

**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. 2623/Bang/2019
Assessment Year : 2015-16

M/s. Blue Coat Network (India) Pvt. Ltd., Unit No. 1001 & 1002, 10 th Floor, RMZ Campus 8-B, Plot No. C-L, Sarjapur Marathalli Outer Ring Road, Bangalore – 560 037. PAN: AAHCS7844Q	Vs.	The Deputy Commissioner of Income Tax, Circle – 1(1)(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Chavali Narayan, CA
Revenue by	:	Dr. Manjunath Karkihalli, CIT DR

Date of Hearing	:	14-06-2022
Date of Pronouncement	:	29-07-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against the final assessment order dated 22/10/2019 passed by Ld.DCIT, Circle -1 (1)(2), Bangalore for A.Y. 2015-16 on following grounds of appeal:

The grounds mentioned herein are without prejudice to one another.

A. General Ground

1. That the order of the learned, Deputy Commissioner of Income-tax, Circle 1(1)(2), Bengaluru ('Assessing Officer' or 'learned AO') and directions of Hon'ble Dispute Resolution Panel, Bangalore ("Hon'ble DRP") to the extent prejudicial to the Appellant, is contrary to law, facts and circumstances of the case and liable to be quashed.

B. Transfer Pricing

2. That on facts and in the circumstances of the case, the learned AO/ Assistant Commissioner of Income-tax (Transfer Pricing) - 1(1)(2), Bangalore ('learned TPO'), erred in making an upward adjustment to the transfer price of the Appellant's international transactions of INR 37,976,187 in respect of software development services, INR 411,198 in respect of data center services and INR 6,346,182 in respect of marketing support services. The learned DRP erred in further enhancing the adjustment in respect of Appellant's marketing support service segment to INR 10,339,660, and confirming the adjustments in respect of software development services and data center services segments at INR 35,111,149 and INR 411,198 respectively.
3. That on the facts and in the circumstances of the case, the learned Panel/ learned TPO erred in rejecting the segmental financial information as provided by the Appellant and reallocating the "other expenses" between the Software development services, Marketing and support services and Data center services segments on the basis of revenue by disregarding the documents/ information submitted by the Appellant before the learned Panel/ learned TPO during the assessment proceedings, supporting the allocation methodology adopted by the Appellant for the segmentation.
4. That on facts and in the circumstances of the case, the learned TPO erred in not giving effect to the direction of the learned Panel, with respect to rectification of the computation of the operating mark-up on cost earned by the Assessee, by excluding the restructuring costs of INR 19,028,483 from the operating cost base, as directed by the learned Panel.
5. That on the fact and in the circumstances of the case and in law, with respect to transfer pricing adjustment for software development services, marketing support services and data center services. the learned DRP/ learned TPO erred in:
 - 5.1. Rejecting the Transfer Pricing ("TP") documentation maintained by the Appellant for all three segments, under Section 92D of the Act, in good faith and with due diligence.
 - 5.2. Rejecting the comparability analysis carried out by the Appellant in the TP documentation for all three segments, and in conducting a fresh comparability analysis for the software development services, marketing support services and data center services, based on the application of additional filters in determining the arm's length price.
 - 5.3. Using data, which was not contemporaneous, and which was not available in the public domain at the time of preparing the TP documentation.



- 5.4. Using information under section 133(6) of the Act, which tantamount to choosing secret comparable companies whose information was not available in public domain while preparing the transfer pricing documentation for the relevant financial year.
- 5.5. Disregarding certain filters applied by the Appellant in selection of the comparable companies for all three segments, at the time of TP documentation:
- Rejection of companies with expenses of R&D ratio to sales greater than 3%;
 - Acceptance of companies with ratio of sum of advertising, marketing and distribution expenses to sales less than or equal to 3%.
- 5.6. Applying/ modifying the following filters while undertaking comparability analysis for all three segments:
- Rejection of companies whose employee cost is less than 25% of operating revenue;
 - Rejection of companies having export sales less than 75% of the total sales.
6. Selecting comparable companies having significant onsite activities without appreciating the differences in the functionality of such companies vis-à-vis the Assessee.
7. Not providing adjustment for the differences in working capital of the Appellant and the comparable companies selected for each of the three segments.
8. Not providing suitable adjustment to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies selected for each of the three segments.
9. That the learned Panel/ learned TPO erred in not considering certain expenses/income while computing the operating mark-up on cost of the comparable companies on the premise that these are not the routine operating costs, in doing so the learned Panel/ learned TPO failed to provide any cogent reason to substantiate their findings. .

(Tax effect: INR 4,58,62,307)

Grounds for software development services

10. On the fact and in the circumstances of the case and in law, with respect to adjustment to the transfer price of the software development services, the learned DRP/ AO/ TPO erred in:
- 10.1. Including the following companies even though they are functionally different from operational profile of the Appellant:
- Mindtree Limited
 - R S Software (India) Ltd.
 - Larsen & Toubro Infotech Ltd.
 - Infobeans Technologies Ltd.
 - Persistent Systems Ltd
 - Nihilent Technologies Ltd.
 - Aspire Systems (India) Pvt. Ltd.
 - Inteq Software Pvt. Ltd.



- i) Infosys Limited
- j) Cybage Software Pvt Ltd.

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

- a) Akshay Software Technologies Ltd
- b) Celstream Technologies Pvt. Ltd
- c) I2T2 India Ltd
- d) Infomile Technologies Ltd

11. The learned TPO erred in not giving effect to the directions of the learned Panel, with respect to inclusion of the following comparable companies in the final set of companies:

- a) Sasken Communication Technologies Limited
- b) Cigniti Technologies Limited

(Tax Effect: INR 3,51,11,149)

Grounds for marketing support services

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

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

- a) Axience Consulting Pvt. Ltd.
- b) Killick Agencies & Marketing Ltd.
- c) Digital Radio (Delhi) Broadcasting Ltd.
- d) Just Dial Limited
- e) Platinum Advertising Pvt. Ltd.

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

- a) Fusion Events Pvt. Ltd.
- b) MCI Management India Private Limited
- c) Showhouse Event Management Pvt. Ltd.
- d) Netscribes India Pvt. Ltd.
- e) Competent Automobiles Ltd. (Service & Spares)

13. The learned TPO erred in not giving effect to the directions of the learned Panel, and determining a different set of final comparable companies, which was not arrived at in the original TP order or as per the directions of the learned Panel

(Tax Effect: INR 1,03,39,660)



Grounds for data center services

14. On the fact and in the circumstances of the case and in law, with respect to adjustment to the transfer price of the data center services, the learned DRP/ AO/ TPO erred in:
- 14.1. Re-characterising the transaction pertaining to provision of data center services as Information Technology enabled Services ('ITeS') and rejected the comparability analysis undertaken by the Assessee in its TP documentation.
- 14.2. Without prejudice to the above ground 15.1, including the following companies even though they are functionally different from operational profile of the Appellant:
- Cross Domain Solutions Pvt. Ltd.
 - A G S Health Pvt. Ltd.
 - Infosys BPO Ltd.
 - SPI Technologies India Pvt. Ltd
 - Excel Infoways Ltd
 - E-Care India Pvt. Ltd.
- 14.3. Without prejudice to the above ground 15.1, including the following company at entity level and not segmental level:
- BNR Udyog Ltd
- 14.4. Without prejudice to the above ground 15.1, excluding the following companies even though they are functionally comparable to the Appellant and passes all the filters applied by the learned TPO in its order:
- Informed Technologies India Ltd.
 - Cosmic Global Ltd.
 - Sundaram B P O India Ltd.
 - e4e Healthcare Business Services Pvt Ltd

(Tax Effect: INR 4,11,498)

C. Other grounds

15. The consequential relief is to be granted in computation of interest under section 234B and section 234C of the Act.

(Tax effect: INR 4,58,62,307)

16. The learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act, despite the fact that the Appellant has acted in a *bona fide* manner and provided all necessary details called for by the Assessing Officer.

2. The assessee also filed application dated 15/04/2022 for admission of following additional ground.

“17. The learned AO/TPO has erred in applying only the lower turnover filter of less than INR 1 crore as a comparability criterion and not applying a higher threshold limit for turnover filter (i.e. INR 200 crores)”.

2.1 The Ld.AR submitted that this ground was not specifically raised while filing the original grounds and due to inadvertence. He submitted that no new facts needs to be verified in order to adjudicate the ground and therefore prayed for its admission.

2.2 We note that no new documents needs to be verified for adjudicating this ground and respectfully following the decisions of *Hon'ble Supreme Court* in case of *National Thermal Power Co. Ltd. Vs. CIT* reported in (1998) 229 ITR 383 and *Jute Corporation of India Ltd. Vs. CIT* reported in 187 ITR 688, we are admitting the additional ground raised by the assessee.

Accordingly, the application dated 15/04/2022 raising additional ground stands allowed for the year under consideration.

Accordingly, additional grounds raised by assessee stands allowed.

3. Brief facts of the case are as under:

3.1 Blue Coat India is a subsidiary of Blue Coat Systems BV, Netherlands, which in turn is a subsidiary of Blue Coat US. It provides software development services, marketing support services and data center services to its AEs.

3.2 The assessee filed its return of income on 27/11/2015 declaring total income of Rs. 21,17,150/-. The assessee shown book profit at Rs. 25850725/-. The case was selected for scrutiny and notice u/s. 143(2) was issued. The Ld.AO observed that, the assessee had international transaction exceeding Rs. 15 crores, and accordingly, referred the case to the transfer pricing officer to determine the arms length price.

3.3 On receipt of the reference, the Ld.TPO called for the economic details of the international transaction in form 3CEB. From the details filed, the Ld.TPO observed that assessee performed following functions for its associated enterprises.

“2. FUNCTIONAL ANALYSIS OF THE TAXPAYER

2.1. Blue Coat India is the subsidiary of Blue Coat Systems BV, Netherlands, which in turn is a subsidiary of Blue Coat US.

Pursuant to a Research and Development Services agreement ("SWD Agreement") effective April 1, 2013, executed between Blue Coat Switzer and Blue Coat India, Blue Coat India provides software development services in relation to Blue Coat Switzerland's products.

Blue Coat India provides certain software services which include software architectural analysis and design, engineering design and documentation, programming, testing, debugging and product sustaining engineering.

Blue Coat India develops and designs the software with characteristics specified by Blue Coat Switzerland. It is responsible for ensuring that the services conform to Blue Coat Switzerland's specification.

Further, pursuant to the Marketing Support Services agreement ("MSS Agreement"), effective April 1, 2013, executed between Blue Coat India and Blue Switzerland, Blue Coat India provides marketing support services in the nature of marketing and after-sales support functions for customers in India in relations to Blue Coat Switzerland's products. These services focus on increasing the awareness of the Blue Coat brand, educating the market on issues and challenges associated with WAN Application Delivery and Secure Web Gateway products and creating demand for its products and technology.

With effect from April 1, 2013, Blue Coat India entered into a Data Center Services Agreement ("DC Agreement") where in the former makes available data center equipment and provides other support that enable Blue Coat US to support Blue Coat Group's global customers.

Our analysis recognizes that Blue Coat India was engaged in primarily three activities during FY 2014-15:

- Software Development Services: Provisions for software design and development services to Blue Coat Systems International Sarl, Switzerland.*
- Marketing Support Services: Provision of Marketing Support Services with respect to Blue Coat Systems International Sarl, Switzerland's products in India.*

- *Data Center Services; Provision of data center equipment and other support to Blue Coat Systems Inc. ("Blue Coat US"), which included making available the data center equipment and other support that enables Blue Coat US to Blue Coat Group's global customers.*

Blue Coat India leverages on all valuable intellectual property rights (know-how, copyrights etc.) and other commercial or marketing intangibles (brand names, trademarks etc.) owned by the Blue Coat Group. During the FY 2014-15 Blue Coat India engaged about 41 employees approximately to provide the services as per the agreements.

During the year ended March 31, 2015 Blue Coat India had the following International Transactions with its Associated Enterprises;

- Receipt for provision of Software Development Services,*
- Receipt for Marketing Support Services,*
- Receipt for provision of data center equipment and other support, and*
- Recovery of restructuring costs."*

3.4 The Ld.TPO noted that the following were the international transactions undertaken by the assessee.

Particulars	Amt (Recd)	Method
Software Development Services	8,96,18,197	TNMM
Marketing Support Services	13,66,10,710	TNMM
Data Center Services	55,21,397	TNMM
Recovery of Restructuring costs	1,90,28,483	CUP
Total	25,07,78,787	

3.5 The Ld.TPO observed that assessee had computed its margin under the 3 segments as under:

Particulars	Software Development Services	Marketing Support Services	Data Center Services	Total
Operating and Other Expenses	37,47,298	4,31,67,861	18,08,058	4,87,23,217
Operating Profit (A)-(B)	1,16,89,330	1,24,19,157	5,01,945	2,46,10,432

Operating Profit / Total Cost	15.00%	10.00%	10.00%	
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3.6 Following are the details of the comparables selected by the assessee under the two segments:

SWD Segment

Sl.No.	Name of the Company	Wt. Avg (%)
1.	New-Age Bizsoft Solutions Pvt. Ltd.	-1.03%
2.	Akshay Software Technologies Ltd.	3.34%
3.	Helios & Matheson IT (Bangalore) Ltd.	8.50%
4.	CG-VAK Software & Exports Ltd.	10.25%
5.	E-Zest Solutions Ltd.	11.82%
6.	Tata Elxsi Ltd.	12.11%
7.	Sasken Communication Technologies Ltd.	17.76%
8.	Bells Softech Ltd.	19.24%
9.	Helios & Matheson Information Technology Ltd.	19.36%
10.	Centurylink Technologies India Pvt. Ltd.	20.06%
11.	Cigniti Technologies Ltd.	21.14%
12.	Ideavate Solutions	24.84%

ITES Segment

Sl.No.	Name of the Company	Wt. Avg (%)
1.	A2Z Infraserivices Ltd.	5.87%
2.	Ashiana Maintenance	8.71%

	Services Ltd.	
3.	Forbes Facility Services Pvt. Ltd.	3.20%
4.	Geo Connect Ltd.	26.31%
5.	Kingston Property Services Ltd.	1.87%
6.	Lancor Maintenance & Services Ltd.	21.36%
7.	Updater Services Pvt. Ltd.	6.48%

3.7 The Ld.TPO observed that assessee had selected 12 comparables for software development service segment and 7 comparables for ITES segment and applied TNMM as the most appropriate method to compute the margins by using OP/TC as the PLI. Dissatisfied with the comparability analysis carried out by the assessee, the Ld.TPO applied new filters for the segments as under:

Sl.No.	Particulars	Remarks of the TPO
Software Development Services		
1	Companies for which data was not available in Prowess and having positive sale over the time period under consideration.	This is an appropriate filter.
2	Sales > 0 Sales other Operating Income / Total Sales > 50 to Select companies primarily engaged in services activity	This is an inappropriate filter. The TPO has applied service to sale filter greater than 75%.
3	Companies providing Services	This is an appropriate filter
4	Companies with ratio of research and development expenses to sales less than 3% were selected, thereby resulting in selection of companies which do not own intangibles and are pure service providers	This is an inappropriate filter

5	Companies with ratio of net fixed assets to sales less than 200% were selected thereby resulting in selection of comparables which do not undertake manufacturing or hold substantial assets that are not utilized for the provision of services	This is an inappropriate filter
6	Companies that had average sales of less than INR 1 crore.	This is an inappropriate filter. The TPO has selected more appropriate filter as discussed below.
7	Companies with net worth less than zero implying companies which have eroded their net worth and hence are not comparable were rejected.	This is an appropriate filter.
8	Companies with ratio of the sum of advertising marketing and distribution expenses to sales less than 3% were selected, thereby resulting in identification of comparables that do not have ownership of marketing intangibles	This is an inappropriate filter
9	Software Development companies clearing the quantitative criteria were analysed the qualitatively to select functionally comparable companies.	A subjective filter. To be seen on a case to case basis.
10	Segments having data for at least one out of the three financial years under consideration	This is an inappropriate filter. The TPO has selected more appropriate filter as discussed
11	Segments classified under the service industry	This is an appropriate filter.
12	Companies that had average sales of less than 1 INR crore were eliminated.	This is an appropriate filter.
13	Software Development segments of companies clearing the quantitative criteria were analysed the qualitatively to select functionally comparable companies.	This is an appropriate filter.

ITES (Data Center Services)		
1	Companies for which data was not available in Prowess and having positive sale over the time period under consideration.	This is an appropriate filter.

2	Sales > 0 Sales other Operating Income / Total Sales > 50 to Select companies primarily engaged in services activity	This is an inappropriate filter. The TPO has applied service to sale filter greater than 75%.
3	Companies providing Services	This is an appropriate filter
4	Companies that had average sales of less than INR 1 crore.	This is an inappropriate filter. The TPO has selected more appropriate filter as
5	Companies with net worth less than zero implying companies which have eroded their net	This is an appropriate filter.
6	Companies clearing the quantitative criteria were analysed the qualitatively to	This is an appropriate filter.
7	Segments having data for at least one out of the three financial years under	This is an inappropriate filter. The TPO has selected more appropriate filter as
8	Segments classified under the service industry	This is an appropriate filter.

Marketing Sales Support Services		
1	Companies for which data was not available in Prowess and having positive sale over the time period under consideration.	This is an appropriate filter.
2	Sales > 0 Sales other Operating Income / Total Sales > 50 to Select companies primarily engaged in services activity	This is an inappropriate filter. The TPO has applied service to sale filter greater than 75%.
3	Companies providing Services	This is an appropriate filter
4	Ownership screening (independent, non governmental or nor cooperates)	This is an inappropriate filter. The TPO has selected more appropriate filter as discussed below.
5	Companies that had average sales of less than INR 1 crore.	This is an inappropriate filter. The TPO has selected more appropriate filter as discussed below.
6	Companies with net worth less than zero implying companies which have eroded their net worth and hence are not comparable were rejected.	This is an appropriate filter.

7	Companies clearing the quantitative criteria were analysed the qualitatively to select functionally comparable companies.	This is an appropriate filter.
8	Segments having data for at least one out of the three financial years under consideration	This is an inappropriate filter. The TPO has selected more appropriate filter as discussed below.
9	Segments classified under the service industry	This is an appropriate filter.

3.8 The Ld.TPO treated the foreign exchange gains / loss as operating in nature and computed the margins of assessee under the 3 segments as under:

Particulars	Software Development Services	Marketing Support Services	Data Center Services	Total
Operating Profit (A)-(B)	-1,05,57,970	1,59,61,802	7,08,470	61,12,302
Operating Profit / Total Cost	-10.54%	13.23%	14.72%	

3.9 The Ld.TPO selected the following comparables for SWD and ITES as under:

SWD

Sl.No.	Company Name	Financial Year wise OP/OC (%)			
		2014-15	2013-14	2012-13	Average
1	Kals Information Systems Ltd	5.77	16.94	13.51	11.88
2	E-Zest Solutions Ltd	12.59	15.80	14.05	14.05
3	CG-VAK Software & Exports Ltd.	19.87	13.81	22.07	18.50
4	Tata Elxsi Ltd. (Seg)	23.33	22.02	11.24	19.34
5	Rheal Software Pvt. Ltd.	2.76	36.64	No data in Public Domain	19.88
6	Mindtree Ltd.	20.55	21.18	19.75	20.55
7	Larsen & Toubro Infotech Ltd.	24.22	23.54	25.10	24.21
8	R S Software (India) Ltd.	32.66	24.14	17.44	24.82
9	Infobeans Technologies Ltd.	20.70	41.95	29.22	29.91
10	Persistent Systems Ltd.	31.11	35.44	28.20	31.69
11	Nihilent Technologies Ltd.	29.19	35.72	No data in Public Domain	32.21

12	Aspire Systems (India) Pvt. Ltd.	30.98	38.04	No data in Public Domain	34.18
13	Inteq Software Pvt. Ltd.	31.16	45.00	Fails Employee cost filter	37.90
14	Infosys Ltd.	40.29	36.28	39.25	38.59
15	Thirdware Solution Ltd.	43.69	44.68	32.65	41.12
16	Cybage Software Pvt. Ltd.	68.17	68.82	60.81	66.27
	35 th Percentile				20.55%
	Median				27.37%
	65 th Percentile				37.90%

ITeS

Sl.No.	Company Name	F.Year wise OP/OC (%)			Wt. Average
		2014-15	2013-14	2012-13	
1	ACE BPO Services Pvt Ltd	2.21	1.40	3.21	2.38
2	Jindal Intellicom Limited	7.87	11.56	-2.84	5.44
3	Microgenetic Systems Limited	1.08	13.00	16.97	10.18
4	Crossdomain Solutions Pvt Ltd	15.23	21.18	22.43	18.81
5	Tech Mahindra BSPL	29.96	13.45	Fails RPT Filter	21.05
6	BNR Udyog (Seg)	6.62	27.40	35.80	23.26
7	A G S Health Pvt. Ltd.	25.35	No Data	No Data	25.35
8	Infosys B P O Ltd.	26.16	27.43	29.31	27.45
9	S P I Technologies India Pvt. Ltd.	33.29	42.72	No Data	36.6 ²
10	Excel Infoways Ltd.	2.55	27.97	70.07	39.97
11	E-Care India Pvt Ltd	27.02	47.46	53.91	40.77

3.10 The Ld.TPO thus determined the adjustment proposed under the two segments as under:

SWD SEGMENT		
Particulars	Formula	Amount
Taxpayers PLI	PLI=OP/OC	-10.54%
35th Percentile Margin of comparable set		20.55%
Adjustment Required (if PLI< 35th Percentile)		Yes
Median Margin of comparable set	M	27.37%
Arm's Length Price	ALP=(i+M)*OC	12,75,94,384
Price Received	OR	8,96,18,197
Shortfall being adjustment	ALP-OR	3,79,76,187

ITeS SEGMENT		
Particulars	Formula	Amount
Taxpayers operating revenue	OR	55,21,397
Taxpayers operating cost	OC	48,12,927
Taxpayers operating profit	OP	7,08,470
Taxpayers PLI	PLI=OP/OC	14.72%
35th Percentile Margin of		18.81%
Adjustment Required (if PLI< 35th Percentile)		Yes
Median Margin of comparable set	M	23.27%
Arm's Length Price	ALP=(1+M)* OC	59,32,895
Price Received	OR	55,21,397
Shortfall being adjustment	ALP-OR	4,11,498

3.11 The Ld.TPO subsequently observed that, the assessee applied TNMM as the most appropriate method for marketing support service segment and computed its margin at 10%. Assessee selected the comparables that had the weighted median margins at 7.33% by using OP/OC as PLI.

Sl. No	Name of the Company	Wt. Avg (%)
1	Fusion Events Pvt. Ltd.	6.81%
2	Majestic Research Services & Solutions Ltd.	9.16%
3	MCI Management India Pvt. Ltd.	5.49%
4	Showhouse Event Management Pvt Ltd	7.37%
5	Netscribes India Pvt. Ltd.	8.61%
6	Competent Automobiles Ltd. (Service & Spares)	8.15%
7	Empire Industries Ltd. (trading & Indenting)	5.72%

3.12 The Ld.TPO rejected the study carried out by assessee for the marketing support service segment. The Ld.TPO selected the

following set of comparables for marketing support service segment and computed the proposed adjustment as under:

Sl. No.	Company Name	YE-Mar 2015	YE-Mar 2014	YE-Mar 2013	All Years
		(OP/OC) (%)	(OP/OC) (%)	(OP/OC) (%)	Wt. PLI (SOP/SOC)(%)
1	Adhaan Solution Pvt. Ltd.	1.37	1.46	-	1.40
2	Kestone Integrated Mktg. Services Pvt. Ltd.	9.73	7.15	6.87	8.13
3	Concept Public Relations India Ltd.	16.22	4.79	0.76	8.54
4	Irclass Systems & Solutions Pvt. Ltd.	15.21	-	-	15.21
5	Ugam Solutions Pvt. Ltd.	11.53	29.08	9.86	16.87
6	Axience Consulting Pvt. Ltd.	19.84	17.72	15.63	18.03
7	Majestic Research Services & Solutions Ltd.	18.49	-	-	18.49
8	Axis Integrated Systems Ltd.	44.14	23.30	-0.21	22.88
9	Killick Agencies & Mktg. Ltd.	23.12	22.43	26.91	24.16
10	Digital Radio (Delhi) Broadcasting Ltd.	39.70	27.51	11.09	27.20
11	Just Dial Ltd.	32.66	37.15	31.36	33.75
12	Rites Ltd.	33.90	-	-	33.90
13	Platinum Advertising Pvt. Ltd.	53.94	14.40	-	34.07
35th percentile					16.87
Median					18.49
65th percentile					24.16

3.13 The Ld.TPO thus proposed an adjustment under the 3 segments that are summarized as follows:

MSS SEGMENT		
Particulars	Formula	Amount
Taxpayers Operating Revenue	OR	13,66,10,710
Taxpayers Operating Cost	OC	12,06,48,908
Taxpayers Operating Profit	OP	15961802
Taxpayers PLI	PLI=OP/OC	13.23%
35th Percentile Margin of comparable set		16.87%
Adjustment Required (if PLI < 35th Percentile)		Yes
Median Margin of comparable set	M	18.49%
Arm's Length Price	ALP=(1+M)*OC	14,29,56,892
Price Received	OR	13,66,10,710
Shortfall being adjustment	ALP-OR	63,46,182

Sl. No	Description	Adjustment u/s 92CA (In Rs.)
1	Software Development segment	3,79,76,187
2	ITeS segment	4,11,498
3	MSS Segment	63,46,182
Total adjustment u/s 92CA		4,47,33,867

3.14 On receipt of the transfer pricing order under 92CA, the Ld.AO passed the draft assessment order on 05/12/2018 by making further additions along with the adjustment proposed u/s. 92CA, being disallowance on account of addition made to fixed assets Rs.6,20,971/-.

3.15 Against the draft assessment order, the assessee filed objections before the DRP. DRP upheld the adjustment proposed by the Ld.TPO.

3.16 On receipt of the DRP directions, the Ld.AO passed the impugned order by incorporating the additions proposed in the draft assessment order.

3.17 Aggrieved by the order of Ld.AO, the assessee filed the present appeal before this *Tribunal*.

4. At the outset, the Ld.AR submitted that **Ground nos. 1 & 2** are general in nature.

5. Ground nos. 5 & 6 are not pressed.

6. Ground no. 7 – Assessee is seeking working capital adjustment in this ground.

7. Ground nos. 8-10 are general in nature and therefore not pressed.

8. Ground no. 10 entirely is not pressed and is only seeking to argue the additional ground no. 17.

9. Ground no. 12 is also not pressed by the assessee.

10. In **Ground No. 12.1**, assessee is restricting to seek exclusion of only 3 comparables under the MSS segment on functional dissimilarities.

a) Killick Agencies & Marketing Ltd.

b) Digital Radio (Delhi) Broadcasting Ltd.

c) Just Dial Ltd.

11. The assessee is not pressing **Ground nos. 12.2, 13, 14 to 14.4**.

Accordingly we are restricting our view only in respect of Ground nos. 3-4, Ground nos. 7, 12.1 and additional ground no. 17 raised by assessee.

12. The Ld.AR filed before us, synopsis of the arguments on the date of hearing and a chart in respect of the comparables sought for exclusion.

13. Ground nos. 3-4 are in respect of reallocating other expenses between software development service segment, marketing

support service segment and Data center service segment on the basis of revenue by the Ld.TPO. It is submitted that the directions of the DRP has not been followed by the Ld.TPO while passing the impugned order. Further, the Ld.AR submitted that, in **Ground no. 4**, the directions of the DRP with respect to rectification of computation of operating markup on cost earned by the assessee by excluding restructuring cost from the operating cost passed was directed to be granted by the DRP. He submitted that the above direction in respect of these two issues have not been applied with by the Ld.AO.

13.1 The Ld.AR relying on the decision of *Coordinate Bench of this Tribunal* in case of *CISCO Systems (India) Pvt. Ltd. vs. DCIT* reported in *(2014) 50 taxmann.com 280* has held “headcount” to be an appropriate allocation key for allocating common indirect expenses within various segments.

13.2 On the contrary, the Ld.DR relied on the orders passed by authorities below.

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

13.4 We note that the Ld.AO/TPO rejected the segmental financial details provided by assessee and reallocated other expenses including restructuring cost between SWD segment, marketing support service segment and Data center service segment by using segmental turnover as the allocation key instead of “headcount” as was followed by the assessee in the TP study. We note that the DRP observed and held as under:

“2.2.1 The assessee has raised a plea that the TPO has treated restructuring cost incurred by the assessee of Rs.1,90,28,483/- as operating in nature, and recomputed

the PLI of the various segments. We have perused the TP order, we note that there is no specific discussion on this issue. In the circumstances, we consider it appropriate to direct the TPO, not to treat the above restructuring cost as operating cost, if he had given such treatment in the computation of PLI. Accordingly, the PLI may be recomputed, if need be. This objection is accordingly disposed.”

13.5 We note that the directions of the DRP has not been followed by the Ld.TPO. The Ld.TPO is directed to pass the order in consonance with the directions of the DRP as per the sub clause (13) to section 144C of the Act. We therefore direct the Ld.TPO/Assessing Officer to consider this issue in accordance with the directions of DRP.

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

14. The assessee in additional ground no. 17 and 12.1 is seeking exclusion of certain comparables on turnover filter as well as dissimilarity in functions.

15. Before we undertake the comparability analysis it is *sinequa non* to understand the FAR of the assessee under SWD and MSS.

SWD

Functions

Blue Coat India carries out software development services for Blue Coat Switzerland based on the intercompany services agreement defining the scope and nature of the assignments. An understanding of Blue Coat India's participation in the various stages of the product lifecycle determines the role that Blue Coat India undertakes in the value chain of Blue Coat Switzerland.

It is important to note that, the product conceptualization and designing i.e., requirement analysis, is the most critical stage in a product lifecycle which is performed by Blue Coat Switzerland.

The various functions performed by Blue Coat India for Blue Coat Switzerland with respect .to. software development services as well as its development projects are illustrated in the following diagram. The Waterfall model of software product development life cycle with the role of Blue Coat India & Blue Coat Switzerland are:

- i) Low level design
- ii) Coding
- iii) Testing
- iv) Post Implementation Support

Assets

Blue Coat Switzerland is the owner or licensee, as the case may be, of rights; titles and interest in intellectual properties and Blue Coat India do not own any significant intangibles. Blue Coat India uses the process, technical data software, quality standards etc.

Risks

Risk Category and Description	Exposure of Blue Coat India	Exposure of AEs
Market Risk: Market risk arises for a business due to increased competition and relative pricing pressures, change in demand patterns and needs of customers, inability to develop/ penetrate in a market, etc.	Blue Coat India does not have any exposure to market risk as it renders software development services exclusively for Blue Coat Switzerland and is compensated irrespective of the success or failure of its activity. However it may bear a secondary consequential risk if the business of Blue Coat Switzerland were to be materially and adversely affected for any foreseen / unforeseen reasons.	Blue Coat Switzerland is entirely responsible for marketing, negotiating and entering into contracts with its clients.

<p>Service liability risk: Risks associated with service failures including non-performance to generally accepted or regulatory standards. This could result in product recalls and possible injuries to end-users.</p>	<p>Blue Coat India renders its software development services to Blue Coat Switzerland and hence does not bear any risk on account of any liability arising in terms of product or technology. It does not bear warranty costs or risks relating to contract enforceability or any other similar risks, since it renders its software development services for captive utilization by Blue Coat Switzerland and its role is only to develop certain software for the ultimate product(s) of Blue Coat Switzerland.</p>	<p>Blue Coat Switzerland contracts with the customers and bears the product liability risk for the sale of its products / licenses to the customers.</p>
<p>Technology Risk: This risk arises if the market in which the company operates in is sensitive to introduction of new products and technologies. Hence, business units may face loss of potential revenues due to inefficiencies arising from obsolete infrastructure and tools as well as obsolescence of processes.</p>	<p>Blue Coat India does not bear any risk in this regard because it operates as a captive service provider, and is remunerated on the basis of costs incurred by it plus an agreed mark-up.</p>	<p>Blue Coat Switzerland being the entrepreneur bears the risks with respect to the technology obsolescence or introduction of new products or technologies.</p>
<p>Credit Risk: This is the risk arising from non-payment of dues by customers.</p>	<p>Blue Coat India assured of its payment from Blue Coat Switzerland and hence does not bear any risk of no-payment for services provided.</p>	<p>Blue Coat Switzerland provides services to a wide array of customers worldwide, both on advance payment or payment in arrears, which might result in non-payments and bad debts.</p>
<p>Foreign Exchange Risk: This risk relates to the potential impact on profits that may arise because of changes in foreign exchange rates.</p>	<p>Blue Coat India incurs expenses in local currency and is paid by Blue Coat Switzerland in local currency. As a result of Blue Coat India bears minimal foreign exchange risk.</p>	<p>As Blue Coat Switzerland compensates Blue Coat India in its local currency it takes the risk associated with the exchange rate fluctuations.</p>

MSS

Functions

Blue Coat India performs marketing and after-sales support functions for the customers in India, cusing on increasing the awareness of the Blue Coat products, educating the market on issues and challenges associated with WAN Application Delivery and Secure Web Gateway products and creating demand for its products and technology etc.

The primary role of Blue Coat India is to function as a local contact for Blue Coat Group's customers. As such, Blue Coat India

- facilitates customers' orders;
- maintains relationship with the customers;
- introduces new products to the customers; and
- conducts market research.

Blue Coat India uses its best efforts to promote the products of Blue Coat Switzerland in India, including advertising and sales, service and support, distribution of promotional materials and participation in trade shows. Blue Coat India uses promotional and advertising material supplied by its AE.

Blue Coat India does not make decisions on pricing or key terms, or take title to Blue Coat Switzerland's products at any time — Blue Coat Switzerland sells products directly to third-party distributors and customers.

Risks

Risk Category and Description	Exposure of Blue Coat India	Exposure of AEs
Market Risk: Market risk arises for a business due to increased competition and relative pricing pressures, change in demand patterns and needs of customers, inability to develop / penetrate in a market, etc.	Blue Coat India does not have direct exposure to market risk as it renders marketing support services to facilitate Blue Coat Group's sales in India. Further the compensation model of Blue Coat India ensures a return for its services as it is compensated on a cost plus pre-determined mark-up basis and is compensated for the services provided, irrespective of the success or failure of its activities or the volume and product mix of sales.	Since Blue Coat Switzerland's revenues depend on the market for networking hardware and software, Blue Coat Switzerland bears market risk within their respective territories.
Contract Risk: This risk arises if the contracting entity is unable to fulfil the terms of contract entered into with third party.	Blue Coat India does not take part in negotiations with the prospective Indian clients and thus bears no contract risk.	All negotiations and terms of sale of the products and services are carried out independently by Blue Coat Switzerland with the prospective Indian clients. Further, the sales contracts are entered into with the customers by Blue Coat Switzerland directly or through channel partners.
Product Development risk: This risk arises if the market in which the company operates in is sensitive to introduction of new. Hence, in that case, business units may face loss of potential revenues due to inefficiencies arising from obsolete infrastructure and tools as well as obsolescence of development processes.	Blue Coat India does not undertake any research and development activities on its own account and does not bear any risk on this count.	Blue Coat US / Blue Coat Switzerland undertake the activity related to the development of the products, As a result, Blue Coat US / Blue Coat Switzerland bear a portion of the risk associated with the success or failure of R&D activities, which may arise, in part, due to the high degree of technical complexity of Blue Coat Group's products and services.
Credit Risk: This is the risk arising from non-payment of dues by customers.	Blue Coat India renders services only to its associated enterprise and thus is assured of payment for services on raising the invoice. Blue Coat India does not sell products to customers directly and	As such, Blue Coat Switzerland bears credit and collection risk relating to the sale of Blue Coat US products in India.

Risk Category and Description	Exposure of Blue Coat India	Exposure of AEs
	therefore do not hold receivables from customers. As a result, of Blue Coat India do not bear credit and collection risk in their operations.	
Inventory Risk: This risk is associated with management of inventory in case of overstocking or slow/ non-moving inventory resulting from a rapidly changing and technology/ price sensitive market. As a result the enterprise may be forced to bear a loss of margin on the inventory, or incur additional costs to dispose the same.	Blue Coat India does not take title to Blue Coat Group's products at any time, and, as a result, do not bear any inventory risk.	Blue Coat Switzerland directly sells to third party customers and thus takes the inventory risks associated with maintaining adequate inventory to meet customer requirements.
Foreign Exchange Risk: This risk relates to the potential impact on profits that may arise because of changes in foreign exchange rates.	Blue Coat India incurs expenses in local currency and is paid by Blue Coat Switzerland in local currency. As a result of Blue Coat India bears minimal foreign exchange risk.	As Blue Coat Switzerland compensates Blue Coat India in its local currency it takes the risk associated with the exchange rate fluctuations.
Warranty and product liability risk: Risks associated with product / service failures including non-performance to generally accepted or regulatory standards. This could result in product recalls and possible injuries to end-users.	Blue Coat India does not take any warranty or Service liability risks as it does not carry out any sales activity on its own account and thus does not contract with third party customers also.	Blue Coat Switzerland contracts with customers for sale of Blue Coat US products and thus bears ultimate responsibility for any warranty and product liability risk incurred for sales of Blue Coat US's products.

Characterisation

Based on the functional profile, assets utilised and the risks borne, as documented in the above analysis, for transfer pricing purposes, it is possible to characterise Blue Coat India as a captive contract service provider providing software development services, being a contract service provider, Blue Coat India is risk insulated for the provision of software development services.

With regard to marketing support services, Blue Coat India is characterised as a contract service provider providing services to

its AEs. Blue Coat India is risk insulated for the provision of marketing support services.

16. The Ld.AR thus challenged exclusion of following comparables under SWD service segment by way of a chart filed on 14/06/2022.

SWD Segment:

- a) Mindtree Ltd.
- b) Larsen and Toubro Infotech Ltd.
- c) RS Software India Ltd.
- d) Infobeans Technologies Ltd.
- e) Persistent Systems Ltd.
- f) Nihilent Technologies Ltd.
- g) Aspire Systems India Pvt. Ltd.
- h) Inteq Software Pvt. Ltd.
- i) Infosys Ltd.
- j) Cybage Software Ltd.

16.1 Additional ground no. 17, 12.1 – It is submitted that the Ld.AO has applied turnover filter of less than Rs. 1 crore but failed to apply the upper turnover filter. The Ld.AR relied on various judicial decisions wherein it is held that companies having considered turnover in excess of Rs. 200 crores deserves to be excluded in case of an assessee with a low turnover. The Ld.AR submitted that assessee has a turnover of Rs. 8 crores under SWD service segment and therefore companies with high turnover cannot be included for comparability analysis.

16.2 The Ld.AR also relied on decision of *Coordinate Bench of this Tribunal* in case of *M/s. Zynga Game Network India Pvt. Ltd. vs. DCIT in ITA No. 2573/Bang/2019 by order dated 23/03/2021* for

A.Y. 2015-16 wherein the above comparables under SWD service segment were rejected on account of high turnover. He also relied on following decisions.

- *Radisys India Pvt. Ltd. v ACIT for AY 2015-16 in IT (TP) A No. 2482/Bang/2019*
- *Yahoo Software Development India Pvt. Ltd for AY 2015-16 in IT(TP)A No. 2365/Bang/2019*
- *Arista Networks India Pvt. Ltd. for AY 2015-16 in IT(TP)A No.2440/Bang/2019*
- *Goldman Sachs Services Pvt. Ltd. for AY 2015-16 in IT(TP)A No. 2355/Bang/2019*
- *Pearson India Support Services Pvt. Ltd. v. DCIT in ITA No.3171/Bang/2018*

16.3 The Ld.DR relied on the orders passed by authorities below.

15. We note that, the *Coordinate Bench* of this Tribunal in case of *M/s. Zynga Game Network India Pvt. Ltd. vs. DCIT (supra)* in respect of the alleged comparables observed as under:

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

38. We note that Ld.AO/TPO has applied filter of more than Rs.1 crore, but did not put an upper limit to the filter. This Tribunal in case of [Genesis Integrating Systems India Pvt Ltd vs DCIT](#) reported in (2012) 53 SOT 159 and various other decisions have held that, companies having turnover in excess of Rs.200 crores cannot be compared with companies having turnover less than Rs.200 crore. This proposition has been accepted by Hon'ble Bombay High Court in case of [CIT vs Pentair Water Pvt.Ltd.](#), by order dated 16/09/2015 in ITA No. 18/2015. Hon'ble Court upheld rejection of companies having turnover holding that turnover is a relevant factor in considering comparability of companies.

*39. Objection raised by Ld.CIT.DR has been dealt with by this Tribunal in case of *Autodesk India Pvt.Ltd. vs DCIT* in (2018) 96 taxmann.com 263 for assessment year 2005-06. This Tribunal reviewed gamut of case laws to consider, whether companies having turnover more than Rs.200 crores should be regarded as comparable with a company having turnover less than 200 crore. This Tribunal held as under:*

"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 ITA No.2573/Bang/2019 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 Pentair Water India (P.) Ltd. (supra) 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 Systems (I) (P.) Ltd. (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 Systems (I) (P.) Ltd. (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 Systems (I) (P.) Ltd. (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 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 ITA No.2573/Bang/2019 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)."

40. Ld.AR submitted that though this decision was rendered with reference to AY 2005-06 and 2006-07, same reasoning would apply to AY 2015-16 also and in this regard. Based upon above discussions and the decision relied by Ld.AR herein above. We are of opinion that objection raised by revenue cannot withstand the test of law.

Accordingly 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."

16.4 The assessee in *Zynga Game Network India (P.) Ltd. (supra)* was a captive service provider to its AE for assessment year 2015-16. 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)*.

16.5 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.

17. Infobeans Technologies Ltd.

17.1 The assessee is seeking the exclusion of this company from the comparable list. According to the Ld.AR, Infobeans Technologies Limited is engaged in providing Custom Application Development (CAD), Content Management Systems (CMS), Enterprise Mobility (EM), Big Data Analytics (BDA). Therefore, it was submitted that Infobeans Technologies Limited cannot be compared to assessee, who is engaged in providing routine software development services to its AEs.

17.2 We have heard rival submissions and perused the material on record. The *Tribunal* in the case of *Zynga Game Network India (P.) Ltd. (supra)* excluded Infobeans Technologies Ltd., from the list of comparables. 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 *Zynga Game Network India (P.) Ltd. (supra)*, are as follows:—

"43. We have perused submissions advanced by both sides in light of records placed before us. It is observed that the annual report of this company categorises the diversify services provided by this company under software development segment. We also note that this company is basically into application development for web and mobile and provides customised services to its offshore clients comprising. Entire revenue received by this comparable ease under one single segment of sale of software. This company also owns software licenses.

44. In our considered opinion this comparable cannot be considered to be functioning in 100% risk mitigated environment and is a full-fledged enterprise. Such a comparable cannot be compared with a captive service provider like assessee.

Accordingly we direct this comparable to be excluded from finalist."

17.3 The assessee therein was a captive service provider to its AE for assessment year 2015-16. 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 order of the *Tribunal* in the case of *Zynga Game Network India (P.) Ltd. (supra)*, we direct the AO/TPO to exclude Infobeans Technologies Ltd., from the list of comparables.

18. Inteq Software Pvt.Ltd.

18.1 The assessee is seeking to exclude the above company from the list of comparables. According to the assessee, Inteq Software Pvt.Ltd., provides application services, software testing, data warehousing, EI & EDI, BPO and staffing services. It is stated that Inteq Software Pvt.Ltd., is also involved in end to end product development with primary focus in healthcare industry and there is no segmental information. The Ld.AR referred the audited accounts of Inteq Software Pvt.Ltd., placed at paged 838-839 of paper book in support of his submission.

18.2 The Ld.DR supported the order of the Ld.AO/TPO.

18.3 We have heard rival submissions and perused the material on record. On perusal of the balance sheet of of this comparable, we note that it is involved in multifarious services such as application services, software testing, data warehousing, EDI, BPO, staffing etc. However, we noticed from the Ld.AO/TPO and the DRP's order, it is stated that Inteq Software Pvt.Ltd., is only involved in software development services and the entire turnover is from such service. It is not clear how DRP had arrived at such

a conclusion. The profit and loss account of Inteq Software Pvt.Ltd., is not on record. We therefore, deem it appropriate to restore this issue to the file of Ld.AO/TPO. The AO/TPO is directed to afford a reasonable opportunity of hearing to the assessee and decide whether Inteq Software Pvt.Ltd., is to be included in the comparable list of companies.

18.4 This comparable is remand to the Ld.AO/TPO to be considered in accordance with law. Needless to say that proper opportunity of being heard must be granted to the assessee.

19. Aspire Systems (India) Private Limited

19.1 The assessee is seeking the exclusion of the above company from the list of comparables. It is contended that Aspire Systems (I.) Pvt.Ltd., is an outsourced technology service company focused on helping software companies create innovative products through its onsite and offshore model. It is also contended that the said company has also income from power generation. It was stated that bifurcation of revenue from both software and power generation services is not provided in the annual report. The Ld.AR also had contended that the said company fails RPT filter. The Ld.AR had took us through the abridged balance sheet of Aspire Systems (I.) Pvt.Ltd., to contend that the said company is not merely into the software development services, but has multifarious activities and cannot be compared to the assessee.

19.2 The Ld.DR supported the findings of the TPO/DRP.

19.3 We have heard rival submissions and perused the material on record.

19.4 On perusal of the annual report of Aspire Systems (I.) Pvt. Ltd., it is seen that the said company is an outsourced

technology service company. It is also stated that, there is income from power generation. Since the profit and loss account of the assessee company is not enclosed, we are not in a position to examine the observation of the DRP that, this comparable is a pure software development service provider. Therefore, in the facts of the instant case, we deem it appropriate to restore the issue to the files of the AO/TPO. The AO/TPO is directed to afford a reasonable opportunity of hearing to the assessee and take a decision whether Aspire Systems (I.) Pvt.Ltd., can be a comparable.

19.5 This comparable is remand to the Ld.AO/TPO to be considered in accordance with law. Needless to say that proper opportunity of being heard must be granted to the assessee.

Accordingly Additional Ground No.17 stands allowed as indicated herein above.

20. Ground No.7 is in respect of non granting to WCA while computing the margins of the comparables.

20.1 At the time of hearing, the Ld.AR pressed for providing working capital adjustment. Identical issue was considered by coordinate bench of this Tribunal in case of *Huawei Technologies India (P.) Ltd. v. JCIT* reported in [2019] 101 *taxmann.com* 313. This Tribunal held as follows :

'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 insofar 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.

20.2 In the light of the above, we are of the view that, the Ld.AO was not justified in denying adjustment on account of working capital adjustment. In the light of the decision referred to above, the assessee is entitled to working capital adjustment. The assessee is directed to provide the working capital adjustment for year under consideration. The TPO is accordingly directed to allow the same as per law.

Accordingly this ground raised by the assessee stands allowed.

21. Ground No.12.1 is in respect of following 3 comparables sought for exclusion by the assessee under the MSS segment.

1. Killick Agencies & Marketing Ltd.
2. Digital Radio Broadcasting Lts.
3. Justdial Ltd.

The Ld.AR submitted that, apart from above three, the assessee do not wish to contest any other comparables for exclusion under this segment.

21.1 Killick Agencies & Marketing Ltd.

21.1.1 It was argued before us that the comparable was functionally different whereas the ld. DRP held that the business

model are type of income does not matter with reference to functional comparability.

21.1.2 The DRP also held that the comparable provides lot of services which help the companies to sustain the market.

21.1.3 We find that "Killick" is engaged in acting as agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propellers, maritime and aviation lighting, acoustic communication equipment etc. and sales services. Apart from this, the company is involved in exports of micro switches, engineering items, acoustics items & headsets. It is engaged in the business of marine equipment like specialized propulsion systems, marine engines, industrial & marine gear boxes, ballast water treatment system, special purpose sea going vessels, industrial & marine exhaust system, ship lighting & navigation lighting systems, dredges and dredge equipment, ship building presses, rescue boats and specialized davits, reverse osmosis water systems and special acoustic communication equipment for defence. "Killick" provides after sales services for the equipment's supplied by its principals.

21.1.4 Whereas, the assessee is involved in corporate services and market research & business development. The corporate service includes assisting the day-to-day management of the organization (*e.g.* finance, human resources, information systems etc.). With respect to human resources, financial management, routine administration etc. In our view this comparable cannot be held functionally similar with that of the assessee before us.

Accordingly we direct this comparable to be excluded from the list of comparables.

21.2 Digital Radio Broadcasting Ltd.

21.2.1 The Ld.AR submitted that this company is predominantly earning revenue from the sale of advertisement and sale of concert tickets. The Ld.AR submitted that this comparable is earning revenue from which head is not identifiable from the audit reports placed at page 1666 of the paper book in the Director's report.

21.2.2 Though it is mentioned that the company have above revenue of Rs.55 crores however in the note 17 at page 1679, income from other sources are computed at Rs.6,97,05,166/-. At page 1681, this company has entered into Broadcast open commencement of commercial operations, music in which phonographic performance ltd. has a copyright. Further at page 1684, the segmental report of this company has been mentioned to be as under:

“Segment Reporting:

a) Primary Segment:

The company operates predominantly in only one business segment viz. ‘Advertisement Sale’ and there are no reportable business segments.

b) Secondary Segment:

The Company caters predominantly to the needs of Indian market and there are no reportable geographical segments.”

21.2.3 The Ld.TPO considered it to be functionally similar merely because it is performing advertisement sales as mentioned at page 1684 of the paper book.

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

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

21.2.6 Comparing the above functions with that of assessee before us, is after sales support functions for customers in India causing an increasing awareness of the Bluecoat products. Further the services are rendered only to the clientele of the AE to whom the Bluecoat products are sold. The above functions of this comparable is therefore not akin to the functions performed.

Accordingly we direct the Ld.AO/TPO to exclude this comparable from the final list.

21.3 Justdial Ltd.

21.3.1 The Ld.AR submitted that this comparable is not functionally similar with that of assessee as it is a search engine providing search related services to its customers. It is further submitted that Just dial provides users with a search option, which enables them to enter their search requests, against which Just dial lists the results, based on the information in Just dial interface. Just dial earns revenue for listings on its website, which could be with or without a premium and the Ld.AR submitted that this company owns significant intangibles. He thus prayed for this company to be excluded.

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

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

21.3.4 We note that this company has a turnover of more than 5,897.98 million. We note that this company works on pan India operation and is supported by sales and marketing team consisting of telesales executives, Feet-On-Street and Just dial ambassadors. The advertising activity carried by this company

has led to increase in its brand value and is considered to be India's leading local search related service provider. This company has its presence in the e-commerce sector with an unprecedented growth in the year 2014 with about 893 million wireless subscribers by placing India as the largest wireless largest market globally. With the above functions and the wide variety of services rendered by this company, assessee is not at all comparable that has carried on with the captive service provider only rendering services to the clients of its AE.

Accordingly, we direct the Ld.AO/TPO to exclude this comparable from the final list.

Accordingly, ground no. 12.1 raised by assessee stands allowed.

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

Order pronounced in open court on 29th July, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 29th 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