

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

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

IT(TP)A No.261/Bang/2021
Assessment Year: 2016-17

NTT Data FA Insurance Systems (India) Pvt. Ltd. Ground Floor, Block-2, Plot No.123, EPIP Phase-II, Whitefield Industrial Area Hoodi Village, K.R. Puram Hobli, Bengaluru Karnataka 560 066 PAN NO : AAACF9123A	Vs.	Deputy Commissioner of Income-tax Circle-3(1)(1) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri T. Suryanarayana, Sr. A.R.
Respondent by	:	Shri Sumer Singh Meena, D.R.

Date of Hearing	:	22.09.2022
Date of Pronouncement	:	03.10.2022

ORDER

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against final assessment order passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (for short “the Act”) dated 27.4.2021. The assessee has raised following grounds of appeal:-

1. *“The order of the Assessing Officer ('AO' for short) pursuant to the directions of the Hon'ble Dispute Resolution Panel (the DRP' for short). is bad in law and liable to be set aside.*

2. *The impugned directions of the Hon'ble DRP and the order passed by the Ld. AO are based on incorrect appreciation of facts and wrong interpretation of law and therefore, bad in law and liable to be set aside.*
3. *The Hon'ble DRP/Ld. AO/Ld.TPO erred in making an addition of INR 61.092,371/- to the total income of the Appellant on account of adjustment under section 92CA of the Act for the software development services transactions and outstanding receivables by the Appellant from its Associated Enterprise.*
4. *The Hon'ble DRP/Ld. AO/Ld. TPO erred in rejecting the Appellant's transfer pricing study and accordingly conducting fresh search for comparable companies.*
5. *The Hon'ble DRP/Ld. AO/Ld. TPO erred in rejecting the use of Comparable Uncontrolled Price (CUP') method for determining the arm's length price of the Appellants provision of software development services transactions*
6. *Without prejudice to the above grounds, the Hon'ble DRP/Ld. AO/Ld. TPO erred in rejecting the segmental profitability analysis computed by the Appellant while computing the arm's length price of Appellant's provision of software development services transactions using Transactional Net Margin Method (TNMM').*
7. *Without prejudice to the above grounds, the Hon'ble DRP/Ld. AO/Ld. TPO has erred in not allowing an adjustment on account of difference in the level of risks assumed by the Appellant vis-a-vis the comparable companies.*
8. *The Hon'ble DRP/Ld. TPO erred in law in applying arbitrary filters to arrive at a fresh set of companies as comparables to the Appellant, without establishing functional comparability.*
9. *The Hon'ble DRP/Ld. AO/Ld. TPO erred in law and facts by rejecting certain comparable companies selected by the Appellant in the comparability analysis. namely. Sagar4oft (India) Ltd. Akshay Software Technologies Ltd and Sasken Communication Technologies Ltd. despite these companies being functionally similar to the Appellant.*
10. *While giving effect to the Hon'ble DRP directions, the Ld. AO/Ld. TPO erred in law and facts by not accepting Rishabh Software Private Ltd as comparable company.*
11. *The Hon'ble DRP/Ld. AO/Ld. TPO erred in law and facts by accepting companies namely Persistent Systems Ltd. Aspire Systems (India) Pvt, Ltd. Infosys Ltd. Larsen & Toubro Infotech Ltd. Thirdware Solutions Ltd, Nihilent Ltd, Inteq Software Pvt. Ltd. Infobeans Technologies Ltd and Cybage Software Pvt Ltd from the Ld. TPO's search as being comparable to the Appellant despite being functionally dissimilar to the Appellant.*

12. *The Hon'ble DRP/Ld. AO/Ld. TPO erred in law and facts by accepting R S Software (India) Ltd as a comparable which was rejected by the Appellant during the course of assessment proceedings as being functionally dissimilar to the Appellant.*
13. *The Hon'ble DRP/Ld. AO erred in considering outstanding receivables as a separate international transaction.*
14. *The Hon'ble DRP/Ld. AO/Ld TPO erred in imputing notional interest on outstanding receivables without appreciating the fact that the Appellant is a debt free company.*
15. *The Hon'ble DRP/Ld. AO/Ld. TPO erred in imputing notional interest on outstanding receivables without appreciating the fact that that the Appellant does not charge interest from third party customer for delay in realisation of invoices.*
16. *The Hon'ble DRP/Ld. AO/Ld. TPO erred in imputing notional interest on outstanding receivables without appreciating the fact that the average receivables collection period from AE is less than that of third-party customer*
17. *The Hon'ble DRP erred in directing the Ld. TPO to use SBI short-term deposit rate for computing notional interest on receivables without appreciating the fact that the Appellants receivables are realised in USD and not in INR currency*
18. *Without prejudice to the above grounds, the Ld. AO/Ld TPO erred in not correctly applying the LIBOR rate for imputing notional interest on outstanding receivable balances.*
19. *While giving effect to the Hon'ble DRP directions, the Ld. AO/Ld. TPO erred in recomputing interest on outstanding receivables by considering credit period of 30 days instead of 90 days agreed by the Appellant with its Associated Enterprise.*
20. *Without any prejudice to the above grounds, the Ld. AO/Ld TPO erred in making an addition of INR 1,675.822 on account of interest on outstanding receivables as against INR. 1,192.909 while giving effect to the Hon'ble DRP directions.*
21. *The Hon'ble DRP/Ld. AO/Ld. TPO has erred in not considering the ruling of Hon'ble Supreme Court and jurisdictional Tribunal rulings while issuing the directions and passing the order.*
22. *The Hon'ble DRP/Ld. AO/Ld. TPO has erred in ignoring the principle of consistency by not following the directions of Hon'ble ITAT issued on similar issues in the Appellant's case for earlier years.*
23. *The Ld. AO has erred in levying interest under section 234B of the Income Tax Act, 1961.*

24. The Ld. AO has erred in levying interest under section 234C of the Income Tax Act, 1961.

25. The Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961.

2. The issue arising for consideration in the above appeal pertains to the Transfer pricing adjustment (“TP adjustment”) made by the Transfer Pricing Officer (‘the TPO’ for short) towards the international transaction of provision of Software Development (‘SWD’ for short) services to the Assessee’s Associated Enterprises (‘AE’ for short), and TP adjustment made with respect to interest on outstanding trade receivables aggregating to Rs. 5,94,16,549/- which was subsequently enhanced to Rs. 6,10,92,371/- on giving effect to the directions of the Dispute Resolution Panel (‘the DRP’ for short).

BRIEF FACTS:

3. The assessee is a wholly owned subsidiary of NTT Data FA Insurance Systems Pte. Ltd. The assessee is engaged in the business of providing software development services to its parent company. During the previous year relevant to the assessment year 2016-17, one of the international transactions that took place between the assessee and its AE was the provision of SWD services by the assessee at a price of Rs. 25,52,91,602/- in respect of which the TPO determined a TP adjustment of Rs. 5,89,33,636/-. Additionally, the TPO determined a TP adjustment in respect of interest on delayed receivables of Rs. 4,82,913/-.

3.1 Initially, a draft assessment order dated 07.12.2019 came to be passed by the Assessing Officer (‘AO’ for short), in which the aforesaid TP adjustment was incorporated. Aggrieved, the assessee filed its objections before the Ld. DRP which, vide its directions dated 15.03.2021 upheld the order passed by the TPO.

3.2 Pursuant to the directions of the Ld. DRP, the AO passed the final assessment order dated 27.04.2021 in line with the directions issued by Ld. DRP. Aggrieved by the final assessment order, the assessee has preferred the above appeal before this Tribunal.

SUBMISSIONS OF A.R. ON TRANSFER PRICING ADJUSTMENT:

DETAILS OF THE ASSESSEE'S INTERNATIONAL TRANSACTIONS

Particulars	Amount in Rs.	Outcome of the TP Order
Provision of software development services	Rs. 25,52,91,602/-	Adjustment of Rs. 5,89,33,636/-
Unbilled revenue	44,50,512/-	Accepted to be at arm's length
Outstanding payables	17,24,868/-	Accepted to be at arm's length
Reimbursements of expenses	82,690/-	Accepted to be at arm's length
Recovery of expenses	26,94,007/-	Accepted to be at arm's length
Payments made on behalf of non-resident director	22,522/-	Accepted to be at arm's length

ANALYSIS OF THE TP STUDY OF THE ASSESSEE AND THE TPO:

Net mark-up on cost earned by the assessee as computed by the assessee:

Operating Income	Rs. 25,52,91,602/-
Operating Cost	Rs. 23,17,23,496/-
Operating Profit (Op. Income – Op. Cost)	Rs. 2,35,68,106/-
Operating/Net mark-up (OP/OC)	10.2%

Net mark-up on cost earned by the assessee as computed by the TPO:

Operating Income	Rs. 26,18,78,852/-
Operating Cost	Rs. 25,20,52,552/-
Operating Profit (Op. Income – Op. Cost)	Rs. 98,26,300/-
Operating/Net mark-up (OP/OC)	3.90%

Comparison of the TP studies done by the assessee and TPO:

	Assessee	TPO
Methodology adopted	Primarily CUP Supplementary method TNMM	TNMM
Profit Level Indicator (PLI)	OP/TC (TNMM)	OP/OC
Database used	PROWESS & CAPITALINE PLUS (TNMM)	PROWESS & Ace TP
Comparables selected	7 (TNMM)	14
Period for which data used	FYs 2013-14 to 2015-16 (TNMM)	FYs 2013-14 to 2015-16

Filters applied by Assessee in its TP study under TNMM:

Step	Description
1.	Companies having sales income less than 1 crore – rejected
2.	Companies with service income more than or equal to 75% of the total income – selected
3.	Companies with ratio of research and development expenses to sales less than 3% - selected.
4.	Companies with ratio of net fixed assets to sales less than or equal to 200% of sales – selected.
5.	Companies with positive net worth – selected.
6.	Companies which were functionally comparable – selected.
7.	Companies which have related party transactions in excess of 25% of total sales- rejected.
8.	Companies having export turnover of less than 50% of the total revenue – rejected
9.	Companies which had incurred persistent losses in three financial years i.e., FY 2013-14 to 2015-16
10.	Companies having employee cost less than or equal to 25% of sales – rejected

Analysis of CUP applied by the assessee in its TP study:

3.3 Ld. A.R. submitted that the ALP of a controlled transaction is compared to the price in an uncontrolled transaction under similar

circumstances. Thus, application of CUP method depends on the existence of similar uncontrolled services rendered by the taxpayer. Similar transactions can be an internal comparable or an external comparable.

3.4 **Internal CUP** : During the assessment year 2016-17, the assessee has rendered services to unrelated third parties in India. However, the services rendered to unrelated third parties are not similar services to the services rendered by the assessee to its AEs. However, during the year, the assessee has received similar services from unrelated third parties in India.

3.5 **External CUP**: These are those external transactions which are similar to the international transaction between NTT India and its AE, under similar conditions. This information is not available from publicly available database, and accordingly, the Ld. A.R. submitted that the external CUP method cannot be applied even for the purpose of external comparison.

3.6 Therefore, since internal CUP is available for a price based comparability analysis, the CUP method was selected as the most appropriate method for determining the ALP of the international transaction.

Comparables selected by assessee and the range of weighted average of OP/TC of comparable companies under TNMM applied alternately:

Sl. No.	Name of the company	Weighted average (in %)
1.	Akshay Software Technologies Ltd.	1.08
2.	Sagarsoft (India) Ltd.	1.47
3.	Sasken Communication Technologies Ltd.	6.89
4.	CG-Vak Software Exports Ltd.	12.16
5.	E-zest Solutions Ltd.	13.79
6.	Cigniti Technologies Ltd.	19.44
7.	R S Software India Ltd.	21.16
35th Percentile		6.89

Median	12.16
65th Percentile	13.79

3.7 Out of the 7 comparables selected by the assessee, the TPO accepted the 3 highlighted above, viz. CG-Vak Software & Exports Ltd., E-zest Solutions Ltd. and R S Software India Ltd. and rejected the other 4.

Filters applied by the TPO:

Step	Description
1.	Companies whose data is not available for FY 2015-16 - excluded.
2.	Companies having different financial year ending (i.e., not March 31, 2016) or data of the company does not fall within 12 month period i.e., 01-04-2015 to 31-03-2016 - excluded.
3.	Companies whose income was less than Rs. 1 Crore - excluded.
4.	Companies whose software development service income is less than 75% of the total operating revenues - excluded.
5.	Companies which have more than 25% related party transactions of the sales - excluded.
6.	Companies which have export service income less than 75% of the sales - excluded.
7.	Companies with employee cost less than 25% of turnover - excluded.
8.	Persistent loss filter (Companies reporting loss for any 2 years out of last three years, is excluded)

Comparables selected by TPO and the median of weighted average of PLIs of the companies:

Sl. No.	Name of the Company	Mark-up on Total Costs (WC-un-adj) (in %)
1.	Kals Information Systems Ltd.	8.60
2.	E-Zest Solutions Ltd.	10.87
3.	Rheal Software Pvt. Ltd.	14.50
4.	CG-VAK Software & Exports Ltd.	18.50
5.	R S Software (India) Ltd.	20.87
6.	Larsen & Toubro Infotech Ltd.	24.83
7.	Nihilent Technologies Ltd.	26.36

8.	Inteq Software Pvt. Ltd.	28.20
9.	Persistent Systems Ltd.	30.89
10.	Infobeans Technologies Ltd.	32.42
11.	Thirdware Solution Ltd.	36.90
12.	Infosys Ltd.	38.61
13.	Aspire Systems (India) Pvt. Ltd.	39.28
14.	Cybage Software Pvt. Ltd.	66.45
35th Percentile		20.87
Median		27.28
65th Percentile		32.42

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

Taxpayers operating revenue	26,18,78,852
Taxpayer operating cost	25,20,52,552
Taxpayers operating profit	98,26,300
Taxpayers PLI	3.90%
35 th Percentile Margin of comparables set	20.87
Adjustment required (if PLI<35 th Percentile)	Yes
Median margin of comparable set	27.28
Arm's length price	3,08,12,488
Price received	26,18,78,852
Shortfall being adjustment u/s. 92CA	5,89,33,636

DIRECTIONS ISSUED BY THE DRP:

3.8 Briefly, the directions issued by the Ld. DRP are as follows:

(i) The Ld. DRP rejected the contentions of the assessee and upheld the TPO's order with respect to the adjustment made towards SWD segment and enhanced the adjustment in respect of interest on delayed receivables.

List of comparables post the Ld. DRP's Directions:

3.9 On giving effect to the above directions issued by the Ld. DRP, the final list of comparables is 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.	CG-VAK Software & Exports Ltd.	18.50
5.	R S Software (India) Ltd.	20.87
6.	Larsen & Toubro Infotech Ltd.	24.83
7.	Nihilent Technologies Ltd.	26.36
8.	Inteq Software Pvt. Ltd.	28.20
9.	Persistent Systems Ltd.	30.89
10.	Infobeans Technologies Ltd.	32.42
11.	Thirdware Solution Ltd.	36.90
12.	Infosys Ltd.	38.61
13.	Aspire Systems (India) Pvt. Ltd.	39.28
14.	Cybage Software Pvt. Ltd.	66.45
35th Percentile		20.87
Median		27.28
65th Percentile		32.42

Final Assessment Order

3.10 The AO passed the final assessment order in line with the directions of the Ld. DRP, in terms of which, the TP adjustment stood at Rs. 6,10,92,371/-.

4. Ground Nos. 1 to 4 are general in nature.

5. Ground No.5 is not pressed. Hence, dismissed as not pressed.

6. Ground No.6 of the assessee is reproduced below:-

6. Without prejudice to the above grounds, the Hon'ble DRP/Ld. AO/Ld. TPO erred in rejecting the segmental profitability analysis computed by the Appellant while computing the arm's length price of Appellant's provision of

software development services transactions using Transactional Net Margin Method (TNMM').

6.1 The Ld. A.R. submitted that the TPO has erred in computing the profitability of the assessee at entity level and arriving at a mark-up of 3.90% as against the profitability computed by the assessee at 10.17% in its TP Study by bifurcating its revenues and expenses into related party and non-related party segments. In this regard, he submitted that the segmentation has been done on logical allocation keys and this segmentation of the assessee has been accepted by the Tribunal in assessee's own case for AY 2004-05 and 2005-06. The facts and circumstances as well as the nature of the transactions for this assessment year has remained similar to that of AY 2004-05 and 2005-06. Thus, he submitted that the TPO ought to have accepted the segment level PLI as computed by the assessee as against the entity level PLI.

7. The Ld. D.R. relied on the order of the Ld. CIT(A)

8. We have heard the rival submissions and perused the materials available on record. As rightly pointed out by the Ld. A.R., in assessee's own case, in IT(TP)A No.332 to 333/Bang/2014 for assessment year 2004-05 dated 31.1.2017 for the AY 2005-06, the Tribunal held as under:-

“12. We have heard the rival parties and perused the record. The ALP in relating to the international transactions is required to be determined by applying the most appropriate method of transaction, class of transaction or class of associate persons. In the present case, the assessee as well as the TPO had applied Transaction Net Margin Method (TNMM) to arrive at ALP. The ALP is to be determined in relation to the international transaction with AE only. Therefore, for that purpose, the operating profit is required to be calculated by taking into account the operating cost incurred by the assessee for the purpose of rendering the international transaction of software development to AE. In the present case, there was an agreement between the assessee and its AE for the purpose of developing software and designing services on man/material basis.

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However, while calculating the cost of services rendered by the assessee to the related parties, the head count method has been applied by the assessee by assigning the cost to the number of employees earmarked for related parties and unrelated parties. In our view, the authorities below are required to calculate the ALP on the basis of the operating profit of the assessee which was derived on the basis of the cost incurred by it with respect to the related parties i.e A.E and should not include the operating profit cost in respect to non-AE transactions. The learned AR has drawn our attention to the judgment in ITA No. 1878/M/2014 in the matter of MIs. Paradigm Geophysical (I) Pvt. re particularly to paragraph 10 and 13. In the said judgment, the coordinate bench relied upon the judgment of Hon'ble Delhi High Court in the matter of CIT Vs. Tara Jewels Exports Pvt. Ltd. In the conclusion, it was held as under:

When the assessee has furnished segmental profits., the entity level profits cannot be considered for bench marking international transactions in view of the jurisdictional High Court decision. Therefore. respectfully following the said decisions, we hold that the ALP of the assessee should be determined only on the international transactions and not on the entire transactions at entity level. We also find from various decisions that the four comparables selected by the TPO out of 9 have been rejected for various reasons like high turnover, functionally different, abnormal profits etc. Taking the totality of the facts and circumstances, we are of the view that this matter has to go back to the TPO for denovo adjudication in view of the fact that no proper opportunity was given by the TPO. Therefore, we direct the TPO to complete the denovo assessments keeping in view the decisions of the Jurisdictional High court and various other Tribunals in rejecting various comparables selected by the TPO after providing adequate opportunity of being heard to the assessee."

8.1 In view of above order of the Tribunal, we decide the issue in favour of the assessee and direct the AO/TPO to consider the segmental profitability analysis computed by assessee with regard to software development services transactions using TNMM method. Ordered accordingly.

9. Ground Nos.7,8 & 10 are not pressed. Hence, dismissed as not pressed.

10. Ground No.9 in the assessee's appeal is reproduced as under:-

9. The Hon'ble DRP/Ld. AO/Ld. TPO erred in law and facts by rejecting certain comparable companies selected by the Appellant in the comparability analysis. namely. Sagar4oft (India) Ltd. Akshay Software Technologies Ltd and Sasken Communication Technologies Ltd. despite these companies being functionally similar to the Appellant.

In this ground, the assessee seeks inclusion of following 3 comparables:-

- a) Akshay Software Technologies Ltd.
- b) Sagar Soft India Ltd.
- c) Sasken Communication Technologies Ltd.

10.1 The Ld. A.R. submitted that these companies are functionally comparable and formed a part of final set of comparables arrived by the assessee. The annual report was very much available with the AO/TPO. These companies are pure software developers like the assessee and earn 97% of its total revenue from software services, passes all filters applied by the TPO and hence these has to be included.

11. The Ld. D.R. relied on the order of Ld. DRP and submitted that this company was not there in the TPO's search matrix and there is no TP documentation. Hence, it was not considered by TPO.

12. We have heard the rival submissions and perused the materials available on record. These companies have not been included in the comparable on the reason that these companies were not appeared in TPO search matrix and documentation was available on this comparable. In our opinion, it is appropriate to remit this issue to the file of AO to consider it afresh to see whether all the filters applied by the TPO is satisfied. Accordingly, this ground is remitted back to the file of AO for fresh consideration. Accordingly, all three

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comparables are remitted to AO for fresh consideration on similar lines.

13. Ground No.11 in the appeal of the assessee is reproduced below:-

11. The Hon'ble DRP/Ld. AO/Ld. TPO erred in law and facts by accepting companies namely Persistent Systems Ltd. Aspire Systems (India) Pvt, Ltd. Infosys Ltd. Larsen & Toubro Infotech Ltd. Thirdware Solutions Ltd, Nihilent Ltd, Inteq Software Pvt. Ltd. Infobeans Technologies Ltd and Cybage Software Pvt Ltd from the Ld. TPO's search as being comparable to the Appellant despite being functionally dissimilar to the Appellant.

13.1 The assessee wants exclusion of following comparables on turnover filter on the reason that these comparables have high turnover i.e. more than Rs.200 crores.

- a) Infosys Ltd.
- b) L&T Infotech Ltd. – 24.83
- c) Persistent Systems Ltd.
- d) Asper System India Pvt. Ltd.
- e) Thirdware Solutions Ltd.
- f) Cybage Pvt Ltd.
- g) Nihilent Technologies Ltd.

14. We have heard the rival submissions and perused the materials available on record. This Tribunal consistently holding that the turnover filter to be applied between Rs.1 crore to Rs.200 crores and if the comparable from the software development segment exceeds Rs.200 crores, the same to be excluded from the list of comparables. Accordingly, we direct the AO/TPO to consider the segmental financials of the above company and if it is more than Rs.200 crores, those companies to be excluded in view of the order of the Tribunal in the case of Autodesk India Pvt. Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Bangalore – Trib), wherein held as under:-

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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. La, (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 Pentair Water India (P.) Ltd. (supra) has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

*17.8 In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating Systems (I) (P.) Ltd. (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) **and** Capegemini India (P.) Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis*

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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).

14.1 In view of the above discussion, we direct the AO to exclude the companies which are having more than Rs.200 crores segmental turnover. Ordered accordingly.

15. The Ld. A.R. made argument without prejudice to the turnover filter that the below mentioned companies to be excluded from the list of comparables on the basis of functionalities.

- a) Infosys Ltd.
- b) L&T Infotech Ltd.
- c) Persistent Systems Ltd.
- d) Aspire Systems Pvt. Ltd.
- e) Thirdware Solutions Ltd.
- f) Cybage Software Pvt.Ltd.
- g) Nihilent Technologies Ltd.

15.1 Since we have already excluded above comparables on the basis of turnover filter, this ground do not require any adjudication.

16. The assessee wants exclusion of Infobeans Technologies Ltd. from the list of comparable companies.

16.1 The Ld. A.R. submitted that this company is engaged in providing software engineering services primarily in Custom application development, Content Management Systems, Enterprise Mobility, big data analytics. Though the annual report of the company mentions that the company is earning 100% revenues from sale of software services, such services are in the nature of CAD, CMS etc., which are in the nature of KPO services. The above services rendered by the company are vastly different from the SWD services rendered by the assessee, and therefore the company ought to be excluded as being functionally different. Further, the segmental details for these diverse services are not available and therefore the company cannot be selected as a comparable.

Significant intangible assets:

16.2 During the FYs 2013-14 to 2015-16, the company owned intangible assets representing around 7% of the total fixed assets held by the company.

Expenses in foreign currency:

16.3 Ld. A.R. further submitted that it also incurred significant expenditure in foreign currency, in the nature of onsite activities representing around 1.5% of the total sales and is thus not comparable to the assessee and ought to be excluded from the final list of comparables.

Abnormal increase in revenue and fluctuation in margin:

16.4 The revenue increased from Rs. 35 crores (FY 2014-15) to Rs. 62 crores (FY 2015-16) in a period of 1 year (76%). Also, the company's profitability increased by 147%. Also, the company's margin fluctuates widely (**34.98%**- FY 2015-16, **20.78%**- FY 2014-15, **41.95%**-FY 2013-

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14) which demonstrates that there exists some factor having an impact on the margin, and therefore the company cannot be selected as a comparable.

16.5 The website of the company shows that the company is engaged in diverse dissimilar services, and therefore it ought to be excluded. Ld. A.R. made detailed submissions are made at pages 163-168 of the paperbook. He placed reliance on the decision of this Tribunal in the case of **Arm Embedded Technologies Pvt. Ltd. v. DCIT** (Order dated 30.08.2022 passed by this Tribunal in IT(TP)A No. 235/Bang/2021)), the decision of this Tribunal in the case of **SanDisk India Device Design Centre Pvt. Ltd. v. JCIT (order dated 30.06.2022 passed in IT(TP)A No. 288/Bang/2021)** and the decision of the Tribunal at Hyderabad in **ADP Pvt. Ltd. v. DCIT [Order dated 03.02.2022 in ITA Nos. 227&228/Hyd/2021 at para 7]** where, in the case of a similarly placed assessee, the Tribunal directed the exclusion of Infobeans from the list of comparables for assessment year 2016-17 on the ground that it is not functionally comparable and no segmental details were available for the said year and the decision of the Delhi Bench of the Tribunal in **GlobalLogic India (P.) Ltd. V. DCIT** (reported in [2022] 134 taxmann.com 35)) for AY 2016-17. He also placed reliance on the decision of this Tribunal in para-11 in the case of Airlinq Technology Pvt. Ltd. In IT(TP)A No.231/Bang/2021 dated 28.7.2022.

17. The Ld. D.R. submitted that the annual reports of the company shows the revenue of that company was from provision of software services and it is also noted that this company has qualified all the filters applied by the TPO. The independent auditor's report at page 4 of the annual report certifies that the company is a service company, primarily rendering software services. The information at page 323 of the annual report also clarify that the company is engaged in development and maintenance of computer software. The

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operational revenue stream is mainly from rendering of software services as could be seen from the profit & loss account and other information in the annual report. Therefore, the company is functionally comparable to the assessee and it should be included in the list of comparables.

18. We have heard the rival submissions and perused the materials available on record. In our opinion, this comparable was considered by the Hyderabad Tribunal in the case of ADP Pvt. Ltd. in ITA No.227 & 228/Hyd/2021 dated 3.2.2022 at para 7 page 3678 to 3680 wherein held as under:-

7. “*Infobeans Technologies Ltd.: The ld. AR of the assessee submitted that this company is functionally different for the following reasons:*

- 1. It is engaged in diversified activities in the nature of custom application development, content management systems, enterprise mobility, big data analytics,*
- 2. No change in the business as compared to last year*
- 3. Leading provider of consulting technology & next generation service.*
- 4. There is abnormal increase in percentage of revenue from 35.35 crore to 62.06 crore.*
- 5. It is also into IT enabled services i.e. business process management, HR and Payroll, commerce*
- 6. No segmental details are available.*

7.1 He relied on various decisions of ITAT including the decision in ITA No. 2233/Hyd/2018 for AY 2014-15 wherein this company is excluded as comparable.

7.2 The Ld. DR, on the other hand, submitted that this company is engaged in rendering of software services and, hence, functionally comparable to assessee company.

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7.3 We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The coordinate bench of this Tribunal in ITA No. 2233/Hyd/2018 for AY 2014-15, directed the AO/TPO to exclude this company from the list of comparables for determining ALP by observing as under:

21. Having regard to the rival contentions and the material on record, we find that the Coordinate Bench of the Tribunal in the following case has considered similar objections of the assessee therein to direct exclusion of this company from the final list of comparables. For the purpose of ready reference, the relevant paragraph is reproduced below:

"18. We have heard the rival contentions and perused the record. The first aspect is the functional comparability of concern which has been finally selected to be comparable. In respect of Infobeans Systems Pvt. Ltd., the financials of said concern clearly reflect that in addition to providing software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis. The event of export of goods was also mentioned in notes and also in the Profit and Loss Account, where revenue from sale of software was declared. The segmental details of two activities

carried on by the said concern were not available and in the absence of the same, the concern could not be equated as functionally comparable to a concern which was providing software development services to its associated enterprises. Applying the same set of reasoning as in the paras hereinabove, we hold that Infobeans Systems Pvt. Ltd. is not comparable to the assessee".

22. Respectfully following the same, we direct that Infobeans be excluded from the final list of comparables in this case also.

7.4 On perusal of the order of the coordinate bench of this Tribunal and on perusal of the financial statements of Infobeans Technologies Ltd., we observe that the company is functionally not comparable and no segmental details are available. Therefore, the coordinate bench did not consider this company as comparable in assessee's own case for AYs 2014-15 & 2015-16. Respectfully following the decision of the coordinate bench, we direct the AO/TPO to exclude this company from the final list of comparables."

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18.1 Same view was taken by the Tribunal in the case of Global Logic India Pvt. Ltd. Vs. DCIT reported in (2022) 134 Taxmann.com 35 for the assessment year 2016-17. Respectfully following above judgement, we are inclined to direct the AO/TPO to exclude this company from the list of comparables.

19. The assessee wants exclusion of Inteq Software Pvt. Ltd.

19.1 Ld. A.R. submitted that this company is engaged in outsourced product development for small, medium corporation and emerging technology businesses. The company undertakes all the process of product development life cycles, which is a high end product development, which is incomparable to the SWD services rendered by the assessee. As per the website of the company, the company renders data warehousing services, consulting services, EI and EDI services, testing services healthcare BPO services, and in respect of the diverse services, no segmental details are available.

Significant related party transactions:

19.2 Ld. A.R. submitted that the company's related party transactions (sales) for the FY 2013-14 stand at 79.49% of sales, and therefore the company ought to be excluded. While the Ld. DRP had directed exclusion of the margin of the company for the financial year 2013-14, the TPO did not give effect to the same.

Wide fluctuation in the margin:

19.3 Ld. A.R. further submitted that the company's margin fluctuate widely, suggesting that there exists a peculiar economic circumstance. For the FY 2013-14, the company's margin stood at 47.21%, for the FY 2014-15 32.14% and for the FY 2015-16 7.56%. He stated that the

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detailed submissions are available at pages 158-162 of the paperbook and he placed reliance on the decision of this Hon'ble Tribunal in the case of **Arm Embedded Technologies Pvt. Ltd. v. DCIT** (Order dated 30.08.2022 passed by this Tribunal in IT(TP)A No. 235/Bang/2021)), the decision of the Delhi Bench of the Tribunal in **GlobalLogic India (P.) Ltd. v. DCIT** (reported in [2022] 134 taxmann.com 35)) for AY 2016-17. In view of the above, he submitted that Inteq Software Pvt. Ltd. ought to be excluded from the final list of comparables.

20. The Ld. D.R. submitted that as per information in the Director's report of the company, the company's principal activity is software development services (NIC code 620), which is 100% of its total turnover. The independent Audit report states that the company is a service company primarily rendering software services. As per Revenue Recognition Policy (Note 20(F)), there is mention relating to revenue from software development and there is no information about product sales. This company satisfies the various filters adopted by the TPO. The assessee has not disputed or rebutted any of this information stated in the annual report. Instead, the assessee has merely argued that this company is functionally different with reference to certain information in the website. Ld. DRP stated that the information in the website cannot be given credence as they are generally forward-looking statements with advertisement and promotional motives. In view of these, he did not find any merit in the assessee's pleas. As he finds that this company is engaged in software development services, he held that it is functionally comparable to the assessee and accordingly, the objection was rejected by the Ld. DRP.

21. We have heard the rival submissions and perused the materials available on record. This comparable has considered in the

case of Global Logic India Pvt. Ltd. Vs. DCIT (2022) 134 Taxmann.com 35 for the assessment year 2016-17, wherein held as under:-

46. "The taxpayer sought exclusion of Inteq again on account of functional dissimilarity being into providing outsourced product development services and Healthcare BPO services to its customers as per website extracted at pages 83 to 85 of the appeal memo set. It being a private limited company its financials are not available in the public domain. Its annual report made available at pages 848 to 909 of the annual reports paper book does not provide segmental profitability earned from software development services, outsourced product development services and Healthcare BPO services.

47. When we examine profit & loss account at page 873 of the annual report paper book, software development and service charges are shown in composite manner with no segmental profitability. In these circumstances, we are of the considered view that Inteq is not a suitable comparable vis-a-vis the taxpayer which is a routine software development service provider working on cost-plus mark up model, hence ordered to be excluded from the final set of comparables."

21.1 In view of the above order of the Tribunal, we direct the AO/TPO to exclude this company from the list of comparables.

22. Ground No.12 in the appeal of the assessee is reproduced below:-

12. The Hon'ble DRP/Ld. AO/Ld. TPO erred in law and facts by accepting R S Software (India) Ltd as a comparable which was rejected by the Appellant during the course of assessment proceedings as being functionally dissimilar to the Appellant.

22.1 Assessee wants exclusion of R.S. Software Ltd. from the list of comparables. Ld. A.R. submitted that this company is engaged in diversified activities, which are not similar to the services rendered by the assessee. This company renders custom application development, quality assurance and testing, application maintenance and support,

strategic consulting, in respect of which diverse services, segmental details are unavailable.

22.2 The company is engaged in development of platform services and is rendering data analytics services, which are different from the routine SWD services rendered by the assessee. The data analytics services rendered by the company will fall within the definition of KPO services, which are incomparable to the services rendered by the assessee. The company also owns stock in trade.

Significant research and development activities:

22.3 Ld. A.R. submitted that the company conducts research and development work in the areas of real time analytics, MDM, proximity, payments, digital commerce, mobile payments, testing, automation, personalised loyalty in payments and merchant management in payments laboratory.

Wide fluctuation in margin:

22.4 Ld. A.R. submitted that the company, during the FY 2013-14 and 2014-15 had a turnover of Rs. 351.88 crores and 345.51 crores, and profit margin of 24.14% and 32.75%, respectively. However, during the FY 2015-16, the company realised a turnover of Rs. 171.41 crores, leading to loss of -2.09%. There is an apparent wide fluctuation in the margin of the company. The relevant details as computed by the TPO is provided hereunder:

<i>*figures in crores</i>	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

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Operating profit	-3.66	85.24	68.42
OP/OC	-2.09%	32.75%	24.14%

22.5 Ld. A.R. submitted that the reason for decline in margin is attributable to the strategic shift made by the company as it is making substantial investments in a) developing tools and platforms and b) sales and marketing to enhance its customer base. Further, there is a significant drop in revenue (51 percent) vis-à-vis the previous year. Further, the company recognizes that this shift has impact on the margin of the company. In view of the same, he requested that the company ought to be excluded.

Presence of intangibles.

22.6 Ld. A.R. further submitted that the company owns significant intangible assets. The company is also developing further intangible assets. The total value of intangible assets as a percentage of fixed assets is 17.3%, which is significantly higher than the intangible assets owned by the assessee, which is 0.04% of its fixed assets. Further, the company also owns stock in trade, unlike the assessee.

Significant foreign branch expenses.

22.7 Ld. A.R. submitted that the company has significant onsite operations. The company incurred expenses in respect of its foreign branch of 81.64% of operating cost during the FY 2013-14, 68.82% during the FY 2014-15 and 57.41% during the FY 2015-16, which demonstrates that the company operates in a different business model. He placed the detailed submissions in this regard at pages 79-84 of the paperbook.

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22.8 Ld. A.R. placed reliance in this regard on the decision of this Tribunal in the case of **Arm Embedded Technologies Pvt. Ltd. v. DCIT** (Order dated 30.08.2022 passed by this Tribunal in IT(TP)A No. 235/Bang/2021)).

22.9 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 for FY 2015-16 alone ought to be considered.

23. Ld. D.R. submitted that the Ld. DRP after having considered the submissions, on perusal of the annual report, noted that this company is engaged in rendering services relating to maintenance and testing of computer software for the payment industry. As per information given at page 125 of the annual report, 'the company has focused exclusively on providing software solution to electronic payment industries since its inception. The company is engaged in development, testing and maintenance of software for its clients based in different Geographies. Thus, it is very apparent, it has a single business activity and the argument that it has diversified activities is prima facie untenable. As it operates in a single business segment, it has reported segmental information based on geography. Further. the company is primarily engaged in rendering services related to maintenance and testing of computer software'. Therefore, Ld. DRP found that this company is functionally comparable to the assessee.

23.1 Further, referring to information at page 29 of the annual report, it was argued that this company performs diversified

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

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

23.3 Further, Ld. D.R. argued that the Ld. DRP noted in his order that R&D activities are in the nature of routine activities to improve service delivery and there is no specific debit towards R&D in the P & L account. These indicate that the R&D activities are

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towards routine business activity. The company does not own intangibles except for computer software licenses and ERP implementation. Therefore, Ld. DRP was of the view that this company is comparable to the assessee company. The assessee has failed to establish that such differences, if any, on account of R & D/Intangibles, have material effect on the margin of the above company, in terms of clause (i) of sub-rule (3) of Rule 10B, which provides that an uncontrolled transaction shall be comparable to an international transaction if none of the differences, if any, between enterprises entering into business transactions or likely to materially affect the profit arising from such transactions in the open market. Hence, these pleas are rejected by Ld. DRP. As the company is primarily engaged in software development services and earns the revenue from this activity, there is no need of providing segmental information. In view of the above, Ld. DRP upheld the selection of this company as comparable as stated by Ld. D.R. in his arguments.

24. We have heard the rival submissions and perused the materials available on record. In our opinion, this comparable M/s. R.S. Software (I) Pvt. Ltd. has been considered as not comparable in the case of Arm Embedded Technologies Pvt. Ltd. in IT(TP)A No.235/Bang/2021 for the A.Y. 2016-17 vide order dated 30.8.2022 in para 25, wherein held as under:-

24.1 In view of the above order of the Tribunal, we hold that this comparable to be excluded from the list of comparables as it is functionally not comparable with the assessee and directed accordingly. Since we allowed the ground taken by the assessee on the basis of functionality itself, other arguments of the assessee has been not considered.

25. Ground Nos.13 to 20 are with regard to TP adjustment determined by AO in respect of interest on outstanding receivables. The Ld. A.R. submitted that vide these grounds, the assessee is challenging the TP adjustment determined by the TPO in respect of interest on outstanding receivables. Ld. A.R. submitted that the assessee is a debt free company and did not have any borrowings from external sources and hence was not required to pay any interest. The assessee has not charged any interest from its AE as well as non AEs customers for the extended period of credit as there is no interest or borrowing cost borne by the assessee during the year. He placed reliance on the decision of ***CIT v. Indo American Jewellery Ltd (order dated 08.01.2013 passed by the Hon'ble High Court of Bombay in ITA(L)No. 1053/2012)***, and the decision of the Hon'ble Delhi High Court in the case of ***PCIT v. Bechtel India Pvt. Ltd.*** (Order dated 21.07.2016 in ITA No. 379/2016).

25.1 The Ld. A.R. for the assessee submitted that the outstanding receivables are only in respect of the provision of software development services by the assessee. Since the outstanding receivables related to the SWD services rendered by the assessee, Ld. A.R. 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 outstanding receivables cannot be treated as an independent international transaction. Reliance in this regard is placed on the decision of this Tribunal in the case of ***Avnet India (P.) Ltd. v. DCIT*** (reported in [2016] 65 taxmann.com 187 (Bangalore - Trib.)) which was upheld by the Hon'ble High Court of Karnataka in ITA No. 358/2016.

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25.2 Further, Ld. A.R. submitted that the credit period agreed between the assessee and its AE was 90 days. However, the TPO has without any basis considered the credit period to be 30 days to impute notional interest. Detailed submissions in this regard are placed at pages 180-197 of the paperbook by the Ld. A.R. Without prejudice and in any event, the interest rate, if at all ought to be LIBOR plus, as computed by the TPO, as against SBI short term deposit interest rate which the Ld. DRP has erroneously applied. Reliance in this regard is placed by the Ld. A.R. on the decision of this 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). Without prejudice, Ld. A.R. submitted that TPO erred in making an addition of Rs. 16,75,822/- on account of interest on outstanding receivables as against Rs. 11,92,909/- while giving effect to the Ld. DRP's directions.

26. The Ld. D.R. submitted that no interest could be imputed when the assessee has no finance cost or debt-free. Ld. DRP observed that the ITAT Delhi in Bechtel case (ITA No.6530/De1/2016 dated 16.05.2017) rejected the said plea deviating from its earlier order in the same case and observed as under:

The Id. counsel has also advanced an argument that since it was debt free fund company, which finding is not disputed, therefore, no interest could be attributable on the late realization of receivables. In our opinion, this plea is to rejected at the threshold because, as noted earlier, interest on delayed realization of receivables is a separate international transaction and therefore, requires separate benchmarking. It has nothing to do with the operations of the assessee company being with the debt free fiends only.

26.1 In view of the above, Ld. DRP found no substance in the contention of the assessee that no interest could be imputed when the assessee has no finance cost or debt-free. It was also contended by the Ld. DRP that the actual credit period allowed by the assessee has to be compared to the average receivable days of the comparable companies taken for comparable analysis. The period of credit allowed by the comparables is not a relevant factor or justification for the extended credit period allowed by the assessee. Such a plea has no merit, and loses its relevance, in the light of the various judicial decisions, wherein, it has been categorically held that the amount not realized beyond the agreed credit period would constitute a separate international transaction and is in the nature of debt arising during the course of business, liable to be visited with TP adjustment on account of interest income short charged or uncharged. Hence, Ld. DRP rejected these pleas.

26.2 Ld. D.R further stated that the assessee has raised another plea before Ld. DRP that it has not charged interest on the receivables from non- AEs, and by way of CUP, interest cannot be imputed on the AEs transaction also. In this regard, Ld.D.R. opined that the assessee has failed to furnish before Ld. DRP, the details of non-AE transactions, the terms of credit period agreed, the relevant agreements & invoices to the transaction, to examine the existence of CUP, if any, as contended. As the assessee failed to prove that on identical comparable transaction with non-AEs also, it had not charged interest, and failed to demonstrate CUP with documentation & evidence, accordingly, this plea was rejected by the Ld. DRP.

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27. We have heard the rival submissions and perused the materials available on record. The Tribunal consistently taking a view that if the credit period granted to the AE is more than 90 days that should be a TP adjustment towards notional interest @ LIBOR+2%. Accordingly, same view was taken by the Tribunal in the case of Swiss Re Global Business Solutions India Pvt. Ltd. in IT(TP)A No.397/Bang/2021 dated 21.1.2022 for the A.Y. 2016-17, 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

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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

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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 repaid, 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

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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.*

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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.”*

27.1 In view of the above, we remit this issue to the file of AO/TPO to pass order in conformity with the above direction of Tribunal as in the case of Swiss Re Global Business Solutions India Pvt. Ltd. Cited (supra) by allying LIBOR+2% in this case also.

28. The other grounds in the assessee’s appeal are not pressed at this stage. However, the assessee sought liberty to urge the said grounds in any future proceeding, appellate or otherwise, and in these proceedings at a future point in time. Accordingly, the other grounds are not considered for adjudication.

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

Order pronounced in the open court on 3rd Oct, 2022.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 3rd Oct, 2022.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.