IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

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

IT(TP)A No.492/Bang/2015 & 556/Bang/2016
Assessment years : 2010-11 & 2011-12

Xchanging Solutions Ltd., (formerly Cambridge Solutions Limited), Plot No.13, 14, 15, SJR iPark, EPIP Industrial Area, Phase-I, Whitefield, Bangalore – 560 066. **PAN: AAFCS 9303L**	Vs.	The Deputy Commissioner of Income Tax, Circle 7(1)(2), Bangalore.
APPELLANT		RESPONDENT

IT(TP)A No.459/Bang/2015 & 402/Bang/2016
Assessment years : 2010-11 & 2011-12

The Deputy Commissioner of Income Tax, Circle 7(1)(2), Bangalore.	Vs.	Xchanging Solutions Ltd., (formerly Cambridge Solutions Limited), Bangalore – 560 066. **PAN: AAFCS 9303L**
APPELLANT		RESPONDENT

Appellant by	:	Shri Vikram Raghavan, Advocate
Respondent by	:	Shri Arunkumar, CIT(DR)(TP)(ITAT), Bengaluru.

Date of hearing	:	14.12.2021
Date of Pronouncement	:	19.01.2022

O R D E R

Per Chandra Poojari, Accountant Member

These are cross appeals by the assessee and the revenue directed against the final assessment order passed by the Assessing Officer u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act] dated 30.01.2015 & 28.01.2016 for the assessment years 2010-11 & 2011-12 respectively.

AY 2010-11 IT(TP)A No.492/Bang/2015]

2. **In the assessee's appeal**, the following grounds are raised:-

(I) "**General**

1. The order of the learned AO is based on incorrect appreciation of facts and interpretation of law and is, therefore, bad in law.

2. On the facts and in the circumstances of the case, the learned AO has erred in assessing the total loss at INR 6,72,99,740 as against returned loss of INR 24,98,75,085 (revised by the Appellant during the assessment proceedings) and arriving at an adjusted Book profit of INR 12,44,87,119 as against the Book profit of INR 12,12,87,119, as returned by the Appellant.

(II) Corporate tax grounds

3. ***Export proceeds amounting to INR 2,27,59,326 realized after six months from the end of Financial Year 2009-10***

3.1 The learned AO has erred in law and on facts, by reducing INR 2,27,59,326, being export proceeds realized after six months from the end of the relevant previous year, from both the Export turnover and Total turnover of Bangalore BPO unit (10A unit), without properly appreciating the directions of the DRP.

3.2 ***Without prejudice to the above***, the learned AO has erred in law and on facts, by not considering the above mentioned export proceeds as part of Export turnover and Total turnover in light of provisions of Section 155(11A) of the Act, as the export proceeds were realized by the

Appellant before the completion of assessment proceedings under Section 143(3) of the Act.

4. ***Non-reduction of telecommunication expenses (reduced from Export turnover) amounting to INR 2,23,44,926 from Total turnover for computing deduction under Section 10A***

4.1 The learned AO has erred in law and on facts, by not considering the directions issued by the Honourable DRP for reduction of telecommunication expenses amounting to INR 2,23,44,926 from both the Export turnover and Total turnover of Bangalore BPO unit (10A unit) while computing deduction under Section 10A of the Act for Bangalore BPO unit (10A unit).

4.2 The learned AO has erred in law and on facts, by not following the jurisdictional ruling of the Karnataka High Court in the case of CIT and ACIT vs. Tata Elxsi Ltd and others (349 ITR 98) which has upheld the principle of parity between numerator and denominator in the formula prescribed under Section 10A(4) of the Act.

5. ***Reduction of expenditure incurred in foreign currency from Export turnover and Total turnover though the Appellant is not engaged in rendering technical services***

The learned AO has erred in law and on facts, by reducing an aggregate expenditure of INR 3,55,75,055 (travel and conveyance of INR 1,59,02,746, project work expenses of INR 29,08,163, foreign per diem allowance of INR 26,58,619 and contract charges of INR 1,41,05,527) from Export turnover and Total turnover of Bangalore BPO unit (10A unit), without appreciating the fact that the Appellant is not engaged in rendering technical services outside India.

6. ***Exclusion of loss of INR 15,31,42,273 pertaining to Bangalore IT unit (10A unit) and profit of INR 1,42,23,652, post Section 10A deduction, pertaining to Bangalore BPO unit (10A unit) at source level***

6.1 The learned AO has erred in law and on facts, by not considering the loss of INR 15,31,42,273 of Bangalore IT Unit (10A unit) and profit of INR 1,42,23,652 of Bangalore BPO Unit (10A unit) while computing the gross total income of the Appellant.

6.2 The learned AO, while applying the ratio of decision in the case of Yokogawa India Ltd. and Ors. (341 ITR 385) of the Hon'ble High Court of Karnataka, has failed to appreciate that Section 10A is a deduction section (as amended by the Finance Act, 2000 w.e.f. 1 April 2001) and hence, the loss of INR 15,31,42,273 pertaining to Bangalore IT unit (10A unit) and

profit of INR 1,42,23,652, post Section 10A deduction, pertaining to Bangalore BPO unit (10A unit) should not be excluded at the source level.

6.3 The learned AO has erred in law by not considering Section 10A as a deduction section, having regard to Circular No. 07 dated 16 July 2013 issued by the Central Board of Direct Taxes ("CBDT") in this regard.

6.4 The learned AO has erred in law in excluding the profit and/or loss of units eligible for deduction under Section 10A of the Act from the source itself thereby, rendering the provisions of Section 10A(4) otiose.

6.5 The learned AO has erred in law and on facts, by not allowing carry forward of loss from Bangalore IT unit (10A unit) to subsequent years.

7. ***Disallowance of Provision for litigation amounting to INR 32,00,000 under normal provisions of the Act as well as upward adjustment to net profit while computing Book profit under Section 115JB of the Act***

7.1 The learned AO has erred in law and on facts, by treating the Provision for litigation amounting to INR 32,00,000 as a contingent liability and thereby has erred in disallowing the same while computing total income of the Appellant under normal provisions of the Act.

7.2 The learned AO has failed to appreciate that the provision for litigation is an ascertained liability, not being contingent in nature and therefore, the same is eligible for deduction under Section 37(1) of the Act.

7.3 The learned AO has erred in law and on facts, in treating the provision for litigation amounting to INR 32,00,000 as contingent and thereby, has erred in adding the same to the net profit as per profit and loss account of the Appellant while computing the Book profit under Section 115JB of the Act.

8. ***Disallowance of bandwidth and lease line charges amounting to INR 41,27,602***

8.1 The learned AO has erred in law and on facts, by holding that the payments made towards bandwidth and lease charges aggregating to INR 41,27,602 are towards 'use of equipment' as envisaged under Explanation 2 to Section 9(1)(vi) of the Act and thus, has erred in holding that the same is subject to withholding tax.

8.2 The learned AO has erred in law and on facts, by holding that the above payments are in the nature of royalty for 'use or right to use the equipment', on the erroneous presumption that the Appellant acquires significant economic and possessory interest in the bandwidth hired.

8.3 The learned AO has erred in law and on facts, by stating that the Appellant has acquired significant economic and possessory interest in the bandwidth provided by the service provider without any basis and/or ground and therefore, the disallowance made by the learned AO is bad in law and on facts.

8.4 The learned AO has failed to appreciate the fact that mere provision of leaseline/bandwidth facility by the service provider to the Appellant will not amount to the Appellant acquiring significant economic and possessory interest over the equipment used by the service provider for provision of such facility.

8.5 The learned AO has erred in law and on facts, by not considering the Appellant's submission that the payments made by it are towards provision of standard services and thus, not taxable under the provisions of the Act.

8.6 The learned AO has erred in law and on facts, by disallowing the underlying expenditure under Section 40(a)(i) of the Act for non-deduction of tax at source.

8.7 The learned AO has failed to analyse the provisions of the Double Tax Avoidance Agreements ("DTAA") entered into between India and Belgium and that entered into between India and Singapore while holding that such payments are in the nature of royalty in terms of relevant provisions DTAA with Belgium and Singapore.

Disallowance of Marked to market loss amounting to INR 29,08,450

9.1 The learned AO has erred in law and on facts, by holding that marked to market losses ("MTM loss" or "exchange loss") amounting to INR 29,08,450 claimed by the Appellant on account of restatement of forward contracts for hedging its foreign currency exposures at the end of the financial year, are notional, contingent and speculative in nature.

9.2 The learned AO has erred in law and on facts, by not considering the Appellant's submission that the CBDT Instruction No. 03 dated 23 March 2010 is not binding on the Appellant as the same is prejudicial to the interest of the Appellant and against the Honourable Supreme Court decisions in the case of Woodward Governor India Private Limited (162 Taxman 6) and ONGC Limited (2010-TIOL-20-SC-IT).

9.3 The learned AO has erred in law and on facts, by not considering the submission of the Appellant that since the forward contracts entered into by the Appellant, to hedge against exposure to exchange fluctuation loss, are settled by giving actual delivery of foreign exchange, the provisions of Section 43(5) of the Act are not applicable in its case.

9.4 ***Without prejudice to all the above***, the learned AO has erred in law and on facts, by not considering the Appellant's submission that entering into the forward contract transactions is integral to the core business operations of the Appellant and thus, the same are not speculative transactions within the main provisions of Section 43(5) of the Act.

9.5 The learned AO has, therefore erred in law and on facts, by disallowing such MTM losses while computing taxable income of the Appellant under normal provisions of the Act.

9. ***Non-consideration of increased profit of Bangalore BPO unit (10A unit), owing to adjustments made in the assessment order, for computing deduction under Section 10A of the Act***

10.1 ***Without prejudice to the grounds mentioned in Para Nos. 7 to 9 above***, the learned AO has erred in law and on facts, by not considering the increased profit of Bangalore BPO unit (10A unit), on account of disallowances made under the above grounds, while computing deduction under Section 10A of the Act for Bangalore BPO unit (10A unit).

10.2 The learned AO has erred in law and on facts, by holding that the apportionment of adjustments between 10A eligible units and other units is neither available on records nor submitted by the Company while such information was submitted during the proceedings under Section 144C of the Act.

10. ***Non-consideration of voluntary disallowance of performance incentive amounting to INR 35,91,493 while computing taxable income of the Appellant***

The learned AO has erred in law and on facts, by not considering the directions issued by the Honourable DRP for consideration of voluntary disallowance of performance incentive amounting to INR 35,91,493 (pertaining to 10A eligible units) while computing taxable income of the Appellant from such units.

11. ***Non-consideration of disallowances made under Ground Nos. 7 to 9 while computing taxable income of the Appellant***

12.1 ***Without prejudice to the grounds mentioned in Para Nos. 7 to 9 above***, the learned AO has erred in law and on facts, by not considering the apportionment of disallowances, made in the assessment order, between 10A units and non-10A units while computing income from STPI business and domestic business.

12.2 The learned AO has, therefore, erred in computing income from 10A eligible units at a loss of INR 13,89,18,621 as against loss of INR 14,19,45,354.

(III) Transfer pricing grounds

12. ***Corporate guarantee commission imputed at INR 2,83,32,477***

13.1 The learned TPO and the learned AO have erred, in law and in facts, by considering corporate guarantee transaction as an intra-group service, warranting an arm's length remuneration by ignoring the fact that such a transaction is a mere shareholder activity.

13.2 ***Without prejudice to the above***, the learned TPO and the learned AO have erred, in law and in facts, in not objectively selecting the rate of commission for making the adjustment.

(IV) Other grounds

13. The Learned AO has erred in law and on facts, by restricting credit towards tax deducted at source ("TDS") for an aggregate amount of INR 1,07,35,084 as against INR 1,25,98,389 claimed by the Appellant in its Return of income resulting into reduction of TDS claim by INR 18,63,305.

14. The Learned AO has erred in computing interest under Section 234C of the Act at INR 1,02,411 as against Nil computed by the Appellant having regard to "tax due" on "Returned income" while filing its Return of Income.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Honourable Tribunal to decide on the appeal in accordance with the law.''

3. The assessee has also filed a petition for admission of additional ground submitting that these grounds were not raised on the earlier occasion due to inadvertence and it relates to the issues fundamental to the appeal and prayed that it may be admitted in the interest of justice. The additional grounds are as follows:-

"Ground No 16: Without prejudice to other grounds, the learned AO and the learned TPO have erred, in law and in facts, by considering corporate guarantee transaction as an international transaction subject to transfer pricing.

Ground No. 17: Without prejudice to our contention that the provision for onerous lease is an ascertained liability, the provision reversed during the year amounting to INR 2,50,68,510, out of provision of INR 6,41,61,438 created during Assessment Year 2009-10 and added to book profit for that year, should be excluded in book profit computation for Assessment Year 2010-11 in terms of clause (i) of Explanation I to Section 115JB(2) of the Act.

Corporate tax matters

18. Without prejudice to other grounds, the learned AO has failed to appreciate that during impugned Financial Year 2009-10, the Appellant was not liable to withhold tax on the payments made as there was no provision under the Act, or the relevant DTAA, mandating the deduction of tax at source on bandwidth charges while there were many favorable judicial precedents for the Appellant including jurisdictional Bangalore Tribunal ruling.

19. Without prejudice to other grounds, the learned AO's disallowance requires the Appellant to perform an impossible act of deducting tax at source relying on a subsequent amendment made in Act with retrospective effect, more specifically by Explanation 5 to Section 9(1) inserted only vide Finance Act, 2012 with effect from 1976. The learned AO's disallowance would therefore lead to violation of a fundamental tenet of law being the "impossibility of performance" doctrine that has been upheld by plethora of Tribunals and Hon'ble Courts including the Hon'ble Apex Court."

4. We have heard both the parties and perused the material on record. These additional grounds are fundamental to the appeal and non-admission of the same would result in incomplete appreciation of facts. The facts material to this issue are already on record and there is no necessity of investigation into fresh facts. Placing reliance on *the Hon'ble*

Supreme Court judgment in the case of *M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*, the additional grounds are admitted for adjudication.

5. At the time of hearing, ground Nos.1 to 3 were not pressed, accordingly they are dismissed.

6. Ground No.4 is regarding deduction u/s. 10A of the telecommunication expenses. It was submitted that pursuant to the rectification application of the assessee, the AO has issued rectification order u/s. 154 on this issue and hence this ground is not pressed. Accordingly, this ground is dismissed.

7. Ground No.5 was not pressed before us, hence dismissed accordingly.

8. Regarding ground No.6, it was submitted that in the draft assessment order, deduction u/s. 10A for Bangalore BPO Unit was restricted to total income (under the head business) after set off of losses from other units (10A and non-10A units). While the DRP accepted the objection of the assessee, the AO in the final assessment order for the first time excluded the loss/profit of section 10A units eligible for deduction at the source level itself, while no such direction was given by the DRP. According to the ld. AR, the action of the AO in the final assessment order is against the mandate of the provisions of section 144C(10) r.w.s. 144C(13) of the Act. Further it was submitted that the provisions of section 10A are deduction in nature and in the absence of provisions similar to section 80A(2), the entire deduction to be restricted to total income in all the loss/profit of 10A units to be excluded at source level. For this purpose, he relied on the order of the Supreme Court in the case of *Yokogawa India Ltd., 391 ITR 274 (SC)* wherein it was held that though section 10A, as

amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV and not at the stage of computation of the total income under Chapter VI. Being so, the issue is remitted to the AO to pass consequential order in compliance of the decision of *Yokogawa India Ltd., 391 ITR 274 (SC)*.

9. Ground No.7 is regarding disallowance of provision for litigation of Rs.32,00,000 under normal provisions of the Act as well as upward adjustment to net profit while computing book profit u/s. 115JB of the Act. The ld. AR submitted that the provision is created at Rs.32 lakhs as provision for litigation on the legal representative fees and out of pocket expenses to be incurred by the legal counsel for representing the company on various matters. According to him, it is a business liability that has arisen during the FY 2009-10 relevant to AY 2010-11 and to be allowed in view of various decisions, specifically *Bharath Earth Movers Ltd., 245 ITR 428 (SC) and Rotork Controls v. CIT, 314 ITR 62 (SC)*.

10. On the other hand, the ld. DR submitted that there is no basis for this provision towards legal fees or out of pocket expenses and the lump sum provision is made without specific production of details of litigation pending at various courts. As such, he relied on the order of DRP.

11. We have heard both the parties and perused the material on record. Even before us, the ld. AR could not establish that this provision has been made on a scientific basis relating to particular cases pending before various courts and due to particular counsel. As such, we decline to entertain this ground and the same is rejected.

12. On the ground No.8 read with additional grounds 18 & 19, the contention of the ld. AR is that the issue in dispute is also subject matter of

appeal in ITA No.2068/Bang/2019 against the order dated 31.3.2017 passed u/s. 201(1) & 201(1A) of the Act for not withholding tax on payments towards bandwidth and leased line charges. The issue has been settled by the assessee by availing VSVS, 2020 scheme. Also, that issue is directly related to the issue raised in this appeal. As such, this ground is to be allowed in favour of assessee.

13. We have heard both the parties and perused the material on record. At the time of passing the DRP order, the certificate under VSVS, 2020 was not made available before the lower authorities. Since the issue raised before us is directly related to the issue in the appeal in ITA No.2068/Bang/2019, if the issue was settled by the assessee by availing VSVS, 2020, the assessee is entitled for consequential relief. Accordingly this issue is set aside to the file of AO to consider the VSVS, 2020 scheme availed by the assessee and decide the issue accordingly.

14. Ground No.9 is not pressed before us and accordingly dismissed.

15. Ground No.10 is regarding non-consideration of increased profits due to above disallowances for computing section 10A deduction for Bangalore BPO unit. It was submitted that the assessee has submitted a rectification application seeking relief provided by the DRP. The AO has issued rectification order u/s. 154 of the Act dated 13.6.2018 granting the relief. Accordingly this ground is not pressed and dismissed as such.

16. Grounds No.11 to 14 are not pressed before us and hence dismissed.

17. Ground No.15 regarding interest u/s. 234C of the Act is consequential in nature and does not require adjudication.

18. Regarding the additional ground No.17, the ld. AR submitted that as per Explanation 2(i) to section 115JB of the Act, any reversal out of provision created in earlier year, if the book profit of such year has been increased by those provisions, be reduced from net profit while computing book profit in the year of reversal, if such amount is credited to Profit & Loss account.

19. The ld. DR relied on the orders of the lower authorities.

20. We have heard both the parties and perused the material on record. In our opinion, if the book profit is increased by provision created in that year and on reversal of that provision in the present assessment year, net profit of this assessment year to be reduced so as to compute the correct book profit. With these observations, we remit the issue to the AO for fresh consideration.

21. The assessee's appeal is partly allowed for statistical purposes.

Revenue's appeal [IT(TP)A No.459/Bang/2015]

22. The grounds raised by the revenue are as follows:-

> "1) The order of the DRP is opposed to law and the facts and circumstances of the case
>
> 2) The DRP erred in directing the AO to follow the ratio of the Hon'ble Court in the case of Tata Elxsi Limited 349 ITR 98 and exclude Communication and travel expenses incurred in foreign currency from the total turnover also while computing the deduction u/s 10A of the I.T. Act as the decision of the High Court is binding, without appreciating the fact that there is no provision in section 10A that such expenses should be reduced from the total turn° ,er also, as clause (iv) of the explanation to section 10A provides that such expenses are to be reduced only from the export turnover.

3) The DRP erred in not appreciating the fact that the jurisdictional High Court's decision in the case of Tata Elxsi Limited 349 ITR 98 has not been accepted by the department and an appeal has been filed before the Hon'ble Supreme Court.

4) The DRP erred in not appreciating that the deduction U/s 10A has to be allowed from the total income of the assessee and as per the Section 2(45) of the I.T.Act,, the total income should be computed from various sources after set off of losses from one source against s .e income from other sources under the same head of income in terms of section 70(1)

5) The DRP also erred in placing reliance on the order of the Hon'ble High Court of Karnataka in the case of Yokogawa India Ltd which has not become final as the Department has preferred a SLP before the Hon'ble Supreme Court

6) The DRP erred in directing the AO to revise the computation of the eligible profit for the purposes of the deduction under section 10 A without appreciating the fact that the eligible profit for the deduction U/s 10A is already furnished by the assessee in the return of income / in respective Form and now on the findings of the AO during assessment proceedings, the same cannot be revised afresh for the computation of the deduction u/s 10A of the I. T. Act.

7) The DRP erred in directing the AO to delete the addition made with out appreciating the findings of the AO that the provision is found to be created towards expected liability for future years and this may change if any income is generated out of the sublease and hence it cannot be termed as ascertained liability.

8) For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the DRP be reversed and that of the Assessing Officer be restored.

9) The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal."

23. After hearing both the parties we are of the opinion that this issue has been decided in favour of the assessee by the judgment of the Karnataka High Court in the case of *Tata Elxsi Ltd., 349 ITR 98 (Karn)* holding that for the purpose of computing deduction u/s. 10A if the export turnover in the numerator is to be arrived at after excluding the communication expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. This has been confirmed by the Hon'ble Supreme Court in the case of *HCL Technologies Ltd. 404 ITR 719 (SC)*. Being so, we dismiss the grounds raised by the revenue.

AY 2011-12 [IT(TP)A No.556/Bang/2016]

24. **The assessee** has raised the following grounds:-

"General

1. The order of the learned AO and directions of the Hon'ble DRP are based on incorrect interpretation of law and therefore are bad in law.

2. On the facts and in the circumstances of the case and in law and based on the directions of DRP, the learned AO erred in assessing the total income of the Appellant at INR 19,08,05,854 as against Nil returned income, computed by the Appellant.

Corporate Tax matters

1. The learned AO has erred in law and on facts, by disregarding the directions, issued by the Hon'ble Dispute Resolution Panel, basis the jurisdictional Karnataka High Court decision in the case of CIT and ACIT vs. Tata Elxsi Ltd and others (349 ITR 98) and accordingly, has erred in law and on facts, by not considering that the telecommunication expenses amounting to INR 57,82,839 reduced from export turnover of Bangalore IT unit, should

also be reduced from total turnover of such unit for computing the deduction under Section 10A of the Act.

2. The learned AO has erred in law and on facts, by reducing INR 10,01,27,982 (foreign travel expenses including foreign per-diem allowances of INR 2,71,91,800 and project work expenses of INR 7,29,36,183) from export turnover of Bangalore BPO unit and that by reducing INR 27,61,593 (foreign travel expenses including foreign per-diem allowances of INR 22,76,169 and project work expenses of INR 4,85,424) from export turnover of Bangalore IT unit on the ground that such expenses were incurred towards providing technical services outside India.

   The learned AO has erred in law and on facts, by making the above adjustment without appreciating the fact that the Appellant is engaged in Software development and IT enabled Services and hence, the services rendered by the Appellant do not constitute technical services.

3. The learned AO has erred, in law, and on facts, in computing interest under Section 234B of the Act at Rs.36,37,685 as against Rs.36,01,814, computed by the Appellant at the time of filing its Return of Income

Transfer Pricing matters

4. The learned AO and the learned transfer Pricing Officer ("TPO") erred in making an addition of INR 25,75,41,584 to the total income of the Appellant on account of adjustment to the arm's length price with respect to the international transactions entered into by the Appellant with its associated enterprise.

5. The learned AO and the learned TPO have erred, in law and in facts, by not accepting the economic analysis undertaken by the Assessee in accordance with the provisions of the Act read with the Rules, conducting a fresh economic analysis for the determination of the ALP in connection with the impugned international transaction, and holding that the Assessee's international transaction is not at arm's length.

6. The learned AO and the learned TPO have erred, in law and in facts, by determining the arm's length margin/ price using only FY 2010-11 data, which was not available to the Assessee at the time of complying with the transfer pricing documentation requirements.

7. The learned TPO and the learned AO have erred, in law and in facts, by accepting certain companies based on unreasonable comparability criteria:

- Acropetal Technologies Limited
- e-Zest Solutions Limited
- E-Infochips Limited
- ICRA Techno Analytics Limited
- Infosys Technologies Limited
- Tata Elxsi Limited

8. The learned AO and the learned TPO have erred, in law and in facts, by rejecting certain comparable companies based on unreasonable comparability criteria:

i. the learned AO and the learned TPO erred in rejecting the following comparable companies identified by the Appellant on the ground that the comparables were having different accounting year (other than March 31 or companies whose financial statements were for a period other than 12 months):

- R Systems International Limited
- Helios and Matheson Information Technology Ltd

ii. the learned AO / TPO erred in rejecting the following comparable company identified by the Appellant where consolidated results had been used for analysis:

- Saven Technologies Limited

iii. the learned AO / TPO erred in rejecting the following comparable companies identified by the Appellant on the ground that the comparables are functionally different:

- Akshay Software Technologies Limited

iv. the learned AO and the learned TPO have erred, in law and in facts, by rejecting the following comparable companies identified by the assessee on the ground that the data is not available in the public domain:

- Ancent Software International Limited
- Caliber Point Business Solutions Limited
- KPIT Cummins Infosystems Limited

v. the learned AO and the learned TPO have erred, in law and in facts, by rejecting the following comparable companies identified by the Assessee using employee cost lesser than 25% of the total revenues as a comparability criterion:

- CG – VAK software & Exports Limited
- Ybrant Digital Limited (Formerly LGS Global Limited)

vi. the learned AO and the learned TPO have erred, in law and in facts, by rejecting the following comparable companies identified by the Assessee using export sales less than 75% of the operating revenues as a comparability criterion:

- Goldstone Technologies Limited
- Maveric Systems Limited
- Thinksoft Global Services Limited
- Zylog Systems Limited

9. The learned AO and the learned TPO have erred, in law and in facts, by treating foreign exchange fluctuation as non-operating in nature while computing the operating margin of the Assessee and the comparables.

10. The learned AO and the learned TPO have erred, in law and in facts, by incorrectly computing the working capital adjustment benefit for software development services transaction.

11. The learned AO and the learned TPO have erred, in law and in facts, by considering corporate guarantee transaction as an international transaction subject to transfer pricing.

12. Without prejudice to ground 12 above, the learned AO and the learned TPO have erred, in law and in facts, by applying an arbitrary rate of 3% as guarantee fee.

13. The learned AO and the learned TPO have erred, in law and in facts by not providing an opportunity of being heard to the Appellant before making the adjustment with respect to reimbursement of expenses which is violative of principles of natural justice, resulting in unjustified demand.

14. The learned AO and the learned TPO have erred, in law and in facts, by making an adjustment with respect to the reimbursement of expenses as the revenue authorities have no jurisdiction to question the commercial rationale and or the wisdom of the assessee to incur expenditure towards its business.

15. The learned AO and the learned TPO have erred, in law and in facts, by not taking cognizance of the fact that the reimbursement of costs pertain to provision of Services and are routed through the profit and loss account. Accordingly, these expenses form part of the cost base for mark-up and hence no adjustment is warranted in this regard.

16. The Honourable DRP has grossly erred in not taking cognizance of the detailed submissions made by the Appellant demonstrating the benefits received from the incurrence of the expenses, the other documentary evidences placed on record and passing a summary order without providing appropriate reasons for upholding the adjustment.

17. The learned AO and the learned TPO have erred, in law and in facts, by incorrectly applying the CUP method for determining the ALP of the impugned transaction and overlooking the fact that TNMM is most appropriate under the facts and circumstances since the expenses are closely linked to provision of services.

18. The learned AO and the learned TPO have erred, in law and in facts, by not taking into consideration the fact that there is no element of service involved in the reimbursement of expenses made to AEs.

The Appellant submits that each of the above grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

25. The assessee has filed petition for admission of additional grounds stating that the same were not raised on the earlier occasion due to inadvertence and it relates to the issues fundamental to the appeal and prayed that it may be admitted in the interest of justice.

26. The additional grounds read as under:-

"Ground No. 19: Without prejudice to our contention that the provision for onerous lease is an ascertained liability, the provision reversed during the year amounting to INR 3,74,90,455, out of provision of INR 6,41,61,438 created during Assessment Year 2009-10 and added to book profit for that year, should be excluded in book profit computation for Assessment Year 2011-12 in terms of clause (i) of Explanation I to Section 115JB(2) of the Act."

27. We have heard both the parties and perused the material on record. These additional grounds are fundamental to the appeal and non-admission of the same would result in incomplete appreciation of facts. The facts material to this issue are already on record and there is no necessity of investigation into fresh facts. Placing reliance on *the Hon'ble Supreme Court judgment* in the case of *M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*, the additional grounds are admitted for adjudication.

28. By ground No.7, the assessee seeks to include certain companies as comparables. The ld. AR submitted that E-Infochips Ltd. is functionally different as the revenue from software development services (Rs.192,106,661) is less than 75% of its operating revenue (Rs.260,384,251) and the company earns revenue both from software development and sale of products where the revenue bifurcation is not available.

28.1 Acropetal Technologies Ltd. is also functionally different as it fails 75% revenue filter as income from IT services is Rs.81.40 crores out of total income of Rs.141 crores. It provides various services such as Engineering Design Services, Healthcare and IT Infrastructure Management Services like network security solution, cloud services and enterprise software solution and engaged in diversified revenue model. The company is also engaged in R&D as part of its business operations which is included in operating expenditure. The break up of revenue for various services under ITS is not available.

28.2 E-Zest Solutions is functionally different since the company is engaged in software and product development and break up of revenue between services and products is not provided in the annual report.

28.3 ICRA Techno Analytics Ltd. is engaged in wide array of services like engineering services, web development and hosting, business analytics and BPO services and revenue break up of the same is not provided in the Annual report and hence functionally different from the assessee company.

28.4 Persistent Systems & Solutions Ltd. also is functionally different for the reason that it is engaged in diversified activity i.e., rendering of software development services, licensing of products and royalty of software

products. There is no segmental break up of various services provided by this company.

29. The ld. DR relied on the orders of lower authorities.

30. We have heard both the parties and perused the material on record.

31. However, we find that the assessee has not put any objections about exclusion of these comparables before the DRP, but raised this issue for the first time before us. Hence, we remit this issue in respect of above comparables to the file of DRP for adjudication of this issue after considering the submissions and case laws cited by the assessee.

32. By ground No.8, the assessee wants to include the companies viz., R. Systems International Ltd. and Helios and Matheson Information Technology Ltd.

33. This issue was considered by this Tribunal in the case of *Cisco Systems (India) (P.) Ltd. v. DCIT, IT(TP)A No.271/Bang/2014 dated 14.10.2014* wherein it was held as under in respect of R. Systems International Ltd.:-

> "(C) These companies were rejected by the TPO/DRP for the reason that these companies have different accounting year. On this issue, the submission of the ld. counsel for the assessee was that the data for each quarter of both the aforesaid companies were available and from that data, the TPO could have culled out the financial results of the two companies to match with the accounting year of the assessee. Our attention was drawn to the decision of the ITAT Delhi Bench of the Tribunal in the case of Mercer Consulting (India) (P.) Ltd. v. Dy CIT [2014] 47 taxmann.com 84 (Delhi - Trib.), wherein the Delhi Bench of the Tribunal, on the question of applying the filter of different accounting year of the comparable, observed as follows:—
>
> "R. Systems International Limited
>
> 11.1 The assessee included this case in a list of comparables. The TPO applied a filter of excluding companies whose data for the

financial year 2008-09 was not available. As the data considered by R. Systems International Ltd. was for the year ending other than March, the TPO held that this case was not comparable. The assessee is contesting the exclusion of this case.

11.2 The ld. AR fairly conceded that R. Systems was following calendar year for maintaining its annual accounts and, as such, the assessee adopted data for 31.12.08 for including it in the list of comparables. It was, however, stressed that this case ought not to have been excluded on this count alone, when it was otherwise comparable. The ld. DR opposed this contention by placing reliance on certain decisions in which it has been held that if the data for the financial year of the comparable case similar to that of the tested party is not available, then, such case should be expunged from the list of comparables.

11.3 In order to appreciate the rival submissions on this issue, it would be apt to note the relevant part of sub-rule (4) of Rule 10B which is as under:—

'(4) The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction has been entered into.'

11.4 On circumspection of the above part of this sub-rule, it comes to fore that the comparability of an uncontrolled transaction can be analysed with the 'data relating to the financial year' in which the transaction has been entered into. As per this mandate, it is clear that if the tested party has March ending, then the comparables must also have the data relating to the financial year ending on 31st March itself. If such a data is not available, then the case should be disqualified from the list of comparables.

11.5 Turning to the facts of the instant case, we find that the assessee has adopted the figures of this company for the calendar year ending 31.12.2008. Since the assessee is closing its accounts as on 31.3.2009, naturally, the data of R. Systems does not pass the test laid down in sub-rule (4) of Rule 10B. The ld. AR invited our attention towards the Annual accounts of R. Systems available at page 144 of the assessee's paper book. It can be seen from the audited accounts of R. Systems that the data for year ending 31.12.08 has been given under one column and the data

for quarter ending 31.3.09 and 31.3.08 (both audited) has been given in the other two columns. This shows that if we take up the yearly data ending 31.12.08 and exclude the results of quarter ending 31.3.08 and include the results of quarter ending 31.3.09, what we get is the data for the financial year ending 31.3.09, being the same financial year in which the instant international transactions were entered into by the assessee.

11.6 The ld. DR relied on an order passed by the Mumbai Bench of the Tribunal in ACIT v. Hapag Lloyd Global Services Ltd. 2013-TII-68-ITAT-MUM-TP (authored by one of us, namely, the AM) in which it has been held that a company with a different financial year ending cannot be compared and is likely to be excluded. There is not and cannot be any dispute over this proposition that an otherwise comparable company having a different financial year cannot be considered as comparable. But if the data relating to the financial year in which the international transaction has been entered into is directly available from the annual accounts of that comparable, then it cannot be held as not passing the test given under sub-rule (4) of rule 10B. In the case under consideration before the Mumbai Bench, there is no mention of the audited quarterly data of such comparable being available for consideration. It is quite natural that if the data of the financial year is not available or not capable of being directly deduced from the annual accounts of such company, then such case deserves to be excluded. If, however, the audited accounts of such comparable directly give the figures in such a manner that the data of the financial year in which the assessee has entered into an international transaction can be easily deduced, then there is no reason for excluding such an otherwise comparable case.

11.7 We find that R. Systems International Ltd. has been excluded by the TPO solely for the reason that its financial year is different without considering that the data for the financial year adopted by the assessee can be easily compiled from the audited statements of such company. We, therefore, set aside the impugned order on this issue and remit the matter to the TPO/AO for including the case of R. Systems International Ltd. in the list of comparables by working out the figures relevant to the financial year ending 31.3.09 from the audited accounts of R. Systems International Ltd."

> 27.7 Following the aforesaid decision of the Tribunal, we direct the TPO to cull out the financial results of these two comparable companies for the period relatable to the assessee's financial year and thereafter consider these two companies as comparables. We hold and direct accordingly."

34. Following the above order of the Tribunal, we remit this issue to the file of AO/TPO for fresh consideration with similar directions.

35. With regard to Helios and Matheson Information Technology Ltd., the ld. AR submitted that the company satisfies all the comparability criterion and should not be rejected on the filter of different financial year ending. The company is engaged in the business of software development services and he submitted that in the light of the order of the Tribunal in the case of *DCIT v. Mckinsey Knowledge Centre India Pvt. Ltd. in ITA No.2195/Del/2011 dated 13.9.2013*, the data could be extrapolated relating to the assessment year under consideration and the above company be considered as a comparable.

36. We have heard both the parties on the issue. In the case of *Mckinsey Knowledge Centre India Pvt. Ltd. (supra)*, the Tribunal observed in para 23.1 as follows:-

> "23.1 Keeping all these principles in mind, we find that this rule only prescribes a methodology to be followed for utilizing the current year's data of a comparable with the tested party. If the data for a financial year can be extra-polated with credible accuracy on the basis of data available on record then there is no reason why the said comparable should be rejected. Moreover, there is no dispute that data for nine months is common for both the comparable and the tested party and since it is not a case of seasonal industry, therefore, reliance can be placed on the data for nine months after making adjustments for extra ordinary items. At the cost of repetition, we may reiterate that primarily if a comparable is performing similar functions as that of the tested party, then the same should not normally rejected, but for strong reasons. In the present case, it is not disputed that the data

> available on record in respect of Fortune Infotech Ltd. meets the aforementioned requirements and, therefore, the comparable could not be rejected."

Accordingly, we remit this issue to the AO/TPO to consider this company as a comparable after extrapolating the data relating to assessment year under consideration.

37. The next issue is regarding lower authorities considering corporate guarantee transaction as an international transaction and applying arbitrary rate of 3% as guarantee fee.

38. The DRP after considering its order for the AY 2010-11 rejected the contention of the assessee.

39. After hearing both the parties, we find that this issue came up for consideration in assessee's own case for the AYs 2008-09 & 2009-10 before the Tribunal and vide order dated 31.10.2016 it was held as under:-

> "15. We have considered the rival submissions as well as the relevant material on record. At the outset we note that the assessee has raised the objection before the DRP as recorded in paras 6.1 and 6.2 as under :
>
> '6.1 Grounds 1, 2 and 3 are considered together for convenience. Briefly stated the assessee provides software development and information technology enabled services (ITES) to its AEs. During the FY 2005-06 the assessee provided a corporate guarantee to a third party bank on behalf of an AE but failed to charge a fee for the guarantee. The assessee conducted a TP study and concluded that this transaction was at arm's length however during audit proceedings the TPO rejected the analysis of the assessee and made adjustments to this transaction. The taxpayer cites the order of Four soft Ltd wherein the Hon'ble ITAT Hyderabad observed as under:
>
> > "We find that the TP legislation provides for computation of income from international transaction as per section 92B of the Act. The corporate guarantee provided by the assessee company does not fall within the definition of

> international transaction. The TP legislation does not stipulate any guidelines in respect to guarantee transactions. In the absence of any charging provision, the lower authorities are not correct in bringing aforesaid transaction in the TP study. In our considered view, the corporate guarantee is very much incidental to the business of the assessee and hence, the same cannot be compared to a bank guarantee transaction of the Bank or financial institution."

6.2 It has also been submitted by the assessee that the transaction arising on account of ownership linkage and which derives largely from the reputation of the group necessarily implies that there can be no guarantee acceptable to the banker which can be provided by the independent third party. The guarantee provided by financial institutions are characteristically different compared to the guarantee provided by the parent. The advantages arising to the parent itself from providing guarantee in lieu of equity support or financial support is also not capable of being evaluated satisfactorily. These differences between the alleged controlled transaction and the guarantee provided by independent parties in the uncontrolled transaction are not capable of being evaluated so as to arrive at determination of the fair uncontrolled price. In the circumstances, computation methodology of TP exercise may fail. It is undisputed that failure of computation mechanism results in failure of the charge.'

Thus it is clear that grievance of the assessee against the order of the TPO on the issue of ALP in respect of guarantee fees is limited only regarding the correct ALP. We further note that prior to the decisions of Mumbai Bench in the case of Siro Clinpharm (P.) Ltd. (supra) there are series of decisions of this Tribunal including the decision in cases of Four Soft (P.) Ltd. (supra) and Nimbus Communications Ltd. v. Asstt. CIT [2010] 38 SOT 246 (Mum.) wherein the Tribunal has taken a consistent view that providing corporate guarantee to AE is an international transaction however, the ALP of such transaction was to be computed having regard to the financial consideration as the nature of transaction between the related parties. The Tribunal has taken a view that the guarantee fees for providing corporate guarantee should not be more than 0.5%. The Hyderabad

Benches of this Tribunal in the case of Four Soft (P.) Ltd. (supra) has considered an identical issue in paras 24 to 26 as under :

> "24. It is noted by the TPO, during the F.Y. 2005-06 the assessee has provided bank guarantees on behalf of its Overseas subsidiary, Foursoft BV, Netherlands for an amount of Rs.69,81,16,000/- which is continuing for the year under consideration also. The TPO following the order passed for A.Y. 2006-07 treated the commission changed by ICICI Bank at 3.75% arms length price for the corporate guarantee provided by the assessee to its AE worked out the TP adjustment of Rs.2,61,79,350/-. The DRP also rejected assessee's objection on the issue.
>
> 25. We have heard the parties and perused the material on record. The sum and substance of the submissions made by the learned AR is, the corporate guarantee provided by the assessee cannot be equated to bank guarantee and resultantly the commission rate for bank guarantee cannot be applied to the corporate guarantee. It was submitted that the corporate guarantee is nothing but an additional guarantee provided by the parent company and it does not involve any cost or risk to the share holders. It was submitted that since the corporate guarantee was given keeping in view paramount business interest of the parent company it has to be allowed as business expenditure. It is the further submissions of the learned AR that the retrospective amendment effected to section 92B of the Act, by Finance Act, 2 012 by insertion of Explanation (i)(c) to section 9 2B also has not enlarged the scope of the 'international trans action' to include the corporate guarantee in the nature provided by the assessee. The learned AR further contended that the issue is covered in favour of the assessee by virtue of the order passed by the Tribunal in assessee's own case for AY 2006-07 (supra).

25.1 The learned DR, on the other hand, submitted that by virtue of the amendment made to section 92B of the Act with retrospective effect from 01/04/2002, the corporate guarantee provided by the assessee is to be considered as an international transaction, and, therefore, the Assessing Officer was justified in determining arm's length price of such transaction.

25.2 Having considered the submissions of the parties, we are unable to accept the contention of the learned AR that corporate guarantee of the nature provided by the assessee will not come within the meaning of international transaction in terms with section 92B of the Act. It is not disputed that section 92B of the Act has been amended by the Finance Act, 201 2 with the insertion of Explanation I(c) with retrospective effect from 01/04/2002. Explanation (i)(c) to section 92B, reads as under:

"capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business."

25.3 A reading of the aforesaid clause from the Explanation would make it clear that the corporate guarantee provided by the assessee comes within the scope and ambit of 'international transaction' as per the aforesaid clause. Therefore, the contention of the learned AR that the issue is covered in favour of the assessee by virtue of the order passed in assessee's own case for AY 2006-07 no longer holds good since the order passed by the coordinate bench is prior to the amendment made to provision of section 92B of the Act. It will be pertinent to mention here that this issue was also considered by the ITAT Mumbai Bench in case of Mahindra & Mahindra v. DCIT in ITA No. 8597/Mum/2010, 54 SOT (UR) 146. The coordinate bench of this Tribunal while

considering similar argument advanced on behalf of the assessee by placing reliance on the decision of the Four Soft Ltd. (supra), held as under:

"15.2 After hearing the rival submissions we feel that Assessing Officer will have to follow the decision of the ITAT Hyderabad or the amended provision of the Act in this regard. If the Finance Bill of 2012 is passed by the Parliament amending the provisions of section 92B, with effect from 1st April, 2002, he will have to ignore the decision of the ITAT Hyderabad. In case section 92B is not amended with retrospective effect, he should grant relief to the appellant."

25.4 In the aforesaid view of the matter, we agree with the TPO that ALP of the corporate guarantee has to be determined as it falls within the scope and ambit of an international transaction after the retrospective amendment to section 92B. However, it appears that the TPO has applied the rate of 3.75%, which is applicable to bank guarantee issued by the bank. As the corporate guarantee is not in the nature of bank guarantee, the rate applicable to bank guarantee provided by the bank cannot be applied to corporate guarantee which is provided by a group company. In case of Glenmark Pharmaceuticals v. ACIT in ITA No. 5031/M um/2012, dated 13/11/2013, the Mumbai Bench of the Tribunal after analysing the facts in that case had held that 0.53% corporate guarantee rate in that case was appropriate. The ITAT Hyderabad Bench in case of Infotech Enterprises Ltd. in ITA No. 115/Hyd/2011 and in ITA No. 2184/Hyd/2011, dated 16/01/2014 while considering identical issue of determining ALP of corporate guarantee provided by the assessee to its AE followed the ratio laid down in case of Glenmark Pharmaceuticals v. ACIT (supra) and remitted the issue back to the TPO to decide the quantum of corporate guarantee rate by following the method adopted in case of Glenmark Pharmaceuticals (supra).

> 26. Since the issue in the present case is identical to the issue decided by the ITAT, Hyderabad Bench in case of Infotech Enterprises (supra), following the same, we also remit this issue to the file of the TPO to decide the quantum of corporate guarantee rates accordingly. If the assessee is able to bring on record any comparables with regard to corporate guarantee, the TPO may also consider the same while determining ALP of corporate guarantee. The TPO must provide a reasonable opportunity of being heard to the assessee before deciding the issue. This ground is allowed for statistical purposes."

It is pertinent to note that in case of corporate guarantee provided to a bank or financial institution on behalf of the AE, the assessee creates a charge on its assets in favour of the bank/financial institution and to that extent the transaction of providing corporate guarantee is having bearing on the assets of the assessee and in turn the assessee cannot use those assets under charge for the purpose of availing further financial credit/loans from the bank/financial institution. Thus this Tribunal held that by providing corporate guarantee falls in the definition of international transactions as per Section 92B(1) without considering the Explanation to the said Section. As we have discussed in the foregoing part of this order that the Tribunal has been taken a consistent view that corporate guarantee provided to the AE falls in the ambit of international transactions as per Section 92B(1) even without considering the Explanation inserted vide Finance Act, 2012. The Mumbai Bench of this Tribunal in the case of Siro Clinpharm (P.) Ltd. (supra) has restricted its finding only to the applicability of Explanation in the cases where the assessment was completed prior to the insertion of the said Explanation retrospectively. Even otherwise the earlier decisions of the Tribunal on this issue were not considered by the Delhi Bench of the Tribunal. In the case of Nimbus Communication Ltd. v. ACIT in ITA Nos.6816/Mum/2010 and 7105/Mum/2011, the Tribunal vide order dt.7.8.2013 has considered an identical issue in paras 4 & 5 as under :

'4. As regards the issue raised in ground No. 2 relating to TP adjustment made on account of guarantee commission in respect of corporate guarantee given by the assessee to its Associated Enterprises (AEs) for obtaining bank loans, the ld. representatives of both the sides have agreed that a similar issue was involved in assessee's own case for the immediately preceding year i.e. A.Y. 2005-06 and the Tribunal vide its order dated 12-06-2013 passed in ITA No. 3664 & 2359/Mum/2010 has already decided the same vide para No. 9 & 10 which read as under:-

> "9. We have considered the rival submissions and also perused the relevant material available on record. For the guarantee given to the bank against the financial assistance given to its AEs, no commission was charged by the assessee company on the ground that the said AEs were not benefited by the guarantee so given and it was the assessee who benefited as a result of commercial benefits secured for future. In support of this stand of the assessee, the ld. counsel for the assessee has contended that business strategy should be taken into consideration while making any TP adjustments in respect of such transactions and has relied on the OECD Transfer Pricing Guidelines issued in 2010. As stated in para 1.59 of the said guidelines, the business strategies should also be examined in determining comparability for transfer pricing purposes and certain illustrations of such business strategies are also given therein. As stated in para 1.60 of the said guidelines which has been relied upon by the ld. Counsel for the assessee, business strategies also could include market penetration schemes and taxpayer seeking to penetrate a market or to increase its market share might temporarily charge a price for its product that is lower than the price charged for otherwise comparable products in the same market. As explained further, a tax payer seeking to enter a new market or expand (or defend) its market share might temporarily incur higher costs and hence achieve lower profit levels than other taxpayers operating in the same market. In our

opinion, the relevant facts of the present case do not indicate that there was any such business strategy adopted by the assessee in not charging commission in respect of guarantees issued for its Associated Enterprises. As a matter of fact, there is nothing to suggest that any such business strategy was adopted by the assessee with specific intention or motive and the case has been sought to be made out merely on the basis of commercial expediency by claiming that the assessee was benefited as a result of giving the guarantees in the form of commercial benefits secured for future. In our opinion, such commercial expediency cannot be equated with business strategy, which is specific and well laid out. As rightly held by the ld. CIT(A), a financial loan guarantee is a commitment entered into by the assessee company with a third party lender of its Associated Enterprises which obliges the assessee company to cover the risk of default by its Associated Enterprise and this act thus involves performance or carrying out of service to cover the risk of default for which "price" has to be charged. Even the OECD Transfer Pricing Guidelines 2010 supports this view in para 7.13 where it is explained that where higher credit rating of Associated Enterprise is due to a guarantee by another group member, such association positively enhances the profit making potential of that Associated Enterprise. We, therefore, find ourselves in agreement with the contention of the ld. D.R. that there was a clear benefit accrued to the Associated Enterprises by the guarantee provided by the assessee and when such benefit was passed on by the assessee to the said Associated Enterprises, guarantee commission should have been charged at arm's length price. The commercial relationship between the assessee and its Associated Enterprises is distinct and separate from the transactions of giving guarantee and such transactions have to be considered and examined independently in order to determine the arm's length price.

> 10. As regards the rate of guarantee commission, it is noted that the arm's length price of guarantee commission was determined by the TPO by applying CUP method and the arithmetic mean of 1.5% of the guarantee commission charged by the HSBC Bank in the range of 0.15 to 3% was taken as arm's length price. The ld. CIT(A) upheld the CUP method applied by the TPO but adopted the rate of 0.25% of guarantee fee as arm's length price relying on the decision of French Court in the case of Societe Carrefour. The ld. D.R., at the time of hearing before us has relied on the decision of the co-ordinate Bench of this Tribunal in the case of M/s Everest Kanto Cylinder Ltd. (supra) wherein while accepting the CUP method as the most appropriate method for benchmarking the guarantee fee, the Tribunal accepted 0.5% guarantee fee/commission to be at arm's length after taking into consideration the rates of guarantee commission charged by various banks including the guarantee commission charged by the HSBC Bank in the range of 0.15% to 3%. Since the facts involved in the present case are materially similar to the facts involved in the case of Everest Kanto Cylinder Ltd. (supra), we prefer to follow the decision rendered by the co-ordinate Bench of this Tribunal in the said case over the decision of French Court in the case of Societe Carrefour (supra). We, accordingly modify the impugned order of the ld. CIT(A) on this issue and direct the A.O. to recompute the commission for guarantee given by the assessee to its Associated Enterprises @ 0.5% being the arm's length price. Ground No. 1 of Revenue's appeal is thus partly allowed whereas ground No. 2 of assessee's appeal is dismissed".

5. As the issue involved in the year under consideration as well as all the material facts relevant thereto are similar to A.Y. 2005-06, we respectfully follow the order of the co-ordinate Bench of this Tribunal for A.Y. 2005-06 and direct the A.O. to restrict the TP adjustment by recomputing the commission for guarantee given by the assessee to its AEs at 0.5% being the arm's length price.

> Ground No. 2 of the assessee's appeal for A.Y. 2006-07 is partly allowed.'
>
> As it is clear that the Tribunal has followed the decision of the Tribunal for the earlier assessment year and while taking a consistent view held that guarantee provided by the assessee gives the benefit to the AE and such benefit was passed on by the assessee to the said AE and therefore should have been charged at ALP.

16. We further note that the DRP for the Assessment Year 2011-12 vide its direction dt.3011.2015 as well as for the Assessment Year 2010-11 accepted the assessee's argument that an appropriate adjustment that the value of corporate guarantee received from its arm's length be granted. In para 2.9 of the said direction of DRP as under :

> "2.9 As far as the argument of corporate guarantee received by the taxpayer is concerned the same carries merit. In the interest of fairness, the TPO is directed to provide adjustment for the value of corporate guarantees received by the taxpayer form its AEs after verification of individual transactions."

Accordingly, we set aside this issue to the record of the A.O./TPO to recompute the ALP by considering the arm's length guarantee fees at 0.5% and further by providing appropriate adjustment for corporate guarantee received by the assessee from its arm's length."

40. Accordingly, we remit this issue to the AO/TPO to consider this issue afresh with similar directions as in the above order of the Tribunal. Accordingly, this ground of the assessee is partly allowed.

41. Ground Nos. 13 to 18 is regarding the reimbursement transactions. The DRP noted that the assessee was requested to submit the details / documents in support of these payments but as the assessee has failed to submit the same, the TPO proposed to apply CUP method and treat the payment towards the Re-imbursement as NIL and made adjustment in the intragroup payment made by the assessee. The assessee has mentioned

in the TP document that Re-imbursement payments have been made by the CSL at actuals and these payments are expenses incurred by the AE's on behalf of the Cambridge Solutions Limited and cross charged to Cambridge Solutions Limited. The TPO agreed that ideal condition is that the ALP of each international transaction should be determined separately. Only when it is not possible to do so and the international transaction are intricately related to each other, one should see the level of aggregation of international transaction at which the TP method can be applied. The Act does not say that ALP should be done at the enterprise level or the segment level or once the TNMM or any other method is applied at the segment level, ALP of all the international transactions is established. As payments made towards intra group service charges is a class of transaction of its own, it requires separate analysis. The Act does not preclude TPO to apply appropriate method for each class of transactions like intra group services. Though the primary responsibility is cast upon the assessee to establish the ALP of the international transactions, the Income Tax Act, 1961, Income Tax Rules, 1962, the OECD guidelines and the Circulars of the Board permit the TPO to reject the method used by the assessee and to use in its place the most appropriate method, if the assessee has not successfully discharged it. The TP study does not become infallible simply on the basis that it has been prepared by the independent auditors who constitute the third party for this purpose. Likewise, no existing Court decision on this issue has declared that the ALP determined by the assessee cannot be disturbed by anyone even if it is found to be not determined correctly in terms of circumstances given in the TP Documentation.

42. Further, after elaborate discussion on the issue, the TPO has concluded that "to sum up, the payment of the Payment of Re-imbursement of expenses in the case of the taxpayer is not at all justified. There is no

proof of any service having actually been rendered by the AE. The existing facts and circumstances amply show that the services even if any render by the AE were mere duplication of the functions being carried out by the taxpayer on his own and independently. The taxpayer did not get any economic value from the alleged services render by the AE. Thus the arm's length price of payment of re-imbursement of expenses paid is treated as 'Nil' due to inadequacy of the taxpayer's argument and the entire payment of re-imbursement of expenses fee Rs.17,99,88,610/- is treated as an adjustment u/s.92CA. Thus, according to the DRP, the TPO has delved into the issue and discussed the same thoroughly in the order. Inadequacy of taxpayer's argument and documentation has been pointed out. There is force in the argument of TPO to treat the payment of re-imbursement expenses fee as a separate class of transaction. The taxpayer has been found wanting to establish his claim. In view of the above, the objection raised by the assessee is rejected. Reliance was also placed by the DRP on the ITAT, Mumbai decision in case of Stream International Services Pvt Ltd 31 taxmann.com 227 (Mum) wherein it was held that re-imbursement of expenses is an international transaction.

43. We have heard both the parties and perused the material on record. Before the lower authorities, the assessee has not placed the necessary evidence, as such this issue was decided against the assessee. Before us, it was pleaded that the assessee is in a position to place the evidence to support its claim. Accordingly, the issue is remitted to the AO/TPO to consider the same and decide the issue afresh.

44. Thus, the appeal of the assessee is partly allowed for AY 2011-12.

Revenue's appeal [IT(TP)A No.402/Bang/2016]

45. The grievance of the revenue is regarding expenditure incurred in foreign currency towards telecommunication to be excluded both from export turnover and total turnover for the purpose of computation of deduction u/s. 10A of the Act. This issue has already been decided in favour of the assessee and against the revenue in the AY 2010-11 hereinabove and for similar reasons, this ground of the revenue is dismissed.

46. In the result, the appeals of the assessee are partly allowed and that of the revenue are dismissed.

Pronounced in the open court on this 19th day of January, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(CHANDRA POOJARI)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 19th January, 2022.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.