

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
BENCH- A, BANGALORE**

**BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER  
SHRI S JAYARAMAN, ACCOUNTANT MEMBER**

IT(TP)A Nos.1068/Bang/2011  
(Asst. Year 2007-08)

M/s Infineon Technologies India Pvt. Ltd.,  
Kalyani Platina, 3<sup>rd</sup> Floor, Block I,  
#6&24, EPIP Zone Phase I,  
Whitefiled,  
Bengaluru- 560 066.

. Appellant

Vs.

The Dy Commissioner of Income-tax,  
Circle – 11(4),  
Bengaluru.

. Respondent

Appellant by : Shri KR Vasudevan, Advocate

Respondent by : Smt. Priscilla Singsit, CIT

Date of Hearing : 27-7-2016

Date of Pronouncement : 22-9-2016

**ORDER**

**PER ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER, JM**

This appeal by the assessee is directed against the order of Dy. Commissioner of Income-tax dated 30/8/2011 and it pertains to the assessment years 2007-08.

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2. The assessee company is engaged in the business of software development research center and provides software development services of electronic integrated circuits. It also provide support services to Infineon, Singapore. The operation of the assessee are organized into 2 business development center (STPI unit) and sales and market support division (non STPI unit).

3. The assessee company files its return of income for the asst. year 2007-08 on 25/1/2007 declaring total income of Rs.15,19,500/- after claiming deduction u/s 10A and tax was paid under the normal provision of Income-tax Act. The case was selected for scrutiny assessment and notice u/s 143(2) was issued on 9/9/2008.

4. During the previous asst. year 2007-08, the assessee had certain international transactions therefore reference was made to the TPO. The TPO vide order u/s 92CA dated 14/10/2010 determined the ALP adjustment in respect of software services rendered to the extent of Rs.22,98,13,929/-. Therefore the ALP adjustment to the extent of Rs.22,98,13,929/- was added to the total income of the assessee.

5. The assessee company filed its objection before the DRP on 12/1/2011. The DRP issued directions u/s 143(3) r.w.s 144C vide order dated 22/8/2011.

6. In confirmation with the DRP, the asst. was concluded arriving at the total tax payable by the assessee at Rs.14,52,83,020/-

7. Aggrieved, the assessee is in appeal before us.

8. The assessee has filed the following grounds of appeal.

1. *The learned Dispute Resolution Panel ('DRP') and the learned Director of Income Tax (Transfer Pricing –IV), Bangalore ('Transfer Pricing Officer' or 'TPO') grossly erred in law and facts of the case in determining the arm's length price ('ALP') of the international transaction of the appellant of Rs.1,590,777,300/- received on account of provision of software development services and proposing a transfer pricing adjustment of Rs. 229,813,929/-.*
2. *That on the facts and circumstances of the case, the learned DRP erred in upholding*

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*the rejection of transfer Pricing ('TP') documentation by the learned TPO without appreciating the contentions, arguments, and evidentiary data put forward by the Appellant during the course of the proceedings before them, and in doing so have grossly erred:*

*in rejecting Cost Plus Method as the most appropriate method and accepting Transactional Net Margin Method as the most appropriate method.*

*in upholding the rejection of comparability analysis carried in the TP documentation and conducting a fresh comparability analysis carried in the TP documentation and conducting a fresh comparability analysis for determining the arm's length price by the learned TPO.*

3. *in adopting the arm's length mark up to be 24.14% in respect of software development services of the Appellant.*
4. *in upholding the actions of the learned TPO in completely relying on the unaudited data requisitioned and consequently obtained by taking recourse to the provisions of Section 133(6) of the Income-tax Act, 1961 ('the Act'), which in*

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*many instances are inconsistent with the data disclosed in audited report.*

5. *in considering 25 percent as the threshold limit for the Related Party Transactions filter as this number is an arbitrary number that has been adopted without any judicial precedence or reasonable basis.*
6. *in upholding the actions of the learned TPO in rejecting the upper limit for sales turnover filter proposed by the assessee without providing any empirical analysis. In doing so, the learned TPO erred in not appreciating that the software industry is clearly demarcated based on size.*
7. *in not maintaining consistency in applying the filters of rejecting companies with software development revenue less than 75% of the total revenue and companies of different year end.*
8. *in upholding the actions of the learned TPO in applying the onsite filter for selection of software comparables with the use of the data obtained under section 133(6) of the Act. In doing so the learned TPO erred in rejecting Akshay Software*

*Technologies Limited and VJIL Consulting Limited.*

- 2.9 *in upholding the actions of the learned TPO in accepting a companies like Infosys Limited and Wipro Limited as a comparable companies even though the sales of Infosys and Wipro are driven based on brand developed by them, and doing so the learned DRP have incorrectly applied the ratio of the jurisdictional Delhi Income Tax Appellate Tribunal (ITAT) ruling in Agnity India Technologies India Pvt. Ltd. (reference: ITA No.3856(Del)/2010).*
- 2.10 *In upholding the actions of the learned TPO in accepting Tata Elexi Limited as comparable company even though the company in its reply to the learned TPO under section 133(6) had mentioned that the company provides product design services, which is functionally not comparable to the assessee's business.*
- 2.11 *In upholding the actions of the learned TPO in accepting companies engaged in the provision of software product development like Megasoft Limited, Flextronics Software*

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*Systems Limited, KALS Information Systems Limited, Avani Cimcon Technologies Limited, Lucid Software Limited, Ishir Infotech Limited, E-zest Solutions Limited, Persistent Systems Limited and R Systems International Limited which are functionally not comparable to the assessee's business.*

- 2.12 *In accepting Accel Transmatics Limited as a comparable company even though the company had sold its intellectual property and earned income from royalty.*
- 2.13 *In upholding the actions of the learned TPO in accepting Celestial Labs Limited as a comparable company eventhough it is a contract research company which also engaged in bio-informatics and hence functionally dissimilar to the assessee.*
- 2.14 *In upholding the actions of the learned TPO in accepting companies like Megasoft Limited, Flextronics Software Systems Limited and Helios & Matheson Information Technology Limited which have abnormal/fluctuating profit margins. In doing so the learned DRP have disregarded the various jurisdictional ITAT rulings in case of SAP LABS India Pvt Ltd. Vs. ACIT*

*(reference ITA No.398/Bang/2008), E-Gain Communication Private Limited (reference: ITANo.1685/PN/07 – Pune).*

- 2.15 In upholding the actions of the learned TPO in rejecting Thinksoft global Services Limited by stating that it is not functionally comparable while ignoring the fact that Thinksoft Global Services Limited was accepted as a comparable company by the learned TPO in AY 2006-07.*
- 2.16 In upholding the actions of the learned TPO in concluding that Maars Software International Limited is not functionally comparable without even considering the fact that the IT consultancy services forms an integral part of the software development services and cannot be classified as functionally different from that of the assessee.*
- 3. That the learned TPO and the learned DRP erred in disregarding the use of multiple year data and have accepted the use of contemporaneous data as per the transfer pricing regulations due to non-availability of current year data in the public domain at the time of preparing the documentation.*

4. *That the learned TPO and the learned DRP erred in disregarding the fact that the assessee has not claimed a deduction or tax benefits under section 10A of the Act and has not shifted profits. Therefore the adjustment proposed is not called for and is hence misplaced.*
5. *That the learned TPO and the learned DRP erred in upholding the actions of the learned TPO in concluding that the assessee is exposed to single customer risk without evaluating the business arrangement of the assessee.*
6. *That the learned TPO and the learned DRP erred in not allowing the benefit of range of +5% as provided in proviso to Section 92C(2) of the Act to the appellant, while determining the arm's length price.*

## *II. Corporate Tax*

7. *Disallowance of Project Specific Costs amounting to Rs. 158,395,739/- under section 40(a) of the Act.*

7.1 *The learned AO and learned DRP erred in disallowing the expenditure of Rs. 158,395,739/- incurred by the appellant towards the usage of EDA (electronic Design Automation) software tools in software development, under section 40(a) of the Act.*

7.2 *The learned AO erred in disallowing the expenses by placing reliance on the judgement of Hon'ble Karnataka High Court in the assessee's own case for the assessment years 2000-01 and 2001-02 where it has been held that the taxes are required to be withheld at source on payments made to non-residents.*

7.3 *The learned AO erred in not appreciating that the Honorable Supreme Court in the assessee's own case for the assessment years 2000-01 and 2001-02, vide order dated 9<sup>th</sup> September, 2010, has set aside the order of the Karnataka High Court (supra) and requested the High Court to decide the case on merits.*

7.4 *The learned AO erred in not observing that since the Honorable Supreme Court (supra) has set aside the order of the Karnataka High Court (supra), the decision of the Honorable Income-tax Appellate Tribunal in the assessee's own case for the assessment years 2000-01 and 2001-*

*02, wherein it has been held that the amount paid by the appellant to its parent company was not in the nature of royalty and no tax was required to be deducted at source, would continue to hold good.*

*7.5 The learned AO ought to have appreciated that the EDA software licenses are purchased by Infineon Technologies AG Germany, the ultimate parent company of the appellant, from the vendors as a standard off-the-shelf product and are not transferred to the appellant company. The appellant company only uses the licenses owned by Infineon Technologies AG, Germany.*

*7.6 The learned AO ought to have appreciated that the payments made by the appellant company to Infineon Technologies AG, Germany for usage of EDA software tools is towards reimbursement of costs incurred by Infineon Technologies AG, Germany without any mark-up, and therefore no tax is required to be deducted on the same.*

***8. Adjustments made to the Total Turnover in computing deduction under section 10A of the Act***

*8.1 The learned AO erred in reducing telecommunication expenses (bandwidth charges)*

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*amounting to Rs. 12,321,729/- and foreign currency expenditure on travel, professional & consultancy expenses amounting to Rs. 177,080,369/- from the export turnover computed by the appellant on the contention that these expenses are attributable to the delivery of computer software outside India.*

*8.2 The learned AO has erred in reducing the entire sum, debited by the appellant under the account head 'communication expenses', from the export turnover as attributable to the delivery of computer software outside India for the purposes of computing the deduction under section 10A of the Act. The learned AO ought to have observed that, out of the above sum of Rs. 12,321,729/-, an amount of Rs.885,354/- only relate to the bandwidth charges. The balance sum of Rs. 11,436,375/- pertain to expenses such as mobile charges, courier charges, landline charges and audio conference charges.*

*8.3 Notwithstanding and without prejudice to the above, the learned AO erred in not observing that should a portion of the telecommunication expenses (bandwidth charges) be reduced from the export turnover, the expenses should also be reduced from the total turnover in arriving at the deduction under section 10A of the Act.*

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8.4 *The learned AO has erred in not relying upon the decision of the jurisdictional Income Tax Appellate Tribunal in the case of KPIT Cummins Infosystems (Bangalore)(P) Ltd. V. ACIT – 26 SOT 529, wherein it has been held that should the expenses be reduced from export turnover then the expenses ought to be reduced from total turnover also.*

8.5 *Further, the learned AO has also erred in not relying on the decision of the Special Bench of the Chennai Tribunal in the case of Sak Soft Limited v. ITO (ITA No.691 & 1953/Mds/2007) wherein it has been held that if the telecommunication, freight and insurance expenses are reduced from the export turnover then the same would also have to be reduced from the total turnover in order to compute the deduction under section 10A. Further, recently the High Court of Karnataka has decided the matter in favour of the assessee in the case of Honeywell Technologies Solutions Lab Pvt.Ltd. (ITA No.820 of 2009).*

8.6 *The learned AO erred in computing deduction under section 10A by erroneously considering the profits of the software (STPI) unit as Rs. 297,319,880/- instead of Rs. 181,072,777/- thereby resulting in a lower deduction under section 10A.*

9. *Interest*

9.1 *The learned AO erred in levying interest of Rs. 48,314,743/- under section 234B of the Act. The Appellant submits that the levy of interest is consequential in nature.*

*The appellant craves to leave/to add to/to alter/to amend/to rescind/to modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing this appeal.*

9. The TPO adopted TNMM method. The segmental details pertaining to software development service and BPO services are as under:-

| <i>Particulars</i>         | <i>Software Research &amp; Development &amp; Information technology</i> | <i>Marketing Support services</i> | <i>TOTAL</i>      |
|----------------------------|---|-----------------------------------|-------------------|
| <i>Operating Income(*)</i> | <i>1360963371</i>   | <i>15424364</i>                   | <i>1376387735</i> |
| <i>Operating Cost (**)</i> | <i>1275478913</i>   | <i>14054641</i>                   | <i>1289533554</i> |
| <i>Operating Profit</i>    | <i>85484458</i>   | <i>1369723</i>                    | <i>86854181</i>   |
| <i>Op Margin/Cost</i>      | <i>6.70%</i>  | <i>9.76%</i>                      | <i>6.73%</i>      |

*(\*) Excluding other Income. (\*\*) excluding loss on sale of asset*

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10. The list of companies selected by the TPO are as follows:-

1. Accel Transmatics Ltd (Segment)
2. Avani Cimcon Technologies Ltd
3. Celestial Labs Ltd
4. Datamatics Ltd
5. E Zest Solutions Ltd
6. Flextronics Software Systems Ltd (Segment)
7. Geometric Software Limited (Segment)
8. Helios & Matheson Information Technology Ltd
9. iGate Global Solutions Ltd (Segment)
10. Infosys Limited
11. Ishir Infotech Ltd
12. KALS Information Systems Limited
13. LGS Global Ltd (Lanco Global Solutions Ltd)
14. Lucid Software Limited
15. Mediasoft Solutions Private Limited
16. Megasoft Ltd
17. Mindtree Consulting Limited
18. Persistent Systems Limited
19. Quintegra Solutions Ltd
20. RS Software (India) Ltd
21. R Systems International Limited (Segment)
22. Sasken Communications Limited (Segment)
23. SIP Technologies & Exports Limited
24. Tata Elexi Limited (Segment)
25. Thirdware Solutions Ltd
26. Wipro Ltd (seg)

11. The learned counsel for the assessee Shri KR Vasudean submitted that out of 26 companies selected by the TPO, the

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following 16 companies may be rejected for the reasons mentioned in the table below. The assessee relied on the decision of **Hewlett-Packard (India) Globalsoft Pvt. Ltd., IT(TP)A No.1031/Bang/2011.**

| SN | Comparables                                | Rejection Reasons  |
|----|--|--|
| 1  | Accel Transmatics Ltd (Segment)            | 1.Functionally dissimilar<br>2.Abnormally high growth rates<br>3.Fluctuating margins from 5.68% in 2004 to a loss of (18.13%) in 2005 to a profit 40.75% in 2006 and 21.11% in 2007;<br>4.Revenue from the software services is 27.60% of the total operating revenue which is much less than the 75% threshold. |
| 2  | Avani Cimcon Techno-logies Ltd             | Functionally dissimilar  |
| 3  | Celestial Labs Ltd                         | Functionally dissimilar  |
| 4  | E Zest Solutions Ltd.,                     | Functionally dissimilar  |
| 5  | Flextronics Software Systems Ltd (Segment) | Functionally dissimilar  |

|    |  |   |
|----|--|---|
| 6  | Helios &<br>Matheson<br>Information<br>Technology<br>Ltd., | 1.Functionally dissimilar<br>2. Abnormal Margin fluctuations  |
| 7  | Infosys Limited  | 1. Functionally dissimilar<br>2. Presence of Brand<br>3. High Margin and<br>4. Industry leader – large economies of scale |
| 8  | Ishir Infotech<br>Ltd                                      | Functionally dissimilar   |
| 9  | KALS<br>Information<br>Systems Limited                     | Functionally dissimilar   |
| 10 | Lucid Software<br>Ltd.,                                    | Functionally dissimilar   |
| 11 | Megasoft Ltd   | 1.Functionally dissimilar<br>2.Margin to be computed at segmental level and not entity level<br>3.Abnormally high margins |
| 12 | Persistent<br>Systems Limited                              | Functionally dissimilar   |
| 13 | RS Software<br>(India) Ltd.,                               | Different financial year end  |
| 14 | Tata Elexi<br>Limited<br>(Segment)                         | Functionally dissimilar   |
| 15 | Wipro Ltd (seg)  | 1. Functionally dissimilar  |

|  |  |   |
|--|--|---|
|  |  | <p>2. Industry leader – large economies of scale; and</p> <p>3. Presence of intangibles</p> |
|--|--|---|

12. We find that the above companies, which the assessee has chosen to request for exclusion/rejection, are covered by the decision of Hewlett-Packard (India) Globalsoft Pvt. Ltd., (Supra). Hence, respectfully following the decision of the coordinate Bench, we direct the TPO to exclude all of them.

13. The assessee has raised the following additional ground:

*The appellant submits that Thirdware as referred in Ground No. 2.11.1 was selected as a comparable by the Ld. TPO to the software development services rendered by the appellant at the time of transfer pricing assessment proceedings. Based on the recent judicial pronouncements, the appellant submits that Thirdware is held to be functionally not comparable to the Appellant as it is engaged in product development and earns revenue from sale of licenses and subscription. Further, Thirdware has not provided any separate segmental profit and*

*loss account for software development services and product development services and sale of licenses.*

14. Third ware Solution Ltd., should be rejected as a comparable company as it is held to be functionally not comparable to the assessee since it is engaged in product development and earns revenue from sale of licenses and subtraction.

15. In respect of the following companies, we are of the opinion that the same shall be taken as comparable.

1. Datamatics Ltd
2. Geometric Software Limited (Segment)
3. iGate Global Solutions Ltd (Segment)
4. LGS Global Ltd (Lanco Global Solutions Ltd)
5. Mediasoft Solutions Private Limited
6. Mindtree Consulting Limited
7. Quintegra Solutions Ltd
8. RS Software (India) Ltd
9. Sasken Communications Limited (Segment)
10. SIP Technologies & Exports Limited

16. Thus, we direct the TPO to reject the 15 companies as stated above in para 11, accept the 10 companies as stated in para 15 and

reject 1 company (Thirdware Solution Ltd.,) as stated in para 14 and rework the ALP of the assessee.

17. With respect to the remaining grounds of appeal filed, the following observations are to be taken into account.

18. Ground No. 1, 2 are general.

19. Ground No.2.1 to 2.4 conceptual.

20. Ground No.2.2 to 2.8 and 2.15 to 2.16, 3, 4, 5 and 6 are not pressed.

21. Ground No. 7 to 7.6 are with respect to corporate tax disallowance of project specific costs amounting to Rs.158,395,739 u/s 40(a)(ia) of the Act.

22. This issue is covered by the decision of the tribunal in the assessee's own case in ITA No.1670/Bang/2012, wherein it has been held as under:-

*10.1 This Ground is in respect of the disallowance of project specific costs amounting Rs.11,25,95,270 u/s 40(a)(i) of the Act.*

*In the course of assessment proceedings, the Assessing Officer observed that the assessee had claimed these amounts as project specific costs. It was found that these charges consist of GLM and software charges paid by the company. The Assessing Officer held that this issue of disallowance of software usage charges (shrink wrapped software) for non-deduction of taxes is to be disallowed under Section 40(a)(i) of the Act as has been held by the Hon'ble High Court of Karnataka in the case of Samsung Electronics Co. Ltd. & Others (Kar) in ITA No.2808 of 2005 dt.15.10.2011 and to which case the assessee was also a party (ITA No.1264 & 1265/06). In this view of the matter, the Assessing Officer made the disallowance of Rs.11,25,95,270 under*

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*Section 40(a)(i) of the Act. On appeal, the DRP upheld the decision of the Assessing Officer who then made the disallowance in the final order of assessment.*

*It is against these findings of the authorities below, that the assessee is before us in this appeal. In the course of hearings before us, the learned Authorised Representative for the assessee fairly conceded that this issue is covered against the assessee and in favour of Revenue by the decision of the Hon'ble High Court of Karnataka in the case of Samsung Electronics Co. Ltd. (supra), relied on by the A.O./DRP, and to which case the assessee was also party before the Hon'ble High Court. Respectfully following the decision of the Hon'ble High Court of Karnataka in the case of Samsung Electronics Co. Ltd. (supra) which has also been rendered in the assessee's case, we uphold the decision of the Assessing Officer. Consequently, we dismiss Ground No.8 raised by the assessee.*

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23. Respectfully following the decision of Co-ordinate Bench (Supra), we dismiss this ground of appeal.

24. Ground No.8 is adjustments made to the Total turnover in computing deduction u/s 10A of the Act.

25. Ground 8.1 to 8.5 are covered by the decision of Tata Elxsi 378 ITR 29. Further the AO is directed to consider the recent decision of High Court in the case of Honeywell Technologies Solutions Lab Pvt. In ITA No.820 of 2009.

26. In ground No.8.6, the assessee has submitted that while computing deduction u/s 10A, the profits of the software (STPI) unit as Rs.297,319,880/- instead of Rs.181,072,777/- thereby resulting in a lower deduction u/s 10A.

27. We direct the TPO to correct the error which has crept in while computing deduction u/s 10A and take the profit of software unit at Rs.181,072,777/-

28. Additional ground Nos.5.1 and 6.1 are as under:

**Ground 5.1 Market risk adjustment**

*The appellant submits that the Hon'ble DRP members and learned AO ought to have granted market risk adjustment to the appellant:*

*\* The Hon'ble DRP members and the learned AO have grossly erred in accepting the learned TPO's rejection of market risk adjustment submitted by the appellant.*

*\* The Hon'ble DRP and the learned AO have erred in not appreciating the difference in the functional profile that exists between the appellant who functions in the role of a captive service provider vis-avis the independent unrelated comparable companies who operate in the capacity of entrepreneurial entities.*

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*\* The Hon'ble DRP members and the learned AO erred in concluding that the market risk adjustment will be nullified against the existence of single customer and political risks.*

**Ground No.6.1 - Depreciation Adjustment**

*The appellant submits that it should be granted Depreciation adjustment.*

*\* The depreciation cost as a percentage of the cost of the appellant during the financial year 2006-07 is significantly different from that of the comparable companies.*

*\* The difference in the depreciation cost arises due to differences in the accounting treatment across the comparable companies and the appellant.*

*\* Considering the above fact, to achieve reliable comparability, the margins of the comparable companies should be adjusted for difference in depreciation cost of comparable companies and tested party.*

29. With respect to market risk adjustment, the learned counsel for the assessee relied on the decision of Intellinet Technologies Pvt. Ltd., in ITA No.1237/Bang/2010 which has been followed in

the case of Infineon Technologies India Pvt. Ltd., in IT(TP) No.1670/Bang/2012.

*The assessee contends that it is a low risk service provider whereas the comparable companies chosen by the TPO are risk bearing entities and hence the difference in the risk profile needs to be adjusted for proper comparability. The assessee also submits that the details of the computation of the risk adjustment has also been submitted. In support of its contentions for being allowed risk adjustment, the learned Authorised Representative of the assessee placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of Intellinet Technologies India Pvt. Ltd. in ITA No.1217/Bang/2010 and Bearing Point Business Consulting Pvt. Ltd. in ITA No.1124/Bang/2011.*

*We find that the co-ordinate bench of this Tribunal in the cases of Intellinet Technologies India Pvt. Ltd. (supra) and Bearing Point Business Consulting Pvt. Ltd. (supra) have held that, in principle, risk adjustment must be granted, if warranted in the facts of the case, for bringing the comparables on par with the assessee company. Following the above decision and of the co-ordinate*

*bench (supra), we also hold that in principle, the assessee may be granted risk adjustment, if so required in the peculiar facts of the case for bringing the comparable companies on par with the assessee. However, the quantum of risk adjustment to be granted, if any, is remanded back to the file of the TPO. The TPO is directed to examine the details of the quantitative computation of risk adjustment and attendant details submitted by the assessee justifying its claim for risk adjustment and to take into account the same along with all the relevant material before deciding on the percentage of risk adjustment to be allowed, if any, in accordance with law. It is ordered accordingly. Consequently, Ground Nos.3 & 4 are treated as allowed for statistical purposes.*

30. We direct the Assessing Officer to follow the above order in assessee's own case (Supra) and rework the Market risk adjustment.

31. With respect to depreciation adjustment allowance of depreciation adjustment, the learned counsel for the assessee relied on the decision of tribunal in the assessee's own case (supra) for the asst. year 2008-09.

*19.2 The assessee in the grounds raised sought adjustment towards depreciation on the ground that the depreciation cost as a percentage of the gross block of the assessee was 25% as against 10% for the comparable and hence this difference needs to be adjusted for comparability. During the proceedings, on being specifically asked, the learned counsel for the assessee stated that this ground was not raised before the TPO and CIT (Appeals) but prayed that the same be admitted for adjudication as it was a legal issue.*

*19.3 The learned Departmental Representative submitted that he has, prima facie, no objection to admission of this additional ground. He, however, pointed out that the additional ground raised was very general, put in a bland manner, was not clear or specific and appeared to be an afterthought after the CIT (Appeals) has confirmed the adjustments made by the TPO. The learned Departmental Representative submitted that the assessee has not*

*explained as to why this claim of depreciation is being submitted now; why it is necessary to accept the same; why this claim was not raised earlier; computation of quantum, etc. In the absence of these details, such an additional ground would have no meaning and not being maintainable ought to be dismissed summarily.*

*9.4 We have heard both parties and considered the rival submissions. We find force in the submissions of the learned Departmental Representative. Whether an adjustment towards depreciation is warranted or not may be, issue of principle. But whether the principle needs to be applied to a particular case or not would depend on the peculiar facts of that case. It cannot be anybody's case that an adjustment has to be necessarily granted whenever and wherever there is difference in depreciation between the tested party and the comparables. An adjustment for difference in depreciation is a valid principle for comparability, but whether this case entails such an adjustment has to be examined in the light of the particular facts of the case. Hence, the additional ground raised by the assessee is as much as issue of fact as it is of principle.*

*19.5 Before us, the assessee has not been able to adduce any reason as to why this issue was not raised before the authorities below. It gives credence to the view of the*

*learned Departmental Representative that this claim is only an afterthought, pursuant to the learned CIT (Appeals) confirming the adjustments proposed by the TPO.*

*19.6 Besides this, the adjustment for depreciation, sought for by the assessee, does not appear to be tenable even on merits. It has been stated in the additional grounds raised that while the depreciation of the assessee is 25% of its gross block, it is 10% of the gross block for the comparables. It is interesting to note that the assessee has compared the depreciation as a percentage of the gross block of the individual cases and not as a percentage to operating cost.*

*19.7 No case has been made out by the assessee that the difference in depreciation is due to any reason like capacity utilization, etc. The difference in depreciation could be due to many reasons as different companies have their own accounting problems in the matter of fixed assets and depreciation on the basis of technical estimates made of useful life of the assets. Depreciation provided under the Income Tax Rules or the minimum depreciation provided under the Companies Act may not be really exhibiting the actual position. Over a period of time, the difference of depreciation provided under different methods would almost be the same except for marginal difference. In the*

*written down value (WDV) method, the depreciation for the initial year would be more, whereas in straight line method, depreciation in the initial years would be less. However, at the end of the day, the depreciation off sets each by itself.*

*19.8 In the interest of equity and natural justice, we feel constrained to admit the additional ground raised by the assessee on the issue of depreciation. However, mere claim for an adjustment will serve no purpose unless it is backed by proper details. The additional ground states that the depreciation of the assessee is a ratio of its gross block of 25% as against 10% of the comparable companies. The assessee has not stated the depreciation as a percentage of operational cost nor has any evidence been placed on record to show that the difference in depreciation is due to any operational reasons. As discussed (supra), there could be several reasons for difference in depreciation between companies like, rates of depreciation, age of the assets, etc. and therefore adjustment towards depreciation can be granted only if there are operational differences that affect comparability. We remit the issue of depreciation as raised by the assessee in the additional grounds (supra) to the file of the Assessing Officer / TPO with direction to examine and consider the claim for adjustment towards depreciation in the light of our observations from paras 19.3 to 19.8 of this order and to dispose the matter expeditiously after*

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*affording adequate opportunity of being heard to the assessee. It is ordered accordingly.”*

*12.3 Following the aforesaid decision of the co-ordinate bench of this Tribunal in the case of 24/7 Customer.com Pvt. Ltd. (supra), we admit the additional ground raised for grant of depreciation adjustment and remit the matter to the file of the TPO to consider and examine the assessee's claim for adjustment towards depreciation in the light of the Tribunal's observations at paras 19.4 to 19.8 of the order of the co-ordinate bench (supra) after affording the assessee adequate opportunity of being heard and to submit details/explanations required, which shall be duly considered. It is ordered accordingly. Consequently, this additional ground is treated as allowed for statistical purposes.*

32. We direct the TPO to follow the order of Tribunal in assessee's own case (Supra) and decide the issue accordingly.

33. In the result, the appeal is partly allowed for statistical purposes.

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Order pronounced in the open court on **22nd September,**  
**2016.**

**Sd/-**  
**(S JAYARAMAN)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(ASHA VIJAYARAGHAVAN)**  
**JUDICIAL MEMBER**

Bangalore  
Dated : 22/09/2016

Vms

Copy to :1. The Assessee  
2. The Revenue  
3.The CIT concerned  
4.The CIT(A) concerned  
5.DR  
6.GF

By order

Asst. Registrar, ITAT, Bangalore.