

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

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

IT(TP)A No. 2411/Bang/2019
Assessment Year : 2015-16

M/s. Ocwen Financial Solutions Pvt. Ltd., Pritech Park, Block 12, Unit 2, 5B & 6A Floors, Bellandur Village, Sarjapur Marathahalli Ring Road, Bangalore – 560 103. PAN: AAACO3764E	Vs.	The Joint Commissioner of Income-tax, Special Range-5, Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri K.R. Vasudevan & Ms. Rashmi, Advocates
Revenue by	:	Dr. Manjunath Karkihalli, CIT-DR

Date of Hearing	:	02-03-2022
Date of Pronouncement	:	13-05-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against the final assessment order dated 24/09/2019 passed by the Ld.JCIT, Special Range-5, Bangalore under section 143 (3) r.w.s 144C (13) of the Act, for Assessment Year 2015-16 on following grounds of appeal:

“I. Transfer Pricing

The grounds mentioned hereinafter are without prejudice to one another.

1. *The learned Assessing Officer ("learned AO"), learned Transfer Pricing Officer ("learned TPO") and the Honourable Dispute Resolution Panel ("Hon'ble DRP") grossly erred in adjusting the transfer price by INR 14,57,03,780/- with respect to the international transaction rendered by the Appellant under section 92CA of the Income-tax Act, 1961 ("the Act").*
2. *The learned AO/ learned TPO/ Hon'ble DRP erred in rejecting the Transfer Pricing ("TP") document maintained by the Appellant by invoking provisions of sub-section (3) of section 92C of the Act.*
3. *The learned AO/ learned TPO/ Hon'ble DRP erred in rejecting comparability analysis undertaken in the TP documentation and in conducting a fresh comparability analysis by adopting various filters for the purpose of determining the Arm's Length Price ('ALP') of the international transaction.*
4. *The learned AO/learned TPO/Hon'ble DRP erred in applying the core service income filter of 75% to sales instead of 50%, leading to a narrower set of comparable companies.*
5. *The learned AO/learned TPO/Hon'ble DRP erred in applying export earning filter of 75% of the total sales instead of 25%, leading to a narrower set of comparable companies.*
6. *The learned AO/learned TPO/Hon'ble DRP erred in not rejecting companies reporting abnormal profits.*
7. *The learned AO/ learned TPO/ Hon'ble DRP erred in selecting the companies only if the data pertaining to the Financial Year ended March 2015 ("FY 2014-15") is available in the public databases.*
8. *The learned AO/ learned TPO/ Hon'ble DRP erred in rejecting companies with different financial year ending while selecting the comparable companies thereby not considering the fact that the relevant data for the concerned financial year could be deduced from the corresponding financials.*
9. *The learned AO/ learned TPO/ Hon'ble DRP erred in applying the employee cost filter of 25% to total sales leading to a narrower set of comparable companies.*
10. *The learned AO/ learned TPO/ Hon'ble DRP erred in not applying an upper limit to the turnover filter while selecting the comparable companies. The lower limit on turnover has already been applied mutually by the Appellant as well as the learned TPO while carrying out the respective comparability analysis, accordingly upper limit on the turnover should also have been applied based on similar principle.*

11. *The learned AO/ learned TPO/ Hon'ble DRP erred in collating the information that are not publicly available using powers under section 133(6) of the Act.*

12. *The learned AO/ learned TPO/ Hon'ble DRP erred in considering provision for doubtful debts as non-operating expense while calculating the operating profit on operating cost of the comparable companies.*

13. *The learned AO/ learned TPO/ Hon'ble DRP has grossly erred in not rejecting the following companies from the list of comparable companies:*

1. *Infosys BPO Ltd.*
2. *Crossdomain Solutions Pvt. Ltd.*
3. *E-Care India Pvt. Ltd.*
4. *SPI technologies India Pvt. Ltd.*

14. *The learned AO / learned TPO / Hon'ble DRP has grossly erred in rejecting companies that ought to have been accepted as comparable:*

1. *Informed Technologies Ltd.*
2. *R Systems International Ltd.*
3. *Microland Ltd.*
4. *Allsec Technologies Ltd.*
5. *Techprocess Payment Services Ltd.*
6. *Crystal Voxx Ltd.*
7. *Hartron Communications Ltd.*
8. *Caliber Point Business Solutions Ltd.*

15. *The learned AO/learned TPO erred in computing the weighted average operating profit on operating cost ("OP/OC") of Cosmic Global Ltd. The learned AO/learned TPO ought to have not considered the OP/OC of Cosmic Global for the FY 2013-14 and FY 2012-13 while computing the weighted average OP/OC, as the company fails export turnover filter applied by the learned TPO, for the said years.*

16. *The learned AO/ learned TPO/ Hon'ble DRP has erred in not allowing appropriate adjustments towards working capital differential existing between the Appellant vis-a-vis independent comparable companies.*

17. *The learned AO/ learned TPO/ Hon'ble DRP erred in not allowing appropriate adjustment towards the risk difference between the Appellant vis-à-vis the comparable companies.*

II. Corporate Tax

18. *Levy of interest under section 234B of the Act*

a. *The Learned AO has erred in levying interest under section 234B of the Act which is consequential to the addition made in the assessment order.*

b. The Learned AO has also erred in computation of such interest under section 234B of the Act

The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

2. Brief facts of the case are as under:

2.1 The assessee is a company and filed its return of income for year under consideration on 28/11/2015 declaring total income of ₹71,36,86,120/-. The case was selected for scrutiny and notice under section 143(2) was issued to the assessee, along with notice under section 142(1). In response to statutory notices, the representative of the assessee appeared before the Ld.AO and filed requisite details as called for. On receipt of the financials, the Ld.AO noted that, the assessee had international transaction with the associated enterprises exceeding ₹15 crores, and therefore, reference was made to the transfer pricing officer under section 92CA of the Act to determine the arm's length price of the international transaction.

2.2 On receipt of the reference, the Ld.TPO called for economic details of the international transaction in Form 3 CEB. It was observed by the Ld.TPO that, the assessee is a wholly owned subsidiary of Ocwen Asia Holdings Ltd I, Mauritius and it is engaged in provision of IT enabled services to Awkward Mortgage servicing Inc.USVI. (AE)

2.3 The Ld.TPO observed that, the assessee characterised itself to be a under:

“Characterization of Ocwen India: Based on the analysis of functions performed, risks borne and assets used, it is appropriate to characterize Ocwen India as a captive service provider that assumes lower than the normal

risks associated with the business of providing information technology enabled services ("ITeS" or IT enabled services") to its AEs.

Ocwen India provides call center services and certain other loan servicing operations as well as back office/corporate support function such as accounting, risk management, human resources, audit, training and other corporate support functions."

Functional Analysis:

Ocwen India has entered into a Services Agreement with Ocwen Mortgage Servicing, Inc ("OMS") based out of USVI for provision of information technology enabled services ("ITeS") to OMS. The significant functions performed by OMS and Ocwen India are described below.

- Business development functions
- Conceptualization and Performance of Services
- Human Resource
- Supervision and Quality function
- Marketing and advertising functions
- Price negotiations and customer liaosining
- Assets employed
- Risk Analysis

2.4 Ld.TPO observed that, the assessee entered into following international transaction:

International Transactions as per 3CEB		
Particulars	Received/ Receivables	Method
IT enabled services	5333570492	TNMM
Reimbursement of Expenses	111110286	Other Method
Trade Receivables	545546697	TNMM
Other receivables	101458765	Other Method
Total	6091686240	

2.5 The Ld.TPO noted that, the assessee used OP/OC as PLI to compute its margin at 16.08%. The assessee used 10 broadly comparables independent companies between 4.7% to 17.49% with a median of 8.9%. Since the margin of the assessee falls

within the range, the assessee concluded the transaction at arms length. The comparables selected by assessee are as under:

Sl. No.	Company Name	Database	FY 2014-15	FY 2013-14	FY 2012-13	Weighted Average
1	Allsec Technologies Ltd.	Prowess	-4.37%	6.54%	-5.69%	-1.39%
2	Informed Technologies India Ltd.	Prowess	-5.25%	7.11%	4.29%	1.66%
3	Jindal Intellicom Ltd.	Prowess	NA	11.43%	-3.01%	3.97%
4	Ace BPO Services Pvt. Ltd.	Prowess	NA	4.74%	4.74%	4.74%
5	Techprocess Payment Services Ltd.	Prowess	NA	6.79%	5.32%	6.07%
6	BNR Udyog Ltd	Prowess	-3.24%	12.18%	25.51%	11.73%
7	Microgenetics Systems Ltd	Capitaline	NA	19.24%	16.25%	17.85%
8	Cosmic Global Ltd.	Prowess	NA	19.78%	21.81%	20.74%
9	R Systems International Ltd	Prowess	18.85%	19.90%	13.27%	17.49%
10	Excel Infoways Ltd.	Prowess	0.43%	27.65%	70.85%	39.61%
	35 th Percentile					4.74%
	65 th Percentile					17.49%
	Median					8.90%
	Average					12.25%

2.6 The Ld.TPO rejected the TP study carried out by the assessee and conducted his own analysis by adopting various filters and selected following 11 comparables with an average 3 years median at 23.26%.

Sl. No.	Company Name	Average of 3 years (OP/OC)
1	Ace BPO Services Pvt. Ltd.	2.38%
2	Jindal Intellicom Ltd.	5.44%
3	Microgenetic Systems Ltd.	10.18%
4	Crossdomain Solutions Pvt. Ltd.	18.81%
5	Tech Mahindra BSPL	21.05%
6	BNR Udyog	23.26%
7	AGS Health Pvt. Ltd.	25.35%
8	Infosys BPO Ltd.	27.45%
9	SPI Technologies India Pvt. Ltd.	36.62%
10	Excel Infoways Ltd.	39.97%
11	E-Care India Pvt. Ltd.	40.77%
	35 th Percentile	18.81%
	Median	23.26%
	65 th Percentile	27.45%

2.7 The Ld.TPO also did not grant any working capital or risk adjustment and computed the shortfall at Rs.32,97,03,960/-.

2.8 On receipt of the transfer pricing order, the Ld.AO passed the draft assessment order, by making the addition of the transfer pricing adjustment proposed. Subsequently, order under section 154 of the Act, was passed, wherein, the transfer pricing adjustment was recomputed by considering foreign exchange fluctuation as operating expenditure. Thus, the shortfall was computed at ₹29,87,03,960/-.

2.9 Aggrieved by the order passed by the Ld.AO, the assessee preferred objections before the DRP.

3. The DRP upheld the adjustment made to the international transaction partly by excluding ASG Health Pvt.Ltd & Excel Infoways Ltd., the DRP also directed inclusion of Cosmic Global Ltd. as prayed for by the assessee.

4. On receipt of the DRP directions, the Ld.AO passed final assessment order by making addition to the international transaction for ITeS segment at ₹14,57,03,780/-.

5. Aggrieved by the order passed by the Ld.AO, the assessee has filed an appeal before this *Tribunal*.

6. At the outset, the Ld.AR submitted that, **Ground No.1-12** are general in nature, and therefore need not be adjudicated.

He submitted that, in **Ground No. 13**, the assessee wish to seek exclusion of only 2 comparables being:

1. Infosys BPO Ltd
2. Cross domain solutions Private Limited

7. The Ld.AR submitted that, in respect of **Ground No.14** assessee seeks inclusion of only 2 comparable is being:

1. Crystal Voxx Ltd
2. Hartorn Communications Ltd

8. The Ld.AR submitted that in **Ground No.15** assessee is seeking correction in the margin computed in respect of Cosmic Global Ltd by the Ld.TPO.

9. And in **Ground No.16**, the assessee is seeking appropriate working capital adjustment, to iron out the differences, existing between the assessee and the comparable companies.

10. Before we undertake the compatibility analysis, it is *sine qua non* to understand the functions performed, assets owned and risk assumed by assessee under the segment.

IT enabled services

Functional Analysis

Ocwen India has entered into a Services Agreement with Ocwen Mortgage Servicing, Inc. ("OMS") based out of USVI for provision of information technology enabled services ("ITeS") to OMS. The significant functions performed by OMS and Ocwen India are described below.

Business development functions

OMS plays a significant role in determining the business strategy of the group. It is responsible for business development and strategic functions like identifying business opportunities and developing the business plans. Ocwen India does not perform any strategic functions for/ on behalf of OMS. Ocwen India provides purely ITeS like voice based call centre services; data based services and other related back office support services to OMS.

Conceptualization and Performance of Services

OMS is responsible for identifying service requirements and assigning the same to Ocwen India. Ocwen India understands the scope of work and executes the services as specified by OMS. The services provided by Ocwen India includes document imaging, payroll processing, loan accounting, internet based customer services, corporate accounts payable, etc., based on the established workflow, procedures, and service standards set by OMS.

As per the service agreement, OMS shall assist Ocwen India by providing information and access to its facilities, computer networks, and other systems to enable Ocwen India perform its services on a timely basis.

Human Resource

Ocwen India identifies the skill sets required for a particular service. Based on the inputs from OMS, Ocwen India also determines the number of employees required. Ocwen India is also responsible to recruit and train the employees for rendering the services.

Supervision and Quality function

OMS contracts with the end customers, therefore, it is responsible for the quality of services provided to them. OMS establishes standards for all quality control checks and procedures for all business processes, decision models, scripting engines, knowledge bases, and IT platforms. Ocwen India performs its services based on the workflow, procedures and service standards established by OMS.

Marketing and advertising functions

ITeS offered by Ocwen India are for captive use of OMS in the performance of its home loan servicing and allied functions. Since, ITeS rendered by Ocwen India are not offered to third party customers, Ocwen India is not required to undertake any advertising or marketing strategy in respect of such services. OMS undertakes the entire gamut of marketing and advertising functions.

Price negotiations and customer liaisoning

OMS is responsible for negotiating prices with the ultimate customers. OMS liaises with customers and understand their requirements. Based on the specific customer requirements, OMS provides guidance to Ocwen India and Ocwen India would provide such services separately. Ocwen India does not play any role in price negotiations and customer liaising.

Assets employed

Tangible assets

Ocwen India uses the following tangible assets for carrying out its business:

- Leasehold improvement;
- Computer hardware; and
- Office and other equipment

Intangible Assets

Ocwen India does not own any non-routine intangibles.

Risk Analysis

Risks are those business factors that may expose a company to the possibility of loss or damage. In other words, risk is the probability that a particular adverse event may occur during a stated period or may result from a particular challenge. The following section discusses the risk borne by Ocwen India vis-a-vis OMS.

Market Risk

Market risk arises when a company is subject to adverse sales conditions due to either increased competition in the marketplace, adverse demand conditions within the market, or the inability to develop markets, or position products to service targeted customers.

Ocwen India renders services in the capacity of a captive service provider exclusively to OMS. As a result, it is not affected by factors such as non-availability of markets for its services, fluctuation in demand and prices, etc. OMS contracts with the end customer for rendering services. Thus, the primary market risk lies with OMS who is responsible for providing the final deliverables to its customers. Ocwen India provides services only to OMS and is assured of a fixed return on its operating cost irrespective of the market conditions.

Service Liability Risk

Service liability risk arises when a company's services fail to perform at the accepted or stated standards, and, in extreme cases, may even cause its user bodily harm.

Ocwen India is responsible for the quality of the services provided to OMS. As OMS enters into contracts with the end customer the ultimate risk of delivering the quality of services to such customers lies with OMS.

Credit Risk

Credit risk arises when services are rendered to customers on credit terms and the customers fail to make payment.

OMS is responsible for identifying customers, negotiating and formalising contracts with the end customer. Ocwen India has no role in relation to negotiation of payment terms with the end user. It works as per the guidelines provided by OMS and is remunerated on a cost plus basis. Hence, credit risk is borne by OMS.

Foreign Exchange Fluctuation Risk

This risk relates to the potential impact on profits when the transaction currency is different from the reporting currency and arises because of fluctuation in foreign exchange rates.

Ocwen India invoices OMS all its operating costs incurred in the provision of ITeS along with a mark-up. Ocwen India is insulated from foreign exchange risk as it is compensated for any foreign exchange loss that may arise.

Risk of Attrition of Manpower

Workforce is one of the most valuable resources employed by an organisation to carry out its day-to-day operations. Increasing competition in the market place along with other uncontrolled variables results in exposure to risks through attrition.

The primary risk as far as identification of resources, recruitment, training and assignment to suitable jobs lies with Ocwen India. However, any

recruitment related costs are considered as operating costs and form part of the cost base that is compensated on cost plus method. Therefore, OMS also relatively bears the risk of attrition of manpower.

Idle Capacity Risk

This risk relates to non utilization or under-utilization of the resources of a Company.

Ocwen India may maintain some employees who could be on the bench at any point of time during the year. However, costs associated with the idle capacity are charged to OMS as part of the cost base along with mark-up. Hence, Ocwen India does not bear the risk relating to idle bench cost.

Contract Risk

Contract risk arises when a company fails to perform its services that do not adhere to the standards, terms and conditions agreed with its customers.

OMS enters into contract with customers directly. The services provided by Ocwen India are to OMS and any costs incurred by Ocwen India are reimbursed by OMS with a mark-up. Hence, OMS bears the contract risk while rendering services. Ocwen India does not bear any contract risk.

Characterisation

The functional analysis serves as a foundation to characterise entities for the purposes of inter-company transfer pricing. Based on the facts as presented in the above analysis of functions performed, risks borne and assets used, it is appropriate to characterise Ocwen India as a contract service provider that assumes minimal risks associated with the business of providing IT enabled services

Based on the above characterisation, we shall undertake the comparability analysis in respect of the comparables sought for exclusion / inclusion by the assessee.

11. The Ld.AR submitted that, **Infosys BPO** was excluded in assessee's own case for assessment year 2014-15 in ITA No. 3068/B/2018, by order dated 17/07/2019 by observing as under:

"7. Infosys BPO Ltd., ('Infosys')

7.1 This company 'Infosys' was selected as a comparable company by the TPO. The assessee objected to its inclusion both before the TPO as well as the DRP, but both the authorities below rejected the assessee's objections to its inclusion.

7.2.1 Before us, the assessee objected to the inclusion of this company, 'Infosys' on the following grounds:-

I Functionally Different

(i) It is engaged in diversified activities and provides services in the area

of Analytics, Legal process outsourcing, etc., unlike the assessee in the case on hand which provides low end ITES.

(ii) It provides business process management services, consultancy and management services and end-to-end outsourcing, as can be seen from pages 5, 14 and 33 of its Annual Report.

(iii) It is engaged in research and development.

II Ownership of intangible assets

This company, Infosys, owns intangible assets worth Rs.19 Crores during the year as can be seen from pages 16, 47 and 58 of its Annual Report; whereas the assessee does not possess any intangible asset.

III Brand Value

'Infosys' has brand value; having incurred Rs. 5 Crores for its brand building and advertisement, as can be seen from pages 24, 29, 47, 58 and 64 of its Annual Report; whereas the assessee does not have any brand.

IV Sub - contracting

Infosys operates on a different business model as it has incurred Rs.157 Crores towards cost of technical sub-contractors.

7.2.2 In support of the assessee's contentions, the learned AR submitted and took us through the relevant pages of the Annual Report of 'Infosys'. It was submitted that for the reasons given above, it has been consistently held by various benches of the Tribunal over the years that this company cannot be considered as a comparable to companies leading ITES. In this regard, the learned AR placed reliance on the following decisions:-

(i) CGI Information Systems and Management Consultants (P) Ltd., Vs. ACIT in IT(TP)A Nos.586 and 183/Bang/2017 dated 11.04.2018 for Assessment Years 2010-11 and 2012-13.

(ii) Mobility Infotech India Pvt. Ltd., in IT(TP)A No.2055/Bang/2015 for Assessment Year 2012-13.

7.3 Per contra, the learned DR for Revenue supported the orders of the authorities below.

7.4.1 We have considered the rival contentions / submissions and perused the material on record; including the judicial decisions cited. We find from a perusal of the Annual Report at page 14 thereof, under the head 'Managements Discussion and Analysis', it has been stated that this company provides services to both horizontal and vertical focus areas. The Horizontal focus areas are sourcing and procurement (S & P), Customer Services (CS), Finance and Accounting (F & A), Legal Process Outsourcing (LPO), Sales and Fulfillment (S & F), Analytics (AT), Business Platform (BP), Business Transformation Services (BTS), Human Resources Outsourcing (HRO) and Technology Solution Optimization

(TSO). The Vertical focus areas of services are Financial Services & Insurance (FSI) Manufacturing (MFG), Energy, Utilities Communication & Services (ECS) and Retail, Consumer Packaged Foods, Logistics & Life Services (RCL). From the above, it is clear that 'Infosys' offers a gamut of different and diversified services which cannot be compared with routine back office services provided by the assessee. In fact, it is mentioned at page 14 of the Annual Report that the company 'Infosys' provides business process management services which are different from routine back office services. It is also seen that this company enjoys significant brand value and owns intangible assets which clearly establish that Infosys is different from the assessee in the case on hand.

7.4.1 We also further observe that this company, 'Infosys' has consistently been rejected as a comparable to companies rendering routine back office services in various judicial pronouncements of the Tribunal; including the two decisions cited by the assessee (supra). In the case of CGI Informaiton Systems and Management Consultants (P) Ltd., (2018) 94 taxmann.com97 (Bangalore - Trib) for Assessment Year 2012-13, cited by the assessee, this company 'Infosys' has been excluded from the list of comparables for the reason that it has brand value which had an impact on its pricing and margins. As the facts of the year under consideration are similar, the decision rendered in the earlier year would apply to the year under consideration as well. In this factual view of the matter, we hold that Infosys BPO Ltd., stands on a totally different footing from a company engaged in rendering routine back office ITES; being both functionally different and having brand value and therefore is to be excluded from the final set of comparables. We hold and direct accordingly.”

Respectfully following the above, we direct the Ld.AO/TPO to exclude this comparable from the finalist.

12. Cross domain solutions Pvt. Ltd.

12.1 We note that in the preceding assessment year, the assessee had not pressed this comparable for exclusion, as has been observed by coordinate bench of this Tribunal in IT(TP)A No. 3068/Bang/2018 by order dated 17.07.2019 at page 21 of the Index to case law paper book. However, it is submitted before us

that, this comparable is functionally not similar to a captive service provider as has been observed by coordinate bench of this Tribunal in *Swiss Re Global Business Solutions Pvt.Ltd.*, reported on (2020) 116 taxman.com 716.

12.2 Accordingly, we remand this comparable back to the Ld.AR AO/TPO as has been submitted in the chart filed before this Tribunal by the Ld.AR. The Ld.AO/TPO shall verify the functionality of this comparable with that of the assessee, based on the details filed and shall consider it in accordance with law.

13. Crystal Voxx Ltd.:

The assessee has sought for inclusion of this comparable.

13.1 It is submitted that *Coordinate Bench* of this Tribunal in assessee's own case (*supra*) directed this comparable to be included by observing as under:

"11. Crystal Voxx Ltd., ('Crystal')

11.1 This company, 'Crystal' was proposed by the assessee before TPO as an additional comparable to be included in the final set of comparables. The TPO, however, rejected the assessee's proposal on the ground that this company had not reported any earnings from export of services and therefore it is not possible to determine as to whether 'Crystal' has exports / foreign earnings more than 75% of total sales / turnover. The DRP concurred with the finding of the TPO; observing that while it is stated that "income from foreign currency" is Rs.3,23,08,386/-, it is not clear whether this relates to export of services as this information is not available and therefore this company 'Crystal' is rejected.

11.2 Before us, it was contended that this company 'Crystal' is functionally comparable to the assessee in the case on hand as it is operating as a BPO Company which is a ITES provider. According to the learned AR, it is very evident from a perusal of the Annual Report of this company 'Crystal' that the income in foreign currency amounting to Rs.3,23,08,386/- is out of export of services. In support of this contention, the learned AR took us through the relevant pages of the Annual Report

of this company, 'Crystal', which is placed at pages 474 to 497 of the paper book.

11.3 Per contra, the learned DR for Revenue supported the orders of the authorities below in not including this company, Crystal Voxx Ltd., in the final set of comparables.

11.4 We have considered the rival contentions / submissions and perused the material on record. We have carefully perused the Annual Report of this company, 'Crystal'. At Note 3 of the Notes forming part of the accounts, at page 491 of the paper book, it is stated that the operations of the company predominantly relate to a single segment, namely "BPO Activity". At note 6, the income in foreign currency is shown as Rs.3,23,08,386/-. In the Director's Report, at page 480 of the paper book, the foreign exchange earnings is given as Rs.3,23,08,386/-. In the factual matrix of the matter, as laid out above, we are of the considered opinion that the reason ascribed by the TPO and DRP for exclusion of this company, 'Crystal' is factually incorrect. Taking into consideration that the company 'Crystal' is otherwise comparable to the assessee in the case on hand as it is operating as a BPO company which is a provider of ITES, we direct that this company, Crystal Voxx Ltd., be included as a comparable company in the final set of comparables in the case on hand. The AO / TPO are accordingly directed."

13.2 Respectfully following the above we direct the Ld.AO/TPO to include this comparable in the finalist.

14. Hartorn Communications Ltd.:

14.1 For inclusion of this comparable, the assessee placed reliance on the decision of coordinate bench of this Tribunal in case of *Swiss Re Global Business Solutions India Pvt.Ltd (supra)*.

It is submitted that in similar circumstances this Tribunal remanded this comparable by observing as under:

"B. Alleged for inclusion

a) Hartron Communications Ltd:

It has been submitted that, Ld.TPO/DRP rejected this comparable, as it was persistent loss making company and has incurred losses in BPO segment in two years, out of preceding 3 years. Ld.AR submitted that relevant segmental detail only was to be considered, whereas,

Ld.TPO considered revenue earned by this comparable on entity level. It has been submitted that, this crucial objection raised by assessee, has not been considered by authorities below. In support of, Ld.AR placing reliance on decision of Pune Tribunal in case of [Yazaki India Pvt Ltd vs DCIT](#) in ITA No.621/Pun/2014 for assessment year 2009-10 by order dated 11/07/2019.

On the contrary Ld.CIT.DR placed reliance on observations of authorities below.

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

It is observed that this comparable has not been verified by Ld.AO/TPO having regards to the submissions made by assessee. We therefore, direct Ld.AO/TPO to verify this comparable in the light of observations by Pune Tribunal in case of [Yazaki India Pvt Ltd vs DCIT](#) (supra).

Needless to say that proper opportunity of being heard must be granted to assessee in accordance with law.

Accordingly this comparable is set aside to Ld.AO/TPO.”

14.2 Respectfully following the above, we direct the Ld.AO/TPO, to verify the compatibility of this comparable in the light of the observations by *Hon'ble Pune Tribunal* in case of *Yazaki India Pvt.Ltd vs.DCIT(supra)*. Needless to say that proper opportunity of being heard must be granted to assessee.

Accordingly, ground number 13-14 stands allowed as indicated hereinabove.

15. Ground no.15

15.1 It is submitted that the Ld.AR AO/TPO has wrongly computed the weighted average OP/OC of the comparable Cosmic Global, for assessment FY 2013-14 and 2012-13. The AR submits that, these years the company fails export turnover filter applied by the Ld.TPO and therefore deserves to be corrected.

15.2 We direct the Ld.AR AO/TPO to consider the claim of assessee in accordance with law.

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

16. Ground No.16

16.1 The assessee is seeking working capital adjustment to iron out the differences, existing between the assessee in the comparables.

16.2 Before us, the Ld.AR placed reliance on the decision of the coordinate bench of this *Tribunal* in case of *Huawei Technologies India Pvt.Ltd vs JCIT* reported in (2019) 101 taxman.com 313.

This *Tribunal* in case of *Huawei Technologies India Pvt.Ltd vs JCIT*(*supra*) observed and hailed as under:

10. The next grievance projected by the Assessee in its appeal is with regard to the action of the CIT(A) in not allowing any adjustment towards working capital differences. On this issue we have heard the rival submissions. The relevant provisions of the Act in so far as comparability of international transaction with a transaction of similar nature entered into between unrelated parties, provides as follows:

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

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

(e) transactional net margin method, by which,

(i) the net profit margin realised by the enterprise from an international transaction [or a specified domestic transaction] entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [or the specified domestic

transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

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

(f).....

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

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

(c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

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

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

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

11. A reading of Rule 10B(1)(e)(iii) .of the Rules read with Sec.92CA of the Act, would clearly shows that the net profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the

differences, if any, between the international transaction and the comparable uncontrolled transactions, which could materially affect the amount of net profit margin in the open market.

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

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

13. In Paragraph 13 to 16 of the aforesaid OECD guidelines, need for working capital adjustment has been explained as follows:

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

14. The opposite applies to higher levels of accounts payable. By carrying high accounts payable, a company is benefitting from a relatively long period to pay its suppliers. It would need to borrow less money to fund its purchases and/or benefit from an increase in the amount of cash surplus available to invest. In a

competitive environment, the cost of goods sold should include an element to reflect these payment terms and compensate for the timing effect.

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

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

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

14. Examples of how to work out adjustment on account of working capital adjustment is also given in the said guidelines. The guideline also expresses the difficulty in making working capital adjustment by concluding that the following factors have to be kept in mind (i) The point in time at which the Receivables, Inventory and Payables should be compared between the tested party and the comparables, whether it should be the figures of receivables, inventory and payable at the year end or beginning of the year or average of these figures. (ii) the selection of the appropriate interest rate (or rates) to use. The rate (or rates) should generally be determined by reference to the rate(s) of interest applicable to a commercial enterprise operating in the same market as the tested party. The guidelines conclude by observing that the purpose of working capital adjustments is to improve the reliability of the comparables.

15. In the present case the TPO allowed working capital adjustment accepting the calculation given by the Assessee. The CIT(A) in exercise of his powers of enhancement held that no adjustment should be made to the profit margins on account of working capital differences between the tested party and the comparable companies for the following reasons:

(i) *The daily working capital levels of the tested party and the comparables was the only reliable basis of determining adjustment to be made on account of working capital because that would be on the basis of working capital deployed throughout the year.*

(ii) *Segmental working capital is not disclosed in the annual reports of companies engaged in different segments and therefore proper comparison cannot be made.*

(iii) *Disclose in the balance sheet does not contain break up of trade and non-trade debtors and creditors and therefore working capital adjustment done without such break up would result in computation being skewed.*

(iv) *Cost of capital would be different for different companies and therefore working capital adjustment made disregarding this different based on broad approximations, estimations and assumptions may not lead to reliable results.*

16. *The CIT(A) also placed reliance on a decision of Chennai ITAT in the case of Mobis India ITA No.2112/Mds/2011 (2013) 38 taxmann.com. That decision was based on the factual aspect that the Assessee was not able to demonstrate how working capital adjustment was arrived at by the Assessee. Therefore nothing turns on the decision relied upon by the CIT(A) in the impugned order. In the matter of determination of Arm's Length Price, it cannot be said that the burden is on the Assessee or the Department to show what is the Arm's Length Price. The data available with the Assessee and the Department would be the starting point and depending on the facts and circumstances of a case further details can be called for. As far as the Assessee is concerned, the facts and figures with regard to his business has to be furnished. Regarding comparable companies, one has to fall back upon only on the information available in the public domain. If that information is insufficient, it is beyond the power of the Assessee to produce the correct information about the comparable companies. The Revenue has on the other hand powers to compel production of the required details from the comparable companies. If that power is not exercised to find out the truth then it is no defence to say that the Assessee has not furnished the required details and on that score deny adjustment on account of working capital differences. Regarding applying the daily balances of inventory, receivables and payables for computing working capital adjustment, the Delhi Bench of ITAT in the case of ITO Vs. E Value Serve.com (2016) 75 taxmann.com 195(Del-Trib) has held that insisting on daily balances of*

working capital requirements to compute working capital adjustment is not proper as it will be impossible to carry out such exercise and that working capital adjustment has to be based on the opening and closing working capital deployed. The Bench has also observed that that in Transfer Pricing Analysis there is always an element of estimation because it is not an exact science. One has to see that reasonable adjustment is being made so as to bring both comparable and test party on same footing. Therefore there is little merit in CIT(A)'s objection on working adjustment based on unavailable daily working capital requirements data. There is also no merit in the objection of the CIT(A) regarding absence of segmental details available of working capital requirements of comparable companies chosen and absence of details of trade and non-trade debtors of comparable companies as these details are beyond the power of the Assessee to obtain, unless these details are available in public domain. Regarding absence of cost of working capital funds, the OECD guidelines clearly advocates adopting rate(s) of interest applicable to a commercial enterprise operating in the same market as the tested party. Therefore this objection of the CIT(A) is also not sustainable.

17. In the light of the above discussion we are of the view that the CIT(A) was not justified in denying adjustment on account of working capital adjustment. Since, the CIT(A) has not found any error in the TPO's working of working capital adjustment, the working capital adjustment as worked out by the TPO has to be allowed. We may also add that the complete working capital adjustment working has been given by the Assessee and a copy of the same is at page 173 & 192 of the Assessee's paper book. No defect whatsoever has been pointed out in these working by the CIT(A). We may also further add that in terms of Rule 10B(1)(e) (iii) of the Rules, the net profit margin arising in comparable uncontrolled transactions should be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions which could materially affect the amount of net profit margin in the open market. It is not the case of the CIT(A) that differences in working capital requirements of the international transaction and the uncontrolled comparable transactions is not a difference which will materially affect the amount of net profit margin in the open market. If for reasons given by CIT(A) working capital adjustment cannot be allowed to the profit margins, then the comparable uncontrolled transactions

chosen for the purpose of comparison will have to be treated as not comparable in teinis of Rule 10B(3) of the Rules, which provides as follows:

"(3) An uncontrolled transaction shall be comparable to an international transaction if—

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

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

18. In such a scenario there would remain no comparable uncontrolled transactions for the purpose of comparison. The transfer pricing exercise would therefore fail. Therefore in keeping with the OECD guidelines, endeavor should be made to bring in comparable companies for the purpose of broad comparison. Therefore the working capital adjustment as claimed by the Assessee should be allowed.

We hold and direct accordingly."

16.3 Respectfully following the above, we direct the Ld.AR AO/TPO to grant the working capital just and in accordance with law, in respect of the comparables that it is finally retained.

Accordingly this ground raised by assessee stands allowed.

In the result appeal filed by the assessee stands partly allowed.

Order pronounced in open court on 13th May, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 13th May, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore