

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE**

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT  
AND  
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

IT(TP)A No.2088/Bang/2017
Assessment year : 2013-14

Yokogawa India Limited, Plot No.96, Electronic City, Bangalore – 560 100. <b>PAN : AAACY 0840P</b>	Vs.	The Deputy Commissioner of Income Tax, Large Taxpayers Unit, Bangaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Nageshwar Rao, Advocate
Respondent by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	20.11.2023
Date of Pronouncement	:	01.02.2024

**ORDER**

*Per Laxmi Prasad Sahu, Accountant Member*

This appeal by the assessee is against the final assessment order passed by the Assessing Officer u/s. 143(3) r.w.s. 144C of the Income-tax Act, 1961 [the Act] dated 31.8.2017 for the AY 2013-14 on the following grounds:-

“Grounds relating to transfer pricing matters:

**Trading segment**

1. Impugned order erroneously rejects the Transfer Pricing ("TP") documentation maintained by the assessee and upholds undertaking a new search beyond the due date prescribed for maintaining the TP documentation and also

rejecting the use of multiple year data by the assessee in its TP documentation.

2. Impugned order erroneously determines TP adjustment in relation to trading segment by attributing notional shortfall in profits entirely towards AE purchases, without restricting the same to proportion of purchase transactions from AEs to total operating costs of the assessee.

3. Impugned order erroneously proceeds on presumptions, choosing following companies which are totally incomparable to Appellant to make huge unjustified adjustment under provisions of Chapter X:

- Adtech Systems Limited
- Zicom Electronic Security Systems Limited

4. Impugned order erroneously rejects the following comparable company identified by the Applicant on the reasoning that the same is a government company:

- Telecommunication Consultants India Limited

5. Impugned order erroneously computes adjustment pertaining to the trading segment, by considering operating revenue of trading segment as INR 2,49,37,26,000 instead of correct amount of INR 2,52,92,26,000 being total operating revenue of the trading segment.

#### **Global Sales and Marketing Activities Fees ("GSMAF")**

6. Impugned order erroneously determines TP adjustment in relation to GSMAF by considering only export sales of manufactured goods to non-AEs in the denominator to compute the percentage of GSMAF, and failed in not following Hon'ble DRP directions to consider total non-AE sales (export as well as domestic sales) in the denominator for computing the percentage of GSMAF expense

7. Impugned order erroneously concludes without any basis that the payment towards Global Sales and Marketing

Activity Fees ("GSMAF") made is in the nature of Advertising, Marketing and Promotional ("AMP") expenses of the Associated Enterprise ("AE") of the assessee which leads to rise in the marketing intangible of the AE's brand

8. Impugned order unlawfully disallows expenditure towards GSMAF purportedly by application of Comparable Uncontrolled Price ("CUP") method claiming same to be sub-method of Transactional Net Margin Method ("TNNM").

9. Impugned order inappropriately determines the ALP of payment of GSMAF by using the bright line test which is not a method recognized under the Act.

#### **Management Fees ("MF")**

10. Impugned order erroneously determines the TP adjustment in relation to MF by concluding that the Arm's Length Price ("ALP") of sub-services under MF i.e. Public relation and Corporate Social Responsibility ("CSR") to be duplicative in nature and considering the value of these sub-services to be Nil, without appropriately following the DRP direction to follow the TP order (post giving effect to the ITAT order) for the AY 2007-08 and 2009-10 while concluding the ALP of such sub-services.

11. Impugned order erroneously determines the adjustment in relation to MF by stating MF (Global Head-quarters) and MF (International Head-quarters) to be duplicative in nature, while no such categorization of MF exists for the subject year

12. Impugned order erroneously determines the arm's length nature of the international transactions of payment in relation to MF by not applying any of the methods specified under the Act r.w. the Income tax Rules, 1962 ("Rules"), but by merely applying the "benefit test"

#### **Grounds relating to other matters:**

13. The Learned AO has erred in law and in facts by disallowing an amount of Rs. 22,91,614 on the basis that such expenditure pertains to 'income not includible in total income' for the purpose of Section 14A

14. The Learned AO and DRP has erred in not accepting the claim of the Appellant that only Rs. 1,90,461/- has been incurred for earning the exempt income and hence the disallowance under Section 14A should be restricted to Rs.1,90,461/-

15. The Learned AO and DRP has erred in not following the method as described under rule 8D for determining amount of expenditure in relation to income not includible in total income' for the purpose of Section 14A

16. Without prejudice to the above ground no. (3), the Learned AO has erred in not following the directions of the Hon'ble DRP for re-computation of the amount of disallowance under section 14A read with Rule 8D and by considering the amount of Rs. 13,910.05 lakhs for the purpose of formula prescribed under rule 8D(2)(ii)

17. The Learned AO and DRP has erred in considering the amount of Rs. 13,910.05 lakhs as indirect expenses for the purpose of computing the amount of disallowance under Section 14A read with Rule 8D

18. The learned AO has erred, in law, and in facts, in computing interest of Rs. 3,18,10,370 under Section 234B of the Act.

19. The learned AO has erred, in law, and in facts, in computing interest of Rs. 13,46,477 under Section 234C of the Act.

20. The learned AO has erred, and in facts, in initiating penalty proceedings under Section 274 read with Section .271(1)(c) of the Act, without appreciating the fact that the Appellant has not concealed or furnished any inaccurate particulars of income.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law.”

2. The assessee has also raised additional grounds under Rule 11 of the ITAT Rules, 1963 vide its letter dated 5.7.2021 which is as under:-

**“Ground 21: Refund of dividend distribution tax (DDT) paid in respect of non-resident shareholder**

21.1 Based on facts and the circumstances of the case and in law, the Ld. Assessing Officer ("AO") ought to have restricted the levy of dividend distribution tax paid during the year amounting to INR 1,41,94,688, being taxable in the hands of non-resident shareholder, i.e. Yokogawa Electric Corporation to the rate of 10% prescribed under Article 11 of the India - Japan DTAA or INR 87,50,00 as against the rate of 16.223% of INR 1,41,94,688 under section 115O of the Income Tax Act, 1961.

21.2 Based on facts and the circumstances of the case and in law, the Appellant prays that it is eligible for refund of the excess Dividend Distribution Tax paid by the Appellant.

**Ground 22: Deduction in respect of education cess and secondary and higher secondary education cess paid under section 37(1) of the Income-tax Act, 1961 ('Act')**

22.1 That on the facts and the circumstances of the case, the Appellant prays that education cess and secondary and higher education cess on income tax paid amounting to INR 50,78,437 for the year under consideration, i.e. AY 2013-14 ought to be allowed as a deduction under Section 37(1) of the Income Tax Act, 1961 while computing the total income.

The Appellant craves leave or add, alter, delete or modify the above grounds of appeal.

3. It is submitted that the abovementioned ground may kindly be admitted as it does not require any fresh examination of facts and can be adjudicated on the basis of material on record. It goes to the root of the matter and is required to be adjudicated in order to determine the correct tax liability of the Appellant. Reliance is also placed on the decision of the Apex Court in the case of National Thermal Power Corporation Limited v. CIT (1998) 229 1TR 383 (SC). In the interest of justice, it is therefore humbly submitted that the said additional ground may kindly be admitted and adjudicated.

4. After hearing both the parties, since the additional grounds involves legal issue, therefore following the decision of National Thermal Power Corporation Limited (supra), the same are admitted for adjudication.

5. The brief facts of the case are that the assessee filed return of income for AY 2013-14 on 13.11.2013 admitting an income of Rs.53.74 crores. The case was selected for scrutiny and statutory notices were issued to the assessee. The assessee submitted documents in response to notice u/s. 142(1) and it was observed that the assessee had international transaction exceeding Rs.15 crores and therefore the case was referred to TPO for determination of ALP after approval from the competent authority. The TPO noted that business of the assessee is divided into three segments – Systems, Trading of products and Engineering services. Under the Systems segment, the company

manufactures and sells process control systems/solutions. This segment also includes execution of projects pertaining to process control systems for which the assessee imports raw materials and components from its AEs. Under the trading segment, the company purchases various traded finished goods from its AEs. Under the Engineering Services segment, the assessee renders certain engineering services in the nature of remote engineering, onsite engineering, erection, commissioning etc. to its AEs.

6. During the year, the assessee had international transactions as under:-

<b>Particulars</b>	<b>Amount</b>
Purchase of raw materials	914,036,654
Sale of systems	88,618,110
Purchase of fixed assets	3,687,447
Payment of engine ?ring support fees	11,019,293
Payment towards after sales service	12,795,517
Rendering of systems related service	47,057,639
Purchase of traded goods	1,281,378,072
Commission received	35,075,154
Income from rendering of engineering services	726,227,657
Payment of CEC support fees	15,276,100
Management fees	6,149,549
Global sales and marketing activity fee	21,101,417
Reimbursement expenses	6,855,392
<b>Total</b>	<b>3,169,278,001</b>

## 7. The segmental details of the taxpayer are as under:-

Particulars	Segmental operating results (Amount in lakhs)				Total (A+B+C+D)	FY 2012- 13
	Manufacturing A	Trading (B)	Export of services (C)	Non operating (D)		As per P & L a/c
<b>Income</b>						
Revenue from operations (Gross)	34799.43	24937.26	7968.18	-	67704.87	67704.86
Less: Excise duty	2525.46	NA	NA	-	2525.46	2525.46
<b>Net revenue</b>	32273.97	24937.26	7968.18	-	64179.41	65179.4
<b>Other operating income</b>						
Commission	-	350.74	-	-	350.74	350.74
Sale of scrap	13.79	-	-	-	13.79	13.79
Miscellaneous income	9.09	-	-	-	9.09	9.09
Provision no longer required written	5.94	4.26	1.36	-	11.56	11.56
<b>Total operating income</b>	32302.79	25292.26	7969.54	-	65564.59	65564.58
Non-operating income	-	-	-	70.33	70.33	70.33
<b>TOTAL INCOME, as per P &amp; L account</b>					65634.92	65634.91
<b>Expenditure</b>						
Cost of materials consumed	21527.71	NA	NA	-	21527.71	21527.71
Purchase of traded goods	NA	19032.31	NA	-	19032.31	19032.31
Changes in inventories	-	658.94	NA	-	658.94	658.94
Personnel costs	5353.01	2782.06	2796.05	-	10931.12	10931.12
Depreciation	429.78	89.14	111.6	-	630.52	630.52
Other operating cost	3137.84	2488.86	3199.71	-	8826.4	8826.4
<b>Total operating cost</b>	30448.34	25051.31	6107.35	-	61607.00	61607.00
Non-operating expenses	-	-	-	52.88	52.88	52.88
<b>TOTAL EXPENSES as per P &amp; L account</b>					61659.88	61659.88
<b>Operating /Net profit</b>	1854.45	240.95	1862.19	17.45	3975.04	3975.03
<b>Operating profit/operating revenue</b>	5.74%	0.95%				

8. The TPO observed from the segmental details of the taxpayer that the assessee trades in test and measurement equipments such as oscilloscope, bus analyser, dc source and measure, power measurements, waveform measurements etc. are electronic equipments. The manufacturing activity is high on process control, but its trading activity is in simple industrial electronics. The assessee has done a search on Capitaline but not considered any company in

Prowess inside industrial electronics classification. The TPO applied qualitative filter, trading sales filter, RPT filter, merging companies filter and Govt. ownership filter and after considering the objections of the assessee, selected the following comparables:-

Sl.	Name of company	OP/OR
1	Adtech Systems Ltd	15.11%
2	Kusam Electrical Inds. Ltd	3.33%
3	Zicom Electronic Security Systems Ltd	6.51%
	OP/OR	8.32%

9. The TPO made the adjustment of Rs.11,30,74,949 in trading segment as under:-

Arms length OP/OR	A	8.32%
Operating revenue in trading segment	B	249,37,26,000
Arms Length OC	$C = (100-A)\%$ of B	228,62,47,996
OC of taxpayer's trading segment	D	250,51,31,000
Difference	$E = D - C$	21,88,83,004
Purchase of traded goods from AE	F	128,13,78,072
Payment to AE towards after sales service	G	12,795,517
Total AE transactions in OC	$H = F + G$	129,41,73,589
AE transactions as ratio of total OC	$I = H/D$	51.66%
Excess in AE transactions to be adjusted	$J = 1\%$ of E	11,30,74,959/-

10. The TPO further noticed that the assessee has paid Rs.61,49,549 under the head Management service fees and proposed adjustment of Rs.38,55,298 towards Public Relations and Rs.7,31,915 towards Corporate social responsibility totaling to Rs.45,87,213 based on benefit test. After considering the objections of the assessee and

relying on certain judgments quoted in para 5.3 of his order and made adjustment of Rs.45,87,213.

11. Further, the TPO noticed that the assessee has made payment of Rs.2,11,01,417 to its AE towards Global Sales and Marketing Fees (GSAMF). The taxpayer's trading segment relates to local sales and software segment is a captive service provider, accordingly this expense is related to manufacturing segment. He noted that goods exported by taxpayer in FY 2012-13 is Rs.20.48 crores out of which Rs.8.86 crores is sale of systems to AE. Hence the only export in manufacturing segment to third parties is Rs.28.77 crores and the assessee has claimed Rs.2,11,01,417 as GSAMF paid to AE. The TPO noted that GSMAF is nothing but AMP expense paid to YEC (AE) towards global sales and marketing fees. YEC has spent monies on 'Advertisement, Marketing and Publicity' and has allocated costs to various group concerns. As a group concern, the taxpayer has also been made to pay for AMP expenses of YEC. The TPO however noted that the AMP expenses of AE leads to generation of marketing intangibles for the AE, not the taxpayer and there is no logic and no explanation for spending Rs.2.11 crores to make a sale of Rs.28.77 crores in international markets. The assessee has not separately benchmarked this expenditure. The TPO after selecting some comparables calculated adjustment towards GSMAF at Rs.2,03,41,827.

12. Accordingly, the following adjustments were made by the TPO:-

Adjustment	Ref	Amount in Rs
Purchase of traded goods	Para 4.7	11,30,74,959/-
Management support service fees	Para 5.5	45,87,213/-
Excess AMP payment to AE	Para 7	2,03,41,827/-
		<b>Rs. 13,80,03,999/-</b>

13. After the receipt of TPO order dated 13.10.2016, the AO passed the draft assessment order u/s. 143(3) r.w.s. 144C on 24.10.2016 making the TP adjustment and he also made addition u/s. 14A. Aggrieved, the assessee filed objections before the DRP and the DRP passed the order on 3.7.2017. Accordingly, the AO passed the final assessment order making TP adjustment of Rs.24,11,65,069 and addition u/s. 14A of Rs.22,91,614 determining assessed income at Rs.78,08,57,463. Aggrieved, the assessee is in appeal before the Tribunal.

14. The ld. AR has filed written submissions as under:-

“1. At the hearing held on 11th of September 2023, we had submitted, along with a ground-wise summary chart, that broadly 3 issues require adjudication in present appeal filed by the Appellant. The same are transfer pricing adjustment made to the Trading segment [Ground Nos. 2 to 5]; transfer pricing adjustment made towards Global Sales and Marketing Activity fees ("GSMAF") and Management fees ("MF") [Ground Nos. 6 to 12]; and ad hoc disallowance made under Section 14A of the Income Tax Act, 1961 ("Act") [Ground Nos. 13 to 17]. We had also submitted that Ground Nos. 18 to 20 are consequential and further that additional Ground No. 21 relating to applicable rate of Dividend Distribution Tax ("DDT") will have to covered by decision of Special Bench of this Hon'ble Tribunal in Total Oil India Pvt. Ltd [TS-197-ITAT-2023(Mum)J, although several aspects of the said dispute remained to be considered by the

Hon'ble Special Bench. It was prayed that Appellant's right to contest the issue of DDT on all aspects may kindly be reserved.

**Ground Nos.2 to 5 : Transfer pricing adjustment in Trading segment**

15. The written submissions of the assessee with respect to these grounds are as under:-

A. Ground Nos. 2 to 5

2. Transfer pricing dispute was confined to the Trading segment. Issues involved in brief are: (i) Ld. Dispute Resolution Panel's ("DRP") unjustified withdrawal of proportionate adjustment granted by Ld. Transfer Pricing Officer ("TPO") contrary to Hon'ble Supreme Court's decision in CIT vs Hindustan Unilever Ltd., [2018 259 Taxmann 218 (SC)] [Pg. No. A51/ Case law PB]; (ii) unjustified exclusion of Telecommunication Consultants India Ltd. ("TCIL") as comparable; (iii) inclusion of Adtech Systems Ltd. ("Adtech") and Zicom Electronic Security Systems Ltd. ("Zicom") in final set of comparable companies; and (iv) incorrect exclusion of 'commission income' and reversal of provisions for doubtful debts from operational income for computing tested party margin.

3. Kind attention was invited to Transfer Pricing Study [Pg. No. 202 @ 235/ Factual PB], wherein international transaction of trading is described in sufficient detail.

4. Ground No. 5 — Discussion relating to commission income on Pg. No. 235/ Factual PB would be relevant for determining Ground No. 5 on whether same is required to be considered as operating margin. In this context it is relevant to note the commission income and reversal of provisions for doubtful debts are treated the same by Ld. DRP at paras 30 to 32 of DRP's order (internal page 11 of 20). Decisions relied on by Ld. DRP of Telecordia, 22 taxmann.com 96 and Thyssen Krupp Industries India Pvt. Ltd., 33 taxmann.com 107 were considered in paras 6 to 10 of later decision of this Hon'ble Tribunal in M/s Evolving Systems Networks India Pvt. Ltd. vs DCIT, IT(TP)A

No. 2751/Bang/2017. It was our respectful submission that the later decision based on Hon'ble High Court decision deserves to be applied in present case and direction issued to include commission and reversal of provisions towards doubtful debts as part of the operating revenue for margin computation.

Ld. DR's reliance on para 31 of Ld. DRP's order is misplaced

5. As coordinate Bench decision in Evolving Systems (supra) notes Telecordia (supra) and Thyssen Krupp (supra) and is a later decision in time following Hon'ble Karnataka High Court's decision, reliance placed by Ld. DR deserves to be overruled and may kindly be overruled.

6. Ground No. 4 — Appellant requested inclusion of TCIL. Multiple reasons in support of such request are set out in the Ground-wise summary chart filed on record and the same are not being repeated herein in the interest of brevity.

Ld. DR's request for opportunity to verify whether TM, (segment) is persistent operating loss making

7. Ld. DR's reliance on para 4.3 on internal page 7 of Ld. TPO's order to contend that TCIL is a persistent operating loss-making entity needs re-verification is totally unjustified. We wish to submit that it cannot be denied that at page 397 of paper book (part of transfer pricing study) details of margin in 3 years for TCIL were provided to Ld. TPO. After verification during TP proceedings Ld. TPO while agreeing that TCIL segment is comparable made a passing observation about persistent operating loss. Appellant specifically objected to above observation before Ld. DRP (please refer page 54 of 119 of appeal set, internal page 13 of DRP objections). Ld. DRP findings are at paras 14 to 16 of Ld. DRP order on internal page 6 of 20. Ld. DRP did not persist with the persistent operating loss allegation but did not direct inclusion of TCIL (segment) as comparable on a new ground that TCIL is a government company. Kind reference is invited to ground wise chart wherein coordinate bench decisions are referred which hold that it is not permissible to reject a company solely on it being government company. Ld. DR's and Ld. DRP's objection deserve to be overruled and TCIL (segment) deserves to be directed to be

included. It will amount placing premium on Ld. TPO's and Ld. DRP's failure to expressly comment on specific objections and coming up with a new ground each time. Further, as will kindly be noticed from the ground-wise chart TCIL (segment) was included in other years including AYs 2014-15 and 2017-18.

8. In addition to above kind attention is invited to Pg. Nos. 1036 to 1046 of paper book whereat submission dated 20th April 2017 is placed. The detailed line by line working was submitted for TCIL before Ld. DRP. After considering the same Ld. DRP did not even cite the reason of persistent operating loss and switched to a new unjustifiable reason of government company to exclude TCIL. As noted by Hon'ble Gujarat High court in case of Rajesh Babhubhai Damania vs ITO, [2001] 251 ITR 541 at para 5 disapproved Hon'ble Tribunal's order in that case allowing one more innings. We pray that clear direction be given to include TCIL.

9. Ground No. 3 — It was submitted that Adtech and Zicom are not functionally comparable to trading segment of Appellant for reasons briefly stated in the ground-wise summary chart and further made good during hearing of the Appeal by drawing reference to relevant portions of audited financials of these companies placed on record:

a. For Adtech — kindly refer to Pg. Nos. B 157, B160, B162, B163, B191, B192, B221, B225, B236, B237, B245 and B257

b. For Zicom — kindly refer to Pg. Nos. B272, B276, B278, B280, B282, B299, B300, B304, B344, B359, B369 and B378.

Cursory glance through above cited pages would show that functionally Adtech and Zicom are not comparable to any trading segment. During the hearing attention was also invited to paras 4.4 and 4.5 of Ld. TPO's order as also paras 19 to 21 of Ld. DRP's order to demonstrate the arbitrary and unreasonable manner in which these companies have been compared to Appellant's trading segment.

10. Ground No. 2 — Reference to computation at para 4.6 on internal page 9 of Ld. TPO's Order (running page 113 of appeal set) would show that adjustment is proportionately quantified for transactions with AE (51.66%). Enhancement by Ld. DRP at paras 22 to 28 of Ld. DRP's order is contrary to law laid down by Hon'ble Supreme Court in Hindustan Uniliver (supra). Details are mentioned in Ground-wise chart which may kindly be considered, and direction issued restoring proportionate adjustment of any residual TP adjustment in trading segment.

16. Regarding ground No.2, the assessee submitted that the TPO has granted proportionate adjustment to the assessee. However, the ld. DRP has enhanced TP adjustment reversing the relief granted by the TPO with respect to proportionate TP adjustment. The ld. AR submitted that the issue is no longer res integra and relied on the decision of Bombay High Court in Hindustan Unilever Ltd (ITA No 7868/Mum/2010) which has been upheld by the Hon'ble Supreme Court and the decision of Hindustan Unilever Ltd (supra) is consistently followed by the Bangalore Tribunal and relied on IKA India Ltd. in IT(TP)A No.2476/Bang/2017.

17. The ld. DR relied on the orders of lower authorities.

18. Considering the rival submissions, we noted that the TPO has made adjustment on the international transactions carried out by the assessee with its AE. However, the ld. DRP has considered the entire transactions with AE as well as non-AEs. This issue has been settled by the various Hon'ble High Courts observing that as per the Transfer Pricing provisions and judicial precedents, the TP adjustment should be restricted only to AE related transactions of the assessee. The ld.

AR has relied on the judgment of Hon'ble High Court of Bombay in the case of CIT-1, Mumbai vs Hindustan Unilever Ltd. reported in [2016] 72 taxmann.com 325 (Bombay) and the Hon'ble Apex Court dismissed the SLP filed by the revenue reported in [2018] 99 taxmann.com 135 (SC), therefore this this is no more res integra Respectfully following the above judgment, we hold that the application of arm's length price should be restricted only to AEs transactions and not to all transactions. Accordingly, this ground is allowed.

19. The next issue in ground No.4 is inclusion of Telecommunication Consultants India Ltd. [TCIL] as comparable company. The TPO rejected this company on the ground that it is a persistent loss making company. The DRP also rejected it stating it is a Government company and relied on ITAT Bangalore decision in the case of KHF Components P. Ltd.

20. The ld. AR submitted that TCIL is not persistent loss making company as evident from the profit margins of TCIL for 3 years in the TP study and TCIL has earned profit in FY 2010-11 thereby not incurring losses for all the 3 years. He relied on the Madras High Court in the case of Same Deutz-Fahr India P. Ltd. (ITA No.567 of 2017) where it is held that Government Company cannot be treated as not comparable. He also relied on the decisions of Moog Controls (India) Private Limited [IT(TP)A No.412/Bang/2015 & IT(TP)A No.425/Bang/2015 2010-11] and IKA India Pvt. Ltd. (supra) and

Yazaki India P. Ltd. (ITA No.621(PUN) of 2014 that persistent loss making means only if company incurred all 3 years losses. It was further submitted that TCIL has been considered as a comparable by Ld. TPO for AY 2014-15 and AY 2017-18 in assessee's own case.

21. The ld. DR relied on the orders of lower authorities and submitted that the TPO has observed that this company is persistent loss making company as computed by him. The ld. DRP noted that the company is a government company which is engaged in engineering and consultancy under the administrative control of the Dept of Telecommunications (DOT), Ministry of Communications and Information Technology, Govt. of India. The operations of a public sector undertaking/company are based on policy requirements of the Govt. and it operates in controlled environment. Hence the company cannot be compared with assessee company which is a private company operating in uncontrolled business environment. He further submitted that case law relied by the ld. DRP in the case of KHF Components P. Ltd. v. ITO, Ward 11(2), Bangalore [2016] 71 taxmann.com 52 (Bang. Trib.) is squarely applicable. He also relied on CITG v. Philip Morris Services India, SA [2019] 102 taxmann.com 376 (Delhi) in which it is held as under:-

**“4.** The Tribunal in the impugned order has gone into great depth and details to record findings as to why the five above mentioned companies should be excluded. For the sake of convenience and completeness, we would reproduce relevant portion of the reasoning given by the Tribunal, which reads:—

"Apitco Ltd.,

\*\*

\*\*

\*\*

13. As could be seen from the annual report of this company, is company is one of the 18 TCOs was formed by the key national level financial institutions in association with state-level institutions and banks, and accordingly being a government enterprise Apitco Ltd., was established to provide technical services to other government companies and body corporate. Further this company is engaged in providing services such as asset reconstruction and management, clustered allotment for mega footmarks, and environment services, energy- related services, infrastructure planning and development, energy audit etc. and undoubtedly this company is a high-end consultancy service provider. The annual report further reveals that this company is engaged in providing high-end technical services also.

14. Ld. AR brought to our notice that they Apitco Ltd., was rejected by a catena of decisions rendered by different Benches of this Tribunal including a coordinate Bench of this Tribunal in *Ciena India (P.) Ltd. v. DCIT* in ITA No. 2948 and 3224/del/2013 following which in *Avaya India Private Limited versus DCIT* in ITA No. 146/del/2013. He also placed reliance on the nation reported in *Kobelco Cranes India Private Limited v. ITO* in ITA No. 802/del/2016. In *International SOS services India private limited versus DCIT* ITA No. 1631/del/2014 this company was excluded on account of being hundred percent government organisation and the appeal against this decision of the tribunal was dismissed by the Hon'ble jurisdictional High Court.. Further it could be seen in *Vestegaard Asia private limited verses DCIT* in ITA No. 6670/del/2015 and *H & M Mouritz India private limited verses DCIT* in ITA 282/Bang/2015 it is held that the Aptico Pvt Ltd., is not a good comparable with any company rendering business support services on the ground that this company is a public sector undertaking and its operations are mainly based the on the policy requirements of the government.

15. Further reliance is placed by the counsel on the decision of the Mumbai bench of this tribunal in *TysokKrupp industries India private limited verses ACIT* in ITA No. 6460/mum/2012 wherein it was held that this company being a government enterprises is not comparable with a private business service provider because in case of government

enterprises profit motive is not irrelevant consideration, and government companies work for other public sector undertakings and in that sense the related party transactions are much more than the filter of 25%. This decision of the tribunal was upheld by the Hon'ble Bombay High Court in ITA number 20/02/2018 of 2013.

16. The reasons recorded by the Tribunal in all the decisions referred to above hold good for the assessee also inasmuch as the assessee is a private company in the field of providing business support services. We, therefore, while respectfully following the ratio laid down in the above decisions hold that Apitco Ltd., is not a good comparable with the assessee and is accordingly liable to be excluded. We, therefore, directly Ld. TPO to exclude this company from the finalist of comparables to benchmark the international transaction relating to the market support services provided by the assessee to its AEs.”

22. The Id. DR further submitted, however, the case cited above of Hon'ble Delhi High Court relates to selection made by the revenue and the Tribunal directed to exclude the Govt. company named Aptico Ltd., which was confirmed by the High Court. But in the present case on hand, the assessee wants to include the Govt. company as a comparable which cannot be accepted as per the ratio decendi in the above judgment. Alternatively he submitted that the assessee has filed paperbook in which it has computed profit, considering the entire receipts of the assessee, therefore, the PLI/profitability should be considered only from the trading activity of the comparable company as business activity carried out by the assessee company.

23. Considering the rival submissions, the TPO considered trading segment of TCIL as comparable to assessee's trading segment. However, the TPO calculated losses in trading segment from segmental reporting and observed that this company is persistent loss

making and hence rejected it as comparable. The assessee has computed profit for all the three years. The Id. DRP have rejected this company only on the basis that it is a Government company relying on the judgement of the case of KHF Components Ltd. vs. ITO noted supra. The Id. DR has also supported the order of the DRP by relying on the judgment of the Hon'ble Delhi High Court in the case of CIT v. Philip Morris Services India SA [2019] 102 taxmann.com 376 (Del). We find that the Id. DRP has not decided on the basis of objections raised by the assessee. We note that while computing PLI for the AY 2014-15 and 2017-18, this company has been considered as a comparable in assessee's own case. Since the revenue authorities have accepted this company as a comparable in subsequent years, therefore to maintain parity, we reject the argument of the Id. DR that Govt. company cannot be considered as a comparable, if it passes FAR analysis. We further observe that the TPO has observed this company is a persistent loss making company. However, as per the computation submitted by the assessee at page No.397 of PB, it has been shown as a profit making company in the FY 2010-11 in unadjusted margin analysis, whereas at page 398 of PB in the adjusted margin of analysis of trading activity it is shown as persistent loss for FYs 2010-11 to 2012-13. We note from the order of the Id. DRP that this aspect has not been examined. From the financial statements of TCIL it is observed that it is engaged in various types of activities. Hence we accept the alternative submission of the Id. DR that the PLI/profitability should be considered only from the Trading activity of the comparable

company as business activity carried out by the assessee company and the Id. AR had also calculated PLI in which the company has profit in one year as observed above. FAR analysis of comparable has to be considered for each year separately irrespective of other years. Accordingly we remit this issue to the Id. TPO/AO for de novo consideration of the FAR analysis as indicated above and considering the decision of Pune Bench of ITAT in the case of Yazaki India P. Ltd. in IT(TP)A No.621(PUN) of 2014 in which it has been observed that if the comparable company is continuously not making loss for any of the three years, it is not persistent loss making company. If the TPO/AO finds that the comparable company is persistent loss making company in trading segment for all the three years, then it should not be considered as a comparable company.

24. The next issue (ground No.3) is exclusion of two companies viz., Adtech Systems Ltd. and Zicom Electronic Security Systems Ltd. from the final list of comparables. The Id. AR submitted that the TPO held that these two companies are broadly similar to business of the assessee's trading segment. Even though there is stark difference in the products traded, there is similarity in the genus of products traded in. He further submitted that The Id. DRP upheld the order of the TPO by observing that these companies are comparable on the broad functional requirements under TNMM.

25. The Id. AR submitted that the TPO concluded that Adtech is comparable based on comparison of engineering/ technical functions

i.e., analog signal or digital signal etc., Functional comparability contemplated under chapter X is distinctly different. Audited financials are at page B153 of the Annual Report paper book. Reference to page B157 of the Annual Report Paper book explains business activities, page B160 of the Annual Report paper book shows efficient R&D department which is out of place for trading activity like assessee, B162 of the Annual Report paper book under head ' material changes' shows distinctly different business model of Adtech, B163 of the Annual Report paper book' details of R&D' explains the service oriented business model in contrast to trading activity of assessee, B221 of the Annual Report paper book ' corporate information' shows Adtech is electronic security solution provider, B225 of the Annual Report paper book' segmental details' further establishes the divergent business activities of Adtech, B237 of the Annual Report paper book 'one business segment' makes this further clear and B245 of the Annual Report paper book under P&L shows sales and service income. The Assessee wishes to submit that Adtech provides a wide range of solutions in electronic security systems and service with a pan India presence. Adtech functions would be vastly different like its divergent business activities and cannot be compared to simple trading of Assessee.

26. The Company operates mainly in one single segment viz Supply and integration of Electronic Security Systems which are further categorised into industrial use and to cater to the retail segment,

however, there is no break-up as between the two. (Page B225 of the annual report paperbook).

### ZICOM

27. Audited financial of Zicom (refer B268 onwards) indicates that this company is engaged in the manufacturing and selling of Electronic security systems and equipment including CCTV Surveillance System, Access Control System, Fire Alarm System, intruder Alarm system Multi-Apartment Video Door Phones, Fingerprints Locks Video Door Phones. (Page B359 of the Annual Report paperbook). Zicom belongs to Electronic security industry B274 of the Annual Report Paperbook) as compared to ' testing and measurement business' of Assessee ( page 211 of the factual paper book), page B282 of the Annual Report paper book shows Zicom earned from period related fees for e-SAAS and not trading alone, nature of services of Zicom are further explained in page B284 of the Annual Report paper book, reference to page B340 explains this further, B369 and B380 ( note 27.18) make this further clear.

28. No Segmental breakup for manufacturing, trading and service segment along with no revenue break-up (Page B378 of the Annual Report paperbook) make this company not comparable to assessee.

29. The Assessee wishes to place reliance on the Hon'ble Delhi High Court in the case of Saxo India Pvt Ltd ITS-790-HC-2016(DEL)-TP].

30. The Id. DR relied on the order of lower authorities and submitted that assessee and TPO have applied TNMM method for computation of PLI, The TPO has examined the issue in detail and observed that both the companies are engaged in electronic security systems in trading activities and in the written submissions the assessee has also accepted that the Adtech is engaged in trading of electronic security systems, therefore the functional profile of the assessee is same with the comparable company as per the TNMM. The Id. DR further submitted that the company has incurred expenditure towards research & development for the future prospects of trading activities which is clear from the textual information (9) of Adtech Systems Ltd. placed at paper book B163. He also submitted that service income received is only 5.22% of the total revenue & revenue from sale of services are only towards earning post maintenance services activities of traded goods, therefore the service income is the part of the trading activities, it cannot be said that the , company is earning for providing different service. Therefore, no separate segmental reportings are required. Further in the case of Zicom Electronic Security Systems Ltd., the Id. DR reiterated the submissions made to the extent of above in the case of Adtech Ltd. and submitted that the service income received is negligible which is about 0.76% of the total revenue earned by the company and it is received from the product sales towards maintenance/service charges. The functional profile of this comparable company is similar with the assessee company. The business activity of

these two companies are similar with the assessee company. Therefore these two companies should be retained as comparables.

31. After considering the rival submissions, we note that the TPO has observed that the taxpayer trades in oscilloscope, temperature measurement instruments, power measurement instruments, etc. Both Adtech Systems Ltd. and Zicom Electronic Security Ltd. deal in electronic products, smoke detectors, among other fire and safety electronics. A power measurement instrument traded by taxpayer has sensors that sense an analog signal which is converted into digital signal using analog to digital converter and fed to an electronic circuit which gives an output on screen. Similarly a smoke detector has also sensors which converts digital signal and gives output alarm. The TPO observed that both taxpayer and the two companies trade in multiple industrial electronics. There is diversification in products but similarity in products traded by tax payer and comparable companies and treated these two companies as comparables.

32. We note from pg. 212 & 235 of PB the activities of the assessee is trading of finished goods. It purchases various finished products in the nature of transmitters, recorders, flow meters, oscilloscopes, digital power analysers, optical spectrum analysers etc. from its AEs for resale to unrelated parties. Under TNMM analysis, broadly comparable activities of the companies are considered.

33. We note that Zicom Electronics Security Systems Pvt. Ltd. is offering security products as a cloud based technology driven

electronic security service provider and it installs, manages and performs the maintenance on a regular basis. The company is in trading activity of the security products and the function of the traded goods are similar with the assessee company as analysed by the TPO. Further we note that the company is not engaged in manufacturing activity as contested by the Id. AR of the assessee. We note from the annexure referred to independent auditor's report financial statement from paperbook page 353 at para no.8 as under:-

“The Central Government has prescribed maintenance of cost records under clause (d) of section (1) of section 209 of the Companies Act, 1956. The company during the year under review not used its manufacturing facility and hence the said clause was not applicable.”

34. We further note from the “Notes forming part of the financial statements” at paperbook page B359 under the head corporate information which is as under:-

“Zicom Electronic Security Systems Ltd. is a public company domiciled in India and incorporated under the provisions of the Companies Act, 1956. Its shares are listed on two stock exchanges in India. The company is engaged in the manufacturing and selling of electronic security systems and equipments. The company also provides maintenance services for electronic security products.”

35. We note from the above the independent auditor has reported at one place the company has not utilized its manufacturing facility, however, under the corporate information the auditor has stated the company is engaged in manufacturing and selling activities. We

further note from the financial statements from Note No.19 “Revenue from operations” under the head ‘Sale of product’ of Rs.2,64,40,81,559 and sale of services is Rs.2,00,46,600 which is 0.76% of the total revenue. Further, under Note No.21 cost of material consumed is NIL. In Note No.22, purchase of traded goods reported is Rs.2,22,46,62,887 which is almost 84.13% of the total sale of products. We further observe at Notes para No.27.3 (under details of consumption of imported and indigenous items) for the year ending 31.3.2013, there is Nil reporting. It clearly shows that the company has not purchased raw material for its consumption for manufacturing activity during the year under consideration. We note from page B340 of PB that under Electronic Security Business, the company on standalone has three main business verticals viz., Sales & Distribution business, Direct Sales business and Builder business. Accordingly, we hold that the company is engaged in trading activity. Further, we note from Note No.27.18 that the company is selling safety products of Rs.1,44,88,051, security products of Rs.2,62,81,36,825 and others of Rs.14,56,683. Similarly, the company has purchased safety products of Rs.32,58,337, security products of Rs.2,22,12,28,527 and others of Rs.1,76,023. The service income earned by the comparable company are from the maintenance of product sales, therefore it cannot be said that the company is engaged in separate service segment. The ratio of safety products of purchase and sales are minimal with the main security products purchased and sold. Therefore, no segmental

reportings are required as submitted by the Id. DR. Therefore this company is functionally comparable.

Adtech Systems Ltd.

36. We note from the financial statement that the company Adtech is in the business of Electronic security systems, Access Control Systems, CCTV video surveillance through Closer Circuit Television system, Fire Alarm System etc. Installation is an activity conducted by the company along with its main business and income corresponding to installation is also minuscule". The Company operates mainly in one single segment viz Supply and integration of Electronic Security Systems. Though not strictly necessary, the Company has, for as a measure of providing greater understanding, divided this segment into two viz the Electronic Article Surveillance Systems (EAS) used for providing security to the retail segment and the Commercial Industrial (C/I) for providing security solutions for industrial use.

37. Hence, it can be observed that the company primarily operates in single segment viz Supply and integration of Electronic Security Systems and its functions are broadly same in both segments. The company is in trading activity of the security products and the function of the traded goods are similar with the assessee company as analysed by the TPO. The ratio of sale of service and maintenance income to traded goods is only 5.51%. The company is in trading segment only. On perusal of the financial statements we did not find any expenses under the Research and development account head. Therefore

considering the entire facts, the company is comparable. Accordingly, we reject the contention of the Id. AR.

Computation of operating margin (Ground No.5)

38. The Id. AR submitted that commission income earned by the Appellant is closely linked to its Trading segment and has been tested under Combined approach. He referred to Page 209 & page 235 of the paperbook and submitted that the TP study explained the direct linkage to trading. He submitted that commission income deserves to be considered as part of trading revenue for computing assessee's margin. He relied on the decision of the Tribunal in the case of Evolving System Networks India Private Limited in IT(TP)A No.2751/Bang/2017.

39. The Id. DR relied on the order of lower authorities and submitted that the Id. DRP has dealt this issue at para 30 to 32 and relied on two judgments of ITAT in which it has been held that the provision for doubtful debts cannot form part of operating cost. Further in the case of Thyssen Krupp Industries India P. Ltd., the Mumbai Tribunal held that provision for doubtful debts is to be considered as non-operating in nature because it is only a provision. He further submitted that only receipt & expenditure for determining the operating profit should be considered which has direct relation for determining the profit has to be taken into account.

40. On going through the paperbook filed by the assessee at page 235 of PB, it is clear that the AEs are selling goods also directly to

third party customers in India. During the course of hearing, the Bench specifically asked the Id. AR regarding the nature of services rendered by the assessee for the sales from AE to third party customers, but the Id. AR could not show the nature of services rendered by the assessee. Therefore, we hold that that commission received by the assessee cannot be considered as part of trading segment and therefore, dismiss this ground of the assessee.

41. We further note that in segmental operating results at para 2.2 of the TP order, the assessee has given details of trading segments in which the assessee has included provision no longer required returned of Rs.4.26 lakhs. However, the lower authorities have not considered it as part of operating revenue. It is not clear whether this provision was allowed in earlier years as operating expenditure in trading segment. We therefore remit this issue to AO examine the same. If the provision no longer required back in trading segment is allowed as operating expenditure in the earlier year, the same should be treated as operating revenue in the trading segment. The assessee is directed to produce necessary evidence. We direct accordingly.

Grounds 6 to 12 objecting to arbitrary adjustment towards GSMAF and MF

42. The TPO has questioned the necessity of the expenditure out of payment made by the assessee towards Management Fees and proceeded to determine the ALP by applying the benefit test. The TPO treated the payments towards GSMAF and proceeded to benchmark the same by using the bright line test.

43. The Id. AR has filed written submissions on this issue as under:-

11 This issue has been recurring issue since AY 2007-08. Ld. DRP relied on Hon'ble Tribunal's decision in AY 2007-08 and 2009-10 (kindly refer to para 34). Ld. DRP's order in present case is dated 03.7.2017. Kind reference is invited to order passed in Miscellaneous Application relating to AY 10-11 (page 1450 of paperbook @ para 2 on page 1451). Hon'ble Tribunal decided the issue conclusively after taking into account all facts. It is important to note from Hon'ble Tribunal's order for AY 2010-11 @ page 1440 that the Hon'ble Tribunal has taken note of earlier order relating to AY 2007-08 at page 1443 and after considering submissions of both sides and decided the issue, which was further clarified by MA order as referred just above. Subsequently the same conclusion as in AY 2010-11 has been followed by coordinate benches in all years (except AYs 11-12 and 12-13 in which years, assessment orders were quashed / set aside on legal grounds). AY 2014-15 order was submitted before Hon'ble Tribunal on 06.06.2022 in connection with present Appeal and numbered as A552. This issue is discussed at para 15 on page A559. Similarly, in AY 2017-18, coordinate Bench has once again followed the same conclusion as reached in AY 2010-11. Kind reference is invited to Hon'ble Tribunal's order in IT(TP)A No. 849/Bang/2022 dated 17.5.2023 — kindly refer para 12.5 of said order. Thus, issues relating to GSMAF and MF arising from identical facts and law for several years stand decided in favour of assessee which we respectfully request to be followed in present appeal also.

12. Ld. DR's submission that AYs 2011-12 and 2012-13 have not been cited in the Ground wise chart as perhaps same may not be favourable to Assessee stands explained above viz., that these years were decided by the Hon'ble Tribunal in favour of the taxpayer on technical grounds and not merits.

44. The Id. AR further submitted that this issue is squarely covered by the decisions in assessee's own case for other assessment years. In the Assessee's own case for AY 2010-11 (ITA No. 342 &464/Bang/2015) the Tribunal held that the said payments shall not be

tested separately and are to be considered as operating cost and to be allocated on the basis of turnover and the ALP has to be determined under TNMM analysis. This decision of Tribunal was subsequently upheld by the Hon'ble Karnataka High Court and Hon'ble Supreme Court (copies placed from page 1440 to 1492 paper book). This decision and corresponding MA order were passed subsequently and were not available to Ld. DRP at time of issuing directions for AY 2013-14 issued on 3 July 2017 relying on the assessee's own case in AY 2007-08 and AY 2009-10. However, ITAT Order for AY 2010-11 of the assessee was pronounced on 9 June 2017 and has to be read with MA Order dated 8 June 2018) wherein the TNMM has been upheld as the MAM for these payments. The Nature of the Intra Group service fees i.e. MF and GSMAF, facts and law related thereto has remained consistent throughout all years and consistently held in favour of Assessee by various tax authorities (including TPO and DRP). The Bangalore ITAT has relied upon the above ruling and directed the TPO to follow a similar approach for benchmarking the said payments for AY 2014-15 and AY 2017-18. In addition, for AY 2015-16 the DRP issued directions in favour of the assessee by relying on its own case for AY 2010-11 and further for AY 2016-17, the TPO at his own level has not disturbed the ALP of these payments.

45. The ld. DR relied on the orders of the lower authorities.

46. Considering the rival submissions, we note that this issue has been considered by the coordinate Bench of this Tribunal in assessee's own case for AY 2017-18 and it is held as under:-

12. Ground nos. 17-19 has been raised by assessee against the addition made on global sales and marketing activity expenses incurred by assessee to be in the nature of AMP spent.

12.1. The Ld.AR at the outset submitted that this issue stands squarely covered by the order of Hon'ble High Court in assessee's own case for A.Y. 2010-11 in ITA No. 940/2017 by order dated 28/08/2018. The Ld.AR referred to pages 5691-5698 of the paper book wherein the order of the Hon'ble High Court is placed.

12.2. At page 5692, following substantial questions of law was framed by Hon'ble High Court. "Whether the Hon'ble Tribunal is justified in setting aside the determination of Arms Length Price done by assessing authority and has directed the assessing authority to the file of the TPO/AO by considering the payment in respect of management fees and global sale and marketing activity fees as part of the operating cost and allocating the same in the ration of the turnover of the other international transactions when each transaction is different and should be analyzed separately and without appreciating that duplication of services and benefit analysis is very important to bench mark the transaction in transfer pricing?"

12.3. The Ld.AR submitted that Hon'ble High Court referring to various observations of the Tribunal's order observed and held as under:

"3. The learned Tribunal, after discussing the rival contentions of both the Appellants- Revenue and Respondent- Assessee, has returned the findings as under:

"4. We have heard the learned D.R. as well as learned A.R. and considered the relevant material on record. We find that the

assessee has carried out multiple and diversified international transactions in different segments. The international transactions of the assessee involve charges for raw material and components, sales and manufacturing goods, reimbursement of expenses, payment towards royalty and management fees, charges of capital equipment, payment of intra-goods services, charges of material, commission income, rendering of software services, reimbursement of expenses and Global Sale and Marketing Activity Fees. The TPO has accepted all other transactions except the international transactions regarding Global Sale and Marketing Activity Fees. It is pertinent to note that the international transactions of the assessee are comprising of revenue receipt from the AE as well as revenue payment to the AE. Therefore in these facts and circumstances of the case, we find that when the other international transactions regarding revenue receipt from the AE are tested under the TNMM analysis then the transaction of fee payment by the assessee towards the services rendered by the AE should not be separately tested but all the international transactions having receipt from the AE and payment to the AE shall be clubbed together and then has to be analysed under TNMM. We further note that the DRP has directed the TPO to determine the ALP in respect of the Global Sale and Marketing Activity Fees instead of considering the ALP at NIL. Therefore in principle we do not find any error or illegality in the directions of the DRP however having regard to the peculiar facts and circumstances of the case wherein the assessee is having multiple and diversified international transactions involving receipt as well as payment, we are of the considered view that the payment in respect of management fees as well as Global Sale and Marketing Activity Fees shall be considered as operating cost and has to be allocated in the ratio of turnover of the other international transactions and then the ALP of the other international transactions has to be determined under TNMM analysis. Hence we set aside the entire issue of determination of ALP and TP Adjustment to the record of the TPO/A.O. for carrying out fresh exercise of determination of ALP in respect of international transactions by considering the payment in respect of management fees and Global Sale and

Marketing Activity Fees as part of the operating cost and allocating the same in the ratio of the turnover of the other international transactions."

4. However, this Court in a recent judgment in I.T.A. Nos.536/2015 c/w 537/2015 delivered on 25.06.2018 (Prl. Commissioner of Income Tax & Anr. -v- M/s Softbrands India Pvt. Ltd.) has held that in these type of cases, unless an ex-facie perversity in the findings of the learned Income Tax Appellate Tribunal is established by the appellant, the appeal at the instance of an assessee or the Revenue under Section 260-A of the Act is not maintainable.

The relevant portion of the said judgment is quoted below for ready reference:

"Conclusion:

55. A substantial quantum of international trade and transactions depends upon the fair and quick judicial dispensation in such cases. Had it been a case of substantial question of interpretation of provisions of Double Taxation Avoidance Treaties (DTAA), interpretation of provisions of the Income Tax Act or Overriding Effect of the Treaties over the Domestic Legislations or the questions like Treaty Shopping, Base Erosion and Profit Shifting (BEPS), Transfer of Shares in Tax Havens (like in the case of Vodafone etc.), if based on relevant facts, such substantial questions of law could be raised before the High Court under Section 260-A of the Act, the Courts could have embarked upon such exercise of framing and answering such substantial question of law. On the other hand, the appeals of the present tenor as to whether the comparables have been rightly picked up or not, Filters for arriving at the correct list of comparables have been rightly applied or not, do not in our considered opinion, give rise to any substantial question of law.

56. We are therefore of the considered opinion that the present appeals filed by the Revenue do not give rise to any substantial question of law and the suggested substantial questions of law

do not meet the requirements of Section 2CO-A of the Act and thus the appeals filed by the Revenue are found to be devoid of merit and the same are liable to be dismissed.

57. We make it clear that the same yardsticks and parameters will have to be applied, even if such appeals are filed by the Assessee, because, there may be cases where the Tribunal giving its own reasons and findings has found certain comparables to be good comparables to arrive at an 'Arm's Length Price' in the case of the assessee with which the assessee may not be satisfied and have filed such appeals before this Court. Therefore we clarify that mere dissatisfaction with the findings of facts arrived at by the learned Tribunal is not at all a sufficient reason to invoke Section 260-A of the Act before this Court.

58. The appeals filed by the Revenue are therefore dismissed with no order as to costs.”

5. Having heard the learned counsel appearing for the Appellants-Revenue, we are therefore of the opinion that no substantial question of law arises in the present case also. The Appeal filed by the Appellants-Revenue is liable to be dismissed and it is dismissed accordingly. No costs.”

12.4. The Ld.DR on the contrary relied on the observations by the DRP.

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

12.5. As the issue has been decided in favour of assessee by Hon'ble High Court upholding the view taken by the Tribunal, it has been reproduced in para 3 of the order of the Hon'ble High Court (supra). Respectfully following the same, we are of the view that the expenditure incurred by assessee towards global sales and marketing activity has to be treated as operating cost and has to be allotted in the ratio of the turnover of the other

international transaction for determining the ALP under TNMM analysis.

Accordingly ground nos. 17-19 raised by assessee stands allowed.”

47. Respectfully following the above decision of this Tribunal, we allow grounds No.6 to 12 raised by the assessee.

48. Ground Nos.13 to 17 are with regard to disallowance u/s. 14A of the Act of Rs.22,91,614 made by the AO. The assessee had restricted expenditure to Rs.1,90,462. The AO computed the adhoc disallowance of Rs.33,00,000 by considering 0.25% of certain expenditure. The DRP directed the AO to recompute the disallowance as per formula prescribed in Rule 8D.

49. The Id. AR submitted that the AO in the final assessment order has incorrectly considered Rs.13,910.50 lakhs as relatable expenditure to apply the formula prescribed under Rule 8D(2)(ii) as against Nil amount. Disallowance already made of Rs.1.96 lakhs deserves to be accepted as correct. The Tribunal’s order in assessee’s own case for AY 2014-15 on similar issue cannot be followed in the facts of the present case.

50. The Id. DR relied on the orders of the lower authorities.

51. Considering the rival submissions, we note that there is no opening and closing balance of the investments made by the assessee. However the AO has applied Rule 8D(2)(i) and Rule 8D(2)(ii) for calculation of disallowance and calculated total disallowance of

Rs.22,91,614. We note that similar issue has been decided by the coordinate Bench of the Tribunal in IT(TP)A No.3369/Bang/2018 dated 24.9.2021 in which it has been held as under:-

“20. We noticed earlier that the assessee has made investments during the course of the year and has sold the same before the end of the year. Accordingly, the value of investments as on beginning of the year and as on end of the year were Nil. In this fact situation, the provisions of Rule 8D cannot be applied since computations prescribed in those rules are not possible in the absence of opening and closing value of investments, i.e., computational provisions of rule 8D would fail in this case. Even though the Rule 8D prescribed for computation of disallowance to meet the requirements of sec. 14A fails, in our view, it is required to disallow the expenses related to the exempt income. We noticed earlier that against exempted dividend income of Rs.24,86,000/-, the assessee has disallowed a sum of Rs.48,573/- only u/s 14A of the Act. The said disallowance does not appear to be correct when compared with the peak value of investments of Rs.72.09 crores. In these facts, we are of the view the disallowance may be estimated to meet the requirements of section 14A of the Act. Accordingly, we are of the view that an estimated disallowance of 10% of the dividend income would meet the requirements of provisions of Section 14A of the Act and the same will put this issue at rest. Accordingly, we direct the A.O. to restrict the disallowance u/s 14A of the Act to 10% of exempt dividend income. He may work out the addition accordingly.”

52. Respectfully following the above decision in assessee's own case for AY 2014-15, we also restrict disallowance u/s. 14A of the Act to 10% of exempt dividend income. Accordingly, the AO shall work out the disallowance.

53. Ground Nos. 18 to 20 regarding interest u/s. 234A & 234B are consequential.

54. Additional Ground No.21 is regarding of DDT paid to non-resident. The ld. AR submitted that the Special Bench of the Mumbai Tribunal deals with the some of the contentions of the assessee on this issue in the case of Total Oil India Pvt. Ltd. (TS-197-ITAT-2023)(Mum) and prayed that the assessee reserves its right to contest the same before the appropriate forum and subject to the same, this issue may be left open. Accordingly, this issue is left open.

55. Additional Ground No.22 is regarding allowability u/s. 37(1) towards education cess paid. The ld. AR submitted that the retrospective amendment to section 40(a)(ii) of the Act where it is clarified that education cess cannot be claimed as business expenditure and the Hon'ble Supreme Court has allowed the appeal of the revenue against the decision of the Rajasthan High Court in the case of Chambal Fertilizers & Chemicals Ltd. [TS-966-SC-2022]. Accordingly this ground is dismissed.

56. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 1<sup>st</sup> day of February, 2024.

Sd/-

Sd/-

( GEORGE GEORGE K. )  
VICE PRESIDENT

(LAXMI PRASAD SAHU )  
ACCOUNTANT MEMBER

Bangalore,  
Dated, the 1<sup>st</sup> February, 2024.

*/Desai S Murthy /*

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar  
ITAT, Bangalore.