

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

Before Shri Waseem Ahmed, Accountant Member and  
Shri Soundararajan K., Judicial Member

**ITA No. 562/Coch/2022**  
(Assessment Year: 2017-18)

US Technology International Pvt. Ltd. 621, Nila, Technopark Campus Kariyavattom, Trivandrum 695581 [PAN: AAACU5628B]	vs.	ACIT, Circle - 1(1) 1st Floor, Aayakar Bhavan Kowdiar Thiruvananthapuram 695003
(Appellant)		(Respondent)

Appellant by:	Shri Rajakannan, Advocate
Respondent by:	Shri Sanjit Kumar Das, CIT-DR

Date of Hearing:	27.09.2024
Date of Pronouncement:	21.10.2024

**ORDER**

Per Bench

This appeal filed by the assessee is directed against the order of the National Faceless Appeal Centre, Delhi u/s 144C(3) of Income Tax Act, 1961 (hereinafter "the Act") dated 24.02.2022 for Assessment Year (AY) 2017-18.

2. The assessee has raised fresh grounds of appeal detailed as under:

**“Ground No. 1-Assessment and Reference to Transfer Pricing Officer are bad in law**

- 1.1 The final order issued by the Assistant Commissioner of Income Tax, Circle 1(1) ('Assessing Officer' or 'AO') is bad on facts and in law, and is in violation of the principles of natural justice that the AO did not issue to the Appellant, a show cause notice, as per proviso to section 92C(3) of the Act;
- 1.2 The AO has erred in making a reference to the Deputy Commissioner of Income-tax, (Transfer Pricing) ('TPO'), inter alia, since the TPO has not recorded an opinion that any of the conditions in section 92C(3) of the Act, were satisfied in the instant case. Accordingly, the order passed by the TPO is without jurisdiction;

- 1.3 On the facts and in the circumstances of the case and in law, the learned TPO and accordingly, the learned AO erred in not demonstrating that the motive of the Appellant was to shift profits outside of India by manipulating the prices charged in its international transactions, which is a pre-requisite condition to make any adjustment under the provision of Chapter X of the Act; and
- 1.4 The final order passed by the AO is without jurisdiction, inter alia, insofar as it purports to give effect to an invalid order of the TPO.

**Ground No. 2: Erroneous computation of the margin of the Assessee by disregarding the segmental margin computation**

- 2.1. The TPO/AO erred in re-computing the Net Cost Plus ('NCP') of the Company at 18.12% being at an entity level, instead of considering the segmental margin computation of 19.75%.

**Ground No. 3-Determination of arm's length price by the TPO in relation to the 'IT Services'**

- 3.1. The Ld. AO/DRP erred on facts and in law in conducting a fresh benchmarking analysis using non contemporaneous data and substituting the Appellant's analysis with fresh benchmarking analysis on his own conjectures and surmises.
- 3.2. The Ld. AO/DRP grossly erred on facts in benchmarking the transactions of the captive IT services of the Appellant with companies operating as full-fledged entrepreneurs without considering the differences in the functions performed, assets employed, and risk undertaken by the Appellant vis- à-vis comparable companies.
- 3.3. The Ld. AO/DRP erred on facts in arbitrarily rejecting the following comparable companies selected by the Appellant in the transfer pricing documentation without considering the functional and risk analysis of the Appellant.
  - a) Akshay Software Technologies Ltd
  - b) Evoke Technologies Pvt Ltd
  - c) Sasken Communication Technologies Ltd.
  - d) E-zest Solutions Ltd.
- 3.4. The Ld. AO/DRP erred in rejecting the comparable, Maveric Systems Limited stating that it fails TPO's filter of income from software development segment >75% for FY 2015-16 and 2016-17, when it actually qualifies all the filters. In this regard, the Appellant has filed a rectification application before the TPO.
- 3.5. The Ld. AO/DRP erred in accepting the comparable, Aptus Software Labs Pvt. Ltd. that fails TPO's own filters as below;
  - a. Employee cost filter for FY 2014-15 & FY 2015-16; and
  - b. Export turnover filter for FY 2014-15.

- 3.6. The Ld. TPO erred in law in rejecting the Transfer Pricing study maintained by the Appellant by proposing new filters.
- 3.7. The Ld. AO/DRP erred in law in applying an arbitrary filter to reject companies having related party transactions greater than 25% of sales. The appellant seeks 0%-15% RPT filter as judicially upheld in various appeals to consider any comparable as an "uncontrolled transaction" and accordingly seek rejection of the following companies;

<b>Company Name</b>	<b>FY 2014-15</b>	<b>FY 2015-16</b>	<b>FY 2016-17</b>
Persistent Systems Ltd	31.21%	32.02%	39.13%
Cygnnet Infotech Private Limited	-	16.65%	18.41%
Threesixty Logica Testing Services Pvt. Ltd.	-	-	18.23%
Harbinger Systems Pvt. Ltd.	-	18.87%	16.10%

- 3.8. The Ld. AO/DRP erred in including the following comparables, despite these companies being functionally dissimilar to the Appellant. The Ld. AO/DRP also erred in confirming the same.

- a) Great Software Laboratory Pvt Ltd
- b) Larsen & Toubro Infotech Ltd
- c) Mindtree Ltd
- d) Tata Elxsi Ltd
- e) Persistent Systems Ltd
- f) Infobeans Technologies Ltd
- g) Aptus Software Labs Pvt Ltd
- h) Cygnnet Infotech Pvt Ltd
- i) Nihilent Ltd
- j) OFS Technologies Ltd
- k) Infosys Ltd
- l) Threesixty Logica Testing services Pvt Ltd
- m) Cybage Software Pvt Ltd
- n) Consilient Technologies Pvt Ltd

- 3.9. The Ld. AO/DRP erred in considering the following companies with significant Intangibles.

- a) Larsen & Toubro Infotech Ltd
- b) Mindtree Ltd
- c) R Systems International Ltd
- d) Persistent Systems Ltd
- e) Tata Elxsi Ltd
- f) Cygnnet Infotech Pvt Ltd
- g) Infobean Technologies Ltd
- h) Threesixty Logica Testing Services Pvt Ltd

- i) Infosys Ltd
  - j) Cybage Software Pvt Ltd
  - k) Consilent Technologies Pvt Ltd
- 3.10. The Ld. AO/DRP erred in considering the following companies which operate under different business model with significant onsite activities.
- a) Larsen & Toubro Infotech Lid
  - b) Mindtree Lid
  - c) Persistent Systems Ltd
  - d) Tata Elxsi Ltd
  - e) Nihilent Ltd
  - f) Infosys Lid
- 3.11. The Ld. AO/DRP has erred on facts in wrongly computing the margins of certain companies identified as comparable by the TPO.
- g) Harbinger Systems Pvt ltd
  - h) CG-VAK Software & Exports Ltd
  - i) Great Software Laboratory Ltd
  - j) Mindtree Ltd
  - k) Aptus Software Labs Pvt Ltd
  - l) Nihilent Ltd
  - m) Infosys Ltd
  - n) Threesixty Logica Testing Services Pvt ltd
- 3.12. The Ld. AO/DRP erred in selecting the following companies having exceptional year of operation/Abnormal Margins/peculiar economic circumstances. Ld. AO/DRP erred in accepting the action of TPO.
- a) Larsen & Toubro Infotech Ltd
  - b) Mindtree Ltd
  - c) Persistent Systems Ltd
  - d) Nihilent Ltd
  - e) Threesixty Logica Testing Services Pvt ltd
  - l) Consilent Technologies Pvt. Ltd.
  - g) Cybage Software Pvt Ltd
  - h) OFS Technologies Ltd

**Ground No. 4-Erroneous data used by the TPO**

- 4.1. The Ld. AO/DRP/TPO has erred in law in using data, which was not contemporaneous and which was not available in the public domain at the time of conducting the transfer pricing study by the Appellant.

**Ground No. 5- To provide appropriate adjustments to the comparable companies**

- 5.1. The Appellant requests the Hon'ble Tribunal to provide appropriate adjustments under Rule 10B to account for, inter alia, differences in (a) marketing adjustment, (b) research and development expenditure adjustment, (c) depreciation adjustment and (d) risk profile between the Appellant and the comparable companies.

**Ground No 6-Imputation of interest on recovery of expenses**

6.1 The Ld. AO/DRP erred in imputing interest on recovery of expenses at domestic borrowing rate of the Appellant instead of LIBOR/EURIBOR.

**Ground No 7-Erroneous TP adjustment on advances written off and imputation of interest thereon**

7.1 The Ld. AO/DRP erred in adjusting advances written off and imputing interest on such advances written off, ignoring the fact that the nature of these advances are personal (balance sheet accounts) in nature and not nominal account heads (expenses). Further, the Assessee has never claimed the same as an expense in any of the previous years.

**Ground No. 8-Erroneous Imputation of Interest on outstanding trade receivables**

8.1 Imputation of interest on trade receivables should be restricted up to 31 March 2017.

**Ground No. 9: Erroneous levy of interest under section 234B and 234C of the Act**

9.1 On the facts and in the circumstances of the case and in law, the learned AO has erred in computing consequential interest under section 234B and 234C of the Act

The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal.”

3. At the outset, we note that the learned AR for the assessee before us submitted that issue raised by the assessee in ground Nos. 1 to 2 of its appeal are general in nature and do not require any separate adjudication. Likewise, the Id. AR submitted that the issues raised in ground nos. 3.1 to 3.7 & 3.9 to 3.14, 5 and 6 are not pressed. Accordingly, the issues raised in those grounds of appeal are hereby dismissed as general in nature and as not pressed.

4. The issue raised by the assessee in ground No.3.8 is that the learned DRP/TPO/AO erred in selecting fresh comparable companies which are functionally different.

5. The necessary facts as arising from the order of the authorities below are that the assessee in the present case is an offshore development facility of UST Group and subsidiary of UST Global Investment (Mauritius) Pvt Ltd. The assessee is providing end to end IT services to its AE, in other words, the assessee is providing captive services of software development to its AEs. The assessee in the year under consideration has carried out certain international transactions including provision for software development services (SWD-segment). The assessee in TP study worked out its PLI i.e. OP/OC at 14.17% and claimed the transaction in SWD-segment at the arm length price based on TNMM. However, the TPO was not satisfied with the transfer pricing study of the assessee with respect to said international transactions carried out by it (the assessee) with the AE. Accordingly, the TPO rejected the TP study filed by the assessee and conducted a fresh TP study. The TPO in the fresh TP study worked out the PLI OP/OC at 18.12% after selecting fresh set of comparable by applying certain filter. The TPO based on filter applied and considering the objection of the assessee, finally selected set of 20 comparable companies and worked out the median of margin of such comparable at 26.18%. Thus, TPO made an upward adjustment of ₹ 91,42,39,711/- by adding to the total income of the assessee.

5.1 The assessee raised the objection before the Id. DRP against the selection of new set of comparable companies by the TPO and requested to include certain companies as comparable. The learned DRP after considering facts in totality dismissed the objections of the assessee against the selection of new set of comparable, however directed the TPO to recompute the correct value of the margins of the certain comparable and also directed to include one company suggested by assessee as comparable. Accordingly, the AO in

the final assessment order computed the TP adjustment at the reduced amount at Rs. 87,87,40,000/- only.

6. Being aggrieved by the order of Id. DRP/AO, the assessee is in appeal before us.

7. The learned AR before us filed a paper book running from pages 1 2582 and contended that the certain comparable selected by the TPO and upheld by the learned DRP are functionally dissimilar to the assessee and accordingly it should be excluded from the list of the comparable. The learned AR further contended these company are held functionally dissimilar and excluded from the set of comparable by the Tribunal in the own case of the assessee for A.Y. 2014-15 in IT(TP)A No 592/Coch/2018 and in A.Y. 2016-17 in IT(TP)A No. 2/Coch/2021.

8. On the other hand, the Id. DR before us vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. The facts of the case have been elaborated in the preceding paragraph which are not in dispute, therefore for the sake of brevity and convenience, we are not inclined to repeat the same. The only issue raised before us is that the certain companies which are included in the set of comparable by the TPO are functionally different from the assessee. As such the TPO has selected set of 20 companies as comparable out which 14 comparable companies are disputed by the assessee in the ground of appeal.

10. We further note that the learned AR for the assessee at the time hearing before us submitted that he was instructed by the assessee not to press the issue regarding 8 comparable companies which are detailed as under:

- i. Great Software Laboratory Pvt Ltd
- ii. Mindtree Ltd
- iii. Tata Elxsi Ltd
- iv. Aptus Software Labs Pvt Ltd
- v. Cygnet Infotech Pvt Ltd
- vi. OFS Technologies Ltd
- vii. Threesixty Logica Testing Services Pvt Ltd
- viii. Consilient Technologies Pvt Ltd

10. Therefore, the ground of appeal of the assessee against the inclusions of the above-mentioned companies as comparable are hereby dismissed as not pressed.

11. Coming to remaining set of comparable companies selected by the TPO which has been challenged by assessee before us as functionally different are detailed as under:

- (i) Larsen and Toubro Infotech Ltd
- (ii) Persistent System Ltd
- (iii) Infobeans Technologies Ltd
- (iv) Nihilent Analytics
- (v) Infosys Limited
- (vi) Cybage Software Ltd.

12. At the outset we note that the above-mentioned companies was also selected as comparable by the TPO in the own case of the assessee for AY 2016-17 which was challenged by the assessee before the Tribunal on account

of functionally difference in IT(TP)A No. 2/Coch/2021. The Tribunal vide order dated 27.02.2023 set aside issue to the file of the TPO by observing as under:

*40. We heard the rival submissions and perused the material on record. We notice that the exclusion of the above companies has been considered by the coordinate bench of the Tribunal in the case of ARM Embedded Technologies, IT(TP)A 235/Bang/2021 dated 30.8.2022 and the relevant extract is as given below –*

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*41. From the functions performed as per the TP study, we notice that the assessee is a captive service provider providing SWD services to its AE which is similar to the profile of ARM Embedded Technologies. Hence in our view the exclusions as has been held in the decision of ARM Embedded Technologies (supra) is applicable to assessee's case also. We respectfully follow the above decision and remit the issue to TPO with similar directions. Needless to say that the assessee be given a reasonable opportunity of being heard. It is ordered accordingly.*

12. Before us, no material has been placed on record by the Revenue demonstrating that the decision of the Tribunal in own case of the assessee as discussed above has been set aside/stayed or overruled by the Higher Judicial Authorities. Likewise, before us, no material was placed on record pointing out any distinguishing feature in the facts of the case of earlier AY and the year under consideration. Thus, respectfully following the order of the Tribunal in the own case of the assessee discussed above, we hereby remit the issue to the file of the TPO with similar direction. Hence the grounds of appeal of the assessee with regard to such 6 comparable companies are hereby allowed for statistical purposes.

13. The next issue raised by the assessee in ground No. 6 is that the AO/DRP erred in charging interest at the rate of domestic borrowings instead of applying LIBOR rate on the recovery of expenses from the AE

14. In the present case, the assessee has shown recovery of certain expenses from the AE which was treated as international transactions.

Accordingly, the same was benchmarked by charging interest on the recovery of such expenses at the domestic borrowing rates. Thus, the addition was made for Rs. 87,87,40,000/- to the total income of the assessee. The assessee raised the objection before the learned DRP which was dismissed by confirming the draft assessment order of the AO.

15. Being aggrieved by the order of the AO/DRP the assessee is in appeal before us.

16. The learned A.R. before us conceded that the impugned transaction is international transaction and therefore the same is to be benchmarked for working out the ALP. However, the only grievance raised by the learned A.R. is that the LIBOR rate should be applied for calculating the ALP.

17. On the other hand, the Id. Sr. DR vehemently supported the orders of the authorities below.

18. We have heard rival contentions of both the parties and perused the materials available on record. At the outset, we note that identical issue was raised in the own case of the assessee for AY 2016-17 in ITA No. 2/Coch/2021 wherein it was directed vide order dated 27.02.2023 as detailed below: -

“46. The assessee in this regard submitted that the amount classified as loans & advances are in the nature of recovery of expenses and mainly pertain to recovery of travel expenses incurred by the assessee on behalf of its AE. The assessee submitted that using average internal borrowing cost plus spread of 300 basis points @ 14.13% by the TPO is not correct and submitted that for imputing interest on a balance receivable from AE is to be adopted at LIBOR rate with suitable benchmarking. The DRP gave partial relief to the assessee by stating that the average domestic cost of borrowing i.e., at 11.13% should be adopted.

47. The Id. AR during the course of hearing reiterated the submissions made before the lower authorities.

48. We heard the rival submissions and perused the material on record. We notice that the assessee has incurred expenses on behalf of the AE towards employee travel and has shown the amount recoverable as receivable against the assessee. The TPO considered this as an international transaction and proceeded to apply interest @ 14.13% being domestic cost of borrowing. The DRP did not accept the contention of the assessee that the amount outstanding is recoverable in foreign currency and therefore LIBOR rate should be applied. The DRP however gave partial relief by reducing the rate of interest to 11.13%. The reason for rejecting the LIBOR rate is that the advances / spend is done by the assessee in Indian currency and the invoices submitted are also in Indian currency. However, we see merit in the argument of the assessee that the amount is recoverable in foreign currency and therefore in our considered view, the LIBOR rate should be applied. Accordingly, we hold that interest @ LIBOR + 200 basis points should be applied. For this purpose, we place reliance on the judgment of the Bombay High Court in the case of CIT v. Aurionpro Solutions Ltd., 99 CCH 0070 (Mum HC). It is ordered accordingly.”

19. Respectfully following the order of the Tribunal cited above in the own case of the assessee, we direct the TPO to charge interest on such advances representing recovery of expenses at the rate specified above. Hence the ground of appeal of the assessee is partly allowed.

20. The next issue raised by the assessee in ground No. 7 is that the AO/DRP erred in making TP adjustments on the advance written off and computing interest thereon which were incurred on personal account.

21. The assessee has written off the advances give to the AE in the year under consideration which was treated as international transaction and accordingly the same was considered for making the upward adjustment along with the interest thereon to the total income of the assessee. The action taken by the AO was subsequently confirmed by the learned DRP.

22. Being aggrieved by the order of the AO/DRP, the assessee is in appeal before us.

23. The learned A.R. before us contended that the transaction in dispute is not an international transaction and furthermore the same was not claimed as deduction in the P&L account. Accordingly, there cannot be any adjustment on account of writing off such advanced and computation of interest thereon.

24. On the other hand, the ld. Sr. DR supported the orders of the authorities below.

25. We have heard the rival contentions of both the parties and perused the materials available on record. Under the regime of transfer pricing, it is ensured that the legitimate tax due to the government exchequer should not be repatriated to the foreign countries by the Indian entity. Therefore, the transactions which are apparently of capital nature have also been made subject to transfer pricing adjustment. As such, the transaction of advancing loan by the Indian entity to the foreign AE was made subject to interest adjustment irrespective of the fact that no interest was charged by the Indian entity from the AE. Taking the object of transfer pricing adjustment, the writing off advance given by the Indian entity to the AE is against the provisions of transfer pricing provisions. It has also not brought on record whether the writing off of such advances given to the foreign associate enterprises was done after obtaining the approval from the competent authority, i.e. RBI. At the time of hearing, a query was posed to the learned counsel for the assessee as to whether the approval was obtained, the learned A.R. requested to remand the issue to the file of the AO for fresh adjudication with the liberty to the assessee to file necessary documents in support of its claim.

26. It is not out of place to mention that the assessee has not claimed deduction of such writing off of advances in the P&L Account, yet it has to be seen whether such writing off of advanced falls within the definition of transfer pricing and therefore the same needs to be adjusted suitably. Accordingly, we are inclined to set aside the issue to the file of the TPO/AO for necessary verification and adjudication as per the provisions of law. Hence the ground of appeal of the assessee is hereby allowed for statistical purposes.

27. The issue raised by the assessee in ground No. 8 is that the amount of interest attributable on the trade receivables should be restricted up-to the end of the financial year, i.e. 31.03.2017. It is the trite law that the income pertaining to a particular year should only be taxed in that year. Accordingly, we direct the AO/TPO to restrict the interest on trade receivables up-to 31.03.2017. Hence the ground of appeal of the assessee is hereby allowed.

28. The issues raised by the assessee in ground No. 9, relating to the levy of interest u/s 234B and 234C of the Act, are consequential in nature and therefore no separate adjudication is required to be made. Accordingly, we dismiss the same as infructuous.

In the result, appeal filed by the assessee is partly allowed of statistical purposes.

Order pronounced on 21<sup>st</sup> October, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-  
(Soundararajan K.)  
JudicialMember

Sd/-  
(Waseem Ahmed)  
AccountantMember

Cochin, Dated: 21<sup>st</sup> October, 2024

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar  
ITAT, Cochin