

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU "A" BENCH, BENGALURU**

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

IT(TP)A No. 236/Bang/2021 (Assessment Year: 2016-17)		
M/s. UXC India IT Services Pvt. Ltd. Digital Park, HP Avenue 39/40, Electronic City Hosur Main Road Bangalore 560100 PAN – AABCU6681K	Vs.	DCIT, Circle - 2(1)(1) Bengaluru
(Appellant)		(Respondent)

Assessee by:	Shri Vishal Kalra, Advocate
Revenue by:	Shri K. Sankar Ganesh, JCIT-DR

Date of hearing:	02.11.2022
Date of pronouncement:	20.01.2023

ORDER

PER BEENA PILLAI, J.M.

Present appeal is filed by the assessee against the order dated 08.04.2021 passed by the National e-Assessment Centre, Delhi for assessment year 2016-17 on following grounds of appeal: -

1. *That on the facts and circumstances of the case and in law, the Assessing Officer ("AO") has erred in assessing the total income of the Appellant under section 143(3) read with sections 144C(13) read with sections 143(3A) & 143(3B) of the Act, for the subject assessment year at INR 4,76,55,172 as against the returned income of INR 1,97,83,270.*

2. *That on the facts and circumstances of the case and in law, the orders passed by the lower authorities is bad in law and void ab initio.*
3. *That on the facts and circumstances of the case and in law, the reference made by the AO to the Transfer Pricing Officer ("TPO") under section 92CA of the Act, suffers from jurisdictional error as the AO has not recorded any reasons in the order based on which it was concluded that it was "expedient and necessary" to refer the matter to the TPO for computation of arm's length price ("ALP").*
4. *That on the facts and circumstances of the case and in law, the TPO erred in not accepting and AO/ Dispute Resolution Penal-2 ("DRP") have further erred in not upholding the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("Rules") for determination of the ALP of international transactions.*
5. *That on the facts and circumstances of the case and in law, the TPO erred in rejecting / arbitrarily modifying the search process and filters adopted by the Appellant for the purpose of benchmarking the international transactions. The AO / DRP erred in upholding the action of the TPO.*
6. *That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in arbitrarily rejecting following comparable companies namely; Akshay Software Technologies Ltd, Athena Global Technologies Ltd (formerly known as VJIL Consulting), Sasken Communication Technologies Ltd and Maveric Systems Ltd, selected by Appellant for the purpose of benchmarking the software development services on the basis of arbitrary search filters and incorrect appreciation of functional, asset and risk profile of the Appellant.*
7. *That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in arbitrarily selecting functionally incomparable companies namely; Inteq Software Pvt Ltd, Larsen & Toubro Infotech Ltd, Nihilent Technologies Ltd, Persistent Systems Ltd, Infobeans Technologies Ltd, Aspire Systems (India) Pvt Ltd, Infosys Ltd, Thirdware Solution Ltd, Cybage Software Pvt Ltd, for the purpose of benchmarking the software development services on the basis of arbitrary search filters and incorrect appreciation of functional, asset and risk profile of the Appellant.*

8. *That on the facts and circumstances of the case and in law, the TPO has erred in rejecting the following comparable companies, namely, Batchmaster Software Private Limited, Celstream Technologies Private Limited, DCIS DOT COM Solutions India Private Limited, Evoke Technologies Private Limited, Insummation Technologies Private Limited, Sagarsoft (India) Limited and Informile Technologies Limited. The AO/DRP have erred in upholding the action of the TPO.*
9. *That on the facts and circumstances of the case and in law, the AO/TPO erred in incorrectly computing the margin of certain comparable companies.*
10. *That on the facts and circumstances of the case and in law, the Transfer Pricing Officer ("TPO") has erred in making and the AO/DRP have erred in upholding the transfer pricing adjustment of INR1,14,70,507 in respect of international transaction pertaining to receipt of intra-group services from associated enterprises.*
11. *That on the facts and circumstances of the case and in law, the AO/DRP/TPO have erred in alleging, inter alia, that the Appellant had failed to establish the receipt of services, justification of the costs incurred and commensurate benefits received therefrom, without appreciating the submissions and evidences furnished.*
12. *That on the facts and circumstances of the case and in law, the AO/DRP/TPO have erred in rejecting the aggregated benchmarking analysis adopted by the Appellant using Transactional Net Margin Method ("TNMM"), as the most appropriate method for determining the arm's length price ("ALP") of intra-group charges, without providing any justifications and/or cogent reasons for the same.*
13. *That on the facts and circumstance of the case and in law. the AO/DRP/TPO have erred in not appreciating that the management fee was included as part of operating expenses in computing the margin of the Appellant for software development services and further grossly erred in computing the ALP as Nil.*
14. *Notwithstanding and without prejudice to the above, in case the above disallowance is upheld, the corresponding income along with the mark-up should also be reduced from the income of the Appellant.*
15. *That on the facts and circumstances of the case and in law, the AO/DRP/TPO have erred in not providing working capital adjustment to the Appellant.*

16. That on the facts and in the circumstances of the case and in law, the AO be directed to allow deduction for education cess ("EC") and higher and secondary education cess ("SHEC") paid on income-tax for computing the total income as per the provisions of the Act.
17. That on the facts and circumstances of the case and in law, the AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act mechanically and without recording any adequate satisfaction for such initiation.
18. That on the facts and circumstances of the case and in law, the AO has erred in levying/ charging interest under sections 234B and 234C of the Act.

2. **Brief Facts of the case are as under:**

2.1 The assessee is a wholly owned subsidiary of Applied Materials Inc., USA, which is a supplier of products and services to the global semiconductor industry, the assessee is engaged in the provision of SWD services and engineering services to Applied Inc., its AE, as a captive service provider.

2.2 The Ld.AO noted that, the assessee had international transaction with its associated enterprise, and therefore reference was made to the Ld.TPO for determining arms length price of the international transaction.

2.3 On receipt of the reference, the Ld. TPO called for economic details of the international transactions which are as under:

Particulars	Amount in Rs.
Purchase of fixed assets	Rs. 1,42,71,849/-
Software development services	Rs. 429,81,72,137/-
Reimbursement of expenses	
Reimbursement of travel expenses	Rs. 3,06,70,299/-
Reimbursement of expat salary related expenses	Rs. 5,24,18,236/-
Reimbursement of expenses for employee stock purchase plan	Rs. 1,80,66,453/-
Reimbursement of software expenses	Rs. 2,08,70,149/-

Reimbursement of training expenses	Rs. 1,15,98,967/-
Reimbursement of employees' contribution to employee stock purchase plan	Rs. 4,97,22,765/-
Reimbursement of repairs and maintenance	Rs. 12,41,012/-
Recovery of expenses	
Recovery of expenses at cost	Rs. 2,12,68,240/-
Recovery of travel expenses	Rs. 2,83,70,976/-
Recovery of CSR expenses	Rs. 37,63,400/-
Reimbursement of training expenses	Rs. 93,483/-
Recovery of withholding taxes of employees on restricted stocks unit and ESOP granted and remitted to local tax authorities	Rs. 7,47,14,054/-

2.4 The Ld.TPO noted that, the assessee used TNMM as most appropriate method and OP/OC as PLI to compute its margin at 14.77%. The Ld.TPO noted that the assessee used following 7 comparables with average margin of 19.77%, and thus held the transaction to be at arm's length.

Sl. No.	Name of the company	Average NPI (in %)
1.	Akshay Software Technologies Ltd.	4.72
2.	Lycos Internet Ltd.	5.34
3.	R S Software (India) Ltd.	25.03
4.	Sasken Communications Technologies Ltd.	16.25
5.	Helios & Matheson Information Technology Ltd.	19.77
6.	Evoke Technologies Pvt. Ltd.	5.69
7.	R Systems International Ltd.	20.48
35th Percentile		5.69
Median		16.25
65th Percentile		19.77

2.5 The Ld.TPO further noted that, the assessee excluded subcontracting charges while computing its operating margins. The Ld.TPO thus called upon the assessee to explain the same. Before the Ld.TPO, the assessee submitted that, in order to ensure timely delivery of software development services to its

AE, it utilized the services of certain third-party subcontractors who performed part of the services during the relevant previous year. It was further submitted before the Ld.TPO that, the said subcontracting charges formed part of its total cost base, on which the cost plus mark-up of 10% was applied as the revenue recognition policy followed by the assessee and the service agreement entered into by it with its AE both required that the mark-up be charged on the entire costs incurred by it for provision of the services. It was thus submitted that, since the subcontracting charges were paid to third-party service providers under uncontrolled circumstances, the same ought to be considered as being at arm's length.

2.6. It was submitted by the assessee that, the third-party service providers, being Tier I and Tier II companies in India, were marking-up their costs by significant margin, and it was thus submitted that, the aforesaid subcontracting charges included the profit element, which was earned by such third-party service providers. It was submitted that applying a further mark-up on such already marked-up charges would lead to duplication, which would be unreasonable. It was thus submitted that, the said subcontracting charges were merely pass-through costs and thus ought to be excluded from both the assessee's operating revenue and cost base while determining its effective NCP margin for provision of the software development services.

2.7. However, the Ld.TPO was of the view that, the subcontracting charges formed a part of the operating cost of the assessee for provision of SWD services and thus cannot be excluded from either its cost base or operating revenue as it

would not give a correct picture of the profit margin earned by it. The Ld.TPO thus computed assessee's margin at 10.02% as under:

Operating Income	Rs.429,81,72,137/-
Operating Cost	Rs. 390,68,94,345/-
Operating Profit (Op. Income – Op. Cost)	Rs. 39,12,77,792/-
Operating/Net mark-up (OP/TC)	10.02%

2.8 Dissatisfied with the TP analysis by assessee, the Ld.TPO applied the following filters:

Sr.No.	Description
1.	Companies whose data is not available for FY 2014-15 - excluded.
2.	Companies having different financial year ending (i.e., not March 31, 2014) or data of the company does not fall within 12 month period i.e., 01-04-2013 to 31-03-2014 - rejected.
3.	Companies whose software development service income < Rs. 1 Cr- excluded.
4.	Companies whose software development service income is less than 75% of the total operating revenues - excluded.
5.	Companies which have more than 25% related party transactions of the sales - excluded.
6.	Companies which have export service income less than 75% of the sales - excluded.
7.	Companies with employee cost less than 25% of turnover - excluded.

2.9. The Ld.TPO thus shortlisted the following 16 comparables:

Sl. No.	Name of the Company	Mark-up on Total Costs (WC-unadj) (in %)
1.	Kals Information Systems Ltd.	11.88
2.	E-Zest Solutions Ltd.	14.05
3.	CG-VAK Software & Exports Ltd.	18.50
4.	Tata Elxsi Ltd.	19.34
5.	Rheal Software Pvt. Ltd.	19.88
6.	Mindtree Ltd.	20.55
7.	Larsen & Toubro Infotech Ltd.	24.21
8.	R S Software (India) Ltd.	24.82
9.	Infobeans Technologies Ltd.	29.91
10.	Persistent Systems Ltd.	31.69
11.	Nihilent Technologies Ltd.	32.21
12.	Aspire Systems (India) Pvt. Ltd.	34.18

13.	Inteq Software Pvt. Ltd.	37.90
14.	Infosys Ltd.	38.59
15.	Thirdware Solution Ltd.	41.12
16.	Cybage Software Pvt. Ltd.	66.27
35th Percentile		20.55%
Median		27.37%
65th Percentile		37.90%

2.10. Out of the 7 comparables selected by the assessee, the Ld.TPO accepted one comparable, viz. R S.Software (India) Ltd., and rejected the other 6. The Ld.TPO proposed the shortfall at Rs.67,80,39,190/- as adjustment.

2.11. The Ld.TPO also computed interest on delayed receivables at Rs.3,10,32,759/- by using 6 Month LIBOR rate computed at 4.6386%.

2.12. On receipt of the order passed by the Ld.TPO, draft assessment order dated 26/12/2018 was passed by the Ld.AO in which the aforesaid TP adjustment was incorporated. The Ld.AO further computed the total income of the assessee by making following additions:

- (i) disallowing amount of Rs.5,24,18,236/- under Section 40(a)(i) of the Act and;
- (ii) disallowing amount of Rs.65,65,463/- claimed as depreciation on leasehold premises on the basis that the Assessee had not demonstrated that the same were put to use.

Aggrieved, the Assessee filed its objections before the DRP which, vide its directions dated 19.09.2019, partly allowed the objections raised by the Assessee.

2.13. The DRP rejected the contentions of the assessee and upheld the inclusion of following companies on the basis that they are functionally comparable:

- (a) Tata Elxsi Ltd.
- (b) Rheal Software Pvt Ltd.
- (c) Mindtree Ltd.
- (d) R S Software (I) Ltd.
- (e) Larsen & Toubro Infotech Ltd
- (f) Infobeans Technologies Ltd
- (g) Persistent Systems Ltd.
- (h) Nihilent Technologies Ltd
- (i) Aspire Systems (I) Pvt. Ltd.
- (j) Inteq Software Pvt Ltd
- (k) Infosys Ltd.
- (l) Cybage Software Pvt.Ltd

2.14. In respect of Thirdware Solutions Ltd., and CG-VAK Software exports Ltd., the DRP accepted contention of the assessee and directed their exclusion from the final list of comparables. The DRP also accepted contention of the assessee and directed inclusion of the software service segment of Sasken Technologies Ltd. However in respect of Akshay Software Technologies Ltd., Evoke Technologies Ltd., Infomile Technologies Ltd., and I2T2 India Ltd., the DRP rejected the contentions of the assessee and upheld their exclusion.

2.15. The DRP also rejected contentions of the assessee that, the subcontracting charges incurred by the assessee for provision of the software development services ought to be considered as pass-through costs and thus ought not to have been included in the operating revenues or costs while determining the arm's length price of the services provided by it to its AE.

2.16. The DRP upheld the action of the Ld.TPO in determining the TP adjustment in respect of the delayed receivables. While doing so, the DRP remanded the matter to the Ld.TPO to the limited extent of recomputing the adjustment. In that regard, the DRP directed the assessee to produce details of the

receivables invoice wise, their dates of realization and the number of days delay in realization. The said details were sought for the receivables forming part of the opening balance as well. The DRP further directed the Ld.TPO to apply the rate of interest applicable to short term deposits as opposed to PLR adopted by the Ld.TPO.

2.17. On receipt of directions from the DRP, the Ld.AO passed the final assessment order in which the TP adjustment came to be reworked and the total income of the assessee came to be recomputed after making certain disallowances.

Aggrieved by the final assessment order, the assessee has preferred the above before this *Tribunal*.

3.The Ld.AR at the outset submitted that Ground Nos.1-5 are general in nature. It is submitted that Ground No.9,15 & 16, the assessee do not wish to argue.

Accordingly we do not adjudicate Grounds 9,15 &16.

3.1. Before us the Ld.AR submitted that the assessee wish to contest for exclusion of following comparables raised in **Ground No.7:**

- (a) Larsen & Toubro Infotech Ltd
- (b) Persistent Systems Ltd
- (c) Nihilent Technologies Ltd
- (d) Aspire Systems (I) Pvt. Ltd.
- (e) Inteq Software Pvt Ltd
- (f) Infosys Ltd.
- (g) Infobeans Technologies Pvt.Ltd
- (h) Cybage Software Pvt.Ltd.,
- (i) Thirdware Solutions Ltd.,

3.2. In **Ground No.6-8** assessee seeks inclusion of following comparables:

Akshay Software Technologies Ltd.,
Athene Global TechnologiesLtd.,
Sasken Communications Technologies Ltd,
MAveric Systems Ltd.
BACHmaster Software Pvt.Ltd.,
Celstream Technologies Pvt.Ltd.,
DCIS DOT COM Solutions India Pvt.Ltd
Evoke Technologies Pvt.Ltd
Isummation Technologies Pvt.Ltd
Sagarsoft (India) Ltd.,
Informile Technologies Ltd.

3.3. Before we undertake the comparability analysis, it is *sine qua non* to analyse the FAR of the assessee under SWD segment.

Software Development & IT support services

UXC has been established as a service provider, to support the requirements of AEs, as the latter pursues its business objectives in India. UXC basically provides back end IT support to its associated enterprises. UXC is obligated to regularly appraise the AE about the status and progress of the agreed services.

Services

UXC is committed to the highest standards of excellence and customer satisfaction remains the driving force behind the organization's activities. The employees at every level are integral components and the medium through which such quality consciousness gets routed. Evaluation of the challenges faced by the organization upon adoption of new technology and adaptation to the same are inherently performed at all levels. The highly skilled and trained personnel contribute towards the following:

- ★ Efficient target deliveries
- ★ Cost effectiveness and timely implementations
- ★ Knowledge and skills — acquisition & dissemination among peers
- ★ Best technological and business fit
- ★ Realisation of the business benefit of the new systems as early as possible

Project Methodology

UXC follows a comprehensive system of acclimatization, training and execution. The process commences from the day of induction wherein the recruits are given an orientation about the company's processes, the functioning, the working models and goals. Based on the customer need and the flowing projects on hand, the recruits are assigned to the various teams. This is also accompanied by a system of training the recruits in accordance with the projects they are expected to handle. The progress of each project is monitored at regular intervals and course correction and appraisals follow depending upon the observations at each level.

Management Fee

Since Management Fee is directly related to rendering of IT support services by UXC to associated enterprises, it is analysed along with the IT support services by considering it as closely linked transactions. Further, it is noted that 'Management Fee' is included as part of cost while calculating the revenue mark-up.

Functions

Sl.No.	Functions	Performed By	
		UXC India IT Services Private Limited	White Labelled Pty Ltd
		(India)	(Australia)
1.	Market Survey for Project Demand		✓
2.	Business Planning and Strategy		✓
3.	Feasibility & Viability Ascertainments		✓
4.	Project Formulation		✓
5.	Identification of Project Requirements and specifications		✓
6.	Project Designing		✓
7.	Backend Development and Production	✓	
8.	Project Testing	✓	
9.	Project Delivery		✓
10.	Regulatory Clearances		✓
11.	Sales and Distribution		✓
12.	Employee Quality Control and Maintenance	✓	
13.	Product Quality Control and Maintenance		✓

14.	Marketing & Business Promotion		✓
15.	Management and Administration		✓
16.	Personnel Recruitment & training	✓	

Asset Analysis

The machinery, equipment's, fixtures etc., in India which are necessary to undertake the service function, are fully owned by UXC.

The asset analysis is given below:

Sl.No.	Particulars	UXC	AE
1.	Infrastructure and office equipment for providing services	✓	
2.	Human Resource Assets	✓	
3.	Owner of Intellectual Property Rights		✓

However, the AEs may grant a limited license to UXC for its work product solely on the terms of the agreement and for fulfilment of the obligations contained therein.

Summary of Assets employed as on 31st March 2016:

Sl.No.	Particulars	WDV (Amount in INR)
1	Plant & Machinery	16,40,474/-
2	Computer Hardware	28,05,150/-
3	Furniture & Fixtures	10,694/-
4	Computer Software	1,10,414/-
TOTAL		45,66,732/-

Risk Analysis

The following table enumerates the risks borne by UXC and AE(s).

Description of risks	UXC	AE(s)	Comments
<i>Market Risk</i> Risk arises for a business due to increased competition and relative pricing pressures, change in demand patterns and needs of customers, inability to develop / penetrate in a market		✓	The company is a captive service provider catering only to AEs; direct correlation with markets does not exist. However, the prospects of the AE are market linked, and it can be inferred to bear the market risk.
<i>Service Liability</i> Risks associated with service failures including non-		✓	Since the company does not cater to end users, no service liability can be

performance to generally accepted or regulatory standards			said to exist, excepting standards of quality desired by the AEs.
Credit risk of clients Risk of non-payment of dues by customers who do not pay in advance		✓	Given that the company serves only the AE, credit risk is hypothetical.
Intellectual Property Rights		✓	Retained by the AE.
Exchange fluctuation This risk relates to the potential impact on profits that may arise because of changes in Foreign Exchange Rates.	✓		The company invoices in foreign currency and receives funds for the same in foreign currency too. Therefore, the risk of Exchange Fluctuation is borne by the UXC India IT Services Pvt Ltd
Legal & Statutory Environmental Risk This risk primarily arises on account of non-compliances	✓		
Manpower Risk Any enterprise which is largely dependent, for its success, upon quality personnel with superior technical knowledge is faced with this risk. Competitive market forces expose such an enterprise to the risk of losing its trained personnel.	✓		Personnel recruitment & management is the responsibility of the company and therefore risk borne by the company.
Political Risk This risk primarily arises on account of operating in geographical jurisdictions with unstable political regimes/unfavourable government policies.	✓		

Based on the above, we verify the comparability of the comparables alleged for exclusion by the assessee referred to herein above.

4. Ground No.7: 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 analysed all the above alleged comparables on functionality and had excluded them from being compared with a captive service provider like present assessee. This *Tribunal* observed as under:

“ 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., Thirware 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 Persistant 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.

Particulars	FY 2013-14	FY 2014-15	FY 2015-16
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.

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 Larsen & Toubro Infotech Ltd., Persistent Systems Ltd., Nihilent Technologies Ltd., Aspire Systems (I) Pvt. Ltd., Inteq Software Pvt Ltd., Infosys Ltd., Infobeans Technologies

Pvt.Ltd., Thirdware Solutions Ltd., Cybage Software Pvt.Ltd., comparables from the final list.

Accordingly, Ground No.7 of the appeal stands allowed.

5. Ground nos.6 & 8

Vide these grounds, the assessee is seeking the inclusion of Akshay Software Technologies Ltd., I2T2 India Limited, Infomile Technologies Limited, Isummation Technologies Pvt. Ltd., Orangescape Technologies Ltd., Maveric Systems Limited and Batchmaster Software Pvt.Ltd., in the list of comparables.

It is submitted that these companies are engaged in providing SWD services which were not considered by the Ld.TPO, as in most of the cases, no data were available which has been upheld by the DRP. It submitted that assessee has filed all details in respect of the annual reports of these comparables.

Based on the above submissions, we remand these comparables back to the Ld.TPO for fresh consideration.

Accordingly, Ground No.6 &8 stands allowed for statistical purposes.

6. Ground No.10-14 are raised by the assessee against the adjustment proposed by the Ld.TPO of INR1,14,70,507 in respect of international transaction pertaining to receipt of intra-group services from associated enterprises.

6.1 It is submitted that the assessee provides software support services to its AE. In order to provide these services, the assessee received some services from its AE, in the nature of operation, treasury, information systems, etc. These services are utilized towards rendering IT support services by the assessee to its AE.

6.2 It is submitted that the assessee analysed aggregation of closely linked transactions, the transaction of management fee

paid to AE and benchmarked along with software support services rendered, by applying TNMM. It is submitted that, while calculating arm's length margin for IT support services, the assessee considered 'Management Fee' as part of operating expense. Accordingly, it was prayed that, the expense be treated as incurred towards rendition of software support services to AE.

6.3 The Ld.AR submitted that the Ld.TPO/AO, on one hand included this cost for purpose of computing arm's length margin in respect of revenue earned and on the other hand, the Ld.TPO/AO considered the entire management fee expense as a separate international transaction, without appreciating that the complete cost has been recovered from AE alongwith a markup of 15.26% on operating cost.

6.4 The Ld.AR referred to the calculation of markup recovered by the assessee already included in the expense incurred on receipt of such intra-group services is reproduced as under:

S. No.	Particulars	Amount (INR)	Relevant page no. of Statement of Profit and Loss / Trial Balance
1.	Total Cost (including the expenses amounting INR 1,14,70,507 incurred for receipt of intra- group services from AE)	13,77,99,430	Page 146 of PB Vol 1 for total cost Page 160 of PB Vol 1 (for Trial Balance)
	Less: Non-operating cost : Interest	37,032	-
	Unrealised forex fluctuation expense	18,28,465	-
	Net Operating Cost	13,59,33,933	-
2.	Markup @15.258% on net operating cost	2,07,40,756	-
3.	Operating Revenue	15,66,74,689	Page 146 of PB Vol 1

6.5 The Ld.AR also relied on following decisions, wherein it is held that, where the entire cost incurred by the assessee has been remunerated with a mark-up which is offered to tax by the assessee, no adjustment/addition shall be made on such cost:

- *Eaton Industries Manufacturing GmbH vs DCIT (ITA No. 415/PN/2015) (Pune- Trib.)*
- *Fidelity Information Services India Pvt. Ltd. vs. DCIT (ITA No. 363/CHD/2017) (Chandigarh – Trib.)*

The Ld.DR submitted that, the issue may be remanded to the Ld.AO to verify the above submission of the assessee.

We have perused the submission advanced by both sides based on the record placed before us.

6.6 It is noted that the assessee had submitted before the authorities below regarding the markup charged by the assessee to its AE on the cost of services rendered by the assessee. However, the same has not been verified. We direct the Ld.AO/TPO to verify the above details and submitted by the assessee before us. The claim of the assessee may be considered in accordance with law and the ratio laid down by the coordinate benches of this *Tribunal* relied by the assessee referred to herein above.

Accordingly, Grounds 10-14 stands allowed for statistical purposes.

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

Order pronounced in the open Court on 20th January, 2023.

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Sd/-
BEENA PILLAI
JUDICIAL MEMBER

Bengaluru, Dated: 20th January, 2023

Copy to:

- 1. The Appellant*
- 2. The Respondent*
- 3. The CIT(A) -*
- 4. The CIT -*
- 5. The DR, ITAT, Bengaluru*
- 6. Guard File*

By Order

//True Copy//

*Assistant Registrar
ITAT, Bengaluru*

n.p.