

आयकर अपीलीय अधिकरण
मुंबई पीठ "जे", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एस. रिफौररहमान, लेखाकार सदस्यके समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

आअसं. 8389/मुं/2010 (नि.व. 2005-06)
ITA NO.8389/MUM/2010(A.Y.2005-06)

DCIT-2(3),
Room No.555, 5th Floor,
Aaykar Bhavan, M.K.Road,
MUMBAI – 400 020

..... अपीलार्थी / Appellant

बनाम Vs.

M/s. Zensar Technologies Ltd.,
Magnet House, 2nd Floor,
N.M.Marg, Ballard Estate,
Mumbai – 400 001

.....प्रतिवादी / Respondent

PAN: AAACZ 0742 K

अपीलार्थी द्वारा / Appellant by : Shri Manoj Kumar, CIT - DR
प्रतिवादीद्वारा / Respondent by : Shri Nitesh Joshi, Advocate
सुनवाई की तिथि / Date of hearing : 22/08/2023
घोषणा की तिथि / Date of pronouncement : 13/11/2023

आदेश / ORDER

PER VIKAS AWASTHY, JM:

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals) 15, Mumbai [in short 'the CIT(A)'] dated 17/09/2010, for the Assessment Year 2005-06.

2. The assessee is a software development company that provides software solutions to its customers both offshore and on site. The assessee has subsidiaries in USA, UK, Singapore, Germany and China. The subsidiaries provide marketing and sales support and on-site software services. The

assessee also provides onsite services to its clients by deputing its employees to the site of the clients for software development assignments. During the period relevant to the Assessment Year under appeal, the assessee inter-alia provided software development services to its Associated Enterprise(AE). To benchmark the transaction, the assessee applied Transactional Net Margin Method (TNMM) as the most appropriate method. The same was accepted by the Transfer Pricing Officer (TPO). The assessee selected 28 companies as comparable having an average net profit margin of 13.37%. The assessee earned net profit margin of 9.82%, since the margin of the assessee was within +/- 5% range, the transaction of software development entered into by the assessee with its AE according to the assessee was at arms length. During the course of assessment proceedings the Assessing Officer made a reference to the TPO u/s. 92CA(1) of the Income Tax Act, 1961 [in short 'the Act']. The TPO accepted TNMM applied by the assessee as most appropriate method, however, he rejected 24 companies out 28 selected by the assessee as comparable. The TPO thereafter, introduced 15 new companies as comparable. Thus, the total number of companies selected by the assessee for determining arms length price was 19 including the four from the list of comparable selected by the assessee. The final list of comparable companies as per TPO is as under:

S.No.	Company Name	OP to Total Cost (%)
1.	Bodhtree Consulting Ltd.	24.85
2.	Akshay Software Technologies Limited	7.72
3.	Lanco Global Systems Ltd	13.78
4.	Exencys Software Solutions Ltd.	70.68
5.	Sankhya Infotech Ltd	27.35
6.	Sasken Network Systems Ltd	16.64

7.	Gebbs Infotech Limited	16.52
8.	VJIL Consulting Ltd.	6.68
9.	Four soft Ltd.	24.7
10.	Thirdware Solutions Limited	66.11
11.	Geometric Software Solutions Co. Ltd	20.34
12.	Tata Elxsi Limited (seg)	24.35
13.	Visual soft Technologies Ltd(seg)	23.52
14.	Sasken communication Technologies Ltd(seg)	14.42
15.	Flextronics (seg)	32.19
16.	L&T Infotech Ltd.	11.72
17.	Satyam Computer Services Ltd.	30.31
18.	Infosys	43.49
19.	Compulink Systems Ltd	43.62
	Comparable companies Avg. margin	27.31

According to the TPO based on the companies selected as comparables the arms length margin is 27.31%. The TPO applied revised arms length margin to the 'provision of services' and made an adjustment of Rs.30,67,61,000/-.

2.1 Further, the TPO made adjustment in respect of secondment of employees to its AEs based in US. The computation of arms length price for the secondment of employees to the US AE during the financial year 2004-05 as per TPO is as under:

Total number of skilled software personnel seconded to the US AE	63
Total salary of these 63 personnel [converted into Rs.]	Rs.8,33,38,349/-
11.25% of the salary cost treated as arm's length price	Rs.93,75,564/-
Less: Human resource cost already allocated to the US AE	Rs.29,90,281/-
Amount of Adjustment	Rs.63,85,284/-

2.2 Apart from the above adjustments on international transactions, the Assessing Officer inter-alia made following additions while passing assessment order dated 22/12/2008:

- (i) Exclusion of telecommunication expenses from export turnover while determining deduction u/s. 10A of the Act.
- (ii) Rejection of revised long term capital gain claimed by way of revised computation of total income during the assessment proceedings.
- (iii) Rejection of interest u/s. 244A of the Act on the refund arising out of self-assessment tax paid.

Aggrieved by the assessment order, the assessee carried the issue in appeal before the CIT(A). The CIT(A) vide impugned order deleted the entire adjustment in respect of software development services and granted part relief qua adjustment on secondment of employees. On the corporate issues the CIT(A) accepted the assessee's claim of deduction u/s. 10A of the Act. The CIT(A) further accepted the assessee's claim of revised long term capital gain made in revised computation of total income and also the claim in respect of interest u/s. 244A of the Act. The Department is in appeal against the findings of CIT(A) allowing relief to the assessee.

3. The grounds of appeal by the Department assailing the order of CIT(A) are as under:

“On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

- 1. The order of the CIT(A) is opposed to law and facts of the case.*
- 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)*

erred in holding that telecommunication expenses of Rs. 76.21 lacs be excluded from export turnover and total turnover without appreciating the facts of the case.

3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in giving relief of Rs. 86,71,275/- to the assessee based on revised return without appreciating the facts that revised return was time barred.

4. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing interest u/s. 244A with respect to self asstt. tax paid by the assessee while there is no provision- in the Act.

5. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs. 30,67.61.000/- in international transactions with associated enterprises ignoring the fact that the same are not at arm length price and ignoring the material placed on record by the A.O.

6. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in restricting the disallowance with respect to secondment of employees to associated enterprises at Rs.11,80,385/- ignoring the fact that transaction was not at arm's length and ignoring the evidences brought on record by the A.O.

7. For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the AO restored."

4. Shri Manoj Kumar representing the Department, with reference to ground No.2 of appeal submitted, that the assessee had claimed exemption of Rs.26.27 crores u/s. 10A of the Act. The Assessing Officer asked the assessee to furnish details with regard to the exemption claimed. In the export turnover the assessee had included telecommunication expenses, whereas "export turnover" as defined in Explanation -2(iv) to section 10A of the Act would show that "export turnover" does not include telecommunication charges and insurance charges attributable to the delivery of computer software outside India. Before the Assessing Officer, the assessee failed to submit necessary

details with regard to link charges between incoming data and outgoing data. In submissions before the CIT(A) the contention of the assessee was that telecommunication charges are separately recovered. However, the claim of the assessee was not supported by any documentary evidence, still the CIT(A) granted relief to the assessee.

5. In respect of ground No.3 of appeal, the Id. Departmental Representative submitted that, during the period relevant to Assessment Year under appeal the assessee had sold land and had offered long term capital gain of Rs.11.74 crores to tax. Thereafter, during the assessment proceedings the assessee revised the sale consideration and reduced the long term capital gain to Rs.10,88,13,422/-. The Assessing Officer rejected the fresh claim made by the assessee in light of the decision in the case of Goetze (India) Ltd., 284 ITR 323 (SC). The Id. Departmental Representative submitted that the CIT(A) accepted the contentions of the assessee without examining as to whether the amount was actually refunded by the assessee and how the transaction has been accounted in books of the assessee.

6. The ground No.4 of appeal is against allowing of interest u/s. 244A of the Act. The Id. Departmental Representative supported the assessment order and prayed for reversing the findings of CIT(A).

7. In respect of transfer pricing issue raised in ground No.5 assailing the findings of CIT(A) in deleting addition of Rs.30.67 crores with respect to provision of service, the Id. Departmental Representative submitted that the

entire risk is borne by the assessee in providing service, in return the assessee gets miniscule part of the total consideration. This clearly shows that the assessee is shifting profits to its AEs. The Id. Departmental Representative submitted that before the CIT(A) the assessee was seeking exclusion of various companies selected by the TPO as comparable and inclusion of some of the companies that have been excluded by the TPO as they fail to qualify the criteria selected by the TPO for selection of comparable viz:

- (a) Related party transactions of 4%.
- (b) Export turnover less than 25%.
- (c) Lack of segmental data
- (d) Consistent loss making companies
- (e) Exceptional/extra ordinary event.

He submitted that the TPO while rejecting 24 comparable companies from the list of 28 companies selected by the assessee has given independent reasons for rejecting each of the company. The TPO has also given search criterion for selecting companies as comparable. The CIT(A) in the impugned order has not given detailed reasons for disturbing the list of companies finalised by the TPO as comparable. The Id. Departmental Representative further submitted that the assessee for the first time before the CIT(A) had taken the argument for exclusion of branch profits. No document was placed on record before the TPO with respect to exclusion of branch profits. He also objected to the claim of depreciation adjustment and working capital adjustment allowed by the CIT(A). He submitted that there is no basis for allowing said adjustments.

8. In respect of secondment of employees, the Id. Departmental Representative vehemently supported the findings of TPO. However, he fairly stated that similar issue was considered by the Tribunal in assessee's own case in ITA No.5653/Mum/2009 for Assessment Year 2004-05 decided on 19/04/2023, wherein on similar set of facts the Tribunal has partly upheld the adjustment.

9. Per contra, Shri Nitesh Joshi appearing on behalf of the assessee strongly supported the impugned order. In respect of ground No.2 of appeal, the Id. Counsel for the assessee submits that the Assessing Officer has erred in excluding telecommunication expenses from export turnover. He submitted that though telecommunication charges were not part of the export turnover, nevertheless if the Assessing Officer reduced the same from export turnover, the same should have been reduced from total turnover as well. He submitted that when the object of the formula in section 10A of the Act for computation of deduction is to arrive at the profit from export business, the expenses that are excluded from export turnover ought to have been excluded from total turnover as well. In support of his submissions, he placed reliance on the decision in the case of HCL Technologies Ltd., 404 ITR 719(SC). The CIT(A) in first appellate proceedings directed to exclude telecommunication charges from total turnover in accordance with this settled legal position. He thus prayed for upholding the findings of CIT(A) on the issue.

10. In respect of ground No.3 of appeal, the Id. Counsel for the assessee submitted that while filing return of income the assessee offered LTCG on sale of land situated at Nagar Rd., Pune. The long term capital gains was computed

based on sale of land admeasuring 71564 sq.mtrs. vide agreement dated 30/03/2005. As per clause -3 of the said agreement determination of final consideration was dependent on actual measurement of the land sold. Upon physical measurement jointly undertaken by the vendor (assessee) and the buyer it was found that the area of the land sold was 69909 sq. mtrss. Accordingly, excess consideration of Rs.86.71 lacs initially received as part of total consideration was refunded to the buyer by the assessee. The assessee revised the amount of LTCG in computation of income. The revised computation of total income filed before the Assessing Officer was not in respect of any fresh claim but was the correction of original claim of LTCG made at the time of filing return of income. The Id. Counsel for the assessee referred to the sale deed at page-58 of the paper book and deed of confirmation dated 07/03/2007 at page 98 of the Paper Book, wherein the fact of refund of Rs.86,71,276/- being excess consideration received is mentioned. The Id. Counsel for the assessee further referred to the copy of cheque issued by the assessee in the name of Cityline Construction Pvt. Ltd. at page 57 of the Paper Book. The Id. Counsel for the assessee submitted that it is only the actual income received or accrued on sale of capital asset i.e. taxable and not the consideration that was contingent upon future uncertain even. In support of his arguments, he placed reliance on the decision in the case of CIT vs. Hemal Raju Shet, 68 taxmann.com 319 (Bombay) and Dinesh Vazirani vs. PCIT, 140 taxmann.com 581 (Bombay).

11. In respect of ground No.4, the Id. Counsel for the assessee submitted that the Assessing Officer did not grant interest u/s. 244A of the Act on refund of excess amount paid as self-assessment tax. In first appellate proceedings

the CIT(A) directed the Assessing Officer to grant interest u/s. 244A of the Act on the refund of self-assessment tax paid. The directions of the CIT(A) are in accordance with the decision of Hon'ble Jurisdictional High Court in the case of Stockholding Corporation of India Ltd. vs. NC Tiwari, CIT, 373 ITR 282(Bombay).

12. In respect of ground No.5 raised by the Revenue on deleting of transfer pricing adjustment, the Id. Counsel for the assessee submitted that in so far as the most appropriate method i.e. TNMM adopted by the assessee, the TPO has accepted the same. The only dispute is with respect to comparables. The Id. Counsel vehemently defending the findings of CIT(A) submitted that the TPO was inconsistent in applying the filters. One of the filters applied by the TPO was Related Party Transactions (RPT)>4%. The CIT(A) rejected following companies applying above filter:

- (i) Sasken Network Systems Ltd.
- (ii) Foursoft Ltd.
- (iii) Tata Elxi Ltd.
- (iv) Flextronics Software System Ltd.
- (v) Infosys Technologies Ltd.
- (vi) Larsen & Toubro Infotech Ltd.

All these companies were selected by the TPO but were having RPT>4%. The CIT(A) further rejected Thirdware Solutions Ltd. on the ground of lack of segmental data and Exensys Software Solutions Ltd. on account of exceptional event. The CIT(A) included following companies in the list of comparables which were initially selected by the assessee in Transfer Pricing Study, as they were wrongly excluded by the TPO on the parameters of filters:

i. ASM Technologies Ltd. & Subex Systems Ltd.

The TPO rejected the above companies on the ground of high RPT. The CIT(A) came to the conclusion that there is no RPT during the relevant year in the said companies.

ii. Blue Star Infotech Ltd.

The TPO rejected the company on account of high RPT. The CIT(A) included the company in the list of comparable as RPT is <4% during the relevant period.

iii. Gold Stone Technologies Ltd.

The TPO rejected this company for the reason that forex earnings are less than 25%. The CIT(A) after examining the records came to the conclusion that the export turnover of the company is >25%.

iv. Megasoft Ltd.

The TPO rejected the company for the reason that it is chronically loss making company. The CIT(A) come to the conclusion that it is not a chronically loss-making company, hence, included in the list of comparable. To support the findings of CIT(A) the Id.Counsel for the assessee referred to the financials of the company at page 684 of the Paper Book. He pointed that during the financial year ending on 31/12/2003 the company had profit and for the financial year ending 31/12/2004 the company had loss. Therefore, it cannot be said that it is a persistent loss making company.

v. Mphasis BSL Ltd.

The TPO rejected the company for the reason, no segmental breakup of software development segment is available. Whereas, the CIT(A) after examining the records came to the conclusion that segmental data is available in respect of activities of the said company. The Id. Counsel for the assessee referred to the extract of Annual Report of the company at page 681 to show that the said company had reported segmental information.

The Id.Counsel for the assessee further submitted that the overseas branches have not entered into international transactions with the AE, therefore, the profit of overseas branches has to be excluded for arriving at arms length price for the international transactions. The CIT(A) accepted the contention of the assessee and has placed reliance on certified profitability statement.

13. With respect to depreciation adjustment, the Id. Counsel for the assessee submitted that the rate of depreciation charged by the assessee is higher than the rate of depreciation provided by the comparable companies. The assessee is providing depreciation at a rate higher than the rate as specified in Schedule -XIV of the Companies Act, 1956, therefore, the depreciation adjustment has been rightly allowed by the CIT(A). In support of his contention that depreciation adjustment is allowable in such cases the Id. Counsel for the assessee placed reliance on the decision in the case of ACI Worldwide Solutions Pvt. Ltd. vs. DCIT in IT(TP)A No.652/Bang/2012 for Assessment Year 2004-05 decided on 10/04/2015. With regard to working

capital adjustment the Id.Counsel for the assessee submitted that there are catena of decisions by different Benches of the Tribunal allowing working capital adjustment.

14. In respect of ground No.6 of appeal by the Revenue assailing the findings of CIT(A) on restricting the disallowance with respect to secondment of employees, the Id. Counsel for the assessee submitted that for secondment of employees to AEs, arms length price is to be computed only in respect of employees who remain in employment for more than six months and on the basis of Indian salary and not on the basis of US salary. The Id. Counsel for the assessee pointed that this issue has already been considered by the Tribunal in assessee's own case in Assessment Year 2004-05 (supra).

15. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the documents and decisions on which rival sides have placed reliance in support of their respective submissions.

16. The ground No.1 and 7 in appeal by the Revenue are general in nature, hence, require no separate adjudication.

17. In ground No.2 of appeal, the Revenue has assailed the findings of CIT(A) with respect to telecommunication expenses amounting to Rs.76.21 lacs excluded from export turnover and total turnover. The Assessing Officer in assessment proceedings has excluded telecommunication charges from export turnover only. The CIT(A) in first appellate proceedings has directed the Assessing Officer you to reduce telecommunication charges from export turnover and total turnover while computing deduction under section 10A of

the act. The contention of the assessee is that export turnover does not include telecommunication charges. It is no more res-integra that freight, telecommunication charges, or insurance charges attributable to the delivery of the Computer Software outside India are to be excluded from export turnover as well as total turnover. The Hon'ble Apex Court in the case of CIT vs. HCL Computer Technologies Ltd. (supra) has in an explicit manner held that if freight, telecommunication charges and insurance charges are excluded only from export turnover and not the total turnover it would give absurd result as *Total Turnover = Export Turnover as defined in Explanation 2(iv) of section 10A of the Act + Domestic Sale Profits*. For the sake of completeness, the relevant extract of the observation of the Hon'ble Apex Court are reproduced herein below:

“17. The similar nature of controversy, akin this case, arose before the Karnataka High Court in CIT v. Tata Elxsi Ltd. [2012] 204 Taxman 321/17/taxmann.com 100/349 ITR 98. The issue before the Karnataka High Court was whether the Tribunal was correct in holding that while computing relief under Section 10A of the IT Act, the amount of communication expenses should be excluded from the total turnover if the same are reduced from the export turnover? While giving the answer to the issue, the High Court, inter-alia, held that when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to it, the said ordinary meaning is to be in conformity with the context in which it is used. Hence, what is excluded from 'export turnover' must also be excluded from 'total turnover', since one of the components of 'total turnover' is export turnover. Any other interpretation would run counter to the legislative intent and would be impermissible.

18. Accordingly, the formula for computation of the deduction under Section 10A of the Act would be as follows:

$$\text{Export Profit} = \text{total Profit of the Business} \times \frac{\text{Export turnover as defined in Explanation 2 (IV) of Sec. 10A of IT Act}}{\text{Export turnover as defined in Explanation 2(IV) of Section 10A of the IT Act + domestic sale proceeds}}$$

19. In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under Section 10A of the IT Act are allowed only in Export Turnover but not from the Total Turnover then, it would give

rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the Respondent which could have never been the intention of the legislature.

20. *Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well."*

Thus, in the light of the facts of the instant case and the aforesaid decision rendered by Hon'ble Supreme Court, we find no infirmity in the findings of CIT(A) on this issue. Hence, ground No.2 of appeal of Revenue is dismissed being devoid of any merit.

18. In ground No.3 of appeal, the Revenue has assailed the findings of CIT(A) in allowing relief of Rs.86,71,275/- to the assessee based on revised computation of total income furnished before the Assessing Officer during the course of assessment proceedings. During the period relevant to the Assessment Year under appeal, the assessee vide sale agreement dated 30/05/2005 sold land admeasuring 74014 sq. mtrs to Cityline Construction Pvt. Ltd. for a total consideration of Rs.35,10,04,090/-. In Sale Agreement (Clause-3) it was mutually decided by the parties that both parties shall make an application to Government Authorities to carry out survey of the land. If, in a survey, the actual area of the land is found to be more or less than 74014 sq.mtrs., then the consideration agreed between the parties shall increase or reduce at such rate as mutually agreed. On survey the total area of the land was found to be 69909 sq.mtrs. Accordingly, the assessee refunded Rs.86,71,270/- to Cityline Construction Pvt. Ltd. in the financial year ending on 31/03/2007. A deed of confirmation to that effect was also executed between the parties, the same is at page 98 of the paper book. The Id. Counsel for the

assessee pointed that in the books, the assessee had reflected Rs.100 lacs as advance against sale of assets. When the assessee refunded Rs.86.71 lacs in the financial year 2006-07, Rs.86.72 lacs was adjusted towards the refund to the purchaser and the balance Rs.13.28 lacs was written back in the P&L Accounts for Assessment Year 2007-08. The write back of Rs.13.28 lacs was reduced while computing 'Profits and Gains from Business and Profession' in the computation of income for Assessment Year 2007-08 as it was already considered in the computation of long term capital gain in Assessment Year 2005-06. In support of his contentions the Id. Counsel for the assessee furnished copy of revised computation of income for the year ended 31/03/2007. It is further seen that write back was also reported in Form 3CD for Assessment Year 2007-08. A perusal of financial results for F.Y.2005-06 and F.Y 2007-08 further shows that the amount reflected as advance against sale of assets does not appear in the Balance Sheet as on 31/03/2007. It is a well settled principle that only the real income of assessee can be taxed. The Department cannot tax the income that has never accrued to or received by the assessee. The Hon'ble Apex Court in the case of CIT vs. Shoorji Vallabhdas & Company, 46 ITR 144 held, "*Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which liability to tax is attracted, viz. the accrual of its income or its receipt; but the substance of the matter is income, if income does not result, there cannot be a tax, even though in book-keeping an entry is made about a hypothetical income, which does not materialize.*" The aforesaid principal laid down by the Hon'ble Supreme Court has been reiterated by the Hon'ble Jurisdictional High Court in the case of Hemal Raje Shete and Dinesh Vazirani (supra). Thus in an undisputed facts of

the case we find no merit in ground No.3 of appeal, hence, ground No.3 of appeal is dismissed.

19. In ground No.4 of appeal, the Revenue has assailed findings of CIT(A) in allowing interest u/s. 244A of the Act on the refund arising out of excess self-assessment tax paid by the assessee. In so far as the fact of refund arising out of self-assessment tax paid there is no dispute. The Hon'ble Jurisdictional High Court in the case of Stockholding Corporation of India (Supra) has held that tax paid on self-assessment would fall u/s. 244A(1)(b) of the Act that is a residual clause. The said section clearly mandates that the Revenue would pay interest on the amounts refunded for the period commencing from the date payment of tax is made to the Government exchequer upto the date when refund is granted. Hence, the assessee is eligible for interest on refund on excess amount paid on self assessment tax. We find no error in the findings of CIT(A) on this issue, hence, ground No.4 of appeal is dismissed.

20. In ground No.5 of appeal the Revenue has assailed the findings of CIT(A) in deleting transfer pricing adjustment of Rs.30,67,61,000/- in respect of software development services. In so far as the facts narrated above with regard to transfer pricing adjustment they are not in dispute. The only dispute is with regard to inclusion/exclusion of some of the comparables finally selected by the TPO. From the list of 19 companies selected as comparable by the TPO the CIT(A) rejected 9 companies and has accepted six companies from the list of comparables selected by the assessee in the transfer pricing study. First we will deal with nine comparable that were included by the TPO and rejected by the CIT(A):

Sasken Network Systems Ltd:

The TPO selected the said company as comparable. One of the filters applied by the TPO for rejection of comparable was Related Party Transaction >4%. The Id. Counsel for the assessee referring to the P&L Account of Sasken Network Systems Ltd. at page 670 of the Paper Book has pointed that the RPT of the said company is more than 8%. Hence, the said company was excluded by the CIT(A) from the list of comparable.

Four Soft Ltd.:

The said company was excluded by the CIT(A) for the reason that the RPT of the said company was >5%. The submissions made by the assessee before the CIT(A) shows that the RPT of the company is 22.69%.

Thirdware Solutions Limited:

The CIT(A) rejected the company from the list of comparables on the ground that no segmental data is available. In support of the findings the assessee has drawn our attention to the extracts of the financials of the company at page 682 and 683 of the Paper Book. A perusal of the same reveals that the company has revenue from sale of licenses, services, export and subscription. However, no segmental profits were reflected by the company.

Tata Elxsi Limited :

The CIT(A) has excluded the company from the list of comparable as RPT is >4%. The Id.Counsel for the assessee has drawn our attention to the extracts of P&L Accounts for the year ended 31/03/2005 of Tata Elxsi Limited at page 668 of the paper book to contend that RPT of the said company is >5.74%.

Flextronics Software Systems Ltd.:

The said company has also been rejected by the CIT(A) on the ground of RPT filter >4%. As per the findings of the CIT(A) the RPT of the said company for the relevant Assessment Year is 5.23%

Infosys Technology Limited.

The said company has also been rejected by the CIT(A) on the ground that RPT is >4%. The Id.Counsel for the assessee has drawn our attention to the extract of the Annual Report of the company at page 666 and 667 of the Paper Book to contend that RPT to cost is 5.26%.

Exensys Software Solutions Ltd.:

The CIT(A) has excluded the said company from the list of comparables as an exceptional event had happened during the relevant period. During the relevant period, another company Holool India Ltd. was amalgamated with Exensys Software Solutions Ltd. w.e.f. 01/04/2004, which had purportedly significant impact on the financial results of company for the year ended 31/03/2005.

Larsen & Toubro Infotech Ltd.

The said company was excluded from the list of comparable by the CIT(A) as it had RPT of >4%. The Id. Counsel for the assessee pointed that the RPT of the said company is 4.35%.

20.1. The reasons given for rejecting the aforesaid companies by the CIT(A) could not be controverted by the Department. In the absence of any contrary material, we find no reason to interfere with the findings of CIT(A) in excluding the said companies from the list of comparable.

20.2. The companies that have been accepted by the CIT(A) as comparable are:

ASM Technologies Ltd.and Subex Systems Ltd.:

These companies were rejected by the TPO as they failed to qualify the RPT filter. The CIT(A) included both these companies in the list of comparable as these companies do not have RPT.

Blue Star Infotech Ltd.

The TPO rejected the company as comparable on the ground that it had high RPT. The Id. Counsel for the assessee referring to the extract of financials of the company at page 656 of the Paper Book pointed that the RPT of the company is only 3.43% i.e. within the filter range. Hence, the same was included in the list of comparable by the CIT(A).

Goldstone Technologies Ltd.

One of the filters applied by the TPO to reject companies was export turnover less than 25%. The TPO rejected the company on the ground that the said company is having export turnover of less than 25%. The assessee has placed on record extract of P&L Account for the period ending on 31/03/2005, which shows that the entire revenue of the company is from exports. Thus, the findings of the TPO are contrary to the facts on record.

Megasoft Ltd.

The TPO rejected the company on the ground that it is chronically loss making company. The persistent loss making company is the company which had suffered losses in three consecutive preceding financial years including the financial year relevant to assessment year under consideration. The assessee has placed on record the extracts of the Annual Report of the company at page

684 of the Paper Book. A perusal of the same reveals that the company had profits in the financial year ended on 31/12/2003 and had losses in the financial year ending on 31/12/2004. Since, the said company had earned profit in one of the immediate three preceding F.Ys, the said company cannot be classified as persistent loss making company.

Mphasis BFL Ltd.

The said company was rejected by the TPO on the ground that segmental data is not available. The assessee has furnished extracts of the Annual Report of the said company at pages 680 and 681 of the Paper Book . A perusal of the same reveals that segmental information is available. The company has indicated segmental revenue from IT Services and BPO services.

20.3 Thus, considering the documents available on record, we see no error in the findings of the CIT(A) to include aforementioned six companies in the list of comparable.

20.4 Another facet of the submissions of the Revenue is that the CIT(A) has erred in allowing depreciation and working capital adjustment. The contention of the Id. Counsel for the assessee is that the assessee has provided depreciation at a rate higher than the rates of depreciation charged by the comparable companies. Comparable companies have charged depreciation at rates provided in Schedule -XIV of the Companies Act, 1956. Therefore, depreciation adjustment has been claimed. The CIT(A) has verified the claim of the assessee and has given a specific finding that depreciation in the books of the assessee are at a higher rate than the rate prescribed under the Companies Act, 1956. We find that depreciation adjustment is not an alien concept. The Tribunal in the case of Egan Communication Pvt. Ltd. v s. ITO 23 SOT 385

(Pune) allowed adjustment for depreciation, where the rates of depreciation adopted by the tested party and the comparable companies were different. Subsequently, depreciation has been allowed by the Tribunal in various decisions some of them are cited herein under:

- (i) Outsource Partner International Pvt. Ltd. vs. DCIT, 87 taxmann.com 332 (Bang-Trib);
- (ii) DCIT vs. 24x7 Customer Pvt. Ltd., IT(TP)A No.228/Bang/2020, A.Y. 2005-06 decided on 30/06/2022.
- (iii) ACI Worldwide Solutions Pvt. Ltd. vs. DCIT, IT(TP)A No.652/Bang/2012 A.Y. 2004-05 decided on 10/04/2015.

20.5 As regards working capital adjustment the assessee had carried out the adjustment to eliminate interest component in working capital. No contrary material is placed before us by the Revenue to support the argument against allowing of working capital adjustment. We find no infirmity in the findings of CIT(A) in allowing the depreciation adjustment on working capital adjustment. Thus, in view of our above finding ground No.5 of appeal is dismissed.

21. In ground No.6 of appeal, the Revenue has assailed restricting disallowance with respect to secondment of employees to AEs. The TPO while considering the issue had made adjustment of Rs.63,85,284/-. In the first appellate proceedings the CIT(A) observed that the facts in impugned Assessment Year are similar to the facts in AY 2004-05. The CIT(A) taking consistent view held that the assessee should be remunerated on the basis of Indian Salary and not on the basis of US salary. Thus, the CIT(A) restricted the adjustment to Rs.11,80,385/-. We find that the Co-ordinate Bench in

assessee's own case in preceding year i.e. Assessment Year 2004-05 in ITA No.5653/Mum/2009(supra) approved the approach of the CIT(A) in considering Indian salary of employees. Taking into consideration entire facts, we see no reason to interfere with the findings of CIT(A) on this issue, hence, ground No.6 in the appeal by the Revenue is dismissed.

22. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on Monday the 13th day of November, 2023.

Sd/-

(S.RIFAUH RAHMAN)

लेखाकार सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 13/11/2023
Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्तCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
- 5.. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai