

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

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

<b>IT(TP)A No. 181/Bang/2022</b>
<b>Assessment Year : 2017-18</b>

M/s. Quicklogic Software (India) Pvt. Ltd., No. 10 Brindavan, 3 <sup>rd</sup> Floor, Yashoda Nagar Main Road, Jakkur Plantation, Bengaluru – 560 064. <b>PAN: AAACQ0656P</b>	<b>Vs.</b>	The Deputy Commissioner of Income Tax, Circle 3(1)(1), Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri Mahaveer C Jain, CA
Revenue by	:	Shri Sumer Singh Meena CIT DR

Date of Hearing	:	12-07-2022
Date of Pronouncement	:	27-07-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against order dated 25/01/2022 by the National Faceless Assessment Centre for A.Y. 2017-18 on following revised grounds of appeal:

REVISED GROUNDS OF APPEALGround No. 1:

The Id. TPO erred in facts and law by comparing the Appellant with the following companies having turnover greater than Rs. 200 Crore, despite the same failing the legally accepted criteria of turnover being lesser than Rs. 200 crores and the Id. AO and the Hon'ble DRP have erred in upholding the same:

- (i) Larsen & Toubro Infotech Limited
- (ii) R Systems International Limited
- (iii) Persistent Systems Limited
- (iv) Tata Elxsi Limited
- (v) Nihilent Technologies Limited
- (vi) Infosys Limited
- (vii) Cybage Software Private Limited



Ground No. 2:

The Id. TPO erred in fact and law by rejecting the following functionally similar companies available on public databases as proper comparables to the Appellant, on unjustifiable grounds even though they are functionally comparable to the Appellant:

- (i) Batchmaster Software Pvt. Ltd.
- (ii) DCIS DOT COM Solutions India Pvt. Ltd.
- (iii) Sasken Technologies Ltd
- (iv) Evoke Technologies Pvt. Ltd.
- (v) Sagarsoft (India) Ltd.
- (vi) Akshay Software Technologies Ltd.
- (vii) E-Zest Solutions Ltd.

Ground No. 2  
Sasken & E Zest  
Not processed  
12/7/22

And the Id. AO and the Hon'ble DRP have erred in upholding the same.

Ground No. 3:

The Id. TPO erred on facts and law by disregarding the Appellant's functional profile and comparing the Appellant with the following companies, which have an entirely different functional and risk profile:

- (i) Larsen & Toubro Infotech Ltd.
- (ii) Persistent Systems Ltd.
- (iii) Tata Elxsi Ltd.
- (iv) Infosys Ltd.
- (v) Great Software Laboratory Pvt. Ltd.
- (vi) R Systems International Ltd.
- (vii) Aptus Software Labs Pvt. Ltd.
- (viii) Cygnet Infotech Pvt. Ltd.

Ground No 3 Not processed.  
12/7/22



- (ix) Infobeans Technologies Ltd.
- (x) Nihilent Technologies Ltd.
- (xi) OFS Technologies Ltd.
- (xii) Threesixty Logica Testing Services Pvt. Ltd.
- (xiii) Cybage Software Pvt. Ltd.
- (xiv) Consilient Technologies Pvt. Ltd.

And the Id. AO and the Hon'ble DRP have erred in upholding the same.

Ground No. 4:

The Id. TPO has erred in applying related party filter of 25% in his search process instead of 15% as applied by the Appellant relying on various precedents and the Id. AO and the Hon'ble DRP have erred in upholding the same.

Ground No. 5:

The Id. TPO has erred in facts and law by computing incorrect margins of Orangescape Technologies Ltd. and Mindtree Ltd. by not considering data as per relevant audited financial statements of the entities from publicly available databases and the Id. AO and the Hon'ble DRP have erred in upholding the same.

Ground No. 6:

The Id. TPO has erred in facts and law by computing incorrect net cost-plus margin of the Appellant by considering losses on foreign exchange translation as 'operating' in nature and the Id. AO and the Hon'ble DRP have erred in upholding the same.



**Ground No. 7:**

The Id. TPO has erred in facts and law by considering the deferred receivables from Associated enterprise as 'International Transaction' within the purview of Section 92B of the Income Tax Act, 1961. The Id. TPO has further erred in holding that the Appellant must charge notional interest income on such receivables and the Id. AO and the Hon'ble DRP have erred in upholding all of the above.

**Ground No. 8:**

The Id. TPO has erred in facts and law by not considering working capital adjustment made by the Appellant, which eliminates the need for a separate benchmarking of deferred receivables and thereby computing notional interest separately and the Id. AO and the Hon'ble DRP have erred in upholding the same.

**Ground No. 9:**

The Id. TPO has erred in computing notional interest using the incorrect and the Id. AO and the Hon'ble DRP have erred in upholding the same:

- a. Rate of 6-month LIBOR, in the currency in which the transaction was carried out between the Appellant and its Associated enterprise.
- b. Additional interest rate over and above the LIBOR including additional rate accounting for currency risk.



The Appellant prays that each of the above grounds be considered discretely and without prejudice to each other.

The Appellant would hereby like to reserve the right to raise any additional grounds in the course of these proceedings that it deems necessary in relation to any matter specified in this appeal.



For Quicklogic Software (India) Private Limited

Place -  
Date -

Tarachand Pagarani, Director  
(Authorised signatory for the Appellant)  
DIN: 07516038

## **2. Brief facts of the case are as under:**

2.1 The assessee is a wholly owned subsidiary of QuickLogic Corporation USA and is engaged in providing software development services to QuickLogic Corporation, USA. It filed its return of income for the year under consideration on 29/11/2017 declaring total income of Rs.1,58,96,300/-. The case was selected for scrutiny, and notice u/s. 143(2) was issued along with notice u/s. 142(1) and questionnaire. In response to the statutory notices, the assessee filed requisite details. On perusal of the details filed, the Ld.AO noted that the assessee had international transaction exceeding Rs.15 crores and therefore a reference was made to the transfer pricing officer u/s. 92CA of the Act.

2.2 On receipt of the reference, the Ld.TPO called upon assessee to furnish the economic details in respect of the international transactions entered into by the assessee with its AE. The

Ld.TPO from the details filed observed that following were the international transactions:

International Transactions			
Particulars	Receivables / Received	Payables / Paid	Method
Software development services	1352,43,252		TNMM
Extended credit period for receivable (lending)	1352,43,252		TNMM
Withholding from employees and payment on their behalf for purchase of stock under ESPP Scheme		37,52,919	TNMM
Total	2704,86,504	37,52,919	2742,39,423

2.3 The Ld.TPO noted that assessee computed its margin at 11.69% by using OP/OC as the PLI and TNMM as the most appropriate method.

2.4 The Ld.TPO noted that assessee selected 16 comparables with an average margin of 9.59% and held the transaction to be at arms length.

2.5 Dissatisfied with the comparables selected by the assessee, the Ld.TPO applied various filters and rejected 10 comparables chosen by the assessee. The Ld.TPO selected a set of 20 comparables with an average margin of 21.24% and computed the adjustment being shortfall at Rs.1,75,34,230/- for the SWD segment. Following were the comparables chosen by Ld.TPO.

Sl. No.	Company Name	F.Year wise OPI/OC (%)			Wt. Average
		2016-17	2015-16	2014-15	
1	Rheal Software Pvt. Ltd.	-12.27	3.28	3.01	-1.85
2	Kals Information Systems Ltd	1.37	3.97	5.77	3.62
3	Infomile Technologies Ltd.	10.22	9.91	11.12	10.43
4	Harbinger Systems Pvt Ltd	12.28	12.69	17.18	14.1
5	C G-V A K Software & Exports Ltd.	11.65	16.95	17.3	15.09
6	Larsen & Toubro Infotech Ltd.	20.78	19.21	23.98	21.14
7	Great Software Laboratory Pvt. Ltd.	27.18	20.24	10.67	21.24
8	Mindtree Ltd.	20.12	26.11	27.51	24.17
9	R Systems International Ltd.	16.74	31.05	26.44	24.40
10	Persistent Systems Ltd.	25.05	23.95	30.39	26.17
11	Tata Elxsi Ltd.	24.90	29.13	24.45	26.19
12	Infobeans Technologies Ltd.	23.89	34.98	20.46	26.44

Sl. No.	Company Name	F.Year wise OP/OC (%)			Wt. Average
		2016-17	2015-16	2014-15	
13	Aptus Software Labs Pvt. Ltd.	24.83	27.67	26.72	26.46
14	Nihilent Ltd.	34.26	24.46	30.80	29.82
16	OFS Technologies Ltd.	19.88	26.47	67.57	29.93
15	Cygnnet Infotech Pvt. Ltd.	25.24	30.45	36.61	30.19
17	Infosys Ltd.	38.79	38.30	41.40	39.50
18	Threesixty Logica Testing Services Pvt. Ltd.	36.63	48.46	42.02	41.94
19	Cybage Software Pvt. Ltd.	41.89	62.90	68.68	57.82
20	Consilient Technologies Pvt. Ltd.	54.85	71.82	69.51	65.14
	<b>35th Percentile</b>				21.24
	<b>Median</b>				26.18
	<b>65th Percentile</b>				26.46

2.6 The Ld.TPO thereafter observed that assessee had outstanding trade receivables and therefore computed notional interest by using six months LIBOR rate + 450 basis points and bench marked the transaction by applying interest at 5.975%. The Ld.TPO thus proposed following adjustment in the hands of the assessee.

S.No	Description	Adjustment u/s 92CA(In Rs.)
1	Software development segment	1,75,34,230
2	Interest on delayed receivables	24,25,718
Total adjustment u/s 92CA		1,99,59,948

2.7 On receipt of order u/s. 92CA, the Ld.AO passed the draft assessment order by incorporating the transfer pricing additions.

2.8 On receipt of the draft assessment order, assessee filed objections before the DRP.

2.9 Before the DRP, the assessee sought exclusion of certain comparables which were upheld partly. The DRP further directed inclusion of M/s. Orangescape Technologies Ltd., M/s. Maveric Systems Ltd., M/s. Inteq Software Pvt. Ltd. in the final set. On receipt of the DRP directions, the Ld.AO passed final assessment order by making addition on transfer pricing adjustment amounting to Rs.1,78,89,497/-.

Aggrieved by the impugned order, assessee filed the present appeal before this *Tribunal*.

3. At the outset, the Ld.AR submitted that assessee is seeking exclusion of all the comparables raised in Ground no. 1 for not satisfying the turnover filter.

4. He submitted that, in Ground no. 2, the assessee is seeking inclusion of only following comparables.

- a) Batchmaster Software Pvt. Ltd.
- b) DCIS DOT COM Solutions India Pvt. Ltd.
- c) Evoke Technologies Ltd.
- d) Sagarsoft (India) Ltd.
- e) Akshay Software Technologies Ltd.

5. Ld.AR submitted that, Ground no. 3 is not pressed in its entirety.

6. Ground nos. 4-5 are not pressed.

7. Ground no. 6 is in respect of foreign exchange fluctuation being considered as operating in nature.

8. In Ground nos. 7 – 9 assessee is seeking Working Capital Adjustment is to be granted to assessee in respect of deferred receivables.

We therefore restrict to the adjudication of Ground nos. 1, 2 (partly), 6-9 only.

9. Before we undertake the comparability analysis, it is *sinequa non* to understand the functions performed, assets owned, risks assumed by assessee under the software development segment.

From the order passed u/s. 92CA, we note that Ld.TPO has regarded the functions performed by assessee as under:

- **Project Identification** - The development of software starts with the identification of the requirements, which are generally driven by new products or enhancements in existing products.
- **Requirement Analysis** – On the basis of the skill set required for a certain project a team is selected on the initial requirement analysis. Further clarifications or corrections can be made on the recommendation of the originator of the project.
- **Configuration Management** – A certain tool developed by QuickLogic India is used for the configuration of codes for every project.
- **Tracking** – The next process is tracking of development of a project. It includes tracking of bugs which is carried out by an internally developed bug tracking tool. Also, minutes of meetings, review comments are recorded depending on project requirement.
- **Design** – The design required for a certain project is based on the project identification and requirement and accordingly design documents are prepared.
- **Implementation** – The implementation takes place through predefined set of codes for project and other related data.
- **Testing** – A test plan is generated after freezing the requirement document. Tests are carried out during design development and implementation stages.
- **Review** - The review of development of software takes place at every stage of the project and the requirement, design, test plan and implementation documents are reviewed and incorporated.
- **Release** – Finally the project is released after it goes through a streamlined procedure. If any extra changes are to be made it is informed to the developers of the project.

## Assets employed

### 8.2 Assets Employed

While performing a comparison of the functions performed it is relevant to take into account the type of assets used in rendering services. The primary assets used for providing software development services is summarised below:

Sl. No	Particulars	Net Block as at March 31, 2017 (₹)
1	Computer Equipment	20,31,131
2	Laboratory and Test Equipments	2,37,542
3	Office Equipments	5,85,825
4	Furniture and Fittings	14,861
	<b>Total</b>	<b>28,69,360</b>

(Source: Audited Absolute Financials)

### Intangibles

QuickLogic India does not own any significant non-routine intangibles except that it owns software net worth of ₹ 4,65,138/-

## Risks assumed

Assessee is found to be undertaking foreign exchange risk as the AE remunerates the assessee for the services rendered in foreign currency. Apart from that all major risks are being borne by the AE. Assessee is thus held to be a captive service provider who is remunerated on cost plus basis for the services rendered.

	Final Comparables	Weighted NCP	NCP after WCA
1	Kals Information Systems Ltd.	-6.85%	-6.44%
2	Rheal Software Pvt. Ltd.	-1.93%	-0.11%
3	Akshay Software Technologies Ltd.	-2.90%	0.56%
4	Batchmaster Software Private Limited	1.18%	3.48%
5	DCIS DOT COM Solutions India Pvt Ltd	2.40%	4.52%
6	Evoke Technologies Pvt. Ltd.	4.19%	5.08%
7	Sagarsoft (India) Ltd.	4.26%	6.28%
8	Orangescape Technologies Limited	7.51%	8.43%
9	Maveric Systems Ltd.	6.26%	9.04%
10	Sasken Technologies Ltd.	7.02%	9.14%
11	Inteq Software Pvt. Ltd.	8.69%	9.29%
12	Harbinger Systems Pvt. Ltd.	10.43%	11.91%
13	E-Zest Solutions Ltd.	11.15%	12.39%
14	Infomile Technologies Ltd.	10.38%	12.57%
15	C G-V A K Software & Exports Ltd.	15.82%	16.86%
16	Mindtree Ltd.	17.77%	18.70%

10. Based on the above, we shall carry out the comparability of the comparables sought for inclusion / exclusion by the assessee in Ground nos. 1,2 (partly).

**11. Ground no. 1** – The Ld.AR submitted that following are the turnover of the comparables sought for exclusion in ground no.1.

1. L&T Infotech Ltd. - Rs. 6183 crores
2. Persistent Systems Ltd. – Rs. 1720 crores
3. Tata Elxsi Ltd. – Rs. 1201 crores
4. Infosys Ltd. – Rs. 59,257 crores
5. R Systems International Ltd. – Rs. 264 crores
6. Nihilent Technologies Ltd. – Rs. 259 crores
7. Cybage Software Pvt. Ltd. – Rs. 759 crores

11.1 He submitted that these comparables are not at all similar even in functions with that of the assessee as they have product segment without segmental details available. It is the submission of the assessee that these comparables are involved in various research and development activities that generate huge intangibles.

11.2 The Ld.AR submitted that in case of the present assessee, the turnover for year under consideration is only 13 crores and it is a captive service provider rendering services only to its AE. The Ld.AR submitted that the business profile of the activities carried out by the assessee is no way a match with the functions performed and services rendered by the above comparables. The Ld.AR thus prayed for these comparables to be excluded.

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

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

11.5. *Coordinate bench of this Tribunal* in the case of *Barracuda Networks India (P.) Ltd. vs. DCIT* reported in [2021] 131 *taxmann.com* 337 excluded Tata Elxi Ltd (Seg.), Persistent Systems Ltd., Larsen and Toubro Infotech Ltd., RS International Ltd., Nihilent Technologies Ltd., Infosys Ltd., Cybage software Pvt.Ltd., from the list of comparables for having high turnover more than 200 crores. This *Tribunal* observed that, the said company was having multiple segments and cannot be compared with a captive service provider. The relevant observation of this *Tribunal* in the case of *Barracuda Networks India (P.) Ltd. vs,DCIT (supra)*, are as follows:

**11.** As far as comparability of companies listed as (a) to (g) in Grd.No.4 raised by the Assessee is concerned, the admitted factual position is that the turnover of these companies is more than Rs. 200 Crores and the Assessee's turnover is only Rs. 17,77,11,711/-. The TPO excluded from the list of comparable companies chosen by the Assessee in its TP study companies whose turnover was less than Rs. 1 Crore. The contention of the Assessee before the DRP was that while the TPO excluded companies with low turnover, he failed to apply the same yardstick to exclude companies with high turnover compared to the Assessee. The reason for excluding companies with low turnover was that such companies do not reflect the industry trend as their low cost to sales ratio made their results less reliable. The contention of the Assessee was that there would be effect on profitability wherever there is high or low turnover and therefore companies with high turnover should also be excluded from the list of comparable companies. The DRP primarily relied on the decision rendered by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) (P.) Ltd v. Dy. CIT [2017] 82 taxmann.com 167(Delhi - Trib), wherein it was held that high turnover ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded and that the effect of such high turnover on the margin should be seen. The DRP therefore held that a company which is otherwise functionally comparable cannot be excluded only on the basis of high turnover. The Assessee has raised Grd.No.4 before the Tribunal challenging the aforesaid view of the DRP.

**12.** On the issue of application of turnover filter, we have heard the rival submissions. The parties relied on several decisions rendered on the above issue by the various decisions of the ITAT Bangalore Benches in favour of the Assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. v. Dy CIT [2018] 89 taxmann.com 44, took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software (P.) Ltd. v. Dy. CIT [2016] 67 taxmann.com 243 wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) (P.) Ltd. (supra) and the decision to the contrary in the case of CIT v. Pentair Water India (P.) Ltd., [2016] 69 taxmann.com 180/381 ITR 216 (Bom.) wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of Pentair Water India (P.) Ltd. (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International Services (P.) Ltd. (supra):

'41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of Genesis Integrating Systems (India) (P.) Ltd. v. DCIT, ITA No. 1231/Bang/2010, relying on Dun and Bradstreet's analysis, held grouping of companies having turnover of Rs. 1 crore to Rs.

200 crores as comparable with each other was held to be proper. The following relevant observations were brought to our notice:-

"9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which .ire (sic) making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various benches of the Tribunal, when companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs. 1.00 crore to 200 crores have to be taken as a particular range and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study."

42. The Assessee's turnover was around Rs. 110 Crores. Therefore the action of the CIT(A) in directing TPO to exclude companies having turnover of more than Rs. 200 crores as not comparable with the Assessee was justified. As rightly pointed out by the learned counsel for the Assessee, there are two views expressed by two Hon'ble High Courts of Bombay and Delhi and both are non-jurisdictional High Courts. The view expressed by the Bombay High Court is in favour of the Assessee and therefore following the said view, the action of the CIT(A) excluding companies with turnover of above Rs. 200 crores from the list of comparable companies is held to be correct and such action does not call for any interference.'

**13.** The Tribunal in the case of *Autodesk India (P.) Ltd. v. Dy. CIT* [2018] 96 taxmann.com 263 (Bang-Trib), took note of all the conflicting decision

on the issue and rendered its decision and in paragraph 17.7. of the decision held as that high turnover is a ground for excluding companies as not comparable with a company that has low turnover. The following were the relevant observations:

"17.7. We have considered the rival submissions. The substantial question of law (Question No. 1 to 3) which was framed by the Hon'ble Delhi High Court in the case of *Chryscapital Investment Advisors (India) (P.) Ltd.*, (*supra*) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of *CIT v. Pentair Water India (P.) Ltd.* Tax Appeal No. 18 of 2015 judgment dated 16-9-2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of *Genisys Integrating (supra)* by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of *Genisys Integrating (supra)*, we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of *Genisys Integrating (supra)* was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5-8-2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of *Willis Processing Services (supra)* and *Capegemini India (P.) Ltd. (supra)* are to be regarded as *per incurium* as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the

learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra)".

**14.** In view of the aforesaid decision, we hold that companies listed in Sl. No.(a) to (g) of Grd.No.4 raised by the Assessee whose turnover in the current year is more than Rs. 200 Crores should be excluded from the list of comparable companies.

**15.** As far as company listed at Sl .No.(h) of Grd.No.4 and Grd.No.5 i.e., R.S. Software (India) Ltd., is concerned, the turnover of this company in the current year is less than Rs. 200 Crores but in the earlier two years its turnover was more than Rs. 200 crores and was liable to be excluded in those earlier two years. The question raised in the aforesaid grounds is as to: whether this company should also be excluded on the application of turnover filter by reason of its turnover in the earlier two years being more than Rs. 200 crores in the light of Rule 10CA of the rules which were applicable from AY 2014-15 onwards  
or

whether in computing the weighted average profit margin of this company, the earlier two years profit margins have to be ignored because they fail the test of comparability in those two earlier years by reason of the application of the Rs. 200 Crore turnover filter.

**16.** To answer the above question, we need to look at the amendment to the rules that allow for introduction of a "range concept" for determination of ALP and "use of multiple year data" for undertaking comparability analysis in transfer pricing cases. The provisions of the Income-tax Act were amended through the Finance (No.2) Act, 2014 to facilitate alignment of Indian transfer regime with international best practices. The manner of computation of ALP is laid down under the Income-tax Rules. The Government has notified the amended Rules for determining ALP vide S.O. No. 2860 (E) dated 19/10/2015. The amended regime will be applicable for computation of ALP of international transactions and specified domestic transactions

undertaken on or after 1/04/2014 i.e. on and after PY 2014-15. The amended rules allow for introduction of a "range concept" for determination of ALP and "use of multiple year data" for undertaking comparability analysis in transfer pricing cases. The use of range concept being a statistical tool enhances the reliability of analysis undertaken for computation of ALP. The range concept will be applicable in certain cases for determining the price and will begin with the 35th percentile and end with the 65th percentile of the comparable prices. Transaction price shown by the taxpayers falling within the range will be accepted and no adjustment will be made. The use of multiple year data allows for yearly variations to be averaged out and would therefore add value to transfer pricing analysis. The Amended Income-tax Rules, 1962 ('Rules') via Notification 83 of 2015 which is the 16th amendment to the originally drafted Indian Tax Rules, 1962, are applicable for transactions undertaken on or after 1 April 2014 (i.e. from FY 2014-15 and onwards). These amended provisions are applicable only when the determination of 'ALP' is done under the MAM being resale price method ('RPM'), cost plus method ('CPM') or transactional net margin method ('TNMM'). The relevant provisions of Rule 10CA of the Rules, in so far as it relates to choice of comparable companies, read as follows:

*"Computation of arm's length price in certain cases.*

10CA. (1) Where in respect of an international transaction or a specified domestic transaction, the application of the most appropriate method referred to in sub-section (1) of section 92C results in determination of more than one price, then the arm's length price in respect of such international transaction or specified domestic transaction shall be computed in accordance with the provisions of this rule.

(2) A dataset shall be constructed by placing the prices referred to in sub-rule (1) in an ascending order and the arm's length price shall be determined on the basis of the dataset so constructed:

**Provided** that in a case referred to in clause (i) of sub-rule (5) of rule 10B, where the comparable uncontrolled transaction has been identified on the basis of data relating to the current year and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise undertaking the international transaction or the specified domestic transaction referred to in sub-rule (1)], has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction then,-

- (i) the most appropriate method used to determine the price of the comparable uncontrolled transaction or transactions undertaken in the aforesaid period and the price in respect of such uncontrolled transactions shall be determined; and
- (ii) the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the current year

and in the aforesaid period preceding it shall be included in the dataset instead of the price referred to in sub-rule (1):

**Provided further** that in a case referred to in clause (ii) of sub-rule (5) of rule 10B, where the comparable uncontrolled transaction has been identified on the basis of the data relating to the financial year immediately preceding the current year and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise undertaking the international transaction or the specified domestic transaction referred to in sub-rule (1)], has in the financial year immediately preceding the said financial year undertaken the same or similar comparable uncontrolled transaction then,-

- (i) the price in respect of such uncontrolled transaction shall be determined by applying the most appropriate method in a similar manner as it was applied to determine the price of the comparable uncontrolled transaction undertaken in the financial year immediately preceding the current year; and
- (ii) the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the aforesaid period of two years shall be included in the dataset instead of the price referred to in sub-rule (1) :

**Provided also** that where the use of data relating to the current year in terms of the proviso to sub-rule (5) of rule 10B establishes that, -

- (i) The enterprise has not undertaken same or similar uncontrolled transaction during the current year; or
- (ii) the uncontrolled transaction undertaken by an enterprise in the current year is not a comparable uncontrolled transaction,

then, irrespective of the fact that such an enterprise had undertaken comparable uncontrolled transaction in the financial year immediately preceding the current year or the financial year immediately preceding such financial year, the price of comparable uncontrolled transaction or the weighted average of the prices of the uncontrolled transactions, as the case may be, undertaken by such enterprise shall not be included in the dataset.

(3) Where an enterprise has undertaken comparable uncontrolled transactions in more than one financial year, then for the purposes of sub-rule (2) the weighted average of the prices of such transactions shall be computed in the following manner, namely:-

- (i) Where the prices have been determined using the method referred to in clause (b) of sub-rule (1) of rule 10B, the weighted average of the prices shall be computed with weights being assigned to the quantum of sales which has been considered for arriving at the respective prices;

*(ii) where the prices have been determined using the method referred to in clause (c) of sub-rule (1) of rule 10B, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs which has been considered for arriving at the respective prices;*

*(iii) where the prices have been determined using the method referred to in clause (e) of sub-rule (1) of rule 10B, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs incurred or sales effected or assets employed or to be employed, or as the case may be, any other base which has been considered for arriving at the respective prices "*

**\*\***

**17.** *Let us apply the above rules to the comparable company R.S. Software (India) Ltd. As per Rule 10CA(2), the dataset of comparable companies chosen has to be arranged in ascending order. As per the 1st proviso to Rule 10CA(2), R.S. Software (India) Ltd., was chosen as a comparable company based on the data relating to the current year and in the earlier two financial years immediately preceding the current financial year. In all the financial years the said company has undertaken similar comparable uncontrolled transaction. Clause (i) to 1st proviso to section 10CA(2) mandates that the same MAM has to be used to arrive at the price of the comparable uncontrolled transaction undertaken by R.S. Software (India) Ltd., in the financial years 2013-14 and 2014-15. As per clause (ii) of 1st proviso to section 10CA(2), weighted average of the prices of the 3 financial years have to be taken in accordance with Rule 10CA(3) and the weighted average so taken shall be included data set instead of the price arrived at by using current year data alone. In the present case, if one sees the chart of comparables of TPO given in paragraph-4 of this order, the profit margins of the Company R.S. Software (India) Ltd., for the three financial years were 2013-14 to 2015-16 were 24.14%, 32.75% and -2.09% respectively and the weighted average margin of 24.83% has been considered by the TPO.*

**18.** *The second proviso to section 10CA(2) of the Rules provides for a situation where R.S. Software (India) Ltd., has undertaken comparable uncontrolled transaction only in Financial year 2014-15 & 2015-16, then the weighted average of the two financial year 2014-15 and 2015-16 has to be computed in the manner laid down in Rule 10CA(3) of the Rules and the margin so arrived at has to be included in the dataset.*

**19.** *The third proviso to section 10CA(2) of the rules provides that if in the current year i.e., financial year 2015-16 if R.S. Software (India) Ltd., has not undertaken any uncontrolled comparable transaction then that company can never be considered for inclusion in the dataset.*

**20.** *The submission of the learned Counsel for the Assessee was that as per the proviso to Rule 10CA(2) of the Rules, R.S. Software (India) Ltd., cannot be regarded as comparable company for Financial Year 2013-14 and 2014-15 because in those years, the turnover of this company was more than Rs. 200 crores. Therefore as per the first and second proviso to Rule 10CA(2) of the Rules, the profit margin of this company for Financial year 2013-14 & 2014-15 has to be ignored and the profit margin of the financial year 2015-16 alone should be taken. If one looks at Rule 10CA(2) in isolation, we have to reject this argument because the 1st and 2nd proviso to Rule 10CA(2) of the Rules refers to only R.S. Software (India) Ltd., (i.e., "where the comparable uncontrolled transaction has been identified on the basis of data relating to the current year and the enterprise undertaking the said uncontrolled transaction has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction") undertaking uncontrolled transaction during the relevant previous year and if this condition is satisfied then the profit margin of R.S. Software for the 2 financial years immediately prior to the current financial year has to be taken. A plain reading of the 1st proviso would show that the question of comparability is not to be seen while applying the 1st and 2nd proviso to Rule 10CA(2) of the Rules. The provisions of Rule 10CA(2) have to be read harmoniously with the other provisions of Rule 10B:*

*"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];*

*\*\**

*(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.*

(4) *The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction [or a specified domestic transaction] shall be the data relating to the financial year [(hereafter in this rule and in rule 10CA referred to as the 'current year')] in which the international transaction [or the specified domestic transaction] has been entered into :*

**Provided** *that data relating to a period not being more than two years prior to [the current year] may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared:"*

*A reading of Rule 10B(3) shows that comparison of an uncontrolled transaction to an international transaction can be done only if differences, if any, between the transactions that are 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 reasonably accurate adjustments can be made to eliminate the material effects of such differences. A reading of Proviso to Rule 10B(4) would show that use of data relating to a period of two years prior to the current year may also be considered but with a rider that "if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared". If by application of any filter an enterprise undertaking uncontrolled transaction similar to an international transaction is regarded as not being comparable in the earlier two years immediately preceding the current year and thereby attracting the provisions of Rule 10B(2) or 10B(3) then the data for those years will not have any influence on the determination of transfer prices in relation to the transactions being compared for the current year and hence have to be ignored. On a harmonious reading of the provisions of Rule 10CA, 10B(3) (4) of the Rules, we agree with the stand taken by the learned counsel for the Assessee. Therefore, if at all R.S. Software Ltd., is to be regarded as a comparable company, then the margins for AY 2014-15 and 2015-16 of the company have to be ignored because in those years they are to be regarded as not comparable. We hold accordingly.*

The assessee in *Barracuda Networks India (P.) Ltd. vs. DCIT.* (*supra*) was a captive service provider to its AE for assessment year 2016-

12. Further this *Coordinate Bench* of this Tribunal in case of *ACI Worldwide Solutions* in *ITA no.106/Bang/2022* by order dated

13/05/2022 for assessment year 2017-18 in an identical situation in respect of the alleged comparables observed as under:

*“4. By raising ground 6(iii), the assessee is seeking to exclude seven comparables on the grounds that the turnover of the said companies far exceeds Rs.200 crore, and therefore, the said companies cannot be compared with that of the assessee, where the turnover under the software development segment is only Rs.45.35 crore. In this context, the learned AR relied on the following judicial pronouncements:-*

*(i) [Autodesk India \(P\) Ltd. v. DCIT, Circle 11\(1\), Bangalore \(2018\) 96 taxmann.com 263 \(Bangalore Trib.\)](#)*

*(ii) [Cenduit \(India\) Services Pvt. Ltd. v. DCIT, Circle 2\(1\)\(1\), Banglaore \(TS-19-ITAT-2022 Bang-TP\)](#).*

*(iii) [M/s.Software Paradigms Infotech Pvt. Ltd. v. ACIT, Circle 1\(1\), Mysuru \(TS-676-ITAT-2021 Bang-TP\)](#)*

*4.1 The learned Departmental Representative was duly heard.*

*4.2 We have heard rival submissions and perused the material on record. Admittedly, the assessee's turnover in the software development segment is Rs.45.35 crore. The turnover of for Larsen & Toubro Infotech Limited, Mindtree Limited, Persistent Systems Limited, Tata Elxsi Limited, Nihilent Limited, Infosys Limited and Cybage Software Private Limited, are far exceeding Rs.200 crore for the relevant assessment year. The TPO/DRP has excluded the companies having turnover of less than Rs.1 crore, however, the TPO / DRP has not put upper limit of the turnover for exclusion of comparables having high turnover. The Bangalore Bench of the Tribunal in the case of Autodesk India (P) Ltd. v DCIT, Circle 11(1), Bangalore (supra) has held as follows:-*

*"17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a*

*non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015 judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.*

*17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on*

*the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra)."*

*4.2.1 In view of the judicial pronouncements, cited supra, we direct the AO to exclude Larsen & Toubro Infotech Limited, Mindtree Limited, Persistent Systems Limited, Tata Elxsi Limited, Nihilent Limited, Infosys Limited and Cybage Software Private Limited from the list of comparables, since the said companies are having turnover far exceeding Rs.200 crore for the relevant assessment year. It is ordered accordingly.*

*4.3 In the result, ground 6(iii) is partly allowed."*

12.1. Nothing has been placed by the Revenue to deviate from the above view taken by the coordinate bench of this *Tribunal* in *Zynga Game Network India (P.) Ltd. (supra)*. Respectfully following the above, we direct Ld. AO/TPO to exclude Tata Elxi Ltd (Seg.), Mindtree Ltd., Larsen and Toubro Infotech Ltd., RS Software (India) Ltd., Persistent Systems Ltd., Nihilent Technologies Ltd., Infosys Ltd., Cybage software Pvt.Ltd. for having high turnover as compared to a captive service provider like assessee.

Accordingly, we direct the Ld.AO to exclude the above comparables from the final list.

**Accordingly Ground no. 1 raised by assessee stands allowed.**

13. In respect of **Ground no. 2**, assessee is seeking inclusion of only following comparables:

a) Batchmaster Software Pvt. Ltd.

- b) DCIS DOT COM Solutions India Pvt. Ltd.
- c) Evoke Technologies Ltd.
- d) Sagarsoft (India) Ltd.
- e) Akshay Software Technologies Ltd.

13.1 It is submitted by Ld.AR that **Batchmaster Software Pvt. Ltd.** and **DCIS DOT COM Solutions India Pvt. Ltd.** was ignored by the Ld.TPO as it was reflecting in the search matrix carried out by him. **Evoke Technologies Ltd.** was rejected by the Ld.TPO for the reason that it supplies end to end services. The Ld.TPO also noted that it may be included in the services other than IT services.

13.2 It is thus submitted by the Ld.AR that in respect of the above three comparables, the Ld.TPO has not considered the functions performed and has cherry picked the comparables without going through the actual functions and annual reports. We are therefore directing these comparables to be reconsidered by the Ld.AO/TPO based on the annual reports.

13.3 The Ld.TPO shall consider these comparables after verifying the FAR of these comparables with that of assessee.

**Accordingly, Batchmaster Software Pvt. Ltd., DCIS DOT COM Solutions India Pvt. Ltd. and Evoke Technologies Ltd. for *denovo* consideration to Ld.AO/TPO.**

13.4 In respect of **Sagarsoft (India) Ltd.**, the company has been rejected by the Ld.TPO as he found to be engaged in providing system administration, human resources and training and facilities. The Ld.AR submitted that, the company is engaged in the business of software development service segment along with

system administration and that this fact has been not considered by the Ld.TPO.

13.5 In respect of **Akshay Software Technologies Ltd.**, the Ld.TPO rejected it as he found this company to be a persistent loss making company. The Ld.AR on the contrary submitted that this comparable has incurred losses only for two out of 3 years and is not a persistent loss making company placing reliance on the decision of *Coordinate Bench of this Tribunal* in case of *M/s. Goldman Sachs Services Pvt. Ltd. vs. JCIT in IT(TP)A No. 2355/Bang/2019*. He submitted that this comparable cannot be rejected merely because it had incurred loss in two out of three preceding years.

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

13.7 We note that above two comparables has not been verified by the Ld.AO/TPO in detail. We are therefore remanding these comparables also to the Ld.AO/TPO for a *denovo* verification.

13.8 The principles laid down by this *Tribunal* in various cases shall be kept in mind while considering the comparability of all these with that of assessee, having regards to the FAR analysis.

**Accordingly Ground no. 2 raised by assessee stands partly allowed for statistical purposes.**

**14. Ground nos. 7-9** is in respect of Working Capital Adjustment.

14.1 The Ld.TPO computed interest on outstanding receivables at the rate equal to 5.975% on receivables that exceeded 90 days as per the directions of the DRP. It has been argued by Ld.AR that authorities below disregarded

business/commercial arrangement between the assessee and its AE's, by holding outstanding receivables to be an independent international transaction.

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

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

14.4 On the contrary Ld.CIT.DR submitted that interest on receivables is an international transaction and Ld.TPO rightly determined its ALP. In support of the contentions, he placed

reliance on decision of *Hon'ble Delhi Tribunal* order in case of *Ameriprise India Pvt. Ltd. vs. ACIT (2015- TII-347-ITAT-DEL-TP)* wherein it is held that, interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that Finance Act, 2012 inserted Explanation to Section 92B, with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this Explanation provides that:

- (i) the expression "international transaction" shall include—
  - (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;....’.

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

international transaction. Referring to discussion in said order, it was stated that *Hon'ble Delhi Tribunal* in this case noted a decision of the *Hon'ble Bombay High Court* in the case of *CIT vs. Patni Computer Systems Ltd.*, reported in (2013) 215 *Taxmann* 108 (Bom.), which dealt with question of law:

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

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

14.7 We have perused the submissions advanced by both the sides in the light of the records placed before us. This Bench referred to

decision of *Special Bench of this Tribunal* in case of *Hon'ble Special Bench of ITAT* in case of *Instrumentation Corpn. Ltd. v. Asstt. DIT in ITA No. 1548 and 1549 (Kol.) of 2009, dated 15-7-2016*, held that outstanding sum of invoices is akin to loan advanced by assessee to foreign AE., hence it is an international transaction as per explanation to section 92 B of the Act. Alternatively, it also argued that in TNMM, working capital adjustment subsumes sundry creditors. In such situation computing interest on outstanding receivables as loans and advances to associated enterprise would amount to double taxation. *Hon'ble Delhi Tribunal* in case of *Orange Business Services India Solutions Pvt. Ltd. vs. DCIT in ITA No. 6570/Del/2016* vide its order dated 15.2.2018 observed that:

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

14.8 In view of the above, we deem it appropriate to set aside this issue to Ld.AO/TPO for deciding it in conformity with the

above referred judgment. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in accordance with law.

**Accordingly these grounds raised by assessee stands allowed for statistical purposes.**

**15. Ground no. 6** – The Ld.AR has submitted that the foreign exchange loss were treated by the Ld.TPO as operating in nature both in the hands of the assessee as well as comparables. It is submitted by the Ld.AR that the foreign exchange losses did not arise out of the revenue transactions and the assessee who were due to the yearend restatement advance received from the AE. As we are remanding the issue of notional interest computed by the Ld.TPO for *denovo* verification, this ground also deserves to be reverified along with Ground nos. 7 – 9. Both these issues are inter related to each other.

**Accordingly, these grounds raised by the assessee stands allowed partly for statistical purposes.**

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

Order pronounced in open court on 27<sup>th</sup> July, 2022.

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 27<sup>th</sup> July, 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