

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

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

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| IT(TP)A No. 3133/Bang/2018 |
| Assessment Year : 2014-15 |

| | | |
|---|------------|--|
| M/s. Cypress Semiconductor Technology India Pvt. Ltd., No. 65/2, Bagmane Laurel, Block C, Bagmane Tech Park, C.V Raman Nagar, Bangalore – 560 093. PAN: AABCC2470Q | Vs. | The Deputy Commissioner of Income Tax, Circle – 2 (1)(1), Bangalore. |
| APPELLANT | | RESPONDENT |

| | | |
|-------------|---|--------------------------------------|
| Assessee by | : | Smt. Tanmayee Rajkumar, Advocate |
| Revenue by | : | Dr. Manjunath Karkaihalli, CIT DR |

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| Date of Hearing | : | 20-01-2022 |
| Date of Pronouncement | : | 28-02-2022 |

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against the final assessment order dated 25/09/2018 passed by Ld.DCIT, Circle – 2(1)(1), Bangalore for assessment year 2014-15 on following grounds of appeal:

“The grounds mentioned herein by the Appellant are without prejudice to one another.

1. That the order of the learned Deputy Commissioner of Income-tax, Circle - 2(1)(1), Bangalore (learned AO) to the extent prejudicial to the Appellant, is bad in law, contrary to the facts and circumstances of the case and is liable to be quashed. (Tax Effect: INR 59,987,559)

2. That the Dispute Resolution Panel (learned DRP) erred in not appreciating that the order of the learned Assistant Commissioner of Income-tax (Transfer Pricing) — 1(1)(2), Bangalore (learned TPO) passed under Section 92CA of the Income-tax Act, 1961 ('the Act') is contrary to law and thus liable to be quashed. (Tax Effect: INR 59,987,559)

3. That on facts and in the circumstances of the case, the learned AO/ learned TPO erred in making an upward adjustment to the transfer price of the Appellant's international transactions of INR 111,953,486 in respect of software development services and INR 39,529,834 on account of imputation of notional interest on outstanding receivables. The learned DRP erred in further enhancing the adjustment in respect of Appellant's software development services to INR 136,956,071/- and confirming the adjustment of INR 39,529,834 in respect of notional interest on outstanding receivables. (Tax Effect: INR 59,987,559)

Grounds for software development services

4. On the fact and in the circumstances of the case and in law, with respect to adjustment to the transfer price of the software development services, the learned DRP/ AO/ TPO erred in:

4.1. Rejecting the Transfer Pricing ('TP') documentation maintained by the Appellant under Section 92D of the Act, in good faith and with due diligence.

4.2. Rejecting the comparability analysis carried out by the Assessee in the TP documentation and in conducting a fresh comparability analysis for the software development services based on the application of additional filters in determining the arm's length price.

4.3. Using data, which was not contemporaneous and which was not available in the public domain at the time of preparing the TP documentation.

4.4. Not considering the multiple year/prior year data of comparable companies while determining the arm's length price in relation to the Assessee's international transactions with its AEs.

4.5. Using information under section 133(6) of the Act, which tantamount to choosing secret comparable companies whose information was not available in public domain while preparing the transfer pricing documentation for the relevant financial year.

4.6. Disregarding certain filters applied by the Appellant in selection of the comparable companies at the time of TP documentation.

4.7. Applying/ modifying the following filters while undertaking comparability analysis:

- a) Rejection of companies whose employee cost is less than 25% of operating revenue;
- b) Rejection of companies having export sales less than 75% of the total sales; and
- c) Companies of different financial year ending or data of the company do not fall within 12 month period.

4.8. Including the following companies even though they are functionally different from operational profile of the Appellant:

- a) Infosys Limited;
- b) Persistent Systems Limited;
- c) Thirdware Solutions Limited; and
- d) Larsen & Tubro Infotech Ltd.

4.9. Excluding the following companies even though they are functionally comparable to the Appellant and passes all the filters applied by the learned TPO in its order:

- a) Sasken Communication Technologies Limited;
- b) Akshay Software Technologies Limited;
- c) E-Zest Solutions Limited;
- d) Sankhya InfoTech Limited;
- e) I2T2 India Limited;
- f) Daffodil Software Limited;
- g) Kireeti Soft Technologies Limited;
- h) Exilient Technologies Private Limited;
- i) Celstream Technologies Limited;
- j) Maveric Systems Limited; and
- k) Evoke Technologies Limited.

4.10. Not considering certain expenses such as provision for doubtful debts, provision for warranties, provision of doubtful deposits, and miscellaneous expenditure written off, as operating in nature on the premise that these are not the routine operating costs in determining the operating markup of the comparable companies.

4.11. Not providing appropriate adjustments towards material differences between the operational profile of comparable companies and the Appellant.

4.12. Computing incorrect operating mark-up of certain comparable companies. (Tax Effect: INR 46,551,368)

Grounds for imputation of notional interest on outstanding receivables

5. On facts and in the circumstances of the case, the learned DRP/AO/TPO erred in :

5.1. Considering overdue receivables from Associated Enterprises ('AEs') as an international transaction under the provisions of Section 92B of the Act.

5.2. Without prejudice to ground nos. 3 & 6.1 above, ignoring the fact that the Appellant does not pay interest to the AEs in relation to outstanding payable to AEs.

5.3. Without prejudice to ground nos. 3 & 6.2 above, charging interest for the full year instead of restricting it till March 31, 2014, i.e. while computing the notional interest on overdue receivable the interest should be computed only from the date of raising invoices up till the date of realization of such invoices or March 31, 2014, whichever is earlier.

5.4. Without prejudice to ground nos. 3 & 6.2 above, imputing the notional interest on average outstanding receivables from AEs.

(Tax Effect: INR 13,436,190)

6. That the learned AO erred in levying interest under Section 234 B & 234C of the.

That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein below or produce further documents before or at the time of hearing of this Appeal.”

Additional grounds of appeal:

“To be read in continuation with existing grounds of appeal:

7. That on the facts and in the circumstances of the case and in law, Education Cess and Secondary & Higher Education Cess paid by the Appellant while arriving at the assessed income for the year under appeal ought to be allowed as a deduction under Section 37(1) of the Income Tax Act, 1961 .

8. That on the facts and in the circumstances of the case and in law, the TPO erred in not giving effect to the DRP's directions allowing credit period of 30 days while computing the notional interest on outstanding receivables.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of the appeal.”

The Ld.Sr.DR did not object for the additional ground being admitted.

We note that the additional ground is directly connected with the main issue of disallowance and no new facts needs to be investigated for adjudicating the same.

Considering the submissions and respectfully following the decisions of Hon'ble Supreme Court in case of *National Thermal Power Co. Ltd. Vs. CIT* reported in (1998) 229 ITR 383 and *Jute*

Corporation of India Ltd. Vs. CIT reported in 187 ITR 688, we are admitting the additional ground raised by the assessee.

Accordingly the additional ground raised by assessee stands admitted.

2. Brief facts of the case are as under:

2.1 The assessee is a wholly owned subsidiary of Cypress Semiconductor Technology Ltd., Cayman Island, which in turn is a wholly owned subsidiary of Cypress Semiconductor Corporation, US. The Cypress Group (all affiliates of Cypress Corporation, USA, excluding the assessee) is engaged in semiconductor design and manufacturing. The Cypress Group designs, develops, manufactures and markets a broad line of high-performance digital and mixed-signal programmable solutions for a range of markets, including consumer, computation, data communications, automotive, industrial and solar power. The assessee provides SWD services to its AEs.

A reference was made to the Ld.TPO as the international transactions exceeded Rs. 15 Crores for the year under consideration. On receipt of reference by the Ld.TPO, details were called for in form 3CEB in respect of the transactions entered into by assessee with its AE.

| Particulars | Amount in Rs. |
|--|----------------------|
| Receipt for provision of SWD services | 202,61,50,090/- |
| Reimbursement of expenses paid | 1,36,65,043/- |
| Reimbursement of expenses received | 1,96,85,068/- |
| Remittance on behalf of employees towards ESPP | 4,31,11,029/- |

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| Reimbursement of expenses received towards withholding tax on stock option | 5,96,77,344/- |
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The Ld.TPO observed that assessee used TNMM as the most appropriate method and OP/OC as PLI to compute its margin at 22.82%.

The Ld.TPO used following 7 comparables with an average margin of 11.93% and held the transaction to be at arm's length.

| Sl. No. | Name of the company | Average OPTIC (in %) |
|-------------------|---|----------------------|
| 1. | Akshay Software Technologies Ltd. | 7.46 |
| 2. | Bells Softech Ltd. | 7.92 |
| 3. | Helios & Matheson Information Technology Ltd. | 18.27 |
| 4. | Locuz Enterprise Solutions Ltd. | 6.91 |
| 5. | CSS Corp. Pvt. Ltd. | 20.01 |
| 6. | E-zest Solutions Ltd. | 12.60 |
| 7. | Sasken Communication Technologies Ltd. | 10.31 |
| Arithmetical Mean | | 11.93 |

The Ld.TPO rejected all the companies selected by the assessee in its TP study and applied following filters to select following comparables with an average margin on 29.4%

Filters applied by the TPO

| Step | Description |
|------|--|
| 1. | Companies whose data is not available for FY 2013-14- excluded. |
| 2. | Companies having different financial year ending (i.e. not March 31, 2014) or data of the company does not fall within 12 month period i.e., 01-04-2013 to 31-03-2014- rejected. |
| 3. | Companies whose service income < Rs. 1 Cr- excluded. |
| 4. | Companies whose software development service income is less than 75% of the total operating revenues- excluded. |
| 5. | Companies which have more than 25% related party transactions of the sales- excluded. |

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| 6. | Companies which have export sales less than 75% of the sales-excluded. |
| 7. | Companies with employee cost less than 25% of turnover-excluded. |

Comparables selected by TPO and their arithmetic mean:

| Sl. No. | Name of the Company | OP/OC (WC—unadj) (in %) |
|------------------------|-------------------------------|--------------------------------|
| 1 | Infosys Ltd. | 36.13 |
| 2 | Larsen & Toubro Infotech Ltd. | 24.61 |
| 3 | Mindtree Ltd. | 20.43 |
| 4 | Persistent Systems Ltd. | 35.10 |
| 5 | R S Software (India) Ltd. | 24.25 |
| 6 | Cigniti Technologies Ltd. | 27.62 |
| 7 | SQS India Ltd. | 22.37 |
| 8 | Thirdware Solution Ltd. | 44.68 |
| AVERAGE MARK-UP | | 29.40 |

The Ld.TPO thus computed the shortfall at **Rs.11,19,53,486/-** as under.

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| Arm's Length Mean Mark-up | 29.40% |
| Operating Cost | Rs.170,08,56,137/- |
| Arm's Length Price @129.40% of operating cost | Rs.220,09,07,841/- |
| Price Received | Rs.208,89,54,355/- |
| Shortfall being adjustment u/s. 92CA | Rs.11,19,53,486/- |

Aggrieved by the proposed adjustment, assessee preferred objections before the DRP. The DRP on considering the submissions by assessee, directed the exclusion of the following companies by accepting the contentions of the assessee:

- (i) Cigniti Technologies Ltd.; and
- (ii) SQS India Ltd.

The other objections raised by assessee were rejected by the DRP. The DRP has also rejected the assessee's contention seeking grant of working capital adjustment and risk adjustment.

The DRP also upheld the action of the TPO in determining the TP adjustment in respect of the delayed receivables.

The Post DRP directions the final list of comparables is as follows:

| SI. No. | Name of the Company |
|----------------|-------------------------------|
| 1 | Infosys Ltd. |
| 2 | Larsen & Toubro Infotech Ltd. |
| 3 | Mindtree Ltd. (seg) |
| 4 | Persistent Systems Ltd. |
| 5 | R S Software (India) Ltd. |
| 6 | Thirdware Solutions Ltd. |

On receipt of the DRP directions, the Ld.AO passed the final assessment order.

Aggrieved by the final assessment order, assessee filed appeal before this *Tribunal* raising various issues. However at the time of argument, the Ld.AR submitted that assessee wishes to argue the following comparables raised in ground nos. 4.8 and 4.9:

- Infosys Ltd.,
- Persistent Systems Ltd.,
- Larsen and Toubro Infotech Ltd.
- Thirdware Solutions Ltd.
- I2T2 India Ltd.,
- Akshay Software Technologies Ltd.,
- Sankhya Infotech Ltd.,
- Kireeti Soft Technologies Ltd.,
- Exilient Technologies Pvt. Ltd.,
- Celstream Technologies Ltd., and
- Maveric Systems Ltd.

Before we undertake the comparability analysis, it is *sine qua non* to understand the FAR of assessee under the software development segment.

Functions:

The Ld.TPO has observed the functions of assessee as under:

Cypress India is a wholly owned subsidiary of Cypress Semiconductor Technology Limited, Cayman Islands ("Cypress Cayman Islands") which is a wholly owned subsidiary of Cypress Semiconductor Corporation, US. Cypress India provides software development services to its affiliates and uses all the valuable Intellectual Property Rights (know-how, copyrights etc.) and other commercial or marketing intangibles (brand names, trademarks etc.) owned by Cypress Group in provisions of its services. For the purposes of billing for the services rendered, Cypress India invoices Cypress Cayman Islands.

Our analysis recognizes that Cypress India could be characterized as a contract software development service provider. Cypress Group owns all the valuable Intellectual Property Rights and other commercial or marketing intangibles and is involved in complex operations of developing proprietary technologies and marketing of the same.

The functions performed by the taxpayer have been provided vide para 4.1.2 of the TP document. As per the said para, the taxpayer provides Software Development Services to its AEs and the steps involved are as under:-

- a) Design and development.
- b) Testing
- c) General Management Functions.

Assets owned:

In the TP study, it has been recorded that non routine tangible assets like computer systems, office equipments, furniture and fixture etc. are being owned by assessee. It is also mentioned that assessee does not own any significant intangibles and does

not undertake any research and development on its account that leads to the development of non routine intangibles. Assessee uses the process, know-how, technical data etc. developed and owned by the group companies of AE.

Risks assumed:

It has been submitted that assessee does not have any exposure to market risk, product and technology risk and credit risk.

Assessee is assured of the payments from the group and therefore do not have the risk of non-payment for the services provided. Except for foreign exchange risk due to the payment received in foreign currency, assessee is a risk mitigated company operating towards the provision of services only to the AE.

Characterization:

Based on the facts as presented in the above analysis of functions performed, assets employed and risks assumed by Cypress India, it is possible to characterize Cypress India as a contract service provider. Being a contract service provider, Cypress India is risk insulated for the provision of software development services to Cypress Group.

Ground No. 4.8:

The assessee is seeking exclusion of **Infosys Ltd., Persistent Systems Ltd., Larsen and Toubro Infotech Ltd. and Thirdware Solutions Ltd.** from the list of comparables. It has been submitted that these comparables have been considered for exclusion in following decisions by *Coordinate Bench* of this *Tribunal* under similar facts/ functions as assessee:

- *LG Soft India Pvt. Ltd. v. DCIT (Order dated 28.05.2019 in IT(TP)A No. 3122/Bang/2018 for the assessment year 2014-15),*
- *EMC Software and Services India Pvt. Ltd. v. JCIT [2020] 115 taxmann.com 293 and*
- *Brocade Communications Systems (P.) Ltd. v. DCIT ([2020] 117 taxmann.com 439*
- *Goldman Sachs services Pvt. Ltd. vs. JCIT reported in (2020) 115 taxmann.com 286*

At the outset, the Ld.AR further submitted that these comparables are also not functionally similar with assessee on various counts. These comparables also have revenue from development of products and enjoys ownership of marketing intangibles, intellectual property rights and business rights. These comparables are submitted to be engaged in rendering IT services and in the development of software products without there being segmental information disclosed in the annual reports for the activities.

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

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

Admittedly, the assessee is a capital service provider rendering contract services to its group companies and is risk insulated company. With this such limited activities, giant companies with huge intangibles and product development activities cannot be compared with that of assessee. *Coordinate Bench* of this *Tribunal* in case of *Goldman Sachs services Pvt. Ltd. (supra)* excluded these comparables by observing as under.

“5.1.1 Infosys Ltd:

This comparable was upheld by authorities below and has been objected by assessee for its inclusion. Ld.AR submitted that this company is functionally not comparable with that of assessee as it is engaged in providing diversify activities like business consulting, technology, engineering and outsourcing services. It has been submitted that this company is a market leader in software development segment and provides IP-based solutions. It has also been submitted that this company owns huge intellectual properties and revenues from licensing of software products which is not at all akin to the functions performed and assets owned by assessee. Ld.AR submitted that, this company is a huge brand value and expenses of brand building is high. Referring to page 1860 of paper book volume 3 Ld.AR submitted that this company owns prod and are also involved in research and development activities.

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

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

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

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

On the contrary, Ld.CIT DR submitted that, this company should be remanded by following the view taken by coordinate bench of this Tribunal in case of CGI Information Systems and management consultants (P) Ltd. vs DCIT reported in (2019) 101 Taxmann.com 294. We have perused submissions advanced by both sides in light of records placed before us.

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

"9. In respect of the applicability of this Tribunal order for exclusion of Larsen & Toubro Infotech Ltd, this has been submitted by ld. AR of assessee in the chart submitted before us that on page no. 698 of Annual Report paper book, this company has debited an amount of Rs. 27,10,89,274/- as cost of bought-out items for resale. But this fact was not brought to the notice of the Tribunal in the case of Advice America Software Development Center (P.) Ltd. (supra). It has also been submitted that on page no. 706 of Annual Report paper book, this has been reported that this company is engaged in sale of services to its related parties and this fact was also not brought to the notice of Tribunal in case of Advice America Software

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

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

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

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

On the contrary, Ld.CIT DR submitted that, this company should be remanded by following the view taken by coordinate bench of this Tribunal in case of [CGI Information Systems and management consultants \(P\) Ltd. vs DCIT](#) reported in (2019) 101 Taxmann.com 294. We have perused submissions advanced by both sides in light of records placed before us.

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

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

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

Ld.CIT DR however placed reliance upon decision of Hon'ble Delhi High Court in case of [Steria India Ltd vs DCIT](#) reported in (2018) 92 Taxmann.com 120. She

submitted that Hon'able Delhi High Court held this comparable to be a good company.

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

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

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

It is also submitted that these comparables have been upheld for exclusion by *Hon'ble Delhi High Court* in case of *Steria India Ltd. vs. DCIT* reported in (2018) 92 taxmann.com 120.

Respectfully following the above, we are of the opinion that these comparables are to be excluded.

Ground Nos. 4.9:

The assessee is seeking inclusion of

- I2T2 India Ltd.,
- Akshay Software Technologies Ltd.,
- Sankhya Infotech Ltd.,
- Kireeti Soft Technologies Ltd.,
- Exiliant Technologies Pvt. Ltd.,
- Celstream Technologies Ltd., and
- Maveric Systems Ltd.

a) I2T2 India Ltd. ("I2T2"):

It is submitted that this company appeared in the accept/reject matrix of the search conducted by the TPO and its inclusion was sought by the Assessee. However, it was rejected by the TPO without any basis. Subsequently, in the order under Section 92CA of the Act passed by him, he excluded the company on the ground that information regarding its related party transactions was not available in the annual report. The DRP upheld its exclusion on the ground that the company is rendering ITE services and renders transaction processing services, which are not comparable to the services rendered by the Assessee.

We note that the DRP upheld the exclusion of this comparable on an issue without putting the assessee to notice and the Ld.TPO has rejected without any basis. Under such circumstances, we deem it fit and proper to remand this comparable back to Ld.AO/TPO to consider it in accordance with law.

b) Akshay Software Technologies Ltd., Kireeti Soft Technologies Ltd., Exiliant Technologies Pvt. Ltd., Celstream Technologies Ltd., Maveric Systems Ltd. and Sankhya Infotech Ltd.

The Ld.AR submitted that these companies were selected by assessee and rejected by the Ld.TPO for non-fulfillment of certain filters. She submitted that the Ld.TPO has not applied the filter correctly. She placed reliance on

following decisions in support of her contention that these comparables fulfill all the relevant filters that the Ld.TPO has applied:

- *EMC Software and Services India Pvt. Ltd. v. JCIT [2020] 115 taxmann.com 293 (Bangalore — Trib) and*
- *Brocade Communications Systems (P.) Ltd. v. DCIT ([2020] 117 taxmann.com 439 (Bangalore - Trib.))*

At the outset, the Ld.AR further submitted that these comparables are also not functionally similar with assessee on various counts. These comparables also have revenue from development of products and enjoys ownership of marketing intangibles, intellectual property rights and business rights. These comparables are submitted to be engaged in rendering IT services and in the development of software products without there being segmental information disclosed in the annual reports for the activities.

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

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

Admittedly, the assessee is a capital service provider rendering contract services to its group companies and is risk insulated company. With this such limited activities, giant companies with huge intangibles and product development activities cannot be compared with that of assessee. *Coordinate Bench* of this *Tribunal* in case of *Brocade Communications Systems (P.) Ltd. v. DCIT (supra)* included following comparables by observing as under.

“Akshay Software Technologies Ltd. (“Akshay”)

17. This company was selected by the assessee in its TP analysis but was rejected by the TPO for the reason that the company is engaged in providing professional services, procurement, installation, implementation, support and maintenance of ERP products and services, and that the company incurred expenditure to the tune of 85% on foreign branches, which suggested that the business model adopted by the company was different from that of

the assessee. The exclusion of this company came to be upheld by the DRP on the latter basis.

18. Before the Tribunal, the ld. AR submitted that firstly, perusal of the functions of the company listed in its annual report shows that the company is functionally similar to the assessee. The website of the company states that the company is engaged in rendering IT services, which are in the nature of SWD and caters to the needs of corporate bodies, banks and financial institutions. Further, it was submitted that the income from commission and sale of software licenses constitutes a meagre 0.5% of the total revenue and therefore the same would not have any impact on the profitability of the company. It was submitted that the action of the DRP in upholding the exclusion of this company on the basis that it incurs foreign branch expenses indicating that the business model adopted by it is different is erroneous as firstly, the TPO did not apply the on-site development filter. Therefore the action of the DRP is arbitrarily rejecting Akshay on this count, without first applying the filter at a uniform threshold across all companies is erroneous and unsustainable. In any event, it is submitted that foreign branch expenses per se do not indicate onsite development. There is no difference in the business model adopted by the company and the assessee, and without prejudice, it is submitted that the difference if any, would not have any impact on the profitability of the company. Reliance in this regard is placed on the decision of this Tribunal in the case of [DCIT v. ABB Global Industries & Services \(P.\) Ltd.](#) (reported in [2018] 97 taxmann.com 465 (Bangalore - Trib.) wherein in the case of an assessee placed similar to that of the assessee, the inclusion of this company was upheld.

19. Reliance was also placed on the decision of this Tribunal in the case of EMC Software and Services India Pvt. Ltd. v. JCIT (Order dated 18.12.2019 passed in IT(TP)A No. 3375/Bang/2018), wherein in the case of an assessee placed similar to the assessee, the comparability of the company was remanded to the TPO.

20. The ld. DR relied on the order of the DRP.

21. We are of the view that in the light of the submissions made as above and as directed by the Tribunal in the case of EMC Software and Services India Pvt. Ltd. (supra), the comparability of the this company should be considered afresh by the TPO after affording assessee opportunity of being heard. We therefore order accordingly.”

Maveric Systems Ltd. ("Maveric")

29. It was submitted that this company appeared in the accept/reject matrix of the search conducted by the TPO and was rejected by the TPO on the basis that the company was engaged in software testing. The company's inclusion was sought by the assessee. In the order passed under Section 92CA of the Act, the TPO excluded the company on the ground that the company is engaged in significant R&D activity and incurred expenditure of 6% of turnover. The DRP upheld the exclusion of the company on the basis that generally, companies with R&D expenditure of less than 3% alone were considered.

30. In this regard it was submitted that the actions of the lower authorities are erroneous and wholly inconsistent. It was submitted that while the TPO rejected the application of R&D expenses > 3% of total turnover filter, the DRP upheld the exclusion of the company on the basis that it incurred R&D expenses in excess of 3% of revenue. This action of the DRP is wholly baseless and arbitrary and on that ground, the company ought to be included in the final list of comparables. It was submitted that the company is functionally comparable and passes all filters applied by the TPO, which is not disputed by the lower authorities. Therefore this company ought to be included in the final list of comparables. Relevant submissions in this regard are placed at pages 171 and 474 of the paperback.

31. Reliance was placed on the decision of this Tribunal in the case of [EMC Software and Services India Pvt. Ltd. v. JCIT](#) (supra) wherein in the case of an assessee placed similar to the assessee, the company's comparability was remanded to the TPO.

32. The ld. DR relied on the order of the DRP.

33. In the light of the submissions made as above and as directed by the Tribunal in the case of EMC Software and Services India Pvt. Ltd. (supra), we are of the view that the comparability of this company should be considered afresh by the TPO after affording assessee opportunity of being heard. It is ordered accordingly.

Sankhya Infotech Ltd. ("Sankhya")

34. This company was selected by the assessee in its TP study and came to be rejected by the TPO for the reason that it fails the export revenue filter. While the assessee demonstrated before the DRP that the company passes the filter and earned revenue from export of services

comprising 96.53% of the total revenue, the DRP upheld the rejection of the company on an altogether new basis that the company is engaged in development of software and products, and that it had incurred substantial R&D expenses to the tune of 5.9% of total operating revenue.

35. At the outset it was submitted that the company is functionally comparable and passes all the filters applied by the TPO. It was submitted that action of the DRP in upholding the exclusion of the company on an altogether new basis without first putting the assessee on notice of the same is wholly erroneous and unsustainable.

36. We are of the view that the comparability of the company should be considered afresh by the TPO both on the export revenue filter and the filters applied by the DRP, because admittedly the assessee was not confronted by the DRP on the new filter it applied nor did it give a finding one way or the other on the export turnover filter.”

Coordinate Bench of this Tribunal in case of EMC Software and Services India Pvt. Ltd. v. JCIT (supra) included Kireeti Soft Technologies Ltd., Exiliant Technologies Pvt. Ltd. and Celstream Technologies Ltd.

“7.....

*(v) **Keerthi Soft Technologies Ltd.**, where the margin of the company is 4.11%. The observations of the DRP that the TPO has rejected the company on the ground of functional dissimilarity. On perusal of Paper Book at page 1641 where statement of profit and loss account was disclosed, the revenue from sale of products is disclosed as NIL and at page 1635, there is no segmental reporting except domestic and export reporting available. We are of the opinion that the DRP has made observations on the functionality of the company. Therefore we consider it appropriate to restore this issue to the file of TPO for verification and examination.*

*(vi) **Excellent Technologies Pvt. Ltd.**: The TPO has rejected this comparable as P & L Account is not available in the public domain and the DRP has confirmed the observations. Before us, the learned Authorised Representative relied page 1677 of Paper Book disclosed the financial summary of business for the relevant year. As this information is available, we consider it proper to restore this comparable to the file of TPO for examination and verification.*

*(vii) **Celstream Technologies Limited** - The TPO and DRP has rejected the comparable as profit and loss account is not available in public domain and the learned Authorised Representative referred to page 1755 to 1786 of Paper Book where the details of profit and loss account and Annual Report of the company are filed. Since the financial statements are available, we restore this issue to the file of the TPO to consider the financial statements, profit and loss account and Director's Report. Accordingly, we restore the comparable to the file of TPO for verification of the financial statements."*

Respectfully following the same, we direct the Ld.AO/TPO to verify and consider these companies in accordance with law. Accordingly, these grounds raised by assessee stands allowed as indicated hereinabove.

Ground nos. 5 and 8:

The issue raised by assessee in this ground is on interest imputed by the Ld.TPO on delayed receivables.

The Ld.AR submitted that interest on receivables outstanding as on 31/03 for a period of more than 6 months was imputed by the Ld.TPO in relation to transaction with AE. Ld. AO/TPO characterised the outstanding receivables to be loan transaction on which notional interest to the extent of Rs. 3,95,29,834/- was charged.

From TP study, it is observed that payments to assessee are not contingent upon payment received by AEs from their respective customers. Further Ld.AR submitted that working capital adjustment undertaken by assessee includes the adjustment regarding the receivables and thus receivables arising out of such transaction have already been accounted for. Alternatively, he submitted that working capital subsumes sundry creditors and therefore separate addition is not called for.

Ld.TPO computed interest on outstanding receivables at the rate equal to 4.3836% on the receivables that exceeded 6 months. It has been argued by Ld.AR that authorities below disregarded business/commercial arrangement between the assessee and its AE's, by holding outstanding receivables to be an independent international transaction.

The Ld.AR placed reliance on decision of *Delhi Tribunal in [Kusum Healthcare Pvt.Ltd vs. ACIT](#)* reported in (2015) 62 *Taxmann.com* 79, deleted addition by considering the above principle, and subsequently *Hon'ble Delhi High Court in [Pr. CIT vs. Kusum Health Care Pvt. Ltd.](#)*, reported in (2017) 398 *ITR* 66 (Del), held that no interest could have been charged as it cannot be considered as international transaction. He also placed reliance upon decision of *Delhi Tribunal* in case of *[Bechtel India vs DCIT](#)* reported in (2016) 66 *taxman.com* 6 which subsequently upheld by *Hon'able Delhi High Court* vide order dated 21/07/16 in *ITA No. 379/2016*, also upheld by *Hon'ble Supreme Court* vide order dated 21/07/17, in *CC No. 4956/2017*.

It has been submitted by Ld.AR that outstanding receivables are closely linked to main transaction and so the same cannot be considered as separate international transaction. He also submitted that into company agreements provides for extending credit period with mutual consent and it does not provide any interest clause in case of delay. He also argued that the working capital adjustment takes into account the factors related to delayed receivables and no separate adjustment is required in such circumstances.

On the contrary Ld.CIT.DR submitted that interest on receivables is an international transaction and Ld.TPO rightly determined its ALP. In support of her contentions, she placed reliance on decision of *Hon'ble Delhi Tribunal* order in [Ameriprise India Pvt. Ltd. vs. ACIT](#) in 2015- TII-347-ITAT-DEL-TP, wherein it is held that, interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that [Finance Act](#), 2012 inserted Explanation to [Section 92B](#), with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this Explanation provides that:

*(i) the expression "international transaction" shall include--
..... (c) 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;....'.*

Ld.CIT DR submitted that expression 'debt arising during the course of business' refers to trading debt arising from sale of goods or services rendered in course of carrying on business. Once any debt arising during course of business is an international transaction, he submitted that any delay in realization of same needs to be considered within transfer pricing adjustment, on account of interest income short charged or uncharged. It was argued that insertion of Explanation with retrospective effect covers assessment year under consideration and hence under/non- payment of interest by AEs on debt arising during course of business becomes international transactions, calling for computing its ALP. He referred to decision of *Delhi Tribunal in Ameriprise (supra)*, in which this issue has been discussed at length and eventually interest on

trade receivables has been held to be an international transaction. Referring to discussion in said order, it was stated that *Hon'ble Delhi Bench* in this case noted a decision of the *Hon'ble Bombay High Court* in the case of [CIT vs. Patni Computer Systems Ltd.](#), (2013) 215 Taxmann 108 (Bom.), dealt with question of law:

(c) 'Whether on the facts and circumstances of the case and in law, the Tribunal did not err in holding that the loss suffered by the assessee by allowing excess period of credit to the associated enterprises without charging an interest during such credit period would not amount to international transaction whereas [section 92B\(1\)](#) of the Income-tax Act, 1961 refers to any other transaction having a bearing on the profits, income, losses or assets of such enterprises?'

The Ld.AR submitted that, while answering above question, *Hon'ble Bombay High Court* referred to amendment to [section 92B](#) by [Finance Act](#), 2012 with retrospective effect from 1.4.2002. Setting aside view taken by *Tribunal*, *Hon'ble Bombay High Court* restored the issue to file of *Tribunal* for fresh decision in light of legislative amendment. It was thus argued that non/under-charging of interest on excess period of credit allowed to AEs for realization of invoices, amounts to an international transaction and ALP of such international transaction has to be determined by Ld.TPO. In so far as charging of rate of interest is concerned, he relied on decision of the *Hon'ble Delhi High Court* in [CIT vs. Cotton Naturals \(I\) Pvt. Ltd](#) (2015) 276 CTR 445 (Del) holding that currency in which such amount is to be re-paid, determines rate of interest. He, therefore, concluded by summing up that interest on outstanding trade receivables is an international transaction and its ALP has been correctly determined.

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

This Bench referred to decision of *Special Bench* of *Kolkotta Tribunal* in case of *Instrumentation Corpn. Ltd. v. Asstt. DIT in ITA No. 1548 and 1549 (Kol.) of 2009, dated 15-7-2016*, held that outstanding sum of invoices is akin to loan advanced by assessee to foreign AE., hence it is an international transaction as per explanation to section 92 B of the Act. We also perused decision relied upon by Ld.AR. In our considered opinion, these are factually distinguishable and thus, we reject argument advanced by Ld.AR.

Alternatively, it has been argued that working capital adjustment subsumes sundry creditors. In such situation computing interest on outstanding receivables and loan and advances to international transaction would amount to double taxation. *Hon'ble Delhi Tribunal* in case of *Orange Business Services India Solutions Pvt. Ltd. vs. DCIT in ITA No. 6570/Del/2016 vide its order dated 15.2.2018* has observed that:

*"There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which would have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee would have to be studied. It went on to hold that, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that vis-à-vis the receivables for the supplies made to an AE, the arrangement reflected an international transaction intended to benefit the AE in some way. Similar matter once again came up for consideration before the Hon'ble Delhi High Court in Avenue Asia Advisors Pvt. Ltd. vs. DCIT (2017) 398 ITR 120 (Del). Following the earlier decision in *Kusum Healthcare* (supra), it was observed that there are several factors which need to be considered before holding that every receivable is an international transaction and it requires an assessment on the working capital of the assessee. Applying the decision in *Kusum Health Care* (supra), the Hon'ble High Court directed the TPO to study the impact of the receivables appearing*

in the accounts of the assessee; looking into the various factors as to the reasons why the same are shown as receivables and also as to whether the said transactions can be characterized as international transactions."

In view of the above, we deem it appropriate to set aside the impugned order on this issue and remit the matter to the file of the Ld.AO/TPO for deciding it in conformity with the above referred judgment. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such fresh proceedings.

Accordingly these ground raised by assessee stands allowed for statistical purposes.

Ground No. 7 raised as additional ground vide application dated 11.09.2020.

Assessee is seeking deduction of the Education Cess and Secondary & Higher Education Cess ("Cess") paid during the assessment year 2014-15.

We note that above admission of additional ground is necessary for computing the correct income in the hands of assessee. It is also noted that no new facts are required to be looked into for adjudicating the same. These grounds are purely legal in nature. Therefore respectfully the decision of *Hon'ble Supreme Court* in case of *National Thermal Power Co. Ltd. Vs. CIT* reported in 229 ITR 383 and *Jute Corporation of India* reported in 187 ITR 688, we admit the above ground.

Accordingly the application dated 11/09/2020 stands allowed.

Education Cess:

This issue urged by the assessee related to claim for deduction of Education Cess including secondary & higher education Cess on income tax as deduction while computing the total income.

We notice that identical issue has been dealt with by *Coordinate Bench* of this *Tribunal* in case of *M/s. Infinera India Pvt. Ltd.* in IT(TP)A No. 2589/Bang/2019 by order dated 23.02.2022 as under:

“10.1 We notice that the Kolkata Bench of Tribunal in the case of Kanoria Chemicals & Industries Ltd Vs. Addl. CIT (ITA No.2184/Ko1/2018 dated 26.10.2021) has held that the education cess is an additional surcharge levied on income tax and hence it partakes the character of income tax. Accordingly it held that the education cess is not allowable as deduction. The Tribunal also noted the decision rendered by Hon'ble Bombay High Court in the case of Sesagoa Ltd. 117 Taxmann.com 96 and by Hon'ble Rajasthan High Court in the case of Chambal Fertilisers & Chemicals Ltd. Vs. JCIT (ITA No.52/2018 dated 31.7.2018), wherein it was held that the education cess is allowable as deduction. However, the Tribunal observed that the decision rendered by Hon'ble Supreme Court in the case of CIT Vs. K. Srinivasan (1972) 83 ITR 346 was not brought to the notice of the above said Hon'ble High Courts. Accordingly, the Tribunal has expressed the view that the decision rendered by Hon'ble Supreme Court in the case of K. Srinivasan (supra) shall prevail on this issue and accordingly held that the education cess is not allowable as deduction.

10.2 Following the above said decision of Kolkata bench of Tribunal in the case of Kanoria Chemicals & Industries Ltd (supra), we hold that payment of education cess including secondary and higher education cess is not allowable as deduction. Accordingly, we reject this ground of the assessee.”

Accordingly, this ground raised by assessee stands dismissed.

All the grounds relating to the transfer pricing adjustment that has not been pressed at this stage are left open with the liberty to urge in any future proceedings.

In the result, appeal of the assessee stands partly allowed.

Order pronounced in the open court on 28th February, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 28th February, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore