

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

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

IT(TP)A No. 292/Bang/2021
Assessment Year : 2016-17

M/s. Mandiant Cyber security Pvt. Ltd. (formerly known as FireEye Cybersecurity Pvt. Ltd.), No. 5, Front Wing Salarpuria Infinity, 2 nd Floor, Bannerghatta Road, Bengaluru – 560 029. PAN: AACCF1341A	Vs.	The Deputy Commissioner of Income Tax, Circle – 3(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri T. Suryanarayana, Senior Advocate
Revenue by	:	Shri Vilas Shinde, CIT DR

Date of Hearing	:	26-09-2022
Date of Pronouncement	:	10-11-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of order passed by National e-Assessment Centre, Delhi dated 30/04/2021 on following revised grounds of appeal:

Sl. No	Grounds of Appeal	Tax effect (in INR)
1.	The Order/ Directions are bad in law and on facts	NA
1.1	<p>The assessment order passed by the Ld. Income Tax Officer, National e-Assessment Centre ('ITO'), under Section 143(3) read with Section 144C(13) and 144B of the Income-tax Act, 1961 ('the Act'), is bad in law and on facts and is in violation of the principles of natural justice.</p> <p>Without prejudice to the generality of the above, the order issued by the Ld. ITO is bad in law in so far as the fact that the Ld. ITO did not issue to Mandiant Cybersecurity Private Limited ('the Appellant or 'the Company'), formerly known as FireEye Cybersecurity Private Limited, a show cause notice for such reference, as per proviso to Section 92C(3) of the Act.</p>	
1.2	<p>The Ld. ITO has erred in law in making a reference to the Deputy Commissioner of Income Tax, Transfer Pricing Officer – 1(2)(2) ('Ld. TPO'), inter alia, since he has not recorded an opinion that any of the conditions in Section 92C(3) of the Act were satisfied in the instant case. Accordingly, the order passed by the Ld. TPO is without jurisdiction, and the proceedings, including Directions issued by the Dispute Resolution Panel ('Ld. Panel') is bad in law.</p>	
2.	Determination of arm's length price of international transactions	52,357,847
2.1	<p>The Ld. ITO/ Ld. TPO/ Ld. Panel erred in rejecting the value of international transactions, in the nature of provision of Software development services, Information technology enabled services and Marketing sales & support services (hereinafter referred to as 'IT Services', 'ITeS' and 'MSS' respectively), as recorded in the books of account, as the arm's length price.</p>	
2.2	<p>The Ld. ITO/ Ld. TPO/ Ld. Panel erred in law by re-determining arm's length price by incorrectly rejecting the arm's length price determined by the Appellant.</p>	
2.3	<p>The Ld. ITO/ Ld. Panel erred in upholding the Ld. TPO's rejection of the Transfer Pricing documentation maintained by the Appellant, where such rejection was done on the Ld. TPO's own conjectures and surmises, including the following:</p> <ol style="list-style-type: none"> 1. Use of alleged inappropriate filters such as: <ul style="list-style-type: none"> • Net worth less than 0 • Operating income to Sales \geq 50% • Forex earning to Sales \geq 25% • Manufacturing + Trading income to Sales \leq 50% 2. Erroneously stating that the Appellant has not applied employee cost filter; 3. Erroneously stating that the Appellant has not applied income from core service filter; and 4. Non-use of comparable data which is available at the time of assessment and not at the time of preparation of the Transfer Pricing documentation by the Appellant. 	
2.4	<p>The Ld. ITO/ Ld. TPO/ Ld. Panel erred in law by selecting the final list of alleged comparable companies solely based on financial data for FY 2015-16; and the companies from such list</p>	

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	were further evaluated for comparability in either or both of the preceding two financial years (FY 2014-15 and FY 2013-14).																									
3.	Issues with computation of Net Cost Plus Mark-up of the Appellant and comparable companies	NA																								
3.1	The Ld. ITO/ Ld. TPO/ Ld. Panel had erred in facts and in law by considering the losses incurred on account of foreign exchange fluctuations as operating in nature, thereby including it in the operating cost for the purpose of determining the net margin of the Appellant.																									
3.2	The Ld. ITO/ Ld. TPO/ Ld. Panel erred in facts and in law in erroneously computing the margins of certain companies identified as comparable by the Ld. TPO. In doing so the Ld. ITO/ Ld. TPO/ Ld. Panel have erred in not providing the detailed computations to the Appellant thereby, denying the Appellant the opportunity to verify the margin computations. The Appellant submits the correct margins to be considered for the said companies:																									
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4.	Comparability Analysis adopted by the Ld. TPO for determination of arm's length price	NA																								
4.1	The Ld. ITO/ Ld. TPO/ Ld. Panel erred in facts and in law by benchmarking the transactions of IT Services, iTeS and MSS of the Appellant with companies operating as full-fledged entrepreneurs thereby not considering the differences in the functions performed, assets employed, and risk undertaken by the Appellant vis-à-vis the companies selected as being comparable.																									
4.2	The Ld. ITO/ Ld. TPO/ Ld. Panel erred in law in applying arbitrary filters to arrive at a fresh set of companies as comparables to the Appellant, without establishing functional comparability.																									
4.3	The Ld. ITO/ Ld. TPO/ Ld. Panel, while applying the turnover filter rejected companies having turnovers less than INR 1 crore, however, erred in not applying an appropriate upper limit to reject high turnover companies and thereby, erred in accepting companies without considering the turnover and size of the Appellant and comparables. The Appellant submits that should an upper limit of INR 200 crores be applied; the following companies would be rejected:																									
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	3	Thirdware Solution Ltd.	206.76	230.08	221.37																																																																							
	4	Larsen & Toubro Infotech Ltd.	4,643.94	4,709.95	5,569.52																																																																							
	5	Infosys Ltd.	44,358.00	47,340.00	55,034.00																																																																							
	6	Nihilent Ltd.	242.77	267.83	251.22																																																																							
	7	Cybage Software Pvt. Ltd.	544.27	622.26	722.25																																																																							
	8	Aspire Systems (India) Pvt Ltd	-	-	230.81																																																																							
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	2	Infosys BPM Ltd.	2,323.00	2,510.00	2,858.00																																																																							
	3	S P I Technologies India Pvt Ltd.	-	252.86	336.22																																																																							
	4	Eclerx Services Ltd.	713.38	818.34	1,105.89																																																																							
4.4	<p>The Id. ITO/ Ld. TPO/ Ld. Panel erred in applying only the lower turnover filter without considering the turnover and size of the Appellant and companies selected as comparables. The Appellant submits that companies having turnover less than 1/10th or more than 10 times the turnover of the Appellant ought to be rejected. The Turnover of the Appellant for different segments is provided below:</p> <table border="1"> <thead> <tr> <th>Year</th> <th>IT</th> <th>ITeS</th> <th>MSS</th> </tr> </thead> <tbody> <tr> <td>FY 2015-16</td> <td>555,025,698</td> <td>393,680,401</td> <td>144,438,306</td> </tr> <tr> <td>FY 2014-15</td> <td>311,664,837</td> <td>160,430,467</td> <td>107,258,934</td> </tr> <tr> <td>FY 2013-14</td> <td>302,561,004</td> <td>-</td> <td>76,108,967</td> </tr> </tbody> </table> <p>Should such tolerance band be applied, the following companies would be rejected:</p> <ul style="list-style-type: none"> IT segment <p>(INR cr)</p> <table border="1"> <thead> <tr> <th>Sl.No</th> <th>Company</th> <th colspan="3">Turnover</th> </tr> <tr> <td></td> <td></td> <th>FY 2013-14</th> <th>FY 2014-15</th> <th>FY 2015-16</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Larsen & Toubro Infotech Ltd.</td> <td>4,643.94</td> <td>4,709.95</td> <td>5,568.5</td> </tr> <tr> <td>2</td> <td>Persistent Systems Ltd.</td> <td>1,184.12</td> <td>1,242.50</td> <td>1,447.14</td> </tr> <tr> <td>3</td> <td>Infosys Ltd.</td> <td>44,358.00</td> <td>47,340.00</td> <td>54,034.00</td> </tr> <tr> <td>4</td> <td>Cybage Software Pvt. Ltd.</td> <td>544.27</td> <td>622.26</td> <td>722.25</td> </tr> <tr> <td>5</td> <td>R S Software(India) Ltd.</td> <td>351.89</td> <td>345.50</td> <td>-</td> </tr> </tbody> </table> <ul style="list-style-type: none"> ITeS segment <p>(INR cr)</p> <table border="1"> <thead> <tr> <th>Sl.No</th> <th>Company</th> <th colspan="2">Turnover</th> </tr> <tr> <td></td> <td></td> <th>FY 2014-15</th> <th>FY 2015-16</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Eclerx Services Ltd.</td> <td>818.34</td> <td>1,105.89</td> </tr> <tr> <td>2</td> <td>Infosys BPM Ltd.</td> <td>2,510.00</td> <td>2,858.00</td> </tr> <tr> <td>3</td> <td>Tech Mahindra Business Services Ltd.</td> <td>731.20</td> <td>703.20</td> </tr> </tbody> </table>					Year	IT	ITeS	MSS	FY 2015-16	555,025,698	393,680,401	144,438,306	FY 2014-15	311,664,837	160,430,467	107,258,934	FY 2013-14	302,561,004	-	76,108,967	Sl.No	Company	Turnover					FY 2013-14	FY 2014-15	FY 2015-16	1	Larsen & Toubro Infotech Ltd.	4,643.94	4,709.95	5,568.5	2	Persistent Systems Ltd.	1,184.12	1,242.50	1,447.14	3	Infosys Ltd.	44,358.00	47,340.00	54,034.00	4	Cybage Software Pvt. Ltd.	544.27	622.26	722.25	5	R S Software(India) Ltd.	351.89	345.50	-	Sl.No	Company	Turnover				FY 2014-15	FY 2015-16	1	Eclerx Services Ltd.	818.34	1,105.89	2	Infosys BPM Ltd.	2,510.00	2,858.00	3	Tech Mahindra Business Services Ltd.	731.20	703.20
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4.6	<p>Without prejudice to any of the other grounds of appeal, the Ld. ITO/ Ld. TPO/ Ld. Panel erred in not considering the total value of related party transactions (income + expenses) for computing the threshold of 25%. The Ld. ITO/ Ld. TPO/ Ld. Panel have considered either only the incomes or only the expenses for such computation, which is an erroneous approach.</p>																																																																																					

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4.9	<p>The Ld. ITO/ Ld. TPO/ Ld. Panel erred in facts and in law in accepting companies having significant onsite operations. The Appellant submits that the following companies ought to be rejected on account of having significant onsite operations:</p> <p>IT segment</p> <table border="1"> <thead> <tr> <th rowspan="2">Sl. No.</th> <th rowspan="2">Name of the company</th> <th colspan="3">Onsite expenditure / revenue</th> </tr> <tr> <th>FY 13-14</th> <th>FY 14-15</th> <th>FY 15-16</th> </tr> </thead> <tbody> <tr> <td>1.</td> <td>R S Software (India) Ltd.</td> <td>57.80%</td> <td>51.85%</td> <td>58.63%</td> </tr> <tr> <td>2.</td> <td>Larsen & Toubro Infotech Ltd.</td> <td>44.03%</td> <td>45.99%</td> <td>47.53%</td> </tr> <tr> <td>3.</td> <td>Nihilent Ltd.</td> <td>37.47%</td> <td>33.27%</td> <td>37.68%</td> </tr> <tr> <td>4.</td> <td>Persistent Systems Ltd.</td> <td>13.41%</td> <td>15.03%</td> <td>18.40%</td> </tr> <tr> <td>5.</td> <td>Aspire Systems (India) Private Ltd.</td> <td>15.27%</td> <td>16.67%</td> <td>19.50%</td> </tr> <tr> <td>6.</td> <td>Infosys Ltd.</td> <td>51.10%</td> <td>50.40%</td> <td>52.70%</td> </tr> <tr> <td>7.</td> <td>Thirdware Solution Ltd.</td> <td>-</td> <td>-</td> <td>16.98%</td> </tr> </tbody> </table> <p>ITeS segment</p>	Sl. No.	Name of the company	Onsite expenditure / revenue			FY 13-14	FY 14-15	FY 15-16	1.	R S Software (India) Ltd.	57.80%	51.85%	58.63%	2.	Larsen & Toubro Infotech Ltd.	44.03%	45.99%	47.53%	3.	Nihilent Ltd.	37.47%	33.27%	37.68%	4.	Persistent Systems Ltd.	13.41%	15.03%	18.40%	5.	Aspire Systems (India) Private Ltd.	15.27%	16.67%	19.50%	6.	Infosys Ltd.	51.10%	50.40%	52.70%	7.	Thirdware Solution Ltd.	-	-	16.98%																	
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Sl. No	Grounds of Appeal				Tax effect (in INR)	
	Sl. No.	Name of the company	Onsite expenditure / revenue			
			FY 13-14	FY 14-15	FY 15-16	
	1.	Eclerx Services Ltd.	16.62%	18.87%	14.68%	
	2.	SPI Technologies India Pvt Ltd	-	13.48%	-	
	3.	Infosys B P M Ltd.	13.41%	15.03%	18.40%	
4.10	The TPO erred in holding that in cases of companies where segmental results are considered for comparability purposes, the service income filter and export revenue filter would be applied to the segmental results.					
5.	Erroneous rejection of comparable companies				NA	
5.1	<p>The Ld. ITO/ Ld. TPO erred in rejecting certain comparable companies despite these companies being functionally similar to the Appellant and satisfying all the filters applied by the Ld. TPO and the Ld. Panel erred in upholding the same:</p> <p>IT Segment</p> <p>a) Akshay Software Technologies Ltd. b) Evoke Technologies Pvt. Ltd. c) Sasken Communication Technologies Ltd. d) Intense Technologies Ltd.</p> <p>ITeS Segment</p> <p>a) Informed Technologies India Ltd. b) Allsec Technologies Ltd. c) Microgenetic Systems Ltd. d) Jindal Intellicom Ltd. e) Cosmic Global Ltd. f) E-Zest Solutions Ltd.</p> <p>MSS Segment</p> <p>a) Honeycomb Relationship Management Services Pvt Ltd. b) Hindustan Field Services Pvt Ltd. c) Spectrum Business Solutions Ltd. d) DGM India Internet Marketing Ltd. e) Keastone Integrated Mktg Services Pvt. Ltd. (Segmental) f) Quadrant Communications Ltd.</p>					
6.	Erroneous acceptance of companies				NA	
6.1	<p>The Ld. ITO/ Ld. TPO erred in including the following companies as comparables, despite these companies being functionally dissimilar to the Appellant, the Ld. Panel erred in upholding the same:</p> <ul style="list-style-type: none"> IT segment 					

Sl. No	Grounds of Appeal	Tax effect (in INR)
	a) R S Software (India) Ltd b) Inteq Software Pvt. Ltd. c) Larsen & Toubro infotech Ltd d) Nihilent Technologies Ltd e) Persistent Systems Ltd f) Infobeans Technologies Ltd g) Aspire Systems (India) Pvt. Ltd. h) Infosys Ltd. i) Thirdware Solution Ltd j) Cybage Software Pvt. Ltd. • ITeS segment a) Eclerx Services Ltd. b) SPI Technologies India Pvt Ltd c) Infosys BPM Ltd. d) Tech Mahindra Business Services Ltd. • MSS segment a) Majestic Research Services & Solutions Ltd b) Ugam Solutions Private Limited c) Killick Agencies & Mktg Ltd. d) Scarecrow Communications Ltd.	
6.2	The Ld. ITO/ Ld. TPO/ Ld. Panel erred in considering data obtained under Section 133(6) of the Act for the following companies, without giving the Appellant the data or opportunity to rebut the same: IT Segment a) Infobeans Technologies Ltd. b) Persistent Systems Ltd. c) Thirdware Solution Ltd. d) Cybage Software Pvt. Ltd. ITeS segment a) Eclerx Services Ltd. b) SPI Technologies India Pvt Ltd c) Infosys BPM Ltd.	
7.	Non-allowance of appropriate adjustment to the comparable companies by the Ld. Panel and Ld. ITO/ Ld. TPO	NA
7.1	The Ld. ITO/ Ld. TPO/ Ld. Panel erred in law and on facts in not allowing appropriate adjustments under Rule 10B to account for, <i>inter alia</i> , differences in (i) accounting practices,	

Sl. No	Grounds of Appeal	Tax effect (in INR)
	(ii) marketing expenditure adjustment, (iii) research and development expenditure adjustment, (iv) working capital, and (iv) risk profile between the Appellant and the comparable companies, despite the Appellant providing the computations before the Ld. TPO and Ld. Panel.	
8.	That Ld. Panel erred in observing that decisions of this Hon'ble Tribunal cannot be relied upon while adjudicating the comparability of the companies and that companies cannot be rejected for non-availability of segment details.	
9.	Computation of notional interest on delayed receivables	NA
9.1	The Ld. ITO/ Ld. TPO/ Ld. Panel erred in law and on facts by treating the delayed receivables as unsecured loan advanced by the Appellant to its AE and treating the delayed receivables as an international transaction and computing notional interest on the same.	
9.2	Without prejudice, in any event the delayed receivables cannot be treated as a separate international transaction and if at all, ought to be aggregated with the principal transactions.	
9.3	Without prejudice to the above, the Ld. ITO/ Ld. TPO have not taken in cognizance the fact that most of the invoices were realised in advance and there were only minor delays in few invoices. Further, the Ld. ITO/ Ld. TPO did not appreciate the fact that weighted average realisation period during the year was within the agreed credit period as per the intercompany agreement.	
10.	Incorrect TP adjustment amount included in Final Order dated 30 April 2021	NA
	Without prejudice and notwithstanding the rectification application filed before the Ld. ITO dated 6 May 2021, the Ld. ITO has erroneously considered the TP adjustment before DRP directions of INR 158,357,822 in the final order instead of the revised adjustment of INR 132,274,310 after Ld. Panel's directions as per the order giving effect to directions as passed by the Ld. TPO on 19 April 2021.	
11.	Consequential levy of interest under Section 234B of the Act	22,015,083
11.1	The Ld. ITO has erred in levying interest under Section 234B, amounting to INR 22,015,083 which is consequential in nature.	
12.	Initiation of penalty proceedings	NA
12.1	The Appellant submits that based on the facts and circumstances of the case, there was no basis for the Ld. ITO to initiate proceedings under section 271(1)(c) of the Act.	
Total tax effect		74,372,930

Each of the aforesaid grounds and sub-grounds are without prejudice to each other and are independent of each other. The Appellant humbly requests that when giving effect to the above grounds of appeal, the benefit of proviso to section 92C(2) of the Act available to the Appellant (variation of 3 percent from the arithmetic mean) are also granted, if applicable.

2. Brief facts of the case are as under:

2.1 Assessee is a company and is a wholly owned subsidiary of FireEye International LLC engaged in the business of providing services in the nature of SWD, ITeS and MSS to its AEs. During the year under consideration, the Ld.AO observed that assessee

had international transaction exceeding Rs.15 Crores and therefore the case was referred to the transfer pricing officer for determining the arms length price of the transaction.

2.2 On receipt of the reference under 92CA, the Ld.TPO called for the economic analysis of the following international transaction in form 3CEB.

Particulars	Amount in Rs.
Provision of software development services	Rs. 55,50,25,698/-
Provision of sales and marketing services	Rs. 14,44,38,306/-
Provision of IT enabled services	Rs. 39,36,80,401/-
Purchase of fixed assets	Rs. 4,64,73,040/-
Issue of shares	Rs. 16,51,22,464/-
Recovery of expenses (in the nature of ESOP taxes of employees)	Rs. 72,66,034/-
Reimbursement of expenses (in the nature of computer hardware maintenance and travel cost)	Rs. 2,22,60,171/-
Remittance of amount collected from employees towards Employee Stock Purchase Plan	Rs. 2,51,03,011/-

2.3 The Ld.TPO observed that assessee computed its segmental margins as under:

Particular	ITeS	SWD	MSS	Total
Revenue from operations	39,36,80,401	55,50,25,698	14,44,38,306	1,09,31,44,405
Employee benefits and other expenses	13,32,25,635	29,95,60,203	8,71,14,141	51,98,99,979
Depreciation and amortization	4,83,52,035	5,80,22,442	77,88,829	11,41,63,306
Other expenses	16,07,53,112	11,67,98,293	3,52,21,631	31,27,73,036
Forex loss*	8721294	12295614	3199775	24216683
Total expenses	35,10,52,076	48,66,76,552	13,33,24,376	97,10,53,004
Net profit	4,26,28,325	6,83,49,146	1,11,13,930	12,20,91,401
NCP (%)	12%	14%	8%	

* The Ld.TPO treated Forex gain / loss as operating. All provisions expenses or written back provisions were also treated as non-operating.

2.4 The Ld.TPO noted that assessee used TNMM as the most appropriate method by using OP/OC as the PLI for computing margins for all the 3 segments for computing the above margins. The Ld.TPO noted that the assessee used following comparables under all the 3 segments in order to hold the transaction to be at arms length.

SWD

Sl. No.	Company Name	Weighted Average
1.	Akshay Software Technologies Ltd.	0.04%
2.	Evoke Technologies Pvt. Ltd.	5.47%
3.	Sasken Communication Technologies Ltd.	6.35%
4.	CG-VAK Software & Exports Ltd.	10.30%
5.	Intense Technologies Ltd.	10.47%
6.	Mindtree Ltd.	19.89%
7.	R S Software (India) Ltd.	21.36%
8.	R Systems International Ltd.	22.40%
35th Percentile		6.35%
Median		10.38%
65th Percentile		19.89%

ITES

Sl. No.	Name of the Company	Weighted Average
1.	Informed Technologies India Ltd.	0.86%
2.	Allsec Technologies Ltd.	3.72%
3.	Jindal Intellicom Ltd.	9.08%
4.	Microgenetics Systems Ltd.	10.03%
5.	Cosmic Global Ltd.	13.37%
6.	R Systems International Ltd.	16.18%
35th Percentile		9.08%
Median		9.55%
65th Percentile		10.03%

Sales and marketing services segment:

Sl. No.	Name of the Company	Weighted Average
1.	Honeycomb Relationship Management Services Pvt. Ltd.	3.61%
2.	Hindustan Field Services Pvt. Ltd.	4.85%
3.	Spectrum Business Solutions Limited	5.87%
4.	ICRA Management Consulting Services Ltd.	9.12%
5.	DGM India Internet Marketing Ltd.	14.10%
6.	Kestone Integrated Marketing Services Pvt.	15.10%

	Ltd.	
7.	Majestic Research Services & Solutions Ltd.	25.85%
35th Percentile		5.87%
Median		9.12%
65th Percentile		14.10%

2.5 The Ld.TPO was not satisfied with the bench marking of the transaction. He adopted following filters for all the 3 segments and shortlisted the final set of comparables as under:

Filters applied by the Ld.TPO for all the 3 segments are common are as under:

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

And the following are the comparables selected by the Ld.TPO for the 3 segments.

SWD

Sl. No.	Name of the Company	Weighted Average
1.	Kals Information Systems Pvt. Ltd.	8.60%
2.	Rheal Software Pvt. Ltd.	14.50%
3.	CG-VAK Software & Exports Ltd.	18.50%
4.	R S Software (India) Ltd.	20.87%
5.	Larsen & Toubro Infotech Ltd.	24.83%
6.	Nihilent Technologies Ltd.	26.36%
7.	Inteq Software Pvt. Ltd.	28.20%

8.	Persistent Systems Ltd.	30.89%
9.	Infobeans Technologies Ltd.	32.42%
10.	Thirdware Solution Ltd.	36.90%
11.	Infosys Ltd.	38.61%
12.	Aspire Systems (India) Pvt. Ltd.	39.28%
13.	Cybage Software Pvt. Ltd.	66.45%
35th Percentile		24.83%
Median		28.20%
65th Percentile		32.42%

ITES

Sl. No.	Name of the Company	Weighted Average
1.	Tech Mahindra Business Services Ltd.	20.44%
2.	Infosys BPM Ltd.	26.44%
3.	SPI Technologies India Pvt. Ltd.	37.77%
4.	Eclerx Services Ltd.	56.44%
Mean		35.27%

Sales and marketing services segment:

Sl. No.	Name of the Company	Weighted Average
1.	Esha Media Research Ltd.	-0.10%
2.	Goldmine Advertising Ltd.	4.93%
3.	Pressman Advertising Ltd.	11.52%
4.	Ugam Solutions Pvt. Ltd.	14.43%
5.	Killick Agencies & Marketing Ltd.	18.24%
6.	Majestic Research Services & Solutions Ltd.	20.94%
7.	Scarecrow Communications Ltd.	22.52%
35th percentile		11.52%
Median		14.43%
65th percentile		18.24%

2.6 The Ld.TPO thus proposed an adjustment in respect of the international transaction as under:

S.No	Description	Adjustment u/s 92CA(In Rs.)
1	Software development segment	Rs 6,88,93,642
2	Information Technology Enabled Services Segment	Rs 8,11,87,742
3	Marketing and Support Services Segment	Rs 81,24,777

Proposed adjustment	Rs 15,82,06,161
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2.7 The Ld.TPO further observed that, the assessee had outstanding trade receivables due from the associated enterprises. He thus considered to be an independent international transaction and imputed notional interest based on 6 month LIBOR + 450 basis points and bench marked the interest transaction at the rate of 4.485%. The Ld.TPO computed the interest on outstanding receivables as a proposed adjustment at Rs.1,51,661/-.

2.8 On receipt of the transfer pricing order, the Ld.AO passed the draft assessment order by making further disallowance in respect of the expenditure claimed as rent amounting to Rs.13,72,413/-.

2.9 On receipt of the draft assessment order by the assessee, objections were raised before the DRP. The DRP on perusal of the submissions of the assessee, accepted its contention in respect of some comparables sought for exclusion / inclusion under the 3 segments which are as under:

2.10 The comparables that remained after giving effect to the directions of the DRP are as under:

SWD

Sl. No.	Name of the Company	Weighted Average
1.	Kals Information Systems Pvt. Ltd.	8.60%
2.	Rheal Software Pvt. Ltd.	14.50%
3.	R S Software (India) Ltd.	20.87%
4.	Larsen & Toubro Infotech Ltd.	24.83%
5.	Nihilent Technologies Ltd.	26.36%
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35th Percentile		24.83%
Median		28.20%
65th Percentile		32.42%

ITES

Sl.No.	Name of the Company
1.	Microland Ltd.
2.	Tech Mahindra Business Services Ltd.
3.	Infosys BPM Ltd.
4.	SPI Technologies India Pvt. Ltd.
5.	Eclerx Services Ltd.

Marketing Support service segment

Sl.No.	Name of the Company
1.	Esha Media Research Ltd.
2.	Goldmine Advertising Ltd.
3.	ICRA Management Consulting Services Ltd.
4.	Pressman Advertising Ltd.
5.	Ugam Solutions Pvt. Ltd.
6.	Killick Agencies & Marketing Ltd.
7.	Majestic Research Services & Solutions Ltd.
8.	Scarecrow Communications Ltd.

2.11 All other objections raised by assessee were dismissed by the DRP. The Ld.AO on receipt of the DRP directions passed the impugned order making addition in the hands of the assessee at Rs.15,97,30,235/- (Rs.15,83,57,822/- + Rs.13,72,413/-).

2.12 Aggrieved by the order of Ld.AO, assessee is in appeal before this *Tribunal*.

3. The Ld.Counsel submitted that **Ground nos. 1-4.2** are general in nature and do not require separate adjudication.

4. The Ld.AR has submitted that major issue raised in the present appeal is in respect of inclusion / exclusion of comparables for failing turnover filter / functionality.

5. Before we undertake the comparability analysis, it is *sine qua non* to understand the functions performed, assets owned and risks assumed by the assessee under all these segments.

Functions performed:

SWD

FireEye India is engaged in IT services (in the nature of software development) to FireEye US. FireEye India provides these services in accordance with the specifications provided by its FireEye US.

FireEye India is engaged in providing IT services to FireEye US for existing as well as new products. Broadly these services provided by FireEye India includes software developmental activities for modification, enhancement, or improvement to the existing software technology and creation or development of any new software technology, which involves a number of stages that broadly include software requirement analysis, low level designing, coding, testing and maintenance.

The head of Products development department is located in US. FireEye India executes the services based on the detailed inputs (including user requirements, technical and engineering specifications etc.) and under the oversight of the product development team at FireEye US. The principal functions relating to the new products are performed by FireEye US.

Software engineering is a complex process involving a number of stages ranging from system and requirement analysis to implementation. The development process broadly includes system and requirement analysis, high-level designing, low-level designing, coding, testing and implementation. Requirement analysis coupled with the high level design ("HLD") gives the broad definition of the software to be designed. The analysis usually includes broad functionality of the software program to be designed, broad specification of the software program and feasibility of the design.

The system and requirement analysis, and high-level designing is done by the FireEye US and the low-level designing, coding, testing and implementation support is done by both FireEye US and FireEye India. The following activities generally form part of the software development life-cycle: Requirement analysis or feasibility study encompasses all of the tasks that go into the instigation, scoping and definition of a new or altered system. This is an important part of the system design process whereby requirements engineers and business analysts, along with systems engineers or software developers, identify the needs or requirements. Once the requirements have been identified, the system designers proceed to design a solution. FireEye US solely performs the system and requirement analysis function.

Softwaredesign is a multi-step process that focuses on package architecture, the database design, the data structure design etc. and creates a software development model. The design process translates requirements into a representation of the software that can be assessed for quality before code

generation begins. The high level design function is undertaken by FireEye US where as low level design is performed by both FireEye US and FireEye India.

Development of Software/Coding involves translating the design into a machine readable form. In this phase the designs are translated into code. FireEye US provides broad level specification required for the development of software. Based on the specification provided by FireEye US, FireEye India engages in the activity of development/ coding of the software. Typically FireEye India team works on project basis and is engaged in the development of design in accordance with the specification provided by FireEye US.

Verification or software testing is the process used to help identify the correctness, completeness, security and quality of developed computer software. Various testing methodologies and tools are/ or be used in this process. This step helps to uncover errors and ensure that defined input will produce actual results that agree with required results. FireEye India is engaged in preliminary testing of the software before releasing the same to FireEye US. Once the preliminary level testing is done by FireEye India, the final testing before the launch of the software is carried out by FireEye US. FireEye India's testing activities follow processes and specifications defined by FireEye US.

Acceptance, installation, integration and deployment: FireEye US undertakes the integration of the software modules developed by FireEye India.

Software Maintenance for the developer consists of fixing bugs that are found during customer operation and adding enhancements to product functionality to meet evolving customer requirements. Software maintenance is the process of enhancing and optimizing deployed software, as well as remedying defects. The software maintenance phase involves changes to the software in order to correct defects and deficiencies found during field usage as well as the addition of new functionality to improve the usability and applicability of the software. Software will undergo some modifications after it is delivered to the customer. Both FireEye US and FireEye India carry out software maintenance work on a continuous basis by rectifying defects, optimizing and enhancing the deployed software.

Functions performed by FireEye India and its AEs

Description of Functions	FireEye India	FireEye US
Software development and related		
Requirement analysis	X	✓
High level design	X	✓
Low level design	✓	✓
Software development/Coding	✓	✓
Testing & Quality assurance	✓	✓
Maintenance	✓	✓

Sales and marketing services

FireEye India provides MSS to FireEye US and FireEye Ireland. Pursuant to the intercompany agreement, FireEye India has been appointed as non-exclusive marketing & support representative to market and promote the products within the specified territory.

FireEye India promotes enquiries but does not accept orders on behalf of AEs. While providing pricing information, it disseminates only those prices as specified in the most current product price list for the territory as provided by AEs. On behalf of AEs, FireEye India solicits orders from the customers in the territory. All orders and modifications to orders were subjected to written acceptance by AEs.

The MSS provided by FireEye India to AEs primarily comprise of the following activities -

- Driving the marketing efforts to market and promote the products within the territory and generate leads that are passed on to distributors, resellers, and AEs.
- Organizing programmes for advertising and promotion of the products regularly within the territory. This includes participating in trade shows and exhibitions, performing sales presentations, prepare localized promotional and marketing materials etc.
- Provides periodic written reports regarding promotion of products to AEs with respect to sales forecast for the products, market conditions, customers' attitude towards the products, competitors' products, governmental regulations and other related market information.
- Creates awareness about the warranties and other representations made by AEs as per the standard terms and conditions of sale among the customers within the territory
- Provides customers within the territory with pre-sale support, limited onsite installation support, and limited post-sale customer support services with respect to the products.

Once a customer has been identified, the customer places an order directly with AEs which will be responsible for the production and delivery of the products directly to the customer.

ITES

FireEye India provides Customer Support ('CS') and Infrastructure Support Services ('ISS') to its AEs.

Customer Support Services

FireEye India provides CSS which includes the following activities:

- Attending the calls of the customers and providing solutions by the support team from India.
- The support team is responsible for providing Level 1 and Level 2 support (both voice and non-voice based support) services to the customers of FireEye US. Any bug fix required to resolve the problem is always referred to the R&D team located in US.

Infrastructure Support Services

FireEye India provide ISS which includes the following:

Network Management & Support Services

- Installation & maintenance of passive and active network equipment.
- Network monitoring & incident management.
- Troubleshooting.
- SLA based operations.

Users IT Support services

- End user support, both technical and functional (on local applications use).
- Installation, configuration, monitoring & maintenance of end-user computing equipment; and
- IT asset management services.

FireEye India provides services to the customers 24/7 for any issues raised by the customers. The ISS team will provide both voice and non-voice based support. The services provided by FireEye India could be broadly classified in the nature of IT Enabled Services.

FireEye AEs will supervise and guide FireEye India in relation to the activities performed in rendering the services. In addition, AEs will create market visibility for the services provided by FireEye India through various marketing techniques. It will carry out research and develops strategies and identify marketing opportunities.

Some of the key responsibilities of AEs include:

- Targeting new customers,
- Services - Defining the kind of services offered; and
- Promotion (Communication).

AEs will carry strategic functions which include but are not limited to, assessments of marketing opportunities and target markets, intelligence gathering on customers and competitors, generating leads for possible sales and follow-up sales activity.

Risks

Market Risk

Market risk arises when a firm faces adverse sales conditions resulting from either increased competition in the marketplace, declines in demand within the market, or the inability to market or position products for targeted customers.

The primary market risk lies with FireEye US as FireEye India is solely responsible for provision of IT, ITeS and MSS services to its AEs. FireEye India does not bear any market risk as it is compensated at total cost plus mark-up, irrespective of how successful and profitable the FireEye US is at any given point in time. Hence, FireEye India is not exposed to market risk.

Contract Risk

Contract risks arise when a company enters into a contract and thus has to bear the liabilities associated with such contracts.

FireEye US is responsible for the contract risk since it contracts with the end customers in its own name. As FireEye US deals with and caters to the needs of third party clients, it bears the contract risk with respect to the contracts entered into with third parties.

In respect of the services rendered by FireEye India, FireEye India is merely acting as a subcontractor of FireEye US. Accordingly, it does not bear any

contract risk vis-à-vis FireEye US in relation to the performance of the project.

Price Risk

Price risk is the risk that future income streams are sensitive to market prices.

Since FireEye US negotiate the price with their customers, they bear entire price risk. FireEye India in its role as a captive service provider does neither directly or indirectly bear any pricing risk as it is not directly engaged with FireEye US customers in commercial transactions and is compensated on a cost plus mark-up basis.

Credit Risk

A firm faces customer credit risk when it supplies products to a customer and the customer

fails to make payment or the payment is deferred.

FireEye US assumes full credit risk in respect of contracts entered into with its third parties customers. Since FireEye India provides services only to its AEs for which it gets remunerated directly by the latter, it is insulated from any credit risk.

Foreign exchange fluctuation Risk

This risk relates to the potential impact on profits that may arise because of changes in foreign exchange rates.

FireEye India invoices FireEye US in mutually agreed currency and is thus to some extent exposed to foreign currency fluctuation risk in respect of its international transactions with the latter. Accordingly, the exchange fluctuation risk is borne by FireEye India.

Service Liability Risk

Service liability risk arises when the services rendered fails to perform at accepted or advertised standards. Malfunctions, errors, or defects in the services rendered could cause the appliances to run erratically and may even cause personal injury to users. If any of these events occurs, AEs could be subject to significant liability for personal injury.

FireEye India provides IT services, ITeS and MSS to FireEye US based on its service agreement. The services rendered by FireEye India are based on the specifications received from FireEye US. FireEye India does not assume any risk with respect to the ultimate success or failure of the activities.

In the event that FireEye US determines that the services provided by FireEye India do not meet the specifications prescribed and rework is required, the entire costs related to such rework are marked up by FireEye India and invoiced to FireEye US.

Human Capital Risk:

This risk is specific to the industries which require skilled manpower. Increase in the human capital turnover would result in excessive cost on account of training and retention to the companies and also loss of business in certain cases.

FireEye India and the AEs both bear the normal risks related to human capital.

The risks undertaken by FireEye India with respect to rendering services to its AEs has been summarized below:

Summary of Risk Analysis

Risk	FireEye India	AEs
Market Risk	Limited	Yes
Contract Risk	No	Yes
Price Risk	No	Yes
Credit Risk	No	Yes
Foreign Exchange Fluctuation	Yes	No
Service Liability Risk	No	Yes
Capacity Utilisation Risk	No	Yes
Human Capital Risk	Yes	Yes

Assets

Any business requires assets (tangible or intangible), without which, it cannot carry out its activities. Intangibles play a significant role in the functioning of a business and are accordingly more important. An understanding of the assets employed and owned by FireEye India provides an insight into the resources deployed by them and their contribution to the business processes/economic activities.

The tangible assets employed in FireEye India are considered essential for running the

business. FireEye India does not own any non-routine valuable intangible assets.

Tangible & Intangible assets owned by FireEye India

Particulars	Net Block as on 31 March 2016
Computer equipments	141,527,905
Computer equipments — appliances	34,399,073
Furniture and fixtures	5,894,012
Leasehold improvements	57,607,801
Office equipments	44,773,000
Computer software	953,500
Total	285,155,291

Summary and Economic Characterization

Based on the functional and risk analysis relating to IT services, ITeS and MSS rendered by FireEye India to its AEs, it can be characterized as captive service provider performing routine functions and bearing limited risk with respect to its international transactions.

On the other hand, AEs performs critical functions of product conceptualization and design, identification of customers and own significant non-routine intangibles. Accordingly, AEs can be characterized as an entrepreneur being the contracting entity and bearing the significant risks, viz. marketing, contractual risks and client ownership.

6. The above characterisation of assessee under all 3 segments are not disputed by the revenue authorities and assessee has been accepted to be a captive service provider performing routine functions and bearing limited risk with respect to its international transactions.

7. Based on the above, we shall deal with the comparables sought for inclusion / exclusion by the assessee under all the 3 segments.

7.1 In **Ground no. 4.3**, assessee is seeking exclusion of following comparables under the SWD segment.

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

7.2 Following comparables are also sought for exclusion under ITES segment.

- a. Tech Mahindra Business Services Ltd.
- b. Infosys BPM Ltd.
- c. SPI Technologies India Pvt. Ltd.
- d. Eclerx Services Ltd.
- e. Microland Ltd. (which was directed to be included by the DRP)

7.3 It is submitted that the turnover of the assessee from rendering SWD services is Rs. 55,50,28,698/-. This being so, the Ld.TPO ought to have applied the upper turnover filter, to reject companies generating turnover far in excess of the assessee, and thereby not being comparable.

7.4 It is submitted that, the Ld.TPO erred in not applying a cap on upper limit on the turnover/service revenue while selecting the companies comparable to the assessee. It was submitted that application of turnover filter is a relevant criterion in choosing comparable companies. It is submitted that, the difference in the scale of operations have a direct impact on the profitability. Further, it is submitted that medium/large size organisation operating in a particular industry also enjoys benefits of certain other market drivers and cost arbitrages.

7.5 The Ld.Counsel relied on following decisions in support of the above submissions.

- *Autodesk India (P) Ltd. V. DCIT* (reported in (2018) 96 taxmann.com 263 (Bang Trib)).
- *Razorpay Software Pvt. Ltd. v. ACIT* (order dated 27.12.2021 passed in IT(TP)A No. 190/Bang/2021)

7.6 The Ld.AR thus submitted that, the above comparables are to be excluded for having turnover more than 200 crores and hence not a fit comparable with that of assessee.

On the contrary, the Ld.DR relied on the orders passed by authorities below. He also relied on the decision of *Coordinate Bench of this Tribunal* in case of *BORQS Software Solutions Pvt. Ltd. v. ACIT* in *IT(TP)A No. 310/Bang/2021* by order dated 25.10.2021.

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

7.7 Be that as it may we note that *Coordinate Bench of this Tribunal* in case of *M/s. SanDisk India Device Design Centre Pvt.*

Ltd. vs. JCIT (supra) observed and held following comparables to be excluded on functional dissimilarities:

“17.3 At the outset, the Ld.AR submitted that the above comparables have been considered by Coordinate Bench of this Tribunal, Hon’ble Hyderabad Tribunal as well as Hon’ble Mumbai Tribunal in other cases having similar facts it is also been submitted by Ld.AR that these comparables do not satisfy the turnover filter that has been applied by the Ld.TPO and at the outset deserves to be eliminated. The Ld.AR referring to the annual reports, placed in the paper books filed before this Tribunal reveals that turnover is more than Rs.200 crores and does not match even 10 times the turnover of assessee. The Ld.AR thus submitted that applying either the turnover filter of Rs. 1 crore to Rs. 200 crores or 10 times the assessee’s turnover to 1/10th , these comparables deserves to be excluded.

17.4 It is also submitted that these comparables are not functionally similar with that of the assessee as has been observed by Coordinate Bench of this Tribunal in following cases:

1. Decision of Hon’ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT in ITA No. 1379/M/2021 by order dated 25.02.2022 for A.Y. 2016-17.

2. Decision of Hon’ble Hyderabad Tribunal in case of Infor (India) Pvt. Ltd. vs. DCIT in ITA-TP.No. 198/Hyd/2021 by order dated 06.10.2021 for A.Y. 2016-17.

3. Decision of Coordinate Bench of this Tribunal in case of OLF (India) Software Pvt. Ltd. vs. ACIT in IT(TP)A No. 182/Bang/2021 by order dated 28.09.2021 for A.Y. 2016-17.

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

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

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

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

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

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

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

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

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

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

We also notice that in AY 2008-09, the co-ordinate bench has excluded M/s Thirdware Solutions Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd. (supra), where in it was held that

M/s Thirdware solutions Ltd is engaged in product development and earns revenue from sale of licenses and subscription. Further, the segmental details were not available.

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

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

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

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

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

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

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

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

“Nihilent Analytics Ltd. (Nihilent)

44. The assessee sought exclusion of Nihilent on ground of its functional dissimilarity vis-à-vis assessee. We have examined the website information of Nihilent, made available by the assessee at page No.405 of the paper book, wherein it is mentioned that it is engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data science, cloud services etc.

45. Perusal of the disclosure of enterprise’s reportable segment explanatory available at page No.A406 of the paper book shows that Nihilent is engaged in software development and consultancy, engineering services, web development and hosting and subsequently diversified itself into the domain of business analytics and business process outsourcing and financials of Nihilent available at page No.A304, A405-A406 of the paper book shows that Nihilent has only one business segment and in the absence of segmental financials, as it is into diversified business, this company cannot be a valid comparable vis-à-vis assessee, who is a low risk entity working on cost + markup model. Hence, Nihilent is ordered to be excluded as a comparable.

Nihilent Ltd.

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

provider working on cost + markup model, hence ordered to be excluded.”

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

We thus direct the Ld.TPO/AO to exclude Persistent Systems Ltd., Thirdware Solution Ltd., Larsen & Toubro Infotech Ltd., Infosys Ltd., Nihilent Ltd. and Aspire Systems (India) Pvt Ltd. for not satisfying functional similarity under SWD segment.

7.8 Cybage Software Ltd.

The Ld.AR submitted that this company is functionally different engaged in the diversifying business activities and having super profits which cannot be compared to the assessee's case.

On the other hand, Ld.DR relied on the order of authorities below.

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

Admittedly, there is no discussion about any other other revenue stream in its annual and financial statements. Further, in the various notes of the annual report, it is mentioned that the company has its entire earnings from software development services. Under Segment Reporting, in the annual report, it is mentioned that 'the company operates in a single business segment namely software development services. There is no

reference in the annual report to indicate that this company is engaged in rendering any other services or any other activity.

It was contended that the company is engaged in functionally dissimilar activities and ITeS activities. DRP was of the view that high profitability as such cannot be criteria for exclusion of companies, when it is found to be functionally comparable in terms of rule 10B. The Hon'ble ITAT Spl.Branch Mumbai in the case of *Maersk Global Centres (India) (P.) Ltd. v. Asstt. CIT* reported in [\(2014\) 43 taxmann.com 100](#) held that comparables with high profit margins cannot be discarded *per se* and it has to be examined whether the profit margin was on account of normal business conditions or not. Such a view has been taken by coordinate bench of this *Tribunal* in the case of *24/7 Customer.com (P.) Ltd. vs DCIT* reported in [\(2012\) 28 taxmann.com 258](#) holding that high profit companies need not be excluded, as the Indian TP regulations adopt the Arithmetic mean, for determining the ALP.

We have considered the submissions advanced by both sides in light of records placed before us. The main contention of the Ld.AR is that this assessee is having super profit in immediate two financial years and also having huge turnover is more than 200 crores in the assessment year under consideration. In our opinion, these facts to be examined by the Ld.AO/TPO. Accordingly, the issue remitted to the Ld.AO/TPO. If the functionality of the Cybage Software Pvt. Ltd. is not similar to the assessee and/or if the turnover is more than Rs.200 crores for the assessment year under consideration, it deserves to be excluded on any one of the above reasons.

Accordingly this comparable is remitted back to the file of AO/TPO for fresh consideration.

8. In respect of the comparables sought for exclusion under ITES segment, we note that *Coordinate Bench of this Tribunal* in case of *Mindteck India Limited* in *IT(TP) No 252/Bang/2021* for AY 2016-2017 by order dated 27/06/2022, wherein the companies sought for exclusion by present assessee were excluded in ITeS segment for having turnover of more than 200 crores. It is also submitted that these comparables are also functionally not similar to the assessee due to various reasons such as diversified business, segmentation unavailability, presence of extraordinary events, etc. The Ld.AR submitted that similar view has been taken in another decision of this coordinate bench, in the case of *Swiss Re Global Business Solutions India (P.) Ltd. vs. ACIT* reported in (2022) 137 taxmann.com 417 for assessment year 2016-17, the comparables *Infosys BPO Ltd. (in para 20)*, and *Eclerx Services Limited. (in para 29)* were excluded on the basis of failing in functionality also.

Accordingly the comparables i.e. Tech Mahindra Business Services Ltd., Infosys BPM Ltd., SPI Technologies India Pvt. Ltd. and Eclerx Services Ltd. to exclude from the final list for failing the turnover filter under ITES segment.

9. Ground no. 6.1 – assessee is seeking exclusion of following comparables on functional dissimilarity under SWD and ITES segment.

For SWD segment;

- 1) R S Software (India) Ltd.
- 2) Infobeans Technologies Ltd.

R S Software (India) Ltd.

In this regard, it is submitted that the company, during the financial years 2013-14 and 2014-15 had a turnover of Rs. 351.88 crores and 345.51 crores, and profit margin of 24.14% and 32.75%, respectively. However, during the financial year 2015-16, the company realised a turnover of Rs. 171.41 crores, leading to loss of -2.09%. It is submitted that there is an apparent wide fluctuation in the margin of the company. The relevant details as computed by the TPO is extracted hereunder:

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

9.1 The reason for decline in margin is attributable to the strategic shift made by the company as it is making substantial investments in

- a) developing tools and platforms and
- b) sales and marketing to enhance its customer base.

Further, there is a significant drop in revenue (51 percent) vis-à-vis the previous year, which leads to the presumption that there exists a peculiar economic circumstance which is bound to have an impact on the margin of the company.

9.2 It is also submitted that the turnover of this comparable for F.Y. 2013-14 and 2014-15 is in excess of Rs. 200 crores and therefore the margins of the said year needs to be excluded for computing the average margin for comparability analysis.

9.3 On the contrary, the Ld.DR relied on the decision of *Coordinate Bench of this Tribunal* in case of *Barracuda Networks*

India (P.) Ltd. vs. DCIT reported in [2021] 131 taxmann.com 337 wherein this comparable has been retained in the final list.

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

9.4 We note that this comparable was retained in the decision of *Barracuda Networks India (P.) Ltd. vs. DCIT (supra)* by Coordinate Bench for satisfying the turnover filter however on functionality this comparable was not analysed. The figures reproduced hereinabove in respect of the revenue generated by this comparable in the proceedings 3 years reveals that this comparable has exceeded the turnover filter of 200 crores during FY 2013-14 and 2014-15 and the margin of this comparable in FY 2015-16 is (-)2.09%. There is a wide fluctuation in the profits in the immediately preceding year and the previous years thereby this comparable margin cannot be relied on. This *Tribunal* however observed as under:

“15. As far as company listed at Sl.No.(h) of Grd.No.4 and Grd.No.5 i.e., R.S.Software (India) Ltd., is concerned, the turnover of this company in the current year is less than Rs. 200 Crores but in the earlier two years its turnover was more than Rs. 200 crores and was liable to be excluded in those earlier two years. The question raised in the aforesaid grounds is as to:

whether this company should also be excluded on the application of turnover filter by reason of its turnover in the earlier two years being more than Rs. 200 crores in the light of Rule 10CA of the rules which were applicable from AY 2014-15 onwards

or

whether in computing the weighted average profit margin of this company, the earlier two years profit margins have to be ignored because they fail the test of comparability in those two earlier years by reason of the application of the Rs. 200 Crore turnover filter.

16. To answer the above question, we need to look at the amendment to the rules that allow for introduction of a "range concept" for determination of ALP and "use of multiple year data" for undertaking comparability analysis in transfer pricing cases. The provisions of the Income-tax Act were amended through the Finance (No.2) Act, 2014 to

facilitate alignment of Indian transfer regime with international best practices. The manner of computation of ALP is laid down under the Income-tax Rules. The Government has notified the amended Rules for determining ALP vide S.O. No. 2860 (E) dated 19/10/2015. The amended regime will be applicable for computation of ALP of international transactions and specified domestic transactions undertaken on or after 1/04/2014 i.e. on and after PY 2014-15. The amended rules allow for introduction of a "range concept" for determination of ALP and "use of multiple year data" for undertaking comparability analysis in transfer pricing cases. The use of range concept being a statistical tool enhances the reliability of analysis undertaken for computation of ALP. The range concept will be applicable in certain cases for determining the price and will begin with the 35th percentile and end with the 65th percentile of the comparable prices. Transaction price shown by the taxpayers falling within the range will be accepted and no adjustment will be made. The use of multiple year data allows for yearly variations to be averaged out and would therefore add value to transfer pricing analysis. The Amended Income-tax Rules, 1962 ('Rules') via Notification 83 of 2015 which is the 16th amendment to the originally drafted Indian Tax Rules, 1962, are applicable for transactions undertaken on or after 1 April 2014 (i.e. from FY 2014-15 and onwards). These amended provisions are applicable only when the determination of 'ALP' is done under the MAM being resale price method ('RPM'), cost plus method ('CPM') or transactional net margin method ('TNMM'). The relevant provisions of Rule 10CA of the Rules, in so far as it relates to choice of comparable companies, read as follows:

Computation of arm's length price in certain cases.

10CA. (1) Where in respect of an international transaction or a specified domestic transaction, the application of the most appropriate method referred to in sub-section (1) of section 92C results in determination of more than one price, then the arm's length price in respect of such international transaction or specified domestic transaction shall be computed in accordance with the provisions of this rule.

(2) A dataset shall be constructed by placing the prices referred to in sub-rule (1) in an ascending order and the arm's length price shall be determined on the basis of the dataset so constructed:

Provided that in a case referred to in clause (i) of sub-rule (5) of rule 10B, where the comparable uncontrolled transaction has been identified on the basis of data relating to the current year and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise undertaking the international transaction or the specified domestic transaction referred to in sub-rule (1)], has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction then,—

- (i) the most appropriate method used to determine the price of the comparable uncontrolled transaction or transactions undertaken in the aforesaid period and the price in respect of such uncontrolled

transactions shall be determined; and

- (ii) the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the current year and in the aforesaid period preceding it shall be included in the dataset instead of the price referred to in sub-rule (1):*

Provided further *that in a case referred to in clause (ii) of sub-rule (5) of rule 10B, where the comparable uncontrolled transaction has been identified on the basis of the data relating to the financial year immediately preceding the current year and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise undertaking the international transaction or the specified domestic transaction referred to in sub-rule (1)], has in the financial year immediately preceding the said financial year undertaken the same or similar comparable uncontrolled transaction then,—*

- (i) the price in respect of such uncontrolled transaction shall be determined by applying the most appropriate method in a similar manner as it was applied to determine the price of the comparable uncontrolled transaction undertaken in the financial year immediately preceding the current year; and*
- (ii) the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the aforesaid period of two years shall be included in the dataset instead of the price referred to in sub-rule (1) :*

Provided also *that where the use of data relating to the current year in terms of the proviso to sub-rule (5) of rule 10B establishes that,—*

- (i) the enterprise has not undertaken same or similar uncontrolled transaction during the current year; or*
- (ii) the uncontrolled transaction undertaken by an enterprise in the current year is not a comparable uncontrolled transaction,*

then, irrespective of the fact that such an enterprise had undertaken comparable uncontrolled transaction in the financial year immediately preceding the current year or the financial year immediately preceding such financial year, the price of comparable uncontrolled transaction or the weighted average of the prices of the uncontrolled transactions, as the case may be, undertaken by such enterprise shall not be included in the dataset.

(3) Where an enterprise has undertaken comparable uncontrolled transactions in more than one financial year, then for the purposes of sub-rule (2) the weighted average of the prices of such transactions shall be computed in the following manner, namely:—

- (i) where the prices have been determined using the method referred to in clause (b) of sub-rule (1) of rule 10B, the weighted average of*

the prices shall be computed with weights being assigned to the quantum of sales which has been considered for arriving at the respective prices;

- (ii) where the prices have been determined using the method referred to in clause (c) of sub-rule (1) of rule 10B, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs which has been considered for arriving at the respective prices;*
- (iii) where the prices have been determined using the method referred to in clause (e) of sub-rule (1) of rule 10B, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs incurred or sales effected or assets employed or to be employed, or as the case may be, any other base which has been considered for arriving at the respective prices*

17. Let us apply the above rules to the comparable company R.S. Software (India) Ltd. As per rule 10CA(2), the dataset of comparable companies chosen has to be arranged in ascending order. As per the 1st proviso to rule 10CA(2), R.S. Software (India) Ltd., was chosen as a comparable company based on the data relating to the current year and in the earlier two financial years immediately preceding the current financial year. In all the financial years the said company has undertaken similar comparable uncontrolled transaction. Clause (i) to 1st proviso to sec. 10CA(2) mandates that the same MAM has to be used to arrive at the price of the comparable uncontrolled transaction undertaken by R.S. Software (India) Ltd., in the financial years 2013-14 and 2014-15. As per clause (ii) of 1st proviso to sec.10CA(2), weighted average of the prices of the 3 financial years have to be taken in accordance with rule 10CA(3) and the weighted average so taken shall be included data set instead of the price arrived at by using current year data alone. In the present case, if one sees the chart of comparables of TPO given in paragraph-4 of this order, the profit margins of the Company R.S. Software (India) Ltd., for the three financial years were 2013-14 to 2015-16 were 24.14%, 32.75% and -2.09% respectively and the weighted average margin of 24.83% has been considered by the TPO.

18. The second proviso to Sec.10CA(2) of the Rules provides for a situation where R.S. Software (India) Ltd., has undertaken comparable uncontrolled transaction only in Financial year 2014-15 & 2015-16, then the weighted average of the two financial year 2014-15 and 2015-16 has to be computed in the manner laid down in Rule 10CA(3) of the Rules and the margin so arrived at has to be included in the dataset.

19. The third proviso to Sec.10CA(2) of the rules provides that if in the current year i.e., financial year 2015-16 if R.S. Software (India) Ltd., has not undertaken any uncontrolled comparable transaction then that company can never be considered for inclusion in the dataset.

- (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];*

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(2) For the purposes of sub-rule (1), the comparability of an international transaction [or a specified domestic transaction] with an uncontrolled

- (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.*

transaction shall be judged with reference to the following, namely:—

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

- (i) *none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or*
- (ii) *reasonably accurate adjustments can be made to eliminate the material effects of such differences.*

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

Provided *that data relating to a period not being more than two years prior to [the current year] may also be considered if such data reveals*

facts which could have an influence on the determination of transfer prices in relation to the transactions being compared:

A reading of rule 10B(3) shows that comparison of an uncontrolled transaction to an international transaction can be done only if differences, if any, between the transactions that are compared or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market or reasonably accurate adjustments can be made to eliminate the material effects of such differences. A reading of Proviso to Rule 10B(4) would show that use of data relating to a period of two years prior to the current year may also be considered but with a rider that "if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared". If by application of any filter an enterprise undertaking uncontrolled transaction similar to an international transaction is regarded as not being comparable in the earlier two years immediately preceding the current year and thereby attracting the provisions of rule 10B(2) or 10B(3) then the data for those years will not have any influence on the determination of transfer prices in relation to the transactions being compared for the current year and hence have to be ignored. On a harmonious reading of the provisions of rule 10CA, 10B(3) (4) of the Rules, we agree with the stand taken by the learned counsel for the Assessee. Therefore, if at all R.S. Software Ltd., is to be regarded as a comparable company, then the margins for AY 2014-15 and 2015-16 of the company have to be ignored because in those years they are to be regarded as not comparable. We hold accordingly."

Applying the above principle, it is not appropriate to consider the margins for AY 2014-15 and 2015-16. Coming to the margin earned by this comparable for AY 2016-17, we have already noted herein above that it is (-) 2.09%. We have also noted in the preceding para that this comparable underwent a shift in the revenue generating segments. This comparable has made investments in developing tools and platforms and has also enhanced the sales and marketing activities. These are any ways not the functions performed by the assessee before us which is a captive service provider, only catering to its AE.

Based on the above principle, we hold that R.S. Software(India) Ltd., should be excluded from the list of comparables.

9.5 In respect of **Infobeans Technologies Ltd.**, the Ld.AR submitted that, this company is engaged in providing custom developed services to offshore clients. It was submitted that, it is engaged in providing software engineering services primarily in Custom application development ('CAD'), Content Management Systems ('CMS'), Enterprise Mobility ('EM'), Big data analytics ('BDA'), and has incurred expenses towards the software licenses and subscription fees worth INR 46.44 lakhs. The Ld.AR referred to Pg 47 of the paper book in support.

9.6 The Ld.AR also submitted that the segmental information is not available for the company and the company is into diversified activities such as providing business IT services (comprising application development and maintenance, Big Data, UX & UI, Automation engineering services, including product engineering and lifecycle solutions, and business process management); in the Verticals of Storage & Virtualization, Media & Publishing, HR & Payroll and e commerce The Ld.AR referred to page 854 of the paper book in support of the submission.

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

9.7 We also note that the decision by *Coordinate Bench of this Tribunal* in case of *BORQS Software Solutions Pvt. Ltd. v. ACIT* in IT(TP)A No. 310/Bang/2021 by order dated 25.10.2021 for the same Assessment Year retained a few of the comparables that is been sought for exclusion by the assessee in the present case.

9.8 This case law was relied by the Ld.DR. We note that this *Tribunal* merely affirmed the findings of the DRP, which in turn

relied on the reply filed by the company in response to notice u/s 133(6) of the I.T.Act. Further, this *Tribunal* held the finding of DRP has not been countered by the assessee in the said case. However, the company's response to the notice u/s 133(6) of the I.T.Act is contrary to the functions set out in the audited financial statements (enclosed as Annexure-A to this order), and therefore, the same cannot be relied upon.

9.9 Further, the website of the company shows tht the company is engaged in diverse service, which are not similar to functions of a captive service provider like the assessee in the instant case. Since the Ld.AR has clearly established that Infobean Technologies Limited is not functionally comparable to that of the assessee, we follow the orders of the ITAT referred in para 9 (supra) and direct the Ld.AO / TPO to exclude Infobean Technologies Limited from comparable list. It is ordered accordingly.

Accordingly, we direct the Ld.TPO to exclude the above comparables from the Final list of SWD segment for failing in functionality tests.

9.10 **Microland Ltd.**

The Ld.AR submitted that DRP accepted the contentions of the assessee and directed the inclusion of Microland Ltd. in the final set. However before this *Tribunal*, the Ld.AR has submitted that this comparable has a turnover of more than 200 crores in the written submission filed. As in the preceding paragraphs, we have excluded various comparables that exceeded 200 crores turnover, this comparable also deserves to be excluded on the same principle.

Accordingly, we direct the Ld.TPO to exclude this comparable from the final list.

10. In **Ground no. 5.1**, assessee has sought for inclusion of following comparables under SWD segment.

IT Segment

- a) Akshay Software Technologies Ltd.
- b) Evoke Technologies Pvt. Ltd.
- c) Sasken Communication Technologies Ltd.
- d) Intense Technologies Ltd.

ITeS Segment

- a) Informed Technologies India Ltd.
- b) Allsec Technologies Ltd.
- c) Microgenetic Systems Ltd.
- d) Jindal Intellicom Ltd.
- e) Cosmic Global Ltd.
- f) E-Zest Solutions Ltd.

10.1 It is submitted that in respect of SWD and ITES segment, these comparables were not considered as it did not form part of the search matrix by the Ld.TPO. We are therefore of the opinion that these comparables needs to be reconsidered by the Ld.TPO afresh, based on the annual reports filed by the assessee.

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

Ground Nos. 5.1 & 6.1 in respect of MSS segment:

11. In respect of the comparables sought for exclusion and inclusion by the assessee under Marketing Support Services segment, it is submitted that, the functions performed by the assessee has not been considered by the Revenue authorities. It

is submitted that, the comparables selected by the Ld.TPO are into high end marketing services which is not comparable with that of services provided by the assessee. It is thus submitted that, Marketing Support Services segment is to be analysed afresh.

The Ld.DR did not object for the *de novo* verification of Marketing Support Services segment.

The Ld.AR in the written submissions have sought for exclusion / inclusion of comparables under the Marketing Support Service segment. However, we note that the comparables selected by the Ld.TPO are into high end Advertising activities which is not akin to the functions performed by the assessee before us. We have in detail recorded the functions performed by the assessee in the preceding paras.

As the Ld.TPO has not considered the functions performed by the assessee for its AE's, we direct the Ld.TPO to compute the margins of MSS segment *de novo*. It is directed that comparables to be selected must be similar in functions with that of the assessee having regard to the decisions rendered by the *Tribunals* in respect of this segment.

Accordingly, comparables alleged for inclusion / exclusion under MSS segment raised in Ground nos. 5.1 and 6.1 remanded to the Ld.AO/TPO for *de novo* consideration.

12. Interest on receivables

12.1 The Ld.AR submitted that the Ld.TPO proposed transfer pricing adjustment in respect of outstanding receivables in respect of trade creditors being the AEs by using 6 months

LIBOR + 450 basis points and CUP as the most appropriate method.

12.2 The Assessee wishes to submit that the delayed/outstanding receivables should not be considered as a separate international transaction. Further, it is humbly submitted that determination of ALP in respect of delayed receivables from inter-company transactions is not required since ALP of inter-company transactions of provision of services has been already determined and no separate adjustment is necessary in this regard.

12.3 The Ld.AR placed reliance on decision of *Hon'ble Delhi Tribunal* in *Kusum Healthcare Pvt.Ltd vs. ACIT* reported in (2015) 62 *Taxmann.com* 79, deleted addition by considering the above principle, and subsequently *Hon'ble Delhi High Court* in *Pr. CIT vs. Kusum Health Care Pvt. Ltd.* reported in (2017) 398 *ITR* 66, held that, no interest could have been charged as it cannot be considered as international transaction. He also placed reliance upon decision of *Hon'ble Delhi Tribunal* in case of *Bechtel India vs DCIT* reported in (2016) 66 *taxman.com* 6 which subsequently upheld by *Hon'ble Delhi High Court* vide order dated 21/07/16 in ITA No. 379/2016, also upheld by *Hon'ble Supreme Court* vide order dated 21/07/17, in *CC No. 4956/2017*.

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

capital adjustment takes into account the factors related to delayed receivables as assessee adopted TNMM as the MAM for computing its margin, and therefore no separate adjustment is required to be made.

12.5 On the contrary, Ld.CIT.DR submitted that, interest on receivables is an international transaction and Ld.TPO rightly determined its ALP. In support of her contentions, she placed reliance on decision of *Delhi Tribunal order in Ameriprise India Pvt. Ltd. vs. ACIT (2015- TII-347-ITAT-DEL-TP)* wherein it is held that, interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that Finance Act, 2012 inserted Explanation to Section 92B, with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this Explanation provides that:

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

12.6 Ld.CIT DR submitted that expression 'debt arising during the course of business' refers to trading debt arising from sale of goods or services rendered in course of carrying on business. Once any debt arising during course of business is an international transaction, he submitted that any delay in realization of same needs to be considered within transfer pricing adjustment, on account of interest income short charged or uncharged. It was argued that insertion of Explanation with retrospective effect covers assessment year under consideration and hence under/non-payment of interest by AEs on debt arising during course of business becomes international transactions, calling for computing

its ALP. He referred to decision of *Delhi Tribunal in Ameriprise (supra)*, in which this issue has been discussed at length and eventually interest on trade receivables has been held to be an international transaction. Referring to discussion in said order, it was stated that *Hon'ble Delhi Bench* in this case referred to the decision of the *Hon'ble Bombay High Court* in the case of *CIT vs. Patni Computer Systems Ltd.*, reported in (2013) 215 Taxmann 108, which dealt with question of law:

*(c) 'Whether on the facts and circumstances of the case and in law, the Tribunal did not err in holding that the loss suffered by the assessee by allowing excess period of credit to the associated enterprises without charging an interest during such credit period would not amount to international transaction whereas section 92B(1) of the Income-tax Act, 1961 refers to any other transaction having a bearing on the profits, income, losses or assets of such enterprises?' 3.5.6. She submitted that, while answering above question, Hon'ble Bombay High Court referred to amendment to section 92B by Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside view taken by Tribunal, Hon'ble Bombay High Court restored the issue to file of Tribunal for fresh decision in light of legislative amendment. It was thus argued that non/under-charging of interest on excess period of credit allowed to AEs for realization of invoices, amounts to an international transaction and ALP of such international transaction has to be determined by Ld.TPO. In so far as charging of rate of interest is concerned, he relied on decision of the Hon'ble Delhi High Court in *CIT vs. Cotton Naturals (I) Pvt. Ltd (2015) 276 CTR 445 (Del)* holding that currency in which such amount is to be re-paid, determines rate of interest. He, therefore, concluded by summing up that interest on outstanding trade receivables is an international transaction and its ALP has been correctly determined.*

He thus submitted that the Interest on outstanding receivables have been rightly constituted as independent international transaction

12.7 We have perused the submissions advanced by both the sides in the light of the records placed before us. This Bench referred to decision of *Special Bench of this Tribunal* in case *Instrumentation Corpn. Ltd. v. Asstt. DIT in ITA No. 1548 and 1549 (Kol.) of 2009*,

dated 15/07/2016, held that outstanding sum of invoices is akin to loan advanced by assessee to foreign AE., hence it is an international transaction as per explanation to section 92 B of the Act. Alternatively, it has been argued that working capital adjustment subsumes sundry creditors. In such situation computing interest on outstanding receivables and lones and advances to international transaction would amount to double taxation. *Hon'ble Delhi Tribunal* in case of *Orange Business Services India Solutions Pvt. Ltd. vs. DCIT* in *ITA No. 6570/Del/2016* vide its order dated 15.2.2018 observed that:

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

12.8 In view of the above, we deem it appropriate to set aside the impugned order on this issue and remit the matter to the file of the Ld.AO/TPO for deciding it in conformity with the above referred judgment. We also direct the Ld.TPO that in the event the WCA subsumes the outstanding recivables, no separate characterisation

is to be made. However for those recivables that fall out of the WCA pertaining to year under consideration, then, the rate of interest to be charged must be LIBOR + 300 basis points which is in accordance with the principles laid down by *Hon'ble Delhi High Court* in case of *CIT vs. Cotton Naturals (I) Pvt.Ltd.*, reported in (2015) 276 CTR 445 by considering a credit of 90 days.

Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such fresh proceedings.

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

In the result, the appeal filed by the assessee stands partly allowed.

Order pronounced in the open court on 10th November, 2022.

Sd/-
(LAXMI PRASAD SAHU)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 10th November, 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