

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

BEFORE SMT BEENA PILLAI., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

IT(TP)A Nos.27/BANG/2020 & 194/BANG/2021
Assessment years : 2015-16 & 2016-17

Lloyds Offshore Global Services Private Limited, 6/12, Primrose Road, Guruappa Avenue Bangalore 560 025 PAN: AAACL 9321N	Vs.	Deputy Commissioner of Income Tax Circle 4(1)(1), Bangalore.
ASSESSEE		RESPONDENT

Assessee by	:	Shri Chavali Narayan, Advocate
Respondent by	:	Shri Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	12.10.2022
Date of Pronouncement	:	20.10.2022

ORDER

Per Padmavathy S., Accountant Member

These appeal is against the final assessment order passed u/s. 143(3) r.w.s. 144C of the Income-tax Act, 1961 [the Act] by DCIT, Circle 4(1)(1), Bangalore dated 29.10.2019 for AY 2015-16 and by DCIT., National e-Assessment Centre dated 31.03.2021 for AY 2016-17. Since common issues are involved, these appeals were taken up together for hearing. We deem it convenient to pass a common order.

IT(TP)A 27/BANG/2020

Brief facts of the case

2. The assessee is a part of Lloyds Bank Plc ("LBP"). LBP has outsourced some of the work pertaining to its business units to independent third-party service providers ("outsource partners") in India. The assessee primarily provides an overarching function of overseeing the LBP's outsourcing contracts in India and to render, inter alia, the following services to LBP:

- (i) Overall management of LBP's presence in India, facilitating and providing links into the Government and outsourcing activity; and
- (ii) Oversee off-shored business operations, risk and compliance and all necessary relationships in India.

3. The assessee performs functions that ensure that the deliverables of the outsourced partners are as per the requirements and specifications of LBP. This involves Assessee's personnel visiting the site of the outsource partners, to monitor the services provided by them and if any discrepancy or failure to provide service as per the specified parameters is noted, Assessee reports the issue to LBP.

4. During the AY 2015-16, the assessee filed the return of income on 30.11.2015 declaring a total income of Rs.3,08,05,230. The return was selected for scrutiny under CASS. The assessee has entered into the international transaction towards provision of support services to its Associated Enterprise ("AE") amounting to INR 33.81 crores. Hence a

reference was made to the Transfer Pricing Officer ("TPO") for determination of ALP. The TPO rejected the economic analysis carried out by Assessee in its TP documentation and undertook a fresh comparability analysis, basis which a TP adjustment of Rs.3,22,61,334 was proposed in the TP order dated 24 October 2018. The Assessing Officer ("AO") incorporated the above TP adjustment in the draft assessment order. Aggrieved, the Assessee filed its objections before the Dispute Resolution Panel ("DRP"). The AO passed the final assessment order incorporating a TP adjustment of Rs.3,80,67,944 after giving effect to the DRP directions. Aggrieved by the same and to the extent the order of the DRP is unfavourable, the Assessee filed an appeal before the Hon'ble Income Tax Appellate Tribunal ("ITAT").

5. Assessee raised 9 grounds and two additional grounds contending the TP adjustment. Ground Nos. 1 to 4 are general in nature and does not warrant separate adjudication. Ground no 7 is not pressed by the Id AR during the course of hearing and dismissed as not pressed. Ground Nos.8 & 9 are consequential. The effective grounds are as extracted below

5. The learned AO/ DRP/ TPO erred, in law and in facts, by accepting/ rejecting certain companies based on unreasonable comparability criteria;

- a) The learned AO/ DRP/ TPO erred, in law and in facts, by accepting the following companies that cannot be considered as comparable to the Appellant in law and fact on one or more grounds:
 - i) Ugam Solutions Private Limited,
 - ii) Axience Consulting Private Limited; and
 - iii) Platinum Advertising Private Limited.

b) The learned AO/ DRP/ TPO erred, in rejecting the following comparable companies selected by the Appellant in its TP documentation even though the companies are functionally comparable to the Appellant:

- i) Concept Public Relations India Limited;
- ii) Priya International Limited;
- iii) EDCIL India Limited; and
- iv) MCI Management (India) Private Limited

6. The learned AO/ DRP/ TPO erred, in law and in facts, by not making suitable adjustment to account for differences in working capital of the Appellant vis-à-vis that of the comparable companies;

Additional grounds

10. The learned AO/DRP/TPO and the learned DRP have erred, in law and in facts, by accepting companies based on unreasonable comparability criteria

The learned AO/ DRP/TPO have erred, in law and in fact, by retaining the following companies as comparable which are functionally dissimilar to the Appellant company:

- i. Killick Agencies and Marketing Limited;
- ii. ICC International Agencies Limited; and
- iii. India Tourism Development Corporation Limited.

11. The learned AO/DRP/TPO have erred by wrongly computing the operating margin of following companies:

- i. Kestone Integrated Mktg. Services Private Limited;
- ii. Axience Consulting Private Limited;
- iii. India Tourism Development Corporation Limited;
- iv. ICC International Agencies Limited; and
- v. Platinum Advertising Private Limited.

6. The additional grounds raised do not require examination of new facts otherwise than on record and are pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds.

TRANSFER PRICING ISSUES

7. The assessee for the purpose of TP study chose Transaction Net Margin Method as the most appropriate method. The operating profit by operating cost is the profit level indicator. The assessee chose the following comparables in the TP study

Sl.No.	Name of the company	Weighted average (%)
1	ICC International Agencies Ltd. (Segmental)	0.09%
2	I C R A Management Consulting Services Ltd	1.05%
3	Concept Public Relations India Ltd	1.49%
4	Priya International Ltd (Segmental)	2.30%
5	Kestone Integrated Marketing Services Private Limited	4.88%
6	MCI Management (India) Limited	5.52%
7	India Tourism Devp. Corpn. Ltd.	8.72%
8	E D C I L (India) Ltd (Segmental)	13.61%
9	Killick Agencies and Marketing Limited	24.77%
35th percentile		2.30%
Median		4.88%
65th percentile		5.52%

8. The operating margin computed by the assessee as per the financial statements is as given below

Particulars	Amount (INR)
Revenue from operations	33,81,26,271
Total Operating Cost	30,88,62,246
Operating Profit	2,92,64,025
Operating profit / operating cost	9.47%

9. Out of the 9 comparables selected by the assessee, the TPO accepted only 4 comparables i.e. Kestone Integrated Mktg. Services Pvt. Ltd., India Tourism Devp. Corporation Ltd., ICC International Agencies Limited, Killick Agencies and Marketing Limited in the TP order. The TPO conducted fresh search to choose comparables. The final list of comparables of the TPO are as given below

Sl. No.	Company name	Margin as per TP order
1	Kestone Integrated Mktg. Services Pvt. Ltd.	13.30%
2	Irclass Systems & Solutions Pvt. Ltd.	15.21%
3	Ugam Solutions Private Limited	16.87%
4	Axience Consulting Pvt. Ltd.	18.03%
5	India Tourism Devp. Corpn. Ltd.	21.80%
6	ICC International Agencies Limited	24.03%
7	Killick Agencies and Marketing Limited	24.16%
8	Platinum Advertising Private Limited	34.07%
35th percentile		16.87%

Median	19.92%
65 th percentile	24.03%

10. Based on the above fresh set of comparables the TPO proceeded to make the TP adjustment as given below based on which the AO passed the draft assessment order –

Particulars	Amount (INR)
Operating Cost (“OC”)	30,88,62,246
Arm’s Length Price Mean margin	19.92%
Arm’s Length Price (119.92% * OC)	37,03,87,605
Price received	33,81,26,271
Short fall being adjustment u/s 92CA	3,22,61,334

11. Aggrieved with the draft assessment order passed by AO, the Assessee filed its objections before the DRP accepted the contentions of the Assessee to exclude 1 comparable i.e., Irclass Systems & Solutions Private Limited, which was proposed for exclusion by the Assessee in the final comparable set. The TPO passed the Order giving effect whereby the TP adjustment was enhanced to Rs.3,80,67,944. The AO passed the final assessment order in pursuant to the DRP directions incorporating the revised TP adjustment. Aggrieved the assessee is in appeal before the Tribunal.

12. During the course of hearing, out of the exclusions sought through Ground no.5(a) and additional ground 10, the Id AR presented arguments with regard to Ugam Solutions Private Limited, Axience Consulting Private Limited, Platinum Advertising Private Limited, Killick Agencies and Marketing Limited, and ICC International Agencies Limited.

Ugam Solutions Private Limited – (Ugam)

13. The Id AR made the following submissions with regard to the company being functionally different.

- ▶ As per the annual report for FY 2014-15, Ugam Solutions is engaged in provision of managed analytics services. (Page 509 of Paperbook II)
- ▶ Ugam is a leading provider of managed analytics services and solutions combining its proprietary big data platform with a global team of insights and analytics experts. Ugam offers a range of service offerings and solutions to global market research firms, internet retailers and leading brands. Ugam's range of services and solutions to global market research firms include research operations, technology infrastructure transition, aggregation and visualization, sample management optimization, global program management, custom panel solutions, reporting solutions and mobile solutions.(Page 520 of Paperbook II)
- ▶ Ugam's range of services and solutions to Global Market Research firms include research operations, technology infrastructure transition, data warehousing, aggregation and visualization, sample management optimization, global program management, custom panel solutions, reporting solutions and mobile solutions. (Page 600 of Paperbook II).

► Ugam's services and solutions to Internet Retailers and Brands includes price intelligence and optimization, assortment intelligence, product content solutions and channel monitoring solutions. (Page 600 of Paperbook II)

14. In this regard, Id AR placed reliance on the ruling by the Hon'ble Bangalore Tribunal in case of Epson India Pvt. Ltd. [IT(TP)A No. 206/Bang/2021]. The Id AR drew our attention to pg. 8 and 9 of DRP order where it is stated that Ugam is into Marketing Support Services and is comparable with the assessee, whereas the assessee is into Business support services which is different from marketing support services. The Ld AR also submitted that the profile of the assessee is stated in the order of the TPO (page 2 of TPO order) as per which the TPO has mentioned that the assessee is into Business support services.

15. Ld DR submitted that the decision rendered in the case of Epson India (supra) is in the context of the comparability with the nature of business of Epson and that the assessee cannot draw direct reference from the same for seeking exclusion. The Id DR also submitted that in other inclusions sought by the assessee, there are companies who are into marketing support services which would mean that the assessee itself is considering marketing support services as comparable and that the assessee cannot cherry pick the comparables. The Ld DR therefore supported the orders of the lower authorities.

16. We heard the rival submissions and perused the material on record. We notice that the TPO in defining the profile of the assessee has stated that the activities of the assessee are classified into Compliance management, supplier management services, staff welfare support and other support functions. The DRP has stated that Ugam's services falls within the ambit of market support services and a proper comparable. We also notice that the coordinate bench of the Tribunal in the case of Epson India has excluded Ugam as a comparable company to Epson based on the functions performed by Ugam. Therefore it is important to analyse the functions performed by Ugam during the year under consideration, before applying the ratio laid down by the Hon'ble Tribunal. We therefore remit the issue back to the AO/TPO to look into the functions performed by Ugam based on the various details submitted by the assessee and decide accordingly. Needless to say that the assessee may be given a reasonable opportunity of being heard. It is ordered accordingly.

Axience Consulting Private Limited – (Axience)

17. The Id AR submitted that the company is in the business of providing consultancy and advisory services in the field of finance, market research & business administration to corporate & non-corporates. (Page 800 of Paper book II) and therefore not comparable to the assessee. The Id AR also submitted that the DRP has held this company to be a comparable after stating that the company is into marketing support services.

18. The Id DR supported the orders of the lower authorities. We heard both the parties. We notice that Axience is mainly into analysis and research and is into strategic human capital services. We also notice that the DRP has confirmed the inclusion by stating that the company is into marketing support service and therefore to be included whereas the assessee is mainly into business support services and this fact has been acknowledged by the TPO. In the light of this we are of the considered view that Axience is not functionally comparable to the assessee and we hold accordingly.

Platinum Advertising Private Limited – (Platinum)

19. In this regard, the Id AR drew our attention to the annual report for FY 2014-15 according to which Platinum is engaged in providing other advertising - Advertising Agency Services (Page 1058 and 1068 of Paperbook II). It is also noticed from the annual reports that revenue from operations of the company comprises of commission and fee for media planning, media buying and ancillary services. (Page 1117 of Paperbook II). The DRP has confirmed the inclusion on the basis that the company is into marketing support services and therefore is a comparable with the assessee.

20. After hearing, both the parties and on perusal of the annual reports, we are of the considered view that Platinum is not a comparable company with that of the assessee as Platinum's functions i.e. advertising agency services, and media planning and ancillary services is different from the functional profile of the assessee which is

mainly into business support services. We therefore direct the AO/TPO to exclude Platinum from the comparable list. It is ordered accordingly.

Killick Agencies and Marketing Limited (Killick) and ICC International Agencies Limited (ICC)

21. The Id AR submitted that Killick is acting as an agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propellers, maritime and aviation lighting, acoustic communication equipment etc. Company also offers after sales services. Apart from this, Company is involved in export of micro switches, engineering items, acoustics items and headsets (Page 1054 of Paperbook II). Further the Id AR submitted that the company derives majority of its revenue from sale of services which includes commission and service income (Page 1052 of Paperbook II). The Id AR also submitted that the exclusion of killick was argued before the DRP and that the DRP did not consider the submissions made in this regard. The Id AR placed reliance on the decision of the coordinate bench of the Tribunal in the case of Epson India (supra). The Id AR prayed for the exclusion of Killick before us.

22. With regard to exclusion of ICC the Id AR submitted that as per the annual report for FY 2014-15, the company is an indenting agent and reseller of textile machines (Page 935 and 948 of Paperbook II). And that the company operates in two segments - a) commission and servicing activity and b) trading activity, both of which are not

comparable to the assessee. (Page 1025 of Paperbook II). The Id AR also submitted that the exclusion of ICC was not sought before the lower authorities. The Id AR further submitted that coordinate bench in assessee's own case [IT(TP)A 421/BANG/2016] has held that ICC be excluded.

23. The Id DR on other hand submitted that Killick and ICC are companies chosen by the assessee as a comparable and now the assessee cannot seek exclusion. The Id DR also pointed out that the exclusion of ICC was not sought before the lower authorities and therefore cannot raise the issue first time before the Tribunal.

24. The learned A.R. in rebuttal submitted that though the company is included as comparable by the assessee, it does not stop the assessee to plead for exclusion before the Tribunal and in this regard placed reliance on decision of the Special Bench in the case of DCIT vs Quark Systems (P) Ltd., [(2010) (4 ITR(T) 606 (Chandigarh Trib)]

25. We heard the rival submissions and perused the material on record. We notice that the assessee has not contended the exclusion of ICC before the lower authorities and that the submissions made with regard to exclusion of Killick has not been considered. In view of this we remit the issue back to the TPO/AO for fresh consideration. The TPO/AO is directed to keep the decisions of the coordinate bench in assessee's own case (supra) and Epson India (supra) while deciding the issue after giving a reasonable opportunity of being heard to the assessee. It is ordered accordingly.

26. Out of the inclusions contented by the assessee through ground no. 5(b), the Id AR did not press for the inclusion of MCI Management (India) Private Limited. The Id AR presented arguments with regard to the inclusion of Concept Public Relations India Limited, Priya International Limited and EDCIL India Limited

Concept Public Relations India Ltd (Concept)

27. The Id AR argued that the company is functionally comparable as it is into provides its expertise of relationship building to company, individuals and organisations. (Page 1146 of Paperbook II). Further it is submitted that the company earns revenue from - Public relation fees, media receipts and other fees and business receipts. (Page 1151 of Paperbook II). The Id AR also submitted that the nature of the services provided by the company falls within the broad head of business/management support services and therefore should be included.

28. The Id DR submitted that the company is into media and public relation and therefore cannot be included as comparable.

29. We heard the rival submissions and perused the material on record. We notice that as per Note -1 of the Notes to accounts, the company is engaged in the business of PR relations and as per the Director's report the activities of the company includes advertising, communication and public relations activities. It is also mentioned by the DRP that the company is into marketing support services. We have in earlier part of this order has excluded companies who are into

marketing support services for the reason that it is functionally different from the profile of the assessee which is into business support services. Further Concept is in public and media relations which is functionally different from the activities of the assessee. Hence we hold that concept cannot be included as a comparable and the ground raised by the assessee in this regard is rejected.

Priya International Ltd

30. The Id AR submitted that

- ▶ The company is into three main business segments, namely: - (a) Indenting business,(b) Trading business - chemicals and (c)Trading business - electronics. The indenting business segment is comparable to the business of the assessee. (Page 1188, 1194 of Paperbook II)
- ▶ The company is involved in sale of products such as, chemical, electronics/ software and other products, and indenting commission. (Page 1188 of Paperbook II)
- ▶ Considering the financial data of the relevant segment (i.e., indenting business segment) is taken to be comparable, the service income filter of 75 percent would not be applicable

31. The Id DR submitted that the company is into manufacture of signage and functionally different from assessee. Therefore the Id DR prayed that the exclusion of the company to be upheld.

32. We heard the rival submissions. On perusal of the annual report it is noticed that the company is into three different segments Indenting business, Trading business of chemicals and electronics. It is also noticed that the assessee has included the indenting business for the

purpose comparison. However the nature of business the revenue of which is reported under indenting business is not coming out clearly from the annual report. The Id AR also could not substantiate that the activity reported under indenting business is functionally comparable to that of the assessee. Considering the overall nature of business of the company which is mainly into trading, we are of the considered view that the company is not functionally comparable with the assessee and need to be excluded. The assessee's ground in this regard is dismissed.

EDCIL (India) Limited (EDCIL)

33. The Id AR submitted that EDCIL's revenue from operation comprises of - Income from Technical Assistance, Income from Institutional development. (Page 1301 of Paperbook II). The Id AR drew our attention to the annual report FY 2014-15, wherein it is stated that EDCIL's primary business segment is Technical Assistance, Institutional Development and Human Resource Development. (Page 1318 of Paperbook II) which is similar to the functions of the assessee. The Id AR further submitted that EDCIL has been included in the assessee's own case (supra) for AY 2011-12.

34. We heard the Id DR. We notice that the coordinate bench in assessee's own case has held that EDCIL be excluded from the comparables for AY 2011-12 by relying on the decision in assessee's own case for AY 2008-09. The year under consideration being AY 2015-16, it is important to verify whether the facts are identical before applying the decision of the Hon'ble Tribunal. Therefore we remit the

issue back to the TPO/AO to verify the facts and if there is no change i.e. facts are being identical with that of earlier year in which the above decision is rendered, then follow the decision of the Hon'ble Tribunal. Needless to say that the assessee be given a reasonable opportunity of being heard. It is ordered accordingly.

35. Through additional Ground no.11 the assessee is seeking for considering the correct margins of the comparable. We direct the TPO/AO to consider the correct margins of the final list comparable that will be arrived at after considering the directions given in the above paragraphs of this order after giving a reasonable opportunity of being heard to the assessee.

Working capital adjustment

36. The ld AR submitted that –

i. The Rules provide that a transaction can be considered as comparable, if reasonably accurate adjustments can be made to eliminate differences that are likely to materially affect the price or cost or profit between a controlled and an uncontrolled transaction.

ii. As per Rule 10B(1)(e), the manner of computation under the Transactional Net Margin Method (“TNMM”) clearly mandates comparison of the net margin (after adjustment, if any) between the comparable companies and the Appellant. Thus, in undertaking such a comparison, the difference, if any, between the comparable companies and the Appellant would necessarily have to be adjusted in the net margin of either the Appellant or the comparable companies.

iii. The extent to which companies extend and receive credit in the form of accounts payable and receivable affects their sales and cost of sales.

Hence, in case there are significant differences in working capital between the tested party, i.e. Lloyds India and the comparable companies, an appropriate adjustment may be required for such difference in determining the arm's length price.

37. We notice that the Co-ordinate Bench of this Tribunal in the case of *Huawei Technologies India (P.) Ltd. 101 taxmann.com 313* has discussed all the reasons on the issue and held that working capital shall be allowed, holding as under -

“10. The next grievance projected by the Assessee in its appeal is with regard to the action of the CIT (A) in not allowing any adjustment towards working capital differences. On this issue we have heard the rival submissions. The relevant provisions of the Act insofar as comparability of international transaction with a transaction of similar nature entered into between unrelated parties, provides as follows;

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

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

(a)****

(e) transactional net margin method, by which –

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

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a

number of such transaction is computed having regard to the same base:

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

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

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

(f).****

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

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

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

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

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic

development and level of competition and whether the markets are wholesale or retail.

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

(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in. or the profit arising from, such transactions in the open market; or

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

11. A reading of Rule 10B(1)(e)(iii) of the Rules read with Sec. 92CA of the Act, would clearly shows that the net profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, which could materially affect the amount of net profit margin in the open market.

12. Chapters I and III of the DECO Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereafter the "TPG") contain extensive guidance on comparability analyses for transfer pricing purposes. Guidance on comparability adjustments is found in paragraphs 3.47-3.54 and in the Annex to Chapter III of the TPG. A revised version of this guidance was approved by the Council of the DECO on 22 July 2010. In paragraph 2 of these guidelines it has been explained as to what is comparability adjustment. The guideline explains that when applying the arm's length principle, the conditions of a controlled transaction (i.e. a transaction between a taxpayer and an associated enterprise) are generally compared to the conditions of comparable uncontrolled transactions. In this context, to be comparable means that:

None of the differences (if any) between the situations being compared could materially effect the condition being examined in the methodology (e.g price or margin), or

Reasonably accurate adjustments can be made to eliminate the effect of any such differences. These are called "comparability adjustments.

13. In Paragraphs 13 to 16 of the aforesaid DECO guidelines, need for working capital adjustment has been explained as follows:

"13. In a competitive environment, money has a time value. If a company provided, say, 60 days trade terms for payment of accounts, the Price of the goods should equate to the price for immediate payment plus 60 days of interest on the immediate payment price. By carrying high accounts receivable a company is allowing its customers a relatively long period to pay their accounts. It would need to borrow money to fund the credit terms and/or suffer a reduction in the amount of cash surplus which it would otherwise have available to invest. In a competitive environment, the price should therefore include an element to reflect these payment terms and compensate for the timing effect.

14. The opposite applies to higher levels of accounts payable. By carrying high accounts payable, a company is benefitting from a relatively long period to pay its suppliers. It would need to borrow less money to fund its purchases and/or benefit from an increase in the amount of cash surplus available to invest. In a competitive environment, the cost of goods sold should include an element to reflect these payment terms and compensate for the timing effect.

15. A company with high levels of inventory would similarly need to either borrow to fund the purchase, or reduce the amount of cash surplus which it is able to invest. Note that the interest rate July 2010 Page 6 might be affected by the funding structure (e.g. where the purchase of inventory is partly funded by equity) or by the risk associated with holding specific types of inventory)

16. Making a working capital adjustment is an attempt to adjust for the differences in time value of money between the tested party and potential comparables, with an assumption that the difference should be reflected in profits. The underlying reasoning is that:

A company will need funding to cover the time gap between the time it invests money (i.e. pays money to supplier) and the time it collects the investment (i.e. collects money from customers)

This time gap is calculated as: the period needed to sell inventories to customers + (plus) the period needed to collect money from customers - (less) the period granted to pay debts in suppliers"

14. Examples of how to work out adjustment on account of working capital adjustment is also given in the said guidelines. The guideline also expresses the difficulty in making working capital adjustment by concluding that the following factors have to be kept in mind (i) The point in time at which the Receivables, Inventory and Payables should be compared between the tested party and the comparables, whether it should be the figures of receivables, inventory and payable at the year end or beginning of the year or average of these figures, (ij) the selection of the appropriate interest rate (or rates) to use. The rate (or rates) should generally be determined by reference to the rate(s) of interest applicable to a commercial enterprise operating in the same market as the tested party. The guidelines conclude by observing that the purpose of working capital adjustments is to improve the reliability of the comparables.

15. In the present case the TPO allowed working capital adjustment accepting the calculation given by the Assessee. The CIT (A) in exercise of his powers of enhancement held that no adjustment should be made to the profit margins on account of working capital differences between the tested party and the comparable companies for the following reasons:

(i) The daily working capital levels of the tested party and the comparables was the only reliable basis of determining adjustment to be made on account of working capital because that would be on the basis of working capital deployed throughout the year,

(ii) Segmental working capital is not disclosed in the annual reports of companies engaged or different segments and therefore proper comparison cannot be made.

(iii) Disclose in the balance sheet does not contain break up of trade and non-trade debtors and creditors and therefore working capital adjustment done without such break up would result in computation being skewed.

(iv) Cost of capital would be different for different companies and therefore working capital adjustment made disregarding this different based on broad approximations, estimations and assumptions may not lead to reliable results.

16. The CIT (A) also placed reliance on a decision of Chennai ITAT in the case of Mobis India Ltd. v. Dy. CIT [2013]38 taxmann.com 231/[2014] 61 SOT 40. That decision was based on the factual aspect that the assessee was not able to demonstrate how working capital adjustment was arrived at by the Assessee. Therefore nothing turns on the decision relied upon by the CIT (A) in the impugned order. In the matter of determination of Arm's Length Price, it cannot be said that the burden is on the Assessee or the Department to show what is the Arm's Length Price. The data available with the Assessee and the Department would be the starting point and depending on the facts and circumstances of a case further details can be called for. As far as the Assessee is concerned, the facts and figures with regard to his business has to be furnished. Regarding comparable companies, one has to fall back upon only on the information available in the public domain. If that information is insufficient, it is beyond the power of the Assessee to produce the correct information about the comparable companies. The Revenue has on the other hand powers to compel production of the required details from the comparable companies. If that power is not exercised to find out the truth then it is no defence to say that the Assessee has not furnished the required details and on that score deny adjustment on account of working capital differences. Regarding applying the daily balances of inventory, receivables and payables for computing working capital adjustment, the Delhi Bench of ITAT in the case of ITO v E Value Servc.com [2016] 75 taxmann.com 195 (Delhi -Trib.), has held that insisting on daily balances of working capital requirements to compute working capital adjustment is not proper as it will be impossible to carry out such exercise and that working capital adjustment has to be based on the opening and closing working capital deployed. The Bench

has also observed that in Transfer Pricing Analysis there is always an element of estimation because it is not an exact science. One has to see that reasonable adjustment is being made so as to bring both comparable and test party on same footing. Therefore there is little merit in CIT(A)'s objection on working adjustment based on unavailable daily working capital requirements data. There is also no merit in the objection of the CIT (A) regarding absence of segmental details available of working capital requirements of comparable companies chosen and absence of details of trade and non-trade debtors of comparable companies as these details are beyond the power of the Assessee to obtain, unless these details are available in public domain. Regarding absence of cost of working capital funds, the OECD guidelines clearly advocates adopting raters) of interest applicable 10 a commercial enterprise operating in the same market as the tested party. Therefore this objection of the CIT (A) is also not sustainable.

17. In the light of the above discussion we are of the view that the CIT (A) was not justified in denying adjustment on account of working capital adjustment. Since, the CIT (A) has not found any error in the TPO's working of working capital adjustment, the working capital adjustment as worked out by the TPO has to be allowed. We may also add that the complete working capital adjustment working has been given by the Assessee and a copy of the same is at pages 173 & 192 of the Assessee's paper book. No defect whatsoever has been pointed out in these working by the CIT (A). We may also further add that in terms of Rule 108(l)(e)(iii) of the Rules, the net profit margin arising in comparable uncontrolled transactions should be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions which could materially affect the amount of net profit margin in the open market. It is not the case of the CIT (A) that differences in working capital requirements of the international transaction and the uncontrolled comparable transactions is not a difference which will materially affect the amount of net profit margin in the open market. If for reasons given by CIT(A) working capital adjustment cannot be allowed to the profit margins, then the comparable uncontrolled transactions chosen for the purpose of

comparison will have to be treated as not comparable in terms of Rule 108(3) of the Rules, which provides as follows:

"(3) An uncontrolled transaction shall be comparable to an international transaction if-

(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged to paid in, or the profit arising from, such transactions in the open market; or

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

18. In such a scenario there would remain no comparable uncontrolled transactions for the purpose of comparison. The transfer pricing exercise would therefore fail. Therefore in keeping with the OECD guidelines, endeavor should be made to bring in comparable companies for the purpose of broad comparison. Therefore the working capital adjustment as claimed by the Assessee should be allowed. We hold and direct accordingly."

38. Respectfully following the above decision of the Co-ordinate Bench in the case of Huawei Technologies India (P.) Ltd. (supra), we hold that the working capital adjustment is to be allowed as per actuals, after considering the decisions rendered in this order on the exclusion/inclusion of comparable companies out of/into the final set of comparables. The TPO/AO is also directed to consider the submissions made by the assessee in this regard (page 421 of paper book). The TPO/ AO are accordingly directed.

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39. For AY 2016-17, the TPO rejected the comparable chosen by the assessee and based on fresh search arrived at revised set of comparable. Accordingly the TPO made the adjustment as given below

—

Particulars	Amount (INR)
Operating Cost ("OC")	32,95,39,570
Arm's Length Price Mean margin	16.60%
Arm's Length Price (116.60% * OC)	38,42,43,139
Price received	36,25,85,717
Short fall being adjustment u/s 92CA	2,16,57,422

40. Aggrieved with the draft assessment order passed by AO incorporating the above TP adjustment, the assessee filed its objections before the DRP. The DRP vide its directions dated 09 February 2021, granted partial relief to the assessee by accepting the contentions of the assessee to exclude 2 comparable i.e., Irclass Systems & Solutions Private Limited and Aparajitha Corporate Services Pvt. Ltd, which was proposed for exclusion by the assessee in the final comparable set. Accordingly the TP adjustment was recomputed at Rs.1,95,48,368 by the TPO. The assessee is in appeal against the final AO order passed in accordance the DRP directions.

41. Ground 1 to 4 are general not warranting separate adjudication. Ground 8 and additional ground 12 are not pressed and hence dismissed as not pressed. Ground no.9 and 10 are consequential.

Through ground no.5 and through additional ground no.11 the assessee sought for exclusion and exclusion of certain comparable. Out of the list the Id AR argued for only the below listed comparable and the rest are dismissed as not pressed

Exclusion

- (i) Ugam Solutions Private Limited,
- (ii) Killick Agencies and Marketing Limited
- (iii) Axience Consulting Private Limited; and
- (iv) Platinum Advertising Private Limited.
- (v) Majestic Research Services & Solutions Limited

Inclusions

- (i) Concept Public Relations India Limited;
- (ii) Priya International Limited;
- (iii) EDCIL India Limited; and

42. The additional grounds raised do not require examination of new facts otherwise than on record and are pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds.

43. The exclusion of Ugam Solutions Private Limited, Killick Agencies and Marketing Limited, Axience Consulting Private Limited; and Platinum Advertising Private Limited have already been adjudicated in the earlier paragraphs of this order while considering the appeal for AY 2015-16. The facts being identical we direct the

TPO/AO to follow the same direction for AY 2016-17 also. It is ordered accordingly.

44. With regard to exclusion of Majestic Research Services & Solutions Limited, the Id AR submitted that –

- i. As per the annual report for FY 2015-16, the company is solely into the business of market research services and has a dedicated team for the same. The company offers a wide range of quantitative and qualitative research both nationally and internationally. The Company focuses on market research, advertising research, and brand research. The company has wide range of offerings such as Eye Tracking, Mobile Analytics, Video Analysis, Facial Recognition, Digital Tracking, Online Communities, Neuroscience, Emotional Analysis, Automated Audience Measurement, Sensory Sciences, etc. to deliver powerful insights into the effectiveness of branding, advertising and consumer choices. (Page 911, 912 and 958 of Paperbook II). As per company website, Majestic Research is a market research agency.
- ii. Majestic Research is engaged in providing services which are different from the support services provided by Lloyds India. Also, it fails the related party filter of 25% of sales for FY 2013-14.

45. The Id AR therefore prayed for exclusion of Majestic. In this regard, the Id AR also placed reliance of the ruling by the Hon'ble Bangalore Tribunal in case of Epson India Pvt. Ltd. [IT(TP)A No. 206/Bang/2021] wherein the said company was rejected.

46. We heard the rival submissions. We notice that the DRP has upheld the inclusion by stating that the company is engaged in market research and is in marketing support services. We have in earlier part

of this order have held that the company which is engaged in market support services is functionally different from the assessee which is into business support services. Further it is noticed that the coordinate bench of the Tribunal in the case of Epson India (supra) has held that the company is not functionally comparable for AY 2016-17. The relevant extract of the decision of the Tribunal is given below -

20.3 Majestic Research Services & Solutions Ltd.

It is submitted that this comparable is a market research agency relying exhaustively on usage of technology for data acquisition, it offers a wide range of quantitative and qualitative research both nationally and internationally. The company focuses on market research, advertising research, and brand research, thus making it entirely different from the services provided by Epson India to its associated enterprises.

The Ld.AR submitted that this is functionally different and not be considered a comparable to business support services segment of the assessee.

The Ld.AR also submitted that this company fails RPT filter of 25% of sales adopted by the Ld.TPO. In support he referred to page 309 of Paper Book-I. We are of the view that this company is rendering advertisement functions which are not akin to Business Support Services rendered by the assessee.

Therefore we do not hold this comparable to be included in the final list. Accordingly this comparable is directed to be excluded from the final list.

47. Considering the functions of the company, the year under consideration being AY 2016-17 we respectfully follow the decision of the coordinate bench of the Tribunal and hold that Majestic is not a comparable. We direct the TPO/AO to exclude the same. It is ordered accordingly. This ground is allowed in favour of the assessee.

48. With regard to the inclusion of Concept Public Relations India Limited, Priya International Limited and EDCIL India Limited, we have already adjudicated in the earlier paragraphs of this order while considering the appeal for AY 2015-16. The facts being identical we direct the TPO/AO to follow the same direction for AY 2016-17 also. It is ordered accordingly.

49. Through Ground no.6 the assessee is seeking for considering the correct margins of the comparable. We direct the TPO/AO to consider the correct margins of the final list comparable that will be arrived at after considering the directions given in the above paragraphs of this order after giving a reasonable opportunity of being heard to the assessee.

50. Ground no.7 is with regard to the TPO not making suitable adjustment to account for differences in working capital. Respectfully following the above decision of the Co-ordinate Bench in the case of Huawei Technologies India (P.) Ltd. (supra), we hold that the working capital adjustment is to be allowed as per actuals, after considering the decisions rendered in this order on the exclusion/inclusion of comparable companies out of/into the final set of comparables. The TPO/AO is also directed to consider the submissions made by the assessee in this regard (page 529 to 580 paper book). The TPO/ AO are accordingly directed.

51. In the result, the appeals for AYs 2015-16 and 2016-17 are partly allowed.

Pronounced in the open court on this 20th day of October, 2022.

Sd/-

(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-

(PADMAVATHY S.)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 20th 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.