

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

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

<b>IT(TP)A No. 209/Bang/2021</b>
<b>Assessment Year : 2016-17</b>

M/s. Applied Materials India Pvt. Ltd., Unit -5, 3 <sup>rd</sup> Floor, Explorer Building, International Tech Park, Whitefield Road, Bangalore – 560 001. <b>PAN: AAECA2635C</b>	<b>Vs.</b>	The Deputy Commissioner of Income Tax, Circle – 1(1)(1), Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri T. Suryanarayana, Advocate
Revenue by	:	Dr. Manjunath Karkihalli, CIT-DR

Date of Hearing	:	30-11-2022
Date of Pronouncement	:	30-11-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against the order dated 31/03/2021 passed by the National e-Assessment Centre, Delhi for A.Y. 2016-17 on following grounds of appeal:

Sl. No	Grounds of Appeal	Tax effect (in INR)
1.	<b>The Order/ Directions are bad in law and on facts</b>	NA
1.1	The final assessment order passed by the Ld. Assessing Officer ("AO"), under section 143(3) read with section 144C(13), 143(3A) and 143(3B) 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.  Without prejudice to the generality of the above, the order issued by the Ld. AO is bad in law in so far as the fact that the Ld. AO did not issue to Applied Materials India Private Limited ('the Appellant or 'the Company'), a show cause notice as per proviso to section 92C(3) of the Act.	
1.2	The Ld. AO has erred in law in making a reference to the Assistant Commissioner of Income Tax Transfer Pricing – 1(1)(1) ['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.	
1.3	The order passed by the Ld. AO is without jurisdiction, inter alia, in so far as it purports to give effect to invalid directions of the Dispute Resolution Panel ('Ld. Panel')	
1.4	The directions issued by the Ld. Panel and the order passed by the Ld. AO is without jurisdiction, <i>inter alia</i> , in so far as it purports to give effect to an invalid order of the Ld. TPO.	
2	<b>The Ld. Panel and Ld. AO/ Ld. TPO have erred in justifying the motive of shifting of profits</b>	NA
2.1	On the facts and in the circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Ld. Panel erred in not demonstrating that the motive of the Appellant was to shift profits outside India by manipulating the prices charged in the international transaction, which is a pre-requisite condition to make any adjustment under the provision of Chapter X of the Act. The Ld. Panel erred in upholding the same.	
3	<b>Determination of arm's length price of international transactions</b>	249,480,134
3.1	The Ld. AO/ Ld. TPO/ Ld. Panel erred in rejecting the value of international transaction of provision of software development services, as recorded in the books of account, as the arm's length price.	
3.2	The Ld. AO/ Ld. TPO/ Ld. Panel erred in law by redetermining arm's length price by incorrectly rejecting the arm's length price determined by the Appellant.	

Sl. No	Grounds of Appeal	Tax effect (in INR)
3.3	The Ld. AO/ Ld. TPO/ Ld. Panel erred in law in holding that the comparability analysis undertaken by the Ld. TPO on its own conjectures and surmises is based on data which was not available to the Appellant and thereby incorrectly rejecting the Appellant's comparability analysis.	
3.3.1	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in law in by incorrectly computing the arm's length price using multiple-year data not in accordance with the prescribed rules in undertaking the comparability analysis.</i>	
3.3.2	<i>The Ld. AO/ 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 were further evaluated for comparability in either or both of the preceding two financial years (FY 2014-15 and FY 2013-14).</i>	
3.3.3	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in law by not analyzing such potential comparable companies based on financial data of FY 2014-15 in a situation where the financial data of FY 2015-16 is not available.</i>	
<b>4</b>	<b>Determination of Net Cost Margin of the Appellant</b>	NA
4.1	The Ld. Panel erred in holding that sub-contracting charges ought to be a part of operating cost for the purposes of determination of the net margin of the Appellant:	
4.1.1	<i>The Ld. AO/ Ld. TPO/ Ld. Panel has erred in facts and in law by not appreciating that the subcontracting charges were paid to third party service providers under uncontrolled circumstances, which ought to be considered as arm's length.</i>	
4.1.2	<i>The Ld. AO/ Ld. TPO/ Ld. Panel has erred in facts and in law by not appreciating that the sub-contracting charges include the profit element earned by such third parties and attributing any further mark-up on the same for the purposes of determining the arm's length price is incorrect and outside the ambit of Chapter-X of the Act.</i>	
4.1.3	<i>Without prejudice, the Ld. AO/ Ld. TPO/ Ld. Panel failed to appreciate the fact that the Appellant has sub-contracted activities which are non-core in nature, and in respect of such sub-contracted activities the Appellant does not perform any substantial function, therefore such expenses incurred should not be part of the operating cost base pertaining to the software development services for the mark-up to be imputed as regards the same.</i>	

Sl. No	Grounds of Appeal	Tax effect (in INR)
4.1.4	<i>The Ld. AO/ Ld. TPO/ Ld. Panel has erred in facts and in law by not appreciating that the Appellant, with significant sub-contracting charges, operates through an operating model, which is different from most of the Companies incorrectly chosen as comparable by the Ld. AO/ Ld. TPO/ Ld. Panel to the Appellant and therefore, appropriate adjustments are necessary for comparability and the failure to do so would be contrary to Rule 10B(3) of the Income-tax Rules, 1962.</i>	
4.2	The Ld. AO/ Ld. TPO/ Ld. Panel had erred in facts and in law by excluding scrap sales and including bank charges while computing the Net Cost Plus Mark-up ('NCP') of the Appellant.	
<b>5</b>	<b>Comparability Analysis adopted by the Ld. TPO for determination of arm's length price</b>	NA
5.1	The Ld. AO/ Ld. TPO/ Ld. Panel erred in facts and in law by benchmarking the transactions of software development services 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.	
5.2	The Ld. AO/ 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.	
5.3	The Ld. AO/ Ld. TPO/ Ld. Panel, while applying the lower turnover filter to reject companies having turnovers less than INR 1 crore, erred in not applying an appropriate upper limit to reject high turnover companies and arbitrarily accepting companies without considering the turnover and size of the Appellant and comparables.	
5.4	The Ld. AO/ Ld. TPO/ Ld. Panel erred in facts and in law by not selecting an appropriate threshold for applying the related party transaction filter which needs to be determined based on the availability of comparable data, size of comparables companies and other parameters pertinent to the facts and circumstances.	
5.4.1	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in incorrectly computing the related party transaction ratio by considering, either revenue account transactions over total operating revenue; or, expense side transactions over total operating expense; depending on the nature of international transaction being tested;</i>	
5.5	The Ld. AO/ Ld. TPO/ Ld. Panel erred in facts and in law in arbitrarily rejecting companies having software development services income less than 75% of total operating revenue.	

Sl. No	Grounds of Appeal	Tax effect (in INR)
5.6	The Ld. AO/ Ld. TPO/ Ld. Panel erred in facts and in law in arbitrarily rejecting companies having export earnings less than 75% of total operating revenue.	
5.7	The Ld. AO/ Ld. TPO/ Ld. Panel erred in facts and in law in arbitrarily rejecting companies with different year ending (i.e. other than 31 March 2016).	
5.8	The Ld. AO/ Ld. TPO/ Ld. Panel erred in facts and in law in accepting companies having significant onsite operations.	
5.9	That 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.	
5.10	The Ld. AO/ 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.	
5.10.1	<i>The Ld. AO/ 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 by considering provision for doubtful debts and bad debts written off as non-operating while computing the margins of the comparable companies.</i>	
5.11	The Ld. AO/ Ld. TPO erred in arbitrarily rejecting certain comparable companies like Akshay Software Technologies Ltd., Evoke Technologies Pvt. Ltd. and Sasken Technologies Ltd. despite these companies being functionally similar to the Appellant and the Ld. Panel grossly erred in not adjudicating their exclusion on the basis that the companies not having featured in the TPO's search matrix, their inclusion would amount to cherry picking.	
5.12	The Ld. AO/ Ld. TPO erred in including certain companies as comparables, despite these companies being functionally dissimilar to the Appellant.	
5.12.1	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Rheal Software Pvt. Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.2	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including C G -VAK Software &amp; Exports Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.3	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including R S Software (India) Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.4	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Larsen &amp; Toubro Infotech Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	

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30/6/2022

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Sl. No	Grounds of Appeal	Tax effect (in INR)
5.12.5	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Nihilent Technologies Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.6	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Inteq Software Pvt. Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.7	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Persistent Systems Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.8	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Infobeans Technologies Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.9	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Thirdware Solution Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.10	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Infosys Limited as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.11	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Aspire Systems (India) Pvt. Ltd as comparable despite being functionally dissimilar to the Appellant.</i>	
5.12.12	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily including Cybage Software Private Limited as comparable despite being functionally dissimilar to the Appellant.</i>	
5.13	The Ld. AO/ Ld. TPO/ Ld. Panel erred in not considering the Appellant's submission that certain companies were held as functionally not comparable by this Hon'ble Tribunal in the Appellant's own cases for earlier Assessment years.	
5.14	The Ld. AO/ Ld. TPO/ Ld. Panel erred in considering data obtained u/s 133(6).	
5.15	That the DRP grossly erred in observing that (i) decisions of this Hon'ble Tribunal cannot be relied upon while adjudicating the comparability of certain companies; (ii) companies cannot be excluded for making supernormal profits; and (iii) companies cannot be rejected for non-availability of segment information.	
<b>6</b>	<b>Determining an interest on the outstanding trade receivables of the Appellant</b>	<b>3,783,216</b>
6.1	The Ld. AO/ Ld. TPO/ Ld. Panel erred in treating the outstanding trade receivables as an "International Transaction" and in determining an interest on the outstanding trade receivables of the Appellant.	

Sl. No	Grounds of Appeal	Tax effect (in INR)
6.1.1	<i>The Ld. AO/ Ld. TPO/ Ld. Panel erred in law in fact by treating on an arbitrary basis, that the realization of an invoice beyond 30 days would be treated as delayed receivables.</i>	
6.1.2	<i>The Ld. AO/ Ld. TPO, while giving effect to the Directions of the Ld. Panel, erred in incorrectly imputing interest on 'unbilled revenue' without appreciating the fact that the same is not invoiced by the Appellant as on 31 March 2016.</i>	
<b>7</b>	<b>Non-allowance of appropriate adjustment to the comparable companies by the Ld. Panel and Ld. AO/ Ld. TPO</b>	NA
7.1	The Ld. AO/ 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, (ii) marketing expenditure adjustment, (iii) research and development expenditure adjustment, (iv) working capital, and (iv) risk profile between the Appellant and the comparable companies.	
<b>8</b>	<b>Variation of 3% from the arithmetic mean</b>	NA
8.1	The Ld. AO/ Ld. TPO/ Ld. Panel erred in law in not granting the benefits of proviso to section 92C(2) of the Act available to the Appellant.	
<b>9</b>	<b>Erroneous disallowance of INR 73,027,599 under section 40(a)(i) of the Act towards salary cost reimbursed to Applied Materials Inc. on an 'at cost' basis</b>	<b>25,273,391</b>
9.1	The Ld. Panel and the Ld. AO erred in law and on facts in disallowing reimbursement of salary costs amounting to INR 73,027,599 paid by the Appellant to Applied Materials Inc., ['Applied Inc'] alleging non-deduction of tax at source u/s 195 of the Act.	
9.2	The Ld. Panel and the Ld. AO erred in not appreciating that the amounts reimbursed by the Appellant to Applied Inc. was on an 'at-cost' basis and that in the absence of 'income' the same was not liable to income tax in India and therefore TDS liability u/s 195 did not arise.	
9.3	The Ld. Panel and the Ld. AO erred in holding the 'source of income' for Applied Inc. w.r.t salary cost reimbursement to be in India, without appreciating that Applied Inc. did not render any service to the Appellant nor did it perform any activity in India.	
9.4	The Ld. Panel and the Ld. AO erred in concluding that reimbursement of salary cost was taxable as Fees for Technical Service ['FTS'] under Section 9(1)(vii) of the Act, without appreciating that the Appellant had not availed any 'service' from Applied Inc.	

Sl. No	Grounds of Appeal	Tax effect (in INR)
9.5	The Ld. Panel and the Ld. AO has also erred in concluding that reimbursement of salary cost is taxable as Fees for Included Services ['FIS'] under the Double Taxation Avoidance Agreement between India and the United States of America ['India-US DTAA'] alleging that the employees of Applied Inc. had 'made available' technical skill, experience or knowledge, etc. to Appellant's employees.	
9.6	The Ld. Panel and the Ld. AO erred in relying upon the decision of Hon'ble Delhi High Court in the case of <i>Centrica India Offshore Pvt. Ltd. [2014] 364 ITR 336</i> and the decision of the Bangalore bench of Income tax Appellate Tribunal ['ITAT'] in the case of <i>Foodworld Supermarkets Limited [2015] 63 taxmann.com 43</i> without appreciating that the facts of those cases were distinguishable from that of the Appellant's case.	
9.6	The Ld. Panel and the Ld. AO erred in disregarding the fact that the salary costs were already subjected to tax deduction at source u/s 192 of the Act and therefore, could not be made liable for tax deduction, once again, u/s 195 of the Act.	
9.7	The Ld. Panel and the Ld. AO grossly erred in holding that no employer-employee relationship existed between the Appellant and the seconded employees.	
9.9	The Ld. Panel and the Ld. AO erred in not following the decision of the Hon'ble High Court of Karnataka in the case of <i>Abbey Business Services India Private Limited vs. DIT (2020) 122 taxmann.com 174 (Karnataka)</i> , wherein the Hon'ble High Court, <i>inter alia</i> , held that reimbursement of costs relating to the seconded employees was not FTS under the Act and the relevant tax treaty and hence was not to be subjected to tax deduction u/s 195 of the Act.	
<b>10</b>	<b>Erroneous denial of claim of education cess paid on income-tax of INR 5,241,584</b>	<b>1,814,007</b>
10.1	The Ld. AO erred in not considering the additional claim for deduction of education cess raised by the Appellant in the assessment proceedings without providing any reason.	not pressed
10.2	The Ld. AO erred in not allowing the claim of education cess of INR 5,241,584 paid by the Appellant during the year under consideration as a deductible expenditure in computing business income.	me d 30/4/2022

Sl. No	Grounds of Appeal	Tax effect (in INR)
10.3	The Ld. AO erred in not following the decision of the Hon'ble High Court of Bombay in <i>Sesa Goa Ltd. vs JCIT [2020] 117 taxmann.com 96</i> , decision of the Hon'ble High Court of Rajasthan in <i>Chambal Fertilizers and Chemicals Limited Vs JCIT (ITA No.52 of 2018 dated 31 July 2018)</i> as well as several decisions of this Hon'ble Tribunal wherein the claim of education cess as a tax deductible expenditure was allowed to the taxpayer.	
11	<b>Initiation of penalty proceedings</b>	NA
11.1	The Appellant submits that based on the facts and circumstances of the case, there was no basis for the Ld. AO to initiate proceedings under section 271(1)(c) of the Act	
<b>Total tax effect</b>		<b>280,350,748</b>
Each of the aforesaid grounds and sub-grounds are without prejudice to each other and are independent of each other.		

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

2.1 The assessee is a Pvt. ltd company engaged in the business of providing software development and engineering services including technical product support and design services to its Holding Company. The Company is registered as a 100% export oriented unit ("EOU") with the Software Technology Park of India and was eligible for a tax holiday up to 31st March, 2011. The assessee filed its ITR for the AY 2016-17 electronically on 30.11.2016 declaring return income of Rs. 52,52,39,980/. The return was duly processed u/s 143(1) of the IT Act, 1961. Thereafter the case of the assessee was selected for the scrutiny under CASS. Notice u/s 143(2) of the IT Act, 1961 was issued.

2.2 In response to the statutory notices, representative of assessee appeared before the Ld.AO and filed requisite details. The Ld.AO observed that assessee had international transaction with its associated enterprises. Accordingly the case was referred

to the transfer pricing officer u/s. 92CA for determining the arms length price of such international transactions.

2.3 On receipt of the reference u/s. 92CA, the Ld.TPO called upon assessee to file the economic details of the international transaction it has had with its AE for the year under consideration. From the TP report observed that following were the international transactions.

Nature of Transaction	Amount(INR)
Hardware purchased	12,078,445
Software development service	464,50,42,311
Reimbursement of travel expenses	4,87,43,840
Reimbursement of expat salary related expenses	73,027,599
Reimbursement of expenses for employee stock purchase plan (ESPP)	16,575,944
Reimbursement of software expenses	23,919,431
Reimbursement of training expenses	59,37,547
Reimbursement of employee contribution of ESPP	27,71,250
Reimbursement of training expenses	19,83,292
Reimbursement of repair & maintenance expenses	6,219
Reimbursement of travel expenses	50,53,349
Recovery of travel expenses	3,05,92,169
Recovery for with-holding taxes for employees on restricted stocks unit and ESOP granted and remitted to local tax authorities	503,25,996

2.4 The Ld.TPO noted that assessee computed its margin by using OP/OC as PLI at 11.09% for software development service segment. Assessee had used TNMM as most appropriate method for benchmarking the transaction. In the TP study, assessee had used 7 comparables with an average margin of 10.91% and thus held its transaction to be at arms length.

Sl.No.	Name of the Company	Weighted Average (%)
1.	Lycos Internet Ltd. (Formerly known as ybrant Digital Ltd.)	3.49
2.	Sasken Communication Technologies Ltd.	8.50
3.	Evoke Technologies Pvt. Ltd.	5.25
4.	E-Zest Technologies Ltd.	11.02
5.	Akshay Software Technologies Ltd.	2.11
6.	R Systems International Ltd.	23.51
7.	OFS Technologies Ltd.	26.74

2.5 Dissatisfied with the companies selected by assessee, the Ld.TPO finalised following comparables after giving an opportunity to the assessee under the SWD segment.

Sl.No.	Company Name	Financial Year wise OP/OC (%)			Weighted Average
		2015-16	2014-15	2013-14	
1	Kals Information Systems Pvt. Ltd.	3.97%	5.77%	16.94%	8.60%
2	Rheal Software Pvt. Ltd.	3.20%	2.76%	36.64%	14.50%
3	C G-V A K Software & Exports Ltd.	19.60%	19.87%	13.81%	18.50%
4	R S Software (India) Ltd.	-2.09%	32.75%	24.14%	20.87%
5	Larsen & Toubro Infotech Ltd.	26.29%	24.22%	23.54%	24.83%
6	Nihilent Ltd.	15.94%	29.19%	35.72%	26.36%
7	Inteq Software Pvt. Ltd.	7.53%	32.14%	45.00%	28.20%
8	Persistent Systems Ltd.	26.92%	31.34%	35.64%	30.89%
9	Infobeans Technologies Ltd.	34.98%	20.78%	41.95%	32.42%
10	Thirdware Solution Ltd	23.89%	44.39%	44.68%	36.90%
11	Infosys Ltd	38.22%	41.30%	36.28%	38.61%
12	Aspire Systems (India) Pvt. Ltd.	34.26%	47.56%	38.04%	39.28%
13	Cybage Software Pvt. Ltd	62.90%	68.68%	68.82%	66.45%
	35th Percentile				24.83%
	Median				28.20%
	65th Percentile				32.42%

2.6 These comparables had an average margin of 24.83% and thus the Ld.TPO computed proposed adjustment being the shortfall at Rs.72,08,74,173/-.

2.7 The Ld.TPO observed that assessee had outstanding trade receivables for the year under consideration. After calling for various details and submissions in respect of the same, the Ld.TPO computed the notional interest on the outstanding receivables based on 6 month LIBOR + 450 basis points. The rate thus computed was at 4.4985% by allowing a period of 30 days credit.

2.8 The Ld.TPO thus worked out the proposed adjustment at Rs.1,30,90,069/-.

2.9 On receipt of the transfer pricing order, Ld.AO passed the draft assessment order by further making addition u/s. 40(a)(ia) in respect of the reimbursement of salary and other related costs to the AE towards the seconded employees as TDS u/s. 195 was not deducted.

2.10 The Ld.AO thus proposed total addition as under:

- a) Transfer pricing addition –Rs.73,39,64,242/-
- b) Disallowance u/s. 40(a)(i) – Rs. 7,30,27,599/-

2.11 Against the draft assessment order, assessee filed objections before the DRP.

2.12 The DRP upheld the draft assessment order in respect of the disallowance u/s. 40(a)(i). With regard to the adjustment proposed u/s. 92CA, the DRP directed the Ld.AO/TPO the following:

- Verify and adopt correct PLI as per the annual report in respect Cybage Software Private Limited in SWD segment.
- Adopt short term deposit interest rate as the ALP interest rate and recompute the adjustment on account of delayed receivables after verifying the details in respect of invoices and other evidence

2.13 Based on the above directions, final adjustment u/s. 92CA was reduced to Rs.73,18,05,797/- and final assessment order was passed by incorporating the disallowance u/s. 40(a)(i) as made in the draft assessment order in addition to the adjustment reworked u/s. 92CA.

2.14 On receipt of the final assessment order, assessee has preferred this appeal before this *Tribunal*.

3. The Ld.AR at the outset submitted that **Ground nos. 1-3** are general in nature and does not require any adjudication.

4. In respect of **Ground no. 4**, it is submitted that this issue has been raised for excluding the sub-contracting charges from the operating cost as they are a pass-through cost.

4.1 The Ld.AR submitted that assessee places reliance on the decision of *Hon'ble Delhi Tribunal* in case of *DCIT vs. Cheil Communications India Pvt. Ltd.* reported in (2011) 11 *taxmann.com* 205.

4.2 However, the Ld.AR fairly admitted that this issue has been considered against assessee in assessee's own case for A.Y. 2014-15 reported in (2022) 141 *taxmann.com* 421. We refer to the relevant observation which is reproduced as under:

*"18. The ld. AR submitted that the determination of net cost margin excluding the sub-contract charges is decided against the assessee by the Tribunal in assessee's own case for the AY 2011-12 in IT(TP)A No.17/Bang/2016 dated 21.09.2016 (page 2265 to 2269 of PB, para 4 to 8 of the order). The relevant observations of the Tribunal are as follows:-*

*"7. We have considered the rival submissions as well as the relevant material on record. Undisputedly, the assessee is charging a mark up on the software development services provided to the AE being captive service provider. Therefore the assessee is not acting as an agent or distributor of the AE but is a provider of*

*services of its own. It is not the case of rendering services of an agent without any value addition but the assessee is providing software development services to the AE and charging margin on the same. Therefore the cost on the software development activity is incurred by the assessee and charging the AE on the said services with a mark up of 10% on cost. The cost of sub-contracting in software development services is also charged with 10% mark up to the AE. When the margin on the cost of sub-contracting charges is part of the operating revenue of the assessee then only the cost of sub-contracting activity cannot be excluded as pass through. It would amount to artificially inflate the margins of the assessee on the other revenue from the services other than sub-contracting activity. In any case, pass through cost can be considered only when the activity of providing services to the AE does not involve value addition on the part of the AE. The decision of the Delhi Benches of the Tribunal in the case of DCIT Vs. Cheil Communications India Pvt. Ltd. (supra) would not help the case of the assessee as in the said case the activity of the assessee was only a distributor without any value addition. It IT(TP)A No.3403/Bang/2018 is pertinent to note that outsourcing cost in software development services activity is part and parcel of cost of providing the service to the AE and cannot be separated from the operating cost and operating revenue of the said segment of services. Accordingly, the cost of software development services cannot be treated in this fashion as claimed by the assessee. Hence we do not find any merit in the contention raised by the assessee on this issue.*

*8. As regards the alternative plea raised by the ld. AR that the comparables should also have similar activity, we find that the TPO has applied a filter of cost of employee which subsumes the outsourcing activity of both assessee as well as the comparables. Accordingly, the issue is decided against the assessee."*

*19. Respectfully following the above decision of the coordinate bench of the Tribunal, we see no reason to interfere with the decision of the lower authorities and hence these grounds of the assessee are dismissed."*

4.3 Respectfully following the above view, we see no reason to interfere with the view taken by the authorities below and the same is upheld.

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

**5. Ground no. 5:** The Ld.AR submitted that sub-ground no. 5.1 – 5.11 is not pressed by assessee as they are general in nature.

**5.1** He submitted that in Ground no. 5.12, assessee seeks exclusion of 10 comparables being

- a) RS Software
- b) L&T Infotech Ltd.
- c) Nihilient Technologies Ltd.
- d) Intex Software Pvt. Ltd.
- e) Persistent Systems Ltd.
- f) Infobeans Technologies Ltd.
- g) Thirdware Solutions Ltd.
- h) Infosys Ltd.
- i) Aspire Systems India Pvt. Ltd.
- j) Cybage Software Pvt. Ltd.

**5.2** He submitted that the two comparables raised by assessee in 5.12.1 and 5.12.2 are not pressed and accordingly they are not adjudicated herein.

**6.** Before we undertake the comparability analysis, it is *sinequa non* to understand the FAR analysis of assessee under the SWD segment.

**FAR****5.2 Software Development and Support Services****5.2.1 Functions**

Applied India renders software development and support services to Applied Inc. through its centers in Bangalore and Chennai. Applied India provides the above services to Applied Inc. in pursuance of the agreements entered into between them. In providing such services, to ensure timely delivery of the services, amongst other things, Applied India employs sub-contractors, who perform a part of the services.

The Chennai centre is registered as an STPI<sup>16</sup> unit and employs approximately 80 engineers who are regular full time ('RFT') personnel to conduct software development services.

The Bangalore centre is also registered as an STPI unit and employs engineers to provide software development services. In providing such services, Applied India has engaged third party service providers (e.g. Tata Consultancy Services, Tech Mahindra Ltd, ASM Technologies Limited etc.) for sub-contracting certain portion of their software development work. Although Applied India uses the services of the sub-contractors, all the critical functions under software development cycle are undertaken by Applied India as the critical mass of manpower resources engaged in the software development and support activity are on the payroll of Applied India. All the core activities relating to software development life cycle are conducted in house by Applied India whereas a part of non-core activities (on Applied India Premises) are sub-contracted to third party service providers. This centre employs 736 regular full time ('RFT') personnel and 913 sub-contractors. The employees of Applied India and the services providers work closely with each other for rendering the software development services to Applied India.

<sup>16</sup> Software Technology Parks of India.

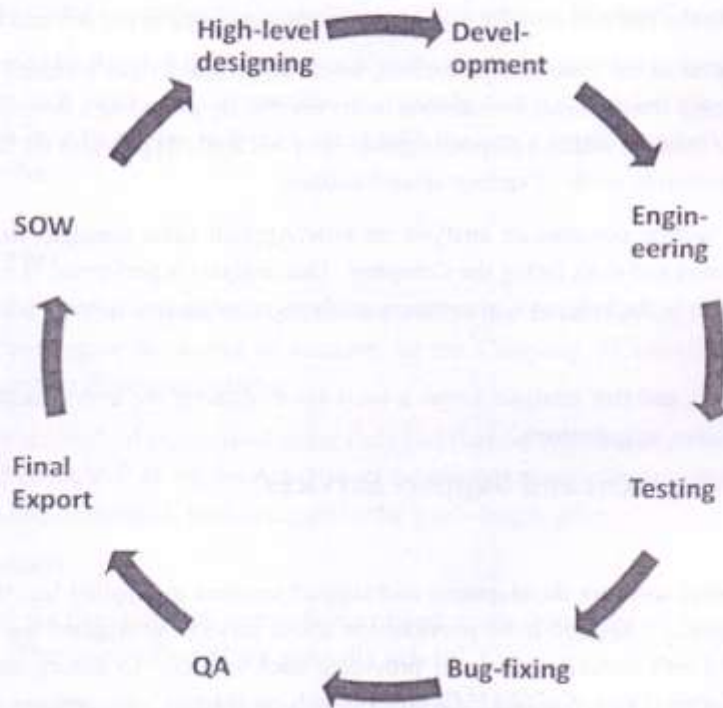


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These third party service providers furnish timesheets to Applied India where the same would be approved by the Managers in India. If a particular cost center does not have a manager then the same is sent to Applied Inc. for seeking their approval. Once approved, the third party service provider raises invoice on Applied India on 'time & material' and fixed delivery amount basis.

Applied India, in turn, invoices Applied Inc. on a cost-plus basis. The cost base in this case includes the charges paid to these third party services providers and the overheads incurred by these third party service providers as well as Applied India. The work flow of the software development is explained in Figure 2.

Figure 7: Work flow of the software development



The provision of software development and support services by Applied India can be broadly split into eight steps, which are explained as under:

- **Step 1: SOW**

The process is initiated with the Statement of Work ('SOW') being issued by Applied Inc. to Applied India, which specifies the activities to be carried out and the deliverable which is expected by Applied India.

- **Step 2: High level designing**

Based on the specifications mentioned in the SOW, Applied India undertakes high level designing of the project. During the designing phase, an action plan for development and engineering of the project is drawn. Since Applied India sub-contracts a part of the development to Satyam and TCS, the allocation of work is done for the two companies as well as the workforce of Applied India.

- ***Step 3: Development (Coding)***

Once the allocation of work is done, the development activity begins. At this stage, to ensure that the project is being developed as per the specifications of the SOW and to ensure that the timelines are being met, the project managers of Applied India work closely with the team of consultants deployed by Satyam and TCS. The personnel of Applied India also engage its own employees in the development part of the life cycle. These project managers are on the payrolls of Applied India and spend their time equally on overseeing the development activities by the team of the sub-contractors as well as of Applied India.

- ***Step 4: Engineering***

The outcome of the development activity requires engineering as well as re-engineering to ensure its acceptable performance. For this purpose, the team of Applied India works closely with the team of the sub-contractors who ultimately ensure that the developed software serves its purpose.

- ***Step 5: Testing***

Once the developed software is re-engineered, it becomes important for Applied India to test it on a system to ensure that the final outcome works. The testing activity is generally carried out by the team of Applied India.

- ***Step 6: Bug-fixing***

As a result of the testing activity, certain bugs may be identified in the software developed which would need fixing. This activity is generally carried out by the team which has done the basic development.

- ***Step 7: QA***

Quality Assurance or QA is one of the most important part of the entire software development life cycle where the team of Project Managers and Group Heads of Applied India ensure that the final product which is exported to Applied Inc. is in line with the international standards of the Applied Group. It is the responsibility of the Applied India's team to take corrective actions if there is any deviation from the quality standards of Applied India.

- ***Step 8: Final Export***

After the Applied India's team is satisfied that the final product which has been developed and created by Applied India and the sub-contractors meets all quality standards, the same is exported to Applied Inc. for their usage. Should Applied Inc. accept the project developed in India, the project is considered as closed; else the same is returned to India with instructions of further corrections.

A summary of role of Applied India and the sub-contractors in the development cycle is summarized below.

**Table 3: Role of Applied India and the sub-contractors in the development cycle**

Process in Software Development Life Cycle	Applied India	Sub-contractors
SOW	✓	
High Level Designing	✓	
Development (Coding)	✓	✓
Engineering	✓	✓
Testing	✓	
Bug-fixing	✓	✓
Quality Assurance	✓	
Export	✓	

In view of the above summary, it is clear that the sub-contractors perform functions which have been specifically sub-contracted by Applied India, namely development (coding) and engineering. Further, Applied India is engaged in all the activities / functions, which are a part of the software development life cycle. The core activities of the software development life cycle are conducted in house by the Applied India team, whereas a part of the non-core activities are sub-contracted to third-party service providers.

Applied India as well as the sub-contractors' work together as one team and render services to Applied Inc. Thus, the entire activity is handled by the teams together and there are no such projects on which Applied India or the sub-contractors work independently.

#### 5.2.2 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 Applied India and Applied Inc. provides an insight into the resources deployed by them and their contribution to the business processes/economic activities.

##### 5.2.2.1 Tangible Assets

Applied India employs necessary tangible assets required in respect of the above mentioned functions.

##### 5.2.2.2 Intangible Assets

Applied India does not own or develop significant intangible assets and it also does not undertake any significant design and development activities on its account that leads to development of non-routine intangibles.

Applied India uses computer software to carry out its business activities.

Applied India employed following tangible and intangible assets for the use in its business activities as on 31 March 2017:

**Table 4: Assets (net block) employed as on 31 March 2017**

Particulars	Amount (INR)
<b>Tangible Assets</b>	
Computers	283,023,892
Leasehold improvements	107,363,780
Networking Equipment	112,798,881
Office Equipment	64,177,034
Furniture & Fixtures	29,001,078
<b>Total Assets</b>	<b>596,364,665</b>

Source: Audited Financial Statement FY 2016-17

### 5.2.3 Risk undertaken

The following sections provide an overview of the significant risks borne by Applied India vis-à-vis its AEs involved in the period under review:

**Table 5: Risk Profile**

Risk Category and Description	Exposure of Applied India	Exposure of AEs
<b>Market Risk:</b> The market risk comprises the risk caused by a shortfall in demand for the products and services offered by the company, which could lead either to a loss of market shares or a decrease in the company's profit margin. In this regard, it is distinguished between short-term effects resulting in a certain level of market volatility as well as long-term effects requiring an adjustment of the market strategy including, e.g., product types and features as well as the scope of services.	The primary market risk lies with AEs as it is responsible for providing software development services. Applied India does not bear market risk as these services are provided only to AEs. However, a slump in business volumes for AEs may result in lower volumes, and thus an indirect but limited market risk for Applied India	
<b>Capacity Utilization Risk:</b> Provision of services may require substantial investment manpower and related infrastructure. The risk of sub-optimal utilization of such capacity may lead to non-recovery of fixed costs related to such resources.	As Applied India is compensated for its software development services on a cost plus basis, the capacity utilisation risk is borne by AEs.	
<b>Credit Risk:</b> A counter party risk occurs when a customer is not able to settle an invoice for delivered goods or rendered services. The payment default could be caused either by illiquidity or insolvency of a customer as well as a limited willingness	AEs assumes full credit risk in respect of contracts entered into with its third party customers. Since, Applied India provides services only to its AEs for which it gets remunerated directly by the latter, it is insulated from any credit risk.	



Risk Category and Description	Exposure of Applied India	Exposure of AEs
to pay. The risk could, for example, materialize by means of allowances for bad debt or costs in connection with legal actions.		
<b>Foreign Exchange Risk:</b> The foreign exchange risk becomes relevant if the sourcing of, e.g., materials, resources and services or if sales is performed in a currency different from the tested party's functional currency. The risk could be mitigated by hedging.	Applied India is subject to this risk in respect of its international transactions with AEs. Applied India invoices AEs in foreign currency and is thus exposed to foreign currency fluctuation risk. However, as Applied India invoices AEs on a cost plus basis, the exchange fluctuation risk borne by Applied India is limited.	
<b>Service Liability Risk:</b> 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, the Group could be subject to significant liability for personal injury	Applied India provides software development service to AEs based on contracts. The software development services rendered by Applied India are based on the specifications received from AEs. Applied India does not assume any risk with respect to the ultimate success or failure of the activities. In the event that AEs determine that the services provided by Applied India do not meet the specifications prescribed and rework is required, the entire costs related to such rework are marked up by Applied India and invoiced to AEs.	
<b>Contract Risk:</b> Contract risks arise when a company enters into a contract and thus has to bear the liabilities associated with such contracts.	AEs are responsible for the contract risk since they contract with the clients in their own name. As Applied India merely acts as a provider of services, it bears a limited contract risk <i>vis-à-vis</i> Applied Inc. in relation to the performance of the project. As AEs deal with and cater to the needs of third party clients, they bear the contract risk with respect to the contracts entered into with third parties	
<b>Price Risk:</b> Price risk is the risk that future income streams are sensitive to market prices.	Since AEs negotiate the price with their customers, they bear significant price risk. Applied India does not bear any significant price risk as it is compensated on a cost plus mark-up basis.	

Risk Category and Description	Exposure of Applied India	Exposure of AEs
<b>Technological Risk:</b> This risk relates to the obsolescence of existing/old technology due to new technology superseding the former.	Both Applied India and AEs are subject to this risk.	
<b>Intangible Property Right Risk:</b> This risks relates to the infringement of patent rights/copyrights to the technology software	AEs bear this risk as they own all the IPR related to the technology.	
<b>Human Capital Risk:</b> This risk is a direct function of the employees leaving the organization	Applied India and AEs bear the risk of attrition respectively for their own employees.	

Summary of the risks borne by Applied India and AE are tabulated below:

Sr. No.	Risk	Applied India	AE
1	Contract Risk	No	Yes
3	Credit Risk	No	Yes
4	Market Risk	No	Yes
5	Price Risk	No	Yes
6	Capacity Utilization risk	No	Yes
7	Service Liability Risk	No	Yes
8	Foreign Exchange Fluctuation risk	Limited	Yes
9	Technological Risk	Limited	Yes
10	Intangible Property Right Risk	No	Yes
11	Human Capital Risk	Limited	Yes

### Characterisation

Based on the FAR analysis it may be concluded that Applied India is an IT service provider who is insulated from a majority of the business risks and is engaged in rendering services as per the requirements of, and specifications provided by AEs. Based on such a FAR profile, it may be appropriate to characterize Applied India as a limited risk captive service provider.

**7.** Based on the above facts, as presented in the FAR analysis, the assessee cannot be characterised as a full-fledged software service provider. Assessee is thus a captive service provider rendering service only to its associated enterprises and assuming limited risk.

8. It is submitted by the Ld.AR that in the similar circumstances, in case of *ARM Embedded Technologies Pvt. Ltd. vs. DCIT* in IT(TP)A No. 2353/Bang/2021, Coordinate Bench of this Tribunal vide order dated 30/08/2022 had analysed all the above alleged comparables on functionality and had excluded them from being compared with a captive service provider.

**“12. Inteq Software Pvt. Ltd.:**

*It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, and that, the segmental data is not available in respect of diverse activities carried on by it. He relied on pages 1334, 1341 of the annual report paper book. He thus prayed for this comparable to be excluded from the final list due to lack of segmental data.*

**13. Larsen and Toubro Infotech Ltd.:**

*It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, as it renders application development maintenance, enterprise solutions, testing and validation, digital solutions, infrastructure management services, platform-based service which cannot be equated to the routine software service provider like the assessee. The Ld.AR submitted that this company is also engaged in activities such as cloud computing, infrastructure management, analytics & information management, etc., and that No segmental details are available. The LdAR submitted that this company is also engaged in trading IT related products has cost of brought out items and has won awards and recognitions for innovative products. He relied on pages 969, 979, 922, 986 of the annual report paper book in support.*

*The Ld.AR submitted that this company is a market leader and enjoys significant benefits on account of ownership of marketing intangibles, intellectual property rights and business rights and brand value. As a result of this high brand value, the company enjoys a high bargaining power in the market. He relied on pages 943, 946, 920, 1011 of the annual report paper book in support. Referring to page 1023, 1015 the Ld.AR submitted that this company has*

significant onsite activities. Further, he submitted that during the year under consideration, this company has extraordinary event, whereby Information Systems Resources Centre Private Limited amalgamated with the Company. He thus prayed for exclusion of this company from the final list.

**14. Infobeans Technologies Ltd.:**

It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, as it is specialised in business applications development for web and mobile. This company provides software engineering services primarily in Custom Application Development, Content Management Systems, Enterprise Mobility, Big Data Analytics. He placed reliance on page 1668 of annual report paper book. The services rendered by this company are different from the routine low end software development services rendered by the assessee as a captive service provider to its AE. The Ld.AR further submitted that, segmental details of such diverse activities carried on by this company are not available. He thus prayed for exclusion of this company from the final list.

**15. Thirdware Solutions Limited**

It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, as it is engaged software and consultancy. The Ld.AR submitted that this company has significant competencies in transaction systems, Analytics and Cloud applications. Further, the company has earned revenue from software development, implementation services, application management services, and other related services and from sale the sale of license and subscription for software application, which are not akin to the captive services rendered by the assessee. He placed reliance on page 1825, 1834, 1857 of annual report paper book. The Ld.AR submitted that this company deals in product also and segmental details of diverse services are not available. He relied on page 2508 of annual report paper book. He thus prayed for exclusion of this company from the final list.

It is submitted by the Ld.AR that, Inteq Software Pvt.Ltd., L&T Infotech Ltd., Infobean Technologies Ltd., Thirdware Solutions Ltd. excluded by Hon'ble Delhi Tribunal in case of Global Logic India Ltd., reported in (2022) 134 taxmann.com 35 for functional dissimilarities.

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

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

*16. We note that the decision of Hon'ble Delhi Tribunal in case of Global Logic India Ltd.,(supra) considered these comparables for assessment year 2016-17 and has held them to be functionally not similar with a captive service provider like that of the assessee before us. Further The assessee in Global Logic India Ltd.,(supra) is also as captive service provider as observed by Hon'ble Delhi Tribunal therein. Hon'ble Tribunal observed as under:*

*COMPARABLE COMPANIES SOUGHT TO BE EXCLUDED BY THE TAXPAYER **LARSEN & TOUBRO INFOTECH LTD. (L&T)***

*14. The taxpayer sought to exclude L&T from the final set of comparables chosen by the ld. TPO for the purpose of benchmarking its international transactions qua SDS on the grounds inter alia that it is functionally dissimilar; that its segmental data is not available; that L&T is a huge brand with ownership of intangibles and on account of extra ordinary event; and on the ground that this company was rejected in taxpayer's own case in Global Logic India Ltd. v. Dy. CIT [2020] 117 taxmann.com 39 (Delhi - Trib.).*

*15. However, on the other hand, ld. DR for the Revenue opposed the contentions raised by the taxpayer to exclude L&T as a comparable on the grounds inter alia that this comparable was chosen by the taxpayer itself and in case of TNMM applied for benchmarking the international transactions minor dissimilarities are not to be taken into account; that the taxpayer cannot be taken as a captive entity as its spectrum is much more and it is also a global brand having presence in many countries and relied upon the order passed by the ld. TPO/ld. DRP.*

*16. When we examine profile of L&T from its financials, available at pages 6, 7 & 11 of the paper book, it is into providing application development and maintenance services providing digital solutions such as big data analytics, enterprise computing, cognitive computing, infrastructure management services and enterprise solutions. It has also been awarded and recognized by various forums for providing such niche services in the field of innovation in information technology category, analytics solutions/services etc., explained at page 11 of the paper book.*

*17. When we examine Notes forming Parts of Accounts at page 116 of the paper book, it is evident that L&T is having two segment accounts, namely, (i) Services Cluster*

*Segment which includes Banking and Financial Services, Insurance, Media & Entertainment, Travel & Logistics and Healthcare, and (ii) Industrial Cluster Segments which consists of Hi Tech and Consumer Electronics, Consumer Retail & Pharma, Energy & Process, Automobile & Aerospace, Plant Equipment & Industrial Machinery, Utilities and E&C. But aforesaid various segments do not indicate profit earned from provisions of SDS. Apart from it, L&T is a huge brand having ownership of significant intangibles to the tune of Rs. 7.42 millions, as is evident from its financials at pages 8 and 103 of the paper book.*

**18.** *Coordinate Bench of the Tribunal rejected L&T in taxpayer's own case for AY 2014-15 (supra), available at pages 61 to 63 of the case law paper book, by returning following findings :—*

*"6.6 The next objection of the assessee is regarding multiple segments. From segment reporting on page S-1258 of the Annual Report (page 129 of PB-2), we find that the assessee has reported three business segments. The first segment is service cluster which includes banking, financial services, insurance, media and entertainment, travel and logistics and healthcare. The second segment industry cluster which includes Hi Tech and consumer electronics, consumer, retail and Pharma, energy and process, auto Mobile and aerospace, plant equipment and industrial machinery, utilities and E &C. The third segment, is telecom segment which refers to product engineering services (PES) which has been discontinued in this year. Regarding the PES, in Director's report, (available on page S-1225 of the Annual Report or page 96 of PB-2), it is reported as under :*

*"TRANSFER OF PRODUCT ENGINEERING SERVICES (PES) BUSINESS TO L&T TECHNOLOGY SERVICES LIMITED (LTTSL) AND WINDING UP OF GDA TECHNOLOGIES INC. (GDA INC.) As part of business restructuring undertaken within L&T Group, it was decided to consolidate the engineering services business under a separate subsidiary of L&T, L&T Technology Services Ltd. (LTTSL). Pursuant to this, the Company initiated and completed transfer of its Product Engineering Services (PES) Business Unit to LTTSL effective January 1, 2014, PES Business Unit was transferred by way of slump sale for total sales consideration of Rs. 489.53 crs based on ITA No. 4740/Del./2018 fair valuation, GDA Technologies Inc., USA (GDA Inc.), a wholly owned subsidiary of the Company was part of PES business with synergy in terms of the end customers they serve, primarily the semiconductor companies. Over last few years, the*

*performance of GDA Inc. was adversely affected resulting in falling revenues and operational losses. Consequent to the transfer of PES business, certain IPs (Intellectual Properties) owned by GDA Inc. were transferred to LTTSL, the Company was wound up during the year."*

*6.7 In view of the above reporting, it is clear that under the telecom segment, the assessee was engaged in providing engineering services, which is distinct from the services of the software development. Thus, at entity level, the company cannot be considered functionally similar to the assessee. The company cannot be considered comparable at the segment level also because of there are expenses of Rs. 205,80,17,445/- ( page 129 of PB-2) , which has not been allocated into three segments, and thus the segmental result are distorted.*

*6.8 During the year, the extraordinary event of demerger of product engineering service business (PES) has occurred with effect from 01/01/2014, which has also impacted the profit of the company at the entity level. In the decision of the Tribunal in case of Xchanging Technology Service India Private Limited (ITA No. 1897/Del./2004), which has been approved the Hon'ble High Court in ITA No. 813/2015 , the company is held to be not valid comparable on account of extraordinary events. Thus, In view of the extraordinary event in the year under consideration also, this company is liable to be excluded from the set of the comparable."*

**19.** *In taxpayer's own case in Global Logic India (P.) Ltd. v. DCIT [IT Appeal No. 8726 (Delhi) of 2019, dated 29-6-2020] L&T was excluded by the coordinate Bench of the Tribunal by returning following findings :—*

*"20. The Tribunal in assessee's own case in ITA No. 4740/Del/2018 relating to Assessment Year 2014-15 vide order dated 1-5-2020 has directed the exclusion of the said concern from the final list of comparables while benchmarking the ALP of the international transaction by the assessee with its AE. Before parting, we may also refer to an extraordinary event under which Larsen & Toubro Infotech Ltd. initiated and completed transfer of its Product Engineering Services Business (PES) Unit to L&T Technology Services Ltd. w.e.f. January 1, 2014 as part of the business restructuring undertaken within the Larsen & Toubro group. Though the initiation started from 1-1-2014 but the whole effect of the transaction was during the year under consideration. Further, Larsen & Toubro Infotech Ltd. during the year under consideration acquired Information Systems Resource Centre Private limited ("ISRC") thereby making it wholly owned subsidiary and because of such extraordinary event of acquisition, the*

said concern cannot be held to be a valid comparable and thus has to be excluded from the final set of comparable. Accordingly, we hold so."

**20.** In view of the facts inter alia that L&T is into various segments having no segmental financials, having huge brand value and intangibles is not a suitable comparable vis-à-vis taxpayer which was working as a captive entity and that contention raised by the ld. DR that under TNMM minor dissimilarities do not affect the overall comparability is not sustainable because though it is a taxpayer's own comparable but there being no estoppel against statute and that taxpayer can rectify its mistake at any stage of the proceedings. Secondly, it is not a case of minor dissimilarities rather it is a case of functional dissimilarity and non-availability of segmental financials to provide the clear picture qua profit earned by the company from provisions of SDS. L&T is a big brand having ownership of huge intangibles which ought to provide competitive advantage to the taxpayer in the form of premium pricing and huge volume of business ultimately leading to the higher profitability. So, we are of the considered view that L&T is not a suitable comparable vis-à-vis the taxpayer, hence ordered to be excluded.

**THIRDWARE SOLUTION LTD. (THIRDWARE)**

**40.** The taxpayer sought exclusion of Thirdware on the ground that it is functionally dissimilar vis-à-vis the taxpayer. However, on the other hand, ld. DR for the Revenue relied upon the orders passed by the ld. TPO/ld. DRP to retain this comparable.

**41.** Perusal of Notes - Additional Information and Profit & Loss account, available at page 570 of the annual reports paper book, shows that it has income earned from sale of licence and provision of training services also under the head 'software services from local unit', 'export of software services', 'revenue from subscription & training' and 'sale of licence' to the tune of Rs. 2809.62 lakhs, Rs. 19285.11 lakhs, Rs. 32.59 lakhs & Rs. 8.77 lakhs respectively. The taxpayer has also brought on record website of the company, available at pages 71 to 73 of the appeal memo, which shows that Thirdware is having competency in providing services in most advanced and niche area of technologies such as Robotic Process Automation, Big Data Analytics & Cloud Computing.

**42.** From the profile of Thirdware it has come on record that Thirdware is functionally dissimilar vis-à-vis the taxpayer as it has been deriving income from sale of licence and software services export from SEZ unit and revenue from subscription and training etc. and it is also

into sale of licence and its segmental financials are not available.

**43.** Thirdware has been ordered to be excluded by the coordinate Bench of the Tribunal in case of *Fiserve India (P.) Ltd. v. ITO [2015] 60 taxmann.com 48 (Delhi - Trib.)* on ground of dissimilarity to routine software development service provider which has been affirmed by Hon'ble Delhi High Court in ITA 17/2016 order dated 6-1-2016. So, we order to exclude Thirdware from the final set of comparables.

**INFOBEANS TECHNOLOGIES LTD. (INFOBEANS)**

**44.** The taxpayer sought exclusion of Infobeans as a comparable again on ground of functional dissimilarity, it also being into providing services viz. software engineering services primarily in Custom Application Development (CAD), Content Management Systems, Enterprise Mobility, Big Data Analytics, UX & UI, Automation Engineering Services, as is evident from its financials, available on page 123 of the annual report paper book.

**45.** The taxpayer also brought on record profile of the Infobeans at pages 58 to 60 of the appeal memo wherein it is claimed by the Infobeans that it is providing wide range of services under four verticals i.e. services, automation, enterprise and industries and under the automation services verticals, the company is providing advanced robotic process automation services. Since Infobeans is into diversified activities it cannot be a suitable comparable vis-à-vis the taxpayer which is a routine software development services provider. Infobeans has been excluded as a comparable on account of functional dissimilarity vis-à-vis routine software development service provider by the coordinate Bench of the Tribunal in case of *Pub Matic India (P.) Ltd. (supra)*. So, in view of the matter, we order to exclude Infobeans from the final set of comparables.

**INTEQ SOFTWARE LTD. (INTEQ)**

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

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

17. *We note that the assessee in Global Logic India Ltd. (supra) was a captive service provider to its AE for assessment year 2016-17. Nothing has been placed by the Revenue to deviate from the above view taken by the coordinate bench of this Tribunal in Global Logic India Ltd. (supra).*

18. *Respectfully following the view taken by the coordinate bench of this Tribunal in Global Logic India Ltd. (supra), we direct Ld. AO/TPO to exclude **Inteq Software Pvt.Ltd., L&T Infotech Ltd., Infobean Technologies Ltd., Thirdware Solutions Ltd.** from the final list of comparable for SWD segment.*

**19. Persistent Systems Ltd. :**

*It is submitted that this company is functionally dissimilar to the assessee on various counts and therefore deserves to be rejected. The Ld.AR submitted that, this comparable is functionally not similar with that of assessee, as it is engaged in, rendering Enterprise Digital Transformation, product engineering and solutioning for Internet of Things (IoT), product engineering and professional services to ISVs and enterprises, IP products, IT services, development of software products and offers complete product life cycle services without there being separate segmental information disclosed in its Annual Report for such activities . He placed reliance on page 1421, 1592, 1608, 1641 of the annual report paper book. It is submitted that Persistent Systems made significant investments towards research and development activities in the relevant previous year. Persistent has collaborated with researchers from IGIB, JNU, IISER-Pune and NCL to develop SanGeniX - an DNA sequencing using Next Generation Sequencing (NGS) technology), eSkIN-will help discovery of new pharmaceutical and cosmetic products to empower pharmaceuticals and cosmetic companies to predict the effects of their products on human skin). He placed reliance on page 1421 of the annual report paper book. Persistent has established “persistent labs” which focuses on latest technologies viz., gesture computing, machine learning etc. Using the innovations of Persistent*

labs. The Ld.AR further submitted that this company partnered with IBM and have added an engineering team that is building products and tools for continuous lifecycle management and for digital transformation and has partnerships with various leading platform providers in Analytics, Big Data, Cloud, Mobile, Machine Learning, and IoT. He placed reliance on page 1420, 1421, 1422, 1391 of the annual report paper book. The Ld.AR submitted that as a part of Aepona acquisition, this company acquired development centers in Belfast, UK and in Colombo, Sri Lanka during the year under consideration. He placed reliance on page 1420, 1421 of the annual report paper book. He thus prayed for exclusion of this company from the final list.

The Ld.AR submitted thus submitted that Persistent Systems Ltd, is not functionally similar with that of assessee who is a captive service provider to its AE.

**20. Infosys Ltd.:**

It is submitted that this company is functionally dissimilar to the assessee on various counts, and therefore, it ought to be rejected from the final list of comparables. It is submitted that the Ld.TPO erred rejected contentions of the assessee and upheld the inclusion of the company in the final list of comparables.

It is submitted that this company renders services like business IT services comprising of application development and maintenance, independent validation, infrastructure management, engineering services comprising product engineering and life cycle solutions and business process management; Consulting and systems integration services comprising consulting, enterprise solutions, systems integration and advanced technologies; Products, business platforms and solutions to accelerate intellectual property-led innovation including Financial, and banking solution; and offerings in the areas of Analytics, Cloud, and Digital Transformation He placed reliance on page 1901, 1903, 1949, 2013 of annual report paper book. It is submitted that this company is a full-fledged risk bearing entrepreneur who cannot be compared to the assessee that renders routine software services. It is submitted that the company owns seven Edge products/platforms and six other product based solutions.

The Ld.AR submitted that, this company does not have segmental data in respect of rendering software services and development of products. It is submitted that this company has significant intangibles as a part of its fixed assets in the nature of intellectual property. He placed reliance on 1904, 1944, 1984 of annual report paper book.

The company owns significant brand value and focuses immensely on brand building. The Ld.AR submitted that, this company heavily focuses on research and development activity and incurs significant expenditure for this account and for the financial year relevant to assessment year under consideration, the company incurred research and development expenses of Rs. 415 crores. He placed reliance on page 1942 of annual report paper book. The Ld.AR submitted that, this company for the year under consideration has earned abnormally high profit with margin of 38.61%, which makes it incomparable with the assessee.

The Ld.AR submitted thus submitted that this company is not functionally similar with that of assessee who is a captive service provider to its AE.

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 reported in (2022) 136 taxmann.com 52.

2. Decision of coordinate bench of this Tribunal in case of OLF India Software Pvt.Ltd. vs. ACIT in IT(TP)A No.182/2021 by order dated 28/09/2022 for A.Y. 2016-17.

3. 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.

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

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

21. Before us, the Ld.DR has not been able to place anything on record contrary to the above submissions by the Ld.AR. We of the view that with such varied functions, these companies cannot be compared with assessee before us, which is a captive service provider. We accordingly direct the Ld.AO/TPO to **exclude Persistent Systems Ltd., and Infosys Ltd. from the final list.**

**22. Aspire Systems (India) Pvt.**

It is submitted that, this company is functionally not comparable with the assessee as it earns income from power generation. The Ld.AR placed reliance on page 127 of Annual Report. The Ld.AR submitted that, the company owns significant intangibles in form of goodwill, customer contracts. He placed reliance on page 2077 & 2087 of

annual report paper book in support. It is submitted that Applied Development Software (India) Pvt.Ltd., and Pure Apps Consulting Services Pvt. Ltd., amalgamated with the company that lead to acquisition of assets. He placed reliance on page 2056 of annual report paper book. The Ld.AR placed reliance on following decisions in support:

Decision of Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT reported in (2022) 136 taxmann.com 52

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

Decision of Hon'ble Punjab & Haryana in Equant Solutions India (P.) Ltd. reported in (2020) 113 taxmann.com 517

Coordinate bench of this Tribunal in case of ARM Embedded Technologies (P.) Ltd. reported in (2021) 129 taxmann.com 263

Coordinate bench of this Tribunal in case of Yahoo Software Development India Pvt. Ltd. reported in TS-191-ITAT-2020(Bang)

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

We have perused the submissions of both sides in light of records placed before us. We note that this company earns its revenue from power generation and it has nothing to do with the rendering of software development service. In fact, we note that this company is a full fledged entrepreneur in the business of power generation and therefore is not comparable functionally with a captive software service provider like assessee.

Nothing is been placed by the Revenue contrary to the above observation. We therefore respectfully following the above view, direct the Ld.AO/TPO to **exclude Aspire System India Pvt. Ltd. from the final list.**

### **23. Nihilent Technologies Limited**

It is submitted that, this company is functionally dissimilar to the assessee and therefore ought to be rejected from the final list of comparables. It is submitted that, services rendered by this company are wide in range and diversified. The Ld.AR submitted that, the company is engaged in diversified activities. It is submitted that, it renders services in the nature of consulting, software development and product development, provision of business consulting in the area of the enterprise transformation, change and performance management, digital transformation, business intelligence and data science services and also providing related IT services. The Ld.AR submitted that, software-consulting services include

*end-to-end solutions, onsite management and IT functions, and planning & system designing, which are in no way comparable to the captive software development activities as provided by the assessee.*

*The Ld.AR further submitted that, this company has incurred significant expenses in foreign currency of 37.68%, 33.27% and 37.47% of its total expenditure during the FYs 2015-16, 2014-15 and 2013-14, respectively, which suggests that is engaged in provision of onsite services. And that, during the FY relevant to assessment year under consideration, this company acquired GNet Group LLC, a business intelligence and analytical company, and Intellect Bizware Services Pvt. Ltd., specialising in ERP and enterprise innovation. The Ld.AR submitted that, these acquisitions are bound to have a significant impact on the financials of the company. The Ld.AR thus submitted that, for all the above reasons this company cannot be considered to be comparable with. He relied on the decision of Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. v. ACIT (supra)*

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

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

*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 A 412 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.*

*We note that the assessee in Red Hat India Pvt. Ltd. v. ACIT (supra) was a captive service provider to its AE for assessment year 2016-17. Nothing has been placed by the Revenue to deviate from the above view taken by the coordinate bench of this Tribunal in Red Hat India Pvt. Ltd. v. ACIT (supra). We are of the view that, based on the functions performed by this company as submitted by the Ld.AR and the observations of Hon'ble Mumbai Tribunal, this comparable deserves to be excluded from the final list. We therefore respectfully following the above view, direct the Ld.AO/TPO to exclude Nihilent Technologies Ltd from the final list.*

**24. Cybage Software Pvt.Ltd.**

*It is submitted that this company is engaged in the provision of diversified services which include product engineering, testing & quality assurance services, specialized services, support services, etc. It is submitted that this company is engaged in product development and has developed a product called 'excelshore' apart from providing spectrum of services including ITeS and BPO services and that segmental information of the diverse business functions undertaken by the company is not available.*

*The Ld.AR submitted that this company is making super normal profits and that it is not reflective of the performance of the industry in which it operates.*

<b>Particulars</b>	<b>FY 2013-14</b>	<b>FY 2014-15</b>	<b>FY 2015-16</b>
OP/OC	68.82%	67.75%	62.04%

*Reliance in this regard is placed on the decision of the Hon'ble Hyderabad Tribunal in Infor (India) Pvt. Ltd. v. DCIT (supra).*

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

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

*Primarily we note that this company is a product company and has diversified business segments. We note that this company is a full fledged entrepreneur and assumes all the risks attributable to the various business segments for which details are not available. In our view, under such circumstances, this company cannot be held to be functionally comparable with that of assessee which is a captive service provider that caters only to its AE.*

**Respectfully following the above view, we direct the Ld.AO/TPO to exclude Cybage Software Pvt.Ltd., from the final list.**

**25. R.S Software (I) Pvt.Ltd:**

*It is submitted that, this company is engaged in diversified activities, which are not similar to the services rendered by the assessee. The company is into custom application development, quality assurance and testing, application maintenance and support, strategic consulting, in respect of which, segmental details are unavailable.*

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

*It is submitted that this company conducts research and development work in the areas of real time analytics, MDM, proximity, payments, digital commerce, mobile payments, testing, automation, personalised loyalty in payments and merchant management in payments laboratory.*

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

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

*We note that this company is a full fledged entrepreneur and assumes all the risks attributable to the various business segments for which details are not available. In our view, under such circumstances, this company cannot be held to be functionally comparable with that of*

*assessee which is a captive service provider that caters only to its AE.*

**We therefore direct the Ld.AO/TPO to exclude R.S Software (I) Pvt.Ltd, from the final list.**

**Accordingly this ground raised by the assessee stands allowed.”**

Before us, the Ld.DR has not brought out any distinguishing factor in order to take a different view.

Respectfully following the above view, we direct the Ld.AO/TPO to exclude all the above 10 comparables from the final list.

**9. Ground no. 6** is in respect of interest on receivables.

9.1 The Ld.AR submitted that interest on receivables were computed at Rs.1,30,90,069/- on the average net receivables amounting to Rs.28,63,91,854/-. The Ld.AR submitted that the outstanding receivables are in respect of provision of software development services by assessee and that since arms length price has been computed by TNMM as the most appropriate method, it subsumes the principle transaction of rendering of SWD services and therefore the outstanding receivables cannot be considered as an independent international transaction.

9.2 Reliance was placed in support of this submission on following decisions.

1) *Avnet India Pvt. Ltd. vs. DCIT reported in (2016) 65 taxmann.com 187.*

2) *Kusum Healthcare Pvt. Ltd. vs. ACIT reported in (2015) 62 taxmann.com 79 which has been upheld by Hon'ble Delhi High Court reported in (2017) 398 ITR 66.*

9.3 Alternatively, it was submitted that if at all, an adjustment has to be made, an appropriate benchmarking has to be carried

out and the interest ought to be adopted based on the LIBOR rate.

9.4 It has been submitted by Ld.AR that outstanding receivables are closely linked to main transaction and so the same cannot be considered as separate international transaction. He also submitted that into company agreements provides for extending credit period with mutual consent and it does not provide any interest clause in case of delay. She argued that, the working capital adjustment takes into account the factors related to delayed receivables and therefore no separate adjustment is required in such circumstances.

9.5 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 *Hon'ble Delhi Tribunal* order in *Ameriprise India Pvt. Ltd. vs. ACIT* in 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;....' .*

9.6 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 noted a decision of the *Hon'ble Bombay High Court* in the case of *CIT vs. Patni Computer Systems Ltd.*, (2013) 215 Taxmann 108 (Bom.), 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?'*

9.7 The Ld.AR 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.

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

9.8 Ld.TPO computed interest on outstanding receivables at the rate equal to 4.985% on the receivables that exceeded 6 months. It has been argued by Ld.AR that authorities below disregarded business/commercial arrangement between the assessee and its AE's, by holding outstanding receivables to be an independent international transaction.

9.9 This Bench referred to decision of *Special Bench of Kolkotta Tribunal* in case of in case of *Instrumentation Corpn. Ltd. v. Asstt. DIT in ITA No. 1548 and 1549 (Kol.) of 2009, dated 15- 7-2016*, 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. We also perused decision relied upon by Ld.AR. In our considered opinion, these are factually distinguishable and thus, we reject argument advanced by Ld.AR.

9.10 Alternatively, it has been argued that working capital adjustment subsumes sundry creditors. In such situation computing interest on outstanding receivables and loan 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 has observed that:

*"There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which would have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee would have to be studied. It went on to hold that, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that vis-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."*

9.11 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.

9.12 We note that in assessee's own case for A.Y. 2014-15 and 2018-19, the Ld.TPO has considered a credit period of 90 days. Accordingly, we direct the Ld.AO/TPO to compute the notional interest if any that falls out of this credit period for the year under consideration by considering LIBOR + 300 basis points.

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

**10. Ground nos. 7 & 8** are general in nature and do not require any adjudication.

**11. Ground no. 9** is raised by assessee in respect of the disallowance u/s. 40(a)(i) towards the salary cost reimbursed by assessee to AE on cost to cost basis.

11.1 It is submitted by the Ld.AR that section 195 has no application in respect of the reimbursement of salary cost. He placed reliance on the following decisions.

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

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

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

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

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

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

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

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

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

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

11.6 We therefore remand this issue to the Ld.AO to consider the claim in accordance with the decision of *Hon'ble Karnataka High Court* in case of *M/s. Flipkart Internet Pvt. Ltd. vs. DCIT (IT) (supra)* and Coordinate Bench of this *Tribunal* in the above referred cases

*M/s. Toyota Boshoku Automotive India Pvt. Ltd. vs. DCIT (supra) Goldman Sachs Services Pvt. Ltd. vs. DCIT(supra)* having regard to the evidences filed by the assessee.

11.7 We also direct that in the event, TDS has been deducted u/s. 192 of the Act, no disallowance can be made u/s. 40(a)(i). Section 40(a)(i) can be invoked only when there has been non-deduction of tax at source. Assessee has relied on the decision of *Coordinate Bench of this Tribunal* in case of *ACIT vs. AON Specialist Services Pvt. Ltd.* reported in (2020) 116 taxmann.com 368. We accordingly direct the Ld.AO to carry out necessary verification in accordance with the decisions referred to hereinabove.

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

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

**12. Ground no. 10** raised by assessee is not pressed and hence not adjudicated.

**13. Ground no. 11** is consequential in nature.

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

**Order pronounced in the open court on 30<sup>th</sup> November, 2022.**

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 30<sup>th</sup> November, 2022.  
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore