IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

IT(TP)A No.237/Bang/2021
Assessment year : 2016-17

M/s. TiVo Tech Private Limited [formerly Veveo (India) Private Ltd.), 10th Floor, Primrose 7B, Embassy Tech Village, Outer Ring Road, Devarabisanahalli Village, Bangalore – 560 103. **PAN: AABCV 9504G**	Vs.	The Deputy Commissioner of Income Tax, Circle 7(1)(1), Bangalore.
ASSESSEE		RESPONDENT

Assessee by	:	Smt. Tanmayee Rajkumar, Advocate
Respondent by	:	Dr. Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	27.09.2022
Date of Pronouncement	:	12.10.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal by the assessee company is against the final assessment order passed us/. 143(3) r.w.s. 144C(13) r.w.s. 143(3A) & 143(3B) of the Income-tax Act, 1961 [the Act] dated 9.4.2021 for the assessment year 2016-17.

2. The following issues arise for consideration:-

(a) TP adjustment made with respect to interest on outstanding trade receivables aggregating to Rs. 4,52,15,619/- which was subsequently reworked to Rs. 4,52,45,728/- after DRP directions in Software Development Services segment (SWD).
(b) Disallowance of trade payables, legal and professional charges, repairs and maintenance expenses, foreign exchange loss and recruitment and reimbursement expenses u/s. 37 of the Act.
(c) Levy of interest u/s. 234B and 234C of the Act and Advance tax paid not considered.

3. The assessee company is a wholly owned subsidiary of Veveo Inc., USA. Subsequent to the acquisition of Veveo Inc. USA by Rovi Corporation, the assessee also forms part of Rovi Group. It provides IT, ITES and MSS services to Associated Enterprise [AE] offered by Rovi Group. The Assessee filed the return of income for the assessment year 2016-17 on 29.11.2016 declaring a total income of Rs.8,03,16,570. The case was selected for scrutiny through CASS and a notice u/s.143(2) was duly served on the assessee. In view of the large international transaction carried out by the assessee, a reference was made to the Transfer Pricing Office (TPO). The TPO aggregated the ITE services rendered by the Assessee along with its SWD services and determined a TP adjustment of Rs. 4,49,24,168/- towards the SWD segment. Additionally, the TPO determined a TP adjustment in respect of interest on delayed receivables of Rs. 2,91,451/-. A draft assessment order dated 16.12.2019 was passed by the AO incorporating the aforesaid TP adjustment. The AO also made the below additions while passing the draft assessment order

(i) 30% of trade payables amounting to Rs. 85,20,015/-

(ii) 30% of Rent, Legal and professional expenses, and repairs & maintenance totalling to Rs.9,40,47,886 /-

(iii) 30% of Forex losses of Rs. 14,13,683/-.

(iv) Recruitment expenses and reimbursement of expenses incurred in foreign currency of Rs. 30,11,460/-

4. On objections by the assessee, the DRP its directions dated 19.03.2021 rejected most of the objections. The AO passed the final assessment order dated 09.04.2021 pursuant to the DRP directions, whereby the TP adjustment was reworked to Rs. 4,52,45,728/- and the disallowance towards Rent, Legal and professional expenses, and repairs & maintenance was reduced to Rs.2,85,14,365.

5. Aggrieved by the final assessment order, the Assessee has preferred the above appeal to this Tribunal.

TP adjustment – SWD segment

6. The assessee raised 7 grounds and several sub grounds pertaining to the TP adjustment. The assessee also raised one additional ground with regard to the TP adjustment. During the course of hearing the ld AR presented arguments with regard to only the following issues -

(i) The TPO while applying the turnover filter at the lower limit erred in not applying the said filter at the upper end so as to reject high turnover companies. The DRP further erred in confirming the same.

(ii) Exclusion of R S Software on the ground that for AY 2014-15 & 2015-16 the turnover filter would fail for this company

(iii) Interest on delayed receivables

7. The ld AR submitted that if these grounds are allowed, then the rest of the grounds raised for the TP adjustment would become academic. The additional grounds raised are pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds. We will proceed to adjudicate the issues contended by the ld AR during the course of hearing in the following paragraphs

8. The assessee for the purpose of TP study has chosen Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM). The Operating Profit divided by the Operating Cost (OP/OC) is the Profit Level Indicator (PLI). The assessee selected 8 comparable companies and the range of weighted average of OP/OC of the comparable companies were as follows:-

Sl. No.	**Name of the company**	**Weighted average (in %)**
1.	Akshay Software Technologies Ltd.	0.04
2.	Evoke Technologies Pvt Ltd.	5.47
3.	Sasken Communication Technologies Ltd.	6.35
4.	C G Vak Software & Exports Ltd.	10.30
5.	Intense Technologies Ltd.	10.47
6.	Mindtree Ltd.	19.89

7.	R S Software (India) Ltd.	21.36
8.	R Systems International Ltd. – IT Services and Products	22.40
35th Percentile		**6.35**
Median		**10.38**
65th Percentile		**19.89**

9. The financials of the of the assessee as per the TP study is as given below -

Operating Income	Rs. 57,93,47,456/-
Operating Cost	Rs. 49,69,96,104/-
Operating Profit (Op. Income – Op. Cost)	Rs. 8,23,51,352/-
Operating/Net mark-up (OP/OC)	**16.57%**

10. The weighted average of the comparable companies is in the range of 6.35 percentile to 19.89 percentile and therefore the assessee concluded that the international transactions are within arm's length.

11. TPO rejected 6 of the above comparable companies selected by the assessee. The TPO applied new filters and selected 17 comparables against 8 selected by the assessee and the median of the weighted average of PLI of the companies as follows:-

Sl. No.	**Name of the Company**	**Mark-up on Total Costs (WC–unadj) (in %)**
1.	Kals Information Systems Ltd.	8.60
2.	E-Zest Solutions Ltd.	10.87
3.	Rheal Software Pvt. Ltd.	14.50
4.	Sybrant Technologies Private Limited	14.74
5.	Harbinger Systems Pvt. Limited	15.06
6.	CG-VAK Software & Exports Ltd.	18.50
7.	R S Software (India) Ltd.	20.87

8.	Larsen & Toubro Infotech Ltd.	24.83
9.	Orion India Systems Private Limited	25.64
10.	Nihilent Technologies Ltd.	26.36
11.	Inteq Software Pvt. Ltd.	28.20
12.	Persistent Systems Ltd.	30.89
13.	Infobeans Technologies Ltd.	32.42
14.	Thirdware Solution Ltd.	36.90
15.	Infosys Ltd.	38.61
16.	Aspire Systems (India) Pvt. Ltd.	39.28
17.	Cybage Software Pvt. Ltd.	66.45
35th Percentile		**18.50**
Median		**25.64**
65th Percentile		**30.89**

12. The TPO also reworked the operating revenue and the operating cost of the assessee and recomputed the arm's length price (ALP) to arrive at the TP adjustment as follows:-

Taxpayers operating revenue	57,20,14,832/-
Taxpayer operating cost	49,10,37,090/-
Taxpayers operating profit	8,09,77,742/-
Taxpayers PLI	16.49%
35th Percentile Margin of comparables set	18.50%
Adjustment required (if PLI<35th Percentile)	Yes
Median margin of comparable set	25.64%
Arm's length price	61,69,39,000/-
Price received	57,20,14,832/-
Shortfall being adjustment u/s. 92CA	**4,49,24,168/-**

13. The DRP upheld the TPO's order with respect to inclusion and exclusions of comparables. Aggrieved, the assessee is in appeal before the Tribunal.

14. The ld. AR submitted that the TPO erred in not applying a cap on upper limit on the turnover/service revenue while selecting the

companies comparable to the Assessee. In this regard, it is submitted that application of turnover filter is a relevant criteria in choosing comparable companies. It is submitted that the difference in the scale of operations have a direct impact on the profitability. The concept of economies of scale wherein, an increase in the size and scale of the operations lead to a decrease in the long run average cost of each unit or each service project delivered. Therefore, the per unit fixed cost of a small scale company would be much higher than of a medium/large size organisation. Further, it is submitted that medium/large size organisation operating in a particular industry also enjoys benefits of certain other market drivers and cost arbitrages. It is submitted that the turnover of the Assessee from rendering SWD services is Rs. 57,20,14,832/-. This being so, the TPO ought to have applied the upper turnover filter while selecting companies comparable to the Assessee. The ld AR placed reliance on the decision of the Bangalore Bench of this Hon'ble Tribunal in ***Autodesk India (P) Ltd. V. DCIT (2018) 96 taxmann.com 263 (Bang Trib)*** and ***Razorpay Software Pvt. Ltd. (order dated 27.12.2021 passed in IT(TP)A No. 190/Bang/2021).*** The ld AR further submitted that on application of the turnover filter on 1-200 crores, the following the companies would be excluded:

(a) Infosys Ltd.
(b) Larsen & Toubro Infotech Ltd.
(c) Persistent Systems Ltd.
(d) Aspire Systems (India) Pvt Ltd.
(e) Thirdware Solution Ltd.
(f) Cybage Software Pvt Ltd.
(g) Nihilent Ltd.

15. We have considered the rival submissions and perused the material on record. The Tribunal in the case of *Autodesk India Pvt.Ltd(supra)* 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).

16. In view of the aforesaid decision, we hold that companies listed in Sl.No.(a) to (g) of para 15 hereinabove whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies.

17. With regard to the exclusion of R S Software (India) Ltd the ld. AR submitted that the company during the financial years 2013-14 and 2014-15 had realised turnover of Rs. 351.88 crores and 345.51 crores, and profit margin of 24.14% and 32.75%, respectively. Being so, during the financial year 2015-16, the company realised a turnover of Rs. 171.41 crores, leading to loss of -2.09%. It is submitted that there is an apparent wide fluctuation in the margin of the company. The relevant details as computed by the TPO is extracted hereunder:

****figures in crores***	**FY 2015-16**	**FY 2014-15**	**FY 2013-14**
Operating revenue	171.41	345.50	351.89
Operating cost	175.07	260.26	283.47
Operating profit	-3.66	85.24	68.42
OP/OC	**-2.09%**	**32.75%**	**24.14%**

18. It is submitted that the wide fluctuations in profit suggest the existence of a peculiar economic circumstance, for which no appropriate adjustment could be made to mitigate the impact on the margin of the company. In view of the wide fluctuation in the margin of the company, the company cannot be selected as a comparable. Also, segmental details bifurcating revenue generated from SWD services vis-à-vis revenue generated from KPO services are not

available. The Company has also incurred significant outsourcing charges in the nature of subcontracting expenses.

19. Without prejudice, if the company were to be retained in the final list of comparables, the company's turnover for the financial years 2013-14 and 2014-15 is in excess of Rs. 200 crores, and therefore the margins for the said years ought to be excluded, and the margin of the company at -2.09% ought to be considered.

20. We have considered the rival submissions and perused the material on record. The comparability of R S Software in similar circumstances was also considered by this Tribunal in *Barracuda Networks India Private Limited Vs. CIT, (2022) 95 ITR (Trib) 0350 (Bangalore)* wherein it was held as under:-

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

profit margin of R.S.Software for the 2 financial years immediately prior to the current financial year has to be taken. A plain reading of the 1st proviso would show that the question of comparability is not to be seen while applying the 1st and 2nd proviso to Rule 10CA(2) of the Rules. The provisions of Rule 10CA(2) have to be read harmoniously with the other provisions of Rule 10B.

Determination of arm's length price under section 92C.

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

(a) to (d) …..

(e) transactional net margin method, by which,—

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

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

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

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

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

……..

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

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

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

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

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

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

(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost

charged or paid in, or the profit arising from, such transactions in the open market; or

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

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

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

A reading of Rule 10B(3) shows that comparison of an uncontrolled transaction to an international transaction can be done only if differences, if any, between the transactions that are compared or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market or reasonably accurate adjustments can be made to eliminate the material effects of such differences. A reading of Proviso to Rule 10B(4) would show that use of data relating to a period of two years prior to the current year may also be considered but with a rider that "if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared". If by application of any filter an enterprise undertaking uncontrolled transaction similar to an international transaction is regarded as not being comparable in the earlier two years immediately preceding the current year and thereby attracting the provisions of Rule 10B(2) or 10B(3) then the data for those years will not have any influence on the determination of transfer prices in relation to the transactions being compared for the current year and hence have to be ignored. On a harmonious reading of the provisions of Rule

> 10CA, 10B(3) (4) of the Rules, we agree with the stand taken by the learned counsel for the Assessee. Therefore, if at all R.S.Software Ltd., is to be regarded as a comparable company, then the margins for AY 2014-15 and 2015-16 of the company have to be ignored because in those years they are to be regarded as not comparable. We hold accordingly."

21. The facts of the present case are identical to the case of *Barracuda Networks India Private Limited* decided by the Tribunal and respectfully following the same, we hold that if R S Software Ltd. if at all to be considered as comparable the margins for AY 2014-15 & 2015-16 have to be ignored and not to be considered as comparable.

Interest on delayed receivables (Ground No.7)

22. The TPO considered the delay in realisation of receivables as separate international transaction and for the purpose of arriving at the TP adjustment, the TPO called for the invoice wise details. Based on the details furnished the TPO computed the notional interest od Rs.2,91,451 by applying the interest rate of 4.985% i.e. 6 months LIBOR + 450 basis points and considering the credit period of 45 days.

23. The Assessee filed its objections before the DRP primarily contending that the delayed receivables are in respect of the SWD services rendered by the Assessee and since the same is integral to the primary transaction, the delayed receivables cannot be treated as an independent international transaction. The DRP directed the TPO to apply the rate of interest applicable to short term deposits as opposed to PLR adopted by the TPO

24. The ld AR submitted that the amounts outstanding have been settled by the AE on an on-going basis in the normal course of business having regard to economic and commercial factors. Since the outstanding receivables related to the SWD services rendered by the Assessee, the ld AR submitted that the determination of ALP of the outstanding receivables is not warranted as the same is subsumed in the ALP of the principal transaction. The ld AR also contended the outstanding receivables could not be made subject matter of a TP adjustment as the same is not covered under the provisions of Section 92B of the Act. Also, it is submitted that the Assessee is a debt free company and does not bear any working capital risk since it is fully funded by its AEs. The Assessee has not incurred any interest expenses for its working capital requirement. Hence, the ld AR submitted that the Assessee does not have any interest cost in the funds blocked on deferred receivables from AEs as it is entirely funded by its AEs for its working capital requirements. Reliance in this regard is placed on the following decisions:-

> (i) ***Avnet India (P.) Ltd. v. DCIT*** (reported in [2016] 65 taxmann.com 187 (Bangalore-Trib)
>
> (ii) The appeal against the above order came to be dismissed by the Hon'ble High Court of Karnataka in ***PCIT and Anr. V. Avnet India (P.) Ltd.*** (Order dated 01.08.2018 passed by the Hon'ble High Court of Karnataka in ITA No. 358/2016).
>
> (iii) ***Goldstar Jewellery Ltd. v. JCIT*** (reported in [2015] 53 taxmann.com 353 (Mumbai-Trib) where the Tribunal held as follows:-

25. Without prejudice the ld AR submitted that in any event, the interest rate, if at all ought to be LIBOR plus, and not as directed by the DRP. Reliance in this regard is placed on the decision of this Hon'ble Tribunal in the case of ***Swiss Re Global Business Solutions India Pvt. Ltd. v. The Addl./Jt./Dy./Asst.Commissioner of Income Tax/ITO, National Faceless Assessment Centre*** (Order dated 21.01.2022 passed in IT(TP)A No. 397/Bang/2021). The ld AR also prayed that a credit period of 90 days is a reasonable period and if the same is granted, there is no delay in realising any of the invoices by placing reliance on the decision of the coordinate bench of the Tribunal in the case of ***Applied Materials India Pvt. Ltd. v. ITO*** (Order dated 08.06.2022 passed by this Hon'ble Tribunal in IT(TP)A No. 3403/Bang/2018).

26. We have considered the rival submissions and perused the material on record. We have heard the rival submissions and perused the material on record. The impugned issue is squarely covered by the decision of the coordinate Bench of the Tribunal in the case of *Swiss Re Global Business Solutions India Pvt. Ltd. (supra)* wherein it was held as under:-

> "35. The only other issue that remains for adjudication is ground No.15 with regard to re-characterizing certain trade receivables as unsecured loans and computing notional interest on such trade receivables. The main contention of the ld. AR is that deferred receivables would not constitute a separate international transaction and need not be benchmarked while determining the ALP of the international transaction. In our opinion, this issue was considered by the Tribunal in assessee's own case for AY 2014-15 and in para 23 to 23.9 of the order dated 21.5.2020 this Tribunal held as under:-

“23. Ground No. 14-17 alleged by assessee against adjustment of notional interest on outstanding receivables.

From TP study, it is observed that payments to assessee are not contingent upon payment received by AEs from their respective customers. Further Ld.AR submitted that working capital adjustment undertaken by assessee includes the adjustment regarding the receivables and thus receivables arising out of such transaction have already been accounted for. Alternatively, he submitted that working capital subsumes sundry creditors and therefore separate addition is not called for.

23.1. Ld.TPO computed interest on outstanding receivables under weighted average method using LIBOR + 300 basis points applicable for year under consideration that worked out to 3.3758% on receivables that exceeded 30 days. It has been argued by Ld.AR that authorities below disregarded business/commercial arrangement between the assessee and its AE's, by holding outstanding receivables to be an independent international transaction.

23.2. Ld.AR placed reliance on decision of Delhi Tribunal in Kusum Healthcare (P.) Ltd. v. Asstt. CIT [2015] 62 taxmann.com 79, deleted addition by considering the above principle, and subsequently Hon'ble Delhi High Court in Pr. CIT v. Kusum Health Care (P.) Ltd. [2018] 99 taxmann.com 431/[2017] 398 ITR 66, held that no interest could have been charged as it cannot be considered as international transaction. He also placed reliance upon decision of Delhi Tribunal in case of Bechtel India (P.) Ltd. v. Dy. CIT [2016] 66 taxman.com 6 which subsequently upheld by Hon'ble Delhi High Court vide order in Pr. CIT v. Bechtel India (P.) Ltd. [IT Appeal No. 379 of 2016, dated 21-7-16] also upheld by Hon'ble Supreme Court vide order, in CC No. 4956/2017.

23.3. It has been submitted by Ld.AR that outstanding receivables are closely linked to main transaction and so the same cannot be considered as separate international transaction. He also submitted that into company agreements provides for extending credit period with mutual consent and it does not provide any interest clause in case of delay. He also argued that the working capital adjustment takes into account the factors

related to delayed receivables and no separate adjustment is required in such circumstances.

23.4. On the contrary Ld.CIT.DR submitted that interest on receivables is an international transaction and Ld.TPO rightly determined its ALP. In support of the contentions, he placed reliance on decision of Delhi Tribunal order in Ameriprise India (P.) Ltd. v. Asstt. CIT [2015] 62 taxmann.com 237 wherein it is held that, interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that Finance Act, 2012 inserted Explanation to section 92B, with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this Explanation provides that:

(i) the expression "international transaction" shall include—

. . . . . (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;. . . . '

23.5. Ld.CIT.DR submitted that expression 'debt arising during the course of business' refers to trading debt arising from sale of goods or services rendered in course of carrying on business. Once any debt arising during course of business is an international transaction, he submitted that any delay in realization of same needs to be considered within transfer pricing adjustment, on account of interest income short charged or uncharged. It was argued that insertion of Explanation with retrospective effect covers assessment year under consideration and hence under/non-payment of interest by AEs on debt arising during course of business becomes international transactions, calling for computing its ALP. He referred to decision of Delhi Tribunal in Ameriprise (supra), in which this issue has been discussed at length and eventually interest on trade receivables has been held to be an international transaction. Referring to discussion in said order, it was stated that Hon'ble Delhi Bench in this case noted a decision of the Hon'ble Bombay High Court in the case of CIT v. Patni Computer Systems Ltd. [2013] 33 taxmann.com 3/215 Taxman 108 (Bom.), which dealt with question of law:

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

23.6. Ld.CIT.DR submitted that, while answering above question, Hon'ble Bombay High Court referred to amendment to section 92B by Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside view taken by Tribunal, Hon'ble Bombay High Court restored the issue to file of Tribunal for fresh decision in light of legislative amendment. It was thus argued that non/under-charging of interest on excess period of credit allowed to AEs for realization of invoices, amounts to an international transaction and ALP of such international transaction has to be determined by Ld.TPO. Insofar as charging of rate of interest is concerned, he relied on decision of the Hon'ble Delhi High Court in CIT v. Cotton Naturals (I) (P.) Ltd. [2015] 55 taxmann.com 523/231 Taxman 401 holding that currency in which such amount is to be re-paid, determines rate of interest. He, therefore, concluded by summing-up that interest on outstanding trade receivables is an international transaction and its ALP has been correctly determined.

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

This Bench referred to decision of Special Bench of this Tribunal in case of Special Bench of ITAT in case of Instrumentation Corpn. Ltd. v. Asstt. DIT (IT) [2016] 71 taxmann.com 193/160 ITD 1 (Kol. - Trib.), held that outstanding sum of invoices is akin to loan advanced by assessee to foreign AE., hence it is an international transaction as per Explanation to section 92B of the Act. We also perused decision relied upon by Ld.AR. In our considered opinion, these are factually distinguishable and thus, we reject argument advanced by Ld.AR.

23.8. Alternatively, it has been argued that in TNMM, working capital adjustment subsumes sundry creditors. In such situation

computing interest on outstanding receivables and loans and advances to associated enterprise would amount to double taxation. Hon'ble Delhi Tribunal in case of Orange Business Services India Solutions (P.) Ltd. v. Dy. CIT [2018] 91 taxmann.com 286 has observed that:

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

23.9. In view of the above, we deem it appropriate to set aside this issue to Ld.AO/TPO for deciding it in conformity with the above referred judgment. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in accordance with law."

36. Accordingly, we are of the opinion that deferred receivables would constitute an independent international transaction and the same is required to be benchmarked independently as held by the

> Hon'ble Karnataka High Court in PCIT v. AMD (India) Pl. Ltd., ITA No.274/2018 dated 31.8.2018.
>
> 37. Once we have held that the transaction between the assessee and AE was in foreign currency with regard to receivables and transaction was international transaction, then transaction would have to be looked upon by applying the commercial principles with regard to international transactions and accordingly proceeded to take into account interest rate in terms of London Inter Bank Offer Rate [LIBOR] and it would be appropriate to take the LIBOR rate + 2%. For this purpose, we place reliance on the judgment of the Bombay High Court in the case of *CIT v. Aurionpro Solutions Ltd., 99 CCH 0070 (Mum HC).* It is ordered accordingly"

27. In view of the above discussion and considering the decision of the of the coordinate bench of the Tribunal and the judgment of the Hon'ble High Court of Karnataka in the case of *AMD (India) Pvt. Ltd. (supra),* we hold that the treatment of interest on deferred receivables is rightly considered as an independent international transaction and benchmarked separately by the revenue authorities. With regard to calculation of interest, respectfully following the above decision we hold that it would be appropriate to take the LIBOR rate + 2%. For this purpose, we place reliance on the judgment of the Bombay High Court in the case of *CIT v. Aurionpro Solutions Ltd., 99 CCH 0070 (Mum HC).* It is ordered accordingly.

28. The rest of the grounds raised with regard to TP adjustment have become academic in view of the decision given in the above paragraph. The TPO is directed to recompute the ALP in accordance with the directions given in this order.

Ground No. 9: Disallowance of trade payable and certain other expenses u/s. 37 of the Act:

29. The Assessing Officer has made an adhoc disallowance of 30% of the actual expenses on (i) trade payables amounting to Rs. 85,20,015/-; (ii) rent expenses of Rs. 3,92,57,989/-; (iii) legal and professional expenses of Rs. 5,04,90,993/-; and (iv) forex losses of Rs. 14,13,683/-. The payments of recruitment expenses and reimbursement of expenses amounting to Rs. 30,11,460/- were fully disallowed. The disallowances were made on the ground that the Assessee failed to furnish details with respect to the aforesaid expenditures. Before the DRP, the Assessee filed all the evidences. A table reflecting the disallowance proposed in the draft assessment order and the direction issued by the DRP are as under:

Expenses	Amount of disallowance	DRP directions
Addition of Trade Payables	Rs. 85,20,015 (being 30% of the total trade payables amounting to Rs. 28,00,052/-)	If the Assessee submits the confirmation of trade payables, the AO was directed to not disallow 30% of the trade payables.
Rent expenses	Rs. 11,77,73,967/- (being 30% of the rent expenses amounting to Rs.3,92,57,989)	Assessing Officer was directed not to make any disallowance.
Legal and professional charges	Rs. 1,51,47,298/- (being 30% of the expenses amounting to Rs. 5,04,90,993/-)	If the Assessee submits proof of TDS payments, the AO was directed to not disallow 30% of the trade payables.

Repair and maintenance	Rs. 1289671/- (being 30% of Rs. 42,98,904/-)	The DRP has failed to adjudicate on the said issue.
Recruitment expenses	Rs. 3,27,448/- (being 30% of the expenses amounting to Rs. 10,91,491)	If the Assessee submits proof of TDS payments, the AO was directed to not disallow 30% of the trade payables.
Reimbursement expenses	Rs. 5,75,991/- (being 30% of the expenses amounting to Rs. 19,19,969/-)	If the Assessee submits proof of TDS payments, the AO was directed to not disallow 30% of the trade payables.
Forex loss	Rs. 14,13,683/-	The Assessee was directed to furnish invoice wise details of foreign exchange loss.

30. The ld. AR made the following submissions with regard to the various disallowance made u/s.37-

(i) On remand by the DRP, the AO called for certain details vide notice dated 23.03.2021 which were to be submitted by the Assessee on or before 30.03.2021. Since the Assessee was unable to collate the required details in time, the Assessee filed a letter dated 30.03.2021 before the AO seeking additional time till 13.04.2021 to collate the required documents. However, the AO proceeded to pass the final assessment order holding that the Assessee failed to submit the required details. Subsequently, the Assessee filed an application for rectification requesting the AO to consider the details submitted therein and the same is pending consideration. Details of the same are available at page 802-1058 of the paperbook.

(ii) With respect to rent expenses, as the Assessee had furnished the proof of payment of TDS, the DRP directed the AO not to disallow 30% on account of rent expenses.

(iii) As regards the disallowances of legal and professional, it is submitted that the Assessee has produced the party-wise details for the ledger and professional expenses (page 809-810 of the paperbook), copies of Form 16A (page 811-932 of the paperbook) and challan copies evidencing that the Assessee had deducted TDS appropriately under Section 194J of the Act (pages 933-956 of the paperbook).

(iv) With respect to repairs and maintenance expenses, though the DRP has noted submissions made by the Assessee, has failed to adjudicate on the said issue.

(v) With respect to recruitment expenses, it is submitted that expense of Rs. 10,91,491/- comprises of only payments made to an unrelated party i.e., LinkedIn Ireland. It is submitted that the Assessee has furnished details of TDS deducted (page 957 of the paperbook), Form 16 issued to LinkedIn Ireland (page 958-961 of the paperbook) and challans evidencing appropriate deduction of TDS under Section 195 of the Act (page 962-964 of the paperbook).

(vi) As regards the disallowance Rs. 19,19,969/-made towards reimbursement of expenses, it is submitted that Rovi Corporation, USA rolled out a plan to reward the employees which is termed as 'Bravo Rewards'. The cost incurred by Rovi Corporation, USA for such rewards is allocated based on number of awards issued by each group entities and the cost is cross-charged to the group entities on a cost to cost basis without any mark-up. It is submitted that the Bravo Rewards points are taxed in the hands of the employees as perquisites and accordingly, the Assessee has deducted taxes under Section 192 of the Act. Since the payments had already suffered TDS under Section 192 of the Act, it is submitted that no TDS is required on the reimbursements made.

(vii) With respect to forex loss, it is submitted that accrual wise / invoice wise details of foreign exchange loss amounting to Rs. 47,12,278/- was

furnished before the AO (pages 970-976 of the paperbook). It is submitted that foreign exchange loss amounting to Rs. 46,57,125/- was accounted by the Assessee towards the following:

- Bravo rewards;
- Amount payable to vendors;
- Amount receivable towards recovery of expenses on account of share based compensation plans;
- Amount payable to employee on account of retention bonus; and
- Amount receivable towards export of services

(viii) The balance forex loss of Rs. 55,153/- has been accounted by the Company upon consolidation of financials on account of merger of Snapstick Technologies Pvt. Ltd. with the Assessee. Also, it is submitted that the Assessee has disallowed a sum of Rs. 93,331/- in its return of income incurred towards fixed assets. Hence 30% disallowance on the said amount would lead to double disallowance.

31. Further, the ld AR is submitted that all the above mentioned expenses were incurred by the Assessee in normal operations of the business and were incurred exclusively for the purpose of business and ought to be allowed as a business expenditure. It is submitted that the Assessee has filed the relevant details before the DRP and also subsequently before the Assessing Officer to substantiate its claim. Therefore, it is submitted that the said expenses ought to be allowed as a deduction under Section 37 of the Act.

32. We have considered the rival submissions and perused the material on record. The DRP has given directions to the AO to allow expenses after considering whether the tax is deducted at source or not. It is also noticed that the assessee has submitted various details before

the lower authorities which have not fully considered. We also notice that the rectification petition filed by the assessee u/s.154 with the details have not been disposed off by the lower authorities. In view of this we remit the issue back to the AO with a direction to verify the details as per the directions of the DRP and the additional details filed through the rectification petition u/s.154 filed by the assessee and decide the allowability in accordance with law. Needless to say that a reasonable opportunity of being heard should be given to the assessee.

33. With respect to the disallowance of Rs. 2,84,00,052/- made towards trade payables, the DRP directed the Assessee to provide confirmations. The ld AR in this regard submitted that trade payables being a balance sheet entry, no disallowance can be made while computing the assessed income. Without prejudice, ld AR also submitted that out of the total trade payables amounting to Rs. 2,84,00,052/-, an amount of Rs. 1,86,91,371/- is disclosed as Sundry creditors as at 31 March 2016 and the balance amount of Rs. 97,08,681/- is towards provision of expenses disclosed under the head ‘other liabilities-expenses. It is submitted that the above details were furnished before the AO under the rectification application dated 05.05.2021.

34. We heard the rival submissions and perused the material on record. We notice that the assessee has furnished the following details before the lower authorities:

(i) The details of the trade payables amounting to Rs. 2,84,00,052/- along with PAN and address of the parties are furnished at pages 965-966 of the paperbook

(ii) With respect to the trade payables amounting to Rs. 1,86,91,371/-, the Assessee has obtained confirmation from Rovi Corporation which is at page 967 of the paperbook.

(iii) The balance amount of Rs. 3,61,606/- pertaining to Bharati Airtel Ltd., the Assessee has furnished copies of invoices at pages 968-969 of the paperbook.

(iv) For the other liabilities amounting to Rs. 97,08,681/-, the Assessee has furnished party-wise invoices before the AO.

35. We also notice that the DRP has given a direction to consider the confirmations produced by the assessee and that the details listed above as submitted by the assessee have not been considered while deciding the disallowance. We therefore remit the issue back to the AO to take into consideration the details/confirmations submitted by the assessee to decide the allowability in accordance with law after giving reasonable opportunity of being heard to the assessee.

36. Ground 8 is general and does not warrant separate adjudication. Ground Nos. 10 is regarding levy of interest u/s. 234B and234C which are consequential in nature. Ground No.11 is with respect to the advance tax paid not considered and in this regard we direct the AO to verify the same and give the due credit. Ground No.12 relates to initiation of penalty which is consequential.

37. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 12th day of October, 2022.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 12th October, 2022.
/*Desai S Murthy /*

Copy to:
1. Assessee 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.