

**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.2385/Bang/2019
Assessment Year: 2015-16

Airbus Group India Pvt. Ltd. 4 th Floor, Xylem, Plot No.4&4A Dyavasandra Industrial Area Mahadevpura Post Whitefield Road Bangalore 560 048. PAN NO : AAGCA1513R	Vs.	Deputy Commissioner of Income-tax Circle – 1(1)(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri Sumeet Khurana, A.R.
Respondent by	:	Dr. Manjunath Karkihalli, D.R.

Date of Hearing	:	13.07.2022
Date of Pronouncement	:	05.08.2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by the assessee is directed against the final assessment order passed by DCIT, Circle-1(1), Bangalore. The assessee has raised following grounds of appeal:-

The grounds mentioned herein below are independent and without prejudice to one another.

1. That, orders passed by the Deputy Commissioner of Income-tax, Circle 1(1)(1), Bengaluru (“Learned AO”) and the Deputy Commissioner of Income-tax (Transfer pricing) – 1(1)(1), Bengaluru (“Learned TPO”) under section 143(3) read with section 144C of the Act in pursuance of the directions of the Dispute Resolution Panel (“Learned Panel”), to the extent prejudicial to the interest of the Appellant, are bad in law and contrary to the facts.

2. That the draft of the Assessment Order passed under section 144C of the Act is time barred and resultantly final assessment order is invalid being null and void.

Grounds relating to transfer pricing matters

3. On facts and in the circumstances of the case and in law, Learned DRP erred in confirming the action of the Learned AO/ Learned TPO in making an adjustment of INR 13,18,94,281 to the transfer price of the Appellant's international transactions in respect of software engineering and design services.
4. On the fact and in the circumstances of the case and in law, with respect to adjustment to the transfer price of the software engineering and design services, the Learned DRP/ AO/ TPO erred in:
 - 4.1. Applying the provisions of Rule 10B(5) read with Rule 10CA(2) and Rule 10CA(4) of the Income-tax Rules, 1962 ('the Rules') while undertaking a fresh benchmarking analysis for the software engineering and design services.
 - 4.2. Rejecting the Transfer Pricing ("TP") documentation maintained by the Appellant under Section 92D of the Act, in good faith and with due diligence.
 - 4.3. Rejecting the benchmarking/ comparability analysis carried out by the Appellant in the TP documentation and in conducting a fresh comparability analysis for the software engineering and design services based on the application of additional filters in determining the arm's length price.
 - 4.4. Using data, which was not contemporaneous and which was not available in the public domain at the time of preparing the TP documentation.
 - 4.5. Using information under section 133(6) of the Act, which tantamount to choosing secret comparable companies whose information was not available in public domain while preparing the TP documentation for the relevant financial year.
 - 4.6. Disregarding certain filters applied by the Appellant in selection of the comparable companies at the time of TP documentation.
 - 4.7. Applying/ modifying the following filters while undertaking comparability analysis:
 - a) Rejection of companies having different financial year ending or data of the company not falling within 12 month period; and
 - b) Rejection of companies by applying an inappropriate interpretation of computing the related party transaction filter.
 - 4.8. Including the following companies even though such companies are functionally different (such as engaged in R&D activities, presence of intangibles, significant onsite revenue, etc.) from the Appellant:
 - a) Rheal Software India Private Limited;
 - b) Mindtree Limited;
 - c) Larsen & Tubro Infotech Ltd;
 - d) R S Software (India) Limited;

- e) Infobeans Technologies Limited;
- f) Persistent Systems Limited;
- g) Nihilent Technologies Limited;
- h) Aspire Systems (India) Private Limited;
- i) Inteq Software Private Limited;
- j) Infosys Limited; and
- k) Cybage Software Private Limited.

4.9. Excluding the following companies even though the same are functionally comparable to the Appellant:

- a) Akshay Software Technologies Limited;
- b) Evoke Technologies Private Limited;
- c) R Systems International Limited;
- d) I2T2 India Limited; and
- e) Daffodil Software Limited.

4.10. Not providing suitable adjustment to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies.

4.11. Not providing appropriate adjustment towards the unutilized capacity in the Commercial and Defense Space Division within software engineering and design services segment.

4.12. Computing incorrect operating mark-up of certain comparable companies selected by the Learned TPO.

(Tax effect: INR 44,830,866)

Grounds relating to other than transfer pricing matters

5. Disallowance of reimbursement of salary cost of personnel transferred from overseas group entities under section 40(a)(i) of the Act

5.1. That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel have erred in making / sustaining the disallowance of INR 25,13,98,099.

Without prejudice to the generality of the foregoing:

5.1.1 The Learned AO and the Learned Panel have erred in holding that absence of mark-up does not determine the nature of the payment.

5.1.2 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in disregarding the fact that tax was deducted on the said payment by treating the same as 'Salary' hence there was no *failure*¹ to deduct tax at source thereon.

5.1.3 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in treating the said payment to be in the nature of 'fees for technical services' (FTS).

- 5.1.4 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in treating the said payment to be in the nature of 'fees for technical services' (FTS).
- 5.1.4 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in ignoring that amount paid to overseas entities was not towards rendition of any service by any non-resident but represented salary cost incurred by the Appellant on which tax was deducted at source under section 192 of the Act and that mere reimbursement of such salary cost by the Appellant cannot be treated as FTS.
- 5.2. The Learned Panel, erred in not taking cognizance of the submission and supporting documents filed by the Appellant that out of INR 25,13,98,099 (i) an amount of INR 6,531,079 pertained to insurance payment outside India which was not liable for withholding of tax at source and (ii) an amount of INR 4,515,351 pertained to payments made to trainees on which the Appellant had appropriately deducted tax at source under section 195 of the Act. Accordingly, no disallowance was warranted on such payments.
- 5.3. That the quantum of disallowance is excessive having regard to Article 26(4) of India-France Double Taxation Avoidance Agreement.

(Tax effect: INR 85,450,214)

6. Disallowance of payment towards technical support services under section 40(a)(i) of the Act

- 6.1. That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in treating payment for technical support services of INR 5,74,22,160 to Airbus SAS (Intermediate Holding Co. based out of France) as FTS and disallowing the same under section 40(a)(ia) of the Act for the alleged failure to withhold tax at source.
- 6.2. Without prejudice to the above, the quantum of disallowance is excessive having regard to Article 26(4) of India-France Double Taxation Avoidance Agreement.

(Tax effect: INR 19,517,792)

7. Short grant of credit for advance tax and tax deducted at source ("TDS") and non-grant of Minimum Alternate Tax ("MAT")

- 7.1. That the Learned AO erred in allowing lower advance tax credit amounting to INR 15,25,00,000 as against INR 19,10,98,300 claimed in the return of income.
- 7.2. That the Learned AO erred in allowing lower TDS credit amounting to INR 1,18,60,516 as against INR 2,14,90,666 claimed in the return of income.
- 7.3. That the Learned AO erred in not allowing MAT credit of INR 86,35,946 claimed in the return of income.

2. Facts of the case are that the assessee company engaged in manufacturing of Seat belt, Air packs, Steering Wheels, Passive Safety electronics and Active Safety system, such as Radar, night

vision and camera vision systems and sale to original equipment manufacturers. The assessee has filed its return of income on 30.11.2015 declaring a total income of Rs.46,73,55,970/-. The return filed was u/s 143(1) of the Act. The case was selected for scrutiny through CASS and notice u/s 143(2) of the Act was duly served to the assessee within the prescribed time, calling for details in connection with return filed. Consequent to the change in incumbent, a fresh notice u/s 142(1) of the Act dated 9.4.2018 was issued and served to the assessee. Later the above assessment order u/s 143(3) r.w.s. 144C of the Act dated 24.12.2018 was served on the assessee. The assessee filed its objection before Ld. Dispute Resolution Panel ("DRP") and the Ld. DRP vide order dated 27.9.2019 issued direction to the AO/TPO and the TPO in turn passed an order giving effect to the direction of Ld. DRP-1 on various objections raised by assessee and arrived at the assessment consequent to Ld. DRP's direction which was intimated through their letter dated 4.10.2019. Adjustment u/s 92CA of the Act by TPO is as follows:-

Adjustment u/s 92CA of the Act:

2.1 During the F.Y. 2014-15, the assessee company had international transactions in respect of the Support services segment as per Section 92B of the I.T. Act. According to Section 92CA of the I.T. Act, the case was referred to the Transfer Pricing Officer in order to determine the Arm's Length Price after obtaining necessary approval of the Hon'ble Commissioner of Income Tax, Bangalore-I, Bangalore. The Deputy Commissioner of Income-tax (Transfer Pricing)-1(1)(1), Bangalore has passed order u/s 92CA of the I.T. Act, 1961 on 31.10.2018. In the order passed by the Deputy Commissioner of Income-tax (Transfer Pricing)-1(1)(1)

Bangalore, adjustment to Arm's Length Price to the extent of Rs. 20,00,10,833/- was made u/s 92CA of the I.T. Act. Consequent to the DRP's direction issued on the proposed adjustment made u/s.92CA of the Income Tax Act, 1961, the Deputy Commissioner of Income-tax (Transfer Pricing), circle 1(1)(1), vide order dated 4.10.2019 has revised the adjustment to Rs.13,18,94,281/- (Adjustment in SWD segment).

2.2 Further, there was a disallowance u/s 40a(i) of the Act on account of reimbursement of salary cost of personal transfer from overseas group entities.

2.3 Facts of this issue are as follows:-

Disallowance of reimbursement of salary cost of personnel transferred from overseas group entities u/s 40(a)(i) of the Income Tax Act

It is observed that the assessee company has paid an amount of Rs.25,13,98,099/- to its related concerns abroad without effecting TDS. The assessee was asked to explain why these payments should not be disallowed under section 40(a) (ia) of the IT Act as it amounts to fee for technical services. The payments constitute reimbursement of seconded employees.

2.4 The assessee company had made submission on the same. The explanation of the assessee was examined but not found to be acceptable. As discussed in the draft assessment order dated 24.12.2018, the reimbursement of salary and other related costs paid by Airbus India to Airbus overseas towards seconded employees are chargeable to tax both as per the Act and DTAA. According to AO, the same will attract the

provisions of section 195 of the Act and Airbus India should have had deducted tax u/s.195 of the Act at the time of payment made to Airbus overseas companies. As Airbus India has failed to discharge its obligation to deduct tax at source as stipulated u/s.195 of the Income Tax Act, 1961, an amount of Rs.25,13,98, 099/- is disallowed under section 40(a)(ia) of the IT Act for non-deduction of TDS on fee for technical services paid abroad. Further, there was disallowance towards payment of technical services u/s 40a(i) of the Act.

2.5 It is seen in the assessee's case for FY 2014-15 that there were payments made by the assessee to Non-resident entity M/s Airbus SAS, France, (ASAS) without deducting TDS as per provisions of Sec. 195. On verification of 15 CA data for the Financial Year 2015-16, it was observed that the company had remitted these amounts with the nature' of remittance as 'Engineering Services' but not deducted any TDS. The remittances for Engineering Services paid to ASAS were totaling to an amount of Rs.23,70,78,604/-, whereas an amount of Rs. 57,422,160 was debited to the profit and loss account for the said year. It was also gathered that the said issue is the subject matter of order under section 201 and 201(1A) dated 10.04.2018. After a detailed discussion in the draft assessment order, it has been clearly established that the assessee has failed to deduct tax at source as stipulated u/s 195 on the payments made towards Engineering Services for the F.Y. 2014-15 relevant to Assessment Year 2015-16 for an amount of Rs57,422,160. The same was disallowed under section 40(a)(i) of the Act. Against this, assessee is in appeal before us.

3. First ground of appeal is reproduced below:

1. That, orders passed by the Deputy Commissioner of Income-tax, Circle 1(1)(1), Bengaluru ("Learned AO") and the Deputy

Commissioner of Income-tax (Transfer pricing) – 1(1)(1), Bengaluru (“Learned TPO”) under section 143(3) read with section 144C of the Act in pursuance of the directions of the Dispute Resolution Panel (“Learned Panel”), to the extent prejudicial to the interest of the Appellant, are bad in law and contrary to the facts.

3.1 This ground of appeal is general in nature, which does not require any adjudication.

4. Ground No.2 of the appeal is reproduced below:-

2. That the draft of the Assessment Order passed under section 144C of the Act is time barred and resultantly final assessment order is invalid being null and void.

4.1 This ground is not pressed by Ld. A.R. before us and accordingly, this ground is dismissed as not pressed.

5. Ground No.3 of the appeal is reproduced below:-

3. On facts and in the circumstances of the case and in law, Learned DRP erred in confirming the action of the Learned AO/ Learned TPO in making an adjustment of INR 13,18,94,281 to the transfer price of the Appellant’s international transactions in respect of software engineering and design services.

5.1 This ground is also general in nature which does not require any adjudication.

6. Ground Nos.4 to 4.7 of the appeal are reproduced below:-

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

4.1 Applying the provisions of Rule 10B(5) read with Rule 10CA(2) and Rule 10CA(4) of the Income-tax Rules, 1962 (‘the Rules’) while undertaking a fresh benchmarking analysis for the software engineering and design services.

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

4.3 Rejecting the benchmarking/ comparability analysis carried out by the Appellant in the TP documentation and in conducting a fresh comparability analysis for the software engineering and design services based on the application of additional filters in determining the arm's length price.

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

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

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

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

- a) Rejection of companies having different financial year ending or data of the company not falling within 12 month period; and*
- b) Rejection of companies by applying an inappropriate interpretation of computing the related party transaction filter."*

6.1 These grounds were not pressed before us and hence these grounds are dismissed as not pressed by Ld. A.R.

7. Ground No.4.8 of the appeal is reproduced below:-

4.8 Including the following companies even though such companies are functionally different (such as engaged in R&D activities, presence of intangibles, significant onsite revenue, etc.) from the Appellant:

- a) *Rheal Software India Private Limited;*
- b) *Mindtree Limited;*
- c) *Larsen & Tubro Infotech Ltd;*
- d) *R S Software (India) Limited;*
- e) *Infobeans Technologies Limited;*
- f) *Persistent Systems Limited;*
- g) *Nihilent Technologies Limited;*
- h) *Aspire Systems (India) Private Limited;*
- i) *Inteq Software Private Limited;*
- j) *Infosys Limited; and*
- k) *Cybage Software Private Limited.*

7.1 The assessee wants exclusion of above mentioned comparable companies from (a) to (k).

7.2 However, before us, assessee has not pressed the comparables (a) Rheal Software India Pvt. Ltd. Accordingly, the issue related to this comparable is dismissed.

(b) Mindtree Ltd.

7.3 The Ld, AR submitted as follows:

- **Functionally dissimilar-** Diversified activities engaged in analytics and information management, application development and maintenance, infrastructure management services, business process management, technology consulting, product engineering and SAP services.

Further, the Company has sub-contracted the work.

- **Lack of segmental data** - segmental information in respect of profitability reported from business activities in the nature of infrastructure management services, technology consulting and SAP services.

- **Intangibles-** intangible to total asset ratio cannot be deciding factor as it is recorded in historical cost. Moreover, business rights are non-routine intangibles and contribution from that is uncertain able.

As pointed out by DRP- value of IPR is very minimal- the fact is DRP is referring to historical cost of IPR not the value created by such intangibles.

Further, as per para 6.142 of OECD transfer pricing guidelines “There rarely is any correlation between the cost of developing intangibles and their value or transfer price once developed.”

Furthermore, the Company is leading provider of Bluetooth Intellectual Property solutions (He referred page 1915 of Annual Report Compendium, expert thinking para) and is also providing digital video surveillance solutions based on the technology developed and for which company has filed patent application (He referred page 1871 & 1872 which is the Annual Report Compendium).

R&D expenditure- for improving the process in delivering software development services will lead to better performance and profitability. If adjustment cannot be made to account for the difference, then the company cannot be selected as comparable.

Further, quantum of expenditure on R&D, shouldn't be a criterion as even small R&D expenditure can lead to highly valuable improvements/inventions.

For R&D activity carried out by the company he referred pages 1870 to 1872 of the Annual Report Compendium.

Significant onsite activity-46% of revenue is from onsite model. He referred page 1912 of the Annual Report Compendium.

Turnover filter- T/over of company is INR 3,547 crore i.e. beyond the range of 1-200 crore.

- Even fails 10 times filter. Refer page 1926 of the Annual Report Compendium.

Whereas turnover of tested part is INR 171 crore.

Ld. A.R. relied on following Case Law:

Company specifically excluded-

- Yahoo Software Development India P. Ltd. [TS-191-ITAT-2020(Bang)] 2015-16 (He referred pages 2995 to 3025 of the Case Law Compendium, relevant paras 41 & 42 at pages 3022 & 3023).
- Citrix R&D India Pvt. Ltd. IT(TP)A 2428/Bang/2019 AY 2015-16 (He referred pages 3466 to 3514 additional case law compendium, relevant paras 12 at pages 3482 to 3486)
- **Company with intangibles were justified to be excluded:**
- Equant Solutions India (P.) Ltd. [2020] 113 taxmann.com 517 (Punjab & Haryana) AY 2010-11
- **Turnover filter:**
- M/s Autodesk India Pvt. Ltd. IT(TP)A No. 1108(Bang)2010 AY 2006-07

7.4 Ld. D.R. relied on the order of Ld. DRP

7.5 After hearing both the parties, we are of the opinion that this comparable has been considered as not comparable in the case of M/s. Citrix R&D India Pvt. Ltd. In IT(TP)A No.2428/Bang/2019 dated 15.6.2022 in which it was held as under:-

“12. Ground No.9 is with regard to exclusion of Mind Tree Ltd. from the list of comparables. Ld. A.R. submitted the following:-

- *Significant onsite activity (viz. 46% of revenue earned under Onsite model)*
- *Diversified business operations*
- *UN Practice Manual, Chapter 5 extract - comparables having unique intangibles have to be rejected*
- *Significant Research and development activity*
- *Presence of significant non-routine intangibles.*
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12.1 Ld. D.R. submitted that on perusal of the annual report of this company Ld. DRP noted that this company is engaged in rendering of software development services in different verticals and not engaged in product sales as contended. As seen from the annual report of this company, it is engaged in international information technology consulting and implementation delivering business solutions through global software development. Its software development is structured into five verticals. As per page 108 of annual report, it is stated, 'that the company derives its revenue primarily from software services'. Again, as per page 122 of annual report 'the company is engaged in software development services'. Further, as per Note 3.1.2 of the annual report, the company's earnings in foreign currency from software development services was Rs.34.45 millions. As per the Note on Revenue Recognition, it has stated the principles adopted in recognizing revenue from software development services and there is no reference to product sales.

12.2 All these information clearly indicate that this company is engaged in software development. Besides, it is also relevant to note that the IP led revenue constituted meagre 2% of the consolidated revenue of the company for the F.Y. 2014-15 & 1% for F.Y. 2013-14 as per page 90 of the annual report. Considering these information in the annual report, Ld. DRP observed that this company is predominantly (i.e., 98%) engaged in software development activity and is functionally comparable to the assessee. The different services activities (referred in page 90 of annual report), in the form of consulting, maintenance, testing, management support services etc. clearly fall within the gamut of software development services, though it pertains to different verticals. That is the reason, the company has recognized a single business segment i.e., software development services, and which are categorized into five verticals. Besides, page 39, Annexure 4 of the annual report, the nature of the various services activities are given as under:

Sl. No	Name and Description of main products / services	NIC Code of the Product / service the company	% total turnover
1	Writing, modifying, testing computer program to meet	62011	15.6
2	Web-page designing	62012	0.0
3	Providing software support and maintenance to the clients	62013	21.1
	Computer consultancy and computer facilities management activities	62020	4.0
5	Software installation	62091	5.6
6	Other information technology and computer service		53.7
	Total		100

12.3 The above information clearly show that this company is engaged only in software development and related services. Therefore, the pleas that the company performs different and diverse activities and hence functionally different is rejected. Hence, Ld. DRP also rejected the plea that this company is product-based company.

12.4 It was also contended that this company owns significant non-routine intangibles and hence not comparable. However, on perusal of the annual report for the F.Y. 2014-15, Ld. DRP noted that there is no information to indicate that the assessee acquired technology licenses or developed patents to give it an edge over others. There is no information to indicate that it owns IPRs which are seen to be insignificant, amounting to Rs.67 million out of total assets of Rs.9849 Million, to constitute a major source of revenue. Ld. DRP further noted that the IP led revenue constituted meagre 2% of the consolidated revenue of the company for the F.Y. 2014-15 & 1% for F.Y. 2013-14 (refer page 90 of the annual report) which show that these intangibles have materially not affected the profit or revenue of this company. Therefore, Ld. DRP rejected the pleas raised. The selection of this company was upheld.

12.5 It was also argued that this company has significant intangibles and undertakes R & D activity. On careful perusal of the information in the annual report, Ld. DRP noted that the R&D activities are mainly towards remaining abreast with the technological development

so as to remain competitive in the business and improve delivery excellence. Further, there is no specific debit in the P&L a/c towards R&D activity, which only indicates that the R&D activities are routine and carried in the normal course of business. Besides, as per the information in the Asset Schedule (at page 11 of Annual report), the intangible assets comprised of Intellectual Property and computer software. The value of Intellectual Property as on 31.03.2013 was Rs.67 million, as on 31.03.2014 Rs.15 million and as on 31.03.2015 Rs.2 Trillion which is insignificant and meagre in regard to its Asset Portfolio of Rs.6407 million; Rs.3436 million & Rs.4626 million in the corresponding period. The computer software refer to routine computer licenses & not Intellectual Property generated by the company. Besides, Ld. DRP also noted that as per information in the annual report at page 90, the IP led revenue was only 2% during the year and meagre 1% in the earlier year. Thus, it is evident that the intangibles has no material impact on the revenue growth or profitability of the company. Besides, the assessee has failed to establish that such differences have material effect on the margin of the above company, in terms of clause (i) of sub-rule (3) of Rule 10B, which provides that an uncontrolled transaction shall be comparable to an international transaction if none of the differences, if any, between enterprises entering into business transactions or likely to materially affect the profit arising from such transactions in the open market. Hence, these pleas were rejected by Ld. DRP.

12.6 *As to onsite expenses, it was noted that the assessee has assumed that the entire expenditure incurred in foreign currency would be onsite expenses, which is incorrect, as there may be requirement to incur expenditure in foreign currency for offshore transactions also like payment of professional charges, sales commission etc. Besides, the onsite activity, as such would not affect adversely comparability when the company is otherwise functionally comparable. Therefore, Ld. DRP considered it appropriate to reject these pleas. Accordingly, he upheld the selection of this comparable.*

12.7 *We have heard the rival submissions and perused the materials available on record. Admittedly, this comparable is considered as not comparable in the case of Yahoo Software Development India Pvt. Ltd. in ITA No.2651/Bang/2018 and 2635/Bang/2019 for the assessment years 2014-15 & 2015-16 vide order dated 28.2.2020*

“42. The DRP while dealing with the aforesaid objections has merely taken the view that the presence of IPR revenue was insignificant and so also expenses of brand value, R&D & intangibles. More importantly, the DRP did not dispute the presence of 46% of revenue from onsite model, but went on to hold that the presence of revenue is not sufficient to exclude a company, when it is otherwise functionally comparable. On this aspect, we have already referred to the decision of the ITAT Bangalore bench in the case of

Trilogy e-business Software India (P) Ltd. (supra) and in the light of this decision and admitted the factual position regarding presence of onsite revenue over and above the threshold limit of 255 of total revenue, we are of the view that this company should be excluded from the list of comparable companies. We hold and direct accordingly.”

12.8 *In view of the above findings of the Tribunal, we are inclined to direct the TPO/AO to exclude this company from the list of comparables.”*

7.5 In view of the above order of the Tribunal, we are inclined to direct the AO/TPO to exclude Mindtree Ltd. from the list of comparables.

(c) Larsen & Toubro Infotech Ltd.

7.6 AR submitted as follows:-

- **Functionally dissimilar**-Company is engaged in activities such as infrastructure management services, digital consultation, data & analytics.

He drew our attention to the Paper Book Page No. **2021 (under heading-Quality Initiatives and Awards/Recognitions)** of the Annual Report Compendium.

- **Segmental data not available**-The company has 3 business segments i.e. service cluster, industrial cluster and Telecom (PES). Service cluster includes Banking, Financial services, Insurance, Media & Entertainment, Travel & Logistics and Healthcare. Break-up of revenue attributable to IT segment is not specifically available.

He Referred Paper Book Page No. **2071 (S.10)** of the Annual Report Compendium.

- **Significant onsite revenue**-Company operates on the basis of onsite model with **47.92% of total cost attributes to overseas office expense.**

He referred Paper Book Page No.R **2067 (Note S 3(i))** of the Annual Report Compendium.

- **Intangibles**-The company has intangibles in the nature of business rights. contribution from which is uncertain able to make an adjustment for difference.

He referred paper Book page no. **2048, 2052 & 2057** of the Annual Report Compendium.

- **Brand value**-The company is having huge brand value and benefits from the group synergies.

He referred Paper Book page no. **2021** of the Annual Report Compendium.

- **Extra-ordinary event**- Acquired Information Systems Resource Centre Pvt. Ltd.

He referred Paper Book page no. **2019 (heading-acquisition of ISRC and amalgamation of IRSC with the company) & 2073 (S.13)** of the Annual Report Compendium.

- **Trading Activity**-The company is into trading activities which is evident from the "Cost of Bought out Items for resale" in its Profit and Loss Account

He referred Paper Book page no. **2061 (O.ii)** of the Annual Report Compendium

Turnover filter- T/over of company is **INR 4,744 crore i.e. beyond the range of 1-200 crore. Even fails 10 times turnover filter.** Refer page **2019** of the Annual Report Compendium.

Whereas turnover of **tested part is INR 171 crore.**

He relied on following Case Law:

Company specifically excluded:

- Yahoo Software Development India P. Ltd. [TS-191-ITAT-2020(Bang)] AY 2015-16
- M/s EIT Services India Private Limited [TS-390-ITAT-2021-TP] AY 2015-16
- Citrix R&D India Pvt. Ltd. IT(TP)A 2428/Bang/2019 AY 2015-16
- Goldman Sachs Services (P.) Ltd. [2020] 117 taxmann.com 535
- Global Logic India Ltd. [2020] 117 taxmann.com 640 (Delhi - Trib.) AY 2015-16

Company with intangibles were justified to be excluded:

Equant Solutions India (P.) Ltd. [2020] 113 taxmann.com 517 (Punjab & Haryana) AY 2010-11

Turnover filter:

M/s Autodesk India Pvt. Ltd. IT(TP)A No. 1108(Bang)2010 AY 2006-07

7.7 Ld. D.R. relied on the order of Ld. DRP

7.8 After hearing both the parties, we are of the opinion that L&T Infotech Ltd. was considered by this Tribunal in the case of M/s. Citrix R&D India Pvt. Ltd. Cited (supra) wherein it was held as under:-

13. “ Ground No.10 is with regard to exclusion of Larsen & Toubro Infotech Ltd. from the list of comparable companies. In this regard, the Ld. A.R. submitted as follows:-

- *Engaged in functionally dissimilar activities. No segmental information.*
- *Brand Value - Presence of such brand value commands premium price.*
- *Significant Onsite activity - Overseas office expenses constitute 47.925 of the operating cost during FY 2014-15.*
- *Company acquired Information Systems Resource Centre Private Limited (“ISRC”) on October 16, 2014 - Extraordinary event during the year under consideration.*

13.1 Ld. D.R. submitted that at the outset, the assessee had selected this company as functionally comparable in its TP study giving the following reasons, "Larsen & Toubro Infotech Limited is an IT service company. The company is engaged in providing Application maintenance and Development, Enterprise Resource Planning and specialized services like Data Warehousing and Business Intelligence, Testing Services and Infrastructure Management Services. The services offerings are focussed mainly towards four verticals namely manufacturing, utilities, financial services and telecom. For the period ended March 31, 2015, March 31, 2014 and March 31, 2013 100 percent of the operating revenues respectively were derived from software development services". However, without giving reasons, it has raised a plea that it is functionally different, when the TPO has selected this company as comparable. Further, Ld. DRP noted that this company has two business segments — services cluster and industrials cluster operating in software development services. The information in the annual report clearly show that the entire revenue is from provision of software services. As per

Note 2, regarding accounting principle on Revenue Recognition, it is stated that revenue is recognized when services are rendered and related costs incurred; and there is no reference to sale of products. The financial statements do not mention about any product sale or inventory. As there is no revenue stream on account of product sales, Ld. DRP did not find any merit in the argument that the company is engaged in product sales. Accordingly, he upheld it as functionally comparable being a software service provider.

13.2 It was also contended that the company is engaged in diversified activities with reference to certain information said to be available in the company's website. At the outset, Ld. DPR noted that the information put in website cannot be given much credence, as they are mere forward looking statements with the motive of advertisement and other promotion. Further, the information in website are dynamic and cannot be related to a particular period. The information in the website in the year 2018-19 or 2019-20 will show the functionality for the current period which may be very much different from that existing in 2014-15, the year of scrutiny. There is no way to verify whether the said information have relevance for the year under scrutiny. Therefore, as a principle, Ld. DRP strictly gone by the information in the annual report which is based on audited financial statements. Even otherwise, the information only refer to software services rendered by the company to various industries and as such this company is functionally comparable. The assessee has also not pointed out specifically as to any non-software service undertaken by this company. Therefore, Ld. DRP rejected the pleas raised.

13.3 A plea was raised that this company also provides data analytic services which is high end and hence, cannot be compared to the assessee. Ld. DRP did not find merit in the plea, as undoubtedly, provision of data analytic services is not functionally different from software development activity. The data analytic services also use only certain software and tools, write codes to perform certain tasks. Like any other software application, these tools also facilitate and enables business enterprises for informed management and decision. Therefore, Ld. DRP did not find merit in the plea. Further, there cannot be any distinction between high end software activity and low-end activity, so long as it falls within the purview of software development services. Besides, under the TNMM, such differences are tolerable and there is no requirement that the services / activities performed are identical. It is enough that the services are similar and fall within the same domain of software development. Accordingly, the pleas raised were rejected by the Ld. DRP.

13.4 On the pleas as to presence of brand, Ld. DRP noted that, there is no specific information in the financial statements to indicate that the brand has contributed to revenue growth of the company. On the other hand, the reference in the annual report mentions that the company's efforts to be

cost-effective and agile in contributing value to clients have strengthened its brand. In other words, its operational efficiency has contributed to its revenue growth and brand name and not the other way. There is no information to indicate that the brand has impacted the revenue or profit of the company. The intangibles referred in the Asset Schedule represent the computer software, and business rights and as such does not refer to any IPR or license owned by the said company as argued. Certain developments are under way which has not crystallized into an intangible to be a source of revenue. Thus, the assessee has failed to establish that such differences have material effect on the margin of the above company, in terms of clause (i) of sub-rule (3) of Rule 10B, which provides that an uncontrolled transaction shall be comparable to an international transaction if none of the differences, if any, between enterprises entering into business transactions or likely to materially affect the profit arising from such transactions in the open market. Hence, these pleas were rejected by the Ld. DRP.

13.5 *On the plea of onsite expense, Ld. DRP noted that the expenditure incurred in foreign currency have been assumed to represent onsite expenses which is totally incorrect. It was seen that, the assessee has not given any reasons or justification as to how these affect comparability. In this regard, Ld. DRP noted profit margins for onsite work is normally low as compared to offshore work and average rate per hour differs for onsite and offshore work; the salary structure in case of on-site project is governed by the economic conditions prevailing in the resident country where work is actually performed, whereas in offshore projects, Indian conditions govern the salary structure which is much lower as compared to the country where associated enterprise is located. This fact is favorable to the assessee on which, there should be no grievances to the assessee. Besides, onsite activity, as such would not affect adversely comparability when the company is otherwise functionally comparable. Accordingly, there is no need to reject a functionally comparable company on account of onsite expenditure.*

13.6 *Further, it was seen that this company was upheld to be functionally comparable to a software service provider company, by this Tribunal in the case of M/s. Advice America Software Development Centre Private Limited (in ITA (TP) No. 2531/Bang/2017 dated 23.05.2018 relating to A.Y. 2013-14). In view of the above, Ld. DRP upheld the selection of this comparable.*

13.7 *We have heard the rival submissions and perused the materials available on record. This company as not considered as comparable in the case of Global Logic India Ltd. in ITA No.8726/Del/2019 vide order dated 29.6.2020 and in the case of Goldman Sachs Services Pvt. Ltd. in IT(TP)A No.2355/Bang/2019 dated 15.6.2020*

“9. But The learned Authorized Representative supported his arguments with the decision of the co-ordinate bench of this Tribunal for the A.Y. 2015-16 Yahoo Software India Pvt. Ltd. v. JCT (115 Taxman.com 60) and the three comparables discussed for exclusion in the above paragraphs are dealt by

the co-ordinate bench of the Tribunal at page 13, Para 37 to 40 of the order which is read as under :

" 37. On the issue of RPT filter, we notice that the TPO in pars 16 has accepted that the RPT filter should be @ 25%. In the case of Persistent Systems Ltd., the RPT is at 31.32% as extracted in the earlier part of this order and therefore this company should be excluded by application of RPT filter. In view of the above, we do not wish to go into other grounds on which this company is sought to be excluded viz., that it is a product company and there is no segmental data between product and services segment, presence of onsite activity and the impact of extra-ordinary event of acquisition during the relevant previous year. Therefore; this company is, directed to be excluded from the list of comparable company.

38. As far as "L&T Infotech Ltd. is concerned, the Id. counsel for the assessee brought to our notice the decision of ITA Delhi Bench in the case of Saxo India Pvt. Ltd. v. ACIT, ITA No. 6148/De1/2015 for AY 2011- 12, order dated 5-2-2010, wherein the Tribunal took note of the fact that this company was also trading in software and owned insignificant intangible assets. The company was excluded from the list of comparable companies with reference to SWD services provider such as the assessee. The Id. Counsel pointed out that though this decision was rendered with reference to AY 2011-12, the same reasoning would apply to AY 2015-16 also and in this regard, he drew our attention to page 696 of assessee's PB, which gives the details of the revenue generated by this company without any segmental break-up. Our attention was also drawn to page 682 of PB which shows that there is substantial onsite revenue activity as well as cost incurred on onsite software development. We notice from page 676 of assessee's PB that this company as part of its operating profit in Schedule 0 of profit & loss account contains expenditure for 'cost of bought out items for resale' and this is a significant part of the operating expenditure. When we see the revenue in Schedule M of the profit & loss account, there is no break-up of the revenue with regard to software services and software product. In our opinion, this distinction is enough to exclude this company from the list of comparable companies as held by the Hon'ble Delhi ITAT in the case of Saxo India Pvt. Ltd. (supra) which decision was also confirmed by the Hon'ble Delhi High Court.

*39. The next company which the assessee seeks to exclude is 14Lom.Ltd. As far as this company is concerned, it is seen that the following are the functional dissimilarities brought to our notice:-
"Functionally dissimilar*

- owns intellectual properties, incurs significant R&D costs*

& onsite activity. - Engaged in diversified business_.
activities.

- *Involved in development of software products in addition to software services. - Owns intellectual property rights.*
- *Incurs significant research and development costs. - Carries out significant activities based on onsite business.*
- *Owns products such as Finacle, Edge Verve and other Extra-ordinary event of merger product based solutions with Infosys Consulting India Ltd*

Segmental profit & loss account not available. Commands substantial brand value.

40. The DRP, however, has not thought it fit to exclude this company by observing that this company has substantial pre-dominant revenue from software services and the growth was not attributable to any brand value. Presence of onsite activity and the expenses on R&D have all been brushed aside. In our view, the difference pointed out by the Id. counsel for the assessee before us show that this company cannot be compared with that of the assessee basically because of its business model, presence of onsite revenue generation and other reasons cited before us. Besides, the reason that turnover of this company is huge and more than 10 times that of the assessee.

We find the decision relied, pertains to A.Y. 2015-16, and the comparable Persistent Systems Limited was excluded based on the RPT filter and the L & T InfoTech Limited was considered for exclusion because of trading in software and owned significant intangible assets, and further the Infosys Limited was excluded considering the brand presence and turnover criteria. We follow the judicial precedence and direct the TPO to exclude L & T InfoTech Limited, Persistent Systems Limited and Infosys Limited from the final list of comparables for determination of ALP.”

13.8 In view of the above, we direct the AO/TPO to exclude this company from the list of comparables.”

7.9 In view of the above order of Tribunal, we are inclined to direct the TPO to exclude L&T Infotech Ltd. from the list of comparable while determining the A.L.P of international transaction.

(d) R.S. Software (India) Limited:

7.10 The Ld. A.R. submitted as follows:

Functionally dissimilar - Big Data and Analytics akin to KPO services

He referred Paper Book page no. 2106 of the Annual Report Compendium.

Further, the Company has incurred sub-contractor expense- He referred Paper Book page no. refer page 2186 of the Annual Report Compendium.

- **Lack of appropriate segmental data-** He referred Paper Book page no 2189 of the Annual Report Compendium.
- **Significant onsite activity** – 68.82% of the operating cost was towards overseas branch expenditure during FY 2014-15.

He referred Paper Book page no 2205 of the Annual Report Compendium

Percentage calculation is at page 807 of the paper book.

Turnover filter- Companies having turnover of INR 1-200 crore should not be compared with companies having turnover of more than INR 200 crore. T/over of company is INR 346 crore. He referred Paper Book page no 2186 of the Annual Report Compendium.

Whereas turnover of tested part is INR 171 crore.

He relied on following Case Law:

Company specifically excluded:

M/s. Citrix R&D India Pvt. Ltd. IT(TP)A No. 2428/Bang/2019 AY 2015-16.

Functionally dissimilar - Big Data and Analytics akin to KPO services

He referred Paper Book page no Refer page 2106 of the Annual Report Compendium.

Further, the Company has incurred sub-contractor expense- He referred Paper Book page no.2186 of the Annual Report Compendium.

- **Lack of appropriate segmental data**-referred Paper Book page no.2189 of the Annual Report Compendium.
- **Significant onsite activity** – 68.82% of the operating cost was towards overseas branch expenditure during FY 2014-15.

He referred Paper Book page no. **2205** of the Annual Report Compendium

Turnover filter- Companies having turnover of INR 1-200 crore should not be compared with companies having turnover of more than INR 200 crore. T/over of company is INR 346 crore. He

referred Paper Book page no. 2186 of the Annual Report Compendium.

Whereas turnover of tested part is INR 171 crore.

He relied on following Case Law:

Company specifically excluded:

M/s. Citrix R&D India Pvt. Ltd. IT(TP)A No. 2428/Bang/2019 AY 2015-16,

Company having onsite activity of more than 25% were excluded:

Yahoo Software Development India P. Ltd. [TS-191-ITAT-2020(Bang)] AY 2015-16.

Turnover filter

M/s Autodesk India Pvt. Ltd. IT(TP)A No. 1108(Bang)2010 AY 2006-07

7.11 The Ld. D.R. relied on the order of AO/TPO.

7.12 After hearing both the parties, we are of the opinion that this comparable is considered by Bangalore bench of Tribunal in the case of Citrix R&D India Pvt. Ltd. cited (supra) wherein held as under:-

“14. Ground No.11 is with regard to exclusion of R.S. Software (India) Ltd. from the list of comparable companies. In this regard, the Ld. A.R. submitted as follows:-

- *Significant Onsite activity - The overseas staff and office expenses constitutes a significant portion of the operating cost of the company - 68.82%*
- *Functionally dissimilar*

- *Significant outsourcing charges - Charges are in the nature of sub-contractor expenses.*

14.1. *The Ld. D.R. submitted that the assessee had selected this company as functionally comparable in its TP study giving the reasons, "R S software is engaged in providing technology solutions to the electronic payments industry. The company is focussed exclusively on providing software solution to electronic payment industries since its inception. The company is engaged in development, testing and maintenance of software. For the three years, 100 percent each of the operating revenues were derived from the above mentioned services". Ld. DRP expressed his view that it was strange to note that without giving any specific reason as to how it has become functionally different on selection of this comparable by the TPO, it argues for its exclusion. On perusal of the annual report, he noted that this company is engaged in rendering services relating to maintenance and testing of computer software for the payment industry. As per information given at page 113 of the annual report, 'the company has focussed exclusively on providing software solution to electronic payment industries since its inception. The company is engaged in development, testing and maintenance of software for its clients based in different Geographies'. Thus, it is very apparent, it has a single business activity and the argument that it has diversified activities is prima facie untenable. As it operates in a single business segment, it has reported segmental information based on geography. Further, at page 131, it is categorically stated, 'the company is primarily engaged in rendering services related to maintenance and testing of computer software'. Therefore, Ld. DRP found that this company is functionally comparable to the assessee.*

14.2 *Referring to information at page 4 of the annual report, it was argued that this company performs diversified activities such as custom application development quality assurance and testing, application maintenance and support, strategic consulting and hence not comparable. However, Ld. DRP noted that these are not separate and different activities. They form part of the application maintenance and testing services provided as software solution to electronic payment industry. There is no information in the annual report to take a view that these are different from software development services.*

14.3 *A plea was raised that this company also provides data analytic services which is high end and hence, cannot be compared to the assessee. Ld. DRP did not find merit in the plea, as undoubtedly, provision of data analytic services is not functionally different from software development activity. The data analytic services also use only certain software and tools, write codes to perform certain tasks. Like any other software application, these tools also facilitate and enable business enterprises for informed management and decision. Therefore, he did not find merit in the plea. Further, there cannot be any distinction between high end software activity and low-end activity, so long as it falls within the purview of software development services. Besides, under the TN MM, such differences are tolerable and there is no requirement that the services / activities performed are identical. It is enough that the services are similar and fall within the same domain of software development. Accordingly, the pleas raised were rejected by the Ld. DRP.*

14.4 *On the plea of onsite expense, Ld. DRP has already noted that they do not adversely affect comparability. Hence, this plea was rejected by him.*

14.5 *The company has reported outsourcing activity constituting about 21.17% of total operating cost of the company during the year. The annual report mentions that these activities are used for operational activities. This is a common practice in almost all the companies to give a small portion of the work to some other vendors for a variety of reasons. This may allow the company to focus on its core activities. Sometimes it may be to meet the mismatch in certain skill-sets that are required in various projects. These expenses are incurred in the routine course of business. This cannot be held to be a criteria to affect the functional comparability of a company. This objection is accordingly rejected.*

14.6 *In view of the above, we uphold the selection of this company as comparable.*

14.7 *We have heard the rival submissions and perused the materials available on record. As rightly pointed out by Ld. A.R., this company is not comparable with the assessee company as held by Tribunal in the case of Yahoo Software Development India Pvt. Ltd. Cited (supra), wherein the overseas staff and office expenses constitutes significant portion of operating cost of the company i.e. 68.82% which is very exorbitant and hence as held by Tribunal in the case of Yahoo Software Development India Pvt. Ltd. cited (supra), we are inclined to direct the AO to exclude this company from the list of comparables.”*

7.11 In view of this, we direct the AO/TPO to exclude this company from the list of comparables.

(e) Infobeans Technologies Ltd.

7.12 The Ld. AR submitted as follows:

- **Functionally diverse-** Company is engaged in providing services primarily in Custom application development, Content Management Systems, Enterprise Mobility, Big data analytics. He referred page 2222 of the Annual Report Compendium.
- In addition to providing software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis. He referred page 2233 of the Annual Report compendium.
- **Lack of segmental data**

- Since audited financial statements clearly demonstrate that company is functionally different from the Appellant then Ld. TPO should not have resort to section 133(6) of the Act and relied thereon.

Case Laws:

Company specifically excluded:

M/s EIT Services India Private Limited [TS-390-ITAT-2021-TP] AY 2015-16

Functionally diverse- Company is engaged in providing services primarily in Custom application development, Content Management Systems, Enterprise Mobility, Big data analytics. He referred Paper Book page no. 2222 of the Annual Report Compendium.

- In addition to providing software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis.

He referred Paper Book page no. 2233 of the Annual Report compendium.

- **Lack of segmental data**
- Since audited financial statements clearly demonstrate that company is functionally different from the Appellant then Ld. TPO should not have resort to section 133(6) of the Act and relied thereon.

He relied on following Case Laws:

Company specifically excluded:

M/s EIT Services India Private Limited [TS-390-ITAT-2021-TP] AY 2015-16

He submitted that the Case law relied by Department Representative- Borqs Software Solutions (P.) Ltd. [2022] 135 taxmann.com 337 (Bangalore-Trib.) AY 2016-17 can not be applied to the assessee case in view of the

fact that Tribunal has directed to ignore AY 2015-16. Being so, the company was not regarded as comparable in AY 2015-16.

Hence, he submitted that the decision relied upon by the Departmental Representative is in favour of the Appellant.

7.13 The Ld. D.R. relied on the order of Ld. DRP and also order of the Tribunal in the case of BORQS Software Solutions Pvt. Ltd. in IT(TP)A No.310/Bang/2021 dated 25.10.2021 for the assessment year 2016-17.

7.14 We have heard the rival submissions and perused the materials available on record. This issue is considered by Coordinate Bench of Bangalore in the case of Borqs Software Solutions (P.) Ltd. [2022] 135 taxmann.com 337 (Bangalore-Trib.) AY 2016-17 which was relied by the Ld. D.R. is not relevant to the assessment year 2015-16 and it is relating to assessment year 2016-17. Hence, it is not considered. However, this issue was considered by Bangalore bench of Tribunal in the case of EIT Services India Pvt. Ltd. in ITA No.2498/Bang/2019 dated 3.9.2021 for the assessment year 2015-16, wherein it was held as under:-

“8. We notice that M/s. Infobeans Technologies Ltd. have been directed to be excluded by the coordinate bench in the case of Metric Stream Infotech (India) Pvt. Ltd. with the following observations:

“14.3. Infobeans Technologies Ltd.,

Ld.AR submitted that this comparable was selected by authorities below as it passes all filters, based upon response received from this company under section 133 (6) of the act. He submitted that this observation is contrary to the facts and figures appearing in annual report. Referring to page 1015 Ld.AR submitted that this company is operating at CMMI Level 3 and is a software service company specialising in business application development for web and mobile. In the company overview this company has been stated to be primarily engaged in providing custom developed services to offshore clients and it provides software engineering services primarily in custom application development, content management systems, enterprise mobility, Big Data analytics. Ld.AR thus submitted that this company is functionally not at

all similar with a captive service provider like assessee that this providing Ltd services to its associated enterprises.

14.3.1. On the contrary Ld. CIT DR, referring observations of DRP in para 3.6.1 submitted that the activities of company fall under the gamut of software development has categorised by company itself and that the information obtained under section 133 (6) is sufficient enough to come to such conclusions. However he submitted that this comparable also may be sent back to learnt AO/TPO for verification.

14.3.2. 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.

14.3.3. 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.”

9. *Following the above said decisions rendered by co-ordinate benches, we direct exclusion of Persistent Systems Ltd., Larsen & Toubro Infotech Ltd. and Infosys Ltd. & Infobeans Technologies Ltd. from the final list of comparables.”*

7.15 In view of this we direct the AO/TPO to exclude this company from the list of comparables.

(f) Persistent Systems Ltd.

7.16 The Ld AR submitted as follows:

Fails RPT filter – RPT during FY 2014-15 constitutes 31.32% of sales.

- **Research & Development**-Persistent has set-up Persistent Labs in 2011 wherein R&D activities are carried out. It has developed some product for which a Trademark Application is filed by it.

He referred Paper Book page nos.2369, 2466 of the Annual Report Compendium

The company is engaged in software products, services and technology innovation but no segmental breakup is available w.r.t. these services. He referred Paper Book Page nos. 2412 & 2440 of the Annual Report Compendium.

- **Engaged in Outsourced Product Development** services which are different from general Software development services. He referred Paper Book page nos. 2259 & 2260 of the Annual Report Compendium.
- **Company is into IP-led business**-IP revenue grew by 20.5%. He referred Paper Book page no. of the Annual Report Compendium.

Further, the company earns revenue in form of royalty which makes it evident that the company is into IP led Business. He referred Paper Book page no. 2394 (under the heading Income from software service) of Annual Report compendium.

- **VAT Receivable**-The company has recognized VAT receivable. VAT is payable on the sale of products. Input tax credit can be recognized only if the Company is of the view that it can adjust in future. He referred page no.2451 of paper book of the Annual Report Compendium

Turnover filter- Companies having turnover of INR 1-200 crore should not be compared with companies having turnover of more than INR 200 crore T/over of company is INR 1235 crores. He referred Paper Book page 2452 of Annual Report Compendium.

Whereas turnover of tested part is INR 171 crore.

He relied on following Case Laws:

- Yahoo Software Development India P. Ltd. [TS-191-ITAT-2020(Bang)] AY 2015-16
- M/s EIT Services India Private Limited [TS-390-ITAT-2021-TP] AY 2015-16
- Salesforce.com India Private Limited [TS-140-ITAT-2021(Bang)-TP] AY 2014-15.
- Goldman Sachs Services (P.) Ltd. [2020] 117 taxmann.com 535 (Bangalore - Trib.) AY 2015-16

Turnover filter

M/s Autodesk India Pvt. Ltd. IT(TP)A No. 1108(Bang)2010 AY 2006-07.

7.17 The Ld. D.R. relied on the order of Ld. DRP.

7.18 We have heard both the parties and perused the materials available on record. We are of the opinion that this comparable is considered as not good comparable in the case of Yahoo Software Ltd. in IT(TP)(A) No.2657/Bang/2018 & 2635/Bang/2019 for the assessment years 2014-15 & 2015-16 dated 28.2.2020 wherein held as under:

37. *“On the issue of RPT filter, we notice that the TPO in para 16 has accepted that the RPT filter should be @ 25%. In the case of Persistent Systems Ltd., the RPT is at 31.32% as extracted in the earlier part of this order and therefore this company should be excluded by application of RPT filter. In view of the above, we do not wish to go into other grounds on which this company is sought to be excluded viz., that it is a product company and there is no segmental data between product and services segment, presence of onsite activity and the impact of extra-ordinary event of acquisition during*

the relevant previous year. Therefore, this company is directed to be excluded from the list of comparable company.”

7.19 In the present case, the TPO adopted the RPT filter at 25% as in the case of Yahoo Software Ltd. cited (supra). *In the case of Persistent Systems Ltd., the RPT is at 31.32%.* Being so, we direct the AO/TPO to exclude this Persistent Systems Ltd. from the list of comparables.

(g) Nihilent Technologies Ltd.

7.20 The Ld, AR submitted as follows:

Turnover filter – Companies having turnover of INR 1-200 crore should not be compared with companies having turnover of more than INR 200 crore. Turnover of comparable is INR 268 crore. He referred Paper Book page no. 2500 of Annual Report Compendium.

Whereas turnover of tested part is INR 171 crore. He referred page no. 1793 of the paper book.

- **Onsite activity**-As per geographical segmental results in Annual Report of company, company generates 99% of revenue from export of service and holds 99.78% assets in foreign countries

He referred page nos.2523 & 2530 of Annual Report Compendium

He relied on following Case Laws:

Companies having onsite activity of more than 25% were excluded-

Yahoo Software Development India Pvt. Ltd. [TS-191-ITAT-2020(Bang)] AY 2015-16,

Turnover filter:

M/s Autodesk India Pvt. Ltd. IT(TP)A No. 1108(Bang)2010 AY 2006-07

7.21 The Ld. D.R. relied on the order of Ld. DRP.

7.22 We have heard both the parties and perused the materials available on record. In our opinion, this comparable is considered in the case of Citrix R&D India Ltd. cited (supra) wherein held as under:

“17.4 We have heard the rival submissions and perused the materials available on record. In this case also on site revenue is 90.26% on its total revenue as such it is held in the case of Yahoo Software Development India Pvt. Ltd. Cited (supra) para 42 of its order as follows:-

“42. The DRP while dealing with the aforesaid objections has merely taken the view that the presence of IPR revenue was insignificant and so also expenses of brand value, R&D & intangibles. More importantly, the DRP did not dispute the presence of 46% of revenue from onsite model, but went on to hold that the presence of revenue is not sufficient to exclude a company, when it is otherwise functionally comparable. On this aspect, we have already referred to the decision of the ITAT Bangalore bench in the case of Trilogy e-business Software India (P) Ltd. (supra) and in the light of this decision and admitted the factual position regarding presence of onsite revenue over and above the threshold limit of 255 of total revenue, we are of the view that this company should be excluded from the list of comparable companies. We hold and direct accordingly.”

17.4 In view of the high percentage of on site revenue compared to the assessee company, Nihilent Technologies Ltd. cannot be compared to the assessee and cannot be considered as a comparable. However, these facts were not verified or the assessee not raised these arguments before lower authorities. Hence, this issue is remitted back to the file of AO/TPO for fresh consideration to examine this issue afresh.”

7.23 In view of this, we direct the AO/TPO to exclude this company Nihilent Technologies Ltd. from the list of comparables on a similar reason.

(h) Aspire Systems (India) Private Ltd.

7.24 The ld. AR submitted as follows:

- **Fails RPT filter** 29.94% of Sales during FY 2014-15, method used by TPO to apply RPT filter is incorrect.

For calculation he referred page no.822 of paper book.

Functionally dissimilar- It's a outsourced technology services company focused on helping software companies create innovative products through its onsite and offshore model, company is also engaged in power generation. He referred Paper Book Page no. 2540 (Company Overview and revenue recognition) of Annual Report Compendium.

Product engineering, enterprise solutions, Independent testing services, IT infrastructure support service.

(Source – Referred Company's website, screen shot at page 823 of paper book)

Above functions are categorized as ITeS under safe harbor rule.

- **Intangibles-**The company has intangibles in the nature of goodwill, trademarks and customer contracts. A reasonable adjustment cannot be made for difference.

He referred Paper Book page no. 2543 (Intangible fixed assets) and 2549 (note 11) of the Annual Report Compendium.

- **Lack of segmental data-refer page 2556** of the Annual Report Compendium.

Case Law:

Company with intangibles were justified to be excluded:

Equant Solutions India (P.) Ltd. [2020] 113 taxmann.com 517
(Punjab & Haryana) AY 2010-11
(He referred page 3123 to 3133 of the case law compendium,
relevant paras 12 & 13 at page no.3128)

7.25 Ld. D.R. relied on the order of AO/TPO.

7.26 We have heard both the parties and perused the materials available on record. This company came for consideration before this Tribunal in the case of Yahoo Software Development Ltd. in IT(TP)(A) No.2657/Bang/2018 & 2635/Bang/2019 for the assessment years 2014-15 & 2015-16 dated 28.2.2020 wherein held as under:

“33. We have considered the rival submissions. We find that on the question of application of RPT filter, the assessee had made the following submission before the DRP:-

4. Fails the Related Party Transaction to Sales filter applied by the learned TPO

In the show-cause notice issued, the learned TPO has excluded companies for which the ratio of RPT to sales exceeds 25% during the current year i.e., during FY 2014-15. The relevant extract from the show-cause notice is reproduced below for ease of reference:

e) Companies who have more than 25% related party transactions of the sales were excluded.

Companies having related party transactions of more than 25% are proposed to be excluded. A threshold of 25% is being applied following the provisions of Section 92A(2)(a) which

provides a limit of 26% of the equity capital carrying voting rights for treating an enterprise as Associated Enterprise. if the limit is reduced further it would only result in eliminating more and more companies, on the other hand if the limit is relaxed then companies with predominantly related party transactions would get included which would not represent uncontrolled transactions. Therefore, on a balancing note, 25% is a proper threshold limit for related party transactions. The companies having more than 25% related party transactions should therefore be rejected as comparables.

The Hon'ble [IT.AT](#) has upheld the application of this filter by the TPO in its order in the case of M/s. Supporisoft India Pvt. Ltd for AY 2005-G6 in IT (TP)A 1372/B/11 & 20/2012 dated 28.03.2013 following its own decision in the case of M/s. Actis Advertisers Pvt. Ltd vide ITA No.5277/De1/2011 dated 12.10.2012.

On perusal of the Annual Report of Persistent, we observe that the company has RPT in excess of 25% of the sales. The calculation of the same has been provided below for your ease of reference:

R PT to Sales ratio for FY 2014-15	Amount
Particulars	(INR Million)
Sale of services	2,410.02
Commission received	10.26
Purchase of software	1.49
Cost of technical professional	1,339.1
Commission paid on sales	111.79
Traveling and conveyance	19.27
Total related party transactions (A)	3,891.93
Total Sales (B)	12,424.98
RPT % of Sales (A/B)	31.32%

*From the above computation, it is clear that the **controlled transactions of Persistent constitutes 31.32% of sales**. Based on the above, it can be seen that Persistent fails the 'RPT to sales ratio' filter applied by the learned TPO and should therefore not be considered as a comparable."*

34. This argument has been addressed by the DRP in its order as follows:-

“4.4.9 We note that the approach of the TPO in treatment of related party transaction into two sets, are for revenue transactions and other for expense transaction is logical and correct. We also note that the RPT filter was adopted by the TPO

was with the above conditions and has adopted consistently. Hence, we do not find any infirmity the approach. Hence, we reject the assessee's plea. We hold that onsite expenses do not adversely affect comparability and hence, such plea is rejected.”

.....

37. *On the issue of RPT filter, we notice that the TPO in para 16 has accepted that the RPT filter should be @ 25%. In the case of Persistent Systems Ltd., the RPT is at 31.32% as extracted in the earlier part of this order and therefore this company should be excluded by application of RPT filter. In view of the above, we do not wish to go into other grounds on which this company is sought to be excluded viz., that it is a product company and there is no segmental data between product and services segment, presence of onsite activity and the impact of extra-ordinary event of acquisition during the relevant previous year. Therefore, this company is directed to be excluded from the list of comparable company.”*

7.27 In view of the above order of Tribunal, the issue is remitted to the file of AO for fresh consideration in the light of above observations of the Tribunal in the case of Yahoo Software Development Ltd. cited (supra).

(i) Inteq software Private Ltd

7.28 The Ld. AR submitted as follows:

- Under software development the company offers data warehousing, augmentation service. AO/TPO should specifically ask the company whether they provide above mentioned service and an opportunity to cross examination should be granted to assessee. Ld. TPO disregarded the appellant request for cross examination
- Moreover, the Tribunal in the case of BORQS cited (supra) has not considered the fact that the company has offered revenue from software development and service charges in composite manner with no segmental profitability. Assessee submitted that Delhi Tribunal in Global Logic (supra) has excluded the company from the list of comparable. Case law relied by Department Representative in the case of Borqs Software Solutions (P) Ltd.

[2022] 135 taxmann.com 337 (Bangalore-Trib.) AY 2016-17 have no application to the facts of present case.

- **Functionally dissimilar-** Data warehousing, Resource augmentation service and ITeS.
(He referred the source website of company <http://www.inteqsolutions.com/html/factSheet.htm>, for screen shot, referred page 826 of paper book)
- **Lack of segmental data** – Software development and service charges are shown in composite manner with no segmental profitability.

He relied on following Case Law:

Company specifically excluded:

GlobalLogic India (P.) Ltd.[2022] 134 taxmann.com 35 (Delhi-Trib.), AY 2016-17.

Cross examination:

- M/s Andaman Timber Industries, Civil Appeal No. 4228 of 2006(S.C)
- Cashedge India Private Limited (TS-445-HC-2016(Del)-TP),
- **Turnover filter-** T/over of company is INR 47,300 crore i.e. beyond 1-200 crore range.
Even fails 10 times turnover filter. Refer page 2755 of Annual Report Compendium.
Whereas turnover of tested part is INR 171 crore.

Significant onsite activity- 50.4% of revenue is from onsite activity. He referred Paper Book page no 2738 of Annual Report Compendium.

- **Functionally dissimilar** – diversified operations such as infrastructure management services, business process management, sale of products and other high-end services. He referred Paper Book page no.2757 (Company overview) of the Annual Report Compendium.
- No segmental bifurcation of the basis of operations. Referred Paper Book page no.2774 of the Annual Report Compendium.
- Income from software products
He referred Paper Book page no. 2769 (note 2.16)
- Huge brand value and benefits of group synergies. He referred Paper Book page no 2692 of the Annual Report Compendium.
- **R&D expenditure** - for improving the process in delivering software development services will lead to better performance and profitability. If adjustment cannot be made to account for the difference, then the company cannot be selected as comparable. Further, quantum of expenditure on R&D, shouldn't be a criterion as even small R&D expenditure can lead to highly valuable improvements/inventions. He referred Paper Book page no. 2773 of the Annual Report Compendium

Further he relied following Case Law:

Company specifically excluded:

Yahoo Software Development India P. Ltd. [TS-191-ITAT-2020(Bang)] AY 2015-16

M/s EIT Services India Private Limited [TS-390-ITAT-2021-TP] AY 2015-16

(He referred Page nos. 3026 to 3037 of the Case Law Compendium, relevant para 7 & 9 at page nos.029, 3032 & 3033)

Goldman Sachs Services (P.) Ltd. [2020] 117 taxmann.com 535
(Bangalore - Trib.) AY 2015-16

M/s. Citrix R&D India Pvt. Ltd. IT(TP)A No. 2428/Bang/2019 AY
2015-16, Relevant para 20 at page nos. 3508 to 3509. He referred
page nos.3466 to 3514 of additional case law compendium.

7.29 Ld. D.R. relied on the order of Ld. DRP and also order of the
Tribunal in the case of BORQS Software Solutions Pvt. Ltd. cited
(supra) wherein held as under:

*“27. As far as the plea of the Assessee for exclusion of Infobeans Software Ltd.,
is concerned, the first plea of the learned counsel for the Assessee is that this
company is functionally dissimilar to a SWD service provider and in this regard
reference has been made to certain decisions of Tribunal rendered for AY 2015-
16. As far as AY 2016-17 is concerned, the DRP has observed that this company
was in the business of rendering SWD services in para 2.16.3 to 2.16.7 of its
order, which reads thus:*

*“2.16.3. It was also pleaded that some of the software activities carried out
by this company are not software services as defined in the safe harbor
rules. In this regard, it is relevant to note that as per information
submitted by this company in response to 133(6), this company is engaged
in customized software development services and has not earned revenue
from any service activity other than customized software development
services. The relevant extract of the reply submitted is as under: -*

*That our company is engaged the Customized Software Development
Services and the expertise/clarifications of the employees belongs to the
same field of software development.*

*That the company has no: earned from any services other than from the
customized Software Development Services,*

*4 (a) (1) Since no software product and that no "off the shelf" software
product was manufactured by the company, thus this point is not
applicable.*

*4 (a) (2)] Likewise no sale of softv4are product was made during the
assessment year 2016-17, details or revenue generated from Software
services is mentioned in the Audited Profit & Loss A/c.*

4 (a) (3)] That the company owned intangible assets (Software) which is also mentioned in Note no. 10 of the Audited Balance Sheet. As regard "whether the same represent software licenses acquired for its own use or if it is an inbuilt software product which generate revenue for company", it is submitted that no such software is owned by the company. The software represents mainly Utility Software for the purpose of its efficient operation of the business and coding software's for providing software services. our company is not engaged in technology innovation activity: thus this point is not applicable.

2.16.4 Therefore this plea has no merits and rejected.

2.16.5 With regard to the objections related to information collected under Section 133(6) and the claim of high-end service provider, we note that there is no inherent contradiction as claimed by the assessee. From the information collected u/s.13:3(6), it is confirmed by the company that it is engaged in provision of customised software development services and not in any activity relating to technological innovation. The functional aspect of the comparable company cannot be contradicted when the company itself confirmed its business activity. Accordingly, we reject the assessee's pleas. _

2.16.6 The intangibles referred in the Asset Schedule represent the computer software, and as such does not refer to any IPR or license owned by the said company. For any software company, it is essential to have rights of software for coding purposes. Further these intangibles are meagre 6.89% of total fixed assets. Therefore, such intangibles cannot be equated with the intangibles acquired created by the assessee to provide specific enduring benefit. Also, the assessee has failed to establish that such differences have material effect on the margin of the above company, in terms of clause (i) of sub-rule of Rule 10B, which provides that an uncontrolled transaction shall be comparable to an international transaction if none of the differences, if any, between enterprises entering into business transactions or likely to materially affect the profit arising from such transactions in the open market. Hence, these pleas are rejected.

2.16.7 It was contended that sufficient business information is not available in the public domain, and hence, it has to be excluded. We note that there is clear information in the annual report to show that this company is engaged in software development activity. Further, the information obtained u/s 133(6) clarify that this company is engaged in software development activity. Hence, this plea is rejected."

28. The above conclusions of the DRP have not been countered by the Assessee and by merely relying on findings in earlier AY that this company was held to be not a comparable company, the Assessee cannot seek exclusion of this company from the list of comparable companies. The only direction that the Assessee can get is that the margins for AY 2015-16 in which year this company was regarded

as not comparable have to be ignored in arriving at the average of three years profit margin of this company. We direct accordingly.”

7.30 We have heard both the parties and perused the materials available on record. The Ld. A.R. wanted cross examination of the assessee, which is not possible when the AO relied on the financials in the public domain. However, we make it clear that the financials relied by the AO/TPO to be confronted to the assessee. Thereafter, he has to decide the issue in accordance with law. This issue remitted to AO for fresh consideration.

(j) Infosys Ltd.

7.31 The Ld. A.R. submitted as follows:-

- **Turnover filter-** T/over of company is INR 47,300 crore i.e. beyond 1-200 crore range
Even fails 10 times turnover filter. Refer page 2755 of Annual Report Compendium.
Whereas turnover of tested part is INR 171 crore.

Significant onsite activity- 50.4% of revenue is from onsite activity. He referred page 2738 of Annual Report Compendium.

- **Functionally dissimilar** – diversified operations such as infrastructure management services, business process management, sale of products and other high-end services.

Refer page 2757 (Company overview) of the Annual Report Compendium.

- No segmental bifurcation of the basis of operations. He referred page 2774 of the Annual Report Compendium.

- Income from software products
He referred page 2769 (note 2.16) of paper book.
- Huge brand value and benefits of group synergies. He referred page 2692 of the Annual Report Compendium.
- **R&D expenditure** - for improving the process in delivering software development services will lead to better performance and profitability. If adjustment cannot be made to account for the difference, then the company cannot be selected as comparable.

Further, quantum of expenditure on R&D, shouldn't be a criterion as even small R&D expenditure can lead to highly valuable improvements/inventions.

He referred page 2773 of the Annual Report Compendium

Case Law:

Company specifically excluded:

Yahoo Software Development India P. Ltd. [TS-191-ITAT-2020(Bang)] AY 2015-16

(He referred Page 2995 to 3025 of the Case Law Compendium, relevant para 39 at page 3021 to 3022)

M/s EIT Services India Private Limited [TS-390-ITAT-2021-TP] AY 2015-16

(He referred Page nos. 3026 to 3037 of the Case Law Compendium, relevant paras 7 & 9 at page 3029, 3032 & 3033)

Goldman Sachs Services (P.) Ltd. [2020] 117 taxmann.com 535 (Bangalore - Trib.) AY 2015-16

M/s. Citrix R&D India Pvt. Ltd. IT(TP)A No. 2428/Bang/2019 AY 2015-16, He referred relevant para 20 at page 3508 to 3509 and page 3466 to 3514 of additional case law compendium.

7.31 Ld. D.R. relied on the order of Ld. DRP.

7.32 We have heard both the parties and perused the materials available on record. This comparable is considered as not comparable in the case of Yahoo software Development India Pvt. Ltd. cited (supra) in the assessment year 2015-16, wherein held as under:-

“39. The next company which the assessee seeks to exclude is Infosys Ltd. As far as this company is concerned, it is seen that the following are the functional dissimilarities brought to our notice:-

“Functionally dissimilar - owns intellectual properties, incurs significant R&D costs & onsite activity.

- Engaged in diversified business activities.*
- Involved in development of software products in addition to software services.*
- Owns intellectual property rights.*
- Incurs significant research and development costs.*
- Carries out significant activities based on onsite business.*
- Owns products such as Finacle, Edge Verve and other product based solutions.*

*Extra-ordinary event of merger with Infosys Consulting India Ltd.
Segmental profit & loss account not available.
Commands substantial brand value.*

40. The DRP, however, has not thought it fit to exclude this company by observing that this company has substantial pre-dominant revenue from software services and the growth was not attributable to any brand value. Presence of onsite activity and the expenses on R&D have all been brushed aside. In our view, the difference pointed out by the ld. counsel for the assessee before us show that this company cannot be compared with that of the assessee basically because of its business model, presence of onsite revenue generation and other reasons cited before us. Besides, the reason that turnover of this company is huge and more than 10 times that of the assessee.”

7.33 Accordingly, we direct the AO/TPO to exclude Infosys Ltd. from the list of comparables.

k) Cybage Software Private Ltd.

7.34 The Ld. AR submitted as follows:

- Functionally dissimilar- outsourced product engineering services, application development and maintenance, MIS and Data analytics, documentation. He referred Paper Book Page no. 1262 to 1264 to establish the functions of this comparable.
- Segmental information not available.
- Turnover filter- Companies having turnover of INR 1-200 crore should not be compared with companies having turnover of more than INR 200 crore. Turnover of comparable is INR 622.26 crore as against the Appellant with INR 171 crore.

He referred page 2864 of Annual Report Compendium.

He relied on following Case Law:

Turnover filter

- Razorpay Software (P) Ltd. [2022] 136 taxmann.com 62 (Bangalore-Trib.) AY 2016-17,.
- M/s Autodesk India Pvt. Ltd. IT(TP)A No. 1108(Bang)2010 AY 2006-07

7.35 The Ld. D.R. relied on the order of AO/TPO

7.36 We have heard both the parties and perused the materials available on record. The main contention of the Ld. A.R. is that this company is functionally dissimilar to the assessee company and also on the basis of turnover filter, it should be excluded. Further, it was submitted that segmental breakup of the revenue attributable to the software development not available. Hence, it cannot be considered. In our opinion, the AO/TPO has to look into

this aspect and this company has to be considered as comparable only on availability of segmental data relating to software development segment and decide the same afresh and if he relied in financials, he should confront the same to the assessee and decide the issue after giving an opportunity of hearing to the assessee. The decisions relied by the Ld. A.R. before us cannot be applied as those are not related to the assessment year under consideration. This ground is partly allowed for statistical purposes.

8. The assessee wants to include following comparables:-

- a) Akshaya Software Technologies Limited
- b) Evoke Technologies Private Limited
- c) R. Systems International Limited
- d) I2T2 India Limited
- e) Daffodils Software Limited

8.1 At the time of hearing, the assessee made an endorsement that he is not pressing sl.nos. (a), (c) & (e) in above comparables. He pressed only following two comparables:-

- (b) Evoke Technologies
- (c) I2T2

(b) Evoke Technologies Pvt. Ltd.

8.2 The Ld. A.R. submitted as follows:

- Functionally comparable – Engaged in software development and implementation services. He referred page 2956 of the Annual Report Compendium.
- If the branch results are unreliable, the total results can be split between India and the branch using information mentioned in Page 2962 para 2.33 of the of the Annual Report Compendium.

- Despite their being an unaudited branch, the Audit report (He referred Page 2936 of the of the Annual Report Compendium) mentions financial statements to be true and fair. Hence, the conclusion remains that even if unaudited, financial statements can be considered true and fair.
- Passes all the filters applied by the TPO. Refer page 779 of the paper book.
- Case Law:
- Company specifically included for fresh consideration:
- Infor India Pvt Ltd, ITA no. 2307/Hyd/2018, AY 2014-15
He referred Page 3075 to 3099 of the Case Law Compendium, relevant para 73 at page 3096
- M/s SAP Labs India Pvt. Ltd. IT(TP)A No. 3271/Bang/2018 AY 2014-15. He referred page 3134 to 3151 of case law compendium, relevant para 9 to 11 at page 3149-3150

8.3 Ld. D.R. submitted that this company is not comparable in view of the decision of Tribunal in the case of Blue Coat Network India Pvt. Ltd. in IT(TP)A No.78/Bang/2019 dated 23.11.2020, wherein held as under:

“44. We have heard the rival submissions and perused the materials available on record. Admittedly, this comparable was considered by this Tribunal and observed in para 6.1 in the case of Goldman Sachs Research Pvt. Ltd. (supra) as follows:

“Ld.AR submitted that the assessee prayed for inclusion of this company before DRP. However, DRP rejected the prayer of the assessee for the reason that financial results incorporated branch revenue and profit, which was based on unaudited financial statements of branch outside India. It was also observed by DRP that export revenue constituted only 20.34% which did not fulfill filter applied by Ld. TPO. Ld.AR placed reliance upon annual reports of this company placed at page 2491 of paper book volume 6 wherein at page 2511 geographic income has been tabulated for year under consideration and income from software services and products by this company has

been shown to be at 3621.72 lakhs. It is observed at page 2512 that this company is earning Rs.35,99,47, 572/-in foreign exchange under software development segment.”

45. *Taking a consistent view, we are of the opinion that this should be excluded from the list of comparables. This ground of the assessee is rejected.”*

8.4 We have heard both the parties and perused the materials available on record. In our opinion, the AO/TPO has to examine the issue afresh in the light of decision relied by the Ld. D.R. in the case of Blue Coat Network India Pvt. Ltd. cited (supra) and also AO/TPO to see whether it passes through all the filters applied by him. The issue is remitted to the file of AO/TPO for fresh consideration.

(d) I2T2 India Ltd.

The Ld. A.R. submitted as follows:

Functionally comparable – The company is engaged in providing software development. He referred page 2970 & 2992 of the Annual Report Compendium.

- Passes all the filters applied by the TPO. He referred page 783 of the paper book.
- Financials were filed before TPO and DRP. He referred page 1294 & 782 of the paper book.

Case law:

Company specifically included for fresh consideration:

- M/s. EMC Software & Services India Pvt. Ltd. IT(TP)A No. 3375/Bang/2018, AY 2014-15
(He referred Page 3119 to 3122 of the Case Law Compendium, relevant para 5 at page 3120 to 3121)
- Goldman Sachs Services (P.) Ltd. [2020] 117 taxmann.com 535 (Bangalore - Trib.) AY 2015-16

- M/s SAP Labs India Pvt. Ltd. IT(TP)A No. 3271/Bang/2018 AY 2014-15. He referred page 3134 to 3151 of case law compendium, relevant para 9 to 11 at page 3148-3150.

8.5 The Ld. D.R. submitted that this comparable should be excluded in view of the decision in the case Blue Coat Network India Pvt. Ltd. cited (supra) wherein it was held as under:

“27. First we will consider I2T2 India Limited. The Ld. A.R. submitted that I2T2 Limited is engaged in the Software development services and passes all filters followed by the TPO.

28. Ld. D.R. submitted that the company is in the IT enabled Services industry and has not done transaction processing work which is not functionally comparable to assessee’s case.

29. We have heard the rival submissions and perused the materials available on record. We find force in the argument of Ld. D.R. as seen from the direct report of the I2T2 India Ltd. for the year ending on 31.3.2014, which is placed on record in page no.1837 that assessee is engaged in IT enabled services industry and it cannot be compared with assessee’s case, which is engaged in Software development services marketing support services and data centre services and accordingly, exclusion is justified. We confirm the findings of the lower authorities on this comparable.”

8.6 We have heard both the parties and perused the materials available on record. This issue came for consideration before this Tribunal in the case of Goldman Sachs Service Pvt. Ltd. (117 Taxmann.com 535 (Bang Trib) in assessment year 2015-16 and the Bangalore bench of Tribunal has decided the issue wherein held as under:

“In this case, the TPO rejected this I2TS on the reason that details of RPT transaction is not available. According to the Ld. A.R., if the RPT details are not available, it has to be considered as Nil and it should be included as comparable. In our opinion, it is appropriate to remit the issue to the file of AO/TPO to call for required details from the concerned company and decide the same after giving an opportunity of confronting the same and decide accordingly.”

8.7 In view of the above order of the Tribunal, this issue is remitted to the file of AO/TPO for fresh consideration on similar line as given in the case of Goldman Sachs Services Pvt. Ltd. cited (supra).

9. Ground No.4.10 of the appeal is reproduced below:-

“4.10 Not providing suitable adjustment to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies.”

9.1 This ground is not pressed and accordingly dismissed as not pressed.

10. Ground No.4.11 & 4.12 of the appeal are reproduced as under:-

4.11 “Not providing appropriate adjustment towards the unutilized capacity in the Commercial and Defense Space Division within software engineering and design services segment.

4.12 Computing incorrect operating mark-up of certain comparable companies selected by the Learned TPO.”

10.1 Facts in brief

The appellant company for the FY 2014-15 relevant to AY 2015-16, had entered into international transaction with Associated Enterprises. The appellant discharged its duties under “Chapter X-Special Provisions Relating to Avoidance of Tax” of the Act, by furnishing report from an accountant in Form 3CEB on November 30, 2015 and had maintained detailed information and documents as prescribed in Rule 10D of Income-tax Rules, 1962 (“the Rules”).

10.2 Approach of Ld. TPO, DRP and AO

The Ld. TPO has rejected Appellant's transfer pricing document proposing change in filters adopted during the TP Study alleging that the adoption of correction filters will render the computation of the arm's length price by the Appellant unreliable or incorrect. The Ld. TPO proceeded to determine arm's length price by conducting an independent search of comparables. The Ld. DRP and Ld. AO upheld the process adopted by Ld. TPO.

The Ld. AR. Submission:

10.3 During the FY 2014-15, AGIPL had maintained a certain quantum/capacity of seats for the provision of software engineering and design services in the Commercial and Defense Division. The said capacity was built by the company as work was flowing from the Group.

10.4 However, during the year AGIPL had not utilised the entire seats available. Details of the Appellant's level of operations is as below:

- Commercial division- AGIPL had maintained an average quantum of 616 seats for the provision of software engineering and design services in this division. However, during the said year only 393 seats were occupied by the software engineers for performing their activities. Accordingly, from a service level perspective there were 223 seats un utilised i.e. around 36% of the overall seats. Working of utilised capacity and required capacity adjustment is at page 1298 of the paper book.

- DS Division- AGIPL had maintained an average quantum of 114 seats in this division, out of which only 49 seats were occupied during the year i.e. around 57% of the overall seats. Working of utilised capacity and required capacity adjustment is at page 1299 of the paper book. There is no dispute to the fact that the capacity of the Assessee has been severely under utilised. The solitary reason to deny the adjustment is the fact that utilisation data of the comparable was not produced and the proposition that the adjustment cannot be made in the hands of the tested party. In this regard, it is a settled law that instead of denying adjustment the TPO can call for records from the comparable companies for ascertaining the differences in utilisation percentage and grant adjustment accordingly. For this, he relied on following precedents:

- **Huawei Technologies India P. Ltd. v. JCIT I.T. (TP) A – 1939 / Bang / 2017- relevant para 16**

“.....Regarding comparable companies one has to fall back only on the information available in public domain. If that information is insufficient, it is beyond the power of the assessee to produce the information about comparable companies. The revenue on the other hand has the power to compel the production of required details from comparable companies. If that power is not exercised to find out the truth then it is no defence to say that assessee has not furnished required details and on that score deny adjustment on account of working capital differences.....”

10.5 Similarly, in following cases the Hon'ble ITAT directed the learned TPO to exercise its powers under section 133(6) to call for information from comparable companies and make suitable adjustment on account of capacity utilisation differences.

- TE Connectivity India P. Ltd. IT(TP)A 693/ Bang/2017 dated 25 / 11 / 2021- relevant para 11 & 12 at page 3156-3166 of case law compendium.

- IKA India P. Ltd. IT(TP)A 2192/Bang/2017 dated 19/9/2018

10.6 Ld. D.R. relied on the order of AO/TPO

10.7 We have heard both the parties and perused the materials available on record. Similar issue was considered by this Tribunal in the case of TE Connectivity India Pvt. Ltd. in IT(TP)A No.693/Bang/2017 dated 25.11.2021 wherein held as under:-

“11. We have heard both the parties and perused the materials on record. In our opinion, when the assessee not functioned in full capacity, the assessee is entitled for suitable adjustment on capacity utilization and this view is fortified by the order of coordinate bench in the case of IKA India Pvt. Ltd., cited (Supra).

“21. The assessee in its TP documentation as well as before the TPO and the CIT(A), highlighted the fact that there are significant differences in the capacity utilization between the assessee vis-à-vis the comparables. It was also brought to the notice of the TPO and the CIT(A) that the assessee was incorporated in FY 2008-09 and FY 2011-12 (i.e., FY relevant to the impugned AY) was just the third year of commercial operation of the assessee during which the installed capacity was under-utilized to a significant extent. The assessee pleaded before the TPO and CIT(A) to provide an adjustment for idle capacity. However, the TPO/CIT(A) did not allow any adjustment to account for the differences in the capacity utilization by the assessee vis-à-vis the comparables while computing profit margin of assessee as well as the comparable companies.

22. We have heard the submissions of the assessee and the ld. DR on the issue raised by the assessee in ground No.7. We shall first see the statutory provisions relevant to the issue. Rule 10B(1)(e) of the Rules states that adjustments should be made to account for:

"...the differences, if any, between the international 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"

23. Rule 10B(2) of the Rules provides comparability of an international transaction with an uncontrolled transaction needs to be judged with reference to certain specified factors. One such factor is 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.

24. Rule 10B(3) of the Rules provide that: "An uncontrolled transaction shall be comparable to an international transaction if — (i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged 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."

25. As per Section 92C of the Act, ALP is required to be computed using any of the given six methods and in the manner as is prescribed in Rule 10B of the Rules. Rule 10B in turn states that the most appropriate method would be one which inter alia provides the most reliable measure of ALP, and one of the important factors to be taken into account herein is the ability to make reliable and accurate adjustments.

26. The OECD Guidelines on this aspect is as follows:- Para 1.35 of the OECD Guidelines states as follows: "Where there are differences between the situations being compared that could materially affect the comparison, comparability adjustments must be made, where possible, to improve the reliability of the comparison. Therefore, in no event can unadjusted industry average returns themselves establish arm's length conditions" Para 1.36 of the OECD Guidelines states as follows:

".... material differences between the compared transactions or enterprises should be taken into account. In order to establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or enterprises that would affect conditions in arm's length dealings. Attributes that may be important include the characteristics of the property or services transferred, the functions performed by the parties (taking into account assets used and risks assumed), the contractual terms, the economic circumstances of the parties, and the business strategies pursued by the parties." Further, Para 2.74 of the OECD Guidelines while laying down the comparability criteria to be adopted while applying the transaction net margin method states as follows:

"..... Thus where the differences in the characteristics of the enterprises being compared have a material effect on the net margins being used, it would not be appropriate to apply the transactional net margin method without making adjustments for such differences. The extent and reliability of those adjustments will affect the relative reliability of the analysis under the transactional net margin method' (Emphasis supplied)

27. US transfer pricing Regulations on this aspect is as follows:- In addition, the US transfer pricing regulations, u/s 482 of the Internal Revenue Code (hereinafter referred to as 'the US regulations') also support the above. Regulation 1.482-1(d)(2) of the US regulation states as follows: "In order to be considered comparable to a controlled transaction, an uncontrolled transaction need not be identical to the controlled transaction, but must be sufficiently similar that it provides a reliable measure of an arm's length result. If there are material differences between the controlled and uncontrolled transactions, adjustments must be made if the effect of such differences on prices or profits can be ascertained with sufficient accuracy to improve the reliability of the results. For purposes of this section, a material difference is one that would materially affect the measure of an arm's length result under the method being applied."

28. The Indian transfer pricing regulations, OECD Guidelines and the US transfer pricing regulations call for an adjustment to be made in case of material differences in the transactions or the enterprises being compared so as to arrive at a more reliable arm's length price/ margin. While the Indian transfer pricing regulations refer to the adjustments on uncontrolled transactions, however the same has to be read with Rule 10B(3) of the Rules which clearly emphasizes the necessity and compulsion of undertaking adjustments. Hence in case appropriate adjustments cannot be made to the uncontrolled transaction, due to lack of data, then in order to read the provisions of transfer pricing regulations in harmony, the adjustments should be made on the tested party. In the following decisions it has been held that adjustment to the profit margins have to be made on account of underutilization of capacity: (i) In the case of M/s. Mando India Steering Systems Private Limited vs Assistant Commissioner of Income Tax, [I.T.A. No. 2092/Mds 12012], the Tribunal upheld the contention of the taxpayer for making a suitable adjustment on account of idle capacity for the purpose of margin computation. The relevant extract is reproduced as below:

"10. We are of the considered view that underutilization of production capacity in the initial years is a vital factor which has been ignored by the authorities below while determining the ALP cost. The TPO should have made allowance for the higher overhead expenditure during the initial period of production." (ii) In the ruling of DCIT Vs Panasonic AVC Networks India Co Ltd (I.T.A. No.: 4620/De1/2011), it was held that:-

"5. Capacity underutilization by enterprises is certainly an important factor affecting net profit margin in the open market because lower capacity utilization results in higher per unit costs, which, in turn, results in lower profits. Of course, the fundamental issue, so far as acceptability of such adjustments is concerned, is reasonable accuracy embedded in the mechanism for such adjustments, and as long as such an adjustment mechanism can be found, no objection can be taken to the adjustment."

(iii) *In the case of Biesse Manufacturing Company Limited (IT(TP) A Nos. 97 & 493/Bang/2015) for AY 2010-11, the Tribunal held as follows: "10.4.1. We have heard the rival contentions and perused and carefully considered the submissions made and material on record; including the judicial pronouncements cited. The issue for consideration is whether adjustment for under-utilisation of capacity is allowable in the case on hand and if so, the manner of computation thereof and the quantum of adjustment....."*

10.4.5 In the above cited case of the Mumbai Tribunal i.e. Petro Araldite P. Ltd. (supra), the Tribunal has upheld the principle that adjustment for capacity under-utilisation can be granted Following the decision of the ITAT, Mumbai in the case of Petro Araldite P. Ltd. (supra), we hold that any adjustment for capacity under-utilisation can be granted....." (iv) In the recent case of GE Intelligent Platform Private Limited (IT(TP)A No. 148/Bang/2015 and 164/Bang/2015) for AY 2010-11 was held as follows:

"8 now the law is quite settled to the extent that once there is unutilized capacity or men power, such underutilization impacts margin and therefore, the adjustment should be made while computing the ALP If the underutilization is more than average underutilization of the industry then necessary adjustment is required to be made to the margin of computing ALP....."

29. Moreover, the above argument of the assessee for grant of capacity utilization adjustment is also supported by the following decision of Bangalore ITAT in the case of Genisys Integrating Systems (India) Pvt. Ltd (ITA No.1231/Bang/2010). Relevant extract of the decision is under:-

"15.2 We agree with this contention of the counsel for the assessee. All the comparables have to be compared on similar standards and the assessee cannot be put in a disadvantageous position, when in the case of other companies adjustments for under utilization of manpower is given. The assessee should also be given adjustment for under utilization of its infrastructure. The AO shall consider this fact also while determining the ALP and make the TP adjustments. With these directions, the appeal of the assessee is disposed of."

30. The reliability and accuracy of adjustments would largely depend on availability of reliable and accurate data. For certain types of adjustments, relevant data for comparables may either not be available in public domain or may not be reliably determinable based on information available in public domain, whereas, it may be possible to make equally reliable and accurate adjustments on the tested party (whose data would generally be easily accessible).

31. In such a scenario, one has to resort to the provisions of Rule 10B(3)(ii) which provides for making "reasonably accurate adjustments" for eliminating any material differences between the two transactions being compared. The purpose or intent of the comparability analysis is to

examine as to whether or not, the values stated for the international transactions are at ALP i.e., whether the price charges is comparable to the price charges under an uncontrolled transaction of similar nature. The regulations don't restrict or provide that the adjustments cannot be made on the results of the tested party. Therefore, keeping in mind the aforesaid objective, the net profit margin of the tested party drawn from its financial accounts can be suitably adjusted to facilitate its comparison with other uncontrolled entities/transactions as per sub-clause (i) of rule 10B(1)(e) of the Rules itself. The absence of specific provision in Rule 10B(1)(e)(iii) of the Rules does not impede the adjustment of the profit margin of tested party. The above view has also been upheld in the following decisions:-

- *Capegemini India Pvt. Ltd. (ITA No.7861/Mum/2011)*
- *Demang Cranes & Components (India) Pvt Ltd. [49 SOT 610 (Pune)]*

32. As far as data of comparable companies on capacity utilization being not available in public domain is concerned, it is practically not possible to obtain data on capacity utilization of comparable companies and consequently compute adjustment on the comparable companies, the operating cost of the tested party is adjusted for capacity utilization adjustment.

33. The assessee has under-utilized capacity during the subject AY and is accordingly factually and legally eligible to an adjustment for the same. Therefore, such a benefit cannot be denied to the assessee only for the reason that the data about comparable companies is not available. Requiring the assessee to produce such a data which is not available in public domain would tantamount to requiring the Appellant to perform an impossible task. The only way to get the data in the current case, would be where the TPO collates the same from the comparable companies by exercising his powers under section 133(6) of the Act. The relevant extracts of the section are as under:-

"(6) require any person, including a banking company or any officer thereof, to furnish information in relation to such points or matters, or to furnish statements of accounts and affairs verified in the manner specified by the Assessing Officer, the Deputy Commissioner (Appeals), the Joint Commissioner or the Commissioner (Appeals), giving information in relation to such points or matters as, in the opinion of the Assessing Officer, the Deputy Commissioner (Appeals), the Joint Commissioner or the Commissioner (Appeals), will be useful for, or relevant to, any enquiry or proceeding under this Act :"

34. In this regard, we find that the Mumbai ITAT in case of M/s Kiara Jewellery P.Ltd. (I.T.A.No.8109/Mum/2011), has directed the AO/ TPO to obtain the exact details of capacity utilization of comparable companies, if not available in public domain. The relevant extract of the aforesaid decision is as under:-

"11. Keeping in view the decision of the Tribunal in the case of Petro Araldite (P) Ltd (supra) laying down the guidelines on the issue of capacity utilization, we consider it appropriate to restore this issue relating to adjustment on account of capacity utilization in the case of assessee company to the file of AO/TPO for deciding the same afresh keeping in view the said guidelines. If the exact details of capacity utilization of the comparable companies are not available in the public domain, the AO/TPO is directed to obtain the same directly from the concerned parties and to decide this issue afresh after giving assessee an opportunity of being heard." (Emphasis Supplied)

35. Accordingly, we direct the TPO to exercise powers under section 133(6) of the Act to call for information on capacity utilization comparable companies such as

- Installed Capacity,*
- Actual Production in Units,*
- Break-up of Fixed Cost and Variable Cost;*
- Segmental/ product wise information, if any.*

36. Post obtaining the information, he is requested to provide the assessee an opportunity by sharing the details so obtained, and accordingly, grant the adjustment for capacity under-utilized. Ground No.7 is decided accordingly."

12. Accordingly, this issue is remitted back to the file of AO/TPO for fresh consideration by following above order of the Tribunal. The additional ground No.1 raised by the assessee is infructuous and dismissed accordingly."

10.8 In view of the above decision, we remit these issues to the file of AO/TPO on similar directions.

11. Ground Nos. 5 to 5.3 :

Grounds relating to other than transfer pricing matters

5. Disallowance of reimbursement of salary cost of personnel transferred from overseas group entities under section 40(a)(i) of the Act

5.1 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel have erred in making / sustaining the disallowance of INR 25,13,98,099.

Without prejudice to the generality of the foregoing:

5.1.1 The Learned AO and the Learned Panel have erred in holding that absence of mark-up does not determine the nature of the payment.

5.1.2 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in disregarding the fact that tax was deducted on the said

payment by treating the same as 'Salary' hence there was no *failure*² to deduct tax at source thereon.

5.1.3 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in treating the said payment to be in the nature of 'fees for technical services' (FTS).

5.1.4 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in ignoring that amount paid to overseas entities was not towards rendition of any service by any non-resident but represented salary cost incurred by the Appellant on which tax was deducted at source under section 192 of the Act and that mere reimbursement of such salary cost by the Appellant cannot be treated as FTS.

5.2 The Learned Panel, erred in not taking cognizance of the submission and supporting documents filed by the Appellant that out of INR 25,13,98,099 (i) an amount of INR 6,531,079 pertained to insurance payment outside India which was not liable for withholding of tax at source and (ii) an amount of INR 4,515,351 pertained to payments made to trainees on which the Appellant had appropriately deducted tax at source under section 195 of the Act. Accordingly, no disallowance was warranted on such payments.

5.3 That the quantum of disallowance is excessive having regard to Article 26(4) of India-France Double Taxation Avoidance Agreement.

(Tax effect: INR 85,450,214)

The Ld AR submissions is as follows:

Facts in brief

11.1 The Appellant for the operations of business undertakes various projects in the field of software development and engineering design, marketing support and customer support services, for that its need from time to time employ personnel having requisite skills and expertise. In addition to local recruitment from India of such personnel, the Appellant also requests Airbus Group Companies to transfer certain employees to the company for facilitating the Appellant's business operations in India.

11.2 AGIPL (or erstwhile entities) has entered into following cost **reimbursement agreement** with Airbus Overseas entities:

Table A: Cost Reimbursement Agreement

S.No.	Parties to agreement	Paper Book Page No.	Salient Features of agreement
1.	Airbus SAS, France and Airbus Training India Private Limited ('ATI')	354 to 359	<ul style="list-style-type: none"> • Employees shall be working for the Appellant under its direct supervision and control . Page No. 355 Article 1.1 Page No. 481 Article 1.7, Article 2.1 Page No. 570 Article 1.7, Article 2.3 Page No. 604 Article 3.1
2.	EADS Deutschland GmbH and EADS DS India Private Limited	480 to 488	<ul style="list-style-type: none"> • Functions to be carried out by the Employees shall be decided by the Appellant. Page No. 355 Article 1.4 Page No. 481 Article 2.3 Page No. 570 Article 2.3
3.	Cassidian SAS, France and EADS DS India Private Limited	569 to 577	<ul style="list-style-type: none"> Responsibility for payment of salary and benefits lies with the Appellant. Page No. 355 Article 2.1 Page No. 481 Article 2.4 Page No. 570 Article 2.4 Page No. 604 Article 3.2
4.	Eurocopter SAS and Eurocopter India Pvt. Ltd.	602 to 609	<ul style="list-style-type: none"> • The Appellant shall be responsible for

S.No.	Parties to agreement	Paper Book Page No.	Salient Features of agreement
			<p>withholding tax on salaries. Page No. 355 Article 2.2 Page No. 482 Article 2.6 Page No. 571 Article 2.6 Page No. 605 Article 3.3</p> <ul style="list-style-type: none">• For ease of disbursement the Airbus overseas entity shall at request of and on behalf of the Appellant, disburse the salaries to the Employees in their home country. Page No. 355 Article 2.1 Page No. 481 Article 2.4 Page No. 570 Article 2.4• None of the acts of the Employees during the course of their employment with the Appellant shall in any manner be deemed to be binding on Airbus overseas entities. Page No. 355 Article 1.1 Page No. 481 Article 2.3 Page No. 570 Article 2.3 Page No. 604 Article 3.1

11.3 Further, the Appellant has entered into **employment agreement** with the personnel seconded by above entities:

11.4 On a sample basis, the relevant documents for Mr. Bert Portman seconded to Appellant entity are as under with respective paper book page references:

Employee Name and Designation	Seconded by and Seconded to	Amount Reimbursed	Employment agreement page reference	Other documents along with page reference
Bert Porteman Senior Flight Operations Engineer	By Airbus SAS, France To Airbus Training India Private Limited	71,38,364	360-363	<ul style="list-style-type: none">• Salary Slip -Pg. 365-380• Form 16- Pg. 381-385• Reconciliation- Pg. 364

Table B: Documents of seconded employee

Approach of Ld. DRP and AO

11.5 Ld. DRP findings can be **referred from page no. 211 to 214** of the paper book and AO's finding can be **referred from page no. 271 to 276** of the paper book.

11.6 The Ld. AO and DRP held that the transferred personnel were employees of Airbus Overseas Entities and were rendering services to the Appellant for and on behalf of Airbus Overseas Entities. Ld. AO has treated reimbursement of salary cost of INR 25,13,98,099 to Airbus Overseas Entities as Fee for Technical Service chargeable to tax in India and disallowed the same under section 40(a)(i) of the Act on account of failure to deduct tax at

source on such payments under section 195 of the Act. Ld. AO/DRP has made following observation:

Factual observations

- i. Deputed employees are at senior level and were heading the managerial and technical divisions of the Appellant, thus, inappropriate to say that they were under the control and supervision of the Appellant.
- ii. Employees holding the chief position are required to adhere to the global strategies and the global requirements of the business.
- iii. No severance of employer-employee relationship between the overseas entity and the employees.
- iv. Technical expertise and managerial skills of the deputed employees are imparted to the Indian employees
- v. Fact of reimbursement is not proved with evidence

Inferences / conclusions

- vi. Service of AEs of the assessee constitute 'included service' under the India-USA DTAA.
- vii. Reimbursement of salary and other related costs paid by AGIPL to Airbus overseas entity towards seconded employees are chargeable to tax both as per the Act and DTAA.
- viii. The same will attract the provisions of section 195 of the Act and the Appellant had failed to discharge its obligation to deduct TDS.
- ix. Reliance was placed on Delhi High Court judgement in case of Centrica India Offshore (P) Ltd.

A.R. Submission

11.7 Ground No. 5.1

(a) Dual employment and Legal employer-

Dual employment- means holding two employments at the same time.

During the period under consideration, the Appellant was **one of the legal employers** of deputed employees. The deputed employees have taken additional employment with the Appellant. Sample employment agreement can be referred at **page 360 to 363** of the paper book.

We wish to refer sub section (2) of section 192 of the Income-tax Act, 1961 states that-

*“(2) Where, during the financial year, **an assessee is employed simultaneously under more than one employer**, or where he has held successively employment under more than one employer, he may furnish to the person responsible for making the payment referred to in sub-section (1) (being one of the said employers as the assessee may, having regard to the circumstances of his case, choose), such details of the income under the head "Salaries" due or received by him from the other employer or employers, the tax deducted at source therefrom and such other particulars, in such form and verified in such manner as may be prescribed³³, and thereupon the person responsible for making the payment referred to above shall take into account the details so furnished for the purposes of making the deduction under sub-section (1).”*

Legal employer- means A person who appoints someone and, therefore has right to terminate the employment.

Ld. AO has alleged that the Appellant that there was no severance of employer-employee relationship between deputed employees with AEs. The Appellant has right to terminate its employer-employee relationship with deputed employees (for sample agreement **refer clause 14 at page 362 of the paper book**) and at the same time seconder have

the right to terminate their employer-employee relationship with deputed employees.

In light of above, the observation of the Ld. AO -No severing of employer – employee relationship between the employees and the seconder, and the seconder is actual/real/legal employer of the secondee employees and they rendered services in India on behalf of the seconder are incorrect.

(b) Appellant has complied with section 192 then the transaction will not qualify as fee for technical services (‘FTS’)

The Appellant submits that there cannot be a double taxation one under section 192 and again under section 195. The Appellant has deducted tax at source under section 192 while making payment, as the sum is chargeable under the head salaries in the hands of employees. Furthermore, Explanation 2 to section 9(1)(vii) specifically excludes income chargeable under the head salaries.

The above proposition is upheld in following cases:

- **Temasek Holdings Advisors India Pvt. Ltd. V. DCIT [2013] 27 ITR (T) 125 (Mumbai – Trib.) wherein Tribunal observed that** *“The Assessing Officer has missed this crucial point which was placed before him and even recorded by him in his order that the salary paid to the seconded employees has already been subjected to TDS under section 192. Once, he himself holds that it is a salary, then the only provision for taxing the same is under section 192, which has been discharged. There cannot be a double taxation, one under section 192 and again under section 195.”*

- **Marks & Spencer Reliance India Pvt. Ltd ('M&S') vs DIT (TS-178-HC-2017 (BOM))**- The assessee made a payment to Marks & Spencer Plc, UK towards salary reimbursement of employees deputed to it for providing assistance in the area of management, setting up business, property selection and retail operations etc.. The tax officer treated the said payment as “fee for technical services” as per the provisions of the India-UK DTAA and passed an order holding assessee as assessee-in-default. Honourable Bombay High Court noted the findings of the tribunal that there was no rendering of service within the meaning of India-UK DTAA and held that- “Since the said payment to the employees was already subjected to tax in India, therefore there is no question of treating the assessee in default for non-deduction of tax at source.”
- **Reckitt Beckinser (India) Ltd. [2016] 70 taxmann.com 143 (Kolkata-Trib.) wherein Tribunal held that:**
*“9. ... The amount in question paid by the assessee-company to M/s. RBESL-UK is claimed to be reimbursement of salary paid by the said concern on behalf of the assessee-company to its employees., the fact, which is not in dispute, is that tax at source was duly deducted by the assessee from the entire salaries paid to the concerned two employees including that part, which was paid by M/s. RBESL-UK in foreign currency and subsequently claimed to be reimbursed by the assessee-company to M/s. RBESL-UK. **This claim of the assessee of having paid and deducted tax at source from the amount in question as salary income is duly supported by TDS certificates issued in Form No. 16 and the same, in our opinion, is sufficient not only to***

establish that the amount in question is already subjected to TDS but also that there was employer-employee relationship between the assessee-company and the concerned two employees. In the case of *Nagase India (P.) Ltd. (supra)*, a similar fact situation was involved, inasmuch as, the amount paid by the assessee on account of reimbursement of salary was disallowed by the Assessing Officer under section 40(a)(i) for want of TDS. However, keeping in view that the assessee had already deducted tax under section 192 on entire salary reimbursed by him, it was held by the Tribunal that there was no case of disallowance under section 40(a)(i). ... Keeping in view these decisions of Coordinate Bench of this Tribunal in the case of *Nagase India (P.) Ltd. (supra)* and *Temasec Holdings Advisors (I) (P.) Ltd. (supra)* and having regard to all the facts of the case, we are of the view that the assessee was not liable to deduct tax at source from the amount in question paid to M/s. RBESL-UK towards reimbursement of salary paid to expatriate employees and the disallowance made by the Assessing Officer under section 40(a)(i) for the alleged failure of the assessee to deduct tax at source is not sustainable. We accordingly delete the said disallowance and allow Ground No. 1 of the assessee's appeal."

Further, the Appellant wishes to draw Hon'ble members attention to **Circular No. 720, dated August 30, 1995** issued by CBDT, wherein it was stated as follows:

"2. It is hereby clarified that each section, regarding TDS under Chapter XVII, deals with a particular kind of payment

*to the exclusion of all other sections in this Chapter. Thus, **payment of any sum shall be liable for deduction of tax only under one section.** Therefore, a payment is liable for tax deduction only under one section.”*

(c) Not FTS

(i) AE has not rendered any service through seconded employee which will qualify as fee for technical service-

In this regard, the Appellant wishes to place reliance on:

• **Carborandum Company [1973] 92 ITR 411 (Mad.)**

“.....In the context of the question to be considered it is necessary to find out as to what are the services rendered by the assessee in pursuance of the agreement and whether such services were rendered in India or outside.

.....

The Commissioner took the view that the provision for providing by the assessee foreign technical personnel to work in India would suggest that the assessee is rendering some services in India in pursuance of the terms of the said agreement. The Tribunal, however, disagreed with the Commissioner and held that as these foreign technicians had worked as whole-time employees under the Indian company, they should be taken to be the employees of the Indian company and, therefore, the services rendered by the foreign technicians in India cannot be attributed to the assessee as the assessee had nothing to do with the day-to-day work of the said foreign technicians.

....

On a due consideration of the matter, we are of the view that the Tribunal did not have a proper perspective of the said services rendered by the assessee. The question is not whether foreign technicians were under the employ of the assessee or the Indian company and whether they received the salary from the assessee or from the Indian company for the services rendered by them in India..... The requirement that the assessee has to send foreign technicians to India for the purposes set out in the agreement leads to the inference that the assessee has undertaken to do some service or activity in India by sending its foreign technicians to work in India. The payment of salary and other

emoluments to such foreign technicians is purely a matter of bargain between the assessee and the Indian company and they have agreed that the foreign technicians will be paid by the Indian company. But this will not affect the question whether the assessee is obliged to send foreign technicians to India to assist the Indian company. Similarly the obligation of the assessee to train the Indian personnel in India through their foreign technicians can also be said to be services rendered in India. Though the foreign technicians did train the Indian technicians in the course of their duties which they have to perform as employees of the Indian company, still the obligation to train Indian personnel is that of the assessee and, therefore, such training of Indian personnel in India through the assessee's foreign technicians can be said to be a service rendered by the assessee in India.”

- **Carborandum Co. [1977] 108 ITR 335 (SC)**

“The High Court was wrong in its view that activities of the foreign personnel lent or deputed by the American company amounted to a business activity carried on by that company in the taxable territory. The finding of the Tribunal in that regard was specific and clear and was unassailable in the reference in question. The American company had made the services of the foreign personnel available to the Indian company outside the taxable territory. The latter took them as their employees, paid their salary and they worked under the direct control of the Indian company. The service rendered by the American company in that connection was wholly and solely rendered in the foreign territory.”

- **M/s Faurecia Automotive Holding vs DCIT ITA No. 784/PUN/2015** – Agreement clauses clarify that FCo is not responsible for the outcome

“4.7.....Here, we are confronted with a situation in which Mr. Franck Euvrard was employed by Faurecia India as its CEO. It is not as if Mr. Franck Euvrard was rendering services to Faurecia India on behalf of the assessee for which the amount in dispute was received by the assessee company. Rather, it is a case of Mr. Franck Euvrard working as an employee of Faurecia India. The assessee had no role to play in the rendition of services by Mr. Franck Euvrard to Faurecia India, except that a part of salary payable by the Indian entity was initially paid by the assessee in France to Mr. Franck Euvrard, which was later on recovered without any profit element.”

- **Abbey Business Services (India) (P.) Ltd.**
[2012] 23 taxmann.com 346 (Bang.)

wherein Tribunal held that –

“15.4 The reimbursement made to Abbey National Plc, UK also cannot be regarded as 'provision of services of technical or other personnel.' The use of the words 'services of' in the above expression u/s.9(1)(vii) of the Act mandates the rendering of some sort of work through the act of the services of technical on other personnel. In the instant case, Abbey National Plc, UK has not rendered any services to the assessee. It has only deputed secondees to the assessee. The expression 'provision of services of technical or other personnel' used in the definition of 'fees for technical services' is thus not satisfied. The co-ordinate bench of the Tribunal in the case of IDS Software Solution (India) (P.) Ltd (supra) held that reimbursements made to foreign company under the secondment agreement in circumstances similar to that of the instant case cannot be regarded as 'fees for technical services' u/s.9(1)(vii) of the Act. The Delhi High Court in the case of Karl Storz Endoscopy India (P.) Ltd has held that reimbursement of salary costs of employees under a secondment agreement cannot be regarded as 'fees for technical services' u/s.9(1)(vii) of the Act. In view of the above discussion, we are of the considered opinion that the reimbursement of salary costs and other administration expenses made by the assessee cannot be categorized as 'fees for technical services' u/s.9(1)(vii) of the Act.”

- M/s. Flipkart Internet Private Limited Writ Petition No. 3619/2021(T-IT)- relevant para 37 at page 3418. Copy of order is placed at page 3372 to 3419 of additional case law compendium.
- M/s. Toyota Boshoku Automotive India Pvt. Ltd. IT(TP)A 1646/Bang/2017 -relevant para 15 at page 3460. Copy of order is placed at page 3372 to 3419 of additional case law compendium.

- (ii) Appellant becomes economic employer –The transferred personnel were working under the direct supervision, control and management as other employees of the Appellant. The authority to instruct lies with the Appellant and employees are bound to follow those instructions. The place at which the employees work is under the control and supervision of the Appellant, refer **page no. 355 Article 1.1, page no. 481 Article 1.7 & Article 2.1, page no. 570 Article 1.7 & Article 2.3 and page no. 604 Article 3.1**

Further, Ld. AO's contention that deputed employees are at senior level and it would be inappropriate to say that that they were under the control and supervision of the Appellant. In this regard, the Appellant wishes to place reliance on **Supreme Court decision in case of Ram Prashad [1972] 86 ITR 122 (SC)** wherein it was observed that in terms of managing director, control need not be day to day and it could be exercised through articles of association. Similarly, in present case the degree of control has to be judged based on designation/seniority of deputed employees.

Conditions laid down by Hon'ble jurisdictional High Court and Tribunal

From **IDS Software Solutions India (P) Ltd. [2009] 122 TTJ 410 (Bang.), Abbey Business Services [2012] 23 taxman.com 346 (Bangalore) and Abbey Business Services India (P.) Ltd. [2020] 122**

taxmann.com 174 (Karnataka) decisions following conditions emerges to qualify as economic employer:

Table C: Conditions laid down to qualify as economic employer

S.No	Condition	How appellant has fulfilled the said condition.
1.	Who bears the responsibility or risk for the results produced by the employee's work.	Appellant bears the risk and responsibility.
2.	With whom the authority to instruct the worker lies with.	Appellant. Refer Page No. 355 Article 1.4, Page No. 481 Article 2.3, Page No. 570 Article 2.3
3.	In whose place the work is performed.	Appellant. Also, accommodation in India is provided as perquisite by Appellant.
4.	Who is liable to pay the remuneration.	Appellant. Refer Page No. 355 Article 2.1, Page No. 481 Article 2.4, Page No. 570 Article 2.4, Page No. 604 Article 3.2.
5.	Who provides tools and materials which are essential for the employee to perform his duty.	Appellant as the employee will work from the office of Appellant.

(iii) No make available

Without prejudiced to above, the Appellant submits that the impugned transaction will not fall under the definition of FTS as provided in DTAA.

The Appellant humbly submits that in present case DTAA is more beneficial to it, taxability of impugned transaction should be decided considering same. As mentioned under brief facts para, the Appellant has entered into cost reimbursement contract with entities located in France and Germany.

Table D: Location wise amount reimbursed

S.No	Overseas entity located at	Reimbursement Amount (INR)
1.	France	16,67,56,074
2.	Germany	7,28,23,378

India-France DTAA

Article 13(4) of DTAA states that “fee for technical services” means payments of any kind to any person, in consideration for services of a managerial, technical or consultancy nature.

Further, clause 7 of protocol to DTAA:

“In respect of articles 11 (Dividend), 12 (Interest) and 13 (Royalties, fees for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1-9-1989, between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later.”

Having regards to above, the Appellant's submits that restrictive definition of the expression 'fee for technical services' appearing in India-UK or India-USA DTAA, must be read as forming part of the India-France DTAA as well.

Article 13 of India-UK DTAA clearly excludes managerial services. Further, Article 13(4)(c) of India-UK DTAA states that: "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

The above proposition is upheld by Delhi High Court in case of **Steria (India) Ltd. [2016] 72 taxmann.com 1 (Delhi)** and jurisdictional Karnataka High Court in case of **Apollo Tyres Ltd. [2018] 92 taxmann.com 166 (Karnataka)**.

DRPs observation that technical expertise of secondees is imparted to Indian employees is fallacious and imaginary - unsupported by any material or evidence

Concept and meaning of make available:

- **CIT vs De Beers India Minerals (P) Ltd. [2012] 21 taxmann.com 214 (Kar.)** held that:

“22. What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, knowhow and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or knowhow on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.”

Similar observations were made in :

- **Raymond Limited vs DCIT [2003] 86 ITD 791 (MUM.)**
- **DIT vs. Guy Carpenter & Co. Ltd [2012] 346 ITR 504 (Delhi)**

Onus on Revenue not discharged –

- In **Burt Hill Design Pvt. Ltd. Vs. Deputy Director of Income-tax [2017] 79 taxmann.com 459 (Ahmedabad - Trib.)** it was observed that: *“There is not even an effort to show as to how any technical knowledge, skills, knowhow or processes etc are “made available” by these*

services in as much as these services can be performed by the assessee without any recourse to the service provider.”

No agreement to transmit knowledge

DCIT vs PanAmSat International Systems Inc. [2006] 9 SOT 100 (Delhi) “26..... the act of "making available" should emanate from the person who renders the technical services and does not take in the capacity or ability of the person to whom the services are rendered to gather, by his own efforts or inquisitiveness, any technical knowledge, experience, skill, etc. **There should be an agreement or formal understanding or arrangement under which the technical knowledge, experience, etc. are transmitted to the person utilizing the technical services, with both parties at that time clearly acknowledging or being aware of the right of the person utilising the technical services to apply the technical knowledge, experience, etc. in future for his own benefit without recourse to the person rendering the technical services.....”**

Not FTS if recurring activity and indefinite period

- **Outotec Oyj Vs. Deputy Director of Income-tax [2016] TS- 76 taxman.com 33 (Kol.)** wherein court observed that:

“in order to be covered by the provisions of Article 13(4) of the India–Finland DTAA, not only the services should be of technical in nature but such as to result in making the technology available to the person receiving the technical services. We also agree that merely because the provision of the service may require technical input by the person providing the service, it cannot be said that technical knowledge, skills, etc are made available to the person purchasing the service. As to what are the connotations of ‘making the technology available to the recipient of technical services’, as is appropriately summed up in protocol to Indo -US DTAA, “generally speaking, technology will be considered ‘made available’ when the person acquiring the service is enabled to apply the technology”.

“We find in the instant case, from the nature of services rendered by the assessee to the Indian group company, there is no technology or technical knowhow, skills etc that were made

available by the assessee in order to enable the Indian group company to function on its own without the dependence of the assessee. It is not in dispute that the agreement entered between Outotec Oyj and Outotec India Pvt Ltd is for an indefinite period and such services are provided on recurring basis by the assessee to Outotec India Pvt Ltd. We find lot of force in the argument of the ld AR that had the technical knowhow, skills etc being made available by the assessee to Outotec India Pvt Ltd, then there would be no need for Outotec India Pvt Ltd to recourse to the recipient for these services. We also hold that the other services such as IT Infrastructure, IT administration (collectively referred to 'IT Support Services') also do not satisfy the 'make available' test as no technology ,knowhow, skills etc were transferred to the recipient.

(iv) Pure reimbursement

The amount paid to overseas group entity were reimbursement towards the expenditure incurred by overseas entity while paying deputed employee. The Appellant submits that there was no profit element and was only cost-to-cost reimbursement.

The above fact can be verified from the following documents (a) reconciliation of salary with reimbursement amount, (b) overseas salary slips and (c) Form 16.

Reproduction of Table C

Employee Name and Designation	Seconded by and Seconded to	Amount Reimbursed	Employment agreement page reference	Other documents along with page reference
Bert Porteman Senior Flight Operations	By Airbus SAS, France To Airbus	71,38,364	360-363	<ul style="list-style-type: none">• Salary Slip -Pg. 365-380• Form 16- Pg. 381-

Employee Name and Designation	Seconded by and Seconded to	Amount Reimbursed	Employment agreement page reference	Other documents along with page reference
Engineer t h	Training India Private Limited			385 • Reconciliation- Pg. 364

A service tax demand was raised on it by Indirect Tax Authorities under reverse charge basis by treating reimbursement of salary cost as payment towards manpower supply services provided by overseas group entity. The Company preferred an appeal before Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') Delhi. CESTAT vide **order no. 52564/2016 dated 26.07.2016**, accepted the fact that *“the employees are under the control and supervision of the appellants and their salary is disbursed by the appellant. All the statutory obligations as an employer, like payment of PF, TDS for income tax are all fulfilled by the appellant. It is not shown in the proceedings before the lower Authority that any consideration is being paid for obtaining manpower supply service from the foreign companies. **The reimbursement amount paid by the appellant to the foreign companies is relating to the cost of salaries and wages of the employees working under the appellant.....the global employees working under the Indian company are working as their employees and having employee employer relationship there is no supply of manpower service and no tax liability.**” A copy of above order is placed at page no. 3316 to 3319 of case law compendium.*

A. P. Moller Maersk A S [2017] 78 taxmann.com 287 (SC) (refer CLC page 3350 to 3357) wherein court observed that:

“9. It is in the aforesaid circumstances the issue arose as to whether any technical services were rendered by the assessee to its aforesaid three agents and the payment made by the agents was in the form of fee for the said technical services OR the payment was nothing but reimbursement of the cost by the three agents to the assessee for using the Maersk Net.

.....

11. Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as fee for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is re-emphasised that neither the AO nor the CIT (A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Record shows that the assessee had given the calculations of the total costs and pro rata division thereof among the agents for reimbursement. Not only that, the assessee have even submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax.”

- (d) Ld. AO placed reliance on **Centrica India Offshore Private Limited [(2014) 364 ITR 336 (Delhi)]**, however facts in case of Centrica are different from the present case, below table captures the difference:

Table E: Distinguishing Centrica ruling from present facts

S.No	Facts of Centrica ruling	Applicability to the instant case as evidenced by the cost reimbursement agreement
1.	Who requisitioned secondment? whose business interest to be served?	

S.No	Facts of Centrica ruling	Applicability to the instant case as evidenced by the cost reimbursement agreement
	<p>Employees were seconded to Centrica India, to ensure quality guidelines and provide business support to meet vested business interest for the Overseas entities.</p> <p>Please refer page 3345 of CLC and para 39.</p>	<p>The Company had requested the Airbus Overseas Entities to assign certain employees from time to time based on the needs of the business of the Company.</p> <p>Refer-Agreement at page 354-last para, Article 1.1 of agreement at page 480</p>
2. Employer employee relation / control and supervision		
	<p>Did not exist between Centrica India and the secondees.</p> <p>Please refer page 3342 para of CLC and para 34.</p>	<ul style="list-style-type: none"> • Secondees work under the direct supervision and control of the Appellant Company. • Secondees shall not be deemed to be representing or acting on behalf of or as employees of Airbus Overseas Entities and that their acts shall not be deemed to be binding upon the Airbus Overseas Entities.
3. Liability to pay salary		
	<p>Obligation to pay the salary rested with the Overseas entities and the right of the employee to claim it only against the Overseas entities. The</p>	<ul style="list-style-type: none"> • That the Appellant Company shall be responsible for payment of salary. <p>Hence, it may be noted that the primary responsibility of discharging the salary lies with</p>

S.No	Facts of Centrica ruling	Applicability to the instant case as evidenced by the cost reimbursement agreement
	<p>employee is conferred no right to claim the salary from Centrica India nor is Centrica India burdened with an obligation to pay that salary.</p> <p>Please refer page 3342 para of CLC and para 34.</p>	<p>the Company. However, for administrative convenience and ease of disbursement of salary, it was agreed that the Airbus Overseas Entities would pay the salary to the employees and later the Company shall reimburse the same to the Airbus Overseas Entities. No mark-up is charged by the Airbus Overseas Entities at the time of raising the reimbursement claim on the Company.</p> <ul style="list-style-type: none">• The Company shall be responsible for withholding deposit of tax on account of the salaries of the transferred personnel

Based on above analysis, the Appellant humbly submits that the decision of Centrica (supra) is not applicable to the Appellant case.

(e) Other Judicial Pronouncement which the Appellant wishes to place reliance on:

- **Delhi Tribunal in Yum! Restaurants (Asia) Pte. Ltd. [2020] 117 taxmann.com 759 (Delhi-Trib.)** wherein ITAT observed that “*salary of deputed person is born by YRIPL*”

who is also responsible for tax obligations on salary payment. YRIPL has deducted tax on source on salary paid and has also paid fringe benefit taxes as applicable. Therefore, it is clear that salary paid to Sh. Mahboobani has been brought to tax in India and YRIPL has claimed it as its business expenditure. The AO has again taxed the same amount as FTS which amounts to double taxation. All the facts and circumstance of the case and clauses of deputation agreement indicate that Sh. Mahboobani was employee of YRIPL and YRAPL had simply acted as conduit to pay salary to him in Singapore as his family was there in Singapore”

.....

In the absence of fulfilment of "make available" clause, it is not possible to hold that there is taxability of FTS under Article 12 of the DTAA. Further, we find no merit in the stand of the Assessing Officer in treating the reimbursement received by the assessee company from YRIPL on account of salary payment as FTS. We have already held in the paras above that Mr. Vinod Mahboobani was working as an employee of YRIPL and not as an employee of the assessee company. The reimbursement of salary had no element of income and was not taxable. In any case since Mr. Vinod Mahboobani had already paid taxes in India on the aforesaid salary, the same amount being taxed as FTS in the hands of the assessee company, **would amount to double taxation.**

- **Delhi Tribunal in AT & T Communications Services (India) (P.) Ltd., ITA no. 354/Del/2017**, wherein, it was held that reimbursement of salary cost of seconded employees could not be treated as fee for technical services

and deleted the disallowance under section 40(a)(i) of the Act. The Tribunal made the following observations:

*“31. It can be seen from the above that so long as a payment to non-resident entity is in the nature of payment consisting of income chargeable under the head ‘Salaries’, the assessee does not have any tax withholding applications u/s 195 of the Act. In our considered view, **the nature of income embedded in related payments is relevant for deciding whether or not section 195 will come into play.** We have also gone through the agreements exhibited at pages 525-530 of the paper book and have also considered Form 16 which are placed on record on page 605 of the paper book. **Considering the facts on record, it can be reasonably concluded that the employees seconded to the assessee company are working as the employees of the assessee company, their salary is subject to TDS u/s 192 of the Act and, therefore, provisions of section 195 are not applicable on the facts of the case in hand.***

32. In our considered view, the reliance on the decision of the Hon'ble High Court of Delhi in the case of Centrica (supra) by the Assessing Officer is misplaced inasmuch as the seconded employees of AWPS were not taking forward the business of AWPS in India, but, were effectively working under the control and supervision of the assessee company and by no means can be said to be rendering services on behalf of AWPS. Whereas in the case of Centrica (supra), it was established only to provide services to the overseas entity to ensure that the services to be rendered to the

*overseas entities by the Indian vendor are properly coordinated. We are, therefore, of the considered view that reimbursement made by the appellant company cannot be classified as FTS/FIS under the provisions of the Act and Indo-US DTAA. **It would not be out of place to mention here that total tax deducted by the assessee u/s 192 of the Act is Rs.1,97,36,176/- which is much higher than the withholding tax sought to be levied by the Assessing Officer which comes to 10% of Rs.4,17,56,851/-.** Considering the facts in totality, we direct the Assessing Officer to delete the impugned addition. Ground No.6 is allowed.”*

11.8 Ground no. 5.2

(a) Details and amount of cost reimbursed

The learned DRP and AO, have disallowed INR 25,13,98,099 under section 40(a)(i), whereas the Appellant had only paid INR 24,02,54,027 to Airbus Overseas Entities. Statement reconciling the salary income reflected in Form 16:

Table F: Amount of reimbursement

S.No.	Airbus Overseas Entities	Amount of salary cost reimbursed (in INR)
1.	Airbus Group SA	11,02,70,342
2.	Airbus Defence & Space GmbH	7,28,23,378
3.	Airbus DS SAS	1,39,02,623
4.	Eurocopter SAS	4,32,57,684
	Total	24,02,54,027

Further, INR 25,13,98,099 disallowed by the learned AO includes items which are not salary reimbursement to Airbus Overseas Entities:

Table G: Reconciliation between amount disallowed and amount of reimbursement

Particulars	Amount (in INR)
Amount disallowed by the learned AO in the Final Order	25,13,98,099
Less: Insurance payment to CPRN	65,31,079
Less: Fees paid to Eurocopter SAS towards trainers on which tax was deducted at source under section 195 of the Act	45,15,351
Salary reimbursement to overseas entity	24,03,51,669

For detailed explanation, on insurance payment and fee paid to Eurocopter SAS-please refer **page 340, 676 to 687 of the paper book.**

11.9 Ld. D.R. relied on the order of AO/TPO

11.10 We have heard the rival submissions and perused the materials available on record. In the case of M/s. Scania CV AB Vs. Deputy Commissioner of Income-tax in IT(IT)A No.3432/Bang/2018 dated 6.7.2022 it was held as under:-

“2.3 It is submitted that identical issue has been considered at length and in detail in the above decisions. The Ld.AR referred to the recent decision of Hon’ble Karnataka High Court in case of M/s. Flipkart Internet Pvt. Ltd. vs. DCIT (IT) (supra) wherein Hon’ble Court observed as under:

“(viii) The Revenue has relied upon the judgment of the Apex Court in C.C., C.E. & S.T.-Bangalore (Adjudication) etc. v. M/s.Northern Operating Systems Pvt. Ltd.12 where the Apex Court has interpreted the concept of a secondment agreement taking note of the contemporary business practice and has indicated that the

traditional control test to indicate who the employer is may not be the sole test to be applied. The Apex Court while construing a contract whereby employees were seconded to the assessee by foreign group of Companies, had upheld the demand for service tax holding that in a secondment arrangement, a secondee would continue to be employed by the original employer.

(ix) The Apex Court in the particular facts of the case had held that the Overseas Co., had a pool of highly skilled employees and having regard to their expertise were seconded to the assessee and upon cessation of the term of secondment would return to their overseas employees, while returning Civil Appeal Nos.2289-2293/2021 such finding on facts, the assessee was held liable to pay service tax for the period as mentioned in the show cause notice.

(x) It needs to be noted that the judgment rendered was in the context of service tax and the only question for determination was as to whether supply of man power was covered under the taxable service and was to be treated as a service provided by a Foreign Company to an Indian Company. But in the present case, the legal requirement requires a finding to be recorded to treat a service as 'FIS' which is "make available" to the Indian Company.

(xi) Accordingly, any conclusion on an interpretation of secondment as contained in the M.S.A. to determine who the employer is and determining the nature of payment by itself would have no conclusive bearing on whether the payment made is for 'FIS' in light of the further requirement of "make available."

3. On the contrary, the Ld.DR placed reliance on orders passed by authorities below.4. We have perused the submissions advanced by both sides in the light of records placed before us.

4.1 We note that the evidences filed by assessee has not been considered by the revenue authorities.

4.2 We therefore remand this issue to the Ld.AO to consider the claim in accordance with the decision of Hon'ble Karnataka High Court in case of M/s. Flipkart Internet Pvt. Ltd. vs. DCIT (IT) (supra) and Coordinate Bench of this Tribunal in the above referred cases M/s. Toyota Boshoku Automotive India Pvt. Ltd. vs. DCIT (supra) Goldman Sachs Services Pvt. Ltd. vs. DCIT(supra) having regard to the evidences filed by the assessee. Needless to say that proper opportunity of being heard must be granted to assessee in accordance with law.

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

11.11 Respectfully following the above, we remit this issue to the file of AO to examine the claim in the light of the decision of Hon'ble Karnataka High Court in case of M/s. Flipkart Internet Pvt. Ltd. Vs. DCIT (IT) in W.P. No.3619/2021(T-IT) by order dated 24.6.2022 and Coordinate bench of this Tribunal in the above referred cases in M/s. Toyota Boshoku Automotive India Pvt. Ltd. Vs. DCIT in IT(TP)A No.1646/Bang/2017 by order dated 13.4.2022 and in the case of Goldman Sachs Services Pvt. Ltd. Vs. DCIT in IT(IT)A Nos.362 to 369 & 338 to 345/Bang/2020 by order dated 29.4.2022 having regard to the evidences filed by the assessee.

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

12. Ground No.6, 6.1 & 6.2 of the above appeal are reproduced below:-

6. “Disallowance of payment towards technical support services under section 40(a)(i) of the Act

6.1 That on the facts and in the circumstances of the case, the Learned AO and the Learned Panel erred in treating payment for technical support services of INR 5,74,22,160 to Airbus SAS (Intermediate Holding Co. based out of France) as FTS and disallowing the same under section 40(a)(ia) of the Act for the alleged failure to withhold tax at source.

6.2 Without prejudice to the above, the quantum of disallowance is excessive having regard to Article 26(4) of India-France Double Taxation Avoidance Agreement.

(Tax effect: INR 19,517,792)”

12.1 These grounds of appeal are not pressed and hence dismissed as not pressed.

13. Ground Nos.7 to 7.3 of the appeal are reproduced below:-

7. “Short grant of credit for advance tax and tax deducted at source (‘TDS’) and non-grant of Minimum Alternate Tax (‘MAT’)

7.1 That the Learned AO erred in allowing lower advance tax credit amounting to INR 15,25,00,000 as against INR 19,10,98,300 claimed in the return of income.

7.2 That the Learned AO erred in allowing lower TDS credit amounting to INR 1,18,60,516 as against INR 2,14,90,666 claimed in the return of income.

7.3 That the Learned AO erred in not allowing MAT credit of INR 86,35,946 claimed in the return of income.”

A.R. submissions:-

Facts in brief

13.1 As mentioned in background para, the Appellant company is amalgamated entity and had filed a consolidated return of income on November 30, 2015 declaring a total income of INR 46,73,55,970, advance tax 19,10,98,300 and TDS INR 214,90,666 **(for copy of amalgamation order, please refer page no. 285 to 294 of the paper book and for copy of return of income, please refer page no. 1717 to 1770 of the paper book)**. Pursuant to the aforesaid amalgamation, the Appellant had considered income of all amalgamated and amalgamating entities and had claimed the following tax credits in the return of income filed for AY 2015-16 accordingly:

Table H: Reconciliation of TDS

Name of the entity	PAN of entity	Advance Tax	Tax deducted at source	Paper book page no. for Form 26AS
Airbus Group India Private Limited (the	AAGCA1513R	15,25,00,000	1,18,60,516	295-303

Name of the entity	PAN of entity	Advance Tax	Tax deducted at source	Paper book page no. for Form 26AS
amalgamated entity)				
Add: Tax credit of the amalgamating entities				
- Airbus Training India Pvt. Ltd.	AAGCA1219G	98,00,000	4,37,764	304-307
- EADS India Pvt. Ltd.	AABCE6092J	60,15,000	67,38,579	308-312
- EADS DS India Pvt. Ltd.	AACCE1124A	2,27,83,300	1,49,969	313-316
- Eurocopter India Pvt. Ltd.	AACCE4404H	-	23,03,838	317-331
Amount claimed in the return of income (A)		19,10,98,300	2,14,90,666	
Credit given by the learned AO (B)		15,25,00,000	1,18,60,516	
Short credit (C=A-B)		3,85,98,300	96,30,150	

Approach of learned AO and DRP

13.2 Learned DRP directed the learned AO, to verify the claim of the Appellant factually and allow credit as per verification. Learned AO, verified the claim and provided credit as available in the National Securities Depository Limited (“NSDL”).

13.3 The learned AO had failed to appreciate the fact that, during the relevant AY, there was amalgamation of entities as per High Court order and has given credit of advance tax and TDS as reflecting in NSDL under the PAN of the Appellant i.e. Airbus Group India Private Limited resulting into short credit of INR 3,85,98,300 and 96,30,150, which is credit available under the PAN of amalgamating entities.

13.4 A detailed application was made before the learned AO, pointing out the same along with Form 26AS and other supporting documents, **please refer page no. 283 to 284 of the paper book.** The learned AO has not considered the same while giving credit of advance tax and TDS to the Appellant.

13.5 In this regard, the Appellant wish to place reliance on **M/s CES Limited ITA no. 2088/Hyd./2018**, wherein, ITAT Hyderabad bench made an observation that *“we agree with the contention of the assessee that when the amalgamated results or income of the amalgamating company has been taken into consideration, then the credit for advance tax paid and TDS made by amalgamating company should be given to amalgamated company, i.e. the assessee before us.”*

“.....remanded the issue to the file of AO with a direction to verify the claim of TDS credit and advance tax paid by amalgamating company and allow the same to the assessee”.

13.6 Ld. A.R. requested to direct the learned AO for considering credit available under the PAN of amalgamating entities.

13.7 We have heard both the parties and perused the materials available on record. These grounds are remitted to the file of AO for fresh consideration in giving TDS & MAT credit as per records.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 05th Aug, 2022

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 5th Aug, 2022.
VG/SPS

Copy to:

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

By order

Asst. Registrar,
ITAT, Bangalore.