

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'C' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>IT(TP)A No. 711/Bang/2017</b>
<b>Assessment Year : 2012-13</b>

M/s. Textron India Pvt. Ltd., 1 <sup>st</sup> & 2 <sup>nd</sup> Floor, B Block (Tower 2), SEZ Campus, Global Village, RVCE Post, Mylasandra, Off Mysore Road, Bangalore – 560 059. <b>PAN: AACCT0118M</b>	<b>Vs.</b>	The Deputy Commissioner of Income Tax, Circle – 7(1)(1), Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri Sumit Khurana, CA
Revenue by	:	Shri V.S. Chakrapani, CIT-DR

Date of Hearing	:	02-06-2022
Date of Pronouncement	:	26-08-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against the final assessment order dated 27/01/2017 passed by the Ld.DCIT, Circle-7(1)(1), Bangalore for A.Y. 2012-13 on following grounds of appeal:

*“The grounds mentioned herein are without prejudice to one another.*

*1. That the Assessing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in rejecting the Transfer Pricing documentation maintained by the Appellant under Section 92D of the Income-tax Act, 1961 ("the Act") by invoking Section 92C(3)(c) of the Act and holding that the information or data used in the*

*computation of the arm's length price is not 'reliable or correct' and accordingly proceeded to determine the arm's length price.*

*2. That the Assessing Officer/Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in disregarding the application of multiple-year/ prior-year data as used by the Appellant in the Transfer Pricing documentation and holding that current year (i.e. Financial Year 2011-12) data for companies should be used for comparability and computing the margin of comparable companies.*

*3. That the Assessing Officer/ Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in using data which was not contemporaneous and which was not available in public domain at the time the Transfer Pricing documentation was prepared by the Appellant.*

*4. The Assessing Officer/ Transfer Pricing Officer erred on facts, in including I-Design Engineering Solutions Limited, as comparable to the engineering design services segment of the Appellant, as the same fails the filter of RPT greater than 25% applied by the Learned TPO.*

*5. The Assessing Officer/ Transfer Pricing Officer erred on facts, in including Onward Technologies Limited, as comparable to the engineering design services segment of the Appellant, as the same fails the filter of RPT greater than 25% applied by the Learned TPO.*

*6. That the Assessing Officer/ Transfer Pricing Officer erred in law and on facts in not considering the rejection of companies which have large scale operations while performing comparability analysis.*

*7. That the Assessing Officer/ Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in including comparable companies, (that is, Genesys International Corporation Limited), in the comparability analysis which has diversified business operations and substantial investment made in intangibles and do not satisfy the test of functional comparability in relation to the engineering design services segment of the Appellant.*

*8. That the Assessing Officer/ Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel*

*erred in including companies (namely, Holtec Consulting Private Limited, Acropetal Technologies Limited, Tracteble Consulting Engineers Private Limited and Onward Technologies Limited) in the comparability analysis which do not satisfy the test of functional comparability in relation to the engineering design services segment of the Appellant.*

*9. That the Assessing Officer/ Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in rejecting the additional comparable selected by the Appellant pursuant to a fresh search, that is, Accuspeed Engineering Services Limited which is functionally similar to the engineering design services segment of the Appellant.*

*10. That the Assessing Officer/ Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in rejecting comparable companies, (that is, Empire Industries Limited [Seg-Trading and Indenting segment] and Salora International Limited [Seg- Infocomm division]) which are functionally similar to the marketing support services segment of the Appellant.*

*11. That the Assessing Officer/ Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel erred in including additional companies (namely, Just Dial Limited) in the comparability analysis which do not satisfy the test of functional comparability in relation to the marketing support services segment of the Appellant.*

*12. That the Assessing Officer/ Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in rejecting the additional comparable selected by the Appellant pursuant to a fresh search, that is, Kores (India) Limited (Seg- Business and Computer Systems division), which is functionally similar to the marketing support services segment of the Appellant while performing the fresh comparability analysis.*

*13. That the Assessing Officer/ Transfer Pricing Officer in pursuance of the directions of the Dispute Resolution Panel erred in computation of mark-up on cost of certain companies which are considered for comparability analysis in engineering design service segment (namely Holtec Consulting Private Limited, Cades Digitech Private Limited and Onward Technologies Limited) and marketing support services segment (namely, Marketing Consultants*

*& Agencies Limited, Concept Communication Limited and Killick Agencies and Marketing Limited).*

*14. That the Assessing Officer/ Transfer Pricing Officer has erred in upholding the error in computation of working capital adjustment and in limiting the working capital adjustment for engineering design services segment and marketing support services segment while determining the arm's length price.*

*15. That the Assessing Officer/ Transfer Pricing Officer has erred in not providing appropriate adjustments towards the risk differential while determining the arm's length price.*

*16. That the Assessing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in adding back the broadband connectivity charges amounting to Rs 58,639 to the total income of the Appellant on account of non- deduction of tax at source under section 40(a)(ia) of the Income-tax Act 1961 ('Act').*

*17. That the Assessing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in adding back the depreciation on capital expenditure incurred on purchase of software amounting to Rs 1,371,275 on account of non- deduction of tax at source without appreciating the fact that section 40(a)(ia) of the Act is not applicable retrospectively and also that it is applicable only in respect of outgoing expenditure and not for denial of depreciation.*

*18. (a) That the Assessing Officer in pursuance of the directions of the Dispute Resolution Panel erred in law and on facts in adding back secondment charges amounting to Rs.3,109,572 which are merely reimbursement of administrative charges and other incidental expenses paid by the Company to Group Companies on behalf of expat employees.*

*(b) That the Assessing Officer in pursuance of directions of Dispute Resolution Panel erred in law in not appreciating the fact that reimbursement are not subject to withholding tax provisions under the Act.*

*19. Consequently, the Assessing Officer erred in law and on facts in charging interest under section 234B and 234C of the Act.*

*That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein below or produce further documents before or at the time of hearing of this Appeal.”*

2. The assessee has raised additional ground vide application dated 18/12/2020 which is as under:

*“20. On the facts and in the circumstances of the case and in law the learned Transfer Pricing Officer ('TPO') / the learned Deputy Commissioner of Income Tax, Circle 7(1)(1), Bangalore (Assessing Officer' or 'AO') / the Dispute Resolution Panel, has erred in computing the operating margin of the Appellant in the case of marketing support services segment. The Revenue has added the amount of forex loss of INR 3,566,336 twice to the amount of operating expenses in the case of marketing support services segment.*

*The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.”*

3. It has been submitted that no new facts needs to be considered in order to dispose of the additional ground raised by the assessee vide application dated 18/12/2020. It is submitted that the additional grounds is a legal issue that goes to the root cause of the proceedings. The Ld.AR, thus prayed for the admission of additional grounds so raised by assessee.

4. On the contrary, the Ld.CIT.DR though opposed admission of the additional grounds, could not bring anything on record which would challenge such a right available to assessee under the Act. We have perused the submissions advanced by both sides in light of records placed before us.

The Ld.DR did not object for the additional grounds being admitted.

5. We note that the additional ground is directly connected with the main issue of disallowance and no new facts needs to be investigated for adjudicating the same. Another issues alleged by the assessee is a legal issue that does not require investigation of any facts.

6. Considering the submissions and respectfully following the decisions of *Hon'ble Supreme Court* in case of *National Thermal Power Co. Ltd. Vs. CIT* reported in (1998) 229 ITR 383 and *Jute Corporation of India Ltd. Vs. CIT* reported in 187 ITR 688, we are admitting the additional ground raised by the assessee. **Accordingly, the additional grounds raised by assessee stands admitted.**

**7. Brief facts of the case are as under:**

7.1 Textron India Pvt. Ltd. is a subsidiary of Textron Far East Pet Ltd. and Textron Inc. US. The assessee is engaged in undertaking design and development services including drafting, computer aided design, computer aided engineering, solid modelling, finite element analysis, sourcing, marketing, and other related services, to the business units of Textron Group.

7.2 The Ld.TPO has observed that assessee applied TNMM for computing the margin of engineering design service segment at 10.59% as against 4 comparables selected by assessee that had a margin of 11.7%.

7.3 The Ld.TPO rejected the comparables of the assessee and proposed set of 14 comparables with an average PLI of 24.22% as under:

S.no	Company Name	OP/OC	OP/OR	Database
		201203	201203	
1	Cades Digitech Pvt. Ltd. [Merged]	2.92%	2.84%	Prowess
3	Holtec Consulting Pvt. Ltd.	59.00%	37.11%	Prowess
4	I-Design Engineering Solutions Ltd.	16.89%	14.45%	Prowess
6	Neilsoft Ltd.	2.57%	2.51%	Prowess
7	Tractebel Consulting Engineers Pvt. Ltd.	57.67%	35.35%	Prowess
8	Onward technologies Limited	17.04%	14.56%	
9	Acropetal Technologies Limited(Segment)	9.21%	8.43%	ACE TP
10	Mahindra Engineering Services Limited	30.68%	23.48%	Prowess
11	IOT Design and Engineering Limited	8.21%	7.58%	ACE TP
12	TCE Consulting Engineers Limited	21.15%	17.46%	Last Year comparable/Prowess
13	Korus Engineering Solutions Pvt Ltd	36.46%	26.72%	Capitaline
14	Genesys International Corporation Ltd	29.66%	22.88%	Prowess
Average		24.22%	17.72%	

7.4 Regarding marketing support service segment, the Ld.TPO observed that the assessee computed its margin by using TNMM At 4.58% whereas the 5 comparables selected by assessee had an average margin of 7.33%.

The Ld.TPO rejected the comparables selected by assessee and short listed the set of 5 comparables that had an average PLI of 12.06% by using OP/OC.

Sl.No.	Company Name	OP/OC(%)
1.	Concept Communication Ltd.	4.00%
2.	Cyber Media (India) Ltd.	7.96%
3.	Just Dial Ltd.	28.86%
4.	Killick Agencies & Mktg. Ltd.	8.96%
5.	Marketing Consultants & Agencies Ltd.	10.53%
	<b>AVERAGE</b>	<b>12.06%</b>

7.5 The Ld.TPO thus proposed an adjustment of Rs.11,62,45,725/- as total adjustment as under:

<b>Engineering &amp; design services</b>		
Operating Cost	A	77,64,47,328
ALP margin on cost	B	24.22%
Arms length Operating Revenues	$C=A + B\%$ of A	96,45,02,871
OP of taxpayer	D	85,86,58,459
Adjustment on international transactions	E-C-D	10,58,44,412
<b>Marketing support service</b>		
Operating Cost	F	13,90,29,420
ALP margin on cost	G	12.06%
Arms length Operating Revenues	$H=F+G\%$ of F	15,57,96,368
OP of taxpayer	I	14,53,95,055
Adjustment on international transactions	J=H-I	1,04,01,313

7.6 On receipt of the transfer pricing order, the Ld.AO passed draft assessment order by making a further disallowance as under:

- Disallowance of secondment expenses at Rs.31,09,572/-
- Disallowance of broadband charges for non-deduction of TDS – Rs.58,639/-
- Disallowance of software expenses for non-deduction of TDS – Rs.13,71,275/-

7.7 The Ld.AO also noted that the assessee had not claimed deduction u/s. 10AA of the Act and therefore total income of the assessee was computed at Rs.9,89,27,766/-.

Aggrieved by the draft assessment order, assessee filed objections before the DRP. The DRP after considering the submissions, upheld the order of the Ld.AO/TPO.

On receipt of the draft assessment order, the Ld.AO passed the impugned order by computing addition as computed by the assessing officer in the draft assessment order.

Aggrieved by the final assessment order, assessee is in appeal before us.

8. In respect of Ground nos. 2-9, it is submitted that the assessee has entered into MAP resolution dated 04/10/2019 which is filed at pages 162 to 164 of paper book. Pursuant to the MAP, assessee filed letter dated 04/12/2019 withdrawing the grounds related to transfer pricing adjustment in respect of US related transaction.

Further in respect of the non-US related transaction amounting to Rs.27,94,512/-, the Ld.AR submitted that, the rate applied for the US transaction may be adopted which is at 15.85%.

The assessee placed reliance on the decision of *Hon'ble Bombay High Court* in case of *J.P. Morgan Services India (P.) Ltd. reported in [2019] 105 taxmann.com 40 (Bombay)*.

9. We note that, the Ld.TPO considered both AE and non-AE transaction together for benchmarking the international transaction, and therefore respectfully following the observations of *Hon'ble Bombay High Court* in case of *PCIT vs. J.P. Morgan Services India (P.) Ltd. (supra)*, we are of the view that, the rates agreed by the CBDT for the US based transactions can be adopted for non US transaction.

**Accordingly additional Ground no. 20 stands allowed and Ground nos. 2-10 stands withdrawn.**

**10. Ground nos. 10-15** raised by assessee are in respect of marketing support service segment. It is submitted by the Ld.AR that, the assessee wish to argue inclusion of only one comparable raised in **Ground no. 10** being Salora International Ltd. and in

**Ground no. 11**, assessee seeks exclusion of one comparable being Just Dial Ltd.

11. **In Ground no. 12**, the assessee raised certain additional comparable before the DRP, pursuant to fresh search, which were alleged to be functionally similar to the assessee. It was submitted that the comparable was rejected without verification by the Ld.TPO and DRP. It was prayed that, the same may be remanded to the DRP for consideration.

12. In respect of **Ground No. 13**, the Ld.AR submitted that, the comparables alleged therein have been considered for engineering design service segment. It is submitted that the margins computed by the TPO is wrong that deserves to be corrected.

In Ground no. 14, assessee is seeking working capital adjustment for marketing support service segment and engineering design service segment on actuals.

13. As the **Ground nos. 1-9** have been withdrawn by the assessee, **Ground no. 10** – assessee is seeking inclusion of Salora International Ltd.

14. It is submitted that the said company was rejected by the Ld.TPO by holding it to be functionally different. The Ld.AR submitted that there is no basis for this observation by the Ld.TPO. The Ld.AR relied on page 172, wherein, synopsis of the comparable is placed. The Ld.AR submitted that, this company is into sales and marketing, supply chain management and after sales services for a wide range of leading national and international brands of consumer electronic goods, IT and telecom products, household and lifestyle products.

He thus submitted that this comparable is functionally similar to that of assessee.

On the contrary, the Ld.DR relied on the orders passed by authorities below.

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

15. In the transfer pricing study report placed at page 622 of the paper book, we note that assessee provides marketing support services through representing / liasoning with prospective buyers of Textron group products in India including Government of India and State Governments, Indian conglomerates and other third party customers for sale and maintenance of products relating to price negotiations and conclusion of contracts are undertaken by respective offices of business units located in the US.

16. The detailed functions performed by assessee under marketing support service segment are as under:

*“The marketing support services, wherein TIPL assists are:  
Defence Sector*

*a) Find out when Request for Information ("RFI") are issued by the Ministry of Defence ("MoD"). Further TIPL assists Textron Group with receiving the forms from the MoD in order to submit such responses.*

*b) To find out about competitors, information on their product, service and pricing.*

*c) Follow up with the defence agencies to know about the status of the RFI's.*

*The Ministry of Defence ("MoD") has an offset policy which means that the successful bidder has to source materials to the limit set (currently 30%) by MoD from India. TIPL assists in sourcing vendors who can supply the required materials.*

*Civil Sector*

*a) TIPL assists Textron Group in identifying the prospective customers. Herein, it is important to note that Textron Group has third party distributors, in India, who facilitates the order booking and sale of the products to the end customer.*

*b) The third party distributors work on a commission model for sale of Textron products. These distributors are*

*not involved in buying and selling function and hence the end users directly remit the payment to Textron Group.*

*Cost cross charge: Textron Group has deputed expatriates to TIPL under a secondment agreement with Bell Helicopter Textron Inc., USA and Cessna Aircraft Company, USA. The expatriate employment is under the directions and instructions of TIPL. The expatriate does not perform any activities for the Textron Group during the tenure of their secondment with TIPL.*

*The costs of the expatriate with regard to compensation travel and incidental expenses are cross-charged by Textron Group to TIPL. TIPL bears other expenses, such as accommodation, in relation to the secondment of the expatriate. These expenses are all included in the operating cost base of TIPL and subjected to a mark-up for the purposes of invoicing to Textron Group.”*

17. We also note that the assessee is characterised to be a contract service provider for this segment that is insulated with risk for provision of such services to the group companies.

As we compare the functions performed by Salora International Ltd., we note that, this company has a tendency towards market penetration by launching innovative products. The detailed activities carried out by this comparable as placed in the paper book page 172 by the assessee are as under:



## Annexure – I

**MANAGEMENT DISCUSSIONS AND ANALYSIS**

The Management Discussion and Analysis report comprises of the followings:

- Industry Structure and Development
- Opportunities and Threats
- Segment wise and Product wise Performance
- Outlook
- Risk and concern
- Internal control system and their adequacy
- Financial Performance viz-a-viz operational performance
- Human Resources and Industrial Relations
- Subsidiaries
- Cautionary Statement

**1. Industry Structure and Development**

The business of the Company includes sales and marketing, supply chain management and after sale service for wide range of leading national and international brands of consumer electronic goods, IT and telecom products, house hold & lifestyle products and manufacturing of color televisions and components for color television. The Company's value addition in the distribution segment includes the forecasting of demand and procurement of goods from manufacturers/suppliers, stocking at warehouses, supplying to sub-distributors/channel partners with appropriate credit facility and collection of receivables.

The overall consumer electronic market continues to be competitive and there is a pressure on profit/margin. Company exposed to a variety of business risk including rapidly changing technology, frequent new product introductions, changes in Consumer preferences and demand for features. Consumer preferences have been shifted towards high end and technologically advanced branded products. Companies in consumer electronic goods, IT and telecom industry are focusing on customizing products to suit Indian requirements.

**2. Opportunities and Threats****Opportunities**

- There are opportunities to increase market penetration by launching innovative products.
- There are opportunities to reduce cost of products.
- Introduce new products in existing market and existing products in new market.
- The increasing popularity of easily available consumer loans is being leveraged upon by Companies to market the products.
- Phenomenal growth of media in India and flurry of television

channels have spread awareness of IT and telecom products in the remotest markets.

- Growth in internet penetration in both urban and rural markets will lead to growth in sale of IT products.
- There are opportunities to develop high end products.
- Demand for consumer electronic goods, IT and telecom products usually pick up during the festive seasons. Most of the Companies come out with offers like free gifts, discounts etc. This period will continue to be the growth driver for the Company.

**Threats**

- Margins are under pressure due to increasing cost of raw material, marketing, advertising and after sale services.
- Interest rates continue to be the key issue. Any increase in the interest rate will have negative impact on the profitability of the Company.
- Foreign Exchange fluctuation may affect the Company adversely.
- Any increase in taxes and change in Government policies may have negative impact on the Company.

**3. Segment wise and Product wise Performance****A) Infocom Business**

Salora has become one of the leading distribution Companies in consumer electronic goods, IT and Telecom Sector. The Company has 27 branches spread all over the Country. The Company is connected by a VPN and the complete operation is managed by an Oracle based ERP System.

Infocom Division undertakes the distribution of the following products:-

- Salora Mobile Phone and 3G Data Card
- Motorola Mobiles – Distribution Partner for mobile handset.
- Lexmark – Distributor Partner
- Tenda Networking Products – Distribution Partner
- Zojirushi Thermo ware Products – Distribution Partner
- MTS – Distribution Partner
- Acer – National Distributor for Laptops, Desktops and projectors.
- Pleomax (Samsung) – Distribution Partner for computer peripherals and CFL Bulbs.
- Mercury (Kobian) – Distribution Partner for distribution of Motherboard and Computer Cabinet.
- Micromax Mobile – Authorised Service Partner
- Crystal Glass Ware

**Salora Mobile Phone and 3G Data Card** - The Company has launched new models of Salora Brand Mobile Phone during the year.

18. From the above it is clear that, this company is a full-fledged entrepreneur and launches its own products into the open market, whereas, the assessee is a contract service provider only catering or marketing the products of its parent company in India.

We do not find any similarity in the functions performed by this comparable with that of assessee and hence the same is upheld to be rejected.

**Accordingly this ground raised by assessee stands dismissed.**

**19. Ground no. 11** is seeking exclusion of only one comparable being Just Dial Ltd. under the marketing support service segment. The Ld.AR submitted that, this comparable is primarily engaged in providing local search related services to users in India through multiple platforms such as the internet, mobile internet, over the telephone (voice) and text (SMS). It is submitted that this company also earns revenue from reseller activity providing data collection services to the company. The assessee also submitted that from the Annual Report of Just Dial Ltd., it clearly shows that, this Just Dial Ltd. is involved in search related services and directory activities and hence not comparable to the functions of the assessee. Further, the company is engaged in review and rating certification services which is completely functionally dissimilar to the contract service provider like the assessee who provides marketing support services to the AE.

20. Further, the Ld.AR submitted that during the year the company has underwented demerger of IT related testing services, other related services along with IT infrastructure that is utilised for providing such services. It is thus submitted that this comparable deserves to be excluded.

The Ld.DR relied on the orders passed by authorities below.

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

21. We find that Just Dial Ltd. is a search engine for multifarious activities using different platforms, dealing with different products whereas assessee is a captive service provider providing marketing services only to its AE. Hence we do not find any functional similarity of this company with that of assessee.

**Accordingly we direct this comparable to be excluded.**

**This ground raised by assessee stands allowed.**

**22. Ground no. 12** – Assessee is raising an additional comparable being Kores (India) Ltd. which is submitted to be functionally similar to the marketing support service segment of assessee. The Ld.AR submitted that Kores is engaged in diversified businesses ranging predominantly relating to manufacture and trading of office stationary, accessories and allied products. The 'Business and Computer Systems' division is involved in marketing of equipment relating to banking, postal, offices etc. and after sales service including software support.

He thus prayed for inclusion of this comparable or the comparable may be remanded to be considered by the authorities.

23. On the contrary, the Ld.DR submitted that this company is into diversified business and there is no revenue that is generated by this comparable under marketing service segment. He thus relied on the orders passed by authorities below.

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

24. It is the submission of the assessee that 'The Business and Computer Systems' division of this company is into marketing of equipment relating to banking, postal and offices etc. This

company is also said to be providing after sales services including software support. Not much of detail has been filed other than an extract of the segment report of this comparable. In the interest of justice, we find it appropriate to remand this comparable to the Ld.AO/TPO. The revenue shall compare the functions performed by this comparable with that of assessee and then consider the claim in accordance with law.

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

**25. Ground no. 13** has been raised seeking rectification of the margins of the comparables under engineering design services. We direct the Ld.AO/TPO to compute the margins having regard to the segmental details available.

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

**26. Ground no. 14** is in respect of restricting the working capital adjustment. We note that the DRP has rejected the working capital adjustment which is not in accordance with the provisions.

27. We direct the Ld.AO/TPO to compute the working capital adjustment while computing the operating margin of the comparables following the decision of *Coordinate Bench of this Tribunal* in case of *Huawei Technologies India P. Ltd.* in *IT(TP)A No.1939/Bang/2017 dated 31.10.2018*, wherein, it was held 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 in so far 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) to (d).....**

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

- (i) the net profit margin realised by the enterprise from an international transaction [or a specified domestic transaction] entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;
- (ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;
- (iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;
- (iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);
- (v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the, international transaction [or the specified domestic transaction];

(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.*
- 1. 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.*
  - 2. Chapters I and III of the OECD 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 OECD 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 affect 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."*
  - 3. In Paragraph 13 to 16 of the aforesaid OECD 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 to 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. (ii) 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 in different segments and therefore proper comparison cannot be made.*
  - (vi) 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.*
  - (vii) 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 ITA No.2112/Mds/2011 (2013) 38 [taxmann.com](#). 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 Vs. E Value [Serve.com](#) (2016) 75 [taxmann.com](#) 195(Del-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 that in Transfer Pricing Anal is 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 rate(s) of interest applicable to 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 page 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 10B(1)(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 10B(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."

28. In view of the above, we remit the issue to the file of AO/TPO to compute the working capital adjustment after necessary

examination in the light of the above observation and after allowing an opportunity of hearing to the assessee.

**Accordingly this ground stands partly allowed for statistical purposes.**

**29. Ground no. 15** is in respect of risk adjustment which the assessee did not wish to press.

**30. Ground no. 16** is in respect of the disallowance of broadband connectivity charges for non-deduction of TDS. Admittedly, it is submitted that this issue has been considered by *Coordinate Bench of this Tribunal* in assessee's own case for A.Y. 2011-12 by observing as under:

*19. The next issue contested by the assessee relates to disallowance of broadband charges paid to M/s. BSNL amounting to Rs.62,459/- u/s 40(a)(ia) of the Act for non-deduction of tax at source. The Ld. A.R. submitted that an identical issue was considered by the coordinate bench in the assessee's own case in assessment year 2008-09 and the disallowance was deleted with the following observation:-*

*23. In respect of non-deduction of TDS u/s 194J, we found that the CIT(A) has dealt on the disputed issue in para 3.3.2 which is as under and granted relief:*

*"3.3.2. It is not disputed that, it was submitted before the AO, that there is no specific contract with the service provider. The AO has considered this in the assessment order. Since there is no specific contractual facility that has been obtained from M/s. Tata Indicom, the character of "service contract" is ruled out. It is evident that the assessee has utilised standard service ordinarily available to all and sundry and it is not a specific one. The assessee relied on CIT Vs. Bharthi Cellular (319 ITR 139)(DeI), Asia Satellite Vs. DIT (332 ITR 340)(DeI) & Skycell Communications Vs. DCIT (251 ITR 53)(Mad). The unanimous decision of the Hon'ble High Courts is that fee for providing internet / broadband facility is not technical services as contemplated under Explanation 2 to section 9(1)(vii) of the Act, and the payment made for interconnection provided, through ports is not liable for deduction of tax at source. The Delhi High Court emphasized that the services do not involve any human interface. Similar*

*view was expressed by the Mumbai Bench of the Hon'ble Tribunal in [14 ITR (Trib) 349] & [3 ITR (Trib) 294]. After examining the facts and circumstances of the instant case, I find that the assessee has simply obtained broadband / Internet facility from the service provider M/s. Tata Indicom. It is not a case where a service contract has been entered into. The facility is open to all and sundry and any member of the public can avail of it. In such circumstances, the view of the AO that the nature of service rendered as an element of implicit contract is struck down and therefore, the addition of Rs.21.49 lakhs cannot be sustained in first appeal. It is ordered accordingly.*

*24. Before us, learned DR has relied on order of the AO but could not controvert the findings of the CIT(A) with any cogent evidence or new facts. We are in agreement with the decision of the CIT(A) on this ground. Accordingly, we affirm the action of the CIT(A) on this issue and dismiss the revenue's ground of appeal."*

*20. Following the above said decision, we direct the A.O. to delete the disallowance of broadband charges made u/s 40(a)(ia) of the Act."*

Respectfully following the above view, we direct the Ld.AO to delete the disallowance made.

**Accordingly this ground stands allowed.**

**31. Ground no. 17** is in respect of disallowance of depreciation on software that is capitalised by assessee. The assessee during the previous year has purchased software amounting to Rs.7,62,38,026 which has been treated as capital expenditure and is included in the block of plant and machinery. TDS has been deducted on all software additions except to the extent of an additions amounting to Rs. 22,85,459 (pertains to SEZ books) being downloadable software and software's purchased in the form of media like ) CD and DVD. The assessee claimed the depreciation on software purchases amounting to Rs. 13,71,275.

32. Identical issue has been considered by *Coordinate Bench of this Tribunal* for A.Y. 2011-12 in assessee's own case by observing as under:

*“23. We heard Ld. D.R. on this issue and perused the record. As submitted by Ld. A.R., depreciation is not an item included u/s 40(a)(ia) of the Act and hence the depreciation cannot be disallowed u/s 40(a)(ia) of the Act. We find support by this proposition on the decision rendered by the coordinate bench in the case of UKN Properties Pvt. Ltd. in ITA No.2012/Bang/2016 dated 2.7.2021. Accordingly, the disallowance of depreciation u/s 40(a)(ia) of the Act is liable to be deleted. The Ld. DRP however has directed the A.O. to treat software purchases as revenue expenditure and disallow the same u/s 40(a)(ia) of the Act. In this regard, the Ld. CIT(A) has followed the decision rendered by Hon'ble High Court of Karnataka in the case of Samsung Electronics Company Ltd. (supra) which has since been reversed by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra). Accordingly, in our view, the disallowance of entire amount of software purchases u/s 40(a)(ia) of the Act treating the same as revenue expenditure requires fresh examination at the end of the A.O. by considering the decision rendered by Hon'ble Supreme Court referred above. Accordingly, we restore this issue to the file of the A.O. for examining it afresh.”*

Respectfully following the above view, the disallowance of entire amount of software purchases u/s 40(a)(ia) of the Act treating the same as revenue expenditure requires fresh examination at the end of the A.O. by considering the decision rendered by Hon'ble Supreme Court referred above. Accordingly, we restore this issue to the file of the A.O. for examining it afresh.”

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

**33. Ground no. 18** is in respect of disallowance of secondment charges for non-deduction of TDS.

The assessee depends upon the Group entities if there is need for employees having specific skill set, knowledge and experience.

During the year the assessee incurred Rs. 17,65,03,114 towards secondment charges in respect of salary and other expenditure.

Ld. AO inquired whether TDS was deducted on the above amount. To which assessee filed its submission dated January 22, 2016, January 29, 2016 & February 22, 2016 (refer page no. 175 to 205 of the paper book).

34. The breakup of above expense was submitted before the AO which is as follows:

S.No.	Particulars	Amount
1.	Amount on which TDS u/s 192 was deducted	15,36,89,646
2.	Amount on which TDS was not deducted as the same were exempt income in the hands of employee	1,97,03,896
3.	Amount on which TDS was not deducted as the expense was not salary expenditure as it was incurred before the personnel became employee of the assessee	31,09,572
	Total	17,65,03,114

It is submitted that the Ld. AO accepted the assessee submission with respect to S. No. i and 2, however, disallowed Rs. 31,09,572 by disregarding the fact that those expense were pre-joining expenses for example visa charges, stay charges, insurance charges, relocation expenses etc. (refer page no. 199 to 201 & 673 of the paper book) and were reimbursed on cost-to-cost basis i.e. the same doesn't have any income element to it.

Further, the Ld. DRP upheld the disallowance on different footing any categorised the payment as fee for technical services.

The Ld.DR relied on the orders passed by authorities below.

35. *Coordinate Bench of this Tribunal in case of M/s. Scania CV AB vs. DCIT in IT(IT)A No. 3432/Bang/2018 by order dated 06/07/2022 observed as under:*

*“2. At the outset, the Ld.AR submitted that the only issue alleged before this Tribunal is non-deduction of TDS on reimbursement of salary expenses made on behalf of the seconded employees as fee for technical services.*

*2.1 The Ld.AR submitted that TDS has been deducted on the entire salary paid by assessee to the seconded employees and what is reimbursed is the payment which has been partly made by the AE to the families of such seconded employees. The Ld.AR submitted that though the 100% salary has been subjected to TDS assessee has paid only part of the salary to the seconded employees in India and balance of such salary has been reimbursed to the AE as the same has been paid by the AE to the employees. The Ld.AR submitted that all the details relevant in respect of the salaries and the TDS deduction which were submitted before the authorities below which has not been considered.*

*2.2 The Ld.AR relied on the following decisions.*

- Decision of Hon’ble Karnataka High Court in case of DIT(IT) vs. Abbey Business Services India (P.) Ltd. reported in [2020] 122 taxmann.com 174*
- Decision of Hon’ble Karnataka High Court in case of M/s. Flipkart Internet Pvt. Ltd. vs. DCIT (IT) in W.P. No. 3619/2021(T-IT) by order dated 24.06.2022*
- Decision of Hon’ble Pune Tribunal in case of M/s. Faurecia Automotive Holding vs. DCIT (IT) in ITA No. 784/PUN/2015 by order dated 08.07.2019*
- Coordinate Bench of this Tribunal in case of M/s. Toyota Boshoku Automotive India Pvt. Ltd. vs. DCIT in IT(TP)A No. 1646/Bang/2017 by order dated 13.04.2022 and*
- Coordinate Bench of this Tribunal in the case of Goldman Sachs Services Pvt. Ltd. vs. DCIT in IT(IT)A Nos. 362 to 369 & 338 to 345/Bang/2020 by order dated 29.04.2022.*

*2.3 It is submitted that identical issue has been considered at length and in detail in the above decisions. The Ld.AR referred to the recent decision of Hon’ble Karnataka High Court in case of M/s. Flipkart Internet Pvt. Ltd. vs. DCIT (IT) (supra) wherein Hon’ble Court observed as under:*

*“(viii) The Revenue has relied upon the judgment of the Apex Court in C.C., C.E. & S.T.-Bangalore (Adjudication) etc. v. M/s.Northern Operating Systems Pvt. Ltd.12 where*

*the Apex Court has interpreted the concept of a secondment agreement taking note of the contemporary business practice and has indicated that the traditional control test to indicate who the employer is may not be the sole test to be applied. The Apex Court while construing a contract whereby employees were seconded to the assessee by foreign group of Companies, had upheld the demand for service tax holding that in a secondment arrangement, a secondee would continue to be employed by the original employer.*

*(ix) The Apex Court in the particular facts of the case had held that the Overseas Co., had a pool of highly skilled employees and having regard to their expertise were seconded to the assessee and upon cessation of the term of secondment would return to their overseas employees, while returning Civil Appeal Nos.2289-2293/2021 such finding on facts, the assessee was held liable to pay service tax for the period as mentioned in the show cause notice.*

*(x) It needs to be noted that the judgment rendered was in the context of service tax and the only question for determination was as to whether supply of man power was covered under the taxable service and was to be treated as a service provided by a Foreign Company to an Indian Company. But in the present case, the legal requirement requires a finding to be recorded to treat a service as 'FIS' which is "make available" to the Indian Company.*

*(xi) Accordingly, any conclusion on an interpretation of secondment as contained in the M.S.A. to determine who the employer is and determining the nature of payment by itself would have no conclusive bearing on whether the payment made is for 'FIS' in light of the further requirement of "make available.""*

*3. On the contrary, the Ld.DR placed reliance on orders passed by authorities below.*

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

*4.1 We note that the evidences filed by assessee has not been considered by the revenue authorities.*

*4.2 We therefore remand this issue to the Ld.AO to consider the claim in accordance with the decision of Hon'ble Karnataka High Court in case of M/s. Flipkart Internet Pvt. Ltd. vs. DCIT (IT) (supra) and Coordinate Bench of this Tribunal in the above referred cases M/s. Toyota Boshoku Automotive India Pvt. Ltd. vs. DCIT (supra) Goldman Sachs Services Pvt. Ltd. vs. DCIT(supra) having regard to the evidences filed by the assessee.*

*Needless to say that proper opportunity of being heard must be granted to assessee in accordance with law.*

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

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

**In the result, the appeal filed by the assessee stands allowed on the grounds argued by assessee and other issues that has not been pressed is kept open.**

Order pronounced in the open court on 28<sup>th</sup> August, 2022.

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 28<sup>th</sup> August, 2022.  
/MS /

Copy to:

- |               |                        |
|---------------|------------------------|
| 1. Appellant  | 4. CIT(A)              |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT        | 6. Guard file          |

By order

Assistant Registrar,  
ITAT, Bangalore