*"1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("AO") is bad in law and void ab-initio.*

*2. That on facts and circumstances of the case and in law, the reference made by the AO suffers from jurisdictional error as the AO did not record any reasons in the draft assessment order based on which he reached the conclusion that it was "expedient and necessary" to refer the matter to the Ld. Transfer Pricing Officer ("TPO") for computation of the arm's length price, as is required under section 92CA(1) of the Act.*

*3. That on the facts and circumstances of the case and in law, the AO erred in determining the arm's length price ("ALP") of the Appellant's international transactions at Rs.204,901,460 as against Rs.18,96,85,540 determined by the Appellant and recommending an addition of Rs. 15,215,920 on that account to the Appellant's income.*

*4. That on facts and circumstances of the case and in law, The AO/ Ld. TPO/ Ld. Dispute Resolution Panel ("DRP") erred*

*while making an aforesaid addition of Rs. 15,215,920 to the value of international transactions by:*

*4.1 modifying the comparability analysis conducted in the transfer pricing documentation of the Appellant on inappropriate and inadequate grounds;*

*4.2 rejecting the applicability of functional filter applied in the search process by the Appellant;*

*4.3 rejecting the comparable companies selected by the Appellant in the transfer pricing documentation without providing cogent and sufficient reasoning;*

*4.4 selecting companies which were not comparable to the Appellant on various grounds;*

*4.5 not allowing the benefit of working capital adjustment since the Appellant being a service company;*

*4.6 confirming the selection of current year (i. e. financial year 2008-09) data for comparability.*

*5. That on the facts and circumstance of the case and in law, the AO/Ld. DRP erred in reducing expenditure in foreign currency amounting to Rs.5,82,813 in respect of data communication charges from 'export turnover' for the purposes of computing deduction under section 10A of the Act.*

*6. That on the facts and circumstances of the case and in law the Ld. AO/Ld. TPO/ Ld. DRP erred in not examining the validity of initiation of penalty proceedings u/s 271(1)(c) of the Act.*

7. *That on the facts and circumstances of the case and in law, the AO erred in charging and computing interest under section 234B of the Act."*

4. The ground-wise submission is made hereunder.

### **Transfer Pricing**

5. These grounds are against addition of Rs. 1,52,15,920/- on account of upward adjustment in arm's length price of the appellant's international transaction related to providing IT services to its AEs.

6. It is submitted that the assessee, Serco India Private Limited, was a subsidiary of Serco Group PLC, UK, incorporated in India on 27-02-2006. The company was established as a captive service center with an objective to provide IT services to Serco Group. During the year under consideration, the assessee company has provided IT Services to Serco Group. The assessee entered into a master service agreement with its AEs for providing IT services on a cost-plus mark-up of 15%. The assessee company has entered into international transactions with its associated enterprises during the year and furnished Transfer Pricing Study for ALP. These international transactions were as under:

<b>Type of international transaction</b>	<b>Transfer Pricing Method</b>	<b>Profit Level Indicate ["PLI"]</b>	<b>Total value of transactions (Rs.)</b>
Provision of IT Services	Transactional Net Margin Method (TNMM)	Operating Profit/Operating Cost [OP/OC]	18,96,85,540
Receipt of share application	-	-	48,07,39,005
Issue of share capital	-	-	4,38,38,060
Recovery of expenses	-	-	8,37,995

7. During this year, the assessee has shown NCP margin of 14.20% from the 'Provision of IT services' as under:

Revenue from operations	Rs. 18,96,85,540
Total Expenses	Rs. 16,61,01,811
Net Profit	Rs. 2,35,83,729
NCF %	14.20%

8. In the TP Study, the assessee has benchmarked its international transactions relating to software development services using TNMM as the most appropriate method with OP/OC as PLI. In the TP Report, a final set of 8 comparables had been taken with average PLI of 16.08% as under:

S. No.	Name of the Company	FY 2006- 07	FY 2007- 08	FY 2008-09	Weighted Average
1.	Microland Limited	-2.06	1.02	NA	-0.31
2.	Allied Digital Services Ltd	25.56	26.69	31.98	28.88
3.	Larsen & Toubro Infotech Ltd.	15.49	18.36	NA	17.06
4.	Helios & Matheson Information Technology Ltd.	39.87	36.19	18.65	30.61
5.	R S Software (India) Limited	13.08	6.69	NA	9.80
6.	Sagarsoft (India) Limited	22.82	6.68	NA	12.13
7.	Thirdware Solutions Limited	25.81	21.75	NA	23.43
8.	PSI Data Systems Limited (Software Services Segment)	7.26	6.82	NA	7.03
<b>Average</b>					<b>16.08%</b>
<b>Serco India Results</b>					<b>14.20%</b>

9. Since, the arithmetic mean of margin of the above 8 comparable companies selected in TP Study was 16.08% which was within the +/-5% range as per proviso to section 92C(2) of the Act, the assessee's international transactions with its AEs were considered to be in consistent with arm's length price.

10. During the proceedings before TPO, as required by the TPO, after conducting of fresh search for suitable comparables with updated margins and after applying filters suggested by the TPO, a list of 16 comparable companies was given with unadjusted operating margin of 10.00% and adjusted margin of 7.78%. The TPO has not accepted these comparables, mainly on the reasons that the assessee has used multiple years data when current year data only should have been used, and the assessee has used inappropriate filters and some important filters have not been used. The TPO has used the following set of filters to select comparables:

- (i) Use of current year data
- (ii) Reject companies having different accounting year
- (iii) Reject companies where turnover is less than Rs. 5 Crores
- (iv) Select companies where the ratio of service income to total income is not at least 75%
- (v) Select companies where income from exports is at least 75% of total income
- (vi) Reject companies where related party transactions exceed 25% of sales
- (vii) Reject companies that have employee cost less than 25% of total cost; and
- (viii) Reject companies that are affected by some peculiar economic circumstances.

11. The TPO has selected the following comparables for benchmarking the international transactions relating to IT services:

<b>SI. No.</b>	<b>Comparables</b>	<b>OP/OC (%)</b>
1	Akshay Software Technologies Limited	7.99
2	Aztech Soft Limited (Consolidated)	27.37
3	Bodhtree Consulting Limited	69.80
4	Cat Technologies Ltd.	34.43
5	Goldstone Technologies (Seg)	10.28
6	Infosys Technologies Limited	40.74
7	Larsen & Toubro Infotech Limited	21.56
8	Mindtree Limited	27.36
9	Persistent Systems Limited	37.77
10	R S Software (I) Limited	10.15
11	Sasken Communication Tech Limited	22.67
12	Tata Consultancy Services Limited	31.44
13	Tata Elxsi Limited	16.89
14	Think Soft Global	16.56
15	Thirdware Solutions	37.27
<b>Average</b>		<b>27.49</b>

12. Accordingly, the arm's length price of the international transaction relating to IT services was computed by the TPO at Rs. 23,14,36,275/- as against Rs. 18,96,85,540/- shown by the assessee. Therefore, the TPO proposed upward adjustment of Rs. 4,17,50,735/- (Rs. 23,14,36,275 - Rs. 18,96,85,540) vide his order dated 30-01.2013. Subsequently, the TPO passed an order u/s 154- dated 19-03- 2013 and revised the proposed adjustment of Rs. 2,02,04,281 /- instead of Rs. 4,17,50,735/-.

13. Having regard to the order of TPO, the Assessing Officer passed draft assessment order dated 26-03-2013 proposing addition of Rs. 2,02,04,281/- on account of transfer pricing.

14. The assessee filed objections u/s 144C of the Act before Ld. Dispute Resolution Panel (DRP), Delhi in respect of the

addition proposed to be made by TPO. The Ld. DRP has passed order u/s 144C(5) of the Act on 30-12-2013 directing to exclude one company 'Bodhtree Consulting Limited' from the list of comparables. TPO revised, as per the directions of Ld. DRP, the average margin of comparable as under:

<b>SI. No.</b>	<b>Comparables</b>	<b>OP/OC (%)</b>
1	Akshay Software Technologies Limited	7.99
2	Aztech Soft Limited (Consolidated)	27.37
3	Cat Technologies Ltd.	34.43
4	Goldstone Technologies (Seg)	10.28
5	Infosys Technologies Limited	40.74
6	Larsen & Toubro Infotech Limited	21.56
7	Mindtree Limited	27.36
8	Persistent Systems Limited	37.77
9	R S Software (I) Limited	10.15
10	Sasken Communication Tech Limited	22.67
11	Tata Consultancy Services Limited	31.44
12	Tata Elxsi Limited	16.89
13	Think Soft GSIobal	16.56
14	Thirdware Solutions	37.27
<b>Average</b>		<b>24.46</b>

15. Initially, the adjustment of Rs. 3,62,50,289/- was proposed by the TPO vide his order dated 02-01-2014. Therefore, the Assessing Officer made addition of Rs. 3,62,50,289/- in assessment order u/s 143(3)/144C dated 07.01.2014 as per directions of the Ld. DRP.

16. Subsequently, the TPO noticed that while calculating the ALP, the operating cost was wrongly taken at Rs. 18,15,32,885/- as against correct cost of Rs. 16,46,32,380/-. Therefore, the TPO passed rectification order dated 17.01.2014 determining adjustment to be made at Rs. 1,52,15,920/-.

17. Thereafter, the Assessing Officer also rectified the assessment order vide order u/s 154 dated 17.02.2014 making addition on account of TP adjustment at Rs.1,52,15,920/- and determined the total income at Rs.3,57,65,050/-. Against this addition, the appellant has taken these grounds in the appeal.

18. It is submitted that the assessee has taken many grounds of appeal against addition of Rs. 1,52,15,920/-. However, at present, it is pressing for ground regarding inclusion of six comparable companies as follows:

- (i) Infosys Technologies Limited
- (ii) Tata Consultancy Services Limited
- (iii) Persistent Systems Limited
- (iv) Sasken Communication Tech Limited
- (v) Cat Technologies Limited
- (vi) Thirdware Solutions Limited

19. If these six companies are excluded from the list of comparables, there will be no requirement of adjustment on account of arm's length price of international transaction related to provision of IT services.

### **Infosys Technologies Limited**

20. It is submitted that Infosys Technologies Limited, a giant company, is not comparable with the assessee, a smaller company. The comparative chart of Infosys Technologies Limited with the assessee company is as under:

<b>Sr. No.</b>	<b>Particulars</b>	<b>Infosys Technologies Limited</b>	<b>Serco India Private Limited</b>
1	Revenues (Turnover)	<b>Rs. 20,264 Crores</b>	<b>Rs.18.97 Crores (1068 times)</b>
2	Ownership of Branded/ Propriety products	Infosys owns propriety products like Finacle; Infosys iProwe; Infosys InGreen; Sinfosys mConnect etc.	Nil
3	Expenditure on Brand Building	Rs.62 Crores	Nil
4	Brand Value	Rs. 32,345 Crores	Nil
5	Research & [Development Expenditure	Capital Expenses Rs. 31 Crores Revenue Expenses Rs. 236 Crores Total Expenses Rs. 267 Crores	Nil
6	Nature of Services	Diversified- Business and technology consulting; Custom application development; Infrastructure maintenance services; Maintenance and production support; Package enabled consulting and implementation including enterprise solutions; Product engineering solutions and product lifecycle management; Systems integration; Validation solutions and Software as a Service (SaaS) related solutions etc.	Captive IT software services.
7	Risk	Infosys operates full-fledged risk-taking enterprise.	Minimal risk as 100% of the services are provided to AEs.
8	Onsite/Offshore	<b>About half of the software development services rendered by Infosys are onsite. Segmentation of Revenues -Onsite : 49.3% -Offshore : 50.7% (Page 47 of Annual Report) (PB-329)</b>	<b>The appellant provides only offshore services from India.</b>

21. From the above, it may kindly be seen that Infosys Technologies Limited is functionally dissimilar; it has huge sales/turnover of Rs. 20,264 Crores having substantial intangible assets, incurring huge amount on R&D for development of new area of functions and it owns branded or propriety products. Further, this company has revenue from onsite and offshore activities. Whereas, the assessee is a

smaller company, having no brand value, not owning any branded or propriety products, has not incurred any expenditure on R&D and has revenue only from offshore activities.

22. Further, Infosys Technologies Limited was into providing diversified services viz. providing end-to-end business solutions that leverage technology thereby enabling clients to enhance business performance. The solution span the entire software lifecycle encompassing technical consulting, design, development, re-engineering, maintenance, system integration, package evaluation and implementation, and testing and infrastructure management services. In addition, this company also offered software products for banking industry. Whereas the assessee company was a captive IT service provider and provided services as desired by its AEs.

23. Therefore, Infosys Technologies Limited is no match to the assessee and hence, it is not a comparable company for benchmarking international transactions of the assessee relating to software development services.

24. It is pertinent to mention that the Ld. DRP has excluded Infosys Limited in subsequent A.Y. 2010-11 in the case of the assessee considering the similar reasons and relying on the decision of Hon'ble Delhi High Court in the case of Agnity India Technologies (P.) Ltd. vs. CIT [2013] 36 taxmann.com 289.

25. It is submitted that in several decisions, it has been held that a company having high brand value and huge turnover as compared to assessee company could not be selected as comparable.

26. The Hon'ble High Court of Bombay in the case of C/7' v. Pentair Water India (P.) Ltd. [2016] 69 taxmann.com 180 has categorically concluded that "the turnover is obviously a relevant factor to consider the comparability". Thus, significant differences in the size of the companies would impact comparability.

27. The Hon'ble Delhi High Court in the case of Agnity India Technologies (P.) Ltd. [2013] 36 taxmann.com 289, on similar facts, has upheld the proposition that a giant company having huge turnover cannot be compared with a smaller captive unit of the parent company. The Hon'ble High Court approved the findings of the ITAT that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk.

28. The Hon'ble Delhi High Court has also held in the following cases that a giant company having huge turnover and high brand value cannot be compared with a smaller company working as a captive service provider to its AEs:

- Pr. CIT vs. B.C. Management Services (P.) Ltd. [2018] 89 taxmann.com 68 (Delhi)
- Pr. CIT-3 vs. Evalueserve SEZ (Gurgaon) Pvt. Ltd in ITA No. 241/2018 order dated 26.02.2018
- Pr. CIT-7 vs. Oracle (OFSS) BPO Services (P.) Ltd. [2018] 90 taxmann.com 388 (Delhi)
- Avaya India (P.) Ltd. vs. Assistant Commissioner of Income Tax [2019] 108 taxmann.com 222 (Delhi)

29. It has been decided in number of Tribunal decisions that the companies having a turnover from Rs. 1 Crore to Rs. 200 Crores have to be taken as a particular range. Since the assessee company falls in this range having total turnover of Rs. 18.97 Crores, the companies which have turnover in the range of Rs. 1 Crore to Rs.200 Crores only should be taken into consideration for comparable for the purpose of determining arm's length price. This proposition is being consistently followed by various benches of the ITAT such as:

- Yokogawa IA Technologies India (P.) Ltd. vs. DCIT [2019] 112 taxmann.com 341 (Bangalore – Trib.)
- Triology e-Business Software India (P.) Ltd. vs. DCIT, Circle 12(4), Bengaluru [2021] 127 taxmann.com 255
- Autodesk India (P.) Ltd. v. DCIT, Circle 11(2), Bangalore [2016] 96 taxmann.com 263 (Bangalore - Trib)
- Tavant Technologies India (P.) Ltd. v. DCIT, Circle 7(1)(1), Bangalore [2020] 120 taxmann.com 122 (Bangalore - Trib.)

30. It may also be noted that the Hon'ble Karnataka High Court in the case of Acusis Software India (P.) Ltd. v. ITO, Ward-11(1), Bangalore [2018] 98 taxmann.com 183 (Karnataka) approved the decision of ITAT holding that if the turnover of the comparable company is less or more than 10 times the turnover of the assessee, then it cannot be considered as a comparable company.

31. Reliance is also placed on the following decisions of the Delhi ITAT, where the assessee company was a captive service provider to its AEs, it was directed to exclude Infosys Technologies Limited from the list of comparables, considering

that it was a giant company, having brand value, providing diverse services and assuming all risks:

- Siemens Industry Software (I) (P.) Ltd v. DCIT, Circle-8(1), New Delhi [2018] 98 taxmann.com 369 (Delhi - Trib.)
- Nokia Solutions and Networks India (P.) Ltd. v. ACIT, Circle-13(1), New Delhi [2019] 111 taxmann.com 389 (Delhi - Trib.)
- United Health Group Information Services (P.) Ltd. vs. DCIT, Circle 18(1), New Delhi [2018] 90 taxmann.com 423 (Delhi - Trib.)
- Sun Life India Service Centre (P.) Ltd v. DCIT, Circle-2, Gurgaon [2017] 88 taxmann.com 371 (Delhi - Trib.)

32. In view of the above, it is prayed that Infosys Technologies Limited may kindly be excluded from the list of comparables adopted by the TPO.

### **Tata Consultancy Services Limited**

33. It is submitted that Tata Consultancy Services Limited, a giant company, is not comparable with the assessee, a smaller company. The comparative chart of Tata Consultancy Services Limited with the assessee company is as under:

Sr. No.	Particulars	Tata Consultancy Services Limited	Serco India Private Limited								
1	Revenues (Turnover)	<p style="text-align: right;">(Rs. In Crores)</p> <table border="1" style="width: 100%;"> <tr> <td data-bbox="597 331 867 394">Information Technology and Consultancy Services</td> <td data-bbox="867 331 1040 394" style="text-align: right;">21,535.75</td> </tr> <tr> <td data-bbox="597 394 867 457">Sale of equipment and software licences</td> <td data-bbox="867 394 1040 457" style="text-align: right;">868.25</td> </tr> <tr> <td data-bbox="597 457 867 489">Other Income (Net)</td> <td data-bbox="867 457 1040 489" style="text-align: right;">(456.24)</td> </tr> <tr> <td data-bbox="597 489 867 510">Total</td> <td data-bbox="867 489 1040 510" style="text-align: right;">21,947.76</td> </tr> </table>	Information Technology and Consultancy Services	21,535.75	Sale of equipment and software licences	868.25	Other Income (Net)	(456.24)	Total	21,947.76	Rs.18.97 Crores (1057 times)
Information Technology and Consultancy Services	21,535.75										
Sale of equipment and software licences	868.25										
Other Income (Net)	(456.24)										
Total	21,947.76										
2	TATA	Brand	Nil								
3	Onsite/Offshore	<p>The distribution of TCS's revenues from on-site/offshore are as follows:</p> <p>-Offshore : 44.22%</p> <p>-Onsite : 51.19%</p>	The appellant provides only offshore services from India.								
4	Risk	TCS operates as full-fledged risk-taking enterprise.	Minimal risk as 100% of the services are provided to AEs.								

#### Strategic Acquisitions and Alliances.

34. The Company has been making acquisitions during the past few years, with the objective of moving towards its goal of being among the top IT companies in the world.

35. During the year 2008-09, the Company has acquired Citigroup Inc.'s (Citi) 96.26% interest in TCS e-Serve Limited (formerly known as Citigroup Global Services Limited), the India-based captive BPO, for a total consideration of USD 504.54 million. In addition to the sale, Citi has signed an agreement for TCS to provide process outsourcing services to Citi and its affiliates for an aggregate amount of USD 2.5 billion over a period of 9.5 years. The acquisition broadens TCS' portfolio of end-to-end IT and BPO services in the global Banking and Financial Services (BFS) sector. The agreement builds upon the existing relationship between Citi and TCS whereby TCS provides application development, infrastructure

support, help desk and other process outsourcing services to Citi. This acquisition has not only helped in acquiring new capabilities in the banking domain, but has also underscored the importance of TCS' long-term, sustainable relationships with its large customers, including Citi. The acquisition complements TCS' domain expertise and has brought in new capabilities to TCS that will help drive growth going forward.”

36. Tata Consultancy Services Limited is functionally dissimilar; it has huge sales/turnover of Rs. 21,947.76 Crores having substantial intangible assets, incurring huge amount on R&D for development of new area of functions and it owns branded or propriety products. Further, this company has revenue from onsite and offshore activities. Whereas, the assessee is a smaller company, having no brand value, not owning any branded or propriety products, has not incurred any expenditure on R&D and has revenue only from offshore activities.

37. Further, the income of Tata Consultancy Services Limited comprises of revenues from Information Technology and Consultancy Services at Rs. 21,535.75 Crores and Sale of equipment and software licences at Rs. 868.25 Crores. There is no functional segmentation. Thus, the total revenue of the company includes consultancy services, sale of equipment and software licences. This company provides to its customers an integrated portfolio of services including a comprehensive range of IT and Application related services, Remote Infrastructure Management, BPO and Engineering services, front-ended by a strong, domain- led Global Consulting Practice. Thus, services provided cover the entire value chain of IT - from consulting to products and solutions and from

implementation to support. As mentioned on page 23 of the Annual Report reproduced above, TCS has also acquired TCS e-Serve Limited (formerly known as Citigroup Global Services Limited) from Citigroup Inc. during the year, which is an extraordinary financial event.

38. Whereas the assessee company was a captive IT service provider and provided services as desired by its AEs.

39. Therefore, Tata Consultancy Services Limited is no match to the assessee and hence, it is not a comparable company for benchmarking international transactions of the assessee relating to software development services.

40. It is submitted that in several decisions, it has been held that a company having high brand value and huge turnover as compared to assessee-company could not be selected as comparable.

41. The Hon'ble High Court of Bombay in the case of CIT v. Pentair Water India (P.) Ltd. [2016] 69 taxmann.com 180 (Bombay) has categorically concluded that "the turnover is obviously a relevant factor to consider the comparability". Thus, significant differences in the size of the companies would impact comparability.

42. It has been decided in number of Tribunal decisions that the companies having a turnover from IRs. 1 Crore to Rs. 200 Crores have to be taken as a particular range. Since the assessee company falls in this range having total turnover of Rs. 18.97 Crores, the companies which have turnover in the range of Rs. 1 Crore to Rs. 200 Crores only should be taken into consideration for comparable for the purpose of

determining arm's length price. This proposition is being consistently followed by various benches of the Hon'ble ITAT such as:

- Yokogawa IA Technologies India (P.) Ltd. v. DCIT [2019] 112 taxmann.com 341 (Bangalore - Trib.)
- Triology e-Business Software India (P.) Ltd. vs. DCIT, Circle 12(4), Bengaluru [2021] 127 taxmann.com 255
- Autodesk India (P.) Ltd. v. DCIT, Circle 11(2), Bangalore [2016] 96 taxmann.com 263
- Tavant Technologies India (P.) Ltd. v. DCIT, Circle 7(1)(1), Bangalore [2020] 120 taxmann.com 122

44. It may also be noted that the Hon'ble Karnataka High Court in the case of Acusis Software India (P.) Ltd. v. ITO, Ward-11(1), Bangalore [2018] 98 taxmann.com 183 (Karnataka) approved the decision of ITAT holding that if the turnover of the comparable company is less or more than 10 times the turnover of the assessee, then it cannot be considered as a comparable company.

45. The Hon'ble Delhi High Court in the case of Agnity India Technologies (P.) Ltd. [2013] 36 taxmann.com 289 (Delhi), on similar facts, has upheld the proposition that a giant company having huge turnover cannot be compared with a smaller captive unit of the parent company. The Hon'ble High Court approved the findings of the ITAT that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk.

46. The Hon'ble Delhi High Court has also held in the following cases that a giant company having huge turnover and high brand value cannot be compared with a smaller company working as a captive service provider to its AEs:

- B.C. Management Services (P.) Ltd. v. Dy. CIT[2018] 89 taxmann.com 68 (Delhi)
- Pr. CIT-3 v. Evalueserve SEZ (Gurgaon) Pvt. Ltd in ITA No. 241/2018 order dated 26.02.2018
- Pr. CIT-7 v. Oracle (OFSS) BPO Services (P.) Ltd. [2018] 90 taxmann.com 388 (Delhi)
- Avaya India (P.) Ltd. v. Assistant Commissioner of Income Tax [2019] 108 taxmann.com 222 (Delhi)

47. Reliance is also placed on the following decisions of the Delhi ITAT, where the assessee company was a captive service provider to its AEs, it was directed to exclude Tata Consultancy Services Limited from the list of comparables, considering that it was a giant company, having brand value, providing diverse services and assuming all risks:

- Nagarro Software (P.) Ltd. v. ITO [2020] 115 taxmann.com 284 (Delhi - Trib.)
- United Health Group Information Services (P.) Ltd. v. DCIT, Circle 18(1), New Delhi [2018] 90 taxmann.com 423 (Delhi - Trib.)
- Sun Life India Service Centre (P.) Ltd v. DCIT, Circle-2, Gurgaon [2017] 88 taxmann.com 371 (Delhi-Trib.)

48. In view of the above, it is prayed that Tata Consultancy Services Limited may kindly be excluded from the list of comparables adopted by the TPO.

## Persistent Systems Limited

49. It is submitted that Persistent Systems Limited, a bigger company, is not comparable with the assessee, a smaller company. The comparative chart of Persistent Systems Limited with the assessee company is as under:

Sr. No.	Particulars	Persistent Systems Limited	Serco India Private Limited
1	Revenues (Turnover)	Sale of software services and products: Rs. 519.69 Crores	Rs. 18.97 Crores (more than <b>27 times</b> )
2	Fixed Assets	Rs. 217.06 Crores	Rs. 0.22 Crores (more than <b>986 times</b> )
3	Risk	Persistent Systems Limited operates full-fledged risk-taking enterprise.	Minimal risk as 100% of the services are provided to AEs.
4	Research & Development Expenditure	Rs. 5.61 Crores	Nil
5	Nature of Services	(i) Persistent Systems Limited is functionally different from the Appellant. Profit & Loss Account clearly shows turnover from "Sale of software services and products". This shows that the company is engaged in both rendering software development services as well as sale of software products.  (ii) No segmental information is available.	Captive IT software services.

50. Turnover and Assets: From the above, it may kindly be noted that Persistent Systems Limited is a bigger company having turnover of Rs. 519.69 Crores as compared to the assessee company which is a smaller company having turnover from IT services of Rs. 18.97 Crores, which was more than 27 times. Persistent Systems Limited has employed fixed assets of Rs. 217.06 Crores, more than 986 times of the fixed assets of Rs. 0.22 Crores used by the assessee.

As discussed above, since the assessee falls in the range of turnover of Rs. 1 Crore to Rs. 200 Crores, therefore, Persistent Systems Limited having turnover of Rs. 519.69 Crores (more than 27 times) cannot be a comparable company. Thus, on this account itself, Persistent Systems Limited may kindly be excluded from the list of comparables.

51. In view of the above, it is prayed that Persistent Systems Limited may kindly be excluded from the list of comparables adopted by the TPO.

### **Sasken Communication Technologies Limited**

52. At the outset, it is submitted that the TPO did not select this comparable at the time of show cause notice issued to the assessee during TP proceedings. This company has been included in the list of comparables by the TPO in his order, without providing reasonable opportunity to the assessee. Despite objection raised by the assessee, the Ld. DRP has also not decided the objections raised by the assessee against this comparable in the order.

53. It is submitted that 'Sasken Communication Technologies Limited' is not comparable with the assessee. The comparative chart of Sasken Communication Technologies Limited with the assessee company is as under:

Sr. No.	Particulars	Sasken Communication Technologies Limited	Serco India Private Limited										
1	Revenues (Turnover)	Rs. 479.75 Crores	Rs. 18.97 Crores (more than 25 times)										
2	Fixed Assets	Rs. 81.49 Crores	Rs. 0.22 Crores (more than 370 times)										
3	Nature of Services	<p>Diversified- Product and technology licensing, software services and installation and commissioning Services etc.</p> <p>The company earned revenue from three segments as under:</p> <table border="1"> <thead> <tr> <th>Particulars</th> <th>Amount in Rs. Lakhs</th> </tr> </thead> <tbody> <tr> <td>Telecom Software Services</td> <td>40,531.20</td> </tr> <tr> <td>Telecom Software Products</td> <td>6,146.43</td> </tr> <tr> <td>Other Services</td> <td>1,297.05</td> </tr> <tr> <td><b>Total</b></td> <td><b>47,974.68</b></td> </tr> </tbody> </table> <p>However, the segmental operating margins are not available. Therefore, in the absence of segmental relevant data and particularly operating margins, this company cannot be comparable with assessee for IT software services.</p>	Particulars	Amount in Rs. Lakhs	Telecom Software Services	40,531.20	Telecom Software Products	6,146.43	Other Services	1,297.05	<b>Total</b>	<b>47,974.68</b>	Captive IT software services.
Particulars	Amount in Rs. Lakhs												
Telecom Software Services	40,531.20												
Telecom Software Products	6,146.43												
Other Services	1,297.05												
<b>Total</b>	<b>47,974.68</b>												
4	Research & Development Expenditure	<p>This company has incurred substantial expenditure in Research &amp; development.</p> <p><b>"Research and Development and Technology Absorption</b></p>	Nil										
		Subsystem and the Wireless Protocol Stacks were enhanced."											
5	Patents	The company has been granted 33 patents (USA 23 + India 8 + Other Countries 1 + Acquired 1) and 24 patents are pending to be granted.	Nil										
6	Risk	The company operates full-fledged risk-taking enterprise.	Minimal risk as 100% of the services are provided to AEs.										

54. Turnover and Assets: From the above, it may kindly be noted that Sasken Communication Technologies Limited is a bigger company having turnover of Rs. 479.75 Crores as compared to the assessee company which is a smaller company having turnover from IT services of Rs. 18.97 Crores, which was more than 25 times. Sasken Communication Technologies Limited has employed fixed assets of Rs. 81.49 Crores, more than 370 times of the fixed assets of Rs. 0.22 Crores used by the assessee.

55. As discussed above, since the assessee falls in the range of turnover of Rs. 1 Crore to Rs. 200 Crores, therefore, Sasken Communication Technologies Limited having turnover of Rs. 479.75 Crores (more than 25 times) cannot be a comparable company. Thus, on this account itself, Sasken Communication Technologies Limited may kindly be excluded from the list of comparables.

56. In this regard, it would be fruitful to refer decision of Hon'ble ITAT Bangalore in the case of Mformation Software Technologies (I) (P.) Ltd. vs. ITO, Ward 12(1), Bangalore [2020] 116 taxmann.com 458 (Bangalore-Trib.) wherein companies having turnover more than 10 times of turnover of the assessee have been excluded as comparables by giving the following findings:

*"10. As far as exclusion of 7 companies listed above which are part of the final comparable companies chosen by the TPO are concerned, we find that the turnover of these companies is 10 times greater than the turnover of the assessee which is only a sum of Rs.25,50,19,320. The turnover of (i) M/S. Tata Elsi Ltd., (Turnover Rs.378,43,03,000) (ii) Sasken Communication Technologies Ltd. (Turnover Rs.405,31,20,000) (iii) Persistent*

*Systems Ltd. (Turnover Rs.519,69,10,000) (iv) Zylog Systems Ltd. (Turnover Rs. 734,93,51.475) (v) Mindtree Ltd.(Turnover Rs. 793,22,79,326) (vi) Larsen and Toubro Infotech Ltd. (Turnover Rs. 1950,83,81,374 and (vii) Infosys Ltd. (turnover Rs. 20264,00,00,000). It has been held by the Hon'ble Karnataka High Court In the case of Acusis Software (I) P. Ltd. vs. ITO in ITA No.223/2017, judgment dated 14.8.2018 that if the turnover of the comparable company is less or more than 10 times the turnover of assessee, then it cannot be considered as a comparable company. In the light of the aforesaid decision of the Hon'ble High Court, we are of the view that the aforesaid 7 companies were rightly excluded from the list of comparable companies by the CIT(A). Thus Gr.No.2 & 3 raised by the revenue are dismissed."*

57. In view of the above, it is prayed that Sasken Communication Technologies Limited may kindly be excluded from the list of comparables.

### **Cat Technologies Limited**

58. The company 'Cat Technologies Limited' is not comparable with the assessee company because it is engaged in diverse activities of different functions, no segment reporting of different activities, and abnormal growth/results during this year in this company.

59. Cat Technologies Limited is engaged in diverse activities such as software development, consulting services, training, and medical transcription services. As per Schedule-9 forming part of Profit & Loss Account, the company has shown following income from operations:

(i)	Training Income	Rs.2,44,107/-
(ii)	Software Development & Consulting Services	Rs. 8,49,39,375/-
(iii)	Medical Transcription Receipts	Rs.83,74,194/-
	Total	Rs.9,35,57,676/-

60. Further, during the year, Cat Technologies Limited launched a job portal viz. Logtalent.com for job aspirants. Extracts from page 12 of the Annual Report (PB-927) for FY 2008-09 are reproduced below:

*"During the year the company launched job portal viz. Logtalent.com which was instant success with job aspirants. Encourage with success of this portal company proposed to launch 3 to 4 portals during the current financial year in the different fields. "*

*"Your Company has achieved good market reputation in the domain area of HR BPO, which is a high growth business area in the outsourcing space. BPO seeks to leverage the benefits of service delivery globalization, process design and technology to drive efficiency and cost effectiveness in customer business process. Your Company leverages strategic partnerships with global leaders in technology and business solutions, with the goal of providing clients with end-to-end business solutions."*

61. Thus, the company is dealing in medical transcription, training, software development and consultancy services. The software development and consultancy services are clubbed together. It is also evident from the above that this company also rendered services such as job placement portal and BPO services, which cannot be compared with the business profile of the assessee company.

62. Furthermore, there is no separate segment of software services of the company. It may kindly be noted that expenses are not segregated according to the revenue streams and therefore, it is not possible to have separate revenue and expenditure data relating to software development services segment. As per Note-7 to the Notes on Accounts regarding Segment Reporting (PB-955), it is treated that the company considers whole of India as a single geographical segment. The relevant note is reproduced as under:

*"7. SEGMENT REPORTING*

*The Company's exclusive business is Medical Transcription, Training Software Development and Consulting Services as such this is the only reportable segment as per Accounting Standard -17 on Segment Reporting issued by the Institute of Chartered Accountants of India. As the Company consider whole of India as a single geographical segment, the disclosures related to secondary segments are not relevant for the Company."*

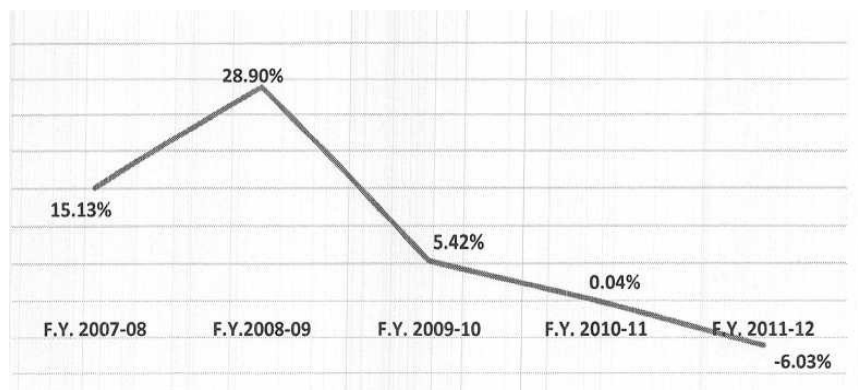
63. Thus, it is evident that functions performed by Cat Technologies Limited are completely different from the IT Software Services provided by the Appellant and there was no segment reporting of different activities.

**Abnormal Growth/Result:**

64. The total turnover/income and profit shown by the company' at Technologies Limited for the five financial years are as under:

F.Y.	2007-08	2008-09	2009-10	2010-11	2011-12
Total Income	6,54,22,644	9,90,07,541	8,28,76,384	7,45,62,215	8,55,62,911
Profit before Tax	98,98,449	2,86,08,282	44,92,969	33,296	-51,57,377
Ratio [PBT/Sales]	15.13%	<b>28.90%</b>	5.42%	0.04%	-6.03%
	<b>PB-945</b>	<b>PB- 945</b>	<b>PB-958</b>	<b>PB-959</b>	<b>PB-963</b>

Ratio [PBT/Sales]



65. Thus, there was abnormal high profit in FY 2008-09 (AY 2009-10) under consideration and there was growth in profit of 191% from the immediately preceding F.Y. 2007-08. The profit of this company is very volatile. Hence, this company cannot be considered as comparable.

66. It may be mentioned that the Ld. DRP has excluded the company 'Bodhtree Consulting Limited' as comparable in this year itself on the ground that this company had shown extraordinary revenue growth and profits were very volatile.

67. The reliance is placed on the following decisions wherein the company 'Cat Technologies Limited' was excluded from the list of comparables on the basis of above-mentioned factors:

- Sun Life India Service Centre (P.) Ltd v. DCIT, Circle-2, Gurgaon [2017] 88 taxmann.com 371 (Delhi - Trib.)

- GE Converteam EDC (P.) Ltd v. ACIT, Company Circle 1(3) Chennai [2017] 79 taxmann.com 408 (Chennai - Trib.)
- Siemens Industry Software (I) (P.) Ltd v. DCIT, Circle-8(1), New Delhi [2018] 98 taxmann.com 369 (Delhi - Trib.)
- United Health Group Information Services (P.) Ltd. v. DCIT, Circle 18(1), New Delhi [2018] 90 taxmann.com 423 (Delhi - Trib.)
- Nokia Solutions and Networks India (P.) Ltd. v. ACIT, Circle-13(1), New Delhi [2019] 111 taxmann.com 389 (Delhi - Trib.)
- Nagarro Software (P.) Ltd. v. ITO [2020] 115 taxmann.com 284 (Delhi - Trib.)

68. In view of the above, it is prayed that this company 'Cat Technologies Limited' may kindly be excluded from the list of comparables.

### **Thirdware Solution Limited**

69. The company 'Thirdware Solution Limited' is not functionally comparable with the assessee company. Thirdware Solution Limited' is engaged in varied activities i.e., sale of licenses, software services, export, and revenue from subscription etc. for which no segmental disclosure has been made by the company in its Audited Financial Statements.

70. The details of sales as reflected in Schedule 12 forming part of Financial Statements (PB-976) as on 31-03-2009 are as under:

<b>Particulars</b>	<b>Amount (Rs.)</b>
<b>SCHEDULE 12: SALES</b>	
Sale of Licence	2,32,37,588
Software Services	8,91,77,023
Export from SEZ Unit	47,85,72,420
Export from STPI Unit	16,29,00,630
Revenue from Subscription	1,64,33,714
<b>Total</b>	<b>77,03,21,375</b>

71. It is also submitted that segmental results are not available. Note 23 of Notes on Accounts (PB-1007) related to 'Segment Reporting' states that the company's operation comprises; of software development, implementation, and support services. Primary segment reporting is based on geographical areas.

72. From the above, it can be seen that the company 'Thirdware Solution Limited' derived revenue from various streams, such as sale of licences, software services, exports, revenue from subscription etc. Thus, this company was engaged in diversified business including software products and hence, this company cannot be treated as comparable with the assessee company. Further, there is no information relating to segmental break-up in the Annual Report of this company providing information on revenue and expenditure from software services only and hence, this company cannot be a good comparable with the assessee which is a captive IT service provider to its AEs. It may be noted that in the case of Fiserv India (P.) Ltd. v. ITO, Ward-13(4), New Delhi [2015] 60 taxmann.com 48 (Delhi-Trib.), the Hon'ble ITAT referred the decision of the Tribunal in the case of Conexant Systems (P.) Ltd. v. ITO [2014] 65 SOT 123 (URO)/48 taxmann.com 363 (Hyd.-Trib) wherein inter-alia it was observed that- "Even if he

has adopted the filter of more than 75% of the revenue from the software services for selecting a comparable company, he ought to have taken the segmental results of the software services only. The percentage of expenditure towards the development of software products may differ from company to company and also it may not be proportionate to the sales from the sale of software products.

73. Reliance is also placed on the following decisions wherein the company 'Thirdware Solution Limited' was excluded from the list of comparables on the account that it was engaged in diverse activities and no information regarding segment reporting was available:

- Siemens Industry Software (I) (P.) Ltd. vs. DCIT Circle 8(1), New Delhi [2018] 98 taxmann.com 369
- St. Ericsson India (P.) Ltd. v. ACIT, Range-9, New Delhi [2017] 79 taxmann.com 207 (Delhi - Trib.)
- Nokia Solutions and Networks India (P.) Ltd. v. ACIT, Circle-13(1), New Delhi [2019] 111 taxmann.com 389 (Delhi - Trib.)
- Nagarro Software (P.) Ltd. v. ITO [2020] 115 taxmann.com 284 (Delhi - Trib.)
- Fiserv India (P.) Ltd. v. ITO, Ward-13(4), New Delhi [2015] 60 taxmann.com 48 (Delhi - Trib.)
- Pr. CITS v. Fiserv India (P.) Ltd. in ITA 17/2016 for AY 2009-10 order dated 06.01.2016 (Delhi High Court)

74. In view of the above, it is prayed that this company 'Thirdware Solution Limited' may kindly be excluded from the list of comparables.

75. The Id. DR relied on the orders of the authorities below.

76. Heard the arguments of both the parties and perused the material available on record.

77. With regard to the Infosys Technologies Ltd. having a turnover 1068 times to that of the assessee, Tata Consultancy Ltd. having a turnover 1075 times of the assessee, Persistent Systems Ltd. having a turnover 27 times of the assessee with fixed assets more than 986 times, Sasken Communication Technologies Ltd. having turnover 25 times and 37 times of the fixed assets and owing to the functional dissimilarity relying on the judgment of Acusis Software India (P.) Ltd. v. ITO, Ward-11(1), Bangalore [2018] 98 taxmann.com 183 (Karnataka), we hold that they cannot be treated as right comparable.

78. With regard Cat Technologies Ltd., the company had medical transcription receipt and training income. The profit ratio are inconsistent ranging from (-)6.03% to 28.90% in the declining phases from the year to 2007 to 2011-12. The profits of the company is very volatile, hence keeping in view the judgment of Sunlife Service Centre Pvt. Ltd. Vs. DCIT 88 Taxman 371 (Del), Siemens Industries Software India Pvt. Ltd. 98 Taxman 369, we hold that the same is to be excluded from the list of comparables. With regard to Thirdwave Solutions Ltd., we find that the company is engaged in sale of licenses, software services, export, and revenue from subscription etc. for which no segmental disclosure has been made by the company in its Audited Financial Statements. Hence, we hold that the same is to be excluded from the list of comparables.

## Corporate Taxation

79. This ground is that the AO/ Ld. DRP erred in reducing expenditure in foreign currency amounting to Rs. 5,82,813/- in respect of data communication charges from 'export turnover' for the purposes of computing deduction under section 10A of the Act.

80. The assessee company was involved in the business of development and export of computer software in an Undertaking registered under Software Technology Park of India and claimed deduction u/s 10A of the Act. The assessee has made total export turnover of Rs. 9,82,87,609/- in this undertaking and there was no domestic turnover in this undertaking. Therefore, the amount of export turnover and total turnover was same. During assessment proceedings, the Assessing Officer has noticed that the assessee company has incurred an expenditure of Rs. 5,82,813/- in foreign exchange as data communication charges, which were considered attributable to delivery of computer software outside India. The Assessing Officer reduced these expenses from export turnover and calculated the amount of export turnover at Rs. 9,77,04,796/- (Rs. 9,82,87,609 - Rs. 5,82,813). However, the Assessing Officer has not reduced these expenses from total turnover. Accordingly, the Assessing Officer re-computed allowable deduction u/s 10A of the Act as under:

$$\begin{aligned} &\text{Net Profit of the business of the Undertaking} \times \frac{\text{Export Turnover}}{\text{Total Turnover}} \\ &= 1,21,71,990 \times \frac{9,77,04,796}{9,82,87,609} \end{aligned}$$

Allowable Deduction u/s 10A = 1,20,99,814/-

81. Thus, the Assessing Officer allowed deduction u/s 10A of Rs. 1,20,99,814/- as against Rs. 1,21,71,990/-, resulting into disallowance of deduction u/s 10A to the extent of Rs. 72,175/- (1,21,71,990 - 1,20,99,814).

82. The assessee filed objections before the Ld. DRP against this disallowance and submitted that if data communication charges are to be reduced from export turnover, these should be excluded from the total turnover also. But the Ld. DRP confirmed the above disallowance observing that export turnover has been defined in section 10A itself whereas total turnover has not been defined. It was noted that total turnover has been defined in other sections like 80HHC, 80HHE etc. Definition of total turnover as given in other sections cannot be imported into section 10A. For the purposes of section 10A, total turnover has to be taken as it means in common parlance and then in general sense, expenses cannot be reduced from total turnover. It was further pointed out that this issue is still pending before the Hon'ble Supreme Court. Hence, the Ld. DRP rejected the objection of the assessee.

83. The Hon'ble Supreme Court in the case of CIT Central-III vs. HCL Technologies Ltd. [2018] 93 taxmann.com 33 (SC) held that for computation of deduction under section 10A on the profit from export business, expenses excluded from export turnover have also to be excluded from total turnover. The Hon'ble Supreme Court concluded as under:

*"18. Accordingly, the formula for computation of the deduction under Section 10A of the Act would be as follows:*

Export Profit = total Profit of the Business x Export turnover as defined in Explanation 2

(IV) of Section 10A of the IT Act \_\_\_\_\_

Export turnover as defined in Explanation 2 (IV) of  
Section 10A of the IT Act + domestic sale proceeds

19. *In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under Section 10A of the IT Act are allowed only in Export Turnover but not from the Total Turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the Respondent which could have never been the intention of the legislature.*

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

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

84. In another case of CIT vs. Intel Technology India (P.) Ltd. [2019] 107 taxmann.com 462 (SC), the Hon'ble Supreme Court dismissed the SLP filed against the order of the High Court, where the Hon'ble High Court upheld Tribunal's order holding that expenses excluded from export turnover were also to be excluded from total turnover for the purpose of section 10A of the Act.

85. In view of the above, the expenditure incurred in foreign currency on lease line charges excluded from export turnover by the Ld. Assessing Officer has to be reduced from total turnover also. Hence, the figure of total turnover would also become Rs. 9,77,04,796/- (9,82,87,609 - 5,82,813). Appeal of the assessee on this ground is allowed.

86. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 10/01/2022.

Sd/-

**(Saktijit Dey)**  
**Judicial Member**

**Dated: 10/01/2022**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**