

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

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT
AND MS. PADMAVATHY S, ACCOUNTANT MEMBER**

Appeal Nos. and Assessment Year	Appellant	Respondent
ITA No.365/Bang/2019 2014-15	M/s. Texas Instruments (India) Private Limited, Bagmane Tech Park, No.66/3, Adjacent to LRDE, Byrasandra, C V Raman Nagar, Bangalore – 560 093. PAN: AA ACT 5445 M	ACIT (LTU), Bengaluru.
ITA No.1075/Bang/2019 2012-13	-do-	JCIT (LTU), Bengaluru.
ITA No.1076/Bang/2019 2013-14	-do-	-do-
IT(TP)A No. 1967/Bang/2018 2010-11	JCIT (LTU), Bengaluru.	M/s. Texas Instruments (India) Private Limited, Bangalore – 560 093. PAN: AA ACT 5445 M
IT(TP)A No. 1446/Bang/2019 2012-13	-do-	-do-
IT(TP)A No. 1447/Bang/2019 2013-14	-do-	-do-
IT(TP)A No. 606/Bang/2019 2014-15	ACIT (LTU), Bengaluru.	-do-

Assessee by	:	Shri. Sharath Rao, CA
Revenue by	:	Mrs. Susan D. George, CIT (DR) (ITAT), Bengaluru.

Date of hearing	:	04.05.2022
Date of Pronouncement	:	17.05.2022

ORDER

Per Bench

These group of seven appeals for different Assessment Years by the assessee and the Revenue were heard together and deemed it convenient to pass consolidated order.

2. ITA No.1967/Bang/2019 - Appeal by the Revenue for Assessment Year 2010-11:

This appeal by the Revenue is directed against the order of CIT(A)-2, Bengaluru, dated 29.03.2018, relating to Assessment Year 2010-11. There is a delay of 26 days in filing this appeal on the part of the Revenue. The appeal ought to have been filed on or before 08.06.2018, but was filed on 04.07.2018 resulting in a delay of 26 days in filing the appeal. The same has been explained as owing to administrative reasons. The delay not being inordinate, the same is condoned.

3. The grounds of appeal raised by the Revenue reads as follows:

1. *The order of the Ld.CIT(Appeals) in so far as it pertains to the following grounds of appeal is opposed to law and facts of the case.*
2. *The Ld. CIT(A) erred in holding that data automation expenses are revenue in nature.*
3. *The Ld. CIT(A) erred in holding that Information Technology Support service expenses are revenue in nature.*

Grounds of Appeal in respect of TP issue

4. *Whether the Hon'ble CIT(A) was right in fact and law in removing 3 companies in MSS Segment M/s Asian Business Exhibition & Conference Ltd, M/s HCCA Business Services Pvt Ltd and M/s Killick Agencies & Mktg Ltd as comparable on functional dissimilarity?*

5. *Whether the CIT(A) is right in not appreciating in fact that transfer pricing is not an exact science and no two entities can be exact replicas?*

6. *Whether the Hon'ble CIT(A) is right in trying to find out exact replica of the assessee for determining the Arm's Length price based on such replica, even when the law and the international jurisprudence itself recognize that there cannot be an exact comparable to a given situation, especially with TNMM as the most appropriate method?*

7. *Whether the Hon'ble CIT(A) was right in law in demanding comparability standards that may itself defeat the purpose of law relating to determination of ALP under the income tax Act.*

8. *Whether the order of CIT(A) in imposing conditions is beyond the scope of law and business reality by rejecting all close comparables on one or the other ground, without appreciating that not two companies can ever be same?*

9. *The appellant craves leave to add, alter, amend and delete any of the grounds on or before the hearing of the appeal.*

4. As far as ground No.2 raised by the Revenue is concerned, the facts are that the assessee is in the business of design, manufacture and export of computer software. The assessee while computing its business income, claimed deduction of a sum of Rs.1,62,24,40,373/- under the head "Data Automation Software Expenses" (EDA). The AO noticed that identical claim was made by the assessee in the Assessment Year 2008-09 and 2009-

10 and in those Assessment Years similar expenditure was treated as capital expenditure and depreciation at 60% was allowed. Following the reasoning given in the aforesaid orders, the AO treated the EDA as capital expenditure and allowed 60% depreciation. Consequently, a sum of Rs.97,34,64,223/- was disallowed by the AO. The assessee pointed out computational errors and the AO accepted the same and the ultimate disallowance on account of EDA expense was a sum of Rs.15,58,13,566/-.

5. The assessee filed appeal against the order of the AO. Before the CIT(A), the assessee pointed out EDA is a category of software tools for designing the electronic systems such as printed circuit boards and integrated circuits. The EDA is provided by the ground entity outside India (TI Inc.) and the cost for providing such services are allocated on the basis of actual usage. The tools work together in a design flow that the chip designer uses to design and analyse the entire semiconductor chip. The manner in which TI Inc allocates the cost to the assessee is based on the number of seconds TI India personnel are logged onto any of the EDA software packages provided by TI Inc. to the Assessee. Following the end of each yearly accounting period, TI will make a final determination of costs actually incurred and will adjust the amount charged to the Assessee in the prior period by issuing a final invoice or a credit. Any cost incurred by TI not covered by per second of use if any will be allocated to the Assessee on a mutually agreed basis. Given that the payment is towards per second usage of software, the same cannot be said to be capital in nature. Further, the expenditure incurred by the Assessee did not result in bringing into existence any new asset or an advantage or benefit of an enduring nature to TI India. In this regard, reliance was placed on the Honourable Supreme

Court in the case of Empire Jute Co Ltd Vs CIT (124 ITR 1). The assessee had also cited several case laws to substantiate that the software expenditure has been held to be in the nature of revenue expenditure.

6. Furthermore, in the earlier two years i.e., AY 2008-09 and AY 2009-10, the CIT(A) has held EDA expenses as being revenue in nature. Therefore, the issue is squarely covered in favour of the Appellant.

7. The CIT(A) deleted addition made by the AO observing as follows:

“Having considered the submissions, I am inclined to agree with the submissions of the Appellant in this regard. As per the agreed facts brought on record, the EDA is a category of software tools for designing the electronic systems such as printed circuit boards and integrated circuits. The tools work together in a design flow that the chip designer uses to design and analyse the entire semiconductor chip. And as per the Group Cost Allocation Agreement dated 24.03.2006 with the parent company (TI Inc), the manner in which TI Inc allocates the cost to the Appellant is based on the number of seconds TI India personnel are logged onto any of the EDA software packages provided by TI Inc to TI India. The facts of the case, together with the manner in which the cost is allocated clearly establishes that the TI Inc is the owner of the EDA tools and has given access to the personnel of the subsidiary companies by charging them based on the actual usage. There is no acquisition of any asset, thus, the cost can be described as revenue expenditure.

It is also pertinent to mention here that in the immediate preceding two years, the CIT(A) has agreed with the submissions of the Appellant that the said expenditure is revenue in nature. As the facts and circumstances of the current year being identical to that of the preceding years adjudicated by my predecessor, I do not find any reason to deviate from the findings. Accordingly, I allow this ground of the Appellant by treating the expenditure of Rs 1,622,440,373 incurred towards Data Automation Software ("EDA") as revenue.”

8. Aggrieved by the order of the CIT(A), Revenue has raised ground No.2 before the Tribunal.

9. Learned DR pointed out that the agreement for rendering EDA services was used for manufacturing certain semiconductor components and products and the EDA expenditure in question helps the assessee to bring into existence the capital asset and therefore the expenditure ought to have been treated as a capital expenditure. It was submitted that the expenditure was part of the profit making operative and therefore ought to be considered as capital expenditure. Learned Counsel for the assessee pointed out that identical expenditure was allowed in assessee's own case by the Tribunal in Assessment Year 2008-09 in IT(TP)A No.149/Bang/2014, order dated 06.03.2020. The Tribunal in the aforesaid order held as follows:

“28. Gr.No.3 raised by the revenue is with regard to the grievance of the revenue in treating amount paid towards automation software as revenue expenditure. The facts with regard to this ground of appeal are that the Assessee claimed deduction of a sum of Rs.135,52,51,594/- while computing income from business under the head “Data Automation software Expenses”. The AO called upon the Assessee to explain the nature of the aforesaid expenditure. The Assessee vide its letter dated 28.7.2011 explained to the AO that the software in question were “Electronic Design Automation”(EDA) which are used by the Assessee’s designers for product design and verification. The Assessee pointed out that EDA software license is acquired by the Texas Instruments Inc. USA under a global agreement from vendors of such software like Synopsis, Cadence, Mathwork, Magma, Rational etc., and the Assessee is allowed to use such software and billed on the basis of actual hours the Assessee uses the software. The Assessee therefore submitted that the expenditure was a payment for license to use software and the Assessee never acquired any right or interest in the software and therefore the payment made for right to use such software was purely revenue expenditure and should be allowed as deduction. The AO

however did not allow the claim of the Assessee by concluding that the expenditure was capital expenditure and therefore only depreciation at 60% would be allowed and not the entire expenditure. The following were the relevant observations of the AO:-

“5.3 The assessee's submission is carefully considered. The Data Automation Software is a computer software which is being used by the assessee for designing its products. Electronic design automation (EDA) is a category of software tools for designing electronic systems such as printed circuit boards and integrated circuits. The tools work together in a design flow that chip designers use to design and analyze entire semiconductor chips. The expenditure on computer software under the head. "Data Automation Software expenses" is necessarily an expenditure which is required to be capitalized by the assessee. Assessee's relies on the Hon'ble Supreme court decision in the case of Empire Jute Co Ltd Vs CIT [124 ITR 1] is misplaced since the decision was given by the Hon'ble Court in a different set of facts and circumstances. The assessee has not stated or clarified in its submission dated 28.07.2011 as to how it has applied the judgment in the case of Empire Jute Co Ltd in its case.

5.4 The computer software expenses have been held to be capital in nature by the Hon'ble Rajasthan High Court in the case of CIT Vs Arawali Construction Co. (P) Ltd. (259 ITR 30). The Hon'ble Court held as under:

"The fact on record is that the payment of Rs 1,38,360/- was not made as consultancy fee to Hindustan Computers Ltd_ in fact, the payment was made for outright sale of 'computer software' which is used as technique in mining operations. The finding of the Commissioner (Appeals) was that the acquisition of software cannot be treated to be an asset of endurable nature. If the programme is used in one mining to another mining operation, why it should not be treated as capital asset and expenditure on that, capital expenditure. Considering these facts and decision of their Lordships and later decision of the Bombay High Court, in our view, the acquisition of technical know-how is a capital expenditure, therefore, the assessing officer has rightly treated the expenditure on acquiring the computer software as

expenditure of capital nature and rightly allowed depreciation as per rules."

5.5 Reliance is also placed on the decision in the case of Amway India Enterprises Vs. DCIT (ITAT, Del-Special Bench) [111 ITD 112]. In this case the Hon'ble ITAT held that computer software was tangible asset eligible for depreciation @ 60%.

In the result, the Automation software expenses of Rs. 135,52,51,594/- are held to be capital in nature. The amount as claimed in P 86 L a/c is disallowed and added back. Instead, the assessee is allowed depreciation on the amount @ 60%. [Addition Rs. 54,21,00,637/-]” 29. On appeal by the Assessee, the CIT(A) deleted the addition made by the AO holding that the Assessee acquired on purchase by the Assessee and as per the Agreement with the owner of the software the Assessee had only a right to use the software and that the software was an enabling tool in the business of the Assessee and therefore the expenditure question was revenue expenditure. Aggrieved by the order of the CIT(A), the revenue is in appeal before the Tribunal.

30. We have heard the rival submissions. A copy of the group cost allocation Agreement dated 24.3.2006 is at page -406 of Assessee's paper book. The agreement is between Texas Instruments Inc., USA and the Assessee. The Agreement refers to the US parent company of the Assessee having acquired license to use EDA tools from the vendors and the right of the Assessee to use the same and the fact that billing will be done on the Assessee on the basis of actual use of the software by the Assessee. It is thus clear that the Assessee had acquired no right or interest whatsoever in the EDA tools and had only a right to use the software. It is not the case of the revenue that the EDA tools was not connected to the business of the Assessee. In such circumstances, we are of the view that the deduction was rightly allowed by the CIT(A) as revenue expenditure. We find no grounds to interfere with the order of the CIT(A) and dismiss Gr.No.2 raised by the revenue.”

10. He also pointed out the clause of the agreement and highlighted the fact that what was paid by the assessee was of the expenses incurred by TI

Incorporated, USA, for use of computer software which it allowed its group companies to use. He pointed out that US parent company charged the assessee on the basis of the actual use of software. He therefore submitted that the expenditure was nothing but the right to use the computer software on the basis of actual usage which did not give any benefit of enduring nature to the assessee nor did it result in any asset coming into existence.

11. We have carefully considered the rival submissions and are of the view that the nature of expenses is identical to the expenses that was considered by the Tribunal in Assessment Year 2008-09. The Tribunal, after analyzing the terms of the agreement, has come to the conclusion that assessee acquired no right or interest of whatsoever in the EDA tools and had only the right to use software. The use of the software was no doubt connected to the business but did not result in any asset coming into existence. The Tribunal held that the expenditure was revenue in nature. We are of the view that in the light of the similarity of facts with regard to these expenses, the decision by the Tribunal for Assessment Year 2008-09 will equally apply to Assessment Year 2010-11 also. Following the aforesaid decision of the Tribunal, we uphold the order of the CIT(A) and dismiss ground No.2 raised by the Revenue.

12. As far as ground No.3 raised by the Revenue is concerned, the facts are almost identical to the EDA expenses. As far as the ground No.3 is concerned, it relates to expenses incurred by the assessee towards information technology support services. The agreement by which the assessee received information technology support services is dated 01.01.2006 and the information technology services were provided by Texas

Instruments, USA. The agreement clearly mentions that the assessee desires to avail information technology services from the parent company to better carry on its operations of the business. The nature of services for the following services to be performed by the parent company

1.0 Services to Be Performed By TI

1.1 Purchaser employs TI to provide it with services as to certain phases of its information technology needs, including but not limited to:

- Maintenance and on-going support services for various information systems including but not limited to SAP, Oracle, Peoplesoft, UNIX, etc.
- System malfunction and software repair.
 - Manage and coordinate with worldwide third party vendors such as SAP, Oracle, Peoplesoft, Unix, Network Appliance etc for required support for various information systems

13. The mode of payment is on the basis of allocation which is as follows:

2.0 Allocation of Expenses. Invoicing. and Payments

2.1 *The IT costs incurred by TI and subject to allocation and reimbursement by Purchaser shall be calculated on a calendar year basis and reflect the actual costs and expenses incurred by TI in providing and coordinating such services and support. Only those costs and expenses which are wholly exclusively or otherwise attributable to the provision and coordination of the IT services and support provided shall be included in the total costs subject to allocation. Global IT costs will be pooled by TI and allocated to the purchaser and all other TI subsidiaries and affiliates on a consistent allocation method or methods based on usage as defined in 2.2 below. Accordingly, local IT costs incurred by the Purchaser will be included in the total IT cost pool subject to allocation and will be charged by the Purchaser to TI or credited to the Purchaser as provided in 2.4.*

2.2 *IT costs will be allocated to Purchaser on the basis of a fixed activity based per person charge. Any cost incurred by TI not covered by the per person charge will be allocated to Purchaser on a mutually agreed basis. TI will periodically notify Purchaser of the amounts of the per person charge used to determine the allocable charge.*

14. The AO took the view that the expenditure was capital in nature and the assessee has purchased software licences and software from the parent company which is factually incorrect. The AO however allowed depreciation at 60%.

15. On appeal by the assessee, the CIT(A) held that the expenditure was Revenue in nature, as follows:

“Having considered the submissions, it is evidently clear that the Appellant being charged for the licenses used by its employees from the software licenses purchased and owned by the parent company, i.e., TI Inc. The License Cost Allocation Agreement makes it amply clear. The AO, on the other hand, has relied only on the invoices on stand-alone basis. The cost allocation method provided in the License Cost Allocation Agreement makes it clear that the Appellant is only utilizing the softwares owned by the parent and there is no separate and exclusive purchase of any software from the parent company. The ownership rights in respect of these software vests with the parent company, i.e, TI Inc.

Considering the above, and also considering the other supporting facts brought on record by the Appellant, I am of the view that the ITSS cost is to be treated as revenue expense. Accordingly, the addition made by the AO in this regard by treating the said expenditure as capital, is deleted. In the result, these grounds of appeal are allowed.”

16. At the time of hearing, learned Counsel for the assessee brought to our notice that in Assessment Year 2011-12, on identical expenditure in assessee’s own case, the Tribunal in ITA Nos.275, 525/Bang/2019, order dated 11.03.2022, upheld similar order of the CIT(A) deleting the addition

made by the AO. The relevant observations of the Tribunal in this regard are contained in paragraph 6.3. It is not disputed before us that the facts and circumstances of the case are identical. In these circumstances, following order of the Tribunal in Assessment Year 2011-12, we uphold the order of the CIT(A) and dismiss ground No.3 raised by the Revenue.

17. Ground Nos.4 to 6 raised by the Revenue are with regard to depreciation of Arm's Length Price (ALP) in respect of international transaction of providing marketing support services by the assessee to its AE. The assessee provided marketing support services to its AE. There is no doubt that the transaction of providing MSS is an international transaction and the arm's length remuneration received by the assessee for providing such services satisfy the test of ALP as envisaged under section 92 of the Act. Both the assessee and TPO adopted Transaction Net Margin Method (TNMM) as the most appropriate method for determining ALP. The profit level indicator (PLI) chosen for the purpose of comparing assessee's margin with that of the comparable companies was on OP/OC. The assessee's OP/OC was 5% on cost. The assessee chose 19 comparable companies whose average profit margin was 6.81%. The assessee claimed that the price received was within the (+) (-) 5% range of comparable companies and therefore the remuneration received for MSS was at arm's length. The TPO rejected the TP study and he chose final set of 7 comparable companies whose average profit margin was 24.80%. The TPO ultimately computed the ALP as follows:

“Computation of Arm's Length Price:

*The arithmetic mean of the Profit Level indicators is taken as the Arm's length margin.
Based on this, the Arm's length price of the Marketing support services rendered by you is
computed adopting the ALP as under:*

Arm's length mean margin	24.80%
<i>Operating Cost</i>	<i>Rs. 37,24,46,533</i>
<i>Arm's Length Margin of the Operating Cost</i>	<i>24.80%</i>
<i>A rm 's Length Price (ALP) 124.80% of operating cost</i>	<i>Rs. 46,48,13,184</i>
<i>Price received</i>	<i>Rs. 39,10,68,860</i>
Shortfall being adjustment u/s 92CA	Rs. 7,37,44,413

Thus a sum of Rs.7,37,44,413 was added to the total income of the Assessee on account of determination of ALP.

18. Aggrieved by the order of the TPO which was incorporated in the draft Order of Assessment and the final Order of Assessment, assessee preferred appeal before the CIT(A). The CIT(A) accepted submission of the assessee and excluded 4 comparable companies out of the 7 comparable companies chosen by the TPO. The Revenue is aggrieved by the order of the CIT(A) for excluding 3 out of the 4 comparable companies excluded by the CIT(A). In ground No.4, the names of the 3 comparable companies excluded by the CIT(A) which is challenged in this appeal have been set out.

19. The submissions of the learned DR before us was that in the TP study of the assessee at page 159, the assessee has set out the broad comparability criteria that have been adopted by it in selecting comparable companies which is as follows:

These companies are regarded as comparable to TI India having regard to the following counts:

- *Companies engaged in the business of arranging tours and travel earn their revenue by acting as a conduit between the buyer and seller,*
- *Companies engaged in market research, event management promotional activities, facility maintenance and administration support render low-end routine services and do not have any decision making powers,*
- *Similar to TI India, these companies do not hold any inventory,*
- *Such companies have a similar asset profile as they do not own machinery or transportation equipment,*
- *Companies identified can be classified as operating in broadly the same level in a value chain, though in a different industry, and*
- *They do not own any non-routine intangibles.*

Thus, there is a broad similarity in terms of functions performed, assets employed and risk assumed.

20. According to the learned DR, the 3 companies set out in the ground No.4 satisfies the criteria laid down by the assessee in its TP study. Learned Counsel for the assessee however pointed out that on identical facts, the Bengaluru Benches have excluded the 3 companies from the list of comparable companies, in cases involving companies providing MSS.

21. We have carefully considered the rival submissions. In the case DCIT Vs. Electronics for Imaging Pvt. Ltd., (2016) 70 taxmann.com 299, this Tribunal has excluded the aforesaid 3 companies from the list of companies in the case of an assessee providing MSS similar to the one provided by the assessee in this appeal in relation to AY 2010-11. In paragraphs 50 to 54 of the aforesaid decision, the Tribunal held that Asean Business Exhibition and Conferences Ltd., was engaged in event management services and earns revenue from sale of advertisements and

event management and therefore cannot be regarded as company functionally comparable with a company rendering MSS such as the assessee. In paras 41 to 43, the Tribunal held that HCCA Business Services Pvt. Ltd., cannot be regarded as a comparable company because it was engaged in the business of rendering pay roll processing services. Vide paras 41 to 42 of the said decision, Killick Agencies and Marketing Ltd., was held to be not comparable because it was acting as agent for various foreign principles for sale of equipment, dredgers, dredging equipment, steerable rudder propellers, maritime and aviation lighting, acoustic communication equipment etc. The Tribunal also held that this company does not satisfy the 75% export revenue filter. This company was also rendering export of micro switches, engineering items, acoustic items and head sets and no segmental details of revenue are available. In our view, the ratio laid down in the aforesaid decisions will be squarely applicable to the present case also. The 3 companies were rightly regarded as functionally not comparable by the CIT(A). We find no grounds to interfere in the order of the CIT(A) and accordingly dismiss ground Nos.4 to 6 raised by the Revenue.

22. In the result, appeal of the revenue is dismissed.

23. IT(TP)A No.1446/Bang/2019 and ITA No.1075/Bang/2019 :

ITA No.1075/Bang/2019 is an appeal by the assessee while IT(TP) A No.1446/Bang/2019 is an appeal by the Revenue. Both these appeals are directed against the order dated 15.3.2019 of CIT(A)-Bengaluru-2, relating to AY 2012-13. First we shall take up for consideration the Revenue's appeal:

24. There is a nominal delay of 31 days in filing this appeal which has been explained as owing to the regular incumbent going on leave for a month at the relevant point of time resulting in the delay in finalizing the grounds of appeal. The delay is condoned accepting the reasons given for the delay.

25. The grounds of appeal raised by the Revenue reads as follows:

TP adjustment on SWD segment:

- a) *The Ld. CIT(A) has erred in law in directing that the operating margin decided in the Bilateral APA with USA for the US AE which was decided by the APA authorities after examining the FAR of the US AE, be applied to the Malaysian AE without verifying and analysing the FAR of the Malaysian AE.*
- b) *The order of the CIT(A) is erroneous, since as per the provision of section 92CC(5)(a), BAPA is binding on the person in whose case, and in respect of the transaction in relation to which, the agreement has been entered into and none other.*

TP adjustment on MSS segment:

- a) *The Ld. CIT(A) has erred in fact and law in removing M/s Killick Agencies 86 Marketing Ltd and M/s Just Dial as comparable on grounds of functional dissimilarity.*
- b) *The Ld. CIT(A) has erred in not appreciating the fact that transfer pricing is not an exact science and no two entities can be exact replicas.*
- c) *The Ld. CIT(A) has erred in trying to find out exact replica of the assessee for determining the Arm's length price based on such replica, even when the law and the international jurisprudence itself recognize that there cannot be an exact comparable to a given situation, especially with TNMM as the most appropriate method.*
- d) *The Ld. CIT(A) has erred in law in demanding comparability standards that may itself defeat the purpose of law relating to determination of ALP under the Income Tax Act.*
- e) *The Ld. CIT(A) has erred in imposing conditions is beyond the scope of law and business reality by rejecting such a close*

comparable, without appreciating that not two companies can ever be same.

26. In so far as ground (a) & (b) with regard to Transfer Pricing Adjustment in the Software Development Services segment (SWD Segment) is concerned, the facts are that the assessee rendered SWD services to its AE Texas Instrument Inc. (TI US) and Natsem Malaysia. The volume of international transaction with the aforesaid two AE was as follows:

Sl. No.	Name of the AE	Value of the transaction in INR	Value of the transaction in % terms	Remarks
1	TI US	10,23,83,42,951	98.43%	Covered by BAPA, wherein the ALP has been determined at 17.50%
2	Natsem Malaysia	16,37,75,973	1.57%	
	Total	10,40,21,18,924	100.00%	

27. With regard to the international transaction with TI US, the assessee entered into a Bilateral Advance Price Agreement (BAPA) accepting profit margin of 17.50%. The assessee made a prayer before CIT(A) that the same percentage of profit margin as agreed in the BAPA should be applied to transaction with Natsem Malaysia also. In this regard the assessee highlighted before the CIT(A) the nature of services rendered by the assessee to both TI US and Natsem Malaysia was one and the same. The arguments in this regard are set out in the order of the CIT(A) at pages-36 to 43 of his order. The CIT(A) agreed with the submissions and held that the rate agreed under BAPA in respect of international transaction with TI US should also be applied to the transaction with Natsem Malaysia for the following reasons:

“The submissions made by the Appellant have been carefully considered and it is noted that the TPO after re-characterizing certain portion of the software development activities as engineering design services, has determined the ALP for EDS and SWD at 25.58% and 19.71% [including the transactions with TI Inc, US]. It is also noted that the Appellant has got Bilateral APA concluded in respect of transaction.; with TI Inc, US, wherein the ALP has been determined at 17.50%. The transactions with Natsem Malaysia are not covered by the Bilateral APA and the Appellant's contention is that the transactions with Natsem Malaysia are to be treated at par with transactions of TI Inc, US. To this effect, the Appellant has furnished the submissions on 15 March 2019. The Appellant also highlighted that the transactions with TI Inc, US are 98.43% of the contract SWD/ EDS contract services transaction, whereas the transactions with Natsem Malaysia is only 1.57% of the contract services transaction which is very meager in comparison with the transactions of TI Inc US, the ALP of which has been determined in the APA. The Appellant further submitted that there is no distinction in the nature of services provided by TI India to Natsem Malaysia and the services provided to TI Inc, US. Accordingly, the Appellant requests that the ALP for transactions with Natsem Malaysia should be considered at par with the transactions with TI Inc, US. I have considered the following decisions as relied upon by the Appellant in support of its contention that as the transactions with Natsem Malaysia are similar to the transactions with TI Inc, US, the margin determined by the APA is to be applied to the similar transactions with Natsem Malaysia.”

28. The CIT(A) also excluded 4 comparable companies chosen by the TPO from the list of comparable companies viz., Infosys Ltd., Persistent Systems Ltd., Larsen & Toubro Infotech Ltd. And Genesys International Corporation Ltd. The revenue has not challenged the action of the CIT(A) in this regard and if such exclusion is accepted the price charged by the assessee in the SWD segment would be at Arm's length. Be that as it may. As far as the grounds raised by the Revenue before the Tribunal is

concerned, the grievance of the revenue as projected in the grounds of appeal before the Tribunal and the argument of the learned DR was that the Functions performed, Assets employed and risks assumed in the transactions between the assessee and TI Us and that with Natsem Malaysia were different. The other submission was that the BAPA is binding only on the parties to the agreement but on Natsem Malaysia which is not a party to the BAPA. The learned counsel for the assessee reiterated submissions made before CIT(A) and highlighted as to how the TPO did not distinguish the services rendered by TI US and Natsem Malaysia as different and adopted results of both the companies for the purpose of comparison.

29. We have carefully considered the rival submissions. Identical submissions on identical facts was considered by this Tribunal in the case of Dell International Services India Pvt. Ltd. Vs. JCIT (LTU) in IT (TP) A No.637 & 639/Bang/2016 for AY 2010-11 and the Tribunal in its order dated 3.8.2021 held as follows:

“40. As far as the additional ground is concerned, it is seen that subsequent to filing of the present appeal, the Assessee’s AE located in the United States of America (“US”) opted for the Mutual Agreement Procedure (“MAP”) proceedings pursuant to Article 25 of the India-US Double Taxation Avoidance Agreement (“DTAA”) with respect to the transfer pricing adjustment made to the ITES revenue earned by the Assessee from its AE located in the US. Thereafter, the Assessee has accepted the terms of the MAP resolution under Article 27 of the India-US DTAA on 13.07.2020 with respect to its ITES rendered to the AEs based in the US at a margin of 15.69%. Accordingly, the Assessee has withdrawn the grounds in the appeal insofar as it related to the ITES provided by the Assessee to its AE based in the US.

41. It is the plea of the assessee in the additional ground of appeal filed along with application dated 24.02.2021 for admitting additional ground that the profit margin of the assessee adopted in MAP ought to

be adopted as ALP mark-up for non-US based AE transactions also. It is submitted that the transactions entered by the Assessee with its US based AE is similar to the transactions entered into with the non-US based AEs and that no distinction has been made by the Assessee between the two in its TP study and while preparing its audited financial statements. It has further been submitted that no distinction has been made by the TPO also in the comparability analysis carried out by him. Therefore, the assessee prays that the Tribunal may adopt the same arm's length mark-up cost for the international transactions entered into with the Non-US AEs as well and, accordingly, dispose of the TP grounds with respect to the ITES revenue earned by the Assessee from its Non-US based AE transactions.

42. *The learned Counsel for the assessee in this regard placed reliance on the decisions of this Tribunal in the case of CGI Information System & Management Consultants (P.) Ltd v. DCIT ([2017] 81 taxmann.com 169 (Bangalore - Trib.)) and the Hon'ble Tribunal – Mumbai Bench in J.P Morgan Services (P.) Ltd. v. DCIT ([2016] 70 taxmann.com 228 (Mumbai - Trib.)) wherein, the same margin as the US transactions was directed to be applied for the Non-US transactions. The learned Counsel for the assessee also pointed out that the Commissioner of Income-tax (Appeals) in its own case for the Ays 2005-06, 2007-08 and 2008-09, adopted the arm's length price determined in the MAP resolution for the international transactions entered into with the Non-US AEs. The learned DR could not point out any infirmity in the submissions on the additional ground of appeal made by the learned Counsel for assessee.*

43. *We have considered the rival submissions and find merit in the same. As pointed out by the learned Counsel for assessee, the assessee or TPO have not made any distinction between US and Non-US AE transactions. In such circumstances, the margin accepted in MAP in respect of US AE transaction has to be regarded as Arm's Length mark-up cost for the Non-US AE transaction in the ITES segment. We hold and direct accordingly. In view of the above conclusion, the other grounds raised by the Revenue and assessee in their appeals on determination of ALP in the ITES segment become infructuous and calls for no adjudication and are dismissed.”*

30. We find that in the present case also neither the assessee or TPO have not made any distinction between US and Non-US AE transactions. In such circumstances, the margin accepted in MAP in respect of US AE transaction has to be regarded as Arm's Length mark-up cost for the Non-US AE transaction also. Respectfully following the aforesaid decision, we uphold the order of CIT(A) and find no merits in the grounds raised by the revenue in its appeal.

31. We shall now take up for consideration the Transfer Pricing adjustment in the MSS segment for AY 2012-13. As far as the provision of MSS by the assessee to its AE is concerned, the assessee filed a Transfer Pricing Study (TP Study) to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining ALP. The assessee selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for the purpose of comparison. The OP/OC of the assessee was arrived at 5.89%. The assessee chose companies who are engaged in providing similar services such as the assessee. The assessee identified companies whose average arithmetic mean of profit margin was comparable with the Operating margin of the assessee. The assessee therefore claimed that the price it charged in the international transaction should be considered as at Arm's Length.

32. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/TC. He also selected comparable companies from database. The TPO identified 5 companies as comparable

with the assessee company and worked out the average arithmetic mean of their profit margins at 12.06%.

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

14.6 The taxpayer's PLI is 5.89% whereas that of comparables is 12.06%. The adjustment in this segment is calculated as under:

<i>Arm's Length Mean Margin on cost</i>	<i>12.06%</i>
<i>Operating Cost</i>	<i>61,91,12,991</i>
<i>Arm's Length Price(ALP)</i>	<i>69,37,78,018</i>
<i>112.06% of Operating Cost)</i>	
<i>Price Received</i>	<i>65,55,89,900</i>
<i>Shortfall being adjustment u/s 92CA:</i>	<i>3,81,88,118</i>
<i>5% of price received</i>	<i>3,27,79,495</i>
<i>Since the shortfall is exceeding 5% of the International Transaction, adjustment is made</i>	

Thus a sum of Rs.3,27,79,495/- was added to the total income of the assessee on account of determination of ALP.

34. On appeal by the assessee, the CIT(A) excluded 2 companies, Just Dial Ltd., and Killick Agencies and Marketing Ltd. Aggrieved by the order of the DRP excluding the aforesaid 2 companies, the Revenue has raised grounds before the Tribunal. We have heard rival submissions. As far as exclusion of Killick Agencies and Marketing Ltd., is concerned, we have already upheld exclusion of this company on the ground of functional comparability. The functions performed in Assessment Year 2012-13 are also identical and therefore this company was to be rightly excluded from the list of comparable companies by the CIT(A). As far as exclusion of Just Dial Ltd., is concerned, it is clear that this company is engaged in local

search related services in India through multiple platforms. The nature of services rendered by this company is providing a list of available service providers and this cannot be equated to specific marketing support services which the assessee performs to its AE. Apart from that, in Assessment Year 2015-16, in assessee's own case, the TPO has himself excluded this company from the list of comparable companies. This company owns intangibles in the nature of goodwill, computer software, website and unique telephone numbers. Besides the above, the ITAT, Delhi Bench in the case of Nokia India Ltd., in ITA No.6502/Del/2017 in its order dated 26.12.2021 excluded this company on the ground that it is functionally not comparable to the company providing marketing support services. The Tribunal held that Just Dial Ltd., operates local search engine which assists general public in finding information pertaining to nearby areas. In the light of the above discussion, we are of the view that the order of the CIT(A) excluding Just Dial Ltd., was just and proper and calls for no interference. We also find that the Revenue in its ground of appeal has raised issues with regard to the comparability criteria to be adopted in TP cases and has contended that it is not possible to have exact comparable companies as was sought to be demanded by the CIT(A). In this regard, we may observe that under Rule 10B(1)(e)(iii) profit margin realized by an unrelated enterprise from a comparable uncontrolled transaction has to be compared with the profit margin realized by the assessee carrying out the international transaction. Rule 10B(2) gives the comparability criteria which essentially talks about functions performed, characteristic of the property at service, contractual terms, conditions prevalent in the market, etc. In our view, the Revenue has raised a general ground without pointing out as to how the comparability criteria as laid down in the Rules have been violated. With these

observations, we find no merits in the grounds raised by the Revenue in so far as it relates to TP adjustments in the MSS segment. The appeal of the Revenue is accordingly dismissed.

35. As far as the appeal of the assessee in ITA No.1075/Bang/2019 is concerned, the only ground raised by the assessee is with regard to disallowance of information technology support services. In Assessment Year 2010-11, the CIT(A) allowed the claim of the assessee and the Revenue was in appeal against the order of CIT(A). While deciding ground No.3 in ITA No.1964/Bang/2018 of the Revenue for Assessment Year 2010-11, we have already discussed the facts with regard to the aforesaid addition and as to how the order of the CIT(A) deleting the action of the AO in making disallowance of the aforesaid of the aforesaid expenses was not correct. Reasoning given while deciding the aforesaid in Assessment Year 2010-11 will equally apply to Assessment Year 2012-13 also. In Assessment Year 2012-13, both the AO and the Revenue authorities took the view that the expenditure in question was capital expenditure. For the reasons given while adjudicating ground No.3 of Revenue's appeal for Assessment Year 2010-11 in ITA No.1967/Bang/2018, we allow ground of the appeal of the assessee and hold that the expenditure in question is revenue expenditure.

36. In the result, appeal filed by the assessee for Assessment Year 2012-13 is allowed.

37. IT(TP)A No.1447/Bang/2019 and ITA No.1076/Bang/2019 :
IT(TP)A No.1447/Bang/2019 is an appeal by the Revenue while ITA No.1076/Bang/2019 is an appeal by the assessee. Both these appeals are

directed against the order dated 18.03.2019 of CIT(A), Bengaluru-2, Bengaluru, relating to Assessment Year 2013-14.

38. First, we shall take up appeal of the Revenue for consideration. There is a delay of 29 days in filing this appeal by the Revenue which is explained as owing to the regular incumbent going on leave and consequently delay in filing the appeal. We find the reasons assigned for delay in filing the appeal as proper and sufficient reason and hence the delay in filing the appeal is condoned.

39. The following are the grounds of appeal raised by the Revenue in this regard:

TP adjustment on SWD segment:

- a) *The Ld. CIT(A) has erred in law in directing that the operating margin decided in the Bilateral APA with USA for the US AE which was decided by the APA authorities after examining the FAR of the US AE, be applied to the Malaysian AE without verifying and analysing the FAR of the Malaysian AE.*
- b) *The order of the CIT(A) is erroneous, since as per the provision of section 92CC(5)(a), BAPA is binding on the person in whose case, and in respect of the transaction in relation to which, the agreement has been entered into and none other.*

TP adjustment on MSS segment:

- a) *The Ld. CIT(A) has erred in fact and law in removing M/s Asian Business Exhibition 86 Conference ltd and M/s Killick Agencies & Marketing Ltd in MSS segment on grounds of functional dissimilarity.*
- b) *The Ld. CIT(A) has erred in not appreciating the fact that transfer pricing is not an exact science and no two entities can be exact replicas.*
- c) *The Ld. CIT(A) has erred in trying to find out exact replica of the assessee for determining the Arm's length price based on such replica, even when the law and the international jurisprudence itself recognize that there cannot be an exact comparable to a*

given situation, especially with TNMM as the most appropriate method.

- d) The Ld. CIT(A) has erred in law in demanding comparability standards that may itself defeat the purpose of law relating to determination of ALP under the Income Tax Act.*
- e) The Ld. CIT(A) has erred in imposing conditions is beyond the scope of law and business reality by rejecting such a close comparable, without appreciating that not two companies can ever be same.*

40. As far as grounds raised by the Revenue with regard to TP adjustments on software development services (SWD) segment is concerned, the facts are identical to the facts on similar grounds in Assessment Year 2012-13. For the reasons stated in deciding the identical grounds in Assessment Year 2012-13, we find no merits in these grounds raised by the Revenue.

41. We shall now take up for consideration the Transfer Pricing adjustment in the MSS segment for AY 2013-14. As far as the provision of MSS by the assessee to its AE is concerned, the assessee filed a Transfer Pricing Study (TP Study) to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining ALP. The assessee selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for the purpose of comparison. The OP/OC of the assessee was arrived at 6%. The assessee chose companies who are engaged in providing similar services such as the assessee. The assessee identified companies whose average arithmetic mean of profit margin was comparable with the Operating margin of the assessee. The assessee therefore claimed

that the price it charged in the international transaction should be considered as at Arm's Length.

42. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/TC. He also selected comparable companies from database. The TPO identified 6 companies as comparable with the assessee company and worked out the average arithmetic mean of their profit margins at 12.06%.

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

23.2 The taxpayer's PLI is 6.00% whereas that of comparables is 9.73%. The adjustment in this segment is calculated as under:

<i>Arm's Length Mean Margin on cost</i>	<i>9.73%</i>
<i>Operating Cost</i>	<i>68,33,33,551</i>
<i>Arm's Length Price(ALP)</i>	<i>74,98,21,905</i>
<i>109.73%</i>	<i>of Operating Cost)</i>
<i>Price Received</i>	<i>72,43,33,562</i>
<i>Shortfall being adjustment u/s 92CA:</i>	<i>2,54,88,343</i>
<i>3% of price received</i>	<i>2,17,30,006</i>
<i>Since the shortfall is exceeding 5% of the International Transaction, adjustment is made</i>	

Thus a sum of Rs.2,17,30,006/- was added to the total income of the assessee on account of determination of ALP.

44. On appeal by the assessee, the CIT(A) excluded Asian Business Exhibition and Conferences Ltd., and Killick Agencies and Marketing Ltd., as functionally not comparables. The Revenue is aggrieved by the order of the CIT(A) and has therefore filed appeal before the Tribunal. The

functional profile of both the aforesaid 2 comparable companies excluded by the CIT(A) is identical in Assessment Year 2013-14 also. The reason given for exclusion of these companies in Assessment Year 2012-13 will therefore equally apply to Assessment Year 2013-14 also for the reasons given in Assessment Year 2012-13 and 2008-09 for excluding these 2 companies from the list of comparable companies. We uphold the order of the CIT(A) and find no merits in the grounds raised by the Revenue.

45. In the result, appeal by the Revenue is dismissed.

46. **ITA No.1076/Bang/2019** : This is an appeal by the assessee for Assessment Year 2013-14. The first issue raised by the assessee in its appeal is with regard to disallowance of information technology support services. The ground raised by the assessee is with regard to disallowance of information technology support services. In Assessment Year 2010-11, the CIT(A) allowed the claim of the assessee and the Revenue was in appeal against the order of CIT(A). While deciding ground No.3 in ITA No.1964/Bang/2018 of the Revenue for Assessment Year 2010-11, we have already discussed the facts with regard to the aforesaid addition and as to how the order of the CIT(A) deleting the action of the AO in making disallowance of the aforesaid of the aforesaid expenses was not correct. Reasoning given while deciding the aforesaid in Assessment Year 2010-11 will equally apply to Assessment Year 2012-13 also. In Assessment Year 2012-13, both the AO and the Revenue authorities took the view that the expenditure in question was capital expenditure. For the reasons given while adjudicating ground No.3 of Revenue's appeal for Assessment Year

2010-11 in ITA No.1967/Bang/2018, we allow ground of the appeal of the assessee.

47. The next ground of appeal raised by the assessee is with regard to the disallowance of a sum of Rs.71,28,124/- by the Revenue authorities. The facts with regard to this addition are that the assessee claimed an expenditure of Rs. 71,28,124 towards loans and advances written off in the profit and loss account. The assessee was asked to furnish the details of expenditure and the substantiation for the claim. The assessee submitted that the advances written off represents the under recovery of insurance claim on damaged shipments. The same was reflected as loans and advances in the earlier year; and on settlement of the insurance claim, the under recovery has been written off. The assessee made further submission stating that, the same is revenue in nature and not capital. According to the assessee, the item of loss is incidental to the business of the assessee and it is allowable deduction u/s 37 of the Act. The assessee further stated that it can assume the nature of trading loss and should be allowed as deduction while computing the income from business and profession. The assessee has also quoted some of the judicial pronouncements in support of its claim that the said loss is not capital in nature.

48. The AO however did not accept the plea of the Assessee. He found that the Assessee received one EMC storage Primary Hardware in damaged condition on 21/06/2011. The assessee lodged the insurance claim towards the damaged equipment with M/s New India Assurance Co Ltd. The assessee considered the insurance receivable as loans and Advances in its Balance sheet. Subsequently, the insurance claim of the

assessee was settled for a lesser value resulting in under recovery of Rs. 71,28,124. The assessee wrote off this amount reflected under loans and advances and charged to profit and loss account. The assessee claimed the same as revenue expenditure for Income Tax purposes. According to the AO had the damaged item received by the Assessee it would have been a capital asset of the assessee. However, the same has not entered into the fixed asset schedule as it got damaged in the transit itself. The damaged item was not a tradable good of the assessee, but it was a capital asset. The assessee was supposed to include all the incidental cost including the purchase price as cost of acquisition of the asset and the same was not to be claimed as revenue expenditure if the asset was received in good condition. However, the asset was received in damaged condition and the assessee could not put to use the same for the purpose of business. The insurance claim was also under recovered. Under such circumstances, the nature of loss is definitely capital in nature. If it were to be a trade loss, then the same would have already been claimed by the assessee in the year of damage to the equipment and accordingly valued its closing stock. The assessee treated the insurance receivable as loans and advances as it was capital in nature. Now if a loan/ advance is written off, then it will not change the character of loss from capital to revenue. The AO held that there is no provision under income tax act to claim the advances written off. Under Section 36(1)(vii) r.w.s 36(2), only bad debts can be written off as irrecoverable and can be claimed as expenditure. The advances do not qualify for debts/bad debts. Under section 37(1), only expenditure, not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of the business or profession is allowed. In this case, the assessee's business

is not dealing in purchase and sale of EMC storage Primary Hardwares. Therefore, the advances write off claim of the assessee cannot be allowed. The AO further went on to hold that the loss is in the nature of capital loss as the advance was for acquiring the capital assets and purchase and sale of machineries/equipments is not the business of the assessee. Therefore the claim of the assessee in respect of under recovery of loss towards damaged machinery can not be allowed even u/s 37(1) of the Income Tax Act, 1961. Reliance was placed by the AO on the decision of Hon'ble Supreme Court in the case of Hasimara Industries Ltd. vs. CIT [1998] 231 ITR 842. The AO thus held that the assessee is not eligible to claim **Advances written off amount of Rs. 71,28,124 and disallowed and added back to the total income.**

49. The CIT(A) upheld the order of the AO. The assessee has preferred the appeal before the Tribunal. We have heard the rival submissions. From the facts of the case, it is clear that the assessee purchased EMC storage primary hardware. It is not disputed that this asset was for the purpose of business of the assessee. The asset was received in a damaged condition and the assessee lodged insurance claim towards the damaged equipment. The insurance claim was settled at a lesser value to the extent of Rs.71,28,124/- which was claimed as a loss incidental to the business and deductible expenditure in computing income from business. The claim was examined by the Revenue authorities in the light of the provisions of section 36(1)(vii) of the Act as bad debts written off which was rightly rejected by the Revenue authorities. The deduction was also examined under section 37(1) of the Act and was rejected by the Revenue authorities. The amount in question cannot be regarded as a capital expenditure because the capital asset never reached

the assessee and got damaged in transit. The loss cannot be regarded as a capital loss just because it was a sum paid for purchase of a capital asset. The loss in question in our view is allowable under section 28 r.w.s 29 of the Act as a loss incidental to the business of the assessee. We are therefore of the view that the Revenue authorities were not justified in not accepting the claim of the assessee for deduction. In this regard, we are of the view that the decision of the Hon'ble Kolkata High Court in the case of CIT Vs. Graphite India Ltd., 221 ITR 420 (Kolkata) was squarely applicable. The relevant question referred by the Tribunal to the High Court in that case was whether in the facts and circumstances of that case, the Tribunal was justified in holding that the expenditure incurred for the assessee's proposed petrochemical project was revenue expenditure and to be allowed as a deduction? This Court in answering the question, held as follows:

"So far as question No. 4 is concerned, the Tribunal recorded the finding that the assessee spent an amount of Rs_ 56_665 as project expenditure_ The expenditure represented fees paid to Engineering India Ltd. in connection with the petrochemical project report. The amount was paid by the assessee in order to explore the possibility of setting up of a Petro-chemical project which could provide a captive plant for manufacture of raw material at the assessee's own factory which would help the assessee in getting continuous supply of raw material even during periods of acute shortage. In fact, the project did not materialise. The ITO as well as the CTT(A). therefore, held that the expenditure was capital in nature. However, the Tribunal found that the expenditure did not result in bringing into existence any capital asset of enduring in nature. The Tribunal further found that the decision of the Calcutta High Court in the case of Hindustan Aluminium Corporation Ltd. v. CIT (1986) 55 CTR (Cal.) 237: (1986) 159 ITR 673 (Cal) was applicable and following that decision held that the expenditure was allowable as incurred wholly and exclusively for the purpose of the assessee's business. Therefore, the Tribunal deleted the disallowance. The case relied upon by the Tribunal was

subsequently followed in the case of Asiatic Oxygen Ltd v. CIT (1991) 190 ITR 328 (Cal). This Court in the said case reiterated the view taken in Hindustan Aluminium Corporation Ltd's case (supra). According to us, question No 4 in this reference stands concluded by the aforementioned two decisions. We, accordingly, answer question No. 4 in the affirmative and in favour of the assessee and against the Revenue.”

50. Following the aforesaid decision, we direct that the claim made by the assessee should be allowed.

51. In the result, ground of appeal of the assessee is allowed and the appeal of the assessee is also allowed.

52. ITA No.365/Bang/2019 and IT(TP)A No.606/Bang/2019

IT(TP)A No.606/Bang/2019 is an appeal by the Revenue and **ITA No.365/Bang/2019** is an appeal by the assessee. Both these appeals are directed against the order dated 21.12.2018 of CIT(A), Bengaluru-2, Bengaluru, relating to Assessment Year 2014-15.

53. First, we shall take up the appeal of the Revenue for consideration. There is a nominal delay of 12 days in filing this appeal which has been explained as owing to the regular incumbent going on leave for a month at the relevant point of time resulting in the delay in finalizing the grounds of appeal. The delay is condoned accepting the reasons given for the delay.

54. The grounds of appeal raised by the Revenue reads as follows:

1. *The Order of the Ld. CIT (A), in so far as it is prejudicial to the interest of the Revenue, is opposed to law and the fact and circumstances of the case.*

2.
 - A) *Whether the Hon'ble CIT(A) was right in fact and law in directing that the operating margin decided in the Bilateral APA with USA for the US AE which was decided by the APA authorities after examining the FAR of the US AE, be applied to the Malaysian AE without verifying and analysing the FAR of the Malaysian AE.*
 - b) *Whether the CIT(A) is right in not appreciating in not appreciating that the purpose of DTAA is to prevent profit shifting and tax avoidance by MNC's and hence the transactions with the Malaysian AE should have also been subject to transfer pricing audit instead of merely applying the operating margin decided under Bilateral APA with AE of another country i.e. US AE.*
 3. *Whether the Hon'ble CIT(A) was right in fact and law in removing 3 companies in MSS segment: - M/s Killick Agencies & Marketing Ltd. I media Corp Ltd. & Irunway India Pvt Ltd. on grounds of functional dissimilarity.*
 - a. *Whether the Hon'ble CIT(A) is right in appreciating in fact that transfer pricing is not an exact science and no two entities can be exact replies.*
 - b. *Whether the Hon'ble CIT(A) is right in trying to find out exact replica of the assessee for determining the Arm's Length Price based on such replica, even when the law and the international jurisprudence itself recognize that there cannot be an exact comparable to a given situation, especially with TNMM as the most appropriate method.*
 4. *Whether the Hon'ble CIT(A) was right in law in demanding comparability standards that may itself defeat the purpose of law relating to determination of ALP under the income tax Act.*
 5. *Whether the order of the CIT(A) in imposing conditions is beyond the scope of law and business reality by rejecting all close comparable on one or the other ground, without appreciating that not two companies can ever be same.*
55. As far as grounds raised by the Revenue with regard to TP adjustments on software development services (SWD) segment is concerned, the facts are identical to the facts on similar grounds in Assessment Year 2012-13. For the reasons stated in deciding the identical

grounds in Assessment Year 2012-13, we find no merits in these grounds raised by the Revenue.

56. As far as ground No.3 is concerned, the Transfer Pricing adjustment in the MSS segment for AY 2012-13. As far as the provision of MSS by the assessee to its AE is concerned, the assessee filed a Transfer Pricing Study (TP Study) to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining ALP. The assessee selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for the purpose of comparison. The OP/OC of the assessee was arrived at 6.78%. The assessee chose companies who are engaged in providing similar services such as the assessee. The assessee identified companies whose average arithmetic mean of profit margin was comparable with the Operating margin of the assessee. The assessee therefore claimed that the price it charged in the international transaction should be considered as at Arm's Length.

57. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/TC. He also selected comparable companies from database. The TPO identified 4 companies as comparable with the assessee company and worked out the average arithmetic mean of their profit margins at 12.06%.

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

17.5 Computation of Arm's Length Price:

17.5.1 *The arithmetic mean of the Profit Level indicators is taken as the arm's length margin. Please see Annexure 'A' for details of computation of PLI of the comparable. Based on this, the arm's length price of the services rendered by the taxpayer to its AE(s) is computed as under:*

<i>Arm's Length Mean Margin on cost</i>	<i>29.14%</i>
<i>Operating Cost</i>	<i>86,90,06,264</i>
<i>Arm's Length Price(ALP) @ 129.14%</i>	<i>112,22,34,689</i>
<i>of Operating Cost)</i>	
<i>Price Received</i>	<i>92,79,38,210</i>
<i>Variation in Price</i>	<i>19,42,96,479</i>
<i>3% of price received</i>	<i>2,78,38,146</i>
<i>Shortfall being adjustment</i>	<i>19,42,96,479</i>

17.5.2 *The above shortfall of Rs. 19,42,96,479/-is proposed as transfer pricing adjustment u/s 92CA in respect of Marketing Support Services segment of the taxpayer's international transactions."*

59. Thus, a sum of Rs.2,78,38,146/- was added to the total income of the assessee on account of determination of ALP.

60. On appeal by the assessee, the CIT(A) excluded I Media Corp Ltd., Ironway India Private Limited and Killick Agencies and Marketing Limited. Aggrieved by the order of the CIT(A), the Revenue has raised ground No.3 before the Tribunal. As far as exclusion of Killick Agencies and Marketing Limited is concerned, we have already held that this company is not functionally comparable with a company providing marketing support services and hence we uphold exclusion of this company from the list of comparable companies. As far as exclusion of I Media Corp Ltd., is concerned, this company is engaged in event management services and earns revenue from sale of advertisement and event management. Besides the above, extraordinary events occurred in the previous year relevant to

Assessment year 2014-15. Considering all these aspects, this Tribunal in the case of Sales Force.Com Vs. DCIT in ITA No.3286/Bang/2018 order dated 22.03.2021 excluded this company from the list of companies in the market support services segment. Following the said order, we uphold exclusion of I Media Corp Limited. As far as exclusion of Irunway India Private Limited is concerned, this company is basically engaged in IPR related services and has related party transaction exceeding the threshold of 25%. This company was considered as not comparable with a company rendering MSS by this Tribunal in the case of Sales Force.Com (supra). We, therefore, uphold the order of the CIT(A) in excluding the 3 companies from the list of comparable companies.

61. In the result, appeal by the Revenue is dismissed.

62. As far as the appeal by the assessee in ITA No.365/Bang/2019 is concerned, the only issue in this appeal is with regard to disallowance of information technology support services. While deciding ground No.3 in ITA No.1964/Bang/2018 of the Revenue for Assessment Year 2010-11, we have already discussed the facts with regard to the aforesaid addition and as to how the order of the CIT(A) deleting the action of the AO in making disallowance of the aforesaid of the aforesaid expenses was not correct. Reasoning given while deciding the aforesaid in Assessment Year 2010-11 will equally apply to Assessment Year 2014-15 also. In Assessment Year 2012-13, both the AO and the Revenue authorities took the view that the expenditure in question was capital expenditure. For the reasons given while adjudicating ground No.3 of Revenue's appeal for Assessment Year

2010-11 in ITA No.1967/Bang/2018, we allow ground of the appeal of the assessee.

63. The assessee has also raised an issue with regard short grant of TDS to the extent of Rs.4,02,858/-. The AO is directed to verify the claim in this regard and consider afresh after affording opportunity of being heard to the assessee.

64. In the combined result, appeals of the Revenue are dismissed while appeal by the assessee allowed.

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

Sd/-

(S. PADMAVATHY)
Accountant Member

Sd/-

(N. V. VASUDEVAN)
Vice President

Bangalore,
Dated: 17.05.2022.
/NS/*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.