Three Digests of 8000 Important Judgments on Domestic Tax (4400 cases), Transfer Pricing (3100), International Tax (500 cases)

(Pronounced in the period from July 2015 to December 2018)

By Dr. Sunil Moti Lala, Advocate
(assisted by Team at SML Tax Chamber)

ENCLOSED :

TRANSFER PRICING DIGEST (3100 CASES)

PREFACE

We have prepared summaries of 8000 important judgments pronounced in the period July-2015 to December-2018. The same have been segregated into 3 Digests viz. :

i) Domestic Tax Digest (4400 Cases)
ii) Transfer Pricing Digest (3100 Cases)
iii) International Tax Digest (500 Cases)

In each of the aforesaid Digests the judgments have been classified into various categories and sub-categories to enable ease of reference. Further, each Digest has been indexed separately along with hyperlinks which would enable the reader to straightaway go to the relevant category or sub-category of cases. Also, the case have been sequenced in the priority of Supreme Court, High Court and Tribunal. The High Court and Tribunal cases in each category / sub-category have been further arranged alphabetically i.e. e.g. all Allahabad High Court cases in each category/sub-category are placed together followed by say Bombay High Court decision if any and so on. Similarly, thereafter the Tribunal cases in each category/sub-category are also arranged alphabetically as indicated above. We have also given the date of pronouncement and the appeal numbers in most cases so as to enable the judgments to be retrieved from the website of the respective Court or Tribunal. Thus, with the hyperlinks and control "F" function the reader would be able to locate at one place all decisions rendered by a particular Court or Tribunal with respect to a particular category or sub-category of cases.

The ***Transfer Pricing Digest of 3100 cases*** *pronounced in the period* ***July-2015 to December-2018*** *is enclosed. We hope you will find the said Digest useful.*

I must thank and acknowledge the painstaking efforts put in by all my team members at SML Tax Chamber in assisting me in preparing the aforesaid Digests. I would particularly like to thank Advocate/C.A's Bhavya Sundesha, Tushar Hathiramani, Shilpa Dinavahi, Sejal Mistry, Sahil Sheth for supporting me in this endeavour to serve the Tax Fraternity. Special thanks to Bhavya for making the sub-categories of cases (a very time-consuming exercise) which would be of immense use to the Reader.

If there are any suggestions the same are most welcome. You may write to ITAT online or inbox me directly at office@smltaxchamber.com.

HAPPY READING !! HAPPY RESEARCHING !!

August 2019 *Dr. Sunil Moti Lala*
Mumbai

TRANSFER PRICING DIGEST (3100 CASES)

(Pronounced in the period July 2015 to December 2018)

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Transfer Pricing

a. Applicability of TP Provisions

International Transactions

1. The Apex Court dismissed Revenue's SLP challenging the order of the Gujarat High Court wherein the High Court upheld the order of the Tribunal wherein it was held that the assessee and its supplier of rough diamonds viz. Blue Gems BVBA (Belgian entity) were not associated enterprises notwithstanding the fact that there was common control between the two enterprises as none of the conditions laid down in Section 92A(2) were fulfilled.
Pr. CIT vs. Veer Gems - TS-2-SC-2018-TP - SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 37719/2017 dated 05-01-2018

2. The assessee had released money in favour of the AE with a specific purpose of acquisition of distributorship of the films from Citi Gate (with whom AE had entered into a contract with) and CitiGate refunded the same to assessee through AE once the deal failed to materialize. The Court dismissed Revenue's appeal on treating it as an international transaction noting that the instant case was a simple one where the money was routed through the AE by the assessee for the purpose of acquisition of distributorship. This was not a case of either financing or lending or advancing of any moneys as per Explanation to s 92B. The aforesaid transaction did not result into diversion of income of the assessee to its AE and thus, it opined that Tribunal committed no error.
Pr. CIT-3 vs KSS Limited [TS-1379-HC -2018(BOM)-TP] IT No.476 of 2016 dated 26.11.2018

3. The Court held that where the assessee sold its imaging business to another Indian company during the year under review and the holding companies of both the assessee and the buyer Indian company had entered into a global agreement for the sale of business, as per Section 92B(2) prevalent during the relevant assessment year, the transaction would not fall within the definition of deemed international transaction since the global agreement did not control the terms and conditions of the actual transaction between the assessee and the buyer.
CIT v M/s Kodak India Pvt Ltd - TS-471-HC-2016 (Bom) - TP - ITA NO.15 OF 2014

4. The assessee had entered into the following transaction a) purchase of loans of HDFC Ltd of more than 5000 crores b) payment to HBL Global for rendering of services c) payment of interest to HDB Welfare Trust (Trust created by assessee for its employees. The AO was of the view that the transactions fell within the ambit of specified domestic transactions and made a reference to TPO. The Court held that for transactions to fall within meaning of a Specified Domestic Transaction, assessee has to have a transaction (not being an international transaction) with a person as listed in sub-clauses (i) to (vi) of section 40A(2)(b). The Court examined the transactions and held that purchase of loans from HDFC Ltd did not fall within the ambit of SDT for the reason that HDFC Ltd did not have a substantial interest in assessee, as HDFC Ltd. admittedly held 16.39 per cent of shareholding in assessee, and was thus not a person as contemplated under section 40A(2)(b)(iv) for present transaction to fall within meaning of SDT as set out in section 92BA(i). Further it could not be said that HDFC

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Ltd. indirectly had 20 per cent of voting power in assessee even though HDFC Investments which was a wholly owned subsidiary of HDFC Ltd. and had approximately 6 per cent shareholding of assessee as such clubbing of shareholding, in law, is clearly impermissible because a shareholder of a company can never have any beneficial interest in the assets of that company. This would be contrary to all canons of Company Law. It is well settled that a shareholder of a company can never be construed either the legal or beneficial owner of the properties and assets of the company in which it holds the shares. Thus, the Court opined that HDFC Ltd. did not have a substantial interest in assessee as required and stipulated in Explanation (a) to section 40A(2)(b). In the case where it received services from HBL Global, the Court opined that merely because assessee held 29 per cent shareholding of ADFC which in turn held 98.4 per cent of shares of HBL Global, it did not have beneficial ownership and voting rights of more than 20 per cent of HBL Global as assessee being a shareholder of ADFC did not have any interest (beneficial or otherwise) in properties/assets of ADFC and that being case, even this transaction was not entered into with a person as mentioned in section 40A(2)(b). In case of welfare trust, since trust had been set up exclusively for welfare of its employees and there was no question of assessee being entitled to 20 per cent of profits of such trust, this transaction clearly would not fall within meaning of section 40A(2)(b) to be a SDT as understood and covered by section 92BA(i). Thus, it held that AO was clearly in error in concluding that transactions undertaken by assessee were specified domestic transactions which required to be disclosed in Form 3CEB and thus AO could not have referred the transactions to TPO for determining the ALP. It allowed the assessee's petition by holding that said order and said reference were without jurisdiction.

HDFC Bank Ltd vs ACIT [TS-1299-HC-2018(Bom)-TP] Writ Petition No.462 of 2017 dated 20.12.2018

5. The Court relying on the decision in Sony Ericsson Mobile Communications India Pvt. Ltd [TS-543-HC-2016(DEL)-TP] (wherein it was held that unilateral incurring of AMP expenses does not constitute an international transaction and benefit to AE is incidental only) remitted the AMP issue for comprehensive decision by Tribunal on whether AMP expenditure with regard to the assessee's outbound travel business constituted an international transaction for AY 2009-10 and AY 2010-11 on ground that the Tribunal should have first decided whether in the circumstances of the case, the nature of the AMP reported could lead to the conclusion that there was an international transaction. The Court noting that the LG Electronics [TS-11-ITAT-2013(Del)-TP] Ruling approving the Bright Line Test had been overruled by the Delhi HC in the case of Sony Ericsson Mobile Communications India Pvt Ltd, it further held that every endeavour should not be made to conclude that all transactions reporting AMPs were to be treated as international transactions, the facts of each case would have to be examined for some deliberations. Accordingly, it directed the tribunal to decide whether the reporting of the AMP in regard to the outbound business constituted and international transaction.

LE Passage to India Tour & Travels (P) Ltd & ANR - (2017) 98 CCH 009 (Del) - ITA 368/2016, 369/2016

6. The Court relying on its earlier decisions in CIT v EKL Appliances and Sony Ericsson Mobile Communications India Pvt Ltd v CIT, (wherein it was held that where form and substance of the transaction were the same but the arrangements when viewed in totality differed from those adopted by an independent enterprise behaving in a commercially rational

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manner), held that the TPO was correct in considering the assessee's transaction of import of raw materials from an intermediary as a deemed international transaction, where the assessee, as opposed to purchasing the components from the manufacturer (which was an AE), chose to import components from an intermediary (over whom the AE had significant influence) and such imports constituted over 85 percent of all raw materials imported.
Further, it held that even if TNMM was found acceptable as regards all other transactions, it was open to the TPO to segregate a portion and subject it to an entirely different method i.e. CUP if the assessee did not provide satisfactory replies to his queries.
Denso India Ltd v CIT - (2016) 95 CCH 0057 (Del), ITA 443/2013, 451/2013, dated Feb 29, 2016

7. The Court upheld the order of the Tribunal and held that for determining whether two parties are Associated enterprises, the conditions laid down in both Section 92A(1) and 92A(2) were to be fulfilled. It held that Section 92A(1) broadly states that two enterprises would be AEs if they have common management, capital or control, but 92A(2) provides practical illustrations to determine whether Section 92A(1) is satisfied. Accordingly, it held that the assessee and a concern from which is purchased rough diamonds viz. Blue Gems were not AEs despite the fact that t he two entities were being controlled by the same family or four brothers and their close relatives as none of the conditions provided in Section 92A(2) were satisfied.
Pr.CIT vs. Veer Gems - TS-545-HC-2017(GUJ)-TP - TAX APPEAL NO. 338 of 2017 dated 20.06.2017
Pr. CIT vs. Veer Gems - TS-557-HC-2017(GUJ)-TP - TAX APPEAL NO. 339 of 2017 dated 20.06.2017

8. The Court dismissed assessee's petition challenging AO's reference to TPO for AY 2013-14 and held that where there was prima facie material suggesting that the directors of the Petitioner company, in aggregate, held more than 20% of the shares in voting power in Writers & Publishers Pvt Ltd and the aggregate of transactions entered into by the assessee (expense, loan and interest, etc.) with such company exceeded Rs. 5 crores, the transfer pricing procedure adopted by the TPO was to be allowed. It rejected the contention of the assessee that since the individual shareholding of directors and their relatives in Writers & Publishers Pvt Ltd was less than 20 percent, the alleged AE did not constitute a related party under section 40A(2)(b) because the Petitioner company by itself held an aggregate shareholding of more than 20 percent. However the Court kept open legal issues relating to consideration of aggregate shareholding for applicability of Section 40A(2)(b) and whether AO can subsequently invoke basis of Section 40A(2)(b).
D B Corp Ltd vs DCIT [TS-607-HC-2016(GUJ)-TP] SPECIAL CIVIL APPLICATION NO. 5035 of 2016

9. The Court dismissed Revenue's appeal against Tribunal order holding that assessee and India Gems & Beads were not associated enterprises u/s 92A. The Tribunal had rejected Revenue's contentions that since Smt. Anupama Singh who was sole shareholder of India Gems & Beads Inc. was wife of brother of director in assessee, they were relatives for the purpose of adjustment under ALP and held that referring to the provisions of section 92 and definition provided u/s 2(41), it was abundantly clear that Smt Anupama Singh was not a relative of the

director of the assessee company. Accordingly, it held that the transaction between the assessee and India Gems & Beads Inc., USA could not be treated as an international transaction. The Court, held that as sister in law is not associated not relative under the income tax act, the provision of section 92A(2)(m) had been wrongly interpreted by the AO and accordingly upheld Tribunal's order.

CIT vs Jaipur Silver Jewels P Ltd-TS-854-HC-2017(RAJ)-TP D.B. Income Tax Appeal No. 600 / 2011 dated 26.2017

10. The Tribunal relying on the decisions in Orchid Pharma and Page Industries, held that assessee (an Indian partnership firm) and the Belgian entity (shares of which were held by partners' brother and relatives) were not associated enterprises (AEs), as the conditions of section 92A(2) are not fulfilled. The Court, applying the provisions of section 92A(2), held that mere fact of participation of one enterprise in management or control or capital of other enterprise would not make them AEs. While a certain degree of control may actually be exercised by these enterprises over each other, due to relationships of the persons owning these enterprises, that itself was not sufficient to hold the relationship between the two enterprises as 'associated enterprises'.

Veer Gems TS-7-ITAT-2017 (Ahdmedabad)-TP - ITA No.1514/Ahd/2012 dated 03.01.2017

11. The Tribunal held that in the case of public sector companies, even if all or majority of the shareholdings are by the union or state governments, these companies for that reason alone cannot be said to be associated enterprises for the purpose of section 92A. Circular No. 9/76 dated 19-5-1976 issued by the Ministry of Corporate Affiars clarified that for the purpose of section 370 of Companies Act 2013, Companies will not be deemed to be under the same management as the President or the Governor does not hold shares and exercises or controls voting rights as an individual in Govt. Companies. The scope of section 370 (1B), in the Companies Act in force at that point of time, was with respect to the expression 'individual' as against 'person' in the present case, but then the same position, for the detailed reasons set out above, holds good in the present context, i.e. in the context of 'person', as well. If all public sector undertakings were to be treated as Associated Enterprise, the inter se transactions between all the public sector undertakings would be subject to arm's length price determination-something which was seemingly quite incongruous and contrary to the scheme of the transfer pricing legislation. Therefore, PSUs cannot be said to be associated enterprises.

Hazira LNG Private Limited – TS-1027-ITAT-2016 (Ahmedabad) – TP - I.T.A. No. 1056/Ahd/ 2014 dated December 27, 2016

12. The Tribunal, relying on the provisions of section 92B which provides that even an arrangement, understanding or an action in concert having a bearing on the profit income, losses or assets of the enterprises would qualify as international transaction, held that the sharing of cost between Nike India (assessee) and its AE in respect of contract with BCCI for promotion and brand building of Nike was an international transaction noting that the assessee had incurred the expenditure for the promotion of brand Nike since the agreement between brands in the territory enhanced the brand value of NIKE which belonged to the AE of the assessee. In respect of other local AMP expenses the tribunal held that such

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expenditure cannot be regarded as an independent international transaction as there was no agreement or arrangement in writing or otherwise with the AE.

Nike India Pvt Ltd - TS-1034-ITAT-2016 (Bang)- TP - I.T.{T.P) A. No.232/Bang/2014

13. The Tribunal upheld CIT(A)'s order considering 3 companies namely Multitrade Overseas INC, Harris Freeman & Co. LP and Southern Tea LLC as associate enterprise of the assessee, since all the three companies were being controlled and managed by the same shareholders and persons and therefore the condition provided under section 92A(2)b, 92A(2)(j) & 92A(2)(h) were satisfied.

General Commodities Ltd -[TS-1061-ITAT-2016(Bang)-TP - I.T.{T.P} A. Nos.1824 & 1825/Bang/2013

14. The Tribunal held that where the transactions between the assessee and its AE fell within the ambit of the definition of international transaction as provided under section 92B of the Act, then the mere fact that the transactions with the associated enterprise were in relation to projects carried out in India as a result

of which the AE was a tax resident of India, would not justify the plea of the assessee that the international transactions ought not to be covered by the transfer pricing provisions since there was no profit shifting / base erosion.

United Engineers (Malasia) Berhad Quorum [TS-827-ITAT-2016 (Bang- TP] (IT(TP)A.1204 & 1205IBang/2012)

15. The Tribunal held that in the absence of an agreement between the Indian entity and foreign AE whereby the Indian entity was obliged to incur AMP expenditure of a certain level for the foreign AE for the purpose of promoting the brand value of its products, no international transaction could be presumed and that mere presence of incidental benefit to the foreign AE would not imply that the AMP expenses incurred by the Indian entity were for promoting the brand of the foreign AE.

Essilor India Pvt Ltd v DCIT - (2016) 68 taxmann.com 311 (Bang - Trib)

16. The Tribunal, held that the royalty paid by the assessee to Jockey International Inc (JII) was not an international transaction and therefore could not be subjected the provisions of Chapter X since Jockey was not an AE of the assessee as per Section 92A of the Act. It held that the assessee was a mere licensee of the brand-name 'Jockey' and that there was no participation of JII in the management and capital of the assessee and therefore did not satisfy the conditions of Section 92A(1) of the Act. It further held that both sub- sections viz. 92A(1) and 92A(2) have to be fulfilled together. Accordingly, it deleted the TP addition made by the TPO on account of the royalty paid.

Page Industries Ltd v DCIT - TS-382-ITAT-2016 (Bang) - TP

17. The Tribunal held that the sharing of cost between Nike India (assessee) and its AE in respect of contract with BCCI for promotion and brand building of Nike is an international transaction noting that the assessee incurred the expenditure for the promotion of brand Nike and the agreement between assessee and AE acknowledged that BCCI Agreement would provide suitable benefit for Nike brands in the territory. The payment of 50% of the cost paid to the BCCI born by the AE of the assessee is under conscious understanding and agreement

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between the parties to promote and enhance the brand value of NIKE which belongs to the AE of the assessee, because, as per Section 92B even an arrangement, understanding or an action in concert having a bearing on the profit income, losses or assets of the enterprises would qualify as international transaction. In respect of other local AMP expenses the tribunal held that such expenditure cannot be regarded as an independent international transaction as there was no agreement or arrangement in writing or otherwise with the AE.
Nike India Pvt Ltd [TS-1034-ITAT-2016 (Bang)- TP]

18. The Tribunal held that assessee and a Singapore company having a common director were not associated enterprises as the parameters laid down under section 92A(1) and (2) were not satisfied. It held that for enterprises to be associated as per Section 92A, at least one of the 13 conditions prescribed in sub section (2) as per clause (a) to (m) had to be satisfied and that where the common director did not exercise any control over the AE, the mere fact that the assessee and its AE had one common director alone did not establish the AE relationship.
Obulapuram Mining Co Pvt Ltd [TS-847-ITAT-2016(Bang)-TP] (IT (TP) A No.182 (Bang) 2014)

19. The Tribunal held that where it was a concerted action intended in a manner as not to attract section 92B of the Act but in substance the agreements indicated a transaction between two AEs along with an intervening third party, the said transaction was to be classified as a deemed international transaction.
Novo Nordisk India Pvt Ltd v DCIT [IT(TP)A No 146 / Bang / 2015] - TS-366-ITAT- 2015 (Bang)-TP

20. The Tribunal relying on the decision in assessee's own case for earlier year [TS-1034-ITAT-2016 (Bang)-TP] held that the sharing of cost between (assessee) Nike India and its AE in respect of contract with BCCI for promotion and brand building of Nike was an international transaction. Noting that the assessee incurred the expenditure for the promotion of brand Nike and the agreement between assessee and AE acknowledged that BCCI Agreement would provide suitable benefit for Nike brands in the territory, it held that the payment of 50% of the cost paid to the BCCI borne by the AE of the assessee was under conscious understanding and agreement between the parties to promote and enhance the brand value of NIKE which belonged to the AE of the assessee, which was within the ambit of the definition of international transaction u/s 92B which provides that even an arrangement, understanding or an action in concert having a bearing on the profit income, losses or assets of the enterprises would qualify as international transaction. Accordingly, it remitted the issue to the file of AO/TPO for the limited purpose of determination of ALP.
Nike India Private Limited vs DCIT-TS-647-ITAT-2017(Bang)-TP-ITA no. 1338/bang/2011 and 1181/bang/2012 dated 04.08.2017

21. The Tribunal held that interest on delayed realization of sales proceeds from AE is not a separate international transaction but an integral part of sale made to the AE. It held that early or late realization of sale proceeds was only incidental to the transaction of sale and accordingly deleted the notional interest addition made by the TPO.
Avnet India Pvt Ltd v DCIT [IT(TP)A No.757(Bang.)/2011] – TS-629-ITAT-2015 (Bang) - TP

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22. The Tribunal deleted the TP-adjustment in case of Renault India (assessee) as the transaction of purchase of cars from a resident entity RNAIPL (related entity with 30% shareholding from Renault France and 70% from Nissan Japan) was not international transaction subject to transfer pricing. It rejected TPO's contention that as per the Master Supply Agreement and Master License Agreement, the terms and conditions of transactions were predominantly determined by assessee's foreign parent (Renault France) and therefore, the transaction was an international transaction. Further, the TPO also noted that while the assessee suffered losses, RNAIPL was paying royalty at 5 percent of turnover to Renault France. It held that the master supply agreement between assessee and RNAIPL as well as master License agreement between Renault France and RNAIPL did not show any influence of Renault France on the price determination for supply of cars by RNAIPL to assessee and that Renault France only had 30% of shareholding in RNAIPL whereas balance 70% was held by Nissan. It observed that the influence that could be exerted by M/s. Renault S.A.S France on M/s. RNAIPL was not such that it could freely decide on the pricing of latter's products. It further held that there was nothing in methodology followed by assessee that could lead to belief that the arrangement was sham or type of scheming which resulted in exorbitant loss for assessee. Accordingly, it held that the transaction could not be classified as a deemed international transaction and accordingly deleted the TP addition.
Renault India P Ltd - TS-87-ITAT-2018(CHNY)-TP – ITA No 1078 / Mds / 2017 dated 30.01.2018

23. The Tribunal upheld the order of the TPO and held that the assessee, engaged in manufacture and selling of generic injectable drugs) had an AE relationship with 2 entities viz. Apotex Corp and Apotex Inc US under section 92A(2)(i) since 20 percent of the assessee's sales were to these 2 entities. It agreed with the ruling of the co-ordinate bench in Orchard Pharma viz. that the term 'influence' used in Section 92A(2)(i) means dominant influence leading to de facto control and held that a person who purchased more than 1/5th of the total sales of the assessee would have a distinctly dominant influence on the pricing and could exercise de facto control and therefore was to be considered as an AE.
Hospira Healthcare India Pvt Ltd – TS-147-ITAT-2017 (CHNY) – TP dated 28.02.2017 - I.T.A. No. 821/Mds/2016

24. The Tribunal held that where business relations between assessee and entities were so insignificant that export sales made to them were less than 5 per cent of its entire sales and there was no element of de facto control they could not be treated as AEs under section 92A.
Orchid Pharma Ltd. vs.DCIT [2016] 76 taxmann.com 63 (Chennai - Trib.) (IT APPEAL NO. 771 (CHENNAI) OF 2016)

25. The Tribunal remitted the matter to the file of the AO with the direction to determine whether the non- resident with whom the assessee had entered into international transactions was an AE of the assessee since the assessee had less than 26 percent interest in the said company and was not holding any controlling interest in management and finance and the DRP had incorrectly presumed that since the assessee was pricing the sale of material, it had controlling interest over the said non-resident.
Dun & Bradstreet Technologies & Data Services Pvt Ltd v ACIT - TS-524-ITAT-2016 (Chny) – TP I.T.A.No.760/Mds/2014

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26. The Tribunal set aside the TPO's order holding the assessee and its overseas Distribution Partners ('DPs') as deemed associated enterprises in terms of Section 92A(2)(i) and deleted the consequent TP adjustment made by the TPO. It noted that the TPO had relied on the Income-tax Settlement Commission order in the assessee's own case to conclude that the assessee's overseas DPs would constitute its deemed AE on the ground that the DPs had an influence over the final sale price of the assessee's product sold through relevant distribution channels and that the assessee was entitled to get cost of goods sold plus 25 / 50 percent share in profit through distribution channels. The Tribunal observed that the sales to DP were less than 5 percent of the total exports and 6 percent of total sales and held that the scale of commercial relationship was no insignificant vis-à-vis the assessee's total business that there was no participation in control by one enterprise over the other so as to satisfy the mandate of Section 92A(1). It held that even though conditions under section 92A(2)(i) were fulfilled, in the absence of satisfaction of conditions set out in Section 92A(1) viz. participation in capital, management or control, the assessee and the DPs could not be treated as AEs. It held that control as stipulated under section 92A had to mean a dominant influence which leads to de facto control over the other enterprise rather than an influence simplictor as the liberal interpretation would lead to a situation where all transactions with negotiated prices would be hit by the provisions of Section 92A(2)(i).
Orchid Pharma v DCIT – TS-943-ITAT-2016 (Chny) – TP

27. The Tribunal considering assessee's reliance on Maruti Suzuki HC ruling and other judgments which were not available before TPO, remitted to the file of the TPO the issue relating to existence of international transaction of AMP expenses for fresh consideration
Bacardi India Pvt Ltd-TS-1052-ITAT-2016 (Del)-TP- I.T.A. No. 1197/Del/2016

28. The assessee-company derived income from business of providing advisory and consulting services to companies engaged in business of general insurance and life assurance. It entered into an agreement with Amway (AE), and availed data processing services. However, AO made a disallowance under section 40A(2)(b) of said data processing charges paid to Amway on ground that the payments made by assessee to were excessive and unreasonable as regards the legitimate needs of business or benefits derived by it. The Tribunal deleted the said adjustment relying on coordinate bench ruling in assessee's own case for earlier year wherein it was held that a) the adhoc disallowance made by the A.O was arbitrary and without any basis. The A.O. had not given a finding as to what as per him, was the fair market value b) Amway had duly disclosed the amount received from the assessee company on account of data processing charges and paid tax thereon c) assessee had chosen to use transfer pricing provisions to demonstrate its claim that the expenditure in question was at arm's length and that the same was not excessive or unreasonable and when the transfer pricing reports submitted by the assessee were not rejected, it could be concluded that the assessee had discharged the burden of proof.
Amserve Consultants Ltd vs ADIT [TS-1167-ITAT-2018(DEL)-TP] ITA No.3062/Del/2015 dated 29.10.2018

29. The Tribunal deleted the disallowance of alleged excess price paid for purchase of components u/s 40A(2)(b) by following the decision of the coordinate bench in assessee's

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own case for earlier year wherein the said disallowance was deleted noting that the parties were not related in terms of definition provided u/s.40A(2)(b) but they were related to the assessee only in accordance with AS-18 issued by the ICAI.

Hero Moto Corp Ltd vs DCIT [TS-823-ITAT-2018(DEL)-TP] ITA No.6990/Del/2017 dated 20.06.2018

30. The Tribunal upheld the applicability of provisions of Chapter X on the international transactions entered into by assessee (engaged in production & telecasting of Common Wealth Games 2010) viz. services received from its AE, reimbursement of expenses paid to its AE, availing of equipment on hire and inter-company receivable from its AE. It rejected the assessee's plea that Chapter X provisions were inapplicable to these transactions as no deduction for expenses were claimed as expenses as it followed the cash system of accounting and therefore there was no impact of these transactions on its profit, losses, income or expenses. It concluded that the assessee's transactions with its AEs relating to availing of services, reimbursement of services, availing equipment on hire and Inter-company receivables fell within the categories of "provision of services", "lease of tangible assets" and "borrowing / lending of money" u/s 92B(1) and that the condition of 'bearing on profit, income and loss' of the assessee only applies to the last category of transactions i.e. "Other transactions". It observed that if the contention of the assessee was to be accepted, then under the cash accounting system, income on interest free advances to AEs would never get recognised any point. It distinguished the following cases relied upon by the assessee viz. Bombay High Court decision in Vodafone India Services Private Limited [TS-308-HC-2014(BOM)-TP] as well as coordinate bench decisions in Bharti Airtel [TS-76-ITAT-2014(DEL)-TP] and Topsgrup Electronic Systems [TS-61-ITAT-2016(Mum)-TP], noting that those cases dealt with transactions falling in "other transaction category" to which condition of impact on profit, Income, loss or assets was relevant.

SIS Live vs. ACIT - TS-149-ITAT-2017(DEL)-TP ITA No.1313/Del/2015 dated 13.02.2017

31. The Tribunal deleted the TP-adjustment for assessee engaged in R&D activities for Honda products in India) for AY 2006-07 and 2007-08. It noted that the TPO had found that assessee was customizing Honda Technology used in 4 & 2 wheelers to suit the requirement of Indian Customer, but benefit of such customized technology earned by the Parent Company from Indian subsidiaries was not shared with the assessee, and thus proposed adjustment. The Tribunal observed that Delhi HC in assessee's own case for AY 2005-06 had restored the matter back to ITAT after categorically mentioning that assessee was not into Core R&D activity. It held that since the Hon'ble High Court for Assessment Year 2005-06 had clearly concluded that the assessee had not carried out any research and development activity, the same could not be taken into account for rendering services as per international transactions. Thus, the Tribunal concluded that the assessee company had not carried out any international transaction. Regarding working capital adjustment notes that HC decision was not available before the TPO and DRP and thus restored the matter to AO/TPO to verify the same

Honda R & D (India) Pvt. Ltd vs. DCIT-TS-1006-ITAT-2017(DEL)-TP - I.T.A .No. 4800/DEL/2010 dated 03.11.2017

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32. The Tribunal held that transaction between head office in India and branch office in Canada cannot be subject to ALP determination so as to make TP addition and any under or over invoicing between head office and branch office is always income-tax neutral because on aggregation of accounts, income of head office will be set-off with equal amount of expense of branch office, leaving thereby no separately identifiable income on account of this transaction. However, in reverse situation, a transaction between a foreign enterprise and its Indian branch, would be considered as international transaction as Indian branch of foreign enterprise is an 'enterprise' under section 92F.

Aithent Technologies Pvt Ltd -TS-752-ITAT-2016(DEL)-TP-ITA No.6446/Del/2012

33. The Tribunal remitted the issue relating to existence of international transaction of AMP expenses incurred by the assessee to the file of the TPO for fresh consideration considering the assessee's reliance on the decision of the Court in Maruti Suzuki which was not available before the TPO. It held that if the existence of international transaction was not proved, no TP addition would be called for, however, in case of existence of international transaction, the TPO must determine ALP in light of the relevant decisions of the Court on this issue. It directed the TPO to correctly classify the nature of expenditure and to exclude expenses directly incurred in connection with sales not leading to brand promotion and rejected the use of the Bright Line Test.

Bacardi India Pvt Ltd – TS-1052-ITAT-2016 (Del) - TP

34. Where the assessee had sold its IPRs to its AE in the prior years (which was benchmarked under the TP provisions) and the AE in the capacity of owner had exploited the impugned IPR in the year under review by entering into transactions with third parties, the Tribunal held that the TPO was incorrect in imputing an adjustment in the hands of the assessee contending that the economic ownership of the IPR was still with the assessee and that income earned by the AE from exploitation of IPR was in effect an international transaction between the assessee and the AE. The Tribunal held that once IPR was sold and the arm's length price of such sale was determined, the IPR became the property of AE and any subsequent transaction between AE with outsiders or outside the jurisdiction of the Indian territory did not give rise to international transaction between assessee and AE. Accordingly, it deleted the TP adjustment made.

DQ Entertainment International Ltd v ACIT - TS-19-ITAT-2018(HYD)-TP - ITA No. 441/ Hyd/2017 dated 12.01.2018

35. The Tribunal deleted TP adjustment in the case of the assessee (engaged in business of providing animation production services) with respect to profit attributed under PSM by the TPO considering the income generated by the AE out of the Intellectual Property Rights sold by the assessee to its AE. It noted that sale of IPR had taken place in earlier AY and the coordinate bench had already deleted the TP adjustment on the basis that once IPR is sold and arm's length price is determined, IPR becomes the property of AE and any transaction of AE with 3rd party would be outside the jurisdictional territory of India and would not fall under the ambit of international transaction.

M/s DQ Entertainment (Intl) Ltd vs ACIT Circle 14(1)- TS-332-ITAT-2018(HYD)-TP ITA No 546/HYD/2016 dated 06.04.2018

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36. The Tribunal held that outstanding receivables on account of services cannot be equated with international transactions in the nature of capital financing as provided for in Explanation to section 92B of the Act as it related to services rendered to the AE and was not in the nature of loans or advances given for capital financing. Accordingly the addition made by the TPO on account of notional interest on outstanding balances was deleted.
Pegasystems Worldwide India Pvt Ltd v ACIT [I.T.A. No. 1758/HYD/2014] – TS-488-ITAT-2015(Hyderabad)-TP

37. The Tribunal held that for the purpose of falling under the definition of international transaction, at least one of the parties had to be a non-resident and therefore the purchase of know-how by the assessee, a joint venture between an Indian company (Matrix) and a South African company (Aspen), from the Indian company (Matrix) pursuant to an tri-partite agreement between the three aforesaid companies could not be considered as a deemed international transaction since both transacting parties were residents in India and the contention of the TPO that the transaction was a deemed international transaction on the basis that Aspen being a party to the agreement dictated the terms and conditions of the transaction, was invalid.
Astrix Laboratories Ltd v ACIT - (2016) 67 taxmann.com 28 (Hyderabad)

38. The Tribunal, relying on the decision in assessee's own case (wherein considering Bombay HC ruling in Vodafone, it was held that transaction of purchase of shares of AE cannot be regarded as international transaction and cannot be subject matter of investigation u/s 92), held that the when the transaction of purchase of shares was held to be outside the purview of the provisions of Sec.92 of the Act, the excess price paid for acquiring shares could not be treated as a deemed loan and an international transaction. Accordingly, it held that the transaction in question was on capital account and determination of ALP in respect of such transactions was outside the purview of Chapter X of the Act and deleted the TP-adjustment in respect of purchase of shares by assessee from its AEs.
TCG Lifesciences Pvt. Ltd (Formerly "TCG Lifesciences Ltd") vs. DCIT- [TS-921-ITAT-2017(Kol)-TP]- I.T.A No. 121/Kol/2016 & 647/Kol/2017 dated 17.11.2017

39. The Tribunal, relying on the decision in the case of Siro Clinpharm wherein it was held that amendment to Sec 92B was not retrospective at least to the extent pertaining to issuance of corporate guarantee, set aside CIT's revision order u/s 263 treating AO's order as erroneous & prejudicial to Revenue's interest as no TP-adjustment was made in respect of corporate guarantee extended by assessee to subsidiary/AE for AY 2010-11. Noting assessee's submission that corporate guarantee to an associate company was brought within the ambit of international transaction vide Finance Act 2012 (w.r.e.f. April 1, 2012). judicial precedents had held that such corporate guarantee was not an international transaction. Further, Form 3CEB was revised from April 1, 2013 (to cover transactions in the nature of guarantee) and assessee had already filed its tax return on October 8, 2010 (followed by revised return filed on March 30, 2012) for relevant AY 2010-11 i.e. before the amendment was made and before the new Form 3CEB had come into existence. Therefore, it held that when the amendment was brought in by the Finance Act, 2012 and when the Rules were notified on 10th June 2013, the assessee cannot be expected to have reported this transaction as international transaction prior to that. Accordingly, it held that there was no error in the order of the AO causing prejudice to the Revenue.

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EIH Ltd vs CIT-TS-609-ITAT-2017(KOL)-TP-ITA No. 530/kol/2015 dated 09.06.2017

40. The Tribunal held that in the absence of an agreement between the assessee and its AEs for the sharing of AMP expenses, the TPO was incorrect in concluding that the AMP expenses incurred by the assessee were for the benefit of its AEs and accordingly the AMP expenses could not be treated as an international transaction. The Tribunal noted that the very nature of the business of the assessee was such that it had to incur huge expenses for establishing its product in the Indian markets and therefore held that the arguments of the TPO / AO that the AMP expenses were incurred primarily for the benefit of the AEs were without merit. Accordingly, it held that the TPO had wrongly applied the provisions of Chapter X to the AMP expenses of the assessee.

Loreal India Pvt Ltd v DCIT - (2016) 47 CCH 0015 (Mum-Trib) Heinz India Pvt Ltd v Add CIT-TS-194-ITAT-2016 (Mum)-TP Goodyear India Ltd v DCIT - TS-226-ITAT-2016 (Del) – TP

41. Following the coordinate bench decision in assessee's own case for earlier year, the Tribunal held the assessee and Kaybee Exim Pte Limited, Singapore fell under the meaning of AEs as per the provisions of section 92A since Mr. Govind Karunakaran who was a Director and 99.9% shareholder of the assessee company was also a Director and Chief Operating Officer of Kaybee Exim Pte Limited, Singapore and, therefore, the condition of one enterprise participating directly or indirectly or through one or more intermediaries in its management or control or capital as prescribed under clause (a) & (b) of sub section (1) of section 92A were satisfied. Considering that the assessee had not brought any change in facts from the preceding year, the Tribunal dismissed assessee's appeal challenging the AO's treatment of KEPTL, Singapore as an AE of assessee on account of common director.

Kaybee Private Limited vs ITO [TS-898-ITAT-2018(Mum)-TP] ITA No.2166 and 2167/Mum/2015 dated 08.08.2018

42. The TPO had made the disallowance of foreign travel expenses incurred to the extent of Rs.24.66 lakhs since he was of the view that expenses were incurred for the benefit of AE and treated it as an international transaction accordingly, made the adjustment. The DRP accepted assessee's contention that expenses of Rs 24.66 lakh were incurred on foreign travel of employees and could not be considered as expenses incurred for benefit of AE and accordingly could not be considered as international transaction. Further, the DRP sustained addition to the extent of Rs 8.49 lakhs on account of details being furnished only to the extent of Rs 16.16 lakhs. The Tribunal deleted the disallowance of Rs 8.49 lakhs towards foreign travel expenses incurred for employees' visit to places of AE noting that assessee furnished two sets of statements, one containing full details of travel expenses (which was furnished before the TPO) and another one containing details of Rs 8.49 lakhs (which was furnished before the TPO) and opined that addition of Rs 8.49 lakhs could not be sustained since full details had been furnished by the assessee before the TPO and the expenses were incurred for the purpose of business.

Essar Power Limited vs ACIT [TS-1100-ITAT-2018(Mum)-TP] ITA No.1332/Mum/2017 dated 19.09.2018

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43. The Tribunal, relied on the decision of the co-ordinate bench in the case of the assessee for the earlier year and held that AMP expenditure could not be held to be an international transaction on the basis of probable incidental benefit to the AE absent an agreement for sharing AMP expenditure. It held that the Revenue had to show that there existed an agreement or arrangement or understanding between the assessee and its AE whereby the assessee was obliged to spend excessively on AMP in order to promote the brand of the AE in absence of which the impugned transaction could not be considered as an international transaction under section 92B of the Act.

Thomas Cook (India) Ltd v DCIT – TS-63-ITAT-2017 (Mum) – TP - ITA No.383/Mum/2016

44. The Tribunal ruling in favour of the assessee, held that the TP provisions under Chapter X of the Act were not applicable to the assessee's sale and purchase transactions with 2 concerns (viz. Durian Industries and General Woods). In noted that Durian Industries was an Indian Tax Resident incorporated under the Companies Act, 1956 and therefore the transactions with it would not be an international transaction u/s 92B as the section postulates at least one non- resident. In respect of General Woods, the AO sought to treat it as an AE on three counts, - (i) two shareholders of the assessee were also directors/shareholders in General Woods u/s 92A(2) (j), (ii) THE Shareholders were involved in fixing prices of transactions between assessee & General Woods u/s/ 92A(2)(i) (iii) the total purchases made by assessee form both the entities (Durian and Gneral Woods) exceeded 90% of total purchases. The Tribunal held / observed that i) 92A(2)(j) was not applicable as the TPO failed to demonstrate how the test mentioned in the said section was satisfied ii) Section 92A(2)(i) did not apply as the shareholders determined the purchase and selling prices for and on behalf of the assessee only and not for General Woods and iii) section 92A(2)(h) did not permit aggregation of purchases from different parties for the purpose of testing the limit of 90% prescribed. Accordingly, it held that the lower authorities had erred in considering transactions with Durian and General Woods as international transactions and deleted the TP adjustment.

Elder Exim Pvt Ltd vs DCIT-TS-689-ITAT-2017(Mum)-TP-ITA No.5385/Mum/2014, (A.Y. 2008-09) ITA No.2744/Mum/2014, (A.Y. 2009-10) ITA No.5386/Mum/2014, (A.Y. 2010-11) dated 16.08.2017

45. The Tribunal held that the impugned transaction i.e. the routing of an amount through the AE, which was immediately paid to a third party as an advance for purchase of film rights did not fall within the purview of international transaction under section 92B since the transaction was not between two associated enterprises, but in fact between the assessee and a third party and that too for the acquisition of rights and not as a loan or source of finance. Further, it held that since the transaction did not give rise to any income / benefit to the assessee or the AE, the transfer pricing provisions were not applicable and therefore deleted the addition made by the TPO on account of notional interest on such advances.

KSS Ltd v DCIT - TS-651-ITAT-2015 (Mum) – TP

46. The Tribunal held that R&D Cess and tax paid on technical know-how royalty could not be treated as an international transaction and since royalty payment was at arm's length price, no disallowance could be made by the TPO.

Johnson & Johnson Limited v Add CIT- TS-19-ITAT-2016 (Mum) - TP

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47. The Tribunal held that amendment in definition of International transaction u/s 92B, to the extent it pertains to issuance of corporate guarantee being outside scope of 'international transaction', could not be said to be retrospective in effect and has to be necessarily treated as effective from at best the assessment year 2013-14. It further held that merely because Legislature described an amendment as 'clarificatory' in nature, a call would have to be taken by the judiciary whether it was indeed clarificatory or not.
Siro Clinpharm (P)Ltd & Anr v DCIT - [2016] 46 CCH 0485 (Mum)- Trib

48. The Tribunal held that the interest free advances given by the assessee to its overseas subsidiary by incurring expenditure on behalf of the AEs without charging interest or without recovering the said amount, was to be considered as an international transaction under clause (c) of Explanation (i) to section 92B of the Act. The Tribunal further held if the assessee would not have entered into such type of transaction with unrelated parties, then the transaction between the related parties could not be considered at arms' length. Accordingly, the Tribunal directed the AO / TPO to compute interest on the said advance at the rate of LIBOR + 300 basis points.
Strides Shasun Ltd v ITO - TS-277-ITAT-2016 (Mum) - TP

49. The Tribunal held that in the absence of any direct evidence of incurrence of AMP expenses by the assessee for the benefit of its AE or on behalf of its AE, the AMP expenses could not be treated as an international transaction under section 92B of the Act. It held that probable incidental benefit to the AE would not make the transaction an international transaction. Accordingly, it deleted the addition made by the TPO arrived at by benchmarking the AMP expenses of the assessee with the industry mean AMP expenses to total revenue.
Thomas Cook (India) Ltd v DCIT - TS-307-ITAT-2016 (Mum) – TP

50. The Tribunal held that losses incurred by assessee on derivative contract entered with a third party (ICICI Bank Mumbai) to cover forex fluctuation with respect to interest payments made to the foreign bank on loan borrowed for purpose of further advancing to AE, was not an international transaction between assessee and AE as the said loss was incurred under a contract between assessee and third party and thereby, not liable to TP adjustment.
Aries Agro Limited vs Dy.CIT [TS-1326-ITAT-2018(Mum)-TP] ITA No.1452 /Mum/2017 dated 28.11.2018

51. The Tribunal held that writing off of obsolete stock worth Rs. 6.48 crore by the assessee was an extraordinary event and not an international transaction whose fair market value had to be assessed under the TP-provisions. It noted that similar write-offs were made in earlier years which had not attracted TP-adjustments by TPO and that there were no new facts warranting addition in the current year. Further, examining the transaction against the distribution agreement between AE and assessee, it concluded that the AE was not involved in any manner in the writing off of the obsolete stock since the agreement was limited to replacement/guarantee for goods with manufacturing defects and not for those which were obsolete or out-of-fashion (like the written-off goods). Accordingly, it deleted the TP-adjustment.

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Safilo India Private Limited vs. DCIT - TS-12-ITAT-2018(Mum)-TP - I.T.A./588/Mum/2015 dated 12.01.2018

52. The Tribunal restored the issue of determination of Carpro Netherlands as an AE of the tested party i.e. assessee to the CIT(A) noting that the CIT(A) had not passed a speaking order in accordance with the principles laid down u/s.250(6). The CIT(A) had held that Carpro Netherlands was an AE of the assessee as per sec 92A(2)(g) since it provided its platform for the provision of software services and thus, he opined that the assessee was dependent on the knowhow of the aforesaid entity and could not provide its services without it. The Tribunal considered the assessee's contention that it was a general industry practice to share the platforms on which software was to be developed with parties who had been appointed to develop software and further, the business of assessee was not wholly dependent upon the knowhow of Carpro Netherlands and apart from export of software services (which constituted only 20% of revenue), it was providing software development services as well as trading of software licenses in local market.The assessee relied on the coordinate bench decision of Page Industries wherein it was held that assessee and foreign company were not AEs due to absence of defacto control in the business inspite of the assessee being a licensor of the brand name of the foreign company for exclusive manufacturer and marketing of goods. The Tribunal directed the CIT(A) to adjudicate the issue after considering the ratio of the aforesaid decision.

Magic Software Enterprises India Pvt Ltd vs ITO [TS-747-ITAT-2018(PUN)-TP] CO No.98/Pun/2014 dated 18.07.2018

53. The Tribunal held that for a deemed AE to exist, the goods / articles manufactured / processed by one enterprise are sold to the other enterprise or to persons specified by the other enterprise and the prices and conditions relating thereto are influenced by such other enterprise. Therefore in-spite of the first condition being satisfied in the case of the assessee, since there was no influence exercised over the prices, no deemed AE relationship existed.

DCIT v WB Engineers International Pvt Ltd [ITA No 523 / PN / 2014] - TS-404-ITAT-2015(PUN)-TP

54. The Tribunal held the assessment order passed was invalid since absent an international transaction with Associated Enterprise ("AE"), normal assessment was to have been completed without making reference to TPO. It rejected the stand of the Revenue that Cummins Turbo USA (majority importer of plates manufactured by assessee), being able to regulate the price at which goods were sold by the assessee, was a deemed AE u/s 92A(2) of the Act, and held that the pricing between Cummins and the assessee was fixed as per mutual understanding between the two and in case Cummins found an alternate supplier who was offering competitive cost, the assessee was to be given 30 days' time to respond to the competitive threat failing which a mutually acceptable phase out would be negotiated between the parties and thus it could not be concluded that Cummins controlled the price at which goods were sold by the assessee. It further observed that there was no connection whatsoever by way of participation in management or control or capital by the entities or its subsidiaries (either directly or indirectly) and therefore both the enterprises had not fulfilled the conditions laid down in Sec 92A(1) and were not AEs.

JCIT v Suttati Enterprises(P)Ltd - TS-234-ITAT-2016(PUN)-TP

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Specified Domestic Transactions

55. The Court set aside the order passed by the AO making a domestic TP assessment reference to the TPO stating that donations made by the assessee to a charitable institution were specified domestic transactions as the definition of specified domestic transaction contained in Section 92BA of the Act includes any transaction referred to 80A of the Act, on the ground that the AO had not considered the submissions filed by the assessee and had not applied his mind to the objections contained therein and failed to substantiate how exactly the said transaction fell under the definition of specified domestic transaction under section 92BA of the Act.
DSP Adiko Holdings Pvt Ltd v DCIT - TS-622-HC-2016 (Bom) - TP WRIT PETITION NO.1424 OF 2016 WITH WRIT PETITION NO.1573 OF 2016

56. The Court, prima facie, held that the notice issued by AO making reference to TPO and TPO's consequent notice to assessee for AY 2013-14 to be without jurisdiction. The notices proceeded on the basis that amount paid by assessee to cane growers was an expenditure which would be a specified domestic transaction u/s 92BA. However, the Court held that the expenditure incurred by a sugar co-operative society would not be a 'specified domestic transaction' as it was not one of the entities referred to in Sec40A(2)(b).
Satpuda Tapi Parisar Sahakari Sakhar Karkhana Ltd vs DCIT [TS-517- HC-2016(BOM)-TP] WRIT PETITION NO. 6158 OF 2016

57. The Tribunal remitted assessee's claim of expenditure with respect to payment of remuneration of directors (which fell under the erstwhile specified domestic transactions provisions under clause (i) of Sec. 92BA) back to the file of AO for AY 2014-15 noting that the issue was squarely covered by co-ordinate bench ruling in assessee's own case for earlier year wherein similar issue was remitted with a direction to the AO to adjudicate the issue of claim of expenditure in accordance with law after affording opportunity of being heard to the assessee after holding that directors remuneration transaction no longer fell within the definition of specified domestic transactions after omission of Clause (i) of Sec. 92BA(i) by the Finance Act, 2017 (which would be deemed to be omitted since inception) and hence the proceedings initiatied or action taken under clause (i) become otiose.
Texport Overseas Private Limited vs Dy.CIT (TS-996-ITAT-2018(Bang)-TP) IT(TP)A No.2213/Bang/2018 dated 12.09.2018

58. The Tribunal quashed the reference made by the AO to the TPO under Section 92CA as well as the consequential order passed by the TPO / DRP noting that the transaction in question was that of payment of directors remuneration (transaction under Section 40A(2)(b) which fell under the specified domestic provisions) and held that since transactions under Section 40A(2)(b) of the Act were omitted from the SDT provisions by Finance Act, 2017, the transaction, though pertaining to AY 2013-14 would also no longer fall under the definition of Specified domestic transactions. It held that once the clause was omitted by a subsequent amendment, it would be deemed that the clause was never on the statute. Accordingly, it remitted the assessee's claim of expenditure back to the file of the AO for verification under the normal provisions of the Act.

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Texport Overseas Pvt ltd v DCI – TS-1032-ITAT-2017 (Bang) – TP - IT(TP)A No.1722/Bang/2017

59. The assessee claimed expenditure relating to payment of remuneration of directors. The TPO upon reference by the AO benchmarked the ALP of the transaction at Nil observing that the transaction was a specified domestic transaction as defined under clause (i) of Section 92BA (transactions referred to under Section 40A(2)(b). The assessee raised an additional ground before the Tribunal contending that since transactions under Section 40A(2)(b) were omitted from the definition of international transactions vide amendment made in Finance Act., 2017, transactions under Section 40A(2)(b) could not be considered as international transactions even for the impugned AY 2013-14. Relying on the rulings of the Apex Court in Kolhapur Canesugar Works and General Finance Co & of the jurisdictional HC ruling in GE Thermometrics, the Tribunal held that once a particular provision of section is omitted from the statute, it shall be deemed to be omitted from its inception unless and until there is some saving clause or provision to make it clear that action taken or proceeding initiated under that provision or section would continue and would not be left on account of omission. Noting that clause (i) of Sec. 92BA was omitted by Finance Act, 2017 w.e.f. April 1, 2017, it observed that it would be deemed that clause (i) was never on the statute more so since while omitting the clause (i) of section 92BA, nothing was specified whether the proceedings initiated or action taken under the section would continue. Therefore, the proceeding initiated or action taken under that clause would not survive at all"; Accordingly, it quashed the reference made by AO to TPO u/s 92CA as well as the consequential order passed by TPO/DRP and directed AO to re-adjudicate the issue of claim of expenditure incurred which could not be done on account of provisions of Sec. 92BA(i).

Texport Overseas Private Limited vs. DCIT - TS-1032-ITAT-2017(Bang)-TP - IT(TP)A No.1722/Bang/2017 dated 22.12.2017

60. The Tribunal, relying on the decision in the case of Keihin Panalfa –(381 ITR 407) [wherein it was held that for the purpose of transfer pricing adjustment, the transaction of the assessee with Associated Enterprise outside the country alone had to be taken into consideration and the domestic transaction unless it was a Specified Domestic Transaction, could not be a basis for making any adjustment], reversed DRP's order making entity level adjustment. It held that TP- adjustment has to be made only in respect of transactions with AE after comparing the transaction made by similarly placed company in uncontrolled transaction with non-AEs.

Yongsan Automotive India Pvt. Ltd. vs. ACIT-TS-1046-ITAT-2017(CHNY)-TP /ITA No.357/Mds/2017 dated 16.11.2017

Others

61. The Court held that unutilized subsidy received from an Associated Enterprise could not be reflected as income unless corresponding expenditure was also debited to the Profit and Loss account as it would be contrary to the matching concept and therefore receipt of the said subsidy could not be subject to transfer pricing.

CIT v Canon India Pvt Ltd - (2015) 93 CCH 0172 Del HC

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62. The Tribunal held that where conditions stipulated by Article 9(1) (Associated Enterprises article) of DTAA for application of arm's length standard are shown to exist, domestic TP law would apply since DTAAs contain no machinery provision for applying 'arm's length standard' envisaged in Article 9(1). It held that once it was undisputed that the arms length standards are to be applied in computation of taxable profits, as is the specific mandate of article 9, it is only axiomatic that since the manner in which arm's length standards are to be applied has not been defined by the treaties, the mechanism provided under the domestic law must hold good. It held that Article 9(1) is thus, in a way, an enabling provision, and the TP mechanism under the domestic law is the machinery provision. It further held that the provisions of article 9(1) permit ALP adjustment in all situations in which the arm's length standards require higher profits in the hands of any one of the enterprises and could not be read to confine the application of transfer pricing to domestic entities only. Accordingly, it dismissed appeals filed by assessee (a Dutch company and a non-resident) seeking relief from TP adjustment of Rs. 100 crores fees for technical services ('FTS') received from its Indian AEs, which were subject to tax @ 10% under India Netherlands DTAA and rejected the plea that Article 9 of the Indo-Dutch DTAA does not permit ALP adjustments in the hands of non-resident.
Shell Global Solutions International BV [TS-921-ITAT-2016(Ahd)-TP] (I.T.A. Nos.: 2933/Ahd/2011)

63. The Tribunal rejected assessee's contention that since Chapter X has not been referred to in section 4 & 5 TP adjustment could not be subjected to tax. It held that as per section 4 of Income tax Act, 1961, income tax is chargeable on Total Income and as per section 5, total income includes all income received or deemed to be received in India or income that accrues or arises or is deemed to accrue or arise in India. It held that unless it is shown that the International transaction is not liable to tax, no dispute could be raised about the applicability of Chapter X because section 5 provides that subject to the provisions of the Act, the Total Income includes various types of incomes and since Chapter X is part of the Act, the same has to be applied wherever applicable. Noting that Chapter X provides for the manner of computation of income from an international transaction, it held that there was no merit in the submission of the
assessee.
Insilica Semiconductors India Pvt Ltd [TS-346-ITAT-2017(Bang)-TP- ITA No. Dated 15.03.2017

64. Where the assessee's contented that Sec 92 should not have been invoked for making TP-addition as assessee's income had been computed u/s 44 read with First Schedule, the Tribunal referring to the provisions of section 44 held that only provisions relating to the computation of income chargeable under the head "Interest on securities", "Income from house property", "Capital gains" or "Income from other sources", or in section 199 or in sections 28 to 43B' are inoperative and provisions relating to section 92 were applicable to the assessee carrying on insurance business. Further, noting that that there are 2 computations made in determining total income viz. first computation of income under respective heads under Chapter IV (which exercise is undertaken by AO) and second computation of income from international transaction by determining its ALP (which exercise is done by TPO), it held that section 44 simply substitutes the first computation and it has no role whatsoever in so

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far as the second computation of determination of ALP of an international transaction u/s 92 of the Act is concerned. Accordingly, it dismissed assessee's appeal.

ACIT vs. Max New York Life Insurance Company Ltd-TS-822-ITAT-2017(DEL)-TP dated 17.10.2017

65. Relying on the decision of the co-ordinate bench in the assessee's own case (TS-822-ITAT-2017(DEL)-TP) for the earlier year, the Tribunal rejected the assessee's contention that provisions of Sec 92 should not have been invoked for making TP-addition as assessee's income had to be computed under section 44 of the Act as it was engaged in general insurance business and held that the provisions in Section 44 of the Act do not substitute the provisions contained under Section 92 which deal with the determination of ALP arising out of an international transaction. Regarding Revenue's appeal against CIT(A) order deleting transfer pricing addition, following the earlier year's decision it remitted the ALP computation to the AO/TPO noting that the co-ordinate bench had set aside the CIT(A)'s order observing that the CIT(A) failed to appreciate that the impugned international transaction was more in the nature of a short-term assignment of employees and not receipt of consultancy services as claimed by assessee. It further noted that the Tribunal in the earlier year had observed that the CIT(A)'s deletion of TP-addition was in complete disregard of TPO's elaborate findings for rejecting assessee's adoption of CUP-method as the consulting firms whose rates were cited in the TP study report were only quotations and not actual rates. However, it also rejected TPO's approach of computing ALP under TNMM by considering cost of seconding an employee to assessee in another year to compute daily charge-out rates. Accordingly, it held that the matter required fresh consideration.

ACIT vs. Max New York Life Insurance Company Ltd - TS-822-ITAT-2017(DEL)-TP - ITA No.1768/Del/2011 dated 17.10.2017

66. The Tribunal laid down law on applicability of TP-provisions to admitted bogus/sham transaction revolving around assessee's purchase of drilling Rig from AE on hire purchase basis and its further sale back to the AE. The Tribunal noted that, u/s 92 if an international transaction is proved to be not genuine, the transfer pricing provisions are not triggered and held that only a declared and accepted genuine international transaction can be subjected to the TP regulations.

Further, regarding TP-adjustment under Payment of instalments of principal under hire purchase agreement, the Tribunal considered assessee's claim that since no deduction was claimed by assessee in the tax computation in respect of the principal amount, no addition could have been made by taking Nil-ALP of the transaction.

Further, the Tribunal deleted TP-adjustment on repossession of Rig by its AE (i.e. sale back by assessee, represented by the amount covered under 'Deletion' column in the Schedule of Fixed Assets of the assessee]. It stated that Revenue's Nil-ALP determination on this transaction would have the effect of the assessee claiming higher depreciation and putting the assessee in a more advantageous position as against the non-application of the transfer pricing provisions. Consequently, it held that that the transfer pricing provisions need not be given effect to as per the mandate of sub-section (3) of section 92.

M/s. Mitchell Drilling India Pvt Ltd vs DCIT Circle 6(1)- TS-252-ITAT-2018(Del)-TP- ITA No 5921/Del/2010 dated 11.04.2018

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67. The Tribunal held that transfer pricing adjustments could not be added to book profits under MAT as it did not fall under the permissible adjustments enumerated in Explanation 1 to Section 115JB(2) of the Act which are the only adjustments possible to book profits under section 115JB of the Act. It held that the AO could only travel beyond the net profits declared by the assessee if the accounts were not in accordance with Part I&II of Schedule VI of the Companies Act or if the wrong accounting policies, standards were adopted.
Cash Edge India (Pvt) Ltd v ITO (ITA No 64 / Del / 2015) – TS-443-ITAT-2015(Del) – TP

68. The Tribunal rejected the TP adjustment of Rs. 1.30 crores to the amount of book profits under minimum alternate tax (MAT) provisions and held that there was no provision under the law that permitted the AO to make an adjustment on account of transfer pricing addition to the amount of profit shown by the assessee in its profit and loss account, for the purpose of computing book profit u/s 115JB. It noted that section 115JB is a self- contained code which prescribes certain adjustments permissible to book profit, whereas TP adjustments are governed by altogether different sets of provisions contained in Chapter X and that such an approach was highly unfair and would result in undue and avoidable hardship to the tax payers.
Owens Corning (India) Pvt Ltd. v DCIT - TS-245-ITAT-2016(Mum)-TP Owens Corning (India) Pvt. Ltd. v DCIT - TS-269-ITAT-2016 (Mum)

b. Tested Party

69. The Court dismissed Revenue's appeal on selection of foreign AE as tested party issue absent discussion in CIT(A) / ITAT order on the said issue. It noted that the assessee had used 2 tested parties (Dupont Asia Pacific and Dupont USA) and selected 7 and 20 comparables respectively for benchmarking its transactions, however the TPO rejected the same and applied CUP instead of assessee's TNMM. It observed that even the assessee met with only limited success in its transfer pricing exercise and its most appropriate method was also rejected. Accordingly, it dismissed the appeal holding that the question of law framed did not arise for consideration.
Pr. CIT vs. E.I. Dupont India Pvt Ltd - TS-138-HC-2018(DEL)-TP - ITA 25/2017 dated 13.02.2018

70. The Court allowed the assessee's appeal challenging the order of the Tribunal wherein the Tribunal held that a foreign AE could not be considered as a tested party as it lacked statutory sanction since there was nothing in section 92B of the Act prohibiting such consideration. Accordingly, since the Tribunal had remitted the issue of consideration of most appropriate method and appropriate comparables, the Court held that it would be appropriate for the TPO to consider the question of adopting a foreign AE as a tested party as well.
GE Money Financial Services Pvt Ltd v Pr CIT - TS-697-HC-2016 (Del) - TP - ITA 662/2016, CM Nos. 31740-31741/2016

71. Where in the previous assessment years, the issue of acceptance of a foreign tested party for the purpose of benchmarking international transactions of the assessee was

favorably disposed of by the Tribunal on the ground that it was the least complex and the requisite information was available, the Tribunal in the instant case noted that the Revenue could not point out any distinction in the facts for the relevant year as compared to the previous year and set aside the issue to the TPO directing the TPO to conduct the benchmarking process in accordance with the prior years.

General Motors India Pvt Ltd – TS-939-ITAT-2016 (Ahd) - TP

72. The Tribunal allowed assessee's appeal for selection of foreign AE as tested party for AYs 2003-04 and 2004-05 and directed the TPO to verify financial data of the foreign comparables as provided by assessee. The Assessee provided Express services within India for its Group companies, and contended that in the case of outbound consignments (which generated approximately 97% of overall revenue), assessee was acting as an entrepreneur whereas in respect of inbound consignments, it was acting as a mere service provider for delivery of the consignments to destinations within India. Thus, the assessee considered the Group companies as the tested party for outbound consignments and itself as the tested party for inbound consignments, and selected independent service providers from European and US region as foreign comparables. The Tribunal noted that that the Revenue did not place any arguments against assessee's contentions, and considering the lack of Indian comparable companies, it held that it was more appropriate to select foreign AE as the tested party.

TNT India Pvt Ltd [TS-920-ITAT-2016(Bang)-TP] (ITA No. 1443 & 1444/Bang/08)

73. The Tribunal rejected CIT(A)'s adoption of assessee's AE as tested party and selection of Indian company as comparable for foreign tested party, by holding that the entire exercise of determining the ALP by the CIT (Appeals) was contrary to the provisions of transfer pricing. It restored the issue to the file of AO / TPO for deciding the matter afresh by considering segment-wise data of the assessee & then comparing it with comparable companies in light of various judicial precedents; and further directed adoption of 15% RPT filter as against 25% adopted by TPO.

Kshema Technologies Ltd v ACIT - TS-182-ITAT-2016(Bang)-TP

74. The Tribunal upheld the assessee's selection of foreign AE as tested party for benchmarking international transaction of provision of IT/IT enabled services for AY 2010-11, rejecting the Revenue's contention that reliable data was not available in respect of foreign comparables. Relying on the decisions of the Tribunal in Ranbaxy Laboratories [TS-173-ITAT-2016(DEL)-TP], General Motors [TS-215-ITAT-2013(Ahd)-TP] and Development Consultants [TS-3-ITAT-2008(Kol)], it held that there was no bar in treating foreign AE as tested party merely because data of comparable companies were not available so long as the following two conditions were fulfilled i.e. i) data should be available in public domain and ii) assessee has furnished all relevant data to tax administration. Noting that both these conditions were fulfilled as the relevant data from Global Symposium database used by assessee was available in public domain and had also been furnished to the TPO including entire detail of search process, business description and P&L accounts, the Tribunal held that the Revenue could have accessed the said sources and conducted comparability analysis. It also observed inconsistencies in TPO's approach noting that the foreign AE had been

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accepted as tested party in preceding year as well as in the current year for benchmarking marketing support services. Accordingly, it allowed the assessee's appeal.
IDS Infotech Ltd. Vs DCIT - TS-184-ITAT-2017(CHANDI)-TP - ITA No.130/Chd/2016 dated 09.03.2017

75. The Tribunal allowed selection of foreign AEs (engaged in sales and distribution activities or secondary manufacturing) as tested party, being the least complex entity, while benchmarking assessee's international transactions drawing support from assessee's Advance Pricing Agreement (APA) signed with CBDT for AY 2014-15, wherein the CBDT had approved selection of foreign AEs as tested party with TNMM as the most appropriate method. The Tribunal further observed that the assesse's functional, assets & risk (FAR) analysis as well as international transactions for APA year as well as year under appeal were identical and adequate financial data for comparison on region basis/country were available. Further, even though no separate books of accounts were maintained for the units, the Tribunal also allowed the section 80IB/80IC deduction claim for AY 2008-09 on the ground that Sec 80IA(7) only provided that accounts of the eligible undertaking should be audited by an accountant and it did not talk about maintenance of 'separate books of accounts'.
Ranbaxy Laboratories Ltd - TS-707-ITAT-2016 (Del)

76. The Tribunal remitted the matter, with respect to determination of ALP for benchmarking of the debt collection services & telemarketing rendered by assessee on the basis of adopting the foreign AE as the tested party, for fresh determination at the assessment stage. Noting that the TPO and CIT(A) had not assigned any reason for rejecting the foreign AE as a tested party, considered the submissions of the assessee that the tested party has to be the least complex entity which was the case as the foreign AE owned insignificant infrastructure whereas operating assets were mostly owned by the assessee and the risk of performance of services and risk of quality and timeliness of services were also with the assessee and further the assessee was involved in the actual business of debt collection. It noted peculiar business model and functional relationship between the assessee and AE and restored the matter to the AO/TPO.
Global Vantedge Pvt Ltd vs. ACIT [TS-895-ITAT-2018(DEL)-TP] ITA Nos.2093 and 2386/Del/2014 dated 23.08.2018

77. In the case of an assessee engaged in manufacturing of optical and magnetic storage media, the Tribunal directed the AO to re-examine issue of selection of assessee's foreign AE [GDM Dubai] as tested party for AY 2005-06 and 2006-07 in the event the assessee was able to provide complete financials of GDM Dubai along with complete financials of relevant comparables required to benchmark the international transaction. The Tribunal also directed the TPO to verify if the AE was the least complex entity requiring minimum adjustment and for which comparables are available in public domain. It rejected assessee's submission regarding its inability to obtain the required financials of tested party. The Tribunal opined that in case the assessee was not able to provide the financials of its AE as mentioned, it shall be treated as tested party and TPO shall consider the other argument advanced by assessee that it cannot be expected to earn profit more than the combined profit of assessee and AE which was accepted by the Tribunal for earlier year.

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Moser Baer India Ltd. vs. DCIT [TS-334-ITAT-2018(DEL)-TP] ITA Nos.883,894/Del/2008 and 988, 1139 and 4484/Del/2013 dated 01.05.2018

78. The Tribunal rejected the adoption of a foreign AE as a tested party for the purpose of benchmarking the intra group services received by the assessee from its AE. It held that under the TNMM, the profit margin realized by the Indian assessee from the transaction with its foreign AE was to be compared with the margin earned by the comparable companies and that there was no question of substituting the profit realized by the Indian enterprise with the profit realized by the foreign AE and that the assessee's methodology of adopting the foreign AE as the tested party was a patently unacceptable position having no sanction under the TP laws of India. Further, on examination of the search process adopted by the assessee it held that the foreign comparable companies selected by the assessee were completely lacking comparability and therefore held that apart from contending that the foreign AE should have been considered as a tested party, there was no material to substantiate the same since the data chosen by the assessee was neither relevant nor reliable.
GE Money Financial Services Pvt Ltd - TS-457-ITAT-2016 (Del) - TP – ITA No.440/ Del/ 2014

79. The Tribunal upheld the TPO's rejection of the foreign AE as a tested party observing that for accepting a foreign AE as a tested party all necessary information about the tested party and foreign comparables adopted ought to be provided which was not done so in the instant case.
Sutherland Healthcare Solutions Ltd v ITO – TS-947-ITAT-2016 (Hyd) – TP

80. The Tribunal upheld the CIT(A)'s order accepting separate benchmarking of assessee's transactions under Business model 1 - receipt of marketing & support services from AE (choosing foreign AE as tested party) and Business model 2 - assessee's rendering of ITeS to AE (choosing assessee as tested party). It noted that under Business model 1, risks and rewards were with the assessee and AEs [which were remunerated on cost plus basis] were insulated from the risks borne by assessee as an entrepreneur and therefore upheld CIT(A)'s view that AE was rightly chosen as the tested party being the least complex entity. Vis-à-vis Business model 2, it noted that major risks were borne by WNS UK, which functioned as an entrepreneur and therefore held that the assessee (which was only a captive service provider bearing limited risks) was rightly chosen as the tested party. Observing that the transactions undertaken by assessee were not interlinked as various transactions formed part of different business models adopted by assessee, the Tribunal held that the TPO's approach of aggregating these international transactions and benchmarking the assessee at an entity level was not appropriate since the far profile of the Indian assessee was different in both the transactions.
ITO vs. WNS Global Services Pvt. Ltd - TS-474-ITAT-2018(Mum)-TP – ITA No 2318 / Mum / 2009 dated 04.05.2018

81. The Tribunal admitted assessee's additional ground for AY 2007-08 seeking consideration of overseas AE as a 'tested party' and remitted the matter to the file of AO/TPO for fresh enquiry and determination as complete details were not available on record but were filed as

additional evidence. Referring to the definition of 'tested party' under OECD TP guidelines in absence of corresponding definition in domestic law, it directed the AO / TPO to consider the following relevant factors while determining whether the foreign entity could be considered as a tested party viz. (a) whether it was the least complex entity (b) whether reliable and accurate data for comparability was available and (c) whether the data available could be used with minimal adjustment.
Nivea India Private Ltd vs DCIT-TS-668-ITAT-2017(Mum)-TP-ITA no. 121/mum/2013 dated 21.08.2017

c. Most Appropriate Method

Comparable Uncontrolled Price Method

82. The Apex Court dismissed Revenue's SLP against Rajasthan HC decision that had upheld Tribunal's order deleting Rs.2.07cr TP-adjustment. The Tribunal had followed the earlier year decision in the assessee's own case wherein the Tribunal had rejected the TPO's approach of adopting CUP method and determining the ALP at Nil (by applying benefit test). Thus, in the earlier year, the Tribunal had accepted the assessee's benchmarking of the royalty payment to AE using TNMM, holding that the TPO/ AO could not justify the application of CUP method.
Pr. CIT vs. Sakata Inx (India) Ltd [TS-326-SC-2018-TP] SLP (Civil) Diary No.(s) 14221/2018 dated 04.05.2018

83. The assessee provided two types of broking services to related as well as unrelated parties viz., Delivery Verses payment (DVP) and direct custodian settlement (DCS) and benchmarked these international transactions using TNMM as MAM. Since an internal CUP was available, the TPO rejected TNMM and applied CUP. However, it rejected assessee's contention that it had incurred lower cost in providing broking services to related parties than to unrelated parties and accordingly adjustment for additional cost incurred in transaction with unrelated parties was to be allowed to the assessee. The CIT(A) observed that there were substantial differences between the functions undertaken and risks assumed by assessee while providing broking to related and unrelated parties, the TPO ought to have granted adjustment sought by the assessee for additional cost incurred for unrelated parties and accordingly deleted the adjustment. Tribunal upheld the order of CIT(A). The Court observed that CIT(A) and Tribunal had rightly accepted the accepted the differences in functions performed and the risk undertaken by the assessee w.r.t the transaction between related and unrelated parties and accordingly it held that where the rates charged by the assessee to related parties and unrelated parties were not the same, CUP method could be used after making adjustments to the rate charged by the assessee to related and unrelated parties.
J P Morgan India Pvt Ltd-TS-568-HC-2017(BOM)-TP-ITA No 1599 of 2014 dated 07.07.2017

84. The Court admitted the assessee's appeal on the following questions of law – "1. Did the ITAT fall into error in reversing the CIT (A)'s decision on the appropriateness/maintainability of CUP as the most appropriate for determining the ALP in the circumstances of the case? 2. Did the

ITAT fall into error in its treatment of the foreign exchange fluctuation as far as the ALP determination was concerned?"

Ecocat India Pvt. Ltd vs. Pr. CIT - TS-111-HC-2018(DEL)-TP - ITA 152/2018 dated 09.02.2018

85. The Court held that In application of the CUP method the authorities have to go by what was actually paid or charged in the comparable uncontrolled transaction and not the price payable or chargeable in case of an eventuality, which never occurred. Therefore, the Revenue was incorrect in considering the additional discretionary interest rate chargeable by the Bank in the event of default in repayment of loan taken by assessee for benchmarking the interest receivable by the assessee on loans given to its AEs, since the assessee had neither defaulted in its repayments nor paid the additional interest.

CIT v Bumi Highway India Ltd (ITA No 621 / 2015) – TS-437-HC-2015(Del) TP

86. The Court held that the CUP method was the most appropriate method for benchmarking the residual profits shared between the assessee, a freight forwarding service provider, and its AE, which were split in the ratio of 50:50. It upheld the finding of the Tribunal that in the business line of the assessee, the business model of sharing residual profits in equal ratio was a standard practice and therefore no different from a third party scenario.

Pr CIT v Toll Global Forwarding India Pvt Ltd (ITA 374/2015 & ITA 396/2015) – TS-598-HC-2015 (Del) – TP

87. The Court upheld Tribunal's order wherein it rejected the TPO's imputation of markup of 3% on cost since it was without any basis against the assessee's claim of 10% in respect of its fees for IT services. The Revenue also admitted that nowhere on record were there any specific comparables before the TPO to justify the estimation adopted by the TPO.

Pr.CIT vs Sabic Innovative Plastic India Pvt. Ltd. [TS-1089-HC-2018 (Guj)] ITA No.248&231 of 2018 dated 31.07.2018

88. The Court held that the Tribunal was correct in remanding the issue of determination of ALP of the 12 international transactions undertaken by the assessee during the relevant year since, the assessee had adopted both the CUP method as well as TNMM to justify the ALP of the transactions but the TPO had discarded CUP for all the transactions without providing any cogent reasons and where one method for determination of ALP was being preferred over another, the selection of that method was to be justified with proper reasoning.

Honda Motorcyle& Scooters India Pvt Ltd v ACIT - TS-660-HC-2016 (P&H) - TP I. T. A. No. 345 of 2015

89. The Tribunal dismissed Department's appeal and upheld the CIT(A)'s order wherein CUP was accepted to be the MAM and assessee was taken as the tested party following the decision of coordinate bench in assessee's own case wherein it was held that the assessee [engaged in procuring medicines and disposables from suppliers] and not the AE should be the tested party. The Tribunal in the earlier year had rejected the contention of the TPO that AE should

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be the tested party since the AE was sourcing materials from the Indian manufacturers much before the setting up of the assessee company hence had intangibles in form of supplier list and bore all types of risks and thus, it was the more complex entity.

ACIT vs Missionpharma Logistics Pvt Ltd [TS-872-ITAT-2018(Ahd)-TP] ITA No.1352/Ahd/2015 dated 02.08.2018

90. The Tribunal deleted the TP adjustment on call centre services provided by assessee to its US-based AE noting that the assessee's transactions were at ALP under internal CUP, internal TNMM as well as external TNMM. Vis-à-vis internal CUP, it noted that the average hourly rate earned from AE in USA (Rs. 274.39 per hour) was higher than rate earned from Non AEs in UK (Rs. 108.82 per hour) and dismissed the contention of the Revenue that the internal CUP was not an appropriate method considering different pricing mechanism for AE and Non AEs. As regards the TPO's contention i.e. that there was a difference in risk profile between AE and Non-AE transactions for which no accurate adjustment could be made, it held that even if the adjustment was made, it would further reduce the average hourly rate charged from the Non-AEs which was lower than the average hourly rate charged from AE in any case. The Tribunal also adjudicated on the appropriateness of internal TNMM and observed that the services provided to AE and non-AEs were identical and that the functions performed, assets used and risks assumed (FAR) in AE as well as non AE business were also similar and therefore held that even internal TNMM could be considered as most appropriate method as per which the operating margin for the AE transactions (74.92%) was higher than non-AE transactions (30.90%).

Vis-à-vis External TNMM, it rejected the Revenue's argument for the exclusion of All sec and CG VAK and held that i) All Sec was wrongly excluded on account of non-satisfaction of the export filter of 75 percent whereas its export sales to total sales was 74.45% and ii) CG Vak though functionally comparable was wrongly excluded merely because its segmental turnover was less than 1 crore. Accordingly, it noted that once these two companies were included as comparable, even under External TNMM, the assessee's international transactions would be at ALP.

Effective Teleservices Pvt Ltd vs. ACIT - TS-75-ITAT-2018(Ahd)-TP - ITA. No: 2411/ AHD/ 2014 dated 16 -01-2018

91. The Tribunal rejected Revenue's contention relating to rejection of books of accounts maintained by the assessee by relying on assessee's own order passed by the Co-ordinate bench for the earlier year as well as the HC order upholding the same on further appeal by the department. In the earlier year, it was held that since the assessee had followed the recognized accounting standard issued by ICAI and no major defects had been found by the AO in the assessee's books, the AO could not reject the said books.

Further, the Tribunal held that the transaction of executing the onshore part of a project by the Indian PE of the Chinese entity (where the project was awarded by Indian companies to the HO of Chinese entity) between the Indian PE of Chinese entity and its HO in China was an international transaction and subject to transfer pricing provisions. The Tribunal further upheld the CIT(A)'s order, relating to rejection of TNMM (applied by TPO) and accepting of CUP method for benchmarking the said transaction consequent to which there would be no adjustment. Further, the Tribunal also held that there was no difference in the functions performed, asset employed, risk undertaken, price charged in comparable uncontrolled

transactions and the entire profit of the foreign entity was charged to taxation through its PE in India and thus there was no shifting base of profits.

ADIT (Intl Tax)-II vs Shandong Tijun Electronic Power Eng. Co Ltd – TS-353-ITAT-2018(Ahd)-TP- ITA No 2926/Ahd/2014 dated 13.04.2018

92. The Tribunal rejected TPO's selection of TNMM as the MAM and accepted the CUP method applied by assessee for benchmarking its import transactions in manufacturing segment by following the coordinate bench decision in assessee's own case for AY 2006-07 wherein CUP method was accepted on basis of consistency as even in subsequent years, the TPO had applied the CUP method. The coordinate bench in assessee's own case for AY 2010-11 had directed the AO/TPO to follow DRP's directions which was to adopt the internal CUP in view of product category being identifiable. It also noted that the findings of the DRP in the subject year appeared to be on wrong appreciation of facts since it had stated that the assessee had applied weighted average rate of purchase of products from AE's itself as internal CUP and thus, concluded that assessee had benchmarked under internal CUP on basis of controlled transactions which was incorrect whereas the TPO in his order had clearly stated that the assessee had adopted weighted average price of unrelated vendors as an internal CUP.

Lenovo (India) Private Ltd vs Dy.CIT [TS-802-ITAT-2018(Bang)-TP] IT(TP)A No.74/Bang/2014 dated 06.07.2018

93. The Tribunal held that internal CUP was not the most appropriate method for benchmarking the import of electro-optic components from AEs as the assessee failed to establish that the purchases made from AE as well as non-AEs were in respect of identical products and in the absence of such similarity CUP method could not be applied. Accordingly it held the TNMM to be the most appropriate method.

Alpha ITL Electro Optics Pvt Ltd v DCIT (IT(TP)A No.249/Bang/2015) – TS-601-ITAT-2015 (Bang) – TP

94. The Tribunal held that where the assessee had acquired shares of a JV from its AE and immediately sold the shares to Jindal Group, the said income arising out of the transfer was to be treated as business income and not capital gains and held that the TPO was justified in applying the CUP method to benchmark the purchase of the said equity shares by adopting the per share purchase price paid by independent third parties and comparing the same with the price paid by the assessee. Since the price paid per share by the assessee was higher than the price paid per share by independent third parties, the TPO was justified in taking the lower price as the arm's length price and making consequent TP adjustments by treating the investment made by the assessee as excessive.

GDF Suc TSA Energy India Pvt Ltd v ACIT - TS-537-ITAT-2016 (Bang) - TP ITA. 984 & 1030/Bang/2010

95. The Tribunal deleted interest adjustment on external commercial borrowings (ECBs) taken by assessee from overseas AE at 5% as the effective rate of interest paid by assessee on loans taken in India was 6.62% and held that when internal CUP with unrelated parties is available it should be given precedence over external CUP (which was adopted by TPO).

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Intergarden (India)(P)Ltd. vs ACIT - TS-114-ITAT-2016(Bang)-TP

96. Where the assessee had adopted quotation prices of various companies as CUP for benchmarking its import/export transactions with the AE and the TPO/AO rejected it on the ground that such quotations were subject to negotiation and could not be regarded as comparable uncontrolled transaction, the Tribunal relying on the decision of the Gujarat High Court in the case of Adani Wilmer [363 ITR 338] held that in terms of Rule 10D(3), price publications could be adopted if the same were authentic and reliable. However, noting that this judgment was not available at the time when CIT(A) passed the impugned order; the Tribunal restored the matter back to AO/TPO for fresh decision and directed the assessee to establish that the quotations which were taken for CUP were authentic and reliable and if so to take CUP as the MAM, else adopt TNMM as the MAM and decide the issue afresh.
British Engines (India) Pvt. Ltd vs. DCIT-TS-915-ITAT-2017(Bang)-TP IT (TP)A No.340/Bang/2014 dated 27.10.2017

97. The assessee was engaged in the business of rendering software development services to its Associated Enterprises (AEs) and non AEs and adopted the internal CUP to justify the price of its international transactions, which was rejected by the TPO, who adopted TNMM and selected 13 external comparables, 6 of which were rejected by the DRP as they had turnover in excess of Rs. 200 crores. Noting that the AO had not complied with the DRP's direction for exclusion of the 6 comparable and that neither the TPO nor DRP had assigned any reason as to why CUP was not most appropriate method. The Tribunal remitted the matter back to AO for de novo consideration of assessee's submissions after affording assessee due opportunity of being heard.
KMG Infotech Ltd. Vs DCIT - TS-312-ITAT-2017(Bang)-TP - IT(TP)A No.286/Bang/2016 dated 04/04/2017

98. The Tribunal upheld the order of the CIT(A) wherein the CUP method was held to be the most appropriate method since the assessee had similar transactions with its Non-AEs and its AEs.
DCIT v Devendra Kumar Bhasin (ITA No. 12/CHD/2014) – TS-499-ITAT-2015 (Chd) – TP

99. The assessee had purchased raw materials from its AE during AY 2012-13 and adopted the CUP method as the most appropriate method by considering the purchase price (of the said raw material) of the AE. It filed the invoice relating to its purchase from AE and the back to back invoice copies relating to AE purchasing from third party as comparable. However, TPO rejected CUP method used by assessee on the basis that assessee had not given any evidence to support the applicability of CUP method and adopted TNMM as MAM, which was upheld by the DRP. On appeal, the Tribunal held that assessee had not substantiated that the AE had not derived any benefit or mark up on the price charged by the vendor for supply of material to it (AE). It held that unless the assessee filed full details of financial statement to show that the assessee's AE had not derived any benefit, it was not possible to apply the CUP method." Thus, it remitted the issue regarding application of CUP vs. TNMM back to AO to see whether AE derived any benefit or mark up on the price charged by **its** vendor for supply of raw materials to assessee's AE, which it had sold to assessee.

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Enfinity Solar Solutions Pvt. Ltd. vs. ACIT - TS-301-ITAT-2017(CHNY)-TP- I.T.A.No .208 / Mds/2017 - 03-04-2017

100. The Tribunal upheld the use of the CUP method for the import of raw cashes from the AE and held that the TPO was to compare the average price published by the Cashew Export Council with the average price charged by the assessee and not the price mentioned in individual transactions. The Tribunal also held that due weightage was to be given to the fact that the assessee had availed credit for 150 days which required to be factored in while determining the ALP.

Reliable Cashew Co (P) Ltd v ACIT (I.T.A. No. 2237/Mds/2013) – TS-420-ITAT-2015 (CHNY) – TP

101. The Tribunal deleted the transfer pricing adjustment made on interest free advances given by assessee to its wholly owned subsidiary in USA whose capital stood completely eroded and who was suffering continuous losses, on the ground that finding a comparable uncontrolled transaction under the CUP method applied by the TPO by considering LIBOR plus rate for Exim loan as ALP for such a transaction was not practical or feasible CUP method. It further held that the question of benchmarking this transaction applying any of the methodology prescribed in Sec 92C(1) did not arise at all.

Ucal Fuel Systems Ltd [TS-930-ITAT-2016(CHNY)-TP] (I.T.A.No.688/Mds/2014, 723, 724 & 725/Mds/2015)

102. The Tribunal upheld CUP Method adopted by TPO/DRP in preference to TNMM adopted by the assessee for benchmarking assessee's exports of various types of sewing threads to its AEs situated in 63 countries based on its decision in earlier years and agreed with the DRP finding that since assessee was catering to Asian countries, there was not much geographical difference between supplies made by it to AEs and Non-AEs.

Madura Coats Private Limited [TS-932-ITAT-2016(CHNY)-TP] (I.T.A. No.770/Mds/2014)

103. Assessee's group company had acquired controlling interest in HS Penta (engaged in manufacture of automotive cylinders) and post the acquisition transferred the business to the assessee so as to take advantage of lower costs and bigger markets in India. The TPO adopting WDV as the CUP sought to reduce the ALP value of assets purchased and rejected the contention of the assessee that since production commenced immediately, the impact of purchase of assets was factored into the operating profits. The Tribunal rejected both contentions and held that WDV was not reflective of fair market value and that capital costs could not be imputed with reference to profits. Noting that at the time of purchase of controlling interest of HS Penta, the assessee's group company had valued the shares of HS Penta, which was based on the value of the assets and liabilities, it held that the value of assets therein would be an appropriate CUP since the acquisition was an independent uncontrolled transaction and that there was hardly any time lag between the acquisition and subsequent transfer to India. Accordingly, it remitted the matter to the AO for fresh determination based on such valuation.

Interpump Hydraulics Pvt Ltd – TS-621-ITAT-2017 (CHNY)) – TP-ITA No.

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459/mds/2017 dated 30.06.2017

104. The Tribunal remanded the issue of benchmarking of transaction with respect to payment of management service fee to AE back to the TPO, noting that the TPO and DRP had rejected the assessee's TNMM and had adopted CUP method without selecting any comparable for benchmarking the said transaction so as to arrive at Nil ALP by applying benefit test. It held that for selecting CUP method, the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transaction was to be identified and thereafter MAM was to be decided.
Gates Unitta India Company (P.) Ltd. v. ITO – [2018] 93 taxmann.com 10 (Chennai – Trib.) – IT Appeal No. 2745 (CHNY) of 2017 dated April 6, 2018

105. The Tribunal upheld TNMM over CUP for benchmarking software development services rendered to AEs during AY 2008-09 on the ground that assessee (specializing in providing quality and customized IT solutions to several entities in the marketing, Financial Services and Insurance (BFSI) domain) had not provided the total volume of transactions of related parties (both onsite and offshore) for applying CUP method. Further, it held that since assessee's transactions with Citi Group (used as a comparable in CUP method) fell in the same class although software features may not have been identical, TNMM was more appropriate than CUP.
Polaris Consulting & Services Ltd -TS-3-ITAT-2017(CHNY)-TP - ITA No. 447/ Mds/ 2016

106. The Tribunal dismissed assessee's appeal against the DRP's denial of 3% adjustment which was made by the assessee [engaged in export of sea food] to the sale price in each sale made to its AE so as to bring it at ALP under CUP method. Such rates were compared to the rates published by the Marine products Export Development ["MPEDA"] weekly data. The Tribunal rejected the assessee's contention that the adjustment ought to be provided on account of difference in glaze content in sea food i.e. assessee's sea food glaze (25%) while MPEDA's sea food glaze (20%) which resulted in a difference in price. It observed that assessee failed to bring on record any evidence to show that assessee's products were having glaze of 25% so that the MPEDA price could not be compared with it.
Torry Harris Sea Foods Pvt Ltd vs ACIT [TS-508-ITAT-2018(COCH)-TP] IT(TP)A No.447/Coch/2016 dated 05.07.2018

107. The Tribunal held that the TPO was incorrect in rejecting the assessee's TP study and making an independent search of comparable transactions under CUP to benchmark the export of freeze dried shrimps by the assessee to its AE as the comparable selected by the TPO (based on which he made an upward addition) was an AE of the assessee as well as they had a common shareholder, holding more than 25 percent share capital. It held that transactions between two AEs could not be used as a CUP for benchmarking the assessee's transaction as the same would not be 'uncontolled'. It accepted the assessee's contention that the transaction should have been benchmarked under TNMM and remitted the issue to the file of the TPO for computation of ALP under TNMM.
HIC ABF Special Foods P Ltd v ACIT -TS-100-ITAT-2017 (Coch) – TP - /I.T.A. No. 115/ Coch/2016 dated 07.02.2017

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108. The Tribunal held that where the services provided to the AEs are similar to those provided to non AEs the CUP method was the most appropriate method as opposed to TNMM and therefore approved hourly rates charged to non-AEs as internal CUP.

ADIT v ABB Lummus Heat Transfer BV (ITA No.2763/Del/2013) – TS-492-ITAT-2015 (Del) - TP

109. The Tribunal rejected the CUP method used by the assessee for benchmarking the sale of train sets to its German AE, wherein it used the price at which the German AE in-turn sold the train sets to Delhi Metro Rail Corporation ('DMRC') at the same price, on the ground that the transaction between the assessee and the German AE and the transaction between the AE and DMRC were on totally different footing as the buyer and sellers in both sets of transactions were in different geographical markets and operating at different levels viz. one was selling to an international buyer while the other was selling to a local market and that the assessee failed to justify with documentary evidence, comparability on the issue of quality of the product, contractual terms, level of market, geographical market of the respective transactions, date of transaction and foreign currency receipt. Accordingly, it held that the TNMM method was correctly adopted as the most appropriate method by the TPO.

Bombardier Transportation India Pvt Ltd v DCIT (I.T.A .No.-1626/Del/2015) – TS-520-ITAT-2015 (Del) – TP

110. The Tribunal held that where the assessee purchased equipment from its AE, the ALP of which was supported under the CUP method by certificates issued by the AE stating that the equipment was supplied at cost along with Customs Valuation Reports proving that the value was truthfully declared, no addition could be made to the said transaction and since the equipment was purchased for pure non-commercial use, the market price could not be ascertained. Accordingly, the addition made by the TPO was set aside.

DCIT v C-Dot Alcatel Lucent Research Centre Pvt Ltd - (2016) 66 taxmann. Com 281 Del)

111. The Tribunal held that the CUP method was the most appropriate method for determining the ALP of purchase and sale of goods and services since it seeks to compare the exact price charged or paid rather than the profit rate and held that TNMM sought to be applied by the assessee was affected by several factors which would significantly impact the determination of ALP. It further held that the TPO was incorrect in considering the transaction between the AE and a third party in Italy as an internal CUP due to the geographical differences prevalent. It held that the CIT(A) had deleted the addition made by the TPO based on the submission of the assessee without considering the conflicting stand adopted by the TPO and therefore remanded the matter to the file of the TPO.

DCIT v Rayban Sun Optics India Ltd - TS-170-ITAT-2016 (Del) - TP

112. The Tribunal upheld the use of the CUP method over TNMM for the purpose of benchmarking the assessee's international transaction viz. purchase of DAP fertilizers on consignment basis. It held that where the assessee submitted adequate and reliable information and comparable uncontrolled prices, such as the price list of 'Fertecon Price

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Service' which is a weekly trade journal widely used in the fertilizer industry, for the purposes of benchmarking the international transaction under CUP, the TPO's approach of adopting TNMM was erroneous. It further held that TNMM was not the most appropriate method since the sale price was regulated by the government as a result of which the net profit margin was not under the control of the assessee and that 40 to 45 percent of the receipts of the assessee were by way of subsidy and not from the sale of products.

Mosaic India Pvt Ltd v ACIT - TS-312-ITAT-2016 (Del) - TP

113. Where the Assessee paid interest to its AEs @ 12% coupon rate on the CCDs and applied CUP method for benchmarking the same, but the TPO / DRP treated the CCDs as External Commercial Borrowing ("ECB") and made TP adjustment using 6 months LIBOR + 300 bps as base and the Assessee contended that as per FIPB, RBI and FEMA guidelines CCDs are considered as FDI and not ECB, and also submitted analysis (as part of additional evidence) based on the BSE database which indicated that average coupon rate of comparable instruments issued during the year was 14.50% for Real Estate Industry and 12.39% for all instruments,the Tribunal remitted the issue to the AO/TPO to consider the additional evidence since the same went to the root of the matter and was very much relevant to resolve the issue as to whether or not the borrowing was an External Commercial Borrowing.

Brahma Center Development Pvt Ltd vs ITO [TS-522-ITAT-2016(DEL)-TP] ITA No. 373/Del/2016

114. The Tribunal held that the CUP method was the most appropriate method for benchmarking the international transactions of the assessee viz. export and import of agro commodities and upheld the use of third party quotations as an external CUP since the quotations furnished by the assessee were authentic and reliable.Accordingly, it dismissed the contention of the TPO, rejecting CUP on the ground that the data provided by the assessee did not provide support for functional comparability. Reference was also made to the BEPS Action Plans 8-10 in respect to use of Quoted Prices and their authenticity for comparability analysis under the CUP Method.

DCIT v Noble Resources & Trading India Pvt Ltd - TS-269-ITAT-2016 (Del) - TP

115. The Tribunal held that where assessee company having imported gold bars from its AE, converted the same into jewellery and sold the same back to AE, since assessee was a simple job worker, CUP was to be regarded as most appropriate method for determining ALP.

Kailash Jewels (P) Ltd vs ITO - [2016] 68 taxmann.com 303 (Delhi-Trib)

116. The Tribunal held that where TPO proposed adjustment for royalty paid by assessee to its AE even where assessee justified (a) how technical know- how supplied by AE was crucial to running of assessee's business (b) the same to be at ALP as per TNMM, the addition made by the TPO by applying CUP was not justified since in the instant case, no comparable transaction had been brought on record by the revenue.

Frigoglas India (P)Ltd. vs DCIT-[2016] 68 taxmann.com 370 (Delhi- Trib)

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117. The Tribunal held that DRP erred in applying CUP for indenting segment of assessee and comparing the commission earned from AE and non-AE segments; noting that CUP required a high degree of similarity and there were various dissimilarities in transaction with AE and non-AE such as volume of transactions, contractual terms, geographical location and markets which affected the pricing. It held that TNMM was the MAM in view of the fact that TPO had accepted it from AY(s) 2003-04 to 2006-07 (noting that OP/TC was taken and not the berry ratio which assessee had adopted) and b) from AY 2011-12 to 2018-19 under MAP, TNNM had been agreed to be MAM as there was no change in FAR analysis and assessee was a low risk service provider. Further, it observed that berry ratio (profit/value added expenditure) was to be taken as base for computing PLI as the assessee was acting as an indenting agent/ service provider incurring mainly operating expenses and thus, the operating expenses represented the functions performed and risks undertaken by assessee. It remanded the matter back to the file of TPO to examine and benchmark the transaction by adopting TNMM as the MAM by taking berry ratio as PLI.

Sumitomo Corporation India Pvt Limitedvs ACIT [TS-1204-ITAT-2018(Del)-TP] ITA No.5095/Del/2011, 5850/Del/2012, 328 and 6646/Del/2014 and 1321/Del/2016 dated 22.10.2018

118. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order deleting the addition made to the ALP by TPO by applying CUP (as against TNMM applied by assessee) on account of export by assessee (manufacturer of spices) to its AE by following the coordinate bench decision in assessee's own case for earlier year. In the earlier year the Tribunal restored the issue back to TPO on ground that TPO had not selected comparables which were selling similar type of spices in public domain and had computed ALP on erroneous basis by computing the average rate of carton by dividing the total value of invoice with total number of cartons ignoring that the said cartons did not have same/comparable items. The said average was then compared with the average computed for the bills raised on uncontrolled party during the same period and then the difference therein was multiplied with the number of cartons to arrive at the amount of addition. In the remand proceedings, the TPO had accepted TNMM as the MAM and deleted the addition.

Asst CITvs Manashin Di Hatta Ltd. [TS-1403-ITAT-2018(Del)-TP] (ITA No.1799/Del/2015 dated 29.10.2018

119. The Tribunal remitted the ALP-determination in respect of assessee's import of goods from AE back to CIT(A). It noted that the TPO/CIT(A) made a TP-addition on imports considering variation in import price for the same unit of good from AE at €204.64 in October 2001 and €75 in February 2002 by discarding the market quote furnished by assessee which supported its contention that there was a drastic fall in the product prices. Relying on the decision of Adani Wilmar [TS-114-HC-2014(GUJ)-TP], wherein the Court held that authentic and reliable market quotes on price publication were relevant while determining the ALP employing the CUP method, the Tribunal directed the CIT(A) to examine the evidence produced by the assessee and verify its authenticity and reliability instead of rejecting it at the threshold level.

DCIT vs. Alcatel India Ltd. - TS-1085-ITAT-2017(DEL)-TP - ITA No. 339/Del/2012 dated 06/12/2017

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120. Noting that the services rendered by the assessee to AE were the same as those rendered by AE to independent enterprises, the Tribunal upheld the deletion of TP-adjustment in respect of back to back software development services rendered by the assessee to US-AE which were benchmarked by the assessee using services rendered by AE to independent customers as comparable under CUP. Rejecting Revenue's contention that there was difference in FAR between assessee and AE, it held that since the transaction was exactly the same, there could not be any occasion for the FAR of the transaction to be different. Further, it also disagreed with TPO's contention that where a more reliable method viz TNMM was available, then there was no need to adopt CUP especially when reliable data of the comparable cases were not available for ascertaining the man hourly charges for identical or near identical services in an uncontrolled transaction or by an independent enterprise. It observed that the distinction drawn by the TPO on the basis of FAR of the enterprise rather than the transaction was not tenable and perfect CUP inputs were available in the form of back to back transactions.

DCIT vs Calance Software Pvt Ltd-TS-451-ITAT-2017(DEL)-TP- ITA No.5023/Del/2012 dated 04.04.2017

121. Assessee was engaged in the business of leasing and hiring heavy cranes and had purchased nine cranes from it AE during the relevant year. The assessee got these cranes valued from custom authorities and chartered engineers and accordingly benchmarked the said international transactions. The method adopted by assessee for benchmarking the international transactions was rejected by the TPO who applied the CUP Method. The TPO took the written down value of the cranes in books of AE as ALP which resulted into certain adjustments to assessee's ALP. The DRP held that the written down value of cranes in books of AE could not be considered as ALP as it was not derived from transactions between enterprises other than associated enterprises and accordingly the TPO was directed by the DRP to accept the valuation report of the assessee and delete the additions made on account of ALP of cranes. The Tribunal on appeal did not find any illegal infirmity in the order of the DRP and upheld the same.

ACIT v. Sarens Heavy Lift (I) (P.) Ltd. – [2018] 93 taxmann.com 431 (Delhi – Trib.) - IT Appeal No. 1027 (DELHI) Of 2015 dated April 2, 2018

122. The Tribunal remitted the matter of ALP determination of assessee's international transaction in respect of management group cost back to AO/TPO under the CUP method. The Tribunal upheld the TPO's rejection of the assessee's approach of aggregating the "management group cost" and "R&D assistance cost" as a single international transaction and opined that management group costs had to be separately benchmarked since the assessee had failed to establish any inextricable link between the transactions as one not surviving without the other. The Tribunal also observed that in assessee's own case for AY 2011-12, the Tribunal had approved CUP as the MAM. Thus, it directed the TPO to apply CUP and in case of non-availability of relevant data vis-à-vis comparables or any other genuine reason, to apply appropriate method.

Atotech India Pvt Ltd vs. ACIT [TS-340-ITAT-2018(DEL)-TP] ITA Nos.3419&6571/Del/2016 &1112/Del/2014 **dated 11.05.2018**

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123. The Tribunal remitted the ALP determination in respect of assessee's guarantee commission received back to AO/TPO since the TPO had used the CUP data obtained by issuing notice u/s. 133(6) of the Act without providing an opportunity to the assessee with it. The Tribunal observed that no one should be condemned unheard and restored the issue so that the TPO could confront the CUP data to the assessee. Further, the Tribunal directed the AO/TPO to keep in mind the directions of the DRP in the subsequent assessment years wherein it was held that no addition could have been made on account of receipt of guarantee commission and for which the department had not preferred an appeal.
The Bank of Tokyo-Mitsubishi UFJ Ltd. vs. DCIT [TS-824-ITAT-2018(DEL)-TP] ITA No.7212/Del/2017 dated 11.06.2018

124. The Tribunal remitted the benchmarking of the royalty and fees for technical services transactions undertaken by the assessee back to the TPO for fresh adjudication. It noted that the assessee had benchmarked the said transactions on an aggregate basis which was rejected by the TPO who sought to apply CUP to benchmark the transactions on a standalone basis. However, it observed that as per the CUP method the price of the international transaction was to be benchmarked but the TPO had benchmarked the same by comparing the ratio of royalty / FTS to sales of the comparables which did not satisfy the mandate of CUP. It noted that the Delhi High Court in Gruner India Pvt Ltd – TS-1049-HC-2016 (Del) – TP did not approve of TNMM for benchmarking such transactions and had remitted the issue of aggregation v segregation back to the file of the TPO in view of the decisions of Sony Ericsson and Magneti Marelli. Accordingly, it also remitted the issue back to the TPO.
TS Tech Sun India Pvt Ltd – TS-1030-ITAT-2017 (Del) – TP - ITA No.1943/Del/2017 dated 13.12.2017

125. Where the assessee's AE had sub-contracted work to the assessee on back to back basis on the price received from the customer i.e. Gas Authority of India Ltd. (GAIL), the Tribunal held that since the transaction between the GAIL and the AE, was an independent and uncontrolled transaction. It was an appropriate CUP for benchmarking of provision of project management services to AEs.
Tractebel Engineering Pvt Ltd vs DCIT- TS-958-ITAT-2017(DEL)-TP - ITA No. 1078/Del/2014 dated 23.11.2017

126. The Tribunal held that where the TPO accepted the application of CUP method on the basis of the mean of the prices of pulses obtained from a website called agriwatch.com to benchmark the arm's length price of the transactions undertaken by the assesse viz. import of agricultural produce, but at the same time noted that the method used by the assessee suggested a range of values on a particular date and felt that the website was a good indicator but not a perfect CUP, he was incorrect in adopting the arithmetic mean of prices on a day to day basis as the final comparable value and comparing it with the import prices on each day and consequently making a transfer pricing adjustment. It held that where the TPO had himself accepted that generally the price charged by the AEs from the assessee was equal to or less than the ALP, then his act of making an ALP adjustment on the basis of daily arithmetic mean of the transaction values was not permissible under the scheme of the Act.
UE Trade Corporation India Pvt Ltd v ITO - TS-10-ITAT-2016 (Del) - TP

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127. The Tribunal held that the TPO was not justified in determining the ALP of the purchase of trademark by the assessee from its AE at Nil on the ground that there was no need for the assessee to purchase such trademark. It held that the TPO had no role in examining the commercial rationale of decision to purchase a trademark and determine the ALP at Nil without conducting any analysis under the CUP method.
DCIT v FabIndia Overseas Pvt Ltd - TS-333-ITAT-2016 (Del) - TP

128. The Tribunal, following the decision of the coordinate bench in assessee's own case for AY 2011-12 accepted assessee's adoption of CUP method over TNMM for benchmarking medical transcription services for AY 2012-13. It noted that the Tribunal for the earlier AY had accepted assessee's reliance on the decision in the case of Ckar Systems Pvt. Ltd [TS-694-ITAT-2012(HYD)-TP] and had upheld the adoption of CUP method as the most appropriate method as assessee and Ckar were in the same line of business i.e. medical transcription services. The Tribunal in the case of Ckar Systems had held that if the comparables considered by assessee were not connected either to the assessee or its holding company, and all information/data relating to its transactions were available, the TPO was not justified in rejecting the computation of ALP made by the assessee by applying CUP method. Noting that there was no factual difference between earlier year and this year, it held that review of the earlier year order was not within the purview of the Tribunal.
iMedX Information Services Private Limited vs DCIT -TS-457-ITAT-2017(HYD)-TP-ITA No.1716/hyd/2016 dated 28.04.2017

129. The Tribunal held that the CUP method was the most appropriate method for determining the ALP of the assessee's international transactions viz. provision of man power / human resources to its AEs and rejected the assesee's application of TNMM. It noted that the assessee had charged both its AEs and Non-AEs for the man power supply on an hourly rate for the same functions and therefore held that the CUP method was most appropriate. However, it rejected the application of an average or weighted average rate as directed by the DRP. Accordingly, it remitted the matter to the file of the TPO.
Taksheel Solutions Ltd v ACIT - TS-352-ITAT-2016 (Hyd) - TP

130. The Tribunal upheld the application of the CUP method adopted by the assessee in benchmarking its transactions in relation to provision of medical transcription services by relying on the decision of the Tribunal in ACIT v Ckar Systems Pvt Ltd as the assessee in that case was in the same line of business as the assessee in the instant case. It rejected the TPOs rejection of the CUP method and adoption of TNMM whereby he aggregated the medical transcription services with the software development services. Consequently, the Tribunal remitted the matter to the AO / TPO for redoing the benchmarking exercise afresh on the basis of CUP method.
iMedX Information Services Pvt Ltd v ITO – TS-36-ITAT-2017 (Hyd) – TP ITA No. 577/Hyd/2016 ITA No.617/Hyd/2016 dated 18.01.2017

131. The Tribunal allowed the appeal of the assessee and upheld the application of CUP as the Most appropriate method for benchmarking the medical transcription services, as against

TNMM proposed by the TPO who rejected the CUP method on the ground that the assessee was also involved in development of software for the purpose of medical transcription and therefore the entire activity of the assessee was to be aggregated and benchmarked under TNMM. The Tribunal relying on the decision of the co-ordinate bench in Ckar Systems Pvt Ltd (TS-694-ITAT-
2012 (Hyd) – TP), wherein the application of CUP was upheld as the most appropriate method. Therefore, it held that CUP was to be adopted for analyzing the ALP of medical transcription transactions and TNMM for the software development services, for which no objection was raised by the assessee. Accordingly, it remitted the matter to the AO / TPO to redo the benchmarking exercise on the basis of the CUP method.
iMedX Information Services Pvt Ltd v ITO – TS-36-ITAT-2017 (Hyd) – TP – ITA No 577/Hyd/2016

132. Where the assessee, a cigarette manufacturer, had benchmarked its transaction of paymentfor purchase of tobacco leaf paid to its AE under CUP by comparing the AE price with third party quotes and the TPO out rightly rejected the quote and applied TNMM by selecting two comparables and making an upward addition of Rs.12.46 crore, the Tribunal held that the TPO erred in applying TNMM as the comparable companies were not functionally comparable, the cost figures of the comparables taken by the TPO did not match with their financials, the TPO had erred in considering the total costs of the assessee without restricting it to the AE related costs. Also, since the TPO had not examined the contentions of the assessee on the application of the CUP method, it remitted the matter to the TPO for fresh consideration.
JT International (India) vs DCIT – TS-107-ITAT-2017 (Hyd) – TP I.T.A. No. 422/HYD/2014 dated 17.02.2017

133. The Tribunal upheld CIT(A)'s order deleting TP-adjustment on account of international transaction of royalty payment by assessee to its AE for AY 2011-12. The assessee had adopted TNMM as MAM with operating profit margin as the profit level indicator. The TPO rejected TNMM as MAM and made an adjustment to the arm's length by applying CUP method. The TPO contended that the assessee had not been able to justify the payment of royalty during the year on the sale of offset ink as well as gravure ink and thus made an adjustment as per the provisions of section 92CA of the Act. CIT(A) relying on the Tribunals decision in the assessee's own case for AY 2007-08 and 2008-09 had held that products manufactured by assessee were developed from continuous technology support provided by AE and therefore deleted the royalty adjustment. The Tribunal held that the cost benefit test worked out by TPO was not based on proper appreciation of facts and thus held that the choice of CUP method was unjustified.
ACIT vs Sakata Inx (India) Ltd-TS-505-ITAT-2017(JPR)-TP-ITA No 1035/JP/2016 dated 24.04.2017

134. The Tribunal held that CUP was the MAM to benchmark the transaction of sale of printed circuit boards (PCBs) by assessee to its AE in Austria [for further sale in Europe as distributor] as against TNMM adopted by the TPO at entity level; and deleted the TP adjustment following the coordinate bench ruling in assessee's own case for earlier year wherein adoption of entity level TNMM was rejected in respect of the export transaction since the Revenue was not able to demonstrate or bring any cogent evidence or material as to how CUP method was not

applicable and that TNMM was the more appropriate method. The Tribunal further held that assessee was to be taken as the tested party and not its AE as testing had to be done in order to examine if the Indian entity was offering its profits to lawful taxation in India and thus keeping the AE as tested party would defeat the purpose of TP regulations.

AT&S India Private Limitedvs DCIT [TS-1179-ITAT-2018(KOl)-TP] ITA No.69/Kol/2018 dated 10.10.2018

135. The Tribunal deleted TP adjustment in respect of export of Printed Circuit Boards (PCBs) by assessee to its AE in Austria for further sale in Europe as distributor for AY 2011-12 on the ground that internal CUP should be preferred over external TNMM & the prices at which the assesse sold goods to its AE were equal to the prices at which they were sold by the AE to independent customers in Europe. Though the Tribunal rejected assessee's selection of foreign AE as tested party as its accounts were based on Austria GAAP and also rejected Revenue's adoption of entity level TNMM for benchmarking profit margin earned by the assesse it deleted the addition by adopting internal CUP.

AT & S India Pvt Ltd v DCIT [TS-539-ITAT-2016(Kol)-TP] ITA No.179/Kol/2016

136. The Tribunal relied upon the coordinate bench ruling in assessee's own case and adopted CUP as the MAM in respect of the export transaction and deleted the TP-adjustment in respect of export of printed circuit boards (PCBs) by assessee to its AE in Austria [for further sale in Europe as distributor]. It rejected the TPO's adoption of entity level TNMM in respect of the export transaction since the Revenue was not able to demonstrate or bring any cogent evidence or material to prove that CUP method was not suitable for the assessee. The Tribunal noted that that there was no value addition by the AEs in the goods manufactured by assessee and prices at which PCBs were sold by the assessee to AE were equal to the prices at which PCBs were sold by AE to independent customers in Europe. Accordingly, the Tribunal adopted the CUP-method as MAM.

AT & S India (P) Ltd v/s. DCIT [TS-336-ITAT-2018(Kol)-TP] ITA No.77/Kol/2017 dated 11.05.2018

137. The Tribunal deleted the TP adjustment in respect of export of chemicals to AEs on the basis of the CUP method, observing that the assessee was bound to sell the chemicals to its AE at lower prices to recover its manufacturing costs since it was obsolete stock and there was no room for determination of prices based on free interplay of demand and supply.

N L C Nalco India Ltd. vs. DCI - TS-36-ITAT-2016(Kol)-TP

138. The assessee was engaged in the business of providing assistance in sourcing and procurement of yard textile etc. from sources within India and outside India to its AE i.e. KB Exim Pte. Ltd. (KEPTL) in Singapore and was charging a brokerage for the same. The AO determined the ALP of brokerage rate for yarn products at 2% by taking a comparable instance of assessee's own international transaction with another AE. It was assessee's contention that brokerage rate ought to be adopted between 0.5% to 0.75% in view of comparable instances. The Tribunal restored the matter to re-compute the ALP afresh noting that the AO had not adopted the method under section 92C(1) of the Act as he considered

related party transaction as a base for benchmarking of brokerage rate for yarn product and further directed the assessee to furnish documentary evidence to substantiate its contention.
Kaybee Private Limited vs ITO [TS-898-ITAT-2018(Mum)-TP] ITA No.2166 and 2167/Mum/2015 dated 08.08.2018

139. The Tribunal held that CUP was not the MAM and TNMM applied by assessee was the MAM for export of finished product in case of assessee (engaged in the business of manufacturing of aromatic ingredients, natural and synthetic perfumery, flavoring and derivatives) noting that price at which finished products were sold to AE were not comparable to non-AEs owing to difference in volume of transaction (quantity sold to non-AE much lower than AE's), geography, functions performed and risks assumed. Further, it observed that as per Rule 10B(3) (uncontrolled transaction not to be comparable unless differences between transaction are eliminated so like comparison can be made), the TPO was unable to quantify the differences. It relied on coordinate bench decision in Amphenol Interconnect India Pvt Ltd. (which was subsequently upheld by Bombay HC) wherein it was held that CUP would not be the MAM in case of geographical differences, volume differences, timing differences, risk differences and functional differences and accepted assessee's stand of applying TNMM.
Firmenich Aromatics Product ion (India) Pvt.Ltd. vs ITO [TS-1214-ITAT-2018(MUM)-TP] (ITA No.7145/Mum/2017) dated 13.11.2018

140. The Tribunal restricted TP-adjustment in respect of assessee's s sale of finished goods to AEs in Thailand & Hong Kong. The Tribunal noted that while had assessee applied TNMM, TPO/CIT(A) rejected the same and proceeded to apply CUP-method for benchmarking the transaction. However, the Tribunal considered assessee's submission that CUP rates for Hong Kong only should be compared to work out the said disallowance as against average rates of various countries taken by TPO. The Tribunal thus restricted the TP adjustment and clarified that the above approach shall remain valid only for this impugned AY and would not be applicable in any other AY.
Lupin Ltd vs ACIT (LTU)-TS-398-ITAT-2018(Mum)-TP-ITA No. 7488/Mum/2013 dated 27.04.2018

141. Where the assessee had applied CUP method on the basis of the gross margin earned from availing similar services from third parties but the TPO rejected CUP Method on the ground that assessee had failed to justify similarities between services availed from AEs and non-AEs, and applied TNMM on entity level which was upheld by the CIT(A), the Tribunal remitted transfer pricing issues related to benchmarking of freight & forwarding services availed by the assessee from its AEs during AY 2009-10 for fresh adjudication on the ground that CIT(A) had not adjudicated issues related to application of most appropriate method (MAM).
Will Loesch India Private Limited - TS-4-ITAT-2017(Mum)-TP - ITA No.6761/Mum/2014

142. The Tribunal, relying on the decisions in the cases of Sumitomo Corporation India Pvt Ltd and Marubeni India P Ltd held that the internal CUP method was the most appropriate method to benchmark the assessee's commission for provision of indenting services as opposed to the Profit Split Method sought to be applied by the TPO and that where there was no data to support the CUP method, the TNMM method was to be

applied. Considering the decisions of the Tribunal in the case of Sumitomo and Bayer Material Science wherein the ALP rate of indenting commission was taken at 2.26 percent and 5 percent, respectively, the Tribunal held that 3.36 percent (the average of the two) was to be considered as ALP.
Johnson Controls (India) Pvt Ltd v DCIT-TS-662-ITAT-2015 (Mum)-TP

143. The Tribunal upheld TPO's application of CUP to benchmark assessee's import transaction following Serdia Pharmaceuticals ruling and also allowed 10% quality adjustment as the quality of asseessee's products (being manufactured in a German plant where quality control requirements are much more stringent than in India) were demonstrably superior to locally manufactured products in India. The Tribunal rejected Revenue's contention that weighted average rather than simple arithmetic mean should be used to compute ALP of import prices, and held that only domestic prices of the product should have been taken into account and not the export price while benchmarking the import transaction.
Merck Ltd. vs DCIT - TS-143-ITAT-2016(Mum)-TP

144. The Tribunal held that so far as CUP comparability was concerned, differences in the size, geographical location etc. could not be reason enough to discard the comparables, unless it was shown that such factors influenced conditions in the market in which respective parties to the transactions operated. Further, it held that IBB was a generic chemical product and so far as prices of generic products were concerned, CUP on the basis of database built on inputs like customs data was reasonably acceptable.
SI Group India Ltd v DCIT -TS-150-ITAT-2016(Mum)-TP

145. The Tribunal held that where the assessee had selected the CUP method as the most appropriate method for benchmarking the payment of consultancy fees to its AE, by using the service agreement between the AE and an independent Hungary company as comparable, the AO was not justified in rejecting the CUP method and the comparable without any reasoning and making an ad hoc disallowance of 25 percent of the said consultancy fee on the ground that no evidence had been submitted by the assessee.
ITO v Intertoll ICS India Pvt Ltd - (2016) 47 CCH 0132 (Mum-Trib)

146. The Tribunal upheld the TPOs adoption of the CUP method over TNMM for benchmarking the stock broking services rendered by the assessee to its AE with respect to Clearing House Trades considering the high degree of comparability between the assessee and top 10 FII customers selected by the TPO as comparables. It held that since the terms and conditions of clearing house trade for the assessee and the FIIs were the same, there was no justification in adopting any other method.
RBS Equities India Ltd – TS-1020-ITAT-2016 (Mum) – TP

147. The Tribunal held that the CUP method was the MAM for benchmarking the brokerage transactions rendered by the assessee as it rendered similar services to non-related parties as well. For determining an appropriate adjustment allowable to the assessee on account of difference in functions performed and risk assumed in respect of services provided to related parties vis a vis unrelated parties, the Tribunal held that

the difference in interest earned on margin monies received by the assessee from AE / Non-AE transactions could be taken into account for calculating the said adjustment.
JP Morgan India Pvt Ltd v ACIT [ITA NO 8193/Mum/2010] - TS-354-ITAT-2015(Mum)

148. The Tribunal upheld the use of CUP as the Most Appropriate Method noting that there was no difference in the methodology adopted in determining price of copper concentrates between the AEs and Non-AEs and the difference in prices occurred merely because the AEs used the calendar year for determining treatment and refining charges (which was deducted from the price quoted) and the Non-AEs used the financial year which was a temporary difference.
Hindalco Industries Ltd v ACIT – TS-431-ITAT-2015(Mum) – TP

149. The Tribunal held that once the TPO had accepted the CUP data (valuation report from a Chartered Engineer) submitted by the assessee in relation to the sale of 5 machines, he could not reject the CUP data for the 3 other machines sold merely because they were sold at a loss.
Perma Pipe India Pvt Ltd v DDIT (ITA NO 471/Mum/2015) – TS-470-ITAT-2015 (Mum) – TP

150. Where during the assessment proceedings, the assessee had adopted the CPM as the MAM and the TPO had proposed an upward adjustment by rejecting the adjustments claimed by the assessee to the cost and sale price of unrelated party transactions and subsequently, during the appellate proceedings, the assessee proposed to change the MAM to CUP due to availability of data not previously available, which was accepted by the CIT(A), the Tribunal dismissed the appeal of the Revenue and held that if at the time of TPO study, details were not available with the assessee to apply the CUP method, there was no restriction on the assessee for re- computing ALP by applying CUP, if during the course of assessment / appellate proceedings, the relevant data came in its possession of the assessee.
ACIT v Sudarshan Chemical Industries Ltd – TS-1078-ITAT-2016 (Pun) – ITA No. 1792/PN/2013 dated 10.11.2016

151. The Tribunal, following co-ordinate bench's ruling in assessee's own case for AY 2008-09 which had in-turn relied on its findings for AY 2007-08 upheld TPO's adoption of internal CUP over assessee's TNMM for benchmarking export of finished goods to AE.
Henkel Adhesives Technologies India Pvt. Ltd vs DCIT-TS-988-ITAT-2017(PUN)-TP dated 24.11.2017

Cost Plus Method

152. Where the TPO made an adjustment by adopting the Cost Plus method as the most appropriate method (as opposed to TNMM adopted by the assessee) to benchmark the assessee's international transaction viz. sale of formulations & hospital products by the assessee to its Kenya based AE back to AO for AY 2004-05, noting that the Tribunal in the prior assessment years had remitted the issue back to the CIT(A), the Tribunal remitted the issue to the file of AO for fresh adjudication. It further held that even though the Tribunal had remanded ALP-issue to CIT(A) in preceding years, it was the Assessing Officer who needed

to re-adjudicate to avoid multiplicity of proceedings before the assessing authority and the CIT(A)

Cadila Pharmaceuticals Ltd. vs. DCIT-TS-715-ITAT-2017(AHD)-TP-ITA No. 1117/ahd/2012 & 848/ahd/2016 dated 11.09.2017

153. The TPO had applied CPM as MAM and made a TP adjustment since the gross profits earned on exports 23.22% were far lesser than the profit of 50.65% earned by the domestic consumer division. The Tribunal accepted the assessee's TNMM as the MAM over TPO's CPM for exports to AE noting that under CPM ,the functions performed, assets employed and risks undertaken in export and domestic segments were not the same and suitable adjustments could not be made. It observed that the TPO had disregarded the mandate of Rule 10B(1)(c) when adjusted profit markup under CPM had to be determined by adjusting the GP margin for functional and other differences between export and domestic segment. The Tribunal accepted assessee's contention that CPM was not the MAM as it had incurred huge expenditure on discount, marketing, advertising and selling expenditure etc. in the domestic segment which resulted in selling price and gross profit of domestic segment being higher and there were transactional and functional difference between domestic and export sales. It relied on the coordinate bench decision of Alfalevel to reject CPM wherein it was held that in view of the fact that there were various differences in export segment and domestic segment, such as market fluctuations, geographic differences, volume difference, credit risk, RPT, etc., the TPO was not justified in adopting CPM as the MAM as suitable adjustments were not possible. Accordingly, the Tribunal deleted the TP adjustment since under TNMM the net margin of exports to AE was higher than net margin of personal consumer division of assessee demonstrating that it was at ALP.

The Himalaya Drug Company vs Dy.CIT [TS-614-ITAT-2018(Bang)-TP] IT (TP) A No.807/Bang/0216 dated 04.07.2018

154. The Tribunal held that the assessee, engaged in the business of manufacture and sale of plastic ophthalmic lenses to its foreign AEs as well as other independent Indian companies, could not be considered as a contract manufacture of its AE since it was carrying out its own independent business activity as well and therefore, the plea of the assessee, relying on GE Medical Systems India Pvt Ltd v DCIT, that the Cost Plus method was the most appropriate method for contract manufacturers, was inapplicable. Accordingly, the TNMM method was used as the most appropriate method.

Further, the Tribunal held that where the cost components of the assessee were in variation with that of comparable companies, the Cost Plus method could not be regarded as the Most Appropriate Method.

Essilor Manufacturing India(P)Ltd. vs. DCIT - [2016] 67 taxmann.com 377 (Bangalore-Trib)

155. The Tribunal rejected TPO/DRP's application of cost plus method for benchmarking assessee's export transactions and held that products exported by assessee and also sold in the domestic market cannot be functionally compared in view of the variations in the specifications, difference in climatic conditions, marketing efforts involved by assessee. It observed that sale in the export market must be compared with the exports by similarly placed companies in an uncontrolled transaction.

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Orbinox India Pvt Ltd - TS-732-ITAT-2016(CHNY)-TP-ITA No.454/ Mds/2015

156. The Tribunal following the coordinate bench decision of the assessee for earlier year (subsequently upheld by the High Court) accepted the assessee's application of TNMM over the TPO's CPM for benchmarking assessee's domestic ticketing, tour and package business (direct customer) and ticketing and tour packaging services (where it was acting as a subagent for its AE). The assessee had entered into customer and data handling management with its AE where it would act as an agent for the customers of the AE for ticketing and tour and packaging business. The Tribunal in the earlier year order noted that the lower authorities failed to appreciate the value of functions and risks assumed in relation to the international transaction carried out by the assessee vis-à-vis customer handling and data management with its AE, since it was acting as a routine back office service for its AE without being assigned any risk or carrying out any entrepreneurial functions and accordingly, accepted the approach of the assessee adopting TNMM as the MAM by finding comparables engaged in similar business.

MakeMy Trip (India) Pvt Ltd vs DCIT [TS-882-ITAT-2018(DEL)-TP] ITA No.6055/Del/2010 dated 30.07.2018

157. The assessee (engaged in developing customized commercial application software) adopted CPM to benchmark its sale and purchase of services with its AE. The TPO was of the view that question of applicability of CPM did not arise as assessee itself had taken PBIT/Sales as profit indicator which was PLI used in TNMM. Thus, TPO rejected CPM and used TNMM. The TPO made certain addition on basis of mean margin of comparables selected by him. The Tribunal deleted the addition noting that assessee had fulfilled all conditions of CPM except using a terminology by mistake as PBIT instead of GP. Moreover, CPM was the MAM for sale of services by manufacturer or service provider. It was also undisputed that difference between two ratios GP to Sales and PBIT to sales was only 0.67% and thus, if tolerance band of 5% was taken, no adjustment would sustain.

RS Software (India) Ltd vs ACIT [2018] 100 taxmann.com 165(Kol Trib) ITA No.741 of 2017 dated 25.10.2018

158. The Tribunal rejected TPO's selection of external TNMM as the most appropriate method (MAM) for benchmarking of assessee's (engaged in the business of processing blended tea) international transaction of sale of tea to AE and directed the TPO to adopt internal Cost Plus Method (CPM) as adopted by the assessee. It noted that the assessee had adopted internal CPM for export of tea and export of PP Bags and PP Geo frabric but the TPO adopted entity level TNMM and using external comparables proposed an adjustment of Rs. 7.54 Cr despite the fact that the TPO had accepted assessee's CPM as MAM for earlier years. Noting that the nature of international transactions, functions performed and risks assumed by the parties and method adopted were similar to those adopted by the assessee in the earlier years, it held that there was no reason for the TPO to take a different stand in the year under consideration. Accordingly, it remanded the matter back to the file of the AO.

Madhu Jayanti International Ltd vs. DCIT - S-1069-ITAT-2017(Kol)-TP - I.T.A No. 214/Kol/ 2016 – dated 01.12.2017

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159. The assessee had exported spools to its AE wherein cost plus 10% of product cost was charged. However, TPO was of the view that 10% of indirect cost also needed to be charged and hence made an addition. The Tribunal relied on co-ordinate bench ruling in assessee's own case in earlier year wherein it was held that there was nothing on record to suggest that any indirect expenses were considered for determining the ALP of export of spools and the TPO had made no such adjustment for AY 2004-05. Accordingly, the Tribunal deleted the adjustment made on account of indirect costs while computing ALP of the export transaction.
Bekaert Industries Pvt Ltd vs. ACIT [TS-349-ITAT-2018(PUN)-TP] ITA No.2376/Pun/2012 dated 14.05.2018

160. Tribunal upheld CIT(A) order deleting TP-adjustments in respect of export of manufactured steel items to its AE and receipt of commission from AE. In respect of export transaction, the TPO had applied CUP method over assessee's cost plus method(CPM) on the basis of small sales made by assessee of similar components, which was rejected by CIT(A). Noting that the TPO had accepted CPM in the subsequent AYs 2008-09 to 2010-11, the Tribunal held that there was no merit in the order of TPO applying CUP method to benchmark the international transaction and accordingly, upheld the order of CIT(A). Further, in respect of commission, the TPO had applied internal rate of return for benchmarking, however, CIT(A) had upheld assessee's CUP method. Relying on the decision in the assessee's own case for AYs 2006-07 to 2010-11, wherein the TPO had applied CUP method from AYs 2006-07 to 2010-11, the Tribunal upheld CIT(A)'s order deleting TP adjustment for the same.
DCIT vs Thyssenkrupp Electrical Steel India Pvt Ltd-TS-567-ITAT-2017(PUN)-TP-ITA No. 2005/PUN/2014 dated 06.04.2017

Resale Price Method

161. Where the assessee had applied RPM as the most appropriate method for benchmarking its international transactions but the TPO rejected it and adopted TNMM as the MAM, the Court held that mere disagreement between the assessee and Revenue or amongst the Revenue authorities vis-à-vis application of a method for determining ALP would not constitute a question of law unless the aggrieved party is able to demonstrate that application of a certain method had led to distortion or prejudice. Further, noting that the TPO in subsequent year had accepted RPM as the MAM, it dismissed Revenue's appeal.
Pr.CIT vs McCain Foods India Pvt Ltd-TS-885-HC-2017(DEL)-TP- ITA No. 965/2017 dated 13.11.2017

162. The Court upheld the decision of the Tribunal and held that the Resale Price Method was the most appropriate method for determining the ALP of the transactions undertaken by the assessee as the assessee was a trader who purchased goods from its AE and sold them to independent third parties without any value addition.
CIT v Luxottica India Eyewear Pvt Ltd (ITA 852 / 2015) – TS-532-HC-2015 (Del) -TP

163. The Court dismissed Revenue's appeal against the Tribunal's order wherein it was held that RPM was the most appropriate method for assessee's import and resale of equipments by relying on the coordinate bench ruling of L'oreal wherein RPM was held to be MAM in case of reselling products without any value addition. The Court dismissed the appeal opining that no

substantial question of law arose in the present case since the Revenue failed to establish perversity in the findings of the Tribunal.

CIT Bangalore vs Tetronix India Pvt Ltd [TS-694-HC-2018(KAR)-TP] ITA No.118/2013 dated 11.07.2018

164. The Tribunal, relying on the order of the co-ordinate bench in the assessee;s own case for the subsequent year, deleted the TP adjustment made in respect of import of Liquefied Natural Gas by the assessee from its foreign AE and upheld the use of Resale Price Method as most appropriate method over the Revenue's adoption of CUP. It held that the TPO was incorrect in adopting the CUP method and comparing the price at which the assessee purchased LNG with the crude oil prices / Henry Hub Prices prevalent in the USA open market since the LNG was not purchased and sold in the open market by the assessee. Accordingly, it held that the assessee was justified in using the RPM by adopting the gross profit margin per million British thermal unit, as the PLI and comparing the same with 2 comparable companies viz. Petronet LNG and Gas Authority of India Ltd.

Hazira LNG Pvt Ltd – TS-1053-ITAT-2016 (Ahd) – TP

165. The TPO rejected RPM applied by the assessee (trader of switch, isolation amplifier and level switch) on its import transaction of switch, isolation amplifier and level switches to determine ALP of the transaction observing that there would be distortion in GP margin in case of functions performed by comparables (in case of distributors) like advertising, marketing, distributing and guaranteeing the goods, financing the stock and warranty risk, and also as the gross profit margin could not be calculated as the costs incurred by comparables were not in public domain. The DRP upheld the TPO's order rejecting RPM and adopting TNMM noting that gross profit margins would be affected by considerations like accounting policies of assessee and comparable companies, presence of brand value and contractual terms regarding payments etc. and further, noted that the assessee after importing goods was performing functions like assembling and packing which partake value addition. The Tribunal allowed the assessee's appeal and accepted RPM as the MAM as the assessee was not undertaking any value addition since expenses incurred on packing material could not create any value addition thus, the finding of DRP that assessee was not a simple reseller (as it assembled and did packing) was incorrect and RPM had consistently been adopted in the previous years. It relied on the coordinate bench decision in Citizen Watches wherein it was held that there was no value addition for expenses incurred on packing of goods.

Pepperl & Fuchs (India) Pvt Ltd vs Dy.CIT [TS-1134-ITAT-2018(Bang)-TP] IT(TP)A No.227/Bang/2014 dated 14.09.2018

166. The Tribunal held that where the assessee was engaged in the importing of goods from its AE without making any value additions, the most appropriate method for benchmarking the international transactions was the Resale Price Method.

DCIT v Sanyo India Pvt Ltd – (2015) 45 CCH 0098 BangTrib

167. Where the assessee purchased goods from AEs and sold them to third parties in India without any further processing or value addition, the Tribunal reiterating the settled position in law that when there is no value addition by assessee, RPM should be adopted as MAM,

accepted assessee's adoption of RPM as MAM as against TNMM adopted by TPO. Further, noting that the factual position was similar to that of AY 2012-13 wherein the TPO accepted the application of RPM as the MAM, the Tribunal following the principle of consistency, directed the TPO to carry out a fresh comparability analysis for selecting comparable companies under RPM.

Avnet India Pvt. Ltd vs DCIT-TS-982-ITAT-2017(Bang)-TP dated 29.11.2017

168. Relying on the Bombay HC ruling in L'Oreal India Pvt. Ltd, the Tribunal accepted assessee's resale price method (RPM) as the most appropriate method (MAM) over TPO's TNMM for transaction of purchase of finished watches/clocks for resale noting that TPO's conclusion that loss incurred by assessee was indicative of carrying out value-added functions was not borne out by the facts on record. The Tribunal further held that expenses in assessee's profit and loss account did not establish value-added functions. It also observed that packing expenses did not create any value for product.

Dy.CIT vs Citizen Watches (India) Pvt Ltd [TS-963-ITAT-2018(Bang)-TP] IT(TP)A No.26/Bang/2014 dated 06.07.2018

169. The Tribunal upheld TPO/DRP's adoption of Berry Ratio (Gross Profit / Value Added Expenses) [any other method] for benchmarking assessee's import of goods from AE for resale in India for AY 2010-11 as against the RPM adopted by the assessee. It noted that TPO rejected RPM on the basis that assessee had not purchased all materials from AE but 50% of the materials such as battery and other related materials were purchased from the domestic market / independent enterprises. Rejecting assessee's submission that there was no purchase from the domestic market as it was contrary to findings of lower authorities, it rejected the assessee's reliance on the decisions of the Tribunal in Mattel Toys India [TS-159-ITAT-2013(Mum)-TP], Frigoglass India [TS-112-ITAT-2014(DEL)-TP] and Tupperwear India [TS-284-ITAT-2014(DEL)-TP] as it was not the case of the assessee that it had purchased all its materials from its A.E. Accordingly, it confirmed the application of Berry Ratio.

Socomec Innovative Power Solutions Pvt. Ltd. vs. DCIT - TS-359-ITAT-2017(CHNY)-TP - I.T.A.Nos.617/Mds./2015 dated 26-04-2017

170. The Tribunal held that where the assessee was an independent distributor having all the risks, then the Resale Price Method would be the most appropriate method for benchmarking the import of finished goods from its AE for resale in India.

Roca Bathroom Products Pvt Ltd v JCIT (ITA No.586/Mds/2014 & ITA No.610/Mds/2015) – TS-634-ITAT-2015 (CHNY) – TP

171. The Tribunal held that the Resale Price Method was the Most Appropriate method for determining ALP with respect to the assessee's trading and distribution segment, i.e. goods imported from its AE for onward sale, and not TNMM as proposed by the assessee. It further held that for the certain transactions wherein there was a value addition made to the imported spares by the assessee or where procurement of spares was done through job workers, the determination of Most Appropriate Method would require fresh adjudication and therefore, in respect of such cases, remanded the matter to the TPO.

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It was further held that internal comparables were to be preferred as against external comparables.
Honda Motor India Pvt Ltd v ACIT - (2016) 66 taxmann.com 9 (Del)

172. The Tribunal held that where TPO rejected RPM as MAM for calculating ALP in respect of trading segment, however Commissioner (Appeals) dealt with issue and reproduced relevant data of subsequent year wherein TPO himself had accepted RPM to be MAM for determining ALP for trading segment, findings of Commissioner (Appeals) had to be upheld.
DCIT v Delta Power Solution India (P)Ltd - [2016] 68 taxmann.com 247 (Delhi-Trib)

173. The Tribunal held that the TPO was incorrect in adopting the gross profit margin of the assessee's Group Company as the ALP for the international transactions entered into by the assessee viz. the import and distribution of Marlboro brand of cigarettes in India as well as export of tobacco leaves, since the Group as a whole (engaged in manufacturing, conducting R&D activities and owning trade marks) was functionally dissimilar to the assessee who was merely engaged in the distribution of these products. Accordingly, it held that the assessee, being a reseller / distributor had rightly benchmarked its transactions using the Resale Price Method.
DCIT v Phillip Morris Services India (SA) India Branch Office - TS-151- ITAT-2016 (Del) – TP

174. The Tribunal held that where the assessee was engaged in purchase of finished goods from its AE without any value additions, the most appropriate method for benchmarking the international transactions was the Resale price method. It held that the TPOs reasoning to adopt TNMM i.e that comparability could be compromised under TNMM which provides for broad comparability as opposed to higher degree of similarity under the other methods was invalid.
ACIT vs Akzo Nobel Car Refinishes India Pvt. Ltd-TS-661-2017(DEL)-TP-ITA No.1925/del/2011 and ITA No. 6482/del/2012 dated 04.08.2017

175. The Tribunal, following co-ordinate bench ruling in assessee's case for 3 years, remitted ALP-determination of assessee's international transaction of purchase of finished cosmetic goods under Resale Price method (RPM). Noting that the assessee was engaged in trading of goods without any value addition and the assessee had been consistently applying RPM as MAM which had been accepted by Tribunal in the preceding years, the Tribunal rejected assessee's argument to switch over from RPM to TNMM. Further, relying on the decision in the case of Keihin Penalfa Ltd [TS-474-HC-2015(DEL)-TP] it admitted assessee's additional grounds and held that TP adjustment should be limited to the international transactions alone and accordingly directed the AO/TPO to determine the ALP of the international transaction after providing a reasonable opportunity of being heard to the assessee.
Oriflame India Pvt ltd vs ACIT-TS-673-ITAT-2017(DEL)-TP-ITA No.328/Del/2017 dated 13.06.2017

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176. Where in the set aside proceedings for AY 2007-08 the TPO had accepted RPM as MAM and the coordinate bench in assessee's case for AY 2007-08 had remitted the issue of rejection of RPM as MAM to the file of AO, the Tribunal dismissed appeal and upheld the DRP order directing the AO/TPO to consider RPM over TPO's TNMM for benchmarking assessee's international transaction of purchase and sale of food supplements and healthcare products for AY 2009-10.

DCIT vs Tianjin Tianshi India Pvt Ltd-TS-837-ITAT-2017(DEL)-TP dated 13.10.2017

177. The Tribunal accepted the TPO's application of RPM as the MAM noting that assessee purchased products from its AE's and these products were resold without any further value addition and further, assessee had categorized itself to be low risk bearing entity. However, it held that TPO/DRP erred in not carrying out a fresh search of comparables with similar functions as assessee to determine the ALP of the transaction by using RPM as MAM. Thus, it restored the issue to AO/TPO with direction to adopt RPM as MAM and admit additional evidence regarding fresh comparables for determining the ALP. The TPO was of the view that RPM would be the MAM to benchmark the import of automotive components for trading as against the TNMM method applied by the assessee after doing FAR analysis observing that assessee was a minimal risk distributor who did not bear any inventory risk, promotion of product, market risks etc.

Mitsubishi Electric Automotive [I] Pvt Ltd vs Dy.CIT [TS-1147-ITAT-2018(DEL)-TP] ITA No.312/Del/2015 dated 29.10.2018

178. The Tribunal rejected TPO's adoption of RPM method as MAM for trading segment of assessee noting that RPM would not be appropriate as assessee purchased goods from its AE and also resold them to another AE. The Tribunal opined that the method was nothing but a backward calculation from resale price to obtain the purchase value in an independent scenario which was the reason why it would be applicable only when resale was made to an unrelated party, because if the resale price per-se was
tainted then it would be impossible to compute ALP in respect of purchase of property. It remanded the benchmarking of trading segment to TPO to analyze whether TNMM (as applied by assessee) ought to be adopted (as done in the earlier years), and to carry out fresh search of comparables.

Kehin India Manufacturing Pvt Ltd vs DCIT [TS-1220-ITAT-2018(DEL)-TP] ITA No.312/Del/2015 dated 05.10.2018

179. The Tribunal held that assessee had rightly applied RPM which was the MAM (as against TNMM confirmed by lower authorities) noting that assessee was a routine distributor engaged in trading of lighting products to the independent customers without any value addition to the products purchased from its AEs. Further, the TPO/AO had accepted RPM method applied by assessee in earlier years and there was no change in facts and circumstances in subject year. Thus, applying rules of consistency, the Tribunal directed TPO/AO to adopt RPM method for computing PLI in case of lighting division.

GE India Industrial Private Limited vs ACIT [TS-1315-ITAT-2018(DEL)-TP] ITA No.2781/Ahd/2012 dated 04.12.2018

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180. The Tribunal upheld the CIT(A)'s acceptance of assessee's selection of RPM over TPO's TNMM for benchmarking assessee trader's import transaction for AY 2003-04. The TPO rejected RPM and adopted TNMM as MAM observing that assessee's P&L account revealed that there were certain expenses which were directly connected with selling & distribution function which had not been considered for comparability in either the case of the assessee or the comparables under RPM and that the benchmarking conducted was faulty. Noting that the TPO had accepted RPM as the MAM in the subsequent years, the CIT(A) reversed TPO's order. Observing that the Revenue had not brought anything on record to substantiate that the facts for the year under consideration were different from the subsequent assessment, the Tribunal held that the CIT(A) was justified in accepting RPM based on the principle of consistency. Further, it relied on the decision of the Bombay High Court in L'Oreal India (P.) Ltd. (2015) 53 Taxmann.com 432 (Bom.), wherein it was held that the RPM was the most appropriate method for benchmarking the ALP of the trading segment.
JCIT v M/s Michelin India Pvt. Ltd - TS-15-ITAT-2018(DEL)-TP - ITA No. 1874/Del/2011 dated 10.01.2018

181. The TPO rejected RPM and adopted TNMM as MAM which was upheld by the DRP by observing that the assessee was not a simple distributor since the assessee had incurred substantial advertising, marketing and promotion expenses which had also not been demonstrated by the assessee to have been incurred by the comparables. The Tribunal accepted the assessee's selection of RPM over TNMM applied by the TPO and held that the assessee was a routine market distributor who was selling/distributing products without any value addition on the products. The Tribunal also relied on the order of the coordinate bench in Nokia India Private Limited vs. DCIT (2015) 153 ITD 508 (Delhi Trib.) and held that incurring of high advertisement and marketing expenses by the assessee vis-a- vis the other comparable companies does not in any manner affect the determination of ALP under the RPM.
Burberry India Pvt Ltd vs ACIT [TS-615-ITAT-2018(DEL)-T] ITA No.758/Del/2017 dated 22.06.2018

182. The Tribunal set aside the issue of selection of the most appropriate method (MAM) and determination of ALP for the assessee engaged in distribution of medical equipments like capital equipment and surgical implants. It noted that the assessee had selected Resale Price Method (RPM) on the ground that it was engaged in reselling the imported products without any value addition whereas the TPO applied TNMM on the ground that product profile of assessee was totally different. It noted that the co-ordinate bench of the Tribunal for AY 2002-03 had observed that TPO had accepted RPM as the most appropriate method for AY 2007-08 onwards and had remitted the issue back to AO/TPO in view of lack of clarity as to why the Department had adopted TNMM for earlier years while accepting RPM for later years. Accordingly, relying on the Tribunal order for AY 2002-03, it remitted the matter to AO/TPO for fresh adjudication.
Stryker India Pvt. Ltd v DCIT - TS-441-ITAT-2018(DEL)-TP - ITA No. 351-53/DEL/2015 dated 04.05.2018

183. The Tribunal rejected the application of the CUP method as the MAM adopted by the assessee in relation to its international transaction viz. import of crystal and crystal

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components from its AEs by adopting the sales made by it to its group companies as an internal comparable, observing that the import transactions consisted of two things viz. Crystal goods and Crystal components which were aggregated and shown as one international transaction but the sale transactions used as comparable only pertained to Crystal components. It held that functional similarity was a sine qua non for adopting CUP method and if the goods in the international transactions do not exactly match with the goods in comparable uncontrolled transactions then the method was inapplicable. Therefore, it upheld the TPO's rejection of the CUP method.

As regards, the application of TNMM, as adopted by the TPO, it held that the same was incorrect noting that the TPO had taken Swarovski Korea and Swarovski Singapore as comparable when these parties were AEs of the assessee itself and could not be considered as comparable uncontrolled transactions. It also held that the balance 19 companies selected by the TPO were not good comparables being foreign companies operating in different lines of business and that the computation of PLI was also faulted as the TPO had averaged the PLI of comparables by taking gross margins in the case of few companies and net margins in the case of the balance. Accordingly, it rejected the application of TNMM as well. Referring to Rule 10B(1)(b), the Tribunal observed that RPM was the MAM as it was applicable where a property was purchased from an AE and resold as such without any value addition and the assessee in the instant case sold the Crystal components imported from its AEs without any value addition. It accordingly remitted the matter to the TPO to benchmark the transactions as per RPM.

Swarovski India Pvt Ltd v ACIT – TS-94-ITAT-2017 (Del) – TP - ITA No.5621/Del/2014 dated 10.02.2017

Swarovski India Pvt Ltd v ACIT – TS-91-ITAT-2017 (Del) – TP - ITA No.5622/Del/2014 & ITA No.5497/Del/2014 dated 10.02.2017

184. For benchmarking assessee-distributor's international transaction of purchase of finished cosmetic goods for AYs 2009-10 to 2011-12 Modi Care Ltd had been selected as a standalone comparable under Resale Price Method (RPM). Referring to Rule 10B(1)(b), the Tribunal stated that though product comparability was less decisive while using RPM (as opposed to CUP method), wherever the gross margins were demonstrated to be impacted either with incomparable activities; functions; accounting practices; product dissimilarities; etc. necessary adjustments ought to be made. Accordingly, noting that Modi Care Ltd had advertising spend, franchisee income, different product mix, different accounting policies and Revenue recognition policies, higher discounts and rebates, etc, the Tribunal directed the TPO to look into claim of adjustments required to be made to consider Modi Care Ltd.

Oriflame India Pvt. Ltd vs. ACIT- TS-236-ITAT-2017(DEL)-TP- I.T.A .No.-960/Del/2014, 184/Del/2016 & 271/Del/2016 dated 24.03.2017

185. The Tribunal held that Resale Price Method (RPM) was the Most Appropriate Method (MAM) for benchmarking international transactions in case of assessee performing distribution functions in respect of earth moving equipment for AY 2008-09. Relying on provisions of Rule 10B(1)(b), OECD Guidelines as well as decision of the Tribunal in Mattel Toys [TS-159-ITAT-2013(Mum)- TP], it observed that under RPM, focus was more on similar nature of properties / services rather than similarity of products. Noting that the assessee was

performing the function of normal distributor and purchased goods were resold without any value addition, the Tribunal upheld the CIT(A) order's accepting RPM as MAM. It opined that the TPO, while rejecting RPM and adopting TNMM as MAM, had merely relied on OECD Guidelines which highlighted strengths and weaknesses of RPM, without analyzing the actual facts of the case and the FAR analysis vis-a -vis the comparables. Further, it also upheld the CIT(A)'s rejection of comparable selected by TPO viz. 'T&I Global Limited' noting that it was engaged in manufacturing machinery and thus incomparable with assessee performing purely distribution function. Accordingly, it dismissed the Revenue's appeal.
ACIT Vs Kobelco Construction Equipment India Limited - TS-299-ITAT-2017(DEL)-TP - ITA No.6401/Del/2012 dated 17.04.2017

186. The Tribunal held that the Resale Price Method (RPM) was the Most Appropriate Method (MAM) for benchmarking the transactions of the assessee, engaged in distribution of 'medical equipment' and 'automotive equipment' manufactured by its Japanese parent company in India as opposed to TNMM adopted by the TPO. Noting that the assessee was performing pure distribution function and was re-selling the finished goods manufactured by its AE without any value addition, the Tribunal accepted assessee's RPM, relying on Rule 10B(1)(b) as well as decision of the Tribunal in Mattel Toys [TS-159-ITAT-2013(Mum)-TP]. It rejected TPO/DRP's reasoning that assessee being a full-fledged/full-risk distributor performing a host of functions, RPM was not representative of the correct gross profit margin. It further held that the Revenue had also not brought any evidence on record to prove that the other comparables were not functionally comparable to the assessee. As regards Revenue's objection regarding huge variation in gross profit margin of the two products distributed by assessee, the Tribunal directed the TPO to examine assessee's submission that as per separate gross profit margin working for both items, assessee's margin was higher than that of comparables.
Horiba India Pvt. Ltd. Vs DCIT - TS-300-ITAT-2017(DEL)-TP - ITA No.-6638/Del/2015

187. The assessee (engaged in supplying cranes and mechanical equipment) in its TP-study, had specifically stated that TNMM and not RPM was MAM and that assessee should be selected as the tested party since its functions were the least complex. However, during proceedings before DRP,assessee stated that RPM should be selected as MAM since assessee's functions were that of a mere dealer of goods (which even the TPO had stated) but also stated that foreign AE (though it was a manufacturing entity) should be selected as the tested party on the ground that the AE had least complex functions. The TPO applied TNMM as MAM and considered assessee as a tested party. The DRP rejected RPM as the MAM on the ground that there was qualitative addition and that assessee performed function of market research, customer mining, order program from customers, requirement analysis, quality checks, apart from bearing marketing, price, credit, bad debt, warranty, forex, inventory and manpower risk. The Tribunal concurred with the DRP's view and opined that with such a complicated profile, RPM could not be the MAM. It upheld the application of TNMM as MAM. Further, noting that AE was a leading manufacturer and supplier of wide range of lifting and transport systems and had a notable presence and leadership in international markets, it rejected contention of assessee that AE should be the tested party since the assessee was performing only distribution and marketing function of the assessee, and concluded that assessee was the party which had the least complex functions.

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Jaso India Private Limited vs Dy.CIT [TS-1065-ITAT-2018(Kol)-TP] ITA No.507/Kol/2017 dated 28.09.2018

188. The Tribunal followed the coordinate bench decision in assessee's own case for earlier year to apply RPM to benchmark the import of seeds transaction from its AE for purpose of resale by assessee (as in against TNMM adopted by TPO). The Tribunal in the earlier year had relied on coordinate bench decision assessee's own case for earlier year (wherein AO's order was set aside to pass directions in conformity with DRP accepting RPM) holding that principle of consistency was to be followed. It was assessee's contention that RPM was the MAM when a trader purchases from an AE and resells to an independent enterprise without adding substantially to the value of the product; or does not contribute substantially to the creation or maintenance of intangible property associated with the product.
Seminis Vegetable Seeds (India) Pvt Ltd vs Dy.CIT [TS-1381-ITAT-2018(Mum)-TP] ITA No.4202/Mum/2014 dated 18.12.2018

189. The Tribunal upheld DRP's selection of RPM as MAM for assessee's export of iron ore to AEs and dismissed the TPO's application of CUP method as faulty. The DRP had held that that the TIPS database (used as CUP by the TPO) was unreliable tool to determine ALP of assessee's transaction noting that it provided prices of iron ore exported from Vishakhpatanm port as per iron content which did not match the iron content in the assessee's transaction (50.60 percent). It upheld the DRP's observation that the difference in iron content would directly impact the market value and therefore held that the CUP method could not be adopted. Accordingly, it upheld the DRP's direction to consider the mean GP-rate realised in the exports to non-AEs to benchmark the AE-transactions.
ACIT vs. Billion Wealth Minerals Pvt. Ltd. - TS-43-ITAT-2018(Mum)-TP - / I. T. A. / 1818/ Mum/2015 dated 19.01.2018

190. The Tribunal, relying on ITAT decisions in Mattel Toys [TS-159-ITAT-2013(Mum)-TP], Luxottica India Eyeware [TS-375-ITAT-2014(DEL)-TP], (which was upheld by jurisdictional HC [TS-532- HC-2015(DEL)-TP]), and OSI Systems [TS-396-ITAT-2015(HYD)-TP] applied the Resale Price Method (RPM) as the most appropriate method (MAM) in case of assessee engaged in reselling liquor, perfumes, confectionary, tobacco etc. in the duty free shops set up at Delhi Airport. It held that where there was no dispute on the fact that the assessee was purchasing finished products from the AEs for the purpose of reselling to unrelated parties without any value addition, under normal circumstances, the most appropriate method to bench mark the arm's length price of such transaction in terms of 10B was the RPM and that the TPO was not justified in rejecting the RPM method and applying TNMM on the ground that the gross profit margin computation of comparables was not produced by assessee. It concluded that the TPO should have made an effort to bench mark the transaction under RPM instead of rejecting it on flimsy grounds and straight away proceeding to apply TNMM. Accordingly, it directed AO/TPO to examine assessee's benchmarking under RPM in an objective way, leaving it open to the AO/TPO to call for necessary / relevant information relating to gross profit margin of comparables from assessee, or to independently proceed for selection of comparables under RPM after obtaining the information.
Airport Retail P. Ltd. (formerly known as Alpha Future Airport Retail P. Ltd.) vs JCIT - TS-118-ITAT-2017(Mum)-TP - ITA no. 158/Mum./2014 & ITA no. 1762/Mum./2014 dated

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17.01.2017

191. The Tribunal, considering the fact that the assessee, engaged in the importing of high end toys from its AE and selling them to third parties, had incurred 65 percent of its total operating costs on AMP expenses and that there was a huge gap between the Gross Profit and Net Profit rates of the assessee during the year under review, held that the assessee could not be considered as a mere distributor and therefore the RPM method would not be the most appropriate method. Accordingly, it remanded the file to the TPO for fresh adjudication.
Mattel Toys (India) Pvt Ltd v ITO (ITA No.6391/M/2011) – TS-518-ITAT-2015 (Mum) – TP

192. The Tribunal held that RPM (as against TNMM adopted by TPO) was to be adopted for assessee's distribution activity following the coordinate bench ruling in assessee's own case for earlier year wherein it was held that RPM was the most appropriate method as there was no value addition in case of assessee's import of finished goods transaction from its AE which were resold to non-AEs.
Fresenius Kabi India Private Limited vs ACIT [TS-1212-ITAT-2018(PUN)-TP] (ITA No.2572/PUN/2016) dated 02.11.2018

193. The Tribunal upheld CIT(A)'s deletion of TP-adjustment in respect of international transaction of import of finished goods, accessories, components and spares by the assessee (engaged in trading) from its AE. The assessee adopted RPM as MAM and compared the gross profit margin earned by it on sale of finished goods imported from AE with margin earned on sale of finished goods purchased from unrelated parties. TPO rejected assessee's approach of computing such gross profit margin earned by considering cost of components, spares, accessories, consumables etc. within the total cost of finished products resold (as their sale price was included in the sale value charged to customers). The Tribunal observed that the assessee was providing power solutions to its customers for which it was not only importing UPS or DP power systems from its AEs but was also attaching various other components, spares, accessories etc. to it including batteries and racks to provide an end-solution to the customers and the assessee had not charged separately for such components. Accordingly, it rejected the TPO's contention and accepted the assessee's transactions to be at ALP.
DCIT vs. Eaton Power Quality Pvt Ltd - TS-186-ITAT-2018(PUN)-TP - ITA No.1025/PUN/2014 dated 12.03.2018

194. The Tribunal directed the AO/TPO to apply RPM as the MAM method for benchmarking assessee's import of finished goods from its AE for onwards sale as against the CPM method applied by the TPO. The TPO applied a markup of 11% to benchmark the arm's length price of international transaction undertaken. In arriving at the above decision, the Tribunal noted that the assessee was importing finished goods from its AE and there was no value addition.
Bekaert Industries Pvt Ltd vs. ACIT [TS-349-ITAT-2018(PUN)-TP] ITA No.2376/Pun/2012 dated 14.05.2018

195. Where assessee bought products from AE and resold them without further processing, the Tribunal, relying on the decision in the case of Tektronix India P Ltd [ITA No. 1334/bang/2010 dated 31st October 2012], held that RPM was the most appropriate method. It also relied on

the case of Frigoglass India Pvt. Ltd. [TS-112-ITAT-2014(DEL)-TP] and Bose Corporation India Pvt. Ltd which upheld Resale Price Method as the most appropriate method in case of a distributor. This view was further fortified by OSI Systems Pvt. Ltd ruling wherein all the aforementioned rulings were considered before deciding in favour of RPM in case of distribution activity. The Tribunal opined that it was a settled position in law that in case of distribution activity, there could not be any value addition to the product in question, even when selling and marketing expenses were borne by assessee. Noting that Revenue did not dispute that assessee was into distribution activity, it held that in such cases, Resale Price Method was the most appropriate method and accordingly reversed the decision given by the TPO/DRP of using TNMM as the most appropriate method for the transaction under consideration.

Fresenius Kabi India Private Limited vs DCIT-TS-625-ITAT-2017(PUN)-TP-ITA No.235/pun/2013 dated 16.06.2017

Transactional Net Margin Method

196. The Apex Court dismissed the SLP filed by the Revenue against order of the High Court wherein it was held that where TNMM had been accepted as the most appropriate method to benchmark all of the assessee's transactions i.e import of raw materials, sub-assemblies and components, payment of royalty, payment of software and purchase of fixed assets barring the payment of technical fee, adoption of a different method viz., CUP would lead to chaos in benchmarking as it could lead to adoption of more than 2 methods for determination of ALP within a single year.

DCIT vs Magnetti Marelli Powertrain India Pvt Ltd-TS-860-SC-2017-TP SLP No. 15244/2017 dated

197. The assessee provided sales support services and liaisoning services to its AEs with regard to the exports and imports of the commodities from its AE to / from India and benchmarked the international transaction adopting TNMM as MAM, which was rejected by TPO and recharacterized the service and commission activities of the assessee as trading segment. On appeal, the Tribunal observed that in assessee's own case for AY 2007-08 and 2008-09 had ruled on identical issues which were decided in favour of assessee. ITAT deleted the adjustment relying on Li & Fung HC ruling [TS-346-HC-2013(DEL)-TP]. In that case, it was held that computation of the operating profit margin by increasing the cost of the sales leads to an arbitrary adjustment of assessee's income and that such alteration resides plainly outside the Rules and the provisions of the Act. ITAT upheld assessee's international transactions computed by using TNMM as MAM and Berry Ratio as PLI. The High Court dismissed Revenue's appeal on the ground that no substantial question of law arose. Accordingly, the Revenue filed a SLP before the Apex Court which was admitted.

Pr. CIT vs Mitsui and India Pvt Ltd-TS-602-SC-2017-TP-ITA No.788/2016 dated 28.02.2017

198. The Court dismissed Revenue's appeal and upheld the Tribunal's order accepting TNMM as MAM for exporter assessee and held that since the assessee was an exporter of goods the TPO had wrongly used Resale Method (RM), which was only to be applied to importers.

Accordingly, it held that TNMM method was rightly used for exporters and therefore, the resultant concession granted to the assessee on this count was correct.
Pr CIT v Rahman Exports Pvt. Ltd - TS-23-HC-2018(ALL)-TP dated INCOME TAX APPEAL No. - 7 of 2017 dated 11.01.2018

199. The Court admitted assessee's appeal on the following question of law "Whether on the facts and circumstances of the case and in law, the Tribunal was justified in upholding the rejection of segmental Transactional Net Margin Method and adopting the comparable Uncontrolled Price method for determining any adjustment under Chapter X in respect of the purchase of raw materials and sale of finished goods made by the Appellant?"
Henkel Adhesives Technologies India Pvt Ltd vs. DCIT - TS-106-HC-2018(BOM)-TP - INCOME TAX APPEAL NO. 817 OF 2015 dated 20.02.2018

200. The Court dismissed Revenue's appeal and held that the Tribunal was justified in holding TNMM as MAM for benchmarking exports to AEs. It noted that the TPO made adjustment on approx. 5% of total exports by applying CUP-method on the basis that there were similarities between goods sold to AE and third parties but the Tribunal, considering the customization of finished goods and the geographical, volume, timing, risk and functional differences, came to a conclusion that CUP method could not be MAM and upheld the assessee's stand that TNMM was MAM. It dismissed Revenue's contention that Tribunal had adopted TNMM as MAM without considering FAR-analysis as 'unjustified' noting that Tribunal had done the necessary FAR analysis and therefore opined that the view taken by the Tribunal on the facts before it, was a possible view on the application of appropriate tests.
Amphenol Interconnect India P. Ltd - TS-205-HC-2018(BOM)-TP] INCOME TAX APPEAL NO. 1131 OF 2015 dated 7th MARCH, 2018

201. The Court dismissed Revenue's appeal and upheld Tribunal's application of TNMM as Most Appropriate Method (MAM) for benchmarking assessee's export & import transactions and noted that Tribunal rightly followed co-ordinate bench ruling in assessee's own case for previous AYs (which was subsequently confirmed by HC) wherein for the same transactions, TNMM was upheld as MAM over TPO's CUP-method. Thus, in the absence of any distinguishing facts in subject AY, the court held that the said ratio would equally apply to the facts of the present appeal and accordingly dismissed revenue's appeal
PCIT- 5 Pune vs Amphenol Interconnect India P Ltd- TS-275-HC-2018(Bom)-TP- ITA No. 1388 of 2015 dated 18.04.2018

202. The Court admitted assessee's appeal on the following substantial question of law i.e. whether the Tribunal was justified in rejecting the principle of aggregation of closely linked transactions using the Transactional Net Margin Method.
JCB India Ltd vs DCIT Circle 13(1)- TS-301-HC-2018(DEL)-TP-ITA No 525/2017 dated 18.04.2018

203. The Court rejected admission of question of law raised by assessee involving rejection of CUP method by Revenue as the most appropriate method (MAM) for the transaction of sale of railway wagons to AE based on the sale price charged by the AE from the ultimate third-party buyer and noted that Revenue rejected CUP method having regard to the fact that it

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unduly restricted the choices of the Revenue and TNMM was considered to be a more appropriate method where greater choice was available. The Court thus concluded that appropriateness of the MAM per se does not give rise to a question of law since it involves analysis of facts done first by the Revenue authorities and settled by the Tribunal and held that unless the facts show glaring distortion in the adoption of one or the other method, a question of law cannot be said to arise.

The Court thereafter admitted 3 legal questions raised by the assessee in respect of Tribunal's order on the issues of cherry-picking of comparables, deletion of comparables selected by the assessee, and intra-group services related to management support. The same are as under:

- Whether on the facts and in the circumstances of the case, the Tribunal erred in law in upholding the action of the TPO in cherry-picking comparables and considering Titagarh and Texmaco as comparable companies for undertaking benchmarking analysis of international transaction of main line segment applying TNMM, not appreciating that the said companies did not satisfy the test of comparability as provided in Rule 10B (2) of the Rules?
- Whether on the facts and in the circumstances of the case, the Tribunal erred in law in upholding the action of the TPO in deleting the comparables proposed by the appellant, viz., Braithwaite and Bharat Wagon, (without prejudice and in response to the additional comparables selected by the TPO),completely ignoring that the same are identical in functional profile to the comparables introduced by the TPO for undertaking benchmarking analysis of international transaction of main line (MLN) segment applying TNMM, not appreciating that the said companies satisfy the test of comparability as provided in Rule 10B(2) of the Rules?
- Whether on the facts and in the circumstances of the case, the Tribunal erred in law in upholding the addition made by the TPO on account of intra-group services related to management support by President and his team, human resources, Six Sigma and operation, and quality and other services, received by the appellant from its associated enterprises, on the erroneous reasoning that such services, rendered by the AEs are in the nature of shareholders activities and of no economic and commercial value to the business of the appellant?

Bombardier Transportation India Pvt Ltd vs DCIT- TS-244-HC-2018(Del)-TP-ITA No 223/2018 dated 09.04.2018

204. The Court, allowing assessee's appeal, reversed Tribunal order remitting ALP determination in respect of assessee's import of raw materials, components and semi-finished goods in manufacturing segment (class I transactions) and also for assessee's class II transactions in respect of import of finished goods in trading segment. It held that on a plain reading of the order of CIT(A), it was apparent that it agreed that transactions both in class I and Class II segments had to be benchmarked by applying TNMM and therefore it was factually incorrect on part of the Tribunal to observe the contrary. Referring to a compilation of the orders passed by TPO for subsequent AYs 2007-08 to 2010-11, the Court held that there was factually no change in the classification or the nature of international transactions undertaken or the functional profile of the Assessee and thus rejected Revenue's contention that the Court should proceed on the assumption that assessee had changed his business profile and functions. Further, it held that in the absence of any change in assessee's business profile there was no need to uphold the Tribunal order remitting the matter to the TPO / AO or

Tribunal for a fresh consideration as remitting the matter back would be a sheer waste of time, serving no purpose. Accordingly, it set aside the order of Tribunal and affirmed the order of CIT(A).

Rayban Sun Optics India Ltd vs CIT-TS-597-HC-2017(DEL)-TP-ITA NO. 889/2016 & CM APPL. 45967/2016 dated 11.07.2017

205. The Court affirmed Tribunal's acceptance of assessee's TNMM over TPO's RPM as MAM for benchmarking international transaction in case of assessee (engaged in the travel and tourism business) i.e. customer handling and data management services for AY 2005-06 and held that the difference of opinion as to the appropriateness of one or the other methods, could not per se be a ground for interference unless the appropriateness of the method was shown to be contrary to the Rules especially Rules 10B and 10C. Accordingly, it held that no question of law arose and dismissed Revenue's appeal.

Pr. CIT vs. Makemy Trip India Pvt Ltd vs. ACIT-TS-871-HC-2017(DEL)-TP ITA 881/2017 dated 07.11.2017

206. The Court while dismissing the Revenue's appeal held that where the assessee received a host of intra- group services from its AE via a consolidated agreement which were all intrinsically linked to the manufacturing activity of the assessee, the TPO was not justified in splitting up the agreement to determine the ALP of certain services separately on the ground that the services did not result in any benefit, while accepting the price of the other services.

Pr CIT v Avery Dennison (India) Pvt Ltd - TS-527-HC-2016 (Del) - TP ITA 386/2016 With ITA 392/2016

207. The Court held that where the TPO had accepted the TNMM as the most appropriate method for all the international transactions, it was not open for him to subject only one element viz. the technical assistance fee paid by the assessee to its AE to an entirely different method – CUP. Accordingly, it directed the AO / TPO to apply the TNMM in respect of technical payment fee as well.

Magneti Marelli Powertrain India Pvt Ltd [TS-869-HC-2016(DEL)-TP] (ITA 350/2014)

208. The Court held that where transfer pricing officer accepted TNMM applied by the assessee, as the most appropriate method in respect of all the international transactions including payment of royalty, but however disputed the application of TNMM as the most appropriate method for the payment of technical assistance fee and applied CUP on the said transaction, it was not open to the TPO to subject only one element, i.e payment of technical assistance fee, to an entirely different method.

Magneti Marelli Powertrain India Pvt. Ltd. vs. DCIT (2016) 97 CCH 0037 (Del HC) (ITA 350/2014)

209. The TPO was of the view that CPM was the MAM (as against TNMM applied by assessee) for determining the ALP of sale of manufactured products to AE in case of assessee engaged in business of manufacturing of glass mosaic. The Tribunal remitted the matter to TPO for determining ALP by applying TNMM following the coordinate bench decision in assessee's own case wherein it was held that DRP erred in applying CPM on basis that there was imperfect data. It noted that if at all there was a residuary method or default method which

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could be applied under such conditions, it was TNMM. It observed that for TNMM, it was only broad similarity in the product and economic similarity in the conditions which was needed (as there was difference between the product that the assessee is manufacturing vis-a-vis the products being manufactured by the comparables adopted). Further, TNMM would also be more appropriate for use in certain situations where there were data limitations on gross margins (difference in treatment of costs as cost of goods sold or operating expense) as net profit margins are analyzed.

Gemstone Glass Pvt Ltd vs DCIT [TS-1221-ITAT-2018(Ahd)-TP] ITA (TP) No.3533 /Ahd/2015 dated 23.10.2018

210. Where the TPO rejected the assessee's TNMM (based on cost plus 55% mark-up) to adopt the CUP method based on price agreed in supply agreement with another AE, pursuant to which he made an adjustment which was later deleted by the CIT(A), the Tribunal confirmed the deletion made by the CIT(A) on the ground that the price quoted in the assessee's supply agreement with overseas AE could not be adopted as 'comparable un-controlled transaction under CUP method.

ACIT v Bilag Industries Pvt Ltd - TS-603-ITAT-2016 (Ahd) - TP ITA Nos 1441 & 1670 /Ahd/2006 & 343/Ahd/2012

211. The Tribunal held that TNMM and not the CUP method was the most appropriate method for determining arm's length price of the overseas sales of glass mosaic products manufactured by the assessee to its AEs. It held that the DRP and TPO were incorrect in considering sales to resident affiliate companies as CUP as the definition of uncontrolled transactions in Rule 10 specifically provided for transactions with Non-AEs. Accordingly, the logic of the DRP stating that since the companies were domestic affiliates, there was no motive for tax avoidance and therefore they could be considered as comparable was dismissed by the Tribunal.

Gemstone Glass Pvt Ltd v JCIT (I.T.A. No.: 3223/Ahd/11 and 2858/Ahd/12) –TS-510-ITAT-2015 (Ahd) – TP

212. The Tribunal upheld the application of TNMM as MAM for benchmarking the sale of products by the assessee to AE and deleted the TP adjustment computed by the TPO adopting the CUP method by benchmarking the transactions with the Non-AEs. It relied on the findings of coordinate bench in the earlier year in assessee's own case wherein CUP method was rejected in light of the geographical factors and difference in the quantity of the products sold.

Dishman Pharmaceuticals & Chemicals Ltd vs DCIT [TS-958-ITAT-2018(Ahd)-TP] ITA No.955/Ahd/2012 dated 20.06.2018

213. The Tribunal held that the selection of the most appropriate method was not an unfettered discretion of the assessee and is subject to adjudication at both the assessment as well as the appellate stage and that determination of the most appropriate method was based on the availability, coverage and reliability of data necessary for the application of the method and therefore where the assessee provided only one comparable under the internal TNMM whereas there was sufficient, relevant, reliable data for comparables under the external TNMM, the method chosen by the assessee viz. Internal TNMM was not the most appropriate method. Further it noted that the one comparable selected by the assessee under internal

TNMM was an erstwhile AE of the assessee, which was now of independent status in legal terms as a result of group restructuring and therefore it did not satisfy the reliability test either.
Fortune Infotech Ltd v ACIT - (2016) 66 taxmann.com 92 (Ahd - Trib)

214. The Tribunal upheld assessee's [manufacturer of bulk drugs, chemicals and intermediates] application of TNMM over TPO's adoption of CUP-method as the Most appropriate method for benchmarking international transactions of product sales and receipts for contract research services. It noted that while TPO had stated that CUP-method was better than TNMM, he did not mention how TNMM was not applicable on the given set of facts. Further, it held that the DR could not improve the case of the TPO at this level. It also observed that the co-ordinate bench in assessee's own case for AY 2002-03 had upheld assessee's adoption of TNMM as MAM and therefore held that there was no justification for deviating from order of the ITAT passed in similar facts of the same assessee.
DCIT vs. Dishman Pharmaceuticals & Chemicals Ltd - TS-440-ITAT-2018(Ahd)-TP – ITA No 692/Ahd/2011 dated 23 /05/2018

215. The Tribunal deleted TP adjustment of Rs. 612.03 crores in respect of sale of Pantoprazole tablets by assessee (Indian Pharma company engaged in manufacturing of bulk drugs as well as formulation products) to AE (SPG BVI). The TPO/CIT(A) had rejected TNMM adopted by assessee on the ground that the assessee was not merely a contract manufacturer but performed substantial functions and accordingly applied PSM on the basis that respective functions between assessee and AE could not be distinctly ascertained. Noting that the assessee performed only one simple function of manufacturing the tablets without providing any other significant unique contribution, the Tribunal held that as per OECD guidelines the profit split method was not appropriate for benchmarking**.** Further, it held that the conditions for applicability of PSM i.e. transfer of unique intangibles & interrelated multiple transactions were both missing in present case. Accordingly, it deleted the TP-adjustment.
Sun Pharmaceuticals Industries ltd vs ACIT-TS-596-ITAT-2017(Ahd)-TP-ITA No.3297 & 3420/AHD/2014 dated 16.06.2017

216. The Tribunal relying on the decision of the coordinate bench in the assesse's own case for AY 2006-07 [TS-915-ITAT-2016(BANG)-TP] and noting that that the TPO had applied TNMM in respect of sale of spare parts for the assessee in the earlier assessment year held that TNMM as selected by the assessee was the MAM as against Cost Plus Method adopted by TPO for AY 2008-09. Further, it directed AO/TPO to consider the working capital adjustment claimed by the assessee and held that when the issue of MAM had been decided in favour of the assessee then the issue of working capital was required to be reconsidered. However, it rejected assessee's plea for grant of risk adjustment as assessee had not furnished the computation and working of the risk adjustment by giving requisite details of level of risk and computation of quantification of risk adjustment for assessee vis-à-vis comparables.
GE BE Pvt Ltd vs DCIT -TS -373-ITAT-2017(Bang)-TP- - I.T.(T.P) A. No. 1291/Bang/2012 dated 13.04.2017

217. Where the TPO for the succeeding assessment years viz. AY 2010-11 and AY 2012-13 had accepted TNMM as the most appropriate method to benchmark the assessee's international

transaction but sought to apply the Cost Plus Method in the relevant year, the Tribunal held that since the TPO had accepted TNMM in the subsequent years, TNMM ought to have been accepted in the relevant year as well. Accordingly, it remitted the issue to the file of the TPO to benchmark the transactions applying TNMM.

GE BE Pvt Ltd – TS-916-ITAT-2016 (Bang) - TP

218. Noting that the domestic transaction with non-AE was entirely different (including geographical difference) from the international transaction, the Tribunal rejected internal TNMM adopted by assessee to benchmark provision of telecommunication networking services to AE for AYs 2009-10 to 2011-12 and held that entity level results comprising of international transactions and domestic transactions could not be considered for the purpose of testing the price of the international transactions. Further, it held that CUP was the most appropriate method since, prior to assessee's incorporation, AE was availing networking services directly from Tata Communications but post incorporation, assessee became the lease holder of the network owned by Tata Communications & started raising bills to AE.

Cable & Wireless Networks India Pvt. Ltd vs. DCIT-TS-616-ITAT-2017(Bang)-TP-IT(TP)A No. 1549/bang/2014, 401 and 402/bang/2017 dated 12.07.2017

219. The assessee providing software development services to its AEs benchmarked its transactions under TNMM which was rejected by the TPO who selected CUP as the MAM and adopted the average industry hourly rates as comparable and made an addition. The CIT(A) struck down the application of CUP as the MAM and proceeding under TNMM, selected a list of comparables as adopted in the case of Sun Microsystems India P. Ltd. for the same AY which led to partial relief to the assessee. The Tribunal held that TP comparability analysis has to be carried out for each taxpayer, for each assessment year to decide the Most Appropriate Method to be adopted, the filters to be applied and the comparable companies to be selected and therefore held that it was not appropriate for the CIT(A) to merely quote a particular judicial pronouncement in order to decide the MAM to be adopted or to cite another to decide the final set of comparable companies. Noting that the functions of the assessee (software development) and that of the taxpayer in the decision relied on by the CIT(A) (ITES) differed, it remitted the entire TP issue to the file of the TPO for fresh adjudication. Further, it held that the TPO erred in selecting CUP as the MAM as the TPO failed to provide any reasoning as to why the TNMM adopted by the assessee was incorrect.

Infineon Technologies India Private Limited vs ACIT-TS-899-ITAT-2017(Bang)-TP dated 03.11.2017

220. The assessee had benchmarked its international transactions in the call centre segment adopting CUP as the most appropriate method. However, it had also conducted a supplementary analysis under TNMM. The TPO accepted the CUP method but benchmarked the transaction using the average rate charged by the assessee for 9 months as opposed to 12 months since the comparable company only had 9 months data. Noting that the rate charged by the assessee for 9 months (USD 1.63) was less than the CUP rate of USD 1.83, the TPO made an adjustment of Rs. 2.30 crore. The TPO rejected the assessee's plea that the difference in rate was due to the difference in credit period granted

by the assessee vis-à-vis the comparable which required adjustment in respect of the rate of both the assessee as well as the comparable and held that as per Rule 10B no adjustment could be made to the value of international transactions of the assessee under CUP. CIT(A) upheld the adjustment. The Tribunal held that the price charged by the assessee from April, 2003 to March, 2004 (12 months) had to be taken into consideration for benchmarking its international transactions and opined that where the appropriate data was not available at the relevant point of time CUP could not be used. It further held that the MAM in the case of ITES services, ought to have been TNMM instead of CUP method as it encompasses the minor variation and also provides for suitable adjustment. Accordingly, it remitted the issue to TPO for fresh consideration and determination adopting TNMM as the Most appropriate method.

Dell International Services India Pvt Ltd vs ACIT [TS-443-ITAT-2017(Bang)-TP] - I.T.{T.P} A. No.699/Bang/2009 dated 21.04.2017

221. The Tribunal held that charging lesser rates to Non-AEs as compared to AEs was not a reason to reject internal TNMM as it is possible to make a reasonably accurate adjustment for such differences. It also held that internal CUP could not be accepted as the CUP method visualizes comparison on a project to project basis, if similar in all respects which was not the case of the assessee.

Valtech India Systems Pvt Ltd v DCIT [IT(TP)A No 1380 / Bang / 2011] - TS-374-ITAT-2015(Bang)-TP

222. The Tribunal accepted the internal TNMM method adopted by the assessee as the MAM for the software development services provided by it since the transactions with Non-AEs abroad were more than 25 percent of the total value of international transactions and that the assessee was able to demonstrate that the services rendered to unrelated parties were similar to those rendered to the AEs.

Valtech India Systems Pvt Ltd v DCIT [IT(TP)A No 22 / Bang / 2014] – TS-455-ITAT-2015(Bang) – TP

223. The Tribunal, noting assessee's submission that once TNMM at entity level was applied and accepted by TPO and the items of expenditure formed part of the operating expenditure, no separate adjustment on account of specific items of expense was required, remitted the TP-adjustment in respect of selling commission and network charges paid by assessee to its AE to the file of AO directing it to delete the TP adjustment on account of these two items if it formed part of operating expenditure.

Mphasis Ltd vs. Addl. CIT-TS-745-ITAT-2017(Bang)-TP-ITA No. 242/bang/2014 dated 09.08.2017

224. The Tribunal allowed assessee's appeal and directed the TPO to consider assessee's claim for application of internal TNMM for benchmarking its AE transactions, noting that the TPO had applied external TNMM which was upheld by DRP, rejecting Internal TNMM without considering that the assessee had substantial transactions with unrelated parties and that the OP/OC of its transactions with AE was in the range of 17.93% and 20.35% as against 9.76% for transactions with unrelated parties, thereby warranting no TP-adjustment. Accordingly, it restored the issue to the file of TPO for fresh consideration.

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Xchanging Solutions Ltd vs DCIT - TS-87-ITAT-2017(Bang)-TP - IT (TP) A No.1385 (Bang) 2011 dated 11-01-2017

225. The Tribunal held TNMM to be the MAM for the following reasons, viz (i) the assessee was only a custodian of the goods imported till they were delivered to the client or customer of its parent company on its directions and therefore since the assessee could not be held to be a trader or distributor of the goods the resale price method was not applicable. (ii) The other methods i.e. cost plus method which is applicable to the transactions relating to manufacture and sale of goods and Profit Split Method which is applicable mainly in international transactions involving transfer of unique intangibles or in multiple international transactions which are so inter-related were also inapplicable to the facts of the given case.

DCIT vs. CISCO Systems (India) Pvt. Ltd - (2016) 47 CCH 0464 (Bang Trib) - IT.(T.P) A No. 1447/Bang/2013

226. The Tribunal held that the TPO was correct in adopting TNMM over the Resale Price Method as the Most appropriate method, since the assessee had incurred huge expenditure on account of selling, distribution and promotion in respect of the trading of the goods imported from the AE as the assessee had closed its manufacturing operations during the subject AY and therefore the business model of the assessee was not comparable with that of the comparable companies who did not incur such expenditure. It held that the RPM could be considered as MAM in case the distribution of goods was without any value addition but since the assessee had incurred substantial expenses on selling and promotion, TNMM was to be considered. It also held that appropriate adjustment was to be allowed while determining ALP under TNMM if abnormal expenditure was incurred on advertisement, marketing and promotion on account of the commencement of a new distribution activity.

Abott Medical Optics Pvt Ltd v DCIT - TS-443-ITAT-2016 (Bang) - TP - I.T.(T.P) A. No.1116/Bang/2011

227. Where the assessee had purchased cotton bales from various factories in India and sold the same to its Associated Enterprises (AEs) as well as to Non-AEs in the domestic market and the TPO had applied internal TNMM to benchmark the international transaction as opposed to the external TNMM adopted by the assessee (wherein the assessee had selected 2 comparable transactions) and made an addition of Rs. 10.8 crore as the margin from AE transactions was -11.91 percent as opposed to the 4.32 percent earned from Non-AE transactions, the Tribunal held that held that since it was an undisputed fact that an internal uncontrolled comparable price was available in the assessee's case, preference was to be given to Internal TNMM as the comparison was more reliable. It dismissed the submission of the assessee that it had entered into forward contract for purchase of cotton bale from domestic market and sale to AE at pre- determined price but due to default on the part of the vendors, it had to purchase cotton bales from local market as per the prevailing market to supply to AE at lower rates agreed between the parties as per the forward contract and that the loss suffered on account of default of forward purchase contract was extraordinary in nature. It observed that the concept of a forward contract was to hedge the future price fluctuations on the basis of a pre-agreed price when parties were dealing independently without any mutual interest and since the assessee had entered into forward contract with its AE, it held that the such agreement did not serve the very purpose of entering into a

forward contract because a loss to either of the party would not be a gain to the other party. Further, it held that that even if assessee had purchased cotton bales from market at a higher price, the sale price to the AE at a lower rate and that too lower than the sale price to the non-AE clearly manifested the internal arrangements of the related party to supply the cotton bales to the AE at a price which was lower than the purchase price of the assessee. Accordingly, it upheld the TPO's addition.

Dhanya Agroindustrial Pvt. Ltd. Vs DCIT - TS-168-ITAT-2017(Bang)-TP- I.T.(T.P) A. No.161/Bang/2016 dated 08.03.2017

228. Where the TPO for the succeeding assessment years viz. AY 2010-11 and AY 2012-13 had accepted TNMM as the most appropriate method to benchmark the assessee's international transaction but sought to apply the Cost Plus Method in the relevant year, the Tribunal held that since the TPO had accepted TNMM in the subsequent years, TNMM ought to have been accepted in the relevant year as well. Accordingly, it remitted the issue to the file of the TPO to benchmark the transactions applying TNMM for AY 2006-07.

GE BE P Ltd v DCIT-TS-803-ITAT-2017(bang)-TP- IT (TP) A No.1143 (Bang) 2011 dated 28.09.2017

229. Relying on the co-ordinate bench ruling in assessee's own case for the assessment year 2011-12 and 2012-13, the Tribunal restored the matter to the file of the AO/TPO to benchmark the assessee's provision of software development services by adopting internal TNMM (adopted by the assessee) as internal TNMM was to be preferred over external TNMM adopted by the TPO.

Brillio Technologies Pvt. Ltd. vs. DCIT - TS-427-ITAT-2018(Bang)-TP - IT(TP)A No.1897/Bang/2017 dated 31/05/2018

230. The Tribunal upheld the CIT(A)'s adoption of TNMM as MAM over RPM applied by the TPO.since the assessee had incurred huge selling, marketing and advertising and promotion in respect of the import of goods for the subject year. The Tribunal relied upon the co-ordinate bench ruling in assessee's own case for earlier year wherein the reason assigned by the TPO for rejecting RPM was accepted i.e. that the business model of the assessee could not be compared with comparable companies on account of the selling, marketing and advertising and promotion expenses incurred and hence concluded that TNMM would be the MAM.

Abbott Medical Optics Pvt. Ltd. v DCIT (formerly Advanced Medical Optics India Pvt. Ltd) [TS-517-ITAT-2018(Bang)-TP] IT(TP) A No.08/Bang/2014 dated 22.06.2018

231. The assessee adopted RPM as the MAM for ALP determination of its transaction of purchase of water heaters (trading segment) and CPM for transaction of purchase of raw materials (manufacturing segment) from its AE. The TPO applied TNMM as against RPM applied by assessee as the functions performed by the assessee before reselling the products of its AE and costs for performing such functions were not available. Further, in the case of transaction of purchase of raw materials, TPO observed that the assessee had not shown how its gross profit was computed. The DRP set aside the TPO's order and accepted RPM and CPM as MAM for its manufacturing and trading segment respectively observing that TNMM being applied resulted in abnormal gross profit margins in assessee's trading segment (60.08%) and manufacturing segment (83.61%) as against gross margin stated in TP documentation

(11.38% and 25.53%) and the adjustment made by the TPO was more than the international transaction entered into in the segments. The Tribunal held that the TPO's reason for rejecting CPM for the manufacturing segment could not be sustained on account of assessee having submitted cost of sales and other indirect costs before the TPO. However, the Tribunal also held that RPM ought to be adopted following its ruling in the assessee's own case for earlier year wherein it was held that RPM was the MAM for trading segment of assessee as the assessee sold the water heater imported from its AE in India without making any value addition. It set aside DRP's order and remanded the determination of ALP on basis of TP study (i.e. methods applied by the assessee) to TPO/AO noting that DRP fell into error while accepting the price of international transactions was at ALP on the basis that the profit margins of the assessee would be abnormal if the TPO's method was to be accepted and did not determine ALP in a manner mandated by the Act and Rules.

ACIT vs AO Smith India Water Products Pvt Ltd [TS-1175-ITAT-2018(Bang)-TP] IT(TP)A No.216/Bang/2016 dated 12.09.2018

232. In a departmental appeal, The Tribunal set aside the order of the CIT(A) deleting the TP-adjustment as the impugned order was cryptic, non-speaking and stereotyped. The TPO had proposed adjustment on export of cables to AE by using internal TNMM based on margin earned on domestic sale which was deleted by the CIT(A) who observed that the export transaction could not be compared with domestic transaction in view of different economic conditions in different geographic markets. The Tribunal held that under TNMM, a preference was to be given to an internal comparable and that the CIT(A) ought to have carried out FAR analysis for the international transaction and internal comparable transaction (domestic sales) and then made adjustment for differences such as geographical location, etc. Accordingly, it remanded the matter to the file of the CIT(A) to re-adjudicate the issue.

DCIT V Lapp India P. Ltd - TS-129-ITAT-2018(Bang)-TP - LT(TP).A No.114/Bang/2014 dated 17.01.2018

DCIT vs. Lapp India P Ltd - TS-128-ITAT-2018(Bang)-TP - I.T(TP) .. ANos.1017 & 1018/Bang/2014

233. The Tribunal held that where the assessee had rendered similar services to both AEs and Non-AEs, internal comparable companies were to be considered as opposed to external comparables.

E4E Business Solutions India Pvt Ltd v DCIT [IT(TP)A No.324(B)/2015] – TS-542-ITAT-2015 (Bang)-TP

234. The Tribunal held where there was insufficient reliable data for the application of CUP, Resale Price Method and Profit Split Method for the purpose ascertaining direct and indirect cost of production of services, the TPO was justified in adopting the TNMM as the most appropriate method.

iSoft Health Services (I) P Ltd [TS-819-ITAT-2016 (Bang)-TP]

235. The TPO segregated the transaction of payment of license fee and management fee made by assessee and benchmarked them separately by adopting CUP as MAM. He determined the ALP of license fees and management fees to be nil and made a TP adjustment. The action of TPO was upheld by CIT(A). The Tribunal set aside CIT(A)'s order not accepting aggregation

of payment of license fee and management fees made by assessee and it held that they were closely linked with the transaction relating to manufacture and export of drug formulations by assessee following the coordinate bench ruling in assessee's own case for earlier year wherein it had relied on Sony Ericsson Mobile Communication India (P) Ltd (wherein it was held that that aggregation of transactions was permissible considering the legislative intent manifested by way of Rule 10A(d) read with Rule 10B of the Rules, and the position clearly emerged that in appropriate circumstances where closely linked transactions exist, the same should be treated as one composite transaction and a common transfer pricing analysis be performed for such transactions by adopting the MAM.) It remanded back the comparability analysis in the TP study carried out by the assessee by aggregation of transactions adopting TNMM as the MAM noting that determination of ALP at entity level had not been examined by either of the authorities below who merely concentrated on the issue of aggregation/segregation of transactions.

Adcock Ingram Ltd. vs Dy. CIT [2018] 97 taxmann.com 668 (Bangalore - Trib.) IT (T.P.) APPEAL NO. 2728 (BANG.) OF 2017 dated 14.09.2018

236. The Tribunal rejected assessee's use of internal TNMM for benchmarking its international transactions in its CAT manufacturing segment (employing modern technology of the assessee's group) with the non-CAT manufacturing segment (comprising of products of erstwhile Hindustan Motors which had been acquired by it in 2011) as the two segments were not comparable due to differences in technology, marketing / R&D efforts, brand, procurement process and risk profile used in the two segments. It noted the findings of the TPO that i). the Non-CAT category used the old technology whereas the CAT category used the modern technology of Caterpillar Group, and even the types of machines used in both the categories were different with different specifications ii) the Non CAT segment had pre-existing marketing arrangements while CAT was a well-known global brand iii) the products manufactured in Non-CAT segment previously belonging to Hindustan Motors did not have the same brand value as the products in the CAT segment and therefore the Non-CAT segment had higher risks iv) materials were procured locally for Non-CAT, whereas for the CAT segment the raw materials were imported, and held that the two segments could not be considered as internal comparables. Accordingly, it confirmed the addition made by the TPO adopting external TNMM.

Caterpillar India Pvt. Ltd vs. ACIT - TS-302-ITAT-2017(CHNY)-TP - ITA 204 & 365/12 dated 05.04.2017

237. The Tribunal upheld TNMM, adopted by the assessee, as the most appropriate method for benchmarking the international transactions entered into by the assessee viz. payment of R&D and management fee, as opposed to the CUP method adopted by the TPO. It noted that the respective fees were paid on a cost-plus basis for which the AE had allocated costs to the assessee based on the ratio of head counts and sales which was rejected by the TPO on the ground that the method of allocation was skewed and unreasonable. It held that the transactions undertaken by the assessee was not purely independent transactions amenable to an independent analysis and in fact they were interconnected / closely linked with the rest of the transactions undertaken by the assessee and therefore upheld the application of TNMM. It further observed that the TPO was unable to identify a single uncontrolled comparable for benchmarking these transactions and accordingly held that the assessee could not be faulted

in insisting that the TNMM method was to be accepted. Noting that the lower authorities having rejected TNMM had not verified the functional profile of the comparables selected by the assessee in its TP study, the Tribunal remitted the issue to the file of the TPO.

Durr India Pvt Ltd v ACIT – TS-1056-ITAT-2016 (Chny) - TP

238. The Tribunal held that when assessee had both related party transaction and non-related party transaction, in absence of similarly placed companies having similar functions, similar assets employed and similar risk undertaken, transaction of assessee with non-related party could be considered as best method to determine arm's length price by applying TNMM.

Igarashi Motors India Ltd v DCIT - [2016] 68 taxmann.com 333 (Chennai-Trib)

239. The Tribunal held that in an indirect method like TNMM, a reasonable number of comparables are to be selected to ensure that results are truly representative of segment to which tested party belongs.

GE Healthcare Bio-Sciences Ltd v DDIT [2016] 68 taxmann.com 369 (Chennai-Trib)

240. The assessee had entered into a Services Agreement dated April 1, 2010 with its AE (Gamesa Corporation Technologies SA) for availing certain services (legal, administrative, human resources, finance, business development etc). The assessee adopted TNMM as the MAM consequent to which the transaction was at ALP. However, the TPO adopted CUP as MAM and determined the ALP of the impugned transaction at NIL and made addition of the entire amount paid by the assessee for the aforesaid transaction. The Tribunal, relying on the decision in the case of Magneti Marelli and Air Liquid Engineering held that where the assessee had adopted TNMM for benchmarking its profits, adoption of CUP solely for evaluating management fee would be detrimental to the interest of revenue and assessee. Further, relying on the decision in the case of Merck Ltd [TS-143-ITAT-2016(Mum)-TP, it rejected TPO's determination of NIL ALP on the ground that the assessee had substantiated underlying benefit as well as rendition of service. Accordingly, it allowed assessee's appeal.

Siemens Gamesa Renewable Power Pvt Ltd vs DCIT-TS-927-ITAT-2017(CHNY)-TP-ITA No.1420 and 376/mds/2017 dated 13.11.2017

241. The Tribunal held that where the sales made to Non-AEs was merely Rs.34 crore as compared to the sale to AEs viz. Rs.235 crore, the internal TNMM was not the most appropriate method since the sales to non-AEs was insignificant. It therefore upheld the use of external comparables for the purpose of benchmarking the international transactions of the assessee with its AEs.

FCI OEN Connectors Ltd v ACIT – (2016) 48 CCH 0295 Cochin Trib – ITA No 70 / Coch / 2016

242. The Court dismissed Revenue's appeal due to delay in filing of appeal wherein the Tribunal had held that TPO was not justified in rejecting internal TNMM based on non- AE transactions merely because segmental results were not audited.

Lummus Technology Heat Transfer BV - ITA 441 / 2016 (Del) [For the Tribunal order see - TS-48- ITAT-2014 (Del) - TP (I.T.A. No.: 6227/ Del/2012)]

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243. The Tribunal held that the TNMM method was the most appropriate method for benchmarking the international transactions of the assessee as opposed to the Cost Plus method applied by the assessee. In the given case, the TPO considered both TNMM and Cost Plus method, but for benchmarking under the Cost Plus Method he used an arbitrary margin of 35 percent and applied it on direct costs. The Tribunal held that there was inadequate discussions as to how the 35 percent markup was arrived at and also noted that the markup was applied on direct costs, whereas it was to be applied on both direct and indirect costs. Noting that the TPO had accepted 11 comparable companies under TNMM method as well and the international transaction of the assessee was at arms length price considering these comparable companies, it held that the TNMM method was the most appropriate method.

ITO v Styx Back Office Services Pvt Ltd - (2016) 68 taxmann.com 62 (Del - Trib)

244. The Tribunal held that internal comparables were to be preferred to external comparables and therefore held that internal TNMM was more appropriate than external TNMM. It further held that the geographical differences were not relevant where the FOB price was considered.

Inslico Ltd v DCIT (I.T.A .Nos. 4880 /Del/2013) – TS-623-ITAT-2015 (Del) – TP

245. The Tribunal held that the issue of comparability should be decided on the basis of facts on record and not on the basis of precedents as there cannot be an exact identical comparable and that, it was for this very purpose that TNMM was often resorted to as the minor differences, if any, were typically addressed by comparing net profitability of the comparables.

Virage Logic International India TS-480-ITAT-2016(DEL)-TP - I.T.A. No.-6918/Del/2014

246. The Tribunal held that where assessee was unable to furnish reliable data either to adopt Cost Plus Method or to analyse data on basis of CUP method, TNMM would be most appropriate method to analyse assessee's transactions in order to arrive at ALP

Mercedes Benz Research & Development India (P)Ltd. vs. ACIT - [2016] 68 taxmann.com 230 (Bangalore-Trib)

247. The Tribunal held that where the assessee company, engaged in the business of manufacture, assembly and sale of air-conditioning commercial refrigeration equipment, entered into various international transactions with its AE, and adopted an internal comparable of commercial refrigeration segment for justifying the PLI of transport refrigeration segment, TPO without carrying out detailed functional comparability of two segments, could not reject the said internal comparable and, make addition to assessee's ALP on basis of profit margin earned by an external comparable.

Carrier Air conditioning & Refrigeration Ltd v Addl.CIT - [2016] 67 taxmann.com 72 (Delhi-Trib)

248. The Tribunal, allowed Revenue's appeal and held that the assessee was not justified in benchmarking the purchase price of raw materials acquired from its AE under CUP by comparing the price charged by the AE to independent third parties in Europe as the market conditions of Europe and India were not similar and had different regulatory norms for pollution caused by automobiles. Accordingly, it upheld AO/TPO's approach of adopting TNMM and benchmarking the profit margins with the other comparables in India having similar market conditions.

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DCIT vs Ecocat India Pvt Ltd-TS-722-ITAT-2017(DEL)-TP-ITA No. 847/Del/2012 dated 15.09.2017

249. Noting that the department had accepted TNMM as the most appropriate method in the subsequent year for benchmarking the assessee's international transaction of provision of software services to its AE and the facts prevalent in the impugned & subsequent year were the same, the Tribunal upheld the order of the CIT(A)/DRP accepting assessee's adoption of TNMM over TPO's adoption of PSM as the most appropriate method and accordingly dismissed Revenue's appeal.
DCIT vs Target Sourcing Services India Pvt Ltd-TS-720-ITAT-2017(DEL)-TP-ITA.No.457/Del./2014 dated 13.09.2017

250. The Tribunal upheld DRP's adoption of TNMM for benchmarking the international transactions (relating to purchase of raw materials, components and spare parts) of assessee (engaged in manufacture of earth moving and construction equipment) on basis that facts and circumstances remained unchanged vis-à-vis previous years wherein the same method was adopted by the assessee and accepted by the TPO.
Terex Equipment Pvt Ltd (Formerly known as Terex Vectra Equipment Pvt. Ltd.) vs ACIT [TS-1196-ITAT-2018(DEL)-TP] (ITA No.930/Del/2013) dated 02.11.2018

251. The TPO had wrongly understood that assessee (engaged in manufacturing and trading of light commercial air conditioning system) had selected RPM (as opposed to "other method prescribed" by taking GP/Sales) and arbitrarily rejected the PLI i.e. GP/Sales adopted for the manufacturing segment and instead applied net profit margin under TNMM. The Tribunal noted that in subsequent year, the TPO in the manufacturing segment had accepted the same PLI i.e. G.P to Sales ratio thus, in the very first year when manufacturing activity started, selection of most appropriate method should not have been arbitrarily interfered with. It further noted assessee's concession that if adjustments as permissible under TNMM (i.e. capacity utilization) were to be considered, there would not be much impact in the subject year, and hence the issue of selection of most appropriate method may be left open for adjudication in some other year. Thus, the Tribunal held that in view of the relief maintainable to the assessee even in the method selected by the TPO the issue of most appropriate method in terms of the concession of the assessee would become academic and left open for adjudication.
Carrier Midea India P. Ltd vs Dy.CIT [TS-1256-ITAT-2018(DEL)-TP] (ITA No.7675/Del/2017) dated 22.11.2018

252. The TPO had rejected use of foreign AE as a tested party and taken assessee as the tested party for benchmarking the transaction of supplying CD's to its AE which used to be resold and distributed further by its AE's. The Tribunal following the decision of coordinate bench in assessee's own case for earlier year directed the assessee to submit financials of the foreign AE which it wanted to take as a tested party and also directed the TPO to verify whether the foreign AE could be considered as the least complex and for which comparables were easily available in public domain.
Moserbaer India Ltd vs ACIT [TS-1139-ITAT-2018(DEL)-TP] ITA No.6042/Del/2012 and 2395/Del/2014 dated 03.10.2018

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253. The CIT(A) deleted the TP adjustment made in respect of the export transaction of diamond cutting tools noting that after allocating expenses on actual basis, the average margin of assessee (9.53%) vis-à-vis comparables (9.22%) was within the range of +/-5%. Further, he restricted the TP adjustment for import of raw material from its AE noting that TPO had segregated purchases i.e. import of raw materials on basis of turnover instead of actual consumption (for which assessee had submitted cost sheet). The Tribunal restored the matter to CIT(A) for fresh adjudication and directed it to confront the material to AO/TPO (calling for remand report) noting that CIT(A) had granted relief on basis of certain cost sheets and computations which were not produced before it or not examined by AO/TPO.
DCIT vs. W Diamant India Ltd [TS-998-ITAT-2018(DEL)-TP] ITA No.5993/Del/2014 dated 21.08.2018

254. The TPO applied TNMM method as against CPM method applied by the assessee who was engaged in the business of sale of packages for leisure travel where two or more components of travel such as flights, hotels, car rentals, transfer and ground handling services were bundled together for sale to customers and Air Charter business.The Tribunal rejected the TPO's adoption of TNMM over CPM noting that Revenue had accepted CPM in earlier years and in the instant case, the business model of the assessee was the same vis-à-vis previous years hence CPM ought to be applied by applying the rules of consistency.
Greaves Travel India Pvt Ltd vs ACIT [TS-1145-ITAT-2018(DEL)-TP] ITA No.6722/Del/2015 dated 24.10.2018

255. The Tribunal held that the TPO erred in segregating assessee's transaction of trading with AE and commission income from AE (which were aggregated by the assessee) and benchmarking the said transactions separately by relying on the coordinate bench decision of the assessee's own case. The TPO had rejected the assessee's application of TNMM on entity level and adopted CUP for benchmarking the commission income. It noted that the Tribunal in assessee's own case for earlier year had held that the TPO had discarded the economic analysis of assessee by segregating the two activities and erred in rejecting TNMM as the MAM for benchmarking international transaction. It was observed in the earlier year that there was no change in FAR analysis and business model of the assessee and it was identical to the previous years wherein TNMM was consistently applied and segregation solely on basis of income without reference to either GP or sales was the most unreliable and that the adoption of TNMM at entity level was safe and plausible.
Viavi Solutions India P Ltd (Formerly known as JDSU India P.Ltd.) [TS-884-ITAT-2018(DEL)-TP] ITA No.1483/Del/2016, ITA No.1478/Del/2016 and ITA No.231/Del/2017 dated 11.07.2018

256. The Tribunal, in the department's appeal, upheld the DRP's aggregation of assessee's distribution & commission segments and application of entity level TNMM for benchmarking analysis following approach adopted by DRP in assessee's own case in preceding AYs and noted that though, the TPO had segregated the financials into 2 segments viz. distribution and commission and applied TNMM and CUP-method to benchmark distribution and commission segments respectively, the Tribunal upheld assessee's reliance on DRP orders for previous years after noting similarity of the international transactions to be benchmarked, assessee's

business model over the past few years and absence of any compelling reasons submitted by Revenue for discarding earlier years' approach (of aggregating the two aforesaid two transactions). It rejected TPO's view that higher appellate authorities had not decided the issue at all and therefore there was no question of accepting assessee's stand to apply aggregation approach accepted in earlier years

DCIT Circle 13(1) vs JDSU Indian Pvt Ltd- TS-287-ITAT-2018(DEL)-TP- ITA No 1120/Del/2015 dated 02.04.2018

257. Where the assessee was engaged in distribution of books, software, electronic products and reprinting of books, publications, noting that the reprinting of books required deployment of assets, employees and involved risk in publishing and selling, the Tribunal held that TPO was correct in adopting TNMM as opposed to RPM as RPM could not be adopted where there was value addition and application of technology. Therefore, it upheld the order of the TPO.

Cengage Learning India Pvt. Ltd vs ITO - TS-736-ITAT-2018(DEL)-TP - ITA No. 5926/DEL/2010 dated 11.05.2018

258. The Tribunal rejected the TPO's CUP as well as assessee's TNMM for benchmarking assessee's international transaction i.e. manufacture and sale of drugs to AEs in contract manufacturing segment for AY 2012-13 and set aside Rs. 55 Cr TP-adjustment remitting the issue back to TPO for fresh consideration.

It held that the data used by the TPO under CUP (retail prices of products in CIMS database) was not appropriate as (i) such data related to different year (FY 2015-16), (ii) there was a lack of details of the products sold by assessee and comparable products used for benchmarking (iii) the TPO only considered one price despite wide fluctuation in the prices charged for the same product by different manufacturers (iv) that the CIMS data related to full-fledged manufacturers as against the assessee which was a contract manufacturer. Further it noted that the TPO had scaled down the retail prices arrived at from the CIMS data using a factor of 39.6% in order to arrive at ex-factory price, taking assistance from the pricing policy of Organization of Pharmaceutical Producers, whereas such policy was only applicable to prices charged for products sold in India whereas assessee exported products to its foreign AEs. Accordingly, it held that the CUP method as applied by the TPO was not appropriate.

It also rejected the assessee's benchmarking under TNMM, noting significant difference in sales price charged to different AEs for similar product despite cost of production being more or less similar and held that the 4 comparables selected by the assessee could not be selected as comparable as they were full-fledged manufacturers whereas the assessee was engaged in contract manufacturing. Accordingly, it remitted the issue to the file of the TPO for the purpose of carrying out a fresh benchmarking exercise under TNMM by selecting comparables engaged in contract manufacturing.

Tevapharm India Pvt. Ltd vs Addl CIT – TS-151-ITAT-2017 (Del) – TP ITA No.6707/Del/2016 dated 06.03.2017

259. The Tribunal observing that the international transaction of imports from AE had a direct bearing on the export of goods to AE as the price of exports to AE was impacted by import price, held that when the transactions were multiple and inter-related then if a particular transaction out of the composite transactions could not be tested under CUP then it was not

proper to apply separate methods for determining the ALP for each of the transaction. Further, noting that TPO had first applied TNMM on assessee's entire turnover to propose TP-adjustment on import transaction which was subsequently set-off against adjustment on export transaction (determined based on internal-CUP), it upheld CIT(A)'s adoption of TNMM for benchmarking assessee's import and export transactions and dismissed the Revenue's appeal.

ACIT vs Gates India (P) Ltd-TS-649-ITAT-2017(DEL)-TP-ITA No. 75/del/2011 dated 31.07.2017

260. Where the assessee sought to apply internal TNMM to benchmark its international transactions, the Tribunal rejected Revenue's contention that internal comparable could not be considered in view of miniscule turnover of the third party transactions and relying on the decision of the Delhi Tribunal in Lummus Technology Heat Transfer BV ([TS-48-ITAT-2014(DEL)-TP] it held that, in a transaction level comparison within same entity, mere difference in size of uncontrolled transactions would not not render the transaction incomparable. Noting that the assessee has separately submitted segmental accounts reflecting business with AEs, non-AEs and idle capacity, the Tribunal opined that there was no bar in adopting uncontrolled transaction for the purpose of internal TNMM. Vis-à-vis the capacity utilization adjustment, the Tribunal noted that the profit margins were arrived without factoring for idle capacity (70% under-utilization in this case), and held that profitability of the organization would be impacted when there was huge underutilization of the capacity. Accordingly, it held that there had to be an adjustment internally within the organization or an adjustment of idle capacity when compared with outside comparables. Considering that the assessee had not properly maintained allocation of overheads, it set aside the issue to the file of the TPO and directed the assessee to submit the segmental results based on the absorption of overhead on utilized capacity and idle capacity considering segments export to AE, export to non-AE, domestic sales to non-AE and idle capacity; Accordingly, the Tribunal remitted the TP issue back to TPO directing it to consider the revised segmental profit and loss reports and arrive at the ALP adjustment by considering non-AE transactions as one of the comparable in determining ALP.

Srini Pharmaceuticals Ltd vs. DCIT - TS-60-ITAT-2018(HYD)-TP - ITA No. 102/Hyd/2015 dated 19-01-2018

261. The Tribunal allowed the assessee's appeal and held that the TNMM and not CUP method (originally selected by assessee) was the most appropriate method for benchmarking the sale of engineering goods to AE in view of differences in products, market conditions, geographical features etc. It held that the requirement of law was that the most appropriate method suitable for determining ALP was to be adopted irrespective of the fact that the assessee had originally selected the CUP method in its transfer pricing study.

Euroflex Transmission (India) Pvt. Ltd vs ACIT-TS-928-ITAT-2017(HYD)-TP dated 24.10.2017

262. The Tribunal allowed the assessee's appeal and held that the TNMM and not the CUP method (originally selected by assessee) was the most appropriate method for benchmarking the sale of engineering goods to AE in view of differences in products, market conditions, geographical features etc. It held that the requirement of law was that the most appropriate method suitable

for determining ALP was to be adopted irrespective of the fact that the assessee had originally selected the CUP method in its transfer pricing study.

Euroflex Transmissions India P Ltd v ACIT – TS-958-ITAT-2016 (Hyd) - TP

263. The Tribunal held that where the TPO had adopted TNMM as the most appropriate method and the assessee had rendered similar services to both the AEs and non-AEs, and the non-AE transactions satisfied the internal TNMM, the Assessing Officer ought to have considered them for determining ALP. Accordingly, it remitted the issue back to the file of AO and consider internal TNMM where services rendered by the assessee were similar to both AEs and non-AEs.

Satyam Venture Engg. Services (P) Ltd vs Dy.CIT-TS-1072-ITAT-2017(Hyd)-TP ITA No. 1464/Hyd/2014 dated 29.12.2017

264. The TPO treated the services provided by assessee to be IT and ITES services (as against the assessee's claim of rendering management consultancy services to its AE) and adopted TNMM as against RPM applied by the assessee. The DRP upheld TPO's order observing choice of comparables in TP study report showed profile of such entities to be IT and ITES and in absence of clear depiction of functions performed as per the TP study report, the assessee's contention that it was rendering management consultancy services could not be accepted. Before the Tribunal, the assessee also sought admission of additional evidence in form of segmental profits and contended that the adjustment should be restricted to only value of international transaction and accordingly the TPO had erred in taking entity level margin. The Tribunal admitted the additional evidence [relying on Bombay HC rulings in the case of Tara Jewels Export Pvt. Ltd. and Alstom Projects (I) Ltd. and Delhi HC ruling in case of Kaihin Peanalfa wherein it has been held that only international transactions with AE are to be considered in TPO's proceedings and not the entire corresponding figures at entity level] and remanded the matter back for afresh adjudication. Further, it held that assessee's assertions that it was providing tax regulatory services and consultancy services appeared to be prima facie correct. However, in view of the fact that the entire issue of correctness of TP adjustment had been remanded back to the AO/ TPO, the Tribunal remanded this issue also back to the AO/ TPO.

PriceWaterhouse Coopers. vs ACIT TS-1247-ITAT-[2018] ITA No.483/Kol/2017 dated 12.09.2018

265. The Tribunal noted that even though there was a loss incurred by the assessee on export of one product (PCMX) to its AE, as evident from Cost Accountant's Report, the assessee had not taken the same into consideration while working out its PLI (Operating Profit / Total Cost) of 7.96% and therefore the reliability of the segmental financials taken by the assessee to work out the OP/TC of its export with AEs was doubted. Accordingly, the Tribunal held that the OP/TC of the relevant transactions worked out by the assessee, could not be taken as basis for benchmarking the relevant transactions by adopting TNMM and it would be more appropriate to take the OP/TC at the entity level by taking into consideration the entire set of transactions of the assessee. Thus, the Tribunal remitted the matter back to AO / TPO for fresh ALP- determination under TNMM. It held that by considering the entity level PLI, even the import transactions would be benchmarked and therefore no separate benchmarking would be required for the import transactions.

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Reckitt Benckiser (India) Ltd v JCIT - TS-269-ITAT-2016 (Kol) - TP

266. The assessee had benchmarked sale of goods to its AE's in Bangladesh, Dubai and the United Kingdom (AE) using TNMM which was rejected by TPO who applied CUP. The CIT(A) accepted TNMM adopted by the assessee. The Tribunal dismissed Revenue's appeal and upheld the CIT(A)'s application of the TNMM as the MAM as against the CUP applied by the TPO. It observed that the TPO/AO had not made any adjustments owing to the differences in market and economic conditions of countries in which products were sold to independent third parties. Further, TPO had failed to take into account the profile of consumers, preference amongst consumers, purchasing power, etc. Thus, It opined that selective application of CUP Method by TPO was ad hoc, and without any cogent basis, hence the entire approach followed by the TPO in rejecting TNMM was unjustified.
DCIT/ACIT vs. Emami Limited [TS-468-ITAT-2018(Kol)-TP] ITA Nos. 1065 and 1066/Kol/2017 dated 15.06.2018

267. The Tribunal deleted the TP addition in the case of the assessee, engaged in the business of manufacture and sale of tea and held that the functions assets and risks of the two segments in which the assessee operated viz. private sales and auction sales, were incomparable as in the private sales the assessee was a mere facilitator assuming minimal risks and in the auction sales it performed significant functions and bore all associated risks. Thus, it rejected the approach of the TPO in aggregating all the AE related transactions of the assessee viz. AE related private and AE related auction sales and comparing it with the margin of Non-AE auction sales. Accordingly, since the benchmarking adopted by the assessee at first i.e. entity level comparison with other comparable companies engaged in the tea business, was at ALP, the Tribunal deleted the adjustment made by the TPO.
Tata Global Beverages Ltd v DCIT – TS-48-ITAT-2017 (Kol) – TP I.T.A No.511/Kol/2010 I.T.A No.2105/Kol/2010 dated 03.02.2017

268. The Tribunal rejected TPO's selection of external TNMM as the most appropriate method (MAM) for benchmarking of assessee's international transaction of sale of tea to AEs and directed the adoption of internal CPM as MAM. The Tribunal, noting that the assessee had adopted internal CPM for export of tea and export of PP Bags and PP Geo frabric while adopting internal TNMM for export of packaging material and other transactions which was accepted by TPO for AY 2007-08 to 2010-11, held that the TPO erred in taking a different stand in the year under appeal in spite of the similar facts prevailing in the current year when compared to the earlier years and accordingly allowed assessee's appeal.
Madhu Jayanti International Ltd vs. DCIT-TS-1069-ITAT-2017(Kol)-TP I.T.A No. 214/Kol/2016 dated 01.12.2017

269. The assessee was an Indo-Russian JV company which merely facilitated after sales product and support services rendered by the Russian AE to Ministry of defence by co-ordinating between the Ministry and the Russian AE. The Russian company raised bill on the assessee-company for the product supplied and services rendered, which in turn, would raise bill on the Ministry of Defence by adding its profit. In its T.P study, the assessee did not furnish any comparable due to peculiar nature of the "After sales services" provided by the assessee-company. At the instance of the TPO, the assessee furnished certain comparable companies.

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Noting that the after sales service involved supply of materials as well as providing services, the TPO segregated the services rendered into two segments, viz. 'Trading segment' for supply of materials and 'Services segment' for services actually rendered, to determine the ALP of transaction, based on the comparables given by the assessee. The same was upheld by the DRP. The Tribunal considered the assessee's submission that provision of after sales support services involved supply of materials as well as providing services i.e. composite services and thus TPO was wrong in determining ALP separately for products and services. Further, noting that this aspect, which went to the root of the issue, had not been considered by the TPO, it remanded the matter back to the AO/TPO to examine the assessee's contention of aggregation of the transactions for determination of ALP.

Rosoboronservice India Ltd vs. DCIT [TS-810-ITAT-2018(Mum)-TP] ITA No.7418/Mum/2017 dated 01.08.2018

270. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order accepting internal TNMM for benchmarking sale of polyester film products to AE's to USA and UK by relying on coordinate bench decision in assessee's own case for earlier year wherein it had restored the matter to apply TNMM as MAM for determining ALP (as both parties agreed to it) and carry out fresh comparability analysis. The Tribunal in earlier year upheld CIT(A)'s rejection of TPO's application of CUP vis-à-vis prices charged to non-AEs in African countries, Middle East, Russia and other countries as it had failed to take into account the geographical, economical market differences where the A.E and non-A.E. agents were carrying out their business activities.

Dy.CIT vs Garware Polyester Ltd. [TS-1402-ITAT-2018(Mum)-TP] ITA No.6537/Mum/2016 & 5083/Mum/2015dated 27.12.2018

271. The Tribunal dismissed Revenue's appeals seeking the use of external controlled comparables in the same sector such as JP Morgan Chase and Bank of America under the Profit Split Method, over uncontrolled comparables under TNMM to benchmark assessee's marketing of derivative products on behalf of AEs. It deleted the TP- addition which was based on the difference between assessee's global TP policy prescribed remuneration @ 24.40% of initial net present value (INPV) of derivative transactions as against the 60% multiplier on the same offered by controlled comparables to their Indian branches. At the outset, the Tribunal noted the unavailability of information on the controlled transaction in the public domain, and held that the TPO had violated the principles of natural justice by not confronting the assessee with the comparables used against it which itself was sufficient basis to have the adjustment validly deleted. On the merits, the Tribunal held that it was inappropriate to apply a uniform multiplier effect on the value of sales credit/INPV as the INPV computation was dependent on unique discounting factors that will lead to different values for different banks. Further, following the decision of the Court in Johnson and Johnson ruling, it held that the TPO's application of PSM was adhoc and not as per the rules, since the said method could not be applied for benchmarking marketing support service functions and was mainly adopted when transactions involved unique intangibles. Considering that the TPO did not adhere to the prescribed methods consciously and that the order of CIT(A) suffered from no legal or factual infirmity, it refused to restore the matter to the file of TPO.

Barclays Bank PLC vs. ADIT - TS-11-ITAT-2018(Mum)-TP - /I.T.A./178/Mum/2011 dated 12.01.2018

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272. The Tribunal restored the benchmarking of assessee manufacturer's international transactions for AY 2010-11, noting that the TPO rejected assessee's entity level TNMM and adopted internal TNMM for benchmarking and proposed a TP-adjustment and that the co-ordinate bench in assessee's own case in subsequent AY 2011-12 on similar facts had restored matter back to AO for fresh examination as the DRP had failed to adjudicate the issue.

ASB International Pvt. Ltd vs. ACIT - TS-422-ITAT-2018(Mum)-TP - ITA No.1068/Mum/2015 dated 29/05/2018

273. In a case where the assessee contested the exclusion of the comparables selected by the assessee itself and no comparables were introduced by the Revenue while determining the ALP under the TNMM method, the Tribunal held that the onus was more on assessee to justify the exclusion / inclusion of the comparables. It held that under TNMM method, only a broad functional comparability is required and the statute, itself, has provided for a tolerance range of +/-5% to weed out the dissimilarities since no two entities could exactly be the identical / similar in all respect. It took note of the judicial pronouncements relied on by the assessee to contend that the comparables initially selected by the assessee could be excluded subsequently, finding them to be functionally or otherwise uncomparable in the circumstances. However, it held that there could not be any cherry picking to suit the requirement of the assessee. The Tribunal thus held that keeping in view the overall factual matrix of the case, the matter was to be remitted back to the file of the AO /TPO for fresh determination of ALP of the transactions.

Roche Diagnostics India Pvt Ltd vs ACIT Range 8(3)-TS-803-ITAT-2018(Mum)-TP- ITA No 7566/Mum/2012 dated 04.05.2018

274. The Tribunal rejected TPO's approach for entity wide benchmarking of the assessee's international transactions vis-à-vis International express and International freight forwarding segments without considering the segmental accounts, noting that (i) the TPO had not considered segment accounts since he was of the view that the domestic business was suffering losses on account of incorrect allocation of expenses whereas the domestic courier business was suffering losses on account of stiff competition being faced (ii) TPO's observation of volume being the basis of allocation of expenses was flawed since the assessee had actually allocated the expenses on the basis of revenue, weight and volume. (iii) TPO's observation that domestic business was an extension of international business was factually incorrect since the assessee's domestic segment was 10 times the size of the international express segment and was an independent business and also the FAR profile was entirely different.

Aramex India Pvt. Ltd vs. DCIT [TS-351-ITAT-2018(Mum)-TP] ITA No.6749/Mum/2017 dated 18.05.2018

275. The Tribunal, relying on its own order in the assesse's own case for a prior AY, rejected the CUP applied by the assesseewhile benchmarking its international transactions of 'export of polyester films' to AE's in UK and US by comparing it with Non-AE transactions in Asia, Africa Middle East etc. It held that CUP could not be applied due to difference in geography and other economical factors associated with AEs in a developed market (US and UK) vis-a-vis

Non-AEs in developing markets(Asia, Africa, Middle-East etc) and therefore rejected the assessee's approach of benchmarking AE transactions based on price charged to Non-AE customers in India as well as TPO's approach of comparing the same with average Non-AE price on exports to countries in Asia, Latin America. Thus, it held that TNMM was the most appropriate method and remitted matter to TPO for carrying out benchmarking analysis under TNMM.

Garware Polyester Ltd v DCIT – TS-34-ITAT-2017 (Mum) – TP - I.T.A. No. 6169/Mum/2011 I.T.A. No. 6541/Mum/2011 dated 18.01.2017

276. The Tribunal, relying on its order for the earlier year [TS-650-ITAT-2015 (Mum) – TP], remitted the issue of benchmarking the export of finished goods by the assessee to its AEs to the file of the AO /TPO, since the CIT(A) failed to follow the mechanism laid down in the TP provisions to determine ALP. It also accepted the assessee's grievance that for benchmarking the export transactions, the TPO ought to have used TNMM as the most appropriate method as opposed to CUP. Accordingly, it directed the AO / TPO to conduct a fresh analysis under the TNMM method.

ACIT v Strides Acrolabs Ltd - TS-294-ITAT-2017(Mum)-TP - /I.T.A. No.6528/Mum/2010 dated 31/03/2017

277. Assessee received a sum of Rs. 79.35 crores as proceeds against the export/sale of TV programmes and films to its AE i.e. ATL and benchmarked the international transaction by applying Transaction Net Margin Method (TNMM), with Profit Level Indicator (PLI) of operating profit/operating cost (OP/OC) which was determined at 56.36%. Since the margin of selected comparables was 0.13%, assessee claimed its transaction to be at arm's length price. The TPO rejected TNMM and selected Resale Price Method (RPM) as most appropriate method (MAM). Selecting ATL as the tested party he attributed 90% of its gross profits to assessee and made consequent adjustment. The Tribunal, noting that the transactions of ATL were with its 100% subsidiaries Zee TV-USA and Asia TV-UK, it held that since the comparable transactions adopted by the TPO were not between unrelated parties and hence could not be considered as uncontrolled transactions. It held that Rule 10B(1)(b)(i) provides that price under RPM refers to the price at which the property purchased by the enterprise from an AE is re-sold or provided to an 'unrelated enterprise' or in other words an independent entity and since the comparable transactions adopted by the TPO were with related enterprises, it held that the action of the TPO in selecting RPM as MAM was wholly inappropriate and wrong. Accordingly, it deleted the TP addition.

Zee Entertainment Enterprises Ltd vs ACIT -TS-382-ITAT-2017(Mum)-TP ITA No.3406/Mum/2014 dated 05.05.2017

278. The Tribunal set aside DRP's order rejecting internal TNMM as most appropriate method for benchmarking import/export transactions of assessee engaged in the manufacture of studded jewellery for AY 2011-12. It held that the TPO/DRP had arrived at hollow and unsubstantiated observations without any concrete material or irrefutable reasoning for rejecting assessee's segmental accounts. It further rejected DRP's conclusion regarding difference in FAR of Non-AE segment pertaining to the local sales in India and held that the assessee itself had specifically categorized and earmarked such Non-AE segment pertaining to local sales in India as uncomparable' and had conducted the analysis based on the Non – AE segment pertaining to export sales.

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S.B.&T Designs Ltd vs ACIT [TS-404-ITAT-2017(MUM)-TP- ITA No. 5189/MUM/2015 dated 03.05.217

279. The Tribunal held that TNMM and not internal CUP was the MAM to benchmark the assessee's international transactions of providing portfolio management services, mutual fund services and investment advisory services, since the volume of non-AE transactions sought to be used as internal CUP by the Department was so minimal that the fee in percentage terms vis-à-vis Non- AE transactions would not be comparable to the fee in percentage terms for the AE transactions. It held that since the assets under management for AE transactions were around USD 135 million and that with the Non- AE fund was USD 2.55 million, mere comparison on the basis of fees in percentage terms was not appropriate.
ICICI Prudential Asset Management Co Ltd v ACIT - TS-148-ITAT- 2016 (Mum) - TP

280. The Tribunal held that TNMM and not CUP was to be used for benchmarking the assessee's activity of sale and purchase of diamond and gold jewellery from AEs as the transaction from Non-AEs amounting to 0.59 percent of total transactions was very negligible in comparison to sale transactions with AEs and also held that the transaction of the assessee required high degree of comparability between AE and Non-AE transactions in terms of quantity, specification, design and purity of the stones / metals involved which was absent in the assessee's case.
Vijaydimon Diamond (India) Pvt Ltd v ACIT (ITA No.5182(Mum.) 2013) – TS-453-ITAT-2015(Mum) – TP

281. The Tribunal directed the TPO to adopt Internal TNMM based on man hour rates as the MAM for determining the ALP of specialized engineering services provided by the assessee to its AE by following the coordinate bench decision in assessee's own case for earlier year. In the earlier year, the Tribunal accepted assessee's plea that hourly rates charged by it in providing specialized services to its AEs can be the basis for verifying its stand as to whether the services provided by the assessee to its AEs were at ALP.
Magna Steyr India Private Limited vs ACIT [TS-881-ITAT-2018(PUN)-TP] ITA No.517/Pun/2015 dated 08.08.2018

282. The assessee was engaged in manufacture and sale of cars (Mercedes Benz) in the Indian market and was also importing cars in form of Completely built units (CBU) , importing raw materials and importing spares from its AEs. The assessee had adopted combined transaction approach and applied TNMM in order to benchmark its international transactions. However, the TPO did not accept the approach adopted by assessee using TNMM. The TPO benchmarked the international transaction related to import of CBUs by using RPM and compared the gross margin earned from transaction of import of spares with import of CBUs and thus, made an upward adjustment which was confirmed by CIT(A) noting that DRP in previous year had made a similar addition and no new facts had emerged. It was assessee's contention before the Tribunal that a) aggregation approach had to be applied for manufacturing activities, import of spares and import of CBUs b) under RPM, gross margin earned had been compared with another uncontrolled transaction of assessee. The Tribunal held that TPO erred in segregating the transaction as import of CBUs and spares were closely linked with the manufacturing activities noting that the assessee was only manufacturing C

and E class brands in India and in order to widen its customer base was importing CBUs from AEs while the spares were being imported for the manufactured cars and CBUs in order to fulfill warranty commitments of passenger cars. Further, it also held that TPO erred in applying RPM method and comparing the margin earned by assessee on import of CBUs with import of spares observing that controlled transaction had to be compared with uncontrolled transactions as held in coordinate bench ruling in assessee's own case. The ALP had to be determined without being influenced by AE. It remitted the issue of determination of ALP of transactions to TPO and directed them to look into the comparability aspect of margins of assessee with mean margin of comparables after aggregating the transactions and applying TNMM.

Mercedes-Benz India Pvt Ltd (formerly known as Daimler Chrysler India Pvt. Ltd.)vs ACIT [TS-1164-ITAT-2018(PUN)-TP] ITA No.1083/Pun/2013 dated 25.10.2018

283. The Tribunal directed the TPO to adopt Internal TNMM for determining the ALP of engineering design services to its AE following the coordinate bench ruling in assessee's own case for earlier year (noting that there was no change in facts) wherein Internal TNMM based on man hour rates as the MAM for determining the ALP of specialized engineering services provided by the assessee to its AE. It accepted the assessee's plea that hourly rates charged by it in providing specialized services to its AEs can be the basis for verifying its stand as to whether the services provided by the assessee to its AEs were at ALP. It rejected the Revenue's contention that domestic segment (costs having transactions with AE) was itself tainted for its controlled transactions and could not be compared to export transactions (whose costs also had AE transactions). It further relied upon the coordinate bench decision of DCIT v/s. ManTrucks Pvt. Ltd. [ITA No.547/Pun/2014] wherein it was held that even if costs were identical for providing services to AE, Non-AE's or domestic parties, the margins earned from domestic parties could be compared to benchmark ALP of international transaction.

Magna Steyr India Pvt Ltd vs ACIT[TS-1154-ITAT-2018(PUN)-TP] ITA No.468 /Pun/2016 dated 12.10.2018

284. The Tribunal dismissed Revenue's appeal and held that internal TNMM was the MAM for assessee's manufacturing segment following the coordinate bench in assessee's own case for earlier year wherein it was observed that assessee had explained that it had bifurcated the manufacturing segment on product basis into AE (vane/pistons, pumps, power units, cylinders control valves etc. manufacturing of which required raw materials imported from AE) and non-AE segment (gear pumps and cylinders) which was fair and apt and emphasis of TNMM was on functional similarity and not product similarity.

Dy.CIT vs Eaton Power Fluid Pvt Ltd vs ACIT[TS-1217-ITAT-2018(PUN)-TP] ITA No.493 /Pun/2015 dated 15.10.2018

285. The Tribunal upheld the application of TNMM as MAM for benchmarking the export of finished goods by the assessee to AE and deleted the TP-adjustment computed by the TPO adopting the CUP method by benchmarking the transactions with transactions with the Non-AEs. It held that the CUP method was inappropriate owing to i) difference in the volume of goods, and ii) geographical differences and noted that the Tribunal in the assessee's own case for AY 2002-03 had rejected CUP Method for the identical issue wherein products were supplied to AEs and non-AEs in different countries.

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Intervet India Private Limited vs. DCIT - TS-1087-ITAT-2017(PUN)-TP - ITA No. 721/ PUN/ 2014 dated 21.12.2017

286. The Tribunal ruled on selection of Internal TNMM Most Appropriate Method (MAM) and use of internal comparables for benchmarking export and import transactions of assessee engaged in manufacture of heavy commercial vehicles. In respect of assessee's export of trucks to developing countries (like South Africa, Ethiopia and Indonesia) through its German AE, it was observed that billings were raised on German AE, but trucks were not routed through Germany and were directly sent to developing countries due to stricter emission norms in Germany. The Tribunal discarding TPO/DRP's approach of rejecting internal comparables (sale of similar products in India) opined that geographical differences would not be relevant where the products were exported to markets similar to Indian markets, where emission norms were less stringent as compared to Germany.

DCIT Circle-9 vs Man Trucks India Pvt Ltd- TS-228-ITAT-2018(PUN)-TP- ITA No 547/PUN/2014 dated 03.04.2018

287. The Tribunal relying on its order of earlier years allowed assessee's selection of foreign AE as a tested party and noted that TNMM was rightfully followed as the most appropriate method for benchmarking transactions of payment of fees for advisory and other services to its AE. In the earlier year, the Tribunal had accepted the assessee's stand of selecting the foreign AE as the tested party, noting that (i) the AE was rendering service to various other entities also (ii) the AE was following a scientific method of allocating cost and charging the same with markup to all the entities at same level and (iii) the relevant details to compute the cost allocation on account of services had been certified and filed before the AO. The Tribunal sent back the matter to AO for limited purpose of verification of assessee's claim that margin was within 5% range of average comparables margin.

Emerson Climate Technologies (India) Pvt Ltd vs DCIT Circle 1(2)- TS-362-ITAT-2018(PUN)-TP- ITA no's 359 & 2847/PUN/2016 dated 25.04.2018

288. The Tribunal directed the TPO to adopt Internal TNMM based on man hour rates as the MAM for determining the ALP of specialized engineering services provided by the assessee to its AE. The Tribunal accepted the assessee's plea that hourly rates charged by it in providing specialized services to its AEs can be the basis for verifying its stand as to whether the services provided by the assessee to its AEs were at ALP. It further relied upon the coordinate bench decision of DCIT v/s. ManTrucks Pvt. Ltd. [ITA No.547/Pun/2014] wherein it was held that even if costs were identical for providing services to AE, Non-AE's or domestic parties, the margins earned from domestic parties could be compared to benchmark ALP of international transaction and accordingly, it rejected the Revenue's contention that since the cost incurred for transaction with AEs as well as domestic transactions were same, the domestic transactions were controlled and thus tainted.

Magna Steyr India Pvt Ltd [TS-625-ITAT-2018(PUN)-TP] ITA No.314/Pun/2014 dated 05.06.2018

289. The Tribunal relying upon the ITAT order in assessee's own case for the prior year upheld the approach of assessee aggregaring all transactions in the manufacturing segment and adoption of TNMM to benchmark the transaction as compared to CPM applied by the TPO as

the MAM. Further, in line with the earlier year, the Tribunal also directed the AO to verify assessee's claim by applying single year data and accordingly, compute the TP-adjustment, if any.

Sandvik Asia Pvt. Ltd (formerly known as Sandvik Asia Ltd) vs. DCIT [TS 444 ITAT 2018] ITA No.1459/Pun/2010 dated 06.06.2018

290. The Tribunal accepted the stand of the assessee of aggregating installation and commissioning/ engineering services with the manufacturing activity (while determining ALP by applying TNMM) by relying on the co-ordinate bench ruling in assessee's own case in AY 2007-08 wherein it was held that activity of installation and commissioning/engineering services are closely linked with manufacturing and ought to be combined and construed as single transaction for determining the ALP of transaction.

Terex India Pvt. Ltd (as successor of Demag Cranes and Components (India) Pvt. Ltd) vs. DCIT [TS-477-ITAT-2018(PUN)-TP] ITA No.583/Pun/2016 dated 06.06.2018

291. Where, for the purpose of benchmarking the international transactions of the assessee viz. export of internal combustion ('IC') engines by the assessee to its AEs, the TPO applied internal TNMM by taking the transactions with domestic parties as comparable, to which the assessee objected stating that there could be no comparison between IC engines sold in domestic market and those exported by assessee outside India due to functional differences in the products sold under both segments and also due to variance in the gross margins between the 2 segments, the Tribunal relying on its decision for a prior year held that since the assessee failed to demonstrate material variation in the margins of each product type its plea that the two were functionally different could not be accepted. It also observed that unless the assessee demonstrated, with relevant facts, as to why it earned lower profits while exporting to AEs, the assessee's argument on this ground could not be considered. Further, it held that comparing of gross margins as done by the TPO was not envisaged under the IT Rules and that net profit of controlled transactions had to be compared with net profit of uncontrolled transactions. Accordingly, it directed the AO to re-compute the adjustment based on differences in the net profit margins between sales to AEs and sales in domestic market.

Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

292. The Tribunal following the co-ordinate bench ruling in assessee's own case in AY 2006-07 & 2008-09 upheld the DRP's order accepting assessee's selection of TNMM as MAM over TPO's selection of CUP method for benchmarking imports and exports from AE for AY 2010-11. It held that once net margin of assessee was higher than the net margins of its comparable, all international transactions of assessee were at ALP. Accordingly, it dismissed the Revenue's appeal.

Amphenol Interconnect (I) Pvt Ltd vs DCIT- TS-393-ITAT-2017(PUN)-TP ITA No.477/PUN/2015 dated 12.05.2017

293. Where the assessee had adopted the CUP method to benchmark its purchase and sale transactions from its AEs and the trade discount granted to the AE on account of prepayment (which was accepted by the TPO / DRP) and had also applied TNMM to corroborate the

same, which was rejected by the TPO / DRP and the assessee appealed before Tribunal challenging the said rejection, the Tribunal held that once CUP was applied as the MAM it was irrational for the assessee to choose to apply TNMM to substantiate the benchmarking of the transactions. Accordingly, it dismissed the appeal of the assessee challenging the rejection of TNMM.

Cargill Foods India Limited vs ACIT-TS-541-ITAT-2017(PUN)-TP-ITA No. 1557/PUN/2011 dated 21.04.2017

294. Where the assessee claimed that it had bought raw materials as per AE's pre-determined price list which it contended that was used for selling to third party buyers also but could not establish that the same price list was applicable for third party exports with evidence, the Tribunal rejected adoption of CUP method as MAM for benchmarking inter alia import of raw material/consumables/machinery by assessee and held that TPO was justified in adopting TNMM as MAM. It rejected assessee's contention that u/s 92F(ii), ALP could be worked out on the basis of price applied or proposed to be applied and held that rule 10B(1) provided for price charged or paid and not for proposed price and since the assessee was unable to substantiate its claim that the same list was used for third party buyers also, it dismissed the assessee's appeal.

Yazaki India Limited (Formerly Known as Tata Yazaki AutoComp Ltd) vs. ACIT-TS-774-ITAT-2017(PUN)-TP ITA No.886/PUN/2014 dated 11.09.2017

295. The Tribunal rejected TPO's selection of CUP as MAM for benchmarking assessee's export of Floxidin 10% (50ml) product over TNMM, which had been applied by assessee. It noted that TPO accepted TNMM as MAM in respect of 4 out of 5 products exported by assessee but applied CUP as MAM for export of Floxidin 10% (50ml) on the ground that the price charged by the assessee from its AEs was far less than the price charged from the third parties. It observed that that the volume of sale of the impugned product to AE in Thailand was almost 10 times to that of third party in Vietnam and though both countries were members of the Association of South East Asian Nations ('ASEAN') , it did not mean that the market conditions in both countries were similar. It opined that where substantial part (more than 80 percent) of the exports made to AEs were accepted by the TPO under TNMM and the assessee had provided due reasoning for the price difference in respect of one product, the TPO was wrong in adopting CUP method as the most appropriate method for benchmarking the remaining transactions.

Intervet India (P) Ltd vs DCIT - [TS-251-ITAT-2016(PUN)-TP]

Profit Split Method

296. The TPO had rejected the assessee's TP study on the ground that there was no separate FAR analysis of the transactions performed with the AEs and had recharacterized the activity/functions performed by the assessee company as a KPO instead of "IT services" classified by the assessee company. The assessee had argued that principle of consistency would be applicable and even for the previous years i.e. from AYs 2009-10 to 2011-12, the assessee had been accepted as an IT service provider. The Tribunal opined that the TPO was justified in rejecting the TP analysis undertaken by the assessee since it was not made based on each of the functions performed with the AEs. The Tribunal thus remanded the

entire TP issue to the file of AO/TPO with a direction to afford a reasonable opportunity to the assessee to furnish a TP study report covering the functions performed, risks analysed and assets employed in respect of the international transactions with AEs.

The Tribunal however also directed the AO/TPO to aggregate the functions having a direct nexus with AdWords distribution programme having regard to the TP study and to benchmark such aggregated transactions by adopting profit split method, relying on the decisions of Orange Business Services and Global one India wherein it was held that Profit split method was the most appropriate method for cases involving multiple interrelated international transactions which could not be evaluated separately.

Google India Private Limited v. Jt.DIT(IT) & others [TS-335-ITAT-2018(Bang)-TP] - IT(IT)A No.69 & 1190/Bang/2014, 374/Bang/2013, 387, 949 & 950/Bang/2017, 68/Bang/2015 & 559/Bang/2016 dated 11.05.2018

297. The Tribunal held that where RPM was suggested as most appropriate method of ALP computation by the assessee, it is imperative that the products sold by the tested Indian entity were subjected to a close comparison with those products sold by the comparable companies and that before rejecting RPM, the TPO should have made an analysis to determine whether the required data regarding the set of comparable companies dealing in similar products could be obtained from public data basis. Accordingly, the matter was remanded to the file of the AO / TPO.

Kohler India Corp (P)Ltd. vs. DCIT - [2016] 67 taxmann.com 200 (Bangalore-Trib)

298. The Tribunal upheld the use of the Profit Spilt Method as the activities performed by the assessee and its AE were inextricably linked, with both entities contributing significantly to the value of the services. Additionally, it held that selecting the most appropriate method does not depend on whether the assessee is loss / profit making and that in the absence of an external comparable relative contribution of each entity based on key value drivers was to be determined

Infogain India Pvt Ltd v DCIT [ITA No 6134 / Del / 2012] - TS-392-ITAT-2015(DEL)-TP

299. The assessee had sold the IP rights of Jungle Book Animation series to its AE based on average of values adopted by two independent valuers. The TPO was of the view that even though the legal ownership had been transferred to the AE, but the economic ownership still was with the assessee. The TPO adopted PSM as the instant case was of two AEs contributing their respective intangibles to develop a new product or process and earn income therefrom. He assigned a profit share of 80% on IP contribution to assessee after concluding that assessee had as many as 8 directors with a trained and skilled combined work force of 3000+, as compared to its AE in Ireland which had no other set up other than the presence of 2 directors. He concluded that it was only due to the identity and standing of assessee in Global arena, the persons in Ireland got hired. The Tribunal following the order of coordinate bench in assessee's own case for earlier year deleted the TP adjustment arising on account of sale of Intellectual property (Jungle Book) under profit split method by TPO. Noting that the Tribunal in earlier year had observed that the assessee (engaged in the business of providing animation production services for Television and Film Production Companies) had sold "IP" (Jungle Book) to its "AE" at development stage and hence any revenue generated by the AE

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at a later stage could not be attributed to the assessee since there was no international transaction after outright sale of IP to its AE.

DQ Entertainment (International) Ltd vs. ACIT [TS-879-ITAT-2018(HYD)-TP] ITA No.1890/Hyd/2017 dated 17.08.2018

300. The assessee followed Revenue split method as prescribed by the Group's Global Transfer Pricing Policy for benchmarking the provision of investment banking services to AE and computed its share as at 0.56% of the total investment banking division revenue. The TPO/CIT(A) rejected the method on the basis that Revenue split method was unacceptable in Indian jurisprudence and applied TNMM on entity level to arrive at TP adjustment of Rs. 33.10 crore. The Tribunal, observing that the assessee could not make effective representations before the lower authorities due to extraordinary situation faced by the assessee owing to collapse of the Lehman group, accepted the assessee's prayer for another opportunity to present necessary evidences and to justify its adoption of Revenue split method by placing reliance on Rule 10AB (other method for determination of ALP). Accordingly, it remitted the matter to the file of the AO/TPO for denovo assessment proceeding in the interest of justice.

Lehman Brothers Securities Pvt Ltd vs DCIT-TS-999-ITAT-2017(Mum)-TP- I.T.A. No.4574/Mum/2012 dated 12.12.2017

301. The Tribunal held that where in respect of revenue derived by assessee company from distribution of television channels and sale of advertisement time, Profit Split Method (PSM) was adopted on basis of detailed analysis and allocation of profits based on the role and functions of the entities vis-a-vis AEs and Non-AEs and the combined net profit had been arrived at by taking into account all transactions of the AE as well as the non-AE and factoring all costs and revenue, the DRP was not justified in concluding that profits from non AE would not be covered under PSM and same had to be determined separately at a higher rate.

Satellite Television Asian Region Ltd v DDIT - [2016] 66 taxmann.com 247 (Mumbai-Trib)

Any other Method

302. Where the assessee (specialised in scientific and technical journals) paid a sum to its AE towards cost contribution for costs incurred by a Swiss based fellow subsidiary, the allocation of which was based on the number of articles and subscriptions of the assessee and the same was benchmarked under 'any other method' which was brought into force during the impugned AY, as opposed to TNMM adopted by the AO (and also used in prior years by the assessee), the Court held that the Tribunal erred in holding that the assessee had not satisfied the onus of justifying the change in method and in remitting the matter back to the file of the TPO for reverification and held that the Tribunal should have determined the applicability of the other method itself. Accordingly, it remitted the matter to the Tribunal for adjudication.

Springer (India) Pvt Ltd v ACIT – TS-1062-HC-2017 (Del) – TP - ITA 1148/2017 dated 15.12.2017

303. Where the assessee had adopted TNMM for benchmarking its international transactions in all previous years but sought to use residual method which was effective for subject AYs and

resorted to TNMM only for transactions not covered by the other method, which was rejected by the AO who applied TNMM on all transactions, the Court held that the Tribunal was not justified in remanding the issue back to TPO stating that it did not find any reasons for change in assessee's approach (from TNMM to the Other Method). It observed that the TP-report clearly claimed that 'other method' was MAM and also outlined the reason for shifting from TNMM to the 'Other method', which had neither been considered by the Tribunal nor DRP. Noting that the 'other method' was introduced for the first time during the impugned AY, the Court held that the Tribunal ought to have proceeded with the matter afresh instead of having remanded the matter totally to the TPO. Accordingly, it remitted the matter to the file of the Tribunal.

Springer (India) Private Limited vs. ACIT - TS-1062-HC-2017(DEL)-TP - ITA 1148/ 2017 dated 15.12.2017

304. The Tribunal deleted the addition made by the TPO in respect of sharing of regional office expenses and for services received by the assessee from its AE since the TPO had neither disputed assessee's claim that TNMM was MAM nor disputed comparables chosen by assessee and made an ad-hoc addition of 20 percent of the cost sharing and the services received which was not based on a method recognized under the scheme of transfer pricing envisaged by the statute.

Det Norske Veritas v ADIT - (2016) 46 CCH 0542 - Mum Trib

Others

305. The Tribunal remitted the determination of ALP in respect of payments for technology support services, back end service charges, shared cost for co-located premises and loan processing fees by assessee engaged in the business of hire purchase and auto loans to the file of AO/TPO for fresh consideration. Relying on the decision in the case of Festo Control Private Limited [150 ITD 305], it rejected TPO's determination of ALP as nil under the CUP method and held that if CUP method is considered as MAM, the value could not be 'nil'. The assessee had for the purpose of benchmarking its international transaction relied on the principle that none of the methods for the purpose of computation of arm's length price as per the Act were applicable in the assessee's case and having regard to the economic and commercial factors, the payments were at arm's length. Relying on the decision in the case of Carraro India Ltd [120 TTJ 77], it rejected the assessee's contention that international transactions were at arm's length since they were accepted to be arm's length in the previous and succeeding AYs and held that since they were accepted to be at arm's length in one year, it is carried at arm's length in other assessment years as well. Noting that the assessee had done no exercise or documentation for benchmarking the international transactions as per the provisions of section 92D of the Act, it relied on the SB ruling in the case of Aztec Software and held that the onus was on the assessee to provide details for determination of MAM for international transactions. Accordingly, it remitted the issue back to TPO and directed the assessee to furnish all material and information/documents required to be maintained as per Rule 10D to the TPO determined the ALP afresh.

Citicorp Maruti Finance Ltd vs DCIT-TS-500-ITAT-2017(DEL)-TP-ITA No.4634 /del/ 2010 dated 11.05.2017

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306. The Tribunal set aside the CIT(A)'s order deleting transfer pricing adjustment on commission income of 10 percent on sales earned by the assessee, made by the TPO by rejecting the Profit Split Method adopted by assessee for benchmarking commission income from its associated enterprise. It disagreed with the CIT(A)'s finding that the TPO had not mentioned conditions prescribed under section 92C(3) triggering transfer pricing provisions and noted that the TPO had stated that comparison of commission under PSM was not proper where the assessee had incurred considerable loss in the commission business (which was ascertained based on the segmental results). It further held that the action of the TPO adopting TNMM and selecting 7 comparable companies without conducting FAR analysis was flawed and therefore remitted the matter to the file of the TPO to re-determine arm's length price after providing assessee opportunity of being heard.

Bio Rad Laboratories (India) Pvt Ltd. [TS-829-ITAT-2016 (Del)-TP] (ITA No.3284 / Del/ 2010)

307. The Tribunal, relying upon ITAT order in assessee's own case for the prior AY remitted the entire TP-issue in case of assessee engaged in import/export and trading of various agricultural/food products. It noted that the TP-adjustments were made in respect of 3 types of transactions viz. a) merchanting transactions b) purchase of fertilizers and c)sale of rice which were benchmarked by the assessee under TNMM for the merchanting transactions and CUP for the others. The TPO rejected the methods selected by the assessee and adopted RPM for the merchanting activities, TNMM for the purchase of fertilisers and TNMM for the sale of rice [which was changed to RPM by the CIT(A)]. Since the issue had not been dealt with properly by the lower authorities so as to reach a logical and reasonable conclusion it directed the AO/TPO to adjudicate the issue de novo.

Cargill India P Ltd v DCIT - TS-92-ITAT-2018(DEL)-TP - ITA No. 2988/Del/2011 dated 09.01.2018

308. The Tribunal held that it is the duty of the CIT(A) to examine the most appropriate method for determination of the ALP particularly when the assessee itself had challenged the method adopted by it in its TP study.

Euroflex Transmissions India P Ltd v ACIT – TS-958-ITAT-2016 (Hyd) – TP

309. The Tribunal deleted TP addition for assessee providing ship management services to parent company (AE) by holding that AO erred not only in resorting to an unscientific and unrecognized method for determining ALP(of computing revenue on the basis of minimum rate per crew member) but also in rejecting bonafide quotations as a valid input for ascertaining ALP; on the basis that no actual transactions had taken place. It held that the quotations could be a valid input under the residuary method set out in Rule 10AB read with Rule 10B(1),(particularly considering the limited scale of operations of assessee and smallness of amount involved); and that not only the actual price of transactions under comparable uncontrolled conditions but also hypothetical price which would have been charged under comparable uncontrolled conditions could be taken into account for computing the arm's length price.

Gulf Energy Maritime Services (P) Ltd - [TS-74-ITAT-2016(Mum)-TP

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310. The Tribunal, upheld the DRP order permitting assessee's use of separate methods to benchmark sale of spares and component transaction after bifurcating it into 3 categories based on their applications for AY 2010-11. Noting that bifurcated category (A) represented sale of spare parts to third party as well as AEs for vehicles made by assessee, category (B) represented sourcing of components required sourcing by overseas AE for the manufacture of 2 or 3 wheelers, and category (C) represented sourcing by overseas AE for the manufacture of 4 wheelers. It distinguished category (A) from (B) and (C) relying on Tribunal's ruling in assessee's own case in AY 2006-07 wherein it was held that the nature of transactions in category (A) effectuated by the assessee to its AE abroad as well as third party distributors involve supply of servicing spares and are purely in the realm of after-sale distribution resulting in higher margins while category (B) and (C) transactions were are akin to logistics support service providers.

DCIT vs. Piaggio Vehicles Pvt. Ltd-TS-953-ITAT-2017(PUN)-TP ITA No.573/PUN/2015 dated 24.11.2017

311. The Tribunal held that where Revenue has accepted the method adopted by the assessee for benchmarking international transactions, in the absence of reasons brought on record, there is no merit in deviating from the stand accepted in the previous and succeeding years.

Racold Thermo Limited v DCIT (ITA No 1454 / PN / 2010) – TS-436-ITAT-2015(PUN)-TP

d. Comparability– Inter Industry

Engineering / Designing and related Consultancy services

312. The Tribunal held that a company excluded as comparable on account of extra-ordinary event 2 years prior could not be excluded on the same ground in the year under review and therefore dismissed the assessee's reliance on the order of the Tribunal excluding the company 2 years prior. However, it noted that since the Tribunal in the said case did not adjudicate on merits, the issue of comparability of the company was to be remitted to the file of the TPO.

Further, it directed the TPO to consider the relevant segmental results of a comparable (viz. KLG Systel Ltd) as against the entity wide results while benchmarking the engineering services of the assessee. ***General Motors India Pvt Ltd v JCIT – TS-939-ITAT-2016 (Ahd) – TP***

313. The Tribunal held that the assessee in the business of computer radiated designing of light vehicle systems could not be compared to companies engaged in clinical research, companies providing KPO services, companies having huge revenues and significant intangibles, companies engaged in software development and product development, providing animation services, companies for which reliable data was unavailable, companies failing the employee cost filter, companies having their own brand, companies which had undergone significant restructuring during the year and earning income from sale of licenses.

Meritor LVS India Pvt Ltd v ACIT [I.T(TP).A No.1231/Bang/2011] – TS-496-ITAT-2015 (Bang) – TP

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314. The Tribunal held that in Transfer Pricing proceedings, a company performing similar functions could not be rejected as a comparable on the ground that it had higher proportion of material cost in total operating cost. It further held that a company rendering consultancy services in the field of Marine infrastructure, Industrial infrastructure, renewable energy etc. could be accepted as comparable on account of functional similarity with the assessee rendering engineering services in various industries such as oil and gas, environment, infrastructure and marine terminal.

Saipem India Project Ltd - [2017] 77 taxmann.com 17 (Chennai - Trib.) - IT APPEAL NO. 401 (MDS.) OF 2016

315. The Tribunal held that assessee engaged in provision of engineering design to its AE could not be compared to Acropetal Technologies as the margin for subject year (57.66%) was abnormal when compared to margins in preceding and succeeding financial years.

Cameron Manufacturing India Pvt Ltd. vs DCIT [TS-1254-ITAT-2018(CHNY)-TP] ITA No.336/Chny/2018 dated 16.10.2018

316. The Tribunal held that Mahindra Consulting Engineering Ltd engaged in providing engineering consultancy and other services were broadly comparable to the assessee engaged in providing engineering and allied services as well as support services for plant commissioning and therefore dismissed the plea of the assessee seeking for exclusion of the said company. It held that strict product or service similarity was not required under TNMM.

Further, it held that where the assessee failed to provide the annual report for 2 companies (viz.Desein Pvt Ltd and Blue Star Design and Engineering Ltd), the same were rightly excluded as comparable by the DRP / AO.

Saipem India Projects Ltd v DCIT – TS-974-ITAT-2016 (Chny) - TP

317. The Tribunal held that the assessee engaged in providing engineering and design services to its AE could not be compared to:

- Kitco Limited as it was a 100% Government owned undertaking rendering services primarily to Central/State Government undertaking and PSUs and derived benefit out of this relationship. Its profit margins could not be said to be indicative of a free market economy since profit motive was not a relevant consideration in case of government undertakings and hence the company wouldn't be a good comparable. [It relied on the coordinate bench decision in assessee's own case for earlier year which had in turn relied on decision in case of Thyssenkrupp Industries]
- TCE Consulting Engineers Ltd as the as the company was engaged in pre-project activities, procurement assistance, project management, commissioning and coordination, inspection, construction and supervision which was functionally different from the assessee and in absence of segmental data, profitability of engineering design segment could not be known. [[It relied on the coordinate bench decision of the assessee's own case for earlier year]
- Certification Engineering International Ltd as it was functionally dissimilar, distinct in the geographical market in the light of foreign exchange fluctuation risk in addition to high RPT undertaken by the company. [It relied on the coordinate bench decision of the assessee's own case for earlier year]

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- Global Procurement Consultants Ltd as the company undertook valuation, consultancy and financial advisory assignments not linked with services provided by the assessee to its AE
- IBI Chematuru Engineering and Consultancy Ltd. as the company was engaged in diversified activities like project planning, management services, procurement assistance, project management, commissioning and coordination, inspection, construction and supervision etc. and had no separate segment information. Further, the company also undertook substantial R&D activities which was not a function performed by the assessee. [It relied on the coordinate bench decision of the assessee's own case for earlier year]
- Mitcon Consultancy and Engineering Services as the company was engaged in diversified activites like providing technical consultancy, rendering vocational trainings, IT trainings and laboratory services, executing environment monitoring assignments, etc which was not functionally comparable to the assessee.
- REC Power Distribution Company Ltd. as the company was a wholly owned subsidiary of of REC Ltd which is a government company and hence could not be comparable in light of the findings given by the co-ordinate bench in the case of Thyssenkrupp Industries.
- RITES Limited as it was functionally not comparable since it was engaged in activities like engineering consultancy, traffic studies, and export of locomotives and maintenance of the locomotives, construction and project management for railway track, electrification together with traffic and software consultancy assignments. [It relied on the coordinate bench decision of the assessee's own case for earlier year]
- Usha Hydro Dynamics Ltd as the services offered by the company were different from the assessee since it was engaged in the business of cleaning of various machines and equipment for various industries and was also doing trading business.
- UB Engineering Ltd as the company was engaged in mechanical erection/engineering procurement and construction [EPC] and EPC Electrical and therefore was functionally dissimilar to the assessee.
- The Tribunal relying on the coordinate bench decision in assessee's own case for earlier year included Accuspeed Engineering Services India Ltd as a comparable since it provided consultancy services in engineering solutions and services covering designs, detailed engineering, project construction and management which was functionally similar to the assessee

Bechtel India Pvt Ltd vs DCIT [TS-1026-ITAT-2018(DEL)-TP] ITA No.6779/Del/2015 dated 20.08.2018

318. The Tribunal held that assessee engaged in providing engineering design services to its AE could be compared to:

- Mahindra Consulting Ltd as it was providing services in civil and structural similar to the assessee.
- STUP Consultants Private Limited as it was providing consultancy services in civil engineering similar to the assessee.
- KITCO and MM Dastur Ltd. for the same reasons as inclusion of Mahindra Consulting Ltd. and STUP Consultants Private Limited as the function profiles of said comparables was similar to assessee

Further

- It remanded the comparability of Alphageo India Ltd. in line with earlier coordinate bench decision in assessee's own case with direction to TPO to give an opportunity to the

assessee to substantiate that said comparable was engaged in providing other engineering services and assets employed were comparatively higher than assessee company

- It remanded the comparability of Semat Ltd. with a direction to TPO to call for the Annual report for the subject year and to decide the comparability afresh.
- It remanded the comparability of Consultant Engineers Services (India) Pvt Ltd and Development Consultants Private Limited with direction to TPO to call for annual reports of the companies for subject year and decide the issue in accordance with DRP's directions for subsequent year (accepted as good comparables).
- It excluded Kirloskar Consultants Ltd. as it had undergone financial restructuring which was an extraordinary event

Eigen Technical Services Pvt Ltd vs Dy.CIT [TS-1286-ITAT-2018(DEL)-TP] (ITA No.806/Del/2013) dated 22.10.2018

319. The Tribunal held that the assessee providing repair services, computer hardware and software related services, erection, commissioning and installation services could not be compared to Capital Trust Ltd which provided consultancy services to foreign banks.

Verient Systems (India) Pvt Ltd v ITO [ITA No 5927 / Del / 2010] - TS-394-ITAT-2015(DEL)-TP

320. Relying on the decision of the co-ordinate bench in the assessee;'s own case for the prior year, the Tribunal held that the assessee, engaged in the business of engineering, design and related support services could not be compared to:

- Accentia Technologies Ltd as the company was engaged in sale of products apart from rendering ITeS and both these components of income for which no segmental details were available.
- Eclerx Services Ltd as the company was rendering Financial as well as Sales & Marketing services and income from both these services was clubbed without any segmental break-up.
- TCS E-Serve Ltd as the company's operations broadly comprised of transaction processing and technical services which was not functionally comparable to the assessee

Samsung Heavy Industries Pvt. Ltd. vs. DCIT - TS-117-ITAT-2018(DEL)-TP - ITA No. 402/Del/2017 dated 01.01.2018

321. The Tribunal rejected assessee's contention for use of multiple year data for benchmarking engineering design services for AY-2006-07 on the ground that the mix of initial and later stage project would remain the same in all years except for first few years of operations. The assessee had justified use of multiple year data stating that engineering projects are divided into 2 phases i.e (i) Basic engineering (initial phase) and, (ii) detail and production engineering phase (later) phase and this resulted in profit fluctuation as less number of man hours were required in initial phase as compared to the later phase of the project. Further, the Tribunal observed that since the assessee had not provided bifurcation as to hours spent on initial stage project and later stage project, it could not be held that the different phases of the projects had an overall impact on the profitability from year to year.

Flour Daniel India Pvt Ltd - TS-20-ITAT-2017-(Del)-TP - ITA No. 5493/Del/2010

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322. The Tribunal held that assessee being a captive design centre and engaged in providing design services could not be compared to:

- Rolta India Ltd as the company had expertise in CAD/CAM/GIS providing IT solutions addressing customers total requirement of engineering services and generated 90% income from such activity.
- Infosys Technology Ltd as it had high brand values and ownership of proprietary products. (The Tribunal relied on assessee's own case in previous AY and Agnity India Technologies ruling.)
- Quintegra Solutions Ltd as it was mainly engaged in software development and developing own software products.

Further, the Tribunal held that assessee could be compared to:

- Infotech Enterprises Ltd after considering segmental results.
- Federal Technologies Ltd as it was rendering design and development services comparable to assessee
- Mindteck (India) Ltd as it was engaged in area of embedded systems and segmental information were available.

Motorola Solutions India Pvt Ltd vs DCIT Circle-2 – TS-346-ITAT-2018(Del)-TP-ITA No 1652/Del/2014 dated 27.04.2018

323. The Tribunal remitted the TP adjustment made in case of an assessee engaged in the provision of engineering design services to its AE noting that CIT(A) had passed a cryptic order and not considered the grounds of rejection by TPO. He had simply stated that FAR analysis of comparables was same as that of assessee vis-à-vis selections and in case of rejection of comparables given a reason that profit and loss statement were not available, thus ignoring the aspect pointed out by Revenue that PLI of such comparables was calculated which would not have been possible in the absence of financial statements. It also noted that CIT(A) in his order had observed that TPO did not provide an opportunity to the assessee to have the audited financial statements along with the FAR analysis of the comparables selected by him and there was thus violation of principles of natural justice by the TPO. He should have remanded the matter back to TPO for providing an opportunity to the assessee to have the audited financial statements along with the FAR analysis of the said comparables, in view of alleged violation of principles of natural justice. He ignored the portion of TPO's order which clearly stated that financial statements were available in public domain and the same were not asked for by the assessee specifically. Thus, the Tribunal set aside CIT(A)'s order and remitted the matter back to CIT(A) for deciding the same afresh after obtaining a remand report from AO/TPO.

Dy.CIT vs Steel Plus Ltd. (2018) 54 CCH 0036 KolTrib ITA Nos. 1320 & 1321/Kol/2017 dated 12.09.2018

324. The Tribunal held that the assessee engaged in providing application engineering services to its AEs could not be compared to:

- Acropetal Technologies ltd as an extra-ordinary event had occurred during the year and therefore it could not be considered as a valid comparable.
- Holtech Consulting Private Limited as it was engaged in providing comprehensive services from concept to commissioning for green field, modernization/expansion of cement as well as captive power plant rendering it functionally dissimilar to the assessee.

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- Cather Consulting Engineers Pvt as it was involved in providing comprehensive consultancy services in the field of Power, Oil and Gas sectors in India and overseas and during the year it had received orders for project management services for a thermal power plant and therefore could not be compared to the assessee.

Rolls-Royce Marine India Private Limited vs. DCIT [TS-841-ITAT-2017(Mum)-TP] dated 18.10.2017

325. The assessee a resident of UK entered into an agreement with its parent company (Tata Motors Ltd.) for rendering of design, engineering, testing, validation services etc. for which it sent its employees to India (constituted a service PE). The assessee had selected UK companies as comparables as it (foreign tested party) was incurring operating costs in UK, and had employees based in UK. The DRP upheld TPO's rejection of foreign comparables selected by assessee. The assessee had challenged the rejection of foreign companies selected as comparables by the assessee for benchmarking the international transactions with its Associated Enterprises (AE) which was decided in its favour by the coordinate bench decision of preceeding years wherein foreign comparables were selected. The Tribunal noted that the issue had been raised before DRP who had not adjudicated on it since on the basis of its directions no TP-adjustment had survived. It observed that the issue was a merely academic one and there was no need to delve into it but kept it open for decision if need be in future in light of the favourable coordinate bench ruling in its own case.

Tata Motors European Technical Centre Plc vs DCIT [TS-1022-ITAT-2018(Mum)-TP] ITA No.850/Mum/2017 dated 12.09.2018

326. The Tribunal excluded Motilal Oswal as a comparable as it was into merchant banking, capital markets, finance markets and therefore functionally dissimilar to the assessee who merely provided non-binding advisory services.

Lehman Brothers Advisors Pvt Ltd v ACIT (I.T.A. No. 7722/M/2012) – TS-465-ITAT-2015 (Mum) – TP

327. The Tribunal remitted a) Cosmic Global Ltd and b) Calibre Point Business Solutions Limited (not part of assessee's TP study as financials were not available in public domain and submitted during scrutiny proceedings) in case of assessee engaged in providing engineering design services to its AE to verify assessee's contention that they were functionally comparable and if they satisfied the filters applied by TPO. Further, it directed to determine whether after inclusion of comparables, the margin of assessee vis-à-vis comparables would be within +/-5%.

Carraro Technologies India Pvt. Ltd. vs Dy. CIT[TS-1386-ITAT-2018(PUN)-TP] ITA No. 1281/Pun/2015 dated 05.12.2018

328. The Tribunal held that the assessee engaged in providing application engineering services was comparable to Ace Software Exports Ltd considering that the company was held to be functionally comparable to the assessee in the preceding year and that the Revenue had failed to show change in functionality in the present year and that its operating margins did not reflect it to be persistently loss making concern.

It dismissed the contention of the assessee for the exclusion of Vardan Projects Ltd on ground of higher margins of 96.33%, stating that assessee had failed

to prove that there was any functional dissimilarity between the assessee and the said company or that the high profit margins did not reflect the normal business condition.
Honeywell Turbo Technologies (India) Pvt. Ltd - TS-84-ITAT-2017(PUN)-TP - ITA No. 2584/PUN/2012 dated 10.02.2017

Agency services

329. The Tribunal held that companies providing agency services, companies providing commissioning agency services and engaged in trading, companies engaged in publishing news-papers and other publications and companies earning commission from air tickets and transaction fees from sale of holiday packages were not comparable to the assessee who was engaged in the business of manufacturing and trading of mineral processing equipment and provision of market support services.
Metso Minerals (India) Pvt Ltd v DCIT [ITA No 2449 / Del / 2014] - TS-405-ITAT-2015(DEL)-TP

330. The Tribunal excluded a company engaged in port loading / unloading and storage activities as it was a complete service provider and the assessee was merely providing agency services in respect of shipping activities in India. It also held that merely because the assessee had included the said company it in TP study it did not preclude the assessee from raising the objection that the said company was not comparable, if the assessee is able to demonstrate the functional dissimilarity.
NYK Line (India) Ltd v ACIT (ITA No. : 8549/Mum/2011) – TS-464-ITAT-2015 (Mum)-TP

ITES Sector / Software Development Services

331. The Apex Court dismissed Revenue's SLP against HC order upholding application of RPT filter of 25% (It had opined that such related party transactions in excess of a certain threshold may result in a profit-making capacity that presented a distorted picture) and it had also upheld ITAT's exclusion of Wipro Ltd for comparability analysis owing to significant brand presence in the market inspite of similar functionality. The Apex Court opined that no ground for interference was made out in exercise of its jurisdiction under Article 136 of the Constitution of India.
Pr.CIT vs Oracle (OFSS) BPO Service Pvt Ltd [TS-1248-SC-2018-TP] SPECIAL LEAVE PETITION (CIVIL) Diary No(s).32469/2018 dated 30.11.2018

332. The Apex Court admitted Revenue's SLP against the order of the Delhi High Court wherein the High Court dismissed the Revenue's appeal and upheld the Tribunal's exclusion of 3 comparables while benchmarking the ITeS transactions of the assessee. The High Court confirmed exclusion of a). Coral Hub Ltd (which had different business model as services were outsourced) b) e-Clerx Services (on account on functional dissimilarity), observing that the issue was covered against the Revenue by the judgment in Rampgreen Solutions Pvt. Ltd. V. Commissioner of Income Tax" and c) Infosys observing that the issue of exclusion of Infosys as a comparable stood covered against the Revenue by way of the decision of the Court in CIT v. Agnity India Technologies Pvt. Ltd.

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Pr. CIT Vs Vertex Customer Services India Pvt Ltd - TS-35-SC-2018-TP] - SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 41889/2017 dated 19-01-2018

333. The Apex Court admitted Revenue's SLP challenging Delhi HC ruling in the case of Actis Global Services Pvt. Ltd. The High Court had declined to interfere with the Tribunal ruling on comparability analysis and held that Infosys BPO and Eclerx services ltd were incomparable to assessee engaged in providing KPO services.
Pr.CIT vs Actis Global Services Pvt Ltd-TS-619-SC-2017-TP-6657/ 2017 - ITA No. 2280/mum/2017 dated 04.08.2017

334. The Apex Court admitted revenue's special leave petition against the decision of the High Court wherein it was held companies providing KPO services were not comparable to assessee engaged in providing voice call services to its AE and had held that entities would be comparable only if (a) the functions performed by the tested party and the selected comparable entity were similar including the assets used and the risks assumed and (b) the difference in services/products offered had no material bearing on the profitability and that BPO service provider could not be compared with KPO service provider.
Rampgreen Solutions Pvt Ltd [TS-937-SC-2016-TP] (SLP No.11117/2016)

335. The Court admitted Revenue's appeal on whether Tribunal was justified a) in excluding Wipro as a comparable when the TPO/DRP established that the peculiar economic circumstances did not have a bearing on the profits and also whether Tribunal wrongly relied on Sunlife India ruling disregarding the fact that TPO had already established Wipro's functional similarity and b) in excluding TCS as a comparable when TPO/DRP had established that peculiar economic circumstances and higher turnover did not impact its margins.
Pr. CIT vs. Adobe Systems India Pvt. Ltd - TS-429-HC-2018(ALL)-TP - INCOME TAX APPEAL No. - 59 of 2018 dated 24.5.2018

336. The Court admitted Revenue's appeal against Tribunal-order and admitted the following questions – i) Whether the Tribunal was justified in directing TPO to exclude 4 comparables (Accentia Technologies, E-Clerx Services, TCS E-Serve and TCS E-Serve International) when the TPO had already established the functional similarity of these companies with assessee. Ii) Whether Tribunal was justified in relying on its earlier order which in turn relied on Bechtel ITAT ruling & Rampgreen HC ruling (against which SLP was admitted by SC) without appreciating the fact that a company which was held as incomparable in one case may actually be a good comparable in another case and iii) Whether Tribunal (being the last fact finding authority) was justified in deciding the issue of inclusion / exclusion of comparables without upsetting the findings of fact recorded by TPO after appreciating the material and evidence available on record.
Pr. CIT vs. Samsung Heavy Industries India Pvt. Ltd - TS-431-HC-2018(ALL)-TP - INCOME TAX APPEAL No. - 60 of 2018 dated 24.5.2018

337. The Court dismissed Revenue's appeal against Tribunal's order wherein relying on the co-ordinate bench ruling in the assessee's own case involving identical grounds held that the comparables selected by the TPO were not comparable at all with the assessee since the said comparables were engaged in ITeS as against software design and development services

rendered by the assessee. The Court relying on division bench decision in the case of Pr.CIT v. Barclays Technology Centre India Private Ltd noted that Revenue routinely brings such factual matters before the Court knowing fully well that exclusion and inclusion of certain comparables to determine ALP would not necessarily give rise to purely legal question or substantial question of law. It held that findings of the Tribunal could not be termed as perverse or vitiated by error of law apparent on the face of record and the issue involved was factual.

Pr CIT vs TIBCO Software (India) Pvt Ltd - TS-1077-HC-2018(BOM) - ITA No.522 of 2016 dated 24.09.2018

338. The Tribunal rejected the ground in miscellaneous petition that CyberMate Infoteck Ltd. (CIL) was to be excluded in view of jurisdictional HC decision in case of PTC Software Pvt Ltd. wherein it had held that the software services and software products were not identical activities and therefore, the two separate companies or entities providing respective services would not give rise to comparable instances and further, in assessee's own case for earlier year, the Tribunal had taken a favourable view. On appeal from the said Order rejecting the assessee's rectification application in part, the Court directed Tribunal to undertake a fresh and detailed inquiry as to the permissibility of comparing the instances of CIL with that of the petitioner/assessee with special focus on the aforesaid decision noting that Tribunal is even otherwise hearing the tax appeal and Tribunal in earlier AY had dealt with same issue differently.

Lionbridge Technologies Pvt Ltd vs UOI [TS-1294-HC -2018-(Bom)-TP] WP No.2906 of 2018 dated 13.12.2018

339. The Court admitted the Revenue's appeal against the order of the Tribunal wherein EDCIL India Ltd was accepted as a comparable to the assessee merely on the basis that it had been considered comparable in earlier years. However, it refused to interfere with the Tribunals inclusion of ICRA Management Consulting Services Ltd observing that the Tribunal had accepted this comparable on examination of its functional profile.

Lloys TSB Global Services Pvt Ltd – TS-992-HC-2016 (Bom) - TP

340. The Court dismissed revenue's appeal against Tribunal's order directing exclusion of certain comparables following different financial period and held that it was clear and self evident from the provisions of Rule 10B(4) that the data to be used for comparability analysis should be contemporaneous with the time when international transactions are entered into. Further, it upheld the Tribunal's exclusion of a comparable on ground of functional dissimilarity coupled with the fact that its related party transactions exceeded 25% filter. Further, it held that companies engaged in Engineering and Technical Services could not be compared to the assessee who was engaged in providing routine customer support services.

PTC Software (I) Pvt Ltd [TS-835-HC-2016 (Bom)-TP] (INCOME TAX APPEAL NO. 337 OF 2014)

341. The Court dismissed the Revenue's appeal and upheld the Tribunal's order of excluding comparable which was following different financial period from that of assessee on the ground that no such liberty is granted in terms of Rule 10B(4). It further upheld Tribunal's

determination of related party transaction percentage by restricting the denominator to only total sales and not total sales plus total expenses on the ground that related party transactions have to be considered in the context of total transactions and not by a conversion formula. It further confirmed Tribunal's rejection of comparable providing knowledge process outsourcing service on the ground that it requires superior level of man power and human resources as compared to the assessee engaged in BPO service.

PTC Software (I) Pvt Ltd [TS-788-HC-2016 (Bom)-TP]

342. The Court dismissed Revenue's appeal and upheld the Tribunal's order wherein the Tribunal had excluded the following comparables in case of assessee providing software services:

- Kals Information System Ltd. as it was a software product company. [The Court noted that the Revenue was not able to distinguish the decision of jurisdictional High Court in PTC Software wherein the aforesaid comparable was excluded in case of assessee engaged in similar business applicable.]
- Cosmic Global Ltd.as it had a different business model (subcontracted its work) as against the assessee which had an in-house business model. [The Court noted that jurisdictional High Court in Aptara affirmed the Tribunal's order in not including Cosmic Global because of identical difference in business model.]
- Transworld Infotech Ltd. as its data pertained to July 2008 to June 2009 whereas the assessee 's financial year was from April to March and did not satisfy TPO's filter. The Court noted that the finding of fact was a possible view and hence no substantial question of law arose
- Compucom Software Ltd as its software development services were different from the assessee and it customer profile was that of government companies whereas the assessee company rendered services to only its AE. The Court noted that the finding of fact was a possible view
- Infosys BPO Ltd. as its turnover was high i.e.(Rs.9028 crores) vis-à-vis assessee (Rs.18 crores). The Court noted that that the finding of fact was a possible view.

CIT vs. Principal Global Services [2018] 95 taxmann.com 315 (Bombay) ITA No.57 of 2016 dated 12.06.2018

343. The Court held that assessee, a captive unit engaged in IT & ITeS to its AE could not be compared to:

- Kals Information Solutions Ltd as it was engaged in software services as well as software product.
- Vishal Information Technology (now known as Coral Hubs) & Cosmic Global Ltd as it was outsourcing the services to be rendered to third party vendors.
- Accentia Technologies Ltd as it was engaged in developing its own software and rendering medical transcription services (the Tribunal had relied on the ruling in Aptara Technology Ltd.)
- Eclerx Services Ltd as it was providing Knowledge Process Outsourcing (the Tribunal relied on the ruling in case of Aptara Technology Ltd and Rampgreen Solutions)

Further, the Court admitted Revenue's appeal for inclusion of one comparable namely Bodhtree Consulting Ltd (which was excluded by the Tribunal) after relying on the HC judgement in case of Mindteck India & Cummins Turbo Technologies

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PCIT -2 Pune vs PTC Software (I) Pvt Ltd- TS-276-HC-2018 (Bom)-TP- ITA No 598 of 2016 dated 16.04.2018

344. The Court dismissed Revenue's appeal and upheld Tribunals exclusion of 5 comparables for an assessee providing BPO services to its AE. The Court noted that the Tribunal rightly relying on the ruling in case of PTC Software excluded 5 companies namely Accentia Technologies, Cosmic Global, Eclerx Services**,** Coral Hubs and Crossdomain Solutions on grounds of functional dissimilarity, as the said comparables were engaged in distinct activities such as payroll activity, KPO service, development of products etc.
PCIT -1 vs BNY Mellon International Operations (I) Ltd- TS-293-HC-2018(BOM)-TP- ITA No 1226 of 2015 dated 23.04.2018

345. The Court upholds exclusion of i) Eclerx Services Ltd and Vishal Information Technologies Ltd considering both companies transacted entirely different business i.e. Knowledge Processing Outsourcing (KPO) ii) Infosys BPO and Wipro BPO Ltd as they had a significant brand presence for profits and large corporate size which could not be compared to the assessee's transactions and iii) HCL Commet Systems & Services Ltd. on the ground that it did not pass the appropriate filter and related party transactions were used for the pricing exercise. However, regarding Accentia Technology Pvt. Ltd. and Bodhtree Consulting Ltd, it admitted the following questions of law: "(1) Did the ITAT err in its consideration as to whether the amalgamation undertaken by Accentia Technology Pvt. Ltd. for A.Y. 2007-08 had any effect on its finance or profitability in the circumstances of the case. and (2) Did the ITAT err in excluding the reliance placed by the TPO upon information collected by him under Section 133(6) of the Act, having regard to Section 92CA(7) read with Section 92D(3) of the Act".
Pr. CIT vs. H & S Software Development and Knowledge Management Centre Pvt. Ltd - TS-9-HC-2018(DEL)-TP - ITA 912/2017 dated 03.01.2018

346. The Tribunal held that the assessee, engaged in providing its AE with IT and IT Enabled services could not be compared to a company like Wipro Technology Ltd due to the existence of an extra-ordinary factor of acquisition of Citi Technologies Services Ltd as well as the fact that the said company was engaged in undertaking software development services for developing software application. It also held that the assessee could not be compared to Infosys Technologies Ltd due to its brand value, R&D expenses, offshore revenue etc. Further, companies engaged in software development as well as software products and marketing and not having segmental results for its software development work, could not be compared with the assessee.
FIL India Business Services Pvt Ltd v DCIT - TS-248-ITAT-2016 (Del) - TP Pr. CIT v Cash Edge India Pvt Ltd - TS-262-HC-2016 (Del) - TP

347. The Court held that the assessee company rendering software development services to its AE could not be compared with –

- CG Vak Software & Exports Ltd. because apart from earning income form software services it also earned income from 'Business process outsourcing services' which fell in realm of IT enabled services and there was no segmental information qua software services alone.

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- Quintegra Solutions Ltd. as the company was incurring persistent losses coupled with declining turnover which indicated its abnormal functional circumstances.

Further, the Court dismissed assessee's plea and included Thirdware Solutions as comparable upholding TPO's view that the company's overseas segment encompassed only export of software services, as identical to the assessee.

Steria India Ltd. v. DCIT - [2018] 92 taxmann.com 120 (Delhi) - IT APPEAL NO. 403 OF 2017 dated April 9, 2018

348. The Court dismissed Revenue's appeal challenging the Tribunal's exclusion of Tata Elxsi Limited and Thirdware Solutions noting that the Tribunal had rightly concluded that they were functionally not comparable to the assessee who was engaged in providing software development services. Further, it held that the Tribunal was justified in including SIP Technologies and Exports Limited as comparable by ignoring its low margin (on the basis of which the TPO had excluded the comparables). However, it admitted the questions of law regarding Tribunal's exclusion of Tata Consultancy Services Limited (TCS) and Infosys Technologies Limited.

Pr. CIT vs. S.T. Ericsson India Pvt. Ltd (Chemical Construction International Pvt Ltd) - TS-59-HC-2018(DEL)-TP - ITA 821/2017 dated 31.01.2018

349. In the case of an assessee engaged in IT services, the Court dismissed Revenue's appeal and upheld the Tribunal's decision of exclusion of 4 comparables company namely Coral Hub, Datamatics Financial (BPO Division), Geneysis International and Mold Tek on the ground of functional dissimilarity between assessee and comparables.

PCIT-6 Vs MPS Ltd-TS-306-HC-2018(DEL)-TP ITA No 255/2018 dated 18.04.2018

350. The Court dismissed Revenue's appeal challenging Tribunal's exclusion of Wipro Technology Services as comparable to assessee and held that exclusion was justified as the said comparable had a strong brand presence and unusual events such as amalgamation, merger which could have a miserable impact on the profits.

PCIT Delhi-1 vs Agnity India Technologies P Ltd- TS-273-HC-2018(Del)-TP- ITA No. 447 of 2018 dated 13.04.2018

351. The Court dismissing Revenue's appeal, confirmed Tribunal's order of exclusion of comparables in case of assessee rendering software development services (IT), IT Enabled Services (ITeS) for AY 2008-09. on the ground that having carefully examined the order of the Tribunal in light of Rule 10B(4) of Income Tax Rules, 1962, the Court was unable to be persuaded that the exclusion of comparables for reasons set out in the order of the Tribunal gave rise to any substantial question of law. The Tribunal had excluded comparables on grounds of functional dissimilarity on account of revenue from software products/KPO services, ownership of branded/proprietary products, RPT filter > 15% and absence of separate segmental reporting.

Pr. CIT vs Avaya India Pvt Ltd – TS-452-HC-2017(DEL)-TP-ITA No.838/2016 dated 16.05.2017

352. The Court upheld the Tribunal's order wherein it was held that on the basis of examination of agreements entered into between the assessee and McKinsey USA, the assessee was

providing high end services in terms of research and intelligence segment where assessee's services included knowledge management systems and infrastructure issues which would encompass infrastructure support, application support, application operations group and survey development centre which were knowledge based and hence the assessee ought to be categorized as a KPO. Relying on the ratio laid down by the HC ruling in case of Rampgreen Solutions India Pvt Ltd., the Court observed that since the services rendered by the assessee were specialized and required specific skill based analysis and research that was beyond the rudimentary nature of services rendered by a BPO, the services provided by the assessee were more akin to KPO.

McKinsey Knowledge Centre India Pvt. Ltd vs Pr.CIT [TS-812-HC-2018(DEL)-TP] ITA 461/2017 dated 09.08.2018

353. The Court dismissed Revenue's appeal challenging Tribunal's exclusion of 6 comparables for assessee providing ITeS to its AE. With respect to 3 comparables (TCS E-Serve, TCS E-Serve International and Infosys BPO), it noted the Tribunal had correctly excluded these companies as they had high brand value and therefore, were able to command greater profits, besides they operated on economic upscale. Further, it held that the Tribunal was justified in excluding Accentia Technologies and ICRA Techno Analysis on the grounds of lack of segmental data. It held that e-Clerx Services, a KPO service provider, was also rightly excluded on grounds of functional dissimilarity to assesse BPO.

Pr.CIT vs. Evalueserve SEZ (Gurgaon) Pvt. Ltd - TS-125-HC-2018(DEL)-TP - ITA 241/2018 dated 26.02.2018

354. The Court upheld the order of the Tribunal wherein the Tribunal:
Excluded Infosys BPO as comparable on the ground of its huge brand value Included R Systems International following the order of the Court in Mckinsey Knowledge Centre wherein it was held that if from the available data on record, the results for financial year could be reasonably extrapolated then the comparable could not be excluded. However, it admitted 2 questions of law regarding comparability of Surya Pharmaceutical Ltd. and Excel Infosys with the assessee engaged in providing ITES.

Pr. CIT vs. Baxter India Pvt Ltd - TS-135-HC-2018(DEL)-TP - ITA 260/2018 dated 27.02.2018

355. The Court admitted the appeal of the assessee [engaged in ITeS] for AY 2010-11 on the question whether the Tribunal erred in holding that M/s. TCS E-Serve Limited, TCS E-Serve International and M/s. Infosys BPO Limited could be taken into account as comparables for ALP determination of the asseessee's international transactions. The Tribunal had included Infosys BPO as comparable and rejected the assessee's plea that it was not comparable in view of its brand value and acquisition made by it during year and further on the ground that only insignificant expense was incurred on brand building and infact loss had been incurred in the acquired business.

The Tribunal had also included TCS E-Serve and TCS E-Serve International, holding that the companies were functionally comparable since the companies were engaged in ITes and BPO segment and that rise in turnover/profit could not be considered to be a ground for exclusion since the company was to be compared on the basis of FAR. There was no information

brought on record as to how Tata' brand impacted profitability and it was noted that the expenditure incurred on the brand was miniscule (0.43% of total expenses only).
Cadence Design Systems (India) Private Limited v DCIT [TS-369-HC-2018(DEL)-TP] ITA 592/2018 dated 18.05.2018

356. The Court upheld the order of the Tribunal wherein it held that the assessee engaged in software development could not be compared with:

- E-Infochips and Infinite Data Systems as these companies carried out high-end technology-driven services which were entirely different from activities carried on by the assessee
- Accentia Technologies as it operated from multiple locations throughout the globe in healthcare receivable cycle management and also ventured into legal process outsourcing and high-end software service delivery which were functionally different from the assessee‟s activities
- TCS E-Serve Ltd. and TCS E-Serve International Ltd since their established 'brand value' drew the profitability upward and also since the merger undertaken during the year had resulted in distortion of the profit figures

  Vis-à-vis I-Gate Global Solutions, the Court held that having regard to the submissions made and the material on record, especially the Tribunal's observations that I-Gate's functioning was similar to that of the assessee, it admitted the Revenue's appeal against the Tribunal's exclusion of the said company as comparable on the ground that it underwent significant change in its profitability in view of the amalgamation undergone.

Pr CIT v UNITED HEALTH GROUP INFORMATION SERVICES (P) LTD. - TS-1080-HC-2017(DEL)-TP ITA 1180/2017 dated 21.12.2017

357. The Court, relying on the decision in assessee's own case for AY 2008-09 upheld the exclusion of Infosys Technologies ltd, KALS information Systems, Wipro ltd, Accentia technologies, Coral Hub and Eclerx Services and HCL Comnet Systems & Services on ground that (a) the companies were either functionally dissimilar to the assessee engaged in providing software development services (SDS), IT enabled services (ITES) and Market support services (MSS) or (b) the aforesaid companies had revenue from software products/KPO services for which no separate segments were available or (c) they owned branded/proprietary products or (d) their RPT to Sales exceeded the RPT filter of 15% applied by the TPO.
Pr. CIT Vs Avaya India Pvt. Ltd-TS-612-HC-2017(DEL)-TP-ITA no. 473/2017 dated 16.05.2017

358. The Court dismissed Revenue's appeal challenging ITAT's exclusion of comparables for assessee providing software development services to AE for AY 2007-08. The Tribunal had relied on Hewlett Packard India Global Soft ruling (wherein identical set of comparables were considered) and opined that since the functional profile of the assessee was identical to that of Hewlett Packard India, no different conclusions on comparables could have been arrived at. The Court, noting that the Tribunal had extracted its previous ruling in Hewlett Packard India Global Soft which contained analysis of each of the 16 comparables that were subject matter of the present appeal, rejected the Revenue contention that without fresh determination as to the identical set of the comparable entities taken into account in Hewlett Packard India Global Soft, the Tribunal could not have 'blindly' followed its previous rule. It

held that the Tribunal had clearly communicated and carried out a functional and factual analysis in the present case and therefore no substantial question of law arose.
Pr. CIT vs. ST Microelectronics Pvt. Ltd.-TS-850-HC-2017(DEL)-TP dated 30.10.2017

359. Where the Tribunal had while adjudicating comparables in respect of assesse engaged in the business of providing IT Enabled services to its AE excluded a) Eclerx on the ground that it provided high value financial services relating to consultancy business and solution testing and web content management and web analytics, (b) ICRA techno Analytics on the ground that it was engaged in processing and providing software development and consultancy and engineering services/web development services. (c) TCS E-serve as it had high brand value impacting its profitability and (d) Accentia Technologies Pvt Ltd as it was engaged providing in KPO services in the healthcare sector, the Court held that the Tribunal's findings were reasonable and accordingly dismissed revenue's appeal.
Pr.CIT vs B.C Management Services Pvt Ltd-TS-948-HC-2017(DEL)-TP-ITA no.1064/2017 and CM no. 43177/2017 dated 28.11.2017

360. Where the Revenue filed an appeal before the High Court after a delay of 430 days, the Court refused to condone the delay and dismissed its appeal against Tribunal's order excluding 'Coral Hub Ltd', Infosys BPO and Wipro BPO from the list of comparables for ITeS provider. Following the decisions in the case of Rampgreen Solutions (P) Ltd [TS-387-HC-2015(DEL)-TP], Pentair Water India (P) Ltd [TS-566-HC-2015(BOM)-TP] and Agnity India Technologies Pvt. Ltd [TS-189- HC-2013(DEL)-TP] wherein exclusion of the comparables [Coral Hub (since its business model was based on outsourcing, Infosys BPO & Wipro BPO as it had huge turnover, economies of scale and brand value)] was upheld, it held that no substantial question of law arose and accordingly dismissed the department's appeal.
Pr.CIT vs New River Software Services Pvt. Ltd-TS-672-HC-2017(DEL)-TP-ITA No. 924/2016 dated 22.08.2017

361. The Court dismissed Revenue's appeal challenging Tribunal order on comparables selection dismissing Revenue's contention that the Tribunal order was perverse and incomplete as it dealt with only one of the several grounds considered by DRP in support of its conclusion. It noted that the Tribunal had directed inclusion of one loss making comparable which was functionally similar to the assessee and exclusion of 2 comparables on ground of functional differences and had given detailed reasons in support of its conclusion. Further, it noted that the memorandum of appeal filed by Revenue and the questions of law raised for its consideration did not mention a specific plea that the Tribunal order was perverse and observed that the ground of perversity was not to be casually urged and was to be supported by a proper pleading which again has to be on the basis of a detailed study of the impugned order of the Tribunal pointing out to High Court in what manner the Tribunal's conclusions can be said to be perverse, which was not done in the instant case. Accordingly, it held that no substantial question of law arose.
Pr.CIT vs Sojitz India Pvt Ltd-TS-704-HC-2017 (DEL)-TP-ITA No. 742/2017 dated 04.09.2017

362. The Court, dismissed Revenue's appeal challenging Tribunal's exclusion of TCS E-Serve Limited from the list of comparables for benchmarking the provision of ITES by the assesse to

its AE on the ground that the Tribunal relying on the decision in the case of Ameriprise India Pvt. Ltd [ITA No. 7014/del/2014] had excluded TCS E-Serve Limited as it was engaged in both transaction processing and technical services. It held that considering the profile of the assessee, (engaged only in BPO services) the size and scale of TCS's operations made it an inapposite comparable vis-à-vis the assessee.
Pr. CIT vs Actis Global Service Pvt Ltd [TS-417-HC-2017(DEL)-TP- ITA No.94 of 2017 dated 15.05.2017

363. The Revenue filed an appeal challenging the order of the Tribunal on two grounds i.e. i) Whether Vishal Information Technology was rightly excluded on the ground of difference in business model and ii) whether the Tribunal was justified in holding that KPOs could not be compared to the BPO assessee. The Court, relying on the decision of the High Court in Rampgreen, dismissed the appeal of the Revenue stating that no substantial question of law arose therein and held that the Tribunal's order did not suffer from any infirmity.
EXL Services.com India Pvt. Ltd TS-411-HC-2017(DEL)-TP- ITA 329/2017 dated 15.05.2017

364. The Court upheld the order of the Tribunal wherein it was held that the assessee, engaged in providing software development and maintenance services to its AE could not be compared to companies engaged in software development programmes, huge companies such as Infosys, companies failing the Related Party to sales filter, companies having undergone business restructuring directly affecting the profitability.
Pr CIT v Fiserv India Pvt Ltd - TS-437-HC-2016 (Del) - TP - ITA 17/2016

365. The Court declined to interfere with the Tribunal ruling on comparability analysis and held that Infosys BPO and Eclerx Services Ltd. (ESL) were not comparable with assessee company engaged in KPO services. The Court relying on its ruling in Rampgreen Solutions PvtLtd held that while the assessee was catering to the capital and financial services markets, ESL worked in the area of sales, marketing and supporting financial services and that the financial profile of the two KPOs could not be said to be similar from the point of view of the type of businesses they were catering to.
PCIT vs Actis Global Services Pvt Ltd [TS-535-HC-2016(DEL)-TP] ITA 417/2016

366. The Court dismissed the revenue's appeal and upheld Tribunal's exclusion of 3 comparables for assessee providing ITES to AE on the ground that certain extraordinary events had occurred in these comparables during the previous periods viz. mergers, amalgamations and acquisitions, which distorted the profitability and thereby increased the margin. It further held that even if the figures of comparables were to be included, no adjustment would be permissible due to the fact that the margin of variation would be within the limits of the Safe Harbour Provision.
Ameriprise India Pvt Ltd [TS-875-HC-2016(DEL)-TP] (ITA 461/2016)

367. The Court upheld the order of the Tribunal where in a US based company was excluded as a comparable on the ground that a local software service provider in the US market could not be compared with a software service provider in India due to the difference in markets and also due to the fact that the basis of allocation of costs in the segment was unclear, not

reflecting whether the US profits of the said company were entirely from software operations or whether they included other activities.
Pr CIT v Pitney Bowes Software India Pvt Ltd (ITA 681/2015) – TS-473-HC-2015 (Del) – TP

368. The Court held that Cosmic Global could not be compared with the assessee who was engaged in the provision of ITES Services as Cosmic Global's major activity comprised of translation services which were dissimilar with the assessee's activity and that it outsourced a substantial part of its service therefore having a different business model. Further it excluded Accentia Technologies Ltd as a comparable in view of the fact that there was a merger of this company with another entity.
Pr CIT v Xchanging Technology Services India Pvt Ltd (ITA No 813 / 2015) – TS-555-HC-2015 (Del) – TP

369. The Court dismissed Revenue's appeal against Tribunal's order noting that the Tribunal had excluded Tata Elxsi and E-Infochips as comparables on the ground that separate segmental details in respect of software development services segment was not available, as the order of the Tribunal given on facts, did not give rise any substantial question of law.
Pr.CIT vs. Steria India Ltd-TS-733-HC-2017(DEL)-TP -ITA no. 762 / 2017 dated 19.09.2017

370. The Court dismissed appeal of revenue against Tribunal's exclusion of comparables for lack of segmental data and held that mere availability of proportion of the turnover allocable for software product sales per se could not lead to an assumption that segmental data was available to determine the profitability of the concerned comparable.
Saxo India Pvt Ltd [TS-790-HC-2016 (Del)-TP] (ITA 682/2016)

371. The Court admitted Revenue's appeal challenging the exclusion of E-Infochips as comparable on ground of unavailability of segmental data by framing the following question of law as "*Is the impugned order in error of law in so far as it excludes M/s. E-Infochips Limited from the list of comparables on the ground of unavailability of segmental data, in thecircumstances of the case?"*
Pr.CIT vs. Sapient Consulting Pvt. Ltd - TS-124-HC-2018(DEL)-TP - ITA 261/2018 dated 27.02.2018

372. The Court allowed Revenue's appeal against ITAT's order deleting TP adjustment in case of assessee providing call centre services to its AE wherein it was noted that the transaction was at ALP under internal CUP as the average hourly rate received from AE in USA was higher than that of the Non-AEs in UK
CIT vs. EFFECTIVE TELESERVICES PVT LTD [TS-1081-HC 2018(Guj)-TP] ITA No.893 of 2018 dated 01.10.2018

373. The Court upheld exclusion of i) Mercury Outsourcing Management by Tribunal applying the turnover filter and rejected the assessee's reliance on case laws observing that analysis of the comparables may be in a different context and the same need not adopted in all cases and the inclusion/exclusion of comparables is a decision to be taken by the Tribunal which is a final fact finding authority ii) Maple E-Solutions on the ground that finding of the Tribunal that

alleged fraud by the director in the earlier year does not make the financial statements non-reliable was not perverse by relying on its decision in Softbrands iii) Genesys International Corporation as it failed RPT filter of 25% and the finding of the Tribunal that when the receipt from the Related Party are falling under the definition of international transactions then the same will be treated as part of the RPT was not perverse.

Acusis Software India Pvt Ltd vs ITO [TS-973-HC-2018(KAR)-TP] ITA No.223/2017 dated 14.08.2018

374. The Court upheld inclusion of i) ICRA Online Ltd by the ITAT order and dismissed assessee's appeal. It rejected the assessee's contention that the comparable was a KPO whereas the assessee was a low end BPO service provider providing voice call services noting that the KPO-definition as per Rule 10TA(g) indicated that it was a specie of genus BPO and both being ITES services provided by the software industry to their clients, the area of KPO may fall in the areas of operation and the exclusion as specified in Rule 10TA(g) was only for Research and Development Services whether or not in the nature of contract. Further, if the concerned KPO falls within the genus category of BPO then assessee could persuade the authorities to compare only segmental account available in public domain. It also observed that the Tribunal had clearly noted that the comparable and assessee were engaged in different streams of operation and included the company since the Tribunal had observed that the assessee was engaged in analysis of results, testing for which it had to use market intelligence, maintain e-tools, reporting analytics and thus, it had held that once level of knowledge that was being used for outsourcing was at a reasonable comparable pedestal, the type of service industry to which companies cater need not fit in the mould of comparables while adopting TNMM.

Further, the Court also held that no substantial question of law arose with regard to remand by the Tribunal of comparability of Jeevan Scentific Technologies. The assessee contended that the TPO had reinstated its prior order and not taken into consideration the segmental revenue (i.e.71.219L) of BPO operations as opposed to the total revenue considered which would result in failing the turnover yardstick of less than one crore applied by the TPO. With respect to the above, a miscellaneous petition had been filed with the Tribunal which was rejected and the Court observed that no appeal from such order was raised by the assessee and the aforesaid order passed was not part of the records.

Swiss Re global Business Solutions India Pvt Ltd vs ACIT [formerly known as Swiss Re Shared services (India) Pvt Ltd] [TS-766-HC-2018(KAR)-TP] ITA No.616/2016 dated 16.07.2018

375. The Court upheld the order of the Tribunal wherein two companies viz. Nucleus Netsoft & GIS (India) Ltd and Vishal Information Technologies Ltd were excluded on the ground that a substantial part (more than 40 percent) of their business was outsourced and therefore not functionally comparable to the assessee.

IHG IT Services (India) Pvt Ltd – TS-968-HC-2016 (P&H) - TP - ITA-264-2016 (O&M)

376. The Court held that a comparable could not be excluded merely because it had a 0.55 percent deviation from the 75 percent export earnings filter applied by the TPO and held that there was nothing sacrosanct about the figure of 75 percent and noted that a deviation that did not affect the result was acceptable. Further, it held that companies having a different

financial year ending could not be rejected as comparable if the data relating to the financial year in which the international transaction was entered into was directly available from the annual accounts of the comparable. Further, it held that where the assessee an ITES provider had a turnover of 59 crores, a company whose relevant segment had a turnover of 27.76 lacs could not be considered as comparable and it also excluded companies outsourcing a large portion of its activities.
Mercer Consulting (India) Pvt Ltd - TS-664-HC- 2016 (P&H) - TP Income Tax Appeal No. 101 of 2015

377. The Court upheld the order of the Tribunal wherein two companies viz. Nucleus Netsoft & GIS (India) Ltd and Vishal Information Technologies Ltd were excluded on the ground that a substantial part (more than 40 percent) of their business was outsourced and therefore not functionally comparable to the assessee.
IHG IT Services (India) Pvt Ltd – TS-968-HC-2016 (P&H) – TP

378. The Tribunal excluded Alphageo (India) Ltd engaged in seismic data analysis and Celestial Lab engaged in development of tailor made software packages as comparable on the ground of functional dissimilarity.
Sabic Research and Technology Pvt Ltd TS-327-ITAT-2017(Ahd)-TP ITANo.1065 dated 01.05.2017

379. The Tribunal accepted assessee's plea for inclusion of CG-VAK Software and Export Ltd. noting that it was not a persistent loss-making concern as it showed profitability for FY 2008-09, FY 2010-11 and FY 2012-13 when foreign exchange gains were included as part of operating profits. It remitted the matter to AO to verify whether after the above direction, whether addition to ALP in case of assessee's software development segment would survive or would be modified.
Gateway Technolabs Pvt Ltd vs Dy.CIT [TS-1293-ITAT-2018(Ahd)-TP] (ITA No.677/Ahd /2017) dated 22.10.2018

380. Where the DRP had applied onsite revenue filter to exclude only Thinksoft Global Services Ltd, the Tribunal held that the filter ought to be applied to all comparables and restored the matter to the file of AO/TPO for fresh decision after applying the onsite revenue filter to all comparables. Further, regarding assessee's plea for exclusion of KALS Information Systems, noting that its balance sheet showed inventory as on March 31, 2010 for which no schedule was available, it restored the issue to the AO/TPO directing him to invoke section 133(6) and obtain relevant data of inventory for the purpose of benchmarking.
ITO vs. Galax E Solutions India Pvt. Ltd.-TS-839-ITAT-2017(Bang)-T IT (TP) A No. 166/Bang/2015 dated 13.10.2017

381. The Tribunal, rejecting assessee's contention that Tribunal did not consider the functional comparability of Accentia Technologies while including it as a comparable held that the annual report of the company clearly stated that the revenue of the company was derived from medical transmission, billing, income from coding which were in the nature of ITeS and therefore comparable to the assessee. Accordingly, it dismissed assessee's miscellaneous petition.

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Control Component India Pvt. Ltd vs DCIT-TS-997-ITAT-2017(Bang)-TP MP Nos.100 & 101/Bang/2017 dated 31.10.2017

382. The Tribunal held that the assessee engaged in provision of ITeS services to its AE could not be compared to:

- Infosys BPO Ltd. as it had a high brand value and had undergone an extraordinary event during the year impacting profitability etc.

Further, it remanded the issue of comparability of the following comparables:

- Universal Print Systems Ltd by relying on the decision of CGI Information Systems wherein comparability of this company was remanded for analysis at segmental level.
- BNR Udyog Ltd. noting that benchmarking of BNR was done taking medical transcription segment and issue of RPT on entity level exceeding 25% was not raised before AO/DRP. It directed the AO/TPO to verify how much RPT pertains to the medical transcription segment by relying on the decision of Indegene Pvt.Ltd. wherein comparability had been remanded back on similar facts.
- TCS E-serve Ltd. as the assessee had not brought out as to which of the services out of KPO services would come under technical services in case of TCS and further, the TPO had held that all services rendered by assessee were BPO services without any proper analysis.
- Excel Infoways Ltd. for examination and verification of the assessee's contentions on the issue of abnormality of profits and of failing of the employees cost filter of 25% at segmental level.

Further, it remitted the comparability of Accentia Technologies Ltd. and Jindal Intellicom Ltd. sought to be included by the assessee on the ground that they had been selected by the TPO and assessee however the DRP had suo moto rejected the comparable inspite of no objections being raised by the assessee.

Mobily Infotech India Pvt. Ltd. vs. DCIT TS-1059-ITAT-2018(Bang)-TP] IT(TP)A No.2055/Bang/2016 dated 08.08.2018

383. The Tribunal pursuant to the recall of the its order vis-à-vis adjudication of comparable relying on the decision of Hewlett Packard India Software Operation directed for exclusion of Accel Transmatics. It held that the said company was engaged in business of application of products in the health care, education segment, had also ventured into areas of animation and gaming software and was therefore functionally different from assessee which was engaged in providing software development services to its AE.

Broadcom India Private Ltd vs. DCIT [TS-887-ITAT-2018(Bang)-TP] ITA No.1514/Bang/2010 dated 03

384. The Tribunal relying on the coordinate bench decision of CGI Information Systems and Management Consultants Pvt Ltd. held that the assessee engaged in the provision of software development services could not be compared to:

- Genesys International Corpn. Ltd as it was rendering Geospatial based services and had presence of intangible assets which was indicative of the fact that the company was not in software development services.
- Infosys Ltd. as it was engaged in the development and sale of software product and had intangible assets.

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- L& T Infotech Ltd. as it was also a software product company and segmental information vis-à-vis software development services was not available.
- Persistent Systems Ltd. as it was a software product company and segmental information on software development services was not available.

Microsemi Storage Solutions India Pvt Ltd vs ACIT [TS-927-ITAT-2018(Bang)-TP] IT(TP) A No.2103/Bang/2016 dated 24.08.2018

385. The Tribunal following the decision of coordinate bench in the case of TE Connectivity (where the assessee was also providing software development services and for the same assessment year) excluded Bodhtree Consulting as it was a software product company and therefore functionally dissimilar to the assessee. Further, it restored the comparables to CIT(A) to be decided afresh which were excluded applying the turnover filter in light of the HC ruling of Chryscapital Investment Advisors(India) (P.) Ltd. (wherein it was held that turnover could not be basis for exclusion of the comparables when the functionality was similar) and directed the CIT(A) to decide other aspects of the matter such as functional comparability.

ACIT vs Telsima Communications Pvt Ltd [TS-954-ITAT-2018(Bang)-TP] IT(TP)A No.1112/Bang/2014 dated 03.08.2018

386. Relying on the coordinate bench ruling of Commscope Networks India Pvt Ltd, the Tribunal held that assessee engaged in software development services to its AE could not be compared to

- ICRA Techno Analytics Ltd. as the RPT filter exceeded 15%
- Acropetal Technologies Ltd. (Seg) as it was excluded by coordinate bench ruling of Applied Materials India Pvt Ltd on the ground that it did not satisfy the filter of IT revenue of 75% applied by the TPO himself.
- e – Zest Solutions Ltd. as it was excluded by coordinate bench ruling of Applied Materials India Pvt Ltd since it was engaged in KPO services and was functional dissimilar.
- Infosys Ltd. as it was excluded by coordinate bench ruling of Applied Materials India Pvt Ltd due to its huge brand value, intangibles and huge turnover.
- Larsen & Toubro Infotech Ltd. as it was excluded by coordinate bench ruling of Applied Materials India Pvt Ltd since it exceeded 15% RPT filter.
- Persistent Systems & Solutions Ltd. as it was excluded by coordinate bench ruling of Applied Materials India Pvt Ltd. on the ground that it was functionally incomparable being engaged in diversified activities including licensing of products, royalty on sale of products as well as income from maintenance contract.
- Persistent Systems Ltd. as it was excluded by coordinate bench ruling of Applied Materials India Pvt Ltd. on the ground that it was functionally incomparable being engaged in diversified activities including licensing of products, royalty on sale of products as well as income from maintenance contract
- Sasken Communication Technologies Ltd. as it was excluded by coordinate bench ruling of Applied Materials India Pvt Ltd. in absence of segmental details.
- Tata Elxsi Ltd as it was excluded by coordinate bench ruling of Applied Materials India Pvt Ltd on the ground that the company did not qualify the export earning filter of 75% applied by TPO himself.
- E-Infochip Ltd as it was excluded by coordinate bench ruling of Saxo India Pvt Ltd on the ground of absence of segmental details

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It allowed Revenue's appeal partly and directed for inclusion of Evoke Technology Pvt Ltd, RS Software Ltd and Mindtree Ltd. as the assessee did not contest the inclusion. Further, it upheld DRP's order which directed for exclusion of Intertec Communication Technologies Ltd. noting that DRP had followed the coordinate bench ruling in case of Navisite India Pvt Ltd. and Del HC ruling in Rampgreen Solutions India Pvt Ltd. and the assessee could could not point out any difference in facts. It rejected assessee's plea for inclusion of MYM Technologies Ltd noting that the data for current financial year was not available and the Annual report submitted by the assessee did not contain audited P&L and balance sheet for 12 months. It also upheld DRP's order with respect to exclusion of FCS software on basis of absence of segmental information pertaining to software development, employee cost filter, onsite revenue filter etc. and rejected assessee's reliance on the coordinate bench ruling of Marvell India Pvt Ltd. wherein the said comparable was excluded for reason of high working capital adjustment and there was no discussion about the reasons for exclusion which the DRP had dealt with like absence of segmental information, employee cost filter and onsite revenue filter (in addition to high working capital).

ACIT vs AT & T Global Business Services India Pvt Ltd [TS-1092-ITAT-2018(Bang)-TP] IT(TP)A No.171/Bang/2016 dated 31.08.2018

AT & T Global Business Services India Pvt Ltd vs ACIT [TS-1092-ITAT-2018(Bang)-TP] IT(TP)A No.190/Bang/2016 dated 31.08.2018

387. The Tribunal allowed the Revenue's plea for inclusion of Allsec Technologies as a comparable in case of assessee engaged in ITES segment as the assessee did not object to the same being included. It was pointed out by Revenue that the basis for rejection of the comparable by CIT(A) was that it was a loss-making company; however, CIT(A) failed to appreciate the fact that the comparable's connectivity and data base expenses (being extraordinary in nature) were factored in while computing the margin.

Dy.CIT vs JDA Software Private Limited (formerly i2 Technologies India Private Limited) [TS-1102-ITAT-2018(Bang)-TP] IT (TP)A No.1239/Bang/2013 dated 28.09.2018

388. The Tribunal upheld DRP's order excluding iGATE Global Solutions Ltd. as a comparable in case of assessee engaged in ITES as it was earning revenue from providing IT Services and IT enabled services and there was no segmental information.

Dy. CIT vs Goldman Sach Services [TS-1239-ITAT-2018(Bang)-TP] IT (TP) A NO. 581(BANG.) OF 2016 dated 12.09.2018

389. Noting that the TPO had conducted the benchmarking analysis of the assesse, a captive service provider, merely on the basis of the TP study, the Tribunal remitted the entire TP issue to the file of the TPO and held that it was incumbent upon the TPO to examine the assesse's agreement with its AE so as to ascertain its exact profile and that he could not merely rely on TP study or profile given in the audited accounts.

GE India Exports Pvt. Ltd vs DCIT-TS-426-ITAT-2017(BANG)-TP-IT(TP)A No.117/Bang/2014 dated 05.05.2017

390. The Tribunal held that a company engaged in rendering software development services to its AE could not be compared to:

- iGate GlobalSolutions, Flextronics Ltd. (Seg.), L & T Infotech Ltd, Satyam Computers Ltd,., Infosys Technologies Limited as these companies had a turnover exceeding 200 crores whereas the assessee's turnover was merely 24 crores. [It relied on the coordinate bench ruling in Dell International which inturn had relied on coordinate bench decision in Genisys International.]
- Tata Elxsi as it was engaged in development of niche product and development services, which was entirely different from the assessee company and no segmental information available. [It relied on the coordinate bench ruling in assessee's own case since there was no change in factual matrix.]
- Bodhtree Consulting Ltd. as it was engaged in product development, software development and ITES and segmental details were not available which was not controverted by Revenue.
- Geometric Software Solutions Co. Ltd. as it was engaged in developing and licensing of products and product life cycle management services which were not similar to the functions of the assessee.

Further,

- It remanded the comparability of Exensys Software Solutions Ltd. and Thirdware Solutions Ltd to the CIT(A) as the CIT(A) had excluded on basis of abnormal profits without any discussion and the comparability of the companies had also not been discussed.
- It excluded Quintegra Solutions Ltd. as no evidence had been brought on record that the financial results could be extrapolated. It distinguished coordinate bench ruling of Exevo India Pvt. Ltd. relied on by assessee (wherein it was held if a company was functionally similar, it could not be excluded on basis that data for entire financial year was not available, if data could be reasonable extrapolated with available data on record) noting that data had to be on record for reasonable extrapolation which was not the case of said comparable.
- It included VJIL Consulting as it was predominantly an exporter of software development services which was even the finding of CIT(A). [It relied on coordinate bench ruling in Qualcomm.]
- It included Akshay Software Technologies Ltd. as it was engaged in provision of software development services by relying on coordinate bench ruling in Qualcomm India (P.) Ltd. which was not controverted by Revenue.

DY.CIT vs ABB Global Industries & Services P Ltd [TS-1051-ITAT-2018(Bang)-TP] IT(TP)A No.620/Bang/2013 dated 07.09.2018

391. The Tribunal held that assessee engaged in providing software development services to its AEs could not be compared to:

- Bodhtree Consulting Ltd. as it was in the business of software product and was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology [It relied on coordinate bench ruling of Infinera India]
- Tata Elxsi Ltd. as it operated in the segments of software development services which comprised of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment that made it functionally different from assessee [It relied on coordinate bench ruling of Infinera India]

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- Infosys Ltd. as it was a giant company in the area of development of software and it assumed all risks leading to higher profits [It relied on coordinate bench ruling of Infinera India]
- L&T Infotech Ltd. as it was a global IT service and solutions provider. [It relied on coordinate bench ruling of Cisco]
- Persistent System Ltd. as it was in product designing services and into software product development. [It relied on coordinate bench ruling of Infinera India]
- Sasken Communciation Technologies Ltd. as it was engaged in sale of software products and had intangible assets. [It relied on coordinate bench ruling in Novell Software development]

Further,

- It remanded the comparability of Kals Information System and directed the TPO to call for information u/s.133(6) whether it was engaged in software product development as Revenue pointed out to the Tribunal that TPO's order stated that company had not carried out research and development for instant year and the company only rendered training services and had no software products.
- It also remanded the comparability of CG-VAK Software and Exports Ltd. to consider employee cost vis-à-vis total turnover by taking correct employee cost

LSI India Research and Development Pvt Ltd vs ITO [TS-1224-ITAT-2018(Bang)-TP] IT(TP)A Nos 44 and 45/Bang/2014 dated 07.09.2018

392. The Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

- Kals Information Systems Ltd as it was developing software products and not purely a software development service provider
- Accel Transmatic Ltd as it was engaged in services in form of ACCEL IT and ACCEL animation services for 2D and 3D animation and thus functionally different.
- Tata Elxsi as it was engaged in development of niche products and services provided were different from assessee
- Bodhtree Consulting as it had a consistent change in profit margins due to variation in revenue recognition method (revenue was recognized based on software developed and billed to clients, there was a possibility of expense in relation to revenue was booked in earlier year.)
- Lucid Software as its segmental details with respect to software design and software products were not available

Further, it accepted assessee's contention to reject entity level margin of MegaSoft (on account of the company having software product segment) and compute margins only for software service segment.

Asst CITvs Electronics for Imaging India Pvt Ltd [TS-1323-ITAT-2018(Bang)-TP] (IT(TP)A No.1725/Bang/2017 dated 31.10.2018

393. The Tribunal restored the TP study conducted by TPO in respect of software distribution segment to be re-examined and directed the TPO to consider issue afresh after giving an opportunity to assessee in light of the claim by assessee that the DRP had made a factually incorrect observation that assessee had not filed annual reports of comparables selected by assessee and TPO during its proceedings. It was assessee's contention that TPO had not

applied his mind and selected comparables which were functionally dissimilar (engaged in manufacture of raw material and chemical and trading of commodities.)

Asst CIT vs Arcot R&D Software Pvt Ltd [TS-1331-ITAT-2018(Bang)-TP] (IT(TP)A No.437/Bang/2016 and CO No.14/Bang/2017) dated 15.10.2018

394. The Tribunal held that assessee engaged in providing software development services to its AEs could not be compared to:

- Acropetal Technologies Ltd. as there was no breakup of its employee cost and export sales due to absence of segmental information and thus, it was not possible to ascertain if it passed export earnings and/or employee cost filters [It was Revenue's contention that DRP had arbitrarily applied the onsite revenue filter to exclude the comparable and it was immaterial if they generate revenue from onshore or offshore services when they are functionally similar. The Tribunal upheld DRP's order noting that it had relied on coordinate bench ruling in CGI Information System Ltd and cited other reasons (i.e. absence of segmental information containing breakup of employee cost and export sales) in addition to onsite filter]
- L&T Infotech Ltd. as it was a software product company having significant intangibles. [It was Revenue's contention that DRP had arbitrarily applied the onsite revenue filter to exclude the comparable and it was immaterial if they generate revenue from onshore or offshore services when they are functionally similar. The Tribunal upheld DRP's order noting that it had relied on coordinate bench ruling in CGI Information System Ltd and cited other reasons (i.e. showing revenue from three segments i.e. financial services, manufacturing and telecom without any segmental breakup) in addition to onsite filter]
- E-Infochips Ltd. as it had diversified services with no segmental information and its income from software development services was less than 75% of its operating revenue. [It was Revenue's contention that DRP had arbitrarily applied the onsite revenue filter to exclude the comparable and it was immaterial if they generate revenue from onshore or offshore services when they are functionally similar. The Tribunal upheld DRP's order noting that it had relied on coordinate bench ruling in CGI Information System Ltd and cited other reasons (i.e. fluctuating revenue, failed service filter, lack of segmental information) in addition to onsite filter]

Further, it included RS Software noting that assessee and TPO had selected it as a comparable which was excluded by DRP on its own by applying onsite filter and further, both assessee and Revenue wanted it to be included.

Dy.CIT vs Goldman Sach Services [TS-1239-ITAT-2018(Bang)-TP] IT (TP) A NO. 581(BANG.) OF 2016 dated 12.09.2018

395. The Tribunal remanded back the inclusion/exclusion of comparables to DRP with respect to ITES/ Software development services noting that DRP had not given a reasoned and cogent finding while allowing/disallowing the plea of assessee with respect to comparables. It restored back the entire matter to the file of DRP to pass a reasoned speaking order and to afford assessee an opportunity of hearing before passing a detailed order. It directed DRP to consider the Delhi HC's decision in Chryscapital Investment Advisors (India) (P) Ltd wherein it was held that high turnover or low turnover do not affect the comparability of the company while adjudicating the grounds.

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ITO vs Dell International Services India P Ltd [TS-1291-ITAT-2018-(Bangalore)-TP] IT(TP)A No.340/Bang/2015 dated 13.12.2018

396. The Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

- AvaniCimcom Technologies Ltd as it had revenue from software products and segmental details were not available.
- Celestial Labs Ltd. as it was engaged in clinical research and manufacture of bio products and other products which were functionally different from assessee.
- Flextronics SoftwareSystems Ltd as it had a different financial year ending.
- Infosys Ltd as it owned intangibles and had huge revenue from software products and the breakup of revenue from software services and software products was not available
- Ishir Infotech Ltd as it was outsourcing its work
- Lucid Software Ltd. as it was into development of software whereas assessee was providing software development services.
- Wipro Ltd as it owned intangibles and company owning intangibles could not be compared to a low risk captive service provider who does not own any such intangible.
- KalsInformation Systems Ltd as it was developing software products and not purely or mainly software development service provider.
- Tata Elxsi Ltd as the segment 'software development services' related to design services and are not similar to software development services performed by the assessee.

Further,

- It included Megasoft and directed TPO to rework its segmental results after considering only the software development services.

NI Systems India Pvt. Ltd vs DCIT. [TS-1270-ITAT -2018 (Bang)-TP] IT(TP)A No.1355/Bang/2011 dated 07.11.2018

397. Relying on the coordinate bench ruling in E4E business solutions, the Tribunal held that assessee engaged in providing ITES to its AE could not be compared to a) Vishal Information Technologies and and b) Accurate Data Converts Ltd. as the employee cost was less than 25% of operating revenue in case of the said comparables and did not satisfy the employee cost filter applied by TPO.

Mphasis Ltd vs ACIT [TS-1197-ITAT-2018(Bang)-TP] IT(TP)A No.14/Bang/2012 dated 05.10.2018

398. The Tribunal relying on the decision of co-ordinate bench in the case of Symphony Marketing Services held that the assessee engaged in rendering IT-ES to it AE could not be compared to:

- Acropetal Technologies Ltd. as it was providing high end services such as engineering design service.
- Coral Hubs Ltd as it had low employee cost.
- Crossdomain Solutions Ltd as it was providing high end KPO services, development of product suites and routine low end ITES service and segmental data was unavailable.
- Eclerx Services Ltd as it had super normal profits and provided KPO services
- Genesys International Corporation Ltd as it provided KPO services.

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- Infosys BPO Ltd as it was functionally not comparable to to an ITeS provider, had brand value and owned significant intangibles.
- Mold-tek Technologies Ltd as it was providing high end services such as engineering design service
- Wipro Ltd as it was not functionally comparable to an ITeS provider, had brand value and owned significant intangibles

Further the Tribunal upheld the inclusion of Cosmic Global Ltd and held that whether a company provides medical transcription or medical translation, they have to be regarded as being in the ITeS field. It rejected the assessee's contention that as it was engaged in medical translation and was not comparable with an ITeS company.

DCIT vs Mphasis Limited [TS-890-ITAT-2018(Bang)-TP] ITA 325/Bang/2014 dated 01.06.2018

399. The Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

- Bodhtree Consulting Ltd as it was in the business of software product and was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology.
- Persistent System Limited as it was in product designing services and into software product development
- Tata Elxsi Ltd as it operated in the segments of software development services which comprised of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment. There were no sub-services break up/information provided in the annual report or the databases based on which the margin from software services activity only could be computed. Also, the company had in its response to the notice u/s 133(6) stated that it could not be considered as comparable to any other software service company because of its complex nature
- L&T Infotech Ltd as it had a turnover exceeding 1000 crores and it had multifaceted activities.
- Sasken Communication Technologies Ltd. as it earned revenue from software services, software products and other services for which it had no segmental information available.

Further

- It remanded the comparability of Kals Information System Ltd to DRP for deciding the issue of inclusion or exclusion (as assessee had not raised the issue of exclusion before DRP) and directed it to consider coordinate bench rulings of TE Connectivity (wherein said comparable was excluded for being a product company) and contrary decision of AOL India P Ltd (wherein it was held that said comparable was not developing products as it did not have any such revenue and held it was functionally similar to software development companies).

Coreone Technologies India P Ltd vs Dy.CIT [TS-1292-ITAT-2018(Bang)-TP] (IT(TP)A No.263/Bang/2014) dated 26.10.2018

400. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Infosys Ltd. as it was a giant risk-taking company and engaged in development and sale of software products and also owned intangible assets and therefore not comparable with a software development service provider
- L&T Infotech Ltd as it was also a software product company and segmental information on software development services was not available.
- Persistent Systems Ltd as it was also a software product company and segmental information on software development services was not available.
- Genesys International Corporation Ltd. as it rendered mapping and geospatial services which was under GIS based services segment (which was only segment as per reports) and there was no basis for TPO to conclude that it was predominantly software development services. Further, presence of intangible assets was indicative of the fact that company was not into software development services business.

Evolving Systems Network India Pvt. Ltd vs ITO [TS-1361-ITAT-2018-(Bang)-TP] IT(TP)A No.216/Bang/2017 dated 21.12.2018

401. Relying on coordinate bench decision of CGI Systems and Management Consultants (P) Ltd (which was for same AY i.e. AY 2012-13)., the Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

Genesys International Ltd as it was engaged in mapping and geospatial services (which clearly showed that it was not into software development and there was no basis for TPO to conclude that it was a software development company)

- Infosys Technologies Limited as it was a giant risk-taking company and engaged in development and sale of software products and also owned intangible assets.
- L&T Infotech Ltd as it was a software product company and segmental information pertaining to software development services was not available.
- Persistent Systems Ltd as it was a software product company and segmental information pertaining to software development services was not available

Huawei Technologies India P Ltd vs JCIT [TS-1318-ITAT-2018(Bang)-TP] (IT(TP)A 1939/Bang/2017)) dated 31.10.2018

402. The Tribunal held that the assessee engaged in providing ITES / BPO services to its AE could not be compared to:

- Infosys BPO Ltd as the company was a KPO and it also had huge brand value and possessed intangible assets rendering it functionally dissimilar to the assessee.
- TCS e-Serve Limited as it was engaged in core business processing services, analytics & insights (KPO) and support services for both data and voice processes and no segmental information regarding BPO services were available
- Universal Print Systems Limited as it was into the business of printers whereas the assessee was into the Business Process Outsourcing

Further, it held that BNR Udyog Limited (Medical Transcription segment) could not be excluded as a comparable as medical transcription services fell within the definition of ITES and therefore it could not be held that the company was functionally dissimilar to the assessee.

It also dismissed assessee's contention for exclusion of Excel Infoways Limited and held that the assessee did not furnish any evidence in support of its plea that the company was functionally dissimilar as it was engaged in both IT and ITES services.

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Vis-à-vis assessee's plea for inclusion of R Systems and Caliber Point, it held that the said companies could not be taken as comparable as they followed a different financial year ending.

XLHealth Corporation India Pvt. Ltd vs. ACIT - TS-162-ITAT-2018(Bang)-TP - IT{TP)A No. 2311/Bang/2016 dated 09.02.201S

403. The Tribunal held that assessee engaged in software development services could not be compared to:

- AcropetalTechnologiesLtd as it was a software product company. Further, its revenue from software development service was less than 75%of total revenue. [It relied on the coordinate bench decisions of Electronic Imaging India and Microsoft Research].
- E-Infochips Ltd as it was a software development , software product and ITeS company and segmental data was not available. [It relied on the coordinate bench decision of Electronic Imaging India].
- ICRA TechnoAnalytics Ltd. as the company was not functionally comparable as it was engaged in diversified activities of software development and consultancy, engineering services, web development & hosting and substantially diversified itself into domain of business analysis and business process outsourcing. [It relied on the coordinate bench decision of Electronic Imaging India]
- PersistentSystems Ltd. as it developed software products. [It relied on the coordinate bench decision of Electronic Imaging India]

MetricStream Infotech (India) Pvt Ltd vs ACIT[TS-749-ITAT-2018(Bang)-TP] IT(TP)A No.493/Bang/2016 dated 20.07.2018

404. The Tribunal upheld DRP's order excluding Acropetal Technologies Ltd. in case of assessee engaged in ITES segment noting that TPO had considered the engineering design service segment (functions performed were Architectural, Structural, Electrical, Plumbing, Steel Detailing,External Utilities, Design Engineering) of said comparable, which was functionally dissimilar to the ITES segment of assessee (functions performed were back office services relating to finance and human resource functions). It relied on coordinate bench ruling in Novo Nordisk (I) P Ltd. wherein Acropetal Technologies Ltd. was excluded as it was providing high end engineering services which could not be compared to ITES segment of assessee.

ACIT vs. Flextronics Technologies (India) Pvt Ltd. [TS-1208-ITAT-2018(Bang)-TP] IT(TP)A No.576 /Bang /2016 dated 31.10.2018

405. The Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

- Persistent Systems Ltd as it was excluded by coordinate bench in assessee's own case for earlier year (subsequently affirmed by HC) for being engaged in diversified activities like licensing of products, royalty on sale of products as well as income from maintenance contract and further, there was no segmental information for services and product.
- Persistent System and Solution Ltd as it was excluded by coordinate bench in assessee's own case for earlier year (subsequently affirmed by HC) on ground that it had sale of products and there was no segmental bifurcation between software development services and products.

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- Sasken Communication and Technologies Limited as it was excluded by coordinate bench in assessee's own case for earlier year (subsequently affirmed by HC) for earning revenue from three segments (software services, software products and other services) for which there were no segmental bifurcation.
- Evoke Technologies as expenses had increased by 1118% vis-à-vis preceding year which clearly indicated low margin due to peculiar economic circumstance.
- Mindtree as DRP had given a categorical finding that due to extraordinary event of merger in investment and product development business, margin had declined. Further, the company had also incurred substantial revenue from onsite services which could not be compared with company engaged in offshore software development.
- Acropetal Technologies Ltd as it was predominantly engaged in onsite software development whereas assessee was engaged in software development in India. It also failed software development services filter greater than 75% of operating revenues and failed employee cost filter of 25% applied by TPO.
- L&T Infotech Ltd as it incurred expenses in foreign currency and had onsite revenue of 50%, revenue from operations were from three segments (financial management, manufacturing and telecom). Further, it was excluded by coordinate bench ruling in assessee's own case for earlier year on basis of size, scale, products, intangible etc.
- E-Infochip Ltd as DRP had given a finding (which the Revenue was not able to controvert) that it earned revenue from software development, IT Enabled services and products for which there was no segment bifurcation, abnormal trend in profit and also it failed the filter of software development services greater than 75% of total operating revenue.
- ICRA Techno Analysis Ltd as revenue from software development, consultancy, licensing, sublicensing, annual maintenance charges for software support, web development were reported in single segment. Further it failed the RPT filter of 15% and was also functionally dissimilar (consultancy, webhosting etc)
- E-Zest Solutions as it was engaged in product engineering and software development and demonstrated abnormal trend in profit.
- Infosys Ltd as it had been rejected by coordinate bench ruling in assessee's own case for earlier year on ground that it had brand value as well as intangible assets. It was also engaged in diversified services including design as well as technical consultancy, consulting, re-engineering, maintenance, systems integration as well as products for banking industry
- Tata Elxsi as it had been rejected by coordinate bench ruling in assessee's own case for earlier year on ground that it was engaged in diversified activities under software development segment (product design services, innovation design, engineering services and visual computing etc.)

Further

- It included RS Software (India) as it accepted assessee's contention that it had passed filters applied by TPO and also was considered as comparable in assessee's own case for earlier year (functionally similar)

Asst CITvs Arcot R&D Software Pvt Ltd [TS-1331-ITAT-2018(Bang)-TP] (IT(TP)A No.437/Bang/2016 and CO No.14/Bang/2017) dated 15.10.2018

406. The Tribunal held that the assessee engaged in providing software development services to its AEs could not be compared to:

- ICRA Techno Analytics Ltd as it had an RPT of 20.94% and failed the 15% RPT filter applied by TPO.
- Infosys ltd as it was engaged in providing end to end business solutions that leverage cutting edge technology. Further, it had huge brand value and intangibles as well as its high bargaining power rendering it incomaparable to the assessee.
- KALS Information Systems Ltd as it was engaged in the business of software products and could therefore could not be compared to a pure software development service provider.
- L&T Infotech as it earned 49% of its revenue from on-site software services and had an RPT
  of 18.66% failing the 15% RPT filter.
- Persistent Systems Limited as was engaged in diversified activities and earning revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract, etc.
- Sasken Communication Technology Ltd as it earned revenue from 3 segments and the segmental operating margins were not available.
- Tata Elxsi Limited as it earned revenue from software development services as well as product and segmental data was not available.

Further, it remitted the comparability of Mindtree Ltd to the file of TPO/AO to consider the functional comparability vis-à-vis the assessee.

Softtek India Pvt Ltd vs. DCIT-TS-844-ITAT-2017-TP I.T. (T.P) A. No.396/Bang/2015 dated 31.08.2017

407. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Infosys Technologies Ltd as it owned significant intangibles and had huge revenue from software products and the breakup of revenue from services and products was not available.
- KALS Information System Ltd as it was also engaged in software products and was not purely software development provider and adequate segmental results were not available.
- Persistent System Ltd as it was engaged in the business of product development, software product document and product design and no segmental details were available.
- Celestial Biolabs Ltd as it was engaged in the clinical research and manufacture of bio-products business and therefore functionally dissimilar.
- Avani Cimcon Technologies Ltd as it was also engaged software development and sale of software products and no segmental details were available.
- E-Zest Solutions Ltd as it was engaged in providing product development services and high end technical services which were under category of KPO services.
- Wipro Ltd as it owned intellectual property in the form of registered patents and was a full fledged risk bearing company and owned proprietary software.
- Tata Elxsi Ltd Flextronics Software Systems Ltd as they were engaged in providing development services and high end KPO services.

Infinera India Pvt Ltd vs ITO-TS- 980-ITAT-2017(Bang)-TP- IT(TP)A No.1096/Bang/2011 dated 27.10.2017

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408. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Infosys Technologies Ltd as it owned significant intangibles and earned huge revenues from software products and breakup of revenue from software services and software products was not available.
- KALS Information Systems Ltd as it was engaged in developing software products.
- Persistent Systems Ltd as it was engaged in product development and product design services and segmental details were not available.
- Quintegra Solutions Ltd as it was engaged in business of proprietary software products.
- Tata Elxsi Ltd as it was engaged in product designing services and not purely software development services.
- Thirdware Solutions as it was engaged in product development and earned revenue from sale of licenses and subscription, however, segmental details were not available.
- Wipro Ltd as it was engaged in software development services and product development and segmental details were unavailable.
- Lucid software Ltd as it was engaged in development of software products.

DCIT vs Verisign Services India Pvt Ltd-TS- 1081-ITAT-2017(Bang)-TP dated 25.10.2017 - I.T.(T.P) A. No.1230/Bang/2013

409. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Flextronics Software Ltd, Satyam Computer Services Ltd and Infosys Technologies Ltd as they had a turnover of more than 200 crores.
- Sankhya Infotech Ltd as it was engaged in providing software development services as well as software products and did not have segmental results and therefore could not be compared to the assessee.

Further, it remitted Bodhtree Consulting Ltd to verify the RPT % and exclude it if it was more than 15%.

Dell International Services India Private Ltd vs DCIT-TS-965-ITAT-2017(Bang)-TP IT(TP)A Nos. 85 & 1026/B/14, 1838/B/13 & CO No.21/B/16 dated 13.10.2017

410. The Tribunal relying on the decision of co-ordinate bench in the case of 3DPLM Software Solutions held that the assessee engaged in providing software development services to its AE could not be compared to:

- Celestial Lab Ltd. as it was engaged in the manufacture of industrial enzymes and pharmaceutical ingredient
- Avani Cimcon Technologies Ltd as the company was into software products
- E-Zest Solutions Ltd as it was engaged in rendering product developmental services and high end technical services which come under the category of KPO services
- KALS Information Systems Ltd as the company was developing software products and was not purely or mainly a software service provider.
- Persistent Systems Ltd as the company was engaged in product development and product design services and no separate segmental details available
- Tata Elxsi Ltd as the company was predominantly engaged in design services and the segment 'software development services' relates to design services and are not similar to software development services performed by the assessee

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- Thirdware Solutions Ltd. as the company was engaged in product development and earns revenue from sale of licences and subscription, which is different from software developmental services.
- Wipro Ltd as the company was into software products also and no seperate segmental details were available.
- Soft Sol India Ltd as RPT filter exceeded 15%
- Lucid Software Ltd as it was engaged in development of software products.
- Infosys Technologies Limited as segmental breakup of towards the products and services segments was unavailable.

DCIT vs Mphasis Limited [TS-890-ITAT-2018(Bang)-TP] ITA 325/Bang/2014 dated 01.06.2018

411. The Tribunal held that assessee engaged in software development services could be compared to:

- CG Vak Software Exports Ltd- as the company was into software product development which would tantamount to software development services
- L&T Infotech- as it provided software development services to 3 clusters (Banking, manufacturing and telecom), rejecting the assessee's contention that it was functionally dissimilar because assessee was servicing banking segment only. It also rejected the assessee's contention of presence of intangibles and non-availability of segmental data, noting that the said company didn't not own any intangibles in the form of brand and that there was only one segment of software development.
- Persistent Systems as its entire revenue was from software services and there was no software product segment.

The Tribunal also held that assessee engaged in software development services could not be compared to:

- Cigniti Technologies Ltd. engaged in software testing by holding that though software testing was only a part of software development life cycle but could not be equated with software development services

Further, the Tribunal remitted the issue of comparability of Helios and Matheson Information Technology Ltd. (having different financial year-end vis-à-vis the assessee) back to the file of TPO in view of assessee's submission that on the basis of financial results for two years**,** which financial results for relevant financial period could be ascertained.

Advice America Software Development Center Pvt. Ltd. vs. ITO [TS-373-ITAT-2018(Bang)-TP] IT(TP)A No.2531/Bang/2017 dated 23.05.2018

412. The Tribunal held that the assessee, engaged in provision of software development to its AE could not be compared to:

- Acropetal Technologies Ltd. as the company did not satisfy the 75% revenue filter of software development services revenue applied.
- E-Infochips Ltd. as the company was earning revenue from softwareproducts and segmental details were unavailable.
- ICRA Technologies Ltd. as the company was functionally incomparable with pure softwaredevelopment service provider and its RPT was exceeding 15%.
- Infosys Ltd as the company had huge brand value, intangibles and huge turnover.
- Larsen & Toubro Infotech Ltd. as the company's RPT filter was exceeding 15%.

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- Persistent Systems Ltd. since it was engaged in diversified activities and earning revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract.
- Sasken Communication Technologies Ltd. as the segmental details were not available for its 3 segments of activities.

The Tribunal held that the assessee, engaged in provision of software development could be compared to Thinksoft Global Ltd on the ground of being functionally comparable and could be excluded for the reason that the working capital adjustment to be done was very high.

Further, with regard to the assessee's contention of excluding E-Zest Solutions Ltd. the issue of functional comparability was remitted back to AO/TPO by following the decision in Toluna India [TS-247-ITAT-2014(DEL)-TP], wherein also the issue of comparability was remanded back to the AO/TPO noting that insignificant variation in activity could not be a determinative factor under TNMM. Similarly, as regards the assessee's contention for inclusion of LGC Global Ltd, the Tribunal remitted the issue of functional comparability back to AO/TPO by relying on the decision of the Tribunal in Applied Materials Pvt. Ltd wherein also the matter was remanded to decide on functional comparability.

Finastra Software Solutions (I) P Ltd. (formerly Misys Software Solutions India Private Limited) vs. ACIT [TS-404-ITAT-2018(Bang)-TP] - IT(TP)A No.529 & 491/Bang/2016 dated 02.05.2018

413. The Tribunal held that the for the purpose of benchmarking the provision of software development services the application of the onsite filter was a very relevant filter. Accordingly, noting that RS Software had incurred expenses on foreign branches to the extent of Rs. 12.42 crores (82%) out of total expenses of R.s. 15 crores debited in P & L account, evidencing that it was predominantly an onsite software development company it held that the said company could not be retained as comparable. However, the Tribunal noted that the DRP applied the said filter only in respect of one comparable - RS Software India Ltd and thus directed the DRP to apply the filter to all companies as well as to examine the applicability of all other relevant filters and all other objections such as functional similarity/dissimilarity etc vis-à-vis the other comparables.

ACIT vs. Broadcom Communication Technologies Pvt. Ltd - TS-1105-ITAT-2017(Bang)-TP - IT(TP)A No. 347/Bang/2015 dated 17.11.2017

414. The Tribunal held that the assessee, engaged in software development services could not be compared to:

- Kals Information Ltd & Persistent Systems Ltd as the said companies derived revenue from software services and software products and did not have segmental bifurcation
- Tata Elxsi Ltd &AccelTransmatic Ltd as the said companies were functionally dissimilar
- Bodhtree Consulting Ltd as the company suffered drastic variations in the profit margins.

Valtech India Systems Pvt Ltd v DCIT – TS-70-ITAT-2017 (Bang) – TP - I.T. (T.P) A. No.1496/Bang/2010 dated 13.01.2017

415. The Tribunal excluded companies having turnover in excess of Rs. 200 crore based on the reasoning that such companies would be in a position to attract more customers and would also have a broad base of skilled employees able to give better output which would not be

available in the case of smaller companies. It further excluded companies having related party transactions in excess of 15 percent.
Additionally, it held that merely because companies had inventories in their balance sheet it was not indicative of the fact that the companies were in the nature of a software product company. It held that segmental analysis was required to arrive at the said conclusion.
Radisys India Pvt Ltd v ITO [IT(TP)A 371 & 345 / Bang / 2015] – TS-489-ITAT-2015(Bang) – TP

416. The Tribunal held that companies having turnover in excess of Rs.200 crore could not be compared with the assessee who had a turnover of Rs. 32.84 crores. Further it excluded companies that were functionally dissimilar with the assessee.
DCIT v Software AG Bangalore Technologies Pvt Ltd [IT(TP)A No 1343 / Bang / 2014] – TS-472-ITAT-2015 (Bang)- TP

417. The Tribunal allowed assessee's appeal and excluded 10 companies from the list of comparables for benchmarking software development services rendered by assessee to its AEs in UK and Australia 7 on the ground of functional dissimilarity and 3 as their related party transactions exceeded 15%. It noted that assessee's margin of 8.18% to be within 5% range of average margin of remaining comparables and thus directed TPO to re-compute ALP based on remaining 10 comparables after allowing +/-5% benefit.
CGI information Systems and Management Consultants Pvt Ltd [TS-849-ITAT-2016(Bang)-TP] (IT(TP)A No.1446IBang/2010)

418. The Tribunal held that the assessee, providing ITES to its AE in the field of insurance could not be compared to a) companies earning substantial amounts from high end medical transcription services without segmental results b) companies providing high end engineering design services and c) companies having turnover of less than 1 crore since it failed to satisfy the turnover filter applied by the TPO himself.
Swiss Re Shared Services (India) P Ltd v ACIT - TS-598-ITAT-2016 (Bang) - TP - IT(TP)A.380/Bang/2016

419. The Court held that in case of assessee-company rendering IT enabled services (ITES) to its AE, a company having high brand value and intangibles and a company which failed to satisfy filter of 25 per cent of export earnings, could not be accepted as comparables while determining ALP. It further held that, benefit of proviso to section 92C(2) could not be given as a standard deduction as the said benefit is restricted to cases where variation between arm's length price and price at which international transaction has actually taken place does not exceed 5 per cent.
Acusis Software India (P.) Ltd. vs. ITO [2016] 76 taxmann.com 121 (Bangalore - Trib.) (IT (TP) APPEAL NOS. 442, 444 & 445 (BANG.) of 2011)

420. The Tribunal dismissed the appeal of the Revenue and upheld the exclusion of ICRA Techno Analytics Ltd, Persistent Systems Ltd and Infosys Ltd as they were functionally dissimilar owing to diversified activities, outsourcing of services and having high brand value / owning intangibles, respectively. Further, it allowed the appeal of the assessee, a pure software development service provider and excluded (i) Kals Information Systems Ltd since

the company was engaged in development of software products as well as software services and no segmental details were available (ii) Tata Elxsi Ltd since the said company's software development segment included diversified activities not comparable to the assessee..

It also rejected the plea of the assessee for the inclusion of Akshay Software Technologies Ltd and held that the DRP had rightly excluded the same from the list of comparables since it was engaged in onsite development of software which would result in different assets and risk profile.

CGI Information System & Management Consultant Pvt Ltd – TS-1016-ITAT-2016 (Bang) - TP

421. The Tribunal held that the assessee engaged in the business of developing, testing, customizing and maintaining high quality software could not be compared to the following:

- Companies earning revenue from software services as well as software products, not having segmental details
- Companies engaged in clinical research and manufacture of bio products, being functionally dissimilar
- Companies functionally different, being engaged in developing software products along with providing software development services
- Companies rendering product development services and high end technical services which come under the category of KPO services
- Companies engaged in the sale of software products / niche products
- Companies engaged in product engineering services
- Companies outsourcing work and therefore not satisfying the 25 percent employee cost filter
- Companies having turnover in excess of Rs. 200 crore.

Sharp Software Development India Pvt Ltd v DCIT – TS-987-ITAT-2016 (Bang) – TP

422. The Tribunal held that a high employee-cost was a normal feature in the software development business as it is a skill oriented business and therefore companies having the said feature could not be rejected as comparable.

Arowana Consulting Ltd v ITO [IT(TP)A No 235 / Bang / 2015] - TS- 282-ITAT-2014(Bang)-TP

423. The Tribunal held that companies engaged in product development, giant companies engaged in development of niche products could not be compared to a software development company. Further it held that companies having unreliable financial data, not satisfying the RPT and forex revenue filter, having considerable of its business outsourced and having a different business model due to amalgamation could not be taken as comparable.

Goldman Sachs Services Pvt Ltd v DCIT [IT(TP)A No 1423 / Bang / 2010]– TS-435-ITAT-2015 (Bang) – TP

424. The Tribunal held that the assessee, engaged in software development could not be compared to companies having software products, hybrid services business models,

engaged in product development services, owning significant intangibles, engaged in product design services and having different financial year ending.
Hewlett Packard India Software Operation Pvt Ltd v ACIT [IT(TP)A 1682 / Bang / 2012) – TS-433-ITAT-2015 (Bang) – TP

425. The Tribunal held that companies having multi-stream revenues (product, sales, product maintenance & other IT services) were not comparable with an IT Product company in absence of segmental breakup. It further held difference in depreciation rates warrants appropriate adjustment and not exclusion from the margin of comparables.
ACI Worldwide Solutions Pvt Ltd v DCIT [IT(TP)A No 1089 / Bang / 2012] - TS-347-ITAT-2015(Bang)-TP

426. The Tribunal held that companies engaged in the business of software products and providing open and end to end web solutions software consultancy and design and having significant intangibles and extra-ordinary revenues were not comparable to a pure software development services company.
DCIT v Nvidia Graphics Pvt Ltd [IT(TP)A No 1118 / Bang / 2014] - TS-402-ITAT-2015(Bang)-TP

427. Where the assessee engaged in providing ITES filed an additional ground of appeal seeking exclusion of 3 comparables (Maple Esolutions, Datamatics Financial Services and Apex Knowledge Solutions) on different grounds i.e. functional dissimilarity as compared to that pleaded before DRP, the Tribunal admitting the additional ground held that it was not a new plea for seeking exclusion of these companies per se as but only an additional point for exclusion of the companies. Further observing that the DRP rejected assessee's arguments without giving reasons or considering various Tribunal rulings on points raised by assessee, it held that the entire TP issue required to be reconsidered at the level of the TPO and directed the TPO to adjudicate the same by considering the earlier objections as well as other fresh objections raised by the assessee .
Indecomm Global Services (India) Pvt. Ltd vs. ACIT-TS-909-ITAT-2017(Bang)-TP I.T.(T.P)A. No.1484/Bang/2010 dated 27.10.2017

428. Where the assessee did not have any objection to Revenue's ground for excluding the two comparables viz. Thinksoft Global and FCS Software for benchmarking software development services, the Tribunal allowed the exclusion of the said two comparables for benchmarking software development services provided by the assessee to its AE.
DCIT vs Yodlee Infotech P Ltd-TS-497-ITAT-2017(Bang)-TP-IT(TP)A.83/B/2014 & CO.70/B/2016 dated 05.05.2017

429. The Tribunal remanded the benchmarking of assessee's international transactions relating to provision of software development & back pffice processing (ITeS) services. The TPO had rejected assessee's TP study report including adoption of comparable uncontrolled price (CUP) method as MAM and undertook FAR analysis of comparables in respect of software development services segment but made a TP-adjustment in respect of ITeS segment. Noting that there was no finding of TPO on software segment and no FAR analysis of comparables in ITES segment, the Tribunal held that the order of the TPO was not

sustainable and accordingly remanded the matter back for fresh benchmarking analysis in both the segments after affording an opportunity of being heard to the assessee.
First Advantage Global Operating Center Pvt ltd (formerly known as First Advantage Offshore Services Pvt ltd) vs DCIT-TS0548-ITAT-2017(Bang)-TP dated 24.05.2017

430. The Tribunal allowed assessee's appeal against cryptic CIT(A) order on comparables selection in respect of call center services rendered to AE for AY 2005-06. The TPO had finalized a list of 9 comparable enterprises exporting IT Enabled Services. The Tribunal noting that the CIT(A) had not given any reasoning for upholding the inclusion of the comparables, held that the CIT(A) should have examined the FAR of the comparables while examining assessee's objections. Accordingly, it remitted the matter back to the file of CIT(A) for fresh adjudication.
24/7 Customer.com P. Ltd vs. DCIT-TS-627-ITAT-2017(BANG)-TP-IT(TP)A No. 228/bang/2010 dated 12.07.2017

431. The Tribunal remitted the comparability of Lucid Software Ltd and Bodhtree Consulting Ltd to the file of TPO for fresh consideration. These comparables were selected by TPO, but the assessee had not objected to their inclusion as the specific details of the financials were not available in the public domain. However, after filing appeal before Tribunal, the assessee noticed that the details were available in the public domain and the Tribunal in various cases had held that since these two companies were engaged in product development, and their financials did not have adequate segmental details, they were functionally dissimilar to the assessee engaged in software development. Accordingly, the Tribunal admitted assessee's additional ground contesting the exclusion of these two companies and held that it would be in the interest of justice to allow the assessee to take these objections.
Moong Controls India P Ltd vs ACIT-TS-483-2017(Bang)-TP-IT(TP)A No. 1519/bang/2012 dated 09.06.2017

432. The Tribunal held that the assessee, engaged in software development services and marketing support services could not be compared to companies having related party transactions to sales greater than 15 percent, companies having turnover in excess of Rs. 200 crore and companies having drastic variation in its profit margins.
Support.com India Pvt Ltd v ITO (IT(TP)A No. 1340/Bang/2010) – TS-609-ITAT-2015 (Bang) – TP

433. The Tribunal held that companies engaged in product development were not comparable with the assessee who was engaged in the business of provision of software development services to its parent company. Further, it excluded companies having turnover in excess of Rs. 200 crore.
M/s Infineon Technologies India Pvt Ltd v ACIT [IT (TP)A No 1670 / Bang / 2012)] – TS-549- ITAT-2015 (Bang) –TP

434. The Tribunal held that the assessee, engaged in the provision of software development, consultancy services and IT enabled services could not be compared with companies providing call center services and companies outsourcing a large portion of its business.
DCIT v Genesis Integrating Systems (India) Pvt Ltd [IT(IT)A No.869(B)/2013] – TS-637-

ITAT-2015 (Bang) – TP

435. The Tribunal held that companies engaged in the following services were not functionally comparable with the assessee who was engaged in designing and development of software for its parent company:

- Companies engaged in development of software products / business of software products and software consultancy and design, providing training services
- Companies engaged in product development.
- Companies providing KPO Services such as consultancy services and technical services
- Companies providing product engineering services and R&D activity resulting in IPRs and companies owning substantial intangibles

GXS India Technology Centre Pvt Ltd v ITO [IT(TP)A No.1444(Bang) 2012] – TS-412-ITAT-2015 (Bang) – TP

436. The Tribunal excluded Accentia Technologies (i.e. selected by the TPO) as a comparable on account of the fact that an extra-ordinary event of acquisition had taken place during the year under review. Further it held that the reasons cited by the DRP for exclusion of Microland (selected by the assessee) i.e. non availability of segmental data and lack of information in relation to exports, were incorrect as the published accounts provided both the aforesaid details. Therefore it included Microland as a comparable and held that where the demarcated segment results were available there was no reason to apply revenue ratios.

ISG Novasoft Technologies Ltd v DCIT [IT(TP)A No.185(B)/2015] – TS-485-ITAT-2015(Bang)-TP

437. The Tribunal held that the following companies could not be considered as comparable to the assessee who was engaged in the provision of software development services to its AE:

- Companies having significant intangible value, owning IPRs (patents) and revenue from software products segment.
- Giant companies, assuming all risks which led to higher profits.
- Companies, whose services segment comprised of software consultancy, engineering services, web development and web hosting in addition to software development for which no segmental information was available.
- Companies engaged in development of software and software products and also providing training facilities.
- Companies providing outsourced product development services along with software development services without segmentation of the results into software services and product development.
- Companies having related party transactions in excess of 15 percent.
- Companies engaged in providing complex services.
- Companies engaged in clinical research and manufacture of bio-products.
- Companies having abnormal profits due to amalgamation with another company.
- Companies providing Geospatial Information Systems therefore being functionally

different.

DCIT v Ikanos Communication India Pvt Ltd [I.T(IT).A No.137/Bang/2015] – TS-548-ITAT-2015 (Bang) –TP

Infineon Technologies India Pvt Ltd v ACIT [I.T. (T.P) A. No.1670/Bang/2012] – TS-549-ITAT-2015 (Bang) – TP

Unisys India Pvt Ltd v DCIT [IT(TP)A No.67/Bang/2015] – TS-512-ITAT-2015 (Bang) –TP Software AG Bangalore Technologies Pvt Ltd v ITO (ITA No.1264/PN/2013) – TS-539-ITAT-2015-(Pun)TP

DCIT v Synopsis India Pvt Ltd [I.T(TP).A No.1107/Bang/2011] – TS-504-ITAT-2015 (Bang) –TP ACIT v Hyundai Motors India Engineering Pvt Ltd (ITA No 1743 / Hyd / 2014 and ITA No 1917 / Hyd / 2014) – TS-554-ITAT-2015 (Hyd) – TP

Lionbridge Technologies Pvt Ltd v ITO [I.T.A. No. 668/Mum/2014 and I.T.A. No.1375/Mum/2014] – TS-557-ITAT-2015 (Mum) – TP

438. The Tribunal held that companies that were market leaders enjoying economies of scale and diverse customer base along with significant brand value, companies who have undergone extra-ordinary events having impact on profitability and companies engaged in high end services involving specialized knowledge could not be compared with the ITES Segment of the assesee. However, it held that companies could not be rejected merely on the basis of abnormal profits.

Unisys India Pvt Ltd v DCIT [IT(TP)A No.67/Bang/2015] – TS-512-ITAT-2015 (Bang) -TP

439. The Tribunal held that companies engaged in the business of software products and in providing open and end to end web solutions, software consultancy, design and development of software could not be compared with the assessee who was a captive software service provider.

Analog Devices India Pvt Ltd v DCIT [IT(TP)A No 1288 / Bang / 2014] – TS-419-ITAT-2015 (Bang) – TP

440. The Tribunal held that assessee providing data processing and other IT enabled services could not be compared to companies providing KPO services such as engineering design services, companies outsourcing most of its work, having a huge brand impacting profit margins, owning substantial IP or having extra ordinary event during the year impacting profit margins.

Global – e Business Operations Pvt Ltd v DCIT [IT (TP) A No 1678 / Bang / 2012) – TS-426-ITAT-2015 (Bang)

441. The Tribunal held that the assessee providing software development services and marketing services exclusively to its AE could not be compared to companies owning substantial intangibles and having huge revenues, companies engaged in product development and product design services, engaged in both software development services as well as product development services but not having segmental information and companies engaged in clinical research and manufacture of bio products.

Support.com India Pvt Ltd v JCIT [IT(TP)A No.240/Bang/2013] – TS-498-ITAT-2015 (Bang) – TP

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442. The Tribunal excluded the following companies as they were not comparable to the assessee engaged in providing software development services:

- Companies engaged in 2D and 3D animation services
- Companies engaged in software products business
- Companies engaged in clinical research and manufacture of bio and other products
- Companies not being a pure software service company
- Companies providing KPO services
- Companies failing the employee cost filter
- Companies having huge turnover exceeding Rs. 200 crores and significant intangibles.

Further it admitted additional ground for exclusion of comparable considered by TPO even though it was chosen by the assessee in its own TP Study and held that the assessee was not estopped from pointing out mistakes in assessment even if such mistake was a result for evidence adduced by it.

AMD India Pvt LTd v ITO [IT(TP)A No.1244/Bang/2011] – TS-495-ITAT-2015 (Bang) – TP

443. The Tribunal held that the assessee, a software development service provider could not be compared to companies having related party transactions in excess of the permitted limit, companies having unusually high profits with a growth rate double the industry average, companies engaged in clinical research and manufacture of bio and other products, companies outsourcing its work therefore failing the employee cost filter, companies owning substantial intangibles and having huge revenues and companies whose income included income from sale of licenses.

M/s SAP Labs India Pvt Ltd v DCIT [I.T(TP).A No.1118/Bang/2011] – TS-497-ITAT-2015 (Bang) – TP

444. The Tribunal held that companies engaged in product development, development of software products, high end technical services such as KPO services, high end hardware and software activities, holding technology and marketing intangibles and assuming full-fledged risk could not be compared to the assessee, a captive offshore development center engaged in software development.

Apigee Technologies (India) Pvt Ltd v JCIT [IT(TP)A No.870/Bang/2013] – TS-472-ITAT-2015(Bang)-TP

445. The Tribunal held that software product companies, companies such as Infosys being a market leader, having significant R&D activities and owning significant IPRs, intangibles and companies providing embedded product design services, industrial design and engineering services could not be compared with the assessee who was a captive software service provider.

iPass India Pvt Ltd v ITO [IT(TP)A No 1292 / Bang / 2014] – TS-427-ITAT-2015 (Bang) TP

446. The Tribunal excluded 17 companies on the following grounds:

- Functionality – Activity of software product development, KPO services, product engineering, product designing, sale of licenses carried on by companies were not comparable with software development services provided by the assessee.
- Turnover Companies having turnover in excess of Rs.200 crore were rejected as the assessee's turnover was Rs.66.94 crores

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- Employee cost – Companies having employee cost to sales ratio less than 25 percent were rejected

AMD India Pvt Ltd v ITO [IT(TP)A No 437 / Bang / 2013] - TS-352-ITAT-2015(Bang)-TP

447. The Tribunal excluded 13 comparables on the following grounds:

- Functionality – Companies engaged in product development, KPO services, training & software services, software development & analytical services, product engineering,product designing, incurring high R&D expenses and owning intangibles were not comparable with the assessee engaged designing and development of software.
- Related Party transactions ('RPT') – Companies having RPT in excess of 15 percent

GXS India Technology Centre Pvt Ltd v ITO [IT(TP)A No 1444 / Bang / 2012] - TS-356-ITAT-2015(Bang)-TP

448. The Tribunal held that companies engaged in development of software product and having revenue from both software services and products were not comparable with software development service provider. Further, companies having exceptional year of operations and fluctuating margins are not to be considered as comparable.

ST Microelectronics Pvt Ltd v DCIT [IT(TP)A No 1394 / Bang / 2014] - TS-358-ITAT- 2015 (Bang)-TP

449. The Tribunal held that companies engaged in product development, sale of product, providing KPO services, providing product engineering services and owning substantial intangibles are not comparable to companies providing software development services. Additionally companies engaged in the ITES sector could not be compared with companies providing complete business solutions, providing high end intangible services, providing engineering design services, owning substantial intangibles or having extra-ordinary events such as mergers.

Kodiak Networks (India) Pvt Ltd v DCIT [IT(TP)A No 1540 / Bang / 2012) - TS-369-ITAT-2015(Bang)-TP

450. The Tribunal held that a company providing pure software development services cannot be compared with companies developing software products, having significant intangibles and huge revenue from software products, engaged in product design services or software product companies

NXP Semi Conductors India Pvt Ltd v DCIT [IT(TP)A No 1634 / Bang / 2014) - TS-370-ITAT-2015(Bang)-TP

451. The Tribunal relying on precedents held that R Systems International Ltd, being functionally comparable to the assessee could not be excluded as a comparable merely because it followed a different financial year compared to the assessee and that the data for the relevant year should be deduced and considered for determining the margin. Further it held that Ultramarine and Pigments Ltd could not be excluded as comparable on the ground that it did not satisfy the services income filter of 75 percent where the assessee had only considered the segmental data for ITES services. It excluded Accentia Technologies as comparable on the ground that it was a software product company which provided Software as a Service model to its clients including both software and hardware products without

segmental data and that the said company possessed brand value and had undergone various amalgamations and acquisitions during the year.
It further excluded Fortune Infotech Ltd on the ground that the said company used web based software, unique technology and technical know-how imported from its business partner for providing services and therefore was not functionally comparable to the assessee engaged in providing back office outsourcing services to its AE.
Business Process Outsourcing (India) Pvt Ltd v ACIT – [TS-925-ITAT-2016(Bang)], IT(TP)A No.2381Bang/2016, Dated 03.08.2016

452. The Tribunal held that the assessee, engaged in providing software development and testing services to its AE as a captive service provider could not be compared to (i) Bodhtree Consulting Ltd as the said company had erratic margins and growth as well as fluctuating salary cost ratio, (ii) Exensys Software Solutions Ltd as the company had abnormal profits and had undergone amalgamation during the year, (iii) Sankhya Ltd as it was also engaged in software products and training and (iv) Thirdware Solutions as it was engaged in product development. Further, it excluded 5 companies as comparable since their turnover exceeded 10 times the assessee's turnover.
DCIT v Cypress Semiconductors Technology India Pvt Ltd – TS-1009-ITAT-2016 TP(Bang)]

453. The Tribunal admitted the additional ground of appeal raised by the assessee, engaged in the business of development and export of software as well as provision of IT services to its AE, for the exclusion of Kals Info Systems Ltd and Mega Soft Ltd which were initially selected by the assessee itself holding that there was no hurdle in admitting the additional ground. It excluded Infosys Technologies Ltd as comparable on the ground that the company earned huge revenues from software product development, it owned IPRs and was not a pure software service provider. Kals Systems was excluded as the company was engaged in development of software products and hence not comparable. Further, Persistent Systems Ltd and Tata Elsxi Ltd were excluded as comparable as the companies were engaged in product development. As regards, Megasoft Ltd, the Tribunal relied on the earlier years order and included the same as comparable directing the TPO to correct the margin of the said company.
Broadcom India Pvt Ltd – TS-1010-ITAT-2016 (Bang) - TP

454. The Tribunal allowed the assessee's appeal for exclusion of certain comparables selected by the TPO in respect of its IT and ITES segments and directed the exclusion of comparables (viz. Asit C Mehta Financial Services Ltd, Cosmic Global Ltd, Datamatics Financial Services Ltd, Infosys BPO Ltd, Wipro Ltd for the ITES segment and Accentia Tech Ltd, Acropetal Tech Ltd, Aditya Birla Minacs Worldwide Ltd, Crossdomain Solutions Ltd, Spanco Ltd and Allsec Tech Ltd for IT segment) having turnover of either less than 1/10th or more than 10 times the turnover of the assessee, following the decision of the Tribunal in McAfee Software India. Further, it excluded 4 comparables (viz. Persistent Systems Ltd, Quintegra Solutions Ltd, Tata Elxsi Ltd and Thirdware Solutions Ltd) in the IT segment and 5 comparables (Coral Hubs Ltd, Crossdomain Solutions Ltd, Eclerx Services Ltd, Genesys International Corpn Ltd and Mold Tek Technologies Ltd) in the ITES segment on functional dissimilarities vis-à-vis the assessee.

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Tesco Hindustan Service Centre Pvt Ltd v DCIT – TS-985-ITAT-2016 (Bang) - TP

455. The Tribunal held that the assessee, engaged in the business of software development could not be compared to (i) Bodhtree Consulting Ltd due to its erratic margins and growth over the years, (ii) Exensys Software Solutions Ltd as it operated in 3 business segments – software services, BPO services and software product development, (iii) Sankhya Infotech Ltd as it was functionally dissimilar, (iv) Foursoft Ltd as it was engaged in product development and owned its own products, (v) Tata Elxsi Ltd as its range of activities was substantially different, (vi) Infosys Technology Ltd on account of high turnover and brand name and (vii) Flextronics as it was also selling software products (viii) Satyam Computers Ltd on account of non-reliability of financial data and (ix) Igate Global Solutions Ltd and L&T Infotech Ltd since the turnover of these companies (Rs. 405 crore and Rs.562 crore, respectively) was beyond the range of ten times the turnover of the assessee – Rs. 6.56 crore.

ACI Worldwide Solutions P Ltd – TS-984-ITAT-2016 (Bang) - TP

456. The Tribunal held that the assessee, providing medical transcription services viz. purely ITES services, could not be compared to companies such as Wipro BPO Ltd having high brand value, goodwill and high turnover. Further it held that companies not satisfying the export turnover to total turnover filter of 25 percent could not be considered as comparable as the conditions prevailing in the export and domestic market were different. It also held that Allsec Technologies Ltd and Mercury Outsourcing Ltd could not be excluded merely on the ground of abnormal profits / losses unless there was some evidence to show that the same was earned / incurred due to some special reasons.

It further held that Tricom India Ltd was to be considered as comparable as its annual report clearly indicated that it was wholly engaged in ITES and BPO services and there was no material on record to support the contention of the Revenue that the said company was engaged in software development. The Tribunal included Mapro Industries Ltd and Cosmic Global as comparable and held that it could not be excluded merely because it was loss making since it was not persistently loss making.

Acusis Software India Pvt Ltd v ITO – TS-940-ITAT-2016 (Bang) - TP

457. With respect to the IT segment and software services of the assessee, the Tribunal held that Accel Transmatics Ltd could not be considered as comparable since it had Related Party Transactions at 19.29 percent of its total transactions and its turnover was less than 1/10 of the assessee's turnover coupled with the fact that the company was not a pure software development service company as it was also engaged in 2D / 3D animation services. It also excluded 13 companies on the ground of functional differences and turnover filter. It also remitted the comparability of Megasoft Ltd to the file of the TPO to re-examine the RPT filter of the said company as the assessee claimed that its RPT filter was 20.33 percent i.e. in excess of the 15 percent filter applied by the TPO.

With regards to the ITES segment, the Tribunal excluded companies on account of extra-ordinary events during the year, RPT to total transactions filter exceeding 15 percent, companies having different financial year ending, companies functionally dissimilar to the assessee, companies under serious indictment in fraud cases, companies having low employee costs and outsourcing majority of its activities. Further, it rejected the assessee's

contention to exclude a comparable on the basis of its RPT which was marginally higher than the benchmark of 15 percent viz. 15.72 percent.
Tesco Hindustan Service Centre Pvt Ltd v DCIT – TS-996-ITAT-2016 (Bang) - TP

458. The Tribunal allowed the assessee's appeal and directed exclusion of the four companies viz. Accentia Technologies, Eclerx Services Ltd, Infosys BPO Ltd and Cosmic Global Ltd from from the list of comparables on the ground of functional dissimilarities by relying on the decision of the Tribunal in e4e Business Solutions India, noting that the assessee and e4e Business Solutions performed similar functions i.e. BPO services.
Flextronics Technologies India Pvt Ltd v DCIT – TS-982-ITAT-2016 (Bang) – TP

459. The Tribunal held that the assessee, a pure software development service provider, could not be compared to companies engaged in the business of software products, companies engaged in R&D activities resulting in creation of IPRs, companies engaged in embedded product development, companies developing software products as well as software development but having no segmental results, companies engaged in software design and development product services and companies engaged in 2D and 3D animation.
Further, it held that the acceptable RPT filter range was 5 percent to 25 percent and where there were a sufficient number of comparable companies, to obtain better comparison a filter of 15 percent as opposed to 25 percent was to be used.
LSI Technologies India Pvt Ltd v ITO - (2016) 47 CHH 0016 (Bang Trib)

460. The Tribunal held that the assessee, a software development service provider could not be compared with a software product company. Further, it held that companies operating in the segment of software development services comprising of embedded product design services, industrial design and engineering services, visual computing labs and system integration services, having no break up of sub- services based on which the margin of only the software services activity could be computed, could not be considered as a comparable. Also, companies owning significant intangibles and huge revenues from software products could not be considered as comparable. It observed that though TNMM obviates necessity for complete product identity or services identity between tested party and comparables and broad functional similarities would suffice, but where functional profile shows that dissimilarity, even within very same segment, is so significant so as to erode comparability, then there is a good case for exclusion.
Citrix R & D India (P)Ltd. vs DCIT - [2016] 68 taxmann.com 42 (Bangalore-Trib)

461. The Tribunal dismissed the assessee's miscellaneous application seeking exclusion of Avani Cincom Technologies Ltd on the ground of functionality (as it was also dealing in software products) against its previous order wherein Avani Cincom Technologies Ltd was held to be comparable to the assessee, engaged in software development, as there was nothing on record to show that this company earned revenue from software products. The Tribunal further noted that the assessee merely placed reliance on the commentary reported in the annual report and not on the actual information and financial details reported in the annual report.
Ariba Technologies India Pvt Ltd v ITO - TS-714-ITAT-2016 (Bang) - TP - I.T. (T.P) A. Nos.441 & 442/Bang/2012

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462. The Tribunal held that companies having a turnover in excess of Rs. 200 crore, companies having a software products and hybrid service business model and therefore functionally dissimilar, companies engaged in bi- informatics software products / services and development of bio-technology products, companies actively involved in R&D activities were not comparable to the assessee, engaged in software development services which included network management, technical documentation etc, having a turnover between Rs. 1 crore and Rs. 200 crore.

Further, it held that when TNMM is adopted as the most appropriate method, only net margin of the tested party was to be considered without looking into individual elements of cost since all elements of costs are aggregated irrespective of their classification and composition.

The Tribunal included a comparable wrongly excluded due to erroneous computation of export revenue.

ITO v Infinera India Ltd - (2016) 67 taxmann.com 8 (Bang)

463. The Tribunal held that the assessee, rendering software development services to its AE, having a turnover below Rs.10 crore, could not be compared to the following:

- Companies having turnover in excess of Rs.200 crore, as per the decision of the Court in the case of CIT v Pentair Water India Pvt Ltd.
- Companies having erratic margins and growth over the years and having a growth in revenue which was not supported by a corresponding growth in expenses.
- Companies engaged in the business of development of Software Products & Services and training.
- Companies having a related party transactions to sales percentage in excess of 15 percent.

Sysarris Software Pvt Ltd v DCIT - (2016) 67 taxmann.com 243 (Bang)

464. With regard to the assessee's software development segment, the Tribunal excluded 14 comparables on grounds of functional dissimilarity following co-ordinate bench rulings in Broadcom India, NXP Semiconductors India and Capgemini India; However, it refused to apply upper turnover filter of Rs 200cr to eliminate companies noting that assessee's turnover was Rs 50.20cr, therefore, excluded only Flextronics Software Solutions (having turnover Rs 848 cr) and iGate Global Solutions (having turnover Rs 747cr) and retained Mindtree (having turnover Rs 590cr) and Sasken Technologies (having turnover Rs 343cr).

AOL Online India (P) Ltd v DCIT -TS-156-ITAT-2016(Bang)-TP

465. The Tribunal held that the assessee, engaged in providing software development services to its AE having a turnover of Rs. 22.71 crores could not be compared to companies having huge turnovers ranging from Rs. 250 crores to Rs.13,000 crores as they were beyond the reasonable realm of comparability. Further, it held that for determining the employee cost filter of comparable companies, the TPO was to consider contribution to PF & ESI, Gratuity and Ex gratia payments and where companies satisfied the impugned filter after considering the aforesaid items, it was to be considered as comparable.

DCIT v Sunquest Information Systems (India) Pvt Ltd - (2016) 47 CCH 0138 (Bang Trib)

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466. The Tribunal held that the assessee, providing IT enabled analysis services to its AE was not comparable with companies who had undergone amalgamation during the relevant year. It further held that where the segmental results of a comparable were available, it was incorrect to exclude a company only for a reason that it was into high end services.
Further, the Tribunal, relying on the decision of the Bombay High Court in the case of CIT v Pentair held that companies having huge turnover were to be excluded as comparable companies and accordingly excluded companies having a turnover in excess of Rs. 200 crore.
Zyme Solutions Pvt Ltd v ITO - TS-65-ITAT-2016 (Bang) - TP

467. The Tribunal, following the principle that where two views were available on the issue, the view favourable to the assessee was to be adopted, followed the decision of the Bombay High Court in the case of CIT v Pentair Water India Pvt Ltd and excluded companies based on the turnover filter. Further, it held that the assessee engaged in providing software development services was not functionally comparable with companies engaged in development of niche products. Additionally, companies not satisfying the related party transaction filter of 15 percent were excluded as comparable.
FCG Software Services (India) Pvt Ltd v ITO - TS-18-ITAT-2016 (Bang) - TP

468. The Tribunal held that the assesssee, engaged in development of delivery of domain specific software to its AE could not be compared to companies engaged in development of both, software products and software.
Further, considering both conflicting views on the elimination of comparable companies based on turnover, the Tribunal, following favourable view in CIT v Pentair Water India Pvt Ltd, Bombay High Court, held that turnover is a relevant criteria for choosing comparable companies in determination of ALP and excluded companies on the basis of turnover and size.
Obopay Mobile Technology India Pvt Ltd v DCIT - (2016) 66 taxmann.com 119 (Bang)

469. The Tribunal held that the assessee engaged in providing software development services could not be compared to Infosys Ltd, Larsen & Toubro Infotech Ltd, Mindtree Ltd, Persistent Systems Ltd, Spry Resources having turnover Rs. 33083 crores, Rs. 23685533 crores, 12558 crores, 8427.4 and Rs. 37074498 crores respectively as they failed the turnover filter of 10 times the assessee's turnover of Rs. 51.99 crores.
Further, it remitted the comparability of Genesys International Corpn. Ltd to the file of the DRP in the absence of availability of annual report or a ruling pertaining to the relevant AY.
Mindteck (India) Ltd vs DCIT- [TS-533-ITAT-2017(Bang)-TP]- IT(TP)A No.1834/B/16 dated 24.03.2017

470. The Tribunal held that company engaged in providing animation services for 2D and 3D animation cannot be compared with company providing software development and support service. Further, it held that where nine comparables remained after exclusions, comparable having RPT at 15 percent could also be excluded.
The Tribunal held that assessee can raise additional ground to seek exclusion of a comparable included in assessee's own TP study when he had not raised such ground before the lower authorities.

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Noveli Software Development (India) (P) Ltd v DCIT - [2016] 68 taxmann.com 201 (Bangalore-Trib)

471. The Tribunal held that company having revenue from software licensing could not be compared to a company providing software development services.
Hewlett Packard (India) Software Operation (P)Ltd v DCIT - [2016] 67 taxmann.com 309 (Bangalore- Trib)

472. The Tribunal held that in case of assessee company rendering IT enabled services (ITES) to its AE, company outsourcing major portion of its work and a company having substantial intangibles could not be accepted as comparables while determining ALP.
Telelogic India (P) Ltd v ACIT - [2016] 68 taxmann.com 165 (Bangalore-Trib)

473. The Tribunal held that the assessee company rendering IT enabled services to its AE could not be compared to companies providing KPO services, engaged in research and development activities, owning intangibles and companies who have undergone extraordinary event of amalgamation during the relevant year. It further held that while determining ALP, turnover was a valid criteria that could be adopted for inclusion or exclusion of companies in comparability study of the assessee company.
DCIT v IGS Imaging Services (I) (P) Ltd. - [2016] 67 taxmann.com 148 (Bangalore-Trib)

474. The Tribunal held that a super profit making company into diversified product development would not be functionally comparable with assessee, a software development service provider.
Hewlett-Packard India Software Operation (P) Ltd v ACIT - [2016] 67 taxmann.com 371 (Bangalore-Trib)

475. The Tribunal held that in case of assessee company rendering software development services to its AE, company developing its own software products, company rendering KPO services and company owning significant intangibles and earning huge revenue from software products could not be accepted as valid comparables while determining ALP.
Teleogic India (P) Ltd vs DCIT - [2016] 67 taxmann.com 159 (Bangalore-Trib)

476. The Tribunal held that a company operating in a different business strategy of acquiring companies for inorganic growth cannot be selected as valid comparable vis-à-vis a company providing ITES services
Amba Research (India) (P) Ltd v DCIT - [2016] 67 taxmann.com 342 (Bangalore-Trib)

477. The Tribunal held that a company could not be considered as comparable due to its huge brand value and substantial ownership of intangibles, with a company having ITES segment with much lesser revenue.
Momentive Performance Materials (India) Pvt Ltd v ACIT - (2016) 67 taxmann.com 327 (Bangalore -Trib)

478. The Tribunal held that a company which owned significant intangible and had huge revenues from software products was not functionally comparable to a software

development service provider. Further, it held that a company operating in different business strategy of acquiring companies for inorganic growth was incomparable to assessee rendering ITE services to its AE.

Logica (P) Ltd v DCIT - [2016] 68 taxmann.com 197 (Bangalore-Trib)

479. The Tribunal held that Satyam Computer Services Ltd. was rightly excluded by Commissioner (Appeals) on basis of non-reliability of financial data. Further, the Tribunal held that the Commissioner (Appeals) had rightly excluded Infosys and Exensys, on the basis of functional dissimilarity and having extraordinary event during the year. Exensys was having extraordinary profits by way of amalgamation of companies during the year. Infosys was excluded having different functionality of products, having high turnover and brand name.

The Tribunal held that though a company was included by TPO and not objected to by assessee, CIT(A) had wrongly rejected the same on the reason of low profit margin. It further held that only continuous loss making companies were to be excluded.

It also held that a product based company was not strictly comparable to a service company like the assessee.

ACIT v McAfee Software (India)(P)Ltd - [2016] 68 taxmann.com 293 (Bangalore-Trib)

480. The Tribunal held that a specialised Embedded Software Development Service Provider cannot be compared with any other software development company. Further, it held that Infosys Ltd. cannot be considered as comparable to the assessee company which is a captive unit of its parent company in US and which assumed only limited risk, since Infosys Ltd. is a giant in the area of software development which assumed all risks leading to higher profit.

It also held that L&T Infotech could not be rejected as objected by the assessee company on the ground of high turnover and related party transaction, since the turnover filter was not a relevant criteria in the service industry.

Further, it held that the event of merger itself cannot be a fact for exclusion of a company from the list of comparables where it is not the case of the assessee- company that the amalgamating company is functionally dissimilar.

NTT Data Global Delivery Services Ltd v ACIT - [2016] 69 taxmann.com 7 (Bangalore-Trib)

481. The Tribunal allowed assessee's plea for exclusion of 4 comparables while benchmarking the provision of software R&D services to AEs during AY 2012-13 and held that the assessee could not be compared to the following companies:

- Infosys Limited, Larsen and Toubro Infotech Limited and Persistent Systems Limited on account of turnover filter. It held that the 3 companies failed the turnover filter of 1/10th and 10 times of assessee's turnover i.e 18.45 crores as they had very high turnover i.e.31253 cr, 2960 cr and 810 cr respectively.
- Genesys International Corporation Limited on the ground of functional dissimilarity as the company was engaged in development of cutting edge applications by developing state of the art GIS technologies and allied spatial data acquisition, processing and integration techniques to meet the demand of the consumers.

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UEI Electronics Pvt. Ltd Vs DCIT [TS-274-ITAT-2017(Bang)-TP –IT(TP)A No.2005 (Bang)/2016 dated 10.03.2017

482. The Tribunal held that the assessee, engaged in providing software development could not be compared to:

- Vishalsoft Technologies Ltd as 56% of its expenses had been incurred in respect of onsite software development as against assessee who is a captive service provider and it also incurred R&D expenses to the extent of 4.96 percent of its sales and therefore operated a different business model
- Infosys Technologies Ltd & Satyam Computer Services Ltd as they were functionally not comparable to the assessee a captive service provider.
- L&T Infotech Ltd as the TPO/AO had accepted the exclusion of this company in remand report dt.8.1.2010 for the case of Vishal Web Solution Ltd and therefore could not take a different stand in this appeal
- Geometric Software Solution Co. Ltd as its Related Party transactions (16.40 percent) exceeded the 15 percent filter applied.

DCIT vs. Novell Software Development (India) Pvt. Ltd - TS-190-ITAT-2017(Bang)-TP - I.T. {T.P} A. No.1313 / Bang / 2012 dated 10.02.2017.

483. The Tribunal held that the assessee engaged in in provision of software development and marketing support services to its AEs could not be compared to:

- Exensys Software Solutions as it was a product development company and a BPO and had also earned abnormal profits due to amalgamation (extra-ordinary event)
- Satyam Computers Ltd as the financial results of the company were unreliable
- Thirdware Solutions as it was engaged in the business of information services, consulting and outsourcing company and also derived income from sale of licenses.
- Infosys Technology Ltd on account of its high brand value
- Flextronics Software Systems Ltd as it incurred substantial R&D expenses
- Tata Elxsi as it was engaged in diverse activities which were dissimilar to those rendered by the assessee
- Bodhtree Consulting as it was engaged in provision of niche IT services and it had fluctuating margins year-on-year since it followed different revenue recognition policies

Further, it held that L&T Infotech Ltd & iGate Global Solutions Ltd, which were excluded as comparable by the CIT(A) on the ground that their turnover exceeded Rs.200 crore, were to be considered as comparable as turnover was not a relevant criterion for the purpose of deciding the comparability as Rule 10B(2) does not specify turnover as one of the factors for deciding comparability.

Electronics for Imaging India Pvt. Ltd vs. DCIT - TS-169-ITAT-2017(Bang)-TP - IT(TP)A No.462/Bang/2013 dated 10.03.2017

484. The Tribunal held that the assessee engaged in the business of providing back office processing services to AE could not be compared to:

- Tricon India Limited as it had developed a unique software to provide BPO services to customers and thus was functionally dissimilar to the assessee.
- Fortune Infotech Limited as it had developed unique software from which it would derive substantial benefits/advantages and therefore could not be compared to the assessee

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which was providing pure call centre services.

- Wipro BPO Solution Ltd as it had unique intangibles considering the influence of the wipro brand.

Further, it remitted the comparability of Ultramarine & Pigments Ltd, Spanco Telesystems & Solutions Ltd, Allsec Technologies Ltd to the file of AO/TPO as they were functionally dissimilar to the assessee and this issue had not been examined by the AO/TPO.

Siemens BPO Services Pvt. Ltd vs DCIT-TS-530-ITAT-2017(BANG)-TP

485. The Tribunal held that the assessee engaged in providing back office service in the ITeS sector could not be compared to:-

- Infosys BPO Ltd as it had an extraordinary event of amalgamation during the year.

Further, it earned revenue from providing business process management services to other organizations engaged in outsourcing business services.

- Accentia technologies ltd as it was engaged in diversified activity of medical activity of medical transcription, medical coding, billing, receivable management which were functionally different from the service of contract center service provided by assessee.
- Cosmic Global ltd as it was engaged in providing service of medical transcription and consultancy services, translation services and accounts of BPO and therefore functionally dissimilar to the assessee.

Business Process Outsourcing (India) Pvt Ltd vs DCIT-TS-577-ITAT-2017(Bang)-TP dated 09.06.2017

486. The Tribunal held that the assessee engaged in the business of providing shared services (ITeS) to its AE could not be compared to:

- Accentia Technologies Ltd as there was an extraordinary event of merger and amalgamation during the year and thus could not be compared to the assessee.
- Infosys BPO Ltd as it was engaged in the business of providing software products apart from software services and therefore functionally dissimilar to the assessee.

Further, it owned intangible assets and had a brand value commanding premium pricing.

Flextronics Technologies India Pvt ltd vs DCIT-TS-588-ITAT-2017(BANG)-TP-ITA No. 649/bang/2015 and Cr. objn IT(TP)A No. 208/bang/2015 dated 21.06.2017

487. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- KALS Information Systems Ltd as it was engaged in developing software products and not purely engaged in software development service provider.
- Bodhtree Consulting Ltd as it was engaged in sale of software products and therefore could not be compared to the assessee.
- Tata Elxsi Limited as it was engaged in software development services which comprised of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and no segmental breakup was available.
- Infosys Technologies Limited as it was engaged in development as well as

sale of software products and therefore functionally dissimilar to the assessee.

- Persistent Systems Ltd as it was engaged in software product development and product design services and therefore functionally dissimilar to the assessee.
- Infosys BPO Ltd as it was a giant company with huge turnover and brand value.

TE Connectivity Global Shared Services India Pvt. Ltd vs. ITO-TS-1049-ITAT- 2017 (Bang)-TP I.T.(T.P) A. No.1280/Bang/2014 dated 13.12.2017

488. The Tribunal held that the assessee engaged in the business of providing software development services and ITeS to its AE could not be compared to:-

- Infosys BPO ltd as it possessed high brand value and intangibles.
- Accentia Technologies India ltd as the company had undergone an extra-ordinary event i.e. another company was amalgamated into the impugned company during the year and therefore the results of the company were incomparable due to such amalgamation.
- Cosmic Global Ltd as it outsourced/sub contracted its work and was therefore functionally dissimilar.
- E-clerx Services Ltd as it was providing high end services involving specialized knowledge and domain expertise.

Further, specifically vis-à-vis the software development services, it held that the assessee could not be compared to:-

- Tata Elxsi Ltd as it was engaged in product designing service.
- Persistent Systems Ltd as it was engaged in product development and product design services and segmental details were not available.
- Infosys Technologies Ltd on the ground of brand attributable profit margin and huge turnover from software products for which segmental details were not available.

Altair Engineering India Pvt Ltd vs DCIT-TS-514-ITAT-2017(BANG)-TP dated 03.05.2017

489. The Tribunal held that the assessee engaged in the business of software development services could not be compared to:-

- KALS Information Systems Ltd as the company having turnover of Rs. 2.14 crores failed the turnover filter of 1/10th of assessee's turnover of Rs.69.07 crores.
- Zylog Systems Ltd as the company having turnover of Rs failed the turnover filter of 10 times the assessee's turnover of Rs. 69.07 crores
- Mindtree Ltd as the company failed the turnover filter of 10 times the assessee's turnover of Rs. 69.07 crores
- Larsen & Toubro Infotech as the company failed the turnover filter of 10 times the assessee's turnover of Rs. 69.07 crores
- Infosys Ltd as the company having turnover of Rs. 20,264 crores failed the turnover filter of 10 times the assessee's turnover of Rs. 69.07 crores
- Bodhtree Consulting Ltd as the company engaged in the business of KPO services.
- Tata Elxsi Ltd as the company was engaged in the business of KPO services.
- Persistent Systems Ltd as the company was engaged in the business of

software development services as well as product designing services.

Further, it remitted the comparability of Sasken Communications Technologies Ltd to the file of AO/TPO since the entire annual report was not available.

ITO vs Aris Global Software Private Ltd-TS-473-ITAT-2017(BANG)-TP-IT(TP)A No. 94 & 31/bang/2016 dated 28.04.2017

490. The Tribunal held that the assessee engaged in the business of software development services could not be compared to:-

- Infosys Limited having a turnover of Rs 21,140 cr as it failed the turnover filter of 10 times the assessee's turnover i.e Rs 151.08 cr
- KALS Information Systems Ltd having a turnover of Rs 2.16 cr as it failed the turnover filter of 1/10th times the assessee's turnover.
- L&T Infotech Ltd having a turnover of Rs 1776.76 cr as it failed the turnover filter of 10 times the assessee's turnover.
- Persistent Systems Limited as the company was engaged diversified activities and earned revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract, outsource product development and its segmental results were unavailable.
- Tata Elxsi Limited as the company was engaged in diversified activities like product design services, innovation design, engineering services, visual computing labs etc. Further, it held that segmental details were unavailable.
- Accentia Technologies Ltd. as the company was engaged in the business of medical coding and providing in KPO services and its segmental details were unavailable.
- Icra Online Limited (seg.) as the company having 16% RPT failed the 15% RPT filter applied by the TPO.
- Infosys BPO Ltd. as the company having a turnover of Rs 1126.63 cr failed the turnover filter of 10 times the assessee's turnover of Rs 151.08 cr.

Further, it remitted the comparability of Nittani Outsourcing Services Ltd. to the TPO on the ground that the TPO had not initially selected the company as a comparable while issuing a show cause notice but without giving an opportunity to the assessee had included it in the final set of comparables. It also noted that the DRP had not entertained the assessee's objection vis- à-vis the comparable. It accordingly set aside the issue to the file of the TPO for reconsideration of functional comparability.

Misys Software Solutions (India) Pvt. Ltd vs DCIT – TS-456-ITAT-2017(Bang)-TP dated 19.05.2017

491. The Tribunal held that the assessee engaged in the business of Software Development services could not be compared to:-

- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology and was thus functionally dissimilar to the assessee.
- Tata Elxsi Limited as its software development segment constituted three sub-segments – product design services, engineering design services and visual computing labs and system integration services segment and no segmental breakup was available.

- Persistent System Ltd as it was engaged in product designing services.
- Infosys Technology Ltd as it was a giant company in the area of software and it assumed all risks leading to higher profits.
- L&T Infotech Limited as it was engaged in multifaceted activities including both software development services and products and also owned intangibles.
- Sasken Communication Technology Ltd as it earned revenue from 3 segments viz., software services, software products and other services for which segment wise operating margins and other relevant segmental data was unavailable.

Arcot R&D Software Pvt Ltd-TS-494-ITAT-2017(BANG)-TP-ITA No dated 17.03.2017

492. The Tribunal held that the assessee engaged in the business of providing software development services for administration of higher education institutions worldwide to its AEs could not be compared to

- Infosys Technologies Limited since it had a very high turnover of Rs. 9028 crores and also had high brand value.
- Bodhtree Consulting Limited as it had a RPT filter of 34.68% i.e, greater than 15% threshold applied by TPO.
- Flextronics Software Systems Limited (seg) since it was engaged in software products and thus was functionally dissimilar with pure software development services provider.
- Sankhya Infotech Limited since it was engaged in the business of development of software products and services as well as training and its segmental details were unavailable.
- Foursoft Limited since its RPT filter was at 19.89% which was greater than 15% threshold applied by TPO.
- Tata Elxsi Limited (seg) since it was engaged in the development of niche product and development services.
- Satyam Computer Services Limited since the financial data was unreliable owing to fraudulent activities by Directors of the company.
- Exensys Software Solutions Limited due to extraordinary event of amalgamation with Honlool India Ltd during the year and abnormal profits of more than 50%.

SunGard Solutions (India) (P.) Ltd vs ACIT [TS-351-ITAT-2017(BANG)-TP] dated 28.04.2017

493. The Tribunal held that the assessee engaged in the business of software development services could not be compared to:-

- Infosys BPO Ltd having turnover of Rs 33083 crores as it failed the turnover filter of 10 times the assessee's turnover of software development segment i.e Rs.198.65 crores.
- L&T Infotech Ltd having turnover of Rs 2959.55 crores as it failed the turnover filter of 10 times the assessee's turnover of software development segment i.e Rs 198.65 crores.

Further, it remitted the comparability of Persistent Systems Ltd, Thinksoft Global Services and Evoke Technologies Pvt Ltd to the file of AO/TPO to examine afresh functional dissimilarity since the assessee contended that the three companies in the business of and the DRP order had not considered the above contention.

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Misys Software Solutions (India) Pvt Ltd vs DCIT-TS-492-ITAT-2017(BANG)-TP-IT(TP)A No.1560 (bang) 2016 dated 12.05.2017

494. The Tribunal held that the assesse engaged in the business of software development services could not be compared to:-

- Virinchi Technologies Limited since as per the annual report, the company was engaged in R&D in software engineering technology and products. Further, the segmental data was unavailable.
- Thirdware Solutions Limited since the company was engaged in diversified activities such as software design and consultancy, trading and development of software, subscription contracts, sale of user license for which no segmental details were available.
- Gebbs Infotech Limited since the company provided software development services as well as BPO services and segmental operating margins were not available.
- WTI Advanced Technology since the company reported income from technical services rendered, CAD (computer aided design) convergent drawings and software services and segmental details were not available.
- Transworld Infotech Limited as the company was engaged in software solutions and products as well as consultancy services and segmental details were unavailable.

Dell International Services India Pvt Ltd vs ACIT [TS-443-ITAT-2017(Bang)-TP] dated 21.04.2017

495. The Tribunal held that the assessee engaged in the business of providing software development services was not comparable to

- Flextronics Limited (seg), iGate Global Solutions Ltd, Infosys Limited, L&T Infotech Limited, Satyam Computers Limited having Turnover 457.45 cr, 406 cr, 6859.70 cr, 562.45 cr, 3464.20 cr respectively could not be compared to the assessee engaged in the business of software development services as it failed the turnover filter of 10 times the assessee's turnover of Rs.14.92 crores.
- Orient Information Technology Limited as it was engaged in providing BPO services.
- Bodhtree Consulting Limited as it was engaged in providing BPO services.
- Geometric Software Solutions as its RPT to sales was 19.47% which did not satisfy the RPT filter of 15% applied by TPO.

Further, in light of the SB ruling in case of Maersk Global Centres (India)(P.) Ltd [TS-74-ITAT- 2014(Mum)], which held that in respect of companies having abnormally high profits, it was necessary to ascertain whether the high profit was the result of some abnormal conditions prevailing in the relevant year, it remitted to the file of CIT(A) the comparability of Exensys Software Solutions Limited (70.68%), Thirdware Solutions Ltd (66.09%), to consider the comparability of the companies vis-à-vis the assesse.

DCIT vs Alliance Semiconductors India Pvt Ltd IT(TP)A No. 618(Bang) 2013 dated 21.03.2017

496. The Tribunal relying on the decision in the case of Symphony Marketing [TS-915-ITAT-2016(Bang)-TP] held that the assessee engaged in the business of providing software development services could not be compared to:-

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- Infosys BPO as it was engaged in the business of providing BPO services and had huge brand value having significant influence on the pricing policy.
- Wipro Limited (BPO division) as it owned substantial intellectual property on software products.

GE BE Pvt Ltd vs DCIT – TS- 915-ITAT-2016(Bang)-TP dated 13.04.2017

497. The Tribunal held that the assessee engaged in the business of providing ITE services could not be compared to:-

- Infosys BPO Ltd having turnover of Rs 1312.42 crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 15.29 crores.
- TCS E-serve ltd having turnover of Rs 1578.44 crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 15.29 crores.

Further, it remitted the comparability of BNR Udyog Ltd and Universal Print Systems Ltd to the file of AO/TPO to examine the afresh functional dissimilarity since the assessee contended that the two companies were engaged in the business of Medical transcription services and BPO services respectively and the DRP order had not considered the above contention.

Misys Software Solutions (India) Pvt Ltd vs DCIT-TS-492-ITAT-2017(BANG)-TP-IT(TP)A No.1560 (bang) 2016 dated 12.05.2017

498. The Tribunal held that the assessee engaged in the business of providing software development and application engineering services to its AE could not be compared to:-

- I Power Solutions Ltd. as it was dissimilar to the assessee on account of difference in revenue recognition policy as it was based on completed contract method while the assessee followed proportionate completion method. Further there was also difference in terms of salary cost, foreign exchange earnings and comparability in term of size and operation.
- VMF Soft-tech Ltd having turnover of Rs. 2 cr. as it failed the turnover filter of 1/10 th of the assessee's turnover i.e. 135 Cr.
- Xcel Vision Technologies Ltd. having turnover of Rs. 90 lakhs as it failed the turnover filter of 1/10th of assessee's software segment turnover of Rs. 135cr.

DCIT vs Robert Bosch Engineering & Business Solutions Ltd-TS-444-ITAT-2017(Bang)-TP- dated 21.04.2017

499. The Tribunal upheld DRP's exclusion of 6 companies having turnover more than Rs.200 crores while benchmarking software development services rendered by the assesse whose turnover was Rs 17.10 crores. It held that though Rs.200 crores turnover filter adopted by the DRP was not appropriate, even if the filter of 10 times of asssessee's turnover was applied, the companies which had more than Rs.171 crores of turnover would be excluded i.e 10 times the assessee's of 17.10 cr. Vis-à-vis the assesssee's claim for risk adjustment, relying on the decision in the case of Zyme Solutions Pvt. Ltd [IT(TP)A No. 465/bang/2015 it held that where the assessee had not provided any computation for risk adjustment, the claim of the assessee was purely hypothetical in nature and accordingly set aside DRP directions allowing 1% risk adjustment.

ITO vs Solidcore Techsoft Systems (India) Pvt Ltd-TS-350-ITAT-2017(Bang)-TP- dated 28.04.2017

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500. The Tribunal ruled on selection of comparables for assessee providing ITES to AEs in the field of insurance on the following grounds

- Tricom India Private Ltd was rejected as it had developed unique in-house software for providing specialized services.
- Wipro BPO Solutions Ltd was rejected as it had the influence of 'WIPRO' brand and intangibles.
- Fortune Infotech Ltd was rejected as it was functionally dissimilar was it used unique technology/technical knowhow and had developed its own software.
- Vishal Information Technology ltd as it had outsourced its work.
- Ultramarine & Pigments Ltd was rejected as it had abnormal trading results and was a super profit company.
- Air Line Financial Support Services India Ltd was remitted back to TPO for reexamination and re-adjudication as the company was essentially a captive service provider.
- Nucleus Netsoft & Gis India Ltd- remitted to the AO/TPO for re-examination and re- computation of the margin.

Swiss Re Shared Services (India) P Ltd vs DCIT-TS-352-ITAT-2017(Bang)-TP I.T(TP).A.No.1139/bang/2011 dated 03.05.2017

501. The Tribunal held that the assessee engaged in the business of IT enabled services could not be compared to:-

- Infosys BPO ltd. as it performed high end and integrated services and it had a huge brand value as a result of which it earned higher profits and was functionally dissimilar.
- Accentia Technologies Ltd. as it was engaged in diversified KPO services in the areas of health-care cycle management, legal process outsourcing and high-end software delivery.

Further, it included Microland since both the assessee as well as Revenue had pleaded for inclusion of this comparable as it satisfied the forex to sales filter applied by the TPO.

Global e-business Operations Pvt. Ltd vs DCIT- TS-445-ITAT-2017(Bang)-TP- IT(SS)A No.172 and 147/bang/2015 dated 21.04.2017

502. The Tribunal held that the assessee engaged in the provision of ITES to its AE could not be compared to:-

- Accentia Technologies Limited since an extraordinary event such as merger had taken place which had a significant impact on its profitability.
- Eclerx Services Limited as it was engaged in providing high end KPO services involving specialized knowledge and domain expertise in its field.

DCIT vs Goldman Sachs Service Pvt Ltd – TS-430-ITAT-2017(Bang)-TP-IT(TP)A No.66/bang/2014 dated 05.04.2017

503. The Tribunal upheld DRP's direction to exclude Infosys Technologies as a comparable while benchmarking the software development services provided by the assessee to the AE noting that it was a giant in the area of software development and had higher intangibles and

goodwill and assumed all risks leading to higher profit which rendered it functionally dissimilar to the assessee. It relied on the decision in the case of NTT Data Global Delivery Services Ltd [TS-219- ITAT-2016(Bang)] wherein it was held that Infosys Technologies could not be compared to any other company as it had a huge brand influence.

ITO vs Symphony Marketing Solutions India – TS-370-ITAT-2017(BANG)-TP-IT(TP) Nos.233 and 809/bang/2015 dated 04.04.2017

504. With regard to the assessee engaged in providing data processing services to its AE, the Tribunal remitted back to the TPO/DRP to evaluate the profile of the comparable i.e.

- Accentia Technologies Ltd vis-à-vis the assessee by relying on the ruling in the case of Swiss Re Shared Services India Pvt Ltd [TS-598-ITAT-2016(BANG)-TP] wherein it was held that in the absence of any document showing the kind of service being rendered by the comparable company, it was difficult to compare the functions/profile.
- Remanded to TPO to verify assessee's claim that RPT of ICRA Online Ltd was 22.77% (i.e. >15%) and directed it to exclude it if it failed 15% threshold.
- Rejected Jeevan Scientific Technology Ltd, Mindtree Ltd and iGate Solutions Ltd as comparable as they failed the 10 times turnover following the ruling in case of Mcfee Software India Pvt. Ltd [TS-136-ITAT-2016(BANG)-TP].
- included two companies on the following grounds-Acropetal Technologies as the assessee itself had selected these companies and had neither challenged it. Infosys BPO as the assessee itself had selected these companies and had neither challenged it before DRP nor Tribunal.

Zyme Solutions Pvt Ltd TS-353-ITAT-2017(Bang)-TP - IT(TP)A No.85/Bang/2016 dated 28.04.2017

505. The Tribunal following the ruling in McAfee India excluded 3 companies viz. L&T Infotech Ltd (turnover of 2959.55 cr). Persistent Systems Ltd (turnover of 810.36 cr.) and Mindtree Ltd (Turnover of 1255.80cr) from the list of comparables while benchmarking the international transaction of the assesse engaged in the business of software development services as the said companies failed to satisfy the turnover filter of 10 times the assessee's turnover i.e 38.07 cr.

Aptean Software India Pvt Ltd vs DCIT [TS-332-ITAT-2017(Bang)-TP- I.T(TP).A No.1826/Bang/2016 dated 15.05.2017

506. The Tribunal relying on the decision of the coordinate bench in the case of Thomson Reuters India Services Pvt. Ltd. [TS-1084-ITAT-2016(Bang)-TP] held that Vishal Information technology ltd was functionally dissimilar as it provided agency services by way of outsourcing to third party vendors and acted as an intermediary between final customer and vendor and directed the AO/TPO to re-adjudicate the issue relating to comparability of Vishal Information Technology Ltd. in respect of assessee's IT enabled back office services for AY 2005-06. Further, it also upheld Revenue's adoption of RPT filter of 15% rejecting CIT(A)'s 0% RPT filter noting that the Tribunal had, in a series of decisions, held that the tolerance range of RPT in normal circumstances was 15% and in extreme cases it could be extended upto 25%. Also, relying on the decision in the case of Wipro BPO Solution Ltd., directed TPO to apply turnover filter of 10 times of assessee's turnover on both sides since it

was a consistent view that the if turnover was within range of 1/10th of the turnover or upto 10 times, then the comparable was considered to be a good comparable. Accordingly, it remitted the issue to the file of the AO/TPO to carry out the search afresh pursuant to its directions.

Sykes Enterprises (India) Pvt Ltd [TS-410-ITAT-2017(Bang)-TP] - IT(TP)A No.1034//Bang/2011 dated 28.04.2017

507. The Tribunal held that the assessee engaged in providing software development services to its AE for AY 2011-12 could not be compared to

- E-Zest Solutions Ltd as it was engaged in the activity of KPO
- Persistent Systems Ltd as it was engaged in diversified activities and earned revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract etc.
- Sasken Communication Technologies Ltd as the company had a turnover of Rs 394cr and failed the turnover tolerance range of 10 times of assessee's turnover.
- Akshay Software Technology Ltd as it was engaged in both software services and products and lacked adequate segmental results.
- Acropetal Technologies Ltd on the ground that it did not satisfy the filter of 75% of income from information technology, revenue applied by the TPO itself.
- ICRA Techno Analytic Ltd relying on the decision in the case of Electronics for Imaging wherein it was held that this company was functionally incomparable with pure software development service provider as its service segment comprised of software development, software consultancy, engineering services, web development, web hosting for which segmental details were unavailable. Also, it had RPT greater than 15%.
- Infosys Technologies Ltd as it failed the turnover tolerance range of 10 times of assessee's turnover
- L&T Infotech Ltd failed the turnover tolerance range of 10 times of assessee's turnover.

Further, it had RPT greater than 15%

- Tata Elxsi Ltd on the ground that the export revenue of the company was less than 75% applied by the TPO
- E-Infochips Limited due to absence of segmental data.
- Mindtree Ltd as it failed the turnover tolerance range of 10 times of assessee's turnover.
- R S Software as it failed the turnover tolerance range of 10 times of assessee's turnover.

Further, LGS Global Ltd was remitted to the file of the AO to verify relevant facts to ascertain the employee cost and then decide the functional comparability.

GT Nexus Software Pvt Ltd vs Dy.CIT -TS-335-ITAT-2017(BANG)-TP-I.T.A No.409/Bang/2016 dated 18.04.2017

508. The Tribunal relying on the decision of Cisco Systems India excluded 2 companies viz. Kals Information Systems ltd and Bodhtree Consulting Ltd from the list of comparables while benchmarking the international transactions i.e. provision of software development services to

its AEs on the ground of functional dissimilarity noting that both Kals Information Sytems ltd and Bodhtree Consulting ltd were involved in software products.

Sonim Technologies (India) Pvt Ltd vs Dy CIT - TS-341-ITAT-2017(Bang)-TP- IT (TP) A No.2S2 (Bang) 2014 dated 24.03.2017

509. The Tribunal relying on the co-ordinate bench ruling in the case of Trilogy E-Business Software India Pvt ltd [TS-410-ITAT-2016(Bang)-TP] held that for AY 2008-09 the assessee engaged in providing software development to AE for AY 2008-09 could not be compared to

- Avani Cincom Technologies Ltd as it was functionally dissimilar to software development service provider and segmental details were unavailable.
- Bodhtree Consulting Ltd due to fluctuating margin and different functional profile.
- Celestial Biolabs Ltd as it was engaged in product development in the field of biotech and pharmaceuticals which was functionally dissimilar to assessee.
- KALS Information Systems Ltd as it was engaged in development of software products as well as provision of training services.
- Infosys Technologies Limited as it owned significant intangibles and segmental breakup was unavailable.
- Wipro Limited as it owned IPR and intangibles and engaged in both software development and sale of product without segmental bifurcation.
- Tata Elxsi Ltd as it was engaged in product designing services.
- E-Zest Solutions Ltd as it was engaged in rendering product development services and KPO services which is functionally dissimilar.
- Third ware Solutions Ltd as it derived revenue from sale of software product licenses.
- Lucid Software Ltd as it was engaged in development of software products.
- Persistent Systems Ltd as it was engaged in product development and product design services and segmental data was not available.
- Quintegra Solutions Limited as it was engaged in product engineering services.
- Softsol India Ltd as its Related party transactions were greater than 15% limit applied

Verifone India Technology Private Limited vs DCIT TS-345-ITAT-2017(Bang)-TP-IT(TP)A No.1 Bang/2014 dated 24.03.2017

510. The Tribunal held that the assessee engaged in the business of software development services and marketing support services could not be compared to

- Foursoft Ltd as it was engaged in the sale of products and had substantial selling and marketing expenses and related party transactions greater than 0%
- Geometric Software Solutions Co Ltd as it rendered services in the nature of design and engineering services, the related party transactions were greater than 0% and it owned intellectual property.
- Sankya Infotech as it was engaged in the sale of products and had substantial selling and marketing expenses, extreme high profit company and owned intellectual property.
- Sasken Network System on the ground that it had substantial selling and marketing expenses.

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- Sasken Communication Technologies Ltd as it was engaged in the sale of products and had substantial marketing and selling expenses.
- Tata Elxsi Ltd as it rendered services in the nature of product and engineering and design services.
- Flextronics Software Services Pvt Ltd as its profitability was extremely high and the related party transactions were greater than 0%.
- Exclusion of Exensys Software Solutions Limited, Thirdware Solutions Limited and Bodhtree Consulting Limited was admitted by the Tribunal as additional ground by relying on the decision of Quark Systems India P Ltd [TS-448-HC-2011 (P&H)-TP and remitted the matter to the AO/TPO to decide on comparability.

Infineon Technologies India Pvt Ltd vs ACIT [TS-340-ITAT-2017(Bang)-TP - IT(TP)A No.657/Bang/20 11 dated 06.01.2017

511. The Tribunal held that the assessee, a captive service provider of ITES could not be compared to:

- Accentia Technologies as an extraordinary event took place during the year under consideration
- eClerx Services as it was a KPO mainly engaged in providing high-end KPO services

Goldman Sachs Service Pvt Ltd [TS-430-ITAT-2017(Bang)-TP] IT(TP)A No. 66lBang/2014

512. The Tribunal allowed assessee's plea for exclusion of 3 comparables while benchmarking the provision of software development services to its AE for AY 2010-11 and held that the assessee could not be compared to the following companies:

- E Infochips Bangalore Ltd as it was engaged in software development ITES and also derived income from consultancy charges and the segmental information was not available.
- Sasken Communication Technologies Ltd as it was functionally dissimilar as it was also engaged in sale of products and no segmental details were available.
- Infosys Technologies Ltd as it was functionally dissimilar as it was a giant company in the area of development of software and it assumed all risks leading to higher profits.

Broadcom Communications Technologies Pvt Ltd vs DCIT- TS-254-ITAT-2017(Bang)-TP – I.T.(TP) A. No. 145/bang/2014 dated 17.03.2017

513. The Tribunal held that the assessee, engaged in providing IT enabled services could not be compared to:

- Fortune Infotech Ltd, ICRA Online Ltd and Sundaram Business Services Ltd as their RPT to Sales transactions was 25 percent, 19.6 percent and 29.44 percent, respectively i.e. in excess of the 15 percent filter applied
- E-clerx Services Ltd. as it was engaged in providing complete business solutions in the nature of high end services
- Infosys BPO Ltd as it has the benefit of market value as well as brand value, and also enjoys the benefits of scale and market leadership
- Accentia Technologies Ltd, relying on Equant Solutions India Pvt. Ltd. [TS-28-
- ITAT-2016(DEL)-TP]and Interwoven Software Services (India) Pvt. Ltd. [TS-

- 723-ITAT-2016(Bang)-TP], wherein it was excluded as comparable as it was
- functionally dissimilar to a captive service provider
- Acropetal Technologies Ltd. (Seg.), relying on Kodiak Networks (India) Pvt. Ltd. [TS-369-ITAT-2015(Bang)-TP], wherein it was excluded as comparable as it was functionally dissimilar to a captive service provider

DCIT vs. Tesco Hindustan Service Centre Pvt. Ltd - TS-80-ITAT-2017(Bang)-TP - I.T.(T.P} A. No.191/Bang/2015 dated 25.01.2017.

514. The Tribunal held that the following companies could not be considered as comparable while benchmarking the International transaction of the development and design services:

- Accel Transmatic Ltd as the business activities were functionally different from that of the assessee it was engaged in design, development and manufacture of multi function kiosks queue management system, ticket vending system and services for 2D/3D animation.
- Avani Cimcon technologies ltd was it was engaged in the business of software products as well as software services and segmental details were unavailable.
- Celestial Labs Ltd as it was mainly engaged in clinical research and manufacture of software products.
- KALS Information Systems Ltd as it was engaged in the business of development of software products as well as providing training, and thus functionally not comparable.
- E-Zest Solutions as it was engaged in product development and high end technical services under the category of KPO services.
- Helios & Matheson Information Technology Limited relying on coordinate bench ruling in the case of NXP Semiconductors India Pvt Ltd [TS-427-ITAT-2014(Bang)-TP] wherein it was held that it was functionally incomparable.
- Ishir Infotech Limited as it outsourced its work and did not satisfy the 25% employee-cost filter.
- Lucid Software Limited as it was engaged in the business of development of software products and was thus functionally incomparable.
- Tata Elxsi Ltd as the company had significant R&D activity, brand value etc.
- Thirdware Solutions Ltd as it was engaged in product development and earned revenue from selling licenses subscription and no segmental details were available.
- Wipro Limited as it owned a large amount of intellectual property.
- Infosys Technologies Ltd as it owned significant intangibles and had earned huge revenues from software products with no segmental breakup available.
- Persistent Systems Ltd as it was engaged in product development and segmental details were unavailable.

FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

515. The Tribunal held that the assesse rendering software development services and Marketing support services for AY 2011-12 could not be compared to

- Acropetal Technologies Ltd as it was functionally different since it was engaged in both software services and product and segmental information between software

services and software products was unavailable and also since it failed the employee cost filter of 9.8% of sale

- E-Zest Solutions Ltd as it was engaged in KPO activity.
- E-Inforchips Ltd as the company earned revenue from software products and segmental details were not available.
- ICRA Techno Analytics Ltd as it was functionally dissimilar since it was engaged into software development, engineering services, web development & hosting, business analytics & BPO and had substantial RPT i.e. 22.37% of sales.
- Infosys Technologies as it had huge brand value, intangibles and huge turnover.
- Larsen & Toubro Infotech Ltd as the RPT exceeded 15% and it was engaged in sale of software products.
- Tata Elxsi (Seg) as it was functionally dissimilar since its software development and services consisted of embedded product design, industrial design and visual computing labs and it failed the 75% export earning filter as it had an export revenue of 73.30%.
- Persistent Systems & Solutions Ltd and Persistent Systems ltd on the ground that they were functionally dissimilar as there were engaged in diversified activities and earned revenue from various activities.
- Sasken Communication Technologies as it was not functionally comparable due to lack of segmental data.

Further, the Tribunal accepted inclusion of 3 companies on the following grounds

- Evoke Technologies, Mindtree Ltd and RS Software (India) Ltd as the assessee did not specifically reject these comparables.

AMD India P Ltd vs ACIT [TS-362-ITAT-2017(Bang)-TP I.T (TP).A No.1487/Bang/2015 dated 06.04.2017

516. The Tribunal held that the assessee engaged in rendering software development services to its AE could not be compared to:

- Bodhtree Consulting Ltd. as it was engaged in the business of software product and provided open and end to end web solutions, off shore data management, software consultancy and design and development of software using latest technology.
- Persistent Systems Ltd. as the company was engaged in software development services and products and was also engaged in R&D activities and owned Intangibles.
- Infosys Ltd as it owned intangibles, had significant brand value and derived income from both software services and products without any segmental reporting.
- Larsen & Toubro Infotech Ltd. as the company was engaged in multi-faceted activities including both software development services and products and its turnover was more than 10 times the turnover of the assessee.

Broadcom India P. Ltd vs. DCIT - TS-243-ITAT-2017(Bang)-TP - LT (TP).A No. 95/ Bang/ 2014 dated : 17.03.2017

517. The Tribunal held that the assessee engaged in providing core software service activities for its AE and independent customers, could not be compared to:

- Celestial Biolabs since it was functionally dissimilar
- Infosys Techologies Ltd since it was functionally dissimilar and owned significant intangibles and earned huge revenues from software products and no segmental information was available,
- Kals information Systems Ltd (Seg) since it was engaged in developing software development products and was not purely a software development service provider
- Tata Elxsi ltd(Seg) since it was engaged in product designing services and was not purely a software development services provider
- Wipro Ltd (Seg) since it had revenue from both software and product development services and no segmental bifurcation was available and it owned intellectual property
- E-Zest Solution ltd since it was engaged in rendering product developmental services and high-end technical services which come under the category of KPO services
- Persistent Systems Ltd since it was engaged in product development and product design services and segmental information was not available
- Quintegra Solution Ltd since it was engaged in product engineering services and not purely providing software development services, it owned intangibles, had done substantial R&D activity and there was extraordinary event of acquisition
- Thirdware Solution Ltd since it was engaged in product development and had earned revenue from sale of licences and subscription which is different from software developmental services and no segmental information was available
- Lucid Software Ltd since it was engaged in development of software product
- Bodhtree Consulting Ltd as the company was not engaged in software development services and no segmental information was available.

It however, rejected assessee's contention for exclusion of LGS Global in absence of any evidence filed by the assessee for exclusion of the same.

Further, where the TPO had included Avani Cincom Technologies as comparable on the basis of information obtained u/s 133(6), it remitted comparability to AO/TPO for fresh adjudication after making information obtained u/s 133(6) available to the assessee.

Trianz Holdings Pvt Ltd [TS-249-ITAT-2017(Bang)-TP]

518. The Tribunal, relying on the decisions in the case of Pentair Water India Pvt Ltd [TS-566-HC-2015(BOM)-TP]and Agilent Technologies (International) Pvt. Ltd. [TS-593-HC-2015(P & H)-TP], applied the turnover filter of 10 to 1/10 times the assessee's turnover (Rs. 71.37 crore) and excluded Universal Print Systems Limited, Informed Technologies India Limited, Infosys BPO Limited, Microgenetic Systems, TCS-E Serve Ltd and BNR Udyog Limited as comparables while benchmarking the IT enabled back office services viz. contract administration, claim administration and technical reinsurance accounting provided by the assessee to its AE.

Swiss Re Global Business Solutions India Pvt Ltd [Formerly known as Swiss Re Shared Services (India) Pvt Ltd] vs DCIT - TS-307-ITAT-2017(Bang)-TP - IT(TP)A No. 2315/Bang/2016 dated 13.04.2017

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519. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- ICRA Techno Analytics Ltd as its revenue stream consisted of software Development, consultancy, engineering services, web development and hosting and no segmental results were available
- Infosys Technologies Ltd as it owned significant intangibles, earned Huge revenues from software products and there was no segment break-up of revenue from software services and software products
- Kals Info Systems Ltd as it was engaged in providing software development services and development of software products
- Tata Elxsi Ltd as it was engaged in product designing services and not purely software development services.

Further, it held that R S Software (India) Ltd was to be included as comparable and that the DRP erred in excluding the company on the basis that it was an onsite software development company as onsite revenue was not one of the filters adopted by TPO. It also held that Persistent Systems & Solutions Ltd was to be included as comparable and that the DRP had wrongly excluded the said company as comparable on the ground that no segmental information was available with regard to software services and software products as the said company was predominantly engaged in software development services and it derived income mainly from software services.

ACIT vs. Curam Software International P. Ltd - TS-244-ITAT-2017(Bang)-TP - IT(TP)A.499 & CO.136/Bang/2015 dated : 21.03.2017

520. The Tribunal held that the assessee engaged in providing software development services to its Associated Enterprises (AE) could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology whereas the assessee was engaged in rendering only software development services
- Tata Elxsi Ltd as this company's software development and services segment constituted three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs and system integration services segment and therefore functionally dissimilar
- Persistent Systems Ltd as the company was engaged in product designing services
- Infosys Technologies Ltd as the company was a giant company in the area of software and it assumed all risks leading to higher profits, whereas assessee company was a captive unit of the parent company and assumed only a limited risk.

Broadcom Communications Technologies Pvt. Ltd. vs. DCIT - TS-298-ITAT-2017(Bang)-TP - I,T.{T.P} A. No.145/Bang/2014 dated 17.03.2017.

521. The Tribunal held that assesse engaged in the business of providing digital imaging services falling within the category of IT enabled Services (ITeS) to its AEs could not be compared to:

- Accentia Technologies Ltd as an extraordinary event of merger and amalgamation took place during the year under consideration
- Acropetal Technologies Ltd.(seg) as it was engaged in high end KPO type design

engineering activities which cannot be equated with IT services

- E-Clerx Services Ltd as it was a KPO mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field of retail, manufacturing and financial services; therefore, not comparable with the assessee.
- ICRA Online Ltd as it was not functionally comparable
- Infosys BPO as it was a market leader, had huge brand value commanding premium pricing, had geographically diverse customers, owned intangible assets and was engaged in the business of software product apart from proving software services.

Further, the Tribunal accepted the Revenue's contention that an application of turnover band of Rs.1 to Rs.200 crores was bereft of any rationality as the application of this filter does not enable comparison of a company with Rs.200 crores with another company having a turnover of Rs.201 crores. Accordingly, it held that turnover could not be a relevant criterion in a service sector where fixed overheads were nominal and the cost of service was in direct proportion to the services rendered.

Scancafe Digital Solutions Pvt. Ltd. vs. ITO - TS-313-ITAT-2017(Bang)-TP - IT(TP)A Nos.502 & 450/Bang/2015 dated 12/04/2017

522. The Tribunal held that the assessee engaged in providing ITES to its AEs could not be compared to:

- Bodhtree Consultancy Ltd as the company had only one segment viz. software development which cannot be compared to ITES segment.
- e-clerx Services Ltd as the company was engaged in providing data analysis and process solutions and recognized as expert in market financial services, retail and manufacturing.
- Infosys Ltd as the company was deriving revenue from the software products, had huge intangible assets apart from the brand value and being a leader in the market
- Mold-tek Technology Ltd. (Seg.) as the company was providing highly technical and specialized engineering services and was also is engaged in producing design, drawing and structural engineering drawings of 2D and 3D software and hence, could not be compared with the assessee.
- Vishal Information Technology Ltd as the company outsourced a considerable portion of its business and thus fails employee cost filter
- Wipro Limited as the company was functionally dissimilar because of brand value, significant investment in acquiring new business, innovation activities of various fields including technology innovation and also it as it was engaged in R&D activities
- Apollo Health Street Ltd, Asit C Mehta Financial Services Ltd, HCL Comnet Systems & Services Ltd and Informed Technologies India Ltd as its RPT transactions exceeded the 15 percent filter applied by the TPO.

Thomson Reuters India Services P. Ltd (Formerly known as Thomson Corporation (International) P. Ltd) vs. Addl. CIT - TS-279-ITAT-2017(Bang)-TP - I.T (TP).A No.1206/Bang/2011 dated 06.04.2017

523. The Tribunal held that the assessee engaged in providing contract software development services to its AEs could not be compared to:

- Celestial Labs Ltd as the company was engaged in clinical research and manufacture of bio products
- E-Zest Solutions Ltd as it rendered product development services and high end technical services under KPO category
- Infosys Technologies Ltd as it owned significant intangible and had huge revenues from software products without any break-up of revenue from software services and software products is not available
- Kals Information Systems Ltd (seg) as it was engaged in providing software development services and development of software products.
- Lucid Software Ltd as the company is also involved in the development of software as compared to the assessee, which is only into software services
- Wipro Ltd (seg) as this company was engaged both in software development and product development services and it owned intellectual property in the form of registered patents and several pending applications for grant of patents
- Accel Transmatic Ltd (seg) as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation
- Avani Cimcon Technologies Ltd as the company was also into development of software product.
- Flextronics Software Systems Ltd (seg) as there was a clear contradiction between contents of annual report and information obtained u/s 133(6)
- Helios & Matheson Information Technology Ltd as the application software segment of the said concern is not comparable to the assessee's segment of IT services
- Ishir Infotech Ltd it was out-sourcing its work and, therefore, had not satisfied the 25% employee cost filter and thus had to be excluded from the list of comparables.
- Persistent Systems Ltd as this company was engaged in product development and product design services while the assessee was a software development services provider
- Sasken Communication Technologies Ltd as the company owned IPR, had branded products and it had undergone significant restructuring during the year
- Tata Elxsi Ltd (seg) as the company was predominantly engaged in product designing services and not purely software development services.
- Thirdware Solutions Ltd as the company was engaged in product development and earned revenue from sale of licenses and subscription, without segmental results
- Quintegra Solutions Ltd as it was engaged in in product engineering services, was developing proprietary software products and owned intangibles.

Thomson Reuters India Services P. Ltd (Formerly known as Thomson Corporation (International) P. Ltd) vs. Addl. CIT - TS-279-ITAT-2017(Bang)-TP - I.T (TP).A No.1206/Bang/2011 dated 06.04.2017

524. The Tribunal held that the assessee engaged in the business of providing software development services and support services to its AEs could not be compared to:

- Infosys Technologies Ltd as it was functionally dissimilar, it owned significant intangibles, earned huge revenues from software products and segmental break-up

of the company was not available

- KALS Information Systems Ltd as it was engaged in the development of software products and therefore not functionally comparable to the assessee
- Tata Elxsi Ltd as it was engaged in in product designing services and not a pure software development service provider
- Lucid Software Ltd as it was also into sale of software products and segmental break-up not available
- Accel Transmatic Ltd as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation

Further, it rejected the plea of the assessee for exclusion of comparables having Related Party transactions more than 15 percent (as against the 25 percent filter adopted by the TPO) as it noted that the assessee had not contested application of RPT filter of 25% by the TPO. Further, it observed that Tribunals had been consistently upholding TPO's decision to apply RPT filter in the range of 15% to 25%.

Citrix R&D India Pvt. Ltd vs. ITO - TS-242-ITAT-2017(Bang)-TP - IT(TP)A No.1373/Bang/2010 dated 24/03/2017

525. The Tribunal dismissed the appeal of the Revenue and held that the following companies could not be included in the list of comparables for benchmarking the assessee's software service transactions with its AE:

- Bodhtree Consulting Ltd as it was engaged in ITeS and software development while its segmental details were absent
- Celestial Biolabs as the company was functionally different from that of software development company as it was engaged in clinical research and manufacture of other bio products (Reliance was placed on the decision of 3DPLM Software Solutions Ltd [TS-359-ITAT-2013(Bang)-TP]).
- Lucid Software Ltd as the company was engaged in product development rather than services (Reliance was placed on the decision of 3DPLM Software Solutions Ltd [TS-359- ITAT-2013(Bang)-TP])

Sunquest Information Systems India Pvt. Ltd vs. JCIT - TS-176-ITAT-2017(Bang)-TP - IT(TP)A No. 79/Bang/2013 dated 17 .03.2017

526. The Tribunal held that the following companies could not be compared to the assessee:

- ICRA Techno Analytics Ltd and Larsen & Toubro Infotech Ltd as their PT transactions exceeded the 15 percent filter applied
- Acropetal Technologies Ltd. (Seg) as it failed the filter of 75% IT revenue applied by the TPO Itself.
- e – Zest Solutions Ltd as it was engaged in KPO Services
- Infosys Ltd as it had high brand value, intangibles and huge turnover
- Persistent Systems & Solutions Ltd, Persistent Systems Ltd & Sasken Communication Technologies Ltd as it was functionally dissimilar
- Tata Elxsi Ltd as it failed the export revenue filter of 75%
- E – Infochips Ltd as it had revenue from software products and segmental details unavailable

Commscope Networks (India) Private Ltd. (Earlier known as Airvana Networks (India) Private Ltd.) Vs ITO - TS-161-ITAT-2017(Bang)-TP - IT (TP) A No.166 (Bang) 2016 dated

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527. The Tribunal held that the assessee, engaged in providing software development services to its AEs could not be compared to:

- Kals Information Systems Ltd as it was engaged in the development of software and sale of software products
- ICRA Techno Analytics Ltd (seg) as its service segment comprises of various services such as software development, software consultancy, engineering services, web development, web hosting, etc and no further segmental results were available
- Persistent Systems & Solutions Ltd as no segmental results were available

Further, rejecting the RPT filter of 0 percent adopted by the DRP and applying the filter of 15 percent, the Tribunal held that RS Software (India) Ltd and Thinksoft Global Services Ltd were now to be considered as comparable as they had RPT of 0.96 and 11.09 percent, respectively. Further, following the decision of the co-ordinate bench in Obopay Mobile Technolgy India P Ltd [TS-20-ITAT-2016(Bang)-TP], excluded 6 comparables Infosys Ltd (Rs. 21,140 crore), Larsen & Turbo Infotech Ltd (Rs. 1,777 crore), Mindtree Ltd (seg) (Rs. 698 crore), Persistent Systems Ltd (Rs. 504 crore), Sasken Communication Technologies(Rs. 402 crore) and Tata Elxsi Ltd (seg) (Rs. 376.37 crore) on the ground of turnover and size of the said comparables (as compared to the assessee's turnover of Rs. 13.23 crores)

Logitech Engineering & Design India P. Ltd vs DCIT - TS-145-ITAT-2017(Bang)-TP - I.T(TP).A No.287/Bang/2015 & I.T(TP).A No.127/Bang/2015 dated 03.03.2017

528. The Tribunal held that the assessee, engaged in providing software development services to its AEs could not be compared to:

- Infosys Tech. Ltd as it was a giant company in the area of development of software and it assumed higher risks leading to higher profits
- Persistent Systems Ltd as it was engaged in product designing and software product development
- Tata Elxsi Ltd as it was engaged in provision of product design, engineering design and visual computing labs
- Kals Information Systems Ltd. as it operated in the field of consultancy, information provider and general insurance sector
- Bodhtree Consulting Ltd as it was engaged in the business of software product and end-to- end web solutions software consultancy.

Noting the contentions of the assessee that Sasken Communications Services Ltd's margin was incorrectly computed and that Larson & Toubro Infotech Ltd had a good volume of transactions relating to securities trading and that its margins were incorrectly computed, it held that the issue was to be remitted to the TPO for fresh consideration.

With regard to the assessee's plea for inclusion of certain comparable companies it remitted the issue to the file of the AO / TPO to determine:

- Whether Azlecsoft Ltd & Quintegra Solutions Ltd satisfied the 75 percent export earning filter
- Whether CG-VAK Software and Exports Ltd was functionally comparable and if it would satisfy the 25 percent employee cost filter on inclusion of contribution to PF,

gratuity etc were also included in cost

- Whether Goldstone Technologies Ltd was functionally comparable to the assessee

Magma Design Automation India P. Ltd. Vs. DCIT - TS-141-ITAT-2017(Bang)-TP - I.T(TP).A No.1279/Bang/2014 dated 28.02.2017

529. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to the following companies:

- Bodhtree Consulting Ltd as the company was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology.
- Tata Elxsi Ltd. (Seg) as its software development and services segment constituted three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs and system integration services segment
- Persistent Systems Ltd as it was engaged in product designing services
- Sasken Communications Technology Ltd as this company owned IPR, had branded products, and had undergone significant restructuring during the year.

Further it rejected the assessee's claim for exclusion of Zylong Systems Ltd and Mindtree Ltd. (Seg.) on the ground that they did not satisfy the turnover filter of Rs. 2-200 Cr, holding that the correct turnover filter to be applied was more than of 10 times the turnover of the assessee (Rs.100 crore) and since the revised upper turnover filter was Rs.1,000 crore, these companies could not be excluded as their turnover fell within the said upper filter.

VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P}A. No.1311/Bang/2014 dated 6.1.2017

530. The Tribunal held that for the purpose of benchmarking the international transactions of the assessee, the following companies could not be considered as comparable:

- KALS Information Systems Ltd. as it was in the field of consultancy, information provider and general insurance sector
- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology
- Tata Elxsi Ltd. (seg) as the company's software development and services segment constituted three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs and system integration services segment.
- Persistent System Ltd as the company was in engaged in product designing services
- Infosys Technologies Ltd as the company was a giant company in the area of software and it assumed all risks leading to higher profits.
- Sasken Communication Tech Ltd being functionally dis-similar as it owned IPR and had branded products, and also since it had undergone significant restructuring during the year

Sandisk India Device Design Centre Pvt. Ltd. Vs. DCIT- TS-183-ITAT-2017(Bang)-TP - IT(TP)A No. 126IBang/20 14 dated 15.02.2017

531. The Tribunal dismissed the order of the CIT(A) wherein the CIT(A) had adopted 0% RPT filter noting that various benches of Tribunal had been accepting 15% RPT filter. Noting the

contention of the assessee that if the 15% RPT filter was applied, various comparables rejected by CIT(A) would get reinstated and thereafter those comparables would have to be examined on other aspects such as functional similarity etc, it remitted the matter to the file of the CIT(A) for reconsideration.

Misys Software Solutions India Private Ltd vs DCIT - TS-81-ITAT-2017(Bang)-TP - IT (TP) A No.552 (Bang) 2012 dated 31.01.2017

532. The Tribunal accepted assessee's application of turnover filter at 10 times the assessee's turnover noting that it was a relevant factor in the selection of comparables and accordingly excluded the following companies on the basis that their turnover was either more than Rs. 560 crores or less than Rs. 5.6 crores considering that assessee's turnover was Rs. 56 crores.

(i) KALS Information System Ltd. (ii) Zylog System Ltd. (iii) Mindtree Limited (Seg.) (iv) L& T Infotech Ltd & (v) Infosys Limited.

It also held that the following companies could not be compared to:

- Bodhtree Consulting Ltd as it was Software product company and not a software development services company
- Tata Elxsi Ltd as it was engaged in different activities including embedded product design, industrial design, engineering services and visual computing laboratory and segmental details in respect of software services activity was not available.
- Persistent Systems Ltd as it was engaged in product designing services and software product development

Evry India Pvt. Ltd vs DCIT - TS-76-ITAT-2017(Bang)-TP - LT. (T.P)A. No.I09/Bang/2014 dated 25.01.2017

533. The Tribunal held that the assessee, engaged in providing software development and consultancy services could not be compared to:

- Bodhtree Consulting Ltd as it had undergone drastic fluctuations in profit margins due to revenue recognition method followed by the company
- KALS Information Systems Ltd as the company was engaged in development of software products and was also excluded in the prior years
- Sasken Communication Technology Ltd as based on the application of the 10 Times turnover filter, it would not satisfy the said filter considering that its turnover of the company was Rs.479 Crores in comparison to assessee's turnover of Rs. 25.44 crores

Logix Microsystems Ltd. vs. DCIT - TS-181-ITAT-2017(Bang)-TP - IT. {T.P} A. No.280/Bang/2014 dated 22.02.2017.

534. The Tribunal held that the assessee, engaged in providing software development services to its AE could not be compared to:

- Bodhtree Consulting Limited as it provided e-paper solutions, data cleansing software, website development and other customised software and had RPT transactions in excess of 25%.
- Geometric Software Solutions Limited as it was a product based company and segmental details of its service income were not available

- Tata Elxsi Limited due to the diverse nature of business it carried out and that its software development service segment also comprised 3 sub-services namely product design, design engineering and visual computing labs
- Sankhya Infotech Ltd as engaged in the development of software products & services and training, for transport and aviation industry and segmental information was not available
- Four Soft Ltd as it was Functionally dis-similar.

As regards the IT enabled services provided by the assessee, it held that it could not be compared to:

- Vishal Information as it had a low employee cost of 1.25% of operating revenue as against IT/ITes industry average of 46.1%, it was engaged in call centre services and its operating margin at 50.68% could not be considered to be normal
- Nucleus Netsoft& GIS Ltd as it had outsourced a considerable portion of its business,

Google India Pvt. Ltd. Vs. DCIT - TS-154-ITAT-2017(Bang)-TP - IT(TP)A No.1298/Bang/2013 dated 03.03.2017

535. The Tribunal, relying on the decision of the coordinate bench in Citrix Research & Development India Pvt. Ltd [TS-90-ITAT-2016(Bang)-TP] dismissed the appeal of the Revenue and upheld the order of the CIT(A) wherein Infosys Ltd had been excluded as a comparable. It observed that Infosys Ltd was a giant company, market leader, owned substantial intangibles, had substantial revenue from software products and had incurred huge expenditure on research and development and therefore could not be compared to the assessee, a captive service provider.

DCIT vs. Informatica Business Pvt. Ltd - TS-212-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1285/Bang/2014 dated : 17.03.2017.

536. The Tribunal held that the software development services provided by the assessee to its AEs could not be benchmarked with the following comparables:

- KALS Information System Ltd as it was engaged in development of software products and was not a pure software development service provider
- Bodhtree Consulting Ltd. as it provided end to end web solutions, off-shoring data management and data warehousing, it was more of a software product company and due to its different revenue recognition model whereby expense may have been booked in one year and revenue may have been recognized in earlier or subsequent year, it had fluctuating margins
- Tata Elxsi Ltd as its software development and services segment constituted 3 sub-segments namely product design, engineering design and visual computing labs
- Persistent Systems Ltd as it was engaged in product designing services and software product development.
- Larsen & Toubro Infotech Ltd as it was a global IT service and solutions provider.
- Sasken Communications Services Ltd as it owned products, IPRs etc.

Further, it held that insignificant 'other income' (interest, foreign exchange gain) could not affect the operating margins and therefore the comparability of an other-wise comparable company and thereby included F C S Software Solutions Ltd & Thinksoft Global Services Ltd as comparable.

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Huawei Technologies India P. Ltd. Vs. ITO - TS-157-ITAT-2017(Bang)-TP – IT(TP) A No 265 / Bang / 2014 dated 17.02.2017

537. The Tribunal held that the assessee engaged in providing software development services and market support services to its AEs could not be compared to:

- KALS Infosystems Ltd. as it was engaged in sale of software products apart from provision of software development services
- Tata Elxsi Ltd as it was engaged in product development, undertook diverse activities such as industrial design, engineering design and visual computing and also carried out R&D resulting in IP
- Accel Transmatics Ltd as it was engaged in provision of ACCEL Animation Services for 2D and 3D Animation etc. apart from software development service
- Infosys Technologies Ltd on account of its huge Brand value, substantial IPs, diversified operations including product development and also since it engaged in R&D activity
- Flextronics Software System Ltd as it was engaged in R&D and also acquires IP
- Lucid Software Ltd as it was involved in development of software product apart from software development services and its segmental details were not available
- Further, applying a turnover filter of 10 times the turnover of the assessee (Rs.19.39 crore), it also held that Flextronic Software Systems Ltd, having turnover of Rs. Rs.595.12 crores, ought to be excluded from the list of comparables.

Netscout Systems Software India Pvt. Ltd. (Formerly Network General Software India Pvt. Ltd.) vs DCIT - TS-185-ITAT-2017(Bang)-TP - I.T.{T.P} A. No.1479/Bang/2010 dated 15.02.2017

538. The Tribunal held that the assessee engaged in providing software development services to its AEs could not be compared with:

- Avani Cimcon Technologies Ltd as it earned revenue from software product sales apart from rendering of software services and no segmental data was available and also since it earned abnormally high profits during the relevant year which represented abnormal circumstances
- Celestial Labs Ltd as it was mainly into clinical research and manufacture of bio-products and other pharma related activities and it also owned Intellectual property
- E-Zest Solutions Ltd as it rendered product development consulting and other high-end IT enabled services normally categorised as KPO-type services
- Helios & Matheson Information Technology Ltd as it was functionally dis-similar
- Infosys Technologies Ltd as it was functionally dis-similar, it owned significant intangibles, had huge revenue from software products, incurred substantial R&D and segmental details for its software services and software products were not available
- Ishir Infotech Ltd as it out-sourced its work and therefore did not satisfy the 25% employee cost filter
- Lucid Software Ltd as it was engaged in development of software in addition to software services as opposed to assessee who was only into software development services
- KALS Information Systems Ltd as it was functionally dis-similar as it was engaged

in developing software products as well as services

- Persistent Systems Ltd as it engaged in product development and software designing and segmental details were not available.
- Thirdware Solutions Ltd as it was engaged in product development, it earned revenue from sale of licenses and subscriptions in addition to software development services and segmental details for software development services and product development were not available
- Wipro Ltd as it owned substantial IP and intangibles, was engaged in both software development and product development services and its segmental details were not available
- R-Systems International as it followed a different financial year
- Flexotronics Software Systems as its financial data was only for 9 month period and segment data reconciliation was not available.

ST Microelectronics Pvt. Ltd. vs. DCIT TS-82-ITAT-2017(Bang)-TP - IT(TP)A No.949IBang/2011 dated 06.01.2017

539. The Tribunal, following the decision of the co-ordinate bench in Airbus India Operations Pvt. Ltd [TS-446-ITAT-2014(Bang)-TP] excluded 2 companies viz. Infosys Technologies Ltd. and Bodhtree Consulting Ltd from the list of comparables for the purpose of benchmarking software development services provided by the assessee to its AEs during AY 2009-10, noting that the Revenue could not point out any difference in the facts vis-à-vis the said decision. As regards assessee's plea for exclusion of 'Thirdware Solutions Ltd', it noted that segmental data of this company was available with respect to revenue from software services and therefore remanded the comparability of this company to TPO with direction to consider only relevant segmental data for the purpose of computing the margin of the company.

Intuit Technology Services Private Limited Vs CIT(A) - TS-140-ITAT-2017(Bang)-TP - IT(TP)A No.1665/Bang/20 14 dated 31.1.2017

540. The Tribunal held that the assessee, engaged in providing software development services could not be compared to:

- Bodhtree Consulting Ltd as it was Functionally dissimilar
- Celestial Labs as it was engaged in product development in the field of biotech and pharmaceuticals, and had R&D expenditure more than 3% of its sales
- Persistent Systems Ltd as it was functionally dissimilar since it was engaged in software development and analytics services and did not have the required segmental data
- Quintegra Solution Ltd as it was engaged in R&D activities, product engineering services and also owned IPR
- Tata Elxsi Ltd as its software segment comprised activity of product designing services, it had significant intangible and R&D expenditure and also failed the onsite filter of more than 75%
- Thirdware Solutions Ltd as it was engaged in the business of software development products as well as software development, it acquired intangible assets and derived revenue based on sales of licenses, and did not have any segmental data.
- Wipro Ltd as it was an industry leader and owned IPR, and had also undertaken an amalgamation during the year.

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- Indus Networks Ltd as it outsourced its activities which was indicated by its very low employee cost

DCIT Vs Cypress Semiconductors Technology Pvt. Ltd. - TS-144-ITAT-2017(Bang)-TP] IT (TP) A No.463 (Bang) 2013 dated 07-02-2017

541. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- Tata Elxsi as the company was engaged in diverse activities, which included product design, services, innovation design, engineering services within the software development segment.
- Akshay Software as the company had onsite revenue.

The Tribunal also included R S Software as a comparable since both the parties i.e. the assessee and Revenue contested against the exclusion of the said comparable by the DRP and had agreed for its inclusion.

Further, the Tribunal remanded the comparability of Evoke Technologies in view subsequent availability of relevant data which was not available during assessment proceedings and also remanded L&T Infotech with specific directions to consider segmental results of the services segment, if available

Autodesk India Private Limited vs DCIT [TS-532-ITAT-2018(Bang)-TP] IT (TP) A Nos.303/Bang/2015 and 422/Bang/2015 dated 08.06.2018

542. The Tribunal held that the following companies could not be included in the list of comparable companies while benchmarking the international transactions carried out by the assessee viz. provision of software development services to its AEs:

- AvaniCincom Technologies, Celestial Biolabs Ltd, e-Zest Solutions Ltd, Infosys Ltd, Kals Information Systems Ltd, Persistent Systems Ltd, Tata Elxsi Ltd and Wirpo Ltd as they were functionally dissimilar as held in the decision of the Tribunal in Infineon Technologies India Pvt. Ltd. [TS-549-ITAT-2015(Bang)-TP]
- Flextronics Software Systems Ltd, iGate Global Solutiosn Ltd, Sasken Communication Technologies Ltd as their turnover exceeded 10 times the turnover of the assessee.

Further, it held that Softsol India Ltd was incorrectly rejected as comparable by the CIT(A) on the ground that it did not satisfy the 15 percent RPT Filter as the RPT filter was not a water tight compartment and the RPT percentage of 15 to 20% had been accepted in many cases. Considering the fact that the RPT of the said company was 18.3% (within the range of 15-20%), it held that the said company was to be considered as a comparable.

ITO vs. Ketera Software India Pvt. Ltd TS-139-ITAT-2017(Bang)-TP IT(TP)A No.460/Bang/ 2013 dated 22.02.2017

543. The Tribunal held that the ITES services provided by the assessee could not be compared to Wipro BPO Solutions Ltd as the said company owned substantial intangibles as well as huge goodwill and brand value.

Thomson Reuters India Services Pvt. Ltd. v ACIT – TS-1084-ITAT-2016 (Bang) – TP I.T. {T.P} A. No.1097/Bang/2011 I.T.(T.P} A. No.1115/Bang/2011 dated 09.12.2016

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544. The Tribunal, pursuant to a miscellaneous petition filed by the assessee, adjudicated on the assessee's ground relating to selection of comparables and held that:

- AvaniTransmatic Ltd, Celestrial Labs Ltd, Infosys Technologies Ltd, Kals Information Systems Ltd, Lucid Software Ltd, Tata ElxsiLtd, Flextronics Software Systems Ltd and Wipro Ltd were
- to be excluded as comparable as they were not functionally comparable with the assessee in light of the decision of the Co-ordinate bench in NXP Semiconductors India Pvt Ltd.
- Geometric Ltd and Ishir Infotech be rejected as their RPT was in excess of 15 percent.

Accordingly, it excluded 10 companies from the list of comparables.

Open Silicon Research PVt Ltd v ITO – TS-85-ITAT-2017 (Bang) – TP IT(TP)A No.1128lBang/2011) dated 09.01.2017

545. The Tribunal held that the assessee, engaged in providing software development services to its AEs could not be compared to:

- AccelTransmatics Ltd as it had abnormally high growth rates, fluctuating margins, failed the 75 percent software revenue filter and was functionally different
- AvaniCimcon Technologies Ltd, Celestial Labs Ltd, Ezest Solutions Ltd, Inshir Infotech Ltd, Kals Information Systems Ltd, Lucid Software Ltd, Persistent Systems Ltd & Tata Elxi Ltd as they were functionally dissimilar
- Flextronics Software Systems Ltd as it did not satisfy the upper turnover filter
- Helios & Matheson Information Technology Ltd as it had undergone abnormal fluctuations in margins and was functionally dissimilar
- Infosys Ltd as it had a huge brand name, earned high margins, was functionally different and was the industry leader
- Megasoft Ltd as it was functionally dissimilar and had abnormally high margins
- Wipro Ltd as it owned substantial intangible assets and was an industry leader

As regards Akshay Software Technologies Ltd and VJIL Consulting Ltd, it held that the DRP erred in excluding the said companies on the ground of onsite services as the onsite filter was not a valid ground for exclusion.

CAPCO IT Services India Pvt. Ltd. vs. ITO – TS-1079-ITAT-2016 (Bang) – TP ITA No. 1340 lBang/2011 dated 09.12.2016

546. The Tribunal held that the assessee operating as an offshore processing centre could not be compared to:

- Accentia Technologies Ltd as it was engaged in healthcare management, it owned IPRs which facilitated premium pricing and it had undertaken an extra-ordinary event during the year (acquisition and amalgation) which impacted its profitability
- Fortune Infotech Ltd as it was engaged in product development, owned IPRs and did not satisfy the RPT filter of 25 percent
- ICRA Online Ltd as it was providing KPO Services including financial research and analysis.

Outsource Partners International P Ltd vs. DCIT – TS-57-ITAT-2017 (Bang) – TP I.T(TP).A No.337/Bang/2015 dated 06.02.2017

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547. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- Sankhya Infotech Ltd as it was engaged in the development of software products and services and providing training for the transport and aviation industry
- Visual Soft Technologies Ltd as it was engaged in substantial R & D activities, which entitled it to command premium return
- Exensys Software Solutions Ltd as it was engaged in diversified operations visa-vis assessee Thirdware Solutions Ltd as it was engaged in diversified activities such as sale and purchase of licenses, ERP, purchase of AMCs etc
- Tata Elxsi Ltd as the company was engaged in development of niche product and development services
- Flextronics Software Systems Ltd since it was engaged in development of software products and incurred R&D expenditure for development of such products
- Satyam Computer Services Ltd since its data and information was unreliable owing to the financial scam
- Infosys Technologies Ltd as it was engaged in diversified activities owned intangibles, had high turnover and brand value

Thomson Reuters India Services Pvt. Ltd. v ACIT – TS-1084-ITAT-2016 (Bang) – TP I.T. {T.P} A. No.1097/Bang/2011 I.T.(T.P} A. No.1115/Bang/2011 dated 09.12.2016

548. The Tribunal directed exclusion of 9 companies viz. Aziec Software & Technology Ltd, Infosys Technologies Ltd, Mindtree Consulting Ltd, Persistent Systems Ltd, Sasken Communication Technologies Ltd, Tata Elxi Limited, Flextronics Software Systems Ltd, iGate Global Solutions Ltd and Lucid Software Ltd following the Tribunal ruling of Maxim India Integrated Circuit [TS-265-ITAT-2016(Bang)-TP],wherein the Tribunal had upheld turnover filter at certain number of times of assessee's turnover as against fixed slab from Rs. 1 crore to Rs. 200 crore.

Further, it accepted assessee's contention to exclude KALS Infosystem and AccelTransmatics as they were functional dissimilar as they were engaged in development of software products whereas the assessee was engaged in providing software development services.

IPASS India Pvt Ltd v ITO TS-1073-ITAT-2016 (Bang) – TP .IT(TP)A No. 1367 /Bang/2010 dated 29.11.2016

549. The Tribunal allowed the appeal of the Revenue and held that the CIT(A) was incorrect in applying a RPT filter of 0% and a turnover filter of Rs. 1-200 crore. It remitted the matter to the CIT(A)directing him to apply the RPT filter of 15 percent and a turnover filter of 10 times the turnover of the assessee and pass fresh orders.

DCIT v Shipara Technologies Ltd – TS-1041-ITAT-2016 (Bang) – TP IT (TP) A No.591 (Bang) 2012 dated 03.11.2016

550. The Tribunal dismissed the appeal of the assessee wherein it sought the exclusion of Bodhtree consulting Ltd by relying on the decision of Infinera India Pvt Ltd and held that

Infinera India was engaged in providing end to end web solutions, software consultancy as well as design and development of software whereas the assessee and Bodhtreewere engaged in mere software development services and therefore the reliance was misplaced. Further, it noted that Bodhtree had been accepted as comparable in the prior years as well for which the assessee had not raised any objection.

Narus Networks Pvt Ltd v DCIT – TS-55-ITAT-2017 (Bang) – TP IT(TP)A No.1631/Bang/2014 dated 31.01.2017

551. The Tribunal held that the assessee, a software development service provider, could not be compared to:

- Infosys Technologies Ltd on account of the huge difference in turnover
- Kals Information Systems Ltd as it was engaged in both software development service as well as products
- Sasken Communication Technologies as it was engaged in both software development services as well as in products
- Tata Elxsi Ltd as its software service segment contained income from product design, innovation design and engineering design
- Persistent Systems Ltd as it was engaged in diversified activities including licensing of products, providing maintenance services and earning income by way of royalty on sale of products.

Target Corporation of India Pvt Ltd v DCIT – TS -1083-ITAT-2016 (Bang) – TP IT. (T.P) A. No.343/Bang/2015 dated 29.12.2016

552. The Tribunal in the second round of litigation held that the assessee engaged in providing software development services could not be compared to:

- Kals Info Systems Ltd as it was engaged in development of software products and training
- AccelTransmatics as it was functionally different

As regards Megasoft ltd, the Tribunal directed the AO / TPO to consider only the software development services segment of the company for the purpose of benchmarking.

Yodlee Infotech Pvt Ltd – TS-1082-ITAT-2016 (Bang) – TP - I.T. (T.P) A. No.131/Bang/2016 dated 29.11.2016

553. The Tribunal remitted the issue of comparability of the following companies vis-à-vis the assessee, engaged in the business of development of software and indenting sale of industrial software

- Aztec Software & Technology Ltd to verify the export revenue to sales ratio of the company (the assessee had contended that the comparable was erroneously rejected by the TPO since its export to sales ratio was 89.44 percent which satisfied the filter of the TPO)
- Larsen & Toubro Infotech Ltd to verify whether the assessee was correct in contending that the TPO had erroneously rejected the company on the basis of the RPT filter whereas the company's RPT filter was 19.97% i.e. less than the 25% filter adopted by the TPO
- SIP Technologies & Exports Ltd to verify whether the assessee's contention that the TPO had wrongly excluded the company on the ground of extra-ordinary

event, when the extra-ordinary event had taken place in prior years, was correct.

NXP Semi Conductors India P Ltd v DCIT – TS-1081-ITAT-2016 (Bang) – TP I.T(TP).A No.1560/Bang/2012 dated 25.01.2017

554. The Tribunal held that the assessee, engaged in providing software development services to its AE could not be compared to:

- Bodhtree Consulting Ltd as it was functionally dissimilar to the assessee being engaged in the business of software product and provided open and end to end web solutions, offshore data management, software consultancy and design services
- Infosys Technologies Ltd as it owned intangibles and derived income from both software services and products without any segmental reporting
- Persistent Systems Ltd as it was engaged in software development services and products and also engaged in R&D activities and owned intangible assets
- Larsen & Turbo Infotech LTd as it carried out various activities including both software development services as well as products, had a huge turnover in excess of 10 times that of the assessee and it also owned intangible assets

Broadcom India Research Pvt Ltd v DCIT – TS-1036-ITAT-2016 (Bang) – TP IT(TP)A No.621Bang/2014 IT(TP)A No.46 /Bang/2014 dated 03.11.2016

555. The Tribunal held that the assessee, a captive service provider engaged in the business of rendering software development services to its AEs could not be compared to:

- Infosys Technologies as it owned intangible assets, had huge brand value and provided diversified services
- L&T Infotech Ltd as it earned revenues from both software products as well as software development services and did not have any segmental information
- ICRA Techno Analytics Ltd as it was engaged in diversified activities
- Kals Information Systems Ltd as it was engaged in the software product business
- Persistent Systems Ltd as it earned revenue from various activities including licencing of products and the segmental data was not available
- Tata Elxsi Ltd as it was engaged in diversified activities
- Sasken Communications Technologies Ltd as it earned revenue from 3 segments but the segmental margins were unavailable.

Cerner Healthcare Solutions P Ltd v ITO – TS-28-ITAT-2017 (Bang) – TP I.T(TP).A No.44/Bang/2015 I.T (TP).A No.69/Bang/2015 dated 16.01.2017

556. The Tribunal held that the assessee, engaged in the business of providing ITES services relating to back office operation to its AEs was not comparable to:

- Eclerx Services Ltd as it was engaged in providing KPO / high end services involving specialized knowledge and domain expertise in the field of retail, manufacturing and financial services
- Infosys BPO Ltd as it was a market leader, had huge brand value commanding premium pricing, owned substantial intangible assets and was engaged in the business of software products and software services

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- Vishal Information Technologies as it had a different business model considering it outsourced a substantial portion of its work
- Wipro Ltd as it owned substantial IP on software products
- Acropetal Technologies as it was engaged in high end KPO type design engineering activities which could not be equated with IT Services.

Further, it remitted the comparability of the following companies to the file of the TPO:

- Accentia Technologies Ltd & Mold Tek Technologies Ltd to verify whether an extra-ordinary event had taken place in the ITES segment of the company
- Genesys International Corp Ltd to verify the nature of services provided by the company
- Crossdomain Solutions to verify the functional comparability of the company.

Siemens Technology & Services Pvt Ltd v ACIT – TS-1080-ITAT-2016 (Bang) – TP I.T.{T.P} A. No.1601/Bang/2012 dated 16.12.2016

557. The Tribunal held that the assessee, engaged in providing data processing and IT enabled services could not be compared to:

- Accentia Technologies Ltd as it had undergone extra-ordinary events during the year (merger / acquisition) and had had low employee cost
- Asit C Mehta Financial Services Ltd as it was engaged in product development and outsourced a substantial portion of its work
- Bodhtree Consulting Ltd as it owned intangibles, had fluctuating margins and was functionally different
- Eclerx Services Ltd as it was engaged in providing KPO services
- HCL Comnet Systems and Services Ltd as it was functionally different and followed the June year ending
- Informed Technologies as it was functionally different and had abnormal growth
- Infosys BPO Ltd as it was a market leader and provided diversified services
- Maple eSolutions Ltd as it had unreliable financial results since its director was involved in fraud
- Mold TekTechnolgoies as it was functionally different and had abnormal growth patterns
- Spanco Ltd as it had low employee cost and was functionally different
- Triton Corp Ltd as it had unreliable financial results since its Director was involved in fraud and also since it was functionally different and had undergone an extra-ordinary event (merger)
- Vishal Information Technologies Ltd as it had low employee cost
- Wipro Ltd as it was a market leader and owned intangibles

Global e-Business Operations P Ltd v DCIT -TS-35-ITAT-2017 (Bang) – TP - I.T(TP).A No.1092/Bang/2011 dated 16.01.2017

558. The Tribunal held that the assessee, engaged in providing contract software development services to its AE could not be compared to:

- Infosys Technologies Ltd as it was a market leader in software development activities, had huge brand value, dealt in both software and software products owned substantial intangibles and incurred huge R&D expenses

- Kals Information System Ltd & Persistent Systems Ltd as they were engaged in the development of software products
- SaskenComm Technologies as it was engaged in both software development services and development of software products without segmental results.

It also accepted ICRA techno Analytics Ltd (seg), Larsen & Toubro Infotech Ltd, Mindtree Ltd (seg) and Thinksoft Global Services Ltd as comparable.

IDS Software Solutions India Pvt Ltd v ITO – TS-1072-ITAT-2016 (Bang) – TP IT(TP)A No.l541Bang/2015 dated 28.11.2016

559. The Tribunal held that the assessee, engaged in providing contract software development services to its AE could not be compared CelestrialBiolabs as the said company was engaged in the development of products in the field of bio technology and pharma and thus functionally dissimilar to the assessee.

DCIT v IDS Software Solutions India Pvt Ltd – TS-1085-ITAT-2016 - IT(TP)A No.214 IBang/20 14 IT(TP)A 179/Bang/2014 dated 16.12.2016

560. The Tribunal held that the assessee engaged in the business of providing ITES and Support Services could not be compared to Infosys BPO Ltd due to its high turnover, high brand value and presence of intangibles.

Further it rejected the assessee's contentions and held that the following companies were to be included as comparable:

- Aditya Birla Minacs Worldwide Ltd as the said company was functionally comparable and satisfied all filters chosen by the TPO
- Accentia Technologies Ltd as the company, as contended by the assessee, was not engaged in software development and in fact was into ITES.
- Cosmic Global Ltd as the company, as contended by the assessee, did not outsource majority of its services considering that the salaries and wages account for 21.31% of its expenses and no expenditure was shown towards outsourcing of work

It remanded the comparability of Eclerx Services as there was no finding on record enabling the Tribunal to determine whether the company was a KPO or ITES company. It held that if it was found to be a KPO company it ought to be excluded.

Control Component India Pvt Ltd v DCIT – TS-1043-ITAT-2016 (Bang)- TP - IT(P)A No.4/Bang/2014 dated 09.11.2016

561. The Tribunal held that the assessee, engaged in providing software development services to its US based AE could not be compared to Kals Information Systems Ltd as the said company was engaged in development of software development products. It held that it was a well settled principle that software development companies could not be compared with companies engaged in development of software products.

DCIT v Sterling Commerce Solutions India Pvt Ltd – TS-86-ITAT-2017 (Bang) – TP - IT(TP)A No.439/Bang/2015 IT(TP)A No.546/Bang/2015 dated 20.01.2017

562. The Tribunal held the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Celestial Biolabs Ltd as it was engaged in providing clinical research and

manufacture of bio products and other products rendering it functionally dissimilar to the assessee.

- Avani Cimcon Technologies ltd as it was earning revenue from software products as well as services and its segmental details were unavailable.

ITO vs. Radisys India P Ltd-TS-747-ITAT-2017(bang)-TP-I.T(TP).A No.615/Bang/2013 dated 24.09.2017

563. The Tribunal held that assessee engaged in the business of providing IT related services could not be compared to:

- Celestial Labs as it was engaged in providing pure software development services and R&D and therefore was functionally dissimilar to the assessee.
- Avani Cimcon Technologies as it was earning revenue from software products along with IT services and its segmental details were unavailable.

Further, it remitted the comparability of Flextronics Ltd, iGate Global Solutions Ltd, Infosys Technologies Ltd, Mindtree Ltd, Persistent Systems Ltd, Sasken Communication Technologies Ltd, Tata Elxsi Ltd, Wipro Ltd to the file of AO/TPO to verify whether the turnover or size of the said comparables affected their price/margins. It also remitted the comparability of KALS Information Ltd to the file of AO/TPO for computation of margin and to examine whether it was engaged in product development and earned income from training/brand name.

Radisys India P Ltd [TS-662-ITAT-2017(Bang)-TP-I.T(TP).A No.615/Bang/2013 Dated 24.08.2017

564. The Tribunal held that the assessee engaged in the business of software development services could not be compared to:

- E-Infochips Limited as it earned revenue from software development, hardware maintenance, information technology, consultancy without adequate segmental data rendering it functionally dissimilar to the assessee.
- Sasken Communication Technologies ltd as the company was engaged in providing software services and software products and segmental details were unavailable.
- E-Zest Solution ltd as it was engaged in providing KPO services which was not functionally comparable to the assessee.
- Acropetal Technologies ltd as its income from ITES was less than 75% of its total income failing the filter applied by TPO.
- L&T Infotech Limited as it had an RPT of 18.66% and failed the 15% RPT filter applied by TPO.
- Persistent System Solution ltd as it was engaged in providing licensing of products and earned income from maintenance contract and therefore was functionally dissimilar to the assessee.
- Tata Elxsi Limited as its export revenue to total revenue was 73.30% which failed the 75% filter applied by TPO.
- ICRA technology Analytics Limited as it was engaged in providing KPO services rendering it functionally dissimilar to the assessee.
- Infosys Technologies Limited as it had huge brand value, intangibles and huge turnover and therefore could not be compared to the assessee.

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Electronic Imaging India Pvt Ltd vs DCIT-TS-659-ITAT-2017(Bang)-TP-ITA No. 1506 / bang /2015 dated 14.07.2017

565. The Tribunal held that the assessee a captive software development services provider could not be compared to:

- ICRA Techno Analytics Ltd as it had an RPT of 20.94% and failed the 15% RPT filter applied by TPO.
- Infosys Ltd as it had huge brand value, substantial intangible asset and bargaining power and there could not be compared to a captive service provider.
- KALS Information Systems Ltd as it was engaged in the business of software products and had huge inventory rendering it functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was engaged in diversified activities and earned revenue from licensing of products, royalty on sale of products as well as income from maintenance contract.
- Sasken Communication Technologies Ltd as it had 3 revenue segments viz., software services, software products and other services without adequate segmental details.
- Tata Elxsi Ltd as it was engaged in providing diversified services like product design, innovation design services, visual computing labs rendering it incomparable to the assessee.

Further, in respect of sales and marketing segment, it held that the assessee could not be compared to:

- HCCA Business Services Pvt. Ltd as it was engaged in providing payroll process services which was functionally dissimilar.
- Killick Agencies & Marketing Ltd as it was acting as an agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propulsions and other equipment and machineries rendering it functionally dissimilar to the assessee.

AMD India Pvt Ltd vs DCIT-TS-702-ITAT-2017(Bang)-TP-IT(TP)A No.242 & 204 / B / 15 dated 24.08.2017

566. The Tribunal held that assessee engaged in providing software development services to its AEs could not be compared to:

- KALS Information Systems Limited as it was engaged in development of software products and services and therefore could not be compared to a pure software development service provider.
- Bodhtree Consulting Limited as it was engaged in business of software products and providing open and end to end web solutions software consultancy and design and development of software rendering it functionally dissimilar to the assessee.
- Tata Elxsi Limited as it was engaged in software development services comprising of embedded product design services, industrial design and engineering services and visual computing labs and system integration services and segmental details were unavailable.
- Persistent Systems Limited as it was engaged in product designing and software

product development. Further it had a research centre for development informatics, specially life time product, life cycle services, medical research, chemistry and computer science rendering it functionally dissimilar to the assesee.

- Infosys Limited as it owned significant intangibles, brand influence and had huge revenue from software products.

Kodiak Networks India Pvt Ltd vs DCIT-TS-753-ITAT-2017(Bang)-TP-IT(TP)A No. 296 / bang / 2014 dated 08.09.2017

567. The Tribunal held that the assessee a captive service provider engaged in the business of providing software research and development services to its AE could not be compared to:

- E-Infochips Ltd as it earned revenue from software development, hardware maintenance, information technology and consultancy services and no segmental data was available.
- Acropetal Technologies ltd as it failed the 75% Revenue filter applied by TPO as the income from software development services [Rs. 81. 40 cr out of rs. 141.65 cr] was only 57.46% of the total revenue.

Microsoft Research Lab India Pvt. Ltd vs. ACIT-TS-701-ITAT-2017(Bang)-TP-IT(TP)A no. 115/bang/2016 dated 16.08.2017

568. The Tribunal held that the assessee engaged in the business of providing ITeS services could not be compared to:

- Accentia Technologies ltd as it was operating under Software as a service model (SAAS) model and had developed its own software product for BPO services and therefore was functionally dissimilar to the assessee.
- Datamatics Financial as the export sale of 58.90% and failed the 75% export filter applied by TPO.
- ICRA online Ltd as it was engaged in KPO services and therefore was functionally dissimilar to the assessee.
- Infosys BPO Ltd as it was a giant company with the benefit of brand value and market leadership.
- E-clerx Services Limited as it was engaged in providing data analysis, operating management, audits, reconciliation, metrics management and operating services and therefore was functionally dissimilar to the assesse.

Further, it remitted the comparability of Jeevan Scientific Technology Limited to verify the segmental details submitted by the assessee as the annual report of the company showed that its revenue/income comprised of various operations and activities which included BPO, ERP project implementation, corporate and student training and income from study centre and the assessee had contended that segmental details were available which were not accepted by TPO.

ITO vs Arctern Consulting (P) ltd-TS-717-ITAT-2017(Bang)-TP-I.T. (T.P) A. No.195/Bang/2015 dated 11.08.2017

569. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in the business of software

products and was engaged in providing open & end to end web solutions software consultancy and design & development of software using latest technology and therefore was functionally dissimilar to the assessee. Persistent Systems Ltd as it was engaged in product designing services and into software product development rendering it functionally dissimilar to the assessee.

- L&T Infotech and Sasken Communications Technologies Limited as they had a turnover of more than 200 crores as compared to the assessee of Rs. 111.60 crores.
- Infosys Ltd as it was a giant company in the area of software and it assumed all risks leading to higher profits rendering it incomparable to the assessee.
- KALS Information systems Ltd as it was engaged in the development of software products and services and segmental details were unavailable.
- Tata Elxsi Limited as it was engaged in providing embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and therefore was functionally dissimilar to the assessee.

DyCIT vs Sterling Commerce Solutions India Pvt. Ltd.-TS-920-ITAT-2017(BANG)-TP-ITA No. 186/Bang/2014 dated 31.10.2017

570. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- KALS Information Systems as it was engaged in software development services and software products and segmental details were unavailable.
- Bodhtree Consulting Co. as it was engaged in the business of software products and in providing open & end to end web solutions software consultancy and design & development of software using latest technology rendering it functionally dissimilar to the assessee.

Sling Media Pvt. Ltd vs Deputy Commissioner of Income Tax- TS-917-ITAT-2017(Bang)-TP- ITA No 253/Bang/2014 dated 27.10.2017
British Marine PLC -India Branch [TS-908-ITAT-2017(Mum)-TP dated 27.10.2017

571. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- Sasken Communication Technologies Ltd, SQL Star International Ltd, Space Computer and Systems Ltd as it had a wage/sales ratio of 61.85%, 27.61% and 22.99% respectively and failed the 30% to 60% range of the employee cost filter applied by the TPO.

Avaya India Private Limited vs. DCIT-TS-944-ITAT-2017(Bang)-TP ITA No.1420/Del/2014 dated 30.11.2017

572. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology and therefore functionally dissimilar to the assessee.
- KALS Information Systems Ltd as it was providing services in the field of

consultancy, information provider and general insurance sector rendering it functionally incomparable to the assessee.

Further, it included Thinksoft Global Services and FCS Software Solutions Ltd in the list of comparables as they were functionally similar to the assessee..

NI Systems (India) Pvt. Ltd vs. DCIT-TS-900-ITAT-2017(Bang)-TP-ITA No. 1337/bang/2014 dated 10.11.2017

573. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in providing KPO services, was a product development company which held significant IPRs and its segmental information was not available.
- Acropetal Technologies Ltd as it was engaged in providing high end engineering design services rendering it functionally dissimilar to the assessee.

Further, it remitted the comparability of i) Jeevan Scientific Technology Ltd to verify whether the income from BPO operations was less than 1 cr in which case the company was to be excluded, ii) Infosys BPO to examine the functional comparability and iii) ICRA Online Ltd for the limited purpose of computation of margin to the file of TPO.

Novo Nordisk India Pvt. Ltd vs. DCIT-TS-879-ITAT-2017 IT(TP)A No.247/Bang/2016 dated 31.08.2017

574. The Tribunal accepting Revenue's plea, included Exencys Software Solutions, Flextronics Software Systems, iGate Global Solutions Ltd, Infosys Technologies Ltd (which were excluded by the CIT(A) on the ground that they did not satisfy the Turnover filter of Rs. 1-200 crores) and held that the a company cannot be excluded only on the ground of turnover filter. While the assessee conceded to the application of the Turnover filter during the hearing before the Tribunal and contested the exclusion of the comparables based on functionality, the Tribunal noting that the plea of the assessee had not been taken before the TPO dismissed the assessee's contention.

ITO vs Infinera India Pvt Ltd-TS-866-ITAT-2017(Bang)-TP IT(TP)A No.599/Bang/2013 dated 13.10.2017

575. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in providing end to end web solutions, off shore data management, software consultancy and design and development of software using latest technology rendering it functionally dissimilar to the assessee.
- Infosys Ltd as it was a giant company owing huge intangibles. Further, it earned income from software services as well as software products without adequate segmental results and was therefore functionally dissimilar to the assessee.

Celstream Technologies Pvt. Ltd vs. DCIT-[TS-853-ITAT-2017(Bang)] dated 29.07.2017

576. The Tribunal held that the assessee engaged in the business of providing software development services to its AEs could not be compared to:

- Exensys Software Solutions Ltd as it had abnormal profits on account of extra

ordinary event of amalgamation and non-availability of segmental results.

- Thirdware Solutions Ltd as it was engaged in providing software development services as well as software products and segmental details were unavailable.
- Sankhya Infotech Ltd as it was engaged in the business of development of software products and services and training, and segmental results were unavailable.
- Bodhtree Consultancy Ltd as it had an RPT of 24.68% failing the 15% RPT filter applied by TPO.
- Geometric Software Solutions Ltd as it was engaged in providing software development services as well as software products and segmental details were unavailable.
- Foursoft Ltd as it was engaged in product development and ownership of products such as LS etrans and 4S elog and therefore was functionally dissimilar to the assessee.

SAP Labs India Private Ltd vs Addl.CIT-TS-855-ITAT-2017(Bang)-TP dated 22.09.2017

577. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- Bodhtree Consulting ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology and therefore was functionally dissimilar to the assessee.

Further, it remitted the comparability of FCS Software Solutions ltd and Thinksoft global services ltd to the file of TPO, directing it to examine the benefit of working capital adjustment and include it in the final list of comparables.

Ariba Technologies India Pvt. Vs ITO-TS-831-ITAT-2017(Bang)-TP IT(TP)A No.1592/Bang/2014 dated 11.10.2017

578. The Tribunal held that assessee engaged in providing software development services could not be compared to:

- Bodhtree Consulting Ltd as it had fluctuating margins and followed a different revenue recognition model i.e a fixed price model.
- Infosys Technologies Ltd as its brand value was much higher than the brand value of the assessee company
- Further, the Tribunal included the following as comparables :
- TATA Elxsi Ltd as functions of both the assessee as well as of this company were broadly comparable. It opined that when TNMM is used as the MAM (Most Appropriate Method), the functions need not be identical and a broad similarity, would suffice for the purpose of selecting a comparable.
- Persistent Systems Ltd. as it was functionally similar to the assessee
- Larsen & Toubro Infotech Ltd., it rejected assessee's plea for exclusion of the company on the ground that the related party transactions in the case of this company was more than 15% accepting Revenue's contention that 25% RPT filter had been consistently applied by the Tribunal in various cases.

Tribunal remitted back to the file of AO, FCS Software Solutions &Think Soft Global Services Limited for the limited purpose of verification of the nature of core activity and

availability of segmental data and Sasken Communication Technologies Ltd to AO for computation of margins.

CAE Simulation Technologies Pvt Ltd [TS-796-ITAT-2017(Bang)-TP] I.T(TP).A. NQ. l0Q/Bang/2()14 dated 01.09.2017

579. The Tribunal held that the assessee engaged in providing software development services could not be compared to:

- Avani Cimcon Technologies Ltd as it was engaged in providing software development services and software products and segmental details were unavailable.
- Celestial Biolabs Ltd as it was engaged in product development in the field of biotech and pharmaceuticals rendering it functionally dissimilar to the assessee.
- E-zest Solutions Ltd it was engaged in rendering product development and KPO services and therefore was functionally dissimilar to the assessee.
- Infosys Technologies Ltd as it had substantial brand value, owned intellectual property right and was a market leader in software development activities.
- KALS Information Systems Ltd as it was engaged in development of software products and also provision of training services rendering it functionally dissimilar to the assessee.
- Lucid Software Ltd as it was engaged in software products and therefore could not be compared to the assessee.
- Persistent Systems Ltd as it was engaged in product development and product design services and segmental details were unavailable.
- Quintegra Solutions Ltd as it was engaged in product engineering services and therefore functionally dissimilar to the assessee.

  Softsole India ltd as it had an RPT of 17.98% failing the 15% RPT filter applied by TPO.
- Tata Elxsi Ltd as it was engaged in product designing services and not pure software development services rendering it functionally incomparable to the assessee.
- Thirdware Solutions Ltd as it was engaged in software development services and earned revenue from sale of licenses and subscription and therefore was functionally dissimilar to the assessee.
- Wipro Ltd as it owned IPR, intangibles and was also engaged in software development services and software products and segmental details were unavailable.

ABB Global Industries & Services Limited vs ACIT-TS-816-ITAT-2017(BANG)-TP IT(TP)A No.1612/Bang/2012 dated 24.08.2017

580. The Tribunal held that the assessee engaged in the business of providing IT and ITes could not be compared to:

- Accentia Technologies Ltd as it had an extraordinary event during the year and therefore was incomparable to the assessee.
- E-clerx Services Ltd as it was engaged in providing complete business solutions in the nature of high end services and therefore was functionally dissimilar to the assessee.

- Infosys BPO as it had benefit of market value as well as brand value and enjoyed benefits of scale and market leadership.

ACIT vs. Mindteck (India) Ltd-TS-784-ITAT-2017(Bang)-TP 426/Bang/2015 2010-11 dated 27.09.2017

581. The Tribunal remitted the functional classification of services rendered by assessee to AE for fresh adjudication. The Tribunal noted that the AO/DRP had considered nature of services rendered by assessee as software development services instead of manpower supply/ IT Consulting Services as claimed by assessee. The Tribunal opined that there was merit in the contentions of the assessee that services rendered were of man power/personnel on perusal of the Service Agreement between assessee & AE as well as invoices raised which showed that billing was done on man days of employees, billing rates were different for various grades.

Enzen Technologies Private Limited vs ACIT [TS-533-ITAT-2018(Bang)-TP] IT (TP) A No.2540/Bang/2017 dated 04.06.2018

582. The Tribunal remanded the following comparables to file of TPO for the assessee engaged in the provision of software development services:

- R Systems International Limited with a direction to include the company if the financial results for the year ending on 31.03.2013 can be worked out from audited accounts by relying on the HC ruling in the case of Mercer Consulting (India) Pvt Ltd
- ICRA Techno Analytics Ltd for computing the RPT and also held that RPT filter of 25% was proper
- L&T Infotech Limited for the TPO to be satisfied whether the brand value, hugh profits or high turnover materially affected the price or cost and secondly, an attempt to be made to eliminate the effect of such differences in light of the HC ruling in the case of Chryscapital Investment Advisors Ltd wherein it was held that high profits or high turnover cannot be a reason to exclude a company.
- Mindtree Ltd noting that orders of TPO and DRP were not speaking order on the aspect that the company was engaged in diversified activities and had high IP with a direction to provide the assessee with an opportunity of being heard before considering the aforesaid aspects.
- Persistent Systems Limited noting that the orders of the TPO and DRP were not speaking orders on the aspect that the company was functionally dissimilar and was engaged in product engineering, technology consulting, strategic partnership to build platforms and IP-led business etc. with a direction to provide the assessee with an opportunity of being heard.

Tecnotree Convergence Pvt Ltd vs DCIT [TS-925-ITAT-2018(Bang)-TP] IT (TP) A No.1616/Bang/2017 dated 27.06.2018

583. The Tribunal held that the assessee engaged in the business of providing software development services to its (AEs) could not be compared to:

- Infosys Ltd as it was engaged in providing end to end solutions encompassing technical, consulting, design,development, reengineering, maintenance, systems integration and package evaluation and implementation.
- KALS Info Systems Ltd as it was engaged in software development services

and software products and segmental details were unavailable.

- Tata Elxsi Ltd as it was engaged in niche product and development services and therefore functionally dissimilar to the assessee.
- Accel Transmatics ltd as it was engaged in the services in the form of training services in hardware and networking, enterprise system management, embedded system, VLSI designs, CADICAMIBPO and animation services for 2D and 3D animation.

Sykes Enterprises (India) Pvt Ltd vs ACIT-TS-798-ITAT-2017(BANG)-TP IT(TP)A No.1291/Bang/2010 dated 01.09.2017

584. The Tribunal remitted the comparability of the following companies while benchmarking the international transaction of the assessee engaged in the business of providing ITeS:

- Vishal Information Technologies Ltd as the assessee had not objected for its exclusion before TPO/CIT(A).
- Wipro BPO ltd as the CIT(A) had failed to comment on the functional dissimilarities raised by assessee.
- Tricom India Ltd as though the assessee itself had selected the comparable, it had now sought its exclusion on the ground of functional dissimilarity, huge R&D activities and, abnormal growth and extraordinary events.

Global e-Business Operations Pvt. Ltd vs DCIT-TS-654-ITAT-2017(BANG)-TP-IT(TP)A no. 297/bang/2014 dated 26.07.2017

585. The Tribunal, while benchmarking the international transactions of the assessee i.e provision of software consulting services to its AE, allowed Revenue's plea for inclusion of the following companies:

- Exensys Software Solutions ltd, iGate Global Solutions and Flextronics ltd, L&T Infotech and Satyam Infotech ltd as they would not be excluded merely because they earned/suffered abnormal profits/abnormal losses.
- Bodhtree Consulting ltd since it had only one segment of software development, therefore functionally comparable and could not be excluded merely on the ground of wide fluctuations in the margin.

DCIT vs. Oracle Solutions Services (India) Pvt. Ltd-TS-663-ITAT-2017(Bang)-TP-IT(TP)A No. 880/bang/2013 dated 09.08.2017

586. The Tribunal held that the assessee engaged in the business of providing software design and development services could not be compared to:

- Tata Elxsi Limited as the company was functionally dissimilar to the assessee as it was not engaged solely in the business of software development services but also embedded product design, industrial services and engineering services which was functionally dissimilar to the assessee.
- Infosys Ltd as it was a product company owning significant inventory, intangibles and had earned brand related profits and thus was functionally dissimilar to the ssessee.

JCIT vs Rambus Chip Technologies (India) Pvt Ltd-TS-635-ITAT-2017(Bang)-TP-IT(TP)A No. 1091/BANG/2016 dated 28.07.2017

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587. The Tribunal held that assessee engaged in the business of providing software development services could not be compared to:

- Acropetal Technologies Ltd as the revenue from IT services was Rs. 81.40 crores i.e. less than 75% of the total revenue of Rs. 141.65 crores.
- E-Infochips Ltd as it was engaged in the business of providing software development services and sale of software products and also held inventories. Further segmental details were unavailable.
- Infosys ltd as it was engaged in the production of software products such as Finacle, I-smart etc and the company also incurred substantial expenditure on R&D, owned intangibles/patents and had tremendous brand value.
- ICRA Techno Analytics Ltd as it was engaged in the business of providing software development, consultancy, licensing and sub-licensing, annual maintenance charges for software support and accordingly was functionally dissimilar to the assessee.

Zynga Game Network India Pvt Ltd vs. ACIT-TS-640-ITAT-2017(bang)-TP-IT(TP)A No. 360/bang//2016 dated 12.07.2017

588. The Tribunal held that Infosys BPO which had huge brand value, goodwill, huge economies of scale and wide geographical disposal of customers, could not be compared to the assessee,a captive service provider engaged in providing software development services. Further, it remitted the comparability of TCS Eserve, BNR Udyog Ltd and Jindal Intellicom ltd to the file of DRP to decide the issue of availability of segmental data after affording an adequate opportunity of being heard to the assessee.

Indegene Pvt. Ltd (formerly known as Indegene Life Systems Pvt. Ltd) vs ACIT-TS-645-ITAT-2017(Bang)-TP-IT(TP)A No. 591/B/17 dated 02.08.2017

589. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- Infosys Ltd as it was giant in the area of development of software having high profits.
- Tata Elxsi Ltd as it was engaged in the development of niche product and development services which was entirely different from pure software development company.

Further, it rejected assessee's plea to exclude the following companies as comparables:

- Aztec Software Systems ltd and Megasoft Ltd on the ground that they had RPT in excess of 15% i.e., 17.78% and 18% as it satisfied the 25% RPT filter applied by TPO. It held that the assessee had not brought any evidence or reasons on record justifying application of 15% filter as against 25% applied by TPO.
- KALS Infosystems ltd as it earned 75% of revenue from software services and therefore the assessee's contention that it was engaged in development of application software (software products) and training was not invalid.
- Accel Transmatics ltd as it was engaged in both software products as well as software services and segmental details were clearly available contrary to assessee's claims.

Synopsys (India) Pvt. Ltd vs ACIT-TS-641-ITAT-2017(Bang)-TP-ITA No. 1169/bang/2010 dated 07.07.2017

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590. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- Tata Elxsi Ltd as it was engaged in software development, product design services, innovative design engineering services and visual computing labs and therefore functionally dissimilar to the assessee.
- Infosys Ltd as it was a giant company engaged in software development and software product, owned intangibles and had huge revenue from software products.
- Persistent Systems as it was engaged in software products and services and segmental details were not available.

NMS Communications Pvt Ltd vs DCIT-TS-652-ITAT-2017(Bang)-TP-ITA No. 267/bang/2014 dated 14.07.2017

591. The Tribunal, in respect of assessee engaged in the business of software development, remitted the comparability of the following companies to the file of AO/TPO:

- Flextronics Ltd, iGate Global Solutions ltd, Infosys Technologies ltd, Mindtree Ltd, Persistent Systems, Sasken Communication technologies ltd, Tata Elxsi ltd, Wipro ltd to decide whether turnover/size of the comparables affected their price/margins.
- KALS Information Ltd to verify whether the company was engaged in the business of product development and earned income from training/brand name.

Further, it held that the assessee could not be compared to:

Celestial Biolabs ltd as it was not a pure software development company and was engaged in research and development.

- Avani Cimcom Technologies ltd as it was engaged in software services and products and segmental details were unavailable.
- Saksoft ltd as it had RPT of 16% which failed the 15% RPT filter applied by TPO.

ITO vs Radisys India P. Ltd-TS-662-ITAT-2017(Bang)-TP-IT(TP)A no. 615/bang/2013 dated 24.08.2017

592. The Tribunal held that the assessee engaged in the business of providing information technology enabled service (ITeS) could not be compared to:

- Accentia Technologies Limited as it was engaged in the business of providing high end medical transcription services & had substantial income from coding, therefore functionally dissimilar to the assessee.
- Microland Limited as thus it failed the 75% revenue filter applied by TPO, as its revenue from ITeS segment was only 20% of the company's total revenue.
- E4e Healthcare Business Services Pvt Ltd as the company had an outstanding on account of forward contracts of USD 11.85 million and therefore the forward contract had influenced the margins of the company. Further, there was huge difference in the amount of bad debts written off in the earlier years in comparison to the year under consideration.

Further, it included Microgenetic Systems Limited as it satisfied the employee cost filter applied by TPO and accordingly directed the AO/TPO to include the comparable.

Capital One Services India Pvt Ltd vs DCIT-TS-629-ITAT-2017(Bang)-TP-IT(TP)A No. 276/bang/2016 dated 28.06.2017

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593. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- Infosys BPO Ltd as it was engaged in the business of providing end to end outsourcing service, provider and therefore was functionally dissimilar to the assessee.
- Acropetal Technologies ltd as it was engaged in providing high end knowledge processing services and therefore functionally dissimilar to the assessee.

Further, it remanded the comparability of Accentia Technologies Ltd to the file of TPO with a direction to examine the master service agreement of the assessee with its AE and compare the functions performed by the assessee with that of the comparable.

Zyme Solutions P. Ltd vs ACIT-TS-633-ITAT-2017(Bang)-TP- IT(TP)A No. 85/bang/2016 dated 26.07.2017

594. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- E-Infochips Limited as it was engaged in the business of software development, hardware maintenance, information technology, consultancy and therefore was functionally dissimilar to the assessee.
- Sasken Communications as it earned revenue both from software products and services as against the assessee who provided only software services.
- E-zest Solution Limited as it was engaged in providing KPO services and therefore was functionally dissimilar to the assessee.
- Acropetal Technologies Limited having revenue from ITES of 56% as it failed the 75% revenue filter applied by TPO
- L&T Infotech Limited as it failed the 15% RPT filter applied by TPO.
- Persistent System & Solution ltd and Persistent Systems ltd as it was engaged in diversified activities and earned revenue from licensing of products, royalty on sale of products as well as income from maintenance contract and therefore was functionally dissimilar to the assessee.
- Tata Elxsi ltd as it failed the 75% export filer applied by TPO.

Further, in respect of sales and marketing support services, it held that the assessee could not be compared to:

- Asian Business Exhibition and Conferences limited as it was engaged in the organization of exhibitions and events as well as conducting conferences on behalf of the various clients for their various products and businesses vis-à-vis assessee which was a sales and marketing services to its AE.
- ICC International Agencies Limited as it derived income from trading activity and also maintained inventories and therefore was functionally dissimilar to the assessee.

Electronic Imaging India Pvt. Ltd vs DCIT-TS-659-ITAT-2017(Bang)-TP-ITA No. 1506/BANG/2015 dated 14.06.2017

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595. The Tribunal held that the assessee engaged in the business of developing **software** and exporting software services could not be compared to :

- ICRA Techno Analytics Ltd as it was engaged in diversified activities of software development, consultancy, engineering services, web development and hosting and thus functionally dissimilar to the assessee.
- Infosys Ltd as it had a huge brand value, owned intangible assets and was engaged in diversified activities.
- Kals Information Systems Ltd as it had inventories in its balance sheet and was engaged in software products and therefore could not be compared with a pure software development service provider.
- Persistent Systems Ltd as it was engaged in diversified activities, earned income from outsourcing product development and its segmental details were unavailable.
- Sasken Communication Technologies as the company earned revenue from 3 segments- software services, software products and other services but segmental data and particularly operating margins were not available.
- Tata Elxsi as it was engaged in diversified activities of product design and innovation and thus functionally dissimilar to the assessee.
- Persistent Systems & Solutions ltd as it earned its entire revenue from sale of software services and products and thus functionally dissimilar to the assessee engaged in software development services.
- Larsen & Toubro Ltd as it earned its entire revenue from software products and thus was functionally dissimilar to the assessee. Further, it had an RPT of 18.66% and failed the 15% RPT filter applied by TPO.

Further, noting that the DRP had suo motu applied a new onsite **revenue** filter while rejecting the comparable, the Tribunal held that the new filter should be adopted without any discrimination to all comparables and accordingly, it remanded the comparability of R S Software (India) Ltd to the file of TPO.

DCIT vs ACI Worldwide Solutions P. Ltd (formerly known as Visual Web Solutions P. Ltd-TS-614-ITAT-2017(Bang)-TP-IT(TP)A no 262/bang/2015 dated 26.06.2017

596. The Tribunal held that the assessee engaged in the business of providing software design and development services to its AE could not be compared to:

- Acropetal Technologies ltd as its income from information technology services was Rs. 81.40 crores out of total income of Rs. 141. 65 crores which was less than the 75% revenue filter applied by TPO.
- E-Infochips ltd as it was engaged in the business of providing software development services, hardware maintenance, information technology and consultancy services which was functionally dissimilar to the assessee. Further, sale of products constituted 15% of total revenue and segmental details were unavailable.
- LGS Global Limited as it was engaged in providing software development services to financial and banking industry which was functionally dissimilar to the assessee.
- CG-VAK Software & Exports Limited as it was engaged in providing software development services to financial and banking industry which was functionally

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dissimilar to the assessee.

ACIT vs. Marvell India Pvt. Ltd-TS-592-ITAT-2017(Bang)-TP-IT(TP)A No. 384/bang/2016 and 471/bang/2016 dated 28.06.2017

597. The Tribunal held that the assessee engaged in the business of software development and quality assurance programme working on cutting edge technology could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in development of software products and therefore functionally dissimilar to the assessee.
- Tata Elxsi ltd as it was engaged in providing services such as embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and therefore functionally dissimilar to the assessee.
- Persistent systems ltd as it was engaged in product designing services and development of software products and thus functionally dissimilar to the assessee.
- Infosys Tech. ltd as the company was a giant in the area of software and assumed all risks leading to higher profits whereas assessee was a captive unit and assumed only limited risk.

Further, it held that the assessee's ITES segment could not be compared to:-

- Infosys BPO ltd as the company had an extraordinary development of amalgamation during the year. Further, it was not engaged in direct activity of BPO but provided management services to BPO.

AOL Online India P Ltd-TS-583-ITAT-2017(Bang)-TP dated 09.06.2017

598. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Foursoft Limited as it was engaged in the business of software products and thus functionally dissimilar to the assessee.
- Thirdware Solution ltd as it failed the 75% revenue filter of ITeS segment applied by TPO.
- Tata Elxsi Ltd as it was engaged in providing product design services and thus functionally dissimilar to the assessee.

Further, it included Flextronics ltd which was wrongly excluded by TPO as 85% of the revenue was earned from software development services.

JCIT vs Winphoria Networks India Pvt Ltd-TS-513-ITAT-2017(Bang)-TP dated 24.05.2017

599. The Tribunal held that the assessee engaged in providing software development services was not comparable to:-

- KALS Information Systems Ltd as it was engaged in the business of consultancy, information provider and general insurance provider and thus functionally dissimilar to the assessee.
- Bodhtree Consulting ltd as it was engaged in providing KPO services and therefore functionally dissimilar to the assessee.
- Tata Elxsi Ltd as it was engaged in the business of providing KPO services
- Persistent Systems Ltd as it was engaged in development of software products.

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- Sasken Communications Tech ltd as it owned IPR and also had branded products.
- Akshay Sofware Technologies Limited as its turnover was only Rs. 12.23 crores therefore failing the turnover filter of 1/10th of assessee turnover of Rs. 239 crores.

Further, it remitted the comparability of L&T Infotech Limited to the AO/TPO with a direction to verify the RPT %.

DCIT vs ABB Global Services Pvt Ltd-TS-501-ITAT-2017(Bang)-TP-IT(TP)A No.49 and 97/B/2014 dated 05.05.2017

600. The Tribunal held that the assessee, engaged in providing software development services could not be compared to:

- Avani Cimcon Technologies Ltd as it was engaged in development of software products and segmental details were not available.
- Celestial Labs ltd as it was primarily engaged in clinical research and manufacture of bio and other products and therefore functionally dissimilar to the assessee.
- KALS Information Systems ltd as it was engaged in the business of software product development and therefore functionally dissimilar to the assessee.
- Accel Transmatic as it was engaged in providing ACCEL IT and ACCEL Animation services which was functionally dissimilar to the assessee.
- Lucid Software Limited as it was engaged in the business of software development services and development of software products and segmental details were unavailable.
- Infosys Technologies Ltd as it was an IT service giant and assumed all risks while the assessee assumed limited risk.
- Wipro Ltd as it was a global IT company and 67% of its sales related to products which were sold at premium resulting in higher profitability.
- Tata Elxsi Limited as it was engaged in the development of niche product and development services which was functionally dissimilar to the assessee.
- E-Zest Solutions Ltd as it was engaged in rendering product development services and high end technical services which were basically KPO services.
- Thirdware Solutions ltd as it earned revenue from sale of licenses and therefore was not comparable to the assessee.
- Geometric Software Ltd having RPT 19.98% as it failed the RPT filter of 15% applied by TPO.
- Ishir Infotech Limited having RPT 21.97% as it failed the RPT filter of 15% applied by TPO.
- Helios & Matheson Information Technology ltd as it was engaged in the business of development and sale of software products and thus functionally dissimilar to the assessee.
- Persistent System Ltd as it was engaged in the business of product development and product design services and segmental details were unavailable.

Tavant Technologies India Pvt Ltd vs DCIT-TS-488-ITAT-2017(Bang)-TP-IT(TP)A No.292/bang/2014 and 1592/bang/2012 dated 31.05.2017

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601. The Tribunal held that assessee engaged in the business of IT Support services segment could not be compared to:

- Bodhtree Consulting Ltd, Eclerx Services Ltd and Moldtek Technologies ltd as the said companies were engaged in KPO services therefore functionally dissimilar to the assessee.
- Infosys BPO Ltd and Wipro ltd as they had huge brand value and therefore could not be compared to the assessee.
- Informed Technologies India Ltd and Caliber Pint Business Solutions Ltd as they had an RPT to sales ratio of 15.93% and 15.44% which failed the 15% RPT filter adopted by TPO.
- Triton Corporation Ltd and Maple Esolutions ltd as the promoters of the two companies were involved in fraud for earlier years and therefore the financial results could not be relied on.
- Iservices India Pvt ltd and Apex Advanced Tech Pvt Ltd as they were engaged in the business of providing data creation services and therefore functionally dissimilar to the assessee.

In respect of Software segment, it held that the assessee could not be compared to:

- Accel Transmatic Ltd as it was engaged in design, development and manufacture of multifunction management system and ticket vending system as well as providing training in hardware and networking, enterprise system management and software services for 2D/3D animations and therefore functionally dissimilar to the assessee.
- Avani Cimcon tech Ltd as it was engaged in business of software products and therefore functionally dissimilar to the assessee.
- Celestial Labs ltd as it was engaged in clinical research and manufacture of software products and therefore functionally dissimilar to the assessee.
- KALS Information Systems ltd as it was engaged in development of software products as well as providing training and therefore not functionally comparable to the assessee.
- E-Zest Solutions ltd as it was product development and high end KPO technical services.
- Thirdware Solutions Ltd and Persistent Systems ltd as they were engaged in software product development and therefore functionally dissimilar to the assessee.
- Helios & Matheson Information Technology Ltd as it was engaged in development and sale of software products.
- Infosys Technologies Ltd as it owned significant intangibles and had huge revenues from software products with no segment break-up available.

Wipro Ltd as it owned intellectual property and therefore could not be compared to the assessee.

- Tata Elxsi ltd as it had significant R&D activity, brand value and therefore could not be compared to the assessee.
- Lucid Software Ltd as it was engaged in development of software products.
- Flextronics Software Systems Ltd as it was engaged in software development services as well as software products and segmental details were

unavailable.

Mphasis ltd vs ACIT-TS-562-ITAT-2017(BANG)-TP-ITA No. 14/bang/2012 dated 19.05.2017

602. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:-

- Bodhtree Consulting Ltd as it was a software product company and therefore functionally dissimilar to the assessee.
- Tata Elxsi Limited having turnover of Rs 378.43 crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Infosys Technologies Limited having turnover of Rs. 20264crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Persistent systems ltd having turnover of Rs. 519.69 crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- KALS Information Systems ltd having turnover of Rs. 2.14 crores as it failed turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Sasken Communication technologies ltd having turnover of Rs. 405.31 crores as it failed turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Zylog Systems Ltd having turnover of Rs. 734.80 crores as it failed turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores.
- Mindtree Ltd having turnover of Rs. 793.22 crores as it failed turnover filter of 10 times the assessee's turnover of Rs. 25.80 crores
- Larsen & Toubro Infotech Ltd having turnover of Rs. 1950.8 crores turnover filter of 10 times the assessee's turnover of Rs 25.80 crores.

ITO vs CSR India P ltd-TS-570-ITAT-2017(Bang)-TP-IT(TP)A.58 & 241 Bang/2014 dated 06.04.2017

603. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:-

- Acropetal Technologies Ltd as it failed the Revenue filter of 75% applied by TPO.
- E-Zest Solutions Ltd as it was engaged in providing KPO services which was functionally dissimilar to the assessee.
- E-infochips ltd as it earned revenue from software development and software products and segmental details were unavailable.
- Infosys Ltd as it had huge brand value, intangibles and thus not comparable to the assessee. Persistent Systems Solutions Ltd as it was engaged in diversified activities like licensing of products, royalty on sale of products as well as income from maintenance of contract etc and therefore functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was engaged in diversified activities like licensing of products, royalty on sale of products as well as income from maintenance of contracts and thus functionally dissimilar to the assessee.
- Sasken Communications Technologies ltd as it was engaged in software development and software products and segmental details were not available.
- Akshay Software Technologies ltd as it was engaged in development of software and software products and segmental details were unavailable.

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Further, it remitted the comparability of LGS Global ltd to the file of AO/TPO for fresh consideration since the information obtained u/s 133(6) was different from what was given in the annual report.

DCIT vs LSI India Research Pvt Ltd-TS-571-ITAT-2017(Bang)-TP dated 16.06.2017

604. The Tribunal held that the assessee engaged in the business of rendering software development services could not be compared to Infosys ltd as it was a giant company owning intangibles and had huge turnover.

Mercedes-Benz Research & Development India Private Limited(Formerly Daimler Chrysler Research & Technology India Pvt.Ltd vs ACIT-[TS-529-ITAT-2017(Bang) TP] dated 28.04.2017

605. The Tribunal held that the assessee engaged in the business of software development and testing services could not be compared to:-

- Avani Cimcon technologies ltd as it was engaged in the business of software product development and thus functionally dissimilar to the assessee.
- Celestial Labs ltd as it was engaged in the business of product development in the field of biotech and pharmaceuticals and therefore functionally dissimilar to the assessee.
- E-Zest Solutions Ltd as it was rendering product development services and high-end services which would qualify as KPO services which were functionally dissimilar to the assessee.
- Infosys Technologies ltd as it had a huge brand influence, ownership of IP, intangibles and huge revenues from software products.

KALS Information systems ltd was engaged in the business of development of software products as well as provision of training services. Further, the information obtained by the TPO u/s 133(6) was contrary to the annual report.

- Persistent Systems ltd as it was engaged in product development and product design services and segmental data were not available.
- Quintegra Solutions ltd as it was engaged in product engineering services which was functionally dissimilar to the software development service provided by the assessee. Further, it was engaged in proprietary software product and had substantial R&D activity resulting in creation of IPRs.
- Tata Elxsi Ltd as it was engaged in product development and design services and not purely software development services.
- Thirdware Solutions ltd as it derived revenue from sale of software products and was thus functionally dissimilar to the assessee.
- Wipro Ltd as it owned IPR, intangibles and was engaged both in software development and sale of product without segmental bifurcation.
- Lucid Software ltd was engaged in development of software products and thus was functionally dissimilar to the assessee.

DCIT vs Century Link Technologies India Pvt. Ltd- [TS-555-ITAT-2017(Bang)-TP]-IT(TP)A No. 292/8an9/2013 & CO No. 48/Bang/2016 dated 09.06.2017

606. The Tribunal remitted the selection of comparables for assessee being a captive software development company to the file of AO/TPO with the direction to apply 10 times

turnover filter observing that 10 times turnover filter was a more just filter. Further, in view of the consistent view taken by the Tribunal that in normal circumstances, RPT tolerance range should not exceed 15%, it directed the TPO to apply 15% RPT filter instead of 25% applied by TPO.

Microchip Technology (India) Pvt Ltd vs ACIT- [TS-535-ITAT-2017(Bang)-TP]- IT(T.P) A No.1586/Bang/2012 dated 03.05.2017

607. The Tribunal held that the assessee engaged in providing software development services for AY 2006-07 could not be compared to:-

- Aztech Software Ltd, Geometric ltd (seg.) and Megasoft Ltd (seg) having RPT of 17.78%, 19.34% and 17.08% respectively as it failed the RPT filter of 15% applied by TPO.

Further, Megasoft was engaged in the business of which was functionally dissimilar to the assessee.

- iGate Global Solutions Ltd (seg), Infosys Ltd, Mindtree Consulting Ltd, Persistent Systems Ltd, Sasken Communication Ltd, Tata Elxsi ltd and Flextronics Software Ltd having turnover of Rs, 527.91 crores, Rs. 9028, Rs. 448.79 crores, Rs. 209.18 crores, Rs. 240.03 crores, Rs. 188.81 crores and 595.12 crores respectively as it failed the turnover filter of 10 times the assessee's turnover of Rs. 16.97 crores.
- Lucid Software Ltd having turnover of Rs. 1.02 crores as it failed the turnover filter of 1/10th of assessee's turnover of Rs.16.97 crores
- KALS Info Systems Ltd as it was engaged in the business of sale of products and training which was functionally dissimilar to the assessee.

Further, for AY 2007-08, the Tribunal held that the assessee could not be compare to:

- Geometric Ltd and Ishir Infotech ltd having RPT of 19.98% and 21.97% as it failed the RPT filter of 15% applied by TPO.
- Flextronics SW Systems Ltd, IGate Global Solutions Ltd, Infosys Tech Ltd, Mindtree Ltd, Persistent Systems Ltd, Sasken Commn. Tech Ltd, Tata Elxsi ltd having turnover of Rs. 848.66 cr, Rs. 747.27 cr, 13149 cr, 590.35 cr, 293.75 cr, 343.57 cr, 262.58 cr and 9616 cr respectively could not be compared to the assessee having turnover of Rs.22.06 crores as it failed the turnover filter of 10 times the assessee's turnover.
- KALS Information Systems Ltd, Lucid Software Ltd and Megasoft Solutions Ltd having turnover of Rs, 2 crores, 1.70 crores and 1.85 crores could not be compared to the assessee as it failed the turnover filter of 1/10th of assessee's turnover of Rs. 22.06 crores.
- Accel Transmatics Ltd as it was engaged in providing services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation.
- Avani Cimcon Technologies Ltd as it was engaged in the business of software development and development of software products and segmental details were unavailable.
- Celestial Labs ltd as it was engaged in clinical research and manufacture of bio products and other products and thus functionally dissimilar to the assessee.
- E-zest Solutions as it was engaged in the business of rendering product development services and high end technical services (KPO services) and thus functionally different from the assessee.

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- Helios Matheson Information Tech. Ltd as it was engaged in the business of application software and thus functionally dissimilar to the assessee.
- Thidware solutions Ltd as it was engaged in the business of product development and earned revenue from sale of licenses and subscription.
- Quintegra Solutions Ltd as it was engaged in the business of developing proprietary software products and owned intangibles.

Aspect Technology Centre India Pvt. Ltd vs ITO-TS-518-ITAT-2017(Bang)-TP-IT(TP)A No. 1252(bang)2011 and IT(TP)A no.1391(bang) dated 02.05.2017

608. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Bodhtree Consulting Limited as it was engaged in providing open and end-to-end web solutions, software consultancy and design and development of software solutions using latest technology and therefore not comparable to the assessee.
- Further, it restored Tata Elxsi and Infosys BPO to the file of TPO to verify the functional similarity vis a vis the assessee.

Narus Networks Pvt. Ltd vs. DCIT-TS-1047-ITAT-2017(Bang)-TP-i.T. (T.P) A. No.1631/Bang/2014 dated 23.11.2017

609. The Tribunal held that the assessee engaged in providing back office support services to its AE could not be compared to Accentia Technologies Ltd as it had an extraordinary event of merger during the year which impacted it profits. Further, it remitted the R Systems International Ltd Infosys BPO, TCS E-serve ltd to the file of TPO to examine the functional comparability afresh. ***Outsource Partners International Pvt. Ltd. vs. DCIT-TS-1021-ITAT-2017(Bang)-TP ITA No.443/Bang/2016 2011-12 dated 31.10.2017***

610. The Tribunal held that the assessee engaged in providing software development services to its AEs could not be compared to:

- KALS Information Systems Ltd as it was developing software products and not purely or mainly software development service provider.
- Bodhtree Consulting Ltd as it was a software product company and could be considered as comparable to the assessee merely providing software development services to its AEs
- Tata Elxsi Limited as it operated in the segments of software development services which comprised of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and there were no sub-services break up provided in the annual report
- Infosys Technologies Limited as it owned significant intangibles and was functionally different as it generated huge revenues from software products
- Persistent Systems Limited as it was engaged in software product development and product design services, and could not be compared to the assessee merely providing software development services to its AEs.

Further, it included Larsen & Toubro Infotech Ltd and held that the assessee was incorrect in contending that the 15% RPT filter be applied as the RPT filter of 25 percent was well accepted.

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Vis-à-vis Thinksoft Global Services Ltd and FCS Software Solutions Ltd it held that the TPO was unjustified in rejecting the companies as comparable merely because their working capital adjustments exceeded 4 percent and accordingly directed the inclusion of the companies as comparable.

TE Connectivity Global Shared Services India Pvt. Ltd vs. ITO - TS-1049-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1280/Bang/2014 dated 13.12.2017.

611. Pursuant to miscellaneous petition of the assessee wherein the Tribunal accepted the assessee's contention and recalled the order to decide on the comparability of Bodhtree Consulting, Tata Elxsi Limited (Seg.) and Infosys Ltd, the Tribunal i) excluded Bodhtree Consulting as comparable as it was engaged in software products as well as services and therefore could not be compared to companies providing software development services ii) remitted the comparability of Tata Elxsi Limited (Seg.) and Infosys Ltd. back to the file of CIT(A) noting that CIT(A) had not specifically dealt with, examined or considered any of the objections specifically raised by the assessee for non-inclusion / exclusion of these two companies.

Narus Networks Pvt. Ltd vs. DCIT - TS-1047-ITAT-2017(Bang)-TP - i.T. (T.P) A. No.1631/Bang/2014 dated 23.11.2017.

612. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- Accel Transmatics Limited as it was engaged in engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation and therefore functionally dissimilar to the assessee.
- Avani Cimcon Technologies Limited as it was engaged in the business of software products and earned unusually high profit margin and therefore could not be compared to the assessee.
- Celestial Labs Limited as it was engaged in clinical research and manufacture of software products and therefore functionally incomparable to the assessee.
- KALS Infosystems Ltd as it was engaged in development of software products as well as providing training and thus functionally dissimilar to the assessee.
- Infosys Technologies Limited as it had significant intangibles and huge revenue from software products with no segmental breakup.
- Ishir Infotech Limited as it had outsourced its main activity and therefore had a different business model than the assessee.
- Lucid Software Ltd as it was engaged in the development of software products and therefore functionally dissimilar to the assessee.
- Wipro Limited and Tata Elxsi Ltd as it owned intellectual property and significant R&D activity, brand value.
- E-Zest Solutions Limited as it was engaged in rendering product development and high end technical services which were in the nature of KPO services.
- Persistent Systems Ltd as it was engaged in software development and software products and no segmental details were available.
- Quintegra Solutions Limited as it was engaged in developing proprietary software products and owning intangibles.

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Yodlee Infotech Pvt. Ltd vs DCIT-TS- 1077-ITAR-2017(Bang)-TP IT(TP) No. 1138/Bang/2011 dated 15.12.2017

613. The Tribunal considering assessee's submission that DRP's order was very cryptic as he included Bodhtree consulting by only stating that the TPO made elaborate discussion regarding the comparability of entities engaged in providing software development services with entities engaged in development of software products, remitted the comparability of Bodhtree Consulting to the file of DRP for fresh consideration.
Sonus Networks India Pvt Ltd vs DCIT-TS-1076-ITAT-2017(Bang)-TP (IT(TP) A No. 193/Bang/2014 dated 01.12.2017)

614. The Tribunal held that the assessee engaged in the business of providing ITES services to its AE could not be compared to:

- Caliber Business Solutions Ltd as it had a different financial year ending than the assessee.
- Datamatics Financial Services Ltd as it was engaged in the business of registration and share transfer work and ITES, but there was no segmental information available in the Annual report of the company.
- ICRA Techno Analytics Ltd as it was engaged in various high end functions but no segmental details were available.
- Infosys BPO Limited as it was engaged in a variety of verticals like Banking, Communication, Media and Entertainment, Manufacturing, Retail and Energy, had diversified activities, IPRs and tremendous brand value.
- Further, it remitted the Accentia and TCS E-Serve to the file of TPO to determine the functionally comparability vis-à-vis the assessee.

e4e Business Solutions India Pvt. Ltd. vs. ITO-TS-977-ITAT-2017(Bang)-TP IT(TP)A No.451/Bang/2017 dated 03.11.2017

615. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Infosys Limited as it was earning revenue from both software services and products and was also the owner of various brands earning huge amount on account of brand.
- Persistent Systems Ltd as it was into product development and was also deriving income from product sales as well as royalty and segmental information was not available.

Tektronix (India) P Ltd (Formerly Tektronix Engineering Development (India) P. Ltd) vs. ITO-TS-964-ITAT-2017(DEL)-TP I.T(TP)A No.293/Bang/2014 dated 27.10.2017

616. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- Celestial Bio-labs Limited as it had undergone an extra-ordinary event which resulted in distorted profits
- Avani Cimcon Technologies Ltd as the company had diversified activities and the segmental accounts were not available

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- Infosys Technologies Ltd as it owned significant intangible and had huge revenues from software products and the breakup of revenue from software services and software products was also not available
- Kals Information Systems Ltd as this company was engaged in developing of software and was thus not comparable
- Persistent Systems Ltd as it was engaged in product development and product design service and therefore could not be compared to the assessee
- Quintegra Solutions Ltd as it had undergone an extraordinary event and also since it was engaged in business of dealing in proprietary software products.
- Tata Elxsi Ltd since it was predominantly engaged in product designing services and not purely software development services
- Wipro Ltd as it was engaged both in software development and product development services and segmental details were not provided separately and the company also owned intellectual property in the form of registered patents and had several pending applications for grant of patents.
- Lucid Software Ltd as it was engaged in the development of software products

DCIT vs. Verisign Services India Pvt Ltd - TS-1081-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1230/Bang/2013 dated 25.10.2017.

617. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Acropetal Technologies Ltd as it was engaged in provision of high end healthcare services and developed & owned intellectual property providing it a substantial competitive advantage to this company, leading to higher profitability.
- Infosys Ltd as it was a giant company with high risk profile and therefore could not be compared to the assessee a captive service provider.
- Larsen and Turbo Infotech Ltd as it was engaged in software development services and software products and segmental details were not available.
- Mindtree Limited as it was undertaking R&D activity and owned IPRs.
- Further, it remitted Sonata Software Limited to the file of TPO to verify whether company earned 100% of its revenue from export of software development and related services.

Agilis Information Technologies International Pvt. Ltd. (Now known as Infogix International Pvt. Ltd.) vs. ACIT -TS- 995-ITAT-2017(DEL)-TP dated 15.11.2017

618. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Infosys Ltd as it had huge brand, turnover and was a leading product in the banking industry.

Further, it was engaged in significant R&D.

Further, it remitted Bodhtree Consulting Ltd to the file of TPO directing it to establish how the difference in accounting policy wherein it recognized revenue when software was developed and billed from assessee's cost plus model impacted the profitability. It also remitted Sonata Software Ltd to the file of TPO directing it to verify the RPT percentage and exclude it if the RPT is more than 25%.

Freescale Semiconductor India Pvt. Ltd vs DCIT-983-ITAT-2017(DEL)-TP - ITA No.

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2589/Del/2015 dated 07.12.2017

619. The Tribunal remitted the following comparables to the file of TPO for fresh consideration in respect of assessee engaged in providing software development services:

- Larsen and Turbo as the issue of insufficient segmental details, lack of clarity on whether the cost of bought out items of sale related to services/products, and the nature of sub-contracting expenses incurred by the company had not been examined by lower authorities,
- Persistent Systems Ltd, as the Annual Report that the company stated that it was into software products, services, and innovation and no analysis of the operational segments was done by the lower authorities to compute margin of one segment only.

Microsoft Research Lab India Pvt. Ltd. vs. DCIT-TS-994-ITAT-2017(Bang)-TP dated 03.11.2017

620. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in the business of software product and providing end to end web solutions software consultancy and design and development of software using latest technology.
- Infosys Technologies Ltd as it owned significant intangible and had huge revenues from software products and the segmental details were not available.
- Persistent Software Ltd as it was engaged in product designing services and into software product development which was not functionally comparable with software developer assessee.
- Tata Elxsi Ltd as it was engaged in business of software development services which comprised of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment and the segmental breakup was not available.
- Sonata Software Ltd as it had an RPT filter of 33.39% and therefore failed the 15% RPT filter applied by TPO.

Sterling Commerce Solutions India Private Ltd vs. DCIT-TS-969-ITAT-2017(Bang)-TP IT(TP)A No.309/Bang/2014 dated 27.10.2017

621. The Tribunal held that the assessee, engaged in the business of providing ITES, including data processing and call centre services in the insurance and financial sectors to its AEs could not be compared to:

AY2009-10

- Accentia Technologies Ltd as the said company was engaged in providing health care management services
- E c l e r x Services Ltd as it was providing high end and complex KPO Services

It remanded the comparibility of Infosys BPO and Cosmis Global to the file of the TPO noting that the assessee had not raised an additional ground for exclusion of the said companies and that the only objection that was raised before the CIT(A) was that of turnover filter.

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AY2008-09

It further held that the assessee could not be compared to the following companies:

- Acropetal Technologies Ltd, Asit C Mehta Financial Services, Cosmic Global LTd, Datamatics Financial Services Ltd, I Services India Pvt Ltd, Jindal IntellicomPvt Ltd, Mold Tek Technologies Ltd and R Systems Interantional Ltd as the said companies did not satisfy the lower turnover filter of 1/10th times of the assessee's turnover
- Accentia Technologies Ltd as it had undergone an abnormal activity during the year (viz. acquisition of other Indian and foreign companies)
- Crossdomain Solutions Ltd as the company was engaged in the business of providing re- engineered payroll services and product development
- Eclerx Services Ltd as it was providing high end and complex KPO Services
- Genesys International Corporation as it was providing specialized services requiring highly skilled employees
- WIPRO Ltd as it owned substantial intellectual property and had high brand value

AXA Business Services Pvt. Ltd – TS-1032-ITAT-2016 (Bang) – TP - I.T. (T.P) A. No.334/Bang/2013, I.T. (T.P) A. No.484/Bang/2013 & IT. (T.P) A. No.965/Bang/2014 dated 29.11.2016

622. The Tribunal held that in case of assessee-company rendering software development services to its AE, (a).a company engaged in animation services,(b).a company developing its own software products,(c).a company having abnormal growth rate,(d).a company rendering KPO services, (e) a company involved in research activities could not be accepted as comparables while determining ALP. Incase of the assessee-company rendering IT enabled services (ITES) to its AE, a company in whose case extraordinary event of amalgamation took place, a company having related party transactions in excess of 15 per cent of total sales and a company providing data analytics, operations, management and audit services, could not be accepted as comparables while determining ALP.

Tesco Hindustan Service Centre (P.) Ltd – (2017) 77 taxmann.com 48 (Bangalore - Trib.) - IT (TP) APPEAL NO. 1285 (BANG.) OF 2011

623. The Tribunal excluded 8 comparables on the grounds of functional dissimilarity with the assessee (engaged in the business of rendering software development services) following decision in case of LSI Technologies India Pvt Ltd [TS-296-ITAT-2015(Bang)-TP] whose functional profile was similar to that of the assessee and 2 comparables viz. Flextronics Software Ltd and Persistent Systems Ltd (on account of non-availability of segmental results and amalgamation in the year of comparability) relying on Agnity India [TS-573-ITAT-2016(Del)-TP].

NovellSoftware Development (Ind.) Pvt Ltd - TS-1044-ITAT-2016(Bang)-TP - IT (TP) A No. 1483 (Bang) 2010

624. The Tribunal directed exclusion of 8 companies from the final list of comparables while benchmarking software development services rendered by the assessee to its AEs during AY 2009-10 by following the decision in McAfee Software (India) Pvt Ltd [TS-136-ITAT-

2016(Bang)] on the grounds of high turnover. Further, It also excluded Bodhtree Consulting (engaged in providing open & end to end web solutions, software consultancy, design & development of software using latest technology) as functionally dissimilar to assessee rendering pure software development services.

Metric Stream Infotech -TS-1065-ITAT-2016(Bang)-TP- IT(TP)A 216/Bang/14

625. The Tribunal rejected the assessee's ground for adoption of internal TNMM for benchmarking routine low end ITeS services to AEs during AY 2011-12 on the ground that assessee's non-AE business had been sold during the year, therefore comparison for same period was not available. However, it accepted the ground for exclusion of 3 comparables viz. Accentia Technologies (engaged in diversified activity of medical transcription), Acropetal Technologies Ltd (engaged in providing engineering design services and information technology services (KPO)) and Infosys BPO Ltd (functionally different as it is a market leader, enjoying goodwill and huge brand value with huge economies of scale) on the ground of functional dissimilarity following decisions in assessee's own cases for earlier years.

e4e Business Solutions India Pvt Ltd - TS-13-ITAT-2017(Bang)-TP - I.T (TP).A No.1397/Bang/2016

626. The Tribunal held that the assessee engaged in providing software development services could not be compared to:

- Accel Transmatics Limited as its business activities (i.e. services in the form of ACCEL IT and ACCEL animation services for 2D and 3D) were functionally different from that of the assessee, and its related party transactions were more than permitted level.
- Avani Cimcon Technologies Limited as it was engaged in the software products business and was also earning unusually high profit margin for the subject year
- Celestial Labs Limited as this company was mainly engaged in clinical research and manufacture of software products
- KALS Infosystems Ltd this company was engaged in development of software products as well as providing training
- Helios & Matheson Information Technology Limited as this company was found to be functionally incomparable
- Infosys Technologies Limited as this company owned significant intangibles and had huge revenues from software products with no segment break-up.
- Ishir Infotech Limited as the company outsourced its work and did not pass 25% employee-cost filter.
- Lucid Software Ltd as it was engaged in development of software products and thus, was functionally not comparable to assessee.
- Wipro Limited & Tata Elxsi Ltd as they owned intellectual property and had significant R&D activity, brand value, etc. and therefore was not functionally comparable
- Megasoft Limited as the details of the software service segment were not available
- E-Zest Solutions Limited as the company rendered product development and high end technical services which came under the category of KPO services
- Persistent Systems Ltd & Third ware Solutions Ltd as they were engaged in product development & no segmental details were available.
- Quintegra Solutions Limited as the company developed proprietary software products and owned intangibles.

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Yodlee Infotech Pvt. Ltd vs. DCIT - TS-1077-ITAT-2017(Bang)-TP - 1138/Bang/2011 dated 15.12.2017

627. Noting that the assessee's business activities i.e. software development services were similar to the activities carried on by Yodlee Infotech, the Tribunal relying on the decision of the co-ordinate bench in Yodlee Infotech Pvt Ltd [TS-465-ITAT-2014(Bang)-TP] held that the following companies could not be considered as comparable to the assessee:

- Bodhtree Consulting Ltd as it was software product company and therefore functionally different to the assessee
- Infosys Technologies Ltd as it had considerable intangibles like IPR and was also engaged in software product development.
- Persistent Systems Ltd as the company was into product designing services and into software product development.
- Tata Elxsi Ltd as the company was engaged in developing niche products and rendering product designing Services

It remitted the comparability of Larsen & Toubro Infotech to the file of the TPO and held that merely because the company had turnover in excess of 10 times the turnover of the assessee it would not render it non-comparable. Relying on the decision of the Court in Chryscapital Investment Advisors (India) Pvt Ltd [TS-173-HC-2015(DEL)-TP] it remitted the matter to the TPO directing him to attempt to provide a reasonable adjustment to eliminate the material effect of such difference.

Manhattan Associates (India) Development Centre Pvt. Ltd vs. DCIT - TS-464-ITAT-2018(Bang)-TP - IT(TP)A No. 1293/Bang/2014 dated 31.05.2018

628. The Tribunal held that assessee engaged in provision of software development services could not be compared to:

- Infosys Ltd. as it provided end to end services encompassing technical consulting, design, re-engineering, systems integration etc. and had a high brand value and owned intangible assets.
- KALS Information Systems Limited as it was engaged in sale of software products.
- Persistent Systems Ltd. as it was engaged in diversified activities and and earning revenue from various activities including licencing of products, royalty on sale of products as well as income from maintenance contract, and segmental data was not available.
- Tata Elxsi Ltd.as it was engaged in development of niche products and services coupled with lack of segmental information
- Persistent Systems and Solutions Limited as it was engaged in software development products and no segmental details were available.
- L& T Infotech Ltd as it was a software product company and segmental details for software development services were unavailable.
- Genesys International Corporation Ltd as it was engaged in rendering mapping and geospatial services and and as part of rendering these services it developed software.

CGI Information Systems and Management Consultants Private Limited vs ACIT [TS-492-ITAT-2018(Bang)-TP] IT(TP)A Nos. 586 (Bang) of 2015 and 183(Bang) of 2017 dated 11.04.2018

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629. The Tribunal held that assessee engaged in provision of Software Development services to its AE could not be compared to:

- Avani Cincom as it was into production of products such as DExchange, lTrak, Law firm Solution, hotel and restaurant booking engines etc and no revenue bifurcation between Software development services and products was given.
- Bodhtree Consulting Ltd. as it was engaged in Software consulting, web services integration ,Data management and Data warehousing services (which were classified as lTES).
- E-Zest Solutions Ltd as the company was rendering product developmentservices and high end technicalservices which came under the category of Knowledge Process Outsourcing (KPO) services
- Infosys Technologies Ltd. as it owned intangibles and engaged in sale of software products and had no segmental bifurcation between revenue from software development services and products.
- PersistentSystems Ltd. as it was engaged in product development and product design services.
- Quintegra Solutions Ltd.as it was engaged in product engineering and extensive R&D and owned its own intangible
- Tata Elxsi Ltd. as it was predominantly engaged in product designing services and not purely software development services.
- Thirdware Solutions Ltd. as it was engaged in product development and earned revenue from sale of licenses and subscription.
- Wipro Ltd. as it was engaged both in software development and product development services and no segmental bifurcation between them was available.
- Softsol India Ltd. as it had RPT of 18.3% thereby failing the RPT filter of 15%
- Lucid Software Ltd. as it was engaged in software product development and hence functionally dissimilar.

SAP Labs India Pvt Ltd vs Addl CIT [TS-298-ITAT-2018(Bang)-TP] IT(TP)Appeal Nos.981 and 1070 of 2016 dated 06.04.2018

630. The Tribunal held that the assessee engaged in rendering software development services to AE could not be compared to –

- Acropetal Technologies Limited as the segmental information containing break-up of its export sales and employee cost was not available and, thus, it was not possible to ascertain if it passed export earnings and/or employee costs filters.
- L & T Infotech Ltd. as the company was developing its own software products and had huge marketing intangibles.
- E-Infochips Ltd. as it failed to satisfy software service income filter at 75 per cent.

DCIT v. CGI Information Systems & Management Consultation (P.) Ltd. - [2018] 93 taxmann.com 9 (Bangalore - Trib.) - IT APPEAL NO. 502 (BANG.) OF 2016 dated April 6, 2018

631. The Tribunal held that assessee engaged in software development services and ITeS could not be compared to:

- Acropetal Technologies Ltd as segmental details relating to export sales was unavailable.

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- E- infochips Ltd after upholding DRP's finding that the company did not meet 75% software service income filter.
- Accentia Technologies as the company primarily catered to healthcare industry and lacked segmental data. (The Tribunal relied on the case of Swiss Re Shared Services India Pvt Ltd.)

Further, the Tribunal included RS Software (India) Pvt Ltd as comparable since assessee and TPO both contested to include the comparable and DRP's suo moto exclusion due to its onsite development activities was not justified.

DCIT Circle 2(1)(2) vs M/s. EMC Software and Services (I) Pvt Ltd- TS-487-ITAT-2018(Bang)-TP- IT (TP) No 273/Bang/2016 dated 25.04.2018

632. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared with:

- Akshay Software Technologies Ltd as it was dealing in software products.
- Thinksoft Global services Ltd as it was engaged in software testing which required different skills, software and assets rendering it functionally dissimilar.

It rejected DRP's stand of not considering assessee's contention to include 4 other comparables for which it had filed additional documentary evidence and held that the proceedings before the DRP was a continuation of the assessment proceedings and the purpose of providing the proceedings before the DRP was to ensure due and fair adjudication of the ALP by comparing the operating profit / operating cost of the assessee with that of the functionally comparable companies. Accordingly, it remitted the 4 comparables to the file of the TPO for fresh consideration.

WM Global Technology Services (India) P. Ltd vs. ACIT - TS-144-ITAT-2018(Bang)-TP - I.T(TP).A No.1963/Bang/2017 dated 28.02.2018

633. Relying on the decision of the co-ordinate bench in Electronics for Imaging India Pvt Ltd [TS-279-ITAT-2016(Bang)-TP], the Tribunal held that the assessee engaged in providing software development services to its AE could not be compared with:

- ICRA Techno Analytics Ltd as it was engaged in diversified activities of software development and consultancy, engineering services, web development & hosting and substantially diversified itself into domain of business analysis and business process outsourcing, which was functionally not comparable to the assessee
- Persistent Systems Ltd as the company was engaged in diversified activities and earned revenue from various activities including licencing of products, royalty on sale of products as well as income from maintenance contract, etc. the same could not be considered as functionally comparable with the assessee.
- Persistent Systems & Solutions Ltd as this company was earning revenue from software products and services and segmental data was not available
- Infosys Ltd as it had brand value and intangible assets and thus could not be compared with an ordinary entity providing captive services
- Kals Information Systems Ltd as the inventory in the books of accounts of this company showed that it was in the software product business and hence, it could not be compared with a pure software development service provider.

ACIT vs. Cypress Semi - Conductor (I) Pvt. Ltd - TS-118-ITAT-2018(Bang)-TP - IT (TP) A No. 434/Bang/2015

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634. The Tribunal held that assessee engaged in provision of ITES services could not be compared to:

- ICRA Online Limited as it failed to satisfy the 75% export filter
- Infosys BPO Limited as it had a high brand value which would impact its pricing and margins
- Accentia Technologies Ltd. as it had undergone merger for the subject year which would impact its profitability
- Infosys BPO Ltd. as it had high brand value and acquired Australian based company thus impacting profitability.
- TCS E-serve Ltd as it was engaged in diversified business activities such as software testing, verification and validation of software.
- Excel Infoway Limited as it had consistent diminishing revenues.

Further, it rejected assessee's plea with regard to the exclusion of BNR Udyog Ltd noting that on consideration of segmental data of ITES, it passed the RPT filter and 100% of the revenue was from providing ITES (medical transcription) and thus, the company satisfied the filters. The Tribunal accepted the assessee's plea for inclusion of (i) Informed Technologies Limited (ii) Jindal Intellicom Ltd. since they had been consistently considered as a comparable in the previous years. The Tribunal remanded the comparability of Universal Print systems Ltd on the ground that TPO and DRP had not dealt with various objections of the assessee on its functional comparability.

CGI Information Systems and Management Consultants Private Limited vs ACIT [TS-492-ITAT-2018(Bang)-TP] IT(TP)A Nos. 586 (Bang) of 2015 and 183(Bang) of 2017 dated 11.04.2018

635. Relying on coordinate bench decision in AT&T Global Business Services India P Ltd, the Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Acropetal Technologies Ltd. as it failed the filter of 75% of Revenue from software development services applied by TPO. [It relied on coordinate bench decision of Commscope Networks India Pvt Ltd.]
- E-InfochipsLtd as it was engaged in diversified activities like software development services, ITES and sale of products and segmental information was not available.
- Infosys Ltd as it had huge brand, huge intangibles and high turnover
- Persistent Systems Ltd as as it was engaged in diversified activities including licensing of products, earned royalty on sale of products as well as income from maintenance contract and segmental information was not available
- Sasken Communication Technologies Ltd as it earned revenue from software product, software services and other services and segmental margins were not available in absence of segmental data.
- Tata Elxsi Ltd as it was engaged in development of niche products and development services which was entirely different from the assessee company.

Salesforce.com India P. Ltd vs DCIT [TS-1325-ITAT-2018-(Bang)-TP] IT(TP)A No.697/Bang/2016 dated 21.12.2018

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636. The Tribunal remitted the comparability of Bodhtree Consulting Ltd vis-à-vis the assessee (engaged in providing software development services) back to the DRP observing that the DRP's order was very cryptic as it included Bodhtree Consulting by only stating that the TPO made elaborate discussion regarding the comparability of entities engaged in providing software development services with entities engaged in development of software product and therefore, there was hardly any ground for rejecting this entity. The Tribunal directed the DRP to pass a speaking order. Further, the Tribunal rejected the Revenue's contention for exclusion of FCS Solutions & Thinksoft Global Services as comparables and following the decision of the co-ordinate bench in Logica [TS-187-ITAT-2016(Bang)-TP] it held that the said comparables could not be excluded merely because of a working capital impact of over 4%.
Sonus Networks India Pvt. Ltd vs. DCIT - TS-1076-ITAT-2017(Bang)-TP - I (TP) A No. 193/Bang/2014 dated 01.12.2017

637. The Tribunal held that assessee engaged in providing ITES to its AE could not be compared to:
TCS E-serve Ltd. as it was a KPO whereas assessee was a low end BPO
Further,

- It remanded the comparability of Universal Print Systems Ltd.(seg)(BPO) noting that said company had 4 segments viz., Repro, Label Printing, Offset Printing and Pre-press BPO. Whether the other segments supplemented the functions performed by BPO segment had to be seen and if it did reasonable accurate adjustments had to be made in terms of Rule 10B(3) (segmental adjustment) for comparing with the assessee. It afforded assessee an opportunity of being heard with respect to functional comparability.
- It included BNR Udyog Ltd as it passed RPT filter and income from providing ITES being more than 75% at segmental level.
- It included Excel Infoways Ltd as it earned revenue from BPO segment which clearly demonstrated it was engaged in ITES segment.

Zyme Solutions Pvt Ltd vs Asst CIT [TS-1272-ITAT-2018(Bang)-TP] (IT(TP)A No.1661/Bang/2016) dated 16.11.2018

638. The Tribunal held that the assessee engaged in the provision of software development services to its AE could not be compared to:
Persistent Systems Ltd. as it was engaged in diversified activities and and earning revenue from various activities including licencing of products, royalty on sale of products as well as income from maintenance contract, and segmental data not available. [It relied on the coordinate bench decision of Applied Materials]
Sasken Communication Technologies Ltd as there was no break-up of operating costs and net operating revenues of the two segments viz. software services and software products. [It relied on the coordinate bench decision of Applied Materials which in turn relied on the Delhi HC ruling of Saxo]
Further, the Tribunal included R S Software (India) Ltd as comparable as the assessee contended that the DRP had wrongly excluded it after applying onsite filter and the Revenue also agreed with the inclusion of the said comparable. The Tribunal also included Mindtree and Evoke Technologies observing that the profile of these companies were functionally comparable with the assessee and it also qualified the tests applied by TPO and upheld the DRP's finding.

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Cypress Semiconductor Technology India P. Ltd. vs. DCIT [TS-1060-ITAT-2018(Bang)-TP] IT(TP) A No.356/Bang/2016 dated 31.07.2018

639. The Tribunal, relying on the co-ordinate bench decision in Cerner Healthcare Solutions P Ltd [TS-28-ITAT-2017(Bang)-TP] held that the assessee, engaged in providing software development services to its AE could not be compared to:

- Infosys Ltd as the company owned intangibles, had huge brand value as well as bargaining power and it was also engaged in diversified services.
- Tata Elxsi Ltd as it was engaged in diversified activities even in software development segment.
- Kals Information Systems Ltd & Persistent Systems & Solutions Ltd as they was functionally dissimilar being engaged in software product business.
- Sasken Communications Tech Ltd as it earned revenue from 3 segments, but segmental margins were unavailable.
- Persistent Systems Ltd as it was earning revenue from various activities including licensing of products, and segmental data was unavailable.
- L & T Infotech Ltd as it had Revenues reported from software development services and products and segmental information was unavailable.

ITO vs. CSR India Pvt. Ltd - [TS-83-ITAT-2018(Bang)-TP - IT (TP) A No. 256/Bang/2015 dated 24.01.2018

640. The Tribunal restored the issue with respect to determination of the functional profile of the company (engaged in the business of software design and development of services in respect of layout of chips) to the TPO with a direction to examine and decide the issue afresh. The TPO had examined the agreement with its AE and held that the assessee was a KPO service provider and the DRP had concurred with the view of the TPO and held that the assessee was a KPO as it was involved in services related to IC designing with help of large specialized workforce. The Tribunal noted that a) the coordinate bench in assesse's own case wherein co-ordinate bench had examined same agreement with AE (as referred to by TPO in subject AY) and found that assessee was providing software development services and b) that even in subsequent years on the same facts, the TPO had characterized the assessee as software development service provider. Thus, the Tribunal remanded the matter back and directed the TPO to consider the above observations and provide the assessee with an opportunity of being heard.

Open Silicon Research Pvt Ltd vs. Dy.CIT [TS-799-ITAT-2018(Bang)-TP] IT(TP)A No.244/Bang/2016 dated 06.07.2018

641. The Tribunal held that assessee engaged in provision of software development services to its AE could be compared to:

- ICRA Techno Analytics Ltd, Persistent System and Solution Ltd and Think Soft Global Services Ltd. as RPT transactions were below threshold of 15%. [It relied on coordinate bench decision of Autodesk India Pvt Ltd. wherein it was held that depending on availability of comparables RPT of 25% or RPT of 15% have to be taken, considering there is no dearth in comparables in software development services, RPT of upto 15% was taken.]

Further, it remanded comparability of Kals Information Systems Ltd. directing TPO to exercise his power u/s.133(6) to find whether company was a product company and that no

segmental information was available noting that assessee's contention for exclusion on ground that it was a software product company evident from snapshot of website of company that it was a customized product manufacturing company and had significant inventory.
Sunquest Information Systems (India) Pvt Ltd vs Dy.CIT, [TS-1390-ITAT-2018(Bang)-TP], IT(TP)A No.552/Bang/2015 Dated December 21, 2018

642. The Tribunal held that the assessee, engaged in provision of ITES to its AE could not be compared to:

- Accentia Technologies Ltd. as his company providing high-end medical transcription services, and having substantial income from coding coming to about 16% gross receipts without availability of segmental results.
- Acropetal Technologies Ltd. as the company was providing high end services.
- Jeevan Scientific Technology Ltd. as the turnover of BPO services segment was less than 1 Cr.

Further, ICRA online Ltd. was remitted back to decide comparability and to verify whether RPT exceeded 15%. iGate Global Solutions Ltd. was remitted back since the Revenue's plea was accepted that this comparable be remanded to AO/TPO to enable them to issue notices u/s 133(6) to get the required segmental details to consider the comparability.
Finastra Software Solutions (I) P Ltd. (formerly Misys Software Solutions India Private Limited) vs. ACIT [TS-404-ITAT-2018(Bang)-TP] - IT(TP)A No.529 & 491/Bang/2016 dated 02.05.2018

643. The Tribunal relying on the judgement of coordinate bench in case of Hewlett Packard (I) Software Operation Pvt Ltd held that assessee engaged in providing software development services to its AE could not be compared to:

- Avani Cimcon Technologies Ltd due to absence of segmental data with respect to revenue from software services
- Celestial Labs Ltd as it was engaged in clinical research and manufacture of bio products.
- E-zest Solutions Ltd as it was engaged in development services and high end technical services.
- Flextronics Software Systems Ltd as it had different financial year ending and no reconciliation was made by the department.
- Helios & Matheson Information Tech Ltd as it was engaged in sale of software products.
- Infosys Technologies Ltd as it had huge revenues and significant intangibles
- Ishir Infotech as it outsourced its work and failed employee cost filter.
- Kals Information Systems Ltd as it was not purely a software development service provider.
- Lucid Software as it outsourced its work and failed employee cost filter.
- Persistent Systems as Ltd segmental data were unavailable.
- Wipro Ltd as segmental data were not available, and it owned huge intellectual property.

The Tribunal further, remitted back the comparable of Tata Elxsi after relying on coordinate bench in case of Quark System which has been upheld by the HC (wherein the Tribunal had remanded the issue of comparability of companies considered in the assessee's own TP study consequent to assessee's ground challenging the comparability of its own comparable).
M/s. SCM Microsystems (India) Pvt Ltd vs ACIT CC VI(1)-TS-358-ITAT-2018(CHNY)-TP-ITA No 2155/Chny/2011 dated 04.04.2018

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644. The Tribunal held that the assessee, dealing in global IT solutions, application development and maintenance, application re-engineering and retesting and outsourcing software development to its AE, was not comparable to companies engaged only in software services and companies engaged in the business of software products as well as end to end web solutions since they were functionally dissimilar. Additionally, where a company had been rejected by the TPO on account of extraordinary events during the year, but the assessee submitted that the said company did not undergo a merger but the merger took place in one of the company's subsidiary companies, the company was to be included as comparable subject to verification of facts.

Kumaran Systems Pvt Ltd v DCIT - (2016) 66 taxmann.com 75 (Chennai - Trib)

645. The Tribunal held that the assessee, engaged in providing software services could not be compared to:

- Bodhtree Consultancy Ltd as it was functionally different since it was engaged in both software products and services, providing ITES Data activities, data management and data warehousing activities and its margins were fluctuating over a period of 3 years
- CIP Technologies and Export Ltd as there was an abnormality of profits and losses as the 3 years average margin of the comparable included two years of losses
- VMS Software Technology Ltd as it had a turnover of merely Rs.85 lakhs which was below the turnover filter of one crore applied by the TPO
- FCS Software Solutions Ltd as it was functionally different, had fluctuating margins and did not have any segmental details
- CAT Technologies Ltd as no relevant information of the said company had been provided.

GE Converteam EDC Pvt Ltd v ACIT - TS-98-ITAT-2017(CHNY)-TP] - I.T.A. No. 973/Mds/2014 dated 25.01.2017

646. The Tribunal held that a company having a different financial year end viz. January to December as compared to the assessee viz. April to March could be selected as a comparable if the data for the financial year could be compiled from its audited accounts, considering the fact that it was functionally similar to the assessee. Accordingly, it directed the assessee to furnish the compiled data to the TPO for due verification.

Further it held that companies having a low turnover of Rs.1 crore could not be compared to the assessee who had a turnover of Rs.317 crore and that companies developing and owning its own unique web based software by which they provided niche services to its customers could not be compared to the assessee who did not have any intangibles of its own.

RR Donnelley India Outsource Pvt Ltd v DCIT – TS-956-ITAT-2016 (Chny) – TP

647. The Tribunal held that the assessee, engaged providing software development and technical support services to its AE could not be compared to:

- Acropetal Technologies Ltd as it was engaged in development of computer software

- E-Zest Solutions Limited as it was engaged in product engineering services in the nature of High end knowledge process outsourcing and having expertise in emerging technologies cloud Saas, business Intelligence and mobility
- Persistent Systems as it was engaged in software product development and product design services, it earned income from product licensing and did not have any segmental details Sasken Communications Limited as it was engaged in multimedia products.

Symantec Software and Services India Private Limited vs. DCIT - TS-96-ITAT-2017(CHNY)-TP - I.T.A. No. 614/Mds/2016 dated 20.01.2017

648. The Tribunal ruled on selection of companies for assessee engaged in design and development of software used in rendering the services to the shipping industry and rejected its appeal for exclusion of the following companies on the following grounds:

- Mindtree (IT Services segment), L&T Infotech Ltd. And Persistent Systems Ltd. on the ground that even though the turnover of these 3 companies was more than Rs 800 cr compared to assessee's turnover of Rs 22 cr, Rule 10B provided that, turnover and brand- value were not a criteria for selection of comparable. Further, it rejected assessee's reliance on High Court decision in the case of Pentair Water India Pvt. Ltd [TS-566-HC-2015(BOM)- TP] since Pentair was engaged in manufacturing industry and volumes/turnover were relevant factors to meet huge capital investment and service charges, whereas assessee was engaged in service sector where cost of service was proportionate to services rendered.
- Spry Resources Pvt. Ltd as the assessee failed to provide any functional dissimilarity, assets deployed and impact on margins and held that the company could not be excluded merely because it was engaged in Government projects. Further, it held that the assessee could not be compared to:
- Acropetal Technologies Ltd as it was engaged primarily in Engineering design services.
- Kals Information Systems as it was functionally dissimilar and segmental data with regard to software products, training income, translation fee.
- Goldstone Technologies Ltd. as it was functionally dissimilar and engaged only in IT segment and not in software development. As the assessee failed to rebut the DRP findings, Tribunal upheld exclusion of this company.
- CG-VAK Software Systems Ltd as it was a persistent loss making company and accordingly could not be compared to the assessee. Reliance was placed on the decision in the case of Tibco Software India Pvt. Ltd.
- Sankhya Infotech Ltd on the ground of functional dissimilarity, ownership of intangibles and lack of complete segmental data

Shipnet Software Solutions India Pvt Ltd vs DCIT-TS-427-ITAT-2017(CHNY)-TP-ITA No.3404/Mds/2016 dated 28.04.2017

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649. The Tribunal remitted the matter of functional comparability of Acropetal Technologies noting that though the assessee had characterized itself as a software development company however it was recharacterized by the AO as an engineering design service provider which was not contested by the assessee. However, the assessee had not filed TP documentation as an engineering design service provider which had to be done. Thus, it remitted back the matter for the TPO (who had rejected assessee's comparables for software development segment and selected the aforesaid comparable for engineering design service provider) to re-examine the comparability after considering the TP documentation (to be filed by assessee as an engineering design company) noting that assessee relying on coordinate bench decision in Bloom Energy had rightly contended that comparable should be excluded for the subject year on the ground of high operating profit margin (61.11%).

GE Power Conversion India Private Limited, (Successor to GE Power Conversion Technology Pvt Ltd) [TS-1117-ITAT-2018(CHNY)-TP]

650. The Tribunal held that the assessee, providing IT enabled Services to its AEs could not be compared to the following companies:

- Cosmic Global as it outsourced a substantial portion of its activities as a result of which its employee cost was only 25 percent of its total cost.
- Infosys BPO Ltd as it had a huge turnover of Rs. 850 crores which exceeded the turnover of the assessee by more than 10 times.

Observing that the assessee had itself selected Cosmic Global Ltd in its TP study, relying on the decision of the Special Bench in Quark Systems [TS-23-ITAT-2009(CHANDI)-TP] (which was upheld by P&H HC [TS-448-HC-2011(P & H)-TP]), the Tribunal held that the assessee could not be estopped from seeking exclusion of a comparable which was on its own list.

Visual Graphics Computing Services India Private Limited Vs ACIT - TS-129-ITAT-2017(CHNY)-TP /I.T.A. No.2340/Mds/2012 dated 10-02-2017

651. The Tribunal held that the assessee engaged in the business of rendering data conversion services was not comparable to companies providing consulting services, developing software products, companies who have undergone an extra-ordinary event such as merger / demerger. Further, it held that loss making companies could not be compared with profit making companies and directed for the exclusion of such companies.

Lason India Pvt Ltd v JCIT - (2016) 47 CCH 0147 (Chen Trib)

652. The Tribunal rejected assessee's use of data relating to past 2 years in case of comparables due to assessee's failure to give a valid reason in light of provisions of section 10B(4). The Tribunal further, allowed assessee's ground for exclusion of 9 comparables on grounds of functional dissimilarity as engaged in software product development, failed 25% employee cost filter and KPO services and 8 comparables on applying Rs 1200 cr Turnover filter relying on the ground that the guidance note of ICAI on Transfer Pricing states that a transaction entered into by a Rs.1000 crores company cannot be compared with the transaction entered into by a Rs.10 crores company. It also remitted to the file of the TPO the comparability of one company for verification of extraordinary events by way of amalgamation during the year.

Polaris Consulting & Services Ltd -TS-2-ITAT-2017(CHNY)-TP

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653. The Tribunal held that assessee engaged in provision of ITES to its AE could not be compared to:

- Infosys BPO Ltd. as the export turnover was approx. Rs.1356 crores whereas assessee's export turnover was only Rs.14.5 crores thus, there was undisputedly a wide gap in size and turnover
- Hartron Communication as it had diversified activities and had achieved extraordinary profits during AY 2013-14.
- Cenlub Industries, Demba Valva and SE Electricals Ltd. as TPO had selected the said companies as comparables observing that under TNMM only broad functional comparability is required inspite of giving a clear cut finding they were functionally dissimilar.

Further,

- It remitted Caliber Point Business Solution to the file of the TPO observing that the manner in which profits were extrapolated were not placed before it. It accepted assessee's contention that the comparable could not be excluded on merely a different financial year.
- It remitted the comparability of MPS Ltd. as TPO had not examined the issue with respect to its inclusion. It directed the TPO to pass an appropriate order in accordance with merit after examining the objections raised by the assessee.

Cameron Manufacturing India Pvt Ltd. vs DCIT [TS-1254-ITAT-2018(CHNY)-TP] ITA No.336/Chny/2018 dated 16.10.2018

654. The Tribunal held that Geodesic Information Systems Ltd could not be considered as a valid comparable as the said company was also engaged in the development of software product which led to an abnormal increase in income viz. 89 percent and in profits viz. 249 percent. Further, IT Micro Systems (India) ltd was excluded as comparable as it provided software development services and was also engaged in the hotel business. Further, Fortune Infotech Ltd was excluded as the said company was providing web centric application whereas the assessee was operating purely on IT services provided to its AE therefore functionally incomparable.

The Tribunal excluded 4 companies viz. Dynacons Systems & Solutions Ltd, Online Media Solutions, KCC Software Ltd and Bangalore Softsell Ltd as comparable since they had a low margin of below 5 percent as compared to the margin of the assessee viz. 27.94 percent.

Further, applying a turnover filter of Rs. 1 crore to Rs.25 crore, dismissed the contention of the Revenue

for exclusion of Star Infotech Ltd on the basis that its turnover was Rs.22.9 crore as compared to that of the assessee viz. 7.66 crore. It also held that where the annual reports of a comparable for the year under review was duly furnished by the assessee, the Revenue was incorrect in seeking for its exclusion on the ground of non-availability of financials.

J&B Software India P Ltd v ACIT – TS-978-ITAT-2016 (Chny) – TP

655. Where the assessee was engaged in providing both software services and sale of software products, the Tribunal upheld DRP's exclusion of 3 comparables on the ground of non-availability of segmental data, turnover of less than 10% of the assessee and a wide gap in employee cost between the assessee and comparable company.

Wabco TVS Ltd [TS-889-ITAT-2016(CHNY)-TP] (I.T.A.No.883/Mds./2015)

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656. The Tribunal remitted the comparability of Informed Technologies Ltd. noting that the assessee's (engaged in IT services) plea for exclusion of the company on account of the it not qualifying the filter of operating income exceeding 70% of revenue was not raised before the TPO and DRP. It directed the TPO to re-examine the comparability after giving an opportunity to the assessee to raise all contentions before the TPO and place necessary evidence before it.

Navigant BPM (India) Private Limited (Formerly known as M/s.Revenue Med India (P) Ltd) vs ACIT [TS-1143-ITAT-2018(COCH)-TP] IT(TP)A No.146/Coch/2015 dated 07.09.2018

657. The Tribunal held that the assessee providing business support services & ITeS to AE could not be compared to:

- Infosys BPO Limited as it was a giant company with turnover of INR1,312 crores as against the assessee's turnover of only INR 11.47 crores.
- TCS E-Serve Limited as it had significantly high turnover of INR1,578 crores as against the assessee's turnover of only INR 11.47 crores
- Informed Technologies India Limited as it had granted interest free loan of INR74.56 lakhs to related party which was irrecoverable which had a direct impact on its profitability.

XM Software Solution Private Limited vs. ACIT - TS-190-ITAT-2018(COCH)-TP dated 07/02/2018

658. The Tribunal restored the determination of ALP of ITES segment of assessee noting that assessee had raised objections before the TPO and DRP vis-à-vis comparables (ICRA Online Ltd., Acropetal Technologies, Accentia Technologies Ltd, Jeevan Scientific Technology Ltd.) on segmental account details being absent, presence of intangibles and failure to satisfy certain filters which was disposed off by DRP confirming TPO's order without passing a speaking order. Thus, it restored the matter with directions to the assessee to raise contention vis-à-vis comparables to be excluded before the TPO.

Navigant BPM (India) Pvt Ltd.vs ACIT [TS-1223-ITAT-2018(COCH)-TP] IT(TP)A No.57 /Coch /2016 dated 23.10.2018

659. The Tribunal held that the assessee engaged in the business of providing ITES services to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in providing a gamut of services, had significant intangibles. Further, segmental details were unavailable.
- Cosmic Global Limited as it had outsourced its main activity and the employee cost was less than 21.30%.
- Fortune Infotech Limited as it was engaged in providing web application development including mobile applications, e-Commerce applications and SEO services, developing CMS based website using Drupal, Joomla, WordPress, e-Commerce Magento etc., offering onsite and offsite services to various clients and also into web designing services.
- Igate Global Ltd as it had a turnover of Rs. 932.18 crores as compared to the assessee's turnover i.e Rs. 76.91 crores.
- Infosys BPO Limited as it was engaged in diversifying services like customer

service outsourcing, finance and accounting, knowledge services, human resource outsourcing, legal process outsourcing, sales and fulfillment, sourcing and procurement outsourcing, banking and capital outsourcing, media outsourcing, energy outsourcing, retail, etc. Further, it had an exceptional year of operation as it had acquired McCamish Systems LLC to provide end to end services.

- TCS E-serve International Limited as it was engaged in providing transaction processing and technical services which was functionally dissimilar to the assessee.
- Satyam BPO Limited as the financials were not reliable due to fraud.
- Further, It remitted R Systems International Limited to the file of TPO to examine its functionally similarity vis-à-vis the assessee.

Vertex Customer Services India Private Limited (now merged with Vertex Customer Management India Private Ltd) vs. DCIT-TS-1052-ITAT-2017(DEL)-TP dated 28.11.2017

660. The Tribunal held that the assessee company rendering IT enabled services to its AE, could not be compared to companies using highly skilled work force for carrying out research and development activities, companies rendering web designing and software testing services and companies in whose case extraordinary event of amalgamation took place during the relevant year.

ACIT v Tech Book Electronics Sercices (P) Ltd - [2016] 67 taxmann.com 169 (Delhi-Trib)

661. The Tribunal admitted the assessee's additional ground with respect to TP study report not being rejected by the TPO and hence improper on the part of the Revenue to proceed with their own determination of ALP, but rejected assessees contention that since TPO categorically accepted assessee's TP Study, his order modifying economic analysis of international transaction was unsustainable. The assessee had relied on the Del HC ruling in the case of Li and Fung and coordinate bench decision in COIM wherein it was held that without first discarding the methodology of the assessee the TPO cannot proceed to make any alterations The Tribunal noted that vis-a-vis benchmarking of IT enabled services and software development services, though TPO had accepted assessee's TNMM for both the segments, he had rejected the economic analysis of the software development segment, filters applied by the assessee and assessee's use of multiple year data. Accordingly, the TPO had directed the assessee to carry out fresh search and had modified qualitative as well as quantitative filters giving reasons. Thus, it observed that the TPO's order clearly and unambiguously demonstrated that the TPO had objected to the TP Study and overruled the objections of the assessee on various aspects of the TP study. Further it noted that the TPO had stated that assessee was not a mere contract software developer but involved in coding and testing of particular items. Thus, it rejected assessee's additional ground, but also clarified that its observations were only restricted to the context of whether the TPO had accepted assessee's TP Study and not on whether the TPO's approach was correct, accordingly scheduled the hearing of the appeal to hear parties on merits.

Microsoft India (R&D) P. Ltd vs Dy.CIT [TS-753-ITAT-2018(DEL)-TP] ITA No.1479/Del/2016 dated 23.07.2018

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662. The Tribunal held that the assessee, engaged in the business of design and development of customized software applications could not be compared to companies having revenue from software development, hardware maintenance, information technology, consultancy in the absence of segmental information and companies engaged in software development services along with sale of software products without a break-up between the two.
Further, it held that where a comparable company earned income from a customer pursuant to an agreement entered into between such customer and the comparable company's parent company, which in the instant case was the AE of the assessee as well, the said transaction of receipt of income would be considered as a deemed international transaction under section 92B and the company could not be considered as comparable since it would no longer be an uncontrolled transaction.
Saxo India Pvt Ltd v ACIT - (2016) 67 taxmann.com 155 (Del - Trib)

663. The Tribunal held that the assessee-company engaged in rendering software development services to its AE, could not be compared to companies developing their own software products and company owning significant intellectual property rights in form of patents which were used in rendering software development services.
Headstrong Services India Pvt Ltd v DCIT - (2016) 66 taxmann.com 185 (Delhi - Trib)

664. In respect of assessee's financial and accounting support services segment which was a high-end KPO segment, the Tribunal rejected reliance on jurisdictional HC ruling in Rampgreen Solutions to contend exclusion of 2 comparables since in the said precedent the assessee's profile was taken as low end ITeS and not a high end KPO as in the case at hand.
Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] - I.T.A .No.- 6779/Del/2015

665. The Tribunal held that the assessee, providing IT Enabled services to its AEs was not comparable with companies having undergone substantial business restructuring resulting into extraordinary circumstances during the relevant financial year, companies engaged in providing KPO and LPO services, companies who have developed and own unique web based software by which it provides niche services to its customers, companies having huge brand value and intangibles and companies providing both BPO services and high end technology services not having segmental results.
Further, in relation to the software development services, the Tribunal held that the assessee could not be compared with companies developing their own software products, companies having undergone business restructuring, engaged in both, the sale of services and products but not having segmental break-up and companies failing the related party transactions filter.
Equant Solutions India Pvt Ltd v DCIT - (2016) 66 taxmann.com 192 (Del)

666. The Tribunal excluded E-clerx services Ltd as a comparable while benchmarking the transactions of the assessee (provision of ITeS to its AE), noting that the business model of Eclerx was significantly different as it incurred more than 26% of the total employees and

job work cost on outsourcing which was significantly different from the business model of the assessee.

Ariba India Pvt Ltd vs DCIT-TS-750-ITAT-2017(DEL)-TP-ITA No. 5201/del/2012 dated 25.09.2017

667. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Tata Consultancy Ltd as it had earned income from information technology and consultancy services but segmental details were not available.
- Wipro Ltd as it was a leading provider of IT service including business process outsourcing (BPO) and had other products such as IT products and customer care and segmental details were unavailable.

Adobe Systems India Pvt Ltd vs. JCIT-TS-1008-ITAT-2017(DEL)-TP ITA No.1163/Del/2014 dated 30.11.2017

668. The Tribunal held that for the purpose of benchmarking the call centre services provided by the assessee to its AEs, the following companies could not be considered as comparable:

AY 2008-09

- Accentia Technologies Ltd at it had undertaken an extra-ordinary event of acquisition during the year and it earned revenue from software development and implementation as well
- Coral Hub (earlier Vishal Information Technologies Ltd.) as it outsourced a substantial amount of its services
- Eclerx Services Ltd as it had undergone an extraordinary event of merger which resulted in increased profitability and also since it was functionally different as it provided specialized services in the nature of a Knowledge Process Outsourcing (KPO) such as data analytics, data process solution, tailored outsourcing process and management services including multitude of data aggregation, mining and maintenance services

AY 2009-10

- Coral Hub as it outsourced a substantial amount of its services and also since it had a huge inventory of POD publishing titles
- Eclerx Services Ltd due to the functional differences based on which it was excluded in the immediately preceding assessment year

AY2010-11

- Accentia technologies Ltd as it had undergone an extraordinary event of merger and acquisition and also since the company had shown income from

medical transcription, billing and coding, and software development and implementation for which no segmental data in respect of ITES services was available

- TCS E-serve limited as it was engaged in providing high-end transaction processing, technical services involving software testing, verification and validation at the time of implementation, data centre management activities and also used the 'TATA' Brand which impacted its profitability
- TCS E-serve international Ltd as the company was engaged in providing technical services such as software testing, verification and validation of software at the time of implementation and data centre management activities and no segmental information was available to bifurcate ITES services and technical services.

AY2011-12

- TCS E-serve limited & E clerx service Ltd based on the findings for the earlier years as there was no material change in facts

Corporate Executive Board India Pvt. Ltd. (now known as CEB India Pvt. Ltd) vs. ACIT - TS-220-ITAT-2017(DEL)-TP - ITA No. 6328/Del/2012, ITA No. 1088/Del/2014, ITA No. 963/Del/2015, ITA No. 6683/Del/2015 dated 17.03.2017

669. The Tribunal held that the assessee engaged in online courseware development services to its AE could not be compared to:

- Infosys Technologies Ltd as it was a giant company in terms of risk profile, nature of services, number of employees, ownership of its branded products and brand related profits, having huge turnover of as compared to assessee's turnover (which was 1043 times of the turnover of the assessee). Further, it also noted that this company was also into software product and incurring huge amount of its R&D.
- KALS Information Systems as it was engaged in imparting training on commercial basis of selling its software products and therefore was functionally dissimilar to the assessee.
- Tata Elxsi Ltd as it was engaged in distinct activities like development of hardware and software for embedded products, such as multi-media and some other electronic etc. and it was also engaged into making some programmes developing technology and was having huge intellectual property.
- Wipro Limited as it had significant investment in R&D for development of IP and products to the extent of 11% of the revenue. Further, it had huge turnover (Rs.11,955 crore), substantial intangible assets in the form of goodwill and there was no availability of standalone data for FY 2007-08.

Element K India Pvt. Ltd vs. ITO-TS-959-ITAT-2017(DEL)-TP ITA No.6277/Del./2012 dated 22.11.2017

670. The Tribunal held that the assessee engaged in the business of provision of finance/IT back office support services could not be compared to:

- E-clerx Service Limited as it outsourced most of its services. Further, it provided services through two business units viz., financial services including consulting business analysis and solution testing and sales and marketing

services which also included web content management & merchandising execution, web analytics which were high end KPO services and segmental details for the same were not available.

- TCS E-serve Limited as it was a subsidiary of Tata Consultancy services limited having an inherent element of very high brand value associated with it. Further, it was engaged in rendering services broadly comprising of transaction processing and technical services including software testing, verification and validation for which no segmental bifurcation was available.
- ICRA Technology Analytics Ltd as it was engaged in the business of software development and consultancy, engineering services, web development and providing business analytic and business process outsourcing and thus functionally dissimilar to the assessee.
- Accentia Technologies Private Limited as it had acquired a software development company during the year due to which its revenue had significantly increased affecting the pricing and comparability of the company vis-à-vis the assessee.

BC Management Services Pvt Ltd vs DCIT-TS-438-ITAT-2017(DEL)-TP-ITA No.6134/del/2015, 5839/del/2015 and 6572/del/2016 dated 25.05.2017

671. The Tribunal held that the assessee, a captive service unit, engaged in providing research and development services relating to contract software development maintenance could not be compared with companies such as Infosys, having huge turnover, IP rights and brand value. Further, the Tribunal excluded TCS as a comparable on the ground that it was engaged in providing IT and Consultancy services as well as sale of equipment and software licenses without a segmental break-up along with the fact that it made an acquisition of another company during the year.

Sony Mobile Communications International AB v DDIT - (2016) 46 CCH 0550 (Del - Trib)

672. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- Avani Cincom Technologies as it was engaged in providing software development and consulting IT services and therefore functionally dissimilar to the assessee.
- Bodhtree Consulting ltd as the revenue recognition policy followed by it was different from the assessee.
- Infosys Technologies ltd as it was a giant company in terms of risk profile, number of employees and ownership of brand.
- KALS Information Systems ltd as it was engaged in providing software development as well as training services and accordingly was functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was engaged in licensing of products.
- Quintegra Solutions Ltd as it had copyrights of Rs. 2.71 crores which was used in its business which made it functionally dissimilar to the assessee.
- Tata Elxsi as it was engaged in providing integrated hardware and

packaged software solutions and innovation design and engineering solutions and therefore functionally dissimilar to the assessee.

- Thirdware Solutions Ltd as the company earned income from export of software products from SEZ/STPI units apart from sale of license.
- Wipro Ltd as it was operating as a full-fledged risk-taking entity and engaged in providing technology infrastructure services, testing services, package implementation and accordingly functionally dissimilar to the assessee.
- Akshay Software Technologies ltd as it was engaged in sale of products and accordingly functionally dissimilar to the assessee.

Aircom International India Pvt. Ltd vs DyCIT (2017) 50 CCH 280 (DEL Trib.)-ITA no. 6402/del/2012 dated 02.08.2017

673. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Infosys Limited as it was giant risk-taking company, owing intangibles was engaged in development and sale of software products for which segmental details were unavailable.
- Zylog Systems Limited as it was engaged in providing onsite services, specialized in providing software products and solutions and earned revenue from consulting, licensing fee, as well as from software products and solutions and therefore functionally dissimilar to the assessee.
- Persistent Systems & Solutions Ltd. as it was dealing in software products in outsourcing of software product development.
- E-Zest Solutions Ltd as it was engaged in providing diverse services like BPO, product engineering, software product development and KPO.
- Acropetal Technologies Ltd. as it was engaged in IP led product development, engineering design services, healthcare services.

Alcatel-Lucent India Ltd vs. ACIT-TS-1005-ITAT-2017(DEL)-TP-I.T.A .No. 1112/DEL/2017 (A.Y 2012-13) & S. A No. 142/Del/2017 dated 03.11.2017

674. The Tribunal held that the assessee was incorrect in seeking exclusion of a company on the ground that it was engaged in the business of software products because the company did not have any inventory of software products and the said company was engaged in providing software development services akin to the services provided by the assessee. With regard to the exclusion of Infosys and Wipro on the grounds of brand value possessed by the two companies, the Tribunal remitted the matter to the TPO to determine the impact of the brand on the profitability of the companies. Additionally, it held that the assessee was incorrect in seeking to exclude companies on the basis of them having revenues from software products, where 96 percent of their operating revenues were derived from software development services.

Further, it held that where the TPO used the segmental data of companies obtained under section 133(6) of the Act to determine comparability of the companies with the assessee, he was obligated to afford the assessee an opportunity to cross examine the data.

Agnity India Technologies Pvt Ltd v DCIT - (2016) 47 CCH 0475 Del Trib - I.T.A .No.-6485/Del/2012

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675. The Tribunal held that the assessee engaged in the business of providing software development services to its AEs could not be compared to:

- E-Infochips Bangalore Ltd as it was engaged in product and semiconductor engineering services having 500 products for key verticals like aerospace and defence, security and surveillance, consumer devises, medical devices, retail and e-commerce and software technology and it was a Member of Indian Electronics and Semiconductor Association (IESA).
- Infinite Data Systems Pvt Ltd. as it was engaged in providing solutions that encompass technical consulting, design and development of software, maintenance, systems integration, implementation, testing and infrastructure management services.

Further, in respect of the ITES segment, it excluded TCS E-Serve International Ltd as it had volatile profit margin, super-normal growth of 173% in revenue and was an industry giant as against the assessee which was a captive service provider rendering back-end support services to its AE.

Stryker Global Technology Center Private Limited vs. DCIT-TS-863-ITAT-2017(DEL)-TP-ITA No.6866/Del./2014 dated 13.10.2017

676. The Tribunal held that in case of assessee company rendering software development services to its AE, a company engaged in research and development activities, a company which was huge in terms of nature of services, number of employees, ownership of branded products, etc and a company which included its revenue even from hardware segment in 'software devlopment' segment, could not be accepted as valid comparables while determining ALP.

It further held that in case of assessee company rendering IT enabled services (ITES) to its AE, a company rendering technical services such as software testing, verification and validation of software item and a company rendering ITES services after outsourcing same to third parties, could not be considered as comparables while determining ALP.

Headstrong Services (India) (P) Ltd v DCIT - [2016] 68 taxmann.com 363 (Delhi-Trib)

677. The Tribunal held that the assessee engaged in the business of providing IT enabled services to its AE/overseas group company could not be compared to:-

- Vishal Information Technologies Ltd as it outsourced majority of its work and thus had a completely different business model than the assessee.
- Mold Tek Technologies Ltd as it was engaged in providing structural engineering services and during the year, it had also entered into an extraordinary transaction of amalgamation.
- Accentia Technologies ltd as it had a different revenue model comprising of Medical transcription coding and software which was functionally dissimilar to the assessee. And segmental details were unavailable.
- E-clerx Services Ltd as it was engaged in providing KPO services which was functionally dissimilar to the assessee.
- Bodhtree Consulting Ltd as it was engaged in providing open and end to end

web solutions, software consultancy, design and development of solution and segmental details were unavailable.

- Informed Technologies India ltd as it had a high profit margin of 34.71% for AY 2007-08 compared to losses for earlier year and therefore had an abnormal business trend.
- HCL Comnet Services Ltd as it followed a different accounting year compared to the assessee.
- Infosys BPO Ltd as it was engaged in CRM, finance and accounting, knowledge services, order management and procurement and human resources for various vertical business undertaking and thus functionally dissimilar to the assesseee.
- Wipro Ltd as the company's revenue from ITeS segment was Rs 979 crores as compared to assessee's 55.94 lacs.

American Express (India) Pvt Ltd vs DCIT-TS-551-ITAT-2017(Del)-TP-dated 07.06.2017

678. Where the assessee had initially decided not to contest the addition proposed in the assessment order, but subsequently filed an appeal considering the fact that not filing an appeal before the Tribunal would prejudice its tax related matters pending adjudication before different forums for other years, the Tribunal condoned a delay of 148 days in filing appeal by assessee and held that, the issue permeated through all the years and if on account of one year, the adverse finding for that year should not prejudice the assessee's claim for other years. Further, noting that KALS information's software development expenditure included software consumption from inventory, it held that since it had inventory, it earned revenue from products and therefore excluded the company from the comparables while benchmarking the international transaction of the assessee who was engaged in the business of software development services.

Aircom International (India) Pvt. Ltd vs. DCIT-TS-399-ITAT-2017(DEL)-TP-ITA No.4403/Del/2012 dated 19.05.2017

679. The Tribunal held that the assessee engaged in the business of providing business process outsourcing services to its AE could not be compared to:

- Accentia Technologies Ltd as it had an extraordinary event of amalgamation during the year leading to a growth of 150% in the relevant year compared to the previous year showing that it had an impact on the company's profitability.
- Eclerx Limited as it was engaged in providing KPO services and had 1500 domain specialized employees.
- Maple Esolutions Ltd as its directors were under serious indictment for fraud.

DCIT vs. Everest Business Advisory India (P) Ltd vs DCIT-TS-1038-ITAT-2017(DEL)-TP ITA No.41/Del./2013 dated 15.12.2017

680. The Tribunal held that in case of assessee company rendering IT enabled services (ITES) to its AE, a company in whose case extraordinary event of amalgamation took place, a company rendering KPO service, company with brand and ownership of intangibles cannot be considered as comparable to the assesseee company.

United Health Group Information Services-TS-731-ITAT-2016(DEL)- TP-ITA No. 1038/Del/2015

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681. The Tribunal held that the assessee's software development services segment was not comparable to giant companies such as Infosys Technologies Ltd and Wipro Ltd in terms of risk profile, scale, nature of services, revenue, ownership of branded products and provision of both onsite and offshore services and companies having revenue from software products and training as well.

Further, with respect to the ITES Segment of the assessee, it held that companies engaged in providing high end KPO services and companies having related party to sales in excess of 15 percent could not be compared to the assessee engaged in providing low end services.

The Tribunal further held that the assessee's marketing support segment could not be compared to companies imparting technical consultancy services and companies not having a separate marketing support segment.

Avaya India Pvt Ltd v DCIT - TS-377-ITAT-2016 (Del) - TP

682. The Tribunal remitted the TP-issue relating to assessee's international transactions viz., provision of software development services to its AE to the file of CIT(A) for fresh consideration. The TPO had rejected the assessee's application of cost plus method (CPM) as most appropriate method assessee had failed to substantiate how the requirements for applying CPM had been fulfilled and applied TNMM as it was more tolerant to functional differences between enterprises. Noting that the assessee had not given any basis or detail regarding the comparables before the TPO for which he was left with no other alternative and considered TNMM as the most appropriate method to take care of functional differences, it remitted the matter to the file of CIT(A) for fresh adjudication.

DCIT vs. Vedaris Technology Pvt. Ltd-TS-768-ITAT-2017(DEL)-TP ITA No.166/Del/2011 dated 29.09.2017

683. The Tribunal held that the assessee engaged in the business of providing IT enabled services to its AE could not be compared to:

- Eclerx Services Ltd as it was engaged in providing high end KPO services and there was an extra-ordinary event of amalgamation impacting its profits.
- Infosys BPO Ltd as it had acquired 100% voting interest in another entity which was a strategic sourcing and category management service provider having an impact on its profits. Further, it was a giant company having huge brand value and intangibles.
- TCS E-serve Ltd as it was engaged in providing financial services to help its customers achieve their business objectives by providing innovative best in class services. Further, its operations included delivering core business processing services, analytics and insights (KPO) and support services for both data and voice process.

  It remitted Excel Infoways Ltd. to the file of TPO to verify the details provided by the comparable u/s 133(6) vis-à-vis the financial details. Further, it also remitted CG-VAK Software exports Ltd, Datamatics Services Ltd and Calibre Point Solutions Ltd to the file of TPO for verification of its compatibility with the assessee.

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Exevo India Pvt. Ltd (Now MA KS Solutions (India Pvt. Ltd) vs. DCIT-TS-1007-ITAT- 2017(DEL)-TP I.T.A. No.20/Del/2017 dated 30.11.2017

684. In case of an assessee engaged in IT enabled services to its AE, the Tribunal relied on the co-ordinate bench judgements in case of Ameriprise India, Bechtel India & Sun Life India and accepted assessee's plea for exclusion of TCS e-serve International on grounds of functional dissimilarity, absence of segmental details, possession of intellectual property and usage of Tata Brand,

Further the Tribunal accepted assessee's plea for inclusion of Karvy Global as comparable on the basis of functional similarity and similar operating revenues.

Stefanini India Pvt Ltd vs ITO Ward 3(4)- TS-338-ITAT-2018(DEL)-TP- ITA No 5479/Del/2016 dated 25.04.2018

685. The Tribunal allowed assessee's appeal seeking exclusion of Wipro technologies as a comparable for benchmarking software development services for AY 2010-11. Relying on the decision in the case of Open Solutions and Saxo held that since Wipro had acquired all Citi Group interests by virtue of Master Services Agreement (MSA), it would make subsequent rendition of services by this company to Citi Group fall within the ambit of deemed international transaction and fail the RPT filter as entire revenue of this company would be on account of RPT rendering it incomparable to the assessee. Accordingly, it directed the exclusion of this company from the final list of comparables.

Agnity India Technologies Pvt Ltd vs DCIT-TS-778-ITAT-2017(DEL)-TP ITA No.955/Del./2015 dated 20.09.2017

686. The Tribunal held that the assessee engaged in the business of providing data processing/ITES

to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in providing KPO services, operating in the healthcare industry, and owning proprietary software products such as instacare, instascribe, instaweb.
- TCS E-serve Ltd as it had significant intangibles and had substantially increased operating profits post acquisition.
- Infosys BPO Ltd as it was engaged in high end integrated services and therefore was functionally dissimilar to the assessee.

Omniglobe Information Technologies (India) Pvt. Ltd vs. ITO-TS-1025-ITAT-2017(DEL)-TP ITA No.1003/Del/2016 dated 06.11.2017

687. The Tribunal held that the assessee engaged in the business of providing software development and quality analysis services could not be compared to:

- Infosys Ltd as it was a giant company having huge turnover, brand value, significant AMP

  expenditure and therefore was incomparable to the assessee.
- KALS Info Systems Limited as it earned revenue from software services and software products for which segmental details were unavailable, rendering it functionally dissimilar to the assessee
- Tata Elxsi Ltd as it was engaged in development of specialized/niche products

and therefore functionally dissimilar to the assessee.

Mentor Graphics (India) Private Limited vs DCIT-TS-799-ITAT-2017(DEL)-TP ITA No.2587/Del/2014 dated 27.09.2017

688. The Tribunal held that the assesse rendering software development services and Marketing support services to its AE could not be compared to

- Avani Cincom Technologies as it was engaged in the business of providing consulting

  IT services and therefore functionally dissimilar to the assessee.
- Bodhtree Consulting Ltd as it was engaged in providing end-to-end solutions and consultancy services and therefore was functionally dissimilar to the assessee. Further, it recognized revenue based on software developed and billed to clients as against assessee who recognized revenue over the contracted period of development on cost plus basis.
- Infosys Technologies ltd as it was engaged in the business of providing services IT consulting and a giant un terms of risk profile, nature of services, number of employees, ownership of branded products and branded products and brand related profits etc vis-à-vis a captive unit providing software development services without any IP rights.
- KALS Information Systems Ltd as the annual report of the company showed that it was engaged in the business of providing software development services and software products. Further, it was also engaged in providing training to software professionals online and therefore was functionally dissimilar to the assessee.
- Persistent Systems ltd as the company had developed software Products in the area of identity management contractors and therefore was functionally dissimilar to the assessee.
- Quintegra Solutions ltd as it was utilizing its own software for providing software development services whereas the assessee did not have any software to be used in rendering software development services.
- Tata Elxsi as it offered integrated hardware and packaged software solutions which was functionally dissimilar to the assessee.
- Thirdware Solutions ltd as it earned majority of the revenue from exports from SEZ/STPI units and sale of license making it incomparable to the assessee.
- Wipro ltd as it was a full-fledged risk-taking entity and was engaged in providing technology infrastructure services, testing services, package implementation and had more than 82000 employees as well as its own R&D centre, making it functionally dissimilar to the assessee.
- Akshay Software Technologies ltd as it was engaged in sale of products which was functionally dissimilar to the assessee.
- Nihar Info Global ltd as it earned revenue from sale of products and therefore functionally dissimilar to the assessee.
- VMF Softtech as it had outsourced its work and therefore functionally dissimilar to the assessee.

Aircom International (India) Pvt Ltd vs DCIT-TS-671-ITAT-2017(DEL)-TP-ITA No. 6402/del/2012 dated 02.08.2017

689. The Tribunal held that assessee engaged in providing IT Enabled services to its AE could not be compared to:

- Flextronics Software Systems Ltd as the company was engaged in the business of both software products and services and no break-up was available.
- HCL Comnet Systems and Services Ltd due to unavailability of financial data for the same financial year as that of the assessee
- Informed Technologies Ltd on the ground that the company had super normal growth and abnormally high fluctuating profits
- Infosys BPO, relying on the decision of the co-ordinate bench in American Express [India] {P} Ltd vs DCIT [TS-551-ITAT-2017(DEL)-TP] wherein it was held that since the said company had huge turnover it was not comparable to companies operating on a smaller scale such as the assessee
- Wipro Ltd, relying on the decision of the co-ordinate bench in American Express [India] {P} Ltd vs DCIT [TS-551-ITAT-2017(DEL)-TP], wherein it was held that companies such as Wipro having huge turnover and scale of operations could not be compared to companies operating on a much smaller scale such as the assessee.
- Bodhtree Consulting Ltd as the said company was engaged in both software sales and services and no segmental data was available

Cengage Learning India Pvt. Ltd vs ITO - TS-736-ITAT-2018(DEL)-TP - ITA No. 5926/DEL/2010 dated 11.05.2018

690. The Tribunal held that the assessee engaged in the business of providing software development and marketing support services to its AE could not be compared to:

- Accentia technologies Ltd as it was engaged in providing services in the areas of Transcription, Coding, Billing, and Collections. Further, it had Offshore Development Centers (ODCs) in different cities of the country and 3000 trained professionals as compared to the 12 of the assessee and therefore was not comparable to the assessee.
- Crossdomain Solutions Pvt Ltd as it was an insurance KPO company and payroll KPO which were high end KPO services.
- Infosys BPO Limited as it had carried out re-organization of its subsidiaries and engaged in transferring shares, liquidation of entities and merge. Further, its turnover was 55 times of assessee's turnover.

UT Starcom Inc. vs. DDIT-TS-976-ITAT-2017(DEL)-TP ITA No.1829/Del./2014 dated 25.11.2017

691. The Tribunal upheld the DRP's order excluding the following comparables for assessee engaged in the provision of call centre services to its AE:

- Infosys BPO Ltd. as it offered wide range of services viz. platforms like Source-to-pay, Business Order Management, Business platform etc. and had high brand value and segmental information was not available. [It relied on the coordinate bench decision in case of Equant Solutions.]
- TCS E-Serve Ltd. as it was engaged in providing high end technology services like software testing, verification and validation of software and was using Tata brand. [It also noted that DRP in subsequent year had excluded the comparable and relied on the coordinate bench decision of Equant Solutions.]

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- TCS E-Serve International Ltd. as it was engaged in providing high end technology services like software testing, verification and validation of software and was using Tata brand.

DCIT vs BA Call Centre India Pvt. Ltd. [TS-470-ITAT-2018(Del)-TP] ITA No.387/Del/2015 dated 08.06.2018

692. The Tribunal relying on Delhi HC's decision in Chryscapital Investment Advisors admitted assessee's additional ground for inclusion of two companies (i.e CG-VAK and Microgenetics Systems Ltd engaged in the business of rendering IT enabled services) in the list of comparables for benchmarking provision of IT enabled services provided by assessee to its AEs during AY 2009-10. It remitted the entire issue to AO/TPO for examining inclusion or otherwise of two comparables in accordance with the settled principles of comparability and also directed the assessee to justify before AO/TPO as to why these companies were not included in its TP study report originally and to demonstrate comparability of FAR of these comparables.

Vaildor Capital India Pvt Ltd - TS-1050-ITAT-2016- (Del)-TP- ITA No. 1979/Del./2014

693. The Tribunal held that the assessee engaged in rendering ITES services to its AE could not be compared to Genesys International Corporation Ltd as the company was engaged in diversified business operations providing high-end and complex services such as GIS consulting, 3D mapping, navigation maps, Lidar, photogrammetry etc. as against assessee's rendering of mere back office ITeS. It also held that comparability failed on account of the company being full-fledged risk taking entity vis-à-vis assessee's limited risk profile and had significant intangible whereas the assessee did not own any intangibles.

Exl Service.com India Pvt Ltd vs DCIT [TS-486-ITAT-2018(DEL)-TP] ITA No.2559/Del/2014 dated 18.06.2018

694. The Tribunal upheld CIT(A)'s order deleting TP-adjustment in respect of assessee providing IT enabled services. Relying on ITAT order in assessee's own case for prior year, it excluded Vishal Information Technologies, Wipro Limited, MoldTek Technologies as comparables since there were no change in facts in the present year. Further, it relied on the categorical findings of CIT(A) to exclude Genesys International since its geospatial services were functionally not comparable to assessee and it needed skilled manpower.

DCIT vs Everest Business Advisory India (P) Ltd [TS-622-ITAT-2018(DEL)-TP] ITA No.2562/Del/2013 dated 13.06.2018

695. The Tribunal held that assessee engaged in provision of ITeS and financial support services for AY 2009-10 could not be compared to:.

- Coral Hub Ltd as it was outsourcing majority of its activity;
- Cosmic Global and eClerx Services as they were providing high end services. [The Tribunal relied on the rulings of Mercer Consulting (India), PTC Software and Maersk Global Service Centres to exclude the said comparable.]

GE India Business Services Pvt. Ltd. vs. DCIT [TS-381-ITAT-2018(DEL)-TP] ITA No.1423/Del/2014 dated 18.05.2018

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696. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Eclerx Services Ltd as it was rendering different set of services such as data analytics, computer added simulations to global clients and therefore was functionally dissimilar to the assessee.
- TCS e-Serve Ltd as it was involved in high end services like transaction processing, technical services involving software testing, verification and validation of software at the time of implementation and management activities rendering it functionally dissimilar to the assessee. Further, it remitted the comparability of R Systems International Ltd to the file of TPO directing the assessee to provide relevant information and TPO to verify the same and if found appropriate include the same.

BT e-Serv (India) Pvt Ltd vs ITO-TS-949-ITAT-2017(DEL)-TP dated 30.10.2017

697. The Tribunal held that assessee engaged in provision of ITES to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in diversified activities like healthcare management receivables, medical transcription, software development and film production and there was no segmental information available. [It relied on coordinate bench rulings in assessee's own case for earlier years.]
- E Clerx Ltd as it was KPO company, outsourcing substantial work to third parties whereas the assessee was providing back office support services with their own human resource. [It relied on coordinate bench ruling in assessee's own case which in turn had followed the ratio laid down in Delhi HC in Rampgreen Solutions.]
- Infosys BPO Limited as the company had a high employee cost base and turnover and intangible in form of brand value which would have huge effect while computing PLI and vitiated the comparability with a company which is a captive service provider without much tangibles and risk.[It relied on the jurisdictional HC decision in BC Management Services Ltd.]
- TCS e-Serve Limited as the company had a high employee cost base and turnover and intangible in form of brand value which would have huge effect while computing PLI and vitiated the comparability with a company which is a captive service provider without much tangibles and risk. [It relied on the jurisdictional HC decision in BC Management Services Ltd.]

Further, it included R Systems International Ltd as a comparable relying on the decision of P&H HC ruling in the case of Mercer Consulting India P. Ltd, wherein it was held that R Systems could not be rejected owing to different financial year ending and the financials could be extrapolated if the quarterly financial results were in public domain. The Tribunal relying on the jurisdictional High Court decision in Chryscapital Investment Advisors India Ltd. wherein it was held that turnover could not be the basis of exclusion if the company was functionally comparable included the companies (i) CG Vak Software and Exports Ltd. (ii) Informed Technologies India Ltd. (iii) Microgenetics Systems Ltd. which were rejected by the TPO on account of low turnover.

Cadence Design Systems (I) P Ltd vs ACIT [TS-955-ITAT-2018(DEL)-TP] ITA No.6315 of 2015 dated 02.04.2018

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698. Where the Assessee was engaged in the business of software development and providing IT enables services, the Tribunal accepted assessee's contention to exclude 3 comparables in the software development segment viz Infosys Technologies Ltd (giant risk taking company with huge intangibles), KALS Information System Ltd (engaged in executing end to end software development projects through entire value chain of software development cycle) and Tata Elxsi Ltd (engaged in providing integrated hardware and package software solutions) and 3 comparables in the ITeS segment viz. Coral Hub Ltd (outsources its work), Triton Corporation Ltd (financial irregularities committed by directors) and Maple eSolutions Ltd (financial irregularities) on the ground of functional dissimilarity, outsourcing of work, turnover of intangibles, unreliable financials, etc. Further, it observed that while computing working capital adjustment for software development services and ITeS, TPO had considered sundry debtors, creditors, inventory at consolidated entity level and held that TPO should have taken relevant standalone balances only and remitted the matter for deciding afresh by providing an opportunity of being heard to the assessee.

Ut Starcom Inc (India Branch) - TS-1063-ITAT-2016(DEL)-TP - ITA No.5848/Del./2011

699. The Tribunal upheld CIT(A)'s exclusion of Mold Tech Technologies Ltd from the list of comparables for benchmarking IT enabled services (ITeS) rendered by the assessee to its AEs on the ground that the company was having extraordinary profits in ITeS segment (213% in present AY) and was not functionally similar as it was dealing in engineering design and detailing services, website design services etc.

Evaluesserve.com Pvt Ltd - TS-1060-ITAT-2016(DEL)-TP - I.T.A. No. 5270/Del/2012

700. As the functional profile of Rampgreen Solutions P Ltd and that of the assessee (rendering IT enabled services to its AE) were similar, relying on the judgement of Rampgreen Solutions Pvt Ltd, the Tribunal excluded from the list of comparables Accentia Technologies, I-gate Global Ltd, Infosys BPO Ltd & TCS E-Serve International Ltd stating functionally dissimilarity and extraordinary event of merger.

Further, the Tribunal remitted back the issue with respect to inclusion/exclusion of TCS E-serve Ltd to the file of AO/TPO to decide afresh in light of assessee's submission that the said comparable had substantial related party transactions

GE India Business Services P Ltd. Vs DCIT Circle 10(1)- TS-330-ITAT-2018(Del)-TP- ITA No 6906/Del/2014 dated 27.04.2018

701. The Tribunal held that assessee providing IT and IT enabled services to its AE was comparable to:

- Infosys Ltd, Satyam Ltd, Nucleus Netsoft & Vishal Information relying on HC judgement in case of Chryscapital Investment Advisors. It further held that for an otherwise comparable company high/low turnover was not a valid criterion for rejection.
- Blue Star as CIT(A) had while excluding the same failed to provide proper calculation of RPT.
- Maars Software as the merger was called off and hence, no extraordinary event occurred to justify exclusion

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The Tribunal further held that Encore Software was to be excluded as comparable by relying to co-ordinate bench judgement in case of Navisite India wherein it was held that company having diminishing revenue not in conformity with normal operations results could not be considered as comparable. Further, the Tribunal excluded Quintegra on the grounds of high RPT percentage and different financial year ending.

DCIT Circle 11(1) Delhi vs FIS Global Business India Pvt Ltd- TS-321-ITAT-2018(DEL)-TP- ITA No 5944/DEL/2010 dated 11.04.2018

702. The Tribunal held that the assessee engaged in providing IT enabled services to its AE could not be compared to Accentia Technologies Ltd as it earned income from various streams and did not have segmental income. Further, the company had undertaken acquisitions during the year under review rendering functionally dissimilar.

It rejected assessee's contention and held that TCS e-serve International ltd and TCS e-serve Ltd were to be included as comparable. It held that mere high turnover / profit could not be valid grounds for exclusion and further that the companies software testing and validation of software formed part of ITES services and could not be considered as software development .

It rejected the assessee's argument that the company had high brand value noting that the companies expended only 0.43 percent of its total expenditure on brand. Further

Further, it rejected assessee's contention to exclude Infosys BPO holding it to be functionally similar to assessee and also rejected the plea relating to brand value and acquisition during year noting that the company incurred insignificant expenses on brand building and had infact incurred loss in the acquired business.

However it accepted assessee's plea to include CG- VAK Software & Exports Ltd and R Systems International Limited as comparable and held that the TPO incorrectly rejected the said companies as comparables. It held that CG Vak could not be excluded merely because it did not satisfy the turnover filter as turnover could not be the basis for rejection of an otherwise functionally similar comparable. Further vis-à-vis R Systems, it held that merely because the company followed a different financial year it could not be excluded where the results of the relevant financial year could be reasonably extrapolated from the data in public domain.

Cadence Design Systems (India) Pvt. Ltd. vs. DCIT - TS-191-ITAT-2018(DEL)-TP - ITA No. 380/Del/2015 dated 05.01.2018

703. The Tribunal held that the software development segment of the assessee was not comparable to the following companies viz. a). Avani Cimcon Technologies Ltd as it was a software product company having IP and not providing software development services and therefore not functionally comparable to the assessee, b). Celestial Labs Ltd as it was a software product company engaged in development of software products in the diverse filed of bio informatics and also it owned intangibles and undertook R&D activities, c). Infosys Ltd as it was a market leader, engaged in diverse activities including software products and also it owned intangibles and had high brand value d). Kals Information Systems Ltd as it was engaged both in software services and software products e). Wipro Ltd as the company was engaged in both software development and software development services and also it owned intangibles and undertook R&D unlike the assessee.

Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) – TP - ITA No. 6334/Del/2012

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704. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Eclerx Services Ltd as it was a KPO and mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field of retail, manufacturing and financial services (including consulting, process outsourcing, process re-engineering and automation services)
- TCS e-serve Ltd as it was engaged in transaction processing and technology services and separate segmental details were not available.

H&S Software Development & Knowledge Management Centre Pvt Ltd vs. ITO - TS-136-ITAT-2018(DEL)-TP] - ITA No. 2200/Del/2014 dated 15.02.2018

705. The Tribunal remitted the question of inclusion/exclusion of 5 comparables for assessee's provision of ITeS to AE noting that there was no observation of the DRP on the said issue. Vis-à-vis i) Alphageo, it observed that the company had been excluded in co-ordinate bench ruling in Flour Daniel on grounds of functional dissimilarity and for having a very high net fixed asset/sales ratio as compared to the assessee and accordingly, directed the AO/TPO to verify if the same held good for this case and ii) Mahindra Engineering, it directed the AO/TPO to reject the company as a comparable if its RPT was found to be greater than 25% as the said issue had not been brought before TPO/DRP.

Eigen Technical Services Pvt. Ltd. vs. DCIT - TS-78-ITAT-2018(DEL)-TP - ITA No.244/Del/2012 dated 22-01-2018

706. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Accentia technologies Ltd as it was engaged in (i) Healthcare Receivables Cycle Management (HRCM) and (ii) development of software products for Business Processing Outsourcing (BPO) and segmental details were unavailable.
- Cosmic Global Limited as it earned revenue from 3 segments Viz., medical transcription, translation services and accounts BPO segment and segmental details were unavailable. Further, it had an abnormal growth of 106%.
- Eclerx Services Limited as it was a KPO providing data analytics and data process solutions to global enterprise clients and had significant intangibles to the tune of 7.24% and it was also engaged in providing sales and marketing support services to leading global manufacturing, retail, travel and leisure companies and therefore functionally dissimilar to the assessee.

NCS Pearson India Private Limited vs. ACIT-TS-868-ITAT-2017(DEL)-TP ITA No.2556/Del./2014 dated 25.10.2017

707. Where the CIT(A) had while considering the remand report from the TPO in respect of assessee engaged in software development services excluded Infotech Enterprises Ltd and Subex Systems Ltd as it had substantially high proportion of related party transaction i.e 45.03% and 31.86% respectively, the Tribunal upheld that order of CIT(A) and dismissed Revenue's appeal by holding that since the order of the CIT(A) was detailed and reasoned, there was no need to interfere with the same.

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DCIT vs Transwitch India Pvt Ltd-TS-895-ITAT-2017(DEL)-TP - I.T.A .No. 4375/DEL/2011 dated 06.11.2017

708. Relying on the co-ordinate bench decisions in the case of Alcatel Lucent and Symantec Software, the Tribunal excluded the following comparables for the assessee engaged in providing software development services to its AE:

- Persistent System and Solutions Ltd. as it was a product development company with diversified services and separate segmental information was not available.
- Sankhya Infotech Limited as it was engaged in diversified services, which included the provision of customized products and services for training purposes. It also owned a research and development center.
- E-Zest Solutions Ltd. as it was engaged in diversified services such as product engineering, outsourced product development, enterprise application development, IT services, industries solutions and technical expertise, without any segmental information. Its high end services were classified as KPO.
- Infosys Ltd as it was not functionally comparable, had hugh scale of operations, high brand value, R&D with significant revenue and capital expenditure which created significant intangibles.
- Wipro Ltd. as it was engaged in the development of a product, namely FLOW which was used in the retail sector and was a result of significant R&D activities
- Sasken Communication Technologies as it was functionally different
- Zylog Systems Limited as the company had earned income from both, software development services and products but no separate segmental information was available

Clear 2 Pay India Pvt Ltd vs ITO TS-757-ITAT-2018(DEL)-TP ITA No.2788,2744 and 594/Del/2017 dated 22.06.2018

709. The Tribunal held that the assessee engaged in providing liasioning, administrative support and other ITeS could not be compared to:

- E-Clerx Services Ltd as the company was engaged in high-end KPO not comparable to the assessee and also since the company had acquired a UK-based Igentica Travel Solutions Limited ("ITS") company during the year
- Accentia Technology Ltd as the revenue earned by it from services was less than 75 percent, the company was engaged in software development and it had undertaken mergers / demergers during the year under review
- Coral Hub Ltd as the working model of the company was outsourcing based and therefore it could not be compared with the assessee moreso considering its employee costs were merely 4.39 percent of its total costs.
- Mod-Tek Technologies Ltd as the company was engaged in providing structural engineering service not comparable to the activities of the assessee.

NCS Pearson India Private Ltd. vs. DCIT - TS-99-ITAT-2018(DEL)-TP - ITA No.5577/Del/2014 dated 03.01.2018

710. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Larsen and Turbo Infotech as it was engaged in the sale of products apart from rendering software development services and segmental details were unavailable

- Persistent Systems as it was engaged in product development, product design and analysis services rendering it functionally dissimilar to the assessee.
- Persistent Systems Solutions Ltd as its net profit for the relevant year increased by 247% and turnover increased by 184%.
- Sasken Communication Technologies as it had significant intangibles in the form of sasken branded products and exceptional year of operation.
- Wipro technologies as it was engaged in providing program management, third party data security, quality assurance and business process management services and that the company is a product company rendering it functionally dissimilar to the assessee.

Agilis Information Technologies Interntional Pvt. Ltd. (Now known as Infogix International Pvt. Ltd.) Vs ITO -TS-894-ITAT-2017(DEL)-TP-ITA No. 1063 / del / 2016 dated 13.11.2017

711. The Tribunal held that assessee providing IT enabled services in the nature of research and analyst services to its AE could not be compared to:

- Infosys BPO Limited considering the huge turnover or giantness of the company (by relying on the precedent judgment namely CIT vs Pentair Water India Pvt Ltd [TS-763-ITAT-2016(PAN)-TP] and New River Software Services Pvt. Ltd Delhi HC)
- Accentia Technologies Ltd due to occurrence of an extraordinary event of amalgamation in the said case.

Further, the Tribunal remanded the following comparable to the file of the TPO

- E4e health care services Pvt Ltd as the annual accounts were not available in public domain. (The Tribunal directed the TPO/AO to provide the copy of financial statements and then decide on the issue of retaining or excluding it as a comparable.)
- Datamatics Financial Services, Optimus Global Services & Sparsh BPO Services as objections raised by the assessee (i.e. negative net worth and export sales filter) were factual in nature, thus required verification.

Further**,** TCS e serve International Ltd was included as a comparable and the Tribunal held that it was functionally comparable to assessee by relying on Cadence Designs System vs DCIT.

M/s. Smart Cube India Pvt Ltd vs ITO ward 24(1) Delhi-TS-379-ITAT-2018(DEL)-TP- ITA No. 1103/Del/2015 dated 27.04.2018

712. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Infosys Limited as it was a giant company in terms of risk profile, nature of services, number of employees, ownership of branded proprietary products, expenditure on R&D rendering it incomparable to the assessee.
- Tata Elxsi as it was engaged in product design services, innovation design engineering services and visual computing labs and had specialized and niche domain of software products/ services and therefore was functionally dissimilar to the assessee.
- Persistent Systems Ltd as it was dealing in software products and earned its income both from software services and products.

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Thirdware Solutions Ltd as it earned revenue from subscription as well as sale of license rendering it functionally incomparable to the assessee.

NEC Technologies India Ltd (formerly known as NEC HCL Systems Technologies Ltd) vs DCIT-TS-887-ITAT-2017(DEL)-TP ITA No.1102/Del./2015 dated 27.10.2017

713. The Tribunal held that the assessee engaged in providing IT enables services could not be compared to:

- E4 Health care business services as it was engaged in transcription of medical prescription and thus functionally dissimilar to the assessee
- ICRA Techno Analytics as it was engaged in various activities namely software development, consultancy services web development etc however, no segmental information was available.
- Infosys BPO Ltd as it had huge turnover and goodwill

The Tribunal included Cosmic Global at segment level and directed inclusion only of its medical transcription and consultancy services segment as comparable and further included Jindal Intellicom P Ltd as not specifically pressed by assessee for exclusion.

Keystroke Pro India P Ltd vs ITO Ward 14(3) – TS-333-ITAT-2018(DEL)-TP ITA No 537/Del/2015 dated 10.04.2018

714. The Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

- Persistent Systems Ltd. as it was dealing in software products and earned income from sale of both software products as well as services for which segmental details were not available
- Sasken Communication Technologies Ltd. as revenue generated from software products was high and though there was a break-up of revenue from software services and software products the operating cost and net operating revenues from 2 segments was not separately given.
- Zylog systems Ltd as it was into research and development activities and owned significant intangibles
- Wipro Technology Services Ltd. as it earned majority of revenue from Citigroup Inc and was earlier part of Citi Group and subsequently, it was acquired by Wipro and the arrangement of earning revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services was actually a prior arrangement between assessee's AE (Wipro Ltd) and third party (Citigroup Inc.) and hence the transaction ceased to be a comparable uncontrolled transaction.
- E-Info Chips Ltd. as there was no segmental information available in respect of sale of products and revenue from software development segment.

Further, the Tribunal dismissed Revenue's appeal for exclusion of Calibre Point Business Solutions (absence of segmental details) as it was pointed out by assessee that segmental information for software development services was considered by the TPO while giving effect to DRP's directions.

NEC Technologies INDIA PVT. LTD. vs. Dy CIT (2018) 53 CCH 0344 DelTrib ITA No. 6283/Del/2015 dated 11.07.2018

Dy.CIT vs NEC Techologies India Pvt Ltd (2018) 53 CCH 0344 DelTrib ITA No. 312/Del/2016 dated 11.07.2018

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715. The Tribunal held that the assessee engaged in the provision of ITES to its AE could not be compared to:

- Accentia Technologies Ltd. as it had acquired stake in companies viz. Geo-Soft Technologies (Private) Ltd and Indium Technologies India Pvt Ltd and was also engaged in diversified activities like healthcare management receivables, medical transcription, software development and film production and there was no segmental information available
- Vishal Information Technologies Ltd. as it was considered as a KPO service provider in the Del HC decision of Rampgreen Solutions Pvt. Ltd.
- Eclerx Services Ltd as the company was engaged in providing high level services involving specialized knowledge and domain expertise and is a KPO service provider. [It relied on the Special bench decision of iQor India Services (P.) Ltd]
- Genesis International Corporation Ltd as the company provided cadastral mapping, navigation maps, 3-D mapping, photogrammetry /remote sensing services, power etc., which were highly skilled and knowledge-based services. Further, it disregarded the reliance placed by the TPO on CBDT Circular no.890(E) which listed 15 products or services under the umbrella of IT enabled services by following the decision of coordinate bench decision of Macquaireb Global Services Pvt Ltd wherein it was held that Genesis International Corporation Ltd. (even though covered under the list of ITES falling under the head geographic information system services) could not be compared to assessee which was engaged in providing backoffice operations and call centre services (which was also covered under the list of ITES) as 15 products or services under overall umbrella of ITES of the CBDT Circular were entirely diverse in nature due to different proportion of skills and extent of capital employed required for such services.
- HCL Comnet Systems and Services Ltd. (Seg.) as the company incurred significant R&D expenses and also developed several tools as reported in the annual report. It also had a high RPT of 23 per cent as against the 15 per cent threshold applied by the TPO. The company also owned sufficient intangible assets in the form of computer software and there was inconsistency in the information between the annual report and the data obtained under 133(6) as a different financial year has been adopted. Also, the company earned from sale of networking equipment and software. [It relied on the Delhi HC decision of Rampgreen Solutions Pvt. Ltd.]
- Infosys BPO Ltd. as the company had huge turnovers, owned IPR and brand value on products.
- Acropetal Technologies Ltd,(segment) as the company was engaged in the development of computer software involved in engineering design services and also had products, which were high end functionally dissimilar. [It relied on the coordinate bench decision of Capital IQ Information Systems (India) (P.) Ltd.]

  Cengage Learning India P Ltd vs Dy.CIT [TS-828-ITAT-2018(DEL)-TP] ITA No.6484/Del/2012 dated 19.07.2018

716. The Tribunal had excluded i) Infosys Technologies as it was a giant risk taking company with significant intangibles and assets, ii) KALS Information Systems as it derived income from software products and was also engaged in executing end to end project in the software development cycle in the Software development segment and iii) Vishal Information

technology as it outsourced most of its work to vendors/service providers. The Court held that since the Tribunal had assigned clear reasons for exclusion and no substantial question of law arose. Accordingly, it dismissed the Revenue's appeal.

CIT (International Taxation) vs Ut Starcom Inc (India Branch)-TS-758-HC-2017(DEL)-TP-ITA 767/2017 dated 25.09.2017

717. The Tribunal held that the assessee engaged in providing software development services could not be compared to:

- Infosys Ltd as the company had been rejected as a comparable on account of functionality, high turnover, brand value and significant AMP expend by the co-ordinate bench in its own case for the earlier year which had been upheld by the High Court - MentorGraphics (India) P Ltd [TS-420-HC-2017(DEL)-TP] and Mentor Graphics (India) Private Limited [TS-799-ITAT-2017(DEL)-TP]
- KALS Information Systems Ltd as the company was engaged in development of software products rendering it functionally dissimilar (as also held in the assessee's own case for the prior year)
- Bodhtree Consulting Ltd as it had fluctuating profitability and was excluded by the co-ordinate bench in its own case for the earlier year which had been upheld by the High Court
- Tata Elxsi Ltd as it was engaged in the development of specialized/niche products which was entirely different from the assessee. (as also held in the assessee's own case for the prior year)
- Avani Cincom Technologies Ltd as the company was engaged in both software products and services and the segmental data was not available.
- Wipro Ltd as the company was engaged in both software products and services and the segmental data was not available.
- E-Zest Solutions Ltd as the company was into software products development services and providing high end technical services which fell under the ambit of KPO services.
- Persistent Systems Ltd as the company was engaged in both software products and services and the segmental data was not available.

Mentor Graphics (India) Pvt. Ltd. vs. DCIT - TS-432-ITAT-2018(DEL)-TP - I.T.A .No. 410/DEL/2013 dated 23.05.2018

718. The Tribunal held that the assessee engaged in providing ITeS to its AE could not be compared to:

- Accentia Technologies Limited as it had undergone extra ordinary events on account of amalgamation and also was engaged in providing the entire gamut of services under healthcare receivables cycle management viz., medical transcription, medical coding and billing and receivables management services and did not have adequate segmental results.
- Cosmic Global Limited as the company had a different business model as it had outsourced significant work to outside ventures and as such, its employee cost was less than 21.30%
- Fortune Infotech Limited as the company was into web application development including mobile applications, e-Commerce applications and SEO services, developing CMS based website using Drupal, Joomla, WordPress, e-Commerce Magento etc., offering onsite and offsite services to various clients and also into web designing services whereas the assessee was into providing routine ITES to its AE.

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- Igate Global Ltd as the company was engaged into providing IT and ITES whereas no segmental information was available in its annual report company and it had also undergone restructuring by way of amalgamation.
- Infosys BPO Limited as it was engaged in different and diversifying services like customer service outsourcing, finance and accounting, knowledge services, human resource outsourcing, legal process outsourcing, sales and fulfillment, sourcing and procurement outsourcing, banking and capital outsourcing, media outsourcing, energy outsourcing, retail, etc. as against assessee which was into routine ITES. Moreover, it noted that the said company had i) huge turnover of Rs.1126.63 crores ii) goodwill of Rs.19.30 crores as per annual report iii) incurred selling and marketing expenses to the tune of 6.96% to enhance its business and iv) had an exceptional year of operation due to acquisition of McCamish Systems LLC to provide end to end services.
- TCS e-Serve International Limited and TCS e-Serve Limited as their operations broadly comprised of transaction processing and technical services and therefore was not comparable to the activities of the assessee
- Satyam BPO Limited as the creditability of a company due to the scam was at stake and therefore could not be considered as a reliable comparable
- Vis-à-vis R Systems it accepted the assessee's plea that a comparable could not be rejected merely on account of different financial year where the company was functionally comparable and the results for the relevant year could be reconciled and remitted the comparability of the said company back to the file of the TPO directing the assessee to provide reconciliation of the profitability with authentic and reliable data

Vertex Customer Services India Private Limited (now merged with Vertex Customer Management India Private Ltd) vs. DCIT - TS-1052-ITAT-2017(DEL)-TP - ITA No. 1508/ Del./2015 dated 28.11.2017

719. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Infosys Limited as the company was functionally dissimilar, had brand value and substantial intangible assets. [It relied on the coordinate bench decision in assessee's own case for earlier year.]
- Persistent Systems Ltd as it earned royalties from licensing and sale of products. Further segmental information was not available. It also had significant portion of its revenue from export of software services and products. [It relied on the coordinate bench decision in assessee's own case for earlier year.]
- Wipro Technology Services Ltd as the company was earlier part of Citi Group and subsequently, it was acquired by Wipro and the arrangement of earning revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services was actually a prior arrangement between assessee's AE (Wipro Ltd) and third party (Citigroup Inc.) and hence in light of the transaction ceased to be a comparable uncontrolled transaction. [It relied on the coordinate bench decision of Saxo India Pvt Ltd.]
- Tata Elxsi Ltd. as its software development services performed were akin to research and development services. Its software development services included but were not limited to product &innovation design, engineering and visual computing labs and it also performed R&D activities towards software and electronic system development for industries such as wireless multimedia and broadcasting.

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Pyramid IT Consulting P Ltd [TS-618-ITAT-2018(DEL)-TP] vs ACIT ITA No.7083/Del/2014 dated 11.07.2018

720. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Infosys Ltd as it had significant assets and high brand value **and was** a full-fledged risk taking entrepreneur developing and engaged in selling of software products. **[The Tribunal** held it that it could not compared with the captive service and contract software development companies as the comparability analysis failed on all the factors of FAR. It relied on coordinate bench decision **in** assessee's own case which in turn had relied on Delhi High Court ruling in Agnity India.]
- Wipro Technology Services Ltd as **it** earned majority of revenue from Citigroup Inc and was earlier part of Citi Group and subsequently, it was acquired by Wipro and the arrangement of earning revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services was actually a prior arrangement between assessee's AE (Wipro Ltd) and third party (Citigroup Inc.) and hence in light of the transaction ceased to be a comparable uncontrolled transaction. [It relied on the coordinate bench decisions in Orange business Systems and Ness Technologies.]
- Acropetal Technologies Ltd. as **it** failed the filter applied by the TPO viz. employee cost filter of greater than 25% (as Acropetal's employee cost was only 13.74%).
- E-Infochips Limited as Ltd as it was a software development , software product and ITeS company and as segmental data was not available and not a good comparable to pure software development services undertaken by assessee as a captive service provider.[It relied on the coordinate bench decision **in** Saxo India and Ness Technologies.]
- E-Zest Solutions Ltd. as **it** was engaged in diversified business activities, including product engineering services and outsourced product development services, inventory in the books of account and company's special expertise in emerging technologies. [It relied on coordinate bench decision in Symantec Software.]

  Further,
- it remitted the comparability of CG-VAK Software and Exports Ltd. and directed the AO to verify the employee cost filter after considering the cost of services under the expenditure head and accept it as comparable if it passes the employee cost filter.
- With respect to R Systems International Ltd. (having a different financial year from the assessee), it directed the TPO to consider the quarterly financial statements for FY 2010-11 for the purpose of inclusion observing that the coordinate bench decision for assessee's own case had considered it to be functionally comparable.
- It directed the TPO to verify the export sales of Thinksoft Global Ltd. vis-a-vis the total operating revenue from the annual report and to include it in the list of comparables if it passed the export earnings filter.
- It also remanded the comparability of Cat Technologies Ltd. to the file of the TPO to reach a fresh conclusion on the aspect of whether it passes the RPT filter or not.
- It remitted the comparability of LGS Global Ltd. to the TPO to verify whether classification of expenses under the head "purchase and personnel cost" were mainly on account of employee cost since the assessee had pointed out that there were no tangibles or inventory in the books of accounts and directed the TPO to verify again if employee cost filter is satisfied.

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- It included Goldstone Technologies Ltd. noting that the DRP in assessee's own case had held it to be a comparable and Revenue was not able to point out any change in business model of the assessee for the subject year.

Cadence Design Systems (I) P Ltd vs ACIT [TS-955-ITAT-2018(DEL)-TP] ITA No.6315 of 2015 dated 02.04.2018

721. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Bodhtree Consulting Limited as it was engaged in IT consulting and product engineering service and had a wide array of business activities like data warehousing and data management and therefore was functionally dissimilar to the assessee
- Infosys Technologies Ltd as it had mega operations and significant assets and brand value and full-fledged risk-taking company and therefore was not comparable to the assessee.

Further, it remitted the comparability of Sonata Software Limited and Gold Stone Technologies ltd to the file of TPO to determine the RPT percentage and segmental details.

Further, in respect of the ITES segment, the Tribunal held that assessee providing IT back office support services comprising of UNIX/windows administration and support, internal helpdesk services could not be compared to:

- Accentia Technologies ltd as it was engaged in medical transcription, billing and collections,

  income from coding etc and segmental information for each stream was unavailable.
- E-Clerx Services Ltd as it was engaged in providing KPO services and had outsourced substantial work to third parties.
- Vishal Info Tech as it outsourcing charges of 90.57% which reflected that it had a different business model and it was also engaged in e-publishing services which was a KPO business model rendering it functionally dissimilar to the assessee.

Cadence Design Systems (India) Pvt Ltd vs DCIT-TS-716-ITAT-2017(DEL)-TP-ITA No. 2074/del/2014 dated 04.09.2017

722. The Tribunal held that the assessee, a captive service provider engaged in rendering software development research and other related services to its parent company could not be compared to:

- Infosys Ltd as the functional profile of the company was highly diversified and that it was full- fledged risk bearing entrepreneur having a turnover of above Rs. 21,000 crore and significant R&D, advertising expenses. Further, it held that the brand equity and intangibles of the company were more than Rs.1,00,000 crores which proved that the company derived substantial portion of its profits from its brand value and hence such a giant company could not be compared with the assessee which did not have any significant intangibles and is a risk mitigated entity.
- Wipro Technology Services Ltd, noting that the said company was part of the Citi Group, rendering services to various entities of the Citi Group

worldwide and was acquired on
January 20, 2009 by 'Wipro Ltd' and that there was pre-arrangement between Citi group
and Wipro Ltd. for providing business of at least $500 million over a period of 6 years after acquisition as a result of which, all the revenue received by the company from Citi Group on account of such prior agreement or pre-arrangement amounted to a deemed international transaction and therefore the company did not satisfy the RPT filter of 25 percent adopted by the TPO as all its revenue was from the Citi Group.

- Persistent Systems Ltd as it was a leader in the world of outsource software product development and the break-up of income as to revenue from software services and products, both from exports and domestic was not available
- Thirdware Solutions Ltd as it was engaged in various activities like sale of licenses, software services and revenues from subscription and there was no segmental data to work out the separate margin from software services.

Open Solutions Software Services Pvt. Ltd. vs. DCIT - TS-305-ITAT-2017(DEL)-TP - ITA No.7078/Del/2014 dated 17.04.2017

723. The Tribunal held that the assessee engaged in the business of providing human resource related services, payroll processing services, training and performance system data entry to its AE could not be compared to:

- TCS e-Serve Ltd as it had significant brand influence which affected the profitability.
- Infosys BPO Ltd as it had brand value and incurred substantial selling and marketing expenditure. Further, there was an event of acquisition in the relevant year and therefore, it could not be compared to the assessee.
- Excel Infoways ltd as there was contradiction in the facts or data sourced from annual report and as per information gathered u/s 133(6).

Baxter India Pvt Ltd vs ACIT-TS-694-ITAT-2017(DEL)-TP-ITA No. 6158/del/2016 dated 24.08.2017

724. The Tribunal held that the assessee company rendering software development services to AE could not be compared with –

- Cat Technologies Ltd. as the company was earning Revenue from software development services as well as consultancy services and did not contain any segmental information.
- Thirdware Solutions Ltd. as the company was earning income from software development services as well as sale of licences and the segmental information was unavailable for the same.
- Tata Elexi Ltd. as the company was engaged in making animated films and there was a functional difference between the assessee and the company.
- Akhay Software Technologies Ltd. as the company was earning income from sale of software products as well as software development services and the segmental information about the same was not available.

Virage Logic International-India Branch Office v. JDIT - [2018] 93 taxmann.com 54 (Delhi - Trib.) - IT APPEAL NOS. 6919 & 7044 (DELHI) OF 2014 dated APRIL 16, 2018

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725. The Tribunal held that assessee engaged in providing ITES to its AE could not be compared to:

- Accentia Technologies Ltd. as it was engaged in development of software products for healthcare. Further, it was engaged in diersified activities like KPO,LPO, Data processing, LPO high end software services and segmental details were not available.
- TCS E-Serve Ltd as it had made payment for use of TATA brand and use of such brand increased its operating profits.
- Informed Technologies India Ltd. as it was a KPO and analysed data on financial fundamentals serving the needs of financial content sector in USA

Further, the Tribunal included R Systems International Ltd. as a comparable directing the assessee to furnish its quarterly report to extrapolate the financials

INDUCTIS INDIA PVT. LTD. vs. Dy CIT (2018) 53 CCH 0329 DelTrib ITA No. 1438/Del/2016 dated 13.07.2018

726. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Birla Soft Ltd as its RPT transactions constituted 80% of its sales thus, it did not satisfy the filter applied by TPO of RPT of 25%
- Wipro Ltd as it was engaged in provision of IT services including BPO and IT products, has significant brand presence and owned intangibles
- L&T Infotech Ltd. as it earned revenue from three segments namely, service cluster, industrial cluster and telecom cluster and its unallocable expenses were not allocated between the segments in absence of availability of nature of expenses and proper allocation keys, and thus correct operating margin could not be ascertained
- Tata Technologies Ltd as RPT transactions came to about 87% of sales thus, it did not satisfy the filter applied by TPO of RPT of 25%

Pitney Bowes Software India Pvt Ltd vs Addl CIT [TS-1313-ITAT-2018-(Del)-TP] ITA No.5052 /Del/2018 dated 17.12.2018

727. The Tribunal while adjudicating on recalled order (arising from miscellaneous petition) in case of assessee engaged in software development directed TPO/AO to consider Megasoft Ltd. as a comparable after taking only the relevant segment by relying on ratio laid down in case of coordinate bench decision of Core Objects India (P) Ltd wherein Megasoft was held to be a good comparable in case of software development after considering only software development segment.

Infinera India Pvt Ltd vs ITO [TS-1313-ITAT-2018-(Del)-TP] ITA No.5052 /Del/2018 dated 17.12.2018

728. The Tribunal held that assessee engaged in provision of ITES to its AE could not be compared to:

- Accentia Technologies Ltd as it was providing KPO services in medical transcription segment
- E-clerx Limited as it was engaged in providing data analytics, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management and revenue management and offered financial services such

as real-time capital markets, middle and back office support, portfolio risk management. It was providing KPO services

- Infosys BPO Ltd as it had a high turnover and high brand value
- Fortune Infotech Ltd. as it developed its own software for performing specialized services in medical transcription due to which it had derived substantial benefit/advantage as compared to company engaged in routine ITES services

Further, it included TCS E-serve Ltd and TCS E-Serve International Ltd noting that activities of both the companies were similar to assesssee's activities (ITES) and the technical servicesof software testing, verification and validation the software were carried out at the time of implementation of software only and were in the nature of back-office support. Further, in case of TCS E-Serve International Ltd, the Tribunal observed that the expenditure corresponding to contribution of "Tata" brand by companies was a very small part of total operational expenses by company.

Avaya India Pvt Ltd vs ACIT [TS-1290-ITAT-2018-(Del)-TP] ITA No.1904 /Del/2015 dated 03.12.2018

729. The Tribunal held that assessee engaged in providing software development & IT services to its AE was not comparable to:

- Aricent Technologies (holding) Ltd. as no separate segment result for software services were available.
- CAT Technologies Ltd.as the company had revenue earnings from consulting services along with software development.
- KPIT Cummins Infosystems Ltd.- as related party transactions were 98.87%,
- Tech Mahindra Ltd as the RPT was greater than 25%, being a filter deployed by the TPO.
- Thirdware Solutions Ltd as the revenue stream of the company consisted of sale of license and revenue from subscription along with software and export services.

As regards Bodhtree Consulting Ltd- The Tribunal remanded the said comparable to verify the issue of accounting entries of revenue recognition from software development and its consequent impact on profit margin of the said company.

M/s. Opera Solutions Management Consulting Services Pvt. Ltd. Vs ITO ward 13(4), New Delhi- TS-389-ITAT-2018(DEL)-TP-ITA no 5761/Del/2014 dated 27.04.2018

730. In case of an assessee engaged in providing software development services to its AE the Tribunal rejected assessee/TPO's comparable viz: Thirdware Solutions on grounds of functional dissimilarity and absence of segmental results.

The Tribunal further directed the TPO to consider forex fluctuation as operating in nature for both assessee and comparable company relying on the co-ordinate bench ruling in assessee's own case.

Further, the Tribunal allowing assessee's claim for working capital adjustment restored the matter to the file of the AO relying on Co-ordinate Bench ruling in assessee's own case.

Wipro Ltd vs DCIT Central Circle 7(1)-TS-323-ITAT-2018(Del)-TP- ITA No 1594/DEL/2014 dated 11.04.2018

731. The Tribunal held that the assessee, engaged in providing software development services could not be compared to:

- Infinite Data Systems Private Limited as the company was providing services of technical consulting, design and development of software, maintenance system integration,

implementation, testing and infrastructure management services which was not comparable to the assessee

- E-Infochips Bangalore Ltd as it was engaged in development and maintenance of computer software, production and sale of software without adequate segmental results
- Infosys Limited as it was functionally different and had significant R&D, huge brand value, huge turnover, and also has a leading banking product known as “Finacle
- Sonata Software Limited if upon verification it was found that the company did not satisfy the RPT filter.

Freescale Semiconductor India Pvt. Ltd. vs. DCIT - TS-1098-ITAT-2017(DEL)-TP - ITA No1263 /Del/2015 dated 08/12/2017

732. The Tribunal held that the assessee providing IT enabled back office support services to its AE was not comparable to:

- Accentia Technologies as it had undertaken extra-ordinary events (merger and demerger) during the year which impacted its financial results and also since there was a wide gap between employee costs of the company vis-à-vis the assessee
- Bodthree Consulting Ltd as it was engaged in the business of software products and software services and did not have a segmental break-up
- Eclerx Services Ltd as the company was engaged in KPO and high end services involving specialized knowledge and domain expertise in the field of retail, manufacturing and financial services
- HCL Comnet Systems & Services Ltd as its RPT (18.72%) exceeded the 15 percent RPT filter applied by the assessee
- Informed Technologies Ltd as its employee cost / sales ratio (21.77%) was less than the filter of 25 percent applied
- Infosys BPO Ltd as it owned substantial intangible assets, undertook research development and carried on diverse business activities
- Vishal Information Technologies Ltd as it was a KPO engaged in high end services requiring employees with advanced levels of skills and knowledge.
- Wipro LTd as it was a giant entity with difference as regards risk profile, nature of services, ownership of IP rights etc.

H&S Software Development v ACIT – TS-31-ITAT-2017 (Del) – TP - ITA No.6455/Del./2012 – 18.01.2016

733. The Tribunal characterized the services rendered by the assessee under the ‘Research and Information services’ segment as KPO services involving huge expertise and skills and rejected the assessee’s plea that the services were BPO services, observing that the role of the assessee was to carry out research from internet based databases to compile data which was further customized in accordance with requirements and then organized into templates in Excel, Powerpoint etc and then transmitted outside India. Accordingly, it held that the assessee was making value addition to the data before exporting it. Further, it noted that deduction under section 10A of the Act was granted for the prior assessment year on the basis of the assessee’s claim that it was making great value addition to the data before exporting it and that it could not switch back to contend that it was simply collecting data from databases before sending it to its group companies. Accordingly, it excluded 4

functionally dissimilar companies (viz. Aditya Birla Capital Advisors Pvt Ltd, Birla Sun Life Asset Management Co Ltd, ICRA Ltd and Ladderup Corporate Advisory Pvt Ltd) based on the aforesaid characterization.

Further, it rejected the Revenue's argument for exclusion of 2 companies (viz. ICRA Management Consulting Ltd and IDC (India) Ltd) chosen by the TPO himself and held that once the TPO expressly accepted a company with low margin as comparable after due application of mind, then the DR could not be allowed to contend that the the TPO fell in error in accepting such comparability.

With regard to the ITES segment, the Tribunal noted that there was an apparent conflict in the nature of services claimed by the assessee and what was prima facie coming out from record and therefore in the absence of material, it remitted the matter to the AO / TPO.

McKinsey Knowledge Centre Pvt Ltd – TS-997-ITAT-2016 (Del) - TP

734. The Tribunal admitted assessee's additional ground for inclusion of two companies in the list of comparables for benchmarking the provision of IT enabled services by the assessee to its AEs. Noting that the assessee had submitted the additional ground before the Tribunal before the first time without producing it before the TPO it remitted the entire issue to the AO for examining inclusion or otherwise of the two comparables in accordance with the settled principles of comparability. It also directed the assessee to justify why these companies were not included in its TP Study originally.

Validor Capital India Pvt Ltd – TS-1050-ITAT-2016 (Del) - TP

735. The Tribunal held that the assessee engaged in providing software development services to its AEs could not be compared to L&T Infotech as the TPO failed not allocate 'Unallocable expenses' to L&T Infotech's Industrial cluster segment which was considered for benchmarking without which the correct amount of operating profits could not be ascertained. Noting that neither the nature of common unallocated expenses was known nor the information concerning the appropriate allocation keys was available in the present case, the Tribunal held that the inclusion of Larsen & Toubro Infotech Ltd. (Seg.) in the list of comparables would vitiate the comparability. Accordingly, it directed its exclusion.

Pitney Bowes Software India Pvt. Ltd vs. ACIT - TS-163-ITAT-2018(DEL)-TP - ITA No.7034/Del/2017 dated 13.03.2018

736. The Tribunal held that where a company was indulged in fraud and its financial statements could not be taken as true, financial results of said company (Satyam) cannot be relied upon and said company cannot be selected as comparable.

Astt.CIT v. Motherson Sumi Infortech & Design Ltd.[2015] 61 taxmann.com 303/155 ITD 8 (Delhi)

737. The Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

- Infosys Technologies Ltd as it provided diversified services viz. end to end business solutions spanning across entire software life cycle as well as offer software product (viz. "finacle" which is owned by Infosys) for banking industry, for which segmental details were not available

- 3K Technologies Ltd as its employee cost was only 3.70 percent which did not satisfy the employee cost filter of 25 percent as applied by the TPO
- KALS Information Systems as it was engaged in development of software, software products as well as training of professionals of which segmental details were not available
- Persistent Systems Ltd as it was Outsourced Software Product Development (OPD) specialist and therefore not comparable to the assessee providing software development services
- Bodhtree Consulting Ltd as the company provided product engineering services ranging from application development and maintenance, web development and outsourced product development to QA and managed testing services; and had highly volatile margins.
- Zylog Systems Ltd as the company acquired two companies during the year under review and also was a software product company not comparable to the assessee.

Siemens Product Lifecycle Management Software (India) Pvt. Ltd. vs. ACIT - TS-182-ITAT-2018(DEL)-TP - ITA No.5922/Del./2012 dated 22.01.2018

738. The Tribunal held that the assessee, engaged in the provision of ITES services such as customized business research support was not comparable with Coral Hub Ltd as it outsourced majority of its functions while the assessee carried out most functions in-house. It further held that Eclerx Services was functionally different as it was a KPO providing complete business solutions and the assessee merely provided primary data for various field of activities.

Copal Research India Pvt Ltd v ITO (ITA no. 1713/Del/2014) – TS-597-ITAT-2015 (Del) – TP

739. The Tribunal held that companies outsourcing a major portion of its activitites (75 percent of total cost) could not be compared with the assessee, engaged in electronic publishing services and data conversion services as they operated completely different business models.

Further, it held that the Revenue could not be aggrieved by the AO / TPOs action in considering a company as comparable and that even Rule 27 of the ITAT Rules could not be invoked. It stated that though the Revenue had the right to file cross appeals against the adverse decision of the CIT(A), it had no right to file appeal against the view taken by the AO / TPO himself which was not disturbed in the first appeal.

ACIT v Tech Books Electronics Pvt Ltd (ITA No.6081/Del/2012) – TS-606-ITAT-2015 (Del) – TP

740. The Tribunal held that the assessee, engaged in providing IT Enabled Services such as back office services, web enabled services, email support etc exclusively to its AE could not be compared to the following:

- Companies failing the filter of export sales to total sales of 25 percent as the geographical markets in which parties entering into transactions operate is an important factor influencing price of the transaction.
- Companies having huge turnovers and large economies of scale, catering to different industries as opposed to the assessee whose business profile was quite limited
- Companies providing data analytics knowledge process outsourcing services

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Actis Global Services Pvt Ltd v ITO (ITA No. 30/Del/2015) – TS-611-ITAT-2015 (Del) – TP

741. The Tribunal held that the assessee, engaged in the business of providing ITES to its AEs was not comparable to:

- Accentia Technologies Ltd as it had undertaken an extra-ordinary event (amalgamation)
  during the year, owned substantial intangibles and provided medical transcription services,
  medical coding, billing and receivable management to the healthcare industry
- TCS e-serve International Ltd as it was functionally dissimilar and the segmental information relating to ITES and software development services were unavailable and it also had substantial intangibles
- TCS e-Serve Ltd as it was involved in transaction processing and technology services and owned huge intangibles

Exl Service.com (India) Pvt Ltd v DCIT – TS-104-ITAT-2017 (Del) – TP ITA No. 302/Del/2015 ITA No. 615/Del/2015 dated 03.01.2017

742. The Tribunal held that the assessee, engaged in providing back office support services to its AE without any direct involvement in the conduct of its business, could not be compared with companies having undergone business restructuring / extraordinary financial events and companies providing both BPO services as well as Technical services having no segregation of revenues attributable to the two. Further, the Tribunal, relying on the decision of the Delhi High Court in Chrys Capital Investment Advisors (India) Pvt Ltd, held that mere high / low turnover or low / high profitability could be no reason to eliminate an otherwise comparable company.
Ameriprise India Pvt Ltd v DCIT - (2016) 66 taxmann.com 246 (Del)

743. The Tribunal held that 100 percent Government owned undertakings, rendering services primarily the Central / State governments could not be considered as comparable to the assessee, since it received preferential treatment in obtaining contracts from the Government, impacting profits and not indicative of a free market economy in which the assessee operated. Further it held that in the absence of segmental results, companies carrying on pre-project activities, procurement assistance, project management / planning, commissioning, inspection, construction and supervision were not comparable to the assessee, a captive service provider, engaged in providing engineering design and related services. It also held that companies undertaking substantial R&D activities (5.41 percent of turnover) were not comparable with the assessee who did not perform the said function.
Bechtel India Pvt Ltd v DCIT - TS-638-ITAT-2015 (Del) - TP

744. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- E-Infochip Ltd. as it earned revenue from software development, hardware maintenance, information technology consultancy, information technology services and sale of products. Thus, it did not satisfy the functionality test to initiate the process of comparability

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- Wipro Technology Ltd as it earned its revenue from Citigroup Inc which was a related party transaction. Wipro (its parent company) had acquired company known as 'Citi Technology Services Ltd. which was carrying out the software development and maintenance services for Citi Group Inc and thereafter Wipro had entered into an agreement with aforesaid company for delivery of same set of services. Wipro Technology services Ltd was providing services to Citi Group out of India as a part of said agreement and thereby it fell within the deeming ambit of section 92B (2), whereby it had to be treated as deemed AE as the service agreement earlier entered was between the related party and same terms and agreement was continuing, hence had to be reckoned in the category of related party transactions (Clause (2) of section 92B provides that, if a transaction entered into by an enterprise with a person other than AE, shall for the purpose of sub-section (1), be deemed to be an international transaction entered into between two AE, if there exists a prior agreement in relation to the relevant transaction between the other person and the AE, then the terms of the relevant transaction in substance remains the same when it was a related party transaction)

Further, it included R System on ground that it could not be rejected on ground of different financial year if results of company could be reasonably extrapolated.

Navisite India Pvt Ltd vs ITO [TS-1367-ITAT-2018-(Del)-TP] ITA No.1054 /Del/2016 dated 17.12.2018

745. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Infinite Data Systems Private Ltd. as it derived its revenue from technical support and infrastructure management services and was also rendering technical consultation, design & development of software, maintenance system integration, implementation, testing & infrastructure, management services and its segmental information was not available and its profitability increased by 1496% as compared to the preceding year.
- Infosys Ltd. as it was incurring huge expenditure of its total revenue on its R&D activities leading to creation of intangible property, brand, it assumed entrepreneurial risk and also dealt in software products. It relied on Delhi HC decision in Agnity India Technologies Pvt Ltd. wherein said comparable was excluded on ground that Revenue was not able to controvert Tribunal's findings that it operated as full-fledged entrepreneur had huge turnover, engaged in diversified activities (consulting application design, reengineering and maintenance system integration, package evaluation and implementation and process management) and half of its services rendered were onsite.
- Persistent Systems Ltd as it was involved in software development, software products and marketing and its segmental data was not available. [It relied on Delhi HC in Cashedge India Pvt Ltd.]
- Sonata Software Ltd as it was primarily engaged in development of software product and it also provided IT solutions, IT consulting, and also provided both onsite as well as offshore services in the area of RP customization conversion and migration projects, data warehousing, Business Intelligence, Web Development, Infrastructure Management amongst others and further it did not satisfy TPO's filter of RPT to sales of 25% (as its RPT to sales was 53.83%).
- Tata Elxsi as it was functioning into specialized domain of software products / services (software development and services is broken up into three distinct business groups viz.

Productive Design Services (PDS) innovation, design, Engineering and visual computing labs). [It relied on coordinate bench decision in case of NEC Technologies India Ltd. (formerly known as NecHcl Systems technologies Ltd)

- Zylog Systems Ltd. as it had undergone business restructuring due to acquisition which was an extraordinary event and had significant intangibles and was also carrying out research and development activities creating significant intangibles. [It relied on coordinate bench decision in Equant Solutions India Pvt. Ltd.]
- Thirdware Solution Ltd. as it earned income from development and sale of software products, services and subscription and sale of license and segmental information was not available. [It relied on coordinate bench decision in Open Solutions Software Services Pvt Ltd.]

Lime Labs (India) Pvt. Ltd vs ITO [TS-1307-ITAT-2018-(Del)-TP] ITA No.1703/Del/2015 dated 12.12.2018

746. The Tribunal held that the assessee, engaged in the provision of ITES services to its AE, could not be compared to the following companies:

- Companies outsourcing its services, since the assessee rendered services on its own
- Companies engaged in KPO services encompassing data analytics, data processing services, pricing analytics, content operation, product data management etc (such as Eclerx Services Ltd)
- Companies having extra-ordinary events such as mergers which impact profitability
- Companies for which sufficient information was not available in the public domain
- Companies providing geographical information services

IHG IT Services (India) Pvt Ltd v DCIT (ITA No.6381 /Del./2012) – TS-476-ITAT-2015 (Del)- TP

747. The Tribunal held that the assessee, engaged in providing software development services could not be compared to:

- Infinite Data Systems Private Limited as the company was providing services of technical consulting, design and development of software, maintenance system integration, implementation, testing and infrastructure management services which was not comparable to the assessee
- E-Infochips Bangalore Ltd as it was engaged in development and maintenance of computer software, production and sale of software without adequate segmental results
- Infosys Limited as it was functionally different and had significant R&D, huge brand value, huge turnover, and also has a leading banking product known as “Finacle
- Sonata Software Limited if upon verification it was found that the company did not satisfy the RPT filter.

Freescale Semiconductor India Pvt. Ltd. vs. DCIT - TS-1098-ITAT-2017(DEL)-TP - ITA No1263 /Del/2015 dated 08/12/2017

748. The Tribunal held that the assessee engaged in the provision of ITES could not be compared to:

- TCS E-Serve International Ltd as the company provided high-end technology services and owned substantial intangibles in the form of software licenses, no separate segmental information was available and noted that the company would also benefit from Tata brand.

[It relied on the coordinate bench decision in the case of Omniglobe Information Technologies Pvt. to exclude the company.]

- TCS E-Serve Ltd as the company was in business of providing technology service such as software testing, verification and validation. It had also developed a transport management software therefore it was functionally dissimilar to the assessee/ company provided high-end technology services and owned substantial intangibles and noted that the company would also benefit from Tata brand. [It relied on the coordinate bench decision in the case of Omniglobe Information Technologies Pvt. to exclude the company.]
- Infosys BPO Ltd. as the Infosys brand would result in higher operating profits of the company and was engaged in high end integrated services which made it functionally dissimilar to the assessee. [It relied on the coordinate bench decision in the case of Omniglobe Information Technologies Pvt. to exclude the company.]
- Accentia Technologies Ltd. as the company was engaged in diversified activities such as Knowledge Process outsourcing (KPO), Legal process outsourcing (LPO), Data process Outsourcing (DTO), high end software services and no separate segmental information was available and further, the company had undergone restructuring during the year. [It relied on the coordinate bench decision in the case of Bechtel India. to exclude the company.]
- e4e Healthcare Business Services Ltd. as the company provided health care outsourcing services and in addition it also rendered software development services and no separate segmental information was available. [It relied on the coordinate bench decision in the case of Bechtel India. to exclude the company.]
- Eclerx Services Ltd as the company provided high value financial services in respect of consultancy business and solution testing besides the web content management merchandising execution, web analytics which made it functionally dissimilar and it had no separate segmental information. [It relied on the HC ruling in the case of B C Management Services P Ltd.to exclude the company.]
- ICRA Techno Analytics Ltd. as the company was engaged in providing software development and consultancy and engineering services/web development services which made it functionally dissimilar and it had no separate segmental information. [It relied on the HC ruling in the case of B C Management Services P Ltd.to exclude the company.]

Further, it remanded the comparability of Acropetal Technologies Ltd. to the TPO relying on the coordinate bench decision in the case of Cadence Design wherein AO was directed verify whether assessee passed the "employee cost percentage to the total cost" filter of 25% and then decide the matter in afresh.

Torus Business Solutions Pvt Ltd vs DCIT [TS-929-ITAT-2018(DEL)-TP] ITA No.1974/Del/2015 dated 10.08.2018

749. The Tribunal relying on the coordinate bench decision of Electronics for Imaging India in case of a software service development provider (for the same AY namely AY 2011-12) accepted assessee's plea for exclusion of (i) Acropetal Technologies (ii) E-Zest Solutions Ltd. (iii)E-Infochips Ltd (iv) ICRA Techno Analytics Ltd and (iv) Persistent Systems and Solutions Ltd. as they were in the business of developing software products and could not be compared to assessee engaged in software development services.

ACIT vs Yokogawa Technologies India Pvt Ltd [TS-1046-ITAT-2018(DEL)-TP] IT(TP)A No.466/Bang/2016 dated 8.08.2018

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750. The Tribunal held that the assessee, providing software development services to its AE could not be compared to:

- Infosys Technolgies Limited as it incurred substantial R&D expenses, owned intangibles, had a higher risk profile, provided diversified services, owned proprietary products, earned more than half of its income from outsourcing activities, had huge brand value and had a large number of employees
- Tata Consultancy Services Ltd as it was engaged in IT infrastructure services, engineering and industrial services, earned huge profits, sold equipment and software license, incurred substantial R&D expenses
- Tata Elxsi limited as its software development services segment also included design and development of hardware
- Thirdwave Solutions Lt as it earned revenue from various business segments such as sale of license, software services and subscription and lacked segmental details

St-Ericsson India Private Limited vs Addl CIT - TS-119-ITAT-2017(DEL)-TP ITA No.1672/Del./2014 dated 22.02.2017

751. The Tribunal held that assessee engaged in software development services to its AE could not be compared to

- Infosys Ltd. as it was excluded in assessee's own case for earlier year (by relying on Delhi HC in Agnity India) on basis that it was a giant company in terms of risk profile, scale, nature of services, revenue ownership of branded/proprietary products, on site and offshore services, etc.
- Wipro Technology Services Ltd. as it earned majority of revenue from Citigroup Inc and was earlier part of Citi Group and subsequently, it was acquired by Wipro and the arrangement of earning revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services was actually a prior arrangement between assessee's AE (Wipro Ltd) and third party (Citigroup Inc.) and hence the transaction ceased to be a comparable uncontrolled transaction. [It relied on coordinate bench ruling in Microsoft India]

Global Logic India Ltd.vs Dy.CIT [TS-1249-ITAT-2018(DEL)-TP] ITA No.1690/Del/2016 dated 30.10.2018

752. The Tribunal excluded a company on the ground that it had undergone restructuring and acquired another company resulting in a high profit margin and because it had a strong R&D background along with product development expertise which differed from the assessee. Additionally it held that exclusion of a company merely because it was loss making was not warranted

ACIT v Citi Financial Consumer Finance India Ltd [ITAs No 2848 and 6305 / Del / 2012] - TS-389-ITAT-2015(DEL)-TP

753. The Court upheld the exclusion of the following companies in the case of assessee engaged in software development, specifically in healthcare claims adjudication and bio-pharmaceutical services:

- E-Infochips and Infinite Data Systems as they were engaged in providing high end

technology

driven services and therefore were entirely different from assessee's software development services.

- Accentia Technologies as it operated in multiple locations throughout the globe in healthcare receivable cycle management and also into legal process outsourcing and high -end software service delivery and therefore functionally dissimilar to the assessee.
- TCS E-serve ltd and TCS E-Serve International Ltd as it had high brand value and drew profitability upward and therefore could not be compared to the assessee.
- Further, regarding comparability of I-Gate Global Solutions, considering Tribunal's observations that the company's functioning was similar to that of the assessee, the Court framed question of law as to whether the Tribunal erred in holding that I-Gate Global solutions Limited underwent significant change in its profitability in view of the amalgamation undergone, having regard to the report and materials on record and the circumstances of the present case.

CSR Technology (India) Pvt. Ltd vs ACIT-TS-1071-ITAT-2017(DEL)-TP- ITA No.1895/Del./2017dated 14.12.2017

754. The TPO had included/excluded certain comparables in case of assessee's software development services and accordingly, made a TP adjustment. The assessee and Revenue had come up in appeal against the CIT(A)'s order which gave certain directions. The Tribunal remitted the benchmarking of software development services to the file of TPO (to select comparables and determine the ALP afresh) in light of the audited segmental accounts of the company submitted as additional evidence by assessee which demonstrated that the company within the overall segment of software development had two divisions software development services and software product. The Revenue did not object to the same. Further, it directed that the assessee had liberty to file any fresh evidence/material before the TPO/AO in such fresh proceedings, if required.

Infrasoft Technologies Limited vs DCIT [TS-1013-ITAT-2018(DEL)-TP] ITA No.1987 and 2236/Del/2014 dated 29.08.2018

755. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Accentia Technologies as it was engaged in KPO services in health care sector. Further, it owned various software products and segmental financials to work out the profitability of ITES segment and software segment were also not available
- Acropetal Technologies Ltd. as it was engaged in KPO services in health care segment
- E-Clerx Services Ltd. as it was providing high end KPO services
- ICRA Techno Analytics Ltd. as it was providing software development and high-end analytic services
- Infosys BPO Ltd as it was providing business process management services and operating as a full-fledged risk-bearing entrepreneur and had high turnover, huge brand value and considerable R&D activities
- TCS E-Serve Ltd. as it was providing high end KPO services and was also exploiting brand TATA

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Timex Group India Limited vs DCIT [TS-1366-ITAT-2018-(Del)-TP] ITA No.845 /Del/2016 dated 20.12.2018

756. The Tribunal held that assessee engaged in software development, competency centre and IT support services (clubbed and aggregated by TPO) could not be compared to:

- Cat Technologies Ltd. as it was rendering other services in the nature of advisory and consulting besides launching the job portal, namely, Logtalent.com. apart from software development and IT support services and there was no information on the mode of earning revenues from such activities. The Tribunal noted that the company derived Rs.8.49cr out of software development and consulting services but no segmental data was available and from the Accounting Policies and Notes on Account it was evident that the company's exclusive business was medical transcription and training software development and consulting services which was treated as the only reportable segment. [It relied on the coordinate bench ruling of SunLife India Service centre ruling wherein the comparable was excluded in case of an assessee engaged in software development and maintenance support services as it was running both software development and maintenance support services with IT support services low or high end whether onsite or offsite.]
- Infosys Technologies Ltd as it was a giant company operating on full-fledged risk leading to maximum profit, had huge revenue and expending its turnover on R&D having huge intangibles vis-à-vis taxpayer which was a captive service provider operating on a minimum risk and only having turnover of RS.109 crores as against turnover of Infosys of Rs.15648 crores. [It relied on coordinate bench decision in assessee's own case for earlier year since no change in facts was pointed out by the Revenue.]
- Tata Elxsi as it was not a mere software developer and was involved in products and Innovative functions like visual computing labs with the track record of making India's first full length animated film.
- Thirdware Solutions Ltd. as the company derived revenue from various services, sale of licences, export from SEZ unit, revenue from subscription etc. and the company engaged in diversified business including software products and further, no segmental information was available.

Siemens Industry Software (I) P Ltd vs DCIT [TS-1045-ITAT-2018(DEL)-TP] ITA No.1307/Del/2014 dated 14.09.2018

757. The Tribunal dismissed the contention of the Revenue viz. that the assessee was a high end software development service provider and upheld the TPO's characterization of the assessee as a captive service provider, who only worked based on the specifications provided by its AEs. It held that the contention of the Revenue had not been taken before lower authorities and therefore it could not be considered at this stage i.e. before the Tribunal. With regard to the benchmarking of international transactions of the assessee, it excluded the following companies as comparable:

- Infosys Technologies Ltd it had substantial R&D, significant intangibles, high risk profile, owned proprietary products, providing onsite services, had a huge brand value and had a high number of employees vis-à-vis the employees of the assessee
- Tata Consultancy Services as it was engaged in IT infrastructure services, ITES, engineering and BPO services, it sold equipment and software licenses and had a high risk profile

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- Tata Elxsi Ltd as it was functionally dissimilar as its software development services segment also included design and development of hardware
- Thirdware Solutions Ltd as it earned revenue from various business segments such as sale of license, software services and subscription and did not have segmental data

Further, it held that SIP Technologies & Exports Ltd was to be considered as comparable as it passed both the employee cost filter and export revenue filter, It held that the mere fact that its turnover was low could not be the sole factor for its exclusion.

St-Ericsson India Private Limited vs Addl CIT – TS-119-ITAT-2017 (Del) – TP - ITA No.1672/Del./2014 dated 22.02.2017

758. The Tribunal held that assessee engaged in providing medical transcription services to its AE could be compared to:

- UltraMarine and Pigments Ltd observing that assessee before the CIT(A) had stated that the company's RPT filter exceeded 25%, but the CIT(A) had found that its RPT filter was 10%. It rejected assessee's reliance on the website extract which showed the comparable was carrying out R&D and project implementation (to hold that it was functionally not comparable to the assessee) since the year to which it pertained to was not known. Further, the assessee was not able to demonstrate the reason for which TPO had excluded it in the subsequent year.
- Fortune Infotech Ltd.as it was carrying on business of medical transcription. Merely because it was doing business through different tools simply could not make it non comparable. It noted that for the subject year, the company had developed webbased software and therefore, it was apparent that it did not carry its business with different tools.
- Tricom Ltd.as the functions performed were similar to the assessee. It rejected assessee's contention that merely because the company was undertaking R&D it was not comparable. Further, it rejected the contention of assessee that company had abnormal growth as it was not backed up by the profitability statement.
- AceSoftware as it was functionally comparable and the Tribunal noted that the TPO had erred in rejecting it on basis of single transaction with Apex Data Services (since it was with a related party) without reliable data.
- Tulisian Technologies as the Revenue could not point any infirmity in CIT(A)'s order wherein it had stated that it would be unjust to exclude it on the ground that turnover (94Lakhs) was marginally less than 1 crore
- Mapro Industries as it was functionally similar. It rejected Revenue's plea for its exclusion on account of non-utilization of assets noting that non utilization of the assets or under utilization thereof may be internal inefficiency built in of the comparable company however, when it was functionally comparable it could not be rejected.

Further, it excluded

- Vishal Information Technologies as it was outsourcing majority of its operations and hence had a different business model
- Wipro BPO Solutions Ltd as its turnover was 30 times that of the assessee

ITO vs Transcend M T Services Pvt Ltd (Formerly Heartland Bangalore Transcription and Services Pvt. Ltd merged with Heartland Informati [TS-1168-ITAT-2018(DEL)-TP] ITA No.2372/Del/2011 dated 05.10.2018

Transcend M T Services Pvt Ltd vs ITO (Formerly Heartland Bangalore Transcription and Services Pvt. Ltd merged with Heartland Informati [TS-1168-ITAT-2018(DEL)-TP] CO No. 214/Del/2011 dated 05.10.2018

759. The Tribunal dismissed Revenue's order and upheld the DRP's order excluding Accentia Technology as a comparable for assessee engaged in rendering backoffice support services to its AE noting that DRP had given a detailed finding with respect to exclusion and Revenue was not able to point out any infirmity in the directions of DRP and any judicial precedent wherein Accentia Technology was retained as a comparable. The DRP had excluded it on the ground that it was engaged in diversified activities in the nature of medical transcription services, medical billing, practice management consulting services, medical coding, claims processing and software development including SAAS and implementation services and segmental information was not available and further, it had undergone acquisition during the year.

ITO vs Actis Global Services Pvt Ltd [TS-1150-ITAT-2018(DEL)-TP] ITA No.6710/Del/2015 dated 30.10.2018

760. The Tribunal held that assessee engaged in providing the business of financial data processing and analysis could not be compared to:

- Eclerx Services Ltd. as it provided services through two business units i.e. Financial Services and Sales & Marketing Services. It also observed that the assessee company was providing services to the comparable. Under the Financial Service Segment, it. provided professional services including consulting, business analysis and solution testing. Further, under Sales & Marketing Services, it provided web content management and merchandising execution, web analytics, social media moderation and analytics.

Further,

- It remanded the comparability of Omega Healthcare Management Services Ltd, Zavata India Ltd., Rsystem (different financial year ending) to the TPO as they had been rejected on account of the financials not being available which did not seem to be a proper reason since the the database was available in public domain. It also noted that the quarterly financials of RSystems was available

Markit India Services Pvt Ltd vs DCIT [TS-1160-ITAT-2018(DEL)-TP] ITA No.84/Del/2016 dated 29.10.2018

761. The Tribunal held that assessee engaged in providing BPO/data processing and ITES to its AE could not be compared to:

- iGate Solutions Ltd as the RPT filter was more than 25% and the TPO himself had rejected companies with RPT filter of more than 25%. Further, it had undergone restructuring by way of amalgamation which would have financial impact on its results.

Further

- It remanded the comparability of Capgemini Business Services (India) Pvt. Ltd with direction to TPO to verify if the company had segmental information observing that KPO was an extension of BPO.
- It upheld the action of AO/TPO to include E4E Healthcare pursuant to remand proceedings by DRP noting that it had satisfied the employee cost filter

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Omniglobe Information Technologies (India) Pvt Ltd vs Addl CIT [TS-1146-ITAT-2018(DEL)-TP] ITA 6980/Del/2017 dated 15.10.2018

762. The Tribunal held that the assessee was a contract research and development software service provider and not a routine low-end software service provider as contended by it. It was assessee's contention that it was involved only in coding and testing which were a part of the phase development of products done by its AE located in USA and its role was limited. The Tribunal on perusing the Parent Subsidiary agreement (PSA) concluded that clauses of the PSA provided for the assessee to undertake research and development and actual creation of intellectual property in India patented in the USA (which were around 113 patents), Thus it was substantiated that the assessee was involved in research and development work. Further, it noted that the assessee was satisifying the CBDT guidelines for a contract R&D service provider for the following reasons (i) Microsoft, USA was performing most of the economically significant functions involved in research or product development cycle, while the assessee as an Indian Development Centre carried out the work assigned to it by the foreign principal (ii) Microsoft, USA was remunerating the assessee with cost plus 15% for the work carried out by it and was also providing its intangibles in the shape of Process tools (customised software, readymade templates and guidelines, etc.) to the assessee for doing the work (iii)The assessee was working under the direct supervision of Microsoft, USA, which was actually controlling or supervising research or product development through its strategic decisions and also monitoring activities on regular basis. (iv) The assessee in India did not assume or had no economically significant realized risks. (v) The assessee had no ownership right (legal or economic) on the outcome of the research which vested with Microsoft, USA, and that this was evident from the contract as well as from the conduct of the parties. Thus, the Tribunal termed the assessee as a contract research and development service provider.

The Tribunal held that the assessee who was providing contract research and development software development services could not be compared to:

- E-Infochips Bangalore Limited as it had revenues from software services and IT enabled services in a common pool, and no separate segmental information apart from revenues from software services and ITES services was available whereas the assessee had only revenue from software development services.
- Infosys Technology Ltd. as its total profit included profit from software development services as well as software products and there was no separate profit available of the software development services.

  Persistent Systems Ltd. as it was engaged in rendering software development services as well as sale of software products and no seperate segmental information was available.
- Wipro Technology Services Ltd as it was earlier part of Citi Group and subsequently, it was acquired by Wipro and the arrangement of earning revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services was actually a prior arrangement between assessee's AE (Wipro Ltd) and third party (Citigroup Inc.) and hence in light of the transaction ceased to be a comparable uncontrolled transaction.
- Akshay Software Ltd. as it was engaged in rendering software development services as well as sale of software products and no seperate segmental information was available.
- Blue Star Infotech Ltd. as apart from being a product company and dealing in hardware also, it was also not providing any research and development services.

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- Caliber Point Business Solutions Ltd as it was not rendering any research and development software services and was providing only BPO services whereas the assessee was rendering only software development services.
- Cat Technologies Ltd. as it was engaged in rendering software development services as well as ITES and no seperate segmental information was available.
- CG-VAK Software & Exports Ltd as it was a persistent loss-making company and assessee failed to prove it was rendering any software development under the relevant segment.
- Evoke Technologies Pvt. Ltd. as it was not providing research and development software services

  LGS Global Ltd as it was not rendering any research and development services and was a simple software service provider.
- Maveric Systems Ltd. as research and development activity done by this company was meant for its own use and it had not earned any revenue from rendering R&D services.
- RS Software as income from the relevant segment of 'Software development & Customization services' taken by the assessee for the purposes of comparison included sale of products not only of its own but also those of third parties.
- Silverline Technologies Ltd. as it also had income from software products and was not engaged in rendering research and development software services,

Further, it included Mindtree Ltd. (IT Service Segment) in the list of comparable as it fulfilled the parameters, namely, rendering of research and development software services and also Product

engineering services to its customers leading to the creation of patents. It directed the TPO to examine the PLI of this company from the IT services and Product engineering services and then treat the same as comparable with the segment of the assessee under consideration for the purposes of benchmarking

Microsoft India (R&D) Pvt. Ltd vs DCIT [TS-1015-ITAT-2018(DEL)-TP] ITA No.1479/Del/2016 dated 14.09.2018

763. Relying on the order of the co-ordinate bench for the prior year, the Tribunal remitted the issue of comparability to the file of the DRP with the following observations:

- Companies with extra-ordinary events such as merger / demerger etc impacting the Financial results could not be treated as comparable
- Companies which were functionally dissimilar to the assessee engaged in providing IT enabled services to its AE, could not be taken as comparable
- Companies having outsourced its activity and acting merely as an intermediary could not be considered as comparable
- Companies whose directors were involved in fraud could not be taken as comparable as their financials would not be reliable

Equant Solutions India Pvt Ltd v DCIT – TS-975-ITAT-2016 (Del) - TP

764. The Tribunal excluded Cosmic Global Solution as a comparable for assessee engaged in providing back office support services on the ground that its employee cost to sales was low (21%) which showed it was outsourcing its operations whereas the assessee's employee cost to sales was high (55%) which showed it had inhouse operations. It relied on coordinate bench decision of Xchanging Technology wherein the said comparable was excluded on account of different business model (outsourcing its operations). Thus, the Tribunal remitted

the ALP-determination of the international transaction for fresh determination to AO/TPO after excluding the said comparable.

Integreon (India) Private Ltd vs ITO [TS-1122-ITAT-2018(DEL)-TP] ITA No.2059/Del/2014 dated 14.09.2018

765. The Tribunal held that an assessee engaged in provision of ITES and financial support service to its AE could not be compared to:

- Cosmic Global Ltd. as income from medical transcription segment which was similar to assessee's business was barely 1% of its total revenue and the major part of its income was from translation charges the business which was dissimilar to that of assessee.
- Eclerx Services Ltd. as it was engaged in providing data analytics and customized process solutions and had undergone demerger for the subject year (extraordinary event).
- Genesys International Corpn. Ltd. as it was engaged in rendering geospatial services catering to the needs of consumer mapping, navigation and internet portals.
- Vishal Information Technology as it was mainly engaged in e-publishing business apart from document scanning work (similar to assessee's business) and there were no separate segmental results available for document scanning.
- Accentia Technology as there was a merger of an entity by way of amalgamation and its asset base had increased substantially.
- Infosys BPO Ltd as it had acquired McCamish Systems Ltd. being an extraordinary event Further, it remanded the comparability of Acropetal Technologies which was contested by assessee on ground that it was not provided an opportunity to rebut the data collected u/s.133(6) by the TPO in light of Delhi HC judgment in Cashedge India Pvt Ltd wherein the TPO order was set aside for affording an opportunity to assessee to cross examine the data collected and used by the TPO.

GE India Business Private Ltd vs ACIT [TS-1190-ITAT-2018(DEL)-TP] ITA No.6008/Del/2012 dated 25.09.2018

766. The Tribunal held that the software segment of the assessee, engaged in providing support services to major Telecom and IT service providers, could not be compared to companies failing the employee cost to total cost filter of 25 percent, companies deriving revenue from both product and software services without segmental results, giant companies in terms of risk profile, scale and owning branded / proprietary products, companies developing software products in-house, companies developing hardware and software for embedded products and programs.

Nokia Siemens Networks India Pvt Ltd v ACIT - (2016) 47 CCH 0081 (Del-Trib)

767. The Tribunal remitted the benchmarking of the assessee's international transaction to the file of the TPO since the financials of the companies selected by the assessee were not available in the public domain at the time of the TP study but were now available. Accordingly, it directed the TPO to decide the matter afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee. The Tribunal further held that where the TPO had selected a comparable based on information received under section 133(6) of the Act without giving the assessee an opportunity of being heard,

the issue was to be set aside to the file of the TPO for fresh adjudication after providing the assessee with such opportunity.

Microsoft India (R&D) Pvt Ltd v DCIT - (2016) 47 CCH 0316 (Del - Trib)

768. The Tribunal held that the assessee engaged in provision of ITES to its AE could not be compared to:

- Accentia Technologies Ltd. as it was engaged in providing diversified services like software development and IT Enabled Services and that its services and solutions was focused on healthcare receivables cycle and no separate segmental information was available. Further, the Revenue could not point out any change in the functional profile of the company vis-à-vis preceding year where the company was excluded in assessee's own case
- Eclerx Services Ltd. as the company was a KPO providing data analytics and data process solutions which could not be compared to the ITES segment of the assessee. Further, the Revenue could not point out any change in the functional profile of the company vis-à-vis preceding year where the company was excluded in assessee's own case.
- Genesys International Corporation Ltd as the company operated as a high end KPO service provider. Further, the Revenue could not point out any change in the functional profile of the company vis-à-vis preceding year where the company was excluded in assessee's own case
- TCS E serve Ltd. as it was engaged in diversified services including ITeS and certain other technical services involving software testing, verification and validation of software at the time of implementation, data center management activities etc. and no separate segmental information pertaining to ITes and technical services was available. Another aspect was the brand value for which it relied on the coordinate bench ruling in the case of BC Management Services.
- TCS E-Serve International Limited it was engaged in diversified services including ITeS and technical services like software testing, verification, data processing services and validation of software at the time of implementation and data center management activities and no separate segmental information pertaining to ITes and technical services was available. [The Tribunal followed the coordinate bench decision of Vertex Customer Services India Pvt.Ltd.]

OSC Services Pvt. Ltd Vs. DCIT [TS-1005-ITAT-2018(DEL)-TP] ITA No.1846/Del/2015 dated 14.08.2018

769. The Tribunal held that assessee engaged in providing IT Enabled services to its AE could not be compared to:

- E-Clerx Services Ltd as it was a high end KPO Company which provided data analytics, business knowledge process outsourcing company, re-engineering and automation services and the coordinate bench in assessee's own case had held the company to be a non-comparable with assessee following Delhi HC ruling in Rampgreen Solutions P Ltd.
- Vishal Information Technologies Ltd. as it had a different business model all together i.e. outsourcing model as against the assessee which carried out its work through its own resources as it reflected huge difference in employee cost ratio to turnover. [The Tribunal relied on Delhi HC ruling in Rampgreen Solutions P Ltd.

  Further,

- The Tribunal included ICRA Online Ltd (even though categorized as KPO) as it was functionally similar to assessee in the field of financial and economic analysis. Noting that the Tribunal in the earlier year had held assessee's back office, call centre operations to be ITES, it observed that assessee's functions of preparing of financial reports from a raw data and preparation of balance sheet and profit and loss account and data analytics were high end ITES. It also noted that there is actually a thin line of demarcation between BPO and KPO. Further, it also observed that the assessee had included the comparable in TP study report and had not disputed it before the AO.
- It also included Allsec Technologies Ltd. noting that the main contention of TPO for excluding the company was diminishing revenue for last three years which would not hold good as operating revenue for AY 2008-09 had increased from previous year. Further, it rejected Revenue's contention that the comparable did not satisfy export filter of 75% of revenue applied by the TPO noting that the export turnover to total turnover of the comparable was 74.45% (difference was only 0.5%) It observed that there was no rule or mechanism for putting specific ceiling of limit in a particular filter.
- It included R system International Ltd. as data for quarterly results was available and directed TPO to consider quarterly results to work out profit margin. thus, ground of different financial year could not be a reason for exclusion.
- It included CG VAK Software and Export Ltd. following the ratio laid down in Delhi HC ruling in Chryscapital Investment Advisors India (P.) Ltd. (wherein it was held that if company is functionally comparable, it could not be rejected on basis the turnover.) noting that low turnover could not be ground for exclusion.
- It restored the comparability of Cepha Imaging Ltd. to examine aspect of export turnover noting that TPO had rejected it for not meeting export turnover however from the financials, its entire turnover was from export.
- It remitted back the comparability of Fortune Infotech Ltd. and Microland Ltd. noting that assessee had taken the ground before DRP which was not discussed by it.

American Express (India) (P.) Ltd. vs ACIT [2018] 97 taxmann.com 180 (Delhi - Trib.) IT APPEAL NOS. 1973 & 2577 (DELHI) OF 2014 dated 03.08.2018

770. The Tribunal remanded the comparability of the comparables in case of assessee engaged in ITES to the TPO for fresh adjudication after taking into account the functional profile of the assessee, comparable concern and taking into account the decision of the Tribunal in the case of sister concern i.e. Evalueserve SEZ (Gurgoan) P. Ltd. It observed that for AY 2010-11, the assessee had not argued comparables but only submitted chart according to the decision given by the Tribunal in case of the sister concern and also failed to demonstrate the functional profiles of the assessee and the sister concerns are similar.

Evalueserve.Com Pvt. Ltd vs. ACIT [TS-817-ITAT-2018(DEL)-TP] ITA Nos.6310 and 1466/Del/2015 dated 03.08.2018

771. Where the assessee could not put forth any material difference in the FAR between itself and comparable's case, other than that the comparables had a very high profit during the year, the Tribunal, relying on the decision in the case of Chryscapital Investment Advisors India (P) Ltd [TS-173-HC-2015(DEL)-TP] wherein it was held that mere high profit/loss cannot be basis for comparables exclusion, allowed Revenue's appeal and included Ultramine & Pigments Ltd as comparable for assessee providing ITES to AE.

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DCIT vs. Vertex Customer Services India (P) Limited-TS-904-ITAT-2017(DEL)-TP ITA No. 5228/Del/2014 dated 06.11.2017

772. The Tribunal held that assessee engaged in provision of medical transcription services to its AE could not be compared to:

- Accentia Technologies Ltd as it earned revenue from three sources (medical transcription, coding and software development) and there were no segmental details available and it had been categorized under a single segment namely healthcare receivables management. Further, the company had undergone an extraordinary event of merger
- Cat Technologies Ltd as it had revenue from three sources (namely, medical transcription; software development and consultancy services; and training income) however there was no segmental details available and further, majority of its revenue was from software development

DCIT vs Transcend India Pvt. Ltd [TS-1319-ITAT-2018(DEL)-TP] ITA No.2754/Del/2015 and CO No.446/Del/2015 dated 10.12.2018

773. The Tribunal following the decision of coordinate bench in assessee's own case upheld by the Court restored the ALP determination for benchmarking of assessee's software design and development services and set aside the action of TPO rejecting the internal TNMM adopted by the assessee. The Court had upheld the findings of the Tribunal wherein observing that the assessee was providing services to AE as well as Non-AE, it was held that the assessee's transactions with Non-AE can be used for benchmarking the AE transactions. The issue had been restored back by the Tribunal who directed the TPO for making an internal comparison of the net margin earned by assessee from its international transactions with AE and profit earned by the assessee from foreign transaction with unrelated parties.

BIRLASOFT (INDIA) LTD vs ACIT [TS-811-ITAT-2018(DEL)-TP] ITA Nos.1028 and 7180/Del/2017 dated

774. The Tribunal held that companies cannot be excluded as comparable merely on the turnover filter without analyzing their functionality. Additionally, it excluded companies having extra-ordinary events such as amalgamation or acquisition of another company and companies providing software development services as opposed to BPO services provided by the assessee.

M/s Rampgreen Solutions Pvt Ltd v DCIT (ITA no. 1066/Del/2015) – TS-538-ITAT-2015 (Del) – TP

775. The Tribunal held that the assessee engaged in rendering data processing and data entry services to its AE could not be compared to:

- e4e Healthcare as it provided high end services to its clients in the field of healthcare business and was also also engaged in receivables cycle management and further developing software for the healthcare industry which was functionally dissimilar to the assessee.
- Fortune Infotec as it was engaged in rendering BPO and KPO services and also providing services like document management, insurance claim processing, cheque processing and taxation which was functionally dissimilar to the assessee. Further it relied on the coordinate bench decision of Equant Solutions India (P) Ltd wherein the said company was

held to be not comparable with a company providing ITES services and having no intangibles of its own on account of developing and owning unique web based software since it was providing niche services

- I-Gate Global as it was providing customized global solutions and shared corporate services and was also engaged in CIS & BPO services for the insurance, financial services, telecom, life sciences and offshoring services of the entire benefits administration lifecycle which made it functionally dissimilar to the asssessee. Further, the said comparable was excluded by following the coordinate bench decisions of Ameriprise India (P) Ltd vs DCIT and Techbooks International (P) Ltd vs DCIT on ground of extraordinary event of amalgamation for AY 2010-11.
- Jindal Intellicom Ltd as the financials covered a period of 15 months as against 12 months of the assessee and the Revenue could not point out that financials for the 12 months period were available in case of the company
- Omega Heathcare as the company was engaged in services like medical coding, medical billing, providing facilities, rehabilitation centres and acute care facilities and was functionally dissimilar to the assessee.
- TCS E-Serve International Limited as it provided ITes or BPO services to the banking and financial industrial services industry & Travel, Tourism and Hospitality services in different geographic segments unlike the assessee who was only providing data processing and data entry services. Further, relied on the coordinate bench decision of Bechtel India where the said company was excluded on account of payment being made for use of Tata brand which had increased its operating profit.
- TCS E-Serve Ltd as the said company was making payments for use of Tata brand which had increased its operating profit by relying on the coordinate bench decision of Bechtel India
- Accentia Technologies Ltd as it was functionally dissimilar by following the coordinate bench decision of the assessee in its own case for earlier year having regard to the principle of consistency since the functional profile of the assessee and the company remaining unchanged
- Cosmic Global Ltd. as it was functionally dissimilar by following the coordinate bench decision of the assessee in its own case for earlier year having regard to the principle of consistency since the functional profile of the assessee and the company remaining unchanged
- Infosys BPO Limited as it was functionally dissimilar by following the coordinate bench decision of the assessee in its own case for earlier year having regard to the principle of consistency since the functional profile of the assessee and the company remained unchanged
- Microgenetic Systems Limited as it was engaged in activity of medical prescription, which could not be considered to be a low end BPO as the activity involved a process of knowledge and hence functionally dissimilar to the assessee by following the coordinate bench decision in the assessee own case for earlier year

Further, the Tribunal remanded the comparability of the companies viz. BSI Financial Services (as no reason was assigned for the exclusion of the comparable) and Suntech Web Services P. Ltd noting that on perusal of the annual reports no mention of services had been made from which income was generated and hence exclusion on ground of functional dissimilarity was incorrect.

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OKS Span Tech Pvt Ltd vs DCIT [TS-972-ITAT-2018(DEL)-TP] ITA No.1551/Del/2015 dated 23.08.2018

776. The Tribunal held that a).companies earning medical transcription and training receipts besides software service receipts b) companies earning a combined revenue from sales and software services c) companies having acquisitions during the year d). companies functionally dissimilar could not be considered as a comparable to the software development and maintenance support segment of the assessee.

With respect to the assessee's back office support segment the Tribunal excluded companies functionally dissimilar, companies having extra-ordinary financial events, companies outsourcing their activities and KPO service providers.

Sun Life India Service Centre Pvt Ltd v DCIT (ITA No.1489/Del/2014) – TS-482-ITAT-2015(Del) -TP

777. The Tribunal held that assessee engaged in providing ITES (data management services, data collection, organization, validation, analysis and filtering of accounts) to its AE could be compared to:

- Accentia Technologies Ltd as it had undergone extraordinary activity of amalgamation during year 2008-09 which had no impact on financials of AY 2010-11 and the merger in its case was with a business similar to it (that of healthcare receivable management and had same income streams of Medical Transcriptions and Coding alongwith Bills and Calculations Systems).
- R Systems International Ltd as results could be reasonable extrapolated (in presence of reliable and authentic data submitted by assessee for three months).
- E4E Healthcare as assessee had relied upon judicial precedents for its exclusion without submitting financials and also not contested the said comparable before TPO and DRP. It noted that the judicial precedent of excluding the one company against the other cannot be judged as such without comparing functions of that comparable company with the assessee company.
- TCS E-serve Ltd. as it had diversified services like software testing verification and validation software for which segmental analysis was not available, high turnover and brand value.
- TCS E-serve International Ltd. as it was engaged in technical services of software testing, high turnover and brand value.
- Infosys BPO as it provided Business process management services (business not carried out by assessee), prepared segments on basis of customers related to particular industry and not according to functions brand value, huge goodwill, had huge intangibles and higher risk.

VAILDOR CAPITAL INDIA PVT LTD vs ITO [TS-1329-ITAT-2018(DEL)-TP] (ITA No.1961/Del/2015) dated 22.11.2018

778. The Tribunal dismissed the Revenue's appeal and upheld the CIT(A)'s order that the assessee engaged in providing ITES and BPO services to its AE could not be compared to Mold Tek Technologies Ltd. as the company was providing CAD support, product development and software customization which are high-end technical services while the assessee was a routine low end service provider by following the decision of Special Bench in

the case of Maersk and HC ruling in the case of Rampgreen Solutions (P.) Ltd. Further, the company in one of its segments had 100% tax exemption while the assessee company paid tax and the cost of sales was low vis-à-vis assessee.

ACIT vs. WNS Business Consulting Services Pvt Ltd [TS-956-ITAT-2018(DEL)-TP] ITA No.919/Del/2013 dated 14.08.2018

779. The Tribunal held that the assessee engaged in the provision of ITES to its AE could not be compared to:

- Accentia Technologies Ltd. as it had acquired stake in companies viz. Geo-Soft Technologies (Private) Ltd and Indium Technologies India Pvt Ltd. Further, its business model was different vis-à-vis assessee since it incurred 68% of operating expenses towards overseas business expenses as against nil in case of assessee.
- Bodhtree Consulting Ltd. as it was into software development and data cleansing segment.
- E-Clerx Ltd. as it was providing high level services involving specialized knowledge and it was a KPO. [relied on the Del HC decision of Rampgreen Solutions India Pvt. Ltd.]
- Informed Technologies India Ltd as it was operating as knowledge based back office processing centre and consisted of providing financial database and backoffice activity for research and advisory division reports. Also as per the TP study report, its focus was on niche market segment of financial content and outsourcing services.
- Infosys BPO Ltd as it had huge turnover, owned IPR and brand value on products and provided services to vast clientele.
- Moldtek Technologies Ltd. as it was involved in providing structural engineering services and also had undergone merger. Further, there was a huge change in business module due to revision of accounts post amalgamation. [It relied on coordinate bench decision of Tribunal in case of Cienna India Pvt Ltd and Petro Araldite wherein it was held that a company could not be considered as comparables in case of its financial results distorted due to merger.]
- Wipro as it owned IPR, incurred expenses on research and development, risk profile and nature of services whereas the assessee was a captive service provider with minimal risks and no intangibles. [It relied on the coordinate bench decision of ICC India Pvt Ltd which in turn relied on the decision of Caliberated Healthcare Systems]
- Asit C Mehta as it derived income from various activities like brokerage, arbitrage and trading in securities. Its business involved immense knowledge and experience for advising its client towards investment in stock.
- Vishal Information Technology Ltd. as it was a KPO.[relied on Delhi HC decision of Rampgreen Solutions India Pvt Ltd.]
- Maple E-solutions Ltd and Triton Corporation Ltd. as the directors of the companies were involved in frauds and money laundering.
- Further, it restored the functional comparability of HCL Comnet Systems and Services Ltd as it had a separate segment for ITes and also directed the TPO to consider forex fluctuation while computing PLI margin. It restored Flextronics Software for recomputation of PLI margin since forex fluctuation at entity level was considered.

NTT Data Global Delivery Services Ltd. vs ITO [TS-953-ITAT-2018-(Del)-TP] ITA No.5339/Del/2011 dated 12.07.2018

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780. The Tribunal held that KPO company being quite different in business from the assessee company (which provided only IT enabled services to its AE which falls in the realm of BPO services) could not be considered as comparable. It restored the matter back to the TPO/AO for re-determining the ALP of the international transaction.
Genpact Services LLC (India Branch) v ADIT - [2016] 46 CCH 0458 (Del Trib)

781. The Tribunal held that the assessee, engaged in providing medical transcription services could not be compared to:

- Vishal Information Technologies Ltd as it's employment cost as a ratio of turnover was much less than assessee and it outsourced most of its work.
- Nucleus Netsoft & GIS India Ltd as it had undertaken an amalgamation and also outsourced most of its work.
- Tricom India Ltd as it developed its own software and also since it had a related party to sales ratio of 61.86% percent.

Transcend MT Services Pvt. Ltd. vs. ACIT - TS-1091-ITAT-2017(DEL)-TP - ITA No.4048/Del./2013 dated 12.12.2017

782. The Tribunal held that the assessee, providing software development and IT enabled services could not be compared with Infosys as the assessee was a captive unit assuming limited risk as opposed to Infosys who was a giant company assuming all types of risks leading to high profits. The Tribunal rejected exclusion of companies merely due to supernormal profit. Further it held that only current year data is to be considered for benchmarking purposes.
Xchanging Technology Services India Pvt Ltd v DCIT (ITA No 1222 / Del / 2015) – TS-428- ITAT-2015 (Del) TP

783. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- KALS information System Ltd as there was an enormous difference in asset base when compared to assessee. (Reliance was placed on the prior years ITAT order - FreescaleSemiconductor India P.Ltd. [TS-366-ITAT-2014(DEL)-TP]
- Infosys Technologies Ltd and Wipro Ltd as it owned branded / proprietary products.

Further, it remitted the comparability of Bodhtree Consulting back to the file of the TPO to examine the assessee's claim i.e. that the accounting policy followed by the said company (revenue was recognised based on software developed and billed to client) impacted its profitability.
Freescale Semiconductor India Pvt. Ltd. vs. DCIT - TS-1100-ITAT-2017(DEL)-TP - ITA No. 2427/Del/2015 dated 07/12/2017

784. The Tribunal held that Accentia Technologies Ltd could not be considered as a comparable to the assessee as it was engaged in diversified KPO activities without segmental information and more so since it had undergone extra-ordinary events during the year (acquisition) which had led to an abnormal growth in profits.
It dismissed the contention of the assessee for the exclusion of Eclerx Services Ltd and held that the services provided by the assessee and Eclerx were similar in nature and supernormal profits could not be a basis for exclusion of a comparable.

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As regards Microland Ltd and CSS Technology Ltd it held that the said comparable was rightly excluded by the DRP considering the fact that its turnover from ITES activities was extremely small as compared to the assessee.

Further, it held that R Systems International Ltd could not be excluded as comparable merely because of difference in financial year ending and held that it should have been accepted as a comparable since the results for the relevant financial year could be reasonably extrapolated from the data available on record.

Hyundai Motor Engineering Pvt Ltd v ITO – (2016) 48 CCH 0277 (Hyd-Trib) – ITA No 128 / Hyd 2016 & ITA No 216 / Hyd / 2016

785. The Tribunal held that companies failing the related party transaction filter, having extra-ordinary events resulting in high operating margins, failing the employee cost filter, having directors involved in fraud, owning substantial intangibles and functionally dissimilar with the assessee who was engaged in providing software development and related services could not be considered as comparable. Further it held that reimbursement of costs should be excluded from operating cost while computing the operating margin.

ADP Pvt Ltd v DCIT (ITA No 471 / Hyd / 2011) – TS-417-ITAT-2015 (Hyd) – TP

786. The Tribunal held that the assessee engaged in the business of providing its AE software solutions could not be compared to companies engaged in both software development and ITES absent segmental information, companies having product sales and providing telecommunication software services without a segmental break-up of the said activities and companies engaged in software development services and products.

Pegasystems Worldwide India Pvt Ltd v ACIT [I.T.A. No. 1758/HYD/2014] – TS-488-ITAT-2015(Hyd)-TP

787. The Tribunal held that the assessee, engaged in providing IT and ITES to its AEs could not be compared to (i) Mold Tek Technologies Ltd which was functionally different as it was engaged in providing engineering design services which were in the nature of KPO services (ii) Vishal Information Technologies since it was subcontracting majority of its ITES work to third parties, (iii) Eclerx Services as it was providing high end services in the nature of KPO (iv) Maple Esolutions Ltd as its financials were unreliable owing to the fact that its directors were involved in fraud.

BA Continuum India Pvt Ltd v DCIT – TS-1005-ITAT-2016 (Hyd) – TP

788. The Tribunal held that the aggregation of the entire software development revenue of the merged assessee was not warranted as the maintenance of accounts was entity specific and the software development services were provided in 2 separate sectors. Additionally in relation to the ITES segment of the assessee the Tribunal excluded companies engaged in product development, dealing in software products and huge companies as they were not comparable with a software development company. Further, it held that provision for bad and doubtful debts was to be considered as operating in nature and that the distribution segment (pure trading) was to be benchmarked using RPM and not TNMM.

OSI Systems Pvt Ltd v DCIT [ITA No 683 /Hyd / 2014] - TS-396-ITAT-2015(HYD)-TP

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789. The Tribunal held that the assessee, engaged in providing IT enabled back office services to its AE could not be compared to the following companies:

- Accentia Technologies, on account of extra-ordinary event of merger / demerger which had a significant impact on the company's profitability.
- Coral Hub Ltd, as it was functionally different, being engaged in e-publishing as well as document scanning and indexing.
- Eclerx Services, as the company was engaged in providing KPO services and also since the company had undergone an extra-ordinary.
- Mold Tek Technologies, since the company was a KPO service provider engaged in a host of engineering services.
- Genesys International Corporation Ltd, as it was engaged in providing geographical information services.

BA Continuum India Pvt Ltd – TS-1023-ITAT-2016- Hyd- TP

790. The Tribunal held that the assessee engaged in providing software design and development services could not be compared to:

- Persistent Systems Ltd as it was engaged in product development which was different from software development services and earned revenue from licensing of products, royalty on sale of products as well as income from maintenance contracts and no segmental details were available
- Sasken Communication Technologies Ltd as this company earned revenue from software services as well as software products and the breakup of operating costs and the net profitability between the two segments was not available

Further, it held that Conexant Systems Private Limited vs. DCIT could not be excluded as a comparable merely because of increase in consultancy charges and held that the increase in consultancy charges were proportionate to the increase in turnover.

Conexant Systems Private Limited vs. DCIT - TS-95-ITAT-2018(HYD)-TP - I.T.A. No. 464/HYD/2016 dated 24-01-2018

791. The Tribunal held that the assessee, engaged in the business of providing ITES to its AEs could not be compared with a) companies outsourcing a substantial portion of its work thereby having low employee cost, b) companies who had undergone mergers during the year c) companies operating different business strategies and d) KPO companies.

Cognizant Technology Services Pvt Ltd v DCIT - (2016) 67 taxmann.com 99 (Hyd)

792. Where the Revenue by relying on the decision of Intoto Software India Pvt Ltd V ACIT [TS-141- ITAT-2013(HYD)-TP], contended that out of the 24 companies (selected by the TPO) excluded by the CIT(A) 8 companies (viz. E-Zest Solutions Ltd, Igate Global Solutions Ltd, Persistent Systems Ltd, Helios & Atheson Information, LGS Global Ltd, Quinteqra Solutions Ltd, RS Software India Ltd and Thirdware Software Solution Ltd) were not covered in the impugned decision and therefore were to be included and out of the above the assessee only argued for the exclusion of 4 of the companies relying on the decision Society General Global Solution Centre Pvt. Ltd [TS-323-ITAT-2016(Bang)-TP], the Tribunal remitted the comparability of all 8 comparables contested by Revenue to TPO for fresh consideration.

Xilinx India Technology Services Pvt. Ltd. Vs. DCIT -TS-225-ITAT-2017(HYD)-TP

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- ITA No. 1051/Hyd/2014 dated 24.03.2017

793. The Tribunal remitted TP-adjustment made in respect of tele-calling BPO services rendered by the assesse to AE for AY 2007-08 & 2008-09 on the ground that the TPO had committed certain factual errors in calculating operating costs by considering cost of whole business instead of cost relevant for international transactions and that he had selected filters/comparables irrelevant to the assessee. Further, ITAT excluded 6 comparables in respect of ITES rendered by the assessee to AE on the following grounds:

- Infosys BPO Ltd as it was a giant company had a huge brand influence.
- Genesys International Ltd as it was engaged in software development as well as geospatial services which involved the services relating to the relative position of things on the earth's surface. These basically include 3D mapping, Navigation maps, Image processing, Cadastral mapping, etc.
- Exlerx Services Limited as it was engaged in high end KPO services and segmental data was unavailable.
- Cosmic Global Ltd as the revenue from BPO services was negligible i.e Rs 27.76 lakhs.
- Acropetal Technologies Ltd as it was engaged in provision of high end engineering design services and sophisticated delivery system
- Accentia Tech as acquisition of various companies, being an extraordinary event which had an impact on the profit.

Monster.com India Pvt Ltd vs DCIT [TS-247-ITAT-2017(HYD)-TP-1762/H/11,1697/H/11,49/H/13, 69/H/13, 1333/H/14, 872/H/14, dated 15.05.2017

794. The Tribunal held that it excluded 5 comparables for ITes on the following grounds:

- Accentia Technologies Ltd as it involved an extraordinary event of merger/demerger.
- Coral Hub Ltd as it was engaged in e-publishing business and segmental details were not available.
- Eclerx Services Ltd as it was engaged in providing KPO services.
- Mold-Tek Solutions Ltd as it was engaged in providing engineering services and was classified as a KPO service provider.
- Genesys International Corporation Limited as it was engaged in providing geographical information services and also carried out R&D services.

BA Continuum India Private Limited vs Addl CIT [TS-396-ITAT-2017(HYD)-TP-ITA-1144/HYD/2014 dated 28.04.2017

795. The Tribunal excluded the following companies as comparable to the assessee who was engaged in providing software development services:

- Companies engaged in software product development, absent segmental details
- Companies having large turnover, brand value, scale of operation, diversified activities and owning intangibles
- Companies not satisfying employee cost and RPT filters
- Companies having a variety of services and products and a large magnitude of operations

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- Companies providing 2D and 3D animation services

United Online Software v ITO (ITA No.1658/Hyd/11) – TS-493-ITAT-2015 (Hyd) – TP

796. The Tribunal held that the assessee engaged in the business of providing contract software development services, back office support services, corporate IT support services and marketing support services to group entities could not be compared to:

- Larsen & Toubro Infotech Ltd since the said company carried out a variety of activities and the relevant segmental results were not available
- Persistent Systems Ltd. as it was engaged in providing outsourced software product development services and technology solutions to independent software vendors, it constantly invested in new IP solutions, derived significant revenue from export of software services and products and did not declare segmental results based on its services / products.

Electronic Arts Games (India) Pvt. Ltd vs. ACIT - TS-326-ITAT-2017(HYD)-TP - ITA No. 444/Hyd/2017 dated 28-04-2017

797. The Tribunal held that the assessee, engaged in providing software development services to its AE could not be compared to:

- Infosys Ltd on account of its huge turnover (reliance placed on Agnity India Technologies Pvt. Ltd. [TS-312-ITAT-2013(DEL)-TP])
- Exensys Software Solutions Ltd as there was merger of said company and Holool India Ltd which had a material impact on the financial results of the company for the year.
- Thirdware Solutions Ltd as the company was into both software services as well as product development and the segmental details and in particular, details of the expenditure incurred towards software products were not available.

Capgemini Technology Services India Ltd (formerly known as IGATE Global Solutions Ltd vs. ITO - TS-1095-ITAT-2017(HYD)-TP - ITA No.633/Hyd/2011 – dated 29.12.2017

798. The Tribunal held that the assessee, engaged in the business of rendering I.T. enabled services to its AEs could not be compared to the following companies:

- Mindtree Ltd (Seg), Sasken Technologies, Tata Elxsi, Zylog Systems and Persistent Systems Ltd as the turnover of these companies was more than 12 times of assessee's turnover (Rs.25 Crores) and they were functionally dissimilar
- Comp-U-Learn Tech India Ltd as it was engaged in internet based solution, education and training, e-commerce solutions, software design/development, web designing/development
- E-Zest Solutions Ltd &Kals Information Systems Ltd as they were engaged in product engineering services
- Infosys Technologies Ltd & L&T Infotech Ltd as they earned super profits and had very high turnover

Wissen Infotech Private Limited vs. DCIT - TS-142-ITAT-2017(HYD)-TP ITA No.99/Hyd/2015 ITA No.311/Hyd/2015 dated 28.02.2017

799. The Tribunal rejected assessee's plea for exclusion of 2 comparables on grounds of extraordinary event and functional dissimilarity while benchmarking provision of KPO/Engineering services/IT enabled services (ITeS) to AEs during AY 2011-12. It held that

winding up of dormant subsidiary of Eclerx Services was not an extraordinary event having impact on operating results, also, retained Crossdomain Solutions since the assessee's objections that the said company was functionally dissimilar was based on website info and not annual report.

Hyundai Motor India Engineering Private Limited - TS-1057-ITAT-2016(HYD)-TP – ITA No 128/Hyd/2016

800. The Tribunal held that the assessee engaged in the business of providing ITeS and Software development services to its AE could not be compared to:

- Microgenetics Systems Ltd as it outsourced its business activity and therefore was functionally dissimilar to the assessee
- Infosys BPO Ltd as it was a giant company having brand value, diversified activity and therefore functionally dissimilar to the assessee.
- Eclerx Services Ltd as it was a part of the group of a large conglomerate and had huge turnover with global brands, operating on a large scale with lakhs of employees and therefore was functionally dissimilar to the assessee.
- TCS E-serve Ltd as it provides technology services involving software testing, verification and validation of software at the time of implementation and data centre management and therefore functionally dissimilar to the services provided by the assessee.
- Cosmic Global Ltd as it had a different working model as upto 41% of its expenses were incurred on sub-contracting which had a significant effect on margins.

Avineon India P Ltd vs DCIT-TS-679-ITAT-2017(HYD)-TP dated 07.07.2017

801. The Tribunal held that the assessee, engaged in providing software development services could not be compared to:

- E Infochips Bangalore Ltd as it was engaged in both software development as well as ITES and no segmental information was available
- Persistent Systems Ltd as it had a high turnover of Rs.509 crore as against Rs.29.53 crore of the assessee and also since it was engaged in sale of software products

Further, it received the contention of the assessee and held that Comp-U-Learn Tech India Ltd was to be included as a comparable as its receipts were only from software development services and there was no sale of products, that the extra-ordinary events did not have an impact on the profitability of the company and more so since the company was accepted as comparable in many cases for the same AY i.e. 2010-11.

ITO v Intoto Software (India) Pvt Ltd – TS-42-ITAT-2017 (Hyd) – TP ITA No. 1921/Hyd/14 ITA No. 25/Hyd/15 dated 31.01.2017

802. Where the assessee was a software development service provider in the gaming sector and could not be compared with the general software development providers due to its unique utilization of technical manpower as selected by the TPO, the Tribunal held that since the activities carried on by the assessee were not properly appreciated by the TPO, the entire matter was to be remitted for fresh benchmarking.

Gameloft Software Pvt Ltd v ACIT - TS-16-ITAT-2018(HYD)-TP - ITA No.598/Hyd/2016

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803. The Tribunal held that the assessee engaged in the business of providing ITeS and Software development services to its AE could not be compared to:

- Microgenetics Systems Ltd as it was incurring expenses for the purpose of outsourcing activity and therefore was functionally dissimilar to the assessee
- Infosys BPO Ltd as it was a giant company having brand value, diversified activity and therefore was functionally dissimilar to the assessee.
- TCS E-serve ltd as it provided technology services involving software testing, verification and validation of software at the time of implementation and data centre management
- Cosmic Global ltd had a different working model and expenses upto 41% were on sub- contracting which had a significant effect on margins.

Avineon India P Ltd vs DCIT-TS-679-ITAT-2017(HYD)-TP dated 07.07.2017

804. The Tribunal held that where the TPO proposed to apply the 75 percent services revenue filter, he was to apply it on the segmental results of the comparables as opposed to the entity level results. Accordingly, it remitted the issue to the file of the TPO and directed him to collect information from comparables and adopt the said filter with segmental information.
Palred Technologies Ltd – TS-981-ITAT-2016 (Hyd) - TP

805. The Tribunal held that Fortune Infotech Ltd, Tricom India Ltd and Ultramarine & Pigments Ltd were to be excluded as comparable as they had extraordinary circumstances and abnormal trading results and were functionally dissimilar to the assessee who was engaged in providing IT enabled services. Further, it remitted the comparability of Goldstone Teleservices Ltd to the TPO directing him to determine whether the company had export turnover in excess of 25 percent of total turnover.
It further held that Vishal Information Technologies and Allsec Technologies were to be excluded as comparable as they had a different business model of outsourcing most of its work and were loss making, respectively.
Sutherland Healthcare Solutions Ltd v ITO – TS-947-ITAT-2016 (Hyd) – TP

806. The Tribunal excluded the following companies from the list of comparables while benchmarking the ITES and software development services rendered by the assessee:

- Accentia Technologies Ltd as it acquired a new business during the year which impacted its financial results
- Acropetal Technologies Ltd as it was functionally different and did not have adequate segmental results
- Cosmis Global Ltd as the company earned only Rs.27.76 lakhs in the BPO segment and also incurred huge costs by way of translation charges which had an inbuilt margin included in the cost
- Eclerx Services Ltd since the company was involved in a diverse nature of services without segmental data and more so since it was engaged in KPO services
- Genesys International Corporation ltd as it was functionally different.

ADP Pvt Ltd v DCIT – TS-32-ITAT-2017 (Hyd) – TP ITA No. 191/Hyd/2014 ITA No. 134/Hyd/2014 dated 18.01.2017

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807. The Tribunal held that the assessee, engaged in IT Enabled services to its group companies could not be compared with:

- Accentia Technologies Ltd as it was engaged in high onsite operations in different geographic zones and had undertaken extra-ordinary events (merger), which resulted in higher profits
- Asit C Mehta Financial Services as the said company had low employee costs
- Bodhtree Consulting Ltd as it was engaged in software development
- Eclerx Services Ltd as it was engaged in KPO services and reported extra-ordinarily high profits
- Mold Tek Technologies as it was engaged in providing structural engineering consultancy services under the KPO division and reported supernormal profits
- Vishal Information Technologies as it outsourced substantial work to third party vendors as a result of which it had low employee cost
- HCL Comnet, Infosys BPO and Wipro Ltd as there were differences in the FAR profile and the companies had huge brand value and owned significant intangible assets.

TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) –TP I.T.A. No. 1927/HYD/2011 dated 06.01.2017

808. The Tribunal held that the assessee a software developer exclusively engaged in gaming software development could not be compared with general software developers or service providers as the services it provided were unique in terms of technical manpower utilization etc. However, it rejected the assessee's claim for inclusion of international comparables and held that the TPO could only complete the transfer pricing study / scrutiny based on information available domestically as he could not call for information from international comparables.

Further, the Tribunal relying on the decision of the co-ordinate bench in Hyundai Motors Engineering Pvt Ltd accepted the application of the turnover filter and held that the size of an organization is an important factor while determining comparability and held that large business have the benefit of economies of scale and therefore could not be compared to the smaller businesses.

Additionally, it rejected the assessee's contention seeking for exclusion of companies merely on the ground that they had a long business standing as compared to the assessee who was in its second year of operation.

Gameloft Software Pvt Ltd v DCIT – TS-972-ITAT-2016 (Hyd) - TP

809. The Tribunal held that assessee engaged in software development services could not be compared to:

- Accentia Technologies Ltd due to lack of segmental information
- Acropetal Technologies due to functional differences as compared to assessee
- Eclerx Services as it was engaged in KPO activities
- Infosys BPO Limited due to its exceptional size and brand value.
- TCS eServe Ltd due to functional dissimilarity.
- Microgenetic Systems Ltd as significant expenditure of 23% was incurred towards medical transcription services

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- Cosmic Global as it had substantial sub-contracting expenses, which represented a different business model from the assessee.

Further, the Tribunal included Crossdomain Solutions Pvt Ltd as comparable to the assessee

M/s. Excellence Data Research Pvt Ltd vs DCIT Circle 17(1)- TS-484-ITAT-2018(HYD)-TP- ITA No 93 & 34/ HYD/2016 dated 25.04.2018

810. The Tribunal held that the assessee engaged in providing software development services could not be compared to Persistent Systems ltd as it was engaged in providing software development services as well as manufacture and sale of software products and therefore was functionally dissimilar to the assessee. Further, it included E-Zest Solutions ltd as it was engaged in providing development and design services, software product testing, maintenance and support and license management and the assessee had not provided any document to show that the comparable owned any intangible assets or had any inventory. It remitted the comparability of E- Infochips Bangalore ltd and Mindtree Limited to the file of AO to verify the functional comparability vis a vis the assessee and existence of peculiar circumstances respectively.

Conexant Systems Private Limited vs DCIT-TS-681-ITAT-2017(HYD)-TP-ITA No.264/Hyd/2015 dated 23.08.2017

811. The Tribunal held that the assessee engaged in the business of sale of user license of enterprise application to external parties, software development, software related services and back office services to its AE could not be compared to:

- Accentia Technologies Limited as it was engaged in e-prescription and document management services which were KPO services which was functionally dissimilar to the assessee
- Acropetal Technologies Limited as it was engaged in providing engineering design services and therefore was functionally dissimilar to the assessee.
- eClerx Services Limited as it was engaged in providing KPO services and therefore was functionally dissimilar to the assessee.
- TCS e-serve Limited as it was engaged in providing technical services comprising of software testing, verification and validation of software at the time of implementation and data centre service management activities which was functionally dissimilar to the assessee.
- Infosys BPO Limited as it was a giant company with high risk profile and therefore could not be compared with the assessee having low risk profile.

Further, it included E4e Healthcare Business Services Private Limited to the final list of comparables as the assessee had no objection to the inclusion of this company provided the correct margin was taken and accordingly directed the AO to include this company the correct margin.

DCIT vs Infor (India) Private Limited-TS-682-ITAT-2017(Hyd)-TP-ITA.No.113/Hyd/2016 dated 07.07.2017

812. The Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

- Persistent Systems Ltd as it was engaged in both software products, services and technology innovation and segmental details were not available, whereas the assessee

was into software development. It further observed that the said company had high intangibles.

- L&T Infotech Ltd. as the revenue from IT services of said company for AY 2013-14 was Rs. 3613 Crs and it had huge intangibles and further, relied on Del HC ruling in Saxo India (P.) Ltd. wherein it was held that segmental information for said comparable was not available (break-up between product and software development services not provided.)

Further,

- It remanded the comparability of Infobeans Technologies Ltd. observing that as per the company's financials, the export of goods and services was calculated under FOB basis. However, except for the said reporting in financials, there was no material to demonstrate that the company was carrying on business of sale of software and that it was functionally different from the assessee company.

EPAM Systems India Pvt Ltd vs ACIT [TS-1311-ITAT-2018(Hyd)-TP] ITA No.2122/Hyd/2017 dated 20.11.2018

813. The Tribunal held that assessee engagedin the business of research and development for the design and development of semi-conductor IC (software segment) to its AE could not be compared to:

- SIP Technology and Exports Ltd. as there was no comparable data for AY 2005-06 on account of it closing its books on September 2004 and no information was filed about yearend closing of results on 31.03.2005 [it relied on coordinate bench decision of PTC Software Ltd. wherein it was held that only data pertaining to financial year to be considered for comparability purposes.]
- VMF Soft Tech Ltd. as no segmental breakup was available between software services and infrastructure support services and no information about the nature of business was also available from annual reports regarding the type of products/services
- Helios and Matheson Information Technology Ltd. as assessee had 100% RPT.
- Geometric Software Solutions Ltd as it was engaged in developing and licensing of products and product life cycle management services
- ICSA Ltd. as it had a different business model of outsourcing its services whereas assessee had adopted an in-house business model of providing services \
- Further,
- It restored the comparabilityof Compucom Software Ltd. directing TPO to conduct a segmental analysis as it had operations in software and software products and if it was found that segmental data was not available, to eliminate the comparable
- It restored the issue of computation of margin of Visual Soft Technologies Ltd to determine proper OP/TC and adopt the same as proper margin in arriving at ALP
- It included Saksoft Ltd. rejecting assessee's contention for excluding on basis of its RPT exceeding 25% (74.16%) on ground that assessee was a 100% subsidiary like the aforesaid comparable and assessee's entire revenue was generated from its AE. Further, the TPO had not applied RPT filter to any of its comparables.

Conexant Systems Pvt Ltd vs Dy. CIT [TS-1396-ITAT -2018-(Hyd)-TP] ITA 1694/Hyd/2016 dated 26.12.2018

814. The Tribunal held that assessee engaged in providing software development services to its AE could not be compared to:

- Comp-U-Learn Tech India Ltd. as it had revenue from ITES and software and there was no segmental bifurcation. Further, it was also seen that said comparable was into research & development to enhance the quality of its products whereas the assessee was a routine software provider.
- E-Infochips Bangalore Ltd. as it had revenue from ITES and software for which segmental details were not available.
- Persistent Ltd. as it was engaged in sale of software product, owned significant intangibles and segmental data for services and products was not available.
- Sasken Communication Technologies Ltd. as it earned revenue from three segments and segmental data was absent.
- Kals Information Systems Ltd. as it had revenue from developing software products and was not purely a software development service provider.
- Tata Elxsi Ltd. as it was predominantly into product design services, Innovation Design Engineering and visual computing labs division which are specialized services under software development which are complex in nature and further no breakup based on which margin from software services could be computed.
- Satyam Computers Services Ltd. as it was being investigated by various authorities and courts

Further,

- It included CG-VAK Software Software and Exports Ltd (which was rejected by TPO for failing to satify the employee cost filter) noting that TPO ignored contribution to PF & ESI, Gratuity and Ex Gratia payments and arrived at the employee cost.

Ivy Comptech Pvt Ltd vs Dy.CIT [TS-1316-ITAT-2018(Hyd)-TP] ITA No.334 /Hyd/2015 dated 29.11.2018

815. The Tribunal set aside the DRP's order and remitted the benchmarking exercise of the assessee's international transactions (viz. provision of back office support services, corporate IT support services and marketing support services to AE) to TPO. It noted that out of 18 comparables selected by the TPO, the DRP had excluded 15 and retained 3 comparables which were either excluded by it in the earlier or subsequent years. Noting that out of TPO's 18 comparables, DRP had excluded 15 and the other 3 were also liable to be excluded based on earlier / subsequent years DRP orders, the Tribunal opined that the TPO's selection of comparables was not proper and therefore restored the matter back to TPO.

Electronic Arts Games (India) Private Limited vs. DCIT - TS-1074-ITAT-2017(HYD)-TP - I.T.A. No. 325/HYD/2016 dated 29-12-2017

816. The Tribunal held that the assessee engaged in rendering ITeS to AE could not be compared to Infosys BPO and TCS eServe as they had a high turnover, brand value and intangibles and also had been excluded by the coordinate bench in the assessee's own case for earlier year Further, the Tribunal rejected the contention of the assessee as regards the inclusion of E-Clerx Services Ltd since it opined that acquisition of a new company in USA would not have an impact on the financials of the assessee and the coordinate bench in the assessee's own case had included the said comparable as a company. The Tribunal also retained Crossdomain Solutions as a comparable following the coordinate bench decision of the prior year wherein it had upheld the DRP's observations that engineering design services rendered by assessee are akin to KPO services rendered by the said company.

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The Tribunal remanded the comparability of Crystal Voxx to TPO observing that the DRP had not provided an opportunity to the assessee to be heard while holding that the company was functionally not comparable to the assessee.

Hyundai Motor India Engg Pvt Ltd [TS-503-ITAT-2018(HYD)-TP] ITA No.87/Hyd/2017 dated 08.06.2018

817. By relying on coordinate bench decision of Hyundai Motors India Engg. P Ltd., the Tribunal held that assessee engaged in providing ITES to its AE could not be compared to a) TCS E-serve International Ltd. as it had acquired Citi group India based captive BPO arm which was exceptional event affecting the financials b) Accentia Technologies Ltd as it was into diversified KPO, owned goodwill/IPRs and had undergone an extra-ordinary event which would have an effect on profit margins of said company.

Ivy Comptech Pvt Ltd vs Dy.CIT [TS-1316-ITAT-2018(Hyd)-TP] ITA No.334 /Hyd/2015 dated 29.11.2018

818. The Tribunal adjudicated on the functional profile of the company and held that the DRP had mis-read itself in determining assessee as a high end service provider, whereas assessee was only providing ordinary technical support which was categorized as ITeS BPO services provider in earlier years. Thus, it held that the assessee should be treated as a BPO providing ordinary support services to its AE.

Further, it held that assessee engaged in the provision of ITES services to its AE could not be compared to:

TCS EServe Ltd as it was engaged in diversified business like providing IT Consulting, KPO services etc and it was deriving benefit of huge brand value of TATA resulting in high margins and high turnover. [It relied on the coordinate bench decisions of BC Management Services (P.) Ltd., S&P Capital IQ (India) Pvt. Ltd, Infor (India) (P.) Ltd., Baxter India Pvt. Ltd]

Infosys BPO Ltd. as it was providing diversified services including high end KPO and LPO, product based solutions and BPO services and therefore, was functionally incomparable and had acquired another company during the year which impacted its profitability. [It relied on various rulings including assessee's own case for earlier year, Agnity India Technologies (Delhi HC), Monster.com and Aginity India Technologies (Del Trib)]

Eclerx Services Ltd as it was a high end KPO and the only reason for inclusion of the company for the subject year was recategorization of assessee as KPO and once it had held that the assessee was only a ordinary BPO, this company had to be excluded.

Accentia Technologies Ltd. as it was functionally not comparable in light of the coordinate bench decisions of the assessee's own case for earlier years.

C3i Support Services Private Limited vs Dy.CIT [TS-797-ITAT-2018(HYD)-TP] ITA No.503/Hyd/2017 dated 25.07.2018

819. The Tribunal held that companies engaged in software development and related support services could not be compared with companies having revenue from both software development and software products and companies engaged in providing 2D and 3D animation services. It further held that huge size of brand value and reputation of a company disqualifies it from being treated as comparable to the assessee, a small captive service provider. The Tribunal further held that where the assessee had not raised an objection to the lower turnover filter, companies could not be eliminated on the basis of an

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upper turnover filter and that companies could not be rejected merely on the basis of turnover.

JDA Software India Pvt Ltd v ITO - (2016) 66 taxmann.com 327 (Hyd)
Parexel International (India) Pvt Ltd v ACIT - (2016) 66 taxmann.com 150 (Hyd)

820. The Tribunal held that the assessee, a wholly owned subsidiary of its USA based AE, engaged in providing IT and IT enabled services to its group could not be compared to a) companies not satisfying the service income filter of 75 percent, b) companies engaged in development of product and consultancy, c) companies having a huge brand value and reputation, d) companies specializing in embedded software development and e) companies having a huge turnover.

ADP Pvt Ltd v DCIT - TS-633-ITAT-2015 (Hyd) - TP Avineon India P Ltd v DCIT - (2016) 46 CCH 0512 (Hyd)

821. The Tribunal held that assessee engaged in providing ITES services to its AE could not be compared to:

- Infosys BPO Ltd as it had a brand value along with high turnover (It relied on coordinate bench in assessee's own case for earlier year)
- Jeevan Scientific Technology Ltd. as its BPO segment had foreign exchange earnings which was absent in case of assessee and further, there was huge fluctuation in its BPO segment.

Further,

- It included ICRA Online Ltd. noting that its RPT filter was less than 25% after excluding reimbursement transactions and thus did not fail the RPT filter of 25%.

ITO vs Knoah Solutions Pvt Ltd. [TS-1263-ITAT -2018 (Hyd)-TP] ITA No.584/Hyd/2016 dated 30.11.2018

822. The Tribunal held that the assessee company rendering ITES services to AE could not be compared with –

- Acropetal Technologies Ltd as the company was involved in providing engineering design services.
- eClerx Services Ltd. as the company provided high end KPO services.
- TCS E-serve Ltd. as the company was providing technical services involving software testing, verification and validation of software at time of implementation.

DCIT v. Progressive Digital Media (P.) Ltd. - [2018] 92 taxmann.com 426 (Hyderabad - Trib.) - IT APPEAL NO. 426 (HYD.) OF 2016 dated APRIL 11, 2018

823. The Tribunal held that the assessee, a captive service provider, engaged in providing software development and allied services to its AEs could not be compared to large companies having huge turnover, companies engaged in the development of software product, companies engaged in the development of niche products and development services, companies engaged in both software development and product development with no segmental break-up, companies rendering KPO services and companies carrying out substantial R&D activities which resulted in the creation of IPRs.

United Online Software Development (India) Pvt Ltd v ITO - (2016) 46 CCH

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0509 (Hyd Trib.)

824. The Tribunal held that the assessee, providing software development services could not be compared with companies a) engaged in sale and development of software b) having huge turnover in comparison to that of the assessee c) engaged in product development d) having minimal employee cost e) engaged in development of a niche product f) engaged in providing animation services or g) incurring selling and R&D expenses for sale / development of its products.
NTT Data India Enterprises Application Services Pvt Ltd v ACIT - (2016) 67 taxmann.com 88 (Hyd)

825. The Tribunal held that the assessee, engaged in providing software development and support services to its AE could not be compared to E Infochips Bangalore Ltd since the said company was engaged in providing both Software development services as well as ITES services and did not have segmental results, and therefore functionally different. Further, it held that Kals Information Systems Ltd, being engaged in development of software products as well as providing training facilities could not be considered as a comparable owing to the difference in functionality. Tata ElxsiLtd, engaged in complex activities such as product design services, innovation design engineering and visual computing was also excluded as comparable.
Oaktown Global Technology Services Centre (India) Pvt Ltd v ACIT - (2016) 47 CCH 0575 (HydTrib) ITA No. 434/Hyd/2015

826. The Tribunal upheld DRP's order to exclude Infosys Technologies Ltd and L&T Infotech Ltd as they were having super profit and very high turnover by relying on coordinate bench of Wissen Infotech Pvt Ltd wherein the companies had been excluded for the same reason in case of assessee engaged in providing software development services to its AE. Further, vis-à-vis assessee's ITES segment, it also upheld DRP's order with respect to exclusion of a) Infosys BPO as it had the benefit of market value and brand value b) Eclerx Services Ltd as KPO services are distinct from BPO services. c) TCS e-serve Ltd as it was engaged in diversified activities.
Dy.CIT vs Ivy.Comptech Ltd [TS-1316-ITAT -2018 (Hyd)-TP] ITA No.222/Hyd/2015 dated 29.11.2018

827. The Tribunal upheld the DRP's order with respect to exclusion of the following comparables in case of assessee engaged in the provision of ITes to its AE:
Infosys BPO as it was into high end services and had a turnover of Rs 1130 Cr which was more than 10 times assessee's turnover of Rs. 66.44 Cr. Further, it had a huge brand value which would impact its profitability for the relevant year. [It relied on Del HC ruling in Agnity India Technologies Pvt Ltd.] TCS-E-Serve Ltd as it had a huge brand value which affected its profitability and had a turnover of Rs 1405 Cr which was more than 10 times assessee's turnover. e-Clerx Services Ltd as the company was a KPO service provider. [It relied on HC ruling in Rampgreen Solutions (P) Ltd.]
ACIT vs DST Worldwide Services India Pvt Ltd [TS-813-ITAT-2018(HYD)-TP] ITA No.291/Hyd/2015 dated 18.07.2018

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828. Where the assessee was engaged in providing software services to its AEs and distribution of products on behalf of its AEs, the Tribunal held that the following companies could not be considered as comparable:

- CompU Learn Tech India Ltd as the company was also engaged in R&D to enhance the quality of its products while assessee was into simple software development services.
- E-Infochips Bangalore Ltd as it was not only into software development services but was also into consultancy services and segmental data was unavailable
- Kals Information System Ltd as it was engaged in software services, software products and ITeS and no segments were available.
- Tata Elxsi as the company was functional dissimilarity because of its complex activities.

Further, it held that the following companies were to be included as comparables:

E-Zest Solutions Ltd ('E-Zest') as its operations were similar to the software services rendered by the assessee.

Open Text Corporation India Pvt Ltd (earlier known as Cordys Software India Products Ltd) vs. DCIT - TS-500-ITAT-2018(HYD)-TP - ITA No.486/Hyd/2015 dated 18.05.2018

829. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to companies engaged in development of software products, companies owning intellectual property and brand value, companies for which segmental data is unavailable, companies failing the Related Party transaction filter.

Intoto Software India Pvt Ltd v ITO (ITA.No.1810/Hyd/2012) – TS-635-ITAT-2015 (Hyd) – TP Starnet Networks (India) Pvt Ltd v ACIT (ITA No. 1684/PN/2011) – TS-636-ITAT-2015 (Pun) – TP

830. The Tribunal held that a company engaged in providing software development services to its AE could not be compared to:

- Infosys BPO Ltd as the company had a high turnover, global brand value, operations on a large scale, large talent pool and significantly different FAR and was also excluded by ITAT in assessee's own case for earlier years
- TCS E Services Ltd. as the company provided technology services involved in software testing, verification and validation of software at the time of implementation and data in the management. to the assessee. Also it had its own brand value and its scale and operations were different from the assessee.

Further, the Tribunal rejected assessee's plea for exclusion of E-Clerx Services Ltd. on the ground that it was a KPO and provided data analytics, operations management and process improvement and thus functionally different. It observed that since the assessee had been categorized as a KPO in its own case for the earlier year, E-Clerx could not be excluded on the basis of functional dissimilarity.

Avineon India Pvt Ltd vs Dy.CIT [TS-893-ITAT-2018(HYD)-TP] ITA No.82/Hyd/2017 dated 27.06.2018

831. The Tribunal directed the TPO to conduct a fresh search for comparables for the assessee engaged in software development to determine the arm's length price. The Tribunal observed that the DRP erred in upholding the set of 13 comparables selected by TPO even after noticing that 9 out the 13 comparables were functionally dissimilar. In so far as the assessee's plea for exclusion of Persistent Systems as comparable was concerned, the Tribunal noted

that the assessee itself had taken Persistent Systems Ltd as one of the comparables and no objection against the same was raised before the DRP. The turnabout by the assessee at a later stage without raising a specific ground of appeal was rejected by the Tribunal.
Steelwedge Technologies Pvt Ltd [TS-473-ITAT-2018(HYD)-TP] ITA No.385/Hyd/2017 dated 06.06.2018

832. The Tribunal held that assessee, engaged in rendering ITES to its group companies could not be compared to the following companies viz. a). Accentia Technologies as it was engaged in high on-site operations in different geographical zones and it had undertaken extra-ordinary events (merger) during the year which resulted in higher profits b). Asit C Mehta as it had abnormally low employee cost c). Bodhtree Consulting Ltd as it was engaged in software development therefore functionally different, d). Eclerx Services Ltd as it was a KPO service provider and it reported extraordinary high profits e). Mold Tek Technologies Ltd as it was engaged in providing structural engineering consulting services under the KPO division f). Vishal Information Technologies since it outsourced a large portion of its work to third party vendors and g). HCL Comnet Systems and Services Ltd, Infosys BPO Ltd, Wipro Ltd on account of functional difference, high brand value and premium pricing.
TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) - TP

833. The Tribunal held that the assessee, engaged in the business of providing software development, quality assurance and support services to its AEs could not be compared with:

- E Infochips Bangalore Ltd as it was engaged in the business of software and ITES without adequate segmental data
- Kals Info Systems Lt d as it was engaged in the development of software products
- Tata Elxsi as it had high turnover, was engaged in complex activities and did not have segmental data.

Invensys Development Centre India Pvt Ltd v DCIT – TS-125-ITAT-2017 (Hyd) – TP ITA No.329/Hyd/2015 ITA No.318/Hyd/2015 dated 23.02.2017

834. The Tribunal following precedent excluded 5 comparables on grounds of functional dissimilarity, ownership of intangibles, extraordinary event during the year affecting profitability and non- availability of segmental data. Further, it also remitted to the file of the TPO the calculation of working capital adjustment considering assessee's claim about incorrect average receivables adopted by the TPO.
BA Continuum India Private Limited -TS-1023-ITAT-2016(HYD)-TP - I.T.A. No. 1143/HYD/2014

835. The Tribunal in case of assessee engaged in software development and support services, rejected assessee's contention of use of contemporarious data and multiple year data on the ground that in a number of cases by Cordinate Benches it is held that only the data pertaining to relevant financial year has to be considered and stated that a company cannot be selected as comparable in absence of availability of segmental information if the comparables are engaged in providing diversified services and income from software development cannot be equated with income from services as software development may

include sale of products. Relying on the decision of Co-ordinate bench in case of Sony India Pvt Ltd. directed assessing officer to treat the provisions for bad and doubtful debts of the comparable companies as part of their operating expenses.

Sum Total Systems India Private Limited vs. DCIT (2016) 48 CCH 0082 (Hyd Trib)-ITA No.255/Hyd/2015

836. The Tribunal held that the assessee, engaged in providing software development services could not be compared to a company engaged in both IT and IT Enabled services in the absence of a segmental break-up of income. It further directed exclusion of companies having undergone extra-ordinary events during the year and companies engaged in providing software consultancy services as they were not functionally similar to the assessee.

Labvantage Solution Pvt Ltd [TS-836-ITAT-2016 (Kol)-TP] (I.T.A No.1051/Kol/2015)

837. The Tribunal remanded the comparability of the following comparables in case of an assessee engaged in the provision of software development services to its AE:

- Spry Resources (India) Pvt. Ltd to verify if it passed the filter of employee's cost to sales of 50% as bench marked by TPO.
- Lucid Software Limited to verify if it passed the filter of employee's cost to sales of 50% as bench marked by TPO.
- PreludeSys (India) Ltd. to verify as to whether the said company failed the RPT filter adopted by TPO.
- ASM Technologies Ltd. to verify as to whether the said comparable failed the RPT filter adopted by the TPO.
- E-InfoChips Ltd. to verify as to whether the said company failed the RPT filter as well as employee's cost filter adopted by the TPO. Also, it had undergone amalgamation which was not addressed by TPO/DRP.

Further, the Tribunal accepted the assessee's plea for exclusion of Infosys Consulting (India) Ltd. as the turnover of the said company vis-à-vis the assessee was disproportionate and the said company failed the employee's cost filter adopted by the TPO.

Orga Systems India Pvt. Ltd. vs DCIT [TS-924-ITAT-2018(KOL)-TP] ITA No.2152 /Kol/2016 dated 21.08.2018

838. The Tribunal in the second round of litigation held that the assessee, engaged in the business of software development and provision of software services to its AEs could not be compared to Aftek Infosys Ltd as it had a different business model as compared to the assessee considering that the said company had Intellectual Property Rights whereas the assessee did not have any IPRs in its fixed assets.

Further, it held that where the DRP, in its directions had excluded 3 companies viz. Mphasis BFL LTd, Visual Soft Technologies Ltd and Blue Star Infotech Ltd, originally selected by the TPO, the AO was incorrect in considering the said 3 companies as comparable while giving effect to the DRP directions as it was not open for him to do so. Accordingly, it directed for the exclusion of these companies.

Philips India Ltd v DCIT – TS-67-ITAT-2017 (Kol) – TP - I.T.A No. 1068/Kol/2015 dated 8.02.2017

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839. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- E-Infochips Limited as it was engaged in diversified activities viz. software development, hardware maintenance, IT consultancy and did not have segmental information, it was involved in R&D, and had an exceptional year (grew at rate 5 times more than industry average)
- Infosys Limited as it provided a wide range of services encompassing technical design, engineering design etc and in addition offers software products for the banking industry and did not have segmental information, it owned marketing intangibles and Intellectual Property Rights and was also engaged in R&D.
- Persistent Systems Limited as the company was functionally not comparable being engaged in provision of outsourced product development services and did not have segmental information, it owned intangibles, was engaged in R&D, and had undertaken several acquisitions in the year in consideration
- Acropetal Technologies Ltd. (Seg.) as it was functionally dissimilar
- ICRA Techno Analytics Ltd. engaged in the provision of ITeS services along with software development and did not have segmental details
- Larsen &Turbo Infotech Ltd. as the company owned intangibles for its propriety products & services.
- Sasken Communication Technologies Ltd. as it was engaged in ITeS and also outsourced its services.
- Tata Elxsi Ltd. (Seg) as it owned intangibles

DCIT vs. Philips India Ltd - TS-1088-ITAT-2017(Kol)-TP - ITA No.863 & 539/Kol/2016 dated 15-12-2017

840. The Tribunal held that an assessee providing software development services could not be compared to E-infochips engaged in IT, ITES and sale of products due to absence of segmental details following Alcatel Lucent ruling (which was subsequently confirmed by Delhi HC)

M/s. Labvantage Solutions Pvt Ltd vs ACIT Circle 2(1)- TS-410-ITAT-2018(Kol)-TP- ITA No. 927 & 2400/Kol/2017 dated 11.05.2018

841. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order excluding Indusind Information Technology Ltd as a comparable for assessee engaged in providing BPO services to its AE following the coordinate bench decision in assessee's own case for preceeding year wherein the said comparable was excluded on the ground that it was a software development company whereas the assessee was a BPO company. Further, the software development company had a completely different functional profile as compared to a company engaged in BPO Services and the risk undertaken and the assets employed by a software development company could not be compared to a BPO company.

ACIT vs Acclaris Business Solutions (P) Ltd [TS-1056-ITAT-2018(Kol)-TP] ITA No.1457/Kol/2017 dated 14.09.2018

842. The Tribunal after relying on coordinate bench ruling in assessee's own case for previous AY, held that the assessee engaged in rendering advance analytic service related to market

research to its AE could not be compared to E Clerx Services Ltd (engaged in diverse functions comprising of consulting, business analysis and solution testing) due to absence of segmental data

M/s. Fractal Analytics Pvt Ltd vs ACIT Circle 9(3)(2)- TS-236-ITAT-2018(Mum)-TP-ITA No 6621/Mum/2017 dated 06.04.2018

843. The Tribunal held that E-Infochips Ltd was not comparable to the assessee, engaged in providing software development services to its AE, as apart from providing software development services it was also engaged in selling software products and the said company did not have relevant segmental data to facilitate comparison. Further, as regards Infosys Technologies Ltd, it held that since neither the TPO nor the assessee had applied the turnover filter during the search process, the said company could not be excluded on this basis as it would be inappropriate to apply the filter to a particular comparable without applying it across the entire spectrum of comparables. However, it held that the said company was also engaged in the production of software products and had a brand image incomparable to the assessee and therefore could not be compared to the assessee, a captive service provider. It further excluded Wipro Technologies Services Ltd on account of the related party transactions of the said comparable.

Ness Technologies India Pvt Ltd – TS-953-ITAT-2016 (Mum) - TP

844. The Tribunal held that the margin approved in MAP proceedings for provision of ITES to US AEs could be adopted for benchmarking international transactions with non-US AEs as well. Reliance was placed on the orders of the co-ordinate bench for earlier years where the assessee's claim was accepted on identical facts.

JP Morgan Services India Pvt Ltd – TS-64-ITAT-2017 (Mum) – TP

845. The Tribunal held that the assessee, engaged in providing research and development support services to its AE could not be compared to Celestial Labs Ltd as the said company was engaged in the development of software products which was not functionally comparable to the assessee. Further, it held that the TCG Lifesciencs Ltd could not be considered as comparable since more than 35 percent of its revenues were derived from the sale of chemical compounds which was not comparable to the tested activities of the assessee.

Evonik Degussa India Pvt Ltd v DCIT – TS-936-ITAT-2016 (Mum) - TP

846. Tribunal held that the assessee engaged in the business of rendering software development and localization services to its AE could not be compared to:-

- TCS E-serve Limited as it was engaged in the business of BPO services and also provided high end technology services such as software testing, verification and validation of software and did not maintain any segmental accounts also that it benefited from the use of TATA brand and
- Wipro Technology Services Ltd as it was engaged in providing technology software solutions and diversified activities comprising software related support services, primary information technology software solutions, maintenance and technology support which was functionally dissimilar to the assessee and no segmental information was available.

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Lionbridge Technologies Pvt Ltd vs CIT -TS -468-ITAT-2017(MUM)-TP- dated 17.05.2017

847. The Tribunal held that assessee engaged in providing Software development services to its AE could not be compared to:

- Genesys International Corpn Ltd. as it rendered mapping and geospatial services and there was no basis for TPO to conclude that company was into software development services
- Infosys Ltd. as it was a giant risk-taking company and engaged in development and sale of software products and also owned intangible assets [It relied on coordinate bench ruling of CGI Information Systems and Management Consultants Pvt Ltd.]
- Larsen and Toubro Infotech Ltd. as it was a software product company and segmental information on Software development services was not available. [It relied on coordinate bench ruling in CGI Information Systems and Management Consultants Pvt Ltd.]
- Persistent Systems Ltd. as it was a software product company and segmental information on Software development services was not available. [It relied on coordinate bench ruling in CGI Information Systems and Management Consultants Pvt Ltd.]

MICROSEMI STORAGE SOLUTIONS INDIA PVT. LTD. vs ACIT [2018] 53 CCH 0496 (Mum- Trib.) IT (TP)A No.2103/Bang/2016 dated 24.08.2018

848. The Tribunal held that the assessee engaged in providing IT and ITES services to its AE could not be compared to:

- Exensys Software Solutions Limited as it had an extraordinary event of amalgamation in the relevant year leading to increase in income.
- Infosys Limited as it had a hybrid business model of supplying products and providing services to its customers
- Thirdware Solutions Limited as it earned revenue from subscriptions and no segmental data was available between the product and service segment.
- Vishal Technologies Limited as it outsourced most of its business and its employee cost was 25% of total cost vis-à-vis 1.36% of the assessee.
- Wipro BPO Solutions Limited as it was a market leader and element of brand value was associated with it and therefore could not be compared with the assessee.
- Maple E-Solutions Limited as its financial results were not reliable.

ACIT vs. Tata Consultancy Services Ltd. (formerly TCS Business Transformation Solutions Ltd.)-TS-842-ITAT-2017(MUM)-TP ITA No. 6648/Mum/2012 dated 18.10.2017

849. The Tribunal held that the assessee, engaged in the business of software services was not comparable to a). Exensys Software Solutions Ltd as the company had undertaken an extraordinary event (amalgamation) during the year under review, b). Thirdware Solution as the company was engaged in trading and development of software products hence functionally different c). Foursoft as it was engaged in developing innovative software products and providing consultancy services without segmental details d). Flextronics as it was an end to end provider of communication products, services and solutions and incurred significant R&D expenses e). Compulink as the company provided a wide range of services and

did not have segmental results f). Sankhya and Geomertic Software Solutions as they were functionally not comparable and g). Infosys and Satyam Computer Services by following the decision of Intoto Software India Ltd and Textron Global Technology Centre P Ltd.

Ad CIT v CA India Technologies Pvt Ltd – TS-39-ITAT-2017 (Mum) – TP - ITA No.17/Mum/2012

850. The Tribunal held that assessee engaged in providing consultancy services to its AE could not be compared to:

- Coral Hubs Ltd. as it outsourced majority of its activities [It relied on the HC decision of PTC Software.]
- E-Clerx as it was engaged in diversified activities like data analytics, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management and also offered financial services such as real-time capital markets, middle and back-office support, portfolio risk management services and various critical data management services. [It relied on the coordinate bench decision of Fractal Analytics.]
- Accentia Technologies Ltd. as it developed its software and rendered medical transcription services and had undergone an extraordinary event of merger. [It relied on the HC decision of PTC Software.]
- Cosmic Global Ltd. as it was outsourcing its services to vendors. [It relied on the HC decision of PTC Software.]
- Excel Infoway Ltd. as it had super normal profit for the subject year and the employee cost could not computed properly on account of the entire cost being allocated to the BPO segment though its 49% of its revenues were from the infra segment. [It relied on the coordinate bench decision of Baxter India.]

Swiss Re- services India Pvt Ltd vs DCIT [TS-1120-ITAT-2018(Mum)-TP] ITA No.1493/Mum/2014 dated 31.08.2018

851. The Tribunal held that an assessee engaged in provision of data processing and back office support services to its AE could not be compared to:

- Apex Knowledge Solution Pvt Ltd. as it was primarily a software development company and further even where the TPO had rejected companies selected by assessee on the ground that they were engaged in software development activities.
- Asit C. Mehta Financial Services Ltd. (formerly known as Nuclues Netsoft and GIS (I) Ltd.) as it was engaged in providing ITES and software development services and no separate segmental data was available.
- Cosmic Global Ltd.as it outsourced part of the business activities to others, whereas the assessee had carried out the entire activities itself.
- Goldstone Infotech Ltd. as its export turnover was less than 25% of sales and hence did not satisfy the filter applied by TPO.
- Maple E-solutions Ltd. as the financial results of a company were not reliable due to fraud committed by the directors.
- Datamatics Financial Services Ltd. as it had significant related party transactions greater than RPT filter of 25%

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- MCS Ltd as it was engaged in handling public issue and acting as Registrar and Share Transfer agent and the activities were restricted to domestic segment unlike the assessee who was providing services to international customers.
- Tata Share Registry Ltd. as the activities were limited to domestic segment unlike the assessee who was providing services to international customers and the business model and field of operation of assessee were different.

Further, it restored the comparability of CS Software Enterprises Ltd. in view of the coordinate bench ruling in DBOI Global Services wherein the Tribunal had observed that it appeared that the said company was engaged into ITeS/BPO service, however restored the comparability to TPO to examine FAR analysis to conclude whether comparable to assessee engaged in ITES. It rejected Ask Me Info Hubs on the ground that its export turnover was less than 25% of total sales and did not satisfy the filter applied by TPO.

Deutsche Networking Services Private Ltd. Vs. The Dy.CIT [TS-1177-ITAT-2018(MUM)-TP] ITA No.8972/Mum/2010 dated 14.09.2018

852. The Tribunal, highlighting the importance of quantitative filters in the selection of comparables in the ITES sector, adopted a minimum turnover filter of Rs. 100 crore, observing that selection of comparables had to be done on the basis of both quantitative and qualitative criteria and that size of companies and relative economies of scale under which they operate have a huge bearing while carrying out comparability analysis.

Further, it included a comparable originally rejected by the TPO on the non- satisfaction of the export to sales filter of 25 percent since the financials clearly demonstrated an export earning filter of 89 percent. It further excluded Wipro and Infosys as comparable companies on qualitative filters such as presence of huge brand value, intangible R&D activities and the said companies being full- fledged risk bearing entities could not be compared to a captive service provider like the assessee and held that a qualitative analysis assumes greater significance for selecting comparable companies as opposed to a high turnover filter.

Capgemini India Pvt Ltd v ITO - TS-640-ITAT-2015 (Mum) - TP

853. The Tribunal held that assessee engaged in providing BPO/data processing and ITES to its AE could not be compared to:

- Infosys BPO Ltd as it had high brand value and assessee was providing routine BPO services (not high end BPO or KPO services) and further, coordinate bench in assessee's own case had held it was not a good comparable as it had goodwill and high turnover, incurred marketing and selling expenses as well as provisions for bad and doubtful debts which indicated that Infosys had taken marketing risk, therefore, FAR undertaken was different from the assessee..

Further

- It remanded the comparability of Acropetal Technologies Ltd. as it was remitted by the coordinate bench in preceding year with direction to TPO to verify the segmental analysis (It was remitted by the coordinate bench with a direction to verify segmental analysis as it was assessee's contention that said comparable's healthcare segment provided niche IT solutions/ software development services (software expenses to total operating expenses were 65%) which could not be compared to low end ITES and further, segmental verification would be needed as software expenses were allocated on basis of allocation and not actual.)

- It remanded the comparability of RSystem International Ltd. with direction to AO to verify if the company was a persistent loss-making concern and was incurring losses consistently for three years continuously. It observed that said company could not be excluded due to different financial year when data was available in public domain for extrapolation.
- It directed the AO to include Caliber Point Solution Ltd. as a comparable inspite of different accounting period (financial year ending being December instead of March) in view of RSystems being accepted as a comparable in preceding years inspite of different accounting year

Maersk Global Service Centre India Pvt. Ltd. vs ACIT [TS-1280-ITAT-2018(MUM)-TP] ITA 653/Mum/2017 dated 20.11.2018

854. The Tribunal held that assessee engaged in the provision of software development services could not be compared to:

- Avani Cimcon Technologies Ltd as it was engaged in both software development services as well as product development and segmental details were not available
- Bodhtree Consulting Ltd as it failed the RPT transactions for subject year as its RPT filter exceeded threshold of 25%
- E-Zest Solutions Ltd as it was into product development and also provided high end technical services in the category of KPO services
- Helios and Matheson Technology Ltd as it was involved in development of software products.
- Kals Info System Ltd as it was engaged in development of software products
- Lucid Software Ltd as it was into software product development
- Persistent System Ltd as it was engaged in product development and product design services and segmental details were not available
- Sasken Communication Ltd as it was engaged in licensing of products / technology which demonstrated that the company was engaged in development of products also and also there was an amalgamation / merger in the company which might have impacted the profitability
- Tata Elxsi Ltd as it was engaged in diversified activities including development of niche product and development services.
- Thirdware Solutions Ltd as it was involved in development of products and trading in software licenses
- Ishir Infotech as it was outsourcing most of its operations and the employee cost of the company was 3.96% of the operating revenue.

Further, the Tribunal remanded the comparability of

- MegaSoft and directed AO /TPO to include the company only if segmental details of software development segment were available
- Rsystem for TPO to ascertain if segmental details of software development segment were available and if so, to extrapolate the financial data for 9 months (i.e. March to December) to the subsequent three months (from December to March).
- LGS Global for TPO to ascertain if segmental details of software development were available as it was engaged in development of software products also
- Accel Transmatic Ltd for TPO to ascertain if segmental details of software development were available as it was engaged in development of software products also

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- PSI Data Systems Ltd. for TPO to ascertain if related party transaction of the company as a percentage of sales worked out to 22.42% and if so, it could not be rejected as a comparable as it would satisfy TPO's filter of 25%

Infor Global Solutions India (P.) Ltd. vs. Dy.CIT [2019] 102 taxmann.com 58 (Mumbai - Trib.) IT APPEAL NO. 520 (MUM.) OF 2012 dated 04.12.2018

855. The Tribunal held that assessee engaged in provision of ITES to its AE could not be compared to TCS E-Serve Ltd noting that TPO in previous year had excluded it as a comparable and TPO in succeeding year had relied on Bombay HC decision in Pentair Water India Ltd wherein it was held that while making the selection of comparables, turnover filter had to be basis of selection to exclude the said comparable. It disregarded Revenue's reliance on Delhi HC judgment in case of Chryscapital Investment Advisors (India) Ltd. wherein it was held that a comparable having huge profit or a huge turnover ipso facto does not lead to its exclusion noting that Revenue could not produce any contrary decision of jurisdictional High Court nor any decision of Apex Court was cited which had taken a view in favour of Revenue.

Integreon Managed Solutions (India) Pvt. Ltd vs ACIT [TS-1385-ITAT-2018-(Mum)-TP] ITA No.6927/Mum/2016 dated 14.12.2018

856. Relying on coordinate bench decision in assessee's own case for earlier year, the Tribunal held that assessee engaged in provision of ITES to its AE could not be compared to:

- E-clerx Services Pvt Limited as it was engaged in providing data analytics, operations, management, audits and reconciliation, metrics management and reporting services and was a KPO [The coordinate bench decision in assessee's own case for earlier year had relied on coordinate bench decision of Maersk]
- Moldtek Technologies was a provider of engineering and design services with specialization in civil, structural and mechanical engineering services and providing high-end services to its clients involving higher special knowledge and domain expertise in the field and the same could not be taken as comparable to the assessee company which is mainly involved in providing low-end services. [The coordinate bench decision in assessee's own case for earlier year had relied on coordinate bench decision of Maersk]
- Accentia Technologies Ltd. as it had undergone amalgamation/merger which was an extraordinary event impacting profitability and further, segmental data was not available.

Stream International Services Pvt Ltd vs ACIT [TS-1378-ITAT-2018-(Mum)-TP] ITA No.6869 /Mum/2012 dated 13.12.2018

857. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Acropetal Technologies Ltd. (Seg) as the company had substantial on–site development activities The Tribunal noted that out of Rs.36.4 crores relating to employee cost and on-site development expenditure , 31.45 crore was towards on-site development expenditure in addition to which the company had also reported expenditure in foreign currency amounting to Rs.32.38 crores and thus, the onsite expenses worked out to more than 73% of total expenditure. If the proportionate revenue from on–site development was taken, it worked out to more than 60% of the export revenue which failed the filter applied by the TPO. Further, it also observed that the TPO was not justified in applying selective approach

since in the case of RS Software where there was no breakup of on-site and off shore revenue, the TPO had relied upon the foreign currency expenditure of the company to assume that company had similar proportion of on-site revenue which exceeded the filter of 60% of export revenue applied by Revenue. [It relied on co-ordinate bench decisions in IBM India Pvt. Ltd. and Ness Technologies which excluded Acropetal Technologies Ltd. as a comparable since it had substantial on–site expenses.]

- Kals Information System Ltd. as it was also involved in development and sale of product and absence of segmental details.
- Thirdware Solutions Ltd. as it was involved in sale of products. [It relied on the coordinate bench decision in assessee's own case for earlier year.]
- E-Zest Solutions Ltd as the company was rendering product developmentservices and high end technicalservices which came under the category of Knowledge Process Outsourcing (KPO) services. [It relied on the coordinate bench decision in the case of Invensys Development Centre.]

Accenture Services Pvt Ltd vs ACIT [TS-737-ITAT-2018(Mum)-TP] IT(TP)A No.7686/Mum/2012 dated 20.07.2018

858. The Tribunal restored the benchmarking of ITES segment to TPO/AO directing it to examine contentions of assessee to arrive at a proper finding and directed assessee to file relevant documents. The assessee had contested inclusion of 4 of the comparables, namely, Maple e-Solution Ltd, Goldstone Infratech Ltd., Datamatics Financial Services Ltd. and Apex knowledge Solutions Pvt Ltd. It was also assessee's contention that suitable adjustment ought to be provided vis-à-vis comparable for substantial difference of working capital adjustments, however TPO had not provided basis for same in his order.

Monsanto Holdings P. Ltd vs Addl. CIT [TS-1365-ITAT-2018(Mum)-TP] ITA No.8081/Mum /2010 dated 14.12.2018

859. The Tribunal held that assessee engaged in provision of ITES or BPO services to its AE could not be compared to:

- Genesys International Corporation Ltd. as it was engaged in engineering design services (CAD/CAM) and Geographic Information System (GIS) which are in the nature of KPO services.[It relied on coordinate bench decision in assessee's own case for earlier year.]
- Nucleus Netsoft & GIS India Ltd. (SEG) as it was engaged in KPO services.[It relied on coordinate bench decision in assessee's own case for earlier year.]
- E-Clerx Services Ltd. as it was engaged in providing KPO services in data analytics and data process solutions and further that the TPO had himself excluded this company for AY 2009-10. [It relied on the decisions of Delhi HC in Rampgreen Solutions and jurisdictional HC in PTC Software.]
- CrossDomain Solutions as it was providing diversified activities like providing KPO services related to software development and maintenance services, software testing services etc. and had segmental data was not available. [It relied on the decision of jurisdictional HC in Aptara Technology India Pvt Ltd.]
- Accentia Technologies Ltd as it had undergone merger for the year which impacted the profitability and the Tribunal also noted that if a particular comparable selected by assessee could not be accepted due to merger, for the same reason, the company selected by the Transfer Pricing Officer also could not be accepted as a comparable.

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- Allsec Technologies Ltd. as it had undergone merger and in absence of authentic and reliable data to assess the impact of merger on the profitability of this company, the company could not be considered as a comparable.

Accenture Services Pvt Ltd vs ACIT [TS-737-ITAT-2018(Mum)-TP] IT(TP)A No.7686/Mum/2012 dated 20.07.2018

860. The Tribunal held that assessee engaged in provision of software development services to its AE could not be compared to:

- Acropetal Technologies Ltd. (Seg) as the company failed 2 of the filters applied by the TPO viz. employee cost filter of greater than 25% (as Acropetal's employee cost was only 7.48%) and onsite development less than 60% (as onsite development revenue was as high as 73%). Further, it was engaged in diversified activities like education services, healthcare services, hospital administration management etc. and was also in the business of sale of products. [It relied on the coordinate bench decision of Ness Technologies.]
- Avani Cincom as it was into production of products such as DExchange, lTrak, Law firm Solution, hotel and restaurant booking engines etc and no revenue bifurcation between Software development services and products was given. [It relied on the coordinate bench decision of Infor (Bangalore)]
- Bodhtree Consulting Ltd. as it was engaged in providing Data management and Data warehousing services (which were classified as lTES). Further, segmental data was not available and during the subject year, it had undergone restructuring activity by hiving off its e-paper business. [It relied on the coordinate bench decision of Mindteck (India) Ltd.]
- Celestial Labs Ltd. as the employee cost of Celestial Labs was only 21.56% and hence it failed the employee cost filter of 25% applied by the TPO himself. On perusal of annual report, it was observed that the entire income of this company was from sale of products and this company had incurred substantial expenditure on product development of drug molecule. The Tribunal also noted that the company was engaged in software development services as well as ITES services which were considered the only segment as per AS-17. [It relied on the coordinate bench decision of Ness Technologies.]
- E-Infochips Ltd. as it was engaged in the development and maintenance of computer software and also manufacturing EVM and VDB Electronic Board (Hardware Division) and the company earned income from software services and products and further, there was no segmental bifurcation between software services and products.
- E- Zest Solutions Ltd. as it was engaged in KPO services, helpdesk services, infrastructure management, Vendor Management services, etc. The Tribunal also noted that this company had inventories and that no segmental data was available pertaining to the software development activity due to which the margins could not be drawn up. [It relied on the coordinate bench decision of lnfor (Banglore).]
- Igate Global Solutions Ltd. as its turnover was Rs.781 crores vis-à-vis assessee's turnover (Rs.13.5 crores) and its scale of operations were entirely different. Further, the company was engaged in application development, Application management, Business Process Management etc. and provides Business Intelligence and Data Warehousing Solutions which made it functionally dissimilar. [It relied on coordinate bench decision of assessee's own case for earlier year.]
- Infosys Ltd. as its turnover was 1160 times that of assessee's turnover (Rs.13.5cr). Its service offerings include custom application development, maintenance and production

support, package enabled consulting and implementation, technology consulting and other solutions etc. to clients across multiple industry verticals including banking and capital markets, communications, energy, manufacturing and retail which made it functionally not comparable to the assessee.

- Kals Information Systems Ltd. as it was also a software product company (On account of holding high percentage of inventories) and revenue from products and services were reported under the segment of Application software as a single business segment and bifurcation between products and services was not available in order to consider this company for comparison.[It relied on the coordinate bench decision of Infor(Bangalore).]
- Persistent Systems Ltd. as the company had four types of business segments, namely ISV5, Telecom, Enterprises and VLSI and others and was also engaged in the sale of products and segmental information was not available. [It relied on coordinate bench decision of assessee's own case for earlier year.]
- Quintegra Solutions Ltd.as this company was engaged in product engineering and extensive R&D and its goodwill constituted approximately 78% of its total assets as against assessee who did not have any goodwill / intangible assets. [It relied on the coordinate bench decision of 24/7 Customer.Com Pvt. Ltd.]
- Tata Elxsi Ltd. as the company was predominantly engaged in product designing services and not purely software development services. The details in the Annual Report showed that the segment "software development services" related to design services which were not similar to software development services. .[It relied on the coordinate bench decision of Infor(Bangalore).]
- Thirdware Solutions Ltd.as the company was also engaged in trading of software and licenses and had not disclosed any segmental information in the annual report. .[It relied on the coordinate bench decision of Infor(Bangalore).]
- Wipro Ltd. as the company had a high turnover, brand value and was engaged in IT Services, acquisitions, IWO services, etc. and segmental data for the above services was not available. .[It relied on the coordinate bench decision of Infor(Bangalore).]

Further, the Tribunal remitted Softsol India Ltd. for considering the correct operating margin since the TPO made an arithmetical error in computing the operating margin of this company and considered a figure of 42.33% in place of 15%. The Tribunal directed the Revenue to take 15% operating margin in the case of this company while working out the OP margin.

Dialogic Networks (India) Pvt Ltd vs ACIT [TS-807-ITAT-2018(Mum)-TP] ITA No.7280/Mum/2012 dated 27.07.2018

861. The Tribunal noting that the services/ products and functions rendered by Cybermate Infotek Ltd (CIL) i.e providing Custom Built Software development, product development and IT services to customers in domestic and overseas locations were broadly similar to the assessee engaged in providing low end software development & localization services to its AE, upheld AO's retention of CIL as a comparable as TNMM required only broad functional and product/services comparability which was satisfied in the present case.

Lionbridge Technologies Pvt. Ltd vs. ACIT-TS-984-ITAT-2017(Mum)-TP ITA No. 1291/MUM/2017 dated 07.11.2017

862. Where the assessee is engaged in providing software development services and not in sale or development of software product, the Tribunal held that a company engaged in

software development services and selling software products and having no segmental breakup, companies having substantially higher turnover and company having related party transactions could not be taken as comparable. It further held that where the assessee rendered services to its associated enterprises abroad for which it was compensated on a cost plus mark-up basis and also incurred out-of-pocket expenses, adhoc addition of 10% made by TPO was deleted.

Ness Technologies India Private Limited v DCIT - (2016) 48 CCH 0184 MumTrib (ITA No.696/Mum/2016, IT(TP)A No. 1006/Mum/2016)

863. The Tribunal upheld DRP's characterization of assessee as market research service provider in respect of international transactions / service rendered to its AE and rejected revenue's contention that substantial chunk of work carried out by the assessee involved data processing with the help of computers, akin to ITES provider. It distinguished marketing services from ITES services on the basis that in market research, output is the product of collecting, collating and analysing information/data, which may involve use of technology, whereas in the case of ITE services, rendering of services is primarily driven by use of technology on the part of human resources.

Synovate India Pvt Ltd [TS-898-ITAT-2016(Mum)-TP] (ITA NO. 6572/MUM/2012)

864. The Tribunal held that assessee engaged in provision of ITES to its AE could not be compared to:

- Accentia Technologies Ltd. as it had undergone reconstruction during the relevant year, that it acquired 2 entities which had an impact on the profits of the company. It operated as a single segment of Healthcare receivables management and had its own line of products which made it functionally not comparable to the assessee. [It relied on the coordinate bench decisions of Flextronics Technologies (India) Pvt Ltd, Symphony Marketing Solutions India Pvt Ltd. and Capital IQ Information Systems Pvt Ltd.]
- Acropetal Technologies Ltd. as the services provided showed that it was a high end KPO services provider. [It relied on the coordinate bench decisions of Flextronics Technologies (India) Pvt Ltd and Symphony Marketing Solutions India Pvt Ltd.]
- Coral Hubs Ltd. (Earlier known as Vishal Technologies Ltd) as it had incurred negligible employee cost of 2.92% of operating revenue, signifying that it was engaged in outsourcing of services unlike the assessee providing services himself. . [It relied on the coordinate bench decisions of Flextronics Technologies (India) Pvt Ltd. and Symphony Marketing Solutions India Pvt Ltd.]
- Crossdomain Solutions Ltd. as it was engaged in KPO services in insurance, Healthcare, HR & accounting and also offered Business Excellence, Market Research & Data Analytics and IT Services. [It relied on the coordinate bench decisions of Flextronics Technologies (India) Pvt Ltd. and Symphony Marketing Solutions India Pvt Ltd.]
- Datamatics Financial Services Ltd. as it was engaged in diversified activities providing registrar & transfer agency services and also offered issue management services and ITeS and there was no segmental information. [It relied on the decision of HSBC Electronic Data Processing Ltd]
- Eclerx Services Ltd. as it was a leading third party data analytics KPO in Financial Services and Retail and Manufacturing and hence, functionally not comparable. . [It relied on the

coordinate bench decisions of Flextronics Technologies (India) Pvt Ltd. Lionbridge Technologies and and Symphony Marketing Solutions India Pvt Ltd.]

- Genesys International Corporation Ltd as it was engaged in rendering geospatial services and catered to the needs of consumer mapping, navigation, internet portals etc. providing geographical information service Photogrammetry, Remote Sensing, and other related services and hence functionally not comparable.
- HCL Comnet Systems& Services Ltd as the scale of operation (i.e. turnover of Rs 495 cr) was very different from the assessee (turnover of 1.43 cr).
- Infosys BPO Ltd as the company had high turnover of Rs.825 crores and acquired entities ai.e. ILFS Holding B.V, Netherlands and had 11 delivery centers across in India and overseas. . [It relied on the coordinate bench decisions of Flextronics Technologies (India) Pvt Ltd. and Symphony Marketing Solutions India Pvt Ltd.]
- Mold-Tek Technologies Ltd. as the company had undergone restructuring for the subject year and the company's IT division specialized in providing structural engineering and design services for construction of buildings.
- Wipro Ltd as it did not have a BPO segment on a standalone level and hence, it could not be considered as a comparable to the IT support services rendered by the assessee. The comparable had undergone restructuring and its turnover was Rs.1,781.9 Crores as against that of the assessee. i.e. 1.43 crores. [It relied on the coordinate bench decisions of Flextronics Technologies (India) Pvt Ltd. and Symphony Marketing Solutions India Pvt Ltd.]

Dialogic Networks (India) Pvt Ltd vs ACIT [TS-807-ITAT-2018(Mum)-TP] ITA No.7280/Mum/2012 dated 27.07.2018

865. The Tribunal accepted assessee's plea for exclusion of TCS E-Serve Limited as comparable while benchmarking the assessee's IT-enabled services by relying on the order of the coordinate bench in assessee's own case for earlier year wherein the said comparable was excluded owing to functional dissimilarity, ownership of significant intangibles and impact of 'TATA' brand on its profitability. It observed that there was no change in the facts and circumstances as discussed in the assessee's own case for AY 2011-12, hence the said company was to be excluded as a comparable.

Capital India Private Limited vs DCIT [TS-864-ITAT-2018(Mum)-TP] ITA No.6795/Mum/2017 dated 19.06.2018

866. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Accentia Technologies Ltd as the company had undertaken a extra-ordinary event during the year under consideration.
- Genesys International Corporation Ltd as the company was engaged in KPO service which required advance skill and hence, not comparable with assessee's BPO activity.
- Coral Hubs Ltd as the company outsourced its activities rendering it functionally different to the assessee.
- Eclerx Services Ltd as it was providing high end KPO services

Tracmail (India) Private Limited vs. DCIT - TS-8-ITAT-2018(Mum)-TP - /I.T.A./7519/Mum/2012 dated 05/01/2018

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867. The Tribunal relying on the judgement of Special Bench and co-ordinate bench in assessee's own case held that assessee engaged in providing IT enabled services and back office support services to its AE could not be compared to:

- Accentia Technologies Ltd as it provided high-end KPO services
- Infosys BPO Ltd on account of its high goodwill, brand value and higher turnover

As regards Acropetal Technologies Ltd the Tribunal remitted back to AO/TPO for fresh adjudication with reference to segmental results and cost allocations.

Further, the Tribunal included R System International Ltd (following different FY-ending) as comparable after relying on the co-ordinate bench decision in assessee's own case wherein it was held that data available for 9 months in public domain could be extrapolated to make a reasonable comparability analysis.

ACIT 15(2)(2) vs Maersk Global Services Centre (I) P Ltd- TS-299-ITAT-2018(Mum)-TP-ITA No 944/Mum/2016 dated 19.04.2018

868. The Tribunal held that the assessee engaged in the provision of BPO services to its AE could be compared to:

- Ace Software Exports Ltd. as it was not a consistent loss making concern.
- Flextronics Software Systems Ltd. and Genesys International Corporation Ltd as the revenue cannot seek exclusion of comparables which were included by TPO in his TP-analysis.
- Aditya Birla Minacs Ltd and Maple Esolutions Ltd. as they were included in TP study

Further, the Tribunal revised the margins of R Systems International Ltd. after considering audited quarterly results of March 2007 and 20006. The Tribunal also excluded of the comparables viz. Asit C Mehta Financial Services Ltd, Ecterx Services Ltd, Informed Technologies India Ltd., Mold-Tek Technologies Ltd and Vishal Information Technologies Ltd by relying on the decision of Steam International. It rejected Infosys BPO Ltd. since it rendered KPO services.

ACIT v/s.Capita Offshore Services Pvt Ltd [TS-399-ITAT-2018(Mum)-TP] IT(TP) A/7141/Mum/2012 dated 16.05.2018

869. The Tribunal held that the assessee engaged in providing low-end ITES services could not be compared to:

- Persistent Systems Limited as it was engaged in software product development services, which was functionally dissimilar to the activities carried out by the assesse.
- Thirdware Solutions Limited as it was into acquisition/purchase of hardware and software including software as a service and was also engaged in software development, implementation and support services

Further, it held that R Systems International Limited was to be included as a comparable even though its financials were prepared for a different Financial year (December ended) as the data for the relevant financial year could be reasonably extrapolated from the data available in the public domain.

Vis-à-vis Acropetal Technologies Ltd, it directed the TPO to consider the margin of the ITES segment as opposed to the health care segment.

It also included Aspire Systems (India) Private Limited as comparable noting that this company and assessee broadly engaged in the same activities and the assessee could not rebut the reasoning for inclusion as provided by the TPO and DRP.

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Vis-à-vis Infobeans Technologies Limited it held that since the assessee could not prove how the extra-ordinary event undertaken by the company had an impact on its profits, the company was to be included as a comparable.

Lionbridge Technologies Private Limited vs. ACIT - TS-438-ITAT-2018(Mum)-TP - I.T.A. No. 7304/Mum/2017 dated 21.05.2018

870. Where the assessee had contested comparability of the 8 companies citing various reasons like functional dissimilarity, loss making comparables, failing employee cost filter, significant RPT etc, the Tribunal reiterating the principles of comparability, economic adjustments, RPT, current year vs. multiple year data, segmentation vs. aggregation etc. by relying on various landmark judicial precedents, remitted the comparability of 8 comparables to the file of AO/TPO for fresh adjudication **as the factual matrix had to be tested in respect of all the comparables.**

MWH India Pvt. Ltd vs. DCIT-TS-951-ITAT-2017(Mum)-TP ITA No. 792/MUM/2013 dated 27.10.2017

871. The Tribunal, noting that the assessee was rendering its IT enabled services i.e. legal data base and other administrative services, through highly skilled and professionally qualified lawyers, agreed with the contention of the Revenue that the assessee could not be regarded as providing simple BPO or low-end ITES.

With regard to benchmarking the international transactions of the assessee it held that:

- R-Systems International Ltd, which had been rejected as a comparable on the ground that it had a different year ending (Calendar year as opposed to the financial year adopted by the assessee), was to be included as a comparable as it was possible to reasonably determine the financial results of the company for the relevant period with the information available in the public domain
- Mircoland Ltd was incorrectly rejected as comparable by the TPO who contended that the assessee was precluded from considering a comparable at a later stage when the same was not considered earlier in its TP Study. It held that once the TPO has rejected most of the comparables and asked the assessee to furnish fresh comparables, then TPO is bound to consider the comparables as submitted by the assessee. It also rejected the contention of the Revenue that the company ought to have been excluded since it had incurred a loss during the year and held that loss incurred was in the normal course of business unless certain peculiar factors were pointed out, which was not done so by the Revenue.
- Omega Healthcare Management Services Pvt Ltd as the financials of the company were now available in the public domain

Further, it held that Acropetal Technologies Ltd could not be considered as comparable to the assessee as it was engaged in providing a broad spectrum of services in the nature of software development under its 'Engineering Design Services' segment and also since it had undergone an extra-ordinary event (acquisition) which impacted its PLI.

Additionally, it remitted the issue of comparability of the following companies to the file of the

TPO:

- Accentia Technologies Ltd - for verifying the impact of the M&As undertaken by the said company on the trading results and profit margins of the company by comparing the same with earlier financial years and if no major impact was found then to include the said company as comparable
- Eclerx Services Ltd to examine the outsourcing activities of the said company vis-à-vis that of the assessee with a direction to exclude the company if there was a substantial difference
- Allsec Technologies to determine whether the loss incurred by the company was in the normal course of business or if it arose specifically due to the merger undertaken during the relevant year.
- Jindal Intellicom Pvt Ltd to verify whether financials after 31st December 2008 were available and whether based on the data for next year, the turnover as well as proportionate margin could be worked out and if so to include the company as comparable.

Pangea3 & Legal Database Systems Pvt Ltd – TS-148-ITAT-2017 (Mum) – TP dated 06.03.2017

872. The Tribunal held that the assessee, engaged in providing IT enabled BPO services and receivable management services to its AEs could not be compared to:

- Accentia Technologies Ltd as it had undertaken an extra-ordinary event during the year (merger) which impacted its profitability
- Cosmic Global Ltd as it outsourced a substantial portion of its work and therefore had a different business model
- Infosys BPO Ltd as it was engaged in providing high end integrated services, had a significantly large scale of operations and high brand value
- R Systems International Ltd as it had a different financial year ending i.e. 31/12/2009 whereas assessee's financial year ended on 31/3/2010

Aegis Ltd v DCIT – TS-66-ITAT-2017 (Mum) – TP ITA No.7694/Mum/2014 ITA No.1209/Mum/2015 dated 08.02.2017

873. The Tribunal held that where the TPO had applied a lower turnover filter, eliminating companies having turnover less than Rs.1 crore, logically he should have fixed an upper turnover filter for rejecting companies having very high turnover as well. Relying on the decision of the Bombay High Court in Pentair Water India, it held that companies having more than 20 times the turnover of the assessee from software development services, could not be treated as comparable.

UCB India Pvt Ltd v ACIT - TS-605-ITAT-2016 (Mum) - TP - I.T.A./ 1218/Mum/2014

874. The Tribunal held that companies engaged in development of products & sale of products, companies deriving revenue from software services as well as software products without having segmental data could not be considered as comparable to the assessee who was engaged in providing information technology and software support services to its AE.

UCB India Pvt Ltd v ACIT - TS-605-ITAT-2016 (Mum) - TP-I.T.A./1218/Mum/2014

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875. The Tribunal held that the assessee engaged in the business of IT enabled services could not be compared to:

- E-Clerx services ltd as it was engaged in providing KPO services and therefore was functionally dissimilar to the assessee.
- Moldteck Technologies ltd as it was engaged in providing highly technical and specialized engineering services which was in the category of KPO and accordingly functionally dissimilar to the assessee.
- Vishal Information Technologies ltd as it outsourced the work to third party vendors and therefore functionally dissimilar to the assessee.
- Infosys BPO Ltd and Wipro ltd as they were giant companies, owning intangibles, brand value and therefore functionally dissimilar to the assessee.

Hinduja Ventures Limited (Formerly known as HTMT Ltd.) vs DCIT & others-TS-685-ITAT-
2017(Mum)-TP-ITA 4503/Mum/2012 dated 14.07.2017

876. The Tribunal rejected the claim of the assessee for exclusion of Persistent Systems & Solutions on the ground of turnover and held that where the assessee had not applied a turnover filter itself it would not be justified in excluding one comparable based on turnover without applying the filter to all the comparable companies. However, considering that the said company was not only rendering software development services, but was also in sale of products and carried out R&D in life sciences, products lifecycle services, medical research, chemistry, bio-informatics, it held that the company was not functionally comparable to the assessee and therefore excluded it. Further it held that the assessee, providing software development services and global call centre services to its AE could not be compared to:

- Sonata Software Ltd as it had related party transaction (RPTs) of more than 25% of its total revenue which did not satisfy the filter applied by the TPO himself
- Igate Global Solutions Ltd as it operated in one single segment with respect to both product and services and was engaged in ITE Services
- Bodhtree Consulting Ltd as it earned abnormally high margins which did not reflect a normal business condition.
- Genesys International Corporation Ltdas it was a geospatial service and content provider, specializing in land based technologies
- FCS Software Solutions Ltd as the company operated in diverse segments, including Infrastructure Management outsourcing centre for hardware requirements of its customers, imparting internet based E-learning and IT consulting services, and its segmental reporting was based on geographies and not as per different activities undertaken by it.

Further, it held that CG Vak Software and Exports Ltd was to be included as a comparable relying on the decision in Yodlee Infotech Pvt. Ltd wherein it was held that this company was a good comparable to benchmark software development services for same AY 2009-10.

Dialogic Networks India Pvt Ltd v DCIT – TS-2-ITAT-2017 (Mum) – TP IT(TP)A No.1324/Mum/2014 dated 31.01.2017

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877. The Tribunal held that the assessee engaged in the provision of CAD/CAE services for automotive services to its AE could not be compared to:

- Jeevan Softech as the said concern was engaged in medical writing, clinical data management, bio-statistics and other services and hence functionally dissimilar.
- BNR Udyog Ltd. as the said comparable was engaged into medical transcription, construction and financial activities and therefore, functionally dissimilar. The Tribunal also noted that the said concern failed the RPT filter since the said entity had a filter of 739.04% greater than 25%.

Faurecia Interior Systems India Private Limited vs. ACIT [TS-396-ITAT-2018(PUN)-TP] ITA No.781/Pun/2015 dated 23.05.2018

878. The Tribunal accepted assessee's plea for exclusion of Bodhtree Consulting Ltd and Kals Information Systems Ltd as comparables for its software development services segment by following the coordinate bench decision of JohnDeere India wherein it was held that the said concerns were not functionally comparable since they were also engaged in the sale of software products apart from software services for which separate segmental information was not available. Further, Bodhtree Consulting Ltd. also had abnormal fluctuating profit margins which was another reason for exclusion.

Nihilent Limited, (Formerly Nihilent Technologies Limited) vs ACIT [TS-1001-ITAT-2018(PUN)-TP] ITA No.304/Pun/2014 dated 31.08.2018

879. The Tribunal remitted the TP issue relating to selection of comparables for benchmarking software development services rendered by the assessee to its AE noting that the both the assessee and the Revenue made various contradictory submissions regarding the inclusion / exclusion of comparables. Accordingly, it directed the TPO to re-work the ALP adjustment after conducting a fresh search of comparbales by applying requisite filters and provided the assessee liberty to submit a fresh list of comparables.

eGain Communications Pvt Ltd v ITO – TS-51-ITAT-2017 (Pun) – TP - ITA No.1579/PUN/2013 dated 31.01.2017.

880. The Tribunal held that assessee engaged in export of software development to its AEs could not be compared to:

- Bodhtree Consulting Ltd as it was engaged in software development and product as well as ITES services and segmental details were not available.
- Kals Information System as it was a software product company. [It relied on ratio laid down in Bombay HC ruling of PTC Software Pvt Ltd.]
- Compucom Software Ltd. as it was engaged in ITES sector and also software development services and segmental details were not available.
- TVS Infotech Ltd. as it was a persistent loss-making company. (assessee had not furnished details of margins of earlier year and later years)

Further,

- It included Quintegra Solutions Ltd. noting that Tribunal in preceding year had remitted the comparability of the said company and in the remand proceedings, the TPO had found it functionally comparable to the assessee.

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- It accepted assessee's plea for inclusion of ICRA TechnoAnalytics on basis that reimbursements from AE's should not be included while computing RPT percentage and thus, it would pass the RPT filter of 25%.

Starent Networks (India) Private Ltd. vs JCIT [TS-1205-ITAT-2018(Pune)-TP] ITA No.585/Pune/2014 dated 26.09.2018

881. The Tribunal held that assessee engaged in software development services could not be compared to:

- Bodhtree Consulting Ltd. as it was engaged in sale of software product apart from providing software services and segmental information was unavailable.
- Kals Information Systems Ltd. as it was engaged in developing software products, development of software services and in running a training center for software professional on online projects unlike assessee which was engaged only in providing software services.

Further, it included SIP Technologies and Exports Ltd by relying on coordinate bench decision in John Deere India Pvt Ltd. for same assessment year wherein it was held that the comparable had profit in one out of the three year and thus, could not be **considered to be** a persistent loss-making company. Accordingly, the Tribunal held that the said comparable could not be excluded on ground of persistent loss-making concern when it was **otherwise** functionally comparable.

SAS Research and Development (India) Pvt Ltd. vs.Jt.CIT [TS-1276-ITAT-2018(Pun)-TP] ITA No.1539 /Pun /2014 dated 24.10.2018

882. The Tribunal upheld DRP's order excluding MindTree Ltd, Infosys Technology Ltd, L&T Infotech Ltd., Persistent Systems Ltd. and Sasken Communication Tech Ltd.in case of assessee's software development segment on basis of higher turnover. It also held that Maveric Systems Ltd., Evoke Technologies Ltd and Silverline Technologies Ltd. were to be included by relying on ratio laid down in coordinate bench decision in Dar Al-Handasah Consultants India Pvt Ltd wherein it was held that comparables which were found to be functionally comparable though selected by assessee during TP proceedings, needed to be considered in case they fulfill all the other filters, by the TPO.

ACITvs MSC Software Corporation of India Pvt Ltd [TS-1370-ITAT-2018(PUN)-TP] (ITA No.577/Pun/2015) dated 24.10.2018

883. The Tribunal held that assessee providing software development services to its AE could not be compared to:

- Kals Information System as it was engaged in the business of developing and selling software products.
- Bodhtree Consulting Ltd. as it was involved in providing open and end-to-end web solutions, software consultancy, design and development of solutions. Further, it had fluctuation margins over the years.
- FCS Software Solution Ltd. as operating margins of said concern did not reflect consistent trend over the years and the current year's margins i.e. for assessment year 2008-09 in comparison to earlier years were quite abnormal.
- E-Zest Solutions Ltd as it was engaged in e-business consultancy services consisting of web strategy services, ITES services and technology consultancy services including portal development services which were KPO services.

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- E-Infochips Ltd. as it was engaged in software development and ITES for which segmental data was not available.

Further,

- It included SIP Technologies Ltd. as it was not a persistent loss-making concern in light of coordinate bench ruling of John Deere for AY 2009-10 wherein it was held that the said comparable had made profit in one out of three years and hence could not be a lossmaking concern.

Renishaw Metrology Systems Pvt. Ltd. vs Dy.CIT [TS-1282-ITAT-2018(PUN)-TP] ITA No.271/PUN/2013 dated 16.11.2018

884. The Tribunal held that assessee engaged in software development services could not be compared to:

Kals Information Systems Ltd. as it was a software product company.

- FCS Software Solutions Ltd. even though the company was engaged in provision of ITes services and as segmental information was not available.
- LGS Global as it failed the export filter applied by the TPO since its overall exports was only 14% of the total turnover.

Further, it remanded the comparability of E-Infochip to the file of CIT(A) on the ground that CIT(A) had not passed a speaking order.

ITO vs. Magic Software Enterprises India Pvt Ltd [TS-747-ITAT-2018(PUN)-TP] ITA No.1802/Pun/2013 dated 18.07.2013

885. The Tribunal held that the assessee engaged in providing call centre services could not be compared to:

- Accentia Technologies Ltd & E4e-health Solutions Ltd as it was engaged in providing high-end KPO services
- Cosmic Global Limited as it was engaged in translation and prescription of data which was entirely different from the functions performed by the assessee and also since it was operating a different business model as it was outsourcing its activities.
- Vishal Information Technologies Limited as it was functionally incomparable to concern providing BPO services since it was outsourcing its work.
- Cross Domain Solutions Ltd & E-clerx Services Ltd as they were engaged in KPO services

Further, it held that CG Vak could not be excluded as comparable on the ground of persistent losses as it earned profits in the earlier years.

Ventura (India) Pvt. Ltd. vs. ACIT - TS-201-ITAT-2018(PUN)-TP - ITA No.1788/PUN/2014 dated 09.03.2018

886. The Tribunal held that for benchmarking IT enabled services Excel Infoways Ltd was to be excluded as a comparable, as the said company was in the process of shutting down its BPO business for the year under consideration. As regards another comparable namely Universal Print Systems, the Tribunal, relying on the judgement in case of Goldman Sachs directed the TPO to verify employee cost to sales ratio of one comparable company and to exclude the same if the said ratio was less than 25%.

Emerson Climate Technologies (India) Pvt Ltd vs DCIT Circle 1(2)- TS-362-ITAT-2018(PUN)-TP- ITA no's 359 & 2847/PUN/2016 dated 25.04.2018

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887. The Tribunal held that the following could not be included in the final set of comparables in case of assessee rendering ITES to its AE –

- Coral Hubs Ltd. as it was engaged in e-publishing.
- Cross domain Solutions Ltd. as it was providing high-end KPO services and geographical information services.
- Persistent loss-making concerns
- Triton Corporation Ltd. and Maple eSolutions Ltd. as both the concerns were fraud companies.

KPIT Cummins Global Business Solutions Ltd. v. ACIT - [2018] 93 taxmann.com 368 (Pune - Trib.) - IT APPEAL NOS. 246 (PUN) OF 2013 AND 459 AND 525 (PUN) OF 2014 dated April 9, 2018

888. The Tribunal accepted the Revenue's plea for exclusion of the comparables viz. R System International and Coral Hub for failing financial year filter for assessee providing ITeS to AE for AY 2011-12. Inspite of being functionally similar, they failed the financial year filter adopted by TPO as data for R System International was maintained only from January 1, 2010 to December 31, 2010 and from July 1, 2010 to June 30, 2011 for Coral Hub. The Tribunal relied on the HC ruling in PTC Software and opined that the accounting periods of said two concerns were at variance to the accounting period followed by the assessee and consequently, the margins of said concerns could not be applied to benchmark the arm's length price of international transactions undertaken by the assessee.

DCIT vs. Ocwen Financial Solutions Pvt. Ltd. [TS-350-ITAT-2018(PUN)-TP] ITA No. 511/Pun/2016 and CO No.01 and 14/Pun/2018 dated 14.05.2018

889. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- Helios & Matherson Information Technology Ltd as it had turnover of Rs. 213 crore which failed the turnover filter applied by the TPO i.e. Rs.200 crore. It dismissed the Revenue's contention that the company be included as its turnover exceeded the filter marginally
- FCS Software Ltd as it provided both IT services and ITeS and did not have adequate segmental results
- E-Zest Solutions Ltd and Kals Information Systems as the company was engaged in the business of software products which was not functionally comparable to the business carried on by the assessee.

Further, it accepted the assessee's plea for inclusion of CG Vak Software & Exports Ltd and held that the TPO was unjustified in excluding the company as comparable merely because it suffered losses for the year under consideration. It noted that the company earned profits in the earlier years and accordingly held that the TPO incorrectly held that the company suffered persistent losses. Accordingly, it held that the company ought to have been considered as a comparable.

Amber Point Technology India Pvt. Ltd. vs DCIT - TS-172-ITAT-2018(PUN)-TP - ITA Nos.756 & 757/PUN/2014 dated 25.01.2018

890. The Tribunal dismissed the Revenue's appeal and held that the assessee engaged in providing software development services could not be compared to Infosys Technologies Ltd as it had huge turnover and brand value.

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Tieto IT Services India Pvt Ltd vs. DCIT - TS-155-ITAT-2018(PUN)-TP - ITA No.242/PUN/2015
dated : 07.03.2018

891. In the case of an assessee providing software development services to its AE, the Tribunal rejected Revenues plea for inclusion of 3 companies as comparables viz: Infosys Ltd, Sasken Communications Ltd & Sonata Software Ltd- The same were excluded as they had huge turnover as compared to assessee and also had patents. Further, the Tribunal concluded that the above companies fell beyond the Rs 200cr turnover filter, applied by the TPO and thus excluded them from list of comparables.
ITO Ward 1(2) vs Billion Hands Technologies P Ltd- TS-331-ITAT-2018(PUN)-TP- ITA No 372/PUN/2016 dated 27.04.2018

892. The Tribunal held that assessee providing software development and consultancy services to its AE could not be compared to:

- Bodhtree Consulting Limited as it was functionally different, and it also failed to qualify turnover filter
- John Deere India P Ltd due to absence of segmental result
- E-zest Solutions Ltd as KPO services of company were not functionally comparable to software development services of assessee
- Helios & Matheson Info Technology Ltd.
- KALS Systems as it was engaged in development of software and other activities.

Further the Tribunal included SIP Technologies & Exports Ltd as comparable based on co-ordinate bench judgement in case of John Deere India P Ltd, where in it was held that exclusion was not warranted as it was not a persistent loss making company and loss in one financial year cannot make it a persistent loss making company
SAS Research & Development (I) Pvt Ltd vs ACIT Circle -6 Pune- TS-313-ITAT-2018(PUN)-TP- ITA No 254/PUN/2013 dated 13.04.2018

893. The Tribunal held that the assessee engaged in providing software development services could not be compared to:

- Bodhtree Consulting Ltd it was engaged in product engineering and engineering services while the assessee was engaged in software development.
- E-Zest Solutions Ltd as it rendered product development and technology services, which fell under the category of KPO services which could not be compared to the assessee engaged in providing software development services
- Helios & Matheson Information Tech, relying on the decision John Deere India Pvt. Ltd. [TS-553-ITAT-2015(PUN)-TP], wherein it was held that the company was functionally dissimilar.
- Kals Information System as the company was engaged in development and sale of software products and was not comparable to software development services provided by the assessee.
- Goldstone Technologies Ltd as it was engaged in activities related to Media & IP TV and further carried inventory of set top boxes and movie rights in its Balance Sheet for the previous year rendering it functionally dissimilar to the assessee.

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Further, it held that SIP Technologies and Exports Ltd and CG-Vak Software Exports Ltd could not be excluded merely on the ground that they incurred losses for the year under review. It held that companies could be excluded only if they were persistent loss making companies i.e. incurred losses for three continuous years.

Nihilent Technologies Pvt. Ltd vs ITO - TS-658-ITAT-2018(PUN)-TP - ITA No.2428/PUN/2012 dated 10-05-2018

894. The Tribunal held that the assessee engaged in providing software development services to its AE cannot be compared to:

- Thirdware Solution Ltd as it was engaged in the business of software products as well and therefore functionally dissimilar
- Kals Information Technology System Ltd as it was engaged in software services as well as Software products and had reported inventory and work in progress in annual report indicative of the fact that it was functionally dissimilar to the assessee.
- Bodhtree Consulting Ltd as it was a product company and had also undertaken major business restructuring during the year

Vis-à-vis Goldstone Technologies Ltd, it held that the company was erroneously excluded by the TPO on the ground that it was loss making as only companies that were persistently loss making were to be excluded.

MSC Software Corporation India Pvt. Ltd vs. ACIT - TS-489-ITAT-2018(PUN)-TP - ITA No.379/PUN/2014 dated 31-05-2018

895. The Tribunal held that the assessee engaged in providing IT based engineering design services to its AE could not be compared to:

- Coral Hub Ltd as it adopted a different business model (outsourcing) and therefore was functionally dissimilar to the assessee
- Chakkilam Infotech Limited as the company did not satisfy the 75 percent export turnover filter
- ICRA Techno Analytics Limited as the financials of the said company and segmental data of the engineering design segment were not available
- ISmart International limited as the financials of the said company were not available in public domain.
- Valuemart Info Technologies Limited as the company was engaged in consultancy and software development which fell within the ambit of KPO Services and could not be compared to the services rendered by the assessee.

Visteon Engineering Center (India) Private Limited vs. ACIT - TS-462-ITAT-2018(PUN)-TP - ITA No.316/PUN/2015 dated 28-05-2018

896. The Tribunal accepted the assessee's contention and excluded E-infochip Ltd. as a comparable relying on the decisions of Philips India and Ness Technologies where the said comparable was excluded in case of assessee's engaged in like activities of provision of software development and technical support services as E-Infochip was engaged in manufacturing and trading of printed electronic circuit boards and had income from software development, hardware maintenance, information technology consultancy and information technology services and selling software product and no separate segmental information was available and was also held to be an undertaking engaged in ITES.

Redknee (India) Technologies Private Limited vs. DCIT ITA No.486/Pun/2016 dated 29.06.2018

897. The Tribunal upheld the exclusion of Onward Technologies Limited as comparable for benchmarking design engineering and IT enabled services (ITeS), on the ground that it could be considered as a consistent loss-making company for AY 2010-11. It noted that a company is considered to be a loss-making company if it has incurred losses in three consecutive financial years including relevant financial year. Since, the said company had suffered losses in FYs 2007-08, 2008-09 and 2009-10, it was held to be loss making company.

Carraro Technologies India Pvt Ltd -TS-1058-ITAT-2016(PUN)-TP - ITA No. 2189/PN/2013

898. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in providing services of medical transcription, was not at all comparable to the back-office support services provided by the assessee.
- Jeevan Softtech ltd as it was engaged in medical writing, clinical data management, biostatistics and other services and therefore functionally dissimilar to the assessee.
- Fortune Infotech Ltd as it had its own unique web based software through which it provided services to its customers and therefore could not be compared to the assessee.
- In respect of the Software segment, it excluded Infosys Ltd as it had a huge brand value, intangibles.

Principal Global Services Pvt. Ltd vs. DCIT-TS-970-ITAT-2017(PUN)-TP ITA No.323/PUN/2015 dated 29.11.2017

899. The Tribunal held that the assessee engaged in the business of providing software development services to its AE could not be compared to:

- Coral Hubs Ltd as it had a different accounting period i.e comprising of 15 months and therefore could not be taken as a comparable.

Further, it included Cades Digitech Private Limited as it was into engineering design services and considered it comparable to the assessee.

DCIT vs. Applied Micro Circuits India Pvt. Ltd-TS-1013-ITAT-2017(PUN)-TP ITA No.1250/PUN/2015 dated 24.11.2017

900. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- FCS Software Ltd as it was engaged in the business of software development and IT Consulting services and segmental results were unavailable.
- Infosys Technologies ltd as it was a software giant and had huge turnover.
- L&T Infotech as it was engaged in software products and had high turnover.

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DCIT vs Exfo Electro Optical Engg India Pvt. Ltd-TS-648-ITAT-2017-ITA No. 1347/PUN/2015 dated 07.07.2017

901. The Tribunal held that the assessee engaged in the business of providing software development services could not be compared to:

- FCS Software Ltd as it had high turnover and it owned intangibles.
- Infosys Technologies ltd as it was engaged in software products and had brand influence.

ACIT vs Synechron Technologies Pvt. Ltd-TS-646-ITAT-2017(PUN)-TP ITA No.536/PUN/2015 dated 16.06.2017

902. The Tribunal held that the assessee engaged in the business of providing IT enabled services/business processing services to its AE could not be compared to:

- Infosys BPO Ltd as it had high brand value and turnover associated with the Infosys brand rendering it incomparable to the assessee.
- Accentia Technologies Ltd as it had an extraordinary event of amalgamation with IQ group of companies which had an impact on the financial results of the company.
- E-Clerx Services Ltd as it was engaged in KPO services and therefore was functionally dissimilar to the assessee.

Further, it remitted the comparability of Jeevan Softech Limited to the file of AO/TPO to work out its correct margins and include it in the list of comparables for benchmarking.

DCIT vs BNY Mellon International Operations (India) Pvt. Ltd-TS-769-ITAT-2017(PUN)-TP ITA No.303/PUN/2015 dated 27.09.2017

903. The Tribunal held that FCS Software India engaged in development of products & sale of products could not be compared to assessee engaged in software development services. Further, it observed that FCS Software was also engaged **in imparting** education to corporate companies and institutions of central and state government and accordingly, upheld CIT(A)'s exclusion of FCS on grounds of functional dissimilarity.

DCIT vs Barclays Technology Centre India Pvt Ltd-TS-770-ITAT-2017(PUN)-TP-ITA No. 1251 / PUN /2015 dated 29.09.2017

904. The Tribunal held that the assessee engaged in providing ITES services to its AE could not be compared to:

- FCS Software Ltd as its revenue from software services comprised of 42% of the total revenue
- Eclerx Services Limited as it was engaged in providing KPO services rendering it functionally dissimilar to the assessee.
- Accentia Technologies Limited as it had extraordinary event of amalgamation/merger during the year which had an impact on its profits.
- Infosys BPO Ltd as it was a giant company and deals with variety of functions and integrated services and was differentiated by huge brand value and scale of operation.

DCIT vs. PTC Software (India) Pvt. Ltd-TS-914-ITAT-2017(PUN)-TP- ITA No.572/PUN/2015 dated 27.10.2017

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905. The Tribunal held that the assessee engaged in providing designing and development softwares to its AE could not be compared to:

- KALS Information Systems ltd as it was engaged in product development and segmental details were unavailable.
- Helios & Matheson Information Technology ltd as it was engaged in rendering ITES including BPO services, offshore delivery, project management services and therefore was functionally dissimilar to the assessee.
- FCS Software Solution ltd as it was engaged in providing software development services and application support services and infrastructure management services and segmental details were unavailable.
- Further, in respect of ITES services segment, it held that the assessee could not be compared to:
- Accentia Technologies Ltd as it had an extraordinary event of merger/acquisition which had an impact on the financial results of the company.
- Coral Hubs Ltd as it was engaged in providing diversified activities like custom application development services and ITES without adequate segmental data rendering it incomparable to the assessee.

PTC Software (India) Private Limited vs Dar ACIT-TS-746-ITAT-2017(PUN)-TP-ITA No. 2546/PUN/2012 dated 11.09.2017

906. The Tribunal excluded the following companies from the list of comparables while benchmarking the international transactions of the assessee, engaged in providing software development services to its AEs:

- Kals Information System Ltd as it was engaged in development and sale of software products
- Thirdware Solutions Ltd as it was engaged in software development, trading of software licenses and training implementation activities and it earned supernormal profits.

Approva Systems Pvt Ltd v DCIT – TS-40-ITAT-2017 (Pun) – TP - ITA No.1921/PUN/2014 dated 25.01.2017

907. The Tribunal held that the international transactions of the assessee viz. provision of software research, development and support services could not be compared to

- Infosys Ltd and FCS Software Ltd as the companies were product companies.
- Kals Information Systems Ltd as the company was engaged in development and sale of software products
- Thirdware Solutions Ltd as the company was engaged in software development, trading of software licenses and training implementation activities
- Acropetal Technologies LTd as the company was engaged in design engineering activites Further, it held that E-Zest Solutions Ltd, Evoke Technologies Ltd and E-Infochips Ltd, being functionally comparable ought to have been included.

TIBCO Software India Pvt Ltd – TS-49-ITAT-2017 (Pun) – TP - ITA No.276/PUN/2015 dated 31.01.2017

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908. The Tribunal held that the assessee engaged in providing IT and IT Enabled Services to its AE could not be compared to :

- Continental Controls Ltd as it failed to satisfy the turnover filter as its software segment turnover was only Rs.29 lakhs and also since it earned a huge profit of 222.22 percent
- Tanla Solutions as it was engaged in product development, it had acquired two companies during the year which had an impact on its financial results
- Geodesic Information Systems Ltd as over and above the software services it was engaged in product development and no segmental results of the company were available
- Trident Infotech Corporation Ltd as its RPT to sales percent was 89.53 which far exceeded the filter applied
- Ultramarine & Pigments since it did not satisfy the RPT filter and also since it was engaged in providing engineering services
- Vishal Information Technologies Ltd as its asset base was Rs.2.54 crore as against Rs.10.93 crore of the assessee.

DCIT v PTC Software India Pvt Ltd – TS-1071-ITAT-2016 (Pun) – TP ITA No. 945/PN/2013 dated 14.12.2016

909. The Tribunal held that the Software Consultancy Services provided by the assessee could not be benchmarked with Persistent Systems Ltd, Wipro Technologies Ltd and Infosys Technologies Ltd as the assessee's turnover in software segment was only Rs. 81 crore as against the turnover of Infosys Technologies and Persistent Systems was very huge (in excess of Rs. 200 crore)

As regards the BPO services provided by the assessee, it held that the following companies could not be considered as comparable:

- Accentia Technologies Ltd as it operated in KPO segment
- Acropetal Technologies Ltd as it was engaged in providing design engineering activities which was more akin to KPO

ITO vs. Systime Global Solutions Ltd - TS-54-ITAT-2017(PUN)-TP ITA No.336/PUN/2015 dated 31.01.2017

910. The Tribunal held that the assessee, engaged in providing IT enabled & marketing support services could not be compared to:

- Genesys International Corporation Ltd as it was functionally different and had abnormally high profits
- Accentia Technologies Limited as it had undertaken an extra ordinary event during the year viz. acquisition of IQ group of companies
- Eclerx Services Ltd as the company had been excluded as comparable in the assessee's own case for AY 2009-10 on account of functional difference.

Cummins Turbo Technologies Limited vs DCIT - TS-1094-ITAT-2016(PUN)-TP ITA No. 593/PUN/2015 dated 28.12.2016

911. The Tribunal held that Infosys, having a huge turnover as compared to the assessee could not be compared to the assessee, a limited risk software development service provider. Accordingly, it directed for the exclusion of the said comparable.

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ACIT v Amberpoint Technology India Pvt Ltd – TS-124-ITAT-2017 (Pun) – TP ITA No.266/PUN/2012 ITA No.1862/PUN/2012 dated 15.02.2017

912. The Tribunal held that the assessee, engaged in the business of software development was not functionally comparable to**:**

- Bodhtree Consulting Ltd, KALS Information Systems Ltd & E-zest Solutions Ltd as they earned income from both software product development as well as ITES and had no segmental break-up
- Akshay Software Technologies Ltd, Maars Software International Ltd & RS Software (India) Ltd as they were onsite services providers and the assessee was an offsite service provider
- Quintegra Solutions Ltd as the company owned substantial intangibles

Further, it excluded Indium Software (India) Ltd as comparable as its export turnover was less than the 75 percent filter applied and S I P Technologies and Exports Ltd as the company had shown a loss of -33.20 percent. Applying the turnover filter Rs. 1-200 crore, it directed the exclusion of Helios and Matheson Information Technology Ltd with a turnover of Rs. 213.39 crores on the ground of failing Rs.200cr turnover filter. Further, rejecting the contention of the assessee that E-Infochips Ltd was to be excluded as it was engaged in the sale of software products, the Tribunal noting that the turnover from software products was merely 4 percent of total turnover, directed for the inclusion of the said company.

MSC Software Corporation India Pvt. Ltd vs. ACIT - TS-226-ITAT-2017(PUN)-TP - ITA No.46/PUN/2013 dated 22.03.2017

913. The Tribunal held that Compucom Software and Sterling International Enterprise Ltd could not be compared to the assesee engaged in the business of software development as they failed to satisfy the RPT filter of 25 percent and had a different financial year ending, respectively.

Tieto Software Technologies LTD. vs. DCIT - TS-155-ITAT-2017(PUN)-TP - ITA No.986/PUN/2013 dated 03.03.2017

914. The Tribunal held that the assessee, engaged in providing engineering design services to its AE could not be compared to Kitco Ltd, Water & Power Consultancy Services (India) Ltd and Engineers as the said companies were public sector companies working as per the governmental policies and social obligations and therefore, their risk profile and functions were distinct and dissimilar to a captive service provider i.e. the assessee.

Behr India Limited [TS-320-ITAT-2017(PUN)-TP] - ITA No. 566/PUN/2013 dated 21.04.2017

915. The Tribunal, relying on the decision of the Bombay HC in PTC Software (I) Pvt. Ltd [TS-788- HC-2016(BOM)-TP] held that Rolta India Ltd could not be accepted as a comparable while conducting the benchmarking exercise of the assesse (engaged in providing engineering design services) as its financial results pertained to a different accounting period.

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Further, the Tribunal directed the AO to consider the segmental results of KLG Systems Ltd as against the entity level results of the said comparable. It held that the margins of comparable concerns which are functionally comparable are to be selected and applied and in case any concern is engaged in various activities, then the segmental details of the activity, which were functionally comparable to the assessee were to be applied in order to work out the margins of the said concern

Dover India Pvt. Ltd Vs ACIT - TS-318-ITAT-2017(PUN)-TP - ITA No.411/PUN/2014 dated 19.04.2017

916. The Tribunal remitted the issue of whether Coral Hubs Ltd (formerly known as Vishal Information Technologies Ltd.) could be selected as comparable while benchmarking the international transactions of the assessee (as ITES provider) noting that that the said comparable outsourced major part of its work, incurring nominal employee cost as compared to assessee who incurred over 60% of its expenditure on salaries. Observing that the assessee placed reliance on the decision of the High Court in the case of Rampgreen Solutions Pvt. Ltd [TS-387-HC-2015(DEL)- TP] (wherein the comparable had been excluded), which was not available before the CIT(A) as it was subsequent to the date of passing the impugned order, it remitted the issue back to the file of AO to re-consider the inclusion/ exclusion of Coral Hubs in light of HC ruling.

Credit Pointe Services Pvt Ltd vs DCIT-TS-502-ITAT-2017(PUN)-TP dated 24.05.2017

917. The Tribunal held that the assessee, engaged in providing information technology related back office services to its AEs could not be compared to:

- Accentia Technologies Ltd as the company was engaged in the business of medical prescription services which was functionally not comparable to the assessee.
- Coral Hubs Ltd as the company had a very low employee cost of only 4.3% and had substantial vendor payments thereby outsourcing a large portion of its work.
- Cross Domain Solutions Ltd as the company was engaged in providing KPO services and was functionally dissimilar to the assessee.
- E4e Health Solutions as the company was engaged in the business of providing healthcare services which was a specialized of knowledge based services and thus functionally dissimilar to the assessee.
- Ace Software Exports ltd as it was a loss-making company and also had an extra-ordinary event during the year i.e. it had restructured its business operations during the year.
- R Systems International Ltd as it followed a different financial year. It relied on the decision in the case of PTC Software (I) Pvt. Ltd [TS-788-HC-2016(BOM)-TP] wherein it was held that the data to be used for comparability analysis should be of the same financial year in which the international transactions were entered into by the tested party.
- Aditya Minacs Worldwide Ltd as it was engaged in providing KPO services.
- Informed Technologies India Ltd as it was engaged in providing KPO services.

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Vishay Components Pvt. Ltd vs. ACIT - TS-491-ITAT-2017(PUN)-TP - ITA No.341/PUN/2013 dated 31.05.2017

918. The Tribunal reversed CIT(A)'s order directing combined benchmarking of off-shore software development and on-site software consultancy services provided by assessee to its AEs and held that even in a case where one company itself provides both the said services, the same have to be considered separately while benchmarking the international transactions and fact that the assessee was reimbursed at cost plus 7.5% for off-site services and 15.04% for on-site services itself established that the two services were different from functional and risk perspective. Accordingly, it remitted the issue to the AO with the direction to benchmark the international transactions of provision of software development services i.e. off-site services independent of on-site services.
SAS Research & Development (India) Pvt Ltd [TS-859-ITAT-2016(PUN)-TP] (ITA No.810/PN/2013)

919. The Tribunal held that in case of assessee company rendering IT enabled services (ITES) to its AE, a company in whose case extraordinary event of amalgamation took place or a company rendering KPO services or a company which outsourced major portion of its business activity could not be accepted as comparables while determining ALP
Cummins Turbo Technologies Ltd v DDIT - [2016] 68 taxmann.com 273 (Pune-Trib)

920. The Tribunal upheld CIT(A)'s exclusion of Rolta India Ltd and KLG Systel Ltd as comparables on account of distinct nature of business, size and diversified products. It also noted that turnover of Rolta India was Rs. 599 crore or at best Rs. 347crore (as contended by Revenue) and turnover of KLG Systel was Rs.112.53cr, which was much higher than assessee's turnover of Rs. 13.31crore, and excludes these 2 companies applying turnover filter as well relying on Bombay HC ruling in Pentair Water India and Delhi HC ruling in Agnity India rulings.
ACIT vs. Dana India Technical Centre (P) Ltd - TS -140-ITAT-2016 (PUN)-TP

921. The Tribunal held that only those loss making companies incurring losses for three consecutive years and not those companies merely incurring losses only in the relevant year, were to be excluded as comparable while determining the ALP of the international transactions undertaken by the assessee, engaged in providing software development services.
Sungard Solutions (India) Pvt Ltd v ADIT - (2016) 68 taxmann.com 89 (Pune)

922. The Tribunal held that the assessee, engaged in providing software development services to its AE and having a turnover of Rs.100 crore could not be compared to companies such as (i) Infosys Technologies Ltd having a turnover of Rs.20,000 crore since there was a substantial disparity in scale of operation, (ii) Kals Information System Ltd as the company was engaged in the sale of software products and therefore functionally different and (iii) Bodhtree Consulting Ltd on account of functional dissimilarity since it was engaged in providing software development, ITES and Sales Support Services to its AE. It held that SIP

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Technologies could not be excluded as comparable on the ground of persistent losses as it had earned a profit in one out of the last 3 years.

As regards the design engineering services provided by the assessee to its AE, the Tribunal held that (i) Coral Hubs could not be considered as comparable as the said company was engaged in e-publishing and therefore not functionally comparable, (ii) Cosmic Global being functionally different as it outsourced substantial operations could not be considered as comparable and (iii) Geneys International Corporation Ltd, engaged in the business of providing Geospatial Services could not be compared to the assessee.

John Deere India Pvt Ltd v DCIT – TS-927-ITAT-2016 (Pun) – TP

Investment advisory services

923. The Court dismissed Revenue's appeal and upheld Tribunal's order wherein Motilal Oswal Investment Advisors ("MOIL") was excluded as a comparable for assessee engaged in rendering non-binding investment advisory services relying on its decision in case of Carlyle India Pvt. Ltd wherein it was held that MOIL was declaring a solitary stream of operating income under the head "advisory fee" but engaged in diversified activities without segmental information in respect of each of them. It held that that the factual finding of the Tribunal was not perverse and it was in full agreement with respect to the Tribunal's findings that MOIL was engaged in diversified activities and no segmental information was available in respect of the activites and thus, no substantial question of law arose.

Pr.CIT vs NVP Venture Capital India Pvt. Ltd [TS-1016-HC-2018(BOM)-TP] (IT No. 406 of 2016)(Bom) dated 18.09.2018

924. The Court dismissed Revenue's appeal and upheld ITAT's order excluding Motilal Oswal Investment Advisors Pvt Ltd ["MOIL"] as comparable in case of assessee engaged in providing investment advisory services to AE, by relying on HC ruling of NVP Venture wherein it held that Tribunal's findings that MOIL was declaring a solitary stream of operating income under the head "advisory fee" but engaged in diversified activities without segmental information in respect of each of them and thus could not be compared with a non-binding investment advisory company were not perverse. Further, the Court observed that the findings of Tribunal had not been shown to be perverse nor vitiated by error of law apparent on face of the record.

Pr.CIT vs. Arisaig Partner India Pvt Ltd [TS-1115-HC-2018(BOM)-TP]] ITA No.609 of 2016 dated 10.10.2018

925. The Court admitted the Revenue's appeal against the order of the Tribunal wherein the Tribunal had excluded certain companies as comparable on the ground that they were not functionally comparable with the assessee who was engaged in equity broking and investment banking and marketing support services in relation to investment banking. The questions urged before the Court were as follows (i) whether research and information services segment of comparables could be compared to advisory services and (ii) whether the Tribunal was justified in not considering the Segmental financial and advisory services segment as comparable to the assesse.

CIT v UBS Securities India Pvt Ltd – TS-951-HC-2016 (Bom) – TP

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926. The Court, relying on the decision of the High Court in CIT v Carlyle India Advisors Ltd and CIT v General Atlantic P Ltd, dismissed the appeal of the Revenue filed against the order of the Tribunal, wherein the Tribunal held that broking companies, asset management companies and merchant banking companies were not comparable with the assessee, who was engaged in providing investment advisory services.

CIT v Temasek Holdings Advisors India Pvt Ltd – TS-928-HC-2016 (Bom) – TP

927. The Court held that an investment advisor could not be compared to a merchant banker

CIT v General Atlantic (P)Ltd - [2016] 68 taxmann.com 88 (Bombay), IT APPEAL NO. 1993 OF 2013 & 8914/MUM/2010, March 8, 2016

928. The Court dismissed Revenue's appeal and held that assessee engaged in Investment advisory could not be compared to:

- Brescon Corporate Advisors Ltd as segmental result in case of income schemes were not available
- Keynote Corporate Services Ltd due to occurrence of an extraordinary event of Amalgamation approved by the HC

PCIT- 2 vs M/s Chrys Capital Investment Advisors- TS-295-HC-2018(Del)-TP- ITA no 634/2017 dated 16.04.2018

929. Where the Tribunal had excluded 3 comparables on the ground that they were engaged in debt syndication, debt financing, IPO advisory etc, the Court set aside Tribunal's order on comparable selection for benchmarking the international transactions of the assessee providing non-binding investment advisory services. It noted that the Tribunal had gone by usage of terms such as debt syndication, debt financing, IPO advisory etc appearing in annual reports of the 3 contested comparables (merchant bankers) to be functionally dissimilar. Observing that the services of the assessee could not be termed as that of merchant banking though there may be some overlap in the advisory segment of the services provided by merchant bankers, it restored the comparability of 3 companies back to CIT(A).

Avenue Asia Advisors Pvt. Limited vs. DCIT-TS-737-HC-2017(DEL)-TP ITA No. 350 / 2016 dated 18.09.2017

930. In case of the assessee providing investment advisory and support services to its AE, the Tribunal had disagreed with assessee's contention that it was merely a non-binding investment advisory service provider and affirmed characterization of the assessee by the TPO as a merchant banker / fee based investment and financial advisory service provider. Further, as regards AE receivables the Tribunal had restored the computation of the notional interest on outstanding receivables to the TPO with directions to compute interest for receivables on day to day basis and apply the LIBOR rate of interest as against PLR used by the TPO. The Court admitted assessee's appeal challenging Tribunal's order and framed 3 questions for determination viz.(i) characterization of assessee's function as a merchant banker (ii) inclusion of certain comparables selected by the TPO considering assessee's business profile (iii) whether the Tribunal erred in upholding addition of notional interest on outstanding receivables from AE.

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Avenue Asia Advisors Pvt. Ltd vs DCIT-TS-415-HC-2017(DEL)-TP-ITA 350/2016 dated 26.04.2017

931. Where the assessee was engaged in providing non-binding investment advisory services to its AE, the Tribunal allowing assessee's appeal held that Asian Business Exhibition and Conference limited could not be compared to the assessee as it was engaged in the business of organizing exhibitions.
Intellectual Venture India Consulting Pvt. Ltd-TS-884-ITAT-2017(Bang)-TP dated 20.10.2017

932. The Tribunal allowed Revenue's appeal and set aside DRP's cryptic order excluding 2 companies (Motilal Oswal Investment Advisors P Ltd and IM Capital) as comparable for assessee providing investment advisory services for AY 2011-12 noting that DRP excluded these companies (registered with SEBI as Merchant Banking companies) merely on the ground that TPO had rejected Birla Capital Financial Services Ltd which was also a merchant banking company as comparable. It opined that the order of the DRP was very cryptic and they had not considered the various issues raised by the TPO. Thus, Tribunal remanded the issue to the file of the DRP with a direction to pass a speaking order on the issue of selection of the above two comparables as per fact and law.
ACIT vs Wolfensohn India Advisors Pvt Ltd [TS-1281-ITAT-2018(DEL)-TP] ITA No.705 /Del /2016 dated 06.12.2016

933. The Tribunal held that the assessee engaged in providing investment advisory services could not be compared with:

- Motilal Oswal Investment Advisors Private Ltd as the said company providing a variety of services and had delivery capacity in cross border product acquisition for its clients, which could not be compared to the work done by the assessee
- Khandwala Securities Ltd business operations of this company included investment banking, corporate advisory services, institutional broking and private client broking which could not be compared to the activities of the assessee
- Axis Private Equity Ltd as it was an asset/funds management company entrusted with the responsibility of investing funds in the best possible way whereas the assessee only provided research based information and advised the clients so that they could take informed decisions about where they should invest their money to get maximum returns.
- Almondz Global Securities Ltd as it was engaged in merchant banking, investment advisory and loan syndication fee which was functionally dissimilar to the activities carried out by the assesse.
- Milestone Capital Advisors Private Ltd as the company was more into asset management rather than investment advisory

Sungroup Enterprises Private Limited vs. DCIT - TS-461-ITAT-2018(DEL)-TP - ITA No.1029/Del/2014 dated 21.05.2018

934. The Tribunal in case of assessee engaged in providing consultancy services, forensic crisis and security related services held that the TPO had flawed in characterising assessee as engaged in providing investment and other financial advisory when the officer himself had addressed assessee's profile as consulting business intelligence services. It observed that

ignoring the assessee's employee profile, the officer proceeded on a general discussion so as to justify his conclusion drawn regarding characterization and that by no stretch of imagination the assessee could be compared with companies who were trading in shares and investments.

Control Risks India Pvt Ltd - TS-769-ITAT-2016(DEL)-TP-I.T.A .No.-979/Del/2015

935. The Tribunal held that the assessee engaged in providing investment advisory services to its AEs could not be compared to:

- Brescon Corporate Advisors as it was engaged in merchant banking and its main source of income was from recapitalization advisory and debt syndication.
- Keynote Corporate Services Ltd as it had launched an ESOP division which focused on designing and implementing stock option schemes for corporate

ChrysCapital Investment Advisors (India) Private Limited vs Addl.CIT-TS-772-ITAT-2017(DEL)-TP ITA No.4294/Del./2014 dated 19.09.2017

ChrysCapital Investment Advisors (India) Private Limited vs Addl.CIT-TS-754-ITAT-2017(DEL)-TP dated 19.09.2017

936. The Tribunal held that the assessee engaged in providing investment advisory services to its AEs could not be compared to:

- Brescon Advisors & Holdings ltd as it was carrying on merchant banking and investment activities along with providing project advisory services. Further, it had two streams of income namely fee based financial services and other income.
- Keynote Corporate Services limited as it was engaged in merchant banking and therefore was functionally dissimilar to the assessee.

DE Shaw India Advisory Services Pvt. Ltd vs. DCIT-TS-817-ITAT-2017(DEL)-TP ITA No. 1681/Del/2015 dated 24.07.2017

937. The Tribunal held that the assessee engaged in providing investment research services to its AE could not be compared with:

- Brescon Corporate Advisors Limited as the company was mainly carrying out merchant banking, restructuring and syndication of debt. Further, the Tribunal noted that there was no segmental information vis-à-vis various streams of fees, i.e., financial restructuring and re-capitalisation, syndication of debt equity related advisory, M & A Advisory, etc
- Khandelwal Securities as the company was engaged in diversified activities like institutional equity sales, sales trading and research, private client broking and portfolio management services and no separate segmental information was available.
- India Venture Capital as the company was into software products & services while assessee was purely into ITeS in the nature of business and investment research services.

Pipal Research Analytics and Information Services India Pvt Ltd [TS-733-ITAT-2018(DEL)-TP]- ITA No.6374/Del/2012 dated 18.06.2018

938. The Tribunal restored the functional characterization & selection of comparables in the case of the assessee back to the TPO, noting that the TPO had wrongly characterized the assessee as a stock broking and trading firm whereas the assessee did not provide such services and rendered other financial services. It observed that the Tribunal in the assessee's own case for AY 2010-11 & 2011-12 remitted a similar issue back to the TPO to carry out FAR analysis of

assessee after characterizing its activity on the basis of evidence on record and then proceed to select comparables as per law, pursuant to which the TPO had passed orders for AY 2010-11 & 2011-12 admitting that assessee was incorrectly characterized as provider of investment and financial advisory. Accordingly, it remitted the matter back to the TPO in line with the earlier years orders.

Control Risks India Pvt. Ltd vs. ACIT - TS-723-ITAT-2018(DEL)-TP - ITA No. 1480/Del/2017 - 30.05.2018

939. The Tribunal held that assessee engaged in rendering non-binding investment advisory services to its AE could not be compared to:

- Motilal Oswal Investment Advisors Pvt. Ltd as it was engaged in diversified activities and segmental bifurcation was not available and it was also registered as a merchant banker.
- Ladderup Corporate Advisory Pvt. Ltd as it was registered as a Category–1 merchant banking company with SEBI and was engaged in Merchant Banking service from July 2010

Further, it included

- It included ICRA Management Consulting Services Ltd. as it was engaged in providing consultancy services in area of strategy, risk management, process consulting transaction advisory, policy and development consultantancy.
- IDC(India) as its profitability, operational efficiencies, future outlook, etc. were similar to that of the functions and activities performed by the investment advisory service providers.

Carlyle India Advisors Pvt Ltd vs ACIT [TS-1285-ITAT-2018(Mum)-TP] IT(TP)A No.2410/Mum/2017 dated 20.11.2018

ACIT vs Carlyle India Advisors Pvt Ltd [TS-1285-ITAT-2018(Mum)-TP] IT(TP)A No.2506/Mum/2017 dated 20.11.2018

940. For AY 2011-12, the Tribunal held that assessee engaged in rendering non-binding investment advisory services to its AE could be compared to:

- ICRA Management Consulting Services Ltd. as it was engaged in providing consultancy services in area of strategy, risk management, process consulting transaction advisory, policy and development consultantancy. (Relied on coordinate bench decision in General Atlantic Pvt Ltd for same AY and coordinate bench ruling in assessee's own case for earlier year)
- IDC(India) Ltd as it was found to be functionally similar to companies engaged in investment advisory services(Relied on coordinate bench decision in General Atlantic Pvt Ltd for same AY and coordinate bench ruling in assessee's own case for earlier year wherein it was held that said comparable was in the business of marketing research and management consultancy which were similar to the activities carried out by assessee).

Further, it excluded

- Ladderup Corporate Advisory Pvt. Ltd as it was registered as a Category–1 merchant banking company with SEBI and was engaged in Merchant Banking service from July 2010.
- Motilal Oswal Private Equity Advisors Pvt Ltd. as it had four different business verticals, such as, financial advisory, investment advisory, management and facilitation services and identifying investment opportunities with no segmental data available. It relied on coordinate bench ruling in Temasek Holding Advisors India Pvt Ltd wherein it was held said

company could not be compared due to difference in functional profile while considering the comparability vis-à-vis investment advisory services provider.

- Motilal Oswal Investment Advisors Pvt. Ltd as it was engaged in the business of investment banking, merchant banking, merger and acquisition, private equity syndication, etc., which was no way similar to the assessee's activities.

Blackstone Advisors India Pvt. Ltd vs ACIT [TS-1298-ITAT-2018(Mum)-TP] ITA No.1370/Mum/2016 dated 30.11.2018

ACIT vs Blackstone Advisors India Pvt. Ltd [TS-1298-ITAT-2018(Mum)-TP] ITA No.928 /Mum/2016 dated 30.11.2018

941. For AY 2011-12, the Tribunal held that assessee engaged in rendering non-binding investment advisory services to its AE could be compared to:

- Cyber Media Research Ltd. (formerly IDC(India) Ltd) relying on coordinate bench ruling in General Atlantic Pvt Ltd for same AY. It also relied on other coordinate bench rulings in AGM Advisors and Goldman Sachs wherein it was held that said comparable was in the business of marketing research and management consultancy which were similar to the activities carried out by assessee.

Further**,** it excluded

- Ladderup Corporate Advisory Pvt. Ltd as it was registered as a Category–1 merchant banking company with SEBI and was engaged in Merchant Banking service from July 2010.
- Motilal Oswal Private Equity Advisors Pvt Ltd. as it had four different business verticals, such as, financial advisory, investment advisory, management and facilitation services and identifying investment opportunities with no segmental data available. It relied on coordinate bench ruling in Temasek Holding Advisors India Pvt Ltd wherein it was held said company could not be compared due to difference in functional profile while considering the comparability vis-à-vis investment advisory services provider.
- Motilal Oswal Investment Advisors Pvt. Ltd as it was engaged in the business of investment banking, merchant banking, merger and acquisition, private equity syndication, etc., which was no way similar to the assessee's activities.

New Silk Route Advisors Pvt. Ltd vs ACIT [TS-1304-ITAT-2018(Mum)-TP] IT(TP)A No.1148/Mum/2016 dated 30.11.2018

ACIT vs New Silk Route Advisors Pvt. Ltd [TS-1304-ITAT-2018(Mum)-TP] IT(TP)A No.2092/Mum/2016 dated 30.11.2018

942. For AY 2011-12, the Tribunal held that assessee engaged in rendering non-binding investment advisory services to its AE could not be compared to

- Ladderup Corporate Advisory Pvt. Ltd as it was engaged in the merchant banking/investment banking and other similar activities, which could not be compared to investment advisory services [It relied on coordinate bench in Temasek Advsiors wherein the said comparable was excluded for being engaged in merchant banking]
- ICRA Online Ltd as it was operating in KPO and ITES, further activities performed under outsourced services were in nature of maintenance and management of data.
- Integrated Capital Services Ltd. as it was providing advisory and consulting services in area of mergers, acquisition and reconstruction, and activities were in nature of investment banking

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Further, it included

- ICRA Management Consulting Services Ltd. as it was engaged in providing consultancy services in area of strategy, risk management, process consulting transaction advisory, policy and development consultantancy.(It relied on coordinate bench decision in General Atlantic Private Ltd which in turn had relied on AGM India Advisors Pvt Ltd wherein it was held it was functionally similar and observations of TPO were rejected that there was a difference in skill set of employees and value addition to functions as it was based on wrong appreciation of facts)

SBI Macquarie Infrastructure Management Pvt Ltd vs DCIT [TS-1304-ITAT-2018(Mum)-TP] IT(TP)A No.1148/Mum/2016 dated 30.11.2018

943. The Tribunal held that assessee engaged in provision of non-binding investment advisory services to its AE could be compared to ICRA Management Consulting Services Ltd relying on by coordinate bench decision in Temasek and others wherein it was held that it was offering consultation services in the area of strategy, risk management, operations, improvement, regulatory economics and translations advisory and entire revenue was generated from consultation fee and thus was providing consultation to various types of industries through investment advisory. Also, in assessee's own case in earlier year wherein the Tribunal had clearly stated that the said comparable was functionally comparable and rejected TPO's reasons for exclusion on basis of being a loss-making company and significant RPT for being factually incorrect. (It was not a loss-making company and had RPT of 14%).

TPG Capital India Private Limited vs Dy.CIT (As a successor to TPG Growth Advisors (India) Private Limited) [TS-1321-ITAT-2018(Mum)-TP] ITA No.5411/Mum/2016 dated 07.12.2016

944. The Tribunal for AY 2011-12 held that assessee engaged in provision of non-binding investment advisory services to its AE could not be compared to:

- Ladderup Corp. Advisory Pvt. Ltd. as it was a category-I merchant banker registered with SEBI and was functionally dissimilar. [It relied on the decision of General Atlantic (Pvt.) Ltd. in view of factual findings being the same for AY 2011-12.]
- Primary Real Estate Advisors Pvt. Ltd as it was engaged in real estate investment and was servicing landowners, overseas and domestic developers and hence the functional profile was different vis-à-vis assessee.

Further, the Tribunal included Cyber Media Research Ltd. (formerly known as IDC (India) Ltd) as a comparable and rejected the reliance placed by Revenue on the case of Teva Pharma (P.) Ltd wherein the comparable was excluded in case of assessee engaged in like activities since it was for the assessment year AY 2007-08. Further the Tribunal also dissented with the case of Actis Advisors (P.) Ltd relied on the by the Revenue noting it was on the wrong footing since the functional profile was obtained from the website link of its holding company which was discussed in the case of TPG Capital India (P.) Ltd. (The TPO had rejected the above comparable on the ground that it was engaged in market research and survey services not comparable to the assessee.)

Mount Kellett Capital Management India Pvt. Ltd. vs Dy.CIT [TS-967-ITAT-2018(Mum)-TP] IT (TP)A No.1552/Mum/2016 dated 27.07.2018

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945. The Tribunal held that the assessee engaged in providing non-binding investment advisory services could not be compared to ICRA Online which was engaged in providing e.knowledge Process Outsourcing and information Services and Technology Solutions which was functionally different as compared to the activities of the assessee.
Sparkles Dhandho Advisors Pvt. Ltd v ITO - TS-18-ITAT-2018(Mum)-TP - I.T.A./1047/Mum/2015 dated :03/01/2018

946. The Tribunal held that the assessee engaged in providing non-binding investment advisory services ('IAS') to AE could not be compared with Ladderup Corporate Advisory as the said comparable was engaged in providing merchant banking services which was functionally dissimilar.
Following its order in the case of the assessee for the earlier assessment year, it held that ICRA Management Consulting and Informed Technologies were to be considered as comparable.
Vis-à-vis CRISIL and ICRA Techno Analytics, it remanded the matter to the file of AO/TPO considering that that no reasonable opportunity of being heard had been afforded to the assessee by DRP on these companies and also observed that i) CRISIL ought to be excluded if found to have RPT of more than 25% and ii) ICRA Techno Analytics ought to be excluded if verified to be a software development service provider.
Temasek Holdings Advisors India Private Limited v ITO - TS-17-ITAT-2018(Mum)-TP - ITA No. 1429/Mum/2017 dated 03.01.2018

947. The Tribunal held that the assessee engaged in providing non-binding investment advisory services to its AE could not be compared with:

- Ladderup Corporate Advisory Pvt. Ltd. as the company was registered with SEBI for engaging in merchant banking services which was also duly substantiated by the website of the company as well as its Annual Reports
- ICRA online Ltd as the assessee failed to bring anything on record to prove that the company was comparable to the assessee other than the contention that the Revenue had accepted it to be comparable in the subsequent year.

Further, it held that ICRA Management Consulting Ltd and IDC Ltd were to be included as comparables as they were carrying out investment advisory services similar to that of the assessee.
SUN-Ares India Real Estate Private Ltd (formerly known as SUN AREA Real Estate Pvt. Ltd) vs. DCIT - TS-84-ITAT-2018(Mum)-TP - /I.T.A. No.621/Mum/2016 dated 09 /02/2018

948. The Tribunal held that the assessee engaged in providing non-binding investment advisory services to its AE could not be compared with

- Ladderup Corporate Advisory Pvt. Ltd. as the company was engaged in providing merchant banking services.
- Motilal Oswal Investment Advisors Ltd as it was engaged in four different business verticals such as equity capital markets, merger and acquisition, profit equity syndications and structure debts and its core competence is in the field of merchant banking

Further, relying on the decision of AGM India Advisory Pvt. Ltd [TS-1-ITAT-2017(Mum)-TP] wherein it was held that this company was a valid comparable for assessee providing non-

binding investment advisory services. Accordingly, it upheld the assessee's contention for inclusion of ICRA Management Consulting Services Ltd.

It also held that IDC (India) Ltd was to be included as a comparable as it was considered as a valid comparable to companies engaged in providing non-binding investment advisory services by the High Court in General Atlantic Pvt. Ltd and had also been considered as comparable in the assessee's own case for earlier years.

DCIT vs. General Atlantic Pvt. Ltd - [TS-181-ITAT-2018(Mum)-TP – ITA no.1717/Mum./2016 dated – 21.02.2018

949. The Tribunal, relying on the decision of the co-ordinate bench in Temasek Holding Advisors India [477/Mum/2016] held that the assessee engaged in providing non-binding investment advisory services could not be compared with:

- Motilal Oswal Private Equity Advisers India Private Ltd as the company was engaged in investment in portfolio companies, managing the 'India Business Excellence Fund I' and 'India Reality Excellence Fund I' and also had multiple sectors of operations for which no segmental information was available.
- Ladderup Corporate Advisory Private Ltd. as it was engaged in merchant banking /investment banking services.

Further, it held that the TPO erred in excluding i) ICRA Management Consulting Services Ltd merely on the ground that it had fluctuating profit margins without appreciating that the company was accepted to be comparable in the prior assessment year and ii) Informed Technologies Ltd on the ground that it had declining turnover without appreciating that the company was accepted to be comparable in the prior years. Vis-à-vis Informed Technologies, it held that declining turnover was not relevant for service companies as their margins were not dependent on the scale of operations.

Wells Fargo Real Estate Advisors Pvt. Ltd. (Previously known as Wachovia Management Services Private Limited) vs. DCIT - TS-66-ITAT-2018(Mum)-TP - /I.T.A./1520/Mum/2016 dated 17/01/2018

950. The Tribunal held that the assessee engaged in providing non-binding investment research services to its AE could not be compared with Motilal Oswal Investment Advisors Ltd as the company was engaged in the business of investment banking/merchant banking activity.

Further it held that ICRA Management Consulting Services Ltd and IDC (India) Ltd were to be included as comparables as they were carrying out investment advisory services similar to the assessee.

IIML Assets Advisors Ltd v DCIT [TS-800-ITAT-2018(Mum)-TP]-ITA No.4060/Mum/2016 dated 20.06.2018

951. The Tribunal following the coordinate bench decision in assessee's own case for AY 2008-09 and held that the assessee was a mere investment advisory company and could not be categorized as a KPO as alleged by the TPO.

The Tribunal excluded the following comparables for assessee engaged in rendering investment advisory to its AE:

- Coral Hubs Ltd. as it was engaged in outsourcing and also the TPO had included it while categorizing assessee as a KPO;

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- E-Clerx Ltd. as it was rejected by the Tribunal in assessee's own case for the previous year;
- Cosmic Global as it was engaged in the business of translation services and had a different business model which was functionally different from the assessee

The Tribunal included ICRA Management consultancy P. Ltd relying on the coordinate bench in assessee's own case.

Further, the Tribunal dismissed the Revenue's appeal with regard to the inclusion of IDC(India) Ltd as a comparable since it could not bring anything on record to contradict the findings of the DRP that the company was a market research company dealing in research services and products.

Apax Partners India Advisers Pvt Ltd [TS-832-ITAT-2018(Mum)-TP] ITA No.1682/Mum/2014 and 1738/Mum/2014 dated 08.06.2018

952. The Tribunal held that the assessee, engaged in rendering investment advisory services to its AE could not be compared with:

- Crisil Ltd (segment Research Service) as it was Functionally different, its RPT filter was more than 25% and its advisory segment had been transferred to its wholly owned subsidiary
- ICRA Ltd as it was functionally incomparable
- SBI Fund Management Ltd as it was an 'Asset manager' whose main source of income was by way of management fees, while its income from advisory fees was negligible.
- Sundaram Asset Management Ltd as it was an asset management company whose main source of income was by way of 'Investment management fees'
- Deutsehe Asset Management India Ltd as it was functional incomparable and had substantial RPT

It also included the following companies that were excluded by the TPO:

- Future Capital Holding, KPIT Cummins Global Business Solution Ltd as the said companies were not persistently loss making companies though they had incurred losses during the year.
- ICRA Management Consulting Services Ltd as the TPO had incorrectly rejected this company on the ground of RPT and persistent losses whereas its RPT was 14 percent (below the 25 percent threshold applied by the TPO) and it was not a persistently loss making company.
- IDC India Ltd as the company was selected as comparable in the preceding year and there had been no change in its functionality since then.

TPG Capital India Private Limited Vs DCIT - TS-101-ITAT-2017(Mum)-TP ITA. No. 7594/Mum/2014 dated 08.02.2017

953. The Tribunal excluded two comparables viz. Motilal Oswal Investment Advisory Pvt Ltd. (engaged in rendering services of investment banking and corporate banking and advisory)and Brescon Corporate Advisors Pvt Ltd. (engaged in rendering the services of Merchant Banker)on grounds of functional dissimilarity with the assessee rendering investment advisory services during AY 2009-10. It further held that the DRP was not justified in stating that the comparables selected by the TPO for the earlier year would be valid for

the under appeal. It reasoned that each and every year was a separate and independent unit and process of identifying comparables was not merely a formality, and that the procedure laid down in the Act and Rules could not be deviated from.

Blackstone Advisors India Private Limited - TS-5-ITAT-2017 (Mum) – TP

954. The Tribunal held that the assessee engaged in the business of providing investment advisory services to its AE could not be compared to Motilal Oswal Investment Advisors Pvt Ltd. as it was engaged in providing merchant banking functions rendering it functionally dissimilar to the assesse. Further, considering the assessee's submission that the AO had erred in considering interest income as operating income, it remitted the comparable Integrated Capital Services Ltd to the file of AO to verify the same and pass a consequential order.

WL Ross India Pvt. Ltd vs DCIT-TS-954-ITAT-2017(Mum)-TP-ITA No. 977 / mum / 2015 dated 03.11.2017

955. The Tribunal held that the assessee, engaged in providing non-binding investment advisory services' to its AE could not be compared to:

- Centrum Capital Limited as it was engaged in 'merchant banking' activities having its main income from syndication fees, brokerage and commission and trading in bonds
- Keynote Corporate Services Limited as it was engaged in providing merchant banking activities involving lead managing IPOs, right offer, buyback of shares and takeover, corporate finance and M & A advisory
- SREI Capital Markets Limited as it carries out full scale investment banking, corporate advisory and project management consulting firm, and primary income is from merchant banking activities and it operated under a single segment, i.e., Project consultancy, merchant banking and underwriter services
- Sumedha Fiscal Services Limited as it was engaged in providing merchant banking activities involving loan syndication and project consultancy services

JP Morgan Advisors India Private Limited Vs DCIT - TS-170-ITAT-2017(Mum)-TP - ITA No.7979/MUM/2010 dated :16.03.2017

956. The Tribunal held that the assessee, engaged in providing non-binding investment advisory services could not be compared to Motilal Oswal Investment Advisers Pvt. Ltd as it was a merchant banker and therefore not functionally comparable

Further, it held that ICRA Management Consulting Services Ltd & IDC India Ltd were to be accepted as comparables as they had been accepted as comparables by the Tribunal in the assessee's own case for prior assessment years.

Warburg Pincus India Pvt. Ltd. vs DCIT - TS-238-ITAT-2017(Mum)-TP-I.T.A.No.1612/Mum/2015 dated 29.03.2017

957. The Tribunal held that the assessee engaged in the business of providing non-binding investment advisory services could not be compared to :-

- Motilal Oswal Investment Advisors P. Ltd since it was engaged in providing a gamut of functions and activities as such as M&A, profit equity syndication and structured debt,

  advisory services related to corporate matters, merchant banking activities etc and which was functionally different from the investment advisory services provided by

the assessee.

- Integrated Capital Services Ltd as the company was engaged in the business of providing consultancy services in the field of business, M&A, etc. which was not comparable with investment advisory services.

Further, it accepted assessee's plea for inclusion of IDC India Limited as it was engaged in advisory and consultancy services.

Singuler Guff India Advisors Pvt Ltd vs DCIT- TS-448-ITAT-2017(MUM)-TP- ITA No. 403/Mum/2015 dated 21.04.2017

958. The Tribunal held that the assessee engaged in the business of providing non-binding investment advisory services to its AE could not be compared to:

- Eclerx Services Limited as it was engaged in providing data analytics and risk management services rendering it functionally dissimilar to the assessee.
- Mold-Tek Technologies limited as it was engaged in providing engineering design services and therefore was functionally incomparable to the assessee.
- Acropetal Technologies as it was engaged in providing engineering design services and information technologies services without adequate segmental data rendering it functionally dissimilar to the assessee.
- Crossdomain Solutions Limited as it was engaged in providing data processing services and insurance claim processing and therefore was functionally not comparable to the assessee.

Apax Partners India Advisors Private Limited vs DCIT-TS-743-ITAT-2017(MUM)-TP-ITA No.628/Mum/2013 dated 12.09.2017

959. The Tribunal held that for AY 2008-09, the assessee, engaged in providing investment advisory services to its AE could not be compared to:

- ICRA Ltd as it was not functionally comparable having almost all its income from credit rating services
- Deutsche Asset Management India Ltd as it earned significant revenue from investment management services and had no segmental details in respect of income from other activities
- Sriyam Broking Intermediary Ltd as the company was into share broking services
- 21st Century Share and Securities Ltd as significant amount of its income were from share broking services
- SBI Fund Management Pvt Ltd as most of its income was from asset management services Further, it included IDC India Ltd as comparable observing that the company operates in the single segment of market research and management consulting which was held to be comparable to an investment advisory service provider in various precedents of. Hon'ble Bombay High Court in General Atlantic Pvt Ltd, Temasek Holding Advisory India Pvt Ltd and Sandstone Capital Advisors Pvt Ltd.

Further, for AY 2009-10, the Tribunal held that the assessee could not be compared to:

- Integrated Capital Services Ltd as the company was engaged in providing investment banking banking services, advisory in mergers and acquisitions and re–

construction of business

- MotilalOswal Investment Advisors Pvt Ltd as the company was into merchant banking services

It included ICRA Management Consulting Services Ltd as comparable as it was engaged in consulting services to various types of industries through investment advisory, which was held similar to assessee's business.

Warburg Pincus India Pvt. Ltd. vs. ACIT – TS-44-ITAT-2017 (Mum) – TP ITA no. 6981/Mum./2012 / ITA no. 1717/Mum./2014 dated 13.01.2017

960. The Tribunal held that the assessee, rendering non-binding investment advisory services to its AE could not be compared to a company engaged in providing merchant banking and investment banking services.

TA Associates Advisory Pvt Ltd v DCIT - (2016) 66 taxmann.com 130 (Mum)

961. The Tribunal rejected the separate benchmarking of portfolio management services and held that the same were part and parcel of the non- binding investment advisory services provided by the assessee to its AEs and therefore deleted the addition made on account of performance fee received by the assessee. Further, it held that even if the portfolio management services were to be benchmarked separately, the benchmarking could only be done by carrying out comparability analysis with uncontrolled transactions which was not done in the present case as the TPO had merely taken an ad hoc rate of 0.25 percent as the ALP. Further, the Tribunal noted that the assessee had entered into an APA with the CBDT for future years, where a margin of cost plus 21 percent had been accepted to be at ALP and since the margin of the assessee was cost plus 20 percent for the current year, it was to be accepted as it was at the same range as accepted in the APA.

3i India Private Limited [TS-799-ITAT-2016 (Mum)-TP] (ITA No. 581/Mum/2015

962. The Tribunal held that a company which is functionally comparable to the assessee, could not be excluded as comparable merely for the reason of low turnover, especially where no turnover filter was applied. Further it held that the assessee, engaged in providing non-binding investment advisory services could not be compared to companies engaged in merchant banking activities.

Tamasek Holdings Advisors India Pvt Ltd v DCIT - (2016) 46 CCH 0175 (Mum - Trib)

963. The Tribunal held that a company which is functionally comparable to the assessee, could not be excluded as comparable merely for the reason of low turnover, especially where no turnover filter was applied. Further it held that the assessee, engaged in providing non-binding investment advisory services could not be compared to companies engaged in merchant banking activities.

Tamasek Holdings Advisors India Pvt Ltd v DCIT - (2016) 46 CCH 0175 (Mum - Trib)

964. The Tribunal held that the assessee, engaged in providing non-binding investment advisory services to its AE could not be compared to Motilal Oswal Investment Advisors Pvt Ltd since it was engaged in merchant banking and therefore not functionally comparable to the assessee. Further, it held that IDFC Investment Advisors Ltd and ICRA Online Ltd could not be considered as comparable as the said companies were engaged in KPO / Information

Services and portfolio management services, respectively. Accordingly, it allowed the assessee's appeal.

Arisaig Partners (India) Pvt Ltd v ACIT – TS-916-ITAT-2016 (Mum) – TP

Mount Kellet Capital Management India Pvt Ltd – TS-912-ITAT-2016 (Mum) - TP

965. The Tribunal held that companies engaged in the merchant banking business were not functionally comparable with the assessee rendering investment advisory services as there was a huge difference between the functions involving different risks and remuneration. It also excluded a comparable on the ground that the related party transactions exceeded 50 percent.

General Atlantic Pvt Ltd v DCIT (I.TA No.1019/Mum/2014) – TS-544-ITAT-2015(Mum) – TP

966. The Tribunal held that the assessee, engaged investment advisory services for investment in Indian equities and strategic investments could not be compared to companies engaged in asset management services, companies engaged in debt resolution and debt syndication, companies making investments out of its own funds, companies engaged in investment banking & corporate advisory services, companies engaged in merchant banking, mergers and acquisitions and companies engaged in the business of agency and retail distribution.

Goldman Sachs (India) Securities Ltd v DCIT (I.TA No. 222/Mum/2014) – TS-589-ITAT-2015 (Mum) - TP Dated November 30, 2015

967. The Tribunal upheld the CIT(A)'s order excluding Motilal Oswal Investment Advisors Pvt. Ltd. as a comparable for assessee engaged in the rendering of investment sub-advisory services to its AE by noting that TPO after selection of the company as a comparable had observed that the company was engaged in diversified activities including merchant banking / investment banking concerning private placement of equity, debt and convertible instrument, mergers and acquisitions, advisory and re–structuring advisory and implementation, services like private wealth management, asset management and commodities with no segmental details. Further, in response to a letter from the assessee, the CEO of Motilal Oswal had stated that the company was in merchant banking and investment banking and was not engaged in providing investment research and advisory services. Thus, it concluded that the comparable was functionally different from the assessee and the Revenue had failed to bring anything on record to controvert it.

ACIT vs. Sandstone Capital Advisors Pvt.Ltd.[TS 1014-ITAT-2018(Mum)-TP], ITA No.7067/Mum/2016 dated 31.08.2018

968. The Tribunal held that assessee engaged in providing investment advisory services to its AE could not be compared to:

- Ladderup Corporate Advisory as it was engaged in merchant banking which was distinct from investment advisory services. [It relied on the coordinate bench decision of Temasek Holdings Advisors (India) Pvt. Ltd.]

Further, it accepted assessee's plea for inclusion of Informed Technologies Ltd. noting that coordinate bench in Temasek Holdings had considered the functional profile of said

comparable and held it to be comparable to assessee engaged in providing investment advisory services and further, the TPO himself had accepted it to be a good comparable.

Goldman Sachs Asset Management (India) Pvt. Ltd vs ACIT [TS-1103-ITAT-2018(Mum)-TP] ITA No.1427/M/2017 dated 31.08.2018

969. The Tribunal held that assessee engaged in provision of investment advisory services to its AE could not be compared to Motilal Oswal Private Equity Advisors Pvt. Limited. as it was undertaking portfolio management work on behalf of its clients by actually investing funds of the clients in the equity market whereas assessee was only rendering investment advisory services. It noted that there was difference in functions and risks of both the companies. Further, it also observed that business income of comparable was only from investment management. It relied on coordinate bench ruling in case of Temasek Holding Advisors India Pvt. Ltd. wherein it was held that aforesaid comparable should be excluded as the functional analysis of the aforesaid comparable substantially differed from the functions carried out by the assessee of undertaking investment advisory.

Further, it included IDC (India) Ltd and ICRA Online Ltd. relying on coordinate bench ruling in Temasek Holdings Advsiors (I) P Ltd. wherein it was held that M/s IDC (India) Limited and ICRA Online Ltd. were considered to be good comparables as they were engaged in investment advisory.

Blackstone Advisors (India) P. Limited vs ACIT [TS-1211-ITAT-2018(Mum)-TP] ITA No.1581/Mum/2014 dated 26.09.2018

970. The Tribunal relying upon the ITAT order in assessee's own case for earlier year held that under TNMM, a foreign AE could be used as a tested party in respect of the transaction of payment of fees by the assessee to its AE for advisory and other services and the said transaction was to be benchmarked by comparing the margins of the tested party with the margin of external comparables i.e. foreign companies engaged in providing similar advisory services. In the earlier year, the Tribunal had accepted the assessee's stand of selecting the foreign AE as the tested party, noting that (i) the AE was rendering service to various other entities also (ii) the AE was following a scientific method of allocating cost and charging the same with markup to all the entities at same level and (iii) the relevant details to compute the cost allocation on account of services had been certified and filed before the AO. Thus following the earlier year's order, the Tribunal remitted the matter back to the AO for limited verification that the margin shown by the AE was at ALP vis-à-vis foreign comparables selected by the assessee.

Emerson Climate Technologies (India) Private Limited [TS-531-ITAT-2018(PUN)-TP] SA.No 70/Pun/2017 arising out of ITA No.2432/Pun/2017 dated 06.06.2018

Manufacturing & contracting

971. The Court dismissed the Revenue's appeal against Tribunal order upholding TPO's inclusion of S.H. Kelkar and Company Limited as comparable for assessee engaged in the business of manufacturing industrial fragrance, flavours and chemical specialities. The Revenue contended that the Tribunal had not considered other instances where the said company was not held to be comparable. Expressing surprise that Revenue had filed an appeal against Tribunal order which was in its favour, the Court held that when the Tribunal held that the

Transfer Pricing Officer was right in considering this company as comparable whereas some other instances wherein the said company was held to be not comparable were left out from consideration by the Tribunal, then, such findings and conclusion essentially on facts did not raise any substantial question of law.

CIT vs. Firmenich Aromatics India Pvt. Ltd - TS-286-HC-2017(BOM)-TP - INCOME TAX APPEAL NO. 2483 OF 2013 dated 22.02.2017

972. The Court dismissed Revenue's appeal against the Tribunal order confirming CIT(A)'s inclusion of three companies as comparables for benchmarking the transactions of the assessee engaged in manufacturing and trading of medical devices and diagnostic equipments. Noting that the CIT(A) and Tribunal observed that the companies all qualified as manufacturers and sellers of medical and diagnostic equipment (Span Diagnostic – manufacture of diagnostic regents, elissa kits for AIDS; Hicks Thermometers – manufacture of elissa kits, thermometers and Centenial Surgical – manufacture of surgical suture), it held that the TPO was unjustified in excluding the comparables. It further held that the exclusion or inclusion of one or the other comparable would by itself not constitute a question of law unless it was shown that there were important functional dissimilarities or that vital material facts which go to the route of profitability or other material circumstances were involved, which was not so in the instant case and accordingly, it dismissed the appeal.

CIT vs. Becton Dickinson India Pvt. Ltd - TS-45-HC-2018(DEL)-TP - ITA 48/2018 dated 16.01.2018

973. The Tribunal held that the assessee engaged in manufacture and export of frequency control products (FCP) could not be compared to:

- Bharat Electronics Ltd as it was a manufacturer of equipment whereas the assessee was only a manufacturer of components used in making equipment.
- Bharath Heavy Electricals Ltd. as it was engaged in diverse activities of manufacture of power station equipment and was also involved in erection and commission, engineering and consulting services
- MIC Electronics Ltd as it was manufacturer of equipment such as LED display systems, LED lighting products, solar grid etc. whereas assessee was only manufacturer of components used in making equipment.

DCIT vs. Centum Rakon India Pvt. Ltd [TS-750-ITAT-2018(Bang)-TP] IT(TP) A No.472/Bang/2016 dated 20.07.2018

974. The Tribunal held that the assessee engaged in manufacturing of woodworking machinery and spare parts could not be compared to:

- Lakshmi Precision Tools ltd as it had RPT of 74.41% which failed the RPT filter of 15% applied by TPO.
- Guindy Machine Tools Ltd, Lykot Hitech Toolrooms ltd, Kiran Machine Tools ltd and Kulkarni Power tools ltd as they were engaged in the business of software services and thus functionally dissimilar to the assessee engaged in the business of manufacturing machinery.

Biesse Manufacturing Company Private Limited vs DCIT-TS-601-ITAT-2017(BANG)-TP- IT(TP)A No. 755/bang/2017 dated 07.07.2017

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975. The Tribunal held that assessee engaged in manufacturing of laboratory and processing equipments could be compared to Shree Pacetronix, Hindustan Syringes and Medical Devices Limited, Centennial Surgical Suture Limited, Allengers Medical Systems Limited Ganson Ltd. and Span Diagnostic Ltd as it was acceptable to broaden the scope of the comparability analysis to include transactions involving products that are different, but functionally similar and rejected assessee's contention that they should be excluded on the basis of product differences.

IKA India Pvt Ltd vs DCIT [TS-1049-ITAT-2018(Bang)-TP] IT(TP)A No.2192/Bang/2017 dated 17.09.2018

976. The Tribunal held the assessee, engaged in the purchase of electro-optics components and manufacture, assembling and testing of opto-electronic equipment could not be compared to companies engaged in manufacture of cardio vascular equipment and devices, companies engaged in the manufacture of high precision special purpose motors for surgical and dental instruments, companies engaged in the manufacture of electronic equipment, companies engaged in manufacture of fuse holders, reed relays, switches and key boards and companies engaged in the manufacture of storage optical media.

Further, it held that a difference in fixed assets between the assessee and its comparable does not adversely affect the interest of the assessee but would reduce the operating margin of the comparable companies and that the cost of fixed assets alone was not a determining factor for comparability if the corresponding turnover was also higher.

Alpha ITL Electro Optics Pvt Ltd v DCIT (IT(TP)A No.249/Bang/2015) – TS-601-ITAT-2015 (Bang) – TP

977. The Tribunal remanded the entire matter to CIT(A) to decide afresh noting that CIT(A) had passed a cryptic order on the issue raised by the assessee that TPO had erred by not restricting the TP adjustment to AE transaction only,although it was observed by CIT(A) that assessee had two manufacturing units in two buildings (one in respect of goods manufactured and exported to AE and one for non-AE). Observing that the CIT(A)'s order had not given a finding when the assessee had specifically taken a ground before CIT (A) that the AE segment under the manufacturing activities was concerned, its transactions were at arm's length even if the comparables adopted by the TPO were to be considered, it restored the appeal to CIT(A) directing that he should decide all the aspects of the matter afresh by way of a speaking and reasoned order after providing adequate opportunity of being heard to both sides.

Sartorius Stedim India Pvt Ltd. vs Dy.CIT [TS-1218-ITAT-2018(Bang)-TP] ITA No.2084/Bang/2017 dated 12.10.2018

978. The Tribunal remitted the issue in the case of assessee's contract manufacturing & software services segments to the file of AO/TPO in respect of the following comparables:

- Aztech Software Ltd, Accel Transmatics Limited, Megasoft Limited where the assessee contended that the companies failed the RPT filter of 15% as it had an RPT of 17.35%,30.76% and 52.74% respepctively. The Tribunal questioned assessee about the correctness of RPT% submitted vis-à-vis TPO's order and accordingly remitted the matter to the AO/TPO for fresh decision.
- Infosys Technologies Limited, KALS Information Systems Ltd and Tata Elxsi ltd

as the assessee contended that these companies should be excluded on grounds of functional dissimilarity. Accordingly, Tribunal remitted the matter back to the AO/TPO for fresh consideration.

GE Medicals Systems India Pvt ltd vs DCIT-TS-587-ITAT-2017(BANG)-TP-ITA No. 1414(Bang)2010 dated 23.06.2017

979. The Tribunal held that the assessee engaged in the business of manufacture and/or assembly of components of cable glands, hydraulic motors and pumps and its parts could not be compared to:

- Amtek Auto Ltd as it was engaged in automotive components and therefore could not be compared to the assessee. In respect of the Hydraulics Division i.e Sale of motor & pumps, noting that the assessee had sought exclusion of Dynamatic Technologies Ltd and Denison Hydraulics India Ltd on the ground of their related party transaction (RPT) was more than 15% of the revenue and the TPO had not applied RPT filter, the Tribunal remitted the matter back to the file of TPO/AO to exclude the same if the RPT was more than 15%.

British Engines (India) Pvt. Ltd. vs. DCIT-TS-890-ITAT-2017(Bang)-TP IT(TP)A No.1454/Bang/2010 dated 06.11.2017

980. The Tribunal held that a company having 50 percent of its turnover relating to manufacturing activities could not be compared with the assessee who did not carry on any manufacturing activities.

DCIT v Devendra Kumar Bhasin (ITA No. 12/CHD/2014) – TS-499-ITAT-2015 (Chd) – TP

981. Where the assessee was engaged in the manufacture and export of tractors and the TPO rejected HMT Ltd as comparable on the ground that its turnover was Rs.248 crore as against the assessee's turnover of Rs.120 crore, the Tribunal observing that HMT Ltd. was engaged in the manufacturing of tractors and power tillers and was functionally similar to the assessee and held that the turnover of the company was only 2 times that of the assessee, included this company as a comparable.

SAME Deutz-Fahr India Pvt. Ltd. [TS-316-ITAT-2017(CHNY)-TP] - /ITA No.2666/Mds/2016 dated 22.02.2017

982. The Tribunal restored the comparability of Supraj Engineering Ltd (manufacturing brake lining for four wheelers and two wheelers) in case of assessee engaged in the business of manufacturing brake lining to automobile industry, more particularly, 4-wheeler noting that assessee's ask for exclusion was on basis that there were no segmental details in respect of manufacture for 4 wheelers and 2 wheelers however Revenue could obtain the segmental details. It directed TPO to issue necessary notice under Section 133(6) to find whether segmental details were available and thereafter decide issue afresh in law.

Infac India Pvt Ltd vs Dy.CIT [TS-1369-ITAT-2018(Chny)-TP] (IT(TP)A No.27 /Chny /2018 dated 05.10.2018

983. The Tribunal observed that the TPO excluded the three comparables viz. Akasaka Electronics Ltd, DR Electricals & Switchgears Pvt. Ltd. and JK Switchgears& Cable Pvt. Ltd by merely stating that they did not meet the criteria of one or more filters with respect to the assessee

engaged in manufacturing of medium voltage switchgear components, ring main unit components, etc. Further, the DRP had confirmed the TPO's order of exclusion without any findings. The TPO/DRP had failed to consider the submissions of the assessee vis-à-vis the comparables satisfying all the filters. Thus, the Tribunal directed the DRP/TPO to give clear finding on their inclusion/exclusion after considering all details and evidence available and remanded the matter.

Efacec Switchgear India Pvt Ltd vs DCIT [TS-830-ITAT-2018(DEL) TP] ITA No.7817/Del/2014 dated 13.06.2018

984. In case of assessee engaged in manufacture of autoparts, the Tribunal remanded comparability of a) Munjal Showa Ltd. so as to enable assessee to submit financials which were not submitted before the TPO. (The assessee was contesting its exclusion on basis high turnover and that it was engaged in manufacture of different products) b) Bosch Chasis Systems India Ltd directing the TPO to call for comparable's data to verify if results could be reasonable excluded (It relied on Del HC decision of Mckinsey Knowledge Centre wherein it was stated that a comparable having different financial year could not be excluded if its results could be reasonably extrapolated.)

Nissin Brake India Pvt Ltd vs DCIT [TS-1252-ITAT-2018(DEL)-TP] ITA No.6366/Del/2017 dated 16.11.2018

985. The Tribunal held that assessee engaged in provision of designing services to its AE could not be compared to:

- Archohm Consults Pvt Ltd. as it was providing architect services whereas assessee was engaged in designing, development of new product and computer aided designing.
- Zipper Trading Enterprises as it was into trading and received commission from acting as an agent from trading.

Further, it included

- Neilsoft Ltd as it was engaged in software engineering services which were similar to assessee's designing services.
- Tata Elxsi's software development and services segment (which included product design services, innovative design engineering and visual computing) as nature of services provided were similar to assessee.
- Software development and services segment of Varna Industries as its segment was similar to the services provided by the assessee

Terex Equipment Pvt Ltd (Formerly known as Terex Vectra Equipment Pvt. Ltd.) vs ACIT [TS-1225-ITAT-2018(DEL)-TP] (ITA No.1882/Del/2014) dated 14.11.2018

986. The Tribunal held that assessee engaged in manufacturing products assembled in manufacture of air conditioners for its AE could not be compared to:

- Rexnord Electronics. as it was a turnkey provider for industrial refrigeration where its compressors manufactured and packaged condensers were used in food and chemical industries and as per financials on record, the company had undertaken several research developmental activities.
- Frick India Ltd. as it was into manufacturing fans, motors, blades and accessories.

Further,

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- It included Blue Star Limited subject to TPO being able to compute the profit margin from assembly of airconditioners otherwise on failure of TPO to do so, the comparable was directed to be excluded.

Carrier Midea India P. Ltd vs Dy.CIT [TS-1256-ITAT-2018(DEL)-TP] (ITA No.7675/Del/2017) dated 22.11.2018

987. The Tribunal held that Astra Microwave Component Ltd (AMCL) could not be considered as comparable to the assessee, engaged in the manufacturing and export of microwave components as the assessee was a captive unit as against AMCL, a full-fledged manufacturing and marketing company. Further, it also held that theassessee was not a complete manufacturer of the final product, but was only making value addition on behalf of the AE and therefore, it excluded the same company.

Akon Electronics India Pvt. Ltd vs. DCIT – TS-105-ITAT-2017 (Del) – TP ITA No.4804/Del/2009 ITA No.4837/Del/2009 dated 15.02.2017

988. The Tribunal held that Shroff Engineering Limited engaged in in the manufacturing of premium "PLUGA" brand Submersible Pumpsets, Openwell Submersible Pumpsets, Drainage Pumps and Mini Monoblock Pumps was comparable to the assessee engaged in the business of manufacturing and sale of pumps to AEs and non-AEs and accordingly disregarded DRP's rejection of this company merely on the ground that TPO had no occasion to consider this company in the TP proceedings.

Weir Minerals (India) Private Ltd. vs DCIT-TS-975-ITAT-2017(DEL)-TP ITA No.-2021/Del/2015dated 23.11.2017

989. The Tribunal noted the proposition laid down in the Delhi High Court decision in Rampgreen Solutions wherein it was held that though product comparability can be of broad level under TNMM, the nature of products manufactured by the comparables, vis-a-vis that of the tested party should be considered and if found to be entirely different from the tested party, such comparables should be excluded. On the above basis, the Tribunal held that the assessee, engaged in manufacturing of a wide range of equipments used for Dynamic Weighing, Feeding and Controlling flow of sold materials could not be compared to Bharat Bijli Limited (manufacturing Electric Motors and Transformers**),** CTR Manufacturing Industries Limited(manufacturing engineering and electronics products being tap changers, capacitors, railway equipments, fire systems, wind turbine generation etc.), GMM Pfaudler Limited (manufacturing chemical process equipments, mixing system, filtration and separation), and even Greaves Cotton Limited (manufacturing diverse products such as high-pressure pumps, gear boxes, etc.) and Lincoln Helios (manufacturing of lubrication systems).

DCIT vs. Schenck Process India Limited [TS-397-ITAT-2018(Kol)-TP] ITA No.130/Kol/2016 dated 18.05.2018

990. The Tribunal dismissed Revenue's appeal and held that assessee engaged in manufacture and export of silk fabric could be compared to:

- Zenith Exports Ltd as it was engaged in manufacture and trading of silk fabrics and its segmental results were available and rejected Revenue's contention of high turnover and assets since in AY 2010-11 TPO himself had selected the comparable with similar turnover and comparable assets.

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- Eastern Silk Ind. Ltd as its RPT filter of 16.25% was within the tolerance range of 15%-25% as considered by coordinate bench decisions and also the TPO had accepted this comparable in subsequent year even though the comparable had a higher RPT.

Further, it excluded Silktex Ltd. from the list of comparables included by the TPO and confirmed by the CIT(A) since its asset base was a mere 23.47 crores as against the tested party's asset base of 64.21 crores.

DCIT vs JJ Exporters Ltd. [TS-1047-ITAT-2018(Kol)-TP] ITA No.1371/Kol /2017 and CO No.71/Kol/2018 and ITA No.1372/Kol/2017 and and CO No.72/Kol/2018 dated 19.09.2018

991. The Tribunal citing Rule 10D which stresses the relevance of the FAR analysis, held that only those companies which were into the manufacture of bulk drugs i.e the same business of the assessee could be taken as comparable.

Astrix Laboratories Ltd v ACIT - (2016) 67 taxmann.com 28 (Hyd)

992. The Court dismissed Revenue's appeal seeking exclusion of HMT Limited as a comparable for assessee engaged in manufacture and export of tractors. Noting that both assessee and HMT Limited were in the segment of manufacture of tractors and power tillers and performed the same functions, the Court upheld Tribunal's view that that exclusion of a company only on the ground of high turnover was not justified. Further, it rejected Revenue contention that HMT should be excluded as it was a government company and held that no provision of law which makes any distinction between a government owned company and a company under private management for the purpose of transfer pricing audit and/or fixation of ALP and accordingly dismissed the appeal.

CIT vs. Same Deutz – Fahr India Private Limited-TS-973-ITAT-2017(MAD)-TP dated 05.12.2017

993. Where the assessee had obtained factory license, paid excise duty and carried on operations of value addition through plant and machinery, the Tribunal rejected assessee's classification of itself as a 'limited risk distributor and held that the TPO was correct in classifying the assessee's operations of slitting jumbo roll into smaller rolls and repacking it as 'manufacturing activity' for the purpose of benchmarking assessee's import transactions for AY 2012-13. It relied on the decision in the case of Northern Strip Ltd case and Apex Court decision in India Cine Agencies [TS-38-SC-2008], wherein it was held that cutting and slitting of polyester films was a manufacturing activity. Further, it rejected TPO's benchmarking approach whereby he had increased margin of trading comparables selected by assessee by 3%, and held that the presumption drawn by the TPO that the increase of margin by 3% would bring out the result for manufacturing activity also was not correct, since it did not consider the risks attached to manufacturing activity; Accordingly, the Tribunal remitted the selection of comparables to the file of AO directing it to select comparables which were engaged in similar activities of converting jumbo rolls into smaller sized rolls.

UPM-Kymmene India Pvt. Ltd vs. DCIT-TS-765-ITAT-2017(Mum)-TP dated 27.09.2017

994. The Tribunal held that the assessee engaged in manufacture and sale of luggage and travel accessories to its AEs could not be compared to:

- Gammco Limited as it was engaged in sales and marketing, services and

assembling of DG sets as dealer and manufacture of DG sets and segmental details were unavailable.

- TIL Limited as it was engaged in manufacturing and marketing of a comprehensive range of material handling, lifting port and road construction solutions with integrated customer support and after Sales Service and its products and services were termed as Materials Handling Solutions (MHS) rendering it functionally dissimilar to the assessee.

Samsonite South Asia Pvt Ltd vs. DCIT-TS-809-ITAT-2017(Mum)-TP ITA No.1934/ Mum/ 2017 dated 01.09.2017

995. The Tribunal held that assessee engaged in the manufacture of jewellery could not be compared to Gitanjali Export Corporation Pvt Ltd as it was into polished diamond export and the content of gold in the jewellery exported by the company was negligible i.e.1.10% as against assessee's average gold content of 40%. Thus, could not be compared owing to product dissimilarity.

DCIT vs Uni Design Jewellery Pvt Ltd [TS-769-ITAT-2018(Mum)-TP] ITA No.4341/Mum/2016 dated 02.07.2018

996. The Tribunal held that the TPO erred in excluding the following companies as comparable while benchmarking the manufacturing and contracting activities of the assessee:

Dragger-Frost Tools Ltd as the company was wrongly excluded by the TPO on the ground that the company stopped operations during the year under review, which was not the case.

Hittco Tools Pvt. Ltd.as the TPO wrongly excluded the company as comparable as it was a consistent loss maker whereas the company was consistently making profits in the subsequent years

Rajasthan Udyog and Tools Ltd as the company was wrongly excluded on the ground of persistent losses whereas it had earned profits in the earlier years.

DCIT vs. Seco Tools (India) Pvt. Ltd. - TS-1101-ITAT-2017(PUN)-TP] - ITA No.606/PUN/2014 dated 29.11.2017

997. The Tribunal held that Assessee engaged in manufacturing and marketing of measuring instruments, could not be compared to

- Schrader Duncan Ltd as the product manufactured by this company (tyre pressure gauges) were different from assessee as observed, by the Tribunal in assessee's own case for previous A.Y.
- Areva T&D India Ltd as the company was engaged in different business activity (power transmission and distribution business), further it did not meet the turnover filter applied for comparable selection and had different accounting period as observed, by the Tribunal in assessee's case for previous A.Y.

Further, the Tribunal accepted assessee's contentions for inclusion of Aplab Ltd as comparable since the strike of 8 days during relevant year, which was the TPO's basis for rejection the said comparable had insignificant impact on the comparable company's turnover.

The Tribunal also held that ALP-adjustment should be restricted to transactions with AEs only and cannot be made at entity level, relying on Bombay HC ruling in case of Thyssen Krupp Industries India P. Ltd. It further accepted the additional ground raised by assessee and directed the Revenue to consider foreign exchange fluctuations as part of operating income by relying on Pune ITAT ruling in case of Approva Systems (P.) Ltd

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WIKA Instruments India Pvt. Ltd vs DCIT Circle 12 Pune -ITA No 760&764/ PUN/2015-TS-425-ITAT-2018(PUN)-TP dated 25.04.2018

998. Where the assessee, engaged in the manufacture and sale of internal combustion (IC) engines for power generation and industrial applications in the domestic market as well as for export outside India entered into various international transactions relating to export of IC engines, payment of royalty and technical know-how fees to associate enterprises ('AEs'), rendering of procurement support services and receipt of commission from AEs as well as transactions relating to interest on extended credit period allowed to AEs and other transactions and, benchmarked the same under TNMM by aggregating the said transactions, which was rejected by the TPO who proceeded to benchmark the transactions on a stand-alone basis and made an upward addition of Rs.40.64 crore, the Tribunal relying on Rule 10A(d) and 10B of the Rules as well as OECD Guidelines, held that, in appropriate circumstances, where there was existence of closely linked transactions, the same could be grouped and constituted as one composite transaction for the purpose of determining ALP. With regard to the facts of the case, it noted that, where the assessee's primary activity was to manufacture and sell IC engines and components, then the activities of importing engine parts and components, payment of royalty against receipt of know-how, provision of procurement support services to the AEs to help the sourcing of components, receipt of IT support services, design services and payment of technical knowhow fees, etc. were closely linked to the export of manufactured IC engines. Accordingly, it directed TPO to aggregate the various activities undertaken by assessee under the head of 'manufacturing activities' for the purpose of benchmarking.

Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated
03.03.2017

999. The Tribunal held that the assessee engaged in the business of manufacture and sale of train components could not be compared to:

- Shanthi Gears Ltd as it was engaged in the manufacturing of gears and geared boxes used in textile machinery, power sector etc whereas assessee operated in the automotive sector
- International Combustion (India) Ltd as it was engaged in the manufacture and sale of premium quality equipments, it has three business divisions i.e. heavy engineering, polymer and bauer and catered to a different industry.

Spicer India Limited Vs ACIT - TS-99-ITAT-2017(PUN)-TP - ITA No.251/PUN/2014 dated 10.02.2017

1000. The assessee was engaged in the manufacture of headliners, door panels, parcel trays, etc (covered in auto ancillary segment). for its AE. The TPO rejected three of the eleven comparables selected by assessee. The Tribunal held that a) K.R. Rubberite Ltd b) Lifelong India Ltd. which were engaged in production/manufacture of autoparts were comparable to assessee as the auto parts were covered in auto ancillary units. Further, it rejected Bright Autoplast Ltd.as its RPT was very high and hence did not satisfy the RPT filter applied by TPO. It directed TPO to recompute mean margin of comparables and determine the ALP, if any.

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Grupo Antolin India Pvt. Ltd (Erstwhile known as Grupo Antolin Pune Pvt. Ltd vs Dy.CIT) [TS-1128-ITAT-2018(PUN)-TP] ITA No.299/Pun/2013 dated 17.10.2018

1001. The Tribunal rejected assessee's contention and held that Hindustan Copper Ltd, engaged in the manufacture and production of copper wires was comparable to the assessee who was engaged in the manufacture, production and export of Steel Wire Ropes and held that what was required under TNMM was broad comparability and therefore copper and steel being includible within the broad category of metals was indeed comparable.
Usha Martin Limited (Earlier known as Usha Beltron Limited) vs. ACIT - TS-442-ITAT-2018(RANCHI)-TP - ITA No .68/Ran/2017 dated 31.05.2018

Support Services

1002. The Court, noting Tribunal's finding that Cosmic Global ltd's nature of business was distinct from the one carried out by assessee engaged in the business of providing VISA processing services to its AE dismissed Revenue's appeal in the absence of substantial question of law. The Tribunal had remanded the matter back to the AO/TPO for determining the functional comparability of Cosmic Global vis-à-vis the assessee. The Revenue had contended before the Court that since the company was selected by the assessee as a comparable, it was not open for the assessee to deviate from the same.
VFS Global Services Pvt ltd-TS-595-HC-2017(BOM)-TP-ITA No 336 of 2015 dated 19.07.2017

1003. The Court dismissed Revenue's appeal, and upheld Tribunal's exclusion of ICRA Online Ltd for assessee providing marketing support services to AE for AY 2007-08; Even though assessee had initially included ICRA Online Ltd as a comparable in its TP-study and subsequently contended its exclusion during assessment proceedings on the basis of Director's Report which was not available when TP-study was carried out, the Court rejected the Revenue's contention that as per Rule 10D(4), information / document for TP-study should as far as possible be contemporaneous and should exist on the date specified in Sec 92 (f)(iv) and that fresh TP-study on the basis of the Director's Report of ICRA Online Ltd could not be the basis of its exclusion by observing that the date specified in Sec 92(f)(iv) was the due date specified in Explanation 2 to Sec 139 of the Act i.e. November 30th of the AY and assessee's contention to exclude ICRA Online Ltd was based on Director's Report dated May 12, 2007 (before due-date), However, the Court admitted Revenue's appeal on the question whether ITAT was justified in directing inclusion of Machine Tools India Ltd. as a comparable.
CIT v/s Haworth (India) Pvt Ltd. [TS-534-HC-2016(BOM)-TP] INCOME TAX APPEAL NO.233 OF 2014

1004. The Court dismissed Revenue's appeal and upheld the Tribunal's order excluding Media Research Users Council (MRUC) as a comparable to assessee engaged in marketing support services noting that Tribunal had excluded MRUC from the list of comparables on grounds of functional dissimilarity as no risk was assumed by MURC being a non-profit organization, failure to meet turnover filter, and difference in risk profile, etc. It observed that MRUC was outsourcing most of its activities to a third party research agency unlike the assessee and also

the element of quid pro quo or payment of consideration commensurate with the service given was absent in MRUC's case as major source of its income was in form of membership fees and subscription fee for Indian Readership Survey (IRS) and Indian Outdoor Survey (IOS) reports which were prepared for its members; Thus, it held that since the working pattern and model adopted by MRUC was unlike a commercial organization and completely different, the Tribunal was justified in exluding MRUC from list of comparables.

Pr.CIT vs Belkin India Private Ltd [TS-1098-HC-2018(DEL)-TP] ITA No.966/2018 dated 04.09.2018

1005. The Court dismissed Revenue's appeal and upheld ITAT's order excluding five comparables namely, Aptico Ltd., Cameo Corporate Services, Global Procurement Consultants, Killik Agencies and Marketing Ltd. TSR Darashaw in case of assessee engaged in marketing support services to its AE noting that the reasoning given by Tribunal was factual and disclosed the functional and other reasons to elucidate, dissimilarities between the five entities and the assessee. ITAT had excluded a) Aptico as it was a government enterprise not comparable with a private service provider b) Cameo Corporate Services as functional profile was similar to TSR Darashaw (which was a comparable excluded on grounds of functional dissimilarity) c) Global Procurement Consultants Ltd as its business model was different since it was established by the government to serve the purpose of professional procurement and management services needs and also to provide combined management services required by the government departments d) Killik Agencies and Marketing Ltd. as it acted as an agent for various foreign companies for sale of dredgers, Dredging Equipments, steerbable Ruddar propulsion, maritime and aviation lighting, acoustic communication equipments and also exported micro switches, engineering items, acoustic items and headsets, etc) TSR Darashaw Ltd as it undertook the registrar and transfer agent activity functions for equity and preference shares, venture instruments and bonds, commercial paper and private placements and undertook storage, retention and tribal of physical and/or electronic records and handled activities handled by Payroll and retirement ”funds”.

CIT-International Taxation-2 vs PHILIP MORRIS SERVICES INDIA SA [TS-1377-HC - 2018-(Del)-TP] INCOME TAX APPEAL No. 1468/2018 dated 18.12.2018

1006. The Court dismissed Revenue's appeal against Tribunal order upholding exclusion of Mold-tek technologies ltd from the list of comparables for benchmarking back-office research services rendered by assessee to its AEs. Noting that the Tribunal had excluded Mold-Tek Technologies holding it was functionally dissimilar as it was dealing in engineering design and detailing services, website design services etc and on account of exceptional financial results due to mergers/demergers, the Court held that being a pure question of fact, the findings of the Tribunal, in the opinion of this Court, **could not** be looked into or faulted under Section 260A of the Income Tax Act.

Pr.CIT vs EVALUESERVE.COM Pvt Ltd-TS-859-HC-2017(DEL)-TP dated 31.10.2017

1007. The Court held that where the Tribunal in the prior years for AY 2004-05 accepted the plea of the assessee that it was not into core R & D activities but actually into the provision of marketing support services which was also accepted by the AO in his remand report for the relevant year i.e. AY 2005-06 as well the DRP for AY 2007-08, the Tribunal was incorrect in concluding that the assessee was engaged in providing core R&D activities for the year

under review. Accordingly, it held that ITDC (a comparable selected by the assessee and affirmed by the DRP for AY 2007-08) was wrong excluded by the Tribunal on the ground of functional dissimilarity since the said company was also providing market support services akin to the assessee.

Honda (R&D) India Pvt Ltd v ACIT - TS-525-HC-2016 (Del) TP ITA 616/2015

1008. The Court held that Call Centers are not functionally comparable with KPO service providers and that supernormal profits indicating functional dissimilarity would require further analysis.

Rampgreen Solutions India Pvt Ltd v Commissioner of Income-tax - [2015] 60 taxmann.com 355 (Delhi)

1009. The Tribunal held that the assessee providing marketing support services to its AEs could not be compared to (i) Coral Hubs Ltd as it had outsourced its IT enabled services to third party vendors, (ii) Accentia Technologies Ltd as it had undergone an extra ordinary event (merger) which impacted its margins (iii) Acropetal Technologies Ltd as it was engaged in providing high end services of engineering design which were totally different from IT enabled services. As regards Crossdomain Solutions Ltd, it noted that the company was engaged in providing high end and KPO services, development of product suits and IT enabled services and therefore directed the TPO to restrict the inclusion of the said company to IT enabled services only.

Lubrizol Advanced Materials India Pvt Ltd v ACIT – TS-1025-ITAT-2016 (Ahd) - TP

1010. The Tribunal remanded the comparability of Just Dial Ltd. to DRP for benchmarking the sales support transaction of the assessee with its AE on the ground that financials for the subject year were not available in public domain to indicate that it was functionally dissimilar when proceedings before the DRP were completed. Therefore, it remanded the comparability of the said company and directed the DRP to consider exclusion of Just Dial Ltd from the list of comparable companies based on the Financials.

Microsemi Storage Solutions India Pvt Ltd vs ACIT [TS-927-ITAT-2018(Bang)-TP] IT(TP) A No. 2103/Bang/2016 dated 24.08.2018

1011. With regard to the assessee's call center service segment, the Tribunal excluded 12 comparables on grounds of functional dissimilarity following co- ordinate bench rulings in Stream International Services, Capital IQ Information, Avineon India and Zavata India; Also excluded 2 more comparables which failed TPO's employee cost filter; However, refused to accept assessee's contention to exclude Allsec Technologies Ltd, Apollo Healthstreet Ltd and I-Services India Pvt. Ltd as assessee had not made out a case for their exclusion.

Considering that the assessee was involved in Telecom and BPO services and its employee cost was very less compared to similar business, the Tribunal concluded that a company which failed the employee cost filter was to be rejected.

AOL Online India (P)Ltd v DCIT - TS-156-ITAT-2016(Bang)-TP

1012. The Tribunal admitted the additional ground of the assessee for exclusion of Asian Business Exhibition & Conferences even though it was not contested before lower authorities, since the Tribunal in the case of Electronics for Imaging India P Ltd had excluded the said

company on the ground of functionality. Accordingly, it held that the impugned company engaged in organizing exhibitions and events was not comparable to the assessee w ho provided support services. Further, where the AO / TPO did not give effect to the DRP directions which provided for exclusion of HCCA business Services as a comparable, it held that the assessee could approach the appropriate authorities for compliance of the directions. ***Brocade Communication Systems Pvt Ltd v ACIT – TS-995-ITAT-2016 (Bang) – TP***

1013. The Tribunal held that the assessee, engaged in providing back office services relating to accounts payable processing and HR to its AEs could not be compared to the following companies:

- Companies whose financial results arise out of amalgamation
- Companies providing KPO Services
- Companies failing the employee cost filter
- Companies having super normal profit and functionally incomparable
- Companies providing geospatial services in land based technologies
- Companies having a different scale of operations owing to the brand value of its parent company.

Flextronics Technologies (India) Pvt Ltd v DCIT (IT(TP)A No.1559/Bang/2012) – TS-600-ITAT- 2015 (Bang) – TP

1014. The Tribunal held that the assessee engaged in the business of providing customer relationship services and BPO services could not be compared to the following companies:

- Companies having undergone extra-ordinary events during the year
- Companies providing engineering design services, data analytics and operation management which were KPO services
- Companies outsourcing most of its work
- Companies functionally dissimilar being established market leaders, having huge brand value and economies of scale.

E4e Business Solutions India Pvt Ltd v DCIT (I.T. (T.P.) A. No.1765/Bang/2013) – TS-541-ITAT-2015 (Bang) – TP

1015. The Tribunal held that the assessee, engaged in providing end to end BPO services could not be compared with the following companies:

- Companies engaged in the diversified activity of medical transcription, medical coding, billing, receivable management as these were different from the service of contract center provided by the assessee
- Companies providing high-end services involving decision making analysis, requiring thought process and evaluation of various factors
- Companies undergoing extra-ordinary development such as amalgamation
- Companies engaged in the providing consultancy services, translation services and accounts BPO and companies outsourcing its services.

E4e Business Solutions India Pvt Ltd v DCIT [IT(TP)A No 1845 / Bang / 2013 & IT(TP)A No 1777 / Bang / 2013) – TS-632-ITAT-2015 (Bang) – TP

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1016. The Tribunal held that the assessee, engaged in marketing support services to its AEs could not be compared to:

- ICRA Techno Analytics Ltd (seg) as its service segment comprised of various services such as software development, software consultancy, engineering services, web development, web hosting, etc
- Persistent Systems & Solutions Ltd as the segmental details of software services were not available

Logitech Engineering & Design India P. Ltd vs DCIT - TS-145-ITAT-2017(Bang)-TP - I.T(TP).A No.287/Bang/2015 & I.T(TP).A No.127/Bang/2015 dated 03.03.2017

1017. The Tribunal held that the assessee, engaged in providing software development services to its AE could not be compared to Infosys Ltd as it owned significant intangibles, had huge revenues from software products and segmental details of software services were not available

Further, it remitted the issue of comparability of LGS Global Limited back to the file of the CIT(A), noting that instead of deciding the issue itself, the CIT(A) had remitted the matter to the file of the TPO, which was not in accordance with the provisions of Section 251 of the Act.

Samsung R&D Institute India Bangalore Pvt. Ltd. Vs. DCIT - TS-156-ITAT-2017(Bang)-TP - IT(TP)A No.55//Bang/2015 dated 03-03-2017

1018. The Tribunal held that the assessee, engaged in providing customer support services to its AEs could not be compared to:

- Eclerx Services Ltd as it was involved in diverse services (business consultancy etc) in the nature of KPO services and there was lack of segmental data
- Accentia Technologies Ltd., (Seg.) as it operated a different business strategy i.e acquiring other companies for growth
- Cosmic Global Ltd as it was functionally dissimilar considering the fact that its segment revenue from BPO services was very low
- Informed Technologies Ltd as it had diverse operations, lack of segmental data, was engaged trading of securities
- Infosys BPO Ltd as it was a market leader and a giant company, had significant brand value, incurred large amount of marketing expenses.

Magma Design Automation India P. Ltd. Vs. DCIT - TS-141-ITAT-2017(Bang)-TP - I.T(TP).A No.1279/Bang/2014 dated 28.02.2017

1019. The Tribunal held that companies providing variety of operations such as marketing of equipment relating to banking and postal offices and whose after sales support service was only an insignificant component of the revenue were not comparable with the assessee's marketing support services.

DCIT v Parametric Technology (India) Pvt Ltd [I.T. (T.P) A. No.145/Bang/2015] – TS-514-ITAT-2015 (Bang) – TP (the rest of the issues and comparables were remitted back)

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1020. The Tribunal held that the assessee engaged in the business of providing customer support services to AE could not be compared to:-

- Eclerx Services Limited relying on the decision in the case of Tesco Hindustan [ITA NO. 1285/BANG/2011] wherein the company was excluded on account of abnormal profits and it was also engaged in KPO services
- Coral Hubs as the it was primarily engaged into outsourcing and thus the business model was different than the assessee.
- Mold Tek Technologies (seg) having employee cost of 7.6% of sales as it failed the employee cost filter of 25% applied by the TPO.

Further, it remitted Genesys International Corporation Ltd. to the file of CIT(A) with the direction to compare its profile with the profile of the assessee based on various documents/agreements entered by assessee and work done, technology used for the purpose of rendering the work to AE.

G.E India Exports Pvt. Ltd vs DCIT-TS-477-ITAT-2017(Bang)-TP- IT(TP)A No. dated 28.04.2017

1021. The Tribunal ruled on selection of comparables in case of assessee providing customer support services to AE for AY 2007-08. Noting that assessee was providing high end technical services with engineering inputs and architecture applications to its AE with engineering inputs and architecture, it ruled that the assessee could not be compared to

- Mold Tek Technologies Limited, relying on the decision of Tesco Hindustan Service Centre

  Pvt Ltd [TS-996-ITAT-2016(Bang)-TP] wherein this company was excluded on acoount of

  abnormal profits and it failed employee cost filter
- eClerx Services Limited on the ground of abnormal profits.
- Vishal Information Technologies Ltd as it was engaged into outsourcing and thus had a different business model than the assessee.
- Infosys BPO Ltd on account of difference in size of operations.

G.E India Exports Pvt. Ltd (Formerly GE Power Controls India (P) ltd) Vs DCIT TS-348-ITAT- 2017(Bang)-TP IT(TP)A No.987/Bang/2011 dated 28.04.2017

1022. The Tribunal remitted the following comparables to the file of AO in respect of assessee engaged in providing customized and development support services to its AEs:

- Larsen & Toubro lnfotech Limited as the functional comparability of this company required

  adjudication at the DRP level.
- Marveric Systems Limited as the DRP had restored this company holding that it failed the export earning filter of 75%. However, in the final order, AO included this company and granted part relief to the assessee.

Accordingly, it remitted the entire issue to the file of DRP and directed it to give a specific finding on the functional comparability of each company against which the assessee had contested.

Alten Calsoft Labs (India) Pvt Ltd vs DCIT -TS-735-ITAT-2017(Bang)-TP-I.T,.(T'.P) A. No.403/Bang/2017 DATED 31.08.2017

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1023. The Tribunal held that the assessee engaged in providing marketing support services to its AEs could not be compared to:

- Asian Business Exhibition and Conferences ltd as it earned revenues from organizing exhibitions and events, sponsorship, delegate fees and entry charge whereas the assessee only participated in such events.
- Killick Agencies & Marketing Ltd as it was engaged in varied activities such as exports of micro switches, engineering items and acoustics and head sets, indicating earning of revenue from sale of products and from activity as agent for various foreign principals for sale of dredgers, dredging equipment rendering it functionally dissimilar to the assessee.
- PAE limited as it was engaged in sale of automotive parts of various vehicles all over India and in providing warranty services to its customers in this regard and therefore was functionally dissimilar to the assessee.
- Salora International Ltd as it was engaged in the sale of mobiles, computers and computer peripherals and other telecom products of various companies all over India and also provided after sales services.

NI Systems (India) Pvt. Ltd vs. DCIT-TS-815-ITAT-2017(Bang)-TP IT(TP)A No. 10491Bang/2016 dated 13.09.2017

1024. The Tribunal held that the assessee engaged in providing marketing support services to its AE could not be compared to:

- HCCA Business Services Pvt Ltd as it was engaged in providing payroll processing services and therefore was functionally dissimilar to the assessee.
- Killick Agencies and Marketing Limited as it was acting as agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propulsions and other equipment and machineries rendering it functionally incomparable to the assessee.
- Asian Business Exhibition & Conferences Ltd as it was mainly engaged in the organization of exhibitions and events as well as conducting conferences on behalf of the various clients for their various products and businesses and therefore was functionally dissimilar to the assessee.

ITO vs. Alcon Laboratories Pvt. Ltd.-TS-942-ITAT-2017(Bang)-TP IT(TP)A No. 391/Bang/2015 dated 21.11.2017

1025. The Tribunal held that the assessee engaged in providing marketing support services could not be compared to Asian Business Exhibition & Conferences Ltd as the said company was in the business of organizing exhibitions and conferences and it operated as an event manager and hence was functionally dissimilar to the marketing and support activities performed by the taxpayer.

Autodesk India Private Limited vs DCIT [TS-532-ITAT-2018(Bang)-TP] IT (TP) A Nos.303/Bang/2015 and 422/Bang/2015 dated 08.06.2018

1026. The Tribunal held that the assessee, engaged in provision of marketing support services to its AE could not be compared to:

- Asian Business Exhibition & conferences Ltd. as it was engaged in organization of exhibitions and events as well as conducting conferences on behalf of the various clients for their various products and businesses.
- AMD India P Ltd as the company derived its income from trading activity and also maintained inventories.

Finastra Software Solutions (I) P Ltd. (formerly Misys Software Solutions India Private Limited) vs. ACIT [TS-404-ITAT-2018(Bang)-TP] - IT(TP)A No.529 & 491/Bang/2016 dated 02.05.2018

1027. The Tribunal held that assessee engaged in provision of marketing support services to its AE could not be compared to:

- Asian Business Exhibition and conference Ltd. as it was primarily and fundamentally engaged in event management.

Further,

- It remanded ICC International Agencies Ltd. (segmental) back to file of TPO for fresh decision to examine complete facts in this regard as it was a new ground raised by assessee

Citrix Systems India Pvt Ltd vs Dy.CIT [TS-1368-ITAT-2018(Bang)-TP] IT(TP)A No.318/Bang/2016 dated 31.12.2018

1028. The Tribunal held that assessee engaged in provision of marketing support services to its AE could not be compared to:

- Asian Business Exhibition and Conference Ltd. as it was deriving income from conducting exhibitions, road shows, conferences, customer events and not from marketing support services.
- HCCA Business Services P Ltd. as its functions were not similar to the assessee. [It relied on coordinate bench ruling in Alcolab which inturn relied on Electronics for Imaging India wherein it was held that payroll processing was a main part of company's operations and thus, DRP's order that its functions were different from marketing support activities was upheld.]

Intuit India Software Solutions P Ltd vs Dy.CIT [TS-1201-ITAT-2018(Bang)-TP] ITA No.2090/Bang/2017 dated 18.10.2018

1029. The Tribunal held that the assesee, engaged in providing technical support services to its AEs could not be compared to

- Cosmic Global Ltd, as it had faced wide fluctuation in its margin as compared to earlier years which was opposed to its normal business trend. Additionally, unlike the assessee, the company outsourced a substantial part of its activities.
- Allsec Technologies as it was engaged in the business of data verification, processing of orders telemarketing, monitoring of quality of calls etc which was different from the functions of the assessee.
- R Systems International Ltd as it was engaged in product development and sale of products.

Gaddomajra Cooperative Labour & Construction Society v ITO - (2015) 45 CCH 0168 Chd Trib

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1030. The Tribunal excluded Allsec Tech Ltd from the list of comparables while benchmarking the transactions of the assessee providing support services to its AEs, since Allsec was in the business of HR outsourcing, mortgage processing, voice intelligence, financial processing and anti-money laundering which was completely different to the services provided by the assessee.

Watanmal India Pvt Ltd – TS-1015-ITAT-2016 (Chny) – TP

1031. The Tribunal held that an assessee engaged in the business of providing financial accounting supporting services to its AE could not be compared to:

- Accentia Technologies Limited as it owned significant amount of brand, IPR and goodwill while the assessee on the other hand, was a simply captive service provider, which provided services related to accounts payable management, payroll, processing invoice processing and handling of related queries and hence not functionally comparable
- Eclerx Services Limited as the company was a KPO engaged in providing data analytics, data solutions services etc. and relying on Delhi HC in the case of Rampgreen Solutions held that it would be flawed to benchmark IT enabled service provider using KPO companies. Noting that the DRP had wrongly categorized the assessee as a KPO, who was a captive service provider and hence the said company was not comparable.
- TCS E-Serve Limited as this company was engaged in diversified activities customer service, transaction processes, collections, risk management, and analytics which made it functionally different. It also relied on the findings of the coordinate bench decision for assessee's own case in earlier year while excluding the company that use of TATA and TCS brand had substantially increased the operating profits.

Bechtel India Pvt Ltd vs DCIT [TS-1026-ITAT-2018(DEL)-TP] ITA No.6779/Del/2015 dated 20.08.2018

1032. The Tribunal held that an assessee engaged in the business of providing IT Infrastructure supporting services to its AE could not be compared to:

- Infosys Limited as it had a high turnover, incurred significant expenditure on R&D, advertisement and marketing resulting in non-routine marketing intangibles, ownership of brands and diversified product portfolio.
- Wipro Technology Services Ltd as its sale transactions was with Citicorp Banking from which shares were purchased by the holding company viz. Wipro Ltd hence its RPT filter exceeded 25% by relying on the decision of coordinate bench in the case of Saxo India Pvt Ltd.
- Acropetal Technologies Limited as its employee cost filter (being 15.3%) failed the 25% filter applied by the TPO.
- Sankya Infotech Ltd as company was engaged in the e- learning activities and training solutions and also in the development of simulation and virtual training products which made it functionally dissimilar to the activities performed by the assessee under IT Infrastructure support services.
- Sasken Communication Technologies Limited as the company was not considered a good comparable IT Infra Support Services segment in light of the coordinate bench decisions in the cases of Saxo India Pvt. Ltd, ION Trading India Pvt. Ltd., Tibco Software etc. wherein it was held that the company was engaged in rendering testing, satellite communication

services, and production of software products, had significant involvement in R&D and had a high proportion of marketing and advertising expenses.

Bechtel India Pvt Ltd vs DCIT [TS-1026-ITAT-2018(DEL)-TP] ITA No.6779/Del/2015 dated 20.08.2018

1033. Where the assessee was not engaged in the activity of purchase and sales, the Tribunal held that the TPO had erred in selecting comparables engaged in trading activity while benchmarking the assessee's business support services and accordingly upheld CIT(A)'s order deleting TP- adjustment for AYs 2007-08 and 2008-09 in respect of the aforesaid services provided to its AEs for the purpose of sourcing of goods.

DCIT vs Itochu India (P) ltd-TS-650-ITAT-2017(DEL)-TP-ITA No. 6287/Del/2012 dated 18.08.2017

1034. The Tribunal held that assessee providing marketing support services to its AE could not be compared to:

- Aptico Limited as it prepared project feasibility reports, carried out market / other surveys, arranged seminars and trainings and also provided energy related services, skill development etc. which were functionally dissimilar to business profile of assessee under MSS segment.
- Choksi Laboratories Ltd as the company was engaged in in clinical research, assaying and hall marking and instrument calibration and validation having assets of high value required for chemical testing whereas the assessee was a routine service provider.
- Rites as the ratio of consultancy fee to the total income came to 45.15% and, therefore, failed the filter of more than 75% of revenue adopted by the TPO.
- Wapcos Ltd. as it was engaged in diversified activities like pre-feasibility studies, feasibility studies, simulation studies, diagnostics studies, socio economic studies, master plans and regional development plans, field investigations, details engineering including design, detailed specifications, tendering process, contract and construction management, commissioning and testing, operation and maintenance, quality assurance and management, software development and human resource development whereas the assessee was a routine service provider.

Further, it restored the inclusion/exclusion of Best Mulyankan Consultants Ltd and directed the TPO to verify if it had a RPT filter of 27.30% of the total revenue, which would exceed the 25% RPT filter applied by TPO and if so, to exclude the same.

Lufthansa Technik Services India Pvt Ltd vs Dy.CIT [TS-1133-ITAT-2018(DEL)-TP] ITA No.5451/Del/2012 dated 15.10.2018

1035. Relying on the coordinate bench ruling in Philip Morris Services Ltd. (Revenue could not distinguish findings given related to comparables), the Tribunal held that assessee providing marketing support services to its AE could not be compared to:

- Aptico Limited as it was providing diversified services like Project report preparation, Technical and economic studies, feasibility studies, Micro enterprise development, Skill development, Project management consulting, Industrial clusterdevelopment, Environmental management consulting, Energy management consulting, Market and social research and Asset reconstruction management services and segmental details were not available.

- Global Procurement Consultants Ltd. as it was providing services aimed at providing advice on procurement and also carrying out procurement audit whereas the activities of assessee were strictly confined to marketing support.
- TSR Darashaw Ltd. as it was undertaking registrar and share transfer activities, recorded management activity and trust fund activity which was functionally dissimilar to the assessee's marketing support services rendered by the assessee to its AE.
- Quippo Valuers as it was providing mainly asset management services (It was engaged in sale of construction and earthmoving equipments through auctions and provision of valuation services in respect of assets).

GECAS Services India Pvt Ltd vs ITO [TS-1187-ITAT-2018(DEL)-TP] CO No.217/Del/2015 dated 18.10.2018

1036. The Tribunal held that assessee engaged in rendering business support services to its AE could not be compared to:

- Certification Engineers International Ltd. as it was engaged in certification, re-certification, safety audit and HSB management systems for offshore and onshore oil and gas facilities. It also supplied manpower to its holding companies which made it functionally incomparable.
- Engineers India as it was engaged in high end diversified activities i.e. in providing engineering procurement, construction, lumpsum turnkey projects and total solutions consultancy, high end and full-fledged engineering and related technical services for petroleum refineries, pipelines and other industrial projects.
- NTPC Electric Supply Co Ltd as it was engaged in electrification services (87% of its operating revenues) and had undertaken several activities for the generation of power during the year.
- Kitco Ltd as it was engaged in providing technical services including services like asset valuation, energy audits, revival studies and was a multi-functional, multi-disciplinary organization offering wide range of services to the industrial and infrastructure.
- Rites Ltd. as it was providing project management consultancy services in diversified fields like rail infrastructure, building and airport transportation and economics, technical services, transport infrastructure, urban infrastructure, quality assurance and training.

Further, the Tribunal observed that the said comparables were government companies whose business models were different and hence was also a ground for exclusion.

Boeing International Corporation India P Ltd vs DCIT [TS-1253-ITAT-2018(Del)-TP] ITA No.1127 /Del/2015 dated 30.10.2018

1037. The Tribunal held that assessee engaged in rendering support services to its AE in network division could not be compared to:

- Aptico Ltd. as it was a government undertaking and engaged in turnkey implementation, preparation of reports and into core activities and also provided high end technical consultancy which made it functionally different. Further, segmental details were not available and it failed TPO's export filter of greater than 25% of total income.
- IDC(India) Ltd. as it was a research company, primarily dealing in research and survey services and product and a high-end service provider rendering varied services in the nature of data measurement products, subscription services, industry research, IT executive program, Custom Solutions and events which made it functionally different.

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- Rites (seg)as it was providing comprehensive engineering and project management services such as pre-project planning involving project identification, feasibility studies and project appraisal. It was a full risk bearing company and thus, could not be compared to a service provider like assessee.
- WPCOS Ltd. (seg) as it was into provision of engineering consultancy services and turnkey projects and had diverse business activities. Further, it had grants by government and the same were treated as fee from other services. Thus, the company was functionally different.

Nokia Siemens Networks Pvt Ltd vs ACIT [TS-1203-ITAT-2018(Del)-TP] ITA No.332 /Del/2013 dated 01.10.2018

1038. The Tribunal held that assessee engaged in provision of marketing support to its AE could not be compared to:

- Bharat Earth Movers Ltd as it did not pass the turnover filter on account of high turnover (more than 7.5 times the turnover of assessee company)
- Telco Construction Equipment Company as it had intangible in form of know-how which was an added advantage as the assessee company did not possess any intangible. Further, the turnover was also substantially higher (more than 12 times the turnover of assessee company).

Terex Equipment Pvt Ltd (Formerly known as Terex Vectra Equipment Pvt. Ltd.) vs ACIT [TS-1196-ITAT-2018(DEL)-TP] (ITA No.930/Del/2013) dated 02.11.2018

1039. The Tribunal held that the assessee engaged in provision of marketing support services to its AE could not be compared to:

- Techprocess Solutions Ltd. as it developed various online platforms for financial services distributors and earned a significant percent of its revenue from transaction processing fees, software development &maintenance services, which were incomparable to the assessee. Further, the company owned unique capabilities and proprietary tools, had 27.38% of its asset in the form of software and was engaged in software services, document management and transaction processing services, which could not be compared to those of the assessee, which was engaged in routine marketing support services.
- Vapi Waste & Effluent Mgmt Co. Ltd as it was a non-profit making entity engaged in treatment of polluted water, industrial effluents and deposition and treatment of solid wastage of the member units. Further, the majority of its capital was contributed by its members and government and hence the price could not be treated as independent and uncontrolled.[It relied on the coordinate bench decision of Actis Advisers India Pvt. Ltd affirmed by Del HC wherein it was held that the comparable was functionally different from the assessee who was a routine market support distributor).
- Choksi Laboratory Ltd. as the company provided laboratory services and was engaged in business of testing, analysis and research services. Further, it expended significant amount on glassware and laboratory consumables and had a high fixed asset ratio.

Intercontinental Hotels Group [India] Pvt Ltd [TS-894-ITAT-2018(DEL)-TP] ITA No.5809/Del/2014 and ITA No.5479/Del/2014 dated 27.07.2018

1040. The Tribunal held that assessee engaged in provision of marketing support to its AE could not be compared to:

- Global Procurement Consult Ltd. as it was engaged in providing full-fledged procurement and financial management support services and further was rejected as a comparable by DRP in AY 2011-12
- Kellick Agencies and Marketing Ltd as it failed to satisfy TPO's revenue filter of 75% (Its revenue came upto 27.7% only).
- TSR Darashaw Ltd as it was engaged in providing share registry, record management, fund management and payroll processing services.
- MCS Ltd and Times Innovation Ltd as they failed to satisfy TPO's employee cost filter of less than 25%

Terex Equipment Pvt Ltd (Formerly known as Terex Vectra Equipment Pvt. Ltd.) vs ACIT [TS-1225-ITAT-2018(DEL)-TP] (ITA No.1882/Del/2014) dated 14.11.2018

1041. The Tribunal held that assessee engaged in provision of management support services to its AE could not be compared to:

- TSR Darashaw Ltd as it was engaged in the activity of record management, handling payroll etc which were more in the nature of back-office support services
- HCCA Business Services Pvt Ltd as it was engaged in payroll processing (activities which were similar to the comparable TSR Darashaw Ltd excluded by Tribunal).

Avaya India Pvt Ltd vs ACIT [TS-1290-ITAT-2018-(Del)-TP] ITA No.1904 /Del/2015 dated 03.12.2018

1042. The Tribunal held that assessee engaged in provision of marketing support services to its AE could not be compared to:

- Aptico Ltd as it was engaged in highly technical services which included Asset Reconstruction and Management Services, Projects Related services, Micro Enterprise Development, Infrastructure, Planning and Development etc.
- Choksi Laboratories Ltd. as it was a Commercial Testing House engaged in testing of various products including chemicals and also offers consultancy services in the field of pollution control as an allied activity
- WAPCOS Ltd. as it was engaged in high-end consultancy and works on engineering projects and was also a government company.
- IDC Ltd. as it was engaged in the business of rendering market research and management consulting services in the field of IT, telecommunications and consumer technology.
- Rediff.com as revenues comprised of revenues from online advertising and fee-based services and no segmental bifurcation was available in the financials.

Beam Global Spirits & Wine (India) Pvt. Ltd. vs CIT [TS-1305-ITAT-2018-(Del)-TP] ITA No.252/Del/2013 dated 11.12.2018

1043. The Tribunal remitted the issue of determining the ALP of business support services of the assessee to its AE with direction of selecting comparables afresh on account of TP analysis carried out by the TPO based on wrong FAR of the assessee and comparables and further, the TPO had assumed wrong functions (marketing support services) were performed by the assessee. It also observed that TPO had himself accepted comparables challenged by assessee in present appeal in subsequent AYs and assessee's business model had not undergone any change. Thus, the Tribunal remitted the issue back by applying the principle of consistency and co-ordinate bench ruling in Adidas Technical Services.

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Wolters Kluwer (India) Pvt Ltd vs DCIT [TS-521-ITAT-2018(DEL)-TP] ITA No.1700/Del/2015 dated 06.07.2018

1044. The Tribunal held that the assessee engaged in provision of business/technical support services to its AE could not be compared to:

- Engineering India, Rites Ltd and HSCC (India) as the companies was a government based company having limited risk factor since the customers were mainly of Government and therefore had different functional profile as compared to assessee. Further, from the annual report of Engineering India, Rites Ltd and HSCC (India), it was evident that the OP/OC margin of this company was higher as compared to assessee.
- IBI Chematur as it was engaged in diversified activities like providing basic and detailed engineering services in the field of petrochemicals, fine chemicals, cosmetics, pharmaceuticals, industrial explosives and waste acid recovery and there were no segmental details available. It undertook significant R&D efforts. It had high related party transactions.
- TCE Consultancy Engineering Ltd as the company was functionally different since it offered multidisciplinary services relating to project engineering, industry of power plants, water supply, waste water projects and segmental information was not available.

Parsons Brinchkerhoff India Pvt Ltd [TS-886-ITAT-2018(DEL)-TP] ITA No.1037/Del/2015 dated 31.07.2018

1045. The Tribunal held that the assessee, engaged in providing marketing support services to its AE could not be compared to TSR Darshaw Ltd as it was engaged in provision of share registry and related financial services and therefore could not be compared with the assessee, a captive market support service provide. Further, it held that Global procurement Consultants Ltd providing shipping logistics, payment and accounting, know-how transfer (training) and bid support services was to be considered as comparable to the assessee.

Freescale Semiconductor India Pvt. Ltd. vs. DCIT - TS-1098-ITAT-2017(DEL)-TP - ITA No1263 /Del/2015 dated 08/12/2017

1046. The Tribunal following the order of the coordinate bench in assessee's own case for AY 2008-09 restored the matter to TPO for carrying out search and selection of comparables having functions similar to the assessee's segment of sales support services noting that it was factually similar to the earlier year where the assessee and TPO had chosen comparables which were functionally different from the functions of the assessee.

Comverse Network Systems [India] Pvt Ltd. vs. ACIT [TS-1012-ITAT-2018(Del)-TP] ITA No.6704/Del/2015 and ITA No.7328/Del/2017 dated 31.07.2018

1047. The Tribunal held that assessee engaged in Marketing Support and Technical Support Services could not be compared to:

- Aptico Ltd as segmental data was not available. Further, it rejected Revenue's argument that there was no requirement to have identical services for applying TNMM after relying on Rampgreen Sales P Ltd case.
- Mahindra Consulting Engineers Ltd as the company was providing consultancy services in the areas of SEZ, water supply and sewage etc as against the assessee providing

installation, commissioning and testing of telecommunication equipment; post implementation equipment support; and after-sales support and maintenance services.

- STUP Consultants Pvt Ltd as the segment being compared was of Civil Engineering and Architecture Consultancy.
- Semac Ltd as the company was primarily engaged in engineering consultancy of industrial projects and related activities.
- Intarvo Technologies as the company was providing call centre services of technical support catering to hardware of computers and installation of BTS equipment for telecom towers.
- Microland Ltd as it was engaged in providing end to end IT infrastructure management services.
- Alphageo (India) Ltd as it was engaged in providing seismic services to the oil exploration and production centres.

Alcatel- Lucent India Ltd vs ITO Ward (1)(4)- TS-256-ITAT-2018(Del)-TP- ITA No 2209/Del/2014 dated 06.04.2018

1048. The Tribunal held that assessee providing marketing support services to its AE was not comparable to:

- Choksi Laboratories as the same was a heavy asset-based company
- WAPCOS as it was a Government Company undertaking engineering contracts and turnkey contracts
- Basiz Fund Services as it possessed huge intangibles.
- HCCA Business Services P Ltd as it was engaged in payroll processing services.

The Tribunal included Cyber Media as comparable as it was engaged in providing marketing and advertisement services being functionally similar to assessee. Further, it remitted back to TPO for evaluating inclusion of one comparable namely ICRA management, after verifying the filter of 25% RPT

Genzyme India Pvt Ltd vs ACIT Circle 1(1)- TS-339-ITAT-2018(DEL)-TP- ITA No 892/Del/2014 dated 20.04.2018

1049. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order rejecting TPO's re-characterization of assessee as 'trader' instead of business support services provider. Relying on the decision of the High Court in Li & Fung, it observed that in view of the undisputed fact that AEs of the taxpayer was into trading activities of various product and the assessee was merely rendering business support services to these AEs in the form of facilitation services to source goods from India, the activities carried out by the assessee could not be classified as trading activities. It further noted that the assessee did not bear any risk in the nature of credit risk, price risk, inventory risk, storage and handling risk etc and accordingly held that the TPO erred in his recharacterization. Considering that assessee had not developed any intangibles or accorded location savings to AE and had earned net operating profit margin on cost of 129.34% against that of its comparables i.e. 14.05%, it held that the assessee was adequately compensated.

ACIT vs. Itochu India Private Ltd. - TS-120-ITAT-2018(DEL)-TP - ITA No.6612/Del./2014 dated 21.02.2018

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1050. The Tribunal held that the assessee rendering marketing support services to its AE could not be compared with-

- Aptico Ltd. as it provided services in nature of project management consulting, feasibility studies and micro enterprise development.
- Choksi Ltd. as it was engaged in providing testing services for various products and was also offering services in the field of pollution control.
- WAPCOS Ltd. as it was awarded with project of Emergency Transport and Infrastructure development and projects of development and hygiene education development.

Fujifilm Corporation v. ITO - [2018] 92 taxmann.com 411 (Delhi - Trib.) - IT APPEAL NOS. 5826 (DELHI) OF 2011 & 195 (DELHI) OF 2013 dated APRIL 4, 2018

1051. The Tribunal deleted the TP adjustment and the rejected the TPO's approach of discarding 2 comparables selected by assessee for benchmarking technical support services to BMWAG [a German entity] on the basis that they were not from Germany but from USA and Japan respectively. The Tribunal relied upon the decision of Bharati Airtel and held that difference in geographical location of market is not sufficient reason to reject a comparable until it can be substantiated that the same resulted in different market conditions. The Tribunal accepted assessee's contention that pricing /cost structures and market dynamics of developed countries like Germany, USA Japan were similar and the service providers from developed countries like USA and Japan have similar economic environment as Germany.

BMW India Pvt Ltd v/s. ACIT [TS-401-ITAT-2018(DEL)-TP] ITA No.6160/Del/2014 dated 14.05.2018

1052. The Tribunal held that assessee engaged in providing sourcing support services to AE for AY 2013-14 could not be compared to Axis Integrated Systems. The Tribunal noted that assessee was a routine captive sourcing service provider while Axis Integrated Systems was engaged in the business of issuing digital certification, however, TPO/DRP included it as a comparable after holding there was a broad similarity in the functionality as both the companies were providing business support services. The Tribunal observed that TPO/DRP had not elaborated as to how it had reached the conclusion that there was a broad functional similarity between assessee and Axis Integrated Systems. The Tribunal relied on Rampgreen Solutions HC ruling and co-ordinate bench ruling in Avenue Asia Advisors and held that DRP as well as the TPO had overlooked the essential requirement that even under TNMM the standard for selection of the comparable transactions could not be diluted. Thus, it dissented with the findings of the lower authorities that a captive sourcing service provider like the assessee could be considered functionally similar to a company providing liaisoning services like Axis Integrated Systems Ltd and directed exclusion **of the said company**.

Li & Fung (India) Pvt. Ltd vs. ACIT [TS-352-ITAT-2018(DEL)-TP] ITA No.7549/Del/2017 dated 14.05.2018

1053. The Tribunal directed the AO/TPO to re-examine the functional comparability of the three government companies viz. Certification Engineers International Limited, Wapcos Limited and NTPC Electric Supply Co Limited via-a-vis the assessee providing business development, advisory and other support services to Boeing Group and also to verify if these companies were benefitting from preferential treatment from Government in getting contracts impacting profits, any grants/ subsidies and if so, to exclude the same from the list of comparables.

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Boeing International Corporation India Private Limited [TS-471-ITAT-2018(DEL)-TP] ITA No.1118/Del/2014 dated 07.06.2018

1054. The Tribunal remanded the comparability of the following comparables for assessee engaged in providing technical support services in the nature of erection, installation, commissioning, etc. of power plants and turbines to its AE:

- HSCC India Ltd as it was not clear whether the company being a government company had received any grants or subsidies. Further, it also directed the TPO to keep in mind that the said company was rejected as a comparable in the assessee's own case for the previous year.
- Mahindra Consulting Engineers Limited to verify the functional profile and clearance of RPT filter.
- Mitcon Consultancy Engineering Services Ltd to verify the RPT filter and segmental information to decide comparaibility..
- Mahindra Engineering Services as the RPT of the company was 58.63 observing that it had been retained as a comparable in the assessee's own case for the last two years.
- EDCA Engineering to decide on the functional comparability

Further, the Tribunal directed for inclusion of MN Dastur & Company Pvt Ltd as the company was functionally comparable since it is engaged in the provision of engineering services which are akin to the assessee's functions and it was selected as a comparable for the previous two years.

Granite Services International India Private Limited vs DCIT [TS-628-ITAT-2018(DEL)-TP] ITA No.740/Del/2017 dated 19.06.2018

1055. The Tribunal upheld the DRP's order excluding Basiz Fund Services as a comparable for benchmarking the marketing support services provided by the assessee to its AE. Noting that the detailed analysis of the international transaction, financial statements of the company justify the findings of the DRP that the company was functionally not comparable to the assessee in as much as the company was involved in the fund accounting services, possessed significant intangible assets, had a different employees profile, significant growth in the revenue and was earning of profits at supernormal level. It also observed that the Revenue had not filed an appeal against the DRP order of the earlier year excluding the **said** comparable and held that the Revenue ought to follow a consistent view.

Microsoft Corporation India Pvt. Ltd vs DCIT [TS-926-ITAT-2018(DEL)-TP] ITA No.1206 and 2529/Del/2014 dated 22.06.2018

1056. The Tribunal held that assessee engaged in the distribution, agency & marketing support segments could not be compared to:

- Apitco Limited- as it was into diversified business like asset re-construction and management services, project related services, infrastructure planning & development, research studies and tourism, skill development, environment management, cluster development and no separate segmental information is available.
- Choksi Laboratories Ltd as it was providing end to end solution and was into commercial testing and analysis laboratory engaged in analyzing food and agricultural products while the assessee was a routine market service support provider and also there were no segmental details

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- Wapcos as it is engaged in high end technical services by rendering technical consultancy services for various projects and absence of segmental details

Corning SAS-India Branch Office vs. DDIT [TS-495-ITAT-2018(DEL)-TP] ITA No.5713/Del/2012 dated 18.06.2018

1057. The Tribunal held that the assessee engaged in provision of market support services could not be compared to:

- Apitco Ltd as it was engaged in diversified activities in the nature of project report preparation, technical and economic studies, feasibility studies, microenterprise and skill development etc. and there was no segmental information available. It noted that apart from the market and social research activity, none of the other activities appeared to be functionally comparable to the assessee. The Tribunal relied on the Delhi HC ruling in Rampgreen Solution India Pvt. Ltd. to reject the Revenue's contention that there was no requirement to have identical services under TNMM.
- Global Procurement Consultants Limited as the company focused on procurement and provided related technical assistance, transparency, efficiency and effectiveness of procurement, procurement audits and implementation services to various sectors including power, water resources, transportation, etc. thus, the services provided by the company were different from the services rendered by the assessee, which were confined to market support. [A similar view was taken by the coordinate bench assessee's own case for earlier year.]
- TSR Darashaw Limited as there was a huge functional disparity between the companies noting that the company undertook registrar and transfer agent functions for equity and preference shares, debenture instruments and bonds commercial paper and private placements. As part of its records management activity, the company storage, retention & retrieval of physical and/or electronic records and under the payroll and trust fund activity, it handled payroll and retirement funds, including interface with the government organizations. [A similar view was taken by the coordinate bench assessee's own case for earlier year.]
- Quippo Valuers as the company was engaged in asset management services, including a sale of construction and earthmoving equipment, execution of live auctions for financial institutions, valuation of assets and hence was functionally different.

Philip Morris Services India S A vs ACIT (Now known as Philip Morris Services India SARL) [TS-806-ITAT-2018(DEL)-TP] ITA No.1408/Del/2015 dated 19.07.2018

1058. The Tribunal held that assessee engaged in rendering market support services for AY(s) 2007-08 and 2008-09 could not be compared to:

- Priya International Ltd. - as the said entity's business model of earning commission on sales was different from assessee's business model of getting remunerated at Cost plus basis. It was observed that Priya International Ltd. (Seg.) had a huge amount of unallocated expenses which was ignored by the TPO in computing the segmental margin of this company.
- Hightemp Techmat Pvt. Ltd.as the said entity was mainly into Processing business which was different from assessee's business.

- ICRA Management Consulting Services- as the company apart from the corporate advisory practices, had established two specialized divisions, viz., Information technology and Research activities
- IDC (India) Ltd.- as the comparable was a research company, primarily dealing in research and survey services and products, and it was also engaged in selling products
- IL & FS Ecosmart Ltd.- as the company was engaged in four business lines, namely, Waste management; Resource conservation; Information systems; and Consulting & advisory services and there was ostensible differences in activities carried out by this company
- Inmacs Management Services Ltd.- as the true nature of services was not discernible even from its Annual report.
- RITES Ltd.- as the said entity had diverse nature of services and segmental details were not available.
- Shree Raj Travels and Tours Ltd- as the said entity's business model of earning commission on sales was different from assessee's business model of getting remunerated at Cost plus basis irrespective of actual sales.
- Spencer's Travel Services- as the company was engaged in making sales which was not similar to the assessee company
- Choksi Lab Ltd.- as it was engaged in providing testing services unlike assessee company engaged in marketing support services.
- WAPCOS Ltd- as it was engaged in infrastructure development projects
- Interads Ltd.- as the company was earning income from participation fee, onsite service fee and other miscellaneous receipts and thus the nature of services rendered by this company were nowhere close to that of the assesee.
- PL Worldways Ltd- as the company was earning income on commission basis which was distinct from the cost-plus model followed by the assessee.

Brown Forman Worldwide LLC India vs.DDIT [TS-347-ITAT-2018(DEL)-TP] ITA Nos.433 and 6139/Del/2012 dated 11.05.2018

1059. The Tribunal held that assessee engaged in provision of market support services to AE could not be compared to:

- Apitco Ltd as its operations were mainly based on the policy requirements of the government whereas the assessee was a private company in the field of providing business support services.
- Cameo Corporate Services as it was engaged in diversified activities and no separate segmental information was available
- Global Procurement Consultants Ltd. as the company was primarily engaged in preparing and reviewing technical specifications, estimation of castes, selection of vendors, inspection and expediting and quality control and time management and also rendered financial advisory services with a high volatile margin which would not be comparable with routine market distributors.
- Killik Agencies and Marketing Ltd as it was engaged in diversified activities such as agent for various foreign clients for sale of dredgers, Dredging Equipment, steerable Ruddar propulsion, maritime and aviation lighting, acoustic communication equipment etc. and also offered after sales services hence it was functionally dissimilar
- TSR Darashaw Ltd as it was involved in outsourcing with a new global payroll ERP application called RAMCO for its payroll business and undertook registrar and transfer

agent activity functions for equity and preference shares, venture instruments and bonds, commercial paper and private placements.

Philip Morris Services India S.A v DDIT [TS-488-ITAT-2018(DEL)-TP] ITA No.827/Del/2014 dated 21.06.2018

1060. The Tribunal held that the assessee engaged in the business of providing business support services to its AE could not be compared to:

- Aptico Limited as it was engaged in providing services in the nature of Entrepreneurship development & Training, Asset Reconstruction & Management Services, Micro Enterprises Development rendering it functionally dissimilar to the assessee.
- TSR Darashaw Limited and Cameo Corporate Services Limited as they were engaged in performing share registry services which were different from the services performed by the assessee.
- Further, it included EDCIL (India) Ltd on the ground that financial information was available on the MCA website which was in public domain and it was providing similar services as the assessee i.e. technical support services, procurement services, training and management services etc. Further, it also included Sporting & Outdoor Ad-Agency Pvt. Ltd as there was a minor difference in revenue (1 lakh rupees) for the current year as compared to the previous year which could not be regarded as diminishing revenue.

Vestergaard Asia Pvt. Ltd vs. DCIT-TS-1020-ITAT-2017(DEL)-TP ITA No. 6670/Del./2015 dated 30.11.2017

1061. The Tribunal held that the assessee engaged in the business of technical support services to its AE could not be compared to:

- Wapcos Limited as it was engaged in rendering consultancy services in Water Resources, Power and Infrastructure which included preliminary investigations and feasibility studies field studies, engineering design, drawings and tendering process, project management operations and maintenance and institutional/human resource development and was also a government company.
- Mahindra Consulting Engineers Limited as it was engaged in the provision of technical consultancy in Multi-Disciplinary Projects which included designing, engineering, procurement, construction, monitoring and supervision, infrastructure consulting services and integrated project management services.
- Further, it included Kirloskar Consultants Limited having an RPT of 11.79% as it satisfied the RPT filter of 25%.

Alcatel-Lucent India Ltd. vs. DCIT-TS-1027-ITAT-2017(DEL)-TP I.T.A .No. 6856/DEL/2015 dated 06.11.2017

1062. The Tribunal directed the exclusion of Media Research Users Council as a comparable as it was a not for profit organization and as its major source of revenue was the income from its members in the form of membership fee and subscription fee for Indian Readership

Survey (IRS) and Indian Outdoor Survey (IOS) reports and therefore could not be compared to the assessee engaged in the business of marketing support services.

Belkin India Private Limited vs. ACIT-TS-1031-ITAT-2017(DEL)-TP dated 12.12.2017
Autoliv India Pvt. Ltd. vs. DCIT-TS-1033-ITAT-2017(Bang)-TP dated 28.11.2017

1063. The Tribunal restored back to AO/TPO, the issue of TP-adjustment in respect of assessee's project management services (PMS) and marketing support services (MSS) segment for AY 2009-10 to verify as to whether it was a combined segment or a single segment respectively and accordingly, make adjustments. During the assessment proceedings, the TPO had rejected the assessee's approach of aggregating PMS and MSS services and had proceeded to examine the income pertaining to both these services on standalone basis whereas, the coordinate bench in assessee's own case for subsequent year(s) AY 2010-11 and 2011-12 had combined the segments and compared them with comparables providing low end services. However, the Tribunal also noted that assessee had not given any plausible reason as to why these segments should be combined for benchmarking other than relying on the Tribunal order in its own case for AY 2010-11 and 2011-12 .The Tribunal also observed that neither the TPO nor DRP elaborated on this aspect.

Rolls Royce India Pvt. Ltd vs. DCIT [TS-367-ITAT-2018(DEL)-TP] ITA No.1042/Del/2014 dated 02.05.2018

1064. The Tribunal held that the assessee engaged in providing back office services to AE for AY 2010-11 could not be compared to:-

- Accentia Technologies Ltd as it was engaged in the business of medical transcription (which required employment of medical professionals and medical coding) as it was functionally dissimilar to the assessee.
- EClerx Services Ltd as it was a KPO company providing data analytics and data process solutions to global clients and it also provided end to end support through trade life cycle including trade confirmations and settlements and therefore functionally dissimilar to the assessee.
- ICRA Techno Analytics Ltd as it was engaged in business intelligence and analytics space and thus functionally dissimilar to assessee's back office services.
- Infosys BPO Ltd-relying on the decision in the case of Actis Global Service Pvt Ltd[TS-417- HC-2017(Del)-TP], it held that the size of the company was 20 times the assessee's size and therefore not comparable.
- TCS eServe International Ltd as it was engaged in the business of software testing, verification and validation of software and thus functionally dissimilar to the assessee.

Further, it remitted the comparability of R Systems Pvt Ltd and Omega Helthcare Ltd to the file of AO/TPO on the ground that R systems pvt ltd followed a different financial year than the assessee and Omega Healthcare Ltd's annual report which was not available in the public domain earlier was now available.

Further, it included e4e Healthcare Ltd as comparable **as it** was selected by assessee itself and it did not provide any reasons for withdrawing of the comparable at this stage.

Evalueserve SEZ (Gurgaon) Private Ltd vs ACIT-TS-564-ITAT-2017(DEL)-TP-ITA No. 1467 (Delhi) of 2017 dated 30.06.2017

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1065. Where the assessee was engaged in providing management of day-to day accounting functions, the Tribunal referring to the definition of ITeS under Safe Harbour Rules held that support services were primarily within the ambit of ITeS and if the core function was only to provide support services merely because high skilled personnel were involved, it could not be classified as high-end services. Accordingly, the Tribunal held that assessee's operational outsourcing services to AE was low-end ITeS for AY 2012-13. Based on the above ruling the Tribunal held that the assessee could not be compared to:

- Eclerx Services Ltd as it was engaged in providing KPO services which could not be compared to low end services rendered by assessee.
- Infosys BPO ltd as it had acquired company engaged in providing high end services. Further, it had incurred high AMP expenditure and had brand leverage and presence of intangibles.
- BNR Udyog ltd having RPT of 28.08% I.E >25% filter applied by TPO.
- TCS E-serve Limited as it was engaged in software testing and validation activity which was functionally dissimilar to the assessee.

Further, it remitted the comparability of R systems International ltd and Caliber Point Business Solutions ltd to verify if the quarterly audited statements were available.

IHG IT Services (India) Pvt. Ltd vs. DCIT-TS-638-ITAT-2017(DEL)-TP-ITA no. 397/del/2017 dated 30.06.2017

1066. The Tribunal held that the assessee engaged in providing Technical support services to its AE could not be compared to:

- HSCC (India) Ltd as it was a government company and its related party transactions were more than 25%
- Mitcon Consultancy & Engg. Services Ltd and Rites Ltd as both the companies had multi- dimensional functionality and RPT was 100%.

Granite Services International P Ltd vs ACIT-TS-731-ITAT-2017(DEL)-TP- ITA No. 532/Del/2016 dated 12.09.2017

1067. The Tribunal remitted the TP-issues in respect of marketing support services provided by assessee to AE. Noting that the comparables selected by TPO were well established and the assessee was in the initial stage of operation, the Tribunal directed the TPO to make adjustments to the operating expenses in order to give due leverage to the contribution of income to the fixed cost so as to bring it at the level playing field with the comparables. Further, observing that assessee had pointed out specific instances for allowing capacity underutilization adjustment which were not considered by CIT(A) & also furnished certain information on comparables which were not appreciated by CIT(A) in right perspective, it remitted the matter back to the file of AO/TPO for fresh adjudication.

Hitachi High-Technologies (Singapore) Pte Ltd-India BO vs. DDIT-TS-705-ITAT-2017(DEL)- TP-ITA No. 3333/del/2014 dated 28.08.2017

1068. The Tribunal held that the sales and support services segment of the assessee was not comparable to the following companies viz. a). Aplhageo India Ltd since the said company was engaged in seismic research activities such as 2D and 3D seismic services for design; b). Mahindra Consulting Engineers Ltd as the company was engaged providing

consultancy services in the infrastructure sector; c). Kirloskar Consultants Ltd as it was providing engineering consultancy, project management services and architectural consultancy, d). Stup Consultant Pvt Ltf as it was engaged in the profession of civil engineering and architectural consultancy; and e). Semac Pvt Ltd as it was engaged in providing engineering consultancy services

Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) – TP

1069. The Tribunal allowed the grounds of the appeal of the Revenue wherein it contended that the CIT(A) was unjustified in 1) reducing lower limit of sales turnover filter from Rs. 1Cr to Rs. 0.50 Cr without assigning any reason 2) rejecting the wage/sales ratio of 25-50 percent where theassessee's wage/sales ratio was 37% 3) including Astro Bio Systems (Margin: -18.26%) as comparable even when the assessee itself had eliminated comparables having margin less than 0.05%. It noted the submission of the assessee that even if the grounds of the Revenue were accepted, it would be at ALP. Accordingly, it remitted the matter to the file of AO/TPO to examine the veracity of the submissions made by the assessee.

However, it dismissed the Revenue's plea against exclusion of Four Soft, and upheld CIT(A)'s exclusion of the company citing presence of extra ordinary events i.e. merger/amalgamation. ***DCIT vs. Aircom International India Pvt. Ltd - TS-162-ITAT-2017(DEL)-TP - ITA No.4836/Del./2009 dated 28.02.2017***

1070. The Tribunal held that the assessee, engaged in providing representation and logistics/marketing support services and cost reimbursement could not be compared to the following companies:

- IDC India Ltd as it was a KPO and could not be compared with the back office support services carried out by the assessee
- Empire Industries Ltd as it was engaged in the trading and indenting of industrial and medical equipment and machine tools

Further, it held that Agrima Consultants International Ltd engaged in the activities of preparation of feasibility report in respect of cement grinding plant, akin to the market support services provided by the assessee could not be excluded merely because there was a negative trend in the economy of the company.

Philip Morris Services India SA Vs. ADIT - TS-224-ITAT-2017(DEL)-TP - ITA No. 5301/Del/2011 dated 15.03.2017

1071. The Tribunal held that the assessee (non-resident company incorporated in Cayman Islands) who had entered into various international transactions with its associated enterprises (AEs) viz. joint acquisition and development of IT infrastructure and software, provision of support services, interest on loan, management services could not be compared to:

- Aptico Limited as it was engaged in skilled allotment, asset reconstruction and management services
- IBI Chemature Limited since the company was engaged in the business of high-end engineering services and had high R&D cost
- TSR Darshwa Limited as it was engaged in the business of providing registrar and share transfer agency services
- Dalkia Energy services Limited and Kirloskar Consultants Limited on the

ground of non- availability of financial data in public domain.

It however held that Global Procurement Consultants Ltd could not be excluded merely because it was a Government owned company and held that the fact that the company was a Government company does not have any impact on the business model of the company. It held that Government companies, which are mostly public sector undertakings also operate with similar functions, risks and assets employed, therefore it could not be said that merely because a company is a government company, it should be excluded from comparability analysis.

BG Exploration & Production India Ltd [TS-317-ITAT-2017(DEL)-TP]

1072. The Tribunal noted that the TPO was incorrect in categorizing the services provided by the assessee as technical support services and maintenance services and held that in light of the TP study report, it was clear that the assessee merely acted as an interface between the AEs and customers in India and therefore the services provided by the assessee were mediation services and income therefrom was to be characterized as income from mediation rather than income from technical and maintenance services. It further held that the following companies could not be compared to the assessee:

- Apitco Ltd as the said company was functionally dissimilar and did not have segmental results
- Choksi Lab Ltd as the company was engaged in providing testing services and services in the field of pollution control, not functionally similar to the assesse
- WapcosLTd as the company was engaged in infrastructure development projects

Fujitsu India Ltd v DCIT – TS-56-ITAT-2017 (Del) – TP - ITA No.6280/Del/2012 dated 02.02.2017

1073. The Tribunal held that the assessee, engaged in providing IT Infrastructure support services and Financial and Accounting Support services in the capacity of a captive service provider could not be compared to a) companies in possession of intellectual property rights and having a huge brand, b) companies engaged in development of software products and also engaged in KPO, c) legal process outsourcing, d) data process outsourcing and e) high end software services and having undergone business restructuring during the year, f) companies engaged in health care outsourcing and software development services not having segmental information.

Bechtel India Pvt Ltd v DCIT - TS-638-ITAT-2015 (Del) - TP

1074. The Tribunal held that the assessee, engaged in providing business support services in the nature of pre- sale / purchase and post-sale / purchase to its AEs, could not be compared to companies engaged in providing Project management consulting services, feasibility studies, micro enterprise development etc, companies providing advice on procurement and also carrying out procurement audits, Advisory-cum-consultants and companies engaged in project monitoring and quality assurance. It also rejected the contention of the assessee that companies engaged in information vending and companies having a different financial year ending were to be accepted as comparable.

Marubeni Itochu Steel India Pvt Ltd v DCIT - (2016) 67 taxmann.com 52 (Del - Trib)

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1075. The Tribunal held that where the assessee was primarily engaged in providing sales support and post- sales support services, and the TPO found that assessee's employees were highly qualified and technically competent while the employees of the comparable companies were low level skilled employees and accordingly excluded the said companies as comparable, the CIT(A) was incorrect in disregarding the comparability analysis of the TPO on the general broad sweeping reasoning that a certain leeway was to be given in choosing comparable companies. Accordingly, the matter was remanded to the file of the AO / TPO.

CIT v Comverse Network Systems India (P)Ltd - [2016] 67 taxmann.com 290 (Delhi-Trib)

1076. The Tribunal held that the assesee engaged in providing marketing support services such as liaison of potential new customers, hosting conferences and sales events to promote the LinkedIn product in the local market, could not be compared to a) non-profit companies mainly earning subscription fees from its members, b)companies engaged in the process of building its own brand and therefore expending huge advertising expenses, c) companies owning valuable online portals through which it earned service fees from third party customers. It further held that the assessee was incorrect in contending that companies engaged in a wide range of services including advertising, interior decoration and event management were to be included as comparable.

LinkedIn Technology Information Pvt Ltd v ACIT - TS-435-ITAT-2016 (Del) - TP - I.T.A. No.706/Del/2016

1077. The Tribunal rejected TPO's selection of high-end technical service providers as comparables for benchmarking marketing support services rendered by assessee. It also held that a company which was engaged in online portal activities and its major revenue was advertisement and subscriptions could not be compared to assessee engaged in marketing support services.

Further, it rejected the assessee's ground for exclusion of comparable being a 100% EOU, stating that registration as a 100% EOU only gives benefit with respect to direct and indirect taxation, and does not change the functional profile. It further held that even if it had impacted the prices charged by the comparable it was required to be shown as to what was its impact on the PLI of the comparable.

Rolls-Royce India (P) Ltd v DCIT - TS-180-ITAT-2016(DEL)-TP

1078. The Tribunal held that the asessee-company rendering marketing support services to its AE in respect of sale of software products was not comparable to companies involved in providing engineering and consultancy services relating to hydroelectric projects and companies conducting clinical trials on food and drugs.

Microsoft Corporation India (P) Ltd v DCIT - [2016] 67 taxmann.com 94 (Delhi-Trib)

1079. The Tribunal held that companies which have undergone amalgamation during the year under review or companies having outsourced major of its activities cannot be compared to the assessee who was engaged in providing tele-servicing and transaction processing support to its AEs.

American Express India Pvt Ltd v DCIT (ITA No.3532/Del/2014) – TS-517-ITAT-2015 (Del) – TP

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1080. The Tribunal held that the assessee engaged in providing support services / BPO Services including customer care and technical support services could not be compared to companies rendering KPO services involving specialized knowledge and domain expertise and companies providing high end services.

Daksh Business Process Services Pvt Ltd v DCIT - TS-455-ITAT-2016 (Del) - TP - ITA No. 2666/Del/2014

1081. The Tribunal held that the assessee, engaged in providing marketing support services to its AE could not be compared to companies imparting high end technical services and companies imparting consultancy in an entirely different field.

It held that if a particular segment was performing a specific function, then for determining the ALP only those comparables having close similarity with the functional segment under consideration should be selected.

Rolls Royce India Pvt Ltd v DCIT (ITA no. 1310/Del/2015) – TS-616-ITAT-2015 (Del) - TP

1082. The Tribunal held that since the activities performed by the assessee viz. providing emergency assistance and support services were not performed by any comparable companies, companies having a broad comparative functional profile of undertaking support services in other fields were to be taken as comparable.

Further, it held that Government owned companies should not be included as comparable as profit motive was not a relevant consideration for those companies.

International SOS Services India Pvt Ltd v DCIT (I.T.A .No. 1631/Del/2014) – TS-620-ITAT-2015 (Del) – TP

1083. The Tribunal held that the assessee, engaged in providing engineering support services to its AEs could not be compared with companies engaged in comprehensive green field related services, Government companies as profit motive might not be a relevant consideration, companies engaged in the surface transport business (developer, operator and facilitator of surface transport infrastructure projects from conceptualization to operation), companies engaged in providing engineering consultancy services and companies having service income to sales ratio of less than
75 percent.

Bechtel India Pvt Ltd v DCIT (I.T.A. No.1477 /Del/2015) – TS-602-ITAT-2015 (Del) – TP
Bechtel India Pvt Ltd v DCIT (I.T.A. No.1476 /Del/2015) – TS-607-ITAT-2015 (Del) – TP

1084. The Tribunal held that the assessee, engaged in providing business support services to its AE was comparable with companies engaged in providing technical assistance and human resources and companies providing management services functionally comparable to the assessee.

Further, it held that companies providing payroll processing outsourcing services were not comparable to the assessee.

Eli Lilly & Co (India) Pvt Ltd v ACIT (ITA No 788 / Del / 2015) – TS-573-ITAT-2015 (Del) – TP

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1085. As regards to the assessee's infrastructure support service segment the Tribunal held that Infosys Ltd could not be taken as a comparable due to its owenership of brands and proprietary products which results in its bargaining power for higher profits.
Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] - I.T.A. No.- 6779/Del/2015

1086. The Tribunal, following the decision of the High Court in the case of Rampgreen Solutions Pvt Ltd excluded high end KPO service providers as comparable to the assessee's low end back office support services. It also excluded companies involved in fraud and financial irregularities and companies having extra-ordinary events during the year. It further held that the RPT filter of 15 percent was to be applied eliminating companies having RPT in excess of 15 percent.
Avaya India Pvt Ltd v ACIT (ITA No 5528 / Del / 2011) – TS-444-ITAT-2015 (Del) – TP

1087. The Tribunal set aside the TPO's order and remitted the issue of comparables, computation of margins for them and ALP-determination back to the file of AO/TPO in case of an assessee engaged in providing content design and development support services for online courseware to AE in USA. It was assessee's contention that the TPO had erred in computing the margin of comparables namely Sasken Communications Technologies Ltd) and Sonata Software Ltd. The Tribunal set aside all comparables finally selected by TPO/AO in terms of FAR analysis of assessee. It directed the AO to decide the comparability of comparables on the basis of functions performed by these companies, risks assumed and assets owned by the comparables vis-a-vis that of assessee and also to verify the computation of margins.
Element K India Pvt Ltd vs ITO [TS-1119-ITAT-2018(DEL)-TP] ITA No.1153/Del/2014 dated 06.09.2018

1088. The Tribunal held that the assessee engaged in providing of BPO services (online recruitment services) to its AE could not be compared to:

- Accentia Technologies Ltd as it had a different strategy of growth by way of acquisitions and no segmental data was available.
- Eclerx Services Ltd as it was engaged in KPO services and therefore was functionally dissimilar to the assessee.
- Infosys BPO Ltd as it was a giant company and had a huge brand value making it incomparable to the assessee.
- TCS E Serve Ltd as it was engaged in providing technical services involving software testing, verification and validation of software at the time of implementation and data centre management activities and therefore was functionally dissimilar to the assessee.
- Crossdomain Solutions Ltd it was engaged in market research and analysis and IT services which included software development and maintenance and no segmental information was available.

ACIT & others vs. Monster.com-TS-718-ITAT-2017(HYD)-TP- ITA No. 1425 / H / 15 dated 30.08.2017

1089. The Tribunal held that assessee, a BPO, could not be compared with a company that was into KPO services.

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C3I Support Services (P)Ltd. v DCIT - [2016] 46 CCH 0423 (Hyd Trib)

1090. The Tribunal held that the assessee engaged in the business of providing call centre services/ business process outsourcing services to its AE could not be compared to

- BNR Udyog Ltd as its RPT to sales was 359.35% which did not satisfy the RPT filter of less than 25% applied by TPO.
- CMC Ltd (seg) as its RPT to sales was 59.14% which did not satisfy the RPT filter of less than 25% applied by TPO
- Datamatics Technologies Ltd as its RPT to sales was 66.91% which did not satisfy the RPT filter of less than 25% applied by TPO.
- MCS Ltd as it was engaged in Registrar and share transfer activities and thus functionally different from assessee.
- TSR Darashaw Ltd as it was engaged in Registrar and share transfer and outsourcing activities.
- Maple Esolutions Ltd as it was involved in fraud and business reputation had come under serious indictment.
- Triton Corp Ltd as it was involved in fraud and its business reputation had come under serious indictment.
- Wipro Ltd (BPO services segment) as the company had huge brand value.
- Fortune Infotech Ltd as its RPT to sales was 99.96% which did not satisfy the RPT filter of less than 25% applied by TPO.
- HCL Technologies as its RPT to sales was 66.90% which did not satisfy the RPT filter of less than 25% applied by TPO.

Oracle (OFSS) BPO Service vs DCIT – TS- 462-ITAT-2017(KOL)-TP- dated 02.06.2017

1091. The Tribunal restored the comparability of Just Dial Ltd to DRP for an assessee engaged in providing sales support services to its AE noting that financials for subject year were available in public domain which was not the case when proceedings were completed before DRP and TPO (relied on financials for AY 2013-14). It was pointed out by the asseessee that financials showed that the comparable was functionally different.

MICROSEMI STORAGE SOLUTIONS INDIA PVT. LTD. vs ACIT [2018] 53 CCH 0496 (Mum- Trib.) IT (TP)A No.2103/Bang/2016 dated 24.08.2018

1092. The Tribunal held that the assessee, engaged in providing marketing support services to its AE could not be compared to:

- Aptico Ltd as it derived the revenue from various sources like skill development, tourism and research studies, project related services etc. thus not functionally comparable to the assessee.
- Choksi Laboratories Ltd as the said company was a leading analysis and research group providing complete solution for improving quality in process, products and services, that it provides contract laboratory services including pharmaceutical analysis, food and beverages analysis, etc and the company treated analytical charges and consultancy receipts as a single segment and the details of segments were not separately reported.
- Genins India TPA Ltd as the company provided third party administrative services in the field of health insurance including receiving of insurance claim and revenue was recognized

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as and when Medicare policy was issued by general insurance companies in favour of the policyholders and therefore was not functionally comparable

- Rites Ltd as this company has business operations in four distinct fields namely consultancy in transportation infrastructure section, construction activities, export and leasing of railway equipments and running railway system on concession and therefore was not functionally comparable
- WAPCOS Ltd as it was basically engaged into project engineering consultancy and therefore not comparable to the functional profile of the assessee.

Abacus Distribution Systems (India) Pvt Ltd vs. DCIT - TS-34-ITAT-2018(Mum)-TP - ITA Nos.1766 & 2183/Mum/2015 dated 10/01/2018

1093. Where the assessee was engaged in providing business process and back office support services to its AE, the Tribunal directed the TPO to exclude Eclerx Services ltd as a comparable since it was engaged in providing a diverse range of services such as financial services, sales and marketing support services without adequate segmental data.

Fractal Analytics Private Limited vs DCIT-TS-744-ITAT-2017(MUM)-TP-ITA No.1024/Mum/2017 dated 21.09.2017

1094. The Tribunal held that the assessee, engaged in the business of providing marketing support services and business support services in relation to re-insurance, underwriting and actuarial activities was not comparable with companies engaged in providing event management services.

ACIT v RGA Services India Pvt Ltd (I.T.A. No.22/Mum/2015) – TS-580-ITAT-2015 (Mum) – TP

1095. The Tribunal held that the assessee engaged in providing back office support services to its AE could not be compared to:

- Airline Financial services, Fortune Infotech Ltd, Datamatics Technologies Ltd. and Tricom Ltd as they had an RPT of 35.54%, 98.32%,52.54% and 58.03% and accordingly failed the 25% RPT filter adopted by TPO.
- National Securities Depository Ltd. as the revenue derived from the ITES sector was only 1.15%, further, it was also catering to government work and therefore was functionally dissimilar to the assessee.
- Shreejal Info Hubs Ltd. as it was a consistently loss making company and therefore could not be compared to the assessee.
- TSR Darashaw as the assessee had not provided copy of the annual report of this company and only a print of its web home page has been enclosed and it only means that the Annual Report or the Management discussion and analysis of this company is not available in the public domain and accordingly the company cannot be taken as comparable for want of sufficient information I data

DCIT vs Exxon Mobile Company India Pvt. Ltd.- TS-903-ITAT-2017(Mum)-TP- ITA No.8798/Mum/2011 dated 27.10.2017

1096. The Tribunal held that the assessee engaged in providing marketing support services to its AE could not be compared to:

- Aptico Ltd. (AL) as it was generating revenue from 10 different sources like skill development, tourism and research studies, environmental management etc.
- Choksi Laboratories Ltd.(CLL) as it was a leading analysis and research company providing complete solution for improving quality in process, products and services
- Genins India TPA Ltd.(GITL) as it provided third-party administrative services in the field of health insurance including receiving of insurance claims
- Rites Ltd as it was engaged in the consultancy business in relation to transport infrastructure sector, construction activities, export and leasing of railway equipments and running railway system on concession
- WAPCOS Ltd as it was engaged in project engineering consultancy

.Abacus Distribution Systems (India) Pvt. Ltd vs. DCIT - TS-116-ITAT-2018(Mum)-TP - ITA Nos.1402/Mum/2014 dated 05/01/2018

1097. The Tribunal excluded 8 of the TPO's comparables on the ground of non-satisfaction of the 25% export-filter, functional dissimilarity, extraordinary events like amalgamation impacting profitability, non-availability of segmental results, unreliable financial data etc and observed that the TPO had adopted faulty search process wherein only 'ITeS' companies and not those from the fields of 'Back-Office Support Services' and 'Software Development Services' were analyzed for potential comparables. It dismissed the Revenue's contention to remand the matter to the TPO noting the discrepancies between TPO's order (finalizing 13 comparables) vis-a-vis the show cause notice issued to assessee (wherein 17 comparables were selected) and accordingly held that if the Revenue's contention of remanding the matter was to be accepted it would tantamount to allowing the TPO premium on his carelessness and callousness of the and would encourage unnecessary litigation.

Franklin Templeton International Services (India) Private Limited vs. DCIT - TS-10-ITAT-2018(Mum)-TP - /I.T.A./7472/Mum/2010 dated 10.01.2018

1098. The Tribunal held that the assessee, engaged in providing support services such as administrative support in providing demos for products, helping distributors get orders, tracking logistics etc could not be compared to a company engaged in the business of hiring and chartering ships / maritime vessels earning revenue in the form of charter hire charges.

Emerson Electric Company (India) Pvt Ltd v DCIT (ITA No.7613/Mum/2012) – TS-625-ITAT-2015 (Mum)

1099. The Tribunal held that the assessee, engaged in the business of research and development of telecommunication software & Sales and providing marketing and customer support services could not be compared to a). Persistent Systems since the company was engaged in the sale of products, R&D in life sciences, product lifecycle services, medical research etc, b). Sonata Software ltd as the company had Related Party Transactions of more than 25 percent of its total revenue, c). Igate Global Solutions Ltd since it was engaged in both IT products and services without any segmental break-up, d). Bodhtree Consulting Ltd on the ground that the said company had an abnormal margin of 64.89 percent which was indicative of the fact that the company did not reflect a normal business connection e). Genesys International Corporation Ltd as it was functionally not comparable since it was engaged in providing geospatial services and specialized in land based technology f). FCS Software Solutions Ltd since it operated in diverse activiites viz. infrastructure management outsourcing for hardware

requirements, imparting internet based e-learning and IT consulting services without any segmental break-up.

Noting that the TPO had not applied the turnover filter, it rejected the assessee's contention for excluding a single comparable viz. Persistent Systems (though excluded on other reasons) based on the turnover filter.

Dialogic Networks (India) Pvt Ltd v DCIT – TS-2-ITAT-2017 (Mum) - TP

1100. The Tribunal held that the assessee engaged in providing Clinical Study Management & Monitoring Support Services and outsourcing its research activities could not be comparable to companies carrying on in-house research, companies having substantial related party transactions, companies having two streams of revenue viz. contract research fees and sale of compounds, but not having segmental break-up.

Pfizer Limited v ACIT (ITA no.3729/Mum./2008) – TS-561-ITAT-2015 (Mum) TP

1101. The Tribunal held that companies engaged in engineering activities, testing services; micro enterprise development, skill development and project related services, tourism research studies, environment management, foreign exchange related service, travel agency services; business of container freight station could not be taken as comparable for the assessee engaged in providing marketing and other support services to its AE.

Roche Products (India)(P)Ltd v ACIT - TS-154-ITAT-2016(Mum)-TP

1102. The Tribunal held that the international transaction of the assessee viz Provision of global call centre services could not be benchmarked by considering the following companies as comparable viz. Informed Technologies Ltd as the company was operating as an IT enabled knowledge based Back office processing centre, which was functionally different, Rev IT Systems Ltd as its RPT transactions were in excess of 25 percent of its total revenue. Further, it held that Allsec Technologies Ltd could not be excluded as comparable merely because it incurred losses as it was not a persistently loss making concern.

Dialogic Networks (India) Pvt Ltd v DCIT – TS-2-ITAT-2017 (Mum) – TP

1103. The Tribunal held that assessee providing marketing support services to its AE could not be compared to Empire Industries Ltd as its major chunk of revenue was from trading activity whereas the assessee **was** predominantly a service providing entity.

ACIT 14(2)(1) vs Hitachi Data Systems India Pvt Ltd- TS-420-ITAT-2018(Mum)-TP-ITA No 1012/Mum/2016 dated 04.05.2018

1104. The Tribunal held that assessee engaged in marketing support services and business support services could not be compared to:

- Times Innovation Media Ltd as it was solely engaged in organizing and executing events which was different from the functions performed by assessee.
- Agrima Consultants International Ltd. as it was engaged in providing financial consultancy.

Eaton Technologies Pvt Ltd vs ACIT [TS-1297-ITAT-2018(Pun)-TP] (ITA No.1650/Pun /2013) dated 31.10.2018

1105. The Tribunal held that CG-VAK Software and Export Private Limited could not be excluded as comparable merely because its margin post accounting for working capital adjustments was

negative moreso since the company was accepted to be comparable to the assessee in the earlier AY.

Further, it held that following companies were to be excluded while benchmarking the engineering support services rendered by the assessee to its AE:

- Jindal Intellicom as it had different financial year reporting period (15-month) as against that of the assessee (April to March).
- Coral Hub Limited as the company followed an outsourcing model and also followed a different accounting period (April - June) in its preparation of financial statements as compared to that of the assessee
- Cosmic Global Ltd as it had a different business model (outsourcing) as compared to that of the assessee
- Accentia Technologies Ltd as it had undergone and extra-ordinary event during the year and also since the company was not functionally comparable being engaged in transcription, hoarding and billing.
- E4e Healthcare Business Services Pvt. Ltd. as it was engaged in providing healthcare outsourcing services.

Schlumberger India Technology Centre Pvt. Ltd. (formerly known as Schlumberger Global Support Centre Pvt. Ltd.) vs. DCIT - TS-36-ITAT-2018(PUN)-TP - ITA No.640/PUN/2014 dated 10.01.2018

1106. The Tribunal held that the assessee engaged in providing marketing support services to its AE could not be compared to:

- ICRA Online Ltd as it had also derived revenue from software products and therefore was functionally dissimilar to the assessee.
- Agrima Consultants International Ltd as it was engaged in providing consultancy services to financial institutions rendering it functionally dissimilar to the assessee.

Further, it included Empire Industries Limited in the final set of comparables rejecting the TPO's contention that it should be excluded from the list as it had segregated trading/distribution activities from the marketing support segment.

Haworth (India) private Limited vs DCIT-TS-940-ITAT-2017(PUN)-TP ITA No. 281/PUN/2014, A.Y. 2009-10 dated 30.10.2017

1107. The Tribunal held that the assessee engaged in providing customer support services to its AE could not be compared to:

- Accentia Technologies Ltd as it was engaged in onsite development and therefore was functionally dissimilar to the assessee.
- Coral Hubs Ltd as it was engaged in KPO services and had outsourced majority of its work.
- Cross Domain Solutions Ltd as it was engaged in providing KPO services rendering it functionally dissimilar to the assessee.

Eaton Industries Pvt. Ltd. vs. ACIT-TS-897-ITAT-2017(PUN)-TP ITA No.2544/PUN/2012 dated 30.10.2017

1108. The Tribunal held that the manufacturing segment of the assessee engaged in the business of handling sales, services and technical functions could not be compared to:-

- Rollatainers Limited as it had a different financial year and negative net worth for three consecutive assessment years.
- Stovec Industries Limited as it had a different financial year compared to the assessee and as per Rule 10B(4), data used for comparability had to be of the same financial year in which international transactions were entered into by the tested party.

Bobst India Private Limited vs DCIT-TS-510-ITAT-2017(PUN)-TP-ITA No 2231/PUN/2013 dated 24.05.2017

1109. The Tribunal held that the assessee, engaged in the business of rendering marketing & sales support services to its AE could not be compared to:

- Asian Business Exhibition and Conference Ltd as the company was engaged in the sale / leasing out of stall place in exhibitions and events and it underwent wide fluctuations in margins during the year under consideration vis-à-vis previous years
- Cyber Media (India) Ltd and Asian Industry & Information Services Ltd as they were functionally dissimilar to the assessee
- Crystal Hues Ltd as sufficient details to establish the margins and functional similarity had not been submitted by the assessee
- Hansa Vision Pvt Ltd, Denave India Pvt Ltd and Sadhna Media Pvt Ltd as the P&L account of these companies were not available.

TIBCO Software India Pvt Ltd – TS-49-ITAT-2017 (Pun) – TP ITA No.276/PUN/2015 ITA No.334/PUN/2015 dated 31.01.2017

1110. The Tribunal held that the assessee, engaged in providing business support services and supply based development services and information technologies to its AE could not be compared to the following companies:

- TSR Darashaw Ltd as it was engaged in organizing events with various kinds of sponsors therefore functionally different
- Access India Advisors Ltd as it had deviating margins from

year to year.

It dismissed the contention of the Assessee for the exclusion of ICRA Online Ltd and held that the said company ought to have been considered as comparable as it was also providing certain services of conducting research and preparing reports which were provided to its customers and more so since the assessee had selected this comparable in instant and preceding years.

Though it ultimately excluded Access India Advisors Ltd as comparable, it held that the assessee was incorrect in seeking its exclusion merely on the basis of super normal profit margins.

Honeywell Turbo Technologies (India) Pvt. Ltd - TS-84-ITAT-2017(PUN)-TP ITA No.2584/PUN/2012 dated 10.02.2017

1111. The Tribunal held that the assessee, a company providing technical support services to its AEs outside India could not be compared to the following companies:

- Companies earning abnormally high profits as compared to the preceding and succeeding years and which were functionally different since it outsourced its work

resulting in a lower employee cost to turnover percentage as compared to the assessee.

- Companies which were functionally different and incurring losses in the current and preceding years
- Companies engaged in providing outsourced product development services and in sale of products.

Schlumberger Global Support Centre Ltd v DDIT (ITA No.86/PN/2013) – TS-528-ITAT-2015 (Pun) – TP

Research & Development Services

1112. The Court dismissed Revenue's appeal and upheld the Tribunal's order as regards the inclusion of Dolphin Medical Services Ltd in case of the assessee providing contract manufacture, contract research and development of drugs services to its AE since Revenue had not disputed the Tribunal's finding that the said company was engaged in the business of clinical trial and was broadly similar to assessee.

CIT vs Watson Pharma Pvt Ltd [TS-480-HC-2018(BOM)-TP] ITA 124 of 2014 dated 25.06.2018

1113. The Court noting that the Tribunal had excluded Celestial Labs as a comparable in respect of assessee providing contract research and testing services to AE on grounds on functional dissimilarity as the said company was engaged in providing diversified services such as rendering IT services encompassing application development and maintenance, production support, EERP, data warehousing, SAP implementation and was also engaged into manufacturing and trading of products such as ERP package for manufacturing and had a product 'Sarijivani' which is a portal for live ayurvedic consultation, held that no substantial question of law arose and accordingly dismissed Revnue's appeal

Pr.CIT vs Tevapharm India Pvt Ltd-TS-730-HC-2017(DEL)-TP-ITA No 816 / 2017 dated 19.09.2017

1114. The Tribunal held that the following companies could not be included in the list of comparable companies while benchmarking the R&D services provided by the assessee:

- Sankhya Infotech Ltd as it was engaged in the business of software products, services and training for transport and aviation industry without any segmental data
- Thidware Solutions Ltd as it was engaged in the sale of software license and related services
- Exensys Software as it had undergone an amalgamation during the year which led to abnormal profits
- Four Soft Ltd as it was functionally different and had RPT in excess of 15 percent (19.89%) Further, it held that LGS Global Ltd could not be excluded as comparable merely because it had a lesser margin as compared to the assessee.

DCIT v Nvidia Graphics Pvt Ltd – TS-1089-ITAT-2016 (Bang) – TP IT(TP)A No.1211/Bang/2011 dated 23.11.2016

1115. The Tribunal held that the assessee, engaged in contract research and development services could not be compared to:

- Celestial Biolabs Ltd as it was engaged in providing host of IT Services and

some trading activity and also owned IPRs

- IDC India Ltd as it was engaged in providing market research and survey services
- Oil Field Instrumentations Ltd as the nature of assets employed and the activities performed indicate that the company was functionally different

Further, it dismissed the contention of the assessee for exclusion of TCG Lifesciences on the ground that its income from R&D services was 74.5 percent which was less than the filter of 75 percent adopted by the TPO. It held that a difference of 0.1 to 0.9 percent could not be considered as a substantial difference for the purpose of exclusion.

Apotex Research Pvt Ltd v ITO – TS-1035-ITAT-2016 (Bang) – TP IT(TP)A No.40/Bang/2014 dated 04.11.2016

1116. The Tribunal held that the assessee engaged in providing R&D services to its AE could not be compared to:-

- Alphageo India Limited as it had not undertaken any R&D activities during the year and therefore was not comparable to the assessee.
- Vimta Labs as it was engaged in wide spectrum of services (focusing on food, water, drugs, clinical diagnostics and environment) which was functionally dissimilar to the assessee.
- Geologging Industries Limited as it was engaged in mudlogging services, drilling data monitoring services and wireline services and thus functionally dissimilar to the assessee.

FMC India Private Limited vs DCIT-TS-573-ITAT-2017(Bang)-TP-dated 23.06.2017

1117. The Tribunal while adjudicating on the inclusion / exclusion of 2 companies as comparable on the ground of functionality held that a company performing research in seismic services was comparable with the assessee who was engaged in the research and development for automobile components and since no difference in assets employed or risks assumed were brought there was no reason to exclude the company. Further, it held that a company providing research and development relating to effects of various drugs on humans involved living beings and human interface and was therefore not comparable with the assessee.

Bosch Ltd v ACIT IT(TP)A No.670/Bang/2011– TS-411-ITAT-2015 (Bang) – TP

1118. The Tribunal held that the assessee, engaged in providing research and development services to its AE could not be compared to companies engaged in activities such as mud logging, gas detection, drilling and companies engaged in development and sale of software products and data warehousing.

FMC India Pvt Ltd v DCIT [IT(TP)A No 1039 / Bang / 2012] - TS-480-ITAT-2015 (Bang)

1119. The Tribunal held that the assessee, engaged in providing contract research and development services to its AEs could not be compated to:

Chocsi Laboratories as the said company performed diverse activities and did not have segmental results TCG Lifesciences Ltd & Transgene Bioteck Ltd as the said companies, engaged in the pharmaceutical industry were functionally dissimilar to the assessee engaged

in the automobile industry. Further, it noted that the companies owned intangible assets and undertook high risks and therefore held that they could not be adopted as comparable.

DCIT vs Akzo Noble Car Refinishes India Pvt. Ltd - TS-51-ITAT-2018(DEL)-TP - ITA No. 2936/Del/2014 dated 08.01.2018

1120. The Tribunal held that the assessee company carrying out R & D activities in relation to development of hybrid seeds for its group could not be compared to –

- Venus Diagnostics Ltd. as it was operating a diagnostic centre and was not engaged in research services.
- Syngene International Ltd. as it had two sets of income i.e. income from contract research fees and sale of compounds and the segmental details were absent.

DDIT v. Pioneer Overseas Corporation India - [2018] 93 taxmann.com 274 (Delhi - Trib.) - IT APPEAL NOS. 2934 (DELHI) OF 2013 dated APRIL 13, 2018

1121. The Tribunal held that the issue of capping the upper turnover filter had been decided in favour of the assessee in the case of 24/7 Customer.com Pvt Ltd v DCIT and therefore excluded companies having turnover over Rs.1,000 crores. Further it held that companies engaged in software development and ITES were not comparable with the assessee who was engaged in the business of research, design and development of application solutions. Further, companies having extra- ordinary events such as mergers and acquisitions during the year were also excluded as comparable.

AMD Research & Development Centre India Pvt Ltd v DCIT (ITA No. 275/Hyd/2015 & ITA No. 242/Hyd/2015) – TS-563-ITAT-2015 (Hyd) – TP

1122. The Tribunal remanded comparability of the two companies viz. Celestial Lab Ltd. and Tonira Pharma Ltd. to the AO/TPO for benchmarking product development services carried out by the assessee engaged in research and development activities for its AE:

- Celestial Lab Ltd. as the authorities did not reach a conclusion as to how the company was functionally dissimilar since the company was engaged in activities of research and development in the pharma industry which were similar to the product development services rendered by the assessee to its AE in the pharma industry. Further, noting that the said company launched an IPO which was an extraordinary event, it directed the AO/TPO to exclude the expenses incurred in connection with it for arriving at the PLI;
- Tonira Pharma as the basis of exclusion adopted by TPO that the the said company was having effluent treatment plant/waste disposal system was not justified since the requirement of having the said system was State Policy mandate. Noting that one of the units of Tonira Pharma was hit by an extra-ordinary event of attachment of its inventory by the Excise and Custom Departments, the Tribunal directed that the impact of extraordinary event should be excluded while computing PLI

Ferring Pharmaceutical Private Limited [TS-457-ITAT-2018(Mum)-TP] ITA No.6072/Mum/2014 dated 01.06.2018

Sales / Trading

1123. The Court dismissed Revenue's appeal against Tribunal's exclusion of comparables in the absence of substantial question of law as the Tribunal had assigned clear reasons for

exclusion of comparables. The TPO had rejected the comparables adopted by assessee and adopted new set of comparables. The Tribunal held that the following companies could not be considered as a comparable to the assessee engaged in the business of distribution and sale of digital switching equipment, cellular exchange equipment and other telecommunication equipment provided contract software development (CSD) services.

- E-Infochips Ltd. on the ground that it had income from software products and services and there was no segmental data available.
- Larsen &Toubro Ltd. on the ground that it had income from software development services and earned revenue from licensing of products
- Persistent Systems Ltd. on the ground that it was engaged in diversified services such as software consultancy, software product development and system integration services.
- Infosys Ltd. on the ground that it was engaged in providing software consulting and products.
- Zylog Ltd. on the ground that this company derived revenue from consultancy services,project and e Governance projects.

Alcatel Lucent India Ltd-TS-585-HC-2017(DEL)-TP-ITA No.515/2017 dated 18.07.2017

1124. The Court, relying on the decision of Sumitomo Corporation India Pvt. Ltd., [TS-202-HC-2015(DEL)-TP] upheld the Tribunal's order rejecting TPO's approach of benchmarking commission from trading activities on the basis of commission rate for indenting business and vice versa on the ground that indenting transactions are different from trading transactions.

Sojitz India Private Limited [TS-177-HC-2017(Del)-TP] [ITA 28/2017]

1125. The Tribunal dismissed the assessee's appeal for exclusion of Advanced Micronic Devices as it was also engaged in trading of health-care products like the assessee and only the relevant segmental details were considered. Further, the Tribunal remanded the comparability of RFL Ltd. to the AO/TPO to bring on record sources of information since the TPO was silent on this aspect and also remitted the calculation of margin as it was engaged in diversified activities and segmental information was not available.

Abbott Medical Optics Pvt. Ltd. v DCIT (formerly Advanced Medical Optics India Pvt. Ltd) [TS-517-ITAT-2018(Bang)-TP] IT(TP) A No.08/Bang/2014 dated 22.06.2018

1126. The Tribunal noting that for trading segment ALP determination, TPO had considered gross profit margin of a compatable- Advanced Micronic Devices Ltd at entity level, set aside CIT(A) order deleting TP-adjustment on international transaction in trading segment and held that if the comparable had more than one segment, then only the trading segment of the said company had to be compared with the assessee. Further, it held that the CIT(A) had violated the principles of natural justice by carrying out ALP determination exercise on its own without calling for remand report from AO/TPO and directed AO/TPO to consider the matter afresh in light of above observations.

DCIT vs Wipro GE Medical Systems Pvt Ltd-TS-429-ITAT-2017(BANG)-TP-IT(TP)A.No.40/bang/2011/ & 1647/bang/2013 dated 21.04.2017

1127. The Tribunal, ruling on selection of comparables in respect of assessee engaged in the business of trading of roller, chemical and blanket testing equipments, remitted the comparability of the Tirupati Incs Ltd and ITD imagetic ltd to the file of AO/TPO directing it to verify whether the said companies were engaged in the business of trading and exclude it if it was confirmed that it was engaged in manufacturing operations.

Boettcher India Pvt. Ltd vs ACIT-TS-760-ITAT-2017(DEL)-TP-ITA No. 6610/Del/2016 dated 29.09.2017

1128. The Tribunal held that the assessee engaged in trading in cash counting machines could be compared to:

- CCS Infotech Ltd as it was in similar line of business and was accepted by the TPO as a comparable for earlier years. The Tribunal noted that the business profile of the comparable and the assessee had not changed over the years.
- ACI Infocom Ltd as it was in similar line of business and was accepted by the TPO as a comparable for earlier years. The Tribunal noted that the business profile of the comparable and the assessee had not changed over the years.
- Compuage Inforcom Ltd. as it was accepted by the TPO as a comparable for earlier year since its business profile was similar to assessee and the DRP had directed for its inclusion for AY 2009-10 but failed to include it in the subsequent year AY 2010-11 without any justifiable reason.
- Priya Limited as it was accepted by the TPO as a comparable for earlier year since its business profile was similar to assessee and the DRP had directed for its inclusion for AY 2009-10 but failed to include it in the subsequent year AY 2010-11 without any justifiable reason.
- Iris Computers Ltd as it was in similar line of business and was accepted by the TPO as a comparable for earlier years. The Tribunal noted that the business profile of the comparable and the assessee had not changed over the years.
- CMS Computers Ltd as it was in similar line of business and was accepted by the TPO as a comparable for earlier years. The Tribunal noted that the business profile of the comparable and the assessee had not changed over the years.

De La Rue Cash Processing Solutions India Pvt Ltd vs ACIT [TS-1121-ITAT-2018(DEL)-TP] ITA Nos.1113/Del/2014 and ITA No.1606/Del/2015 dated 28.08.2018

1129. The Tribunal held that the assessee engaged in trading of refractory materials and providing marketing support services to its AE could not be compared to:

- Basiz Fund Services Private limited as it was engaged in providing funds accounting services to fund administrators, insurance companies, prime brokers, private equity funds in selected geographies, managed accounts / portfolio accounts, family offices and internal fund accounting for hedge funds.
- ICRA Management Consultancy Services Limited as it was persistent loss making company.

DCIT vs. RHI India Private Limited-TS-818-ITAT-2017(MUM)-TP ITA No.244/Mum/2014 dated 07.08.2017

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1130. The Tribunal held that the CIT (A) was incorrect in considering NDTV and Cinevistaas as comparable to the assessee as they were pure content developers as compared to the assessee who was merely engaged in trading of content purchased / procured. It noted that the assessee was a mere trader and not a developer of content as supported by its P&L account which did not reflect any production or post production expenses as contained in the P&L accounts of NDTV and Cinevistaas. Accordingly, it deleted the addition made by the TPO arrived at by incorrectly considering the average margin of the two companies.
Star India Pvt Ltd v ACIT - TS-406-ITAT-2016 (Mum - TP)

Distribution

1131. The Court, set aside Tribunal's order remanding TP-issues in respect of international transactions undertaken in assessee's distribution, agency & marketing segments without giving any conclusive finding on selection of comparables for AY 2008-09. It held that Rule 10B(2) r.w. Rule 10B(3) required that comparables selection to be made with reference to FAR analysis and after considering specific characteristic of the property transferred or services provided in both the controlled and uncontrolled transactions. Accordingly, it remanded the matter to the file of Tribunal for disposal on merits.
Corning SAS-India Branch Office vs DDIT-TS-725-HC-2017(DEL)-TP- ITA 505/2017 dated 18.09.2017

1132. The assessee was a wholly owned subsidiary of Oriflame Investments Ltd., Mauritius and was engaged in the distribution and sale of cosmetic products manufactured by AE primarily through direct selling channel. During the TP proceedings, the TPO included a comparable viz Modi Care Ltd which apart from cosmetics was also engaged in the marketing of other products. The assessee challenged the inclusion before the Tribunal on the ground that dissimilarity with respect to products sold and the proportion borne by each of the products on turnover would impact profitability of the comparable entity. Although the Tribunal accepted the plea of functional dissimilarity, yet it did not pass an order for exclusion of the comparable and remanded back the matter to the TPO. The Court on further appeal, remanded the matter back to the Tribunal with a direction for disposal of the case on merits and directed the order of the Tribunal, to remand the matter to the TPO, to be set aside.
Oriflame India (P.) Ltd. v. ACIT – [2018] 93 taxmann.com 185 (Delhi) – IT Appeal Nos. 811 to 813 & 825 of 2017 dated April 10, 2018

1133. The assessee was engaged in the business of distribution of subscription rights of satellite channels. The Tribunal following the coordinate bench decision of assessee's own case for earlier year included 4 comparables namely, Softcell Technologies Ltd., Sonata Information Technologies Ltd., Empower Indsutries India Ltd. (In the earlier year's decision, the Tribunal noted that the said comparables were accepted by assessee) and Trijal Industries (The Tribunal in the earlier year noted that software distribution company were held to be a good comparable to distribution companies in case of coordinate bench ruling in case of NGC India Pvt Ltd and also was accepted as a valid comparable by TPO in AY 2013-14.) as there was no change in material facts from previous year.
DCIT vs Turner International Pvt Ltd. [TS-1238-ITAT-2018(DEL)-TP] ITA No.1149/Del/2015 and CO No.43/Del/2018 dated 08.10.2018

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1134. The Tribunal, in second round of proceedings, excluded 7 channel/content owner companies as comparables for assessee's distribution segment. Further, it noted that distribution segment of the assessee was different and independent from assessee's production/ancillary activities which was carried out as a captive service provider and found to be at arm's length by the TPO. It disapproved the action of DRP/TPO of mixing functionality of independent activities of distribution and production/ancillary to distort the functionality to justify the selection of channel owner companies especially when the transaction from such production/ancillary services constituted only 4% of the value of the international transaction. The Tribunal relied on the co-ordinate bench ruling in assessee's own case for subsequent AYs 2007-08 & 2008-09 to re-iterate that that Satellite TV channels and cable network operators had significantly different operating models and directed exclusion of the said companies. The Tribunal accepted the stand of the the assessee that software distribution companies could be considered for comparability analysis by following the co-ordinate bench decision in NGC Network wherein it was held that the aforesaid companies can be taken for comparability analysis, when no direct comparable dealing with distribution of satellite channels are available. Thus, Trijal Industries Ltd (trader in computer packages) as a comparable was accepted and the Tribunal further noted that TPO in subsequent years also had accepted software distributors as valid comparables. However, it excluded Syam Software (also a software distributor) in view of its persistent losses.

Turner International India Pvt. Ltd v ACIT [TS-483-ITAT-2018(DEL)-TP] ITA No.1204/Del/2018 dated 18.06.2018

1135. The Tribunal held that the assessee,engaged in distribution of channels was to be compared to companies engaged in the business of distribution and that the TPO was incorrect in choosing service companies as comparable. It further held that where data of distributors of channels was not available in the public domain, distributors of broadly comparable products and services should have been selected.

ACIT v Turner International India Pvt Ltd-TS-336-ITAT-2016 (Del)- TP

1136. The Tribunal followed co-ordinate bench ruling in assessee's own case for previous AY 2011-12 wherein the assessee had selected software distributors as comparables in absence of data available in public domain with regard to channel distributors and the Tribunal had remitted the benchmarking of assessee's payment of distribution fee on the ground that the assessee had not furnished agreement with AEs and revenue sharing agreement with Non-AEs (so as to enable the AO to apply internal CUP). Thus, the Tribunal also remitted the benchmarking of assessee's payment of distribution fees to AEs (channel operators) for AY 2012-13.

MSM Discovery Private Limited vs. ACIT [TS-316-ITAT-2018(Mum)-TP] ITA No.1935/Mum/2017 dated 02.05.2018

Transport / Freight / Tours / Travel Services

1137. Relying on the coordinate bench decision in assessee's own case for earlier year, the Tribunal held that assessee engaged in providing tour services to AE could not be compared to Cox & Kings Limited as it was involved in different activities besides tour operation and had

its own brand value. Therefore, it could not be held to be a good comparable for determination of the ALP for the international transactions. [The coordinate bench decision in assessee's own case for earlier year had in turn relied on HC decision of Oracle (OFSS) BPO Services wherein said comparable was excluded on the ground that the said company's brand plays its own role in price or cost determination].

Enchanting Travels Pvt Ltd vs ITO [TS-1123-ITAT-2018(Bang)-TP] IT(TP)A No.444/Bang/2017 dated 14.09.2018

1138. The Tribunal held that assessee engaged in providing tourism services to customers of AE could not be compared to:

- Kerala Travels Interserve Ltd as the revenue was from different activities such as airline commission and not from tour operations
- Cox & Kings Limited as the company had its own brand value and was engaged in multiple activities.

Enchanting Travels Private Limited vs ITO [TS-744-ITAT-2018(Bang)-TP] IT (TP) A No.2149/Bang/2017

1139. The Tribunal held that the assessee engaged in providing cargo handling and freight forwarding services could not be compared to Gordon Woodfree Logistics Ltd and that the said company was rightly rejected by the TPO as it was a persistent loss making company. It noted that the company made losses in the prior and relevant year and only earned a small profit in the subsequent year and therefore upheld the TPO's exclusion of the comparable.

As regards the TPO's selection of NR International Ltd and Natura Hue Chem Ltd, the Tribunal noted that though the said companies were engaged in various other businesses, the TPO had only considered the relevant segment viz. cargo handling segment for comparability and therefore upheld their selection.

Further, noting that the TPO had excluded Hindustan Cargo Ltd and Tiger Logistice (India) Ltd on the ground of non-availability of financial data for the relevant year, the Tribunal remitted the issue to the file of the TPO directing the assessee to furnish data for the relevant year for verification of comparability.

Ahlers India Pvt. Ltd. Vs DCIT - TS-150-ITAT-2017(CHNY)-TP - I.T.A.No.1071/Mds./2016 dated 03.03.2017

1140. The Tribunal held that the assessee engaged in rendering freight and forwarding services in domestic and international sector (including ancillary services) could not be compared to:

- Balmer Lawrie & Co. Ltd. as company earned revenue from sale of Manufactured goods, Trading goods, Turnkey projects and Services and that the Logistics Segment of the company could not be accurately compared as there were unallocable costs which were wrongly apportioned to the segment based on gross revenue as there were many other considerations such as cost of capital and labour which were to be factored.
- ABC India Limited as the company had 2 streams of income, namely, Transport division and Petrol pump division which could not be compared to the assessee's activities
- S.E.R. Industries Ltd and Delhi-Assam Roadways Corporation Ltd as the companies were not providing any ancillary services, such as, storage and warehousing and custom clearance & documentation etc which were being provided by the assessee

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- Transport Corporation of India Ltd. as computation of the profit margin of the Transportation Division of this company by allocating common unallocated expenses in the proportion of revenue was not accurate as held above in the case of Balmer Lawrie.

Further, it held that the following companies were to be included as comparables:

- Premier Road Carriers Ltd as the basis of exclusion adopted by the TPO i.e. it had a high ratio of lease rent to sales of 79.01% was not justified as the assessee itself had a similar ratio of 66.56%
- Roadways India Ltd. as the TPO was incorrect in excluding it merely based on low profits without disputing the functional similarity of the company
- Skypack Service Specialists Ltd as the company was wrongly excluded on the ground of persistent losses wheras it had suffered losses only for the year under review and the immediately preceding year.

CEVA Freight India Private Limited (Formerly Known as EGL Eagle Global Logistics (India) Pvt Ltd) vs. DCIT - TS-40-ITAT-2018(DEL)-TP - ITA No. 4956/Del/2013 dated 18.01.2018

1141. The Tribunal held that the assessee, engaged in providing travel security services to its AEs could not be compared to:

- Apitco Ltd as the company was engaged in providing services in the nature of Project report preparation, Technical and economic studies, Feasibility studies, Micro enterprise development, Skill development, Project management consulting, Industrial cluster development, Environmental management consulting, Energy management consulting, Market and social research and Asset reconstruction management services without any segment-wise profitability data. Relying on the High Court ruling in Rampgreen Sales Pvt. Ltd. vs. CIT [TS-387-HC-2015(DEL)-TP], it dismissed the contention of the Revenue that the activities done by this company were mainly 'Business Services' and that differentiation of functions in the overall `Business services' umbrella was taken care of under the TNMM.
- TSR Darashaw Limited (TSRDL) as the company was one of India's leading BPO organizations engaged in payroll & employees' Trust Fund administration & management, Record management, providing registry related services, depository related services etc and had striking dissimilarities with the assessee's tourists' safety services.

Travel Security Services (India) Pvt. Ltd. vs. DCIT - TS-285-ITAT-2017(DEL)-TP - ITA No.6828/Del/2015

1142. The Tribunal held that assessee engaged in the provision of vessel related services could not be compared to:

- Aegis Logistic Ltd. as the functional profile vis-à-vis assessee was different on account of it providing liquid logistics outside port area, to the destination through pipelines. Further, the DRP had directed the TPO to retain the said comparable only if segmental data was available.
- Malabar Coast Services Pvt. Ltd. as the turnover of Rs.1.96 crores vis-à-vis assessee company of 275 crores could not be comparable. Further, the Tribunal noted that the comparable had a high margin of 42.33% as compared to its holding company also which was an anomaly and should have been investigated by the TPO before its inclusion. [It

relied on the decision of Bom HC in Pentair Water India Pvt. Ltd for excluding on basis of turnover.]

Bothra Shipping Services (Currently known as Bothra Shipping services Pvt) vs ACIT [TS-814-ITAT-2018(Kol)-TP] ITA No.188/Kol/2017 dated 31.07.2018

1143. The Tribunal held that Arcadia Shipping Ltd (ASL) could not be rejected as comparable to the assessee engaged in the business of ship management services considering both these companies were engaged in shipping business and were conducting similar activities. It rejected Revenue's contention that while the overall functions of ASL were similar to assessee some of the activities were different, and opined that TP proceedings especially selection of valid comparables-are not meant to put the proverbial fly in place of a fly and that there might be some differences in each model of business and therefore two comparables could not be expected to be mirror image of each other. Further, it noted that that in earlier year TPO himself had included ASL as a valid comparable and Revenue could not bring out any difference in facts in the subject years and accordingly directed inclusion of ASL. Additionally, it excluded HSCC (a government of India enterprise), selected by TPO/DRP, as comparable on grounds of functional dissimilarity as it was awarded the work of rendering consultancy services for design and engineering, project management, procurement of medical equipments, drugs and pharmaceuticals for various prestigious and big projects and it was participating in exhibitions organised by various agencies & also since it was earning abnormal profit vis-à-vis the previous year. However, it clarified that a government enterprise could not be rejected as a valid comparable merely because it is a government undertaking.

Anglo-Eastern Ship Management (India) Pvt. Ltd. vs. DCIT - TS-29-ITAT-2018(Mum)-TP -/I.T.A./1500/Mum/2016 dated 03/01/2018

1144. The Tribunal held that the assessee [engaged in the business of transportation to various destinations in the domestic and international sectors] could not be compared to:

- Sical Logistics Ltd. as the company was engaged in the business of port handling, customs house agency, ship agency, road logistics and goodwill travel. It also did not have segmental information and did not have any earnings in foreign exchange, indicating that the company did not have international operations
- All Cargo Logistics Ltd as the consolidated financial statements included financial results of not only the Indian operations but also of the multimodal transport business carried on by the company's subsidiaries in other countries. The Tribunal also noted the asset base of the company vis-à-vis the assessee which was Rs.1330 crores as against the assessee's asset base of Rs. 11crores.
- SDV International Logistics as the company was following a different financial year and quarterly audited financial data was not available in public domain, hence no such adjustment could be made
- Om Logistics Ltd as it was was engaged in providing air cargo, train Cargo services factory relocation, home shifting/office relocation services which by no stretch of imagination could be compared to courier business of assessee.

Further, the Tribunal also held that Indo Arya Central Transport Ltd. could be included as a comparable and the TPO was unjustified in rejecting the company on the reasoning that it was incurring losses. TheTribunal observed that the reasoning was factually incorrect since

the said comparable had earned a profit but only post working capital adjustment, it was showing a loss.

Aramex India Pvt. Ltd vs. DCIT [TS-351-ITAT-2018(Mum)-TP] ITA No.6749/Mum/2017 dated 18.05.2018

1145. The Tribunal, relied on the decision of the co-ordinate bench in the case of the assessee for the earlier year and held that the assessee engaged in the business of rendering travel and financial services was comparable to Crown Tours Ltd, Tamarind Tours Pvt Ltd, Balmer Lawrie & Co Ltd and Trade Wings Ltd as they were also engaged in the business of Tours and travel.

Thomas Cook (India) Ltd v DCIT – TS-63-ITAT-2017 (Mum) - TP

Others

1146. The Court held that where a substantial part of revenue of a comparable company in execution of turnkey projects arose out of executing projects of public sector undertakings, it could not be considered to be comparable to assessee-company providing turnkey services to its AE as contracts between Public Sector undertakings were not driven by profit motive alone but other considerations also weigh such as discharge of social obligations etc.

CIT v Thyssen Krupp Industries India (P)Ltd -[2016] 68 taxmann.com 248 (Bombay)

1147. The Court dismissed Revenue's appeal and upheld Tribunal's deletion of TP-adjustment. It observed that the Tribunal deleted the adjustment on the ground that the TPO had wrongly compared transaction of export of components with net margin of domestic sales of finished goods which was unjustified considering the difference in the nature of customers in the domestic and export market and the fact that the exports were of parts whereas the domestic sales were of finished goods. Noting that both the CIT(A) and the Tribunal, on facts, had held that the comparable adopted by the TPO was incorrect, it held that since the finding of fact was not shown to be perverse the question raised by the Revenue did not give rise to any substantial question of law.

CIT vs. Keihin Fie Pvt. Ltd - TS-189-HC-2018(BOM)-TP - INCOME TAX APPEAL NO. 1176 OF 201 dated 21.03.2018

1148. The Court admitted 2 questions of law raised by Revenue on comparables selection and risk adjustment viz.- "1. *Did the Income Tax Appellate Tribunal (ITAT) fall into error by including M/s. Petron Engineering Consultants Ltd. and M/s. Simon India Ltd. in the list of comparables for the purpose of ALP determination in the circumstances of the case?* and 2. *Was the ITAT correct in law in concluding that the risk adjustment could be allowed in the comparability analysis on general appraisal of facts and without returning any findings, to displace the reasoning of the Disputes Resolution Panel (DRP), in the circumstances of the case*?"

Pr. CIT vs. Haldor Topsoe India Pvt Ltd - TS-44-HC-2018(DEL)-TP - ITA 74/2018 dated 23.01.2018

1149. Where the comparable selected for benchmarking the assessee's international transactions in the crop protection segment operated in two segments viz. crop protection segment and pharmaceuticals segment, the Court upheld the order of the Tribunal and held

that the relevant segmental results of the comparable were to be considered (segmental results of the crop protection segment) as opposed to the entity level results of the company.
E.I Dupont India Pvt Ltd vs CIT - TS-179-HC-2017(DEL)-TP - ITA 40/2017, C.M. APPL.2421/2017 dated 01.03.2017

1150. Where the Tribunal had excluded (a) Ashok Leyland Projects Services ltd as major part of its revenue was derived from wind energy segment and due to extraordinary event of merger during the year which presented a clear possibility of differential advantage. (b) Kitco Ltd as it was a substantial government undertaking and prominent business was from government entity and (c) Mitcon Consultancy & Engineering Services Ltd as it was engaged in diversified activities like training and engaging in laboratories and research etc. and it derived less than 75% of revenue from consultancy services, the Court held that the issue of inclusion/exclusion of comparables could not be treated as a question of law unless it was demonstrated that the Tribunal/lower authorities took into account irrelevant considerations or excluded relevant factors which impacted the ALP determination significantly. Accordingly, it dismissed Revenue's appeal.
Pr. CIT vs. WSP Consultants India Pvt. Ltd-TS-861-HC-2017(DEL)-TP ITA 935/2017 dated 03.11.2017

1151. The Court dismissed Revenue's appeal against Tribunal's decision wherein it included comparables having negative net-worth and held that when the FAR was comparable, it could not be said that the company was non-comparable unless it was shown how the negative net- worth of the company had impacted the profitability.
Pr. CIT vs Gillette Diversified Operation Pvt Ltd [TS-441-HC-2017(DEL)-TP] dated 02.05.2017

1152. The Court, observing that the order of Tribunal did not give rise to any substantial question of law dismissed Revenue's appeal challenging exclusion of ICC International Agencies Ltd as a comparable for AY 2008-09.
CIT vs Panasonic Industrial Asia Pte Ltd-TS-520-HC-2017(DEL)-TP-ITA No. 244/2017 dated 24.04.2017

1153. The Court dismissed Revenue's appeal against the order of the Tribunal treating assessee, engaged in sourcing of apparels from India for its AE, as a service provider as against a manufacturing company as contended by the Department. It noted that the Tribunal had rejected TPO's selection of comparables engaged in contract manufacturing and upheld assessee's cost plus model and that the Tribunal had listed at least 21 reasons to support its conclusion that assessee's PLI at 437% was much higher than 12.27% of the comparables which were engaged in activities similar to or identical with that of assessee. Accordingly, the Court held that the order of the Tribunal was not erroneous and dismissed the Revenue's appeal holding that no question of law arose for its consideration.
Pr CIT v Bestseller United India Pvt Ltd – TS-967-HC-2016 (Del) – TP

1154. The Tribunal rejected the contention of the assessee for inclusion of Neelkanth Rock Minerals as comparable on the ground that it was functionally dissimilar since it had activities of granite quarrying and processing whereas the assessee was not into mining but only processing.

Further, the Tribunal also rejected the contention of the assessee for inclusion of Vajra Granites Ltd. as comparable on the ground that it was functionally dissimilar since unlike the assessee it had quarry land on which the company had claimed depreciation also on the basis of depletion of mineral resources.

Indigra Exports Pvt Ltd v DCIT [TS-509-ITAT-2018(Bang)-TP] IT (TP)A No.488/Bang/2016 dated 22.06.2018

1155. The Tribunal remitted the issue of comparability of Lotus Labs to the file of the TPO noting that the assessee, a clinical trial coordinator, contended that it was not a good comparable on account of its significant RPT transactions and lack of segmental information in respect of the clinical trial segment of the said company.

Astra Zeneca Pharma India Ltd v DCIT – TS-1074-ITAT-2016 (Bang) – TP I.T(TP).A NO.107/Bang/2014 dated 27.12.2016

1156. The Tribunal following the order of the co-ordinate bench in the assessee's own case remitted the issue of exclusion of comparables on the basis of functionality back to the file of the TPO for fresh adjudication. It rejected assessee's reliance on judgments wherein the comparables were excluded and held that since the Tribunal in the assessee's own case had remitted the matter back to the file of the TPO, the facts being the same in the year under consideration, the matter ought to have been remitted to the TPO as well.

Open Silicon Research Pvt. Ltd vs. ITO-TS-1023-ITAT-2017(Bang)-TP IT (TP) A No.131 (Bang) 2014 dated 14.02.2017

1157. The Tribunal held that a company catering to needs of defence and armed forces and other organizations in field of space applications, night vision equipment, etc would not be functionally comparable to assessee engaged in the manufacturing of optical plastic lenses of human care.

Essilor Manufacturing India(P)Ltd. vs. DCIT - [2016] 67 taxmann.com 377 (Bangalore-Trib)

1158. The Tribunal dismissed the assessee's appeal ex-parte since none appeared on behalf of assessee despite notice of hearing being served and acknowledgement available on record. It rejected the assessee claim for multiple year data and also rejected the assessee's ground against TPO's 'arbitrary' comparability analysis stating that it was general as assessee had not mentioned any specific comparable to be included / excluded on the basis of functionality. Further, it upheld the TPO/DRP's restriction of working capital adjustment to 1.63% for the reason that assessee had not quantified its claim before the lower authorities.

Salesforce.com India Pvt Ltd vs. DCIT - TS-255-ITAT-2017(Bang)-TP - IT (TP) A No.697 (Bang) 2016 dated 10-03-2017

1159. The Tribunal held that an internal comparable is always preferable over external comparable when relevant data is available.

M/s Agila Specialities Pvt Ltd v DCIT [IT(TP)A No.214/Bang/2015] – TS-500-ITAT-2015 (Bang) – TP

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1160. The Tribunal held that in case of assessee, engaged in import of medical devices from AE, a company in whose case an extraordinary event of merger took place which affected its financial results, could not be accepted as a valid comparable while determine ALP.
Asstt. CIT v. Cook India Medical Devices (P.) Ltd. [2015] 60 taxmann.com 404 (Chennai – Trib.)

1161. In respect of the assessee engaged in outsourced publishing services the Tribunal remitted back the issue of inclusion/exclusion of comparables to AO/TPO for fresh consideration based on the following particulars and judgements submitted by the assessee:

- Cosmic Global by taking into consideration assessee's reliance on the decision in case of Xchanging Technology Services, Rampgreen Technologies, Parexel International & Cummins Turbo Technologies on the contention of functional difference
- Fortune Infotech Ltd by taking into consideration assessee's relinace on Symphony marketing solutions and Capital IQ Information system decision for exclusion of the said comparable due to occurrence of extraordinary events
- Jeevan Scientific Technologies Ltd by taking into consideration assessee's reliance on Amtel R&D India Pvt Ltd to emphasize that entire ITeS as classified in schedules of P&L should be considered.

Further, with respect to inclusion of 2 comparable companies namely Caliber Point Business Solution Ltd & R Systems International Ltd, the Tribunal directed assessee to furnish comparables data for verification by TPO.
M/s. MPS Ltd vs DCIT CC 4- TS-337-ITAT-2018(CHNY)-TP- ITA No 963/Chny/2015 dated 03.04.2018

1162. The Tribunal excluded Nitin Fire Protection Industries Ltd from the set of comparables on the ground that its major income was from project related activity.
R Stahl Private Limited [TS-377-ITAT-2017(CHNY)-TP] I.T.A No.2745/Mds/2016 dated 19.04.2017

1163. The Tribunal excluded Hindustan Syringe and Medical devices as a comparable for assessee engaged in business of import of assembly of component and re-export of assembled medical disposable balloon catheters] for AY 2010-11 by relying upon co-ordinate bench ruling in assessee's own case for AY 2009-10 wherein it was held that the said company was functionally dissimilar with the assessee since the said company had been using intangible assets for which royalty was paid whereas the assessee was merely a job worker. Further**,** an observation was made that the said company was engaged in trading activities without any segmental accounts available for different activities whereas the assessee was only an assembler.
Degania Medical Devices Pvt Ltd v Dy.CIT [TS-523-ITAT-2018(DEL)-TP] ITA No.1254/Del/2015 dated 27.06.2018

1164. The Tribunal held that government related, protected/affiliated/ favoured companies rendering "Certification/Inspection" services etc. and companies trading in products and goods or providing vocational training cannot be said to be functionally similar to assessee's engineering design segment.
Bechtel India Pvt Ltd. vs DCIT [TS-499-ITAT-2016(DEL)-TP] - I.T.A . No.-6779/Del/2015

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1165. The Tribunal restored the issue of benchmarking the transport segment of the assessee by comparing the non-AE refrigeration segment of the assessee as an internal comparable in light of the Calcutta HC decision of Trimline Vyapaar Ltd. wherein it was held that additional evidence could not be permitted to be adduced without giving an opportunity to the AO. The TPO had rejected the refrigeration segment as an internal comparable since the nature of work carried out was different. The TPO adopted external comparables and proposed a TP adjustment. The Tribunal noted that the coordinate bench decision in assessee's own case had restored the issue to TPO to examine the functional profile of the relevant two segments with a direction to obtain the opinion of technical expert on functions performed by the assessee under the two segments to find out the similarily/dissimilarity.In the remand proceedings, the TPO had relied on the valuation officer's report to hold that functions were not similar of the two segments however it was noted by the Tribunal that there was no detailed discussion on functions, assets and risks in the two segments of the assessee. Thus, the Tribunal restored the issue to the TPO/AO to examine the technical expert opinion submitted by the assessee as additional evidence and report of the valuation officer to adduce if the functions performed by the assessee under two segments were similar considering that the facts of each year need to be separately examined.

Carrier Air-conditioning & Refrigeration Ltd vs. ACIT [TS-798-ITAT-2018(DEL)-TP] ITA No.1126/Del/2014, ITA No.728/Del/2015, ITA No.2140/Del/2016 and ITA No.7312/Del/2014 dated 13.07.2018

1166. The Tribunal held that Hikal Ltd, having a crop protection segment was comparable to the Crop Protection Segment of the assessee and that the financial data of Hikal's crop protection segment was to be considered for comparison purposes as opposed to the entity level results taken by the TPO.

Further, in relation to the assessee's organic chemical segment, the Tribunal held that the TPO was

incorrect in rejecting Sunshield Chemicals as a comparable on the ground that it was a persistent loss making company and sick company, since the impugned company ceased to be a potentially sick company and the annual reports for the two years prior to the relevant year reflected profits. Further, it held that companies not satisfying the R&D filter of 3 percent, applied by the TPO himself were to be excluded as comparable.

El DuPont India Pvt Ltd v DCIT - TS-338-ITAT-2016 (Del) - TP

1167. The Tribunal held that compromising similarity to some extent under TNMM does not mean switching over to an altogether different product and therefore companies dealing in tractors could not be compared with the assessee who dealt in harvester combines.

DCIT v Claas India Pvt Ltd [ITA No 1783 / Del / 2011] - TS-371-ITAT-2015(DEL)-TP

1168. The Tribunal held that companies providing services in the nature of product report preparation, technical and economic studies, feasibility studies, skill development, project management consulting etc, companies providing Procurement Review of multilaterally funded projects across the globe and companies undertaking Registrar and Transfer agent activities, records management activities and payroll and trust fund activities could not be compared to the assessee who was engaged in identifying customers, understanding their

requirements and forwarding the same to its AE along with assisting in finalization of the sale of products.

Trend Micro India Pvt Ltd v DCIT (ITA No.1585/Del/2015) – TS-556-ITAT-2015 (Del)

1169. The Tribunal held that the assessee engaged in the business of import of assembly of component and re-export of assembled medical disposable balloon catheters could not be compared to:

- Hindustan Syringes and Medical Devices Pvt Ltd as it had technology collaborations with multiple companies and carried out research and development in several areas including quality improvement, capacity optimization, waste reduction etc and therefore was functionally dissimilar to the assessee.
- Pregna International Ltd as it was a leading contraceptive solutions organization and engaged in sale of components. Further, it also had an inhouse research team.

Degania Medical Devices Pvt. Ltd. vs. ACIT-TS-946-ITAT-2017(DEL)-TP ITA No. 895/Del/2014 dated 07.11.2017

1170. The Tribunal held that the assessee engaged in provision of staffing services to its AE could be compared to HCCA Business Services Pvt Ltd as the company was engaged in human resource services and based on its agreements with its customers it provided staffing services.

Further, the Tribunal remitted Ma Foi Management Consultants Ltd to analyse if financial results could be extrapolated owing to different financial year endings between the comparable and assessee. It also remitted the comparability of Nirbhay Management Services Pvt Ltd to the file of the TPO for analyzing the functional profile with direction to the assessee to provide all relevant information and material required for verification on account of the company being introduced during course of proceedings before DRP and TPO not being given reasonable opportunity to verify the functional profile of the company.

Pyramid IT Consulting P Ltd [TS-618-ITAT-2018(DEL)-TP] vs ACIT ITA No.7083/Del/2014 dated 11.07.2018

1171. The Tribunal held that assessee engaged in business of formulations, purchased from its AE could not be compared to:

- Engineers India Ltd, Rites Ltd and Water & Power Consulting Services Ltd (WAPCOS) as they were Government entities and had different business model
- TCE Engineers Consulting Limited as it was engaged in providing high end engineering services as against the assessee who was engaged in providing low end business support services.

Further, the Tribunal upheld CIT(A)'s decision to determine ALP based on single year data instead of multiple year data as assessee had failed to bring on record any evidence indicating influence of earlier 2 years data on ALP-determination.

M/s Eli Lily & Co (India) Ltd. Vs ACIT Gurgaon- TS-407-ITAT-2018(DEL)-TP- ITA No 6819/Del/2014 dated 11.04.2018

1172. Where the TPO had excluded India Japan Lighting Ltd [introduced by TPO himself] as a comparable though assessee had not requested for its exclusion and also rejected assessee's contention for inclusion of 6 more comparables having FAR similar to India Japan Lighting Ltd,

on perusal of the TPO/DRP's order, the Tribunal observed that the assessee's plea for including 6 new comparables was rejected in a summary manner without giving a proper reasoning and therefore held that the comparables had not been properly analysed by the Ld. TPO in light of the submissions of the assessee which had been simply disregarded without any reasoning. Accordingly, it restored the entire issue of the selection of the comparables to the file of the TPO for making a fresh comparability analysis after duly considering the evidences and submissions of the assessee.

Denso India Limited vs. ACIT - TS-456-ITAT-2018(DEL)-TP - ITA No. 4788/Del/2010 dated 31.05.2018

1173. The Tribunal remitted the issue of adjustment made to ALP of international transactions for denovo adjudication by the TPO accepting assessee's contention for set aside on ground that the comparables were not considered by TPO/DRP. It directed assessee to submit necessary documentation in support of its contention and to adduce fresh evidences.

Foster Wheeler Bengal Pvt. Ltd. vs ACIT[TS-1269-ITAT-2018(Kol)-TP] ITA No. 41/Kol/2017 dated 07.12.2018

1174. The Tribunal held that assessee engaged in provision of business facilitation services (consulting services) to its AE could be compared to a) Cyber Media Research Ltd. and b) ICRA Online Ltd. as it was accepted by TPO in the last two preceding years then there was no premises to reject the comparables when TPO/DRP had not brought out that that the functional profile of either of the aforementioned comparables or that of the assessee had witnessed a change during the subject year as against the preceding year. It opined that in the absence of any change in the circumstances a company which has been accepted as a good comparable by the Revenue in the earlier years cannot be whimsically rejected in a subsequent year by relying on Bombay HC judgment in Aptara Technology Ltd. wherein it was held that in the absence of Revenue being able to establish any difference in the facts from that existing in the earlier AY to that existing in the subject AY, there was no reason to exclude the comparable.

Basell Polyolefins India Pvt. Ltd vs ACIT[TS-1388-ITAT-2018(MUM)-TP] ITA No. 2659/Mum/2016 dated 19.12.2018

1175. The Tribunal following the decision of the co-ordinate bench in the assessee's own case in AY 2008-09 directed the AO/TPO to consider assessee's objections regarding comparables selected by the AO / TPO for the purpose of benchmarking the commission income received by the assessee from its AE with respect to sale of fixed income & derivative products on behalf of its AE i.e. that the comparables selected by the TPO did not have any derivate transactions, that the margin of the comparables were not correctly computed and that the some of the comparables had different functions and risks. It also directed TPO to apply arm's length margin only to operating costs related to AE transactions.

Societe Generale [TS-314-ITAT-2017 (Mum)-TP] - / ITA No.1854/Mum/2015 dated 19.04.2017

1176. The Tribunal remitted the issue of determining the ALP to AO/TPO and directed them to include two comparables viz. Haldiram Bhujiawala and Capital Foods for benchmarking assessee's sale of Ready-to-Serve products to AE. It observed that the comparables had

been accepted by the assessee in subsequent assessment year and relied on the ruling of Bobst India where the TPO was directed to include a company in the list of comparables as the said company was found to be comparable entity in the subsequent assessment year.
Tasty Bite Eatables Limited vs DCIT [TS-730-ITAT-2018(PUN)-TP] ITA No.337/Pun/2014 dated 11.06.2018

1177. The Tribunal restored the issue of determination of ALP in case of assessee engaged in leasing and sub-leasing of vessel from AE and to its AE noting that none of the companies selected by TPO were engaged in the same activity as the assessee. It directed the TPO/AO to select the correct comparables functionally, asset wise to arrive at PLI to benchmark and determine ALP. Further, it rejected assessee's plea that adjustment for government policies should be granted while determining ALP noting that assessee intended to buy the vessel from AE however RBI had not granted permission for ECB Borrowing due to which it had leased the vessel from AE and the assessee failed to explain the reasons as to why it had leased the vessels from AE at a higher rate.
Lewek Altair Shipping Pvt Ltd. vs ACIT [TS-1114-ITAT-2018(Viz)-TP] ITA No.93/Viz/2017 and ITA No.559/Viz/2017 dated 10.10.2018

e. Comparability – Intra Industry

Turnover filter

1178. The Court held that the turnover filter was a relevant factor for comparability and upheld the order of the Tribunal excluding companies having turnover substantially higher (23 times, 65 times) than that of the assessee i.e. Rs. 11 crores
CIT v Pentair Water India Pvt Ltd (Tax Appeal No 18 of 2015) – TS-566-HC-2015 (Bom)

1179. The Court held that removal of filter by the ITAT which had been accepted by the TPO would not be feasible as companies eliminated by the filter could not be brought back for examination. Further high or low turnover was not reason to justify exclusion of a comparable but since the TPO had applied a lower limit of Rs. 5 crore there was no justification in not applying an upper turnover filter.
CIT v Nokia India Pvt Ltd (ITA 676 / 2015) – TS-432-HC-2015 (Del) – TP

1180. The Tribunal relying on the Bombay HC ruling in Pentair Water India held that turnover filter is an important filter to select comparables for assessee engaged in the manufacture of bulk drugs. Further, observed that though there were conflicting judgments on the aspect of application of turnover filter, the Revenue failed to bring to its attention any judgment of jurisdictional HC which prohibited application of turnover filter. The Tribunal affirmed the turnover filter criteria applied by the CIT(A) which held that since the assessee has a turnover of 15.84 crores, turnover of companies exceeding Rs.30 crores could not be considered to be comparable. On the basis of filter set by the CIT(A), the Tribunal included Welcure Drugs which was bulk manufacturer of drugs as a comparable and deleted the adjustment since no adjustment would be required as per the provisions of section 92(3) of the Act after the inclusion.

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Schutz Dishman Biotech P Ltd [TS-472-ITAT-2018(Ahd)-TP] ITA No.1229/Ahd/2012 and 954/Ahd/2012 dated 05 June 2018

1181. Where the CIT(A) had excluded several comparables applying the high turnover filter, the Tribunal relying on the decision in the case of Chyscapital Investment Advisors India Pvt Ltd [TS- 173-HC-2015(DEL)-TP held that it had to be seen whether the size and turnover was materially affecting the price or not and whether the effect of such differences can be eliminated by way of a reasonable adjustment or not. Accordingly, it remitted the matter back to the file of CIT(A) for fresh consideration.
ITO vs. Huawei Technologies India Pvt Ltd-TS-826-ITAT-2017(Bang)-TP-ITA No. 598/bang/2013, C.O No.192/bang/2015 dated 22.09.2017

1182. The Tribunal, relying on the decision in the case of Chryscapital Investment Advisors held that turnover filters could not be applied unless and until it was established that it affected the profitability of the comparables and accordingly remitted the comparability of iPower Solutions Limited, Infosys Technologies Limited, Satyam Computer Services Limited and Larsen & Toubro Infotech Limited and Xcelvision Limited to the file of CIT(A) for re-examination.
Sharp Software Development India Pvt Ltd vs Dy.CIT-TS-797-ITAT-2017(Bang)-TP dated 27.09.2017

1183. The Tribunal held that the assessee engaged in the business of development and delivery of domain specific software for its AE was not comparable to Infosys Ltd, Larsen & Toubro Infotech Ltd, Mindtree Ltd, Persistent Systems Ltd having turnover Rs. 25385 crores, Rs. 2181 crores, Rs. 878 crores and Rs. 610 crores respectively as the said comparables failed the 10 times turnover filter of the assesseee having turnover Rs. 41.13 crores.
Obopay Mobile Technology India Private Ltd vs DCIT-TS-493-ITAT-2017(Bang)-TP-IT(TP)A Nos 238 & 553/bang/2016 28.04.2017

1184. The Tribunal excluded 10 companies viz. Visual Soft Technologies Ltd, Infosys Technologies Ltd, Satyam Computer Services Ltd, Geometric Software Solutions Co Ltd, Tata Elxsi Ltd, RS Sofware Ltd, Sasken Communication Technologies Ltd, Flextronics Software Systems Ltd, iGate Global Solutions Ltd & L&T Infotech Ltd by applying the turnover filter of 10 times the turnover of the assessee i.e. Rs.4.95 crores. Accordingly, these companies having turnover ranging between 81.69 crore to Rs.6859.66 crore were excluded.
DCIT v Nvidia Graphics Pvt Ltd – TS-1089-ITAT-2016 (Bang) – TP - IT(TP)A No.1211/Bang/2011 dated 23.11.2016

1185. The Tribunal agreeing that turnover was a relevant factor to be taken into account, held that there should be some proper and reasonable parameter to apply turnover filter which may be a multiple in the range of 'x' number of times rather than a fixed slab. Noting that many Tribunals have been applying a turnover filter of 10 times of assessee's turnover on both sides, it directed the TPO to apply turnover filter of 10 times of assessee's turnover, which was Rs. 100 Cr in the software development services segment, thereby arriving at tolerance range of Rs. 10 Cr to Rs.1000 Cr. Accordingly, it noted that 2 companies viz.KALS Information System Ltd. (Rs. 2.5 Cr turnover) and Infosys Technologies Ltd. (turnover of Rs. 20,000 Cr) were to be excluded on account of turnover.

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VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P}A. No.1311/Bang/2014 dated 6.1.2017

1186. The Tribunal set aside TP issues relating to ALP determination in respect of software development services rendered to AE for AY 2008-09. Out of 20 comparables selected by TPO, CIT(A) had rejected 7 comparables by applying Rs 1-200 cr turnover filter, 1 comparable on the ground of high profit margin and 2 on the grounds of functional dissimilarity. Rejecting Rs 1-200 cr turnover filter applied by CIT(A), the Tribunal held that a turnover filter of 1-200 cr was not proper as it gave unacceptable results and a tolerance range of turnover as ten times of turnover of the tested party was an appropriate filter. Regarding the ground of high profit margin, it held that high profit margin or loss could not be a ground or criteria for exclusion or inclusion of comparable, however, abnormal circumstances or extraordinary events could be a reason for exclusion but not high profit margin alone. Further, observing that the CIT(A) had not examined the functional comparability of 8 out of 10 comparables rejected by it, the Tribunal set aside the entire issue of determination of arm's length price and consequential transfer pricing adjustment to the file of CIT(A) for fresh determination of the functional comparability of the companies objected by assessee.

Huawei Technologies India Pvt. Ltd vs ITO-TS-526-ITAT-2017(Bang)-TP-IT(TP)A No.395 and 459/bang/2013 dated 31.05.2017

1187. The Tribunal, relying on the decision in the case of Chryscapital Investment Advisors India P Ltd [TS-173-HC-2015(DEL)-TP], restored TP-adjustment for AY 2005-06 and 2008-09 to the file of AO/TPO. It held that huge profits or huge turnover could not ipso facto lead to exclusion of comparable unless such difference could materially affect the price or cost. Further, it held that an attempt had to be made to make a reasonable adjustment to eliminate the material differences between assessee's transaction and comparables. Accordingly, it directed the AO/TPO to consider the issue afresh after giving the assessee an opportunity of being heard.

DCIT v ARM Embedded Technologies P. Ltd-TS-703-ITAT-2017(Bang)-TP-ITA No. 623 & 624(bang) 2013 dated 24.08.2017

1188. Where the CIT(A) had excluded companies by applying the Rs. 1-200 crores turnover filter without examining the functional differences of these companies, the Tribunal relying on the decision in the case of Chryscapital Investment advisors (India) (P) ltd and held that mere high profit or loss could not be basis for comparables exclusion and analysis under rule 10B(3) must be done and accordingly remitted the matter to the file of AO/TPO for fresh consideration**.**

ITO vs iPass India P LTD-TS-584-ITAT-2017(Bang)-TP-IT(TP)A no.597/bang/2013 dated 16.06.2017

1189. The Tribunal applied a turnover filter of 1/10th times to 10 times of the assessee's turnover (Rs.90 crore) and accordingly held that:

AvaniCimcon Technologies (Rs.2.93 crore), e-zest Solutions Ltd (Rs.7.66 crore), Flextronics (Rs.954.42 crore), Infosys Ltd (Rs.15,672 crore), Kals Information Systems Ltd (Rs.2.05 crore)., Lucid Software Ltd (Rs.2.35 crore) could not be considered as comparable to the

assessee engaged in providing software development services and thatiGate Global Solution Ltd, Mindtree Ltd and Sasken Communication Technologies Ltd which were previously excluded on the turnover filter of Rs.1 – 200 crore were to be included as they satisfied the 1/10th to 10 times filter.

DCIT Vs Cypress Semiconductors Technology Pvt. Ltd. - TS-144-ITAT-2017(Bang)-TP - IT (TP) A No.463 (Bang) 2013 dated 07/02/2017.

1190. The Tribunal allowed the appeal of the Revenue and relying on Chryscapital Investment Advisors (India) Pvt Ltd [TS-173-HC-2015(DEL)-TP], held that the CIT(A) erred in excluding certain comparables on grounds like size, turnover, high profit margin etc.,It held that huge profit or turnover, ipso facto would not lead to the exclusion of a comparable and directed the TPO to verify if such difference materially affected the price or cost and if so make reasonable adjustment to eliminate the effect of such differences. Accordingly, it restored the matter to the file of AO for fresh consideration.

DCIT vs. Synopsys India Pvt. Ltd.-TS-678-ITAT-2017(Bang)-TP-ITA no. 874/B/2013, 1576 & 1622/B/2014 & C.O No. 154(B)-2015 dated 16.06.2017

1191. The Tribunal held that the related party to sales filter of 15 percent was appropriate. Further, it held that the application of a turnover filter was important however applying a turnover filter of say Rs. 1 to 200 crores would give unrealistic results as an entity having a turnover of Rs. 1 crore could be compared to a company having a turnover of Rs. 200 crore but at the same time, as per the filter, a company having a turnover of Rs. 200 crore could not be compared to a company having a turnover of Rs. 201 crore as it fell outside the filter. Therefore, it suggested the application of an appropriate multiple (for example, 10 times) for determining comparability based on turnover. Additionally, it held that companies having high profit margin or high loss could be rejected as comparable only if such high profit or high loss was a result of some abnormal event or circumstance and the mere fact of high profit or high loss was not sufficient to exclude companies as comparable.

ITO v Maxim India Integrated Circuit Design Pvt Ltd - TS-265-ITAT-2016 (Bang) – TP

1192. The Tribunal held that for the benchmarking of purchase of raw material and exports to AE, a comparable having a turnover of Rs.1745 crore could not be compared to the assessee having a turnover of Rs. 86 crore and held that the turnover filter was to be applied at 5 times the turnover of the assesse.

Luwa India Pvt Ltd v ACIT - TS-687-ITAT-2016 (Bang) - TP - I.T.(T.P) A. No. 568/ Bang/ 2012 & C.O.No.31/Bang/2015

1193. The Tribunal allowed the appeal of the Revenue and relying on Chryscapital Investment Advisors (India) Pvt Ltd [TS-173-HC-2015(DEL)-TP], held that the CIT(A) erred in excluding certain comparables on grounds like size, turnover, high profit margin etc.,It held that huge profit or turnover, ipso facto would not lead to the exclusion of a comparable and directed the TPO to verify if such difference materially affected the price or cost and if so make reasonable adjustment to eliminate the effect of such differences. Accordingly, it restored the matter to the file of AO for fresh consideration.

Tesco Hindustan Service Centre Pvt Ltd vs CIT and others-TS-740-ITAT-2017(Bang)-TP-IT(TP)A No.577/Bang/2012 dated 13.09.2017

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1194. The Tribunal remanded the TP-issue to the file of AO/TPO since the TPO/DRP rejected assessee's TP study and selected a fresh set of comparable without considering turnover filter as a result of which the TPO/DRP's selection of comparables was not correct. Accordingly, it directed the AO/TPO to re-examine matter and give assessee opportunity of being heard on selection of comparables.

PB Systems (India) Pvt. Ltd v DCIT - [TS-132-ITAT-2018(CHNY)-TP - ITA No.3164/Mds/2016 dated 28.02.2018

1195. The Tribunal directed the TPO to consider turnover filter while selecting comparables for the purpose of benchmarking, noting that the turnover of the company was very vital for determining the ALP since it would have a substantial impact on the financial results. It noted the contention of the assessee viz. that TPO erred in selecting comparables with turnover ranging from Rs.3crores to Rs. 730 against it's turnover of Rs. 148 crores the fact that the issue was not adjudicated by CIT(A) and accordingly remitted the selection of comparables back to the file of TPO for fresh examination on the basis of turnover. However, it directed the assessee to submit specific and necessary information on how the comparables were not comparable instead of giving generalized grounds like huge turnover.

Venture Power Systems India Pvt. Ltd. Vs. DCIT - TS-123-ITAT-2017(CHNY)-TP - ITA No.1703/Mds/2011 dated 13.01.2017

1196. The Tribunal held that the assessee engaged in the business of trading in Uninterrupted Power Supply (UPS)/ Invertors with its AE could not be compared to Su-Kam Power Systems Ltd. (Rs.680.41 crores) and Swelect Energy Systems Ltd (turnover of Rs.534.64 crores) since it failed the turnover filter criteria applied by the TPO of more than one crore and less than 200 crores.

The Tribunal further noted that as a result of the two comparables being excluded the PLI applying the Berry ratio of comparable left would be within the ±5% margin and there would be no need for any further adjustments.

Socomec Innovative Power Solutions Private Ltd [TS-428-ITAT-2018(CHNY)-TP] ITA No.848/Chny/2018

1197. The Tribunal restored the matter back to TPO for examination noting that turnover was not relevant criteria if companies were otherwise functionally comparable in case of power control division of assessee. The assessee had relied on Delhi HC decision of Chryscapital Investment Advisors (India) P Ltd. wherein it was held that high turnover does not ipso facto lead to the exclusion of comparables and TPO had to satisfied that such differences do not materially affect price or cost and an attempt would have to be made to eliminate such differences.

GE India Industrial Private Limited vs ACIT [TS-1315-ITAT-2018(DEL)-TP] ITA No.2781/Ahd/2012 dated 04.12.2018

1198. The Tribunal held that companies having turnover 20 times more than the assessee could not be accepted as a comparable.

DCIT v United State Pharmacopeia India (P)Ltd - [2016] 46 CCH 0447 (Hyd Trib)

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1199. The Tribunal upheld the DRP's order excluding companies with turnover of less than 200 crores and exceeding 2000 crores relying on the coordinate bench decision in Genisys Integrating Systems wherein a guideline in the matter of turnover was suggested that companies having turnover less than 200 crores are small companies, companies with turnover between 200 to 2000 crores are medium companies and companies exceeding turnover of 2000 crores are large companies and hence taxpayer being a medium company, small and large companies had to be excluded as comparables.
Thomson Reuters International Service Pvt Ltd vs DCIT [TS-1090-ITAT-2018(MUM)-TP] - ITA No. dated 03.08.2018

1200. The Tribunal remitted back to the file of AO/TPO, the issue of TP-adjustment in case of assessee engaged in import and distribution of biomedical diagnostic equipment, where the dispute arose as regards the rejection of comparables selected by the assessee by TPO applying the turnover filter exceeding 1000 crores. The Tribunal took note of the fact that the assessee and the Revenue were not able to demonstrate whether turnover filter was relevant for arriving at the margins in the peculiar line of business that the assessee was engaged in.
Roche Diagnostics India Pvt Ltd vs ACIT Range 8(3)-TS-803-ITAT-2018(Mum)-TP- ITA No 7566/Mum/2012 dated 04.05.2018

1201. The Tribunal held that turnover filter could not be applied after applying the qualitative filter, as a tool for cherry picking at later stage of assessment, but was to be applied at the time of the search process.
Star Limited [TS-773-ITAT-2016 (Mum)-TP] (ITA No.7680/Mum/2012)

1202. Where the DRP had included Anshuni Commercials Ltd as a comparable stating that it was functionally similar and held that the difference in turnover of Anshuni Commercials (Rs. 79.80 lakhs) and the assessee (Rs. 33.32 crore) was not a valid criteria to exclude a comparable, the Tribunal held that the Revenue was incorrect in seeking to exclude the said comparable on the ground of difference in turnover. Further, dealing with the contention of the Revenue that the Bombay High Court in Pentair had upheld the application of the turnover filter, it held that the Revenue was misplaced in raising this ground that it had not used the turnover filter uniformly on all comparables and was seeking to selectively apply the same only to Anshuni Commercials.
Accordingly, it dismissed the appeal filed by the Revenue.
ACIT v Golawala Diamonds – TS-1008-ITAT-2016 (Mum) – TP

1203. The Tribunal held that when neither the TPO nor the assessee applied the turnover filter while selecting comparables, the same could not be applied for the purpose of rejecting comparables. It further held that low turnover alone may not have an impact on profitability unless there are other factors impacting the profitability.
Ness Technologies (India) Pvt Ltd v DCIT [IT(TP)A no.943/Mum./2015] – TS-483-ITAT-2015(Mum) – TP

Export Revenue Filter

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1204. The Tribunal set aside TPO's application of 75% export revenue filter which was neither used in the past or subsequent years and opined that rule of consistency demands uniform filter to be applied for transactions on year to year basis unless there is a material change in facts.
Tasty Bite Eatables Limited vs DCIT [TS-730-ITAT-2018(PUN)-TP] ITA No.337/Pun/2014 dated 11.06.2018

1205. The Tribunal dismissed assessee's plea for inclusion of comparable companies on the basis of additional filter of export sales less than 75% of the total income noting that assessee had failed to rebut the DRP's finding that more than 86% of the operating revenue was earned by assessee out of export sales and thus, opined that the lower authorities had rightly applied an appropriate filter for comparability analysis.
Omniglobe Information Technologies (India) Pvt Ltd vs Addl CIT [TS-1146-ITAT-2018(DEL)-TP] ITA 6980/Del/2017 dated 15.10.2018

Onsite revenue filter

1206. The Tribunal, noting that the DRP had applied onsite revenue filter to only one comparable (RS Software) in assessee's software development segment, accepted Revenue's appeal against the DRP order and held that if a new filter was applied, it had to be applied to all comparables and not to particular comparables on pick and choose basis. Accordingly, it remitted the matter to the file of DRP and directed it examine all comparables under the filter and examine the applicability of other relevant filter as well as functional comparability of those comparables.
ACIT vs Broadcom Communications Technologies Pvt Ltd-TS-932-ITAT-2017(Bang)-TP IT(TP)A No. 347/Bang/2015 dated 17.11.2017

1207. Where the assessee was earning 90% of its revenue from onsite services, the Tribunal noting that the comparables selected by the TPO failed the onsite revenue filter, directed the TPO to consider the onsite revenue filter as the relevant factor for the purpose of selecting the comparable and accordingly, remitted the entire TP issue to AO/TPO for AY 2012-13.
Arowana Consulting Ltd vs. ITO-TS-876-ITAT-2017(Bang)-TP dated 23.10.2017

1208. The Tribunal restored the entire TP matter to DRP directing it to apply onsite filter for all the comparables (and then to decide objections on functional similarity/dissimilarity) noting that DRP had applied onsite filter to only three out of thirteen comparables and the aforesaid filter was not applied by TPO. It followed the coordinate bench ruling in Broadcom Communication Technologies (P.) Ltd. wherein the DRP had applied onsite filter to only one comparable and the Tribunal had restored back with directions to DRP that for comparables passing the onsite filter, DRP should examine the applicability of all other relevant filters also and decide about inclusion/exclusion of comparables after providing adequate opportunity to the assessee to be heard.
ACIT vs IMS Health Technology Solutions Pvt Ltd. [TS-1199-ITAT-2018(Bang)-TP] IT(TP)A 577/Bang/2016 dated 12.10.2018

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Core Revenue filter

1209. The Tribunal noting that the TPO had applied filter of commission and related revenue not being less than 75% of the total revenue, excluded Priya International and ICC International Agencies ltd as comparable for assessee's sales and marketing support services provided during AY 2007-08 on the ground that Priya International Ltd had 23% commission income while ICC International Agencies Ltd had commission income of 59% which did not meet the filter adopted by TPO.
Texas Instruments (India) Private Limited vs ACIT-[TS-544-ITAT-2017(Bang)-TP]-IT(TP)A No. l032/Bang/2011 dated 16.06.2017

1210. The Tribunal accepted assessee's application of 50% manufacturing/trading income filter as against TPO's 75% service income filter since the filter was in fact broader one leading to the broader set of potential comparables noting that the TPO in the subsequent year accepted the assessee's 50% manufacturing/trading income filter.
Wolters Kluwer (India) Pvt Ltd vs DCIT [TS-521-ITAT-2018(DEL)-TP] ITA No.1700/Del/2015 dated 06.07.2018

Related Party Transaction (RPT) filter

1211. The Court upheld ITAT's application of 25% RPT filter for comparability analysis and held that the RPT filter is relevant and fits in with the overall scheme of a transfer pricing study. It held that if a particular entity predominantly had transactions with its AE in excess of a certain threshold percentage its profit making capacity may result in a distorted picture and therefore the RPT filter was necessary. Further, it upheld the exclusion of Wipro Ltd owing to its significant brand presence in the market, opining that brand value of an entity has a significant role in its ability to garner profits and negotiate contracts despite the fact that the companies are otherwise similar in terms of services or products they offer. Accordingly, it dismissed Revenue's appeal.
Pr. CIT vs. Oracle (OFSS) BPO Services Pvt. Ltd. - TS-67-HC-2018(DEL)-TP - ITA 124/2018 dated 05.02.201

1212. The Court remitted the issue of comparability of Keynote Corporate Service Ltd and Motilal Oswal Investment Advisors Pvt. Ltd vis-à-vis the assessee engaged in investment advisory service back to the file of the Tribunal. As regards Keynote Corporate Service Ltd, it accepted Revenue's contention that abnormal profits could not be a ground for exclusion of an otherwise functionally comparable company in view of co-ordinate bench ruling in assessee's own case (for earlier years i.e. AY 2006-07). However, it also noted assessee's argument that after High Court ruling (wherein the HC remitted the comparability of Keynote back to the DRP), the Tribunal had held Keynote Corporate Services as functionally incomparable to assessee in the earlier year. Accordingly, it remitted the matter back to Tribunal to consider the findings of the Tribunal in the earlier year and to record its appropriate findings year-wise on the issue of functional similarity. With respect to Motilal Oswal Investment Advisors Pvt. Ltd, the Court noted that the Tribunal had adopted RPT filter only in the case of this company and held that adopting one procedure for only one entity and adopting another for all other

entities or comparables would lead to a distorted picture. Accordingly, it remitted the matter to the Tribunal for consistent application of the filter.

Chryscapital Investment Advisors (India) Pvt Ltd vs DCIT - TS-173-HC-2015(DEL)-TP - ITA 417/2014 dated 27.03.2018

1213. The Tribunal excluded a certain company as comparable on the ground that its related party transactions were in excess of 50 percent and that it was a government undertaking whose prices were regulated and therefore could not be compared with a non-government company whose prices were determined by market forces.

DCIT v Babite Consultants (India) Pvt Ltd (In ITA. No.1018/Ahd/2011)– TS-414-ITAT-2015 (Ahd) – TP

1214. The Tribunal allowed Revenue's miscellaneous petition against its order and accepted Revenue's submission that while remitting comparability of Denison Hydraulics India for verification of RPT filter, Tribunal had inadvertently mentioned RPT percentage at 25% instead of 15%. Accordingly, finding merit in Revenue's petition, the Tribunal modified its order to reflect RPT percentage at 15% and allowed the miscellaneous petition.

DCIT v British Engines (India) P Ltd - TS-430-ITAT-2018(Bang)-TP – MP 114 / Bang / 2018 dated 14.05.2018

1215. The Tribunal upheld the order of CIT(A) upholding RPT filter of 25% and held that if lower RPT filter was applied, the number. of remaining comparables would be lesser and as a result, the whole TP exercise would become redundant. Observing that only 3 comparables were left even after applying 25% RPT, the Tribunal refused to interfere with the order of CIT(A).

Siebel Systems Software (India) Pvt. Ltd vs. ACIT-TS-832-ITAT-2017(Bang)-TP-ITA No. 1195/bang/2013 dated 22.09.2017

1216. The Tribunal held that a related party filter of 15% was to be adopted as against CIT(A)'s 0% filter and TPO's 25% RPT filter. It held that the 0% related party transaction was an impossible situation and no comparables would be available if the said filter was applied. It explained that 15% RPT filter would be proper in ordinary circumstances when there was no difficulty of selecting comparable companies and only in extreme and exceptional circumstances when the comparable companies were not easily available the tolerance range could be relaxed upto 25%. It held that the Tribunal in a series of decisions had taken the view that a tolerance range of related party transaction could be considered from 5% to 25% depending upon the facts and circumstances of each case particularly the availability of the comparable companies. Further, Since neither the TPO not the assessee had made out a case of exceptional difficulty in searching for comparables, it adopted the 15% RPT filter. Further, relying on the decision in the case of Maersk Global Centres (India) (P.) Ltd [TS-74-ITAT-2014(Mum)-TP] , it held that mere high profit margin or loss could not be considered as a parameter or criteria for selection/exclusion of comparable companies, and accordingly held that the CIT(A) erred in excluding Éxensys Solutions Ltd and Thirdware Solutions Ltd merely on the ground of high profit margin.

SunGard Solutions (India) (P.) Ltd vs ACIT [TS-351-ITAT-2017(BANG)-TP] dated 28.04.2017

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1217. The Tribunal upheld 15% RPT filter as proper in assessee's case on the ground that ideally the RPT should be nil, however in case of non-availability of enough comparables by applying 0% filter, RPT Filter of 15 or 25% may be acceptable on case to case basis.
Novell Software Development (Ind.) Pvt Ltd - TS-1044-ITAT-2016(Bang)-TP

1218. The Tribunal held that the CIT(A) was not justified in applying the RPT filter of 0 percent and relying on the decision of ITO v Net Devices India Pvt Ltd (TS-354-ITAT-2016 (Bang) – TP, ordered the adoption of 15 percent as the RPT filter. Accordingly, companies having RPT below
15 percent were considered and included / excluded based on functionality of the companies.
Thomson Reuters India Services Pvt Ltd v ACIT – TS-1084-ITAT-2016 (Bang) – TP - I.T. {T.P} A. No.1097/Bang/2011 I.T.(T.P} A. No.1115/Bang/2011 dated 09.12.2016.

1219. The Tribunal set aside the DRP's direction adopting 0% RTP filter and directed the TPO to adopt 15% RPT filter and restored the entire TP issue to the files of AO/TPO noting that several comparables rejected due to adoption of 0% RPT filter would have to be considered afresh for comparability. Accordingly, it directed the AO/TPO to decide the matter afresh after allowing adequate opportunity of being heard to the assessee.
Net Devices India Pvt. Ltd. Vs. ITO - TS-216-ITAT-2017(Bang)-TP - IT(TP)A No.435/Bang/2012 dated 23/02/2017

1220. The Tribunal held that the CIT(A) was incorrect in applying a 0% RPT filter as it was an impossible situation and held that a reasonable range of RPT to sales had to be considered for selecting uncontrolled comparables. Noting that the Tribunal, in a series of orders, accepted a tolerance range of 5% to 25% of total revenue depending upon availability of comparables, it held that when a good number of comparables were available, the threshold limit of RPT should not be more than 15% of total revenue. Accordingly, it opined that the RPT filter of 15% was proper in assessee's case and directed AO/TPO to apply the same.
DCIT vs. Novell Software Development (India) Pvt. Ltd - TS-190-ITAT-2017(Bang)-TP - I.T. {T.P} A. No.1313 / Bang / 2012 dated 10.02.2017.

1221. The Tribunal noting that various benches of Tribunal were consistently adopting 15% RPT filter, set aside CIT(A)'s order adopting 0% RPT filter for selection of comparables for assessee engaged in providing software development services and directed the CIT(A) to obtain remand report from the AO/TPO and then examine and decide the entire TP matter including other objections of the assessee in respect of cornparables which were excluded applying 0% RPT filter.
DCIT vs Though Works Technologies (I) Pvt Ltd-TS-542-ITAT-2017(Bang)-TP-IT(TP)A No.31(B) & CO No.31(B)2012 dated 16.06.2017

1222. The Tribunal admitted assessee's grounds seeking exclusion of 14 comparables viz. [Accel Transmatic Limited, Avani Cincom Technologies Limited, Celestial Labs Limited, E-Zest Solutions Limited, Flextronics Software Systems Limited, Geometric Limited, Ishir Infotech

Limited, KALS Information Systems Limited, Lucid Software Limited, Megasoft Limited, Persistent Systems Limited, Tata Elxsi Limited, Thirdware Solutions Limited and Wipro Limited] on grounds of functional dissimilarity and 4 companies viz., [Hellos & Matheson Information Technology Limited, Infosys Technologies Limited and Sasken Communication Technology Limited on grounds of RPT filter **and remanded the matter** to the file of AO/TPO with the direction to decide the issue on merits.

Novellus Systems (India) P Ltd-TS-632-ITAT-2017(Bang)-TP-ITA No. 1087/bang/2011 dated 12.07.2017

1223. The Tribunal rejected Revenue's miscellaneous petition against Tribunal order remitting the comparability of Lotus Labs to examine RPT percentage. Since the assessee had argued that Lotus Labs should be rejected as a comparable as it had significant RPT while Revenue had contended that there were no RPT in the non-AE segment, the Tribunal restored the matter back to the file of AO/TPO to re-examine whether RPT was significant or not.

DCIT vs AstrsZeneca Pharma India Ltd-TS-708-ITAT-2017(Bang)-TP-[MP No. 1 Q9/B/2017 dated 24.08.2017

1224. The Tribunal allowed Revenue's appeal and set aside CIT(A)'s order on application of filters for comparables selection for AY 2005-06 stating that the order of the CIT(A) was very cryptic and erroneous as he had adopted 0% RPT filter as opposed to 15% RPT filter adopted by a number of Tribunals. It noted that, once 15% RPT filter had been adopted instead of 0% RPT filter, several comparables which were rejected by the CIT(A) would come back and be required to be re-examined on functional comparability aspect. Thus, it restored the matter to the file of Ld CIT(A) fresh consideration.

Novellus Systems (Ind) Pvt ltd [TS-391-ITAT-2017(Bang)-TP- In IT(TP)A No.1101(bang)/2011

1225. The Tribunal held that where Assessing Officer had excluded a company from comparable list on basis of information obtained under section 133(6) of the Act but did not make available said information to assessee, comparability was to be considered afresh. The Tribunal held that where assessee had

requested for inclusion of two companies as comparables, excluded by TPO in his TP analysis on ground that they had failed RPT filter, in view of fact that actual working of TPO was not verifiable, matter required re- adjudication.

Mercedes Benz Research & Development India (P) Ltd. v ACIT - [2016] 68 taxmann.com 2307(Bangalore-Trib)

1226. The Tribunal allowed Revenue's appeal and held that the CIT(A) erred in applying the 25% related party transaction (RPT) filter for excluding Wipro BPO Solutions as comparable, noting that the assessee did not raise any ground to that effect before the CIT(A). However, it held that it's finding on the CIT(A)'s erroneous application of the RPT filter would not in any way affect the finding of the learned CIT (Appeals) in excluding Wipro BPO Solutions Limited from the list of comparables on grounds of brand and intangible ownership and huge turnover. Further, it also accepted Revenue's contention that the CIT(A) erred in holding that assessee was eligible to benefit of standard deduction of 5% from ALP under the proviso to Sec. 92C(2) and held that by virtue of the retrospective amendment to the Act made by Finance Act, 2012

w.r.e.f. 1.4.2002 it was clear that the + / - 5 % variation was to be allowed only to justify the price charged in international transactions and not for adjustment purposes.
DCIT vs. Nirvana Business Solutions Pvt. Ltd - TS-56-ITAT-2018(Bang)-TP dated I.T. (T.P) A. No.171/Bang/2012 dated 19.01.2018

1227. The Tribunal held that 0% related party filter was not practically possible and noted that in light of the view taken by Tribunals, in the normal course 15% was the tolerance range of related party transaction which could be relaxed to a maximum of 25%. Noting that neither the assessee nor the transfer pricing officer had applied related party filter, it remitted the matter to the TPO directing him to verify the RPT of comparable companies by applying a suitable RPT filter not exceeding 25 percent.
United Engineers (Malasia) Berhad Quorum [TS-827-ITAT-2016 (Bang- TP]

1228. The Tribunal held that since the assessee had objected against the incorrect RPT to sales filter of 25 percent adopted by the TPO, 15 percent being the reasonable threshold, it could not be estopped from seeking exclusion of comparables even though the said comparables were originally selected by it in its study.
Siebel Pvt Ltd v ITO [IT(TP)A No 1318 / Bang / 2010] - TS-360-ITAT-2015(Bang)-TP

1229. The Tribunal held that the RPT to sales filter should be considered at 15 percent and not 10 percent. It further held that size and turnover of a company are deciding factors while considering comparability. Further, companies having erratic margins and growth over the years and incorrect revenue recognition policies were not to be considered
Kodiak Networks (India) Pvt Ltd v DCIT [IT(TP)A No. 532 / Bang / 2013]-TS-378-ITAT-2015(Bang)-TP

1230. The Tribunal held that the application of 0 percent RPT to Sales filter was incorrect and that 15 percent was an optimum threshold. It further upheld the application of an upper turnover filter and the treatment of foreign exchange gains / losses as operating gains / losses
ACIT v Iron Mountain Information Management India Pvt Ltd [IT(TP)A No 445 / Bang /2012] - TS-373-ITAT-2015(Bang)-TP

1231. The Tribunal excluded companies having Related Party transactions in excess of 15 percent and companies that were functionally different being giant companies having significant brand value, R&D activities and owning IPRs. However, it rejected the assesse's prayer for exclusion of a company (selected by the TPO) the assessee had failed to raise the ground for exclusion of the said company before lower authorities.
Misys Software Solutions (India) Pvt Ltd v ITO [I.T.(T.P.) A. No.1425/Bang/2010] – TS-484-ITAT-2015 (Bang) – TP

1232. The Tribunal held that companies having ratio of Related Party to Sales transactions in excess of 15 percent, turnover in excess of Rs.200 crore (assessee's turnover was approximately Rs. 31 crore) and companies functionally incomparable could not be considered for benchmarking the ALP of the international transactions undertaken by the assessee.
VeriSign Services India Pvt Ltd v DCIT [IT(TP)A No.1404(B)/2010] – TS-617-ITAT-2015

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(Bang)- TP

1233. The Tribunal held that a company having related party transactions to sales in excess of 25 percent (37.88 percent) could not be considered as comparable as it would constitute a controlled transaction.

ITO v NTT Data Global Delivery Services Ltd - (2016) 47 CCH 0071 (Del- Trib)

1234. The Tribunal denied the exclusion of comparable companies on the 15 percent RPT filter based on mere reliance on legal proposition without any supporting evidence to substantiate the said the percentage of related party transactions.

ITO v ICC India Pvt Ltd (ITA No 2630 / Del / 2011) – TS-424-ITAT-2015 (Del) – TP

1235. Where the Tribunal had held that companies having related party transactions more than 15% could not be considered as comparable and had remitted the matter to AO without examining the materials on record, the Court held that the matter should have been considered on merits by the Tribunal itself and accordingly directed it to decide the matter afresh after taking into consideration the materials on record and submissions.

ICC India Pvt [TS-938-HC-2016(DEL)-TP] (ITA 320/2016)

1236. The Tribunal remitted TP adjustments on various international transactions of assessee such as receipt of licensing revenue, corporate guarantee, payment for media rights and signage fees. With respect to international license revenue receivable by the assessee from its AE, the Tribunal also noted that the assesse had not applied RPT filter for comparables selection and remitted the issue for fresh consideration with a direction to assessee to furnish fresh set of comparable after applying RPT filter. With respect to transaction of purchase of signage and media advertisement rights, it accepted assessee's request for remand back for selection of fresh set of comparables.

Nimbus Communications Ltd. vs. DCIT - TS-520-ITAT-2018(Mum)-TP - LT.A. No. 1988 / Mum / 2016 dated 21.05.2018

1237. With regard to assessee engaged in investment advisory services, the Tribunal accepted the assessee's contention by relying on the ruling of Goldstar Jewellery that reimbursements not affecting profitability should be excluded for RPT transactions and hence directed the AO/TPO to recompute the RPT filter for Future Capital which was previously excluded for the reason that its RPT filter exceeded 25%.

Apax Partners India Advisers Pvt Ltd [TS-832-ITAT-2018(Mum)-TP] ITA No.1682/Mum/2014 and 1738/Mum/2014 dated 08.06.2018

1238. The Tribunal held that the value of debtors and creditors were to be excluded while computing RPT to sales ratio.

Schlumberger Global Support Centre Ltd v DDIT (ITA No.86/PN/2013) – TS-528-ITAT-2015 (Pun– TP)

Employee Cost filter

1239. The Tribunal reversed the order of the CIT(A) order, wherein the CIT(A), relying on the decision of Mentor Graphic Noida, rejected the TPO's application of the employee cost filter ranging from 25% to 65% and held that since employee cost was low or similar

throughout India, employee cost would not make a significant difference. Noting that the Tribunal in Mentor Graphics had not rendered any specific finding regarding the acceptability of the employee cost filter, the Tribunal held that since the assessee's employee cost to total cost ratio was 42 percent, companies having employee costs of 10% or 70% would not be comparable. Observing that after application of the 25 to 65% filter, 6 companies remained in the set of comparables, it held that since the number of comparables were sufficient to conduct benchmarking analysis, the application of the said filter by the TPO was justified.

DCIT vs. Unisys India Private Limited-TS-805-ITAT-2017(Bang)-TP dated 28.09.2017

1240. The Tribunal held that the CIT(A) could not arbitrarily modify the 25 percent employee cost filter by including companies have 24.70 percent employee cost on the basis that it was almost 25 percent.

ACI Worldwide Solutions Pvt LTd v ACIT [IT(TP)A No.651/Bang/2012] – TS-492-ITAT-2015(Del) – TP

1241. The assessee was engaged in business of electronic manufacturing service provider and assembling electronic components in printed circuit board for mobile chargers. While proposing TP-adjustment, TPO made certain adjustment to PLI of comparables observing that assessee's capacity utilization was higher than comparables while ratio of depreciation to operating income was higher for comparables companies as against that of assessee. The Tribunal accepted the contention of the assessee that it's capacity utilization was in fact lower than average capacity utilization of the comparables and that the cause of higher employment cost of the comparable companies could not be attributable to their level of capacity utilization as incorrectly done by the TPO. Therefore, it noted that the higher employee cost of the comparables indicated use of skilled labour which was not required in the work done by the assessee. Accordingly, considering the above findings, it held that the comparable companies adopted by the assessee company and the Revenue could not be strictly viewed as comparable companies as the functional analysis with respect to employee cost had not been carried out. Accordingly, it remitted the matter to the file of TPO for fresh adjudication.

Flextronics Technologies (India) Pvt. Ltd. V ACIT - TS-1090-ITAT-2017(CHNY)-TP - I.T.A.No.1195/Mds/2016 dated 04.12.2017

1242. The Tribunal remitted the issue pertaining to application of employee cost filter while benchmarking the international transactions undertaken by the assessee, engaged in providing corporate information services. It held that the employee cost filter was one of the factors to be taken into consideration for the purpose of determining ALP. However, it agreed with the contention of the Department that the employee cost may vary wherever manpower was outsourced and accordingly held that the AO had to consider whether the assessee had employed its employees directly or outsourced its man power. Since these factors were not available on record with regard to the comparable companies and the assessee, the Tribunal remitted the entire issue to the file of the AO.

Williams Lea India Pvt Ltd – TS-979-ITAT-2016 (Chny) – TP

Multiple filters

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1243. The Court rejected Revenue's contention that companies could not be selected as comparable since they had a different financial year ending as compared to the assessee, by holding that if a comparable was functionally similar to the assessee and the results of the remaining part of the financial year could be reasonably extrapolated from the available data, then companies could not be eliminated on the ground of having a different financial year. Further, it dismissed the Revenue's plea for exclusion of companies having turnover less than Rs 1 crore and held that if the said filter was to be applied, then companies with higher turnover also should have been rejected.

It also held that the Revenue had erroneously excluded a company on the ground that it was in a negative phase of growth since the annual reports of the company exhibited a considerable rise in income over the past year.

CIT v McKinsey Knowledge Centre India Pvt Ltd - TS-672-HC-2015 (Del) - TP - ITA 217/2014

1244. The Tribunal remitted the comparability of the following companies to the file of the AO/TPO for fresh consideration:

- Infosys Ltd, L&T Infotech ltd, Midntree ltd, R S Software Ltd, Tata Elxsi ltd. Persistent Tech ltd, Sasken Communications ltd relying on the decision in the case of Chryscapital Investment Advisors (india) Pvt ltd [TS-173-HC-2015(DEL)-TP] wherein it was held that before excluding a comparable based on turnover filter, some exercise had to be done by the AO/TPO to find out whether such a high or low turnover had any effect on the price and whether reasonable adjustment could be made for such difference.
- Acropetal Tech ltd- the Revenue had sought exclusion of this company on the basis that it did not qualify employee cost filter which was not applied to other companies. Accordingly, the Tribunal remanded its comparability for fresh consideration and directed the AO/TPO to apply the filter to other comparables as well.

ITO vs Cenduit India Services Pvt. Ltd-TS-576-ITAT-2017(BANG)-TP dated 07.07.2017

1245. Noting that while selecting comparables the TPO failed to apply the filters uniformly to all the comparables the Tribunal remitted the issue back to the TPO to re-examine the comparables of the assessee as well as those of the TPO by applying the same filters uniformly.

Swiss Re Global Business Solutions India Private Ltd vs. DCIT - TS-161-ITAT-2018(Bang)-TP - IT(TP)A No.2028/Bang/2017dated 28.02.2018

1246. The Tribunal upheld TPO's rejection of assessee's TP-study due to failure to adopt filters like employee-cost filter and export earnings filter as well as use of 3 years weighted profit margin. Further, it rejected assessee's grounds to include/exclude comparables since no proper application had been made by assessee for admission of additional grounds and the same had not been a subject matter of proceedings before the AO/DRP.

Curam Software International Pvt Ltd vs ITO-TS-540-ITAT-2017(Bang)-TP-IT(TP)A No.192/bang/2017 dated 07.06.2017

1247. Noting that Tribunal has **in other cases** been restoring cases back to AO/TPO for fresh consideration where grounds raised relate to application of turnover/ high profit filter in light of Chryscapital HC ruling (wherein it was held that turnover cannot be a criteria for inclusion / exclusion of a comparable, but it is for DRP / TPO to examine whether the turnover

has affected the price or margin of the comparable with that of the assessee), the Tribunal remitted the entire TP issue in respect of assessee's provision of software development and marketing support services for AY 2010-11. Further, in respect of RPT filter, relying on the decision in the case of ACI Worldwide Solutions P Ltd [TS-614-ITAT-2017(bang)-TP], held that 25% RPT filter was to be applied as opposed to 0% proposed by the CIT(A) as it would lead to a larger number of comparables and 25% filter had been consistently applied by the Tribunal. Accordingly, it restored the entire TP issue to the file of TPO.

Microchip Technology (India) P Ltd vs. ACIT-TS-864-ITAT-2017(bang)-TP-I.T(TP).A No.260/Bang/2015) dated 27.10.2017

1248. The Tribunal, relying on the decision in the case of Chryscapital Investment Advisors Limited [TS-173-HC-2015(DEL)-TP (wherein it was held that mere fact that an entity makes high profits/losses or has huge turnover does not ipso facto lead to its exclusion from the list of comparables for the purpose of determination of ALP) , remitted the comparability of Flextronics Software Systems Ltd, Infosys Ltd, Foursoft Ltd, Geometric Software Solutions Company Ltd, Sankhya Infotech Ltd, Satyam Computer Services Ltd, iGate Global Solutions Ltd and L&T Infotech Ltd to the file of AO/TPO for fresh decision. Further, in respect of Exensys Software Solutions Ltd, noting that the Tribunal had not decided all the aspects as they were never argued before the Tribunal (except the issue of extraordinary event), remitted it back to the file of AO/TPO to consider it afresh.

DCIT vs IGEFI Software India Pvt Ltd-TS-923-ITAT-2017(bang)-IT(TP)A No. 461/Bang/2013 dated 17.11.2017

1249. Where the DRP suo-moto invoked 0% RPT filter and applied Rs. 200 cr turnover filter pursuant to which only 2 companies remained in the list of comparables, the Tribunal, relying on the decision in the case of ACI Worldwide Solutions P Ltd. [TS-614-ITAT-2017(Bang)-TP] wherein it was held that RPT filter of 25% was required to be applied if there were less than six comparables and 15% would be applied if they were more than six comparables, remitted the matter to the file of DRP directing it to apply 25% RPT filter. Further, in respect of application of Rs. 200 cr turnover filter, noting that the DRP did not have the benefit of Chryscapital Investment Advisors India P ltd [TS-173-HC-2015(DEL)-TP] ruling wherein it was held that if the turnover has not affected the margin or price of the comparable and the comparable on the test-stone of FAR, then it cannot be included/excluded merely on the ground of turnover, it remitted the application of turnover filter back to DRP for fresh adjudication.

Broadcom Communications Technologies P Ltd vs ACIT-TS-752-ITAT-2017(Bang)-TP IT(TP)A No.I230/Bang/2011 dated 01.09.2017

1250. The Tribunal, relying on the decision in the case of Chryscapital investment advisors (India) pvt ltd-TS-173-HC-2015(DEL)-TP wherein it was held that the huge turnover/abnormal margin etc. ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded, restored the TP issue to the file of CIT(A), directing it to decide comparable issue after examining the aspect of high profit margin/turnover. Further, relying on the decision in the case of ACI Worldwide Solutions P Ltd [TS-614-ITAT-2017(bang)-TP], held that On account of application of 25% RPT filter, several comparables would be available which were earlier deleted on account of 0% RPT filter.

Further, the Tribunal has been consistently adopting 25% and 15% filter depending on availability of comparables. Accordingly, it held that this aspect required fresh consideration and remitted the matter to the file of the CIT(A).

Robert Bosch Engineering and Business Solutions Ltd vs DCIT-TS-783-ITAT-2017(BANG)- TP I.T(TP).A No.1519/Bang/2013 dated 13.09.2017

1251. The Tribunal held that where a reasonable number of comparable companies were available (29 in this case) the RPT filter could not allowed to be the extreme limit of 25 percent of revenue. Accordingly, it directed the application of 15 percent RPT filter, which led to the exclusion of 3 comparables viz. Aztec Software Ltd, Lanco Global Solutions Ltd and Geometric Software Ltd.

As regards the turnover filter applied by the AO/TPO viz. Rs. 1 crore to Rs. 200 Crore, the Tribunal observed that there was an inherent difficulty in applying such a turnover slab as it gave unrealistic results i.e. an entity having Rs. 1 Cr turnover could be compared with a concern having turnover of Rs. 200 Cr, but an entity having Rs. 200 Cr turnover could not be compared with an entity having 201 Cr turnover. Accordingly, it held that such classification of comparables on the basis of companies selected on turnover basis is not appropriate and acceptable and adopted the multiple of 10 times of turnover. Since the assessee's turnover was Rs. 31.33 Cr, it directed the exclusion of companies having turnover less than Rs. 3.1 Cr and more than Rs. 313 Cr. As a result, following 4 comparables were excluded IGate Global Solutions Ltd. (Rs.527.91 Cr), Infosys Ltd. (Rs.9,028 Cr), Mindtree Ltd. (Rs.448.79 Cr) and Flextronic Software System Ltd. (Rs.595.1 Cr)

Valtech India Systems Pvt Ltd v DCIT – TS-70-ITAT-2017 (Bang) – TP - IT. (T.P) A. No.1496/Bang/2010 dated 13.01.2017.

1252. Where the TPO had applied the export revenue filter of 75% while benchmarking the software development segment but did not apply the same in ITES Segment, the Tribunal dismissed the appeal of the Revenue against the CIT(A)'s direction to apply the filter in ITES Segment (on thr ground that the assessee had not objected on this issue before TPO) and held that since the international transactions either in the software development or in ITES Segment were 100% export sales, it was justified to compare them with the uncontrolled unrelated price of comparable with at least 75% of export sale. Thus, it concurred with CIT(A)'s direction in principle and stated that CIT(A) had co-terminus power of the A.O. and could take up an issue for adjudication even if assessee had not raised any objection earlier. Further, it held that the employee cost filter was a relevant criteria for selection of comparables as it showed the business model of a particular company and noting that the assessee's employee cost was much more than 25 percent of total revenue, it held that an employee cost filter of 25 percent was not incorrect. Accordingly, the Tribunal set aside the issue to TPO and added that assessee was at liberty to raise the objections of functional comparability if the need arose.

As regards the assessee claim for inclusion of comparables with a different financial year ending, the Tribunal noted that FAR analysis had to be done by considering the contemporaneous financial data of the assessee as well as comparables and held that such companies could not be considered as good comparable for want of necessary data.

The Tribunal also held that the turnover filter of < Rs. 1 crore could not be applied and upheld the 10 times turnover filter as applied by various Tribunals.

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Further, noting that the TPO's eliminated Thinksoft Global Services Ltd. and FCS Software Solutions Ltd. on ground that these companies were having borrowed funds and the working capital impact was more than 4% on company profits which would distort the profit margin, the Tribunal opined that the limit of working capital was relevant for adjustment in the price and not for inclusion/exclusion of comparables. Accordingly, the Tribunal directed AO/TPO to include the functionally similar comparables.

DCIT vs. Informatica Business Pvt. Ltd - TS-212-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1285/Bang/2014 dated : 17.03.2017.

1253. The Tribunal, noting that the DRP had adopted turnover filter of RS.200 crores and RPT filter of 0%, held that as per recent trend the Tribunals were now adopting turnover filter of 10 times the assessee's turnover and 15% RPT filter, which if had to be applied to the case of the assessee would result in some comparables originally excluded on the basis of the DRPs filters being now included. It held that these comparables which would be now included based on the new filters would have to be examined on other aspects. Further, as regards assessee's claim for working capital adjustment and risk adjustment, it noted that the DRP rejected the same on the ground that it had negative impact, and held that whether the impact of an adjustment was negative or positive was not relevant to decide as to whether any adjustment was to be made or not. Accordingly, it remitted all TP issues to AO/TPO for applying proper turnover and RPT filter and for deciding issues regarding working capital and risk adjustment afresh.

ITO Vs Open Silicon Research Pvt. Ltd - TS-205-ITAT-2017(Bang)-TP - IT(TP)A No.3491Bang/20 15 dated 22.02.2017

1254. The Tribunal upheld the application of the turnover filter of 10 and 1/10 th times assessee's turnover and also directed the TPO to adopt a 15% related party transaction filter in view of the fact that there were adequate number of comparable companies. It observed that the entire TP- issue required fresh examination and consideration at AO/TPO's level as the comparability of the entire set of comparables had to be decided by applying the appropriate filters. Accordingly, it set aside the transfer pricing issue for AY 2008-09 including the issue of selection of comparables to TPO for fresh consideration after giving opportunity of being heard to assessee.

Microchip Technology (India) Pvt. Ltd v ACIT - TS-384-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1586/Bang/2012 dated 03.05.2017.

1255. The Tribunal upheld the exclusion of Mecon Limited from the list of comparables due to (i) unavailability of current year data, (ii) persistent losses, (iii) unavailability of segmental data and (iv) functional dissimilarity as it was a Government owned company.

Sunway Construction India Pvt Ltd-TS-342-ITAT-2017(Bang)-TP-IT(TP)A No.1190(bang) dated 23.05.2017

1256. The Tribunal, noting that wrong filters for related party transactions i.e. 0% and turnover i.e. 1-200 crores were adopted by DRP in respect of assessee engaged in providing software development and related services, held that the Tribunal had consistently adopted 15% RPT filter and 1/10th or 10 times of assessee's turnover as filter and accordingly remitted the TP-issue back to the AO/TPO for fresh consideration after applying proper filters.

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L.G Soft India Pvt. Ltd vs. DCIT- [TS-553-ITAT-2017(Bang)-TP]- IT(TP)A Nos.463 & 516(B)/2015 & CO No. 140(B)/2015 dated 09.06.2017

1257. Noting that the DRP had excluded Jeevan Scientific Technology by applying employee cost filter on its own account, the Tribunal accepted assessee's & Revenue's submission that employee cost filter should not have been applied to this company alone but to all comparables. Further, by way of additional grounds, assessee requested for rejection of comparable based on 10 times turnover range. Relying on the decision in the case of Chryscapital Investment Advisors (India) Pvt Ltd[TS-173-HC-2015(DEL)-TP] held that huge profit or a huge turnover, ipso facto could not lead to exclusion of comparable and the TPO first had to be satisfied that such differences did not materially affect the price or cost. Accordingly, it remitted the matter back to the AO/TPO for fresh consideration.
Dell International Services India Pvt Ltd vs JCIT-TS-575-ITAT-2017(Bang)-TP-IT (TP) A No.636 (Bang) 2016 dated 28.06.2017

1258. Where the DRP had adopted wrong related party transactions (0)% and Turnover (Rs. 1-200 cr) in respect of assessee providing software development and related services, the Tribunal held that the Tribunal had been consistently adopting 15% RPT filter and 1/10th or 10 times of assessee's turnover as turnover filter and accordingly remitted TP-issue back to the file of AO/TPO for fresh adjudication.
L.G Soft India Pvt. Ltd vs. DCIT-TS-553-ITAT-2017(BANG)-TP dated 09.06.2017

1259. The Tribunal, relying on the decision of High Court in the case of Chryscapital Investment Advisors (India) Pvt Ltd [376 ITR 183], held that huge profit / turnover does not ipso facto lead to exclusion of a comparable unless such difference materially affected price/ cost. Further, on the RPT filter, it held that Tribunal had been consistently adopting 25% and accordingly directed the CIT(A) to adopt 25% as the RPT filter as against 0%. Accordingly, it restored the matter to the file of CIT(A), directing it to decide the issue afresh by applying 25% RPT filter and examining the aspect of high profit and turnover.
ITO vs. AT & T Global Business Bangalore Services India (P) Ltd (Formerly known as USI Internet Working Solutions Pvt. Ltd.)-TS-680-ITAT-2017(BANG)-TP-IT(TP)A No.342 /bang/2012 dated 24.08.2017

1260. Where the assessee had filed an appeal against various filters applied by TPO viz., 25% RPT filter. Rs. 1-200 cr turnover filter, employee cost filter, functionality etc, the Tribunal noting that the RPT filter of 25% and turnover filter have been universally applied by many coordinate benches, restored the matter to the file of AO/TPO directing it to verify the functional comparability of those companies satisfying the turnover and RPT filter applied by TPO.
Texas Instruments (India) Pvt Ltd vs ACIT-TS-738-ITAT-2017(Bang)-TP-IT(TP)A no. 755 & 756 (bang) 2012 dated 08.09.2017

1261. The Tribunal excluded certain companies as comparable on the ground that a). they didn't satisfy the related party transaction filter of 15 percent, b). were functionally dissimilar, c). had turnover in excess of Rs. 200 crore and d). failed the employee cost to total cost filter of 25 percent.
Autodesk India Pvt Ltd v DCIT [IT(TP)A No.912/Bang/2011] – TS-502-ITAT-2015(Bang) –

TP

1262. The Tribunal remitted the issue of comparability of companies in case of assessee engaged in software development to DRP in view of DRP passing a cryptic and non-speaking order noting that it had not dealt with any of the objections filed by assessee vis-à-vis exclusion of comparables (export filter, employee cost filter etc.) and had only observed that the TPO had given reasons for rejecting the comparables.

Sun Tec Business Solutions (P) Ltd vs Dy.CIT [TS-1206-ITAT-2018(Coch)-TP] ITA No.113/Coch/2016 and 509/Coch/2016 dated 12.09.2018

1263. The Tribunal held that the following companies could not be considered as comparable to the assessee who was engaged in providing engineering design and related services to its AE:

- Companies who were 100 percent owned by the Government since it was sheltered by its holding company and awarded various projects / contracts by government companies
- Companies having Related Party Transactions in excess of 25 percent and carrying out activities which were functionally different.

Bechtel India Pvt Ltd v DCIT [I.T.A.No.882/Del/2014] – TS-487-ITAT-2015 (Del) – TP

1264. The Tribunal held that a company could not be rejected as comparable merely because it was not included at the time of TP study since its financial data was not available but included at the appellate stage when the financial details were made available. Additionally, it held comparables could not be excluded merely on the basis of its low turnover. It also held that companies having high significant related party transactions were to be excluded.

American Express (India) Pvt Ltd v DCIT [ITA No 1700 / Del / 2010] - TS-408-ITAT-2015(DEL)-TP

1265. The Tribunal held that companies in whose case extraordinary event of amalgamation took place, companies having segmental revenue lower than the filter applied by the TPO, companies with huge turnover and brand value cannot be considered as comparable. Also, where a comparable has been excluded in the earlier assessment year and if there are no change in activities, the comparable should be excluded.

Excellence Data Research Pvt.Ltd. & ANR. Vs. ACIT & ANR. (2016) 48 CCH 0051 (Hyd Trib)-ITA No.310/Hyd/2015

1266. The Tribunal relying on the decision in the case of Thyssen Krupp Industries (P) Ltd [TS-46-ITAT-2013(MUM)-TP] (Confirmed by Bombay High Court [TS-134-HC-2016(BOM)-TP] held that the assessee engaged in the business of providing Engineering Consultancy services in the field of chemicals, petrochemicals, fertilizers, cement, pharmaceuticals and allied industries could not be compared to:-

- Engineers India Ltd and Water and Power Consultancy Ltd as they were Government companies and the contracts between Public Sector Undertakings were not driven by profit motive alone by other consideration also, such as discharge of social obligations.

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Further, it directed the AO to exclude infrastructure and overhead recoveries in the case of L&T Sargent & Lundy Limited, as they were mere reimbursement of expenses incurred by a group concern on behalf of the assessee and hence should not be considered as a commercial transaction involving profit element while computing the percentage of related party transactions. Relying on the decision in the case of McAfee Software India P Ltd [TS-136-ITAT-2016(Bang)] it held that the co-ordinate bench had consistently accepted the turnover filter at 1/10th to 10 times of turnover and the adoption by TPO of filter of 1/4th to 4 times the assessee's turnover was arbitrary in nature. Accordingly it directed the AO/TPO to adopt a filter of 1/10th to 10 times of the turnover of the assessee. It accepted assessee's argument that Telecommunications Consultants India Ltd was functionally similar to the assessee and held that since it had been accepted as a comparable in the earlier year and subsequent year in the assessee's own case, the TPO was not justified in rejecting the same during the year under consideration and accordingly restored the issue to the file of the AO with the direction to finalize the comparables.

Jacobs Engineering India Private Limited vs DCIT-TS-428-ITAT-2017(MUM)-TP- I.T.A.No.7194/Mum/2012 dated 17.05.2017

1267. The Tribunal upheld DRP's order and held that,

- Pfizer ltd was to be excluded from its list of comparables as its related party transactions were about 95% which did not satisfy the RPT Filter applied and the said company had a different accounting year. It relied on the decision in the case of PTC Software (I) Pvt Ltd [TS-788-HC-2016(BOM)-TP] it held that to ensure comparability the accounting period of the comparable and the assessee had to be same.
- Celestial lab limited could not be considered as comparable due to difference in functional profile as it was engaged in software development and services and derived revenue from sale of products and services.

Tevapharm India Pvt Ltd vs DCIT (formerly known as Ratio Pharm India pvt ltd [TS-387-ITAT-2017(Mum)-TP] dated 12.05.2017

1268. The Tribunal held that the assessee engaged in manufacture of material handing equipments could not be compared to WMI Cranes Ltd. as it had undergone extraordinary event of demerger during the AY 2011-12

Further, the Tribunal included Brady & Morris Engineering Company Ltd. observing that increase in profits from ₹ 28.61 crores to ₹ 30.24 crores i.e. turnover shown in the last year as against the turnover of this year, cannot be said to be exceptional.

Terex India Pvt. Ltd (as successor of Demag Cranes and Components (India) Pvt. Ltd) vs. DCIT [TS-477-ITAT-2018(PUN)-TP] ITA No.583/Pun/2016 dated 06.06.2018

1269. The Tribunal held that the assessee engaged in the business of manufacturing and trading of packaging equipment and reconditioning of packaging equipment and machines could not be compared to Rollatainers Ltd as the said company had significant related party transactions (48.57%), it was a sick company and it followed a different financial year ending. It rejected the Revenue's argument that the said company could not be excluded as it was included as comparable in the TP study by the assessee itself and relying on the ruling of Barclays Technology Centre India Pvt Ltd TS-41-ITAT-2015 (Pun) – TP, held that where an assessee

subsequently points out that a company is not comparable due to justifiable reasons, the plea of the assessee could not be rejected merely because the said company was initially adopted by it as a comparable in its TP study.

Bobst India Pvt Ltd v ACIT – TS-90-ITAT-2017 (Pun) – TP - ITA No.2090/PUN/2012 dated 03.02.2017

High Profit Making

1270. The Court held that the mere fact that an entity makes high/extremely high profits/losses does not, ipso facto, lead to its exclusion from the list of comparables for the purposes of determination of ALP. It held that that mere huge profit or huge turnover of a company which otherwise conforms to all stipulations in Rule 10B, ipso facto does not lead to its exclusion. It held that the TPO should first ensure that such differences do not materially affect the price or cost, and then attempt to 'adjust' or 'eliminate the material effects'. Further, it rejected assessee's contention for relying on previous years' data and held that while there could be a wide fluctuation in the profit margins of comparables from year-to-year, this by itself does not justify the need to take into account previous years' profit margins and held that Rule 10B(3) would account for such volatility. It dismissed assessee's reliance on OECD Guidelines, firstly, observing that since India is not an OECD member, the Guidelines would only have persuasive status without legal sanction. Further, it acknowledged that in the present case, both OECD Guidelines and Income-tax Rules were in consonance since both did not prescribe automatic exclusion of entities with extreme financial results, and provide for consideration of multiple year data only for the purposes of factoring in material changes in, inter alia, economic conditions, third party variables, etc. Further, remits comparability of 3 high-profit companies to DRP, with the direction to first conduct fresh enquiry regarding functional similarity and then to carry out analysis under Rule 10B(3) for these companies to determine if there were material differences on account of exceptionally high profits, capable of elimination and only if such differences could not be eliminated, would the company be excluded.

Chryscapital Investment Advisors (India) Pvt Ltd vs DCIT - TS-173-HC-2015(DEL)-TP ITA 417/2014 dated 27.03.2018

1271. The Tribunal held that the assessee engaged in the business of manufacturing of power conditioning systems for solid oxide fuel cell using power electronics technology to its AE could not be compared to Acropetal Technologies as its average operating margin (57.66%) was significantly high vis-à-vis other comparables.

Bloom Energy India Pvt. Ltd v DCIT [TS-626-ITAT-2018(CHNY)-TP] ITA No.2857/Chny/2017 dated 20.06.2018

1272. The Tribunal rejected assessee's contention of exclusion of company where the comparable company had super normal profit and brand value on the ground that merely because company has higher profits it cannot be excluded as comparable and it was not demonstrated that whether such brand value has any impact on the pricing or profitability of the company.

United Health Group Information Services--TS-731-ITAT-2016(DEL)- TP-ITA No. 1038/Del/2015

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Loss Making Company

1273. The Court dismissed Revenue's appeal against Tribunal's order directing inclusion of two loss making comparables and considering DEPB (Duty Entitlement Passbook) benefits and depreciation while computing assessee's margin for AY 2008-09 since the Revenue itself accepted the comparables in the earlier AY, and as such there was no dispute regarding their comparability. Further, the parameters set out in Rule 10B(2) or judging comparability with international transaction are exhaustive and the rule does not require exclusion of a company only because it had suffered a loss in a particular year.
Welspun Zucchi Textiles Ltd -TS-9-HC-2017(BOM)-TP

1274. The Court held that where the Revenue failed to urge before the CIT(A) or the Tribunal the plea that Himachal Futuristic Communication Ltd ('HFCL') was not comparable to the assessee since the FAR analysis of the said comparable had not been conducted, the same could not be considered as a substantial question of law. Accordingly, it upheld the decision of the Tribunal wherein the Tribunal had included the said company as comparable dismissing the contention of the Revenue that the said company was loss making on the ground that the Revenue had not controverted the CIT(A)'s finding that HFCL was functionally comparable.
Nortel Network India Pvt Ltd - TS-770-HC-2016(DEL)-TP-ITA 548/2016

1275. The Tribunal remitted TP issues related to import of components and rejected exclusion of two comparables merely on the ground that they had been consistently loss making since 2002 holding that the TPO had neither looked into the FAR analysis of the two entities nor conducted the exercise provided in Rule 10B(4) for use of prior period data. Further, it also allowed assessee's plea for adopting PBDIT/Sales as PLI under TNMM i.e after excluding depreciation noting that the assessee had increased its fixed assets eligible for depreciation which resulted in decline in net profits. It also agreed with assessee's arguments in principle that difference in sale price of cloth guiders involving AEs and third parties was on account of huge volume of sales to its AEs and warranties provided to its local purchasers and directed the TPO to make appropriate adjustments. However, it upheld TP Adjustment of commission income since the assessee was unable to dispute that the German unrelated party was a valid comparable under CUP method.
Erdhardt+Leimer India Private Limited - TS-1059-ITAT-2016(AHD)-TP

1276. The Tribunal held that the TPO was not justified in excluding two companies from the list of comparables merely because they had been consistently making losses since 2002 without looking into the FAR analysis of the two loss making companies. Accordingly, it directed the TPO to redo the entire exercise regarding these two comparables after affording adequate opportunity of hearing to the assessee.
Erhardt+ Leimer India Pvt Ltd – TS-1028-ITAT-2016 (Ahd) – TP

1277. The Tribunal held that where a company was correctly chosen as comparable based on its FAR analysis, it was necessary for the revenue to bring some cogent reason, argument or

fact to justify that the comparable was to be excluded, other than the fact that the company was loss making.

DCIT v Nortel Networks India Pvt Ltd - (2016) 66 taxmann.com 177 (Del)

1278. The Tribunal held that the assessee engaged in the business of market development, dissemination of product information, research and development activities and providing onsite and back office support services could not be compared with Neeman Medical International Asia Ltd as the company was a consistent loss making company.

Further, it accepted assessee's contention that Pfizer was to be included as a comparable observing that the said company had adequate segmental results and was accepted as a comparable by the DRP in the assessee's own case for the preceding years.

ExxonMobil Company India Private Limited vs. CIT - TS-390-ITAT-2018(Mum)-TP - /I.T.A./3601/Mum/2014 dated 23/05/2018

1279. The Tribunal rejected TPO's approach of making adhoc adjustment of 3% which was enhanced to 8% by the DRP towards differences between assessee's contract manufacturing activity for AE and sales made to Non-AEs under internal TNMM, on the ground that adhoc adjustment without giving reasons was against the basic concept of transfer pricing. The Tribunal further observed that DRP, after rejecting internal TNMM, should have deliberated upon the issue of determination of ALP in a more rational manner. As regards DRPs rejection of loss-making comparable on the ground that assessee being a contract manufacturer, could never incur a loss, the court observed that the eliminated comparable had not suffered losses after losses and only a persistent loss making comparable could be excluded.

ASB International Pvt Ltd - TS-6-ITAT-2017(Mum)-TP

1280. The Tribunal held that merely because a comparable incurred loss during the year in normal course of business it could not be excluded as a comparable where it satisfied the functional comparability analysis.

Syngenta India Ltd v ACIT - TS-366-ITAT-2016 (Mum) – TP

1281. The Tribunal held that where the disputed companies viz. Gujarat Poly Avx Electronics and Keltron Group companies were not simply loss making concerns but persistently loss making concerns, their margins could not be adopted in order to benchmark the international transactions of assessee which was making supplies to AEs and was a market dominant concern.

Accordingly, ITAT directed AO to verify the claim of assessee and exclude the comparables if found to be persistent loss making concerns.

Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No.1712/PUN/2011
dated 10.02.2017

Abnormal Profits

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1282. The Tribunal held that consistent abnormal profits earned by a Company intended to be taken as a comparable and several irregularities in financial statements of same, shall rightly disqualify such company as a comparable.
ACIT v Transcent MT Services (P)Ltd. & Anr - [2016] 46 CCH 0295 (Del Trib)

Non-availability of financial data

1283. The Tribunal held that where the current year data was not available for a company it could not be considered as comparable. Further, it held that where a company was functionally comparable it could not be excluded merely because it had negative net worth.
ACIT v Gillete Diversified Operations (P)Ltd - TS-218-ITAT- 2016(DEL)-TP

1284. The Tribunal held that comparables which became available in public domain even after conduction of studies by assessee could be taken as comparables and considered for benchmarking.
Syngenta Biosciences (P)Ltd. v DCIT- [2016] 46 CCH 0507 (Mum Trib)

1285. Noting that assessee had not included Microgenetic Systems in final set of comparables due to non-availability of financial data which subsequently became available during assessment proceedings, pursuant to which assessee sought its inclusion, the Tribunal upheld CIT(A)'s direction to include the said company as comparable while benchmarking the assessee's international transaction viz., provision of engineering design services to its AE. Relying on the decision in the case of Vishay Components India Private ltd [TS-356-ITAT-2016(PUN)] it held that since TPO had the powers to select and include any functionally comparable concern in the final set of comparables, data of which was available during TP proceedings and not TP study report, the same was permissible even in the case of the assessee. Accordingly, it dismissed Revenue's appeal.
Dar Al-Handasah Consultants (Shair and Partners) India Pvt Ltd-TS-741-ITAT-2017(PUN)- TP-ITA No. 1711 / PUN / 2014

1286. In the case of assessee engaged in manufacturing of chemicals, the Tribunal remitted back to the file of AO/TPO, comparability of Calchem Industries (India) Limited as comparable which was rejected due to non-availability of annual report, which was later filed by assessee as additional evidence before the Tribunal.
Imerys NewQuest (India) Pvt Ltd vs DCIT [TS-727-ITAT-2018(PUN)-TP]- ITA No 590/Pun/2015 dated 23.05.2018

1287. Noting that assessee had not included Microgenetic Systems in final set of comparables due to non-availability of financial data which subsequently became available during assessment proceedings, pursuant to which assessee sought its inclusion, the Tribunal upheld CIT(A)'s direction to include the said company as comparable while benchmarking the assessee's international transaction viz., provision of engineering design services to its AE. Relying on the decision in the case of Vishay Components India Private ltd [TS-356-ITAT-2016(PUN)] held that since TPO had the powers to select and include any functionally comparable concern in the final set of comparables, data of which was available during TP proceedings

and not TP study report, the same was permissible even in the case of assessee. Accordingly, it dismissed Revenue's appeal.

Dar Al-Handasah Consultants (Shair and Partners) India Pvt Ltd-TS-741-ITAT-2017(PUN)- TP-ITA No. 1711 / PUN / 2014 dated 30.08.2017

Different Financial Year

1288. The Apex Court, admitted Revenue's SLP challenging High Court decision upholding exclusion of comparable following different financial period and rejecting the Revenue's submission that mandate of Rule 10B of the Rules could not be ignored merely because the difference in the respective financial periods was only of three months.

CIT vs PTC Software (I) Pvt ltd-TS-598-SC-2017-TP- SLP 16015/2017 dated 04.07.2017

1289. The Apex Court, allowed Revenue's request to withdraw SLP against High Court order for AYs 2006-07 & 2007-08 wherein the Court had upheld exclusion of comparables on account of different financial year, rejecting Revenue's contention that a difference of 3 months could be ignored.

CIT vs. PTC Software India Pvt. Ltd-TS-707-SC-2017-I.A no. 84278 of 2017 dated 08.09.2017

1290. The Tribunal remitted the issue of comparability of ADCC Research & Computing Centre, Bodhtree Consulting and Onward Technologies for benchmarking the international transaction of the assessee i.e. software development services to the file of AO/TPO for fresh consideration. The assessee had appealed for the exclusion of said comparables on the ground of non- availability of data. Noting that the TPO had adopted data for different accounting year for 3 companies, it held that even if a concerned comparable was adopting a different accounting period as its accounting year then also, the data for relevant FY could be compiled on the basis of quarterly reports of the said company. Further, in respect of comparability of Satyam Computers vis-à-vis the assessee, relying on the decisions in the case of SAP Labs India Pvt. Ltd [TS-657-ITAT-2011(Bang)] and NTT Data Global [TS-219-ITAT-2016(Bang)-TP] wherein the Tribunal had given a finding that the company was alleged to have involved malpractice, it remitted to the file of AO/TPO, comparability of the said comparable to factually verify whether the accounts for subject AY 2003-04 were also falsified and if so, it directed AO/TPO to exclude the said comparable.

i2 Technologies Software Pvt Ltd vs CIT -TS-475-ITAT-2017(Bang)-TP- IT(TP)A Nos. 1207 and 274(B)2014 dated 06.04.2017

1291. The Tribunal excluded companies having different financial year endings on the ground that comparability would not yield correct results until and unless there are reliable published accounting records for a financial year comparable to that of the tested party.

DCIT v Electronics for Imaging India Pvt Ltd [I.T(TP).A No.876/Bang/2013] – TS-468-ITAT-2015 (Bang) – TP

1292. The Tribunal in this case sent back the matter to TPO for reapplication of TP analysis as the assessee had not used data for relevant FY for benchmarking its various international transactions. Further the TPO had also made adjustments to non AE transactions.

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Makino India Pvt. Ltd. Vs ACIT Circle 4(1)(2) Bangalore- TS -416-ITAT-2018(Bang) TP-IT(TP) No 3/Bang/2012 dated 20.04.2018

1293. The Tribunal remitted the comparability of R Systems International Ltd to the file of TPO as it had a different accounting year (Jan to Dec) directing it to verify the availability of data for FY (April to March). Regarding exclusion of certain companies as comparable, noting that the TPO considered the services rendered by these companies as IT enabled services based on limited information it accepted assessee's submission that it would provide all relevant details if the matter was restored back to the TPO, and accordingly remitted the entire matter back to the file of TPO directing him to provide adequate opportunity of being heard to the assessee.
DCIT vs. Continental Automotive Component (I) Pvt Ltd-TS-825-ITAT-2017(Bang)-TP dated 28.09.2017

1294. Where the AO made a TP addition in the hands of the assessee adopting earlier years data for the purpose of benchmarking and the CIT(A) observing that that the AO had neither been able to establish that assessee's pricing pattern was influenced by market conditions/ business cycle etc. of earlier years nor provide fresh working of ALP utilizing current year data which could have been confronted before assessee, the Tribunal upheld the order of the CIT(A) and observed that as per Rule 10B(4) the data for comparability of an uncontrolled transaction with international transactions ought to have been the data of the relevant to the Financial Year in which the international transaction has been entered into, unless there were circumstances justifying the use of previous year data. It held that multiple year data could not be used as a matter of right and accordingly held that the CIT(A) was justified in rejecting the method and basis of making addition by the Assessing Officer.
DCIT vs. Softbrands India Pvt. Ltd (Now INfore Bangalore Pvt Ltd)-TS-934-ITAT-2017(bang)-TP IT(TP)A No. 461/Bang/2013 dated 17.11.2017

1295. The Tribunal relying on the decision of the High Court in Mckinsey Knowledge Centre ITA 217/2014 held that a functionally comparable company cannot be rejected merely because of different financial year. Accordingly, it remitted the inclusion of R Systems International Ltd for software developer assessee provided that the results for financial year could reasonably be extrapolated.
ST Microelectronics Pvt. Ltd vs. Addl. CIT - TS-48-ITAT-2018(DEL)-TP - ITA No. 4396/Del/2017 dated ITA No. 4396/Del/2017

1296. The Tribunal accepted Revenue's plea for exclusion of Jindal Intellicom as a comparable while benchmarking the assessee's ITES transactions as the company had a different financial year ending (on 31.12.2008) as compared to assessee's (on 31.03.2009). Referring to Rule 10B(4) as well as the decision of the Bombay High Court in PTC Software (I) Pvt Ltd [TS-835-HC-2016(BOM)-TP] it held that Rule 10B mandated that the comparable ought to have data for the same financial year in which the international transaction had been entered into and if such a data was not available, then, a company could not be considered as functionally comparable.
ITO vs. Copal Research (I) Pvt. Ltd. - TS-32-ITAT-2018(DEL)-TP - ITA No.1865/Del/2014 dated 09.01.2018

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1297. The Tribunal, relying on the decision of the Delhi High Court in the case of Mckinsey Knowledge Centre India Pvt. Ltd [TS-672-HC-2015(DEL)-TP (wherein it was held that if from the available data on record, the results for financial year can be reasonably extrapolated then the comparable could not be excluded solely on the ground that it had a different financial year ending) included R Systems International Ltd as a comparable in respect of assessee's ITES segment.

Bain Capability Centre India Pvt Ltd vs DCIT-TS-989-ITAT-2017(DEL)-TP dated 13.11.2017

1298. The Tribunal set aside the CIT(A)'s order deleting TP adjustment without giving reasons for taking average of multiple year data for computing PLI of comparables for AY 2005-06. It dismissed assessee's contention that variation in net profit of comparables by itself justified use of multiple year data and held that Rule 10B(4) specifically provides for using the data of the relevant FY and data of the 2 years prior to the relevant FY only if such data reveals facts which could have influence on the determination of the transfer price in relation to the transaction being compared. Noting that assessee had not brought on record any factual information showing the influence of the cyclic nature of the transactions of the comparables or having financial impact of operational activity over the subsequent years, the Tribunal held that CIT-(A) was not justified in deleting the transfer pricing addition without giving reasons for taking average of multiple year data for computing PLI of comparables.

ACIT vs. Va Tech Esher Wyas Flovel Ltd.-TS-902-ITAT-2017(DEL)-TP ITA No. 1675/Del/2010 dated 13.11.2017

1299. The Tribunal held that companies following different accounting years could not be considered as comparable unless it was possible to draw financials for the period corresponding to assessee's accounting year. Further, it directed the AO/TPO to examine assessee's contentions regarding inclusion of provisions write back & miscellaneous income as part of assessee's operating income. Also, admitted assessee's additional grounds relating to selection of comparables and working capital adjustment on the ground that companies included in earlier years as comparables could not be excluded without demonstrating any functional dissimilarity. Noting similar treatment in APA in earlier year, it directed the AO to consider foreign exchange gains as part of operating profits.

RBS India Development Centre Pvt Ltd - TS-18-ITAT-2017(Del)-TP

1300. The Tribunal, relying on the decision in assessee's own case for AY 2006-07 [TS-672-HC-2015(DEL)-TP] remanded the matter to the file of TPO directing it to verify the quarterly results and include CG-VAK Software & Exports as a comparable for the assessee since it was a listed company and quarterly results of the company were available in the public domain and accordingly there was no need of extrapolating the result.

Mckinsey Knowledge centre India Private Limited vs DDIT-TS-700-ITAT-2017(DEL)-TP-ITA No. 1879/del/2014 dated 30.08.2017

1301. The Tribunal held that merely because a company follows different accounting year, it cannot be excluded. However, onus would be on the party which presses for its inclusion to provide reconciliation of the profitability in an authentic and reliable manner.

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United Health Group Information Services--TS-731-ITAT-2016(DEL)- TP-ITA No. 1038/Del/2015

1302. The Tribunal, observing that the assessee followed financial year (April to March) for accounting its income, whereas Bosch Chassis and Escorts Ltd followed the calendar year (January to December) and year ending September 2007, respectively, held that since the accounting year adopted by the said comparables were at variance with the financial year adopted by the assessee, the said companies were to be excluded from the final list of comparables, in order to benchmark the international transactions undertaken by the assessee.

Endurance Systems (India) Pvt. Ltd. vs ACIT - TS-114-ITAT-2017(PUN)-TP - TS-114-ITAT-2017(PUN)-TP ITA No.2567/PUN/2012 dated 15.02.2017

Multiple Years Data

1303. The Tribunal held that comparability was to be tested using the current years data of comparable companies and only when such data does not provide a true picture of uncontrolled comparable price, can multiple years data be considered. Further, it held that the tolerance range of + / - 5 percent as per proviso to section 92C(2) was a consequential benefit and would be available only if the difference between mean margin and assessee's margin on international transactions price was within such range.

Essilor Manufacturing India(P)Ltd. vs. DCIT - [2016] 67 taxmann.com 377 (Bangalore-Trib)

1304. The Tribunal held that as per Rule 10B(4) of the Income-tax Rules, 1962, it is a mandatory requirement to use the data of the financial year in which the international transaction took place and the exception provided for in the said Rule was for allowing the use of data for the two preceding year only if it was established that the data reveals facts which could have an influence on determination of transfer price.

Emerson Electric Company (India) Pvt Ltd v DCIT (ITA No.7613/Mum/2012) – TS-625-ITAT-2015 (Mum)

1305. The Tribunal relying on its decision for the prior year held that for the purpose of benchmarking, the TPO was correct in adopting the single year data as the assessee had failed to demonstrate any peculiarities in the data that would justify invoking proviso to Rule 10B(4) permitting use of multiple year data. In this regard it held that the multiple year data in the case of a comparable could be used only to understand its peculiar circumstances and not to work out PLI of comparable and that the proviso to Rule 10B (4) provides that multiple year data can be invoked only if assessee demonstrates any Qualitative peculiarities in the data which reveal facts that are potent to justify invoking the proviso.

Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No. 1712/PUN/2011 dated 10.02.2017

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Government / Public Sector Company

1306. The Apex Court dismissed Revenue's SLP challenging HC's rejection of 100% government owned undertakings as comparables for assessee providing emergency assistance and support services to its AE. The High Court had affirmed the Tribunal's order and concurred with the Tribunal's view in Thyssenkrupp Industries (subsequently affirmed by Bombay HC) with respect to public sector undertakings not being comparable and opined that view taken by the ITAT in the present case, was consistent with the view expressed by the Mumbai Bench of the ITAT which had been affirmed by the Bombay High Court, and was a plausible view.
Pr.CIT vs International SOS Service India P Ltd [TS-493-SC-2018-TP] SLP 18255/2018 dated 03.07.2018

1307. The Tribunal held that Government undertakings/companies are not suitable comparables for benchmarking of assessee rendering network support services and accordingly directed the AO to verify all the Government undertakings either benefitting from preferential treatment from Government in getting contracts etc. or those that are not driven by profit motive alone and to exclude from the list of comparables.
AT & T Communication Services India Private Limited vs. ACIT - TS-127-ITAT-2018(DEL)-TP - ITA No.1016/Del./2015 dated 15.02.2018

1308. The Tribunal allowed the assessee's appeal against the DRP order directing the TPO to compute ALP under TNMM by considering only 2 comparables which were selected by both assessee and the TPO which led to an upward addition of Rs.2.98 crore and accepted the contention of the assessee that there were two additional comparables selected by the TPO, having margins of 11.12 percent and 9.18 percent respectively, which were not contested by the assessee and therefore those comparables ought to have been considered as well. Relying on the decision in the case of Fortune Infotech Ltd it held that the TNMM was an indirect method, requiring a reasonable set of comparables to arrive at the correct ALP. Further, it admitted the assessee's additional ground for exclusion of Projects & Development Ltd which had been included by the assessee itself in its TP study, on the ground that the said company was a government company and had diversified activities. The Tribunal relying on the decision of the Bombay High Court in ThyssenKrupp Industries, wherein it was held that Public Sector Undertakings were not driven by profit motive alone but also had other considerations such as discharge of social obligations, directed the AO to exclude the said company from the list of comparables.
Worley Parsons India Pvt Ltd v DCIT – TS-1012-ITAT-2016 (Hyd) – TP

Working Capital Position

1309. The Tribunal partly allowed Revenue's appeal and directed the AO /TPO to retain inclusion of FCS Solutions and Thinksoft Global Services Limited as comparables after making working capital adjustment on actual basis for AY 2009-10. It noted that the AO/TPO had excluded these comparables on the basis that their working capital adjustment required was more than 4% and held that once a working capital adjustment was made, there was no reason to exclude any company for such reasons it is found that the company was comparable on all other grounds. Since no other reason was

given for exclusion of these companies, the Tribunal held that the two companies were wrongly excluded by the AO / TPO.

DCIT vs Torry Harris Business Solutions Pvt Ltd – TS-463-ITAT-2017(Bang)-TP- IT(TP)A Nos 238/B/2014, 1495/B/2015 and 266/B/2016 dated 14.04.2017

1310. The Tribunal upheld DRP's inclusion of FCS Software Solutions and Thinksoft Global Services Limited and held that the comparables were wrongly excluded by the TPO merely because their impact on working capital adjustment exceeded 4%. Further, relying on the decision in the case of Mercer Consulting (India) Pvt. Ltd [TS-664-HC-2016(P&H)-TP, it upheld assessee's claim for inclusion of R Systems having different accounting years noting that data for quarter ended 31/3/2008 and 2009 was available in public domain so as to reliably arrive at data for FY ended 31/03/2009.

G.E India Exports Pvt. Ltd vs DCIT-TS-426-ITAT-2017(Bang)-TP- IT(TP)A No.117/Bang/2014 dated 05.05.2017

1311. The Tribunal, relying on the decision in the case of Logica Private Limited [TS-187-ITAT- 2017(bang)-TP] wherein it was held that merely because of a working capital impact of 4%, the said companies could not be characterized as being engaged in the provision of financing activities, held that as the TPO himself had included the companies, they passed all necessary filters and directed the inclusion of FCS and Thinksoft Global as comparables in respect of benchmarking assessee's international transaction of ITes services.

Target Corporation India Pvt Ltd-TS-756-ITAT-2017(Bang)-TP-IT(TP)A No.184 (Bang) 2014 dated 31.08.2017

1312. The Tribunal directed the TPO to follow the DRP's instructions to include 2 comparables viz. Thinksoft Global Services Ltd and FCS Software Solutions Ltd for the purpose of determining the ALP of the international transactions. It noted that the TPO had excluded these comparables on the basis that the impact of the working capital position on their operating margin was greater than 4 percent and held that the reasoning adopted by the TPO was incorrect.

Symbol Technologies India Pvt Ltd – TS-1001-ITAT-2016 (Bang) – TP

1313. The Tribunal held that the TPOs action of excluding companies as comparable due to the fact that the working capital adjustment required for the companies exceeded 4 percent of profits and that their profits consisted of a substantial amount of income from financial activities which was not its operating business, was incorrect as the other income was insignificant and small, not enough to warrant such conclusion.

ARM Embedded Technologies Pvt Ltd v DCIT [IT(TP)A No 1659 / Bang / 2014] – TS-466-ITAT- 2015 (Bang) TP

Foreign Comparable

1314. The Tribunal remitted comparability of foreign companies to CIT(A) for fresh adjudication on the ground that CIT(A) had not called for remand report from AO/TPO to examine circumstances in which foreign comparables were considered in subsequent years vis-a-vis

the circumstances in which foreign comparables were excluded by AO/TPO in the present year. Tribunal agreed with Revenue's contention that geographical locations, different markets & the prevailing laws and government orders, cost of labour and capital, overall economic development, size of the markets etc. also played an important role in the test of comparables and accordingly held that if common foreign comparables were considered in subsequent years under identical facts and circumstances and having similar FAR analysis, then assessee deserved relief on this issue, provided this fact was duly demonstrated.
Timex Watches India Pvt Ltd - TS-1064-ITAT-2016(Del)-TP

1315. The Tribunal, relying on the earlier year's Tribunal orders in the case of the assessee, accepted the use of foreign comparable companies for carrying out FAR analysis and to benchmark the assessee's international transactions of providing automobile design services and engineering services to its Indian holding company, since the assessee was a Permanent establishment of a company incorporated in the UK.
Tata Motors European Technical Centre Plc v DCIT - TS-647-ITAT- 2015 (Mum) – TP

Own Comparable

1316. The Court confirmed the decision of the Tribunal allowing the assessee's plea for exclusion of two comparables though originally included in the TP study and upheld the finding of the Tribunal that the TP mechanism requires comparability analysis between like companies on the basis of FAR analysis and that an assessee was not barred from withdrawing a comparable if the same was included on account of mistake. It observed that the Tribunal, on facts found that the two companies were not comparable as they were in a different area i.e. wind energy and the assessee was in the field of solar energy.
Tata Power Solar Systems Ltd – TS-1007-HC-2016 (Bom) – TP

1317. The Court upheld the order of the Tribunal and held that an assessee is not barred from withdrawing a comparable originally selected by it in its transfer pricing study where the comparable was included on account of mistake of fact or where on further examination the assessee realised that the said company is not comparable. It held that the Transfer Pricing mechanism requires comparability analysis to be done between companies and the controlled transactions and that the assessee's submission in arriving at ALP is not the final position as the TPO is to examine whether the companies selected by the assessee are in fact comparable.
CIT v Tata Power Solar Systems – published on 09.08.2017

1318. The Tribunal relying on the decision of Quark System wherein it was held that merely because the assessee had wrongly added in the list of comparables, it would not bar the assessee to take objection against the functional dissimilarity of a company dismissed petition filed by the assessee seeking rectification of mistake in the order of Tribunal for AY 2010-11 in respect of comparability of ICRA Techno Analysis Ltd on the ground that the company had been selected as a comparable by both the assessee and TPO, and the assessee had not raised any objection before lower authorities.
Aptean Software India Pvt Ltd - TS-1076-ITAT-2016(Bang)-TP

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1319. The Tribunal held that the assessee is entitled to raise objections regarding comparability at any stage of proceedings and even in cases where it has not raised objections for including companies as comparable before lower authorities or even if the assessee had chosen the company it seeks to exclude in its Transfer Pricing study, subject to providing the TPO with an opportunity to examine the comparables. It further eliminated companies as comparable on functionality as well as by applying a turnover filter of Rs.200 crores since the turnover of the assessee was Rs. 13 crore.

Open Silicon Research Pvt Ltd v ITO [IT(TP)A No.1128/Bang/2011] – TS-454-ITAT-2015 (Bang) – TP

1320. The Tribunal held that merely because the assessee had accepted the filters while preparing the TP Study, it could not be denied right to insist upon the exclusion of a comparable which has remained in the list of comparables accepted if subsequent information/data available in the public domain shows that the said comparable has become incomparable as its very profitability is impacted by its peculiar mix of its functionality or asset base or risk analysis.

Neither the acceptance nor the retention or for that matter lack of objection at the first instance makes an incomparable a comparable. The Tribunal further held that a comparable could not be foisted upon an assessee merely because it was proposed by the assessee, or was not objected to by the assessee in the earlier years or at the initial stages in the year under consideration.

Virage Logic International India [TS-480-ITAT-2016(DEL)-TP] - I.T.A. No.-6918/Del/2014

1321. Where the assessee sought the exclusion of 5 of its own comparables, the Tribunal observing that nothing precluded the assessee from doing so and that prima facie there was a case in favour of the assessee on facts and in law, remitted the matter to the file of the TPO observing that the matter would require input from the TPO.

Vis-à-vis assessee's claim for economic adjustments (capacity utilisation adjustment, working capital adjustment, custom duty adjustment and cash PLI adjustment), noting that the similar issues were remanded by the Tribunal for the earlier year in assessee's own case with a direction to note that such adjustments were allowed in subsequent AYs but were not considered by the DRP/TPO/AO for the impugned AY, it remanded the issue to the file of AO/TPO for fresh adjudication.

NORD Drive systems Private Limited vs. ACIT - TS-140-ITAT-2018(PUN)-TP dated ITA No.509/PUN/2015 dated 07.02.2018

One Comparable

1322. The Tribunal, referring to Rule 10B(1)(e)(ii) noted that net profit margin realized could be benchmarked from one or more comparable uncontrolled transactions and therefore rejected the Revenue's argument that consideration of one comparable company could not be taken for benchmarking ALP of a party. It further explained that although more than one comparable was desirable to get appropriate arm's length results, there was no mandate in the law that one may choose more than one comparable only.

However, it clarified that on consideration of only one comparable, the tolerance range of +/- 5% (or 3%) as envisaged in the second proviso to Sec 92C would not be applicable.

Accordingly, considering the Tribunal eliminated 4 out of 5 companies on functionality, it directed the TPO to benchmark assessee's margin with only one comparable.
JP Morgan Advisors India Private Limited Vs DCIT - TS-170-ITAT-2017(Mum)-TP - ITA No.7979/MUM/2010 dated 16.03.2017

Consistency

1323. The Court held that even though the Tribunal had rejected three comparables on merits, the Court restored the issue to the file of the TPO as the same were never examined by him. However, the Court approved the Tribunal's order to the extent it held that merely because a comparable had been used in the subsequent AY for determining the ALP, it would not ispo facto apply to determine the ALP in the relevant AY as well.
Advance Power Display Systems Ltd v CIT - TS-670-HC-2015(BOM)-TP

1324. The Tribunal held that the TPO was to be consistent in matters relating to selection of comparables and therefore if a comparable had been included or rejected in an earlier year, he was not entitled to take a different view in a later year if there was no change in circumstances.
Hyundai Rotem Company v ACIT - IT(TP) No 1772 / Del / 2015

1325. The Tribunal held that though the principle of res judicata does not apply to income-tax proceedings, the rule of consistency was still applicable and therefore the TPO should not have rejected comparables which were valid comparables in the previous year without assigning a valid reason for rejecting the earlier year's stand or without bringing on record the salient features of the year under consideration as compared to the facts of the earlier years.
Thomas Cook (India) Ltd v DCIT - TS-307-ITAT-2016 (Mum) - TP

Others

1326. The Apex Court dismissed revenue's SLP against Delhi HC judgment wherein the Court upheld the Tribunal order regarding comparable selection and had upheld exclusion of 2 comparables for the purposes determining the ALP of international transactions observing that no substantial question of law arose from Tribunal order.
Pr. CIT vs. ST Microelectronics Pvt Ltd - TS-46-SC-2018-TP - SPECIAL LEAVE PETITION (CIVIL) Diary No. 42218/2017 dated 22.01.2018

1327. The Court quashed the Tribunal's order and held that the Tribunal had no jurisdiction to render decision relating to adoption of international database for identifying comparables in international market while restoring TP adjustment for fresh adjudication by TPO as this was not subject matter of appeal. The Court directed the Tribunal to decide the appeal afresh and clarified that all contentions of both parties were left open.
Pentair Water India Private Limited -TS-762-HC-2016(BOM)-TP-TAX APPEAL NO. 65 OF 2016

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1328. The Court held that where the Revenue failed to urge the plea that a company was not functionally comparable to the assessee before the CIT(A) or the Tribunal, the same could not be urged before the Hon'ble High Court at a later stage.
PCIT v Nortel Network India Pvt Ltd - TS-770-HC-2016 (Del) – TP

1329. Tribunal allowed assessee's appeal and held that the AO/TPO was incorrect in considering the 2 related parties as comparable for determining ALP of its royalty payment at 4% of net sales to AE. It held that for determination of ALP, price to be taken into account was the price charged or paid in the same or similar uncontrolled transaction with or between two non-related parties and therefore held that the comparable adopted by TPO was invalid.
Praxair India Private Limited vs DCIT-TS-388-ITAT-2017(Bang)-TP-IT(TP)A No.315/bang/2014 dated 15.05.2017

1330. Where the TPO neither gave reasons for rejection of 2 comparables nor provided details of search process adopted for selection of 14 new comparables and even the DRP had not fully addressed assessee's contentions in this regard, the Tribunal taking note of sizeable increase in quantum of addition due to margin proposed by TPO (8.53%) being substantial as against assessee's margin (1.47%), it directed the TPO to provide reasons for rejecting existing comparable as well as the search criteria for selection of new comparables and decide the issue afresh after giving assessee an opportunity of being heard.
Woosu Automotive India Private Vs ACIT - TS-74-ITAT-2017(CHNY)-TP - ITA No.870/Mds/2016 dated 13.01.2017

1331. The Tribunal directed the DRP to consider the correctness of margins of various comaparbles chosen by the TPO and decide on their inclusion/exclusion. It noted that the TPO in its original order had considered 9 comparables with the average margin of 25.90%. Thereafter, TPO passed a rectification order finalizing a set of 7 comparables with average margin of 24.12%. The Tribunal opined that a change in profit level margins of comparables would have a considerable effect on the TP study since assessee's margin had to be compared with the average PLI of comparables. The Tribunal thus remitted the matter to DRP for fresh consideration.
Extreme Networks India Pvt. Ltd vs DCIT TS-367-ITAT-2017(CHNY)-TP – I.T.A.No.434/mds/2015 and I.T.A,No.449/mds/2015 dated 07.04.2017

1332. Tribunal admitted additional evidence filed by assessee in respect of its international transaction of providing software development services to AE for AY 2006-07. Relying on the decision in the assessee's own case wherein the coordinate bench had restored the matter back to the CIT(A) with directions to consider the additional evidence submitted by the assessee relating to segmental accounts and provide a reasonable opportunity of being heard, it restored the matter back to CIT(A) to adjudicate the issue afresh.
RMSI Pvt Ltd vs ACIT -TS-321-ITAT(DEL)-TP ITA No.3478/del/2012 dated 21.04.2017

1333. The Tribunal held that where a particular company has been held to be not comparable in the case of another company, then such former company shall not cease to be the comparable to the assessee company since comparability of each company needs to be ascertained only after matching the functional profile and other relevant reasons.

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Delphi Automotive Systems Pvt Ltd-TS-755-ITAT-2016(DEL)-TP I.T.A No. 1559/Del/2016

1334. The Tribunal set aside the order of the AO with the direction that the TPO was to carry out a detailed FAR analysis in respect of the assessee's international transaction of providing ITES to its AE before embarking on the selection of comparable companies. It noted that the assessee's arguments for inclusion / exclusion of comparable companies arose solely on account of the fact that the foundational exercise of a proper FAR analysis of the assessee had not been done and also observed that while TNMM was robust enough to tolerate minor variation in the FAR analysis of comparables, the TPO was to conduct a FAR analysis on the basis of functions performed, assets available and risk assumed.
Copal Research India Pvt Ltd v DCIT - TS-624-ITAT-2016 (Del) - TP I.T.A .No.-7079/Del/2014 with I.T.A .No.-1113/Del/2016

1335. The Court admitted 2 questions of law raised by Revenue on comparables selection and risk adjustment; Questions admitted are - "1. Did the Income Tax Appellate Tribunal (ITAT) fall into error by including M/s. Petron Engineering Consultants Ltd. and M/s. Simon India Ltd. in the list of comparables for the purpose of ALP determination in the circumstances of the case? and 2. Was the ITAT correct in law in concluding that the risk adjustment could be allowed in the comparability analysis on general appraisal of facts and without returning any findings, to displace the reasoning of the Disputes Resolution Panel (DRP), in the circumstances of the case?". It listed the final hearing on April 23, 2018.
Pr. CIT vs. Haldor Topsoe India Pvt Ltd - TS-44-HC-2018(DEL)-TP - ITA 74/2018 dated 23.01.2018

1336. Where the assessee sought to include / exclude certain comparable companies, mere reliance on decisions of the Tribunal without bringing out the similarity in facts / functional profile based on which the decisions were rendered vis-à-vis the said comparable companies would not suffice. The Tribunal remanded back the case to the file of assessing officer so that proper analysis on FAR basis could be presented by assessee.
ECI Telecom India Private Limited vs. ACIT (2016) 48 CCH 0050 (Mumbai Trib)-ITA No.7552/Mum/2012

1337. The Tribunal upheld the directions of the DRP deleting the TP addition since the TPO selected two comparable companies but rejected 4 others which were also functionally comparable with the assessee. Further, it noted that during the DRP proceedings, the assessee submitted 6 comparable companies pursuant to which the DRP remanded the matter to the TPO for consideration of these new comparables and that the TPO failed to examine the said comparables on the ground that the assessee could not submit new comparables at the appellate stage. It held that where the TPOs order itself revealed that all 6 companies were in the same segment, the act of the TPO in picking up only two comparable companies was highly objectionable. With regard to the admission of additional evidence / new evidence, the Tribunal held that the DRP being an appellate authority had all the powers of the CIT(A) and therefore was empowered to admit such evidence.
DCIT v M/s Rolls Royce Marine India Pvt Ltd - TS-284-ITAT-2016 (Mum) – TP

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1338. Where the assessee, in the manufacturing segment, had applied TNMM to benchmark its international transactions and claimed them to be at arm's length price based on certain select comparables but the TPO conducted a fresh search and selected certain other companies also, one of which was Tibrewala Electronics Ltd, which was added in the data base on 25.03.2008 i.e. beyond the due date of compliance, the Tribunal held that the assessee was incorrect in contending that the said company could not be used for benchmarking its international transactions based on the fact that it was selected on a later date. It held that data collected by the TPO could not be called non-contemporaneous, where the comparable companies selected by the TPO were functionally comparable to the assessee, observing that TPO has the power to use data gathered by him so long as (a) it was available in public domain (b) it related to the year under consideration (c) assessee had been given an opportunity to explain before the said data is used against him.

Accordingly, itupheld TPO's action in selecting the said concern and dismissed assessee's grounds.

Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No.1712/PUN/2011 dated 10.02.2017

f. Computation / Adjustments

Capacity Utilization Adjustment

1339. The Court dismissed Revenue's appeal and upheld the Tribunal's order as regards the inclusion of comparable Thirumalai Chemicals Ltd. was concerned. Noting that the Tribunal on facts had held that the assessee and the said company dealt in specialty chemicals and that the capacity utilization of assessee (working at 46% of capacility utilization) and said comparable (working at 50% of capacity utilization) was approximately the same due to an economic downturn, the Court held that on facts the view taken by the Tribunal was a reasonable view.

Pr. CIT vs. Petro Araldite Pvt. Ltd [TS-446-HC-2018 (Bom)] ITA No.368 of 2015 dated 06.06.2018

1340. The Court dismissed Revenue's appeal and upheld Tribunal's invocation of Rule 10B(1)(e) (iii) for allowing capacity utilization adjustment to the assessee who was engaged in the business of manufacturing and dealing in basic liquid and solid resins including formulations. The Court noted that the Tribunal had upheld assessee's capacity utilization claim after illustrating how higher capacity utilization would lead to higher profitability as fixed costs would be spread over a larger number of units manufactured and considering that capacity utilization materially affected the profit margin, upheld thus the invocation of rule is valid.

Further, the Court also stated that it was a self-evident position that all aspects/differences between the international transactions and the comparable uncontrolled transactions materially affecting the net profit margin have to be taken into account so as to have the fair comparison while determining the ALP.

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The Court also upheld the Tribunal order restricting TP-adjustment only to assessee's international transaction, relying on various precedents including co-ordinate bench ruling in assessee's own case.

CIT -8 vs Petro Araldite P Ltd.- TS-317-HC-2018(BOM)-TP- ITA No 1540 of 2014 dated 26.04.2018

1341. The Court dismissed the appeal of the assessee against the order of the Tribunal, wherein the Tribunal rejected the assessee's claim for adjustment towards abnormal expenses arising on account of lower capacity utilization since the assessee had not brought any material on record relating to the capacity utilization of the comparable companies. It upheld the finding of the Tribunal that capacity utilization was a relative feature and therefore unless the capacity utilization figures of comparables were known, no adjustment could be granted to the assessee. Further, noting that the assessee was engaged in jewellery manufacturing, it held that it was very difficult to standardize capacity in case of such companies as it involved several items with a wide variation in the consumption of time and labour.

Royal Star Jewellery Pvt Ltd v ACIT – TS-43-HC-2017 (Bom) – TP - INCOME TAX APPEAL NO. 2463 OF 2013 dated 30.01.2017

1342. The Court upheld the order of the Tribunal and held that transfer pricing adjustments were to be restricted to the value of international transactions and not on the entire turnover.

CIT v Firestone International Pvt Ltd [ITA No 1354 of 2013] - TS-401-HC-2015(BOM)-TP

1343. The Court held that as per the Provisions of Chapter X of the Act, transfer pricing adjustments were to be made only on transactions undertaken with AEs and not on the assessee's entire sales including Non-AE sales.

CIT v Tara Jewels Exports Pvt Ltd – (ITA No 1814 of 2013) – TS – 481- HC-2015(BOM)

1344. The Court held that adjustment on account of expenses determined by the TPO and attributed entirely to the international transaction was without merit. Since the international transactions constituted 23.38 percent of the total transactions, only a proportionate TP adjustment could be made in respect of such international transactions.

CIT v Keihin Panalfa Ltd (ITA 11 / 2015 and ITA 12 / 2015) – TS-474-HC-2015(Del) – TP

1345. Where the assessee had set up new installed capacity for manufacture of 11520 machines and had only produced 4133 sets thereby utilizing merely 35 percent of its installed capacity, the Tribunal held that the assessee ought to have been granted a capacity utilization adjustment as capacity utilization / idle capacity was a factor affecting net profit margins as it resulted in higher per unit cost qua the utilized capacity which in turn would lower the profits of the assessee. It held that the capacity utilization adjustment was to be made only in the hands of the comparable entities instead of the tested party and directed the TPO to provide for such adjustment.

Erhardt+ Leimer India Pvt Ltd v ACIT – TS-1028-ITAT-2016 (Ahd) – TP

1346. The Tribunal held that the depreciation adjustment on account of under-utilization of assets and capacity claimed by the assessee was incorrect as the reasons for under-

utilization such as difficulty in procuring raw materials, shortage of power etc were adverse business environment faced by all competitors and that depreciation on fixed assets need not be directly proportionate to utilization of machinery. It held that the assessee was attempting to have a lesser charge of depreciation in the guise of under-utilization of capacity.

Further, it held that since the assessee did not have debtors and was wholly funded by an advance form its AE against supplies, it was essential to make a working capital adjustment to bring parity with the results of comparable companies.

Indigra Exports Pvt Ltd v DCIT (I.T(TP).A No.309/Bang/2015) – TS-529-ITAT-2015 (Bang) – TP

1347. The Tribunal granted the adjustment for capacity under-utilization directing the TPO to obtain necessary information for the comparables noting that the Indian TP guidelines, OECD guidelines and the US transfer pricing guidelines clearly provided that in case of material difference between the controlled and uncontrolled transaction, adjustments must be made if ithe effect of such differences on prices or profits could be ascertained with sufficient accuracy to improve the reliability of the results. It relied on the coordinate bench decisions in Mando India Steering Systems Pvt Ltd (adjustment made on account of underutilization of production capacity in the initial years by making allowance for the higher overhead expenditure during the initial period of production) , Panasonic AVC Network India (which discussed that capacity utilization should be granted subject to being reasonable since lower capacity utilization results in higher per unit costs, which, in turn, results in lower profits), Biesse Manufacturing Company Ltd. (adjustment for underutilization of capacity was granted following coordinate bench decision of PetroAraldite), GE Intelligent Platform Pvt Ltd. (If the underutilization is more than average underutilization of the industry then necessary adjustment was required to be made to the margin of computing ALP), Genisys Integrating system (assessee was given adjustment for underutilization of infrastructure). It was assessee's contention that subject year was just the third year of commercial operation of the assessee during which the installed capacity was under-utlized to a significant extent. The TPO and CIT(A) rejected the plea of the assessee to provide an adjustment for idle capacity which was granted by the Tribunal.

IKA India Pvt Ltd vs DCIT [TS-1049-ITAT-2018(Bang)-TP] IT(TP)A No.2192/Bang/2017 dated 17.09.2018

1348. The Tribunal held that an adjustment could be given to a tested party for under-utilization of manufacturing capacities only if it was possible for the assessee to establish that the comparable companies had a utilization capacity above its own.

Further, it held that an adjustment on account of variation of cost of raw materials could only be made if the variation was substantial enough to establish extraordinary circumstances and that for claiming such adjustment, the assessee was to show how the comparable companies were affected by similar variations, if any and that the products of the comparable companies were of inferior quality.

Momentive Performance Materials (India) Pvt Ltd v ACIT - (2016) 67 taxmann.com 327 (Bangalore -Trib)

1349. The Tribunal remitted adjustment on account of underutilization in respect of extraordinary/non- recurring expenses (like high manufacturing cost, high personnel cost, high

import content cost etc.) to operating cost while computing operating margin for assesse. The assessee was engaged in manufacture of programmable logic controllers, automation software and related automation products. The assessee contended that adjustment in respect of extraordinary expenses/of non-recurring expenses should be allowed since they were incurred keeping in view anticipated expenses of operation of the company and directly relatable to manufacturing activity of the company. The Tribunal held that though the law was quite settled that adjustment should be made for unutilized capacity/manpower and that underutilization does impact operating margin, it held that onus was on the assessee to establish that there was underutilization of capacity which was more than the average underutilization in the industry. Stating that the assessee failed to demonstrate capacity underutilization and that its utilization was also not falling below average rate of utilization in the industry, it remitted the issue back to AO/TPO for adjudication. Further, it remanded the matter back to the file of the TPO for fresh adjudication on the assessee's additional grounds in respect of risk, working capital, entity vs. transaction level adjustments, exclusion of inventory write-off from operating cost and use of internal-CUP for benchmarking purchase of raw materials from AE as TPO had no occasion to adjudicate on the matter since the grounds were not raised before him earlier.

DCIT vs GE Intelligent Platform Pvt Ltd [TS-369-ITAT-2017(BANG)-TP] dated 04.04.2017

1350. The Tribunal held that where the assessee had claimed adjustment for extra-ordinary costs (salary of employees not working on billable projects, recruitment and training costs, rent for unutilized space, business promotion expenses, travelling expenses, depreciation on capital expenditure etc) incurred due to ramp-up of its operations in its first two years of operations, the CIT(A) erred in denying the assessee adjustment vis-à-vis the rent for unutilized space, business promotion expenses, travelling expenses and depreciation. Noting that the CIT(A) had prepared a comparative chart of extra-ordinary expenses incurred in earlier and subsequent years based on which it had disallowed the claim of the assessee, the Tribunal held that only data for the relevant year under consideration was to be considered. It held that any abnormal or extra ordinary event had to be taken into account and wherever possible suitable and reasonable adjustment to such extra ordinary event or circumstances was to be made. Accordingly, it remitted the issue to the file of CIT(A) for fresh consideration.

Symphony Services India P. Ltd vs ACIT-TS-489-ITAT-2017(BANG)-TP- dated 28.04.2017

1351. The Tribunal allowed assessee's appeal with regard to the issue of grant of capacity utilization adjustment and working capital adjustment for AY 2005-06, observing that the Tribunal, in the assessee's own case for succeeding AY 2006-07, had examined the issue in light of the ruling in Claas India (ITA No.1783/Del/2011) and remitted the matter to AO/TPO for granting capacity utilization and working capital adjustment. It held that since the Tribunal had taken a view in assessee's own case in the succeeding year, there was no justification to take contrary view in this appeal and accordingly set aside the CIT(A) order and remitted the matter to AO/TPO to re- adjudicate the issue of lower capacity utilization and working capital adjustment in light of decision in assessee's own case for AY 2006-07.

Molex India Tooling Pvt Ltd v ACIT – TS-92-ITAT-2017 (Bang) – TP – IT(TP)A No.770/Bang/2012 dated 25.01.2017

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1352. The Tribunal held that for the purpose of computing and granting adjustment for underutilization of capacity, the optimum capacity had to be considered as opposed to the total installed capacity as done by the assessee. It held that manufacturing companies could not always operate at full capacity and therefore the optimum capacity at which comparable companies operated was to be compared with the capacity utilization of the assessee to determine the under-utilization.

Further it held that the capacity utilization was to be granted to the extent of fixed costs and not the entire non-operating costs of the assessee.

Biesse Manufacturing Co Pvt Ltd v ACIT [I.T.(T.P.)A. No.97/Bang/2015] – TS-533-ITAT- 2015(Bang) -TP

1353. The Tribunal allowed the in principle, capacity adjustment claim of assessee [engaged in business of manufacture and trade of in-line helical gear boxes, electric motors, shaft mounted gear boxes and related sub assembly and spare parts that from parts of the Machine Tools and Component industry in India] observing that the assessee's business had taken a hit mainly on account of change in the business conditions in respect of wind mills on account of withdrawal of the accelerated depreciation benefit and the withdrawal of the generation based incentive under the wind power sector (amendments made in 2012). It noted that consequent to such changes the assessee's manufacturing capacity utilization fell to 47% as against national average of 75% (as indicated in RBI's report) during the year under review and therefore held that the assessee was entitled to have the benefit of capacity utilization adjustments. However, observing that capacity utilization data was not available, it granted liberty to assessee to obtain variable data and prove its claim before TPO.

Bonfigioli Transmissions Private Limited vs. DCIT - TS-388-ITAT-2018(CHNY)-TP - /I.T.A.No.2977/CHNY/2017 dated 14-05-2018

1354. The Tribunal, dismissed the Revenue's appeal and upheld the order of the CIT(A) granting idle capacity adjustment to the assessee engaged in purchase and sale of components of refrigeration, industrial controls, frequency converters, etc. for AY 2004-05. Noting the assessee's contention that its utilized capacity for AY 2004-05 was only 200 units as against installed capacity of 7200 units and that its margin after idle capacity adjustment was 11.77% as against ALP of 7.16% as determined by the TPO, it dismissed the Revenue's contention that the assessee had not demonstrated idle capacity and capacity utilization.

DCIT Vs Danfoss Industries Pvt. Ltd.- TS-164-ITAT-2017(CHNY)-TP - ITA Nos.1131, 1132 & 1582/Mds/2016 dated 23.02.2017

1355. The Tribunal denied the assessee's claim for idle capacity adjustment dismissing the claim of the assessee that it was in the initial stage of business and incurred huge fixed cost and that it could not achieve the optimum capacity utilization as its utilized capacity was only 34% against the comparable company's capacity utilization of 61.36%. It noted that that assessee was not a new or a startup company, and was existing prior to 2002 when it was manufacturing tractors along with Greaves. Accordingly, it held that since the company was reasonably old from the profile, justifiable reasons had to be explained for non-utilization of the capacity, fixed costs incurred from the year of inception, the installed capacity, utilized capacity and capacity of breakeven point. It further held that the assessee should have

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submitted detailed reasons with particular reference to the availability of raw materials, man power, machinery, capital resources, which have influenced the utilization of maximum capacity and for non-utilization of the installed capacity. Accordingly, since the aforesaid details had not been submitted, it rejected the assessee's idle capacity adjustment claim.
SAME Deutz-Fahr India Pvt. Ltd. Vs CIT - TS-316-ITAT-2017(CHNY)-TP - /ITA No.2666/Mds/2016 dated 22.02.2017

1356. Where the assessee claimed a capacity utilization adjustment on the ground that it went through shutdowns and lockout for a longer period of time which hampered production which was rejected by the DRP on the ground that the labour unrest did not adversely impact assessee's margins and that the assessee had failed to furnish actual details for loss caused by labour problems, the Tribunal after referring to the tabular statement filed by assessee containing details of power and fuel, salary and wages and capacity utilization in last 3 years and present AY, opined that that prima facie, there was under-utilization of installed capacity towards which suitable adjustments were required to be made. Since the assessee had not furnished all details before DRP, the Tribunal directed the DRP to consider under-utilization of installed capacity and grant suitable deduction in TP-adjustment, if any.
Bailey Hydropower (P) Ltd. vs. ACIT - TS-122-ITAT-2017(CHNY)-TP-/I.T.A.No.2605/Mds./2014 dated 17.02.2017

1357. Where the assessee claimed capacity utilization adjustment on the ground that this being its initial year of operation, it was operating only at 28% capacity, thereby incurring substantial amount of idle capacity costs and significant under recovery of cost resulting in lower margins, whereas comparables were in the mature stage of their economic life cycle and were operating at average capacity of 71%, the Tribunal held that idle capacity was one of the factors which could influence margins substantially and observed that the reasons for non-utilization of capacity were required to be verified with respect to resources available and functions performed by comparable companies. Noting that the assessee was engaged in manufacturing and trading while comparables were engaged only in manufacturing activity, it remitted the issue and directed AO to make necessary adjustments for idle capacity after considering all the factors.
Nippon Paint India Pvt Ltd v ACIT– TS-102-ITAT-2017 (Chny) – TP - ITA No.779/Mds/2016 dated 10.02.2017

1358. The assessee engaged in providing engineering design services had adopted TNMM as the MAM and selected a set of 4 comparables having an average operating profit to operating cost margin of 13.5% as against its operating profit to operating cost margin of 37.5% which was computed after making adjustment for idle capacity on the premise that it had only utilized capacity to the extent of 66.5% at its Chennai center. the TPO disallowed the claim for idle time adjustment noting that assessee had been in business since 2001 and annual reports of the assessee for various financial years demonstrated improved working with better volume of work load. The Tribunal noted that for computing the adjustment, the assessee considered the total capacity in terms of billing hours for its Chennai Region but considered capacity in terms of number of persons for its NDPC office. The Tribunal upheld the order of the TPO and denied the assessee's idle capacity adjustment and held that assessee had not been able to demonstrate how it worked out the capacity hours using a

reliable method, as it itself had followed different yardsticks for working out its capacity levels at Chennai and NDPC centers. It held that the assessee had even been unable to prove that idle capacity in service industry was not an across the industry feature, or the existence nor nonexistence of idle capacity for the various comparables selected by it.
Saipem India Projects Limited Vs DCIT - TS-308-ITAT-2017(CHNY)-TP - ITA Nos.985 & 1400, CO 79/2014 dated 05.04.2017

1359. The Tribunal restored the issue of capacity utilization to be granted in case of manufacturing activity of assessee directing the TPO to give necessary relief in accordance with law noting that in the peculiar case like that of the assessee, the manufacturing costs would necessarily have certain fixed overheads and these costs would be met only when manufacturing activity reached a certain level. The assessee had demonstrated the claim of underutilization of capacity through a chart (not available before lower authorities) and also substantiated that after certain threshold, assessee had broken even and reached a profit.
Carrier Midea India P. Ltd vs Dy.CIT [TS-1256-ITAT-2018(DEL)-TP] (ITA No.7675/Del/2017) dated 22.11.2018

1360. The Tribunal restored the issue of capacity utilization to be granted noting that DRP had stated that complete data for claiming capacity utilization adjustment by assessee (engaged in manufacture of auto components) was not on record. It directed the assessee to provide complete data to substantiate its claim and TPO to afford a reasonable opportunity to the assessee to do so.It noted the assessee's contention that assessee was operating at a different capacity (started commercial production in October 2008) vis-à-vis its comparables who were in existence for last 17 to 51 years. Further, assessee had also pointed out that coordinate bench in assessee's own case for earlier year had allowed assessee's claim of capacity utilization and there was no change in business model vis-à-vis previous year.
Nissin Brake India Pvt Ltd vs DCIT [TS-1252-ITAT-2018(DEL)-TP] (ITA No.6366/Del/2017) dated 16.11.2018

1361. The assessee had incurred a loss of 3.93% at net level and reason for same was low capacity utilization (assessee had built one of the biggest plants in India for manufacturing earth moving machinery but was unable to use it fully) and high establishment cost of the assessee company vis-à-vis the comparable company.The Tribunal restored the issue of capacity utilization directing TPO to call for information from comparables u/s.133(6) for correct determination of ALP relying on coordinate bench decision of IKA India Ltd. wherein the TPO was directed to collect information u/s.133(6) by holding that benefit of underutilization of capacity could not be denied to the assessee only for the reason that the data about comparable companies was not available.Further, it directed TPO to compute appropriate adjustment after carrying out the exercise of examining the capacity utilization of the assessee company and to ensure that the capacity utilization of the assessee company i.e. the tested party and that of the comparables was on the same parameters.
Terex Equipment Pvt Ltd (Formerly known as Terex Vectra Equipment Pvt. Ltd.)vs ACIT [TS-1233-ITAT-2018(DEL)-TP] ITA No.5828/Del/2011 dated 02.11.2018

1362. The Tribunal upheld the assessee's claim for grant of capacity under-utilization adjustment in manufacturing segment and explained the step by step mechanism for computing capacity

under-utilization adjustment viz. - (I) ascertain the percentage of capacity utilization vis-a-vis the installed capacity for assessee and comparables, (ii) give effect (positive or negative) to the difference in the percentage of capacity utilizations of the assessee vis-a -vis comparables, one by one, in the operating profit of comparables by adjusting their respective operating costs. Noting that the operating costs could be variable, semi-variable and fixed costs, it held that adjustment was required only in respect of fixed cost and fixed portion of semi-variable cost. Noting that complete financials of comparables were not on records it remitted the issue of computation of adjustment for under-utilization of capacity to AO/TPO with a direction that adjustment should be computed with respect to installed capacity and not licensed capacity.

Daikin Airconditioning India Pvt. Ltd. v DCIT - TS-176-ITAT-2018(DEL)-TP - ITA Nos.2536/Del/2014

1363. The Tribunal relied on the coordinate bench ruling in assessee's own case for AY 2008-09 and allowed the adjustment towards rent and maintenance of unutilized area of premises. It directed the TPO to work out the requisite adjustment after giving assessee an opportunity of being heard. The assessee had taken on lease a premises with 6.5 floors out of which only 4.5 floors were being utilized during relevant year while balance remained vacant in anticipation of future growth of business. The Tribunal noted that DRP had accepted that approximately 25% of the assessee's premises were lying vacant/idle and co-ordinate bench in assessee's own case for AYs 2004-05 and 2006-07 had allowed capacity under-utilization adjustment considering assessee was bearing substantial risk of idle capacity.

C.R.M. Services India Pvt. Ltd vs. DCIT [TS-343-ITAT-2018(DEL)-TP] ITA No.5930/Del/2012 and 1630/Del/2014 dated 14.05.2018

1364. The Tribunal remitted the issue of grant of adjustment for unutilized capacity cost to AO for AY 2007-08, in respect of assessee's international transactions relating to manufacture of crop protection products for verification of material facts relevant to tested party i.e. assessee as well as to the comparables . The Tribunal had noted that the coordinate bench in assessee's own case for the previous year had remitted the issue of capacity under-utilization adjustment to the TPO while determining ALP of purchase of raw material from AE under TNMM. Further, on Revenue's appeal against the Tribunal's order for previous year, the Court had upheld the remand but kept the question open to be decided on merits whether the adjustment of unutilized capacity cost could be worked out by excluding the unused capacity cost and whether such unutilized capacity cost should be excluded/included in the case of comparables also.

DCIT vs. E.I. Dupont India Private Ltd [TS-354-ITAT-2018(DEL)-TP] ITA Nos.5043&4774/Del/2014 dated 10.05.2018

1365. Where the TPO determined ALP based on only 1 comparable, after rejecting 3 other comparables selected by assessee on the premise that capacity utilization figures of production as well as of the installed capacity of these comparables were not available in same units, the Tribunal restored the matter to the file of TPO and held that that Rule 10B clearly provided for reasonable accurate adjustment to be made to eliminate material differences between assessee & comparables and the TPO was obligated to work out the capacity utilization and its effect on the profit earned by the

comparable as well as by the assessee. Accordingly, it restored the matter to the file of TPO for fresh consideration.
Nissin Brake India Pvt. Ltd vs. DCIT-TS-779-ITAT-2017(DEL)-TP ITA No. 3425/Del/2016 dated 22.09.2017

1366. The Tribunal, noting that the assessee was incorporated as a subsidiary of Japanese parent company in March 2007, and that AY 2009-10 was its first year of operation, wherein it had actually utilized only 35.70% of capacity for actual production, remitted the matter to AO/TPO for consideration of capacity utilization issue while selecting comparables.
Yutaka Auto Parts India Pvt. Ltd. Vs DCIT – TS-1096-ITAT-2016 (Del) – TP – ITA No 1120 / Del / 2014 dated 09.12.2016

1367. After noting that there were serious issues with respect to assessee's products and a fall in production by over 64% evidenced that there was substantial underutilization of capacity, the Tribunal upheld assessee's claim for capacity underutilization adjustment, in principle, but remitted the issue back to AO for fresh quantification of adjustment by making necessary changes in the figures of comparables and not the tested party.
Frigoglass India Pvt Ltd [TS-500-ITAT-2016(DEL)-TP] - I.T.A. No.784/Del/16

1368. The Tribunal held that where the assessee, being newly incorporated was incurring losses as it was yet to break even, though TNMM was the most appropriate method, comparability with other companies under TNMM could only be done once the significant differences of operating cost between the comparables and assessee were adjusted since break-even of cost could only be reached after a sufficient period of operations by which time sufficient income could be generated to contribute towards fixed cost. Accordingly, it remitted the ALP determination to the file of the TPO.
MGE UPS System India Pvt Ltd v DCIT - TS-281-ITAT-2016 (Del) – TP

1369. The Tribunal held that capacity adjustment allowable has to be on the profit margin of the comparable companies and not vis-à-vis the assessee and laid down the mechanism for computation of the adjustment to be granted.
DCIT v Claas India Pvt Ltd [ITA No 1783 / Del / 2011] - TS-371-ITAT-2015(DEL)-TP

1370. The Tribunal directed the AO to make suitable adjustment to assessee's employee cost in case of underutilization of employees and thereafter re-compute operating margin of comparables while benchmarking assessee's provision of software development services to AE noting that DRP had retained 3 comparables whose average ratio of employee cost to sales was 58% as against assessee's ratio of 76%. It observed that the difference was not negligible to be ignored and accordingly, the difference which was likely to affect the comparability analysis had to be taken note of and suitable adjustment had to be made to bring the comparables on par with the assessee for comparing their operating margin.
Planet Online Private Limited vs ACIT [TS-739-ITAT-2018(HYD)-TP] ITA No.279/Hyd/2016 dated 18.07.2018

1371. The Tribunal held that where adjustments on account of under- utilization of capacity and difference in depreciation are factors which are likely to materially affect price or

cost charged or paid, or profit arising from, such transactions in open market, Assessing Officer / TPO should allow adjustments on account of under-utilization of capacity and also difference in depreciation method adopted by assessee and comparable companies. Consequently, it further held that the issue of apportionment of unallocated expenses also needed to be allowed.

Srini Pharmaceuticals Ltd v ACIT - [2016] 68 taxmann.com 50 (Hyderabad-Trib)

1372. The Tribunal noting that the assesse was in its second year of operation and had incurred very high cost of rent and electricity allowed the assessee's capacity utilization adjustment claim and remitted the issue to the AO / TPO to determine the underutilization and give an adjustment accordingly.

Further, it held that the TPO was incorrect in determining the ALP by aggregating both international and domestic transactions and therefore remitted the matter to the file of the TPO directing him to exclude the domestic transactions while determining ALP.

Gameloft Software Pvt Ltd v DCIT – TS-972-ITAT-2016 (Hyd) - TP

1373. Where the assessee's total installed capacity took into account anticipated provision of web hosting services which was approved by the AE but during the year under consideration the said web hosting services were not provided to the AE, the Tribunal held that the AO erred in imputing a mark-up on the costs incurred by the assessee with regard to the web hosting services as the assessee had not performed any functions vis-à-vis the services. Accordingly, it held that the assessee was justified in claiming that only the expenses incurred by it with regard to the web hosting services were to be recovered at cost. However, considering that the assessee submitted additional evidence i.e. addendum to the agreement, it restored the issue to the file of the AO for verification of such evidences.

Affinity Global Advertising Pvt. Ltd (Formerly known as Hostway Solutions Pvt. Ltd) vs. ITO-TS-1057-ITAT-2017(Mum)-TP dated 20.12.2017

1374. The Tribunal remitted the issue of capacity utilization adjustment for manufacturer and exporter of jewellery for AY 2008-09 to the file of the TPO by holding that an assessee who starts business in a particular year cannot be compared with those who are doing business for many a years.

Radhashir Jewellery Co Pvt Ltd [TS-459-ITAT-2016(Mum)-TP] - I.T.A./7066/Mum/2013

1375. The Tribunal, reversing the order of the TPO and DRP and relying on the decision of Tasty Bite Eatables Ltd. Vs. ACIT (2015) 59 taxmann.com 437 (Pune-Trib.) allowed the assessee capacity under-utilization adjustment in its manufacturing segment noting that subject AY 2009-10 was its first complete year of operations and it was due to under-utilization of capacity and other unabsorbed expenses that the assessee had incurred losses during the year. It rejected the TPO's alternative stand that since assessee had received support payments from AE for low capacity utilization in the succeeding AY, assessee should have received similar payments in subject AY although such arrangement did not exist. Referring to Section 92B, it held that none of the limbs of section 92B of the Act or Explanation defining the expression 'international transaction' spoke of any hypothetical transaction and in the absence of the same, TPO could not pre-suppose an international transaction between the assessee and its AEs and determinate the TP adjustment on account thereof.

Further, it held that even if there was a presumption of support payments from the AEs to the assessee, it did not get covered by the definition of international transaction and accordingly was beyond the scope of the TPO.
Dover India Pvt. Ltd Vs ACIT - TS-318-ITAT-2017(PUN)-TP - ITA No.411/PUN/2014 dated 19.04.2017

Depreciation Adjustment

1376. Where the asssessee had increased its fixed assets / plant and machinery to the tune of Rs.1435.98 lakhs which were eligible for depreciation as a result of which the net profits had declined, the Tribunal held that depreciation was to be excluded while computing the profit level indicator for conducting benchmarking under the TNMM. Consequently, the Tribunal remitted the issue to the TPO for fresh adjudication.
Erhardt+ Leimer India Pvt Ltd v ACIT – TS-1028-ITAT-2016 (Ahd) – TP

1377. The Tribunal noting that the assessee providing contract research and development services to its AE in the field of petrochemicals and polymers, had adopted SLM for the purpose of computing depreciation as against WDV method adopted by the comparables and noting that the assessee's asset turnover ratio ranged from 17% to 29% for the relevant years AY 2004-05 to 2008-09 while that of the comparables ranged between 71% and 177.8%, directed that depreciation cost be excluded from operating cost for computing PLI. Accordingly held that the issue of allowance of depreciation adjustment claimed by the assessee was academic. Further, relying on Pole to Win India Ruling it held that expenses disallowed as deduction by the assessee in its computation of income could not be included in operating cost for computing operating margin.
Sabic Research and Technology Pvt Ltd TS-327-ITAT-2017(Ahd)-TP ITANo.1065 dated 01.05.2017

1378. The Tribunal held that where the assessee computed depreciation under the straight line method as opposed to the comparable companies who used the written down value method, the assessee was eligible for an adjustment on account of the difference in the methods as depreciation charged by the assessee (29 percent) was substantially higher than the depreciation charged by comparable companies (15 percent).
AMD Far East Ltd v JDIT - TS-299-ITAT-2016 (Bang) - TP

1379. The Tribunal held that where there was a difference in the depreciation of the assessee and the comparable companies due to the age of machinery, rate at which it was claimed and the method of claiming depreciation and details of capacity utilization and rate of depreciation of the comparable companies could not be ascertained, adopting Gross Profit / Sales as the PLI would eliminate such differences.
Kirloskar Toyota Textile Machinery Pvt Ltd v DCIT - TS-363-ITAT-2016 (Bang) – TP

1380. Where the assessee depreciated its assets at higher rates than those prescribed by Schedule XIV of the Companies Act, 1956 and most of the comparable companies considered by the TPO followed the rates prescribed under Companies Act, 1956, thereby charging a lower rate of depreciation, the Tribunal accepted the plea of the assessee and relying on the

Tribunal judgments in ExlService.com India Private Limited [TS-441-ITAT-2014(DEL)-TP] and Worldwide Solutions Private [TS-176-ITAT-2015(Bang)-TP], wherein depreciation adjustment had been granted, remitted the matter to TPO for re-examination and re-adjudication in accordance with aforesaid Tribunal decisions.

Outsource Partners International P Ltd vs. DCIT - TS-57-ITAT-2017(Bang)-TP - I.T(TP).A No.337/Bang/2015 dated 06.02.2017

1381. The Tribunal held that a depreciation adjustment could not be granted in isolation, without taking into consideration the repair and maintenance cost as well as lease rentals for hiring plant and machinery. It observed that depreciation would be higher in a case of newly installed plant and machinery, but corresponding expenditure on maintenance and repairs would be higher in case of old plant and machinery. Noting that the assessee did not produce comparative details of depreciation rates charged by assessee vis-à-vis comparables, it directed the TPO/AO to grant appropriate adjustment if any in respect of difference of depreciation charged by assessee in comparison to comparable companies after taking into consideration corresponding expenditure on repairs and maintenance as well as lease rentals if any.

DCIT vs. Novell Software Development (India) Pvt. Ltd - TS-190-ITAT-2017(Bang)-TP - I.T. {T.P} A. No.1313 / Bang / 2012 dated 10.02.2017.

1382. The Tribunal, relying on the decision passed by the co-ordinate bench in the assessee's own case for AY 2003-04 [TS-441-ITAT-2014(DEL)-TP] held that depreciation adjustment was to be made to the operating profit margin of comparable companies if there was a difference in the rates of depreciation charged by assessee vi-a-vis comparables.

Exl Service.com (India) Pvt Ltd v DCIT – TS-104-ITAT-2017 (Del) – TP - ITA No. 302/Del/2015 & ITA No. 615/Del/2015 dated 03.01.2017

1383. The Tribunal accepted the contention of the assessee that since the depreciation adopted by it was on the higher side since the estimated life of the assets were shorter (3 and 5 years), it led to a higher cost compared to other comparable companies, lowering its operating margin as compared to comparable companies and therefore it should have been excluded from the variable cost of all the comparable companies as well as the assessee.

AMD Research & Development Centre India Pvt Ltd v DCIT (ITA No. 275/Hyd/2015 & ITA No. 242/Hyd/2015) – TS-563-ITAT-2015 (Hyd) – TP

1384. The Tribunal dismissed Revenue's appeal against granting adjustment for accelerated depreciation and exclusion of VoltAmp Transformers from the comparable list on the ground that with respect to the accelerated depreciation adjustment, the Tribunal had decided the issue in favour of the assessee for AY 2008-09 and in respect of exclusion of VoltAmp Transformers as a comparable it held that the Tribunal had regarded it as not a good comparable for AY 2003-04.

Advance Power Display Systems Limited - TS-14-ITAT-2017(Mum)-TP

1385. The Tribunal noting that the assessee had provided for higher depreciation on certain assets whereas comparables were following depreciation rates as per the Companies Act

and relying on the ruling of Welspun Zucchi Textiles Ltd [TS-9-HC-2017(BOM)-TP] held that depreciation was to be considered as part of operating cost and thus there was no merit in assessee's claim for depreciation adjustment. The Tribunal, however, noted that, in case the assessee was able to establish material differences in depreciation between itself and the comparable, then a suitable adjustment could be accorded in the hands of the comparable after due verification by the TPO.

Tieto Software Technologies LTD. vs. DCIT - TS-155-ITAT-2017(PUN)-TP - ITA No.986/PUN/2013 dated 03.03.2017

Extraordinary Expenses

1386. The Court held that provision for stock obsolesce was to be considered as non-operating as it was abnormal and extra-ordinary in nature. Further, dealing with the contention of the Revenue that the provision was claimed year after year, the Court observed that the question for determination was not whether the assessee was claiming the provision as a one-time measure but was whether it was gaining any undue advantage and using the provision as a measure of avoiding tax.

CIT v Federal Mogul Automative Products (India) Pvt Ltd (ITA 848/2015) – TS-531-HC-2015 (Del) – TP

1387. Where the AO, dismissing the contention of the assessee(that for sales made to AEs the warranty cost thereon was incurred by the AE itself as the assessee had allegedly failed to bring any evidence on record), made an adjustment in the hands of the assessee on the ground that the assessee had included the cost of warranty on sale of cloth guiders in the sale consideration to Non-AEs while it did not do so in the case of its AE, the Tribunal relying on the decision in the assessee's own case for AY 2007-08 and 2008-09 (TS-1059-ITAT-2016 (Ahd) – TP) remitted the issue back to the AO for decided the matter afresh after giving adequate opportunity of being heard to the assessee.

Erhardt + Leimr (India) Pvt Ltd v DCIT – TS-72-ITAT-2017 (Ahd) – TP - ITA No. 352/Ahd/2015 dated 06.02.2017

1388. The Tribunal allowed the assessee adjustment on account of extraordinary expenditure incurred by assessee relating to ex-gratia paid to the family of employee on his death as it was a non- recurring expense and also towards extraordinary expenses pertaining to merger (i.e. press meet expenses and rent for vacated old premises as they had a direct connection with the process of merger). However, it refused adjustment towards extra salary paid for duplicate post of CEO/CFO and held that such expenses / salary paid to existing staff could not be treated as extraordinary expenditure. Further it rejected the assessee's claim of extra-ordinary cost adjustment towards salary cost of 5,128 man hours due to the merger, which was claimed without establishing how the assessee's business was impacted because of the acquisition.

Valtech India Systems Pvt Ltd v DCIT – TS-70-ITAT-2017 (Bang) – TP - IT. (T.P) A. No.1496/Bang/2010 dated 13.01.2017.

1389. During the relevant AY, the assessee suffered an abnormal increase in the price of some of its raw – materials, mainly gold, owing to unexpected increase in price of gold (20 percent

increase in price of gold) as a result of which it reduced this cost from the operating cost while arriving at the PLI margin of gross profit to sales, contending that, as the change in gold market did not coincide with the conditions prevailing when the agreement for sale of goods was entered into with the customers, it had not been able to pass on the increased cost to its customers including its AE. The aforesaid reduction in cost was denied by the TPO and on appeal restricted by the CIT(A) to 5 percent as opposed to 20 percent (as claimed by the asssessee). The Tribunal, observing that the CIT (A) had not examined the sales price charged to AE in the present and preceding year, remitted the issue to the file of the CIT (A) with directions to examine the details submitted by assessee in this regard.

Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

1390. The Tribunal rejected assessee's claim for adjustment of extra ordinary expenses on account of

1). abnormal wastage of materials to the tune of Rs. 1.43 crore which arose due to high material cost and learning curve of operators considering that the the assessee started a new knitting division during the year and 2). depreciation, (as the assessee had revised the estimated economic life of its fixed assets based on a technical study resulting in excess depreciation by Rs. 99.94 lakhs) and held that since the assessee's pricing pattern was cost plus mark-up, which had been raised from 5% to 9.5% on the goods procured by it and later revised to 7%, any loss on account of wastage / increased depreciation suffered by assessee would be taken care of by mark-up prices as the same would be included in the cost base while computing the mark-up.

KOB Medical Textiles Pvt Ltd. Vs. DCIT- TS-211-ITAT-2017(CHNY)-TP - I.T.A.No.855/Mds./2015 dated 09.03.2017

1391. The Tribunal allowed the assessee's claim towards adjustment of extraordinary expenditure relating to employee cost and consultancy charges incurred for future project requirement while computing operating margin for AY 2012-13. Noting that manpower was one of the main costs for assessee rendering software development services, it considered the assessee's submission that it maintained more than 10% of its manpower requirement in anticipation of new job orders due to difficulty in recruiting trained software personnel. It held that lack of mention of the fact of such extraordinary event having material impact on profitability in its financials, could not be reason for rejection of assessee's claim. It also observed that these expenses did not relate to the project executed and billed in the subject AY and that assessee was only in the 2nd year of operations, and therefore the impugned expenses could not be considered as intangible assets as the assessee had not exercised sufficient control over the expected future benefits arising from a team of skilled staff and from training so as to consider the expenses as intangible assets. Accordingly, it held that business module could not be straightway compared with other comparables, unless the extraordinary item of expenditure were excluded so as to arrive at correct margin of profit and since the assessee's PLI after adjustment was higher than that of comparables, it deleted the TP adjustment of Rs. 2.64 Cr.

Saggezza India P Ltd. Vs. DCIT - TS-240-ITAT-2017(CHNY)-TP - /I.T.A.No.3323/Mds./2016 dated 22 -03-2017

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1392. Where the assessee claimed adjustment on account of custom duty on imports stating that due to stringent quality norms, imports were necessitated in the initial stages and the non-cenvatable basic custom duty constituted additional cost for the assessee and the TPO disregarded the claim of the assessee stating that no evidence had been provided and that the comparable companies in the industry to which the assessee belonged also incurred import duties for sourcing material, the Tribunal remitted the matter to the TPO for examination of the assessee's claim and to eliminate the difference, if any.

Doowon Automotive Systems India Pvt Ltd v DCIT – TS-97-ITAT-2017 (Chny) – TP- / I.T.A. No. 692/Mds/2016 dated 25.01.2017

1393. The Tribunal accepted assessee's claim for adjustment towards difference in Lube oil price and Zinc tolling fee while benchmarking international transactions of assessee engaged in manufacture and sale of lubricant additives, noting that the comparable company viz. Lubrizol India P Ltd enjoyed better discount from IOCL (one of the JV partner for Lubrizol) in respect of price of Lube Oil and hence, cost of raw material was lower in its case as compared to the assessee and that the cost of zinc for Lubrizol was lower as it had an in-house manufacturing facility as opposed to the assessee, who had entered into sub-contracting arrangement with a third party for manufacture of zinc. Accordingly, it remitted both the issues to TPO for re- consideration with directions to work out the PLI after considering these adjustments. It also stated that the adjustment for difference in cost of zinc could be granted only if Lubrizol's cost details were made available.

Indian Additives Ltd. Vs. DCIT TS-121-ITAT-2017(CHNY)-TP - / I.T.A. No. 2579/ Mds./2016 dated 17.02.2017

1394. The Tribunal, relying on coordinate bench's decision in assessee's own case for AYs 2006-07 and 2007-08 deleted adjustment made on alleged excess payment made by assessee in procuring raw material from AE on the ground that payment of higher price to AE as compared to non-AE was justified considering there were minimum order quantity restrictions on Non-AE purchases. Further, relying on coordinate bench's ruling in assessee's own case it accepted assessee's contention that the commission was paid for the purpose of business wholly and exclusively based on turnover and remitted issue of ALP determination in respect of sales commission paid to AE at 5% of net exports to the file of the Assessing officer to decide the matter afresh on the basis available supporting material and evidence and after providing an opportunity to the assessee to substantiate its claim.

Intimate Fashions India Pvt. Ltd vsDCIT-TS-424-ITAT-2017(CHNY)-TP- I.T.A.No.1163/Mds/2014 dated 10.04.2017

Profit Level Indicator

1395. The Apex Court admitted Revenue's SLP against Delhi HC order treating foreign exchange fluctuation as operating for assessee while working out TP-adjustment. The High Court had dismissed Revenue's appeal noting that the Tribunal after considering that the assessee in its distribution segment imported its finished goods from AEs was exposed to high economic foreign exchange risk and due to a sharp depreciation of the Indian Rupee against the Euro by about 16% in a short span of 6 months, i.e. from February, 2008 to July, 2008, had treated

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foreign exchange fluctuation as operating. The Court opined that the view taken by the Tribunal was a plausible one and did not call for any interference.

Pr.CIT vs SCHNEIDER ELECTRIC INDIA PVT LTD [TS-505-SC-2018-TP] SLP 19004/2018 dated 03.07.2018

1396. The Apex Court admitted the Revenue's SLP against order of the Delhi High Court wherein the High Court had held that for the purpose of computing PLI of OP/TC, the denominator had to be total costs incurred by assessee and not the FOB value of goods sourced through the assessee as the Act did not authorize broadening of the cost base in such circumstances and dismissed the appeal of the Revenue holding that no question of law arose. Since the same issue had arisen in earlier years as well, the Apex Court directed that this case would be heard along with earlier year appeal and other connected matters.

Pr. CIT vs. Li and Fung (India) Pvt Ltd - TS-223-SC-2017-TP - Petition(s) for Special Leave to Appeal (C).....CC No. 5274/2017 dated 24.03.2017

1397. The Court upheld the Tribunal's consideration of forex gain/ losses as operating for assessee & comparables while determining ALP for AY 2010-11 and its rejection of the applicability of Safe Harbour Rules for subject AY 2010-11 (which provided that forex gain/ losses was to be treated as non-operating in nature).

Pr. CIT vs. Rolls Royce India Pvt. Ltd - TS-1066-HC-2017(DEL)-TP - ITA 419/2016 dated 23.10.2017

1398. The Court admitted the assessee's appeal on the question whether the Tribunal erred in concluding that reimbursement of assessee's expenses by AE could form part of the receipts as well as cost base of the marketing support services segment while determining operating profitability of such segment.

Pernod Ricard India Pvt. Ltd vs. CIT - TS-1082-HC-2017(DEL)-TP - ITA 1177/2017 dated 21.12.2017

1399. The Court admitted the assessee's appeal on the following question of law " *Did the Tribunal fall into error in upholding the allocation of expenses as computed by the TPO in the Marketing Support Services segment in complete ignorance of the fact that only one employee was devoted full time to such activity and the other employee spent only a meagre of his time in respect of such activity?"*

Pernod Ricard India Pvt. Ltd vs. CIT - TS-28-HC-2018(DEL)-TP - ITA 1177/2017 dated 09.01.2018

1400. The Court dismissed the appeal on whether repair and maintenance, electricity, insurance and depreciation on assets was to be included in the computation of PLI, noting that the assessee's transaction were at ALP irrespective of inclusion/exclusion.

Pr.CIT vs Swarovski India Pvt. Ltd-TS-874-HC-2017(DEL)-TP ITA No. 419/2017 dated 04.09.2017

1401. The Court, noting that Tribunal had discussed in detail the factual position regarding the sharp depreciation of Indian Rupee (INR) against the Euro (EUR) by about 16% in a short span of 6 months, i.e., February to July 2008, held that a forex fluctuation adjustment had to be

carried out in accordance with the Transfer Pricing regulations so as to eliminate differences between international transactions involving comparable companies and that entered into by the assessee. Accordingly, it held that the Tribunal was correct in making the said adjustment in assessee's hands.

Pr. CIT vs. Schneider Electric India Pvt. Ltd-TS-696-HC-2017(DEL)-TP-ITA no. 713/2017 Dated 09.07.2017

1402. The Court, relying on the decision in the case of Ameriprise India (wherein it was held that forex gains earned in relation to trading items and emanating from international transactions could not be treated as non-operating in nature), held that forex gain/loss was to be treated as operating in nature.

Pr.CIT vs B.C Management Services Pvt Ltd-TS-948-HC-2017(DEL)-TP-ITA no.1064/2017 and CM no. 43177/2017 dated 28.11.2017

1403. The assessee, a wholly owned subsidiary of Mitsubishi Corporation Japan, one of the leading Sogo Shosha establishments in Japan, carried out transaction of provision of services, purchase of goods and various other transactions and used the Berry Ratio to benchmark its transactions. The TPO rejected use of Berry ratio (Gross Profit / Operating Cost)adopted by the assessee contending that the assessee performed all the critical functions, assumed significant risks and used both tangible and unique intangibles developed by it over a period of time and applied the ratio of Operating Profit / Total Cost of comparables (around 2.49%) to the FOB value of goods sourced from India & finally made a TP adjustment. The Court dismissed the appeal of the Revenue and upheld the order of the Tribunal wherein it accepted the assessee's contention that the Berry Ratio was appropriate for benchmarking its transactions (as the assessee neither assumed any major inventory risk nor committed any significant assets for the same and as there was no value addition or involvement of unique intangibles) and remitted the issue of the TPO to benchmark the assessee's transactions accordingly.

Mitsubishi Corporation India P Ltd. [TS-230-HC-2017(DEL)-TP - ITA 159/2017, CM APPL.6427/2017 dated 22.03.2017

1404. The Court, relying on the decision in the case of Cash Edge – (351 ITR 8) (wherein the coordinate bench for same AY 2010-11 had considered forex fluctuation as operating item and held that safe harbor rules which came into force after AY 2010-11 were not applicable), upheld the Tribunal's order considering forex gain/losses as operating in nature.

Pr. CIT vs. Rolls Royce India Pvt. Ltd-TS-1066-HC-2017(DEL)-TP ITA 419/2016 & ITA 747/2016 dated 23.10.2017

1405. The Court, noting that Tribunal had discussed in detail the factual position regarding the sharp depreciation of Indian Rupee (INR) against the Euro (EUR) by about 16% in a short span of 6 months, i.e., February to July 2008, held that a forex fluctuation adjustment had to be carried out in accordance with the Transfer Pricing regulations so as to eliminate differences between international transactions involving comparable companies and that entered into by the assessee. Accordingly, it held that the Tribunal was correct in making the said adjustment.

Pr. CIT vs. Schneider Electric India Pvt. Ltd-TS-696-HC-2017(DEL)-TP-ITA no. 713/2017

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Dated 09.07.2017

1406. The assessee, a wholly owned subsidiary of Mitsui & Company Pvt Ltd., Japan engaged in providing sales support services and liasoning services to its Associated Enterprises ("AEs") with regard to the exports and imports of the commodities from its AE to / from India used TNMM as the MAM for determining ALP of its international transactions and adopted the Berry Ratio i.e. Gross Profit / Operating Cost as PLI but the TPO re-characterized the service and commission activities of the assessee as its trading segment and also rejected the comparables selected by assessee thereby inflating the assessee's total cost by Rs 4,541cr in AY 2009-10 and Rs 5,924cr in AY 2010-11 by including the value of sale / purchases on which it earned commission income, ignoring the fact said value was recorded as sale / purchase by AEs and was never a cost to assessee. The Tribunal, relying on the decision of the co-ordinate bench, in assessee's own case for AY 2007-08 and 2008-09 rejected the TPO's recharacterisation and held that the computation of the operating profit margin by increasing the cost led to an arbitrary adjustment of assessee's income and was contrary to the Rules and the provisions of the Act. The Court upheld the order of the Tribunal. Further, noting that the Tribunal had observed that when the value of the goods on which commission/ service income was earned was not to be added to the cost base, the assessee's international transactions computed by using TNMM as MAM and Berry Ratio (Gross Profit / Operating Cost) as PLI was at arm's length, the Court dismissed the appeal of the Revenue and held that no substantial question of law arose.
Mitsui & India Pvt. Ltd. [TS-174-HC-2017(Del)-TP] [ITA 788 & 789/2016]

1407. Where the Tribunal had upheld use of Berry Ratio (i.e. Gross Profit / Operating Cost) under TNMM for benchmarking international transactions of purchase of goods, provisions of services etc. undertaken by 'Soga Shosha' assessee, but remitted matter back to TPO to determine outcome in line with legal principles, the Court dismissed the Revenue's appeal against Tribunal order by relying on the decision of the co-ordinate bench of Court for a different AY, wherein the Court had declined to interfere with remand order in assessee's appeal. Accordingly, it held no substantial question of law arose.
CIT vs. Mitsubishi Corporation India (P) Ltd - TS-230-HC-2017(DEL)-TP - ITA 159/2017, CM APPL.6427/2017

1408. The Court dismissed the Revenue's appeal against the order of the Tribunal treating reimbursement received by assessee towards advertisement, marking and promotion expenses as operating in nature. It noted that the similar issue had arisen in AY 2002-03, wherein its co- ordinate bench had taken the same view and therefore held that no substantial question of law arose warranting any interference.
Pr. CIT vs. Samsung Electronics India Information & Telecommunications Ltd - TS-324-HC-2017(DEL)-TP - ITA 305/2017 dated 18.04.2017

1409. The Court upheld the order of the Tribunal directing the AO/TPO to exclude reimbursement of costs (without mark-up) from AE in respect of spare infrastructure capacity while working out assessee's PLI for AY 2011-12. It distinguished the decision of Cushman and Wakefield (India) (P.) Ltd [TS-150-HC-2014(DEL)-TP], which provided that the reimbursement was to be included while computing PLI as the said case pertained to reimbursement by an Indian

entity for costs incurred by AE and not vice versa as in assessee's case. It also observed that there was no categorization of the reimbursement costs (with/without markup) in Cushman & Wakefield ruling as in instant case. Noting that the Tribunal had examined agreement with AE to come to a definite factual conclusion as regards reimbursement of the infrastructure costs without any mark up, it rejected the Revenue's general plea that order of the Tribunal was 'perverse and bad in law' as it had failed to consider reasons provided in TPO/DRP's order. Accordingly, it dismissed the Revenue's appeal absent any substantial question of law.

Pr. CIT vs. CPA Global Services Private Limited - TS-329-HC-2017(DEL)-TP - ITA 266/2017 dated 03.05.2017

1410. Where the assessee benchmarked its international transactions viz. provision of software development services under TNMM and allocated its indirect costs to the software development segment based on manpower and turnover and the TPO accepting the application of TNMM disputed the allocation of indirect costs as done by the assessee, proceeded to benchmark the transactions based on the gross profit margins of the assessee and the comparables, the Court upheld the order of the Tribunal and CIT(A) accepting the benchmarking conducted by the assessee and dismissed Revenues appeal. It held that the computation of PLI being a factual issue did not constitute a substantial question of law.

Pr.CIT vs Network Programs India Ltd-TS-883-HC-2017(DEL)-TP ITA 883/2017 dated 07.11.2017

1411. The Court held that for the purpose of computing the PLI of the assessee's transactions with its AEs viz. providing buying services to its AE, the total cost incurred by the assessee was to be taken as the denominator and not the FOB value of the goods sourced through the assessee as the FOB value would enhance the assessee's cost base by the cost of manufacture and export of goods by the third party vendor.

Pr CIT v Li & Fung India Pvt Ltd - TS-686-HC-2016 (Del) - TP -ITA 674/2016

1412. The Court upheld the order of the Tribunal wherein it was held that foreign exchange gains / losses were to be considered as operating in nature. It held that the Safe Harbor Rules introduced in 2013 which stipulate exclusion of foreign exchange gains / losses from operating income / expenses were applicable only with prospective effect and therefore would not apply to the relevant AY i.e. AY 2009-10.

Pr CIT v Fiserv India Pvt Ltd - TS-437-HC-2016 (Del) - TP ITA 17/2016

1413. The Court admitted asssesse's appeal on whether Tribunal erred in coming to the conclusion that reimbursement of assessee's expenses by AE could form part of the receipts as well as cost base of the marketing support services segment while determining operating profitability of such segment. The Tribunal had upheld CIT(A)'s inclusion of reimbursements received from AEs as part of cost base / income while determining operating margins and allocation of certain cost items on head count basis.

Pernod Ricard India Pvt. Ltd vs CIT-TS-1082-HC-2017(DEL)-TP ITA 1177/2017 dated 22.12.2017

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1414. The Court upheld Tribunal's order considering foreign exchange gain/loss arising out of revenue transactions (i.e. ITES services) as an item of operating revenue/cost.
Pr CIT v Ameriprise India (P)Ltd -TS-174-HC-2016(DEL)-TP

1415. The Court disposed of the assessee's appeal against order of the Tribunal wherein the Tribunal had rejected exclusion of pass through costs from PLI under the Cost Plus Method, noting that the issue was academic, since the Tribunal had remanded the entire TP addition to the TPO with directions to use single year data and to use Gross Profit to total cost as the PLI, pursuant to which the TPO revised its order and there was no addition made. It held that since the ultimate outcome of the remand had resulted in no addition, the examination of the issue urged would be academic. However, it also held that if the findings of the Tribunal vis-à-vis the treatment of pass through costs were left undisturbed, it could constitute a barrier and work adversely against the assessee in subsequent years and therefore clarified that the said findings would not be considered as conclusive or binding on the assessee.
Fritidsresor Tours & Travels India Pvt Ltd v DCIT – TS-1011-HC-2016 (Del) - TP

1416. The Court held that though Rule 10B(1)(e)(i) of the Rules do not prohibit the use of Berry Ratio as PLI for applying TNMM, it can be used effectively only in cases where the value of goods have no role to play in the profits earned by an Assessee and the profits earned are directly linked with the operating expenditure incurred by the Assessee. It further held that it would not be an appropriate PLI in cases where an Assessee uses intangibles as a part of its business or in cases of Assessees who have substantial fixed assets since the value added by such assets would not be captured in Berry ratio which can only be applied where the value of the goods are not directly linked to the quantum of profits and the profits are mainly dependent on expenses incurred. Thus Berry ratio can effectively be applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them.
Sumitomo Corporation India (P) Ltd. v. CIT - (2016) 71 taxmann.com 290 (Del) - IT APPEAL NOS. 381, 382 of 2013 & 702 of 2014 and 738 of 2015

1417. The Court admitted the Revenue's appeal on the Tribunal's exclusion of depreciation from operating expenses while computing the PLI on account of difference in method of charging depreciation (SLM basis) by the assessee vis-à-vis comparable companies (WDV) and difference in asset turnover ratio between the assessee (ranging from 17%-29%) vis-à-vis comparable companies (71%-177%) **.**
Pr.CIT vs. Sabic Research and Technology Pvt. Ltd. - TS-1026-HC-2018(Guj)-TP – Tax Appeal No. 243 of 2018 dated 01.05.2018

1418. The Court dismissed Revenue's appeal and upheld the Tribunal's order accepting assessee's treatment of deferred revenue expenditure (written off over a period of five years) incurred before the start of commercial production as non-operating noting that the Tribunal had rightly observed that deferred revenue expenditure was not in the nature of research and development and not recovered from AE after examining the the agreement with its AE where research and development cost could only be reimbursed by the AE. The Tribunal had also

observed that the assessee had suo-moto disallowed the deferred revenue expenditure and it relied on the coordinate bench ruling in Pole to Win wherein it had been held that expenses disallowed while computing taxable income are excluded from operating margin. Thus, the Court rejected the plea of Revenue to treat the deferred revenue expenditure as operating.
Pr.CIT vs. Sabic Research and Technology Pvt. Ltd. - TS-1026-HC-2018(Guj)-TP – Tax Appeal No. 243 of 2018 dated 01.05.2018

1419. The Tribunal, relying on its decision in the case of Techbooks International Pvt Ltd (TS-317- ITAT-2015 (Del) – TP) dismissed the appeal of the Revenue challenging the order of the CIT(A) wherein the CIT(A) had accepted the assessee's claim of including the foreign exchange gains / loss while computing its PLI as well as while computing the PLI of comparable companies. It noted that the foreign exchange loss and gains were in respect of revenue items.
ITT Corporation India Pvt Ltd – TS-245-ITAT-2017 (Ahd) - TP - IT(TP)A No. 552/Ahd/2016 dated March 28, 2017

1420. The Tribunal held that foreign exchange gains were to be considered as operating income as it pertained to debtors and thus were revenue items. It rejected Revenue's reliance on Safe Harbour Rules in this respect, observing that Safe Harbour Rules are applicable only to the assessees who have opted for them.
Effective Teleservices Pvt Ltd vs. ACIT - TS-75-ITAT-2018(Ahd)-TP - ITA. No: 2411/AHD/2014 dated 16 -01-2018

1421. The Tribunal held that the TP adjustment proposed by the TPO was to be restricted to international transactions with the AE and could not be made on the entire turnover. It also accepted the assessee's alternate plea that the difference of operating margin at which the international transaction had actually been undertaken fell within the tolerance range of +/- 5 percent of the ALP margin determined by the TPO and therefore deleted the TP adjustment.
Liquid Controls India Pvt Ltd v ACIT – TS-965-ITAT-2016 (Ahd) - TP

1422. The Tribunal dismissed the Revenue's appeal against the CIT(A) order directing consideration of foreign exchange gain / loss as operating in nature. The Tribunal held that considering the assessee's nature of activities and revenues earned from software development activities rendered abroad, the forex gain could have been construed only as incidental to sales, payment to suppliers.
Electronics for Imaging India Pvt Ltd – TS-986-ITAT-2016 (Bang) – TP

1423. The Tribunal held that foreign exchange fluctuation gain or loss arising from realization of sales made during the year would be considered as operating in nature. Accordingly, it remitted the issue to AO/TPO for verify the source of such gains / losses.
Dhanya Agroindustrial Pvt. Ltd. Vs DCIT - TS-168-ITAT-2017(Bang)-TP- I.T.(T.P) A. No.161/Bang/2016 dated 08.03.2017

1424. The Tribunal accepted the contention of the Revenue and held that only foreign exchange fluctuation gains/losses in respect of the sale proceeds of the current year could be

considered as operating in nature and not on account of realization of sale of earlier years. Accordingly, it set aside the issue to the record of AO/TPO for re-computing the margins.
Logix Microsystems Ltd. vs. DCIT - TS-181-ITAT-2017(Bang)-TP - IT. {T.P} A. No.280/Bang/2014 dated 22.02.2017.
ACIT v Bateman Engineering Pvt Ltd – TS-192-ITAT-2017 (Bang) – TP - IT (TP) A No.495 (Bang) 2015 dated 17-02-2017

1425. The Tribunal held that where foreign exchange fluctuation was considered as operating in nature while computing the PLI of the assessee, it was to be considered on a similar footing while computing the PLI of comparable companies.
DCIT v Sunquest Information Systems (India) Pvt Ltd - (2016) 47 CCH 0138 (Bang Trib)

1426. The Tribunal directed the consideration of foreign exchange gain arising out of current year's turnover as part of operating revenue for AY 2005-06 and directed the assessee to furnish complete details before CIT(A) regarding sale against which forex gain had been received. Further, the Revenue had argued that CIT(A) had erred in considering assessee's nature of business as construction activity when the assessee was actually providing managerial support services. Referring to the order of CIT(A), the Tribunal observed that the CIT(A) had decided the issue considering the assessee to be engaged in the provision of management and supervisory services and thus the Revenue had filed the appeal in the wrong impression that the CIT(A) had considered the assessee as engaged in construction activity**.**
Sunway Construction India Pvt Ltd-TS-342-ITAT-2017(Bang)-TP-IT(TP)A No.1190(Bang) dated 23.05.2017

1427. The Tribunal held that foreign exchange gain/loss arising during the year on account of fluctuation of foreign exchange rate in respect of export realization would form part of operating revenue or cost as the case may be.
Goldman Sachs Service Pvt Ltd [TS-430-ITAT-2017(Bang)-TP] IT(TP)A No. 66IBang/2014

1428. The assessee's AE had provided the assessee with fixed assets free of cost basis and had also provided the assessee's employees with stock options without charging the assessee any amount. Further, it also rendered administrative and management support (generally made available to the companies belonging to the Group) to the assessee, for which no amount was charged from the assessee. Noting that the assessee earned revenue at a mark-up of its total cost, the TPO alleged that the assessee had intentionally suppressed its cost by not making any payment for the aforesaid expenses and therefore, in-turn, suppressed its revenue. Accordingly, he proposed to include the amount representing the aforesaid expenditures (depreciation in the case of the fixed assets) in the value of total cost for the purpose of determining ALP which led to an adjustment of Rs 2 crores due to the corresponding increase in revenue. Vis-à-vis the stock options provided free of cost by the AE, the Tribunal relying on the decision of various co- ordinate benches, held that the value of such costs was not operating in nature and therefore it could not be included in computing the total cost of the assessee. With regard to the other costs i.e. depreciation on fixed assets free of cost and administrative and management support services, the Tribunal opined that since the assessee's revenue was earned as a mark-up of cost, the TPOs allegation i.e. that the assessee's costs had been suppressed required examination. Noting that the lower

authorities had not examined the alleged suppression in costs, it remitted the issue to the file of the AO / TPO.

i2 Technologies Software Pvt Ltd vs CIT -TS-475-ITAT-2017(Bang)-TP- IT(TP)A Nos. 1207 and 274(B)2014 dated 06.04.2017

1429. The Tribunal held that the for the purpose of computing the margins for the assessment year the gain or loss pertaining to exports made during the year under consideration had to be taken into account as operating revenue or cost. It held that if the foreign exchange gain/loss arising on account of fluctuation of foreign exchange rate was in respect of export realization then the same would be part of operating profit or cost as the case may be. Accordingly, it directed the AO/TPO to compute the operating margins of the assessee as well as comparable companies after considering forex fluctuation gain/loss on account of exports made during the year.

DCIT vs Goldman Sachs Service Pvt Ltd – TS-430-ITAT-2017(Bang)-TP-IT(TP)A No.66/bang/2014 dated 05.04.2017

1430. The Tribunal relying on the decision in the case of SAP Labs [TS-61-ITAT-2010(Bang)-TP] held that foreign exchange loss/gain was to be considered as operating in nature and directed the DRP to consider them as part of operating income/expenses only to the extent pertaining to international transactions entered during the year under consideration.

Obopay Mobile Technology India Private Ltd vs DCIT-TS-493-ITAT-2017(Bang)-TP-IT(TP)A Nos. 238 & 553/bang/2016 dated 28.04.2017

1431. The Tribunal rejected Revenue's contention that the CIT(A) had erred in holding foreign exchange loss or gain, amortization expenses of pre-operative and preliminary expenses, forex losses, bad debts written off and fixed assets written off etc. as part of operating cost, when TPO had excluded it from the comparables. CIT(A) had held that such expenses were in the natural course of business and therefore their exclusion for the purpose of calculation of operating profits would not be in line with audited accounts. While upholding the order of the CIT(A), the Tribunal remitted the matter to the AO/TPO to reexamine as to whether there was any calculation error adopted by the CIT(A)/TPO in applying the principles and make suitable correction after affording due opportunity to the assessee.

Swiss Re Shared Services (India) P Ltd vs DCIT-TS-352-ITAT-2017(Bang)-TP I.T(TP).A.No.1139/bang/2011 dated 03.05.2017

1432. The Tribunal, relying on the decision in the case of Fiserv India Pvt Ltd [TS-437-HC-2016(DEL)- TP], held that the exchange gain/loss arising on account of realizing sales, payment to suppliers was to be treated as part of operating revenue/operating cost. It noted that nothing was brought on record to establish that the foreign exchange loss was on account of revenue items and therefore remanded the matter back to the AO/TPO directing him to examine whether loss was arising on account of revenue items, and if so, directed him to treat it as part of operating cost for the purpose of computing the operating margins of the company.

FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

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1433. The Tribunal held that foreign exchange fluctuation gains arising out of earlier years turnover was to be excluded from the operating profit while computing the PLI as it would be absurd to include the same if the related turnover was not included in the denominator. Accordingly, in the absence of details as to whether the gain arose on account of current year's turnover of earlier year's turnover, it remitted the issue to the file of the AO / TPO for verification.

Commscope Networks (India) Private Ltd. (Earlier known as Airvana Networks (India) Private Ltd.) Vs ITO - TS-161-ITAT-2017(Bang)-TP - IT (TP) A No.166 (Bang) 2016 dated 22.02.2017

1434. Where the assessee was allowed working capital adjustment, the Tribunal held that the CIT(A) was justified in not considering interest received on delayed payments from AE as operating income.

Syniverse Teledata Systems Pvt. Ltd (Formerly known as MACHTeledata systems Pvt. Ltd) vs. DCIT - TS-217-ITAT-2017(Bang)-TP - IT (TP) A No.1363 (Bang) 2014 dated 15.02.2017

1435. The Tribunal, following the decision of Capital One Services India P. Ltd [TS-214-ITAT-2015(Bang)-TP], held that donation was to be treated as a non-operating item as it was not in nature of normal business activity.

ACIT vs. Curam Software International P. Ltd - TS-244-ITAT-2017(Bang)-TP - IT(TP)A.499 & CO.136/Bang/2015 dated : 21.03.2017

1436. The Tribunal, held that foreign exchange loss / gain arising on account of realization of sales / exports was operating in nature but noting the contention of the Revenue it held that the issue required verification as to whether such gain or loss pertained to the sales made during the year under consideration or earlier year and accordingly, set aside the issue for verification.

DCIT vs. Informatica Business Pvt. Ltd - TS-212-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1285/Bang/2014 dated : 17.03.2017.

1437. The Tribunal allowed Revenue's appeal w.r.t treatment of forex gain and held that forex gain/loss had to be treated as operating income while computing the margin of the current year if such gain was in respect of the turnover of the current year. It observed that the lower authorities had not given a finding on this aspect and accordingly remitted the matter to the file of the AO/TPO with the direction that assessee should establish that the foreign exchange gain was earned by the assessee in the current year for the purpose of computing operating margin.

DCIT vs ABB Global Services Pvt Ltd-TS-501-ITAT-2017(BANG)-TP- IT(TP)A No.49 and 97/B/2014 dated 05.05.2017

1438. Since the DRP's order was cryptic in respect of forex fluctuation and risk adjustment for AY 2011-12, the Tribunal restored the matter back to the file of DRP for fresh consideration directing it to verify whether such fluctuation was in respect of turnover of the present year or of the earlier year and include it only if it was relatable to the turnover of the present year

for computation of ALP. Further, in respect of risk adjustment, it directed the assessee to provide working of such claim before DRP's adjudication on the issue.
Marlabs Software Pvt Ltd vs ACIT-TS-1002-ITAT-2017(Bang)-TP- IT(TP)A No.588/ Bang/2016 dated 08.12.2017

1439. The Tribunal rejected the assessee's contention that subcontracting charges incurred by the assessee were to be treated as pass through cost and therefore to be excluded from the operating profit / operating cost of the assessee while computing the ALP in respect of the software development services segment. It held that the assessee was not acting as an agent / distributor but was providing services on its own account and further held that when the margin on the cost of sub-contracting charges was part of the operating revenue of the assessee then only the cost of sub-contracting activity could not be excluded as pass through as it would artificially inflate the margins of the assessee on the other revenue from the services other than sub-contracting activity. It explained that pass through costs could be considered only when there was no value addition involved on the part of AE
Applied Materials India Pvt Ltd [TS-815-ITAT-2016(Bang)-TP]

1440. The Tribunal dismissed the Revenue's appeal and upheld CIT(A)'s order directing the TPO to adopt the operating margin of Goldstone Technologies as 7.33% computed by treating bad debt written off as operating. It relied on the coordinate bench decision of Techbooks International Pvt. Ltd. wherein it was held that bad debts written off are in the realm of operations of the assessee's business and directed the TPO to treat provision for bad debts / bad debts as an item of operating expense of the assessee.
Dy.CIT vs JDA Software Private Limited (formerly i2 Technologies India Private Limited) [TS-1102-ITAT-2018(Bang)-TP] IT (TP)A No.1239/Bang/2013 dated 28.09.2018

1441. The assessee filed a miscellaneous petition against Tribunal's order in view of the fact that it had stated that assessee had placed reliance on coordinate bench decision in Kenexa Technologies wherein the issue of treatment of provision for bad and doubtful debt was not discussed. The Tribunal rectified the impugned order noting though there was no dispute that provision for bad and doubtful debts are operating expenditure due to the said order, but the order had not examined the aspect whether the provision for bad and doubtful debts or excess provision written back was in respect of turnover of the same year or of an earlier year and provision for bad and doubtful debts could not be considered for TP analysis as it was not shown that such provision were for the current year's turnover.
Marvell India Pvt Ltd vs Asst CIT [TS-1358-ITAT-2018(Bang)-TP]. MP No.338/Bang/2018 (ITA No.2173/Bang/2017) dated 27.11.2018

1442. The Tribunal accepted Revenue's contention that depreciation could not form part of operating costs as there was a substantial variation in the manner of charging depreciation between assessee and comparables by relying on the co-ordinate bench rulings in Honeywell Technology Solutions Lab (which in turn followed 24/7 Customer.com ruling) and BA Continuum India ruling wherein it was held that if there were differences in the method of charging depreciation between the Tested party and the comparable companies, then there would be impact on the operating profits and thus, PLI was to be computed without

considering depreciation as part of the operating cost. Thus, the Tribunal set aside the DRP's order and directed the AO/TPO to consider the determination of PLI by considering the ratio of the aforesaid decisions.

DCIT vs. Centum Rakon India Pvt. Ltd [TS-750-ITAT-2018(Bang)-TP] IT(TP) A No.472/Bang/2016 dated 20.07.2018

1443. The Tribunal directed the AO/TPO to consider margin after excluding depreciation in case of assessee and comparables. The Tribunal followed the DRP's direction in assessee's own case for AY 2012-13 which had relied upon the HC ruling in BA Continuum wherein it was held that PBDIT to Total Cost should be taken as PLI on account of the difference in rate of depreciation charged by the comparables and the assessee .

Indigra Exports Pvt Ltd v DCIT [TS-509-ITAT-2018(Bang)-TP] IT (TP)A No.488/Bang/2016 dated 22.06.2018

1444. The Tribunal accepted the plea of assessee to treat foreign exchange gains/losses connected to the business of assessee as operating and further distinguished the decisions cited by Revenue that foreign exchange gains/losses not relating to turnover of relevant AY should be excluded from computing profit margin(Revenue's stand was that TPO should examine if foreign exchange gain/losses pertain to subject year) by observing that earlier decisions (SAP Labs and E-Triology) rendered on the subject do not lay down any such condition, thus the later decisions relied on by Revenue (Commscope, Akamai Technologies) would be per incuriam .

Further, it also held that write back of liabilities no longer required should be treated as operating on basis that they were related to operating expenses in the year when it was expected to be incurred. It relied on coordinate bench rulings of Sony India (P) Ltd., Logica Pvt. Ltd. and CGI Information Systems and Management Consultants Pvt Ltd.

LSI India Research and Development Pvt Ltd vs ITO [TS-1224-ITAT-2018(Bang)-TP] IT(TP)A Nos 44 and 45/Bang/2014 dated 07.09.2018

1445. The Tribunal rejected assessee's plea of considering provisions written back as operating income, noting that no specific ground had been raised in respect of the issue. However, the Tribunal stated that the issue of write back related to business taken over by the assessee and therefore any profit arising out of business taken by the assessee constituted capital receipt and cannot form part of the operating income for calculating operating margin of the assessee

Abbott Medical Optics Pvt. Ltd. v DCIT (formerly Advanced Medical Optics India Pvt. Ltd) [TS-517-ITAT-2018(Bang)-TP] IT(TP) A No.08/Bang/2014 dated 22.06.2018

1446. The Tribunal upheld TPO/DRP's consideration of provision for doubtful debts as non-operating item while computing profit margins of comparable and stated that provision for doubtful debts cannot be considered for reduction from the profit as it impacts the profit percentage (which is worked out by dividing such profit of the tested party/comparable by its turnover) since only the numerator would be reduced & not the denominator i.e. turnover would not be reduced because turnover is considered in earlier year and not in the present year and thus opined that provision for doubtful debts has to be ignored and added back in the profit of the tested party or of the comparable Separately, it remitted comparability of 4 companies namely Persistent

Systems Ltd, L&T Infotech Ltd, Tech Mahindra Ltd CG- VAK Software & Exports which were excluded by applying 10 times turnover range back to AO/TPO to be decided considering Chryscapital HC ruling (wherein it was held that huge profit or huge turnover ipso facto did not lead to the exclusion of a comparable and the TPO, first, should be satisfied that such differences did not materially affect the price or cost and if it did, an attempt should be made for making reasonable adjustment to eliminate the material effect of such differences.)
M/s. Marvell India Pvt Ltd vs ACIT Circle 4(1)(2)- TS-253-ITAT-2018(Bang)-TP- ITA No 2173/Bang/2017 dated 06.04.2018

1447. Relying on the Delhi High Court ruling of Ameriprise India (P.) Ltd, the Tribunal held that foreign exchange gains on sale proceeds in respect of its international transaction should be treated as operating in nature.
SAP Labs India Pvt Ltd vs Addl CIT [TS-298-ITAT-2018(Bang)-TP] IT(TP)Appeal Nos.981 and 1070 of 2016 dated 06.04.2018

1448. The Tribunal rejected the assessee's contention for exclusion of expenses reimbursement in operating cost / revenue and held that the relevant expenses were incurred by the assessee in connection with providing services to its AE and therefore ought to have been included while computing operating cost / revenue irrespective of the fact that no mark-up had been charged.
AXA Business Services Pvt Ltd – TS-1032-ITAT-2016 (Bang) - TP

1449. The Tribunal rejected the contention of the assessee i.e. that Rs. 17.13 lacs incurred on outsourced maintenance services to third party vendors should be excluded from the computation of total costs since no value added functions were provided by the assessee on such costs. It noted that in the instant case the costs were incurred qua third parties and ultimately was incurred towards rendering of services by assessee to its AE which fetched contracted revenue and also that they were not recovered as such from AE. Therefore, it held that pass through costs pre-supposed specific and identifiable recovery as such from its AE without any profit element and if such cost was not separately recoverable from AE and formed part of the overall contracted value, then, it would shed the character of pass through costs.
Fujitsu India Ltd v DCIT – TS-56-ITAT-2017 (Del) – TP - I.T. (T.P) A. No.334/Bang/2013, IT. (T.P) A. No.484/Bang/2013, IT. (T.P) A. No.96S/Bang/2014, I.T. (T.P) A. No.91/Bang/2014 dated 29.11.2016.

1450. The Tribunal held that foreign exchange gains / losses arising from the operating activities of the assessee (software development services) was to be considered as an operating item while computing the margin of the assessee.
DCIT v Nvidia Graphics Pvt Ltd [IT(TP)A No 1118 / Bang / 2014] - TS-402-ITAT-2015(Bang)-TP

1451. The Tribunal, allowing Revenue's appeal set aside DRP's order directing the inclusion of forex gain/loss in operating income on the ground that the DRP had erred in including forex gain/loss as operating in nature without ascertaining the nexus with assessee's business activity. Further, it accepted Revenue's argument that the DRP had erred in granting risk adjustment arbitrarily without appreciating the facts of the case and the comparables and

directed the AO to pass a reasoned order with respect to granting of risk adjustment bringing out the facts of the case and giving due regard to to its comparables. The Tribunal found merit in assessee's argument that the DRP had erred in law and on facts in application of inappropriate qualitative filters such as rejection of comparable companies having related party transactions greater than 25% of the sales and inconsistent comparability criteria (i.e using current year data for some comparables and using multiple year data for others) and therefore set aside the ground to the file of the TPO to apply appropriate filters and redo the assessment in accordance with law.

Symbol Technologies India Private Limited - TS-19-ITAT-2017(Bang)-TP

1452. The Tribunal partly allowed Revenue's appeal for AY 2004-05 and AY 2005-06 on the ground that foreign exchange gain was no doubt part of operating profit if it was related to collection of sale proceeds, however, it could not be considered if it arose on account of turnover of earlier year. Further, it accepted revenue's contention of not allowing 5% standard deduction as the price charged by the assessee fell beyond 5% in view of the subsequent amendment in the provisions of section 92C.

Synova Innovative Technologies Pvt Ltd - TS-1068-ITAT-2016(Bang)-TP

1453. The Tribunal remitted the issue of whether forex gain/loss was to be treated as a part of operating income while computing operating margin of the tested party and comparable companies to the file of AO directing it to consider forex gain as operating for computing profit percentage for ALP only if it was in respect of turnover of present year.

Akamai Technologies India Private Limited vs. DCIT-TS-757-ITAT-2017(Bang)-TP IT(TP)A No. l 122/Bang/2011 dated 08.09.2017

1454. The Tribunal held that where losses on account foreign exchange arose during the normal course of business activities, the AO / TPO ought to have included the same as an operating item while computing the PLI of the assessee as well as the comparable companies.

Swiss Re Shared Services (India) P Ltd v ACIT - TS-598-ITAT-2016 (Bang) - TP - IT(TP)A.380/Bang/2016

1455. The Tribunal held that cost to cost receipt of reimbursement of expenses was to be evaluated independently and not a dded to the cost base and revenue in determining the ALP.

FCG Software Services (India) Pvt Ltd v ITO-TS-18-ITAT-2016 (Bang)-TP

1456. The Tribunal, noting that the assessee had debited provision of doubtful debts to the P&L A/c and had also claimed the same in its computation of income on the basis of amount written-off during the year, dismissed the contention of the assessee that the provision for doubtful advances debited to P&L A/c was a non-operating expense which ought to be excluded while computing the operating cost. It held that once the amount was allowed as a written off claim, then it would be part of the operating cost. Noting that the TPO had excluded provision for doubtful debts from the operating margins of comparables, it held that the exclusion of doubtful debts in the case of comparables would also depend on whether the amount was actually written off and claimed as an allowable revenue expenditure u/s

36(1)(vii). Accordingly, it remitted this issue to AO/TPO for verification of relevant facts and directed exclusion of this expenditure from operating cost in the case of both the assessee as well as the comparables only if it was found to be only a provision and not a write-off.
VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P}A. No.1311/Bang/2014 dated 6.1.2017

1457. The Tribunal held that when rental income of the assessee was excluded from the total income for the calculation of PLI, corresponding rental expenditure was also required to be excluded.
Zyme Solutions Pvt Ltd v ITO - TS-65-ITAT-2016 (Bang) - TP

1458. The Tribunal held that while working out operating margin, amount of foreign exchange gain /loss is required to be considered as an item of operating revenue/cost, both in case of assessee as well as comparables.
Mercedes Benz Research & Development India (P) Ltd. v ACIT - [2016] 68 taxmann.com 230 (Bangalore-Trib)

1459. The Tribunal held that foreign exchange fluctuations was to be considered as operating income, observing the fact that the entire turnover of the assessee was from software exports and therefore rejected the contention that there was no nexus between the foreign exchange fluctuations and software development income.
IGEFI Software India Pvt Ltd [IT(TP)A No 1201 / Bang / 2014] – TS-418-ITAT-2015 (Bang)-TP

1460. The Tribunal held that foreign exchange gain on realization of consideration for rendering software development services is to be regarded as part of operating revenue.
Analog Devices India Pvt Ltd v DCIT [IT(TP)A No 1288 / Bang / 2014] – TS-419-ITAT-2015 (Bang) – TP

1461. The Tribunal held that foreign exchange fluctuation arising as a consequence of realization of consideration of rendering software development services was to be included while computing the operating revenue of the assessee.
iPass India Pvt Ltd v ITO [IT(TP)A No 1292 / Bang / 2014] – TS-427-ITAT-2015 (Bang) TP

1462. The Tribunal held that operating revenue should be computed by including foreign exchange gains / losses arising as a consequence of realization of consideration for rendering software development services.
DCIT v NXP Semi Conductors India Pvt Ltd [IT(TP)A No 1662 / Bang / 2014] – TS-426-ITAT-2015(Bang) – TP

1463. The Tribunal upheld the DRP's view that forex fluctuation gain/loss is operating in nature and was to be considered for computing assessee and comparables margin while determining ALP. However, relying on the decision in the case of Synova Innovative Technologies Pvt Ltd [TS-1068- ITAT- 2016(BANG)-TP], it also clarified that if the fluctuation of foreign exchange, either gain or loss, was on account of the sale proceeds booked in the earlier Financial Year, then the same could not be considered as part of the operating

margin of the current assessment year. Accordingly, it held that since in the present case, the turnover of the earlier year had already been taken into consideration for benchmarking the profit margin of the earlier year, the foreign exchange gain resulting from such turnover could not be considered for calculation of operating margin of the current assessment year.
ACIT vs Swiss Re Shared Services (India) Pvt Ltd-TS-504-ITAT-2017(BANG)-TP-IT(TP)A No.630/bang/2016 dated 13.04.2017

1464. The Tribunal allowed the assessee's claim of adjustment for non-operating cost and remitted the issue to the CIT(A) for verification and re-adjudication. It held that for the purpose of allowing such adjustment, complete details had to be furnished and accordingly directed the CIT(A) to call for such details and examine the same.
Telelogic India Pvt Ltd – TS-971-ITAT-2016 (Bang) – TP

1465. The Tribunal held that expenses disallowed in the computation of taxable income were to be excluded from the operating margin and that foreign exchange gains / losses pertaining to business activities were to be included being operating in nature. Further it held that where a company's management was tainted causing the financials to be unreliable, it could not be considered as comparable.
Pole to Win India Pvt Ltd v DCIT [IT(TP)A No 1275 / Bang / 2010] - TS-361-ITAT-2015(Bang)-TP

1466. The Tribunal held that foreign exchange gains / losses arising as a consequence of realization of consideration in the course of business operation for rendering software development / end to end BPO services were to be considered as operating in nature while computing the Profit Level Indicator.
DCIT v Guhring India Pvt Ltd [IT(TP)A No 217 / Bang / 2015] – TS-571-ITAT-2015 (Bang) – TP E4e Business Solutions India Pvt Ltd v DCIT [IT(TP)A No 1845 / Bang / 2013 & IT(TP)A No 1777 / Bang / 2013) – TS-632-ITAT-2015 (Bang) – TP

1467. The Tribunal held that gain on account of foreign exchange fluctuation was to be considered as operating revenue for the purpose of working the profit margins of comparable companies.
Obopay Mobile Technology India Pvt Ltd v DCIT - (2016) 66 taxmann.com 119 (Bang)

1468. The Tribunal held that where the assessee had outsourced some of its work to its subsidiaries and other independent units in relation to services to be provided by it to its other AEs, and these entities raised bills on the assessee for which the assessee made payments to them on its own account, the entire transaction could not be treated as a pass through cost as it was not a mere payment from the AE of the assessee to its subsidiaries, and therefore, the assessee was not correct in seeking its exclusion from income and expenditure while computing PLI.
Lason India Pvt Ltd v JCIT - (2016) 47 CCH 0147 (Chd Trib)

1469. The assessee had suffered forex loss to the tune of Rs. 2.66 Cr on account of cancellation of forward contracts. The Revenue argued that assessee had entered into forward contracts to cover the loss that could arise, if payments were delayed, and since 88% of assessee's

revenue was from AEs, the foreign exchange loss ought to have been considered as operational in nature. The Tribunal followed the decision in Pangea3 & Legal Database Systems Pvt. Ltd. [TS-148-ITAT-2017(Mum)-TP], and held that entering into forward contracts for covering the risks of exchange rate fall was a normal business transaction, and further, extraordinary fluctuations could warrant an adjustment if it could be demonstrated that such a phenomena was absent for comparable cases. Since the assessee had not demonstrated extraordinary forex fluctuations on the basis of comparable cases, the Tribunal accepted the contention of the Revenue and considered the foreign exchange loss/gain as operating in nature.

Saipem India Projects Limited Vs DCIT - TS-308-ITAT-2017(CHNY)-TP - ITA Nos.985 & 1400, CO 79/2014 dated 05.04.2017

1470. The Tribunal dismissed the assessee's appeal praying for treatment of foreign exchange loss as non-operating in nature and followed the assessee's own ruling for AY 2012-13 wherein it was held that forex loss was operating in nature.

Infac India Pvt Limited (TS-387-ITAT-2018(CHNY)-TP) - I.T.A. No.3195/CHNY/2017 dated 03-05-2018

1471. The Tribunal directed AO to exclude foreign exchange loss or gain from operating income relying on the ratio laid down in coordinate bench decision in Hanil Tube India Pvt Ltd wherein it was held that loss incurred by the assessee in foreign exchange fluctuation due to international transaction did not give any extra benefit to the AE who supplied the material. The loss arose due to exchange difference between the foreign currency and Indian currency and thus, had to be excluded from operating income while computing PLI.

Infac India Pvt Ltd vs Dy.CIT [TS-1369-ITAT-2018(Chny)-TP] (IT(TP)A No.27 /Chny /2018 dated 05.10.2018

1472. The Tribunal accepted the plea of the assessee for exclusion of forex gain / loss from operating items, noting that the content of raw material imported was low in case of comparables because of which they were not impacted as much by currency fluctuations, and that in any case the impugned year was an extraordinary year of depreciating rupee.

Relying on the decision of the Tribunal in Motonic India Automotive, it opined that forex fluctuations gains / losses ought to be excluded from the operating incomes / expenses and thus remitted this ground to AO for fresh consideration.

Gates Unitta India company P Ltd. Vs DCIT TS-360-ITAT-2017(CHNY)-TP - /I.T.A.Nos.1041/Mds./2014 dated 26-04-2017

1473. The Tribunal upheld the order of TPO/DRP and stated that depreciation is one of the elements of operating cost which needs to be considered in it and it cannot be excluded from the operating margin ratio as it had a material impact on the profitability of the assessee.

India Japan Lighting Limited-TS-741-ITAT-2016(CHNY)-TP-ITA No.245/Mds/2013

1474. The Tribunal directed the AO to exclude recovery of advance written off from operating profit for comparing ALP, relying on the decision in the case of Logica Private Ltd (Bang)-TP- ITA No.1129/bang/2011. Further, it remitted the issue of non-allowance of adjustment in

respect of extraordinary forex loss suffered by the assessee as against comparables by relying on the decision in the case of Motonic India Automotive (P.) Ltd and held that exchange rate was subject to fluctuation due to economic conditions and while determining the ALP, such factors had to be considered. Further, it also excluded Nitin Fire Protection Industries Ltd from the set of comparables on the ground that its major income was from project related activity.

R Stahl Private Limited [TS-377-ITAT-2017(CHNY)-TP] I.T.A No.2745/Mds/2016 dated 19.04.2017

1475. The Tribunal held that the loss on account of foreign exchange fluctuation arising out of realizable as well as non-realizable debts was to be considered as operating in nature.

ZF Wind Power Coimbatore Pvt Ltd v DCIT – TS-964-ITAT-2016 (Chny) – TP

1476. The Tribunal, relying on the decision in the case of Motonic India Automotive, allowed custom duty adjustment in principle in respect of assessee's manufacturing segment for AY 2009-10, noting the fact that the raw material import content of the assessee was 99% as against 30% import content for comparable companies. It held that the custom duty was to be eliminated from comparable price also to arrive at the correct PLI in order to arrive at correct PLI in order to bring uniformity and therefore remitted the issue to AO for fresh consideration. Further, it excluded one company from list of comparables noting that it used raw material re-cycled from worn out tyres and tread peelings and thus had an inferior product compared to that of the assessee.

Gates Unitta India Company P Ltd -TS-360-ITAT-2017(CHNY)-TP-.ITA Nos 1041/Mds./2014 dated 11.05.2017

1477. The Tribunal held that foreign exchange gain pertaining to marketing commission segment should be considered as operating income while computing margin of comparable companies.

GE Healthcare Bio-Sciences Ltd. vs DDIT - [2016] 68 taxmann.com 369 (Chennai-Trib)

1478. The Tribunal held that the foreign exchange loss arising due to reinstatement of foreign currency in accordance with accounting standards was to be treated as operating in nature. It placed reliance on the ruling of CIT Vs. Pentasoft Technologies Ltd [TS-123-HC-2010(MAD)] wherein it was held that Section 10A benefit would be granted in respect of foreign exchange gain as the gain arose on account of export operations of the assessee, and accordingly held that foreign exchange loss was operating in nature.

Infac India P. Ltd vs DCIT - TS-120-ITAT-2017(CHNY)-TP- I.T.A.No.3182/Mds./2016 dated 17.02.2017

1479. The Tribunal held that while determining the PLI of comparables, cash profits i.e. profits prior to depreciation should be taken by relying on the coordinate bench decision in ICON Clinical Research wherein it was held that profit before depreciation should be considered while computing PLI on account of higher rate of depreciation charged by the company vis-à-vis comparables which followed Companies Act. It accepted assessee's contention that cash profits should be adopted for computing PLI of comparables as the method of depreciation adopted by various comparables was variable.

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Bonfigioli Transmissions Private Limited vs. DCIT [TS-388-ITAT-2018(CHNY)-TP] ITA No.2977/Chny/2017 dated 14.05.2018

1480. The Tribunal held that profit or loss arising out of foreign exchange fluctuations has to be taken into consideration while arriving at operating cost in transfer pricing matters.
Dy.CIT v. Infac India (P.) Ltd. [2015] 61 taxmann.com 49/70 SOT 410(Chennai)

1481. The Tribunal, relying on the decision of the co-ordinate bench in in Motonic India Automotive allowed the assessee custom duty adjustment in principle in respect of assessee's manufacturing segment for AY 2009-10, noting the fact that the raw material import content of the assessee was 99% as against 30% import content for comparable companies. It held that custom duty was to be eliminated from the comparable price also to arrive at correct PLI in order to bring uniformity and therefore remitted the issue to AO for fresh consideration.
Gates Unitta India company P Ltd. Vs DCIT TS-360-ITAT-2017(CHNY)-TP - /I.T.A.Nos.1041/Mds./2014 dated 26-04-2017

1482. The Tribunal remitted TP-issue for fresh consideration in case of an assessee engaged in Jewellery business and rejected TPO's comparison of PLI of MD Overseas Ltd (comparable) [-1.14%] with the PLI of assessee's non-AE segment [6.36%] to arrive at adjusted margin of Non-AE segment at 7.5% [6.36%+1.14%]. The Tribunal remitted the issue to the file of the AO to refer the matter afresh to the TPO for further TP study.
Joy Alukkas vs ACIT Corporate Circle 1(2)-TS-374-ITAT-2018(COCH)-TP- ITA No 190/Coch/2015 dated 10.04.2018

1483. The Tribunal remitted the matter back to the TPO to consider the assessee's claim of premium on forward exchange contract on account of proximity with export turnover to be a part of operating margins noting that the DRP had not adjudicated on the specific plea of the assessee. It directed the assessee to place necessary evidence before the TPO to claim that premium on forward exchange contract was earned in the normal course of the business to hedge against fluctuations in foreign currency exchange rate and gains from such contract.
Navigant BPM (India) Private Limited (Formerly known as M/s. RevenueMed India (P) Ltd) vs ACIT [TS-1143-ITAT-2018(COCH)-TP] IT(TP)A No.146/Coch/2015 dated 07.09.2018

1484. The DRP had not adjudicated on the assessee's plea that premium on forward exchange contract should be treated as operating. The Tribunal restored the issue with same directions which were given in coordinate bench decision in assessee's own case for earlier year wherein the DRP had not given directions with respect to the said plea of assessee and the Tribunal had relied on coordinate bench decision in Ambattur Clothing Ltd. (wherein it was held that premium on forward exchange contract having nexus with export turnover should be treated as operating) to restore the issue to TPO to afford assessee an opportunity to place necessary evidence to substantiate its claim that premium on forward exchange contract was earned in the normal course of the business.
Navigant BPM (India) Pvt Ltd.vs ACIT [TS-1223-ITAT-2018(COCH)-TP] IT(TP)A No.57 /Coch /2016 dated 23.10.2018

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1485. Noting that the TPO himself had taken donation and provision for bad debts to be non-operating while calculating the PLI of comaparables, the Tribunal held that in case of computing assessee's PLI the TPO had erred in treating the donation and provision for bad debts to be operating when he could not show interlink of the same with day to day operations of the assessee.
Evalueserve.Com Pvt. Ltd vs. ACIT [TS-817-ITAT-2018(DEL)-TP] ITA Nos.6310 and 1466/Del/2015 dated 03.08.2018

1486. The Tribunal restored the issue of treating miscellaneous income as operating or non-operating in case of comparables to the TPO after considering the assessee's submission that in the absence of details and nature of 'miscellaneous income' received by comparables, it could not be taken to be an operating item and TPO had erred in its treatment as operating item.
Evalueserve.Com Pvt. Ltd vs. ACIT [TS-817-ITAT-2018(DEL)-TP] ITA Nos.6310 and 1466/Del/2015 dated 03.08.2018

1487. The Tribunal upheld the DRP's order treating forex loss as operating noting that the assessee had taken an inconsistent view in treating the forex gains/loss as non-operating for the subject year when previously it had treated the forex gains/loss for earlier years as operating.
De La Rue Cash Processing Solutions India Pvt Ltd vs ACIT [TS-1121-ITAT-2018(DEL)-TP] ITA Nos.1113/Del/2014 and ITA No.1606/Del/2015 dated 28.09.2018

1488. The Tribunal held that provisions written back should be treated as operating in nature for computation of operating profit margin in view of them being treated as operating when they were written off in earlier years.
De La Rue Cash Processing Solutions India Pvt Ltd vs ACIT [TS-1121-ITAT-2018(DEL)-TP] ITA Nos.1113/Del/2014 and ITA No.1606/Del/2015 dated 28.09.2018

1489. The Tribunal directed the TPO to treat both income from management support service and corresponding expenses as non-operating in nature noting that the TPO had erred by blowing hot and cold in the same breath by the treating the income from management support services as non-operating and on the other hand, expenses allocated to the said services as operating.
De La Rue Cash Processing Solutions India Pvt Ltd vs ACIT [TS-1121-ITAT-2018(DEL)-TP] ITA Nos.1113/Del/2014 and ITA No.1606/Del/2015 dated 28.09.2018

1490. The Tribunal dismissed Revenue's appeal and upheld DRP's order accepting treatment of forex fluctuation as operating by relying on the Delhi HC decision in Ameriprise India wherein it was held that foreign exchange loss which arose as a consequence of trading items would be operating.
ACIT vs Yokogawa Technologies India Pvt Ltd [TS-1046-ITAT-2018(DEL)-TP] IT(TP)A No.466/Bang/2016 dated 8.08.2018

1491. The Tribunal held that forex fluctuation arising out of revenue transactions should be treated as operating income/cost of the assessee as well as comparables relying on the Special Bench decision in Prakash Shah wherein it was held that gain due to fluctuations in the foreign exchange rate emanating from export was its integral part and could not be differentiated from

the export proceeds simply on the ground that the foreign currency rate had increased subsequent to sale but prior to realization, hence should be treated as operating income/cost.
Siemens Industry Software (I) P Ltd vs DCIT [TS-1045-ITAT-2018(DEL)-TP] ITA No.1307/Del/2014 dated 14.09.2018

1492. The Tribunal remitted the matter back to the TPO to consider the assessee's claim that the TPO erred in treating the penalty charges paid to RBI and loss on sale of assets as part of operating cost. The Revenue also did not raise any objections hence the Tribunal remitted the matter back with direction to the TPO to verify and grant relief.
Element K India Pvt Ltd vs ITO [TS-1119-ITAT-2018(DEL)-TP] ITA No.1153/Del/2014 dated 06.09.2018

1493. The assessee had restructured its business and closed down the installation and assembly segment. The TPO excluded the profit from sale of assets from the operating profits while computing the margin of the assessee. It was assessee's contention before the CIT(A) that six months operation of the assessee in installation and erection activity should be compared and bench marked and also that the assessee was incurring fixed costs which were not recovered through business activity, thus, excess costs towards unutilized capacity ought to be excluded from operating cost. The Tribunal dismissed the Revenue's appeal and upheld the CIT(A)'s order accepting assessee's contention that 6 months operation of the assessee in installation and erection activity upto the sale of business segment should be compared and bench marked and excess fixed costs needed to be excluded from operating expenses noting that on sale of segment in the middle of the year, the assessee was incurring unutilised capacity in the form of fixed costs which were no longer recoverable through normal business activity.
ADIT vs ERICSSON Telephone Corporation India AB [India Branch] [TS-1106-ITAT-2018(DEL)-TP] ITA No.2018/Del/2012 dated 28.09.2018

1494. The Tribunal remitted the matter back to the AO/TPO to consider the foreign exchange gain as operating income of the assessee and held that AO erred in not following the directions of DRP to treat the foreign exchange gains as operating income since they were connected with services rendered to its AE.
Omniglobe Information Technologies (India) Pvt Ltd vs Addl CIT [TS-1146-ITAT-2018(DEL)-TP] ITA 6980/Del/2017 dated 15.10.2018

1495. The Tribunal held that the payment of customs duty, freight, insurance, etc. we're not payment to AE and thus, such payment was to be excluded from the value of international transactions while making adjustment on account of ALP. It noted that the same view was taken in assessee's own case for AY 2006-07 by the DRP.
Terex Equipment Pvt Ltd (Formerly known as Terex Vectra Equipment Pvt. Ltd.) vs ACIT [TS-1196-ITAT-2018(DEL)-TP] (ITA No.930/Del/2013) dated 02.11.2018

1496. The Tribunal held that foreign exchange gains should be treated as part of operating income of assessee noting that foreign exchange gain arose on account of export of services relying on ratio laid down in Delhi HC in Rampgreen Solutions Pvt Ltd wherein it was held that foreign exchange fluctuation ought to be treated as operating if it had nexus with business. It also observed that safe harbor rules (where foreign exchange gains/ were treated as non-

operating) were like presumptive taxation and had been made applicable from 18 September 2013 and therefore not applicable for th subject year

VAILDOR CAPITAL INDIA PVT LTD vs ITO [TS-1329-ITAT-2018(DEL)-TP] (ITA No.1961/Del/2015) dated 22.11.2018

1497. The Tribunal dismissed Revenue's appeal against DRP's order wherein the DRP had directed that for the purpose of computing PLI of OP/TC, the denominator had to be total costs incurred by assessee and not the FOB value of goods sourced through the assessee noting that HC had ruled in favour of the assessee on the issue holding that the Act did not authorize broadening of the cost base in such circumstances.

ACIT vs Li & Fung India Pvt Ltd [TS-1163-ITAT-2018(DEL)-TP] ITA No.2480/Del/2015 dated 31.10.2018

1498. The Tribunal relying on the decisions of the Apex Court in Woodward Governor and Ameriprise India rejected the Revenue's treatment of foreign exchange fluctuation income/loss as non-operating cost while computing assessee & comparables margin.

ST Microelectronics Pvt. Ltd vs. Addl. CIT - TS-48-ITAT-2018(DEL)-TP - ITA No. 4396/Del/2017 dated ITA No. 4396/Del/2017

1499. The Tribunal directed the TPO to treat foreign exchange gain as operating in nature while computing assessee's PLI relying on Delhi HC rulings of Fiserve and Agilis Information Technologies International [I] Pvt Ltd. wherein it was held that the Safe Harbour notification was prospective in nature thus, foreign exchange gain would be treated as operating for the year when the notification was not applicable.

Global Logic India Ltd.vs Dy.CIT [TS-1249-ITAT-2018(DEL)-TP] ITA No.1690/Del/2016 dated 30.10.2018

1500. The Tribunal rejected the claim of assessee to exclude customs duty while computing the margin of transportation divison of assessee vis-à-vis comparable (as total cost of goods sold of signaling segment included 64% of import cost, but in the comparables, the average import over total cost of goods sold was only 14%) noting that DRP had rightly concluded that there was no peculiar circumstance in case of assessee to warrant adjustment as import of inputs was not a compulsion in its case. Therefore, there was no need of even neutralizing the impact of custom duty paid. DRP had distinguished the coordinate bench decision of Skoda relied on by assessee to ask for adjustment of customs duty noting that the Tribunal has not suggested that the custom duty should be excluded from the purchase price. Rather, the Tribunal held that the TPO should find out the means of neutralizing the impact of high Custom duty rate in the case of Skoda where it was a compulsion to import car parts as vehicle manufacturers did not have sufficient facilities to indigenize the components.

GE India Industrial Private Limited vs ACIT [TS-1315-ITAT-2018(DEL)-TP] ITA No.2781/Ahd/2012 dated 04.12.2018

1501. The Tribunal remanded the issue of computation of operating profit margins of the comparables back to the file of AO/TPO to be adjudicated after considering the submissions and the relevant material furnished by the assessee to contend that the TPO had considered

non operating expenses as operating and hence the operating cost base was incorrect. The DRP had not given any finding on the issue.

GE India Business Services Pvt. Ltd. vs. DCIT [TS-381-ITAT-2018(DEL)-TP] ITA No.1423/Del/2014 dated 18.05.2018

1502. The Tribunal restored the recomputation of correct margin of assessee to the TPO in light of the fact that the TPO had not considered forex loss as operating despite the directions of the DRP.

NTT Data Global Delivery Services Ltd. vs ITO [TS-953-ITAT-2018-(Del)-TP] ITA No.5339/Del/2011 dated 12.07.2018

1503. The Tribunal rejected assessee's plea of adjusting forex loss against interest income and upheld TPO's consideration of considering forex loss as business loss and directed that forex gain/loss should be part of operating income/expense while computing assessee's margin.

Keystroke Pro India P Ltd vs ITO Ward 14(3) – TS-333-ITAT-2018(DEL)-TP ITA No 537/Del/2015 dated 10.04.2018

1504. The DRP had directed the TPO to treat foreign exchange fluctuation as operating while recomputing the margin of comparables which it failed to do so. The Tribunal held that foreign exchange fluctuation had to be treated as operating income by relying on Delhi HC decision of Fiserve India Ltd. and further, it noted that DRP in the subsequent year had decided the issue in favour of the assessee.

NEC Technologies INDIA PVT. LTD. vs. Dy CIT (2018) 53 CCH 0344 DelTrib ITA No. 6283/Del/2015 dated 11.07.2018

1505. The Tribunal restored the issue of consideration of foreign exchange gain as operating income to the file of TPO. The Tribunal noted that the coordinate bench in the assessee's own case for AY 2010-11 and AY 2012-13 had held that forex gains should be treated as operating income since the same related to the business of the assessee.

Rolls Royce India Pvt. Ltd vs. DCIT [TS-367-ITAT-2018(DEL)-TP] ITA No.1042/Del/2014 dated 02.05.2018

1506. The Tribunal held that the foreign exchange gain and loss was to be treated as an operating item by relying upon the co-ordinate bench ruling in assessee's own case for AY 2009-10 wherein it was held that the fluctuations pertaining to forward contract with respect to purchase of materials was revenue in nature and hedging was a risk mitigating exercise to reduce the cost of imports.

Degania Medical Devices Pvt Ltd v Dy.CIT [TS-523-ITAT-2018(DEL)-TP] ITA No.1254/Del/2015 dated 27.06.2018

1507. The Tribunal upheld the CIT(A)'s approach of considering cost of raw-material obtained from its AE as pass through cost and directed its exclusion from operating cost as well as operating revenue for computing GP margin under Cost Plus Method (CPM), observing that AE had supplied raw material kits which were to be re-exported to AE after assembling and partial testing and that there was a prior binding obligation on part of the assessee for returning the same raw kits in their finished form to the AEs. Thus, it held that assessee's duty was

confined only to rendering services (testing etc.) on the raw kits and that there was no profit element involved. It also took note of method of accounting followed by assessee whereby purchase price of kits received from AE was recorded separately, and though no separate amount was paid to the AE, the same was ultimately adjusted against export price receivable from AE on re-export.

Akon Electronics India Pvt. Ltd vs. DCIT – TS-105-ITAT-2017 (Del) – TP - ITA No.4804/Del/2009, ITA No.4837/Del/2009 dated 15.02.2017

1508. The Tribunal dismissed the contention of the Revenue that foreign exchange loss was to be considered as non-operating expense relying on Safe Harbour Rules, wherein foreign exchange loss and income had been excluded from the calculation of operating expense and income respectively and relying on the ruling of Westfalia Separator India (P.) Ltd. vs. ACIT [TS-220- ITAT-2014(DEL)-TP], held that the safe harbor rules were notified on 18.09.2013, and hence were not applicable to the subject AY and accordingly held that foreign exchange loss was required to be treated as operating in nature.

St-Ericsson India Private Limited vs Addl CIT - TS-119-ITAT-2017(DEL)-TP - ITA No.1672/Del./2014 dated 22.02.2017

1509. The Tribunal directed the TPO to verify margins of three comparables viz.Liners India, India Nippon Electricals and Lucas-TVS on merits since expenses (i.e. sundry expenses written back and excess provision credited back in the case of Liners, -Bank charges in the case of India Nippon Electricals and Bill discounting and cash discount in the case of Lucas TVS) had erroneously been considered as non-operating. Further, with respect to Liners India, it considered assessee's contention that TPO had not considered working capital adjustment and that the difference between assessee and the TPO's margin was due to computation error. It thus directed the TPO to verify and re-compute the same.

The Tribunal directed the TPO to treat the provision of doubtful debts as non-operating as provided in Safe Harbour Rules for AY 2009-10. The Tribunal noted that DRP while dealing with the foreign exchange fluctuation losses in the assessee's own case had followed Safe Harbour Rules. The Tribunal observed that since AO did not object to the said direction of the DRP, the claim of the assessee with respect to doubtful debts following the similar rules could not be objected to.

Federal Mogul Ignition Products India Ltd (formerly known as Federal Mogul Automotive Products India Pvt Ltd) vs. DCIT [TS-394-ITAT-2018(DEL)-TP] ITA No.2691/Del/2014 dated 14.05.2018

1510. The Tribunal directed the AO/TPO to calculate the margins of the comparables after treating the bank charges as operating expenses and remitted the issue back. The Tribunal also observed that the DRP had given clear directions to the TPO that the assessee's submissions ought to be considered yet the AO has failed to consider the same.

Efacec Switchgear India Pvt Ltd vs DCIT [TS-830-ITAT-2018(DEL) TP] ITA No.7817/Del/2014 dated 13.06.2018

1511. In case of an assessee engaged in providing to its AE engineering and design services including offshore construction and drilling in oil and gas sector, the Tribunal deleted TP-adjustment and noted that for working out assessee's PLI, using TNMM, the TPO had

allocated operating cost considering man hours committed for AE (81,962 hrs) instead of man-hours actually utilized for AE (8,695 hrs) and accordingly, arrived at TP adjustment. The Tribunal accepted assessee's contention that man-hours actually utilized should be considered as allocation key and not man-hours committed to AE and held that different yardsticks cannot be adopted for cost allocation to AE and non-AE segment. The Tribunal observed that man-hours actually utilized for AE was only 2% of total man-hours utilized and thus, applying the same for cost allocation purpose, concluded that the assessee's transaction would be at ALP.

M/s Triune Energy Services Pvt. Ltd. Vs DCIT Circle 25(2), New Delhi- TS-424-ITAT-2018(DEL)-TP- ITA No. 1744/Del/2015 dated 27.04.2018

1512. The Tribunal upheld CIT(A)'s allowance of adjustment of expenses on recall of products for AY 2005-06 which failed quality check conducted by AE, accepting that it was extraordinary event leading to abnormal cost. It further observed that TPO had allowed adjustment for expenses incurred by customer and reimbursed by assessee, however CIT(A) had rightly enhanced adjustment to cover expenses relating to goods recalled and lying in factory.

However, the Tribunal reversed the CIT(A)'s direction to grant adjustment of Rs. 10.73 Cr towards higher cost incurred on material procured from AE which was supplied to customer at lesser price. It held that merely because the assessee had imported a new product from its sister concern for onward supply and subsequently, the prices stabilized, it did not make the cost as extraordinary. Further, it held that it was on account of increase in the cost of production which is in the normal course of business.

Further it remanded back the issue of adjustment on account of valuation of the inventory of 'Unicorn' products (where realizable value was less than the cost) allowed by CIT(A) while noting that risk of diminution in value of inventory was inherent in business. The Tribunal held that any claim to treat expenditure as extra-ordinary and not arising in normal course of business needs to be demonstrated with strict evidence.

Munjal Showa Ltd [TS-345-ITAT-2018(DEL)-TP] ITA No.3296/Del/2013 dated 14.05.2018

1513. The Tribunal held that where assessee was remunerated with costs incurred with mark up at 8 percent for services rendered to its AE, TPO was not justified in changing base from 'costs' incurred to 'FOB' value of exports' and applying 6 percent mark-up.

Li & Fung (India) (P)Ltd v DCIT - [2016] 68 taxmann.com 58 (Delhi- Trib)

1514. The Tribunal allowed the assessee's appeal and held that the arbitration award payment by the assessee to DRMC on behalf of AE which was subsequently reimbursed to the assessee does not form part of cost base for margin computation as it was a mere cost to cost reimbursement, however more so since the TPO had accepted the assessee's PLI without including the arbitration payment in the subsequent AY 2012-13.

Hyundai Rotem Company vs. ACIT-TS-924-ITAT-2017(DEL)-TP-ITA No. 510/Del./2016 dated 22.11.2017

1515. The Tribunal dismissed Revenue's appeal against CIT(A)'s acceptance of assessee's operating profit/sales (OP/sales) as PLI while benchmarking imports by assessee under TNMM. Noting that the CIT(A) had rejected OP/TC as PLI as the purchase price in total cost

included purchases from AEs, the Tribunal held that there was no infirmity in the order of the CIT(A) and accordingly, dismissed Revenue's appeal.
ACIT vs Dentsply India (P) Ltd-TS-947-ITAT-2017(DEL)-TP ITA No. 1860/Del/2009 dated 06.11.2017

1516. The Tribunal agreed with the contention of the assessee that foreign exchange losses were to be treated operating expenses and rejected the Revenues contention that as per the Safe Harbour Rules, foreign exchange loss and income was to be excluded from the calculation of operating expense and income respectively. Relying on the decision of Westfalia Separator India (P.) Ltd. vs. ACIT [TS-220-ITAT-2014(DEL)-TP], it held that since the safe harbor rules were notified on
18.09.2013, they were not applicable to the subject AY and accordingly, the foreign exchange loss was required to be treated as operating in nature.
St-Ericsson India Private Limited vs Addl CIT – TS-119-ITAT-2017 (Del) – TP - ITA No.1672/Del./2014 dated 22.02.2017

1517. Reimbursement costs have to be excluded for profitability purposes while working out operating costs (as same do not involve any functions to be performed).
International Merchandising Corporation v DCIT-[2016] 68 taxmann.com 360 (Delhi-Trib)

1518. The Tribunal held that loss arising out of foreign exchange fluctuations in relation to trading items was to be considered as an operating cost.
Ameriprise India Pvt Ltd v DCIT - (2016) 66 taxmann.com 246 (Del)

1519. The Tribunal, relying on the decision in the case of Techbooks International Pvt Ltd [TS-317-ITAT-2015(DEL)-TP] directed the TPO to treat the provision for doubtful debts in case of comparables viz. BVG India Ltd and Cameo Corporate Services Ltd as in operating nature. Noting that Revenue had not disputed that assessee's provision of doubtful debts was excessive and concurring with DRP's direction to have consistent treatment vis-à-vis the assessee and comparables, it held that provision for doubtful debts should be treated as operating. TPO had excluded provision for doubtful debts in case of these 2 comparables treating it as an extraordinary event on the basis that it appeared in their financials for the first time.
Adidas Technical Services Pvt Ltd vs DCIT-TS-507-ITAT-2017(DEL)-TP-ITA No.412/del/2017 dated 18.05.2017

1520. The Tribunal held that the net operating margin realized by the assessee from international transactions was to be compared to the net operating profit margin realized by the comparable companies using the same base i.e. the numerator and denominator used for computation should be common for the assessee as well as the comparable companies and therefore the operating profit to operating cost of the comparable companies could not be compared to the operating profit to value added expenses of the assessee.
DCIT v Agilent Technologies India Pvt Ltd - (2016) 67 taxmann.com 95 (Del - Trib)

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1521. The Tribunal remitted the issue regarding treatment of abnormal loss on account of cancellation of orders as extraordinary cost under Cost Plus Method (CPM) for AY 2006-07 to the TPO / AO and held that the assessee (an exporter of ready-made garments) had failed to prove actual loss incurred on the basis of concrete evidences. Noting the contention of the assessee that in January 2005, export orders from one of its biggest buyers were cancelled because of the buyer going bankrupt, which led to loss of Rs. 2.4 Cr on account of revaluation of raw material inventory at present realisable scrap value, it held that extraordinary costs which were beyond assessee's control and unrelated to sale of goods, were to be excluded from direct / indirect cost, however it observed that assessee had neither shown such extraordinary expenditure in its P&L A/c / schedules as specifically required by accounting standard nor had it furnished details regarding cancellation of order, realisable value of materials or how valuation loss of Rs. 2.4 Cr was determined. It also noted that the assessee was also supplying goods not only to that buyer but also to 3 other AEs, whereas it was not proved whether raw material was purchased for supply to that buyer only. Accordingly, it directed the assessee to furnish all this information to justify its claim and also to show the nature and extent of extraordinary loss incurred by the assessee with evidences.

Cornell Overseas P Ltd Vs DCIT - TS-1092-ITAT-2016(DEL)-TP - ITA No.1158/Del/2014 dated 24.10.2016

1522. The Tribunal held that once there was additional compensation that had been taken as item of operating revenue, then costs incurred in bearing such risks have to be naturally considered as operating cost.The Tribunal held that as operating profit was computed by considering items of operating costs alone, value of two items viz. purchase of capital asset and FTS which were capital in nature and capitalized in balance sheet, could not be included in base amount for applying operating profit margin rate of comparables for computing amount of transfer pricing adjustment.

Asahi Glass Ltd v DCIT - [2016] 46 CCH 0421 DelTrib

1523. The Tribunal rejected the assessee's plea for considering payment of commission of Rs. 2 crore to Voltas Ltd. (third party) as a pass through cost as the said costs were directed towards rendering of marketing support services to its AE and were thus a value added cost and were part of assessee's operating cost for computing margin. It observed that the assessee received Rs. 4.24 cr as commission from AE as consideration for rendering marketing support services, of which a sum of Rs. 2cr was paid to Voltas Ltd under a sub- contract service agreement and therefore the entire amount of Rs. 2 crore represented costs incurred by assessee in its role as principal for carrying out the market and support services and not as an agent of its foreign AE. Therefore, it held that this was not a sum recoverable per se from AE. It further held that if commission paid to Voltas Ltd. (which was exclusively for rendering marketing support services to AE) was treated as a pass through cost, then the payment to assessee's own employees and other expenses, which were also incurred in rendering services to AE, should also be treated as pass through cost, which was an 'absurd' proposition.

Kobelco Cranes India (P) Ltd. vs ITO - [TS-242-ITAT-2016(DEL)-TP]

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1524. The Tribunal held that 'other sales income' and 'corporate support service income' was to be included while computing the PLI of the assessee. Further, it held that foreign exchange gains arising out of the sale of goods was to be included in the operating income of the assessee.
ACIT v Gillete Diversified Operations (P)Ltd - TS-218-ITAT- 2016(DEL)-TP

1525. The Tribunal accepted the assessee's plea for treatment of royalty income received from franchisee / JVs in India and reimbursed to its AE, for marketing and operational rights, as a pass-through cost, noting that there was no value-addition to the collection of royalty amount and reimbursement to AE and further that assessee had not commercially exploited the royalty / franchise fees as it was required to remit such funds within 5 days of end of each month.
Mc.Donald's India (P) Ltd vs DCIT - TS-236-ITAT-2016(DEL)-TP

1526. The Tribunal held that an adjustment should be allowed to the assessee of the difference in the risk borne by the assessee as well as the comparables. Noting that assessee had submitted a working for risk adjustment, without commenting on the correctness of the computation, the Tribunal set aside this ground to the file of TPO for fresh consideration in accordance with law after granting proper opportunity to the assessee for supporting its claim.
Rolls-Royce India (P) Ltd. vs DCIT - TS-180-ITAT-2016(DEL)-TP

1527. The Tribunal rejected Revenue's contention that definition of 'operating cost' & 'operating revenue' under Rule 10TA (Definitions in respect of Safe Harbour Rules for International Transactions) should be adopted for Rule 10B & Sec. 92 and held that such definition under Rule 10TA was for a specific purpose. Accordingly, it held that the forex gain on AE-receivables on account of services rendered by assessee (captive service provider designing transformer components etc. under the projects provided by AE) was to be considered as operating revenue for computing assessee/comparables margin for AY 2009-10.
Virginia Transformer India P. Ltd vs. ITO-TS-651-ITAT-2017(DEL)-TP-ITA No. 1001/del/2014 dated 31.07.2017

1528. The Tribunal held that the foreign exchange loss on account of borrowing from AE should be considered as operating expenditure for assessee engaged in manufacturing of APIs, other intermediaries and bulk drugs. However, since the assessee had failed to link exchange loss of Rs. 112.40 million with the transaction of borrowing from the assessee's AE, the Tribunal remitted the matter to AO/TPO with the direction that exchange loss pertaining to loan transactions should be treated as non-operating while remaining amount pertaining to trading transactions to be taken as operating expenses for determination of PLI.
Teva API India Pvt Ltd (Formerly known as Teva API India Ltd.) vs. ACIT-TS-952-ITAT-2017(DEL)-TP ITA No.6706/Del/2016 dated 27.10.2017

1529. The Tribunal held that foreign exchange gains / losses pertaining to sale are revenue in nature and thus to be treated as part of operating income / loss.

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Further, it held that for the purposes of providing working capital adjustment the interest rate to be applied should be the US currency rate and not the Prime Lending rate as the assessee received all of its business income in US dollars.

M/s Rampgreen Solutions Pvt Ltd v DCIT (ITA no. 1066/Del/2015) – TS-538-ITAT-2015 (Del) – TP

1530. The Tribunal held that costs incurred by the assessee such as booking of hotels, airfare, transport expenses in the course of providing tour services to foreign tourists, were expenses incurred in its capacity of a principal and not as an agent of its Foreign AE and therefore were to be included in the operating cost while computing PLI and could not be treated as pass-through costs (costs incurred on behalf of the AE for which subsequent reimbursement was to be claimed).

DCIT v Fritidsresor Tours & Travels India Pvt Ltd (ITA No.1480/Del/2011) – TS-530-ITAT-2015 (Del) -TP

1531. The Tribunal deleted the TP adjustment made on sale of CDs made by the assessee to its AEs in the US by allowing assessee's claim for adjustment on account of differences in geographical markets of USA and Europe (sales to third parties) while applying the CUP method. It held that he distributor in the US had to incur higher expenses as the products were sold through shopping malls/ super markets which followed the just in time approach requiring rent costs and frequent stock control. However, it rejected the claim of the assessee for adjusting prices by reducing selling and distribution expenses incurred by the AE in the US since expenses incurred by the AE to develop market for the assessee's products had no relevance for comparability adjustments.

Moser Baer India Ltd v DCIT (ITA No 882 / Del / 2008) – TS-624-ITAT-2015 (Del) – TP

1532. The Tribunal held that deferred revenue expenditure incurred and written off would be classified as operating if they were incurred either after the start date of rendering services, or before but were in relation to such services. Further, it held that if revenue from incurring such expenses was linked with and accounted for in the current year then the corresponding deferred revenue expenses were to be treated as operating notwithstanding that the assessee claimed a deduction of only 20 percent thereof.

Corporate Executive Board Pvt Ltd v ITO (ITA No 4986 / Del / 2010) – TS-423-ITAT-2015 (Del) – TP

1533. The Tribunal held that foreign exchange income and miscellaneous income were to be considered as operating income while computing the margin of the assessee.

American Express (India) Pvt Ltd v DCIT [ITA No 1700 / Del / 2010] - TS-408-ITAT-2015(DEL)-TP

1534. The Tribunal held that the foreign exchange gains / losses related to the sale price of export (trading receipt) were to be considered as operating income / loss in the case of the tested party as well as the comparable companies.

Rolls Royce India Pvt Ltd v DCIT (ITA no. 1310/Del/2015) – TS-616-ITAT-2015 (Del) – TP

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1535. The Tribunal held that provision written back should be treated as operating income and provision created during the year should be treated as operating expense. Further, it held that only current years financial information of comparable companies was to be used for comparability analysis.

ACIT v Conexant Systems Pvt Ltd (ITA no. 4359/Del/2009 & C.O. No. 37/Del/2010) – TS-567- ITAT-2015 (Del) – TP

1536. The Tribunal held that the berry ratio could be used as PLI in benchmarking the ALP for indenting and the steel trading transactions of the assessee. The berry ration adopted by the assessee does not offend rule 10B. The compensation model of the assessee did not include profit attributable to the assessee on account of location saving, hence, adjustments for use of the locational savings was unwarranted. Further, the use of intangible could not be inferred or assumed and had to be demonstrated on basis of cogent materials by the TPO/Assessing Officer and adjustment for us of intangibles was unwarranted. The TPO cannot make notional adjustments to cost base of AEs for determining the arm's length price of the assessee and, hence, same were to be deleted and matter was to be remanded back for the necessary factual verifications and the ALP computation.

Marubeni Itochu Steel India (P.) Ltd. v. Dy. CIT [2015] 60 TAXMANN.COM 464(Delhi – Trib.)

1537. The Tribunal held that in course of transfer pricing proceedings, while computing operating cost, abnormal costs incurred on account of start up of business like salary, rent and depreciation etc. have to be excluded.

HCL Technologies BPO Services Ltd. v. Astt. CIT[2015] 60 TAXMANN.COM 186 /69 sot 571 (Delhi)

1538. TThe Tribunal held that trading advances written off and foreign exchange fluctuations resulting from trading items are to be considered as an operating items while computing the Profit Level Indicator. Write offs of fixed assets being capital in nature is a non-operating item. Further, it was held that transfer pricing adjustments were to be made in respect of AE related transactions only and that internal comparables were preferential as compared to external comparables.

Claas India Pvt Ltd v DCIT - (2015) 44 CCH 0515 (Delhi)

1539. The Tribunal deleted the TP adjustment made by the TPO by re-characterising support services as trading activities. It further held that since the assessee was engaged in providing support services, the berry ratio adopted by it as the PLI was correct and that the TPO erred in attempting to include the cost of sales in the PLI as the assessee had not undertaken any sales during the year and its costs were the cost incurred towards providing services only and not towards any sales.

Mitsui & Co India Pvt Ltd v DCIT [ITA No 6463 & 5082 / Del / 2011] - TS-390-ITAT-2015(DEL)-TP

1540. The Tribunal held that for the purpose of computing profit margin under Rule 10B(1)(e) there could be any denominator such as cost incurred or sales effected or assets employed,

however the numerator ought to be the net operating profit as against the net profit adopted by the TPO as the net profit would factor in non-operating expenses as well.
ACIT vs. Progressive Tools & Components Pvt. Ltd - TS-200-ITAT-2017(DEL)-TP –

1541. Where the AO failed to exclude depreciation from the operating margin of the assessee as well as the comparables as per the directions of the DRP, the Tribunal refused to adjudicate on the other grounds raised by the assessee (i.e. on incorrect selection of comparables) as the AO had failed to follow the directions of the DRP. Accordingly, it remitted the matter to the AO / TPO to calculate the TP adjustment excluding depreciation from the computation of operating margin.
GSS Infotech Ltd. vs. DCIT - TS-1086-ITAT-2017(HYD)-TP - ITA No. 267/Hyd/2014 & 329/Hyd/2016 & ITA No. 602/Hyd/2017 dated 30-11-2017

1542. The Tribunal relying on the co-ordinate bench ruling in case of Kenexa Technologies held that operating expenses of comparable company should include bad debts and provision for bad debts and directed AO/TPO to re-compute the margins of comparable companies.
Hyundai Motor India Engg Pvt Ltd [TS-503-ITAT-2018(HYD)-TP] ITA No.87/Hyd/2017 dated 08.06.2018

1543. The Tribunal held that foreign exchange losses incurred by the assessee was to be considered as operating in nature relying on the decision of the Coordinate Bench wherein it was held that foreign exchange losses formed part of operating margins since AS 11 stipulates that foreign exchange loss / gains of any nature relating to any item whatsoever was required to be charged to the P&L.
Excellence Data Research Pvt.Ltd. & ANR. Vs. ACIT & ANR. (2016) 48 CCH 0051 (Hyd Trib)-ITA No.310/Hyd/2015

1544. Where the TPO applied PLI on entire costs which included cost attributable to non-AEs as the well and the assessee had both the AE as well as non-AE transactions, the Tribunal held that the operating profit and operating cost relating to the AE transactions alone ought to be considered for determining the ALP and thereafter the fixed cost attributable to both the transactions ought to be apportioned. Accordingly, it remitted the TP issue for assessee engaged in rendering engineering & consulting services to AEs to the file of AO with the direction to consider only operating profit / operating cost of AE transactions.
Satyam Venture Engg. Services P) Ltd vs Dy.CIT-TS-1072-ITAT-2017(Hyd)-TP ITA No.1464/Hyd/2014 dated 29.12.2017

1545. The Tribunal accepted the assessee's contention to consider 'contract termination fee' received from AEs as part of operating revenue for AY 2010-11 and held that the contract termination fee was in effect compensating the assessee for the expenses incurred by it for executing the contract partially and therefore was to be considered as operating revenue. It observed that the assessee, on execution of contract for rendering software development services, would have received full consideration from AE, whereas contract termination fee was paid on similar lines, but proportionately owing to premature contract termination.
Invensys Development Centre India Pvt Ltd v DCIT – TS-125-ITAT-2017 (Hyd) – TP - ITA No.329/Hyd/2015, ITA No.318/Hyd/2015 dated 23.02.2017

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1546. The Tribunal held that provision for bad and doubtful debts was to be considered as operating expenses and accordingly remitted the issue of the AO to re-compute the margins of the assessee and comparables treating the same as operating expenses.
ITO v Intoto Software (India) Pvt Ltd – TS-42-ITAT-2017 (Hyd) – TP – ITA No 1921/Hyd/14, ITA No 25/Hyd/15 dated 31-01-2017

1547. Where the assessee had incurred high depreciation costs (32.09 percent of total costs) which had an adverse impact on its margin and the TPO computed the PLI of the assessee as well as the comparables after considering depreciation, the Tribunal, following the decisions of the Court in BA Continuum India and that of the Tribunal in the assessee's own case directed the AO to compute the ALP before depreciation, both in case of the assessee as well as the comparable companies and workout the margins accordingly.
Further, the Tribunal also held that the reimbursement of expenditure could not be marked up by the AO by 5 percent while computing ALP and therefore allowed the assessee's appeal against the addition made by the TPO by charging a 5 percent markup on the reimbursement of expenses.
Cambridge Technology Enterprises Ltd v DCIT – TS-1004-ITAT-2016 (Hyd) - TP

1548. The Tribunal upheld the directions of the DRP wherein the DRP directed the AO to verify whether or not the assessee had disallowed the expenses incurred by it, viz. upfront fee paid for obtaining a loan for capital purpose, in its computation of income and if so, to exclude the same from the computation of operating cost.
Further, the Tribunal held that the DRP was justified in directing the TPO to treat provision for bad and doubtful debts as operating in nature since it was in relation to services rendered.
Hyundai Motor Engineering Pvt Ltd v ITO – (2016) 48 CCH 0277 (Hyd-Trib) – ITA No 128 / Hyd 2016 & ITA No 216 / Hyd / 2016

1549. Where the assessee did not include the actual reimbursement of expenses received by it from its AE in its P&L account contending that it did not have any impact on profits / gains and the ALP of the reimbursements had been accepted by the TPO, the Tribunal held that the genuineness of the transaction had been accepted and since it had no impact on the profit of the assessee it did not have a bearing on the computation of profit / income and accordingly deleted the disallowance under section 10A of the impugned expenses.
Value Momentum Software Services P Ltd – TS-957-ITAT-2016 (Hyd) - TP

1550. The Tribunal, following the decision in the assessees' own case for the prior assessment year remitted the issue of exclusion of reimbursement receipts and payments from operating margin, directing the TPO to exclude the reimbursements.
Palred Technologies Ltd – TS-981-ITAT-2016 (Hyd) - TP

1551. The assessee had applied RPM in respect of its purchase of bakery shortening transaction which the TPO rejected and adopted TNMM to determine the ALP of the transaction and on

comparing the margin of the assessee with the comparables made an adjustment. It was assessee's contention that import expenses incurred for customs duty paid for opening stock and purchases during the year had been taken for calculating the margin by the TPO and if apportioned only to the purchases during the year, the operating margin from purchases of AE would be 1.64%. The Tribunal restored the matter to TPO for verification if import expenses attributable to opening stock had been included noting that if the claim of assessee was valid, then no adjustment for ALP would be called for as the margin was within +/-5% of comparables (mean margin of comparables was 4.75%).

ACIT vs Vijay Solvex Ltd. [TS-1088-ITAT-2018(JPR)-TP] CO No.12/JP/2014 dated 24.08.2018

1552. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order accepting assessee's (manufacture of silk fabric and engaged in trading of yarn) PLI as OP/ Sales as against the PLI considered by the TPO as OP/OC noting that OP/OC may not reflect true results.

It also held that TPO erred in excluding directly related amounts to sales such as export incentives and foreign exchange fluctuations and since they formed a part of operating revenue, they should be included while calculating PLI.

DCIT vs JJ Exporters Ltd. [TS-1047-ITAT-2018(Kol)-TP] ITA No.1371/Kol /2017 and CO No.71/Kol/2018 and ITA No.1372/Kol/2017 and and CO No.72/Kol/2018 dated 19.09.2018

1553. The TPO and CIT(A) had treated provision for bad and doubtful debts as operating expenses. The Tribunal accepted assessee's contention that provision for debts could not be treated as operating as they were connected to the sales made in the previous year by HSG (company which was acquired by assessee) relying on the coordinate bench ruling in Marble India Pvt Ltd. wherein it was held that provision for doubtful debt respect to sale of the earlier year had to be ignored for determining correct ALP. (which if reduced from the profit of the subsequent year, the numerator would be reduced but the denominator would not be reduced because corresponding sale stood considered in earlier year, which could not be considered in the subsequent year.)

Philips Medical Systems Private Limited vs ITO (now merged with Philips Electronics India Limited [TS-1165-ITAT-2018(Kol)-TP] ITA No.3412/Mum/2008 dated 26.09.2018

1554. The Tribunal restored the computation of correct margin of assessee to the AO to verify the claim of the assessee that the AO had committed an error in computation of PLI at 0.2% as against 3.88% as per assessee's working.

Bothra Shipping Services (Currently known as Bothra Shipping services Pvt) vs ACIT [TS-814-ITAT-2018(Kol)-TP] ITA No.188/Kol/2017 dated 31.07.2018

1555. The Tribunal held that while determining ALP, if export incentive entitlement is excluded from operating income of assessee company, such exclusion has to be made from operating Income of comparables also.

Super Tannery Ltd. v. Dy. CIT [2015] 60 taxmann.com 185 (Luck.-Trib)

1556. The Tribunal held that the approach of the TPO in excluding export incentive entitlement while computing PLI of the assessee and not excluding the same while computing PLI of the comparable companies was incorrect. It held that since the CIT(A) had rightly compared PLI

after both, including and excluding the export incentive entitlement from the assessee and the comparable companies, which was within the 5 percent range of comparable companies, no TP addition was to be made.

ACIT v Super House Ltd (ITA No.630/LKW/2013) – TS-460-ITAT-2015(LKW)-TP

1557. Relying on the coordinate bench ruling in the case of Emerson Process Management (India) (P.) Ltd wherein it was held that liquidated damages paid on delay in completion of order by assessee company are contingent in nature and not a regular feature of the business hence could not be treated as operating while computing operating profit margin , the Tribunal held that liquidated damages are not direct cost for computing profit margin of assessee.

Rosoboronservice India Ltd vs. DCIT [TS-810-ITAT-2018(Mum)-TP] ITA No.7418/Mum/2017 dated 01.08.2018

1558. The Tribunal upheld CIT(A)'s order vis-à-vis treatment of export benefits received for R&D services as part of operating income considering its direct and intimate connection with export of R&D services transaction. Further, the Tribunal also observed that the said benefit arose from usual activities carried on by the assessee and were part & parcel of the same transaction and therefore, formed part of operating income only.

ACIT vs. Colgate Palmolive (India) Limited [TS-319-ITAT-2018(Mum)-TP] ITA No.2778/Mum/2011 &CO No.126/Mum/2011 dated 04.05.2018

1559. The assessee had computed the ALP manufacturing/processing transactions by applying CPM Method and trading segments by applying RPM method. However, the TPO adopted OP/OC as PLI (as against assessee's method of OP/OR as PLI) and ignored adjustments for startup phase and abnormal expenses. The Tribunal restored the issue vis-à-vis assessee's claim for adjustment of abnormal items to be considered for examination by the AO on merits noting that provisions of Rule 10B(1)(b) (relating to RPM) as well as Rule 10B(1)(c) (relating to CPM) speak about adjustment to be made to account for functional and other differences in international transaction which include abnormal items and in so far as assessee's claim with respect to startup phase adjustment was concerned, it held that the assessee had failed to substantiate the adjustment with any credible material.

Hoya Lense India Pvt Ltd vs DCIT [TS-883-ITAT-2018(Mum)-TP] ITA No.127/Mum/2018 dated 08.08.2018

1560. The Tribunal set aside CIT(A)'s order and remitted the issue of computation of PLI for benchmarking marketing cost paid by assessee to its AE back to TPO/AO for AYs 2003-04 and 2004-05. It directed the TPO to follow guidelines provided by co-ordinate bench in assessee's case for AY 2003-04 wherein it had rejected TPO's computation of PLI using operating profit / marketing cost, noting that since ALP to be determined was that of the marketing cost paid by the assessee marketing cost, or, for that matter cost itself, could not be considered as the denominator, and accordingly, restored the matter to AO consider to examine assessee's claim of adopting PLI of operating profit / operating revenue.

First Source Solutions Ltd. vs DCIT [TS-1265-ITAT-2018(Mum)-TP] (ITA No.3095/M/2014 and 3096/M/2014) dated 12.11.2018

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1561. The Tribunal dismissed Revenue's appeal and upheld the DRP's order noting that fixed assets written off is not a normal expenditure and moreover it could not be equated with depreciation and thus, the DRP rightly held that it should be treated as non-operating and excluded it while calculating the profit margin.
Swiss Re- services India Pvt Ltd vs DCIT [TS-1120-ITAT-2018(Mum)-TP] ITA No.1493/Mum/2014 dated 31.08.2018

1562. The assessee made a provision on account of change in stock valuation policy and claimed it to be a non-operating expense on the ground that it was a one-time extraordinary event. The Tribunal noted that the adjustment was made while arriving at 'Stock valuation of raw material / finished goods/work-in-progress at year end and since there was a discrepancy in the corporate tax treatment of this provision, remitted the matter back to the file of Ld. AO / TPO for appreciation of the factual matrix and re-adjudicate the same and directed the assessee to demonstrate / substantiate his stand in this regard. However, on principles, it held that since the stock valuation was done in accordance with policy adopted by the management, the same constituted part and parcel of assessee's trading operations.
Vishay Semiconductor India Private Limited vs ACIT - TS-478-ITAT-2018(Mum)-TP - I.T.A. No.7503/Mum/2012 dated 04/05/2018

1563. The Tribunal held that interest income earned from Fixed Deposit Receipts was includible as operating income since the said interest arose out of advances received against exports which were immediately placed in FDRs with the bank for the purpose of taking letters of credit in favour of overseas sellers and therefore was an integral part of the assessee's business activity.
Further, it held that TP adjustments were to be restricted to the international transactions undertaken by the assessee with its AEs and therefore the TPO was incorrect in making an adjustment to the entire manufacturing segment of the assessee.
DCIT v Bunge India Pvt Ltd - TS-264-ITAT-2016 (Mum) - TP

1564. The Tribunal held that where the DRP had directed the TPO to compute the operating margin of all comparables on a uniform basis i.e. by excluding sale of DEPB, duty draw back and interest from customers on account of it being non-operating, the order of the AO pursuant to the DRP directions, did not suffer from any infirmity.
Radiant Plastic Industries Pvt Ltd – TS-973-ITAT-2016 (Mum) – TP

1565. The Tribunal upheld the directions of the DRP excluding assessee's Solar Test (ST) activity costs from operating costs while computing the PLI as they were extra-ordinary in nature. It noted that the assessee had undertaken trial runs for production of solar receiver tubes during AY 2010-11, and subsequently, the economic conditions had turned unviable creating uncertainty in demand, owing to which, assessee had stopped the production of tubes and that the solar test trails, carried out by assessee during the period 09.10.2009 to 23.11.2009, were an exception to its regular business of producing tubes for pharmaceutical packaging. Accordingly, it held that the costs incurred on the impugned activity could not be treated as operating in nature. Further, it held that the provision of Rs. 13.9 Cr for impairment of assets used in the t rial made by the assessee as per AS-28 was also to be considered as an extra-ordinary cost.

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ITO vs. Schott Glass India Pvt. Ltd. - TS-166-ITAT-2017(Mum)-TP - I.T.A./1867/Mum/2015 dated 08.03.2017

1566. The Tribunal held that where the assessee, who was entitled to charge its AE a mark-up of 5 percent on the actual costs incurred by it in providing research services, inadvertently failed to exclude the cost of bought out services and service tax from the cost on which mark-up was charged in accordance with the agreement, the TPO ought to have excluded the same. It noted that if the above figures were considered, there would be no scope for making adjustment under section 92 of the Act since the price would be at ALP and accordingly deleted the addition.
Unilever Industries Pvt ltd v JCIT - TS-2-ITAT-2016 (Mum) - TP

1567. The Tribunal dismissed the assessee's contention that outsourcing cost incurred by it was non-operating in nature and held that the outsourcing cost was directly related to the software development and services. Noting that the assessee had merely developed a part of the software through outsourcing instead of in-house development and the outsourced work was incorporated in the work of the assessee in the final software prior to providing the same to the AE it held that the TPO had correctly considered the outsourcing cost as operating expense of the assessee
Lionbridge Technologies Private Limited vs. ACIT - TS-438-ITAT-2018(Mum)-TP - I.T.A. No. 7304/Mum/2017 dated 21.05.2018

1568. The Tribunal upheld the order of the DRP wherein it was held that subvention income earned from the AE was not to be considered as an operating item but since the assessee had offered the subvention income to tax it was to be reduced from the TP adjustment proposed by the TPO.
UPS Jetair Express Pvt Ltd v DCIT [ITA Nos 1166 and 1219 / Mum / 2014] – TS-413-ITAT-2015 (Mum) TP

1569. The Tribunal, following the decision of co-ordinate bench in assessee's own case for AYs 2009-
10 and 2010-11 [TS-80-ITAT-2015(Mum)-TP], allowed assessee's appeal and held that loss/gain on account of foreign exchange fluctuation had to be considered as operating in nature.
Hapag-Llyod Global Services Private Limited-TS-676-ITAT-2017(Mum)-TP-ITA No. 2190/mum/2017dated 18.08.2017

1570. The Tribunal held that as per Accounting Standard 5, bad debts could not be considered as extra-ordinary in nature and were to be considered as operating expenses while computing the PLI.
Thomas Cook (India) Ltd v DCIT - TS-307-ITAT-2016 (Mum) – TP

1571. The Tribunal allowed the adjustment in the PLI of the assessee i.e. tested party, towards the abnormal loss of Rs.2.22 crore arising out of cancellation of forward contracts due to sharp decline in the value of the Indian rupee vis-à-vis the US Dollar. It held that the material difference had arisen due to an abnormal feature qua the assessee which was

absent in the case of comparables and since there is no provision in Rule 10B requiring comparability adjustments to be made only to the PLI of comparables, it directed for the adjustment to be made in the PLI of the assessee / tested party. Considering the fact that there was a difficulty in ascertaining the foreign exchange loss / gain of the comparable companies as the information available in the public domain was not complete, it held that making an adjustment of comparable margins with partial information would lead to absurdity / unscientific analysis. Though it agreed with the in-principle contention of the Revenue, that the hedging loss arising in the normal course of business was to be given the same treatment as the loss or gain in underlying transactions i.e. to be included in operating cost, it held that in the absence of evidence demonstrating similar kind of loss in the hands of the comparable companies it was to be treated as an abnormal loss and therefore was to be excluded from the PLI of the assessee.
Pangea3 & Legal Database Systems Pvt Ltd – TS-148-ITAT-2017 (Mum) – TP dated 06.03.2017

1572. The Tribunal remitted the matter back to the Assessing Officer to consider the assessee's claim of adopting the PLI of net margin/operating revenue. The assessee engaged in the business of supporting services had used the services of its AE vis-à-vis marketing support services. The TPO had rejected the assessee's method of computing PLI i.e. operating profit/ total cost and was of the view that in case of operating profit of marketing support service, the PLI should be net margin divided by marketing cost. The Tribunal rejected the contention of the TPO on the ground that in the instant case the ALP of the marketing costs had to be determined and hence could not be considered as a denominator.
First Source Solutions Ltd v/s. ACIT [TS-423-ITAT-2018 (Mum)] ITA No.3094/Mum/2014 dated 01.06.2018

1573. The Tribunal directed TPO to treat forex gain/ loss as operating in nature considering that it was a part and parcel of trading transactions with AE and followed Ramgreeen HC ruling and DRP's approach of treating the same as operating item for subsequent AY.
M/s. Labvantage Solutions Pvt Ltd vs ACIT Circle 2(1)- TS-405-ITAT-2018(Mum)-TP - ITA No 927 & 2400/Kol/2017 dated 11.05.2018

1574. The Tribunal held that export incentives were to be treated as operating income noting the decision of Bombay High Court in Welspun Zucchi Textiles Ltd. wherein it was held that that DEPB benefit arising to the assessee therein was operating revenue includable in arriving at operating profit and observed that the coordinate bench ruling in Carraro India had relied on the proposition in said HC ruling to hold that export incentives are to be considered as operating income of assessee
Cummins India Limited vs Dy.CIT [TS-1099-ITAT-2018(PUN)-TP] ITA No.556/Pun/2015 dated 25.09.2018

1575. The TPO rejected the working of PLI of the assessee (in manufacturing segment) as the assessee had reduced abnormal cost on account of wastage which were extraordinary in nature (a unit in Chennai was set up which produced wastage in the initial months). The Tribunal accepted assessee's plea for exclusion of extraordinary costs while computing PLI of

assessee by relying on coordinate bench ruling in Hov Services Ltd. wherein the Tribunal while determining PLI of tested party had laid down the proposition that extraordinary expense incurred by assessee such as expenses on account of GDR issue, buy back of shares, restructuring options like ESOP, etc. were to be granted adjustment while determining arm's length price..A similar ratio was also laid down by the coordinate bench ruling in Pangea3 and Legal Database Systems (P.) Ltd. wherein due to a material difference which arose in case of assessee vis-à-vis comparables due to abnormal feature (abnormal loss on cancellation of contratcs), it was held that a suitable adjustment had to be made to factor in material difference in PLI and thus, abnormal loss should be excluded from operating costs.

Grupo Antolin India Pvt. Ltd (Erstwhile known as Grupo Antolin Pune Pvt. Ltd vs Dy.CIT) [TS-1128-ITAT-2018(PUN)-TP] ITA No.299/Pun/2013 dated 17.10.2018

1576. The Tribunal rejected assessee's contention to treat forex loss as non-operating relying on Delhi High Court decision of Cashedge wherein it was held that for relevant AY, the Safe Harbour Rules would not be applicable (where forex fluctuation gains/losses are to be treated as non-operating) and thus, the stand of the coordinate bench decision(s) wherein it has been held that forex fluctuation losses/gains arising out of nexus with business should be treated as operating would prevail.

The Tribunal rejected assessee's contention that customs duty adjustment would have to be made to gross profit margin on account of assessee paying a higher customs duty (100% of its purchases) than comparables (only on 2% of its purchases) observing that if assessee has made costly purchases, it would naturally earn more revenue from the sales. It stated that no adjustment to gross profit could be permitted as the figure of gross profit, took into account not only the higher debit side of cost of purchases but also the higher credit side of the revenue earned from sales.

Fresenius Kabi India Private Limited vs ACIT [TS-1212-ITAT-2018(PUN)-TP] (ITA No.2572/PUN/2016) dated 02.11.2018

1577. The Tribunal set aside TPO's order and directed him to consider forex fluctuation gains as operating income for the purpose of PLI computation for AY 2012-13 since the forex fluctuation gains were earned in normal course of business and derived on account of trade sales made during the year. It rejected Revenue's reliance on Safe Harbour Rules (Rule 10TA) and relying on the decision of the Delhi HC ruling in BC Management Services held that Safe Harbour Rules came into force in 2013 and therefore could not apply to AY 2011-12.

Digital Group Infotech Pvt. Ltd. vs. DCIT - TS-185-ITAT-2018(PUN)-TP - ITA No.475/PUN/2017
dated 28.02.2018

1578. Relying on the decision of the Tribunal in Haworth (India) P Ltd [TS-940-ITAT-2017(PUN)-TP], the Tribunal held that the write back of provision for doubtful debts was to be treated as operating income for computing PLI. Further, relying on the decision of the Tribunal in Approva System Pvt. Ltd [TS-23-ITAT-2015(PUN)-TP], it held that foreign exchange fluctuation gains were to be treated as operating income. It rejected Revenue's reliance on the Safe Harbor Rules to claim these items as non-operating in nature, follows Delhi HC ruling in Cashedge India Pvt Ltd and Rolls Royce India Pvt Ltd wherein it was held that safe harbor rules would not apply retrospectively prior to AY 2013-14.

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Imersys NewQuest (India) Pvt Ltd vs DCIT - TS-727-ITAT-2018(PUN)-TP - ITA No. 590/PUN/2015 – dated 23.05.2018

1579. The Tribunal accepted the assessee's stand that treatment of forex fluctuation gain/loss should be treated as non-operating item following the rulings of co-ordinate bench in BNY Mellon International Operations and DHL Express wherein it was held that forex losses are non-operating since it had no nexus with the main operations of the assessee.
Tasty Bite Eatables Limited vs DCIT [TS-730-ITAT-2018(PUN)-TP] ITA No.337/Pun/2014 dated 11.06.2018

1580. The Tribunal accepted assessee's plea for inclusion of Rs. 37.49cr representing write back in connection with revenue items as part of operating profit for AY 2007-08 but treated write back in connection with purchase of capital goods made in earlier years as non-operating income. It dismissed the TPO's contention that the write back amount of Rs.37.84cr was non-operating income as it was a mere book entry and not connected with assessee's business operations. Relying on the co-ordinate bench ruling in Sony India and Gillete Diversified Operations (which were both accepted by Revenue absent appeal on this ground before HC) it held that if the reversal of provision / write back was on account of revenue in nature, it was to be included as part of operating income and if the liabilities originally created were on account of capital items then their write back could not be considered to be a normal instance of business and hence to be excluded as operating income. Considering the assessee's argument that if such write back amount was included as operating income, the operating margin would be 42.94% as against 14.36% of comparables requiring no TP-adjustment, it remitted the matter back to TPO for the limited purpose of verifying this contention.
Suessen Asia Private Limited (merged with Rieter India Private Limited) vs. ACIT - TS-1055-ITAT-2017(PUN)-TP - ITA No.1629/PUN/2011 dated 20.10.2017

1581. The Tribunal upheld assessee's approach of benchmarking the international transaction of export to AE by using external comparables with net profit to sales as PLI as against TPO's approach of adopting internal comparables in the form of domestic sales with net profit to cost as PLI, relying on the Tribunal's order in the assessee's own case for previous year wherein it was held that while applying TNMM on aggregate basis, since various transactions are interlinked, comparison had to be made with uncontrolled transactions.
It further held that procurement services were to be aggregated with manufacturing for the purpose of benchmarking after relying upon Delhi HC ruling in Sony Ericsson case and Tribunal's ruling in assessee's own case for previous AY. Further, the Tribunal held that the benefit of 5% varaitaion would not be available if the variation did not exceed the tolerance band.
Cummins India Ltd-TS-805-ITAT-2018(PUN)-TP ITA No. 309/Pun/2014 dated 15.05.2018

1582. The Tribunal dismissed Revenue's appeal and upheld the DRP's order of adjustment to PLI of comparables on account of higher cost of import duty on materials noting that co-ordinate bench in assessee's own case in earlier years had remitted the issue in light of the coordinate bench decision of Skoda auto India to examine the claim of the assessee vis-à-vis higher import cost incurred by it compared to the comparables and eliminate the difference which was materially likely to affect the profit in open market in terms of Rule 10B(3).

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DCIT v Terex India Pvt. Ltd [as successor of Demag Cranes and Components (India) Pvt. Ltd] [TS-477-ITAT-2018(PUN)-TP] ITA No.552 & 583/Pun/2016 dated 06.06.2018

1583. Where the TPO treated the entire write back amount of Rs. 37.84 crores as non-operating income on the basis that it was a mere book entry and not connected with assessee's business operations, the Tribunal, relying on the decision in the case of Sony India (P) Ltd – (315 ITR 50) and Gillete Diversified Operations ITA No.400/DEL/2013 (wherein it was held that if the reversal of provision / write back is on account of revenue in nature, it should be included as part of operating income and if the liabilities originally created were on account of capital items then their write back cannot be considered to be a normal instances of business and hence to be excluded as operating income), accepted assessee's plea for inclusion of Rs. 37.49cr representing write back in connection with revenue items as part of operating profit.

Suessen Asia Private Limited (merged with Rieter India Private Limited) vs. ACIT-TS-1055- ITAT-
2017(PUN)-TP ITA No.1629/PUN/2011 dated 20.10.2017

1584. The Tribunal directed the AO / TPO to exclude the pre-operative expenses incurred by the assessee such as rent, employee cost and administrative expenses from the computation of PLI noting that the assessee had entered into an agreement with its AE for provision of software development services on 1.04.2005 while it was granted STPI registration with effect from 30.06.2005 and therefore expenses incurred prior to the registration were to be considered as expenses for establishment of business and not for rendering services and therefore could not be considered as operating in nature.

ACIT v Amberpoint Technology India Pvt Ltd – TS-124-ITAT-2017 (Pun) – TP - ITA No.266/PUN/2012, ITA No.1862/PUN/2012 dated 15.02.2017

1585. The Tribunal rejected assessee's plea to consider operating profit before depreciation, interest and tax (PBDIT) as PLI. It held that in an asset intensive industry where revenues were driven by assets, exclusion of depreciation from profits would distort the comparability analysis. However, it directed the AO/TPO to grant a suitable adjustment in hands of comparables if assessee was able to establish that its depreciation rates were higher than that of its comparables.

Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No.1712/PUN/2011 dated 10.02.2017

1586. The Tribunal, relying on ruling in Welspun Zucchi Textiles Ltd. Vs. ACIT[TS-6-ITAT-2013(Mum)- TP], upheld the claim of assessee and held that export incentives were to be considered as operating income for computation of operating margins of the assessee as well as the comparable.

Carraro India Pvt Ltd v ACIT – TS-26-ITAT-2017 (Pun) – TP - ITA No.1629/PUN/2013, ITA No.1673/PUN/2013 dated 19.01.2017

1587. The Tribunal noted that the TPO included depreciation as part of operating cost while working out PLI for assessee, but excluded the same while working out comparables' margin. Relying on Bombay High Court decision in Welspun Zucchi Textiles Ltd [TS-9-HC-

2017(BOM)-TP] it held that depreciation was required to be considered as part of operating cost for computing PLI and therefore directed the AO/TPO to recompute PLI of comparable companies after considering depreciation as part of operating costs.

Further, it noted that the TPO had excluded duty drawback of Rs. 73.17 lakhs and scrap sale f

23.04 lakhs from operating profit of the assessee while computing PLI. Relying on Welspun Zucchi HC (supra), the Tribunal held that duty drawback was to be considered as part of operating profits. Thus, it directed AO/TPO to recompute PLI of assessee as well as comparables by considering duty drawback and sale of scrap as part of operating profit.

Behr India Limited [TS-320-ITAT-2017(PUN)-TP] - ITA No. 566/PUN/2013 dated 21.04.2017

1588. The Tribunal held that where assessee company had not claimed provision of derivative losses in final computation of its income, same could not form part of operating expenses while computing its PLI. Also, where assessee was engaged in both domestic and export sales in ready to serve food (RTS) segment, transfer pricing adjustment had to be made with respect to international transaction only and not on entire sales of RTS segment. Further, where assessee claimed that interest on finance cost being non-operating expense was to be excluded while calculating PLI of assessee company, in absence of information as to nature of interest paid on finance cost, claim of assessee was to be dismissed.

Further, it held that where TPO made addition to assessee's ALP in respect of ready to serve food sold to its AE without giving adjustment on account of difference in capacity utilization between assessee and its comparatble, impugned addition deserved to be set aside.

Tasty Bite Eatables Ltd. v ACIT - [2016] 68 taxmann.com 272 (Pune- Trib)

1589. The Tribunal held that as per the Rules, the net profit margin of controlled transactions had to be compared with the net profit margin of the uncontrolled transactions and not the respective gross profit margins as done by the TPO.

DCIT v Cummins India Ltd - (2016) 67 taxmann.com 341 (Pune)

1590. The Tribunal held that forex loss on account of late receipt of export proceeds of earlier AY were not relatable to export sales of the year under consideration and thus excluded the same while computing assessee's PLI. However, it clarified that forex loss relating to sales of current AY would need to be adopted for computing assessee's PLI, and accordingly directed the AO to re-compute assessee's PLI.

ACIT v Dana India Technical Centre (P)Ltd -TS-140-ITAT-2016 (PUN)- TP

1591. The Tribunal held that while computing margins of comparable companies, no adjustment for differential rate of depreciation is to be made on account of uncommon assets between assessee and comparables.

eGainCommunications (P.) Ltd. v. ITO [2015] 62 taxmann.com 32/70 SOT 194 (Pune)

Restrict Adjustment to AE transactions

1592. The Apex Court dismissed Revenue's SLP against High Court's order wherein it was held that while determining ALP of international transactions, benchmarking had to be done only on AE transactions and not for entire turnover.
CIT vs Hindustan Unilever Ltd [2018] 99 taxmann.com 135 (SC) SLP 2238 of 2017 dated 29.10.2018

1593. The Court dismissed Revenue's appeal and upheld restriction of TP adjustment only to assessee's International transactions. Further, the Court upheld Rajasthan Udyog &Tools Ltd & HITCO Tools as comparable on the ground that the Tribunal rendered a finding of fact and the Department had not attempted to show that the finding was perverse and/or arbitrary and thus no question of law arose.
PCIT-5 vs Sandvik Asia Pvt Ltd-TS-315-HC-2018(BOM)-TP- ITA no 1088 of 2015 dated 26.04.2018

1594. The Court dismissed Revenue's appeal and upheld the Tribunal's order where**in** the AO/TPO was directed to benchmark only the transactions only with AE and not at the entity level.
Pr. CIT vs. Petro Araldite Pvt. Ltd [TS-446-HC-2018 (Bom)] ITA No.368 of 2015 dated 06.06.2018

1595. The Court held that the TPO was unjustified in applying the base of capital employed under the TNMM method without segregating the capital employed in respect of AE and Non-AE transactions. Further, it held that where the assessee entered into both international as well as domestic transactions, the Tribunal was justified in restricting the adjustment only to international transactions.
CIT v Goldstar Jewellery Design Pvt Ltd - (2016) 67 taxmann.com 86 (Bom)

1596. The Court upheld the order of the Tribunal restricting TP adjustment only to international transactions with AEs and noted that the issue was concluded by the decisions of the Court in Hindustan Unilever Ltd, Tara Jewellers Exports Pvt Ltd, Petrol Araldite Pvt Ltd, Thyssen Krupp Industries Ltd, Sumit Diamond India and Alstom Projects India.
Bhansali & Co – TS-994-HC-2016 (Bom) – TP

1597. The Court admitted the Revenue's appeal against the decision of the Tribunal wherein the TP-adjustment was deleted by considering segmental results for ALP determination without appreciating the objection of the TPO that complete evidence had not been submitted by the assessee. It noted the contention of the Revenue that the TPO had observed that the assessee had shown a loss of 30.66 percent in respect of its Non-AE transactions which was against the trend of the sector in which the assessee operated for which only selective bills and vouchers were submitted as a result of which he proceeded to benchmark the transactions on an entity level basis.
Tecnimont ICB Pvt Ltd [TS-929-HC-2016(BOM)-TP] (ITA No.963 OF 2014)

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1598. The Court held that TP adjustments are only mandated in respect of international transactions and not transactions entered into by the assessee with independent unrelated third parties as there is no issue of avoidance requiring adjustment in valuation in respect of transactions entered into with independent third parties. It held that adjustment on Non-AE transaction would increase the profit in a manner which was beyond the scope and ambit of Chapter X of the Act.

CIT v Thyssen Krupp Industries India Pvt Ltd (INCOME TAX APPEAL NO. 2201 OF 2013) – TS- 590-HC-2015 (Bom) – TP

CIT v Ratilal Becharlal & Sons (INCOME TAX APPEAL NO. 1906 OF 2013) – TS-610-HC-2015 (Bom)

Maine Global Enterprises Pvt Ltd v ACIT (ITA No.5969/Mum/2012 & ITA No.5889/Mum/2012) – TS-630-ITAT-2015 (Mum) – TP

1599. The Tribunal remitted the issue of computation of arm's length cost for onsite services rendered to assessee by its AE to the file of TPO. Noting that the TPO while computing the arm's length cost had first determined the total arm's length cost of the entire revenue of the assessee and then divided in proportion to transactions with the related party and non-related party, it accepted assessee's contention that TPO instead should have calculated ALP of costs of international transactions only and should have taken into account, details furnished by assessee to show that TPO's methodology resulted in excess adjustment of Rs. 60.53 lakhs.

Altimetrik India Pvt Ltd vs ACIT-TS-856-ITAT-2017(Bang)-TP- I.T.(T.P)A. No.1294/Bang/2010 dated 25.10.2017

1600. The Tribunal, relying on the decision in the case of Kshema Technologies Ltd [TS-182-ITAT-2016(BANG)], held that the use of entity level margin for the purpose of benchmarking international transactions was not permissible as per the provisions of Transfer pricing under chapter X of the Act. Accordingly, it remitted the TP-issue in respect of assessee (engaged in the development of computer software and providing other related services) to the AO/TPO for fresh consideration by comparing the margins of the international transactions with the uncontrolled comparable price. Observing that the CIT(A) had considered foreign AE as a tested party, it held that only price/PLI of the assessee's international transaction had to be compared with the uncontrolled comparable price.

Mphasis Limited vs ACIT-TS-539-ITAT-2017(Bang)-TP- I.T. (T.P) A. No.1104/Bang/2012 and 1258/bang/2012 dated 07.06.2017

1601. The Tribunal dismissed Revenue's appeal and upheld the CIT(A)'s order accepting that the adjustment should be made vis-à-vis AE transaction only. It relied on the Bom HC ruling of Tara Jewel Exports Ltd., ThyssenKrup and Goldstar Jewellery Design

SAP Labs India Pvt Ltd vs Addl CIT [TS-298-ITAT-2018(Bang)-TP] CO No.41 (Bang) of 2016 dated 06.04.2018

1602. The Tribunal directed AO to restrict ALP adjustment to transactions of assessee with its AE as against the adjustment made with respect to total transactions of assessee including AE and non-AE relying on ratio laid down in Bombay HC in Alstom Projects India Ltd. wherein it was

held that TP adjustment was permissible only on transaction with associate enterprise and not on entire turnover.

Infac India Pvt Ltd vs Dy.CIT [TS-1369-ITAT-2018(Chny)-TP] (IT(TP)A No.27 /Chny /2018 dated 05.10.2018

1603. The Tribunal dismissed the contention of the assessee that the TP adjustment was to be restricted to the international transactions of the assessee and held that the while determining the ALP, comparison was to be made between the PLI of assessee vis-à-vis arithmetic mean of the PLI of the uncontrollable comparables, and therefore it was to be presumed that every other factor was constant and that the difference had arisen only because of the international transactions. It held that, if this presumption was not made, no adjustment in any case could be made and the assessee could always take an argument that difference in PLI was not due to international transactions and that it was due to non-international transactions.

Caterpillar India Pvt. Ltd vs. ACIT - TS-302-ITAT-2017(CHNY)-TP - ITA 204 & 365/12 dated
05.04.2017

1604. The Tribunal reversed the DRP order wherein the DRP made entity level TP-adjustment and held that rules that TP-adjustment has to be made only in respect of transactions with AE after comparing the transaction made by similarly placed companies in uncontrolled transaction with non-AEs. Thus, it set aside DRP's order and remitted the matter back to AO.

Yongsan Automotive India Pvt. Ltd. vs. ACIT - TS-1046-ITAT-2017(CHNY)-TP - /ITA No.357/Mds/2017 dated 16.11.2017

1605. The Tribunal held that apportioning the payment of product development expenses paid to the AE on the basis of estimated sales was not a prescribed method for determination of ALP under Rule 10B of the Rules and accordingly remitted the issue back to the file of the AO / TPO.

Autoneum Nittoku Sound Proof Products India Pvt Ltd v ACIT (I.T.A.No.1425/Mds. /2014) – TS-608-ITAT-2015 (CHNY) – TP

1606. The Tribunal restored the matter back to TPO for examination (to consider assessee's written submissions and case laws relied on) noting that assessee had submitted workings for proportional adjustments on ground that import of raw materials from AE was a miniscule portion that is only around 9.72% to total material costs and thus, the TP adjustment was to be restricted only to proportionate purchases from AE and relied on a catena of case laws (including Del HC of Keihen Palfa, Alstom Projects Ltd in Bombay HC) wherein it was held that adjustment should be restricted only to the extent of international transaction with AEs.

GE India Industrial Private Limited vs ACIT [TS-1315-ITAT-2018(DEL)-TP] ITA No.2781/Ahd/2012 dated 04.12.2018

1607. The Tribunal remitted the computation of TP-adjustment on representation services rendered by the assessee to its AE to the file of the TPO for fresh consideration noting that while computing the TP adjustment, the TPO had included the non-AE transactions as well.

Observing that the TPO failed to take into consideration the segmental results of the assessee, the Tribunal directed the TPO to examine the same and compute ALP accordingly.
Messe Dusseldorf India Pvt Ltd vs. DCIT - TS-33-ITAT-2018(DEL)-TP - ITA No.5059/Del./2010 dated 04.01.2018

1608. The Tribunal held that it is not permissible to make transfer pricing adjustment by applying average operating profit margin of comparables on assessee's universal transactions entered into with both AEs and non AEs.
Headstrong Services (India)(P)Ltd v DCIT - [2016] 68 taxmann.com 363 (Delhi-Trib)

1609. The Tribunal held that the entire exercise under Chapter X was confined to computing the total income of the assessee from international transactions with its AEs having regard to the arms' length price and therefore, the TPO was incorrect in making an adjustment at an entity level including transactions with unrelated entities.
Federal Mogul Automotive Products (India) Ltd v DCIT - TS-235-ITAT- 2016 (Del) - TP

1610. The Tribunal held that the segmental results of the business of the assessee, segregating transactions undertaken by it with its AEs and Non-AEs was to be admitted as additional evidence so as to determine the transfer pricing adjustment vis-à-vis AE related transactions and not on all transactions undertaken by the assessee. Since the segmental results were not analysed, the Tribunal admitted the same as additional evidence and remanded the matter to the file of the TPO.
RMSI (P) Ltd v ACIT - [2016] 46 CCH 0276 (Del Trib)

1611. The Tribunal ruled against Revenue's consideration of entity level margin under TNMM to determine ALP of its international transactions of providing software development services despite presentation of segmental results (albeit unaudited) by assessee. It noted that while TPO had complete opportunity to examine the segmental results, he instead simply rejected the segmental result by citing reason that transaction with non-AE is minuscule. It placed reliance on the decisions of Lummus Technology as well as Honeywell Electrical (which in turn relied on 3i Infotec ruling) wherein it was held that segmental results could not be rejected on the ground that the same were not audited and TPO/DRP was required to examine the same if the same were maintained in the ordinary course of business. It held that only international transactions with AEs were to be adjusted for ALP adjustment since non-AE transactions operate on a different model. Accordingly, it remanded the matter to the TPO for fresh adjudication taking into account the assessee's segments.
CSR Technology (India) Pvt. Ltd. vs. ACIT - TS-1071-ITAT-2017(DEL)-TP - ITA No.1895/Del./2017 dated 14.12.2017

1612. The Tribunal, relying on the decision of the Bombay High Court in CIT Vs Hindustan Unilever Limited [TS-538-HC-2016(BOM)-TP]held that transfer pricing adjustments ought to be restricted to the international transactions only and it could not be applied to uncontrolled transactions. Accordingly, it directed the AO/TPO to restrict adjustment on account of ALP to the extent of the transactions with AE only.
Cornell Overseas P Ltd Vs DCIT - TS-1092-ITAT-2016(DEL)-TP - ITA No.1158/Del/2014 dated 24.10.2016

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1613. Where the TPO made a TP-adjustment by considering total costs incurred by assessee in respect of transactions with AEs and non-AEs, the Tribunal held that under TNMM it was not permissible to make transfer pricing adjustment by applying the average operating profit margin of the comparables, on the assessee's universal transactions entered into with both the AEs and non-AEs. It held that the entire exercise under Chapter-X of the Act is confined to computing total income of the assessee from international transactions having regard to the arm's length price and there was no scope for computing income from non-international transactions also having regard to the ALP. Accordingly, it remitted the matter back to AO/TPO for deciding the issue afresh;

Syniverse Technologies Services (India) Pvt. Ltd. vs. ACIT - TS-169-ITAT-2018(DEL)-TP - ITA No.500/Del/2018 dated 13.03.2018

1614. The Tribunal held that where assessee engaged in business of system integration and business process outsourcing, allocated actual expenses to each segment to which they were directly related and indirect cost on the basis of head count (except cost of space, which was allocated on basis of number of desk and vacant seats were allocated to IT segment), the method of allocation was appropriate as neither the CIT(A) nor assessing officer commented over the rationality of the allocation keys and this method was appropriate for the reason that BPO segment was in start-up stage. It further observed that even if business support cost was allocated based on revenue, then also, profit level indicator would have been higher as compared to comparables.

Xansa India Ltd-TS-774-ITAT-2016(DEL)-TP-ITA No.2283/ Del/ 2011

1615. The Tribunal upheld the CIT(A)s restriction of the TP addition exclusively to AE transactions relating to purchase of raw material and components. However, it observed that the while segregating the purchases made from AEs from the entity level transactions, the CIT(A) had also included the value of international transaction relating to purchase of machinery / spares, against which no TP-addition had been made. Accordingly, it suggested two options for segregation – i) apportioning the total operating profit in the ratio of `utilized raw material purchased from the AEs' and `utilized raw material purchased from non-AEs' (Opening stock of raw material + Purchases– Closing stock) or ii) Deducing the share of operating profit from the `utilized raw material purchased from AEs' by dividing the amount of `utilized raw material purchased from AEs' with overall amount of `utilized raw material purchased from AEs and non-AEs and remitted the matter to the file of the AO / TPO for re-computation of AE transactions in line with its suggestions.

Hi Lex India Pvt Ltd – TS-152-ITAT-2017 (Del) – TP - ITA No.2036/Del/2014 dated 03.03.2017

1616. The Tribunal approved the assessee's stand of not allocating business development expenses to the AE segment of international transactions pertaining to technical support services based on the contention of the assessee that substantial business development expenditure and expenses incurred for securing independent contracts were incurred as an entrepreneur in the Non-AE segment. Further, it noted that the TPO had accepted the segmental break-up for the prior years and therefore applying the rule of consistency the same was to be accepted in the relevant year as well.

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Stanley Consultants Pvt Ltd v DCIT - TS-610-ITAT-2016 (Del) - TP I.T.A. No.3336/Del/12

1617. The Tribunal, relying on its earlier and subsequent year's orders in the case of the assessee, held that where the assessee had maintained segmental profits that were used for the purpose of claiming deduction under section 10A, the TPO erred in computing TP adjustment on the entire turnover of the assessee which included transactions with non-AEs. Accordingly, it directed the AO / TPO to make adjustments only to the extent of transactions with AE and exclude the adjustment on transactions with non-AEs.
TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) -TP - I.T.A. No. 1927/HYD/2011 dated 06- 01-2017

1618. The Tribunal held that for the purposes of making necessary adjustments as envisaged under Rule 10D, the relevant segments of the comparable companies were to be considered and only the segmental revenue and segmental costs were to be considered with allocation of common expenditure amongst the segments on a proportionate and reasonable basis.
Astrix Laboratories Ltd v ACIT - (2016) 67 taxmann.com 28 (Hyd)

1619. The Tribunal held that the TPO erred in making adjustment under TNMM on the entire turnover of the assessee and that the adjustment should only be made on the international transactions undertaken by the assessee. Further, it held that movement in Work-in-Progress was to be considered for computing the operating margin of the assessee. Accordingly, it directed the AO / TPO to make adjustments only to the extent of transactions with the AE and exclude the adjustment on transactions with Non-AEs and to re-compute the correct margin.
TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) – TP

1620. The Tribunal held that for the purpose of determining ALP, only transactions / turnover of assessee arising out of transactions with its AEs was to be considered and not the transactions undertaken by the assessee on an entity level. Accordingly, it set aside the matter to the file of the AO.
Excellence Data Research Pvt.Ltd. & ANR. Vs. ACIT & ANR. (2016) 48 CCH 0051 (Hyd Trib)-ITA No.310/Hyd/2015

1621. The Tribunal upheld CIT(A)'s order wherein it was held that TP adjustment should be restricted to sales with AE and not to total sales with AEs and non-AEs. It relied on ratio laid down in Bombay HC ruling in CIT vs Alstom Projects India Ltd. wherein it was held that TP adjustment was done under Chapter X of the Act and mandate of Chapter X was only to re-determine consideration received or given to arrive at income arising from international transactions with AE's.
JCIT. vs IBM Business Consulting Service Pvt Ltd [2018] 53 CCH 0431 (Kol- Trib.) ITA No.1068/Kol/dated 01.08.2018

1622. The Tribunal accepted the assessee's contention that the TP adjustments arising during the year under consideration were on account of the ill advice received by the assessee whereby it benchmarked its transactions on an entity level. However, as the assessee had revised the approach to the transaction by transaction approach for which is submitted additional

evidence, the Tribunal, relying on the decision of the Apex Court in N. Balakrishnan Vs. M. Krishnamurthy held that the assessee should not suffer because of earlier wrong legal advice which the assessee is ready to correct. Accordingly, it set aside the matter to the file of the TPO for readjudication.

Epcos India Private Limited vs JCIT-TS- 985-ITAT-2017(KOL)-TP- ITA No. 322/kol/2016 dated 5.12.2017

1623. The Tribunal relying on the coordinate bench ruling in the case of UCB India [TS-8-ITAT-2009(MUM)-TP] and Tej Diam [TS-54-ITAT-2010(MUM)] and considering transaction level margins over entity level approach, upheld the CIT(A)'s order deleting Rs. 10.83 Cr TP-adjustment made by TPO in respect of sale of silk fabrics by assessee to its US subsidiary during AY 2007-08. It held that as per the statutory provision in Rule 10B(e)(i) to (iii) it was only the international transaction that had to be compared with uncontrolled transaction and not the transactions undertaken by the entity as a whole. Noting that the profit margin earned by the assessee from controlled international transaction i.e. sale of silk fabrics was higher than average net profit margin earned by the comparables selected by assessee as well as by TPO it dismissed Revenue's appeal.

J.J Exporters Ltd [TS-392-ITAT-2017(Kol)-TP – ITA No.201/kol/2012 dated 12.05.2017

1624. The Tribunal dismissed Revenue's appeal against the CIT(A)'s order accepting transaction margin only and rejecting entity level margin relying on coordinate bench ruling in assessee's own case for earlier year wherein it was held that it was clear from the statutory provisions especially Rule 10B(e) (i) to (iii) that it is only the international transaction that had to be compared with uncontrolled transaction and not the transaction undertaken by the entity as a whole. It relied on coordinate bench decision in UCB India (P) Ltd. V. ACIT (2009) 121 ITD 131wherien it has been held that sec, 92C read with Rule 10B(l) (e) deals with TNMM and it refers to only net profit margin realized by an enterprise from an international transaction or a class of such transactions but not operating margins of enterprises as whole and noted the same view was taken in various coordinate bench decisions.

DCIT vs JJ Exporters Ltd. [TS-1047-ITAT-2018(Kol)-TP] ITA No.1371 /Kol /2017 and ITA No.1372/Kol/2017 dated 19.09.2018

1625. The Tribunal held there was no infirmity in the CIT(A)'s stand where it restricted the adjustment computed at entity level to the extent of international transactions with AEs vis-à-vis total turnover of the assessee ***ASSISTANT COMMISSIONER OF INCOME TAX vs. Sodexo Food Solutions India Pvt Ltd (2018) 54 CCH 0056 Mum Trib ITA No. 5781/Mum/2016 and ITA 5707/Mum/2016 dated 03.10.2018***

1626. The Tribunal rejected TPO's application of entity level approach for benchmarking assessee's international transactions for AY 2009-10 and following the ruling of the co-ordinate bench in the assessee's own case for the earlier year (ITA/7868/M/2010) which was upheld by the High Court (ITA No.1873 of 2013) held that TP-adjustment should be restricted to international transactions.

Hindustan Unilever Limited v Addl. CIT - TS-21-ITAT-2018(Mum)-TP - I.T.A./1321/Mum/2014 dated 05/01/2018

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1627. The Tribunal held that the transfer pricing adjustment was to be made only in respect of transactions entered into with AEs and not on any Non-AE transactions despite the fact that the assessee carried out benchmarking at an entity level.
DCIT v Alstom Projects India Ltd (ITA No.5335/M/2014, ITA No.5487/M/2014 & ITA No.2143/M/2014) – TS-522-ITAT-2015 (Mum)-TP

1628. The Tribunal held that for the purposes of benchmarking the ALP of purchase of goods by the assessee from its AE the value of unsold stock / closing stock could not be considered relying on the decision of St Jude Medical India Pvt Ltd v DCIT (ITA No 1626/Hyd/2010).
Signity India Pvt Ltd v DCIT (ITA No 7464 / Mum / 2014) - TS-562-ITAT-2015 (Mum) – TP

1629. The Tribunal upheld CIT(A)'s order and directed AO/TPO to re-compute TP adjustment with regard to the international transactions only and to exclude third parties.
DCIT 8(3) Mumbai vs Tara Jewels-TS-309-ITAT-2018(Mum)-TP- ITA no 1385/Mum/2014 dated 12.04.2018

1630. The Tribunal deleted TP-adjustment made at entity level in respect of international transactions entered into by assessee, engaged in manufacturing and trading of tractors/its parts, holding that the TP adjustments had to be made only with respect to international transactions with AEs and not at entity level. Noting that by working out proportionate adjustment on the basis of AE sales to total sales of tractor division, assessee had claimed that entity level transactions could be segregated into AE and non-AE segments, relying on the decision in the case of Bombay HC in the case of Alstom Projects India [TS-758-HC-2016(BOM)-TP], it held that the absence of segmental accounts did not warrant entity wise adjustment and that the absence of segmental data was not an insurmountable issue and proportionate basis could be adopted.
New Holland Fiat (India) Pvt Ltd vs DCIT- TS-356-ITAT-2017(Mum)-TP – I.T.A No. 7574/Mum/2012 dated 03.05.2017

1631. The Tribunal directed the TPO to restrict TP-adjustment only in respect of assessee's international transaction of purchase of components from AE and not assessee's entire turnover for AY 2005-06. The Tribunal held that the action of the TPO was illegal and arbitrary and the adjustment was to be made only in respect of international transaction of purchase of components from its AE and not the entire turnover. Further, it remitted the comparability of Remi Process Plant & Machinery Ltd to the file of TPO/AO for fresh consideration. The CIT(A) had excluded the comparable since its selling price was higher than 5% margin adopted by TPO. The assessee submitted that if the extraordinary item of late delivery charges was excluded from sales expenses, Remi Process would be comparable to the assessee. Accordingly, the Tribunal held that contention of the assessee required fresh examination and restored the matter to the file of AO/TPO for fresh adjudication.
IMA PG India Limited (Formerly known as Precision Gears Ltd) vs Addl.CIT-TS 517-ITAT-2017(Mum)-TP-ITA Nos. 6960 & 7650/M/2010 dated 26.04.2017

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1632. The Tribunal dismissed Revenue's appeal and upheld DRP's order accepting adjustment should be restricted only to AE sales and not to be done at AE level noting that DRP had accepted the same in preceding year and there was no change in facts in subject year. Further, it relied on Bombay HC ruling in case of Alstom Projects India Ltd. wherein it was held that proportionate adjustments were to be made only in respect of the international transactions with Associated Enterprises.
DCIT vs Magna Steyr India Pvt Ltd. [TS-1154-ITAT-2018(PUN)-TP] ITA No.352/Pun/2016 dated 12.10.2018

1633. Relying on the Bom HC decision of Ratilal Becharlal & Sons and Delhi HC decision of Keihin Panalfa, the Tribunal opined that the issue of restricting the adjustment, if any, to the international transactions undertaken with AEs only and not with the third party, was covered in favour the assessee and thus remanded back the issue to be decided afresh by the CIT(A) after considering the ratio of the aforesaid decisions.
Magic Software Enterprises India Pvt Ltd vs ITO [TS-747-ITAT-2018(PUN)-TP] CO No.98/Pun/2014 dated 18.07.2018

1634. The Tribunal dismissed Revenue's appeal and restricted TP Adjustment only to assessee's international transactions, as against TPO's computation of assessee's PLI on entire sales, by relying on the HC ruling in case of Thyssen Krupp Industries and upheld the CIT(A) order.
ACIT Circle-1 nashik vs M/s. Haldex India Ltd.- TS-357-ITAT-2018(PUN)-TP- ITA No 1731/PUN/2015 dated 25.04.2018

1635. The Tribunal relying upon the coordinate bench in Demag Cranes & Components directed the AO/TPO to restrict TP-adjustment only to international transactions with the AE's.
Terex India Pvt. Ltd (as successor of Demag Cranes and Components (India) Pvt. Ltd) vs. DCIT [TS-477-ITAT-2018(PUN)-TP] ITA No.583/Pun/2016 dated 06.06.2018

1636. Where in the second of proceedings the assessee in respect of computation of adjustment of manufacturing activity contended that the TPO/DRP had erroneously benchmarked the transactions with AE at entity level ignoring the fact that the transactions with AEs were required to be benchmarked adopting the basis of proportionality, the Tribunal, relying on the coordinate bench's ruling in assessee's own case for AY 2006-07 to 2008-09 wherein the principle of proportionality against entity level benchmarking was approved. Held that applying the principle of consistency, the ground raised by assessee is allowed.
Demag Cranes & Components (India) Pvt Ltd-TS-892-ITAT-2017(PUN)-TP ITA No.328/PUN/2014 dated 11.11.2017

1637. The Tribunal held that the adjustment arising out of TP analysis was to be confined to the international transactions undertaken with the AEs alone and not in relation to Non-AE transactions. Accordingly, the Tribunal directed the TPO to consider the segment submitted by the assessee with respect to the transactions with AEs.
Vistcon Engineering Center (India) Pvt Ltd v ACIT (ITA No 358 / PN / 2013) – TS-527-ITAT-2015 (Pun) – TP

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Risk Adjustment

1638. With respect to the allowance of risk adjustment by the Tribunal, the Court observed that Tribunal had recorded the fact that the necessary material supporting assessee's claim (i.e. detailed working of risk adjustment using CAPM) was given by the assessee to the DRP before passing the order which was not shown to be perverse by the Revenue.
CIT vs Watson Pharma Pvt Ltd [TS-480-HC-2018(BOM)-TP] ITA 124 of 2014 dated 25.06.2018

1639. The Court dismissed assessee's appeal and upheld the Tribunal's order denying 1% of risk adjustment to assessee relying on Zyme Solutions ruling wherein it was held that that when the assessee has not given any details and computation for risk adjustment then the claim of the assessee was purely hypothetical in nature. The Court opined that no substantial question of law arose in the present case as the Tribunal had given sufficient reasons for not allowing any risk adjustment following its earlier view in the case of Zyme Solutions.
SOLIDCORE TECHSOFT SYSTEMS (INDIA) PVT LTD vs ITO (NOW MERGED WITH McAfee SOFTWARE INIDA PVT. LTD.) [TS-722-HC-2018(KAR)-TP] ITA No.848/2017 dated 04.07.2018

1640. The Tribunal restored issue of risk adjustment to file of DRP for fresh decision by way of reasoned and speaking order noting that DRP without any discussion had allowed 1% of risk adjustment to the average margin by merely following coordinate bench decisions in case of Intellinet Technologies India Pvt. Ltd and Hello Soft Pvt Ltd (wherein it was held that Where if marketing and technical risk attached to comparables were not similar to that of assessee who was having a single customer, risk adjustment had to be given to net margin of comparables for determining ALP) and stated that 1% adjustment to the average margin was to be allowed towards risk differential because the facts of the present case were same as in those two cases without any discussion. Thus, the Tribunal restored the matter to DRP in view of its cryptic order.
ACIT vs Momentive Performance Materials (India) Pvt Ltd [TS-24-ITAT-2018-(Bang)-TP] IT(TP)A No.385/Bang/2016 dated 08.12.2018

1641. The Tribunal admitted Revenue's appeal by refusing to accept DRP's 1% risk adjustment to the average margin by arbitrarily relying on Intelligent and Hello Soft rulings to account for the risk differential between assessee and comparable companies. Noting that the risk adjustment workings were not provided by assessee before DRP and DRP's order was also cryptic, it restored matter to file of DRP for fresh decision by way of a speaking and reasoned order.
ACIT v Momentive Performance Materials (India) Pvt. Ltd - TS-24-ITAT-2018(Bang)-TP - IT(TP)A No. 385/Bang/2016 dated 08.12.2017

1642. The Tribunal upheld the DRP order rejecting assessee's claim for risk adjustment in the absence of any working and held that (i) the DRP had rightly rejected the assessee's claim for risk adjustment and held that the assessee's claim was only a theoretical one since it could not quantify the difference in risk adjustment between the tested party and comparables.(ii) the TPO had also given a categorical finding that the assessee had not been able to

demonstrate the risk difference, thus in absence of working it dismissed the assessee's appeal.

Tecnotree Convergence Pvt Ltd vs DCIT [TS-925-ITAT-2018(Bang)-TP] IT (TP) A No.1616/Bang/2017 dated 27.06.2018

1643. Where the assessee claimed a risk adjustment contending that being a captive service provider, its operations (which were remunerated by a fixed mark up on cost) were devoid of any significant risks and that all the valuable intellectual property rights and other commercial and marketing intangibles were owned by its AE as compared to the independent comparable companies which worked under uncontrolled conditions and bore numerous risks during the course of their business operations, the Tribunal, relying on the decision of the Delhi High Court in Chryscapital Investment Advisors India Pvt. Ltd. [TS-173-HC-2015(DEL)-TP] held that appropriate adjustments should be carried out in situations where there were differences between the tested parties and comparables and in case the differences in the comparables could not be eliminated on account of adjustments or otherwise, then such comparables were to be rejected. Accordingly, it directed TPO to work out an appropriate risk adjustment.

CAPCO IT Services India Pvt. Ltd. v. ITO – TS-1079-ITAT-2016 (Bang) – TP - ITA No. 1340 lBang/2011 dated 09.12.2016

1644. The Tribunal accepted the assessee's contention for granting market risk adjustment noting that comparable uncontrolled companies assumed significant business risks visa-vis a captive service provider such as the assessee, thus warranting an adjustment to account for differences in comparability.

DCIT v IDS Software Solutions India Pvt Ltd – TS-1085-ITAT-2016- IT(TP)A No.214 lBang/20 14, IT(TP)A 179/Bang/2014 dated 16.12.2016

1645. The Tribunal, relying on its earlier year's order held that foreign exchange gain / loss was to be considered as part of operating revenue / operating cost, respectively.

Mercedes Benz Research & Development India Pvt Ltd v DCIT – TS-1075-ITAT-2016 (Bang) – TP - IT (TP) A No.120 (Bang) 2014 dated 11.11.2016

1646. The Tribunal accepted the assessee's claim for risk adjustment and held that where the comparableswere independent risk bearing entities visa-vis the assesse who, being a captive service provider, was a risk free entity, compensated on a Cost plus basis regardless of the result of its operations, the assessee was entitled to a risk adjustment to account for the differences in risk (and consequent margins) between the assesse and the comparable company.

IDS Software Solutions India Pvt Ltd v ITO – TS-1072-ITAT-2016 (Bang) – TP - IT(TP)A No. 154 / Bang/2015 dated 28.11.2016

1647. The Tribunal concurred with the assessee's submissions viz. that it was captive service provider devoid of any significant risks relating to its business operations and provided mere services based on the requirements of AEs in return for a fixed mark up on cost incurred and that all significant risks were borne by AE as all intangibles were owned by its AE as a result

of which it was entitled to a risk adjustment. Accordingly, it directed the TPO to make appropriate risk adjustment.

Outsource Partners International P Ltd vs. DCIT - TS-57-ITAT-2017(Bang)-TP - IT(TP).A No.337/Bang/2015 dated 06.02.2017

1648. The Tribunal denied the claim for risk adjustment made by the assessee wherein the assessee contended that since it was a captive service provider it had risk of single customer as compared to uncontrollable comparables, as the assessee had not provided any scientific working justifying its claim.

Syniverse Teledata Systems Pvt. Ltd (Formerly known as MACHTeledata systems Pvt. Ltd) vs. DCIT - TS-217-ITAT-2017(Bang)-TP - IT (TP) A No.1363 (Bang) 2014 dated 15.02.2017

1649. The Tribunal held that the grant of ad-hoc risk adjustment of 1 percent by the DRP, was unjustified in the absence of any detailed working submitted by assessee as it was without any basis and without any factual foundation and therefore could not be granted to the assessee. ***Obopay Mobile Technology India Private Ltd vs DCIT-TS-493-ITAT-2017(Bang)-TP-IT(TP)A Nos. 238 & 553/bang/2016 dated 28.04.2017***

1650. The Tribunal allowed Revenue's appeal and held that the DRP erred in granting the assessee a risk adjustment at 1% without calculating the risk of the comparable companies. It noted that TPO had rejected assessee's general claim for risk adjustment on the premise that there is always a risk of going out of business when dealing with a single customer and opined that risk adjustment was required to be provided if accurate calculation was provided by the assessee during the assessment / proceedings or before the TPO at the relevant stage. Accordingly, it held that in the absence of the accurate projections it would be unfair for the DRP to provide a lump sum 1% risk adjustment to the assessee and therefore held that the claim of risk adjustment to the extent of 1%, was not maintainable.

ACIT vs Swiss Re Shared Services (India) Pvt Ltd-TS-504-ITAT-2017(BANG)-TP-IT(TP)A No 630/bang/2016 dated 13.04.2017

1651. The Tribunal held that though OECD guidelines allows a risk adjustment wherever necessary, it does not say that any such adjustment was to be given merely based on estimates. It distinguished the ruling of the Bangalore ITAT ruling in Philips Software Centre which had allowed a flat risk adjustment of 5.25% and noted that the order had been stayed by HC and also distinguished Delhi Tribunal's decision in Sony India ruling which had also allowed a flat 20% as a fair and reasonable risk adjustment and opined that the essential requirement for allowing a risk adjustment was that the assessee should quantify the risk adjustment in its TP documentation based on a clear and logical workings, considering the risk profile of tested party and comparables companies and not based on surmises. Further, it held that just because the assessee was serving a single customer would not mean that it was bearing market risk different from any other competitor and therefore denied the assessee's claim of 5% risk adjustment.

Infac India Pvt. Limited vs. DCIT - TS-387-ITAT-2018(CHNY)-TP - I.T.A. No.3195/CHNY/2017 dated 03-05-2018

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1652. Where the assessee, a contract manufacturer claimed risk adjustment contending that its comparables were entrepreneur companies bearing significantly higher risks, the Tribunal held that there was no thumb rule for risk adjustments in accordance with Rule 10C(2)(e), and stated that assessee had to identify and quantify the level of risk involved for the assessee as well as the comparables while undertaking analysis in its TP documents. Despite observing that the assessee did not discharge its initial onus as it failed to provide requisite information pertained to the claim, considering the high degree of risk involved with the comparables, it allowed a risk adjustment at 2% on adhoc basis.

KOB Medical Textiles Pvt Ltd. Vs. DCIT - TS-211-ITAT-2017(CHNY)-TP - I.T.A.No.855/Mds./2015 dated 09-03-2017

1653. The Tribunal directed the AO/TPO to provide for economic adjustments on account of difference in risk profile between the assessee and the comparables by relying on ITAT order for assessee's own case for earlier year noting that the assessee was a captive service provider who was remunerated on cost plus model and hence insulated from business risk while the comparables operated as entrepreneurs and were subjected to risks associated with conducting a business.

Bechtel India Pvt Ltd vs DCIT [TS-1026-ITAT-2018(DEL)-TP] ITA No.6779/Del/2015 dated 20.08.2018

1654. The Tribunal allowed Revenue's appeal and set aside DRP's order allowing standard deduction of 1% in view of risk by relying on the coordinate bench decision of Actis Global Services (P) Ltd wherein it was held that the assessee should demonstrate the nature of risk and as to how the risk had affected the margin. It directed the TPO to reexamine the adjustment on account of risk afresh after giving assessee an opportunity to furnish necessary details of the nature of risk and the impact on profit margins and quantification of adjustment towards risk.

ACIT vs Yokogawa Technologies India Pvt Ltd [TS-1046-ITAT-2018(DEL)-TP] IT(TP)A No.466/Bang/2016 dated 8.08.2018

1655. The Tribunal allowed assessee's claim for risk adjustment of 13.89% on operating margin of comparables following the coordinate bench ruling in assessee's own case for earlier year wherein it was noted that DRP had rejected the claim on basis that assessee had not quantified the adjustment and it was held that the aforesaid reason could not be a ground for rejection of risk adjustment by relying on coordinate bench ruling in Hyundai Rotem Company vs. ACIT where similarly risk adjustment could not be quantified, and the bench had directed the AO to recompute risk adjustment in line with coordinate bench decision in Sony India Pvt Ltd. (wherein it had allowed 20% risk adjustment considering the fact that it may not be possible to quantify risk adjustments)

St Ericsson India Pvt Ltd. vs Dy.CIT (2018) 54 CCH 0042 DelTrib ITA No.4434/Del/2018 dated 26.09.2018

1656. The Tribunal held that the assessee could not combine distribution and agency service activities while determining arm's length price as distribution involved import, warehousing, advertisement etc whereas the agency function involved coordination,

marketing and logistic services and also due to the fact that the risks assumed in the two activities were different, in spite of the transactions being closely linked.
DDIT v M/s Corning SA [ITA No 2564 / Del / 2011] - TS-403-ITAT-2015(DEL)-TP

1657. The Tribunal held that the onus for claiming any adjustment in the computation was on the assessee and therefore denied the assessee a risk adjustment as the assessee had made a generalized submission about assuming low / no risk instead of providing a detailed working or exhibiting that specific risk undertaken by the comparables were absent in its case.
Stryker Global Technology Centre Pvt Ltd v ACIT (ITA No 149 / Del / 2013) – TS-450-ITAT-2015(Del) – TP

Segments

1658. The Court admitted Revenue's appeal on question of law viz. *"Did the ITAT fell into error in upsetting the concurrent view of the TPO and the DRP with respect to desegregation of the intra group service transaction for the purpose of ALP determination under Section 92CA of the Income Tax Act, 1961 in the circumstances of the case?".*
CIT vs. Corning SAS- India - TS-184-HC-2018(DEL)-TP - ITA 1074/2017 dated 19.03.2018

1659. Where the assessee clubbed its revenue from sale of air time along with its revenue from distribution / advertisement / sale of business while benchmarking its international transactions on the ground that there were common features in both the streams of revenue viz., sale of airtime involved bulk sale of product / service to the customer and distribution too involved sale of product / service through a network which was upheld by the Tribunal on the ground that there was direct correlation between the revenue earned from both the streams, the Court held that issue of aggregation or segregation of two transactions was entirely a fact dependent exercise and could not be treated as a question of law. Accordingly, it dismissed Revenue's appeal.
CIT (LTU) vs ESPN Software India Ltd-TS-873-HC-2017(DEL)-TP – ITA No. 882, 890 and 891 of 2017 07.11.2017

1660. The Court allowed the appeal of the assessee against the order of the Tribunal wherein the issue relating to segregation of transactions vis-à-vis the transfer pricing exercise carried out by the TPO was remanded and held that while directing a remand of certain issue, the Tribunal should not have expressed its opinion distinctively on the issue. Accordingly, it directed the TPO to consider the issue of segregation or aggregation on merits having regard to the totality of facts and keeping in mind the decision of the Court in Sony Ericsson.
Agilent Technologies India Pvt Ltd – TS-891-HC-2016 (Del) – TP

1661. The Court, relying on its decision in Sony Ericsson and Magnetti Marelli remitted the issue concerning aggregation v segregation of the transaction of payment of royalty / fees for technical services and import of raw material to the TPO for re-consideration. It held that the claim of the assessee i.e. that aggregation was essential in the given case and that the payment of royalty / fees for technical service had to be viewed along with all

other expenses, was entirely dependent on the facts of the case and that there was no straight jacket formula in respect of aggregation or segregation. Noting that the Tribunal had upheld the segregation of the two transactions and upheld the CUP method adopted by the TPO, it refused to give a definite ruling on the issue of most appropriate method at this stage. Accordingly, it remitted the issue to the file of the TPO.
Gruner India Pvt Ltd – TS-1049-HC-2016 (Del) – TP

1662. The Court held that merely because the purchase of items and the acceptance of services was a component leading to the manufacture of the final product sold or final service provided by the assessee it does not imply that the initial purchases were not independent transaction for the sale of goods or provision of services and therefore the assessee would have to provide that they were all provided under one composite agreement which constitutes an international transaction, if it wished to benchmark the transactions on an aggregate basis.
Knorr Bremse India Pvt Ltd v ACIT (INCOME TAX APPEAL No.182 of 2013) – TS-558-HC-2015 (P&H)-TP

1663. The Tribunal relying on the decision of HC in the case of Knorr Bremse India Private Ltd [TS-558-HC-2015(P&H)-TP] (wherein it was held that closely linked transaction can be components of a single transaction) and decision in the case of Sony Erricson Mobile Communication India Pvt Ltd [TS-96-HC-2015(Del)-TP] (wherein the HC held that CUP method, RP method and CUP method could be applied to a transaction or closely linked or continuous transactions), deleted TP adjustment of Rs 1.12 crores on sale of chemical product by assessee to its non-AEs for AY
2006-07 permitting aggregation of transactions under CUP method. The TPO had made adjustment considering highest sale price to non-AE against average price adopted by the assessee based on aggregation of transaction. It also relied on the Apex Court ruling in Radhasoami Satsang [TS-12-SC-1991], wherein it was held that there was no good reason to take a different stand now and claim that aggregation of transactions could not be permitted in the current assessment year when the same was accepted in the earlier assessment years.
Gulbrandsen Chemicals Pvt Ltd - TS-1026-ITAT-2016(Ahd)-TP

1664. The Tribunal held this concerted action or arrangement of the assessee with TPL involving AE would attract provisions of section 92B and was an international transaction between the assessee and AE requiring determination of Arm's Length Price (ALP) under section 92(1). Transaction of supply of raw material and transaction of sale of imported products directly from AE had no connection whatsoever and could be evaluated individually. Thus, where TPO characterized both transactions as manufacturing and adopted a combined approach in determining ALP, entire approach by TPO in this regard was erroneous and TPO was to be directed to separately determine ALP of above international transaction.
Novo Nordisk India (P.) Ltd. v. Dy.CIT[2015] 63 TAXMANN.COM 351(Bang.-Trib)

1665. Where the assessee had allocated its direct costs as per the actuals and indirect costs based on turnover between the AE and Non-AE segments, the Tribunal held that the TPO was

incorrect in rejecting the said bifurcation and allocating all costs (direct and indirect) based on turnover of the two segments. Accordingly, it set aside the issue back to the file of AO/TPO for the limited purpose of proper verification and allocation of cost. Further, in respect of treatment of forex fluctuation gain/loss on AE receivables, it held that the same had to be treated as operating revenue/cost.

Allegis Services India Pvt Ltd vs DCIT-TS-723-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1370/Bang/2014 dated 15.09.2017

1666. Where the assessee even on specific request by the TPO, did not provide copies of orders, vouchers, work-sheets etc., but only submitted details of incremental cost of salaries, additional employees in the present year number of employees resigned in each month, number of new employees appointed in each month which was not helpful in finding out as to whether the salary paid to particular employee is to be considered for technical services segment or trade support or other trading segment, the Tribunal upheld TPO's allocation of expenses in the ratio of turnover among various segments like software service segment, trade export segment and domestic transactions segment for AY 2006-07. Noting that assessee was not willing to file these details if the matter was remanded back, the Tribunal refused to interfere with allocation of cost on turnover basis in absence of necessary details to support any other reasonable basis.

Systat Software Asia Pacific Ltd vs. Dy. CIT-TS-846-ITAT-2017(Bang)-TP dated 22.09.2017

1667. Tribunal following the co-ordinate bench ruling in the assessee's own case in AY 2006-07 (wherein the issue regarding allocation of various costs between AE and non-AE segments was restored back to the AO for de-novo consideration after holding that such allocation, consideration of cost records was necessary), directed the AO to verify cost records and ensure reconciliation with books of accounts before passing the order **for AY 2003-04 and 2004-05.**

Otto Blitz India Pvt Ltd [TS-344-ITAT-2017(Bang)-TP] IT(TP)A Nos.1388 & 1389/bang/2012 dated 12.05.2017

1668. Noting that the assessee had failed to produce any evidence to justify allocation of expenses on actual basis, the Tribunal remitted the issue of allocation of cost between AE and Non-AE transactions to the file of the TPO who had allocated the entity level costs to AE and Non-AE segments based on the revenue earned from respective segments instead of considering the actuals.

Business Process Outsourcing (India) Pvt Ltd v ACIT – TS-925-ITAT-2016-(Bang)-TP

1669. Where, for the purpose of computing the margin of its software development service segment, the assessee had allocated a sum of Rs. 7.92 crore as administrative & other expenses and the TPO considered the same to be Rs. 17.61 crore, the Tribunal upheld the assessee's allocation noting that the difference of approximately Rs.10 crore was not included for the purpose of computing the margin since the expenditure was incurred for a specific purpose and not attributable to the software development services. Accordingly, it remitted the issue to the file of the TPO for re-computation with

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a direction that if the margin of 31.69% as computed by the assessee was found to be correct, no TP adjustment would survive.
Altair Engineering India Pvt. Ltd. Vs DCIT - TS-206-ITAT-2017(Bang)-TP - LT. (T.P}A. No.279/Bang/2015 dated 22.02.2017.

1670. The Tribunal upheld CIT(A) order deleting TP adjustment made by TPO on the basis of reallocation of direct and indirect costs to assessee's three segments (marketing support services, trading functions and AMC of local sales) in proportion to segment turnover. It held that allocation could be made only in respect of indirect costs and therefore the action of TPO in allocating direct as well as indirect costs in ratio of turnover of each segment was not proper and justified.
3D Networks PTE Ltd vs ACIT [TS-372-ITAT-2017(Bang)-TP IT(TP)A No. 544/Bang/2011 dated 18.05.2017

1671. The Tribunal remitted issue of determination of functional profile of assessee (engaged in the business of integration of hardware and software in the simulation and services) back to TPO . It noted that the assessee contended that its functions were divided into various departments such as marketing department, technical department, quality department, pricing department and finance, human resource and administration and therefore considered itself to be in the field of project management while TPO considered assessee to be engaged in software development services since the assessee undertook independent verification and validation of software including design, coding and testing in various programming languages. As both assessee & Revenue agreed that these aspects in assessee's TP study were not examined by TPO/DRP while adjudicating the main issue with regard to functional profile of the assessee, the Tribunal opined the matter ought to go back to the TPO to first re-examine the issue with regard to functional profile of the assessee and thereafter adopt the comparables of same profile.
CAE India Pvt. Ltd vs. ITO - TS-1096-ITAT-2017(Bang)-TP – IT(TP) A No 762 / Bang / 2017 dated 22.12.2017

1672. The Tribunal held that where a number of individual transactions could not be considered as closely linked, they could not be aggregated and had to be benchmarked on a transaction to transaction basis.
ACIT v Tamil Nadu Petroproducts Ltd - (2016) 46 CCH 0068 (Chen)

1673. The Tribunal relying on the coordinate bench decision in assessee's own case for earlier year rejected Revenue's approach of applying TNMM at entity level and TPO's rejection of segmental results on the basis that transaction with non-AE were miniscule. The earlier year's order had relied on the Special Bench decision in LG Electronics wherein it was held that computation of ALP at entity level was inappropriate when Section 92C unequivocally provides that the ALP in relation to 'an' international transaction shall be determined by any of the prescribed methods and Rule 10B(1)(e) also talks of the net profit margin realized by the enterprise from 'an' international transaction. The earlier year's order with regard to the second issue on rejection of segment results had examined decisions and taken a view that segmental results need not be audited and the TPO erred in disregarding the results citing transaction with non-AE were miniscule. It had remitted the matter back to decide afresh after

considering segmental result of the taxpayer for TP analysis and held that TP adjustment at entity level was not sustainable. Accordingly, for the year under appeal, it directed TPO to decide issue afresh after considering decision of coordinate bench in earlier year.

CSR Technology (India) Pvt Ltd vs ACIT [TS-1138-ITAT-2018(DEL)-TP] ITA No.6805/Del/2015 dated 22.10.2018

1674. The Tribunal held that for the purposes of computing the operating profit of the distribution segment and the agency service segment, the indirect expenses common to both functions were to be allocated on the basis of gross margin of distribution and commission income and not on the basis of sales as allocation on the basis of sales would amount to providing equal weightage in terms of functions performed, assets utilized and risk assumed to both functions whereas the agency service function involved lesser functions and utilization of assets and risks.

Corning SA, India Branch Office v DDIT (ITA No.1129/Del./2014) – TS-547-ITAT-2015 (Del) – TP

1675. The Tribunal, relying on the earlier year's order in the case of the assessee held that the provision of agency services could not be aggregated with the distribution segment as the transactions were not closely linked.

Further, it held that the common expenses of the assessee were to be apportioned to the agency segment on the basis of the gross profit ratio and not in the ratio of sales.

Corning SAS India Branch Office v DDIT (I.T.A .No.-3236/Del/2014) – TS-592-ITAT-2015 (Del) – TP

1676. The Tribunal held that since the services received by the assessee were part of a composite, intrinsic agreement it was incorrect to split the same and hold some services to be at arm's length price. It held that the principle of aggregation seeks to combine all closely linked transactions wherein ALP can be determined for a number of transactions taken together. It observed that there was a direct nexus between the revenue earned and the majority intra-group services received and therefore it would be incorrect to analyze the intra-group service as a single element of cost in isolation.

Avery Dennison (India) Pvt Ltd v ACIT (I.T.A .No. 4869/Del/2014) – TS-619-ITAT-2015 (Del) – TP

1677. The assessee was engaged in providing contract manufacturing services including audit and inspection of the contract manufacturing carried out by third parties for assessee's AE and the said services were benchmarked separately under TNMM for which the assessee made a voluntary upward adjustment of Rs. 10 lakhs. The TPO held that the subject services were similar to the services of 'Business development & Procurement' and 'Support Services' (which were also provided by the assessee to its AEs). Consequently, he aggregated all the services and proceeded to benchmark it under TNMM. The Tribunal held that the TPO was incorrect in ignoring the Rs. 10 lakh voluntary adjustment made by the assessee as income of the assessee. Accordingly, it remitted the issue to the file of the TPO directing him to consider Rs. 29 lakh (Rs.19 lakh considered by the TPO + Rs. 10 lakh offered by the assessee) as the income of the assessee for the purpose of benchmarking the transactions.

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Tevapharm India Pvt. Ltd vs Addl CIT – TS-151-ITAT-2017 (Del) – TP ITA No.6707/Del/2016 dated 06.03.2017

1678. The Tribunal rejected the assessee's apportionment of un-allocable costs among assessee's 3 segments (viz. marketing support services, trading segment and domestic segment which included both services and trading) in the ratio of headcounts and held that that such an allocation without considering staff positions, etc would give distorted results as a well-qualified technician could not be compared to a helper or assistant. It also disagreed with the TPO's allocation based on gross revenue noting that 'trading segment' would have higher revenue than
'service segment' as it would also include cost of goods sold. Accordingly, it held that allocation based on gross profit margin would be more logical and realistic method. However, in the absence of details of un-allocable costs, it remitted the matter to AO/TPO with a direction to examine the same and exclude costs which were directly identifiable to specific segment from the un-allocable costs.
Fujitsu India Ltd v DCIT – TS-56-ITAT-2017 (Del)– TP - ITA No.6280/Del/2012 dated 02.02.2017

1679. The Tribunal restored TP-issue for assessee engaged in the manufacture of spark plugs and marketing and distribution of products for AY 2005-06 to the file of AO/TPO for fresh consideration. The TPO while reviewing the valuation done by assessee found that the assessee had earned commission income of Rs. 1.65 crores while none of the comparables had earned commission income. The Ld. TPO also observed that the goods sold to the Associated Enterprise and non-AE were not similar and hence the comparison made by the assessee company was not acceptable. Noting that the TPO had refused to include commission income while working out PLI of assessee on the ground that none of the comparables earned commission income, it held that the TPO's approach of out rightly rejecting the comparable was not tenable. The assessee had adopted TNMM with operating revenue computed in relation to total cost as a PLI for import of raw material, components and tools, provision of marketing support services and professional services. Noting the assessee's contention that marketing and professional services were intrinsic to assessee's business model and therefore could not be considered as separate business segment, it held that combined transactions approach could be followed under Rule 10A(d) r.w.r. 10B, but the onus to demonstrate with evidence that such an approach was justifiable was on the assessee and it had failed to justify as to why the rendering of marketing services and professional services should be classified as closely linked transactions. The Tribunal questioned TPO's approach of outright rejecting aggregation of transactions without giving any justification and accordingly directed the AO/TPO to re-determine the ALP of each transaction after considering whether such transactions should be combined for the purpose of benchmarking after taking into account the material submitted by assessee.
ITO vs Federal Mogul Automotive Product (India) Pvt Ltd-TS-499-ITAT-2017(DEL)-TP-ITA No. 599/del/2012 dated 12.05.2017

1680. Where the assessee was awarded an Engineering, Procurement and Construction contract from its AE containing 4 parts viz. 1.onshore services 2. Onshore supply of equipment / spares 3. Offshore services and 4.offshore supply of equipment, the Tribunal held that

the TPO was justified in aggregating all the transactions for the purpose of benchmarking the transaction under TNMM as against the benchmarking approach adopted by the assessee i.e. separate benchmarking of equipment supply and services. Observing that the contract was composite in nature as the assessee was required to deliver the complete facility to its AE and revenue of both supply and services were recognized under the percentage of contract executed method, it held that aggregate benchmarking was justified. However, the Tribunal rejected the TPO's characterization of the assessee as an engineering service provider as more than 60 percent of revenue was from supply of equipment. Accordingly, it remitted the matter to the TPO for fresh adjudication directing him to consider the assessee as an EPC contractor engaged in providing turnkey solutions.

RTA Alesa AG vs DCIT (International Taxation)-TS-675-ITAT-2017(DEL)-TP-ITA No. 1659/del/2017 dated 31.08.2017

1681. The Tribunal upheld the CIT(A)'s order deleting TP adjustment on the advertisement segment (benchmarked individually) and held that the aggregation of 'advertisement sale' and 'channel distribution' segments for benchmarking was justified as the advertisement revenue was directly co-related to channel viewership and sale of advertisement airtime increased with number of cricketing events and therefore the two segments were closely linked. It rejected Revenue's argument that the assessee had merged two segments with a view to conceal loss incurred in the 'advertisement sale' segment for the instant year and upheld the assessee's contention that, in the earlier years, it was only acting as a commission agent, thereby soliciting advertisements for its AE for fixed commission, whereas in the instant and subsequent years, it had shifted to a distribution model pursuant to relaxation of foreign exchange regulations. Accordingly, it held that both the activities viz. distribution of channels and aired advertisement were interrelated and inextricably connected and therefore were to be aggregated and since the operating margin of the aggregate transactions exceeded the margin of comparables, it held no addition was warranted.

ACIT v ESPN Software India Ltd – TS-128-ITAT-2017 (Del) – TP - ITA No. 2059/Del/2012 ITA No. 3457/Del/2013 dated 08.12.2017

1682. The Tribunal upheld TPO's aggregation of ITES and software development services (SDS) for benchmarking under TNMM absent assessee's substantiation for bifurcation of the segments as the assessee failed to indicate number of employees actually rendering SDS and ITES and provide evidence such as worksheets/reports of work done for substantiating revenue bifurcation between 2 segments. Further, there was no separate mention of service fee for ITES or SDS in the invoices issued as well as relevant bifurcation in annual accounts and accordingly rejected assessee's contention that since SDS & ITES were benchmarked separately in the past, no deviation should be allowed in subject year. However, it rejected TPO's approach of benchmarking the transactions by only selecting comparables relating to ITES segment and accordingly remitted the ALP-determination for considering comparables which are rendering both SDS and ITES.

Orange Business Services India Solutions Pvt. Ltd vs. DCIT - TS-88-ITAT-2018(DEL)-TP - ITA No.6570/Del/2016 dated 15.02.2018

1683. The assessee-company sold liquor under two segments viz. (i) 'Bottled in India Scotch' ("BIIS") segment – under which, it processed compound alcholic preparation imported from its

AE into scotch/whiskey and then sold it in India and (ii) India Made Foreign Liquor ("IMFL") segment (pertaining to domestic business) – under which it sold the liquor manufactured from raw materials by it in India. The TPO clubbed BIIS and IMFL segment for benchmarking of the import transaction from its AE and made a TP adjustment by considering companies mainly into manufacturing of IMFL as comparable under TNMM. The Tribunal held that segmental approach adopted by assessee by segregating BIIS and IMFL business for purpose of computing ALP was justified. It held that only because the assessee, in its financials, had not shown the aforesaid two segments separately for purpose of reporting as per AS-17 (segmental reporting), it could not be concluded that transactions / segments were interlinked or connected. It followed the coordinate bench ruling in assessee's own case for an earlier year wherein assessee's segregation approach was upheld noting that IMFL and BIIS segment were distinct because of functional and product differences. The Tribunal also held that the TPO had not carried out comparability analysis properly and, accordingly, set aside the issue to TPO to determine comparables which were exclusively in manufacturing/processing of BIIS product only (as comparable companies selected by TPO were mainly into manufacturing of IMFL).

Beam Global Spirits and Wines (P) Ltd vs Dy.CIT [2018] 99 taxmann.com 128 (Delhi - Trib.) IT APPEAL NO. 3530 (DELHI) OF 2010 dated 12.09.2018

1684. The Tribunal dismissed Revenue's appeal and upheld assessee's segregation approach for benchmarking the purchase of Compound Alcoholic Preparation (CAP) from its AE. The assessee, under Bottled in India Scotch ("BIIS") segment, processed CAP, imported from its AE, into scotch/whiskey and sold it in India while in India Made Foreign Liquor ("IMFL") segment [pertaining to domestic business], IMFL was manufactured from a purified form of spirit/alcohol called the Extra Neutral Alcohol which was manufactured by the assessee in India. The assessee benchmarked the import from its AE by segregating the BIIS segment from its IMFL segment. The TPO clubbed assessee's BIIS and IMFL segments and compared the net profit margin (NPM) of the combined manufacturingoperations of the assessee with those of broadly comparable companies. Observing that the manufacturing of ultimate product, market conditions, price and functions of both segments were completely different and distinct, the Tribunal opined that both the segments of the assessee are totally different and independent after noting that TPO / AO did not scrutinize the differences in both segments. It rejected the Revenue's reference to AS-17 stating it was not applicable for undertaking TP-adjustment and observes that assessee had adopted same accounting method on year-to-year basis and filed segmental accounting on both the segments before the authorities below which was undisputed; Thus, it held that the economic analysis undertaken by the assessee in respect of international transaction pertaining to the purchase of CAP following segmental approach by segregating manufacturing operations into BIIS and IMFL business verticals was in accordance with the relevant Transfer Pricing Regulations.

DCIT vs. Allied Domecq Spirits & Wine India Pvt. Ltd - TS-147-ITAT-2018(DEL)-TP - ITA.No.54/Del./2011 dated 09.03.2018

1685. The Tribunal, accepting assessee's submission that since few of the expenses such as depreciation, wages, consumable, power and fuel etc. were directly allocable to manufacturing sector, they could not to be allocated to assessee's trading activity for computation of OP/OC arising therefrom, directed the AO to exclude expenses

directly relating to manufacturing segment while allocating expenses to manufacturing and trading segment in the ratio of turnover.
Silver Oak Laboratories Pvt Ltd vs ACIT-TS-688-ITAT-2017-ITA no. 6197/del/2012 dated 28.08.2017

1686. The Tribunal held that where assessee had undertaken transactions with both AE's and non-AE's and it had not only maintained segmental details of such transactions, but also undertaken comparative analysis in its TP study, internal TNMM had to be adopted as most appropriate method for determining ALP. Accordingly, the matter was remanded.
NTT Data Global Delivery Services Ltd. v.Dy. CIT[2015] 63 taxmann.com 92 (Hyd.-Trib.)

1687. The Tribunal deleted the TP adjustment made vis-à-vis the manufacturing and trading segment of the assessee (engaged in manufacturing and distributing electric meters). It upheld the assesee's approach of benchmarking each transaction separately based on separate certified segments viz. domestic manufacturing, export manufacturing and trading as opposed to the TPOs approach of benchmarking the same on an aggregate basis. It held that the bundled / aggregate approach was only permissible when the transactions could not be benchmarked independently and considering the fact that the assessee's international transactions constituted only 5.75 percent of total transactions if held that comparison based on aggregation of both domestic and international transactions would lead to absurdity. Accordingly, it deleted the addition made by the TPO.
DCIT vs Landis + Gyr Ltd-TS-711-ITAT-2017(Kol)-TP dated I.T.A No. 584/Kol/2015 , I.T.A No. 687/Kol/2015 , I.T.A No. 549/Kol/2016 13.09.2017

1688. The Tribunal dismissing Revenue's appeal, upheld assessee's aggregation of IT and ITeS services provided to Associated Enterprises (AEs) under a single composite contract for AY 2010-11. Referring to OECD's TP guidelines, UN TP Manual and UK Transfer Pricing Guidelines wherein due recognition has been given to contractual terms of the agreement for undertaking TP-analysis & provides for aggregate analysis of transactions encapsulated under a single portfolio held that since the terms of the composite agreement entered into with its AE for totality of services on the basis of 'bundled pricing approach' had been consistently followed by the assessee, its action of entering into composite agreement with its AE for rendering bundled services of IT and ITES could not be doubted and the benchmarking could only be done with the total services (i.e IT and ITES) rendered by the assessee. Further, the Tribunal held that TPO's reliance on AS-17 Segment Reporting for comparison of the margins of AE and Non-AE transactions was highly unwarranted since purpose of the Segmental Reporting was totally different and could not be used to bifurcate between AE and Non-AE transactions. Accordingly, it deleted TP-adjustment noting that assessee's 27.50% margin was above 20% margin specified in Safe Harbour Rules.
Data Core (India) Pvt. Ltd vs. ITO-TS-962-ITAT-2017(KOL)-TP I.T.A No. 387/Kol/2015 dated 06.12.2017

1689. The Tribunal upheld the CIT(A) order deleting TP-adjustment (made in the manufacturing segment of the assessee) on royalty paid by assessee to AE. It held that the TPO was unjustified in rejecting assessee's segmental profitability working (wherein royalty was allocated to the manufacturing as well as trading segments) and in allocating the entire royalty

to the manufacturing segment considering that the royalty agreement provided that the assessee had to pay royalty on goods manufactured as well as traded. Further, the TPO had also included the entire depreciation in the financials towards the manufacturing segment of the assessee which was rightly corrected by the CIT(A) who noted that the amortization of goodwill and other intangibles on acquisition of unit from Hindustan Lever Ltd was to be treated as extra-ordinary item and that the balance depreciation had to be allocated to all segments. It also noted that as even if the TPO's faulty re-casted segments were considered, the margin of the assessee was still higher than the margin of the 5 comparable companies and accordingly, it held that there was no fault in the order of the CIT(A).

ACIT v Diversity India P Ltd (Formerly known as Johnson Diversity India P Ltd) - TS-85-ITAT-2018(Mum)-TP - I.T.A./305/Mum/2012 dated 03/01/2018

1690. The Tribunal remitted assessee's international transaction of provision of BPO services back to the AO/TPO for verification after considering segmental results. The Tribunal noted that TPO had rejected the segmental results for want of adequate details and justification for allocation of common expenditure and thereafter accepted assessee's plea that segmental results were available on record and allocation of common expenditure details were also submitted. Thus, the Tribunal remitted the file back for re-adjudication.

Your Lifestyle Pvt Ltd vs DCIT 14(3)(1)- TS-288-ITAT-2018(Mum)-TP- ITA No 314/Mum/2016 dated 13.04.2018

1691. The Tribunal held that for the purpose of benchmarking selling prices of exports made by the assessee to its AEs using the CUP method, the assessee could use the portfolio approach of the products rather than considering single products since all the products fell in the category of insecticides and were supplementary to each other.

Godrej Sara Lee Ltd v ACIT (ITA No. 1251/MUM/2014) – TS-565-ITAT-2015 (Mum) – TP

1692. Noting that engineering segment reported by assessee in its financial statement comprised of a) manufacturing and sale of goods, and b) engineering services and international transaction with AE pertained only to engineering services, however, data considered by TPO comprised of both engineering goods and services, the Tribunal remitted the TP-adjustment in respect of assessee's engineering segment to the file of TPO directing it to take only segmental data for comparability analysis & benchmarking. Observing that assessee had now submitted segmental data of engineering goods and services, the Tribunal accepted assessee's plea that when the segmental data is available, the same should be taken into account. It rejected DRP's observation that assessee had not demonstrated as to how both the divisions are not enter- twined and held that by no stretch of imagination, the manufacture and sale of engineering goods on one hand and provision of engineering services on the other can be considered as the same segment unless specific facts to the contrary is put on record. Accordingly, it remitted the matter to the file of TPO for fresh adjudication.

Valmet Automation India Private Limited (Formerly known as Metso Automation India Private Limited) vs. DCIT-TS-812-ITAT-2017(Mum)TP, ITA. No.562/Mum/2017, dated 06.10.2017

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1693. The Tribunal upheld assessee's contention that while determining ALP of software development services rendered to AE, the segmental result of AE-transactions was to be compared and not entity -level results. It noted that the assessee (engaged in telecom software development for domestic and European market) was incorporated to provide services to third parties, however, due to surplus workforce and other resources availability, it started rendering services to AE and revenue from AE was 43% of total revenue. Further, it observed that for the purpose of arriving at the segmental profits, it observed that assessee had applied scientific method of allocating expenses based on man-hours spent and the same method was applied in APA signed by assessee in other years. It accepted assessee's contention that if segmental profitability was compared, assessee's PLI would be within 5% range of comparables' margin and accordingly held that no TP-adjustment would be required.
Tieto IT Services India Pvt Ltd vs. DCIT - TS-155-ITAT-2018(PUN)-TP - ITA No.242/PUN/2015 dated : 07.03.2018

1694. Where the assessee had benchmarked its transactions in its manufacturing segment based on a transaction by transaction approach but the TPO proceeded to aggregate the transactions and made addition on the ground that the segmental results of the assessee had not been statutorily audited, the Tribunal relying on the decision of the co-ordinate bench in the assessee's own case for the prior year held that the law did not mandate that the segments be audited and remitted the matter back to the file of the TPO for fresh adjudication.
Fresenius Kabi India Private Limited vs. DCIT-TS-819-ITAT-2017(PUN)-TP dated 22.09.2017

1695. Where the assessee applied the generally accepted Costing Principles to allocate expenses between its various segments but the TPO rejected the assessee's approach, without giving any basis or reason and proceeded to re-allocate the subject expenses on the basis of sales ratio and thus, re-worked the cost used for determination of operating margins, the Tribunal noting that certain expenses i.e. depreciation, rent, rates, repairs & maintenance, taxes and other expenses had not been allocated at all to the export division by the assessee for the reason that they were already included in cost of goods sold and non-allocation if any, did not affect cost, held that the there was no merit in re-allocation of administrative expenses and selling & distribution expenses by TPO.
Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

1696. The Tribunal accepted the assessee's approach of benchmarking its international transactions (viz. developing and selling packaging material, importing and reselling straws and manufacturing processing equipment) on an aggregate basis as opposed to the TPO's approach of benchmarking the transactions separately. Observing that the assessee sold straws along with packaging material at a reduced price so to as reduce its total cost of packaging in order to create demand for consumables manufactured by it, relying on the OECD Transfer Pricing guidelines, it held that since the business strategy of the assessee was an accepted manner of conducting business, the same should not be segregated. Accordingly, it dismissed the appeal of the Revenue.
Tetra Pak India Pvt Ltd – TS-762-ITAT-2017 (Pun) – TP- ITA No.359/PUN/2014 20.09.2017

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1697. Following the coordinate bench decision in assessee's own case for earlier year, the Tribunal held that for assessee engaged in sale of IC Engines, spares, components, manufacturing and procurement activities should be aggregated under TNMM since they are inextricably linked together and the TPO erred in segregating the transactions. Further, it also held that margins of assessee were to be compared with average margins of external comparable companies in view of Tribunal's order in the assessee's own case for earlier year wherein it was held that while applying TNMM on aggregate basis, since various transactions were interlinked, comparison had to be made with uncontrolled transactions.
Cummins India Limited vs Dy.CIT [TS-1099-ITAT-2018(PUN)-TP] ITA No.556/Pun/2015 dated 25.09.2018

1698. The Tribunal held that AO erred in holding that there was no logic in bifurcating trading and manufacturing activity and considering the operations of assessee in entirety following the coordinate bench in assessee's own case for earlier year wherein it had accepted that assessee was engaged in export of finished goods apart from trading of components. It remitted the matter back to AO/TPO to benchmark two activities separately and apply TNMM, accordingly, determine ALP under umbrella of manufacturing and trading activities.
Dy. CIT vs Stauff India Pvt Ltd. [TS-1362-ITAT-2018(PUN)-TP] ITA No.1579/PUN/2014 dated 18.12.2018

1699. The Tribunal reversed CIT(A) order directing aggregated approach for benchmarking of off shore software consultancy service during AY 2005-06, relying on its order in the assessee's case for AY 2004-05 directing AO to independently benchmark the two transactions.
SAS Research & Development India Pvt Ltd - TS-1069-ITAT-2016(Pun)-TP

1700. The Tribunal held that where the assessee's primary activity was to manufacture and sell IC engines and components, then the activities of importing engine parts and components, payment of royalty against receipt of know-how, provision of procurement support services to the AEs to help the sourcing of components, receipt of IT support services, design services and payment of technical knowhow fees, etc. were closely linked to the export of manufactured IC engines. Further, the Tribunal, relying on the decision in assessee's own case for AY 2007-08 [TS-165- ITAT-2017(PUN)-TP] and Rule 10A(d) and 10B of the Rules as well as OECD Guidelines, held that, in appropriate circumstances, where there was existence of closely linked transactions, the same could be grouped and considered as one composite transaction for the purpose of determining ALP. Accordingly, it directed TPO to aggregate the various activities undertaken by assessee under the head of 'manufacturing activities' for the purpose of benchmarking.
Cummins India Limited vs ACIT-TS-933-ITAT-2017(PUN)-TP ITA No.2417/PUN/2012 dated 30.10.2017

Working Capital Adjustments

1701. The Tribunal deleted the negative working capital adjustment made by TPO relying on coordinate bench decision in NTT Data Enterprise Application Services (P) Ltd wherein it was held that where assessee did not pay interest on working capital loans and did not bear any

working capital risk, revenue authorities were not justified in making negative working capital adjustment in course of transfer pricing proceedings

Zyme Solutions Pvt Ltd vs Asst CIT [TS-1272-ITAT-2018(Bang)-TP] (IT(TP)A No.1661/Bang/2016) dated 16.11.2018

1702. The Tribunal rejected the appeal of the Revenue wherein the Revenue contended that in the absence of debtors and inventory, the question of considering the advances received by the assessee from its AE as a part of trade payables did not arise. The Tribunal held that advance received from the AE partakes the character of trade payables which is to be adjusted against the future invoice as a result of which the necessity of borrowings from outside is reduced to that extent thereby reducing the cost of borrowings. It accepted the contention of the assessee that the presence of debtors / inventory were irrelevant for considering trade payables while working out the working capital adjustment.

CGI Information System & Management Consultant Pvt Ltd – TS-1016-ITAT-2016 (Bang) – TP

1703. The Tribunal held that working capital adjustment has to be allowed based on the working capial requirements of the assessee and the comparable companies irrespective of the fact that the adjustment is negative or positive.

DCIT v Software AG Bangalore Technologies Pvt Ltd [IT(TP)A No 1343 / Bang / 2014] – TS-472-ITAT-2015 (Bang)- TP

1704. The Tribunal, relying on the decision in the case of CGI Information System & Management Consultant (wherein it was held that advances received from AEs would reduce the need for borrowings from outsider and would have direct impact on profitability of business, thus should be considered for working capital adjustment calculation), held that advance received from AE should be considered for the purpose of computation of working capital adjustment and accordingly allowed assessee's appeal.

Intellectual Venture India Consulting Pvt. Ltd-TS-884-ITAT-2017(Bang)-TP dated 20.10.2017

1705. The Tribunal relying on the decision of ARM Embedded Technologies Private Limited [TS-466- ITAT-2015(Bang)-TP] wherein it was held that there was no rationality in fixing cap on the actual working capital adjustment, dismissed Revenue's ground challenging DRP direction to carry out working capital adjustment in respect of software development services as per actual figures without putting any cap on the same. Further, it allowed assessee's plea for inclusion of Think Sodt Global Services Limited which was originally selected by the TPO, but subsequently **excluded** as working capital adjustment exceeded 4% of profits.

Genisys Information Systems India Pvt Ltd -TS-267-2017(Bang)-TP- IT(TP) ANo.59/bang/2014 dated 16.05.2017

1706. The Tribunal upheld DRP's order lifting working capital cap imposed by TPO for AY 2009-10.

Observing that the TPO had restricted working capital adjustment to 0.91% which was nothing but the average cost of capital of comparable companies selected by him without considering the capital figures for assessee. The Tribunal held that the TPO could not force

the assessee to fund its working capital requirements in a specific way as the same was not in his domain. Accordingly, it held that the DRP was correct in lifting the working capital cap imposed.

DCIT vs. Synchrony International Services Pvt. Ltd (Formerly known as GE Global Servicing Pvt. Ltd)-TS-622-ITAT-2017(BANG)-TP dated 14.07.2017

1707. The Tribunal upheld the order of the DRP and directed the TPO to allow working capital adjustment based on the actual figures of the comparables without restricting it to 1.71 percent being the average cost of capital of comparables selected.

DCIT v Brocade Communications Systems Pvt Ltd – TS-1031-ITAT-2016 (Bang) – TP - IT. (T.P) A. No.71/Bang/2014 dated 9.11.2016

1708. Where the TPO restricted working capital adjustment to 1.71% (based on the average cost of capital of comparables), instead of considering the actual figures in respect of each and every comparable companies, the Tribunal, relying on the decision in ARM Embedded Technologies Pvt. Ltd. [TS-466-ITAT-2015(Bang)-TP], observed that there was no provision under FAR analysis to restrict the working capital adjustment arbitrarily. Accordingly, it directed the AO/TPO to re-compute working capital adjustment on actual basis without any upper limit.

VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P}A. No.1311/Bang/2014 dated 6.1.2017

DCIT vs. AMD India Pvt. Ltd - TS-250-ITAT-2017(Bang)-TP - IT(TP)A No.92/Bang/2014 dated 08.03.2017

1709. The Tribunal dismissed 3 appeals filed by Revenue for AYs 2007-08, 2008-09 and 2009-10 with respect to grant of working capital adjustment and treatment of forex gains/loss. The Revenue had alleged that the CIT (A) had wrongly issued direction to the TPO to grant working capital adjustment as per the prevailing norms and as per the provisions of Section 251(1)(a) of the Act, the CIT(A) had no power to issue the direction. Rejecting Revenue's contention that CIT(A)'s direction to TPO for granting working capital was beyond jurisdiction held that CIT(A) had not directed the TPO in the way portrayed by Revenue authorities, and held that the direction was only to calculate and grant the working capital adjustment based on final set of comparables. Relying on the decision in the case of SAP Labs India P Ltd, Tribunal noted that TPO neither disputed the quantum of the foreign exchange gain/loss nor had given any finding that such gain / loss was not arising out of assessee's activities and therefore upheld CIT(A) order treating the forex gain / loss as operating in nature.

Sanyo BPL P. Ltd vs. DCIT-TS-537-ITAT-2017(Bang)-TP- I.T(TP)A Nos.1578 to 1580/Bang/2014 dated 09.06.2017

1710. Where the TPO computed working capital adjustment at 5% for software development services and 4.64% for ITeS based on actuals but restricted the adjustment to 1.71% for software development services and 0.91% for ITeS on the basis of the average cost of capital of the comparables, the Tribunal, relying on the decision of ARM Embedded Technologies Pvt. Ltd. [TS-466-ITAT-2015 (Bang)-TP], held that working capital adjustment was to be made on actual basis.

EMC Software and Services India P Ltd [TS-1077-ITAT-2016(Bang)-TP - I. T(TP).A No.324/Bang/20 14, I.T(TP).A No.319/Bang/2014 dated 09.12.2016

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1711. The Tribunal remitted the TP issues arising in both Revenue's and Assessee's appeals back to the file of DRP for fresh adjudication. Allowing the Revenue's appeal it refused to accept the DRP's 1% risk adjustment to the average margin by arbitrarily relying on Intelligent and Hello Soft rulings to account for the risk differential between assessee and comparable companies. It observed that the risk adjustment working was not provided by the assessee and that the DRP's order was also cryptic in respect of assessee's facts and facts of the aforementioned rulings. Further, upon reviewing the grounds of appeal pressed by Assessee, it noted that the AO had not carried out the necessary corrections to arithmetic miscalculations as directed by DRP and that on the remaining issues relating to comparability, computation of margins & working capital adjustment, DRP's directions were cryptic. Hence, it restored the entire matter to the file of the DRP for fresh adjudication by way of a speaking and reasoned order.

ACIT vs Momentive Performance Materials (India) Pvt Ltd-TS-24-ITAT-2018(bang)-TP dated 08.12.2017

1712. The filed a Miscellaneous petition for rectification of the Tribunal's mistake in not adjudicating the ground raised by the assessee against the TPO's action of unreasonably restricting the working capital adjustment to 1.63%, whereas the TPO had himself worked out the same at 2.72% (before such unreasonable restriction). The Tribunal allowed the assessee's petition and directed the TPO to allow adjustment of 2.72%, following the decision in the case of Zyme Solutions Pvt. Ltd. v ITO [M.P. No.36/Bang/16 in TP(TP) No.465/Bang/2015] wherein the TPO had similarly restricted the said adjustment on identical reasoning and the Tribunal had directed the TPO to compute adjustment based on actual figures from the final list of comparables without such restriction.

Obopay Mobile Technology India Pvt. Ltd v DCIT [TS-525-ITAT-2018(Bang)] IT(TP)A No.238/Bang/2016 dated 04.06.2018

1713. The Tribunal dismissed the assessee's appeal against the TPO/ AO's computation of negative working capital adjustment on the margins of the comparable companies (thus increasing the said margins), where the asessee claimed that it did not bear any working capital risk as it did not have any borrowings and thus no working capital expenditure was incurred. The Tribunal held that the working capital risk and whether there is interest burden or not are not relevant factors for deciding working capital adjustment since the said adjustment is done because working capital position affects the pricing of any service or goods in the open market. In the present case, the TPO had given a finding that working capital position affected the pricing. The Tribunal also refused to follow binding decision relied upon by the assessee for deletion of working capital adjustment wherein adjustment was made for the time value of money lost when credit time is provided to the customers. According to the Tribunal, the aforesaid stand of the assessee had no basis since in TP analysis comparison is made of profit before interest and therefore the interest cost has no relevance. It also held that in those decisions, the aspect that working capital position affects the pricing of any goods and services was not dealt with.

Tecnotree Convergence Pvt Ltd vs DCIT [TS-925-ITAT-2018(Bang)-TP] IT (TP) A No.1616/Bang/2017 dated 27.06.2018

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1714. The Tribunal directed the working capital adjustment to be allowed at 2.54% as against TPO's restriction of such adjustment to 1.63%, following the co-ordinate bench decision in Zyme Solutions wherein the TPO had similarly unreasonably restricted the said adjustment and the Tribunal had directed the TPO to compute adjustment based on actual figures from the final list of comparables without such restriction.
MetricStream Infotech (India) Pvt Ltd vs ACIT[TS-749-ITAT-2018(Bang)-TP] IT(TP)A No.493/Bang/2016 dated 20.07.2018

1715. The Tribunal restored the issue of working capital adjustment for fresh decision after providing reasonable opportunity to assessee of being heard noting that assessee had not submitted information pertaining to trade creditors, trade debtors, unbilled revenue and advance from customers before it or the lower authorities and thus, it could not decide on the allowability of working capital adjustment. It restored it back in the interest of justice.
NI Systems India Pvt. Ltd vs DCIT. [TS-1270-ITAT -2018 (Bang)-TP] IT(TP)A No.1355/Bang/2011 dated 07.11.2018

1716. The Tribunal directed the TPO to grant assessee the working capital adjustment on actual basis if the assessee had given the detailed working to the lower authorities. However, if no such working was given by the assessee to the lower authorities then the assessee would not be entitled to such claim. The TPO had worked out working capital adjustment on hypothetical figure of 1.63% instead of on actual basis.
Salesforce.com India P. Ltd vs DCIT [TS-1325-ITAT-2018-(Bang)-TP] IT(TP)A No.697/Bang/2016 dated 21.12.2018

1717. The Tribunal directed the TPO/AO to consider the claim of assessee and allow adjustment to profit margins towards working capital adjustment and distinguished the decisions relied on by CIT(A) noting that in all those cases, the data was not available however in the instant case, the assessee had submitted workings. The CIT(A) had rejected the claim of the assessee for the reason the assessee had to demonstrate the impact on profit margins by reason of a particular level of working capital requirement in the case of the assessee and that of comparable companies by relying on the coordinate bench rulings in Mobis India and SAM Deutz Fahr India Pvt Ltd. It was assessee's plea that there was significant difference in working capital between the assessee and comparable companies and relied on the coordinate bench decisions of Demag Crane and components (India) Pvt Ltd., Capgemini India Pvt Ltd. in support of its contention that working capital adjustment was warranted.
IKA India Pvt Ltd vs DCIT [TS-1049-ITAT-2018(Bang)-TP] IT(TP)A No.2192/Bang/2017 dated 17.09.2018

1718. The Tribunal upheld the TPO's negative working capital adjustment relying on the coordinate bench decision in Tecnotree Convergence Pvt Ltd. wherein it was held that working capital adjustment ought to be made on ground that it affects pricing of any goods or services and working capital adjustment made for time value of money lost on basis the credit time provided to the customers was incorrect because comparison is made of operating profit marhin (PBIT) and therefore interest cost had no relevance.
Coreone Technologies India P Ltd vs Dy.CIT [TS-1292-ITAT-2018(Bang)-TP] (IT(TP)A No.263/Bang/2014) dated 26.10.2018

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1719. The Tribunal held that CIT(A) (who used the power of enhancement to deny working capital adjustment) was not justified in denying adjustment on account of working capital adjustment relying on coordinate bench decision of Evalueserve.com wherein it was held that adjustment had to be based on opening and closing working capital deployed and insisting on daily balances of working capital adjustment requirements to compute adjustment was not proper and it was impossible to carry out such an exercise. Further, it also observed that there was no merit in objection of CIT(A) regarding absence of cost of working capital funds, when OECD guideline clearly advocate adopting rate(s) of interest applicable to a commercial enterprise operating in the same market as tested party. It noted that no defect had been pointed out by CIT(A) in the working submitted by assessee and if for reasons given by CIT(A), adjustment was not granted, transaction would not be comparable in terms of Rule 10B(3) (which allowed accurate adjustment to be made to eliminate material differences between transaction), and thus TP exercise would fail. It allowed working capital adjustment made by assessee observing that in keeping with OECD guidelines, comparison should be made of comparable companies on broad basis.
Huawei Technologies India P Ltd vs JCIT [TS-1318-ITAT-2018(Bang)-TP] (IT(TP)A 1939/Bang/2017)) dated 31.10.2018

1720. The Tribunal, pursuant to the assessee's miscellaneous petition against the original Tribunal order (wherein the issue of working capital adjustment was not adjudicated upon) accepted assessee's contention that the matter be sent back to AO to allow the working capital adjustment based on the actual numbers of the comparables.
Zyme Solutions Pvt. Ltd vs. ACIT - TS-156-ITAT-2018(Bang)-TP – IT(TP) A No 85 / Bang / 2016 dated 09.02.2018

1721. The Tribunal upheld the CIT(A) and the AO's order rejecting/denying the assessee's claim for working capital adjustment since the assessee had not furnished sufficient data for proving the said claim. It noted that the assessee had not taken the actual rate of interest paid on the loans by itself or the comparables but considered the prime lending rate @18.5% and there was no data pointing out whether the actual rate of interest paid was @18.5% or if there was any deviation. The Tribunal thus opined that the claim of working capital adjustment at 3.18% was based on mere estimate.
Infac India Pvt Limited (TS-387-ITAT-2018(CHNY)-TP) - I.T.A. No.3195/CHNY/2017 dated 03-05-2018

1722. The Tribunal remitted issue of working capital adjustment to the AO with the direction to examine facts with relevance to the decision in the case of Mobis India Ltd ITA No.2212/Mds/2011 wherein it held that adjustment had to be granted for eliminating material effects, if any, arising from out of difference in working capital between tested party and comparables. and allow suitable working capital adjustment to the assessee. It also directed the assessee to furnish the pricing models of AE as well as assessee to verify whether the working capital margin of interest was included in the sales price of the product. Further, noting that the assessee was not a start- up company as it was established in 2008, it rejected assessee's claim for unutilized capacity adjustment to the extent of 46.54% since

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adjustments relating to unutilized capacity were allowed in the case of startup companies to cover the initial deficiencies and financial implications.
Shipnet Software Solutions India Pvt Ltd vs DCIT-TS-427-ITAT-2017(CHNY)-TP-ITA No.3404/Mds/2016 dated 28.04.2017

1723. The Tribunal held that where the assessee enjoyed a longer credit period than the period printed in the invoice on its import transactions from its AE as a result of which the AE charged a higher price, it was appropriate to consider the extra credit period enjoyed by the assessee so as to determine ALP while benchmarking the interest paid by the assessee to its AE.
Salcomp Manufacturing India Pvt Ltd - TS-716-ITAT-2016(CHNY)-TP-I.T.A.No.2201/Mds./2012

1724. Where the DRP had given the AO a specific direction to verify the working capital position between the assessee and the comparables, and the AO did not consider working capital adjustment for advances from customers recoverable in cash or kind from 4 companies, viz. Sparsh BPO Service Ltd, Aditya Birla Minacs Worldwide Ltd, Professional Management Consultants Pvt Ltd and Sundaram Business Services Ltd., on the ground that break up was not available from the downloaded financials of the 4 companies, the Tribunal observing that the breakup of advance recoverable in cash or kind were part of the Audited accounts and annual report of these 4 companies, directed the AO/TPO to rework the working capital adjustment after considering the value of advance and deposits recoverable in cash or kind or for the value to be receivable from the 4 companies as well.
Visual Graphics Computing Services India Private Limited Vs ACIT - TS-129-ITAT-2017(CHNY)-TP - I.T.A. No.2340/Mds/2012 dated 10.02.2017

1725. The Tribunal directed the TPO to consider working capital adjustment relying on coordinate bench ruling in Zafin Softwares wherein it was held that without comparing the working capital employed by comparable companies and assessee, there could not be any TP adjustment. Thus, the TPO was directed to consider working capital adjustment while computing ALP of international transaction.
Sun Tec Business Solutions (P) Ltd vs Dy.CIT [TS-1206-ITAT-2018(Coch)-TP] ITA No.113/Coch/2016 and 509/Coch/2016 dated 12.09.2018

1726. The Tribunal restored the isse for computing working capital adjustment by considering provisions written back as operating without applying safe harbor rules. It relied on the coordinate bench decision of Rolls Royce India wherein it was held that rules were effective from 18.09.2013. It also observed that the TPO after directions by DRP had not granted working capital adjustment by not considering the written back amount as operating items.
The Tribunal also set aside the issue in respect of working capital adjustment in case of Telecommunication Consultants India Ltd.
BT (India) Pvt. Ltd. vs ACIT [TS-1010-ITAT-2018 (DEL)] ITA No.442/Del/2016 and ITA No.302/Del/2017 dated 19.07.2018

1727. The Tribunal held that the working capital adjustment should be provided while comparing the margins of the tested party with the comparables relying on the coordinate bench decision of

assessee's own case for earlier year wherein the DRP's order was upheld that working capital adjustment should be provided in view of the impact of trade receivables, payables and inventories on interest cost .

Viavi Solutions India P Ltd (Formerly known as JDSU India P.Ltd.) [TS-884-ITAT-2018(DEL)-TP] ITA No.1483/Del/2016, ITA No.1478/Del/2016 and ITA No.231/Del/2017 dated 11.07.2018

1728. The Tribunal confirmed CIT(A)'s order granting working capital adjustment to assessee based on OECD formula and by taking 10.25% as the Prime Lending Rate (PLR). It rejected Revenue's contention that assessee was ineligible for any adjustments, observing that under Rule 10(3) it is the duty of the AO/TPO/DRP to minimize/eliminate the difference which is likely to materially affect the price. It relied on the rulings in the case of Mentor Graphics, and Sony India to reiterate the settled proposition that working capital adjustment is an adjustment that is required to be made in TNMM, thus dismissing the Revenue's appeal.

DCIT vs Imsofer Manufacturing India Pvt Ltd [TS-970-ITAT-2018(DEL)-TP] ITA No.5155 and 5158/Del/2015 dated 14.08.2018

1729. The Tribunal dismissed Revenue's appeal and upheld the DRP's order directing TPO to grant working capital adjustment to assessee based on the calculation of working capital adjustment furnished by the assessee. Regarding the TPO's objection that assessee had not demonstrated that there was a difference in the levels of working capital employed by it vis-a-vis the comparables which affected price, the Tribunal upheld the finding of the DRP i.e. that holding of inventories, trade debtor/creditors, trade receivable/payable has always an interest cost and also accepted DRP's finding that the average of opening and closing balance of debtors/ creditors would give representative level of working capital over the year.

ITO v H&S Software Development & Knowledge Management Centre Pvt Ltd - TS-41-ITAT-2018(DEL)-TP - ITA No. 6662/Del/2014 dated 04.01.2018

1730. The Tribunal granted working capital adjustment to assessee engaged in IT enabled services to its AE, by holding that working capital difference could materially affect the amount of net profit margin in the open market and hence was allowable as adjustments

Stefanini India Pvt Ltd vs ITO Ward 3(4)- TS-338-ITAT-2018(DEL)-TP- ITA No 5479/Del/2016 dated 25.04.2018

1731. The Tribunal upheld the DRP's order directing the TPO to give working capital adjustment while working out the average margin of comparables noting that the direction of DRP was justified view of the impact of trade receivables, trade payables and inventory on interest cost.

Dy.CIT vs JDSU Indian (P.) Ltd. [2018] 93 taxmann.com 295(Delhi-Trib) ITA No.1120 of 2015 dated 02.04.2018

1732. The Tribunal remitted the issue of risk adjustment to AO/TPO for fresh consideration since in the subsequent year in AY 2011-12 in assessee's own case, the same was allowed by the Tribunal.

Rolls Royce India Pvt. Ltd vs. DCIT [TS-367-ITAT-2018(DEL)-TP] ITA No.1042/Del/2014 dated 02.05.2018

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1733. The Tribunal observed that the TPO / DRP was not justified in denying working capital adjustment to the assessee on the ground that the figures given by the assessee did not match with the financials and that working capital adjustments were to be granted only to manufacturers and not service providers and held that the TPO should have corrected the errors himself rather than denying the adjustment altogether. As regards working capital adjustments vis-à-vis service providers, it relied on the decision of Mercer Consulting (TS-170-ITAT-2014 (Del) – TP, wherein it was held that working capital could not be restricted to manufacturers or traders alone and that in case of a service provider working capital adjustments were warranted for higher / lower trade receivables or payables. Accordingly, it set aside the finding of the TPO / DRP and remitted the matter to the file of the TPO directing him to examine the assessee's claim for working capital adjustment.
Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) - TP

1734. Where the assessee claimed a working capital adjustment which was denied by the Revenue on the grounds that (a) inventory and accounts payables were absent in case of assessee and that (b) working capital was computed on the basis of daily or monthly averages and not on year end balances, the Tribunal relying on the rulings in the case of United Health Group Information Services (P) Ltd [TS-255-ITAT-2014(DEL)-TP] and Marubeni-Itochu Steel India[TS-56-ITAT-2016 (DEL)-TP], accepted the assessee's claim and held that the adjustment was to be granted in order to bring the assessee and the comparables at par. However, it noted that the assessee was to furnish complete details of working capital deployed to identify the differences in margins earned by assessee vis-a-vis comparables and accordingly remitted the issue to the file of TPO
for fresh consideration.
St-Ericsson India Private Limited vs Addl CIT – TS-119-ITAT-2017 (Del) – TP - ITA No.1672/Del./2014 dated 22.02.2017

1735. The Tribunal directed the AO to compute working capital adjustment only on the opening & closing balance of working capital employed at the beginning and end of the year by relying on the co-ordinate bench ruling in assessee's own case in AY 2009-10.
Degania Medical Devices Pvt Ltd v Dy.CIT [TS-523-ITAT-2018(DEL)-TP] ITA No.1254/Del/2015 dated 27.06.2018

1736. The Tribunal dismissed Revenue's appeal against DRP order allowing working capital adjustment in respect of assessee's international transactions for AY 2011-12. The Tribunal noted that DRP had considered various judicial decisions while allowing working capital adjustment and Revenue did not bring on record any contrary decision to rebut it. The Tribunal observed TPO had actually allowed working capital adjustment after considering assessee's detailed computation of margin of comparables.
DCIT vs. Kyocera Asia Pacific India Pvt. Ltd [TS-376-ITAT-2018(DEL)-TP] ITA No.1029/Del/2016 dated 17.05.2018

1737. The Tribunal held that where a company carries high trade receivables it would mean that it allows its customers a relatively longer period to pay its amount resulting in higher interest cost and lower profit and similarly companies carrying high payables enjoy the benefit of a relatively longer period for payment which reduces its costs and increases it profits.

Accordingly, working capital adjustment ought to be granted to bring the case of the assessee at par with other functionally comparable companies.
Marubeni Itochu Steel India Pvt Ltd v DCIT - (2016) 67 taxmann.com 52 (Del - Trib)

1738. The Tribunal remitted the issues of working capital and risk adjustment to the file of the TPO with the direction that if it all any working capital adjustments or risk adjustments in the comparables proposed by the TPO was warranted the taxpayer would have to support its claim by way of justifying the extent of adjustments requested as the law contemplates and support it further by way of placing necessary justification in support of its prayer.
Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] I.T.A. No.-6779/Del/2015

1739. The Tribunal directed the AO to re-compute working capital adjustment of comparable ICRA Management Consulting Services Ltd for benchmarking international transaction of assessee engaged in the business of providing support services with respect to footwear and apparels. The TPO had while computing working capital adjustment of ICRA, taken trade receivables figure at 'nil' which disturbed the entire adjustment calculation. Noting that the financials of ICRA had sufficient trade receivables during the AY under consideration, it set aside the issue and directed the TPO to re-compute working capital adjustment after taking into account the figure of trade receivables.
Adidas Technical Services Pvt Ltd vs DCIT-TS-507-ITAT-2017(DEL)-TP-ITA No.412/del/2017 dated 18.05.2017

1740. The Tribunal rejected the view of the TPO that working capital adjustments could not be allowed to asessees in the service industry and held that it becomes eminent to allow such adjustment in order to neutralize differences on account of high or low inventories, trade payables and trade receivables in order to bring the assessee at par with other functionally comparable companies.
Further, it held that foreign exchange gains / losses should be treated as operating in nature while computing PLI.
Sun Life India Service Centre Pvt Ltd v DCIT (ITA No.1489/Del/2014) – TS-482-ITAT-2015(Del) -TP

1741. The Tribunal held that in absence of any legal infirmity pointed out in direction of CIT(A) by Revenue, the CIT(A) was justified in allowing assessee's claim of working capital adjustment and directing TPO to grant working capital adjustment based on OECD formula and by taking 10.25 percent as Prime Lending Rate (PLR)
Dy.CIT. vs Imsofer Manufacturing India (P.) Ltd [2018] 97 taxmann.com 110 (Delhi - Trib.) IT APPEAL NO. 5155 and 5158(Delhi) of 2015 dated 14.08.2018

1742. The Tribunal upheld DRP's order deleting negative working capital adjustment noting that assessee did not bear any working capital risk as it was fully funded by its AEs. It relied on coordinate bench decision of Capco IT Services India Pvt Ltd. wherein it was held that that there was no need for making any negative working capital adjustment when the assessee did not carry any working capital risk and in fact the TPO should have done necessary working capital adjustment to the profits of the selected comparables so as to make them comparable to the assessee.

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Dy.CIT vs Ivy. Comptech Ltd [TS-1316-ITAT -2018 (Hyd)-TP] ITA No.222/Hyd/2015 dated 29.11.2018

1743. By relying on the coordinate bench decisions in Philips India Ltd., Acusis Software India Pvt Ltd etc the assessee contented that CIT(A) erred in not granting mandatory working capital adjustment. which would bring the arithmetic mean of comparable entities to 9.32% as against 12.25%. The CIT(A) while denying the working capital adjustment had observed that the issue of working capital was introduced by the assessee as an afterthought and assessee by its own admission employed a very meager working capital, and the same would not weigh for consideration of comparables. The Tribunal restored the issue of working capital adjustment back to TPO to be considered or granted as per law by following the DRP directions for AY 2014-15 wherein the DRP had allowed the working capital adjustment vis-à-vis comparable companies and directed the AO to apply SBI's PLR and the coordinate bench decisions relied on by assessee.

Lexmark International (India) Pvt Ltd vs DY.CIT (TS-1086-ITAT-2018(Kol)-TP) ITA No.268/Kol/2017 dated 28.09.2018

1744. The Tribunal relied on co-ordinate bench ruling in Capgemini India Private Limited and held that working capital adjustment should be granted to account for differences in working capital employed by the assessee and the comparable companies. The Tribunal accepted the assessee's contention that in case of companies additionally identified by TPO, the TPO had wrongly considered the unadjusted margins.

Aramex India Pvt. Ltd vs. DCIT [TS-351-ITAT-2018(Mum)-TP] ITA No.6749/Mum/2017 dated 18.05.2018

1745. The Tribunal relying on Demag Cranes & Components allowed assessee's claim for working capital adjustment.

Further, the Tribunal allowed admission of additional evidence filed by assessee with respect to its transactions relating to cost allocation and cost recharges from its AE and remitted back the computation of ALP to the file to AO/TPO for fresh adjudication considering the additional evidences filed.

Lear Automotive India P Ltd. Vs DCIT Circle- 9 Pune – TS-355-ITAT-2018(PUN)-TP- ITA No 515/Pun/2014 dated 26.04.2018

1746. The Tribunal held that where assessee was providing services to its associated enterprises on 10 per cent mark-up on cost and working capital position of assessee was better in comparison to comparable companies, working capital adjustment was to be made international transactions entered into by assessee.

Dy.CIT v. Emptoris Technologies India (P.) Ltd. [2015] 61 taxmann.com 439 (Pune – Trib)

1747. The Tribunal held that the assessee was entitled to a working capital adjustment since it was providing services to its AEs on a cash basis and therefore worked on lower prices for its services as opposed to a company who allowed its customers to pay at a later date. Therefore, it upheld the order of the CIT(A) and allowed a working capital

adjustment on the basis of average credit / debit period for the year and commercial rates of interest.

ACIT v Software AG (India) Pvt Ltd (ITA No.1264/PN/2013) – TS-539-ITAT-2015 (Pun) – TP

+ / - 5% adjustment

1748. The Court dismissed the Revenue's appeal against Tribunal's order deleting the TP adjustment since as per the proviso to section 92C(2), the transfer price was within the range of 5% of ALP. The TPO had made an adjustment in the case of assessee which was upheld by DRP. The Tribunal, however, deleted the TP adjustment made by AO since as per the proviso to section 92C(2), the Transfer price was within the range of 5% of ALP and accordingly, it directed the AO to consider proviso to section 92C(2) and arrive at the conclusion.

CIT vs DHL Danzas Lemuir Pvt ltd-TS-559-HC-2017(BOM)-TP-ITA No.1492 of 2014 dated 05.07.2017

1749. Where the assessee did not dispute the mean margin of 6.84% of comparables computed by TPO, but requested for a benefit of +/- 5% benefit which was accepted by CIT(A) and Tribunal, the Court held that Tribunal had not committed any error in granting benefit of the +/- 5% adjustment as it was in accordance with second proviso to Section 92CA(2). Accordingly, it dismissed Revenue's appeal.

CIT vs. Kgk Enterprises-TS-852-HC-2017(RAJ)-TP dated 18.09.2017

1750. The assessee was engaged in in foreign inward money transfers, buying and selling of foreign currencies and traveller's cheques, air ticketing, corporate agency for insurance and provision of other exchange house services. With respect to the assessee's international transaction of selling foreign currency to its AE, the TPO applied RBI reference rate as the ALP and computed the TP adjustment without giving the 5% tolerance benefit under proviso to Sec 92C(2) on the ground that the said benefit was not available when the ALP is determined based on only one price/ rate. DRP upheld the TPO's order. The Tribunal set aside the TPO/ DRP's order denying 5% tolerance benefit under proviso to Sec 92C(2) relying on the co-ordinate bench ruling in assessee's own case for an earlier year wherein it was held that the assessee was justified in claiming benefit under proviso to Sec 92C(2) as the RBI reference rate itself was derived as an average of several rates. It also noted that the DRP had confirmed the TP-addition primarily on the ground that the Revenue had appealed before HC against Tribunal orders of earlier years. Thus, the Tribunal held that till the time the co-ordinate bench order was not reversed it would hold good for the present case and accordingly it set aside the TPO/DRP's order

UAE Exchange & Financial Services vs DCIT Circle 7(1)(1) TS-261-ITAT-2018(Bang)-TP-IT(TP) No 2788/Bang/2017 dated 13.04.2018

1751. The Tribunal dismissed the Revenue's appeal challenging DRP's deletion of Rs. 7.47 Cr TP addition for AY 2011-12 and upheld the allowability of benefit of 5% variation as per proviso to Sec 92C in case of the assessee, an authorized foreign exchange dealer, rejecting the Revenue's contention that proviso to Sec 92C, which allows +/-5% range to assessee,

could not be applied in case of assessee having transactions on account of trading in foreign exchange, which were benchmarked using RBI rates. Following the decision in assessee's own case for preceding AY 2010-11, it held that RBI rates of foreign exchange were based on averaging and therefore, benefit was available under the proviso to Sec 92C.

UAE Exchange and Financial Services Ltd. Vs DCIT - TS-116-ITAT-2017(Bang)-TP - IT (TP)A No.299 (Bang) 2016 dated 07.02.2017

1752. The Tribunal rejected assessee's claim for benefit of +/- 5% range mentioned in proviso to section 92C(2) considering retrospective amendment vide Finance Act 2012, held that the benefit was not allowable as ALP in the present case was in excess of assessee's margin by more than 5%. It rejected reliance on Tribunal decisions in assessee's own case for earlier AY on the ground that they were pronounced prior to the relevant amendment and accordingly dismissed the appeal.

Insilica Semiconductors India Pvt Ltd [TS-346-ITAT-2017(Bang)-TP- ITA No. Dated 15.03.2017

1753. The Tribunal allowed 5 percent adjustment under section 92C(2) of the Act on the RBI forex rates used as benchmark for international transactions pertaining to trading in foreign exchange as the RBI rates were an average rate computed.

DCIT v UAE Exchange & Financial Service Ltd [IT(TP)A No 213 / Bang / 2015] - TS-349-ITAT-2015(Bang)-TP

1754. Where the assessee was established in 1967and its depreciation ratio was only 0.95% as against 4.72% of comparables and the difference of 0.14% in ALP resulting in Rs.54 lakhs TP- addition was due to AO's reduction of depreciation in the hands of assessee & comparables and if such depreciation ratio was not reduced, the price adopted by assessee would be within the 5% tolerance range, the Tribunal noting that the machineries utilised by comparable companies are latest ones, whereas, the machineries used by the assessee-company are older ones and as a result the efficiency of old machines would be less, held that ignoring the difference of 0.14% over and above +5% of permissible limit would meet the ends of justice and accordingly set aside the order of lower authorities and deleted the TP addition of Rs. 54 lakhs.

Western Thomson (India) Private Ltd vs. DCIT-TS-910-ITAT-2017(CHNY)-TP-ITA no. 1093/Mds/2017 dated 27.10.2017

1755. The Tribunal allowed the assessee's appeal and held that for the purpose of computing the +/- 5 percent variation, the sum of all AE transactions was to be considered. It dismissed the contention of the Revenue that since there was a separate identifiable CUP for each international transaction, 5% tolerance was to be computed for each international transaction separately and where the transaction value was more than 5 percent the tolerance benefit was not to be allowed. Accordingly, it remitted the matter to the AO to re-compute the tolerance level.

DCIT v Ashok Leyland Ltd – TS-977-ITAT-2016 (Chny) - TP

1756. Noting the assessee's contention that the price of exported items charged to its AE would be at ALP if an adjustment of commission expenses was granted in the price from unrelated

parties and the assessee was granted the +/- 5 percent adjustment, the Tribunal remitted the matter to the file of the TPO for fresh adjudication as the supporting details for adjustment in commission were not provided by the assessee.
DCIT v JSL Ltd. - [TS-1079-ITAT-2017(DEL)-TP] - ITA No.4111/Del/2013 dated 03-11-2017

1757. The Tribunal, considering the fact that the circumstances were not identical to the previous year, rejected CIT(A)'s application of filters based on previous year and remitted comparables selection to the file of TPO directing him to verify the various filters (Related party transaction filter, Rs.50 Crores upper-limit sales filter) for assessee's research and development functions to decide the issue afresh. Further, noting that in previous AY the +/- 5% adjustment was granted considering the economic downturn experienced during the year owing to the 11th September disaster, the Tribunal held that the same could not be applied for the AY in question since no economic downfall was experienced.
DCIT vs. Nokia India (P) Ltd.-TS-1017-ITAT-2017(DEL)-TP ITA No. 2380/Del/2010 dated 06.12.2017

1758. Noting that there was a typographical error in the order of the TPO wherein the OP / OC margin was inadvertently mentioned as 13% as opposed to the correct margin of 15% (as self-evident from the computation produced in the impugned order), the Tribunal remitted the issue back to the file of the AO to verify whether the ALP of international transactions determined by the TPO (18.864% based on 5 comparables) fell within the + / - 5 percent adjustment under proviso to Section 92C(2) of the Act.
Everest Business Advisory India Private Limited vs. DCIT-TS-748-ITAT-2017(DEL)-TP-ITA No. 5211 / del / 2014 dated 25.09.2017

1759. The Tribunal held that where only one price had been determined under the most appropriate method, the question of providing the 5 percent (relevant for the year under consideration - AY 2004-05) benefit under the second proviso to Section 92C did not arise.
Philips Electronics v ACIT - TS-316-ITAT-2016 (Kol) - TP

1760. The Tribunal remitted the ALP determination of the assessee's international transaction of purchase of automotive parts directing the AO to verify assessee's claim that ALP is within 5% tolerance range. It noted that the TPO made a downward adjustment of Rs.1.92 crore in respect of international transaction, price of which was Rs.40.24 crore and had therefore arrived at an ALP of Rs.38.32 crore and held that based on the aforesaid figures, the contention of the assessee that the ALP determined by the TPO was within ±5% range as provided in the second proviso to section 92C(2) prima–facie appeared to be correct. It held that as per the said proviso, the ±5% range was applicable to the arm's length price and not arm's length profitability. Accordingly, it remitted the matter back to AO to verify the working of 5% and held that that if the assessee's claim was found to be correct, no TP-adjustment was to be made.
DCIT vs. Exedy India Ltd. (Formerly known as Ceekay Daikin Limited) - TS-160-ITAT-2018(Mum)-TP - ITA no.7220/Mum./2016 dated 21.02.2018

1761. Where the DRP accepted assessee's claim for revised working of margin for one of the comparables and subsequently, the AO passed order u/s 154 in view of some basic

flaws in AO's computation pointed out by assesssee, noting that after considering the revised margin for one of the comparables (as accepted by DRP) the variation from ALP was within 5% of the transaction price and thus no TP adjustment would survive, the Tribunal remitted the matter to the TPO for verification of the working submitted by the assessee with a direction to decide the issue afresh as per law after such verification

BASF Coatings (India) P. Ltd vs ACIT-TS-522-ITAT-2017(Mum)-TP- ITA no.1555/Mum./2012 dated 28.04.2017

Others

1762. The assessee entered into a Market Development Agreement with Microsoft Operations Pte Ltd ('Microsoft Singapore') to provide marketing support services and product support services for Microsoft products in the territories of Bhutan, India, Maldives, Nepal and British Indian Ocean, for which it was entitled to remuneration on cost plus 15% mark-up basis. The TPO proposed an upward adjustment on account of difference in ALP and pursuant to the DRP's directions, the AO assessed total income at Rs. 2.13 Cr as against Rs. 1.76 Cr declared by the assessee. In the meanwhile, the Commissioner of Service Tax ('CST') raised a service tax demand of Rs. 256.07 Cr, rejecting assessee's contention that the services rendered under the Market Development Agreement qualified as 'export of services' and were thus exempt from service tax, pursuant to which the AO issued notice u/s 148 for reassessing assessee's income for AY 2009-10 on the ground that assessee was entitled to a 15% mark up on the service tax element and thus a sum of Rs. 38.41 Cr had escaped assessment, despite the fact that the CESTAT had ultimately held that the service tax demand raised did not hold good. The assessee filed a writ Petition which was allowed by the High Court. It allowed the assessee's writ and observed that the Agreement between assessee and Microsoft Singapore clearly indicated that the compensation payable to the assessee was exclusive of service tax, which would be the responsibility of Microsoft Singapore and therefore held that the reasons recorded by AO for reopening of the assessment viz.that assessee was entitled to 15% mark up on service tax, was clearly erroneous. It also observed that the AO, despite noting that CESTAT had rejected service tax liability on assessee's services, had held that the CESTAT order was likely to be appealed against and therefore observed that the AO had approached the entire matter with the pre-determined mind to raise a demand oblivious of the relevant facts. On further appeal by the Revenue before the Apex Court, the Apex Court issued a notice for the SLP and directed the assessee to file a counter affidavit, if any within four weeks.

DCIT and Anr. vs. Microsoft Corporation (I) Pvt. Ltd - TS-290-SC-2017-TP] - Petition(s) for Special Leave to Appeal (C)...../2017 CC No(s). 3936/2017 dated 07/04/2017

1763. The Court dismissed Revenue's appeal and upheld Tribunal's order wherein TPO's enhancement to ALP on account of location advantage was rejected since assessee and the comparables were situated in India.

CIT vs Watson Pharma Pvt Ltd [TS-480-HC-2018(BOM)-TP] ITA 124 of 2014 dated 25.06.2018

1764. Where the Court vide its earlier order dated 26 Aug, 2016 had upheld the Tribunals remand and refused to adjudicate on the question relating to adjustment of abnormal operating

expenses arising due to strike that occurred in the assessee's company, pursuant to which the assessee filed a review application, the Court subsequently re-called its order to the limited extent of passing fresh decision and allowed adjustment in the profit margin of comparables on account of the strike that had taken place in the assessee company during AY 2006-07. Referring to Rules 10B(1)(e)(ii) and (iii), it opined that the Tribunal had rightly observed that adjustment on account of strike ought to have been made in profit margin of comparables and not that of assessee. Since the entire matter was already remanded to TPO, the Court directed the TPO to consider this question and decide on making appropriate adjustments after taking into account strike like situation.

Honda Motorcycle & Scooters India Pvt Ltd v ACIT – TS-1013-HC-2016 (P&H) – TP

1765. The Tribunal held that where the assessee had a fixed selling price of goods manufactured by it vis-à-vis its AE and the price of raw materials used by it for the manufacture of such goods increased extraordinarily, the assessee was entitled to an adjustment for such extraordinary cost of raw materials since the sale price being fixed, the margin of the assessee was bound to suffer, as opposed to the comparable companies who were not restricted by a fixed sale price.

ACIT v Summit India Water Treatment & Services Ltd - TS-655-ITAT- 2016 (Ahd) - TP ITA. No:377/AHD/2012

1766. The assessee had entered into an international transaction in respect of purchase of raw material, return of packing material and sale of finished goods from its AE and applied TNMM for the purpose of benchmarking the international transaction. It had installed windmill for generating power and sold the above power to its manufacturing division in lieu of payment of transmission cost computed at the rate as is charged by the state undertaking and recorded it in its books as an operating income. The TPO and CIT(A) excluded windmill income as non-operating income for the purpose of determining the ALP. On appeal, the Tribunal held that assessee's windmill income had nothing to do with its international transactions. It rejected assessee's contention that it sold its captive power form one division to the other instead of generating revenue from open market and windmill income had already been taken as business income for the purpose of section 80IA deduction and held that both the divisions of the assessee viz., windmill land and steel manufacturing were separate without having any interwoven element embedded therein and mere fact of the windmill income accepted under the head of business income would not make it as income derived from manufacturing division forming subject matter of the impugned transfer pricing adjustment.

Rajratna Metal Industries ltd-TS-521-ITAT-2017(Ahd)-TP-ITA No.1050/ahd/15 and 91/ahd/15 dated 12.05.2017

1767. The Tribunal held that considering the complex structures involved in many intra AE transactions it could not be held that the ALP adjustments cannot result in a situation wherein the profits of the AE along with the ALP adjusments exceed the global profits of the group as a whole, since it would require interaction of a large number of tax jurisdictions with irreconcilable tax laws.

Fortune Infotech Ltd v ACIT - (2016) 66 taxmann.com 92 (Ahd - Trib)

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1768. Where the assessee had made sales of cloth guiders to its AE as well as to Non-AEs but offered a discount of 15% as bulk discount to sales made to its AEs stating that the discount offered to the AE could not be compared to Non-AEs as there was no other customer who purchased the similar volume of cloth guiders (185 purchased by AE, Non-AEs purchased less than 50 each) and the AO rejected the contention of the assesseestating that no evidence / agreements had been brought on record to substantiate this fact, the Tribunal relying on the decision in the assessee's own case for AY 2007-08 and 2008-09 (TS-1059-ITAT-2016 (Ahd) – TP) remitted the issue back to the AO to decide the matter afresh after giving adequate opportunity of being heard to the assessee.

Erhardt + Leimr (India) Pvt Ltd v DCIT – TS-72-ITAT-2017 (Ahd) – TP - ITA No. 352/Ahd/2015 dated 06.02.2017

1769. The Arrow Group had set up a branch office in Singapore, namely, 'Arrow Electronics India Limited', exclusively to service the customers in India which immediately opened a liaison office (LO) in Bangalore in 1994 after obtaining approval from the RBI and later opened LOs in Hyderabad, Mumbai, New Delhi & Pune. In December 2002, the Arrow Group started a fully owned subsidiary of Arrow Asia Pac Limited in the name of 'Arrow Electronics India Private Limited' i.e. the assessee in December 2002. However, till July 2003, no effective operation was carried out by the assessee as the LO itself was taking care of the operations. Pursuant to a search operation conducted at the premises of the liaison office which was where the Indian subsidiary was also located, notices under section 148 of the Act were issued for which the assessee complied with the notices and filed the returns declaring income on the basis of cost + 6%. The AO noted that the LO had carried out income earning activities even though it was not supposed to and attributed 40 percent of the net profit of the Singapore and Indian LOs (based on Functions, Assets and Risks) to the Bangalore LO. The AO referred the international transactions of the to the TPO who proposed certain adjustments. On appeal, the CIT(A) gave the assessee part relief by holding that the percentage of ALP as determined by the TPO should have been applied only on 40% of the total sales. The Tribunal dismissed the appeal of the Revenue and held that there was no infirmity in the order of the CIT(A).

Arrow Electronics India Ltd vs. Addl. DIT - TS-261-ITAT-2017(Bang)-TP - IT(TP)A.209,210,617 to 619,COs.31 to 33/B/2011dated 31.03.2017

1770. The Tribunal held that the expenses incurred by the Bangalore unit of the assessee viz. personnel expenses, depreciation and other maintenance related expenses were to be considered as non-operating in nature since the Bangalore Unit had ceased operations and its employees had been retrenched.

Business Process Outsourcing (India) Pvt Ltd v ACIT – TS-925-ITAT-2016(Bang)-TP, IT(TP)A No.2381Bang/20 6, dated October 26, 2016

1771. The Tribunal, set aside the order of the TPO/DRP making an adjustment solely on account of alleged location savings and dismissed the TPO's contention that conducting a trial in India led to location savings in the hands of the assesseee as the regulations, compliance and investigating costs were lower. Noting that the TPO's quantification of location savings was merely based on web article and not actual costs, it further held that location savings were only relevant in the cross-border transaction for the limited purpose of examining and

investigating a transaction and not as a basis for determining the ALP and consequent adjustment. It also held that so far as the transactions were not entered into solely for the purpose of avoiding tax, addition on account of location savings was not sustainable. The Tribunal further clarified that even the concept of BEPS is relevant only for transaction solely focused on tax evasion.

Parexel International Clinical Research Pvt. Ltd (Earlier known as Parexel International Synchron Pvt. Ltd) vs. DCIT-TS-580-ITAT-2017(Bang)-TP-ITA No. 254/bang/2016 and 292/bang/2016 dated 16.06.2017

1772. Where the TPO held that prices charged by assessee from its AE were substantially lower than the comparable uncontrolled prices and determined ALP at 125% of the sales price but the CIT(A) considered detailed reasons filed by assessee and concluded that average price difference between the transactions with AE and the domestic transactions would be around 5.1% and if the marketing overheads, selling expenses, packing and material expenses etc. incurred with respect to the non AE export segment are considered, the international transactions undertaken by the assessee with the AE would be at arm's length price, the Tribunal held that the finding of CIT(A) on the issue in dispute was well reasoned and accordingly, deleted the TP adjustment in respect of purchase and sales transactions with AE.

ACIT vs. Unipatch Rubber Ltd-TS-911-ITAT-2017(DEL)-TP ITA No.3267/Del/2014 dated 06.11.2017

1773. The Tribunal dismissed Revenue's appeal challenging reduction of TP-adjustment pursuant to DRP's direction to re-compute comparables' margin in respect of ITeS and software development services provided to AE after considering the the workings provided by the assessee for AY 2009-10. It noted that the TP-adjustment of Rs 8.54cr was proposed in the draft assessment order which was reduced to Rs 6.11cr by TPO (pursuant to DRP directions) recalculating comparables' margin based on OECD TP Guidelines. It held that it could not be said that the DRP had allowed any relief amounting to Rs.2,43,80,550/- (Rs.8,54,98,108 – Rs.6,11,17,557) rather the TPO himself on being satisfied after proper verification worked the adjustment which has been made by the AO. Therefore, it held that the Revenue's appeal was without basis and not maintainable.

DCIT vs. Xchanging Technology Services India Pvt. Ltd - TS-291-ITAT-2017(DEL)-TP - ITA No. 991/Del/2014 dated 31.03.2017

1774. The Tribunal held that as per the language used in section 92(1) and 92C(3)(a) of the Act, it is the actual income earned from an international transaction during the year that has to be taxed at ALP and therefore the actual income of the assessee from an international transaction could not be substituted with any hypothetical figure such as the projected profits for the subsequent years or by considering the profits of the earlier years.

Headstrong Services India Pvt Ltd v DCIT - (2016) 66 taxmann.com 185 (Delhi - Trib)

1775. The Tribunal rejected the CIT(A)'s ALP computation based on a 'contemporary' resale price method (RPM) for benchmarking Engineering Drawing & design Services rendered to AE for AY 2005-06 and directed AO/TPO to re-compute ALP considering AE's audited financials for March ending furnished as additional evidence. It held that the CIT(A) erred in arriving at a

hypothetical ALP figure based on contemporary RPM by trying to correlate AE's sale price for March ending with cost price for December ending arriving at the computation of ALP due to the alleged non- availability of financial figures of AE for period of Jan-Mar period (without giving assessee an opportunity to furnish it). Since the CIT(A) had (i) ignored provisions of Rule 10B(1)(b), (ii) applied contemporary RPM stating that it was internationally recognized, without bringing evidence and citation on record, the Tribunal noted that that audited financial data for March ending was now available and therefore directed the TPO/AO to consider the same for ALP determination. Referring to the working submitted by the assessee before it during the hearing, it clarified that if AE's financial figures were found to be true and correct, assessee's computation should be accepted.

DCIT v Development Consultants Ltd – TS-117-ITAT-2017 (Kol) – TP - ITA No.1591/Kol/2010 dated 15/02/2017

1776. The Tribunal rejected TPO's allocation of 100% loan syndication fee to the assessee (an Indian company) following the preceding year ruling where the Tribunal had restored the allocation of loan syndication fee between the assessee and its AE to the TPO/AO with direction that the issue should be decided based on the ruling of Calyon Bank [TS-106-ITAT-2014-(Mum)-TP] and Credit Lyonnais [TS-180-ITAT-2014(Mum)], where 20% allocation was held as just and proper.

RBS Financial Services India Private Limited - TS-24-ITAT-(Mum)-TP

1777. The Tribunal held that where the sale price of the assessee's key product, constituting 35 percent of the gross margin was substantially reduced by the assessee in the relevant year due to availability of similar cheap generic products, so as to defend its market share, a reasonable and suitable adjustment was to be made to the profit margin. Accordingly, it remitted the file to the AO to determine the impact of reduction of price of the assessee's key product.

Syngenta India Ltd v ACIT - TS-366-ITAT-2016 (Mum) – TP

1778. The Tribunal deleted the TP adjustment made on account of location savings and green environmental cost savings in respect of the assessee, an Indian contract manufacturer and held that there were no such provisions or guidelines in the existing TP provisions prescribing for such adjustment. It noted that the TPO made adjustments on the ground that assessee had not received any compensation from AE on account of location saving advantage because of lower cost of labour of its Indian manufacturing facility and that it also derived savings on account of 'green costs' owing to laxity in enforcement of environmental laws in India as compared to AE countries and held that where the assessee's international transactions had been analyzed under TNMM and its margin was found to be higher than average profit margin of comparables, any return or advantage towards location savings /environmental costs savings would be embedded in the margin of comparables and thus separate adjustment was not warranted. It rejected the TPO's method of making location saving adjustment by comparing the cost per employee globally with cost per employee in India and held that comparison of employees of AE working in economic conditions at AE's location were completely different and could not be the benchmarking factor.

Syngenta India Ltd v DCIT – TS-988-ITAT-2016 (Mum) – TP

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g. Specific Transactions

Advertisement, Marketing and Promotion Expenses

1779. The Apex Court admitted the SLP filed by the Revenue against the order of the Delhi High Court in Maruti Suzuki Ltd wherein the High Court, distinguished the judgment passed by the co- ordinate bench in Sony Ericsson Mobile Communications India P. Ltd [TS-543-HC-2016(DEL)- TP] (on the ground that the impugned judgment was rendered in the context of distributors and not manufacturers and the assessee in the instant case was a manufacturer) had held that AMP expenses incurred by Maruti Suzuki did not qualify as an international transaction under Section
92B of the Act.
CIT v Maruti Suzuki India Ltd – TS-159-SC-2017- TP - PETITION(S) FOR SPECIAL LEAVE TO APPEAL (C) NO(S). 22181/2016 dated March 10, 2017

1780. The Apex Court admitted Revenue's SLP against High Court judgment wherein it had relied upon its own judgment for previous years in assessee's own *cases to* hold that since Revenue was unable to demonstrate with tangible material the existence of an international transaction involving AMP expenses between assessee and foreign AE, the question of determining ALP did not arise.
CIT vs. Honda Siel Power Product Ltd-TS-931-SC-2017 dated 27.11.2017

1781. The Apex Court admitted Revenue's SLP against Delhi High Court judgment dated 6.5.2016 in case of Bausch and Lomb Eyecare (India) (assessee engaged in distribution activities) wherein marketing intangibles adjustment was deleted absent existence of an international transaction involving AMP expenses between assessee and foreign AE and tagged it with the case of Canon India Private Limited Vs DCIT.
Pr CIT v Bausch and Lomb Eyecare India Pvt Ltd – TS-69-SC-2017 – TP - Special Leave to Appeal (C)...../2017 (CC No.3014/2017) dated 10.02.2017

1782. The Apex Court admitted Revenue's SLP filed against the judgment of the Delhi High Court in case of Bose Corporation India Pvt Ltd on the issue of AMP-adjustment wherein the Court dismissed the Revenue's appeal against the Tribunal order remitting the AMP-adjustment back to the file of TPO for fresh consideration following SB ruling in LG Electronics. The High Court had held that since L.G. Electronics itself was been partially reversed the matter that was remitted was to be reconsidered in light of the directions in Sony Ericsson Mobile Communications India Private Limited.
Pr. CIT vs. Bose Corporation India Pvt. Ltd- [TS-556-SC-2017-TP]- ITA No. 635/2016 dated 03.07.2017

1783. The Apex Court admitted Revenue's SLP against High Court order remitting AMP issue for comprehensive decision on whether AMP expenditure in assessee's outbound travel business i.e., engaged in the business of organizing tours and arrangements for foreign tourists coming to India and going out of India) constituted an international transaction. The AO had made TP addition in respect of AMP expenses incurred in outbound segment by comparing them with expenses of inbound segment, which was remitted by the Tribunal on the ground that the

segments were materially different and required different level of expenditure for promotion. On appeal, the High Court had remitted the matter to the Tribunal holding that the Tribunal should have first decided whether in the circumstances of the case, the nature of AMP reported could lead to the conclusion that there was an international transaction and then remitted the matter to the file of AO for fresh examination.

DCIT vs Le Passage To India Tour & Travels P ltd-TS-687-SC-2017-TP IA No. 80934/2017 dated 04.09.2017

1784. The Apex Court admitted the SLP filed by the Revenue against the order of the High Court wherein the Court, relying on the decision of the coordinate bench in the case of Sony Ericsson upheld Tribunal's decision rejecting application of bright line test.

Toshiba India Pvt Ltd [TS-309-SC-2017-TP] - Petition(s) for Special Leave to Appeal (C)....CC No(s).8042/2017 dated 21/04/2017

1785. The Apex Court granted leave to the Departments SLP against High Court's ruling that mere existence of an agreement whereby a license has been granted to assessee to use brand name would not ipso facto imply any further understanding or arrangement between assessee and its foreign AE regarding

AMP expense for promoting brand of foreign AE to infer an international transaction.

DCIT v. Honda Siel Power Products Ltd - (2016) 71 taxmann.com 181 (SC) - SPECIAL LEAVE TO APPEAL (C) NO. 10667 OF 2016

1786. The Court admitted assessee's appeal against Tribunal's decision holding that Advertising, Marketing and Promotion (AMP) expenses incurred by assessee were subject to provisions under Chapter X.

Diageo India Pvt Ltd [TS-913-HC-2016(BOM)-TP] (609 OF 2014)

1787. The Court allowed assessee's appeal against Tribunal order remanding marketing intangibles issue to the file of AO/TPO since the Revenue had failed to show existence of an international transaction with its AE. Distinguishing coordinate bench ruling in the case of Le Passage to India Tour & Travels case wherein the matter was remanded absent determination by TPO as to existence of international transaction, the Court held that TPO had applied his mind as to existence of international transaction involving advertising, marketing and brand promotion ('AMP') expenses and his conclusion as to this issue was solely on the ground that assessee's AMP expenses were in excess of that incurred by comparable. Noting that TPO had applied Bright Line test and made an adjustment of Rs. 23.98 crores which was confirmed by CIT(A), The Court held that Bright Line Test' ('BLT') was not an appropriate yardstick for determining the existence of an international transaction and the mere fact that the Assessee was permitted to use the brand name 'Valvoline' would not automatically lead to an inference that any expense that the Assessee incurred towards AMP was only to enhance the brand 'Valvoline. Further, it held that Tribunal was not justified in remanding the matter to the AO/TPO when in fact, Revenue had failed to discharge its onus to show the existence of any arrangement or agreement inferring that the AMP expense incurred by the assessee was for the benefit of AE.

Valvoline Cummins Private Ltd vs DCIT-TS-610-HC-2017(DEL)-TP-ITA no.158/2016 dated 31.07.2017

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1788. The Court refused to admit Revenue's appeal challenging Tribunal's deletion of TP-adjustment on account of Advertising, Marketing and Promotion (AMP) expenses in the case of Goodyear India for AYs 2007-08 to 2009-10, which had been deleted by the Tribunal by following HC decisions in Maruti Suzuki [TS-595-HC-2015(DEL)-TP] and Honda Siel[TS-627-HC-2015(DEL)-TP]. Since the AMP expenditure was not subjected to adjustments in all the previous years, although it had been part of the Transfer Pricing exercise, it refused to admit the appeal. However, it admitted question of law raised by Revenue against Tribunal's deletion of TP-addition on payment of trademark fee to AE and application of TNMM over CUP method for benchmarking the trademark fee paid.
Pr. CIT vs. Goodyear India Limited – TS-115-HC-2017 (Del) – TP - ITA 77/2017 & CM Nos.3072 -73/2017 + ITA 78/2017 & CM Nos. 3074-75/2017 + ITA 79/2017 & CM No. 3076/2017 dated 13.02.2017

1789. The Court upheld the Tribunal's order deleting the adjustment on account of AMP expenses by relying on the decision of jurisdictional High Court in the assessee's own case wherein it was held that AMP expenses unilaterally incurred by the assessee could not be construed as an international transaction
Pr. CIT vs. HONDA SIEL POWER PRODUCT LTD-TS-930-HC-2017(DEL)-TP ITA 118/2017, C.M. APPL.4660/2017 dated 01.03.2017

1790. The Court dismissed the Revenue's appeal and upheld the Tribunal's order accepting CIT(A)'s deletion of the AMP adjustment noting that co-ordinate bench in Sony Ericsson Mobile Communication had disapproved bright line test ("BLT Test") applied by TPO while making AMP adjustment and to treat the advertising marketing and promotion as a function performed by the assessee, who was engaged in marketing and distribution.
Pr.CIT vs MARY KAY COSMETIC PVT LTD [TS-1063-HC-2018(DEL)-TP] ITA 1010/2018 dated 18.09.2018

1791. The Court dismissed Revenue's appeal against the order of the Tribunal setting aside the TPO's application of bright line method in determining whether the advertisement, marketing and promotional (AMP) expenses incurred by the assessee amounted to an international transaction and remanding matter to AO/TPO. It noted that Special Bench's decision in LG Electronics India case (upholding the use of Bright Line Test) was set aside by the High Court judgment in Sony Ericsson Mobile Communication and accordingly held that no question of law arose.
Pr. CIT vs. Sony India Pvt Ltd - TS-137-HC-2018(DEL)-TP - ITA 159/2018 dated 09.02.2018

1792. In assessee's appeal against the Tribunal's order remanding Advertising, Marketing and Promotion (AMP) adjustment back to TPO/AO, the Court noted that TPO made the adjustment on account of AMP's expenses on the basis of bright line test and the Tribunal remanded the same to TPO/AO for re -examination. Further the Court observed that TPO/DRP had applied the reasoning of HC judgement in case of Sony Ericsson Mobile Communication and thus the Court stated that the Tribunal ought to address the issue in light of the Court findings and thus directed the Tribunal to consider the matter afresh and report on the merits of the case.

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Callaway Golf India P Ltd Vs PCIT-2- TS-300-HC-2018(DEL)-TP-ITA No 106/2018 dated 20.04.2018

1793. The Court, following the ruling of the coordinate bench in assessee's own case for AY 2009-10, dismissed Revenue's appeal against Tribunal's order remanding AMP issue to the file of AO by holding that the Revenue had failed to establish existence of international transaction between assessee and AE involving AMP expenses.
Pr.CIT vs Valvoline Cummins Ltd-TS-613-HC-2017(DEL)-TP-ITA no. 1031/2015 dated 31.07.2017

1794. The Court, set aside Tribunal's order restoring AMP issue to the file of AO/TPO for fresh consideration. It noted assessee's submission that the Tribunal did not have the benefit of rulings of Sony Ericsson Mobile Communications India Pvt Ltd [TS-543-HC-2016(DEL)-TP], Daikin Air- conditioning India Pvt. Ltd. [TS-533-HC-2016(DEL)-TP] wherein the Court had held that prior to commencement of TP exercise, existence of international transaction involving assessee and its AE had to be first established. Accordingly, the Court restored the matter to the file of Tribunal directing it to decide the assessee's appeal afresh without being influenced by anything said in any of the preivous order of the Tribunal that had been set aside by this order.
Haier Appliances (India) P. Ltd vs. DCIT-TS-684-HC-2017(DEL)-TP-ITA no. 563/2017 dated 01.09.2017

1795. Where during the assessment proceedings, the TPO applying the bright line test held that AMP expenses incurred by the assessee were subject to TP adjustment which was confirmed by DRP and on appeal by the assessee, the Tribunal remitted the matter to TPO for reconsideration, the Court, relying on the decision in the case of Passage to India Tour & Travels (P.) Ltd. v. DCIT [TS-15-HC-2017(DEL)-TP], directed the Tribunal to decide whether AMP expenditure constituted an international transaction requiring TP adjustment by applying the ratio laid down in Sony Ericsson Mobile Communications case [TS-96-HC-2015(DEL)-TP].
Pepsico India Holding Pvt. Ltd [TS-178-HC-2017 (Del)-TP] [ITA 100/2017]

1796. The Court remitted the issue pertaining to advertising, marketing and promotion expenditure and directed the Tribunal to carry out necessary inquiry if needed by resorting to a limited remand to the TPO/DRP as the case may be and decide whether the AMP expenses in the instant case involved international transaction and if so, to what extent.
Vodafone Mobile Services Ltd [TS-419-HC-2018(DEL)-TP] ITA 660/2018 dated 01.06.2018

1797. The Court upheld the Tribunal's order deleting the adjustment on account of AMP expenses by relying on the decision of jurisdictional High Court in the assessee's own case wherein it was held that AMP expenses unilaterally incurred by the assessee could not be construed as an international transaction.
Honda Siel Power Product Ltd. [TS-182-HC-2017(DEL)-TP]

1798. The Court, relied on the decision in the case of Sony Ericsson Mobile Communications India Pvt. Ltd [TS-96-HC-2015(DEL)-TP] and held that where the facts pertaining to existence of international transactions of AMP expenses had already been analyzed and considered by

the Tribunal and no new facts had emerged, the Tribunal could not remand the matter back to the TPO. It accordingly set aside Tribunal's order remitting issue regarding existence of international transaction of AMP expenses incurred by the assessee (engaged in the business of manufacturing, distribution, selling and marketing of alcoholic beverages in India) and restored the matter back to it to decide the issue on merits.

Bacardi India Pvt. Ltd vs DCIT-TS-418-HC-2017(DEL)-TP-I.T.No.417/2017 dated 24.05.2017

1799. The Court, directed the AO/TPO to decide AMP issue in case of the assessee for AY 2009-10 in conformity with the High Court decision in the case of Sony Ericsson Mobile Communications
374 ITR 118 and not Special Bench decision in LG Electronics [152 TTJ (del) (SB)] as the opinion in the case of LG Electronics was no longer good in law.

Ray Ban Sun Optics India Ltd [TS-423-HC-2017(DEL)-TP] ITA No.942/2016 dated 15.05.2017

1800. The Court, relying on the decision in assessee's own case [TS-627-HC-2016(DEL)-TP] dismissed Revenue's appeal challenging Tribunal's order in respect of TP-adjustment on advertising, marketing and promotion (AMP) expenses. It held that the Revenue had been unable to demonstrate with any tangible material the existence of an international transaction. Mere existence of technical collaboration agreement whereby license granted to Honda for use of brand name would not imply arrangement with the foreign AE for promoting brand of foreign AE.

Pr.CIT vs Honda Seil Power Products Ltd-TS-421-HC-2017(DEL)-TP-ITA 291/2017 dated 16.05.2017

1801. The Court, relying on the decision in the case of Bausch & Lomb Eyecare (India) Pvt Ltd [381 ITR 227 (Del)] dismissed Revenue's appeal challenging deletion of Rs 75.40 Crores TP- adjustment on account of Advertising, Marketing and Sales Promotion Expenses (AMP expenses) on the ground that since the issue was covered by earlier High Court decisions, there was no substantial question of law involved in the issue.

Amadeus India Private Ltd vs Pr.CIT-TS-422-HC-2017(DEL)-TP-ITA-154/2017 dated 26.04.2017

1802. The Court held that the TPO was incorrect in presuming the existence of an international transaction between the assessee and its AEs, on the basis that the assessee allegedly made a contribution towards AMP expenditure to its wholly owned Indian subsidiary on behalf of its AEs coupled with the fact that the assessee had incurred a loss in the relevant segment and therefore concluding that it was not adequately compensated by the AEs for the creation of marketing intangibles. The Court held that there would be a need for a detailed examination of the operating agreement between the assessee, its Indian subsidiary and the AEs to ascertain if any part of the AMP expenses was for the purpose of creating marketing intangibles for the AE of the assessee and only after an international transaction between the assessee and its AE in relation to AMP expenses was shown to exist, could the question of determining ALP of such international transactions arise.

Yum Restaurants (India) Pvt Ltd v ITO - TS-12-HC-2016 (Del) - TP

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1803. The Court set aside the Tribunal order by holding that the Tribunal should decide the question regarding existence of international transaction involving advertisement, marketing and promotion ("AMP") expenses between assessee and its AE,instead of remanding the issue to any other authority for decision, where all the necessary material relevant to decide this issue is already on record. It further held that in case the question regarding existence of international transaction was answered by the Tribunal in the positive, the Tribunal should decide the further issues that arise in the appeal in accordance with law. It further directed that in the eventuality that the first question is answered in the positive, it would be open to assessee to file further appeal before the High Court and raise relevant questions of law including relating to the jurisdiction and power of TPO to determine the existence of an international transaction even though it was not reported by assessee and also regarding the retrospective application of Sec 92CA(2B)

Daikin Airconditioning India Pvt Ltd v/s ACIT [TS-533-HC-2016 (DEL)-TP] ITA 269/2016

1804. The Court upheld the order of the Tribunal wherein the Tribunal had remitted AMP transaction to AO/TPO consequent to Delhi HC ruling in Sony Ericsson case as it was unable to establish functional comparability regarding AMP functions of assessee and comparables or determine ALP of the AMP transaction on its own. However, the Court held that the finding of the Tribunal that the application of the RPM for determining ALP of AMP expenses would cast the AMP expenses outside the international transaction, was not conclusive and it noted the relevant observation in Sony Ericsson ruling that AMP was to be included as part of the ALP determination as component of the international transaction and also the issue of whether the CUP or RPM was the most appropriate method was to be left for application by the TPO, having regard to the peculiarities of the business module adopted by the assessee.

Haier Appliances India Ltd [TS-935-HC-2016(DEL)-TP] (ITA 711/2016)

1805. The Court upheld the assessee's claim for deduction of advertisement and promotion expenses incurred towards enhancement of brands owned by its foreign parent-company as business expenditure. It noted that the AO had disallowed part of the expenditure on the ground that they were incurred for popularizing parent company's brand and thus were not incurred wholly and exclusively for assessee's business and held that even though all the brands owned by parent company were not made available in Indian market, the overseas brand owner did not set-up any other licensee (as a rival) at least in the area where the assessee operated and relying on Section 48 of the Trademarks Act held that that as long as the arrangement existed, the assessee, who was a licensee of the products, was entitled to claim them as business expenditure though in the ultimate analysis they might have enhanced the brand of the overseas owner.

Seagram Manufacturing Pvt Ltd – TS-1029-HC-2016- Del – TP

1806. The Court held that every AMP spent by an Indian entity which happens to use the brand of a foreign AE could not be presumed to involve an international transaction as it is not one of the deemed international transactions under section 92B of the Act. It held that as per the provisions of Chapter X, the TP adjustment envisaged is a price adjustment and not a

quantitative adjustment by first determining whether the AMP spent by the assessee was excessive and subsequently deeming the excess AMP as an international transaction.
Maruti Suzuki India Ltd v CIT – [2015] 64 taxmann.com 140 (Del)
Honda Siel Power Products Ltd v DCIT (ITA No 346 / 2015) – TS-627-HC-2015 (Del) – TP Bausch & Lomb Eyecare (India) Pvt Ltd v ACIT (ITA No 643 / 2015) – TS-626-HC-2015 (Del) – TP

1807. The Court held that since the Revenue was unable to demonstrate with tangible material that there was an international transaction involving AMP expenses between the assessee and its AE, the question of determining ALP did not arise. It held that merely because the AE had financial interest in the assessee it could not be presumed that the AMP expenses incurred by the asessee was on behalf of the AE. It held that even though Section 92B read with Section 92F included arrangement, understanding or actions in concert within the ambit of international transaction there has to be tangible evidence to show that the parties acted in concert. It further held that the clauses of trade name license agreement do not indicate that the assessee was under obligation to incur AMP expenses for building the brand of its AE and accordingly dismissed the appeal of the Revenue.
Whirpool of India Ltd v DCIT (ITA 610/2014, ITA 228/2015 & CM No.5751/2015) – TS-622-HC-2015 (Del) – TP

1808. The Tribunal had set aside the order of the lower authorities making AMP adjustments by adopting the bright line test in light of the decision of the Jurisdictional Court in the case of Sony Ericsson Mobile which held that the bright line test was inapplicable.
Pr CIT v Toshiba India Pvt Ltd - TS-700-HC-2016 (Del) - TP-ITA 418/2016, CM APPL.25577/2016
Pr CIT v Bose Corporation India Pvt Ltd - TS-702-HC-2016 (Del) -TP- ITA 462/2016, C.M. APPL.26603/2016

1809. The Tribunal restored the TP adjustment towards AMP expenses incurred by assessee noting that the assessee had filed belated submissions dated 09.12.2014 and though the TPO's order was dated 09.01.2015, the said submissons found no mention in the order and TPO had not considered and acted upon the same. It observed that the primary role of the Tribunal was of an adjudicator and not of an investigator, thus the matter was restored to AO/TPO to enable them to consider the material and carry out any required investigation.
Stanley Black and Decker India Pvt Ltd vs ACIT [TS-1019-ITAT-2018(Bang)-TP] IT(TP)A No.675/Bang/2016 dated 07.09.2018

1810. The Tribunal restored the AMP issue to the TPO to decide whether the AMP transaction was an international transaction and to further determine the ALP of the transaction noting that the TPO had not brought anything on record to demonstrate existence of international transaction whereby assessee [exclusive distributor of products like cartridges, scanners, projectors, spares and other consumables] was obliged to incur AMP expenses for purpose of promoting brand, intangibles of its AE and the assessee had also not submitted FAR analysis of AMP functions in its TP study. It also observed that assessee was an exclusive distributor for its AE and was also earning income in the form of commission by arranging direct customers for its AE.

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Epson India Pvt Ltd vs ACIT [TS-768-ITAT-2018(Bang)-TP] IT(TP)A No.293 and 2479/Bang/2017 dated 27.07.2018

1811. The TPO held that through advertisement expenses incurred, the assessee had increased brand awareness and brand value of the product which benefitted its AE and hence a markup had to be charged on the advertisement expenses reimbursed by assessee from its AE for the assessee's efforts. The Tribunal following the coordinate bench decision in assessee's own case for earlier year deleted the markup. In the earlier year, the Tribunal had noted that there was a memorandum(for promoting sales and enhancing the image of brand) in terms of which the assessee and AE shared expenses incurred towards advertisement which provided for major portion of advertisement expenses incurred towards Indian model being borne by assessee while major portion of other advertisment expenses was reimbursed by AE. It observed that there was no service element involved since the assessee had not provided any services to its AE which was evident from the expenses reimbursed (professional charges, magazine press and sales promotion expenses) for Indian brand ambassadors that the third parties were providing services to assessee. Thus, it opined that no services were being provided by the assessee and further, the AE was reimbursing the assessee for any indirect benefit. Accordingly, it deleted the markup.

Dy.CIT vs Citizen Watches (India) Pvt Ltd [TS-963-ITAT-2018(Bang)-TP] IT(TP)A No.26/Bang/2014 dated 06.07.2018

1812. The Tribunal, relying on the decisions in the case of Essilor India (wherein the Sony Ericsson Delhi Hc was followed) and Toshiba India (wherein the issue of existence of international transaction regarding AMP expenditure had been set aside to the file of TPO to undertake fresh TP analysis), remanded the issue of existence of international transaction for distributor assessee's AMP expenditure and consequent determination of ALP back to the file of AO/TPO for de-novo adjudication.

Transitions Optical India Pvt Ltd vs DCIT-TS-1015-ITAT-2017(Bang)-TP dated 22.11.2017

1813. The Tribunal, relying on the decision in the case of AMD India Private Limited [TS-840-ITAT-2017 (bang)-TP] (wherein it was held that extra credit allowed could be considered as an independent international transaction and the same be compared with the internal CUP being average cost of the total funds available to the assessee) dismissed assessee's appeal against DRP/TPO's order imputing notional interest on outstanding receivables from AEs and restored the matter to the file of TPO for the purpose of ascertaining the agreed period and determination of arm's length interest pertaining to the excess credit period.

Ingersoll Rand (India) Ltd. vs. DCIT-TS-1061-ITAT-2017(Bang)-TP 251/Bang/2014 dated 10.11.2017

1814. Considering assessee's submission that AMP expenses had been incurred unilaterally by the assessee (engaged in manufacturing and selling malted nutritional food products and drinks under brand names, Horlicks, Maltova, Viva and Boost) on its own discretion through unrelated Indian parties for the purpose of its own business in order to cater to local market needs and since no arrangement had been shown to exist between assessee and its AE, the Tribunal held that the transaction cannot constitute an international transaction u/s

92B and remitted the AMP- issue back to TPO directing it to adjudicate the issue afresh in accordance with law.

GlaxoSmithKline Consumer Healthcare Ltd vs. ACIT-TS-998-ITAT-2017(CHANDI)-TP dated 17.11.2017

1815. Noting that the assessee was a manufacturer, the Tribunal remanded the issue of AMP adjustment to the AO / TPO for fresh determination in accordance with the High Court ruling in the case of Sony Ericsson. It noted that the High Court ruling distinguished between a limited risk distributor and a manufacturer and since the assessee was a manufacturer, its activities were to be bifurcated into the prime manufacturing activities and the AMP activities. It also held that TNMM was not the most appropriate method for determination of ALP on AMP expenses in the case of a manufacturer and also observed that in case the Cost Plus method was being used, selling expenses were to be excluded from the total AMP expenses.

Glaxo Smithkline Consumer Healthcare Ltd v JCIT (ITA No.290/Chd/2014) – TS-535-ITAT-2015 (Chandi) – TP

1816. The Tribunal held that the payment towards Advertising, Marketing and Promotion (AMP) made by assessee (manufacturer & distributor of digital hearing aids) to domestic parties during AY 2011-12 was not an international transaction. It observed that AMP spend had been treated as international transaction by the Revenue merely because it was found to be benefiting the AE which was owner of brand, whereas there was no finding of any arrangement between assessee and AE obliging assessee to incur AMP expenditure on behalf of the AE. Accordingly, it concluded that the payment made by assessee under AMP head to domestic parties could not be termed as an international transaction and that no imaginary price could be be attributed by allocating AMP costs and then adjusting the same by applying TP provisions. Consequently, the Tribunal concluded that the TPO had wrongly invoked Chapter X provisions, and deleted TP- addition of Rs. 4.59 Cr on AMP spend.

Widex India Pvt Ltd vs. ACIT – TS-60-ITAT-2017 (Chand) – TP - ITA No.117/Chd/2016 dated
06.02.2017

1817. The Tribunal deleted the TP adjustment, made in the case of the assessee, on account of 'deemed brand development' for three years viz. AY 2009-10, 2010-11 and 2011-12. The TPO made a transfer pricing addition on the ground that the assessee significantly contributed to the development of 'Hyundai' brand in the Indian market and Korean parent company (being the brand owner) benefited due to brand promotion activity carried out in India by way of sale of cars and therefore proposed an adjustment by contending that assessee should have received compensation from foreign AE for brand development. He computed the addition based on overall increase in Hyundai's global brand value in proportion to Indian sales and global sales, even though assessee contended that its AMP spend as percentage of sales was much lower than other Indian automotive comparables. The Tribunal held that the accretion of brand value, because of use of the brand name of foreign AE under the technology use agreement- which had been accepted to be an arrangement at an arm's length price, did not result in a separate international transaction to be benchmarked.

Observing that trigger for ALP adjustment in Hyundai's case was mere fact of sale of cars by assessee, and not AMP expenses incurred because of conscious brand promotion, it held that the ratio of Special bench ruling in LG Electronics was not applicable. It explained that brand building which increased market in India was a subliminal exercise and a by-product of the economic activity of sales. However, acknowledging the incidental benefit to AE on account of visibility to trade name, it proceeded to analyze whether accretion to brand value was covered by definition of international transactions u/s 92B and explained that the present case dealt with increase in value of intangibles as a by- product of business model employed by assessee and AE, and not with 'purchase, sale or lease of intangibles'. Further, it held that the use of the 'Hyundai' brand was a "privilege, a marketing compulsion and of direct and substantial benefits to the assessee", and therefore could not fall under 'provision of service'. Also, it noted that accretion in brand value was not on account of costs incurred by the assessee, or even by its conscious efforts, and therefore was not a 'transaction having a bearing on profits, income, losses or assets'. Accordingly, it concluded that no international transaction existed in relation to accretion in brand value of the AE due to use of 'Hyundai' brand by assessee.

Hyundai Motor India Limited Vs DCIT - TS-322-ITAT-2017(CHNY)-TP - I.T.A. No. 853/Chny/2014 and 563/Chny/2015 dated 27.04.2017

1818. The Tribunal deleted TP adjustment of Rs. 14.11 Cr on account of Advertising, Marketing and Promotion (AMP) expenses incurred by assessee for alleged promotion of the brand 'Nippon' in India as it was not an international transaction u/s 92B since the Revenue had failed to demonstrate existence of an agreement with AE (legal owner of the brand) to promote the 'Nippon' brand in India and had also failed to prove that benefits of AMP expenses were for improving the brand in India. It held that the AMP spend was not obligated by AE, but was incurred by assessee as sales promotion expenses for its own cause.

Nippon Paint India Pvt Ltd v ACIT– TS-102-ITAT-2017 (Chny) – TP - /ITA No.779/Mds/2016 dated 10.02.2017

1819. The Tribunal upheld the TP adjustment in respect of brand promotion expenses incurred by the assessee for its Indonesian AE observing that there was no documentary evidence to prove that the assessee was the economic owner of the brand and that the Indonesian AE actually incurred brand promotion expenses lesser than what other manufacturers would have incurred implying that the deficit was incurred by the assessee on behalf of the Indonesian AE. It further noted that the benefit of the AMP expenses accrued to the AE and not the assessee and the since the AE was an independent distinct entity and the assessee could not claim benefit of the AE's business.

TVS Motor Company Ltd v ACIT – TS-963-ITAT-2016 (Chny) – TP

1820. The Court, set aside Tribunal's order restoring AMP issue to the file of AO/TPO for fresh consideration. It noted assessee's submission that the Tribunal did not have the benefit of rulings of Sony Ericsson Mobile Communications India Pvt Ltd [TS-543-HC-2016(DEL)-TP], Bose Corporation (India) Pvt. Ltd. [TS-702-HC-2016(DEL)-TP] wherein the Court had held that prior to commencement of TP exercise, existence of international transaction involving assessee and its AE had to be first established. Accordingly, the Court restored the

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matter to the file of Tribunal directing it to decide the assessee's appeal afresh **itself** without being influenced by anything said in any of the previous order of the Tribunal.
Louis Vuitton India Retail Pvt. Ltd. vs. DCIT- TS-794-ITAT-2017(DEL)-TP ITA No. 980/Del/2017 dated 06.10.2017

1821. Where the TPO had made protective addition in respect of AMP expenses by following Bright Line test (BLT) (which was struck down as a method for imputing adjustments by the High Court), the Tribunal held that the very concept of protective addition would not apply to the instant case as it was relevant only when an income was to be added in the hands of one of the two taxpayers and where there was an element of ambiguity as to in whose hands the said income could be rightly brought to tax, which was not so in the present case. Accordingly, it deleted AMP adjustment of Rs. 23.83 cr made by TPO/DRP on protective basis and held that the mere fact that the appeal against the High Court judgment declaring BLT as unsustainable was pending before the Apex Court would not take away from precedent value of the High Court decision.
MSD Pharmaceuticals Private Limited vs. Addl. CIT-TS-896-ITAT-2017(DEL)-TP SA No.619/Del/2017 dated 10.11.2017
MSD Pharmaceuticals Private Limited vs. Addl.. CIT-TS-888-HC-2017(DEL)-TP - ITA 971/2017 dated 13.11.2017

1822. The Tribunal deleted the AMP adjustment made by the TPO solely on the basis of bright line testing (BLT) by relying on the HC rulings in Bacardi India and Sony Ericsson case wherein BLT was negatived. Noting that the Revenue authorities in subsequent assessment years had not considered AMP expenses to be an international transaction where there were no change in facts and the assessee had been able to demonstrate that part of the AMP expenses were for distribution and the balance were not even incurred on behalf of its AE for brand building, it rejected the AMP adjustment made by the TPO/DRP on alleged engagement by assessee (engaged in importing/ distribution of wines and spirits) in brand promotion on behalf of AE. Further, it was also observed that the TPO's allegation vis-à-vis excess AMP expenditure was without any basis as similar companies dealing with alcohol had incurred such equivalent percentage of expenses which aspect the TPO had not delved into. It rejected the Revenue's contention to remit the matter back to the TPO observing that a remand to the assessment stage cannot be a matter of routine and it has to be so done only when there is anything in the facts and circumstances to so warrant or justify.
Moet Hennessy India Pvt Ltd vs ACIT [TS-923-ITAT-2018(DEL)-TP] ITA No.1906/Del/2014 dated 23.08.2018

1823. The Tribunal restored the AMP adjustment made by the TPO observing that there was no mention of any specific agreement which clearly proved it was an international transaction. It directed the TPO to verify the same in light of the agreements signed by the assessee with its AEs. It was the assessee's [distributor of Cannon] contention that the AMP expenses were incurred locally for domestic independent third parties and could not be categorized as an international transaction and the burden of proving an arrangement was on the Revenue which it failed to demonstrate. Further, The Tribunal following the coordinate bench decision of the assessee's own case for earlier year directed the TPO to exclude exclude sales trade discount, commission and other sales related expenditure and subsidy from the ambit of AMP

expenditure since they were not the nature of brand promotion and were to push sales in the Indian market.

Cannon India Pvt Ltd vs DCIT [TS-870-ITAT-2018(DEL)-TP] ITA No.1405 and 2275/Del/2015 dated 21.08.2018

1824. The Tribunal restored the issue of TP adjustment on AMP expenses incurred by assessee [distributor of Canon products imported from its AEs] to verify if the AMP expenses constitute an international transaction as there was no mention of specific agreements to the effect of the AMP being an international transaction. It directed the TPO to verify the issue in light of agreements signed by the assessee with its AE. It was assessee's contention that existence of an international transaction could not be a matter for inference or surmise and the onus to prove the existence of an agreement/arrangement prior to incurring of the AMP expenses was on the Revenue.

CAMPM OMDOA PVT. LTS & ORS vs Dy.CIT [2018] 53 taxmann.com 110 (Delhi - Trib.) IT APPEAL No. 5155 and 5158(Delhi) OF 2015 dated 14.08.2018

1825. The Tribunal deleted the TP adjustment on AMP adjustment incurred by assessee(engaged in sales and distribution of headphones, microphones, headsets), noting it was not possible that TPO was not aware of the BLT testing being discarded in view of the Delhi HC ruling of Sony Ericson Mobile Communication India Pvt Ltd but he made the adjustment on basis of BLT. It observed that the focus of AMP spend was to sell product by highlighting its features to potential customers on one to one basis, commonly through direct mail, e-mail and online marketing, thus the AMP expenses were not incurred with a view to benefit the AEs but only to increase assessee's own sales.It rejected Revenue's plea to remand back the matter observing that a remand could not be a matter of routine. It had to be so done only when the facts and circumstances so warrant or justify.

Sennheiser Electronics India Ltd vs ACIT [TS-1018-ITAT-2018(DEL)-TP] ITA No.7574/Del/2017 dated 19.09.2018

1826. The TPO had applied BLT for computing ALP of AMP expenses and made a TP adjustment on assessee (engaged in business of sales and distribution of headphones, microphones, receivers, monitoring systems, tour guide systems and aviation headsets). which was upheld by DRP. The Tribunal deleted the AMP adjustment made noting that TPO had segregated AMP expenses as separate international transaction requiring independent benchmarking which lead to unusual results following the HC ruling in case of Sony Ericsson Mobile Communication India [P] Ltd. (wherein it held that once the AO/TPO accepted and adopted TNMM but chose to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would lead to unusual and incongruous results as AMP expenses was the cost or expenses and was not diverse.) It rejected Revenue's stand to remit the matter observing that TPO was aware of the aforesaid HC ruling wherein BLT had been discarded in view of the discussions in its order.

SENNHEISER ELECTRONICS INDIA PVT. LTD vs ACIT (2018) 54 CCH 0219 DelTrib ITA No.7574/Del/2017 dated 19.09.2018

1827. The TPO was of the view assessee (leading marketer, distributor and producer of quality branded automotive and industrial products and services) had incurred huge non-routine

expenditure to promote brand of AE to develop marketing intangibles for the AE. The TPO benchmarked AMP expenses using BLT and made an addition. The Tribunal noted that issue was covered in favour by HC in assessee's own case wherein it was held that ITAT was not justified in remanding the AMP expenses when Revenue was unable to demonstrate that there existed an international transaction between assessee and AE. Thus, it opined that AMP adjustment made was to be deleted in view of no change in business model of assessee following the HC decision in assessee's own case however, it held that it could not ignore the submission of the Revenue that the HC decisions of assessee, and Sony Ericsson (which had been relied on by HC decision of assessee on not treating AMP expenses as an international transaction in absence of agreement and issue of applicability of BLT) were pending before Apex Court and the decision of Hon'ble Apex Court would be binding upon all the authorities. It restored the issue back to AO holding that AO could pass order afresh if the above decisions of HC were reversed by Apex Court.

Valvoline Cummins Pvt Ltd vs DCIT [TS-1236-ITAT-2018(DEL)-TP] ITA No.527/Del./2016 dated 26.11.2018

1828. The assessee-company was manufacturing motorcycle and it had entered into technical collaboration agreement with its AE (Suzuki Japan) which was owning significant intangibles like patents, trademarks, manufacturing know-how. Suzuki Japan also granted right to use its trademarks and brand to assessee TPO noted that assessee had expended huge amount in excess of bright line limit in order to promote brand/trade name of its AE which was required to be compensated by AE and made TP adjustment by applying BLT. The Tribunal noted that there was not an iota of material to affect that assessee had incurred huge AMP/sales expenses to extent of 10.26 per cent and no cogent material was there to treat incurring of AMP expenses as international transaction more particularly when basis for treating AMP expenses as international transaction, i.e., BLT, was not a legally sustainable method. Thus, it opined that since AMP expenses incurred by assessee were not for benefit of AE but only to enhance sales of assessee, adjustment made by TPO on this account was not sustainable in eyes of law but restored the matter back to AO as further issue of applicability of Bright line test (Sony Ericsson case) was pending before Apex Court holding that AO could pass order afresh if the above decisions of HC were reversed by Apex Court.

Suzuki Motorcycles (I) (P.) Ltd.vsDy.CIT [TS-1237-ITAT-2018(DEL)-TP] ITA No.476/Del./2015 dated 26.11.2018

1829. The assessee-company was into manufacturing, selling and distribution of home appliances. The TPO noted that assessee had expended huge amount in excess of bright line limit in order to promote brand/trade name of its AE which was required to be compensated by AE and accordingly made TP adjustment by applying BLT. The Tribunal relied on Delhi HC in Sony Ericsson India Pvt Ltd wherein it had categorically held that BLT was not an appropriate yardstick for determining the existence of an international transaction for calculating the ALP of such transaction and thus, it opined that the said order of TPO/DRP was not correct. It also noted that High Court in assessee's own case had held that the Revenue had been unable to demonstrate by some tangible material that there was an international transaction involving AMP expenses between assessee and AE. Though it opined the TP adjustment was not sustainable, in view of the HC decision of Sony Ericsson, Bausch and Lomb Eye Care and

Honda Siel pending before the Apex Court, it restored the matter to AO directing it to pass an order afresh if the said decisions of HC were reversed by Apex Court.
Whirlpool of India Ltd.vsDy.CIT [TS-1240-ITAT-2018(DEL)-TP] ITA No.1254/Del./2014 dated 26.11.2018

1830. The Tribunal deleted the AMP adjustment made by the TPO in case of the assessee [engaged in manufacturing and sale of confectionary products] following the coordinate bench ruling in assessee's own case wherein the HC ruling of Maruti Suzuki and Sony Erricson had been relied on to hold that AMP expenses incurred by the assessee could not be treated and categorized as an international transaction under section 92B of the Act. It noted that there was no change in facts and circumstances from the preceeding year. It was assessee's contention that it, being a licensed manufacturer for its domestic segment for which AMP expenses were incurred, the benefit from these expenses accrued solely to it and any benefit arising to the AE was purely indirect and incidental.
Wrigley India Pvt Ltd vs DCIT [TS-1064-ITAT-2018(DEL)-TP] ITA NO.656/Del/2016 dated 25.09.2018

1831. Where assessee's (engaged in sale of high quality information and education books and music and video products of Reader's digest brand) business model was only a mail order marketing use as promotion for products sales and there was no advertisement in media nor were the products available in shop, the Tribunal remanded the TP adjustment made on AMP expenses incurred by assessee noting that Revenue had failed to bring on record as to how the advertising and marketing promotion activities were an international transaction for carrying out brand building of AE. It also held that components of AMP expenses being postal expenses i.e. billing expenses, premium, sweeptakes, judging, paper and printing of brochures and also postage were different from advertising expenses and said expenses could not in any circumstances be categorized for creation of making intangible for AE as these expenses were incurred by the assessee wholly and exclusively on account of its own business and any benefit to the AE was only incidental. It remitted the matter as done in earlier assessment years and directed assessee to be given opportunity of hearing by following principles of natural justice.
Readers Digest Book and Home Entertainment India (P) Ltd vs DCIT [TS-1360-ITAT-2018-(Del)-TP] ITA No.1080/Del/2016 dated 20.12.2018

1832. The Assessee was engaged in manufacturing and sale of watches and is also into distribution of watches imported from its AE. The Tribunal noted that TPO had applied BLT in case of assessee and imputed AMP adjustment on ground that it had allegedly incurred AMP expenses on behalf of its AE for developing marketing intangible for AE and building brand for its AE. It opined that Revenue had failed to discharge the onus of proving an international transaction as held by Delhi HC in Maruti Suzuki. It also noted that Delhi HC in Sony Ericcson and Maruti Suzuki had held that BLT was not a valid basis for determining the existence of international transaction. Thus, it held that TP adjustment was not sustainable but remanded the matter back to AO on account of the aforesaid decisions of Delhi HC pending before the Apex Court (with the direction to it to decide afresh in accordance with order of Apex Court)
Timex Group India Limited vs DCIT [TS-1366-ITAT-2018-(Del)-TP] ITA No.845 /Del/2016 dated 20.12.2018

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1833. The TPO had made TP adjustment on AMP expenses incurred by assessee (manufacturer of consumable products) by applying CUP (incurred AMP to sales 16.04% as compared to external comparable where AMP to sales of 3.87% had been incurred) on ground that AMP expenses over and above normal AMP expenses incurred by comparable companies was towards brand building. He also imputed a markup of 15% on AMP spend on account of trained manpower, staff salaries, office expenses, travelling etc. and indirect expenses. TPO proposed an adjustment on account of difference in the ALP of AMP incurred by assessee and the subsidy received from AE. The DRP confirmed TPO's order but varied the markup from 15% to 9%. The Tribunal in the first round had remanded the matter back to TPO in view of Delhi HC decision in case of Sony Ericsson Mobile Communications (wherein BLT method had been discarded and the Tribunal was directed that when figures and calculations as per TNMM or RPM method adopted and applied showed that net/gross margins are accepted (which include AMP expenses), no TP adjustment on AMP expenses would sustain). On appeal to HC against the Tribunal's order, it restored the matter back to Tribunal noting that such directions by Tribunal could not be sustained when it had not examined if there was an international transaction between assessee and its AE. The Tribunal in the second round of proceedings accepted asseessee's contention that issue to be adjudicated on factual matrix (assessee did not want to get into discussion on whether incurring of AMP expenses was an international transaction) and held that direct marketing and sales related expenses or discounts/concessions would not form part of AMP expenses(not related to brand building exercise) and that no TP adjustment would survive as grant received by assessee exceeded the ALP of AMP expenses(with markup of 9%).
Haier Appliances India Limited vsDy.CIT [TS-1296-ITAT-2018-(Del)-TP] ITA No.1515 /Del/2014 dated 03.12.2018

1834. The Tribunal restored the AMP issue following the coordinate bench decision of the assessee for earlier year wherein it had relied on the Special bench decision of LG Electronics to remit the matter back for adjudication for determining the cost/value of international transaction and determine the ALP of the transaction in light of certain guidelines in the Special Bench order.
LG Electronics India (P) Ltd vs ACIT [TS-738-ITAT-2018(DEL)-TP] ITA Nos.3612 and 3613/Del/2017 dated 18.07.2018

1835. The Tribunal in second round of proceedings pursuant to remand by the High Court deleted the AMP adjustment for assessee (engaged in distribution of mobile handsets in India) noting that the TPO had merely presumed that extraordinary expenses in excess of normal routine expenditure were AMP expenses incurred for brand building of its AE. It referred to the OECD guidelines wherein it was clearly mentioned that it is sufficient to compensate distributors with a service fee and not provide it with a return on marketing intangibles. It also observed that the assessee had to advertise aggressively since it was the first year of business in India, and hence such expenditure could not be considered as expenditure for brand building absent any added value to Sony Ericsson brand owned by AE, at most it could be considered as having been incurred for 'brand maintenance' and also clarified that the business promotion expenses incurred by the assessee were towards its promotion. It also rejected the contention that the amount of Rs. 73.83 crores received by the assessee by way of credit notes represents the excess price charged by AE which had been credited to the assessee and observed that the

business model of the assessee with its AE was structured in such a manner that AE ensured that assessee achieved an arm's length return on sales.

Soni Mobile Communications [India] Pvt. Ltd vs Addl CIT [TS-741-ITAT-2018(DEL)-TP] ITA No.6410/Del/2012 dated 26.07.2018

1836. The Tribunal, pursuant to the remand proceedings of HC [where it had discarded BLT method applied by assessee (distributor of Sony products) and directed Tribunal that when figures and calculations as per TNMM or RPM method adopted and applied showed that net/gross margins are accepted (which include AMP expenses), the appeal of assessee is to be allowed] held that AMP expenditure was not incurred for the AE, though assessee did exploit intangibles created by its AE in India for which no royalty payment was made. It could not be denied that brand name Sony was a global brand across globe and it could not be said that Sony brand had become popular as a result of efforts of assessee company. Merely because there was an incidental benefit to AE, it could not be said that AMP expenses were for promoting the brand. Further, it observed that operating margins of assessee were higher than that of comparables, thus it could be concluded that assessee had been suitably remunerated and no further adjustment was required to benchmark AMP expenses.

Sony India Pvt Limited vs Addl.CIT [TS-1371-ITAT-2018-(Del)-TP] ITA No.4978/Del/2011 dated 21.12.2018

1837. The Tribunal, in second round of proceedings, remitted the AMP-issue back to AO/TPO for determining ALP afresh. It noted that, in first round of proceedings, the Tribunal had remitted matter back to AO/TPO for determining AMP-adjustment by applying Special Bench ratio in LG Electronics and also giving certain specific directions for such computation. It rejected assessee's contention that credit notes issued by foreign AE were towards compensation for brand promotion observing that they were only in respect of sales price of product to assessee and not to compensate it for other expenses and therefore held that such credit notes could not be considered as reimbursement of AMP expenses. Regarding assessee's claim for exclusion of selling expenses from the base amount of AMP-expenses, the Tribunal remitted the matter back to AO/TPO for deciding the same after stressing that each and every item of expenditure should be properly examined for ascertaining if it was for promotion of sales or in connection with the sales It rejected the assessee's contention that incurrence of AMP-expenses is not an international transaction as this issue was not raised in first round of proceedings and Tribunal had not restored the entire AMP issue to be decided de novo.

Motorola Solutions (India) Pvt. Ltd vs. DCIT - TS-102-ITAT-2018(DEL)-TP - ITA No. 1933/Del/2017 dated 07.02.2018

1838. The Tribunal remitted the issue of TP-adjustment on Advertising, marketing and promotion (AMP) expenses incurred by assessee for fresh consideration following earlier year ITAT order wherein the co-ordinate bench directed the AO/TPO to decide on existence of international transaction and also to exclude selling expenses from ALP-computation.

Daikin Airconditioning India Pvt. Ltd. v DCIT - TS-176-ITAT-2018(DEL)-TP - ITA Nos.2536/Del/2014

1839. The Tribunal remitted back to AO/TPO AMP-adjustment in respect of assessee engaged in the business relating to import, manufacture, sale and export of all kind of high end crystal

components for jewellery, fashion accessories and home decoration after following co-ordinate bench ruling in assessee's own case for previous AY wherein AMP-issue was remitted for determining existence of international transaction following HC decisions in various cases including Sony Ericson, Rayban Sun Optics & Toshiba India.

Swarovski India Pvt Ltd vs ACIT Circle 22(2)- TS-250-ITAT-2018(Del)-TP-ITA No 4080/Del/2013 dated 02.04.2018

1840. The assessee 'Fujifilm' had an Indian branch which was engaged in import and resale of Fujifilm products in India and 'Provision of marketing and technical support services' to its head office. The TPO observed that huge AMP expenditure was incurred by the Indian branch on promoting the brand name 'FUJI' and considered the said AMP expenses as a separate international transaction and proposed the transfer pricing adjustment by applying the bright line test. On appeal, the Tribunal restored the matter back to the TPO and held that the bright line test could not be applied for determining ALP of international transactions of AMP expenses and stated that the TPO applied the bright line test as he did not have any occasion to consider the ratio laid down in various judgments of jurisdictional High Court. The Tribunal further held that as per Article 7 and Article 9 of DTAA between India and Japan, though deduction of AMP expenses was to be allowed but simultaneously, ALP of AMP expenses for brand promotion was also to be determined and the adjustments to the profits had to be made accordingly.

Fujifilm Corporation v. ITO - [2018] 92 taxmann.com 411 (Delhi - Trib.) - IT APPEAL NOS. 5826 (DELHI) OF 2011 & 195 (DELHI) OF 2013 dated APRIL 4, 2018

1841. The Tribunal deleted the TP adjustment of AMP expenses by following the High Court ruling in assessee's own case stating that TP adjustment was not sustainable as the Revenue failed to demonstrate existence of international transactions. Further, it deleted TP adjustment on royalty payment made to AE by relying on assessee's previous tribunal judgement, wherein it was held that if goods are sold on principal to principal basis, disallowance of royalty on export was unjustified.

Honda Siel Power Products Ltd vs DCIT Circle 11(1)- TS-402-ITAT-2018(DEL)-TP- ITA No. 1579/DEL/2017 dated 17.04.2018

1842. The Tribunal deleted the assessee's AMP adjustment made by TPO in the second round of proceedings on a 'protective' basis for AY 2009-10 by relying upon the co-ordinate bench ruling in assessee's own case for subsequent years.The Tribunal, at the outset, noted that the addition proposed by TPO was on a 'protective' basis and no substantive addition had been made. The Tribunal relied on Delhi HC ruling in Sony Ericsson that Bright Line Test Method cannot be applied for making any kind of adjustment under AMP expenses.

Toshiba India Private Limited vs ACIT [TS-609-ITAT-2018(DEL)-TP] ITA No. 1438/Del/2018 dated 18.06.2018

1843. The Tribunal relying on the conclusion of the Delhi High Court in assessee's case for AY 2008-09 held that in the absence of an agreement or arrangement between the assessee and the associated enterprise with regard to development of brand, it could not be inferred that there existed an international transaction between assessee and the associated enterprise. Therefore, it held that the question of determination of ALP does not arise and accordingly deleted TP adjustments of Rs. 311.88 crores on account of AMP.

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Maruti Suzuki India Pvt Ltd vs ACIT-TS-974-ITAT-2017(DEL)-TP dated 09.11.2017

1844. Where the TPO proposed AMP adjustment of Rs. 33.08 cr on substantive basis and Rs.42.09 cr on protective basis following bright line test and the DRP deleted adjustment on substantive basis but retained the adjustment on protective basis, the Tribunal relying on the decision in the case of Sony Ericsson Mobile Communications India Private Limited [374 ITR 118], held that BLT has been discarded as a method for computing arm's length price for international transactions of AMP and therefore no addition could be sustained applying the BLT even on protective basis. Accordingly, it deleted AMP adjustment in respect of the assessee for AY 2013-14.

Nikon India Pvt. Ltd vs. DCIT-TS-893-ITAT-2017(DEL)-TP ITA No. 6299/Del/2017 dated
06.11.2017
Toshiba India Pvt. Ltd. vs. ACIT-TS-961-ITAT-2017(DEL)-TP ITA No. 6531/Del/2017 dated 30.11.2017

1845. Noting that in the immediately preceding AY 2009-10, the coordinate bench had held that in absence of agreement, arrangement or understanding between the assessee and its AE for sharing AMP expenses or for incurring AMP expenses, payments made by assessee to the domestic parties cannot be termed as an international transaction specifically when the TPO had not been able to prove that the expenses incurred were not for business carried out by assessee in India, the Tribunal directed the AO to delete the TP addition on account of AMP expenses.

Amadeus India Private Limited vs ACIT-TS-898-ITAT-2017(DEL)-TP- ITA No. 1835/Del/2015 dated 23.10.2017

1846. Where pursuant to agreement with AE. it was the responsibility of the assessee to undertake the performance of advertisement and sales functions, the Tribunal held that they were pointers to the fact that the assessee undertook AMP functions. Accordingly, it upheld the existence of international transaction of AMP-expenses. However, it remitted the ALP-determination back to TPO directing examination of distribution & AMP 'functions' carried out by the assessee and the probable comparables in light of Sony Ericsson HC ruling.

BMW India Private Ltd. vs. DCIT-TS-880-ITAT-2017(DEL)-TP ITA No.1406/Del/2015 dated 10.11.2017

1847. The Tribunal remitted the issue of existence of 'international transaction' relating to AMP expenses in assessee's case for AY 2011-12 and directed fresh determination, despite the fact that the jurisdictional HC in assessee's own case [with the lead order in Sony Ericsson [TS-96- HC-2015(DEL)-TP]] had held that AMP expenses resulted in an international transaction, noting that a different view was taken in some later decisions of the Court viz. Maruti Suzuki India Ltd [TS-595-HC-2015(DEL)-TP], Whirlpool of India Ltd [TS-622-HC-2015(DEL)-TP] and that post the decision of Sony Ericsson, even the Tribunal was not consistent in its stand. Noting that TPO did not have the occasion to consider the ratio laid down in several judgments of the jurisdictional Court as well as following the predominant view taken in several Tribunal orders including the recent order in case of Louis Vuitton India Retail P. Ltd, [TS-146-ITAT-2017(DEL)- TP], it restored the matter for fresh

determination in light of relevant judgments of the HC and further held that no TP-addition would be called for if it is found that no international transaction existed.
Reebok India Company vs. DCIT - TS-219-ITAT-2017(DEL)-TP - ITA No. 954/Del/2016 dated 20.03.2017

1848. Noting that the co-ordinate bench had in assessee's own case for AYs 2004-05 and 2005-06 confirmed deletion of AMP adjustment, the Tribunal deleted AMP adjustment of Rs. 5.29 cr in respect of assessee engaged in the business of blending, bottling and trading of India made foreign liquor. Noting that the AO had disallowed 10% of total brand expenses on the contention that expenses incurred by assessee was for increasing brand popularity of parent company it held that benefit arising to AE was purely incidental and since the product manufactured and sold by the assessee was India specific it could not be said that any benefit could have accrued to the AE on account of AMP spend in India in respect of such brand.
Pernod Ricard India Pvt ltd vs ACIT-TS-618-ITAT-2017(DEL)-TP-ITA No.4626/del/2010 dated 24.06.2017

1849. The Tribunal, referring to assessee's exclusive distribution agreement with AE, held that since the assessee undertook brand promotion of Toshiba in India and AEs reimbursed a substantial sum, it constituted an international transaction for AY 2012-13. Referring to the decision of Sony Ericsson, it held that distribution and AMP functions were two separate international transactions and due to their inter-twinning nature, both transactions could be aggregated only for the purpose of benchmarking so that surplus from one could be adjusted against deficit from other in the overall approach. Accordingly, it held that in the absence of suitable comparables carrying out similar functions or where adjustment could be made to iron out differences between functions performed by assessee and comparables, ALP of international transaction of AMP- function should be determined in segregated manner, however a proper set off, if any, available from the distribution activity, should be allowed.
Toshiba India Pvt Ltd vs DCIT-TS-686-ITAT-2017(DEL)-TP- ITA No.1357/Del/2017 dated 01.09.2017

1850. The Tribunal, in the second round of proceedings, deleted Rs. 22.30 cr AMP adjustment made on protective basis. Noting that TPO had proposed AMP-adjustment on protective basis by applying bright line test (BLT), the Tribunal, relying on the decision in the case of Perfetti Van Melle India Pvt Ltd [ITA No. 1073 / del / 2017] and Sony Ericsson Mobile Communications India (P) Ltd [55 taxmann.com 240 (Delhi)] held that Bright Line test had no statutory mandate and it was illogical to consider non-routine AMP-expenses as a separate transaction.
Nikon India Pvt Ltd vs DCIT-TS-749-ITAT-2017(DEL)-TP-ITA no. 4574 / del / 2017 dated 20.09.2017

1851. The Tribunal in the second round of proceedings, remitted AMP-adjustment back to AO/TPO in case of the assessee engaged in distribution of watches etc for determining the existence of international transaction. In the first round of proceedings, the Delhi High Court had directed Tribunal to adjudicate the core issue as to whether there existed an international transaction entered with assessee's AE in respect of AMP expenses. Examining the facts,

Tribunal noting that TPO had not given any finding w.r.t actual expenditure incurred and had analyzed terms and conditions set out in only one of the several agreements with AE, held that it had to be examined in detail whether the services rendered by appellant of incurring expenditure incurred by assessee had really resulted into any benefit to the foreign AE. Accordingly, it restored the matter back to the AO/TPO for determining the existence of international transaction with the direction to determine ALP if the existence of international transaction was proved.

Casio India Company Pvt Ltd vs DCIT-TS-586-ITAT-2017(DEL)-TP-ITA no. 4726/del/2010 dated 03.04.2017

1852. The Tribunal remitted the issue of existence of 'international transaction' relating to AMP expenses in assessee's case for AY 2011-12 and directed fresh determination, despite the fact that the jurisdictional HC in assessee's own case [with the lead order in Sony Ericsson [TS-96- HC-2015(DEL)-TP]] had held that AMP expenses resulted in an international transaction, noting that a different view was taken in some later decisions of the Court viz. Maruti Suzuki India Ltd [TS-595-HC-2015(DEL)-TP], Whirlpool of India Ltd [TS-622-HC-2015(DEL)-TP] and that post the decision of Sony Ericsson, even the Tribunal was not consistent in its stand. Noting that TPO did not have the occasion to consider the ratio laid down in several judgments of the jurisdictional Court as well as the predominant view taken in several Tribunal orders including the recent order in case of Louis Vuitton India Retail P. Ltd, [TS-146-ITAT-2017(DEL)-TP], it restored the matter for fresh determination in light of relevant judgments of the HC and further held that no TP-addition would be called for if it is found that no international transaction existed.

Grohe India Private Ltd. Vs ACIT TS-280-ITAT-2017(DEL)-TP - ITA No.479/Del./2015
Nikon India Pvt. Ltd. vs. DCIT - TS-272-ITAT-2017(DEL)-TP - ITA No.719/Del./2017 dated 31.03.2017
Bose Corporation India Pvt. Ltd. vs. ITO - TS-337-ITAT-2017(DEL)-TP - ITA No.1509/Del./2014 dated 30.03.2017

1853. The Tribunal remitted the TP-issue of Advertisement, Marketing and Promotion ("AMP") expenses incurred by assessee (distribution of watches in India) during AYs 2007-08 and 2008- 09 to the AO / TPO and directed them to re-determine ALP in accordance with directions in Sony Ericsson ruling and not as per the Bright Line Test adopted by the TPO. However, it rejected assessee's contention that since its profit margin was favourable when compared with that of comparables, the AMP expenses stood subsumed in the overall profit and no TP-adjustment was warranted, and held that that such an argument was contrary to the findings of the High Court. It stated that the examination of assessee's Distribution and AMP functions vis-a -vis probable comparables was sine qua non in the ALP determination process and held that if the assessee's argument was taken to a logical conclusion, it would make the AMP spend a non-international transaction, which, would not be appropriate. Considering the observations of the High Court with respect to bundling of transactions, it observed that the essence of the judgment was that the two international transactions of Distribution and AMP was to be examined as per transfer pricing provisions, but on an aggregate basis and clarified that the Distribution and AMP expenses, were being aggregated only for ALP determination purposes, and the same did not take away the separate character of the AMP transaction.

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ACIT vs. Casio India Company Pvt. Ltd - TS-287-ITAT-2017(DEL)-TP - ITA No. 6135/Del/2012 dated 03/04/2017

1854. The Tribunal remitted the issue of addition on account of AMP for AYs 2009-10 and 2010-11 and held that the contentions of the assessee viz. (a) whether incurrence of AMP expenses was an independent international transaction or not and (b) whether no separate adjustment was called for on account of AMP expenditure as its margin was much healthier than the margin of the comparables etc. had to be factually examined by the TPO. It directed the TPO to consider these issues in light of the findings given by the High Court in Sony Ericsson and Maruti Suzuki rulings.
RayBan Sun Optics India Ltd vs. DCIT - TS-239-ITAT-2017(DEL)-TP - ITA No.672/Del/2014 and ITA No.891/Del/2015 dated 24-03-2017

1855. The Tribunal remitted AMP adjustment back to the TPO to determine whether incurrence of AMP expenditure was an international transaction for assessee engaged in the business of manufacturing confectionary products. It noted that the TPO presumed existence of international transaction of AMP by adopting bright line test by relying on special bench ruling in LG Electronics. It observed that while considering AMP expenses as an international transaction, the TPO did not have the benefit of judicial precedents now available for consideration, whereas some judgments consider the transaction of AMP expenses as an international transaction, and some others have held otherwise. Referring to recent HC rulings in Rayban Sun Optics India, Toshiba India and Bose Corporation, it restored the matter to the file of TPO/AO for fresh consideration.
Perfetti Van Melle India Pvt Ltd -TS-403-ITAT-2017(DEL)-TP-I.T.A.No.789/DEL/2016 dated 28.04.2017

1856. The Tribunal, upheld deletion of TP-adjustment on account of brand promotion expenses incurred by assessee engaged in blending, bottling and trading of Indian Made Foreign Liquor ('IMFL') on the ground that if the product manufactured and sold by the assessee was India specific then it could not be said that any benefit could have accrued to the AE on account of AMP spend in India in respect of such brands. Further, it rejected Revenue's plea for remanding the issue in view of Delhi HC decisions on this issue, clarifying that its adjudication on AMP issue was specific to present case and should not be enunciated as a legal principle or precedent. ***Pernod Ricard India Pvt. Ltd (formerly known as Seagram India Pvt Ltd) Vs DCIT TS-354- ITAT-2017(DEL)-TP ITA No.3525/Del/2009 and ITA No. 2770/del/2011 dated 02.05.2017***

1857. The Tribunal following the principle of consistency, remitted the issue of AMP-adjustment back to the TPO to determine the existence of international transaction for AY 2012-13 in light of the decision of the coordinate bench in the assessee's own case of AY 2011-12. In AY 2011-12 the Tribunal remitted the AMP adjustment back to the TPO to determine whether incurrence of AMP expenditure was an international transaction for assessee engaged in the business of manufacturing confectionary products. The TPO had applied bright line test to determine the routine advertising, marketing and promotional expenses and proposed transfer pricing adjustment using a markup 38.27% (assessee's gross profit rate) and calculated the same at Rs. 308.19 crores under cost plus method. The assessee

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relied on the decision in the case of Maruti Suzuki India Ltd [TS-595-HC-2016(DEL)-TP] and Whrilpool of India Ltd [TS-622-HC-2015(DEL)-TP] to contend that AMP expenses could not be considered as an international transaction. Observing that the TPO had benefit of only some High Court judgments while passing its order, Tribunal held that several other judgements on the same issue had been delivered, thus the judicial position of the High Court was required to be applied to the facts of this case. Further, quoting Rule 10B(1)(c) containing the modus operandi for determining the ALP of an international transaction, it rejected TPO's approach of considering assessee's own gross profit rate (38.27%) instead of the comparables for TP adjustment under cost plus method.

Perfetti Van Melle India Pvt Ltd vs DCIT -TS-432-ITAT-2017(DEL)-TP-ITA No.1073/del/2017 dated 24.05.2017

1858. The Tribunal relying on coordinate bench's ruling in assessee's own case for AY 2010-11, remitted TP-adjustment in respect of AMP expenses relating to selling and distribution activities. For AY 2010-11, the TPO had made an addition in respect of AMP expenses incurred by the assessee. The assessee had contended that all expenses incurred by it were in the nature of selling expenses and it was prohibited under the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 from incurring any expenditure on advertisement, marketing and promotion. Further, it also placed reliance on the ruling in the case of CIT vs Whirlpool of India Ltd [(2015) 94 CCH 156 Delhi HC] to contend that AMP expenses could not be considered as an international transaction. The Revenue relying on the decisions in the case of Rayban Sun Optics India Ltd, Toshiba India Pvt Ltd and Bose Corporation contended that there was no blanket rule of AMP expenses as a non-international transaction and that the High Court had restored the issue for fresh consideration. Further, the Tribunal had in several cases restored the matter to the file of TPO to be decided in light of the decision in the case of Sony Ericson Mobile Communications (India) Pvt. Ltd in which the question as to whether AMP expenses was an international transaction had been restored to the file of TPO/AO for fresh determination. Accordingly, the Tribunal restored to the file of AO/TPO the issue relating to transfer pricing i.e. AMP expenses for fresh adjudication.

MSD Pharmaceuticals Pvt Ltd vs DCIT-TS-435-ITAT-2017(DEL)-TP-ITA Nos. 1383 & 1563/del/2016 dated 25.05.2017

1859. The Tribunal held that the TPO was incorrect in comparing the AMP cost incurred by the assessee relevant to its outbound segment with the AMP costs for its inbound segment as such comparison was inappropriate as there was material difference in the inbound and outbound segment as the assessee was required to incur substantial marketing and advertisement expenses in its outbound business whereas those expenses were incurred by the foreign tour operator / travel agent in the inbound business.

Le Passage to India Tours & Travels Pvt Ltd v DCIT (ITA No: 2491/Del/2014 & ITA No. 1529/Del/2015) – TS-471-ITAT-2015 (Del) – TP

1860. The Tribunal held that the examination of the AMP functions carried out by the assessee and probable comparables is sine qua non in the process of determination of ALP of the international transaction. It rejected the TPOs application of the bright line test as it was a mere quantitative analysis ignoring the examination of the AMP functions carried out by the assessee and the potential comparables. It held that distribution and AMP functions,

which are two separate international transactions need to be compared with uncontrolled transactions and because of their inter-twining, could be aggregated in the first instance for comparability purposes if the comparables also perform similar distribution and AMP functions. If there are no comparables performing both functions, then the international transaction of AMP should be segregated and determined separately by applying a suitable method.

Nikon India Pvt Ld v DCIT (ITA No.789/Del./2015) – TS-456-ITAT-2015(Del)- TP and Haier Appliances India Ltd v DCIT – (2015) 45 CCH 0148 Del Trib

1861. The Tribunal remitted the issue of determination of ALP to the lower authorities to first determine the existence of an international transaction prior to making an adjustment on account of AMP expenses. It also directed the TPO to exclude from the ambit of AMP expenses, selling expenses directly incurred in connection with sales not leading to sale promotion.

LG Life Sciences India P Ltd v ACIT - (2016) 47 CCH 0551 (Del Trib) ITA No. 1818/Del/2015

1862. The Tribunal held that where the identical issues (AMP expenses and Intra-group services) were already adjudicated by Jurisdictional High Court in assessee's own case which were in favour of assessee, re- characterisation of intra-group services on the basis of it not being for commercial expediency when it is fully disclosed in the TP study report is clearly beyond powers of transfer pricing officer. Also, revenue had not been able to prove existence of international transaction involving AMP expenses.

Bausch & Lomb India Pvt.Ltd vs. DCIT (2016) 48 CCH 0069 (Del Trib)- ITA No. 6778/Del/2015

1863. The Tribunal held that selling expenses incurred for making sales not leading to brand promotion in any manner are distinct from expenses and should not be included in the base amount for computing ALP of AMP expenses.

Discovery Communications India v DCIT – [2015] 64 taxmann.com 120 (Del – Trib)

1864. Where the Tribunal in the first round of proceedings had remitted the AMP TP adjustment back to the TPO with the specific direction to recompute the ALP after allowing marketing expenses as a deduction but the TPO proceeded to determine ALP afresh, the Tribunal, in the second round of proceedings, remitted the issue back to the TPO observing that the TPO had not been granted any discretion in the first remand and directed the TPO to to calculate ALP exactly in the way directed by it in the first round of proceedings.

St. Jude Medical India Pvt. Ltd vs. DCIT - TS-64-ITAT-2018(HYD)-TP - ITA No.1425/Hyd/2014 dated 24.01.2018

1865. The TPO was of the view that the entire amount of AMP expenses was to be considered as expenditure for creation of marketing intangibles for its AE, which should have been compensated by the AE to the assessee and determined the ALP of AMP expenses by imputing a markup of 5% to the AMP expenses incurred by assessee (who was engaged in both manufacturing and distribution of pharmaceutical formulations). The DRP confirmed the TPO's treatment of AMP transaction as an international transaction and upheld the action of

TPO in determining the ALP of AMP expenses. The Tribunal rejected Revenue's argument that the Delhi HC decision of Maruti Suziki would not be applicable in view of assessee being only a distributor noting that assessee was both a manufacturer and distributor as evident from its financials (in terms of consumption of raw materials, inventories and products manufactured by outsourcing) and accepted assessee's contention that AMP expenses could not be treated as international transaction relying on the coordinate bench decision of Philips India Ltd. wherein it was held that where the assessee was a manufacturer cum distributor ratio laid down in Del HC decision of Maruti Suzuki would be applicable and AMP transaction could not be treated as an international transaction. It also observed that entire AMP expenditure has been incurred and paid only to third parties and not to AEs and also the expenditures incurred were purely related to products of the assesee and not for any brand.
Organon (India) Pvt Ltd vs DCIT [TS-1141-ITAT-2018(Kol)-TP] ITA Nos.633 and 2459/Kol/2017 dated 24.10.2018

1866. The TPO was of the view that the entire amount of AMP expenses was to be considered as expenditure for creation of marketing intangibles for its AE, which should have been compensated by the AE to the assessee and determined the ALP of AMP expenses by imputing a markup of 5% to the AMP expenses incurred by assessee (who was engaged in both manufacturing and distribution of pharmaceutical formulations). The DRP confirmed the TPO's treatment of AMP transaction as an international transaction and upheld the action of TPO in determining the ALP of AMP expenses. The Tribunal rejected Revenue's argument that the Delhi HC decision of Maruti Suziki would not be applicable in view of assessee being only a distributor noting that assessee was both a manufacturer and distributor as evident from its financials (in terms of consumption of raw materials, inventories and products manufactured by outsourcing) and accepted assessee's contention that AMP expenses could not be treated as international transaction relying on the coordinate bench decision of Philips India Ltd. wherein it was held that where the assessee was a manufacturer cum distributor ratio laid down in Del HC decision of Maruti Suzuki would be applicable and AMP transaction could not be treated as an international transaction. It also observed that entire AMP expenditure has been incurred and paid only to third parties and not to AEs and also the expenditures incurred were purely related to products of the assesee and not for any brand.
Organon (India) Pvt Ltd vs DCIT [TS-1141-ITAT-2018(Kol)-TP] ITA Nos.633 and 2459/Kol/2017 dated 24.10.2018

1867. The assessee was party to a Share Purchase Agreement (SPA) signed by existing shareholders of a Mauritius based company, EMSHL for transfer of a portion of shareholding of that company to Kuki Investments Ltd.(Kuki) represented by husband of the assessee ('RK') and under same SPA, Kuki was also to subscribe to additional shares to be issued by company EMSHL. The assessee was neither a buyer nor a seller of shares of EMSHL in SPA. However, under SPA assessee provided brand ambassadorship services to Jaipur IPL Cricket Private Limited (JICPL), an Indian Company that was a 100 per cent subsidiary of EMSHL, in relation to promotional activities of cricket team without any charge. The AO in the assessment order treated the assessee and EMSHL as AEs and held that services rendered by assessee to JICPL under SPA involving shareholders of EMSHL constituted an international transaction and computed the ALP adjustment towards the brand ambassadorship services based on another contemporaneous brand ambassadorship

agreement of the assessee with Hindustan Unilever Limited (HUL). The CIT(A) held that the assessee and Kuki were AEs in view of section 92A(1) and further applied section 92B(2) to hold that there was a deemed 'international transaction' between assessee and JICPL due to the share purchase agreement and confirmed the adjustment. The Tribunal deleted the TP adjustment made by the AO towards the brand ambassadorship services observing that (i) section 92A(2)(J) deems the two enterprises to be AE's if one of the enterprise is controlled by an individual and the other enterprise is controlled by such an individual or his relatives and the Revenue had failed to bring any argument on record with respect to the second limb as to how RK or his relative controlled the other enterprise, the CIT(A) had wrongly presumed that assessee's Profession (not a person u/s. 2(31) and separate from her) was the other 'enterprise' and RK's relative, i.e. assessee, controlled that other 'enterprise', i.e. her 'profession'. (ii) section 92B(2) cannot be applied to hold that transaction between assessee and JICPL was an 'International transaction' as neither any of the parties to the SPA were an AE of the assessee nor JICPL entered into a prior agreement with the AE of the assessee and as such the prerequisite of a prior agreement between a non-AE with the AE of an assessee were not fulfilled (iii) Section 92 was not an independent charging section to bring in a new head of income or to charge tax on income which is otherwise not chargeable under the Act. Accordingly, since no income had accrued to or received by the assessee under section 5, no notional income could be brought to tax under section 92.

Shilpa Shetty vs ACIT [TS-885-ITAT-2018(Mum)-TP] ITA No.2445/Mum/2014 dated 21.08.2018

1868. The Tribunal deleted TP-adjustment on Advertising, Manufacturing and Publicity (AMP) expenses incurred by the assessee absent any agreement/arrangement with AE for incurring of AMP-expenses. It observed that the assessee was a new entrant in the field of manufacturing & sale of cosmetic/personal care products and had incurred AMP expenses to promote its products to compete with similar products of other players. It held that there was a subtle but definite difference between product promotion and brand promotion, i.e. in the first case product is the focus of the advertisement campaign and the brand takes secondary or back seat, whereas in second case, brand is highlighted and not the product and held that since the basic purpose for incurring expenses by assessee was to expand its business in India and not to look after AE's interest, it could safely be said that the expenses incurred by the assessee were wholly and exclusively for its own business and not an international transaction. Accordingly, it deleted the TP adjustment.

Nivea India Pvt. Ltd vs. ACIT - TS-187-ITAT-2018(Mum)-TP - /I.T.A./7744/Mum/2012 dated 21/03/2018

1869. The Tribunal deleted the AMP adjustment by relying upon the decision of coordinate bench in assessee's own case for AY 2010-11 wherein it was held that in absence of any agreement/arrangement between the assessee and its AE for sharing of AMP expenses, it could not be termed an international transaction.

India Medtronic Private Limited vs. DCIT [TS-400-ITAT-2018(Mum)-TP] ITA No.7555/May/2012 dated 04.05.2018

1870. The Tribunal deleted the TP adjustment on AMP expenses incurred by the assessee following the coordinate bench decision in assessee's own case for earlier year which had relied on the

coordinate bench decision of Thomas Cook to hold that the in absence of agreement between the assessee and AE for sharing of AMP expenses, it was not an international transaction. It also noted that the TPO erred in applying BLT to determine the existence of international transaction after the HC decision in Sony Ericsson. Thus, the Tribunal allowed the assessee's appeal.

India Medtronic Private Limited vs DCIT [TS-318-ITAT-2018(Mum)-TP] ITA No.1246/Mum/2016 dated 02.05.2018

1871. The Tribunal deleted the AMP-adjustment for assessee [engaged in manufacturing and marketing of diversified pharmaceutical products] in absence of any agreement obliging assessee to undertake brand building on AE's behalf for AYs 2005-06 & 2007-08. The TPO proposed AMP-adjustment and noted that sales on which royalty was being paid by assessee had recorded a faster growth and AMP expenses [which were the driving force for enhancing business] were to be shared by overseas AE in proportion to benefit accruing to it. It rejected revenue's only argument that brand value of assessee group as a whole had reflected healthy growth during the period 2000-2006. The Tribunal observed that there was no evidence to demonstrate the co-relation between the growth and quantum of AMP-expenditure, and hence the addition on basis of mere surmises could not be sustained. It distinguished Sony Ericsson ruling as it was rendered in the context of distributor of products manufactured by foreign AE and further relied on Bombay HC ruling in Johnson & Johnson and various Delhi HC rulings including Maruti Suzuki & Bausch & Lomb and deleted the AMP adjustment.

ACIT vs. Colgate Palmolive (India) Limited [TS-319-ITAT-2018(Mum)-TP] ITA No.6073/Mum/2014 &CO No.243/Mum/2014 dated 04.05.2018

1872. The Tribunal dismissed Revenue's appeal challenging deletion of AMP-adjustment in case of assessee engaged in the business of production, marketing and sale of instrument, implants and biomaterials for surgical fixation and noted that issue was covered against Revenue by order of co-ordinate bench in assessee's own case for previous AY's wherein AMP-adjustment was deleted after noting that assessee had made payment under AMP head for promotion of its own business and there was no agreement between assessee & AE for sharing AMP-expenses.

Synthes Medical Pvt Ltd vs JCIT LTU-1- TS-266-ITAT-2018(Mum)-TP- ITA No. 1784/Mum/2016 dated 13.04.2018

1873. The TPO was of the view that the assessee had incurred certain AMP expenditure in the consumer segment which had benefited the overseas AE in building its brand and determined the ALP of AMP expenditure by applying Brightline testing following the SB decision of LG Electronics. The Tribunal deleted the AMP adjustment made by the TPO noting that in assessee's own case for assessment year 2011–12, the DRP had held that AMP expenditure did not fall within the definition of section 92 B of the Act and after verifying the terms of agreement had categorically observed that the agreement does not reveal any arrangement between the assessee and its AE for incurring of AMP expenditure. It further applied the ratio laid down in Del HC ruling in Maruti Suzuki wherein it was held that in absence of arrangement or agreement, AMP expenss incurred could not be categorized as an international transaction and method of applying BLT was not provided in statute.

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Johnson And Johnson Pvt. Ltd. vs ACIT [TS-1028-ITAT-2018(Mum)-TP] ITA No.6142/Mum/2017 dated 19.09.2018

1874. The Tribunal by relying on Delhi HC ruling in Sony Ericson Mobile Communication, Maruti Suzuki India Ltd. and Whirlpool India Ltd. dismissed Revenue's appeal and upheld DRP's order deleting AMP adjustment on the basis that there existed no agreement or understanding or arrangement between the assessee and the AE for sharing of AMP expenses and the TPO has not shown anything except BLT to benchmark the alleged excess AMP expenses.
The DRP had remanded the AMP adjustment to be decided afresh by the TPO in light of the Delhi High Court ruling of Sony Ericson Mobile Communication. The TPO in the remand report had also examined the issue of royalty, intra group services and other international transaction and suggested an alternative disallowance of Rs.31,48,74,320/- for royalty and Rs.18.44 crores for intra group services towards availing market support services. The DRP, on fresh information received by the TPO, benchmarked the royalty payment at 3% of sales by applying internal CUP and proceeded to make the adjustment. In so far as intra group services were concerned, DRP made a TP adjustment on intragroup services accepting TPO's view that assessee had failed to demonstrate that services were received by the assessee or that it benefitted from such services as claimed. The Tribunal rejected assessee's contention when DRP was silent on the issue, the TPO did not have jurisdiction to suggest alternative disallowances and examine issues not mentioned. However, the Tribunal restored the issue of royalty and intragroup services on the ground that proper opportunity was not given to the assessee to make the submissions on the alternative disallowances.
Loreal India Private Ltd vs Dy.CIT [TS-1061-ITAT-2018(Mum)-TP] ITA No.963/Mum/2016 and CO No.139/Mum/2016 dated 11.09.2018
Dy.CIT vs Loreal India Private Ltd [TS-1061-ITAT-2018(Mum)-TP] ITA No.1264/Mum/2016 dated 11.09.2018

1875. The Tribunal deleted the TP adjustment on AMP expenses made by TPO in case of assessee (engaged in the business of manufacturing and sale of malted food and drinks as well as chocolates) relying on coordinate bench decision in assessee's own case for earlier year wherein it was held that the disputed transaction was not an international transaction in absence of an agreement entered into between assessee and its AE for sharing/ reimbursement of AMP expenses. It observed that assesseehad incurred the AMP expenditure for creating product awareness and to recall the value of existing products and that it had a local marketing strategy of making advertisement/slogans in local language. Further, nothing was brought on record by TPO to prove that the assessee was directly or indirectly promoting the global brand rather than promoting its own products.
Mondelez India Foods Pvt. Ltd. vs Addl.CIT [TS-1288-ITAT-2018(Mum)-TP] ITA No.1512/Mum/2013 dated 28.11.2018

1876. The Tribunal deleted the AMP-adjustment made by TPO/DRP on alleged engagement by assessee (trader of life saving devices) in brand promotion on behalf of its AE by i) rejecting TPO's application of the Bright Line Test to assess the alleged AE-benefit and arrive at an arm's length compensation by observing that no such method was prescribed under the Act and the Rules; and ii) observing that in the absence of any agreement for sharing AMP expenses between the assessee and the AE, the marketing expenditure of the assessee

could not considered as an international transaction. It noted that the agreements between the assessee and the AE in the present case merely mentioned "best efforts to market and distribute the product or promote the products in a commercially reasonable manner", but did not contain any 'condition' or 'indication' about sharing of AMP expenses.

It held that if the AE was benefitted indirectly by the AMP expenditure incurred by the assessee, it could not be held that the assessee and the AE had entered into agreement for sharing AMP expenses.

India Medtronic Private Limited vs. DCIT - TS-38-ITAT-2018(Mum)-TP - /I.T.A./1600/Mum/2015 dated 17.01.2018

1877. Where on perusal of the agreement between assessee & AE, the DRP observed that nothing was discernible from the said documents that could be construed as an agreement between the assessee and the AEs for AMP expenses on behalf of AEs, the Tribunal relying on the decision in assessee's own case for AY 2008-09 to 2010-11 (wherein it was held that the impugned transaction was not an international transaction and TPO had wrongly invoked provisions of Chapter X), upheld DRP's deletion of AMP-adjustment in the case of assessee for AY 2011-12. ***DCIT vs. Heinz India Pvt. Ltd- TS-881-ITAT-2017(Mum)-TP ITA No. 2101/MUM/2016 dated 06.11.2017***

1878. The Tribunal, relying on the coordinate bench's ruling in assessee's own case for AY 2007-08, deleted AMP adjustment **in the case of the assessee** (engaged in manufacturing & marketing of international alcoholic brands) and held that in the absence of an agreement/arrangement between the assessee and its AE and considering the fact that the assessee mainly made payments to unrelated domestic parties, AMP expenses incurred did not constitute an international transaction.

Diageo India Private Limited vs. ACIT-TS-699-ITAT-2017(Mum)-TP- ITA No. 981/Mum/2017 dated 18.08.2017

1879. The Tribunal, following the decision in assessee's own case for earlier AY 2007-08 (wherein Tribunal, relying on the decision of Johnson & Johnson Limited [TS-19-ITAT-2016(Mum)-TP] and by Delhi HC in the case of Perfetti Van Melle IndiaPvt Ltd. [TS-246-ITAT-2015(DEL)-TP] had restored the matter to AO as the AO had made TP additions on account of the Bright Line Test which was no longer valid), remanded the issue of benchmarking the reimbursement of AMP expenses received by the assessee (engaged in marketing Cobra brand of products in India) for AYs 2008-09 and 2009-10.

Molson Coors Cobra India Private Limited (erstwhile Cobra Indian Beer Pvt. Ltd.) Vs DCIT - TS-213-ITAT-2017(Mum)-TP - /I.T.A./7576/Mum/2013 & I.T.A./4306/Mum/2015 dated 15.03.2017

1880. The Tribunal remitted AMP-issue in the case of the assessee (engaged in trading of all kinds of leather bags, fashion apparels and accessories etc). for AYs 2009-10 and 2010-11, observing that the TPO/DRP had proposed AMP-adjustment by applying Bright Line Test which was overruled by Delhi HC in Sony Ericsson's case. Noting that neither TPO nor DRP had benefit of Sony Ericsson HC ruling, it set-aside the issue relating to the adjustment on account of AMP to the file of TPO/AO to decide the issue afresh and in accordance with law.

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Christian Dior Trading India Pvt. Ltd. vs. DCIT - TS-233-ITAT-2017(Mum)-TP- ITA No.1045/Mum/2014 dated 22.03.2017

1881. The Tribunal, noting that the decision of the Delhi High Court in the case of Sony Ericsson was not available to the TPO at the time of the relevant proceedings, remanded the matter back to the file of the TPO to re-compute the AMP addition in line with the ratio laid down in the aforesaid judgment. Further, it held that the AO / TPO were to adopt the bundled approach in benchmarking AMP transactions and that where the comparable companies were adopted as a bundled transaction, it would be unfair to segregate AMP expenses since the comparable companies are accepted after comparing various functions performed by the tested party and the AMP expenses are duly accounted for in such comparability analysis.
India Medtronic Pvt Ltd v DCIT - TS-633-ITAT-2015 (Mum) – TP

1882. The Tribunal held that the TPO was incorrect in adopting the Bright Line Test for the purpose of determining the ALP of the AMP transactions as specifically held by the Delhi High Court in the decision of Sony Ericsson and accordingly remanded this limited issue to the file of the TPO.
Johnson & Johnson Limited v Add CIT- TS-19-ITAT-2016 (Mum) – TP

1883. The Tribunal held that where the assessee, a market leader in the chocolate confectionary segment, had incurred marketing expenses for increasing awareness of its products in India leading to higher sales, the same could not be presumed to have an indirect benefit to the assessee's AE. Additionally, in the absence of an agreement between the assessee and the AE and where the TPO failed to prove that the assessee incurred marketing expenses on behalf of the AE, the provisions of Chapter X could not be applied to the AMP expenditure of the assessee. It held that a perceived / notional indirect benefit to the AE due to incurring of certain expenditure by an assessee in India was not covered under the TP provisions.
Mondelez India Foods Pvt ltd v Add CIT - (2016) 47 CCH 0098 (Mum- Trib)

1884. The Tribunal deleted TP adjustment on account of AMP expenses in the case of assessee engaged in manufacture and sale of toy products in India for AY 2008-09 by holding that a perceived / notional indirect benefit to the AE , due to incurring of certain expenditure by assessee in India was not covered by the TP provisions. Further, noting that the lower authorities tried to incorporate ingredients of Section 37 while dealing with TP adjustment on account of higher expenditure in respect of AMP, the Tribunal held that the lower authorities had adopted a totally incorrect approach without appreciating that there was a fundamental and basic distinction between the provisions of Section 37 and Section 92 of the Act as the first is expense oriented and the second is pricing oriented.
DCIT v Mattel Toys (India) Pvt Ltd - TS-466- ITAT-2016 (Mum) - TP - ITA/4350/Mum/2014 ITA/4415/Mum/2014 ITA/84/Mum/2015

1885. The Tribunal held that expenses directly related to the sales, marketing and other sales promotion expenses such as trade discounts cannot be included as a part of the AMP expenses for determining ALP.
M/s AW Faber Castell (India) Pvt Ltd v DCIT (ITA No 577 / Mum /2015) – TS-447-ITAT-

2015(Mum) – TP

1886. Where the assessee, a full-fledged risk bearing entrepreneur, had purchased, at cost, certain promotional items from its AE, which were provided to its customers in India and had been procured mainly for boosting its sales in India and developing the market for Pet Products, the risks and rewards of which were exclusively borne by the assessee, the Tribunal held that the Revenue was incorrect in contending that the assessee had purchased the same for the brand promotion of its AE. It noted that the assessee had purchased items worth Rs.1.12 crores on a sale of Rs.44 crore which was a cost to cost reimbursement and which was reasonable and could not be considered as excessive and therefore it held that no adjustment was to be made.
Royal Canin India Private Limited [TS-801-ITAT-2016 (Mum)-TP] (IT(TP)A No. : 784/Mum/2016)

1887. The Tribunal held that the TPO had exceeded his jurisdiction in determining the ALP of commission paid as Nil on the premise that the assessee had not explained the need of the services and not demonstrated how the services were actually rendered. The necessity of the commission expense was not to be determined by the TPO.
Durovalves India Pvt Ltd v ACIT (ITA No 2483 / PN / 2012) – TS-452-ITAT-2015 (PUN) – TP

Receivables

1888. The Apex Court, relying on co-ordinate bench ruling in Kusum Healthcare Pvt. Ltd, and noting Tribunal's findings that the assessee was a captive service provider and a debt free company and that the Revenue had also not brought on record that the assessee had paid any interest to its creditors or suppliers on delayed payments, it directed that no separate adjustment for interest on receivables was warranted in the hands of the assessee and accordingly upheld the order of
High Court.
Bechtel India Pvt Ltd-[TS-591-SC-2016-TP-ITA No. 379/2016 dated 21.07.2016

1889. The Court dismissed Revenue's appeal and upheld the order of the Tribunal which accepted the assessee's contention that notional interest should be charged on the delay in recovery of export receivables and expenses by assessee [engaged in the business of providing EPC in field of petrochemicals to its AE] in terms of LIBOR as against TPO's method of charging at PLR rate. It noted the Tribunal's finding of facts (i) no interest was charged by assessee from its AEs as well as non-AEs for delayed payment of export receivables beyond a period of 60 days (ii) assessee's operating margin in respect of AE transactions was higher than margin earned on non-AE transactions. It observed that it was only the notional interest which was being computed as in fact no interest was charged by the respondent for delayed payments universally i.e. from AEs and non-AEs. Further, it also observed that in cases where any business enterprise is required to pay interest on delayed payment, it would examine the cost of interest and if the same is higher than the amount of interest payable on funds obtained locally, it would take a loan from local sources and pay the amounts payable for exports and expenses within time. Thus, the Court held that order of the Tribunal computing interest at

LIBOR rates as prevailing in country where the loan is received/ consumed by the AE was in line with the decision of Bombay HC in Tata Autocomp and could not be faulted with
Tecnimont Pvt. Ltd. vs Dy.CIT [TS-880-HC-2018(BOM)-TP] ITA No.56 of 2016 dated 03.07.2018

1890. The Court upheld the Tribunals order wherein the TP addition on account of notional interest on delayed realization of sale of diamonds from AEs was deleted on the ground that the assessee had not charged any interest from third parties / Non-AEs on delayed payments exceeding more than 300 to 400 days as well.
CIT v M/s Livingstones – TS-962-HC-2016 (Bom) – TP

1891. The Court, upheld Tribunal's deletion of notional interest adjustment on delayed AE-receivables in the hands of the assessee on the ground that the since assessee had earned significantly higher margin than its comparables, it compensated for credit period extended to its AEs and thus the TP-adjustment on receivables outstanding from AE beyond the stipulated credit period of 180 days was unwarranted and wholly unjustified. Further, it held that the inclusion in the explanation to section 92B of the Act, the expression 'receivables' would not mean that de hors the context every item of 'receivables' appearing in the accounts of an entity which may have dealings with foreign AEs would automatically be characterized as an international transaction. It observed that, assessee had already factored in the impact of receivables on working capital and thereby on its pricing/profitability vis-a-vis that of comparables, and adjustment purely on the basis of outstanding receivables would amount to re-characterizing the transaction which was impermissible as per High Court ruling in the case of EKL Appliances [TS-206-HC-2012(DEL)- TP].
Kusum Helath Care Pvt. Ltd [TS-412-HC-2017(DEL)-TP- I.T.A.No.765/2016 dated 25.04.2017

1892. The Court, admitted assessee's appeal on TP-issue relating to trade receivables and admitted 2 questions of law (1) whether Tribunal erred in setting aside matter to AO/TPO to verify certain calculations without first adjudicating on the primary legal issue of whether a trade receivable per se could be characterized as an international transaction u/s 92B. (2) whether Tribunal ought to have held that even if a trade receivable per se was to be regarded as an international transaction, it was inextricably linked to and arose from the transaction of provision of services and therefore the two formed a bundle of transactions, which ought to be benchmarked.
Target Sourcing Services India Pvt. Ltd vs. ACIT-TS-697-HC-2017(DEL)-TP-ITA No. 741/2017 dated 01.09.2017

1893. The Court upheld Tribunal's order vis-à-vis TP adjustment on account of outstanding receivables relying on coordinate bench decisions in Ameriprise and BT e-serve wherein it was held that after the amendment by Finance Act 2012 in Explanation to s 92B inserted with retrospective effect from 01.04.2002, once any debt transaction arising during course of business has been considered an international transaction,any corresponding non-charging of interest payment/ under charging of interest on excess period of credit allowed to AE amounts to an international transaction and hence ALP of said interest transaction needs to be determined.

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McKinsey Knowledge Centre India Pvt. Ltd vs Pr.CIT [TS-812-HC-2018(DEL)-TP] ITA 461/2017 dated 09.08.2018

1894. Where the TPO had made an addition on account of notional interest on receivables, the Court relying on the decision in the case of Kusum Healthcare Pvt Ltd [TS-412-HC-2017(DEL)-TP] directed the CIT(A) to study the impact of the receivables appearing in the accounts of the assessee, looking into the various factors as to the reasons why the same were shown as receivables and also as to whether the said transactions could be characterized as international transactions.

Avenue Asia Advisors Pvt. Limited vs. DCIT-TS-737-HC-2017(DEL)-TP ITA No. 350 / 2016 dated 18.09.2017

1895. The Court upheld Tribunal's rejection of TPO's re-characterization of assessee's notional interest transaction on delayed realization of trade debts from AE noting that the Tribunal had relied on EKL Appliances Delhi HC-ruling wherein HC had slated the only 2 possible situations where re-characterization of a transition is possible- (i) when the economic substance of a transaction differs from its form and (ii) when the form and substance of the transaction are the same but arrangements made in relation to the transaction, differ from those which would have been in uncontrolled transaction and had categorically held that none of these conditions were satisfied in the present case. Further it noted that the assessee had not charged interest on the delayed realization of debts in non-AE cases as well and therefore held that there could not be any occasion to make ALP adjustment for notional interest on delay in realization of trade debts from AEs. Accordingly it held that the finding given by the Tribunal was based on the facts of the case and therefore no question of law emerged.

Pr. CIT vs. Sharda Spuntex Pvt. Ltd - TS-436-HC-2018(RAJ)-TP - D.B. Income Tax Appeal No. 56 / 2017 dated 11/05/2018

1896. The Tribunal deleted the interest imputed by the TPO on delay in realization of sale proceeds from AE following the coordinate bench decision of the assessee for earlier year which in turn had relied on MicroInk ruling wherein it was held that operating profit under TNMM factors in the interest adjustment on delay in receivables and hence any further adjustment of interest on excess credit allowed on sales to AE would not be needed. It accepted assessee's contention that no separate adjustment was needed since TNMM factored the interest cost for recovery of sale proceeds from debtors and thus. deleted the adjustment made by the TPO to determine ALP.

Bisazza India Pvt Ltd vs DCIT [TS-1095-ITAT-2018(Ahd)-TP] ITA No.2350/Ahd/2017 dated 08.08.2018

1897. The Tribunal deleted the TP adjustment on account of notional interest charged on excess delay beyond the credit facility extended to AE in realization of sale invoices relying on coordinate bench ruling in case of Bisazza India (P.) Ltd. wherein it was held that if the ALP of transaction is benchmarked on basis of TNMM, an adjustment for interest on excess credit allowed on sales to AEs will distort the picture as TNMM analysis by taking operating profit figure already incorporates the financial impact of excess credit period, which would be adjusted again separately as well.

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Gemstone Glass Pvt Ltd vs DCIT [TS-1221-ITAT-2018(Ahd)-TP] ITA (TP) No.3533 /Ahd/2015 dated 23.10.2018

1898. The Tribunal deleted the adjustment made by the TPO on account of excess credit period allowed by the assessee to its AE as opposed to its non-AE customers on the ground that the goods sold to the AEs were semi-finished goods and therefore the period of credit on semi-finished goods could not be compared to the period of credit allowed for finished goods. It further held that where interest is includible in operating income which has been accepted as reasonable under TNMM, there is no occasion to make adjustment for notional interest and that the delay in realization of debts, resulting in a continuing debit balance is not a standalone international transaction per se, but is a result of an international transaction.

The Tribunal held that the issuance of corporate guarantee was in the nature of shareholder activities and thus could not be included within the ambit of services under section 92B of the Act and that there could be activities which benefit group entities but were not necessarily services as there is no express reference to the 'benefit test' in the main definition of the international transaction under the Act. Further it held that even if the corporate guarantee was to be treated as service, it would have to be re-characterised to bring it into tune with commercial reality as no independent enterprise would provide corporate guarantee without a security as in the instant case. Relying on the decision of Bharti Airtel it held that in the absence of bearing on profits, income, losses or assets, the guarantee was outside the ambit of international transactions.

Micro Ink Ltd v ACIT (ITA No 2873 / Ahd / 10) – TS-568-ITAT-2015(Ahd) – TP

1899. The Tribunal deleted the addition on interest on receivables (transaction of sale of network products) where invoicing was beyond 90 days period relying on coordinate bench ruling in case of MicroInk wherein it was held that interest was already factored in operating income in case of TNMM and once the operating profit had been accepted as reasonable, there could not be any occasion to be make adjustment for notional interest on delayed realization of debtors. Also, it observed that assessee was not charging any interest from non-AEs for delay in realization beyond 90 days period which could be taken as a valid CUP input and thus, adjustment would not survive.

Sophos Technologies Private Limited (Formerly known as Cyberoam Technologies Pvt Ltd) vs Dy.CIT [TS-1213-ITAT-2018(Ahd)-TP] ITA No.1565 /Ahd/2017 dated 16.11.2018

1900. The TPO treated the outstanding receivables from AE's for provision of software development services (for a period of more than 3 months) as loan and computed notional interest at 11.25% (being SBI PLR) applying CUP. The DRP directed the TPO to verify whether the AE was recovering interest from third parties for late recovery and if this was found to exist the interest on extended credit period could be reasonable, on contrary facts its adjustment could not sustain. The Tribunal deleted the TP adjustment on interest on receivables accepting assessee's plea that giving a credit period could not be considered as a separate international transaction and was in fact an integral part of transaction of rendering of software development services by the assessee to its AE and had to be considered as part of the international transaction of Software Development Services. Further, it relied on coordinate bench decision in case of Avnet India Pvt. Ltd. wherein it was held that there could be no

separate determination of ALP of international transaction of realization of sale proceeds with extended credit period as it was only incidental to transaction of sale and not an international transaction.

Sunquest Information Systems (India) Pvt Ltd vs Dy. CIT [TS-1390-ITAT -2018-(Bom)-TP] IT(TP)A No.552/Bang/2015 dated 21.12.2018

1901. The Tribunal allowed assessee's appeal against DRP/TPO's imputing of notional interest on outstanding receivable from AEs noting that the assessee had huge outstanding balances exceeding 6 months in respect of AE-debtors. Relying on the decision of AMD India Private Ltd [TS-840-ITAT-2017(Bang)-TP], it held that the extra credit allowed was to be considered as an independent international transaction and the same was to be compared with the internal CUP being average cost of the total funds available to the assessee. Since no specific period of credit was agreed upon in the case of the assessee it restored the matter to the file of TPO to ascertain the agreed credit period and benchmark the transaction accordingly.

Ingersoll Rand (India) Ltd. vs. DCIT - TS-1061-ITAT-2017(Bang)-TP – ITA ***251/Bang/2014 dated 10.11.2017***

1902. The Tribunal held that the credit period on AE receivables was not an independent international transaction but part of the main international transaction of providing software development services and therefore no separate adjustment was warranted on account of the same. It held that for the purpose of determining the ALP of such international transactions, adjustments in the shape of working capital adjustments were to be considered. Accordingly, the Tribunal remitted the matter back to the file of the TPO to provide for adequate working capital adjustments in respect to the software development services.

Dell International Services India Pvt Ltd v JCIT - TS-358-ITAT-2016 (Bang) - TP

1903. The Tribunal held that the transaction of extending credit period to AEs was closely linked with the transaction of providing services to the AE and was not a separate transaction and therefore both transactions were to be aggregated for determination of ALP. It rejected the argument of the assessee that transaction of extending credit period to AEs could not be regarded as "international transaction" in the absence of any income arising therefrom was not acceptable and further held that the observations in Vodafone vs. UOI 368 ITR 1 (Bom) were in a different context.

Tally Solutions Pvt Ltd v ACIT - IT (TP) A No 1364 / Bang / 2011

1904. The Tribunal, relying on the decisions of the coordinate bench in Goldstar Jewellery [TS-14-ITAT-2015(Mum)-TP] and Avnet India [TS-629-ITAT-2015(Bang)-TP], deleted TP adjustment on account of notional interest on overdue receivables, computed @17.22 percent by the TPO and held that the transaction of non-realization of dues from AEs was not an independent transaction and had to be considered along with main transaction viz. sales, as it was an integral part of sales transaction to AE.

Millipore (India) Ltd. Vs ACIT – TS-83-ITAT-2017 (Bang) – TP - IT(TP)A No.327/Bang/2015 dated 07.03.2017

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1905. Relying on the decision in the case of Tally Solutions [TS-620-ITAT-2016(Bang)-TP and assessee's own case [TS-865-ITAT-2016(Bang)-TP], the Tribunal held that extending credit period for realization of sales to AE could not be treated as an individual and separate transaction of advance or loan and accordingly, remitted the ALP determination for outstanding AE receivables to the file of AO/TPO to consider the credit period allowed in realization of sale proceeds as closely linked transaction to the transaction of providing services to AE. Rejecting Revenue's contention based on Delhi HC ruling in Kusum Healthcare Pvt. Ltd that TPO had to analyze the statistics over a period of time (and not merely for one AY) to discern a pattern which would indicate whether the receivables arrangement reflected an international transaction intended to benefit the AE in some way, it held that there may be delay in collection of monies for supplies made even beyond the agreed time limit due to a variety of factors which had to be investigated on a case to case basis.

Lotus Labs Pvt. Ltd. vs. DCIT-TS-574-ITAT-2017(Bang)-TP IT(TP)A Nos.92 & 98/Bang/2016 dated 07.07.2017

1906. Where the Assessee allowed an extra credit period to AEs beyond the agreed credit period (30 days in the present case), the Tribunal held that to the extent of agreed credit period, the sale price to AE or non AE is inclusive of possible interest on such agreed debt but when extra credit is allowed beyond the agreed credit period, the same is a subsequent, independent event and interest for such extra credit period cannot be factored in the price agreed and accordingly amounted to an international transaction. Accordingly, it held that the extra credit period allowed by the assessee's to its AE (30 days) was an international transaction, requiring separate benchmarking. Further, relying on the decision in the case of M/s Goldstar Jewellery Ltd. vs. JCIT in ITA No. 6570/Mum/2012 directed the AO to ascertain the cost of the total funds available to the assessee and adopt it as internal CUP for benchmarking of this independent international transaction.

AMD India Private Ltd vs. DCIT-TS-840-ITAT-2017(Bang)-TP dated 26.10.2017

1907. The Tribunal relying on co-ordinate bench's ruling in assessee's own case for AY 2010-11[TS-865-ITAT-2016(Bang)-TP] held that the credit period allowed in realization of sale proceeds was a closely linked transaction with the transaction of providing services to AE, could not be treated as an international transaction. Accordingly, it remitted the issue to the file of AO/TPO directing it to reconsider the issue of transfer pricing by clubbing and aggregating the transaction with the main transaction of providing service to the AE.

Lotus Labs Pvt. Ltd vs ACIT-TS-624-ITAT-2017(Bang)-TP-IT(TP)A no.2295/bang/2016 dated 12.07.2017

1908. The Tribunal deleted the addition made by the TPO on account of notional interest on outstanding debt receivable from its AEs which were due for a period exceeding six months. It held that adjustment could not be made on a hypothetical and notional basis until there was material on record that there was an actual under charging of real income.

Ingersoll Rand (India) Ltd v DCIT [IT(TP)A No 228 / Bang / 2015] – TS-572-ITAT-2015 (Bang) – TP

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1909. Where the assessee was charging interest on extended credit period (beyond 90 days) to non- AEs but not to its AEs, the Tribunal held that the CIT(A) was justified in making notional interest adjustment on excess credit period allowed to AEs by assessee beyond 90 days.

Ingersoll Rand India Ltd vs DCIT-TS-637-ITAT-2017(BANG)-TP-ITA No. 6&7/bang/2014 dated 02.08.2017

1910. Where the assessee had outstanding receivables from AEs as well as advance to AEs and the TPO made an adjustment of Rs. 2.05 crore at 7.25%, the Tribunal relying on the decision in the case of of Bentley Systems [TS-559-ITAT-2015(DEL)-TP] and Cotton Naturals [TS-117-HC-
2015(DEL)-TP] held that extending credit period for realization of sales to its AE was a closely linked transaction with the transaction of providing services to the AE and accordingly directed the AO/TPO to determine the ALP in respect of interest on receivables considering it as a closely linked transaction with the provision of services to AE and make necessary TP adjustment at the rate of LIBOR+1% as the arm's length interest rate. Further, in respect of Loans and advances, the Tribunal held that it amounted to an international transaction and directed the TPO/AO to compute the arm's length at LIBOR+1.5%.

Och-Ziff Real Estate India Pvt Ltd vs DCIT-TS-693-ITAT-2017(Bang)-TP-IT(TP)A no. 358/bang/2016 dated 24.08.2017

1911. The Tribunal, noting that the co-ordinate bench had taken a similar view in the earlier year after examining all the facts and records and the order was not reversed by the High court, reversed CIT(A)'s order and upheld Revenue's contention to apply Indian rate for determining interest on outstanding AE-receivables and directed that the arm's length interest rate should be determined at 5% as against 10.25% adopted by the AO/TPO.

DCIT vs Izmo limited (formerly known as logix Microsystems ltd)-TS-806-ITAT-2017(BANG)-TP dated 28.09.2017

1912. The Tribunal dismissed the assessee's appeal challenging TP-adjustment towards notional interest on receivables outstanding from AE beyond 90 days and rejected the arguments of the assessee that it was a debt free company and profit margin from provision of software development services was much higher than comparables, not warranting any adjustment on account of notional interest. It distinguished the ruling of the Court in Bechtel India relied on by the assessee, stating that credit period in that case was 60 days while for assessee it was 1 year and rejected the assessee's contention that there was no benefit to AE since it immediately remitted the amount on receipt from its customers and held that assessee could not be a party for delayed payment by AE customers. Observing that the assessee was financing its AE by accommodating the delayed remittance and that the huge funds so parked with AE, if repatriated, could have been invested to earn better profits for assessee, the Tribunal concluded that this potential loss was a factor for consideration while evaluating financial impact of this transaction. Accordingly, it upheld the addition made by the TPO.

Professional Access Software Development Pvt Ltd v DCIT – TS-103-ITAT-2017 (Chny) – TP - I.T.A.No.3305/Mds./2016 dated 09.02.2017

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1913. Where the assessee made payment of interest on overdue outstanding for the prior years in the year under consideration, which was contrary to the mercantile system of accounting, the Tribunal dismissed the contention of the assessee that the TPO could not nullify the transaction as long as it was for business purposes. It held whenever the assessee claimed any payment to the AE, the TPO was within jurisdiction to question the quantum of expenditure incurred. Further, it rejected the submission of the assessee that the impugned interest for the prior years was paid during the year under review in accordance with the directives of the European Parliament and held that the said directives could not bind the assessee as the assessee was not situated in Europe.

ZF Wind Power Coimbatore Pvt Ltd v DCIT – TS-964-ITAT-2016 (Chny) – TP

1914. The Tribunal considered the outstanding amount of travelling & accommodation expenses incurred by assessee on behalf of AE as an international transaction noting that the expenses were incurred on behalf of and for the benefit of the AEs. It held that the expenses so incurred by the assessee on behalf of its AE, if outstanding, would come within the meaning / explanation of international transaction in section 92B of the Act and rejected assessee's plea of granting 6 months period for recovery of cost incurred from AE. It observed that a prudent businessman would always recover the outstanding amounts at the earliest point of time and therefore held that a period of 60 days (as against DRP's 15 days) was a reasonable period within which the expenses ought to have been recovered from AE. Regarding rate of interest, it rejected assessee's plea to adopt LIBOR since expenditure was incurred in Indian currency and not in dollars and held that SBI-PLR rates alone was to be adopted as the ALP interest rate (without any spread). Noting that the weighted average interest of SBI-PLR on FDs had been calculated at 8.15%, it held that 8.15% was to be adopted while calculating ALP interest on the amounts outstanding from the assessee's AEs.

Allianz Cornhill Information Services Private Limited vs. DCIT - TS-433-ITAT-2018(COCH)-TP IT(TP)A No.489/Coch/2016 dated 30.05.2018

1915. Relying on the decision of HC in Kusum Healthcare, the Tribunal directed the AO/TPO to examine if there is a pattern that can be discerned in the payment of outstanding receivables which reflects that the transaction is intended to benefit the AE in any manner. The High Court had held that interest on delay in payment of outstanding receivables from AEs needs to be charged on case to case basis after evaluation. Further, the Tribunal in line with the HC ruling also directed the AO/TPO to verify if the impact of receivables had already been factored in the working capital adjustment since any further adjustment on basis of outstanding receivables would not be warranted. Noting that the CIT(A) did not have the benefit of the HC ruling while passing the impugned order the Tribunal remitted the TP adjustment on account of notional interest on delayed payment of outstanding receivables to the AO/TPO with the said directions.

Gillette Diversified Pvt Ltd vs ACIT [TS-1007-ITAT-2018(DEL)-TP] ITA Nos.5736,5675 to 5677/Del/2015 dated 23.08.2018

1916. The Tribunal directed deletion of interest imputed by the TPO on delayed payments received from AEs by following the decision of coordinate bench in assessee's own case for earlier

year wherein it was held that assessee was a debt free company and it was not justifiable to presume that the borrowed funds are utilized to pass on the facility to its AE.

Bechtel India Pvt Ltd vs DCIT [TS-1026-ITAT-2018(DEL)-TP] ITA No.6779/Del/2015 dated 20.08.2018

1917. The TPO benchmarked the interest rate based on SBI PLR for delay in receivables beyond period stipulated in service agreement by treating it as an unsecured loan to the AEs in case of assessee (engaged in providing IT enabled network management, technical support and other back-office support services to its group company). The DRP upheld TPO's action for taking SBI PLR but directed to add 300 bps to the same and further directed 60 days to be reasonable period beyond which interest was to be charged on said receivables. The Tribunal noted that margin of assessee (16.19%) was higher than comparables (15.72%) which more than compensated for excess credit period extended to AEs and relied on ratio laid down in coordinate bench in Kusum Healthcare Pvt Ltd. (subsequently affirmed by HC) wherein it was held that assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterized the transaction. Thus, the Tribunal deleted the TP adjustment on interest on receivables.

Orange Business Services India Solutions Pvt Ltd vs Dy. CIT [TS-1384-ITAT-2018-(Del)-TP] ITA No.6751/Del/2018 dated 31.12.2018

1918. The Tribunal deleted the TP adjustment on interest on outstanding receivables for provision of ITES services by assessee (treated as an unsecured loan) to its AE by relying on coordinate bench decision of Evonik Degussa India Pvt Ltd. wherein the similar adjustment was deleted on basis that assessee did not have any external borrowings and even if payment was made beyond normal credit period to assessee, there would be no interest cost to assessee and moreover, TP adjustment could not be made on hypothetical and notional basis until there was some under charging of real income noting that even in assessee's case there was no interest liability or any external borrowings and agreement did not provide for any charging of interest for delayed payment by the AEs. It also observed that it was not possible for the assessee to include inter-company receivable in the international transactions in the TP study report as the amendment including "such receivables" in 'international transaction' made by Finance Act, 2012 with retrospective effect was made subsequent to the AY in question. (AY 2010-11).

Metlife Global Operations Support Center Private Ltd vs ITO [TS-1309-ITAT-2018(DEL)-TP] ITA No.826/Del/2015 dated 20.12.2018

1919. Where TPO made addition of notional interest to ALP in respect of delay in realization of payment from AE, the Tribunal deleted the addition in view of fact that in terms of agreement there was no condition to charge any interest for delayed payment by AEs. Moreover, case of assessee pertained to AY 2010-12 during which inter-company receivables were not included in category of international transactions.

METLIFE GLOBAL OPERATIONS SUPPORT CENTER (P.) Ltd vs. ITO (2019) 101 taxmann.com 249 (Del Trib) ITA No. 826 (delhi) of 2016 dated 20.12.2018

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1920. The Tribunal deleted the notional interest imputed on receivables noting that the margin of assessee was within+/-5% tolerance range of margin of comparables and was held to be at ALP, there was no need to make a separate addition for interest additionally. Interest had already been considered in the margins.

Pitney Bowes Software India Pvt Ltd vs Addl CIT [TS-1313-ITAT-2018-(Del)-TP] ITA No.5052/Del/2018 dated 17.12.2018

1921. The TPO computed interest on outstanding receivables (SBI PLR +200 bps) pending from AE for beyond 90 days. It was assessee's contention there was no change in functional profile of the company from preceding year where the Tribunal in its own case had deleted similar adjustment made by noting that assessee was a debt free company, there was no question of charging any interest on receivables by recharacterizing the transaction as loan from its AE and as such, no adjustment on account of ALP on receivables could be made. The Tribunal noted that even for the subject year, it was a debt free company however it restored the matter to decide in conformity with coordinate bench ruling in Orange Business Services India Solutions Pvt Ltd. wherein it was observed that when there was a delay in collection of receivables, TPO had to analyze the statistics to discern a pattern which would indicate that vis-a-vis the receivables for the supplies made to an AE, the arrangement reflected an international transaction intended to benefit the AE. Further, the coordinate bench ruling relied on Delhi HC ruling in Kusum Healthcare wherein it was held that there are several factors which would have to be investigated which need to be considered before holding that every receivable is an international transaction and its impact on working capital has to be studied.

INDUCTIS INDIA PVT. LTD. vs. Dy CIT (2018) 53 CCH 0329 DelTrib ITA No. 1438/Del/2016 dated 13.07.2018

1922. The Tribunal restored the issue of interest on outstanding receivables relying on the decision of Del HC in Avenue Asia Advisors Pvt Ltd. which followed the decision of Del HC in the case of Kusum Healthcare wherein it was held that a pattern has to be discerned after examining whether the transaction is an international transaction and and its impact on working capital and accordingly, the Court directed the TPO to investigate whether delay in collection of receivable beyond a stipulated period was due to any other factors and whether it was as an international transaction intended to benefit the AE and what impact it would have on the working capital.

Carrier Air-conditioning & Refrigeration Ltd vs. ACIT [TS-798-ITAT-2018(DEL)-TP] ITA No.1126/Del/2014, ITA No.728/Del/2015, ITA No.2140/Del/2016 and ITA No.7312/Del/2014 dated 13.07.2018

1923. Relying on the decision of the co-ordinate bench in the assessee's own case for the earlier year - [TS-129-ITAT-2015(DEL)-TP] (which was subsequently upheld by jurisdictional HC - [TS-412-HC-2017(DEL)-TP]), the Tribunal held that interest adjustment on the outstanding receivables was not warranted if the working capital adjustment took into account the outstanding receivables. Accordingly, it remitted the issue back to TPO for verification of whether while making the working capital adjustment the outstanding receivables were taken into account or not.

Kusum Healthcare Pvt. Ltd vs. DCIT - TS-65-ITAT-2018(DEL)-TP - ITA No.-1440/Del/2016

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1924. Relying on the decision of the High Court in Kusum Healthcare, the Tribunal deleted the TP-adjustment towards notional interest on outstanding receivable from AE (beyond 30 days) and held that since the assessee earned significantly higher margin than comparables, there was no justification for charging interest on outstanding AE-receivables. It noted assessee's contention that payments were received only after satisfaction of the customers and therefore, there was delay in receiving the payments and that credit period extended to AE was 57 days as against 66 days in case of non-AEs and accordingly held that the decision of the Bombay HC in Indo American Jewellery was squarely applicable to assessee's case. Accordingly, considering the nature of business of assessee, it held that there was no justification for the authorities below to make adjustment to the income declared by assessee.

Motherson Sumi Infotech & Designs Limited v DCIT - TS-131-ITAT-2018(DEL)-TP - ITA.No.6331/Del./2016 dated 26.02.2018

1925. The Tribunal restored the issue to TPO in respect of interest on outstanding receivables in conformity with the coordinate bench decision in case of Orange business Solutions wherein similar issue was restored after relying on the decision of Delhi High Court in Kusum Healthcare wherein it was held that several factors are to be considered before holding that interest on receivable is an international transaction and the same also requires assessment of working capital of assessee. The TPO had imputed interest of L+300 points for delay of receivables beyond 30 days from its AE however it was noted by the Tribunal that there was no specific period mentioned for payments to be received from AEs.

BT (India) Pvt. Ltd. vs ACIT [TS-1010-ITAT-2018 (DEL)] ITA No.442/Del/2016 and ITA No.302/Del/2017 dated 19.07.2018

1926. The Tribunal deleted the TP -adjustment towards interest on outstanding AE receivables The TPO had re-characterized outstanding AE-receivable as loan and imputed notional interest at SBI base rate plus 300 points i.e. at 12.87%. The Tribunal relying on the order of the Delhi High Court in Kusum Healthcare held that every AE-receivable could not be characterized as international transaction and such characterization was permissible only where the TPO undertook proper inquiry by analysing the statistics over a period of time to discern a pattern which would indicate that there existed an international transaction intended to benefit the AE. Relying on the aforesaid decision, it held that since the assessee had already factored in the impact of receivables on working capital and thereby on its pricing/profitability vis-a-vis that of comparables, adjustment only on the basis of outstanding receivables was impermissible.

Terradata India Pvt. Ltd v ACIT - TS-133-ITAT-2018(DEL)-TP - ITA.No.7885/Del./2017 dated 21.02.2018

1927. The Tribunal, relying on the decision in the case of Patni Computer Systems [TS-51-HC-2013(Bom)], Ameriprise India [TS- 382-ITAT-2015(DEL)-TP] and Techbooks International [TS-317-ITAT-2015(DEL)-TP] held that once any debt arising during the course of business had been ordained by the legislature as an international transaction, if there was any delay in the realization of such debts arising during the course of business, the same was liable to be considered as an international transaction. Further, it rejected CIT(A)'s approach of netting of interest payable with interest receivable only for 1 AE and accepted assessee's contention that aggregate of amounts receivable and payable form all 3 AEs should have been considered for the purpose of computing the TP addition

and held that since the balances with all 3 AEs were on account of trading transactions i.e. same class of transaction, they should be aggregated.

AVL India Private Limited vs DCIT-TS-963-ITAT-2017(DEL)-TP-ITA No.4529/Del/2014dated 07.11.2017

1928. The Tribunal relying on co-ordinate bench ruling in Kadimi Tool Manufacturing Co (subsequently confirmed by HC & SC) deleted the TP-adjustment in respect of outstanding AE-receivables observing that the taxpayer was a debt free company and therefore there was no question of charging any interest on receivables by recharacterizing the transaction as loan from its AE and as such, no adjustment on account of arm's length interest on receivables could be made.

Inductis (India) Private Ltd. vs. ITO - TS-154-ITAT-2018(DEL)-TP - ITA No.2075/Del./2015 dated 06.03.2018

1929. The Tribunal held that interest on delayed outstanding receivables amounts to an international transaction for subject AY i.e. AY 2013-14 in light of Finance Act 2012 amendment, and held that once any debt arising during the course of business had been ordained by the legislature as an international transaction, if there was any delay in the realization of debts arising during the course of business, it would be liable to be visited with the TP adjustment on account of interest income short charged or uncharged. However, it remitted the issue back to TPO to verify assessee's claim that in none of the cases, assessee realized invoices beyond 30 days and then decide the issue afresh.

Pitney Bowes Software India Pvt. Ltd vs. ACIT - TS-163-ITAT-2018(DEL)-TP - ITA No.7034/Del/2017 dated 13.03.2018

1930. The Tribunal held that if the receivables (AE receivable) were outstanding for a period of 6 months no separate addition on account of notional interest was required.

Actis Global Services Pvt Ltd v ITO (ITA No. 30/Del/2015) – TS-611-ITAT-2015 (Del) – TP

1931. The Tribunal deleted the TP-adjustment made by TPO/CIT(A) in respect of outstanding AE-receivables noting that the AO invoked Explanation (1)(c) to Sec 92B inserted by Finance Act, 2012 w.e.f. April 1, 2002 in order to determine interest-ALP to be charged by assessee from its AE on extending credit facility/delay in realization of debit balances outstanding in AEs account by considering it as an international transaction and relying the co-ordinate bench ruling in KGK Enterprises held that Explanation (1)(c) to Sec 92B could not have retrospective effect from April 1, 2002. It held that assuming the transaction was an international transaction, it had to be treated as one from AY 2013-14 whereas taxpayer was before the Tribunal for AY 2009-10. On merits, noting that the Agreement with AE allowed a grace period of 180 days for making the payment of the cost plus mark up it held that when the business agreement was categoric enough to grant the grace period of 180 days to make the payment and all the payments have been made within six months, no adjustment on account of interest on receivables could be made. Further, relying on Kusum Health Care HC ruling it held that when undisputedly the profit margin of the taxpayer has been held to be at arm's length, there was no need to make separate addition.

Globerian India Pvt. Ltd vs. DCIT - TS-200-ITAT-2018(DEL)-TP - ITA No.1170/Del./2016 dated 20.03.2018

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1932. Where the invoices raised by the assessee on its AE were outstanding for a period of more than 300 days, the Tribunal observing that no independent 3rd party would allow its outstandings to drift to such an extent and also noted that the assessee claimed that it did not absorb any credit risk, held that the outstandings constituted sale as well as loan. Accordingly, observing that the receivables or any other debt arising during the course of the business was included in the definition of capital financing as an international transaction as per explanation 2 to section 92B of the Act w.r.e.f 01.04.2002 inserted by the Finance Act 2012, upheld the addition on account of interest on such receivables made by the TPO @ 14.88%. It rejected assessee's reliance on the fact that the RBI Master Circular does not prescribe any conditions for repatriation of exports proceeds for SEZ, held that the RBI circular could not be the basis for determination of ALP.

BT e-Serv (India) Pvt Ltd vs ITO-TS-849-ITAT-2017(DEL)-TP dated 30.10.2017

1933. Noting the assessee's contention that no separate adjustment was required to be made on account of receivables as it was subsumed in the working capital adjustment made by the TPO and following the decision of the Tribunal in the assessee's own case for preceding AYs, the Tribunal remitted the TP adjustment on account of interest on receivables to the file of the TPO absent in-depth analysis of receivables. It directed the TPO to recalculate interest in conformity with Kusum Healthcare HC ruling [wherein HC had stated that the impact of working capital of the assessee was to be studied] and noted though the TPO had allowed working capital adjustment to the assessee, it was not clear as to what point of time whether the receivables, inventory and payables were computed on the basis of the yearly average, as required.

D.E. Shaw India Advisory Services Private Ltd vs. ACIT - TS-72-ITAT-2018(DEL)-TP - ITA No.6735/Del/2017 dated 18.01.2018

1934. The Tribunal rejected 'nil' ALP determined by TPO in respect of transaction for import of fixed assets from AE and held that ALP could not be 'nil' unless it was brought on record by the TPO that in third party situation, the cost to such an asset would also be 'nil'. Further, in respect of delay in receipt of payments from its AE, the AO/TPO treated it as an unsecured loan advanced to the AE and charged interest on the same by taking SBI base rate and adopted interest rate of 11.69%. The assessee contended that the credit period extended to third parties was much longer and since no interest had been charged on delayed payments made by third parties, no interest should be imputed in respect of receivables outstanding from the AEs also. Relying on the decision in the case of Bechtel India Private Limited [ITA No. 1478/del/2015], it held that once it was an accepted fact that assessee did not have any interest bearing borrowed funds for extending any kind of loan to its AE, then it could not be the reckoned that assessee had given any benefit to the AE by blocking its interest-bearing funds to the AE by extending the credit period. Further, it held that If a similar credit period was given to the AE as given to third parties, then under the arms-length scenario and looking into the similar conditions prevailing between controlled transaction and comparable uncontrolled transaction, there could not be any adjustment, as there would be a direct CUP to analyze such transaction and accordingly, it deleted the TP adjustment.

BC Management Services Pvt Ltd vs DCIT-TS-438-ITAT-2017(DEL)-TP- ITA Nos. 6134/Del/2015, 5829/Del/2015 & 6572/Del/2016- dated 25.05.2017

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1935. The Tribunal relying on the decision in the case of Bechtel India wherein it was held that where the assessee was a debt free company, the question of receiving interest on receivable would not arise, deleted TP adjustment in respect of interest on account of delay in recovering outstanding AE-receivables by assessee (engaged in manufacturing thread rolling dies, milled flat dies and milled ground dies and sale of screws). It held that the TPO was not justified in making adjustment of interest on account of alleged delay in recovering the outstanding toward receivables from the AE as per the provisions of section 92CA(3) of the Income Tax Act.

Kadimi Tool Manufacturing Co. Pvt Ltd vs DCIT-TS-781-ITAT-2017(DEL)-TP dated 25.09.2017

1936. Where the TPO re-characterised the outstanding AE receivables of the assessee as a loan and imputed interest @ 17.22 percent thereon, the Tribunal noting that for delays on similar receivables from non-AEs (average 300 days delay, highest being 1178 days delay), no interest had been charged by assessee; deleted the TP adjustment observing that the assessee's transaction were at ALP under the internal CUP. It held that since under both the scenarios (AE and Non-AE), no interest had been charged on similar nature of receivables, then the transaction with the related parties meets the arm's length requirement vis-a -vis, the transactions with the unrelated third parties and no addition could be made.

Axis Risk Consulting Services Private Limited - TS-168-ITAT-2018(DEL)-TP - I.T.A. No.3693/DEL/2014 dated 22.02.2018

1937. The Tribunal, following the decision of the Court in Kusum Health Care [TS-412-HC-2017 (DEL)- TP] wherein it was held that once working capital adjustment was factored into ALP no separate adjustment on account of outstanding receivable was tenable, allowed the assessee's appeal and deleted the TP adjustment made towards notional interest on receivables and held that the TPO was unjustified in re-characterizing the receivable as a loan and imputing interest thereon at SBI + 300 basis points.

Teradata India Pvt Ltd v ITO – TS-655-ITAT-2017 (Del) – TP-ITA No. 87/del/2017 dated 08.08.2017

1938. Where the TPO treated the outstanding AE-receivables as an international transaction and determined ALP of receivables exceeding 6 months at 16% based on SBI prime lending rate + 300 bps and the CIT(A) directed AO/TPO to charge LIBOR based interest rate, the Tribunal relying on the decision in the case of Tech Mahindra [(2011) 12 taxmann.com 13 (mum)] and Cotton Naturals (I) (P) Ltd [(2015) 55 taxmann.com 523 (Delhi)] held that since the outstanding AE receivables was an international transaction, interest rate ALP should be taken from the country of the borrower/debtor and accordingly remitted the issue back to the file of AO/TPO to compute interest rate by applying LIBOR prevalent during the relevant period in case of Australian Dollar/US Dollar plus suitable basis point keeping in view the credit score of the AEs.

DCIT vs. Delhi Call Centers Pvt. Ltd-TS-1019-ITAT-2017(DEL)-TP ITA No.6132/Del/2014 dated 30.11.2017

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1939. Where the assessee had remittances outstanding from its AEs, which was in the nature of continuing debit balance and the TPO, noting a time lag in recovery of the same, which was more than the agreed period between parties the (i.e. 90 days), proceeded to re-characterize the delay in the receipt of these receivables as unsecured loans advanced to the AE, and imputed a notional interest on the delay in receipt of receivable @ 14.75% (based on SBI's average base rate of 11.75% + 3% markup), the Tribunal, observing that the exact nature of the receivables viz. as to whether they represented lending or guarantee or whether they were against sales or advance or represented deferred payments was unclear, and accordingly remitted the issue back to the file of the AO/TPO for fresh adjudication after affording assessee a reasonable opportunity of being heard and after considering various decisions cited by both the parties.

Exl Service.com (India) Pvt Ltd v DCIT – TS-104-ITAT-2017 (Del) – TP - ITA No. 302/Del/2015, ITA No. 615/Del/2015 dated 03.01.2017

1940. The Tribunal set aside the issue relating to adjustment on account of interest on receivables from AE considering assessee's contention that as a policy, it did not charge interest to unrelated party even in cases where receivables were outstanding for more than 6 months. However, it rejected the assessee's contention that outstanding AE receivables do not constitute an international transaction and held that it would fall under the purview of clause (i)(c) of Explanation to Sec. 92B(1). Accordingly, it directed the TPO to examine the issue afresh in light of assessee's contention while directing assessee to support its contention with documents and working.

AT & T Global Network Services (India) Pvt Ltd vs. DCIT-TS-736-ITAT-2017(DEL)-TP-ITA No. 1059 / del / 2015 dated 18.09.2017

1941. The Tribunal held that the TPOs treatment of delay in realization of sales (beyond 30 days) to AE as a loan and charging interest thereon on the basis that the assessee had used borrowed funds to pass on the facility to its AE, was not justified since the assessee was a debt free company and there was nothing on record to show that the assessee was making interest payments to any lenders.

Bechtel India Pvt Ltd v DCIT - TS-638-ITAT-2015 (Del) - TP

1942. The Tribunal held that non-charging or undercharging of interest on excess credit period allowed to the AE for realization of invoices amounted to an international transaction and that such interest would not be subsumed in the working capital. It held that the international transaction covers a period starting with the termination of credit period under the agreement and that the TP adjustment on late realization of receivables had nothing to do with opening / closing balances with respect to which working capital adjustments were computed.

McKinsey Knowledge Centre Pvt Ltd – TS-997-ITAT-2016 (Del) - TP

1943. The TPO made an ALP adjustment on account of outstanding receivables from AE beyond a period of 60 days by re-characterizing outstanding receivables as unsecured loans advanced by assessee to its AEs and imputing notional interest based on SBI PLR + 300 basis points. The Tribunal noting the submission of the assessee (- that it had made a factual mistake in TP study that it was receiving payments from AE in Indian currency

though actually the same was received in foreign currency), held that the LIBOR rate should be applied and not SBI PLR, opined that this fact required verification and therefore remitted the issue to AO for fresh consideration. As regards the assessee's contention that its average days of realization period of receivables was 206.95 days as compared to the average realization period of 446.71 days of the comparables companies, it held that this aspect also required verification and therefore directed the AO / TPO to verify this as well.

Target Sourcing Services India Pvt. Ltd. Vs ACIT - TS-237-ITAT-2017(DEL)-TP - ITA No.6040/Del/2016 dated 24-03-2017

1944. The Tribunal relying on the decision in the case of Kusum Healthcare wherein it was held that the expression "international transaction" shall include "capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business" added in Explanation to Sec 92B does not mean that de hors the context, every item of receivables appearing in the accounts of an entity, which may have dealing with foreign AE, would automatically be characterized as an international transaction, and noting that the assessee had made no distinction between AE and non-AE in charging interest on outstanding receivables, deleted the TP adjustment in respect of interest on account of delay in recovering outstanding AE receivables by assessee.

Global Logic India Ltd. (Formerly known as Global Logic India Private Limited) vs. DCIT- TS-1028-ITAT-2017(DEL)-TP ITA No.1104/Del./2015 dated 12.12.2017

1945. The Tribunal deleted TP-adjustment on outstanding AE-receivables noting that the TPO had charged interest @ 14.45% p.a. on the receivables received beyond the credit period allowed observing that with the retrospective introduction of explanation to Section 92B, receivables formed a part of international transaction. It also noted assessee's submission that the outstanding receivables were consequent to the international transactions of provision of software development services and not in the nature of any advance/loans and the working capital adjustment had duly considered the impact of such receivables. It relied on Delhi HC ruling in the case of Kusum Healthcare Pvt Ltd wherein after noting that the assessee therein had already factored the impact of receivables on the working capital and thereby on its pricing/profitability vis-à-vis that of its comparables, the HC had held that any further adjustment only on the basis of the outstanding receivables would distort the picture. Following the ratio in the aforesaid HC decision, the Tribunal directed the AO to delete interest charged on the outstanding receivables.

Dhanush Infotech Pvt Ltd vs ACIT [TS-1193-ITAT-2018(HYD)-TP] ITA No.2082/Hyd/2017 dated 17.10.2018

1946. The Tribunal, relying on the decision in the case of Kusum Healthcare citation wherein it was held that working capital adjustment takes into consideration the outstanding receivables and therefore no fresh ALP adjustment of interest on the outstanding receivables was called for, accepted assessee contention that no separate addition of interest on outstanding AE receivables was required after allowing working capital adjustment. However, in the absence of details, it directed the AO to examine if the final margin of the comparables and the assessee arrived at after granting WCA.

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EPAM Systems India P Ltd vs ACIT-TS-858-ITAT-2017(HYD)-TP dated 24.10.2017

1947. Noting that as per Section 10A(3) of the Act (which was applicable to the assessee) foreign exchange receivables (whether from AEs or Non-AEs) were to be realized within 6 months from the end of the financial year, the Tribunal held that the TPO was unjustified in imputing notional interest on AE receivables outstanding for a period 3 month as the 6 month period as provided in Section 10A was a reasonable period to be allowed to debtors. Accordingly, it directed the TPO to charge interest of LIBOR + 200 basis points only on those receivables outstanding for a period of more than 6 months.

GSS Infotech Ltd. vs. DCIT - TS-1086-ITAT-2017(HYD)-TP - ITA No. 267/Hyd/2014 & 329/Hyd/2016 & ITA No. 602/Hyd/2017 dated 30-11-2017

1948. The Tribunal relying on the decision of the coordinate bench in Pregasystems Worldwide India Ltd (ITA Nos.1758 and 1936/Hyd/2014) held that notional interest on outstanding receivables is not chargeable to tax under the provisions of transfer pricing and accordingly no TP adjustments ought to be made and further, relied on the HC ruling of Kusum Healthcare and decision of coordinate bench in EPAM Systems India to hold that since the working capital adjustment was considered by the A.O, interest on receivables had been considered.

Hexagon Capability Center India Private Limited [TS-449-ITAT-2018(HYD)-TP] ITA No.258/ Hyd/2016 dated 08.06.2018

1949. The Tribunal deleted the interest on the outstanding receivables from AE noting that the assessee had granted a 180 days credit period to the AE in line with the RBI guidelines and the one-month credit period limit by the DRP was arbitrary and without any basis. Relying on the Del HC decision of Kusum Healthcare, it held that if impact of outstanding receivables was already factored in the working capital adjustment then no further adjustment could be made. Thus, it held that the since the assessee's grant of 6-month period was reasonable no interest could be levied and accordingly, deleted the interest adjustment.

C3i Support Services Private Limited vs Dy.CIT [TS-797-ITAT-2018(HYD)-TP] ITA No.503/Hyd/2017 dated 25.07.2018

1950. The Tribunal relying on Delhi HC decision in case of Kusum Healthcare Pvt Ltd held that no separate adjustment of interest on receivables was required to be made as it was subsumed in working capital adjustment.

EPAM Systems India Pvt Ltd vs ACIT [TS-1311-ITAT-2018(Hyd)-TP] ITA No.2122/Hyd/2017 dated 20.11.2018

1951. Where the TPO made an adjustment on account of interest (@ 14.45 percent) on receivables outstanding for a period of more than 2 months (the normal credit period of 30 days and a grace period of 30 days) , the Tribunal relying on the decision of the co-ordinate bench in GSS Infotech Limited held that there was no basis for adopting only two months as credit period where the RBI itself allows a year for realization of foreign receivables. It noted that whether it was AE or non-AE receivables, it would be in the interest of business that assessee receives the foreign exchange early so that it can claim deduction u/s. 10A. Accordingly, it held that imposing a limit of two months of credit period was arbitrary and therefore deleted the addition.

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United States Pharmacopeia India Pvt Ltd vs DCIT - TS-536-ITAT-2018(HYD)-TP - ITA No. 1927/Hyd/2017 dated 11/05/2018

1952. The Tribunal held that where the assessee had not charged interest on outstanding receivables from both its AEs and its Non-AEs, the TPO was not justified in making an adjustment by leving notional interest on the AE outstanding receivables.
Excellence Data Research Pvt.Ltd. & ANR. Vs. ACIT & ANR. (2016) 48 CCH 0051 (Hyd Trib)-ITA No.310/Hyd/2015

1953. Observing that the account payables were more than the account receivables from the AE, the Tribunal held that the charging of notional interest did not arise and remitted the issue back to the file of the DRP to give clear findings on the issue.
Satyam Venture Engg Services Pvt Ltd v ACIT (ITA Nos. 431 & 432/Hyd/2015) – TS-581-ITAT- 2015 (Hyd) – TP

1954. The Tribunal deleted the addition of interest @ 4.06 percent made by the TPO on receivables outstanding beyond a period of 2 months and held that putting a limit of two months of credit period was arbitrary considering that the RBI permitted realization of foreign receivables within a period of one year. It further noted that it was in the interest of the assessee to receive foreign exchange promptly, irrespective of whether the debtors were AEs or Non-AEs, so as to enable it to claim deduction under section 10A of the Act. The Tribunal observed that the assessee's invoices were outstanding for a period of 3 months which was a reasonable period and therefore held that no interest was to be charged on such receivables and also noted the assessee did not charge interest on outstanding receivables neither from its AEs nor its Non-AEs.
GSS Infotech Ltd v ACIT - TS-298-ITAT-2016 (Hyd) - TP

1955. The Tribunal upheld CIT(A)'s order deleting the notional interest on delay in receivables computed by TPO using PLR rate noting that once the TPO had accepted TNMM as the MAM then delay in realization of debt and consequential income arising therefrom had been factored in while computing the margin in respect of sale made to AE. It observed that since the realization from the AE was in foreign currency, interest should be computed in LIBOR and not PLR as done by the TPO and even if the interest on delay of trade debts was given effect, the margin of the assessee would still be arm's length.
ACIT vs Vijay Solvex Ltd. [TS-1088-ITAT-2018(JPR)-TP] CO No.12/JP/2014 dated 24.08.2018

1956. Where the sales to AE constituted 64% of the total sales and a uniform credit period of 145 days had been granted to the AEs as well as the non-AEs and no interest was charged on delayed realization of sale proceeds from both AEs as well as non-AEs, the Tribunal held that since there was complete uniformity in the act of the assessee, no ALP adjustment could be made and accordingly upheld the CIT(A)'s deletion of notional interest adjustment in respect of outstanding AE receivables for assessee.
KGK Enterprises (now known as KGK Diamonds (I) Pvt Ltd) vs ACIT-TS-943-ITAT- 2017(JPR)-TP dated 28.11.2017

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1957. Where the sales to AE constituted 64% of the total sales and a uniform credit period of 145 days had been granted to the AEs as well as the non-AEs and no interest was charged on delayed realization of sale proceeds from both AEs as well as non-AEs, the Tribunal held that since there was complete uniformity in the act of the assessee, no ALP adjustment could be made and accordingly upheld the CIT(A)'s deletion of notional interest adjustment in respect of outstanding AE receivables for assessee

KGK Enterprises (now known as KGK Diamonds (I) Pvt Ltd) vs ACIT-TS-943-ITAT-2017(JPR)-TP dated 28.11.2017

1958. The Tribunal held that TP-adjustment towards notional interest on outstanding AE receivable was required to be made noting that the credit period extended to AE was higher than credit period extended to non-AEs. However, it rejected interest rate of 6.75% applied by TPO based on cost of capital, and directed that the adjustment should be made using interest rate for export packing credit of 1.92%.

Mahindra & Mahindra Ltd. vs. DCIT - TS-199-ITAT-2018(Mum)-TP dated /I.T.A./6074/Mum/2013 dated 21/03/2018

1959. The Tribunal deleted adjustment on account of interest on delayed realization of debts from AEs by holding that Sec 92B amendment to the extent it pertains to delayed realization of debtors was prospective. It further held that since assessee had not charged interest on delay in realization of debts to non-AEs, no interest could be added / charged from the non AEs. Further, the Tribunal rejected re- characterization of transaction as unsecured loan by relying on Delhi HC decision in EKL Appliances, as form and substance of transaction had remained unchanged, and the assessee had behaved in a commercially rational manner by setting same terms for realization of export proceeds for AEs and non- AEs.

Hiraco Jewellry (India (P) Ltd v DCIT -TS-191-ITAT-2016(Mum)-TP

ACIT vs. Gitanjali Exports Corporation Ltd -TS-192-ITAT-2016(Mum)- TP

1960. The Tribunal held that where assessee received certain amount from AE for rendering EPC services beyond normal period of 60 days, notional interest had to be worked out by applying LIBOR interest rate for computing transfer pricing adjustment.

Tecnimont ICB House v. Dy. CIT[2015] 60 taxmann.com 143/154 ITD 674/ 171 TTJ 778(Mum)

1961. The Tribunal, applying the provisions of section 92C read with section 92B held that since after factoring in notional interest calculated with respect to overdue receivables from associated enterprises, the reduced margin of the assessee was more than average margin of comparables selected, no further adjustment was required to be made to the stated transactions.

Agilisys IT Services India (P.) Ltd - [2017] 77 taxmann.com 16 (Mumbai - Trib.)

1962. The Tribunal in the cross appeals for AY 2007-08 and AY 2008-09 deleted TP adjustment towards notional interest on shareholder's deposits by following the Tribunal's decision in assessee's own case for AY 2012-13. It was noted that the outstanding technical know-how fee receivable from the JV entity for period 1981 to 1995 was treated by the JV partners (one of them being the assessee) as shareholder deposits and RBI had permitted assessee to

obtain the repayment by 2015. In AY 2012-13, the Tribunal had held that the said deposit could not be considered as international transaction as there was no inflow or outflow of funds during the subject year. In AY 2012-13, the Tribunal had also observed that the standard of arms length is inherent in the provision of the foreign exchange laws of India, under which the permission was obtained by the assessee.

The tribunal further deleted TP adjustment towards interest on outstanding AE- receivables relying on the assessee's previous order wherein it was held that outstanding debit balances could not be considered as international transaction. Further, it also confirmed the CIT(A) order and noted that extending Corporate Guarantee solely is not an international transaction u/s 92B.

M/s Bombay Dyeing & Mfg Co Ltd vs ACIT 2(1) – TS-364-ITAT-2018(Mum)-TP- ITA No 588/Mum/12 dated 02.04.2018

1963. The Tribunal held that the plea of the assessee viz. that no TP adjustment on account of notional interest on delayed receivables was to be made where the assessee did not charge interest from its Non-AEs as well, could be meaningfully addressed only after comparing the period of delay in the case of the AEs vis-à-vis that in the case of Non-AEs and therefore remanded the matter to the file of the AO / TPO to examine the factual aspects.

Shrenuj Gems & Jewellery Ltd – TS-954-ITAT-2016 (Mum) - TP

1964. Where the assessee had shown outstanding balance due from its AE and the assessee was not charging interest on debit balance due to bad financial condition of the AE, the Tribunal noting that even if the assessee would have provided for interest on outstanding balance from its AE, it could not have recovered the same as the AE had not honoured its commitments to the lenders, as well as it had incurred heavy losses year after year, held that the outstanding debit balance with the AE could not be regarded as an international transaction within the meaning of section

92B of the act as they had arisen mainly on account of reimbursement of the counter guarantee fee and not in the course of business. It observed that the outstanding debit balances with the associates was not directly covered within the ambit of international transaction and held that the terms 'any other transaction having a bearing on the profits, income, losses or assets of such enterprises must be interpreted ejusdem generis with the transactions mentioned in the preceding clause or at least analogous to it and therefore would not include the provision of guarantee for loans taken by associate enterpises.

Bombay Dyeing & Mfg. Co Ltd vs DCIT-TS-834-ITAT-2017(Mum)-TP dated 27.10.2017

1965. The Tribunal held as per Rule 10A(d), which provides that that all closely linked transactions with AEs have to be aggregated and clubbed together for transfer pricing, where extended period of credit granted to the AE for realization of sales proceeds was directly related to and arising out of the sale transaction benchmarked under TNMM and the extended period of credit could not be considered as an independent transaction.

Yash Jewellery Pvt Ltd v DCIT - (2016) 66 taxmann.com 216 (Mum)

1966. The Tribunal, relying on the its decision in assessee's own case for AY 2009-10 deleted TP addition of Rs. 12 lakhs on account of notional interest on continuing debit balances of AEs

against software development services provided by assessee for AY 2010-11 and held that even if overdue receivables from AE constituted an 'international transaction' within the meaning of Sec 92B, assessee's margin calculated after reducing notional interest still compared favourably with the average margin of comparables and accordingly no addition was warranted.

Agilisys IT Services India Pvt Ltd – TS-908-ITAT-2016 (Mum) - TP

1967. The Tribunal held that where for majority transactions there was no delay in realization of debts, the interest could not be imputed for the few delays in realization since neither the assessee nor the TPO had given any comparable instance as to whether an unrelated party would have charged interest in such a situation. Accordingly, the Tribunal held that for the transactions in which the delay in realization was more than 180 days, the interest to be charged should be on the basis of LIBOR + 1.5 percent relying on the decision in the case of Dania Oro Jewellery Pvt Ltd v ITO (43 taxmann.com
190).

Golawala Diamonds v ACIT (ITA No 518 / Mum / 2014) – TS-543-ITAT-2015 (Mum) – TP

1968. Where the TPO failed to consider assessee's contentions that i) adjustment towards notional interest for delayed payment made by the AEs is not an independent and standalone international transaction, and ii) it had already factored in the impact of the receivables of the working capital in TNMM analysis and thereby on its pricing/profitability vis-a-vis that of its comparable, the Tribunal remitted interest adjustment on account of delay in realization of export receivables to the file of AO for fresh assessment.

Siro Clinpharma Pvt. Ltd-TS-882-ITAT-2017(Mum)-TP ITA No. 7294/MUM/2016 dated 07.11.2017

1969. The Tribunal deleted TP-addition in respect of interest on delayed AE-receivables for assessee (engaged in the business of manufacturing of studded gold jewellery) noting that the assessee did not charge any interest on delay in receiving the payment from AE (where average delay was about 290 days) as well as non-AEs (where average delay was about 340 days). Relying on the assessee's own case in the prior assessment year, it held that the TPO was not justified in making adjustment by applying interest @ 10.68% as there was uniformity in the act of the assessee in not charging interest from both AE and Non-AE debtors for delayed realization of export proceeds.

Dania Oro Jewellery Pvt. Ltd vs. ITO - TS-27-ITAT-2018(Mum)-TP - I.T.A./7635/Mum/2014 dated 03/01/2018

1970. The Tribunal relied on the decision of coordinate bench in assessee's own case for AY 2007-08 and restored the TP-adjustment in respect of software developer assessee's outstanding receivables from AE for AY 2010-11. The Tribunal relied on the assessee's own case for AY 2007-08, wherein ALP-determination of similar outstanding receivables was restored back to AO/TPO. The AO/TPO was directed to re-do the exercise of determination of ALP after considering the credit period allowed to AE on realization of sale proceeds along with the main international transaction in respect of sale to AE. It further held that working capital adjustment appropriately takes into account the outstanding receivable, and concluded that any further adjustment on the pretext of outstanding receivables was not warranted.

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Information System Resource Centre Pvt Ltd. (Now amalgamated with Larsen & Toubro Infotech Ltd) vs. ACIT [TS-384-ITAT-2018(Mum)-TP] - I.T.A. No. 3712/Mum/2016 dated 22.05.2018

1971. Where the assessee had outstanding receivables from its AEs, the Tribunal, relying on its decision in the assessee's own case for earlier years (ITA No.1338/PN/2010), held that the TPO was incorrect in imputing notional interest @ LIBOR + 300 basis points + 200 basis points [as guarantee commission] and directed the AO / TPO to re-compute the adjustment on account of interest on outstanding receivables from AEs on the basis of LIBOR plus 300 basis points only on those receivables which were outstanding for a credit period exceeding 25 days after allowing the assessee the benefit of interest received by it, if any.

Capgemini Technology Services India Limited, (in the matter of iGate Computer Systems Limited) vs. DCIT - TS-58-ITAT-2018(PUN)-TP - ITA No. 360/PUN/2015 dated 25.01.2018

1972. Where the assessee had provided extended credit period facility to its AEs for amounts due against export of IC engines and had charged interest at LIBOR + 290 basis points in case of USD billing and LIBOR + 280 basis points in case of billing in GB pounds and the credit period was extended by 80 days over the original credit period of 90 days allowed to AEs pursuant to which the TPO rejected assessee's application of the rates of packing credit in foreign currency for the purpose of benchmarking and adopting the Prime Lending Rate as ALP, made an adjustment of Rs. 1.41 crores on account of differential interest amount, the Tribunal noted that a similar issue was considered before Pune Tribunal in iGATE Computer Systems Ltd. [TS-250- ITAT-2015(PUN)-TP], wherein the use of LIBOR + rates had been upheld by Tribunal. Thus, it applied the ratio laid down in this ruling to uphold the use of LIBOR + rates for amounts (in foreign currency) due from AEs for the extended period of credit.

Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

1973. The Tribunal deleted the notional interest adjustment made on delay in collection of receivables received by assessee from its AE. The Tribunal accepted assessee's contentions that the notional interest did not accrue or arise in the year under consideration since the invoices were raised on March 31, 2013 and credit period allowed was of 60 days. The Tribunal observed that the assessee was following mercantile system of accounting and interest accrues only when the debt falls due and the same remained unpaid. Since the debt did not fall due for the year under consideration, there was no question of interest accruing or being crystallized. The Tribunal also relied on the Motherson Sumi Infotech ruling and held that the assessee had not indulged in providing any undue credit to its AE. Further, the Delhi HC decision of B.C. Management Services(P) Ltd. was also relied on to hold that notional income on account of delayed payment made by the AO could not be treated as part of income and made subject matter of adjustments.

GVK Power & Infrastructure Ltd v ACIT [TS-385-ITAT-2018(VIZ)-TP] ITA No.530/Vizag/2017 dated 18.05.2018

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Loans

1974. The Apex Court dismissed Revenue's SLP against the order of High Court wherein it was held that assessee would be entitiled to the benefit of Libor rate existing at that time (ie 0.79%) when assessee had advanced interest free loan in foreign currency to foreign owned subsidiary and addition of 2 per cent interest in income was required to be quashed and set aside.

CIT vs Vaibhav Gems Ltd [TS-1079-SC-2018-TP] SLP (Civil) Diary No(s).30849/2018 dated 01.10.2018

1975. The Court dismissed Revenue's appeal and upheld Tribunal's order a) restricting rate of interest at Libor+2%on foreign currency loan given by assessee to its AE (as against TPO's imputation of 17.26%) and b) restricting rate of commission at 0.5% on corporate guarantee given by assessee to its AE (as against 6% charged by TPO) noting that Tribunal had followed coordinate bench decision in Everest Kanto(subsequently affirmed by HC) wherein it was held that a) LIBOR was an internationally recognized rate for benchmarking foreign denominated loans and also held that b) corporate guarantee was distinct from bank guarantee and thus, TPO's adoption of 3% using external comparable (bank) could not be sustained, thus no substantial question of law arose.

Pr.CIT vs Manugraph India Ltd [TS-1382-HC-2018(BOM)-TP] ITA No.454 of 2016 dated 19.11.2018

1976. The Court dismissed Revenue's appeal against the Tribuna's order benchmarking the interest free loan advanced by the assessee to its AE at Mauritius at LIBOR + 200 bps relying on the coordinate bench decision of Aurinpro Solutions wherein it was held that where cost of funds for the AE's to whom loan had been advanced is to be measured by the rate of interest in foreign country in which the AE is located. It observed that Revenue had submitted that its appeal against the Aurinpro Solutions was dismissed by the Court and no distinguishing feature from the above ruling was pointed out and thus, dismissed the Revenue's appeal

Pr.CIT vs S B & T International Ltd [TS-506-HC-2018(BOM)-TP] ITA 66 of 2016 dated 03.07.2018

1977. The Court dismissed Revenue's appeal against Tribunal's deletion of TP-adjustment on loan given to AE considering LIBOR as a comparable for ALP-determination noting that the co-ordinate bench had dismissed Revenue's appeal for the earlier AY on the same issue. Further, it dismissed Revenue's appeal against Tribunal's deletion of TP-adjustment on advance given to AE in the form of share application money by considering LIBOR as comparable for ALP-determination, relying on the decision of Tata Autocomp Systems and Aurionpro Solutions rulings. However, it admitted Revenue's appeal on whether the Tribunal was justified in holding that provisions of corporate guarantee do not affect profits/income/assets of the assessee.

Pr. CIT vs. Videocon Industries Ltd - TS-194-HC-2018(BOM)-TP - ITA NO. 1178 OF 2015 dated 21st MARCH, 2018.

1978. The assessee had provided interest free loans to its wholly owned subsidiaries, which it benchmarked at cost plus zero percent mark-up contending that it did not bear any costs in

the impugned transaction. However, the TPO held that in a comparable uncontrolled situation such advances would have been liable to interest and therefore levied interest at LIBOR plus 3%. The DRP considered the rate of interest at 14% p.a. as reasonable and representative of the market rate prevailing in India and enhanced the addition. The Tribunal rejected the assessee's contention that since there was a commercial consideration involved, no transfer pricing adjustment was justified and it held that interest free advances to wholly owned subsidiary were undoubtedly within the ambit of international transaction. Applying CUP method, it noted that interest on Bank FD for a term equivalent to the term of loan to AEs would be the safest comparable. However, for the purpose of maintaining the rule of consistency, as various benches of Tribunal had considered LIBOR in the past, it held that LIBOR plus 2% would be the appropriate interest rate for the unsecured loans (as also sans guarantee) to the AEs. The Court dismissed the appeal of the Revenue and upheld the order of the Tribunal observing that where there was a choice between the interest rate of a currency other than the currency in which transaction had taken place and the interest rate in respect of the currency in which transaction had taken place, the latter was to be adopted. Therefore, since the loan was in foreign currency, it held that the LIBOR rate would be considered to determine the Arm's Length interest and therefore upheld the order of the Tribunal..

CIT vs Aurionpro Solutions Ltd – TS-474-HC-2017(BOM)-TP-dated 09.06.2017

1979. The Court referring to the decision of the coordinate bench in Tata Autocomp [TS-45-HC-2015 (BOM)-TP] held that arm's length price in the case of loans advanced to AE would be determined on the basis of rate of interest charged in the country where the loan was received/consumed. Therefore, where the assessee was paying interest @ 4.79% on loans taken by it in the US, the interest of 7.5% charged by it on its loan to AE was at ALP. It held that the TPO was incorrect in adopting 14% as ALP based on interest rates prevalent in India.

CIT vs The Great Eastern Shipping Co Ltd- TS-534-HC-2017(BOM)-TP-ITA No. 1455 of 2014 dated 28.06.2017

1980. For the purpose of determining the ALP of services rendered by the assessee to its AE i.e for arranging borrowers for obtaining foreign currency loans from AEs, the interest earned by the foreign AE could not be considered as the income of the assessee as the assessee had not contributed to the loan amount on which the foreign AEs had earned interest income.

DIT vs Credit Lyonnais-TS-608-HC-2017(BOM)-TP-ITA No.4433/mum/2009 dated 18.06.2017

1981. The Court dismissed revenue's appeal against the Tribunal order deleting transfer pricing adjustment on interest on loan advanced by assessee to its overseas subsidiary (AE) at 7% p.a and held that interest rate at LIBOR + 2.47 % was at arm's length. It also rejected revenue's stand that subsidiary loan should be treated as high risk loan subject to higher interest rate.

UFO Moviez India Ltd [TS-883-HC-2016(DEL)-TP] (ITA 623/2016 & C.M.30452/2016)

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1982. The Tribunal dismissed Revenue's appeal against CIT(A)'s deletion of Rs. 14.91 crore TP-addition on account of discounted interest rate charged on AE-loan, noting that CIT(A) order on the same issue for prior AY had not been challenged on this issue by the Revenue authorities. It relied on the Apex Court decision in Radhasoami Satsang [(1992) 193 ITR 321 (SC)] and held that once the Revenue authorities accepted the stand of the CIT(A) on an issue and allow it to reach finality in one assessment year, it could not be open to them to challenge the same in the subsequent assessment year. Separately, it deleted the TP-adjustment in respect of corporate guarantee provided by assessee on behalf of its AEs by rejecting the 0.75% guarantee fee confirmed by CIT(A). Following the decision of the coordinate bench in assessee's own case for AY 2008-09 which in turn relied on the decision Micro Ink ruling (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi-capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B), it held that the provision of corporate guarantee without any charge of commission would not constitute an international transaction.

Suzlon Energy Limited vs. DCIT - TS-1089-ITAT-2017(Ahd)-TP - ITA No.2074 & 2179/Ahd/2013 dated 22.12.2017

1983. The Tribunal held that where the assessee granted loan to its AE at an interest rate amounting to LIBOR, out of the proceeds of FCCBs issued outside India and claimed that the said loan was given to its AE since money raised through FCCBs were not permitted to be brought into India unless actually deployed for capital expansions, the TPO was not justified in questioning the commercial rationale of such transaction and making a TP addition by taking the ALP interest rate at LIBOR + 200 basis points. Further, relying on the decision in the case of the Tribunal in Cadila Healthcare Ltd, wherein notional interest adjustment was deleted on optionally convertible loans on the ground that no interest was chargeable unless the option of conversion vested in such loans was not exercised, the Tribunal deleted the addition made by the TPO.

Sun Pharmaceuticals Ind Ltd v ACIT - TS-247-ITAT-2016 (Ahd) -TP

1984. Where the assessee had advanced interest free loans to its AE and benchmarked the same under TNMM along with its other transactions as the loan was to ensure supply of raw materials to the assessee by the AE and the AO rejecting the benchmarking adopted by the assessee computed interest at the rate of LIBOR + 2 percent, the Tribunal accepted the additional evidence sought to be filed by the assesseei.e. the letter given to SBI in respect of remittance of funds to its AE with a view to demonstrate that the funds were advanced to the AE to avail economies of scale and remitted the matter to the TPO to decide the issue afresh considering the additional evidence filed as well. It dismissed the Revenue's contention that additional evidence could not be filed and held that the letters, being filed with the SBI assumed a regulatory character.

Rubamin Ltd vs ITO – TS-113-ITAT-2017 (Ahd) - TP - ITA Nos. 664/Ahd/2012, ITA Nos. 665/Ahd/2012, ITA Nos. 795/Ahd/2012 dated 17.02.2017

1985. The Tribunal deleted the TP-adjustment towards interest on optionally convertible loans given by the assessee to its Irish subsidiary during AY 2009-10, whereby the assessee

lender had either the option for repayment (in which case the cumulative interest payable by the borrower was LIBOR plus 290 basis points) or for conversion of loan into equity at par at any time during the 5 year tenure of the loan. It held that the assessee's transaction was quasi capital in the nature and could not be characterized as debt and the true reward of this loan was not interest simplictor but the opportunity and privilege to own the borrower's capital (by way of conversion into equity) on certain favourable terms and therefore could not be compared with a simple loan transaction where the sole motivation and consideration for the lender was interest on loans and that the right comparable for this transaction was a loan transaction with a similar option to convert the loan into capital and granting similar privilege and opportunity to the lender. Noting that it was not the case of lower authorities that no independent enterprise would have given an interest free loans even if there was an option, coupled with such a deal, to subscribe to the AE's capital on the terms as offered to the assessee, it held that there was not even a prima facie case made out for ALP adjustment. It also noted that on lapse of assessee's right to exercise the option of converting the loan into equity, the assessee was entitled to interest on the commercial rates, and that it was not the case of lower authorities that interest so charged by the assessee was not at ALP. Consequently, it deleted the TP adjustment on the optionally convertible loan granted to the AEs.

Cadila Healthcare Limited Vs ACIT - TS-241-ITAT-2017(Ahd)-TP - IT (TP) No. 898/Ahd/2014 and 694/Ahd/2015 dated 03.03.2017

1986. The Tribunal accepted LIBOR + 2% as arm's length interest rate for benchmarking loan advanced by assessee to its 100% subsidiary. The TPO, contended that if the subsidiary was to obtain loan from bank, owing to its lower credit rating, it would have required a guarantee from assessee, and thus worked out effective borrowing rate of assessee at 8.7% i.e. LIBOR + 2% (bank's margin) + 2% (guarantee fees). The Tribunal rejected the additional 2% rate considered by TPO and held that the adjustment made by TPO on account of guarantee fees was invalid as no such guarantee had been given by assessee. Further relying on the decision of the co- ordinate bench in UFO Movies [TS-7-ITAT-2016(DEL)-TP] , the Tribunal held that the fiction of assuming a corporate guarantee and then proceeding to benchmark the same was unsustainable in law. Further, even otherwise an adjustment due to assumption about lower credit rating of the subsidiary was not warranted. Noting that for the earlier AY, the TPO himself had adopted LIBOR + 2% which had been accepted by Tribunal, and there was no material change in facts and circumstances for the current year, the Tribunal allowed the assessee's appeal.

Soma Textiles & Industries Ltd. Vs ACIT - TS-295-ITAT-2017(Ahd)-TP - ITA No.472/Ahd/2014 dated 11.04.2017

1987. The Tribunal allowed assessee's appeal and deleted the TP adjustment towards interest on loans given to its AE for infrastructure facilities. Noting that the TPO had made an addition on the ground that one of the AE's was charged interest at Euribor+ 3.75% from a bank, it observed that the assessee was the tested party and not the AE. The addition made by the TPO could not be sustained since the assessee was able to demonstrate that the interest charged was at market rate and the assessee was not charging interest at a higher rate than Libor+1% to any of the other parties.

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Dishman Pharmaceuticals & Chemicals Ltd vs DCIT [TS-958-ITAT-2018(Ahd)-TP] ITA No.955/Ahd/2012 dated 20.06.2018

1988. The Tribunal accepted assessee's plea for considering Euro PLR as benchmarking rates as against Indian PLR for interest free loan given to step down subsidiary. The Tribunal noted that since the interest free loan**s** were given in Euro Currency, the ALP should be adopted at the rate on the basis of prime lending rate prevalent in Europe.
Synchron Research Services Pvt Ltd vs ACIT Circle 4(1)(2)- TS-363-ITAT-2018(Ahd)-TP-ITA No 899/Ahd/2014 & 418/Ahd/2015 dated 18.04.2018

1989. The TPO rejected assessee's claim that the interest rate of 3.24% charged on loan advanced to AE in USA was at ALP vis-à-vis LIBOR, and made TP adjustment by considering the annual average yield for BB rated bonds for 5 years or more term at 13.46%. The Tribunal restored the said TP adjustment made while benchmarking the interest transaction arising out of loan advanced by assessee to its subsidiary in USA with a direction to assessee to submit TP-study on the said loan noting that no material was brought on record indicating the terms of loan i.e. tenure of loan, security offered,terms of repayment of loan, currency in which loan is to be repaid etc. and RBI policy governing advancing of loans by Indian holding company to its foreign subsidiary companies credit rating etc. determination of credit rating of the lender and borrower,identification of comparable, third party loan agreements. It observed that domestic PLR lending or yield rate on corporate bonds in India would have no applicability and LIBOR rate should be taken as bench mark for international transactions relying on Bombay High Court judgment in case of Tata Auto Comp Systems Ltd. (wherein it was held that that ALP in case of loans advanced to AE would be determined on the basis of rate of interest being charged in the country where loan was received and consumed).
Sasken Technologies Ltd. vs Dy.CIT [TS-1284-ITAT-2018(Bang)-TP] IT(TP)A No.627/Bang/2016 dated 16.11.2018

1990. The Tribunal held that the rate of interest paid by the assessee to its associated enterprise was an appropriate rate to benchmark the interest received from its AEs situated in the same country. Further, where interest rates prevalent in the country of the AE was lower than the interest rate received from the said AE, no addition could be made.
iGate Global Solutions Ltd v ACIT [IT(TP)A No 1239 / Bang / 2010] - TS-385-ITAT-2015(Bang)-TP

1991. The Tribunal held that where the assessee received interest on advances given to its AE, the interest rates of the loanee country were to be considered for the purpose of benchmarking the interest and not the Bond rate of BB rated bonds in India.
Subex Ltd v DCIT - (2016) 68 taxmann.com 233 (Bangalore - Trib)

1992. The assessee had advanced loans to its AE in Australia and charged interest rate of 10% p.a, which was rejected by the TPO who held that the 'BB' Corporate Board rate of 14.77% was to be adopted to determine the ALP under CUP method. Noting that assessee's finance cost were available on record, DRP issued directions that the bank overdraft interest rate should be adopted as the internal CUP. Following the order of the Tribunal in the assessee's own case for AY 2008-09(TS-305-ITAT-2016(Bang)-TP), the Tribunal held that

LIBOR rate should be applied for the interest on the said loan transactions and if the interest rate of 10% p.a charged by the assessee was higher than the LIBOR applicable, the adjustment towards interest on the said loans advanced by assessees to its AEs was not tenable. Accordingly, it remitted the issue to the TPO for verification of LIBOR vis-à-vis rate charged by the assessee.

Indegene Pvt. Ltd (formerly known as Indegene Life Systems Pvt. Ltd) vs ACIT-TS-645-ITAT-2017(Bang)-TP-IT(TP)A no. 591/B/17 dated 02.08.2017

1993. Where the TPO had added income by imputing notional interest at the rate of 14% on the outstanding advance balance shown in the assessee's books, the Tribunal remitted the TP-adjustment to the file of AO/TPO for examination as to whether there was any agreement for charging interest on late payments or not from its AEs. It held that if there was no such agreement, then the TP-adjustment made was to be deleted. It relied on the decision in the assessee's own case [TS-572-ITAT-2015(BANG)-TP] and [TS-190-ITAT-2015(BANG)-TP] wherein it was accepted that TP-adjustment could not be made on hypothetical and notional basis until and unless there was some material on record that there had been under charging of real income.

Ingersoll Rand India Ltd vs DCIT [TS-449-ITAT-2017(BANG)-TP] dated 21.04.2017

1994. The Tribunal, following the decisions in Cotton Naturals (I) P. Ltd [TS-117-HC-2015(DEL)- TP] and TTK Prestige [TS-242-ITAT-2014(Bang)-TP], dismissed the Revenue's appeal and confirmed the CIT(A)'s and held that the Prime Lending Rate (PLR) could not be considered for benchmarking interest on foreign currency loan. Accordingly, where the assessee advanced foreign currency loans to its subsidiaries in China & Japan at 4% & 3% rate of interest respectively using LIBOR, it held that the TPO was incorrect in making an adjustment of Rs.35.01 lakhs by considering PLR as benchmark and it rejected the Revenue's submission that since the assessee was the tested party, interest rate prevailing in the Indian market i.e PLR was to be taken as comparable and not LIBOR.

DCIT vs. Steer Engineering Pvt. Ltd – TS-1087-ITAT-2016 (Bang) – TP – IT. (T.P) A. No.965/Bang/2015 dated 09.12.2016.

1995. The Tribunal held that advancing interest-free loans to subsidiary companies constituted international transaction on plain reading of of sub-clause (c) of clause (i) of Explanation to section 92B relating to capital financing. It was the contention of the assessee that the interest free loan advanced to its AE later converted into equity was not an international transaction. The Tribunal rejected the recharacterization of transaction by assessee and called it a colourable device. Further, the Tribunal relied on the co-ordinate bench ruling in CIT vs Tech Mahindra Limited and held that rate of interest prevailing in the country where loans were received by the AE should be applied.

EIT Services India Pvt. Ltd v ACIT EIT Services India Pvt. Ltd. (formerly known as Hewlett Packard Global Soft Pvt. Ltd. [TS-612-ITAT-2018(Bang)-TP] IT(TP)A No.1394/Bang/2012, ITA No.1332/Bang/ 2010 and IT(TP) A No.163/Bang/2012 dated 28.06.2018

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1996. The Tribunal, relying on the decision in the case of Geodesic ltd [62 taxamann.com 383] and Ion Exchange [ITA No. 5109/Mum/2013] held that where the interest payment made by the assessee on ECB to its AE was at EURIBOR+500 basis points i.e within the range of interest payment sanctioned by RBI in its master circular i.e LIBOR +500 basis points, the interest payment was at arm's length. Accordingly, it deleted the TP addition in respect of interest paid by assessee on ECBs.

Tuppadahalli Energy India Pvt. Ltd vs. DCIT-TS-829-ITAT-2017(Bang)-TP-IT(TP)A No. 2207/Bang/2016 dated 13.10.2017

1997. Where the assessee had received interest on loan provided to its AE and the TPO had taken the annualized average yield rate as provided by CRISIL i.e. 14.47%, the Tribunal, relying on the decision in the case of Tata Autocomp Systems Ltd [TS-45-HC-2015(BOM)-TP] held that in case of loans advanced to an Associate Enterprise situated abroad, the rate of interest to be applied is the rate prevailing in the country where the loan has been consumed and therefore the TPO erred in benchmarking the interest based on the CRISIL rates. Accordingly, it remitted the interest adjustment on loan granted by assessee to AE for AY 2012-13 to the file of AO/TPO for fresh decision.

Subex Limited vs. DCIT-TS-843-ITAT-2017(Bang)-TP IT(TP)A No.572/Bang/2017 dated 26.10.2017

1998. The Tribunal held that the TPO was incorrect in adopting the domestic prime lending rate for benchmarking interest on loans given by the assessee to its AE and held that since the loans were given un US dollars, the interest was to be benchmarked by adopting LIBOR. Accordingly, it remitted the issue to the file of the TPO for fresh examination.

Sasken Communication Technologies Ltd – TS-1019-ITAT-2016 (Bang) – TP

1999. The Tribunal, relying on its order in the case of the assessee for the prior years, held that where the assessee had provided interest free loans to its AE as a temporary advance to facilitate the AE in meeting operational requirements and the same was given out of own funds, no adjustment could be made without identification of comparable transactions. Accordingly, it directed the TPO to follow the directions issued for the earlier years.

Wipro Ltd v DCIT – TS-126-ITAT-2017 (Bang) – TP - I.T. (T.P)A. No.1665/Bang/2012 dated 04.01.2017.

2000. The assessee had furnished corporate guarantee in respect of loan taken by AE without charging any fee for the same. TPO determined the interest rate of 1.84% by considering the difference between the yield rates of corporate bonds applicable to BBB+(AE's credit rating) and AA+ (assessee's credit rating) The TPO was of the view that that corporate guarantee fee at 50 per cent of 1.84 per cent of loan i.e.0.92% was to be charged by assessee and accordingly made an addition. The Tribunal remitted the TP adjustment on corporate guarantee fee made by noting that as regards corporate guarantee fee, terms and conditions on which loan was given, risk undertaken, relationship between bank and client, economic and business interest etc. were some of major factors which are required to be taken into consideration to arrive at appropriate rate of said fee and as neither assessee nor TPO

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analyzed transactions in terms of aforesaid factors, impugned addition was to be set aside and, matter was to be remanded back for disposal afresh.

Sasken Technologies Ltd. vs Dy.CIT [TS-1284-ITAT-2018(Bang)-TP] IT(TP)A No.627/Bang/2016 dated 16.11.2018

2001. The TPO treated outstanding receivables as a loan and adopted 13.46% as the rate of interest. The Tribunal remitted the TP adjustment to be worked out by AO at 6 months Libor+400 bps (as submitted by assessee adjustment could not exceed the rate adopted by TPO in previous year). It distinguished the coordinate bench ruling in case of Bechtel (relied upon by assessee) wherein interest was not imputed as company was a debt free company and presumption arose that assessee was not using any interest bearing borrowed funds by observing that even in a case where the assessee was not using any interest bearing borrowed fund, if the actual credit period allowed was more than the agreed credit period then it had to be accepted that earlier price charged as per the agreement was less than the actual prices which was to be charged and in such situation, TP adjustment was to be called for.

Naunce Transcription Services India Pvt Ltd vs DCIT [TS-1353-ITAT-2018(Bang)-TP] IT(TP)A No.307 /Bang/2016 dated 07.11.2018

2002. Where the TPO recharacterized outstanding debts exceeding 6 months as a loan and determined ALP on the basis of B-rate bond yield rate of 13.46%, the Tribunal applying the provisions of subclause (c) of clause (i) of explanation to section 92B inserted by Finance Act 2012 held that deferred payments or receivables or any other debt arising during the course of business fell under the expression 'international transaction. Accordingly, it confirmed the TP adjustment made in respect of outstanding receivables from AE and dismissed assessee's appeal. Further, regarding assessee's plea that adoption of 13.46% interest rate on receivables was excessive and unreasonable, the Tribunal held that it was not raised before the lower authorities and did not emanate from the orders of the lower authorities and therefore dismissed the same.

Nuance Transcription Services India Pvt. Ltd vs DCIT-TS-1009-ITAT-2017(Bang)-TP dated 28.11.2017

2003. The Tribunal held that the transaction of providing loan / advance was clearly defined as an international transaction under section 92B of the Act and rejected the contention of the assessee that the said loan was a shareholders activity to protect investment interest and therefore should not be considered as an international transaction. Accordingly, it directed the AO / TPO to apply LIBOR + 2 percent as the interest rate and make suitable addition on account of interest on the impugned loan.

As regards the adjustment of interest on outstanding receivables from its AE relating to software development @ 10.5 percent, the Tribunal held that if the software development services were at ALP then there would be no question of separate adjustment of account of allowing credit period on receivables from the AE. It directed the AO / TPO to recalculate ALP of international transaction relating to software development services after considering a proper working capital adjustment.

Xchanging Solutions Ltd [TS-910-ITAT-2016(Bang)-TP] (I.T.(T.P) A. Nos.1294/Bang/2012 & 166/Bang/2014)

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2004. The Tribunal rejected the TPO's ALP-determination of interest rate on ECB from AE, based on effective all in cost interest rate as per 'India's External Debt - Status Report - 2008'. It accepted the assessee's contention that the aforesaid rates were unadjusted industry averages which could not be treated as ALP. It also noted that the assessee's loan was based on EURIBOR, while the 3 comparables furnished by assessee had LIBOR based interest rates and since the assessee had not furnished all relevant data such as downloaded financials of the comparables, actual interest rates computed with reference to the interest burden and the loan outstanding for various periods, it remitted the matter back to TPO for fresh determination of ALP after assessee produces necessary evidence for finalization of comparables.

Winergy Drive Systems India Private Limited [TS-586-ITAT-2016(CHNY)-TP] I.T.A.No.1720/Mds/2014

2005. The Tribunal set aside TPO/DRPs order charging notional interest on interest free loan advanced to UK subsidiary (AE) by holding that if assessee had surplus interest free funds after meeting all statutory obligations, including payment of income tax on the income, then assessee was open to invest the same in any manner as it liked. As details of loan borrowed and available surplus were not available in the present case, the Tribunal remitted the matter and directed verification of i) whether assessee had sufficient surplus funds for advancing the corporate loan to UK AE and ii) whether there was any nexus between borrowed funds and advance made by assessee to UK AE.

Sundaram Fasteners Ltd. vs DCIT - TS-121-ITAT-2016(CHNY)-TP

2006. Assessee had borrowed funds in India and advanced the same (without charging interest) to two AEs outside India, which were engaged in excavation of copper ore, a raw material used by the assessee for the manufacture of non-ferrous metals. Accordingly, the assessee claimed that the money had been advanced due to business expediency, which was disregarded by the TPO who made an addition of Rs. 2.13 crores on account of notional interest on advance given by assessee to AE. On appeal, the CIT(A) considering the plea of business expediency deleted the addition by relying on SC decision in S.A. Builders Ltd. [TS-30-SC-2006]. The Tribunal, noting the contention of the Revenue that by diverting the borrowed funds outside India, the assessee was diverting the taxable profit outside the jurisdiction, observed that the CIT(A) had not examined whether the advance made to foreign companies had resulted in shifting of profits. It also considered assessee's contention that the advance made to one of the AEs was made in earlier AY. Accordingly, it remitted the TP adjustment to AO/TPO for re-examining whether any advance was made to foreign company during the current year and whether such advance would amount to shifting of profit to other nation.

ACIT vs. Sterlite Industries (India) Ltd - TS-278-ITAT-2017(CHNY)-TP - ITA Nos.318 & 319/Mds/2008 dated 29.03.2017

2007. The Tribunal held that where the assessee borrowed funds in India on which it paid interest of Rs. 10.05 crores and advanced the same as interest free loans to its foreign AEs, it was an obvious means of shifting profits outside India and reducing tax liability in India by claiming the interest paid as a deduction and not earning any interest on the advances

given. Accordingly, the tribunal held that the TPO had rightly determined the ALP on a notional basis by adopting LIBOR as the rate of interest.

Further, it held that where the assessee had given a corporate guarantee and letter of comfort without charging any fee, the same having no bearing on profits, income, loss or assets of the assessee was therefore outside the scope of international transaction.

TVS Logistics Services Ltd v DCIT - TS-324-ITAT-2016 (Chny) - TP

2008. The Tribunal held that where the assessee had provided its AE with a loan in foreign currency, the interest charged to its AE was to be benchmarked with respect to the LIBOR and not the implicit interest rate on India's External Debt applied by the AO and since assessee charged interest of LIBOR + 2%, no further adjustment was required.

Salcomp Manufacturing India Pvt Ltd - TS-716-ITAT-2016(CHNY)-TP-I.T.A.No.2201/Mds./2012

2009. The TPO treated the money advanced by the assessee to its branches to be in nature of loans and imputed interest of 5% on it. The Tribunal rejected assessee's contention that advances given to the branches were outside the purview of TP Regulations and further, TPO had computed interest on basis that assessee had charged the same rate on loan advanced to AE in Germany (which was not an internal comparable uncontrolled transaction). The Tribunal relied on coordinate bench ruling in assessee's own case for earlier year wherein it was held that advance given by the assessee to its AEs in UK and USA came within the ambit of international transaction as per the amendment made in provisions of sec 92B of the Act which would be applicable restrospectively. Further, it rejected assessee's plea of LIBOR to be charged on loan relying on coordinate bench ruling in assessee's own case wherein it was held that 5% of interest rate was correctly applied.

Sun Tec Business Solutions (P) Ltd vs Dy.CIT [TS-1206-ITAT-2018(Coch)-TP] ITA No.113/Coch/2016 and 509/Coch/2016 dated 12.09.2018

2010. The assessee granted loans to 3 AE's, i.e. Mauritius (interest-free loan as the AE was 100% subsidiary), USA (6% interest) and Bangladesh (6% interest). In respect of the interest free loan to the Mauritius subsidiary, the TPO determined ALP at SBI PLR plus 350pbs which was restricted by the DRP SBI PLR as on 30 June of the previous year plus 150bps. The Tribunal rejected the plea of the assessee that if it charged interest to the AE, it would reduce the AEs profits and in turn reduce the dividend received by it noting that there was no correlation between the two Tribunal also relied on the ruling of Delhi Tribunal in Perot Systems TSI (I) Ltd. vs. DCIT (ITA No. 2320, 2321, 2322/DEL/2008) and Mumbai Tribunal in VVF Ltd. vs. DCIT (2010-TIOL-55-ITAT-MUM) and Tata Autocomp Systems Ltd. vs. ACIT (ITA No. 7354/MUM/2011), wherein assessee's contention that it was commercially expedite to provide interest free loans was rejected holding that international transactions could not be equated with ordinary business transactions. Further, noting that the TPO accepted the interest rate earned by the assessee from its USA and Bangladesh subsidiaries to be at ALP, it held that the TPO could not have inconsistency in its view in respect of the same tested party vis-à-vis benchmarking the loan from Mauritius. Accordingly, it directed the AO to re- compute the ALP of the interest at 6% in respect of loans granted to all three AEs.

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House of Pearl Fashions Limited [TS-926-ITAT-2017(DEL)-TP] ITA No.-1589/Del/2014 dated 8.11.2017

2011. The Tribunal held that where the assessee had advanced interest free loans to its AE without charging any interest, the same was liable for benchmarking under the Act irrespective of the fact that the advances were paid out of EEFC accounts which did not earn any interest in any case. It rejected the argument of the assessee that the advances did not require any benchmarking since they were in the nature of quasi capital and were granted with the main purpose of promoting exports of the AEs outside India. As regards the interest rate applicable the Tribunal held that the since the advances were made in foreign currency, the interest rate on loans and advances in respect of foreign currency and not the PLR of the State Bank of India, was to be considered as the ALP rate of interest.
Baba Global Ltd v DCIT - TS-346-ITAT-2016 (Del) -TP

2012. The Tribunal held that the interest paid on External Commercial Borrowing taken by the assessee from its UK AE was to be benchmarked using the domestic PLR and not the GBP LIBOR as taken by the TPO since the ECBs were denominated in Indian currency. It noted that since the interest paid by the assessee was less than the PLR rate, the same was to be considered to be at ALP and therefore the addition made by the TPO was deleted.
BT (India) Pvt Ltd v DCIT - TS-353-ITAT-2016 (Del) – TP

2013. Assessee had charged a rate of interest of 7% on the foreign loan provided to its AE and determined it to be at ALP on basis of CUP on the ground that the loan was taken from HDFC bank it would have charged an interest rate at 6.5% and TPO made an addition by computing interest at 14% [i.e. domestic PLR] , CIT(A) deleted the addition holding that Libor+1.5% was to be charged for a foreign currency loan which was less than 7% charged by the assessee. However, CIT(A) did not consider the DRP's direction for immediately preceding year where Libor+300bps (inclusive of risk adjustment) was charged against which assessee had not raised an appeal. The Tribunal remanded the matter to CIT(A) to decide afresh after considering the aforesaid direction of DRP and giving assessee a proper opportunity to be heard.
ASSISTANT COMMISSIONER OF INCOME TAX vs. FRESENIUS KABI ONCOLOGY LTD. (2019) 54 CCH 0440 DelTrib/)(TS-1443-ITAT-2018(DEL)-TP ITA No. 3013/Del/2015, 6264/Del/2015 dated 31.12.2018

2014. Relying on the co-ordinate bench ruling in the assessee's own case, the Tribunal deleted the TP-adjustment relating to the interest on assessee's foreign currency loan to AE and held that when a loan was advanced to foreign subsidiary in foreign currency, LIBOR and not the domestic prime lending rate was to be used to benchmark the international transaction. It noted that the earlier year's orders were upheld by the High Court and that the DRP in assessee's subsequent year proceedings directed the deletion of the TP-adjustment on interest while in the preceding AY, the TPO himself chose not to propose any such adjustment. Accordingly, it deleted the TP adjustment in the impugned year.
Cotton Natural (I) Pvt. Ltd vs. DCIT - TS-1068-ITAT-2017(DEL)-TP - ITA No.6910/Del/2014 dated 04-12-2017

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2015. The assessee had granted foreign currency loan to its foreign AE and received interest (EURIBOR+200 bps) equivalent to 6.41%.TPO benchmarked the aforesaid transaction at 17.26% by applying the yield rate on corporate bonds. The DRP directed the TPO to apply PLR prescribed by RBI at 13.25% to benchmark the transaction. The Tribunal deleted the adjustment made noting that interest rate in respect of loan advanced to foreign AE should be computed based on interest rate applicable to currency in which loan had to be repaid by relying on the ratio laid down in Delhi HC ruling in Cotton Naturals and thus, the interest rate charged by assessee was appropriate and further, the interest rate was accepted at ALP by TPO in previous year.

Moserbaer India Ltd vs ACIT [TS-1139-ITAT-2018(DEL)-TP] ITA No.6042/Del/2012 and 2395/Del/2014 dated 03.10.2018

2016. The assessee had benchmarked interest on foreign currency denominated loans advanced to its 100% subsidiary (outside India) at Libor+200% applying CUP. The TPO had adopted Libor+400 bps on basis information available in public domain on websites of Indian banks. Further, the TPO made an adjustment of 300 bps on interest charged by assessee on loan advanced to its foreign subsidiary on account of transaction cost of hedging cost, lack of security and single customer risk on interest rate. The Tribunal adopted the rate charged by assessee noting that commercial expediency and related benefits of close connection would not be factored in by lending rates shown by bank. The Tribunal deleted the transaction cost of 300 bps imputed by TPO by relying on Delhi HC in Cotton Naturals (wherein it was held that transaction cost of hedging is normally borne by the borrower and it is not relevant when loan had to be repaid in foreign currency) and coordinate bench decision of Bharti Airtel (wherein it was held that when assessee had advanced monies to its subsidiaries which are under its control it substantially reduced the risk rather than increasing it thus there is no rationale for adjustment on account of higher risks.)

JSL vs ACIT [TS-1231-ITAT-2018(Del)-TP] ITA No.4249/Del/2013 and ITA No.6337/Del/2012 dated 19.11.2018

2017. Where the TPO made a TP adjustment relating to interest on assessee's foreign currency loan to AE for AY 2010-11, the Tribunal relying on the co-ordinate bench's ruling in assessee's own case for AY 2008-09 (wherein it was held that when loan advanced to foreign subsidiary in foreign currency, LIBOR and not the domestic prime lending rate would be appropriate for benchmarking the international transaction) deleted the TP adjustment related to the interest on foreign currency loan to AE.

Cotton Natural (I) Pvt Ltd vs DCIT-TS-1068-ITAT-2017(DEL)-TP dated 04.12.2017

2018. The Tribunal held that where the assessee advanced a loan to its AE at LIBOR plus 247 basis points and Indian banks were charging LIBOR plus 250 basis points on similar loans, the addition made by the TPO / DRP was to be set aside, more so since the loans granted by the assessee were to subsidiaries under the same management and control which substantially reduced the risk factor.

UFO Movies India Ltd v ACIT - (2016) 66 taxmann.com 120 (Del)

2019. The Tribunal deleted TP adjustment on account of interest payment made by the AEs to the assessee towards the dollar denominated loan extended to them. It rejected the TPO/DRP's

imputation of interest at SBI rate +150 bps and accepted the assessee's stand of charging interest at 6% on the loan advanced to be at ALP by following the coordinate bench decision in assessee's own case for earlier year wherein it was held that for one of the concerns in Bangladesh, interest at 6% was accepted to be at ALP and the TPO could not take an inconsistent view in case of two other concerns and state that ALP should be determined on the basis of interest rate expected by an Indian lender from bank or from any mutual fund etc. when assessee was the tested party in case of all three concerns and hence deleted the TP adjustment made by the TPO.

House of Pearl Fashions Limited vs DCIT [TS-820-ITAT-2018(DEL)-TP] ITA No.744/Del/2015 dated 06.08.2018

2020. The assessee availed unsecured loan in foreign currency from its AEs as external commercial borrowing of USD 500 million until 2020, as unsecured loan for financing its oil and gas operation in India at the interest rate of US dollar Libor +2%. As a result of the 2008 crisis, the assessee availed additional loan amounting to USD 300 million and the interest rate was changed from floating rate of interest to a fixed rate of interest of 6.18% for 5 years as an amendment to the existing loan facility agreement. Consequently, the assessee paid interest at Libor + 2% for the period from 01/04/2009 to 21/10/2009 and at the rate of 6.18% for the period from 22/10/2009 to 31/03/2010. Though the TPO accepted CUP method adopted by assessee, he held that the assessee had not provided any documentary evidence or convincing argument for shift in the interest rates from floating rate of interest to fixed rate of interest mechanism and no independent party would have agreed to such an increase and opined that the interest paid at the rate of 6.18% was excessive, and determined effective rate at 2.33%, being the interest rate paid by assessee from 01/04/2009 to 21/10/2009. Accordingly, he proposed adjustment an of Rs. 42.72 Cr. The Tribunal disagreed with TPO's finding that there was no reason for assessee to increase the interest rate from 2.33% to 6.18% and noted that the assessee had given detailed rational behind its own decision for shifting from floating rate of interest regime to fixed rate of interest viz. it reduced the risk of changes in the interest rates. Based on the a well settled proposition of law it held that the TPO was not supposed to question the business decision of the assessee, and further observed that assessee had given ample reasons for its business decision, even stating that most of the reported loans in that particular period were having a clause of fixed rate of interest. Accordingly, it held that it was beyond the authority of the TPO to question the wisdom of the assessee, and it was not the prerogative of revenue to direct assessee to conduct its business in a particular manner, despite heavy business risk. It also held that the TPO had not performed his duty of determining ALP of interest payment made by assessee, but had only analyzed and questioned the international transactions. It stated that the TPO was duty bound to apply one of the methods specified in Sec 92C to determine ALP and that it was not proper to benchmark both the transactions of payment of interest with respect to two different loans governed by two different agreements which has different terms and conditions as 'one transaction. Consequently, it remitted the matter to the TPO with a direction to examine ALP computation strictly in accordance with the provisions of Sec 92C considering the evidences placed by the assessee.

BG Exploration & Production India Ltd [TS-317-ITAT-2017(DEL)-TP]

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2021. The Tribunal, in the second round of proceedings, restored the ALP determination on interest free loans advanced by assessee to its AE noting that in the first round of proceedings the Tribunal had directed the TPO to apply CUP-method as MAM by taking into account prices at which similar transactions happened with unrelated parties. However, in the remand proceedings, the TPO adopted the average anuual yield rate of BB rated bonds which was Libor+500 bps. The Tribunal observed that the action of the TPO was in contravention of mandate given by the Tribunal and accordingly remitted the matter back to TPO for deciding the issue afresh strictly in accordance with directions given by the Tribunal in first round.

Aithent Technologies Pvt Ltd vs DCIT[TS-731-ITAT-2018(DEL)-TP] ITA No.1564/Del/2015 dated 23.07.2018

2022. The Tribunal dismissed Revenue's appeal and upheld DRP's order deleting TP-adjustment on interest on foreign currency denominated loan advanced to AE relying on Delhi HC ruling in Cotton Naturals wherein it was held that when a loan was given or taken in foreign currency loan, then same had to be benchmarked with reference to the market determined interest rate applicable to the currency loan which had to be repaid. The Tribunal noted that assessee had advanced loan to AE in foreign currency at EURIBOR plus 0.25% which was benchmarked by applying CUP method, the ALP of said transaction was determined at EURIBOR Plus 0.12%, however TPO treated the loan as rupee loan since the loan amount was advanced out of account maintained in India and determined the ALP at SBI PLR plus 7.50%. It upheld DRP's view that there was no rational basis for AO to treating the foreign currency loan to be given in INR.

DCIT vs Siegwerk India Pvt. Ltd [TS-1118-ITAT-2018(Del)-TP] ITA No.6702/Del/2015 dated 08.10.2018

2023. The Tribunal held that benchmarking of interest transaction of loan advanced by assessee to its AE given in USD should be on Libor plus 200 bps only and rejected TPO's benchmarking at 14.45% (i.e. as per SBI PLR). It directed TPO to compute interest for a period of 139 days and on day wise outstanding basis (assessee had given short term advances for an overall period of 139 days without charging any interest which were paid back by its AE in instalments) by adopting Libor +200 bps.

BS Ltd vs Asst CIT [TS-1330-ITAT-2018(HYD)-TP] ITA No.2187/Hyd/2017 dated 29.11.2018

2024. The assessee charged interest at 6% on loan advanced to its AE which was denominated in USD currency. The TPO was of the view that the CUP method was to be applied and the arm's length interest rate was to be computed as a combination of the cost of funds in the hands of the assessee and a credit spread for taking the risk of advancing loan to the AE and thus, concluded that Libor +760bps was an apt rate. He adopted Libor rate of 510 bps and accordingly made an adjustment considering interest rate at 12.70%. The CIT(A) deleted the adjustment and directed the TPO to adopt Libor rate for AY 2009-10 at 113 bps(by relying on various decisions inter-alia HC decision in Cotton Naturals wherein it was held that the foreign currency denominated loans advanced to AEs should be benchmarked against the relevant currency denominated LIBOR rate, which is the present case is US LIBOR. It also noted that even according to TPO's methodology that the interest rate would be 8.74% [113bps +760bps], and the actual interest charged was within +/-5% range would be at ALP. The

Tribunal rejected Revenue's contention that CIT(A) should have remanded back the case for adjudicating on LIBOR rates of all three years and affirmed CIT(A)'s decision noting that there were no specific particulars challenging correctness of CIT(A)'s finding on LIBOR rate.

DCIT vs Britannia Industries Ltd [TS-1279-ITAT-2018(HYD)-TP] ITA No.1390-1392/Kol/2017 dated 22.11.2018

2025. The assessee had subcontracted EPC contracts to its AE viz. Lanco International Pte. Ltd (LIPL) and paid mobilization/ material advance for the execution of projects. The TPO considered these as loans and advances granted/ receivables and treated them as international transaction. The TPO made an addition of Rs 145Ccr towards the advances at 12.25%. Aggrieved, the assessee filed an appeal before Tribunal. The Tribunal deleted the adjustment of Rs 145 cr towards interest on mobilization advances. It noted that mobilization of advances was a well-known practice in the construction industry and there was complete uniformity in assessee's act in not charging interest from both AE and Non-AE and also not paying interest on advances received. Further, it deleted TP adjustment on account of interest received on loans observing that the assessee had received interest at 6.37% which was more than average Singapore PLR of 5.38% relying on the decision in the case of Tata Autocomp Systems ltd [TS-45-HC-2015(BOM)-TP] and Cotton Naturals India Pvt. Ltd [TS-117-HC-2015(DEL)-TP]. The Tribunal also rejected assessee's contention that provision of corporate guarantee did not fall within the scope of International Transaction as per section 92B. However, considering Asian Paints Ltd [TS-868- HC-2016(BOM)-TP] case, it directed the AO/TPO to consider only 0.27% as the guarantee commission on the amount involved and clarified that if any of the corporate guarantees were provided in earlier year, they would not be subjected to transfer pricing during the year under consideration. Accordingly directed the AO/TPO to appropriately quantify the guarantee commission after considering those in earlier year or withdrawn during the year.

Lanco Infratech Limited vs DCIT –TS-328-ITAT-2017(HYD)-TP ITA No. 404/hyd/2016 dated 03.05.2017

2026. The Tribunal directed TPO to adopt arm's length interest rate of LIBOR +2% or 7%, whichever is higher, for benchmarking interest received by assessee on loans advanced to subsidiaries during AY 2007-08 and 2008-09 relying on the decision in the assessee's own case for AY 2006-07 as facts and circumstances were similar. Further, it rejected assessee's contention for considering RBI approvals for investment in subsidiaries as benchmark, stating that RBI approvals were on a different criteria and for different purposes. Also, Although RBI approvals maybe one of the aspects considered for ALP determination, it could not by itself be considered as benchmark or ALP.

Dr Reddy's Laboratories Limited - TS-8-ITAT-2017(HYD)-TP

2027. The assessee had provided a loan to its Singapore based AE and charged interest @ LIBOR + 5.25 percent and benchmarked the same under CUP adopting the Singapore PLR of 5.38 percent as comparable. The TPO made an addition adopting PLR in India @ 14.75 at ALP which was confirmed by the DRP on the ground that the assessee did not respond to the query of the TPO. The Tribunal relying on the order of the co-ordinate bench in the assessee's own case for the prior assessment year (wherein the benchmarking adopted by

the assessee had been accepted) deleted the addition and held that the DRP erred in confirming addition merely because the assessee did not respond to the query of the TPO.
Lanco Infratech Ltd vs. ACIT - TS-1022-ITAT-2017(HYD)-TP - ITA Nos. 221 /Hyd/2017

2028. Where the assessee had provided an interest free loan to its parent company AE against which the AE issued shares to the assessee after a period of 3 years, the Tribunal held that the case of the assessee could not be considered as an investment in share capital and therefore distinguished its reliance on the decision of Prithvi Information Solutions Ltd., ITA No. 472/Hyd/2014. However, it remitted the matter to the file of the TPO to determine when the AE had decided to issue shares against the interest free loan and held that if the decision to do so was made in the impugned AY, then the decision of Prithvi Information would apply and the interest free loan would take the nature of investment in share capital on which no notional interest could be computed but if the decision to issue shares was taken subsequently, the TPO was justified in imputing interest @ LIBOR + 3 percent as the transaction could not be considered as investment in equity share capital.
GSS Infotech Ltd. vs. DCIT - TS-1086-ITAT-2017(HYD)-TP - ITA No. 267/Hyd/2014 & 329/Hyd/2016 & ITA No. 602/Hyd/2017 dated 30-11-2017

2029. The Tribunal directed the AO/TPO to compute the ALP of the loan transaction by applying LIBOR rate relying on the ratio laid down in the rulings of Rain Commodities, Cotton Natural (I) Pvt Ltd. and Vaibhav Gems Ltd. wherein it was held that if the transaction is in foreign currency, domestic prime lending rate would not be applicable and international rate being LIBOR should be taken to benchmark the international transaction. The DRP had applied interest rate at 12.13% as against the SBI PLR at 14.75% applied by the TPO.
Nagarjuna Fertilizers and Chemicals Ltd vs ACIT [TS-734-ITAT-2018(HYD)-TP] ITA Nos.93 and 2021/Hyd/2017 dated Nil.07.2018

2030. The Tribunal upheld DRP's order directing AO to compute interest rate at LIBOR +200 points on advances given by assessee to US AE for AY 2010-11. Noting that the assessee had charged interest based on LIBOR on similar advances to Hong Kong AE but not charged interest on advances to US AE, it held that these were advances given to AEs and not for any capital investment for which there was no allotment of shares and therefore dismissed the plea of the assessee that it was a capital advance on which it received no income, not subject to the TP provisions. The Tribunal following the decision in the case of Transport Corporation directed the AO to compute interest rate at LIBOR +200 points. Further, relying on the decision in the case of Four Soft, it deleted the TP-addition in respect of corporate guarantee and held that providing corporate guarantee would not amount to an international transaction where no cost was incurred by the assessee. Further, relying on the decision in the case of Siro Clinpharm held that the amendment to section 92B in respect of corporate guarantee was only prospective and applicable from AY 2013-14 and accordingly deleted the TP-addition.
Vivimed Labs ltd vs DCIT-TS-498-ITAT-2017(HYD)-TP-ITA Nos 404 & 479/hyd/2015 dated 02.06.2017

2031. The Tribunal held that where assessee company had advanced interest free loans to subsidiaries, the ALP needs to be determined applying the international market

condition since the money was lent and utilized outside India and relying on the ruling of PMP Auto Components (P) Ltd, it directed transfer pricing officer to determine ALP by applying LIBOR + 200 points.

Transport Corporation of India Ltd. - TS-764-ITAT-2016 (HYD)-TP- ITA No. 117/Hyd/2016

2032. The assessee had advanced loan in foreign denominated currency to its subsidiary in Russia and applied CUP to benchmark its transaction and charged 5% interest on the loan. The TPO determined the ALP of interest on the aforesaid transaction to be 19% and accordingly made an upward adjustment. The CIT(A) deleted the adjustment after considering the decisions cited by assessee noting that for a foreign currency loan the rate of interest was to be adopted on LIBOR and at most LIBOR plus 2% (accordingly arrived at a rate of 2.89% considering LIBOR rate of 0.89%) and held that the interest rate of 5% was at ALP. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order following the coordinate bench ruling in assessee's own case for earlier year wherein it was held that LIBOR rate had to be considered while determining the ALP of the transaction. Wherever the transaction of loan between the associated enterprises was in foreign currency then the transaction would have to be looked upon by applying the commercial principles in regard to international transaction. Therefore, the domestic prime lending rate would have no applicability and the international rate LIBOR would come into play.

ACIT vs MK Shah Exports Ltd [TS-1191-ITAT-2018(Kol)-TP] ITA No.977 and 978/Kol/2018 dated 17.08.2018

2033. The assessee had given foreign currency denominated loans to its AE in USD and Euro currency and was of the view that no benchmarking exercise under TP provisions had to be undertaken as it was in nature of trade advances,however the TPO determined the ALP of interest rate at 20%/22% in respect of the aforesaid loans by pricing at the cost of funds in the hands of the assessee at 14.5% and made an appropriate adjustment for the credit risk being borne by the assessee, having regard to the borrower's independent credit rating at 550 bps and 750 bps. Noting that substantial portion of own surplus funds had been deployed for loans, the CIT(A) held that TPO's calculation of cost of funds was not sustainable and opined that TPO's methodology adopted was not in conformity with the methods prescribed in Rule 10B and relied on various decisions to conclude that the settled view was that the foreign currency denominated loans advanced to AEs should be benchmarked against the relevant currency denominated

LIBOR rate. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s findings noting that a catena of case laws has already concluded that foreign currency denominated loans have to benchmarked at LIBOR.

DCIT vs Rohit Ferro Tech Ltd. [TS-1399-ITAT-2018(Kol)-TP] (ITA Nos.262 and 263 /Kol /2018 dated 12.10.2018

2034. The Tribunal dismissed Revenue's appeal and upheld the CIT(A)'s deletion of interest adjustment. The Tribunal noted that assessee had granted loan to its AE namely, Emami International FZE of USD 45 million and charged interest @8% p.a. However, the TPO had computed ALP of such loan at 11% p.a. [5% (cost of funds) + 600bps (risk premium)] and made an upward adjustment of Rs. 48.94 lakhs. The Tribunal opined that the risk premium of 600 bps taken by the TPO was excessive. It noted that suitable risk premium would work out

to be lower than 300 bps considering the facts of the case and credit rating of the assessee. In view of the aforesaid findings, it appreciated the CIT(A)'s view that even following the methodology proposed by the TPO viz., cost of funds plus risk premium, the ALP of the loan would work out to 8%. Thus, the Tribunal held that the TPO/Assessing Officer had grossly erred in applying notional interest @11% (i.e. cost of procurement of funds by assesse @5% + 600 basis points) whereas the cost of procurement of similar funds from third part was LIBOR + 600 basis points, which worked out to 7.20%.(that is, prevailing USD LIBOR rate, which was 1.2% plus 600bps). Hence it confirmed CIT(A)'s order that the interest rate of 8% charged by the assessee from its AE was at arm's length. Further, it also observed that the Revenue had accepted the interest of 8% charged on the same loan to be at arm's length in the earlier as well as succeeding transfer pricing assessments and following the priniciple of consistency, the same would prevail.

DCIT/ACIT vs. Emami Limited [TS-468-ITAT-2018(Kol)-TP] ITA Nos. 1065 and 1066/Kol/2017 dated 15.06.2018

2035. Where the assessee, a promoter of Haldia Petrochemicals Ltd ('HPL') had made interest free advances to HPL, and the AO, noting that on the one hand the assessee had been suffering interest liability on loans taken by it and on the other hand it was providing interest free loans to HPL, made an addition of notional interest income @ 12 percent of the amounts advanced, the Tribunal taking into consideration the submissions of the assessee viz. that notional income could not be brought to tax and that the interest free loans were to be adjusted against the equity contribution, relied on the order passed by its co-ordinate bench in the case of the assessee for another AY and set aside the matter to the file of the AO with direction to decide the same afresh in accordance with law.

Tata Global Beverages Ltd v DCIT – TS-48-ITAT-2017 (Kol) - TP - I.T.A No.511/Kol/2010, I.T.A No.2105/Kol/2010 dated 03.02.2017

2036. The Tribunal for AY 2008-09 relying on the decision of Delhi HC in the case of Cotton Natural (I) Pvt Ltd [ITA No. 5855/del/2012] and Bombay HC ruling in Tata Auto Comp System [52 SOT 48 (Mum)], upheld deletion of TP-adjustment in respect of interest on loan given by assessee to AE for in foreign currency. The TPO benchmarked the international transaction by adopting as the ALP rate of interest at 14.12% (Domestic PLR). Noting that the loan was given in foreign currency at interest of 4% p.a., it held that where the transaction of loan between the AEs was in foreign currency, the international LIBOR rate should be applied and therefore domestic prime lending rate had no applicability. Since the rate charged by assessee was more than LIBOR it deleted the addition of the TPO.

DCIT vs M K Shah Exports Ltd – TS- 470- ITAT-2017(Kol)-TP- ITA No. 2149/kol/2014 dated 12.05.2017

2037. Where the assessee had provided its AEs an interest free loan and worked out an interest rate of LIBOR + 100 basis points as ALP pursuant to which it suo motu offered interest income to tax, the Tribunal held that the TPO was not justified in downgrading the credit ratings of the AEs relying on S&P's corporate ratings and arriving at an ALP of LIBOR + 300 basis points as the TPO relied on only 4 out of the 7 ratios relevant to determining the credit rating of the company and that the method adopted by him was unscientific. In light of the

evidences submitted by the assessee providing for a different credit rating of its AEs based on a scientific approach, the Tribunal remitted the matter to the file of the TPO to determine the correct ALP of the loan.

Tega Industries Ltd [TS-780-ITAT-2016 (Kol)-TP] (ITA No.1912/ Kol/2012)

2038. The assessee had advanced loan in Australian dollars to its AE in Australia and benchmarked the transaction by adopting CUP method and took ALP rate of interest at 8.91% as was prevailing in Australia. The AO was of the view that 10% interest rate would be a reasonable rate and accordingly, made an adjustment.The Tribunal deleted the TP adjustment on interest on loan advanced by the assessee to its AE noting that the rate adopted by the assessee was at ALP since the assessee had adopted interest rate which an Australian company borrowing from Australian bank would have paid. It relied on the ratio laid down in the Delhi HC ruling of Cotton Natural wherein it was held that ALP on loan advanced to its AE should be computed based on market determined interest rate applicable to currency in which loan is required to be repaid.

Dy.CIT vs Russell Credit Ltd. (2018)52 CCH 0315 KolTrib ITA No.629/Kol/2013 and ITA No.674/Kol/2013 dated 11.04.2018

2039. The Tribunal held that commercial expediency of a loan to a subsidiary company was not relevant in the ascertaining the arm's length interest on such a loan and that there was no bar on anyone advancing an interest free loan to anyone but when such transactions are covered by the international transactions between associated enterprises, Section 92 of the Act mandates that the income from such transactions is to be computed on the basis of arm's length price. It rejected the contention of the assessee that when no income was reported from a particular transaction, then computing ALP on the same was not warranted. Further the Tribunal distinguished the decision of the Court in Vodafone India Services Pvt Ltd v UOI - (2014) 50 taxmann.com 300 and held that the said decision dealt with international transactions which were inherently incapable of producing income chargeable to tax since it was in the capital field. Therefore, it was held that even if no income was reported in respect of an item in the nature of income, such as interest, but the substitution of transaction price by arm's length price results in an income, it can very well be brought to tax under Section 92.

Instrumentarium Corporation Ltd v ADIT(IT) - TS-467-ITAT-2016 (Kol) - TP - IT APPEAL NOS. 1548 & 1549 (KOL.) OF 2009

2040. The TPO arrived at arm’s length interest rate of 20.15%, by applying CUP method and benchmarking the same against local interest rates in respect of loan denominated in foreign currency advanced by the assessee company to its AE and made an adjustment. The CIT(A) relying on coordinate bench decision in Kohinoor foods ltd. held that that international transactions involving cross- border country loans to AE could be bench marked against LIBOR and interest rate of Libor+2% could be charged to arrive at ALP. The Tribunal dismissed Revenue’s appeal and upheld the CIT(A)’s order noting that CIT(A) had followed the propositions of law laid down by different benches of the Tribunal (including the jurisdictional bench decision in EIH Ltd.) on the issue.

Dy.CIT vs Manaksia Limited [TS-1101-ITAT-2018(Kol)-TP] ITA No.980/Kol/2017 dated 28.09.2018

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2041. The Tribunal upheld CIT(A)'s order deleting TP adjustment on account of interest charged on foreign denominated loan advanced by assessee to its subsidiary in Russia following the coordinate bench decision in assessee's own case for earlier year wherein it was held that interest should be charged at LIBOR and not domestic PLR in respect of transaction of loan in foreign currency with its AE and accordingly, the interest charged by assessee at 8% (which was more than the Libor rate or even more than a markup of 2% on Libor) was held to be at ALP. Thus, it dismissed Revenue's appeal.

ACIT vs MK Shah Exports Ltd [TS-1232-ITAT-2018(Kol)-TP] ITA No.1974/Kol/2017 dated 16.10.2018

2042. The Tribunal remitted the benchmarking of ALP of interest on loans advanced by assessee to its AE directing TPO to verify as to the currency in which loan was granted and the currency in which it was to be repaid (so that same could be benchmarked at LIBOR if assessee had advanced loan in terms of USD). It rejected assessee's contention that ALP of interest on outstanding loans was to be NIL in view of loan becoming a non performing asset and assessee not recovering any interest therefrom thus notional income could not be offered to tax by observing that as loan as the transaction is an international transaction within framework of law, the computation of income therefrom had to be on basis of ALP.

Laqshya Media Limited [earlier known as Lakqshya Media Pvt Ltd] vs ACIT [TS-1261-ITAT-2018(Mum)-TP] IT(TP)A No.1984/Mum/2017 dated 14.11.2018

2043. Where the assessee, a Singapore based company, had provided interest free loans to its Indian AE and the TPO imputed interest @ 10.50 percent based on the PLR, the Tribunal rejected assessee's contention that since the interest free loan was given by it to strengthen the Indian AE which in turn would improve its own business, no TP adjustment was required. However, it held that the TPO was unjustified in applying the PLR and held that the adjustment ought to have been computed based on LIBOR. Relying on the decisions of the Bombay High Court and the co-ordinate bench it held that LIBOR + 200 basis points was to be used to benchmark the transaction.

Sabre Asia Pacific Pte Ltd (Earlier Known as Abacus International Pte Ltd.) vs. DCIT - TS-112-ITAT-2018(Mum)-TP - I.T.A. No. 486/Mum/2016 dated 16.02.2018

2044. The assessee borrowed monies from bank and advanced the same to its AE for setting up of manufacturing facility charging the same rate of interest (Libor+250 bps) as the bank. The TPO concluded that the transaction was not at ALP by observing that assessee was to be compensated for additional risk borne (loan was advanced to third party and thus interest should be charged at cost plus markup) and accordingly determined the interest rate at 5.82%. The DRP confirmed the action of TPO noting that loan obtained from bank was secured while loan advanced to AE was unsecured and since assessee was risk bearing, it should have been compensated for additional risk borne. The Tribunal held that interest charged by assessee was at ALP since it had used CUP method by charging LIBOR+250 bps and relied on coordinate bench decision in Everest Kanto (wherein it was held that LIBOR is apt rate to be charged for loans denominated in foreign currency) to delete the interest adjustment made by TPO.

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Aries Agro Limited vs Dy.CIT [TS-1326-ITAT-2018(Mum)-TP] ITA No.1452 /Mum/2017 dated 28.11.2018

2045. The assessee provided USD loans to its AEs, (i) ILFS Maritime Offshore PTE Limited; and (ii) IL&FS International PTE Limited at an interest rate of USD LIBOR plus 5.5%. Further, loan was given by assessee in Euros to its AE, Elsamex at Euribor+1.75%. The assessee had applied external CUP and interest rates derived from the Reuters Loan Connector, Bloomberg and claimed the interest rate charged to be within the permissible range. The TPO applied CUP and used the annualized average yield of bonds to determine ALP at 15.41%. The CIT(A) upheld the TPO's order. The Tribunal set aside CIT(A)'s order and held that assessee had rightly benchmarked the transaction as per LIBOR and EURIBOR and same could not have been determined as per the domestic rate by relying on Delhi HC decision in Cotton Naturals (I) Pvt Ltd. wherein it was held that interest rate applicable should be that of the currency concerned in which the loan has to be repaid and had disagreed with the view that the interest rates were to be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party.

IL&FS Transportation Networks Ltd vs Addl.CIT [TS-1383-ITAT-2018(Mum)-TP] ITA No.2393/Mum/2015 dated 19.12.2018

2046. Where the assessee had charged interest rate at 8% in respect of loans provided to its AE in China, for the said transaction, TPO worked out interest at 11.5% and made an upward adjustment to the interest charged, the Tribunal directed AO to restrict the addition on account of interest as per rates applicable to currency in which loan was to be repaid to the assessee i.e. Libor relying on coordinate bench decision in assessee's own case for earlier year which in turn relied on Delhi High Court decision in Cotton Naturals wherein it was held that the ALP on loan advanced to its AE should be computed based on market determined interest rate applicable to currency in which loan is required to be repaid.

Technocraft Industries (I) Ltd vs Dy.CIT [TS-1397-ITAT-2018(Mum)-TP] ITA No.7565/Mum/2014 dated 27.12.2018

2047. The Tribunal relying on the decision of Delhi High Court in the case of Cotton Naturals held that the ALP on loan advanced to its AE should be computed based on market determined interest rate applicable to currency in which loan is required to be repaid.

Technocraft Industries (I) Ltd vs Dy.CIT [TS-827-ITAT-2018(Mum)-TP] ITA No.6686/Mum/2014 dated 31.07.2018

2048. The Tribunal confirmed CIT(A)'s order upholding interest adjustment on advances given by assessee to its AE. The assessee tried to justify non-collection of interest from its AE by submitting that it did not pay commission to its AE on the sale procured by it. The Tribunal observed that assessee had neither brought any material on record to substantiate its claim that AE did some marketing efforts on behalf of the assessee nor any correspondence, to demonstrate that both the parties were waiving their right to collect interest/commission in view of cross services. Further, the Tribunal accepted Revenue's contention that loan and agency were 2 different transactions and opined that alleged marketing efforts could not be linked to the advance given by the assessee interest free and accordingly upheld CIT(A)'s TP Adjustment.

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M/s Virgo Engineering Ltd vs ACIT 10(3) Mumbai- TS-303-ITAT-2018(Mum)-TP- ITA No 685/Mum/2014 dated 20.04.2018

2049. Where the TPO determined interest ALP at 9% (6% domestic cost of borrowing plus 2% exchange risk and 1% being charged as administrative cost) and computed adjustment at Rs.79.20 lakhs, the Tribunal, relying on the decision in the case of Cotton Naturals (I) Pvt Ltd [TS-117-HC-2015(DEL)-TP] and Firestar International Pvt Ltd [TS-355-ITAT-2015(mum)-TP] held that the CIT(A) had rightly held that interest rate be charged at LIBOR + 300 bps as an ALP rate of interest and there was no infirmity in the order of the CIT(A).

Roha Dyechem Pvt Ltd vs ACIT-TS-867-ITAT-2017(Mum)-TP ITA No. 1991/MUM/2016 dated 27.10.2017

2050. The assessee had charged interest at 8% on loans given to some AEs and the TPO had taken a view that interest should have been charged at uniform rate of 8% to all AEs. Further, the TPO held that assessee should have charged certain fees from AE for meeting its administrative expenses and estimated the same at 0.5% of the average amount of loan given to its AE's and thus proposed TP-adjustments on the above grounds of interest and fees. The CIT(A) upheld the adjustment made towards interest and deleted the adjustment towards administrative expense.

The Tribunal followed co-ordinate bench ruling in assessee's own case for previous AY which had held that LIBOR+300bps should be considered as interest ALP and directed the Assessing Officer to compute TP adjustment by adopting LIBOR rate plus 300 bps as ALP rate of interest. Further, regarding TP-adjustment on administrative charges, the Tribunal, in line with Circular No. 21/2015 dated 10.12.2015 issued by CBDT stated that admittedly, tax effect involved on the above said issue was less than Rs.10 lakhs and hence the Revenue was precluded from pursuing this appeal.

ACIT CC-43 vs Roha Dyechem Ltd- TS-417-ITAT-2018(Mum)-TP- ITA No 1334/Mum/2014 dated 30.05.2018

2051. The Tribunal deleted secondary adjustment towards notional interest computed on amount of TP- adjustment on international transaction of sale of business to AE.

The Tribunal noted that such additional consideration was not received by assessee from its AE and the TPO treated the same as interest free advances to AE and charged interest at 12%. The Tribunal followed its earlier year's order in assessee's own case wherein similar secondary adjustment was deleted and held that, as per the requirement of law, there is nothing further provided to impute any secondary adjustment and the charging interest over and above the amount of adjustment, was not found to be in accordance with the provisions of law.

ACIT 15(2)(2) vs Prudential Process Management Services India Pvt Ltd- TS-804-ITAT-2018(Mum)-TP- ITA No 5526/Mum/2015 dated 13.04.2018

2052. The Tribunal upheld the TPO/DRP's determination of ALP in respect of interest on debit balance of advances given by assessee to AEs for AY 2006-07. It observed that though the assessee had incurred cost by availing credit facility, it had advanced interest free funds to its subsidiaries, and therefore held that it could be safely be concluded that a benefit had

accrued to the subsidiaries on account of cost incurred on credit facility which had been shifted by the assessee to its subsidiaries. Further, stating that the principle of commercial expediency would not come into play under the present facts, it held that as the assessee had not charged interest on the outstanding receivables from the overseas subsidiaries, the ALP of the same had rightly been determined by the A.O/TPO. However, it directed the AO/ TPO to apply LIBOR+300 points to compute interest ALP, following co-ordinate bench ruling in assessee's own case in earlier year.

Strides Shasun Limited [Formerly known as Strides Acrolab Limited] vs. ACIT - TS-260-ITAT-2017(Mum)-TP - /I.T.A. No. 8540/Mum/2010 dated 31/03/2017

2053. The Tribunal, following its previous order in the assessee's own case, determined the ALP interest rate for interest free loan advanced by the assessee to its AE at LIBOR + 2 percent as against the PLR i.e. the rate adopted by the TPO in pursuance of the DRP directions.

SB&T International Ltd – TS-969-ITAT-2016 (Mum) - TP

2054. The Tribunal, following the earlier order in assessee's own case, determined the arm's length interest rate for interest free loan advanced by assessee to AE at LIBOR +2% and held that the TPO was incorrect in determining the ALP of interest by adopting internal cost of borrowing (12.56%) plus risk cover (3%) as an internal comparable.

SB&T International Ltd – TS-969-ITAT-2016 (Mum) - TP

2055. The Tribunal deleted the notional interest adjustment made by the TPO by re-characterizing the advance paid by the assessee to its AE on account of purchase of machinery from its AE. It held that the TPO did not bring any material on record to suggest that the transaction was sham or bogus or that it was a loan and therefore he was incorrect in treating it as a loan and imputing notional interest on the same.

Essar Steel Orissa Ltd v ACIT - TS-442-ITAT-2016 (Mum) - TP- I.TA No. 2289/Mum/2014

2056. The Tribunal held that for determination of ALP of interest on loan, the interest should be determined according to the market rate applicable to the currency in which the loan was to be repaid and accepted LIBOR over SBI Prime Lending Rate for interest on loan repayable in US Dollars.

Firestar International Pvt Ltd v ACIT [ITA No.488/MUM/2015] - TS-355-ITAT-2015(Mum)-TP

2057. The Tribunal held that for the purposes of benchmarking interest on loan given in foreign currency, rates of interest prevailing in India could not be taken and it considered the prevailing ECB rates.

IL & FS Maritime Infrastructure Co Ltd v ACIT [ITA No 867 / Mum / 2015] - TS-381- ITAT-2015(Mum)-TP

2058. The Tribunal held that in cases where the lender and borrower are overseas based, the RBI guidelines for benchmarking unsecured loans would be applicable and not the prevailing domestic interest rates.

DCIT v M/s Geodesic Ltd [ITA No 1656 / Mum / 2013] - TS-377-ITAT-2015(Mum)-TP

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2059. The Tribunal held that for the purpose of benchmarking the interest on loan given by the assessee to its US based AE, LIBOR was the safest tool since the loan was denominated in foreign currency and rejected the approach of the CIT(A) in adopting the rate of interest stipulated in the RBI Master Circular No 7 /2006-07 dealing with External Commercial Borrowings.

Marico Ltd v ACIT - TS-411-ITAT-2016 (Mum) - TP - I.T.A./8858/ Mum/2011 I.T.A./8713/Mum/2011

2060. The Tribunal rejected (a) TPO/DRP's treatment of AE as the 'tested party' and adoption of USD Corporate Bond Rates for determining ALP of INR dominated CCD's borrowed by assessee from AE (b)TPO/DRP's 'blanket approach' in applying USD Corporate Bond Rates for interest benchmarking, on the ground that once the tested transaction is in INR denominated debt, then interest rate must necessarily be based on economic and market factors affecting Indian currency and data available for debt issuances in India or INR denominated rather than foreign currency rate or external data by relying on Delhi HC ruling in Cotton Naturals. The Tribunal accepted assessee's alternative approach of undertaking search for comparable debt issuances in BSE data as assessee had used data for the subsequent year and made minor tenor adjustment to factor the time period to arrive at mean margin and held that although a high degree of comparability was required under CUP, but in absence of such a comparable data, a minor adjustment could be made to eliminate the material effect of time difference for arriving at a CUP. The Tribunal deleted the addition by noting that the assessee had filed 2 comparables for the earlier year wherein for credit rating of AA Enterprises, the coupon rate of interest per annum was between 11% to 12% for a tenor of 60 months, and concluded that if for a credit rating company AA or AA(+) the interest rate is ranging between 11% to 12%, then in the case of the assessee which was admittedly BBB(-) credit rating company, 11.30% interest paid by the assessee to its AE was much within the arm's length rate.

India Debt Management (P)Ltd v DCIT -TS-141-ITAT-2016(MUM)TP

2061. The Tribunal held that for the purposes of benchmarking interest on loan granted to an AE situated in Singapore, the interest rates in Singapore and not the SBI Prime Lending Rate were to be considered.

The Tribunal, relying on the decision of the High Court in the case of Everest Kanto Cylinders, held that the rate for benchmarking guarantee commission was 0.5 percent as opposed to the 4.12 percent arrived at by the TPO.

Cox and Kings Ltd v DCIT (I.T.A. No. 1354/M/2014 & I.T.A. No. 7770/M/2014) – TS-540-ITAT-2015 (Mum) – TP

2062. The Tribunal held that interest on loans given by the assessee to overseas subsidiaries situated in Hong Kong and Singapore should be benchmarked considering the LIBOR of the respective country where the loan is consumed. It further held that since the loan was not used for uniform periods, the LIBOR rate for an average of 6 months was to be considered and applying the uniform average of 12 months LIBOR on all loans was not valid.

Arshiya International Limited v DCIT (I.T.A. No. 659/M/2013)- TS-519-ITAT-2015 (Mum) - TP

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2063. The Tribunal applied EURIBOR + 0.8 percent as the arm's length price of the notional interest on loan granted by the assessee to its AE as opposed to the SBI PLR.
With respect to the addition of 0.8 percent margin, it held that it was necessary to add such margin as only banks and other large financial institutions dealing with each other are able to obtain loans at mere EURIBOR and that retail borrowers would be charged an additional margin / premium over and above EURIBOR.
Tata Autocomp Systems Ltd v ACIT (ITA No. 774/M/2014) – TS-582-ITAT-2015 (Mum)

2064. Where the assessee had advanced interest-free loans and share application money to its AEs out of proceeds of zero coupon convertible bonds, the Tribunal rejected the TPO's benchmarking of the said transaction on the basis of net margin on borrowing costs of assessee. It applied the ratio of the decision of Bombay High Court in CIT vs. Tata Autocomp Systems Limited [TS-45- HC-2015(BOM)-TP] wherein it was held that where taxpayer advances loans to its AE in Germany, the rate of interest for TP purposes would be applied based upon rates prevailing in Germany (where loans were consumed). Accordingly, it remitted the matter to the AO for de- novo ALP determination in light of Tata Autocomp ruling, and directed the assessee to produce all necessary and relevant evidences and explanations before the AO to substantiate its claim.
Geodesic Limited Vs DCIT - TS-131-ITAT-2017(Mum)-TP - I.T.A. No. 1234/Mum/2014 dated 27-02-2017

2065. The Tribunal remanded the matter back to the Assessing officer and decided the matter in line with assessee's own case before Tribunal for previous A.Y. The tribunal noted that if the loans were advanced to the Associated Enterprise on the basis of LIBOR/WIBOR + then the said transaction would be at arm's length price, if not the TPO could recompute the arm's length price of the transaction
KPIT Technologies Ltd vs ACIT Circle -14 Pune- TS-408-ITAT-2018(PUN)-TP- ITA no 594/PN/2015 dated 12.04.2018

2066. The Tribunal remanded the matter to the file of the AO/TPO to compute the adjustment in respect of the interest due on loans advanced by the assessee to its AE's for AY 2011-12 following its earlier year order. AO had applied BPLR rates whereas the DRP applied the benchmark of LIBOR + 5%. The co-ordinate bench in assessee's own case in earlier year had directed AO to verify whether the loans were advanced to associated enterprises on LIBOR+ or WIBOR+ rates, as the case may be, and if so, to consider the said transaction to be at arm's length price. If the loan was not advanced at the said rates, the TPO was directed to re-compute the arm's length price of the international transactions.
KPIT Technologies Ltd (earlier known as KPIT Cummins Infosytems Limited.) v DCIT [TS-522-ITAT-2018(PUN)-TP] ITA No.505/ Pun/2016 dated 04.06.2018

2067. Where the DRP had in the subsequent AY i.e AY 2012-13, accepted LIBOR based rate for benchmarking interest on loan granted by assessee to its AE, the Tribunal rejected Revenue's application of flat rate of 13.25% of bank rate for benchmarking and applying the principle of consistency, remitted the interest adjustment on loan to the file of AO to verify the same and decide the issue afresh.
Autoline Industries Ltd vs DCIT-TS-1000-ITAT-2017(PUN)-TP dated 24.11.2017

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2068. The Tribunal, relying on the decision of the High Court in the case of Tata Autocomp Systems Ltd [TS-45-HC-2016(BOM)-TP], rejected the application of Prime Lending rate prevalent in India for benchmarking foreign currency loans and held that where the assessee had advanced loan to its AEs in a foreign country, then the rate of interest was to be determined on the basis of rate prevailing in the said foreign country viz. where the loan had been consumed.
Varroc Engineering Pvt Ltd v ACIT (ITA No.573/PN/2014) – TS-457-ITAT-2015(PUN)-TP

2069. The Tribunal held that where assessee had advanced loan to its 100 percent subsidiary of Poland in
Polish Zloty, interest rate should be computed by adopting WIBOR + 1 percent.
KPIT Cummins Infosystems Ltd v ITO - [2016] 68 taxmann.com 294 (Pune-Trib)

2070. The Tribunal following coordinate bench's ruling in assessee's own case upheld CIT(A)'s restriction of interest rate ALP from 4.31% as adopted by TPO to 2.40% in respect of loan given by assessee to AE for AY 2010-11 on the ground that the calculation of arm's length interest rate for an interest-free unsecured loan to a French AE should be done using the average French interest rate spread as conditions in entire European financial market are not the same and without any adjustment for foreign exchange risk as exchange fluctuations are inherent in comparable transactions.
DCIT vs. Jyoti CNC Automation Pvt. Ltd-TS-968-ITAT-2017(Rjt) ITA No. 301/Rjt/2015 & CO No.57/Rjt/2015 dated 28.11.2017

2071. The assessee had advanced loans out of its internal accruals to its subsidiary company in Singapore. The TPO was of the view that interest charged at 4.5% was not at ALP and thus determined the ALP at the PLR rate prevailing in the financial year i.e. 14.45%. The CIT(A) deleted) deleted the addition holding that on the loan granted by the assessee to its AE located at abroad, LIBOR rate of interest was applicable for determining the arm length price. The Tribunal dismissed Revenue's appeal noting that a similar addition was deleted in earlier year wherein it was held that on outbound loans, the LIBOR rate ought to be adopted and in the instant case, the assessee had charged interest at a rate higher than LIBOR.
Dy.CIT vs CCL Products (India) Pvt Ltd [TS-1171-ITAT-2018(VIZ)-TP] ITA No.191/Viz/2018 dated 28.09.2018

2072. Where the assessee had entered into an international transaction of providing loans to its AE at 2% and established that loans were given for the purpose of carrying on the business and to build the brand image globally and there was no intention of earning interest, the Tribunal relying on the decision in the case of Cotton Naturals (I) Pvt Ltd-TS-117-HC-2015(DEL)-TP held that since interest charged by the assessee i.e., 2% was more than LIBOR rate, it was arm's length and accordingly dismissed the Revenue's appeal.
ACIT vs. CCL Products (India) Limited-TS-777-ITAT-2017(VIZ)-TP I.T.A.No.192 & 193/Vizag/2017 dated 21.09.2017

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2073. The Apex Court dismissed Revenue's appeal against HC order wherein Tribunal's order deleting TP adjustment on guarantee fee had been upheld. The Tribunal had rejected benchmarking of 3% of guarantee fee on basis of commission rates charged by bank noting that commercial considerations for corporate guarantee and bank guarantee were distinct and different since in Bank Guarantee, the customer could recover the default amount from bank and bank in turn could recover the same from customer. As against this, in corporate guarantee, failure to honor the guarantee would attract corporate laws but it was not as foolproof as bank guarantee. It had relied on coordinate bench decision of Everest Kanto (subsequently affirmed by HC) in which rate of 0.5% was considered to be at ALP. Thus, the HC had affirmed the Tribunal's order noting that no distinction in facts and/or law had been brought on record warranting a different view from what was held in the jurisdictional HC in case of Everest Kento Cylinders Ltd.

CIT (LTU) vs GLENMARK PHARMACEUTICALS vs Addl CIT [TS-1268-SC- 2018--TP] Civil Appeal No(s).12632/2017 dated 11.12.2018

2074. The Apex Court admitted Revenue's SLP challenging Gujarat High Court's decision in respect of deletion of TP-adjustment on corporate guarantee absent actual pledging of shares in favor of the AE. Assessee's AE, Adani Global Pvt. Ltd Singapore had raised a term loan from ICICI Bank for which assessee had intended to provide guarantee by way of by pledging 23.5% shareholding of Mundra Port and SE2 Limited (owned by the assessee), subject to RBI approval. Since the RBI denied the assessee the approval, the guarantee was not provided and consequently the assessee did not charge any guarantee fee from its AE. The TPO applied CUP method and proposed TP adjustment of Rs. 3.65 cr based on market rate of 2% of guarantee fees. The TPO rejected assessee's submission that it had intended to provide a guarantee by pledging of shares and that since the same was not approved by RBI, no guarantee had been provided to the AE. The TPO held that RBI letter was regarding pledging of shares in favor of IDBI Trusteeship Services Ltd and therefore may have been referring to some other transaction. CIT(A) reversed AO's decision observing that IDBI Trusteeship Ltd was security trustee of ICICI Bank Limited, Singapore and thus, RBI's letter refusing permission for pledge of the shares pertained to the same transaction. The Tribunal confirmed the decision of CIT(A) and held that since the assessee had not furnished guarantee to AE, no adjustment was warranted. The High Court upheld Tribunal's order.

Adani Enterprises Ltd [TS-408-SC-2017-TP] –CC No.6814/2017 dated 07.04.2017

2075. The Apex Court admitted Revenue's SLP against High Court order confirming deletion of guarantee fee adjustment for AY 2008-09. The Assessee had charged guarantee fee at 0.53% in respect of bank loan and 1.47% in respect of guarantee for L/C facility obtained by 2 AEs while TPO determined ALP at 3% based on guarantee commission rates charged by banks. The Tribunal, relying on the decision in the case of Everest Kanto Cylinders Ltd, had deleted impugned adjustment holding that bank guarantee was not the same as corporate guarantee which was confirmed by the High Court.

CIT vs Glenmark Pharmaceuticals ltd-TS-698-SC-2017-TP - I.R. AND IA NO.81058/2017-AND IA NO.81060/2017 dated 08.09.2017

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2076. The Court dismissed Revenue's appeal and upheld the Tribunal's order directing the TPO/AO to adopt 0.5% as the ALP of the guarantee commission charged as against the TPO's rate of 3.25% as the ALP noting that the issue of guarantee commission was squarely covered by the decision of Bombay High Court in the case of Everest Kento Cylinder Ltd wherein the Court had upheld the Tribunal's order restricting the ALP for guarantee commission to 0.5% as against the rate of 3% adopted by the TPO by considering the rates for bank guarantee. In the said case, the Court had held that the consideration which applied for issuance of corporate guarantees were separate and distinct from the bank guarantees. Further, it held that the comparison could not sustain since it was not between like transactions but were between guarantees issued by commercial bank on one hand as against the corporate guarantee issued by the holding company for the benefit of its AE. With respect to another transaction, being certain amount advanced by the assessee to its subsidiary (AE) in form of share application money, the TPO recharacterized the same as loan advanced to its AE. With respect to TP adjustment of interest, it noted that the only reason for recharacterizing the share application money as loan was delay in receipt of share certificates from the AE and accordingly, the Tribunal remanded back the issue to AO so that the assessee could furnish the said certificate.The Court noted that the Tribunal had not answered the question clearly in favour of the assessee and the Tribunal had held that subject to verification of the share capital by the AO, the share application money could not be treated as loan amount because of mere delay in issuance of shares by the subsidiary in the name of assessee and thus dismissed Revenue's appeal holding no substantial question of law arose.

Pr.CIT vs Couceutrix Services India Pvt. Ltd. [TS-960-HC-2018(BOM)-TP] (ITA No.303 of 2016) (Bom) dated 04.09.2018

2077. The Court dismissed Revenue's appeal against Tribunal's order deleting TP adjustment made by TPO to the extent of 3% of the amount of guarantee given by the assessee on behalf of its AE by relying on coordinate bench decision in assessee's own case wherein it was held that ALP of corporate guarantee could not be determined on basis of bank guarantee by relying on coordinate bench of Everest Kanto Cylinders noting that the issue was decided by High Court in assessee's own case wherein it was held that no substantial question of law arose as no distinction in facts and/or law had been brought on record warranting a different view from what was held in the jurisdictional HC in case of Everest Kento Cylinders Ltd.

CIT vs Glenmark Pharmaceuticals Ltd [TS-1391-HC-2018(BOM)-TP] (IT) No.834 of 2016 dated 10.12.2018

2078. The Court admitted assessee's appeal on the substantial question of law i.e. whether corporate guarantee given by the assessee with respect to the loans given by the subsidiary would come under the purview of section 92 of the Act or not.

Minacs Pvt Ltd vs DCIT 8(1)- TS-302-HC-2018(BOM)-TP- ITA No 1132 of 2015 dated 25.04.2018

2079. The Court, relying on the decision of co-ordinate bench in Everest Kanto Cylinders Ltd, dismissed the appeal of the Revenue and held that that the guarantee commission fee charged by the assessee to its AE @ 0.53 percent in relation to bank loans and @ 1.47 percent in relation to L/C facilities was at ALP. It upheld the finding of the Tribunal that guarantee commissions rates could not be compared to the rates of bank guarantee.

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CIT v Glenmark Pharmaceuticals Ltd – TS-61-HC-2017 (Bom) – TP - INCOME TAX APPEAL NO.1302 OF 2014 dated 02.02.2017

2080. The Court held that the TPO was incorrect in making a TP adjustment on account of corporate guarantee where in fact, the assessee did not furnish any corporate guarantee in favour of its AE. It noted that the assessee intended to provide guarantee to its AE by pledging shares for arranging a term loan from ICICI bank but could not proceed with doing so due to refusal of permission by the RBI. Accordingly, it held that there was no international transaction under section 92B.
Pr CIT v Adani Enterprises Ltd - TS-621-HC-2016 (Guj) - TP TAX APPEAL NO. 574 of 2016

2081. The Tribunal, relying on the ruling of Micro Inks Limited vs. ACIT [TS-568-ITAT-2015(Ahd)-TP], held that as issuance of corporate guarantee did not have bearing on profits, income, losses or assets it did not constitute an international transaction under section 92B. It further held that issuance of guarantees could be said to be in the nature of shareholder activities and hence could not be included in the "provision of services" under the definition of 'international transaction under section 92B.
Rubamin Ltd vs ITO – TS-113-ITAT-2017 (Ahd) – TP - ITA Nos. 664/Ahd/2012 , ITA Nos. 665/Ahd/2012, ITA Nos. 795/Ahd/2012 dated 17.02.2017

2082. The assessee had extended a corporate guarantee in respect of loan of Rs. 101.48 Cr taken by its subsidiary Suzlon Energy BV Netherland for which it had not charged any guarantee fee, contending that the guarantee was granted in the course of its stewardship activities for its subsidiaries and that it did not constitute an international transaction under section 92B of the Act. The TPO, ignoring the alternate contention of the assessee that if the corporate guarantee was considered as an international transaction, a corporate guarantee fee of 0.75 percent was to be adopted as ALP under CUP, adopted 2 percent as the ALP fee and made a TP addition. The Tribunal, relying on the decisions of the Mumbai Tribunal in Micro Ink Ltd. [(2016) 176 TTJ (Ahd)].and Siro Clinpharm Pvt. Ltd [TS 144 ITAT (2016) TP], held that when the assessee had provided the guarantee in the course of its stewardship activities for its subsidiaries, it would not constitute an international transaction, and, as such, no ALP adjustment could be made in respect of the same. Accordingly, it deleted the addition made by the TPO.
Suzlon Energy Limited [TS-311-ITAT-2017(Ahd)-TP] - ITA No.1369/Ahd/2013 dated 21.04.2017

2083. The assessee provided certain corporate guarantees to the bankers, in respect of borrowings by its AEs, and on 2 corporate guarantees issued to ICICI Bank in respect of Zydus Netherlands BV and Bank of Baroda in respect of Zydus Inc USA, it did not charge any guarantee fees, as the loans had been availed by AEs for strategic acquisitions in furtherance of Cadila's inorganic expansion strategy, which had benefited Cadila itself rather than the AEs. The Tribunal, observing that that the issue was covered by the coordinate bench ruling of the Tribunal in case of Micro Ink [TS-568-ITAT-2015(Ahd)-TP], wherein it was held that corporate guarantees issued in nature of 'shareholder activities' / 'quasi capital' could not be included within ambit of 'provision for services' under definition

of 'international transaction' u/s 92B, as they did not have “bearing on profits, income, losses or assets” deleted the addition made by the DRP who had adopted a corporate guarantee fee of 1 percent to be at ALP.

Cadila Healthcare Limited Vs ACIT - TS-241-ITAT-2017(Ahd)-TP - IT (TP) No. 898/Ahd/2014 and 694/Ahd/2015 dated 03.03.2017

2084. The Tribunal rejected Revenue’s request for constituting Special Bench to decide the issue relating to TP-adjustment on corporate guarantee fees for AY 2007-08 noting that the issue was admitted in appeal by Gujarat HC. The Tribunal remitted the matter to AO with a direction to consider it afresh after the HC decision. The assessee had given corporate guarantee to banks on behalf of its AEs without charging any commission/fee. Noting that the legislature had inserted Explanation to section 92B vide Finance Act, 2012 with retrospective effect, it held that the assessee could not benchmark its transaction retrospectively. Further, with respect to interest free advances given by the assessee to its AEs, the AO made an addition of notional interest @ LIBOR + 2 percent which was confirmed by the CIT(A). The Tribunal noted that in the immediately preceding assessment year in the assessee’s own case where the CIT(A) had adopted LIBOR + 0.25 percent to benchmark the impugned transaction, it had held that only the LIBOR rate without any mark-up, was to be considered while making the addition. Accordingly, the Tribunal, following its previous order held that the addition made by the AO / CIT(A) was to be made only on the basis of LIBOR without any mark-up.

Sun Pharmaceutical Industries Ltd [TS-357-ITAT-2017(AHD)-TP- ITA 2076 & 2067/AHD/2013 dated 27.04.2017

2085. The Tribunal held that where the assessee intended to provide guarantee to its AE by pledging shares held by it, for a loan taken by the AE from ICICI Bank, Singapore but the shares were not finally pledged due to refusal of permission by the RBI, the assessee had not furnished the impugned corporate guarantee and therefore no international transaction under section 92C of the Act took place and that the TPO was incorrect in making the addition on the misconception that the refusal of permission by the RBI was in relation to another loan and not the loan taken by the AE.

Adani Enterprises v ACIT - TS-1-ITAT-2016 (Ahd) - TP

2086. The assessee had borrowed Rs. 70 crores from its Associated Enterprise at an interest rate of 12.25% p.a. as against interest of 15% which was quoted by the Bank. Another AE of the assessee viz. M/s. Robert Bosch GmBH provided guarantee on behalf of the assessee in respect of the borrowings of Rs. 70 crores on which the assessee had paid guarantee fee @ 0.75%. The TPO held that the payment of guarantee commission / fee was not required as the assessee had sufficient reserves as well as assets to support the loan and accordingly made a TP adjustment. The Tribunal held that aggregating the interest on loan and the guarantee fee paid by the assessee, the total cost of borrowing was 13 percent which was still less than the 15 percent quote from the bank which was sufficient justification for the payment and therefore it deleted the adjustment made by the TPO. It also noted that even after the payment of guarantee fee, the operating margin of the assessee was at 18.21 percent which was much better than the average margin of comparables i.e. 10.36%.

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ITO vs Bosch Rexroth (India) Ltd – TS-431-ITAT-2017(AHD)-TP- IT(TP)A No. 462/ahd/2016 dated 08.05.2017

2087. The Tribunal upheld CIT(A)'s order and held that corporate guarantee does not fall within the ambit of international transaction by relying on the decisions of the coordinate bench and therefore no adjustment on account of guarantee commission should be made. It rejected TPO's addition of guarantee fee at 2% of the guaranteed money.

Dishman Pharmaceuticals & Chemicals Ltd vs DCIT [TS-958-ITAT-2018(Ahd)-TP] ITA No.955/Ahd/2012 dated 20.06.2018

2088. The Tribunal dismissed assessee's appeal challenging TP-adjustments in respect of corporate guarantee, loan, outstanding receivables ex parte noting that none appeared on behalf of assessee despite notice being served on assessee. On examination of the impugned order of CIT(Appeals) and the order passed by the AO u/s. 143(3) r.w.s. 144C of the Act, it held that there was no infirmity therein.

Opto Circuits India Ltd. vs. DCIT - TS-89-ITAT-2018(Bang)-TP - IT(TP)A Nos.1315/Bang/2017 dated 31;01.2018.

2089. The Tribunal rejected the contention of the assessee that providing corporate guarantee to its AE without charging any fee was not an international transaction and held that in case of a corporate guarantee given to a bank on behalf of the AE, the assessee creates a charge on its assets in favour of the bank / financial institution and to that extent providing a corporate guarantee had a bearing on the assets of the assessee as the assessee could not use those assets under charge for the purpose of availing further financial credit. Accordingly, relying on the decisions of the co-ordinate benches it determined ALP of guarantee fee at 0.5%.

Xchanging Solutions Ltd [TS-910-ITAT-2016(Bang)-TP] (I.T.(T.P) A. Nos.1294/Bang/2012 & 166/Bang/2014)

2090. The assessee provided corporate guarantee to its AE in Mauritius for which it did not charge any fee. The TPO determined the ALP at 2.75 percent based on rates for financial guarantee charged by various third-party banks which was reduced to 1.75% by the DRP. The Tribunal held that the benchmarking adopted by the TPO and DRP was unacceptable and relying on the decisions of the HC rulings of Everest Canto and Glenmark Pharmaceuticals, wherein it was held that corporate guarantees could not be compatred to bank guarantees, determined the ALP rate of guarantee fee on corporate guarantee provided by the assessee to its Mauritian AE at 0.5%.

Laqshya Media Pvt. Ltd v ACIT - TS-20-ITAT-2018(Bang)-TP - ITA Nos. 1774 /Mum/2016 dated January 2018

2091. The Tribunal upheld the order of DRP determining the ALP of the guarantee fee at 2.28% as against guarantee fee determined by TPO at 3%. It noted that the DRP had observed as per the CRISIL data that the assessee could be rated as BBB and AE as B and its AE had a weaker financial standing. The DRP adopted the difference of 4.56% between interest rate for BBB (10.37% for 1-2 years) and B (14.93% for 1-2 years) and held that 50% benefit

(2.28%) should have been received by assessee. Accordingly, it rejected the Revenue's contention that the rate of guarantee fee determined at 3% by TPO ought to be considered.

United Breweries (Holdings) Ltd [TS-746-ITAT-2018(Bang)-TP]- IT (TP) A No.561/Bang/2016 dated 15.06.2018

2092. The Tribunal remitted the issue of TP-adjustment on corporate guarantee given by assessee to its AE back to the DRP to pass a speaking order after considering the assessee's objections, noting that (i) the DRP had not given any reason for accepting the TPO's benchmarking of commission rate @ 4.61% to 4.76% and (ii) various coordinate bench decisions have accepted guarantee commission to be benchmarked at 0.5%.

Punjab Chemicals & Crop Protection Ltd vs. Addl.CIT [TS-965-ITAT-2018(CHANDI)-TP] ITA No.60/Chd/2013 and ITA No.100/Chd/2014 dated 23.07.2018

2093. The Tribunal considering the retrospective amendment brought in by Finance Act, 2012, by which corporate guarantee was included in the definition of international transaction by virtue of explanation i(c) to section 92B, upheld TPO/DRP's treatment of corporate guarantee extended by assessee to AEs as an international transaction.

TAKE Solutions Limited vs ACIT-TS-1070-ITAT-2017(CHNY)-TP dated 04.12.2017

2094. The Tribunal, following the decision of the co-ordinate bench in Redington India [TS-208-ITAT- 2014(CHNY)-TP] , upheld the DRP's order deleting TP-adjustment in respect of corporate guarantee transaction for AYs 2010-11 & 2011-12 and held that since no cost was involved in extending the corporate guarantee, it would not constitute an 'international transaction'. It refused to consider Revenue's submission hat since Redington India ruling had not been accepted by Revenue who preferred appeal before Madras High Court, the decision of the Mumbai Tribunal Everest Kanto Cylinders [TS-309-ITAT-2014(Mum)-TP] ought to have been followed and held that the principle of judicial discipline provides for consistency in proceedings and therefore where the decision of the very same co-ordinate Bench was available, it was to be followed instead of the decision of Mumbai Bench. Further, it held that as per the decision of the Apex Court Court in Vegetable Products (88 ITR 192)(SC), where there are two conflicting decisions, the decision in favour of the assessee is to be followed. Accordingly, it dismissed the appeal of the Revenue.

DCIT vs. Aban Offshore Ltd - TS-366-ITAT-2017(CHNY)-TP - /ITA No.1947/Mds/2015 dated 05.04.2017

2095. The Tribunal, relying on the decisions of the Tribunal in the case of Bharti Airtel and Redington India Ltd, held that where the assessee provided corporate guarantee in respect of loan taken by its AE and extended a letter of credit for working capital facility availed by the AE for which it did not charge any fee, the same did not fall under the purview of international transactions in term of Section 92B of the Act and therefore deleted the adjustment made by the TPO by considering the ALP rate of corporate guarantee at 2 percent.

TVS Motor Company Ltd v ACIT – TS-963-ITAT-2016 (Chny) – TP

2096. Where the assessee had provided corporate guarantee on behalf of its AEs in respect of a term loan obtained by the AE, and the TPO made an adjustment on the ground that an

economic benefit had been provided by the assessee. The Assessee contended that no real benefit had been provided to the AE and after provision of corporate guarantee, the interest liability of the AE had increased. Since the DRP had not dealt with the assessee's objections relating to effect of increased interest rates and overall debt position of AE after corporate guarantee was given, the Tribunal, relying in the decision of the coordinate bench in assessee's own case for AY 2010-11 the TP issue in respect of corporate guarantee to the file of DRP for fresh consideration.

Apollo Tyres Ltd vs DCIT-TS-628-ITAT-2017(COCH)-TP-ITA No. 35/coch/2017 dated 24.07.2017

2097. The assessee issued corporate guarantee to the lenders on behalf of its AE acting as distributor of stainless steel manufactured by it. For AY 2007-08 it had received a commission at 1.5% of loan availed by AE (in conformity with rates quoted by Indusind Bank and ING Vysa Bank). TPO had benchmarked it after obtaining quotations from banks at 2.68% and for AY 2008-09 further added 2% as markup because of security and margin adjustment. The Tribunal deleted the said adjustments relying on HC decision in Everest Kanto Cylinders wherein the commission was restricted to 0.5% by holding that considerations which applied for issuance of a corporate guarantee were distinct and separate from that of bank guarantee.

Jindal Steel Limited vs ACIT [TS-1231-ITAT-2018(Delhi)-TP] ITA No.4249/Del/2013 and ITA No.4110/Del/2013 dated 19.11.2018

2098. The Tribunal deleted the TP-adjustment in respect of corporate guarantee given by assessee [engaged in the business of manufacturing yarn, marketing its products under the CLC brand name] on behalf of its AE for AYs 2008-09 to 2010-11. It relied on Bharti Airtel ruling wherein it was held that no TP-adjustment is to be made in case of there being no diversion of profits out of India. The Tribunal noted that the assessee had not incurred any cost in providing corporate guarantee and relied on various ITAT rulings in Micro Ink, Redington India and Videocon Industries wherein it was held that when an assessee extends assistance to the AE, without any cost to itself, it does not have any bearing on profits, income, losses or assets and therefore the same is outside the ambit of 'international transaction'. The Tribunal opined that since the flagship company of the assessee had accumulated brought forward losses to the tune of Rs. 290 crores and subsidiaries were also in heavy losses, it could not be said that there was any intention of diversion of profits out of India. Further, the Tribunal also relied on Vivimed Labs and Siro Clinpharm rulings wherein it was held that amendment to Sec 92B vide Finance Act 2012 is prospective in nature and is applicable only from AY 2013-14 onwards.

DCIT vs. Spentex Industries Ltd [TS-382-ITAT-2018(DEL)-TP] ITA Nos.4959,6234 and6244/Del/2014 dated 17.05.2018

2099. The Tribunal, noting that the question whether corporate guarantee was an international transaction was pending before the special bench, remitted TP-issues in respect of corporate guarantee to the file of AO/TPO for assessee (engaged in the business of television new broadcasting and producing customized software, programs for broadcasters) for AY 2009-10 with the direction to decide the issue after decision of the special bench of the Tribunal. Further, in respect of working capital adjustment, it remitted the issue back to the file of TPO with a direction to the assessee to submit details of

working capital adjustment to the TPO and directed the TPO to grant the adjustment after verifying the details if it was found to be in accordance with law.

New Delhi Television Ltd vs ACIT-TS-579-ITAT-2017(DEL)-TP- ITA No. 1212/Del/2014 & 2658/Del/2014 C.O. No. 233/Del/2014 dated 14.07.2017

2100. The assessee provided corporate guarantee to a foreign bank ("ABN Ambro") for providing loan to its AE in foreign currency for which it charged nil commission from its AE. TPO determined ALP of the said transaction at 4.75% by addition of markup of 200bps on rate of 2.75% charged by SBI and accordingly, made an addition which was restricted to 0.5% by CIT(A) holding that approach of TPO was not reasonable as bank guarantee and corporate guarantee are distinct and different. Further, the CIT(A) arrived at the rate of 0.5% assuming that had the AE availed loan without corporate guarantee it would have paid an additional interest rate of 1% (interest saving) which had to be split between assessee and AE equally. The Revenue filed an appeal to the Tribunal.The Tribunal directed AO to re-compute ALP for corporate guarantee fee @1% by relying on coordinate bench decision in assessee's own case for earlier year wherein the Tribunal did not fully agree with the findings of the CIT(A) in this regard that the benefit of interest saving of 1% should be shared between the AE and the assessee equally as no cogent reasoning has been given for the same and adopted a corporate guarantee rate of 1%.

ASSISTANT COMMISSIONER OF INCOME TAX vs. FRESENIUS KABI ONCOLOGY LTD. (2019) 54 CCH 0440 DelTrib/) (TS-1443-ITAT-2018(DEL)-TP) ITA No. 3013/Del/2015, 6264/Del/2015 dated 31.12.2018

2101. The Tribunal deleted the TP-adjustment in respect of corporate guarantee provided to 100% Mauritius subsidiary for which no consideration was charged accepting assessee's contention that corporate guarantee was provided as a matter of commercial prudence to protect the interest and fulfill the shareholder obligation as any financial incapacitation of the subsidiary would jeopardize the investment of the assessee. It rejected Revenue's contention that under Explanation to Sec 92B there was no requirement of international transaction of guarantee to have a bearing on profits, incomes, losses or assets of such enterprises and held that the explanation had to be read along with Section 92B(1) of the Act. It held that the provision of corporate guarantee neither fell under 'purchase, sale or lease of tangible or intangible property, provision of services or lending or borrowing of money' contained in Section 92B(1) and therefore was covered under 'any other transaction having bearing on profits, income, losses or assets' of an enterprise as contained in the impugned Section. Accordingly, notwithstanding that the Explanation to Section 92B did not specifically mandate such impact on profits / losses etc, it held that as per Section 92B the requirement would have to be fulfilled for the guarantee to be considered as an International transaction. Observing that no consideration was received by assessee for providing guarantee from its AE, the Tribunal concluded that when a parent company extends an assistance to the subsidiary, being associated enterprise, which does not cost anything to the parent company, and which does not have any bearing on its profits, income, losses or assets, it would be outside the ambit of international transaction under section 92B(1) of the Act. Accordingly, it deleted the TP-adjustment.

DCIT vs. EIH Ltd - TS-13-ITAT-2018(Kol)-TP - I.T.A No. 153/Kol/2016 dated 12.01.2018

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2102. The Tribunal dismissed Revenue's appeal and upheld the CIT(A)'s order deleting the TP adjustment on corporate guarantee provided on loans availed by AE on account of TP provisions not being applicable to such transaction prior to the amendment brought in by way of an explanation to Section 92B of the Act, by Finance Act, 2012.It relied on the coordinate bench decision in EIH Ltd. wherein it was held that provision of corporate guarantee was covered under 'any other transaction having bearing on profits, income, losses or assets' of an enterprise as contained in s 92B and held that as per aforesaid section the requirement would have to fulfilled for guarantee to be considered as an international transaction and the Explanation introduced by Finance Act 2012 could be made applicable only from AY 2013-14 since the rules were only notified on 10.06.2013 and hence the assessee could not be expected to report the transaction as an international transaction in its transfer pricing study and the audit report thereon.

Dy.CIT vs Manaksia Limited [TS-1101-ITAT-2018(Kol)-TP] ITA No.980/Kol/2017 dated 28.09.2018

2103. The assessee had advanced loan to its AE and charged an interest rate at 3.3%. The TPO determined the interest rate to be L+600 bps and accordingly made an addition. The DRP restricted the interest rate to L+400bps. The Tribunal restored the issue of benchmarking of aforesaid transaction in view of assessee submitting additional evidence and revised workings that a credit spread of 217bps over and above the Libor rate needed to be considered and it was assessee's plea that then the interest charged would be at ALP.

The assessee had not charged any corporate guarantee fee from its AE since it considered to be in nature of shareholder services warranting no charge. The TPO determined the fee to be charged at 3% which was upheld by DRP. The Tribunal restored the issue of benchmarking of guarantee fee transaction in view of assessee submitting additional evidence that credit rating of AE and itself was same thus no benefit in terms of interest saved could have passed on to its AE and thus, guarantee was only for providing implicit support warranting no charge.

Apeejay Shipping Limited vs DCIT [TS-1058-ITAT-2018(Kol)-TP] ITA No.119/Kol/2017 and ITA No.2238/Kol/2017 dated 12.09.2018

2104. The Tribunal deleted the TP-adjustment on corporate guarantee fees following the coordinate bench decision in assessee's own case for earlier year wherein a similar adjustment was deleted considering that objective behind providing corporate guarantee was not to earn fee, but to protect its interest by fulfilling shareholder's obligation. It also noted that there was no guarantee fee charged by assessee from its subsidiary, thus held that issuance of Corporate Guarantee by the assessee to its subsidiary company did not fall under the ambit of International transaction u/s 92B.

Further, the Tribunal remitted the issue of determination of ALP of interest on loan to AE to the AO/ TPO, relying upon earlier year order in assessee's own case noting that the LIBOR and basis points should be the criteria for meeting the cost of interest on the international transaction in respect of interest to be charged on the loan advanced to AE as against domestic PLR and credit spread considered by TPO. For this purpose, the credit rating of the assessee as well as the credit rating of the AE should be taken into account.

EIH Limited vs DCIT [TS-1020-ITAT-2018(Kol)-TP] ITA No.2225/Kol/2017 dated 14.09.2018

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2105. Where the assessee had charged guarantee commission at 0.38% of the outstanding guaranteed amount and the TPO/AO assessed commission at 3% in place of 0.38% which adjustment was deleted by CIT(A), the Tribunal allowed Revenue's appeal and benchmarked the aforesaid transaction at 1% by relying on coordinate bench decision in assessee's own case for earlier year wherein it was held that that the Tribunal in various cases had accepted guarantee commission chargeable between 0.5% to 1%, thus, transaction ought to be benchmarked by taking rate of 1% of outstanding guarantee amount.

DCIT vs National Engineering Industries Ltd. [TS-1401-ITAT-2018--TP] ITA No.1791/Kol /2017 dated 28.12.2018

2106. The Tribunal upheld CIT(A)'s order deleting TP adjustment on corporate guarantee by treating corporate guarantee not to be in nature of international transaction noting that coordinate bench in EIH Ltd. held that the Explanation in sec 92B inserted by Finanace Act 2012 (covered corporate guarantee) applies from financial year 2012-13 only without having any retrospective effect.

DCIT vs Britannia Industries Ltd [TS-1279-ITAT-2018(HYD)-TP] ITA No.1390-1392/Kol/2017 dated 22.11.2018

2107. The Tribunal rejected TPO/DRP's treatment of corporate guarantee as an international transaction for AY 2010-11 and accepted assessee's submission that Finance Act 2012 amendment [wherein a clarificatory amendment was inserted w.r.e.f. April 1, 2012 specifying that corporate guarantee will be included within the definition of international transaction] was applicable only prospectively from AY 2013-14 and therefore not applicable to subject AY. It relied on the decision of the co-ordinate bench in Reddy Laboratories wherein it was held that the Finance Act, 2012 amendment could not be applied retrospectively as it would amount to retrospective levy of tax and would impose an impossible obligation on assessees. Accordingly, it deleted the ALP adjustment.

DCIT vs. Cyient Ltd (Formerly Infotech Enterprises Ltd) - TS-159-ITAT-2018(HYD)-TP] - ITA No. 474/Hyd/2015 dated 28/02/2018

2108. The Tribunal upheld CIT(A)'s deletion of TP-adjustment in respect of corporate guarantee given by assessee to AEs for AY 2012-13. Further, it noted that AO/TPO treated corporate guarantee as an international transaction and determined 2% per annum of the loan amount as guarantee ALP and observed that CIT(A) deleted the adjustment following co-ordinate bench ruling in assessee's own case for earlier years wherein it was held that corporate guarantee was not an international transaction u/s 92B and accordingly, any ALP adjustment cannot survive.

Dr. Reddy's laboratories v ACIT [TS-463-ITAT-2018 (Hyd)] ITA. No.1739/Hyd/2017 and ITA 1729/Hyd/2017 dated 13.06.2018

2109. The Tribunal ruled on corporate guarantee, interest on AE-receivables and advances in respect of an assessee engaged in the business of software development & IT enabled services. The assessee had contended that since assessee as well as its AE had incurred losses, no ALP-adjustment could be made for its international transactions, and relied on Apollo Health Street ruling, APP Labs Technologies and Global Vantedge Pvt Ltd ruling. However, the Tribunal distinguished the contention and held that in the above cases there

was no decision as to correctness of the order of the DRP, and therefore it could not be said to have been decided on merits of the issue.

Further, The Tribunal relying on Dr Reddy's Laboratories ruling accepted assessee's contentions that the corporate guarantee was not an international transaction during AY 2012-13 since amendment of Sec 92B of the IT Act came w.e.f. AY 2013-14.

Further, the Tribunal with specific direction remitted back to the file of AO/TPO the transaction of advances given to AE, as nature and purpose of advance were not clear. The Tribunal relied on GSS Infotech ruling and stated that no interest should be levied if advances were in the nature of trade advance. However, if advances were to be treated as a loan, the Tribunal directed adoption of LIBOR+2% interest as ALP.

Further, with regards to interest on outstanding receivables, the Tribunal following GSS Infotech and Bartronics rulings noted that the amount was received back within a period of 1 year from the date of advance to AE and thus no interest was chargeable on the receivables.

Cura Technologies Ltd vs DCIT Circle 1(2)- TS-412-ITAT-2018(HYD)-TP-ITA No 301/Hyd/2017 dated 11.05.2018

2110. The Tribunal determined 0.25% as ALP of commission on corporate guarantee given by assessee (engaged in the business of fabrication, supply, erection and maintenance of telecom towers) to its AE in Afghanistan for AY 2010-11 and AY 2011-12. The DRP had computed the ALP of the guarantee commission at 6% of outstanding loan based on difference between bank loan given to AE at 12% and provisional interest rate in Afghanistan at 18%. It rejected DRP's computation of ALP and held that the parameter for obtaining loan at a particular interest rate was different from providing corporate guarantee and there was no basis for DRP's determination of ALP at 6%. Relying on the decision in the case of Asian Paints [41 taxmann.com 71] and the assessee's own case for AY 2006-07, it held that the difference in interest rate charged on the loan could not be considered as a guarantee commission fee. Further, the assessee had also given a foreign currency loan to its subsidiary in Afghanistan and charged interest @8 percent. The TPO adopting 12.25% as the ALP made consequent TP addition which was reduced by the DRP who held that 8.25 percent was the ALP rate of interest. The Tribunal held that since the loan was given to an overseas subsidiary in foreign currency, LIBOR was to be taken as ALP and noting that the assessee had already charged interest @ 8 percent which was much higher than the LIBOR rate, it deleted the adjustment.

Aster Pvt. Ltd vs DCIT- TS-446-ITAT-2017(Hyd)-TP-ITA No. 220/hyd/2015 and 458/hyd/2016 dated 03.05.2017

2111. The Tribunal following the coordinate bench decision in assessee's own case for earlier year remitted the issue of benchmarking of corporate guarantee provided by assessee on behalf of its AE in Singapore. The Tribunal in the earlier year had remitted the issue to TPO to determine the actual exposure of contingent liability for this AY and apply the rate of 0.53% as per the ratio of coordinate bench decision of Glenmark Pharmaceutical (wherein distinction was made between bank guarantee and corporate guarantee) on the actual contingent liability. However, the Tribunal in subject year accepted assessee's contention that benchmarking was to be based on bank rates and when banks in Singapore were charging 0.15% on guarantee, the same was to be adopted to benchmark.

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BS Ltd vs AsstCIT [TS-1330-ITAT-2018(HYD)-TP] ITA No.2187/Hyd/2017 dated 29.11.2018

2112. The Tribunal deleted TP-adjustment towards corporate guarantee commission for AY 2009-10 and 2010-11 on the ground that corporate guarantee was outside the ambit of definition of international transaction under section 92B. It relied on the coordinate bench's ruling in the case of Bharti Airtel Limited [TS-76-ITAT-2014(DEL)-TP] and Siro Clinpharm Ltd [TS-144-ITAT- 2016(Mum)-TP] and held that explanation to section92B could not be applied retrospectively for the years under consideration and since the assessee had not incurred any costs in providing corporate guarantee, it would not constitute an international transaction within the meaning of section 92B. Further, relying on coordinate bench's ruling in assessee's own case directed the TPO to compute ALP based on LIBOR rate applicable for the years under consideration + 200 basis points.

Dr Reddy's Laboratories Limited – ACIT TS-331-ITAT-2017(HYD)-TP-TA.No.294/Hyd/2014 dated 28.04.2017

2113. The Tribunal relying on the ratio laid down in Siro Clinpharm [TS-144-ITAT-2016(MUM)-TP] held that corporate guarantee provided by the assesse (engaged in the business of manufacturing and trading of cement, calcined petroleum coke (CPC) and generation of electricity) on behalf of its AEs in USA during AY 2011-12 were not international transactions as the amendment to the definition of international transaction under section 92B was applicable prospectively. Further, relying on the decision in the case of Four soft Limited and Siva Industries & Holdings Ltd upheld the adoption of LIBOR+200 basis points as arm's length rate for benchmarking interest on loans provided to its US subsidiary.

Rain Cements Ltd vs DCIT -TS-330-ITAT-2017(HYD)-TP–222/Hyd/2014, 309/hyd/2015, 344/hyd/2015, 259/hyd/2016, 260/hyd/2016, 315/hyd/2015, 433/hyd/2016, 434/hyd/2016 dated 26.04.2017

2114. The Tribunal, relying on the decision in the case of Dr. Reddy's Laboratories Limited [TS-331- ITAT-2017(HYD)-TP wherein it was held that amendment by Finance Act, 2012 to include corporate guarantees under the purview of international transaction was to be treated as prospective, thus applicable from AY 2013-14, deleted the TP adjustment on corporate guarantee rejecting it as an international transaction for AY 2012-13.

Bartronics India Ltd vs DCIT-TS-814-ITAT-2017(HYD)-TP ITA No. 259 /Hyd/2017 dated 27.09.2017

2115. Vis-à-vis the corporate guarantee provided by the assessee to its AEs, the Tribunal following the decision of the co-ordinate bench in the assessee's own case for the prior assessment year held that the TPO was not justified in computing ALP of the corporate guarantee provided based on the bank guarantee rate (2 percent) and accordingly adopted 0.27 percent (based on the rate applied in the decision of Asian Paints Ltd. Vs. CIT (ITA No. 7801/Mum/2010) as the ALP of corporate guarantee.

Lanco Infratech Ltd vs ACIT-TS-1022-ITAT-2017(HYD)-TP-ITA No. 221/hyd/2017 dated 30.11.2017

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2116. The Tribunal, following the decision in the assessees' own case for the prior assessment year remitted the issue of the applicability of transfer pricing provisions to corporate guarantee wherein it was held that corporate guarantee was within the scope and ambit of the definition of international transaction post the retrospective amendment to Section 92B of the Act and that the rate of 3.75 percent applicable to bank guarantees could not be applied to corporate guarantees. Accordingly, it directed the TPO to decide the issue following the directions of the Tribunal for the prior assessment year.
Palred Technologies Ltd – TS-981-ITAT-2016 (Hyd) - TP

2117. The Tribunal adopted LIBOR for determining the ALP of the interest on loan given by the assessee to its AE for the purpose of acquiring another company viz. CII Carbon LLC.
With regard to corporate guarantee provided by the assessee, the Tribunal, noting the decision of the Court in the case of Everest Kento remitted the file back to the TPO as in the instant case no corporate guarantee commission was charged by the assessee whereas in the said decision corporate guarantee commission had been charged.
Rain Commodities v ACIT (ITA No. 157/Hyd/2014) – TS-594-ITAT-2015 (Hyd) – TP

2118. The CIT(A) had deleted the addition made by AO in respect of the corporate guarantee issued by assessee to its wholly owned foreign subsidiary towards the bank loan availed by holding that corporate guarantee transaction did not amount to an international transaction and the instant case was guarantee provided to infuse third party funds as a shareholder service meriting no monetary consideration by relying on ratio laid down in case of Bharti Airtel Ltd vs Addl CIT wherein it was held that the corporate guarantee provided by the assessee, which did not involve cost to the Taxpayer, did not have a bearing on profits, incomes, losses or assets of the Taxpayer and hence the transaction did not fall within the ambit of the amended definition of "international transaction" and coordinate bench decision in Tega Industries wherein it was held that no TP adjustment on account of corporate guarantee could be made where it was a case of shareholder activity. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order.
DCIT vs Rohit Ferro Tech Ltd. [TS-1399-ITAT-2018(Kol)-TP] (ITA Nos.262 and 263 /Kol /2018 dated 12.10.2018

2119. The Tribunal directed adoption of 0.25%, based on free quote given by Royal Bank of Scotland (RBS), as ALP for provision of corporate guarantee by assessee on behalf of its AEs for AY 2012-13 since the free quote considered the credit rating of assessee and other financial data and the said guarantee was given to RBS itself for loan given to its AE. The Tribunal noted that assessee had adopted ALP of 0.2% based on average rate of free quotes obtained from RBS (0.25%) and Indusind Bank (0.15%) while DRP had adopted ALP at 1.5% based on interbank lending rate. The Tribunal held that the average rate adopted by the assessee as ALP was not the right approach as averages do not give logical result.The Tribunal also observed that issuance of corporate guarantee is a non-fund based transaction, and hence opined that interbank lending rate adopted by DRP as a bench mark for determination the ALP of the charge for giving a corporate guarantee, is not appropriate, as these rates are for fund based transaction.
Britannia Industries Ltd vs. DCIT [TS-359-ITAT-2018(Kol)-TP] ITA No.745/Kol/2017 dated 18.05.2018

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2120. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order deleting TP adjustment on corporate guarantee (where there was no commission charged by parent company to its subsidiary) relying on coordinate bench in assessee's own case for earlier year wherein it was held that corporate guarantee prior to amendment brought about by Explanation was not an international transaction. It had relied on the coordinate bench decision in EIH Ltd. wherein it was held that provision of corporate guarantee was covered under 'any other transaction having bearing on profits, income, losses or assets' of an enterprise as contained in s 92B and held that as per aforesaid section the requirement would have to be fulfilled for guarantee to be considered as an international transaction and the Explanation introduced by Finance Act 2012 could be made applicable only from AY 2013-14 since the rules were only notified on 10.06.2013 and hence the assessee could not be expected to report the transaction as an international transaction in its transfer pricing study and the audit report thereon.

Dy.CIT vs Manaksia Limited [TS-1277-ITAT-2018(Kol)-TP] ITA No.208-209 /Kol/201 dated 30.11.2018

2121. The Tribunal, relying on the order of the co-ordinate bench in the assessee's own case in the earlier year, deleted the TP-adjustment in respect of corporate guarantee provided to 100% Mauritius subsidiary for which no consideration was charged accepting assessee's contention that corporate guarantee was provided as a matter of commercial prudence to protect the interest and fulfill the shareholder obligation as any financial incapacitation of the subsidiary would jeopardize the investment of the assessee. It rejected Revenue's contention that under Explanation to Sec 92B there was no requirement of international transaction of guarantee to have a bearing on profits, incomes, losses or assets of such enterprises and held that the explanation had to be read along with Section 92B(1) of the Act. It held that the provision of corporate guarantee neither fell under 'purchase, sale or lease of tangible or intangible property, provision of services or lending or borrowing of money' contained in Section 92B(1) and therefore was covered under 'any other transaction having bearing on profits, income, losses or assets' of an enterprise as contained in the impugned Section. Accordingly, notwithstanding that the Explanation to Section 92B did not specifically mandate such impact on profits / losses etc, it held that as per Section 92B the requirement would have to be fulfilled for the guarantee to be considered as an International transaction. Observing that no consideration was received by assessee for providing guarantee from its AE, the Tribunal concluded that when a parent company extends an assistance to the subsidiary, being associated enterprise, which does not cost anything to the parent company, and which does not have any bearing on its profits, income, losses or assets, it would be outside the ambit of international transaction under section 92B(1) of the Act. Accordingly, it deleted the TP-adjustment.

DCIT vs. EIH Ltd - TS-426-ITAT-2018(Kol)-TP - ITA No.117/Kol/2017 dated 16-05-2018

2122. The Tribunal held that corporate guarantee furnished by assessee to bank for extending loan to subsidiary company is shareholder function not warranting any transfer pricing adjustment on the ground that assessee's expectation from provision of loan and guarantee was not that of a lender or guarantor to earn a market rate of interest or guarantee fee but that of shareholder to protect its investment interest and that transaction of internal loan

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funding and corporate guarantee were international transactions under section 92B requiring determination of arm's length price.

Tega Industries Ltd [TS-780-ITAT-2016 (Kol)-TP] (ITA No.1912/ Kol/2012)

2123. The Tribunal relying on the decision of the coordinate bench in the assessee's own case for earlier year deleted the TP adjustment on account of corporate guarantee. The Tribunal in the assessee's own case had approved the ALP of the corporate guarantee charged by the assessee at 1% by relying on various decisions of coordinate bench as against the addition of 3.35% made by the TPO on the basis of differential ability of the assessee and AE to raise bonds in the market. The Tribunal followed the same parity of reasoning applied by the HC decision of Everest Kanto Cylinder where it was held that consideration for bank guarantee and corporate guarantee are distinct and separate and observed that the consideration for raising of bonds in Indian market are distinct and incomparable with the instance of providing guarantee to a bank in Nepal. While approving the guarantee fee charged at 1%, it noted that the assessee's AE had adequate debt equity ratio to obtain loan from the bank and also the corporate guarantee advanced by the assessee was only to the extent of 35% of sanctioned loan hence was not critical for obtaining the loan.

Grindwell Norton Ltd vs DCIT [TS-1004-ITAT-2018(Mum)-TP] ITA No.3589/M/2016 dated 30.08.2018

2124. The TPO charged a guarantee commission of 2.25% while determining the ALP of the transaction of corporate guarantee provided by the assessee to its AE as against Nil charged by the assessee. The CIT(A) relying on Bombay High Court decision of Everest Kanto restricted the guarantee commission at 0.5% and held that corporate guarantee transaction falls within the ambit of international transaction u/s.92B of the Act. The Tribunal dismissed Revenue's appeal and confirmed the CIT(A)'s order since it was in consonance with the view expressed by the Hon'ble Jurisdictional High Court (supra) and by different Benches of the Tribunal including Mumbai Benches.

Dy.CIT vs Rolta India Ltd [TS-1021-ITAT-2018(Mum)-TP] ITA No.882/Mum/2017 dated 07.09.2018

2125. The Tribunal restricted the rate of TP adjustment on corporate guarantee given by assessee on behalf of its step down subsidiary to a bank at 0.5% as opposed to 2.25% charged by TPO by following the coordinate bench decision in assessee's own case for earlier year wherein adjustment to the extent of 0.5% was sustained in view of Bombay HC decision in case of Everest Kanto Cylinders Ltd. wherein the Court had upheld the Tribunal's order restricting the ALP for guarantee commission to 0.5% as against the rate of 3% adopted by the TPO by considering the rates for bank guarantee observing that bank guarantees are distinct from corporate guarantee.

Laqshya Media Limited [earlier known as Lakqshya Media Pvt Ltd] vs ACIT [TS-1261-ITAT-2018(Mum)-TP] IT(TP)A No.1984/Mum/2017 dated 14.11.2018

2126. The assessee had benchmarked the commission rate for corporate guarantee given on behalf of its AE at 0.5% by applying CUP. The TPO accepted CUP but determined the ALP at 3% (commission charged by banks for giving corporate guarantee). The Tribunal deleted the said adjustment relying on Bombay HC decision of Everest Kanto Cylinder Ltd. wherein the

commission was restricted at 0.5% by holding that commercial consideration for corporate guarantee and bank guarantee are distinct and different.

UTV Software Communications Ltd.vsAsst.CIT [TS-1295-ITAT-2018--TP] ITA No.1258/Mum/2018 dated 11.12.2018

2127. The Tribunal held that Explanation (i)(c) to Section 92B in no way imposed a new liability with retrospective effect as it was clarificatory in nature. It held that the rate of corporate guarantee was not comparable to the rate of bank guarantee and determined its ALP at 0.50 percent following various Tribunal and High Court decisions.

Hindalco Industries Ltd v ACIT (I.T.A. No.4857/Mum/2012) – TS-431-ITAT-2015(Mum) – TP

2128. The Tribunal held that the LIBOR rate should be used to benchmark loan given to AEs situated in a foreign country and following the orders in the assessee's own case in previous year deleted the addition made by the TPO. Further, it held that a rate of 0.5 percent for corporate guarantee provided by the assessee to its AE was wholly justified.

Manugraph India Ltd v DCIT (ITA No. : 491/Mum/2015) – TS-463-ITAT-2015 (Mum) -TP

2129. The Tribunal restricted addition of guarantee fee to 0.9% (normally charged by an Indian bank) for issuance of SBLC relying on coordinate bench in assessee's own case for earlier year wherein it had adopted internal CUP and benchmarked at 0.9% noting that the Indian bank had charged the assessee at the same rate. It rejected the assessee's reliance on various coordinate bench decision for adopting guarantee fee ALP in the range of 0.25% - 0.5% observing that the said rate was in the case of benchmarking corporate guarantee transaction.

Technocraft Industries (I) Ltd vs Dy.CIT [TS-1397-ITAT-2018(Mum)-TP] ITA No.7565/Mum/2014 dated 27.12.2018

2130. The Tribunal upheld the deletion of TP-adjustment in respect of guarantee fee received by assessee noting that the assessee applied CUP-method based on third party quotation (from HSBC India) to determine arm's length guarantee fee commission at 0.75% but the TPO determined guarantee fee ALP at 2.0833% based on the bank guarantee rate. Relying on the decision of the Bombay High Court in Everest Kento Cylinder [TS-200-HC-2015(BOM)-TP]it held that the considerations which applied for issuance of a corporate guarantee were distinct and separate from those in a case of bank guarantee and accordingly upheld the First Appellate Authority's deletion of the TP adjustment made.

ACIT vs. Wockhardt Ltd. - TS-39-ITAT-2018(Mum)-TP- I.T.A./4156/Mum/2012 & I.T.A./5557/Mum/2012 dated 05/01/2018

2131. The Tribunal directed adoption of internal CUP and charging of 0.9% as ALP for benchmarking the guarantee transaction for issuance of standby letter of credit noting that the Indian bank had charged the assessee at the same rate. It rejected the assessee's reliance on various coordinate bench decision for adopting guarantee fee ALP in the range of 0.25% - 0.5% observing that the said rate was in the case of benchmarking corporate guarantee transactions.

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Technocraft Industries (I) Ltd vs Dy.CIT [TS-827-ITAT-2018(Mum)-TP] ITA No.6686/Mum/2014 dated 31.07.2018

2132. The Tribunal held that the DRP erred in determining the ALP of guarantee commission received by the assessee at 1.5% (TPO determined the commission @ 3%) and noted that the co-ordinate bench in the assessee's own case had sustained addition to the extent of 0.5% in the earlier and subsequent year. Accordingly, following the rule of consistency, ITAT directed the AO/TPO to restrict the addition towards guarantee commission by adopting the rate of 0.5%.

Nimbus Communications Ltd. vs. DCIT - TS-520-ITAT-2018(Mum)-TP - LT.A. No. 1988 / Mum / 2016 dated 21.05.2018

2133. The Tribunal restricted the TP adjustment in respect of guarantee fee to 0.5% relying on various coordinate bench decisions as against 1% charged by the CIT(A) as ALP of the corporate guarantee provided by the assessee on behalf of its AE. The CIT(A) had reduced the 3% on the loan availed by the AE's determined by the TPO as ALP of the transaction to 1% since it was excessive. The TPO had arrived at the said rate by addition of 0.6% on account of risks to the rate of 2.4% charged by the bank on loans exceeding Rs.10 crores.

Piramal Enterprises Ltd vs Addl. CIT [TS-808-ITAT-2018(Mum)-TP] ITA No.5471/Mum/2017 and ITA No.5583/Mum/2017 dated 30.07.2018

2134. The Tribunal restricted guarantee commission ALP at 0.5% of average amount of loan outstanding during the year in respect of corporate guarantee on overdraft facility given by assessee by following the co-ordinate bench ruling in assessee's own case for previous AY (wherein relying on various decision of the jurisdictional benches of the Tribunal it was held that ALP of the guarantee commission was to be considered as 0.5%) as against TPO's computation of guarantee fees @ 1.50%.

In respect of counter guarantee given by assessee for guarantee given by IDBI Bank on behalf of Taj TV (AE), the Tribunal accepted assessee's contention following Asian Paints ruling that non fund based facility could not be treated at par with fund based facility and directed AO to compute TP-adjustment in respect of counter guarantee at 0.2% of counter guarantee amount.

ACIT 16(1) vs Zee Entertainment Enterprises Ltd- TS-418-ITAT-2018(Mum)-TP- ITA No 1640/Mum/2016 dated 28.05.2018

2135. The Tribunal restricted ALP of corporate guarantee provided by assessee to Singapore-AE at 0.5% p.a. and noted that while assessee did not benchmark the transaction on the premise that the underlying liability was contingent in nature and that the same was given for overall business consideration, TPO made an adjustment by determining ALP at 5% p.a. The Tribunal opined that corporate guarantee provided by the assessee brought certain benefits to its AE by way of credit facility and therefore, the same were required to be compensated by its AE. The Tribunal relied on Bombay HC ruling in Everest Kanto Cylinders wherein 0.5% commission rate was adopted, and thus directed addition @0.5% per annum.

Apar Industries vs DCIT CC 6(1)- TS-405-ITAT-2018(Mum)-TP- ITA No 956/Mum/2015 dated 04.05.2018

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2136. The Tribunal following the order of the co-ordinate bench in assessee's own case restricted the ALP of the guarantee commission at 0.5% of the average amount of the loan outstanding as against the TPO's determination at 1.5%.

Zee Entertainment Enterprises Limited [TS-448-ITAT-2018(Mum)-TP] ITA No.1475/Mum/2017 dated 08.06.2018

2137. The Tribunal adopted ALP of 0.50% for benchmarking corporate guarantee / letter of undertaking given by the assessee in respect of credit facilities availed by its AEs for AY 2011-12 while refusing to enter into semantics of whether corporate guarantee was an 'international transaction' as the assessee's argument was mainly restricted to the commission rate. It noted that the security for loans was primarily covered by pledged securities, hypothecation of debtors' balances and other assets of AE, which indicated that entire security of loan was not based only on corporate guarantee and after considering bank guarantee commission rate at 0.875% after

50% concession given to assessee by SBI and after evaluating various factors like country risk, currency risk and entity risk etc, it determined arm's length rate at 0.50% as it constituted an internal CUP available to the assessee. Noting that the assessee had recovered corporate guarantee at 0.25 percent, the Tribunal directed AO/TPO to make TP adjustment applying 0.50% rate of corporate guarantee commission as against the 3% rate applied by the AO / TPO.

Videocon Industries Ltd Vs. DCIT - TS-127-ITAT-2017(Mum)-TP - ITA No.1310/M/2016 dated 24.02.2017

2138. Where during the year under consideration, the assessee provided guarantee to banks on behalf of its AEs worth Rs. 670.57 Cr without treating the corporate guarantee as an international transaction within the meaning of Sec 92B and the TPO disregarded this approach and held that assessee ought to have charged corporate guarantee fee from its AEs thereby adopting the guarantee fee at 4.43 percent which was reduced by the DRP to 3 percent, the Tribunal noting the assessees submission that it had recovered guarantee fee @1% of outstanding guaranteed amount from its AEs which had been recognized in the financial statements, followed the decision in assessee's own case for AY 2009-10 and directed the AO/TPO to benchmark the guarantee fee by adopting the rate at 1% of the outstanding guaranteed amount for maintaining consistency with the precedent in the assessee's own case.

Aegis Limited v DCIT – TS-66-ITAT-2017 (Mum) – TP - ITA No.7694/Mum/2014 dated 08.02.2017

2139. The Tribunal held that amendment made by Finance Act, 2012 in section 92B, atleast to the extent it dealt with question of issuance of corporate guarantees, is effective from 1.4.2012 and cannot have retrospective effect from 1.4.2002.

Rushabh Diamonds vs. ACIT - [2016] 68 taxmann.com 141 (Mumbai- Trib)

2140. With respect to corporate guarantee granted by the assessee on behalf of its AEs, the Tribunal relying on its decision in Siro Clinpharm, held that the amendment to Section 92B introducing corporate guarantees as international transactions could not be given

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retrospective effect and therefore the corporate guarantee given by the assessee could not be considered as an international transaction. Consequently, it deleted the TP addition.
Marico Ltd v ACIT - TS-411-ITAT-2016 (Mum) - TP - I.T.A./8858/ Mum/2011 I.T.A./8713/Mum/2011

2141. The Tribunal, relying on the order of the coordinate bench in the assessee's own case of the previous AY, held that the rate of 0.5 percent was to be taken as arms' length rate of guarantee commission fee on corporate guarantee provided by the assessee to its AE (for banking facilities availed by the AE from HSBC, Mauritius) as opposed to the rate of 3 percent arrived at by the TPO.
Thomas Cook (India) Ltd v DCIT - TS-307-ITAT-2016 (Mum) - TP

2142. The Tribunal held that provision of a guarantee by a parent to its subsidiary constituted a shareholder function and hence charging a guarantee fee was not warranted and further held that where the issuance of a corporate guarantee was without consideration there would be no impact on profits, incomes, losses and assets of an entity and therefore it would not constitute an international transactions liable to benchmarking under TP provisions. Accordingly, it deleted the TP adjustment of notional charges @ 6 percent on corporate guarantee issued by the assessee.
Further, it held that LIBOR + 200 basis points was to be used for the purpose of benchmarking loans granted by the assessee to its US based subsidiary and not the average yield on unrated bonds as used by the TPO.
Manugraph India Ltd. vs DCIT - TS-190-ITAT-2016(Mum)-TP

2143. The Tribunal upheld the guarantee fee charged by the assessee at 1 percent to be at ALP in respect of the corporate guarantee given by the assessee to its AE. It held that the TPO was incorrect in benchmarking corporate guarantee fee on the basis of difference between credit rating of assessee and associated enterprise and held that the considerations for raising of bonds in Indian market were distinct and incomparable with providing a corporate guarantee to a bank abroad in respect of loan taken by an AE and therefore the credit rating used for benchmarking the corporate guarantee was without any basis.
Grindwell Norton ltd [TS-793-ITAT-2016 (Mum) - TP] (ITA NO. 523/MUM/2014)

2144. The assessee had not charged any fee or commission for providing corporate guarantee as collateral for the aforesaid borrowing on behalf of its AE. Considering it as an international transaction, TPO worked out addition of Rs. 1.63 crores being 3% of the average amount of loan outstanding during the year. The CIT(A) affirmed the order. The Tribunal noted that the assessee had issued corporate guarantee on behalf of its AE for loan facility availed by it from the bank. It opined that TPO's approach to determine ALP based on fees charged by the bank was inconsistent with Bombay High Court ruling in Everest Kanto Cylinders Ltd [TS-200-HC-2015(BOM)-TP]. Accordingly, it upheld the rate of 0.50% for the purposes of determining arm's length rate of corporate guarantee commission/fee. The Tribunal rejected assessee's plea for guarantee commission rate below 0.5% (on the basis that the loan raised by AE had adequate primary security in the shape of the net worth of the AE itself and therefore the risk of devolvement on assessee was minimal) on the ground that

the it was not a peculiar situation so as to warrant a rate lower than 0.50%. ATL Mauritius had availed credit facilities from Barclays Bank.

Zee Entertainment Enterprises Ltd vs ACIT -TS-382-ITAT-2017(Mum)-TP ITA No.3406/Mum/2014 dated 05.05.2017

2145. The Tribunal restricted TP-adjustment towards guarantee commission at 0.385% for AY 2007-08 to 2009-10 in respect of corporate guarantee provided by assessee to Bank of America in connection with loans taken by its AE. The assessee had not charged any guarantee commission fee to the AE for providing the said guarantee and contended that the transaction did not fall within the definition of an international transaction u/s 92B of the Act as it had no bearing on income of the assessee. The TPO did not accept the above contention and held that providing guarantee to its AE was a clear evidence of benefit being provided. If the AE had requested any bank or third party to provide such guarantee for its loans, it would have had to pay guarantee fee/commission. The Tribunal relying on the decision in assessee's own case for AY 2005-06 and 2006-07, upheld CIT(A) ALP determination based on average guarantee commission rate i.e 0.385% paid by assessee to various third-party banks. Further, the assessee had given interest free loans to two of its subsidiaries since the amounts had been given as temporary advances for the purpose of meeting their urgent business requirements. Further, the companies were 100% subsidiaries of the assessee which contributed to furthering the business interest of the assessee. The TPO has not accepted the explanation given by the assessee and held that the assessee ought to have charged the interest on the said loans at the prevailing market rate and made an adjustment of Interest at 5.3% of the amount advanced. The Tribunal relying on the decision in the case of Taurian Iron & Steel Co. Pvt Ltd vs ADCIT [ITA No. 5920/mum/2012] and Golawal Diamonds vs ACIT [ITA No. 518/mum/2014] directed the AO to restrict the adjustment at LIBOR+1.50%.

ACIT vs Reliance Industries Ltd-TS-528-ITAT-2017(Mum)-TP-ITA no.4361/mum/2012 dated 12.04.2017

2146. Relying on the decision in the case of Videcon Industries ltd [TS-127-ITAT-2017(mum)-TP] wherein 0.5% rate was determined as guarantee fee ALP for benchmarking corporate guarantee transaction, the Tribunal directed the AO to compute ALP of guarantee fees at 0.5% in respect of corporate guarantee given by the assessee to its UAE based AE.

Mahindra Intertrade Ltd vs DCIT-TS-607-ITAT-2017(Mum)-TP-ITA no. 269/mum/2014 dated 15.03.2017

2147. Where the assessee issued a corporate guarantee on behalf of its subsidiary in Thailand, in order to enable the subsidiary to avail financing from Bank of India, despite not being very credit worthy and the TPO applied external CUP and considering 1% guarantee fee charged by banks in India, proposed TP adjustment of US$ 16000 equivalent to approximately Rs.6.4 lacs, the Tribunal relying on the decision of the co-ordinate bench in the case of Manugraph India Ltd [TS-113-ITAT-2015(Mum)-TP] (wherein the rate of 0.5% was accepted to be at ALP) and directed the AO to apply the rate of 0.5% as the charges for providing the impugned guarantee to the AE and to restrict TP addition accordingly.

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Endurance Systems (India) Pvt. Ltd. vs ACIT - TS-114-ITAT-2017(PUN)-TP - ITA No.2567/PUN/2012 dated 15.02.2017

2148. The Tribunal, relying on the decision in the case of Micro Ink Ruling (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi-capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B), deleted the TP adjustment in respect of corporate guarantee as the relevant AY 2012-13 was outside the scope of the international transaction since the amendment applied from 2013-14.
Autoline Industries Ltd vs DCIT-TS-1000-ITAT-2017(PUN)-TP dated 24.11.2017

2149. The Tribunal relying on the decision in assessee's own case for AY 2009-10 (heard alongwith this appeal) which had in turn relied on the ruling of Micro Ink (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi-capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B) upheld CIT(A)'s deletion of TP-adjustment in respect of corporate guarantee for AY 2010-11.
DCIT vs. Jyoti CNC Automation Pvt. Ltd-TS-968-ITAT-2017(Rjt) ITA No. 301/Rjt/2015 & CO No.57/Rjt/2015 dated 28.11.2017
DCIT vs. Jyoti CNC Automation Pvt. Ltd-TS-981-ITAT-2017(Rjt)-ITA No. 435/Rjt/2015 dated 28.11.2017

2150. The Tribunal, relying on the decision in the case of Micro Ink Ruling [176 TTJ 8] (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi- capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B), deleted the TP adjustment in respect of corporate guarantee proposed by the TPO/DRP. Further, noting that TPO treated excess credit (beyond 60 days) allowed to AE as an international transaction and proceeded to benchmark the same at 3.37% on the basis of LIBOR+90bps, the Tribunal relying on Micro Ink ruling –(176 TTJ 8) (wherein it was held that when such an interest was includible in operating income and the operating income itself has been accepted as reasonable under the TNMM), held that there could not be an occasion to make adjustment for notional interest on delayed realization of debtors and accordingly deleted the TP adjustment in respect of outstanding receivables.
Dorf Metal Speciality Catalyst Pvt. Ltd vs. ACIT-TS-993-ITAT-2017(Rjt)-TP ITA No. 16/Rjt/2017 dated 28.11.2017

2151. The Tribunal, relying on the decision in the case of Micro Ink ruling (wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi-capital' and thus could not be included within the ambit of 'provision for services' under the definition of 'international transaction' u/s 92B) upheld CIT(A)'s deletion of TP adjustment in respect of corporate guarantee and held that though corporate guarantee issue in Micro Ink's case was currently in appeal before HC, that did not dilute binding nature of the decision as now. Accordingly, it dismissed revenue's appeal.
DCIT vs. Jyoti CNC Automation Pvt. Ltd-TS-955-ITAT-2017(Rjt)-TP ITA No. 183/Rjt/2015 & CO No.48/Rjt/2015 dated 28.11.2017

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2152. The TPO made addition of guarantee charges @1.3% on the corporate guarantee given to its AE for which it had not charged any fees. The CIT(A) deleted the addition by holding that corporate guarantee given on behalf of its 100% subsidiary AE would not constitute an international transaction within the meaning of section 92B of the Act and accordingly no adjustment was warranted relying on the coordinate ruling in case of Batronics India Ltd. The Tribunal dismissed Revenue's appeal and accepted assessee's contention that where the assessee had not incurred any corporate guarantee charges on behalf of its AE it would not constitute international transaction within the meaning of sec 92B of the Act. It relied on coordinate bench rulings in case of EIH Ltd., Dr. Reddy Laboratories Ltd., Batronics wherein it was held that corporate guarantee was not an international transaction where the assessee had not incurred any expenditure for corporate guarantee and the guarantee was given to protect the interest of shareholders and for securing the credit facilities to its 100% subsidiaries.

Dy.CIT vs CCL Products (India) Pvt Ltd [TS-1171-ITAT-2018(VIZ)-TP] ITA No.191/Viz/2018 dated 28.09.2018

2153. The Tribunal accepted assessee's contention that the corporate guarantee commission charged at 0.9% was at arm's length price and deleted the adjustment by holding that the corporate guarantee commission rates @ 0.25% to 0.53% have been accepted in various rulings of Courts/Tribunals such as Videocon Industries, Nimbus Communications and Glenmark Pharmaceuticals, as reasonable. Further, the Tribunal also opined that bank guarantee and corporate guarantee are at different footing due to factors such as terms,conditions and risk factors and hence the TPO was not justified in determining the ALP at commission rates charged by bank.

GVK Power & Infrastructure Ltd v ACIT [TS-385-ITAT-2018(VIZ)-TP] ITA No.530/Vizag/2017 dated 18.05.2018

Royalty / Trademark

2154. The Apex Court dismissed Revenue's SLP against Rajasthan HC judgment confirming deletion of TP adjustment of Rs. 1.03 Cr on payment of royalty relying on HC ruling in assessee's own case for earlier year. The Tribunal had rejected TPO's CUP and upheld TNMM applied by the assessee held the assessee's margin of 5.18% to be at ALP.

CIT vs SAKATA INX INDIA LIMITED [TS-504-SC-2018-TP] SLP 18868/2018 dated 02.07.2018

2155. The Apex Court dismissed Revenue's SLP challenging Delhi HC order confirming ITAT's deletion of TP adjustment on royalty payment to AE. The High Court had rejected Revenue's ground that ITAT erred in holding that assessee was justified in claiming royalty as expense since only the subsidiaries/enterprises in 10 countries of the 120 locations wherein AEs had presence in were required to make royalty payments and that the ITAT had erred in relying on Delhi HC's EKL Appliances ruling to arrive at the conclusion that TPO had erred in judging commercial and business expediency of expenditure while determining ALP for royalty at Nil.

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CIT vs. Frigoglass India Pvt. Ltd vs. DCIT - TS-31-SC-2018-TP - SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 41702/2017 dated 19-01-2018

2156. The Court confirmed the Tribunal ruling wherein the TP adjustment on royalty paid to AE was deleted. It held that that the TPO was unjustified in reducing the royalty rate from 3% to 2%, on the ground that the increase in sales of assessee was attributable to marketing efforts and that the assessee failed to demonstrate the benefit derived from royalty payment, without substantiating it with an appropriate alternate TP analysis. Relying on the decision of the Apex Court in Walchand and Co.Pvt Ltd [1967]65ITR 381 (SC), it held that once the assessee claimed that it had benefited from royalty agreement in the form of quantum increase in sales with no apparent increase in production, minimal product recalls and low after sales maintenance cost, it was not for the TPO to determine as to what could be the other reasons for increase in the assessee's sales and profit (alleged to be increased marketing expenditure in this case). Thus, categorizing the TPO's approach as an arbitrary and unbridled exercise of power, the Court dismissed the appeal holding that no question of law arises for its consideration.

RAK Ceramics India PvtLtd – TS-1091-HC-2016 (AP) – TP - I.T.T.A.NO.595 OF 2016 dated 23.12.2016

2157. The Court dismissed the Revenue's appeal against the order of the Tribunal wherein the ALP of royalty was accepted at 3 percent. It held that the Revenue's reliance on Clause III of Press Note No 9 (2000) series, stating that royalty was to be paid at 2 percent for exports and 1 percent of domestic sales on use of trademarks and brand name of the foreign collaborator, was incorrect as the given case was covered by Clause IV of the said Press Note which provided for 8 percent on exports and 5 percent on domestic sales in case of payment by a wholly owned subsidiary and the royalty paid by the assessee ranged between 2.5 percent to 4 percent. Further, it upheld the findings of the Tribunal that the said payment was approved by the FIPB and that royalty paid by comparable companies was at 10 percent as opposed to the 2.5 to 4 percent paid by the assessee.

CIT v SGS India Pvt Ltd (ITA No 1807 of 2013) – TS-529-HC-2015 (Bom)

2158. The Court dismissed Revenue's appeal and upheld the Tribunal order deleting TP-addition on account of royalty payment for technical knowhow and brand usage by assessee to its AE for AY 2006-07. Following the decision of the co-ordinate bench in AY 2002-03, it confirmed the Tribunal's view that TPO's restriction of royalty payment to 1% without giving reasons/ justification was arbitrary and adhoc and that TPO had not carried out ALP-determination exercise by following one of the prescribed methods in Section 92C.

Further, the with regard to the part disallowance of publicity and sales promotion expenses paid by the assessee to the AE, it upheld the finding of the Tribunal that the TPO was incorrect in making such disallowance on the ground that AE should have borne a part of such cost considering it received higher royalty due to higher sales. It noted that the TPO had not determined ALP by following any of the methods prescribed u/s 92C(1) read with Rule 10B of the Income Tax Rules, 1962 and accordingly held that the adjustment had been rightly deleted. It stated the determination of the ALP had to be done only by following one of the methods prescribed under the Act and since the Revenue had not acted in accordance

with the clear mandate of law, it held that the appeal of the Revenue did not give rise to any substantial question of law.

CIT (LTU) vs. Johnson & Johnson Ltd - TS-265-HC-2017(BOM)-TP - INCOME TAX APPEAL NO.1291 of 2014

2159. Where the TPO had arbitrarily restricted royalty payment for technical know-how from 2% to 1%, the Court upheld the Tribunal's finding that TPO's restriction was arbitrary and adhoc and that the TPO had not carried out the exercise to determine the ALP by following one of the methods prescribed under Section 92C. Further, where the assessee had entered into agreement to pay royalty @1% on brand usage for the period 1st July, 2001 – 31st March, 2002 which was executed on 14th March, 2002 and where the TPO had allowed the royalty paid on brand usage, but the CIT(A) disallowed the said payment for the period 1st July, 2001-14th March, 2002 as the assessee had failed to produce minutes of its board meeting recording the decision to make the payment of royalty w.e.f. 1st July, 2001, the Court upheld the Tribunal's order of allowing the royalty payment since the assessee had entered into commercial agreement with its AE which was also approved by RBI.

Johnson & Johnson Ltd [TS-171-HC-2017(BOM)-TP] [ITA No. 1030 of 2014]

2160. The Court admitted Revenue's appeal against the Tribunal's order in the case where the TPO disallowed the tax borne by the assessee on the royalty paid on brand usage & technical know- how since there was no specific provision in the agreement providing that the assessee was to bear the taxes, but, the same was allowed by the Tribunal on the ground that the agreement entered into by the assessee mentioned that the royalty was to be remitted net of taxes and for which requisite RBI approval was obtained and accordingly, deleted the disallowance of tax made by the TPO on royalty paid.

Johnson & Johnson Ltd [TS-171-HC-2017(BOM)-TP] [ITA No. 1030 of 2014]

2161. The Court, upheld the Tribunal order deleting TP-addition on account of royalty payment for technical know-how made by assessee to AE for AY 2008-09. It followed coordinate bench ruling in assessee's own case and held that TPO's restriction of royalty payment from 2% to 1% without giving reasons or justification was arbitrary and adhoc. It noted that the TPO had not carried out exercise to determine the ALP by following one of the methods of section 92C. However, it admitted Revenue's appeal on deletion of adjustments on brand usage royalty and royalty payment on traded finished goods and deletion of disallowances of withholding taxes, R&D cess and service tax on royalty payments to consider whether on facts and in circumstances of the case and in law, Tribunal was justified in deleting the addition on account of tax on brand usage royalty without appreciating the fact that approval taken from RBI cannot be taken to be augmenting the terms of agreement with the principals.

Johnson & Johnson Ltd TS-397-HC-2017(BOM)-TP- ITA No.1671 of 2014 dated 03.04.2017

2162. The Court remitted the issue of TP adjustment with respect to royalty payment back to the Tribunal for fresh adjudication, noting that the Tribunal's observation that benchmarking of royalty payment could not be done by using comparables with transactions entered into between two foreign parties was not premised on any reasons. The Court held that the Tribunal's above observation was unwarranted and should not be treated as conclusive

Vodafone Mobile Services Ltd [TS-419-HC-2018(DEL)-TP] ITA 660/2018 dated 01.06.2018

2163. Where the assessee was receiving royalty from its AE in prior years for provision of expertise and brand name, the Court held that a mere change of ownership structure of the AE would not justify the contention that no royalty was charged in the current year. It rejected assessee's contention that mere absence of consideration for use of the Dabur brand per se could not amount to an international transaction. It held that if the assessee's contention was to be accepted any omission by a party to indicate an initial income, which was concededly being shown in the past as an international transaction, could not be scrutinized at all, which would lead to absurd results and therefore could not be accepted. Accordingly, the assessee's appeal was dismissed.

Dabur India Ltd vs Pr.CIT – TS- 979-HC-2017(DEL)-TP- ITA No. 1142/ 2017 & CM No. 45221/2017

2164. The Court dismissed the Revenue's appeal challenging the Tribunal's order of deleting TP adjustment made on royalty payment to AE since the Tribunal had correctly relied on the decision of EKL Appliances [TS-133-ITAT-2016(DEL)-TP] and held that TPO had erred in determining the ALP at Nil by judging commercial and business expediency of the expenditure. Also, the assessee's adoption of combined transactions approach under TNMM was upheld as against TPO's adoption of CUP method as no comparable transaction was brought on record by the AO/DRP.

Frigoglass India Pvt Ltd [TS-180-HC-2017(Del)-TP] [ITA 123/2017]

2165. Where the assessee merely changed the basis of computation of royalty payment to its AE (which was initially paid on the basis of Indian Published Price (IPP) / list price and subsequently on the basis of actual sales) which led to an increase in the rate in terms of the percentage, restriction of royalty payment to the prior year's rate was unwarranted since the rate of royalty in prior years was computed on a different basis, especially since when computed on the same basis the rate in earlier years was in fact more than the rate in the relevant year.

CIT v Oracle India Pvt Ltd - TS-472-HC-2016 (Del) - TP - ITA 334/2016

2166. The Court rejected the assessee's justification for payment of technical assistance fee over and above royalty (i.e. that as per the agreement it was under an obligation to make the impugned payment and that it led to subsequent profits) and held that the assessee's argument that the technology would not have been given to it but for the substantial fee, required a closer scrutiny as the initial burden to prove ALP was on the assessee. Accordingly, the Court upheld the remit directed by the Tribunal.

Magneti Marelli Powertrain India Pvt Ltd [TS-869-HC-2016(DEL)-TP] (ITA 350/2014)

2167. The Court rejected the assessee's justification for payment of technical assistance fee over and above royalty (i.e. that as per the agreement it was under an obligation to make the impugned payment and that it led to subsequent profits) and held that the assessee's argument that the technology would not have been given to it but for the substantial fee, required a closer scrutiny as the initial burden to prove ALP was on the assessee. Accordingly, the Court upheld the remit directed by the Tribunal.

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Magneti Marelli Powertrain India Pvt Ltd [TS-869-HC-2016(DEL)-TP] (ITA 350/2014)

2168. The assessee had entered into an international transaction with its Sharjah AE for payment of technical fees for achieving operational and technical competencies, relating to the know-how and technology licensed to the assessee by Woco Germany. The TPO comparing the transaction of Sharjah AE with the transaction of royalty-free licensing of manufacturing process intangibles by German AE, determined the ALP as Nil, ignoring the contention of the assessee that the services provided by Woco Sharjah and Germany were distinct. (as the technical services agreement with Woco Sharjah was for achieving operational and technical competencies, whereas Woco Germany had granted the assessee a non-exclusive license to manufacture, use, exercise or sell licensed products/use its know-how and inventions). The Tribunal noted that the Revenue's comparison of technical fees to Woco Sharjah with royalty free licensing of manufacturing process intangibles from German AE was not valid since transaction with the German AE was an intra-AE transaction, rejected the TPO's Nil ALP determination and deleted the TP addition. However, the Court admitted the appeal of the Revenue against the impugned Tribunal order.

Woco Motherson Advanced Rubber Technologies Limited [TS-173-HC-2017(GUJ)-TP] (Tax Appeal No. 129 of 2017)

2169. The Court set aside Tribunal order and remanded the matter back to the Tribunal for fresh consideration, wherein the Tribunal had confirmed royalty adjustment in case of assessee manufacturing magnetic based electronic coils, transformers and inductors. It accepted assessee's contention that the Tribunal had upheld royalty adjustment [although royalty payment formed part of operating cost under entity level TNMM] without discussing the applicability of Delhi HC ruling in Sony Ericsson Mobile or Tribunal ruling in Siemens VTO Automotive. In the said cases it was held that when royalty payment formed part of operating cost it need not be separately benchmarked. The Court held that the Tribunal erred in not following decisions of the co-ordinate bench of the same jurisdiction.

Kaypee Electronics vs DCIT Circle 4(1)(1)- TS-414-HC-2018(Kar)-TP-ITA No 65/2018 dated 29.05.2018

2170. The Tribunal had remanded back the ALP determination of royalty to TPO noting that in the earlier year, the Tribunal held that entire exercise of assigning separate consideration for royalty was academic as trading and manufacturing segments were to combined (since activities were interlinked and not distinct), and the adjustment on royalty stood merged with TP adjustment made to manufacturing segment by adopting TNMM. The Tribunal observed that in the subject year, while computing PLI of manufacturing segment (PLI of segments was calculated separately), the TPO had taken royalty as part of cost and hence contradicted itself (Nil determination of royalty). The Tribunal considered the argument of Revenue, that ALP of the royalty payments though not 'nil' had a value which required to be properly fixed, a fresh look by the TPO/AO was required. It directed the AO/TPO to see whether in a case where there is no ALP adjustment required for manufacturing/trading segment or combining both of them, a separate consideration of 'Royalty' for ALP adjustments was required and if so, what could be the ALP assigned for it and the result thereof. The Court dismissed assessee's appeal against the Tribunal order which had remanded back the matter to the TPO to assign separate consideration for ALP adjustment of royalty instead of the ALP determination of

combining the manufacturing and trading segment by following the coordinate bench decision in the assessee's own case for earlier year. The assessee argued that the entire exercise of restoring the matter was an academic one as the findings of the Tribunal of the earlier year had been upheld by the Court. Noting that the exercise of TP Analysis on combined transaction approach needs to be undertaken, the Court held that the Tribunal was justified in remanding the case back to the AO/TPO for determining the ALP of the royalty payments made.

Toyota Kirloskar Motor (P.) Ltd. vs CIT and ACIT TS-1002-HC-2018(KAR)-TP) ITA No.58/2017 dated 06.08.2018

2171. The assessee-company, engaged in the business of manufacturing and supply of wind turbine generators, made a payment of royalty to its AE in Cyprus and the TPO made an adjustment with respect to it by relying on FEMA provisions (8% on export sales). The DRP following its own decision in previous years adjudicated the issue against the assessee and disregarded the coordinate bench decision in assessee's own case wherein the issue had been restored back and in the remand proceedings, the TPO while giving effect to Tribunal's order recalculated the royalty adjustment and further revised it by accepting assessee's claim for downward adjustment. Subsequently, the DRP filed a suo moto application for rectification of its own order/ direction for assessment year 2013-14 to state that the facts for the earlier years were different and passed a rectification without disposing off the application for rectification of the said order filed by assessee contending that the same had to be rectified considering the Tribunal's order for assessment year 2011-12. The assessee filed a writ petition against the rectification order passed by DRP since it had not disposed the application filed by the assessee. The Court held that in, all fairness, the DRP ought to have considered the assesssee's application alongwith its suo moto application for rectification and it was not proper to pass an order on the application filed by one party alone leaving the other application either unheard or not disposed of and accordingly set aside DRP order.

Regen Powertech Private Limited v. DRP & Anr. [TS-1076-HC-2018(MAD)-TP] - TS-1076-HC-2018(MAD) - W.P.No.27334 of 2017; W.M.P.No.29226 of 2017 dated 24.09.2018

2172. The TPO made an upward adjustment on account of payment of royalty made by assessee to its associate concerns noting that the assessee was making a payment at the rate of 3.75% to the AE as against the royalty at the rate of 3% by other group entities. The CIT(A) deleted the addition stating that an identical issue with respect to payment of royalty was decided in favour of the assessee by the CIT(A) in the earlier year. The Tribunal dismissed Revenue's appeal following the coordinate bench ruling in assessee's own case for earlier year wherein it was held that CIT(A) had rightly noted that effective rate of royalty had to be considered and if the amount of royalty paid by the assessee was considered with ex-factory sale value, deducting various expenses, such as dealer commission, special commission, warranty etc., the effective rate worked out to 2.3% on sale, as against 3% paid by the other group entities. It observed that the Revenue could not controvert the finding of fact given by CIT(A).

DCIT vs Hitachi Home & Life Solutions (India) Ltd [TS-1176-ITAT-2018(Ahd)-TP] ITA No.2119/Ahd/2011 dated 29.08.2018

2173. The Tribunal rejected TPO's Nil ALP-determination under CUP-method in respect of payment of license and management fees by assessee (JV engaged in manufacture of pharmaceutical

formulations) to AE and upheld assessee's approach of benchmarking under the aggregation approach. It held that while the benefit test was a necessary part of determining ALP of any intra-group service, it cannot have qualifications such as "substantial", "direct" and "tangible" as these qualifications were not given u/s 92(2) and also observed that there were several non-monetary terms other than profitability required to be seen while judging the benefit test. Observing that the license was required for long term manufacturing of drugs and formulation with know-how of the AE, the Tribunal held that the TPO lost sight of various non-monetary benefits which in the absence of the payment for the use of license would not flow to the assessee. Since the assessee's comparability analysis by aggregation of transactions after adopting TNMM as MAM had not been examined by either of the authorities below who merely concentrated on the issue of aggregation/segregation of transactions, it remitted issue back to CIT(A).

DCIT vs. Adcock Ingram Ltd - TS-57-ITAT-2018(Bang)-TP - I.T(TP).A No.1039 & 1078/Bang/2015 dated 31.01.2018

2174. The TPO determined the ALP of the royalty payment and management services at "Nil" on the ground that the assessee failed to explain the cost benefit analysis for such payments made to its AE. It was assessee's contention that the receipts from the assessee were considered to be at ALP by the tax authorities during the assessment of its AEs. The Tribunal remanded the matter back to the TPO noting that TPO needed to examine whether the payment is at ALP with the benefit received by the assessee and such an exercise had not been carried out and it rejected the assessee's contention by observing that provisions of sec 92CA(4) and sec 92(3) had to be interpreted harmoniously, in respect of the same transaction the Revenue could opt to determine total income on basis of ALP determination in accordance with s 92(1) in hands of one party of the said transaction where the tax base of the country would erode and the Revenue could desist from doing so in the hands of the other party, wherever there would be no tax base erosion.

Filtrex Technologies (P.) Ltd vs ACIT [TS-265-ITAT-2018(Bang)-TP] IT(TP)A No.469 of 2017 dated 11.04.2018

2175. Relying on the decision of co-ordinate bench in assessee's own case for AY 2007-08, 2008-09 and 2010-11, the Tribunal remitted to the file of the TPO the ALP determination in respect of royalty paid by assessee to its AE since the AO applying CUP method had not brought any comparables on record to arrive at ALP but had only applied the benefit test to determine the ALP at 'NIL'.

Toyota Kirloskar Auto Parts Pvt. Ltd V. ACIT-TS-636-ITAT-2017(BANG)-TP-IT(TP)A No.

2176. Relying on the decision of co-ordinate bench in assessee's own case for AY 2007-08, 2008-09 and 2010-11, the Tribunal remitted to the file of the TPO the ALP determination in respect of royalty paid by assessee to its AE since the AO applying CUP method had not brought any comparables on record to arrive at ALP but had only applied the benefit test to determine the ALP at 'NIL'.

Toyota Kirloskar Auto Parts Pvt Ltd vs. DCIT-TS-828-ITAT-2017(bang)-TP dated 13.09.2017

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2177. The Tribunal held that an international transaction could be clubbed / aggregated with other international transactions if such transactions were closely connected with each other, and the onus to establish such justification was on assessee. Accordingly, where the assessee failed to discharge its onus of establishing the justification for clubbing and aggregating royalty transaction with other transactions, the Tribunal upheld the TP-adjustment made by the TPO on the royalty payment arrived at by benchmarking the royalty payment transaction under TNMM on standalone basis. It rejected the assessee's contention that when TNMM was applied at the entity level, there was no necessity of separate benchmarking in respect of royalty transaction.

Kaypee Electronics & Associates Pvt Ltd [TS-310-ITAT-2017(Bang)-TP] - IT (TP) A No. 159/Bang/2015 dated 21.04.2017

2178. Where the assessee had entered into a license and assistance agreement with its Associated Enterprise (AE) for access to license and technical know-how for the purpose of manufacture of power components, pursuant to which it paid a royalty at 5% of net sales and the TPO had determined the ALP of royalty as NIL, the Tribunal noting that that the power components, in turn, were sold to the AE and that the royalty was considered as part of operating cost for the purpose of benchmarking other international transactions of the assessee, the ALP of which had been accepted by the TPO and relying on the decision of Luwa India Pvt. Ltd. [TS-687-ITAT-2016(Bang)-TP] deleted the addition made by the TPO.

It noted that the assessee had produced the agreement under which it was granted technical know-how belonging to AE for the purpose of manufacturing activity and that the alleged royalty was paid in accordance with this agreement and held that ideally the royalty payment should have been benchmarked with reference to uncontrolled comparable price (CUP) but since neither assessee nor TPO had been able locate appropriate CUPs and the royalty transaction had been aggregated along with other related international transactions of the assessee and benchmarked under TNMM, the ALP of which was accepted by the TPO, no addition could be made.

Siemens VDO Automotive Ltd vs DCIT - TS-79-ITAT-2017(Bang)-TP - I,T.{T.P} A. No.923/Bang/2012 dated 25.01.2017.

2179. The Tribunal upheld TPO/DRP's NIL ALP in respect of administrative service fees and royalty payment by assessee to AE for AY 2006-07 and 2007-08 on the ground that the assessee had only described the nature of technical knowhow and administrative services received without conclusively proving their use in the manufacturing. It held that although Delhi High Court ruling in the case of EKL Appliances stressed that TPO/AO cannot question the necessity of incurring the expenditure or the benefits of the expenditure incurred, the onus lied on the assessee to prove that the actual services for which administrative services fess were paid were actually rendered.

Herbalife International India Pvt Ltd [TS-364-ITAT-2017(Bang)-TP- IT(TP)A No.1406(bang)/2010 and IT(TP)A No. 924/bang/2012 dated 17.04.2017

2180. The Tribunal rejected the TPO's determination of the ALP for royalty payment to AE at Nil by applying the benefit test and held that the TPO was not justified to adopt such approach in determining the ALP of royalty payment when the assessee had produced the agreement between the assessee and AE under which license was granted to the assessee. It held that

the TPO's jurisdiction was to determine the ALP by testing the same with uncontrolled comparable prices and not to examine the allowability of the claim by applying the benefit test or conditions provided under section 37(1) of the Act.

Luwa India Pvt Ltd v ACIT - TS-687-ITAT-2016 (Bang) - TP - I.T.(T.P) A. No.568/Bang/2012 & C.O. No.31/Bang/2015

2181. The Tribunal relying on the decision in the case of Toyota Kirloskar Motors Private Limited [TS-
650-ITAT-2016(BANG)-TP] held that where no comparable had been found in respect of royalty payment made by the assessee to its AE, the ALP may be determined by considering the royalty as part of operating cost for the purpose of computing the margin in the trading segment. Accordingly, it remitted the issue back to the file of AO/TPO for fresh consideration.

DCIT vs Wipro GE Medical Systems Pvt Ltd-TS-429-ITAT-2017(BANG)-TP- IT(TP)A.No.40/bang/2011 & 1647/bang/2013 dated 21.04.2017

2182. The TPO had restricted the ALP of royalty payment by the assessee to its AE at 1% of net sales under CUP method, rejecting assessee's approach of aggregating the said payment under the manufacturing operations and applying TNMM. The Tribunal remitted the said issue of ALP determination for the year under appeal i.e. AY 2010-11 by relying on the Tribunals' order in assessee's own case for AY 2007-08, AY 2008-09 and AY 2009-10 wherein the Tribunal had rejected the assessee's aggregation approach holding that the royalty payment was a separate transaction which required to be benchmarked under CUP method and had remitted the matter back to the file of the AO/ TPO for de novo determination of ALP. Further, it was also noted that in one of the years, under the remand proceedings directed by the Tribunal, the TPO had held the royalty payment made by the assessee at 4% to be within the ALP computed at 4.10%.

Praxair India Private Limited V ACIT [TS-524-ITAT-2018(Bang)] IT(TP)A No.361/Bang/2015 and IT(TP)A No.409 /Bang/2015 dated 04.06.2018

2183. The Tribunal held that the RBI approval of royalty rates paid by the assessee to its AE implied that the payment were at ALP.

DCIT v AVT MC Cormick Ingredients Ltd - (2016) 67 taxmann.com 322 (Chennai - Trib)

2184. The Tribunal allowed assessee's miscellaneous petition against its previous decision wherein TP adjustment with respect to royalty payment was originally confirmed as the assessee had not justified its claim that the royalty payment made by it was below the industry average rate of royalty. It accepted the copy of industrial average rate available in Wikipedia as per which the average rate of royalty for automotive industry was 4.7 percent which was higher than the 3.6 percent paid by the assessee and
directed transfer pricing officer to verify assessee's claim.

Hyundai Motor India Ltd-TS-717-ITAT-2016 (CHNY)-TP-I.T.A.No.2353/Mds/2012

2185. The assessee-company was engaged in manufacturing of high-quality automotive glass for Indian automobile industry. It made royalty payment to its AE since it took advantage of AE's reputation to sell its products outside India. The TPO determined the ALP of royalty payment

to be NIL on the ground that assessee was a mere contract manufacturer for its AE. The CIT(A) rejected TPO's nil determination noting that there were negligible purchases/sales to AE vis-à-vis total turnover. The Tribunal dismissed Revenue's appeal noting that inference of TPO was dehors the facts and thus, rejected TPO's NIL determination of royalty.

ACIT. vs Asahi India Glass Ltd. [2018] 97 taxmann.com 106 (Delhi - Trib.) IT APPEAL NO. 1582 OF 2015 dated 03.08.2018

2186. The Tribunal upheld CIT(A)'s order deleting TP adjustment on account of royalty payment made by the assessee to its AE for technical knowhow and personnel training of employees by its AE and rejected TPO's nil determination. It noted that that it was not for the TPO to determine the commercial expediency of availing technical knowhow and his domain was restricted to determining the ALP. Also in absence of the method applied by the TPO which was later during the course of hearing claimed to be CUP (as no other company would pay for the services) the stand of the TPO was rejected on the ground that it was not legally sustainable relying on the decision in AWB India Pvt. Ltd. It also observed that the CIT(A) had passed a well-reasoned order wherein the TP adjustment on royalty payment was deleted since the Appellant benefitted through the technical know-how and processes which included all information and knowledge possessed in relation to passenger handling ,cargo handling ,dangerous goods handling and operation and ramp equipment which was critical for the smooth functioning of the business and hence the TPO's allegation that no independent company would pay for such services could not be sustained.

DCIT vs. Globe Ground India Pvt. Ltd [TS-896-ITAT-2018(DEL)-TP] ITA No.2785 /Del/2014 dated 23.08.2018

2187. The assessee-company engaged in the manufacture of passanger cars had paid royalty (for payment of know how tradename and trademark) to its AE viz. SMC Japan. The TPO noted that that assessee had paid a substantial amount of royalty and at the same time it had also incurred substantial expenditure for research and development and marketing/brand promotion. In view of assessee not bifurcating the payment of royalty for use of brand name and technology, he allocated the royalty paid by the assessee in the ratio of R&D and AMP expenses incurred by the associated enterprise and held that 48% was towards the use of Suzuki logo. He determined the ALP of royalty payment made towards the use of brand to be nil on the ground that the royalty for Suzuki brand was paid to SMC, Japan, when assessee itself was promoting the brand of Suzuki which was a lesser known brand. That since the Suzuki brand was undoubtedly lesser known brand in India and had piggybacked the brand name Maruti which was an established brand in India there was no case for the assessee to have paid any brand royalty to SMC Japan. The Tribunal deleted the TP adjustment on royalty payment by following the coordinate bench ruling in assessee's own case for earlier year wherein it a) accepted assessee's contention that the decision to use Suzuki name/brand was taken by the assessee in order to advance its own commercial interest and Suzuki brand is an international renowned global brand. b) if expenditure had been incurred wholly and exclusively for the purpose of business of the assessee whether or not such expenditure actually benefits the assessee was an irrelevant consideration for the purpose of determination of ALP. Thus, there was no merit in TPO's allegation that payment made for such use was unwarranted

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Maruti Suzuki Ltd vs Addl.CIT [TS-1180-ITAT-2018(DEL)-TP] ITA No.467 /Del/2014 dated 17.10.2018

2188. The Tribunal held that ALP of international transaction of 'Payment of royalty' should be done separately on transaction by transaction approach by applying CUP method and restored the matter to the file of the AO/TPO.
JCB India Ltd v DCIT - [2016] 46 CCH 0366 (Del Trib)

2189. The Tribunal held that where the assessee functioned in a competitive industry where technology was required to survive and grow and where continuous innovation was a pre-requisite and where the Revenue had accepted the payment of royalty to be necessary and at ALP in previous years, no TP adjustment could be made. However, the Tribunal also noted that payment of royalty, even if justified and considered at ALP, could be a relevant factor for determining compensation for carrying out distribution and marketing functions on behalf of its AE.
DCIT v Reebok India Co - (2016) 46 CCH 0484 (Del Trib)

2190. The Tribunal, relying on the decision in assessee's own case wherein the High Court had restored the matter to the file of TPO for reconsideration of aggregation of royalty/ FTS Transaction with other transactions remitted the issue of aggregation vs segregation of payment of royalty/fees for technical services (FTS) from other transactions for deciding the issue afresh.
Gruner India Pvt. Ltd vs ACIT-TS-996-ITAT-2017(DEL)-TP ITA No. 6801/Del/2017 dated 30.11.2017

2191. The Tribunal upheld the TPO's segregation of the payment of royalty and fees for technical services made by the assessee to its AE since such transactions were not closely linked to assessee's other international transactions. With regard to the assessee's contention that the TPO had not segregated payment of royalty and FTS for earlier AYs, it held that the fact that the TPO proceeded on a wrong premise in the preceding year without considering the international transactions of royalty and fees for technical services as separate from the others, could not give a license to the assessee to claim that the same wrong approach be repeated in the subsequent years as well. Further, it refused to accept payment of royalty and FTS at ALP simply on the ground that it was paid at maximum rate stipulated by RBI, and held that the rate of royalty approved by the RBI has a persuasive value in the process of determination of ALP of Royalty for a particular case and could not be considered as conclusive
Gruner India (P) Ltd v DCIT - TS-202-ITAT-2016(DEL)-TP

2192. The Tribunal held that the TPO had not brought on record any cogent reasoning based on which the royalty payment made by the assessee could be held to be not in line with the arm's length standard. Further, considering that the assessee had consistently earned an operating margin substantially higher than that of the comparable and that the effective rate of royalty was lower than earlier years where no adjustment was made, there was no reason to make any adjustment to the royalty paid.
ACIT v Oracle India Pvt LTd – (2015) 45 CCH 0116 Del Trib

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2193. The Tribunal upheld the order of the CIT(A) deleting the addition made by the TPO by way of restricting royalty paid to its AE on software duplication and sub-licensing activity to 30 percent of actual sales. It observed that the assessee changed the basis for royalty payment from 30 percent of Indian Published Price to 56 percent of actual sales revenue (owing to the new liberalized foreign exchange control policy) and that the assessee had clearly demonstrated that the effective royalty pay out was less than the earlier years payout. Further, it noted that the assessee's profit margin was more than that of comparables and that the royalty payment was made exclusively for the purpose of business.

ACIT v Oracle India Pvt Ltd (ITA no. 1432/Del/2011) – TS-605-ITAT-2015 (Del) – TP

2194. Though the Tribunal agreed with the contention of the TPO that royalty paid by the assessee to Suzuki on account of license for trademark was not warranted, since Suzuki was a weaker brand as compared to the assessee, it held that it was not permissible for the TPO to bifurcate royalty paid by the assessee to Suzuki into (i). royalty for licensed information and (ii) royalty for licensed trademark so as to determine the ALP of the royalty for licensed trademark as Nil as the royalty payment was a common consideration for use of licensed information and licensed trademarks, which could not be bifurcated.

Maruti Suzuki India Ltd v ACIT - (2015) 44 CCH 0555 Del Trib

2195. The Tribunal held the AO was not empowered to disallow the royalty expense incurred by the assessee on the basis that the benefit test was not satisfied. It held that where the expenditure or payment by the assessee was demonstrated to have been incurred for the purposes of business, the AO / TPO was not empowered to disallow the same on extraneous reasoning / on the basis of commercial rationale. It observed that the assessee was neither obligated to show that a legitimate expenditure was incurred out of necessity, nor to prove that a certain expenditure has actually resulted in income or profit in the same year or in subsequent years.

It further held that where TNMM was applied to the assessee's transactions as a whole, it covered within its ambit, the royalty transactions as well and therefore the Department was incorrect in seeking to use

the CUP method to benchmark the royalty paid on a standalone basis.

Daksh Business Process Services Pvt Ltd v DCIT - TS-455-ITAT-2016 (Del) - TP- ITA No.- 2666/Del/2014

2196. The Tribunal deleted TP-adjustment in respect of management fees and royalty payment by following co- ordinate bench ruling in assessee's own case for AY 2010-11; wherein it was held that CUP can be chosen over TNMM only when a comparable product or service is available, and when no such comparable is available, as in the given case, there cannot be any occasion to resort to CUP, and, as such, in such a situation, CUP cannot be accepted as MAM over the TNMM.

Frigoglass India Pvt Ltd [TS-500-ITAT-2016(DEL)-TP] - I.T.A. No.784/Del/16

2197. The Tribunal held that where the royalty paid by the assessee for the use of the trademark 'Goodyear' was directly linked to the revenue derived from the manufacture of tyres undertaken by the assessee and formed a part of its cost of sales, it was incorrect to

segregate the royalty transaction for benchmarking purposes. Further, it held that the fact that no such payment was made by another AE was not relevant considering the business dynamics and commercial realties in both the companies.

Goodyear India Ltd v DCIT - TS-226-ITAT-2016 (Del) - TP

2198. The Tribunal upheld the CIT(A)'s deletion of the disallowance of royalty paid (@ 5% on net sale of products manufactured) by assessee (engaged in the business of designing garments) to AE for use of technical know-how, designs, logos, trade names, and trade-marks for AY 2003-04. It noted that that for the previous AY i.e. AY 2002-03, royalty payment was accepted by TPO to be at ALP and the benefit derived by assessee under the royalty agreement was also accepted by AO and that the only dispute raised by AO in previous AY 2002-03 was whether royalty was capital or revenue expenditure, which was settled by the Tribunal holding it to be revenue expenditure. It stated that in the present case, royalty expenditure incurred by assessee was fully and exclusively incurred in regular course of business and after incurring this expenditure the assessee declared profit @19% which was still better than the gross profit rate of 12 & 16% declared by comparables. Observing that the Tribunal ruling for AY 2002-03 was not reversed by higher forum, keeping in view the principle of consistency, it held that the ld. CIT(A) was fully justified in deleting the addition made by the AO, particularly, when the benefit derived under the agreement was not doubted by the TPO and the assessee by using the technical know-how assistance and designs received under the said agreement was manufacturing the finished products which were sold to the AE as well as to the other parties.

DCIT vs Cornell (P) Ltd-TS-469-ITAT-2017(DEL)-TP-ITA No.2166/del/2011 dated 02.05.2017

2199. The Tribunal set aside CIT(A)'s order on ALP determination of royalty and import transactions in case of assessee. It rejected CIT(A)'s deletion of royalty adjustment on the basis that no TP- adjustment in respect of such royalty was proposed for previous AY 2002-03 and the Tribunal had allowed deduction for royalty as revenue expenditure and held that allowance of expenditure operated in altogether different provisions of the law and the determination of arm's length price of international transaction operated in different provisions of law. It held that the AO's adjustment of Rs. 4.67 crore on the basis of benefit test and TPO's comparability analysis based on the past year as impermissible and accordingly, set aside the whole transaction of ALP determination of royalty back to the AO for fresh determination.

ACIT vs. Denso India Ltd-TS-957-ITAT-2017(DEL)-TP ITA No. 1751 and 4365/Del/2011 dated 05.11.2017

2200. Where the assessee had benchmarked the royalty payment under TNMM after aggregating the same with other transactions, but the TPO determined the ALP at NIL by benchmarking royalty separately under CUP method holding that royalty and other transactions were not closely linked, the Tribunal, noting that issue as to payment or royalty and technical fee by the taxpayer to its AE had already been decided in assessee's favour in AYs 2002-03 and 2004-05 by the Tribunal, and an appeal preferred by the Revenue before the Hon'ble Delhi High Court had been dismissed, restored the matter to the file of TPO directing it to decide the issue qua payment of royalty and technical fees qua AY 2009-10 in accordance with the decision taken in earlier years.

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Munjal Showa Limited vs. ACIT-TS-960-ITAT-2017(DEL)-TP-ITA No.1030/Del./2014 dated 22.11.2017

2201. Where the TPO initially determined ALP as NIL by holding that no benefit etc accrued to the assessee because of Royalty payment and the AO made the addition without applicability of section 37(1) of the Act, the Tribunal remitted ALP determination of royalty payment by assessee to the file of TPO for fresh consideration since the ratio laid in down Cushman & Wakefield had not been followed.

Honda Motor India Pvt. Ltd vs. DCIT-TS-966-ITAT-2017(DEL)-TP dated 28.11.2017

2202. The TPO rejected use of TNMM as MAM to benchmark royalty paid (at 3% of value added) and product development fee to its AE for grant to use trademarks and to manufacture product under Intellectual copyright (IPR), applied CUP to determine ALP at nil on ground that no independent entity under such circumstances would pay any such royalty. The Tribunal restored the issue of TP adjustment on royalty noting that year after year, TPO had accepted TNMM applied by assessee but abruptly in the subject year applied CUP without assigning any reason. It noted that royalty and product development fee was intrinsically connected to production and sales and thus, could only be decided under TNMM. It relied on ratio laid down in Delhi HC in EKL Appliances wherein it was held that TPO could not sit in the armchair of businessman and applying benefit test was impermissible. Further, it also noted that the assessee had also brought supplementary analysis on record that the royalty charged between third party licensor and licensee generated an average royalty of 7.20% of the sales which had to be examined in detail.

Nissan Brake India Pvt Ltd. vs DCIT [TS-1252-ITAT-2018(Del)-TP] ITA No.6366/Del/2017 dated 16.11.2018

2203. The Tribunal deleted the TP adjustment on reimbursement made by assessee of salaries of employees of AE (provided various types of consultancy services and assistance to entities in India in connection with development, operation and management of wholesale business, retail business and related operations) by following coordinate bench decision in assessee's own case in its earlier year wherein it was held that TPO had erred in concluding that no independent person would have made separate payment for similar kind of services as it was not his prerogative to see whether assessee benefits or not. It was wisdom of the assessee to hire employees of its AE having significant expertise in commencement and implementation of operation in retail and cash and credit stores and it was also not necessary for AO to see whether any legitimate expenditure had been incurred by assessee out of necessity. The Tribunal had set aside the matter to TPO to decide issue afresh after analyzing the assessee's submission that the salary earned by expats had been offered to tax in India and that there was no loss to Revenue on account of tax neutral transaction and proposed adjustment would lead to double taxation i.e. to be taxed in the hands of expat employees and additionally in the hands of assessee bearing the cost of salary merely owing to reimbursement by the AE. While giving effect to the order of Tribunal, the TPO had deleted the TP adjustment in light of the aforesaid observations.

WM India Technical and Consulting Pvt Ltd vs DY. CIT [TS-1289-ITAT-2018-(Del)-TP] ITA No.755/Del/2016 dated 17.12.2018

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2204. The Tribunal upheld the CIT(A)'s order for AY 2007-08 and 2008-09 deleting adjustment in respect of royalty payments made by assessee (engaged in the business of manufacturing of auto parts and components) to its AE noting that the AO/TPO did not bring on record any comparable case to find out the rate of royalty in the assessee's line of business and also because there was no justification to determine the ALP at NIL on alleged the basis that no worthwhile recurring technology had been transferred. It also noted that the AO/TPO had accepted the ALP of such royalty payments in the earlier AY i..e AY 2005-06.

JCIT vs Progressive Tools & Components Pvt Ltd-TS-476-ITAT-2017(DEL)-TP-I.T.A No 530/del/2012 and I.T.A no 5962/del/2012 dated 15.05.2017

2205. The Tribunal set aside the DRP order and remitted the issue vis-à-vis ALP adjustment of the royalty payment to its AE. The Tribunal noted that identical issue was remitted by ITAT to AO/TPO for fresh consideration for AY 2006-07 to AY 2009-10. Thus, following the said ruling, ITAT remitted the issue to AO/TPO and directed the assessee to file a fresh TP documentation and comparable companies so as to arrive at ALP.

DCIT vs JCB India Ltd [TS-199-ITAT-2015(DEL)-TP] ITA No.1119/Del/2015 dated 25.06.2018

2206. The Tribunal restored the benchmarking of royalty, fees for technical services & design/drawing fee paid by assessee to its AE. It noted that TPO determined ALP of these transactions at Nil on the basis that no tangible benefit had been derived by the assessee. The Tribunal relied on co-ordinate bench ruling in assessee's own case for AY 2009-10 wherein the Tribunal had observed in the ruling that appeal preferred by the Revenue against the said issue for AYs 2002-03 and 2004-05 had been dismissed by the High Court. Further, it was also noted by the Tribunal that co-ordinate bench in assessee's own case had remitted the matter for fresh decision by following earlier year's orders since the AO did not have the benefit of the High Court order at the time when he passed the order.

Munjal Showa Ltd vs. DCIT Ltd [TS-729-ITAT-2018(DEL)-TP] ITA No.1579/Del/2015 dated 27.06.2018

2207. The Tribunal following the order of the coordinate bench in the assessee's own case for earlier year deleted the TP adjustment of Rs.172.08 crores in respect of payment of model fees and Rs.3.53 crores on royalty payments made by the assessee. The assessee had benchmarked the international transaction for payment of model fees and royalty under TNMM and concluded that since the operating profit ratio was higher than the average operating profit ratio of the comparables, the transaction was at arm's length. However, the TPO determined the ALP of the transaction to be "nil" on the ground that the assessee was partly responsible for the technology upgradation which happened in India and the assessee was paying both the model fees and royalty for same set of services. The TPO also held the ALP of the royalty transaction to be nil and further alleged that the assessee being a contract manufacturer, no royalty payment was to be made to the AEs. The aforesaid adjustment was confirmed by DRP. It noted that the co-ordinate bench in assessee's own case for AY 2006-07, 2007-08 and 2008-09 deleted the adjustment made by the Revenue and accepted the ALP determined by the assessee in respect of the transactions. It further observed that for the year under consideration, the payment of royalty was made by the assessee in respect of sales to independent enterprises.

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Hero Moto Corp Ltd. v DCIT [T-801-ITAT-2018(Del)-TP] ITA No.1616/Del/2017 dated 13.06.2018

2208. The Tribunal remitted the ALP determination of royalty paid back to AO/TPO. The Tribunal accepted the assessee's request to admit additional evidence in the form of Addendum to intangible and proprietary property and licensing agreement [which set out the understanding between the parties and the actual conduct of business] and opined that the Addendum to the agreement went to the very root of the matter and that it would suitably assist the lower authorities to reach a logical conclusion on the issue.

C.R.M. Services India Pvt. Ltd vs. DCIT [TS-343-ITAT-2018(DEL)-TP] ITA No.5930/Del/2012 and 1630/Del/2014 dated 14.05.2018

2209. The Tribunal deleted the TP-adjustment on royalty and technical service fee made by the TPO determining ALP at Nil for AY 2013-14 and held that that TPO/DRP could not put themselves in the shoes of assessee to decide which expense should be incurred by assessee for its business. The Tribunal observed that both TPO and DRP had gone into the need for expenses incurred by assessee vis-à-vis benefit for which disallowance can be made under separate provisions of the Act. Further, the Tribunal refused to remit the matter to the AO by relying on the Gujarat HC ruling in Rajesh Babubhai Damania as it would amount to giving second innings to the AO when sufficient material was available before him on record which was impermissible. It rejected Revenue's contention that double deduction of royalty had been claimed and royalty was part of the cost of purchase of raw materials by observing that raw materials were purchased from one AE and royalty was paid to another AE. The Tribunal also observed that lower authorities erred in proceeding to make adjustment without discarding the benchmarking methodology followed by assessee i.e. TNMM in the instant case, by relying on Delhi HC ruling in Li & Fung case.

COIM India Pvt. Ltd v ACIT [TS-344-ITAT-2018(DEL)-TP] ITA No.7260/Del/2014 dated 07.05.2018

2210. The Tribunal deleted the TP addition made on account of royalty by relying on the decision of the High Court in its own case TS-671-HC-2015(DEL)-TP wherein it was held that since TPO found that no adjustment was called for under the external TNMM method adopted by the assessee, no adjustment could have been made by separately benchmarking the transaction. It observed that the assessee received full technical assistance from its AE for which the royalty payment was made and therefore deleted the addition.

Lumax Industries Ltd v ACIT - TS-454-ITAT-2018(DEL)-TP - ITA No. 1441/DEL/2016 dated 04.05.2018

2211. The Tribunal rejected assessee's aggregated approach for benchmarking royalty payment to UK based AE under TNMM and upheld external CUP as most appropriate method. Noting that royalty payment arose from a separate agreement and was payable irrespective of any services or goods received, it held that it was a separate transaction irrespective of the fact that the relevant payment was utilized for manufacture of final product. Further it held that the rates given by the RBI could not reckoned as an external CUP for the purpose of benchmarking. Accordingly, it remitted the matter to the TPO for fresh adjudication as he had

incorrectly determined ALP of the Royalty at Nil contending that the assessee did not receive any benefit.

Johnson Matthey India Private Ltd vs. DCIT - TS-173-ITAT-2018(DEL)-TP] - ITA Nos.:-1817/Del 2014; 2493/Del/2014; & 3755/Del/2015 dated 16/03/2018

2212. The Tribunal rejected TPO's Nil-ALP determination in respect of assessee's royalty payment to AEs for use of brand names 'Vodafone' and 'Essar' and remitted the ALP-determination to AO/TPO. It held that the assessee's royalty payment was a bona fide transaction as the assessee actually used the brand names 'Vodafone' & 'Essar' and held that the TPO erred in determining ALP at Nil merely because the assessee did not pay royalty in the past. It held that simply because no royalty was paid in the past could be no reason to treat the ALP of royalty at Nil in later years. However, the Tribunal rejected assessee's adoption of foreign comparable (royalty payment by Motorola Inc to Forward Industries Inc) for benchmarking royalty payment and held that the transaction between 2 foreign parties could not be considered for comparing international transaction with Indian assessee as tested party. Accordingly, it remitted the matter to the AO / TPO for fresh consideration.

DCIT vs. Vodafone Essar Digilink Ltd - TS-166-ITAT-2018(DEL)-TP - ITA No. 1950/Del/2014 dated 14.03.2018

2213. The Tribunal deleted the TP adjustment on the assessee's royalty payment to AE and rejected TPO/ DRP's contention that the assessee had not been able to prove any real tangible benefit that had passed to it by technology received from its AE. It noted that where the AE granted the assessee exclusive nontransferable and non-divisible license to use the technical information for manufacture and for marketing activities in India for which the assessee paid royalty it was not the prerogative of the TPO to decide if any tangible benefit had been transferred to the assessee. It held that the payment of royalty was a business decision of the assessee and that the TPO could not interfere with the decision making of the assessee.

India Yamaha Motor Private Ltd vs. ACIT - TS-126-ITAT-2018(DEL)-TP - ITA No.297/Del./2015 dated 12.02.2018

2214. The Tribunal confirmed CIT(A)'s order holding assessee's royalty payment (for granting license to use AE's technology & know-how for carrying on business of manufacturing of automotive components in India) at 3.15% of net sales to be at ALP and held that the TPO had erroneously held that royalty should be taken at Nil on the allegation that no economic benefit had been provided to the assessee as the assessee had incurred loss at entity level without carrying out any analysis. It held that such an observation or reasoning could not be upheld at all once there was a valid agreement for transfer of non-exclusive right for use of license to use technology including knowhow of AE from which assessee has earned substantial revenue receipts which evidenced that such a use of technology and knowhow was directly linked with manufacturing and resultantly sales. It further held that that incurring of loss could not be the parameter to hold that the technological knowhow or license was of no benefit hence there was no requirement to pay the royalty.

DCIT vs. Bestexx MM India Pvt. Ltd. - TS-113-ITAT-2018(DEL)-TP - I.T.A. No.544/DEL/2015 dated 15.02.2018

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2215. Where TPO had determined the ALP of administrative and regional support services received by assessee from its AE to be nil by applying CUP on ground that no uncontrolled enterprise would have made payment for services, the Tribunal restored the issue of TP adjustment on administrative and regional support services (including liaison and support services, legal, finance, human resource, IT and reasonable support services) from its AE following the coordinate bench decision in assessee's own case for AY 2009-10 (agreement had been entered into from AY 2009-10) wherein the issue was remitted back for detailed verification of facts as it was Revenue's contention that assessee had not conducted FAR analysis with respect to intragroup services and failed to justify functions performed by AE for payments made and further, directed TPO to follow the reasoned conclusion in Delhi HC in Cushman and Wakefield wherein it was held that TPO could not judge the commercial expediency of transaction and his role was restricted to that of determining the ALP of said transaction.

Avaya India Pvt Ltd vs ACIT [TS-1290-ITAT-2018-(Del)-TP] ITA No.1904 /Del/2015 dated 03.12.2018

2216. The Tribunal upheld CIT(A)'s deletion of TP-adjustment on account of royalty payment by assessee (engaged in manufacturing of toughened glass, laminated glass and float glass) to AE accepting assessee's contentions that maintenance of quality and increase in sales were possible due to AEs licensed technology and that since it was a public limited company (with only 22.21% shareholding by its AE, Indian promoters holding 33.03% and the general public holding 44.76%), the AEs were not in a position to wield significant influence over assessee's business as its performance and commercial expediency were subject to intense scrutiny by shareholders. Further, relying on EKL Appliances ruling, it held that it was not open to the TPO to question the judgment of the assessee as to how it should conduct its business and regarding the necessity or otherwise of incurring the expenditure in the interest of its business. Thus, finding no infirmity in the CIT(A)'s order, it dismissed Revenue's appeal.

Asahi India Glass Limited vs. DCIT - TS-123-ITAT-2018(DEL)-TP - ITA No.1637/Del/2014 dated 26-02-2018

2217. The Tribunal rejected TPO's ALP-determination for technology acquisition cost at Nil and remitted ALP-determination to AO/TPO. It observed that the assessee's (engaged in manufacturing of auto-components) royalty payment was for designs, engineering data, manufacturing and process data, lay-outs etc. for contract products, but it was required to pay acquisition cost separately for modifications or new design which was to be customized for a particular customer in India. Since no royalty payment was required to be made in case of such new product, it held that the TPO as well as the DRP erred in concluding that the payment of application cost was in addition to royalty and therefore held that the benchmarking was incorrectly done. Separately, in respect of intra-group service fee, it rejected TPO's Nil ALP-determination on the ground that no services were received or there was duplication of services. On perusal of the emails submitted by assessee, it held that the assessee's transaction were genuine and clarified that the TPO's role was restricted to ALP-determination while allowability or otherwise of such payment was to be determined by AO. Accordingly, it remitted the issue back to AO/TPO to follow ratio of Delhi HC ruling in Cushman & Wakefield case.

Denso India Limited vs. DCIT - TS-145-ITAT-2018(DEL)-TP - ITA No.1857/Del/2014 dated 07.03.2018

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2218. The Tribunal, following the order of the co-ordinate bench in the assessee's own case for earlier year deleted the TP-adjustment of Rs. 9.48 Cr on royalty payments made by the assessee. The assessee who was making royalty payment since period prior to acquisition of AE status by payee, benchmarked the royalty transaction under the external CUP method where it selected the royalty payment by Maruti Suzuki. The TPO considered the ALP of the transaction at Nil by rejecting the assessee's benchmarking and contended that since external CUP required strict standard of comparability and since Maruti was paying royalty for obtaining license for manufacturing a finished product i.e. Automobile whereas the assessee had obtained a license for manufacturing automobile lighting equipment and accessories, the two were not comparable. The TPO further alleged that the assessee had not provided any evidence to show how the rate of royalty was fixed and also did not provide a cost benefit analysis. Noting that the assessee was making royalty payment since periods prior to acquisition of AE status by payee, the Tribunal held that the benchmarking adopted by the assessee by considering the royalty paid by Maruti as comparable was rightly considered CUP. It further observed that the co-ordinate bench in assessee's own case in AY 2008-09 accepted assessee's royalty payment at 3-5% at ALP and jurisdictional HC had refused to admit Revenue's appeal against the said tribunal order. Considering that the facts of the case under consideration were identifical to facts of earlier year, it deleted the adjustment.

Lumax Industries Ltd v JCIT - TS-1094-ITAT-2017(DEL)-TP - ITA No.6961/Del/2014 dated 05.12.2017

2219. The Tribunal restored the issue of benchmarking management support services to the TPO to consider the detailed submissions made by the assessee vis-à-vis technical services utilized by it from the AEs which were not appreciated by the lower authorities. The TPO determined the ALP of the said services to be NIL by applying CUP and observing that assessee had not been able to demonstrate tangible benefit derived from such services.

Comverse Network Systems [India] Pvt Ltd. vs. ACIT [TS-1012-ITAT-2018(Del)-TP] ITA No.6704/Del/2015 and ITA No.7328/Del/2017 dated 31.07.2018

2220. The Tribunal upheld CIT(A)'s order restricting the royalty payment at 4.05% of sales made by the assessee for technical knowhow as against the TPO's determination of royalty at 4.5% following the decision of coordinate bench of the assessee's own case for the earlier year wherein it was held that the DRP had rightly considered three companies as comparable whose average rate of royalty came upto 4.5% and was discounted with 10% for fixed term license and the resultant rate of 4.05% was the ALP of the transaction. It also noted that the Revenue had not brought anything on record contrary to the decision of the earlier year.

LG Electronics India (P) Ltd vs ACIT [TS-738-ITAT-2018(DEL)-TP] ITA Nos.3612 and 3613/Del/2017 dated 18.07.2018

2221. TPO determined the ALP of management service unit charges paid by assessee to its AE to "NIL" on ground that services were duplicative in nature and assessee had already paid for support services and there was no need for management support services. The Tribunal rejected TPO's nil determination noting that assessee brought on record agreement entered into with AE which clearly indicated that payment of aforesaid services was distinct and huge

sales volume could not be achieved without the aid of support staff provided by AE. Accordingly, it deleted the TP adjustment on management service charges.

B.G. India Energy Solutions (P.) Ltd vs. Dy.CIT (2019) 101 taxmann.com 360 (Del Trib))/(TS-1443-ITAT-2018(DEL)-TP ITA No. 1980(delhi) of 2015 dated 31.12.2018

2222. The Tribunal deleted TP-adjustment stemming from TPO's reduction of arm's length royalty rate from 3% to 2% of assessee's net sales and held that the TPO was unjustified in reducing the royalty rate from 3% to 2% without substantiating it with an appropriate alternate TP analysis. Noting that TPO did not examine alternative comparables to justify reduction in royalty rate after rejecting assessee's comparables on the ground that they were US based while assessee's AE was based out of UAE, it held that the TPO's approach was an arbitrary and unbridled exercise of power.

RAK Ceramics India Private Limited vs. DCIT - TS-1054-ITAT-2017(HYD)-TP - ITA No.193/Hyd/2017 dated 29.11.2017

2223. The Tribunal, following jurisdictional ruling of the High Court in assessee's own case for AY 2010-11[TS-1091-HC-2016(AP)-TP] (wherein deletion of similar royalty adjustment was upheld after holding that TPO was unjustified in reducing the royalty rate from 3% to 2% without substantiating it with an appropriate alternate TP analysis) deleted the TP adjustment arising from TPO's reduction of arm's length royalty rate.

RAK Ceramics India Private Limited vs DCIT-TS-1054-ITAT-2017(HYD)-TP dated 29.11.2017

2224. The Tribunal deleted TP addition on royalty and technical services fee payment to AE which was benchmarked using the CUP method, on the ground that assessee is not required to demonstrate that payment of royalty is justified since such agreements are periodically approved by the RBI and by the Ministry of Industries and the assesse was paying the amount as per agreements.

DCIT vs Kirby Building Systems India Ltd [ITA No.316/Hyd/2015] - TS-363-ITAT-2015(HYD)-TP

2225. The Tribunal, relying on the approval granted by the RBI and earlier year's order in the case of the assessee allowed royalty payment at 5 percent of domestic sales and 1 percent of export sales.

DCIT v Gulf Oil Corporation Ltd (ITA No. 11/Hyd/2014) – TS-576-ITAT-2015 (Hyd) – TP

2226. Where the assessee benchmarked the payment of royalty to its associated enterprise under TNMM (margin of the assessee was higher than that of its comparable), the Tribunal, relying on the order of the High Court in the assessee's own case for earlier years, upheld CIT(A)'s deletion of TP-adjustment on account payment of royalty to AE and held that the TPO erred in determining the ALP of the said payment at Nil under the CUP method when there were no changes in the facts under review vis-à-vis the facts prevalent during the earlier years.

ACIT vs. Sakata Inx (India) Ltd - TS-71-ITAT-2018(JPR)-TP - ITA. No. 828/JP/2017 – dated 29/01/2018

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2227. The Tribunal held that where the assessee had paid its AE royalty of 40 percent on its local sales pursuant to which the AE had granted the assessee with a license which was used by the assessee to derive substantial revenues from third parties, it held that the TPO was incorrect in determining the ALP of such payment at Nil as the assessee had not only established the benefit arising out of payment of such royalty but had also duly benchmarked the transaction vis-à-vis uncontrolled parties wherein royalty was paid at 43.75 percent of turnover.

Labvantage Solution Pvt Ltd [TS-836-ITAT-2016 (Kol)-TP] (I.T.A No.1051/Kol/2015)

2228. The Tribunal deleted disallowance of royalty noting that on examination of agreement, royalty of 0.5% of turnover of manufactured and traded had to be paid in addition to reimbursement of expenses. The AO had erred in disallowing the royalty amount by holding that AE had charged more to assessee towards expenses reimbursement than what was contemplated in the agreement. The Tribunal observed that such payments were towards royalty which was in compliance with the terms of the agreement and not excess reimbursements.

Piramal Enterprises Ltd vs Addl. CIT [TS-808-ITAT-2018(Mum)-TP] ITA No.5471/Mum/2017 and ITA No.5583/Mum/2017 dated 30.07.2018

2229. The Tribunal deleted the TP adjustment made on royalty payment made by assessee (engaged in manufacture of explosives) to its AE for use of trademark for sale made to third parties by following the coordinate bench decision in assessee's own case for earlier year wherein a similar adjustment made was deleted noting that two tests of benefits and commercial expediency could not be invoked by the TPO as per the settled legal position in Del HC ruling of EKL Appliances wherein it was held that the TPO could not sit in judgement on a taxpayers business expediency so as to conclude its ALP of international transactions as unreasonable and that it was wholly irrelevant that there are no corresponding benefit since the real question in transfer pricing regime is as to what would be the price to be paid by an independent enterprise vis-à-vis the one shown by the concerned tax payer. Further it also observed that one of the other reasons by TPO for adopting nil price for royalty payment was that the assessee had not made aforesaid payment for use of trademark in the past and TPO had admittedly applied CUP thus, it held that TPO erred in treating assesee itself having paid Nil amount in the past to the AE, as a valid comparable (transaction not an uncontrolled one).

Indian Explosives Private Ltd vs Dy.CIT [TS-1055-ITAT-2018(Kol)-TP] ITA No.1957/Kol/2017 dated 07.09.2018

2230. The Tribunal deleted the TP adjustment on payment of royalty by the assessee to its AE following the coordinate bench decision in assessee's case for earlier year wherein relying on the decision of EKL Appliances, it was held that it was not open to the TPO to question the commercial expediency/ judgement of the assessee as to how it should conduct its business and further, rejected the TPO's nil determination of ALP arrived at by applying CUP.

Indian Explosives P Ltd vs Dy.CIT [TS-735-ITAT-2018(Kol)-TP] ITA No.2336/Kol/2016 dated 13.07.2018

2231. The assessee (engaged in the business of manufacturing and trading of construction and industrial chemicals and adhesives) made payment of royalty for exclusive rights for manufacturing, making available present and future knowhow necessary for manufacture and

for exclusive rights to use the trade mark, in relation to the products of Sika Group of Companies. It had aggregated the payment of royalty with other transactions and applied TNMM. The TPO was of the view that it was a separate transaction and had to benchmarked separately and applied CUP. However, the DRP held that ALP determination made by the assessee aggregating with the other transactions stands. The Tribunal followed the coordinate bench decision in assessee's own case for earlier year wherein it was held that TNMM at entity level is not the MAM as all the international transactions are not of the same category or nature.

DCIT v Sika India Private Limited [TS-1178-ITAT-2018(KOl)-TP] ITA No.393 & 402/Kol/2014 dated 10.10.2018

2232. The Tribunal held that where the assessee made a payment of royalty / technical collaboration fee to its AE @ 1.5 percent of domestic and export sales in lieu of which the AE provided the assessee with a host of services such as engineering services, purchasing services, brand development services, product development, footwear design and construction services, administration and accounting services, financial services etc, and the assessee had proved the receipt of services and the economic and commercial benefits derived therefrom and the actual application / use of such services by the assessee, the TPO was unjustified in determining the ALP at Nil. Further, it dismissed the contention of the Revenue that some of these activities were shareholders activities to monitor the assessee.

DCIT v Bata India Ltd - TS-149-ITAT-2016 (Kol) - TP

2233. The TPO determined the ALP of royalty and technical knowhow fees paid by assessee as NIL on the basis that the assessee was a contract manufacturer and had no exclusive right to sell without the permission of its AE under the agreement.The Tribunal restored the ALP determination of royalty and technical knowhow fees by following the coordinate bench decision in assessee's case for earlier year wherein it accepted assessee's contention that it was a licensed manufacturer noting that basic premise on which disallowances of royalty and technical knowhow expenses were made would fail and also the TPO had not adopted any method to determine the said payment to be NIL. It considered the assessee's submission that the main reason for restriction imposed by AE was with the objective of ensuring smooth business operations, it was not getting a fixed amount of profit and it had exported goods to even non-AE's and thus it was a licensed manufacturer. Accordingly, it remitted the matter back for fresh examination.

Sulzer Pumps India Pvt Ltd vs Dy.CIT [TS-1157-ITAT-2018(Mum)-TP] ITA No.1453/Mum/2014 dated 31.10.2018

2234. The assessee had entered into an agreement for trademark license agreement relating to HALLS with its AE to whom it used to make a payment of royalty at 2.7% of sales. The TPO was of the view that in the instant case there was no transfer of technology or knowhow and payment of royalty was being made for only use of trademark thus, under automatic route royalty is payable to the extent of 1% of the domestic net sales and 2% of the export net sales whereas in case of manufacturing i.e in case of manufacturing / technology royalty, the upper limit was fixed at 5% of domestic net sales and 8% of export net sales and accordingly he allowed payment of royalty for trademark at 1% and made an adjustment. The Tribunal deleted the TP adjustment made on royalty noting that on reading of the original and

amended agreement it becomes clear the assessee shall manufacture licensed product using any technology of the AE provided to the assessee in accordance with the specifications and instructions. Further, it observed that it could not be said that assessee was manufacturing "HALLS" brand product without obtaining the required technical knowhow. Accordingly, it held that the payment of royalty was made at ALP

Mondelez India Foods Pvt. Ltd. vs Addl.CIT [TS-1288-ITAT-2018(Mum)-TP] ITA No.1512/Mum/2013 dated 28.11.2018

2235. Where the TPO denied the royalty payment made on trademark on basis that as per the terms of earlier agreement approved by the Government, the assessee could pay royalty for technical knowhow at the maximum rate of 2% of net sales, whereas, the assessee had paid royalty both for technical knowhow (1.25%) and trademark (1%) aggregating to 2.25% of net sales, the Tribunal deleted the TP adjustment on royalty payment made on trademark by assessee to its AE by relying on coordinate bench decision in assessee's own case for earlier year wherein it was held that royalty for trademark at 1% of sales was allowable and the assessee was in fact paying a lesser amount for its brand Cadbury vis-à-vis other group companies in other parts of the world. Further, the Tribunal had also observed that payment of royalty for trademark at 1% over and above the royalty at 1.25% for technical knowhow was approved by RBI.

Mondelez India Foods Pvt. Ltd. vs Addl.CIT [TS-1288-ITAT-2018(Mum)-TP] ITA No.1512/Mum/2013 dated 28.11.2018

2236. The Tribunal deleted the TP adjustment on royalty payment at 10% of sales made by the assessee[manufacturer of fragrances] for availing technical knowhow from its AE to be utilized in manufacturer of fragrances noting that the TPO did not have power under the statute to determine the ALP of international transaction on estimate basis by weighing in the business expediency factor and had to adopt a method to determine the ALP of transaction. Further, the DRP had concurred with the TPO's view without examining it in the proper perspective. It also observed that as regards the TPO's alternative benchmarking of the transaction by applying external CUP and determining the ALP of the transaction at 1% of the net sales, the assessee had replied in the showcause notice that the comparables could not be taken in view of different geographical location and all the agreements considered were with respect to asset purchase which was not controverted by the TPO. It also noted that TPO had accepted the payment of royalty from AY 2006-07 onwards and in the subsequent years for AY 2010-11 and 2011-12 also.

Firmenich Aromatics India P Ltd vs Dy.CIT [TS-758-ITAT-2018(Mum)-TP] ITA No.2590/Mum/2017 dated 23.07.2018

2237. The Tribunal held that payment of royalty approved by RBI under automatic route or the approval granted by the FIPB would not be conclusive 'ALP' rates. It rejected the assessee's stand that royalty payment at 3% for AY 2012-13 was at ALP since it was within the rates approved by FIPB and held that the relevant FIPB approval was not a specific approval but it merely referred to rates prescribed under the automatic route and also noted that such rates pertained to payment under technology transfer whereas assessee's payment was on account of use of trademark/ brand name. Further, it noted that the Government of India, vide. Press Note No-8 (2009 series) dated December 16, 2009, had waived all the restrictions

on payment of royalty under foreign technology collaboration and put the same under automatic route and therefore it held that under these circumstances the assessee could not be permitted to take this stand that since there were no restrictions on payment of royalty by the Government of India, any amount paid by assessee on account of royalty would ipso-facto be its ALP. It distinguished the ruling of the High Court in SGS India, noting that Press Note No-8 was not brought to the notice of Court / Tribunal. Stating that the rates allowed under the automatic route by the RBI or FIPB were meant to achieve objectives in different areas, it opined that independent ALP-determination needed to be done to find out ALP of royalty and accordingly remitted the issue to the file of AO / TPO.

A.W. Faber Castell (India) P. Ltd. vs. DCIT - TS-283-ITAT-2017(Mum)-TP - I.T.A. No.1037/Mum/2017

2238. The Tribunal held that where the agreement dated July 1, 2008 provided for technical know-how payment on sale of traded finished goods, the disallowance of such royalty by the TPO on the ground that the assessee should not have borne the same, could be restricted only to payments up to June 30, 2008. Further, in respect of technical know-how royalty on manufactured goods, it held that the TPO was not authorized to disallow such expenditure taking the royalty at 1 percent of net sales, where the agreement provided for such payment, merely on the basis of information on the website of the SIA. It further held that service tax on brand usage royalty and technical know-how royalty could not be disallowed since the taxes were the liability of the assessee based on terms of the agreements and the fact that assessee was the receiver of services and therefore no disallowance could be made of such amounts.

Johnson & Johnson Limited v Add CIT- TS-19-ITAT-2016 (Mum) - TP

2239. Regarding disallowance of royalty paid to AE @ 40% of the revenue from software trading, the Tribunal remitted the matter back for de-novo adjudication after considering assessee's submission that payment was made pursuant to a revenue sharing agreement and was nomenclatured as royalty. The Tribunal distinguished co-ordinate bench ruling in assessee's own case for previous AY wherein relief was granted on benefit test and royalty benchmarking done based on CUP-method (which was undisputed in captioned years). The Tribunal thus directed TPO to benchmark the subject mentioned payment vis a vis the comparables afresh, in order to determine the ALP of the said international transaction

M/s. Labvantage Solutions Pvt Ltd vs ACIT Circle 2(1)- TS-405-ITAT-2018(Mum)-TP- ITA No 927 & 2400/Kol/2017 dated 11.05.2018

2240. The Tribunal held that the RBI / FIPB approvals issued vis-à-vis royalty / technical know-how fee were not determinative of ALP and could not be considered as a valid CUP for benchmarking royalty payments to AEs for use of know-how, formulae and trademarks for the manufacture, packing, sale and distribution of 'Brylcreme'. It held that royalty was a separate international transaction and the onus to determine the ALP was on the assessee. It held that the automatic route under which the FIPB / RBI approvals were granted were devised for ease of doing business and therefore could not be equated with the arm's length principle. Noting that the Revenue authorities had determined the ALP of the royalty paid at 1 percent(as opposed to the 5 percent made by the assessee), without properly appreciating

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the trademark agreement submitted by the assessee, it remitted the issue to the file of the AO and directed the assessee to benchmark royalty transactions with independent comparables.
Sara Lee TTK Ltd vs DCIT [TS-663-ITAT-2016(Mum)-TP] /ITA No. 376/Mum/2012

2241. The Tribunal dismissed assessee's appeal for AY 2008-09 as TP-issue relating to royalty paid by assessee to its AE (Matsushita Electric Works Ltd) was resolved under India-Japan MAP. It noted that this issue was referred by AE under India-Japan MAP pursuant to which order was passed wherein royalty payment was agreed to be allowable @ 1.15% and that the order giving effect to MAP was passed by the AO. Since the ground relating to royalty was not pressed by the assessee on account of them being infructuous as on date, the issue was dismissed by the Tribunal.
Anchor Electricals Pvt. Ltd vs. DCIT - TS-325-ITAT-2017(Mum)-TP - I.T.A.No.6930/Mum/2012 & I.T.A.No.326 /Mum/2012

2242. The Tribunal deleted-adjustment in respect of assessee's payment for technical know-how to AE which was at ALP as per TNMM adopted by the assessee. It held that merely because these services were too general, in the perception of the authorities below, or just because the assessee did not need these services from the outside agencies, could be reason enough to hold that the services were not rendered at all. It further held that benefit test does not have much relevance in ALP ascertainment.
Merck Ltd v DCIT - TS-143-ITAT-2016(Mum)-TP

2243. The Tribunal accepted royalty payment @2 percent of net sales price of goods manufactured relying on a series of judicial precedents from the co- ordinate benches including Owens Corning Industries (India)Pvt Ltd ruling wherein it was held that even Reserve Bank of India's approval of royalty could be a reasonable CUP input for determining arm's length.
SI Group India Ltd v DCIT - TS-150-ITAT-2016(Mum)-TP

2244. The Tribunal deleted the TP addition made by the TPO / CIT(A) on royalty charged by the assessee from its AE viz. MBL by benchmarking it with the higher rate of royalty charged by the assesse from its other AE viz MME. It held that the TPO was incorrect in considering another controlled transaction for the purpose of comparability and also further highlighted that there was a geographical difference and difference in respect of the brands and products used.
Marico Ltd v ACIT - TS-411-ITAT-2016 (Mum) - TP I.T.A./8858/Mum/ 2011 I.T.A./8713/Mum/2011

2245. The Tribunal, relying on the order passed by the coordinate bench for the previous years, held that where the assessee had made royalty payment for usage of trademark 'Cadbury' at a rate lower than the rate paid by other group companies for the same trademark, the TPO was unjustified in making an adjustment to the royalty paid.
Mondelez India Foods Pvt ltd v Add CIT - (2016) 47 CCH 0098 (Mum- Trib)

2246. The Tribunal deleted the TP adjustment towards payment of royalty on traded finished goods made by the assessee to Johnson & Johnson USA following the coordinate bench ruling in assessee's own case wherein the Tribunal had noted RBI approval was obtained and had

observed that TPO could not sit in judgment on whether the royalty had to be paid or not and also found that there was no force in the findings of the TPO that royalty was deemed to be included in the brand royalty.

Further, the Tribunal also allowed the technical know-how royalty payment @ 2% / 4% as per the agreement as against the TPO's approach of restricting royalty @ 1% and followed the assessee's own order for the earlier year.

The Tribunal dismissed Revenue's appeal and relied on the co-ordinate bench ruling in assessee's own case to allow the tax and R&D cess paid on technical know-how royalty. The Tribunal in assessee's own case had noted that royalty payments were approved by RBI and further payments had been made in line with the agreement with Johnson and Johnson US and hence no question of disallowance of tax and R&D cess arose.

ACIT vs Johnson & Johnson Ltd [TS-537-ITAT-2018(Mum)-TP] ITA Nos.1776 & 1777/M/2017 and CO No.242/M/2017 dated 18.06.2018

2247. The Tribunal held that approval from the FIPB cannot substitute the determination of ALP under the provisions of the Act as it is not in context of the ALP under the IT provisions. Further it held that since the payment of royalty was a separate transaction it could not be clubbed with the transactions of purchase and sale of goods and material with the AE.

M/s AW Faber Castell (India) Pvt Ltd v DCIT (ITA No 577 / Mum /2015) – TS-447-ITAT-2015(Mum) – TP

2248. The Tribunal, following the decision of the Court in the case of SGS India, accepted the 3% royalty payment made by assessee to its associated enterprise on grant of license and right to use trademarks at 3 percent of turnover, considering that the assessee had received Government approval for royalty rate at 8 percent on exports and 5 percent on domestic sales.

A W Faber Castell (India) Pvt Ltd [TS-798-ITAT-2016 (Mum)-TP] (IT(TP)A No.1018/M/2016)

2249. The TPO separately benchmarked royalty transaction (which was aggregated with manufacturing activity) and applied CUP as the MAM as against TNMM applied by assessee. The rate of royalty paid by assessee (5% on value addition) was compared to 3% royalty payment made by Maruti Udyog Ltd. to Suzuki Motors Corporation (which was a controlled transaction) and an upward adjustment was made. The CIT(A) deleted the addition observing that TP adjustment determined by benchmarking controlled transaction with another controlled transaction could not be at ALP. The Tribunal dismissed Revenue's appeal and following the coordinate bench ruling in assessee's own case held that royalty had to be aggregated with manufacturing activities since it was linked with production and sales activity in absence of production of sales and sale of products, there would be no question of payment of royalty. Further, upheld CIT(A)'s order as regards the non-applicability of comparing with a controlled transaction under CUP.

ACIT vs Mercedes-Benz India Pvt Ltd (formerly known as Daimler Chrysler India Pvt. Ltd.) [TS-1164-ITAT-2018(PUN)-TP] ITA NO.1110/Pun/2013 dated 25.10.2018

2250. The Tribunal deleted the TP adjustment on royalty paid by assessee (engaged in business of manufacture and sale of propeller shafts and light axles in the automotive industry segment)

for use of licensed technology in the manufacture pursuant to renewal of licensing agreement by following coordinate bench decision in assessee's own case for earlier year wherein a similar adjustment was deleted relying on ratio laid down by Bombay HC in SGS India Pvt Ltd and Dow Agrosciences India Pvt Ltd wherein it was held that where the Royalties were paid in terms of approval granted by SIA / RBI, then the same were to be considered at arm's length rate. In the instant case, royalty paid was approved by Secretariat of Industrial Approval (SIA), Ministry of Industry, Government of India and RBI. Further, the Tribunal in the earlier year also held that it was beyond the scope of TPO while benchmarking the transaction to hold that assessee had not derived any benefit.

Spicer India Pvt Ltd vs Asst CIT [TS-1278-ITAT-2018-(Pune)-TP] ITA No.2498/Pun/2016 dated 11.12.2018

2251. The Tribunal dismissed Revenue's appeal and upheld the deletion of TP adjustment on royalty payment to AE observing that the Tribunal in the earlier years had found royalty payment to be at ALP noting that it was approved by RBI/SIA.

Spicer India Private Limited (Formerly known as Spicer India Limited) vs. ACIT - TS-150-ITAT-2018(PUN)-TP - ITA No. 376/PUN/2016 dated 09.02.2018

2252. The Tribunal, noting that co-ordinate bench ruling in assessee's own case in AY 2009-10 had held that RBI and SIA approved 'royalty' payment to AE was at ALP and had rejected TPO's determination of Nil ALP held that since the assessee's royalty payment to AE for subject AY was germinating from same agreement which was subject matter of dispute in AY 2009-10, the CIT(A) was justified in rejecting the TPO's determination of ALP at NIL.

ACIT v Spicer India Private Limited - TS- 971-ITAT-2017(PUN)-TP -ITA No.1321/PUN/2015 dated 27.10.2017

2253. Where the assessee's Rs. 33.29 lakhs royalty payment to AE was on the basis of RBI-approved agreement which was initially entered into in 1992 between two unrelated parties, the Tribunal, relying on the decision in the case of Ballast Nedam Dredging held that since the price paid to associated enterprise was the same as entered when the entities were independent entities the same had to be considered as uncontrolled transaction. Further, noting that the assessee had paid royalty to its associated enterprises as per the rates which were approved by RBI, the Tribunal held that the said transaction was at arm's length. Further, observing that assessee's royalty payment in all preceding years from AYs 1997-98 to 2002-03 were allowed and Revenue had not brought any evidence to show change in facts, Tribunal upheld deletion of royalty payment to AE.

DCIT vs Kalyan Hayes Lemmerz Ltd- TS- 1001-ITAT-2017(PUN)-TP ITA Nos.999 & 1000/PUN/2013 dated 11.12.2017

2254. Where the assessee had entered into a Drive Shaft Technology Licensing Agreement and Technology License Agreement with its AE, under which it was granted license, patents and design information in respect of drive shafts for which it paid royalty at 2.85% of the net sales of license products, which had been approved by the Secretariat of Industrial Approval, Ministry of Industry, Government of India (SIA), vide letter dated 28/31.01.2003. and royalty was being paid for AY's 2005-06 to 2008-09, which was considered to be at arm's length by the authorities, the Tribunal noting that the AEs were supporting the assessee in technology

upgradation by bringing the latest technology in drive train systems to India and that assessee had submitted the required documentation in support of the payment and relying on the rulings of ACIT Vs. Dow Agrosciences India Pvt. Ltd [TS-489-ITAT-2016(Mum)-TP] and Bombay HC ruling of CIT Vs. SGS India Pvt. Ltd [TS-569-HC-2015(BOM)-TP], held that where the royalty was approved by the RBI and the SIA, the same constituted CUP data and thus, the royalty could be considered to be at arm's-length. Further, it held that the jurisdiction and power of TPO was to determine arm's length price of royalty and the order of TPO holding that the assessee had not derived any benefit under the said agreement was beyond the scope of TPO

Spicer India Limited Vs ACIT - TS-99-ITAT-2017(PUN)-TP - ITA No.251/PUN/2014 dated 10.02.2017

2255. The Tribunal deleted Rs 7.5 cr. adhoc adjustment made by the AO in respect of royalty payment as the assessee had undertaken a similar transaction for succeeding AY 2010-11 which was accepted at arm's length. Relying on the decision in the case of Spicer India Limited [TS-569- HC-2015(BOM)-TP, it held that the Revenue had failed to show difference between the two transactions and the procedure laid down under the transfer pricing provisions had not been followed because it made an adhoc adjustment which was not as per law. Further, it noted that the no addition on account of royalty had been made in the TPO's order and that AO had made the addition on account of royalty on the basis of the show cause notice of the TPO. Additionally, the Tribunal relying on the ruling in the case of SGS India Pvt Ltd wherein rate of royalty approved by SIA/RBI was upheld as CUP data and Spicer India Limited [TS-99-ITAT-2017(PUN)-TP] wherein rate of royalty lesser than 3% was considered to be at arm's length as it was as per RBI approved rate, held that since royalty payment in the instant case was also less than 3%, the same could be considered to be at ALP.

John Deere India Pvt Ltd [TS-398-ITAT-2017(PUN)-TP- ITA No.828/PUN/2014 dated 17.05.2017

Management fees / Intra Group services

2256. The Court upheld the Tribunal's order deleting TPO's disallowance of overheads allocated by JV partners to assessee (an AOP with 5 members formed for executing contract for Delhi Metro Rail Corporation). As per the JV agreement, the members were permitted to allocate their head office (HO) expenses to the extent of 8.5% of turnover of the assessee in their profit sharing ratio, however TPO disallowed the same on the ground that other direct expenses of the JV partners were debited in assessee's books. The Court noted the Tribunal's observation that the TPO had failed to identify comparables to justify that overhead allocation in case of assessee was in excess of comparable transactions and that both the CIT(A) and ITAT took note of certificates from JVs' auditors confirming overhead charging rate and its apportionment to the assessee's operations and thus, rejected TPO's finding that assessee had not furnished details in support of its claim. Accordingly, the Court held that the issue urged by Revenue was essentially of finding of facts, which were not shown to be perverse and accordingly held that no substantial question of law arose.

Pr. CIT vs. International Metro Civil Contractors - [2018] 92 taxmann.com 105 (Bombay) Income Tax Appeal No. 559 of 2015 dated 07.03.2018

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2257. Where the assessee had availed services from its AE in respect of only 5 areas out of 11 mentioned in the agreement, consequent to which the TPO made proportionate disallowance for services not availed by the assessee and the Tribunal following its earlier year's decision in the assessee's own case, deleted the TP addition since the TPO had made disallowance without applying the method prescribed under TP Regulations, the Court, following its earlier order in the case of assessee, dismissed the Revenue's appeal as neither any specific TP-method was applied nor was any benchmarking with comparables carried out.
Merck Ltd [TS-130-HC-2017(BOM)-TP] [ITA No. 909 of 2014]

2258. The Court upheld the finding of the Tribunal that where no method under section 92C was applied to determine the ALP in respect of technical consultancy fee paid by the assessee to its AE and where no exercise was undertaken to benchmark the value of services received by the assessee no addition could be made on the basis that the assessee did not receive adequate benefit for the fee paid. Merely because the agreement entered into between the assessee and the AE provided for 12 categories of services out of which the assessee availed 3 services, the TPO was not correct in making an ad-hoc addition without carrying out any benchmarking exercise. It also upheld the finding of the Tribunal that the fee of Rs.1.57 crore was in respect of the assessee's right to avail and the AE's obligation to provide technical assistance in any of the 12 services enlisted in the agreement.
CIT v Merck Ltd - TS-608-HC-2016 (Bom) - TP INCOME TAX APPEAL NO. 272 OF 2014

2259. Where the assessee had made a payment of technical know- how fee to its AE and the TPO observed that it had availed services from AE in respect of only 5 areas out of 11 mentioned in the agreement with AE, against which he made a proportionate disallowance by taking the ALP for services not availed by assessee at Nil, the Court, following its own order for AY 2003-04, held that assessee could have availed all or any one of the services listed in the agreement as per its business needs and it need not have necessarily availed all services. Accordingly, it rejected the Revenue's plea for disallowing proportionate technical knowhow fee paid by assessee to AE during AY 2006-07.
CIT vs. Merck Ltd - TS-130-HC-2017(BOM)-TP - INCOME TAX APPEAL NO. 909 of 2014 dated 22.02.2017

2260. The Court upheld Tribunal's decision of deleting TP-adjustment in case of an assessee rendering support services by following co-ordinate bench ruling in 'Li and Fung India Pvt. Ltd. The Court rejected Revenue's submission that there were significant differences in assessee's international transactions as opposed to those carried out by Li and Fung India and stated that Tribunal's findings with respect to the functional similarity and identity between Li and Fung India and assessee were clear. The Court observed that like Li and Fung India the assessee did not assume any risk and were dependent entirely for reimbursement of its expenses by the AEs and were thus entitled to the annual and identical markup of 5% over the annual expenditure.
PCIT-4 vs GAP International Sourcing India P Ltd- TS-259-HC-2018(Del)-TP- ITA No 1033/2017 dated 10.04.2018

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2261. Noting that the Tribunal had followed co-ordinate bench's ruling in assessee's own case for AYs 2007-08 and 2008-09 wherein similar TP-adjustment was deleted allowing aggregation of intra- group services closely linked to manufacturing business under TNMM, the Court, dismissed Revenue's appeal against Tribunal's order holding that there was no substantial question of law for consideration.

Pr. CIT vs Avery Dennison (India) Pvt Ltd-TS-589-HC-2017(DEL)-TP-ITA No. 516/2017 dated 18.07.2017

Pr. CIT vs. Avery Dennison (India) Pvt. Ltd - TS-590-HC-2017(DEL)-TP - ITA 517/2017 dated 18.07.2017

2262. The Court kept open the substantial question of law raised in appeal against the order of the Tribunal i.e. whether addition u/s 40(a)(ia) can be made with respect to expenditure incurred for intragroup service, irrespective of any addition being made u/s 92CA [i.e. TP adjustment] with respect to the said expenditure. It was noted that the Tribunal had remanded back the issue to the file of the AO. The Court thus held that the issue would now depend on the AO's findings under the remand proceedings after considering the assessee's contention in this regard. Accordingly, the appeal was disposed of.

SKF Technologies India P Ltd v DCIT [TS-610-HC-2018(KAR)-TP] ITA No.83/2017 dated 19.06.2018

2263. The Court upheld the order of the Tribunal allowing expenditure of Rs.1.25 crore towards legal and professional charges paid by the assessee to its UK based AE and dismissed the contention of the Revenue that the same was to be disallowed as the assessee was unable to establish that the services were actually rendered by the AE by noting that the assessee was able to achieve an incremental turnover of Rs.29 crore as a result of availing of such services. It further held that the said services would not necessarily be recorded in writing since advice, instructions would have been given orally.

CIT v Max India Ltd – TS-948-HC-2016 (P&H) – TP

2264. The Court rejected the reasoning of the Tribunal and TPO in determining the ALP of the fees paid by the assessee for professional management and SAP consultancy services at Nil on the ground that the assessee was unable to substantiate that the payment for services increased profits. It held that profit earned by the assessee could be for reasons other than those relating to international transactions and that mere profitability did not indicate that the transaction was at arms length. It further observed that while profit may reflect upon the genuineness of the assessee's claim, it is not determinative of the same.

Knorr Bremse India Pvt Ltd v ACIT (INCOME TAX APPEAL No.182 of 2013) – TS-558-HC-2015 (P&H)-TP

2265. The Tribunal relying on the order of the coordinate bench in assessee's own case rejected TPO's determination of ALP of the management fees at nil and quoted the observations of the bench wherein they had questioned the authority of the TPO to determine the necessity and expediency of the management fees. The TPO had to only ascertain the arm's length price. Further, the Tribunal also noted that the management fees was held to be in the nature of both capital and revenue expenditure and to be allocated in 60:40 ratio because the person to

whom the fees were paid was involved in the day to day activities of the assessee and also assisted in the expansion and increase in the installed capacity.

Tudor India Private Limited (formerly known as Tudor India Limited) [TS-458-ITAT-2018(Ahd)-TP] ITA No.2585/Ahd/2014 dated 06.06.2018

2266. The assessee made payments to its AE towards information management support at 10 percent mark-up of the costs allocated by the AE, which it benchmarked by adopting comparables in the IT sector. The TPO, contended that the services rendered by the AEs were more of infrastructure support than software development (since the software were procured from outside and distributed to the AEs) and rejected the mark-up of 10 percent and adopted a 3 percent mark-up as ALP. The Tribunal held that no specific comparables had been considered by the Revenue for the purpose of determining mark-up at 3 percent and that the TPO was incorrect in rejecting the comparables selected by the assessee merely because the AE was not developing the software on its own but was providing software obtained from outside vendors. Accordingly, it deleted the addition.

Sabic Innovative Plastics India Pvt Ltd – TS-234-ITAT-2017 (Ahd) - TP

2267. The Tribunal deleted the TP adjustment with respect to the payment of intra-group management services made by the assessee to its AEs. The TPO had determined the ALP of the payment at Nil under the CUP method, contending that there were no services rendered by the AEs and that the benefit derived by the assessee was not commensurate with the payment. The Tribunal held that whether a particular expense on services received actually benefits an assessee was not even a consideration for determination of ALP and held that the ALP determination was to be made on the basis of a recognized method and not on the basis of subjective perceptions as done by the TPO. Noting that the TPO failed to bring anything on record to show that in an arm's length situation these services would be provided without any consideration, it deleted the ALP adjustments.

Sabic Innovative Plastics India Pvt Ltd – TS-234-ITAT-2017 (Ahd) – TP

2268. The Tribunal deleted the TP-adjustments for AYs 2009-10 and 2011-12 on account of payment made by assessee to its AEs on account of intra-group management services. It rejected the TPO/DRP's determination of ALP at Nil under the CUP and held that whether a particular expense on services received actually benefitted an assessee, could not have any role in determining ALP of that service. Observing the nature of services rendered on random sample basis, it concluded that there was reasonable evidence of rendition of services and held the ALP could not be determined at Nil based on subjective perceptions, without anything on record to show that the ALP of the services were in fact Nil.

Further, noting that that no specific comparables had been considered by Revenue, it also deleted the TP-adjustment on payment towards information management support made by TPO by applying 3% mark-up on costs vis-a-vis the 10% mark-up applied by assessee. It rejected the reasoning of the TPO i.e. that the services rendered by AE was more of infrastructure support than software development, because the software was being procured from outside and distributed to AEs and held that the variation in the mark-up proposed by the TPO was based on the perceptions of the TPO and not any cogent material.

Sabic Innovative Plastics India Pvt Ltd [TS-234-ITAT-2017(Ahd)-TP] - ITA No. 1125/Ahd/ 2014 and IT (TP) No. 427/Ahd/16 dated 17.03.2017

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2269. The assessee under a cost sharing arrangement had paid management fees to its French parent company and applied TNMM as the most appropriate method. However, the TPO determined ALP of management fees at NIL contending that the assessee had failed to justify the payment on the basis of receipt and benefit test and that the services were in the nature of stewardship or shareholder activities and the same should not have been charged by the AE. Accordingly, he made TP addition. The CIT(A) upheld the AO's TP addition on the ground that the assessee had not provided details regarding the experts/professionals who had actually rendered the specific services. The Tribunal deleted the TP adjustment on the ground that TPO had not adopted any permissible method for determining ALP at NIL. It further observed that the assessee had submitted evidence for the visits by representatives of AE for rendition of services and had also furnished cost allocation agreement. Accordingly, it held that it was not open for TPO to bother about the business expediency and held that for the purpose of determining ALP at NIL, the TPO had to demonstrate that the said services were available for NIL consideration in an uncontrolled situation. As the TPO failed to do so, it deleted the TP addition made by the TPO.

Schneider Electric India Pvt Ltd [TS-433-ITAT-2017(Ahd)-TP] ITA No. 209/Ahd/2015

2270. The Tribunal upheld ALP adjustment made by the TPO in respect of payment of management fee by assessee (engaged in the business of manufacturing, trading and marketing) to its AE as the assessee had failed to provide proof of actual rendition of services by AE. The assessee had submitted transfer pricing study report adopting TNMM at entity level to justify ALP of all its transactions. Considering the fact that when no management fee was paid in the year 2004-05, the profit was 48% and that in FY 2005-06, after payment of management fee, the profit was 35.95%; the TPO accepted all other transactions except the transaction of management fee at arm's length and considered it as a separate transaction. The TPO accordingly inferred that the above payment had not resulted in any tangible benefit or economic value to the assessee . Accordingly, held that the transaction was a sham transaction which could not be bundled with others and held that the arm's length price was 'nil'. Relying on the decision in the case of EKL Appliances Ltd [TS-206-HC-2012(DEL)-TP] and Volvo India Private Limited [TS-993-ITAT-2016(Bang)-TP], the Tribunal held that ALP of management services fee could not be determined at 'nil' by questioning the necessity or the benefits out of expenditure incurred, but the onus to furnish proof of actual receipt of services by appellant from its AE was on the assessee. It held that in the present case, it was not discernible that the appellant made any attempt to furnish the proof of rendition of services. In respect of additional evidence submitted by assessee in the form of email correspondence and EDP (Electronic data processing) screenshot, the Tribunal opined that the additional evidence could be admitted by the Tribunal at its discretion only in the event that the party submitting the additional evidence satisfied the Tribunal that it was prevented by sufficient cause from providing such evidence before lower authorities and this evidence would have a material bearing on the issue which was to be deiced by the tribunal. In the present case, the appellant had not explained as to how it was prevented from furnishing the additional evidence before lower authorities and how it proved the rendition of services. Accordingly, it held that the TPO was justified in making ALP adjustment.

TaeguTec India Pvt Ltd vs DCIT -TS-454-ITAT-2017(Bang)-TP- IT(TP)A No.1337/bang/2010 dated 24.05.2017

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2271. The Tribunal held that where the assessee had produced all relevant details as well as the evidence in support of the claim that the AE had rendered the services as per the agreement between the parties, the TPO was incorrect in determining the ALP of intra-group services at Nil on the basis that the intra-group services did not result in increase of profit margin and that intra-group services to the extent of cost of services should have been allowed.

DCIT v Essentra India Pvt Ltd (IT(TP)A No.68/Bang/2011) – TS-537-ITAT-2015 (Bang) – TP

2272. The Tribunal held that without giving a finding that the assessee has also incurred expenditure in respect of the same services over and above the management fees paid to the AE it cannot be said that the assessee has not received the alleged management services. The Tribunal further held that even though APA was not applicable for the subject year, making a separate adjustment by TPO by determining ALP of management fees at Nil was contrary to the stand of the department itself while agreeing to APA. However, as TPO had not examined the matter by considering management fees as part of operating cost for the purpose of testing assessee's ITES transactions separately as per Sec 92, the Tribunal set aside the matter back to AO/TPO for reconsideration.

AXA Technologies Shared Services Pvt Ltd [TS-503-ITAT-2016(Bang)- TP] - I.T.(T.P)A. No.659/Bang/2012

2273. The Tribunal relying on the earlier year's decision in the case of the assessee, allowed payment for intra-group services rendered by the AE to the extent of cost of services (not including the mark-up paid). The TPO had determined the ALP of the entire payment at Nil on the ground that the intra- group service did not result in an increase in the profit margin of the assessee.

Essentra India Pvt Ltd v DCIT [IT(TP)A No 1308 / Bang / 2011] – TS-574-ITAT-2015 (Bang) – TP

2274. The Tribunal allowed the management fees paid by the assessee to its AE for services in the areas of Administration, Finance, Treasury etc which were used by the assessee to undertake its business operations in India. The management fee was allocated to the group concerns on a scientific basis (head count, annualized sales) by the AE who was a Centralized service provider. Relying on the decision of the Tribunal in Dresser Rand India Pvt Ltd and the fact that the assessee had furnished evidences to substantiate the said fee, it allowed the payment of management fee.

Ingersoll Rand (India) Ltd v DCIT [IT(TP)A No 228 / Bang / 2015] – TS-572-ITAT-2015 (Bang) – TP

2275. The Tribunal allowed assessee's appeal for AY 2008-09, (wherein the CIT(A) applied the CUP method to benchmark payment of management fees) by noting that the Tribunal in the prior AY [TS-503-ITAT-2016(Bang)-TP] had considered the identical issue in the assessee's own case and had accepted the benchmarking of management fees along with ITES, on a composite transaction basis, under TNMM. It also noted that the Department had accepted the management fees on the basis of TNMM along with other services under the Advance Pricing
Agreement.

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AXA Technologies Shared Services Pvt. Ltd (formerly known as AXA Technology Services India Pvt. Ltd) vs. DCIT - TS-210-ITAT-2017(Bang)-TP - IT(TP)A No.12/Bang/2013 dated 15.03.2017

2276. The Tribunal upheld the TP adjustment made by the TPO by determining the ALP of the management and support services fee paid by the assessee to its AE at Nil as the assessee had failed to establish that such services were actually rendered by the AE. It accepted the well settled position of law that the AO / TPO cannot question the necessity or benefits of expenditure incurred but observed that the onus to prove that the services were actually rendered was on the assessee. It noted that the assessee had only produced certain correspondences which did not prove the rendition of services and held that the failure to discharge the onus could lead to the presumption that the assessee had no evidence to establish that services of management support were rendered by the AE.

Volvo India Pvt Ltd – TS-993-ITAT-2016 (Bang) – TP

2277. The Tribunal remitted the issue relating to TP-adjustment of Rs. 6.19 Crore on payment made by assessee to its AEs towards management fee for AY 2007-08 for which TPO had determined ALP at 'Nil' and accepted the assessee's contention that certain evidence filed by it was not examined by the TPO while determining the ALP. It followed the decision for earlier AY 2006-07 in the case of the assessee wherein it was held that the AO could not disallow entire management fee expenditure on the ground that assessee has not proved the commercial benefit from such payment. Consequently, it remitted matter to AO/TPO to re-examine the evidence filed by the assessee and to re-determine ALP after analyzing the same.

Safran Engineering Services India Pvt. Ltd. (formerly Safran Aerospace India Pvt. Ltd.) Vs DCIT – TS-93-ITAT-2017 (Bang) – TP - IT(TP)A No.1169/Bang/2011 dated 25.01.2017

2278. Where the TPO had made an adjustment by treating ALP of service fee as NIL on the ground that assesse had failed to prove receipt of actual services/justify payment of fees, which was deleted by the DRP after considering services of managing director to the company, the Tribunal relying on Volvo India ruling (wherein it was inter alia held that onus always lies on the assessee to prove receipt of services from AE), held that DRP had not referred to any evidence or dealt with the aspect of receipt of services by the assessee from AE towards management support services and further, assessee had also not filed any evidence to substantiate receipt of services from AE. Accordingly, allowing Revenue's appeal, it rejected assessee's request for remand of issue relating to payment of management technical support and professional fee to AE for de- novo adjudication and confirmed the adjustment made by the TPO.

ITO vs Safran Engineering Services India Pvt. Ltd – TS- 949-ITAT-2017(bang)-TP-IT(TP)A NO. 451/BANG/2015 dated 20.11.2017

WM India Technical and Consulting Services Pvt Ltd vs. ACIT-TS-877-ITAT-2017(DEL)-TP- ITA No. 5875 / del / 2017 dated 13.10.2017

2279. The Tribunal, rejected TPO's 'NIL' ALP determination for services provided by AE and restored the issue back to the file of TPO for verification and examination of evidence submitted by assessee. It noted that an identical issue for AY 2007-08 was remitted back to

AO/TPO and Revenue's appeal against the Tribunal's order was dismissed by the High Court, and in the second round of litigation, Tribunal had again remanded the issue for giving a specific decision. For the relevant year, the Tribunal carried out a prima facie examination of the assessee's agreement with its AE which had an enabling provision for payment by assessee for brief visit of personnel, specialized technical services management team and held that the assessee had to establish basis for payment along with rendition of services by AE. Accordingly, It held that the TPO/AO was required to examine the evidence produced and give a speaking order.

Fosroc Chemicals India Pvt Ltd vs ACIT-TS-547-ITAT-2017(Bang)-TP-IT(TP)A No. 279/bang/2014 dated 31.05.2017

2280. Assessee's parent formed a joint venture with an Indian entity to secure 3 highway projects in India under a contract with NHAI and part of the work was allotted to assessee through supplementary arrangement which was reported as international transaction by assessee. Due to a delay in completion of project, the assessee had incurred losses as a result of which, the TPO made an addition to the income of the assessee contending that the transaction was not at ALP. Following the order of the co-ordinate bench for AY 2004-05 to 2007-08 in the assessee's own case, the Tribunal held that where the TPO had accepted the transaction to be at ALP in the hands of the AE, then he could not take a different stand in the case of the other party to the transaction i.e. Assessee herein. Accordingly, it deleted the TP adjustment.

UE Development India Pvt Ltd v DCIT – TS-550-ITAT-2017 (Bang) – TP - IT(TP)A No.1506 /Bang/2012 -dated 14.6.2017

2281. The Tribunal held that he domain of examining commensurate benefit derived by the assessee from services received on account of management consultancy and technical fees paid to its AE, lies with the AO and not the TPO.

Forsoc Chemicals India Pvt Ltd v DCIT [M.P. No.47/Bang/2015] - TS-407-ITAT-2015(Bang)-TP

2282. The Tribunal remitted the determination of ALP of intra-group services paid by the assessee to its AE, which was benchmarked by the assessee by aggregating the intra-group services with other international transactions under its manufacturing segment which was rejected by the TPO who determined the ALP at Nil on the ground that the assessee could not furnish evidence relating to services received from the AEs. Relying on the decision in the assessee's own case for earlier years, it directed the TPO to find out whether the assessee received any service from the AE from which assessee had derived any benefit.

SKF Technologies India Pvt Ltd – TS-52-ITAT-2017 (Bang) - TP

2283. Noting that there was a close nexus between all international transactions undertaken by assessee, the Tribunal held that the aggregation of these transactions with other transactions was required, and the most appropriate method was to adopt TNMM at entity level for the purpose of the bench marking the transactions and accordingly remitted the matter to the file of AO/TPO directing it to aggregate the transactions. The TPO had questioned the payment of benchmarking of payment of management fees and technical fees and held that there was no basis for assessee's adoption of 10% and 15% markup

respectively. Accordingly, it made an adjustment which was confirmed by CIT(A). The assessee contended that the TP study report adopting TNMM at entity level was accepted by the TPO and therefore, there was no need of separate bench marking in respect of transactions of royalty and technical fee as the same formed part of operating expenditure. Observing that the Revenue had no objection if the matter was remitted back to the TPO to adopt TNMM at entity level, the Tribunal remanded the matter back to the file of AO/TPO.

Fosroc Chemicals India Pvt Ltd vs. ACIT-TS-572-ITAT-2017(bang)-TP IT(TP)A No.1813/Bang/2013 dated 21.06.2017

2284. Where the TPO/DRP rejected assessee's contention that the transaction of payment of management, technical and professional fees should be aggregated with software development services under TNMM and proceeded to determine ALP at Nil by applying CUP-method on the basis that assessee failed to demonstrate benefit derived out of such payment for such services, the Tribunal, relying on the decision in the case of 3M India Ltd [TS-293-ITAT-2016(Bang)-TP] (wherein it was held that it is incumbent on the assessee to prove that services are actually received by the assessee and failure to do so may result in ALP adjustment), upheld the TP adjustment on account of payment of management, technical and professional fees paid by assessee to AE for AY 2011-12.

Safran Engineering Services India Pvt. Ltd vs. ACIT-TS-990-ITAT-2017(Bang)-TP dated 11.12.2017

2285. The Tribunal held that the TPO was incorrect in determining the ALP of intra-group services at Nil on the ground that the services had not resulted in any profit margin increase.

DCIT vs. Payne (India) Pvt Ltd [IT(TP)A No.446(B)/2012] - TS-346-ITAT-2015(Bang)-TP

2286. The Tribunal passed an ex-parte order upholding the CIT(A)'s order confirming the TP adjustment on professional services availed by the assessee and accepting the TPO's nil determination of the ALP on the ground that the CIT(A) had passed a detailed order while adjudicating the issue.

Faurecia Automotive Seating India Pvt Ltd vs ACIT [TS-928-ITAT-2018(Bang)-TP] IT(TP) A No.812/Bang/2017 dated 21.08.2018

2287. The Tribunal, relying on co-ordinate bench ruling in the assessee own case for AY 2007-08 allowed payment for intra group services to the extent cost was substantiated and upheld DRP's order for AY 2011-12 that intra-group managerial services rendered by the AE to the assessee were at ALP. It rejected Revenue's contention that the assessee could not establish that services were rendered by AE against which assessee had made payment.

Essentra India Pvt Ltd [TS-368-ITAT-2017(Bang)-TP- I.T.(TP).A No.311/BANG/2016 dated 31.03.2017

2288. Where the TPO had rejected assessee's approach of aggregating intra-group services paid by it to its AE with other international transactions under its manufacturing segment and determined its ALP at NIL contending that assessee could not furnish evidence relating to services received from AEs, the Tribunal, relying upon the ruling in assessee's own case for AYs 2006-07 & 2007-08, remanded the matter back to TPO for fresh consideration, observing that assessee ought to establish receipt of benefits on account of services rendered by its

AEs and thereafter the TPO was to determine ALP of such services with reference to similar payments made by independent enterprise in uncontrolled transactions.

SKF Technologies India Pvt. Ltd vs. ACIT – TS-52-ITAT-2017 (Bang) – TP - IT(TP)A No.1563/Bang/2012 dated 31.1.2017

2289. The Tribunal set aside the CIT(A)'s order upholding the TP addition of Rs 97 lakhs on payment of management fees. It upheld the TPO and CIT(A)'s segregated benchmarking of the of payment of management fees from the TNMM analysis but held that the CIT(A) erred in questioning the commercial expediency behind incurring the said expenditure as it was in excess of his powers while determining the ALP of the payment. Relying on the order of the Tribunal for the earlier years on the similar issue, it remanded the matter back to the TPO for a fresh examination in light of the substantiating evidence filed by the assessee proving the receipt of services.

DMG Mori Seiki India Machines And Services Pvt. Ltd vs DCIT - TS-535-ITAT-2018(Bang)-TP - IT(TP)A 1617/Bang/2012 dated 02-05-2018

2290. The Tribunal rejected the TPO's Nil determination of management fees noting that the Tribunal in the assessee's own case for earlier year had held that the TPO's nil determination was not under any legally permissible method of ascertaining ALP and the TPO had erroneously determined that the services did not have an intrinsic value without any cogent method and stated that the assessee could have performed them on its own inspite of clear documentation records maintained by the assessee. The Tribunal in the earlier year had restored the matter back to CIT(A) for correctness of ALP at entity level by aggregating the transactions including the management costs and adopting TNMM which had not been examined by the CIT(A). Thus, in line with the earlier year **the Tribunal** restored the matter back to DRP (since the assessee had approached the DRP) with similar directions.

Adcock Ingram Limited vs DCIT [TS-999-ITAT-2018(Bang)-TP] IT(TP)A No.125/Bang/2017 dated 03.08.2018

2291. The Tribunal held that though the ALP of support services rendered by an AE could not be determined at 'Nil' by questioning the necessity or benefits of expenditure incurred, such expenditure could only be allowed after conclusively proving that there was actual rendition of services by the AE. Therefore, where the assessee had filed certain additional evidences in support of rendition of services before the Tribunal for the first time and the CIT(A) had allowed such expenses without being able to examine such evidence, the matter was to be remanded back to the file of the AO / TPO. It dismissed the argument of the assessee that the services were accepted to be at ALP in the previous years and held that the concept of res judicata was inapplicable to assessment proceedings.

3M India Ltd v ACIT - TS-293-ITAT-2016 (Bang) - TP

2292. The TPO had considered professional charges paid to Motilal Oswal for advisory and professional charges for acquiring an AE which was subsequently recovered from the AE itself as marketing support services by the assessee to the AE and charged a markup of 15% (i.e. charged @ 12.5% for lending rate and 2.5% entrepreneurial efforts). The DRP deleted the addition of 2.5% made on account of entrepreneurial efforts. The assessee argued that the expenses were charged on actual basis and no income could arise from these

transactions as it was not in the line of providing acquisition services. The Tribunal restored the TP adjustment of markup on reimbursement received from its AE to DRP to obtain the required details of acquisition by the assessee and verify the details of expenditure incurred by assessee.

Punjab Chemicals & Crop Protection Ltd vs. Addl.CIT [TS-965-ITAT-2018(CHANDI)-TP] ITA No.60/Chd/2013 and ITA No.100/Chd/2014 dated 23.07.2018

2293. The Tribunal held that the AO had no jurisdiction to nullify the transaction of intra group services when the expenditure was incurred for business purposes and the operating margin of the assessee after considering the impugned expenditure was higher than that of its comparables. However, it noted that the assessee failed to substantiate its claim of whether the services, which represented almost 55 percent of the total payment for services, were actually received and therefore remitted the matter to the AO for fresh consideration opining that the expenditure would be allowed if the assessee produced adequate particulars.

Control Techniques India Pvt Ltd – TS-1024 – ITAT-2016 (Chny) – TP

2294. The assessee availed support services / management services from its AEs for which it paid a fee and benchmarked the said payment under TNMM. The TPO adopting CUP method determined the ALP of the said services at Nil on the ground that the assessee was unable to substantiate its claim of expenditure. On submission of evidence by the assessee, the DRP reduced the addition from Rs.2.65 crore to Rs.2.26 crore and observed that many of the services were duplicative in nature as the assessee failed to explain how payments were made to its employees as well as its AEs for similar services. The Tribunal relying on the decision in the case of Control Techniques India Pvt. Ltd. [TS-1024-ITAT-2016(CHNY)-TP] and noting the assessee's submission that the assessing authorities had not considered the documentary evidence submitted in support of the services availed by it, remitted the issue to DRP with direction to provide the assessee with an opportunity to substantiate its claim with supporting the details of expenditure in the nature of management fees paid to the AEs.

Cook India Medical Devices Private Limited vs. JCIT - TS-306-ITAT-2017(CHNY)-TP - /ITA No.: 2546/Mds/2016 dated 30.03.2017

2295. The assessee had sold software to its AE and the sale consideration, which was based on the valuation report of an independent valuer, was claimed to be at ALP. While determining the value / ALP, the Valuer had made his projections on basis of estimated life period of 8, 10 and 15 years under three different scenarios (RFR method, Historical cost and weighted average method). The TPO rejected the valuation report of the independent valuer and thereafter computed the ALP of sale consideration by taking the average of three values worked out by the valuer using three different methods (Relief from royalty, Historical cost and Weighted Average) for estimated life of the asset as 8 years. The DRP upheld the TPO's order and held that the TPO had adopted the right method considering the valuer's projections based on the estimated life of the asset which was expected to be atleast 8 years. The Tribunal restored the transaction of sale of software noting that from the facts of the case, the Revenue and assessee had not adopted any of the methods prescribed U/s.92C(i) of the Act for determining the ALP. It accepted Revenue's contention that there were various other comparables available to compare with the transaction made by the assessee and hence the provisions of Section 92C(i) of the Act could be complied with.

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Siemens Limited (Successor in interest to Siemens Building Technologies Pvt. Ltd.,) vs DCIT [TS-755-ITAT-2018(CHNY)-TP] ITA No.796/Chny/2016 dated 17.07.2018

2296. Where the assessee paid a sum of around Rs. 2 crores as technical service fees toward various services rendered by the AE viz. machinery expansion and sourcing support, test work support, quality support, preparation of response cost sheet for new order procurement, ECB Loan related work etc out of which, the TPO / DRP only accepted the sum paid towards ECB loan related work and determined the ALP for rest of the services as NIL on the ground that (a) no specific services were provided by AE (b) there was lack of details and evidence in support of the subject services c) the payments were beyond the scope of the agreement which only provided for royalty and fees for technical services, the Tribunal relying on an earlier ruling in the assessee's own case [TS-454-ITAT-2016(CHNY)-TP] , remitted the issue to the TPO after observing that that the issue had not been examined with respect to the correct factual matrix. It held that when the assessee made payments to its parent company, it had to establish and justify the nature of payment and the nature of service received for the purpose of determining Arm's length price in Transfer pricing matters and just because the operating cost incurred by the assessee company was less than the operating cost of the comparable companies, the claim of expenses incurred could not be justified. Therefore, it remitted the issue to TPO for fresh consideration.

Infac India P. Ltd vs DCIT - TS-120-ITAT-2017(CHNY)-TP - I.T.A.No.3182/Mds./2016 dated 17.02.2017

2297. The assessee had provided management services to its AEs to the tune of Rs. 4.35 crores, and claimed the transaction to be at arm's length by assuming margin of 15% on cost. However, the TPO noted that the details of specific services provided by assessee were not available and further considering the proportion of the AE companies in terms of inventory, business size and value of assets, he concluded that the assessee should have received double the amount towards management consultancy fee from its AEs and made an adjustment of Rs. 4.35 crore which was deleted by the CIT(A). On appeal, after referring to the provisions of Rule 10C and considering the fact that the TPO had not considered third party comparable cases, and that the details of the actual services rendered by the assessee were not known, the Tribunal remitted the matter to the AO / TPO for re-examination and held that until the details of the actual services rendered by assessee to AEs were not brought on record, the business size of the AEs could not determine the comparability of services (as done by the TPO). It opined that it was obligatory on the part of TPO to bring on record the exact nature of services rendered by assessee and thereafter to compare the same with an uncontrolled transaction.

ACIT vs. Sterlite Industries (India) Ltd - TS-278-ITAT-2017(CHNY)-TP - ITA Nos.318 & 319/Mds/2008 dated 29.03.2017

2298. The Tribunal following its own case in the prior AY i.e. AY 2010-11 restored the TP-adjustment in respect of payment of technical and management service fee by assessee (engaged in manufacturing automobile seats) to its Korean AE to the file of the TPO for re-adjudication. The assessee had benchmarked the transaction under TNMM which was rejected by the TPO who adopting the CUP method determined the ALP at Nil. The Tribunal held that first of all, the TPO/AO was to ascertain whether Technical Management service

expenses were at arm's length as compared to the actual sales achieved by the assessee and accordingly remitted the matter directing him to reconsider the issue afresh. It also noted the assessee's submission that in the set aside proceedings for AY 2010-11, TPO had allowed the issue as per Tribunal directions and no adjustment had been made.

Dymos Lear Automative India Pvt Ltd vs ACIT-TS-487-ITAT-2017(CHNY)-TP-ITA no.3472/mds/2016 dated 31.05.2017

2299. Assessee made payment of Rs. 30.50 lacs towards management consultancy fees to its AE, Twin Star Holdings Ltd., Mauritius for which the TPO proposed a TP addition on the ground that the benefit received by the assessee from such services was not shown. The CIT(A) deleted the addition. Since the nature of services / consultancy provided to assessee was not known, the Tribunal remitted the issue to AO/TPO for examining the actual services rendered and then to re- determine ALP.

ACIT vs. Sterlite Industries (India) Ltd - TS-278-ITAT-2017(CHNY)-TP - ITA Nos.318 & 319/Mds/2008 dated 29.03.2017

2300. The Tribunal held that in the absence of any comparison of the international transaction undertaken by the tested party with a transaction carried out in a uncontrolled market, the TPO could not independently conclude that the volume and quality of management services availed by the assessee from its AE was disproportionate to the payment made by the assessee and therefore rejected the TPO's approach of estimating arm's length price of management service fee paid to AE at 25% of the amount actually paid, since estimation of the services rendered and costs for such services was outside the scope of transfer pricing adjustment. Since the TPO made the TP adjustment without identifying any uncontrolled transaction, the Tribunal upheld the order of the DRP upholding assessee's transfer pricing study and accordingly dismissed the Revenue's appeal.

DCIT v Flakt (India) Ltd - TS-319-ITAT-2016 (Chny) - TP

2301. The Tribunal held that where the assessee could not prove that its AE, to whom it paid service charges for management and administrative services, had rendered the said services to the assessee the ALP of the services charges were rightly determined at Nil. Further, considering the functions performed by the AE, a shareholder of the Indian assessee, it held that the shareholders did not require any compensation for such services even as per the OECD guidelines.

Technical Stampings Automotive Ltd - TS-332-ITAT-2016 (Chny) - TP

2302. The Tribunal deleted the TP adjustment on management service fees paid by the assessee by relying on the coordinate bench decision of Siemens Aktiongessellschaft wherein it was held that benefit test could not be the basis to justify arm's length price. It rejected TPO's Nil determination of ALP of the said services by applying the benefit test by holding that the same was contrary to the provisions of Rule 10B where any of the methods had to be adopted for determining the ALP of the transaction.

US Technology Resources (P.) Ltd. vs Dy.CIT [2018] 97 taxmann.com 490 (Cochin-Trib) IT(TP) No.134 and 475 of 2016 dated 23.05.2018

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2303. The Tribunal deleted TP-adjustment in respect of management and professional consultancy services and SAP consultancy charges paid pursuant to remand back by Punjab & Haryana HC. It relied upon the co-ordinate bench ruling for AY 2008-09 wherein it was observed that assessee had achieved an increase in export turnover as well as gross margin and thus benefited from the services rendered by AE. Further it noted that in the earlier year, the Tribunal had upheld assessee's TNMM as TPO failed to bring anything on record to substantiate ALP determination at Nil under CUP. Relying on Tribunal's order for AY 2008-09, it held that since the facts of the present case were identical TNMM was the most appropriate method and that the Assessing Officer/ TPO/DRP were not justified in making any adjustment in the ALP of the international transactions entered into by the assessee on account of professional consultancy, management fee for support service and SAP consultancy charges.

Knorr-Bremse India Pvt. Ltd v ACIT - TS-527-ITAT-2018(DEL)-TP - ITA No.5097/Del/2011 dated 31/05/2018

2304. The Tribunal quashed the assessment framed in the name of non-existent amalgamating company (Sapient Corporation Ltd) for AY 2011-12. It noted that pursuant to order of the Delhi High Court for merger (dated October 12, 2011 and January 6, 2012) the assessee stood dissolved without the process of winding up w.e.f April 1, 2011. Therefore it held that the notice issued by the AO under section 143(2) of the Act on M/s Sapient Corporation Ltd dated
17.09.2012. to initiate assessment proceedings for the assessment year 2011-12 was invalid as M/s Sapient Corporation Ltd had ceased to exist in the eyes of law and was non-existent on the date of initiation of assessment proceedings. Accordingly, relying on the decision of the Court in SPICE ENTERTAINMENT LTD [TS-830-HC-2011(DEL)-TP] it held that framing of assessment against a non- existing entity/person was a jurisdictional defect as there could not be any assessment against a 'dead person' and therefore held that the impugned assessment was bad in law and liable to be quashed being void ab initio. Since the assessment order was quashed being without valid jurisdiction, it held that other TP-issues raised by assessee were academic & infructuous. Accordingly, the issues were dismissed without deliberations on merits.

Sapient Consulting Pvt. Ltd (Successor in interest of Sapient Corporation Pvt. Ltd) vs JCIT-TS-484-ITAT-2017(DEL)-TP- ITA NO. 1082/DEL/2016 dated 02.05.2017

2305. Where the assessee incurred consultancy fee during the year (for setting up its manufacturing activity which it capitalized as well as other consultancy fee), vis-à-vis the consultancy fee capitalized, the Tribunal held that since the ALP-determination was neither directed by DRP nor carried out by AO/TPO, it could not enlarge the controversy by directing the authorities to determine the ALP of the amount to be capitalized. Vis-à-vis TP-adjustment on payment of balance consultancy fees to AE, it rejected assessee's approach of aggregating the transaction with manufacturing activity absent close connection between two transactions, further also noted that the assessee had not undertaken any manufacturing activity during the first year under consideration and thus, there was no reason for aggregation. However, noting that TPO determined ALP at Nil holding that no benefit was received by assessee which was accordingly disallowed by AO, it held that the AO/TPO's action was contrary to ratio of Delhi HC ruling in Cushman & Wakefield India P Ltd and accordingly remitted the matter to AO/TPO

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to follow directions in Cushman & Wakefield ruling after giving reasonable opportunity of being heard to assessee.

Daikin Airconditioning India Pvt. Ltd. v DCIT - TS-176-ITAT-2018(DEL)-TP - ITA Nos.2536/Del/2014

2306. The Tribunal deleted the ad hoc section 40A(2) disallowance made by the TPO in respect of payments made by the assessee to its AE towards data processing and database charges since neither did the TPO / CIT(A) dispute the fact of the rendition of services nor did they use any comparative data or carry out any exercise to arrive at fair market value. It held that even if the payments were excessive or unreasonable, such arbitrary and baseless disallowances could not be upheld. Further, since both the assessee as well as the AE were assessed at maximum marginal rate of tax it held that the transaction was tax neutral and the payment could not be considered to be made with the intention of tax evasion.

AMserve Consultants Ltd - TS-436-ITAT-2016 (Del) - TP - ITA No.6059/Del/2013

2307. The Tribunal held that where the assessee's AE had only charged salary and related costs of its employees toward the professional and management consultancy services provided to the assessee without any mark-up, the transfer pricing provisions would not apply to the payment made by the assessee since the expenses incurred by the assessee were paid to the third party employees of the AE and not to the AE itself. Further, noting that the assessee had achieved an increase in export turnover as well as gross margin, it concluded that the assessee benefited from the services rendered by the AE and therefore the TPO was incorrect in determining the ALP of the said transaction at Nil.

Knorr Bremse India Pvt Ltd - TS-661-ITAT-2016 (Del) - TP IT(TP)A No. 5886/Del/2012

2308. The Tribunal held that where the assessee failed to provide documentary evidence of services such as invoices or confirmation from the parties and benefit received, the TPO was correct in determining the ALP of the intra-group services at Nil as for the purposes of transfer pricing AEs transacting with each other must replicate the dynamics of market forces and substantiate the benefit derived from such transactions.

Bombardier Transportation India Pvt Ltd v DCIT (I.T.A .No.-1626/Del/2015) – TS-520-ITAT-2015 (Del) – TP

2309. The Tribunal held that the TPO was incorrect in determining the ALP of the intra-group consulting and administrative services availed by the assessee from its AE at Nil since the assessee had satisfied the
'need' test, 'evidence' or 'rendition' test and 'benefit' test envisaged in section 92(2) of the Act. It noted that the assessee had provided overwhelming evidence to prove that the services were actually rendered by the AE and that the assessee, running a vast business required the impugned consultancy and administrative services for its functioning. Further, it noted that there was no evidence brought on record by the Revenue to show that the same services availed from the AE were also availed from independent parties and therefore it held that the services were not duplicative services. The Tribunal also held that where the services received by the assessee satisfied the need test, rendition test and benefit test, the services could not be said to be shareholder activities.

GE Money Financial Services Pvt Ltd v ACIT - TS -216-ITAT-2016 (Del)- TP

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2310. The Tribunal held that where the assessee submitted adequate evidence to prove that it had actually received intra-group services from its AE, the TPO was incorrect in disregarding the receipt of services by simply stating that they were not needed or that they were duplicative in nature or that the assessee did not benefit from the same. It therefore held that the TPO was unjustified in determining the ALP of the intra-group services at Nil.

GE Money Financial Services Pvt Ltd - TS-457-ITAT-2016 (Del) - TP - ITA No.440/Del/2014

2311. The Tribunal held that the TPO was incorrect in determining the ALP of administrative and business support services availed by the assessee from its AE at Nil under the CUP method with regard to the assessee's Inter Group Services Segment. It held that where the proportionate amount of the said expenses were accepted to be at ALP for the other Segments of the assessee, the TPO was not justified in rejecting the said expenses under the IGS Segment without adequate reasoning. It held that it was not the prerogative of tax authorities to ascertain the benefit received by the assessee from the availment of services and that the benefit received from a particular service was to be perceived from the point of view of a businessman and not from that of the tax authorities. It remitted the matter to the file of the TPO to determine whether the services received by the assessee were duplicative of the functions performed in-house as well as to determine whether the services received by the assessee were shareholder services.

El DuPont India Pvt Ltd v DCIT - TS-338-ITAT-2016 (Del) – TP

2312. Where the Assessee was engaged in rendering IT Enabled services ("ITeS") to its AE during AY 2011-12 at cost plus 20% markup, and also availed management support services from its AE, which formed part of cost base for calculating markup; and the DRP deleted TP adjustment on ITeS but upheld the adjustment on management support services by holding the ALP of the same to be Nil, the Tribunal deleted the addition by holding that since management support services availed by the assessee were forming part of cost base for calculating 20 percent markup on ITES services rendered by the assessee to its AE, consideration of ALP of the same at Nil would lead to reduction of cost base by Rs.8.41 crore with corresponding reduction in markup @20 percent of 8.41 crore. It further held that the ALP adjustment of Rs. 8.41 crore by the revenue authorities on account of management support fees would be required to be coupled with a corresponding revenue reduction of Rs. 10.09 crores leading to erosion of tax base, rather than augmenting it. Therefore the Tribunal concluded that the TP provisions could not be invoked in view of specific prohibition under section 92(3) as for every rupee of ALP adjustment in intragroup service (management support service), assessee's revenue would stand reduced by one and one fifth times of the ALP adjustment.

Mercer Consulting India Pvt Ltd. vs. DCIT [TS-495-ITAT-2016(DEL)- TP] - I.T.A. No.1085/Del/2016

2313. The Tribunal held that the double addition made by the AO as well as TPO on account of management consultancy and business auxiliary service fee paid by the assessee to its AE on the ground that the assessee did not produce any submissions in support of the claim could not be sustained since in the MAP proceedings, initiated by the assessee pursuant to

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the order of the AO, the Competent Authorities deleted the TP addition and accepted the assessee's methodology, allocation key and 5 percent mark- up on cost and allowed the amount paid to the extent of the 5 percent mark-up. Based on the outcome of the MAP proceedings, the Tribunal held that the addition made by the AO was to be deleted as well, and held that MAP proceedings were albeit restricted to transfer pricing adjustments but in the instant case it threw light on the actual availing of services along with proper allocation.

GKN Driveline (India) Ltd v ACIT - TS-439-ITAT-2016 (Del) - TP - ITA No.5923/Del/2012

2314. Following the order of the co-ordinate bench in the assessee's own case for the prior assessment years, wherein the Tribunal had restored the determination of ALP of the assessees' international transactions (receipt of IT, network engineering, project management, service delivery and other support services from its AE) to the file of AO / TPO (who had determined ALP at Nil), the Tribunal restored the ALP determination to the file of the AO for the impugned year as well as there was no material difference in the facts vis-à-vis the earlier years.

AT & T Global Network Services (India) Pvt. Ltd vs. DCIT-TS-728-ITAT-2017(DEL)-TP dated 18.09.2017

AT & T Global Network Services (India) Pvt. Ltd vs. DCIT-TS-724-ITAT-2017(DEL)-TP dated 21.09.2017

2315. The Tribunal deleted TP adjustment made on account of payment for management service cross charge made by assessee (an Indian branch office) to various group entities and laid down 4 aspects to be examined while benchmarking intra-group services – *"1. Whether the assessee received intra-group services? 2. What are the economic and commercial benefits derived by the recipient of intra-group services 3. In order to identify the charges relating to services, there should be a mechanism in place which can identity (i) the cost incurred by the AE in providing the intra-group services and (ii) the basis of allocation of cost to various AEs. 4. Whether a comparable independent enterprise would have paid for the services in comparable circumstances?".* Relying on Delhi HC ruling in EKL Appliances, it held that the lower authorities were not justified in examining commercial soundness of the decision and whether any profit had actually been realized pursuant to such payment. Further, it rejected Revenue's argument that assessee did not provide logical cost allocation basis for management support services and observed that the break-up of costs and evidence was duly submitted by the assessee and that the cost allocation of a senior personnel from the regional head office on the basis of time spent was logical and backed by email evidence.

A.T. Kearney Ltd vs A.D.I.T - TS-528-ITAT-2018(DEL)-TP - ITA No. 6249/DEL/2012 dated 21.05.2018

2316. The Tribunal held that while evaluating ALP of a service (being allocation of IT cost) the real question was to determine what price an independent enterprise would have paid and not to determine whether the assessee benefits from it or not and that the AO did not have the power to determine the business needs of the company. Accordingly, it directed the AO to allow the said expenditure claimed with respect to IT cost incurred by the AE and allocated to the assessee.

DCIT v Danisco (India) Pvt Ltd [ITA No 2444 / Del / 2012] - TS-393-ITAT-2015(DEL)-TP

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2317. The Tribunal rejecting TPO's 'nil' ALP determination for administrative and support services directed TPO to re-determine ALP applying TNMM. It rejected Revenue's contention that assessee had not received any services from AE and held that DRP had acknowledged receipt of services by the assessee and also dismissed the Revenue's contention regarding absence of agreement prior to 01.01.2010, holding that services could be availed the assessee from its AE even without agreement. Relying on the decision in the case of EKL Appliances and Knorr Bremse India P Ltd, it held that the assessee was required to establish benefit received from intra-group services. It held that when the services were being taken as per policy of the group company to avail the benefit of low cost, specialization and confidentiality and rendering and need of the services was proved from the details brought on record by the assessee. Further, it held that where the TPO accepted TNMM applied by assessee as most appropriate method in respect of other international transactions, he could not apply different standard or criteria to judge an international transaction of intragroup services and thus upheld the clubbing of intra- group services with other transactions for ALP determination. Accordingly, it directed the TPO to make fresh a TP analysis for benchmarking international transactions undertaken by assessee.

Corning SAS-India Branch-TS-439-ITAT-2017(DEL)-TP dated 29.05.2017

2318. The TPO applied CUP method and determined the value of the receipt of management services at NIL observing that the services did not result into any benefit to the assessee and there was no evidence of receipt of the services. The CIT(A) followed his order of the earlier year restricted the disallowance to 30% noting that 20% of Management Services were in the nature of share-holder services and 10% of it was in the nature of duplication of services/ incidental services. The Tribunal restored the issue following the coordinate bench ruling in its own case for earlier year noting that facts and circumstances were identical. The Tribunal had restored it in the earlier year noting that CIT(A) had sustained the adjustment on estimated basis without considering the cost allocation methodology report and directed the CIT(A) to quantify the adjustment after examining the said report and assessee's explanations

BSI Group India Pvt. Ltd. & ANR vs. ITO TS-1195-ITAT-2018(Delhi)-TP] DelTrib ITA No. 152/Del/2015 dated 20.08.2018

2319. The Tribunal restored the TP adjustment in respect of payment made by assessee to its AE business support services to the AO/TPO for ALP determination noting that prima facie the transaction did not appear to be bogus atleast to the extent of the evidence submitted by the assessee. It rejected the approach of TPO applying CUP as the MAM and determining the ALP of the transaction of eleven segments under business support services to be nil on the ground that there were no services received or duplicate services were received. Further, the TPO proposed adjustment of IT services segment (the twelfth segment) under the business support services stating that not more than 5 persons at Rs.80,000/- per month were required for rendering such services. It observed that the TPO had not brought any single comparable case while applying CUP and action of TPO/AO was contrary to the ratio laid down in the decision of Cushman and Wakefield since the TPO had invoked the benefit test which was not within its domain. It was responsible for only determining the ALP adjustment and further, the AO mechanically made the addition proposed by the TPO without examining the deductibility of the expense under section 37 of the Act.

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Exxon Mobil Lubricants Pvt Ltd vs. ACIT [TS-974-ITAT-2018(DEL)-TP] ITA No.1153/Del/2015 dated 21.08.2018

2320. The Tribunal, noting that the assessee had not produced proper evidences for substantiating actual rendering of various services by foreign AE during AY 2012-13, remitted the matter to AO/TPO for fresh verification. The TPO had applied the CUP method and determined Nil ALP of the services contending that assessee had failed to substantiate actual receipt of the services or the benefit received from these services. It held that while evaluating the intra-group services availed by the assessee, the TPO was required to assess (a) need test, (b) benefit test, (c) rendition test, (d) duplication test and (e) shareholder activity test. Noting that the Tribunal in earlier years had held that the need/benefit test was satisfied for services rendered under the same agreement, it held that TPO was not right in questioning satisfaction of such tests. Further, it held that rendering of intragroup services was subject to determination for each AY independently based on the evidences for rendering of the services, and that assessee was required to demonstrate it with the credible evidence. Since the assessee had not filed proper evidences with respect to each class of services with corresponding manner of rendering of the services it directed the assessee to provide proper and credible evidence.

Avery Dennison (India) Pvt. Ltd. Vs DCIT - TS-282-ITAT-2017(DEL)-TP - ITA No. 5578/Del/2016 dated 31/03/2017

2321. Where the assessee showed no inextricable link between the transactions of intra-group services viz., business planning, project review board and reimbursement of related travel and accommodation expenses from different AEs and there was no package deal as the transactions were valued separately, the Tribunal relying on the decision in the case of Knorr Bremse [TS-558-HC-2015(P&H)-TP (wherein it was held that several transactions between two or more AEs can form a single composite transaction if they are closely linked transactions and the onus is always on the assessee to establish that such transactions are part of an international transaction pursuant to an understanding between various members of a group), upheld the rejection of aggregation approach adopted by assessee (engaged in exploring and drilling, producing, refining and marketing of minerals, oils and related by-products) for benchmarking receipt of intra-group services from different AEs and held that it was not permissible to combine all the international transactions for determining their ALP in a unified manner when such transactions were diverse in nature.

Cairn India Ltd vs. DCIT-TS-767-ITAT-2017(DEL)-TP- ITA No.1459/Del/2016 dated 09.10.2017

2322. The Tribunal, relying on the decision in the case of BG Exploration & Production wherein it was held that time writing charges were neither duplicative in nature nor were shareholder activities, remitted the matter to the file of TPO (who had determined ALP at Nil) directing him to examine the issue following the above mentioned ruling.

BG India Energy Solutions Private Limited -TS- 878- ITAT-2017(DEL)-TP dated 30.10.2017

2323. The assessee was providing business support services to other companies including sales support, marketing, advertisement and IT support to its group company. The AO noting that

that the group company was running its operations with no employees and the income received by the assessee from group company had not been correctly recorded invoked provisions of section 145 and held that assessee should have earned markup of 15% (reduced to 12.82% by DRP) on cost and accordingly proposed an adjustment. The Tribunal restored the adjustment in respect of service fee received by assessee (shown under 'other income') from domestic related party enterprises noting that if the agreement between two resident companies did not provide for any such markup on the total cost then such addition could not be sustained. However, it observed that it was not possible to decipher whether DRP considered assessee's submission that AO did not give it any opportunity to explain the said transaction or whether DRP considered assessee's objection whether AO could make such adjustment to the domestic transaction between two parties. Further, noting that details of 'other income' were not provided nor was it shown what were the relevant documents by which assessee had shown such income & estimation thereof, it set aside the issue to be examined by AO afresh in the interest of justice

Verizon India Pvt Ltd vs ACIT [TS-1084-ITAT-2018(DEL)-TP] ITA No.6053/Del/2012 dated 10.09.2018

2324. The TPO rejected the aggregation of business support services and technical support services and benchmarked the transactions at Nil observing that assessee had not furnished contemporaneous documentary evidences to support that services had been received by it and relied on OECD guidelines to state that essential information should be available with respect to receipt of intra group services, the economic and commercial benefits derived by the recipient and the cost identification of those services on basis of which it could be determined whether an independent enterprise would have paid for such services. The sum and substance of the observation was that the assessee was not able to prove the need for such services and that assessee had infact received such services. The Tribunal relying on the ratio laid down in Del HC in Cushman and Wakefield rejected the NIL determination done by the TPO and held that the TPO should have verified and examined the aspect of benefit and need on the basis of commercial wisdom of the assessee while benchmarking the international transaction and noted that aggregation approach adopted by the assessee had been accepted in subsequent years. It observed that the assessee had submitted documentary evidences ie. copies of invoices pertaining to these two services and certain email communications and also submitted a chart demonstrating need for the services and also the benefit translated therefrom. Thus, it restored the matter back to TPO for determination of ALP of business support and technical support services.

The TPO while adopting the transaction by transaction approach also restricted the payment of royalty on comparison with comparables and made an upward adjustment. The Tribunal remitted the issue back to the AO and directed the assessee to show how payment of royalty was inextricably linked with the manufacturing activities and why it ought to be aggregated and benchmarked together with other international transactions under TNMM. Further, it also observed that the TPO had considered the comparable without showing that whether in case of the comparables there was any payment of royalty and what was the basis as the assessee had contested that out of the six comparables, three comparables were not paying royalty.

Borgwarner Emissions Systems India Pvt Ltd vs ACIT [TS-1029-ITAT-2018(DEL)-TP] ITA No.6840/Del/2017 dated 04.09.2018

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2325. The TPO determined the ALP of the localization expenses paid to AE (for support services provided to assessee for localization of imported products having regard to customer's requirements) to be NIL by applying CUP and TPO was of the view that assessee had already entered into royalty agreement with AE and was paying royalty, therefore, there was no need to pay such localisation expenses and such expenses amounted to duplication of expenditure. The Tribunal set aside the TP adjustment made on localization expenses by relying on the ratio laid down in Delhi HC ruling of Cushman and Wakefield and rejected the benefit test applied by TPO noting that it was a settled legal position that a businessman has prerogative to organise his affairs in the manner best suited to its functioning, commercial or business expediency and Revenue could not step into their shoes. It directed TPO to determine ALP of transaction unconnected with fact of any benefit accrued to assessee.

Mitsubishi Electric Automotive [I] Pvt Ltd vs Dy.CIT [TS-1147-ITAT-2018(DEL)-TP] ITA No.312/Del/2015 dated 29.10.2018

2326. The assessee is one of the leading developers and suppliers of dentification and decorative solutions for businesses and consumers worldwide and had three business segments namely, (i) Pressure Sensitive Materials [PSM] (ii) Retail Branding and Information Solutions [RBIS] and (iii) other Speciality Converting Businesses. The assessee had benchmarked the intragroup services availed from its AE with other transactions of purchase, sale of raw materials and purchase, sale of finished goods with its AE. The TPO was of the view that transaction relating to the receipt of intra-group services in the two business segments, namely, PSM and RBIS were not at ALP. In reply to the SCN issued by the TPO to furnish details regarding the intragroup services, the assessee submitted the specified services received under each of the segments i.e. PSM (Marketing support services, Operations, Logistics and Technical Service, Labor Law and Employee Relations, Finance, Accounting, Administration and MIS Services, Corporate Support Centre [CSC), ITSSC) and RBIS (Ticketing HUB, GVP Services, VIPFS Services and CSC services). The TPO took a view that assessee had also not been able to demonstrate that any tangible gains were achieved from said services. However, he accepted the ALP ascertained by the assessee with regard to two intra-group services received by the assessee i.e., ticketing hub and VIPFS but determined the ALP of balance intragroup services to be NIL by applying CUP. The Tribunal deleted the said adjustment noting that issue had been decided in favour of assessee by coordinate bench decision in assessee's own case wherein it was held that all services received by the assessee were part of composite contract/agreements which could not be unbundled and concluded by holding that the agreement is an intrinsic one and it was wrong to split the same and hold that the same services are at Arm's Length and some services are not. Further, it also observed that there was no merit in TPO/DRP rejecting the evidence in form of e-mails/correspondences filed by assessee for receipt of services stating that it was too general. The TPO could not question the commercial prudence while determining the ALP of transaction. Accordingly, it deleted the adjustment.

Avery Dennison [India] Pvt Ltd vs ACIT [TS-1219-ITAT-2018(Del)-TP] ITA No.504/Del/2018 dated 29.10.2018

2327. The Tribunal deleted TP-adjustment on payment made for management and professional consultancy services by following the co-ordinate bench ruling for AY 2008-09 (which had

been relied upon subsequently by AY 2007-08 to decide the issue in favour of the assessee),wherein it was observed that assessee had achieved an increase in export turnover as well as gross margin from 2007-2009 and thus benefited from the services rendered by AE . Noting that the AE had charged only the cost and other related expenses for the employee and not a markup which was paid to the employees who are third parties , it observed that transfer pricing provisions can be inferred only if there is a related party payment, but the expenses incurred were paid to the third party employees although those employees were the employees of the AE.It rejected TPO's Nil determination of ALP under CUP method as nothing was brought on record to substantiate that the AE provided similar services to independent enterprises in the assessee's market and accepted assessee's adoption of TNMM as the MAM . It dissented with coordinate bench decisions relied on by the Revenue namely Crane Software and Gemplus India Pvt. Ltd (wherein the TP adjustment on management charges had been made due to difference in factuals) as it was not the allegation of TPO that services were not rendered by the AE and Bombardier Transportation India Pvt. Ltd. as the assessee in the instant case had filed detailed evidence and explained specific services provided by the AEs

Knorr-Bremse India Pvt. Ltd v ACIT - TS-526-ITAT-2018(DEL)-TP - ITA No.5097/Del/2011 dated 28.06.2018

2328. The Tribunal dismissed Revenue's appeal and confirmed the deletion of TP-adjustment on foreign component of seconded employees' salary disbursed by AE in Australia. The TPO had determined ALP of reimbursement to AE towards expat employees' salary at Nil while Indian component of the salary was allowed as deduction. The Tribunal noted that the TPO had accepted business support services income and project management fees earned by assessee through the employment of such expat employeesand therefore held that the action of the TPO in denying deduction of the foreign component of the salary was not justified when it accepted the salary paid to such employees in India moreso when the same set of expats engaged in providing business support services the income from which has been offered for tax and accepted by the TPO.

ACIT V Blue Scope Steel India (P) Ltd - [TS-143-ITAT-2018(DEL)-TP] - I.T.A .No. 5535/DEL/2012 dated 01.03.2018

2329. The Tribunal remitted the determination of ALP of intragroup service payment made by assessee (manufacturer of air filteration) and it rejected TPO's Nil ALP-determination of intra-group service payment made to AE noting that TPO in earlier years and subsequent year(s) had accepted the said payment to be at ALP (thus principle of consistency ought to be followed) and the assessee had continued making payment under the agreement entered into in 2004 (hence there was no change in business model). The Tribunal took cognizance of the evidence submitted by the assessee that administrative coordination services and market research were provided by AE from which it derived substantial benefit and held that assessee was able to substantiate benefits derived from rendering of services by the AE. It observed that TPO could not sit on the armchair of a businessman to decide as to what services were beneficial in view of TPO; stating that services appeared to be very generic in nature and were in the nature of shareholder services. The TPO's reasoning that payment of intra-group services was increasing every year and thus, there was shifting of profit would

also not hold good when turnover had increased five times and further, TPO had accepted services to be at ALP in subsequent years.

Donaldson India Filter Systems Private Limited vs DCIT [TS-1113-ITAT-2018(Del)-TP] ITA No.3218/Del/2015 dated 03.10.2018

2330. The Tribunal remitted the benchmarking of intra-group services to TPO. It relied upon the earlier year order wherein ITAT had observed that TPO is required to assess (a) need test, (b) benefit test, (c) rendition test, (d) duplication test and (e) shareholder activity test while determining ALP of intra-group services. The Tribunal in the assessee's earlier year had remanded the matter by holding that assessee had not produced proper evidence for substantiating actual rendering of various services and that determination of the same would be a year-specific exercise.

Avery Dennison (I) Pvt Ltd vs ACIT [TS-611-ITAT-2018(DEL)-TP] ITA No.7183/Del/2017 dated 27.06.2018

2331. The Tribunal dismissed Revenue's appeal and upheld DRP's order deleting the TP adjustment in respect of intragroup services noting the fact that the DRP had recorded that the assessee had provided substantial evidence in form of e-mails, correspondence with the AE etc. so as reach a conclusion that the AE was rendering services which were beneficial for the assessee in conducting its business and though some benefits might have accrued to the overall group but the primary beneficiary was the assessee. It concluded that services were not in nature of stewardship activity. It observed that the Revenue could not point out any factual or legal error in the directions of the DRP and thus, upheld the DRP's order.

ACIT vs Humboldt Wedag India Pvt. Ltd- (2018) 53 CCH 0135 Del Trib ITA No.5097/Del/2011 dated 28.06.2018

2332. The Tribunal remitted back issue of ALP determination of international transactions for assessee acting as a sourcing support service provider for it's group companies and relied on co-ordinate bench ruling in assessee's own case for earlier AYs, which in turn had relied on Li & Fung HC-ruling, and had remitted the issue back to TPO considering that the assessee was not into buy and sell, but a facilitator/service provider and its compensation model would be cost plus remuneration and not a commission based remuneration. Thus, the Tribunal remitted the matter to the file of AO/TPO for a fresh examination on the lines of co-ordinate bench judgment to find out proper comparables and determine the ALP of the international transaction afresh.

GAP International Sourcing (I) Pvt Ltd vs DCIT Circle 10(1)- TS-481-ITAT-2018(Del)-TP-ITA No 6340/Del/2017 dated 11.04.2018

2333. The Tribunal remitted the TP-adjustment on payment for intra-group services to AE noting that the TPO after rejecting assessee's combined transaction approach of adoption of TNMM and applying CUP, had determined ALP of intra-group services at Nil without appreciating i) the assessee's arguments on appropriateness of combined benchmarking approach considering that 5 transactions benchmarked together were closely linked and inappropriate adoption of CUP ii) TPO's failure to consider voluminous documentation submitted by assessee and iii) TPO's incorrect approach in questioning commercial expediency of transaction. Considering the totality of the facts of the case, it held that the matter required

fresh adjudication at the level of the Assessing Officer/TPO in the light of the various evidences produced before them and in the light of the decisions relied on by assessee.

Bright Point India Pvt. Ltd. v ACIT - [TS-1083-ITAT-2017(DEL)-TP - ITA No.123/Del/2017 dated 04-12-2017

2334. The TPO determined the ALP of the of management/business support services to be Nil by applying CUP on ground that these services did not result in any benefit to assessee and there was no evidence of receipt of these services. The CIT(A) granted relief to the extent of 70% of disallowance but sustained 30% adjustment on the ground that services included element of shareholder services and duplicative services. The Tribunal remanded the matter back to CIT(A) noting that CIT(A) had sustained the adjustment on estimated basis without considering the cost allocation methodology report and directed the CIT(A) to quantify the adjustment after examining the said report and assessee's explanations.

BSI Group India Pvt. Ltd. & ANR vs. ACIT (2018) 53 CCH 0091 DelTrib ITA No. 104/Del/2014 dated 31.05.2018

2335. The Tribunal remitted the ALP determination of payment of management group cost back to AO/TPO for deciding afresh by applying the CUP method for AYs 2008-09,2009-10 and 2012-13. The Tribunal noted that the TPO rejected assessee's aggregation of sub-transactions of "management group cost" and "R&D assistance cost" as one international transaction of "cost sharing expenses" using TNMM, segregated the payment of "management group cost" and applied CUP as MAM and determined ALP as nil. The Tribunal rejected the TPO's Nil-ALP determination of management group cost on the ground of non-receipt of services/duplication of services and application of benefit test. The TPO had invoked the CUP method and conducted a "cost benefit analysis" test and eventually arrived at the conclusion that services received were duplicative in nature and in some cases, the assessee did not avail any services. The Tribunal took note of the assessee's submission of list of services received under the management cost services and certain other details of technical materials received from the AEs, and followed Knorr-Bremse High court ruling to hold that the assessee did receive some services and the applicability of `benefit test' could not be countenanced.

Further noting that (i) the coordinate bench in assessee's own case for AY 2011-12 had restored the matter back to TPO to examine whether the payment of "management group cost" was a case of cost sharing arrangement or intra-group services after perusal of various agreements and (ii) since the relevant agreements were the same in that year as well as the present year, the Tribunal restored the matter for present year also to the file of the AO.

Atotech India Pvt Ltd vs. ACIT [TS-340-ITAT-2018(DEL)-TP] ITA Nos.3419&6571/Del/2016 &1112/Del/2014 **dated 11.05.2018**

2336. The Tribunal deleted TP adjustment made on corporate management services availed by assessee from its AE noting that assesseehad furnished detailed description of intra group services rendered by the AE, copy of ledger account of corporate management charges, month-wise chart of corporate management charges and allocation chart. It further relied on Delhi High Court in case of EKL Appliances wherein it was held that TPO could not judge on the commercial expediency of the transaction, his role was limited to determining the ALP of the transaction to delete the said adjustment.

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Terex Equipment Pvt Ltd (Formerly known as Terex Vectra Equipment Pvt. Ltd.) vs ACIT [TS-1225-ITAT-2018(DEL)-TP] (ITA No.1882/Del/2014) dated 14.11.2018

2337. The Tribunal upheld CIT(A)'s order confirming TP adjustment in respect of payment of export commission by assessee to its AE for promoting CTVs abroad, following co-ordinate bench ruling in assessee's own case in AY 2007-08 wherein it was held that commission could not be accepted as a genuine business expenditure as provision of services by LG Electronics Korea could not be demonstrated by the assessee.

LG Electronics India (P) Ltd vs ACIT [TS-738-ITAT-2018(DEL)-TP] ITA Nos.3612 and 3613/Del/2017 dated 18.07.2018

2338. The TPO had imputed markup of 5% on the support services expenses and the DRP concurred with the view of the TPO that the assessee rendered services to its AE and held that the markup was inevitable. The Tribunal deleted the TP adjustment of markup on support services provided for employees deputed to AE noting that recovery of expenses from AE such as travel and telephone expenses were third party costs and therefore, no markup was needed as per TP provisions and further, with respect to salary cost for employees and adhoc support staff, there was a markup of more than 5% charged by assessee.

CPS Cash Processing Solutions Private Ltd vs DCIT [TS-511-ITAT-2018(DEL)-TP] ITA No.5017/Del/2012 and ITA No.2671/Del/2013 dated 03.07.2018

2339. The Tribunal restored the issue of TP adjustment made on management and business support services received by the assessee and directed TPO to determine if services were availed or not during subject year i.e. AY 2013-14 noting that TPO had not made any such addition in AY 2014-15 on reference being made to it u/s.92C. It further discarded the argument of assessee that payments in connection with said services written back in AY 2013-14 and AY 2014-15 were offered to tax u/s. 41(1) in AY 2015-16 and thus, addition ought to be deleted by stating that it would have no relevance.

Carrier Midea India P. Ltd vs Dy.CIT [TS-1256-ITAT-2018(DEL)-TP] (ITA No.7675/Del/2017) dated 22.11.2018

2340. Tribunal rejected assessee's ground seeking to treat assessment order for AY 2008-09 passed in the name of amalgamated company as invalid for the reason that PAN mentioned in the order was that of the amalgamating company. The assessee submitted that on merger, the identity of Transferor company was lost and it seized to exist in the eyes of law, rendering the assessment made in the name of non-existent company invalid. It observed that on bringing the fact of amalgamation to AO's notice, the case was transferred to the jurisdiction of AO under whom the amalgamated company's registered office was located. Further, it observed that mention of PAN was only to differentiate between amalgamated and amalgamation company.

BA Continuum India Private Limited vs Addl CIT [TS-396-ITAT-2017(HYD)-TP] ITA-1144/HYD/2014 dated 28.04.2017

2341. The Tribunal held that the foreign exchange loss incurred by the AE on account of foreign exchange loan taken by it, charged to the assessee, could not be treated as management fee as it could not be considered as services provided to the assessee and accordingly

determined the ALP of such portion of management fee as Nil. For the balance management fee (after excluding foreign exchange fluctuation loss), the Tribunal held that since the fact of rendering of services by the AE had been accepted by the Revenue, in the absence of a comparable the TPO was incorrect in determining the ALP as Nil and accordingly allowed the payment of such management fee.

DQ Entertainment (International) Ltd v ACIT (I.T.A. No. 62/HYD/2013) – TS-524-ITAT-2015(Hyd) – TP

2342. Where the assessee had made payments of management fee and IT support fee ('SAP') to its AE in accordance with an agreement at a mark-up of 1% for management fees (mainly in respect of deputation of personnel whose salaries were paid byassessee) and 5% for SAP fee and TPO considered the ALP as NIL contending that assessee failed to demonstrate benefit derived there from, the Tribunal upheld the contention of theassessee that the TPO's analysis on benefit test and determination of NIL ALP could not be accepted. In this regard, it held that the Revenue could not question the reasonableness of expenditure incurred by assessee. Since the benchmarking of the other transactions undertaken by the assessee were being remitted to the TPO for reconsideration, the Tribunal remitted this issue to the file of the TPO as well.

JT International (India) vs DCIT – TS-107-ITAT-2017 (Hyd) – TP - I.T.A. No. 422/HYD/2014 dated 17.02.2017

2343. The Tribunal rejected TPO's re-characterization of assessee's distribution transaction as a service transaction requiring markup and after perusal of the agreement between assessee and its AE [for distribution of AE's product in India], the Tribunal held that the intention of the parties was clear that the assessee was a distributor of AE's products in India and was not required to make the payments to the AE till the assessee made profit from the transactions. The Tribunal followed the HC ruling in case of Sony Ericsson Mobile Communications and held that there was no difference between the form and substance of the transaction of distribution to recharacterize the transaction as a service agreement. And eventually remitted issue to AO/TPO to conduct fresh TP analysis by treating the assessee's transaction as a distribution agreement.

M/s. Comm Vault Systems (India) Pvt Ltd vs DCIT Circle 1(2)- TS-245-ITAT-2018(Hyd)-TP- ITA No. 343/Hyd/2016 dated 11.04.2018

2344. The Tribunal upheld the final assessment order and dismissed the assessee's contention that the same was void ab initio as the DRP had not passed any directions. It noted that since there was a delay of 13 days in filing objections before the DRP and the DRP rejected the assessee's application for condondation the AO passed the final assessment order as if no objections were filed. Accordingly, it held that the order passed by the AO was within the time limits and dismissed the assessee's appeal.

Gameloft Software Private Limited vs. DCIT-TS-912-ITAT-2017(HYD)-TP I.T.A. No.443/HYD/2017 dated 10.11.2017

2345. The Tribunal held that where the assessee had furnished relevant details of business support services provided by the AE and it had also been able to demonstrate its ostensible

benefits, the AO could not decide the requirement of such services and hold the ALP to be Nil since commercial decisions must be left to the assessee.

Gillette India Ltd Vs ACIT [ITA No. 1087/JP/2011] - TS-372-ITAT-2015(JPR)-TP

2346. The Tribunal upheld CIT's revisionary order u/s 263 and held that the order of the AO was prejudicial to the interest of the revenue as the AO failed to verify the specified domestic transactions [deduction u/s 80IB and payment to specified persons u/s 40A(2)] for AY 2013-14 entered into by the assessee. It rejected the assessee's submission that the transactions had been examined by the AO who denied deduction u/s 80IB/80IE on the ground that assessee was not carrying on manufacturing activity and held that the denial of deduction was on a technical ground and the quantum of deduction claimed was not examined. It held that the mere submission of necessary details in form of 3CEB would not prove that the AO had verified the details regarding the deduction claimed by the assessee u/s 80IB/80IE of the Act. Accordingly, it upheld the initiation of proceedings under Section 263 of the Act.

Amrit Feeds Ltd vs. DCIT- TS-875-ITAT-2017(Kol)-TP- ITA No.753/Kol/2017 dated 31.10.2017

2347. For AY 2010-11 and AY 2011-12 the Tribunal restored the TP adjustment made vis-à-vis payment made for intragroup services to the TPO for factual verification of the unilateral APA placed on record. It noted that the assessee had placed APA for five years commencing from 15.04.2015 and ending on 31.03.2020 and also application form "Rollback on APA" of same international transactions for a period of 4 years from 01.04.2011 to 31.03.2015 on record.

Linde India Ltd (formerly BOC India Ltd) vs DCIT, JCIT [TS-1053-ITAT-2018(Kol)-TP] ITA No.543/Kol/2015, ITA No.381/Kol/2017, ITA No.224/Kol/2016 dated 19.09.2018, DCIT vs Linde India Ltd (formerly BOC India Ltd) [TS-1053-ITAT-2018(Kol)-TP] ITA No.105/Kol/2016 dated 19.09.2018

2348. The Tribunal restored the issue of ALP adjustment pertaining to the assessee's international transactions of sale/resale of manufactured goods in export, payments of sales margins, services rendered etc. to its AE to TPO noting that coordinate bench in assessee's own case for AYs 2011 to 2013 admitted additional evidence furnished by assessee in support of the revised transaction-by-transaction approach and directed TPO to consider these while determining arm's length nature of the transactions. Though the assessee sought to distinguish the coordinate bench ruling in assessee's own case for earlier year stating that additional evidence had been submitted which was not the case in the instant year, the Tribunal rejected the reasoning of assessee and opined that consequential adjudication would indeed have an impact in the impugned assessment year as well, thus adopted judicial consistency to restore the impugned ALP adjustment issue back to the TPO for his simultaneous adjudication with the preceding assessment years.

Epcos India Pvt Ltd vs Dy.CIT [TS-1158-ITAT-2018(Kol)-TP] ITA No.2528/Kol/2017 dated 28.10.2018

2349. The Tribunal held that the TPO / CIT(A) was incorrect in determining the ALP of the intra-group service charge paid by the assessee to its AE at Nil on the ground that there was no evidence of benefit received by the assessee. It held that there was nothing in the order of the TPO indicative of the existence of any of the circumstances prescribed in clauses (a) to (d) of

Section 92C(3) of the Act which necessitated the intervention of the AO / TPO for determination of ALP and that the TPO had no role to play in determining the reasonableness / benefit of a business expenditure. Accordingly, it deleted the addition made by the TPO.

N L C Nalco India Ltd. vs. DCI - TS-36-ITAT-2016(Kol)-TP

2350. The assessee with support of its AEs undertook customized software solution to several clients across globe and there were two revenue sharing models (Model-1 was when the agreement was executed between the assessee and the overseas customers and assessee retained 75% of the revenue and paid 25% of the revenue to its subsidiaries while Model-2 was when AE's raised invoice on the customer and assessee would raise a back to back invoice for 75% of revenue on AE's) The TPO made adjustments in relation to payments on account of accounting management fee charged by assessee to its subsidiaries in case of Model-1 (TPO fixed remuneration sharing model of 15 per cent in cases where customers entered into contracts directly with assessee). The Tribunal upheld CIT(A)'s deleting the TP adjustment made following the coordinate bench decision in assessee's own case (affirmed by HC) noting that subsidiaries companies were engaged in marketing of IT service capabilities of assessee in their respective countries to win contract for providing IT services. It was also undisputed that once customer was won, subsidiaries downloaded non-administrative services to assessee, Thus, in view of services rendered by AEs in respect of contracts entered into by assessee with independent customers, payment of fee equal to 25 per cent of revenue derived under contract to those AEs was justified.

ITO vs ITC Infotech India Ltd [TS-1314-ITAT-2018-(Kol)-TP] ITA No.550/Kol/2014 dated 05.12.2018

2351. In case of an assessee engaged in manufacturing and marketing of paints, speciality chemicals and starch, the Tribunal deleted TP Adjustment in respect of payments made for intra group services received from its AE. The Tribunal relied on assessee's earlier year's order which stated that services provided by AE in the arena of human resources, marketing support, and IT, were not in the nature of stewardship services and the assessee had proved the benefit received from such services. Further, the Tribunal also remitted issue of ALP determination to TPO, after noting that ALP determination activity was not carried out by TPO, as the TPO had cited assessee's failure to provide agreement as reason for non-determination of the ALP and the DRP regarded the transaction as stewardship services. Thus, the Tribunal directed TPO to pass speaking order after hearing the assessee.

DCIT Circle 10(1) vs Akzo Nobel India Ltd.-TS-342-ITAT-2018(KOL)-TP- ITA No 229/Kol/2015 dated 14.04.2018

2352. The Tribunal deleted the adjustment/ disallowance made by the TPO in respect of payment made by the assessee for intragroup services. It relied on the coordinate bench ruling in assessee's own case for earlier year wherein the TP adjustment in respect of intragroup services was deleted by holding that the assessee actually received the services and benefited from them. The Tribunal noted that TPO made the adjustment by observing that services rendered were of stewardship nature and were for maintenance of overall control of the group. However, in the assessee's own case, it was held by the Tribunal that that assessee had clearly demonstrated that services resulted in effective cost savings by way of an effective purchase function, technical assistance in relation to certain products provided by

AE and other ancillary functions like IT management for which the assessee did not have requisite staff to perform functions. The Tribunal noted that there were no change of facts from the earlier year and the Revenue had not been able to bring anything on record to controvert it.

Chryso India Private Limited (formerly known as 'The structural Waterproofing Company Private Limited') v ACIT [TS-329-ITAT-2018(Kol)-TP] ITA No.112/Kol/2017 dated 04.05.2018

2353. The TPO had clubbed the management service fee (which was separately benchmarked by assessee by applying TNMM as MAM) with other transactions under TNMM undertaken by assessee in manufacturing segment. The Tribunal held that TPO erred in clubbing the transaction pertaining to management service fee. It followed the coordinate bench decision in assessee's own case for earlier year wherein it was held that management service fee could be considered as a separate transaction as it had been accepted by DRP in subsequent years and also on remand by DRP, the TPO had not offered any adverse comments with respect to economic analysis carried out by assessee for said transaction.

Landis +Gyr Ltd vs DCIT [TS-1222-ITAT-2018(Kol)-TP] ITA No.524/Kol/2017 dated 17.10.2018

2354. The Assesse engaged in the business of manufacturing and marketing of paints, special chemicals and starch, entered into a service level agreement (SLA) with another Akzo Nobel Group company whereby it was to receive services relating to (i) Advice/support in the area of human resources to attain functional excellence, (ii) Advice and assistance on operation relating to plant, (iii) advice and support on strategies to optimize cost structures in purchasing, (iv) wide range of market support services (v) information technology, (vi) advice and assistance on reporting/accounting, financial control and planning activities and (vii) other ancillary business support functions including public affairs advise or public relations. The Tribunal rejected the TPO's classification of support services received from its AE as stewardship services. It relied on OECD Guidelines and US regulations to observe that co-ordination activities qualified as services unless a particular subsidiary did not need the activity and would not be willing to pay an unrelated party to perform it. Accordingly it deleted the TP addition relating to support services. The Tribunal further upheld the deletion of TP adjustment on account of SAP implementation services received from another AE on the ground that the TPO had erroneously construed these services as stewardship services without considering the plethora of facts, justifications and details. It observed that the assessee had submitted documentary evidence such as sample evidences of communications, training manuals and other relevant documents with TPO showing valuable commercial services received. Observing that SAP implementation leads to improved productivity and reduce costs through flexibility as well as increased profitability, improved financial control as well as optimization of IT spending, it noted that the asseesee had used SAP software for integrating the process at varied locations for the business. The manner of allocation of cost was scientific and correct. It accordingly concluded that the transaction was at ALP and dismissed Revenue's appeal.

Akzo Nobel India Limited [TS-379-ITAT-2017(Kol)-TP I.T.A No. 335/Kol/2014 dated 03.05.2017

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2355. The Tribunal deleted the TP adjustment on payment of IT services and technical support services by assessee to its AE following the coordinate bench ruling in assessee's own case for earlier year wherein similar adjustment was deleted in view of principle of consistency noting that TPO in respect of international transactions involving payments made by the assessee under the Cost Contribution Agreement (CCA) for receiving purchase services, order handling services and sales services for last three assessment years had not made similar adjustments and the TPO erred in making the adjustment for subject year despite there being no change in facts. Further, TPO had not applied any of the prescribed method under sec 92 to arrive at the aforesaid adjustment and thus, the adjustment could not be sustained.

AT&S India Private Limited vs DCIT [TS-1179-ITAT-2018(KOl)-TP] ITA No.69/Kol/2018 dated 10.10.2018

2356. The Tribunal deleted the TP adjustment in respect of management support services fees paid provided by the assessee following the coordinate bench decision of assessee's own case for earlier year wherein it was held that the TPO could not question the commercial expediency and how the assessee benefitted from such services relying on the on ratio laid down in the Delhi High Court ruling in Cushman and Wakefield. It had also observed that the DRP had treated the receipts from assessee as FTS in the hands of the AE which by itself means that services were being rendered and further, the TPO in the earlier years had made no such adjustment. Thus, it deleted the said adjustment made by the TPO on the basis that services rendered by AE to assessee amounted to shareholder activities.

Philips India Ltd. vs ACIT (2018) 52 CCH 0320 KolTrib ITA No.2498/Kol/2017 dated 04.04.2018

2357. The Tribunal deleted the TP adjustment made in respect of payment for services under the cost contribution agreement and rejected the TPO/DRP's determination of nil ALP. The Tribunal observed that for previous AYs 2009-10 to 2011-12, TPO had consistently accepted assessee's TP-documentation without making any adjustments. It relied on Radhasoami Satsang SC ruling for the principle of consistency and opined that unless there was a change of facts or law, Revenue could not blow hot and cold at will. The Tribunal rejected the view of the TPO that assessee had not satisfied the benefit test and opined that the authority of the TPO would be to conduct a transfer pricing analysis to determine the arm's length price and not to determine whether there was a service or not from which the assessee benefits.

AT & S India (P) Ltd v/s. DCIT [TS-336-ITAT-2018(Kol)-TP] ITA No.77/Kol/2017 dated 11.05.2018

2358. The Tribunal, following the order of the co-ordinate bench in the assessee's own case for the earlier AY, deleted TP-adjustment on management support services received from AE and rejected TPO's ALP-determination at Nil observing that the assessee had actually received services and demonstrated benefit. It noted that the said services could not be categorized as stewardship services and that the Revenue had accepted similar claim of assessee for other AYs. Further, it rejected the TP-adjustment on international transaction relating to receipt of IT services made by the TPO by determining its ALP at Nil and noted that the DRP had deleted similar addition made in the earlier and subsequent years. Since the assessee had been claiming the IT expenses for the last several years and the same had not been

denied, in view of the principle of consistency, it held that the TPO was unjustified in making TP addition.

DCIT vs. Philips India Ltd - TS-1088-ITAT-2017(Kol)-TP - ITA No.863 & 539/Kol/2016 dated 15-12-2017

2359. The Tribunal rejected TPO's NIL determination of intra group services in case of assessee who had entered into an agreement with its AE for operational services, marketing services and administrative services. The TPO had characterized the aforesaid services as stewardship services while arriving at the ALP to be NIL. The Tribunal held that such services were not stewardship noting that the TPO had not categorized such services to be stewardship in preceding years and sought to determine the ALP of these services. Further, it observed that the assessee was entirely dependent on the services (including IT services) which were essential for the running of its business. The DRP had given a finding that services had benefitted the assessee however it had confirmed TPO's NIL determination wrongly on the basis that proportion of benefit could not be allocated between assessee and AE. It accepted assessee's contention that the TPO had not used any of the prescribed methods u/s.92C(3) to determine the ALP of transaction. Accordingly, it restored the matter to TPO to determine the ALP of the intragroup services.

Sika India Private Limitedvs DCIT [TS-1178-ITAT-2018(KOl)-TP] ITA No.393/Kol/2014 dated 10.10.2018

2360. For AY 2012-13, the TPO was of the view that the assessee had failed to demonstrate that the payment made towards corporate service charges had resulted in any tangible benefit to the assessee and accordingly he applied CUP to determine the ALP of services at Rs.51,00,000 on man hour rate basis. The DRP upheld the TPO's order relying on its own order for AY 2011-12. The Tribunal remitted the determination of ALP of corporate service charges noting that the Tribunal in assessee's own case for AY 2011-12 had remanded the issue to DRP in view of the earlier year's decision wherein DRP (for AY 2009-10) had not passed a speaking order / given reasoned finding while upholding TPO's order. Further, for AY 2009-10, the DRP had not mentioned regarding the document submitted by assessee as additional evidence while it did point out about failure of assessee to submit single evidence to prove it had received services from its AE in lieu of which payment was made.

Huntsman International (India) P. Limited vs ACIT [TS-1215-ITAT-2018(Mum)-TP] ITA No.1099/Mum/2017 dated 12.09.2018

2361. The Tribunal held that where the assessee had filed details of services availed from its AE i.e. information technology, finance, communication, human resources, client services etc, as well as the allocation of costs pertaining to these services (based on revenue), the TPO / DRP were not justified in determining the ALP of the payment made by the assessee to its AE at Nil on the ground that no documentary evidence was submitted by the assessee. It rejected the contenton of the Revenue that since these expenses were incurred for the benefit of the entire group, no charge of such expenditure was required. Further, it held that the TPO and DRP had exceeded their powers and proceeded to determine the allowability of the expense instead of deteterming the ALP of the expenses.

Nielsen (India) Pvt Ltd v ACIT - TS-347-ITAT-2016 (Mum) – TP

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2362. Sulzer Management AG (AE of assessee) had entered into a contract with Microsoft and allocated charges to group entities. The DRP upheld the TPO's order determining the ALP of the annual charges towards Microsoft licencing fee as Nil on account of the fact that assessee had not received any benefit/service for the payment made to M/s Sulzer Management AG. The Tribunal restored the matter back to TPO following the coordinate bench decision of assessee for earlier year wherein the issue had been restored back noting that TPO had not benchmarked the transaction under any of the prescribed methods.

The DRP upheld the TPO's order disallowing the management fees observing that assessee had failed to prove the receipt of any service from AE commensurate with the cost allocation and also stated that the assessee should have separately benchmarked the transaction. The Tribunal restored the matter back to the TPO for examining the evidence which proved the receipt of services and to consider the explanation of assessee and also opined that the assessee was justified in aggregating the transactions in light of services being inextricably linked to manufacturing costs.

Sulzer Pumps India Pvt Ltd vs Dy.CIT [TS-1157-ITAT-2018(Mum)-TP] ITA No.1453/Mum/2014 dated 31.10.2018

2363. The TPO charged a markup of 10% on cost recovered from the AE by the assessee as he was of the view that marketing and promotion expenses incurred carried a service element and assessee had rendered services to its AE. The CIT(A) confirmed the action of TPO observing that it was clear from the facts that the assessee initially acted as an agent of the AEs through which the services rendered by the third parties were delivered the AEs. It was assessee's contention that the amount represented reimbursement of actual expenditure and also the method adopted for computing ALP was not as per provisions of the Act. The Tribunal directed deletion of markup and held that the TPO had not determined the ALP of transaction by any of the prescribed method u/s. 92 by relying on the Bombay HC decision in Kodak India.

Wartsila India Limited vs ACIT [TS-1166-ITAT-2018(Mum)-TP] ITA No.5002/Mum/2013 dated 04.10.2018

2364. The assessee along with HCL Technologies Ltd (HCL) had bid for a project to be undertaken by National Insurance Company Ltd. (NICL) for which it had incurred costs in terms of manpower, expertise and costs. A tripartite agreement was entered into between the parties. With respect to the execution of the project, the assessee had purchased software from its foreign parent company for Rs.3.2 crores which was sold by it at the same price to HCL. The AO made an addition of 10% as markup on sale of software which was confirmed by CIT(A) observing that the assessee had failed to provide details to substantiate that it was directed by the foreign parent company to simply deliver the software to HCL Technology on cost-to-cost basis and it was acting on behalf of the AE (parent company). The Tribunal restored the issue to TPO directing the assessee to demonstrate and prove its activities were governed by doctrine of commercial expediency and there was no shifting of income outside Indian tax jurisdiction. It rejected the assessee's stand that Revenue could not interfere in the manner in which the assessee was conducting its business noting that the foreign company was not a party to the agreement entered into and further, the ultimate user of software was NICL. After analyzing the factual background, it opined that there was a possibility of shifting of income outside Indian tax jurisdiction since the assessee had incurred costs in Indian tax jurisdiction

while bidding for RFP and the revenue was being booked on cost to cost basis. Thus, a doubt arose that profits were being shifted to foreign jurisdiction and it directed Revenue to examine the true colours of transaction entered into by assessee. In this context, it directed Revenue to analyze the costs booked by assessee while bidding for RFP vis-a-vis costs which were booked by it for other contracts/tender and manner in which revenue was recognized from these contracts to ensure there was no costs being loaded in India and income shifted outside Indian tax jurisdiction.

eBaotech India Pvt. Ltd. vs DCIT [TS-1125-ITAT-2018 (Mum)-TP] ITA No.549/Mum/2016 dated 22.10.2018

2365. The Tribunal restored the TP adjustment on services availed by assessee from its AE i.e. CSAPL noting that TPO could not determine the ALP of said services as NIL by applying benefit test if in the subsequent AY the TPO himself had allowed a part of service charges paid by assessee to CSAPL and accepted the fact that assessee had availed services under the agreement, thus there was no reason to dispute assessee's claim of availing services. Further, it also noted that additional evidence in form of affidavit was submitted by assessee during the course of hearing that services were availed at cost plus markup which was not available before the TPO. Thus, it restored the issue to allow an opportunity to the AO to consider additional evidence and decide the issue. It opined that evidences brought on record deserved to be examined on merit before deciding the issue.

Mondelez India Foods Pvt. Ltd. vs Addl.CIT [TS-1288-ITAT-2018(Mum)-TP] ITA No.1512/Mum/2013 dated 28.11.2018

2366. The assessee made payment of Rs.11,50,31,934 to its AE for availing Software Services which was claimed to be at ALP (as the AE has allocated the cost of the ERP software to all group companies in 40 countries as per the cost allocation mechanism provided in the agreement).The TPO relied on previous year's order for AY 2012-13 and addition of Rs.9,88,26,934 was made by computing ALP of the said transaction at Rs.1,62,05,000 by stating that the employees had rendered service of 2 man hours per days, he arrived at 730 man hours for the year (2 x 365 days) and estimated the ALP of service availed by applying a man hour rate of Rs.8,500 per hour to the said man days, which the TPO claimed to be as CUP. The DRP upheld the estimation made by the TPO as reasonable. The Tribunal deleted the TP adjustment made on payment for availing information services following the coordinate bench ruling in assessee's own case for earlier year wherein the similar adjustment was deleted noting that though the TPO had stated he had applied CUP for determining ALP, no comparable instance was brought on record and his estimation of charge on services was without any supporting evidence. Thus, it concluded that the TPO had not adopted any of the method u/s.92C r.w R 10B.Further, noting the cost was allocated to 40 group companies across globe who were using the software and related services, the Tribunal held that there was no reason for not accepting the payment made to the AE to be at arm's length in the absence of any contrary evidence brought on record.

Firmenich Aromatics Production (India) Pvt. Ltd. vs ITO [TS-1214-ITAT-2018(MUM)-TP] (ITA No.7145/Mum/2017) dated 13.11.2018

2367. The assessee, resident of Singapore, deputed one of its Director/employee to India to an associate concern (MSAS) engaged in providing information technology enabled services and

software development to overseas Morgan Stanley entities. The assessee, as per the terms of contract, agreed to continue paying salary of the employee in Singapore and cross charged the same to MSAS, the said salary was offered to tax in India by the employee. The AO held that the amount received by the assessee was to be treated as FTS and charged a markup of 23.3 per cent on the reimbursement received by the assessee. The CIT(A) confirmed the action of the AO by treating the reimbursement and mark up there on as FTS. Noting that there was a contractual agreement between MSAS and assessee, which clearly provided that salary was being paid by assessee on behalf of MSAS and the same was recharged by assessee to MSAS, the Tribunal held that the amount received/receivable by assessee (being in the nature of reimbursement of salary deputed to deputed employee) could not be brought within the definition of FTS as defined in explanation to section 9(1)(vii). Explanation 2 clearly excludes consideration which would be income of the recipient chargeable under the head "salaries". It relied on coordinate bench ruling in case of Mark and Spencer India (P) Ltd wherein it was held that expatriation of employee under secondment agreement without transfer of technology would not fall under the term 'make available' and would not be taxable under the treaty. Thus, it held that the payment in question being reimbursement of salary was not fee for technical services in the light of relevant provisions of the Act and India-Singapore DTAA. Further, there was no dispute that the assessee has made payment towards the reimbursement of salary expenditure, which clearly showed that there was no element of profit in the said payment and also the salary was subject to tax in India Accordingly, it held that the reimbursement of salary received by could not be taxed in the hands of assessee and consequently the TP adjustment with respect to markup of reimbursement of salary received could not be sustained.

Morgan Stanley Asia (Singapore) Pte. Vs DDIT [TS-623-ITAT-2018(Mum)-TP] ITA No.8595/Mum/2010 and ITA No.4365/Mum/2012 dated 06.07.2018

2368. The assessee made payment to its AE for availing Software Services which was claimed to be at ALP (as the AE has allocated the cost of the ERP software to all group companies in 40 countries as per the cost allocation mechanism provided in the agreement). Though the TPO agreed that AE had provided software services, in absence of specific details towards services rendered to the assessee, he quantified the value of the services rendered by the AE on basis of man hour estimate. Accordingly, stating that the employees had rendered service of 2-man hours per days, he arrived at 730-man hours for the year (2 x 365 days) and estimated the ALP of service availed by applying a man hour rate of Rs.8,500 per hour to the said man days, which the TPO claimed to be as CUP. The DRP upheld the estimation made by the TPO as reasonable. The Tribunal deleted the TP adjustment made on payment for availing information services noting that though the TPO had stated he had applied CUP for determining ALP, no comparable instance was brought on record and his estimation of charge on services was without any supporting evidence. Thus, the TPO had not adopted any of the method u/s.92C r.w R 10B. It also observed that documentary evidence in form of copy of the agreement, invoices raised, certificate from independent Chartered Accountant Firm, KPMG, details of users were also furnished before the TPO and thus, the TPO's allegation that documents were not furnished could not be sustained and the determination of ALP was on adhoc basis. It noted that TPO had given contradictory findings wherein on one hand he had agreed that the AE had provided software and certain services and on the other hand he observed that assessee had failed all the three tests inter alia including whether services have

been provided so as to ultimately disbelieve the quantum of payment. Further, noting the cost was allocated to 40 group companies across globe who were using the software and related services, the Tribunal held that there was no reason for not accepting the payment made to the AE to be at arm's length in the absence of any contrary evidence brought on record and by simply applying the benefit test.

Firmenich Aromatics India P Ltd vs Dy.CIT [TS-758-ITAT-2018(Mum)-TP] ITA No.2590/Mum/2017 dated 23.07.2018

2369. The Tribunal restored the TP adjustment on price charged to AE towards services rendered under Intellectual property service agreement by the assessee noting that content development or animation and website services were within the ambit of ITES and accordingly directed the TPO to benchmark the transaction by aggregating with other ITES transactions and determine the ALP by applying the average margin of the comparables selected under the ITES segment. The TPO had benchmarked the aforesaid service separately and the DRP had also failed to rectify the error committed by the TPO.

Accenture Services Pvt Ltd vs ACIT [TS-737-ITAT-2018(Mum)-TP] IT(TP)A No.7686/Mum/2012 dated 20.07.2018

2370. The Tribunal deleted the TP adjustment in respect of provision of support services and market information provided by the assessee to its AE by following the coordinate bench decision in assessee's own case for earlier year wherein it was held that under the provisions of s 92C of the Act, adhoc disallowance being 0.5% of the turnover could not be made and one of the prescribed methods had to be adopted for making the adjustment. [The assessee's own case for earlier year had relied on the Bom HC judgement of Kodak India Pvt. Ltd.]

Safilo India Pvt Ltd vs DCIT [TS-756-ITAT-2018(Mum)-TP] ITA No.7561/Mum/2016 dated 05.07.2018

2371. Where the assessee availed only certain services out of bunch of services mentioned in an agreement and the TPO did not doubt the arm's length price of the services availed, the Tribunal held that no TP adjustment could be made vis-à-vis the balance services. It held that if the assessee availed only few services of the bouquet of services, the TPO should not reject the TP study on the ground that the assessee did not avail all the services or majority of services as provided in the agreement.

Dimension Data India Private Limited vs DCIT-TS-644-ITAT-2017(Mum)-TP-ITA No. 2280/mum/2016 dated 16.08.2017

2372. The assessee had paid cost allocation charges of Rs.34.63 crores pertaining to intra group services received from its AEs. During assessment proceedings, based on request of TPO details about nature of services provided by AE, cost allocation methodology adopted as well as evidence of receipt of services by assessee were submitted to TPO .However, TPO rejected ALP of cost allocated to assessee by stating that assessee failed to produce supporting documents/evidence to substantiate that services were rendered by AE and charge reflected value/benefit of service received .Further, TPO applied CUP method to benchmark said transaction and made addition of Rs.33.36 crores. He determined the ALP of Rs.1,27,50,000 by considering the total amount of man hours of services rendered by AE at 1500 hrs and applying man hour rate of Rs.8500 per hour. The Tribunal deleted the

adjustment noting that that necessary evidence had been brought on record by assessee which had not been examined by authorities .It was found assessee's allocation of expenses was based upon a global agreement between AEs in this regard and various allocation keys, i.e., asset, revenue, number of employee, depending upon nature had been used and methodology adopted had mandate of guidelines of OECD. Further, allocation was supported by a CPA certificate which had been duly authenticated. Thus, the action of lower authorities below in rejecting CPA certificate was not sustainable and DRP's order was set aside.

Jabil Circuit India Pvt Ltd vs Asst.CIT [TS-1274-ITAT-2018(MUM)-TP] (ITA No.2200/Mum/2017 and 867/Mum/2018) dated 19.11.2018

2373. The Tribunal dismissed Revenue's appeal against CIT(A)'s deletion of TP-adjustment on account of disallowance of part of professional service fees paid by assessee to its AE. The service rendered by AE was to enable assessee's fulfilment of management services contract with an independent third party viz. Hazira LNG for plant construction. Accordingly, accepting the contention of the assessee that the services received by the assessee from its AE was independent of the income received by it from Hazira LNG, the Tribunal held that the TPO erred in concluding that the expenditure related to professional services received by the assessee from its AE was to be allowed only in the next AY since income from Hazira LNG was recognized in that year. It upheld the CIT(A)'s view that income receivable from Hazira LNG would not have altered assessee's liability in respect of its payment to AE and further held that the TPO exceeded his jurisdiction by taking over the role of the AO and disallowing an expenditure based on assessee's adoption of a project completion model for accounting. It held that the TPO was neither supposed to take decision about accounting policy to be followed by the assessee nor comment upon as how to compute income if an assessee follows a particular method of accounting.

DCIT vs Hazaria Cryogenic Engineering and Construction Management Pvt. Ltd - TS-4-ITAT-2018(Mum)-TP - /I.T.A./2124/Mum/2007 dated 03/01/2018

2374. Where the assessee had provided various evidences to corroborate the receipt of intra-group services such as financial, administrative, technical and commercial services from its AE along with the allocation of the costs, the Tribunal held that the TPO was incorrect in determining the ALP at Nil as the assessee had provided adequate documentation. It held that the Revenue was incorrect in disregarding the actual transaction between the parties as the economic substance did not differ from its form.

SKF India Limited [TS-810-ITAT-2016 (Mum)-TP] (ITA No. 1420/Mum/2016)

2375. The Tribunal held that if the intra-group services were inextricably linked with the manufacturing segment, the aggregated margin earned on the overall assets as well as the manufacturing operations would take care of the payment made for intragroup services but also noted that the onus would be on the assessee to demonstrate whether the associate enterprises treated the international transactions as a single transaction or the same was aggregated. Accordingly, it remitted the matter to the file of the TPO to determine whether the intra-group services were inextricably linked with the manufacturing and overall business carried out by the assessee and that if it was found that all the transactions were to be aggregated, then no separate benchmarking would be required.

SKF India Limited [TS-810-ITAT-2016 (Mum)-TP]

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2376. The Tribunal deleted TP-adjustment in respect of provision of manning services by assessee [engaged in the business of sourcing, screening and selecting seafarers and also providing assistance in completing their free joining formalities, etc.] to its AE. The Tribunal observed that, co-ordinate bench in assessee's own case for previous AY had deleted similar TP-adjustment on the basis that after taking into consideration the amount of expenses reimbursed by the associated enterprise over and above the fixed rate of payment (which was not factored in the benchmarking analysis by the TPO), rate charged by assessee could be compared favourably with the rate adopted by TPO. Thus, there being no material difference in facts, it deleted the addition made on account of transfer pricing adjustment of manning services in the present year also.

Wilhemsen Ship Management India P Ltd. Vs ITO- TS-391-ITAT-2018(Mum)-TP-ITA no. 2404/Mum/2012 dated 27.04.2018

2377. The assessee was providing intragroup services relating to external commercial borrowings made by third parties from assessee's AE. The AE earned interest income and commission fees in respect of the said borrowings/loans which was added by the TPO in the hands of the assessee. The Tribunal relying on its order of the earlier year, directed TPO to restrict TP-adjustment on services rendered by Indian Branch of assessee bank to AE at 20% of agency/commission fee and directed deletion of adjustment towards interest as the assessee had a limited role in sanctioning of loan to Indian customers and the loan was granted by AE who had borne risk as well as reward from such activity.

Further, the Tribunal confirmed CIT(A)'s order deleting TP-adjustment on interest received/paid on money market deposits given to AE/accepted from AE by assessee, observing that the TPO had ignored similar transactions wherein the assessee had earned excess interest from AE or paid lesser interest to AE as compared to benchmark and therefore held that all such closely linked transactions were required to be aggregated to determine TP-adjustment. Thus, relying on co-ordinate bench ruling in Audco India Ltd. and Essar steel ruling, it held that the Tribunals were consistently taking the view that arm's length price should be determined after aggregation and there was no scope for adjustment without aggregation.

Barclays Bank PLC vs ADIT (Intl Tax)-3 -TS-360-ITAT-2018(Mum)-TP- ITA No 2242/Mum/2015 dated 13.04.2018

2378. The Tribunal remitted the matter to the DRP to re-adjudicate the issue relating to the computation of ALP of the international transactions of the assessee's payment of corporate service charges (legal services, treasury and credit, purchasing, transportation and logistics, travel co-ordination services, internal audit, human resources services, etc) to the AEs, on which the TPO made an addition by rejecting the TNMM adopted by the assessee and applying CUP, by considering man hours of various services rendered by the AE. Observing that the DRP had not passed a speaking / reasoned order, the Tribunal directed the DRP to re-adjudicate the issue after allowing assessee opportunity of being heard.

Huntsman International (India) Private Limited vs DCIT – TS-65-ITAT-2017 (Mum) – TP - ITA No.5637/Mum/2015, ITA No.382/Mum/2016 dated 31.01.2017

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2379. Where the TPO made an adjustment of Rs.6.34 crore on the corporate service charges paid by the assessee to its AE, by adopting the CUP method and by considering man hours of the services rendered by the AE, which was confirmed by the DRP vide a non-speaking order, the Tribunal remitted the issue to the file of the DRP for re-adjudication, directing it to pass a reasoned order.

Huntsman International India Pvt Ltd – TS-65-ITAT-2017 (Mum) – TP

2380. The Tribunal remitted the TP-adjustment on sales support services rendered by assessee to its AE for re-adjudication noting that the main dispute was around cost allocation between trading and sales support services and assessee had made several submissions which were not considered by lower authorities. It noted that the TPO had made adjustment on reimbursement of project expenses which consisted of travel expenses of engineers, salary, insurance, logistics for importing the material related to the project, etc., for want of documentation while DRP enhanced it holding it to be shareholder activity without giving any plausible reasoning in support of its claim that project expenditure was shareholder activity and would benefit only AE. It noted that the assessee had consistently submitted that expenditure was towards setting up of its Ranjangaon Project and accordingly held that the TPO ought to have determined ALP in light of provisions of Rule 10B. Further, it held that the Revenue could not sit into the armchair of businessman to adjudge necessity of expenditure unless it was shown that the expenditure was not at all required to be incurred for the benefit of the assessee and the assessee, in normal circumstances, would not be willing to pay the same to independent third parties. It also observed that the expenditure was capitalized and disclosed under 'work in progress' in the Balance Sheet and not debited to profit and loss account, thus held that approach of Revenue to add back amount as income was clearly fallacious. Thus it set aside Nil ALP determination and restored the matter back to TPO for de novo consideration.

Jotun India P Ltd v ITO - TS-447-ITAT-2018(Mum)-TP - I.T.A. No.1126/Mum/2013 dated 04 /05/2018

2381. The Tribunal held that since the assessee did not bring any cogent material on record to substantiate the incurrence of expenditure wholly and exclusively for business purposes, the expenditure was clearly disallowable and the ALP was held to be Nil.

Godrej Sara Lee Ltd v ACIT (ITA No. 1251/MUM/2014) – TS-565-ITAT-2015 (Mum) – TP

2382. The Tribunal dismissed Revenue's appeal as withdrawn subject to verification of fact whether amount paid for availing management services was Rs.8,22,38,141/- or Rs.8,22,46,172/- (mentioned in a certain para of TPO order) noting that APA covered the subject year stating that if the payment for provision of management services made to AE did not exceed Rs.8,22,38,141/- , it was to be at ALP.

ACIT vs Gia India Laboratory Pvt Ltd [TS-1245-ITAT-2018(MUM)-TP] (IT(TP)A No.) dated 19.11.2018

2383. The Tribunal remitted the intra-group services (administrative and managerial services) availed by assessee from its AE noting that facts of subject AY were similar to the assessment years covered in the APA. It directed the AO/TPO to examine the facts closely and relevant terms of agreement between CBDT and assessee and also to conclude on the

argument of the assessee vis-à-vis issue of applicability of APA to the assessee's case for the year under consideration in principle.

Honeywell Automation India Ltd. vs ACIT [TS-1207-ITAT-2018(PUN)-TP] (ITA No.359/PUN/2013) dated 02.11.2018

2384. The Tribunal deleted the TP adjustment made with respect to payment to AE for intra-group services on account of Oracle base provided by Eaton UK which was used by assessee (engaged in engineering design and software development, back office support and business development services to its AEs) under APSSC segment for providing back office services to group entities. Noting that both the TPO and CIT(A) had not disturbed the benchmarking of international transactions of APSSC segment (where the oracle implementation charges were included as part of operating costs), however the lower authorities had made TP adjustment in respect of payment made to AE for Oracle implementation charges on account of assessee failing to establish services had been received from its AE. It opined that once the margins have been accepted, then cost incurred could not be disturbed and further, observed that the transaction was closely and intrinsically linked to the business operations carried on by the assessee, then the same could not be segregated and ALP of said transaction could not be determined to be Nil. It also relied on coordinate bench decision in case of assessee's group concern i.e.Eaton Industries Manufacturing GmbH wherein it deleted the disallowance of cost incurred on receipt of support services from its AE by holding that assessee had placed on record the evidence of support services being received from the AEs which were in the nature of back office accounting services and IT support services that enabled it to run its business.

Eaton Technologies Pvt Ltd vs ACIT [TS-1297-ITAT-2018(Pun)-TP] (ITA No.1650/Pun /2013) dated 31.10.2018

2385. The TPO had determined the ALP of the management fees at "NIL" since the assessee had failed to demonstrate the need for services and benefits received. The Tribunal restored the TP adjustment on account of management services fees admitting the additional evidence by following the coordinate bench decision of the assessee in its earlier year wherein the Tribunal had admitted the additional evidence filed by the assessee and remitted the issue back to the file of AO to consider the documents submitted to substantiate the benefits derived by its AE.

Haworth (India) Private Limited vs DCIT [TS-975-ITAT-2018(PUN)-TP] ITA No.109/Pun/2016 dated 21.08.2018

2386. The assessee was engaged in the manufacture of headliners, door panels, parcel trays, etc. and also had technical centre for providing design and drawing services. The assessee in its TPSR had applied TNMM and computed its PLI after excluding abnormal cost for wastage and worked out PLI at 7.31%. The TPO had recomputed the assessee's margin at -11.56% by including abnormal costs and compared it with mean margin of comparables at 6.39%. TPO noted that majority transaction in manufacturing segment was only of advisory services and other transaction were on capital account and held the advisory services (for which payments were made to AE) had not resulted in any benefit to the assessee. Accordingly, the TPO determined the ALP of the same to be NIL and disallowed the entire payment / expenditure. The DRP upheld TPO's order observing that the TPO had clearly demonstrated

that the assessee had not received any benefit through advisory services as it had earned negative margin of (-) 11.56% of manufacturing segment, whereas comparables had earned 6.39% positive margins. The Tribunal noted that a) TPO had failed to come to a finding in this regard as to whether advisory services had been availed by the assessee or not but had gone to take the value of same at Nil b) TPO could not determine ALP to be nil without going into merits of rendition of services c) There was no merit in the stand of TPO that as unadjusted margin was -11.56%, the advisory services were not at ALP when after allowing the adjustment for extraordinary cost the assessee's margin stood at 7.13%. Thus, the Tribunal deleted the adjustment.

Grupo Antolin India Pvt. Ltd (Erstwhile known as Grupo Antolin Pune Pvt. Ltd vs Dy.CIT) [TS-1128-ITAT-2018(PUN)-TP] ITA No.299/Pun/2013 dated 17.10.2018

2387. The assessee had entered into a shared service agreement with its AE and in terms of the agreement, it received corporate support services from AE. It benchmarked the aforesaid transaction by aggregating with manufacturing and trading segment and applied TNMM. The TPO determined the ALP of the aforesaid services to be nil by applying the benefit test. Tribunal deleted the TP adjustment on corporate support services received by assessee from its AE following the coordinate bench decision in assessee's own case for earlier year wherein TPO's nil determination of services was rejected by holding that TPO could not sit in the judgement of business module of assessee and its intention to avail or not avail any services. The role of TPO was to determine ALP of international transactions undertaken by assessee. Further, the IT enabled corporate support services related to the business carried out by the assessee and had to be aggregated with other transactions being intrinsically linked to other transactions undertaken by assessee.

Eaton Fluid Power Limited vs DCIT [TS-1217-ITAT-2018(Pun)-TP] ITA No.506/Pun/2015 and ITA No.476/Pun/2016 dated 15.10.2018

2388. The Tribunal restored TP adjustment on account of payment of management fee and communication fees (in pursuance of cost allocation agreement with its AEs) by following coordinate bench decision in assessee's own case for earlier year(s) wherein it was noted that TPO/DRP had failed to note assessee's contention that these costs had been recovered on markup from AE's and there was no merit in adopting the same at "Nil". The TPO had determined the ALP of said fees at NIL on ground that the assessee had not furnished evidence to prove services and benefit derived from such services with supporting evidences.

MSC Software Corporation of India Pvt Ltd vs Asst.CIT [TS-1370-ITAT-2018(Pun)-TP] (ITA No.592 /Pune /2018 dated 24.10.2018

2389. The Tribunal deleted TP-adjustment on payment of fees for advisory and other services rendered by AE observing that the analysis done by TPO as to nature of services and benefit to assessee was beyond the scope of TP provisions. It observed that the assessee had filed contemporaneous and highly-technical documentary evidences to demonstrate benefits of services such as support for new product, marketing material, training material and technical support, etc and held that once such a business decision had been taken and the payment had been backed by substantial evidence of services received by it from its associated enterprises, then the TPO could not question the same by commenting upon the nature of services provided. It held that the examination of qualification of AEs to provide services and

costs incurred by AE was outside the domain of TPO and further observed that the AEs had provided similar services to other group entities and relevant details as to basis of charge, calculations along with proof that similar arrangements with other related entities which were certified. Accordingly, it accepted assessee's adoption of TNMM and consideration of AEs as tested-party and discarded the Nil ALP determination on the basis of examination of needs and benefits of services instead of benchmarking using uncontrolled transactions and held that such a metholodolgy under the garb of CUP was not permissible in law.

Emerson Climate Technologies (India) Limited. vs. DCIT - TS-1065-ITAT-2017(PUN)-TP - ITA No.2182/PUN/2013 dated 29.12.2017

2390. The Tribunal deleted the TP-adjustment (TPO determined ALP as Nil) on information technology (IT) services availed by assessee (engaged in manufacture and distribution of fluid power equipment) and held that the factum of availing services as well as basis of charge was proved by assessee based on a certificate received from AE which had also certified that similar charge was made to other group entities and other documents like debit notes, JV vouchers, etc. It rejected TPO's segregation of transaction of availing IT services from other international transactions and held that the IT services were related to the business of the assessee and therefore ought to be aggregated.

Eaton Fluid Power Limited vs. ACIT - TS-178-ITAT-2018(PUN)-TP - ITA No.45/PUN/2013 dated 12.03.2018

2391. The Tribunal deleted TP adjustment on payment of fees for advisory and other services rendered by AE. Noting that the assessee had filed contemporaneous and highly technical documentary evidence to demonstrate benefits of services such as support for new product, marketing material, training material and technical support etc and the AE had provided similar services to other group entities, the Tribunal held that the examination of qualification of AEs to provide services and costs incurred by AE was beyond the scope of TP provisions and accordingly deleted the adjustment.

Emerson Climate Technologies (India) Limited vs DCIT-TS-1065-ITAT-2017(PUN)-TP dated 29.12.2017

2392. The Tribunal deleted disallowance under section 37 on payment towards support services and corporate cost allocation to AEs since the activities were routine activities and the said expenditure could not be disallowed on the ground that assessee had failed to provide documentary proof to evidence receipt of benefits of corporate functions. Also the entire cost incurred by the assessee was recovered from the AE with a mark-up of 18.8%. The Tribunal further observed that if the AO's action was upheld it would lead to disallowance of cost on one hand and taxation of markup on the recovery on the other hand.

Eaton Industries Manufacturing GmbH [TS-1051-ITAT-2016(PUN)-TP]

2393. The Tribunal deleted transfer pricing adjustment on payment for technical services fees made by assessee to its AE in Sharjah and rejected revenue's contention that since Sharjah AE was located in a tax haven, the assessee had adopted a tax evasion strategy to make lesser tax payments. It held that ALP determination must be conducted irrespective of whether the AE is situated in high tax or low tax jurisdiction. Further, where revenue had compared Sharjah-fees transaction with royalty-free licensing of manufacturing process intangibles from German

AE, the Tribunal rejected revenue's determination of Nil ALP since transaction with German AE was an intra-AE transaction & could not be considered as a valid internal CUP. It further held that any non-compliance with the scheme of Section 144C was fatal to the assessment itself and as a corollary thereto, when an issue was not raised in the draft assessment order, it could not be raised in the final assessment order either.

Woco Motherson Advanced Rubber Technologies Limited [TS-896-ITAT-2016(Rjt)-TP] (I.T.A. Nos.: 89 and 3208/Ahd/11)

Reimbursements

2394. The Court dismissed Revenue's appeal against deletion of TP-adjustment on reimbursement of 20% of advertisement expenditure incurred by assessee's AE in respect of new products on the ground that sharing of expenditure with AE was a strategy to develop assessee's business which could result in improving brand image and higher profit due to higher sales. It held that it was not part of the TPO jurisdiction to consider whether or not the expenditure which had been incurred by the respondent assessee passed the test of Section 37, the jurisdiction of the TPO was specific and limited i.e to determine the ALP of an International transaction. It further held that as neither the most appropriate method nor the choice of comparable had been disputed by TPO, adhoc disallowance of expenditure could not be allowed and thus, concluded that no substantial question of law arose for its determination.

Lever India Exports Ltd - TS-23-HC-2017-(Bom)-TP

2395. The Court upheld the order of the ITAT allowing the reimbursement of sales promotion expenses incurred by the AE under the assessee's instruction. Further, it held that the question of benefit to the assessee would only arise when the expenses were incurred by the AE in its own right for the common benefit of the group as a whole and not under instruction from the AE which was the present case.

CIT v Apollo International Ltd (ITA 610 / 2015) – TS-439-HC-2015(Del) – TP

2396. Where the assessee had reimbursed certain technical and commercial administrative expenses to its AE at actuals in respect of which TPO made an addition of Rs. 2.67 crores by determining the ALP of the said payments at Nil under the CUP method on the ground that there was no proof of assessee having received any service and also there was no benefit derived therefrom the Tribunal observed that the assessee had not provided any evidence either before TPO or DRP in support of the service having been rendered by the AE and accordingly remitted the issue back to the file of TPO to examine (i) whether any service was actually rendered by the AE and (ii) to ascertain whether the reimbursement was at actuals without involving any profit element and (iii) also whether the same was incurred for the purpose of business only.

Trianz Holdings Pvt. Ltd. vs. DCIT - TS-204-ITAT-2017(Bang)-TP - IT(TP)A No.415 / Bang/2016 dated 23. 02. 2017

2397. The assessee rendered call center / ITeS services to its AEs (which were benchmarked under TNMM) and also to non-AEs. Its international transaction of call center services were split into 'US operations' and 'UK operations'. For its US operations, the AE viz. Mphasis Corp (Mcorp)

entered into contracts directly with ultimate customers and the assessee provided ITeS directly to the customers under a back to back arrangement with MCorp and as a return for the marketing activity carried on by MCorp, a selling commission of 7% was paid by AE while the entire revenue collected from ultimate customers in US was passed on to assessee. With respect to operations in Europe, Mphasis UK (AE), carried out marketing activity for a selling commission of 4%, however, in this case, assessee entered into contracts directly with the ultimate customers. In its TP study, assessee selected foreign AE's i. e Mphasis Corp,USA and Mphasis, UK as tested parties claiming them to be least complex as they were providing only marketing services. The cost of telecom equipment ownership and maintenance was reimbursed by assessee to the AEs on actual costs. The TPO accepting the ITES services to be at ALP, proceeded to determine the ALP of the selling commission, telecom cost, establishment charges and reimbursement of expenses paid at Nil alleging that there were no services provided by the AE. With respect to reimbursement of expenses towards telecom cost, establishment charges and reimbursement of other expenses, assessee submitted that it had provided various additional documents to demonstrate that the reimbursements were actually at cost. The Tribunal opined that since the assessee had filed additional evidence to substantiate that reimbursement towards telecom cost, establishment charges and other expenses are only on cost basis, in the interest of justice, the matter required fresh adjudication/remand to the AO/TPO to examine additional evidence whether reimbursement of expenses towards telecom cost and establishment charges were actually on cost. It also opined that assessee's submissions regarding selection of AE as tested party also required fresh consideration by TPO. Thus, it restored the entire TP-adjustment to the file of AO/TPO for fresh adjudication in accordance with law after affording due opportunity to the assessee.

MSource (I) Pvt. Ltd vs. ACIT - TS-248-ITAT-2017(Bang)-TP - IT(TP)A No.13/Bang/2012 dated 31/03/2017

2398. The Tribunal, relying on the coordinate bench's ruling in assessee's own case [TS-18-ITAT(Bang)-2016-TP] held that reimbursement of paid/ received expenditure could not to be treated as part of operating cost or operating revenue, and remanded the matter back to the file of AO to examine whether any profit element was involved in the reimbursement transaction and whether it was in the nature of pure reimbursement of expenditure.

FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

2399. The Tribunal following the ruling in assessee's own case for AY 2003-04 upheld TP-adjustment towards reimbursement of advertisement expenditure by assessee to its AE for AY 2006-07. In the earlier year, Tribunal noted that assessee was a contract manufacturer for its AE and was entitled to only markup on manufacturing costs incurred by it. Thus, it was not required to bear any risk associated with marketing and distribution of goods sold by AE worldwide. The Tribunal noting that the legal and economic ownership of the brand 'TITAN' in overseas market belonged to and was exploited by assessee's AE held that the benefit from advertisement expenditure was not derived by assessee. Further, it upheld the TP-adjustment in respect of interest on advertisement advance and held that non-charging of interest on such outstanding amounts attracted Transfer Pricing provisions and therefore interest at least LIBOR +2% was appropriate.

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Titan Industries Ltd vs ACIT-TS-363-ITAT-2017(CHNY)-TP dated 03.04.2017

2400. Where a TP adjustment was made by AO/TPO on account of reimbursement of software cost by the assessee to its AE treating its ALP at NIL, the Tribunal, relying on the decision in assessee's case for AY 2007-08 and 2008-09 held that certain transactions entered into by the assessee for business expediency need not necessarily attract financial benefits and Revenue cannot dictate that certain transactions should not be entered into and accordingly deleted the TP adjustment.

Benetton India Private Ltd vs. DCIT-TS 835-ITAT-2017(DEL)-TP ITA No.4329/Del./2014 dated 27.10.2017

2401. Where the assessee manufactured products in line with AE specification, which were then first registered in his name and thereafter, the ownership of the same was passed on to the AE, for which it recovered the registration fees (Rs. 1.3 crores) paid by it from the AE at cost without any mark-up, the Tribunal held that the TPO erred in rejecting this approach of the assessee and in applying a markup of 14.26% (being the mark up charged in contract manufacturing segment) to such expenses. It held that as this cost was incurred by the assessee for and on behalf of its AE and the same was recovered without rendering any service qua the payment of registration fees, the assessee was justified in not charging a mark–up on the same.

Tevapharm India Pvt. Ltd vs Addl CIT – TS-151-ITAT-2017 (Del) – TP ITA No.6707/Del/2016 dated 06.03.2017

2402. The Tribunal remitted the benchmarking of the reimbursements paid by the assessee to its AEs to the file of the AO / TPO for verification. It noted that the assessee had reimbursed its AE for salary expenses relating to two expatriate employees seconded to it by its AEs, which were paid by AEs outside India for administrative convenience and subsequently reimbursed by the assessee. The Tribunal noted that for immediately preceding AY 2005-06, assessee had paid the AEs for the reimbursement of one of the employees, which had been assessed u/s 143(3) and no disallowance in respect of such reimbursement had been made by AO. Further, it noted that the assessee in its TP report had benchmarked the reimbursement by applying CUP method, therefore, TPO's statement that assessee had not benchmarked these transactions was without basis. The remuneration had been agreed upon between two independent parties, i.e. the assessee and expatriate employees, and the same had actually been paid to the employees (initially by the AEs which were subsequently reimbursed by the assessee a). Accordingly, it held that the payment made by the assessee towards reimbursement of salary of seconded employees had to be accepted to be at arm's length. As regards TPO's finding that assessee had been unable to demonstrate that the salary paid to the expatriates was in line with the salary paid to its own senior management personnel, the Tribunal took note of assessee's submission that the employees were rightfully entitled to the same level of salary as they were earning in their country of origin.

Vis-à-vis the consultancy charges reimbursed by the assessee, it noted that the assessee had not claimed a deduction in respect of these charges and therefore the amount had been taxed twice in the hands of the assessee and accordingly directed the AO to make proper adjustment in respect of consultancy charges.

Mars International India Pvt. Ltd. Vs DCIT - TS-289-ITAT-2017(DEL)-TP - I.T.A .No.

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160/DEL/2011 dated 29. 03.2017

2403. The TPO made an adjustment to the reimbursements received by assessee for payments made by it on behalf of its AE opining that the reimbursements being international transaction in terms of section 92B were closely linked to assessee's main transactions of providing ITeS to its AE and by making payments on behalf of its AE, the assessee had performed a service to the AE by using its financial and other services. The DRP held that reimbursements were received as part of the core transaction and, thus, upheld the mark-up / adjustment. The Tribunal restored the issue to the AO/TPO to verify if reimbursements were on actuals (after allowing the assessee to file requisite bills raised on AE along with vouchers/bills) and also directed the AO/TPO to not make any adjustment if it was so.

INDUCTIS INDIA PVT. LTD. vs. Dy CIT (2018) 53 CCH 0329 DelTrib ITA No. 1438/Del/2016 dated 13.07.2018

2404. The Tribunal deleted the TP adjustment of markup on cost reimbursement received from the AE following the coordinate bench decision of the assessee's own case for AY 2005-06 wherein it was held that the transaction of cost recharge for supply of telecom equipment is a mere pass through cost reimbursed to the assessee by AE and could not entail markup. It also noted that the Revenue failed to bring any change in FAR analysis and functions performed by the assessee in subject year and hence there was no difference in factual circumstances from the earlier year.

Ericsson India Pvt Ltd vs DCIT [TS-752-ITAT-2018(DEL)-TP] ITA No.3891/Del/2010 dated 12.07.2018

2405. The Tribunal deleted TP-adjustment on account of reimbursement of software cost by assessee (engaged in production and sale of readymade garments) to its AE for AY 2009-10. Noting that AE charged assessee for use of software in its manufacturing process on a cost-to-cost basis, relying on the decision in assessee' s case for AY 2007-08 and 2008-09, it held that the TPO was not justified in questioning the commercial expediency of such reimbursements Further, it held that even otherwise, there was no data available with the Revenue to prove that the ALP of the transaction was NIL. Noting that TPO/CIT(A) did not dispute the incurring of software cost in the earlier year, Tribunal held that rule of consistency was required to be followed by the Revenue particularly when there was no change in facts and circumstances of the case. When the Revenue has extended relief to the taxpayer in AY 2007-08 and 2008-09 the ld. CIT (A) had no reason to decline the same qua the year under assessment. Accordingly, it allowed assessee's appeal.

Benetton India Private Ltd vs. DCIT-TS-835-ITAT-2017(DEL)-TP dated 27.10.2017

2406. The Tribunal following the order of the co-ordinate bench in assessee's own case for earlier year remitted the issue vis-à-vis charge of markup on reimbursements from AE for the limited purpose of verification whether the transactions were routed through books. The Tribunal observed that AE's employee was transferred to assessee's company payroll as a whole time director with responsibility for scientific business and infrastructure operations of certain sister concerns/ affiliates, accordingly, assessee recharged the apportioned salary and other direct expenses incurred to respective affiliates on a cost-to-cost basis. The Tribunal noted that TPO

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suggested that a markup of 10% should be charged which was upheld by CIT(A) and had also observed that the transaction was not routed through the books.

United States Pharmacopeia India Pvt Ltd [TS-451-ITAT-2018(HYD)-TP] ITA No. 1582/Hyd/2017 and CO. No.37/Hyd/2017 dated 01.06.2018

2407. The AE's employee was transferred to assessee's rolls as a whole-time director with responsibility for scientific business and infrastructure operations of certain sister concerns/ affiliates, for which the assessee reimbursed the AE with the apportioned salary and other direct expenses incurred on a cost-to-cost basis. The TPO suggested that a markup of 10% should be charged which was upheld by CIT(A) observing that the transaction was not routed through the books. The Tribunal held that in case, the transaction was not routed through the books, the action of TPO may be sustained and remitted the issue back to the file of AO to verify the transaction. However, if the transaction was routed through books of accounts, it clarified that it was a normal practice in the multinational companies to utilize the expertise of the various executives in the group companies and since there were no comparable cases in the market, and it was a business decision of the assessee to share the employee cost with other sister concerns on cost to cost basis the addition of markup was to be deleted. Accordingly, it remitted it to the file of AO for the limited purpose of verification of whether the transactions were routed through books of accounts.

DCIT vs. United States Pharmacopeia India Pvt. Ltd-TS-857-ITAT-2017(Hyd)-TP dated 27.10.2017

2408. The Tribunal deleted TP-adjustment in respect of reimbursement received from AE for AY 2011-12. relying on the coordinate bench's ruling in the case of Cambridge Technologies and Mylan Laboratories, held that no ALP adjustments could be made to reimbursement of expenditure (viz. travel and miscellaneous expenses) received by the assessee on costs to cost basis without markup.

Aster Pvt. Ltd vs DCIT- TS-446-ITAT-2017(Hyd)-TP-ITA No. 220/hyd/2015 and 458/hyd/2016 dated 03.05.2017

2409. The Tribunal, relying on the decision of the coordinate bench in the assessee's own case for AY 2009-10 and 2010-11 held that the TPO erred in imputing a mark-up of 5 percent of the reimbursements from AEs without appreciating that the corresponding cost was not debited to the P&L account and was only a balance sheet entry.

Cambridge Technology Enterprises Ltd vs. DCIT-TS-1048-ITAT-2017(HYD)-TP ITA No.1708/Hyd/2016 dated 29.12.2017

2410. The tribunal held that the CUP method was more appropriate than TNMM for benchmarking reimbursement of overhead expenses and consultancy charges expended by the assessee on behalf of the AE as no mark-up was charged. It further held that since the assessee bore lesser business risk as compared to the comparable companies due to its nature of revenue model, the CUP method was better suited.

Lee Harris Pomeroy Architects PC Kolkata v DCIT (ITA No.382/Kol/2015) – TS-458-ITAT-2015 (Kol) – TP

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2411. The Tribunal followed the order of the co-ordinate bench in assessee's AE and held that payments made to the AE were in nature of reimbursement without any mark-up and were duly supported by third-party invoices and hence the TPO could not make TP-adjustment on reimbursements by determining ALP at Nil It rejected the stand of the DRP that that reimbursement represented intra-group services.

Spencer Staurt (India) Private Limited vs ACIT [TS-751-ITAT-2018(Mum)-TP] ITA No.1832/Mum/2016 dated 06.06.2018

2412. The Tribunal deleted transfer pricing adjustment in respect of reimbursement of salary & travelling expenses of an employee seconded in the capacity of Managing Director by the associated enterprise to the assessee noting that the assessee was the economic employer of the MD and that there was adequate proof of the work performed by the MD and quantum of salary paid viz. sample emails, minutes of meeting and nature of services provided, and therefore it could not be held that no activities had been carried out by MD for the assessee in India. It rejected transfer pricing officer's determination of arm's length price at Nil and held that if a person to whom salary has been paid was not an equity shareholder in either of the associate entities, he did not qualify to be a related party and therefore the payment of salary to an independent person could not be subject matter of benchmarking. It further noted that the Revenue had accepted that the reimbursement was a pure cost to cost transaction without any markup and that the only contention of the Revenue was the legitimacy of the expenditure which was a commercial decision of the assessee and not within the powers of the TPO.

Royal Canin India Pvt Ltd vs ACIT-TS-782-ITAT-2017(Mum)-TP ITA No.640/Mum/2017 dated 25.09.2017

2413. The Tribunal deleted transfer pricing adjustment in respect of reimbursement of salary & travelling expenses of an employee seconded in the capacity of Managing Director by the associated enterprise to the assessee noting that the assessee was the economic employer of the MD and that there was adequate proof of the work performed by the MD and quantum of salary paid viz. sample emails, minutes of meeting and nature of services provided, and therefore it could not be held that no activities had been carried out by MD for the assessee in India. It rejected transfer pricing officer's determination of arm's length price at Nil and held that if a person to whom salary has been paid was not an equity shareholder in either of the associate entities, he did not qualify to be a related party and therefore the payment of salary to an independent person could not be subject matter of benchmarking. It further noted that the Revenue had accepted that the reimbursement was a pure cost to cost transaction without any markup and that the only contention of the Revenue was the legitimacy of the expenditure which was a commercial decision of the assessee and not within the powers of the TPO.

Royal Canin India Private Limited [TS-801-ITAT-2016 (Mum)-TP] (IT(TP)A No 784/Mum/2016)

2414. The Tribunal deleted the TP adjustment on reimbursement of expenses from AE and held that the TPO erred in imputing notional income towards adhoc mark-up of 10 percent. As per the material on record it noted that the entire transaction involving recovery of travel, accommodation, visa expenses and other day to day expenses it held that the

reimbursements did not contain any profit element and noted that it was a standard practice in the IT industry to recover out of pocket costs incurred while providing services for clients, on a cost to cost basis.

Ness Technologies India Pvt Ltd – TS-953-ITAT-2016 (Mum) – TP

Share transactions

2415. The Court held that where the assignment of option rights including the call option in favour of a third party had not taken place, mere intention to assign the said rights could not be considered as a transfer under section 2(47) of the Act and therefore the threshold requirement of existence of a transaction including international transaction was not satisfied. It held that mere receipt of incidental benefits would not be sufficient to attract transfer pricing provisions. Since there was no transfer of asset, there was no income arising out of the transaction and therefore transfer pricing provisions would not apply. Further, it held that the Tribunals attempt to get over the binding judgment of the Apex Court could not be sustained.

Vodafone India Services Pvt Ltd v CIT (INCOME TAX APPEAL NO. 82 OF 2015) – TS-621-HC-2015 (BOM)

2416. The AAR upheld Revenue's contention and held that transaction of sale of shares in an Indian company by the Applicant to its Singapore based AE was required to be benchmarked as per the transfer pricing provisions contained in Chapter X of the Act. Relying on its decision in Castleton Investments Limited it held that as opposed to the provisions of Section 195 of the Act, the applicability of Section 92 does not depend on the chargeability under the Act i.e. there is no such requirement in section 92 that the transaction should result in income chargeable to tax under the Act.

AB Mauritius - TS-1099-AAR-2017-TP - A.A.R. No 1128 of 2011 dated 08.11.2017

2417. The Tribunal, rejecting TPO/CIT(A)'s recharacterization of subscription of equity share capital of its AE as loan/advance, deleted TP-adjustment of Rs 6.56cr on account of interest on share application money advanced towards subscription of shares in AE (incorporated in British Virgin Island. Noting that shares worth Rs. 462.3 million were allotted to assessee during the year while balance was allotted in subsequent years and assessee remained 100% shareholder in AE prior & post allotment, the Tribunal held that merely because allotment of shares was delayed it would not alter the characterization to the prejudice of the assessee. The percentage of ownership was the only a material factor. As the assessee was the only shareholder in it's 100% subsidiary company, it would not make any difference merely because part of the share application money was converted into equity shares and the balance were allotted in subsequent assessment years. It rejected Revenue's submission that Indian Companies Act mandates charging of interest if the company was unable to allot shares within specified time, held that relevant provisions of Indian Companies Act would not be applicable to this case and deferent countries had separate laws/regulations on such issue. Accordingly, it deleted the TP-adjustment on account of interest on share application money advanced towards subscription of shares in AE.

Sun Pharmaceuticals Industries ltd vs ACIT-TS-596-ITAT-2017(Ahd)-TP-ITA No.3297 & 3420/AHD/2014 dated 16.06.2017

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2418. The assessee, part of the Vodafone group, pursuant to a Framework Agreement held options to purchase 100 percent of the shares an Indian company viz. SMMS (which in turn indirectly held 3.15 percent in Vodafone India) from IDFC Investors for which it had paid a cost of Rs. 2 crore plus applicable interest @ 17.5 percent (which was a small fraction of the market value of the shares of Vodafone India i.e. the investee of SMMS). During the year under review, it terminated its option for which it paid IDFC Group a sum of Rs. 21.25 crore and disallowed the expenditure in its computation of income. The TPO sought to benchmark the transaction holding it to be a deemed international transaction and contended that instead of making a payment of Rs.21.25 crore, the assessee ought to have received a sum of Rs.1588.85 crore as the assessee had terminated extremely advantageous call options. The TPO noted that during the earlier assessment year, in another transaction IDFC had charged a sum of Rs.62.23 crore on relinquishment of right to purchase 0.1234 percent of Vodafone India and considering the assessee had relinquished the right to purchase 3.15 percent, arrived at a proportionate ALP of Rs. 1588.85 crore. The Tribunal held that it would be myopic to examine the termination of the Framework agreement without considering the Framework agreement and other connected arrangements / agreements. It noted that the assessee was granted the aforesaid option pursuant to an agreement wherein another company viz. HTIL had nominated SMMS to purchase the shares of two Indian companies for which SMMS was to be funded by the ultimate parent company of the Vodafone Group i.e. CGP Cayman Island by way of purchase of shares of SMMS by IDFC. The assessee entered into this agreement to ensure that the SMMS remained in control of the entire group (as it held shares in Vodafone India) by subscribing to options to purchase the shares of SMMS. Further, the Tribunal noted that the termination of options of the assessee was done so as to enable TTI another group company to obtain the shares in SMS. Further, it noted that the overseas Group companies were signatories to all the agreements. Accordingly, it concluded that the transaction between the assessee and IDFC was in effect a deemed international transaction. The Tribunal dismissed the assessee's contention that absent explicit legal rights of the overseas AEs in the instant transaction, it could not be considered as a deemed international transaction and held that Section 92F(v) provided that irrespective of whether an arrangement, understanding or action in concert is intended to be enforceable by legal proceedings or not, it would be includible within the definition of "international transaction". Further, it held that the term acting in concert suggested two or more persons acting in co-ordination for a common goal and therefore held that the Foreign AEs were undisputedly acting in concert in the current transaction.

Further, it dismissed the contention of the assessee that TP would not apply considering that no income arose from the transaction as the entire expense was disallowed in the computation of income. It held that it was only when a transaction was inherently incapable of producing an income that the transfer pricing provisions would not apply and held that merely because an income is not reported or not taken into account in the computation of income of taxable income it would not get out of the ambit of international transaction. It noted that as per the option available to the assessee, the assessee was supposed to pay only 2 crore plus interest (amounting to Rs.4.13 crore) but the assessee had paid Rs. 21.25 crore which evidenced the fact that there were other commercial consideration in the transaction. Accordingly, it held that the instant transaction would lead to income from capital gains considering the amended definitions of Section 2(47) and 2(14). It held that options would

clearly fall under the definition of capital asset / property and that the termination of options would fall under disposing / parting with an asset / interest in any asset as contained in Explanation 2 to Section 2(47). Upholding the ALP determination of the TPO it proceeded to determine the cost of acquisition of the shares and noted that over and above the Rs.21.25 crore paid in the instant transaction the assessee had also paid 62.24 crore towards assignment of right to purchase shares in Vodafone India in the earlier year. Further, it dismissed the contention of the assessee that the capital gains provisions would not apply as there was no consideration and held that under transfer pricing provisions, the capital gains were to be computed on the basis of the ALP consideration. Accordingly, it upheld the TP addition made.

Vodafone India Services P Ltd v DCIT – TS -37-ITAT-2018 (Ahd) – TP – ITA No 565 / Ahd / 2017 dated 23.01.2018

2419. The Tribunal held that the assessee's remittance to subsidiary for subscription of equity shares constituted an international transaction u/s 92B considering extraordinary delay in allotment of shares as the transaction had a direct bearing on the profit /loss as well as the assets of the enterprise. Noting that the assessee had remitted the amount during the year and no shares were allotted till the end of the financial year i.e 31.03.2009, it held that in such a case, share application money loses its character as the money was available to AE for utilization but it agreed with the assessee's contention that ordinarily share application money would not constitute international transaction when allotment of shares was made within reasonable time as the funds would remain in a separate bank account and would not be available to allotting company for utilization. Further, it accepted assessee's alternative plea to apply LIBOR rate for determining the arm's length interest as the remittance was made in foreign currency but however disallowed its claim for grace period of 180 days from date of remittance for computing interest.

Logix Microsystems Ltd. vs. DCIT - TS-181-ITAT-2017(Bang)-TP - IT. {T.P} A. No.280/Bang/2014 dated 22.02.2017.

2420. It was assessee's contention that TPO erred in making a separate adjustment for marketing and allied charges (which formed a part of operating expenses for sale of software to AE for which TNMM was applied), ignoring that once TNMM was applied, for an item of expense forming part of operating expenses no separate adjustment was called for. Further, the assessee also contended that TPO erred in applying separate methods i.e. CUP and TNMM for two transactions of import of raw materials from AE and export of finished product to AE when they were closely interlinked and interdependent.The Tribunal restored the entire issue to the file of TPO noting that DRP/TPO had not given any finding on the objections raised by assessee which were supported by various coordinate bench ruling.

Subex Ltd. vs Dy.CIT [TS-1200-ITAT-2018(Bang)-TP] IT(TP)A No.190/Bang/2018 dated 05.10.2018

2421. The Tribunal held that where the assessee sold 9 percent of the shares held in an Indian company to its Mauritius subsidiary during AY 2013-14, at Rs.10.32 per which was based on the valuation arrived at during AY 2007-08, the valuation adopted for AY 2007-08 could not be relied on to justify the price at which the share was sold in the previous year relevant to AY 2013-14 and that the TPO was justified in computing the value per share as per the

Discounted Cash Flow Method as on AY 2013-14, accounting for the time gap, fluctuation in the market rate and the value of capital assets of the company. Accordingly, it upheld the addition made by the TPO by adopting the value per share at Rs. 36.31 as against the value relied on by the assessee i.e. Rs.10.32.

Visteon Asia Holdings Inc v DCIT - TS-669-ITAT-2016 (Chny) - TP - ITA No. 723/Mds/2016

2422. The assessee-company had entered into a 'Stock Purchase Agreement' with Japanese company and, under this agreement, assessee was to sell shares of its subsidiary on basis of its 'Net Asset Value', i.e. NAV, Rs.224 per share. However, sale finally took place at US $ 35,08,000, and value of shares worked out to be Rs. 206.88 per share as against the said NAV value of Rs. 224 per share. The TPO adopted the NAV price (Rs.224 per share) and concluded that ALP for transfer of shares was US $ 37,98,298.50, transaction value and proceeded to compute capital gains accordingly. The Tribunal held that it was not open to the TPO to go beyond role of determining the ALP and intrude in the exclusive domain of the Assessing Officer to determine the income taxable in the hands of the assessee. The Tribunal also dealt with aspect of which method was to be adopted for determining the ALP of shares sold by referring to the residuary clause of sec 92C (any other method prescribed by the Board which took into account the price charged for similar transaction between non-AE). It held that guidance for determining ALP of the sale of unquoted shares could be taken from the decision of Apex Court in Kusumben D Mahadevia wherein it was held that in case of private company which was not winding up, the profit earning method could be applied for arriving at valuation of shares. In the present case, the company in which shares were transferred was not in the winding up nor was there any reasonable prospect of its going into liquidation. In these circumstances, the adoption of Net Asset Value or book value was not really warranted. Given the fact that it was treated as a going concern, the valuation on the basis of future earnings was quite justified. The Tribunal held that since TPO had not examined that aspect of matter at all and simply proceeded on basis of net asset value, it would be fit and proper to remit matter back to TPO.

Topcon Singapore Positioning Pte Ltd vs DCIT [TS-897-ITAT-2018(DEL)-TP] ITA Nos.2 and 5030/Del/2017 dated 23.08.2018

2423. The Tribunal dismissed Revenue's appeal and upheld DRP's order accepting that no interest was needed to be charged on share application money pending with its foreign subsidiaries. It held that since the transaction of share application payment did not have direct bearing on the profits, income, losses or assets of the enterprise, the same did not fall within the purview of 'international transaction' u/s. 92B by relying on co-ordinate bench ruling in Bharti Airtel wherein it was held that no ALP adjustment could be made on issuance of corporate guarantee involving no costs to the assessee which did not fall within the ambit of international transaction on account of not having any direct bearing on the profits, income, losses or assets of the enterprise.

ACIT vs Moserbaer India Ltd [TS-1139-ITAT-2018(DEL)-TP] ITA No.1200/Del/2014 dated 03.10.2018

2424. The TPO recharacterized the redeemable preference shares as loan and made an ALP addition to interest on redeemable preference shares (RPS). In the first round of proceedings,

the Tribunal had restored the issue to AO to decide afresh in conformity with view of higher appellate authority for preceding year however on appeal by the assessee, the Court directed the Tribunal to decide the issue on merits and not wait for the decision for preceding year. The Tribunal, in the second round of proceedings, examining the transaction whether preference shares could be characterized as loans and held that actual transaction as undertaken should be seen and relied on Delhi HC ruling in EKL Appliances wherein the action of TPO was judged by relying on OECD guidelines which stated that barring exceptional cases, tax administration could not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it had been actually undertaken and structured by the associated enterprises. Relying on Globe United Engineering and Foundry HC ruling (wherein it was held that preference shares were really a part of the company's share capital and not loans) and Apex Court ruling in Sahara India (wherein it was held that Optionally Fully Convertible Debentures were 'securities' under the Companies Act and therefore neither 'loans' or 'deposits'), the Tribunal noted that redeemable preference shares could not be characterized as loans and therefore, conclusion of the TPO/AO that the assessee had given loans/advances to its AE under the disguise of redeemable preference shares does not hold good. Accordingly, the Tribunal held that TPO/AO grossly erred in making notional addition being Arm's Length interest on RPS and deleted the adjustment.

Cairn India Ltd vs ACIT [TS-1151-ITAT-2018(DEL)-TP] ITA No.1459/Del/2016 and ITA No.263/Del/2016 dated 24.10.2018

2425. The TPO was of the view that assessee was showing higher profit margins in case of its homegrown segment (leasing income) as against its domestic segment on account of not allocating the expenses. The TPO rejected the TP study of the assessee and proceeded to reallocate expenses between homebase segment and other segments by holding that assessee had failed to allocate some of the expenses. He determined the ALP of assets purchased (in the nature of spare parts, air craft components, etc., from its AE and the aircrafts purchased which were leased to independent parties) at Rs.20,11,52,152/- (as against the purchase of fixed assets of Rs.98,35,34,236/-) and reduced depreciation of Rs.3,71,63,149/- corresponding to reduction in fixed assets of Rs.78,23,82,084/- in case of the leasing business segment (homebase segment) of assessee. The Tribunal deleted the adjustment made noting that TPO proceeded on the false premise that the assessee has not allocated any expenditure on the homebase segment and thus the findings were erroneous. It was clear that the assessee had allocated routine expenses the details whereof were available with the lower authorities and moreover, the TPO could not question the audited accounts regularly maintained in the course of business unless there were compelling reasons that it was unreliable. Further, the lease price of asset was commensurate with the purchase price of asset clearly shown from the lease agreement. Accordingly, deleted the TP adjustment made.

Lufthansa Technik Services India Pvt Ltd vs Dy.CIT [TS-1133-ITAT-2018(DEL)-TP] ITA No.5451/Del/2012 dated 15.10.2018

2426. The Tribunal restored the issue of depreciation claimed by assessee u/s.32 on trademark noting that disallowance of depreciation was not sustainable when coordinate bench decision in assessee's own case for earlier year had held that the TPO was not to decide the business

expediency of any intangible assets purchased by the assessee by sitting on the armchair of a businessman thus, rejected TPO's nil determination of trademark observing that under the guise of analyzing the transaction in CUP method, TPO had not brought any comparable instance. Accordingly, restored the determination of ALP of purchase of trademark to file of TPO. Thus, the Tribunal restored the issue of claim of depreciation on trademark.

Fabindia Overseas Pvt Ltd. vs DCIT [TS-1116-ITAT-2018(Del)-TP] ITA No.5316/Del/2015 dated 08.10.2018

2427. The assessee had invested Rs. 1343.76 cr. in its Jersey based 100% subsidiary by way of the preference shares which was recharacterized by the TPO as unsecured loan advanced to Cairn India Holding Limited (CIHL) and interest at 14.88% was treated as at arm's length and the TPO made an adjustment of Rs. 84.36 c. The Tribunal, noting that the instant transfer pricing addition has its foundation in the immediately preceding assessment year, held that it cannot adjudicate on the issue independently unless the preceding year on the same issue is decided. Accordingly, it held that if the re-characterization is held to be valid, then the addition will be required to be made in this year and if re-characterization is held to be invalid, this addition will have to be deleted. Accordingly, it remitted the matter to the file of AO/TPO for fresh adjudication.

Cairn India Ltd vs. DCIT-TS-767-ITAT-2017(DEL)-TP ITA No.1459/Del/2016 dated 09.10.2017

Cairn India Ltd vs. DCIT-TS-775-ITAT-2017(DEL)-TP dated 09.10.2017

2428. Where the TPO had re-characterized the advance given by assessee to AE towards investment in shares as loan and imputed interest of Rs. 48.10 cr., the Tribunal noting the disclosure of share application money as loans and advances in assessee's balance sheet, held that it was only a classification of accounting entry in the books and since the assessee received share certification in following AY, held that as the transfer of funds were duly accounted by the AE and there was no restriction on the part of the AE to allot shares in the same AY of receipt of funds. It held that as long as the shares were allotted, there was no profit element and therefore it could not be regarded as an international transaction. Further, relying on the decision in the case of GSS Infotech [TS-298-ITAT-2016(HYD)] held that as the assessee was not charging interest to AE as well as non-AE, deleted the TP-adjustment towards notional interest on mobilization advance to AEs.

Bartronics India Ltd vs DCIT-TS-814-ITAT-2017(HYD)-TP ITA No. 259 /Hyd/2017 dated 27.09.2017

2429. The Tribunal deleted the TP-addition made on account of interest free advances granted by assessee to its AEs and subsequently converted into equity for AYs 2008-09 to 2011-12. The Tribunal noted that assessee had raised funds by way of zero coupon bonds only for investing in its subsidiaries as ultimately share were allotted. It relied on co-ordinate bench ruling in assessee's own case for AY 2012-13 and held that the transaction was not an international transaction. It observed that Explanation(1)(c) to sec 92B(1) was introduced vide Finance Act 2012 which clarified that capital financing also qualified as an "international transaction" retrospectively. The Tribunal stated that at the point of time when the transaction was entered into and equity shares were allotted, capital financing was outside the purview of international transaction. The Tribunal further added that as assessee did not incur any interest liability,

there was no need for receiving any interest and the transaction had no 'bearing on the profits, income, losses or assets of such enterprises'. Accordingly, the said transaction was not an international transaction and hence liability could not be attached.

Bartronics India Ltd vs. DCIT [TS-322-ITAT-2018(HYD)-TP] ITA Nos.1732/Hyd/2012 and ITA Nos. 520,383 and 521/Hyd/2016

2430. The Tribunal held that investments in the nature of equity allotted after a delay due to regulatory approvals cannot be treated as loans and advances. Further it held that foreign exchange fluctuations relating to operations was to be considered as an operating item in computing Profit Level Indicators.

Mylan Laboratories Limited v ACIT [ITA No 2123 / Hyd / 2011] - TS-399-ITAT-2015 (HYD)-TP

2431. The Tribunal upheld the deletion of TP-adjustment in respect of buyback of shares by wholly owned subsidiary-AE from assessee at a lower rate (0.8 pound per share) than the per share investment (1 pound per share) made by assessee during the AE's incorporation. It held that the TPO erred in charging notional interest based on the assumption that it was a loan transaction in the garb of share investment and observed that buying back of shares at par or at higher or lower rate than the purchase price was common practice in the business world and hence it should be accepted until it was proved that such a transaction was not based on a scientific basis or was against the provisions of exchange manual/regulation. It upheld the order of the first appellate authority wherein it was observed that the TPO had not doubted the valuation of the transaction which was arrived at by professionals and accordingly held that the TPO was unjustified in imputing notional interest @ 5.07% p.a. for the 101 day-period between the date of investment and the date of buyback.

ACIT vs. Wockhardt Ltd. - TS-39-ITAT-2018(Mum)-TP - I.T.A./4156/Mum/2012 & I.T.A. 5557/Mum /2012 dated 05/01/2018

2432. The Tribunal deleted TP-adjustment on assessee's sale of shares of group company (FAPL) to another AE based in Singapore and rejected price determined by DRP/TPO at Rs. 12,285.92 per share (using perpetual growth rate (PGR) of 7% which was based on a consultancy firm's Report predicting the long term nominal growth for Indian economy at 7.5%) as against Rs. 8,158 as adopted by assessee. Noting that the consultancy firm's Report relied on by Revenue was a generic report and not specific to business carried on by the assessee and that the Report did not relate to year under consideration it held that the basis adopted by the Revenue was unjustified. Further, it noted both TPO and DRP failed to address assessee's objection that CAGR of earning/free cash flow for FAPL was (-) 16% and similar companies had shown CAGR of (-) 8%, thus held that it was not reasonable to assume that such a company would suddenly grow at the estimated growth rate of the economy in perpetuity. It also observed that the assessee had produced 4 reports in support of its valuation and relying on the Bombay HC ruling in Titan Time Products Limited held that valuation reports of experts could not be rejected by the Revenue unless the assumption considered in the report were proved to be grossly erroneous or another expert opinion contradicting the earlier report was obtained. The Tribunal further observed that the subsequent buy back of FAPL shares from the Singapore entity at the same price was accepted to be at ALP by TPO and therefore held that there was no basis for not treating the

original transaction to be at ALP. Accordingly, it held that the valuation of shares of FAPL was at Arm's length and deleted the TP adjustment.

First Advantage Quest Research Limited vs. DCIT - TS-5-ITAT-2018(Mum)-TP - I.T.A./1546/Mum/2017 dated 05/01/2018

2433. The Tribunal deleted TP-addition on account of remittances made by assessee to its wholly owned subsidiary ('WOS' / 'AE') in Ivory Coast of South Africa towards share application money to the extent of shares allotted but however it sustained addition in respect of balance amount which was refunded by the WOS adopting interest rate of 6 months LIBOR plus 150 basis points as the refunded amount represented an interest free loan.

DCIT v Taurian Iron & Steel Co.Pvt.Ltd. - TS-467-ITAT-2018(Mum)-TP I.T.A./1284/Mum/2015 dated 11/05/2018

2434. The Tribunal deleted the addition on account of alleged under charged premium on shares issued to its overseas holding company and corresponding interest imputed on the same by following the decision of the co-ordinate bench in the assessee's own case for the earlier AY wherein the Tribunal had decided the identical issue in favour of the assessee by following the decision of the Bombay High Court in the case of Vodafone. It was held that Transfer pricing provisions would not apply to capital transactions viz. issue of equity shares as it was not in the nature of income.

MSC Crewing Services Pvt Ltd – TS-38-ITAT-2017 (Mum) _ TP

2435. The Tribunal upheld CIT(A)'s order deleting TP adjustment on buy back of equity shares by the assessee's wholly owned subsidiary in US (on the ground that where assessee-company received certain amount from its wholly owned foreign subsidiary on account of buy-back of shares), since the assessee had given ample justification of buy back price by pointing out NAV of investee company on date of buy-back, which was much lower than buy-back price and therefore the TPO was not justified in considering aforesaid transaction as sham and making addition of notional interest on amount in question. It further held that it was a trite law that the transfer pricing proceedings do not envisage empowering of transfer pricing officer to re- characterize the transactions on the basis of his own whims and fancies.

Patel Engineering Ltd - TS-12-ITAT-2017(Mum)-TP

2436. Where the assessee subscribed to 1,85,03,468 redeemable preference shares of Essar Services Mauritius (AE) and also redeemed 1,81,00,000 of such shares at par and the shares were non- cumulative and redeemable on par without dividend and also had a running account with the AE, the TPO considering the nature and frequency of the transactions in the running account, re- characterized the subscription and redemption of the shares as a loan and computed notional interest on the alleged loan, the Tribunal following the decision in assessee's own case for AY 2009-10 held that the TPO could not disregard an apparent transaction and substitute it with a transaction as per his own perception. Accordingly, it set aside the addition made.

Aegis Limited v DCIT – TS-66-ITAT-2017 (Mum) – TP- ITA No.7694/Mum/2014, ITA No.1209/Mum/2015 dated 08.02.2017

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2437. The Tribunal deleted the notional interest adjustment made by the TPO on advance share application money given the assessee to its AE by treating the aforesaid investment as a loan. Following the case of the Tribunal in the case Bharti Airtel, it held that the TPO had not brought on record anything to show that any unrelated share applicant was to be paid interest for the period between making the payment towards share application money and the allotment of shares and therefore the very foundation of the adjustment was devoid of legal merits.

Pan India Network Infravest Pvt Ltd v Add CIT - TS-653-ITAT-2015 (Mum) - TP

2438. The Tribunal sustained transfer pricing adjustment in respect of amount refunded by wholly owned subsidiary to assessee towards share application money to the extent of shares not allotted by adopting interest rate of 6 months LIBOR plus 150 basis points and deleted adjustment made on the amount to the extent shares allotted. It observed that the advancing of amount by the assessee company and refund of the amount by its wholly owned subsidiary after enjoying the said amounts, has the colour and character of loan transaction. It rejected assessee's challenge that section 144C being a substantive provision will apply prospectively from assessment year 2010-11 by observing that said provisions are applicable to cases where assessing officer on or after 1.10.2009 proposes variation to assessee's income in consequence of TPO's order and as regards time limits for framing of assessment where provisions of section 144C applies, it concluded that section 153C shall not put any fetters to the framing of any such assessment and time limit as provided in section 144C will apply.

Taurian Iron & Steel Co Pvt Ltd - TS-768-ITAT-2016(Mum)-TP-ITA No.5920/Mum/2012

2439. The Tribunal deleted the transfer pricing addition of notional interest made on account of alleged excess consideration paid on investment in share capital of wholly owned subsidiary re-characterized as loan on the ground that the transfer pricing provisions in Chapter X of the Act do not apply to international transactions on capital account, not resulting in any income. Further, it held that the re-characterization of equity share capital into loan was on the ground that the investment was made at a value in excess of the value of shares as per the Wealth Tax Valuation Rules was unwarranted since shares were not even covered under the definition of assets under the Wealth Tax Act. It also held that even if the re- characterization was permissible, the TPO was incorrect in making an addition of the equity share capital invested.

Addressing the contention of the Revenue that there was a possibility of potential income from the said transaction and therefore benchmarking was required, it held that potential income, to qualify as income subject to transfer pricing under the Act, should arise from the impugned international transaction which is before the TPO for consideration and not out of a hypothetical transaction that may or may not take place in the future and since no income arose from the said transaction, no benchmarking was required. ***Topsgrup Electronic Systems Ltd v ITO - [2016] 67 taxmann.com 310 (Mumbai -Trib)***

2440. The Tribunal deleted adjustment on account of notional interest on share application money paid to wholly owned subsidiary which was re- characterized by TPO as interest bearing loan and there being delay in allotment of shares. It held that, a delay in allotment of shares by the subsidiary company, as long as the subsidiary is a wholly owned subsidiary, did not prejudice the interests of the assessee. It further held that none of the conditions for re-characterization of transactions specified in Delhi HC's EKL Appliances ruling were satisfied.

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The Tribunal affirmed DRP's deletion of notional interest adjustment on outstanding recoverable from subsidiary on account of pre-incorporation expenses incurred by assessee on behalf of subsidiary by holding that expenses were incurred for performing 'shareholder services', and thus no interest could accrue on the same.

Sterling Oil Resources (P)Ltd. vs ITO - TS-72-ITAT-2016 (Mum)-TP

2441. The Tribunal relying on the case of the High Court in Vodafone India Services (368 ITR 1) and Shell India Markets (369 ITR 516) and CBDT Instruction No 2 / 2015 held that amount received by the assessee from its AE towards share premium in connection with subscription of share capital does not give rise to any income under the Act and therefore Chapter X of the Act would not apply.

Supergems (India) Pvt Ltd v ACIT (I.T.A. No. 789/M/2013) – TS-511-ITAT-2015 (Mum) – TP

2442. The Tribunal relying on the decision in assessee's own case for AY 2009-10 and 2010-11 rejected TPO's re-characterization of assessee's subscription of preference shares issued by its AE as a loan transaction for AY 2011-12 and 2012-13. It held that the transaction was clearly a case of investment in shares and it could not be given a different colour to expand the scope of transfer pricing adjustments by recharacterizing it as interest free loan and accordingly deleted the TP adjustment made by AO. The assessee had subscribed to redeemable preference shares of its AE and also redeemed some of these shares at par. The shares were non-cumulative and redeemable on par without dividend and the assessee had a running account with the AE, in terms of which monies were being advanced towards purchase of shares as and when need arose. Considering the nature and frequency of the transactions in the running account, the TPO held that the subscription and redemption of the shares was in the nature of loan and not subscription for investment in shares. The TPO applied arm's length rate of interest on the amount given to the AE, and proposed TP addition of Rs. 63.64 Cr which was confirmed by the DRP. The assessee contended that TPO could not re-characterize the subscription of preference shares to advancement of unsecured loan by terming it at as exceptional circumstance, and could not question the commercial expediency of the transactions entered into by the assessee. It contended that the subscription to preference of shares was purely an investment in shares and could not be inferred as a loan. The Tribunal held that the TPO could not disregard the commercial expediency of the transaction unless there was evidence and circumstances to doubt. Further, it held that if in a third-party scenario, if the subscription of a share by the independent enterprise could not be characterized as loan, then this transaction also could not be inferred as loan. It accepted assessee's reliance on the coordinate bench's ruling in the case of Bexiskier Dhboal SA, ITA No. 776 of 2011 for the proposition that re-characterization of a transaction (i.e. re-characterization of subscription of share as loan) was not permissible in the absence of any enabling provision to that effect in the Act) that subscription of shares cannot be characterized as loan and therefore no interest should be imputed treating it as a loan.

Aegis Limited vs ACIT-TS-450-ITAT-2015(MUM)-TP-IT(TP)A no. 962/mum/2016 and IT(TP)A No 1556/mum/2016 dated 12.05.2017

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2443. Relying on the decision of the High Court in the case of Vodafone (368 ITR 1) and Shell (369 ITR 516), the Tribunal held that the issue of shares to foreign AEs was outside the scope of TP provisions as it fell in the capital field and dismissed the appeal of the Revenue.
M/s Solvay Specialties India Pvt Ltd v DCIT (ITA No 1702/M/2014, I.T.A. No. 630/M/2015, C.O.104/M/2015 & C.O. No.41/M/2015) – TS-534-ITAT-2015 (Mum) – TP

2444. The Tribunal deleted the TP adjustment of notional interest made on recharacterizing share application money as loan noting that no income had accrued from share application money and thus, said transaction could not be subject to transfer pricing provisions. It relied on HC decision in Shell India Markets India Pvt Ltd. wherein after noting that the amounts received on issue of shares was a capital account transaction not separately brought within the definition of 'income' as per the provisions of section 2(24) as well as sections 4 & 5 of the Act, it was held that provisions of Chapter X of Act would only be applicable only if there was income chargeable to tax under normal provisions of the Act and it did not operate by itself as a charging section. It observed that the AE could not convert the share application money into share capital by issuing shares to the assessee as the permission from the free trade zone authorities with whom the AE was registered was pending and this was the only sole reason for delay in issuing the shares in favour of the assessee.
Aries Agro Limited vs Dy.CIT [TS-1326-ITAT-2018(Mum)-TP] ITA No.1452 /Mum/2017 dated 28.11.2018

Purchase / Sale of Asset

2445. The assessee had acquired trademark from its AE, the ALP of which was determined at Nil by the TPO on the ground that the acquisition of trademark was not expected to result in any benefit to the assessee. Noting that the assessee produced certain additional evidences before the DRP which was not admitted, and that the assessee was not given adequate opportunity of being heard, the Tribunal remitted the matter back to the AO / TPO for fresh examination after passing of a speaking order.
Magic Woods Exports Private Limited vs. DCIT - [TS-152-ITAT-2018(CHNY)-TP - .I.T.A. No. 871/Mds/2017 dated 06.02.2018

2446. The Tribunal held that the TPO was incorrect in taking the WDV of the machine as a comparable for determining the ALP of the second hand machine purchased by the assessee. It held that the WDV may be one of the factors to be taken into consideration while determining the value of second hand machinery and that the buyer would naturally look for the efficiency and life of machinery after purchase, but in view of the specific provisions of Rule 10B(1)(a) of the Rules, WDV could not be considered to be the ALP and that it was obligatory for the TPO to identify a comparable uncontrolled transaction to determine the ALP. Accordingly, it upheld the order of the DRP deleting the TP addition.
ACIT v Interpump Hydraulics India Pvt Ltd - TS-350-ITAT-2016 (Chny) – TP

2447. The assessee benchmarked the transaction of purchase of fixed asset by aggregating it with transactions pertaining to provisions of software development, ITes and Management support

services and applied TNMM as MAM. The TPO rejected benchmarking methodology followed by the assessee and considered the transaction of purchase of fixed asset as separate transaction and determined ALP of aforesaid transaction to be nil. It was assessee's contention that that depreciation charged on the purchase of the fixed asset is subsumed in the cost base of the assessee and cost pertaining to aforesaid segments had been charged with markup to the AEs (markup had been offered to tax) and further, the transaction of purchase of fixed asset was a tax neutral exercise because if the amount of depreciation is taken at nil then amount of income to the extent would also be at nil. It relied on coordinate bench decision in BC Management services which in turn relied on coordinate bench decision in Ciena India (P) Ltd wherein it was held that in case of purchase of fixed assets from AE, it is amount of depreciation on such purchase to be considered for making the addition and where depreciation allowance on fixed assets was also compensated with markup as in aforesaid circumstances, both transaction had to be seen jointly and therefore, no further addition could be made on account of TP adjustment due to one sided consideration of depreciation at NIL. Accordingly, the Tribunal deleted adjustment.

Avaya India Pvt Ltd vs ACIT [TS-1290-ITAT-2018-(Del)-TP] ITA No.1904 /Del/2015 dated 03.12.2018

2448. The Tribunal upheld CIT(A)'s deletion of TP-adjustment on account of assessee's purchase of old / used machines along with its accessories from UK-AE. It noted that the assessee adopted FMV as certified by a Chartered Engineer as CUP for ascertaining ALP which was rejected by TPO who adopted a unique approach for benchmarking by considering life of the machinery given by Chartered Engineer at India along with year of manufacturing given by the Chartered Engineer at UK for working out the market value of the machinery during the transaction year. It upheld assessee's ALP determination stating that valuation by an independent qualified expert for determining the fair market price or the FMV of the machinery has to be treated as the arm's length price for the value of such products/services, which could be reckoned as the price paid by any independent party in the open market for such product/goods. Further, it held that for used machinery, ostensibly the purchase price of a new product could not be taken as CUP since the cost of used/old machinery depends upon number of various factors like usage maintenance, obsolescence etc. Accordingly, it held that the TPO failed to take note of such factors and also failed to carry out any independent exercise for the value of the machinery by any approved valuer /Chartered Engineer. Further, considering the fact that for AY 2008-09 TPO himself had accepted the same value as per the valuation report given by the Chartered Engineer for similar transaction, the Tribunal upheld the order of the CIT(A).

ACIT vs. Caparo Engineering India Pvt Ltd - TS-109-ITAT-2018(DEL)-TP - I.T.A. No.6838/DEL/2014 dated 22.02.2018

2449. The Tribunal deleted the TP-adjustment on purchase of fixed assets from AE relying upon the co-ordiante bench ruling in assessee's own case for earlier years wherein the Tribunal held that since assessee was receiving compensation from AE on 'cost plus mark up' basis with depreciation as one of the cost components, transaction of fixed assets purchase was 'closely linked' with transaction of services to AE and no separate benchmarking was required. Further, it placed reliance on judicial precedents wherein it was held that since depreciation

cost was also recovered from AE along with mark-up, the transaction was 'tax neutral' and therefore deleted the adjustment.

BT India P Ltd v DCIT - TS-130-ITAT-2018(DEL)-TP - I.T.A .No. 566/DEL/2015 dated 26.02.2018

2450. The Tribunal deleted the TP adjustment on the sale of intellectual property rights by the assessee to its AE. It noted that the assessee had arrived at the sale consideration on the basis of independent valuation reports prepared by two valuers which was prepared on the basis of projected cash flows at the time of sale and the TPO had subsequently replaced the projected cash flows with the actual cash flows, at the time of assessment, to arrive at the TP adjustment. It held that the value at the time of making the business decision was important, and that when the values were replaced subsequently, it was not a valuation but an evaluation. Observing that the Revenue was doubting the valuation only because the actual AE revenues were more favorable that the projected revenues it held that for valuation of an intangible asset, only the future projections alone can be adopted and such valuation cannot be reviewed with actuals after 3 or 4 years down the line.

DQ Entertainment (International) Ltd v ACIT - TS-367-ITAT-2016 (Hyd) - TP

2451. The Tribunal deleted TP-adjustment on transaction of purchase of DSP Software and IP rights from assessee's Malaysian AE. The TPO had relied on the statement of one of assessee's employees and held that entire software was developed in India and thus, determined ALP of the transaction at Nil. The Tribunal rejected TPO's stand of merely relying on employee's statement without following any of the prescribed methods of ALP-determination and further noted that Malaysian AE had compensated assessee for part of development work carried out by assessee which was found to be at ALP by TPOs in earlier years.

Further, regarding price paid for IP rights, the Tribunal relied upon Delhi HC decision in EKL Appliances and co-ordinate bench decision in IWM Constructions (P.) Ltd to hold that Revenue cannot question business decision of the assessee and decide ALP.

Separately, the Tribunal upheld DRP's direction to exclude depreciation from PLI while determining ALP of software development services to AEs by relying upon co-ordinate bench ruling in Market Tools Research Pvt. Ltd and Schefenacker Motherson Ltd and noted that depreciation claims for partnership firms and for companies were different.

DCIT Circle 8(1) vs M/s. Value Labs LLP-TS-409-ITAT-2018 (HYD) TP-ITA Nos. 305 & 405/HYD/15- dated 27.04.2018

2452. The Tribunal remitted issue of adjustment made in respect of sale of assessee's BPO business division by AE to an Indian domestic party noting non-adjudication of assessee's ground by DRP. The assessee's AE gave a contract (global agreement) to a third party towards business process outsourcing of its various products and, as part of the deal, agreed to hive off assessee's BPO division to the Indian AE of the said third party for certain consideration. Pursuant to the above contract, the assessee entered into an agreement with the Indian AE of the said third party, which provided that a part of the consideration for transfer of business division was to be received by the assessee's AE and balance by the assessee. TPO [despite non-reference of the said transaction by AO] made a TP-adjustment on sale of assessee's business division and on the same issue, AO passed an alternate order making addition of same amount u/s 50B by treating the transaction as a slump sale. DRP

observed that the assessee did not have any say in the global agreement (pursuant to which the division was transfered) and thus held that practically it was a case of assessee's AE taking over the business division from assessee at the price received by the assessee and subsequently selling the same to the third party at the value of total consideration of transfer. Thus, it held the above transaction to be an international transaction and upheld the TP adjustment made by the TPO. DRP, however, did not adjudicate the issue of taxability u/s 50B.

The Tribunal noted assessee's acceptance that subsequent to IT Act amendment, TPO is empowered to go into the issue of the international transaction himself without the matter being referred by AO, however, observing that DRP had not adjudicated issue of Sec 50B addition despite AO making such addition in the draft order, ITAT refrained from adjudicating TP-adjustment issue relying on Madras HC ruling in Ramdas Pharmacy and directed DRP to complete its order by adjudicating upon the ground relating to the addition made by AO by treating the transaction as slump sale

Prudential Process Management Services India Pvt Ltd vs DCIT Range 10(3)- TS-285-ITAT-2018(MUM)-TP- ITA No 1274/Mum/2014 dated 13.04.2018

2453. The Tribunal deleted TP-addition of Rs. 5.53 Crore on purchase of intangible assets (Trademarks, Customer lists and Goodwill) by assessee consequent to acquisition of credit card processing and merchant banking acquisition business of HSBC India during AY 2007-08. As regards the Goodwill and Customer List, it noted that no deduction or depreciation was claimed on the consideration paid for it while computing taxable income and applied the decision of Bombay HC in Vodafone India Services and held that Chapter X provisions could only be invoked only when "income arises from international transaction" and there being no income from the said transaction, the provisions of Chapter X could not be applied. With regard to acquisition of Trademark, which had been capitalized and depreciated by assessee, the Tribunal approved the justification of ALP adopted by the assessee viz. on the basis of report of independent valuer, where weightage had been assigned considering various factors, including the potential of generating business in future wherein a higher weightage was given to the India territory and rejected the TPO's contention that lower weightage should have been given to Indian business as credit card business was much more advanced in other countries. Accordingly, it rejected TPO's conclusion that assessee has paid 25% extra for trademark acquisition and deleted the TP addition.

Global Payments Asia Pacific (India) vs. DCIT – TS-112-ITAT-2017 (Mum) – TP ITA NO. 5345/MUM/2012 dated 25.01.2017

2454. Where the assessee had purchased capital goods from AE at cost plus 10% mark-up which was accepted by the authorities in assessee's case for previous years, in the absence of change in facts and law and following the principle of consistency, the Tribunal deleted the TP adjustment regarding the purchase of capital goods and spares.

Samsonite South Asia Pvt Ltd vs. DCIT-TS-809-ITAT-2017(Mum)-TP dated 01.09.2017

2455. The Tribunal upheld the CIT(A)'s deletion of TP-addition on account of depreciation on purchase of trademarks by assessee from its AEs during AY 2005-06 and rejected the Revenue's objection that CIT(A)'s admission of documentary evidence furnished by assessee was contrary to the procedure contemplated under Rule 46A of the Income Tax Rules. It

noted that the CIT(A), after perusing the copies of agreements, had deleted the addition considering the fact that assessee had paid the same price for brands/registrations as was paid by the AEs for acquiring the same from unrelated third party owners, which itself sufficiently proved that the acquisition of the brands/registrations was within ALP and that the CIT(A) had called for remand report from AO and had considered the latter's objections as regards the admission as well as reliability of the documents furnished by assessee (that the report of the Chartered Accountant relied on by the assessee was not reliable on account of the disclaimers contained therein). Accordingly, it held that the CIT(A) was justified in deleting the addition and also that he had acted in the true letter and spirit of law while exercising his powers u/s 250(4). Further, it also agreed with CIT(A)'s observation that the disclaimer incorporated in the certificate of the Chartered Accountant was in the nature of a customary disclaimer, which is given in the reports/certificates to protect the interest of the individual professional issuing such certificate/s, and the same in no way can go to adversely hit the reliability of the same.

ACIT v Strides Acrolabs Ltd - TS-294-ITAT-2017(Mum)-TP - /I.T.A. No.6528/Mum/2010 dated 31/03/2017

2456. The Tribunal upheld CIT(A)'s order deleting the disallowance of depreciation since the disallowance related to the adjustment made by the TPO which had been deleted by the Tribunal in the prior year. In the previous year, the AO had referred the issue relating to the valuation of Intellectual Property Rights to the TPO who lowered its value on account of difference between book value and revised value which reduced the claim of depreciation. It was pointed out by the assessee that the Tribunal confirmed the CIT(A)'s order setting aside the IPR adjustment and deleted the disallowance of depreciation.

ACIT vs Gharda Chemicals Ltd [TS-771-ITAT-2018(Mum)-TP] ITA No.1181/Mum/2017 dated 21.06.2018

2457. The Tribunal deleted the ad-hoc addition made by the TPO on the purchase of second hand machinery by the assessee from its AEs. It held that since the assessee had substantiated the price paid on purchase by producing documentary evidence including the valuation report from an approved valuer in the USA (country where AE was situated), the TPO was incorrect in disallowing 50 percent of the purchase consideration without referring the valuation to the Department Valuation Officer as the TPO is no expert on valuation and the method adopted by him was not as per the provisions of the Act.

Further, it held that the TPO was incorrect in determining the ALP of the cost sharing agreement entered into by the assessee with its AE at Nil since the assessee had furnished all agreements and other ancillary / relevant documents relating to the sharing of cost.

Koch Chemicals Technology Group (India) Ltd v ACIT (ITA no.8091/Mum./2011) – TS-467-ITAT-2015 (Mum) TP

Commission

2458. Where the assessee benchmarked the payments made to its US based AE for selling agent services received by it under CUP method adopting the payments by the AE to independent third parties in the USA for similar services as comparable, the Tribunal held that

since the commission paid by the assessee to AEs was also for services rendered in respect of sales in USA and the scope of services rendered by the AEs was much more than the scope of services being rendered in such cases of uncontrolled comparable cited by the assessee, no adjustment could be made.

Pr.CIT vs Paxar India Private Limited-TS-780-HC-2017-Delhi-TP ITA 771/2017 dated 27.09.2017

2459. The Tribunal held that where the assessee, who made a payment of commission to its AE had provided adequate justification towards the ALP of the said payment and the rate of commission paid to unrelated parties was in excess of the rate of commission paid by the assessee, the TPO was not warranted in making a TP adjustment on the ground that no services were rendered. It observed that the TPO is not empowered to test the genuineness of a transaction under Chapter X of the Act.

Pharmaceutical Industries Ltd v DCIT - (2016) 46 CCH 0169 (Ahd Trib)

2460. The Tribunal, rejecting TPO's nil ALP determination in respect of selling commission paid to US/UK AE in respect of ITES orders procured from end customers and passed on to the assessee, remitted the issue of ALP determination to the file of TPO for fresh consideration. It held that ALP could not be nil in view of the fact that assessee procured the entire business from US region only through its AE for which the AE in turn charged the assesses a selling commission of 7% of sale and therefore the actual rendering of service by the AE had been established.

Msource (India) Pvt. Ltd vs. ACIT-TS-581-ITAT-2017(bang)-TP-ITA No. 420/bang/2015 dated 23.06.2017

2461. The Tribunal held that where the assessee had paid commission to its US AE at 10 percent and justified the same under the CUP method on the basis of similar commission paid (@ 8 percent) by the AE to unconnected parties who acted as selling agents, no addition could be sustained since the commission paid by the assessee to its AE was for services rendered in respect of sales in the US and the scope of services rendered by the AE was much wider than the scope of services rendered by the uncontrolled companies to whom the AE was making commission payments at the rate of 8 percent.

Paxar India Pvt Ltd v DCIT - TS-582-ITAT-2016 (Bang) - TP ITA No. 1788/B/2013

2462. The Tribunal confirmed the TP adjustment on agency commission paid @1.5 percent of invoice value and 5 percent of new exports, by the assessee to its AE for consolidation of fragmental requirements, noting that commission was paid only on items sold to group concerns and not to AEs and that the consolidation could have been done by the assessee itself and the assessee did not require the services of an AE. It held that where the assessee was unable to bring anything on record to provide reasoning for which the commission was paid the ALP was rightly determined at Nil. Agreeing with the contention of the assessee that it was not for the AO / TPO to question commercial expediency, it however held that the judgments in support of the aforesaid contention could not be extrapolated to mean that there rests no onus on the assessee to show the business purpose for which the payments were made.

Madura Coats Private Limited [TS-932-ITAT-2016(CHNY)-TP] (I.T.A. No.770/Mds/2014)

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2463. The Tribunal deleted the disallowance in respect of sales commission paid by assessee to its sister concern (AE), noting that similar commission was allowed in preceding AYs 2010-11 to 2012-13 and Revenue had not been able to bring any new fact, which had led to change the present stand for the purpose of disallowing sales commission.

Bonfigioli Transmissions Private Limited vs. DCIT - TS-388-ITAT-2018(CHNY)-TP - /I.T.A.No.2977/CHNY/2017 dated 14-05-2018

2464. The Tribunal rejected Revenue's contention that rate of commission received by assessee ought to be 4% instead of 1% and deleted the TP adjustment made on commission. The Tribunal noted that Revenue had raised the issue for the first time in the AY 2013-14 and observed that the TPO has compared the rate of commission charged by the assessee with the rate of commission charged by the assessee to its other AEs which was clearly barred by the provisions of section 92F(ii) r.w.s. 92. Accordingly**,** it deleted the TP-adjustment on commission observing that ALP was to be determined based on price charged in uncontrolled transaction and accepted the benchmarking done by assessee as correct

COIM India Pvt. Ltd v ACIT [TS-344-ITAT-2018(DEL)-TP] ITA No.7260/Del/2014 dated 07.05.2018

2465. The TPO disallowed the entire commission payment made by the assessee (engaed in manufacturing business) to its AE for AY 2008-09 by using the 'benefit test' and determined ALP at Nil on the basis that no services were received. The CIT(A) arbitrarily held that 75% commission should be allowed as a deduction. The Tribunal rejected TPO's use of 'benefit test' to determine Nil ALP, relying on Knorr Bremse HC ruling and held that in the instant case it was established beyond doubt that three employees were specifically deployed by the AE for the business operations of the assessee, which deciphered that the international transaction entered into by the assessee with its AE was genuine and bona fide. The Tribunal thus set aside the CIT(A)'s order and remitted the matter to the file of AO/ TPO for deciding the same in accordance with ratio laid down in Cushman & Wakefield jurisdictional HC ruling wherein it was held that the authority of the TPO was limited to conducting transfer pricing analysis for determining the ALP of an international transaction and not to decide if such service or benefit accrued to the assessee.

Further, the Tribunal also rejected the TPO's benchmarking of the payment of commission by applying the CUP method, noting that he had not brought on record even a single comparable to facilitate a comparison between the price for the services by the assessee vis-à-vis that paid by other comparable. It also rejected the assessee's benchmarking under PSM since the assessee was not able to substantiate the ALP under the said method.

DCIT (LTU) vs. Caparo Engineering India Pvt. Ltd [TS-325-ITAT-2018(DEL)-TP] ITA No.444/Del/2015 dated 02.05.2018

2466. The Tribunal held that the ALP of the commission expenses paid by the assessee, a joint venture between Venture, USA and Satyam India, to its promoter company could not be taken as Nil by the TPO by disallowing the payment under section 37(1) of the Act and that he ought to have determined the ALP of the transaction using one of the prescribed methods. Further, the Tribunal held that the TPO could not apply the CUP method without identifying any uncontrolled comparable transaction.

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Satyam Venture Engineering Services Private Limited [TS-466-ITAT- 2016(HYD)] 2004-05-1590/Hyd/2010; 2005-06-197/Hyd/2011; 2006-07- 354/Hyd/2011; 2007-08-1905/Hyd/2011; 2008-09- 1138/Hyd/2013.

2467. Where the TPO had imputed a TP adjustment on account of notional commission income in respect of alleged marketing and distribution activities carried out by the assessee on behalf of its AE who supplied medical devices directly to hospitals in India, the Tribunal, relying on its earlier years order held that since the TPO failed to bring any material on record or to apply any of the approved methods for determining ALP, the addition made being on a notional basis, was invalid. Following the prior year's Tribunal order, it remanded the matter to the AO / TPO to determine ALP by applying one of the prescribed methods.
India Medtronic Pvt Ltd vs ACIT- [TS-531-ITAT-2017(Mum)-TP]- ITA No.812/Ahd/2008 and other three appeals dated 25.05.2017

2468. The Tribunal held that the TPO was unjustified in benchmarking the commission earned by the assesse from its AE on sale of machinery (5 percent) with the commission rate earned by it from its AEs from the sale of spares (18 percent). Following the order of the co-ordinate bench for the earlier year, it held that the benchmark adopted by the TPO was invalid being a controlled transaction in itself. Accordingly, it dismissed Revenue's appeal and deleted the adjustment.
DCIT vs. Bobst India Pvt. Ltd - TS-79-ITAT-2018(PUN)-TP - ITA No. 277/PUN/2016 dated 29.01.2018

2469. The Tribunal, relying on the ruling of Tecnimount ICB (P.) Ltd [TS-557-ITAT-2012(Mum)], and held that an internal comparable having related party transactions was unacceptable for ALP computation and therefore deleted the adjustment made by the TPO on the commission on sale of imported DG sets, earned by the assessee from one of its AEs by comparing the same with the commission earned by the assessee from another AE. Accordingly, it directed AO to delete the adjustment.
Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

Convertible Debentures

2470. Where the DRP deleted the TP adjustment made on interest payable on CCDs made by the TPO but disallowed an equal amount u/s 37(1) and 36(1)(iii) on the ground that the assessee had not utilized the funds for business purposes, without considering how the amount had been utilized by the assessee, the Tribunal remitted the issue to the file of the AO to examine these facts and pass a fresh draft assessment order post such examination.
Epsillon Real Estate Pvt Ltd – TS-1038-ITAT-2016 (Bang) - TP

2471. The assessee had raised funds from its AE in Cyprus and issued two series of CCDs (0% interest and 14% interest). The TPO was of the view that CCDs were equity in nature and the amount of Rs.23,51,564/- was held to be not in the nature of interest, therefore the ALP of the interest on CCDs was held to be NIL and consequently the entire amount of interest was treated as an adjustment. The CIT(A) upheld the contention of assessee that they are debt

however directed TPO to adopt LIBOR rate for payment of interest instead of interest at 14%. The Tribunal opined that CIT(A) ought to have first examined the currency in which the borrowings had been denominated, by examining the agreement entered into by the assessee and the AE and then decided the issue. It relied on the coordinate bench decision in Adama India (P.) Ltd. wherein it was held that since the CCDs were issued in Indian Rupeers, the TPO wrongly treated it as loan by taking it as ECB and in such a case, there was no justification in considering the LIBOR as benchmark rate and set aside the addition. Accordingly, it remitted the matter back to CIT(A) for fresh adjudication after considering the facts of the case and affording the assessee a reasonable opportunity of being heard.

S.L. Plotted Development Projects Pvt Ltd vs Dy.CIT [TS-1376-ITAT -2018(Bang)-TP] IT(TP)A No.1497/Bang/2014 dated 05.11.2018

2472. The Tribunal restored the TP-adjustment on interest on Compulsory Convertible Debentures (CCDs) borrowed by assessee. The TPO considered CCDs as loan and benchmarked the interest at LIBOR+200bps and accordingly made the said adjustment which was confirmed by the DRP in light of its findings that interest received is in foreign currency and debt to be repaid in foreign currency.It was the assessee's contention that weighted average rate of SBI PLR ought to be applied and the assessee's rate of interest would be at ALP resulting in deletion of TP adjustment. In support of the above contention, the assessee submitted a copy of the debenture certificate dated 27.03.2014 showing that amount was in Indian currency for each of the debenture and relied upon the coordinate bench decision of ADAMA India wherein assessee's payment of interest @ 12% on CCDs was held at ALP based on weighted average rate of SBI-PLR at 12.26%. Observing that assessee produced debenture certificate issued on March 27, 2014, the Tribunal noted that debenture issued on 27.03.2014 was not relevant for deciding the issue in present year and particularly when the finding given by DRP was that the amounts was received in foreign currency and was to be repaid in foreign currency. Thus, the Tribunal restored the matter to the file of DRP in light of the Tribunal order placed before the bench and to consider any other judgments available with them while deciding the issue afresh.

ADAMAS Builders Pvt Ltd vs. Dy. CIT [TS-795-ITAT-2018(Bang)-TP] IT(TP)A No.2477/Bang/2017 dated 20.07.2018

2473. The Tribunal remitted to the file of the AO issue relating to disallowance made by DRP for AY 2011-12 on account of interest payable on Compulsorily Convertible Debentures (CCDs) issued by assessee in FY 2007-08, on the ground that though there was no evidence to suggest that the money received from convertible debentures was used for the purpose of business, the DRP had not considered as to how the amount received on issue of convertible debenture in FY 2007-08 was used by the assessee. The Tribunal observed that in the subsequent year, there was waiver of interest by debenture holders and the assessee had written back the interest and offered the same for tax. Further, it rejected assessee's contention that DRP had no power to make such disallowance relying on provisions of sub section 5 and explanation below sub section 8 of section 144C as per which the DRP has powers to issue directions as it thinks fit.

Epsillon Real Estate Private Limited - TS-1038-ITAT-2016(Bang)-TP

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2474. The assessee had issued inter corporate convertible debentures to its AE on which interest was payable at 10.5 percent and the TPO while benchmarking the interest rate adopted the interest rate of 0.5 percent paid by TPG Wholesale Pvt Ltd as comparable and made a consequent adjustment. The Tribunal noting the assessee's contention that the correct interest rate paid by the said company, as per the audited financials, was 50 percent, held that the question of comparability of the assessee with TPG Wholesale Pvt Ltd required fresh consideration as both the rates viz. 0.5% and 50% appeared to be prima facie incorrect unless there were other conditions which constrained the company from paying interest at normal market rates. Accordingly, it remitted the issue to the file of the TPO for fresh consideration.

Hospira Healthcare India Pvt Ltd – TS-147-ITAT-2017 (CHNY) – TP dated 28.02.2017

2475. The Tribunal deleted interest adjustment on fully and Compulsory Convertible Debentures (FCCDs) issued by assesse [engaged in the business of manufacture and sale of electrical automobile components] pursuant to search proceedings absent incriminating material relating to FCCDs found during search. It noted that the assessee had filed original return of income on September 30, 2009 which was processed u/s 143(1) on September 05, 2010 and the time period to issue the notice u/s 143(2) of the Act had already expired before the search took place on October 29, 2013. Further, it observed that during the course of search, though no incriminating material was found relating to the FCCDs which were already shown by the assessee in its regular books of accounts, AO/TPO made the TP-addition on account of differential interest on FCCDs undertaken with assessee's AE stating that though assessment was not framed u/s 143(3), for the purpose of Sec 153A r.w.s. 153C, an intimation u/s 143(1) was also an order of assessment. The Tribunal held that no such adjustment could have been made to the income which was already assessed prior to the date of search and even on merits it held that the difference between assessee's interest rate (16%) and TPO's rate (12.25%) was less than 5% which was within the permissible tolerance range as per Sec 92C(2) second proviso and accordingly held that no addition on account of arm's length price could have been made by the AO/TPO.

Granite Gate Properties Pvt. Ltd vs. ACIT - TS-450-ITAT-2018(DEL)-TP - ITA No. 7022/Del/2017 dated 29.05.2018

2476. The Court deleted the adjustment in respect of interest paid on fully convertible debentures (FCDs) since the assessee's interest rate was within the range of prime lending rate and the TPO's ALP determination by relying on HC ruling in Cotton Naturals India was not tenable as the FCDs were issued in Indian currency.

Bacardi India Pvt Ltd - TS-1052-ITAT-2016 (Del)-TP

2477. Relying on the decision of coordinate bench in assessee's own case for AY 2011-12 [TS-522- ITAT-2016(DEL-TP], the Tribunal deleted the TP adjustment of Rs. 17.62 crores towards interest on compulsorily convertible debentures issued by the assessee following the principle of consistency. Noting that in the remand proceedings for AY 2011-12, TPO had not made any adjustment holding interest rate of 12% to be at ALP, wherein the coordinate bench directed TPO to consider additional evidence submitted by assessee giving analysis of BSE database as per which average rate of return on comparable instruments was 13.66%, the Tribunal held that since the interest paid by assessee during

the relevant year at 12% was at ALP. It accordingly deleted the addition in respect of interest on CCDs.

Brahma Center Development Pvt Ltd vs ACIT-TS-658-ITAT-2017(DEL)-TP-ITA No. 1215/del/2017 dated 02.08.2017

2478. Where the assessee paid interest on Fully Convertible Debentures issued in Indian currency to its AE at the rate of 10 percent and benchmarked the same against the interest paid by its comparables i.e. 12 percent thereby claiming its expenditure to be at ALP, the Tribunal held that the TPO was not justified in computing ALP by using CUP on the basis of LIBOR + 300 basis points. It held that since the currency in which loan had to be repaid was Indian currency, the Prime Lending Rate should have been considered by the TPO. Accordingly, it deleted the addition made.

Bacardi India Pvt Ltd – TS-1052-ITAT-2016 (Del) - TP

2479. The Tribunal deleted the TP adjustment on interest paid by the assessee to its AEs on the Fully and Compulsory Convertible Debentures (FCCDs) issued by it by following the coordinate bench decision of earlier year wherein it was held that that FCCDs being hybrid instruments i.e. a mix of debt and equity, carried a higher risk and hence could not be compared with a plain vanilla loan or bond and the interest rate of PLR of SBI plus 300 basis points adopted by the assessee was in accordance with FEMA regulations and further, the variance in the rate of interest as per TPO/AO to be adjusted and added was 3.75% which was within the permissible range of 5% as permitted by second proviso to Section 92C(2) of the Act.

Granite Gate Properties Pvt Ltd vs ACIT [TS-1025-ITAT-2018(DEL)-TP] ITA No.7025/Del/2017 dated 14.09.2018

2480. The Tribunal deleted TP-adjustment on account of interest paid by the assessee to its AE on Fully Compulsory Convertible Debentures (FCCDs) issued by assessee to its AEs. The TPO recharacterized the FCCDs as foreign loan and benchmarked the interest paid on such FCCDs by adopting LIBOR as the ALP and accordingly made TP adjustment. The Tribunal relying on the coordinate bench's finding in Adama India Pvt Limited [TS-16-ITAT-2017(HYD)-TP], (wherein it was held that considering the fact that the policy of Govt. of India and the RBI indicate that the issuance of CCD was part of FDI being quasi-equity in nature), held that the TPO erred considering the same as a loan. As regards the benchmarking the interest paid on CCDs, the Tribunal noted that the CCD's were issued in Indian Rupees and therefore relying on the decision of Adama India (supra) held that the assessee was justified in benchmarking the interest based on the SBI PLR prevalent and accordingly held that the TPO erred in adopting LIBOR as ALP.

Hyderabad Infratech Private Electronics Limited v DCIT - TS-54-ITAT-2018(HYD)-TP - ITA No.1781/Hyd/2017 dated 25.01.2018

2481. The Tribunal deleted TP-addition on account of interest paid on Compulsorily Convertble Debentures (CCDs) issued by assessee to its AE on the ground that TPO had wrongly treated issuance of CCDs as external commercial borrowing without appreciating that the CCD is hybrid instrument basically categorized as equity in nature and as per Govt and RBI policy, issue of CCD is part of FDI being quasi-equity in nature. Further, it rejected

LIBOR+2% benchmark adopted by the TPO on the ground that assessee had justified 12% interest rate on the basis of SBI PLR and also data from NSDL website.

ADAMA India Private Limited - TS-16-ITAT-2017(HYD)-TP

2482. Where the assessee had paid interest to its AE on fully convertible debentures ('FCD') and external commercial borrowings ('ECB') at the rate of 4% and 5.94% respectively and benchmarked it against LIBOR/SIBOR + 500 basis points ('bps') claiming it to be at arm's length, the Tribunal dismissed the Revenue's appeal against DRP order deleting TP-adjustment on interest paid on ECB/FCD for AY 2011-12 made by the TPO by adopting the rate of LIBOR + 200 bps as ALP. It rejected the contention of the Revenue that 200 bps had to adopted as per various judicial pronouncements viz. Four Soft Ltd [TS-518-ITAT-2011(HYD)-TP], Aurobindo Pharma Ltd [TS-23-ITAT-2014(HYD)-TP] and Dr. Reddy's Laboratories Ltd [TS-332-ITAT-2013(HYD)-TP] and held that that 200 bps could not be adopted as a universal rate for all types of loan. It further observed that the spread could differ according to terms, risk, etc of international loans and since the RBI in its prudential norms had allowed a spread of 500 bps for a term loan beyond 5 years, it held that there was no infirmity in the directions issued by the DRP.

DCIT vs. Devgen Seeds & Crop Technology Pvt. Ltd - TS-222-ITAT-2017(HYD)-TP - ITA No.399/Hyd/2016 dated 24-03-2017

Others

2483. The Court held that where in respect of marketing and administrative services provided to third party customers, the assessee adopted a revenue sharing model whereby it kept 75 percent of the revenue and paid 25 percent to its subsidiaries who provided support services for transactions where the customers directly contracted with either the assessee or its subsidiaries, the TPO was incorrect in determining the remuneration to subsidiaries at 15 percent, where the customers directly contracted with the assessee, since there was no difference in the functions performed by either the assessee or its subsidiaries as compared to cases where customers directly contracted with the subsidiaries.

CIT v ITC Infotech India Ltd - (2016) 66 taxmann.com 106 (Cal)

2484. The Tribunal deleted the TP-adjustment made in respect of BMW India's payments on account of market survey report to its AE, BMW AG, for AY 2007-08. BMW AG arranged for market survey report [conducted by third party] for BMW India and charged the costs incurred to BMW India without any margin/markup, however TPO proposed an adjustment holding that the said report was for the benefit of BMW group and not for the benefit of the assessee. The Tribunal referred to the OECD Guidelines, various debit notes and written confirmations from BMW AG and noted that the market survey report was a country specific report and was different from shareholders' activity. The Tribunal held that that the expenses incurred by BMW AG were for the benefit of BMW India only.

BMW India Pvt Ltd v/s. ACIT [TS-401-ITAT-2018(DEL)-TP] ITA No.6160/Del/2014 dated 14.05.2018

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h. Miscellaneous

Appeal

2485. The Apex Court heard special leave petition filed by revenue against Delhi High Court decision in Cargill Foods India Limited wherein the High Court had accepted commodity exchange quotations as valid CUP for benchmarking assessee's international transaction of import of Soyabean and sunflower oils and directed the Revenue to get instructions as to whether CUP Method had been accepted by TPO in subsequent assessment years by accepting quotation for benchmarking international transaction, posting the SLP admission hearing after 4 weeks.
Cargill Foods India Ltd [TS-866-SC-2016-TP] (CC No(s). 19007/2016)

2486. The Apex Court admitted Revenue's SLP against High Court order confirming Tribunal's quashing of assessments made by AO/TPO u/s 153A pursuant to search and seizure operations. The Tribunal noting that no new or incriminating material was found during search and seizure proceedings which took place in assessee's premises after completion of scrutiny assessment u/s 143(3), but that the AO, based upon existing material, had referred the matter to TPO, who then proposed TP adjustment on interest-free loans granted to AE, deleted this TP addition in absence of any incriminating material which was upheld by the High Court.
Pr.CIT vs Baba Global Ltd-TS-956-SC-2017-TP dated 01.12.2017

2487. The Apex Court dismissed Revenue's SLP challenging High Court order which confirmed deletion of penalty-imposed u/s 271G r.w.s 274. The Court had rejected Revenue's plea that assessee had deliberately avoided the production of TP documentation as required u/s 92D and relied on co-ordinate bench ruling in assessee's own case which had in turn relied on Bumi Highway HC ruling on identical issue wherein Sec 271G penalty order was held to be invalid as the assessee had complied with the TPO's requirement of specific documents and details.
CIT vs Gillette India Ltd [TS-1155-SC-2018-TP] SLP No.11616/2018 dated 05.10.2018

2488. The Apex Court dismissed Revenue's appeal against the High Court's order affirming the Tribunal's order on comparable selection wherein the High Court had noted that the ITAT order gave detailed reasons in support of its conclusion on comparables, further the memorandum of appeal filed by Revenue and a question of law raised for its consideration did not mention a specific plea that the ITAT order was perverse.
Pr.CIT vs SOJITZ INDIA PVT LTD [TS-728-SC-2018-TP] SLP No.17882/2018 dated 19.07.2018

2489. The Apex Court dismissed Revenue's SLP against Delhi High Court order quashing Revenue's show cause notice issued to Li & Fung India (assessee) pursuant to remand by the Tribunal. Noting that the Tribunal had directed TPO to determine ALP afresh by considering 'total cost' and not FOB value of goods as cost base, the High Court held that the Revenue erred in issuing show cause notice proposing to reject 51 out of 53 comparable companies selected by assessee in the set-aside proceedings as the remand was on the

basis of a specific finding and that there was no controversy about the comparables. Finding no reason to entertain Revenue's SLP, SC dismissed the same.

ACIT vs. Li and Fung India Pvt. Ltd. - TS-1-SC-2018-TP - PECIAL LEAVE PETITION (CIVIL) Diary No(s). 25825/2017 dated 05-01-2018

2490. The Apex Court dismissed Revenue's SLP against the High Court's order quashing AO's final assessment order passed in remand proceedings without passing draft order since it violated the provisions of section 144C(1). The High Court had relied on the HC rulings in Turner International and JCB India wherein it was categorically held that mandatory requirements u/s 144C (1) of the Act had to be met even where the TPO had passed the order in the second round on remand by the Tribunal. Further, it had also relied on the ruling of Citi Financial Consumer Finance India wherein it was held that failure to pass a draft assessment order u/s 144C(1) is not a curable defect as per Sec 292B.

Addl CIT vs Nokia India Pvt. Ltd. [TS-1027-SC-2018-TP] SLP No.7302/ 2018 dated 14.05.2018

2491. The Court, dismissed Revenue's appeal challenging Tribunal's decision wherein it had deleted the TP adjustment as the value of international transactions undertaken by the assessee was within +/- 5% range of ALP. The Revenue contended that section 92C(2) had not been properly considered by CIT(A) and Tribunal. It was argued that by mere mathematical calculation, the purchase ALP computed by TPO fell beyond the +/- 5% range. Noting that these grounds were not agitated before lower authorities it held that it could not be agitated in the present appeal.

Accordingly, the appeal was dismissed.

CIT vs Mettler Toledo India Pvt Ltd – TS-478-HC-2017(BOM)-TP-ITA No. 980 of 2014 dated 07.06.2017

2492. With regard to the issue as to whether the AMP expenditure incurred by the assessee amounted to an international transaction, the Tribunal had set aside the matter back to the file of the TPO to consider the issue de novo after considering all the relevant documents. On assessee's appeal to the High Court against the said Tribunal order, the Court held that it had no jurisdiction to interfere with the appeal as issue of AMP expenses had not yet culminated in a final order of the Tribunal

Johnson & Johnson (P.) Ltd. v. CIT – [2018] 93 taxmann.com 155 (Bombay) – IT Appeal No. 1453 of 2014 dated April 13, 2018

2493. The Court held that it is imperative for the Income-tax Department to have a system in place to keep record of questions of law admitted and dismissed by the High Courts to avoid multiplicity / duplication of appeals on identical matters already disposed of, as in the instant case, the question raised by the Department, viz.whether transfer pricing adjustment consequent to arriving at Arms' Length Price(ALP) was required to be made only in respect of the international transactions or in respect of all the business transactions of the assessee i.e. at the entity level, had already been disposed of by the Court in favour of the assessee. It directed the Pr CIT to file an affidavit, indicating steps being taken to ensure that the Department was taking consistent views.

CIT v TCL India Holding Pvt Ltd - (2016) 96 CCH 0010 (Bom)

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2494. Noting that the substantial question of law framed in the said order wrongly pertained to quantum appeal instead of the appeal against penalty, it deleted the earlier 4 questions framed relating to TP-addition of Rs. 5.86 crores, validity of reference to TPO in respect of mere reimbursement and secondment of employees and framed the following questions-(a) Whether on the facts and in the circumstances of the case and in law the Tribunal was right in confirming the levy of penalty of Rs.2,05,26,780/under section 271(1)(c) of the Act. (b) whether the Tribunal was right in holding that the revised return filed was invalid. (c) whether the Tribunal was right in holding that the Appellant had not offered any explanation towards claim of Rs. 5.86 crores as expenditure or deduction u/s 10A of the Act. (d) whether on facts and in circumstances of the case and in law the order of Tribunal was perverse and liable to be quashed.

Deloitte Consulting India Pvt ltd vs ACIT-TS-605-HC-2017(BOM)-TP-ITA NO 107 of 2015 dated 27.07.2017

2495. The Court dismissed Revenue's appeal by upholding exclusion of 3 out of 9 comparables chosen by TPO which was confirmed by DRP for AY 2010-11. It rejected Revenue's contention that if 3 out of 9 comparables were to be excluded, then ITAT ought to have suo motu required the TP-adjustment exercise to be undertaken afresh by TPO since the TP-adjustment based on remaining 6 comparables (that were to some extent functionally dissimilar to the assessee) could not have reflected the correct ALP. It held that the statutory scheme during the relevant AY 2010-11 did not envisage permitting Revenue to appeal against the inclusion or exclusion of a comparable by the TPO which was affirmed by DRP and only assessee had a remedy of filing an objection before the ITAT. It also noted that though such a provision permitting the filing of cross objection by Revenue was introduced by Finance Act, 2012 but the same was removed by Finance Act, 2016.

Pr. CIT v/s Trend Micro India Pvt Ltd [TS-515-HC-2016(DEL)-TP ITA 447/2016

2496. The Court held that the Tribunal was not justified in remanding the issues relating to inclusion/exclusion of comparables, determination of working capital and risk adjustments while benchmarking the assessee's Contract Software Development (CSD) services and Technical Support Services (TSS) segments for AY 2011-12 without giving any finding, and that the Tribunal could remand the matter to TPO only when it was absolutely necessary, i.e. due to lack of clarity on factual aspects or for consideration of facts which have emerged since the TPO's order which would have a bearing on outcome.. Noting that the Tribunal had remanded, it further held that the scope of remand should be clearly spelled out. Accordingly, it held that where all relevant facts were already before the Tribunal and the parties had no new material to provide, simply remanding the issue to the TPO without rendering a finding would be an abdication of the functions of the appellate body. Thus, it directed the Tribunal to decide the 4 issues arising out of appeal viz, (i) exclusion of WAPCOS and Mahindra and Mahindra and inclusion of Kirloskar in TSS segment. (ii) Exclusion of Sasken in CSD segment, (iii) denial of working capital adjustment and risk capital adjustment and (iv) proportionate adjustment in TSS segment.

Alcatel Lucent India Pvt. Ltd vs DCIT -TS-437-HC-2017(DEL)-TP- ITA No. dated 21.05.2017

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2497. Where the Tribunal remanded the matter in respect of determination of ALP for intra-group services to the file of AO even when all the details were available on record, the Court held that the Tribunal had erred in remitting the matter and set aside the order directing it to decide the issue on merits.

Voith Hydro Private Limited (Earlier known as Voith Siemens Hydro Private Ltd) vs. Pr. CIT-TS-771-HC-2017(DEL)-TP ITA 10/2017 dated 25.09.2017

2498. Where the Tribunal had held that the expenditure incurred by the assessee constituted AMP expenditure which was taxable but had also relied on the decision of the Delhi High Court in Maruti Suzuki Ltd v CIT (2016) 381 ITR 117 (Del) wherein it was held that AMP expenditure did not constitute an international transaction for which the Revenue filed an application under Section 254 of the Act pending which it also filed an appeal before the Court, the Court held that the Revenue ought to have exhausted its remedy under Section 254 prior to approaching it. Accordingly, it disposed off the Revenue's appeal.

Pr CIT v Wrigley India Pvt Ltd - TS-25-HC-2018(DEL)-TP - ITA 21/2018, CM APPL.934/2018 dated 10.01.2018

2499. The High Court dismissed the review petition filed by the assessee challenging the previous order of the Court contending that the contentions with respect to appropriateness of the TNMM rather than the CUP (Comparable Uncontrolled Price) was urged but not answered. The Court opined that the appellant/review petitioner's submissions with respect to the nature of the transaction and also the appropriateness of the TNMM as well as the feasibility of application of the TNMM method as the "most appropriate method" were not only considered but actually adverted to and therefore there was no scope for review.

Cargill Foods India Pvt Ltd vs. ACIT - TS-47-HC-2018(DEL)-TP - REVIEW PET.523/2017 IN ITA 938/2017 dated 19.01.2018

2500. Where the assessee appealed against Tribunal's order contending that while Tribunal admitted the additional ground of appeal and required the TPO to undertake fresh comparability analysis for determining ALP, it did not consider it necessary to adjudicate any of the remaining grounds urged by the assessee, the Court dismissing assessee's appeal held that the since the remaining grounds also pertained to comparability analysis, there was no infirmity in the order of Tribunal since the matter being remanded for a fresh determination of ALP was in accordance with law, there was no need to decide the remaining grounds at the current stage.

Validor Capital India pvt. Ltd vs ITO-TS-821-HC-2017(DEL)-TP ITA 491/2017 dated 12.10.2017

2501. The Court, relying on the decision in the case of Post Master General v Living Media India Ltd wherein it was held that mere departmental administrative process involved in filing of appeal could not be a reason for condonation of delay, dismissed Revenue's appeal on account of 158 days delay in filing the appeal.

Pr. CIT vs. Oks Span Tech Pvt Ltd-TS-776-HC-2017(DEL)-TP ITA 789/2017 dated 09.10.2017

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2502. The Court admitted assessee's appeal on the question a) *whether if an assessment proceeding is not pending before the AO, could the AO still make a reference make a reference under Section 92CA (1) of the Income Tax Act, 1961?*

Nokia Siemens Networks India Private Limited [TS-327-HC-2018(DEL)-TP] ITA 525/2018 dated 04.05.2018

2503. Where the Tribunal had directed inclusion of 3 comparables and had remitted comparability of 8 comparables to TPO for reconsideration, the Court held that though remittance of the issue by the Tribunal was justified, however, the lack of reasoning by the authorities for inclusion of the comparables would mean that the matter would be open for the assessee and it had right to contend that the inclusion of comparables was not in accordance with law for whatever grounds it choose to urge. Accordingly, it remitted the matter back to TPO.

Agnity India Technologiers P. Ltd. [TS-175-HC-2017(Del)-TP] [ITA 99/2017]

2504. The Court, refusing to condone extraordinary delay of 505 days in refiling appeal, dismissed Revenue's appeal challenging Tribunal's decision on transfer pricing issues on the ground that change in counsel could not explain a delay of 505 days in curing defects and refiling the appeal. Noting Revenue's explanation that appeal was initially filed on 9.10.2014, but was placed under objections by registry owing to drastic increase in Court fees, digitization (e-filing), it held that the Court registry had conducted orientation sessions to enable lawyers to familiarize themselves with e-filing process and that the increase in court fees had come into force much before filing of present appeal. Accordingly, it dismissed the appeal of the Revenue.

Pr. CIT vs Iqor India Services (P) Ltd [TS-419-HC-2017(DEL)-TP- ITA 314/2017 & CM No. 14730/2017 dated 19.04.2017

2505. The Court, dismissed Revenue's appeal for AY 2006-07 challenging Tribunal's order on exclusion of comparables without proper discussion. It held that previous precedents had been relied by the Tribunal and it was incorrect to say that it had not taken into account the factors that weighed with it for excluding the said comparables.

Pr. CIT vs Mentor Graphics (India) P Ltd-TS-420-HC-2017(DEL)-TP-ITA 318/2017 dated 02.05.2017.

2506. The Court, admitted assessee's appeal and framed 2 questions for determination (i)pertaining to exclusion of 'Advanced Micronic Devices Ltd' as a comparable and (ii) restricting the ALP-adjustment to the value of international transactions instead of the assesses's entire turnover. Further, it also permitted the parties to file additional documents/papers which were part of assessment record filed before Tribunal within 8 weeks.

Becton Dickinson India Pvt. Ltd vs Pr. CIT - TS-416-HC-2017(DEL)-TP-ITA 289/2017 dated 16.05.2017

2507. The Court dismissed Revenue's application for condonation of appeal filing delay and held that unavailability of staff due to demonetisation & file movement on account of transfers were not sufficient cause for a delay of 489 days in filing the appeal. It noted that the appeal was filed on September 19, 2017 while the ITAT order was passed on April 22, 2016 and demonetization occurred on November 8, 2016 and therefore termed Revenue's explanation as 'unconvincing'.

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Pr. CIT vs. Vertex Customer Services India Pvt Ltd - TS-77-HC-2018(DEL)-TP - ITA 172/2018 dated 12.02.2018

2508. The Court dismissed the assessee's review petition wherein the assessee contended that the Court's conclusion that no substantial question of law arose for its consideration was erroneous as the Court did not answer its argument on appropriateness of the TNMM. It opined that the petitioner's submissions with respect to the nature of the transaction and also the appropriateness of the TNMM as well as the feasibility of application of the TNMM method as the "most appropriate method" were not only considered but actually adverted to. Accordingly, it held that the main order of the Court dated 06.11.2017 did not call for review.
Cargill Foods India Pvt Ltd vs. ACIT - TS-47-HC-2018(DEL)-TP - REVIEW PET.523/2017 IN ITA 938/2017 dated 19.01.2018

2509. The Court allowing the assessee's appeal modified the order of the Tribunal order restoring ALP-determination in respect of assessee's international transactions of marketing and support services to TPO/AO and instead remitted matter back to CIT(A). Noting that the comparable used in the present case for ALP determination was not a controlled transaction, the Court held that rather than the matter being examined afresh by the Assessing Officer it would be more appropriate that the matter be remanded to the CIT(A), who may, if necessary, call for a remand report.
The Bank of Tokyo - Mitsubishi UFJ Ltd vs. DCIT - TS-74-HC-2018(DEL)-TP - ITA 107/2018 dated 31.01.2018

2510. Where the assessee had produced before the Court a detailed chart explaining the approach of the TPO, DRP and the Tribunal in respect of determination of ALP for each of the segments which proved that all facts were available on record before the Tribunal, the Court noting that the Tribunal had failed to render a finding, directed the Tribunal to decide TP-issues without remanding matter for de-novo adjudication.
Bechtel India Private Limited vs DCIT-TS-606-HC-2017-Delhi-ITA No 97/2017 dated 25.07.2017

2511. Where the CIT(A) had elaborately considered both the internal as well as external benchmarking analysis and come to a definitive conclusion that TP adjustment was unwarranted, the Court rejected Revenue submission that the AO ought to have made reference to TPO and that the CIT(A) had no power in exercise of its appellate jurisdiction, to undertake a TP analysis. Accordingly, the Court, upheld Tribunal's order refusing to adopt earlier year's comparables without undertaking proper analysis. Noting that the Revenue had not contended before the Tribunal that the CIT(A) ought to have remanded the matter to the file of the TPO rather than adjudicating it himself, the Court held that the Revenue could not be permitted to raise such ground at this stage.
Pr. CIT vs. Interra Infotech (India) Pvt. Ltd.-TS-669-HC-2017(DEL)-TP-ITA No. 250/2017 dated 25.08.2017

2512. The Court dismissed the appeal filed by the assessee owing to extraordinary delay of 439 days and rejected the assessee's justification that the delay occurred since it was pursuing an alternate remedy by way of filing a miscellaneous application before the

Tribunal for the exclusion of Bodhtree as comparable. It held that an application under Section 254(2) of the Act is for rectifying mistakes apparent from record which is much narrower in scope than an appeal before the Court under Section 260A. Therefore, it held that the time period for filing an appeal under Section 260A would not get suspended on account of pendency of miscellaneous application filed before the Tribunal.

Agnity Technologies Pvt Ltd vs CIT-TS-729-HC-2017(DEL)-TP- ITA 939/2016 dated 19.09.2017

2513. The assessee (engaged in software development services) was providing onsite software services to its overseas customers through its branch in UK and had an AE to perform distribution activities for the said services (identifying customers, establishing contacts, soliciting enquiries, customer relationship in UK). The TPO recharacterized the AE as a marketing support services provider and proceeded to select comparables and accordingly, made an upward adjustment to the ALP of payment made by assessee to its AE. The Tribunal deleted the adjustment noting that AE was functioning as a distributor. Further, a performance guarantee was given by assessee to a customer of its AE. The AO had adopted 2% of gross sales (rate on basis the financial guarantee given by various institutions) as ALP for guarantee fee since the performance risk was borne by the assessee. The Tribunal deleted the adjustment relying on MicroInk noting that guarantee transaction would not amount to an international transaction where no consideration was charged by holding company to its subsidiary company (no bearing on income, losses of profit and loss account) and further, the amendment brought about by insertion of explanation to sec 92B was not retrospective hence would not be applicable to the year under appeal. The Court admitted Revenue's appeal against the Tribunal's order deleting TP-adjustment on international transactions relating to distribution of software services, provision of performance guarantee, provision of information technology enabled services and human resource management services. The Court also admitted the question of law as to whether guarantee would amount to an international transaction u/s 92B.

Pr.CIT vs MASTEK LIMITED [TS-1091-HC-2018(GUJ)-TP] TAX Appeal No.1182 of 2018 dated 25.09.2018

2514. The Court dismissed Revenue's appeal against the Tribunal's order (passed in miscellaneous petition filed by assessee against its original order) noting that Revenue had not brought on record perversity in the findings of the Tribunal. The Tribunal in its order had directed the TPO to consider assessee's contention and case laws cited to treat foreign exchange gains/loss as operating noting that the issue had been remanded back in the original order. Further, it remitted the selection of CPM/CUP as against TNMM adopted by TPO since the Tribunal in its original order had not given any findings/ directions about the applicability of CUP.

CIT, ITO vs Mercedes-Benz Research & Development India Pvt. Ltd [TS-712-HC-2018(KAR)-TP] ITA No.230/2013 dated 10.07.2018

2515. The Court dismissed assessee's appeal as withdrawn noting that assessee had filed a memo seeking withdrawal of appeal which was not objected to by Revenue.

Hewlett Packard (India) Software Operation Pvt. Ltd vs ACIT & CIT [TS-1009-HC-2018(KAR)-TP] ITA No.410/2016 dated 01.08.2018

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2516. The Court allowed the assessee to withdraw its appeal challenging the applicability of TNMM as most appropriate method for benchmarking its international transactions. The Tribunal had upheld TPO's application of TNMM over assessee's CUP-method after opining that CUP method could be applied as MAM only when there was no dis-similarity of the goods, articles or services. Since the matter was at the initial stage and was not admitted, it permitted the assessee to withdraw its appeal and clarified that the dismissal of this appeal on withdrawal for the impugned AU would not conclude the issue if sought to be raised in other assessment year.

Mercedes-Benz Research & Development India Pvt. Ltd vs. ACIT - TS-151-HC-2018(KAR)-TP - TS-151-HC-2018(KAR)-TP dated 08.03.2018

2517. The Court dismissed assessee's appeal noting that if there was any factual error in the Tribunal's order on account of the wrong mention of the arguments, the assessee was at a liberty to file a miscellaneous application for seeking for correction of the order. It directed the Tribunal to consider the said application to be filed by the assessee.

Curam Software International P Ltd vs ITO [TS-549-HC-2018(KAR)-TP] ITA No.775/2017 dated 02.07.2018

2518. The Court set aside the Tribunal order refusing to condone delay in filing of appeal on account of the assessee not receiving the CIT(A) order noting that the Tribunal was not justified in placing a negative burden on the assessee to establish the 'non-service' of CIT(A) order and it was for the Revenue to establish the service of the order on the assessee. The Tribunal had dismissed the assessee's appeal observing that assessee had not proved non-service of CIT(A) order. It was the assessee's contention that it was made aware of the CIT(A) order when lower authorities sought to give effect to it and when it sought to get information about service of relevant order from post office, after almost one year of dispatch, they expressed their inability citing non-availability of old records. The Court held that without the proof of service of CIT(A)'s order placed before it, Tribunal could not draw inference of service of order on assessee and accordingly, remitted the matter back to be decided on merits.

Molex India Tooling India P Ltd vs CIT, ACIT [TS-608-HC-2018(KAR)-TP] ITA No.197/2017 dated 02.07.2018

2519. Where the Tribunal, relying on its order for the previous year in the case of the assessee, remitted the issue of determination of the ALP of technical fees paid by the assessee to its AEs to the AO / TPO and made further observations / directions viz. that since the transaction was an expense transaction, profit method could not be the Most Appropriate Method and that the CUP method was to be considered, the Court held that once a finding was recorded to remand the issue with a particular direction, the Tribunal should refrain itself from making any observation with regard to the mode and the manner in which the direction is to be complied with. Therefore, it held that the order passed by the Tribunal making observation exceeding the direction given in the case of the assessee for the Assessment Year 2007-08 would no more operate and directed the TPO/AO to consider the matter in the same manner as was considered earlier viz. AY 2007-08.

Forsoc Chemicals India Pvt Ltd v DCIT – TS-158-HC-2017 (Kar) – TP – ITA No 15 / 2016 dated January 24, 2017

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2520. The Tribunal had remitted the issues back to the Dispute Resolution Panel to pass a speaking order. Consequently, the Dispute Resolution Panel issued fresh directions and the AO through the impugned proceedings passed order giving effect to the DRP directions. The assessee filed a writ of prohibition, prohibiting the AO from passing order fresh assessment order, as the time period fixed for passing an assessment order under section 144C(13) had already elapsed. It was Revenue's contention that the Tribunal had not set aside the original order of assessment dated 21.01.2016 and on the other hand, it had only remitted the issues back to the DRP for passing a speaking order on the disputed issues and therefore, the original assessment order stood as it was and therefore in view of the subsequent order passed by the Dispute Resolution Panel on 28-12-2017, giving certain directions, the AO was justified in passing the present impugned order giving effect to directions of DRP. The Court observed that the Tribunal's order could be interpreted in both ways as stated supra, with regard to status of the order of assessment dated 21-01-2016. The Court while granting the assessee statutory right to appeal from the order giving effect to the DRP directions to the Tribunal , opined that it was for the assessee to approach the Tribunal once again, by challenging the present impugned order, by raising all the contentions, so that the Tribunal would be in a position to clarify the effect of the earlier order passed, while considering the appeal to be filed against the present impugned order and any such clarification by the Tribunal, with regard to the status of the assessment order dated 21-01-2016, would certainly have a bearing on further proceedings including the present impugned order.

CET Power Solutions India Pvt Ltd vs Dy.CIT [TS-1083-HC-2018(MAD)-TP] WP Nos.4695 and 4696 of 2018 dated 11.09.2018

2521. The Court dismissed the assessee's writ petition against the alleged error apparent in TPO order (giving effect to the Tribunal order) wherein the average rate of royalty was fixed at 3.67% after verifying the records and books of accounts submitted by the assessee as against the direction of the Tribunal to verify assessee's claim that its royalty rate (3.6%) was less than the rate prevalent in the industry for relevant AY (4.7%). It noted that there was no error on the part of the TPO in reconsidering the entire books of accounts submitted by the Petitioner for the purpose of assessing the average rate of royalty payment in the industry, and the assessee had an alternative efficacious remedy of approaching the DRP and subsequently the Tribunal and thus, dismissed the writ petition since there was no violation of principles of natural justice or error apparent on record.

Hyundai Motor India Limited vs. DCIT and DCIT (LTU) [TS-748-HC-2018(MAD)-TP] WP No.22508 of 2017 and W.M.P No.38346 of 2017 dated 16.07.2018

2522. The Court disposed the writ petition filed by assessee, challenging the TPO's show cause notice determining the ALP of management fees paid by assessee at Nil in the second round of proceedings for AY 2007-08, observing that no interference was called for at this stage. However it directed the TPO to consider assessee's submissions in their entirety. It noted that in the first round of proceedings, the Tribunal had observed that although assessee had claimed TNMM as MAM, the TPO had not discussed most appropriate method and simply concluded that management fees payment was not justified since there was no improvement in revenue as a result of which the Tribunal had remitted the matter to AO/TPO

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holding that TPO / DRP were expected to compare the payment with that of the comparable companies in India on the basis of method prescribed under Rule 10B.

AB Mauri India Pvt Ltd v DCIT – TS-1097-HC-2016 (Mad) – TP - W.P. No.43204 of 2016 dated 12.12.2016

2523. The Tribunal, in the case of the assessee, had directed the AO/TPO to apply the Court's decision in the case of Knorr Bremse on the issue of adoption of CUP method vs TNMM for determining ALP of assessee's international transaction of payment of management fees to AE. Assessee filed writ on the ground that AO had not applied the said decision in Knorr Bremse, therefore the order was not in accordance with the Tribunal's directions. The Court agreeing with Revenue's contention held that effect giving orders could be challenged before the next fact finding authority, namely the First Appellate Authority, and that it was not inclined to entertain the writ petition as there was an alternative remedy. Noting that the AO had sought to distinguish the facts and circumstances of assessee's case with the case of Knorr Bremse, the Court stated that whether such distinction of the facts as done by the first respondent was correct or not, was for the next fact finding authority to consider and decide, as such exercise involved appreciation of the facts and circumstances of both the cases. Accordingly, it dismissed the writ petition filed by assessee challenging order passed by AO giving effect to Tribunal's directions for AYs 2010-11 and 2011-12, holding that the assesee could avail of alternative remedy before the First Appellate Authority.

Volex Interconnect India Private Limited Vs DCIT & Anr - TS-315-HC-2017(MAD)-TP - W.P.Nos.9199 & 9200 of 2017 dated 17.04.2017

2524. The Court dismissed the writ petition filed by the petitioner against the DRP directions and the draft assessment order on the ground that the assessee had an efficacious alternate statutory remedy available.

Cairn India Ltd v DCIT - TS-58-HC-2016 (P&H) – TP

2525. The Tribunal held that where the issue regarding selection of a non- resident entity as a tested party was pending before the High Court for final adjudication in the case of the assessee itself there was no need to constitute a Special Bench for the same issue. Accordingly, it rejected the Revenue's contention for constitution of Special Bench.

General Motors India Pvt Ltd v ACIT - TS-640-ITAT-2016 (Ahd) - TP - I.T.A. Nos.: 1293/Ahd/2015 and1294/Ahd/2015

2526. The assessee had made royalty payment to its AE under technology license agreement being 5% of net assessable value of units sold. The Tribunal in the first round of proceedings had remanded the ALP determination of royalty directing the TPO to examine the contentions of the assessee regarding comparability of internal CUP agreement between assessee and the Isuzu Motors Ltd, Japan ("Isuzu") already on record noting that lower authorities had not dealt with the objections of assessee to the use of external agreements to benchmark the aforesaid transaction. The TPO in the second round of proceedings had made reference to the assessee's submissions before lower authorities; however, did not verify the external and internal agreements or contentions raised by assessee. The Tribunal in the second round had upheld the adjustment in relation to royalty payment on sole premise that assessee had not made any submissions on the use of external CUP in both the rounds of proceedings.

Thereafter, the Tribunal allowed assessee's miscellaneous petition and recalled Tribunal's order to rehear the issue of royalty adjustment accepting assessee's contention that Tribunal had clearly erred in observing that nothing was brought on record in remand proceedings to show that external CUP agreements used by TPO to benchmark royalty payments were not comparable.

General Motors India Pvt Ltd vs Asst CIT[TS-1357-ITAT-2018-(Ahd)-TP] MANo.65/Ahd/2017 dated 31.12.2018

2527. The Tribunal dismissed Revenue's miscellaneous petition against the Tribunal order wherein the assessment order was held to be null and void-ab-initio as it was passed on an amalgamated entity and the AO had been informed about the change in name. The Revenue had relied on a subsequent Tribunal order in assessee's case where the assessment order was not set aside since the AO was not informed about the factum of amalgamation to contend that there was an error apparent on record. Noting that subsequent order based on erroneous application of facts could not give rise to a mistake apparent in the Tribunal's order, as in the instant order the Tribunal had adjudicated that the AO was informed about the factum of amalgamation.

Dy.CIT vs GE Medical Systems (India) Pvt Ltd (since merged with Wipro GE Healthcare Pvt. Ltd.) [TS-1030-ITAT-2018(Bang)-TP] MP No.285/Bang/2017 dated 17.08.2018

2528. The Tribunal dismissed assessee's miscellaneous petition against the Tribunal order and held that CG Vak Software and Product Ltd. was rightly included as a comparable noting that the Tribunal for the subject year had given a finding that it was not a product company and accordingly, conclusion of TPO in the preceding year that it is a product company was irrelevant on basis of which the assessee was urging the mistake on record. In case of inclusion of Persistent System Ltd., the assessee was contending that the Tribunal had erroneously not considered the comparable to be a product company a fact evident from the perusal of the financials. It noted that the profit and loss account have no income from software products and the case laws relied on by the assessee were for a different assessment year. As regards the contention of the assessee. that rendering of software testing services being part of software development services for inclusion of Cigniti Technologies Ltd as a comparable, it held that the assessee under the garb of Miscellaneous petition was seeking a review of the order of the Tribunal which is not permissible u/s.254(2) of the Act.

Advice America Software Development Center Pvt. Ltd., vs ITO [TS-969-ITAT-2018(Bang)-TP] MP.No.171/Bang/2018 dated 24.08.2018

2529. The Tribunal allowed assessee's miscellaneous petition, modified Tribunal order for AY 2007-08. Noting that the Tribunal had set aside comparability of various companies back to the AO/TPO in the ITeS segment but had , however, omitted to deal with 2 comparables viz., Accurate Data Converters Private ltd and iServices India Private Ltd specifically, it remanded the matter back to the AO/TPO directing it to consider these two companies and thereafter make an analysis of pricing of international transaction of the assessee in the ITeS segment.

Hewlett Packard (India) Global Soft P Ltd vs DCIT-TS-552-ITAT-2017(Bang)-TP-IT(TP)A no. 1031/bang/2011 dated 28.03.2017

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2530. The Tribunal, noting that during the course of the proceedings no one appeared on behalf of the assessee nor any application to seek adjournment was filed even though notice was duly served on the assessee, dismissed assessee's appeal for non-prosecution for AY 2012-13.
Advice America Software Development Center Pvt Ltd vs DCIT-TS-763-ITAT-2017(Bang)- TP dated 06.09.2017

2531. The Tribunal, allowed Revenue's miscellaneous petition against its earlier order. Noting that the Revenue had contended for inclusion of 2 companies (RS Software India Limited and Mindtree Limited) on the ground of functional comparability but the Tribunal had not adjudicated on the issue, and no objection was raised by the assessee vis a vis the inclusion of the two comparables, the Tribunal, directed the AO/TPO to include the aforesaid comparables for determining the arm's length price (ALP).
ITO vs Arcot R&S Software Pvt Ltd-TS-692-ITAT-2017(Bang)-TP-M.P.No. 92/bang/2017 [IT(TP)A no. 393/bang/2015 dated 24.08.2017

2532. The Tribunal dismissed assessee's miscellaneous petition against Tribunal order for AY 2008-09. Noting assessee's submission that Tribunal had considered the margin of transactions with AEs excluding idle costs, but transactions for non-Associated Enterprises were not considered and therefore, the ground relating to operating costs of both Associated and non-Associated Enterprises should be considered in order to determine the ALP adjustment for non-Associated Enterprises also, the Tribunal held that the issue of idle costs incurred by the assessee on account of excess capacity as operating cost for arriving at the ALP was considered by Tribunal in detail in para 8 and had restored the matter to the file of AO for fresh adjudication and therefore there was no error apparent in the order of the Tribunal.
Trianz Holdings Pvt. Ltd (formerly Trianz Consulting P. Ltd.,) vs. DCIT-TS-1037-ITAT-2017(bang)-TP M.P. No.234/Bang/2017 dated 17.11.2017

2533. Where the CIT(A) did not adjudicate assessee's contentions regarding inclusion/exclusion of comparables by passing a reasoned order on all disputed comparables and thereafter to determine ALP, the Tribunal set aside the order of the CIT(Appeals) and restored the matter to his file with a direction to adjudicate the issues raised after affording opportunity of being heard to the assessee.
GE Intelligent Platforms Pvt. Ltd (formerly GE Fanuc Systems Pvt. Ltd) vs. ACIT-TS-1035- ITAT-2017(Bang)-TP dated 15.12.2017

2534. Where the Tribunal had not adjudicated ground no. 7 of its appeal (regarding exclusion of E-Infochips Ltd from the list of comparables for software developer assessee), the Tribunal allowing Revenue's appeal recalled the Tribunal order for the limited purpose of adjudicating ground no 7 of Revenue's appeal.
DCIT vs. Applied Material India P. Ltd-TS-1063-ITAT-2017(Bang)-TP Miscellaneous Petition No.269/Bang/2017 dated 26.12.2017

2535. The Tribunal accepted assessee's miscellaneous petition against Tribunal order for AY 2008-09. Noting that Tribunal, in its order, had incorrectly stated that assessee sought exclusion of Saksoft Ltd whereas in reality, the assessee had successfully appealed before CIT(A) for its inclusion and the CIT(A) had accepted assessee's contentions and held that Saksoft Ltd was

functionally similar and therefore could not be excluded, the Tribunal held that there was an apparent error in the order and accordingly directed the inclusion of Saksoft Ltd.

Radisys India P. Ltd (Formerly Continuous Computing India P. Ltd) vs ITO-TS-1004-ITAT- 2017(Bang)-TP dated 08.12.2017

2536. Where the CIT(A) had not examined and decided the issue of functional dissimilarity in respect of 9 companies against which the assessee had raised objections, the Tribunal remitted the matter to the file of CIT(A) for fresh adjudication. Further, in respect of 0% RPT filter, it held that the CIT(A) was not justified in applying 0% RPT filter suo-moto as no comparables were available. It held that a reasonable tolerance range of 5% to 25% depending on facts and circumstances of the case should be applied.

ITO vs iPass India Pvt Ltd-TS-751-ITAT-2017(Bang)-TP- I.T.(T.P)A. No.526/Bang/2012 dated 31.08.2017

2537. The Tribunal dismissed assessee's miscellaneous petition (MP) seeking to modify Tribunal's order for contending that the Tribunal in the impugned order had discussed the comparability of several companies but failed to render finding thereon. Noting that the assessee had filed a single application for rectification of the order even though the original appeal was filed by both assessee and Revenue as cross appeals, it held that the minimum requirement of law is that separate applications are required to be filed in respect of each appeal. Since the fact of the defect was intimated but the assessee had chosen not to rectify the same, it dismissed the Miscellaneous application filed by assessee as defective.

IDS Software Solutions India Pvt Ltd vs DCIT-TS-759-ITAT-2017(Bang)-TP- Misc. Petn.No.138/Bang/2017 dated 15.09.2017

2538. The Tribunal, noting that no one appeared on behalf of the assessee even though notice was duly served on it fixing appeal hearing for August 21, 2017, dismissed assessee's appeal for non-prosecution under rule 19(2) of Income Tax Appellate Tribunal Rules.

Indeca Sporting Goods Pvt. Ltd vs. DCIT-TS-713-ITAT-2017(Bang)-TP-IT(TP)A No. 445/bang/2017 dated 21.08.2017

2539. The Tribunal allowed assessee's miscellaneous petition seeking recall of ex-parte Tribunal order. Noting assessee's submission that it was unable to appear before the Tribunal on the hearing date as the notice was misplaced since it was delivered on a weekend & collected by the security person, the Tribunal held that there was reasonable cause for non-appearance of the assessee on the appointed date and accordingly recalled the ex-parte order and fixed appeal hearing on December 5, 2017.

Salesforce.com India Private Limited vs DCIT-TS-761-ITAT-2017(Bang)-TP-MP no.160/bang/2017 dated 08.09.2017

2540. The Tribunal partly allowed assessee's miscellaneous petition and recalled Tribunal's order for the limited purpose of adjudicating working capital adjustment not adjudicated earlier. Further, it dismissed assessee's contention that the comparability of Evoke was not to be remanded to the lower authorities as neither did the DRP nor the TPO object to the inclusion of this comparable and held that there was no mistake apparent from records as the Tribunal held that all comparables were to be reexamined.

Obopay Mobile Technology India P. Ltd vs DCIT-TS-710-ITAT-2017(Bang)-TP- Misc Petition No.145/Bang/2017 dated 11.08.2017

2541. The Tribunal, dismissed second miscellaneous petition filed by Revenue against Tribunal order for AY 2005-06 as it was time barred. It held that as per the amended provisions of section 254(2), assessee/Revenue could file a miscellaneous petition within 6 months from the end of the month in which order was passed by the Tribunal and since the Tribunal order against which the petition was filed was passed on August 11, 2016, the miscellaneous petition filed on May 29, 2017 was time barred.

DCIT vs Swiss' Re Shared Services (India) Pvt Ltd-TS-721-ITAT-2017(Bang)-TP- M§ No. 159/Bang/2017 (in IT(TP)A No. l 72/Bang/2012) dated 18.08.2017

2542. The Tribunal dismissed assessee's miscellaneous petition against Tribunal's order for AY 2007- 08. Noting that the Tribunal (vide order dated February 10, 2011) had decided the issue considering the explanation to section 92C(2) which provided that the second proviso to section

92C(2) was applicable to all proceedings pending before the AO on 1.10.2009, it held that since the proceedings for subject AY were pending as on 1.10.2009 and accordingly, there was no apparent mistake in the order of Tribunal.

Insilica Semiconductors India Pvt Ltd-TS-709-ITAT-2017(Bang)-TP-''rvr.P.No. 1211Bang/2017 (in IT(TP)A No. 1 l 17/Bang/2013) dated 18.08.2017

2543. The Tribunal, noting that since the coordinate bench of the Tribunal in a series of rulings in the cases of AMD India, GT Nexus Software & Quark Systems had examined functional comparability of E-Infochips, Acropetal Technologies, ICRA Techno Analytics and E-Zest Solutions even though the assessee did not raise a specific issue of functional dissimilarity before the authorities, as the assessee had made out prima facie case for raising this issue of functional comparability of these four companies, in the instant case, the Tribunal admitted the additional ground and remanded the comparability of the aforesaid companies to the file of

AO/TPO for examination/ verification of functional comparability.

Fortinet Innovation Centre India Pvt. Ltd (formerly known as Meru Networks India Pvt. Ltd) vs. ITO-TS-617-ITAT-2017(BANG)-TP dated 28.07.2017

2544. Noting that since the assessee was taken over by Canara Power Projects Group and entire managing team had quit the office while a new team was yet to be in place, required documents could not be filed before DRP/TPO, the Tribunal admitted additional evidence filed by assessee even though application for admission of such evidence was made for the first time before Tribunal. Although no records were maintained by the assessee and TP study was not filed before TPO/DRP, the Tribunal held that the assessee had vide letter dated November 11, 2013 explained that the entire management team along with the Company Secretary had left the office and new management had taken over the assessee and in view of the that necessary documents had not been furnished before the TPO. Accordingly, the Tribunal held that the it was justified to accept the additional evidence and remanded the matter back to the file of TPO for examination after granting the assessee a personal hearing.

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Conergy Energy Systems Private Limited (formerly known as Sun Technics Energy Systems Pvt Ltd) vs ACIT-TS-604-ITAT-2017(BANG)-TP-IT(TP)A no.584/bang/2015 dated 22.03.2017

2545. Relying on the decision in the case of Desa Singh vs Ajit Singh where it was held that normally when appellant was not represented, the Court would dismiss it for default and not go into merit in detail, the Tribunal dismissed assessee's appeal for non-prosecution/dismiss in default as no one appeared on behalf of assessee to argue the case.
MModal Global Services Private Limited vs ITO-TS-615-ITAT-2017(Bang)-TP-ITA No. 1351/bang/2011 dated 17.05.2017

2546. The Tribunal allowed assessee's miscellaneous petition seeking rectification of Tribunal's order on the ground of non-consideration of 4 out of 5 additional grounds raised by assessee Noting that only 1 additional ground pertaining to inclusion of 2 comparables viz., Guindy Machine Tools ltd and United Drilling Tools Ltd had been considered by Tribunal, it restored the matter back to the file of AO/TPO for fresh consideration in respect of adjustment made by AO/TPO to the same class of international transaction twice, not providing an adjustment to the operating cost mark- up for difference in working capital of assessee vis-à-vis the comparables, considered non- comparable companies, Electronics Machine Tools Ltd. and Kulkami Power Tools Ltd. as comparable while determining the arm's length price as the aforementioned companies failed functional and other criteria.
Molex India Tooling Pvt. Ltd vs. ACIT-[TS-538-ITAT-2017(Bang)-TP]-IT(TP)A No. 1494 (bang)/2010 dated 28.04.2017

2547. The Tribunal dismissed assessee's miscellaneous petition for AY 2005-06 refusing to interfere with its earlier direction to the AO/TPO for verification of additional evidence filed by assessee and decide whether administrative and business support services for which assessee had made payment were actually rendered by the AE. Assessee had contended that the evidence to prove the service rendition was earlier filed before CIT(A) who had granted relief in this respect and thus, remand to the AO / TPO for verification was unwarranted. Noting that nothing was discernable from the CIT(A) order and that the evidence on record did not conclusively prove that services were actually rendered by AE it upheld the remand of the Tribunal. Since there was no finding by lower authorities as evidence was not filed before it by the assessee , it also observed that the jurisdiction of the CIT(A) on issue involving facts could be exercised only if there was a finding by lower authorities. The CIT(A) could only give a finding on the correctness or otherwise of finding of lower authorities. Accordingly, it held that there was no mistake apparent from the record in the Tribunal order requiring modification. It held that in the proceedings u/s 254, the final conclusion reached by the Tribunal in the earlier order was not to be disturbed.
3M India ltd vs ACIT-TS-532-ITAT-2017(Bang)-TP-MP No. 42/bang/2017 dated 31.03.2017

2548. The Tribunal recalled its order in case of the assessee noting that by applying turnover filter alone, the Tribunal remitted 7 comparables in light of Chryscapital HC ruling and had ignored assessee's contention about consideration of other aspects such as functional dissimilarity, absence of segmental results etc. Accordingly, it noted that various aspects were

inadvertently missed out in the impugned Tribunal order and therefore held that there was an apparent mistake. Further, it noted that the Tribunal had remitted comparability of Acropetal Technologies for application of employee cost filter (observing that it was not shown that the other comparable companies which were not excluded satisfied the employees cost filter) even though TPO had already applied employees cost filter as one of the filter across all comparable companies. In light of the aforesaid mistakes apparent from record it recalled the impugned order in entirety for fresh decision.

Cenduit India Services Pvt. Ltd vs. ITO - TS-119-ITAT-2018(Bang)-TP - M.P. No. 226/Bang/2017 dated 19.01.2018

2549. The Tribunal allowed the assessee's miscellaneous petition against Tribunal's order on comparables selection for AY 2007-08 noting that it had directed exclusion of 'Geometric Software Solutions limited' as it had more than 15% RPT and 'Lucid Software Ltd' by relying on Meritor LVS India ruling; but had missed out on their exclusion in the concluding para. Accordingly, it held that there was an apparent mistake in the impugned order to the extent of not specifically passing the directions of the exclusion of these two companies from the set of comparables and therefore modified the order directing the AO/TPO to exclude these 2 companies apart from the 7 comparables already excluded.

Microchip Technology (India) Pvt. Ltd vs. ACIT - TS-257-ITAT-2017(Bang)-TP - M.P. No.3/Bang/2017 dated 08.03.2017.

2550. The Tribunal, relying on the decisions in the case of Nortel Networks India P. Ltd and Roche Products (India) Private Limited, allowed assessee's additional ground on admission of fresh evidence which was declined by CIT(A) for AY 2003-04. The assessee further submitted that Choksi Laboratories (engaged in engineering activities and chemical testing services) was functionally dissimilar to assessee providing contract testing and other services to AE. However, considering the admission of additional evidence, the Tribunal remitted the matter to the file of CIT(A), without adjudicating on the issue of comparability.

UL India Pvt Ltd [TS-343-ITAT-2017(Bang)-TP IT (TP) A No .180/bang/2012 dated 22.03.2017

2551. The Tribunal, relying on Apex Court's ruling in the case of NTPC Ltd admitted software developer assessee's additional grounds challenging CIT(A)'s modification of filters in respect of comparables selection for AY 2007-08 and held that since issues raised in the additional grounds were in respect of the filters applied by the CIT (A), it did not require any investigation and examination of new facts.

PMC Sierra India Pvt Ltd vs DCIT [TS-371-ITAT-2017(Bang)-TP-IT(TP)ANo.1308/BANG/2012 dated 13.04.2017

2552. The Tribunal allowed the assessee's miscellaneous petition seeking rectification of Tribunal order for AY 2010-11 dated 24.6.2016, wherein it had rejected assessee's plea for exclusion of

'Infosys Ltd' from the list of comparables, observing that it was selected by assessee in its TP study and no separate ground was raised before Tribunal whereas the assessee pointed out that it had objected to inclusion of this company before TPO itself, and also submitted that it had selected this company in its TP study by adopting CUP method, whereas TPO had

applied TNMM for benchmarking. Referring to the order passed by AO/TPO which recorded assessee's objection against inclusion of this company, the Tribunal concluded that since its observation was without considering the fact of objection raised by assessee before TPO, there was a mistake apparent on record of ITAT order. Accordingly, it directed the Registry to fix the appeal in normal course for hearing for adjudication of the issue of functional comparability of 'Infosys Limited'.

Mercedes-Benz Research & Development Pvt. Ltd. vs. ACIT - TS-77-ITAT-2017(Bang)-TP - M.P. No.133/Bang/2016 dated 23.01.2017

2553. Where in the original order passed by the Tribunal, it had set aside comparability of one company viz. Jeevan Scientific Technology Ltd. for considering only segmental turnover of 'BPO operations' and the assessee vide a miscellaneous application sought to rectify the said order to the effect that earnings from 'BPO segment' should be considered as against 'BPO operations', the Tribunal dismissed the miscellaneous petition observing that it had in its previous order specifically mentioned that segmental revenue from BPO operations stated at Rs. 71.219 lacs required verification and therefore there was no apparent mistake rectifiable u/s 254(2).

Swiss Re Global Business Solutions India Pvt. Ltd. (Formerly M/s. Swiss Re Shared Services (India) Pvt. Ltd.) vs. ACIT - TS-186-ITAT-2017(Bang)-TP - M.P. No.7/Bang/2017

2554. The Tribunal admitted additional evidence filed by the assessee with regard to TP-adjustment on management fees paid by assessee to its AE the ALP of which was determined at Nil by the TPO TPO who held that assessee had neither received services nor derived benefit from the said payment. Noting that the TPO had also held that the assessee had failed to produce supporting evidence and that the expenses were actually in the nature of stewardship, the Tribunal remitted the issue to TPO for fresh decision in light of additional evidence submitted by assessee after giving assessee an adequate opportunity of being heard. It also clarified that it had not expressed any opinion on the merits of the case.

Flowserve India Controls Pvt.Ltd vs DCIT - TS-195-ITAT-2017(Bang)-TP - IT(TP)A No.1366/Bang/2010 dated 23/02/2017

2555. The Tribunal, concurring with the assessee's submission, held that since the CIT(A) order on the inclusion / exclusion comparables was very cryptic and not a speaking / reasoned order, restored the matter back to CIT(A) for fresh decision with a direction to pass speaking and reasoned order after affording adequate opportunity of being heard to both sides.

Syniverse Teledata Systems Pvt. Ltd (Formerly known as MACHTeledata systems Pvt. Ltd) vs. DCIT - TS-217-ITAT-2017(Bang)-TP - IT (TP) A No.1363 (Bang) 2014 dated 15.02.2017

2556. The Tribunal dismissed the assessee's miscellaneous petition seeking to recall ex-parte Tribunal order on the basis that notice for hearing of stay petition was not served on assessee for AY 2010-11. It held that even if the notice was not served on the assessee, the assessee should have been vigilant to find out the date of hearing because in normal cases, the stay petition is fixed for hearing on the second Friday after filing of the stay petition. Further, it held that in any case, once assessee's stay petition was dismissed, a fresh stay petition could

always be filed and therefore instead of recalling the ex-parte Tribunal order, the assessee may file a fresh stay petition which can be disposed of in regular course.

Logix Microsystem Ltd. Vs ACIT - TS-253-ITAT-2017(Bang)-TP - M.P No.134 (B)/2016 dated 21-03-2017

2557. Where the assessee had not raised grounds for exclusion of Cosmic Global in the grounds of appeal and assessee had only made a submission in the form of a chart, the Tribunal held that it was necessary for the assessee to raise the specific ground for exclusion/inclusion of any comparable in the grounds of appeal and unless the grounds of appeal are specific, no adjudication can take place at the Tribunal level, based on the chart, filed or submissions filed by assessee. Accordingly, it dismissed the miscellaneous petition filed by the assessee against the Tribunal order with regard to non-adjudication of the issue of inclusion/exclusion of Cosmic Global as a comparable.

AOL Online India P. Ltd vs. DCIT-TS-916-ITAT-2017(bang)-TP- Miscellaneous Petition No.189/Bang/2017 dated 02.11.2017

AOL Online India P. Ltd vs. DCIT - TS-907-ITAT-2017(Bang)-TP dated 2.11.2017

2558. The Tribunal allowed the assessee's miscellaneous application against its order dated August 28, 2016 noting that it had wrongly stated the name of M/s Accentia Technologies Ltd for exclusion from the list of comparables as opposed to the correct name of M.s Acropetal Tech Ltd. Further, it noted that in Para 28 of its order it had incorrectly excluded M/s Accentia Technologies Ltd from the list of comparables wherein the correct name of the comparable was M/s Asian Busienss Exhibition and Conference Ltd and that in Para 6 of the order it had wrongly mentioned that the Revenue had filed an appeal for the inclusion of Infosys BPO and that the order was to be read after omitting the said name. Accordingly, it held that the Tribunal order dated August 28, 2016 was to be read with the aforesaid corrections without any change in the final conclusion.

Interwoven Software Services Ind. Pvt. Ltd. Vs ITO - TS-136-ITAT-2017(Bang)-TP] -M.P No.119 (B)/2016 dated 06-01-2017

2559. The Tribunal allowed assessee's miscellaneous petition seeking rectification of mistake in the order for AY 2010-11, accepting assessee's claim that the TP issues pertaining to the ALP determination of both 'service charges' and 'royalty' were adjudicated during appeal but final conclusions referred to only 'royalty' and not 'service charges'. It held that both issues were identical and were adjudicated along similar lines, observing that, similar to royalty, the ALP of service charges also could not be treated as NIL and accordingly rectified its order to set aside ALP determination of both royalty and service charges to TPO for fresh consideration.

Inteva Products India Automotive Pvt Ltd vs. DCITTS-78-ITAT-2017(Bang)-TP - M.P. No.125/Bang/2016 dated 20.01.2017.

2560. Where the assessee had applied RPM in respect of international transaction of goods imported for distribution which was rejected by the TPO who applied TNMM as the MAM, the Tribunal upheld the TPOs order and rejected RPM considering the huge selling and distribution expenses incurred by assessee which was not the case for comparables and held that the precedent relied on by assessee was not applicable as no such expenditure was incurred therein. The Tribunal dismissed the assessee's miscellaneous petition seeking

rectification of its order for AY 2007-08 on the ground of non-consideration of judicial precedent relied upon. It held that the that review of existing evidence was not permissible u/s 254(2) as the issue was decided on merit after consideration of facts and law and accordingly dismissed the petition.

Abott Medical Optics Private Limited vs. DCIT - TS-75-ITAT-2017(Bang)-TP - M.P. No.130/Bang/2016 dated 25.01.2017.

2561. Where the Tribunal had not adjudicated the issue regarding treatment of miscellaneous income earned by comparables as part of operating margin and 2 other issues viz., correctness of assessee's margin computation by TPO on consolidated/combined transaction basis (AE and non-AE) and exclusion of special rebate given by assessee to AE from operating cost, the Tribunal held that there was an apparent mistake in the impugned order to the extent of non- adjudication of these issues and accordingly recalled the order for the limited purpose of adjudication of these issues. Thus, it allowed assessee's miscellaneous petition.

Logix Mircosystems Ltd-TS-820-ITAT-2017(BANG)-TP M.P. No.174/Bang/2017 dated 15.09.2017

2562. The Tribunal, allowed assessee's appeal challenging CIT(A)'s direction to AO/TPO to re- compute/reconsider ALP determination without discussing merits of the case and held that it was incumbent upon the CIT(A) to adjudicate the issue and it was beyond his scope to set aside the matter to the file of AO for recalculation. Accordingly, the Tribunal remanded the matter back to the file of CIT(A) to adjudicate the issue after giving the assessee an opportunity of being heard.

Wipro GE Healthcare P ltd vs ACIT-TS-801-ITAT-2017(Bang)-TP dated 31.08.2017

2563. The Tribunal dismissed assessee's miscellaneous petition and rejected assessee's contention that Tribunal had not adjudicated Ground No 5 (that CIT(A) erred in ignoring margin computation under internal TNMM as not reliable without considering that AO/TPO himself in assessment order had computed margins earned by assessee from transactions with AEs and non-AEs) and held that the Tribunal had adjudicated ground 5 collectively with other grounds and in para No.7 had opined that comparison of internal TNMM was not possible as comparison was not of the same period in respect of AE and non-AE business. Accordingly, it held that though the Tribunal had not made a detailed discussion with respect to ground No.5, but the gist of ground No.5 was considered by the Tribunal and gave its findings which could not be reviewed under the garb of provision to section 254(2) of the Act.

e4e Business Solutions India Private Ltd vs. DCIT-TS-789-ITAT-2017(bang)-TP dated 13.09.2017

2564. The Tribunal, applying the provisions of section 254(2) which provided that miscellaneous petition is to be filed within 6 months from the end of the month in which order was passed, dismissed Revenue's miscellaneous petition on account of delay in filing the petition. Noting that the Tribunal order was passed on 21.10.2016 and therefore, 6 months period from filing of miscellaneous petition ended on 30.04.2017, it held that since there is no provision u/s 254(2) for condonation of delay, the appeal stood dismissed

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DCIT vs Brocade Communications Systems P ltd -TS- 802-ITAT-2017(Bang)-TP dated 13.09.2017

2565. Where the assessee had raised about 20 grounds (including TP grounds), but the Tribunal had extracted only about 9 grounds which did not emerge from the appeal filed by the assessee, but were part of some other case, the Tribunal allowed assessee's miscellaneous petition against the order and held that since the grounds of other appeal had been reproduced inadvertently, the grounds raised in this appeal should replace the grounds extracted in the order.

Magma Design Automation India Private Limited (now merged with and known as Synopsys (India) Private Limited) vs. DCIT-TS-793-ITAT-2017(Bang)-TP dated 13.09.2017

2566. Where the DRP recorded objections raised by the assessee, but while confirming TPO's order, restricted its finding only on the selective points of objections raised by the assessee instead of deciding each aspect of functional similarity of comparables, the Tribunal remitted matter back to the file of DRP for fresh adjudication in respect of assessee's software development & ITeS segments.

Arctern Consulting Pvt Ltd [TS-813-ITAT-2017(Bang)-TP] I.T.(T.P) A. No.240/Bang/2014 dated 08.09.2017

2567. The Tribunal set aside the order of the AO incorporating the ex-parte directions of the DRP and directed the DRP to afford an opportunity of hearing to the assessee and consider its objections afresh. Further, it rejected the contention of the assessee that the directions of DRP to the extent they grant relief to the assessee should be sustained. The DRP had passed its ex-parte directions inter alia directing exclusion of 6 companies by applying Rs.1-200cr turnover filter. The Tribunal further clarified that DRP could re-examine applicability of all filters and was at a liberty to follow its earlier directions insofar as it related to the relief allowed to assessee in its ex parte directions

Jamcracker Software Technologies Pvt. Ltd vs. DCIT [TS-494-ITAT-2018(Bang)-TP] IT(TP)A No.257/Bang/2016 dated 01.06.2018

2568. The Tribunal allowed the miscellaneous petition filed by assessee challenging its previous order dated 26.08.2016 for AY 2011-12 relating to selection of comparables for benchmarking technical and marketing support services rendered to AEs.It agreed that the assessee's ground for inclusion of 'Indus Technical and Financial Consultants' as comparable was not decided by the Tribunal and also that although it had decided assessee's ground for inclusion of 'United Vander Horst Ltd' and 'Yashmun engineers Ltd.' it had not considered the aspects of consistency. Further it accepted that the Tribunal had also not considered and decided on the issue regarding benefit of cost of living index adjustment to comparables for technical support services segment. Accordingly, it concluded that there was apparent mistake in the Tribunal order on these three grounds, and it recalled the order for the limited purpose of deciding these grounds.

EADS India Pvt. Ltd v ACIT – TS-27-ITAT-2017 (Bang) – TP - IT(TP)A No.95 (Bang)/2016) dated 06.01.2017

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2569. The Tribunal allowed the assessee's miscellaneous petition challenging its order for AY 2008-09 dated 30/8/2016, accepting that certain mistakes had crept in its ITAT decision. Accordingly, it recalled the appeal for fresh hearing.

Microchip Technology (India) Pvt. Ltd. Vs ACIT – TS-110-ITAT-2017 (Bang) – TP IT(TP)A No.l586IBang/2012 dated 10.01.2017

2570. The Tribunal dismissed assessee's miscellaneous petition against Tribunal order remitting comparability of Accurate Data Converters Pvt. Ltd back to AO/TPO for AY 2007-08. The assessee submitted that Tribunal had not taken into consideration the complete details of this comparable and had simply restored the matter back to AO/TPO to re-examine exclusion of this company after collecting relevant information. Noting that the Tribunal while adjudicating the issue of exclusion of this comparable, had considered Magma Design and AOL Online rulings and the TPO had in its order categorically observed that the annual report for the comparable was not available, the Tribunal held that there was no infirmity in the order and accordingly dismissed the application.

Global E-Business Operations Private Limited vs. DCIT-TS-830-ITAT-2017(bang)-TP [MP No. 78/B/2017 dated 13.10.2017

2571. The Tribunal dismissed assessee's miscellaneous petition contending that the Tribunal had ruled upon only one ground regarding exclusion of 2 comparables, but had not decided other grounds raised in appeal. Noting Tribunal's categorical finding in its order that the assessee had not pressed remaining grounds of appeal, it rejected assessee's contention that since the Tribunal while deciding another appeal for AY 2011-12 which was heard on the same day, had restored other issues to the file of DRP for fresh consideration, similar action should have been taken for relevant year under consideration i.e. AY 2009-10. It noted that while specific ground was taken regarding comparability of 7 companies in AY 2011-12, assessee had not taken similar specific ground for AY 2009-10. Accordingly, it held that there was no mistake apparent from record in the Tribunal order in absence of specific ground on inclusion/exclusion of specific comparable.

Symbol Technologies India P Ltd v ITO-TS-786-ITAT-2017(Bang)-TP- M.P. Nos. 84 & 85/Bang/2017 (in IT(TP)A Nos.264 & 177/Bang/2014) dated 08.09.2017

2572. The Tribunal dismissed assessee's miscellaneous petition against its order as the assessee had raised general ground of cross objection with respect to exclusion of comparables and not a specific ground with respect to exclusion of 3 comparables viz. Sankya Infotech, Extensys Software Solutions and Thirdware Solutions. Thus, the question of the Tribunal returning a finding did not arise.

Netscout Systems Software India Pvt Ltd v DCIT [TS-726-ITAT-2018(Bang)-TP] MP No.132/Bang/2018 CO No.30/Bang/2012 in IT(TP)A No.1212/Bang/2011 dated 08.06.2018

2573. The Tribunal allowed the assessee's miscellaneous petition and modified the order of the Tribunal directing the AO/TPO to allocate marketing & management fees in the ratio of turnover 'between AE and non-AE transactions' in place of ratio of turnover 'of other international transactions'.

Yokogawa India Ltd vs. ACIT [TS-724-ITAT-2018(Bang)-TP] Miscellaneous Petition No.329/Bang/2017 dated 08.06.2018

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2574. The Tribunal dismissed assessee's miscellaneous petition against its order wherein notional interest adjustment imputed on excess credit to the AE was upheld. Based on the factual findings of the TPO that the assessee charged interest from Non-AE, the Tribunal had confirmed the TP adjustment since the credit period for AEs and Non-AEs was different. However, it was the contention of the assessee that the TPO had recorded wrong findings and no interest was charged from AEs and non-AEs. Noting that this finding of TPO was not challenged before the appellate authorities, the Tribunal observed that its power was confined to the correct any mistakes which crept into its order and not the TPO's order. Further, it accepted the Revenue's counter argument that the Tribunal had considered the Bombay HC ruling of Indo American Jewellery Ltd and the Mumbai bench ruling in Evonik Degussa India which was the basis of passing the decision in assessee's own case vis-à-vis the assessee's stand that its own case was ignored. [In the assessee's own case for the earlier year, the Tribunal had restored the issue to the TPO to examine if there was any agreement for charging interest on late payment and in absence of such an agreement to delete the notional interest adjustment by relying on coordinate bench decision of Evonik Degussa India wherein it was held TP adjustment could not be made on notional basis unless there is real charging of income]

Ingersoll Rand (India) Ltd vs DCIT [TS-770-ITAT-2018(Bang)-TP] MP No.263 and 264/Bang/2017 dated 19.06.2018

2575. The Tribunal dismissed assessee's miscellaneous petition against ITAT order for AY 2007-08 and 2008-09 setting aside TP-issue to AO/TPO in view of cryptic DRP order. It rejected assessee's contention that there was a mistake apparent from the record merely because the matter was restored to AO/TPO and not DRP relying on the decision of Tribunal in IBM India Pvt Ltd. v/s. Addl CIT wherein it was held that even if it is the finding of the Tribunal that the DRP's order is cryptic, it was not necessary that in all such cases, the matter had to be restored to DRP and not AO/TPO.

Further, the Tribunal allowed the assessee's miscellaneous petitions for AY 2009-10 and rectified the original/ earlier order to provide that the four comparables viz. Bodhtree Consulting Ltd, Tata Elxsi Ltd, Persistent Systems Ltd Infosys Ltd should be excluded while determining ALP of IT segment. The Tribunal noted that in the earlier order, after recording a finding that the above four comparables were excluded by it in case of Infinera India P Ltd (for its IT segment) and that the Revenue was not able to point out any difference in facts vis-à-vis the said case, the Tribunal had not given a final finding in respect of IT segment and had merely stated that it declines to interfere with the DRP order (whereas the DRP had decided the issue against the assessee). Thus, the Tribunal observed that there was a mistake apparent from the records in the earlier order for AY 2009-10.

Target Corporation India P Ltd v DCIT [TS-370-ITAT-2018(Bang)-TP] MP Nos. 314,315 and 317/Bang/2017 dated 06.05.2018

2576. The Tribunal allowed the Revenue's miscellaneous petition against the its order since it had failed to render findings in respect of the (i) CIT(A)'s view which was challenged vis-à-vis size & turnover of a company being deciding factors for treating a company as comparable and thereby 8 comparables were excluded and (ii) CIT(A)'s rejection of diminishing revenue

filter used by the TPO. Thus, the Tribunal's order was recalled to the extent of returning a finding with respect to the above two grounds.

DCIT vs. Century Link Technologies Pvt. Ltd (Formerly known as Qwest Telecom Software Service Pvt. Ltd) MP No.3/Bang/2018 dated 08.06.2018

2577. The Tribunal rejected assessee's miscellaneous petition against the Tribunal's order rejecting the first miscellaneous petition. The Tribunal noted that in the first miscellaneous petition, assessee had contended that the Tribunal had not adjudicated upon the fact that CIT(A) erred in ignoring margin computation under internal TNMM as not reliable without considering that AO/TPO himself in assessment order had computed margins earned by assessee from transactions with AEs and non-AEs. However, the Tribunal had dismissed the miscellaneous petition on the ground that the Tribunal had adjudicated upon the issue collectively and had opined that comparison of internal TNMM was not possible as comparison was not of the same period in respect of AE and non-AE business. Accordingly, the Tribunal did not find a reason to interfere with the order of the Tribunal.

e4e Business Solutions India Pvt. Ltd vs. DCIT [TS-818-ITAT-2018 (Bang)] MP No.4/Bang/2018 dated 04.06.2018

2578. The Tribunal allowed Revenue's miscellaneous petition (MP) and held that the Tribunal's non-adjudication of ground no.7 of its appeal (regarding exclusion of E-Infochips Ltd from the list of comparables for software developer assessee) was a mistake apparent from the record. Therefore, it recalled its decision for the limited purpose of adjudicating ground 7 of the Revenue's appeal.

DCIT vs. Applied Material India P. Ltd - TS-1063-ITAT-2017(Bang)-TP - Miscellaneous Petition No.269/Bang/2017 dated 26.12.2017

2579. The Tribunal allowed assessee's miscellaneous petition and deleted the direction given to TPO to bring in more comparables functionally similar to the assessee after applying 25% RPT filter observing that TPO had already applied 25% RPT filter. Further, it also accepted assessee's contention that Tribunal, in the original order, had wrongly excluded Mindtree Ltd as against Persistent Systems & Solutions Ltd and accordingly rectified the earlier order of the Tribunal.

ACI Worldwide Solutions P Ltd vs. DCIT - TS-203-ITAT-2018(Bang)-TP - Miscellaneous Petition N o.220/Bang/2017 dated 09.02.2018

2580. The Tribunal allowed assessee's miscellaneous petition as the Tribunal earlier had dismissed few grounds observing that the issue was not raised before lower authorities. However, as this observation was contrary to material on records, the Tribunal recalled this observation for limited purpose of re-adjudication.

M/s. Nuance Transcription Services India P Ltd. Vs DCIT Circle 5(1)(1)- TS-393-ITAT-2018(Bang)-TP- ITA no73/BANG/2018 dated 20.04.2018

2581. The Tribunal dismissed the miscellaneous application of the assessee and stated that the Tribunal had not committed any error in remitting back one issue to the AO/TPO regarding turnover filter and another issue to the DRP regarding functionality, thus the claim of the assessee for erroneous Tribunal order was dismissed.

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M/s. Systat Software Asia Pacific Ltd. Vs DCIT Circle 12(3) Banglore- TS-365-ITAT-2018(Bang)-TP- MP no 72/Bang/2018 dated 11.04.2018

2582. The Tribunal dismissed miscellaneous petition filed by assessee against Tribunal order as the assessee had filed an appeal before Karnataka HC against Tribunal order (which was yet to be admitted). Further, the Revenue had also filed a cross appeal before HC which was pending admission.

The Tribunal held that judicial propriety does not permit the assessee to seek efficacious remedy simultaneously before two authorities and in particular where the issues are seized by a higher judicial forum even if pending admission. It thus concluded that assessee's miscellaneous petition was liable to be rejected.

M/s. Cable & Wireless Network India P Ltd vs DCIT Circle 11(2)- TS -272-ITAT-2018(Bang)-TP- IT(TP) No. 1549/Bang/2014 dated 06.04.2018

2583. The Tribunal allowed assessee's miscellaneous petition and recalled its order to the extent it did not adjudicate on the ground raised by the assessee with respect to grant of working capital. It directed the AO/TPO to include Cat Technologies Ltd as a comparable since it passed the export turnover filter of 75% of total filter on perusing the financials on standalone basis whereas the Tribunal, while adjudicating the issue had included the said comparable considering the financials on consolidated basis in its order. It remitted the issue of R Systems and Caliber Point Business Solutions Ltd. to TPO to consider the extrapolated results which were on record noting that the Tribunal in its order had not taken note of it.

Mercedes-Benz Research & Development India Pvt Ltd vs Dy.CIT [TS-1144-ITAT-2018(Bang)-TP] MP No.139/Bang/2018 dated 03.10.2018

2584. Where during the hearing on merits before the Tribunal, the assessee had contested that the TPO erred in making an upward adjustment by comparing the export sales made by the assessee to its AE with the export sales to its Non-AEs (which was also submitted by way of a synopsis note) the Tribunal dismissed the assessee's miscellaneous petition wherein the assessee contended that the Tribunal had failed to appreciate that the assessee did not have any export sales to Non-AEs and that the rest of its transactions were only with domestic parties as the submissions made during the hearing on merits clearly stated that the assessee had export sales with Non-AEs and therefore there was no mistake apparent from record. Vis-à-vis the assessee's contention that the ground raised before Tribunal for treatment of loss on cancellation of forward contract as extraordinary cost was not considered, it pointed out the clear finding in the original Tribunal order (that the forward contracts with AE itself were not proper and no copy of forward contract was made available before it) and accordingly dismissed the assessee's ground for rectification observing that there was no mistake apparent from record.

As regards the assessee's contention that the Tribunal erred in not considering its claim for working capital adjustment by holding that no such claim was raised before TPO/DRP, the Tribunal observed that the assessee failed to draw attention to the copy of submission before TPO/DRP which was submitted as part of paper book and therefore held that there was no mistake apparent from record.

Separately, it also rejected assessee's contentions that Forward Market Price should be considered as comparable (which was raised by way of an additional ground) and noted that

the Tribunal in its original order had not even admitted the additional ground as the relevant records / details were not available on record and accordingly dismissed the assessee's petition.

Dhanya Agro Industrial Pvt. Ltd v DCIT - TS-1078-ITAT-2017(Bang)-TP - MP No. 233/Bang/2017 dated 08.12.2017

2585. Where the Tribunal had not adjudicated Revenue's ground against DRP's exclusion of Acropetal Technologies Pvt. Ltd by applying onsite revenue filter, the Tribunal allowed Revenue's miscellaneous petition and directed the AO/TPO to apply onsite revenue filter to all the comparables and include only those companies which satisfy the filter.

Addl. CIT vs Dell International Services India Pvt. Ltd (formerly known as Perot Systems TSI (India) Pvt. Ltd-TS-991-ITAT-2017(Bang)-TP dated 29.11.2017

2586. The Tribunal allowed the miscellaneous petition filed by the assessee as the Tribunal had not decided the assessee's ground regarding treatment of foreign exchange gain / loss as operating in nature for the purpose of computation of PLI of the assessee and the comparables. Observing that there were no details vis-à-vis the issue, it restored the matter back to the AO / TPO for fresh examination.

Further, it dismissed assessee's contention that the AO / TPO erred in selecting certain comparables which were functionally dissimilar and held that there was no mistake apparent from record vis-à-vis this contention as during the original hearing the appeal was heard based on a chart filed by the assessee wherein the only contentions raised were margin computation errors and turnover filter.

ISG Novasoft Technologies Ltd vs. ACIT-TS-1016-ITAT-2017(Bang)-TP- M.P. No. 250/Bang/2017 dated 15.12.2017

2587. The Tribunal, considering assessee's submission that delay in filing objections before DRP in respect of technical & management costs for AY 2012-13 arose as it was in the process of shifting its office to a new location and also due to ongoing assessment proceedings for subsequent AY 2013-14 and CIT(A) for AY 2011-12, held that delay was neither with malafide intention/ wilful and that the assessee had sufficient and reasonable cause. Accordingly, it set aside the DRP directions which rejected condonation of 22 days delay by assessee in filing of objections. Accordingly, it condoned the delay of 22 days and restored the matter back to the file of DRP for fresh adjudication.

Conergy Energy Sytems Pvt. Ltd vs. ACIT-TS-967-ITAT-2017(Bang)-TP I.T. (T.P) A. No.88/Bang/2017 dated 29.11.2017

2588. The Tribunal dismissed Revenue's appeal filed against DRP's directions as non-maintainable and held that as per the provisions of section 253(1)(d), an order passed by the AO under subsection (3) of section 143 or section 147 or section 153A or section 153C pursuant to the directions of the DRP or an order passed under section 154 in respect of such order, was appealable before the Tribunal and not the directions of the DRP.

DCIT vs. Toyota Tsusho India Pvt Ltd - TS-86-ITAT-2018(Bang)-TP - IT(TP)A No.1201/Bang/2015 dated 31.01.2018

2589. Where the CIT(A) remanded the determination of ALP of the assessee's international transactions to the AO directing him to reconsider the issue, the Tribunal accepting Revenue's

contention that CIT(A) had no jurisdiction to set aside the matter to the AO for reconsideration set aside the order of the CIT(A) and directed him to re-adjudicate the issues himself. It clarified that if the CIT(A) wanted comments from the AO he could call for a remand report but he had to adjudicate the issues himself.

ITO vs. Integral India Software Development Centre (P) Ltd - TS-52-ITAT-2018(Bang)-TP - IT(TP)A No.1350/Bang/2013 dated 19.01.2018

2590. The Tribunal considering assessee's submission that Revenue only had time till July 31, 2017 (being the end of 6 months from expiry of January 2017 being the month in which the Tribunal order was passed) and since miscellaneous petition (MP) was filed on September 20, 2017 it was time barred, dismissed Revenue's MP against Tribunal order as time barred.

Infineon Technologies India Ltd vs. DCIT-TS-1010-ITAT-2017(Bang)-TP- M.P. No. 222/Bang/2017 dated 10.11.2017

2591. The Tribunal allowed assessee's miscellaneous petition and recalled its order noting that there was a reasonable cause for non-appearance of assessee's counsel on the date fixed. It directed the registry to fix the hearing of appeal on 16.01.2019.

Faurecia Automotive seating India Pvt Ltd vs ACIT [TS-1161-ITAT-2018(Bang)-TP] MP No.310/B/2018 dated 12.10.2018

2592. The Tribunal dismissed assessee's miscellaneous petition against its order (wherein the issue of application of filters to all comparables was restored to AO/TPO while selecting the comparables) noting that all necessary aspects and arguments advanced during the course of hearing has been taken into consideration. It rejected assessee's contention that the direction should be restricted to applicability of only one filter ITeS viz. income less than 75% of total operating income uniformly for all comparables since this was argued by the assessee.

Swiss Re global Business Solutions India Pvt Ltd vs. Dy.CIT [TS-826-ITAT-2018(Bang)-TP] MP No.161/Bang/2018 dated 27.07.2018

2593. The Tribunal dismissed Revenue's appeal filed against the assessment order noting that the said order was already set aside in its entirety by the co-ordinate bench while adjudicating the assessee's appeal against the said order on the ground that though the AO had framed the assessment order in the name of the merged company, he had mentioned the PAN of the erstwhile (non-existing) company. The co-ordinate bench had directed the AO to pass an appropriate order in the name of merged company against its PAN No. after affording an opportunity of being heard to the assessee.

ACIT vs Wipro GE Healthcare Pvt Ltd (For the merged GE Medical System (India) Pvt. Ltd.,) [TS-796-ITAT-2018(Bang)-TP] IT(TP)A No.467/Bang/2016 dated 27.07.2018

2594. The Tribunal recalled its order in case of assessee noting that the assessee argued for the exclusion of Persistent Systems Ltd. as a comparable as it could be inferred from the order of the Tribunal that it had included only two comparables viz. Mindtree and RS Software (India) Ltd. thus excluded Persistent Systems Ltd. However, there was no discussion in respect of the exclusion. In light of the aforesaid mistake apparent on record, it recalled the impugned order for deciding assessee's claim for exclusion of Persistent Systems Ltd.

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Citrix R&D India Pvt Ltd vs ACIT [TS-825-ITAT-2018(Bang)-TP] MP No.164/Bang/2018 dated 20.07.2018

2595. The Tribunal dismissed the miscellaneous petition filed by the assessee wherein it contended that Tribunal's dismissal of grounds for inclusion/exclusion of various comparables for the reason that the same was not urged before lower authorities was "contrary to facts". It held that the ruling of the Tribunal was based on a chart filed by assessee during the course of hearing wherein it clearly showed that contentions for inclusion/ exclusion of comparables were not put forth before lower authorities. Therefore, considering that assessee had not brought the Tribunals attention to the pleadings made before lower authorities, it dismissed the miscellaneous petition.
Curam Software International Pvt. Ltd. vs. ITO-TS-978-ITAT-2017(Bang)-TP Misc. Petn. No.181/Bang/2017 (In IT(TP)A No.192/Bang/2017) dated 25.10.2017

2596. Where the assessee's appeal was decided based on chart filed during hearing which contained arguments regarding exclusion of certain comprabales and adjustment for capacity under- utilization but grounds for adjustment regarding rent, depreciation, provision for doubtful advance, employee cost and working capital etc were not argued at all, the Tribunal held that there was no mistake apparent from record which could be rectified and accordingly dismissed assessee's miscellaneous petition alleging that certain grounds raised by assessee were not decided by Tribunal.
Biesse Manufacturing Co. Pvt. Ltd v DCIT-TS-1041-ITAT-2017(Bang)-TP M,P. No. 252/Bang/2017 · · in IT(TP)A No. 755/Bang/2017 dated 15.12.2017

2597. Where the assessee claimed that notice for hearing of appeal was received by front desk security guard who misplaced it without informing or handing over the same to appropriate person, the Tribunal held that there was reasonable cause for failure of assessee to appear before the Tribunal for hearing on August 21, 2017 and accordingly, allowed miscellaneous petition filed by assessee, recalled Tribunal order for AY 2012-13 whereby appeal was dismissed in limine for non-prosecution.
Indeca Sporting Goods Pvt. Ltd. v ACIT-TS-1040-ITAT-2017(bang)-TP M.P No.246/Bang/2017 dated 17.11.2017

2598. Where the assessee had raised grounds regarding adjustment on royalty paid to AE,viz., i) DRP's action of disregarding the basis of royalty payment i.e. as a percentage of sales, ii) comparison with Toyota Motors without establishing comparability, iii) absence of tax base erosion, etc, however the representative of assessee had not pressed these grounds of appeal, the Tribunal, relying on the decision in the case of Earnest Exports wherein it was held that miscellaneous petition was maintainable only on the issues which are argued and specific attention of the bench was drawn, dismissed assessee's miscellaneous petition alleging non-adjudication of certain grounds for AY 2010-11.
Kaypee Electronics & Associates Pvt. Ltd v ACIT-TS-1043-ITAT-2017(bang)-TP Misc. Petn. Nos.162, 163 & 164/Bang/2017 dated 31.10.2017

2599. The Tribunal rejected assessee's miscellaneous petition for AY 2006-07 and 2007-08 raising a contention that Tribunal failed to consider additional evidence filed by the assessee to prove

the receipt of administrative services provided by AE. Noting that the Tribunal while passing the original order had rendered a specific finding that evidence on record only describes nature of technical know-how and administrative services, but did not conclusively prove the actual rendition of services held that the Tribunal had considered all material on record and accordingly dismissed assessee's petition as there was no mistake apparent from record.

Herbalife International India Pvt. Ltd v ACIT-TS-1042-ITAT-2017(Bang)-TP Misc.Petn.Nos.131 & 132/Bang/2017 dated 25.10.2017

2600. The Tribunal, referring to the provisions of section 144C, allowed Revenue's appeal challenging DRP's direction to remit working capital adjustment back to AO. It held that the DRP had no power to remit a matter back to the AO and had to determine the adjustment on its own. Accordingly it remitted the matter back to DRP to work out the correct amount of working capital adjustment and then issue necessary directions to AO/TPO. In respect of assessee's plea against inclusion of Dynamic Technologies Ltd as a comparable, following the ruling in assessee's own case, it remitted the matter to the file of AO/TPO for selection of comparables with similar functional profile.

Myunghwa Automotive India Pvt Ltd [TS-401-ITAT-2017(CHNY)-TP ITA No. 1186/Mds/2016 & CO no.179/Mds/2016 dated 12.04.2017

2601. Tribunal remitted TP-issue of exclusion of comparables for AY 2010-11 to the DRP for fresh consideration considering the correctness of margins of various comparables chosen by TPO and decide on their inclusion/exclusion as a change in profit level margins of comparables would have a considerable effect on the TP study. It directed the AO to pass a fresh order based on the directions of DRP.

Extreme Networks India Pvt Ltd [TS-367-ITAT-2017(CHNY)-TP ITA No 449/Mds/2015 dated 26.04.2017

2602. The Tribunal noting that the TPO had mentioned that the information furnished by assessee was incomplete and consequently no conclusion could be drawn, but the assessee had asked for time to comply with the directions which had not been granted by TPO, restored the TP issues back to the AO/TPO for re-adjudication.

POSCO India Chennai Steel Processing Centre Pvt. Ltd vs. ACIT-TS-1011-ITAT-2017(CHNY)-TP dated 01.12.2017

2603. Where the assessee had merged with another entity w.e.f from April 1,2012 and the AO / DRP had passed orders dated December 24, 2014 against the non-existent entity, pursuant to which the assessee filed appeals in the name of the non-existent entity, which was later substituted, the Tribunal dismissed the appeal filed by the assessee and held that when an appeal was filed in the name of a non-existent company, there could not be any substitution during the pendency of the proceedings. It held that the appellate proceedings initiated by a non-existent company before the Tribunal could not survive at all and therefore there was no question of substitution of any existent company in the place of a non-existent company. It further held that the impugned order passed by the AO could not stand in the eye of the law.

Zenta Knowledge Services (P) Limited [TS-787-ITAT-2016 (Chny)- TP] (ITA No.882/Mds/2015)

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2604. The Tribunal dismissed the assessee's appeal as withdrawn in light of the TPO passing a rectification order deleting the TP adjustment as the ALP of the international transaction was within 5% tolerance range.

Futures First Info Services Pvt Ltd vs ACIT [TS-959-ITAT-2018(DEL)-TP] ITA No.6083/Del/2015 dated 16.08.2018

2605. The CIT(A) had directed the AO to verify value of percentage of RPT transactions and exclude comparables with RPT transactions exceeding 35% RPT in case of an assessee engaged in software development services. The Tribunal dismissed Revenue's appeal and held that the order of CIT(A) directing the AO to verify certain factual aspects and recompute the disallowance which resulted in the deletion of TP adjustment by AO giving effect to the appeal order did not suffer from any infirmity. It rejected Revenue's contention that the CIT(A)'s order was contrary to provisions of section 251(a) and observed that the CIT(A) was not prohibited in directing the AO to verify certain factual aspects.

As regards, assessee's appeal the Tribunal dismissed the assessee's appeal challenging the TP adjustment made by the AO noting that total TP-adjustment was deleted by AO after verification on direction of the CIT(A) and thus, the ground ceased to survive.

Motorola India Pvt Ltd vs ACIT [TS-1130-ITAT-2018(DEL)-TP] ITA No.2941/Del/2011 & b45811/Del/2011 dated 24.08.2018

2606. The Tribunal, following the Special bench decision in the case of Aztec Software & Technology Services, dismissed the appeal filed by the assessee and held that the TP provisions would be applicable irrespective of the fact that the assessee is a unit eligible to benefit under section 10A of the Act. It held that the lower judicial forums had to accept and follow the views expressed by the higher judicial forums.

Transcend MT Services Pvt Ltd v ACIT - TS-405-ITAT-2016 (Del) – TP

2607. The assessee filed a direct appeal to the CIT(A) (without filing objections before DRP) which was not entertained by the CIT(A) under the mistaken belief that the order passed by the AO under section 143(3) r.w.s. 144C of the Act was not appealable before the CIT(A) under section 246A of the Act. The Tribunal held that the said order was maintainable and accordingly directed the CIT(A) to admit the same. It held that it couldn't be proved that any draft assessment order was passed by AO or that objections were filed by assessee or that DRP had given any directions and therefore the CIT(A) was not justified in observing that the assessment order has been passed by the AO on the direction of the ld. DRP. Further, it considered CBDT Circular No.5/2010 dated June 3, 2010 and corrected by Corrigendum dated September 30, 2010 and concluded that that in case the assessee did not file objections, the AO can pass the assessment order and thereafter the assessee can file an appeal against such assessment order before the ld. CIT(A). Further, it stated that it was the choice of the assessee as to whether to file an objection before the DRP or to pursue the normal channel of filing appeal against the assessment order before the ld. CIT(A). Accordingly, it remitted the matter to the file of the CIT(A).

Samsung Heavy Industries India Pvt. Ltd. vs. ACIT - TS-304-ITAT-2017(DEL)-TP - ITA No. 4544/Del/2016 dated 28.03.2017

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2608. The Tribunal set aside the non-speaking DRP order confirming the TPO's rejection of comparables as well as inclusion of new comparable observing that the TPO and DRP had failed to consider the financial data of comparable even though it was available. It thus directed the DRP to pass a speaking and reasoned order after giving an opportunity to the assessee to furnish evidences, submission and to consider the cases relied upon by the assessee.

ExxonMobil Gas (India) Private Limited vs DCIT [TS-754-ITAT-2018(DEL)-TP] ITA No.2702/Del/2014 dated 26.06.2018

2609. The assessee was a partnership firm established under the laws of Mauritius.The AO had made a reference u/s.92CA(1) to TPO who proposed nil adjustment. The AO vide his draft assessment order held the income of the assessee taxable under section 9(1) consequent to his finding that the assessee has a PE in India. The DRP held that the assessee was not an 'eligible assessee' in accordance with section 144C(15)(b) as neither the TPO proposed any variation in the returned income nor the assessee was a foreign company. Thus, the DRP declined to issue any direction in this case and dismissed the proceedings in limine. The Tribunal dismissed Revenue's appeal against DRP's directions relying on coordinate bench decision in sister concern of assessee Ess Advertising (Mauritius SNC Et. Compagnie (earlier known as ESPN Star Sports Mauritius SNC Et. Compagnie) wherein the Tribunal quashed the draft assessment order and consequently the final assessment order passed in pursuance to DRP's directions relying on the High Court ruling in ESPN Star Sports Mauritius SNC ET Compagnie wherein it was held that draft assessment order and final assessment orders were invalid in view of the fact that the TPO had not proposed any variation in the income arising from the international transactions and further, the entity was not a foreign company thus, the assessee was not an eligible entity and the AO instead of passing an order u/s. 143(3), had wrongly passed the draft assessment order u/s.144C(1).

Asst. CITvs ESPN Star Sports Mauritus SNC Et. Compagnie [TS-1273-ITAT-2018-(Del)-TP] ITA No.1741/Del/2015 dated 04.12.2018

2610. The Tribunal reprimanded the assessee for contesting inclusion of 2 comparables initially selected in TP study in the second round of proceedings before Tribunal in 2017 i.e. 11 years after filing return of income for AY 2006-07. It admitted the additional grounds while clarifying that Special Bench in the case of Quark Systems had not laid down a law that anytime and every time assessee could resile from a comparable selected by it. It further observed that the assessee in the present had not pointed out any specific functional dissimilarity vis-à-vis the comparable.

Further, it adjudicated the dispute on functional profile of the assessee in the backdrop of the decision in the assessee's own case for subsequent AY 2007-08 classifying assessee as low end ITES provider as against decision for earlier AY 2005-06 wherein it was held that the assessee was a high end ITES provider on the basis of TP study report. It observed that the coordinate bench, while deciding the case for AY 2007-08, had not considered the AY 2005-06 findings which held assessee to be a high end ITES services provider (based on TP study report) as it was conducting research activity and knowledge management services and noted that the for the relevant year the TPO had neither classified assesse as high end or low end ITES provider. Accordingly, it remitted the entire issue of TP-Adjustment to AO/TPO for correct ascertainment of assessee's functional profile, carrying out comparability analysis

and then determining ALP. In sum and substance, the Tribunal admitted additional ground only on the premise that the assessment year involved in Quark Systems was very near to the assessment year involved in the present case i.e AY 2006-07 being initial years of transfer pricing.

Evalueserve.com Pvt Ltd TS-390-ITAT-2017(DEL)-TP- ITA 4001/DEL/2013 dated 11.05.2017

2611. The Tribunal dismissed Revenue's appeal holding that action of AO in passing a draft assessment order was not in accordance with law as neither a TP adjustment had been made in the case of the assessee (who was a foreign partnership firm), nor assessee was a foreign company, thus the assessee was not an "eligible assessee" under sec 144C(15)(b) as none of the two conditions were satisfied in case of assessee. It did not find any fault with the directions of DRP dismissing the proceedings in limine holding that the assessee was not an "eligible assessee" in accordance with section144C(15)(b) of the Act

ACIT vs ESS Distribution (Mauritius)SNC et. Compagnie [TS-1275-ITAT-2018-(Del)-TP] ITA No.1742/Del/2015 dated 06.12.2018

2612. The Tribunal allowed the assessee to withdraw appeal in light of the fact that TPO had deleted TP-addition pursuant to disposal of assessee's rectification application noting that the that assessee filed a rectification application u/s 154 submitting that it was entitled to +/- 5% benefit as per Sec 92C(2) proviso and thereafter, TPO passed an order deleting the TP-addition after giving such benefit. It accepted assessee's plea for withdrawal of appeal since it was infructuous.

Accretive Health Services Private Limited vs DCIT [TS-1052-ITAT-2018(DEL)-TP] ITA No.1014/Del/2016 dated 17.09.2018

2613. Where the assessee's filed TP documentation before the CIT(A) for the first time who thereafter called for a remand report from the AO, the Tribunal held that the approach of the CIT(A) was incorrect and he should have referred the matter back to the file of TPO for determination of ALP. Further, noting that there were mistakes in the margin computation, the Tribunal remanded the matter back to the file of AO/TPO for fresh determination of ALP in accordance with law.

ACIT vs. Mindspeed Technologies Ltd-TS-1012-ITAT-2017(DEL)-TP- ITA No.1600/Hyd/2014 dated 08.12.2017

2614. The Pr. Commissioner took a view that issues before Assessing Officer required reference to TPO, which AO failed to do so and relying upon Circular No.3/2016 passed a revisional order setting aside assessment order. The Tribunal upheld the order passed by Pr.CIT u/s.263 and rejected assessee's contention that assessee's case fell under Para 3.3 of the above Circular which mentioned that the cases which are selected for scrutiny on non-transfer pricing risk parameters but also have international transaction or specified domestic transactions shall be referred to the TPO only in certain circumstances. Noting that assessee's case was selected for scrutiny on transfer pricing risk parameters as well as non-transfer pricing risk parameters and hence assessee's case fell under para 3.2 which made the reference to TPO by AO mandatory in cases which are selected for scrutiny on the basis of transfer pricing risk parameters and non-transfer pricing risk parameters. The AO having failed to do so came

under the jurisdiction of Pr.CIT as AO's order was erroneous and affected the interest of Revenue prejudicially. Thus, the Tribunal held that Pr.CIT had not erred in exercising his jurisdiction and accordingly, dismissed assessee's appeal.

Varian Medical Systems International India Pvt Ltd vs Pr-CIT [TS-1261-ITAT-2018 (Mum)] ITA No.3070/Mum/2018 dated 22.11.2018

2615. Where the tax effect was less than Rs. 10 lakhs, the Tribunal dismissed Revenue's appeal on account of CBDT Circular No. 21/2015 (providing monetary limits for filing of departmental appeals before Appellate Tribunal and High Courts and SLP before the Supreme Court).

ACIT v Glenmark Generics Ltd-TS-787-ITAT-2017(Mum)-TP- ITA No. 4973/MUM/2016 dated 06.09.2017

2616. The Tribunal set aside the non-speaking CIT(A) order confirming TP-adjustment on provision of R&D services, observing that the CIT(A) order did not discuss facts of the case, arguments raised or contain any findings. It held that the CIT(A) should have discussed validity of comparables rejected or introduced by TPO and thus directed the CIT(A) to pass a speaking and reasoned order dealing with all objections of the assessee and after giving opportunity of being heard to assessee. Accordingly, it disposed off the appeal.

Perstorp Chemicals India Pvt. Ltd. v ITO - TS-49-ITAT-2018(Mum)-TP - /I.T.A./4364/Mum/2012, dated 03.01.2018

2617. The Tribunal dismissed assessee's additional grounds agitating that the AO's order dated January 16, 2015 u/s 144C r.w.s. 143(3) was time barred and thus bad in law. It noted that the DRP gave its directions on December 31, 2013 and in the meantime assessee filed a writ petition before the High Court which directed the AO not to pass the final assessment order till disposal of the petition. Since the High Court passed its order on November 18, 2014 setting aside DRP's directions and deleting TP-adjustment on issue of equity shares following the Vodafone India ruling, the Tribunal opined that the assessee's case clearly fell under the ambit of provision of section 153(6), which provides that orders pursuant to an order of any court in a proceeding otherwise than by way of appeal or reference under this Act should be passed before the expiry of 12 months from the end of the month in which such order is received or passed. It held that since the assessment order was passed on January 16, 2015, which was well within 12 months from November, 2014 in which month HC had passed the order, the Tribunal held that the order passed by the A.O. was well within the time limit mandated as per section 153(6). On the merits of the case (taxability of interest on loan given to employees, margin deposits), it followed its own order in the case of the assessee for prior years wherein the said interest income was held to be business income and not IFOS. Vis-à-vis the 14A disallowance, relying on the decision of the High Court in Cheminvest Ltd 281 CTR 447 (Del), it held that no disallowance could be made where no exempt income was earned.

Essar Power Limited vs ACIT-TS-824-ITAT-2017(MUM)-TP dated 17.10.2017

2618. Where the AO/TPO had made no adjustment with respect to guarantee commission while determining the ALP and the Tribunal had in Para NO. 17, by holding that guarantee commission should from part of the ALP, enhanced the income though the Tribunal had no power of enhancement and thereby committed mistake apparent on record, the

Tribunal allowed assessee's miscellaneous application against Tribunal order for AY 2008-09 and expunged the guarantee commission from the order.

Uttam Galva Steel Ltd vs. ITO-TS-1044-ITAT-2017(mum)-TP MA No.292/MUM/2016 dated 27.11.2017

2619. The Tribunal denied condonation of Revenue's 419 days delay in filing appeal against DRP order for AY 2009-10 noting that assessee's appeal against the same DRP order was already disposed of by Tribunal and Revenue had not even initiated process of filing appeal till the time hearings in assessee's appeal were concluded.

DCIT vs Aegis Ltd - TS-79-ITAT-2016(Mum)-TP

2620. The Tribunal partly upheld the order passed by Pr.CIT u/s.263 noting CIT had rightly observed that assessee had clubbed guarantee fee and risk management fee with interest charged on loan advanced to subsidiary and adopted CUP and that he had not erred in holding that it was beyond the purview of AO to examine the said transaction and it ought to have referred the matter to TPO which it failed to do so thus assessement order passed u/s.143(3) was erroneous as it was prejudicial to Revenue. The Tribunal opined that CIT was within the realm of its jurisdiction to rightly set aside the matter to file of AO with a direction to re-do the assessment by making reference to TPO and frame assessment after taking cognizance of his report. However, the Tribunal vacated directions of CIT to the extent he had called upon the A.O to examine the claim of the assessee that the loans of Rs. 11.3 crores were advanced to domestic parties and were not in the nature of specified domestic transactions as defined in Sec. 92BA of the Act noting that complete details of advances aggregating were before him, and therefore he could have made necessary verification. Thus, the above inquiry by the Pr. CIT was in nature of fishing and roving inquiry.

General Computer Services International vs Pr-CIT [TS-1364-ITAT-2018 (Mum)] ITA No.2615/Mum/2018 dated 28.11.2018

2621. The Tribunal dismissed Revenue's appeal with respect to the issue that fresh facts were brought before the CIT(A) without giving an opportunity to AO/TPO noting that as per grounds of appeal filed by Revenue, there was no mention about any particular fact which was not before the TPO, further segmental accounts of corporate entity were analyzed which were available in public domain for selection or rejection of comparables and therefore, there was no possibility of fresh facts being considered by CIT(A).

DCIT vs Uni Design Jewellery Pvt Ltd [TS-769-ITAT-2018(Mum)-TP] ITA No.4341/Mum/2016 dated 02.07.2018

2622. The Tribunal allowed the assessee's miscellaneous application (relating to deductibility of license fee) for AY 2003-04 as it had restored the matter to the file of AO following assessee's own case for AY 2002-03, ignoring the fact that the exact same issue had been decided in favour of the assessee by the High Court for AY 2001-02. It held non-consideration of the jurisdictional HC judgment by Tribunal in case of assessee constituted a mistake apparent from record and accordingly, directed the rectification of the Tribunal order and refixed the matter before Regular bench to hear the case afresh.

Star India Pvt. Ltd vs ACIT-TS-639-ITAT-2017(Mum)-TP-MA No. 329/mum/2016 dated 21.07.2017

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2623. The Tribunal allowed assessee's miscellaneous petition and recalled its order for the limited purpose of adjudicating the other comparables adopted by TPO/AO and the DRP since the observation of the Tribunal that the assessee only argued against the exclusion of one company was patently incorrect since the assessee had submitted a chart containing the arguments of all the comparable companies. Further, the Tribunal held that there was no apparent mistake on record in its order as regards the exclusion of Cybermate Infotek Ltd since no question arose of non consideration of decisions of High Court [PTC Software (I) (P) Ltd. and Rampgreen Solutions Pvt. Ltd.], when it had returned a finding that the assessee engaged in low end software development and the said comparable fell broadly in the same domain by relying on the aforesaid HC rulings.

Lionbridge Technologies Pvt Ltd vs ACIT [TS-619-ITAT-2018(Mum)-TP] MA No.75/Mum/2018 dated 15.06.2018

2624. The Tribunal refused to condone assessee's 117 days delay in filing appeal (including TP-issues) for AY 2009-10 for failure to establish sufficient cause to condone delay. Noting that no one appeared on behalf of assessee for hearing on many occasions despite several notices, the Tribunal opined that from the conduct of the appellant/ assessee it seemed that the assessee was no longer interested in pursuing its appeal. Further, referring to Sec 253(5) (which provided that Tribunal may admit appeal or permit filing of memorandum of cross-objection after expiry of relevant period of limitation if it was satisfied that there was sufficient cause for not presenting it within that period), the Tribunal held that as per the settled law when mandatory provision is not complied with and the delay is not properly explained, the court cannot condone the delay on sympathetic grounds alone. Accordingly, it concluded that since, the application for condonation of delay was dismissed, the appeal of the assessee was not maintainable being barred by law of limitation.

TCL India Holdings Pvt Ltd vs DCIT-TS-972-ITAT-2017(Mum)-TP dated 30.10.2017

2625. The Tribunal remitted the benchmarking of assessee's international transaction relating to Forward Foreign Exchange Contract (FFEC) for fresh adjudication after considering additional evidences filed before CIT(A). It noted that the TPO held that the international transaction relating to FFEC's (entered into 2000 and cancelled in 2007) were not at ALP as assessee was unable to submit any data from its AE regarding CUP for the transaction. The CIT(A) did not accept the additional evidences filed by assessee (data of Bloomberg Future rate for five years) as the documents were not produced before AO/TPO and assessee had not filed any application under Rule 46A. The CIT(A) thus upheld the TP-adjustment. Further observing that the TPO accepted the five years data of Bloomberg and made no adjustment in the succeeding AY, the Tribunal held that the matter should be restored back to the file of TPO/AO for fresh adjudication to consider additional evidences filed by assessee before the CIT(A).

ACIT vs. Citibank Overseas Investment Corporation - TS-6-ITAT-2018(Mum)-TP - I.T.A./7032/Mum/2013 dated 05.01.2018

2626. The Tribunal allowed assessee's miscellaneous petition and recalled its order in the case of the assessee qua the grounds not adjudicated upon by it. It noted that the Tribunal had not decided on the grounds vis-à-vis exclusion of Motilal Oswal Private Equity Advisors as a

comparable and inclusion of ICRA Online Ltd. and IDC India Ltd. as comparables. Accordingly, grounds raised had been left out for determination and therefore held that there was an apparent mistake on record.

Blackstone Advisors India Private Limited vs DCIT [TS-745-ITAT-2018(Mum)-TP] MA No.130/Mum/2016 dated 08.06.2018

2627. The Tribunal admitted assessee's application under Rule 27 of ITAT Rules, 1963 which provides that 'Respondent may support order on grounds decided against him' accepting assessee's contention that though the TP adjustment was deleted however CIT(A) had not passed a speaking order and the grounds were disposed summarily without any reason (not in manner under statute) of adjudication. It adjudicated on one of the grounds in the application by holding that the AO had erred by not making a reference to the TPO in accordance with CBDT Instruction No.03/2003, thus the assessment order was to be quashed (It relied on Bombay HC decision of SG Asia Holdings (India) P. Ltd wherein HC had upheld Tribunal's order that TP adjustment was bad in law on reference not being made by AO to TPO.) However, it dismissed the said issue of passing a speaking order as academic on account of TP adjustment not surviving. Further, it dismissed Revenue's appeal as issues had become academic.

ITO vs Magic Software Enterprises India Pvt Ltd [TS-1320-ITAT-2018(Pun)-TP] ITA No.1834/Pun/2014 dated 10.10.2018

2628. Where the assessee filed additional evidence before the CIT(A) which the CIT(A) refused to admit, the Tribunal relying on the co-ordinate bench ruling in the earlier years 2009-10 & 2010-11 remitted the matter back to CIT(A) for admitting additional evidence and deciding the matter afresh. Accordingly, it remitted the matter for subject years back to CIT(A) with similar direction.

DSV Air & Sea Private Limited vs. DCIT - [TS-153-ITAT-2018(PUN)-TP - सं./I.T.A. Nos. 4829 & 4830/Mum/ dated 07.03.2018

2629. The Tribunal dismissed the assessee's direct appeal to Tribunal (in second round of proceedings) on grounds of maintainability for AY 2006-07 holding that remedy was available before CIT(A). It noted that in the first round of proceedings, Tribunal had remanded matter involving TP-adjustment and comparability of various companies back to AO/TPO for fresh adjudication after considering assessee's submissions. It held that the effect of remand order was not to restrict the jurisdiction of the Assessing Officer to just follow the findings of the Tribunal but it was kept open for fresh adjudication as per law and that when the Assessing Officer / TPO had discretion to take a decision on the issue then a proper remedy to challenge the said order was appealable before the CIT (Appeals) and not directly to the Tribunal. Holding that the present appeal was not maintainable, it dismissed the appeal and provided it liberty to file appeal before CIT(A) and held that the time consumed in filing and pendency of present appeal would be excluded for the purpose of limitation of filing appeal before CIT(A).

Mercedes Benz India Pvt Ltd vs DCIT – TS-901-ITAT-2016(PUN)-TP- IT(TP)A No. dated 06.06.2017

2630. The Tribunal admitted additional grounds pertaining to benchmarking of international transactions in the Trading Segment adopting RPM as the most appropriate

method as opposed to TNMM adopted by the CIT(A) on the ground that it was legal in nature. Accordingly, it remitted the issue to the file of AO/TPO for considering the benchmarking of international transaction of trading activity and directed the AO/TPO to grant a reasonable opportunity of being heard in accordance with the principles of natural justice.
Fresenius Kabi India Private Limited vs DCIT-TS-625-ITAT-2017(PUN)-TP-ITA No.235/pun/2013 dated 16.06.2017

2631. Where the assessee had already withdrawn appeal filed by it before the Tribunal with regard to the Transfer pricing issues arising for the relevant year on the ground that the issues had been resolved under the MAP proceedings which had been accepted by the Tribunal in its earlier order, the Tribunal dismissed the Revenue's appeal for the same year holding that its appeal had become infructuous as the issues had already been resolved.
Symantec Software India Pvt. Ltd vs ACIT - TS-163-ITAT-2017(PUN)-TP- ITA No. 538/PUN/2015 dated 06.03.2017

APA / MAP

2632. The Court dismissed Revenue's appeal for AY 2006-07 in view of TP-dispute settlement under MAP. The Court held that the appeal had become infructuous and dismissed it without going into merits.
Pr. CIT vs. SIEBEL SYSTEMS SOFTWARE (INDIA) P. LTD [TS-616-HC-2018(KAR)-TP] ITA No.136/2016 dated 21.06.2018

2633. The Tribunal noted that for subsequent years, where the assessee had exercised the option to be covered under the Safe Harbour Rules, pursuant to which the TPO passed an order under Rule 10TE(6) considering the assessee to be a low-end / BPO service provider in respect of the same agreement prevalent for the relevant assessment year and held that the same agreement could not give rise to two different types of services (BPO and KPO services) merely on the basis of providing the services at different times and accordingly remitted the issue of characterization of the assessee as BPO or KPO service provider to the AO for fresh adjudication. It further held that the revenue could not take inconsistent stands, classifying the assessee as both a BPO and KPO in respect of services provided under the same agreement.
SNL Financial (India) Pvt Ltd v DCIT - TS-320-ITAT-2016 (Ahd) – TP

2634. Where assessee had availed shared services (including management services) from its AE, the Tribunal noting that issue had been resolved by MAP for AY(s) 2007-08 to 2010-11 by treating 75% of costs allocated at ALP and disallowing 25% of management fees paid , it remitted the issue to the file of the TPO for verification of the matter in the manner as narrated by the terms of the MAP and to pass an order in accordance with law.
ACIT vs Quintiles Data Processing Centre (India) Pvt Ltd. [TS-1306-ITAT-2018-(Ahd)-TP] ITA No.1036/Ahd/2014 dated 03.12.2018

2635. The Tribunal following the coordinate bench case in assessee's own case for AY 2006-07 restored the TP adjustment noting that in the earlier year also, the prices were fixed under MAP in respect of US AEs and the Tribunal in earlier year had restored back the matter to

the file of AO/TPO with the direction that that it was open to TPO to examine the validity of the proposition that price adopted under MAP mechanism for US can be adopted in respect of other countries also where MAP was not resorted to. ***JCIT vs Dell International Services India (P) Ltd [2018] 96 taxmann.com 618 (Bangalore - Trib.) IT (TP) APPEAL NOS. 53 & 86 (BANG.) OF 2014 dated 13.07.2018***

2636. The Tribunal dismissed Revenue's appeal vis-à-vis rejection of comparables in case of assesee engaged in software development services as withdrawn in view of APA signed by assessee on selection of comparables.
ACIT vs Fair Issac IndiaSoftware Pvt. Ltd. [TS-1387-ITAT-2018(Bang)-TP] IT(TP)A No.1503/Bang/ 2015 dated 29.11.2018

2637. The Tribunal, noting that application for resolution of TP issues was filed under Mutual Agreement Procedure (MAP), allowed assessee's appeal for statistical purposes for AY 2008-09 and held that nothing was required to be adjudicated in respect of the TP issues.
Flowserve India Controls P. Ltd vs. DCIT-TS-714-ITAT-2017(Bang)-TP-IT(TP)A no. 1623/bang/2012 dated 23.08.2017

2638. The Tribunal, noting that application for resolution of TP issues was filed under Mutual Agreement Procedure (MAP) consequent to which order dated 28.10.2015 was passed, dismissed TP grounds as infructuous.
Affliated Computer Services of India Pvt. Ltd-TS-889-ITAT-2017(Bang)-TP I.T. (T.P.) A. No.98/Bang/2015 dated 24.10.2017

2639. The Tribunal considering assessee's submission that TP issues were resolved under MAP and therefore grounds of TP issues were being withdrawn, dismissed assessee's appeal as withdrawn for AY 2010-11.
Quintiles Research (India) Pvt. Ltd vs DCIT-TS-950-ITAT-2017(Bang)-TP IT(TP)A No 417/bang/2015 dated 29.11.2017

2640. Assessee company had entered into international transactions of providing Information Technology Enabled Services (ITES). 92.86 percent of the assessee's transactions were for USA and the remaining 7.14 percent constituted of non-USA transactions in the ITES segment. Simultaneously, the assessee had filed an application for MAP (Mutual Agreement Procedure) under Article 27 of India-USA DTAA with respect to Transfer Pricing Adjustments. MAP proceedings were concluded in respect of transaction of assessee at arm's length markup of 18.82 percent for 92.86 percent of USA transactions. The Tribunal held that since no distinction had been made between 'USA' transactions and 'non-USA' transactions, therefore, the margin adopted for US transaction in MAP proceeding were to be adopted for non-US transactions also.
Amazon Development Centre (India) (P.) Ltd. v. ITO – [2018] 93 taxamnn.com 30 (Bangalore – Trib.) – IT (TP) Appeal Nos. 76, 78 and 1387 (BANG.) of 2014 dated April 27, 2018

2641. Noting that the assessee had concluded a MAP with USA vis-à-vis its 'management charges' payment, the Tribunal allowed withdrawal of the ground of appeal against TPO's

determination of ALP at NIL. ; On the dispute of Revenue characterizing assessee company's 'engineering and design' services as ITeS, the Tribunal rejected the ITeS classification and remanded the matter to the file of the TPO for fresh adjudication as the TPO's characterisation was not in tune with the functional analysis and there was no evidence to support the classification.

Flowserve India Controls Private Limited vs CIT - TS-476-ITAT-2018(Bang)-TP - I.T. (T.P) A. No.1277/Bang/2011 dated 02.05.2018.

2642. Where the assessee had accepted a margin of 24% under MAP resolution for USA transactions (2/3rd of the total transactions) and contended that the margin was 10.1% for the remaining 1/3rd non-US transactions was at ALP, the Tribunal held the onus to bring out the distinction between the USA Transactions and the non-USA Transactions and to make out a case for adopting different margins as ALP for the USA and Non-USA Transactions was on the assessee. Further, it desisted from applying the ratio of CGI Information Systems and Management Consultants Pvt wherein the Tribunal had applied the margin for USA transactions to non-USA transactions, highlighting that the percentage of non-USA transactions in that case was only 4% as against 33.33% in the present case. Accordingly, it remanded matter back to CIT(A) to decide whether the profit margin under USA MAP needs to be applied to non-USA transactions in case of ITeS provider.

Global e-Business Operations Pvt. Ltd. vs. DCIT-TS-654-ITAT-2017(Bang)-TP dated 26.07.2017

2643. The Tribunal, noting that application for resolution of TP issues was filed under Mutual Agreement Procedure (MAP), allowed assessee's appeal for statistical purposes for AY 2007-08 and held that nothing was required to be adjudicated in respect of the TP issues.

Flowserve India Controls P. Ltd vs DCIT-TS-665-ITAT-2017(Bang)-TP-IT(TP)A no.1623/bang/2012 dated 23.08.2017

2644. The Tribunal admitted assessee's additional ground on exclusion of Wirpo BPO and Maple eSolution for AY 2005-06. Further, relying on the decision in assessee's own case for AY 2004-05, it directed the CIT(A) to determine whether the profit margin adopted under USA MAP could be applied to non-USA transactions since the assessee as well as TPO had benchmarked both set of transactions together. In respect of comparables, it remitted Vishal Information Technologies ltd and Wipro BPO Ltd to the file of CIT(A) for verifying the functional comparability vis a vis the assessee.

DCIT v Global e-Business Operations Pvt. Ltd.-TS-726-ITAT-2017(Bang)-TP-JT(TP)A No.298/Bang/2014 dated 16.08.2017

2645. The Tribunal dismissed assessee's appeal challenging TP-adjustment of Rs.3.82cr in view of resolution under APA for AY 2012-13. It considered the assessee's request for withdrawal of appeal in light of unilateral APA entered into with CBDT on October 25, 2017 for rollback period of AYs 2012-13 to 2015-16 in respect of international transactions with AE.

Microchip Technology (India) Pvt. Ltd vs. DCIT [TS-375-ITAT-2018(Bang)-TP] IT(TP)A No.36/Bang/2017 dated 02.05.2018

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2646. The assessee had entered into international transactions with its AE in four countries i.e USA, Canada, UK and Australia. During the pendency of the cross appeals before CIT(A), the competent authorities of India and USA arrived at a resolution under MAP resolving the TP adjustment issue arising in the appeal. Assessee withdrew its appeal before the Tribunal insofar as it related to software development services provided by assessee to its AE in USA and Canada as the said issue was covered under MAP. The assessee contended that the markup of 17.5% for USA and Canada should also be applied in case of UK and Australia also. The Tribunal noted that the TPO had determined the ALP of transactions undertaken by the assessee with all AEs together and not considered ALP of different transactions for AEs of different countries. The Tribunal relying on the ruling in the case of JP Morgan Services (P.) Ltd [TS-578-ITAT-2015(Mum)-TP held that whatever margin had been applied through MAP with respect to major transactions, should also be applied for the remaining similar transactions not covered under MAP and therefore, applied the markup of 17.5% approved in MAP with USA and Canada on assessee's IT services transactions with AEs in UK and Australia.

CGI Information System and Management Consultants Pvt Ltd vs DCIT TS-333-ITAT-2017(Bang)-TP- IT(TP)A No.439/Bang/2011 dated 21.04.2017

2647. The Tribunal dismissed assessee's and Revenue's cross appeals for AY 2008-09 as the TP issues were already resolved under MAP proceedings as per which relief of Rs 48.20 lakhs was allowed from TP adjustment.

Agile Software Enterprises Private Limited vs ITO [TS-395-ITAT-2017(Bang)-TP-IT(TP)ANo.1342/B/2013 dated 11.04.2017

2648. The Tribunal, noting assessee's submission that underlying issues were resolved bilaterally though India-USA MAP proceedings which was given effect to by AO & and that the Revenue had no objection against assessee's withdrawal of grounds, allowed the assesseee to withdraw appeal for AY 2007-08.

Quintiles Research (India) P ltd vs DCIT-TS-732-ITAT-2017(bang)-TP-I.T(TP).A No.1162/Bang/2011 dated 22.09.2017

2649. Where the underlying transfer pricing issues were resolved bilaterally though India-USA MAP proceedings which was given effect to by the AO, the Tribunal, noting and that the Revenue had no objection against assessee's withdrawal of grounds, allowed the assesseee to withdraw appeal for AY 2006-07

Quintiles Research (India) P ltd vs DCIT-TS-755-ITAT-2017(bang)-TP-I.T(TP).A No.2/Bang/2011 dated 22.09.2017

2650. The Tribunal considering assessee's submission that TP issues were resolved under MAP and therefore grounds of TP issues were being withdrawn, dismissed assessee's appeal as withdrawn for AY 2009-10.

DCIT v Flowserve India Controls Pvt. Ltd-TS-1045-ITAT-2017(bang)-TP-IT(TP)A No. 136/bang/2014 dated 03.11.2017

2651. Since the assessee had entered into a unilateral APA with CBDT and the settlement was executed for 5 years from AYs 2015-16 to 2019-20 and the assessee submitted to withdraw

the appeal for the impugned assessment year 2011-12, the Tribunal dismissed the assessee's appeal.

First Advantage Global Operating Center Pvt. Ltd (Formerly known as First Advantage Offshore Services Pvt. Ltd) vs. ACIT-TS-1050-ITAT-2017(Bang)-TP IT(TP)A No.198/Bang/2016 dated 10.11.2017

2652. The Tribunal dismissed assessee's appeal for AY 2004-05 as the TP-issue pertaining to payment of engineering fees was AE resolved under MAP. Noting the assessee's submission that the TP-issue was resolved as per MAP order dated July 16, 2015 under Indo-Japan DTAA and since the assessee did not press the TP grounds and requested for it to be dismissed in view of MAP resolution, it held that the grounds were infructuous and therefore were dismissed.

Toyota Kirloskar Auto Parts Ltd vs DCIT-TS-496-ITAT-2017(Bang)-TP dated 03.05.2017

2653. The Tribunal dismissed assessee's appeal as the TP issues were already resolved under MAP proceedings as per which relief of Rs 49.39 crores was allowed from TP adjustment.

Texas Instruments (India) Pvt Ltd vs DCIT-TS-524-ITAT-2017(Bang)-TP-IT(TP)A nos. 1478/bang/2010 and 1603/bang/2014 dated 19.05.2017

2654. The Tribunal dismissed assessee's appeal as the TP issue relating to technical assistance fee was already resolved under MAP proceedings as per which relief of Rs 9.89 crores was allowed from TP adjustment.

Toyota Kirloskar Auto Parts Pvt. Ltd vs Dy.CIT-TS-563-ITAT-2017-TP-ITA No. 118/bang/2014 Dated 03.05.2017

2655. The Tribunal dismissed the appeals filed by the assessee as well as the Revenue since the TP issues arising out of the said appeals were resolved through India-USA Mutual Agreement Procedure and therefore the grounds contained therein were now infructuous.

Yahoo Software Development India Pvt Ltd v DCIT-TS-531-ITAT-2016 (Bang)-TP-IT(TP)A.1046/B/2011, IT(TP) A.1651 & 1685/B/ 2013

2656. The Tribunal remitted the issue pertaining to whether price fixed under MAP concluded with USA in respect of call centre and share services transactions with US-AEs could be adopted in case of transactions with Non-US AEs in the absence of any attempt from the assessee to bring out similarities of the factors that influenced the price between the US and Non-US transaction. The Tribunal directed the TPO to undertake FAR analysis of non-US transactions with a view to find out whether there was any distinction in factors influencing price between the US and Non-US transactions.

Dell International Services India Pvt Ltd v DCIT - TS-498-ITAT-2016 (Bang) - TP - IT(TP)A No.1302/Bang/2010

2657. Where the TP-issue under dispute was resolved under MAP proceedings as per which Indian Government agreed to withdraw TP-adjustment to the extent of Rs. 34.6 lakhs (out of adjustment of Rs. 1.04 Cr) while UK agreed to relieve the remaining adjustment considering assessee's under-utilization of capacity of 65% as against comparable's average of 40%, the Tribunal held that the order passed by the authorities below were not required to be

adjudicated as the MAP resolution shall prevail over directions/order passed by the authorities below. Accordingly, it dismissed appeals filed by assessee and Revenue as withdrawn.
DCIT v British Engines (India) P. Ltd-TS-785-ITAT-2017(Bang)-TP dated 23.08.2017

2658. The Tribunal applied a mark-up of 17.5% approved in MAP with USA and Canada on assessee's IT services transactions with AEs in UK and Australia for AY 2007-08 following the decision of the co-ordinate bench in J. P. Morgan Services (P) Ltd. vs. DCIT [TS-578-ITAT-2015(Mum)-TP] wherein the Tribunal held that the mark-up of 17.5% which was adopted for USA and Canada in MAP proceedings, should be adopted in respect of other countries if there was no distinction in facts. Observing that the assessee had entered into international transactions with its AE in four countries i.e. 1) USA, 2) Canada, 3) UK and 4) Australia, out of which as per MAP with USA and Canada (covering 96 percent of the transactions), a mark-up of 17.5% was agreed, the Tribunal held that since there was no distinction in facts, then the impugned margin determined would be applied to the remaining 4% transactions as well. Accordingly, applying same margin of 17.5% on transactions with UK and Australia AEs, it held that no separate adjudication was called for in respect of TP grounds raised by assessee
CGI Information Systems Management Consultants Pvt. Ltd. Vs DCIT - TS-199-ITAT- 2017(Bang)-TP - IT(TP)A No. 1117 (Bang) 2011 dated 15.02.2017

2659. Since the grounds raised regarding TP adjustment of Rs. 12.48 crores were resolved under Indo-Japan MAP resolution between competent authorities of India and Japan, the Tribunal allowed assessee to withdraw the TP grounds and also dismissed Revenue's TP related appeal as not pressed.
Toyota Kirloskar Auto Parts Private Ltd vs DCIT-TS-1073-ITAT-2017(Bang)-TP- IT(TP)A No. 1024 & 1029 / bang / 2014 dated 22.12.2017

2660. The Tribunal admitted additional evidence filed by assessee in the form of Advance Pricing Agreement wherein it was accepted that the assessee was a contract manufacturer only post financial year 2010-11 and remitted the matter to the file of the TPO who had treated the assessee as a contract manufacturer for years prior to FY 2010-11. It noted that the nature of business would have considerable bearing on determination of arm's length price and since the same could not have been furnished before lower authorities, the additional evidence was to be admitted.
Lotus Footwear Enterprises Ltd [TS-804-ITAT-2016 (Chny)- TP] (I.T.A.Nos.779/Mds/2014, 801/Mds/2015 & 810/Mds/2016)

2661. The Tribunal dismissed assessee's TP ground as withdrawn in in view of resolution under MAP.
McDonald's India Pvt Ltd v DCIT [TS-513-ITAT-2018(DEL)-TP] ITA Nos.1665 and 1769/Del/2015 692 and 296/Del/2016

2662. The Tribunal dismissed the assessee's TP grounds for the subject year as withdrawn, in view of resolution under APA. Noting that it had entered into an APA with CBDT on July 25, 2018 applicable to 5 consecutive AYs (AY 2015-16 to AY 2019-20) and 4 consecutive rollback years (AY 2011-12 to AY 2014-15) and it held that as per Rule 10RA(4), the appeal, if

pending for any rollback year on the issue which is subject matter of APA, shall be withdrawn to the extent of the issues covered by the agreement.

Daikin Air-Conditioning India Pvt Ltd vs DCIT [TS-819-ITAT-2018(DEL)-TP] ITA No.161/Del/2016 dated 06.08.2018

2663. The Tribunal held that provisions for comparability analysis in Advance Pricing Agreement (APA) have immense persuasive value and can be "rolled back" i.e. retrospectively applied for past years also even though in the APA signed by the assessee there were no "rollback provisions" -provided the international transactions in both the years (i.e. the year of APA and the past year) are the same and availability of data for the past year is also on similar lines as suggested in the APA.

Ranbaxy Laboratories Ltd v ACIT - [2016] 68 taxmann.com 322 (Delhi-Trib)

2664. The Tribunal dismissed assessee's appeal on certain TP-issues in view of resolution under Indo-Japan MAP for AY 2007-08.

ACIT vs. Marubeni India Pvt. Ltd - TS-445-ITAT-2018(DEL)-TP - ITA No. 3504/DEL/2014 dated 21.05.2018

2665. The Tribunal dismissed Revenue's appeal against the DRP's order deleting the TP-adjustment made on protective basis amounting to Rs.93.81cr for AY 2011-12 noting that the dispute was resolved under MAP with United Kingdom dated January 29, 2019 wherein it was held that protective adjustment made by the TPO would be withdrawn in toto ie, there would not be any adjustment in A.Y 2011-12 on protective basis. Further, it observed that subsequently AO modified the order framed u/s 143(3) r.w.s. 144C to give effect to the resolution agreed under MAP (order dated 27.04.2018), thereby determining total assessed income after MAP at NIL. Accordingly, Revenue's appeal was dismissed as infructuous

Dy.CIT vs BT Global Communications India Pvt Ltd [TS-1149-ITAT-2018(DEL)-TP] ITA No.506/Del/2016 dated 31.10.2018

2666. The Tribunal, noting that Competent authorities of India and USA had agreed upon a framework to resolve pending TP cases relating to AY 2008-09 pursuant to which relief of Rs.65.58 crores had been computed w.r.t adjustment made by TPO in respect of international transactions of IT enabled customer care and employee care support services segment, it set aside TP-issue to the file of AO to be adjudicated in accordance with MAP.

ACIT vs Convergys India Services Pvt. Ltd-TS-695-ITAT-2017(DEL)-TP-ITA No. 2194/del/2014 dated 31.08.2017

2667. The Tribunal dismissed assessee's TP grounds relating to provision of software development and support services and interest imputed on overdue receivables as withdrawn in view of assessee's submission that issues were covered by the APA and that as per Rule 10RA(4) of the Income-tax Rules, the appeal, if pending on the issue which was subject matter of APA, was liable to be withdrawn prior to furnishing the mandatory modified return (Rule 10A(2)) to give effect to rollback provision

Mentor Graphics (India) Pvt. Ltd. vs DCIT [TS-1234-ITAT-2018(Del)-TP] ITA No.399/Del/ 2016 dated 06.11.2018

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2668. The Tribunal, noting that assessee withdrew TP grounds because of the settlement of dispute under Mutual Agreement Procedure (MAP), dismissed cross appeals filed by Revenue and Assessee as withdrawn.

GKN Driveline (India) Ltd vs DCIT-TS-739-ITAT-2017(DEL)-TP-ITA No. 1416/del/2015, 1616/del/2015 and 843/del/2016 dated 12.09.2017

2669. The Tribunal dismissed assessee's TP-ground for AY 2009-10 relating to adjustment on royalty and franchise fee, as withdrawn, in view of resolution under MAP. However, vis-à-vis the disallowance of foreign exchange loss and R&D Cess on royalty payment, it remanded the issue back to AO/TPO to pass a speaking order in view of MAP resolution.

McDonald's India Pvt Ltd vs. ACIT - TS-103-ITAT-2018(DEL)-TP - ITA No.1426/Del/2014 - 30-01-2018

2670. The Tribunal directed the TPO to apply profit margin adopted/agreed in MAP covering IT/ITeS with US-AE to benchmark similar transactions with non-US AE noting that under MAP margins of 15.7% and 14.68% were adopted to benchmark IT & ITeS respectively for transactions with US-AE. It held that it would be very difficult to accept either assessee's margin of 13 percent or the TPO's higher margin for the same nature of transactions. Accordingly, for the impugned year, it held that the margins for the Software Development Services (IT service) and ITeS segment were to be taken as per the margins accepted in MAP proceedings.

Fidelity Business Services India Pvt. Ltd. vs. DCIT - TS-107-ITAT-2018(DEL)-TP - ITA No. 5872/Del/2011 dated 13/02/2018

2671. In view of resolution of TP issues by the assessee under APA and considering that the APA was concluded on February 23, 2018 and the subject AY was included in rollback period, the Tribunal allowed the assessee to withdraw grounds against TP-adjustment.

FactSet Systems India Private Limited vs. ACIT - TS-202-ITAT-2018(HYD)-TP - ITA No.213/Hyd/2015 dated 23.03.2018

2672. The Tribunal permitted assessee to withdraw appeal for AY 2010-11 in view of resolution of the TP-issue under Advance Pricing Agreement (APA) since a) the assessee had submitted an APA application on March 30, 2013 for determination of ALP for its proposed international transactions covering AYs 2014-15 to 2018-19. b) thereafter also filed an application to include rollback for AYs 2010-11 to 2013-14; c)the APA was concluded on March 31, 2016, d) assessee was obligated to file the modified return of income under section 92CD of the I.T. Act for the above-mentioned assessment years which included the year under appeal. e) Consequently, the assessee had to withdraw the appeal pending before the tribunal. ***Broadridge Financial Solutions India P. Ltd vs DCIT [TS-528-ITAT-2016(HYD)-TP - ITA.No.228/Hyd/2015***

2673. The Tribunal dismissed the crossed appeals in light of resolution under APA after considering letter submitted by AO to CIT(DR) that relevant AY formed part of the rollback years for which APA was signed agreeing to operating margin of not less than 18% which assessee had already complied for the subject AY.

DCIT Circle 17(2) vs M/s. Wells Fargo India Solutions (P) Ltd-TS-251-ITAT-2018(Hyd)-TP- ITA No 111/Hyd/2016 dated 09.04.2018

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2674. The Tribunal, considering assessee's submission that its entity level PLI was 6.43% as against PLI of 4.5% agreed in Advance Pricing Agreement (APA), remitted the TP issue to the file of AO to verify the claim of the assessee. It noted that assessee had entered into an APA with CBDT on February 2, 2017 under which appropriate PLI was agreed to be operating profit margin to sales and arm's length margin was agreed at 4.5% and that APA contained provisions for rollback from AY 2010-11 to AY 2013-14, thus covering the subject AY 2012-13.

DIC Fine Chemicals Pvt. Ltd vs. DCIT-TS-683-ITAT-2017(Kol)-TP-ITA no. 446/kol/2017 dated 25.08.2017

2675. The Tribunal dismissed Revenue's appeal against the rejection of comparables (Motilal Oswal Investment Advisors Ltd & New berry Advisors Ltd) for assessee providing investment advisory services, as infructuous in view of resolution under APA for AY 2011-12 noting that assessee entered into an APA with CBDT on August 29,2016 covering the subject AY pursuant to which assessee filed a modified tax return paying taxes as per the APA and such modified return was also processed where no further addition was made to assessee's income.

DCIT vs India Capital Research & Advisor Pvt. Ltd [TS-1024-ITAT-2018(Mum)-TP] ITA No.1817/Mum/2016 dated 05.09.2018

2676. The Tribunal allowed the assessee to withdraw grounds covered by APA since there was no change in the said AYs in nature of international transactions. It directed the Department to pass an order giving effect to APA u/s.92CD(5) for AY 2010-11 and 2011-12. Further, for AY 2008-09 and 2009-10, (years not covered by APA), it directed that the principles laid down in APA for benchmarking comparability analysis would have a guidance value.

Spencer Staurt (India) Private Limited vs ACIT [TS-751-ITAT-2018(Mum)-TP] ITA No.1832/Mum/2016 dated 06.06.2018

2677. Where the TP issue under consideration was already covered by MAP resolution reached between India and USA competent authorities wherein 15.75% was accepted as appropriate ALP (by directing re-computation of the operating revenue and operating cost on the basis of the audited financials) as against TPO's margin of 36.37% of the comparables and the coordinate bench in assessee's own case for AY 2006-07 to 2009-10 had held that arm's length mark-up agreed under MAP for transactions with US entities should also be applied for transactions with non-US entities as the transactions were considered together, the Tribunal remitted the TP adjustment in assessee's ITeS segment for adjudicating the issue afresh in terms of resolution reached under MAP agreement for AY 2010-11 to the file of TPO.

DCIT vs J.P Morgan Services Pvt. Ltd-TS-795-ITAT-2017(Mum)-TP dated 11.04.2017

2678. The Tribunal dismissed assessee's appeal for AY 2008-09 as the TP issue relating to royalty paid by assessee to AE was resolved under India-Japan MAP, wherein royalty payment was agreed to be allowable at 1.15% and since the appeal had become infructuous as on date, they were dismissed as not pressed.

Anchor Electricals Pvt Ltd [TS-325-ITAT-2017(Mum)-TP I.T.A.No.6930/mum/2012 and I.T.A.No. 326/mum/2012 dated 26.04.2017

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2679. The Tribunal dismissed cross appeals of assessee (engaged in providing software development/research and development services to foreign AEs) and Revenue for AYs 2007-08 to 2010-11 as the TP issues were resolved under India-USA MAP.
Symantec Software India Private Limited - TS-1054-ITAT-2016(PUN)-TP

2680. Since the assessee contended that international transactions for the subject AYs were identical to those in AYs 2010-11 to 2018-19 which were part of APA proceedings (including rollback years) and the assessee contended that the TP-adjustment ought to have been made as per the same terms as agreed in APA proceedings, the Tribunal relying on the decision in assessee's own case for AY 2009-10 wherein the issue was remitted back to the file of TPO to decide the issue afresh in accordance with terms and conditions of APA , remitted the issue of computation of ALP of to the AO for fresh consideration.
Abicor Binzel Production (India) Pvt. Ltd vs. DCIT-TS-1036-ITAT-2017(PUN)-TP dated 15.12.2017

Assessment / Reassessment / Revision / Rectification

2681. Noting that the DRP held that the assessee did not have a PE in India, the Apex Court set aside the order of the High Court dismissing assessee's writ petition and upholding reassessment proceedings based on material found during survey proceedings at Indian subsidiary, based on which AO believed that the assessee had an Indian PE.
LG Electronics Incorporation, South Korea vs. ADIT - TS-42-SC-2018-TP - CIVIL APPEAL NO(S).781 OF 2018 dated 16.01.2018

2682. The Apex Court dismissed Revenue's SLP against Delhi High Court's decision setting aside final assessment order passed without first issuing draft assessment order as mandated by Sec 144C. The High Court noted that in the second round of proceedings pursuant to remand by the Tribunal, the TPO undertook fresh benchmarking exercise and proposed an adjustment and subsequently, AO added TP-adjustment in the final assessment order issued along with notice of demand u/s 156 without issue of a draft assessment order and relying on the decision of Turner International India it set aside the final assessment order.
DCIT v Control Risks India P Ltd - TS-170-SC-2018-TP - SPECIAL LEAVE PETITION (CIVIL) Diary No. 7090/2018 dated 16-03-2018

2683. The Apex Court allowed the assessee's appeal against the ruling of the Allahabad High Court and quashed the issuance of notice under Section 148 of the Act. The High Court dismissed assessee's writ and had upheld re-assessment based on material found during survey proceedings at the premises of the assessee's Indian subsidiary, based on which AO alleged the existence of Indian PE and had held that the examination of transactions by TPO during Indian subsidiary's TP assessment would not be a bar to initiate re-assessment. The Apex Court held that since the impugned notice for the reassessment was based only on the allegation that the assessee had PE in India, the notice could not be sustained once arm's length price procedure had been followed. It relied on co-ordinate bench ruling in E-Funds IT Solution Inc., wherein it was held that once arm's length principle has been satisfied, there could not be any further profit attributable to a person even if it had a PE in India.

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HONDA MOTOR CO. LTD vs. ACIT - TS-174-SC-2018-TP - CIVIL APPEAL NO.(s). 2833 OF 2018 dated 14.03.2018

2684. The Apex Court dismissed the Revenue's appeal against the order of the High Court wherein the High Court set aside the order of the TPO passed without giving the assesee an opportunity to cross-examine the authorized personnel of companies whose segmental data had been relied on for arriving at ALP.

DCIT v Cashedge India Pvt Ltd – TS-593-SC-2017-TP-IA no. 53300/2017 dated 21.07.2017

2685. The Court held that for the purpose of determining the period of 9 months from the date on which the draft assessment order was forwarded to the assessee, under section 144C(12) of the Act (which provides the time limit within which the DRP was to pass its directions), the term "forward" contained therein had to be understood to mean actual service and therefore where the draft assessment order was passed on March 26, 2014 but served on the assessee 5 months later due to the change in jurisdiction, the DRP could not refuse to pass directions stating that the time limit of 9 months under section 144C(12) expired on December 31, 2014 whereas objections were filed in January 2015.

Rain Cements Ltd v DCIT-TS-483-HC-2016 (AP)-ITA No. 723/Mds/ 2016

2686. The Court dismissed Revenue's appeal, upheld Tribunal's rectification order deleting its alternate direction to use subsequent year data for determining ALP after discounting for inflation. It stated that Rule 10B(4) implicitly prohibits the data, of a subsequent year, being taking into consideration as the basis of comparison and further contended that the Tribunal had rightly corrected its order.

Trinity Advanced Software Labs Pvt Ltd [TS-651-HC-2016(AP)-TP] I.T.T.A.NO.421 OF 2015

2687. The Court dismissed Revenue's appeal and upheld the order of Tribunal wherein relying on AP High Court in Zuari Cements, the Tribunal had quashed the assessment order as it was passed contrary to mandatory provisions of sec 144C and a final assessment order passed without a draft assessment order was void-ab-initio. The Tribunal in the first round of proceedings had restored the matter back to TPO who had passed an order. Thereafter the AO proceeded to pass a final assessment order without passing a draft assessment order in remand proceedings. The Court relied on Delhi HC ruling of JCB India to hold that even in remand proceedings, the draft assessment order was necessary and thus, the Tribunal's view could not be faulted with.

Pr.CIT vs Andrew Telecommunication (P.) Ltd [2018] 96 taxmann.com 613 (Bombay) TAX APPEAL NO. 144 OF 2017 dated 16.07.2018

2688. The Court allowed assessee's writ petition and set aside the final assessment order passed in defiance of provisions of section 144C of the Act without passing the draft assessment order as per the requirement of sec 144C(1) of the Act since the assessee being a foreign company was an eligible assessee as defined in section 144C(15) of the Act. It relied on the High Court decision of JCB India to reject Revenue's contention that requirement of passing a draft Assessment order would extend only to first round of proceedings and not in respect of remand proceedings by the Tribunal. Accordingly, the Court quashed the assessment order

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being without jurisdiction on account of the non-compliance of mandatory procedure of passing a draft assessment order under Section 144C(1) of the Act.

Dimension Data Asia Pacific PTE Ltd vs Dy.CIT [TS-719-HC-2018(BOM)-TP] WP No.921 of 2018 dated 06.07.2018

2689. The Court admitted assessee's writ petition challenging reopening notice under section 148 for AY 2009-10 issued beyond 4 years from the end of the relevant AY to disallow ESOP costs on the ground that prime face on the date of issuing of the impugned notice, the assessing officer could not have had any reason to believe that income had escaped assessment. Further, the Court observed that the assessee had given the complete manner of accounting as well as taxation of ESOP cost in its return of income and had also disclosed the relevant details in its form 3CEB. Therefore, the provisions of explanation 1 to section 147 was not applicable.

DSP Merrill Lynch Ltd - TS-21-HC-2017-(Bom)-TP

2690. The Court upheld Tribunal's order wherein the TP adjustments made by the AO were set aside on account of not complying with the mandatory CBDT Instruction 3/2003 of making reference to the TPO as the international transaction instant case exceeded Rs.5 crores. It observed that the finding of the Tribunal was not perverse in law and it was not a case of non-application of mind and therefore the view of the Tribunal could not be interfered with. It thus dismissed the Revenue's appeal.

Pr. CIT vs S.G. Asia Holdings (India) Ltd [TS-922-HC-2018(BOM)-TP] ITA No.281 of 2016 dated 27.08.2018

2691. The Court noted that though the assessee had not challenged before the lower authorities the re-opening on the ground that the notice violated the provisions 92CA(2C) of the Act, (which provides that the AO is not empowered to assess / reassess under section 147 or pass an order enhancing the liability of the assessee under section 154 of the Act, for proceedings which have been completed before July 1, 2012) since the objection went to the root of the matter, it directed the AO to consider the Petitioner's objections in respect to Section 92CA(2C) of the Act and dispose of the same within a period of 4 weeks from the date of filing. Additionally, the Court stayed the impugned notice for a further period of ten weeks from the date of the order (a) so as to enable the petitioner to challenge the order disposing of the objections in respect of Section 92CA of the Act (b) taking into account the decision of the Jurisdictional Court in the case of Asian Paints 296 ITR 90 (Bom) which directs the AO not to commence reassessment proceedings for a period of 4 weeks from the disposal of objections.

Amore Jewels Pvt Ltd v Pr CIT - TS-470-HC-2016 (Bom) - TP - WRIT PETITION NO.800 OF 2016

2692. In case of writ petition filed by assessee on jurisdiction of TPO to examine specified domestic transaction where no reference had been made by AO u/s 92CA(1), the Court provided ad-interim relief by restricting the AO to pass an assessment order and stated that the issue would be examined once Revenue would file its reply. The Court rejected Revenue's contention that writ petition could not be entertained in view of statutory remedies available to assessee from AO's order however the Court opined that AO was bound to pass the order

u/s. 92CA(4) in terms of report of TPO, and if TPO had no power to examine transaction then relegating assessee to statutory remedies was unjustified.

Times Global Broadcasting Company Ltd vs UOI &Ors [TS-1266-HC-2018-(Bom)-TP] Writ Petition No.3386 of 2018 dated 06.12.2018

2693. The Court quashed the final assessment order passed under section 143(3) of the Act without passing a draft assessment order as mandated by Section 144C(1) of the Act which applied to the assessee. It observed that the DRP did not entertain the assessee's objections absent the draft assessment order and therefore the rights made available to the assessee under section 144C of the Act were rendered futile by directly passing final order under section 143(3) of the Act.

International Air Transport Association - TS-62-HC-2016 (Bom) - TP

2694. The Court dismissed Revenue's appeal on whether the principle of estoppel would be applicable for assessee who had appealed against the Final assessment order before the Tribunal. The AO, on remand, by Tribunal had referred matter to TPO and thereafter had passed a Final assessment order dated 12 March 2014 which was corrected by corrigendum dated 16 April 2014 to convert Final assessment order to Draft assessment order which was challenged before DRP and then a Final assessment order was passed pursuant to DRP's directions. The Tribunal held that subsequent passing of order was without jurisdiction as corrigendum dated 12 April 2014 was issued after the time to pass assessment orders had expired i.e.31 March 2014. The Court noted that it had held in its decision in International Air Transport Association that Draft Assessment Order was necessary in terms of Section 144 C(1) of the Act before the AO could proceed to pass a Final assessment order and in the absence thereof the order was without jurisdiction. It opined that there could be no estoppel on issue of law pertaining to jurisdiction and thus, dismissed Revenue's appeal.

Pr.CIT vs Lionbridge Technologies Ltd [TS-1267-HC-2018-(Bom)-TP] INCOME TAX APPEAL NO. 622 OF 2016 dated 03.12.2018

2695. The Court held that where the assessee had imported pigments from its associated enterprise at a price lower than its fair value (in view of predatory pricing policy to capture the market), the contention of the Revenue that imports of pigments were to be benchmarked was misplaced since it would result in transfer pricing adjustment of allowing higher purchase price to the assessee which would reduce income taxable in India which was contrary to the provisions of Section 92(3) of the Act.

CIT v Merck Ltd - TS-608-HC-2016 (Bom) - TP INCOME TAX APPEAL NO. 272 OF 2014

2696. The Court dismissed assessee's appeal against the Tribunal's decision to remand the matter to the TPO for fresh examination of applicability of TP Provisions to assessee's sale of local STPI unit to its domestic group company. The Court noted that the Tribunal in the miscellaneous application had mentioned that the Global Transfer Agreement (GTA) was produced before the DRP but not considered and the same was not on record before AO/TPO. The Court opined that the Tribunal was correct in its action to restore the issue back to the DRP and concluded that the question proposed was subject matter of DRP's consideration and thus no question of law arose.

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Thomson Reuters India Pvt Ltd vs ACIT 2(3)- TS-305-HC-2018(BOM)-TP- ITA No 1157 of 2015 dated 25.04.2018

2697. The Division bench of the Court stayed the order of the Single judge dismissed the writ petition filed by the assessee on the issue of jurisdiction of TPO to examine the existence of international transaction without the AO making a particular finding that there was an international transaction within the meaning of Section 92B before referring the matter to the TPO. The Single bench had upheld the AO's reference to the TPO, holding that Section 92CA(1) did not require the AO to first come to a definite finding that there was an 'international transaction' within the meaning of Sec 92B before referring the matter to TPO. On further appeal, the Division bench was prima facie satisfied with the contention of the assessee viz. the AO should have determined as to whether the transactions involved came within the ambit of the international transactions or not before making reference to the TPO. Accordingly, it proposed to hear the entire appeal and stayed the operation of the judgment of the single bench.

Price Waterhouse and Anr. Vs CIT, Lovelock & Lewes and Anr. Vs CIT - TS-284-HC-2017(CAL)-TP - APO NO.36 OF 2017 & APO NO.37 OF 2017

2698. Where the AO made a reference to the TPO without providing an opportunity of being heard to the assessee or passing a reasoned order, the Court held that though the CBDT instruction No. 2/2016 dated March 10, 2016 was issued subsequent to AO's decision to refer the matter to TPO, the applicability of principles of natural justice and requirement of AO to decide on a jurisdictional fact could not be circumvented. Accordingly, it set aside the reference made by AO to TPO.

PCM Strescon Overseas Ventures Ltd vs DCIT-TS-666-HC-2017(CAL)-TP-WP no. 214 of 2016 dated 11.08.2017

2699. The Court directed the CIT(A) to dispose of the assessee's appeal as expeditiously as possible in light of the fact that the AO failed to furnish to the assessee the draft assessment order consequent to the TPO order but had issued a letter rejecting the stay applied for by the assessee. It held that it was incumbent for the AO to have considered this aspect of the matter before rejecting the stay of demand pending hearing of appeal. It further directed the Revenue not to take any consequential steps for recovery of demand pursuant to the letter issued by DCIT.

Vodafone East Limited v DCIT (W.P. No. 682 of 2015) – TS-515-HC-2015 (Cal) – TP

2700. The Court dismissed the writ petition filed challenging the reference made by the AO to the TPO on the alleged ground that the said reference was without jurisdiction since the Dutch entity with whom the Petitioner had undertaken transactions was not an AE and therefore the impugned transaction did not constitute an international transaction. The Court held that Section 92CA of the Act does not require the AO to come to a definite finding that there is an international transaction before referring the matter to the TPO and all that was required was a prima facie finding. It further held that the determination of whether the impugned transaction was an international transaction or not was a factual issue and that the TPO was well equipped to deal with the same and noted that the Petitioner gets two opportunities to argue its case – once before TPO and then before AO / DRP. Accordingly, it refused to

express any opinion on the merits of the case and directed the TPO to issue a fresh notice to the Petitioner to decide all points raised.

Price Water House v CIT & Lovelock & Lewes v CIT – TS- 976-HC-2016 (Cal) - TP

2701. The Court held that the where the DRP had passed its directions ignoring the request of the assessee to adjourn the matter since the assessee was unable to retrieve records relevant to the hearing on account of a flood in its factory, the said directions were in violation of the principles of natural justice. It held that in the instant case, the availability of an alternate remedy was not a bar to approach the Court and that since no adequate, effective and reasonable opportunity of being heard was granted to the assessee, the directions of the DRP were to be set aside.

Gamea Renewable Pvt Ltd v ACIT - (2016) 96 CCH 0086 (Chen) - W.P.Nos.5499 and 9629 of 2016 and W.M.P.Nos. 4840, 11713, 8658 and 11712 of 2016

2702. The Tribunal had remitted the matter back to TPO on 15.04.2014, however the remand directions were modified by the Court which directed the Tribunal to examine the matter pursuant to which, the Tribunal again remitted the issue to TPO. This resulted in a fresh reference made by the AO to the TPO u/s 92AC (1) however consequent to the TPO order passed, a final assessment order dated 14.11.2017 was passed instead of a draft assessment order. The Court allowed assessee's writ petition and quashed the final assessment order relying on Delhi HC ruling of JCB India wherein it was held that order passed in remand proceedings without passing a draft assessment order (contrary to section 144C) is a nullity in law. The Court observed that HC in JCB India had not expressed anything further which implied that the Revenue's option to proceed afresh was still open (to complete assessment according to provisions of section 144C), It directed the AO to complete final assessment in accordance with provisions of section 144C and exclude the period for proceedings under Article 226 for reckoning period of limitation for passing a fresh assessment order.

Stryker (India) Pvt Ltd vs ACIT [TS-931-HC-2018(DEL)-TP] WP(C) No.11342/2017 and CM 46361/2017 dated 16.08.2018

2703. The Court upheld Tribunal's order accepting DRP's modification in quantum of risk adjustment and noted that the Tribunal directed that the AO had to amend the draft assessment order after the DRP's adjustment. The Court stated that the DRP's mechanism is an administrative and corrective process entitling the assessee to insist upon a second look in regard to the issues decided in the TPO's report. Therefore, its decisions are binding and a part of the decision making process of the AO

Separately, considering some merits in Revenue's submissions the Court admitted legal question in respect of the exclusion by Tribunal of Infosys BPO as a comparable (to assessee engaged in providing data management services to its AE's customers).

Pr. CIT vs. Symphony Marketing Solutions India Pvt. Ltd (now Merged with Genpact India)- TS-268-HC-2018(DEL)-TP- ITA No 413/2018 dated 11.04.2018

2704. The High Court dismissed Revenue's appeal against Tribunal's order wherein final assessment order was quashed for failing to follow the procedure prescribed under Section 144C of the Act by relying on ratio laid down in Delhi HC in JCB India wherein it was held that

draft assessment order had to be passed in accordance with procedure prescribed u/s.144C of the Act and not passing a draft assessment order would vitiate the proceedings. It rejected Revenue's contention that assessee had failed to file objections to the draft assessment order within limitation. Hence, the DRP had not decided any „objection" in the first round thus, in the second round pursuant to order of Tribunal remanding the matter the Assessing Officer was justified in passing the Assessment Order without passing a draft assessment order taking recourse to the procedure prescribed in Section 144C of the Act.

Pr.CIT vs NT Back Office Services Pvt Ltd. vs Dy.CIT [TS-1395-HC-2018(Del)-TP] ITA 1307/2018dated 26.11.2018

2705. Relying on the decision in the case of Turner International India Pvt Ltd [TS-400-HC-2017(DEL)- TP], the Court held that even where the Tribunal had remanded the matter, the AO ought to have passed the draft assessment order under section 144C prior to the final order. Further, it held that section 292B of the Act could not save an order not passed in accordance with the provisions of the Act since it was an incurable illegality. Accordingly, it held that the final assessment order passed by the AO was without any jurisdiction.

JCB India Ltd vs DCIT-TS-706-HC-2017(DEL)-TP dated 07.09.2017

2706. The Court admitted Revenue's appeal against the order passed by the Tribunal quashing the assessment framed on the amalgamating company after incorporating the TP addition for excess royalty paid by it by virtue of the provisions of section 170(2) as per which assessment should be framed on the amalgamated company and not amalgamating company.

Maruti Suzuki India Ltd. [TS-172-HC-2017(DEL)-TP] [ITA 65/2017]

2707. The Court dismissed writ petition filed by MagnetiMarelli (assessee) challenging notice u/s 147/148 of the Act reopening assessment for AY 2010-11. The Court dismissed the writ petition filed by the Petitioner and noted that AO in the 'reasons to believe', indicated the possibility of escapement on the ground that an identical transaction relating to payment to AE for technical know-how had resulted in TP addition for the earlier AY 2009-10 and that, assessment had been completed after framing of assessment u/s 143(1).It rejected assessee's submission for quashing section 148 notice on the ground that revenue's stand for AY 2009-10 had been rejected by the Court and held that the validity of the notice was based on the facts available on the record on the date when the notice was issued.However, it directed the AO to consider the assessee's submissions with respect to the matters covered by HC judgment for AY 2009-10 in light of the said judgment

MagnettiMarelliPowertain India Pvt Ltd v DCIT – TS-68-HC-2017 (Del) – TP - W.P. (C) 8760/2014 dated 06.02.2017

2708. The Court, relying on the decision in CIT vs. Kabul Chawla [TS-494-HC-2015(DEL)], dismissed the Revenue's appeal against the decision of the Tribunal wherein it had quashed assessments made by AO/TPO u/s 153A for AY 2008-09 pursuant to search and seizure operations, despite the fact that no new or incriminating material had been found during search and seizure proceedings [which took place in assessee's premises after completion of scrutiny assessment u/s 143(3)] and that the AO based upon existing material, referred the

matter to TPO, who proposed TP adjustment on interest-free loans granted to AE. The Court observed that the scrutiny assessments concluded earlier were based upon queries, and assessee had disclosed all the materials which came to be reviewed subsequently in Sec 153A proceedings. Accordingly, it upheld the order of the Tribunal quashing the assessments.

Pr. CIT Vs Baba Global Ltd – TS-1098-HC-2016 (Del) – TP - ITA 938/2016, CM APPL.47139-47140/2016 dated 23.12.2016

2709. The Court allowed assessee's writ for AY 2007-08 and 2008-09 and set aside final assessment order passed by AO without first issuing draft assessment order as mandated by section 144C(1). It observed that the Tribunal had remanded TP issues in respect of assessee to the file of the AO who without passing a draft assessment order, issued a final assessment order under section 143(3) and issued demand and penalty notices. The Court relying on the decision in the case of Vijay Television Pvt Ltd [TS-172-HC-2014(MAD)-TP] and ESPN Star Sports Mauritius S.N.C.ET Compagnie [TS-130-HC-2016(DEL)-TP], held that the failure by the AO to adhere to the mandatory requirement of section 144C(1) and first pass a draft assessment order would result in invalidation of final assessment order and the consequent demand notices and penalty proceedings. It rejected Revenue's contention that the failure to adhere to section144C(1) requirement was a curable defect and that the matter should be remanded for passing draft assessment order. Accordingly the Tribunal set aside the demand notices issued by AO and penalty proceedings initiated by the AO.

Turner International India Pvt Ltd vs DCIT [TS-400-HC-2017(DEL)- 4269/2015-TP dated 17.05.2017

2710. The Court dismissed Revenue's appeal against Tribunal's order remitting the inclusion of 6 comparables to TPO as the TPO failed to conduct the FAR analysis which was a prerequisite for selection of comparables. It considered the Revenue's submission that both the DRP and TPO had given reasons and sent notices as to why the six comparables had to be included for purposes of ALP determination and held that the Revenue was not prejudiced in the present matter as it was at liberty to argue all the submissions not foreclosed by the Tribunal. Thus, in absence of substantial question of law, it dismissed the appeals of the Revenue

Copal Research India Pvt Ltd [TS-229-HC-2017(DEL)-TP]

2711. The Court allowing assessee's writ petition, set aside the final assessment order passed by AO without first issuing draft assessment order as mandated by section 144C. Noting that in the first round of proceedings, Tribunal had remanded TP issues in respect of assessee to the file of TPO and directed to pass a speaking order after considering the additional details filed by assessee. The TPO then undertook a fresh benchmarking analysis and passed an order dated 31st March, 2017 proposing an adjustment of Rs. 1,19,49,680/- to the Arm's Length Price ('ALP') determined by the assessee. The AO passed a final assessment order on 11th May,2011 instead of passing a draft assessment order. Applying the provisions of section 92CA(3) of the Act, the Court held that it was incumbent upon the AO to pass a draft assessment order under section 144C of the act which was overlooked by the AO depriving the assessee of an opportunity of questioning the draft assessment order under section 144C of the act before the DRP.

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Control Risks India Pvt ltd vs DCIT-TS-603-HC-2017(DEL)-TP-W.P.(C) 5722/2017 & C.M.NO.23860/2017 (stay) dated 27.07.2017

2712. The Court allowed assessee's writ and quashed the show cause notice issued to Li & Fung India (assessee) for AY 2007-08 pursuant to remand by Tribunal, proposing to reject comparables selected by the assessee in its TP-study noting that the Tribunal, relying on HC decision in assessee's own case for AY 2006-07, had directed TPO to determine ALP afresh by considering 'total cost' as cost base and not FOB value of goods sourced through assessee. The Court observed that when there was a remand on the basis of a specific finding (in this case, the untenability of shifting of the OP/TC to FOB) the TPO could not have travelled beyond it, given that there was no controversy ever about the inclusion of any comparable.

Li & Fung India Pvt. Ltd. Vs ACIT - TS-228-HC-2017(DEL)-TP - W.P. (C) 11596/2016, CM APPL.45660-61/2016 dated 08.03.2017

2713. The Court held that where the Petitioner was not a foreign company and the TPO did not propose any variation to income returned by petitioner, neither of two conditions of section 144C of the Act were satisfied and therefore the petitioner was not an 'eligible assessee'. Consequently, the Assessing Officer was not competent to pass draft assessment order under section 144C(1) of the Act and therefore the said draft assessment order was quashed.

Honda Cars India Ltd v DCIT - [2016] 67 taxmann.com 29 (Delhi)

2714. The Court set aside references made by AO to TPO for AYs 2011-12 to 2013-14 without giving assessee an opportunity of being heard as required by law despite assessee's objection that the impugned transaction were not associated enterprises as contemplated in Sec 92A. It further held that satisfaction to be arrived at by the AO regarding the existence of the international transaction or specified domestic transaction, even prima facie, is a sine qua non for making the reference to the TPO.

Indorama Synthetics India Ltd [TS-501-HC-2016(DEL)-TP] - W.P.(C) 6422/2013 W.P.(C) 4558/2014

2715. The Court quashed the draft as well as final assessment orders passed by AO confirming TP adjustment for AY 2010-11 in respect of two ESPN entities (partnership firms established in Mauritius), not being

'eligible assessees' as defined u/s 144C by holding that this was an instance of blatant disregard by AO of the DRP's order holding that neither of them were 'eligible assessees' u/s 144(15)(b)(ii), as neither was a 'foreign company', and no variation or TP adjustment arose as a consequence of TPO's order. It observed that, even if no direction was issued by the DRP under Section 144C(5) of the Act, the fact that the DRP held that both the Petitioners were not 'eligible assessees' could not have been ignored by the

AO since DRP is superior authority in relation to the AO.

ESPN Star Sports Mauritius S.N.C. ET Compagnie vs The Union of India - TS-130-HC-2016(DEL)- TP

2716. Relying on the decision in the case of Turner International India Pvt Ltd [TS-400-HC-2017(DEL)-TP], wherein it was held that it was mandatory for the AO to pass the draft

assessment order u/s 144C prior to issuing final assessment order, the Court held that even where the Tribunal had remanded the matter, the AO ought to have passed the draft assessment order under section 144C. Further, it held that section 292B of the Act cannot save an order not passed in accordance with the provisions of the Act since it was an incurable illegality. Accordingly, it held that the final assessment order passed by the AO was without any jurisdiction.

JCB India Ltd vs DCIT-TS-706-HC-2017(DEL)-TP W.P. (C) No. 3399/2016 - dated 07.09.2017

2717. The Court, dismissed Revenue's appeal against Tribunal's order wherein the assessment made by the AO was quashed being void, as it was made in the name of the erstwhile non-existing entity which was amalgamated with Maruti Suzuki India Ltd w.e.f april 1 2012.

Pr CIT vs. Maruti Suzuki Ltd (Successor of Suzuki Powertrain India Ltd)-TS-690-HC-2017(DEL)-TP- ITA No. 65/2017 dated 04.09.2017

2718. The Court dismissed the Revenue's appeal on transfer pricing issue by refusing to condone delay of 586 days in respect on filing of appeal as the reason cited by the Department viz Re-organisation of its panel of counsel and pendency of large number of appeals, could not be considered as sufficient cause to condone the delay.

CIT v Premier Exploration Services Pvt Ltd – TS-959-HC-2016 (Del) – TP

2719. The Court dismissed the Revenue's appeal against the order of the Tribunal wherein the assessments made by the AO / TPO under section 153A of the Act pursuant to search and seizure operations was quashed since no new or incriminating material was found during search and seizure which took place in the assessee's premises after completion of scrutiny assessment under section 143(3). It noted that the AO had, based on existing material, referred the matter to the TPO who proposed a TP adjustment on interest free loans granted to the AE but since there was no incriminating material and the assessee had disclosed all materials during scrutiny assessments concluded earlier, the Court quashed the proceedings.

Baba Global Ltd – TS-1000-HC- 2017 (Del)-TP

2720. The Court allowed the assessee's writ petition directing the Tribunal to decide the pending appeal filed by the assessee as expeditiously as possible, preferably within three months keeping in mind that the assessee was facing compulsory winding-up proceedings and there had been a delay in disposing of the
appeal by the ITAT which prejudiced its winding-up proceedings.

Nortel Netwokrs Singapore Pte Ltd v DCIT– TS-961-HC-2016 (Del) -TP

2721. The Court held that Reference to TPO for the determination of ALP of international transaction could not be made by the AO where there was no assessment pending before him as the determination of ALP envisages computation which is possible only during assessment.

CIT v XL India Business Services Pvt Ltd (ITA No 713 / 2015) – TS-438-HC-2015 (Del) – TP

2722. The Court upheld the decision of the Tribunal wherein the Tribunal deleted penalty by holding that there was reasonable cause on account of which the AMP transactions were not disclosed as international transaction since the assessee was under the bonafide belief that no reporting was required for AMP transactions and that the ruling of the Special Bench of LG Electronics [TS-11-ITAT-2013 (DEL)-TP] which was approved by the High Court in the case of Sony Ericsson Mobile Communications [TS-96-HC-2015 (DEL)-TP], addressing the said issue was passed post the penalty order.

Pr CIT v Haier Appliances India Pvt Ltd (ITA 481 / 2015) – TS-477-HC-2015(DEL)-TP

CIT v Amadeus India Pvt Ltd (ITA 535/2014 & ITA 729/2014) – TS-478-HC-2015 (DEL) – TP

Reebok India Company v ACIT (ITA 23 / 2015 & ITA 55 / 2015) – TS-479-HC-2015 (DEL)-TP

2723. The Court allowed the assessee's writ petition and quashed the reference made by the AO to the TPO for determination of the alleged specified domestic transaction without passing a speaking order on the objections raised by the assessee which was in contravention of Instruction No 3 / 2016 dated March 10,2016. It observed that before making a reference to the TPO, assessee was required to be given an opportunity to show cause why the reference may not be made and thereafter a speaking order was to be passed by the AO. Consequently, it remitted the matter to the AO to pass a speaking order after considering the objections raised by the assessee.

Alpha Nipon Innovatives Ltd – TS-950-HC-2016 (Guj) - TP

2724. Where AO had issued a notice u/s.148 on ground that income had escaped assessment for the reason that no reference was made to the TPO u/s92C and 92CA of the Act to the TPO for international transaction of corporate cost/management cost for AY 2011-12 while the TPO and DRP for AY 2010-11 had held that ALP of aforesaid cost to be NIL, the Court quashed the notice u/s.148 which was issued beyond 4 years on ground that assessee had disclosed his transaction of corporate cost to its AEs in Form 3CEB and thus had disclosed truly all material facts necessary for its assessment of income during assessment proceedings and it was clear from reasons recorded that it referred to the failure of the AO to observe procedure prescribed u/s.92C and 92CA. Thus, there was no failure on part of assessee to disclose material facts relevant for assessment. Accordingly, it quashed the notice u/s.148.

Tudor India Ltd. vs JCIT [TS-1427-HC-2018-(Guj)-TP] R/Special Civil Application No. 15142 of 2018 dated 11.12.2018

2725. The Court, upheld Tribunal's order quashing of assessment order for AY 2009-10 making transfer pricing adjustment without following DRP procedure laid down u/s 144C. It rejected revenue's contention that it was a mere procedure and thus a curable defect. Referring to the provisions of section 144C which provide that the AO shall forward a draft of the proposed order of assessment to the assessee if any variation was proposed in income or loss which may be prejudicial to the assessee, it held that the statutory provisions made it abundantly clear that the procedure was of great importance and mandatory. Such an opportunity could not be taken away by treating it as purely procedural in nature.

CIT vs C-Sam (India) Pvt ltd-TS-626-HC-2017(GUJ)-TP dated-ITA No. 542 of 2017

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31.07.2017

2726. Where the AO disallowed section 10AA benefit while passing the final assessment order which was not proposed in the draft assessment order, the Court held that while passing the final assessment order, the AO cannot go beyond what is proposed in the draft assessment order as it will lead to breach of principle of natural justice as no opportunity would be given to the assessee to file its objection before DRP and accordingly, it confirmed Tribunal's order of deletion of disallowance of section 10AA benefit.

Woco Motherson Advanced Rubber Technologies Limited [TS-173-HC-2017(GUJ)-TP] (Tax Appeal No. 129 of 2017)

2727. The Court dismissed assessee's appeal against Tribunal's order as withdrawn absent objections by Revenue for the same. The Tribunal had upheld revision u/s 263 as AO had erroneously allowed Sec. 10A deduction on transfer pricing addition, contrary to provisions of Sec. 92C(4).

MSourcE (India) Pvt Ltd vs CIT [TS-1003-HC-2018(KAR)-TP] ITA No.48/2015 dated 26.07.2018

2728. The High Court quashed the issuance of notice u/s. 148 of the Act on the ground that the AO failed to mention in the reasons recorded that the income that escaped assessment exceeded Rs.1,00,000 and since the AO initiated the reassessment after expiry of period of four years and before six years. Because the requisite condition under section 149(1)(b) of the Act was not met, further proceedings would be nullified. For the subject year, the AO in the original assessment proceeding had made a reference to the TPO in respect of assessee's international transaction and TPO passed a detailed order under Section 92CA(3) of the Act accepting the arm's length price reported by the assessee in respect of its international transactions (i.e. purchase transactions from AEs) and concluded that no adjustment was required in respect of the same. The assessee filed a writ petition in the court challenging the re-opening of the assessment. The Revenue argued that the assessee did not report the said transaction in Form 3CEB [which according to the Revenue was a deemed international transaction as per section 92B(2)]. However, it was pointed out by the assessee that the amendment by Finance Act, 2012 in section 147 providing for deemed escapement of income on account of assessee's failure to report international transaction or file Form 3CEB, was not applicable to the relevant AY 2006-07.Under these circumstances, the Court opined that without adverting to the other issues argued, the notice was quashed on failure of the mandatory requirement of section 149(1)(b) of the Act not being met and consequentially, the order passed under Section 152 as well as the notice issued under Section 143(2) of the Act was also quashed.

NOVO NORDISK INDIA PRIVATE LIMITED v DCIT [TS-501-HC-2018(KAR)-TP] WP No.21206/2014 (T-IT)

2729. The Court allowed Daimler India's writ and quashed re-assessment proceedings initiated after the expiry of 4 years from the end of the relevant AY 2009-10, observing that it was a 'clear case of change of opinion' as assessee made full & true disclosure at the time of the original assessment. The AO sought to reopen the assessment on the basis that assessee had not disclosed the material fact that they had not commenced business during the year. However,

it observed that the assessee had made disclosure about its business activity in Form 3CEB which was duly taken into account by TPO who specifically recorded in his order that commercial production proposed to start in year 2012. Regarding Revenue's contention that the AO would not look into Form 3CEB, it observed that there was sufficient indication to show that AO considered TPO's order and even assuming AO did not look into Form 3ECB, he was bound to look into the order passed by the TPO. Further, it rejected Revenue's contention that the assessee merely produced books of account before the AO and that there was no presumption that all the books were seen by the AO, and held that it was for the Assessing Officer to arrive at a conclusion based on the materials produced and it was not for the assessee to suggest as to what conclusion should be arrived as the assessee is not expected to submit a draft assessment order. It distinguished Revenue's reliance on the decision of the Apex Court in ALA Firm noting that ALA was rendered in the context of the pre-amended Act and that the decision of the Apex Court in Kelvinator of India rendered in the context of the 1961 would apply.

Daimler India Commercial Vehicles Private Limited vs. DCIT - TS-62-HC-2018(MAD)-TP - W.P.No.43435 of 201 dated 30.01.2015

2730. The Court allowed assessee's writ petition and set aside the DRP's cryptic order wherein the DRP without independent application of mind had only agreed with the findings and the reason cited by the TPO. It observed that in the absence of any such independent reasoning and finding, it should be construed that the DRP had not exercised its power and issued directions by following the mandatory requirements contemplated under Section 144C(6) and (7) which provide that DRP had to consider (i) draft order (ii) objections filed by assessee (iii) evidence furnished by assessee (iv) VO/TPO (v) records relating to draft order (vi) evidence collected by or cause to be collected by it (vii)) result of any enquiry made by, or caused to be made by it and further, it may conduct enquiry to be made by the Income-tax authorities. Thus, noting that DRP had failed to do such an exercise, Court held DRP's order as an order passed without application of mind and remitted the matter back to DRP for fresh consideration.

Renault Nissan Automotive India Private Ltd and Nissan Motor India Pvt Ltd vs DRP-2, Dy.CIT and JCIT [TS-1087-HC-2018(MAD)-TP] WP No.26814 and 26815 of 2017 dated 28.09.2018

2731. The Court upheld the Single Bench's order wherein the writ petition filed by the assessee was dismissed and remitted the assessee to its alternative remedy of appeal before the CIT(A) noting that the DRP's rejection of the objections filed 1 day beyond the stipulated 30 day period was not a direction u/s. 144C(5) r.w.s 144C(6) of the Act and the consequent final assessment order passed u/s. 143(3) r.w.s. 144C(13) of the Act was not an order passed pursuant to DRP directions but an order of assessment simplicitor u/s.143(3) and accordingly, rejected the assessee's plea that remedy of appeal should be to approach the Tribunal and not the CIT(A)

Inno Estates Private Limited vs DRP-2 and ITO [TS-759-HC-2018(MAD)-TP] W.A. No.1001 of 2018 dated 26.07.2018

2732. The Court disposed of the writ petition and directed the TPO to keep the notice issued under provisions of s 92CA(2) in abeyance until the objections against the re-opening of the

reassessment were disposed by the AO. The AO had reopened the assessment on the ground that ALP for services rendered by assessee were higher than the sale consideration received from its AE. It relied on GKN Driveshafts ruling, to opine that if AO had reason to believe that the income chargeable to tax had escaped assessment, AO was bound to dispose of assessee's objections in the manner known to law and only thereafter, could the AO choose to refer the matter to TPO, and the said procedure could have been adopted. Accordingly, the AO erred in straightway referring the matter to TPO without passing a speaking order disposing of objections and it directed the AO to pass a speaking order and TPO to keep the notice in abeyance.

Alden Prepress Services Private Limited vs Dy.CIT (TPO) and Dy.CIT (AO) [TS-721-HC-2018(MAD)-TP] WP No.13815 of 2011 dated 12.07.2018

2733. The Court held that the final assessment order passed, without issuing draft order, and the subsequent corrigendum treating the earlier assessment order as draft order u/s 144C, was invalid. The Court observed that AO passed final assessment order along with demand notice u/s 156 and imposed penalty on assessee. Further, while issuing corrigendum, though AO changed the sections under which the order was passed, he had not withdrawn the penalty and demand notice. Thus, the Court relying upon Delhi HC ruling in JCB India Ltd, Turner International India Pvt Ltd and various other HC rulings held that the window dressing which had been attempted by the Revenue would not give life to an order passed without jurisdiction.

The Court further, differentiating irregularity from illegality, held that the Revenue's act of passing a final assessment order, in contravention of provisions of Sec 144C, cannot be corrected, and for Revenue taking support of provisions of Sec 292B, held that if the contention of the Revenue was accepted, then it would literally render all the provisions of the Income Tax Act subservient to Section 292B and allowing such a contention would be misreading the intention of the Parliament in enacting Section 292B and Section 144-C.

ACIT Media Circle II vs Vijay Televisions -TS-469-HC-2018(Mad)-TP- ITA No 1327 to 1329 of 2014 dated 23.04.2018

2734. The Court dismissed assessee's writ challenging the order of enhancement by DRP wherein the DRP directed the AO not to restrict TP adjustment to the proportion of international transactions to the total operating costs and held that the DRP order was binding on the AO, and the assessment order was an order giving effect to the direction issued by DRP and against such an order the assessee could file an appeal before Tribunal. Rejecting assessee's reliance of various judicial precedents viz., Mobis India Ltd [TS-235-ITAT-2013(CHNY)-TP], IL Jin Electronics [TS-11-ITAT-2009(DEL)], it held that none of the decisions arose out of a challenge in Writ petition to the order passed by the DRP. Accordingly, it directed the AO to pass a final assessment order after giving effect to DRP directions and clarified that the assessee was free to challenge such assessment order before Tribunal.

Hyundai Motor India Limited vs The Secretary (Income Tax Department) and Ors.-TS-823- HC-2017(MAD)-TP dated 20.10.2017

2735. The Court dismissed the assessee's writ petition challenging i) the DRP directions refusing to condone assessee's delay in filing objections before it and ii) the consequent final

assessment order by AO making the TP-adjustment for AY 2012-13. The AO issued a draft assessment order dated 29.03.2016 confirming the TP addition on account of excess interest paid on CCDs, which was served on the asessee on the same day. The assessee filed objections before DRP on April 29, 2016, representing to the DRP that it had received the order only on 31.03.2016. The Court also observed that the assessee had deliberately submitted to the AO that it had filed the appeal/objection before DRP on 27.04.2016 (i.e. within time limit prescribed of 30 days from the day of service of Draft AO order), consequently preventing AO from passing the final assessment order u/s 144C(3). The DRP after receiving information from the AO rejected the objections on the basis that the assessee had filed the same beyond the specified period of 30 days (delay of 1 day) vide order dated 10.11.2016. Thereafter, AO passed a final assessment order on November 18, 2016 after incorporating the adjustment proposed by TPO. The Court rejected the assessee's contention that the final order of the AO was not in accordance with the provisions of Section 144C(13), since the DRP had not given any specific directions but had rejected assessee's objections on ground of delay and held that the dismissal or rejection of the objection and communication of the same was to be treated as a direction given by the DRP to the Assessing Officer to complete the assessment as per draft order. It also held that the that assessee was entitled to file an appeal before the Appellate Authorities as the AO's final order was well within the period of limitation.

Inno Estates Private Limited vs DRP/ITO- TS-479-HC-2017(MAD)-TP- dated 14.06.2017

2736. The Court confirmed Tribunal's order for AY 2009-10, holding that AO exceeded the jurisdiction by making new disallowance while passing order u/s 144C(13) giving effect to DRP directions when such disallowance had not emanated from the draft assessment order or from the directions of DRP.

CIT vs Sanmina SCI India Pvt. Ltd. -TS-643-HC-2017(MAD)-TP-567 of 2016 dated 08.08.2017

2737. The Court granted stay of remaining demand to the assessee pending the disposal of appeal as it deemed the case of the assessee to be a fit case for stay in light of the facts viz. the AO had passed a conditional order under section 220(6) of the Act directing the assessee to pay Rs. 5 crores out of Rs. 10 crores but also mentioned that if the appeal was not disposed of by September 30, 2015 it would review the stay order. As the appeal had not been disposed of and the assessee had already paid Rs. 5 crore, the Court granted stay till disposal.

Jyothy Laboratories Ltd v DCIT (Writ Petition No.3145 of 2013) - TS-451-HC-2015(MAD)-TP

2738. The Court set aside the assessment order passed by the AO as the same was passed without referring the matter to the TPO and the AO had not passed a draft assessment order. It held that since the provisions of the Act make it very clear that under Section 92CA of the Act the only option is to place the matter to the TPO, it was necessary for the matter to be placed before the TPO.

Carrier Race Technologies Pvt Ltd v ITO (Writ Petition No: 13442 of 2015) – TS-583-HC-2015 (Mad) – TP

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2739. The Court dismissed the assessee's petition challenging the reference made by the AO to TPO on the ground that it was in contravention of the CBDT Instruction No 3/2016 and noted that as per law it was necessary for the AO to decide the objections, if any, to the applicability of Chapter X before referring the transactions to the TPO as also before determining the ALP of international transactions himself and that in the instant case, the AOs satisfaction recorded contained sufficient reasons and that the AO had clearly indicated the relationship between the Petitioner and the other parties and made a comparative chart pursuant to which he alleged that the sales were under invoiced. It held that the course of action adopted by the AO was sufficient to refer the matter to the TPO and therefore the Petitioner was incorrect in challenging the reference. As regards the service of order, the Court held that the contention of the assessee that the reference was void ab initio on account of non-service of the satisfaction note prior to making reference to TPO was misplaced as the failure to supply the satisfaction note prior to reference was a mere irregularity and did not prejudice the Petitioner in any manner whatsoever.

Shri Vishnu Eatables (India) Limited [TS-795-HC-2016 (P&H)-TP] (Civil Writ Petition No. 13613 of 2016 (O&M))

2740. The Court held that the power to grant stay was only to be exercised when a strong and sound prima facie case was made out by the assessee or where the entire purpose of the appeal would be frustrated by allowing the recovery proceedings to continue during the pendency of appeal. The Court observed that the assessee had already been allowed to pay the outstanding demand on account of AMP adjustment in four instalments and no prejudice had been demonstrated to be caused to the assessee and there was no error in the order of the CIT(A). The Court therefore dismissed the petition seeking stay for balance demand.

M/s Perfetti Van Melle India Pvt Ltd v DCIT (CWP No.21769 of 2015) – TS-585-HC-2015 (P&H) – TP

2741. The Tribunal remitted the functional comparability of 7 companies back to the DRP observing that the DRP passed a cryptic order without deciding on the issue of functional comparability of the individual companies and merely mentioned that assessee's arguments were dealt with by the TPO. It directed the DRP to pass a reasoned and speaking order on comparability of individual companies. Regarding the treatment of foreign exchange gains/loss while computing the margin of companies, the Tribunal noted that the DRP had not applied its mind while rendering its decision rejecting the assessee's claim, even though arguments were raised before it and accordingly restored the issue to the file of the DRP for examination and adjudication by passing a reasoned and speaking order.

Telsima Communications Pvt. Ltd. vs. DCIT - TS-1084-ITAT-2017(Bang)-TP - IT(TP)A No.1178/Bang/2010 dated 17.11.2017

2742. The CIT set aside the assessment order passed u/s. 143(3) on the ground that the original assessment order erroneous and prejudicial to Revenue as TP adjustment proposed by TPO was not incorporated CIT gave a direction to AO to conduct de-novo assessment. However, the AO passed the final assessment order without following the procedure laid down u/s.92CA. The Tribunal set aside the order and directed the AO to refer assessee' s case to TPO for computing ALP of transaction before passing the draft assessment order.

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NT Back Office Services Pvt Ltd vs Pr.CIT [TS-1198-ITAT-2018(DEL)-TP] IT(TP)A No.368/Bang/2016 and CO No.13/Bang/2017 dated 11.10.2018

2743. Where the DRP had rejected assessee's ground that functional comparability was not considered and merely stated that the TPO had discussed functional comparability of comparables, the Tribunal held that any quasi-judicial authority had to pass a reasoned order and accordingly, restored the matter to the file of DRP for fresh adjudication after providing adequate opportunity of being heard to both sides.
Mann and Hummel Filter Pvt Ltd vs ACIT-TS-800-ITAT-2017(Bang)-TP dated 08.09.2017

2744. Where the assessee had amalgamated with another entity (Telelogic India P ltd) w.e.f May 27, 2010 and despite intimation, the TPO passed order in the name of the non-existent entity and the assessee had not filed appeal memo etc in the name of the merged entity, the Tribunal held that both the assessee and Revenue had not followed the procedure established by law and remanded the matter to the file of DRP directing it to pass order in the name of Telelogic India P ltd.
Corio India Infotech Services P. Ltd, (Since merged with Telelogic India P. Ltd) v DCIT-TS-788-ITAT-2017(Bang)-TP dated 23.08.2017

2745. The Tribunal set aside assessment order and restored the matter back to DRP for fresh decision after providing reasonable opportunity to both sides noting that DRP had passed an ex-parte order after assessee had not appeared for two hearings (20.10.2016 and 21.11.2016) which was a case of not providing sufficient opportunities and in the interest of justice, DRP should have provided more opportunities of being heard to the assessee.
WEG Industries (India) Pvt Ltd vs ITO [TS-1327-ITAT-2018-(Bang)-TP] IT(TP)A No.419/Bang/2017 dated 31.12.2018

2746. The Tribunal observed that the assessment proceedings had been continued in the name of GE Medical Systems Pvt Ltd (assessee) rather than in the name of Wipro GE Healthcare (into which the assessee had merged) and therefore cancelled the assessment order passed in the hands of GE which was non-existent on the date of the assessment order. It held that any order made on a non- existent entity is a nullity and invalid.
GE Medical Systems India Pvt Ltd v DCIT [I.T.(T.P.) A. No.328/Bang/2015] – TS-546-ITAT-2015 (Bang) – TP

2747. The Tribunal dismissed the assessee's appeal as infructuous since the assessee had accepted the resolution reached under MAP proceedings between the Indian and US authorities in respect of TP adjustments for the relevant year.
Ocwen Financials Solution Pvt Ltd v DCIT [IT(TP)A 1318 / Bang / 2011] – TS-570-ITAT-2015 (Bang) – TP

2748. The Tribunal granted stay to the extent of balance tax payable (60 percent) as the assessee had a prima facie good case considering that relying on the Delhi High Court decision in Sony Ericsson, most of the issues were decided in favour of the assessee and that the TPO had accepted the ALP of the international transaction in the immediately succeeding assessment year without any change in facts and circumstances.

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Page Industries Ltd v DCIT [IT(TP) No.1 63/Bang/2015] – TS-613-ITAT-2015 (Bang) – TP

2749. The Tribunal held that the CIT(A) merely directing the TPO to apply the functionality test without rendering any finding as to which comparables were functionally dissimilar would tantamount to setting aside the matter which was beyond the mandate of section 251(1)(a) of the Act.
E4e Business Solutions India Pvt Ltd v DCIT (I.T. (T.P.) A. No.1765/Bang/2013) – TS-541-ITAT-2015 (Bang) – TP

2750. The Tribunal held that the direction of the CIT(A) to verify the availability of financials of comparables for the previous year did not limit the power of the AO / TPO to consider comparability on their yardsticks and therefore the direction could not be held to be unfair.
DCIT v Vmoksha Technologies Pvt Ltd [IT(TP)A No 1053 / Bang / 2013] – TS-545-ITAT-2015 (Bang) – TP

2751. The Tribunal allowed Revenue's appeal against CIT(A)'s order for AY 2005-06 and remitted the entire TP-issue back to CIT(A) for fresh decision. Noting that CIT(A) had restored the comparability of certain functionally dissimilar companies back to the file of AO/TPO. It held that the entire matter had to go back to the file of CIT(A) for a fresh decision as the CIT(A) should have decided the matter himself instead of restoring it to the file of AO. Further, it rejected Rs. 1-200 cr turnover filter applied by CIT(A) on the ground that the Tribunal had been consistently adopting a filter of 1/10th to 10 times the assessee's turnover.
ITO vs Intellinet Technologies India Pvt Ltd-TS-527-ITAT-2017(Bang)-TP-ITA No. 1613/bang/2013 dated 09.06.2017

2752. The Tribunal, following the decision of the Special Bench in the case of DCIT v Quark Systems Pvt Ltd [TS-23-ITAT-2009 (CHANDI) – TP], held that an assessee cannot be estopped from seeking an exclusion even from its own selection, at a later stage if it is found that comparables selected were not matching with its profile.
Radisys India Pvt.Ltd. v. ITO [IT(TP) A No.371/Bang/2015-TS-489-ITAT-2015(Bang)-TP

2753. The Tribunal held that the AO could not make disallowance under section 40A(2) of the Act once the international transaction was subject matter of Chapter X of the Act.
Herbalife International India Pvt Ltd v DCIT (IT(TP)A No.1679/Bang/2012 & IT(TP)A No.184/Bang/2013) – TS-491-ITAT-2015 (Bang) -TP

2754. The Tribunal dismissed the appeal filed by the Revenue on transfer pricing issues and deduction under section 10A as it was in violation of CBDT Circular No 21/2015 which provides for a monetary limit of Rs.10 lakh for preferring appeal by the Revenue before the Tribunal.
Curam Software International Pvt Ltd – TS-1037-ITAT-2016 (Bang)- TP

2755. Where the assesee had raised proper objections before DRP and the DRP failed to adjudicate on the matter, the Tribunal restored the TP-issues back to AO/TPO in respect of international transaction of software development services provision for AY 2007-08 for fresh decision after affording adequate opportunity of being heard to the assessee.

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Nvidia Graphics Pvt Ltd – TS-895-ITAT-2016 (Bang) – TP

2756. The Tribunal restored TP-issues relating to transactions in assessee's manufacturing segment back to AO for AY 2006-07 noting that although the DRP noted the facts and objections raised by assessee, it decided the issue in one line by stating that "The panel is of the view that the filters adopted by the TPO are very reasonable and the objections of the assessee cannot be accepted". It held that the order of the DRP was very cryptic and without any reasoning and therefore, the entire issue was to be restored back to the file of the AO/TPO for fresh decision.

Tyco Electronics Corporation India Pvt Ltd – TS-894-ITAT-2016 (Bang) - TP

2757. The Tribunal, relying on the decision of the co-ordinate bench in the assessee's own ase for the subsequent assessment year, remitted TP-issues relating to comparables selection, risk adjustment and depreciation adjustment back to AO/TPO. Noting that the assessee sought exclusion of Tata Elxsi Ltd., Flextronics Software Systems Ltd. (Seg.), R Systems International Ltd. (Seg.), Kals Information Systems Ltd.(Seg.), Infosys Ltd., Accel Transmatics, Megasoft and Bodhtree Consulting Ltd as well as risk and depreciation adjustment, it relied on the decision of the Tribunal for the subsequent AY and restored the entire matter to the file of the AO/TPO for fresh decision after allowing adequate opportunity of being heard to the assessee.

Infineon Technologies India Pvt Ltd – TS-893-ITAT-2016 (Bang) – TP

2758. The Tribunal dismissed the appeal filed by the assessee against order passed by AO pursuant to DRP's directions for AY 2011-12 on the ground that nobody appeared on assessee's behalf on November 22, 2016 (hearing date) even though the date of hearing was mentioned in the notice of hearing which had been issued and served on assessee by registered post with acknowledgement due and held that since the assessee was not interested in prosecuting its case the appeal was infructuous.

Karuturi Global Ltd – TS-934-ITAT-2016 (Bang) – TP

2759. The Tribunal refused to condone the delay of 1 year in filing appeal against the CIT(A) order confirming TP adjustment in respect of international transactions in the absence of proper explanation for delay. It rejected the contention of the assessee that although the CIT(A) dispatched the order in August 2008, the assessee could not find it in its record and held that non-availability of the order of the CIT(A) in its record did not mean that the order of the CIT(A) was not communicated to him. It held that the assessee, being a private limited company duly represented by professionals should have been vigilant towards its right and interests and also noted that the assessee was delayed in filing the application for condonation of delay as well.

Molex India Tooling Pvt Ltd – TS-1018-ITAT-2016 (Bang) – TP

2760. The Tribunal rejected assessee's contention that draft assessment order was passed without regard to the internal instruction issued by the Department that no transfer pricing adjustment is to be made in a routine manner when the quantum of international transactions with associated enterprises is less than Rs. 15 crores and held that where international transactions were referred to transfer pricing officer with prior permission of CIT, then nothing

in section 92A prohibited making of such reference and the instruction was only an internal matter of guidance to officers and there was no statutory prohibition to the making of such reference or the passing of a transfer pricing order based on such reference.

iSoft Health Services (I) P Ltd [TS-819-ITAT-2016 (Bang)-TP] (IT(TP)A.1256IBangI2012)

2761. The Tribunal held that where asessee had to establish receipt of benefits on account of services rendered by its AEs and it submitted that it had evidence to show that there were considerable correspondences between AEs and itself, it was not open to TPO to hold that there was no benefit whatsoever received by assessee without verifying documentation submitted by assessee. It restored the matter to the file of the AO/TPO.

SKF Technologies (India)(P)Ltd v DCIT- [2016] 68 taxmann.com 318 (Bangalore-Trib)

2762. The Tribunal quashed CIT's order u/s 263 for AY 2008-09 wherein CIT invoked revisionary powers u/s 263 for the reason that AO had not referred ALP determination of international transactions to TPO as required under CBDT Instruction No. 3/2003, by relying on Bombay HC decision in Vodafone India & concluding that CIT's reliance on Delhi HC decision in Sony India and ITAT Special Bench decision in Aztec was misplaced as these judgments were rendered in the context of Sec 92CA(4) as existing prior to the amendment in 2007.

Obulapuram Mining Company Pvt. Ltd vs DCIT [TS-512-ITAT- 2016(Bang)-TP ITA No.545(Bang) 2012

2763. The Tribunal dismissed the miscellaneous petition by the assessee against the prior order of the Tribunal filed on the ground that the impugned order which related to transfer pricing issues was passed without arguments made by either party and held that the Tribunal, in the said order specifically mentioned that the 'rival submissions were considered' and the assessee had not even filed an affidavit of its officers / directors or authorized representatives who appeared before the Tribunal during appellate proceedings to contradict the finding of the Tribunal and therefore the contentions being unsupported were rejected.

M Modal Global Services Pvt Ltd v CIT - TS-606-ITAT-2016 (Bang) - TP (In IT(TP)A Nos.176 & 196(B.)/2012)

2764. Where the grounds of appeal filed by the Revenue did not emanate from the DRP order, as no directions were issued therein by the DRP as alleged by Revenue in its grounds, the Tribunal dismissed the appeal of the Revenue.

DCIT vs Subex Ltd-TS-569-ITAT-2017(Bang)-TP-IT(TP)A No.239/Bang/2014 dated 31.05.2017

2765. The Tribunal, allowed Revenue's appeal challenging CIT(A)'s direction to AO/TPO to re- compute/reconsider ALP determination without discussing merits of the case. It held that it was incumbent upon the CIT(A) to adjudicate the issue and it was beyond its scope to set aside the matter to the file of AO for recalculation. Accordingly, the Tribunal remanded the matter back to the file of CIT(A) to adjudicate the issue after giving the assessee an opportunity of being heard.

DCIT vs. Wipro GE HealthCare Ltd-TS-712-ITAT-2017(Bang)-TP-IT(TP)A no. 1392/bang/2013 dated 18.08.2017

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2766. The Tribunal set aside DRP's cryptic & non-speaking order on TP-issues for assessee providing data management services to AEs, since the order of DRP was cryptic and not a speaking / reasoned order.

Symphony Marketing Solutions India P Ltd -TS-734-ITAT-2017(Bang)-TP-I.T(TP).A No.336/Bang/2015) dated 16.06.2017

2767. The directions from DRP were received by AO on 29.12.2015 who was required to pass final assessment order on or before 31/01/2016, however the final assessment order was passed by AO on 18/02/2016 which was beyond the period to period prescribed u/s 144C(13) (i.e one month from theend of the month in which directions from DRP were received by AO). The Tribunal applying the provisions of section 144C, dismissed assessee's preliminary ground for quashing final assessment order passed beyond the time limit prescribed u/s 144C (13) pursuant to DRP directions for AY 2011-12 and held that AO did not have any discretion while passing the assessment order except to follow the directions of DRP and therefore it was not a jurisdictional issue. It held that since the fate of the proceedings initiated u/s 143(2) r.w.s. 144C was well known to the assessee as DRP had already passed the directions along with a copy to assessee, no prejudice was caused to assessee. Further relying on the decision in the case of Rain Cements, it distinguished the language of section 153 which expressly prohibited passing order beyond the prescribed therein, and held that section 144C did not provide for such issue and therefore the proceedings could not be declared null and void.

The Himalayan Drug Co vs DCIT-TS-566-ITAT-2017(Bang)-TP-ITA No. 807/bang/2016 dated 21.06.2017

2768. The Tribunal, noting that the DRP had not discussed the functional profile of each company sought to be excluded or included by assessee individually, remitted the matter to the file of DRP for fresh adjudication after providing an adequate opportunity of being heard to the assessee. Further, in respect of assessee's ground on rejection of TP documentation and use of incorrect data/ information in ALP computation, it held that since assessee had filed a rectification application which was pending before the DRP, it should not have raised the ground before Tribunal, accordingly it directed the DRP to adjudicate these grounds on merits.

Symphony Marketing Solutions India P Ltd vs ITO-TS-582-ITAT-2017(BANG)-TP-I.T.(TP)A no.336/bang/2015 dated 16.06.2017

2769. The Tribunal, noting that the assessee had raised TP-grounds/additional grounds relating to comparability analysis, risk adjustment, application of various filters, restored TP-issues back to the AO/TPO for fresh adjudication for AY 2007-08 and 2008-09 as DRP's order was not speaking and reasoned.

Target Corporation Ltd vs. DCIT-TS-546-ITAT-2017(Bang)-TP- IT(TP)A Nos.1561 & 1562(B)/2012 dated 09.06.2017

2770. Noting that the AO had not given effect to DRP directions while passing the final assessment order to exclude ICC International Agencies Ltd from the list of comparables, the Tribunal dismissed Revenue's appeal for AY 2011-12 and held that an appeal before the Tribunal was maintainable only when the final assessment order was passed in pursuance of and

conformity with the directions issued by DRP. Referring to the provisions of section 144C it held that AO/TPO was bound to give effect to DRP's directions irrespective of the fact whether the same are acceptable to the Revenue or not and thus dismissed the appeal.

DCIT vs Coriant Communication India Pvt ltd-TS-543-ITAT-2017(BANG)-TP-IT(TP)A No.652/Bang/2016 dated 02.06.2017

2771. The Tribunal, noting that the DRP had not considered assessee's ground regarding TPO wrongly invoking provisions of section 92CA as the reference under the section was void ab initio being invoked without satisfying the conditions therein, directed TPO to decide that aspect first, remitted the TP-issue back to the file of AO/TPO for fresh decision. Further, it held that since the main issue relating to TPO's decision to invoke the provisions of section 92CA was yet to be decided, the other grounds relating to TP adjustment of Rs, 2.34crores should also be decided afresh by the AO/TPO after deciding the technical aspect of the matter regarding validity to invoke the provisions of sec.92C(3)(c) of the Act, 1961 and accordingly, remitted the same.

Maxim India Integrated Circuit Design Private Ltd v DCIT-TS-519-ITAT-2017(BANG)-TP-IT(TP)A No. 1660(B)2016 dated 04.04.2017

2772. In the original order, the Tribunal, had accepted assessee's contention that CIT(A)'s order was cryptic in respect of inclusion/exclusion of comparables for IT enabled services had restored the matter back to the CIT(A) for a fresh decision. However, regarding CIT(A)'s decision of not considering interest received on delayed payments from AE as operating income for computation of PLI, it had held that it was based on the High Court decision in the case of Sharavathy Steel Products [347 ITR 371]. The assessee filed a miscellaneous petition contending that there was an apparent mistake in the order of the Tribunal as the Tribunal ought to have remanded this issue back to the file of the CIT(A) as well. The Tribunal dismissed the Miscellaneous Petition filed by assessee noting that it was apparent that the order of CIT(A) on this issue was not cryptic and accordingly held that there was no apparent mistake in the Tribunal order.

Syniverse Teledata Systems Pvt Ltd (Formerly known as MACHTeledata Systems Pvt Ltd) vs. DCIT-TS-845-ITAT-2017(Bang)-TP dated 26.09.2017

2773. The Tribunal rejected assessee's contention that AO's draft assessment order was a final assessment order (as it had computed tax liability in the said order and initiated penalty proceedings) and therefore bad in law. It held that assessee's reliance on the case of Vijay Television [107 DTR (Mad) 111] was not valid as in that case a corrigendum was passed by the AO in which it was stated that the order passed earlier as final assessment order had to be read and treated as draft assessment order. Accordingly, working out of tax liability did not make a draft order final and it was not a case of the assessee that demand notice was issued along with the draft assessment order.

DICT vs Torry Harris Business Solutions Pvt Ltd-TS-463-ITAT-2017(BANG)-TP-IT(TP)A Nos 238/B/2014, 1495/B/2015 and 266/B/2016 dated 14.04.2017

2774. Where the DRP had not recorded any specific finding on assessee's objections regarding various comparables such as high turnover, big size, brand and high profitability, the Tribunal restored the DRP's cryptic order on comparables selection for fresh decision

directing it to decide the exclusion of 7 comparable companies contested by assessee by way of a speaking and reasoned order

Akamai Technologies India Private Limited vs. DCIT-TS-757-ITAT-2017(Bang)-TP IT(TP)A No. l 122/Bang/2011 dated 08.09.2017

2775. Where the DRP upheld CUP method as Most Appropriate Method (MAM) instead of TNMM adopted by TPO, but, the AO/TPO passed final order without giving effect to DRP directions, the Tribunal deleted the TP addition in case of the assessee for AY 2010-11 and held that the AO/TPO acted in clear defiance and disregard to the binding directions of the DRP. It held that when the directions of DRP were binding then the TPO/A.O. were bound to give the effect to the directions of DRP irrespective of the fact whether the same are acceptable or not to the department. It held that the remedy to file appeal against the DRP's directions was available to the department when a final order is passed in pursuant to the directions of the DRP.

DCIT Vs Lenovo India Pvt. Ltd - TS-259-ITAT-2017(Bang)-TP - I.T. (T.P) A. No.511 /Bang/2015 dated 31.03.2017.

2776. The Tribunal set aside the order of the CIT(A) in the case of the assessee engaged in providing software service and directed the CIT(A) to re-adjudicate issues relating to functional comparability and application of filters in light of various tribunal rulings, noting that the CIT(A) had simply remanded the issues in light of Delhi Tribunal ruling in Actis Advisers P. Ltd. Vs. DCIT 20 ITR (Trib) 138. It observed that the findings reproduced by the CIT (Appeals) were only a broad guideline but not the factual finding on the comparability of the comparables selected by the TPO and contested by the assessee. Further, it held that the CIT(A) had no jurisdiction to remand the issue to AO/TPO and held that he was to decide it himself and that if he needed further verification of fact, a remand report could have been sought from the TPO.

Athena Semiconductors Pvt. Ltd. (merged with Broadcom India Pvt. Ltd.) Vs DCIT - TS-383-ITAT-2017(Bang)-TP - IT(TP)A No.1630/Bang/2013 dated 05.05.2017

2777. Where the AO passed the final assessment order without issuing a draft assessment order as provided in section 144(C)(1), the Tribunal accepted the assessee's contention that, in view of the provisions u/s 144C(1), he ought to have been given an opportunity to present its objections before DRP on the basis of a draft assessment order, failing which the final order issued by AO was void-ab-initio. Relying on the decision of Zuari Cement Ltd. [TS-271-HC-2013(AP)- TP] wherein it was held that AO is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objection and then compete assessment, it held that the final order of the assessment was clearly contrary to section 144C of the Act.

Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

2778. The Tribunal held that where the due date for issuing the final assessment order as provided in section 144(C)(4) was February 28, 2011 (within one month from the end of the month in which either (a) the acceptance of the assessee is received or (b) the period of filing of objections under sub-section (2) expires and the assessee does not file such objections) but

the order was actually issued on March 25, 2011, the order passed by AO was contrary to law and void –ab- initio.

Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

2779. Where the assessee had filed a letter on 3/3/2015 intimating change in address in respect of appeal for AY 2005-06 but had not filed a separate letter intimating address change in respect of appeal for subject AY 2009-10, the Tribunal allowed the assessee's miscellaneous petition, and recalled its ex-parte order dated 7/10/2016 for AY 2009-10, opining that not filing of separate letter about the change of address in respect of present appeal being in IT(TP)A No.2871Bang/20 14 for assessment year 2009-10 was an inadvertent mistake and hence, there was a reasonable cause for non-appearance of assessee on the date of hearing. Accordingly, as per Rule 24 of Income-tax Appellate Tribunal Rules 1963, it recalled its earlier order and fixed the appeal for hearing on May 24, 2017.

Maxim India Integrated Circuit Design Pvt. Ltd. vs. DCIT - TS-262-ITAT-2017(Bang)-TP - M.P No.35lBang/2017 dated 10-3-2017

2780. The Tribunal set aside the CIT(A)'s cryptic order with respect to the issue of selection of comparables and restored the matter to the CIT(A) for fresh decision by way of a speaking and reasoned order. It considered assessee's plea that various objections were raised before CIT(A) for exclusion of Bodhtree Consulting Ltd and Kals Information Systems Ltd but the CIT(A) had decided the matter only on the basis of assessee's objection that Bodhtree Consulting Ltd had abnormal profit margin. However, it rejected the assessee's contention that issue regarding exclusion of these two comparables on the ground that the issue was now covered by various Tribunal orders and held that it would do not like to promote a culture of not bringing on record all materials before the lower authorities.

VeriFone India Technology Pvt. Ltd. vs. ITO - TS-293-ITAT-2017(Bang)-TP - IT (TP) A No.300 (Bang) 2014 dated 17-03-2017

2781. The Tribunal set aside the order of the DRP for AY 2008-09 on TP-issues viz. regarding non -exclusion of certain comparables, non-inclusion of comparables, risk adjustment, ALP of Management fees, RPT Filter, Employee cost filter etc by holding the same to be cryptic, non-speaking and non-reasoned and thus remitted the issues to TPO for fresh decision after affording assessee adequate opportunity of being heard.

UL India Private Ltd vs DCIT - TS-207-ITAT-2017(Bang)-TP- IT(TP)A No. 1564(Bang) 2012 dated 03.03.2017

UL India Pvt Ltd vs DCIT - - TS-209-ITAT-2017(Bang)-TP - IT(TP)A No.1240//Bang/2011 dated 23.02.2017

2782. Noting that the assessee placed a copy of MAP order before the Tribunal, it dismissed assessee's transfer pricing grounds as withdrawn in view of MAP order under Article 27 of the relevant DTAA for AY 2009-10.

DCIT v Hewlett Packard (India) Software Operation Pvt Ltd – TS-1039-ITAT-2016 (Bang) – TP - IT(TP)A No.213lBang/2014 IT(TP)A No.2881Bang/2014 dated 04.11.2016

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2783. The Tribunal allowed the miscellaneous petition filed by assessee seeking correction of its previous order wherein the Tribunal set aside the order of the CIT(A) and directed for the selection of 2 comparables viz. Exensis Software Solutions and Thirdwave software Solutions on ground that they could not be excluded merely because of their high profit margin, noting that the assessee sought their exclusion on the ground of functional dissimilarity. Accordingly, it recalled the earlier order to consider assessee's claim for comparable exclusion on ground of functional dissimilarity and scheduled hearing on 23.02.2017.

Maxim India Integrated Circuit Design Pvt. Ltd vs ITO - TS-108-ITAT-2017(Bang)-TP - M.P. No.10S/Bang/2016 dated 13.01.2017

2784. The Tribunal set aside the order of the CIT(A) wherein he had directed the AO to exclude 3 functionally dissimilar companies viz. Exensys Software Solutions Ltd, Four Soft Ltd and Geometric Software Solutions Co Ltd from the list of comparables. The Tribunal held that as per the provisions of Section 251 of the Act the CIT(A) has the power to confirm / reduce / enhance or annul the assessee but does not have the power to remand the matter for fresh consideration. It held that the CIT(A) should not have remanded the matter to the AO and instead ought to have exercised his power under the Act to complete the assessment by excluding companies which were functionally dissimilar. Accordingly, it directed the AO to examine the comparability of the 3 companies on the basis of the submission made by the assessee and to find out whether these companies were functionally dissimilar to that of the assessee or not while making the ALP adjustment.

ITO Vs Crimsonlogic India Pvt. Ltd.- TS-143-ITAT-2017 (Bang) – TP - IT(TP)A No.1666lBang/2013 dated 31.01.2017

2785. The Tribunal accepted the Revenue's contention that CIT(A)'s direction to exclude certain functionally dissimilar companies in light of guidelines laid down by Delhi Tribunal in Actis Advisers Pvt. Ltd. Vs DCIT, was beyond the mandate of Sec 251(1)(a) and held that the CIT(A) should not have restored the matter to the file of the AO with certain directions and that he ought to have decided the issue himself. Accordingly, it remitted the TP-issues raised vide both the assessee's and Revenue's appeals for AYs 2004-05 and 2005-06 to the file of CIT(A) for fresh adjudication.

DCIT vs. AOL Online India Pvt Ltd - TS-134-ITAT-2017(Bang)-TP - IT (TP)A Nos.1669 & 1670(Bang} 2013 dated 25-01-2017

DCIT vs. E4E Business Solutions Pvt. Ltd - TS-221-ITAT-2017(Bang)-TP - 1763/Bang/2013 (2004-05), 1781/Bang/2013 (2004-05) 1764/Bang/2013 (2005-06) 1782/Bang/2013 (Asst. Year 2005-06) dated 17-3-2017

2786. The Tribunal dismissed the assessee's appeal for AY 2009-10 as well as transfer pricing grounds raised in Revenue's appeal as TP-issues raised therein were resolved as per MAP order under Article 25 of the Indo-US DTAA and the MAP order had also passed by AO/TPO.

Northern Operating Services Pvt. Ltd. vs. DCIT – TS-1086-ITAT-2016 (Bang) – TP - I.T. (TP)A. No.261/Bang/2014 dated 13.12.2016

2787. Relying on the decision of the coordinate bench in the assessee's own case for the prior AY, the Tribunal remitted the TP grounds raised by assessee (contract manufacturer / distributor of medical equipment) to the file of DRP for re-adjudication, noting that identical TP issues

involving additions with respect to royalty, distribution / trading, trademark and interest had been remitted back by ITAT for AYs 2006-07 to 2010-11since both TPO and DRP had failed to consider detailed submissions made by assessee, which was so in the instant case as well.

Wipro GE Health Care Pvt Ltd v ACIT – TS-109-ITAT-2017 (Bang) – TP - ITA No. 406IBang/2016 dated 09.01.2017

2788. The Tribunal remitted TP-issues to DRP for passing fresh direction in case of assessee rendering software development services to its AEs during AY 2007-08, noting that the DRP had upheld TPO's application of filters while selecting appropriate comparables for benchmarking, and had rejected assessee's objections with respect to 'secret data' u/s 133(6) used by TPO. It held that the order passed by TPO was cryptic and non-speaking and that no proper reasoning was given by DRP while dismissing assessee's objections. Accordingly, it remanded the matter stating that DRP had not given proper reasons while issuing directions which it ought to have done.

ABB Global Industries & Services Ltd. Vs DCIT - TS-137-ITAT-2017(Bang)-TP - IT(TP)A No.1142//Bang/2011 dated 07.02.2017

2789. The Tribunal dismissed revenue's appeal for AY 2009-10 on transfer pricing issues and deductions under section 10A on the ground that the appeal filed by revenue was in violation of CBDT Circular No 21/2015, prescribing pecuniary limit for preferring appeal by Revenue before ITAT as beyond Rs 10 Lakhs.

Curam Software International Pvt Ltd - TS-1037-ITAT-2016(Bang)-TP

2790. Where the DRP's findings were very cryptic and in view of the settled position of law that any order of a quasi-judicial authority should be a speaking and reasoned order, the Tribunal restored the entire TP-issue in respect of inclusion/exclusion of comparables back to the DRP for fresh decision by way of a speaking and reasoned order for AY 2007-08.

Moody's Analytics Knowledge Services (India) Pvt Ltd [TS-838-ITAT-2017(bang)-TP IT(TP)A No.1238/Bang/2011 dated 22.09.2017

2791. Relying on the decision in the case of Maruti Suzuki India (wherein under similar facts, assessment made in the name of non-existent entity post amalgamation was quashed), the Tribunal rejected Revenue's contention that since in the assessment order, along with the name of the merged company (Aztecsoft Ltd), the name of the successor company (Mindtree Ltd) was also mentioned, it could not be said that the assessment was completed in the name of the merged company, and quashed the assessment order & revisionary order passed in the name of non-existent merged entity (Aztecsoft Ltd).

Mindtree Ltd (Previously known as Aztecsoft Ltd, now merged with Mindtree Ltd.) vs. DCIT-TS-1014-ITAT-2017(Bang)-TP- IT(TP)A No. 277/Bang/2014 dated 08.12.2017

JCB India Limited (formerly known as JCB Manufacturing Pvt. Ltd) vs. DCIT-TS-1034-ITAT-2017(DEL)-TP dated 12.12.2017

2792. Where the DRP rejected the assessee's objections on the basis that there was a one day delay in filing, the Tribunal noting that the assessee filed its objections on April 11, 2016 as the prior day viz. April 10, 2016 was a Sunday, held that it could not be said that the objections filed before DRP were late. Accordingly, it held that the objections should have been accepted and decided upon by DRP on merits and restored the matter back to DRP for

deciding the case. It rejected Revenue's contention that matter was to be remanded to the AO & not DRP and held that the ground before it was whether or not the DRP was justified in rejecting the objections filed by the assessee. In any case it noted that the directions of the DRP were binding on the AO.

Karuturi Global Ltd vs. ACIT - TS-465-ITAT-2018(Bang)-TP - IT(TP)A No.760/Bang/2018 dated 31.05.2018

2793. Where the assessee filed additional evidence before the DRP (which was not filed before TPO due to paucity of time) and the DRP denied to admit the evidence and simply confirmed the AO's order, the Tribunal, following the order of the co-ordinate bench in the earlier years remitted the matter to the AO / TPO to re adjudicate the matter in light of the additional evidence.

Wipro GE Healthcare Pvt. Ltd vs. DCIT - TS-204-ITAT-2018(Bang)-TP - IT(TP)A No.2525/Bang/2017 dated 23.03.2018

2794. The Tribunal quashed final assessment order passed by the AO u/s 143(3) r.w.s 92CA without incorporating the DRP's directions observing that instead of passing the final assessment order u/s 143(3) r.w.s 144C in conformity with the DRP's directions u/s 144C(5), AO passed the final assessment order dated January 17, 2014 u/s 143(3) r.w.s 92CA of the Act by only incorporating TPO's proposals and not considering the DRP's mandatory directions. Considering that the AO clearly violated the binding provisions of Secs. 144C(10) and 144C(13) of the Act, the Tribunal quashed the order. Since the order had been quashed, it held that there was no requirement to adjudicate the other grounds raised by the assessee.

Software Paradigms Infotech Pvt. Ltd vs. ACIT - TS-7-ITAT-2018(Bang)-TP - IT(TP)A No.150/Bang/2014 dated 5-1-2018

2795. The Tribunal dismissed assessee's appeal vis-à-vis final assessment order being bad in law on the ground that it was not passed within one month from the end of the month in which the DRP directions were received following the coordinate bench decision in assessee's own case in earlier year wherein it was held that final assessment order was not bad in law as limitation provisions were only procedural in nature and do not create any substantive right. Further, it was observed that on perusal of the entire provisions of section 144C, sub-section (13) of section 144C particularly, the AO had no discretion while passing the assessment order under sub-section (13) of sec.144C except to follow the directions of the Hon'ble DRP and the fate of such proceedings is already known to the assessee as he would be in receipt of the directions of the DRP. The Tribunal had also opined that the provisions of section 144C were materially different from section 153 which expressly prohibited passing of the order beyond period prescribed therein.

The Himalaya Drug Company vs Dy.CIT [TS-614-ITAT-2018(Bang)-TP] IT (TP) A No.807/Bang/0216 dated 04.07.2018

2796. Where the assessee made a submission that it was not clear from TPO/DRP's order as to which comparables where finally adopted, how ALP was determined and how TP adjustment was quantified, the Tribunal set aside the assessment order on TP issue and restored the entire TP issue to the file of DRP for fresh decision by way of speaking and reasoned order after providing adequate opportunity of being heard to both sides.

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Aptean Software India Pvt. Ltd (formerly CDC Software India Pvt. Ltd.) vs. ITO-TS-870-ITAT-2017(Bang)-TP dated 26.10.2017

2797. Where the TPO in remand proceedings for the subsequent year, had accepted the ALP of SAP implementation / IT / SAP service charges on identical facts but had determined the ALP of such payment at Nil in the relevant year, the Tribunal set aside the assessment order for the relevant year directing the AO / TPO to conduct a fresh exercise for determining ALP in light of the remand report of the succeeding year.

Kennametal India Ltd – TS-30-ITAT-2017 (Bang) – TP

2798. The Tribunal allowed the assessee's miscellaneous application for restoration of the assessee's appeal which was dismissed ex-parte as none appeared on behalf of the assessee. It noted that there was a delay in engaging counsel before the Tribunal and that the non-appearance was neither deliberate nor intentional, which amounted to reasonable cause. Accordingly, it recalled the ex-parte order and re-fixed the hearing.

Merck Life Science Pvt Ltd – TS-46-ITAT-2017 (Bang) - TP

2799. Where the DRP summarily rejected assessee's contentions in a cryptic manner and failed to pass a reasoned order, the Tribunal held that the DRP had not applied his mind to assessee's submission and the TPO's conclusions and accordingly restored the matter back to the file of DRP for fresh adjudication on inclusion/exclusion of comparables for assessee's international transactions relating to software development services and ITes. Further, noting that the assessee had raised additional grounds before tribunal, it also directed the DRP to consider the said grounds while adjudicating the matter.

TE Connectivity Global Shared services India Pvt Ltd (formerly known as ADC (India) communications & infotech ltd) vs ITO-TS-807-ITAT-2017(BANG)-TP IT(TP)A No.l230/Bang/2011 dated 27.09.2017

2800. The Tribunal restored the entire issue to the file of the DRP since the order of the DRP was not speaking and reasoned and directed the DRP to pass a fresh speaking and reasoned order.

Thomson Reuters International Services Pvt Ltd vs DCIT- TS-836-ITAT-2017(Bang)-TP dated 28.09.2017

Thomson Reuters International Services Pvt Ltd vs. DCIT-TS-810-ITAT-2017(Bang)-TP dated 28.09.2017

2801. The Tribunal quashed the assessment order, passed in the name of non-existent entity, RelQ Software Pvt. even after it ceased to exist on its merger with "Hewlett Packard GlobalSoft Pvt. Ltd" noting that the Revenue authorities were repeatedly told about the merger of the erstwhile company with the assessee and it was a case of mere negligence on the part of the AO.It relied on Delhi HC decision in Maruti Suzuki India and a plethora of other cases wherein it was held that assessment framed in the name of non-existent entity was not sustainable in the eyes of law.

EIT Services India Pvt Ltd (former Hewlett Packard Global Soft Pvt Ltd (in the case of erstwhile M/s. RelQ Software Pvt Ltd)) vs ACIT [TS-966-ITAT-2018(Bang)-TP] IT(TP)A No.1088/Bang/2011 dated 27.07.2018

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2802. Where the AO had passed a final assessment order u/s. 143(3) r.w.s 144C without giving effect to the directions of DRP, the Tribunal relying on Software Paradigm Infotech (P.) Ltd. quashed the final assessment order wherein the assessment order was quashed and it was held that the conduct of the AO/TPO in passing the impugned final order of assessment disregarding the binding directions of DRP was a clear violation of the express mandatory provisions of sec. 144C(10) and (13) of the Act. The Tribunal dissented with the judgment cited by Revenue in the case of H & M Hennes & Mauritz India (P) Ltd (where the matter was remanded back to AO to pass a final assessment order incorporating directions of DRP) observing that in the subject case, the assessee had prayed for setting aside the assessment order and thus it was a case of concession by assessee.

July Systems & Technologies vs Dy.CIT [TS-1189-ITAT-2018(Bang)-TP] IT(TP)A No.368/Bang/2016 and CO No.13/Bang/2017 dated 31.10.2018

2803. The Tribunal rejected DRP's interpretation based on the words 'first instance' appearing in section 144C i.e. that DRP will get jurisdiction only against original draft assessment order and not against draft assessment order passed as per direction of the Tribunal. It also noted that the TPO had passed his order by merely reproducing the directions of the Tribunal without giving assessee an opportunity to be heard, and accordingly it remitted the matter to TPO for fresh decision.

Fosroc Chemicals (India) Pvt. Ltd [TS-917-ITAT-2016(Bang)-TP] (IT(TP)A No.188IBang/2015, 87 & 881Bang/2016)

2804. The Tribunal held that a reference made by AO to TPO in cases where international transaction as per Form 3CEB was less than Rs 15 cr could not be held to be bad in law as there was no provision in the Act to that effect. Noting that in the instant case of the assessee (whose international transactions were less than 15 crore), the TPO had returned back the reference made by the AO on the ground that the value of transactions was less than 15 crore, it held that the assessee was correct in challenging the validity of the order of the AO who had proceeded to make his own addition. Accordingly, the Tribunal restored the matter to the TPO, directing him to pass a requisite order as per law, after providing adequate opportunity of being heard to the assessee

Nirvana Business Solutions Pvt Ltd-TS-490-ITAT-2017(BANG)-TP-ITA No. 1623 & 1624 (bang)2014 dated 05.05.2017

2805. The Tribunal quashed the re-assessment order passed u/s. 147 where reopening was done after four years on the basis that royalty payment should be treated as capital whereas the assessee had claimed it as revenue noting that the issue of royalty expenses had been examined in detail by the TPO in the original assessment proceeding and the assessee had explained the nature, purpose and even method of quantification of royalty expense and also submitted a copy of the agreement. Thus, the Tribunal held that material facts had been disclosed by the assessee which the Revenue had failed to take into consideration and further, observed that the reasons recorded did not indicate what material fact was not disclosed nor was there any whisper of such allegation in reasons recorded which is *sine qua non* for initiation of proceedings. Further, it also observed that the Tribunal had decided the treatment of royalty as revenue in favour of the assessee in the subsequent year and hence

the re-assessment order could not be sustained. Thus, the Tribunal held that the re-assessment order passed u/s.147 was invalid.

Dy.CIT vs. DSM Sinochem Pharmaceuticals (P.) Ltd. [2018] 94 taxamnn.com 265 (Chandigarh- Trib) ITA No.1466(CHD) of 2017 and CO No.03 of 2018 dated 28.05.2018

2806. The Tribunal held that where the AO passed the final assessment order without providing the assessee with the draft assessment order and therefore did not provide the assessee with an opportunity to file objections before the DRP, the provisions of section 144C of the Act were not complied with and therefore the final assessment order was bad in law and liable to be quashed.

ACIT v Getrag Hi Tech Gears Pvt Ltd - (2016) 46 CCH 0588 (Chd Trib)

2807. The Tribunal remitted the matter back to DRP for de-nova consideration thereby providing one more opportunity to the assessee (engaged in business of manufacturing drugs and pharmaceuticals) in the interest of justice to present its case before the DRP, which had passed an ex-parte order, though the Tribunal was of the opinion that there was no merit in assessee's submission that the ex-parte order was passed by DRP as the counsel could not appear due to unavoidable circumstances. It directed the assessee to appear promptly and co-operate in the proceedings, failing which Revenue would be at liberty to pass appropriate orders.

MMC Healthcare Limited vs DCIT [TS-1136-ITAT-2018(CHNY)-TP] ITA No.2978/Chny/2018 dated 30.08.2018

2808. The Tribunal held that where the revenue and assessee had not followed any of the prescribed methods envisaged in Rule 10B of the Income-tax Rules and section 92C of the Act, then the method of computation adopted by both of them was erroneous and was to remitted back to the file of the AO to re-compute the ALP.

Autoneum Nittoku Sound Products India Pvt Ltd v ACIT – (2015) 45 CCH 0088 Chen Trib

2809. The assessee had entered into an international transaction for import of raw material and semi finished products from its AE. While computing its operating margin, the assessee had made adjustments with regard to the excise duty, power related adjustment, long period credit, adjustment for depreciation and Forex loss treating the same as non-operating, which was rejected by the TPO as a result of which the margin of the assessee was less than the comparables. Accordingly, the TPO made an adjustment to the proportionate operating cost of the assessee pertaining to its international transactions. The DRP had issued directions to the AO to work out the ALP cost for total cost base of the assessee instead of restricting it to proportionate AE cost. The Tribunal held that as per Section 144C(8) of the Act, the DRP was empowered to confirm or reduce or enhance the variations proposed in the draft Order but was not vested with the power to set-aside or issue direction under Sub-section 5 for further enquiry. Accordingly, the Tribunal remitted the issue to the file of the DRP directing it to conduct the enquiries and determine the amount of ALP on its own and to issue necessary directions to the AO/TPO to make the adjustments.

Young Buhmwoo India Co Pvt Ltd vs ACIT-TS-465-ITAT-2017(CHNY)-TP-ITA No.3181/Mds/2016 dated 19.04.2017

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2810. The Tribunal held that the TPO was incorrect in rejecting revised form 3CEB filed by the assessee after one year from the end of assessment year on the ground that the time limit for filing Form 3CEB was one year from the end of assessment year or before completion of assessment, whichever was earlier. It held
that section 92CA(3) did not provide for a specific time limit for filing revised forms and the Form 3CEB, being a report of a Chartered Accountant on the international transactions and the benchmarking of the said transactions could not be ruled out and therefore in the interest of justice, remanded the matter to the AO to consider the revised form 3CEB.
Ashok Leyland Ltd v DCIT - (2016) 67 taxmann.com 48 (Chen - Trib)

2811. The Tribunal held that where revenue had not brought any evidence to show that price variation in export was on higher side and would impact Arm's Length Price, adjustment on account of price variation in export sales was to be deleted.
DCIT v AVT MC Cormick Ingredients Ltd - [2016] 67 taxmann.com 322 (Chennai-Trib)

2812. The Tribunal set aside the TP- issues for AYs 2005-06 and 2008-09 and remitted the matter back to DRP for fresh adjudication. The TPO had proposed adjustment at entity level both vis-à- vis the marketing and distribution activities carried out by the assessee as well as item-wise adjustments towards AMP, product & brand development. In appeal, DRP confirmed AMP, product & brand development adjustment and directed TPO to exclude entity level adjustment. Consequently, TPO passed an order restricting item wise adjustments of AMP, product & brand development expenses but put a condition that in the event of deletion of any of the 3 adjustments, the entity level adjustment would be restored which was incorporated by the AO while passing the final assessment order. The Tribunal held that it was clear that the DRP had remitted the matter back to the file of TPO to make fresh assessment/determination of Transfer Pricing issues which was executed by the TPO and communicated to AO instead of referring the matter back to the DRP to give appropriate directions to the AO. Referring to Section 144C, it held that the DRP has no power to remit the matter back to the file of the TPO and the DRP alone was to determine the quantum of addition or relief and issue direction to the Assessing Officer. Accordingly, it remitted all the TP-issues back to DRP to decide afresh on merits. Separately, it clarified that foreign comparables could not be used for benchmarking assessee's contract manufacturing & distribution activities and held that the tested party i.e. Ford India Pvt Ltd., being a resident Indian Company, companies exclusively from India based on Indian data bases could be adopted as comparables.
Ford India Pvt Ltd vs DCIT-TS-509-ITAT-2017(CHNY)-TP-ITA No 2344 and 2345/Mds/2012 dated 12.05.2017

2813. The Tribunal remitted the TP-issues back to TPO for re-adjudication noting that assessee was unable to file copy of the Marketing Services Agreement between assessee and AE before TPO and subsequently, DRP had refused to entertain these documents. The Tribunal opined that the assessee had also suffered the consequence of not producing the documents before the TPO. Thus, in the interest of justice, ITAT restored the issue back to TPO for re-adjudication, and directed the assessee to produce all necessary documents to substantiate its case.

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Harting (India) Pvt Ltd vs Dy.CIT [TS-518-ITAT-2018(CHNY)-TP] ITA No.762/Chny/2017 dated 02.07.2018

2814. The Tribunal rejected the assessee's contention that the assessment order passed under section 144(13) of the Act was barred by limitation despite the AO receiving the DRP order in April 2014, noting that Section 144(13) mandates the DRP to give directions to the AO whereas the DRP in the present case had only given directions to the TPO and therefore the instant proceedings had not reached the stage where provisions of Section 144(13) of the Act could be invoked.

L&T Thales Technology Services Pvt Ltd – TS-954-ITAT-2016 (Chny) - TP

2815. The Tribunal allowed the appeal of the Revenue against the directions of the DRP wherein the DRP had directed the TPO to decide the percentage of risk adjustment to be calculated and held that the DRP had no power to do so. Referring to the provisions of Section 144C(7) and (8) it held that the DRP had no authority either to direct the AO or the TPO to make further enquiry and decide the matter and that at best the DRP could call for a remand report from the AO / TPO or make further enquiry itself. Accordingly, it set aside the order passed by the DRP and directed it to decide the issue afresh after considering the relevant material on record.

India Trimmings Pvt Ltd – TS-62-ITAT-2017 (Chny) – TP

2816. The Tribunal admitted assessee's additional grounds for consideration of 7 companies as comparable for its international transaction relating to software development/content development services for AY 2010-11 and remitted the matter to the file of the AO/TPO on the ground that comparable companies submitted by assessee needed further examination for determination of ALP of international transaction. Further, it held that it would be open to assessee to furnish objection in which case DRP would consider the matter afresh in accordance with provisions of section 144C.

Harland Clarke Holdings Software India Private Limited - TS-1062-ITAT-2016-(CHNY)-TP

2817. The Tribunal remitted back the matter to the file of DRP with a direction to admit the Transfer pricing study report of the assessee and pass order after considering it. The DRP had rejected the transfer pricing study report not submitted before the TPO. Observing that the assessee was timebound to furnish the transfer pricing study report before the TPO in accordance with the provisions of Act and the Rule however since the said report had been submitted with the DRP subsequently, the Tribunal remitted the matter back.

MOS Metro India Pvt. Ltd. vs Dy.CIT [TS-1008-ITAT-2018-(Chny)-TP] ITA No.3029/Chny/2017 dated 31.07.2018

2818. A reference was made by the AO to the TPO u/s 92CA in regard to the international transaction of the assessee. The TPO recommended a transfer pricing adjustment of Rs. 2.57 crores and based on these recommendations, a draft assessment order was proposed by the AO on 29-12-2016. The assessee filed the objections before the DRP on 31-01-2017 which was rejected by the DRP on the ground that the assessee had made a delay of three days in filing the objections and the objections had to be filed within a period of 30 days from the passing of the draft assessment order. The Tribunal allowing the assessee's appeal, noted

that the time limit for filing objections had expired on 28-01-2017 and in accordance to the date of filing objections, the assessment order should have been passed by 28-02-2017 but the same was passed only on 22-03-2017. Accordingly, the Court held that the assessment was done beyond the statutory time limit and was liable to be set aside.

Aalaya Jewel Industry (P.) Ltd. v. ACIT - [2018] 93 taxmann.com 23 (Chennai - Trib.) - IT APPEAL NOS. 970 AND 971 (MDS.) OF 2017 dated APRIL 5, 2018

2819. Where the quantum of international transactions undertaken by the assessee during the year under review was Rs. 7.78 crore, the Tribunal held that reference made by assessing officer to transfer pricing officer was invalid as it was contrary to CBDT Circular which provided that no reference could be made to the transfer pricing officer for determining arm's length price if quantum of international transactions was less than Rs. 15 crores. It further held that CBDT being administrative body to administer the direct tax laws, instruction issued by it is binding on all the lower authorities.

Sensiple Software Solution Pvt Ltd [TS-824-ITAT-2016 (CHNY)-TP] (ITA No.556/Mds/2015)

2820. The Tribunal held that the DRP disposed off the assessee;s objection in a summary manner without proper appreiciation and therefore it remitted all issues i.e. selection of comparables, adjustment towards interest on delay in collection of receivables and granting of working capital adjustment to the DRP for fresh adjudication.

Doosan Power Systems India Pvt Ltd – TS-1002-ITAT-2016 (Chny) - TP

2821. The Tribunal held that there were two conditions precedent for the applicability of Section 144C which provides that the AO must pass a draft assessment order prior to final assessment order viz. (i) the assessee should be an eligible assessee and (ii) the AO must propose to make a variation in the income or loss returned by the assessee which is prejudicial to the interest of the assessee. Noting that in the instant case, the AO did not propose to make any variation in the income or loss returned by the assessee but merely determined the taxability at a different tax rate (as business profits as against capital gains), it held that the AO's action of directly issuing the assessment order without issuing a draft assessment order despite the assessee being an eligible assessee was valid.

Mosbacher India LLC – TS-944-ITAT-2016 (Chny) - TP

2822. Where the assessee, a German company, had constituted a PE in India by virtue of its onsite projects in India in relation to supply of equipment under contract with a Korean company and the TPO had apportioned profit to its Indian PE on account of supervisory charges as well as supply and delivery of equipment on the basis of revenue attribution and rejected the assessee's argument that the German company and the Indian PE were in fact a single entity, the Tribunal held that the order of the DRP had merely confirmed the TPO order in a cryptic manner without considering every point of objection raised by the assessee and therefore it remitted the issue back to the file of the DRP.

Durr Systems Gmbh – TS-955-ITAT-2016 (Chny) - TP

2823. The Tribunal allowed the assessee's appeal against the DRP order for AY 2011-12 wherein the assessee's objections were disposed of without giving it any opportunity of hearing and

remitted all issues for fresh consideration. It observed that the assessee had two personal appearances before DRP 1 and thereafter the case was transferred to DRP 2 which disposed off the assessee's objection ex-parte. Further, it dismissed the stay application filed by the assessee as infructuous as appeal was allowed.

Delphi Connection Systems India P Ltd v ACIT – TS-952-ITAT-2016 (Coch) - TP

2824. The assessee was a non-resident entity partnership firm incorporated under the laws of Mauritius and was also a tax resident of Mauritius. The assessee's case was reopened u/s.147 and pursuant thereto, a draft assessment order u/s.144C(1) was passed wherein it was noted that there was no variation as a consequence of order passed by the TPO who did not draw any adverse inference in respect of the international transaction. The Tribunal admitted the additional ground raised by the assessee for quashing of the assessment order on the ground that assessee was not an eligible assesseee. It examined the provisions of s.144C(15)(b) where the term "eligible assessee" was defined to be a foreign company or any person in whose case there was variation arising consequent to order passed by the TPO in terms of section 92CA (3) and only thereafter, provision of section 144C would be applicable. The Tribunal quashed the draft assessment order and consequently the final assessment order passed in pursuance to DRP's directions relying on the High Court ruling in ESPN Star Sports Mauritius SNC ET Compagnie wherein it was held that draft assessment order and final assessment orders were invalid in view of the fact that the TPO had not proposed any variation in the income arising from the international transactions thus, the assessee was not an eligible entity and the AO instead of passing an order u/s. 143(3), had wrongly passed the draft assessment order u/s.144C(1) .

ESS Advertising (Mauritius) SNC et Compagnie (earlier known as ESPN Star Sports Mauritius S.N.C Et Compagnie) vs ADIT [TS-1135-ITAT-2018(DEL)-TP] ITA Nos.5131,5132/Del/2010, 5703/Del/2011 dated 20.08.2018

2825. The Tribunal deleted the TP-adjustment holding that the order passed by the TPO was barred by limitation as per the provisions of Sec 92CA(3A) and therefore liable to be quashed. It arrived at an extended time limit as per Explanation 1 of Sec 153 and worked out a time limit for passing order by TPO as 60 days prior to the extended time limit i.e. on or before 29.11.2014, and since order was passed on 31.12.2014, it concluded that the order was barred by limitation by 31 days.

Asian Honda Motor Co Ltd [TS-569-ITAT-2016(DEL)-TP] ITA No.6143/Del/2015

2826. The Tribunal held that where the TPO refused to consider the comparability of fresh comparable companies, the inclusion of one company sought by the assessee without considering other prospective comparable companies selected by the TPO would distort the overall comparability and therefore remitted the comparability of all the companies to the file of the TPO.

Federal Mogul Automotive Products (India) Ltd v DCIT - TS-235-ITAT- 2016 (Del) - TP

2827. The Tribunal set aside the assessment order stating that the directions given by DRP-II had not been followed by the TPO. Further, the Tribunal noted that it would be reasonable to remand the matter to the AO/TPO with the direction to pass an order afresh in view of the

directions of the DRP-II and objections raised by the assessee in application u/s 154 of the Act.

Quattro Business Support Service (P) Ltd vs ACIT Circle 20(2)- TS-392-ITAT-2018(DEL)-TP-ITA no 1905/Del/2015 dated 16.04.2018

2828. The Tribunal quashed the assessment framed in the name of non-existent amalgamating company (Akzo Nobel Car Refinishes India Pvt. Ltd) noting that erstwhile company (Akzo Nobel Car Refinishes India Pvt. Ltd) amalgamated with Akzo Nobel India and though this fact was brought to AO's knowledge vide letter dated June 11, 2012, the TPO passed the order on erstwhile company ignoring the aforesaid intimation furnished by the assessee before the AO. Further, the AO also framed the final assessment order in the name of the erstwhile company without any mention of the transferee entity (Akzo Nobel India). It relied on co-ordinate bench decision in Genpact Infrastructure (Bhopal) Pvt. Ltd. (now merged with Genpact India) wherein it was held that assessment framed by AO on non-existent entity is "void ab initio", and accordingly, quashed the assessment order.

Akzo Nobel India Ltd., (formerly known as Akzo Nobel Car Refinishes India Pvt. Ltd.) vs DCIT [TS-624-ITAT-2018(DEL)-TP] ITA No.2073/Del/2014 and ITA No.2468/Del/2015 dated 10.07.2018

2829. The Tribunal quashed revision order u/s 263 wherein the Pr.CIT held that AO's order u/s 143(3) was erroneous and prejudicial to the interest of Revenue since the AO did not refer the international transactions to TPO. Relying on the decision of the Court in Delhi Airport Metro Express and in DG Housing Projects (wherein it was held that it is incumbent for the PCIT to make some minimum independent enquiry to reach the conclusion that AO's order was erroneous and prejudicial to Revenue's interest) it observed that the PCIT ignored submissions and contentions put forth by assessee that a reference in this case was non-mandatory as neither of the stipulated conditions laid out by Instruction No. 3 of 2016 were met. It dismissed the Revenue's argument that the mismatch between the remittance declared in Income Tax Return and that reported in Form 15CA (detected under CASS) justified the referral of the case to TPO since it involved international transactions and held that reporting under Form 15CA was not limited / was not particularly in respect of payment made to associated enterprise. Accordingly, it held that the AO was not bound to make a reference to the TPO.

Amira Pure Foods Pvt. Ltd. vs Pr.CIT - TS-1053-ITAT-2017(DEL)-TP - ITA No. 3205/DEL/2017 dated 29.11.2017

2830. Where the rectification order u/s.154 enhancing income was passed by the TPO who made final adjustment with respect to provision of management support services, provision for technical services and purchase of parts without giving assessee an opportunity of being heard, the Tribunal quashed the said order and held that the rectification order was void-ab-initio and contrary to provision of sec 153(4). It relied on the Apex Court decision in Chockalingam and Meyyapan wherein it was held that principles of natural justice had to be followed by authorities.

ACIT vs Humboldt Wedag India Pvt. Ltd- (2018) 53 CCH 0135 Del Trib ITA No.5097/Del/2011 dated 28.06.2018

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2831. Where the assessee [Heartland Delhi Transcription and Services Pvt. Ltd. (HDTS)] amalgamated with Heartland Information and Consultancy Services Pvt. Ltd (HICS) pursuant to Delhi HC-order dated July 25, 2008 and this fact was brought to AO & CIT's notice vide separate letters dated October 19, 2008, however, the AO referred the matter u/s 92CA of amalgamating company to TPO who passed the order on the amalgamating entity and thereafter, AO also passed assessment order on amalgamated entity, the Tribunal, relying on the decision in the case of Maruti Suzuki India Ltd [TS-520-ITAT-2016(DEL)-TP] quashed the assessment order framed on non-existent amalgamating company for AY 2007-08 as the assessment was void ab intio since the assessee entity M/s (HDTS) was not in existence when the TPO as well as the AO passed their respective orders.

DCIT vs Transcend MT Services Pvt. Ltd-TS-992-ITAT-2017(DEL)-TP dated 30.11.2017

2832. The Tribunal allowed assessee's additional ground and quashed AO's reference to TPO. It held that as per CBDT Instruction 3/ 2003, the AO should have decided the issue of international transaction himself instead of referring the matter to TPO as the quantum of international transaction (Rs.2.15cr) was below monetary limit of Rs.5cr. Relying on the Andhra Pradesh High Court ruling in Nayana P Dedhia wherein after considering Circular 3/2003 it was held that the authorities responsible for administration of the Act should observe and follow any such orders, instructions and directions of the board. Holding that the Instruction 3/2003 was mandatory upon tax authorities and had binding force, the Tribunal opined that assessment had become time barred as the reference made to TPO itself was not sustainable and the Assessing Officer should have passed Assessment Order within the prescribed time provided under the statute. Accordingly, it held that the order was bad in law.

Calance Software Pvt. Ltd vs. DCIT TS-196-ITAT-2018(DEL)-TP - I.T.A .No. 4363/DEL/2010 (A.Y 2006-07) dated 23.03.2018

2833. The AO had not passed a draft assessment order and instead passed a final assessment order. On the assessee pointing out that the said order was not a legally sustainable order since it had not complied with the mandatory provisions of sec 144C(1), the AO passed corrigendum order. The Tribunal held that the final assessment order could not be cured by any subsequent rectification proceedings or corrigendum and in such a situation all subsequent proceedings and final assessment order would be invalidated. Accordingly, the Tribunal quashed the final assessment order on the ground that mandatory procedure u/s.144C(1) was not followed.

Add CIT vs Oracle India (P.) Ltd.[2018] 93 taxmann.com 8(Del-Trib) ITA Nos.6288,6714 /Del/ 2013 dated 13.04.2018

2834. The Tribunal, in second round of proceedings, dismissed assessee's appeal against AO's final assessment order (passed without a draft assessment order) as non-maintainable and held that the appropriate remedy was either to file appeal before the or CIT(A) or approach the Hon'ble Court via writ. From the conjoint reading of Section 253(1)(d) and Section 246A (1)(a), the Tribunal observed that appeal before Tribunal would only lie against the assessment order passed in pursuance to DRP's directions It clarified that even if the final assessment order was passed in contravention of any statutory provision, the only course open for the assessee to seek for remedy was, firstly, either to file appeal before the appropriate forum/authority in terms of the provisions of law, i.e. before the CIT (A) or

secondly, by exercising constitutional remedy before the Hon'ble High Court under extra ordinary jurisdiction, of course with the discretion of Hon'ble Court. Accordingly, it directed the assessee to approach the correct forum.

Tevapharm India Pvt. Ltd vs. ACIT - TS-93-ITAT-2018(DEL)-TP - ITA No.:- 741/Del/2018 dated 16/02/2018

2835. The Tribunal quashed the assessment order framed on non-existent amalgamating company noting that it had amalgamated with Genpact India pursuant to HC-order dated November 19, 2010 and this fact was brought to AO's notice vide letter dated January 24, 2011 & received on February 3, 2011. It observed that the TPO/AO/DRP passed orders in the name of the erstwhile entity (Genpact Infrastructure) without mentioning the transferee name which was not in existence when the TPO/AO/DRP passed their respective orders. Relying on the co-ordinate bench rulings in Maruti Suzuki India (subsequently upheld by jurisdictional HC) and Spice Enfotainment (SLP against which was recently dismissed by SC) wherein assessment framed on non-existent entity post amalgamation was quashed, it concluded the assessment framed was void ab initio and the same was rightly quashed by the ld. CIT(A).

Genpact Infrastructure (Bhopal) Pvt. Ltd., (now merged with Genpact India) vs. DCIT - TS-115-ITAT-2018(DEL)-TP - ITA No. 2025/Del/2014 dated 09.02.2018

2836. The Tribunal relying on the decision in assessee's own case for AY 2011-12, held that where the amalgamating company was not in existence when the assessment order was passed, the assessment was void ab initio. It held that amalgamating company i.e. M/s. Suzuki Powertrain India Ltd. was not in existence on the date of passing Assessment Order. Hence, the Assessment proceedings as well as the Assessment order itself were not valid. Accordingly, it quashed the assessment framed in the name of erstwhile entity (i.e. Suzuki Powertrain India Ltd.) which amalgamated with the assessee (Maruti Suzuki India Ltd) for AY 2012-13.

Maruti Suzuki India Ltd. (As Successor in interest of erstwhile M/s. Suzuki Powertrain India Ltd- Since Amalgamated) vs. DCIT-TS-600-ITAT-2017(DEL)-TP-ITA No. 902/del/2017 dated 06.04.2017

2837. The Tribunal set aside the assessment and remitted the matter to the AO/TPO to verify whether the assessee had (i) informed the registrar of companies or similar authority in Cyprus about the applicability of the Income-tax Act, (ii) complied with the provisions of section 178 or section 176 of the Act and (iii) whether such proceedings were challenged by the assessee before AO on the ground that it was a wound up entity. It directed the AO to also check the locus standi of the party pursuing the proceedings and to decide objections regarding validity of making an assessment on non-existent entity, based on its observations. It rejected assessee's contention that assessment order passed on the wound up entity was null and void-ab-initio. It noted that the plea of validity of proceedings was raised at a later stage before the DRP and the assessee had complied with the assessment proceedings before the AO. The Tribunal followed the findings of Gujarat HC ruling in the case of Sumantbhai C. Munshaw wherein it was held that assessment order passed on a deceased person could not be nullified on the ground that the legal representative had allowed the assessment proceedings to continue and the plea for nullity of assessment was taken at a later stage. It rejected assessee's reliance on Delhi HC ruling in Spice Infotainment Ltd. and

Skylight Hospitality LLP since it dealt with the aspect of succession of entity and not winding up.

Pesak Ventures Ltd. vs. DCIT [TS-765-ITAT-2018(Del)-TP] ITA No.1929/Del/2017 dated 19.06.2018

2838. The Tribunal quashed the assessment order passed in the name of erstwhile entity (Genpact Infrastructure (Bhopal) Pvt Ltd.) which was not in existence at the time of passing the order and had amalgamated with Genpact India following the coordinate bench decision of the assessee's own case for earlier year noting that assessment after the amalgamation could only be made on the amalgamated entity as a successor pursuant to provisions of sec 170(2).

Genpact Infrastructure (Bhopal) (P.) Ltd vs Dy.CIT [2018] 93 taxmann.com 334 (Del-Trib) ITA No.199/Del/2015 dated 27.04.2018

2839. The Tribunal quashed the assessment order framed on non-existent amalgamating company noting that the assessee had informed the TPO vis-à-vis amalgamation however the TPO had passed an order in the name of erstwhile entity (Vertex Consumer Services India Pvt. Ltd.). Subsequently, the DRP's order was in the name of new entity (Vertex Consumer Management India Pvt Ltd.) but the Final assessment order was also passed in the name of the erstwhile entity which was not in existence when the AO passed the order. Relying on the Del HC decision of Spice Entertainment (SLP against which was dismissed by SC) and Dimension Apparels (P.) Ltd. wherein assessment framed on non-existent entity post amalgamation was quashed, it concluded that the assessment framed was void ab initio.

Vertex Customer Management India Pvt Ltd vs DCIT [TS-516-ITAT-2018(DEL)-TP] ITA No.966/Del/2016 dated 06.07.2018

2840. The Tribunal relying on coordinate bench decision of Calance Software quashed the assessments and deleted the TP adjustment on the ground that the value of assessee's international transactions were below Rs. 5 Cr for both the years, and in view of the CBDT Instruction No. 3/2003 the AO should have determined the ALP of the international transactions and thus, the AO erred in making a reference to TPO. Accordingly, draft assessment orders passed after making TP-adjustment based on TPO's order, were beyond limitation period and thus, bad in law.

Bucher Hydraulics Pvt Ltd. vs ACIT [TS-512-ITAT-2018(DEL)-TP] ITA No.4237/Del/2011 and ITA No.5690/Del/2012 dated 06.07.2018

2841. The Tribunal upheld the DRP's power to propose TP adjustment (in respect of intra-group services) despite AO/TPO not proposing such adjustment in the draft order and rejected the assessee's contention that DRP overstepped its jurisdiction. Referring to section 144C(8) read with the explanation (inserted retrospectively FROM April 1 2000), it held that the DRP's power was co-terminus with that of the AO/TPO and opined that if the language of the provision was read as disabling the DRP to exercise the power of enhancement, it would amount to diluting the power, which the statute had expressly granted. The Tribunal rejected assessee's contention that the only remedy for mistakes in draft order was by revision u/s 263.

Bausch & Lomb India Pvt. Ltd vs ACIT-TS-667-ITAT-2017(DEL)-TP-ITA NO. 1399/DEL/2017 dated 25.08.2017

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2842. The Tribunal held that if the AO disallowed payment of salary to a person under section 40A(2)(b) of the Act on account of it being too high then the same would have to be adjusted in receipts of the assessee as well as the assessee had recovered the salary cost with a mark-up from its AE.

XL India Business Services Pvt Ltd v ITO (I.T.A .No.-1427/Del/2014) – TS-591-ITAT-2015 (Del) - TP

2843. The Tribunal held the AO could not vary the margins as computed by the TPO in his order, because once reference was made by the AO under section 92CA(1), then in view of the provisions of
92CA(4), the AO was required to compute the total income in conformity with the ALP determined by the TPO. Therefore, absent direction from the DRP altering the ALP determined by the TPO, the
AO cannot alter the same.

Copal Research India Pvt Ltd v ITO (ITA no. 1713/Del/2014) – TS-597-ITAT-2015 (Del) – TP

2844. The Tribunal held that the final order passed by the AO under section 143(3) read with section 144C(13) of the Act was bad in law ab initio and not sustainable as it was passed beyond 30 days from the end of the month in which the DRP issued its directions.

IHG IT Services (India) Pvt Ltd v DCIT (ITA No. 1019/Del./2015) – TS-599-ITAT-2015 (Del) – TP

2845. The Tribunal restored the determination of ALP in respect of assessee's international transactions of marketing and support services for the purpose of external commercial borrowings (ECB) issued by assessee's head office to the TPO as the TPO proposed an adjustment without issuing show-cause notice to assessee. It held that the TPO's action was in violation of principles of natural justice and that the CIT(A) should have adjudicated the issue after calling for the remand report from TPO which was not done in the instant case. Accordingly, it restored the matter to the file of TPO.

DDIT vs The Bank of Tokyo Mitsubishi UFJ Ltd-TS-634-ITAT-2017(DEL)-TP-ITA No. 3754/del/2014 dated 03.08.2017

2846. The Tribunal held that the Revenue could not argue for the exclusion of comparable companies selected by the AO / TPO itself as it would mean that the AO / TPO is challenging the correctness of his own decision through the DR before the Tribunal which is illogical. It further noted that the Department was entitled to file appeal or cross objection against the assessment order passed in pursuance of the direction of the DRP to the extent it was aggrieved against such direction. Further distinction was made between the powers of the Tribunal under section 254 of the Act wherein the Tribunal is empowered to direct the AO / TPO to re-consider the correctness of companies included by him in the list of comparables but in no case could the DR argue against the inclusion.

Trend Micro India Pvt Ltd v DCIT (ITA No.1585/Del/2015) – TS-556-ITAT-2015 (Del)

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2847. The Tribunal held that assessment order passed by the AO in set aside proceedings was void ab initio as the AO did not pass any draft assessment order, did not ask assessee to file objections before the DRP but simply framed the assessment based on comments of the TPO to whom reference was made failing to follow procedure under section 144C of the Act. It rejected the stand of the Revenue that the said procedure was only applicable to original assessment proceedings.

Headstrong Services (India) Pvt Ltd v DCIT (ITA No 5409 / Del / 2014) – TS-526-ITAT-2015 (Del) - TP

2848. The Tribunal allowed the assessee's additional ground and quashed the assessment order framed on non-existent merged company (Sony Ericsson Mobile Communications (India) Private Limited) noting that the fact of merger was intimated to the Department by the assessee, however Revenue still passed the final assessment order in the name of non-existent entity. Relying on the Del HC decision of Spice Entertainment (SLP against which was dismissed by SC) and Dimension Apparels (P.) Ltd. wherein assessment framed on non-existent entity post amalgamation was quashed, it concluded that the assessment framed was void ab initio.

Sony Mobile Communications India (P) Ltd. vs DCIT (now merged with Sony India Pvt. Ltd.) [TS-514-ITAT-2018(DEL)-TP] ITA No.554/Del/2015 and ITA No.836/Del/2014 dated 06.07.2018

2849. The Tribunal admitted the additional ground and decided the issue in favour of the assessee by following the coordinate bench ruling in assessee's own case for earlier year wherein the assessment order was quashed on the ground of being time barred as reference to TPO was not legally sustainable and the AO erred in referring the determination of ALP of the international transaction to TPO since the quantum of international transaction was below 5 crores. The Tribunal relied on the coordinate bench decision of Calence Software which recognized the binding force of CBDT Instruction No.3/2003 (if the value of international transaction is below 5 crores, then AO can determine the ALP of transaction) on authorities.

Bucher Hydraulics Private Limited vs Dy.CIT [TS-1173-ITAT-2018(DEL)-TP] ITA No.1650/Del/2015 dated 29.10.2018

2850. The Tribunal held that where the working capital adjustment claimed by the assessee was not examined by the AO and rejected by the TPO, the CIT(A) was not authorized to proceed with deleting the addition made by the TPO by granting working capital adjustment without entertaining additional evidence and without calling for a remand report from the AO. When the working capital adjustment was demonstrated before the TPO (a quasi-judicial authority) the AO and CIT(A) were legally bound to address the issue.

ACIT v BT (India) Pvt Ltd (ITA No 1496 / Del / 2012) – TS-553-ITAT-2015 (Del) – TP

2851. Where the Pr.CIT issued a show cause notice u/s 263 considering the order of AO as erroneous and prejudicial to the interest of Revenue without making proper inquiries/verifications/investigations on various issues, the Tribunal relying on the High Court ruling in the case of Delhi Airport Metro Express and DG Housing Projects (wherein it was held that it was incumbent for the PrCIT to make some minimum independent enquiry to

reach the conclusion that AO's order was erroneous and prejudicial to the Revenue's interest), quashed the revision u/s 263 by PrCIT.

Amira Pure Foods Pvt. Ltd vs Pr.CIT-TS-1053-ITAT-2017(DEL)-TP SA No. 451/DEL/2017 & ITA No. 3205/DEL/2017 dated 29.11.2017

2852. The Tribunal held that the time limit for completion of assessment pursuant to the order of the TPO is contained in section 144C(4) and (13) of the Act. It further held that time limit under section 153 of the Act has no relation with the passing of the draft order which should be passed within reasonable time. Further it was held that the word 'may' in section 92CA(3) of the Act was to be read as 'shall' providing a mandatory time limit for the TPO to pass an order. If the order of the TPO is time barred by the draft order is timely, the final assessment order would be saved but the TP additions would be deleted.

Honda Trading Corporation v DCIT (IT) – (2015) 61 taxmann.com 223 (Delhi Trib)

2853. The Tribunal deleted the TP adjustment made in assessment order passed under section 153A for AY 2005-06 pursuant to search and seizure operations on the ground that completed assessment under section 143(3) could not be interfered with by AO/TPO in the absence of incriminating material during search, and that the assessee had not suppressed international transactions during assessment proceedings under section 143(3).

Baba Global Limited - TS-1070-ITAT-2016(DEL)-TP

2854. The Tribunal remitted ALP determination in respect of assessee's import transactions for AY 2003-04. Noting that CIT(A) had held that the assessee's operating profit margin during the subject AY from the combined activities as compared by the AO was 4.4% while comparables margin was 2.61%, thus even by adopting TPO's comparables, the transaction would be at ALP under TNMM. Further, observed that CIT(A) allowed adjustment on account of excise duty and working capital and restricted TP adjustment to Rs. 16.99 crore as against TPO's Rs. 36.28 crores. Since the CIT(A)'s order was not elaborate and very cryptic, the Tribunal remanded the matter back to the file of TPO/AO for fresh consideration.

Whirlpool Of India Ltd vs DCIT-TS-1003-ITAT-2017(DEL)-TP dated 03.11.2017

2855. The Tribunal quashed the reassessment proceedings initiated against the assessee and the consequent orders for AYs 1998-99, 1999-00, 2000-01 and 2001-02 which were initiated on the assumption that the assessee had suppressed its profits from its transactions with Indian companies as a result of which the provisions of Section 92 were applicable. With respect to AYs 1998-99 and 1999-00, for which reopening was initiated beyond 4 years, it upheld the contention of the assessee that there was no allegation regarding failure to disclose materials facts and therefore reopening was invalid. Further, in respect of all years, it noted that during the original assessment proceedings, the AO realizing the non-applicability of section 92 had accepted the justifications provided by the assessee and dropped the ground which formed the basis of reopening.

Coca Cola India Inv v DCIT – TS-59-ITAT-2017 (Del) – TP

2856. The Tribunal held that where Commissioner (Appeals) at time of working out adjustment on arm's length price did not give any opportunity to assessee while rejecting CUP method

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and taking TNMM as most appropriate method and also did not provide any reason for rejecting comparables selected by assessee, matter required readjudication.

RS Components & Controls Ltd v DCIT - [2016] 68 taxmann.com 28(Delhi-Trib)

2857. The Tribunal quashed reassessment orders pursuant proceedings initiated u/s.148 on ground that income had escaped assessment with respect to existence of PE of assessee through its Indian subsidiary noting that assessee had filed a writ petition against initiation of reassessment proceedings pursuant to notice u/s.148 which was rejected by Allahabad High Court however Apex Court allowed assessee's SLP against the HC order and held that said impugned notice could not sustain once ALP had been determined, as no further profit could be attributed to a person even if it had a PE in India. In view of the Apex Court quashing notice, the Tribunal held that reassessment proceedings pursuant to said notice and reassessment order passed by AO stood automatically cancelled.

Honda Motor Co Ltd vs DCIT[TS-1283-ITAT-2018-(Del)-TP] ITA Nos 6018& 6019/Del/2015 dated 13.12.2018

2858. With respect to service fees paid by the assessee (a US entity) to GEIIPL, an Indian entity, the Tribunal rejected the plea of the assessee, that since the transfer pricing analysis of the said services was accepted in the hands of GEIIPL, there were no further profits to be attributed to GEIIPL in the capacity of the PE of the assessee and that there was no reason to believe that income had escaped assessment. It noted that the ALP of marketing support services offered by GEIIPL to all the group entities was determined on the basis of the Global Service agreement entered into between GEIIPL and a US based Group company viz. GEIOC Inc, but the reassessment proceedings were initiated based on a survey conducted at the premises of GEIOC's liaison office in India, which revealed that the actual activities carried out in India were far in excess of the services provided in the Agreement and therefore the proceedings were to be upheld as valid. Therefore, it held that since the transfer pricing analysis did not reflect the services provided beyond the scope of the Agreement, there was a need to attribute profits to the PE for those additional functions / risks.

GE Energy Parts Inc v ADIT – TS-22-ITAT-2017 (Del) – TP

2859. The Tribunal upheld the jurisdiction of the TPO in determining ALP of the alleged international transactions relating to AMP expenses which were not reported as an international transaction by the assessee (re-seller of Louis Vuitton Group products in India) in its Form 3CEB. Relying on the decision of the co-ordinate bench in Nikon India Pvt Ltd – TS-469-ITAT-2016(Del)- TP, it rejected the assessee's contention that as per CBDT Instruction No 3/ 2016, the AO ought to have first provided the assessee an opportunity of being heard before recording satisfaction in respect of AMP transaction and that the TPO could not have proceeded to undertake ALP determination without providing such opportunity and held that since in the instant case, it was not the AO who formulated his view on AMP expenses as an international transaction, the said Instruction was not applicable. As regards the contention of the assessee that as per Para 4.1 of the impugned Instruction, the TPO could proceed to determine the ALP of only those transactions which were referred to him, the Tribunal held that though the original jurisdiction of the TPO was confined to the international transactions referred to him by the AO for determination of ALP, such jurisdiction was extendable to other international transactions which came to his notice during the course

of proceedings before him and that it was nowhere mentioned that the power of the TPO to determine the ALP of international transactions was restricted to only those transactions referred by the AO alone. Accordingly, it held that there was no lack of jurisdiction in the instant case.

On the issue of whether the AMP expenses constituted an international transaction, the Tribunal, noted that the order of the TPO had been passed before several other judgments of the Court on this issue and thus remitted the matter to the file of the TPO for fresh determination in accordance with the principles set out in those judgements.

Louis Vuitton India Retail P Ltd v DCIT – TS-146-ITAT-2017 (Del) – TP dated 01.03.2017

2860. The reopening of the assessment was due to the reason that the assessee had claimed and been allowed AMP expenses of Rs.23.31 crores and, the AO was of the view that expense was to be disallowed as it was incurred on behalf of its AE. The Tribunal noted that during the course of assessment proceedings, the assesse had submitted details pertaining to AMP expenses incurred and disclosed that the only international transaction entered into by it was in the form of financial support received from parent company towards advertisement and other sales promotion expenses amounting to Rs. 10,97,55,358/- along with a copy of form No. 3CEB. It observed that there was no new tangible material evidence which prompted the Assessing Officer to issue notice for reopening of the assessment and hence reassessment could not be sustained in view of the Delhi HC ruling of Kelvinator. Further, it also observed that the AO was factually incorrect as AMP expenses were Rs.10.66 crores (which were never claimed by assessee) whereas its selling and distribution expenses were Rs.24.76 crores and accordingly quashed the reassessment order.

Yamaha Motor India Sales Pvt Ltd vs Dy.CIT [TS-1159-ITAT-2018(DEL)-TP] ITA No.1095/Del/2014 dated 22.10.2018

2861. The Tribunal admitted additional evidence submitted by the assessee in the form of a sworn affidavit of the director of its AE corroborating the fact that the AE rendered intermediary services for sale of the assessees products to unrelated customers in Switzerland for which the assessee paid it a commission. It rejected Revenue's argument that the affidavit was to be sworn before the Indian Consular and held that the affidavit satisfied the requirements of the 12th Hague convention (arrived at between signatory states for abolishing the requirement of legalization for foreign public documents). Considering the fact that the said affidavit was not available with the assessee during assessment proceedings it admitted the same as additional evidence and remitted the matter to the file of the TPO who had determined the ALP of the commission paid at Nil on the ground that the assessee failed to substantiate rendering of services by its AE.

Kamla Dials and Devices Ltd v ACIT - TS-286-ITAT-2016 (Del) - TP

2862. The Tribunal upheld the TPO's jurisdiction in determining the ALP of the alleged international transaction relating to AMP expenses not reported by the assessee in Form 3CEB and rejected the assessee's contention that as per Instruction No 3 / 2016 the AO ought to have first provided an opportunity of being heard to the assessee before recording a satisfaction in respect of AMP transaction. It noted that as per the Instruction, though the original jurisdiction of the TPO was confined to the international transactions referred to him by the AO, such jurisdiction was extendable to other international transactions which come to his notice during

the course of proceedings before him. Further, it rejected the contention of the assessee that the Instruction, being curative in nature should have retrospective application since it would render several earlier assessment orders containing transfer pricing additions null and void.
Nikon India Pvt Ltd v DCIT - TS-469-ITAT-2016 (Del) - TP - ITA No.6314/Del/2015

2863. The Tribunal held that where the assessee himself has computed ALP and has disclosed the income, it is not case of enhancement of income, deduction under section 10A would be allowed on voluntary TP adjustment by assessee.
Sum Total Systems India Private Limited vs. DCIT (2016) 48 CCH 0082 (Hyd Trib)-ITA No.255/Hyd/2015

2864. The ITAT had remitted the categorization of assessee as IT and ITES to TPO however the assessee had appealed before the High Court who remitted the matter back to Tribunal to decide the issue on merits. The TPO giving effect to the revised order of ITAT categorized IT and ITES segment of assessee separately and benchmarked them which resulted in ALP addition against which the assessee approached the DRP. However DRP refused to entertain the appeal stating that sec 144C(1) clearly specifies first instance and hence it meant that objections could be against only on variation of returned income and not recomputation of assessed income by AO. The Tribunal remitted the issue to DRP to consider the objections of the assessee relating to order of TPO giving effect to revised Tribunal's order and pass an order noting that the assessee could not be denied its rights to appeal before higher forum and the time frame for assessee to appeal as per section 144C commenced from the fresh order of the TPO irrespective of past events relating to the same assessment.
Broadridge Financial Solutions (India) Pvt. Ltd. vsDy.CIT [TS-1303-ITAT-2018(Hyd)-TP] ITA No.514 and 515 /Hyd/2017 dated 29.11.2018

2865. Since there was a discrepancy in the turnover reflected in the assessee's Transfer Pricing study (Rs.3.97 crore) and value of international transaction in the additional ground of appeal filed by the assessee (Rs. 6.13 crore), the Tribunal remitted the matter to the AO / TPO for re-consideration noting the assessee's submission that a fresh Transfer Pricing study had to be conducted due to the aforesaid error.
Gameloft Software Private Limited vs ACIT-TS-660-ITAT-2017(HYD)-TP-ITA No.25 of 2012 dated 08.09.2017

2866. Where the assessee had filed a revised return increasing its mark-up from 8 percent to 13 percent offering more income as a suo moto adjustment and consequently claiming a higher deduction u/s 10A, but the AO ignoring the revised return proceeded on the basis of the original return, pursuant to which the assessee preferred Mutual Agreement Procedure and reached an acceptance with regard to ALP and agreed to withdraw its appeals relating to its TP issues, the Tribunal noted that the assessee had dropped all other grounds other than the ground in relation to acceptance of revised return for computing adjustment and held that it was incumbent on the assessee to withdraw the entire appeal since the adjustments were subject to MAP. Accordingly, it rejected the appeals filed by the assessee as the assessee had accepted the MAP procedure based on the assessment order in which only the original return was taken into consideration.

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Deloitte Support Services India Pvt Ltd [TS-899-ITAT-2016(HYD)-TP] (ITA No1476/Hyd/2010)

2867. The Tribunal rejected assessee's contention that assessment order for AY 2004-05, passed on the amalgamated entity, was void ab initio. It noted that in the assessee's case, return was filed by amalgamating company and notice u/s 142(1) was also issued on amalgamating company prior to amalgamation and consequently the assessment proceedings initiation was valid. It rejected assessee's reliance on Delhi HC ruling in Spice Infotainment and Micra India on the ground that in those cases, notice was issued after the assessee therein ceased to exist. However as the assessment order was pssed on non-existent entity it directed the AO to issue fresh notice u/s 142(1) transposing amalgamated company as assessee.

Further, for the other AYs under review, it noted that AO had passed final assessment order consequent to ITAT's remand back and that DRP and CIT(A) dismissed assessee's appeal/objections as not maintainable. Relying on the Delhi HC in JCB India Ltd, it held that even in the case of a remand by the Tribunal, the AO was mandated to pass a draft assessment order and not the final assessment order. The Tribunal remanded the matter to the file of AO to pass draft assessment order.

Cyient Ltd (formerly Infotech Enterprises Ltd) Successor to Tele Atlas India Ltd vs. DCIT - TS-1106-ITAT-2017(HYD)-TP - ITA Nos.1052 to 1054/Hyd/2016 dated 29.12.2017

2868. The Tribunal, in second round of appeal, quashed the final assessment order passed by AO without passing draft assessment order.The Tribunal noted in the first round of appeal, assessee's claim for capacity underutilization adjustment was allowed but the matter was remitted back to AO/TPO to examine nature of unallocated costs, the quantum relating to capacity underutilization and re-compute ALP after allowing the adjustments. However, in set aside proceedings, TPO repeated his original order as confirmed by DRP in the original proceedings and AO passed the final assessment order making same amount as addition. The Tribunal observed that as per the provisions of the Act, AO is bound to issue draft assessment order so that assessee can raise objections before the DRP as per the provisions of section 144C of the Act. In the instant case, AO had violated the mandatory provisions of the Act by passing the Final Assessment Order. It relied on the Delhi HC ruling in JCB India and held that assessee's interests were prejudicially affected since AO had not passed a draft assessment order. It was further clarified that even for the remand proceedings, the AO is bound to follow the provisions of the Act and accordingly, the final assessment order passed by AO in violation of Sec 144C was bad in law.

Srini Pharmaceuticals Private Limited vs. DCIT [TS-530-ITAT-2018(HYD)-TP] ITA No.971/Hyd/2017 dated 20.06.2018

2869. The Tribunal relying on co-ordinate bench ruling in BA Continuum India Private Limited (formerly CFC India Services Pvt. Ltd set aside CIT(A)'s order wherein he had quashed the assessment order on the ground that assessment was done in the name of a non-existing company. The Tribunal noted that the assessee, Merrill Lynch India Technology Services Private Limited merged with B. A. Continuum India Private Limited w.e.f. April 1, 2009, and that the order passed by the TPO was in the name of Merrill Lynch, but the draft as well as final assessment orders were passed by AO having jurisdiction over amalgamated company in the name of BA Continuum. Accordingly, it disagreed with the

CIT(A) that assessment was made on non- existent company and remanded the matter to the CIT(A) directing it to decide the issue on merits.

DCIT vs. B. A. Continuum India Private Limited-TS-773-ITAT-2017(HYD)-TP dated 22.09.2017

2870. The Tribunal dismissing assessee's additional ground for AY 2012-13 held that mere issue of demand notice and penalty notice along with the draft assessment order did not tantamount to passing final assessment order. It held that the AO had passed a draft assessment and the issue of demand notice and penalty notice were procedural mistakes. Accordingly, it dismissed the appeal.

Bartronics India Ltd vs DCIT-TS-814-ITAT-2017(HYD)-TP ITA No. 259 /Hyd/2017 dated 27.09.2017

2871. The Tribunal held that the CIT was not justified in invoking jurisdiction u/s. 263 on the ground of non-filing of Form No.3CEB before AO and in directing the AO to examine other transactions where there was no reference to non-filing of Form 3CEB in his show cause notice. It noted that the CIT had not drawn any adverse inference on perusal of Form 3CEB, but merely surmised that there could be some more international transactions with AE and the report disclosing only one international transaction may not be correct. Accordingly, it held that jurisdiction under Section 263 could not be exercised on the basis of such vague reasons.

Pricewaterhouse Coopers LLP USA vs. CIT - TS-134-ITAT-2018(Kol)-TP - I.T.A No. 540/Kol/2015 dated 14.02.2018

2872. Where the Revenue was unable produce any letter to prove that AO had made a reference of international transactions to TPO and what was produced was only an approval granted by DIT on December 27, 2011 to make such reference, the Tribunal quashed assessment orders for AYs 2009-10 & 2010-11 as being barred by limitation u/s 153(1) absent valid reference by AO to TPO u/s 92CA(1). It held that the grant of approval did not meet the requirements of section 92CA(1) of the Act, which specifically requires reference by the Assessing Officer to the Transfer Pricing Officer for the computation of ALP in relation to international transactions. Accordingly, it concluded that the assessment orders were barred by limitation u/s 153(1).

Dongfang Electric Corporation (Kolkata Project Office) vs. DCIT-TS-847-ITAT-2017(kol)-TP dated 25.10.2017

2873. The Tribunal quashed reassessment proceedings and deleted TP addition on the ground that the reference to transfer pricing officer was made prior to initiation of reassessment proceedings when no assessment proceedings were pending and held that such reference was illegal and could not be construed as information having a live link to the formation of belief that income had escaped assessment under section 147.

Labvantage Solution Pvt Ltd [TS-836-ITAT-2016 (Kol)-TP] (I.T.A No.1051/Kol/2015)

2874. The Tribunal set aside the CIT's order u/s 263 wherein the CIT held that that since assessee had not entered into international transaction, the last date for filing of return of income was September 30 as opposed to November 30 and directed the AO to pass a consequential order. It observed that the assessee had disclosed transaction of 'reimbursement

paid/payable by AE' in the annexure to Form No. 3CEB and similar transaction was also considered as an international transaction by the TPO for subsequent AY. Further, it also noted that the CIT confused the disclosure of the reimbursement with another note to return referring to issue of shares at a premium. Accordingly, it concluded that the assessee's return filed on November 28, 2011 was well within the due date.

Bangla Entertainment Private Limited vs Pr. CIT-TS-674-ITAT-2017(KOL)-TP dated 23.08.2017

2875. The Tribunal partially rejected the miscellaneous application filed by the assessee, urging the Tribunal to rectify its order directing the assessee to furnish further comparables for adoption of CUP for benchmarking the cost to cost expenses reimbursement made by the assessee by holding that the said directions did not stand in the way of the assessee making a claim before the AO that one comparable would be sufficient to determine ALP of its International transactions. b) the direction passed in the aforesaid order, directing the use of multiple year data and adopting weighted average data of comparables was contrary to the statutory provisions and therefore amounted to a mistake apparent from record and was to be deleted.

Lee Hours Pomeroy Architects v DCIT - TS-644-ITAT-2016 (Kol) - TP I.T.A No. 382/Kol/2015

2876. The Tribunal set aside the order of the DRP on the ground that it was laconic and non-speaking as it did not deal with the objections raised and the submissions made by the assessee. Accordingly, it directed the DRP to pass a speaking order dealing with the objections.

Lexmark International (India) Pvt Ltd v DCIT (I.T.A. No. 1967/KOL/ 2010) – TS-603-ITAT-2015 (Kol) – TP

2877. The Tribunal held that a reference made to the TPO where there was no assessment pending was invalid and bad in law. It further held that the order of the TPO pursuant to the illegal reference could not be used in the reassessment proceedings by the AO and therefore the reassessment proceedings based on illegal reference were held to be void ab initio.

Bucyrus India Pvt Ltd v DCIT [I.T.A No. 616/Kol/2015] – TS-486-ITAT-2015(Kol)-TP

2878. The Tribunal held as per Section 92CA of the Act, there is no requirement for the AO to furnish to the assessee, his reasons for rejecting the assessee's computation of ALP and the assessee could not contend that the order of the AO / TPO was bad in law merely on the aforesaid ground considering that the assessee was afforded adequate opportunity of being heard before the adjustment was made.

Philips Electronics v ACIT - TS-316-ITAT-2016 (Kol) – TP

2879. The Tribunal dismissed assessee's appeal against CIT's revision order u/s 263 as infructuous, noting that pursuant to the direction of the CIT (i.e. Direction to AO to make a reference to TPO in order to carry out necessary enquiry and obtain data to make examination for ALP-determination in relation to the assessee's domestic transaction with Techni Bharati Ltd and Tantia Construction Ltd) the TPO had passed order holding that no TP

adjustment was warranted. Therefore, noting that the assessee had no grievance against TPO's order, it dismissed the appeal as infructuous.

Tantia TBL Joint Venture vs. Pr. CIT - TS-139-ITAT-2018(Kol)-TP] - I.T.A No. 78/Kol/2017 dated 14-02-2018

2880. The Tribunal quashed the assessment order for three years wherein ALP adjustment to assessee's software development services was made and held that issuance of section 143(2) notice by the competent AO is a mandatory condition before framing of a scrutiny assessment and non-compliance thereof renders the entire consequential proceedings to be non-est in the eyes of law noting that regular assessment was framed by the AO in Kolkata while relevant assessment notices were issued by the AO in Chennai. The Tribunal examined the status report submitted by the Revenue from which it emerged that an order u/s.127(2) was passed by the AO transferring jurisdiction of the assessee from Mumbai to Kolkata while mentioning of the PAN lying with Kolkata. On checking of the database, it was found that the assessee had his address at Chennai with another PAN simultaneously with the present PAN (which was lying in Chennai Jurisdiction at that point of time and later transferred to Kolkata) and thereafter, the PAN in Chennai was deleted in de-duplication process and present PAN was retained. Notice u/s.143(2) was issued by the AO in Chennai and since the time period had elapsed, the AO in Kolkata issued subsequent notices u/s.142(1) and completed the assessment proceedings. The Tribunal quashed the assessment order since the AO in Chennai issuing the section 143(2) notice(s) did not have jurisdiction and the assessing authority in Kolkata did not issue such scrutiny notices.

Lexmark International (India) Pvt Ltd vs DY.CIT (TS-1086-ITAT-2018(Kol)-TP) ITA No.268/Kol/2017 dated 28.09.2018

2881. Where the reassessment was opened on basis of information received from DIT(I) that assessee was exporting iron ore at a price less than prevailing market price in to its AE in China who further sold it at marker price, the Tribunal noted that it was not new information (price at which assessee exported iron ore) as this fact could be discerned from the original assessment order and further, the bench marking based on FOB rate at India with the market rate prevailing at China itself was per-se erroneous. The AO should have applied his mind independently and made enquiries about the FOB rate of iron ore as taken by similar companies in India under uncontrolled conditions in India in relation to exports made to unrelated third parties which would give some comparability to the export price of assessee. Thus, the Tribunal quashed the reassessment proceedings holding that AO was duty bound to make reasonable enquiry to collect material which would make him believe that there was in fact an escapement of income which requirement of law has not been fulfilled in the instant case by the AO

Devansh Exports vs ACIT (TS-1124-ITAT-2018(Kol)-TP) ITA No.2178/Kol/2017 dated 15.10.2018

2882. Where the reopening of the assessment was beyond 4 years for the reason that the assessee had exported iron ore to its AE in Hongkong at a lesser price which was further sold to China at higher price and thus, income had escaped assessment, the Tribunal quashed the assessment order and DRP's order (which had not examined the validity of reopening of assessment) and held that proceedings were null and void-ab-initio on the ground that there

was no failure on the part of assessee to disclose material facts. The assessee had reported the international transaction in Form3CEB and TAR at the time of original assessment proceedings u/s.143(3) and hence the condition precedent of s.147 for reopening of assessment beyond 4 years i.e. failure on the part of assessee to disclose material facts was not satisfied. Thus, the Tribunal relying on the ratio laid down in Bombay High Court in Hindustan Unilever [wherein it was held that the AO must disclose in the reasons as to which fact or material was not disclosed by assessee truly and fully and the reasons must also provide link between conclusion and evidence] quashed the re-assessment order.

Devansh Exports vs ACIT (TS-968-ITAT-2018(Kol)-TP) ITA No.2177/Kol/2017 dated 05.09.2018

2883. The Tribunal held that the AO had no power to deviate from the Draft Assessment Order while passing the Final Assessment Order and thus could not make any addition/disallowance in Final Assessment order not proposed by the Draft Assessment order. The provisions of section 144C provide that on passing of the draft Assessment order, the assessee either accepts the variations or files its objections before the DRP and the AO can vary the final assessment order only in respect of any addition/disallowance as per the directions of DRP. Thus, the Tribunal deleted the disallowance u/s.80 IC made over and above the draft Assessment order by the Final assessment order where the assessee had not approached DRP. [It relied on the ratio laid down in the decisions of Gujarat HC for Woco Motherson Advance Rubber Technologies Ltd (Revenue's SLP subsequently dismissed by SC) and Madras HC in Sanmina SCI India Pvt. Ltd.]

Piramal Enterprises Ltd vs Addl. CIT [TS-808-ITAT-2018(Mum)-TP] ITA No.5471/Mum/2017 and ITA No.5583/Mum/2017 dated 30.07.2018

2884. The Tribunal quashed the assessment order making TP additions on a non-existent entity, by holding that the lower authorities had erred in completing the assessment on the pre merged entity even though the factum of merger was brought to the notice of the AO by assessee at several stages and the same was duly noted, as evident from correspondence between AO and the assessee. Thus, the Tribunal relying on the Delhi HC judgement in the case of Spice Infotainment confirmed that passing assessment order in case of non-existent entity was a jurisdictional defect and not a technical defect and accordingly quashed the said order.

IPSOS Research Pvt. Ltd Vs ACIT Circle 11(2)- TS-361-ITAT-2018(Mum)-TP- ITA No 1177/Mum/2015 dated 11.04.2018

2885. The Tribunal dismissed assessee's appeal challenging the validity of the Assessment order on the ground that AO could not have determined the ALP of the transaction without issuance of notice under the proviso of section 92C(3) of the Act. Noting that the AO had showcaused in the notice u/s.142(1) of the Act as to why the ALP of the transaction should not be computed, it dissented with the case law relied on by the assessee [i.e. Delhi HC rulings in MoserBaer and Maruti Suzuki India Ltd.] observing that they were on different factual matrix as TPO had not served a mandatory notice u/s.92CA (as reference was made by AO to TPO for TP proceedings) served on assessee to produce any evidence to be relied on in support of his computation of ALP which was required by provisions of sec 92CA(2). It observed that AO in its notice u/s.142(1) had clearly showcaused the assessee as to why ALP should not be computed, assessee had failed to respond to notices issued by AO and consequently, penalty

was levied u/s.271(b). Thus, it was evident that under the proviso to of section 92C(3), the AO had given sufficient notice to the assessee and the assessee in the instant case has not complied.

Kaybee Private Limited vs ITO [TS-898-ITAT-2018(Mum)-TP] ITA No.2166 and 2167/Mum/2015 dated 08.08.2018

2886. The Tribunal dismissed assessee's additional ground challenging AO's reference to TPO without giving assessee a hearing opportunity for AYs 2012-13 & 2013-14 absent assessee's objection regarding applicability of Chapter X provisions or that the transactions were not international transactions in the present case. The Tribunal referring to the Bombay High Court's Vodafone India ruling held that the prima facie view of the AO would be sufficient before referring the matter to the TPO for ALP determination. It noted that the assessee's case did not fall within the 3 situations enumerated under CBDT Instruction 15 of 2015 which mandates AO, as a jurisdictional requirement, to record his satisfaction that there was an income / potential income being affected on ALP-determination. However, it accepted assessee's adoption of TNMM (which was accepted by Revenue for the previous 3 years) over TPO's CUP-method for benchmarking the export of natural ingredient products to its AE absent cogent reasons given by TPO/DRP for departing from earlier years' approach. Observing that there was neither any change in facts nor in law nor TNMM was found to be totally wrong method, it held that there was no reason to deviate from the accepted practice. It observed that even with updated comparables margins, the assessee's PLI was higher than that of comparables and thus the transaction was at ALP.

Omni Active Health Technologies Ltd v DCIT – TS – 146- ITAT-2018 (Mum) – TP - ITA No 638 / 2017 dated 06.03.2018

2887. The Tribunal affirmed the CIT(A)'s order holding that the assessment order for AY 2008-09 proposing a TP addition was non-est in the eyes of the law as it was based on notice issued u/s 143(2) of the Act which was time barred. It noted that the assessee filed return of income on September 30, 2008 and therefore the time limit for issuing notice u/s 143(2) was September 30, 2009 whereas the notice was issued on August 23, 2010 and therefore the said notice was time barred. It further held that merely because the assessee continued to appear and co-operate in the on-going assessment, it would not validate an otherwise unauthorized action of the assessing authority.

Standard Chartered Finance Ltd – TS-960-ITAT-2016 (Mum) - TP

2888. Where the assessee contended that the transactions entered into it were at ALP in light of the fact that it had entered into advance pricing agreement (APA) under section 92CC of the Act with CBDT on 24th November 2015, wherein, the arm's length price of international transaction relating to investment advisory services provided to AE had been accepted at operating profit margin of not less than 20% and the DRP and TPO had in AY 2006-07 and AY 2007-08, accepted the margin of the assessee at cost plus 17% and 17.5%, respectively, the Tribunal held that though no conclusive finding on the binding nature of APAs was required in light of its decision on comparables (assessee succeeded in excluding and including certain comparables post which it was at ALP), it held that the the APA entered into by the assessee was of persuasive value while determining ALP of the relevant year.

Warburg Pincus India Pvt. Ltd. vs. ACIT - TS-44-ITAT-2017(Mum)-TP -ITA no.

6981/Mum./2012 dated 13.01.2017

2889. The Tribunal quashed re-opening of assessment u/s148 as there was absence of any reason to believe that the assessee's income had escaped assessment. The Tribunal noted that AO had reopened assessment based on material found during search operations at another party, the material found was in relation to receipt of preference share capital and premium from non-resident shareholder. The AO had contended that the non-resident shareholder qualified as AE and because Form 3CEB was not filed, it became a valid reason for reopening.

The Tribunal stated that merely issuing of shares on premium was no reason for reopening u/s 147 in the absence of any adverse material. Further, it relied on HC judgement in case of Vodafone India Services and noted that reasons recorded nowhere formed a prima facie opinion about escapement of income and thus mere suspicion of AO was no ground for reopening as per HC ruling in case of Nivi Trading

Jay Maa Durga Buildtech Pvt Ltd vs DCIT CC 7(3)- TS-308-ITAT-2018(MUM)-TP ITA No 2720/Mum/2017 dated 17.04.2018

2890. The Tribunal held that it is the statutory duty of the AO / CIT to analyze the transfer pricing transactions independently before making reference / granting approval of reference to the TPO after a proper application of mind to all facts and forming a prima facie opinion / belief. It was further held that CBDT Instruction 3 / 2003 detracting the AO / CIT from the aforesaid obligation was in violation of the provisions of the Act and that necessary hearing was to be given to the assessee in accordance with the principles of natural justice before making reference to the AO in light of the amendment made to Section 92CA.

Further it was held that TP adjustment could not be made in cases where the assessee enjoys benefit under section 10A / 80HHE of the Act or where the tax rate in the country of the AE was higher than the Indian rate, as tax avoidance or manipulation of prices of shifting of profits was not possible.

DCIT v Tata Consultancy Services (ITA No.7513/M/2010 & C.O. No.216/M/2010) – TS-521-ITAT-2015 (Mum) – TP

2891. The Tribunal held that the issuance of a draft assessment order is a sine qua non before the AO can pass a regular assessment order under section 143(3) of the Act and since the AO passed the final assessment order without passing the draft assessment order, the same was liable to be quashed.

Jazzy Creations Pvt Ltd v ITO - TS-38-ITAT-2016 (Mum) - TP

2892. Where the assessee had adopted TNMM to determine ALP of export of vaccine, but TPO proposed adjustment by comparing margins of export sales with margins of sale in domestic market to related entities and the CIT(A) had dismissed assessee's appeal even though assessee made detailed submission and filed additional evidence in support of its claim, the Tribunal noting that right from AY 2002-03 onwards, Tribunal had remitted the matter to the AO/TPO for fresh determination of ALP as neither the assessee nor the TPO carried out ALP determination exercise as per law, remitted the matter to the AO/TPO directing it to consider the assessee's evidence and submission and re-adjudicate the issue after giving opportunity of hearing to the assessee.

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Chiron Behring Vaccine Pvt Ltd vs ACIT-TS-929-ITAT-2017(mum)-TP dated 03.11.2017

2893. The Tribunal held that the margin determined for 96 percent of the assessee's ITES transactions with its US AE entities under MAP proceedings should be applied to the remaining 4 percent of transactions with Non-US AE entities since the facts and nature of the transactions were the same and neither was there any distinction made between the US and Non-US entities by the assessee in its annual report and nor by the Revenue authorities.

JP Morgan Services Pvt Ltd v DCIT (ITA NO.8987/Mum/2010 & ITA NO.7822/Mum/2011) – TS-578-ITAT-2015 (Mum) – TP

2894. The Tribunal, following co-ordinate bench's ruling in assessee's own case for AY 2009-10 wherein the bench had dismissed grounds relating to similar TP-adjustment as infructuous as DRP had subsequently issue a corrigendum (after passing order) deleting the adjustment, deleted the TP addition of Rs. 13.94 crores made on account of assessee's international license revenue transaction for AY 2010-11.

Nimbus Communications Ltd vs ACIT-TS-941-ITAT-2017(mum)-TP dated 03.11.2017

2895. The Tribunal held that merely because the assessee, at the initial stage, while preparing its transfer pricing study, rejected the Resale Price Method and selected TNMM as the most appropriate method, it could not be precluded from making a plea at a later stage that RPM is the most appropriate method for determination of ALP. It observed that the selection of the most appropriate method was a purely legal issue and could be entertained by it in the form of an additional ground.

Pfizer Limited v ACIT (ITA no.3729/Mum./2008) – TS-561-ITAT-2015 (Mum) TP

2896. Noting that the AO made TP-adjustment without making a reference to TPO but following TPO's order for AY 2007-08 as basis for making TP-addition, the Tribunal set aside the order of the CIT(A) on TP -adjustment of Rs. 13.28 crores and admitted assessee's additional grounds challenging the framing of assessment without making reference to TPO for determination of ALP and without following procedure u/s 144C. Accordingly, it remitted the matter to the file of AO for de-novo determination of the issue on merits.

Bericap India Pvt. Ltd. vs. ACIT-TS- TS-935-ITAT-2017(Mum)-TP- I.T.A. No. 4703/Mum/2013 dated 27.11.2017

Bechtel India Pvt Ltd vs ACIT-TS-925-ITAT-2017(DEL)-TP dated 11.11.2017

2897. The Tribunal dismissed assessee's additional ground against AO's failure to refer ALP determination to TPO even though the value of international transactions (Rs. 10.42 Cr) for AY 2010-11 exceeded Rs. 5 crore and confirmed AO's jurisdiction to adjudicate on TP matters in assessee's case. It noted that the though CBDT Instruction No. 3 of 2013 prescribed a monetary limit of Rs. 5 crore for making reference to the TPO, the said limit had been subsequently revised in the CBDT's Central Action Plan for FY 2006-07 wherein the threshold was increased to Rs. 15 Crores. Accordingly, it held that there was no requirement for making any reference to the TPO and further noted that the assessee had not raised similar contention in appeal for AY 2009-10 where the value of international transactions was Rs. 10.52 crore.

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Schlumberger India Technology Centre Pvt. Ltd. (formerly known as Schlumberger Global Support Centre Pvt. Ltd.) vs. DCIT - TS-36-ITAT-2018(PUN)-TP - ITA No.640/PUN/2014 dated 10.01.2018

2898. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order quashing the final assessment order passed by AO without passing the draft assessment order relying on ratio laid down in Bombay High Court in Dimension Data Asia Pacific Pte Ltd, Andrew Telecommunication (P) Ltd and International Air Transport Association wherein it was held that final assessment order being passed without passing a draft assessment order violated sec 144C(1) and thus, had to be quashed. It noted that the AO had clearly passed a final assessment order as it had issued demand notice along with assessment order.
ACIT vs East West Seeds Ltd [TS-1246-ITAT-2018(Pun)-TP] ITA No.2599 /Pun/2016 dated 14.11.2018

2899. The Tribunal admitted the additional ground of the assessee to quash the assessment order and quashed the order proposing TP adjustment issued in the name of the non-existent entity viz. Akzo Nobel Chemicals India Ltd. which merged with Akzo Nobel India Limited as approved by Bombay High Court order dated May 11,2012. Relying on the ITAT order in assessee's own case for AY 2010-11, it held that where an entity merges with another entity then the assessment order passed against the non existent entity cannot stand.
Akzo Nobel India Limited (as successor of Akzo Nobel Chemicals (India) Limited) vs DCIT [TS-621-ITAT-2018(PUN)-TP] dated 05.06.2018

2900. The Tribunal, by applying the provisions of section 144C read with section 143, held that where the Assessing Officer passed final assessment order under section 143(3) making certain adjustments to the assessee's ALP without passing draft assessment order which was against the provisions of the Act and hence, the same was invalid in law. It held that the compliance of section 144C was mandatory in all such cases where the TPO proposed variation in the income or loss returned, which was prejudicial to interest of the assessee.
Soktas India (P.) Ltd - [2017] 77 taxmann.com 19 (Pune - Trib.)

2901. The Court held that the reassessment proceedings initiated by AO u/s 147 for AY 2005-06 on the basis of Form 3CEB furnished by group company of assessee, were without jurisdiction and unsustainable as the AO had no new information or tangible material to conclude that there was escapement of income since the assessee had also filed Form 3CEB along with return of income, making full disclosure of receipts from IT support services rendered to group company and claiming the same to be reimbursement of expenditure and not income.
Sanvik Information Technology AB - TS-1055-ITAT-2016 (PUN)-TP

2902. The Tribunal admitted assessee's additional ground and held that draft assessment order passed along with issue of a demand notice was a complete order which was not envisaged under Sec 143(3) r.w.s. 144C and therefore invalid. It held that the requirement of the Act w.r.t draft assessment order are, that the proposed additions are to be made and show cause notice is to be issued to the assessee on which it can accept the same or file objections before the DRP. However, in the present case, Tribunal observed that the Assessing Officer in the draft assessment order assessed income in the hands of the assessee and itself

crystallized the demand on income by issuing demand notice under section 156 of the Act and also initiated penalty u/s 271(1)(c).

The Tribunal relied on co-ordinate bench ruling in Rehau Polymers & Sandvik Asia (wherein identical facts were considered), HC rulings in JCB India and Turner International wherein it was held that it is mandatory for AO to pass draft assessment order prior to issuing final assessment order and thus held that the draft assessment order passed in the present case was invalid in law.

M/s. Eaton Industrial Systems P Ltd vs DCIT Circle-8 Pune- TS-274-ITAT-2018(PUN)-TP-ITA No. 536/Pun/2014 dated 12.04.2018

2903. The Tribunal admitted assessee's additional ground and held that the draft assessment order passed along with issue of a demand notice was a complete order which was not envisaged under Sec 143(3) r.w.s. 144C and therefore the said order was invalid. It held that as per the Act proposed additions are to be made in the Draft Assessment order and the assessee is to be issued a show cause notice providing it with the option to either accept the same or file objections before the DRP but no such procedure was followed in the instant case. Relying on the decision of the co-ordinate bench in Rehau Polymers (wherein identical facts were considered) and the High Court rulings in JCB India and Turner International wherein it was held that it is mandatory for AO to pass draft assessment order prior to issuing final assessment order, it held that the draft assessment order passed in the case was invalid in law and accordingly quashed the order.

Sandvik Asia Pvt. Ltd vs. DCIT - TS-148-ITAT-2018(PUN)-TP - ITA No.467/PUN/2015 dated 25.01.2018

2904. Where the AO issued demand notice u/s. 156 and as well as issue of notice u/s.274 r.w.s 271(1) (c) at the stage of making the draft assessment order, the Tribunal held that it was undisputed that such notices could only be issued at end of assessment proceedings and accepted the assessee's plea that the order passed was contrary to mandatory provisions of sec 144C and thus, the assessment order passed was null and void-ab-inito not enforceable in law. It relied on the AP HC ruling of Zuari Cements Ltd. (SLP dismissed) wherein it was held that final assessment order passed contrary to provisions of s 144C was void-ab-initio.

Eaton Fluid Power Ltd. vs Dy.CIT [2018] 96 taxmann.com 512 (Pun-Trib) ITA No.535 of 2014 dated 25.04.2018

2905. Where pursuant to the order passed by the TPO, the AO passed draft assessment order dated 07-02-2014 making TP-addition of Rs. 24.37 Cr and along with the impugned assessment order, the AO also issued notice of demand u/s 156 and show cause notice for levy of penalty u/s 271(1(c), after recording satisfaction for initiating penalty proceedings u/s. 271(1)(c) r.w.s Explanation 7, the DRP refused to exercise its jurisdiction, holding that the draft assessment order was final order for all intent and purposes as it was issued along with demand and penalty notices. The Tribunal held that as per the provisions of Sec 144C, it was incumbent upon the AO to forward a draft assessment order to the assessee in the first instance, so as to enable the assessee to file objections before the DRP and that it was only after receipt of directions from the DRP, that the AO could pass the final assessment order and record satisfaction for initiating penalty proceedings. Noting that the AO issued demand notice u/s 156 and show cause notice for levy of penalty u/s. 271(1)(c) while passing the draft

assessment order itself, the Tribunal held that in spirit the draft assessment order was the final assessment order and therefore quashed the assessment order dated 07.02.2014, and held that the subsequent proceedings arising there from were vitiated and null and void.

Can-Pack India Private Limited vs. DCIT - TS-167-ITAT-2017(PUN)-TP - / ITA No. 285/PUN/2015 dated 08.03.2017

2906. The Tribunal adjudicated on 2 grounds not considered in original order which was recalled pursuant to miscellaneous petition filed by assessee for AY 2008-09 and held that since assessee's claim [(i) TP-adjustment exceeded the AE's share of revenue (approximately Rs. 7.7 crores as against TP adjustment of Rs. 16 crores) and that reverse analysis could have been done by making the AE as the tested party and(ii) TPO failed to recognize that the compensation ratio between AE and assessee was commensurate with the FAR analysis of both parties] were not raised before DRP and the TPO and the issues involved were not properly addressed by authorities in earlier proceedings the same ought to have been remitted to the TPO to re- consider the issue after the assessee furnished requisite details.

Synechron Technologies Pvt Ltd v ACIT – TS-50-ITAT-2017 (Pun) – TP - ITA 2518/PUN/2012 dated 01.12.2017

2907. The Tribunal quashed assessment order proposing TP-adjustment issued in the name of the non-existent entity viz. Akzo Nobel Chemicals India Ltd which merged with AkzoNobel India Limited w.e.f. April 1,2011 as approved by Bombay HC order dated May 11, 2012. It noted that the AO and TPO were duly informed by assessee about the amalgamation and assessee had also pointed out that as per the scheme of amalgamation, the entire business had been transferred on a going concern basis to amalgamated company including income tax liabilities and obligations of assessee. It observed that the AO had raised specific query in this regard but had failed to take cognizance of the facts of present case and the submissions made during the course of assessment proceedings and TP proceedings and accordingly held that the assessment order in the name of non-existent entity was void.

Akzo Nobel Chemicals (India) Ltd. (merged with Akzo Nobel India Limited) v DCIT - TS-149-ITAT-2018(PUN)-TP - ITA No.1225/PUN/2015 dated 09.02.2018

2908. The assessee filed return of income declaring taxable income to be nil since it had no permanent establishment in India. On the basis of the disclosure of the management service fees (received by the assessee) in Form 3CEB filed by its AE, AO opined that management fee fell within ambit of section 9(1)(vii) as well as Article 12 of India Sweden Tax Treaty and thus reopened the assessment to tax the amount as fees for technical services. The assessee pointed out that the details of receipt of fees was disclosed in the Form 3CED as well as notes to return/ computation filed by it along with the return of income. The Tribunal discussed plethora of judicial precedents including Apex Court decision in Rajesh Jhaveri Stock Broker (291 ITR 500), Jurisdictional High Court decision in Khubchandani Healthparks (384 ITR 322) and Delhi HC in Orient Craft Ltd (ITA No.555/2012) and held that for the AO to have reason to believe that income has escaped assessment, tangible material should be available with the AO to come to such a finding. Thus, the Tribunal held that reassessment proceedings were invalid in absence of such tangible material.

DY DIT v Sandvik AB [TS-460-ITAT-2018(Pun)-TP] ITA No.623/Pun/2014 dated 05.06.2018

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2909. Where the AO failed to issue a notice under section 143(2) of the Act within the time limit prescribed as a result of which the regular assessment came to an end and the matter had reached its finality, and then subsequently he made a reference to the TPO wherein the TPO made an upward addition of Rs.85.63 lakh, the Tribunal held that the AO erred in issuing a notice under section 148 of the Act on the basis of the order of the TPO contending that income of the assessee had escaped assessment as the reference made by the AO to the TPO was bad in law in the first place as at the time of reference no proceedings were pending. Accordingly, it held that the order of the TPO based on such incorrect reference was void-ab-initio and therefore could not be a valid material to entertain a belief on part of the AO that income chargeable to tax has escaped assessment.

ITO vs. Magic Software Enterprises India Pvt. Ltd - TS-53-ITAT-2017(PUN)-TP- ITA No.1801/PUN/2013 dated 31.01.2017

2910. The Tribunal upheld CIT(A)'s order admitting additional evidence filed by assessee. It noted that, during the TP proceedings, assessee could not substantiate to the satisfaction of TPO that it was carrying on manufacturing activity in respect of goods being exported to its AE and resultantly, TPO rejected assessee's bifurcation of trading activity in domestic sales and export sales. However, before CIT(A), assessee had filed manufacturing process chart, cost sheet, sample copies of invoices and photographs of the manufacturing activity, etc. to show that it was involved in manufacturing activity for export of manufactured/finished goods which was admitted by CIT(A). The Tribunal held that the documents placed on record by the assessee as additional evidence were vital for proper adjudication of the issue as in the present case. It also noted that the additional evidence filed by assessee were referred to AO/TPO for examination and TPO, after examining the documents, agreed that manufacturing activity was being carried out by assessee. The Tribunal thus concluded that there was due compliance of principles of natural justice and dismissed Revenue's appeal filed against CIT(A)'s admission of additional evidence.

ACIT Circle -6 vs Stauff India Pvt. Ltd-TS- 439-ITAT-2018(PUN)-TP- ITA Nos. 669 & 670/PUN/2014 dated 26.04.2018

2911. The Tribunal, relying on the decision in the case of International Air Transport Association [TS-62-HC-2016(BOM)-TP] and Zuari Cement Ltd vs ACIT[TS-271-HC-2013(AP)-TP] dismissed Revenue's appeal against CIT(A) order quashing final assessment order passed by AO without passing draft order on the ground that a final assessment order, not preceded by draft order was without jurisdiction, null, void and unenforceable. Noting that the TPO had made an adjustment after which AO passed the final assessment order u/s 143(3) without the draft order mandated u/s 144C(1), it held that the final assessment order was in violation of provisions of section 144C and therefore liable to be quashed.

DCIT vs Fiat India Automobiles Limited-TS-560-ITAT-2017(PUN)-TP-ITA No. 853/PUN/2015 dated 13.04.2017

2912. The Tribunal relying on the decision in the case of Maximize Learning (P) Ltd [TS-43-ITAT-2015(PUN)-TP] held that the initiation of reassessment proceedings by the AO u/s 147/148 on the basis of adjustments made in TPO's order without initiation of scrutiny assessment u/s 143(2) was invalid as the AO was precluded from making a reference to the TPO u/s 92CA(1)

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of the Act for the purpose of computing arm's length price in relation to the international transaction where no assessment proceedings were pending in relation to the relevant assessment year.

Kimberly Clark Lever Private Limited vs ACIT- TS-378-ITAT-2017(PUN)-TP-ITA No.2480/PUN/2012 dated 05.05.2017

2913. The Tribunal held that the reassessment proceedings initiated by AO u/s 147 for AY 2005-06 on the basis of Form 3CEB furnished by group company of assessee, were without jurisdiction and unsustainable, as the AO had no new information or tangible material to conclude that there was escapement of income, since the assessee had filed its Form 3CEB along with return of income, making full disclosure of receipts from IT support services rendered to group companies. It held that if the AO chose to ignore the material filed by the assessee and later scanned documents of other concerns in the process of which he came across some information of the assessee which had already been disclosed by the assessee itself, such information could not partake the character of new tangible material.

Sanvik Information Technology AB [TS-1055-ITAT-2016 (PUN)-TP]

2914. The Tribunal dismissed cross appeals of assessee and Revenue for AYs 2007-08 to 2010-11 as the TP issues were resolved under India-USA MAP. It noted that the assessee's US AE had applied for MAP with the competent authorities of USA in respect of TP adjustment which had been accepted by the assessee.

Symantec Software India Private Limited [TS-1054-ITAT-2016(PUN)-TP

2915. Where the TPO/DRP proposed an adjustment in the assessee's manufacturing segment on the basis that segmental/sub-segmental accounts were required to be statutorily audited and allocation of interlaced expenses was not properly done, the Tribunal remitted the matter to the file of AO/TPO observing that rulings relied on by assessee regarding non-requirement of furnishing audited segmental/sub-segmental accounts were ignored by TPO/DRP and opined that DRP should have given reasons as to how the TP study demanded auditing of assessee's accounts.

Fresenius Kabi India Private Limited vs DCIT-TS-625-ITAT-2017(PUN)-TP-ITA No.235/pun/2013 dated 16.06.2017

2916. The Tribunal, noting that the AO passed a draft assessment order u/s 143(3) r.w.s 144C but also issued a demand notice and initiated penalty proceedings held that the assessment order passed was invalid in law. The procedure laid down in section 144C had not been followed. It held that the draft AO order issued was as good as a final AO order as it was accompanied with a notice of demand which was in contravention to the provisions of Section 144C which provides that the AO was obliged to first pass a draft order and then a final order after the assessee selected its preferred remedy i.e DRP or CIT(A). Therefore, it quashed the draft assessment order.

DCIT vs Rehau Polymers Pvt. Ltd-TS-642-ITAT-2017(PUN)-TP-ITA no. 566/PUN/2015 dated 14.06.2017

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2917. The Tribunal held that when no assessment proceedings were pending in relation to the relevant assessment year, the AO was precluded from making a reference to the TPO under section 92CA(1) of the Act for the purposes of computing the ALP of international transactions and the consequent order of the TPO proposing an addition was void ab initio and not valid material for the AO to entertain belief that certain income chargeable to tax had escaped assessment under section 147 of the Act.
Kaeser Compressors (India) Pvt Ltd v ACIT [ITA No 2379 / PN / 2012] - TS-406-ITAT-2015(PUN)-TP

2918. The Tribunal remitted the matter back to DRP since it rejected the admission of additional evidences filed by assessee to support its contention that its foreign AE could be selected as tested party for benchmarking raw material import transaction for AY 2008-09. The DRP had declined to admit the additional evidence filed on August 22,2012 and cited non-availability of adequate time to verify the additional evidence as the case would be time-barred on September 30, 2012. However, DRP had called for remand report from AO which was received on September 17, 2012. Upon perusal of the provisions of Sec 144C and DRP Rules, the Tribunal held that the proceedings before DRP are continuation of the proceedings before AO and further held that DRP had powers to admit, consider and adjudicate on the additional evidence. Thus, the Tribunal set aside the DRP order and remitted issue of determination of ALP of import transactions to DRP after considering the additional evidence.
Bekaert Industries Pvt Ltd vs. ACIT [TS-349-ITAT-2018(PUN)-TP] ITA No.2376/Pun/2012 dated 14.05.2018

2919. The Assessing Officer (AO) based on TPO order dated 29.10.2010 proposing TP adjustments of Rs.1.46 crores, issued notice u/s 148, which was served upon assessee on 24.11.2011. CIT(A) applying the second proviso to section 153(2), held that in respect of a notice served after 1.4.2011, the AO was required to complete assessment within 9 months from end of FY in which notice was served i.e. before 31.12.2011 order u/s 144c r.w.s 147 of the Act was passed on 29.02.2012. The CIT(A) thus concluded that re-assessment order passed by AO was time barred. Tribunal upheld the order of CIT(A) wherein the CIT(A).
DCIT vs Menshen Ropa Plastic Pvt. Ltd-TS-466-ITAT-2017(PUN)-TP-ITA No. 1946/PUN/2014 dated 07.06.2017

2920. The Tribunal quashed the final assessment order passed without draft assessment order as mandated by Section 144C noting that the AO had passed the order along with demand notice and show-cause notice for levy of penalty which was contrary to the mandatory provisions of Section 144C. It dismissed the contention of the Revenue that the order was accompanied by a letter mentioning that it was a draft assessment order and held that in spirit the AO had finalized the assessment wherein demand was crystallized and demand notice was issued to the assessee and accordingly held that the AO had not followed the correct procedure as provided in the Statute.
Soktas India Pvt Ltd – TS-998-ITAT-2016 (Pun) - TP

2921. The Tribunal quashed the final assessment order passed as it was not passed in conformity with DRP's direction within a period of one month from end of month in which directions are issued by DRP and was a verbatim repetition of the draft assessment order. It relied on

coordinate bench decision of Software Paradigm wherein under similar factual matrix, the final assessment order was quashed by holding that it was contrary to provisions of s 144C(10) read with 144C(13) of the Act noting that it was a clear disregard of the binding direction of the higher authority i.e. DRP. It distinguished case law cited by Revenue of coordinate bench in case of H & M Hennes & Mauritz India (P) Ltd observing that in the said case the assessee had prayed for set aside of the assessment order and AO to pass order in accordance with DRP's directions.

Flextronics Technologies (India) Pvt Ltd. vs ACIT [TS-1324-ITAT-2018-(JPR)-TP] IT(TP)A No.832/Bang/2017 dated 31.12.2018

2922. The Tribunal referring to the co-ordinate bench ruling in case of Capsugel Healthcare Ltd vs ACIT held that since the AO had failed to follow the mandate of the provisions of section 144C of the Act whereby the AO was required to pass a draft assessment order, it would result in nullification of the final assessment order passed u/s 143(3).

M/s. Jaipur Rugs Company (P) Ltd vs DCIT Circle-2 Jaipur – TS- 415- ITAT-2018(JPR)-TP- ITA no 46/JP/2017 & 1084/JP/2016 dated 24.04.2018

Penalty

2923. The Apex Court dismissed Revenue's SLP against Delhi High Court order confirming deletion of concealment penalty on TP adjustment made vis-à-vis assessee's intra-group services. The TPO had made an adjustment in respect of three international transactions of availing specified business and consultancy services, engineering support services and management services by determining the ALP at 'NIL' under CUP method contending that the assessee did not avail any services from its AEs as no benefit was shown to have been received. The AO imposed a penalty of Rs. 1.20 crores u/s 271(1)(c) on the ground of concealment of income or furnishing of inaccurate particulars. The Tribunal, noting that the assessee had satisfied the requisite conditions of good faith and due diligence as stipulated in explanation 7 of sec 271(1)(c) held that non-filing of quantum appeal could not be a reason for levy of concealment penalty. Rejecting Revenue's contention that failure to substantiate benefit derived from services resulted not only in rejection of TNMM but also in reduction of losses and thus application of explanation 7 to section 271(1)(c) was warranted, the Court held that the provision should be applied on case to case basis and could not be generalized. Accordingly, it concluded that the Tribunal had not committed any error of law.

Pr. CIT vs Mitsui Prime Advanced Composites India Pvt ltd-TS-599-SC-2017-(TP)- ITA No. 913/2016 dated 21.07.2017

2924. The Court, considering the admission of quantum appeal, admitted the appeal filed by assessee challenging penalty u/s 271(1)(c) on disallowance of reimbursement of marketing cost and denial of Sec. 10A benefit on such disallowance. In the quantum proceedings, noting that the assessee's role was mere provision of software services to its AE, the Tribunal held that there was no justification for reimbursement of marketing expenses when the assessee was not involved in marketing and was only involved in delivering software development services to its AE.

Deloitte Consulting India Pvt Ltd vs ACIT-TS-467-HC-2017(BOM)-TP-dated 09.06.2017

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2925. The Court upheld the Tribunal Order deleting penalty levied u/s. 271(1)(c) for failure to consider internal comparable while applying CUP-method for ALP-determination. Noting that the Tribunal in quantum proceedings had rejected assessee's stand that the internal isolated/sole unrelated third-party transaction could not be taken as a comparable and should be excluded. However, in penalty proceedings, Tribunal held that assessee was able to discharge its onus in terms of Explanation 7 to Sec 271(1)(c) and show that its stand in not taking into consideration the internal transaction was in good faith and it had acted with due diligence. The Court noted that Tribunal's findings on the question of explanation, bona fides and due diligence were findings of fact after accepting assessee's justification for exclusion of internal comparable for 2 reasons - firstly, the transaction was of low value in comparison with transactions with AEs and secondly, it was a single transaction, whereas transactions with AE were continuous and based upon long-term business relationship. Thus, the Court dismissed the Revenue's appeal.

Pr CIT vs Sinosteel India Pvt Ltd [TS-833-HC-2018(DEL)-TP] ITA No.825/2018 dated 03.08.2018

2926. The Court allowed the assessee's writ petition and set aside the TPO's order leving penalty u/s. 271G (for failure to furnish documents under s.92D) as it was wholly without jurisdiction since the event of default occurred in March 2014 which was before the amendment in sec 271G conferring jurisdiction on TPO (earlier AO had the power) to levy penalty u/s.271G. The assessee had not complied with the notice to produce some documents under section 92D(3) in support of its case and, for said purpose, a notice was issued on 18-2-2014,giving time up to 25-3-2014. A second notice was issued by TPO alleging default and proposing penalty under section 271G. The said notice was contested by the assessee and it eventually culminated in impugned order dated 22-6-2015 whereby TPO imposed penalty under section 271G. The assessee filed instant petition contending that since jurisdiction and authority to impose penalty under section 271G was with AO till 1-10-2014, impugned penalty order passed on basis of showcause notice issued prior to that date was invalid.

Ericsson India (P). Limited vs Add. CIT [2018] 98 taxmann.com 395 (Delhi) W.P. (C) NO. 7435 OF 2018 dated 25.09.2018

2927. Where the assessee was unable to fully comply with the notice issued by the TPO (on 12.07.2011) but made a part compliance on 16.08.2011 and furnished the balance documentation on 14.10.2011, the Court dismissed Revenue's appeal and upheld CIT(A)'s order deleting penalty u/s 271G. Considering that the lower appellate authorities rendered concurrent findings and, moreover, the assessee had partly complied with the notice, it held that no substantial question of law arose from the Revenue's appeal.

Pr. CIT vs. MMTC Ltd - TS-76-HC-2018(DEL)-TP - ITA 164/2018 dated 12.02.2018

2928. The Court dismissed Revenue's appeal against Tribunal order deleting penalty u/s 271(1)(c) in respect of TP-adjustment noting that the issue based on which TP adjustment was made was debatable and rejected Revenue's contention that the Tribunal ignored the mandate of Explanation 7 to section 271(1)(c) [which deems amount disallowed u/s 92C(4) to be income in respect of which particulars have been concealed or inaccurate particulars have been furnished]. Accordingly, it dismissed Revenue's appeal observing that no question of law arose for its consideration.

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Pr. CIT vs. Global Vantedge Pvt Ltd - TS-177-HC-2018(DEL)-TP - ITA 316/2018 dated 19.03.2018
Pr. CIT vs. GLOBAL VANTEDGE Pvt Ltd - TS-193-HC-2018(DEL)-TP - ITA 332/2018 dated 20.03.2018

2929. Where the assessee engaged in the business of trading, carried on manufacturing for the first time in consequence of entering into business agreement with its AE and adopted TNMM as the most appropriate method and the TPO adopting CUP method determined the ALP as Nil, which resulted in reduction of losses of the assesse consequent to which, penalty u/s 271(1)(c) was levied, the Court confirmed the Tribunal's order deleting penalty levied u/s 271(1)(c) in relation to TP addition made since the assessee had satisfied conditions of good faith & due diligence as stipulated in Explanation 7 to sec 271(1)(c).
Mitsui Prime Advanced Composites India Pvt. Ltd [TS-135-HC-2017(DEL)-TP] (ITA 913/2016)

2930. The Court confirmed the Tribunal's deletion of concealment penalty levied under section 271(1) (c) of the Act for AY 2007-08. It noted that in the quantum appeal, assessee had conceded to the mark-up of 32% on operational costs for the purpose of making TP-adjustment and upheld the order of the Tribunal wherein it held that penalty could not be imposed merely because the addition was accepted by assessee. It held that that there was no deliberate attempt by the assessee to conceal any income or to underpay tax and accordingly, it dismissed the Revenue's appeal.
Pr. CIT Vs Gap International Sourcing India Ltd - TS-323-HC-2017(DEL)-TP - ITA 185/2017 dated 24.04.2017

2931. Assessee, incorporated in India, was a wholly owned subsidiary of GAP International Sourcing Inc, USA and operated as a procurement support service company whereby it facilitated sourcing of apparel merchandise from India for its AE, for which it was remunerated at total operating costs plus a 15% mark-up thereon. The TPO accepted TNMM as the most appropriate method, however, re-characterized the assessee as a 'significant risk bearing' entity having intangibles as opposed to a low risk service provider. In quantum proceedings, the Tribunal noting that the assessee was entitled to a cost plus mark-up on total operating cost of Gap International Sourcing India Ltd. (and not the value of goods sourced by GAP US), rejected the TPO's recharacterization of the assessee as a significant risk bearing service provider but did not accept assessee's mark-up of 15% and instead relying on the Delhi Tribunal's decision in the case of Li & Fung's [TS-583-ITAT-2011(DEL)-TP] substituted the mark-up of 32% (i.e. the maximum operating margin adopted in Li & Fung decision), which the assessee accepted. As there was no deliberate attempt by the assessee to conceal any income, the Court upheld the Tribunal's order wherein penalty under section 271(1)(c) of the Act was deleted on the ground that the assessee had accepted the TP adjustment merely to buy peace of mind.
Gap International Sourcing India Ltd –TS -323-HC-2017(DEL)-TP-ITA 185/207 dated 02.05.2017
Pr. CIT vs Gap International Sourcing India Ltd-TS-425-HC-2017(DEL)-TP- ITA 185/2017 dated 24.04.2017

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2932. Relying on the decision in assessee's own case for AY 2007-08 wherein the Court had dismissed the Revenue's appeal against the Tribunal order deleting penalty levied u/s 271(1)(c), the Court upheld Tribunal's order deleting penalty in respect of the impugned year as well and held that penalty u/s 271(1)(c) was not to be levied merely because the assessee accepted the addition under quantum proceedings.

Pr.CIT vs Gap International Sourcing (India) Pvt. Ltd-TS-677-HC-2017(DEL)-TP- ITA No. 692/2017 dated 31.07.2017

2933. The Court deleted the penalty imposed by the AO in respect of the transfer pricing addition made noting that some of the comparable companies selected by the assessee were rejected by the TPO during the year under review whereas the same had been accepted in the prior year and therefore the assessee could not have visualized that out of the 12 comparables selected by it, 9 would have been rejected resulting in a radical change in margin computation. It further held that in the absence of any overt act which disclosed conscious and material suppression, invocation of Explanation 7 to Section 271(1)(c) in a blanket manner would be injurious to the assessee and contrary to the intent of the statute.

Pr CIT v Verizon India Pvt Ltd - TS-698-HC-2016 (Del) -TP – ITA 460/2016, C.M. APPL.26591/2016

2934. The Court upheld the ITAT's deletion of penalty on non-disclosure of AMP expenses considering that the documentation was correct with the requirement of law at the relevant time and that the Bright Line Test concept was newly framed post the passing of the penalty order.

CIT v Haier Appliances India Pvt Ltd (ITA No 481 / 2015) - TS-400-HC-2015(DEL)-TP

2935. The Tribunal deleted the penalty u/s. 271(1)(c) noting that the TP adjustment on interest on loan in quantum proceedings was deleted (quantum addition had been deleted, penalty proceedings would not sustain) and though adjustment with respect to reimbursement of insurance expenses by AE was made, however the assessee had disclosed the amount of insurance expenses claimed by it ,thus, there was no concealment or furnishing of inaccurate particulars.

Dishman Pharmaceuticals & Chemicals Ltd vs ACIT [TS-1148-ITAT-2018(Ahd)-TP] ITA No.15/AHD/2014 dated 26.09.2018

2936. The Tribunal remitted the issue of levy of penalty under section 271AA in respect of alleged non reporting of international transactions of purchase from AE in Form 3CEB. It noted the assessee's claim that it had wrongly conceded to the non-reporting of transactions during its earlier proceedings and that the assessee submitted a reconciliation of transactions. The Tribunal held that the non-reporting of transactions in Form 3CEB was sufficient for levy of penalty and the fact that no TP adjustment was made on the unreported transactions was irrelevant. It further noted that there was no mention of the alleged unreported transactions either in the assessment or penalty order and question how the TPO found the relevant transactions in the first place. It also held that there were discrepancies in the reconciliation submitted by the assessee. Accordingly, it restored the matter back to the AO for limited purpose for determining if any part of the purchase transactions from AEs remained unreported in Form 3CEB.

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Indian Additives Limited [TS-931-ITAT-2016(CHNY)-TP] (I T.A. No. 1454/Mds/2014)

2937. The Tribunal upheld the order of the CIT(A) deleting penalty under section 271AA for non-maintenance of documentation under section 92D with 10D, noting that the Tribunal, in the quantum appeal, had held that the method employed by the Revenue as well as the assessee for the computation of ALP of product development expenses was erroneous and therefore had remitted the matter to the TPO for fresh consideration. It upheld the finding of the CIT(A) that in light of the matter being remitted for re- consideration, the penalty would not survive. Additionally, the Tribunal observed that the assessee had maintained records which were submitted before the TPO and that the AO had not pointed out any specific findings of failure.

Autoneum Nittoku Sound Proof Products India Pvt Ltd – TS-1021- ITAT-2016 (Chny) – TP

2938. The AO levied penalty under section 271G of the Act, vis-à-vis the TP adjustment on management consultancy fees, which was deleted by the CIT(A). The Tribunal noted that CIT(A) had deleted the penalty since the primary reason on which the penalty had been levied i.e. TP adjustment on management consultancy fees had also been deleted by the CIT(A). Since the Tribunal had remitted the matter relating to management consultancy fees for ascertaining exact nature of services, it directed the AO to also decide afresh the issue relating to levy of penalty after bringing on record the failure of assessee to provide the exact information and documents.

ACIT vs. Sterlite Industries (India) Ltd - TS-278-ITAT-2017(CHNY)-TP - ITA Nos.318 & 319/Mds/2008 dated 29.03.2017

2939. The Tribunal upheld CIT(A)'s order confirming levy of penalty u/s 271AA and 271G for failure to maintain & furnish information/ documents u/s 92D by the assessee. It noted that on perusal of Form 3CEB, it was evident that data with respect to the comparability, whether external or internal, were not available on record nor made available by assessee to TPO contrary to the provisions of Sec 92D(1) which mandates that an assessee who has entered into international transaction necessarily has to maintain information and documents prescribed in Rule 10D. In compliance with the said section, the assessee is additionally required to keep a record of the analysis performed to evaluate comparability of uncontrolled transactions with assessee's controlled international transactions. The assessee had also not been able to demonstrate "reasonable cause" which is an exception to the levy of the penalty under section 273B. Thus, the Tribunal concluded that levy of penalty by the lower authoritities was justified.

India Pistons Ltd vs. ACIT [TS-627-ITAT-2018(CHNY)-TP] ITA Nos.2207 and 2208/Chny/2017

2940. The Tribunal upheld CIT(A)'s order deleting penalty levied u/s 271AA by TPO for failure to maintain the prescribed TP documentation for AY 2005-06. The Revenue had contended that the assessee had not maintained transfer pricing documentation as required under rule 10B of the Act to which the assessee argued that the TPO had not made any adjustment relating to the international transaction and therefore levy of penalty was unjustified. Relying on the coordinate bench's ruling in assessee's own case it held that since no adjustment was made

with respect to international transaction, levy of penalty u/s 271AA was not justified. Accordingly, it deleted the penalty levied u/s 271AA of the Act.

DCIT vs Indian Additives Express High Way-TS-525-ITAT-2017(CHNY)-TP-I.T.A No.649/mds/2017 dated 06.06.2017

2941. The Tribunal deleted penalty under section 271(1)(c) of the Act relating to TP adjustment on account of brand promotion expenses incurred by the assessee in India in respect of the brand name 'Panasonic' based on the 'bright line test' and held that the issue of whether the 'bright line test' could be applied to expenditure incurred in India was itself debatable and therefore the assessee could never have been deemed to have concealed income or furnished inaccurate particulars. It also referred to Explanation 7 to Section 271(1) and observed that the Revenue had not brought anything on record to show that the assessee had computed ALP in a manner which reflected absence of good faith and due diligence.

Panasonic India Pvt Ltd – TS-1003-ITAT-2016 (Chny) - TP

2942. The Tribunal remitted the issue of imposition of penalty under section 271AA of the Act (for non-maintenance of documentation required under TP regulations)to the file of the AO, noting that the subject matter of appeal was already adjudicated in the quantum appeal by the Tribunal wherein the matter was remitted to the file of the TPO for fresh consideration of comparables by considering comparables who sold garments outside India as opposed to the comparables selected by the assessee i.e. companies who sold garments within India. Accordingly, since the Tribunal had remitted the matter in in the quantum appeal, it remitted the issue to the file of the AO directing him to determine the penalty issue after determining the quantum appeal.

Greenland Exports Pvt Ltd v ACIT – TS-25-ITAT-2017 (Chny) – TP - I.T.A.No.2633/Mds./2016 dated 25.01.2017

2943. The Tribunal held that penalty under section 271AA need not be imposed upon assessee when assessee had explained that delay in filing details of international transactions under section 92D occurred on account of the fact that its auditor was busy in marriage of his son considering that there was no modification in the ALP adopted by the assessee.

Augustan Knitwear (P) Ltd. vs. ACIT - (2016) 67 taxmann.com 139 (Chen- Trib)

2944. The Tribunal deleted penalty imposed under section 271(1)(c) of the Act in relation to the TP addition proposed on payment for availing of certain services from AEs as the assessee had satisfied the conditions of good faith and due diligence as stipulated in Explanation 7 to section 271(1)(c) of the Act.

Further, it held that the mere fact that the assessee did not file an appeal against the adjustment did not make penalty an automatic implication as penalty proceedings and assessment proceedings were two separate set of proceedings recognized under the Act.

Mitsui Prime Advanced Composites India Pvt Ltd v DCIT - TS-193- ITAT-2016 (Del) - TP

2945. The Tribunal set aside the order of CIT(A) and deleted the penalty levied under the provisions of section 271(1) of the Act. It held that both of the issues involved viz. use of multiple year data and assessee's claim that benefit under proviso to Sec 92C(2) is a standard deduction were highly debatable issues at the relevant time. Regarding the use of multiple year data by

the assessee, the Tribunal held that the issue when the assessee was filing the return of income was highly contentious and law was yet evolving and hence the claim made by the assessee was a bonafide one. Further, reference was made to clarification given vide the Memorandum to the Finance Bill, 2012 that claim of 5% benefit was not a standard deduction and noted that different courts had taken a different views.

Giesecke and Devrient [I] Pvt Ltd vs DCIT [TS-479-ITAT-2018(DEL)-TP] ITA No.1458/Del/2017 dated 26.06.2018

2946. The Tribunal restored the issue of penalty u/s 271(1)(c) on disallowance of enhanced AMP expenses to the file of the AO for both years noting that relevant issue in quantum appeal was remitted by ITAT to the files of AO/TPO relying on Special Bench ruling in assessee's own case for subsequent year. It noted assessee's contention to delete the penalty as the very basis for the quantum addition had been modified by the ITAT to keep in line with the order of ITAT Special Bench in assessee's own case for assessment year 2007-08 and the matter was restored. However, the Tribunal held that interest of justice would be served if if the penalties for both the years on the quantum enhancement pertaining to AMP expenses were also restored to the file of the AO/TPO.

LG Electronics India (P) Ltd vs CIT(A) [TS-1006-ITAT-2018(DEL)-TP] ITA No.7895-96/Del/2017 dated 07.09.2018

2947. The Tribunal deleted the penalty levied u/s. 271(1)(c) for concealment noting that the Tribunal in the quantum appeal had restored the ALP adjustment on technical support services provided by the assessee to AE and the order giving effect to Tribunal's findings had revealed that assessee's income had been assessed at Rs.(-) 1,21,79,918/- as against Rs.3,07,12,369/- originally assessed by AO. The Tribunal, in the quantum appeal, held that TPO had erred in rejecting the segmental approach of assessee on basis that business development expenses and other expenses (incurred by assessee as an entrepreneur for its business with non-AE) were not apportioned to its AE segment when TPO has clearly accepted the segmental approach in preceding year and subsequent year.

Stanley Consultant India Pvt Ltd vs DCIT [TS-1162-ITAT-2018(DEL)-TP] ITA No.4082/Del/2016 dated 07.09.2018

2948. The Tribunal dismissed Revenue's appeal against CIT(A)'s deletion of Sec 271(1)(c) penalty noting that the AO had levied penalty based on TP-addition of Rs.4.55cr and the Tribunal in quantum proceedings had restored the matter back to AO/TPO, pursuant to which the AO passed a fresh assessment order making part addition of Rs.1.32cr. Accordingly, it held that the original assessment order would no longer survive in the eye of Law and consequently the penalty imposed in connection therewith by the A.O would also not survive. Further, it noted that the AO had also initiated fresh penalty proceedings and accordingly dismissed the Department's appeal as infructuous.

DCIT vs. Actis Advisers Pvt. Ltd - TS-3-ITAT-2018(DEL)-TP - ITA.No.4819/Del./2014 dated 05.01.2018

2949. Where the CIT(A) had given a categorical finding that quantum addition on enhancement of ALP for benchmarking of export transaction of assessee to its AE by TPO applying CUP had to be deleted, and accepted assessee's adoption of TNMM and its TP documentation and

functional economic analysis and accordingly deleted the penalty levied u/s.271AA by AO for not maintaining documents as per clause(e) to clause (m) of sub-rule(1) of 10D A, the Tribunal dismissed Revenue's appeal and held the CIT(A) had rightly held that penalty did not survive .

Asst CIT vs Manashin Di Hatta Ltd. [TS-1403-ITAT-2018(Del)-TP] (ITA No.5667/Del/2015 and ITA No.2374/Del/2016 dated 29.10.2018

2950. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order deleting penalty levied u/s. 271(1)(c) noting that addition in quantum proceedings was sustained on account of choice of PLI (assessee had applied OP/CE which was rejected by TPO to apply OP/TC while the CIT(A) directed adoption OP/Total Sales which was remitted back by the Tribunal and TPO directed adoption of OP/Total sales in remand proceedings.) and use of only single year data (as against multiple year data used by the assessee) which were contentious and debatable issues. It observed that since TP issues were at nascent stage in AY 2003-04, use of multiple year data vs single year data was also a debatable issue. Thus, it dismissed Revenue's appeal.

ACIT vs Kyungshin Industrial Motherson Ltd [TS-1137-ITAT-2018(DEL)-TP] ITA No.3377/Del/2014 dated 17.10.2018

2951. The Tribunal deleted penalty levied u/s 271(1)(b) for non-submission of information as required by TPO vide show cause notice dated December 4, 2012 noting that in response to letter dated December 26, 2012 giving final hearing opportunity, assessee submitted that it had not received the show cause notice dated December 4, 2012 and therefore no appearance could be marked. It accepted assessee's submission that a new receptionist had taken delivery of the said notice but failed to understand its importance and did not pass it on a concerned person dealing with income tax matters and held that there was considerable cogency in assessee's submissions and that the reason for non-compliance of the notice in dispute was genuine and justified.

MAHASHIAN DI HATTI (P) Ltd vs. ACIT - TS-80-ITAT-2018(DEL)-TP - I.T.A. No. 1491/DEL/2016 dated 01.02.2018

2952. The Tribunal, quashed CIT(A)'s enhancement of concealment penalty under section 271(1)(c) on TP addition on import of raw material which was proposed by TPO but not made by AO in final assessment and held that once the addition had been made/confirmed in the quantum proceedings, then subject matter of penalty proceedings under section 271(1)(c) was strictly circumscribed to such addition only. The TPO had proposed additions on import of capital goods and raw materials, of which only the addition in respect of capital goods import was incorporated in final order, however, the CIT(A) while confirming concealment penalty levied by AO, also enhanced penalty on account of TP-addition on raw material import. The Tribunal held that the CIT(A) was unjustified in law and on facts to levy or enhance a penalty on an addition which was not arising out of assessment order or any appellate order in the quantum proceedings or from the penalty order passed by the AO. It also deleted penalty levied on TP addition on import of capital goods, disagreeing with the TPO's approach of benchmarking the transaction by considering foreign AE as tested party and then selecting local comparables on Indian Data System, which operated under different geographical, economical and market environment, to benchmark AE's margin.

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JRK Auto Parts Pvt. Ltd [TS-434-ITAT-2017(DEL)-TP- ITA No.3458/del.2014 dated 31.05.2017

2953. Where the AO levied penalty on the assessee on account of the TP adjustment (imputed mark-up of reimbursement of expenses), the Tribunal noted that the co-ordinate bench in the quantum hearing held that no mark-up on reimbursement of expenses incurred by assessee before incorporation of NDTV Network Plc, UK but upheld charge of mark-up on reimbursements after incorporation at the rate adopted by TPO. Accordingly, it restored the issue to the file of the AO to be decided afresh in accordance with law after considering the outcome of the order to be passed on the quantum additions in accordance with the directions given in aforesaid order.

New Delhi Television Ltd. vs. DCIT - TS-101-ITAT-2018(DEL)-TP

2954. The Tribunal deleted the penalty u/s 271(1) (c.) and noted that the assessee had voluntarily surrendered the TP-adjustment on the ground that DRP had already accepted the operating margin of assessee. It further held that conducting of TP-analysis on the basis of comparables was based on objective material before assessee/ TPO/ DRP, the selection of comparables by the assessee and its further acceptance and rejection by TPO did not amount to concealment of facts. The Tribunal referred to various precedents including SC rulings in Sir Shadilal Sugar & General Mills Ltd and Suresh Chandra Mittal to hold that concealment penalty provisions were not attracted in case of voluntary surrender made in order to buy peace and avoid litigation. Finally, relying on SC ruling in Reliance Petro Products, it held that mere rejection of assessee's claim did not automatically attract penalty u/s 271(1) (c.)

Sequence Design (I) Pvt Ltd vs ITO Ward 8(1) – TS-282-ITAT-2018(DEL)-TP- ITA No 1756/Del/2016 dated 12.04.2018

2955. The Tribunal deleted penalty u/s 271(1)(c) levied in respect of TP addition on interest free loan provided by assessee to its wholly owned subsidiaries by holding that since the jurisdictional HC had admitted a substantial question of law in respect of the TP adjustment, it indicated that the issue was debatable and thus the assessee's contention that it acted on a bonafide belief could not be shot down simply because assessment/TP adjustment made by the TPO had been upheld by the Tribunal.

Perot Systems TSI (India)(P)Ltd v ACIT - TS-97-ITAT-2016(DEL)-TP

2956. The Tribunal upheld CIT(A)'s deletion of Sec 271AA penalty imposed by AO for failure to disclose international transaction pertaining to receipt of share capital from AE. The AO had imposed penalty on the basis that the transaction should have been disclosed in Form 3CEB as it was an international transaction post amendment to Sec 92B vide Finance Act 2012 with retrospective effect from April 1, 2002. The Tribunal noted that Form 3CEB was furnished on September 28, 2011 and held that issue of share capital as an international transaction as on the date of filing Form 3CEB for the above year was not required to be disclosed and the law had been amended with retrospective effect, which clearly showed that the issue had no clarity prior to amendment. Further, noting that Sec 271AA was also subject to provisions of Sec 273B, it concluded that there was a reasonable cause for not disclosing the above transaction as an international transaction in the above form and confirmed CIT(A)'s order deleting penalty.

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ITO ward 18(2) vs Nihon Parkerizing (India) Pvt Ltd- TS-242-ITAT-2018(Del)-TP- ITA No 6409/Del/2015 dated 10.04.2018

2957. Where the TPO had made a transfer pricing adjustment on account of the wrong deduction of export incentive and rebate from cost of goods sold while computing PLI, which was subsequently deleted by the Tribunal, the Tribunal deleted the penalty imposed under Section 271(1)(c) of the Act as the transfer pricing adjustment based on which it was imposed was deleted.

Goodyear India Ltd v DCIT-TS-1039-ITAT-2017(DEL)-TP I.T.A. No. 328/DEL/2015 dated 04.12.2017

2958. The Tribunal, reversing CIT(A)'s order, deleted penalty u/s 271G for failure of assessee to furnish details/documentation of international transactions (IT and ITES services) within the time provided in the notice u/s 92D for AY 200809. It noted that (a) despite a genuine request made by the assessee before the departmental authorities for transfer of jurisdiction (on account of merger with another group entity and transfer of principal place of business) and regular follow up, no action was taken nor any intimation was given to the assessee that such a transfer was not possible and (b) the assessee had requested the TPO to keep the matter in abeyance for the reason that it had been following the transfer of its file from Delhi to Bangalore (c) penalty was imposed by the TPO on the assessee of Rs. 12.71 crores even though all international transactions were found to be at arm's length. Accordingly, the Tribunal held that assessee had a reasonable cause for not filing details before given date and therefore, penalty was not sustainable u/s 271G r.w.s 273B

NTT Data Global Delivery Services Ltd (formerly known as Keane India Ltd vs. ACIT-TS-872-ITAT-2017(DEL)-TP ITA No.:-6905/Del/2014 dated 07.11.2017

2959. Noting that Expl. 7 to Sec. 271(1)(c) refers to term 'good faith' along with 'due diligence', the Tribunal held that as long as no dishonesty is found in the conduct of the assessee, and the ALP was determined in accordance with the scheme of section 92C, deeming fiction under Explanation 7 to section 271(1)(c) could not be invoked, and deleted the concealment penalty levied with respect to TP adjustments in respect of disallowance of Rs 3.31 cr for intra-group services for AY 2010-11. Noting that grounds on which ALP-determination was rejected are debatable and assessee had obtained TP study from outside expert, objectivity of which was not called in question, Tribunal held that lack of due diligence in determining the ALP is neither indicated nor can be inferred.

Halcrow Consulting India Pvt Ltd vs DCIT-TS-848-ITAT-2017(DEL)-TP

2960. The Tribunal deleted penalty levied u/s 271G for non-furnishing of "TP study report" in time on the ground that TPO's order specifically mentioned that TP documentation containing fundamental & economic analysis prescribed under Rule 10D was submitted by assessee. It observed that based on such documentation TPO had accepted assessee's transactions at arm's length. Considering Revenue's failure to point out specifically which information had not been provided by assessee, and the fact that penalty had been levied for non-furnishing of 'TP Study Report' (which was not a specified document under Rule 10D) in time, though the information had been made available before passing of TPO's order, the Tribunal deleted the penalty.

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Worlds Window Impex (India) (P) Ltd. v ACIT-TS-175-ITAT-2016 (DEL) -TP

2961. The Tribunal held that where due diligence had been exercised in good faith by assessee in selecting comparables and by applying TNMM or RPM assessee was fully within arm's length range, this was not a case of concealment or of filing of inaccurate particulars and hence penalty could not have been imposed simply because the assessee accepted transfer pricing addition arising out of the TPO rejecting
/ introducing some comparable and applying TNMM as the MAM.
ACIT v Boston Scientific India (P)Ltd - [2016] 67 taxmann.com 288 (Delhi-Trib)

2962. The Tribunal deleted penalty imposed under section 271(1)(c) of the Act with respect to the TP adjustment confirmed by the Tribunal on procurement support services provided to AE and held that penalty could not be imposed merely because the addition was accepted by the assessee with a view to buy peace and avoid protracted litigation and also noted that the assessee did not conduct its affairs with malafide intent
Gap International Sourcing India Pvt Ltd v DCIT - TS-611-ITAT-2016 (Del) - TP I.T.A .No.-6742 /Del/2013

2963. The Tribunal deleted penalty under section 271G of the Act imposed by the TPO for non- maintenance of information and TP documentation under section 92D in relation to investment made by the assessee in its AE situated outside India. It held that investment in share capital of subsidiaries outside India was not in the nature of international transaction and therefore there was no requirement to maintain TP documentation for the said transaction and accordingly section 271G was inapplicable as there was no contravention of section 92D on the part of the assessee.
ACIT v Hill County Properties Limited (I.T.A. No. 420/HYD/2015) – TS-551-ITAT-2015 (Hyd) -TP

2964. Where the assessee had provided relevant information during the assessment proceedings based on which AO completed the assessment, the Tribunal deleted the penalty u/s 271G (imposed on failure to furnish information or document u/s 92D) and held that penalty was attracted only when the AO had issued a notice u/s 92D(3) and the assessee failed to furnish information for completing the assessment. Since in the present case the assessee had already filed the relevant information as soon as it was brought to its notice and assessment was completed without any adjustment, the levy of penalty was unwarranted.
Karvy Computershare pvt. Ltd vs ACIT-TS-670-ITAT-2017(HYD)-TP-ITA No. 737, 738, 739 and 740/HYD/2016 dated 07.07.2017

2965. The Tribunal upheld the levy of penalty under Section 271BA (for non filing of Form 3CEB as per Section 92E) and held that mere ignorance of the finance manager was not reasonable cause for not filing Form 3CEB.
Karvy Computershare pvt. Ltd vs ACIT-TS-670-ITAT-2017(HYD)-TP-ITA No. 737, 738, 739 and 740/HYD/2016 dated 07.07.2017

2966. The Tribunal deleted penalty imposed u/s 271G for non-filing of documents and held that penalty proceedings were invalid absent issue of notice to assessee u/s 92D(3) requiring the

assessee to furnish such information or documents. Reliance was placed on the Tribunal ruling in Cargill India Pvt Ltd wherein it was held that the AO had to issue a notice u/s 92D(3), requiring assessee to furnish any information or documents and only on the failure of assessee to furnish the same, proceedings u/s 271G could be initiated.

Transport Corporation of India Ltd v ACIT – TS-41-ITAT-2017 (Hyd) – TP -ITA No.188/Hyd/2016 dated 11.01.2017

2967. The Tribunal held where the revenue had not controverted that assessee had provided similar services in both the relevant and previous assessment year, the AO was incorrect in levying penalty under section 271AA of the Act on the basis that the assessee did not maintain records relating to international transactions as required under Rule 10D of the Rules and merely updated the margins of the comparable companies selected in the previous year, since comparable companies selected in the preceding year were relevant to transaction made during relevant assessment year and their updated margins would suffice for the purpose of comparability.

ACIT v Integrated Decisions & Systems(India)(P)Ltd - [2016] 68 taxmann.com 185 (Jaipur-Trib)

2968. The Tribunal deleted penalty u/s. 271(1) (c) levied for TP adjustment on interest on loans advanced to its AE noting that notice initiating penalty proceedings was uncertain as to whether the assesse had concealed his income or furnished inaccurate particulars of income. It accepted assessee's contention that that in the absence of any specific charge against the assessee in the penalty notice and subsequently in the penalty order where AO throughout the body of the order stated that it was a case of concealment and/or furnishing inaccurate particulars of income and provisions of explanation 7 to section 271(1)(c) are applicable, consequent penalty imposed by AO was illegal and bad in law. It noted that assessee had advanced interest free advances to its AEs to meet working capital requirements and had substantiated by detailed TP study on why it had charged "NIL" Interest.The TPO had applied domestic PLR of 14.88% which was restricted to Libor+200% by Tribunal and was further restricted to 0.79% by High Court. Thus, it was nothing but a case of difference of opinion and minor difference of less than 1% of ALP could not be the basis for levy of penalty.

Vaibhav Global Ltd. vs ACIT [TS-1322-ITAT-2018-(JPR)-TP] ITA No.730 and 731 /JP/2018 dated 19.12.2018

2969. The Tribunal, considering assessee's submission that the demand pertained to TP adjustment and the assessee had a strong prima facie case as Revenue had wrongly rejected CUP method and considered comparables with substantial related party transactions and that a refund of Rs.18.50 lakhs and Rs. 26.22 lakhs was due to the assessee, granted stay to the extent of 50% of outstanding demand while directing payment/adjustment of refunds for balance.

Atlas Healthcare Software (India) Ltd v ACIT-TS-1060-ITAT-2017(KOL)-TP dated 22.12.2017

2970. The Tribunal deleted penalty u/s 271(1)(c) in respect of TP addition on international transaction relying upon co-ordinate bench judgement in case of Jeetmal Choraria vs ACIT on the ground that the show cause notice for penalty did not specify the charge against the

assessee as to whether it was for concealing particulars of Income or for furnishing of inaccurate particulars of income.

DCIT Central Circle 4(4) vs M/s Electrosteel Castings Ltd- TS-372-ITAT-2018(Kol)-TP-ITA No 406-410/Kol/2016 dated 18.04.2018

2971. The assessee company entered into international transaction of purchase, export of rough diamonds and polished diamonds with its AE and applied TNMM at entity level. The TPO after examining the details and documents available on record, had called upon the assessee to submit the segmental profitability for AE transactions and non-AE transactions. However, as the assessee had not maintained separate books of account for AE and non-AE segments, it expressed its inability to furnish the details in the manner the same were called for by the TPO. In the absence of the segmental breakup of the AE and non-AE transactions, the TPO concluded that it was prevented from benchmarking various transactions and imposed penalty under section 271G, @ 2 per cent of the aggregate value of the international transactions in the hands of the assessee. The CIT(A) deleted the said penalty on the ground that assessee could show reasonable cause on account of its nature of trade. The Tribunal upheld CIT(A)'s order and accepted his observations that as the assessee had purchased a mix of imported rough and polished diamonds from AEs and non-AEs, and had also sold/exported rough and polished diamonds to AEs as well as the non-AEs, the Profit & loss account of the assessee reflected a mixture of purchases and sales both from the AEs and the non-AEs. The view of the CIT(A) was to be agreed that when the rough/polished diamonds were traded on lot wise basis, it was difficult to identify and say whether a polished diamond came out of a particular lot of rough diamonds or the other and/or out of the polished diamonds purchased locally by the assessee. The export bills of the cut and polished diamonds exported to the AEs and the non-AEs revealed that the diamonds of varying size, quality, colour and carat weight were exported as was evident from the price per carat charged in each bill, and similar would have been the position in respect of cut and polished diamonds purchased and sold locally and/or purchased from abroad but sold locally. In the backdrop of the aforesaid peculiar nature of the trade of the assessee, it could safely or rather inescapably be concluded that it was extremely difficult to identify which rough diamond got converted into which polished diamond.

Dy.CIT vs Interjewel Pvt. Ltd [TS-1226-ITAT-2018(Mum)-TP] ITA No. 5628/Mum/2016 dated 01.11.2018

2972. The Tribunal upheld levy of penalty under section 271BA of the Act in AY 2011-12 for assessee's failure in filing Form 3ECB in respect of its transaction of receipt of share capital / premium from its NRI director-shareholder. Relying on the decision of the co-ordinate bench in IL&FS Maritime Infrastructure Company Ltd. [TS-204-ITAT-2013(Mum)-TP], it held that share investment transactions fell within the purview of Sec 92B and the assessee was required to file audit report in Form 3CEB for such transactions, failure of which would attract Sec 271BA penalty. It distinguished the Bombay High Court ruling in Vodafone India on facts, stating that the present case was entirely different as AO had neither attempted to nor made any adjustment to the ALP for issue of equity shares at a premium to its NRI Director and the issue was simply whether penalty u/s 271BA was attracted since assessee had not filed the Audit Report in Form 3CEB within the period warranted u/s 92E. Thus, concluding that since assessee had entered into an international transaction, failure on the part of the assessee to furnish the Audit Report in Form 3CEB from an Accountant in the prescribed proforma within

the prescribed period, without reasonable cause, was a clear violation of the provisions of section 92E of the Act and therefore the levy of penalty under section 271BA of the Act was clearly warranted.

BNT Global Pvt. Ltd. vs. ITO - TS-319-ITAT-2017(Mum)-TP - ITA No. 4111/Mum/2016 dated 26.04.2017

2973. The Tribunal for AY 2011-12 upheld levy of penalty under section 271BA for assessee's failure in filing Form 3CEB in respect of transaction of receipt from its NRI director shareholder towards share capital premium. It relied on the co-ordinate bench ruling in the case of IL&FS Maritime Infrastructure Company Ltd [TS-2014-ITAT-2013(Mum)-TP] and held that share investment transactions fell within the purview of section 92B and the assessee was required to file audit report in Form 3CEB for such transactions. Further, it distinguished Bombay HC ruling in the case of Vodafone India on facts, noting that the present case was entirely different as the AO had neither attempted to nor made any adjustments to the ALP for issue of equity shares at a premium to its NRI Director and the issue was simply whether penalty u/s 271BA was attracted since the assessee had not filed the audit report in form 3CEB within the period warranted u/s 92E.

BNT Global Pvt Ltd vs ITO - TS-319-ITAT-2017(Mum)-TP-ITA No 4111/Mum/2016 dated 26.04.2017

2974. Where the assessee failed to furnish document/information u/s 92A(1) based on a bondafide belief that since both conditions u/s 92A(1) and (2) were not fulfilled, no international transaction had been undertaken, the Tribunal held that penalty u/s 271BA could not be imposed as the view of the assessee was a possible one and amount to reasonable cause as provided in section
273B.

Palm Grove Beach Hotels Pvt. Ltd vs DCIT-TS-631-ITAT-2017(Mum)-TP-ITA No. 5217/mum/2015 dated 09.08.2017

2975. Where AO levied penalty u/s 271G of the Act on the plea that assessee (engaged as a trader and manufacturer of diamonds) failed to furnish information or documents in respect of segmental account relating to transaction made with AEs and non-AEs for applying CUP to determine ALP of international transactions as required by TPO under Rule 10D(1) and Rule 10D(3), the Tribunal upheld CIT(A)'s order deleting penalty u/s.271G wherein it had noted that it was difficult in diamond industry due to nature of business where invoicing was done for only diamonds for half carat or more and price was indicated separately, it was difficult to determine value of diamonds weighing less except a estimate and thus, applying internal CUP was not practical. In the preceding years, TNMM applied by assessee had been accepted and no adjustment had been made. Further, substantial compliance was made by the assessee who had furnished particulars on basis of which AO had arrived at determination of ALP of transaction and when there was no adjustment made in the ALP, penalty could not be sustained.

DCIT. vs Laxmi Diamond P. Ltd [TS-1363-ITAT-2018-(MUM)-TP] ITA No.2643 /Mum/2018 dated 27.12.2018

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2976. While TPO accepted TNMM for computing ALP, he calculated mark-up of 6% on total cost as against assessee's method of applying the mark-up on standard cost and consequently levied penalty u/s 271(1)(c) read with Exp-7 which was deleted by the Tribunal by holding that the addition determined by lower authorities was not on account of any inaccuracy, discrepancy or concealment found in the information and documents furnished by the assessee but due to the difference in pricing methodology adopted for determining expected profits from AE. It further, held that no penalty was levied in earlier AYs and that, it was not open for the Assessing Officer to hold an assessee guilty under section 271(1)(c) of the Act in one year and not in other preceding two years under identical circumstances.

Cherokee India (P) Ltd. vs DCIT - TS-107-ITAT-2016(Mum)-TP

2977. The Tribunal upheld the CIT(A)'s deletion of concealment penalty u/s 271(1)(c) in relation to TP- adjustment on assessee's payment towards travel and salary costs of specialized technical personnel providing technical support during AY 2006-07 noting that in the quantum proceedings ITAT had confirmed TP-adjustment observing that assessee could not furnish any material or evidence with regard to rendering of services whereas the assessee had filed a debit note evidencing the services received. The Tribunal also accepted the assessee's contention that in quantum proceedings, ITAT had proceeded on an erroneous footing that the disallowance may have been made u/s 40(a)(i) or u/s 37, noting that the assessee had deducted TDS on entire payment @ 15.75% and filed a legible copy of the debit note. Further, it noted that the TPO / DRP erred in determining ALP at Nil without giving any analysis as to why such an adjustment was required to be made when TNMM had been applied and when overall profit margin and method had not been disturbed. Observing that no penalty was levied for non-furnishing of the information and documents as required u/s 92D(3), for which separate penal provision u/s 271G has been prescribed, the Tribunal concluded that no case can be made for the levy of penalty u/s 271(1)(c). It also deleted the penalty in respect of TP adjustment on imports since the entire matter had been set aside and remanded back for fresh adjudication and thus the penalty levied on the basis of impugned assessment order could not be sustained.

DCIT v Kodak Graphic Communication I Pvt Ltd - TS-649-ITAT-2016 (Mum) - TP ITA No. : 6762/Mum/2012

2978. Where the TPO insisted for segment wise P&L account even though the assessee had explained the practical difficulty in furnishing the same and instead of determining ALP, TPO went ahead and levied penalty u/s 271G, the Tribunal upholding CIT(A)'s deletion of penalty u/s 271G imposed on the assessee (diamond manufacturer and traders) for not complying with the statutory obligation cast upon it to furnish requisite details for correctly benchmarking the international transactions. Noting that it was extremely difficult to identify which rough diamond got converted into which polished diamond (unless the single piece rough diamond happened to be of exceptionally high carat value, therein making the tracing out and identification of the polished diamond physically possible and convenient), held that though assessee may not have effected absolute compliance to the directions of the TPO and furnished all the requisite details as were called for by him on account of practical difficulties, failure to the said extent can safely be held to be backed by a reasonable cause, which would bring the case of the assessee within the sweep of Sec. 273B. Accordingly, it dismissed Revenue's appeal.

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ACIT vs. D. Navinchandra Exports Pvt Ltd-TS-862-ITAT-2017(Mum)-TP dated 25.10.2017

2979. The Tribunal held that where the assessee as well as the TPO had adopted the CUP method to benchmark the export transaction and a TP addition was made observing that the assessee sold cold flu tablets to its AE at 1.807 dollars per unit whereas the same was sold to non-related parties at 1.95 dollars per unit, levy of penalty under Explanation 7 to section 271(1)(c) was justified since the assessee being full aware of the factual discrepancy in the rates charged to AEs vis-à-vis Non-AEs chose not to revise its income and challenged the same in assessment proceedings, but did not prefer any quantum appeal due to the smallness of the amount. It held that Explanation 7 to Section 271(1)(c) of the Act (which provides that where an assessee has entered an international transaction as defined under section 92B of the Act, if any amount had been added or disallowed in computing the total income under section
92C(4), such addition or disallowance would be deemed to represent income in respect of which particulars were concealed or inaccurate particulars had been furnished) would be applicable in the instant case since the assessee failed to compute the ALP in the manner prescribed.
Clestra Life Sciences P Ltd v ITO - TS-676-ITAT-2016 (Mum) - TP - ITA No. 6962/Mum/2014

2980. The Tribunal confirmed imposition of penalty under section 271(1)(c) since the assessee failed to demonstrate due diligence and good faith while benchmarking its international transaction by adopting the Cost Plus method on an aggregate basis whereas it was well aware of the availability of a direct CUP for at least two transactions.
Genom Biotech Pvt Ltd v ITO - TS-66-ITAT-2016 (Mum) - TP

2981. Where the AO had accepted income declared by assessee and neither AO/TPO had issued notice u/s 92D(3) to assessee, the Tribunal relying on the decision in the case of Netsoft India Ltd [TS-376-ITAT-2013(Mum)-TP] and Leroy Somer & Controls (India) Pvt. Ltd. [TS-249-HC-2013(DEL)-TP], where in it was held that penalty u/s 271G, for failure to furnish information u/s 92D, could not be imposed unless notice was issued specifying the information to be produced by person entering into an international transaction and post which no information is provided by the said person, deleted the penalty of Rs. 48.70 lacs levied on assessee u/s 271G for failure to furnish information/documents before TPO u/s 92D for AY 2008-09.
Cadbury Schweppes Overseas Ltd vs. ADIT-TS-865-ITAT-2017(mum)-TP ITA No. 5318/MUM/2014 dated 31.10.2017

2982. Where the assessee had failed to properly benchmark payment of management fees and had not contested its disallowance before the CIT(A) and the Assessing Officer had imposed penalty u/s 271(1)(c) in respect of disallowance of cost allocation of management expenses, the Tribunal relying on the Apex Court ruling in the case of Reliance Petroproducts wherein it was obserbed that merely because an assessee had claimed an expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not attract penalty u/s 271(1)(c), held that it was obligatory for the AO to justify the imposition of penalty. Accordingly, it quashed the penalty imposed on the assessee.

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Fuchs Lubricants (India) P Ltd vs DCIT-TS-913-ITAT-2017(mum)-TP / I.T.A. No. 5111/Mum/2015 dated 25.10.2017

2983. Where the assessee (engaged in trading of diamonds) failed to submit details called for by the TPO vis-à-vis segmental profitability separately from AE and non-AE segment, the TPO levied a penalty u/s. 271G of th Act which was deleted by the CIT(A) considering the nature of the diamond trade and the reasonable cause showed by the assessee. On appeal, the Tribunal dismissed Revenue's appeal relying on the coordinate bench decision in D. Navinchandra Exports where in an identical case Sec 271G penalty was deleted citing practical difficulty in information submission for diamond merchants. Noting that since the facts of the assessee's case were similar to the said decision, it thus upheld the CIT(A)'s order deleting the penalty.
ACIT vs Dilipkumar V Lakhi [TS-816-ITAT-2018(Mum)-TP] IT (TP) A No.2142/Mum/2017 dated 02.08.2018

2984. The Tribunal deleted penalty by holding that the determination of arm's length price was a matter of estimate and merely because it was possible to arrive at two different estimates, it could not be held that the lower of the two estimates is based on inaccurate particulars. Further it held that where there was no lack of due diligence on the part of the assessee in determining ALP i.e where the conditions precedent for invoking Explanation 7 to section 271(1)(c) of the Act was not fulfilled, penalty could be levied.
Babcock & Brown India Pvt Ltd v DCIT (ITA No. 2214/MUM/2015) – TS-564-ITAT-2015 (Mum)

2985. The Tribunal deleted the penalty imposed under section 271(1)(c) relating to TP adjustments made in respect of the assesssee's purchase / sale transactions with AEs on the basis of customs data available from other concerns dealing in the same products which was furnished itself in Form 3CEB. Noting that the assessee had submitted documents and evidences to explain the logic for adjustments made to customs data to arrive at ALP and explained the shortfall in transaction value which occurred due to foreign exchange fluctuations between the time of purchase order and actual export it held that the assessee had proved that the price charged / paid was computed in accordance with 92C in good faith and with due diligence and further all material facts had been disclosed before the TPO.
Del Monte Foods India Pvt Ltd v ACIT – TS-1017-ITAT-2016 (Mum) - TP

2986. The Tribunal deleted the penalty levied by the TPO under section 271AA and held that the assessee had made sufficient compliance for maintaining the documents as required under section 92D read with rule
10D. It held that the assessee had furnished duly certified Form 3CEB along with agreements with AE regarding provision of brand license, technical assistance and know-how and royalty agreement and that the order u/s 92CA(3) was made after due consideration of the documents and therefore penalty could not be levied.
Cadbury Schweppes Overseas Ltd – TS-949-ITAT-2016 (Mum)- TP

2987. The Tribunal dismissed Revenue's appeal and upheld the CIT(A)'s order deleting penalty u/s. 271(1)(c) noting that the Assessing Officer had not specified the charge for which penalty was being levied i.e. 'concealment of income' Or 'furnishing inaccurate particulars of income'. It

also observed that apart from provisions of section 271(1)(c), Explanation 7 to section 271(1)(c) mandated that for levying penalty in respect of any addition or disallowance to international transactions, penalty can be levied for either of the two defaults i.e. 'concealment' or 'furnishing inaccurate particulars' of income thus, the AO's order suffered from incurable defect of ambiguity.

ITO vs Carraro Technologies India Pvt Ltd [TS-1097-ITAT-2018(PUN)-TP] ITA No.2776/Pun/2016 dated 07.09.2018

2988. The Tribunal dismissed Revenue's appeal against CIT(A)'s deletion of penalty u/s 271(1)(c) in respect of TP-adjustment in case of assessee (engaged in the business ofsoftware development) for AY 2007-08 noting that co-ordinate bench in assessee's own case for same AY had deleted quantum addition. Further, it also dismissed Revenue's appeal against CIT(A)'s deletion of Sec 271(1)(c) penalty for AY 2008-09 noting that at the time of initiation of penalty proceedings, AO had not mentioned the limb (i.e. for furnishing inaccurate particulars or concealment of income) for which penalty proceedings were initiated while at the time of levy of penalty, AO had imposed penalty by stating that assessee concealed particulars of its income, which suggested the existence of ambiguity with reference to applicability of specific limb. It relied on the HC decision in Samson Perinchery wherein the penalty order was quashed on ground that AO failed to record valid and legally sustainable satisfaction (whether concealment or furnishing inaccurate particulars) in the assessment order while initiating the penalty proceedings.

ITO vs Magic Software Enterprises India Pvt. Ltd [TS-1271-ITAT-2018(Pun)-TP] ITA No.2447 and 2448 /Pun/2018 dated 15.11.2018

Stay

2989. The Apex Court admitted Revenue's SLP against the decision of the Punjab and Haryana High Court wherein the Court upheld the Tribunal's powers to grant stay beyond 365 days by noting that the stay was initially granted by Tribunal for a period of 365 days which was further extended for a period of six months or until the disposal of appeal as the appeal could not be decided by the Tribunal due to pressure of pendency of cases and the delay in disposal of the appeal was not attributable to the assessee in any manner, even though Section 245(2A) restricts the extension of stay beyond a period of 365 days. Accordingly, it directed issuance of notice to the assessee.

Carrier Air Conditioning and Refrigeration Ltd – TS-946-SC-2016 - TP

2990. The Apex Court admitted Revenue's appeal against High Court order upholding Tribunal's power to grant stay beyond 365 days.

Pr. CIT vs. Teradata India Pvt. Ltd-TS-790-SC-2017-TP- 15969/2017 dated 03.10.2017

2991. The Court allowed assessee's writ petition for grant of stay of demand. It accepted assessee's contention that the demand was per se unenforceable as AO had completed assessment by adopting "Bright Line" Test favored in LG Electronics ruling which was later disapproved by co-ordinate bench in the case of Sony Ericsson Mobile Communications. It observed that the co-ordinate bench had categorically ruled against the adoption of the Bright Line Test and accordingly, held that the assessment and the order which resulted in substantial additions

and the demand in question could not be enforced pending the assessee's appeal before the Tribunal and accordingly directed the revenue to keep the demand in abeyance and not take coercive measures till Tribunal's final order.

Bacardi India Pvt. Ltd [TS-884-HC-2016(DEL)-TP] (W.P.(C) 4221/2016)

2992. The Court accepted assessee's civil miscellaneous petition and stayed Tribunal's stay order directing payment of Rs.50 Lakh till the next date of writ appeal hearing (on quantum adjustment). It considered assessee's submission that the AO's finding that incurrence of AMP expenses was a separate international transaction was contrary to Sony Ericsson HC ruling and also observed that issue involved in writ (on quantum adjustment) was that Tribunal should not have remanded the issue but decided it itself. Observing that the impugned order of the Tribunal did not record any reason as to why an amount of Rs.50 lakhs should be deposited, instead recorded that prima facie case and balance of convenience lies in favour of assessee, the Court granted stay till the next date of hearing. It further clarified that pendency of the present writ petition would not come in the way of the Tribunal deciding the appeal of the petitioner and would not be a ground to adjourn the matter.

Casio India Company Pvt Ltd -TS-918-HC-2017(DEL)-TP W.P.(C) 9945/2017 dated 10.11.2017

2993. The Court dismissed Revenue's appeal challenging Tribunal's power to grant stay of demand beyond 365 days. It rejected Revenue's contention that the extension of stay granted was beyond the statutory power of the Tribunal and held that as per the decision of the Court in Pepsi Foods Pvt. Ltd. v. Asstt. Commissioner of Income Tax (2015) 376 ITR 87 (Del.). where delay in disposing appeal was not attributable to the assessee, the Tribunal had power to grant extension of stay beyond 365 days in deserving cases. Noting that the Tribunal applied the said decision while extending stay of demand, it held that no question of law arose from the Department's appeal.

Pr CIT v Pepsi Foods Pvt Ltd - TS-53-HC-2018(DEL)-TP – ITA No 88 / 2018 dated 29.01.2018

2994. Where the demand arose due to TP adjustment in respect of AMP expenses and before High Court, the assessee relied on Valvoline Cummins ruling to contend that AMP-expenses cannot be characterized as an international transaction, however, Revenue relied on Luxottica India ITAT ruling to state that it can no longer be contended that AMP-expenses are to be kept away from ALP fixation, the Court, noting that appeal was pending before Tribunal post remand, held that the demand to pay 20% was justified and directed the assessee to deposit Rs. 15 crore in 2 installments. Accordingly, it disposed assessee's writ petition in respect of Tribunal's refusal to grant interim orders for suspending the tax demand.

Pepsico India Holdings Pvt. Ltd vs. ACIT-TS-1064-HC-2017(DEL)-TP W .P.(C)11454/2017& C M N o.46706/2017 dated 22.12.2017

2995. The Court disposed of the assessee's writ petition in respect of Tribunal's refusal to grant interim orders for suspending the tax demand arising due to TP adjustment in respect of AMP expenses for AY 2013-14. It noted assessee's reliance on Valvoline Cummins ruling to contend that AMP-expenses could not be characterized as an international transaction as well as Revenue's reliance on the decision of Luxottica India to state that AMP expenses could no

longer be kept from ALP fixation and opined that the Tribunal's direction to pay 20% was entirely justified. It clarified that subject to petitioner's compliance, the interim order till date in respect of the tax demand would continue to bind the parties.
Pepsico India Holdings Pvt. Ltd vs. ACIT - [TS-1064-HC-2017(DEL)-TP - W .P.(C)11454/2017 dated W .P.(C)11454/2017

2996. The Court, following co-ordinate bench's ruling in assessee's own case dismissed Revenue's appeal challenging power of Tribunal to extend interim order of stay beyond 365 days and held that where the delay in disposing appeal was not attributable to the assessee, Tribunal had the power to grant extension of stay beyond 365 days in deserving cases.
Pr. CIT vs. Pepsi Foods Pvt. Ltd- [TS-558-HC-2017(DEL)-TP]- ITA 363/2017 and 364/2017 dated 03.07.2017

2997. The AO had imposed a stay on penalty subject to deposit of 20% of penalty. The Court granted ad-interim relief and prevented Revenue from further recovery of penalty imposed u/s 271(1)(c) on the assessee until it heard Revenue in detail as to what should be the correct approach whether to stay the penalty fully or subject to conditions noting that HC had admitted the question of law against quantum addition and also prevented Revenue from recovering 80% tax arising out of such additions then a question arose as to whether the Revenue could proceed to recover the penalty, which was admittedly relatable to such additions.
Vodafone India Services Pvt Ltd vs UOI [TS-1174-HC -2018(Guj)-TP] R/Special Civil Application No.17033 of 2018 dated 01.11.2018

2998. Where the Tribunal in its interlocutory order, had stayed balance amount of Rs. 95 lakhs out of the total demand (on account of Royalty adjustment) subject to the payment of 50 lakhs and also fixed final appeal hearing on December 14, 2017, the Court, held that since the time gap was of only 15 days between the cut-off date of deposit Rs.50 lakhs and the date of hearing, the interest of revenue would not be seriously prejudiced even if the payment of balance amount was stayed till the final decision of tribunal. Accordingly, it accepted assessee's request for demand payment of only Rs.30 lakhs as against Rs.50 lakhs directed in the interlocutory order.
Kaypee Electronics & Associates Pvt. Ltd vs. DCIT- TS-919-HC-2017(KAR)-TP-W.P. No. 52737/2017 dated 21.11.2017

2999. The Court, noting that Tribunal had directed the assessee to deposit 50% of the demand (20% within 7 days of its order and balance within 180 days in 6 monthly installments) out of which assessee had already discharged 20% of the demand, restricted partial payment of outstanding demand to 30% instead of 50% as directed by Tribunal vide an interlocutory stay order. Since
20% of the tax demand was already deposited, the Court directed assessee to deposit the remaining 10% within one month. Considering that main appeal was pending before Tribunal for last one year along with the connected appeals filed earlier, HC directed the Tribunal to decide the pending appeals expeditiously, preferably within 6 months from date of the present order.
Google India Pvt ltd vs ACIT/DIT-TS-594-HC-2017(Kar)-TP-Writ petition no. 13601/2017 (T- IT) dated 17.07.2017

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3000. The assessee filed a writ petition on ground that Tribunal while disposing off the stay application, had failed to look into the material placed before it and given a reason that assessee had not contended before the TPO that TP adjustment be restricted to international transaction of AE and further the assessee had not taken plea of financial hardship. It was assessee's contention that a) in its reply to SCN that assessee had taken a plea that TP adjustment should be restricted to proportion of AE transactions vis-à-vis total turnover b) assessee had furnished AE and non-AE segmental accounts c) finding by Tribunal that no financial hardship was pleaded was erroneous as assessee had specifically taken a plea before Tribunal. The Court allowed assessee's writ petition subject to deposit of 40% of demand noting that Tribunal had passed the order contrary to material on record and thus being a non-speaking, one stood vitiated by non-application of mind.

Rittal India Pvt Ltd. vs ACIT [TS-1425-HC-2018-(Kar)-TP] WP Nos.53218/2018 dated 12.12.2018

3001. The Court dismissed Revenue's writ challenging the stay order of the Tribunal with 'exemplary' cost of Rs. 50,000 each, to be paid personally by 2 Principal CITs & an ACIT, for their irresponsible & unfair behaviour in filing a writ petition just for the sake of proving their 'fictional desires'. The Court observed that a total demand of Rs. 22.17 cr was raised on assessee-company pursuant to AMP adjustments made by DRP, against which assessee secured an interim stay order from ITAT, subject to further payment of Rs. 2 cr. (in addition to Rs.3.32 cr. already paid by it). It held that the entire demand raised by the authorities was prima facie not even sustainable considering that the controversy was apparently covered in assessee's favour by various Delhi High Court and Bengaluru ITAT rulings and that the grant of absolute stay would have been more appropriate in the circumstances. It observed that the approach of the tax department in filing Writ Petition seemed as an attempt to prove their superior wisdom over the wisdom of Tribunal and accordingly reprimanded the 'dogged approach & 'unholy desire' to multiply litigations in Constitutional Courts. It observed that the approach of the Revenue showed a lack of judicial discipline and hierarchical discipline.

Epson India Pvt. Ltd vs. ACIT - TS-14-HC-2018(KAR)-TP - WRIT PETITION No.12913/2017 (T-IT) dated 09.01.2018

3002. The Court dismissed Revenue's writ petition against the Single Bench's order (imposed costs of Rs.50,000 on Revenue) dismissing its writ petition filed against Tribunal's order granting stay to assessee in respect of demand raised on account of TP adjustment made on advertisement, marketing and promotion (AMP) expenses noting that the ITAT-order appeared to be fair, reasonable and not prejudicial to Revenue, particularly when the appeal filed by assessee was set down for final hearing. The Tribunal had observed that the said issue was a debatable issue and had directed the assessee to make a payment of 2 crores over and above the 15% of the demand already paid for the stay to be granted. The Court waived the costs imposed by the single bench but observed that the Department had been filing such petitions without any reason.

CIT vs. Epson India Pvt Ltd [TS-296-HC-2018(KAR)-TP] Writ Appeal No.770 of 2018 dated 24.04.2018

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3003. The Court held that no substantial question of law arose against the Tribunal's order wherein it was challenged that the Tribunal extending stay exceeded period of 365 days (combined period of stay) was contrary to the second and third proviso of sec.254(2A). It relied on the judgment of Voice Telesystem (which had ruled on provision of sec 35(C2A) of the Excise Act,1944 parimateria to sec 254(2A) of the Income-tax Act) wherein it was held that interim protection could continue beyond 365 days in deserving cases where appeal could not be decided by the Tribunal due to pressure of pendency of cases and delay in disposal of the appeal was not attributable to the assessee.

Pr.CIT vs Comverse Network Systems India Pvt. Ltd. [TS-1085-HC -2018 (Pun &Haryana)] ITA-118-2018 dated 31.07.2018

3004. The Court dismissed Revenue's appeal against Tribunal's order after following co-ordinate bench judgement in assessee's own case for previous AY, wherein the Court had upheld Tribunal's power to grant stay beyond 365 days after relying on SC ruling in Kumar Cotton Mills Pvt. Ltd. and coordinate bench ruling in Voice Telesystem Ltd. rendered in the context of similar Sec. 35C(2A) under the Central Excise Act, which had ruled that wherever the appeal could not be decided by the Tribunal due to pressure of pendency of cases and the delay in disposal of the appeal is not attributable to the assessee in any manner, the interim protection can continue beyond 365 days in deserving cases.

PCIT vs Carrier Air Conditioning & Refrigeration Ltd- TS-227-HC-2018(P&H)-TP- ITA No 4/2018 dated 04.04.2018

PCIT vs BMW India Pvt Ltd- TS-226-HC-2018(P&H)-TP ITA 11/2018 dated 04.04.2018

3005. The Tribunal extended stay of outstanding demand for AY 2007-08 and AY 2008-09 for 180 days from the date of the order or till disposal of appeals whichever was earlier noting that delay in disposal of the said appeals was not on account of any lapse on the part of the assessee, and as there was no change in the material facts and circumstances vis-à-vis the material facts and circumstances when the stay was originally granted in this case. In the assessee's case, a special bench was to be constituted on the question whether provisions of section 92 could be invoked in a situation in which income of assessee was eligible for tax exemption or tax holiday vide Tribunal's order dated 20 June 2016 and the hearing was not fixed even thereafter. In view of the above, it also formulated guidelines for expeditious hearing of cases referred to Special Bench members and also with respect to Third member cases viz. a) Wherever Special Benches are constituted, the Special Benches shall, as far as possible, commence hearing within 120 days of the benches being constituted. In the cases in which the respective bench is not in a position to commence hearing of the matter within 120 days for any specific reason, e.g. directions of the Hon'ble Court above or blocking the hearing awaiting decision of a higher judicial forum, it shall record the reasons, in brief, for delay in commencement for hearing b) It is only in exceptional circumstances that the adjournment may be granted, at the instance of the either party, in Special Benches and Third Member cases. Even when adjournment is granted, it shall not be generally granted beyond 30 days.

Doshi Accounting Services Pvt Ltd vs Dy. CIT[TS-1312-ITAT-2018-(Ahd)-TP] SP Nos.68 and 69/Ahd/2018 ITA No.1285 /Ahd/2012 and 1822 /Ahd/2014 dated 26.12.2018

3006. The Tribunal granted extension of stay of outstanding demand of Rs.33,82,76,230/- of 3 months from the date of the stay order or till disposal of appeal whichever is earlier subject to

further payment of Rs.2 crores. Further, it directed the assessee not to seek adjournment of case from hearing without just and reasonable cause and failure of the condition would lead to automatic vacation of stay. It also noted that the assessee had not met the conditions as per the earlier stay order which fact was not brought to its notice when the extension for stay was earlier heard. It had directed the assessee vide its earlier stay order to make a payment of Rs.5 crores in addition to the adjustment of refunds of Rs.5.89 crores by the Department against which the assessee had made only a payment of Rs.3.5 crores and therefore, in its opinion the assessee did not deserve a lenient view. Further, it rejected the assessee's justification that it had paid lesser amount in view of refund determined by AO for another year which was agreed to be adjusted against the demand payable in light of Revenue's claim that the AO did not agree to any such thing. The Tribunal observed that neither the AO nor assessee can change the specific directions of Tribunal given in earlier stay order and if assessee wanted such change, it should have approached the bench for that purpose.

Subex Ltd vs Dy. CIT [TS-1011-ITAT-2018(Bang)-TP] SP No. 201/Bang/2018 dated 24.08.2018

3007. The Tribunal granted stay of demand to the assessee subject to partial payment of Rs.21 crores in 4 instalments as against total outstanding demand of Rs.183 crores noting that principal additions during these years pertained to AMP adjustment and disallowance of Sec. 40(a)(ia). It observed that though there were a number of judgments in favour of the assessee on AMP issue, a detailed hearing would be required to determine whether there existed international transaction and whether the AMP expenditure had resulted in tangible benefit to its AEs, further the DRP had deleted similar addition on AMP issue for AY 2011-12 and the Revenue was in appeal before the Tribunal. It also noted that there was no financial hardship or urgent recovery proceedings initiated by AO for outstanding demand, thus, arrived at a figure Rs. 21 Cr payment after considering totality of circumstances and taking into account total outstanding demand other than interest. It directed assessee to file paper books / documents after supplying the same to the Revenue and take no further undue adjournment and clarified that in case any of the terms or conditions of stay were violated, the stay granted would be vacated, noting that appeal hearing were scheduled on 16.10.2018 for AY 2012-13 and on 25.09.2018 for AY 2013-14.

Acer India P Ltd vs Dy. CIT [TS-1057-ITAT-2018(Bang)-TP] SP No.215 and 216/Bang/2018 dated 11.09.2018

3008. The Tribunal granted extension of stay of outstanding demand to the assessee for a period of three months from the date of this order or till the disposal of this appeal whichever was earlier noting that Tribunal had earlier granted stay (dated 09.03.2018) for 6 months subject to assessee depositing Rs.35 lacs on or before 25.03.2018 and considered assessee's submission that complying with the conditions, payment was made on 22.03.2018 and that hearing of the concerned appeal was in progress, partly heard and fixed for further hearing on October 3, 2018. It further directed the assessee to not seek adjournment without reasonable cause, clarified that if so, it would result in automatic vacation of stay extension granted.

Essilor India Pvt Ltd vs DCIT [TS-1078-ITAT-2018(Bang)-TP] SP No.227/Bang/2018 dated 28.09.2018

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3009. The Tribunal extended stay of outstanding demand till March 31, 2018 or appeal disposal whichever was earlier relying upon Bombay HC ruling in Narang Overseas Private Limited and Bengaluru ITAT ruling in SAP Labs India Pvt. Ltd wherein it was held that when the delay in appeal disposal was not attributable to assessee, stay was to be extended. It directed the assessee not to seek adjournment of the case from hearing without any reasonable and just cause.

The Himalaya Drug Company v DCIT - TS-142-ITAT-2018(Bang)-TP - Stay Petn.No.35/B/2018 dated 09/02/2018

3010. The Tribunal noting that while computing the TP adjustment in the instant case, the TPO had made an adjustment on both AE and non-AE transactions, accepted assessee's contention that the TP adjustment was to be confined to AE transactions only and accordingly granted stay of demand arising for a period of 6 months or till the disposal of appeal, whichever is earlier, with a condition to pay Rs.10 lakhs on or before January 31, 2018. It noted that out of a total demand of 1.28 crore, the assessee had already paid 52.74 lakhs and therefore granted conditional stay to the assessee. It also directed the assessee not to take any undue adjournment without any justifiable reason and further cooperate in early disposal of the appeal.

IKA India P. Ltd vs. DCIT - TS-50-ITAT-2018(Bang)-TP - Stay petition No.1/Bang/2018 dated 19.01.2018

3011. The Tribunal granted stay of demand to the assessee till March 31, 2018 or till appeal disposal, whichever was earlier noting that the demand arose due to TP-adjustment made in respect of assessee's international transactions. Considering that the assessee had already discharged 50% of disputed tax, the Tribunal granted stay and clarified that the stay was subject to condition that the assessee shall not seek adjournment of the case from hearing without any just and reasonable cause***.***

Citrix R&D India Pvt. Ltd. vs. ACIT - TS-91-ITAT-2018(Bang)-TP - SP No.15/Bang/2018 dated 07/02/2018

3012. The Tribunal relying on the decisions of the Delhi HC ruling in Pepsi Foods, Bombay HC ruling in Narang Overseas, co-ordinate bench ruling in SAP Labs extended stay of demand to the assessee noting that existence of all conditions for grant of stay has already been considered by the Tribunal at the time of granting original stay and no new condition could be imposed while extending the stay. It held that when the delay in disposal of appeal was not attributable to the assessee, stay had to be extended.

Manipal Global Education Services P. Ltd. vs. DCIT - TS-100-ITAT-2018(Bang)-TP - SP No.24/Bang/2018 dated 05/02/2018

3013. The Tribunal granted stay of outstanding demand up to March 31, 2018, subject to payment of Rs.15 lakhs noting that the demand arose due to transfer pricing adjustment involving selection of comparables. Considering assessee's submission that it has a prima facie case on merits and Revenue could not controvert the submissions, it opined that the ends of justice would be met if the assessee is directed to pay Rs.15 lakhs on or before 01/03/2018 and the balance was to be stayed.

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Enchanting Travels Pvt. Ltd vs. ITO - TS-98-ITAT-2018(Bang)-TP - SP No.16/Bang/2018 dated 05/02/2018

3014. The Tribunal granted extension of stay of demand relying on Pepsi Foods (P) Ltd vs ACIT Delhi HC, Narang Overseas Pvt Ltd vs ITAT and co-ordinate bench ruling in case of M/s. SAP Labs India Pvt Ltd and stated that when the delay in dispos**al** of appeal was not attributable to the assessee, the stay had to be extended.
Finastra Software Solutions (India) P Ltd. Vs ACIT Circle 4(1)(2) Banglore- TS-368-ITAT-2018(Bang)-TP- SP Nos. 128&129/Bang/2018 dated 18.04.2018

3015. The Tribunal granted extension of stay of outstanding demand to the assessee noting that the stay was earlier granted till January 31, 2018 and there was no change in circumstances. Relying on HC rulings in Pepsi Foods and Narang Overseas wherein it was held that when the delay in disposal of appeal is not attributable to the assessee, stay had to be extended.
Vodafone Mobile Services Ltd. vs. DCIT - TS-114-ITAT-2018(Bang)-TP Stay Petn.Nos.18 & 19/Bang/2018 dated 05/02/2018

3016. The Tribunal granted stay of outstanding demand of Rs.7cr to the assessee upto March 31, 2018, subject to payment of Rs. 1.5cr on before January 31, 2018 noting that the demand arose due to TP-adjustment made on consideration received for sale of shares in ForgePro to its AE and the consideration received by the assessee was determined to be at par with the FMV of shares which determined by experts in the field and that the valuation of the shares conducted by a field expert could not be disturbed by the TPO. It also noted that the TPO himself accepted that transaction took place in uncontrolled situation and accordingly held that there was strong prima facie case in assessee's favour. Since the assessee was running its business operation on overdraft facility and therefore, liquid position of the assessee did not permit the payment of disputed tax liability, it held that the demand ought to be stayed. It granted the assessee an out of turn hearing and clarified that the stay order would cease to operate, in case assessee-sought adjournment from hearing of the appeal any without any just and reasonable cause.
Wevin Pvt. Ltd v ITO - TS-26-ITAT-2018(Bang)-TP - S.P.No.297/Bang/2017 dated 01/01/2018

3017. The Tribunal granted stay of outstanding demand of Rs.225.92cr to Wipro GE Healthcare noting that the demand arose due to TP-adjustment in respect of royalty, distribution and trading, software and support services and other corporate tax additions. It observed that the TPO suggested TP-adjustment even on non-AE transactions and in respect of corporate tax additions which were restored back to AO for de-novo adjudication in earlier years. Clarifying that assessee should not seek adjournment from appeal hearing without just & reasonable cause, it directed the revenue authorities not to initiate coercive steps for collection of demand.
Wipro GE Healthcare Pvt. Ltd vs. DCIT - TS-1056-ITAT-2017(Bang)-TP - SP No.275/Bang/2017 dated 15/12/2017

3018. The Tribunal granted stay of outstanding demand for AYs 2009-10, 2011-12 and 2013-14 to the assessee noting that the TP-adjustment arose due to TPO's selection of comparables. It

noted that the assessee had already discharged 53% of the demand for AY 2009-10 and 45% of the demand for AY 2011-12 and accordingly stayed the balance demand. For AY 2013-14 noting that only 19% of the outstanding demand had been paid, it directed the assessee to pay an additional amount of Rs.2crore. Further, it granted the assessee an early hearing on February 5, 2018 and clarified that the stay order would cease to operate, in case the assessee sought an adjournment without any just and reasonable cause.

Finastra Software Solutions (India) Pvt. Ltd (formerly Misys Software Solutions India Pvt. Ltd.) vs. DCIT - TS-55-ITAT-2018(Bang)-TP dated Sty Petn.No.12/Bang/2018, Sty Petn.No.13/Bang/2018 & Sty Petn.No.14/Bang/2018 dated 18/01/2018

3019. The Tribunal granted extension of stay of outstanding demand for AY 2011-12 and AY 2013-14 for a period of three months from the date of this order or till the disposal of this appeal whichever was earlier accepting that delay was not attributable to assessee noting that appeal for subject year was heard and released(fixed for hearing) while appeal for AY 2013-14 was heard and order awaited. It considered assessee's submission that for AY 2011-12, amount of demand outstanding was same as in earlier petition dated 02.03.2018 and for AY 2013-14, directions given by co-ordinate bench in earlier stay petition dated 09.03.2018 had been complied with. It directed the assessee not to seek adjournment in course of hearing of the appeals without justifiable reasons and in case of assessee seeking an adjournment, the stay granted by the order would stand vacated automatically.

CGI Information Systems Consultants Pvt Ltd vs DCIT [TS-1194-ITAT-2018(Bang)-TP] SP Nos. 221 and 222/Bang/2018 dated 28.09.2018

3020. The Tribunal extended stay of outstanding demand to assessee for a period of 6 months or till disposal of appeal whichever was earlier noting that delay in appeal could not be attributed to the assessee. It followed the Delhi HC decision in Pepsi Foods (P) Ltd and Bom HC in Narang Overseas Pvt Ltd. wherein it was held that if delay was not attributable to assessee, stay had to be extended. Further, it directed assessee not to seek adjournment without justifiable reasons.

Novozymes South Asea Private Ltd vs Dy.CIT [TS-1210-ITAT-2018(Bang)-TP] SA Nos.251 to 253/Bang/2018 dated 26.10.2018

3021. The Tribunal granted stay on recovery of outstanding demand for a period of 6 months or till disposal of appeal whichever is earlier subject to payment of Rs.8 crores noting that demand arose due to TP adjustment and corporate tax issues. In respect of TP adjustment, it observed that assessee had invoked MAP mechanism, application of which was pending disposal, and assessee had submitted bank guarantee pursuant to CBDT Circular in respect of demand attributable to TP-additions. It fixed the hearing of the appeal and directed the assessee not to seek an adjournment without just and reasonable causes.

Novozymes South Asia Pvt. Ltd. vs. Jt.CIT [TS-289-ITAT-2018(Bang)-TP] SP Nos.116 to 118/Bang/2018 dated 13.04.2018

3022. The Tribunal granted extension of the stay of outstanding demand to the assessee till 31.08.2018 or appeal disposal whichever was earlier. The extension of stay was granted relying on the HC Rulings in Pepsi Foods and Narang Overseas wherein it was held that if delay in disposal of appeal was not attributable to the assessee and there was no changed

circumstances from the day of earlier stay, the stay should be extended. Further, it directed the assessee not to seek adjournment without just and reasonable cause and its failure to adhere to the aforesaid condition would result in automatic vacation of stay extension granted.
NXP Semiconductors India Pvt. Ltd. vs. DCIT [TS-529-ITAT-2018(Bang)-TP] S.P. Nos. 167&168/Bang/2018 (In IT (TP) A Nos.306/Bang/2016 and 692/Bang/2017 dated 18.06.2018

3023. The Tribunal granted extension of stay of demand to the assessee subject to further payment of Rs. 50 lakhs on or before July 15, 2018 relying on Delhi HC ruling in Pepsi Foods P Ltd. and Bombay HC ruling in Narang Overseas Private Ltd wherein it was held that extension of stay should be granted if delay in disposal of appeal was not attributed to the assessee and there was no changed circumstance from earlier stay order. It directed that the assessee should not seek adjournment without just and reasonable cause, otherwise stay would stand vacated.
Inteva Product India Automotive Pvt Ltd [TS-869-ITAT-2018(Bang)-TP] SP No.180/Bang/2018 dated 22.06.2018

3024. The Tribunal granted stay of outstanding demand of Rs. 58.92 lakhs arising out of TP issues for AY 2012-12, subject to further payment of RS. 10 lakhs by assessee observing that out of total demand of Rs.69.31 lakhs, assessee had already paid 15% i.e. Rs. 10.39 lakhs. It also noted that some of the companies included in the set of comparables may be excluded on functional dissimilarity, and held that the assessee had made out good case for grant of stay. It directed the assessee to deposit further sum of Rs. 10 lakhs on or before 15 February, 2017and granted stay of balance demand for 180 days or till disposal of appeal whichever is earlier and fixed an out of turn hearing on 7 March, 2017.
UEI Electronics Pvt Ltd v DCIT – TS-111-ITAT-2017 (Bang) – TP - S.P.No.3/Bang/2017 dated 20.01.2017

3025. The Tribunal granted stay of outstanding demand of Rs. 81.24 Cr for AY 2012-13 arising out of TP adjustment on account of AMP expenditure and royalty payment, subject to payment of Rs. 15 Cr on or before 15.07.2017. Further, for AY 2009-10; noting that that the assessment order had been challenged on serious grounds, namely, limitation u/s 143(2) and approval u/s 151, it granted absolute stay of outstanding demand of Rs. 56.32 Cr.
The Himalayan Drug Co v ACIT – TS-88-ITAT-2017 (Bang) – TP - SP Nos.258 & 260/Bang/2016 dated 13.01.2017

3026. The Tribunal extended stay granted to the assessee for AYs 2009-10 to 2011-12 by 3 months, noting that the issues involved in all 3 years were identical to issues in appeal for AY 2008-09 which was already heard by the Tribunal and for which the order was awaited. Further, it noted that the delay in disposal of appeal was not attributable to the assessee and that there was no change in circumstances from the earlier stay order and therefore granted extension on the condition that assessee would not seek adjournment without just and reasonable cause.
Google India Private Limited Vs DCIT – TS-1045-ITAT-2016 (Bang) – TP - Stay Petition Nos.194 to 1961Bang/2016 dated 02.12.2017

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3027. The Tribunal granted the assessee stay of balance outstanding demand of Rs. 1.16 Cr for AY 2012-13 for a period of 180 days or till disposal of appeal whichever is earlier, subject to payment of Rs. 25 lacs by assessee on or before 28 February 2017, stating that assessee had a good prima facie case. It directed the assessee not to seek adjournment without justifiable reasons, failing which, stay granted would be vacated automatically and fixed the appeal for hearing on 23 March 2017.

Kaypee Electronics Associates Pvt. Ltd. Vs ACIT - S-138-ITAT-2017(Bang)-TP - S.P. No 6/Bang/2017 dated 03.12.2017

3028. The Tribunal rejected assessee's request to restrict partial payment to 15% for grant of stay of outstanding demand of Rs. 486 Cr for AY 2012-13 and directed it to deposit 50% demand (20% within 7 days and balance in 6 monthly instalments. Relying on the decision of the High Court in Flipkart India [TS-97-HC-2017(KAR)] , the Tribunal held that if the CBDT Instruction dated February 29, 2016 (providing guidelines for stay of demand at first appeal stage) was made applicable to pending Tribunal proceedings, then the Tribunal would be considered equivalent to CIT(A) which would lead to absurd result as administrative Pr. CIT/CIT would be redressing grievances against Tribunal orders. Further, noting that the assessee had sound financial position to pay the demand and that it failed to establish prima-facie case for demand non-recovery or to show that demand was not payable, and that it had not filed a paper-book, it held that the prima facie case of assessee could not be examined. It dismissed the assessee's contention that since the AO made a disallowance of royalty u/s 40(a)(i) as well as an ALP adjustment it would lead to double addition and held that disallowance u/s 40(a)(i) and computation of income from international transaction regarding to ALP under Chapter X of the Income-tax Act operates in two different fields and the computation of income under Chapter X had no co-relation with disallowances under sec 40(a)(i). It further stated that assessee would not suffer any irreparable loss / injury if stay was not granted as it could get full refund with interest if assessee's appeal was allowed on merits.

Google India Private Limited vs. ACIT - TS-251-ITAT-2017(Bang)-TP - SP No. 45/Bang/2017 dated 22.03.2017

3029. The Tribunal granted extension of stay of demand to Business Process Outsourcing (India) for AY 2009-10, observing that after granting stay of demand on November 4, 2016, appeal was listed for hearing but unfortunately the Bench did not function on that date. Accordingly, since the assessee could not be held responsible for the delay in disposal of the appeal and the facts and circumstances under which the stay was granted, remained the same, it extended the stay upto 30.04.2017 as the appeal was listed for hearing on 10.04.2017.

Business Process Outsourcing (India) Pvt. Ltd vs. DCIT - TS-266-ITAT-2017(Bang)-TP - [SP No. 20/B/2017 dated 03/03/2017

3030. The Tribunal granted stay of outstanding demand of Rs 22.17cr for AY 2012-13 for a period of 90 days or till disposal of appeal, whichever is earlier, subject to payment of Rs 2 crores on or before March 20, 2017. It noted that the demand arose due to TP-adjustment on account of AMP expenditure, and held that the issue was a highly debatable issue in view of various decisions on this point. Accordingly, it held that the assessee made out a prima facie good case for grant of stay subject to part payment. It clarified that if assessee sought adjournment without reasonable cause, stay granted would stand vacated.

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Epson India Private Limited Vs ACITTS-258-ITAT-2017(Bang)-TP - P.No.31/Bang/2017 dated 10.03.2017.

3031. The Tribunal granted stay of outstanding demand of Rs 9.39cr (including 3.45cr interest) for AY 2012-13 for a period of 3 months or till disposal of appeal, whichever was earlier, subject to payment of Rs 2cr. It noted the assessee's submission that it had filed a rectification petition u/s 154 which, if passed, would reduce the demand to Rs 2.40cr and held that the effect of the rectification petition could not be considered at the present stage because it was not clear as to whether the claims in this rectification petition were eligible to be considered u/s 154 or not. Considering assessee's willingness to make further payment of Rs 2cr, it granted conditional stay and fixed the appeal for early hearing, clarifying that if assessee sought adjournment without justifiable reasons, stay granted would get automatically vacated.
Outsource Partners International (P) Ltd. vs. ACIT - TS-292-ITAT-2017(Bang)-TP - S.P. No. 65/Bang/2017 dated 24.03.2017.

3032. The Tribunal, following the co-ordinate bench ruling in SAP Labs India (wherein view was taken that Tribunal can grant the stay beyond 365 days if the delay in disposing of the appeal is not attributable to assessee) granted extension of stay of demand to the assessee beyond 365 days, considering the assessee's submission that appeal was heard on December 27, 2016 but subsequently the matter was released for fresh hearing. It noted that the original stay was granted vide order dated March 11, 2016 and thereafter extended for a period of 3 months vide order dated December 2, 2016. Accordingly, it held that the delay in disposing of the appeal was not attributable to the assessee and therefore in view of the decision of Hon'ble Delhi High Court in case of Pepsi Foods (P.) Ltd. Vs ACIT (supra), the assessee had made out a prima facie good case for extension of stay even beyond 365 days.
Novo Nordisk India Pvt. Ltd. vs. DCIT - TS-296-ITAT-2017(Bang)-TP - SP No. 61IBang/2017 dated 24.03.2017

3033. The Tribunal granted further extension of stay of demand to the assessee till May 31, 2017, noting the assessee's submission that delay in appeal disposal was not attributable to assessee as issue involved in appeal was referred to Special Bench of Tribunal and Special Bench had not yet started hearing the issue. Accordingly, it held that the stay granted earlier should be extended if the delay in disposal of the appeal is not attributable to the assessee-company. It clarified that the assessee shall not seek adjournment from appeal hearing without just and reasonable cause.
Manipal Global Education Services Pvt. Ltd vs. DCIT - TS-297-ITAT-2017(Bang)-TP - SPNo.67 / Bang / 2017 dated 24.03.2017

3034. The Tribunal granted the assessee extension of stay of outstanding demand for a period of 3 months or till disposal of appeal, whichever is earlier. It noted that after stay was granted on July 29, 2016, the appeal hearing was fixed for December 15, 2016 which was adjourned as AR of the assessee was travelling on that date due to prior commitments. It observed that the date of hearing fixed on 15.12.2016 was not fixed in course of hearing of stay or the appeal after ascertaining the availability of the AR of the assessee and accordingly held that under these facts, the request for adjournment was due to cogent reasons and therefore, it could not be said that the delay was attributable to the assessee. It clarified that the assessee should

not seek adjournment during the course of appeal hearing without justifiable reasons and if assessee did so, the stay granted would get automatically vacated.
Outsourcepartners International Pvt. Ltd. vs. DCIT - TS-276-ITAT-2017(Bang)-TP - S.P. No 521Bang/2017 dated 17.03.2017

3035. The Tribunal granted stay of outstanding demand of Rs 26.48cr to the assessee for a period of 3 months or till appeal disposal, whichever was earlier, subject to payment of Rs 4cr. It noted that out of the total disputed demand (as per rectification order) of Rs 64.68cr, assessee had already paid Rs 28.20cr resulting in 44% of demand being discharged and that the assessee was willing to make further payment of Rs 4cr as a result of which it held that it was a fit case for granting of stay, subject to further payment of Rs. 4 Crores. It fixed the early hearing for the appeal and clarified that if the assessee sought adjournment without justifiable reasons, stay granted would be automatically vacated.
Schneider Electric IT Business India (P) Ltd. (Formerly known as American Power Conversion (India) (P) Ltd) vs. JCIT - TS-269-ITAT-2017(Bang)-TP - S.P. No. 263/Bang/2016

3036. The Tribunal, noting that the assessee had paid Rs. 8 Lakhs out of the total demand of 33.57 lakhs, granted stay of demand to the assessee for a period of 6 months or till disposal of appeal, whichever is earlier subject to payment of Rs. 9 lakhs on or before 2nd June 2017 for AY 2012-13. The demand arose due to TP-adjustment of Rs. 66.16 lakhs made in the case of the assessee (engaged in the business of contract development and technology support for pharmaceutical companies). The Tribunal opined that taking into account the merits of the case, the financial position of the assessee and the balance of convenience, it was a fit case for grant of stay on recovery of demand subject to the condition that a further sum of Rs.9,00,000/- on or before 2/6/2017 was paid by the assessee.
Indegene Pvt ltd vs ACIT-TS-506-ITAT-2017(bang)-TP- IT(TP)A No.5911Bang/2017) dated 26.05.2017

3037. The Tribunal noting that the appeal had already been heard and order was awaited, granted further stay of demand to the assessee for AY 2010-11 till July 21, 2017 or till disposal of appeal whichever was earlier. The DR of Revenue had opposed the extension of stay but could not point out any reason or basis to reject the request of the assessee and therefore the assessee was granted extension of stay of demand.
Manipal Global Education Services Private Limited vs DCIT- [TS-536-ITAT-2017(Bang)-TP]- IT(TP)A No.236/bang/15 dated 09.06.2017

3038. The Tribunal, granted stay of outstanding demand of Rs. 92.05 crores for AY 2013-14 for a period of 3 months or till disposal of appeal whichever was earlier, subject to payment of 25% of the disputed outstanding demand and directed assessee to make payment of 10% on or before August 14, 2017 and remaining 15% on or before August 24, 2017. It accepted assessee's submission that it had a good prima facie case and in view of its financial condition it could make a payment of maximum 25% of the disputed demand in 2 instalments subject to which stay was granted for the balance demand.
The Himalaya Drug Company vs ACIT-TS-657-ITAT-2017(Bang)-TP-ITA no. 114/bang/2017 [IT(TP)A no. 1385/bang/17] dated 11.08.2017

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3039. The Tribunal granted stay of outstanding demand of Rs. 14.40 cr (including interest) to assessee till disposal of appeal or for a period of 180 days from the date of order, whichever was earlier. Noting that demand arose due to TP-adjustment on account of AMP-expenses and provision of IT support services and considering that the assessee did not have adequate funds to meet its regular operational requirements and if demand was enforced, it would severely affect assessee's business operations, the Tribunal granted stay of demand with the condition that if the terms were violated, the stay shall stand vacated.
Alcon Laboratories (India) Private Limited vs. ITO-TS-869-ITAT-2017(Bang)-TP SA No.209/Bang/2017 dated 03.11.2017

3040. Relying on the decision in the case of Pepsi Foods P. Ltd [TS-281-HC-2015(DEL)], wherein it was held that the Tribunal had the power to grant extension of stay beyond 365 days, the Tribunal granted further extension of stay of demand for a period of 6 months or till disposal of appeal, whichever was earlier, subject to the condition that no adjournment would be taken without any valid reason.
Vodafone Mobile Services Ltd vs DCIT-TS-578-ITAT-2017(Bang)-TP-IT(TP)A no. 1160 & 1162/bang/2015 [stay petition no. 261 & 262/bang/2016 dated 28.06.2017

3041. Where the Tribunal had earlier granted conditional stay upto 10th November 2017, subject to payment of 25% of the then outstanding disputed demand and considering assessee's submission the fact that the delay in disposal of appeal was not attributable to the assessee, the Tribunal granted extension of stay on collection of outstanding disputed demand of Rs 69.04 Crores to assessee up to December 31, 2017 or till the disposal of appeal noting that the appeal has been fixed for hearing on December 21, 2017.
The Himalaya Drug Company vs. ACIT-TS-937-ITAT-2017(Bang)-TP 263/Bang/2017 (In IT (TP) A No. 1385/Bang/17) 24.11.2017

3042. The Tribunal noting that stay was granted / extended on 4 earlier occasions and appeal was heard by Tribunal on July 26, 2017, however, appeal was released for fresh hearing on October 26, 2017 and thereafter it was posted for hearing on November 22, 2017 on which day Revenue sought adjournment, granted further extension of stay of demand upto 31.03.2018 or till disposal of appeal whichever was earlier as the delay in disposal of appeal was not attributable to the assessee.
Epson India Pvt. Ltd. vs. ACIT-TS-1018-ITAT-2017(Bang)-TP S.P. No. 268/Bang/2017 (in IT(TP)A No. 293/Bang/2017) dated 15.12.2017

3043. Where the TPO suggested TP-adjustment even on non-AE transactions and in respect of corporate tax additions, and the issues were restored back to AO for de-novo adjudication in earlier years, the Tribunal granted stay of outstanding demand of Rs 225.922 crores to the assessee for AY 2013-14.
Wipro GE Healthcare Pvt. Ltd vs. DCIT-TS-1056-ITAT-2017(Bang)-TP SP No.275/Bang/2017 (In IT(TP)A No.2525/Bang/2017) dated 15.12.2017

3044. The Tribunal granted the assessee stay of outstanding demand (arising out of TP adjustments) for a period of 3 months or till appeal disposal, whichever was earlier, subject to

payment of Rs.50 lakhs on or before November 30, 2017. It noted that the assessee had opening cash in hand of Rs. 502.79 lacs in November 2017 and accordingly held that it could not be said that the financial position of the assessee was such that it could not make at least part payment of the outstanding disputed demand. It further clarified that the assessee should not seek any adjournment without justifiable reasons and if the assessee did so the stay granted would be automatically vacated.
CAE India Pvt Limited vs ITO-TS-1075-ITAT-2017(Bang)-TP dated 10.11.2017

3045. The Tribunal, considering the existence of a prima facie case and noting that out of the disputed demand of Rs. 3.03 Crores, assessee had made payment to the extent of Rs. 0.45 Crores and refund adjustment was made by AO of Rs 1.61 Crore, granted stay up to January 31, 2018 or till the disposal of appeal, whichever is earlier.
Swiss Re Global Business Solutions India Pvt. Ltd. vs. ACIT-TS-936-ITAT-2017(Bang)-TP 250/Bang/2017 (In IT (TP) A No. 2028/Bang/17) dated 24.11.2017

3046. The Tribunal granted stay of outstanding demand of Rs.2.59 cr to assessee for a period of 3 months or till appeal disposal, whichever is earlier, subject to payment of Rs. 50 lakhs for AY 2013-14. Further, it clarified that assessee should not seek adjournment in course of the hearing of this appeal without justifiable reasons.
Oaknet Healthcare Pvt. Ltd (Formerly known as Adcock Ingram Healthcare Pvt. Ltd.) vs. DCIT-TS-938-ITAT-2017(Bang)-TP 264/Bang/2017 (In IT(TP)A No. 2097/Bang/2017 dated 24.11.2017

3047. The Tribunal considering the fact that the assessee had already discharged 50% of total disputed demand of Rs. 3.31 crores and the appeal had been already fixed for December 11, 2017, the Tribunal granted stay of outstanding demand of Rs. 1.65 crores till 31st December 2017 or disposal of appeal, whichever was earlier.
Citrix R & D India Pvt Ltd vs DCIT-TS-945-ITAT-2017(Bang)-TP 249/Bang/2017 (In IT (TP) A No. 543/Bang/16) dated 24.11.2017

3048. The Tribunal considering assessee's submission that it had a prima facie case and its financial position was bad, granted stay of outstanding demand of Rs. 5.62 cr for a period of 6 months or till appeal disposal, whichever is earlier, subject to payment of 40% of demand on/before December 31, 2017.
WM Global Technology Services (India) Pvt. Ltd. vs. ACIT-TS-939-ITAT-2017(bang)-TP dated 24.11.2017

3049. The Tribunal, relying on its earlier orders, rejected assessee's petitions seeking stay against demand on the ground that demand arose due to transfer pricing adjustment which is factual matter and therefore the same could not be a fit case for granting stay. Further, with regard to the contention of the assessee that it was facing coercive action for recovery of amount and there had been a delay in hearing due to non-functioning of the bench, it held that since the assessee did not bring on record any material to show that any imminent coercive action was taken by the Revenue, there was no change in facts vis-à-vis facts prevalent at the time of rejection of stay vide earlier orders of the Tribunal and accordingly dismissed the petition.

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Kaypee Electronics & Associates Pvt Ltd [TS-828-ITAT- 2016 (Bang)- TP] (IT (TP) A Nos. 132 & 159/Bang/2016)

3050. The Tribunal extended the assessee's stay of demand for a period of one month noting that the appeals of the assessee for AY 2010-11 and 2011-12 had been heard and that the assessee had already paid Rs.50 crore out of the total demand of Rs. 101.47 crore constituting 49.27 percent of the total demand.
Google India Pvt Ltd v DCIT – TS-991-ITAT-2016 (Bang) - TP

3051. The Tribunal granted stay of outstanding demand of Rs.1.69 crore subject to payment of Rs.40 lacs by the assessee in 2 instalments, since the assessee had a prima facie good case. It also accepted the assessees contention that available MAT credit should be adjusted against the demand. It also clarified that if the assessee sought adjournment, the stay granted would be automatically vacated.
Softtek India Pvt Ltd – TS-990-ITAT-2016 (Bang) - TP

3052. The Tribunal granted extension of stay of outstanding demand to the assessee for AY 2011-12 for a further period of 3 months from the date of order noting that after disposal of the earlier stay application, appeal was listed for hearing on 4.07.2016, but the hearing could not take place and was further adjourned to 14.07.2011 but due to non-functioning of the bench, the hearing was further adjourned to
23.11.2016. Stating that the assessee was not responsible for the delay in the disposal of the appeal, it held that the case of the assessee was a fit case for extending of the stay earlier granted. However, it clarified that the stay granted would be automatically vacated if the assessee sought adjournment on the next date of hearing i.e. 23.11.2016
The Himalaya Drug Co v DCIT – TS-918-ITAT-2016 (Bang) - TP

3053. The Tribunal granted extension of stay of outstanding demand for AY 2009-10 for a further period of 3 months from the date of order or till disposal of appeal, whichever is earlier noting that the appeal was listed for hearing but was adjourned due to no fault of the assessee. However, it clarified that if assessee sought adjournment, the stay granted would automatically be vacated.
Business Process Outsourcing India Pvt Ltd – TS-989-ITAT-2016 (Bang) – TP

3054. The Tribunal dismissed the stay petition filed by the assessee in view of the disposal of the main appeal.
It noted that the order of the Tribunal was already placed on record and therefore the stay petition was now infructuous.
Lenovo India Pvt Ltd v DCIT – TS-1006-ITAT-2016 (Bang) - TP

3055. The Tribunal rejected extension of stay but granted early hearing in the case of the assessee and directed the TPO not to take coercive action till the next date of hearing. It noted that the assessee's appeal was fixed twice but could not be heard due to non-functioning of bench and clubbing of the matter with the Revenues appeal.
Faurecia Automotive Seating India P Ltd v ACIT – TS-983-ITAT-2016 (Bang) - TP

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3056. The Tribunal granted partial stay to assessee in respect of demand raised on account of adjustment made vis-a vis advertisement, marketing and promotion (AMP) expenses. The Tribunal noted that 10% of the substantive demand raised for one of the AY was already paid and, opined that assessee had made a prima facie case by stating that if directions in Tribunal's Special Bench ruling in LG Electronics case were followed, no further collection of tax would arise. Further**,** for other AY's concerned Tribunal granted stay of demand for a period of 180 days or till the disposal of the appeal whichever is earlier, subject to payment of 5% of demand within 30 days of receipt of the order.

Further, the Tribunal condemned Revenue's action of stalling hearing on main appeal by seeking adjournments and further, expressed displeasure over AO's act of requesting refund adjustment permission while keeping DR completely in the dark, and resulting in waste of precious time of the **C**ourt. The Tribunal directed Registry to send a copy of the order to the concerned Pr. CCIT, to take necessary action against the contradicting conduct of its Revenue Officers.

M/s. GlaxoSmithKline Consumer Healthcare Ltd vs ACIT Circle 4(1)- TS-235-ITAT-2018(Chandi)-TP- SA No 4/Chd/2017, 2 & 3/Chd/2018 dated 02.04.2018

3057. The Tribunal, noting that demand inter alia arose due to TP-adjustment on account of AMP expenses and considering assessee's submission that issue was covered in assessee's favour by earlier Tribunal orders, granted stay of tax demand (including interest and other charges) of Rs. 64.84 cr subject to deposit of 5% demand by assessee within 15 days from the date of order.

GlaxoSmithKline Consumer Healthcare Ltd vs. ACIT-TS-905-ITAT-2017(CHANDI)-TP-ITA No. 1528/Chd/2017 17.11.2017

3058. The Tribunal granted the assessee stay of outstanding demand for a period of 90 days subject to part payment of Rs.25 lakhs observing that the assessee had not been able to prove its financial difficulty.

Cook India Medical Devices Pvt Ltd vs. DCIT - TS-141-ITAT-2018(CHNY)-TP - Stay Petition No.30/Mds/2018 dated 02.02.2018

3059. The Tribunal declined extension of stay of demand granted earlier which was granted subject to two conditions viz that the assessee would not seek any adjournment till the date of final hearing of appeal and that the assessee would co-operate for expeditious disposal of appeal, on the ground that the assessee had requested for grant of adjournment 3 times.

Socomec Innovative Power Solutions Private Limited [TS-870-ITAT-2016(CHNY)-TP] (SP. No.220/Mds/2016)

3060. The Tribunal granted stay of demand to the assessee for a period of 6 months or till appeal disposal, whichever was earlier, noting that in the earlier round of proceedings, stay was granted by Tribunal subject to deposit of a certain amount and thereafter order on merits was passed by Tribunal remanding major issue of AMP-expenses back to TPO. Subsequently, the assessee approached High Court which sent the matter back to Tribunal for consideration and decision. Accordingly, the Tribunal observed that the assesse had come back to square one, being, the position when the stay was granted by the Tribunal in the first round subject to

certain payments. Considering that the assessee had complied with the direction given by the Tribunal in the first round of proceedings for grant of stay, it granted stay to the assessee.
MSD Pharmaceuticals (P) Ltd. vs. DCIT - TS-198-ITAT-2018(DEL)-TP - S.A. No.135/Del/2018 - 06.03.2018

3061. The Tribunal granted extension of the stay of outstanding demand to the assessee subject to a payment of 25 Lakhs for a period of six months or appeal disposal whichever was earlier observing that the TP issue was covered in the assessee's favour by its own case. Further, it directed the assessee not to seek adjournment of case from hearing without just and reasonable cause and its failure to adhere to the any of the condition would result in automatic vacation of stay extension granted.
Alcatel Lucent India Ltd vs ACIT [TS-1017-ITAT-2018(DEL)-TP] SA 474/Del/2018 dated 21.08.2018

3062. The Tribunal granted the stay of outstanding demand to the assessee for 6 months or disposal of appeal, whichever is earlier. Noting that TP adjustment arose on account of benchmarking of assessee's software development services and the assessee had a prima facie case on merits granted the stay. It directed the assessee not to seek adjournment which would get automatically vacated if it does not satisfy the condition and fixed the hearing of the appeal on 18.10.2018
NXP India Pvt Ltd (Formerly known as Freescale Semiconductor India Pvt. Ltd.) vs ACIT [TS-891-ITAT-2018(DEL)-TP] SA No.548/Del/2018 dated 03.08.2018

3063. The Tribunal, relying on the decision of the High Court in Verizon India (ITA No 460 / 2016) , granted the assessee full stay on recovery of Rs 1.14cr being penalty u/s 271(1)(c) on TP-additions made for AY 2010-11, for a period of 6 months or till disposal of appeal, whichever is earlier as in the absence of any overt act, which disclose conscience and material separation, invocation of Explanation 7 in a blanket manner could not only be injurious to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. It held that the mere fact that the assessing authority did not agree with the claim of the applicant would not lead to the conclusion beyond doubt that there was concealment of particulars of income or furnishing inaccurate particulars to attract penal provisions under section 271(1)(c) of the Act. Accordingly, it held that there was a prima facie case to justify assessee's request for stay of the disputed demand of penalty and restrained the Department to take coercive measures to recover disputed demand of penalty and fixed early hearing for the appeal.
Halcrow Consulting India Pvt. Ltd. vs. DCIT - TS-288-ITAT-2017(DEL)-TP – SP No 558 / Del / 2016 dated 30.03.2017

3064. The Tribunal deleted the penalty levied u/s 271(1)(c) on TP-adjustment in case of assessee providing IT/software development services to its AE noting that the manner in which arm's length price was determined and TP adjustment was made by the TPO, was unsustainable in law and consequently there could not be any question of furnishing of inaccurate particulars of income or any concealment of income. The TP-adjustment was made on account of under-utilization of capacity for assessee (a captive service provider) due to insufficient orders given by AE and the AO was of the view that AE should have compensated assessee for such

under-utilization. The Tribunal observed that the TPO had not carried out any benchmarking exercise but had presumed that assessee would have earned margin of 24% if there was full utilization of capacity and the TPO's method of determining of arm's length price was unknown under the transfer pricing regulations either under the Income Tax Act or under the Rules. It also noted that TPO should have identified comparables in similar line and determined their capacity utilization for making suitable adjustment and further observed that the AO had granted Sec 10A benefit on TP-adjustment of around Rs.2.21 crores contrary to proviso of Sec 92CA(4) and income was nil so there was no question of any tax sought to be evaded to the extent of the amount of adjustment and accordingly, penalty could not be levied.
Royal & Sun Alliance IT Solutions (India) Pvt Ltd vs DCIT [TS-607-ITAT-2018(DEL)-TP] ITA No.5611/Del/2014 dated 10.07.2018

3065. The Tribunal, noting that demand arose due to TP-adjustment on account of comparables selection and considering that even if 1 company (eClerx Services) was excluded from the list, assessee's margin would fall within 5% tolerance range, opined that there is a prima facie case in assessee's favour in respect of exclusion of eClerx Services on grounds of functional dissimilarity in view of Rampgreen Solutions HC ruling. Accordingly, it granted stay of outstanding demand of Rs. 2.40 cr for a period of 180 days or till disposal of appeal, whichever was earlier. Further, noting from the docket entries that the appeal filed by the assessee was being adjourned from time to time mostly on the behest of Revenue and observing that assessee had already paid 76% of demand, it held that it would be just to grant stay of the outstanding demand of tax and interest.
Quislex Legal Services Private Limited vs ACIT-TS-792-ITAT-2017(HYD)-TP dated 29.09.2017

3066. The Tribunal directed the lifting of attachment of bank account in case of assessee till the disposal of appeal noting that due to attachment of bank account assessee was not able to continue its operations and was experiencing severe cash crunch and liquidity position and was not able to make any further payment of tax. Perusing the copy of ITAT order for earler years, it observed that the issues involving T.P. adjustment, prima facie appeared to be covered in favour of the assessee and if the effect to the earlier order of the Tribunal in assessee's own case was given, then, no demand may arise at all. Accordingly, it fixed the appeal hearing on January 15, 2018 as the case was claimed to be a covered matter.
Planet Online P Ltd v ACIT - TS-1059-ITAT-2017(HYD)-TP - S.A. No.167/Hyd/2017 dated 27.12.2017

3067. The Tribunal granted stay of recovery of demand for180 days to the assessee against the demand raised due to TP adjustment, taking into consideration the fact that prima facie the matter appeared to be in favour of assessee and the refunds due to the assessee for subsequent previous assessment years were pending with the department.
M/s eBizNET Solution Pvt. Ltd vs ACIT Circle 17(1) Hyerabad- TS-403-ITAT-2018(HYD)-TP- SA no 38/HYD/2018 dated 23.04.2018

3068. The Tribunal granted stay of demand to the extent of 50% of outstanding demand while directing payment/adjustment of refunds for balance amount in respect of AY 2013-14 noting the assessee's argument that demand arose on account of TP-adjustment and that it had a

strong prima facie case as the Revenue had wrongly rejected CUP method and considered comparables with substantial related party transactions. Observing that the assessee a refund of Rs. 18.50 lakhs and Rs 26.22 lakhs was due to the assessee for AY 2010-11 and 2015-16, adjustment of which would result in recovery of more than 50% of the demand, it directed the AO to verify the claim of the assessee of refunds and adjust the same against the outstanding demand. Further, it directed that if such adjustment was found to be less than 50% of the outstanding demand, the assessee was to deposit the amount to the extent of such shortfall by 15th January, 2018.

Atlas Healthcare Software (India) Ltd v ACIT - TS-1060-ITAT-2017(Kol)-TP - S.A. No. 134/Kol/2017 dated 22.12.2017

3069. The Tribunal, considering assessee's submission that TP-adjustment should have been limited to transactions undertaken with related parties and not on entire purchases and also noting that assessee had filed rectification application seeking to correct this apparent error and had already discharged demand of Rs.2.49cr, granted stay of outstanding demand of Rs.5.30cr for a period of 6 months or till appeal disposal, whichever was earlier.

M/s Lexmark International (India) Pvt Ltd vs DCIT-TS-886-ITAT-2017(kol)-TP-ITA No. 235/kol/2017 dated 10.11.2017

3070. Where the assessee claimed to be a market research company and had made payments to AE towards shared market research tools, ALP of which was computed at Nil by TPO and TP-adjustment of Rs.7.50cr was made, the Tribunal, considering assessee's submission that co-ordinate bench in assessee's own case for AY 2008-09, AY 2010-11 and AY 2011-12 had dealt with TP-additions and granted / extended stay, granted stay of outstanding demand of Rs.3.67cr to assessee for AY 2012-13 for a period of 180 days or till appeal disposal, whichever is earlier, subject to payment of Rs.50 lakhs on or before November 30, 2017.

Ipsos Research Private Limited (in which Synovate India Private Limited has been amalgamated) vs. ACIT-TS-987-ITAT-2017(Mum)-TP dated 24.11.2017

3071. Where the assessee had made an effort to justify that prima facie the additions (payment of technical fees and reimbursements from AE) were not sustainable in the eyes of law as the expenses were incurred wholly and exclusively for the purposes of business of the assessee and great prejudice would be done if entire demand was pressed for payment, the Tribunal, granted stay of outstanding demand of Rs. 4.86 crores for a period of 180 days or till disposal of appeal whichever was earlier, subject to 2 conditions (1) Revenue to adjust outstanding refund of Rs.1.05 crore arising consequent to Tribunal order for AY 2008-09 within 2 weeks after necessary verifications and (2) assessee to further deposit Rs. 40 lakhs by December 31, 2017.

UPS Jetair Express Private Limited vs ACIT-TS-986-ITAT-2017(Mum)-TP dated 24.11.2017

3072. The Tribunal noted that the demand arose due to TP-adjustment in respect of assessee's payment of royalty/technical know-how to AE whereas the royalty paid for preceding AYs 2010-11 and 2011-12 as per the same rate (5% on local sales and 8% on value of export sales net of Indian taxes) was accepted by AO/TPO. Accordingly, it granted stay of

outstanding demand for a period of 6 months or till appeal disposal, whichever was earlier subject to payment of Rs 1 crore on or before October 15, 2017.
Firmenich Aromatics (India) Private Limited vs DCIT-TS-764-2017(Mum)-TP - SA No.280/Mum/2017 dated 25.09.2017

3073. The Tribunal granted the assesssee stay of outstanding demand for a period of 6 months or till appeal disposal, whichever was earlier, noting that the demand arose due to TP-adjustment on account of distribution fee paid to AE which was incorrectly benchmarked by TPO by using comparables of royalty payments and that there was a mistake in the workings made by TPO, which, if rectified, would reduce the demand substantially. Considering that the co-ordinate bench had stayed collection of similar outstanding demand for previous AY, the Tribunal held that the balance of convenience was in favour of granting full stay to the assessee. It granted the assessee an early hearing and directed it not to seek adjournment on that date without reasonable cause, failing which, the stay would be subject to review by the Bench hearing the appeal.
MSM Discovery Private Ltd. vs. DCIT - TS-73-ITAT-2018(Mum)-TP - S.A. No. 570/Mum/2017 dated t 12.01.2018

3074. The Tribunal, noting that demand inter alia arose due to TP-adjustment worked out on all transactions undertaken by assessee (with AEs and non-AEs) instead of limiting it to transactions with AE only, held that such an approach was untenable inasmuch the objective of the transfer pricing assessment in Chapter-X of the Act was to determine the income arising from an international transaction entered with associate enterprises alone and not in relation to non- associated enterprise transactions. Accordingly it granted stay on outstanding demand of Rs.7.26 crore for a period of 6 months or till disposal of appeal whichever was earlier subject to payment of Rs. 10.97 lakhs.
Owens-Corning (India) Pvt. Ltd vs. ACIT-TS-922-ITAT-2017(MUM)-TP SA NO. 473/MUM/2017 dated 17.11.2017

3075. The Tribunal held that where Vodafone Group Plc's indirect stakeholding in Indian company VIL was increased as a consequence of two transactions and those transactions had been interpreted by Assessing Officer to mean that assessee-company had exercised right of call options available with it and addition was made considering such transaction as an 'international transaction', in view of fact that assessee-company was not even a party to impugned two transactions and there was no such assignment or transfer of call options by assessee, stay on demand raised by Assessing Officer was to be granted. It further held that where TPO made addition to assessee's ALP in respect of rendering IT enabled services to its AEs, in view of fact that TPO had included/excluded certain concerns in final set of comparables which were contrary to ratio of certain decisions of Co-ordinate Benches of Tribunal, stay on recovery of outstanding demand was to be granted.
Vodafone India Services (P)Ltd v DCIT - [2016] 68 taxmann.com 130 (Mumbai-Trib)

3076. The Tribunal, noting that the demand arose due to TP-adjustment in respect of payments made for advisory & managerial services to AE and similar adjustment was made in preceding AYs 2009-10 and 2010-11 which were pending before Tribunal for adjudication, granted stay of outstanding demand for a period of 180 days or till disposal of appeal whichever was

earlier, subject to payment of Rs. 10 lakhs for each AY by September 30, 2017. Further it directed assessee to furnish proof of demand deposit within 10 days for such deposit and fixed hearing for December 18, 2017

Emerson Climate Technologies (India) Pvt. Ltd vs. DCIT-TS-742-ITAT-2017(PUN)-TP- ITA Nos. 359 & 2847/PUN/2016 dated 15.09.2017

Section 10A/10B

3077. The Court dismissed Revenue's appeal against the Tribunal's order deleting deleting disallowance of Sec 10A deduction based on TPO's determination of ALP. The DRP had invoked provisions of Sec 10A(7) r.w.s 80IA(10) and held that assessee has shown more profits from AE transaction in order to claim higher Sec 10A benefit, based on ALP arrived by TPO. The Tribunal relied on co-ordinate bench ruling in Visual Graphics wherein it was held that AO has to independently come to the conclusion that assessee had entered into transactions with AE to claim higher Sec 10A deduction, but in the instant no such exercise was carried out by AO. The Court noted that no substantial question of law arose as the Revenue has not brought anything on record to controvert the findings of the Tribunal.

CIT, ACIT vs M PACT TECHNOLOGY SERVICES PVT LTD [TS-720-HC-2018(KAR)-TP] ITA No.228/2013 dated 11.07.2018

3078. The assessee, engaged in providing software development services to its AE, claimed deduction u/s 10A. The TPO rejected the TP study and made a TP adjustment. The Tribunal decided the issue in favour of assessee after accepting the assessee's contention on various issues like use of earlier year data, allowability of 5% benefit as standard deduction, flat comparability adjustment towards risk and working capital, exclusion of companies with related party transactions and so on. In addition to the aforesaid issues, the Tribunal also accepted the assessee's contention that in view of the CBDT Circular 14/2001 (which is binding upon the TPO) since the TPO had failed to demonstrate that the assessee had manipulated prices to shift profits outside India, the TP provisions could not be applied in the assessee's case which was entitled to tax holiday benefit u/s 10A. On appeal by the Revenue, the Court accepted Revenue's contention that the aforesaid observation of the Tribunal with respect to applicability of TP provisions was contrary to proviso to section 92C(4). However, it opined that the said observation was "a mere obiter" which had not caused prejudice to the Revenue because as far as the computation of income was concerned, the AO had not given any benefit of section 10A with respect to the TP adjustment. Further, with respect to the other questions raised by the Revenue, the Court relied on the decision in case of Softbrands India P. Ltd and dismissed Revenue's appeal.

CIT, ACIT vs Philips Software Centre Pvt. Ltd [TS-701-HC-2018(KAR)-TP] ITA No.49/2009 dated 10.07.2018

3079. The Tribunal allowed deduction under section 10A of the Act in respect of the entire business income as the assesse had made a suo moto transfer pricing adjustment to the arm's length price of its international transactions.

Austin Medical Solutions Pvt Ltd Vs ITO [I.T. (T.P) A. No.542/Bang/2012] - TS-348-ITAT-2015(Bang)-TP

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3080. The Tribunal dismissed the Department's appeal and upheld CIT(A)'s order allowing Sec 10A deduction on voluntary TP-adjustment made by assessee. It noted that the assessee did not have any business other than the unit which was eligible for Sec 10A. The voluntary TP adjustment was made through Form 3CEB in respect of international transaction involving export of engineering design services and assessee excluded the voluntary TP-adjustment from export turnover in line with computation mechanism prescribed in Sec 10A.

Tribunal relied on coordinate bench ruling in the case of iGate Global Solutions wherein it was held that assessee was eligible for Sec 10A deduction in respect of income declared in the return of income on the basis of computation of ALP. In the present case, noting that assessee had disclosed income based on computed ALP, the Tribunal opined that, there was no enhancement of income due to determination of arm's length price, by the TPO. Hence, it held, that assessee was entitled to deduction under section 10A in respect of income based on computation of arm's length price.

ACIT Circle 12(1) vs M/s. GS Engineering & Construction P Ltd- TS-278-ITAT-2018 (Del)-TP- ITA No. 3956/Del/2014 dated 05.04.2018

3081. The assessee had entered into international transactions for provision of engineering services with its AE. It had made a suo-moto TP adjustment to the value of international transactions of provision of engineering services and towards reimbursement of cost of assets and the same was included in the profit of the undertaking as well as the total turnover for purpose of sec 10A but had not included the same in export turnover as the proceeds were not in foreign currency. The AO denied the benefit of sec 10A on the ground that TP adjustment did not have a nexus with the main business of the undertaking of assessee. The CIT(A) deleted the addition made by the AO. The Tribunal dismissed Revenue's appeal noting that the issue was covered in favour by the coordinate bench decision in assessee's own case relying wherein the claim for deduction u/s.10A of the Act in respect of suo-moto TP adjustment made by the assessee, was allowed relying on ruling of iGate Global Solutions Ltd. (subsequently affirmed by Karnataka HC) wherein it was held that the proviso to sec 92(4) of the Act would be applicable only on enhanced income on reading of the Memo Explaining the Provisions of Finance Bill, 2006 as well as from the literal meaning of the word 'enhanced' as it was clear that if income increased, as a result of computation of ALP by the TPO, then such increase was not to be considered for deduction under section 10A.. Thus, it accepted the assessee's contention that proviso to section 92C(4) was not applicable in its case as it had on its own determined its total income in the return of income havingregard to the arm's length price.

DCIT vs G S Engineering & Constructions India Pvt Ltd [TS-1169-ITAT-2018(DEL)-TP] ITA No.3980/Del/2015 dated 29.10.2018

3082. Where the assessee had converted its remuneration model from per diem basis to cost plus 15 percent, which led to a fall in profits in the current year as opposed to the earlier years, the Tribunal dismissed Revenue's contention that the assessee, who was eligible to claim deduction under section 10A till the prior year, had devised a scheme for tax avoidance in the current year (since it was no longer eligible to deduction under section 10A) by switching over to a remuneration model leading to lower profits. It held that there was no logic in the argument of the DR as notwithstanding the fact that the assessee earned more profit in the earlier year there could be no transfer pricing adjustment in a later year as long as the international transactions were at ALP. It held that allowing

excess deduction under section 10A in the earlier years on the basis of exaggerated profits, if any, could not be a reason to disturb ALP of the international transaction of the current year.

McKinsey Knowledge Centre Pvt Ltd – TS-997-ITAT-2016 (Del) – TP

3083. The Tribunal admitted the additional ground raised by assessee objecting to TP adjustment made/confirmed by TPO/DRP when assessee was claiming exemption u/s 10A. However, it dismissed the argument of the assessee that since all of its income was exempt from tax in India, there was no intention to shift profit outside India as AEs were located in USA where tax rates were higher than in India based on the decision of Mumbai Tribunal in case of Tata Consultancy Services Ltd [TS-521-ITAT-2015(Mum)-TP, and held that the decision of Tata Consultancy Services was held inapplicable in case of Gruner India Pvt. Ltd[TS-202-ITAT-2016(DEL)-TP] wherein it was held that assessee's eligibility to claim deduction did not operate as a bar on determining ALP of the international transactions undertaken, and enhancement of income due to TP-addition could not be considered for allowing deduction benefit.

Wissen Infotech Private Limited vs. DCIT - TS-142-ITAT-2017(HYD)-TP - ITA No.99/Hyd/2015 ITA No.311/Hyd/2015 dated 28.02.2017

3084. The Tribunal set aside CIT(A)'s order and held that assessee was entitled to deduction u/s.10B of the Act on additional income offered on account of suo-moto TP adjustment made on export of services relying on coordinate bench decision of I Gate Global Solutions Ltd. (subsequently affirmed by HC) wherein it was clarified that proviso to s 92C(4) (which inter alia provides that no deduction u/s.10A shall be allowed in respect of amount of income by which total income of assessee had been enhanced by TPO after computation of ALP of international transactions) would not apply to suo-moto adjustment and held that assessee was entitled to deduction under section 10A in respect of income declared in the return of income on the basis of computation of ALP asassessee himself had computed the ALP (voluntarily offered the additional income to tax) and it was not a case of enhancement of income due to determination of ALP by the TPO.

QX KPO Services Pvt Ltd vs ITO[TS-1300-ITAT-2018-(MUM)-TP] ITA No.2043 /Ahd/2014 dated 03.12.2018

3085. The Tribunal held that assessee was entitled to deduction under Section 10A of the Act on additional income offered on account of suo-moto TP-adjustment. The TPO/ CIT(A) disallowed the deduction u/s 10A as assessee failed to bring into country the export proceeds in foreign exchange as contemplated in Explanation 2 to Sec 10A in respect of such additional income offered. The Tribunal held that the additional income was artificial/ notional income computed u/s 92(1) and it was neither export turnover nor total turnover but in fact profits of business u/s 10A(4), and therefore held that in the absence of it being offered as export turnover or total turnover, there could not be any condition for getting foreign exchange to India. Further noting that additional income was offered to tax as business profits, it held that the suo moto adjustment would form part of profits of business and thus would have to be taken into consideration while computing the deduction under section 10A(4) of the Act. The Tribunal relied on the on Bangalore Tribunal ruling in iGate Global Solutions allowing Sec 10A deduction in respect of suo-moto TP-adjustment (subsequently confirmed by Karnataka HC)

and held that the Mumbai Tribunal ruling in Deloitte Consulting India taking a contrary view would not stand in view of ratio laid down by Karnataka High Court. It clarified that in the absence of any contrary decision of the jurisdictional High Court, the decision of the non-jurisdictional high court would prevail. Further, it held that the proviso to Sec 92C(4) [which inter alia provides that no deduction u/s 10A shall be allowed in respect of such amount of income, by which the total income of assessee had been enhanced after computation of ALP of international transactions] would not apply to suo moto adjustments.

Approva Systems Pvt. Ltd - TS-167-ITAT-2018(PUN)-TP - ITA No.1051/PUN/2015 dated 12.03.2018

3086. The Tribunal upheld CIT(A)'s deletion of Rs.2.88cr addition made by AO by invoking Sec 10A(7) r.w.s. 80IA(10) in case of assessee (engaged in the business of design engineering services) noting that though TPO accepted the margin shown by assessee at 29.14% to be at ALP, the AO held that ordinary profit earned by assessee was actually 12.55% (as against 29.14% declared in TP-report) pursuant to which he disallowed alleged excess profit on the surmise that assessee had earned higher margins than the mean margins earned by comparables selected by assessee. Relying on the decision of the co-ordinate bench in Honeywell Automation India ruling [TS-82-ITAT-2015(PUN)] wherein in an identical situation it was held that that fact that assessee had higher operating margins as compared to the comparables chosen in its TP study was not a valid ground to invoke Sec 10A(7) r.w.s. 80IA(10), it dismissed Revenue's appeal.

ACIT vs. Faurecia Interior Systems India Pvt. Ltd - TS-386-ITAT-2018(PUN)-TP - ITA No.1722 /PUN/2015 dated 24.05.2018

Others

3087. The assessee, an Indian branch of Calyon Bank (that provided ECB loans to Indian borrowers) provided financial analysis of the borrowers, general market conditions and regulatory environment to its Head office. The TPO had made an adjustment of 25 percent of the interest and commission received by the foreign head office from its Indian customer, treating the same as profit attributable to the Indian branch, which was restricted to 20 percent by the CIT(A). The Court upheld the order of the Tribunal wherein the Tribunal held that the interest earned by the foreign branch was not to be included for the purpose of attributing income to the Indian branch as it had not contributed to the loan amount which had been provided by the foreign branch. Accordingly, it dismissed the appeal of the Revenue and held that the Tribunal was justified in directing the AO/TPO to make TP adjustment at 20% of fees & other charges earned by assessee for arranging foreign currency loans for its existing clients.

DIT vs. Calyon Bank - TS-231-HC-2017(BOM)-TP - INCOME TAX APPEAL NO. 1781 2014 dated 23.03.2017

DIT vs. Caylon Bank [TS-252-HC-2017(BOM)-TP]

3088. The Court held that the Tribunal was incorrect in rejecting reliance on the decision in the case of Frost & Sullivan, which was prima facie identical to the case of the assessee, without pointing out detailed distinctions as to why the decision was not to be relied upon.

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Garnter India Research and Advisory Services Pvt Ltd v ACIT (INCOME TAX APPEAL NO. 2089 OF 2013) – TS-584-HC-2015 (Bom) – TP

3089. The Court directed Revenue to revoke provisional attachment order u/s. 281B and release refund of Rs. 655.67 cr. due to the assessee within a week's time of assessee furnishing a substituted bank guarantee securing such amount. Pursuant to attachment of refund amount u/s. 281B towards likely demands for AYs 2012-13 to 2014-15, assessee had volunteered to furnish a bank guarantee to cover the amount, but the same was not acted upon by the AO in view of the guarantees expiring in August 2018. The Court disposed off petition, ordering the release of refund to the assessee, conditional on assessee extending the validity of bank guarantees till March 31, 2019.In light of Revenue's apprehension over the impending merger between assessee and Idea Cellular likely to result in losses for the new entity, the Court directed that the bank guarantee should also clearly spell out that not only the assessee but also its successor would be bound to honour the instrument.
Vodafone Mobile Services Ltd. vs ACIT [TS-510-HC-2018(DEL)-TP] WP(C) 2732/2018 and CM Appl 11100/2018 dated 04.07.2018

3090. The Tribunal held that the corporate service fee paid by the assessee to its AE for services in the area production, sales, market information, etc were at arm's length price since the assessee derived benefits from it. Following the earlier years order, it held that corporate service fee paid in respect of financial services was to be reduced by 50 percent of the benefit derived from such services for determining ALP, due to the substantial increase in benefits received on account of such services.
DSM Sinochem Pharmaceuticals India Pvt Ltd v DCIT (ITA No 438 / Chd / 2015) – TS-604-ITAT-2015 (Chandi) – TP

3091. The Tribunal set aside the order of the CIT(A) deleting TP addition in respect of assessee's international transaction pertaining to `Purchase of material' for AY 2005-06 as all the points taken note of by the ld. CIT(A) in deleting the transfer pricing addition lacked valid reasoning and sufferred from certain inconsistencies viz.
1). The CIT(A) had held that TP adjustment cannot be made on the entire transactions of the assessee including transactions other than the international transactions whereas the TPO had computed the TP-addition not on entity level but only for a sum of Rs. 74.70 lac in respect of that part of the excess profit relating to the international transaction of purchase of raw material from AEs
2). The CIT(A) excluded 5 companies having turnover ranging between Rs.176 to Rs. 598 Cr as against assessee's turnover of Rs.27.71 Cr, which in the view of the Tribunal was contrary to the direct HC judgment in the case of Chryscapital Investment Advisors (India) P. Ltd [TS-173-HC-2015(DEL)-TP], wherein it was held that high or low turnover was not a criteria for excluding an otherwise comparable company.
3). The CIT(A) erred in considering the net profit margin only of Unit 2 of the assessee contending that both its units earned job work receipts
4) For the purpose of benchmarking the transactions of the assessee, the CIT(A) considered the AE as a comparable.
Further, noting that the assessee had not applied any method for ALP determination on the contention that no comparable was available, the Tribunal observed that assessee's TP study

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report was absolutely devoid of relevant information required to be mandatorily maintained as per Sec 92D r.w. Rule 10D. It also rebuked CIT(A)'s observation that there was no intent to avoid tax absent any unrecorded transactions or undisclosed facts, as such reasoning was completely extraneous with respect to ALP determination. Accordingly, it remitted the issue to the file of the AO / TPO for reconsideration.
ACIT vs. Progressive Tools & Components Pvt. Ltd - TS-200-ITAT-2017(DEL)-TP –

3092. The Tribunal held that the transaction of export of pet chips and guar gum by the assessee to its AE was at arm's length price since the assessee sold the goods to the AE at the same price at which it was purchased from the local market and the AE in turn sold the commodities to customers at the same price at which they were bought from the assessee and the only loss incurred by the assessee was on account of foreign exchange fluctuations.
Pepsico India Housing Pvt Ltd v ACIT (ITA No. 834/Del/2010) – TS-631-ITAT-2015 (Del) - TP

3093. The Tribunal held that the TPO was only required to determine the ALP of an international transaction for services and not to decide if such services exist or if benefits accrued to the assessee and thereafter it was for the AO was to decide the deductibility of the amount under section 37(1) of the Act.
Avon Beauty Products India Pvt Ltd v ACIT (ITA No.5739/Del/2011) – TS-522-ITAT-2015 (Del) – TP

3094. Since there was a discrepancy in the turnover reflected in the assessee's Transfer Pricing study (Rs.3.97 crore) and value of international transaction in the additional ground of appeal filed by the assessee (Rs. 6.13 crore), the Tribunal remitted the matter to the AO / TPO for re-consideration noting the assessee's submission that a fresh Transfer Pricing study had to be conducted due to the aforesaid error.
Gameloft Software Pvt Ltd – TS-660-ITAT-2017 (Hyd) – TP – ITA No 25 / Hyd / 2012 dated 09.08.2017

3095. Where the assessee contended that due to attachment of bank account, the assessee was unable to continue its operations and make tax payments and was experiencing severe cash crunch and liquidity position, the Tribunal observing that the issues involving T.P. adjustment, prima facie appeared to be covered in favour of the assessee and if the effect to the earlier order of the Tribunal in assessee's own case was given, then, there would not be any demand at all, directed to lift the attachment of bank accounts till disposal of appeal. Further, considering assessee's contention that refund of Rs. 40 lakhs was due to the assessee, the Tribunal directed the Revenue to adjust the same towards outstanding demand.
Planet Online P Ltd v ACIT-TS-1059-ITAT-2017(Hyd)-TP S.A. No.167/Hyd/2017 dated 27.12.2017

3096. The Tribunal held that where the assessee was assigned a contract for execution of works contract with respect to the designing, engineering, construction, operation and maintenance of a highway in Andhra Pradesh, for which the assessee entered into an agreement with its AE engaging it as a Project Advisor, the TPO was incorrect in

determining the ALP of the payment made to the AE as Nil on the ground that the assessee had subcontracted a certain portion of the work to another contractor thereby contending that the payment made to the AE was a sham transaction, since the assessee was responsible for the design and suitability of the project and therefore required the said services of its AE. The Tribunal noted that the entire work had not been assigned by the assessee to the sub-contractor and the most important work of design and engineering work had been retained by the assessee and that as per the agreement between the assessee and its AE, the assessee had employed the services of its AE in relation to the designing and engineering of the project. It further noted that since the employees of the AE had visited India and rendered services required, the allegation of the AO that the transaction was a sham transaction was baseless.

IWM Constructions P Ltd v ACIT - TS-494-ITAT-2016 (Hyd) - TP - ITA Nos.457/Hyd/2007 & 1658/Hyd/2008

3097. The point of dispute before the Tribunal was on the issue of Profits attributable to PE. The Tribunal ruled that no further income could be attributable to assessee's Permanent Establishment in India as it was proved that transactions between assessee and its AE were at Arm's length price. The Tribunal relied on co-ordinate bench decision in assessee's own case which had in turn relied on SC decision in case of CIT vs E-funds I.T Solutions Inc, where the assessee's contention that income was not chargeable in India as they had paid arm's length remuneration/ commission to its agent in India had been accepted.

ADIT (IT) 2(2) vs M/s Zee TV USA Inc- TS-311-ITAT-2018(Mum)-TP-ITA No 5608/MUM/2008 dated 23.04.2018

3098. Where the assessee had declared two entities viz. Star Brands Ltd and Dynamic Technologies Ltd to be AEs in its Form 3CEB and subsequently during assessment proceedings contended that the disclosure in Form 3CEB was incorrect as the said parties were not its AEs due to change in the shareholding patterns and directors, the Tribunal observed that the assessee had not explained as to why it had not filed a confirmation or certification from the auditors who signed the 3CEB stating that the two companies were erroneously included in the list of AEs and therefore rejected the plea of the assessee. Noting that the assessee had benchmarked its transactions by applying CPM with mark-up on salary and rent (and not other expenses) in accordance with the agreement with its AE, which was objected to by the TPO, it remitted the matter to the TPO for further verification observing that if the assessee had not incurred other costs, they could not be considered for computing mark-up.

Techsource Services Pvt Ltd v ITO – TS-29-ITAT-2017 (Mum) – TP - ITA No.6966/Mum/2014 dated 04.01.2017

3099. Where the assessee had charged its AE for provision of network services on a provisional basis and subsequently reduced the fee charged by way of a credit note and the AO rejected the credit notes on the ground that that they were issued to reduce / suppress taxable income, the Tribunal, noting that the AE's ledger accounts had included the credit note in its books for working out the final fees, restored the matter to the file of the AO for fresh adjudication.

Reach Network India Pvt Ltd – TS-664-ITAT-2017 (Mum) – TP-ITA no. 5632/mum/2013 dated 05.07.2017

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3100. The Tribunal held that in case where assessee had suo moto disallowed franchise fees paid to associated enterprise on account of non-deduction of TDS under section 40(a)(i), the TPO was incorrect in making a TP addition on the same as it would amount to a double addition. Further noting that the TPO proceeded to decide the issue on merits and contended that the assessee should be precluded from claiming such expenditure in future, it held that such an approach by the TPO was incorrect as he could not pass an advance ruling for subsequent years.

Royal Canin India Private Limited [TS-801-ITAT-2016 (Mum)-TP] (IT(TP)A No. 784/Mum/2016)

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