

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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

IT(TP)A No.350/Bang/2021
Assessment year : 2016-17

Synamedia India Pvt. Ltd., Block 9A & 9B Priteck Park, Sarjapur Outer Ring Road, Bellandur Village, Sarjapur Outer Ring Road, Bengaluru – 560 103. PAN: AAACK 9067G	Vs.	The Deputy Commissioner of Income Tax, Circle 6(1)(2), Bangalore.
ASSEESSEE		RESPONDENT

Assessee by	:	Shri Ankur Pai, Advocate
Respondent by	:	Shri Manjunath Karkihalli, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	11.10.2022
Date of Pronouncement	:	21.10.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal is against the final order of assessment passed by the National e-Assessment Centre, Delhi u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act] dated 30.4.2021 for the assessment year 2016-17.

2. The assessee is the subsidiary of Synamedia Ltd., UK and provides software development services among pre-sales and marketing and sales support services and technical support services to Synamedia, UK. The assessee filed return of income for AY 2016-17 on 30.11.2016 declaring a total income of Rs.97,71,24,230. The case was selected for scrutiny under CASS and a notice u/s. 143(2) was duly issued and served on the assessee. The case was referred to the Transfer Pricing Officer (TPO) for computation of arm's length price (ALP) with regard to the international transactions of the assessee with its Associated Enterprise (AE). The TPO passed an order u/s. 92CA dated 23.10.2019 determining the total adjustment of Rs.39,73,04,165 which was subsequently rectified to Rs.38,89,77,407. The AO passed a draft assessment order incorporating the TP adjustment. Aggrieved, the assessee raised objections before the DRP. Based on directions of DRP, the TP adjustment was enhanced to Rs.40,32,45,354 and the AO passed the final assessment order in accordance with the directions of the DRP. The assessee is in appeal before the Tribunal against the final order of assessment.

3. The assessee raised 19 grounds with respect to the TP adjustment made by the TPO. The assessee also filed additional grounds with regard to certain inclusion of comparables. The effective grounds of appeal are listed as under:-

- (i) Exclusion of companies (Ground 9)
Ground No.9.2 – Nihilent Ltd.,
Ground 9.3 - Persistent Systems Ltd.
Ground 9.4 – Aspire Systems India Pvt. Ltd.

Ground 9.5 – Infosys Ltd.
Ground 9.6 – Thirdware Solutions Ltd.
Ground 9.8 – L&T Infotech Ltd.
Ground 9.9 – Infobeans Technologies Ltd.

- (ii) Inclusion of companies – Ground 10
Ground 10.2 - Evoke Technologies Ltd.
Ground 10.3 - Synfosys Business Solutions Ltd.
- (iii) Additional ground for inclusion of comparables
Ground 19(c) - Insumation Technologies Pvt. Ltd.
Ground 19(f) - Sagarsoft India Ltd.
- (iv) Interest on outstanding receivables (Grounds 13 to 19)

4. The rest of the grounds are not pressed and are dismissed accordingly.

5. For AY 2014-15, the Assessee had received Rs.2,98,36,64,473/- from its AE in respect of the software development services provided. The Assessee had selected Transaction Net Margin Method (“TNMM”) as the Most Appropriate Method (“MAM”) and operating profit / operating cost is the Profit Level Indicator. The assessee had computed the margin of 11.12% in the segmental financials pertaining to software development services in which the assessee has made a *suo motu* TP adjustment of Rs.8,31,45,517/- (page 174 of paper book).

6. The Assessee selected 10 comparable companies whose 35th and 65th percentile range of the weighted average operating profit/total cost is in the range of 10.76% to 20.84% where the 11.12%. Since the profit margin of the Assessee at 11.12% on operating cost was within the 35th and 65th percentile range, the profit margin earned by the

Assessee in the software development segment was treated at arm's length

7. The TPO rejected the TP study and conducted fresh analysis. He agreed with the Assessee that TNMM was to be applied as the MAM. The TPO has characterized the Assessee as a captive service provider which assumes minimal risk associated with the business of providing software development services. The TPO thereafter applied certain filters and selected 15 comparable companies in software development segment which included 12 new companies as comparables, while 3 company selected by the Assessee were retained.

8. The TPO, determined the 35th to 65th percentile at 20.87% to 30.89% with median at 26.36% based on the weighted average operating profit/total cost of the 17 comparable companies in software development segment.

S No.	Company Name	Average of 3 years (OP/OC)
1*	<i>Kals Information Systems Ltd.</i>	8.60%
2	E-Zest Solutions Ltd.	10.87%
3	Rheal Software Pvt. Ltd.	14.50%
4	Harbinger Systems Pvt. Ltd.	14.74%
5*	<i>CG-Vak Software & Exports Ltd.</i>	18.50%
6*	<i>R S Software India Ltd.</i>	20.87%
7	Larsen & Toubro Infotech Ltd.	24.83%
8	Nihilent Technologies Ltd.	26.36%
9	R S Software (India) Ltd	20.87%
10	Persistent Systems Ltd.	28.20%
11	Infobeans Technologies Ltd.	32.42%
12	Thirdware Solution Ltd.	36.90%
13	Infosys Ltd.	38.61%

S No.	Company Name	Average of 3 years (OP/OC)
14	Aspire Systems India Pvt. Ltd.	39.28%
15	Cybage Software Pvt. Ltd.	66.45%
	35th Percentile	20.87%
	Median	26.36%
	65th Percentile	30.89%

* the comparables at S No.1, 5 and 6 are TP study comparables accepted by the TPO.

9. The TP Officer did not grant any adjustment towards working capital. The TPO made revised the operating income of the assessee and re-computed the profit margin of the Assessee at 14.23% against the margin of 11.12% determined by the Assessee in the TP study. Based on the same the TPO arrived at the TP adjustment as per table below:-

Particulars	As per TP Officer
Total Operating Revenue (Rs)	3,15,26,48,699
Total Operating Expenses (Rs)	2,75,99,08,198
Operating Profit (Rs)	39,27,40,501
OP/ OC (percent)	14.23
Median (percent)	26.36
Arm's length price	3,48,74,19,999
TP adjustment (Rs)	33,47,71,300

10. The TPO therefore passed the order dated 28.10.2019 under section 92CA of the Act and determined an adjustment of Rs.33,47,71,300/- in the software development segment. The TPO also made an adjustment towards Interest on delayed receivables. The TPO imputed interest on the delayed receivables applying the rate of

LIBOR- 6 months + 450 basis points and made an adjustment of Rs.6,25,32,865/-. A rectification order dated 20.01.2020 was passed by the TPO and the adjustment with respect to interest on delayed receivables was reduced to Rs.5,42,06,107/-. The TPO accordingly determined a total TP adjustment of Rs.38,89,77,407/- in his order.

11. Aggrieved the assessee raised objections before the DRP. Insofar as it relates to the Assessee's Software Development Services segment, the DRP did not provide any relief and rejected the objections of the Assessee. The Assessee also contended before the DRP that the TPO had not considered the correct margin with regard to the following comparables:

- i. CG-VAK Software & Exports Limited
- ii. Kals Information Systems Private Limited
- iii. Harbinger Systems Private Limited
- iv. Aspire Systems (India) Private Limited
- v. Cybage Software Private Limited

12. The DRP directed the TP Officer to verify and adopt the figures as per the annual report of the above comparable companies. With respect to the mechanism of computation of imputed interest on delayed receivables, the DRP rejected the objection of the Assessee and upheld the order of the TPO benchmarking the same as a separate international transaction and further held that SBI short term FD interest rate was appropriate as against the LIBOR rate duly considered by the TP Officer in his order.

13. The TPO has passed the order giving effect to the directions of the DRP and has computed the interest on delayed receivables invoice wise with reference to the amount received beyond the credit period / not received within the credit period of 60 days as per the agreement. The TPO considered the SBI short term FD rate as directed by the DRP which resulted in enhanced adjustment of Rs.6,84,74,054/- against the adjustment of Rs.5,42,06,107/- as per the rectification order.

14. In relation to the software development segment, the TPO verified and rectified the margin of the comparable companies and determined the 35th to 65th percentile of 20.87% to 30.87% with a median of 26.36%. There was therefore no change to the adjustment determined by the TP Officer in the software development segment which is as follows:-

Description	Adjustment (Rs.)
Software development segment	33,47,71,300
Interest on delayed receivables	6,84,74,054
Total TP adjustment	40,32,45,354

15. Aggrieved by the TP adjustment made in the final assessment order, the Assessee has filed the present appeal before the Tribunal.

16. With regard to the exclusion of **Nihilent Ltd., Persistent Systems Ltd. Aspire Systems India Pvt. Ltd., Infosys Ltd., Thirdware Solutions Ltd., L&T Infotech Ltd., Infobeans Technologies Ltd**, the Id. AR submitted that these companies are functionally different from the assessee and therefore need to be

excluded. In this regard the Id. AR relied on the decision of the coordinate Bench of the Tribunal in the case of *Sandisk India Device Design Centre P. Ltd., IT(TP)A No.288/Bang/2021*.

17. The Id. DR, on the other hand, supported the order of the lower authorities.

18. We have considered the rival submissions and perused the material on record. This Tribunal in the case of *Sandisk India Device Design Centre P. Ltd. (supra)* had considered the comparability of Persistent Systems Ltd., Infosys Ltd., Thirdware Solutions Ltd., L&T Infotech Ltd., Nihilent Ltd., Aspire Systems India Pvt. Ltd. & Infobeans Technologies Ltd. and held as under:-

“17.7 He placed reliance on the decision of Coordinate Bench of this Tribunal in case of OLF (India) Software Pvt. Ltd. vs. ACIT (supra) wherein this Tribunal following its decision in case of LSI India research development (P.) Ltd. vs. DCIT reported in [2021] 124 taxmann.com 83, excluded Persistent Systems Ltd., L&T Infotech Ltd., Thirdware Solutions and Infosys Ltd. by observing as under:

“3.2 This Tribunal in LSI India research development (P.) Ltd. v. DCIT (supra) observed in respect of persistent systems, L & T Infotech, Thirdware Solutions, Infosys Ltd. as under:

16. As far as the challenge by the assessee on exclusion of aforesaid 5 companies in ground No. 2(f), the Id. counsel for the assessee has brought to our notice a decision of Bangalore Bench of ITAT for the very same Assessment Year 2014-15 in the case of LG Soft India (P.) Ltd. v. DCIT [IT(TP) Appeal No. 3122 (Bang.) of 2018, dated 28-5-2019]. In this order rendered in a case of assessee rendering SWD services such as the assessee, the Tribunal excluded 3 out of 5 companies referred to in the earlier paragraph and remanded 1 company for fresh consideration with the following observations:-

"5. The Ld A.R submitted that **M/s Infosys Ltd, M/s Persistent Systems Ltd and M/s Thirdware Solutions Ltd** have been excluded by the co-ordinate bench in the assessee's own case in AY 2008-09 in IT(TP)A No. 1673/Bang/2012.

6. We notice that the co-ordinate bench has excluded M/s Infosys Ltd in AY 2008-09 by following the decision rendered by another co-ordinate bench in the case of 3DPLM Software Solutions Ltd (IT(TP)A No. 1303/Bang/2012 dated 28-11-2013, wherein the decision rendered in the case of Triology E Business Software India P Ltd (ITA No. 1054/Bang/2011) was followed and it was held that M/s Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It was further observed that the break-up of revenue from software services and software product is not available.

6.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of **M/s Infosys Ltd**.

7. In AY 2008-09, the co-ordinate bench has excluded M/s Persistent Systems Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd (supra), where in it was held that M/s Persistent Systems Ltd is engaged in product development and product design services while the assessee is a software development service provider. Further, the segmental details were not available.

7.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of **M/s Persistent Systems Ltd**.

We also notice that in AY 2008-09, the co-ordinate bench has excluded M/s Thirdware Solutions Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd. (supra), where in it was held that M/s Thirdware solutions Ltd is engaged in product development and earns revenue from sale of licenses and subscription. Further, the segmental details were not available.

8.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of **M/s Thirdware Solutions Ltd.**

17. As far as exclusion of **Larsen & Toubro Infotech Ltd.**, is concerned, the Tribunal in the very same case of LG Soft (P.) Ltd. (supra) in another order dated 27-9-2019 in MP No. 95/Bang/2019 held that exclusion of Larsen & Toubro Infotech Ltd., was omitted to be adjudicated in the original order dated 28-5-2019 passed by the Tribunal referred in the earlier paragraph and held that Larsen & Toubro Infotech Ltd., is also not a comparable company because there were extraordinary events that occurred in the relevant previous year and that it possessed brand and intangibles and there was no segmental information of sub-contracting expenses”.

3.3 There is nothing on record brought by the Ld.CIT.DR in order to establish that these are comparable with assessee that is a captive service provider which functions at the strict supervision and instructions by the AE's. Further we note that turnover criteria has to be applied with an upper limit which is not been considered by the Ld. TPO. The TPO has applied less than 1 crore turnover limit to eliminate the comparables however it failed to apply upper limit considering the functions performed assets owned and risk assumed by assessee under this segment for the year under consideration.”

17.8 Before us, the Ld.AR has not been able to place anything on record contrary to the above observation. We therefore respectfully following the above view, direct the Ld.AO/TPO to exclude **Persistent Systems Ltd., L& T Infotech Ltd., Thirdware Solutions and Infosys Ltd.** from the final list.

17.9 In respect of Nihilent Ltd., Infobeans Technologies Ltd. and Aspire Systems (India) Pvt. Ltd., Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT (supra) observed as under:

“Comparable Sought to be excluded by the assessee **Aspire System India Pvt. Ltd. (Aspire)**

40. The assessee sought exclusion of Aspire from the final set of comparables for benchmarking SDS segment on the ground that it fails Related Party Transaction (RPT) filters as its RPT/ sales ratio is more than 25%. The assessee computed the significant related party

transactions at 37.58% whereas the Ld. TPO computed it at 23.55%. The TPO is directed to recalculate the RPT/sales ratio by providing opportunity of being heard to the assessee. So this comparable is remitted back to the Ld. TPO to decide afresh.”

Nihilent Ltd.

46. The assessee sought exclusion of Nihilent Ltd. as a comparable on the ground that it is functionally dissimilar vis-à-vis assessee. This objection was also raised before the Ld. DRP but rejected. The assessee relied upon website of the company which is made available at page A412 of the paper book wherein Nihilent Ltd. is shown to be engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data signs, cloud services etc. The annual financials of this company available at page A412 & A413 of the paper book shows that it is rendering Enterprise transformation and change management, Digital transformation services and Enterprise IT services but segmental financials are not available as is apparent from its financials available at page A305, A412 & A413 of the paper book. When this company is into various segments but segmental financials are not available it cannot be a valid comparable vis-à-vis assessee which is a routine software development service provider working on cost + markup model, hence ordered to be excluded.”

“Infobeans Technologies Ltd. (Infobeans)

49. The assessee sought exclusion of Infobeans on the ground that it is also functionally dissimilar being into providing business IT services (CAD) (application development and maintenance, Big Data, UX and UI, Automation engineering services, including product engineering and lifestyle solutions and business process management) in verticals of storage and virtualization, media and publishing, HR and Payroll and e-commerce. It is also providing software engineering services primarily in Custom Application Development (CAM), enterprise mobility and Big Data Analytics (BDA).

50. Perusal of financials available at page A303, A418 to A421, Infobeans shows that it is into diversified services but its segmental financials are not available without which it is difficult to compute the

correct profit margin of the relevant segment. So Infobeans is also ordered to be excluded as a comparable being not a comparable to the assessee.”

17.10 Perusal of the annual report, filed before us in respect of the above two comparables, we note that the segmental financials are not available in respect of Nihilent and Infobeans and the RPT in respect of Aspire Systems India Pvt. Ltd. is more than 25% being the threshold limit considered by the Ld.TPO. Nothing has been placed before us by the Ld.DR in order to take a different view. Respectfully following the Hon'ble Mumbai Tribunal, we direct the Ld.TPO to exclude Nihilent, Infobeans and Aspire Systems from the final set.

19. Respectfully following the decision of the coordinate bench of the Tribunal in *Sandisk India Device Design Centre P. Ltd. (supra)*, we exclude these companies viz., Persistent Systems Ltd., Infosys Ltd., Thirdware Solutions Ltd., L&T Infotech Ltd., Nihilent Ltd., Aspire Systems India Pvt. Ltd. & Infobeans Technologies Ltd., from the comparables.

20. With regard to inclusion of Evoke Technologies Ltd., the TPO had based on the filters applied excluded the company. The DRP confirmed the TPO's order to exclude the company on the basis that as per the financial results, the branch revenue is unaudited and therefore cannot be included in the revenue of the company. On this basis the DRP held that the company cannot be considered as a comparable in view of unreliable data provided in the annual report.

21. The ld. AR submitted that the company is functionally comparable and qualifies all filters of the TPO. The ld. AR submitted that the branch is a sub-set of an entity and the result of the branch are already included in the audited financial statement of the entity. He

therefore submitted that the DRP's observation that the revenue of the branch is unaudited and cannot be relied on is not correct. The Id. AR placed reliance on the decision of coordinate Bench of Tribunal in the case of *Mindteck India Ltd. IT(TP)A No.252/Bang/2021 dated 27.6.2022.*

22. We heard both the parties. We notice that the coordinate Bench in the case of *Mindteck India Ltd. (supra)* has considered the issue of inclusion of Evoke Technologies P. Ltd. and held that –

“21. As far as the plea of the assessee for inclusion of Evoke Technologies Pvt. Ltd. is concerned, this company was rejected by the TPO on the ground that the financials of this company includes figures from outside branches which are unconnected. The DRP agreed with the view of the TPO. The learned Counsel for the assessee placed reliance on the decision of the ITAT, Hyderabad Bench in the case of *Infor India P. Ltd. Vs. DCIT (2019) 109 taxmann.com 435 (Hyderabad – Tribunal)* wherein it was held that availability unaudited accounts cannot be the reason to reject the comparability of the company which satisfies all filters. Reliance was also placed on the decision of the ITAT, Bengaluru Bench in the case of *Zynga Game Network India Pvt. Ltd. Vs. DCIT* in IT(TP)A No.2573/Bang/2019, order dated 23.03.2021 for Assessment Year 2015-16 in which the comparability of this company was remanded to the TPO for fresh consideration. We are of the view that the comparability of this company has to be remanded to the TPO for fresh consideration in the light of the decision brought to our notice as above.”

23. Considering the facts being identical for the year under consideration, we respectfully follow the decision of the coordinate Bench and remit the issue to the TPO for consideration in the light of the decision stated above.

24. With regard to inclusion of Synfosys Business Solutions Ltd., the TPO excluded the company from the list of comparables by stating that the company fails the persistent loss filter. The DRP stated that the company does not fail the persistent loss filter, but confirmed the exclusion by observing as below:-

“3.3.3 Synfosys Business Solutions Limited (Synfosys)

The company has been rejected by the TPO as "The company fails the persistent Loss filter".

Having considered the submissions of the Assessee, we note that the company does not fail the "persistent loss" filter. However, we note that it is showing different income and expenditure figures for the same year FY 2014-15 in annual report for year ending 2015 and annual report for year ending 2016. We have seen the annual reports of the company and we noted that there are different figures of employee cost, travelling conveyance, salary to directors, payment for audit services, etc. We are of a considered view that the financial data cannot be relied upon and we reject the plea for inclusion of the company.

Moreover, from the perusal of the annual report it is seen from disclosure in notes on additional information of statement of profit and loss account of the Annual Report for the F.Y. 2015-16 that earnings in foreign exchange is Rs. 4.54 crores (page 9) whereas the total revenue from operations is Rs. 11,8 crores (page 7). Therefore, it has export revenue of 38.47% of total revenue from operations. Therefore, this company is not functionally comparable as it fails the export revenue filter of 75% adopted by the TPO. As a result, this objection is found unacceptable.”

25. The Id. AR submitted that the DRP has erroneously considered the earnings in foreign exchange instead of the export turnover which is the filter applied by the TPO. In this regard, the Id. AR drew our attention to page 2195 of PB No.4, wherein as per the annual report of

the company, the export turnover is stated to be 11.8 crores. The Id DR relied on the decision of the lower authorities.

26. We heard the rival submissions and perused material on record. We notice that the DRP for the purpose of exclusion of the company has considered the earnings in foreign exchange during AY 2016-17 and concluded that the company fails the export turnover filter of 75%. This in our view is not correct since it is not the earnings in foreign exchange that needs to be considered while applying the export turnover filter. The Id. AR contended that the company is functionally comparable to assessee. Since the exclusion of the company is done based on mistaken fact of foreign exchange earning as export turnover, we are of the considered view that the issue should be remitted back to the TPO to consider the issue afresh. We therefore remand this issue back to the TPO with a direction to consider the export turnover of the company and decide the inclusion in accordance with law.

27. The assessee raised additional ground for inclusion of Insummation Technologies Pvt. Ltd. and Sagarsoft India Ltd. Keeping in view the ratio laid down by the Hon'ble Supreme Court in the case of NTPC Ltd., 229 ITR 383 (SC), we admit the additional grounds for adjudication.

28. The Id. AR submitted that the coordinate Bench of the Tribunal in the case of Mindteck India Ltd. (supra), has considered the inclusion of Sagar Soft India Ltd. and the issue of Insummation Technologies

has been considered by the coordinate Bench in the case of Prism Network P. Ltd. IT(TP)A No.349/Bang/2021.

29. The Id. DR contended that this inclusions are not proposed by the assessee before the lower authorities and therefore cannot be considered for inclusion.

30. We heard the rival submissions and perused material on record. We notice that the coordinate Bench in the case of *Mindteck India Ltd.* (*supra*) has considered the issue of inclusion of Sagar Soft India Ltd. and has held as under:-

“20. The next company that the assessee seeks to include is Sagarsoft India Ltd. As far as inclusion of this company is concerned the Id. counsel for the assessee placed reliance on decision of ITAT, Mumbai Bench of the Tribunal in the case of Redhat India Pvt. Ltd. Vs. NFAC (2022) 132 taxmann.com 52 (Mumbai Tribunal). In the present case the AO rejected this company for the reason that out of the 3 earlier Financial Years, this company has persistently suffered losses and hence should not be taken as a comparable company. The DRP agreed with the conclusion of the TPO. In the case of Redhat India Pvt. Ltd. (*supra*) which was also an appeal in relation to Assessment Year 2016-17, the Tribunal held that the comparability of the company requires to be examined afresh. It was submitted by the Id. counsel for the assessee that this company did not suffer losses in all the 3 years and submitted that in one of the 3 Financial Years, the assessee made profit. The Id. counsel placed reliance on the decision of the Bengaluru Bench of the Tribunal in the case of KBACE Technologies Pvt. Ltd. Vs. DCIT (2020) 118 taxmann.com 231 (Bengaluru) wherein it was held that for a company to be excluded on the ground that it was persistently making losses, the comparable company should have suffered losses in all the 3 previous Financial Years and even if in one Financial Year it makes a profit, then that company has to be regarded as a comparable company if it is otherwise a

comparable company. In the light of the aforesaid decision and in the light of the facts brought to our notice, we are of the view that the comparability of this company has to be considered afresh by the AO/TPO in the light of the facts brought to our knowledge as above. The TPO will verify if this company suffered financial loss in all the earlier Financial Years and even if in one Financial Year, the company has made a profit, it has to be regarded as a comparable company.

31. Respectfully following the decision of the coordinate Bench, we remit the issue to the AO/TPO with similar directions. It is ordered accordingly.

32. With regard to inclusion of Insumation Technologies, we notice that the coordinate Bench in the case of Prism Network P. Ltd. (supra) has held that the companies cannot be excluded merely because they did not figure in the search matrix of the TPO. The relevant observations of the Tribunal in this regard is extracted below:-

“18. We heard the rival submissions. It is clear from the order of the DRP that the DRP has not considered the plea of the Assessee in proper perspective. The fact that the TPO rejected the TP study of the Assessee cannot be the basis not to consider the claim of the Assessee for inclusion of comparable companies. The TPO excluded these companies only on the ground that information related to these companies was not available in the public domain and this fact was shown to be an incorrect assumption by the Assessee in the submissions before the DRP. In such circumstances, it was incumbent on the part of the DRP to have adjudicated the question of inclusion of these companies as comparable companies. The fact that these companies do not figure in the search matrix of the TPO is not and cannot be a ground not to consider inclusion of these companies as comparable companies. Since the DRP has failed to do so, we are of the view that the issue regarding inclusion of the aforesaid companies as comparable companies should be set aside to AO/TPO for fresh consideration in the light of the information

available in public domain. Thus ground No. 7 is treated as allowed for statistical purposes.”

33. In the given case, we notice that the inclusion of the company sought by the assessee for the first time before the Tribunal and that this company is not being part of the search matrix of the TPO. Therefore, placing reliance on the above decision of the coordinate Bench of the Tribunal, we remit the issue back to the TPO for fresh consideration and decide the issue in accordance with law.

Interest on receivables

34. The TPO treated the trade receivables beyond 60 days as an international transaction and adopted notional interest rate of 4.985% being LIBOR-6 months + 450 basis points, without providing the method of computation of such rate to the Assessee. The TPO therefore made adjustment of Rs.6,25,32,865/-. The DRP had directed the TPO to adopt the SBI short term deposit interest rate and directed the TP Officer to verify and compute interest on delayed receivables for the relevant financial year. The DRP did not give any show cause notice or opportunity of hearing, before proposing to adopt SBI short term deposit interest rate. The TPO on giving effect to the directions of the DRP has determined the adjustment for interest on delayed receivables at Rs.6,84,74,054/- against the adjustment of Rs.6,25,32,865/- made in the TP order.

35. The Id. AR submitted that it is a debt-free company and hence it is not required to pay any interest (*Page 10 of Paper book-Vol I*). The

Id AR further submitted the Assessee there are payables to the AE and the AE had not charged interest from the assessee and hence interest could not be imputed on the receivables of the Appellant. It is further submitted that the DRP and the TPO has not appreciated that the Assessee is not charging interest to both AE's and non-AE's. The TPO and the DRP have selectively considered interest on trade receivables without considering the interest on payables. The Id AR without prejudice prayed that the interest on payables to the AE required to be netted-off while computing the notional interest on receivables. The Id AR placed reliance on the decision of the Delhi Tribunal in the case of *Bechtel India Pvt Ltd (ITA No.1478/Del/2015)* and this order of the Tribunal is accepted by the Hon'ble Delhi High Court and the SLP filed in this regard before the Supreme Court is dismissed.

36. The Id. AR further submitted that DRP revised the interest rate by adopting the SBI short term deposit interest rate, resulting in enhancement of the adjustment without giving an opportunity to the Assessee to explain the issue. Therefore it is submitted that the failure to give an opportunity before enhancement has resulted in violation of principles of natural justice. Reliance is placed upon the decision of this Tribunal in the case of *Verifone India Technology Private Limited [IT(TP)A No.290/Bang/2021]* wherein, the ITAT under similar circumstances has remitted the issue to the TPO for determining the ALP, i.e., interest on delayed receivables by following the Rules.

37. The Id. DR supported the orders of the lower authorities.

38. We have considered the rival submissions and perused the material on record. We notice that the coordinate bench of the Tribunal in the case M/s. Barracuda Networks India Private Limited vs DCIT - IT(TP)A No.229/Bang/2021, has considered the similar issue and held that -

41. We have carefully considered the rival submissions. On the question whether delayed realization of trade receivables from the AE constitutes an international transaction or not, there are conflicting decisions of various benches of the Tribunal, which we shall point out. Sec.92B of the Act defining what is an international transaction was amended by Finance Act, 2012, way of insertion of an Explanation to sec.92B with retrospective effect from 1-4-2002 and the same reads thus:-

“Explanation- For the removed of doubts, it is hereby clarified then-(i) the expression "international transaction" shall include—

(a)

(b)

(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 of receivable or any other debt arising during the course of business:

The amendment is to the effect that “international transaction” would specifically include within its ambit. 'deferred payment or receivable or any other debt arising during the course of business' and hence non-charging or under-charging of interest on the excess period of credit allowed to the AE for the realization of invoices would amount to an international transaction. It was so held by the ITAT Delhi Bench in the case of Bechtel India Pvt Ltd (in ITA No.6530/De1/2016 dated 16 May

2017). It is important to note that the Bench while arriving at the said conclusion distinguished its earlier order in the case of Kusum Healthcare Pvt. Ltd. (supra) and rejected the contention that interest gets subsumed in the working capital adjustment. The Hon`ble Bombay High court in the case of CIT vs. Patni Computer Systems Ltd, (2013) 215 Taxman 108 (Bom) dealt, inter alia, with the following 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?"

While answering the above question, the Hon'ble High Court noticed that an amendment to section 92B has been carried out by the Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside the view taken by the Tribunal, the Hon'ble High Court restored this issue to the file of the Tribunal for fresh decision in the light of the legislative amendment. In the case of BT e Serv (TS-849-ITAT-2017(DEL)-TP) the ITAT Delhi Bench held that undoubtedly the receivable or any other debt arising during the course of the business is included in the definition of 'capital financing' as an 'international transaction' as per explanation 2 to section 92B of the Act w.e.f. 01.04.2002 inserted by the Finance Act 2012. Therefore, even the outstanding receivable partake the character of capital financing and consequently, overdue outstanding is an "international transaction". The natural corollary would be of imputing interest on such "capital financing" if same is not charged at arm's length. The ITAT concluded that if outstanding receivables are within the terms of agreement, then it may be argued that interest on such outstanding is already covered in the sale price of the goods. However, if the agreement does not specify the term of the payment, even then assessee must be given benefit of credit period which is accepted business practice in the trade. The ITAT confirmed 30 days as the normal credit period adopted by the TPO.

42. The foregoing discussion discloses that non-charging or under-charging of interest on the excess period of credit allowed to the AE, for the realization of invoices amounts to an international transaction and the ALP of such an international transaction is required to be determined. In view of the above observations, the reliance placed by the Id. counsel for the assessee on earlier decisions cannot be accepted. Similarly, Considering the above discussion, it is held that deferred trade receivable constitutes international transaction.

43. Having concluded that deferred trade receivables constitute international transaction, we come to the computation of the ALP of the international transaction of 'debt arising during the course of business.' This has two ingredients, viz., the amount on which interest should be charged and the arm's length rate at which the interest should be charged. On this aspect we can take useful guidance from the decision of the ITAT Delhi Bench in the case of Techbooks International (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle-3, Noida [2015] 63 taxmann.com 114 (Delhi - Trib.), wherein the Tribunal laid down guidelines on the manner of determination of ALP, as follows:

“13.11 Now, we come to the computation of the ALP of the international transaction of 'debt arising during the course of business.' This has two ingredients, viz., the amount on which interest should be charged and the arm's length rate at which the interest should be charged.

13.12 In so far as the first aspect is concerned, we find that the TPO has taken normal credit period of 60 days and accordingly made addition on account of transfer pricing adjustment for the period in excess of 60 days. In our considered opinion, transfer pricing adjustment on account of interest for the entire period of delay beyond 60 days cannot be treated as a separate international transaction of trading debt arising during the course of business. It is noticed that the assessee entered into an agreement with its AE for realization of invoices within a period of 150 days. This implies that the interest

amount on non-realization of invoices up to 150 days was factored in the price charged for the services rendered. Annexure-1 to the TPO's order gives details of the instances of late realization or non-realization of advances up to the year ending. First three and a half pages of this Annexure indicate number of days for which there was delayed realization. Such delay ranges from 175 days to 217 days. The remaining pages disclose no realization of invoices up to 31st March, 2010. When we consider the dates of invoices in the remaining pages, it is manifested that in certain cases these invoices have been raised on 31st August, 30th or September or 31st October, 2009. In all such cases, the period of 150 days already stood expired as on 31st March, 2010 and the assessee ought to have charged interest on the delay in realizing such invoices along with the first three and a half pages in which there is an absolute and identified delay in realization of invoices beyond the stipulated period. When the interest for realization of trade advances up to 150 days is part and parcel of the price charged from the AE, then the delay up to this extent cannot give rise to a separate international transaction of interest uncharged. Rather interest for the period in excess of normally realizable period in an uncontrolled situation upto 150 days needs to be considered in the determining the ALP of the international transaction of the 'Provision of IT Enabled data conversion services'. This can be done by increasing the revenue charged by the comparable companies with the amount of interest for the period between that allowed by them in realization of invoices and 150 days as allowed by the assessee, so as to bring such comparables at par with the assessee's international transaction of provision of the ITES. To illustrate, if the comparables have allowed credit period of, say, 60 days and the assessee has realized its invoices in 180 days, then interest for 90 days (150 days minus 60 days) should be added to the price charged by the comparables and the amount of their resultant adjusted operating profit be computed. Rule 10B permits making such an adjustment. Sub-rule (2) to rule 10B stipulates that for the purposes of sub-rule (1), the comparability of an international transaction with an uncontrolled transaction shall be judged, inter alia, with reference to the : '(c) the contractual terms (whether or not such terms are formal or in writing)

of the transactions ...' . Then sub-rule (3) mandates that an uncontrolled transaction shall be comparable to an international transaction if 'reasonably accurate adjustments can be made to eliminate the material effects of such differences'. Applying the prescription of rule 10, it becomes vivid that difference on account of the 'contractual terms of the transactions', which also include the credit period allowed, needs to be adjusted in the profit of comparables. As the TPO has taken the entire delay beyond that normally allowed as a separate international transaction, which position is not correct, we hold that the effect of delay on interest up to 150 days over and above the normal period of realization in an uncontrolled situation, should be considered in the determination of the ALP of the international transaction of 'Provision of IT Enabled data conversion services' and the period of delay above 150 days, namely, 30 days in our above illustration (180 days minus 150 days) should be considered as a separate international transaction in terms of clause (c) of Explanation to section 92B.

13.13 In so far as the question of rate of interest is concerned, we find that this issue is no more res integra in view of the judgment of the Hon'ble jurisdictional High Court in the case of Cotton Naturals (I) (P.) Ltd. (supra), in which it has been held that it is the currency in which the loan is to be repaid which determines the rate of interest and hence the prime lending rate should not be considered for determining the interest rate. Under such circumstances, we set aside the impugned order and remit the matter to the file of TPO/AO for a fresh determination of addition on account of transfer pricing adjustment towards interest not realized from its AE on the debts arising during the course of business in line with our above observations.”

44. We are of the view that the issue with regard to determination of ALP in respect of the international transaction of giving extended credit period for receivables should be directed to be examined afresh by the AO/TPO on the guidelines laid down in the decision referred to in the earlier paragraph, after affording Assessee opportunity of being heard. As held in the aforesaid decision the prime lending rate should not be

considered and this reasoning will apply to adopting short term deposit interest rate offered by State Bank of India (SBI) also. The rate of interest would be on the basis of the currency in which the loan is to be repaid. We hold and direct accordingly.

39. Respectfully following the above decision of the coordinate bench we remit the issue back to the AO/TPO with a direction to examine the issue afresh after giving a reasonable opportunity of being heard to the assessee. The AO/TPO is also directed to consider the ratio laid down in the above decision while considering the issue afresh.

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

Pronounced in the open court on this 21st day of October, 2022.

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 21st 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.