

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

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

IT(TP)A No.314/Bang/2022
Assessment year : 2010-11

M/s. MetricStream Infotech (India) Pvt. Ltd., #23 & 24, AMR Tech Park 4B, Hongasandra Village, Begur Hobli, Bengaluru – 560 068. PAN: AACCM 4991 K	Vs.	The Assistant Commissioner of Income Tax, Circle 4(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Padam Chand Khincha, CA
Respondent by	:	Shri Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	13.09.2022
Date of Pronouncement	:	15.09.2022

ORDER

Per N. V. Vasudevan, Vice President:

This is an appeal by the assessee against the final Order of Assessment dated 31.03.2022 passed by the ACIT, Circle- 4(1)(2), Bengaluru, National Faceless Assessment Centre (NFAC), Delhi, passed under section 143(3) r.w.s. 144C(13) r.w.s. 254 of the Income Tax Act, 1962 (hereinafter called ‘the Act’) in relation to Assessment Year 2010-11.

2. The assessee is a subsidiary of Metric Stream, Inc., USA. It provides software development services [‘SWD services’ for short] to its holding company and marketing support services [‘MSS services’ for short] to its holding company

products across North America, Europe & Middle East. For all the above services, the Assessee is compensated by the Associate Enterprise (AE) on a cost plus mark up basis at 8% for SWD services and 5% for MSS services, respectively. In terms of section 92B of the Income Tax Act, 1961 (Act), the above two transactions were international transactions. In terms of section 92 of the Act, any income arising out of an international transaction has to be determined having regard to Arm's Length Price (ALP). The dispute in this appeal relates to determination of ALP in both the SWD services Segment and MSS Services Segment. We shall take up for consideration first the dispute in SWD services Segment.

SWD SERVICES SEGMENT:

3. As far as SWD services segment is concerned, both the assessee and Transfer Pricing Officer (TPO) to whom the determination of ALP was referred by the AO in terms of Sec.92CA of the Act, adopted Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for determining ALP. The profit level Indicator (PLI) chosen for the purpose of comparing Assessee's margin with that of the comparable companies was Operating profit/Operating Cost (OP/OC).

Mark-up on Total Cost (OP/ OC) earned by the Assessee (as reflected in the TP order):

Particulars	As per TP order
Operating Income	Rs.12,16,75,946/-
Operating Expenses	Rs.11,25,86,295/-
Operating Profit (Op. Income – Op. Expenses)	Rs.90,29,431/-
OP/OC	8.02%

Comparison of TP study done by the Assessee and the TPO:

	The Assessee	TPO
Methodology adopted	TNMM	TNMM
Profit Level Indicator (PLI)	OP/TC	OP/OC
Database used	PROWESS & CAPITALINE	PROWESS
Comparables selected	14	11

4. After rejecting the Transfer Pricing Study (TP Study) of the taxpayer, the TPO selected 11 comparable companies, whose average profit margin was as follows:

Comparables selected by TPO and their arithmetic mean as per TPO order:

Sl. No.	Comparables Selected by TPO	Mark-up on Total Costs (Unadj)
1.	ICRA Techno Analytics Ltd.	24.94
2.	Infosys Ltd.	44.98
3.	Kals Information Systems Ltd.	34.41
4.	Larsen & Toubro Infotech Ltd.	19.33
5.	Mindtree Ltd.	14.83
6.	Persistent Systems & Solutions Ltd.	15.38
7.	Persistent Systems Ltd.	30.35
8.	RS Software (India) Ltd.	10.29
9.	Sasken Communication Technologies	17.36
10.	Tata Elxsi	20.93
11.	Thinksoft Global Services Ltd.	17.05
Arithmetic Mean		22.71%

5. The TPO computed ALP of the international transaction of rendering of SWD services as follows:

Computation of arm's length price by TPO and the adjustment made:

Arm's Length Mean Margin	22.71%
Less: WC Adjustment (restricted to 1.98%)	-0.02%
Adjusted margin	22.73%
Operating cost	Rs.11,25,86,295/-
Arm's Length Price (ALP): 122.73% of Operating Cost	Rs.13,81,77,160/-
Price Received	Rs.12,16,15,726/-
Short fall being adjustment u/s. 92CA	Rs.1,65,61,434/-

6. The adjustment suggested by the TPO was incorporated by the TPO in the draft Order of Assessment. The assessee filed objection to the draft Assessment Order before Dispute Resolution Panel (DRP) u/s.144C of the Act. The DRP gave certain directions dated 29.12.2004 to the TPO. Consequent to the directions of the DRP, the transfer pricing adjustment stood reduced by Rs.21,84,175/-. A final order of assessment was passed by the AO dated 16.1.2015, against which the revenue and the Assessee filed appeal before the ITAT. The ITAT in its order dated 7.2.2020 decided appeal of Assessee and revenue in IT(TP) A No.383 and 424/Bang/2015 whereby it remanded the issue of determination of ALP in both the SWD services Segment as well as MSS services segment to the DRP for fresh adjudication. The DRP gave its directions dated 22.12.2021 in the set aside proceedings. The AO passed the final order of assessment against which the Assessee has preferred the present appeal before the Tribunal.

7. In so far as the addition made in the SWD services segment is concerned, the DRP did not give any relief to the Assessee on choice of comparables. The

Assessee in this appeal is seeking exclusion of 6 comparable companies chosen by the TPO on the ground that the turnover of these 6 companies are above Rs.200 crores and hence cannot be compared with the Assessee's whose turnover was just Rs.12.17 Crores only. The Assessee seeks exclusion of the following 6 companies by application of the turnover filter.

1. Infosys Ltd.;
2. Mindtree;
3. Larsen & Toubro Infotech
4. Persistent Systems Ltd.;
5. Sasken Communication Technologies Ltd.; and
6. Tata Elxsi

8. The TPO excluded from the list of comparable companies chosen by the Assessee in its TP study companies whose turnover was less than Rs.1 Crore. The contention of the Assessee before the DRP was that while the TPO excluded companies with low turnover, he failed to apply the same yardstick to exclude companies with high turnover compared to the Assessee. The reason for excluding companies with low turnover was that such companies do not reflect the industry trend as their low cost to sales ratio made their results less reliable. The contention of the Assessee was that there would be effect on profitability wherever there is high or low turnover and therefore companies with high turnover should also be excluded from the list of comparable companies. The DRP primarily relied on the decision rendered by the Hon'ble Delhi High Court in the case of *Chryscapital Investment Advisors India Pvt. Ltd Vs. DCIT 82 Taxmann.com 167(Del)*, wherein it was held that high turnover ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded and that the effect of such high turnover on the margin should be seen. The DRP therefore held that a

company which is otherwise functionally comparable cannot be excluded only on the basis of high turnover.

9. On the issue of application of turnover filter, we have heard the rival submissions. The parties relied on several decisions rendered on the above issue by the various decisions of the ITAT Bangalore Benches in favour of the Assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. Vs. DCIT (2018) 89 Taxmann.com 44 (Bang-Trib) order dated 13.10.2017, took note of the decision of the ITAT Bangalore Bench in the case of *Sysarris Software Pvt.Ltd. Vs. DCIT (2016) 67 Taxmann.com 243 (Bangalore-Trib)* wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of *Chrystcapital (supra)* and the decision to the contrary in the case of *CIT Vs. Pentair Water India Pvt.Ltd., Tax Appeal No.18 of 2015 dated 16.9.2015* wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of *Pentair Water (supra)* should be adopted. The following were the conclusions of the Tribunal in the case of Dell International (supra):

“41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010, relying on Dun and Bradstreet's analysis, held grouping of companies having turnover of Rs. 1 crore to Rs.200 crores as comparable with each other was held to be proper. The following relevant observations were brought to our notice:-

“9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which .ire

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

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

10. The Tribunal in the case of Autodesk India Pvt. Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Bangalore-Tribunal), took note of all the conflicting decision on the issue and rendered its decision and in paragraph 17.7. of the decision held as that high turnover is a ground for excluding companies as not comparable with a company that has low turnover. The following were the relevant observations:

“17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015 judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the

earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).”

11. In view of the aforesaid decision, we hold that the 6 companies listed in Paragraph 5 of this order whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies.

12. The Assessee has also sought exclusion of the following three companies from the list of comparable companies on the ground that these three companies are not functionally comparable with the Assessee. The three companies which the Assessee seeks exclusion on the ground that these companies are not functionally

comparable with the Assessee are: (i) ICRA Techno Analytics Ltd., (ii) Kals Information Systems Ltd., and (iii) Persistent Systems & Solutions Ltd. In this regard, the learned counsel for the Assessee has placed reliance on a decision of the ITAT Bangalore Bench rendered in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. IT(TP)A No.212/Bang/2015 order dated 24.2.2016. The aforesaid decision relates to a company engaged in providing SWD services such as the Assessee and it also relates to AY 2010-11. The very same 11 comparable companies chosen in the case of the Assessee in this appeal was also chosen as comparable companies by the TPO in the decision cited by the learned counsel for the Assessee, thereby making it clear that the functional profile of the Assessee and that of the Assessee in the case cited by the learned counsel for the Assessee are one and the same. In the aforesaid decision, the Tribunal held that the aforesaid 3 companies are not functionally comparable with a company providing SWD services such as the Assessee. The following were the relevant observations of the Tribunal:

“13. We shall deal with each comparable which has been disputed by the Revenue one by one as under -

(1) ICRA Techno Analytics Ltd. (sect)

14. At the outset, we note that apart from having the related party revenue at 20.94% of the total revenue, this company was also found to be functionally not comparable with software development services segment of the assessee. The DRP has given its finding at pages 13 to 14 as under.-

"Having heard the contention, on perusal of the annual report. it is noticed by us that the segmental information is available for two segments i.e., services and sales. However, it is evident from the annual report that the service segment comprises of software development. software consultancy. engineering services, web development, web hosting. etc. for which no segmental information is available and

therefore. the objection of the assessee is found acceptable. Accordingly, Assessing Officer is directed to exclude the above company from the comparables."

15. *We find that the facts recorded by the DRP in respect of business activity of this company are not in dispute. Therefore, when this company is engaged in diversified activities of software development and consultancy, engineering services, web development & hosting and substantially diversified itself into domain of business analysis and business process outsourcing, then the same cannot be regarded as functionally comparable with that of the assessee who is rendering. software development services to its AE.*

16. *In view of the above facts, we do not find any error or illegality in the findings of the DRP that this company is functionally not comparable with that of a pure software development service provider."*

“(3) KALS Information Systems Ltd.

21. *The assessee raised objections against this company on the ground that this company is engaged in the development of software and software products. Further, this company consists of STPI unit and also having a training centre engaged in training of software professionals on online products Thus, when this company is having revenue from software services as well as software product, the same cannot be considered as comparable with software development service providing company*

22. *The DRP has directed the AO to exclude this company from the list of comparables by taking note of the fact that there were inventories in the books of accounts of this company which shows that this company is in the software product business. Further, by following the decision of this Tribunal in the case of Trilogy e-business Software India Ltd. v DCIT, ITA No.1054/Bang/2011 dated 23.11.2012. this company was found to be not comparable with that of the assessee,*

23. *We have heard the Id DR as well as Id. AR and considered the relevant material on record The Id. DR has not disputed the fact that comparability of this company has been examined by this Tribunal in a series of decisions including in the case of Trilogy e-business Software India Ltd. (supra). We further note that in the balance sheet of this company as on*

31.3.2010, there are inventories of Rs.60,47,977 Therefore, when this company is in the business of software products, the same cannot be compared with a pure software development services provider. Accordingly, we do not find any error or illegality in the impugned findings of the DRP.”

“Persistent Systems & Solutions Ltd.

60. The assessee has the grievance against rejection of this company by the ORP. The AR has submitted that assessee did not raise any objection against this company, however, the DRP has rejected the said company. Therefore, the said company should be retained in the list of comparables

61. Having considered the rival submissions as well as relevant material on record. at the outset, we note that the DRP has examined the functional comparability of this company by considering the relevant details as given in the annual report of this company. The DRP has given the finding that the entire revenue has been earned by this company from the sale of software services and products and in the absence of segmental details, it cannot be considered as comparable with software services segment. We find that this company has shown the income from sale of software services and products to the tune of Rs.6.67 crores. We further note that as per Schedule 11, the entire revenue has been shown under one segment i.e., sale of software services and products. Therefore no separate segment has been given in respect of software services. Accordingly, the composite data of revenue as well as margins of this company pertaining to the sale of software services and products cannot be considered as comparable with the software development services segment of the assessee. In view of the above facts and circumstances, we do not find any error or illegality in the directions of the DRP in excluding this company from the list of comparables. This ground of CO is dismissed.”

13. Respectfully following the aforesaid decision, we direct exclusion of the aforesaid 3 companies list in paragraph-10 above from the list of comparable companies.

14. The Assessee has also sought inclusion of Akshay Software Technologies Ltd. The TPO rejected this company on the ground that the Related Party

Transaction (RPT) are not available in the financials of this company. Apart from the above, the TPO also rejected this company on the ground that this company deals in Software Products and provides support services which is not in the nature of SWD. It acts as reseller for ERP and SWIFT products. The DRP has not dealt with the specific objection of the Assessee that this company is functionally comparable and the RPT details are available in the financials. The learned DR however pointed out that this Tribunal in the case of M/s. MetricStream Infotech (India) Pvt. Ltd., in IT(TP) A No.1418 & 2735/Bang/2017 order dated 27.2.2019 upheld the exclusion of this company on the ground as functionally not comparable. This decision is in relation to AY 2013-14. He also relied on another decision rendered in the case of Infineon Technologies India Pvt. Ltd. IT(TP) A No.405 & 474/Bang/2015 for AY 2010-11 order dated 21.8.2020 wherein the issue was remanded to the TPO for fresh consideration. The learned counsel for Assessee has placed reliance on a decision of Bangalore ITAT in the case of DCIT Vs. Novell Software Development (I) Pvt. Ltd. IT(TP) A.No.281/Bang/2015 for AY 2010-11 order dated 30.9.2016. We are of the view that it would be just and appropriate to remand the question whether this company is comparable or not to the TPO for consideration afresh, as was done in the case of MetricStream Infotech (India) Pvt. Ltd. We hold and order accordingly.

15. The TPO/AO is directed to compute ALP of the SWD services segment in accordance with the directions contained in this order after affording opportunity of being heard to the assessee.

MARKETING SUPPORT SERVICES SEGMENT

16. As far as this segment is concerned, the financial results like operating revenue, operating cost etc., and the manner of computation of ALP in this segment by the TPO was as follows:

Mark-up on Total Cost (OP/ OC) earned by the Assessee (as reflected in the TP order):

Particulars	As per TP order
Operating Income	Rs.5,98,33,575/-
Operating Expenses	Rs.5,69,84,357/-
Operating Profit (Op. Income – Op. Expenses)	Rs.28,49,218/-
OP/OC	5%

Comparison of TP study done by the Assessee and the TPO:

	Assessee	TPO
Methodology adopted	TNMM	TNMM
Profit Level Indicator (PLI)	OP/TC	OP/OC
Comparables selected	7	6

17. The TPO rejected the TP study of the Assessee and proceeded to compute the ALP of the international transaction as follows:

Comparables selected by TPO and their arithmetic mean as per TPO order:

Sl. No.	Name of the Company	Mark up WC Unadj. (%)
1.	Asian Business Exhibition & Conference Ltd.	58.64
2.	Cyber Media Research Ltd.	19.52
3.	HCCA Business Services Pvt. Ltd.	19.11
4.	Hindustan Housing Co. Ltd.	19.59
5.	ICC International Agencies Ltd.	13.27
6.	Killick Agencies & Mktg. Ltd.	16.77
7.		
ARITHMETIC MEAN		24.48

Computation of arm's length price by TPO and the adjustment made:

Arm's Length Mean Margin	24.48%
Operating cost	Rs.5,69,84,357/-
Arm's Length Price (ALP): 124.48% of Operating Cost	Rs.7,09,34,128/-
Price Received	Rs.5,98,33,575/-
Short fall being adjustment u/s. 92CA	Rs.1,11,00,553/-

18. The Addition suggested by the TPO was incorporated in the draft order of Assessment by the AO. The assessee filed objection to the draft Assessment Order before Dispute Resolution Panel (DRP) u/s.144C of the Act. The DRP gave certain directions dated 29.12.2004 to the TPO. Consequent to the directions of the DRP, the transfer pricing adjustment stood reduced by Rs.21,84,175/-. A final order of assessment was passed by the AO dated 16.1.2015, against which the revenue and the Assessee filed appeal before the ITAT. The ITAT in its order dated 7.2.2020 decided appeal of Assessee and revenue in IT(TP) A No.383 and 424/ Bang/2015 whereby it remanded the issue of determination of ALP in both the SWD services

Segment as well as MSS services segment to the DRP for fresh adjudication. The DRP gave its directions dated 22.12.2021 in the set aside proceedings. The AO passed the final order of assessment against which the Assessee has preferred the present appeal before the Tribunal.

19. The Assessee seeks exclusion of the following

1. Asian Business Exhibition & Conference Ltd.
2. HCCA Business Services Pvt. Ltd.
3. Killick Agencies & Mktg. Ltd.
4. Hindustan Hosing Co.Ltd.

The Assessee is also seeking inclusion of ICRA Management Consulting Services Ltd., in the list of comparable companies. We shall deal with each of the comparables sought to be excluded and included.

20. Asian Business Exhibition & Conferences Ltd: The exclusion of this company is sought on the basis that it is functionally dissimilar to the Assessee. This company is an event management company engaged in organizing exhibitions and events. Revenue is derived from sale of stall spaces, through sponsors by displaying names of exhibitors in signages, hoardings and banners, income from entry charges and income from delegates attending conferences/ events. This is in no way comparable to the Assessee's MSS services segment under which it assists its AEs in marketing and sales of their products in India. This Tribunal in DCIT v. Electronics for Imaging India P. Ltd [(2016) 70 taxmann.com 299 (Bang – Trib.)] and ITO v. Interwoven Software Services (India) (P.) [2016] 74 taxmann.com 103 (Bangalore - Trib.) directed this company to be excluded as a comparable in the case of assesseees similar to the Assessee herein. We find no grounds to interfere with the findings of the CIT(A).

21. HCCA Business Services P. Ltd: This company is sought to be excluded by the Assessee for the reason that it is functionally dissimilar to the Assessee. This company is a service provider and provides services in the gamut of HR operations and administration. It provides HR operations and administration services, offering payroll processing and compensation restructuring, management of labour and legal compliances, employee reimbursement processing and accounting services. It is thus clear that the activities of HCCA are not similar to marketing support services provided by the Assessee. This Tribunal in DCIT v. Electronics for Imaging India P. Ltd [(2016) 70 taxmann.com 299 (Bang – Trib.)] and ITO v. Interwoven Software Services (India) (P.) [2016] 74 taxmann.com 103 (Bangalore - Trib.) directed this company to be excluded as a comparable in the case of assesseees similar to the Assessee herein. Therefore, this company ought to remain excluded from the final list of comparables for the MSS segment.

22. Killick Agencies & Mktg. Ltd.: This company is sought to be excluded by the Assessee for the reason that it is functionally dissimilar to the Assessee, earns commission income and is also engaged in export of products. This Tribunal in DCIT v. Electronics for Imaging India P. Ltd [(2016) 70 taxmann.com 299 (Bang – Trib.)] and ITO v. Interwoven Software Services (India) (P.) [2016] 74 taxmann.com 103 (Bangalore - Trib.) directed this company to be excluded as a comparable in the case of assesseees similar to the Assessee herein.

23. Hindustan Hosing Co. Ltd.: This company is sought to be excluded on functional comparability. It is stated to be engaged in construction and other activities besides having related party transactions of more than 15%. The learned

counsel for the Assessee has placed reliance on decision of ITAT Bangalore in the case of Microchip Technology India Pvt. Ltd. Vs. DCIT order dated 14.6.2021 order dated 4.1.2022 in MP No.85/Bang/2021 wherein this company was held to be functionally not comparable with a company providing MSS services such as the Assessee. Following the said order, we direct exclusion of this company from the list of comparable companies.

24. The Assessee seeks inclusion of ICRA management services Ltd., on the ground that it is functionally similar and, in this regard, placed reliance on the decision of ITAT Bangalore in the case of Microchi Technology India Pvt.Ltd. (supra) wherein the Tribunal remanded to the TPO for consideration of inclusion of this company in MSS services segment, observing as follows:

“Ground No. 5.7

18. This ground has been raised by assessee seeking inclusion of ICRA Management Consulting Services Ltd.

18.1 The Ld.Counsel submitted that, this company is engaged in providing support services and is functionally comparable with that of assessee. She placed reliance on Hon'ble Mumbai Tribunal in case of IIMLH Advisors Ltd. vs DCIT in ITA No. 4060/ M/ 2016 by order dated 20/ 06/ 2018 for assessment year 2010-11.

In our view this comparable needs to be remanded to the Ld. AO/TPO for reconsideration in accordance with the observations of Hon'ble Mumbai Tribunal in IIMLH Advisors Ltd. vs DCIT (supra).

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

25. Following the said decision, we remand the question of comparability of this company to the TPO/AO afresh on the lines indicated in the order referred to above.

The Assessee also seeks direction to compute the correct margin of Cyber Media Research Ltd. The TPO computed the margin of this company at 13.62%. It is the plea of the Assessee that the correct margin of this company is 12.88%. The computation in this regard is given by the Assessee in page-188 of the written submission filed before the DRP. The TPO is directed to verify this aspect also while giving effect to this order. The TPO/AO is directed to compute ALP in the MSS service segment as per directions given in this order after affording the Assessee opportunity of being heard.

26. In the result, the appeal is partly allowed.

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

Sd/-

(PADMAVATHY S)
ACCOUNTANT MEMBER

Sd/-

(N. V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated: 15.09.2022.
/NS/*

Copy to:

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|---------------|---------------|
| 1. Assesseees | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.