IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

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

IT(TP)A No.190/Bang/2022
Assessment Year: 2017-18

M/s. Radisys India Limited (formerly known as Radisys India Private Limited) 6th Floor, Electra Wing B Exora Business Park Sarjapur Marathahali Outer Ring Road Bengaluru 560 103 Karnataka **PAN NO : AACCC3169M**	**Vs.**	Deputy Commissioner of Income-tax Circle-3(1)(1) Bangalore & NFAC, Delhi
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Mahveer C Jain, A.R.
Respondent by	:	Shri Binod Kumar Singh, D.R.

Date of Hearing	:	25.08.2022
Date of Pronouncement	:	18.11.2022

O R D E R

PER BEENA PILLAI, JUDICIAL MEMBER:

The present appeal is filed by the assessee against the final assessment order dated 28.2.2022 for the assessment year 2017-18 passed by the CIT(A), NFAC, Delhi on following grounds of appeal:-

Ground No. 1:

The learned Assessing Officer ("AO") has grossly erred in passing the final assessment order u/s 143(3) r.w.s 144C(13) read with section 144B of the Income-tax Act beyond the time prescribed u/s 144C(13) and thereby rendering the proceedings as time barred.

Ground No. 2:

The learned TPO erred in rejecting the search conducted by the Assessee and conducting independent search, inter-alia, on the ground that the Assessee has not applied employee cost filter (ratio of employee cost to total operating cost >25%) even though learned TPO himself has not applied the said filter.

Ground No. 3:

The learned TPO erred in rejecting the search conducted by the Assessee and conducting independent search, inter-alia, on the ground that some of the filters applied by the Assessee are not appropriate (such as export filter, salary to sales filter) even though learned TPO himself has applied same set of filters as summarized below and also the Hon'ble Dispute Resolution Panel ("DRP") has erred in confirming the same.

Search Filters applied by Assessee	***TPO's remarks***	***Search Filters applied by TPO in new search***
Companies whose employee cost is below 25% were rejected.	*Inappropriate and suggested to apply employee >25% of total operating cost filter*	*Companies whose employee cost is below 25% of turnover rejected.*
Companies having export earnings less than total sales were rejected. *Functionally different companies were excluded*	*This filter has been applied for Software segment new search.*	*Companies whose Software Development Service and related services is less than 75% of its total operating revenues were* *Excluded*

		Companies who have export service income less than 75% of the sales were excluded

Ground No. 4:

The learned TPO grossly erred in conducting independent search by wrongly applying the proviso below Rule 10E3(5) and the Hon'ble DRP has erred in confirming the same.

Ground No. 5:

The learned TPO has grossly erred in applying related party filter of 25% in his search process instead of 15% as applied by the Assessee relying on various precedents and the Hon'ble DRP has erred in confirming the same.

Ground No. 6:

The learned TPO and Hon'ble DRP has erred by rejecting the following 7 comparable companies in the software development segment selected/ accepted by the Assessee on unjustifiable grounds even though sufficient data was available, and they were functionally comparable to the Assessee and satisfied all the filters applied by the learned TPO:

(i) Akshay Software Technologies Limited
(ii) Batchmaster Software Private Limited
(iii) DCIS DOT COM Solutions India Private limited
(iv) Evoke Technologies Private Limited
(v) Sagarsoft (India) Limited
(vi) Sasken Technologies Limited
(vii) E-Zest Solutions Limited

Ground No. 7:

The learned TPO and Hon'ble DRP erred on facts and law by comparing the Assessee with the following 13 companies in the software development segment, which have an entirely different functional and risk profile on account of factors like high turnover, significant RPT, onsite revenues, etc and in spite of some of these being held as not comparable to the Assessee either by Tribunal/ DRP or by the learned TPO in preceding years:

(i) Larsen & Toubro Infotech Ltd
(ii) Great Software Laboratory Pvt.Ltd
(iii) Persistent Systems Ltd
(iv) Tata Elxi Ltd
(v) Aptus Software Labs Pvt Ltd

(vi) Cygnet Infotech Pvt.Ltd
(vii) Infobeans Technologies Ltd
(viii) Nihilent Ltd
(ix) OFS Technologies Ltd
(x) Threesixty Logica Testing Sevices Pvt Ltd
(xi) Infosys Ltd
(xii) Cybage Software Private Ltd
(xiii) Consilient Technologies Pvt.Ltd

Ground No. 8:

The learned TPO has erred in law and in facts, by not following the directions of the Hon'ble DRP by including R Systems International Limited which has been rejected by the Hon'ble DRP as a comparable company to the Assessee.

Ground No. 9:

The learned TPO erred on facts by not making changes in arithmetical errors/inaccurate computation in computing NCP of comparable companies based on annual reports despite the directions of the Hon'ble DRP.

Ground No. 10

The learned AO/TPO has also erred in computing the separate NCP of Marketing and support segment of the Assessee, ignoring the fact that this being a minor transaction (1.58% of the total revenue) was aggregated with SWD transaction purely on the grounds of administrative convenience.

Ground No. 11:

1 The learned TPO and Hon'ble DRP has erred by rejecting the following 7 comparable companies in the marketing and support segment appearing in learned TPO's dump selected by the Assessee on unjustifiable grounds even though they are functionally comparable to the' Assessee:

i) Cyber Media Research Et Services Ltd
ii) Confluence Integrated Services Pvt Ltd
iii) Paradigm Plus Marketing Communications Pvt.Ltd
iv) Hindustan Field Services Pvt Ltd
v) Retail Scan Management Services Pvt Ltd
vi) Mudra Online Technologies Pvt Ltd
vii) Concept Public Relations India Ltd

Ground No. 12:

The learned TPO and Hon'ble DRP has erred on facts and law by comparing the Assessee with the following 2 companies in the marketing and support segment, which have an entirely different functional and risk profile and the Hon'ble DRP has grossly erred in confirming the same.

i) *Pressman Advertising Ltd*
ii) *Majestic Research Services and Solutions Ltd*

Ground No. 13:

The learned TPO has erred in law and in facts, by not following the directions of the Hon'ble DRP and keeping the NCP of Marketing and support segment of the Assessee unchanged at 8.67% instead of 13.85%.

Ground No. 14:

The Learned TPO grossly erred in law and facts by treating ESPP cost as operating cost of the assessee even when the stock pertains to the associated enterprise and it was never cross charged to the assessee.

Ground No. 15:

Without prejudice to Ground 14, the learned TPO has erred in considering the ESPP cost (Rs. 67,57,309) as an operating cost in the hands of the Assessee, which was merely collected from the employees and paid to the associated enterprise and the Hon'ble DRP has grossly erred in confirming the same.

Ground No. 16:

Without prejudice to Ground 14 and Ground 15, the learned TPO should be directed to consider the cost incurred by employees to purchase the ESPP of Rs.67,57,309 as an operating cost as well as Operating Revenue of the Assessee as same is recovered from employees and reimbursed to the AE;

Ground No. 17:

The learned TPO erred in law and facts by not allowing working capital adjustments in order to account for material differences in working capital existing between the Assessee and the set of comparable companies, in spite of the fact that reasonably accurate adjustments can be made to account for these material differences and the Hon'ble DRP has grossly erred in confirming the same.

Ground No. 18:

The learned TPO erred in not allowing risk adjustments in order to account for material differences in risk profile existing between the Assessee and the set of comparable companies and the Hon'ble DRP has grossly erred in confirming the same.

Ground No. 19:

The learned Assessing Officer has grossly erred in disallowing the employee provident fund contribution (PF) amounting to INR 2,754 remitted before the due date of filing of the return as per the Income Tax Act, 1961.

2. Brief facts of the case are as under:-

2.1 The assessee is a wholly owned subsidiary company of Radisys International LLC and is engaged in providing software development and marketing support services to Radisys International LLC, the Associated Enterprise. The assessee filed its return of income for the year under consideration on 30/11/2017 and the case was selected for scrutiny. The statutory notices were issued and representatives of the assessee appeared before the Ld. AO and filed requisite details. The Ld. AO observed that assessee had international transactions with the Associated Enterprises and therefore a reference was made to the Transfer Pricing Officer to determine the Arm's Length Price of the International transactions. On receipt of the reference, the Ld. TPO called upon the assessee to file the economic details of the international transactions entered with A.E. in form No.3CEB. The Ld. TPO from the details filed by the assessee observed that following was the international transactions:-

International Transactions		
Nature of Transaction	***Amount (in Rs.)***	***Method***
Income from software development services	***1,59,43,94,173***	***TNMM***
Income from marketing support services	***2,56,61,965***	***TNMM***
Reimbursement of expenses	***1,35,13,207***	***Other method***
Withholding from employees and payment on their behalf for	***61,55,757***	***Other method***

purchase of stock under ESPP scheme		

2.2 The Ld.TPO observed that, the assessee used TNMM as the most appropriate method for determining the arm's length price for both the services and OP/OC as the PLI. It computed its margin at 13.31% for SWD segment and 8.67% for marketing support services segment.

2.3 The Ld.TPO observed that, the assessee used 16 comparables with an average margin of 8.69% under the software development service segment. It thus, held the transaction to be at arm's length. In respect of marketing support service segment, the Ld.TPO noted that the assessee did not benchmark this transaction separately. The Ld.TPO, therefore, carried out fresh search and set out filters thereby considered a set of comparables, which was intimated to the assessee. After considering various submissions by the assessee in respect of the various comparables that was selected by the Ld.TPO, the final set of comparables that came to be considered under both these segments are as under:

Sl. No.	Company Name	F.Year wise OP/OC (%)			Wt. Average
		2016-17	2015-16	2014-15	
1	Rheal Software Pvt. Ltd.	-12.27	3.28	3.01	-1.85
2	Kals Information Systems Ltd	1.37	3.97	5.77	3.62
3	Infomile Technologies Ltd.	10.22	9.91	11.12	10.43
4	Harbinger Systems Pvt Ltd	12.28	12.69	17.18	14.1
5	C G-V A K Software & Exports Ltd.	11.65	16.95	17.3	15.09
6	Larsen & Toubro Infotech Ltd.	20.78	19.21	23.98	21.14
7	Great Software Laboratory Pvt. Ltd.	27.18	20.24	10.67	21.24
8	Mindtree Ltd.	20.12	26.11	27.51	24.17

Sl. No.	Company Name	F.Year wise OP/OC (%)			Wt. Average
		2016-17	2015-16	2014-15	
9	R Systems International Ltd.	16.74	31.05	26.44	24.40
10	Persistent Systems Ltd.	25.05	23.95	30.39	26.17
11	Tata Elxsi Ltd.	24.90	29.13	24.45	26.19
12	Infobeans Technologies Ltd.	23.89	34.98	20.46	26.44
13	Aptus Software Labs Pvt. Ltd.	24.83	27.67	26.72	26.46
14	Nihilent Ltd.	34.26	24.46	30.80	29.82
16	OFS Technologies Ltd.	19.88	26.47	67.57	29.93
15	Cygnet Infotech Pvt. Ltd.	25.24	30.45	36.61	30.19
17	Infosys Ltd.	38.79	38.30	41.40	39.50
18	Threesixty Logica Testing Services Pvt. Ltd.	36.63	48.46	42.02	41.94
19	Cybage Software Pvt. Ltd.	41.89	62.90	68.68	57.82
20	Consilient Technologies Pvt. Ltd.	54.85	71.82	69.51	65.14
	35th Percentile				**21.24**
	Median				**26.18**

Sl. No.	Company Name	F.Year wise OP/OC (%)			Wt. Average
		2016-17	2015-16	2014-15	
	65th Percentile				26.46

MSS Segment

Sl. No.	Company Name	OP/OC15	OP/OC16	OP/OC17	AVERAGE OP/OC
1	Goldmine Advertising Ltd.	5.21%	6.12%	5.71%	5.68%
2	Pressman Advertising Ltd.	15.93%	14.96%	24.95%	18.62%
3	Scarecrow Communications Ltd.	27.91%	19.93%	6.29%	18.04%
4	Ugam Solutions Pvt. Ltd.	14.06%	7.88%	6.72%	9.55%
5	Majestic Research Services & Solutions Ltd.	17.74%	35.90%	46.05%	33.23%
Average					17.02%

2.4. The Ld.TPO thus proposed the adjustment under both these segments being the short fall as under:

Sl. No	Description	Adjustment u/s 92CA (In Rs.)
1	Software development segment	18,09,96,827/-
2	MSS segment	19,70,793/-
Total adjustment u/s 92CA		18,29,67,620/-

2.5 On receipt of the transfer pricing order, the Ld.AO passed draft assessment order by proposing to make an addition in the hands of assessee at Rs.18,29,67,620/-.

2.6. The assessee filed objections before the DRP. The DRP after considering the submissions of assessee upheld the order of the Ld.AO/TPO. The Ld. AO on receipt of the DRP's directions passed the final assessment order being the impugned order by making addition in the hands of the assessee at Rs.18,29,67,620/-.

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

3. Amongst the Transfer pricing issue alleged in this appeal, the assessee is seeking exclusion/inclusion of comparables under SWD & MSS segment. Before we undertake the comparability analysis, it is sine-qua-non to understand the FAR analysis of the assessee under the two segments.

Functions Performed

As per the agreement entered by Radisys India with its Associated Enterprise, Radisys India shall engage in development and support of computer software and marketing support services for its Associated Enterprise. Radisys India is a captive service provider to its Associated Enterprise i.e., Radisys India renders all of its services to its Associated Enterprise.

9. ASSETS EMPLOYED

9.1 Tangible assets

During the year, fixed assets of Radisys India include the following:

In Rs.

Sl.No.	*Particulars*	*Net Block as at March 31, 2017*
1	*Computers*	*64,550,203*

2	*Office Equipment*	*60,402,966*
3	*Furniture & Fixture*	*679,196*
4	*Leasehold improvements*	*11,045,454*
	Total	*136,677,819*

9.2: Intangibles

Radisys India maintains all necessary infrastructures and deploys requisite skilled manpower for the services rendered to its Associated Enterprise. Radisys India does not own any intangible right over the services rendered and software developed. Further, all the intangibles like copy rights; trade names, secrets, patents, etc. are the exclusive property of its Associated Enterprise.

10: RISKS ASSESSMENT

10.1: Foreign Exchange Risk:

Exchange rate risk relates to the. potential variability of profits that can arise because o'f changes in foreign exchange rates.

The Associated Enterprise makes payment to Radisys India in foreign exchange and thus Radisys India bears the risk of foreign exchange fluctuation.

10.2:Legal and Statutory Risk:

This risk primarily arises on non-compliance with any legal/ contractual / statutory provisions.

Radisys India bears this risk to the extent of the legal / statutory provisions of India.

10.3: Man Power Risk:

This risk primarily arises due to the fact that the success of a company depends upon' the quality of personnel deployed with requisite technical knowledge required for carrying out the work of such company.

The entire services of Radisys India are driven based on the specifications received from its Associated Enterprise. For these types of services, it is essential to have highly trained and efficient staff with Radisys India. Since, Radisys India has to hire and retain good personnel and the responsibility of providing deliverables is on Radisys India, Radisys India assumes this risk.

10.4: Market Risk:

Market risk arises for a business due to the uncertainty in the structure of the market, demand patterns and needs of customers, cost, pricing lc.,

Radisys India is a captive service provider to its Associated Enterprise. Radisys India does not provide any service to any other party and it is the Associated Enterprise who assumes market risk as the third party services are provided by it.

This risk arises if the market in which the company operates in is sensitive to introduction of new products and technologies. Hence in that case, business units may face loss of potential revenues due to inefficiencies arising from obsolete infrastructure and tools as well as obsolescence of manufacturing processes.

Radisys India as a service provider solely to its Associated Enterprise works as per specifications and training of Associated Enterprise. Hence, the Associated Enterprise being the owner of the product and technology associated with the products solely bears the risk of technological obsolescence of its products.

10.6: Political Risk:

This primarily arises because of the operating in geographical jurisdictions with unstable political regimes and unfavourable Government economic policies.

Radisys India assumes Indian Political risk as it operates in India.

Radisys India's services are exclusively provided to its Associated Enterprise and it has a limited functional profile under a risk-mitigated environment. It does not carry out significant entrepreneurial activities nor does it bear any risk associated with such activities. The functional autonomy over operational scheduling is limited by the requirements of its Associated Enterprise. Accordingly, we may characterize Radisys India as a 'Contract Service Provider' for development and support of software development services and marketing support services provided to its Associated Enterprise"

Based on the above, we shall under take the comparability of those comparables sought for inclusion/exclusion by assessee before me.

4. Ground No.1 raised by the assessee leads to the challenge of validity of the final assessment order passed to be beyond the time prescribed under section 144C(13)

of the Act. The Ld.AR submitted that order of the DRP is dated 31.12.2021 and the Ld.AO passed the final assessment order on 28.2.2022, which is beyond the period of limitation. On a query being raised asking for the date of receipt of DRP directions by the National Faceless Assessment Centre, the assessee did not have any evidence to place in order to substantiate its plea of a belated order passed by the Ld.AO.

We are therefore, are not inclined to decide this issue and hence, the same is dismissed.

5. Ground Nos.2 to 5 raised by the assessee are general in nature and therefore, do not require to be adjudicated separately.

6. Ground No.6 is raised by assessee seeking inclusion of following comparables under SWD segment:

(i) Akshay Software Technologies Ltd
(ii) Batchmaster Software Private Ltd
(iii) DCIS DOT COM Solutions India Pvt Ltd
(iv) Evoke Technologies Private Ltd
(v) Sagarsoft (India) td
(vi) Sasken Technologies Limited
(vii) E-Zest Solutions Limited

6.1 The Ld.AR submitted that, the assessee do not wish to argue for inclusion of M/s. Sasken Technologies Ltd. and M/s. E-Zest Solutions Ltd.

Accrdingy, the same are dismissed as not pressed.

It is submitted that the remaining 5 comparables sought for inclusion, were not considered by the Ld.TPO/AO. We therefore deem it appropriate to remit them to the Ld. AO/TPO. The Ld. AO/TPO shall look into the functional profile of these comparables and verify the same with that of the assessee. If they are functionally found to be similar with that of assessee, the same may be considered in accordance with law, considering the turnover limit of Rs.1 to 200 Crores.

Accordingly, this ground raised by the assessee stands partly allowed.

7. **<u>Ground No.7</u>** is raised by the assessee seeking exclusion of following 13 comparables:

(i) Larsen & Toubro Infotech Ltd
(ii) Great Software Laboratory Pvt. Ltd.
(iii) Persistent Systems Ltd
(iv) Tata Elxi Ltd
(v) Aptus Software Labs Pvt Ltd
(vi) Cygnet Infotech Pvt Ltd
(vii) Infobeans Technologies Ltd
(viii) Nihilent Ltd
(ix) OFS Technologies Ltd
(x) Threesixty Logica Testing Sevices Pvt.Ltd
(xi) Infosys Ltd
(xii) Cybage Software Pvt.Ltd
(xiii) Consilient Technologies Pvt.Ltd

7.1 The Ld.AR submitted that, amongst the above comparables, L&T Infotech Ltd., Persistent Systems Ltd., Tata Elxi Ltd., Nihilent Technologies Ltd., Cybage Software Pvt. Ltd. and Infosys Ltd. are to be excluded due

to high turnover. He relied on the order passed by this *Tribunal* in assessee's own case for assessment year 2015-16 wherein these comparables were excluded on the non-satisfaction of turnover filter.

7.2. The Ld.DR on the contrary relied on the order passed by the authorities below.

7.3. We have perused the submissions advanced by both the sides in light of record placed before me. We note that the assessee has a turnover under software development service segment at Rs.1,59,43,94,173/-. It is also noted that the Ld.TPO has excluded from the list of comparable companies, chosen by the assessee in the TP study, whose turnover was less than Rs.1 crore. The contention of the assessee is that, as the Ld. TPO excluded companies with a low turnover, he failed to apply the same yardstick to exclude companies with a high turnover. From the submissions of the assessee, we note that the comparables sought for exclusion on turnover filter is more than Rs.200 crores as follows:

1) Larsen & Toubro Infotech Limited – Rs.6,183 Cr.
2) Persistent Systems Limited - Rs.1,732 Cr.
3) Tata Elxsi Limited - Rs.1,201 Cr.
4) Infosys Limited - Rs.59,257Cr.
5) Cybage Software Private Ltd. - Rs.759 Cr.
6) Nihilent Technologies Ltd. - Rs.259 Cr.

7.4. It is also an admitted position that *coordinate bench of this Tribunal in assessee's own case in IT(TP)A No.2482/Bang/2019 dated 22.2.2022* excluded comparables with high turnover and have been consistently following the turnover range of Rs.1 to 200 Crores and Rs.200 to Rs.2000 crores, so on and so forth. The *coordinate bench of this Tribunal* in assessee's own case cited (supra) has dealt with the applicability of turnover filter by observing as under:

> *11. As far as comparability of companies listed as (a) to (g) in Grd.No.4 raised by the Assessee is concerned, the admitted factual position is that the turnover of these companies is more than Rs.200 Crores and the Assessee's turnover is only Rs.1,21,34,35,876/-. The TPO excluded from the list of comparable companies chosen by the Assessee in its TP study companies whose turnover was less than Rs.1 Crore. The contention of the Assessee before the DRP was that while the TPO excluded companies with low turnover, he failed to apply the same yardstick to exclude companies with high turnover compared to the Assessee. The reason for excluding companies with low turnover was that such companies do not reflect the industry trend as their low cost to sales ratio made their results less reliable. The contention of the Assessee was that there would be effect on profitability wherever there is high or low turnover and therefore companies with high turnover should also be excluded from the list of comparable companies. The DRP primarily relied on the decision rendered by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors India Pvt.Ltd Vs. DCIT 82 Taxmann.com 167(Del), wherein it was held that high turnover ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded and that the effect of such high turnover on the margin should be seen. The DRP therefore held that a company which is otherwise functionally comparable cannot be excluded only on the basis of high*

turnover. The Assessee has raised Grd.No.4 before the Tribunal challenging the aforesaid view of the DRP.

12. On the issue of application of turnover filter, we have heard the rival submissions. The parties relied on several decisions rendered on the above issue by the various decisions of the ITAT Bangalore Benches in favour of the Assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. Vs. DCIT (2018) 89 Taxmann.com 44 (Bang-Trib) order dated 13.10.2017, took note of the decision of the ITAT Bangalore Bench in the case of Sysarris Software Pvt.Ltd. Vs. DCIT (2016) 67 Taxmann.com 243 (Bangalore-Trib) wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of Chryscapital (supra) and the decision to the contrary in the case of CIT Vs. Pentair Water India Pvt. Ltd., Tax Appeal No.18 of 2015 dated 16.9.2015 wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of Pentair Water (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International (supra):

> *"41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010, relying on Dun and Bradstreet's analysis, held grouping of companies having turnover of Rs. 1 crore to Rs.200 crores as comparable with each other was held to be proper. The following relevant observations were brought to our notice:-*
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> > *"9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which are (sic) making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with*

the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various benches of the Tribunal, when companies which arc loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges.

Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs.1.00 crore to 200 crores have to be taken as a particular range and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study."

42. The Assessee's turnover was around Rs.110 Crores. Therefore the action of the CIT(A) in directing TPO to exclude companies having turnover of more than Rs.200 crores as not comparable with the Assessee was justified. As rightly pointed out by the learned counsel for the Assessee, there are two views expressed by two Hon'ble High Courts of Bombay and Delhi and both are non-jurisdictional High Courts. The view expressed by the Bombay High Court is in favour of the Assessee and therefore following the said view, the action of the CIT(A) excluding companies with turnover of above Rs.200 crores from the list of comparable companies is held to correct and such action does not call for any interference."

13. The Tribunal in the case of Autodesk India Pvt.Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Banglore-Tribunal), took note of all the conflicting decision on the issue and rendered its decision and in paragraph 17.7. of the decision held as that high turnover is a ground for excluding companies as not comparable with a company that has low turnover. The following were the relevant observations:

> *17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015 judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.*
>
> *17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore*

Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).

14. In view of the aforesaid decision, we hold that 7 companies listed in Sl.No.1,2,4,6,7, 10 and 11 of Grd.No.1 raised by the Assessee whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies."

7.5. In view of the above decision in assessee's own case as well as the consistent approach followed by this

Tribunal, we direct the Ld. AO/TPO to exclude the comparables with high Turnover, mentioned herein above.

8. Amongst the remaining comparables, the Ld.AR submitted that the assessee do not wish to press the following comparables being, Great Software Laboratory Pvt. Ltd., Aptus Software Lab Pvt. Ltd., OFS Technologies Ltd., Threesixty Logica Testing Services Pvt. Ltd. and Concilient Technologies Pvt. Ltd.

Accordingly, these comparables are dismissed as not pressed.

8.1. The two comparables that assessee seeks to exclude on functional dissimilarities are:

(i) Infobeans Technologies Ltd. and

(ii) Cygnet Infotech Pvt. Ltd.

(i) Infobeans Technologies Ltd.

8.2 The Ld.AR submitted that, this company is engaged in Automation Engineering, Customized Software, Custom Application Development (CAD), Content Management Systems, Enterprise Mobility and Big data Analytics. It is the submission of the Ld.AR that this comparable is functionally not similar to the assessee. He also submitted that, there is no segmental details available in respect of the revenue generated by this company and that the content management, Analytic services are considered to be KPO as per safe harbour rules. This comparable was decided to be excluded from the list of comparables by the

coordinate bench of Tribunal vide IT(TP)A No.210/Bang/2021 in the case of EIT Services India Pvt. Ltd. Vs. Deputy Commissioner of Income-tax for the AY 2016-17, wherein held as under:

> *"5.7 We have heard the rival submissions and perused the materials available on record. Infobeans Techonologies Ltd. was considered as comparable in the case of ADP Pvt. Ltd. by the coordinate bench of Hyderabad cited (supra) wherein it was held as under:-*
>
> > *"7.3 We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The co-ordinate bench of this Tribunal in ADP (P.) Ltd. (supra), directed the AO/TPO to exclude this company from the list of comparables for determining ALP by observing as under:*
> >
> > > *"21. Having regard to the rival contentions and the material on record, we find that the Co-ordinate Bench of the Tribunal in the following case has considered similar objections of the assessee therein to direct exclusion of this company from the final list of comparables. For the purpose of ready reference, the relevant paragraph is reproduced below: "*
> > >
> > > > *18. We have heard the rival contentions and perused the record. The first aspect is the functional comparability of concern which has been finally selected to be comparable. In respect of Infobeans Systems Pvt. Ltd., the financials of said concern clearly reflect that in addition to providing software development services to its associated enterprises, it had also earned foreign exchange from export of goods on FOB basis. The event of export of goods was also mentioned in notes and also in the Profit and Loss Account, where revenue from sale of software was declared. The segmental details of two activities carried on by the said concern were not available and in the absence of the same, the concern could not be equated as functionally comparable to a concern which was providing software development services to its associated enterprises. Applying the same set of reasoning as in the paras hereinabove, we hold that Infobeans Systems Pvt. Ltd. is not comparable to the assessee".*

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

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

5.8. In view of the above decision of the Tribunal, we are inclined to hold that Infobeans Technologies Ltd. cannot be considered as a comparable and to be excluded from the list of comparables."

8.3. On verification of the financials of this company for AY 2017-18, we note that in the Annual Report at page 2343 placed in paper book Volumes 4 of 6, this has been stated to be catering into vide range of segments as under:

"INFOBEANS TECHNOLOGIES LIMITED

Founded in 2000, InfoBeans Technologies is a leading player offering Customized Software, Digital Transformation and Enterprise Mobility solutions for clients across the globe. With two state-of-the-art facilities in India, the CMMI level 3 certified Company caters to Fortune 100 clients in USA, Germany and Middle East markets. The Company caters to a wide range of segments in the industry, including distributed storage systems, multi-format multimodal content and e-commerce web and mobile platforms for diverse sectors. The Company's transparent operations, professional team of over 700 employees and high customer-focus has enabled it to grow a blue-chip client base with over 90% repeat business."

8.4. Further, at page 2320 of the paper book, this company is said to be providing computer programming, consultancy and related activities as per NIC code. A

combined reading of this makes it clear that this company is engaged in not only SWD service but other allied services to various industrial segments. Whereas on perusal of financial statement at page 12367 of the paper book and Note 20 at page 2378 of the paper book, we note the revenue recognition is only under one head being "Expert" amounting to Rs.66,12,31,773/-. We also notice that at page 2408, in Related Party Transaction details this company has earned revenue of Rs.8,00,53,350/- from it's AE. From this it is clear that this company is rendering services to non-AE customers also, whereas the assessee before us is a captive service provider only catering to the requirements of its AE. Under such circumstances we do not deem it fit to be considered in the final set of comparables.

Accordingly, this comparable is directed to be excluded.

(ii) Cygnet Infotech Pvt. Ltd.

8.5. The Ld. A.R. submitted that this company is engaged in the business of providing Enterprise Solutions, Application Content Management Services and IT Enabled Services. This has been observed by the DRP also. The Ld.AR thus submitted that, the activities performed by this comparable is basically in the ITES segment, and therefore cannot be compared with the software development service provider. In support the Ld.AR relied

on page 2033 of the paper book where the annual report of his company is placed.

8.6. On the contrary the Ld.DR relied on the order passed by the authorities below.

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

8.7. In the annual report it is mentioned that this company derives revenue various services by providing Enterprise Solutions, Application content, Management services etc. It is also mentioned that the revenue recognition is by providing man power support to its customers. AT page 2033 of the paper book, we note that this company bares all the risks attributable to a full fledged entrepreneur. In our view this company cannot be considered as a good comparable.

Accordingly, this comparable is directed to be excluded.

9. <u>Ground No.8</u> has been raised by the assessee for not following the DRP's directions in respect of excluding R. Systems International Ltd., by the Ld.AO while passing the impugned order.

9.1. On perusal of DRP's directions at page 26, we note that in para 7.3, the DRP excluded R.Systems International Ltd. The revenue is not in appeal against this and therefore, we direct the Ld.AO/TPO to pass an

order in consonance with the DRP's directions in respect of this comparable.

Accordingly, this ground raised by the assessee stands allowed.

10.<u>Ground No.9</u> is in respect of incorrect computation of margins of comparables by the Ld.TPO.

We note that the Ld. TPO has not correctly computed the margins of the comparables those have been finally retained post DRP's directions. As in the present appeal, assessee has already alleged inclusion/exclusion of comparables, we direct the AO/TPO to adopt and compute the correct margins of the comparables that would be finally sustained based on the directions herein above.

Accordingly, this ground raised by the assessee stands allowed.

11. Ground Nos.10 & 11 are not pressed at the time of hearing by the Ld. A.R.

Accordingly, these grounds are dismissed as not pressed.

12. <u>Ground No.12</u> is in respect of exclusion of certain comparables sought to be included by the Ld.TPO under the MSS segment. The Ld.AR submitted that, the assessee seeks to exclude the following two comparables being:

(i) Pressman Advertising Ltd. and

(ii) Majestic Research Services and Solutions Ltd.

(i) Pressman Advertising Ltd.

12.1 The Ld.AR submitted that, there is abnormal increase in the profit in respect of this company for the year under consideration. It is also submitted that no segmental details are available in respect of the various services rendered by this company though the Ld.TPO held it to be functionally similar. The Ld.AR referring to page 4039 of paper book submitted that this comparable is into advertising services, selling of place for advertisement in printing media and public relations. It is also submitted that, it has incurred a huge service cost of about Rs.37,11,57,227/-, which is almost 89% of the total cost. The Ld.AR submitted that, the details of these expenses are verifiable from the P&L account at page No. 4057 of the paper book. Referring to the schedule for revenue recognition at page 4066 of the paper book, the Ld.AR submitted that, these expenses are excessive in nature. The Ld.AR submitted that, the entire revenue generated by this company has been shown as advertising services which is not akin to marketing support services rendered by the assessee before us.

12.2. On the contrary, the Ld. DR relied on the observations of the DRP.

12.3. We have perused the submissions advanced by both the sides in the light of records placed before us. From the Director's report at page 4045 of PB, we note that the

business over view of this company is shown to be advertising, public relation, design and digital. As there is no segmental details available, it is difficult to analyse the revenue generated by this company from the advertising segment.

Therefore, in our view, cannot be considered to be functionally comparable with that of assessee.

(ii) Majestic Research Services & Solutions Limited

13. The Ld.AR submitted that this comparable is functionally not similar to the assessee as it is involved in numerous services like Eye Tracking, Mobile Analytics, Video analysis, Facial recognition, Digital tracking, Online communities, Neuro Science, Emotional analysis, Automated audience measurement, Sensory sciences, etc. Under the marketing research services, which can be verified at page Nos. 4125 to 4126 of the paper book. At the outset, the Ld.AR submitted that these activities carried by this company is not akin to the marketing support service segment and the services rendered by assessee under this segment.

13.1. On the contrary, the Ld. DR relied on the order of the DRP.

13.2. We have perused the submissions advanced by both sides in the light of records placed before us. We note that this comparable is into various activities like Digital Network Services and into analysing media and marketing

information based on various concepts through different mediums of interactions.

Therefore, in our considered opinion, this comparable cannot be compared with assessee and deserves to be excluded.

Accordingly, this ground raised by the assessee stands allowed.

14. Ground No.13 is with regard to seeking rectification of certain errors in computing operating expenses under marketing support services segment.

The Ld.AO/TPO is directed to recalculate the margin under the MSS segment in accordance with law.

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

15. Ground Nos.14 to 16 are in respect of the ESOP considered as operating cost by the Ld.AO/TPO. The Ld.AR submitted that, eligible employees of the assessee are provided with an option to purchase the common stack of Radisys Corporation, USA at a price equal to 85% of the market price by paying the said amount through pay roll deductions. He submitted that the Ld.TPO has considered this expenditure of 85% as operating cost in the hands of assessee. The Ld.AR submitted that the 15% of discount given to these employees are treated as perquisite in the hands of the employees on which TDS is deducted u/s 192 of the Act. It is the submission of the

Ld.AR that, the assessee is merely acting as an agent facilitating the convenience of payments for employees and the AE.

15.1. The Ld.AR pointed out that this transaction has been reported in Form 3CEB and that it does not have any impact on P&L account. The Ld.AR thus submitted that, this expenditure cannot be held to be an operating cost in the hands of the assessee and the 15% of discount given to the employees cannot be treated as cost in the hands of the assessee being borne on behalf of the Radisys Corporation, USA.

15.2. Referring to the DRP's directions for assessment year 2018-19, the Ld.AR submitted that, this cost has been held to be belonging to the AE and it does not form part of the operating cost of the assessee. He also submitted that the DRP for AY 2018-19 observed that, the AE has not been cross charged to the assessee and the cost of the benefit is given to the employees directly, that is borne by the AE.

15.3. Alternatively, the Ld.AR submitted that, in the event the expenditure is treated as an operating cost, then the same needs to be treated as operating revenue as well. This is submitted on the presumption that the AE has cross charged the cost to the assessee.

15.4. On the contrary the Ld.DR relied on the directions of the DRP.

15.5. From the records placed before us, the Ld.AR has filed 1998 Stock Incentive Plan, at the time of hearing. The relevant clauses of the plan are reproduced as under:

> **"***6.* ***PURCHASE PRICE***
>
> *The purchase price of each share covered by the Plan shall be determined by the Committee subject to the following:*
>
> *(a) 'The purchase price of each share covered by each Incentive Option shall not be less than 100% of the Fair Market Value of the Common Stock of the Company on the date the Incentive Option is granted; provided, however, that if at the time an Incentive Option is granted the Optionee owns or would be considered to own by reason of Section 424(d) of the Code more than 10% of the total combined voting power of all classes of stock of the Company or any Subsidiary or Parent of the Company, the purchase price of the shares covered by such Incentive Option shall-not be less than 110% of the Fair Market Value of the Common Stock on the date the Incentive Option is granted.*
>
> *(b) The purchase price of each share covered by each Non-Qualified Option shall not be less than 85% of the Fair Market Value of the Common Stock of the Company on the date the Non-Qualified Option is granted; provided, however, that if the Optionee owns stock possessing more than 10% of the total combined voting power of all classes of stock of the Company or any Subsidiary or Parent of the Company, the purchase price of the shares covered by such Incentive Option shall not be less than* ***1*** *10% of the Fair Market Value of the Common Stock on the date the Non-Qualified Option is granted.*
>
> .....
>
> .....
>
> *9.* ***METHOD OF EXERCISE***
>
> *(a) To the extent that the right to purchase shares has accrued, Options may be exercised from time to time by giving written notice to the Company stating the number of shares with respect to which the Option is being exercised, accompanied by payment in full, by cash or by certified or cashier's check payable to the order of the Company or the equivalent thereof acceptable to the Company, of the purchase price for the number of shares being purchased and, if applicable, any federal, state or local taxes required to be paid in accordance with the provisions of Section 8 hereof. The Company shall issue a separate certificate or*

certificates with respect to each Option exercised by an Optionee.

(b) In the Committee's discretion, payment of the purchase price for the shares with respect to which the Option is being exercised may be made in whole or in part with shares of Common Stock of the Company. If payment is made with shares of Common Stock, the Optionee, or other person entitled to exercise the Option, shall deliver to the Company certificates representing the number of shares of Common Stock in payment for the shares being purchased, duly endorsed for transfer to the Company. If requested by the Committee, prior to the acceptance of such certificates in payment for such shares, the Optionee, or any other person entitled to exercise the Option, shall supply the Committee with a representation and warranty in writing that he or she has good and marketable title to the shares represented by the certificate(s), free and clear of all liens and encumbrances. The value of the shares of Common Stock tendered in payment for the shares being purchased shall be their Fair Market Value on the date of the Optionee's exercise.

(c) Notwithstanding the foregoing, the Company shall have the right to postpone the time of delivery of the shares for such period as may be required for it to comply, with reasonable diligence, with any applicable listing requirements of any national securities exchange or any federal, state or local law. If an Optionee, or other person entitled to exercise an Option, fails to accept delivery of or fails to pay for all or any portion of the shares requested in the notice of exercise, upon tender of delivery thereof, the Committee shall have the right to terminate his or her Option with respect to such shares.

(d) The Company may make loans to Optionees as the Committee, in its discretion, may determine in connection with the exercise of outstanding Options granted under the Plan. Such loans shall (i) be evidenced by promissory notes entered into by the holders in favor of the Company; (ii) be subject to the terms and conditions set forth in this subsection (d) and such other terms and conditions, not inconsistent with the Plan, as the Committee shall determine; and (iii) bear interest at such rate as the Committee shall determine. In no event may the principal amount of any such loan exceed the purchase price of the shares of Common Stock covered by the Option, or portion thereof, purchased by the Optionee. The initial term of the loan, the schedule of payments of principal and interest under the loan, the extent to which the loan is to be with or without recourse against the holder with respect to principal and applicable interest and

the conditions upon which the loan will become payable in the event of the holder's termination of employment shall be determined by the Committee; provided, however, that the term of the loan, including extensions, shall not exceed ten (10) years. Unless the Committee determines otherwise, when a loan shall have been made, shares of Common Stock having a Fair Market Value as of the date of determination at least equal to the principal amount of the loan shall be pledged by the holder to the Company as security for payment of the unpaid balance of the loan and such pledge shall be evidenced by a security agreement, the terms of which shall be determined by the Committee, in its discretion; provided, however, that each loan shall comply with all applicable laws, regulations and rules of the Board of Governors of the Federal Reserve System and any other governmental agency having jurisdiction."

15.6. On plain reading of clause 9 above, it is clear that, the employees to whom the option is extended are required to make the payment towards the subscription of such shares of the AE directly. Further, the assessee before us has issued "Employee Information Supplement India", which is specific to the employees of present assessee in India. For the sake of convenience, we scan and reproduce the same as under:

radisys.

Radisys Corporation
Radisys Corporation 1996 Employee Stock Purchase Plan
Employee Information Supplement
India

This supplement has been prepared to provide you with a summary of the tax consequences and other issues associated with an offer by Radisys Corporation (the "Company") to participate in the Radisys Corporation 1996 Employee Stock Purchase Plan (the "Plan").

This supplement is based on tax and other laws in effect in your country as of **1 July 2011**. It does not necessarily address all local tax laws that may apply to you. Such laws often are complex and can change frequently. As a result, the information contained in the supplement may be outdated at the time you enroll in the Plan, at the time you purchase Company shares, or at the time you sell the shares you acquire under the Plan.

Please note that this supplement is general in nature and does not discuss all of the various laws, rules and regulations that may apply. It may not apply to your particular tax or financial situation, and the Company is not in a position to assure you of any particular tax result. **Accordingly, you are strongly advised to seek appropriate professional advice as to how the tax or other laws in your country apply to your specific situation.**

If you are a citizen or resident of another country, the information contained in this supplement may not be applicable to you.

TAX INFORMATION

Enrollment

On the date you enroll in the Plan and are granted a stock purchase right to acquire Company shares, you will not be subject to taxation.

Purchase

On the date your stock purchase right is exercised and Company shares are acquired on your behalf using your accumulated payroll deductions, you will be subject to taxation on the difference between the fair market value of the shares you acquire on the date of purchase and the purchase price (the "discount"). The discount will be classified as a perquisite and will be subject to tax as "salary". For purposes of the foregoing, "fair market value" will be determined in accordance with Indian law by a Category-I merchant banker engaged by the Company.

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One Year Holding Period

Under the terms of the Plan, you are required to hold any Company shares for one year following the date of purchase before you can sell or otherwise transfer such shares. This one year holding period will not affect the timing of the taxable event occurring on the date of purchase as described above, and you will not experience a second taxable event at the time the holding period expires and you are able to sell or otherwise transfer the shares.

Sale of Shares

When you subsequently sell or otherwise dispose of your Company shares acquired under the Plan, you will be subject to a capital gain tax on any gain you realize from the sale. The amount taxable as a capital gain will equal the difference between the sale proceeds and the fair market value of the shares on the date of purchase. Any gain arising from such sale of shares held for 12 months or less will be treated as ordinary income and subject to taxation at marginal tax rates (including Education cess). Any gain arising from the sale of shares held for more than 12 months will be subject to taxation at a flat rate of 20.6% (inclusive of Education cess of 2% and Secondary and Higher Secondary cess of 1%). You personally will be responsible for reporting any taxable income arising upon such sale or disposition of the shares along with payment of applicable taxes directly to the local tax authorities. Notwithstanding the foregoing, you may be able to report any capital gain arising from the sale of your Company shares through the Company's local affiliate in India and have the local affiliate in India withhold the applicable taxes from your wages. You should consult with your tax personal tax advisor for additional information about this approach.

Dividends

You will be subject to income taxes in India on any dividends paid on the Company shares you acquire under the Plan. You personally will be responsible for reporting any taxable income attributable to such dividends and paying the applicable taxes directly to the local tax authorities. In addition, you also will be subject to U.S. income tax withholding at source, which may be taken as a credit against your Indian taxes.

Tax Withholding and Reporting

In general, the local affiliate in India will be required to report the discount arising on the date of purchase as taxable income, and will be required to withhold income taxes on such amount and pay the same to the Indian tax authorities.

EXCHANGE CONTROL INFORMATION

In general, you will be responsible for complying with any exchange control compliance requirements in connection with your acquisition of Company shares under the Plan. You are

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required to repatriate any cash proceeds derived from the sale of your shares and any dividends you receive, and convert the same into local currency within a reasonable time, but no later than 90 days from the date of the sale of shares or receipt of the dividends. You also are required to retain the foreign inward remittance certificate ("FIRC") as evidence of repatriation.

This document constitutes part of a prospectus covering securities that have been registered with the U.S. Securities and Exchange Commission under the Securities Act of 1933, as amended.

15.7. From the above it is clear that, no cost is charged to the assessee, and that the employees of the assessee is informed regarding the taxability of the option exercised by the employee. On perusal of the financials, it is noticed that, nothing has been debited as ESOP expenses.

15.8. We note that, the Ld.TPO has mentioned regarding treatment of ESOP's cost by an Israili company as under:

> *"In two cases, Supreme Court of Israel held that whatever an Israeli company is remunerated at cost plus mark up by foreign affiliate for services the cost base should include ESOPs issued by foreign affiliate to Israeli company. In the instant cases, the foreign affiliate was directly issuing ESOPs to the employees of the Israeli company. The Israeli company did not route the ESOPs cost through P&L account due to which these expenses did not appear in the cost base."*

15.9 We fail to understand the inference drawn by the Ld.AO/TPO by referring to the above example. The Ld.TPO has not drawn the complete facts of the case and has also not provided complete details of the decision by the Supreme Court of Iserael. The Ld.TPO has recorded that

the Israeli company is remunerated at cost plus mark up by foreign affiliate for services. In the present facts, the re is no mark up paid by the AE to the assessee. Such abstract reference by the revenue authorities is least expected.

15.10. In our view the Ld.TPO failed to consider the basic fact that, purchase cost of the shares of foreign AE is charged from the employees of the assessee directly and the assessee deducts TDS on the 15% discount received by such employees, who have opted for the scheme. In our view, based on the option scheme and the "Employee Information Supplement India", the 15% discount received by such employees of the assessee cannot be treated as operating in nature.

Accordingly, this ground raised by the assessee stands allowed.

16. **Ground No.17** is in respect of non-granting of working capital adjustment. We note that this issue is no longer *res integra*, as the *Tribunal* has been consistently granting working capital adjustment to the assessee while computing ALP of international transactions on actual. This view is fortified by the order of this *Tribunal* in the case of *Huawei Technologies India Pvt. Ltd.* in *IT(TP)A No.1940/Bang/2017, by order dated 4.8.2021* wherein it is held as under:

"15.The learned counsel for the Assessee brought to our notice the decision of the Tribunal in Assessee's own case for AY 2012-13 wherein on an identical issue, the Tribunal held that working capital adjustment cannot be denied to the Assessee, in IT (TP) A.No. 1939/Bang/2017 Huawei Technologies India Pvt. Ltd. v. JCIT [2019] 101 taxmann.com 313 (Bang. Trib.).

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

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

(a) to (d)

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

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

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

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

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

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

(f)……

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

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

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

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

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

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

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

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

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

12. Chapters I and III of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereafter the "TPG") contain extensive guidance on comparability analyses for transfer pricing purposes. Guidance on comparability adjustments is found in paragraphs 3.473.54 and in the Annex to Chapter III of the TPG. A revised version of this guidance was approved by the Council of the OECD on 22 July 2010. In paragraph 2 of these guidelines it has been explained as to what is comparability adjustment. The guideline explains that when applying the arm's length principle, the conditions of a controlled transaction (i.e. a transaction between a taxpayer and an associated enterprise) are generally compared to the conditions of comparable uncontrolled transactions. In this context, to be comparable means that:

- *None of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or*
- *Reasonably accurate adjustments can be made to eliminate the effect of any such differences. These are called "comparability adjustments.*

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

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

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

15. A company with high levels of inventory would similarly need to either borrow to fund the purchase, or reduce the

amount of cash surplus which it is able to invest. Note that the interest rate July 2010 Page 6 might be affected by the funding structure (e.g. where the purchase of inventory is partly funded by equity) or by the risk associated with holding specific types of inventory)

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

- *A company will need funding to cover the time gap between the time it invests money (i.e. pays money to supplier) and the time it collects the investment (i.e. collects money from customers)*
- *This time gap is calculated as: the period needed to sell inventories to customers + (plus) the period needed to collect money from customers – (less) the period granted to pay debts to suppliers."*

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

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

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

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

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

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

16. The CIT(A) also placed reliance on a decision of Chennai ITAT in the case of Mobis India ITA No.2112/Mds/2011 (2013) 38 taxmann.com. That decision was based on the factual aspect that the Assessee was not able to demonstrate how working capital adjustment was arrived at by the Assessee. Therefore nothing turns on the decision relied upon by the CIT(A) in the impugned order. In the matter of determination of Arm's Length Price, it cannot be said that the burden is on the Assessee or the Department to show what is the Arm's Length Price. The data available with the Assessee and the Department would be the starting point and depending on the facts and circumstances of a case further details can be called for. As far as the Assessee is concerned, the facts and figures with regard to his business has to be furnished. Regarding comparable companies, one has to fall back upon only on the information available in the public domain. If that information is insufficient, it is beyond the power of the Assessee to produce the correct information about the comparable companies. The Revenue has on the other hand powers to compel production of the required details from the comparable companies. If that power is not exercised to find out the truth then it is no defence to say that the Assessee has not furnished the required details and on that score deny adjustment on account of working capital differences.

Regarding applying the daily balances of inventory, receivables and payables for computing working capital adjustment, the Delhi Bench of ITAT in the case of ITO Vs. E Value Serve.com (2016) 75 taxmann.com 195(Del-Trib) has held that insisting on daily balances of working capital requirements to compute working capital adjustment is not proper as it will be impossible to carry out such exercise and that working capital adjustment has to be based on the opening and closing working capital deployed. The Bench has

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

17. In the light of the above discussion we are of the view that the CIT(A) was not justified in denying adjustment on account of working capital adjustment. Since, the CIT(A) has not found any error in the TPO's working of working capital adjustment, the working capital adjustment as worked out by the TPO has to be allowed. We may also add that the complete working capital adjustment working has been given by the Assessee and a copy of the same is at page 173 & 192 of the Assessee's paper book. No defect whatsoever has been pointed out in these working by the CIT(A). We may also further add that in terms of Rule 10B(1)(e) (iii) of the Rules, the net profit margin arising in comparable uncontrolled transactions should be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions which could materially affect the amount of net profit margin in the open market. It is not the case of the CIT(A) that differences in working capital requirements of the international transaction and the uncontrolled comparable transactions is not a difference which will materially affect the amount of net profit margin in the open market. If for reasons given by CIT(A) working capital adjustment cannot be allowed to the profit margins, then the comparable uncontrolled transactions chosen for the purpose of comparison will have to be treated as not comparable in terms of Rule 10B(3) of the Rules, which provides as follows:

> *"(3) An uncontrolled transaction shall be comparable to an international transaction if—*

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

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

16. Respectfully following the aforesaid decision, we hold that the working capital adjustment as claimed by the Assessee should be allowed. We hold and direct accordingly."

In view of above, we direct the Ld.AO/TPO to grant working capital adjustment.

Accordingly, this ground raised by the assessee stands allowed.

17. <u>Ground No.18</u> is in respect of risk adjustment sought by the assessee which is not pressed and accordingly, dismissed as not pressed.

18. <u>Ground No.19</u> is in respect of delayed remittance of PF. This issue has been now settled by the decision of *Hon'ble Supreme Court* in case of *Checkmate Services (P.) Ltd. Vs CIT-1,* reported in *(2022) 143 taxmann.com 178,* against the assessee.

18.1. We notice that, *Hon'ble Supreme Court* in the case of *Checkmate Services (supra)* considered the issue of whether the employees contribution paid before due date

for filing the return of income u/s.139(1) whether otherwise allowable u/s.43B, putting to rest the contradicting decisions of various *High Court*. The relevant extract of the decision is as given below –

> *52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund*

is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit

the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere

with the impugned judgment. The appeals are accordingly dismissed.

18.2 In view of the above decision by *Hon'ble Supreme Court,* we hold that the employees contribution to PF and ESI should be remitted before the due date as per explanation to section 36(1)(va) i.e. on or before the due date under the relevant employee welfare legislation like PF Act, ESI Act etc., for the same to be otherwise allowable u/s.43B. We therefore see no reason to interfere with the order of the CIT(A). The grounds taken by the assessee on this issue is dismissed.

Accordingly, this ground raised by the assessee stands dismissed.

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

Order pronounced in the open court on 18th November, 2022

Sd/-	**Sd/-**
(Lami Prasad Sahu)	**(Beena Pillai)**
Accountant Member	**Judicial Member**

Bangalore,
Dated 18th Nov, 2022.
VG/SPS

Copy to:

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

By order

Asst. Registrar,
ITAT, Bangalore.