Transfer Pricing Digest (727 Cases)

(January 2019 to June 2019)

By Dr. Sunil Moti Lala, Advocate, C.A., LL.B, Ph.D
(assisted by CA Dinesh Kukreja, Sahil Sheth & Advocate Bhavya Sundesha)

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By Dr. Sunil Moti Lala, Advocate, C.A., LL.B, Ph.D *

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a. Applicability of TP Provisions

International Transactions

1. The Tribunal ruled that memorandum entries for reimbursement of charter hire, bunker charges by assessee (engaged in shipping business) to AE constituted an international transaction and rejected assessee's plea that the transaction was not an international transaction as no payment had been made by the assessee to the AE or vice versa and the entries were only memorandum entries and bills raised by the ship owners had been simply forwarded to the AE for payment. The Tribunal stated that when an assessee entered into a time charter contract, and instead of using the vessel on his own, it allowed an AE to use the vessel on the same terms (including the price) on which the assessee had contracted, though the bills were raised on the assessee under the time charter contract, generally such an arrangement would have an impact on profit and losses of the assessee and thus concluded it to be an international transaction.
As regards to Departments appeal with respect to CIT(A)'s approach of adopting 7.5% [on the basis of presumptive taxation scheme u/s 172 for income of foreign ships] as reasonable mark-up that the assessee should have charged in respect of these memorandum entries, as against 22.04% adopted by TPO (being the gross margin earned by Assessee)**,** the Tribunal held that while entire estimate profit of operation of ships by the foreign companies was 7.5% under the presumptive taxation scheme under section 172, it would be wholly unreasonable to assign an even higher value to the function of negotiating the time charter alone and such an adjustment must remain restricted to a small part of this overall reasonable estimated income.Thus, the Tribunal remitted the matter back to the file of the TPO for deciding the adjustment to be made in the back to back transaction of time charter vessel vehicle hire contract payments for negotiating the time charter contracts. It was made clear that while so deciding the matter afresh, the TPO would give a fresh opportunity of hearing to the assessee and decide the matter by way of a speaking order.
Synefra Engineering & Construction Ltd vs ACIT-TS-542-ITAT-2019(Ahd)-TP-ITA No 1368 & 1611/Ahd/2013 dated 30.04.2019

2. The Tribunal confirmed DRP-order holding that interest on account of delayed receivables from AE qualified as an international transaction by following Delhi HC ruling in Cotton Naturals where ALP of interest was computed as 6month LIBOR plus 400 basis points. The Tribunal further relying on the High Court judgement concluded that assessee's contention that the interest was subsumed in the sale price of the assessee and that no separate benchmarking for interest was warranted. The Tribunal held that nothing had been demonstrated that margin of the assessee was better than the margin of such comparables who also had receivables, and thus upheld the finding of the DRP.
DCIT vs Bridal Jewellery Mfg Co-TS-252-ITAT-2019(Del)-TP- ITA No 873/Del/2016 dated 28.02.2019

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3. The Assessee was incorporated as a joint venture company between 'Munjal' group and Honda Moto Co (HMC) Japan and on the basis of technology provided by HMC, it had been manufacturing and selling two wheelers in Indian market. During relevant year, HMC decided to exit joint venture and transferred its entire shareholding of 26 per cent in assessee company to Indian promoters i.e., 'Munjal' Group. Further, the Assessee also entered into licence agreement with HMC wherein assessee was granted right to manufacture 4 models of two wheelers for sale in Indian market.In transfer pricing proceedings, TPO made adjustment to assessee's ALP on account of model fee and royalty paid to HMC, Japan, in terms of licence agreement. The Tribunal held that HMC did not have any shareholding or participation in management, capital or control of assessee company, thus it could not be regarded as an 'associated enterprise' in terms of section 92A. Further, the Tribunal concluded that therefore, transaction of payment of model fee and royalty to HMC did not constitute an international transaction within meaning of section 92B and consequently, impugned adjustment made by TPO was set aside.

M/s. Hero Motor Corp Ltd vs DCIT-TS-368-ITAT-2019(Del)-TP-MA No 482/Del/2018 dated 03.04.2019

4. JCIPL, an Indian company and 100% subsidiary of EMSHL (a Mauritian company), owned IPL Cricket Team 'Rajasthan Royals'. The assessee rendered brand ambassadorship services free of cost to JCIPL in relation to promotional activities of the said team. The TPO had noted that though the assessee was neither buyer / seller of shares; she was party to a Share Purchase Agreement (SPA) for transfer of a portion of shareholding in Mauritus based company (EMSHL) to Kuki Investments (Bahamas based company represented by assessee's husband) and she undertook to provide free of cost brand ambassadorship services to Indian company, JCIPL (100% subsidiary of EMSHL) in relation to promotional activities of Rajasthan Royals IPL team. The Tribunal followed co-ordinate bench ruling in assessee's own case for an earlier year wherein similar TP-adjustment was deleted after rejecting Revenue's stand that assessee & Kuki Investments were AE's and that there was a deemed international transaction between assessee & JICPL. The co-ordinate bench had held that the AE relationship between the Assessee and Kuki was based on only one limb of section 92A(2)(J), i.e. an individual controlled one enterprise (assessee's husband controlled Kuki Investment) but Revenue could not show that how her husband controlled the other 'enterprise' (i.e. the assessee). Accordingly, the Tribunal deleted the adjustment made towards brand ambassadorship services rendered by assessee free of cost to Indian company

Shilpa Shetty [TS-885-ITAT-2018(Mum)-TP] - I.T.A. No.5433/Mum/2017 dated 25.06.2019

5. The Tribunal deleted adjustment on account of interest computed on advances given by assessee (engaged in production and distribution of films) to AE for purchase of Hollywood films, following the decision of High Court in assessee's own case an earlier year wherein it was held that the transaction of routing money through AE by assessee for purchase of films was not an international transaction and hence the machinery under Chapter X could not be invoked. The Court had noted that the AE was only used as a conduit since (i) seller of films did not deal with assessee directly for purpose of acquisition of distribution rights and (ii) neither at the point of payment to the seller nor at the point of refund of money (upon cancellation of the agreement), the AE had retained the advance for any significant period of time.

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KSS Ltd (Formerly known as K Sera Sera Productions Ltd.) [TS-591-ITAT-2019(Mum)-TP] - I.T.A.No. 1818/Mum/2016&1958&7110/Mum/2017 dated 17.06.2019

Specified Domestic Transactions

6. The Tribunal remitted the issue of selection of MAM for benchmarking the specific domestic transaction (SDT) of purchase of raw materials from AE of assessee (engaged in the tannery business i.e processing of raw leather) and noted that assessee had raised specific objection requesting for change of method from TNMM to CUP as MAM, while DRP failed to adjudicate the same. Observing that assessee made strong submissions in support of its contention, the Tribunal held that it deemed it proper to restore the same to the file of the A.O/DRP for adjudicating the aforesaid objection raised by the assessee before it and stated that the change in method goes to the root of the matter and hence the same required fresh examination. Thus, the Tribunal set aside AO's order and restored all the matters relating to ALP determination of the SDT to the file of the AO/DRP for fresh examination.
Sura Leathers Pvt Ltd vs DCIT-TS-344-ITAT-2019(Bang)-TP-IT(TP)A No 2727/Bang/2018 dated 24.04.2019

7. The Assessee had various units, one of which was eligible unit under section 80-IC and during the year it had entered into Specified Domestic Transaction (SDT) of inter-unit transfer of raw materials and had benchmarked said transaction using CUP method. However, the AO had computed margin of eligible unit by excluding benefit received on account of excise duty and sales-tax and then compared same with average margins of comparable companies, which were selected by the assessee itself. Thus, the AO applied TNMM method and computed adjustment in view of difference in margin of eligible unit and comparables. The Tribunal held that since functions of assessee's eligible unit were comparable with other comparables at entity level and slight variation in verticals got covered under TNM method, there was no error in method of computing ALP adopted by AO. The Tribunal also concluded that comparison of margin of eligible units of assessee with other assessees would not be independent uncontrolled transaction and being related party transaction, could not be considered for comparison with SDT carried out by assessee.
M/s. Sheela Foams Ltd vs ACIT-TS-463-ITAT-2019(Del)-TP-ITA No 8155/Del/2018 dated 23.04.2019

8. The Assessee had various units one of which was eligible unit under section 80-IC and it had entered into Specified Domestic Transactions (SDT) of inter-unit transfer of raw material during the year. The Assessee itself had allocated Rs. 9.14 crores for common/head office expenses to eligible unit and the said SDT had been held by DRP to be at arm's length. Further, pursuant to DRP directions, the AO while computing operating profit of eligible units allocated head office expenditures. Thus, the Tribunal held that the AO/TPO were not justified in making adjustment to SDT of allocation of common/head office expenses and therefore the said amount was to be excluded from total SDT of eligible unit of Rs. 29.83 crore considered for adjustment.
Further, in respect of the total finance cost of Rs. 11.81 crores incurred by the assessee and the AO/TPO had allocated finance cost of Rs. 65.28 lakhs to section 80-IC eligible unit. The

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Assessee submitted that eligible unit had sufficient funds as this unit earned substantial profit and no part of head office funds were transferred to eligible unit and no fresh borrowings were made during relevant year. However, the Revenue submitted that once common/head office expenses had been incurred by assessee and allocated to the eligible unit, a part of the finance cost was also to be allocated to eligible unit. The Tribunal held that interest or finance cost specific to particular loan utilized by non-eligible unit could not be allocated to section 80-IC eligible unit and for the balance allocation was to be made among various units including eligible unit and then margin of eligible unit was to be computed and adjustment was to be made to specified domestic transaction.

M/s. Sheela Foams Ltd vs ACIT-TS-463-ITAT-2019(Del)-TP-ITA No 8155/Del/2018 dated 23.04.2019

9. With respect to specificed domestic transaction relating to transfer of power from eligible units to manufacturing units of asseesee engaged in manufacture and export of ductile iron pipes, the Tribunal upheld CIT(A)'s order which in turn followed Tribunal's decision in assessee's own case for previous year wherein it was held that the tariff rates at which the non-eligible units procured power from Electricity Board was the most appropriate internal comparable rate to benchmark the transfer of power by assesssee's eligible unit to other non-eligible units.

M/s. Electrosteel Castings Ltd vs DCIT-TS-132-ITAT-2019(Kol)-TP-ITA No 138 & 139/Kol/2018 dated 28.02.2019

10. The Tribunal remitted claim of expenditure relating to payment of remuneration to directors (which fell under the erstwhile specified domestic transactions provisions under clause (i) of Sec. 92BA) for 3 different assessee's back to the file of AO for AY 2013-14 noting that issue was squarely covered by co-ordinate bench ruling in Texport Overseas Private Limited for AY 2013-14 wherein similar issue was remitted 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 have been omitted since inception. It relied on SC rulings in Kolhapur Canesugar Works and General Finance Co. & jurisdictional HC ruling in GE Thermometrics. Considering that in the Finance Act, 2017, clause (i) of section 92BA was omitted w.e.f. 01.04.2017, Tribunal opined that the legal effect of a provision being omitted by subsequent amendment, was that it would be deemed that clause (i) was never on the statute book. While omitting the clause (i) of section 92BA, nothing was specified whether the proceedings initiated or action taken in pursuance thereof would continue. Therefore, the proceedings initiated or action taken under the aforesaid clause would not survive at all. Thus, the Tribunal set aside the orders of the AO & DRP and directed AO to readjudicate the issue of claim of expenditure incurred in respect of which payment was made to person referred to in clause (b) of sub section 2 of section 40A of the Act.

DVC Emta Coal Mines Ltd, Bengal Emta Coal Mines Ltd, M/s. Panem Coal Mines Ltd. v. ACIT Central Cir.-3(1)Kolkata, [TS-377-ITAT-2019(Kol)-TP], I.T.A. No. 2430/Kol/2017, I.T.A. No. 2431/Kol/2017, dated May 01, 2019

11. The Tribunal deleted TP-adjustment for AY 2013-14 on Specified Domestic Transaction of interest paid on funds borrowed by assessee engaged in the business of construction of an info-park from its holding company (determined by TPO by adopting benchmark prime lending rate

[BPLR]). The Tribunal accepted assessee's submission that reduction in rate of interest from 16% to 12.5% from 21/05/2012 was justified as the holding company's stake in assessee was enhanced to 100% from 67% with effect from 21/05/2012, thus lowering the credit risk. The Tribunal also noted that no income was reflected by assessee in the profit & loss account and there was negative reserves at year end and under-construction projects during the year.It thus opined that under such a scenario, assessee shall carry more credit risk and any lender would charge higher premium while advancing loans to the assessee. Accordingly, the Tribunal held that TPO's adoption of BPLR of 14.611% would not constitute a reasonable benchmark to determine the ALP of the transaction and concluded that the rate of 16% paid by the assessee was reasonable.

DLF Infopark Ltd vs ITO-TS-69-ITAT-2019(Mum)-TP-ITA No 6660/Mum/2017 dated 05.02.2019

12. The Tribunal remitted the issue of Domestic TP adjustment on purchase of raw material from AE u/s 40A(2) for AY 2013-14 back to the AO with a direction to compare the tax rate of the assessee and its AE and if the same were found to be comparable, then no adjustment was required to be made. It followed the decision in the case of Glaxo Simithkline[236 CTR 311(SC)] and Indo Southern [310 ITR 30 (Bom)]wherein it was held that when tax rates are identical, the issue becomes tax neutral and hence no adjustment is required.

Lalit Pipes and Pipes Limited [TS-583-ITAT-2019(Mum)-TP] -I.T.A. No. 7063/Mum/2017 dated 07.06.2019

Others

13. The Tribunal held that TP-provisions [Chapter X] did not apply to income taxed under Tonnage Taxation Scheme (TTS) under Chapter XII-G of the IT Act, as TTS was a separate code by itself in as much as it provided a self-contained charging provision as well as method of computation of income. It noted that TPO had proposed TP-adjustment for AY 2007-08 on account of charter hire rentals paid by the assessee to its AE for lease of dredger HAM 312 (Qualifying Ship) during the mobilisation and demobilisation period on the basis that Chapter X created an independent or separate charge of income. The Tribunal observed that income of a tonnage tax company was dependant on the tonnage capacity of the qualifying ships and the number of days for which it had been held irrespective of its revenue realizations and the expenditure incurred for the purpose of the business. Thus the Tribunal opined that the tonnage tax scheme, in that sense, was a presumptive method of computation of taxable income which was not dependent on actual receipts and expenditure of the assessee. Further, it stated that TP provisions envisaged computation of income from specified international transactions of receipt or expenditure with reference to the stated price of such transactions, which was in complete contrast to Chapter XII-G where the stated price of the transaction had no relevance to the computation of income of qualifying ships, hence the determination of income/ expense having regard to arm's length price as envisaged in Chapter-X had no relevance, as it would not affect the computation of income liable for taxation in Chapter-XII G. Also it noted that in TTS the entire chargeable income earned by the tonnage tax vessel including income from an international transaction

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with AE was determined and therefore the computation provisions of Chapter X failed as it was not possible to segregate what portion of the final taxable tonnage income was relatable to international transactions with associated enterprises and then apply transfer pricing provisions to such transactions, because the statutorily prescribed formula to compute income under chapter XII-G was based on the weight of the qualifying ship and number of days it has been held, irrespective of whether the ship has been used for a related party or an unrelated party. Thus, the Tribunal concluded that transfer pricing regulations did not apply to the assessee to the extent of operations carried out through operating qualifying ships where the income is taxed under TTS and rejected AO's view that income from international transactions was to be treated as 'additional income'.

Van Oord India Private Limited v. ACIT 5(3), Mumbai, [TS-440-ITAT-2019(Mum)-TP], ITA No. 7228/Mum/2012, dated May 22, 2019

14. The Tribunal held that the Transfer Pricing provisions are not applicable to income covered under Tonnage Tax Scheme(TTS) under Chapter XII-G providing for taxation on a presumptive basis. It relied on the co-ordiante bench ruling in the case of Van Oord India Private Ltd. vs. ACIT [ITA No. 7228/Mum/2012] wherein it was held that TTS is a charging section for the income generated by carrying outbusiness of operating ships wherein entire computation of the tonnage income depends on thetonnage capacity of qualifying ships and number of days it has been held, without considering the actual receipts/revenues earned and expenses incurred. This is in contrast with the TP provisions which envisage computation ofincome from specified international transactions of receipt or expenditure, ofcoursewith reference to the stated price of such transactions.

Essar Ports Ltd [TS-666-ITAT-2019(Mum)-TP] - ITA No. 4444 Mum 2017 dated 26.06.2019
Van Oord India P. Ltd [TS-605-ITAT-2019(Mum)-TP] - ITA no.10/Mum/2018dated 21.06.2019

b. Tested Party

15. The Tribunal upheld CIT(A)-order deleting TP-adjustment on international transaction of provision of IT/IT enabled services by allowing treatment of foreign AE as tested party. The Tribunal relied on co-ordinate bench ruling in assessee's case for previous AY which was decided in favour of assessee holding that the foreign party could be treated as a tested party after rejecting Revenue's contention that reliable data was not available in respect of foreign comparables. Thus, the Tribunal concluded that Revenue was unable to point out any distinguishing fact in the present year, thus dismissed Revenue's ground.

M/s. IDS Infotech Ltd vs ACIT-TS-58-ITAT-2019(Chandi)-TP-ITA No 352/Chd/2018 dated 04.02.2019

16. The Tribunal accepted selection of foreign AE as tested party for assessee engaged in manufacturing of alumina based refractory and ceramic raw materials and observed that, upon considering the FAR analysis of both assessee and foreign AE, the assessee was a more complex entity as its operation entailed entrepreneurial function and related risks and thus, should not be considered as a tested party. However, the AE, as a manufacturer of products

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based on orders from assessee, performed simpler functions and did not assume any significant risks, and hence, could be treated as a tested party being the least complex party. The Tribunal relied on precedents including decisions of coordinate benches in Landys + Gyr and Ranbaxy Laboratories and referred to Indian TP guidelines issued by the ICAI vide guidance noted on report u/s 92E and OECD TP guidelines and the UN practical manual and accepted foreign AE as tested party.

Almatis Alumina Pvt Ltd vs DCIT-TS-302-ITAT-2019(Kol)-TP-ITA No 726,2361/Kol/2017 dated 16.04.2019

17. The Tribunal ruled on TP-adjustment on payments made for technical assistance to the Singapore based AE by assessee engaged in providing call registration, reservation and booking services. It accepted assessee's treatment of foreign AE as tested party as it was consonance with OECD guidelines and United Nation's Practical Manual. The assessee had also demonstrated as to why the foreign AE should be selected as tested party in its TP study. Thus it restored the issue to TPO directing that the international transaction of payment of fees for technical assistance services was to be benchmarked by comparing the margins of the CWT, Singapore (tested party) with the margins of seven entities selected by the assessee as comparables.

CWT India Pvt. Ltd. v. ACIT 9(2)(2), Mumbai, [TS-544-ITAT-2019(Mum)-TP], 23/MUM/2015, 1484/MUM/2016, 1404/MUM/2017, dated May 1, 2019

18. The Tribunal rejected assessee's adoption of foreign AE as tested party citing lack of statutory sanction for assessee (engaged in manufacture of Steel Tyre Cord and Hose Reinforcement wire) and examined modus operandi of ALP-determination under the prescribed methods and elucidated that it was the profit margin of the Indian enterprise and not that of the foreign AE, which should be compared with the comparables to see if any increase in the total income of the enterprise chargeable to tax in India, was warranted on account of transfer pricing adjustment. The Tribunal stated that considering the profit of the foreign AE for determining the ALP of assessee's transaction with its foreign AE missed the wood from the tree by making the substantive section 92 otiose and the definition of 'international transaction' u/s 92B and rule 10B becoming redundant.The Tribunal also held that assessee had failed to establish the particulars to prove that the foreign companies selected were comparable. Thus, the Tribunal rejected foreign AE as tested party.

Bekaert Industries Pvt. Ltd vs DCIT-TS-347-ITAT-2019(PUN)-TP-ITA No 146,171/PUN/2014 dated 24.04.2019

c. Most Appropriate Method

Comparable Uncontrolled Price Method

19. The Court held that TPO ought to have arrived at the ALP of the assessee's sale of finished valves to its A.E. by only comparing it with uncontrolled transaction of sale in USA.The Tribunal had observed that ALP cannot be determined by comparing the prices charged to other AE's i.e. controlled transactions but has to be done by making comparisons with uncontrolled parties

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in USA [Sec 92F(ii) & Rule 10A(d)]. Thus, Court dismissed the revenue's appeal as view taken by the Tribunal was it is in accordance with the self evident provisions of law.
PCIT vs M/s Audco India Ltd.- TS-413-HC-2019 (BOM)- TP - Income Tax Appeal 1829 of 2016 dated 06-03-2019

20. In respect of international transaction of assessee w.r.t export of Maize to AE, the Tribunal rejected independent third party quotation used for applying CUP by assessee and held that an independent third party quotation, on standalone basis and without any material to establish its bonafide and without anything to show that it's contemporaneous nature and sufficient parity with actual transaction, could not be accepted as a valid CUP input. Thus, confirmed the TP-addition on the export transaction made by the TPO by an upward adjustment due to variation of more than 5% in the only CUP input provided by assessee and the transaction value.
Adani Enterprise Ltd vs ACIT-TS-193-ITAT-2019(Ahd)-TP-ITA Nos 1840/Ahd/12, 3321/Ahd/14 & 2305/Ahd/15 dated 12.02.2019

21. The Tribunal remitted the issue of adjustment claimed by assesseeon account of bulk quantity discount at 15% offered to AE, while benchmarking the transaction of sale of cloth guiders as per CUP method. It followed co-ordinate bench decision in assessee's own case for earlier years which had in principle accepted assessee's contention that it had to offer special discounted prices to AEs as it was a purchaser of huge quantity,though there was no written contract, noting that the bulk sales to AEs were much voluminous as compared to third parties. Accordingly, the TPO was directed to make appropriate adjustments in accordance with law.
Erhardt + Leimer (India) Private Limited [TS-635-ITAT-2019(Ahd)-TP] -I.T.A. No. 1326/Ahd/2016 dated 28.06.2019

22. The Tribunal accepted assessee's adoption of internal-CUP as MAM, noting that co-ordinate bench in assessee's own case for AY 2009-10 had disagreed with Revenue's plea that internal-CUP was inappropriate considering pricing mechanism for AE and non-AEs. It noted that 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).Further, Tribunal noted that co-ordinate bench in assessee's own case for AY 2009-10 had alternatively upheld internal-TNMM by noting that the services provided to AE and non-AE were identical and FAR in AE as well as non AE business were also similar. Accordingly, Tribunal opined that assessee had rightly benchmarked the transaction by choosing the internal CUP method as most appropriate method and alternatively also it had rightly benchmarked the internal TNMM method as most appropriate method to determine the ALP.
Effective Teleservices Pvt. Ltd. v. DCIT, Gandhinagar Circle, Gandhinagar, [TS-538-ITAT-2019(Ahd)-TP], I.T.A. No. 3077/Ahd/2015, dated May 15, 2019

23. The Tribunal remanded issue of selection of MAM for benchmarking international transaction of purchase of fabricated steel structure from AE by assessee formed specifically for the execution of structural steelworks contract at Mumbai International Airport, for AY 2011-12. It noted that assessee had adopted CUP-method as MAM wherein the price charged by AE to unrelated parties was compared with price charged by AE to assessee for similar product. However, TPO/DRP rejected assessee's CUP-method and applied TNMM for benchmarking the

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international transaction. The Tribunal observed that DRP merely concurred with TPO's finding for the purpose of rejecting CUP-method, it opined that it is expected that the DRP should discuss facts in some detail and not cursorily and briefly states conclusions. It observed that assessee had also brought on record the certificate issued by the Engineer and also the Affidavit of the Director saying that the material supplied by the assessee to its AE and its unrelated parties situated in Singapore was similar. The Tribunal stated that it was incumbent upon the authorities to pass a reasoned speaking order disclosing the reasons as to why the CUP was not the most appropriate method. It further stated that the factual findings were required to be examined by the lower authorities, and, if on examination it was found that there was no reasonable distinction or distinguishable features in the material supplied by the assessee to its AE and its unrelated parties in Singapore, then the CUP should be applied as most appropriate method.

Geodesic Yongnam Structurals Pvt Ltd v. DCIT Cir. 3 (1) (2) Bangalore [TS-382-ITAT-2019(Bang)-TP], IT(TP)A No.533/Bang/2016, dated May 03, 2019

24. The Tribunal remanded the issue of ALP determination of purchase of equipment for financial lease from AE back to TPO, holding that ALP could not be determined based on "ROCE" (which was computed at entity level) as PLI under TNMM, rather CUP was a more direct method. It also noted assessee's submission that the cost of imported equipment was the basis on which the assessee determined the rate of return to be charged from ultimate customer (to whom equipment were given on lease) and that if the price of the purchase was inflated, then the rate of return would also be high.

CISCO Systems Capital (India) Pvt Ltd [TS-543-ITAT-2019(Bang)-TP] - IT(TP)A Nos.219/Bang/2018 & 688/Bang/2016 dated 07/06/2019

25. The Tribunal accepted assessee'sinternal CUP over Revenue's PSM as MAM for determining ALP of provision of vessel management services to its AE, holding that in the absence of unique intangibles or finding on multiple interrelated international transactions between the assessee and AE (where PSM can be adopted as provided by Rule 10B(1)(d) and Circular No.2/2013), there was no scope for adopting PSM as MAM. It accepted third party rendering similar services to AE in the capacity of 'Manager' as internal comparable, though agreement referred to assessee as an 'Agent', holding that difference in the nomenclature used in agreement to describe the service provider was not relevant when the nature of service was similar.

Synergy Maritime Pvt Ltd [TS-545-ITAT-2019(CHNY)-TP] – ITA No.2825/CHNY/2017dated 07/06/2019

26. The Tribunal remitted the issue of selection of MAM for benchmarking export and import of traded goods to TPO following coordinate bench's decision in assessee's own case for AYs 2007–08 and 2008–09 wherein assessee's CUP method and use of authentic quoted prices for comparability analysis under CUP, was upheld. It also directed, assessee to produce quotations in support of its CUP and prove their authenticity and comparability to the international transaction and TPO to examine the same and if not satisfied, apply any other appropriate method including TNMM.

Noble Resources & Training India Pvt Ltd vs DCIT [TS-352-ITAT-2019(DEL)-TP] – ITA No. 1827 & 1847/Del/2015 dated 15-03-2019

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27. The Tribunal accepted assessee's internal CUP and deleted the TP-addition made on international transaction of purchase of raw materials for assessee engaged in manufacture/production of GCLE, a drug. It considered assessee's submission that the AE sold identical goods to unrelated parties in India at a higher price than the price at which it sold to assessee, and the TPO had accepted the AE to be the tested party and the AE had confirmed that goods sold by it to assessee and other third parties in India were identical in nature. Further it noted that assessee was able to earn profit during the year only because of the high price sales to the AE and low price purchases from the AE and thus it was beyond doubt that the assessee had never tried to pass on profits to its parent AE and, on the contrary, it had benefitted by making sales of Rs.27.84 crores to parent company at higher rates.

Otsuka Chemical (India) Pvt Ltd. v. Cir. 13 (1), New Delhi, [TS-459-ITAT-2019(DEL)-TP], ITA No.4093/Del/2016, dated May 17, 2019

28. The Tribunal rejected TPO's TNMM as MAM for benchmarking international transactions entered with AE pertaining to provision of student recruitment and office services and IELTS testing services and directed TPO to determine ALP under CUP method. Noting that the internal comparables selected by assessee under CUP were used by the TPO in TNMM, it held that CUP method is transaction specific method thereby lending more credibility to benchmark transaction.

IDP Education India Pvt. Ltd [TS-508-ITAT-2019(DEL)-TP] - ITA No. 6763/Del/2015dated 03/06/2019

29. The Tribunal ruled on ALP-determination in respect of management group cost for AY 2013-14. It relied on ruling in assessee's own case for AY 2008-09, 2009-10 and 2012-13 wherein co-ordinate bench had upheld TPO's CUP-method over assessee's TNMM but remitted ALP-determination for fresh determination considering TPO's failure to bring on record any comparables to facilitate comparison between the prices paid by the assessee vis-a-vis that paid by other comparables. Accordingly, the Tribunal remitted back ALP-determination for fresh adjudication by applying CUP as MAM with a direction that in case TPO finds that identical/similar comparables are not available under CUP, then he was free to apply any other appropriate method for determination of arm's length price of international transaction of management group cost.

Autotech India Pvt.Ltd. v. DCIT Cir 1(1), Gurgaon, [TS-506-ITAT-2019(Del)-TP], ITA No. 5939/Del/2017, dated May 31, 2019

30. The Tribunal remitted the issue of selection of MAM for benchmarking export and import of traded goods to TPO following coordinate bench's decision in assessee's own case for AYs 2007–08 and 2008–09 wherein assessee's CUP method and use of authentic quoted prices for comparability analysis under CUP, was upheld. It also directed, assessee to produce quotations in support of its CUP and prove their authenticity and comparability to the international transaction and TPO to examine the same and if not satisfied, apply any other appropriate method including TNMM.

Noble Resources & Training India Pvt Ltd vs DCIT [TS-352-ITAT-2019(DEL)-TP] – ITA No. 1827 & 1847/Del/2015 dated 15-03-2019

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31. The Tribunal deleted TP-adjustment of Rs 5.73 crores accepting allocation of expenses for laying and fixing of granite stone at Delhi International Airport T3 terminal incurred by the head office of assessee (Baharin based company) to its Indian project office, on cost to cost basis without mark-up, to be at ALP. It noted that Revenue had rejected such allocation of cost certified by assessee's auditor without examining or finding any infirmities in the certificate; and merely because the certificate was given by an auditor of the company it cannot be brushed aside as self-certification. It further observed that DRP upheld TP-addition for 2 reasons – because Bahrain jurisdiction was a no tax jurisdiction and since the addition would lead to 5.60% profit of total project which would be closer to 8% profit rate as provided u/s 44AD of the Act. It observed that both these reasons were not provided in Income Tax Act for determining ALP, thus arm's length price of the international transaction cannot be determined based on the estimates an adhocism. It also noted that TPO had for subsequent AY 2011-12 accepted assessee's CUP-method as MAM.

Bramco WLL [TS-265-ITAT-2019(DEL)-TP] vs. DCIT, ITA No.1780/Del/2015 dated 25.03.2019

32. The Tribunal ruled on determination of Most Appropriate Method (MAM) for assessee (engaged in business of HRD consultancy) and upheld assessee's CUP (comparing transactions with AE with transactions with few Indian entities), thereby rejecting TPO's TNMM for benchmarking transaction of provision of consultancy services. The Tribunal noted that rates charged to AE and non-AEs were based on per hour rate, but due to cut-throat competition, pre- determined fixed rate was billed and if the hourly rate was higher than the pre-determined fixed rate, then difference was written off. The Tribunal held such practice to be standard practice in assessee's line of business and observed that the services were provided by different set of personnel, having different qualification and thus it would not be justifiable to ask for invoices of the same person who had provided service to AEs and also to non AEs. Further, held that geographical location of service recipient to be irrelevant consideration as the consulting services provided by the assessee would remain the same whether the service receiver was located in 'X' country or 'Y' country as long as service provider was in India. Finally concluded that rate per hour for consultant, once decided, did not change irrespective of country and whether it was related/ unrelated entity. Thus, upheld CUP as MAM.

M/s. Tower Watson India Pvt Ltd vs DCIT TS-260-ITAT-2019(Del)-TP-ITA No 1710/Del/2016 dated 02.04.2019

33. The Tribunal rejected TPO's TNMM as MAM and deleted TP adjustment in case of assessee engaged in turnkey contracting and sub-contracting for power projects, development and consultation for power equipment technology etc for AYs 2007-08 and AY 2008-09. TPO had held that transactions between assessee's India project office (PE) and Head Office (HO) in China constituted international transactions u/s 92B and proposed TP-adjustment on account of onshore services under TNMM by choosing a single comparable - Thermax Ltd. The Tribunal rejected TNMM adopted by TPO as he did not consider business strategies, market penetration, which are material factors determining prices and profit while eliminating the material effects which warrant some kind of reasonable accurate adjustments. Further, it considered assessee's submission that the agreement entered between DEC China (holding company) and third party

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contractees (DPL and WBPDCL) constituted a perfect internal CUP and the value agreed between DEC China and the third parties (DPL and WBPDCL) in relation to the onshore services should be considered to be value for the services rendered by assessee in India since the Project Office was carrying out the same activities and was being remunerated at the amount agreed between DEC China and DPL and WBPDCL.

Dongfang Electric Corporation v. ACIT (International Taxation), Circle-1(1), Kolkata, [TS-438-ITAT-2019(Kol)-TP], ITA Nos.2563 & 2564/Kol/2017, dated May 17, 2019

34. The Tribunal accepted assessee's benchmarking of international transactions of dredgers lease rentals by applying valuation certificate issued by independent valuer as a CUP. The assessee, a Netherlands based company was engaged in execution of dredging contracts in India for AY 2011-12. The Tribunal noted that the independent valuer had determined the value of charter hire charges by applying the standard formula prescribed under the CIRIA norms (Construction Industry Research and Information Association, earlier known as VG Bouw norms). The Tribunal relied on the decisions of Boskalis International and Dredging and Ballast Nedam Dredging wherein similar view was taken that the valuation done by the valuer on the basis of VG Bouw norms can be accepted as a valid CUP. It further noted that in AYs 2005-06, 2006-07 and 2010-11, TPO had accepted the independent valuer's valuation report based on VG Bouw / CIRIA Norms as valid CUP and treated said international transaction to be at arm's length price and that facts through the years were more or less identical as the terms and conditions on which the dredgers were hired had not changed. Thus applying the rule of consistency, it was held that a different view could not be taken in the impugned assessment year with regard to the benchmarking of lease rentals paid for charter hire of dredgers by applying CUP method. Accordingly, it directed AO/TPO to accept assessee's benchmarking the international transactions under CUP method after verifying that the independent valuer had made the valuation as per CIRIA norms in AY 2011-12.

Van Oord Dredging and Marine Contractor BV v. DCIT(IT), Cir. 4(3)1, Mumbai, [TS-513-ITAT-2019(Mum)-TP], ITA No.2029/Mum./2016, Dated May 31, 2019

35. The Tribunal deleted TP-adjustment on export of finished goods in case of assessee engaged in manufacturing and marketing of industrial flavours, fragrances and chemical specialties and noted that TPO using CUP method compared the price charged to non-AEs in India with the price charged to AEs in foreign countries. Further, referring to Rule 10B(2) which categorically stated that conditions prevailing in the markets in which the respective parties to the transaction operate including the geographical location along with other factors have to be examined. The Tribunal opined that geographical location of the party to whom sales were made was a crucial factor to be weighed in while making comparability analysis. Further, the Tribunal followed ruling in assessee's sister concern case wherein dealing with identical issue relating to comparability of the price charged to AEs and non–AEs situated in different geographical locations, co-ordinate bench had rejected CUP method and upheld TNMM as MAM.

Firmenich Aromatics India P. Ltd vs DCIT- TS-403-ITAT-2019(Mum)-TP-ITA No 7330/Mum/2017 dated 22.02.2019.

36. The Tribunal deleted TP addition in respect of cost allocation payments made by assessee (engaged in manufacturing ceramite mortar and trading in micro silica, foundry alloy) and noted

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that AE procured user rights for Lotus Note and allocated the cost of license & maintenance amongst all users worldwide on a quarterly basis and assessee's share in cost allocation worked out to Rs.24.54 lakhs (representing 38 users) for subject AY. The Tribunal noted that TPO determined ALP at Nil alleging that assessee was unable to produce any details to demonstrate the working and distribution of cost and no evidence was furnished to establish that 38 users received /used the software in India. The Tribunal observed that except for making some general observations, TPO did not provide any valid reason for rejecting assessee's benchmarking under CUP-method and further the TPO did not follow any of the prescribed TP-methods while determining ALP at Nil. The Tribunal noted that the agreement under which assessee was making payment for availing such services remained unchanged over the years and TPO, in subsequent AYs had accepted assessee's benchmarking of similar services availed. Further, the Tribunal explained that even otherwise also, if the Transfer Pricing Officer was not convinced with the benchmarking done by the assessee, he should have benchmarked the arm's length price of the services availed by following any one of the prescribed methods as provided under the statute. Thus, finding that TPO failed to point out any specific defect or invalidity in assessee's benchmarking, the Tribunal held that the price paid by the assessee to the AE for the services availed had to be held to be at arm's length.

Elkem South Asia Pvt Ltd vs DCIT-TS-335-ITAT-2019(Mum)-TP-ITA No 1070/Mum/2014 dated 22.04.2019

37. The Tribunal upheld TPO's rejection of internal TNMM and adoption of internal CUP for benchmarking international transactions of export of the FDFs (fixed doses form) to the AE's for assessee engaged in the business of manufacture and sale of prescription drugs. The Tribunal agreed with the TPO's view that by adopting TNMM, assessee was trying to camouflage the OP/OC of small exports to AE of Rs 5 cr with the OP/OC of the total export of Rs.33 crore. The Tribunal opined that if TNMM was adopted in earlier years on same facts then it was an error and stated that there was no use of perpetuating an error. The Tribunal observed that there was a readily available internal CUP in the form of local sales of the same products and that DRP had rightly rebutted assessee's objection on FAR differences and directed provision of appropriate discount for the additional marketing expense incurred by the assessee in its local sales.Thus, the Tribunal rejecting TNMM directed to adopt internal CUP.

UCB India Pvt Ltd vs DCIT-TS-289-ITAT-2019(Mum)-TP-ITA No 645/Mum/2015 dated 11.04.2019

38. The Tribunal directed AO/TPO to apply CUP method and consider commission rate charged by LMW (Laxmi Machine Works Ltd) as comparable for determining ALP of commission charged by the assessee engaged in manufacturing of textile machinery and equipment. The Tribunal rejected internal TNMM applied by assessee and noted that transactions with non-AE's were minuscule (3%). Further as regards Kirloskar Toyota used as a comparable by TPO it held that the rate of commission paid by Kirloskar Toyota to its agents could not be used to benchmark the international transactions of assessee receiving commission income after relying on earlier years's order wherein the Tribunal had noted that Kirloskar Toyota paid commission at varied rates from 0.8% to 17.6% and its business through agent was only 12% of its sales and thus, endeavor should be made to select concern with similar transactions as that of tested party. Further, the Tribunal found that the other concern which was held to be functionally comparable

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with the business module of assessee in the preceding year was LMW. It noted that though TPO had called for the results of said concern during initial proceedings, in the final analysis only margins of Kirloskar Toyoda were applied. Thus, the Tribunal remitted the matter for ALP computation and held that It may be kept in mind that commission earned by assessee in addition to the commission income included charges for installation, commissioning and warranty support services and the said commission in total was to be applied to work out the rate in the hands of assessee and the same was to be compared with commission rate charged by LMW.

M/s. Rieter India Pvt Ltd vs DCIT-TS-292-ITAT-2019(PUN)-TP-ITA No 468/PUN/2015 dated 25.01.2019

Cost Plus Method

39. The Apex Court allowed Revenue's appeal and set aside High Court order upholding Tribunal's deletion of TP-adjustment on consultancy charges paid by assessee. It noted that the TPO had adopted the same mark up in relation to its European AE, what the assessee had adopted in relation to its USA AE.

The Apex Court restored the issue to the High Court and noted that the High Court had failed to independently evaluate the merits of Revenue's appeals.The Apex Court observed that HC had upheld Tribunal's opinion that cost plus method could be applied on actuals and not on estimation of cost and when actual figures were replaced in the calculation made by the TPO, then, no adjustment was called for, as the payment was at ALP. The Apex Court restored the matter to the file of the High Court.

CIT vs Reliance Industries Ltd- TS-21-SC-2019-TP-Civil Appeal No 37 of 2019 dated 02.01.2019

40. The Court rejected Revenue's appeal against Tribunal order restoring TP- issue to the file of TPO to benchmark the international transaction afresh by examining suitable comparables in case of assessee engaged in sourcing of apparel merchandise for the Group for AY 2012-13. It noted that TPO had adopted 3 comparables based on the earlier years' selection, however, Tribunal had remitted the issue relying on co-ordinate bench decision in assessee's case for AYs 2006-07 and 2007-08 which was subsequently affirmed by HC wherein assessee's cost plus model was upheld over TPO's commission based model in view of 'low risk procurement support services' performed by assessee. Further, co-ordinate bench had accepted 'net profit/total cost remuneration' model adopted by the assessee, noting that the functions of the assessee and its activities were limited to scrupulously following the hand book and other instructions provided by the parent group and there was no authority or discretion to the assessee in deviating or changing from the policies and procedures prescribed by the parent company.

GAP International Sourcing (India) Pvt. Ltd, [TS-473-HC-2019(DEL)-TP], ITA No. 531/2019, dated May 22, 2019

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41. The Tribunal set aside TPO/DRP order and directed the TPO to re-compute TP-adjustment in respect of international transactions related to contract revenue from projects and rejected TPO's comparison of margins of individual projects with aggregate margins earned from transactions with non-AE while applying internal-CPM. The Tribunal held that the above would give a distorted figure and was impermissible under law. Accordingly, the Tribunal directed the TPO to re-compute adjustment after comparing the margins of individual AE transactions with individual non-AE transactions.
M/s. Andritz Hydro Pvt Ltd vs DCIT-TS-309-ITAT-2019(Ind)-TP-ITA No 686,685/Ind/2017 dated 16.04.2019

42. The Tribunal rejected Cost Plus Method (CPM) adopted by the TPO as the most appropriate method (MAM) for benchmarking transactions in Equipment Division holding that comparison of profit margin of export market segment (i.e. sale to AEs) with that of the domestic market segment was not proper, relying on co-ordinate bench ruling in assessee's own case for an earlier year wherein TNMM was preferred over CPM for benchmarking transactions in Equipment Division.
Alfa Laval (India) Limited [TS-627-ITAT-2019(PUN)-TP] - ITA No.1945/PUN/2017 dated 20.06.2019

Resale Price Method

43. The Tribunal upheld the CIT(A)-order deleting TP-adjustment of Rs.3.72cr in respect of import of Liquefied Natural Gas (LNG) by assessee from its foreign AEs. It followed co-ordinate bench ruling in assessee's own case for AY 2009-10 wherein Resale Price Method (RPM) was upheld as MAM over TPO's CUP method on the basis that the prices of LNG purchased by assessee cannot be compared to JCC prices (Japan) and Henry Hub prices (US). It also upheld comparability of two companies viz Petronet LNG Limited and Gas Authority of India Ltd whose equity capital was owned by President of India, clarifying that,inter se transactions between the public sector undertakings cannot be treated as transactions between the associated enterprises.
Hazira LNG Private Limited vs. Dy.CIT [TS-144-ITAT-2019(Ahd)-TP] ITA No. 1491/Ahd/2016dated 04.03.2019

44. The Tribunal directed TPO to apply Resale Price Method (RPM) for ALP-determination of the international transaction of purchase of finished watches/clocks for resale and rejected TPO's adoption of TNMM as MAM. Considering no change in factual position, the Tribunal followed co-ordinate bench ruling in assessee's own case for previous AY wherein RPM was upheld as MAM for trader/distributor and TPO's TNMM was rejected considering that TPO's conclusion that loss incurred by assessee was indicative of carrying out value-added functions, which although were not borne out by the facts on record. Further, regarding benchmarking of subvention charges in respect of mark-up expenses incurred by the assessee and reimbursed by the AE, the Tribunal noted that after rejecting assessee's TP-study, TPO proceeded to apply TNMM and there was no occasion for TPO to find out correctness of assessee's TP-study

wherein RPM was applied. Accordingly, the Tribunal remanded the matter to the file of the TPO for fresh bench marking by taking RPM as the MAM.
Citizen Watches (I) Pvt Ltd vs ACIT-TS-353-ITAT-2019(Bang)-TP-IT(TP)A No 406,497/Bang/2015 dated 25.04.2019

45. The Tribunal upheld assessee-trader's RPM over TPO's TNMM as MAM for benchmarking import transaction by following co-ordinate bench ruling in assessee's own case for earlier year. The Tribunal stated that since there was no change in the business pattern of the assessee and the same business was continuing and considering the fact that the TPO had accepted RPM as the most appropriate method for previous assessment years, the Tribunal directed the A.O./TPO to adopt RPM as the most appropriate method as considered by the assessee.
Michelin India Tyres Pvt Ltd vs DCIT-TS-18-ITAT-2019(Del)-TP-ITA No 414/Del/2011 dated 08.01.2019

46. The Tribunal ruled on selection of MAM for assessee's international transaction of import of finished goods for resale in India and rejected Revenue's appeal against rejection of TNMM by CIT(A) and directed the AO/TPO to adopt RPM as most appropriate method for determining arm's length price of the international transaction of import of finished goods for resale in India. The Tribunal observed that as per TP-study report, resale of tyres to its AE was without any substantial value addition and the only direct cost involved, relevant for computation of gross margin, was payment made for purchase i.e. cost of sales. Thus it, examined Rule 10B(1)(b) and held RPM to be the most appropriate method since this method pre-supposes, no or insignificant value addition to goods purchased from foreign AE and set aside selection of comparables and ALP-determination to AO/TPO.
DCIT vs Michelin India Tyre Pvt Ltd-TS-471-ITAT-2019(Del)-TP-ITA No 3166/Del/2013 dated 30.04.2019

47. The Tribunal accepted RPM applied by assessee for ALP-computation of import of finished goods by assessee engaged in retail trade and operation of duty free shops at Indian airports from its AE and rejected TNMM adopted by TPO. The Tribunal followed co-ordinate bench decision in assessee's own case for previous AYs wherein it was held that when assessee was purchasing finished products from the AEs for the purpose of reselling to unrelated parties without any value addition, the most appropriate method to benchmark such transaction in terms of Rule 10B was RPM. The Co-ordinate bench had further held that only when it was impossible or rather difficult to determine the ALP by applying any of the direct methods like CUP, RPM, CPM, then only as a method of last resort, TNMM should be applied. Thus, following rule of consistency the Tribunal restored the matter to the file of AO/TPO to re-compute ALP of the international transaction.
Airport Retail P Ltd vs DCIT-TS-11-ITAT-2019(Mum)-TP-ITA No 4816/Mum/2015 dated 09.01.2019

48. The Tribunal accepted assessee's RPM as MAM for benchmarking international transaction of import of reagents and diagnostic equipment (analyzers) from parent company and selling to independent third parties, rejecting TPO's TNMM. It rejected the contentions of lower authorities that asssessee was a manufacturer, noting that as per assessee's financial statements that it

had not started its manufacturing activity in the impugned AY as it was still in the process of setting–up of plant. It also noted that assessee merely purchased reagents from its AE for reselling them to third party customers in India without making any value addition and for the purpose of sale of reagents, assessee provided the customers the analyzers for carrying out the chemical analysis with the reagents for a period of five years without any extra cost and hence, the analyzers were never sold to the customers, but only installed in their premises for chemical analysis for five years.

Randox Laboratories (India) P Ltd [TS-547-ITAT-2019(Mum)-TP] - IT(TP)A no.507 & 1568/Mum./2015dated 07/06/2019

49. The Ttribunal accepted assessee's RPM and rejected TPO's TNMM for benchmarking international transaction of import of men's wear being sold (as a distributor) without any value addition. It noted that the RPM has been consistently held to be MAM in case of simple distribution of products. It rejected Revenue's stand that the advertisement and sales promotion expenses incurred by the assessee was huge and hence the net profit margin alone should be considered under TNMM method for determining ALP, because said expenses "would not increase the inherent value of the products". It relied on coordinate bench in case of Burberry India Pvt. Ltd., Vs. ACIT in ITA Nos. 758 & 7684/Del/2017 wherein it was held that incurring of high advertisement and marketing expenses does not in any manner affect ALP-determination under RPM. Accordingly, the issue was restored to AO/TPO for fresh analysis by adopting RPM as MAM.

Celio Future Fashion Private Limited, (Formerly known as Celio Future Fashion) vs. ACIT [TS-160- ITAT-2019(Mum)-TP] ITA No. 1928/Mum/2016 dated 15.03.2019

50. The Tribunal directed AO/TPO to benchmark the ALP of imports from AE as per RPM after including Dhandapani & Co. and Kusam Electricals in the final list of comparables for distributor assessee in AY 2008-09. It upheld RPM noting that assessee sold goods imported from AE in the domestic market without any value addition and rejected TNMM adopted by TPO, noting that TNMM requires a lot of adjustments to arrive at the actual operating profit and hence direct methods like CUP, RPM, CPM should be preferred unless rendered inapplicable. Further, it discarded TPO's reasoning for rejection of RPM that assessee did not demonstrate that its accounting policies were same as those of the comparables and held that if the comparables selected by assessee were inappropriate then the AO should have made adjustments as envisaged in Rule 10B(1)(b)(iv) or searched for fresh comparables instead of using it as a justification to reject assessee's method of ALP computation i.e, RPM. Also it rejected TPO's justification that assessee was a full-fledged/full risk distributor, performing a host of functions involving huge costs such as freight, insurance, rebates, packaging etc and, hence, RPM may not represent correct gross profit margin. Following coordinate bench decision in Fresenius Kabi India it observed that in a comparable uncontrolled transaction scenario also a normal distributor will undertake all such functions which are related to sales of a product viz. market research, sales and marketing, warehousing, inventory control, quality control etc., and would also bear risks viz. market risk, inventory risk, credit risk etc. Lastly, it reversed TPO's rejection of K. Dhandapani & Co. and Kusam Electricals Industries as comparables stating product dissimilarity, observing that under the RPM method, the focus is more on the functions rather

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than the similarity of products because product differentiation does not materially affect the gross profit margin.

Videojet Technologies (India) Pvt. Ltd. v. ACIT Cir.10(3), Mumbai [TS-497-ITAT-2019(Mum)-TP], ITA No.6956/Mum/2012, dated May 28,2019

51. The Tribunal accepted assessee's selection of RPM as MAM and observed that assessee admittedly imported steel cord from its AEs and sold the same to the non-AEs without any value addition or further processing. The Tribunal stated that the Resale price method, as the name itself suggested, was preferably used when the goods were `resold', thus held that RPM was the most appropriate method for determining the ALP in case of distribution of goods. In other words, if the goods purchased were sold as such without any further processing or value addition, then the RPM was the most appropriate method. The Tribunal relied on High Court ruling in case L'Oreal India P. Ltd. and observed that similar issue was raised in its appeal for a preceding year and the Tribunal then had approved the application of the RPM but restored the matter to the TPO for determining the ALP by applying this method. Respectfully following the precedent, the Tribunal sent the matter to the AO/TPO with a direction to compute the ALP of the international transaction under consideration by applying the RPM.

Bekaert Industries Pvt. Ltd vs DCIT-TS-347-ITAT-2019(PUN)-TP-ITA No 146,171/PUN/2014 dated 24.04.2019

52. The Tribunal rejected assessee's RPM as MAM for benchmarking import of Complete Knock Down (CKD) material by assessee, noting that assesseewas manufacturer and not a pure reseller since as per assessee's TP study as it had a manufacturing facility where it processed the raw material for the manufacturing of sheet metal stampings and assemblies, etc.It rejected the reliance placed on the order of Addl. Commissioner, Customs to substantiate that identity of the CKD parts was not lost or drastically transformed by the processing carried out by assessee, noting that the said order had contradictory findings i.e. on one hand, it was noted that the process of converting an unfinished metal into ready to use automobile component had significant value addition while on the other hand it was concluded that the process did not alter the essential characteristics of the imported materials. The Tribunal thus accected TPO's TNMM to be MAM and remitted the issue of comparability of comparables.

Gestamp Pune Automotive Pvt Ltd (Formerly known as Sungwoo Gestamp Hitech (Pune) Private Limited) [TS-576-ITAT-2019(PUN)-TP]ITA No.2204/PUN/2017 dated 12.06.2019

Transactional Net Margin Method

53. The Court confirmed Tribunal's order upholding TNMM as MAM for benchmarking export & import transactions for assessee engaged in the manufacturing of resistors and capacitors. The Court observed that while TPO/CIT(A) rejected assessee's aggregation approach under TNMM and adopted RPM for benchmarking imports and CPM for benchmarking exports, the Tribunal had upheld application of TNMM on aggregated international transaction following subsequent years' approach where Revenue had been accepting TNMM as MAM for benchmarking the aggregated international transactions with AE's. Thus, the Court opined that the Revenue had

not been able to show any material difference in the subject assessment year which would justify a change in the most appropriate method (TNMM method) adopted while benchmarking the international transactions. Further, the Court rejected Revenue's contention that onus is on assessee to prove that there was no change/ difference in facts in the subject AY from subsequent AYs and held that it would be for the Revenue to show the difference in facts warranting a different view in this AY to that taken in the subsequent AY's.Thus, the Court concluded that the Tribunals's order was based on appreciation of evidence and therefore no interference was warranted.

Pr.CIT vs M/s. Vishay Components India Pvt Ltd-TS-125-HC-2019(Bom)-TP-ITA No 1643 of 2016 dated 18.02.2019

54. The Court dismissed Revenue's appeal against Tribunal's order upholding TNMM as MAM for benchmarking exports to AEs & payment of sales commission to AE. Regarding export transaction, the Court followed co-ordinate bench rulings in assessee's own case for previous AYs wherein TNMM was upheld as MAM after opining that TPO's CUP-method could not be applied considering the customization of finished goods and the geographical, volume, timing, risk and functional differences between goods sold to AE and third parties. Regarding sales commission, the Court again followed co-ordinate bench rulings in assessee's own case for previous AYs wherein TNMM was upheld as MAM over TPO's CUP-method after observing functional and geographical differences between the AEs transaction and third party transaction.

Pr. CIT vs Amphenol Interconnect India Pvt Ltd-TS-56-HC-2019(Bom)-TP-ITA No 1393 of 2016 dated 05.02.2019

55. The Tribunal deleted TP-adjustment accepting assessee's internal-TNMM, thereby rejecting TPO's internal-CUP for benchmarking international transaction of sale of chemical products to AEs. The Tribunal relied on assessee's own case for previous AY, wherein CUP was rejected because accurate adjustments could not be made to nullify the impact of the fundamental differences in economic circumstances and contractual terms between the intra-AE transactions and non-AE transactions (such as credit period, advance payments, scale of transactions, AE's obligation to purchase 50% of assessee's products, reimbursement of R&D cost, interest-free ECBs etc.).

Gulbrandsen Chemicals Pvt Ltd vs DCIT-TS-129-ITAT-2019(Ahd)-TP-ITA No 2276/Ahd/2013 dated 12.02.2019

56. For assessee engaged in manufacture and sale of transmission line, hardware and accessories, the Tribunal remitted MAM-selection back to the file of CIT(A) (who rejected assessee's CPM and upheld TPO's TNMM) to consider the assessee's submissions and the documentation and pass reasoned and speaking order.

M/s. TE Connectivity India Pvt Ltd vs ACIT-TS-26-ITAT-2019(Bang)-TP-IT(TP)A No 1327/Bang/2010 & 231/Bang/2012 dated 25.01.2019

57. The Assessee-company was engaged in manufacture and export of herbal pharmaceutical products and during the relevant year assessee exported its products to various AEs and in order to benchmark those international transactions, adopted TNMM as most appropriate method. In transfer pricing proceedings, TPO opined that assessee acted as a contract

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manufacturer in respect of products manufactured and exported to AEs and thus, CPM was applied for determining ALP of international transactions. The Tribunal deleted the TP-adjustment and relied on co-ordinate Bench of Tribunal in assessee's own case where a finding was recorded that assessee had its own range of products and AEs only chose from standard products which were being manufactured by assessee for Indian Market and that the assessee carrying out its independent activity of manufacturing, could not be treated as a contract manufacturer and, thus, assessee was justified in adopting TNMM.

Further, the Tribunal had observed that the number of adjustments and differences to be carried on for the purpose of comparability were many and thus concluded that when the differences were many, CPM could not be considered as MAM, accordingly, the Tribunal rejected TPO's CPM for benchmarking the transaction and also followed co-ordinate bench ruling in assessee's own case for previous AY wherein CPM was rejected as MAM considering huge differences in FAR of assessee's domestic & export division. The Tribunal upheld assessee's TNMM and noted that assessee earned net margin of 13.39% from exports to AEs whereas the net loss suffered by the assessee in respect of the personal care division in the domestic segment was -10.16%. Thus, opined that as the net margins from the assessee's exports to its AEs was higher when compared to the result of its margins in respect of transactions in the personal care division in the domestic segment, the price of the sale of finished goods were at arms length.

M/s. Himalaya Drug Company vs DCIT-TS-415-ITAT-2019(Bang)-TP-IT(TP)A No 187/Bang/2015 dated 30.04.2019

58. The Tribunal deleted TP-adjustment w.r.t. international transaction pertaining to payment of royalty and technical know-how (for manufacturing a new product i.e. 18mm Alco Fuel Pump as per specific customer demand) for assessee engaged in manufacture and sale of specific governors and engine controls for Indian Railways and other customers for AY 2009-10. It considered letter received from Indian Railways expressing requirement of fuel pump and voluminous documents in the form of agreements with AE for receipt of technical know-how, drawings, products manuals, test specifications etc. produced by assessee to prove benefit received. It observed that having accepted TNMM as MAM to benchmark all transactions, use of CUP method by TPO/CIT(A) to benchmark only one element (payment of technical assistance fee) would cause chaos and be detrimental to interests of both assessee and Revenue. It further observed that TPO, in subsequent years, had accepted assessee's aggregation approach under TNMM. It further noted that assessee's margin of 9.25% was within 5% tolerance range of comparables margin of 11.98%.

Woodward India Pvt. Ltd (Formerly known as Woodward Governor India Ltd vs. DCIT Circle-18 [TS-277-ITAT-2019(DEL)-TP] ITA No. 916/Del/2015 dated 25.03.2019

59. The Tribunal restored benchmarking of international transaction of purchase of finished goods for resale (in distribution segment) for assessee [engaged in distribution of air conditioners imported from AE and manufacturing of water coolers and air cleaners] and noted that TPO, while adopting TNMM as MAM, erroneously clubbed manufacturing activities of the assessee while considering total sales. The Tribunal stated that TPO's benchmarking was on 'erroneous facts and opined that unless a proper bench marking was done the dispute could not be decided. The Tribunal noted that TPO had adopted TNMM as the most appropriate method by saying that the comparables were not clear and their operating profit margin was not capable of

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applying RPM as most appropriate method though the same comparables have been used for bench marking by applying TNMM. The Tribunal thus opined that this contradiction needed to be examined again and thus Tribunal remitted the issue with a direction that the manufacturing activity should not be considered as part of international transaction and directed that expenses directly attributable to manufacturing activity should be ignored and comparables should be examined to decide whether RPM applied by assessee's or TNMM applied by TPO was the Most appropriate method.

JCIT vs Daikin Airconditioning India Pvt Ltd-TS-269-ITAT-2019(Del)-TP-ITA No 1376,1525/Del/2017 dated 02.04.2019

60. The Tribunal upheld CIT(A)'s order accepting assessee's internal-TNMM based on segmental results of AEs and non-AEs for benchmarking technical and consultancy services. The Tribunal noted that the CIT(A) had held that internal uncontrolled transactions were good comparables after relying upon the OECD guidelines and co-ordinate bench decision in case of Birla soft India. The Tribunal noted that the TP Study report of the assessee stated that there was no functional dissimilarity between the AE and the non-AE transactions, and also noted that the TPO did not bring out any difference in the FAR analysis of both the set of transactions.Thus, accepted internal TNMM.

ACIT vs BCEOM (India) Pvt Ltd- TS-351-ITAT-2019(Del)-TP-ITA No 4710/Del/2012 dated 22.04.2019

61. The Tribunal, in second round of appeals pursuant to High Court remand, rejected Modicare Ltd as a comparable under RPM for assessee [engaged in manufacturing of beauty products and having a direct selling model (i.e., sale through sales consultants)] and directed adoption of TNMM using comparables selected by assessee for the international transaction of purchase of finished goods from AEs. The Tribunal considered non-availability of Modicare's segmental data and High Court's direction that the company could be a comparable only when there was availability of data with respect to different product segments. Thus, the Tribunal held that at the very threshold, it would be difficult to include Modicare Ltd. as a comparable company and after taking note of Modicare's franchise expenses, the Tribunal inferred that the company could not be treated wholly as a direct seller. Further, it observed that Modicare was functionally dissimilar as it incurred heavy operating expenses and significant AMP expenses. Further, the Tribunal rejected comparability under RPM stating that if a distributor was incurring substantial AMP expenses then it could not be compared with routine distributor under RPM as it would tantamount to value addition. Further, the Tribunal noted High Court's direction that once Modicare, the sole comparable was removed, then TNMM had to be adopted as the most appropriate method without enlarging the comparables.

Oriflame India Pvt Ltd vs ACIT-TS-326-ITAT-2019(Del)-TP-ITA No 960/Del/2014 dated 15.04.2019

62. The Tribunal upheld TNMM over CUP as most appropriate method for indenting transactions entered into by assessee, a subsidiary of Japanese Sogo shosha company, engaged in import and export activities through provision of trade related support services and advisory services for AY 2012-13 & 2013-14 and remanded the issue to the file of TPO to examine and benchmark international transaction by adopting TNMM and taking Berry ratio as PLI. It relied on co-ordinate

bench ruling in assessee's own case for AY 2007-08 to 2011-12, wherein upholding TNMM, Tribunal had held that CUP cannot be applied as the pricing factor was largely dependant upon the geographical locations which were different in AE and non-AE segment. It had also considered the differences in the products involved, volume on FOB basis, value and market of the transactions between AE and non-AE. Thus, considering the fact that assessee was a low risk service provider and that there was no change in FAR from AY 2003-04 as had been observed by co-ordinate bench in the above order, Tribunal allowed assessee's appeal and upheld TNMM as MAM by taking Berry ratio as PLI, as had been approved by HC.

Sumitomo Corporation India Pvt Ltd. v. DCIT, Circle 24(2) New Delhi, [TS-460-ITAT-2019(DEL)-TP], ITA No. 7261 & 7262/Del/2018, May 21, 2019

63. The Tribunal deleted TP adjustment of Rs 19.30 crores on payments for intra group services availed from AE by assessee engaged in providing wireless, high-speed internet access, etc for AY 2012-13 & 2013-14 noting that TPO had rejected the aggregation approach adopted by the assessee under TNMM to benchmark the intra group services and adopted CUP as MAM. In the absence of comparable data and also by stating that the assessee was not able to prove the receipt of the benefits and demonstrate the arm's length nature, TPO determined ALP of the transaction at Nil on ad hoc basis. The Tribunal observed that in assessee's own case for AY 2009-10 which was subsequently followed in AY 2010-11 and 2011-12 coordinate bench, after considering the facts, material evidences, etc., had held that the assessee had satisfied the need, benefit and rendition test. The coordinate bench had also upheld assessee's TNMM to be the most appropriate method and rejected TPO's Nil ALP determination under CUP. It also reiterated that benefit test is to be viewed from the perspective of assessee/ businessman and not from Revenue's perspective.

AT & T Global Network Services (India) Pvt. Ltd. v. JCIT, Special Range-1, New Delhi [TS-499-ITAT-2019(DEL)-TP], ITA Nos.5535/Del/2016 & 7115/Del/2017, May 27, 2019

64. The Tribunal rejected assessee's plea for adopting internal TNMM for determination of ALP of international transaction of provision of software development services, noting that the non-AE transactions of the assessee were with domestic companies, whereas AE transactions were international transactions and hence, the market conditions would not be the same and therefore, they cannot be considered on par with each other. It also noted that assessee had itself not adopted TNMM in its TP Study.

Hackett Group (India) Ltd vs Dy CIT [TS-328-ITAT-2019(HYD)-TP] – ITA 2039/Hyd/2017 dated 15-03-2019

65. The Tribunal deleted TP-adjustment and upheld CIT(A)-order accepting 7 comparables selected by assessee and adoption of 'Cash Profit Margin' as PLI in case of assessee amanufacturer of soft ferrite electronic components. The Tribunal approved assessee's cash profit margin as net profit indicator (PLI) under the TNMM (over net profit margin). The Tribunal relied on precedents wherein it was clarified that application of 'cash profit margin', under TNMM, in manufacturing industry was appropriate as it eliminated the impact of the differences in respect of technology, age of assets, capacity utilization, depreciation policies and interest on profitability.Thus, the Tribunal held that assessee was justified in applying cash profit margin as more appropriate financial indicator than net profit margin.

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DCIT vs Epcos Ferrites Ltd-TS-139-ITAT-2019(Kol)-TP-ITA No. 1597,1598/Kol/2017 dated 30.01.2019

66. The assessee had benchmarked its transaction of sale of manufactured goods to AE by adopting TNMM. The TPO adopted CUP method. The Tribunal rejected TPO's adoption of internal comparable for benchmarking sale of manufactured goods to AEs by comparing it with assessee's sale of manufactured goods to non-AEs citing differences in products, risks, business model and business process under the two segments. It noted that final products exported to AEs were active pharmaceutical ingredients with medicinal properties used in the further manufacturing of drugs (formulations), whereas the goods exported to unrelated parties were formulations being the finished products and sold by the assessee under its own name. It further noted that there was limited risk undertaken in the AE segment considering that the products were manufactured from the third party as per the specific requirement of AEs whereas higher risk was taken in the Non AE segment where final products were manufactured by assessee which were sold to the ultimate consumer under its own brand.

Organon (India) Ltd vs Addl. CIT.- TS-423-ITAT-2019 (Kol)- TP – ITA no. 1335/Kol/2010 dated 15-05-2019

67. The Tribunal upheld CIT(A)'s application of TNMM over CUP as MAM for benchmarking assessee's sale of finished goods and followed co-ordinate bench ruling in assessee's own case in previous AY wherein assessee's TNMM over TPO's CUP-method was upheld by considering assessee's TP-analysis as 'sound' and noting that Revenue had not objected to application of TNMM in all earlier years. The Tribunal noted that there was no change in facts and law and that Revenue failed to produce any material to controvert the decision, thus the Tribunal respectfully following the above binding precedent, upheld the order of ld CIT(A) and appeal of Revenue was dismissed.

ACIT vs M/s. Emami Ltd-TS-273-ITAT-2019(Kol)-TP-ITA No 1958/Kol/2017 dated 03.04.2019

68. The Tribunal remitted issue of TP-adjustment on investment banking and securities broking transactions in case of assessee a Lehman Brothers Group entity in India. It noted that for transactions under investment banking division, TPO/DRP rejected Profit Split Method (PSM) adopted by assessee in accordance with global transfer pricing policy of the Lehman Group for computing ALP and adopted TNMM as the most appropriate method. The Tribunal followed coordinate bench decision in assessee's own case for previous AY wherein noting that assessee could not make effective representations before the lower authorities due to extraordinarily situation of collapse of Lehman Brothers group worldwide leading to liquidation in 2009, the Tribunal then had remitted the issue to AO/TPO for a de-novo assessment, allowing assessee's prayer for another opportunity to present necessary evidences and to justify its adoption of MAM. Thus, following the above, the Tribunal in the present appeal restored the issue of TP-adjustment to the file of AO/TPO.

Lehman Brothers Securities Pvt Ltd vs ACIT-TS-39-ITAT-2019(Mum)-TP-ITA No 7705/Mum/2012 dated 03.01.2019

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69. The Tribunal rejected TPO's exclusion of 9 comparables while determining the final set of comparables out of the 21 comparables initially selected by the TPO himself by doing a fresh search and applying his own filters, noting that TPO had excluded them without according any reason. It held that this was a classic act of cherry picking. The Tribunal also upheld CIT(A)'s order including one comparable 'Nittany Outsourcing Limited' which came out of re-run of the same search process as followed by the TPO and thus, directed TPO to conduct comparable analysis on the basis of all 21 companies selected by TPO and one additional comparable added by CIT(A).

Frost & Sullivan (India) Private Limited [TS-623-ITAT-2019(Mum)-TP] - I.T.(TP) A. No. 2290/Mum/2017dated 18.06.2019

70. The Tribunal accepted assessee's benchmarking under internal TNMM with respect to provision of engineering servicesand ancillary services to AE over TPO's external TNMM benchmarking, rejecting TPO's contention that the man hour allocated to AEs and non AEs under internal TNMM were not reliable. It noted that assesseehad maintained audited AE and non AE segmental reports as well as comprehensive records of manpower utilisation and allocation which were duly audited and there was no deficiency in that. It also held that TPO's external TNMM adopted to compute arithmetic mean of comparables at 26.54% and assessee's margin on entity level at 0.006% was arbitrary and unacceptable. Accordingly, the Tribunal deleted the TP adjustment.

SNC Lavalin Engineering India Pvt Ltd [TS-614-ITAT-2019(Mum)-TP] -ITA Nos.1067& 4713/M/2016 dated 06.06.2019

71. The Tribunal deleted the adjustment made by TPO with respect to export of finished goods to AEs by rejecting assessee's TNMM and applying CUP as MAM, following the co-ordinate bench ruling in assessee's own case for an earlier year. The co-ordinate bench had deleted similar adjustment by holding that the prices at which finished goods were sold to AEs could not be compared with prices at which they were sold to non-AE's due to multiple factors viz. difference in volume, level of market, geographical locations, functional differences etc. Therefore, it had rejected CUP and accepted TNMM to be used as the MAM.

Firmenich Aromatics (India) Pvt Ltd [TS-539-ITAT-2019(Mum)-TP] - ITA No. 6081/Mum/2018 dated 07/06/2019

72. The Tribunal dismissed Revenue's appeal, confirming deletion of TP-adjustment on exports to AEs by adopting TNMM as MAM over TPO's CUP by concluding that there was absence of justification for rejecting consistently applied TNMM method. The Tribunal relied on co-ordinate bench ruling in Omni Active Health Technologies. It rejected TPO's approach of not taking into account geographical, political and economical environment while adopting CUP-method. The Tribunal accepted assessee's reliance on jurisdictional HC decision in Amphenol Interconnect India P. Ltd wherein it was held that geographical and volume differences were also to be considered in making comparisons in similar cases. The Tribunal opined that TPO was totally wrong in holding that these matters are of academic interest only and without factoring in the difference in FAR, the comparison done by the TPO was not sustainable.

ACIT vs M/s. Glenmark Pharmaceuticals Ltd-TS-465-ITAT-2019(Mum)-TP-ITA No 1654/Mum/2016 dated 01.02.2019

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73. The Tribunal ruled on TP-adjustment on export of goods and payment of information system (IS) service charges to AE in case of assessee engaged in the business of manufacturing of various types of chemicals & compounds and deleted TP-adjustment made on export of goods by applying internal CUP method and accepted assessee's TNMM as MAM. The Tribunal relied on co-ordinate bench decision in assessee's own case for previous AY wherein it was held that the prices at which finished goods were sold to AEs could not be compared with prices at which they are sold to non-AE's due to multiple factors viz. difference in volume, level of market, geographical locations, functional differences etc. & therefore, CUP could not be used as the MAM.

Separately, the Tribunal deleted TP-adjustment in respect of payment for IS charges to AE (internal cost), and observed that assessee filed the details of employees of the AE rendering IS services, details of tickets raised during the year which lend credence to the fact that the services were, in fact, availed by the assessee during the year. It observed that quantum of external cost (which came from a third party service provider, which was accepted by TPO to be at arm's length) as well as internal cost were duly certified by the external auditor, which had not been denied by Revenue. Thus, after relying on co-ordinate bench ruling in assessee's own case which in turn relied on co-ordinate bench ruling in its sister concern wherein TP-adjustment on account of IS charges was deleted, the Tribunal deleted the said addition in case of assessee.

Firmenich Aromatics Production (India) Pvt Ltd vs ITO-TS-93-ITAT-2019(Mum)-TP-ITA No 6082/Mum/2018 dated 05.02.2019

74. The Tribunal remitted issue of ALP determination of international transaction of engineering support services provided by a Group company to assessee, a manufacturer and trader in chemicals. It noted that TPO had not examined the applicability of TNMM (as selected by assessee) or any other prescribed methods but had arrived at conclusion that assessee has not established receipt of services and benefit thereof thereby determining ALP as Nil. It also noted that TPO had in subsequent years accepted the payments and also accepted the receipt of services in the remand proceedings.

Dow Chemical International Private Limited vs. Dy.CIT [TS-143-ITAT-2019(Mum)-TP] 204/Mum/16, 1519/Mum/17, 6472/Mum/17 dated 11.03.2019

75. The Assessee had purchased moulds from its AE, during TP proceedings, the TPO had alleged that these transactions were benchmarked by assessee using CUP, however, no details were produced. Thus, the TPO held the transaction not to be at arms length and made an ad-hoc downward adjustment to the tune of 25%. Thus, the Tribunal noted that the TPO made the adjustment thereon purely on estimation basis without applying any prescribed method under the statute, which was legally unsustainable on one hand, while assessee was unable to justify its benchmarking under the CUP method on the other. Thus, the Tribunal restored the issue to the file of AO for determining the ALP by applying one of the prescribed methods and also directed the AO to consider assessee's alternate claim of determination of ALP by applying entity level TNMM.

DCIT vs Gujrat Glass Ltd-TS-389-ITAT-2019(Mum)-TP-ITA No 4777/Mum/2016 dated 30.04.2019

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76. TPO made an addition while determining the ALP of export of equipments by assessee to its AE by rejecting TNMM applied by assessee and applying CPM by comparing with internal comparables in domestic segment.CIT(A) deleted the addition by holding that TNMM was correctly adopted by assessee by following Tribunal's order in assessee's own case for earlier year, the Tribunal relying on coordinate bench in assessee's own case held that CPM method was not the most appropriate method because of differences between the two segments i.e. on account of geographical differences, products sold, functions differing, credit period, volume difference and bad debt risk. It accepted the assessee's method of aggregating closely linked transactions in case of equipment division and applying TNMM to benchmark the transactions. Thus, the Tribunal dismissed Revenue's appeal.
Dy.CIT vs Alfa Laval India Ltd [TS-79-ITAT -2019(Pune)-TP] ITA No. 2638/PUN/2016 dated 09.01.2019- SD

77. The Tribunal upheld assessee's approach of aggregating transactions in its trading segment for benchmarking under TNMM and noted that assessee had aggregated transaction pertaining to import of goods from AE for sale in domestic market & transaction of sale of imported goods on high seas to sister concern. The Tribunal observed that assessee had earned margin of 7.39% when selling goods to others but incurred loss of (-) 2.61% when selling imported goods to sister concern on high seas and that the TPO proceeded to benchmark the latter transaction separately and consequently proposed TP-adjustment and noted that the sole reason for segregation was due to loss arising on sales made to sister concern of assessee. The Tribunal further referred to Rule 10A(d) and opined that the sale on high seas of trading goods could not be segregated and once the activities were closely interlinked, then the same were to be aggregated and benchmarked under the umbrella of Trading Segment. Thus, the Tribunal concluded that approach of assessee in aggregating transactions under the Trading Segment was to be upheld and since the margins of assessee on aggregate basis under the Trading Segment were higher than the margins of comparables finally selected, thus no adjustment was to be made on account of arm's length price of international transactions of Trading Segment.
Endress+Hauser Flowtec (India) Pvt Ltd vs ACIT-TS-118-ITAT-2019(PUN)-TP-ITA No 255/PUN/2011 dated 28.02.2019

78. The Tribunal remitted the issue of TP-adjustment on payment to AEs for receipt of advisory and other services following co-ordinate bench ruling in assessee's own case for earlier years wherein TNMM had been held to be the most appropriate method in preference to the CUP applied by the TPO. The Tribunal noted that TPO and DRP had adopted CUP method and determined the ALP of International Transaction at Nil and made an addition of Rs.13.74cr relying on DRP's order for previous AY which was later overruled by co-ordinate bench. Thus, the Tribunal directed the TPO to decide the issue afresh in accordance with the directions given by co-ordinate bench in earlier years.
Emerson Climate Technologies (India) Pvt Ltd-TS-103-ITAT-2019(PUN)-TP-ITA No 1714/PUN/18 dated 14.02.2019

79. The Tribunal directed AO/TPO to apply TNMM to benchmark international transaction of sale of manufactured/ finished goods by assessee to France based AEs and rejected TPO/DRP's adoption of internal CUP-method as MAM. The Tribunal noted that assessee was acting as

contract manufacturer, exporting components to AEs (without undertaking any marketing functions, bearing any credit risk; paying any royalty for use of technology and knowhow in production process, while manufacturing goods for AE).The Tribunal rejected TPO's view that price at which assessee was importing similar goods from AE and selling to Mahindra & Mahindra (third party entity in India) in earlier years should be adopted as internal-CUP and stressed that the law of transfer pricing provisions was that while benchmarking arm's length price of international transactions 'like has to be compared with like. It further observed that though the items compared were same, sales to non-AE (Mahindra & Mahindra) were on the basis of agreement agreed upon in 2008, volume of sale was low and there were geographical differences between the markets of AE & non-AEs.Thus the Tribunal held that in view of functional differences arising out of geographical differences, TNMM was more appropriate than CUP.

A Raymond Fasteners Pvt Ltd vs ACIT-TS-73-ITAT-2019(PUN)-TP-ITA No 994/PUN/2016 dated 12.02.2019

80. In case of an assessee being a manufacturer of luxury passenger cars, the Tribunal upheld assessee's stand of aggregating transactions of import of Completely Built Units (CBUs) and import of spare parts with manufacturing, by relying on coordinate bench decision in assessee's own case for previous AY which held that all three transactions were closely inter-linked. The Coordinate bench had observed that assessee had manufacturing units in India and the CBUs which were imported in the present year were manufactured in India in later years when their sales increased and thus, it was held that import of CBU's and it's resale were closely linked with manufacturing activity. Regarding import of spare parts, the Tribunal had observed that spares were imported mainly to fulfill warranty commitments and cost of such spares were recovered from cost of cars sold, and hence, import of spares parts were also interlinked with manufacturing activity. Thus, the Tribunal held that all these transactions were to be benchmarked under the umbrella of manufacturing activity on an aggregate basis and after applying TNMM method. The Tribunal further directed that, margins shown by assessee needed to be compared with the mean margins of finally selected concerns and directed AO/TPO to verify application of assessee's TNMM and comparability of the 6 comparables selected by assessee.

The Tribunal, further upheld aggregated benchmarking for transaction of royalty payment with other transactions applying TNMM under the umbrella of manufacturing activity by relying on Tribunal decision in assessee's own case for previous AY where TPO's CUP based on royalty rate for transaction between Maruti Udyog Ltd. and Suzuki Motors Corporation, being controlled transaction was rejected.

Mercedes Benz India Pvt Ltd vs ACIT-TS-392-ITAT-2019(PUN)-TP-ITA No 1468/PUN/2010 dated 30.04.2019

81. The Tribunal dismissed Revenue's appeal and upheld CIT(A) order rejecting TPO's Cost Plus Method as MAM for sale transaction of Equipment Division and followed co-ordinate bench ruling in assessee's own case for previous AY wherein assessee's aggregation approach & adoption of TNMM was accepted over Cost Plus Method, considering that the transactions in Equipment Division i.e sale of equipments, export and import of spares were closely interlinked,

thus making aggregation justifiable. Accordingly, the Tribunal sustained the relief provided to the assessee by the CIT(A).

ACIT vs M/s. Alfa Laval India Ltd-TS-257-ITAT-2019(Pun)-TP-ITA No 937/Pun/2017 dated 01.04.2019

82. The Tribunal directed AO/TPO to adopt internal TNMM method of man hourly rates for benchmarking assessee's provision of engineering design services to AE and followed ruling in assessee's own case for previous AY wherein relying on previous precedents the Tribunal had rejected TPO's external TNMM and directed adopting internal-TNMM as MAM. Further, it also allowed *assessee's plea and directed AO/TPO* "to restrict the addition, if any, on account of arm's length price of international transactions to international transactions only and not to extend the same on entity level basis. It followed co-ordinate bench ruling in assessee's own case for previous AY which in turn had relied on WIKA Instruments India and jurisdictional HC ruling in case Alstom Projects India.

Magna Automotive India Pvt Ltd vs DCIT-TS-244-ITAT-2019(Pun)-TP-ITA No 457/Pun/2017 dated 03.04.2019

83. The Tribunal rejected TPO's CUP as MAM and deleted TP adjustment with respect to export of finished goods to AE for AY 2012-13 in case of assessee engaged in manufacture of connectors. It noted that coordinate bench in assessee's own case in earlier years i.e., AYs 2005-06 to 2009-10 had accepted assessee's TNMM over TPO's CUP and Bombay HC for AYs 2005-06 and 2006-07 to 2008-09 had dismissed Revenue's appeal against the order of the Tribunal. It observed that HC had held that CUP method would not be the most appropriate method in view of various adjustments, which would have to be made due to differences in FAR, in order to arrive at the arm's length price of finished goods and upheld TNMM method as the most appropriate method. Accordingly, Tribunal held that where the issue stood covered by the order of jurisdictional High Court in the case of assessee itself, there was no merit in the orders of authorities below in making aforesaid transfer pricing adjustment in the hands of assessee.

Amphenol Interconnect India Pvt Ltd. v. ACIT Cir-8, Pune [TS-375-ITAT-2019(PUN)-TP], ITA No.641/PUN/2017, dated May 02, 2019

Amphenol Interconnect India Pvt Ltd. v. DCIT Cir.-8, Pune [TS-379-ITAT-2019(PUN)-TP], ITA No.2300/PUN/2017, dated May 03, 2019

Others

84. The Tribunal remitted the issue of TP-adjustment on payment for intra-group consulting and administrative services [IGS] availed by assessee engaged in the business of consumer and auto finance from AE, (GE International, Japan) as per Master Service Agreement. It noted that TPO had rejected assessee's TNMM and applied CUP as MAM for determining the ALP of the IGS received and held that assessee had not been able to show the genuineness, need and cost effectiveness of such arrangement. It directed AO/TPO to give a fresh look to the issue in light of several documentary evidences brought in support of the IGS fee paid by the assessee.

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GE Capital Services India v. DCIT Cir.10(1), New Delhi [TS-431-ITAT-2019(DEL)-TP] ITA No. 2066/DEL/2015, dated May 14, 2019

d. Comparability– Inter Industry

Engineering / Designing and related Consultancy Services

85. The Apex Court dismissed Revenue's SLP in case of assessee engaged in providing engineering services. The High Court had dismissed Revenue's plea to exclude Stewarts & Lloyds India Ltd, and had upheld the Tribunal's decision that material consumption cost was not significant enough to come to a conclusion that the said company was having an independent manufacturing /production segment requiring a segmental analysis.
Further, while deciding whether Revenue's appeal against the order should be entertained or not, the High Court referred to various case laws and had noted that u/s 260A appeal before Court could only lie when substantial question of law arises, and thus had concluded that there was no question of law in the subject issue.
CIT vs M/s. Saipem India Project Ltd-TS-66-SC-2019-TP-SLP No 1696/2019 dated 08.02.2019

86. The Court dismissed Revenue's appeal against Tribunal order on selection of comparables for ALP determination of international transactions involving the assessee providing technical support services in relation to power plants/turbines to AE holding that Revenue's appeal did not give rise to any substantial question of law. The Tribunal had excluded HSCC (India) as it was a Government company and Mitcon Consultancy and Rites Ltd on grounds of functional dissimilarity & absence of segmental data. Further, Tribunal had directed inclusion of MN Dastur & Company following co-ordinate bench ruling in assessee's own case in AY 2010-11 and remitted comparability of EDAC Engineering for verification of RPT percentage.
Pr. CIT-4, New Delhi v. Granite Services International India Pvt Ltd [TS-450-HC-2019(DEL)-TP], ITA 1413/2018, ITA 1438/2018, dated May 20, 2019

87. The Court upheld Tribunal's order holding that the assesse engaged in provision of project management, engineering, site supervision and commissioning services to AE could not be compared to Engineers India Ltd as it was a government company as well as carrying on Turnkey Project in execution of Hydrocarbon Industry and thus functionally dissimilar. It held that the factual exercise by the Tribunal could not be faulted in the absence of any material placed by the Revenue disputing the correctness of the factual finding.
Saipem India Projects Ltd [formerly known as Saipem India Project Services Ltd.,] [TS-580-HC-2019(MAD)-TP]Tax Case No.763 of 2017 dated 07.06.2019

88. The Tribunal accepted assessee's classification of its services as engineering design services and rejected TPO's classification as ITeS (high end KPO services), following coordinate bench decision in assessee's own case in AY 2007-08. It also accepted assessee's plea for applying 15% mark-up of operating cost as basis to determine the ALP in the case of international transactions with non-US AEs, considering assessee's MAP covering similar transactions with

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US AEs wherein the department had accepted the nature of services as provision of Engineering Design Services and the margin of 15% mark-up of operating cost was agreed as arm's length price. It noted that there cannot be any difference just because the AEs are operating in different countries unless such a distinction is established on the basis of geographical location of AEs. It clarified that the approach adopted was peculiar to the facts and circumstances of the case and shall have no precedent value.

Flowserve India Controls Pvt Ltd vs.Dy.CIT [TS-242-ITAT-2019(Bang)-TP] IT(TP)A No. 2590,2491, /Bang/2017 Dated 15.03.2019

89. The Tribunal remitted issue of characterization of assessee's international transaction of provision of engineering design services as ITeS and had relied on co-ordinate bench ruling in the case of Flowserve India Controls wherein in an identical case, matter was remitted back to AO/TPO with a direction to first decide on the characterization of the functions performed by the assessee.Following the same, the Tribunal set aside the order of the AO on the issue of determination of ALP and remanded the matter back to the file of the TPO with a direction to decide the characterization of the services performed by the assessee. Further, regarding assessee's contention against DRP's reliance on CBDT's Safe Harbour Rules to hold that functions performed by the assessee were akin to KPO and therefore there was no infirmity in selecting the ITeS comparables, the Tribunal held that this aspect was also left open for consideration by the TPO in the set aside proceedings.

M/s. Goodrich Aerospace Services P Ltd vs DCIT-TS-361-ITAT-2019(Bang)-TP-IT(TP)A No 116,252/Bang/2016 dated 24.04.2019

90. The Tribunal held that assessee-company engaged in provision of designing services to its AE could not be compared to

- KITCO Ltd- as it was 100% government owned undertaking rendering services primarily to central/ state government undertaking and public sector undertaking and thus earned revenue mainly from the government
- Dalkia Energy Services Ltd- as though its website showed that it provided various kinds of services such as energy efficiency services, renewable energy services, energy strategy and consulting services and engineering services, there was no segmental information in respect of each of these services in its Financial
- Kirloskar Consultants Ltd- as though it was providing services, but no information (including segment information) was available with respect to the provision of the services of consultancy, its nature and volume in the Financial
- Engineers India, IBI Chematur Ltd, Mahindra Consulting Engineers Ltd, RITES Ltd and TCE Consulting Engineers Ltd- as in the immediately preceding year, the TPO himself had rejected these companies from the final list of comparables and thus were never considered as good comparables by the TPO himself

Further, it accepted assessee's contention and held that the assessee-company engaged in provision of designing services to its AE could be compared to

- Neilsoft Ltd- as it was engaged in software Engineering Services which was similar to the assessee's designing services

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- Vama Industries- as Software Development and Services' segment was similar to the services provided by the assessee and considered it to be a good comparable on the basis of segmental reporting

Terex Equipment Pvt Ltd v ACIT [Formerly Terex Vectra Equipment Private Limited] [TS-478-ITAT-2019(DEL)-TP] - ITA No. 4123/DEL/2015 dated 28.01.2019- BS

91. The Tribunal held that assessee engaged in providing engineering design services to its AE for AY 2010-11 could not be compared to :

- Engineers India – as it was engaged in high end and full fledged engineering and technical services being provided for petroleum refineries and other industrial projects while assessee was a captive entity engaged in providing engineering design services to its AE. Also, it was a government company so other considerations weigh in such as discharge of social obligations etc which impact profitability
- IBI Chematur – as it had incurred huge R & D Expenditure to the tune of 1.16 crores which was 5% of the turnover and also it was excluded for the same reason in assessee's own case for AY 2011-12
- Mahindra Consulting Engineers – as it was engaged in consulting services in infrastructure sector in the area of Special economic zones, water supply and sewerage etc hence functionally different.
- TCE Consulting Engineers – as it was engaged in various services like designing, development of new product and computer aided designing and also segmental financials were not available.
- Kirloskar Consultants – as its substantial income was from consultancy fees and also segmental information was not available.
- Dalkia Energy Services – as it was engaged in providing energy cost reduction consulting services for various sectors such as chemical, cement, sugar etc and hence functionally dissimilar.
- Neilsoft Ltd and – as it was engaged in business of selling software products and no segmental information was available.
- Vama Industries Ltd – as it was also engaged in business of product/hardware sales and services and no segmental financials were available.

Terex India Pvt. Ltd. v. DCIT, Cir. 25(1), New Delhi, [TS-512-ITAT-2019(DEL)-TP] ITA No.4791/Del/2015, dated May 30, 2019

92. The Tribunal held that assessee engaged in the business of preparing and developing drawings and designs in the form of customized software which helps in planning and setting up of power plants world-wide as a captive service provider could not be compared to

- Alphageo (India) Ltd- as on perusal of the Annual Report, it was observed that this company was engaged in providing seismic services which included design and preplanning of 2D and 3D surveys, topographic surveys with GPS/RTK, seismic data acquisition in 2D and 3D, seismic data interpretation, seismic sections and well logs into CGM/SEGY/LAS formats, third party quality control for acquisition and processing etc, thus functionally not comparable.The Tribunal further observed that there was a stark

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difference between employee cost to total cost ratio in the case of this company of 7.55% as against 60.35% in case of the assessee.

- Stup Consultants Pvt Ltd- since it was a consultancy firm which, rendered consultancy and project management services for power, transportation, telecommunications, commercial, institutional, recreational and manufacturing facility infrastructure contrary to the assessee.

DCIT vs M/s. Siemens Power Engg Pvt Ltd-TS-306-ITAT-2019(Del)-TP-ITA No 4754/Del/2014 dated 15.04.2019

93. The Tribunal held that assessee engaged in rendering consultancy and other services could not be compared to

- Mitcon Consultancy & Engineering Services Ltd- due to functional dissimilarity, failing revenue filter of 75% and receiving various grants from Government of India affecting the profitability.

- IBI Chemature (Engineering & Consultancy) Ltd – as it was engaged in high end engineering services with the use of specific technologies and huge research and development expenditure along with R&D center. Further, it failed 75% service revenue filter applied by assessee and also due to unavailability of segmental financials

M/s. STEAG Energy Services (I) Pvt Ltd vs ACIT-TS-374-ITAT-2019(Del)-TP-ITA No 835/Del/2016 dated 26.04.2019

94. The Tribunal held that assessee engaged in business of trading in industrial products could not be compared to

- Dynalog (India) Ltd- as it was engaged in the manufacturing and supply of data acquisition caress, educational trainer kits and industrial communication cards and also assembly and supply of industrial computers and workstations.

- Bose Corporation India Pvt Ltd- as it was engaged in trading of high end audio system directly to the consumer whereas the assessee was dealing in the industrial goods as per trade policy. Further, it was observed that the company was in the business of customer sales whereas the assessee was in the business to business sales.

DCIT vs M/s. Mitutoyo South Asia P. Ltd-TS-381-ITAT-2019(Del)-TP-ITA No 364/Del/2016 dated 29.04.2019

95. The Tribunal held that assessee-company engaged in provision of designing engineering and infrastructure development services to its AE could not be compared to

- Bengal SREI, Certification Engineers International Ltd, Pallavan Transport Consultancy Services Limited, RITES LTD and NTPC Electric Supply Company- as they were government companies and their revenue came from government
- Indus Technical and Financial Consultant Ltd- as it was engaged in financial consultancy, failed TPO's own filter of rejection of companies where Revenue was less

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than Rs. 1 crore and since it had diversified sources of income and segmental accounts were not available

- Usha Hydro Dynamics Limited- as its major revenue was from cleaning activities which was not the business of the assessee and further it was engaged in trading business

ACIT v WSP Consultants India Ltd [TS-476-ITAT-2019(DEL)-TP] - ITA No.370/DEL/2016 dated 30.01.2019- BS

96. The Tribunal held that assessee rendering engineering design services could not be compared to :

- Kitco Ltd- as on comparing FAR analysis of this company with that of the assessee it was observed that, functions performed, risks assumed and assets owned by this company were huge and fast as compared to that of assessee who was acting as a sub-contractor for its AE, rendering engineering and design services and was remunerated on cost plus basis.

- Project & Development India Ltd- as services rendered by it were directly to its clients as against on subcontract basis by assessee and was functionally not comparable to the assessee.

- TCE Consulting engineers Ltd as this company was engaged in providing high end engineering consulting services which was not comparable with limited functions performed by assessee.

- Mahindra Consulting Engineers as it had highly technical capabilities of executing infrastructure development projects and was not comparable to that of assessee who was rendering engineering and related services as a sub-contract limited to specific functions as per the requirement of its affiliates.

Fluor Daniel India Pvt Ltd vs ACIT-TS-38-ITAT-2019(DEL)-TP-ITA No 973/Del/2016 dated 17.01.2019

97. The Tribunal held that the assessee engaged in Engineering Design Services could not be compared to

- Certification Engineers International Ltd - as it was majorly involved in government related services and was a group concern of Engineers India Ltd., which was majorly involved in performing government related contracts

- RITES Ltd - as it mostly undertook and managed the contracts provided by Government of India, it also failed the turnover filter since its turnover was 488.33 Crore as against the assessee which was 9.08 Crores.

- REC Power Distribution Company - as it failed the 75% service revenue filter adopted by the TPO since it had consultancy income of 34% of the total revenue and also it mainly managed and undertook contracts provided by Government of India.

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- Ashok Leyland Project Services Ltd - as was functionally dissimilar to the assessee as it was engaged in wind farm development and also it had disposed of its wind energy division on a slump sale, which had affected its profits. Further, Consultancy income earned by it during the year was only Rs. 2.12 crores in comparison to the income from energy charges amounting to Rs 7.30 crores. Also, it followed the project completion method for accounting of its revenue from consultancy services.

- Bengal SREI Infrastructure Development Ltd - as it was primarily engaged in infrastructure project advisory and was involved into infrastructural development for Government of India.
- IBI Chematur (Engineering &Consultancy) Ltd - as it failed the 75% service revenue filter which had been adopted by the TPO. Also information in the financial statements with regard to the different segments of the company was not available
- Mahindra Consulting & Engg. Services Ltd - as it was engaged in providing a variety of services, only one of which was engineering services and segmental information about the same was unavailable. Also it recognized its revenue on percentage completion method, which was different than the method of revenue recognition being followed by the assessee.

- Mitcon Consultancy & Engg Services Ltd - as it had substantial income from vocational training programmes, income from IT training and income from laboratories. It also failed the filter of 75% of service revenue and also received various grants from the Government of India which also affected its profitability.

- TCE Consulting Engineers Ltd - as it failed the upper turnover filter adopted by the assessee of
  Rs.200 crores since turnover of this company was Rs.416.02 crores. Also its brand name had enabled this company to capture major government contracts and other high profile customers. Also this company recognized its revenue on percentage completion method.

- HSCC (India) Ltd - as it was a Government of India Enterprise and the major part of the business was from the Government itself.

DCIT vs Terex India Pvt Ltd [TS-359-ITAT-2019(DEL)-TP] - ITA No. 6775/Del/2015 dated 26-03-2019

98. The Tribunal held that assessee engaged in rendering engineering design and consultancy services to its AE could not be compared to

- Engineers India Ltd, Rites Ltd and WAPCOS Ltd- by relying on co-ordinate bench decision in assessee's own case where in it was held that a government company cannot be treated as comparable since the contracts between the PSU and others are not driven by profit motive alone, but other considerations also weigh in.

Further, the Tribunal held that assessee could be compared to M.N Dastur & Co Pvt Ltd as the Tribunal relying on DRP's finding concluded that upon verifying the annual report of the

comparable company it gave a factual finding that not only the company is functionally similar with assessee but almost 92% of its income was earned from engineering service. Thus, it upheld DRP's decision of including this company in the final list of comparables.

M/s Jacobs Engineering India P. Ltd vs DCIT- TS-519-ITAT-2019(Mum)-TP- IT(TP) No 1964, 1858/Mum/2016 dated 22.02.2019

99. The Tribunal held that assessee engaged in designing and development of chips, integrated circuits and storage components and allied services and captive supplier of the above products to its AEs could not be compared to :

- E Clerx Services Ltd - as it was engaged in data analytics services hence functionally different
- Genesys International Corporation Ltd - as it was engaged in geographical information system services which was different from assessee's functions;

Relying on judgments of Delhi HC in Rampgreen Solutions and Pune Tribunal in Actis Global Services the Tribunal held that a company does not become a good comparable merely because the same is engaged in KPO activity like the assessee ,one has to go into the characteristic of the functions rendered by the comparables.

MACOM Technology Solutions (India) Private Limited (formerly known as 'Applied Micro Circuits India Private Limited') v. DCIT Cir.1(1), Pune, [TS-404-ITAT-2019(PUN)-TP], ITA No.2831/PUN/2016, Dated May 9, 2019

100. The Tribunal held that the assessee engaged in provision ofApplication Engineering Design Servicescould not be compared to :

- Vardaan Projects Ltd as it was rendering services of financial structuring, financial analysis, financial arrangements, etc. and was also engaged in asset valuation for compliance with IFRS and others and the segmental details were not available, though the entire operating revenue earned by assessee was reported under the head 'Income from Engineering Consultancy Services'.
- Cosmic Global Ltd. as it had outsourced its services to vendors and thus was functionally not comparable
- ICRA Online Ltd. as it was exceptional year of performance for the said company and as reported by Directors in their report that KPO division had reported 52.4% growth in operational income over the previous year on account of addition of new processes.

However, it held that the assessee could be compared to CG VAK Software & Exports Ltd.as the designing services provided by the assesse fell within ITeS services and this company was also similarly engaged in ITeS services though in medical field.

Further, it remitted the issue of comparability of Mahindra Consulting Engineers Ltd for verification of assessee's contention that this companywas following different accounting methodi.e. AS-7 i.e. where the revenue is recognized on estimate basis, based on completion of project; on the other hand, the assessee had recognized its revenue on mercantile system of accounting.

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Honeywell Turbo Technologies (India) Pvt Ltd (Legal Successor of Honeywell Turbo (India) Pvt. Ltd.) [TS-670-ITAT-2019(PUN)-TP] - ITA No.377& 378/PUN/2014 dated 24.06.2019

ITES Sector / Software Development Services

101. The Apex Court dismissed assessee's SLP against High Court order which had upheld Tribunal's characterization of research and information services rendered by assessee to its AE as high-end knowledge-based research services (KPO) and had noted that the services rendered by assessee were specialized and required specific skill based analysis and research that was beyond the more rudimentary nature of services rendered by a BPO. Thus, the Court had concluded that it would be incorrect to slot the services provided by the Assessee into that of a BPO, when it was more akin to a KPO.
MC Kinsey Knowledge Centre India Pvt Ltd vs Pr. CIT-TS-49-SC-2019-TP-SLP No 1785/2019 dated 04.02.2019

102. The Apex Court admitted Revenue's SLP in case of the assessee a software developer wherein the High Court had upheld exclusion of 2 comparables namely Tata Elxsi Limited and Thirdware Solutions on grounds of functional dissimilarity. Further the High Court had also dismissed Revenue's appeal with respect to treatment of forex gain/loss following Cashedge India & B.C. Management Services rulings [wherein it was held that forex gain/loss could not be treated as a part of income and made the subject matter of adjustment].
Pr. CIT vs S.T Ericsson India Pvt Ltd-TS-156-SC-2019-TP-SLP(Civil) Diary No 1987/2019 dated 08.02.2019

103. In case of an assessee engaged in calling of localization and software services the Court dismissed Revenue's appeal challenging Tribunal's exclusion of Bodhtree Consulting Ltd as comparable for AY 2010-11. It observed that Tribunal had excluded Bodhtree Consulting on the ground of functional dissimilarity as it was a software product manufacturer as against assessee who was in the calling of localization and software services. Further, the Court relied on CIT vs Tata Power Solar Systems Ltd (2017) taxman.com 326 (Bombay) ruling wherein it was held that assessee was not barred from withdrawing a comparable if the same was included in the TP Study on account of mistake of fact despite being not comparable.
Lionbridge Technologies Pvt Ltd vs.Pr.CIT [TS-176-HC-2019(BOM)-TP] Income Tax Appeal No.1815 of 2016 Dated 18.03.2019

104. The Tribunal held that the assessee engaged in provision of software development services could not be compared to :

- KALS Information Systems Ltd as it was engaged in software development and selling software products.
- eZest Solutions Ltd as it was engaged in providing e-business services, which were in the nature of ITeS unlike assessee's software development services.
- Bodhtree Consulting Ltd as it was engaged in product engineering and content engineering services, which were in the nature of ITES services unlike assessee who was engaged in

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software development services.

Emptoris Technologies India Pvt Ltd [TS-524-HC-2019(BOM)-TP] - INCOME TAX APPEAL NO.105 of 2017 dated 04/06/2019

105. The Court upheld Tribunal's order holding that the assesseeengaged in provision ofsoftware development could not be compared to :

- Bodhtree consulting Ltd as as it was engaged in sales of software products besides software services, it was also engaged in providing data cleaning services to its clients for whom it had developed the software application and it had adopted pricing model of fixed price project method as against assessee's cost plus model
- eZest Solutions Ltd as it was engaged in ITes in the nature of KPO services,
- Kals Information Systems as it was engaged in software development services as well as sale of software products and separate segmental data was unavailable.
- FCS Software Solutions Ltdon ground of abnormally high profit margin for the subject AY at 57.02% as compared to operating profit margins in the preceding financial years of 19.94% to 14.75% and in the succeeding financial year at 37.09%
- Helios and Matheson Information Technology Ltdas it was engaged in functions other than rendering software development services and on account of earning an operating margin of 40.60% which was far more than assessee's earning capacity, being a captive unit assuming limited risks

John Deere India Pvt Ltd [TS-567-HC-2019(BOM)-TP] - INCOME TAX APPEAL NO.63 OF 2017 dated 11.06.2019

106. The Court held that assessee engaged in ITeS could not be compared to Rolta India Ltd & KLJ Systems Ltd after relying on co-ordinate bench ruling in Behr India Limited wherein finding dissimilarities in FAR, these companies were excluded as comparables on grounds of distinct nature of business, functional dissimilarity, size and diversified products. Thus, excluded from the list of comparables.

Pr.CIT vs Dona India Technical Centre Pvt Ltd-TS-315-HC-2019(Bom)-TP-ITA No 308 of 2017 dated 16.04.2019

107. The Court held that assessee engaged in ITeS in medical sector could not be compared to

- Accentia Technologies Ltd- as the company was into development of software products for healthcare and was engaged into diversified activities such as Knowledge Process outsourcing(KPO), Legal process outsourcing(LPO), Data process Outsourcing(DTO), high end software services, thus functionally dissimilar and also segmental data was not available.The Court held that this issue was factual and did not involve a question of law and thus did not call for any interference.
- TCS e-Serve Ltd- on the ground that it provided high end online software solutions unlike the assessee, which provided internet based medical health related services and thus held that this issue was factual and did not involve a question of law and thus did not call for any interference

Pr. CIT vs Inductis (India) Pvt Ltd- TS-88-HC-2019(DEL)-TP-ITA 144/2019 dated 12.02.2019

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108. The Court held that assessee engaged in software development services could not be compared to CAT Technologies Limited as it had revenue from consulting services along with software development and segmental details were not available.
Pr. CIT-7, New Delhi v. Opera Solutions Management Consulting Services Pvt Ltd [TS-452-HC-2019(DEL)-TP], ITA 516/2019 & CM APPL. 24045/2019, May 20, 2019

109. The Court dismissed Revenue's appeal and upheld Tribunal order excluding Genesys International Corporation Ltd (GICL) for benchmarking assessee's provision of business/ knowledge process outsourcing, research, analysis and risk advisory services (ITeS) to AE for AY 2009-10. It observed that Tribunal had excluded GICL on grounds of functional dissimilarity as it 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.
CIT-LTU, NEW Delhi v. EXL SERVICES.COM INDIA PVT. LTD., [TS-437-HC-2019(DEL)-TP], ITA 487/2019, dated May 10, 2019

110. The assessee was engaged in commissioning of software embedded in the equipment supplied by ZTE Telecom to its customers in India and localization, customization and provision of low end software services. The Court dismissed Revenue's appeal and upheld exclusion of Infosys Technologies as comparable by relying on Agnity India Technologies [TS-189-HC-2013(DEL)-TP] who was also in a business similar to that of assessee. The Delhi High Court had held that Infosys Technologies Ltd. could not be treated to be a comparable to the assessee while determining Arm's Length Price of International Transaction. Also, Infosys Technologies operated at full-fledged risk and performed the services of application design, software engineering etc. whereas the assessee was not into end to end development of products or software but was merely engaged in providing software support services.
Pr CIT vs ZTE Telecom India Pvt Ltd [TS-409-HC-2019(P & H HC)] – ITA-388-2018(O&M) dated 19-03-2019

111. The Tribunal remitted issue of characterization of service provided by assessee to AE back to the file of AO for de-novo adjudication and noted that TPO characterized assessee as an "ITES" provider as against assessee's claim that it rendered "Design and Engineering Services" as a contract R&D service provider, which fact had been recorded in the TPO's order. The Tribunal relied on ruling in assessee's own case for previous AY wherein on an identical issue, co-ordinate bench had remitted the issue to AO / TPO for re-examining the entire issue after providing adequate opportunity of being heard and directing assessee to provide all the details which may be required by the TPO. Accordingly, the Tribunal held that since the issue of characterization of services rendered by the assessee had been remanded back to the file of the TPO for fresh examination / adjudication, all other issues raised with respect to the TP Adjustment were rendered academic in nature and did not require adjudication at this stage.
M/s. Continental Automotive Components (India) Pvt Ltd vs DCIT-TS-312-ITAT-2019(Bang)-TP-IT(TP)A No 457,425/Bang/2016 dated 12.04.2019

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112. The Tribunal held that assessee providing software development services to AE for AY 2010-11 could not be compared to :

- Crazy Infotech - as it was in different line of business i.e. sale of computer hardware and ERP software development, IT education and training.
- KALS Information Systems – as it was primarily a software product company and also, it held nearly 26% of its revenue in the form of inventory.
- Spry Resources India – as it was engaged in software consultancy, product sale and also imparted computer training entrepreneur resources, planning and provision of ERP solution to its customers.
- ICRA Techno Analytics – as it was engaged in provision of variety of services like software products, consultancy, engineering services, webservices and diversified into domain of business analytics, KPO services and business process outsourcing and also no segmental data was available.
- FCS Solutions – as it was mainly engaged into E-learning solutions and managed strategic business unit of IT community, education and information management and further allocated more than 20% of time of senior and skilled professional into research, development and support.

Force 10 Networks India Pvt. Ltd. (merged with Dell International Services India Pvt. Ltd), v. DCIT, 3(1)(1), Bengaluru [TS-515-ITAT-2019(Bang)-TP], IT(TP)A No.685/ Bang/ 2015, Dated May 15, 2019

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

- Infosys BPO as it was predominantly engaged in niche areas like banking, insurance, telecom,etc, brand value and acquisition during the year
- BNR Udyog Ltd as it was engaged inmedical transcription, medical billing and coding and not comparable to a company rendering ITeS

Zyme Solutions Pvt. Ltd. [TS-628-ITAT-2019(Bang)-TP] - IT(TP)A No.1661/Bang/2016 dated 28.06.2019

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

- Coral Hubs Ltd. as its business model was sub-contracting and outsourcing
- Mold-Tek Technologies Ltd. as it provided engineering services like civil and structural engineering and GIS services
- Genesys International Corporation Ltd. as it was rendering geographical information systems services
- Accentia Technologies Ltd. on account of extra-ordinary events like merger and demergerwhich had impact on the profit margins of this company

Acusis Software India Pvt Ltd [TS-678-ITAT-2019(Bang)-TP] - IT(TP)A No. 697 & 842/ Bang/2013 dated 28.06.2019

115. The Tribunal held that the assessee engaged in provision ofITeS services could not be compared to :

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- Maple ESolution Ltd. on the ground of unreliability of data
- Vishal Information Technologies Ltd. as it had outsourced a considerable portion of its business and was functionally different.

Sterling Commerce Solutions India Private Ltd (Successor in interest to Telelogic India Pvt Ltd) [TS-680-ITAT-2019(Bang)-TP] - IT(TP)A No.1497/Bang/2010 dated 28.06.2019

116. The Tribunal held that the assessee engaged in provision of software development services could not be compared to :

- KALS Information Systems Limited as it was developing software products and not purely or mainly softwaredevelopment service provider, like the assessee
- Accel Transmatic Ltd as it was not a pure software development service company since it was engaged in the services in the form ofACCEL IT and ACCEL animation services for 2D and 3D animation
- Lucid Software ltd as was also involved in development of software product and full information about the segmentaldetails as to how much was the sale of product and how much was from the services was not available
- Tata Elxsi Ltd. as it was engaged in development ofniche product and development services and the segmental details for revenue salesfor comparing the profit ratiofrom product and services was not available.

Sterling Commerce Solutions India Private Ltd (Successor in interest to Telelogic India Pvt Ltd) [TS-680-ITAT-2019(Bang)-TP] - IT(TP)A No.1497/Bang/2010 dated 28.06.2019

117. The Tribunal held that the assessee engaged in provision ofsoftware development servicescould not be compared to :

- Infosys Ltd as it was was a giant risk taking company engaged in development and sale of software products and also owned intangible assets
- Larsen & Toubro Infotech Ltd as it was a software product company and segmental information on software development services was not available
- Persistent Systems Ltd as it was a software product company and segmental information on SWD services was not available
- Genesys International Corporation Ltd as it was functionally different and owned intangible assets which were peculiar only when the assessee owned software products

It also remanded the issue of comparability of Spry Resources India (for verification of quantum of receivables vis-a-vis the turnover of the company) and Celstream Technologies (for verifying whether the company was only into providing software development services).

VeriSign Services India Pvt Ltd [TS-581-ITAT-2019(Bang)-TP] - IT(TP)A No.3151/Bang/2018dated 14.06.2019

118. The Tribunal held that the assessee (captive service provider) engaged in provision ofsoftware development and technical support could not be compared to :

- Infosys technologies Ltd. as it owned huge intangibles, undertook research and development activities and owned branded/proprietary products whereas the assessee was a contract service provider for its AEs
- KALS Information Systems ltd as was engaged in development of software and software

products since its inception.

- Tata Elxsi (Seg.) Ltd as it owned huge intangibles and was a group concern of TATA, which made it economically different from assessee who undertook limited risks
- Accel Transmatic (Seg.) Ltd as it was functionally dissimilar, in spite of considering the segmental details of sale of products, since there was a huge difference in the products sold by this company with that of assessee
- Megasoft Ltd as there were contradictions in the facts mentioned in the audited financial reports and annual reports vis-à-vis the information collected by TPO under section 133 (6) with respect to the activities carried out by this comparable.

Schneider Electric IT Business India Private Limited (Formerly known as American Power Conversion (India) Private Limited [TS-574-ITAT-2019(Bang)-TP] -IT(TP)A No. 1415/Bang/2010 dated 07.06.2019

119. The Tribunal held that assessee engaged in provision of captive engineering design service (akin to ITeS) to its AEs for AY 2008-09 could not be compared to :

- Coral Hubs Ltd – as Delhi high court in similar instance in case of Rampgreen Solutions P. Ltd had noted that it had sub contracted majority of its ITes works to third party vendors and thus could not be compared with a company providing ITES to its AE on its own.
- Wipro Ltd – as it had significant brand value which had a role in the ability to garner profits and negotiate contracts. Further it was found that coordinate bench in case of Symphony Marketing Solutions India had excluded this company since it owned significant intangibles.

Volvo India Pvt Ltd., v. ACIT LTU, Bangalore [TS-391-ITAT-2019(Bang)-TP], IT(TP)A No.1537/Bang/2012, dated May 08, 2019

120. The Tribunal allowed assessee's cross objection and held that assessee engaged in the business of software development services to its AE for AY 2010-11 could not be compared to :

- Kals Information Systems Ltd - as it was engaged in business of software products. It followed coordinate bench ruling in Cerner Healthcare Solutions P Ltd rendered for AY in consideration wherein it was held that software development company cannot be compared with company engaged in software development products.

It also accepted assessee's claim and held cross objection to be an independent appeal, relying on Kerala HC's City Centre Builders and Developers and Mumbai ITAT's DBS Bank Ltd rulings wherein it was held that assessee's cross appeal has to be treated as an independent appeal and has to be decided irrespective of the fact that Revenue's appeal has been dismissed. ***Solidcore Techsoft Systems [now merged with McAfee Software (India) Pvt. Ltd.,] v. ITO 6(1)(2) Bangalore, [TS-414-ITAT-2019(Bang)- TP], C.O. No.03/Bang/2019, (in IT(TP)A No.288/Bang/2015), dated May 10, 2019***

121. The Tribunal held that assessee engaged in provision of data sourcing services and building databases could not be compared to

- Accentia Technologies Ltd- due to extraordinary event of amalgamation of subsidiaries resulting in growth of revenue and functional dissimilarity since the TPO had considered

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the Medical transcription, billing, coding and software development and implementation which was not comparable to the services provided by the assessee.

- Eclerx Services Ltd- due to functional dissimilarity since it provided industry specialized services like Data Analytics, Operations Management and Audits & Reconciliation services and abnormal profits.

- HCL Comnet Systems & Services Ltd- as it failed the RPT< 15% filter, since it had RPT of 21.52% of sales and was functionally dissimilar since it was engaged in product and services in area of connectivity services, security services and IT infrastructure management services.

- Mold-Tek Technologies Ltd- as it was functionally dissimilar since it provided engineering design services for construction of building by using design tools like CAD/CAM & staad pro by employing highly skilled software engineers and had growth of 204% in sales over previous year thus making abnormal profit.

- Infosys BPO Ltd- as it was a market leader since this company was a giant company with different risk profits and nature of profits and nature of services. Further, it also had significant brand related profits and had significant benefits on account of intangibles.

- Wipro Ltd- since this company was a giant company with different risk profile and nature of services. Further, during the year the company invested significantly in business acquisitions, thus had extraordinary event during the year.

- Bodhtree Consulting Ltd- due to functional dissimilarity since this company was providing software solutions including open and end-to-end web solution, software consultancy, design and development of solution besides data cleansing and software development.

- Informed Technologies Ltd- due to failing the RPT<15% filter.

M/s. HIS Global P Ltd vs DCIT-TS-47-ITAT-2019(Bang)-TP-IT(TP)A No 1171/Bang/2011 dated 18.01.2019

122. The Tribunal dismissed assessee's (software development service provider) miscellaneous petition seeking adjudication of assessee's plea for exclusion of Infosys Ltd. which was argued by assessee but not decided by the Tribunal in first round of appeal. The Tribunal held that since this was not a finding of the Tribunal in the impugned Tribunal order that Infosys Ltd. should be included in the list of comparables, there cannot be any grievance of the assessee in respect of non-deciding of this issue i.e. regarding exclusion of Infosys Ltd. Thus, clarified that for the assessee, the decision of CIT (A) still stood that Infosys Ltd. stood excluded from the list of comparables. Further, noted that Revenue had not filed any Misc Petition for decision on that aspect i.e. exclusion of Infosys Ltd., thus opined that assessee's MP was to be rendered academic.

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M/s. Winphoria Networks India Pvt Ltd vs JCIT-TS-71-ITAT-2019(Bang)-TP-MP No.253/ Bang/ 2017 dated 16.01.2019.

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

- Satyam Computer Services and Infosys Technology Ltd since their turnover was more than 10 times the turnover of the assessee-company
- Bodhtree Consulting Ltd as its turnover was less than 1/10th of assessee's turnover
- 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 and the revenue break up between products and services was not available
- Tata Elxsi Ltd as it was engaged in development of niche product and development services which was not similar to the services rendered by the assessee
- Exensys Software Solutions Ltd due to extraordinary event of amalgamation with Honlool India Ltd during the year
- Thirdware Solutions Pvt. Ltd. as it was engaged in diversified activities including software product as well as trunky project and was in trading of licenses and no separate segmental data was available
- Sankhya Infotech Ltd as it was engaged in the business of development of Software Products & Services and training.

It, however, remanded the issue of comparability of iGate Global Solutions Ltd, Flextronics Software Systems Ltd and L & T Infotech Ltd back to the CIT(A), relying on Jurisdictional HC ruling of Acusis Software India P. Ltd v. ITO [98 taxmann.com 183 (Kar)] wherein it was held that the turnover of comparables should be within 10 times of the assessee's turnover on both side. It was noted that the CIT(A) had excluded the said comparable merely on the basis of turnover filter of 1 to 200 crores though their turnover was less than 10 times assessee's turnover.

It also remanded the issue of comparability of (i) VJIL Consulting Ltd. of back to the CIT(A) to examine if the said company was a product company and if so, then exclude the same and (ii) Foursoft Ltd. for fresh adjudication noting that the same company was excluded in another case for failure to meet RPT filter.

DCIT v EMC Software and Services (India) P Ltd (Formerly known as EMC Data Storage Systems India P. Ltd) [TS-475-ITAT-2019(Bang)-TP] IT(TP)A.875/Bang/2013 & CO.175/Bang/2018 dated 02.01.2019

124. The Tribunal rectified its order inter alia ruling on comparables selection in software development services segment. The Tribunal earlier, while excluding E-Infochips from the list of comparables had relied on Commscope ruling but also referred to Applied Materials ruling (though comparability of this company was not discussed in this ruling). The Revenue presently requested review of the order citing that Tribunal's decision to rely on a case which had not reached finality was perverse/ unacceptable. The Tribunal noted that the Tribunal earlier had relied on Commscope ruling which in turn relied on Saxo India ruling (which was subsequently affirmed by Delhi HC), thus it stated that the order of the Tribunal required

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rectification only to the limited extent that, exclusion of E-Infochips Ltd., from the list of comparable companies had to be on the basis of the decision rendered in the case of Commscope Networks India Pvt. Ltd.,following the decision of the Delhi Bench of the Tribunal in the case of Saxo India Pvt. Ltd., which was upheld by the Hon'ble Delhi High Court. Thus, the Tribunal order was modified to this limited extent.

JCIT vs M/s. Finastra Software Solutions India Pvt Ltd-TS-267-ITAT-2019(Bang)-TP-MP No 336/Bang/2018 dated 11.01.2019

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

- Bodhtree Consulting Ltd- as it was *a software product company and could not be considered as comparable to the assessee, who was merely providing software development services to its AEs.*

- *Infosys Technologies Ltd- as* it owned significant intangibles, had high brand value and was functionally different as it generated huge revenues from software products.

- Persistent Systems Ltd -as it was engaged in software product development and product design services and hence was to be excluded as it could not be considered as comparable to a company which was merely providing software development services to its AEs.

- Tata Elxsi Ltd- as the company was into diverse activities and there were no sub-services break up/information provided in the annual report or the databases.

M/s.Toshiba Software India Pvt Ltd vs DCIT-TS-54-ITAT-2019(Bang)-TP-IT(TP)A No 268/Bang/2014 dated 11.01.2019

126. The Tribunal held that assessee engaged in ITeS could not be compared to

- Acropetal Technologies Ltd- on the ground of functional dissimilarity since it was engaged in engineering design services which only a knowledge processing outsourcing (KPO) would do and not a business processing outsourcing (BPO) by relying on coordinate bench ruling in Global E Business Operations and Symphony Marketing Solutions India Pvt. Ltd.

- Jeevan Scientific Technology Ltd- due to failing the 75% revenue filter applied by the TPO and on account of huge fluctuating margins from F.Y. 2008-09 to 2012-13

DCIT vs M/s. C- Cube Solutions Pvt Ltd- TS-68-ITAT-2019(Bang)-TP-IT(TP)A No 475/Bang/2016 dated 06.02.2016

127. The Tribunal held that assessee-company engaged in provision of software development services to its AE could not be compared to Persistent System Ltd as it was engaged in software product development and product design services, relying on co-ordinate bench ruling in Electronic Arts Games [TS-326-ITAT-2017(HYD)-TP]. It rejected Revenue's plea that since as per the Annual Report the said company did not have any software products, the issue of

comparability should be decided afresh instead of following co-ordinate bench ruling. It held that there was no reason or basis to disregard the said ruling.
Citrix R & D India Pvt Ltd v ACIT [TS-474-ITAT-2019(Bang)-TP] IT (TP) A No. 383/ Bang/ 2017 dated 25.01.2019

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

- Bodhtree Consulting Ltd- as it was a software product company
- Infosys Technologies Ltd- as it owned significant intangibles, has high brand value and generates huge revenue from software products
- Persistent System Ltd- as it was engaged in software product development and product design services
- Tata Elxsi Ltd- as it was engaged in diverse activities and there was no subservices break up/information provided in the annual report or the databases

It also accepted Revenue's contention to exclude FCS Software Solutions Ltd and Thinksoft Global Services Ltd, which were included by the DRP, noting that the assessee had no objection against the same.
Toshiba Software India Private Limited & Ors vs. ACIT & Ors [TS-477-ITAT-2019(Bang)-TP] IT(TP)A No.198 & 268/Bang/2014 dated 11.01.2019- BS

129. The Tribunal held that assessee engaged in rendering software development and ITeS services could not be compared to

- Universal Print Systems Ltd - as it was engaged in diversified segments including pre-press activities of BPO and after relying on the co-ordinate bench decision in case of CGI Information Systems & Management Consultants the Tribunal observed that the profit margins of Pre-Press BPO had to be adjusted considering that other segments supplement the pre-press BPO segment. Thus, it was held that if such adjustment could not be reasonably or accurately made, then this company had to be excluded from the list of comparables.

- Infosys BPO- on account of functional incomparability owing to brand value and Goodwill of Infosys group, significant intangibles, high turnover and extraordinary events i.e. acquisition of an Australia based company thus, impacting the profits.

- TCS e-Service Ltd- due to its brand value, functional dissimilarity due to being engaged in KPO services, and size of operations (being more than 10 times of assessee's turnover).

- Excel Infoways Ltd- as it is divided into ITeS and Infra activities and was functionally not comparable and failed the ITeS revenue filter and employee cost filter.

M/s Societe Generale Global Solution vs DCIT-TS-155-ITAT-2019(Bang)-TP-IT(TP) A No 2297/Bang/2016 dated 22.02.2019

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130. The Tribunal held that assessee company engaged in provision of IT enabled services to its AE could not be compared to

- Accentia Technologies Limited- as it was engaged in software product development and software services, segment data was not available and it possed brand value/ IPRs
- Fortune Infotech Limited- on the grounds of functional dissimilarity, presence of intangibles assets and RPT of more than 25%

It remitted back the comparibility of R Systems International Ltd which was rejected by the TPO on the ground that it had different year ending, holding that so long as the data relating to the financial year was available (which was so in that case), it did matter if the financial year followed was different.

It also remitted back the comparibility of Jeevan Scientific Technology Limited sought to be excluded by the assessee on the ground that it failed service income filter of 75% as well as export earning filter of 75%, for examination.

FNF India Private Limited vs DCIT [TS-518-ITAT-2019(Bang)-TP] IT(TP)A No. 221/Bang/2015 dated 31.01.2019- BS

131. In case of an assessee rendering software development services, the Tribunal remanded all 5 companies (Acropetal, E-Zest, E-Infochips, ICRA Online and Persistent) sought to be excluded and 1 company (Thinksoft Global) sought to be included by assessee, for fresh consideration to TPO. The Tribunal noted that in some cases TPO/DRP did not consider assessee's plea, in some cases adjudicated merely based on filters without evaluating functional comparability and in some other cases, assessee made new grounds for exclusion/ inclusion of comparables before the Tribunal. Thus, remitted the same to the file of TPO for fresh consideration.

M/s. Telsima Communications Pvt Ltd vs DCIT-TS-99-ITAT-2019(Bang)-TP-IT(TP)A No 304/Bang/2016 dated 22.02.2019

132. The Tribunal held that assessee engaged in provision of Business process outsourcing services could not be compared to:

- Accentia Technologies Ltd -as it was engaged in diversified activities of medical transcription, medical coding, billing, receivable management as compared to service of contact centre provided by the assessee which was purely in the nature of call centre.

- E-clerx Services ltd- as it was engaged in diverse activities including analytic service and data process solutions to it's global clients as against assessee providing low-end services to group concerns.

- Infosys BPO Ltd- as during the year it had undergone amalgamation, hence due to extraordinary event, it was excluded as a comparable. Further, it was also noted that Infosys BPO was not engaged in direct BPO but provided management services to BPO's, thus excluded on functional dissimilarity.

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- Cosmic Global Ltd- as it performed entirely different nature of activity i.e medical transcription and consultation services, translation service and Accounts BPO as against assessee's activity of providing contact centre to its AE.

DCIT vs M/s. Brady Company India Pvt Ltd- TS-126-ITAT-2019(Bang)-TP-ITA No 1223/Bang/2018 dated 28.02.2019

133. The Tribunal held that assessee engaged in providing ITeS services to its AE could not be compared to

- Accentia Technologies Ltd- by relying on coordinate bench ruling in Swiss Re Shared Services India Pvt. Ltd. wherein this company was excluded on grounds of functional dissimilarity, high-end medical transcription services, substantial income from coding coming to about 16% of gross receipts, non availability of segmental results and further considering it's sophisticated level of services.
- Acropetal Technologies Ltd- by relying on coordinate bench decision in Swiss Re Shared Services India Pvt. Ltd wherein this company was excluded on grounds of functional dissimilarity since it provided sophisticated set of services involving higher level of skills, rendered engineering design and enterprise solution in infrastructural and health care.

Further, the Tribunal remitted back the comparability of ICRA online Ltd and directed the TPO to verify and exclude this company if the RPT was more than 15% of the total revenue.

Further, the Tribunal also remitted comparability of Jeevan Scientific Technology by directing TPO to examine the same in line with co-ordinate bench ruling in Swiss Re Shared Services wherein it had directed AO/TPO to verify assessee's submission that turnover of BPO segment of this company was less than Rs.1cr, which was the yardstick applied by TPO himself. Thus, directed the TPO to re compute the ALP on above lines.

M/s. Software Paradigms Infotech Pvt Ltd vs ACIT-TS-87-ITAT-2049(Bang)-TP-IT(TP)A No 994/Bang/2016 dated 15.02.2019

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

- Acropetal Technologies- by relying on coordinate bench decision in Applied Materials India Pvt. Ltd where it excluded this company on ground that since income of this company from software development was less than 75% of its total revenue, the basic criteria for comparability of company viz., existence of more than 75% revenue from software development services was absent.
- E-infochips Ltd- by relying on coordinate bench decision in Saxo India Pvt Ltd wherein it was observed that this company earned operating revenue from software development, hardware maintenance, information technology, consultancy etc and was excluded on ground of unavailability of segmental data indicating operating profit from software development services.
- ICRA Techno Analytics Ltd- by relying on coordinate bench decision in Applied Materials India Pvt. Ltd wherein it excluded this company on ground of functional dissimilarity since it was engaged in diversified activities like software development, consultancy engineering services, web development and hosting

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and substantially diversified itself into domain of business analysis and business process outsourcing.

M/s. Software Paradigms Infotech Pvt Ltd vs ACIT-TS-87-ITAT-2049(Bang)-TP-IT(TP)A No 994/Bang/2016 dated 15.02.2019

135. The Tribunal held that assessee engaged in provision of software development services could not be compared to

- Persistent Systems Ltd and L&T Infotech Ltd- as it was into software products and software solutions and no segmental details were available and therefore the profit margin in the software development services segment could not be compared with the assessee's profit margin.

- Akshay Software Technologies Ltd- as the Tribunal observed that DRP excluded the company noting that it was operating in multiple segments including software products, however segmental data of the same was not available. Further, for ERP products, DRP noted that, its annual report referred to support and maintenance and there wasn't any detail about the nature of this activity as to whether the assessee was into software development activities relating to ERP or just offering IT enabled services. Thus, held that when the nature of services were doubtful, it was always better to exclude a company from the list of comparable.

M/s Metric Stream Infotech (India) Pvt Ltd vs DCIT-TS-134-ITAT-2019(Bang)-TP-IT(TP)A No 1418 & 2735/Bang/2017 dated 27.02.2019

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

- Genesys International Corporation Ltd- as it was engaged in rendering mapping and geospatial services and as part of rendering these services it developed software. Further, the presence of intangibles assets (i.e. 10.42 per cent of the total turnover) itself justified that this company was not in the business of software development services.

- Infosys Ltd- as it was a giant risk-taking company engaged in the development and sale of software and intangible assets constituted a significant part of the asset base.

- Larsen & Toubro Infotech Ltd & Persistent Systems Ltd- on grounds of functional dissimilarity as it was a software product company and due to unavailability of segmental details for software development services.

M/s. Sandvine Technologies (India) Pvt Ltd vs DCIT-TS-472-ITAT-2019(Bang)-TP-IT(TP)A No 647/Bang/2017 dated 30.04.2019

137. The Tribunal held that assessee rendering business process outsourcing services in healthcare, insurance, banking and financial services verticals could not be compared to

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- Infosys BPO Ltd- on the basis of functional incomparability since it has the benefit of market value as well as brand value and enjoyed the benefits of scale and market leadership.

- Eclerx Services- on the basis of functional incomparability as it provides complete business solutions in the nature of high end services and the nature and different field of services provided by this company clearly show that it is not functionally comparable with the ITES

- Accentia Technologies Ltd- relying on coordinate bench decision in Tesco Hindustan Service Centre wherein it was held that this company, was not functionally comparable to an assessee rendering ITES.

DCIT vs M/s. Indecomm Global Services India Pvt Ltd.- TS-100-ITAT-2019(Bang)-TP-IT(TP)A No 404/Bang/2015 dated 13.02.2019

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

- Bodhtree Consulting Ltd- as this company was 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, thus functionally not comparable to assessee

- Tata Elxsi Ltd- as this company operated in software development service segment comprising of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment. Further, there was 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.

- Sasken Communication Technologies Ltd- as it was engaged in software development services as well as development of software products and segmental details of cost were unavailable.

- Persistent Systems Ltd- as it was engaged in product development and product design services and no segmental details were available.

- Larsen & Toubro Infotech Ltd- on grounds of high turnover and the fact that 55% of total exports were from onsite services.

- Infosys Ltd- as it owned significant intangibles and had huge revenues from software products.

The Tribunal also held that assessee could be compared to Thinksoft Global Services Ltd & FCS Software Solutions Ltd as the TPO himself in the show cause notices had proposed the two companies for inclusion in the final set of comparables, but had thereafter excluded these

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companies considering the working capital adjustment for both these companies exceeded 4% of profits. There by the Tribunal relying on co-ordinate bench ruling in case of TE Connectivity Global Shared Services wherein it had directed the TPO to include these two companies in the final set of comparables and set aside to the file of the TPO the issue of working out the correct PLI of the final set of comparables by computing and allowing working capital adjustment on actual basis. Thus, the Tribunal in the present case directed to include the companies in final list of comparables for assessee.

DCIT vs M/s. Informatica Business Pvt Ltd-TS-447-ITAT-2019(Bang)-TP-IT(TP)A No 1285/Bang/2014 dated 25.04.2019

139. The Tribunal held that assessee engaged in ITeS could not be compared to

- Infosys BPO Ltd- as this company had an extra-ordinary event of amalgamation. Further, it earned revenue from providing business process management services to other organizations engaged in outsourcing business services thus, this company was not engaged in direct activity of BPO but provided management services to BPOs.

- Accentia Technologies Ltd- as it was engaged in the healthcare activity and providing BPO service in the healthcare sector, that too by providing specific services of medical transcription, medical coding, medical billing etc.

- Cosmic Global Ltd- on grounds of functional dissimilarity noting that this company earned most of its revenue from outsourcing its services of translation work.

- Eclerx Services Ltd- as this company was not comparable with BPO company which was engaged only in low end services of data processing.

DCIT vs M/s. Informatica Business Pvt Ltd-TS-447-ITAT-2019(Bang)-TP-IT(TP)A No 1285/Bang/2014 dated 25.04.2019

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

- Kals Information Systems Ltd & Persistent Systems Ltd- as they were functionally dissimilar as they derived their revenue primarily from software services and software products, and segmental information was not available.

- Bodhtree Consulting Ltd & Tata Elxsi- by relying on co-ordinate bench ruling in case of Infinera India (P) Ltd which in turn relied on Telcordia Technologies India Pvt. Ltd & EMC Data Storage Systems (India) Pvt. Ltd. where this company was rejected holding that it was functionally dissimilar to software development service providers.

- Infosys Ltd- as it was a giant in the area of Software development, and it held intangibles and had brand value and assumed all risks leading to higher profit which rendered it functionally dissimilar to assessee.

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- Sasken Communication Technologies- by relying on co-ordinate bench ruling in case of VM Ware Software India Private Limited wherein it was held that this company was not functionally comparable with the Assessee who was engaged in the business of providing Software Development services to AE.

- Larsen & Toubro Ltd- as related party transaction to sales of this company were more than 15%.

The Tribunal further held that assessee was comparable to FCS Software Solutions Ltd & Thinksoft Global Services Ltd by relying on coordinate bench ruling in case of VMware Software India Pvt Ltd wherein it was held that these two companies were functionally comparable with a company rendering Software Development services.

Schneider Electric IT Business India Pvt Ltd vs JCIT-TS-406-ITAT-2019(Bang)-TP-IT(TP)A No 299,218/Bang/2014 dated 30.04.2019

141. The Tribunal held that assessee engaged in providing IT Enabled services including product support services, software development services, business process outsourcing, catering mainly to mortgage lending industry in USA could not be compared to

- Hartron Communications Ltd- as it was in software development services for the last 8 years and was also involved in intellectual property services. It was found that income from operations were negative and hence, the profit figures for earlier years could not be relied upon. It was observed that it was engaged in real estate activity. Thus, could not be considered as comparable to the assessee's functional profile.

- Capegemini Business Services (India) Ltd- as this company had revenue from business process management services and assurances and compliance services which included operational control, assessments, and also turnover was around Rs.518.19 crores as against the assessee's turnover of Rs.108 crores. The Tribunal further observed assessee's contention that RPT transactions of this company were very much higher and also had widened scope of services in supply chain, procurement and technical publications services and was also engaged in procurement and technical publication services.Thus, directed exclusion of this company noting that it's RPT (82%) did not satisfy assessee's profile.

- Infosys BPO Ltd- as the company was an established player and a market leader and operated as a full-fledged risk bearing entrepreneur having very high brand value and incurring significant selling, marketing & brand building expenses. It was also observed that the company owned significant intangibles in the form of goodwill. Further, this company failed to meet export earning filter of 75% (i.e, 74.06%) as well as upper turnover filter of Rs.200 crores.

M/s. ISG Novasoft Technologies Ltd vs DCIT-TS-373-ITAT-2019(Bang)-TP-IT(TP)A No 42/Bang/2018 dated 29.04.2019

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142. The Tribunal held that assessee engaged in provision of software development services could not be compared to Infosys Ltd, Persistent Systems Ltd & Larsen &Toubro Infotech Ltd after relying on coo-ordinate bench decision in case of CGI Information Systems and Management Consultants, wherein, in turn relying on ruling in case of Agilis Technologies, these companies were excluded on the ground that they were also engaged in provision of software products and segmental details on provision of software development services were not available. Thus, theTribunal observed that like assessee, CGI Information Systems and Management Consultants was also engaged in provision of Software Development services and thusrelying on the same excluded these companies from final list of comparables.
M/s. Sling Media Pvt Ltd vs DCIT-TS-369-ITAT-2019(Bang)-TP-IT(TP)A No 488/Bang/2017 dated 25.04.2019

143. The Tribunal restored the issue of comparables selection to CIT(A) for fresh adjudication for assessee engaged in software development services. The Tribunal noted that the CIT(A) had simply upheld TPO's findings on selection of 26 comparables and failed to address assessee's contentions that the said companies were incomparable by relying on various judicial precedents. Thus, the Tribunal remitted the matter back to CIT(A) to decide the issue on the lines of the decisions.
M/s. Quark Media House India P Ltd vs DCIT- TS-180-ITAT-2019(CHANDI)-TP-ITA No 94/Chd/2017 dated 28.02.2019

144. The Tribunal held that assessee engaged in BPO/data processing services & ITeS could not be compared to

- Eclerx Services Ltd-after relying on HC decision in Rampgreen Solutions Pvt. Ltd wherein relying on Special Bench decision of the Tribunal in case of Maersk Global Centers (India) Pvt. Ltd this company was excluded on ground of functional dissimilarity since it was engaged in providing outsourcing KPO services

- Acropetal Technologies Ltd- after relying on coordinate bench ruling in Flextronics Technologies (India) (P) Ltd wherein this company was excluded on the ground that the engineering design services segment of this company was functionally different and thus was not a good comparable to the assessee rendering ITES.

ITO vs M/s. Omniglobe Information Technologies (I) Pvt Ltd-TS-31-ITAT-2019(Del)-TP-ITA No 1380/Del/2016 dated 15.04.2019

145. The Tribunal held that the assesse engaged in provision of ITES services could not be compared toTCS E-serve Ltd as it was providing both 'transaction processing' and 'technical services' not comparable to data processing services provided by assesse and thus functional dissimilarity.
Keystroke Pro India Pvt Ltd [TS-584-ITAT-2019(DEL)-TP] - ITA NO. 1446/DEL/2016 dated 20.06.2019

146. The Tribunal held that the assessee engaged in provision of software development services could not be compared to :

- TCS Ltd as it was engaged in diversified operations, i.e. IT Infrastructure services, BPO,

ITES, Engineering and Industrial services and was also engaged in sale of equipment and software license with wide client base and had been conferred with numerous awards/recognition. Further, it had income from IT and consultancy services, sale of equipment and software license but segmental data was not available.

- Cat Technologies Ltd as it was engaged in providing both software development and maintenance support services and had income from software development and consulting services however segmental data was unavailable.
- Tata Elxsi Ltd as it was engaged in software development services, product designing services, Innovation Design Engineering, Visual Computing Lab Division (animation and special effects) etc. Further, sincefinancial statements stated that the income from sales of goods was recognized upon passage of risk and rewards of ownership to the goods, it could not be said to be a mere software developer.
- • Thirdware Solutions Ltd as it derived income from sales of licences, sale of software services, export from SEZ unit, export from STPUI unit and subscriptions but segmental information was unavailable.
- • Infosys Ltd as it had high turnover and huge intangibles while assessee being a captive service provider providing services exclusively to its AEs on cost plus basis had minimum risk and absolutely no intangibles. Further, it provided diversified services like providing end-to-end business solutions that leverage technology thereby enabling clients to enhance business performance and had income from software services and product of which segmental information was not available.

Qualcomm India Pvt. Ltd [TS-522-ITAT-2019(DEL)-TP] - ITA No. 1810/Del/2014 dated 03/06/2019

147. The Tribunal held that the assessee engaged in provision of software development services could not be compared to :

- Infosys Ltd as it owned brands and substantial intangible assets and alos since it generated substantial revenue from sale of its own product as against assessee who was only providing software development services
- Larsen & Toubro Infotech Ltd as it was engaged in business of software product and segmental data was not available
- Mindtree Ltd as it was engaged in development and sale of software product and owned patents being intangible assets whereas the assessee did not own any patents. Also, it during year the company hadacquired 100% equity shares of Mind Tree Wireless Pvt. Ltd and thus has extraordinary event.
- E-zest solutiuons Ltd as it carried out diversified and value-based activities and further theactivities carried out by this company gaverise to a lotof intellectual property rights/intangible assets.
- Persistent systems Ltd since as per the Profit & Loss Account the company received revenue from sale of software & products but there was no segmental result for the same
- Zylog systems Ltd as it had earned revenue from software services as well as softweare products whereas there was no segmental information available. Further, extraordinaryevent had occurred during the year as the company had acquired M/s. Brainhunter Inc., Canada.

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Aircom International (India) Pvt Ltd [TS-800-ITAT-2019(DEL)-TP] – ITA No. 1956/Del/2015&7682/Del/2017 dated 20/06/2019

148. The Tribunal held that the assessee engaged in provision of development of computers software and related servicescould not be compared to :

- E-infochip Ltd as it was engaged in manufacturing and trading of printed circuitelectronic boards and product design services.
- Infosys Ltd on the ground of being,a giant company with high risk profile.
- Thirdware solutions Ltd as it was not confronted to the assessee and thus was excluded on the grounds of the principles of natural justice
- Thinksoft global services Ltd as it was engaged in software validation and verification servicesto banking and financial services industries which were dissimilar to the functions performed by the assessee

Open Solutions Software Services Pvt Ltd [TS-644-ITAT-2019(DEL)-TP] - ITA No.5839&6397/Del/2015 dated 14.06.2019

149. The Tribunal held that Assessee engaged in providing chip designing software development services to its AE could not be compared to

- Mindtree Ltd- as the thrust of the company was on R&D activities and earning from mobility apps in retail /CPG and transport and logistics.

- Acropetal Technologies- as the Tribunal noted that there was a very wide variation in the assets owned by this company and by the assessee and further the profit results of this comparable company during the year under consideration were unreliable for comparing with assessee considering an extraordinary transaction, viz, profit during the year under consideration had been affected by heavy bad debt.

The Tribunal further included Thirdware Solutions Ltd as comparable and noted that the operation of this company comprised of software development, implementation and support services and revenue from different geographical segment had also been reported. Thus, the Tribunal directed inclusion of this company on account of availability of no other segment other than software development, implementation and support services.

NXP India Pvt Ltd vs ACIT- TS-371-ITAT-2019(DEL)-TP- ITA No 5140/Del/2018 dated 28.02.2019

150. The Tribunal held that assessee a captive service provider, engaged in software development being remunerated on a cost plus basis, without incurring any R &D or owning any brand or proprietary products for AY 2011-12 could not be compared to :

- Thirdware Solutions Ltd – as it was engaged in implementation and consulting services of software based on ERP and business intelligence.
- Wipro Technology Services – as it was engaged in providing software related support services, solely to Citi group entities globally.

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- E-Zest Solutions Ltd – as it was engaged in diverse services and sale of software products hence was functionally dissimilar and also segmental details were not available.
- Tata Elxsi Ltd – as it was engaged in high end services and was excluded by Co-ordinate bench of the Tribunal in assessee's own case for AY 2009-10 and AY 2010-11.
- Acropetal Technologies Ltd – as it was engaged in diversified operations such as provision of engineering design services, information life cycle, IT infrastructure management, cloud services enterprise software solutions, etc. hence functionally dissimilar.
- E-infochips Limited – as it operated as a full fledged risk taking entrepreneur and had revenue from software services, hardware and consultancy charges and segmental details were not available. Also, it had incurred huge expenditure on account of Research & Development activities.
- Sankhya Infotech Limited – as it was engaged in end to end simulation solutions which were customized to the end user and the company had developed customizable products for imparting training which could cater to any industry and hence was functionally different. Also, it had incurred huge expenditure on account of Research & Development activities.
- Larsen and Toubro Infotech Limited – as it operated as a full-fledged risk taking entrepreneur and held intangible assets such as software business right amounting to Rs.103.83 crore. Also it had acquired a transfer agency business for 62.3 million CA$ (Canadian Dollars) during the year.
- Persistent Systems and Solutions Ltd – as it was a part of the Special Economic Zone Scheme in India and had abnormal profit during the year since its turnover had increased by 184% and the net profit had increased by 250% for the year ending 2011. It had also incurred huge expenditure on account of Research &Development activities.
- Persistent Systems Ltd – as it was a full fledged risk taking entrepreneur holding huge intangibles and it had acquired OPD business of Infospectrum India Pvt. Ltd. and also had entered into JV with Sprint Nextel Corporation which had benefitted the company to grow its operations.
- Sasken Communication Technologies Ltd – as it was a full-fledged risk taking entrepreneur and it had invested in R&D during the year in multimedia wireless and broadband and mobile value added services, hence functionally dissimilar.

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

- CAT Technologies Ltd - as it was functionally similar and was considered as comparable in assessee's own case for AY 2009-10 which was upheld by High Court. Thinksoft Global Services Ltd - as it was functionally similar and was considered as comparable by TPO in assessee's own case for AY 2010-11.

ST-Ericcson India Pvt. Ltd., v. ACIT, Circle-24(2), New Delhi. [TS-530-ITAT-2019(DEL)-TP], ITA No.6247/Del/2015, dated May 28, 2019

151. The Tribunal held that the assessee engaged in the provision of ITes – back office support services with its own human resource to AEs for AY 2012-13 could not be compared to :

- E-Clerx Services – as it was a KPO company outsourcing its substantial work to third parties
- TCS E-Serve – as it had high brand value as held in the case of B.C.Management Services [TS-948-HC-2017(DEL)-TP]

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- Infosys BPO – as it was providing high end integrated services for business platforms, customer services outsourcing, finance and accounting, etc. and had huge turnover and brand value.

Cadence Designs Systems Pvt. Ltd. v. ACIT Cir.5(2), New Delhi, [TS-504-ITAT-2019(DEL)-TP], ITA No. 86/Del/2017, dated May 29, 2019

152. The Tribunal held that assessee providing software development service to AEs for AY 2009-10 could not be compared to :

- Infosys Technologies – relying on jurisdictional HC ruling in Agnity India Technologies wherein it was excluded on account of being a giant company in the area of software development with high risk profile, leading to higher profit thus being incomparable to captive unit having low risk. It also observed that Infosys was incomparable to the assessee, a captive software development service provider being a non-risk bearing entity with no ownership of intangible, any brand value nor any expenditure in R&D activities.

Citi Financial Consumer Finance India Ltd., v. ITO, Ward 6 (2), New Delhi, [TS-481-ITAT-2019(DEL)-TP], ITA No.2638/Del/2016, Dated May 23, 2019

153. The Tribunal held that assessee engaged in software development and maintenance and data processing services for AY 2010-11 could not be compared to

- Accentia technology Ltd – as it was engaged in medical transcription.
- Infosys BPO Ltd - owing to its brand value and its impact on profitability,
- E-Clerx Services Ltd - it was engaged in rendering KPO services.
- TCS E Serve International & TCS E Serve Ltd - owing to functional dissimilarity, ownership of intangibles and use of 'Tata' brand which benefitted these companies.

Morningstar India Pvt Ltd v. DCIT Cir.17(1), Delhi, [TS-386-ITAT-2019(DEL)-TP] ITA No. 1520/Del/2015, dated May 06, 2019

154. The Tribunal held that assessee engaged in providing software development, content support and back-office support services for AY 2011-12 and 2012-13 could not be compared to :

- Infosys BPO - as it was backed by the Infosys brand which impacted it's profitability. Also, it's functional profile and assets utilised were not similar to assessee company.
- TCS E serve limited – as it had made payment towards Tata Brand equity contribution due to which there was an impact on its profitability. Accentia Technologies – as it was into healthcare and receivable management services involving medical transcription, medical coding, billing and receivables management (collections)

Further, it rejected assessee's contention of excluding a comparable at the threshold itself based on judicial precedents without looking at the functional identity of assessee vis a vis comparable relying on Delhi HC ruling in Microelectronics. It stated that it was of utmost importance that whenever judicial precedent is relied upon, to first show that there is a complete identity of functionality between the assessee in whose case judicial precedent is to be relied upon and, in case of the assessee in whose case the judicial precedent was decided. Further, it held that before relying upon any judicial precedent for exclusion or inclusion, one has to cross

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the threshold of rule 10B(2) of IT Rules, to ensure that the conditions specified therein are similar.

Thus, with respect to assessee's plea on exclusion of E- Clerx services Ltd it remitted the issue back to the file of AO/TPO with a direction to issue notice u/s 133(6) to ascertain whether the sum spent on 'contract for services' debited under the general and administration expenses was relating to outsourcing services, and exclude the company only if found to be engaged in outsourcing.

Also, it setted aside CG Vak software and exports Ltd (seg), R systems international Ltd (seg) and Coral Hubs Ltd. to file of TPO to consider them for comparability analysis if they were found to be functionally comparable.

Kaplan India Pvt Ltd. v. ITO, Ward 14(2), [TS-417-ITAT-2019(DEL)-TP], ITA No.1025/Del/2016, dated May 10, 2019

155. The Tribunal held that assessee inter alia engaged in contract software development services for AY 2013-14 could not be compared to :

- Infosys Ltd – as it was engaged in dealing software products and was earning income from software licensing and there were no segmental results for income from service and sale of products. In absence of any segmental result for software development services, the company cannot be compared at entity level with the contract software development segment of the assessee.
- Larson and Toubro (Infotech) Ltd – as it was also engaged in the sale of products and segmental data was not available.
- Mindtree Ltd – as it was also engaged in Consulting and Implementation services and segmental data was not available.
- Persistent Systems Ltd – as it was engaged in development of the software products and cannot be compared with the assessee who was engaged in contract software development services.

Alcatel-Lucent India Ltd., v. DCIT, Special Range-1, New Delhi, [TS-429-ITAT-2019(DEL)-TP], dated May 9, 2019

156. The Tribunal held that assessee engaged in provision of ITES and software development services for AY 2014-15 could not be compared to :

- Infosys BPO – as it had brand backing of the Infosys group which impacted the profitability and also it had incurred huge expenditure on brand building and advertisement,
- Infosys Technologies - as it was a giant company with huge turnover and expenditure on R&D and also it owned significant intangibles.

Agilent Technologies (International) Pvt. Ltd.v. ACIT Cir. I(l) Gurgaon, [TS-393-ITAT-2019(DEL)-TP], ITA No. 4191/Del/2018, dated May 06, 2019

157. The Tribunal held that assessee engaged in rendering back-office information technology enabled services and related services to its AE and third party customers in India for AY 2010-11 and AY 2011-12 could not be compared to :

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- Accentia Technologies as it was providing healthcare and receivable management services involving medical transcription, medical coding, billing and receivables management
- Infosys BPO Ltd – as it incurred huge expenditure on brand building and was part of Infosys group
- TCS E-Serve International Ltd. and TCS E-Serve Ltd – as these companies belonged to the TATA group and had paid huge contribution for the Tata brand.
- E-Clerx Services Ltd - being KPO, as held in Delhi HC decision in Rampgreen Solutions.

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

- E4e Healthcare Business Services – as it was functionally comparable and engaged in outsourcing services like assessee.

Black Rock Services India Private Limited v. ITO, Phase-5, Gurgaon, [TS-394-ITAT-2019(DEL)-TP], ITA No. 1671/Del/2015, ITA No. 441/Del/2016, dated May 06, 2019

158. The Tribunal held that a captive entity engaged in software development and maintenance services to its AE could not be compared to

- Sonata Software Ltd-as it had related party transactions more than 50% of sales and hence did not pass the related party filter applied by TPO.

- E-Infochips Banglore Ltd-as it was engaged in both IT and IT-enabled services, different from assessee, being a captive service provider and no segmental information was available regarding the company.

- Infinite Data Systems Pvt Ltd- as it was engaged in a wide variety of services including software technical consultancy services etc., and hence, functionally different from assessee being a captive software development service provider. Further, segmental information was also not available in respect of the Company.

- Infosys Ltd- as it had income from sale of software products and segmental information to determine margin from software development services was not available in the financials. Further, Infosys Ltd. had huge brand value impacting its margin and scale of operations.

Kaplan India Pvt. Ltd vs ITO-TS-304-ITAT-2019(Del)-TP-ITA No 1481/Del/2015 dated 02.04.2019

159. The Tribunal held that assessee an ITeS Provider could not be compared to TCS Eserve Ltd as being a subsidiary of Tata Consultancy Services Ltd, it had an inherent element of very high brand value associated with it, thereby affecting its profit margins. Further, TCS had a huge employee cost base and turnover base which also affected the PLI and TCS-E Serve was engaged in transaction processing and technical services including software testing, verification and validation for which no segmental bifurcation was available.

M/s. Integron India Pvt Ltd vs DCIT-TS-258-ITAT-2019(Del)-TP-ITA No 1173/Del/2016 dated 02.04.2019

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160. The Tribunal held that assessee engaged as a captive business process outsourcing unit focusing on providing insurance claims processing services to its AE could not be compared to

- Eclerx Services Ltd- as it was providing KPO services unlike assessee which was into low end ITeS services and the Tribunal held that low end BPO service provider could not be compared with the knowledge process outsourcing unit.

- ICRA Techno Analytics Ltd- as it was not engaged in the business of business analytics and was also not having its own software as against the assessee company who providing overall business operational solution to its globally spread client base by using its own internally developed and customized software and processes.

ITO vs MD Everywhere (India)Pvt Ltd.- TS-529-ITAT-2019(Del)-TP- ITA No 323/Del/2016 dated 08.02.2019

161. The Tribunal held that assessee engaged in Software development services could not be compared to

- Helios and Matheson Information Technology Ltd - as it was primarily engaged in development and sale of software products which cannot be compared with a software service provider relying on PTC Software (I) Pvt Ltd [TS-788- HC-2016(BOM)-TP]
- Sasken Communication Technologies Ltd - as it undertook significant merger and acquisition activity relying on Global Logic India Pvt Ltd (ITA 5809/Delhi/2011)
- TATA ELXSI Ltd - as it was engaged in development and sale of niche software products and also exploited the TATA brand relying on Steria India Ltd (Earlier known as Xansa (India) Ltd)[TS-229-HC- 2018(DEL)-TP]

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

- Lanco Global Systems Ltd - as from perusal of its annual report it was evident that it was engaged in the activities similar to that of assessee.

  The Tribunal remitted the selection of PSI Data Systems sought to be included by assessee directing the TPO to include the same if the RPT was less than 25% as claimed by assessee.
  It also directed the TPO/AO to re-compute operating profit margins of R.Systems & Geometric Software Solutions (comparables) by including provision for doubtful debts as an item of operating expenditure relying on Sony India ruling [114 ITD 448 (Del)], treating royalty payments as operating if found to be a routine expenditure of the company. However, it held that provision for advances was not an item of operating expenditure as assessee could not prove that advances were not made for purchase of capital asset or for any other non-business purpose

ST Microelectronics Pvt Ltd vs Addl CIT [TS-305-ITAT-2019(DEL)-TP] - ITA No. 4888/ Del/2011 dated 19-03-2019

162. The Tribunal held that the assessee engaged the business of providing software development and maintenance services could not be compared to

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- Avani Cincom Technologies Limited - as the company earned revenue from internally developed software product

- Helios & Matheson Limited - as it also earned income from ITES activities and in the absence of segmental information it could not be compared to a company which was purely involved in SDS only. Also it focused more on global brand building which had an impact on Margin earned. It also failed the employee cost filter of 25% as employee cost was only 1.07% of sales and further its FAR was totally different.

- Ishir Infotech Limited - as it failed the employee cost filter and its FAR was different.
- Megasoft Limited - as it was also engaged in the sale of software products and further impact of extraordinary event of amalgamation was also not possible to be quantified and adjusted.
- Tata Elxsi Ltd as it also included Design services including hardware design under SDS Segment and hence was not comparable to simple SDS provider.

Further the Tribunal restored the issue of assessee's plea of including Indium Software (India) Limited and VMF Softech back to the file of TPO/AO for fresh consideration owing to their exclusion by DRP without citing any reasons.

Kaplan India Pvt Ltd vs ACIT [TS-303-ITAT-2019(DEL)-TP] ITA No. 2907/Del/2014 dated 26-03-2019

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

- Chakkilam Infotech Ltd- as it was engaged in software testing and it failed the export filter of 75%.
- Bodhtree Consulting Ltd- as it was a software product company
- Infosys Ltd- on ground of high turnover, substantial IPR, huge expenditure for research and development and huge revenue from software products
- Tata Elxsi Ltd- as its software development services comprised of embedded product design, industrial design and engineering services and visual computing labs which were niche and the company in response to notice u/s.133 had itself mentioned it could not be compared to a software development company due to its complex nature
- Persistent System Ltd- as it was engaged in sale of software products and software development services and no segmental information was available.
- L&T Infotech Ltd- as its turnover was Rs.2200 crores and its revenue from onsite model was 55% as against asessee's turnover of Rs.33 crores and its revenues comprised mainly from offshore business model.

Trianz Holdings Pvt Limited vs DCIT [TS-104-ITAT-2019(Del)-TP] IT (TP)A.No. 199/Bang./2014 dated 25.01.2019-

164. The Tribunal held that assessee engaged in rendering e-learning and courseware content development services could not be compared to

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- Infosys Technologies Ltd- as this company was excluded by co-ordinate bench in assessee's own case for previous AY following the Delhi HC's decision in Agnity India Technologies on the ground that this was a giant company in terms of risk profile, nature of services, number of employees, ownership of its branded products and brand related profits and having huge turnover as compared to assessee's turnover (which was 1043 times of the turnover of the assessee).

- Acropetal Technologies Ltd- as this company was also engaged in sale of software products. Thus, being functionally dissimilar to assessee, engaged in undertaking software development relating to presentation of course material by way of including animation, graphics and audio training aids etc.

- E-infochips Ltd- due to absence of segmental data indicating operating profit from software development services.

- Wipro Technology Solutions Ltd- due to functional dissimilarity, insufficient segmental information and significant related party transactions.

- Sasken Communication Technologies- due to functional dissimilarity since it was engaged in sale of software products and offered IP led products in multimedia, and android software platform and dealt in products as well as services and segmental financials were not available.

Element K India Pvt Ltd vs ITO-TS-74-ITAT-2019(DEL)-TP-ITA No 6001/Del/2015 dated 28.01.2019

165. The Tribunal held that assessee company engaged in provision of customized e-learning modules and IT enabled service to its parent company at Singapore could not be compared to

- Accelya Kale Solutions Ltd- as it was engaged in software package and service, was full risk bearing company and had incurred huge R&D expenditure
- L&T Infotech- as it was engaged in ITES, software development and engineering unlike assessee's services, had huge asset base, incurred huge advertisement expenditure and was full risk bearing company
- Mindtree Ltd- as it was engaged in diversified business activity and although the TPO had taken segmental revenue, allocation of assets had not been considered, had huge asset base, huge and different geographic market and had acquired a listed company
- Persistent Systems Ltd- as it was engaged in product engineering, technology consulting and IP-led business, had incurred R&D expenses and had huge asset base
- R.S. Software (India) Ltd- as it was an e-payments software company which was high end futuristic business and had huge asset base
- Sasken Communication Technologies Ltd- as it was a high end company making satellite phones, had huge asset base including 36 patents (and 31 were under grant) and had huge geographic markets
- Sonata Software- as it had three large subsidiaries including one in Germany and was one of the top ten players in R&D having huge asset base

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- Tata Elxsi (Segment)- as it was a specialized embedded software development company and was in complex segment which could not be compared with that of the assessee company, had incurred huge advertisement and R & D expenditure and had huge asset base
- Zylog Systems Ltd- as it was a high end full risk bearing company having eight subsidiaries, had acquired a number of companies during the year, had a huge asset base and its geographical market consisted of 80 countries

Infinite Data System Pvt. Ltd- as it earned revenue from technical support and infrastructure management services, was a full-fledged risk bearing company and the turnover had jumped more than 900%

- E-Zest Solutions- as it was engaged in sale and development of software and had special expertise in emerging technologies such as cloud, SAS and business intelligence, etc. and it has stock
- Thirdware Solutions- as it had diversified income sources and was engaged in implementation and customer service which included training, customized development and help desk services for ERP Software and distribution of software products of the company Quad Inc and Hyperion solutions Corporation.
- CTIL- as it was engaged in technical/vocational higher education which was different from the case of the assessee, had revenue from software development, had shown 166% growth in revenue and 126% in net profit due to acquisition of many subsidiaries, was high risk bearing company, had incurred huge R&D expenses and had high scale of operation
- e-Infochips- as it was a high risk bearing company and its geographical market was different from that of assessee.

However, the Tribunal included Sankhya Infotech which was sought to be excluded by the assessee on account of non-satisfaction of RPT filter, holding that the same could not be discerned from the details given.

Knowledge Platform India Pvt Ltd v DCIT [TS-479-ITAT-2019(DEL)-TP] ITA No.1333/Del/2015 dated 29.01.2019

166. The Tribunal held that assessee engaged in software development service provider could not be compared to

- Persistent Systems Ltd- as the Tribunal relied on the coordinate bench decision in assessee's own case wherein the Tribunal had accepted Assessee's arguement on the exclusion of it's own comparable i.e. Persistent Systems on the ground that income of Persistent was from sale of both software services and products with no of segmental financials.

- Tata Elxsi Ltd- on the basis of functional dissimilarity, ownership of IP (intangibles), presence of four diverse business segments and non-availability of segmental data of two units.

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- E-infochips- on the basis of functional dissimilarity i.e. engagement in diverse segments like product and semi-conductor engineering services, further it also owned huge intangibles and non-availability of segmental financials.

- Infinite Data Systems Pvt Ltd- on the basis of functional dis similarity as it provided solutions encompassing technical consulting, design and development of software maintenance and system integration.

- Zylog Systems Ltd -on account of diversified operations i.e. product engineering, product lifecycle management solutions and further it owned substantial brand value, owned huge intangibles assets having significant AMP spend to the tune of 9.1% of operating revenue and conducted in-house R&D activities.

M/s. Mentor Graphics India Pvt Ltd vs DCIT- TS-408-ITAT-2019(DEL)-TP-ITA No 1883/DEL/2015 dated 26.02.2019

167. The Tribunal held that assessee engaged in provision of contract software development services could not be compared to

- Infosys Technology Ltd- as this company was engaged in earning revenue from Licensing of software products and that the extent of profit from software products could not be separated because of the merged expenses and also as there was no separate profit available for software development segment.

- Persistent Systems Ltd- as this company was engaged in SDS as well as sale of software products and product revenue amounted to 7.2% of the total revenue and no segmental information was provided by the company in respect of software services, thus was held to be not comparable.

- R.S. Software (India) Ltd- as this company was involved in R&D activities for SDS in the present AY whereas the assessee was not involved in R&D activities.

- Cignity Technologies Ltd & Sasken Communication Technologies- as these companies were involved in R&D activities for SDS in the present AY unlike assessee.

The Tribunal further held that assessee could be compared to Mindtree Ltd as all the parameters, namely, rendering of R&D software services and Product engineering services to its customers leading to the creation of patents, made this company fully comparable to the extent it earned revenues from IT services and Product engineering services, for which segmental information was available.

M/s. Microsoft India (R&D) Pvt Ltd vs DCIT-TS-133-ITAT-2019(Del)-TP-ITA No 507/Del/2017 dated 21.01.2019

168. The Tribunal held that assessee engaged in provision of software development services could not be compared to

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- Think Soft Global Services Ltd- as it was engaged in software testing on time and material contracts and hence not comparable to software development performed by assessee.

- L&T Infotech Ltd, Sasken Communication Technologies Ltd, Persistent Systems Ltd, Space Computers and Systems Ltd- as companies with revenues less than 75% from software development services would be ideal to be excluded, as economic circumstances of such companies would be different, further the same were also excluded due to revenue filter of 1crores to 200 crores.

- Melstar Information Tehnologies Ltd and Objectone Information Systems Ltd- as the Tribunal set a range of 1 crore to 200 crores for turnover filter and opined that companies with revenues less than 75% from software development services would be ideal to be excluded.

Further, the Tribunal remitted Kalas Information Systems and Laser Information Systems as the Tribunal noted that functional comparibility, assets owned, and risk assumed was not been carried out for these companies vis-à-vis the assessee by TPO. Thus, it directed TPO to undertake comparibility analysis as per rule 10 D (2) for finalising comparables for determining ALP of international transaction and also directed the TPO to carry out proper FAR analysis in respect of above.

Contata Solutions Pvt Ltd vs ITO-TS-50-ITAT-2019(Del)-TP-ITA No 1565/Del/2015 dated 15.01.2019

169. The Tribunal held that assessee a captive software developer for its AE in telecom industry could not be compared to

- Bodhtree Consulting Ltd- as it being a software solutions company which is engaged in providing open and end-to-end web solutions, software consultancy, design and development of solutions, using the latest technologies.

- Cat Technologies Ltd- as it was dealing in medical transcription, training software development and consultancy services and that software development and consulting services were clubbed together, and no separate credentials were available.

- E-Infochips Ltd- as it was engaged in software development and IT enabled services, and both the segments were clubbed under the heading ‘income from software services’ and no separate segmental information was available.

- FCS Software Solutions ltd- as this company was engaged in a diversified field deriving revenues from different sources, and the functional segmental information in respect of revenue and cost was not available, and the information relating to the geographical segmentation was not at all helpful for comparison of this company with the assessee.

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- Goldstone Technologies Ltd- as during the relevant year the company had undergone exceptional circumstances as it had acquired its wholly owned subsidiary namely, Staytop Systems Inc, USA and acquired 51% stake in 4G Informatics Private Limited.

- Helios & Matheson Information Technology Ltd- as it was engaged into providing end-to-end services in the healthcare sector and also into the sale of software which was quite different from the software services rendered by the assessee to its AEs.

- iGate Global Solutions Ltd due to non-availability of the segmental information coupled with the fact that that the company had an exceptional event of operations(amalgamation)

- Infosys Technologies Ltd- due to diversified activities of business, its deployment of capital resources and presence of brand name.

- Kals Information System Ltd- as co-ordinate bench in earlier years had found that the software segment of this company also included revenues from software and training.

- LGS Global Ltd- due to vast functional diversity of this company coupled with occurrence of exceptional event during the year (merger with Lanco Global System Inc)

- Larsen & Toubro Infotech Ltd- as this company was a corporate giant and was into the manufacturing and product engineering services, besides also dealing with banking, financial services, insurance, energy and petrochemicals. Further, it was also found that segmental reporting of revenues of the company were on the basis of geographical location of the customers, and not on the functional segments, thus held incomparable.

- Mindtree Ltd-due to functional dissimilarity coupled with the extraordinary event of acquisition of equity shares of TES PV & Projects Solutions Pvt Ltd**.**

- Persistent Systems Ltd- due to functional dissimilarity coupled with the fact of non availability of the segmental information.
- Quintegra Solutions Ltd- due to extra ordinary event of acquisition of copyrights.

- R Systems International- as on perusal of annual report, it was found that this company was not a pure software service provider but was engaged in development and sale of products.

- Tata Elxsi Ltd- as the co-ordinate bench had excluded this comparable for previous AY in assessee's case holding that the company was developing hardware and

software for embedded products, such as, multimedia and other electronics etc and was also making some programs developing technology in the form of intellectual property.

- Indium Software India Ltd- as it was a leading software testing/QA services company focusing on independent objective and highly specialized in software testing whose revenue was bundled up for both software services and training, besides sales of software and other income. Further, no separate financials in the lines of functional segments of software services and training were available. Thus, the Tribunal held that software testing was only a part of software development in which the assessee was engaged, and software testing could not be compared to the whole segment of development of software.

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

Softsol India Ltd- as the company was deriving income only from software exports and there were no separate reportable segments. Even the Profit and Loss Account showed that other than the other income, the company was deriving income only from software exports. Thus, there was no material from record to prove that this

- company had actually been engaged in the activities like business of Software Products, Software Development, Training Services or manufacture of vide range of products or that it provided end to end business solutions. Thus, the Tribunal held that it was difficult to find that this company was functionally different from the assessee or that it was not a good comparable for want of any segmental information or related party information.

M/s. Nokia Siemens Networks India vs ACIT-TS-77-ITAT-2019(Del)-TP-ITA No 333/Del/2013 dated 16.02.2019

170. The Tribunal held that the software segment of the assessee engaged in business of providing liaison, technical support and maintenance services to its associated enterprises (AE) could not be compared to

- Thirdware solutions - as it was engaged in sale of licences and software services and segmental data was unavailable.
- L&T Infotech - as it failed to meet related party filter

Further the Tribunal also allowed the benefit of working capital adjustment to assessee, stating that assessee's claim could not be rejected on the ground that the it was in the service industry.

Comverse Kenan India Pvt Ltd [Known as CSG Systems India Pvt Ltd] vs. ACIT [TS-159-ITAT-2019(DEL)-TP] ITA No. 2461/DEL/2011 dated 11.03.2019

171. The Tribunal held that assessee engaged in provision of span technology consulting, application services, systems integration, software development, maintenance, reengineering and independent testing services could not be compared to

- Avani Cincom Technologies Ltd- on grounds of being engaged into software product development and absence of segmental details

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- Infosys Technologies Ltd- on various factors such as its size, turnover, brand-value, scale of operation, diversified activities and owning of intangibles.

- Persistent Systems- on ground of functional dissimilarity as it was engaged in development and product design services and also due to absence of segmental information.

- Quintegra Solutions Ltd- as it was engaged in proprietary software products, owned its own intangibles and was not purely a software development service provider such as assessee.

Further, the Tribunal held that assessee could be compared to

- Softsol India Ltd- as the Tribunal held that when the comparables were more, the RPT filter was to be adopted at minimum level whereas when the comparables are less, the RPT % were fixed liberally. Further, out of 19 comparables selected by the TPO, assessee accepted only 7 and balance was objected, thus the Tribunal stated that the restricted atmosphere of selection of comparables, the % age should be 25% not 15%.Thus as the RPT of Softsol was 18.3%, the same was included in the list of comparables.

- Celestial Bio Labs Ltd- as this company offered several services to its AEs like the assessee and that since it was determining ALP based on TNMM, the Tribunal concluded that the average margin of all the several activities carried on by the assessee would be considered and held that on compartmentalizing two profit making companies with several activities,they could be comparable, unless they were into different product or highly diversified or some activities which would modify the profit making ability of the organization.Thus included Celestial in the list of comparables.

Further, the Tribunal remitted Bodhtree Consulting Ltd to the file of AO/TPO with the irection to exclude as comparable if found to be into software products. Further remitted comparability of LGS Global Ltd with a direction to determine the service and product details from this company and if in case it was found that it was into product, this company was to be excluded.
Wissen Infotech Pvt Ltd vs DCIT-TS-449-ITAT-2019(Hyd)-TP-ITA No 2010/Hyd/2017 dated 18.04.2019

172. The Tribunal held that assessee providing ITeS to its AE could not be compared to

- Capgemini Business Services (India) Ltd- as this company provided I.T. enabled assured services in finance and accounting to many Indian and Global clients and had widened the scope of services in supply chain, programme, technology and engineering services etc., whereas the assessee was providing services in financial processes, annual and quarterly financial reports, thus functionally dissimilar.

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- Hartron Communications Ltd- as it had exceptional revenue on cash basis and the expenditure on accrual basis, thus violating the concept of mercantile system of accounting thus excluded on account of exceptional performance during the relevant year.

M/s. S&P Capital IQ (India) Pvt Ltd vs DCIT-TS-332-ITAT-2019(Hyd)-TP-ITA No 1878/Hyd/2017 dated 24.04.2019

173. The Tribunal held that assessee engaged in ITes segment could not be compared to RS Software (India) Ltd, Mindtree Ltd, Persistent Systems Ltd, L&T and Infotech Ltd - on grounds of diversified activities, incomparable scale of operations, ownership of non-routine intangibles. Further, it rejected assessee's plea and included Infobeans Technologies Ltd as comparable on the ground that assessee failed to prove the impact of the merger/demerger on margin of the company for the relevant financial year.

Hackett Group (India) Ltd vs Dy CIT [TS-328-ITAT-2019(HYD)-TP] – ITA 2039/Hyd/2017 dated 15-03-2019

174. The Tribunal held that assessee engaged in the business of providing IT enabled services could not be compared to Infosys BPO ltd and TCS e-Serve Ltd as they were functionally dissimilar and had high turnover. Further, it remitted the comparability issue of Crystal Ltd for fresh adjudication by relying on ruling in assessee's own case for AY 2013-14 (wherein comparable was remitted back noting that the company was engaged in only BPO segment and it also satisfied the other filters adopted by the TPO.

Harsco India Services Pvt Ltd vs. Dy.CIT [TS-248-ITAT-2019(HYD)-TP] ITA No.119/Hyd/2017 Date 29.03.2019

175. The Tribunal held that assesee providing IT enabled back office services could not be compared to

- Capgemini Business Services Ltd- since it was engaged in varied services like BPO services, Cloud Business Information Management Services and other I.T related services as against back office services (categorized as ITeS) provided by the assessee. Further, it was noted that it has been held in a number of cases that where a comparable was into diversified activities, the same could not be taken as a comparable if the segmental results were not available. Noting that the segmental results in case of Capgemini was not available, he Tribunal excluded the said company.

- Hartron Communications Ltd- due to unavailability of segmental results and functional dissimilarity since it was engaged in (i) multiple services like BPO, LPO, Back Office Software Development, Technical Solutions, Medical Building, etc, (ii) Intellectual Property Services in the nature of patent search, patent protection, and obtaining the trade-mark services, IP Management and further (iii) in software development services such as Web page Application, Standalone software Application, Distributed Applications,Desktop/Laptop Applications and Mobile Applications.

Further, the Tribunal remitted comparability of 4 companies, namely, Ace BPO Services Private Ltd, Informed Technologies India Ltd, Jindal Intellicom Ltd & Crystal Voxx Ltd to decide the

same in line with directions given by co-ordinate bench in Hyundai Motor India Engineering (P) Ltd (wherein the comparables were remitted back for verification of assessee's claims such as RPT filter, operating revenue filter,similar functional profile and accepted as comparable in earlier years).

M/s. Harsco India Services Pvt Ltd vs DCIT-TS-55-ITAT-2019(HYD)-TP-ITA No 2176/Hyd/2017 dated 18.01.2019

176. The Tribunal held that assessee engaged in IT enabled services could not be compared to

- Vishal Informations Technologies Ltd- as the business model of the company was totally different from the assessee, as, it did not undertake work itself but outsourced the same to third party vendors, which was clearly visible from the low employee cost of the company.

- Maple e-solutions Ltd- as relying on various judicial precedents it was held that financial data of Maple was not reliable due to management fraud.

Travelex India Pvt Ltd vs DCIT vs DCIT-TS-284-ITAT-2019(Mum)-TP-ITA No 8192/Mum/2010 dated 05.04.2019

177. The Tribunal held that the assessee engaged in provision of Corporate / Back Office Support Services (ITeS Services)could not be compared to :

- Accentia Technologies Ltd on ground of functional dissimilarity as it was engaged in complete healthcare documentation as well as receivables management
- Eclerx Services Ltdas it was providing services in a variety of fields for which highly skilled personnel were required, unavailability of segmental information in respect of each category of services rendered,on account of extraordinary event of acquisition of Agilyst Inc. and also operating income of more than 51times than that of assessee
- TCS E-serve Ltdas it was engaged in providing high end KPO services

Further, it remitted the issue of comparability of Cosmic Global Limited back to the TPO for determine the functional profile.

International Specialty Products (India) Pvt Ltd [TS-560-ITAT-2019(Mum)-TP]- I.T.(TP)A. No.1279/Mum/2017dated 06.06.2019

178. The Tribunal held that the assesse engaged in provision of ITeS services for the in-house consumption of the AEs, primarily in the nature of database management, administration and help desk support servicescould not be compared to MPS Ltd as (i) it had incurred outsourcing cost of Rs.1078.76 Crores which was included under the head "miscellaneous expenses" which went to prove that it had got a different business model and (ii) it was predominantly in the business of digital publishing which could not be treated at par with ITeS

Emerson Electric Company (India) Private Limited [TS-564-ITAT-2019(Mum)-TP] - ITA No.6098/Mum/2018 & ITA No.531/Mum/2018 dated 14.06.2019

179. The Tribunal held that the assessee engaged in provision of back office support services(ITeS services) could not be compared to :

- Genesis International Corporation Ltd as it was providing KPO services such as

Geographical Information Services, Photogrammetry, Remote Sensing, Cartography, Data Conversion related computer based services, etc. and thus could not be compared to routine BPO service provider

- Cosmic Global Limited as it was predominantly into the business of providing translation service and revenue earned from the BPO segment was miniscule

Jardine Lloyed Thompson Pvt Ltd [TS-613-ITAT-2019(Mum)-TP] - ITA no.2181/Mum/2014 dated 12.06.2019

180. The Tribunal held that image and web development services redered by the assessee to its AEs under the intellectual property service agreement (IPSA) was to be treated as ITeS services, following co-ordinate bench decision in assessee's own case for an earlier year. The co-ordinate bench had relied on CBDT notification dated 26th September 2010 providing that content development or animation and website services come within the ambit of ITeS. Accordingly, it held that the assessee could not be compared to :

- Genesys International Ltdas it was engagedin Engineering Design Service (CAD / CAM) and Geographical Information System (GIS) which were in the nature of KPO services.
- Crossdomain Solutions Ltd as engaged in rendering services relating tosoftware development and maintenance, software testing, infrastructure set–up and management, consulting service, architecture, configuration and installation, etc. which were in the nature of KPO services
- Accentia Technologies Ltd as it had different segments but segmental information relating to all the segments were not available. Further, there was an extra ordinary event by way of amalgamation of another company

Accenture Services Pvt Ltd [TS-619-ITAT-2019(Mum)-TP] - ITA no. 1110 &1671/Mum/2014&501& 549/Mum/2015dated 28.06.2019

181. The Tribunal held that the assessee engaged in provision of ITeS services could be compared toMicroland Ltd, (which was excluded by the TPO & DRP on account of functional dissimilarity since it was engaged in providing IT services), following following co-ordinate bench decision in the assessee's own case for an earlier year. The co-ordinate bench in earlier year had observed that DRP had included the said comparable noting that separate profitability of ITES segment was available.

Further, the Tribunal held that the assessee could not be compared to Infosys BPO Ltdas it had turnover of more than 10 times than that of assessee and also on account of functional dissimilarity.

Pangea3 Legal Database Systems Pvt Ltd [TS-642-ITAT-2019(Mum)-TP] - I .T.A. No.1663&1923/Mum/2015 dated 25.06.2019

182. The Tribunal held that the assessee engaged in provision of low-end ITeS services could not be compared to Eclerx Services Ltd as it was engaged in providing high end KPO services.

Reliance Corporate IT Park [TS-846-ITAT-2019(Mum)-TP] – ITA NO. 4717 & 4873/Mum/2017 dated 26.06.2019

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183. The Tribunal held that assessee engaged in captive BPO/ITeS provider covering both voice and non voice segments could not be compared to

- Accentia Technologies Ltd- as this company was excluded as a comparable in assessee's own case in previous AY and further , the Tribunal also relied on Bombay High Court ruling in case of Aptara Technology (P) Ltd where it was held that this company was engaged in software product development, and in absence of segmental information it would make it incomparable.

- E-clerx Services Ltd- by relying on Delhi High Court ruling in case of Rampgreen Solutions Pvt. Ltd where it was held that voice call services company i.e the assessee could not be compared with a KPO company i.e E-clerx. Further, the Tribunal had also observed that this comparable had been excluded by the TPO himself in the assessee's case in previous AY. Further it had acquired another UK based company providing different services, viz., Travel and hospitality, thus rendering it incomparable to the assessee.

- Mold-Tech Technologies Ltd- as this company was a KPO company providing structural engineering services and further, during the year extraordinary events of amalgamation and demerger had taken place

- Acropetal Technologies Ltd- as the company had two segments i.e engineering design service segment and ITES segment and the TPO considered engineering design service segment and selected the comparable. The Tribunal observed that the assessee was engaged in providing routine ITES to its AE as a captive service provider and was functionally different from the Engineering Design services provided by the above company.

Capital India Pvt Ltd vs DCIT-TS-32-ITAT-2019(MUM)-TP-ITA No 7674/Mum/2012 dated 15.01.2019

184. The Tribunal held that the assessee engaged in provision of ITeS services could not be compared toGenesys International Corporation Ltd as it was providing full range of Geospatial Services to its customers as against routine back office support service provided by the assessee to its AEs and thus was functionally different

J.P. Morgan Advisors India Pvt. Ltd. [TS-724-ITAT-2019(Mum)-TP] – ITA No. 990& 1754/Mum/2014&1597/Mum/2015 dated 19/06/2019

185. The Tribunal held that the assessee engaged in provision of software development services could not be compared to :

- E-Infochips Ltd. As it provided provides ITeS services, hardware maintenance and products along with provision of software development and quantum of ITeS and other services was more than 25%. Further, it held inventories which clearly denotes that it was also a product developer unlike assessee who was only into provision ofsoftware services.
- Wipro Technologies Limited as it was a subsidiary of Wiporo Ltd. a giant company which

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had high brand value and derived a substantial portion of its profit due to the brand and also scale of operations. Further, it had substantial amount of third partytransaction.

- E-zest solutiuons Ltd as it carried out diversified activities, having special expertise in emerging technologies such as Cloudcomputing business intelligence, etc., but no segmental information was available. Further, it had inventory, denoting it was a product development company and also had super normal profits leading to high margins.

However, it held that the assessee could be compared to R systems International Ltd, noting that though it was into IT solutions and BPO services along with software development services, the annual reportprovided segmental information in respect of all the segments including software development services.

Mobileum (India) Pvt Ltd (Formerly known as Roamware India Pvt Ltd) [TS-698-ITAT-2019(Mum)-TP] - IT(TP)A NO.945& 2047/Mum/2016 dated 26/06/2019

186. The Tribunal remitted entire issue of TP-adjustment back to TPO for assessee engaged in providing IT Enabled Services (ITES) to its AE considering assessee's submission that comparables suggested by assessee, viz, NDS Infotech Ltd, NSE Infotech Services Ltd & Regenersis India Pvt Ltd were accepted by TPO vide his notice dated 29.12.2014, however TPO rejected the same while passing the order u/s 92CA(3). The Tribunal further considered assessee's submission that TPO rejected Coral Hubs Ltd as comparable on ground of being a loss making entity, even though it incurred loss only during the subject-AY and wasn't a persistent loss making entity. Thus, the Tribunal held that it deemed fit in the interest of justice and fairplay, to remand the entire issue of transfer pricing adjustment to the file of ld TPO / ld AO for denovo adjudication in accordance with law and directed the TPO to grant adequate opportunity to the assessee with regard to the final selection list of comparables.

M/s. Hettich Competence Services Pvt ltd vs DCIT-TS-57-ITAT-2019(Mum)-TP-ITA No 3743/Mum/2017 dated 03.01.2019

187. The Tribunal held that the assessee engaged in provision of IT services could not be compared to :

- Thirdware solutions ltd as it was engaged in development of products andcomplete information relating to segmental details were not available
- Persistent systems ltd as it was engaged indevelopment of products and segmental details were not available.
- FCS Software Solutions Ltd asit had three segments and the revenue from IT service segment was less than 75% of the total revenue earned. Further, it was also engaged in e-learning and digital content service which was in the nature of ITES.

However, it held that the assessee could be compared to CAT Technologies Ltd as it had earned a substantial part ofits revenue from software development and consulting services thus, prima-facie itappeared that the company wasfunctionally similar to the assessee.

Accenture Services Pvt Ltd [TS-619-ITAT-2019(Mum)-TP] - ITA no. 1110 &1671/Mum/2014&501& 549/Mum/2015 dated 28.06.2019

188. The Court upheld Tribunal's order holding that the assesseeengaged in provision of software development and distribution of software licenses could not be compared to :

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- Bodhtree Consulting Limited as it was functional dissimilar and its RPT exceeded the threshold limit of 25%
- Lucid Software Limited as it was engaged in software product development
- KALS information system Limitedas it was involved in development of product.
- AvaniCimcon Technologies Limited on ground of unavailability of segmental details of operating income of ITservices and sale of software products
- Tata Elxi Limitedas itwas engaged in varied activities including development of niche product and developmentservices
- Flextronics Software System as it was engaged in software productdevelopment
- Celestial Labs Ltdas it was engaged in clinical research and manufacturing of bio products and other products
- Infosys Technologies Ltdon grounds of being giant enterprise in the area of development of software and it assuming all risks, leading to higher profits unlike assessee which was a captive unit of its parent company assuming onlylimited risk
- Wipro Limited for the same reasons given for Infosys Tech. Ltd

Dun & Bradstreet Information Services India Private Limited [TS-566-ITAT-2019(Mum)-TP] -I.T.A. No.3593& 3501/Mum/2012 dated 06.06.2019

189. The Tribunal held that assessee engaged in ITeS could not be compared to

- HCL Comnet Systems & Services Ltd- as it failed to meet the RPT filter of 25% set by TPO. Further, it also noted that the financial year of this company ended on 30th June whereas assessee's financial year ended on 31st March, thus the company could not be treated as a good comparable due to different financial years.

- Genesys International Corporation Ltd- as it provided geographical information service, photogrammetry, remote sensing, cartography, data conversion related computer based services and other related services, thus, this company was functionally different from the assessee.

- E-clerx Services Ltd- as this company provided data analytics and data processing solutions and admitted being in the nature of KPO services, thus being a KPO it was functionally different from ITES provider.

- Coral Hubs Ltd- as this company outsourced most of its work to third party vendors making its business model totally different from assessee.

- Mold-Tek Technologies Ltd- as this company was functionally different from the assessee as it provided high end services which were in the nature of KPO services.

- Accentia Technologies Ltd- as this company was engaged in the software development and software product development and no segmental details were available. Further, the annual report revealed that in the relevant financial year there were mergers / acquisitions which would have impacted the financial results of the company.

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- Crossdomain Solutions Ltd as this company had earned revenue from different activities and the segmental details were not available. Further it was noted that the company was not into normal ITES / BPO services.

- Wipro Ltd- as this company had a significant brand value associated with it and it was found that the company owned significant intangibles and was into multifarious activities. It had also been granted 40 registered patents which indicated that it was engaged in high end activity unlike the assessee.

- Infosys BPO Ltd- as the company rendered a variety of services but it also owned significant intangibles. Further, being part of Infosys Group, it enjoyed the goodwill and the brand value of the group which gave more bargaining power and advantageous position to it with regard to pricing compared to a captive service provider like the assessee.

- Datamatics Financial Services Ltd- as it failed the export revenue filter of more than 75% applied by the TPO.

- Maple-e- solutions Ltd- as the promoters of this company were indicted for fraud and misappropriation. Moreover, the revenue earned from export of ITES worked out to 52.80% which was less than export revenue filter of more than 75% applied by the TPO.

WNS Global Services Pvt Ltd vs ITO-TS-278-ITAT-2019(Mum)-TP-ITA No 7378/Mum/2012, 396/Mum/2011 dated 16.01.2019

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

- Acropetal Technologies Ltd- as the employee cost of the company worked out to 8.2% of the total revenue failing the employee cost filter of 25% applied by the TPO.

- E-zest Solutions Ltd- as this company was rendering product development services and high end technical services which came under the category of KPO services.

- Helios & Matherson Informed Technology Ltd- as this company was involved in development of products and the High Court in case of PTC Software India Pvt. Ltd. had rejected this company on similar grounds.

- Infosys Technologies Ltd- as it was a reputed company and it had enormous brand value. Moreover, the turnover of this company was Rs. 15,648 crore, thus made it a giant company compared to the miniscule turnover of Rs. 2.59 crore of the assessee. The aforesaid factors, cumulatively, made this company non-comparable to the assessee.

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- Kals Information Systems Ltd- as it was engaged in development of software products and in caseof PTC Software India Pvt. Ltd., High Court had rejected this company as a comparable to a software development service provider.

- Persistent Systems Ltd- as this company was also engaged in the development of product and segmental details were not available.

- Tata Elxsi Ltd- as this company was engaged in various activities including development of niche product and development services. Thus, the company was functionally different from the assessee.

- Thirdware Solutions Ltd- after relying on co-ordinate bench in case of Dialogic Networks (India) Pvt. Ltd. it was observed that this company was involved in development of software product and trading in software licenses and thus could not be a comparable to a software development service provider.

- Wipro Ltd- as this company was into diversified activities and owned substantial intangibles by way of patents and intellectual properties. The company had a huge brand value and it was a giant company having a huge turnover.

WNS Global Services Pvt Ltd vs ITO-TS-278-ITAT-2019(Mum)-TP-ITA No 7378/Mum/2012, 396/Mum/2011 dated 16.01.2019

191. The Tribunal noted that assessee made slump sale of its entire business as a going concern to Vodafone India Services during the year, pursuant to which the same business was carried out by Vodafone India for remaining part of FY and observed that for the subject year, the same set of 17 comparables were selected by TPO in case of both assessee and Vodafone India which, in the case of the latter, was reduced to 8 by the Tribunal. The Tribunal considered assessee's submission that upon exclusion of the 9 comparables as excluded in the case of Vodafone India, assessee's margin fell within the tolerance limit of +/-5% of ALP calling for no TP-adjustment and it noted that the same business was carried on by Vodafone India pursuant to slump sale and the same 17 comparables were selected by TPO in both the cases. Thus, the Tribunal concluded that there was no harm in following learned DRP's order and order of this Tribunal for Vodafone India and accordingly, deleted the TP-adjustment in case of assessee.

Tech Mahindra Business Services Ltd vs DCIT-TS-167-ITAT-2019(Mum)-TP-ITA No 7520/ Mum/2012 dated 23.01.2019

192. The Tribunal held that assessee engaged in provision of IT enabled back office services could not be compared to

- ICRA Techno Analytics Ltd - as it was engaged into diversified business process outsourcing and hence could not be cumulatively called an ITeS provider relying on Delhi HC decision in BC Management on grounds of functional incomparability.

- Accentia Technologies - as in case of Aptara Technology Pvt Ltd (Bom HC**)** it was excluded as being incomparable to ITES provider.

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- Acropetal Technologies - as in case of Maersk Global Services Centre [Mum Trib] it was excluded on the ground that it was engaged in development of computer software product, offering integrated enterprises solutions, Cost Effective Solutions, and hence, having a niche presence in BFSI, Health and Energy.

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

- Microland Ltd - as it was functionally similar ITES service provider and

- E4e Healthcare Business Services Ltd. - as it was providing healthcare outsourcing services, which was comparable to ITES provider.

Hapad Lloyd Global Services Pvt Ltd vs. ACIT [TS-290-ITAT-2019(Mum)-TP] ITA No. 407/Mum/2016 (Assessment Year 2011-12) dated 15.03.2019

193. The Tribunal relying on coordinate bench decision in assessee's own case for AY 2010-11 held that assessee engaged in providing ITeS comprising of contact/call centre services for AY 2011-12 could not be compared to :

- Accentia Technologies Ltd - as it was engaged in provision of software development services as well as development of software products and in the absence of segmental financial information the company could not be considered as a comparable.
- Acropetal Technologies Ltd. (Seg) - as it was engaged in KPO services as defined in Safe Harbour Rules including design engineering, architectural, structural services which were functionally different from the ITeS rendered by the assessee, Safe Harbour Rules issued by CBDT clearly demarcated between BPO and KPO services and had also provided separate Safe Harbour Margin for these services;
- ICRA Online Ltd. (Seg) - as it was engaged in providing KPO and online software services including provision of financial, analytical services and support to clients in the area of data extraction, aggregation, etc.

Sitel India Pvt Ltd., v. DCIT 11(2)(1) Mumbai, [TS-400-ITAT-2019(Mum)-TP], ITA No. 1821/MUM/2016, dated May 03, 2019

194. The Tribunal held that assessee engaged in providing software services including coding, integration, testing, etc. for AY 2009-10 could not be compared to :

- Genesis International Corporation – as it was engaged in diversified activities including Geospatial service and content provider. It was also involved in 3D mapping, GIS, consultancy, photogrammetry and remote sensing service, and various other activities and also segmental data was not available.
- Infinite Data Systems - as it was engaged in providing various other services which included software service, however, in the absence of segmental break–up, the margin relating to such segment could not be ascertained with reasonable accuracy.

ITO Ward-8, (1)(4), Mumbai v. Golden Source India Pvt.Ltd., [TS-422-ITAT-2019(Mum)-TP], ITA No.393/Mum/2014, dated May 10, 2019

195. T-he Tribunal held that assessee engaged in the business of rendering of BPO services for AY 2011-12 could not be compared to :

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- Accentia Technologies Ltd - relying on co-ordinate bench ruling in case of Systime Global Solutions Pvt Ltd wherein the said company was excluded since it was engaged in KPO services.
- Acropetal Technologies Limited – relying on co-ordinate bench ruling in case of Systime Global Solutions Pvt Ltd where it was found that this company was engaged in providing design engineering activities which were akin to KPO services and not BPO services.

KPIT Technologies Ltd., v. DCIT, Circle-14, Pune [TS-661-ITAT-2019(PUN)-TP], ITA No.506/PUN/2016, dated May 24,2019

196. The Tribunal held that assessee engaged in provision of software development services could not be compared to

- Kals Informations Technology Systems Ltd- as on perusal of annual report and notes to financial statements it was observed that it was not only engaged in providing Software Development Services but was also dealing in Software products under the relevant segment.
- Thirdware Solutions Ltd- as this company had segments only on geographical basis and not on functional level and as such, there was no bifurcation of operating profit from Software Services and others including Sale of licence and Revenue from subscription etc.

  Thus, in the absence of the availability of any concrete information in respect of Software Services, also having software products in its portfolio, the Tribunal held that the company could not be construed as comparable.

- Acropetal Technologies Ltd- as it was not only engaged in the business of Software products but was also providing on-site services, which made it distinguishable from the assessee company.

- Akshay Software Technologies Ltd and R.S. Software Systems- as these were rendering on-site services which could not be compared with a company rendering in-house services(assessee).

- Infosys Technologies Ltd- as the total profit of this company included profit from software development services as well as software products and there was no separate data available. Further, the giantness of Infosys Ltd, in terms of risk profile, nature of services, number of employees, ownership of branded products and brand related profits, etc. made it non comparable to the assessee.

M/s. John Deere India Pvt Ltd vs ACIT-TS-370-ITAT-2019(PUN)-TP-ITA No 518,575/PUN/2015 dated 25.04.2019

197. The Tribunal held that assessee engaged in provision of ITeS in the nature of analysis and research of price movement and recommendations of trends in future price movement of securities listed on New York Stock Exchange and Nasdaq, both situated in USA could not be compared to Accentia Technologies after relying on Bombay High Court judgement in case of

BNY Mellon wherein it had it had directed to exclude Accentia Technologies being a KPO company for assessee engaged in BPO services.
Further, the Tribunal remitted the comparability of Informed Technologies Ltd and Jindal Intellicom Ltd and noted that the AO had erred in not following DRP-directions with respect to treatment of income like interest, dividend and rent as non-operating income while computing PLI,thus the Tribunal directed AO/TPO to recompute the PLIs as per DRP's directions.
Capstone Securities Analysis Pvt Ltd vs DCIT-TS-282-ITAT-2019(PUN)-TP-ITA No 90/Pun/2016 dated 05.04.2019

198. The Tribunal held that assessee engaged in providing software development & distribution servies to its AE could not be compared to

- Infobeans Systems Pvt Ltd-by relying on co-ordinate bench ruling in case of PubMatic India Pvt. Ltd, where it was held that it was a product company and thus was functionally different from assessee.

- Persistent Systems Ltd- after relying on the co-ordinate bench ruling in case of 3DPLM Software Solutions Ltd wherein this company was held to be omitted as it was engaged in product development and product design, thus functionally different from the assessee.

- Cybercom Datamatics Information Solutions Ltd and Cybermate Infotek Ltd- after relying on co-ordinate bench ruling in case of PubMatic India Pvt. Ltd. wherein it was held that the said company could not be comparable to a concern providing software development services.

The Tribunal further held that assessee could be compared to Nouveau Global ventures as it noted that the said concern was excluded as it had losses in the said year but it was not persistent loss- making concern and hence, the Tribunal held that it found no error in the directions of DRP to include the said concern and thus upheld its exclusion.
M/s. Triple Point Technology (India) Pvt Ltd vs DCIT-TS-29-ITAT-2019(PUN)-TP-ITA No 581/PUN/2016 dated 01.01.2019

199. The Tribunal held that assessee engaged in software development, software testing and distributor of interactive entertainment products could not be compared to

- Acropetal Technologies Ltd**-** by relying on its decision in assessee's own case for previous year wherein it had rejected the comparable, being functionally not comparable to the assessee. The Tribunal had further observed that the said concern also owned significant intangible assets comprising of 49% of its total fixed assets and had incurred significant R&D expenditure.

- E-infochips- as on perusal of financial statement, the Tribunal noted that the concern was engaged in diversified activities such as software development services, sale of software products and IT Enabled Services and was also a product company

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The Tribunal further held that Maveric Systems which was excluded by TPO citing failure to meet export turnover filter, was comparable to assessee as the TPO had wrongly adopted the earning in foreign currency as equivalent to export sales and thereby computing export sales to total sales ratio inadvertently. Further, on perusal of the financials the Tribunal concluded that the export turnover was 75.87%, thus directed to include the comparable in the final list for benchmarking.

Ubisoft Entertainment India Pvt Ltd vs DCIT-TS-500-ITAT-2019(PUN)-TP- ITA No 526/PUN/2016 dated 11.02.2019

200. The Tribunal held that the assessee engaged in providing software development services could be compared to :

- Lanco Global Systems limited - as it was engaged in development of computer software and was considered to be a comparable by the TPO in assessee's case in AY 2008-09 and further CIT (A) in AY 2005-06 had also considered it to be a comparable and Revenue was not in appeal against the order of CIT (A).
- Maars Software International Limited - as it was engaged in the business of software development and Revenue did not controvert assessee's reliance on co-ordinate Bench ruling in case of John Derre which held these companies to be in the business of software development.
- Quintegra Solutions Limited - as it was engaged in the business of software development and Revenue did not controvert assessee's reliance on co-ordinate Bench ruling in case of John Derre which held Revenue these companies to be in the business of software development.

Further, the Tribunal held that the assessee could not be compared to

- Helios and Matheson Informational Technology Ltd – relying on coordinate bench ruling in assessee's case for AY 2006-07 wherein that this company was rejected on the ground that it was engaged in on-site development and its forex earnings were high.

BMC Software India Pvt Ltd vs Dy CIT [TS-457-ITAT-2019(PUN Trib)] – ITA no. 1646/PUN/2011 dated 01-03-2019

201. The Tribunal held that the assessee the engaged in providing ITes could not be compared to :

- Informed Technologies - as FY 2006-07 was an exceptional year due to the fact that there was increase in sales by 133% and there were wide fluctuations in the margins earned by it over a period of time.
- Maple E Solutions - as it was engaged in call centre activities.

BMC Software India Pvt Ltd vs Dy CIT [TS-457-ITAT-2019(PUN Trib)] – ITA no. 1646/PUN/2011 dated 01-03-2019

202. The Tribunal held that assessee engaged In IT services could not be compared to

- KALs Information Systems Ltd - as it was engaged in software services as well as software products.
- Compucom Software Ltd - as it was engaged in varied activities such as readymade software products,Learning Solutions, Wind power generation and Treasury etc,
- FCS Software Solutions Ltd - as it was engaged in software development services

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- Mindtree Ltd – by reyling on Principle Global Services vs DCIT [ITA No.280/PN/2014] wherein it was held that it provided both R& D services as well as IT Services

It also remitted back issue of inclusion of 4 companies, namely, Techprocess Software Solutions Ltd, Reliance Infosolutions Private Limited, Thinksoft Global Services Limited & Bells Softech Ltd with directions to consider assessee's submissions afresh and adjudicate.

Eaton Technologies Private Limited vs DCIT [TS-310-ITAT-2019(PUN)-TP] – ITA-400/PUN/2014 dated 06-03-2019

203. The Tribunal held that assessee engaged in ITes segment could not be compared to

- Infosys BPO Ltd and Cosmic Global Ltd – relying on Principle Global Services vs DCIT [ITA No.280/PN/2014] they were excluded on grounds of huge turnover, presence of significant intangibles, outsourcing of their work.

Eaton Technologies Private Limited vs DCIT [TS-310-ITAT-2019(PUN)-TP] – ITA-400/PUN/2014 dated 06-03-2019

204. The Tribunal remitted the comparability issue of Galaxy Commercial Ltd by following coordinate bench ruling in Principal Global Services Pvt Ltdvs DCIT [ITA No.280/PN/2014] to verify whether company was 'consistently loss-making'. It also remitted Sparsh BPO Services Ltd, In House Productions Ltd (Healthcare Segment), Cameo Corporate Services Ltd for considering factors such as availability of data in public domain, unreliability of financial data etc.

Eaton Technologies Private Limited vs DCIT [TS-310-ITAT-2019(PUN)-TP] – ITA-400/PUN/2014 dated 06-03-2019

205. The Tribunal held that the assessee engaged in provision of ITeS (relating to data compilation, cleaning and structuring could not be compared to

- Emerson Climate Technologies (India) as it was in the process of closing its BPO division in relevant year, had fluctuating profit margin, low employee cost

Credit Pointe Services Pvt Ltd vs. Dy. CIT [TS-266-ITAT-2019(PUN)-TP] ITA No.600/PUN/2017 Dated 27.03.2019

206. The Tribunal had rejected disallowance of management fee paid by assessee engaged in ITES business to its AE for AY 2010-11. Firstly, it held that assessing authorities could not sit in the judgment of business module of assessee and its intention to avail or not to avail any services from its associated enterprises, thus, fulfilment of benefit test could not be questioned. Regarding Revenue's contention that though assessee was incorporated in April 2005, AE charged management fees only from AY 2010-11, it noted assessee's explanation that in the initial years, AE had not charged anything in order to support its operations, however in subsequent period, reimbursement in the form of management fees was agreed and expenses of executive director of assessee and towards Expenses (payroll and other costs) of other IMC personnel utilized to support executive director. It further noted contemporaneous and detailed evidence placed by assessee in form of various e-mails exchanged between employees of assessee and personnel of AE, invoice for management fee raised by AE, account extracts of AE etc. to demonstrate benefit of service. Regarding Revenue's claim that invoices were serially numbered and amounts were payable only at the close of the year it held that merely because

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the amounts were due at the close of the year, it would not disentitle the assessee from claiming the said expenditure.

IMC Global Technology Services Pvt Ltd vs. ITO [TS-272-ITAT-2019(PUN)-TP] ITA No.976/PUN/2015 Dated 25.03.2019

207. The Tribunal held that the ITES Segment of assessee engaged in manufacturing and export of machine made woollen/Nylon carpets could not be compared

- Eclerx Services Ltd - as it was KPO service provider and hence functionally dissimilar to assessee
- Accentia Technologies Ltd - on account of extraordinary event of amalgamation and
- Informed Technologies Ltd - owing to abnormal profitability trend

It further, directed AO/TPO to compute correct PLI of Jeevan Softech Ltd. relying on DCIT vs BNY Mellon International (2017) 87 taxmann.com 130 (Pune-Trib.) wherein TPO was directed to work out correct margins of the company by considering the revenue of ERP segment as part of ITES segment.

Brintons Carpets Asia Pvt Ltd vs. DCIT [TS-229-ITAT-2019(PUN)-TP] ITA No.1312/PUN/2015 Dated 29.03.2019

208. The Tribunal held that the assessee engaged in software development service provider could be compared to Informed Technologies Ltd and e-Clerx Services Ltd .Further it noted that even after their inclusion, assessee's margin of 17.5% would be within 5% range of mean margin of comparables (18.77% without working capital adjustment). Thus, it opined that there was no necessity to decide the issue on merits of whether the said concerns are to be excluded or to be included in the final list of comparables, as the issue had become academic.

Sungard Solutions Software (I) Pvt Ltd vs. Dy.CIT [TS-221-ITAT-2019(PUN)-TP] ITA No.462/PUN/2016 Date 13.03.2019

209. The Tribunal held that assessee providing software development services to AEs for AY 2012-13 could not be compared to

- Cybermate Infotek Ltd - since it was engaged in providing software development services as well as developing a variety of software products and segmental data was not available.
- Cybercom Datamatics Information Solutions Ltd – as it was a Software product company.
- Infobeans Systems Pvt. Ltd - as in addition to providing software development services, it had also earned foreign exchange from export of goods on FOB basis and segmental details were not available. Also, Coordinate bench had noted that during the year there was an extraordinary event of demerger which made the company incomparable.
- Thirdware Solutions Ltd – as it was deriving revenue from sale of license, software services export to SEZ units and revenue from subscription, etc, and segmental details were not available.

Synerzip Softech India Pvt Ltd. v. DCIT, Cir.6, Pune, [TS-458-ITAT-2019(PUN)-TP], ITA No.224/PUN/2017, May 17, 2019

210. The Tribunal accepted ALP of commission on sales paid to AE @ 6% with respect to Software Distribution Segment for assessee engaged in CAD/CAM engineering and design consultancy, SAP, IT consultancy and networking solutions for AY 2013-14 & 2014-15. It relied on assessee's

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own case for AY 2012-13 where considering the Commission Agreement entered into between assessee and its AE, Tribunal had noted that the AE was facilitating the process of purchase of software license from a UK company in ensuring smooth selling of transactions and also undertook marketing efforts through its dedicated support and thereby upheld the payment of commission at 6% as justified.

Tata Technologies Limited v. ACIT Cir-7, Pune [TS-390-ITAT-2019(PUN)-TP], ITA Nos.168 & 1708/PUN/2018, dated May 03, 2019

211. The Tribunal held that assessee engaged in the business of provision of software development services for AY 2011-12; could be compared to :

- Maveric Systems Ltd – as in case of MSC Software Corporation after analyzing the functionality of the said concern, it was found to be functionally comparable to a concern providing software development services. It also noted that DRP had held that the said concern was in the field of software development services only and merely because certain expenses were mentioned as project expenses and capital work-in-progress in the financial statements, functional profile of the company would not be altered as such expenses related to either projects for creation of infrastructure for the company or its R&D activities for software development.

DCIT, Cir.-7, Pune v. Xpanxion International Pvt Ltd., [TS-433-ITAT-2019(PUN)-TP], ITA No. 666/PUN/2016, dated May 14, 2019

212. The Tribunal held that assessee providing software development services to AE for AY 2012-13 coud not be compared to :

- Cybermate Infotek Ltd - since it was engaged in providing software development services as well as developing a variety of software products and segmental data was not available.
- Cybercom Datamatics Information Solutions Ltd – as it was a Software product company.
- Infobeans Systems Pvt. Ltd - as in addition to providing software development services, it had also earned foreign exchange from export of goods on FOB basis and segmental details were not available. Also, Coordinate bench had noted that during the year there was an extraordinary event of demerger which made the company incomparable.
- Thirdware Solutions Ltd – as it was deriving revenue from sale of license, software services export to SEZ units and revenue from subscription, etc, and segmental details were not available.
- E-Zest Solutions – as it was a KPO service provider, as held in Delhi HC ruling in Rampgreen Solutions Pvt. Ltd and assessee's own case for AY 2008-09.

FIS Solutions (India) Pvt Ltd (formerly known as SunGard Solutions (India) Pvt. Ltd.) v. DCIT, Cir-6, Pune, [TS-446-ITAT-2019(PUN)- TP], ITA No.456/PUN/2017, dated May 17, 2019

213. The Tribunal held that the assessee engaged in provision of software development & quality assurance (testing) services to its AE could not be compared toVama Industries Ltd as the said company was engaged in software development as well as engineering services and the percentage of software development services was minuscule, i.e. 1.86%.

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Approva Systems Private Limited (now merged with Infor (India) Private Limited) [TS-541-ITAT-2019(PUN)-TP] - ITA No.2444/PUN/2016 dated 07/06/2019

Investment Advisory Services

214. The Court held that assessee engaged in providing Investment Advisory Services to its AE in diverse industries like, infrastructure, telecom, media, banking etc could be compared to

- ICRA Management Consultancy Services Ltd- as this company earned revenue purely from consultancy / advisory fees which was similar to assessee's function and further relying on Court ruling in case of Carlyle India Advisors (P) Ltd and General Atlantic wherein similar issue stood against the Revenue.

- Kinetic Trust ltd- as it rejected Department's argument of rejection of this company due to low turnover and further relying on Court ruling in case of Carlyle India Advisors (P) Ltd and General Atlantic wherein it was included in the list of comparables.

Pr.CIT vs Temasek Holdings Advisors India Pvt Ltd-TS-316-HC-2019(Bom)-TP-ITA No 304 of 2017 dated 16.04.2019

215. The Court upheld the Tribunal order holding that the assessee engaged in provision of investment advisory services for investment in Indian equities and strategic investments could not be compared to

- Motilal Oswal Investment Advisors Pvt Ltd as it was engaged in merchant banking business.
- Brescon Advisors Ltd as it earned its income from debt realization and debt syndication, made significant investments using its own funds and was a leading player in distress and special situation advisory
- Khandwala Securities Ltd as it was engaged in Investment Banking, Corporation Advisory Services, Institutional Banking, etc. and the annual report showed that its performance was affected by global crises and resultant market meltdown
- Sundaram Finance Ltd as it had no employees and had outsourced its activities.
- Integrated Capital Service Ltd as it was engaged in advisory for mergers and acquisitions
- Axis Private Equity Ltd as it was engaged in managing directly or indirectly investment in mutual fund, venture capital fund etc., it acted as Investment Manager of Axis Infrastructure fund and its related party transactions were more than 90%.

Goldman Sachs (India) Securities Pvt Ltd [TS-570-HC-2019(BOM)-TP] – ITA NO.30 OF 2017 dated 10.06.2019

216. The High Court dismissed Revenue's plea against Tribunal's selection of comparables for assessee engaged in investment advisory services and observed that the Tribunal excluded Brescon Advisors & Holdings Ltd, Keynote Corporate Services Ltd and Motilal Oswal Investment Advisors Pvt. Ltd. on grounds of functional dissimilarity following precedents. The Court noted Revenue's plea that even though the 3 entities did not carry out business activities similar to assessee, considering that assessee itself included certain entities which did not primarily carry out investment advisory activity as comparables, the above three companies may

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also be included. The Court concluded that the exercise of inclusion or exclusion of the comparables per se did not involve a question of law unless the approach of any of the Revenue authorities or the Tribunal, was unreasonable or excluded some relevant factors or takes into account in relevant factors, extraneous to Rule 10B, 10C and 10D of the Income Tax Rules. Thus, it held that there was no merit in these appeals and accordingly dismissed the same.
Pr.CIT vs DE Shaw India Advisory Services Pvt Ltd-TS-64-HC-2019(Del)-TP-ITA 74/2019 dated 28.01.2019

217. The Tribunal held that the assessee a real estate consultant, engaged in provision of investment advisory services, occupational development management, project management and research and valuation of property to its AE could not be compared to

- CRISIL Ltd. - as it had high RPT. It also rejected Revenue's stand that the comparable was selected by the assessee itself in its TP documentation;
- HGS Business Services Pvt. Ltd - as it was engaged in payroll processing and compliances,
- Killick Agencies and Marketing Ltd - as it was agent of foreign principals dealing in maritime equipment
- Priya International Ltd - as it was predominantly a trading company

DTZ International Property Advisor Pvt Ltd vs.Dy.CIT [TS-246-ITAT-2019(Bang)-TP] IT(TP)A No.78/Bang/2015 Dated 15.03.2019

218. The Tribunal held that the assessee engaged in providing investment research and advisory activities to its AE could be compared to Cyber Media Research Ltd as the said company was accepted as a comparable to a company providing non-binding investment advisory services by the co-ordinate bench in the case of AGM India Advisors, Temasek Holdings Advisors, Warburg Pincus India, Siguler Gulf India Advisors, and by Bombay High Court in the case of Carlyle India Advisors and General Atlantic. Further, the Tribunal also observed that the TPO had selected this company as a comparable for many AYs for the assessee and in the absence of any change in the facts or the functional profile of either the assessee or the comparable, it was not correct to exclude this company. Thus, the Tribunal directed inclusion of this company in the list of comparables.
Standard Chartered Private Equity vs DCIT- TS-455-ITAT-2019(MUM)-TP-ITA No 1924/MUM/2016 dated 08.02.2019

219. The Tribunal held that the assessee engaged in provision of investment research/investment advisory services to its AE in respect of potential investment opportunities in India could not be compared to

- Ladder up Corporate Advisory Ltd as it was engaged in merchant banking business
- MotilalOswal Private Equity Advisors Ltd as it had four business verticals but there was no segmental details available in the annual report
- MotilalOswal Investment Advisors Pvt Ltd as it was engaged in merchant banking business.

However, it held that the assessee could be compared toCyber Media Research Ltd. (formerly IDC India Ltd.) as it was engaged in rendering market research and management consultancy services and was a premier provider of market intelligence and advisory services, and, thus, it was functionally comparable to investment advisory provider.

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Bain Capital Advisors (India) Private Limited [TS-551-ITAT-2019(Mum)-TP] -ITA No.1771 &1996/Mum/2016dated 11/06/2019

220. The Tribunal held that assessee engaged in non binding investment advisory services to its AE could not be compared to Ladderup Corporate Advisory Pvt Ltd as this company was registered as a Category–1 Merchant Banking Company with SEBI and was engaged in Merchant Banking service w.e.f. July 2010. Thus, the Tribunal noted that functional profiles of both assessee as well as the company were not comparable.
General Atlantic Pvt Ltd vs DCIT-TS-367-ITAT-2019(Mum)-TP-ITA No 900/Mum/2017 dated 12.04.2019.

221. The Tribunal held that the assessee engaged in provision of investment advisory services could not be compared toMotilal Oswal Investment Advisors Pvt Ltd, Khandwala Securities Ltd, KJMC Corporate Advisors India Ltd, L&T Capital Company Ltd and Sumedha Fiscal Services Ltd as these companies were engaged in merchant banking business.
However, it held that the assessee could be compared to:

- ICRA Management Consulting Services Ltd as it was engaged in providing various advisoryservices in strategy, riskmanagement, operationsimprovement, etc and main source of income was also fromconsultancy service, thus functionally comparable.
- Informed Technologies Ltd as it was engaged in providingvarious services to clients in the financial market which were in the nature of advisory service, thus functionally comparable.

IDC India Ltd as the serviceprovided were similar to the services provided by the assessee ***J.P. Morgan Advisors India Pvt. Ltd. [TS-724-ITAT-2019(Mum)-TP] – ITA No. 990& 1754/Mum/2014&1597/Mum/2015 dated 19/06/2019***

222. The Tribunal held that the assessee engaged in provision of investment advisory services could not be compared to Ladderup Corporate Advisory Pvt. Ltd and Motilal Oswal Investment Advisors Pvt Ltd as these companies were engaged in merchant banking business. Further, noting that all the comparables selected by TPO stood excluded and if AO also excluded Crisil Risk and Infrastructure Solutions Ltd (which was remitted for verifying if reliable financial data was available for extrapolation), there would be no comparable to benchmark the international transaction. It thus held that in such case, the AO could call upon the assessee to furnish a fresh set ofcomparables to benchmark the international transaction.
IIML Assets Advisors Ltd [TS-647-ITAT-2019(Mum)-TP] - ITA No.5261&5027/Mum/2017 dated 21.06.2019

223. The Tribunal held that the assessee engaged in provision of non-binding investment advisory services could not be compared to Ladderup Corporate Advisory Pvt. Ltd and Motilal Oswal Investment Advisors Pvt Ltd as these companies were engaged in merchant banking business. It also rejected Revenue's plea to exclude ICRA Management Consulting Services Ltd, relying on the co-ordinate bench decision in the case of DCIT vs. General Atlanatic Pvt. Ltd. in ITA No. 1717/Mum/2016 wherein the said company was held to be comparable to investment advisory company.
Orbimed Advisors India Private Limited [TS-634-ITAT-2019(Mum)-TP] - ITA No.2653 /Mum/2017dated 10.06.2019

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224. The Tribunal held that the assessee engaged in provision of non-binding investment advisory services could not be compared to Motilal Oswal Investment Advisors Pvt Ltd as it was engaged in investment / merchant banking business. However, it held that assessee could be compared to ICRA Management Consulting Services Ltd as it was engaged in providing investment advisory services, similar to the assessee and also since the co-ordinate bench, in assessee's own case for an earlier year, had included it on ground of functional similarity. Further, the Tribunal remitted the issue of comparability of ICRA Online Pvt Ltd since it was for the first time contested before the Tribunal.
TPG Capital India Pvt Ltd [TS-595-ITAT-2019(Mum)-TP] -IT(TP)A no.3068/Mum./2017 dated 21.06.2019

225. The Tribunal held that assessee engaged in rendering non-binding investment advisory and related support services could be compared to

- IDC India Ltd- as on perusal of annual reports available, this company was engaged in research and survey services in previous AY and it was held to be a good comparable in assessee's case by Tribunal as well as High Court for previous AY. Thus, the Tribunal noted that there was no material available on record to reveal any change in functional profile and held that, where a party had been held to be a good comparable in the preceding years, the same in the absence of any change in the functional profile or for other justifiable reason cannot be whimsically declined by the Revenue to be accepted as a comparable in a succeeding year.

- ICRA Management Consulting Services Ltd- as it was held as a good comparable by co-ordinate bench in case of Temasek Holdings Advisors which was also providing non-binding investment advisory services.

- Mecklai Financial Services Ltd- as it was engaged in rendering Forex Advisory Services and consultancy services which undertook multiple functions like research, analysing, presenting information by way of report, making recommendations based on the analysis and report and monitoring the solutions/advice given which were similar to assessee's non-binding investment advisory services

- Crisil Risk & Infrastructure Solutions Ltd- as on perusal of 'notes' to the financial statements of this company, it was observed that this company was a leading advisor to regulators and governments, multilateral agencies, investors and large public and private sector firms and provided comprehensive range of risk management tools, analytics and solutions to financial institutions, banks and corporates, which is similar to assessee. Further, the TPO himself had accepted this company as a comparable in the case of certain assesses which were providing investment advisory services viz. Kitara Capital Pvt. Ltd and General Atlantic (P) Ltd.

- Almondz Global Securities Ltd- as it was engaged in providing consultancy in financial areas and the SEBI had debarred the company from conducting merchant

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banking activities, thus were purely into research based investment advisory, thus functionally comparable

The Tribunal also held that assessee was not comparable to

- Harton Communications Ltd- as this company was engaged in offshore BPO services in the medical billing and health care sector, while assessee was providing non-binding investment advisory services.
- E-Clerx Services Ltd- as it was a KPO service provider, thus functionally dissimilar and it also failed the RPT filter of 25% applied by the TPO.

Carlyle India Advisors Pvt Ltd vs ITO-TS-117-ITAT-2019(Mum)-TP-ITA No 2366 & 6321/Mum/2017 dated 27.02.2019

226. The Tribunal held that assessee engaged in rendering investment advisory services could be compared to

- IDC (India) Ltd- after placing reliance on the High Court judgement in case of General Atlantic. The Court had observed that since the non–binding advisory service provided by the general atlantic was similar to the service provided by Carlyle India Ltd., wherein, IDC (India) Ltd. was accepted as a comparable, there was no reason to interfere with the decision of the co-ordinate bench.
- ICRA Management Consulting Services Ltd- by relying on General Atlantic Pvt Ltd and AGM India Advisors Pvt Ltd, where ICRA was held comparable to non-binding investment services.
- Informed Technologies India Ltd- by relying on Goldman Sachs & Temasek Holding ruling wherein its functional profile was considered similar to investment advisory profile.

The Tribunal also held that assessee could not be compared to

- Ladderup Corporate Advisory Pvt Ltd- as the provision of investment advisory services by assessee stood on a different footing as compared to merchant banking services rendered by Ladderup.

M/s. Guggenheim Capital Management (Asia) P Ltd vs ACIT- TS-107-ITAT-2019(Mum)-TP-ITA No 423,299/Mum/2016 dated 20.02.2019

227. The Tribunal held that assessee engaged in rendering investment advisory services could be compared to ICRA Management Consulting Services Ltd, ICRA Online Ltd, IDC (India) Ltd and Informed Technologies India Ltd - as they were functionally similar providing non binding investment advisory services as held in CIT Temasek Holdings Advisors India , ITA no.1051 of 2014, dated 17th November 2016 by Bombay high court.

It further held that, the assessee could not be compared to Motilal Oswal Private Equity Advisors Pvt. Ltd and Ladderup Corporate Advisory Pvt. Ltd - as they were engaged in merchant banking/investment banking services, thus being functionally dissimilar to the assessee.

Tata Asset Management Ltd vs. DCIT [TS-194-ITAT-2019(Mum)-TP] IT(TP) A No. 933/ Mum/2016 Dated 15.03.2019

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Manufacturing & Contracting

228. In case of assessee engaged in manufacturing and trading of engineering thermoplastics and polycarbonate sheets the Tribunal held that DCW Ltd could not be rejected on the alleged ground that it was a persistent loss making company.

Further, it also deleted TP-adjustment on account of payments towards intra-group management services, relying on ruling in assessee's own case for AY 2009-10 to 2011-12 wherein TPO's benefit test and consequent Nil ALP-determination was rejected as there was reasonable evidence of rendition of services.

***Sabic Innovative Plastics India Pvt Ltd vs. Dy.CIT [TS-192-ITAT-2019(Ahd)-TP] ITA No.: 2730/Ahd/ 2017 d*ated 08.03.2019**

229. The Tribunal held that assessee engaged in the business of manufacturing of pharmaceuticals and fine chemicals could not be compared to Embio Ltd & Malladi Drugs & Pharmaceutical Ltd, Harman Finochem Ltd & Shilpa Medicare Ltd after allowing assessee's claim that the comparable companies having turnover within the range of 50% of the assessee should be selected for comparables to determine the ALP and relied on coordinate bench decision in assessee's case for previous AY, thus directed AO/TPO to select comparable companies having the nearest turnover to the assessee company and accordingly, these companies were excluded from final list of comparables.

Further, the Tribunal included Tonira Pharma Ltd as comparable and held that the comparable companies having turnover within the range of 50% of the assessee should be selected for comparables to determine the ALP, relying on on coordinate bench decision in assessee's case for previous AY, thus the Tribunal directed AO/TPO to select comparable companies having the nearest turnover to the assessee company and it was found that,Tonira Pharma was the only company having the nearest turnover to the assessee company.

DCIT vs Schutz Disman Biotech Ltd-TS-410-ITAT-2019(Ahd)-TP-ITA No 1909/Ahd/2015 dated 01.01.2019

230. The Tribunal held that assessee engaged in manufacture and export of aircraft engine parts, components and sub-assemblies for AY 2010-11 could not be compared to :

- Talbros Engineering – as it was engaged in production of motor vehicle parts and
- Jotindra Steel Tubes – as it was engaged in manufacturer of steel pipes & tubes

Snecma HAL Aerospace Pvt Ltd. v. ITO, Ward-6(1)(3), Bangalore [TS-456-ITAT-2019(Bang)-TP], IT(TP)A No.432/Bang/2015, Dated May 17, 2019

231. The Tribunal held that assessee engaged in manufacture and export of ornamental trimmings, tassels and tie-backs could not be compared to Sangeet Syntex Ltd after relying on co-ordinate bench decision in assessee's case for previous AY where theTribunal had noted that Sangeet Syntex manufactured towels, fabrics and garments and though ornamental trimmings may be a species of fabrics, the Tribunal opined that ornamental fabrics manufactured by the other companies which were exported, need to be compared for making transfer pricing adjustment. Accordingly, the matter was remitted to TPO for considering the exact product

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manufactured by the assessee with that of the companies which were manufacturing an identical/similar product.

M/s. India Trimmings Pvt Ltd vs DCIT-TS-12-ITAT-2019(CHNY)-TP-ITA No 190/Chny/2017 dated 08.01.2019

232. The Tribunal remitted the selection of comparables by TPO for assessee engaged in manufacture and sale of lubricating oil additive.

- Amines Plasticizers Ltd- Assessee contended that Amines was not comparable being a listed company with no foreign participation in shareholding vis-à-vis assessee, a joint venture company with partial Indian shareholding. Further, Amines mainly dealt in plasticizers for the plastic industry. Hence, assessee contended on exclusion of Amines ltd. on the basis of engagement in totally different stream of business.
- Ciba India Ltd- Assessee contended that Ciba India was not comparable being a listed company held entirely by foreign shareholding vis-à-vis assessee, a joint venture company with partial Indian shareholding. Further, Ciba India dealt in manufacture and trading of synthetic colouring substance i.e. coating chemicals, textile chemicals etc. Hence, assessee contended on exclusion of Ciba India on the basis of engagement in different business segment as compared to assessee.
- Iftex Oil & Chemicals Ltd- Assessee contended that Iftex was not comparable as its shareholding had no foreign participation vis-à-vis assessee, a joint venture company with partial Indian shareholding. Further, Iftex included domestic transactions different from assessee engaged in international business activities. Hence, assessee contended on exclusion of Iftex on the above basis.
- Pondy Oxides & Chemicals Ltd- Assessee contended that Pondy Oxides & Chemicals was not comparable being a listed company with no foreign participation in shareholding vis-à-vis assessee, a joint venture company with partial Indian shareholding. Further, Pondy Oxides & Chemicals dealt in manufacture and trading of zinc oxides i.e. metallic oxides, plastic additives for the plastic industry. Also, pondy oxides & Chemicals included domestic transactions different from assessee engaged in international business activities. Hence, assessee contended on exclusion of the said company on the basis of engagement in totally different stream of business.

The Tribunal, relying on assessee's submissions, observed that there were apparent variations between the four comparables listed viz-a-viz assessee in terms of industry serviced, nature of products, size of business operations, volume of transactions, turnover etc. Further, the Tribunal noted assessee's submission that the same transaction had taken place in earlier years and the CIT(A) had held in assessees' favour. Thus, on the basis of above, the Tribunal remanded the issue of all four comparables.

M/s. Indian Additives Ltd-TS-111-ITAT-2019(CHNY)-TP-ITA No 1289/Chny/2017 dated 28.02.2019

233. The Tribunal upheld DRP's order on selection of comparables for assessee engaged in the business of manufacturing, assembly and sale of non-core automotive products i.e., horns for

AY 2010-11. It noted that all the companies rejected by the DRP were engaged in manufacture of core components which are vital for the running and performance of the vehicle and can command much higher price considering the utility, high-end technology and resources required for manufacture of the same. It stated that this distinction in FAR had also been recognized by the Safe Harbour Rules in the definition of core and non core auto components under Rule 10TA(b) and though the same is prospective in nature, it can always act like a guide in deciding the difference in FAR and comparability analysis. Accordingly, it rejected Revenue's plea for inclusion of 9 comparables viz. Imperial Industries, Saks Ancilliaries, Motherson Sumi System, Minda Sai, Tata Yazakin Antocomp, Indication Instruments, Suprajit Engineering, Remsons Industries and Ucal Fuel Systems as they were into manufacturing of core components.
Further, it held forex loss/gain as a non-operating item, taking guidance from the definition of operating expenses and income from Safe Harbour Rules.
DCIT Cir. 16(2), New Delhi v. Minda Acoustic Ltd. (Now Minda Industries Ltd.) [TS-468-ITAT-2019(DEL)-TP], ITA No. 1759/Del/2015, dated May 10, 2019

234. The Tribunal held that assessee engaged in manufacture of machinery/equipment could be compared to CTR Manufacturing Inds Ltd,Deltron Ltd,Fineline Circuits Ltd,Incap Ltd, Pan Electronics Ltd,Ruttonsha Internation Rectifier Ltd and SPEL semiconductor Ltd after relying on jurisdictional HC ruling in Watson Pharma wherein it was explained that under TNMM,what is to be seen is functional comparability and not the product comparability and held that if such a high degree of similarity was to be determined in TNMM, then it would become impractical to apply TNMM in any case.
DCIT vs Epcos Ferrites Ltd-TS-139-ITAT-2019(Kol)-TP-ITA No 1597,1598/Kol/2017 dated 30.01.2019

235. The Tribunal rejected Revenue's ground that CIT(A) ought to have set aside the entire issue to the file of the TPO instead of undertaking the comparability analysis at his end. The CIT(A) had undertaken broader product comparability and considered the companies which were functionally comparable and were engaged in the business of manufacture of specialty chemicals including printing inks instead of exact product comparability i.e printing ink companies. The Tribunal noted that assessee's business of manufacture of printing inks was by itself a major industry segment in which several companies were engaged and in the circumstances ideally for application of TNMM, the industry specific data pertaining to printing inks industry alone should have been taken into consideration. But even following the broader approach as advocated by the Ld. CIT(A) and by taking into account functionally comparable companies engaged in manufacture of specialty chemicals, PLI of the tested party i.e. the assessee was at arm's length. Hence, the order of the Ld. CIT(A) on this issue was to be upheld.
DCIT, Circle 10(1), Kolkata v. DIC India Ltd. [TS-461-ITAT-2019(Kol)-TP], I.T.A. Nos. 1362 & 1363/Kol/2017, dated May 3, 2019

236. The Tribunal remitted the issue of comparability of Escorts Ltd for benchmarking import of kits/ spares by assessee engaged in business of manufacturing of marine and industrial gearboxes, diesel engines and generating sets. Noting that though TPO/CIT(A) excluded this company on the basis that it followed a different FY, it held that since it was a listed company with quarterly

results being available in public domain, it should be possible to collate the figures relating to the financial year under consideration.

Greaves Cotton Limited vs Asst. CIT[TS-153-ITAT-2019(Mum)-TP] 2482, 2575/Mum/15 dated 15.03.2019

237. The Tribunal held that the Distribution segment of assessee engaged in manufacturing and trading of wires and tubes etc could not be compared to

- Solitaire Machine Tools Ltd - as it was into manufacturing of machines unlike assessee who was into manufacture of tools

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

- TIL Ltd and The Yamuna Syndicate Ltd - as they were functionally similar and they were included in earlier AY by DRP and there was no change in functionality.
- Modern India Ltd - as it was engaged in to sale of sponge iron / sheets and pipes which was similar to the business of assessee.

Sandvik Asia Pvt Ltd vs. Asst.CIT [TS-152-ITAT-2019(PUN)-TP] ITA No.491,533, /PUN/2016 dated 08.03.2019

238. The Tribunal held that the assessee engaged in manufacturing of bearings could not be compared to Federal-Mogul Bearings India Ltd since it was engaged in manufacture of powder and aluminum tins also apart from bearings and the impact of profit from the sale of Powder and Aluminum on the overall profitability was not ascertainable.

INA Bearings India Pvt. Ltd [TS-540-ITAT-2019(PUN)-TP] - ITA No.148& 281/PUN/2017dated 07/06/2019

239. The Tribunal excluded Bharat Earth Movers Ltd (BEML) as comparable to assessee engaged inter alia in the business of manufacturing and trading of excavators for AY 2009-10. It noted that BEML being a government company had different customers, raw material suppliers and profit margins and operated in entirely different controlled environment and would not operate in a free competitive environment relying on Behr India Tribunal ruling & jurisdictional HC ruling in Thyssen Krupp Industries India. It also allowed assessee's additional ground, and directed restriction of TP-adjustment only to international transactions and not to entire turnover by relying on jurisdictional HC ruling in Firestone International (subsequently confirmed by SC).

Hyundai Construction Equipment India Pvt Ltd vs. DCIT [TS-249-ITAT-2019(PUN)-TP] ITA No.1472, 1670/PUN/2015 Dated 19.03.2019

240. The Tribunal held that assessee engaged in manufacturing and sale of packaging material for food and drink industries based on the aseptic technology for AY 2005-06 could not be compared to :

- Bilcare Ltd – as it was engaged in packaging of perishable products hence functionally different.
- Karur KCP Packaging Ltd – as it was engaged in manufacturing of craft paper from wood pulp and waste paper as well as polypropylene PP & FIBC bags etc, which were required in the cement industries hence functionally different.

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

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Bharat Box Factory Ltd – as it was functionally similar and and also segmental data was available.
Tetra Pak India Pvt. Ltd., v. ACIT, Circle-7, Pune, [TS-616-ITAT-2019(PUN)-TP], ITA No.1647/PUN/2013, dated May 24, 2019

Support Services

241. In the case of assessee engaged in the business of providing software research and services development services, SC dismissed Revenue's SLP against HC-order upholding Tribunal's exclusion of following comparables

- Bodhtree Consulting - as in CISCO Systems (India) Pvt. Ltd.[TS-246- ITAT- 2014(Bang)- TP] it was held to be a Software product company

- Tata Elxsi - as in CISCO Systems (India) Pvt. Ltd.[TS-246- ITAT- 2014(Bang)- TP] it was held to be functionally dissimilar as it was engaged in specialized projects like embedded product design, industrial services and engineering services.
  Citrix R&D India Pvt Ltd vs.Pr.CIT [TS-137-SC-2019-TP] SLP No. 6045/2019 Dated 05.03.2019

242. The Court held that assessee engaged in providing business support services could not be compared to ICRA online Ltd. It noted that AO as well as DRP had included this comparable, however the Tribunal excluded ICRA noting that the operating margin for relevant year was abnormally high compared to earlier years. The Revenue was in appeal contending that high profit margin would not justify exclusion of a company relying on Special Bench decision in case of Maersk Global. The High Court noted that the ruling on Maersk Global applied if the high profit margin was a normal business condition and not peculiar to the comparable. The Court found that even the Tribunal did not dispute that mere high profit margin would not warrant an exclusion of a company from the final list of comparable. However, in the present case, the Tribunal after noting the above ruling of Special Bench and the ruling in Barclays Technology, had found on examination of facts that, the profit margin in the relevant assessment year declared by ICRA Online Ltd. was abnormally high, taking into account the manner in which it conducted its business and opined that the profit margin declared by ICRA Online Ltd. did not reflect a normal business profitability and, therefore, excluded from the list of comparable. It further noted that Tribunal's finding that profit margin of ICRA Online for the subject year was 63.33% which was quite abnormal, taking into account the fact that, the profit margin for preceding years was 8.59% and 25.98% while the profit margin for subsequent year was 26.78%. Thus, the High Court found that the view of the Tribunal was essentially a finding of fact which was not shown to be perverse in any manner and thus held that the question as proposed did not give rise to any substantial question of law, as the view taken by the Tribunal on facts was a possible view.
Pr. CIT vs Honeywell Turbo(I) Ltd- TS-80-HC-2019(Bom)-TP-ITA No 877 of 2016 dated 04.02.2019

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243. The Court held that the assessee engaged in Clinical study Management & Monitoring Support Service could not be compared with

- SIRO Clinpharm Pvt Ltd and Choksi Ltd as the said comparables had a different business model as they carried in-house research unlike assessee who outsourced its research activities.

- Syngene International as it had substantial related party transactions which was undisputed by Revenue.

Pfizer Limited vs.Pr.CIT [TS-130-HC-2019(BOM)-TP] INCOME TAX APPEAL NO. 1731 OF 2016 dated 04.03.2019

244. The Tribunal held that assessee providing call center services (BPO Services) to its AE for AY 2010-11 could not be compared to :

- Cross Domain Solution - as it was engaged KPO services, as held in Tribunal ruling in Monster.com and BP India Services.

Effective Teleservices Pvt. Ltd. v. DCIT, Gandhinagar Circle, Gandhinagar, [TS-538-ITAT-2019(Ahd)-TP], I.T.A. No. 3077/Ahd/2015, dated May 15, 2019

245. The Tribunal held that assessee-company engaged in provision of business /market support services segment to its AE could not be compared to

- Global Procurements Consultants Ltd- as it was engaged in providing full-fledged procurement and financial management support services
- TSR Darashaw Ltd- as it was engaged in providing share registry, record management, fund management and payroll processing services unlike assessee's business
- HCAA Business Services Pvt Ltd- as it was engaged in providing payroll processing services and there was no other observation in the Annual Report from which it could be established that it was engaged in marketing and sales support services comparable to the assessee
- Aptico Ltd- as it was engaged in profit high end diversified activities, agency services and segment-wise profitability data was not available
- Quippo Valuers and Auctioneers Ltd- as it was mainly provided asset management services

Terex Equipment Pvt Ltd v ACIT [Formerly Terex Vectra Equipment Private Limited] [TS-478-ITAT-2019(DEL)-TP] - ITA No. 4123/DEL/2015 dated 28.01.2019- BS

246. The Tribunal held that the assesse engaged in provision of sales support and post salessupport service could not be compared to

- Hindustan Housing Co. Ltd as it was engaged in variety of activities like providing air conditioning, lift andintercom services which typically included operating and service maintenance services thereof, along with post sales service. Further, it failed RPT filter.
- Choksi Laboratories Ltd as it's the core activity was providing analytical and testing services, consequently it had significantly high proportion of testing instruments (which was approximately 58% of its total net assets) implying that the functions performed by the

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company were capital intensive in nature and there was no similaritywith the functions of a service provider

- Vimta Labs Ltd as it was a leading provider of multi-disciplinary contract research and testing services in India

However, it accepted Revenue's plea for inclusion of two comparables viz. ScalServices Ltd. and IsgecCoverma Ltd., which were considered as comparables in earlier year, noting that the assesse had no objection for the same.

Comverse Network Systems India Pvt Ltd [TS-587-ITAT-2019(DEL)-TP] -ITA NO 3680/DEL/2013 dated 19.06.2019

247. The Tribunal held that assessee inter alia engaged in technical support service segment for AY 2013-14 could not be compared to :

- All cargo logistic limited – as it was engaged in providing logistic and transport solutions as against the assessee, who was providing technical support services.
- HSCC (India) Ltd – as it was engaged in altogether different kind of services including procurement of medical equipment, drug and pharmaceutical etc.
- Holtec Consulting Private Limited – as it was engaged in consultancy services, in which the recipient was advised in carrying out the actual project or task whereas under the technical support services, the assessee itself had executed the task on the project and thus the function of providing consultancy was different from the function of providing technical support services.
- Certification Engineering International Ltd – as it was engaged in certification activities and third-party inspection job.
- Acropetal Technologies Private Limited – as it was engaged in engineering design services

Alcatel-Lucent India Ltd., v. DCIT, Special Range-1, New Delhi, [TS-429-ITAT-2019(DEL)-TP], dated May 9, 2019

248. The Tribunal held that assessee engaged in market supporting services could not be compared to

- Global Procurement Consultant Ltd-as the consultancy related to procurement services and project review carried out by this company could not be compared to marketing support services provided by assessee.
- TSR Darashaw Ltd-as this company earned income from share registry and transfer services, depository services, record management payroll and provided fund management, corporate and fixed deposit management thus functionally not comparable.

M/s. Brown Forman Worldwide LLC vs DDIT-TS-317-ITAT-2019(Del)-TP-ITA No 2571/Del/2014 dated 12.04.2019

249. The Tribunal restored the issue of selection / rejection of comparables with respect to marketing support service segment back to the DRP, noting that the DRP had upheld TPO's rejection of certain comparables selected by the assessee which were accepted as comparable by the

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Tribunal in the preceding years in the assessee's own case and the DRP had not passed a speaking order.

DCIT & Ors. v Yum Restaurant India Pvt Ltd & Ors. [TS-464-ITAT-2019(DEL)-TP] - ITA No.897 & 1993/Del/2015 dated 29.01.2019-

250. The Tribunal held that assessee engaged in providing low end marketing support services to its AE could not be compared to

- ICRA Ltd- after relying on co-ordinate bench ruling in previous AY in assessee's own case wherein it was held that ICRA was to be excluded as a comparable for assessee since ICRA was providing advisory services and the same could not be a match to the company providing actual marketing support services.

- CRISIL Ltd- as the DRP had rejected CRISIL (Advisory and information segment) continuously in previous AYs, on the ground that it was engaged in providing niche advisory services of financial markets and as such was functionally different and thereby no cogent reason were brought on record by the TPO/CIT (A) to depart from the consistent view taken in the succeeding years.

M/s. Microsoft Corporation (India) Pvt Ltd vs ACIT-TS-179-ITAT-2019(Del)-TP-ITA No 5140/Del/2015 dated 28.01.2019

251. The Tribunal held that assessee engaged in providing marketing support services could not be compared to

- Info Edge (India) Ltd- due to functional dissimilarity since it was engaged in online portal activities with major source of income from advertisement and on account of it running an employment website, matrimonial website.

- Media Research Users Council- due to it being a council of media companies with members comprising advertisers, publishers, advertising agencies & companies from broadcast & other media was engaged in undertaking surveys, research into the readership, viewership, listenership of various media for advertising.

- MMTV Ltd- due to the ground of being functionally different entity since it was engaged in business of television broadcasting & related operations & had significant intangibles.

- Power Systems Operation Corpn Ltd- due to it being a Government of India undertaking & having RPT of 48.20%, also on account of functional dissimilarity, unavailability of segmental details and failing export turnover filter.

- TSR Darashaw- on the ground of functional dissimilarity since it was engaged in share registry & transfer services, depository services, record management, payroll & provident fund management & corporate fixed deposit management which were in the nature of ITeS.

DCIT vs Teijin India Pvt Ltd-TS-424-ITAT-2019(Del)-TP-ITA No 6625/Del/2015 dated 25.01.2019

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252. The Tribunal held that assessee engaged in providing business support services to its AE could not be compared to

- Aptico Ltd after relying on coordinate bench decision in Adidas Technical services (P.) Ltd wherein this company was excluded on grounds of it being a government company and also since its operations were mainly based on the policy requirements of the government and was a preferred company of the Government of India for entrustment of works.

- TSR Darashaw Ltd after relying on coordinate bench decision in Adidas Technical services (P.) Ltd wherein this company was excluded by relying on Microsoft Corporation Ltd on the ground of functional dissimilarity since 57.4% of its income was derived from share registry services segment.

Further, the Tribunal remitted back to the file of TPO the comparability of Global Procurement Consultants Ltd, BVG India Ltd and Office Care Services Ltd and directed the TPO to look into the functional profile and accordingly exclude/include the same.

ACIT vs Wolters Kluwer (India) Pvt Ltd-TS-81-ITAT-2019(Del)-TP-ITA No 369/Del/2016 dated 15.02.2019

253. The Tribunal held assessee engaged in providing Marketing Support Serivces could not be compared to

- Apitco Limited and Power System Corporation Limited - as their main source of revenue was from Government/Government organizations and hence, the RPT of these companies was much higher than the filter adopted by TPO.
- Media Research Users Council - as its main source of income was subscription fees and it was also a non profit organization and hence could not be used as a good comparable.

DCIT vs Microsoft Corporation India Pvt Ltd [TS-323-ITAT-2019(DEL)-TP] – ITA-1736/DEL/2016 dated 15-03-2019

254. The Tribunal remitted the issue of selection of comparables for the international transaction of provision of business support services, rejecting comparability analysis in the absence of the functional analysis of the assessee. It directed TPO to first capture the functions performed by the assessee for this business segment, supported with the relevant evidences such as agreements, bills, invoices, correspondences, etc., and carry out fresh search of the comparables. It noted that neither the assessee nor the TPO provided/considered a functional analysis of assessee's transactions. It held that unless the functions performed by the assessee for the said segment were properly captured, it is not possible to adjudicate on the comparable selected by the learned TPO. It explained that selection of comparables based on judicial precedents, without functional analysis would render the comparability analysis redundant and unworkable and thus functional analysis was paramount for comparability analysis.

Noble Resources & Training India Pvt Ltd vs DCIT [TS-352-ITAT-2019(DEL)-TP] – ITA No. 1827 & 1847/Del/2015 dated 15-03-2019

255. The Tribunal held that the assessee engaged in providing Business Support Services could not be compared to Global Procurement Consultants Limited as it was promoted by the Export-Import Bank of India and was engaged mainly in World Bank sponsored projects.

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DCIT vs Terex India Pvt Ltd [TS-359-ITAT-2019(DEL)-TP] - ITA No. 6775/Del/2015 dated 26-03-2019

256. The Tribunal held that the assessee engaged in providing investment research support services could not be compared to

- Excel Infoways Ltd - as it was functionally dissimilar since it was engaged in providing customer care services and handling client business relations through voice based services in the areas of collections, telemarketing and customer care & had diminishing profit as held in Emerson Climate Technologies (India) Pvt. Ltd., Vs DCIT in ITA No..359 & 2847/PN/2016.

Further the Tribunal remitted comparability of R Systems excluded by TPO on the ground that it follows a different FY and it was a persistent loss maker. It noted that assessee had collated the financial results of this company for FY 2011-12 and the same showed that company was making a profit of 2.17% on sales, thus it could not be categorised as persistent loss making company. Hence, it remitted issue to AO/TPO for examining the above details and re-determining ALP.

Clear Info Analytics Private Limited vs Asst. CIT [TS-158-ITAT-2019(Mum)-TP] 2299/Mum/2017 dated 15.03.2019

257. The Tribunal held that the assessee engaged in provision ofbusiness support services (which included evaluation and recommendation for finalization of contracts for procurement of goods and services for execution of the project and providing back office support in matters relating to accounting, taxation, insurance, HR & Administration) could not be compared to :

- TVS -E Services Ltd as it was providing warranty Management services for leading IT brands, break fix services for credit cards terminals and e-auction services which is mainly an electronic sector and thus was functionally dissimilar
- ICRA ManagementConsulting Services Ltd as it was engaged in multi-line management and development in the field of risk management, process improvement, public policy and transaction advisory services, thus being functionally dissimilar to the services rendered by the assessee.

Reliance Corporate IT Park [TS-846-ITAT-2019(Mum)-TP] – ITA NO. 4717 & 4873/Mum/2017 dated 26.06.2019

258. The Tribunal held that assessee engaged in providing business support services to its AE could not be compared to Aptico Ltd by relying on co-ordinate bench ruling in case of International SOS Services India which excluded Aptico by treating it as a Government Company and the co-ordinate bench ruling was subsequently upheld by Delhi HC and Revenue's SLP before Apex Court was also dismissed.

Further, the Tribunal held that even otherwise the company could not have been considered comparable to assessee on account of functional dissimilarity and lack of segmental break–up.

NGC Network (India) Pvt Ltd vs ACIT-TS-448-ITAT-2019(Mum)- TP-ITA No 2223/Mum/2017 dated 30.04.2019

259. The Tribunal held that assessee providing support services to its AE could not be compared to Accentia Technologies Ltd as it relied on co-ordinate bench ruling in case of Aptara Technologies and High Court ruling in case of B.C. Management for the same Assessment Year

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wherein it was held that Accentia Technologies Ltd. was not comparable because of extraordinary events in the captioned assessment year.

Credit Pointe Services Pvt Ltd vs DCIT- TS-517-ITAT-2019(PUN)-TP- ITA No 2767/PUN/2016 dated 06.02.2019

260. The Tribunal held that the assessee engaged in provision of business support services (which included Rendering of supply base development and other back office services) could not be compared to :

- Saket Projects Limited as it was not functionally comparable being engaged in organizing events for various kinds of sponsors. Further, it showed fluctuating profit levels in comparison to various years.
- TSR Darashaw Limited as it was engaged in sale of software and also was providing services on account of patented software and hence, was not functionally comparable

Honeywell Turbo Technologies (India) Pvt Ltd (Legal Successor of Honeywell Turbo (India) Pvt. Ltd.) [TS-670-ITAT-2019(PUN)-TP] - ITA No.377& 378/PUN/2014 dated 24.06.2019

261. The Tribunal held that assessee engaged in providing business support services could not be compared to Asian Business Exhibition & Conference Ltd as on perusal of the annual report of the company "the main area of operations of the company was observed to be organizing Exhibitions and Conferences and from the bifurcation of the `Direct Income' it was observed that the entire income pertained to Exhibitions and Events which was also accepted by the TPO in his order. Thus, on going through the functional profile of this company, the Tribunal opined that it was nowhere close to the assessee's activities under this segment, which were confined to maintenance/ updation of suppliers' record and providing pay roll services. Thus, the Tribunal held that the DRP was fully justified in directing to exclude this company from the list of comparable.

M/s. John Deere India Pvt Ltd vs ACIT-TS-370-ITAT-2019(PUN)-TP-ITA No 518,575/PUN/2015 dated 25.04.2019

262. The Tribunal held that the assessee engaged in Sales Support Services could not be compared to

- Cyber Media Events - as it was primarily engaged in event business
- Educational Consultants - as it was engaged in technical assistance, HRD and institutional development projects
- NTPC Electric Supply - as it was engaged in implementation of rural electrification projects in India and therefore functionally different from the Assessee

BMC Software India Pvt Ltd vs Dy CIT [TS-457-ITAT-2019(PUN Trib)] – ITA no. 1646/PUN/2011 dated 01-03-2019

263. The Tribunal held that the assessee engaged in provision of support services (Data processing and ancillary software Development) could not be compared to Universal Print Systems Ltd - as in case of XL Health Corporation India Pvt. Ltd [TS-162-ITAT-2018(Bang)-TP] Tribunal had

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noted that it was into the business of printers and therefore held it be to functionally dissimilar from assessee providing ITeS.

Credit Pointe Services Pvt Ltd vs Dy CIT [TS-498-ITAT-2019(PUN Trib)] – ITA no. 377/PUN/2017 dated 12-03-2019

264. The Tribunal held that assessee engaged in Business Support Services and Marketing Support Serivces could not be compared to

- CRISIL Limited - as in case of TPG Capital India Pvt ltd [TS-101-ITAT-2017(Mum)-TP] it was excluded on account of failing RPT filter as it had RPT of 44.51%.

- Agrima Consultant - as coordinate bench in assessee's own case had held it to be functionally dissimilar as it was engaged in financial consultancy.

Eaton Technologies Private Limited vs DCIT [TS-310-ITAT-2019(PUN)-TP] – ITA-400/PUN/2014 dated 06-03-2019

Sales / Trading

265. The Tribunal deleted TP-addition on account of sale of Pantoprazole drug to AE, relying on co-ordinate bench decision in assessee's own case for AY 2009-10- Sun Pharmaceuticals Industries Ltd. [TS-1126-ITAT-2017(Ahd)-TP] wherein Tribunal, in-turn following assessee's case in AY 2008-09, accepted assessee's TNMM and rejected TPO/CIT(A)'s PSM observing that assessee performed only one function i.e. manufacturing and for such simple function, transaction profit split method typically would not be appropriate. Similarly, it also deleted TP-adjustment on sale of other drugs, again relying on aforesaid decision wherein it was noted that the methodology followed in sale of these drugs is similar to that followed in respect of Pantoprazole.

DCIT vs Sun Pharmaceuticals Industries Ltd [TS-348-ITAT-2019(Ahd)-TP] ITA No.922/Ahd/17 dated 29-03-2019

Research & Development Services

266. The Tribunal held that assessee engaged in manufacturing of active pharmaceutical ingredients and R&D activities could not be compared to

- Celestial Labs Ltd- as the functional profile did not match with the assessee.The Tribunal observed that R&D expenditure as percentage of total turnover was very low for Celestial Labs and further, the company was not only into R&D but also development of various IPR's whereas the assessee was engaged in only R&D of pharmaceutical products.

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- Oil Field Instrumentation (India) Pvt Ltd- as it was excluded noting that the nature of assets employed, and activities performed indicate that the company was functionally different to assessee providing contract research and testing services.

DCIT vs M/s Apotex Pharmachem India Pvt Ltd- TS-185-ITAT-2019(Bang)-TP- IT(TP) No 156/Bang/2014 & 2200/Bang/2016 dated 08.02.2019

Distribution

267. The Tribunal held that assessee engaged in distribution of subscription rights of satellite channels could not be compared to

- Malayalam Communications Ltd, Raj Television Networks Ltd, TV Today Network Ltd, Zee Entertainment Enterprises Ltd and Zee Media Corporation Ltd- as the Tribunal by relying on co-ordinate bench ruling in assessee's own case for AY 2006-07 where in it was held that Satellite TV channels and cable network operators have significantly different operating and earning models and held that such channel/content owner companies could not be included for the purpose of comparability analysis for benchmarking the ALP of the assessee's distribution segment. Thus, the Tribunal rejected, DRPs and TPO action for mixing the functionality of distribution and production activities which were in fact independent and separately benchmarked.

Further, the Tribunal held that assessee engaged in distribution of subscription rights of satellite channels could be compared to

- Soft Cell Technologies and Sonata Information Technologies Ltd – by relying upon co-ordinate bench decision in assessee's own case where in it was held that Software Distribution Company could be accepted for comparability analysis with assessee, when no direct comparables dealing in distribution of satellite channels were available.

Turner International Pvt Ltd vs DCIT- TS-520-ITAT-2019(DEL)-TP- ITA No 296/DEL/2016 dated 04.02.2019

268. The Tribunal held that assessee providing local logistics of freight forwarding services in India could not be compared to

- TSR Darashaw Ltd - on ground of functional dissimilarity. It relied on Delhi Tribunal ruling in Trend Micro India Pvt. Ltd (subsequently upheld by Hon'ble Delhi HC) and GECAS Services India Pvt.Ltd.

APL Logistics (India) Pvt.Ltd.v. ACIT 14(1)(1), Mumbai, [TS-579-ITAT-2019(Mum)-TP], ITA No.2162/Mum/2015, dated May 29, 2019

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Transportation/Frieght/Tours/Travels/Service

269. The Tribunal held that assessee engaged in rendering freight and forwarding services in domestic and international sectors could not be compared to Balmer Lawrie & Co Ltd as it noted that the TPO's own filters of freight cost/ freight revenue between range of 75-85% was not met for the comparable. Therefore, the Tribunal directed the TPO/AO to exclude the comparable from the list.
CEVA freight India Pvt Ltd vs DCIT- TS-466-ITAT-2019(DEL)-TP-ITA No 5682/DEL/2011 dated 12.02.2019

270. The Tribunal held that assessee engaged in the business of providing ground and passenger handling services to AE could not be compared to Kerela State Industrial Corp Ltd as this company was the premier agency of the Government of Kerala, mandated for industrial and investment promotion in Kerala and primary objective was to promote, facilitate and finance large and medium scale industries and catalyse the development of physical and social infrastructure required for industrial growth in the state, thus functional profile was not comparable to the assessee.
Globe Ground India Pvt Ltd vs DCIT-TS-112-ITAT-2019(DEL)-TP-ITA No 3630/Del/2011 dated 18.02.2019

Others

271. The Court dismissed assessee's appeal agitating Tribunal's remand of comparables issue back to TPO for fresh adjudication for AY 2010-11. The Tribunal had remitted back 11 comparables stating that assessee (engaged in ITeS) had simply relied on co-ordinate bench ruling in the case of its sister concern - E-Valuesez (Gurgaon) Pvt. Ltd, for same AY without bringing out any similarities between their profiles. It rejected assessee's contention that the remand was uncalled for and it would only result in a waste of time. It opined that the impugned order of the Tribunal was supported by detailed reasons for remand and thus did not give rise to any substantial question of law.
E-VALUESERVE.COM PVT. LTD. v. Pr.CIT-3, New Delhi, [TS-427-HC-2019(DEL)-TP], ITA No.489/2019, dated May 14, 2019

272. The Tribunal allowed assessee's appeal and remitted TP-issue of comparables selection by noting that neither TPO nor DRP provided the basis of search conducted for rejection of assessee's TP study. Further, The Tribunal opined that with a view to conduct the TP analysis by the TPO, it was necessary for the TPO to provide the basis of the search, key word search filters along with show cause notice on the basis of which the TPO sought to finalise the list of comparables.
Stump Shuele and Somappa Springs P. Ltd vs ACIT- TS-151-ITAT-2019(Bang)-TP-I.T(TP).A No.3142/Bang/2018 dated 25.02.2019

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273. The Tribunal held that assessee engaged in developing, operating and leasing out tech parks could not be compared to the following for benchmarking the transaction for the interest charged on FCCD's issued to its AE

- IL&FS Energy Development and JSW Investments P. Ltd- as the Tribunal found that the data of MCA and NSDL, compiled by the assessee, indicated that FCCD issued of IL&FS & JSW were related party transactions. Thus, the Tribunal allowed assessee's appeal and directed the AO/TPO to exclude the 2 companies from list of comparables.

- Maris Power Supply Company Pvt Ltd and TPG wholesale P. Ltd- as it was found that these companies issued FCCDs at interest much lower than the market rate, which obviously was not based on market rates but on factors not relating to money market. Further, the Tribunal noted that Prime Lending Rate of Punjab National Bank for relevant previous year was above 13.75%. Thus, it was opined that companies issuing FCCDs at interest rate of 0.5 to 2% had to be excluded from the list of comparables selected by TPO.

Futura Techpark Pvt Ltd vs DCIT- TS-411-ITAT-2019(CHNY)-TP- ITA. No.3366/CHNY/2016 dated 26.02.2019

274. The Tribunal held that assessee, a TV channel distributor, w.r.t it's distribution segment could not be compared to Malyalam Communications Ltd, Raj Television Network Ltd, TV today Network Ltd and Zee Media Corporation Ltd as in assessee's own case for previous AY, these companies were excluded wherein it was held that Satellite TV channels and cable network operators had significantly different operating models and provide earning model and that such channel/content owner companies should not be included for the purpose of comparability analysis. Further, the Coordinate bench, referring to the two segments of the assessee viz., distribution and production, had stated that once these were two different segments then there was no justification to mix up the functions of such ancillary activities with that of distribution activity so as to justify selection of such channel/ content owner companies, especially when transaction from such ancillary services constituted only 4% of the value of the international transaction of the assessee. Thus, directed to exclude the said companies from final set of comparables.

Further, the Tribunal held that assessee could be comparable to Empower Industries India Ltd & Sonata Information Technologies Ltd after relying on the coordinate bench in assessee's own case for previous AY which included these two companies by relying upon NGC Network case wherein it was held that companies engaged in distribution of software were also good comparables for benchmarking the distribution of TV channel companies.

M/s. Turner International India Pvt Ltd vs DCIT-TS-59-ITAT-2019(DEL)-TP-ITA No 218/Del/2017 dated 01.01.2019

275. The Tribunal remitted back ALP determination of international transactions and comparability analysis of assessee engaged in software development. It observed that neither assessee nor TPO had carried out the analysis of assessee's functional profile. It noted that the TP-study provided certain details regarding R&D activities, product strategy and design, marketing activity etc., but it was not clear what kind of activities of software development services assessee was

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performing. Further even the risk metrics did not show what kind of risk was borne by the assessee as well as the associated enterprises. Assessee as well as the TPO straight away jumped to the comparability analysis without analyzing the functions performed by the assessee company. Accordingly, it set aside the whole issue back to the file of the learned AO/TPO with a direction to the assessee to first put the complete functional profile before the assessing authority, and, then proceed with the comparability analysis. It also directed that assessee to demonstrate before the TPO/AO the complete justification with respect to all filters applied and the method of determination of ALP adopted.

Contata Solutions Pvt Ltd. v. ITO Ward-6(3), New Delhi [TS-388-ITAT-2019(DEL)-TP], ITA No. 6178/Del/2015, dated May 06, 2019

276. The Tribunal allowed assessee's ground challenging the TP-adjustment made by TPO/DRP by treating the international transactions of administrative support services and IT support services as stewardship activities and followed coordinate bench ruling in assessee's own case for previous AY wherein upon noting that the benefits generated by the said services have added economic / commercial value to enhance the commercial position of the assessee and such services were received by the assessee on a continuous basis, it was held that it was erroneous to classify the services to be in the nature of stewardship services.Thus, following the above ruling assessee's ground was allowed.

Almatis Alumina Pvt Ltd vs DCIT-TS-302-ITAT-2019(Kol)-TP-ITA No 726,2361/Kol/2017 dated 16.04.2019

277. The Tribunal held that assessee engaged in export of entertainment contents to its AE could not be compared to

- Jain Studios, ETC Networks Ltd and Television Eighteen India Ltd- as the Tribunal noted that these comparables were broadcasting companies and content producers and the assessee was different from broadcasting companies on economic factor, functional analysis and activities as evident from the FAR Analysis provided by assessee differentiating the two i.e. content producer and broadcasting company on the basis of functions, tangible assets, capital investment, intangible assets and risks. Thus, excluded based on functional dissimilarity.

Further, the Tribunal included Creative Eye Ltd in the list of comparables ruling that a functionally similar company making loss in one year but profits in earlier and subsequent year could not be excluded on consistent-loss making ground.

ACIT vs Viacom 18 Media Pvt Ltd- TS-187-ITAT-2019(Mum)TP-ITA No 8406/Mum/2010 dated 08.02.2019

278. The Tribunal held that assessee engaged in providing manning/recruitment services for sea going vessels to its holding company, and other group companies could not be compared to Charan Gupta Consultants since it was providing advisory services for designing and re-structuring employees benefit scheme, management of trust funds, pay roll management etc which was functionally different from assessee.

The Tribunal also remitted following comparables

- Mercer India Pvt. Ltd. directing AO to verify assessee's submission on functional dissimilarity and whether RPT exceeds 25%

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- Employment Management India Ltd for verifying whether segmental data related to HR segment out of the diverse activities undertaken by this company was available and then consider its comparability with assessee.
  Teekay Shipping India Pvt Ltd vs DCIT - [TS-321-ITAT-2019(Mum)-TP] - ITA No.4037/Mum/2017 dated 08-03-2019

e. Comparability – Intra Industry

Turnover Filter

279. The Court upheld Tribunal's order on comparables selection for assessee, a BPO service provider engaged in data processing and data entry services to AE for AY 2010-11. It rejected Revenue's contention that Tribunal ought not to have excluded Infosys BPO only on the basis of its earlier order in assessee's own case for AY 2009-10 which had wrongly proceeded on the basis that the said comparable had to be excluded on the ground of high turnover. It also rejected revenue's reliance on Chryscapital Investment Advisors India ruling to urge that a comparable ought not to be excluded only on the basis of 'high turnover' as co-ordinate bench of the Court in the case of Agnity India had excluded Infosys group company as it was a 'giant corporation' and in Chryscapital ruling, none of the comparables involved was a 'giant corporation' like Infosys. Thus, it opined that Tribunal was correct in excluding Infosys BPO Limited relying on the decision of this Court in Agnity India Technologies.
Pr. CIT-8, New Delhi v. Sanvih Info Group Pvt. Ltd (Earlier Known As Oks Span Tech Pvt. Ltd.), [TS-439-HC-2019(DEL)-TP], ITA No.420/2019, dated May 16, 2019

280. The Tribunal upheld CIT(A)' s order directing TPO/AO to apply turnover filter of Rs. 1 crores to Rs. 50 crores for ALP determination in case of assessee rendering accounting services to AE. The Tribunal observed that CIT(A) in assessee's own case for previous AYs had directed TPO/AO to adopt turnover filter of Rs.1 crores to Rs. 50 crores, which was not objected to by the Revenue. The Tribunal opined principle of consistency should be applied in the given facts and circumstances as there were no change in comparison to the previous assessment year and it upheld CIT(A)'s findings.
DCIT vs M/s. Doshi Accounting Services Pvt Ltd-TS-102-ITAT-2019(Ahd)-TP-ITA No 939 &1255/Ahd/2015 dated 01.02.2019

281. The Tribunal excluded the comparables selected by the TPO while benchmarking assessee'sinternational transaction relating to manufacturing of pharmaceuticals and fine chemicals by applying turnover filter of 50% on higher & lower side i.e. excluded companies having turnover of less than 50% or more than 150% as compared to assessee's turnover. It followed co-ordinate bench decisions in the assessee's own case for earlier years wherein, relying on Bombay HC ruling in Pentair Water India, it was hed that turnover filter is one of the essential filters in order to select comparables when acted in same atmosphere.
Schutz Dishman Biotech Ltd [TS-641-ITAT-2019(Ahd)-TP] - ITA No. 2686/Ahd/2017 dated

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26.06.2019

282. The Tribunal held that assessee engaged in providing call center services (BPO Services) to its AE for AY 2010-11 could be compared to :

- CG-Vak Software and Exports - as co-ordinate bench in assessee's own case for AY 2009-10 had held that this company could not be rejected merely because it did not pass the turnover filter of 1 crore since its business was exactly similar to that of the assessee.

Effective Teleservices Pvt. Ltd. v. DCIT, Gandhinagar Circle, Gandhinagar, [TS-538-ITAT-2019(Ahd)-TP], I.T.A. No. 3077/Ahd/2015, dated May 15, 2019

283. The Tribunal held that assessee engaged in rendering software development services to its AE could not be compared to Larsen & Toubro Infotech Ltd, Mindtree Ltd & Persistent Systems Ltd as turnover of these companies, were Rs.3,613.42 Cr, Rs.2,361.80 Cr and Rs 996.75 Cr which were 10 times in excess of the assessee's turnover of Rs.37.02 Crores. Thus, the Tribunal affirmed assessee's reliance on Karnataka High Court's ruling in Acusis Software India Pvt. Ltd which upheld Tribunal's application of 10 times turnover range on either side of assessee's turnover.

M/s. Dell International Services India Pvt Ltd vs ACIT-TS-2-ITAT-2019(Bang)-TP-IT(TP)A No 2847/Bang/2017 dated 02.01.2019

284. The Tribunal held that the assessee engaged in provision of software development services, having turnover of Rs.6 crores could not be compared to Flextronics Software Systems Ltd., iGate Global Solutions Ltd., Mindtree Ltd., Persistent Systems Ltd., Sasken Communication Technologies Ltd and Infosys Technologies Ltd., having turnover of over Rs.200 crores, relying on the co-ordinate bench decision in the case of Autodesk India Pvt. Ltd. v. DCIT [IT(TP)A No.540 & 541/Bang/2013] wherein it was held that companies having turnover more than 200 crores upto 500 crores has to be regardedas one category and those companies cannot be regarded as comparables with companies having turnover of less than 200 crores

Sterling Commerce Solutions India Private Ltd (Successor in interest to Telelogic India Pvt Ltd) [TS-680-ITAT-2019(Bang)-TP] - IT(TP)A No.1497/Bang/2010 dated 28.06.2019

285. The Tribunal remitted the issue of comparability of Lloyd Electrical and Engineering Ltd in case of an assessee engaged in manufacture and sale of enclosures, heat exchangers, industrial cooling equipment and power distribution equipment for AY 2013-14 . It noted that the Lloyd Electrical and Engineering Ltd did not have "Enclosures business" and hence the turnover of "Air-conditioning" segment alone should be compared but since turnover of Air-conditioner business of the company was more than 10 times of the turnover of the assessee from cooling units, it could not be held comparable. But it further observed that if "Enclosures" were used for cooling systems then the same should be considered as part and parcel of Cooling units business of the assessee. Accordingly, it remitted the matter back to AO/TPO for verification.

Rittal India Pvt Ltd v. DCIT Circle-1, LTU, Bangaluru, [TS-484-ITAT-2019(Bang)-TP], IT(TP)A No.2494/Bang/2017, dated May 17, 2019

286. The Tribunal held that the assessee engaged in provision of ITeSservices, having turnover of Rs.26.24 crores could not be compared to Infosys Technologies Ltd and Wipro Ltd., having

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turnover of over Rs.200 crores, relying on the co-ordinate bench decision in the case of Autodesk India Pvt. Ltd. v. DCIT [IT(TP)A No.540 & 541/Bang/2013] wherein it was held that companies having turnover more than 200 crores upto 500 crores has to be regardedas one category and those companies cannot be regarded as comparables with companies having turnover of less than 200 crores.

Acusis Software India Pvt Ltd [TS-678-ITAT-2019(Bang)-TP] - IT(TP)A No. 697 & 842/ Bang/2013 dated 28.06.2019

287. The Tribunal ruled on application of turnover filter for benchmarking assessee's international transaction of provision of Software Development services to it's AE. The Tribunal considered assessee's reliance on co-ordinate bench ruling in Autodesk wherein, after analyzing the conflicting views, it chose to follow Genesis Integrated Systems ruling wherein it had held that companies with a turnover of above Rs.200 crores could not be compared with companies with a turnover of less than Rs.200 Crores. The Tribunal further upheld CIT(A)'s view that since TPO himself applied lower turnover filter for excluding companies with a turnover of less than Rs.1 Crore, there was no reason as to why TPO should not apply the higher turnover limit. Accordingly, the Tribunal directed exclusion of 6 companies (Persistent systems Ltd, Sasken Communications Technologies Ltd, Infosys Ltd, Larsen & Toubro Infotech Ltd, Mindtree Ltd and Tata Elxi Ltd) having turnover above Rs.200 crore and directed the AO to re-compute ALP by excluding above six companies from the list of comparable companies by applying the turnover filter.

ITO vs M/s. Cenduit (India) Services Pvt Ltd-TS-398-ITAT-2019(Bang)-TP-IT(TP)A No 59/Bang/2016 dated 24.04.2019

288. The Tribunal held that the assessee engaged in rendering media analysis services, having turnover of Rs.20.43 crores could not be compared to Infosys BPO Ltd (turnover of Rs 1312.41 crores) and TCS-E-Serve Ltd (turnover of Rs 1578.40 crores) onground of having high turnover in comparison to the assessee.

Nielsen Sports India Pvt Ltd (Formerly known as Repucom Media Analysis India Pvt. Ltd) [TS-633-ITAT-2019(Bang)-TP] - IT(TP)A No.196/Bang/2017 dated 28.06.2019

289. The Tribunal held that the assessee engaged in provision of Software Development services, could not be compared to Infosys Ltd, Larsen & Toubro Infotech Ltd, Mindtree Ltd, Persistent Systems Ltd, Thirdware Solutions Limited and SQS India BFS, having turnover of over Rs.200 crores, relying on the co-ordinate bench decision in the case of Autodesk India Pvt. Ltd. v. DCIT[IT(TP)A No.540 & 541/Bang/2013] wherein it was held that companies having turnover more than 200 crores upto 500 crores has to be regarded as one category and those companies cannot be regarded as comparables with companies having turnover of less than 200 crores. It also held that since TPO himself had applied lower turnover filter to excludecompanies with a turnover of less than Rs.1 Crore, there was no reason as to why the higher turnover limitshould not be applied.

Pearson India Support Services Pvt Ltd (formerly known as Global English India Pvt Ltd) [TS-632-ITAT-2019(Bang)-TP] - ITA No.3171/Bang/2018 dated 28.06.2019

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290. The Tribunal applied 10 times turnover range and excluded CG-VAK Software Exports Limited (less than 10 times of assessee's turnover) and Larsen & Toubro Infotech Limited (more than 10 times of assessee's turnover) from list of comparables of assessee engaged in providing software development services.

Broadcom Communications Technologies Private Limited (earlier known as Broadcom India Research Private Limited) [TS-612-ITAT-2019(Bang)-TP] - IT(TP)A No. 1929/Bang/2017 dated 14.06.2019

291. The Tribunal held that assessee providing ITeS to its AE could not be compared to

- Infosys BPO Ltd- after relying on coordinate bench ruling in case of Genesis Integrated Systems (I) P Ltd wherein it was held that companies with a turnover of above Rs.200 crores could not be compared with companies with a turnover of less than Rs.200 Crores. Thus, Infosys with a turnover of Rs.1312 Crores in comparison to assessee with a turnover of only Rs. 27.61 Crores would stand excluded after applying the turnover filter.
- TCS E-serve Ltd- after relying on coordinate bench ruling in case of Genesis Integrated Systems (I) P Ltd wherein it was held that companies with a turnover of above Rs.200 crores could not be compared with companies with a turnover of less than Rs.200 Crores. Thus, TCS E-serve with a turnover of Rs.1578.40 Crores in comparison to assessee with a turnover of only Rs. 27.61 Crores would stand excluded after applying the turnover filter.

Fulcrum Fund Services (India) Pvt Ltd vs ITO-TS-327-ITAT-2019(Bang)-TP-IT(TP)A No 12.04.2019

292. The Tribunal rejected Revenue's plea, and upheld DRP's application of turnover filter for assessee engaged in the business of providing back office ITeS to its AE. The Tribunal noted that TPO had applied a turnover filter and excluded only the companies whose ITeS service income was < 1cr, but DRP accepted assessee's plea to exclude companies with turnover less than Rs.200cr.

The Tribunal rejected Revenue's reliance on HC ruling in Acusis Software to contend that if the turnover of a comparable company was less or more than 10 times the turnover of the assessee, then it could not be considered as a comparable and held that the Court had merely concluded that the Tribunal order called for no interference and no substantial question of law arose. Thus, the Tribunal stated that revenue's interpretation was incorrect. Further, the Tribunal relied on co-ordinate bench ruling in Autodesk which, after analyzing the conflicting views, chose to follow Genesis Integrated Systems ruling wherein turnover filter of Rs.1-200cr was upheld. Thus, the Tribunal upheld the DRP order

DCIT vs M/s. Northern Operating Services- TS-184-ITAT-2019(Bang)-TP-IT(TP) A No 101/Bang/2016 dated 15.02.2019

293. The Tribunal held that assessee engaged in providing software development and maintenance services to its parent company could not be compared to Infosys Technologies Ltd as the turnover of this company (Rs. 6860 cr) was 76 times of assessee's turnover (90.24 cr), thus the Tribunal held that the comparison had to be on level playing and further noted that Infosys was

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engaged in development of various niche products and had significant brand value. Thus, it upheld CIT(A)'s decision of excluding this company from the final list of comparables.
DCIT vs Virtusa (India) pvt Ltd-TS-53-ITAT-2019(Hyd)-TP-ITA No 1761/Hyd/2017 dated 11.01.2019

294. The Tribunal held that the assessee engaged in provision of Corporate / Back Office Support Services (ITeS Services) could not be compared to Infosys BPO Ltd noting that the operating income of this company was 138 times more than that of the assessee
International Specialty Products (India) Pvt Ltd [TS-560-ITAT-2019(Mum)-TP] - I.T.(TP)A. No.1279/Mum/2017 dated 06.06.2019

295. The Tribunal held that the assesse engaged in provision of ITeS servicescould not be compared to Excel Infoways Ltd as its turnover from its ITeS / BPO segment was Rs.5.28 Crores, whereas the turnover of assessee under ITeS segment was Rs.60.45 Crores and thus did not fall within the turnover filter range fixed by the TPO i.e. Rs.6.45 Crores to 604.50 Crores.
Emerson Electric Company (India) Private Limited [TS-564-ITAT-2019(Mum)-TP] - ITA No.6098/Mum/2018 & ITA No.531/Mum/2018 dated 14.06.2019

296. The Tribunal held that assessee engaged in the business of software consultancy, software development, software training, implementation/trading and maintenance and rendering of BPO services for AY 2011-12, could not be compared to :

- TCS e-serve International - owing to its brand value, high turnover and broad aspect of services.

KPIT Technologies Ltd., v. DCIT, Circle-14, Pune [TS-661-ITAT-2019(PUN)-TP], ITA No.506/PUN/2016, dated May 24,2019

297. The Tribunal held that assessee engaged in software development and consultancy services could not be compared to Infosys Technologies Ltd & Mindtree Ltd as one of the filters which was to be applied was the turnover filter and in such cases as assessee, where the turnover was low (Rs. 62.50 crores), the filter which was to be applied was turnover between ₹ 1 crore to ₹ 200 crores.The Tribunal noted noted that the two companies did not fall in the range and that Infosys Technologies' turnover of Rs 25,385 crores and Mindtree Ltd's turnover of Rs 1509 crores was very high in comparison to assessee's turnover of Rs 62.50 crores, thus excluded as comparables.
DCIT vs M/s. SAS Research & Development (I) Pvt Ltd- TS-106-ITAT-2019(PUN)-TP-ITA No 2792/PUN/2016 dated 21.02.2019

298. The Tribunal rejected assessee's ground against application of turnover filter by TPO, opining that the provisions of the Act and Rules permitted the adoption of filters in general and the turnover filter in particular. It relied on Jurisdictional HC's Pentair Water and Bangalore Tribunal's McAfee Software ruling. Also, it observed that high-end comparables or giant companies or large companies or 'minnows' companies should be avoided for benchmarking the transaction with AEs. It held that picking up the comparable cases with 10 times below and 10 times above the turnover of the assessee, was appropriate. Thus, it held that band of Rs. 30 crores to Rs. 3000 crores was appropriate for assessee having turnover of Rs. 300 crores.

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Tetra Pak India Pvt. Ltd., v. ACIT, Circle-7, Pune, [TS-616-ITAT-2019(PUN)-TP], ITA No.1647/PUN/2013, dated May 24, 2019

299. The Tribunal held that the assessee engaged in research and development relating tosoftware solutions to AE, having turnover of Rs.104.05 crores could not be compared to Infosys Technologies Ltd (turnover of Rs 21,140 crores), holding that for selecting comparables turnover is an important filter and company with exceptionally higher turnover could not be compared with a company operating at small range.
Starent Networks India Pvt Ltd [TS-622-ITAT-2019(PUN)-TP] - ITA No.537/PUN/2015 dated 24/06/2019

Export Revenue Filter

300. The Tribunal held that the assessee engaged in provision of ITeS services could be compared to Goldstone Infratech Ltd. (Seg.) (earlierknown as Goldstone Teleservices Ltd.) on account of failure of foreign exchange earning as the foreignexchange revenue was less than 1% of the total turnover.
Sterling Commerce Solutions India Private Ltd (Successor in interest to Telelogic India Pvt Ltd) [TS-680-ITAT-2019(Bang)-TP] - IT(TP)A No.1497/Bang/2010 dated 28.06.2019

301. The Tribunal held that the assessee engaged in provision of facilitation / marketing support servicescould not be compared to Axis Integrated Systems Ltd since financial statements, under the caption "earnings in foreign currency", reflected that FOB value of sales was Rs.Nil and thus it failed the export revenue filter applied by the TPO.
Emerson Electric Company (India) Private Limited [TS-564-ITAT-2019(Mum)-TP] - ITA No.6098/Mum/2018 & ITA No.531/Mum/2018 dated 14.06.2019

302. The Tribunal held that the assessee engaged in provision of ITeS services could be compared toAllsec Technologies Ltd which was excluded by TPO comparable on thereasoning that it failed export earning filter of 75%.It noted that there was only miniscule difference in export sales of the said company @ 74.45% as against TPO's filter of 75%.
J.P. Morgan Advisors India Pvt. Ltd. [TS-724-ITAT-2019(Mum)-TP] – ITA No. 990& 1754/Mum/2014&1597/Mum/2015 dated 19/06/2019

Related Party Transaction (RPT) Filter

303. The Tribunal held that the assessee engaged in provision of software development services could not be compared to Aztec Software Limited and Geometric Software Ltd. (Seg.) and Megasoft Ltd. since the related partytransaction in the case of these companies exceeded 15%. Similarly, it held that the ITeS service segment could not be compared to Datamatics Financial Services Ltd. since RPT was more that 25%.

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Sterling Commerce Solutions India Private Ltd (Successor in interest to Telelogic India Pvt Ltd) [TS-680-ITAT-2019(Bang)-TP] - IT(TP)A No.1497/Bang/2010 dated 28.06.2019

304. The Tribunal rejected TPO's aggregated method for computing RPT percentage by applying ratio of related party – (sales as well as expenditure) to total sales, opining that a consistent approach must be adopted for numerator and denominator of the ratio, following HC decision in assessee's own case for AY 2008-09. Thus it restored the issue to TPO/AO to re-adjudicate comparables by applying the formula of related party sales to total sales.
ChrysCapital Investment Advisors (India) Pvt.Ltd. v.ACIT Cir. 6(1),New Delhi, [TS-482-ITAT-2019(DEL)-TP] ITA No. 458/Del/2016, dated May 17, 2019

305. The Tribunal held that the assessee engaged in provision of purchases and other services could not be compared to Honda Siel, Hyundai Motors and Maruti Udyog since the said companies did not fulfil the RPT filter of 15% applied by the CIT(A) i.e. less than 15% RPT.
Skoda Auto India Pvt Ltd [TS-563-ITAT-2019(PUN)-TP]- ITA No.154/PUN/2011 dated 10.06.2019

Employee Cost Filter

306. The Tribunal held that the assessee engaged in provision of ITeS services could not be compared to Asit C.Mehta Financial Services Ltd. (earlier known as Nucleus & GIS (India) Ltd.) on the reason of failing employee costfilter and also due to amalgamation during the year, whichhad changed the business model of the company
Sterling Commerce Solutions India Private Ltd (Successor in interest to Telelogic India Pvt Ltd) [TS-680-ITAT-2019(Bang)-TP] - IT(TP)A No.1497/Bang/2010 dated 28.06.2019

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

- Cosmic Global Ltd as it had different businesss model since it was subcontracting majorportion of its work to third parties while assessee was undertaking the work itself
- Vishal Information Technologies Ltd as the business model of the company was completely different from the assesseesince it outsourced major part of its work to third parties.

J.P. Morgan Advisors India Pvt. Ltd. [TS-724-ITAT-2019(Mum)-TP] – ITA No. 990& 1754/Mum/2014&1597/Mum/2015 dated 19/06/2019

308. The Tribunal held that the assessee engaged in provision of ITeS services, which is an employee oriented service, could not be compared toExcel Infoways Ltdsince as it had low employee cost to sales ratio of 13.05%. Similarly, it directed the AO to exclude Universal Print Systems if it's employee cost ratio was less than 25%.
BNY Mellon International Operations (India) Pvt Ltd [TS-653-ITAT-2019(PUN)-TP] - ITA No.88/PUN/2017dated 27.06.2019

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Multiple Filters

309. The Tribunal remanded the issue of selection of comparables with respect to captive service provider assessee engaged in provision of software development services to its AEs, noting that (i) Revenue had selected comparables without complying with DRP's directions to apply turnover filter of 1 to 200 crores (ii) though TPO had applied filters like service revenue filter, employee cost filter, etc., for exclusion of certain comparables, some of the comparables selected by TPO himself did not pass the said filters (iii) objections raised before DRP in regard to comparables by assessee had not been dealt with.
SanDisk India Device Design Centre Private Limited [TS-554-ITAT-2019(Bang)-TP] - IT(TP)A No. 589/Bang/2016 dated 07/06/2019

Loss Making Company

310. The Court upheld the Tribunal's orderholding that SIP Technology and Exports Limited could be compared to assessee engaged in software development services, rejecting Revenue's plea that it was constantly loss making company. It noted that the company had suffered losses only in one out of the last three years under consideration.
John Deere India Pvt Ltd [TS-567-HC-2019(BOM)-TP] - INCOME TAX APPEAL NO.63 OF 2017dated 11.06.2019

311. The Tribunal in case of assessee engaged in manufacture and sale of enclosures, heat exchangers, industrial cooling equipment and power distribution equipment for AY 2013-14 remitted the comparability issue of Schneider Electric President Systems Ltd sought to be included by assessee directing TPO to show that there existed abnormal conditions which resulted in losses in the hands of this company which would warrant exclusion of the same. It followed coordinate bench ruling in Chryscapital Investment Advisors and Capgemini India P Ltd.
Rittal India Pvt Ltd v. DCIT Circle-1, LTU, Bangaluru, [TS-484-ITAT-2019(Bang)-TP], IT(TP)A No.2494/Bang/2017, dated May 17, 2019

312. The Tribunal held that the assessee engaged in provision of software development services could not be compared to Bodhtree Consulting Ltd on account ofdrastic variation in profit margins of the company over the years.
Sterling Commerce Solutions India Private Ltd (Successor in interest to Telelogic India Pvt Ltd) [TS-680-ITAT-2019(Bang)-TP] - IT(TP)A No.1497/Bang/2010 dated 28.06.2019

313. The Tribunal held that the assessee engaged in provision of ITeS services could not be compared to Eclerx Services Ltd. on account of extra-ordinary events andpeculiar circumstances which had an impact on the profit margins However, it remitted comparability of 3 companies, namely, Birla Minacs Worldwide Ltd., Jindal Intellicom Pvt. Ltd. andAllsec

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Technologies Ltd to TPO for fresh adjudication of how the abnormal profits or losses of the companies impacted their comparability.
Acusis Software India Pvt Ltd [TS-678-ITAT-2019(Bang)-TP] - IT(TP)A No.697&842/Bang/2013 dated 28.06.2019

314. The Tribunal held that the assessee engaged in provision of ITeS services could not be compared to Excel Info Ltd for AY 2012-13 as there was abnormal volatility of revenue of this company from 2009-10 to 2014-15.
Zyme Solutions Pvt. Ltd. [TS-628-ITAT-2019(Bang)-TP] - IT(TP)A No.1661/Bang/2016 dated 28.06.2019

315. The Tribunal rejected Revenue's plea that Allsec Technology Ltd could not be considered as comparable for AY 2011-12 since it had incurred losses for 3 years. It noted that though it had incurred losses in 3 preceedingyears, PBIT for the relevant AY had turned negative on account of charges towards depreciation & amortization, which is a normal cost which arises during course of business operations and not on account of extraordinary factors. Further, it also noted that for FY 2006-07, it had positive PBIT and it had turned around in FY 2012-13 with positive PBIT. Accordingly, the Tribunal held that if a company is functionally similar to theassessee,then consistent loss in one or two years was not good ground for exclusion of such comparable.
Reliance Corporate IT Park [TS-846-ITAT-2019(Mum)-TP] – ITA NO. 4717 & 4873/Mum/2017 dated 26.06.2019

316. The Tribunal held that CG VAK Exports Ltd could not be excluded from the list of comparablesfor ITeS segment on the ground that it was a persistent loss making company, noting that if forex gain was included as part of operating revenue, then the company was not a persistent loss making company and there was no adverse remark about functional similarity.
Mobileum (India) Pvt Ltd (Formerly known as Roamware India Pvt Ltd) [TS-698-ITAT-2019(Mum)-TP] - IT(TP)A NO.945& 2047/Mum/2016 dated 26/06/2019

317. The Tribunal held that CG VAK Exports Ltd could not be excluded from the list of comparables for ITeS segment on the ground that it was a persistent loss making company, noting that though it had made loss in thepreceding two assessment years, during the current year it had a margin of 3.4%.
Jardine Lloyed Thompson Pvt Ltd [TS-613-ITAT-2019(Mum)-TP] - ITA no.2181/Mum/2014 dated 12.06.2019

318. The Tribunal held that Hindustan MotorsLtd could not be excluded from the list of comparables for international transaction of purchases and other services on the ground that it was a consistent operating loss making company, noting that had made operative profit of 0.11% during the preceding year.
Skoda Auto India Pvt Ltd [TS-563-ITAT-2019(PUN)-TP]- ITA No.154/PUN/2011 dated 10.06.2019

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Abnormal Profits

319. The Court upheld Tribunal's order holding that the assesseeengaged in provision ofsoftware development could not be compared to FCS Software Solutions Ltd since it had abnormally high profit margin for the subject AY at 57.02% as compared to operating profit margins in the preceding financial years of 19.94% to 14.75% and in the succeeding financial year at 37.09%
John Deere India Pvt Ltd [TS-567-HC-2019(BOM)-TP] - INCOME TAX APPEAL NO.63 OF 2017 dated 11.06.2019

320. The Tribunal held that assessee engaged in provision of transactional processing services (ITES) for AY 2013-14 could not be compared to

- Excel Infoways Ltd. (Seg.) - as it had fluctuating margins and was in the process of closing down its ITES segment. It relied on co-ordinate bench ruling in case of Emerson Climate Technologies (India) Private Limited which had excluded this company by applying the filter of rejecting exceptionally high/low margin concerns and noting that it was in the process of closing down its ITES segment.
  BNY Mellon International Operations (India) Private Limited v. DCIT Cir.1(1) Pune, [TS-401-ITAT-2019(PUN)-TP], ITA No.2320/PUN/2017, Dated May 07, 2019

Different Financial Year

321. The Tribunal remitted the issue of comparability of Helios & Matheson Information Technology Limited (excluded on ground of following different FY) back to AO/ TPO, relying on the decision in the case of Mercer Consulting (India) (P) Ltd wherein it was held that if it is possible to obtain reliable data for the relevant FY then such data can be used and the relevant comparable was not required to be excluded.
Broadcom Communications Technologies Private Limited (earlier known as Broadcom India Research Private Limited) [TS-612-ITAT-2019(Bang)-TP] - IT(TP)A No. 1929/Bang/2017 dated 14.06.2019

322. The Tribunal held that assessee a captive service provider, engaged in software development could be compared to

- R Systems International Limited – as TPO had excluded this company solely on the ground that it used calendar year as financial year. It relied on Delhi High Court decision in case of Mckinsey Knowledge Centre India Pvt Ltd and Baxter India Pvt. Ltd wherein it had held that if from the available data on record, the results for financial year can reasonably be extrapolated, then, the companies cannot be excluded. Thus, it restored the issue to the file of AO/TPO with a direction to include R Systems International Ltd. in the list of comparables after extrapolation of the financial results and giving the assessee an opportunity of being heard.
  ST-Ericcson India Pvt. Ltd., v. ACIT, Circle-24(2), New Delhi. [TS-530-ITAT-2019(DEL)-TP], ITA No.6247/Del/2015, dated May 28, 2019

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323. The Tribunal held that assessee engaged in software development and maintenance and data processing services for AY 2010-11 could not be compared to –

- Mphasis Fincources Ltd - as data selected by the assessee was for FY 2008-09 despite the fact that assessee had used companies with FY 2009-10 as a filter. Also, no application was made by the assessee for admission of any additional evidences.

Morningstar India Pvt Ltd v. DCIT Cir.17(1), Delhi, [TS-386-ITAT-2019(DEL)-TP] ITA No. 1520/Del/2015, dated May 06, 2019

324. The Tribunal held that the assessee engaged in provision of ITeS services could be compared to R Systems International Ltd, which was excluded by the TPO on account of different financial year, noting that financial results of the said company could be ascertained from the quarterly audited accounts.

J.P. Morgan Advisors India Pvt. Ltd. [TS-724-ITAT-2019(Mum)-TP] – ITA No. 990& 1754/Mum/2014&1597/Mum/2015 dated 19/06/2019

325. The Tribunal remitted the issue of comparability of Crisil Risk and Infrastructure Solutions Ltd (excluded on ground of following different FY) back to AO, holding that even though the comparable may be following a different financial year, if financial data of the comparable relating to the financial year followed by the assessee is available and which is authentic and can be relied upon, then the company should not be rejected as a comparable, if it is otherwise functionally similar to the assessee.

IIML Assets Advisors Ltd [TS-647-ITAT-2019(Mum)-TP] - ITA no.5261&5027/Mum/2017 dated 21.06.2019

326. The Tribunal held that the assessee engaged in provision of ITeS services could be compared to R Systems International Ltd, which was excluded by the TPO on account of different financial year, following co-ordinate bench decision in the assessee'sopwn case wherein it was held that if financial data is available for all the quarters including January to March and it isotherwise possible to determine the value of the transaction as well as the profitability during thecorresponding period, then it suffices the comparability criteria.

Pangea3 Legal Database Systems Pvt Ltd [TS-642-ITAT-2019(Mum)-TP] - I .T.A. No.1663&1923/Mum/2015 dated 25.06.2019

327. The Tribunal rejected Revenue's plea to exclude Crisil Risk and Infrastructure Solutions Ltd on the ground of following different FY, holding that even though the comparable may be following a different financial year, if financial data of the comparable relating to the financial year followed by the assessee is available and which is authentic and can be relied upon, then the company should not be rejected as a comparable, if it is otherwise functionally similar to the assessee.

Orbimed Advisors India Private Limited [TS-634-ITAT-2019(Mum)-TP] - ITA No.2653 /Mum/2017 dated 10.06.2019

328. The Tribunal held that the assessee engaged in provision of ITeS services could be compared to R Systems International Ltd, which was excluded by the TPO on account of different financial year, noting that financial results for the financial year followed by the assessee was

available.Infact, operating margin for the said year as provided by the TPO was forming part of the paper book filed before the Tribunal.
Accenture Services Pvt Ltd [TS-619-ITAT-2019(Mum)-TP] - ITA no. 1110 &1671/Mum/2014&501& 549/Mum/2015 dated 28.06.2019

329. The Tribunal remitted the issue of comparability of Agrima Consultants International Ltd (which was excluded by the TPO on account of the said company having different financial year) for verification of availability of data for financial year followed by assessee.
Honeywell Turbo Technologies (India) Pvt Ltd (Legal Successor of Honeywell Turbo (India) Pvt. Ltd.) [TS-670-ITAT-2019 (PUN)-TP] - ITA No.377& 378/PUN/2014 dated 24.06.2019

Multiple Years Data

330. The Tribunal upheld TPO's rejection of use of multiple year data of comparable companies selected for benchmarking software development segment of the assesse, noting that Rule 10B(4) stipulates that contemporaneous information and documents should be considered, as far as possible, for purpose of comparing uncontrolled transactions with international transactions for ALP determination. It thus held that comparability needs to be tested by using current year's data and it is only when current year's data does not give a true picture of affairs and results of comparables due to existence of some abnormal circumstances, use of multiple year data may be considered.
Qualcomm India Pvt. Ltd [TS-522-ITAT-2019(DEL)-TP] - ITA No. 1810/Del/2014 dated 03/06/2019

Government / Public Sector Company

331. The Tribunal held that assessee engaged in manufacture of material processing equipments like crushers, screeners etc and providing business support and engineering design services to its AE for AY 2010-11 could not be compared to :

- Rites Ltd – as it was government company engaged in diversified services including business of captive railway systems in India.
- Kitco - as it was government company engaged in technical services like asset valuation, energy audits, revival study etc.

Terex India Pvt. Ltd. v. DCIT, Cir. 25(1), New Delhi, [TS-512-ITAT-2019(DEL)-TP] ITA No.4791/Del/2015, dated May 30, 2019

332. The Tribunal held that assessee engaged in technical services for AY 2013-14 could not be compared to :

- Mitson Consultancy and Engineering Services Ltd – as it had received capital grant from the Department of Science and Technology, Government of India for export facilities and for setting up Biotechnology Laboratory which had impacted it's profit margin.

Alcatel-Lucent India Ltd., v. DCIT, Special Range-1, New Delhi, [TS-429-ITAT-2019(DEL)-

TP], dated May 9, 2019

333. The Tribunal held that assessee providing local logistics of freight forwarding services in India could not be compared to :

- Apitco Limited and Global Procurement Consultant Ltd – as they were Government companies.

APL Logistics (India) Pvt.Ltd.v. ACIT 14(1)(1), Mumbai, [TS-579-ITAT-2019(Mum)-TP], ITA No.2162/Mum/2015, dated May 29, 2019

334. The Tribunal held that the assessee engaged in provision of business support services could not be compared to Aptico Ltd as it was a Government company.
Reliance Corporate IT Park [TS-846-ITAT-2019(Mum)-TP] – ITA NO. 4717 & 4873/Mum/2017 dated 26.06.2019

335. The Tribunal held that the assesse engaged in provision of engineering and related servicescould not be compared to Certification Engineers International Ltd since was a wholly owned subsidiary of Engineers India Ltd., a government company.
Emerson Electric Company (India) Private Limited [TS-564-ITAT-2019(Mum)-TP] - ITA No.6098/Mum/2018 & ITA No.531/Mum/2018 dated 14.06.2019

336. The Tribunal held that the assesse engaged in manufacturing of excavatorscould not be compared to Bharat Earth Movers Ltd (BEML) on account of being a government company (having different controlled environment, customers, raw material suppliers, profit margins and would not operate in a free competitive environment).
Hyundai Construction Equipment (I) Pvt Ltd [TS-589-ITAT-2019(PUN)-TP] - ITA No.565& 644/PUN/2015 dated 11.06.2019

Own Comparable

337. The Tribunal allowed the assessee to raise additional ground for exclusion of Integrated Capital Service Ltd, which was selected by the assessee itself as a comparable in its TP study report and which was accepted by the TPO and DRP, holding that only because the assessee had selected a particular comparable, it could not be retained irrespective of the fact that it was functionally dissimilar to the assessee. However, noting that the issue was raised for the first time before the Tribunal, it remitted comparability of the company back to the AO for fresh adjudication.
J.P. Morgan Advisors India Pvt. Ltd. [TS-724-ITAT-2019(Mum)-TP] – ITA No. 990& 1754/Mum/2014&1597/Mum/2015 dated 19/06/2019

338. The Tribunal accepted assessee' plea for exclusion of comparablesviz. Genesys International, Accentia Technologies (under ITeS segment) and Persistent systems (under IT segment) which were selected by the assessee itself as a comparable in its TP study report, holding that comparables selected by assesseeare not sacrosanct and if a company, though selected by assessee, is not found to be functionally similar, it has to be rejected.

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Accenture Services Pvt Ltd [TS-619-ITAT-2019(Mum)-TP] - ITA no. 1110 &1671/Mum/2014&501& 549/Mum/2015 dated 28.06.2019

Non-availability of Financial Data

339. The Tribunal ruled on comparable selection in case of assessee engaged in printers trading and provision of software development services and restored the issue of inclusion two comparables viz. Lanco Global Systems Ltd. and VJIL Consulting Ltd. as sought by assessee. The Tribunal observed, from TPO's order that relevant details for computation of margins of the two comparables were not available on the public domain/ prowess database. However, the assessee had contended that all particulars, in relation thereto were available and filed before CIT(A), however, CIT(A) did not subject the same to factual verification. Hence, considering the above, the Tribunal restored the issue of these two comparables to the TPO for fresh adjudication/ factual verification.

ACIT vs M/s. Lexmark International India Pvt Ltd- TS-162-ITAT-2019(Kol)-TP-ITA No 89 & 391/Kol/2017 dated 27.02.2019

Consistency

340. The Tribunal held that assessee engaged in providing call center services (BPO Services) to its AE for AY 2010-11 could be compared to

- R systems International - as it was accepted by CIT(A) as comparable in assessee's own case for AY 2009-10. It opined that department cannot cherry pick the comparables as per its convenience. Once it was held as comparable in a particular year then in later years it could not be excluded as comparable unless there was any material change within the entity related to its structure or business. Just because a company in any particular year incurred heavy expenditure on account of AMP, it could not be held as non-comparable.

Effective Teleservices Pvt. Ltd. v. DCIT, Gandhinagar Circle, Gandhinagar, [TS-538-ITAT-2019(Ahd)-TP], I.T.A. No. 3077/Ahd/2015, dated May 15, 2019

341. The Tribunal in the second round of appeal pursuant to High Court order, directed the TPO to re-conduct benchmarking analysis for assessee providing software services, in line with the methodology and functional profile adopted for succeeding AYs. The High Court had set aside Tribunal's original order, wherein the Tribunal had rejected assessee's cross objection citing 951 days delay in filing the same. The High Court remanded back the issue to the Tribunal noting that the Assessee could not be deprived of its opportunity to contend in the alternative on the merits of its claim, if the aspect relating to 5% Standard Deduction was negatived by a retrospective statutory amendment by Finance Act, 2012.

In second round of proceedings, the Tribunal noted that though the CIT(A) accepted the functional profile and methodology adopted in succeeding AY to be more scientific, he erred in re-computing assessee's margins for current AY. The Tribunal noted assessee's contention that due to wrong functional profile considered by the TPO, the comparables could not be matched

with the actual functional profile of the assessee and thus the Tribunal directed the TPO to re-do the benchmarking exercise.

Synova Innovative Technologies Pvt Ltd vs ACIT-TS-19-ITAT-2019(Bang)-TP-IT(TP)A No 36/Bang/2011 dated 11.01.2019

342. The Tribunal deleted TP-adjustment rejecting Nil ALP-determination for receipt of information technology (IT services), relying on assessee's case for AY 2011-12 wherein the Tribunal had applied the principles of consistency and deleted the adjustment observing that assessee had been claiming the IT expenses for the last several years and the same was not denied.

Philips India Ltd., v. ACIT Cir. 12(2), Kolkata, [TS-443-ITAT-2019(Kol)-TP] ITA No.2600/Kol /2018, ITA No.2600/Kol /2018, dated May 15, 2019

343. The Tribunal deleted TP-adjustment on account of Royalty paid to USA-AE for technical know-how for manufacture of 'halls', following co-ordinate bench ruling in assessee's own case in AY2006-07 wherein similar TP-adjustment was deleted after noting that Revenue, in the subsequent assessment years, had allowed payment of royalty both for trademark and technical know-how.

Mondelez India Foods Pvt. Ltd. (formerly known as M/s. Mondelez India Foods Ltd.) v.Addl.CIT Range5(1),[TS-708-ITAT-2019(Mum) TP],I.T.A.No.4225/Mum/2014(Assessment Year 2007-08), dated May 15, 2019

344. The Tribunal ruled on TP-adjustments on account of interest charged on share application money forwarded to AE. The TPO had made an adjustment to interest charged on share application money forwarded to AE at LIBOR + 500 BPS as opposed to that charged by assessee at LIBOR + 200 BPS. The Tribunal noted that the assessee had charged interest at the rate of LIBOR + 300 BPS in subsequent years which was also accepted by the Department and hence, it directed AO/TPO to recalculate interest by applying LIBOR + 300 BPS.

Suashish Diamonds Ltd. v. Addl. CIT, Range-5(3), [TS-689-ITAT-2019(Mum)-TP], ITA Nos.7508/Mum/2014, dated May 31, 2019

345. The Tribunal held that the assessee engaged in research and development relating tosoftware solutions to AE could be compared to Thinksoft Global ServicesLtd, rejecting Revenue's reliance on the co-ordinate bench decision in assessee's own case for the preceding year wherein the said company was rejected on account of being engaged in onsite and offshore business. It accepted assessee's submission that since for the preceding year its margin was within Arm's Length range after exclusion/inclusion of othercomparables, inclusion of Thinksoft Global Services had become academic exercise and hence, was not contested further. The Tribunal, however, upheld exclusion of FCS SoftwareSolutions following TPO's action in the preceding year wherein the said company was rejected by on ground of functional dissimilarity.

Starent Networks India Pvt Ltd [TS-622-ITAT-2019(PUN)-TP] - ITA No.537/PUN/2015 dated 24/06/2019

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Others

346. The Court admitted assessee's writ petition challenging Tribunal order retaining HCCA Business Services as comparable to its staffing segment for AY 2010-11 and remanded the matter to the TPO for fresh determination. The Assessee had filed MA under section 254 (2) of the Act pointing out that in its order the Tribunal had noted that HCCA owned 'intangibles' and yet it was not excluded as a comparable. The said MA was dismissed by the Tribunal against which the writ petition was filed. The Court had rejected Revenue's contention that mere exclusion or inclusion of a comparable for the purposes of TP-adjustment did not give rise to any substantial question of law. It noted that the only comparable on the basis of which the TP-adjustment was recommended by the TPO was HCCA, thus in that view of the matter it could not be said that the impugned order of the Tribunal did not give rise to any substantial question of law. Considering assessee's plea for excluding HCCA on ground of ownership of intangibles, the Court noted that Tribunal had failed to deal with its earlier decision in case of LG Chemicals India wherein the said company was excluded on the basis that a company owning intangibles could not be compared with one which does not. The Court also observed that Tribunal had overlooked assessee's objections regarding inclusion of HCCA on ground of functional dissimilarity since it was only providing payroll processing services. Thus, the Court remanded the entire issue of determining the TP adjustment, if any in respect of the transactions in the staffing segment of the Assessee to the TPO for a fresh determination.
Pyramid IT Consulting P Ltd v. Addl. CIT, New Delhi, [TS-419-HC-2019(DEL)-TP], W.P.(C) 5198/2019, ITA 1289/2018, dated May 14, 2019

347. The Tribunal considered assessee's contention that TPO/DRP erred in not providing appropriate adjustment for start-up cost and trouble cost and did not appreciate the fact that selection of certain items of fixed costs was an important factor in computing the ALP adjustment. The Tribunal also considered assessee's contention that DRP erred in confirming TPO/AO's order in not treating the one travel expenditure incurred in relation to implementation of SAP as abnormal cost vis-à-vis comparables which were already established in market.The Tribunal, thus opined that these factors were required to be adjusted so as to have a meaningful comparability analysis between the international transactions of the assessee and the comparables. Thus, considering that, in order to arrive at an appropriate adjustment, the entire factual matrix was required to be reexamined/ verified on the basis of the material to be furnished by the assessee. Thus, the Tribunal restored the issues and directed the TPO/AO to allow the assessee a reasonable opportunity to make submissions and produce relevant material in support of its stand and thereafter to allow an appropriate adjustment in the operating margins of the assessee.
M/s. Triumph International (I) P Ltd vs DCIT-TS-299-ITAT-2019(Chny)-TP-ITA No 1035/Chny/2014 dated 04.04.2019.

348. The Tribunal allowed assessee's appeal and restored TP-issue back to AO/TPO for fresh determination of ALP in accordance with law noting that assessee was into manufacture as well as sale of compressors and since both the activities were different, it required different set of comparables. The Tribunal further considered assessee's submission that though assessee was involved in two different activities of manufacture and sale, TPO had taken same set of

comparables for both transactions and arrived at TP-adjustment, which was incorrect. Thus, the Tribunal held that assessee should be allowed to raise contentions on account of comparables and also the method to be adopted for determination of the ALP again before the TPO/AO and thus remitted the matter.

Tecumseh Products India Pvt Ltd vs ACIT-TS-52-ITAT-2019(Hyd)-TP-ITA No 494/Hyd/2015 dated 15.01.2019

f. Computation / Adjustments

Capacity Utilization Adjustment

349. The Tribunal directed AO/TPO to examine assessee's claim of capacity adjustment while benchmarking transaction of export of finished goods to AE. The Tribunal considered assessee's submission that average capacity utilization achieved by it during the year was 42% while that of comparables was 70%, however, noted that assessee did not possess the details of the same. The Tribunal relied on Bombay HC ruling in case of Petro Araldite and Delhi Tribunal ruling in case of Claas India (P.) Ltd. wherein it was held that the adjustment towards difference in capacity utilization was required to be made in terms of Rule 10B(1)(e)(iii) to profit margin of comparable to iron out the difference. Thus, the Tribunal concluded that *since this issue had not been examined by the tax authorities and since the assessee had to furnish necessary details in order to support its claim, which in turn required examination at the end of AO, it restored the file to the AO / TPO for examining the claim of the assessee.*

M/s. SKF Technologies India Pvt Ltd vs DCIT-TS-82-ITAT-2019(Bang)-TP-IT(TP)A No 341/Bang/2014 dated 15.02.2019

350. The Tribunal remitted the issue of adjustment for under-utilization of capacity back to the AO/TPO by following coordinate bench ruling in assessee's own case for previous AY wherein the AO/TPO were directed to grant low capacity utilisation adjustment to the assessee on clarifying that the adjustment was only on account of cost attributable to idle capacity for the year under consideration, for which assessee was required to provide capacity utilisation details for self and comparables. The Tribunal noted that no discussion on comparables was made in DRP's order, thus the Tribunal remitted the issue back to the DRP for fresh adjudication.

M/s. Sami Labs vs DCIT-TS-271-ITAT-2019(Bang)-TP-IT(TP)A No 186/Bang/2015 dated 05.04.2019

351. The Tribunal rejected assessee's claim for capacity adjustment as assessee's computation of capacity utilization of a comparable, Sundaram Fasteners at 218.24% was exceptionally high. It opined that there may have been some error in computation, since it was difficult to achieve capacity utilization of 218% considering normal industry standards.

Snecma HAL Aerospace Pvt Ltd. v. ITO, Ward-6(1)(3), Bangalore [TS-456-ITAT-2019(Bang)-TP], IT(TP)A No.432/Bang/2015, Dated May 17, 2019

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352. The Tribunal admitted assessee's additional ground in respect of adjustment for capacity under-utilization for assessee [engaged in the business of manufacturing and distribution of women foundation garment, swimwear and lingerie brand in India] and restored the matter back to TPO/AO to consider it de-novo. respect of the AE segment within the manufacturing segment, which was as low as 10.61%. The Tribunal stated that assessee's additional ground was purely legal in nature and since this issue was not at all considered by the lower authorities, it admitted the additional ground.

M/s. Triumph International (I) P Ltd vs DCIT-TS-299-ITAT-2019(Chny)-TP-ITA No 1035/Chny/2014 dated 04.04.2019.

353. In additional ground, the assessee claimed that TPO, while computing capacity under-utilization adjustment in the manufacturing segment, erred in considering the capacity utilized by assessee at the whole manufacturing segment / entity level of 15.04% instead of considering it only in The Tribunal allowed assessee's plea for granting of capacity utilization adjustment, considering assessee's underutilisation of capacity as it was the second year of its operation which is a difference materially affecting the profits deserving an adjustment as per Rule 10B(3). It further stated that the methodology to allow the adjustment was to identify all the fixed expenses (and not just machinery depreciation and repairs cost as held by DRP in this case) and to adjust the same in the ratio of the capacity utilized. It directed TPO to utilise his power u/s 133(6) to call for information and work out the adjustment. It also directed TPO to examine whether non-cenvatable custom duty on import made by the assessee was materially affecting the transaction vis-à-vis the comparables as claimed by the assessee and to grant adjustment accordingly.

DCIT vs Terex India Pvt Ltd [TS-359-ITAT-2019(DEL)-TP] - ITA No. 6775/Del/2015 dated 26-03-2019

354. The Tribunal admitted the additional ground against rejection of capacity utilization adjustment raised by assessee engaged in business of production and trading of In-Vitro Diagnostic Kits for humans and animals for AY 2011-12 and directed AO to give an opportunity to the assessee to substantiate its claim of capacity adjustment with evidence to his satisfaction. It separately observed that DRP's order directing treatment of foreign exchange gains as operating income, was very cryptic and did not mention facts or decisions relied on by DRP. Thus, it remitted issue to DRP to pass a speaking order on the issue.

SD Bio Standard Diagnostic Pvt Ltd vs. ACIT [TS-183-ITAT-2019(DEL)-TP] ITA No.1323, 741/Del/2016 dated 15.03.2019

355. The Tribunal remitted capacity utilization adjustment back to TPO following coordinate bench ruling in assessee's own case for AY 2011-12, wherein TPO was directed to identify all the fixed expenses including depreciation and to adjust the same in capacity utilized by exercising his powers by calling information.

Terex India Pvt. Ltd. v. DCIT, Cir. 25(1), New Delhi, [TS-512-ITAT-2019(DEL)-TP] ITA No.4791/Del/2015, dated May 30, 2019

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356. The Tribunal allowed assessee's claim for adjustment towards under utilisation of capacity in one of its plant (Rasai plant) to 42% during the year and consequent shutdown cost considering close down of the plant for 4 months due to lack of demand and pile up of excess inventories.
SI Group India Limited [TS-599-ITAT-2019(Mum)-TP] - ITA Nos.1745/Mum/2014 & 1307/Mum/2014 dated 19.06.2019

357. The Tribunal upheld CIT(A)'s order allowing capacity utilization adjustment to assessee engaged in manufacture and sale of passenger cars, noting assessee's contention that it was in its second year of operation and had utilized only 33% of the total capacity whereas the comparables on an average utilized 50 to 70% of the total capacity and hence the margins of the comparables needed to be adjusted accordingly.
Skoda Auto India Pvt Ltd [TS-563-ITAT-2019(PUN)-TP]- ITA No.154/PUN/2011dated 10.06.2019

358. The Tribunal remitted the issue of capacity utilization adjustment, following the co-ordinate bench decision in assessee's own case for an earlier year. In the earlier year, it was noted that sincelower authorities had refused to accept assessee's assertion in respect of low capacity utilization, the issue was not properly appreciated and accordingly, the co-ordinate bench had remitted the issue with a direction to consider the documents to be furnished by assessee.
Geissel India Pvt Ltd [TS-615-ITAT-2019(PUN)-TP] - ITA No.2574/PUN/2016 dated 14.06.2019

359. The Tribunal rejected the methodology used by assessee for capacity utilization adjustment, following co-ordinate bench in assessee's own case for an earlier year wherein also assessee'smethod for quantifying "capacity utilization adjustment" to the tested party was rejected and the issue was remitted back to AO with a direction to follow the ruling of Petro Araldite (Bom HC) which laid down the proposition of making the adjustment to the profit margin of comparables.
Hyundai Construction Equipment (I) Pvt Ltd [TS-589-ITAT-2019(PUN)-TP] - ITA No.565& 644/PUN/2015 dated 11.06.2019

Depreciation Adjustment

360. The Tribunal restored the issue of depreciation adjustment in case of assessee engaged in marketing and distribution of advanced medical equipments and healthcare products for AY 2011-12. It considered assessee's submission that it had provided for depreciation at a higher rate, while, the comparables claimed depreciation at the rate prescribed under Schedule–XIV of the Companies Act, 1956 and as per co-ordinate bench ruling in case of Honda Motorcycle & Scooters India, the difference in the amount of depreciation due to different rates of depreciation was required to be brought at par. Thus, Tribunal agreed with assessee's claim for depreciation adjustment for benchmarking the international transaction of import of capital assets under TNMM and restored the issue to AO for examination as this argument was made by the assessee for the first time before Tribunal.

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Smith & Nephew Healthcare Pvt. Ltd. v. ITO Ward 11(2)(3) Mumbai, [TS-496-ITAT-2019(Mum)-TP], ITA No.2028/Mum./2016, dated May 24, 2019

Profit Level Indicator

361. The High Court admitted assessee's appeal against Tribunals order holding that export incentive must not be reduced from the cost of goods sold or added to the sale price for computing gross profit markup for determination of arm's length price of international transactions of export of finished goods. The High Court admitted the following question:
"Whether in the facts and in the circumstances of the case, the ITAT fell into error in rejecting the assesse's contention that export incentive had to be reduced from the cost of goods sold or added to the sale price for computing gross profit markup for determination of arm's length price of international transactions of export of finished goods? "
Goodyear India Ltd vs DCIT-TS-136-HC-2019(Del)-TP-ITA 161/2019 dated 15.02.2019

362. The Court dismissed Revenue's appeal against Tribunal order confirming TP-adjustment deletion for Indian subsidiary of Japanese Sogo Shosha entity in respect of business support services provided to AEs for AYs 2007-08, 2008-09 & 2009-10. It upheld Tribunal's view that TPO had wrongly re-characterized the business function of the taxpayer from a business support service provider to a trader. It also upheld Tribunal's rejection of artificial enhancement of assessee's cost base by including the FOB value of the AE's contract in the operating cost in order to determine its margin. Relying on Li & Fung ruling it held that to apply the transactional net margin method, the assessee's net profit margin realized from the international transactions had to be calculated only with reference to the cost incurred by it and not by any other entity either third party vendors or the associated enterprise. It observed that Revenue's SLP against Li & Fung HC ruling for AY 2006-07 was pending before SC and there was no stay of the operation of the HC ruling. It further noted that AO had accepted assessee's ALP-determination for subsequent AYs 2011-12, 2012-13 and 2013-14, which was recorded by Tribunal in the impugned order as well.
Pr. CIT-4, Delhi v. Itochu India Private Ltd., [TS-428-HC-2019(DEL)-TP], ITA No.1111/2018, dated May 13, 2019

363. The Assessee was engaged in manufacture and sale of lube additives and the Tribunal had upheld transfer pricing adjustment made by TPO in respect of international transaction entered into by assessee with its AE by benchmarking financials of a company named 'Lubrizol' which was also in business of manufacturing automobile additives. The Assessee had contended that it had incurred additional cost for transportation whereas cost of transportation in comparable case of 'Lubrizol' was less, therefore, suitable adjustment should be made in this regard while determining arm's length price. The Tribunal had held that since assessee was not able to establish that cost of transportation in case of Lubrizol was lesser than assessee, argument of assessee that suitable adjustment should be made while determining ALP of international transaction entered into by assessee could not be upheld. The Court relied on Karnataka HC ruling in Softbrands India P. Ltd to note that in the case of determination of Arms Length Price,

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unless a perversity in the order passed by the learned Tribunal was established, no substantial question of law would arise requiring interference under Section 260A .Thereby, dismissed assessee's appeal as being devoid of merits.

M/s. Indian Additives Ltd vs DCIT-TS-608-HC-2019(Mad)-TP-Tax Case Appeal No 28 & 29 of 2019 dated 16.04.2019

364. The Tribunal upheld DRP's order on the issue that donation formed part of operating expenses as it had followed the coordinate bench decision in SAP Lab India Ltd ([2010] 8 taxmann.com 207) wherein it was held that donations are regular expenditure incurred by an assessee in the ordinary course of carrying on its business and hence it must not be reduced from operating expenses. Further, it restored the matter in case of miscellaneous income forming a part of operating revenue to TPO as the assessee was not given an opportunity of being heard.

Further, it restored the issue vis-à-vis abnormal expenditure (like excessive sorting charges and warranty charges) to be excluded from operating expenses following the coordinate bench ruling in assessee's own case wherein it had restored the matter to TPO to decide the issue afresh after providing an opportunity to the assessee for being heard. It directed the TPO that if the assessee was able to substantiate that expense in question was abnormal, the same had to be excluded from operating expenses.

Inteva Products India Automotive Pvt Ltd vs ACIT [TS-110-ITAT-2019(Bang)-TP] IT (TP) A No.830/Bang/2017 dated 18.01.2019- SD

365. The Tribunal dismissed Revenue's ground and upheld DRP's observation that foreign exchange fluctuation was operating in nature and observed that the year under consideration was assessee's first year of operation and therefore there cannot be carry forward of forex gain/ loss of the previous year to AY, hence forex gain/loss that arose to assessee was for subject AY.The Tribunal clarified that Mercedes Benz R&D India ruling [holding that forex gain/ loss was operative in nature as long as it pertained to AY under consideration] though correct, would not be applicable to the present facts. Thus, held foreign exchange fluctuation as operating in nature.

DCIT vs M/s. CISCO Development (India) Pvt Ltd-TS-298-ITAT-2019(Bang)-TP-IT(TP)A No 308/Bang/2016 dated 05.04.2019

366. The Tribunal followed coordinate bench ruling in Centum Rakon India Pvt Ltd and directed AO/TPO to consider PLI without considering depreciation as part of the operating cost if the assessee established that there was substantial variation in the manner of charging depreciation by the assessee and comparable companies.

Rittal India Pvt Ltd v. DCIT Circle-1, LTU, Bangaluru, [TS-484-ITAT-2019(Bang)-TP], IT(TP)A No.2494/Bang/2017, dated May 17, 2019

367. The Tribunal directed AO/TPO to accept cash profits as PLI, relying on co-ordinate bench ruling in case of Centum Rakon wherein it was held that profit before depreciation can be taken as PLI, if there was substantial variation in the manner of charging depreciation by the assessee and comparable companies. Accordingly, it also directed assessee to furnish the details to prove that there was substantial variation in the manner of charging depreciation.

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Snecma HAL Aerospace Pvt Ltd. v. ITO, Ward-6(1)(3),Bangalore [TS-456-ITAT-2019(Bang)-TP], IT(TP)A No.432/Bang/2015, Dated May 17, 2019

368. The Tribunal accepted assessee's contention that export incentives were to be considered as part of operating profits but directed the AO/TPO to verify if export incentive pertained to current year's turnover and not earlier year. The Tribunal stated that if export incentives were not pertaining to current year, the profit would remain included in the numerator, but the corresponding turnover would not remain included in the denominator and thus would give absurd result. The Tribunal further held that the same effect should be given for working out the operating profit percentage of the assessee i.e. the tested party and the comparables both and if it was found that the effect could not be given in the case of the comparable for want of required data then it should not be included in the profit of the tested party i.e. assessee also.
M/s. Sami Labs vs DCIT-TS-271-ITAT-2019(Bang)-TP-IT(TP)A No 186/Bang/2015 dated 05.04.2019

369. The Tribunal upheld DRP's order directing the TPO to consider profit before depreciation (i.e. to exclude depreciation from operating cost) while computing the PLI of the assessee and the comparables, noting that the comparables followed SLM and charged depreciation as per the rates prescribed under schedule XIV of the Companies Act, 1956 whereas the assessee company had a policy of charging depreciation on SLM each year at rates higher than the Companies Act due to its overall group policy. It rejected assessee's claim for making adjustment to the PLI on account of different method of depreciation, noting DRP's finding that it would be difficult to make accurate adjustment for this purpose.
The Tribunal also remanded the issue of whether the foreign exchange fluctuation gain / loss was operating or non-operating in nature with the direction that if the gain/loss pertained to earlier years turnover then it would not form a part of operating profit.
It rejected assessee's additional ground for grant of working capital adjustment since the said issue was never raised before lower authorities and the paper books submitted by assessee did not contain TP study or any working of working capital adjustment.
Essilor Manufacturing (India) Pvt Ltd & Ors v DCIT & Ors [TS-436-ITAT-2019(Bang)-TP] - IT(TP)A Nos. 211, 239 & 1166/Bang/2015 & 2124 & 2125/Bang/2016 dated 25.01.2019- BS

370. The Tribunal held that foreign exchange loss on restatement of loans was extra-ordinary and directed exclusion of the same while computing the PLI of the manufacturing segment of the assessee. It also directed exclusion of all foreign exchange losses of other segments as they did not pertain to the manufacturing segment. It also agreed with assessee that TP-adjustment on purchases from AE was to be restricted to the value of raw material consumed and not on entire raw material purchased, as impact on the margin, if any, in respect of such purchases during the year was only of the material consumed and not of the material purchased and which was lying unutilized at the end of the year as closing stock.
DCIT vs Terex India Pvt Ltd [TS-359-ITAT-2019(DEL)-TP] - ITA No. 6775/Del/2015 dated 26-03-2019

371. The Tribunal allowed assessee's plea seeking inclusion of foreign exchange gain/loss in operating revenue/costs of assessee as well as comparables, as foreign exchange gain/loss

directly resulted from trading items emanating from international transactions. It relied on Special Bench ruling in case of Prakash I. Shah and referred to OECD guidelines in this regard. Also, as per Rule 10B(1)(e) there was no scope for arbitrarily excluding any item of income or expense while computing net profit under TNMM.
ChrysCapital Investment Advisors (India) Pvt.Ltd. v.ACIT Cir. 6(1), New Delhi, [TS-482-ITAT-2019(DEL)-TP] ITA No. 458/Del/2016, dated May 17, 2019

372. The Tribunal ruled on nature of subsidy income for assessee (engaged in business of HRD consultancy) and rejected assessee's contention that subsidy received from AE represented ex-gratia received to support structural loss of assessee and no actual services were rendered by assessee. The Tribunal on perusal of service charge agreement held that subsidy received were directly linked to the agreement under which assessee had agreed to provide services, thus, **it** upheld clubbing of subsidy income with income from provision of consulting service for benchmarking.
M/s. Tower Watson India Pvt Ltd vs DCIT TS-260-ITAT-2019(Del)-TP-ITA No 1710/Del/2016 dated 02.04.2019

373. The Tribunal dismissed Revenue's appeal against consideration of foreign exchange gain/ loss as part of operating revenue and observed that the TPO had revised TP-adjustment to Nil after giving effect to DRP's direction of including foreign exchange gain/loss as part of operating revenue (on the basis of the financial statement of one of the comparable, namely, KBRL Ltd) and by computing the average margin of comparables at 5.81%, which was within +/- 5% tolerance range. Further, the Tribunal noted that DRP on observing that foreign exchange gain/loss pertained to the operations of sale transaction, referred to the financials of one of the comparable namely KBRL Ltd, where in foreign exchange gain/loss was considered operating, and the DRP applying the principal of consistency directed adoption of uniform approach to include foreign exchange gain/loss in operating revenue of both the assessee as well as the comparables. The Tribunal further noted that the safe harbour rules cited by the DR (i.e income or expenses arising from foreign exchange fluctuation had been excluded from operating revenue or expense) could not be applied while working out the appropriate margin of the tested party and the comparables, and observed that the OECD TP guidelines provided for inclusion of foreign exchange gain/loss in TNMM to a transaction in which foreign exchange risk was borne by the tested party. Thus, the Tribunal opined that the finding of the DRP as mentioned above on the issue in dispute was well reasoned and did not find any error in the same.
DCIT vs M/s. Tilda Riceland Pvt Ltd-TS-610-ITAT-2019(Del)-TP-ITA No 6592/Del/2015 dated 04.04.2019

374. The Tribunal following precedents like Alliance Global Services and TNS India, directed the TPO to treat the provisions of bad and doubtful debts in the case of the assessee as well as comparables as part of the operating expenses.
Hackett Group (India) Ltd vs Dy CIT [TS-328-ITAT-2019(HYD)-TP] – ITA 2039/Hyd/2017 dated 15-03-2019

375. The Tribunal held that the excess amount of provisions for expenses written back was to be considered as operating in nature while computing operating profit margin of the assesseenoting

that these expenses were part of the regular operating expenses of theassessee's business. ***Pangea3 Legal Database Systems Pvt Ltd [TS-642-ITAT-2019(Mum)-TP] - I .T.A. No.1663&1923/Mum/2015 dated 25.06.2019***

376. The Tribunal accepted assessee's (engaged in manufacture of Steel Tyre Cord and Hose Reinforcement wire) plea with respect to adjustment to operating profit margin of the comparable companies owing to depreciation rates differences and held that difference in the amounts of depreciation due to different rates of depreciation called for bringing both the assessee and the comparable companies at par for comparability, thus directed AO/TPO to make suitable adjustment to the profits of the comparables, if such difference existed.
Bekaert Industries Pvt. Ltd vs DCIT-TS-347-ITAT-2019(PUN)-TP-ITA No 146,171/PUN/2014 dated 24.04.2019

377. The Tribunal held foreign exchange gain / loss to be operating in nature and directed TPO to include the same while computing in the operating revenue/costs of the assessee as well as that of the comparables. It noted that the foreign exchange gain / loss arose out of trading items emanating from the international transactions and relied on co-ordinate bench ruling in case of ACIT Vs Prakash I. Shah (2008) 115 ITD 167 (Mum)(SB) wherein it was held that the forex gain emanating from export is its integral part and cannot be differentiated from the export proceeds. The Tribunal also rejected reliance placed by Revenue on Safe Harbour Rules, 2013 (which states forex gain / loss to be non-operating) holding that such rules were not applicable to the AY under consideration i.e. AY 2010-11.
INA Bearings India Pvt Ltd [TS-553-ITAT-2019(PUN)-TP] -ITA No.43/PUN/2017 dated dated 07/06/2019

378. The Tribunal upheld adoption of PBIT/sales as PLI under TNMM for benchmarking international transactions in assesse's manufacturing segment, rejecting assessee's claim that since it had charged depreciation at rates higher than those prescribed under the Companies Act leading to higher claim of depreciation vis-a-vis the comparables, PBDIT should be adopted as numerator in PLI. It held that depreciation is an inseparable and an integral part of the operating costs as it is the user of the assets leading to depreciation claim which results into production and the resultant operating revenue. It also rejected assessee's claim for suitable adjustment in the operating profits on account of assessee's higher amount of depreciation, holding that depreciation adjustment is called for only when there is a difference on account of different rates of depreciation (which was already granted by the TPO along with adjustment for capacity-utilization) and not different quantum of depreciation simplicitor.
INA Bearings India Pvt. Ltd [TS-540-ITAT-2019(PUN)-TP] - ITA No.148& 281/PUN/2017 dated 07/06/2019

Restrict Adjustment to AE transactions

379. The Court dismissed Revenue's appeal against Tribunal's order wherein the Tribunal had rejected TPO's action of making the adjustment to the entire segment of manufacturing activity instead of restricting the same to the international transaction of import of raw material and

export of finished goods, following the rulings of Tara Jewels Exports (Bom) and Thyssen Krupp Industries India (Bom).

Bunge India Pvt Ltd [TS-526-HC-2019(BOM)-TP] - INCOME TAX APPEAL NO.445 OF 2017dated 03/06/2019

380. The Tribunal directed TPO to restrict TP-adjustment only to international transactions with AE in case of assessee engaged in providing logistics solutions, encompassing supply chain management, freight forwarding, warehousing and distribution services to global customers of Maersk Group. The Tribunal relied on jurisdictional High Court rulings in Tara Jewels and Hindustan Unilever, and held that the objective of computing the ALP was to determine the income arising from an international transaction and accordingly, the adjustment that was required to be made was to be limited to the international transactions with the AEs only and not to the entity / segmental level transactions.

M/s. Damco India Pvt Ltd vs DCIT-TS-16-ITAT-2019(Mum)-TP-ITA No 4728/Mum/2017 dated 08.01.2019

381. The Tribunalheld that the proportionate adjustment was to be made only on the value of international transactions and not for the entire transactions at entity level, where the TPO considered the total operating expenses while computing adjustment, instead of considering only the international transaction of import of raw materials from AE.

SI Group India Limited [TS-599-ITAT-2019(Mum)-TP] - ITA Nos.1745/Mum/2014 & 1307/Mum/2014 dated 19.06.2019

382. The Tribunal ruled on TP-issue for assessee engaged in the business of sourcing, screening, selecting and training Indian seafarers and providing assistance in completing their pre-joining formalities on behalf of foreign ship owners and noted that assessee had adopted CPM, TNMM and CUP method for determining ALP of different services provided by it while TPO adopted entity level TNMM. The Tribunal held that ALP-determination exercise should be restricted only to the international transactions and could not be extend to the entire turnover/sales of the assessee, and thus remitted the matter for fresh ALP- determination. Further, held that if the ALP on the basis of the aforesaid working was found to be within the safe harbour range of +/- 5%, then no adjustment shall be made in the hands of the assessee.

Wilhemsen Ship Management (India) Pvt Ltd vs ACIT-TS-334-ITAT-2019(Mum)-TP-ITA No 6913/Mum/2013 dated 30.01.2019

383. The Tribunal directed TPO to restrict TP-adjustment only to international transactions with AE in case of assessee engaged in providing logistics solutions, encompassing supply chain management, freight forwarding, warehousing and distribution services to global customers of Maersk Group for AY 2012-13 relying on co-ordinate bench decision in assessee's own case in AY 2013-14 wherein it was held that TP adjustment should be restricted to international transactions with AE only by relying on jurisdictional HC rulings in Tara Jewels (ITA No. 1814 of 2013) & Hindustan Lever (2016) 72 taxmann.com 325 (Bombay). Regarding DRP's observation that issue of entity vs. transaction level adjustment was pending before SC in case of Firestone International, Tribunal noted that the SLP in Firestone was admitted on the question of Sec 14A disallowance and not on the present issue

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Damco India Pvt Ltd vs. Dy.CIT [TS-241-ITAT-2019(Mum)-TP] IT(TP)A No.1155/Mum/2017 dated 20.03.2019

384. The Tribunal accepted assessee's plea to adopt segmental details and to compare AE's segmental margins with margins of comparables. It noted that assessee had provided audited segmental information during assessment proceedings which could not be brushed aside merely on the ground that in TP study report assessee worked margins at entity level. It held that under the provisions of section 92C of the Act for computation of arm's length price, benchmarking had to be done of all the international transactions of assessee with its AEs and consequently, segmental details of AE segment were to be adopted and not results at entity level.
Tata Technologies Limited v. ACIT Cir-7, Pune [TS-390-ITAT-2019(PUN)-TP], ITA Nos.168 & 1708/PUN/2018, dated May 03, 2019

385. The Tribunal upheld DRP's order directing TPO to restrict TP adjustment only to the international transactions pertaining to manufacturing operations, noting that the TPO had computed the adjustments on the total operating income from manufacturing operations instead of only the value of international transactions.
Hyundai Construction Equipment (I) Pvt Ltd [TS-589-ITAT-2019(PUN)-TP] - ITA No.565& 644/PUN/2015 dated 11.06.2019

Risk Adjustment

386. The Tribunal rejected assessee's plea for risk adjustment for comparing its operating profit margin as a captive service provider, operating in a risk immune environment with that of full-fledged entrepreneurial-companies relying on a plethora of rulings where such plea was rejected due to lack of appropriate data and quantification of risk adjustment.
ST Microelectronics Pvt Ltd vs Addl CIT [TS-305-ITAT-2019(DEL)-TP] - ITA No. 4888/ Del/2011 dated 19-03-2019

387. The Tribunal allowed the assessee's plea for risk adjustment under the Application Engineering Services segment, relying on the decision of coordinate bench in Sony India and holding that risk adjustment should be allowed on operating margins of comparables
Honeywell Turbo Technologies (India) Pvt Ltd (Legal Successor of Honeywell Turbo (India) Pvt. Ltd.) [TS-670-ITAT-2019(PUN)-TP] - ITA No.377& 378/PUN/2014 dated 24.06.2019

Segments

388. The Court accepted assessee's headcount based allocation of unallocable costs among its segments while benchmarking international transaction of receipt for online marketing support services by adopting TNMM. The Court opined that there were two possible choices, i.e.

turnover method (adopted by TPO) as well as the headcount method, the tax authorities had broadly agreed that expenditure could be allocated on the basis of proportionate turnover, but the option was open to the assessee to accept one or the other method. Accordingly, the Court held that the choice of the assessee of relying upon the headcount principle per se could not have been rejected. Further, the Court observed that co-ordinate bench in EHTP India had recognized that headcount basis was an acceptable principle and known to law.

Further, regarding selection of Indus Technical and Financial Consultants as comparable, the Court found that the Tribunal had upheld the inclusion rejecting assessee's reliance on the company's website while TPO himself had considered material available from the internet to include this comparable. Thus, the Court concluded that if such were the decision, the assessee could possibly also have relied upon material similar to material used by the TPO, however, the Court refrained from giving a final decision on merits and remitted the matter to lower authorities leaving it open for them to consider all the relevant material with respect to the said comparables.

Fujitsu India Pvt Ltd vs DCIT-TS-108-HC-2019(DEL)-TP-ITA No 604/2017 dated 13.02.2019

389. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order directing TPO/AO to verify correctness of segmental margins for AY 2008-09. It noted that CIT(A), in set aside proceedings, had accepted assessee's plea for inclusion of 2 comparables but as a measure of abundant caution had remitted the matter for verification of correct margins stage to the AO. It clarified that it was for AO to take a call on what was correct computation of segmental margin, and, as an integral part thereof, determine correct allocation of common expense. It observed that rather than doing such exercise diligently, he was in appeal on an altogether new plea that certain expenses are unallocable". It opined that if the expenses are unallocable, the expenses must not be allocated which will increase the margins of comparables something that the revenue authorities cannot be aggrieved of and where there was a reasonable basis for allocation of such expenses, the AO could have always adopted the same. Thus, all issues regarding computation of correct margins were open with AO, and there was no reason to interfere as there was no occasion to be aggrieved of the directions of the CIT(A).

Sabic Innovative Plastics India Pvt Ltd vs. Dy.CIT [TS-168-ITAT-2019(Ahd)-TP] vs. 1493/Ahd/ 2017 dated 08.03.2019

390. The Tribunal dismissed Revenue's miscellaneous petition claiming that Tribunal should have considered co-ordinate bench ruling in case of Volvo India Pvt. Ltd for AY 2013-14 while deciding the issue of ALP adjustment made by the TPO in respect of Management Services Fees and License Fee paid by the assessee. It noted that in the original order of the Tribunal, it was held that prices charged by the assessee and the amount of license fees paid to AE could not be examined on stand-alone basis and remitted the issue for examining the correctness of the ALP at the entity level by applying the TNMM by aggregating the transactions. The Tribunal relied on the decision in assessee's own case for AY 2009-10 and 2010-11, which in turn considered the co-ordinate bench decision in case of Volvo India Pvt. Ltd while deciding this very issue. Further it observed that in the case of Volvo India Pvt Ltd, it was not assessee's submission that these transactions were closely related and hence Tribunal had rejected the alternative plea for bundling of this transaction under TNMM. Also, it noted that Revenue was

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not able to establish that it had filed any appeals or MPs against co-ordinate bench ruling in assessee's case for AY 2009-10 and 2010-11 which was followed by Tribunal in the said order.
DCIT 1(1)(1), Bangalore v. Adcock Ingram Limited [TS-444-ITAT-2019(Bang)-TP], MP No.22/Bang/2019 in (IT(TP)A No.2728/Bang/2017), dated May 17, 2019

391. The Tribunal remitted issue of segmentation of financial results between AE and non-AE transactions to AO/TPO for assessee engaged in provision of software development services for AY 2012-13. It relied on Birla Soft vs DCIT (2014) 49 taxmann.com 312 (Delhi-trib) (subsequently upheld by Delhi HC) wherein similar issue was restored to TPO for determination of ALP by making internal comparison of profitability from international transactions with unrelated parties after allocating respective revenues and expenses to both the segments. It also dismissed DRP's entity-level benchmarking and remitted issue relating to computation of ALP restricting the same only to international transactions entered by assessee with AE (not including revenue from third party customers) to AO/TPO, relying on Yongsan Automative India vs ACIT ITA No.357/Mds/2017
Prodapt Solutions Pvt Ltd vs. Dy.CIT [TS-239-ITAT-2019(CHNY)-TP] I.T.A. No.566/Chny/2017 Dated 26.03.2019

392. The Tribunal remanded the issue of aggregation/segregation of Software Trading Segment and Software Development Segment for assessee engaged in the business of sale and service of Computer Software Development, Running Software Consultancy and other services.The Tribunal noted that this was the first time that the TPO had taken a different view from the earlier as well as subsequent assessment years by aggregating Software Trading Segment with Software Development Segment, but while doing so, there was no finding as to why these two segments had been aggregated/merged/clubbed by the TPO. Thus, the Tribunal remanded back this issue to the file of TPO/A.O. to decide the same afresh by taking into account FAR analysis given by the assessee in TP Study as well as principle of consistency.
Siemens Industry Software (India) Pvt Ltd vs DCIT-TS-28-ITAT-2019(Del)-TP-ITA No 318/Del/2015 dated 28.01.2019

393. The Tribunal remitted the issue of segregation of technical support services from Business Support Services (BSS) noting that (i) TPO had arbitrarily, without any basis, segregated transaction without analysing agreement under which such services were applied along with BSS and (ii) in earlier years, TPO had accepted benchmarking of technical support services transaction under BSS segment.
Qualcomm India Pvt. Ltd [TS-522-ITAT-2019(DEL)-TP] - ITA No. 1810/Del/2014 dated 03/06/2019

394. The Tribunal rejected Revenue's approach of aggregating international transactions entered with AE pertaining to provision of student recruitment and office services (student recruitment service segment) and payment of IELTS Test Fee/ EOR fee (IELTS Testing Service Segment) for assessee [engaged in consultancy and advisory services on matters of education, training, diagnostic language testing, admission procedures and students exchange programs in schools and colleges, anywhere in the world], noting that (i) assesseehad provided student recruitment service to AE in exchange for an application process fee which was determined by way of a split

of fee received from educationprovider being 70:30 between assessee and AE, further w.r.t. IELTS service segment, assessee paid AE @ Rs.3600 per candidate opting to appear for IELTS exams (ii) TPO had failed to establish inextricable connection between the two transactions/ segments or that their pricing depended upon assessee accepting all of them together (iii) the said transactions did not satisfy the criteria laid down by jurisdictional High Court in case of Knorr Bremse India ruling as there was no package deal and the transactions were separately valued.

IDP Education India Pvt. Ltd [TS-508-ITAT-2019(DEL)-TP] - ITA No. 6763/Del/2015 dated 03/06/2019

395. The Tribunal dismissed assessee's additional ground seeking exclusion of Priya Ltd from the list of comparables. Relying on SC ruling in case of NTPC it held that assessee's additional ground seeking exclusion of a comparable was not tenable in law as selection of comparables was purely a question of fact requiring examination of "new facts" and no point of law was involved. However it accepted assessee's segmental gross profit margin as allocation key for unallocated expenses rejecting CIT(A)/TPO's view of segmental revenue as the basis of allocation. It found that the CIT(A) had erred in not following his predecessor's decision for AY 2005-06 who had approved the gross profit margin as the correct allocation key.

Verizon India Pvt Ltd., DCIT Cir.26(1), New Delhi, [TS-430-ITAT-2019(DEL)-TP], ITA No. 6700/DEL/2015, May 10, 2019

396. The Tribunal upheld TPO/DRP's segregation of assessee's receipt of intra-group services from AE for AY 2011-12. It rejected assessee's contention that management fees paid to AE was part and parcel of overall transactions undertaken, for the reason that the main transaction undertaken by the assessee with its AE was with regard to the purchase of raw material, consumables and spares and sale of finished goods and purchase of finished good whereas management fee was arising out of altogether separate agreement with the AE with regard to management service. Accordingly, it cannot be held that such a payment for management fees (IGS) was directly linked with the other international transaction. Further, Tribunal observed that management service was divided into non chargeable cost (shareholder service portion) and chargeable cost and it was received at a lower price from AE and if procured from third party the cost would have been huge, and thus it cannot be held that the management service provided by the AE had not benefitted the assessee for reducing its cost. Hence, relying on EKL Appliances, Cushman & Wakefield rulings, the Tribunal rejected TPO's Nil ALP and directed TPO to carry out benchmarking analysis by verifying the working of tangible benefit derived from the services received by the assessee and directed that no adjustment should be made if the benefits were demonstrated.

Bucher Hydraulics P Ltd. V. ACIT Circle-5-1 New Delhi, [TS-532-ITAT-2019(DEL)-TP] ITA No.177/DEL/2016, dated May 10, 2019

397. The Tribunal remitted TP-adjustment in respect of assessee's provision of IT services to AE. It noted that though assessee submitted segmental bifurcation of its revenues and expenses into different operating segments (Trading, Provision of Market Support Services and IT services) which were further bifurcated into domestic and international segments, the TPO did not take the same into account and had in fact even aggregated provision of IT services and receipt of

IT services for benchmarking purpose. The Tribunal accepting assessee's plea, held that the segment profitability of the assessee company was to be taken into consideration as against aggregation of international and domestic segment of the assessee and reiterated that submission of the Assessee was well formed and was to be accepted, as the assessee company had given all the information relating to international segment and domestic segment with the related party sales transaction of the assessee company with its AE's. Thus, the Tribunal concluded that issues raised needed to be addressed by the TPO after taking into account all the relevant evidence provided by the assessee and thus remitted back the matter to TPO.
Fujtisu India Pvt Ltd vs DCIT-TS-89-ITAT-2019(Del)-TP-ITA No 1981/Del/2015 dated 18.02.2019

398. The Tribunal dismissed Revenue's appeal and accepted assessee's segment reporting (based on AE and non-AE transactions) for provision of software development services to AE and computation of ALP therefrom. The Tribunal rejected Revenue's contention that the segment reporting prepared by the assessee did not form a part of the audited accounts, and noted that being a 'Small and Medium Sized Company', the Accounting Standard(AS)-17 was not mandatory and management of the assessee company prepared the segmental details exclusively for the purpose of application of TNMM for computing PLI. It also rejected Revenue's claim that segmental accounts prepared by the assessee was without having regard to the nature of business and noted that assessee was engaged in seven different types of business activities with diverse risk and return portfolios and thus the Tribunal upheld assessee's segmental bifurcation of AE and non-AE transactions Further, it observed that assessee's ALP computation based on segment report duly verified and certified by the independent Statutory Auditor was in compliance of Rule 10B(1)(e) which provides for comparison of net profit margin realized by taxpayer from an international transaction with that realized by an unrelated enterprise from a comparable uncontrolled transaction; Accordingly, the Tribunal held that TPO's net profit indicator computed at entity level from all the seven types of revenues was against the basic tenets of Indian Transfer Pricing Laws and hence, unjustified.
ACIT vs M/s. Netguru Ltd-TS-383-ITAT-2019(Kol)-TP-ITA No 1799/Kol/2018 dated 24.04.2019

399. The Tribunal upheld CIT(A) order deleting TP-adjustment on marketing fees paid to the AE. The Tribunal observed that the TPO erred in aggregating marketing fee with sales made to the AE and selecting comparables relating to the sales segment. The Tribunal noted that assessee had been consistently benchmarking the international transactions separately which was accepted by Revenue in all other years except impugned assessment year. The Tribunal further noted that the agreement between the assessee and the AE clearly established that the payment of marketing fee was not linked to sales and the two transactions were separate and distinct. Thus, the Tribunal comcluded that when the Transfer Pricing Officer was examining the arm's length price of the marketing fee paid, he could not club it with the sales transaction.
DCIT vs Gujrat Glass Ltd-TS-389-ITAT-2019(Mum)-TP-ITA No 4777/Mum/2016 dated 30.04.2019

400. The Tribunalrejected Revenue's plea that DRP erred in accepting segmental results submitted by assessee (which were audited only before submission to the DRP), following the decision in

the case of 3i Infotech Limited (Chen. Trib) wherein it was held that there is no legal requirement that segment wise working of ALP submitted before TPO should be audited by assessee's CA.
SI Group India Limited [TS-599-ITAT-2019(Mum)-TP] - ITA Nos.1745/Mum/2014 & 1307/Mum/2014 dated 19.06.2019

401. The Tribunaldeleted the adjustment acceptingassessee's approach to compute adjustment by comparing the actual sale price and ALP of aggregate country-wise exports to the AEs as against TPO's approach of comparing independent product-wiseactual sales price and ALP. It followed the co-ordinate bench decision in assessee's own case wherein it was noted that the assessee sold some products as a package along with accessories (as per its marketing strategy) and all the products fell within category of insecticides and thus held that ALP be determined as per portfolio approach and not considering the profit motive from each and every single product within the portfolio.
Godrej Consumer Products Ltd [TS-577-ITAT-2019(Mum)-TP] - I.T.A. No.1102&1211/Mum/2015 dated 19.06.2019

402. The Tribunalacceptedassessee's approach in aggregating all transactions falling under engineering and design services segment (comprising of 3 divisions viz., FCEC, EEEC, and EIC), noting that the transactions of engineering service segment were closely linked to each other. Noting that as per Section 92C and Rule 10C, where (i) the nature and class of the international transactions (ii) the class or classes of AEsas well as (iii) the FAR analysisare similar, it is prudent to aggregate the international transactions, it held that assessee had aggregated "class of transactions" under the segment and the AEs fell under "class of associated persons" as mentioned in Sec. 92C(1) as they were engaged in manufacturing of industrial automated products. It also noted that all the three divisions under the engineering services segment were rendering design and engineering services which fell under the common administration and management control of the company and were interlaced, drawing resources from a common pool of funds maintained by the assessee.
Emerson Electric Company (India) Private Limited [TS-564-ITAT-2019(Mum)-TP] - ITA No.6098/Mum/2018 & ITA No.531/Mum/2018dated 14.06.2019

403. The Tribunal remitted the issue of benchmarking international transaction of sale/purchase of packing material with limited direction to the TPO to examine assessee's submission that the operating margin of assessee's export segment compared favorably with that of comparables upon adoption of any allocation key for the common expenses for domestic and export segment. It noted that the lower authorities had objected to comparability of assessee's export segment with the comparable selected by the TPO only on ground that segmental account was not audited and proper allocation key was absent. The Tribunal also rejected Revenue's plea for remitted entire issue of comparability back to TPO holding that Revenue was well within its rights on supporting TPO's order but could not seek that the issue was to be set aside so that TPO could be given a second innings.
Supermax Personal Care Private Limited [TS-558-ITAT-2019(Mum)-TP] - ITA No. 1840/Mum/2017 dated 07/06/2019

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404. The Tribunal rejectedassessee'sapproach of aggregating management services with other internationaltransactions of imports of raw material, traded goods etc holding that since the transactions were entered with different AEs, it could not be said that there existed an inextricable link between these transactions as one not survivingwithout the other. It held that that aggregation can be allowed only if the transactions are closely interlinked orare a part of a package deal and 'cross subsidization of international transactions in a combined approach isimpermissible'.
INA Bearings India Pvt Ltd [TS-597-ITAT-2019(PUN)-TP] - ITA No.150 & 282/PUN/2017 dated 24.06.2019

Working Capital Adjustments

405. The Tribunal rejected DRP's basis for denying the assessee working capital adjustment that finance costs were already excluded while computing margins of assessee and margins of comparables. The Tribunal opined that working capital adjustment is normally provided for the reason of credit period i.e if credit period availed from supplier is high, prices likely to be paid are higher. Thus, for a company with higher working capital, profits are more as compared to lower working capital. It restored the issue of working capital adjustment to the TPO in line with earlier year ruling after providing assessee an adequate opportunity of being heard.
Inteva Products India Automotive Pvt Ltd vs ACIT [TS-110-ITAT-2019(Bang)-TP] IT (TP) A No. 830/Bang/2017 dated 18.01.2019-SD

406. The Tribunal remanded the issue of working capital adjustment to DRP for recompution based on details furnished by assessee, and observed that the DRP calculated working capital adjustment on an 'adhoc/lump sum' basis, thus the Tribunal stated It was the duty of the lower authorities to arrive at actual calculation of working capital adjustment and then grant working capital adjustment and lump sum or exgratia grant of working capital adjustment was not expected from a specialised authority, such as the DRP.
DCIT vs M/s. CISCO Development (India) Pvt Ltd-TS-298-ITAT-2019(Bang)-TP-IT(TP)A No 308/Bang/2016 dated 05.04.2019

407. The Tribunal denied working capital adjustment in absence of proper working and reasons provided by assessee to substantiate its claim.
Black Rock Services India Private Limited v. ITO, Phase-5, Gurgaon, [TS-394-ITAT-2019(DEL)-TP], ITA No. 1671/Del/2015, ITA No. 441/Del/2016, dated May 06, 2019

408. The Tribunal held that no separate adjustment on account of interest on outstanding receivables is required when the outstanding receivables have been factored in computation of working capital adjustment, it also noted that the average credit period of the comparables was 81 days as opposed to 79 days in case of the assessee and it further agreed with assessee's contention that when the assessee is not paying interest on its payables, TPO was not justified in charging interest on outstanding receivables.

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Hackett Group (India) Ltd vs Dy CIT [TS-328-ITAT-2019(HYD)-TP] – ITA 2039/Hyd/2017 dated 15-03-2019

409. The Tribunal directed AO/TPO to allow the working capital adjustment while determining the ALP of the international transaction of import of spare parts by assessee from AE for AY 2013-14. It considered assessee's submission that TPO, while re-computing the quantum of TP-adjustment, had failed to follow DRP's directions of allowing the working capital adjustment using the methodology given in OECD guidelines and by applying SBI Prime Lending rate (as on 30th June of the relevant FY) as the interest rate; Separately, it noted assessee's submission that if ALP of the international transaction is re-computed by the TPO after allowing working capital adjustment as per DRP-directions, the difference between ALP & price computed by assessee would be within tolerance range, thus the other grounds raised by the assessee in this appeal relating to the issue of Transfer Pricing Adjustment would become infructuous.
Dongfang Electric (India) Private Limited vs. Dy.CIT [TS-253-ITAT-2019(Kol)-TP] I.T.A. No. 2356/KOL/2017 Dated 27.03.2019

410. The Tribunal applied assessee's foreign currency borrowing rate (L+1% i.e. 2.2.%) while making working capital adjustment to the gross margins earned by the assessee in respect of the goods sold to the AEsfor AY 2009-10 (on the premise that assessee granted higher credit period to AEs in comparison to that of non-AEs) as against 8% (being rate at which assesse had given loan to AEs) adopted by TPO. It held that the said adjustment proceeds on the assumption that the entity was required to borrow money to fund the transaction and hence due to extended credit terms there was a reduction in cash surplus due to excess outflow in form of interest.
Emami Limited [TS-516-ITAT-2019(Kol)-TP] - I.T.A. No. 873/Kol/2017dated 03/06/2019

411. The Tribunal directed AO/TPO to verify the computation of working capital adjustment made by the assessee and compute the margin of the comparables before determination of ALP for purchase of raw materials and component and sale of finished goods for AY 2012-13.It observed that disallowance of assessee's claim of working capital adjustment by TPO and CIT(A) was not on valid reasoning but by way of general observations. It held that adjustment on account of working capital investment has to be allowed, as it is a crucial factor impacting the pricing and profitability in the open market and Rule 10B(e)(iii) also provided for such adjustment. Further, as against credit period ratio of 85 days of comparables, assessee had a credit period ratio of 1118 days, thus adjustment on account of working capital was to be made while computing the margin of the comparables. It relied on co-ordinate bench ruling in case of Dong Fang Electric India.
DCIT, Cir 1 (1) (2), Mumbai v. Exedy India Ltd. (Formerly know as CEEKAY Daikin Ltd.) [TS-507-ITAT-2019(Mum)-TP], CO No.56/Mum/2019, ITA No.897/Mum/2018, dated May 31, 2019

412. The Tribunal held that assessee's claim of working capital was admissible, since it was fairly well settled that adjustment on account of working capital difference should be allowed while computing the margin of the comparables, since, it is a relevant factor which influences the price and profitability. It found that TPO had completely ignored assessee's submission that its working capital was very less as compared to working capital investment of the comparables as

a ratio of sales. Thus, it directed AO to verify the workings furnished by the assessee and compute the average margin of the comparables after working capital adjustment.
ITO Ward-8, (1)(4), Mumbai v. Golden Source India Pvt.Ltd., [TS-422-ITAT-2019(Mum)-TP], ITA No.393/Mum/2014, dated May 10, 2019

+ / - 5% Adjustment

413. The Court dismissed Revenue's appeal and upheld Tribunal's order benchmarking international transaction of sale of valves to AE by aggregating all transactions with AE and comparing it with aggregation of all comparable non-AE transactions. The Court noted that CIT(A) and Tribunal had found that the difference between prices charged to AE & non- AE after separately aggregating them was within the tolerance range of 5% and therefore deleted TP adjustment and Revenue could not point out any flaw in said aggregated approach.
PCIT vs M/s Audco India Ltd.- TS-413-HC-2019 (BOM)- TP - Income Tax Appeal 1829 of 2016 dated 06-03-2019

414. The Tribunal dismissed Revenue's ground that CIT(A) erred in granting standard deduction of 5% from ALP u/s 92C(2), and noted that the CIT(A) had considered various judicial precedents and passed a reasoned order, which could not be interfered with. Further, noted that second proviso to Sec. 92C (inserted by Finance Act 2012 was applicable retrospectively to all assessment pending before the AO as on 01/10/2009) was not applicable to the present case as assessment order was passed prior to the said date i.e., 28/11/2008.
M/s. TE Connectivity India Pvt Ltd vs ACIT-TS-26-ITAT-2019(Bang)-TP-IT(TP)A No. 1327/ Bang/ 2010 & 231/Bang/2012 dated 25.01.2019

415. The Tribunal deleted TP-adjustment in respect of international transaction of provision of freight forwarding services by assessee to AE and accepted assessee's plea that TP-adjustment fell within the range of safe harbour of +/- 5% as provided u/s. 92C(2). The Tribunal held that since Revenue could not controvert the computation on facts, no adjustment was required in the case of the assessee and the addition made was hereby deleted.
M/s. S Net Freight Pvt Ltd vs ITO-TS-254-ITAT-2019(Del)-TP-ITA No 1398/Del/2016 dated 04.04.2019

416. The Tribunal deleted TP-addition against services giving +/-5% benefit to assessee and agreed with assessee's contention that TPO made a computational error in ignoring the forex gains while computing the range of + 5% though TPO had accepted the same to be operating income while computing assessee's PLI. The Tribunal held that if forex gains were considered as operating income, assessee would fall within the safe harbour band of +/-5% and hence, deleted the TP-additions.
Prudential Process Management Services India Pvt Ltd vs DCIT-TS-36-ITAT-2019(Mum)-TP-ITA No 490/Mum/2015 dated 24.01.2019

417. The Tribunal dismissed Revenue's appeal against the CIT(A)'s order allowing 5% adjustment (standard deduction) in ALP determined while making TP adjustment for AY 2004-05, noting

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that as per CBDT Circular No.5/2010 dated 03.06.2010 [Explanatory Circular for Finance (No.2) Act, 2009] the amended proviso to section 92C(2) [which clearly provided that only in case where the ALP was within 5% of transfer price, the transfer price will be the ALP as against erstwhile provision where in some judgments it was also held that the arithmetic mean should be adjusted by 5% even if the ALP was more than 5% of the transfer price] applies with effect from 01/04/2009 i.e. from AY 2009-10.

J P Morgan India Pvt Ltd [TS-662-ITAT-2019(Mum)-TP] - I.T.A. No. 2745, 2452, 2453 &2746/Mum/2015 dated 26.06.2019

418. The Tribunal adjudicated on Revenue's appeal and cross objections filed by the assessee engaged in software development support service provider in relation to inclusion/exclusion of comparables. The Tribunal proceeded to deal with the preliminary issue without going into merits of issues raised by the Revenue and the cross objections filed by the assessee and found merit in assessee's submission that if CAT Technologies Limited along with other comparables selected by the TPO were included (as directed by DRP), then the margin shown by the assessee fell within the Arm's Length Margin of +/-5%. The Tribunal noted that the TPO selected 9 comparables in the final analysis and determined mean margin of the comparables at 25.47% as against the margin of the assessee at 17.94% while due to DRP's direction of including Cat Technologies, the mean margins of the comparables worked out to 22.78% as against the margin of the assessee at 17.94%. Accordingly, the Tribunal held that the margin shown by the assessee fell within the Arm's Length Margin of +/-5%.

DCIT vs M/s. Ignify Software Pvt Ltd-TS-337-ITAT-2019(PUN)-TP-ITA No 512/PUN/2016 dated 25.01.2019

Others

419. The Tribunal following coordinate bench decision in assessee's own case accepted assessee's classification of its services as engineering design services and rejected TPO's classification as ITeS (high end KPO services). It also accepted assessee's plea for applying 15% mark-up of operating cost as basis to determine the ALP in the case of international transactions with non-US AEs, considering assessee's MAP covering similar transactions with US AEs wherein the department accepted the nature of services as provision of Engineering Design Services and the margin of 15% mark-up of operating cost was agreed as arm's length price as TPO chose the very same set of comparable companies for all international transactions . It noted that there cannot be any difference just because the AEs were operating in different countries unless such a distinction is established on the basis of geographical location of AEs.

DCIT vs Flow Serve India Controls Pvt Ltd (Bang- Trib)- TS-557-ITAT-2019 IT(TP)A no. 2590/Bang/2017 dated 15.03.2019

420. The Tribunal upheld DRP's decision that TP adjustment could not exceed the amount of margin retained by the AE and relied on co-ordinate bench ruling in HCL Technologies BPO Ltd (subsequently confirmed by HC and SC) which in turn relied on co-ordinate bench ruling in Global Vantedge P. Ltd wherein, the Tribunal had held that adjustment on account of ALP of international transactions could not exceed the difference between the maximum ALP, i.e., the

amount received by the AE from the customer and the actual value of international transactions, i.e., the amount received by the assessee in respect of the international transactions.

M/s. Continental Automotive Components (India) Pvt Ltd vs DCIT-TS-312-ITAT-2019(Bang)-TP-IT(TP)A No 457,425/Bang/2016 dated 12.04.2019

421. The Tribunal allowed deduction towards technical fees in respect of an aborted project of setting up of a manufacturing facility in India as revenue expenditure and noted that AO, applying CUP-method, determined ALP as Nil and disallowed the same on the ground that the payment of technical know-how service did not satisfy 'commensurate with income' test and held that the expenditure was capital in nature. The Tribunal relied on co-ordinate bench ruling in assessee's own case for previous AY wherein it was held that the expenses were incurred with a view to establish manufacturing facilities as a part of on going business strategy and to achieve backward integration it should be treated as revenue expenditure, even though the plant for which the funds were expended by assessee i.e. for availing technical services to assess feasibility was eventually hyped off / discontinued. Further, the Tribunal opined that they found merit in the argument of assessee that in absence of direct income attributable to such expenditure it would hardly be a test for determining its ALP under Chapter-X", thus the Tribunal allowed assessee's appeal.

Michelin India Tyres Pvt Ltd vs DCIT-TS-18-ITAT-2019(Del)-TP-ITA No 414/Del/2011 dated 08.01.2019

422. The Tribunal remitted the customs duty adjustment directing TPO to examine if non-cenvat-able customs duty of import paid by the taxpayer was materially affecting the PLI of taxpayer company as per mandate of Rule 10B(3) following coordinate bench ruling in assessee's own case for AY 2011-12.

Further, the Tribunal also accepted assessee's claim that TP-adjustment in respect of import of raw material transaction should be restricted to the value of consumption of material of the taxpayer, coordinate Bench ruling in AY 2011-12

Terex India Pvt. Ltd. v. DCIT, Cir. 25(1), New Delhi, [TS-512-ITAT-2019(DEL)-TP] ITA No.4791/Del/2015, dated May 30, 2019

423. The Tribunal upheld CIT(A) order and deleted TP-adjustment on account of head office share of income in invoice raised by the branch, for assessee an Indian branch and PE of a German company engaged in the business of inspection and certification services in Marine Industries for AY 2011-12.It noted that TPO rejected assessee's CUP method u/s 92CA(3) and made TP-addition however, he did not select any method prescribed u/s 92C while making such addition. Relying on SC ruling in case of Morgan Stanley & Co it upheld assessee's contention that once overall attribution and taxability thereon for head office as well as branch office had been accepted, the TP analysis would not have any result,. It relied on coordinate bench decision in assessee's own case for AY 2007-08 wherein similar addition on account of attribution of income towards head office by Indian branch was deleted.

DCIT (IT)-2(1)(2) v. DNV GL SE-India Branch, [TS-510-ITAT-2019(Mum)-TP], ITA No. 3139/Mum/2018, dated May 29, 2019

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g. Specific Transactions

Advertisement, Marketing and Promotion Expenses

424. The High Court directed the Tribunal to decide whether incurrence of AMP-expenditure could be treated as an international transaction or not in case of assessee trading in life saving devices. The Court considered assessee's submission that the Tribunal, without adjudicating the issue, remanded issue of ALP-determination of AMP-expenses back to the AO/TPO and upon remand, AO passed an order examining the issue of the transaction being an international transaction, which was now in appeal before the Tribunal (second round). The Court thus concluded that the the Tribunal was now in seisen of the issue whether the AMP expenses incurred by the respondent was an international transaction or not. Therefore, it would be appropriate that the Tribunal decided the issue in the second round without in any manner being fettered by the impugned order. Further, it disposed of this appeal with direction to the Tribunal to decide the issue which was a subject matter of dispute in second round of appeal along with this appeal and made it clear that other issues raised in the first round of appeal (except those remanded) were not to be re-adjudicated by the Tribunal.
India Medtronic Pvt Ltd vs DCIT-TS-76-HC-2019(Bom)-TP-ITA No 1404 of 2016 dated 06.02.2019

425. The High Court dismissed Revenue's appeal challenging Tribunal's deletion of AMP-adjustment for Sony Mobile engaged in distribution of mobile handsets in India. Revenue pleaded that for determining comparables, the Tribunal had relied on TP-analysis conducted by TPO which was based on application of BLT & that therefore the Tribunal should have remitted the entire matter for fresh consideration. The High Court opined that Revenue's arguments were insubstantial and unmerited since there was no per se rule that in every case the Tribunal had to necessarily remit each matter. Further, it observed that materials in the form of reports and documents were available and that the Tribunal had itself carried out the analysis based on the record of the facts which were disclosed before the TPO. Thus, the Court did not give any credence to Revenue's complaint that it was not given sufficient opportunity. Further, regarding Revenue's plea that TPO treated AMP-expenditure as a bundled one was also not tenable and the Court opined that Sony Ericsson had itself indicated that there could not be a dogmatic approach as to whether bundled transactions of the kind ought to be segregated and that the entire issue was a fact dependent exercise; thus the Court stated that the Tribunal had correctly opined that the assessee had been suitably compensated by its AEs and dismissed Revenue's appeal finding no substantial question of law.
CIT vs Sony Mobile Communications- TS-270-HC-2019(DEL)-TP- ITA 123/2019 dated 05.02.2019

426. The Court dismissed Revenue's appeal and deleted AMP adjustment on 'protective' basis by applying Bright Line Test (BLT) for AY 2009-10. It noted that Tribunal relying on jurisdictional HC ruling in case of Sony Ericsson Mobile had held that Bright Line Test Method cannot be applied for making any kind of adjustment under AMP expenses hence impugned order of the Tribunal, suffered from no legal infirmity. Also, jurisdictional HC had dismissed identical question raised by Revenue against Tribunal order in assessee's own case for AY 2010-11.

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Pr. CIT-9, New Delhi v. Toshiba India Pvt Ltd., [TS-441-HC-2019(DEL)-TP], ITA 1451/2018, dated May 15, 2019

427. The High Court partly allowed assessee's appeal and set aside Tribunal order directing it to examine merits of issue of ALP-determination of AMP-expenditure in light of co-ordinate bench rulings in Sony Ericsson and Maruti Suzuki. The Court noted that the said cases were decided by HC almost four years ago and that the principles applicable were now quite clear and the bright line test was not in use. Further, the Court held that the Tribunal should first apply its mind and decide the respective contentions of the parties on the facts discernible from the TPO's findings, as confirmed by the DRP rather than remitting the matters mechanically altogether. It noted that assessee was aggrieved that the Tribunal did not decide the issue of AMP-adjustment made by TPO on the basis of the pre-existing norm i.e. "the bright line test" method and had relied on co-ordinate bench decisions in cases of Rayban Sun Optics India and assessee's own case for earlier years to remit the matter for fresh consideration by TPO.
M/s. Bose Corporation India Pvt Ltd vs Pr.CIT-TS-61-HC-2019(Del)-ITA 889/2017 dated 31.01.2019

428. The Tribunal deleted AMP-adjustment noting that TPO failed to establish the existence of an international transaction and had merely entertained the belief on the basis of presumptions that the assessee's AMP expenses promoted the brand value of its AE, following jurisdictional HC in Maruti Suzuki & co-ordinate bench ruling in L.G. Electronics India.
Acer India Pvt Ltd. DCIT Cir. 1(1)(2), Bengaluru, [TS-416-ITAT-2019(Bang)-TP], IT(TP)A No.502/Bang/2017, dated May 10, 2019

429. The Tribunal deleted AMP-adjustment for assessee engaged in business of manufacture and sale of herbal pharmaceutical products relying on co-ordinate bench ruling in assessee's own case for previous AY wherein similar adjustment was deleted in absence of any material evidence to substantiate the existence of any agreement or arrangement (either express or implied) between assessee and AE for promotion of its brand. Further the Tribunal noted that the net margin from assessee's exports to AEs at 13.39% was higher as compared to the net loss of (-)10.16% from the personal care division in the domestic segment, thus the Tribunal concluded that assessee's international transactions with its AEs were at arms length and therefore no separate adjustment for 'AMP' expenditure was warranted
M/s. Himalaya Drug Company vs DCIT-TS-415-ITAT-2019(Bang)-TP-IT(TP)A No 187/Bang/2015 dated 30.04.2019

430. The Tribunal allowed assessee's appeal for AY 2011-12 challenging AMP-adjustment, and held that assessee's incurrence of AMP expenses did not tantamount to 'international transaction' absent material to prove the existence of an international transaction in the form of an agreement, arrangement, understanding or action between assessee and its AE. It further discarded application of bright line test (BLT) noting lack of judicial sanction and intensity approach suggested by DRP, holding that what applied to BLT fully applied to the Intensity approach as it was a reverse of bright line test/ mirror image. It noted that assessee was an independent risk bearing distributor operating in a very narrow competitive market (of digital hearing aids) and the decision to incur AMP expenses was purely market driven in the interest

of assessee itself exploiting the brand of the foreign AE to achieve a higher market penetration in India. It concluded that there was nothing in the conduct of the assessee referred to by the Revenue to show that the incurring of AMP was an international transaction and not a function of the assessee as a distributor. It relied on co-ordinate bench ruling in assessee's own case for AY 2010-11 wherein a similar view was taken & Sony Ericsson, Maruti Suzuki, Whirlpool, Bausch and Lomb HC rulings.

Widex India Pvt.Ltd. v. ACIT, Circle 2(1), Chandigarh, [TS-523-ITAT-2019(CHANDI)-TP] ITA No. 269/CHD/2017, dated May 23, 2019

431. The Tribunal deleted AMP-adjustment for assessee engaged in distribution of imported goods and manufacturing for AYs 2006-07 to 2008-09 relying on Hon'ble Delhi High Court's ruling in Sony Ericson Mobile Communications. It observed that the AMP-expenditure was mainly for assessee's own benefit to market products manufactured by it in India, though there would be incidental benefit to foreign AE and unless TPO could establish direct benefit accruing to foreign AE, it was very difficult to accept existence of international transaction. Further, it observed that the TPO had held assessee's holding company to be a shell company, which would imply that the assessee was also a shell company, and opined that TPO loosely used phrase 'lifting of corporate Veil', without understanding attributes that need to be established by way of cogent materials/evidences to prove. It rejected application of BLT and Revenue's reliance on BEPS guidelines and Action Plan 8-10 since they were not implemented back then, however, it appreciated Revenue's concern that the issue was still pending before Apex Court, thus it setted aside the issue to AO/TPO to pass fresh order considering decision of SC.

Adidas India Marketing Pvt.Ltd. v. ITO, Co.Ward 1(2) New Delhi, [TS-485-ITAT-2019(DEL)-TP], ITA No. 3727/Del/2014, 2770/Del/2012, ITA No. 29/Del/2014, Cross Objection No.85/Del/2013, dated May 27, 2019

432. The Tribunal allowed assessee's plea and deleted TP-adjustment on account of Advertisement, Marketing and Promotion [AMP] expenditure for AY 2011-12; relying on co-ordinate bench ruling in case of assessee for AY 2008-09 which was upheld by Delhi HC wherein it was held that since the brand under which the assessee's products were marketed was relatively unknown in India, the advertisement expenditure could not have been said to inure benefit to the AE, which was otherwise a well known brand overseas. It observed that facts relating to business profile, international transactions and AMP spend were identical to the facts of AY 2008-09 and even Revenue's arguments were similar to those made before the HC which have been considered by HC while adjudicating the matter.

Sony Mobile Communications [India] Pvt Ltd., v. JCIT Special Range-8, New Delhi, [TS-420-ITAT-2019(DEL)-TP], SA No.856/DEL/2016, ITA No.883/del/2016 & ITA No. 2106/ del/ 2016, dated May 14, 2019

433. The assessee company belonged to Nikon group which carried on broad spectrum of business centred on precision equipment, imaging products, instruments and other business. The TPO applied BLT and made a TP adjustment on AMP expenses on substantive basis (issue of applicability of BLT Testing was subjudice in various forums) taking a view that assessee was incurring those expenses on brandbuilding of its AE and also applied a markup of 12.35% on such AMP expenses which was confirmed by DRP. The Tribunal deleted the addition made by

applying BLT relying on coordinate bench decision in assessee's own case for earlier year wherein it was categorically held that BLT had no statutory mandate.

Nikon India Pvt Limited vs DCIT [TS-90-ITAT -2019(Del)-TP] ITA.No. 6870/Del./2018 dated 24.01.2019

434. The Tribunal ruled on TP-adjustment on AMP-expenditure and rejected assessee's claim that AMP-expenditure was not an international transaction considering the fact that the amount was reimbursed by the AE. The Tribunal however rejected application of BLT for determination of ALP by the TPO. The Tribunal also dismissed assessee's claim that ALP need not be determined for the transaction as it offered the reimbursed amount to tax and held that once a transaction had been held to be an international transaction, ALP needs to be determined. Further, stating that TPO had not analysed functional similarity/dissimilarity of the comparables chosen by him vis-a-vis that of assessee, it opined that the ALP-determination was to be revisited by the TPO along with a direction to not apply BLT and to exclude trade/sales discount given to sub distributors/retailers and freight expenses on import as they could not be linked to brand building of AE.

DCIT vs Michelin India Tyre Pvt Ltd-TS-471-ITAT-2019(Del)-TP-ITA No 3166/Del/2013 dated 30.04.2019

435. The Tribunal deleted AMP-adjustment for Casio India (distributor) and noted that assessee was an independent risk bearing distributor who was entirely responsible for marketing, sales, distribution, budgeting, pricing, market and sales strategy, etc. and was bearing all the major risks as any independent distributor would undertake. The Tribunal further remarked that it could not be inferred that AE had any role for sales and marketing in India or assessee was carrying out sales or marketing at the behest of AE or for its own benefit. Further, it rejected DRP's view that display of 'CASIO' logo in advertisements lead to enhancement of CASIO brand and therefore incurring of AMP-expenditure enhanced AE's brand value. The Tribunal held that in order to link AMP expenditure with brand value it had to be demonstrated that brand value had gone up over a period of long time and portion of the enhancement was attributable to successful AMP campaign conducted by the Indian company..Finally, the Tribunal observed that Revenue failed to bring on record any material or any kind of arrangement existing between the AE and assessee to prove that there was separate international transaction with regard to AMP expenditure. Thus, the Tribunal concluded that AMP-expenses could not be treated as a separate international transaction needing separate benchmarking and deleted AMP-adjustment.

Casio India Co. Pvt Ltd vs DCIT-TS-341-ITAT-2019(Del)-TP-ITA No 1764/Del/2015 dated 22.04.2019

436. The Tribunal deleted AMP adjustment made by TPO/DRP in respect of assessee engaged in importing/ distribution of wines and spirits and noted that TPO treated incurrence of AMP-expenses as an international transaction on the basis that assessee's huge AMP-expenses had created marketing intangibles in favour of AE and thereafter applied Bright Line Test (BLT) to propose TP-adjustment. The Tribunal observed that TPO treated the AMP expenditure as international transactions merely on the ground that the taxpayer had incurred huge expenses on AMP and the Tribunal opined that high AMP expenses per se could not be a ground to infer

that there was an international transaction. The Tribunal followed co-ordinate bench ruling in assessee's own case for previous AY wherein similar AMP-adjustment was deleted absent data proving an arrangement, understanding or action in concert to indicate that expenditure was incurred on behalf of AE for promotion of AE's brand. Thus, the Tribunal held that there was not an iota of material apart from applying the Bright Line Test and by taking the view that the taxpayer had incurred huge AMP/sales expenses to the tune of 18.14%. Thus, no cogent material was there to treat the incurring of AMP expenses as international transaction more particularly when basis for treating the AMP expenses as international transactions i.e. BLT was not sustainable method.

M/s. Moet Hennessy India Pvt Ltd vs ACIT-TS-264-ITAT-2019(DEL)-TP-ITA No 85/Del/2015 dated 09.04.2019.

437. The Tribunal deleted the AMP adjustment in the case of assessee-company (engaged in manufacturing and marketing information and communication systems, electronic components, heavy electrical apparatus, consumer products, medical diagnostic imaging equipment, etc) which was made by the TPO on protective basis using Bright Line Test (BLT) method. It relied on coordinate bench ruling in assessee's own case for earlier years wherein relying on Nikon India P. Ltd, it was held that TP-adjustment made by applying BLT is not sustainable as it has no statutory mandate.

Toshiba India (P) Ltd v DCIT [TS-550-ITAT-2019(DEL)-TP] ITA No.7547/Del/2018 dated 10.01.2019

438. The Tribunal deleted AMP-adjustment in case of assessee engaged in manufacture & sale of confectionary products by relying on co-ordinate bench rulings in assessee's own case for previous AY wherein it was held that AMP-expenses incurred by assessee could not be treated & categorized as an international transaction. Thus, the Tribunal stated that since the issue had already been decided in favour of the assessee by the above Orders of the Tribunal, therefore, following the same reasoning, they concluded that AMP expenses incurred by assessee could not be treated as an international transaction under section 92B of the I.T. Act.

Wrigley India Pvt Ltd vs DCIT-TS-15-ITAT-2019(DEL)-TP-ITA No 1536/Del/2016 dated 10.01.2019

439. The Tribunal deleted AMP-adjustment for assessee engaged in manufacturing, trading and marketing of electronics and home-appliances and held that incurring of AMP-expenditure did not give rise to any international transaction. The Tribunal held that Revenue needed to establish, on the basis of some tangible material, the existence of an international transaction and explained that assessee being a full-fledged manufacturer, entire AMP expenditure was incurred at its own discretion and for its own benefit for sale of 'LG' products in India and not towards promoting the brand name of the AE. Further, the Tribunal noted that the assessee had a long term agreement for the use of the 'LG' trademark in India which evidenced that the economic benefit arising out of the alleged promotion of the AE's logo was being enjoyed by the assessee. Thus, the Tribunal inferred that the assessee satisfied the test of economic ownership of the brand as laid down in the Sony Ericsson HC ruling (wherein HC disagreed with the finding of the Special Bench in assessee's own case that the concept of economic ownership was not recognized under the Act). Further, the Tribunal held that mere agreement or arrangement for

allowing use of their brand name by the AE did not lead to an inference that the parties were acting together to incur higher AMP-expenditure to render brand building service. Thus, it opined that since the operating margins of the assessee were in excess of the selected comparable companies, no adjustment of AMP was warranted.
L.G. Electronics India Pvt Ltd vs ACIT-TS-14-ITAT-2019(DEL)-TP-ITA No 6253/DEL/2012 dated 14.01.2019

440. The Tribunal deleted AMP-adjustment in respect of assessee and noted that TPO made intensity adjustment on AMP-expenditure on substantive basis as well as on protective basis following bright line test. Further, on assessee's objections, DRP rejected BLT following Delhi High Court ruling in Sony Ericsson and directed to make adjustment in respect of AMP-expenditure by following intensity method, being the plausible method. The Tribunal found that substantive adjustment was computed at 'Nil' in the order giving effect to DRP directions and further following Delhi High Court decision in Sony Ericsson, the Tribunal held that adjustment made on protective basis by following bright line test was not sustainable.
Casio India Company Pvt Ltd vs DCIT-TS-33-ITAT-2019(DEL)-TP-ITA No 8060/DEL/2018 dated 24.01.2019

441. The Tribunal deleted TP-adjustment on account of Advertisement, Marketing and Promotion ("AMP") Expenses for assessee and noted that co-ordinate bench in assessee's own case for previous AY had deleted AMP-adjustment by observing that there was no international transaction in the form of any agreement/ arrangement on AMP expenditure nor was it incurred at the instance/behest of the AE and under FAR analysis also, no such benefit from AMP-expenditure had any kind of bearing on the profits, income, losses or assets accrued to the AE. Further, the Tribunal had also rejected Revenue's contention that assessee's AMP-spend amounted to brand-building for AE and held that the value of the brand created in India would only be relevant at the point of time the foreign AE would decide to sell the brand. Thus, considering that co-ordinate bench had decided the case in assessee's favour for earlier years and that DRP merely followed its earlier orders in rejecting assessee's objections, the Tribunal set aside the orders of the authorities below and deleted the AMP-adjustment.
Pepsico India Holdings Pvt Ltd vs DCIT-TS-10-ITAT-2019(DEL)-TP-ITA No 7933/DEL/2018 dated 15.01.2019

442. The Tribunal in second round of appeal pursuant to remand by High Court deleted AMP-adjustment for assessee a sole distributor of Sony products in India by following co-ordinate bench ruling in assessee's own case for previous previous AY wherein similar AMP-adjustment was deleted by observing that by virtue of incurring expenditure of AMP, the assessee could not acquire ownership of intangibles which belonged to the AE. The Co-ordinate bench had also inter alia held that Sony was a global brand and it could not be said that the brand had become popular only as a result of efforts of the assessee. Further, regarding Revenue's submission that a miscellaneous application had been filed against Sony Ericsson Mobile Communication ruling and some observations in co-ordinate bench ruling were not as per Court's order, the Tribunal held that merely because department had filed M.A. in the case of M/s. Sony Ericson Mobile Communication India Private Limited, it was no ground to take a contrary view at this

stage. Thus, it set aside the orders of lower authorities and allowed grounds of appeal raised by the assessee.

M/s. Sony India Pvt Ltd vs ACIT-TS-13-ITAT-2019(DEL)-TP-ITA No 6389/Del/2012 dated 16.01.2019

443. The Tribunal deleted AMP-adjustment for assessee observing that incurring of AMP-expenditure did not give rise to any international transaction, and also held that Revenue needed to establish, on the basis of some tangible material, the existence of an international transaction. The Tribunal upon examination of Importation Agreement found that in importing and distributing BMW CBUs and parts, assessee operated its business in its own name, at its own risk, having no authority to legally bind BMW AG (AE) and was responsible for promoting the sales in India and not the brand name owned by the AEs. Thus, the Tribunal held that mere agreement or arrangement for allowing use of their brand name by the AE did not lead to an inference that the parties were acting together to incur higher AMP-expenditure to render brand building service. Further, observed that most of the companies selected by assessee had AMP functions and held that since the operating margins of the assessee was in excess of the selected comparables, no adjustment was warranted.

BMW India Pvt Ltd vs DCIT-TS-30-ITAT-2019(DEL)-TP-ITA No 1514/Del/2016 dated 25.01.2019

444. The Tribunal deleted on AMP-adjustment in case of an assessee engaged in production, sale and distribution of Whirlpool appliances. It rejected Revenue's stand of existence of mutual agreement with AE for discharge of assessee's marketing functions and that assessee's AMP-spend benefitted the AE. The Tribunal stated that since the basis on which adjustment had been made being bright line test itself had been rejected by Hon'ble Delhi High Court in assessee's own case for previous AY, thus no further interference could be called for at this stage. Further, it also rejected Revenue's reliance on BEPS guidelines and held that Action Plan 8-10 could not be applied as the same were yet to be implemented.

Whirlpool of India Ltd vs DCIT-TS-25-ITAT-2019(DEL)-TP-ITA No 1972/Del/2015 dated 18.01.2019

445. The Tribunal dismissed Revenue's appeal and upheld DRP's order restricting AMP-adjustment in case of an assessee, a leading marketer, distributor and producer of quality branded automotive and industrial products and services. The Tribunal followed co-ordinate bench ruling in assessee's own case wherein it was held that AMP-adjustment made by applying Bright Line Test (BLT) was unsustainable.

DCIT vs Valvoline Cummins Ltd-TS-281-ITAT-2019(DEL)-TP-ITA No 1045/Del/2016 dated 30.01.2019

446. The assessee engaged in a data processing center to provide connectivity to the subscribers in India to the host CRS system by creation/modification/up-gradation of computer programmes online had declared Provision of ITeS and Receipt of Data processing services as international transaction for the captioned year. Further, it had incurred AMP expenses to build the brand Amadeus in India which was legally owned by it's AE. The TPO during assessment held that Assessee had incurred more than normal AMP expenses and the assessee should have been

reimbursed with appropriate mark-up on such excessive AMP expenditure identified by the TPO by applying the Bright Line Test (BLT).The Tribunal deleted AMP-adjustment by relying on co-ordinate bench ruling in assessee's own case wherein it was 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 the assessee to the domestic parties cannot be termed as an international transaction specifically when the TPO has not been able to prove that the expenses incurred were not for the business carried out by the assessee in India.
Amadeus India Pvt Ltd vs ACIT- TS-501-ITAT-2019(DEL)-TP- ITA No 475-476/DEL/2018 dated 27.02.2019

447. The Tribunal ruled on AMP-adjustment in case of assessee engaged in production, sale and distribution of Whirlpool appliances and noted that TPO/DRP made AMP-adjustment by adopting Bright Line Test (BLT) by applying the ratio laid down in case of LG Electronics, which however, stood overruled by Delhi HC ruling in Sony Ericson (wherein it was categorically held that BLT was not an appropriate yardstick for determining existence of an international transaction for calculating ALP).
The Tribunal observed that co-ordinate bench in assessee's own case for previous AYs had taken similar view and rejected Revenue's prayer for adjournment in view of pendency of issue before SC. However, appreciating Revenue's concern that SC ruling would be binding upon assessee as well as Revenue, the Tribunal decided to set aside this issue to AO/TPO to pass fresh order considering SC decision after giving the assessee adequate hearing opportunity.
Whirlpool of India Ltd vs ACIT-TS-149-ITAT-2019(Del)-TP-ITA No 8272, 8273/Del/2018 dated 25.02.2019

448. The Tribunal deleted AMP-adjustment made on protective basis by applying BLT for assessee engaged in importing, buying and selling and distributing wide range of mobile phones and related post sale support services. The Tribunal relied on Sony Ericsson HC-ruling wherein it was categorically held that TP-adjustment made by applying BLT on protective basis was not sustainable having no statutory mandate. Accordingly, the Tribunal concluded that protective adjustment made by the TPO/DRP/AO for AMP expenses by applying bright line test on protective basis was not sustainable in the eyes of law having no statutory mandate.
M/s. Sony Mobile Communications India Pvt Ltd vs ACIT-TS-141-ITAT-2019(Del)-TP-ITA No 1085/Del/2017 dated 21.02.2019

449. The Tribunal deleted TP-addition on account of AMP-expenditure for assessee engaged in the business of manufacturing sense care solutions and trading of contact lenses and protein removal enzyme tablets and followed High Court ruling in assessee's own case for previous AY wherein similar adjustment was deleted after observing that Revenue was not able to show existence of international transaction involving AMP-expenses between assessee & AE.
Bausch & Lomb India Pvt Ltd vs DCIT-TS-101-ITAT-2019(Del)-TP-ITA No 7808/Del/2018 dated 25.02.2019

450. The Tribunal remitted ALP-determination of AMP-expenses for fresh adjudication after examination of agreements entered into by assessee with its AE for purchase and resale of

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Cannon products in India. The Tribunal relied on co-ordinate bench ruling in assessee's own case for previous AY.

Further, regarding benchmarking AMP-expenses using PSM as MAM, the Tribunal held that as they had already set aside issue relating to nature of AMP expenditure to AO/TPO, applicability of most appropriate method relating to same transaction was also to be set-aside. However, directed TPO to exclude sales related expenditure/subsidies received by assessee from scope of AMP expenditure and to consider the business promotion expenses after perusal of relevant agreements entered into by assessee with its AE.

Canon India Pvt ltd vs ACIT-TS-70-ITAT-2019(Del)-TP-ITA No 1672,6742/Del/2017 dated 11.02.2019

451. In case of assessee engaged in primarily in import and distribution of various Sony products the Tribunal remitted the issue of selection of comparable companies (viz., Lava International and Micromax Infomatics) to the file of the TPO to determine whether there was any brand registered in the name of the said companies for AY 2013 -14 or not and then to find out whether such brands made any impact on their profitability. As it observed that DRP had rejected these companies on the ground that they did not own any brands, relying merely on the annual accounts of these companies whereas assessee made submission of extracts from the website (dated 29-08-2017) of controller general of patents, designs and trademarks, government of India to prove that these companies had a brand value.

Sony India Private Ltd vs Addl CIT - [TS-338-ITAT-2019(DEL)-TP] - ITA No.6372/Del/2017 dated 08-03-2019

452. In case of assessee engaged in distribution of mobile phones the Tribunal relying on coordinate bench decision in case of assesee's group company -Sony India Private Ltd vs Addl CIT - [TS-338-ITAT-2019(DEL)-TP] - directed the TPO for fresh adjudication to determine whether there was any brand registered in the name of the two companies viz Micromax informatics and Lava international for AY 2013-14 and further to determine the impact of the brands on the companies' profitability.

Sony Mobile Communications India Private Ltd vs Addl CIT - [TS-307-ITAT-2019(DEL)-TP] – ITA No.6370/Del/2017 dated 08-03-2019

453. The Tribunal deleted protective adjustment made on the basis of bright line test on account of advertisement, marketing and promoting expenditure relying on the Sony India Private Ltd vs Addl CIT - [TS-338-ITAT-2019(DEL)-TP] which inturn relied on Delhi High Court decision in Sony Ericsson

Sony Mobile Communications India Private Ltd vs Addl CIT - [TS-307-ITAT-2019(DEL)-TP] – ITA No.6370/Del/2017 dated 08-03-2019

454. The Tribunal deleted AMP adjustment of Rs.27.12 crores made on protective basis for AY 2014-15; following coordinate bench ruling in assessee's own case ITA No.6565/Del/2017 for AY 2013-14 wherein similar AMP-adjustment made on protective basis by applying BLT was deleted considering that application of BLT was held to be unsustainable by jurisdictional HC in Sony Mobile Communications 374 ITR 118, which is pending in appeal before SC.

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MSD Pharmaceuticals Pvt Ltd vs. Addl.CIT [TS-163-ITAT-2019(DEL)-TP] ITA No.7569/DEL/2018 dated 07.03.2019

455. The Tribunal allowed assessee's appeal, and rejected BLT holding that AMP expenditure cannot be considered as International transaction for assessee (joint venture between Yakult Honsha of Japan and Groupe Danone of France) engaged in manufacturing and selling Probiotic milk in India for AY 2011-12. It observed that assessee was a full-fledged manufacturer having no significant intangibles or R&D activity and necessary functions of strategizing, advertising and marketing activities, its implementation and controlling across country were conducted by assessee for market penetration in India and thus, assessee was economic owner of the brand, though not the legal owner. It also noted that assessee had assumed all risks for promoting its sales, and thereby entire profitability was subject to tax in India, and no residual profits were enjoyed by AE and only royalty and technical service fee at 1% of net turnover was being paid to the AE. It further noted that there was no agreement between assessee and AE towards spending of AMP and TPO had failed to establish international transaction vis-a-vis AMP expenses amounting to brand building and trademarking of AE which helps AE in achieving sales in other territories or otherwise. It relied on coordinate bench ruling in case of PepsiCo India Holdings (P) Ltd vs ACIT (2018) 100 Taxmann.com 159(Del-Trib).
Yakult Danone India P Ltd vs. Dy.CIT [TS-243-ITAT-2019(DEL)-TP] ITA No. 996/Del/2016 Dated 29.03.2019

456. The Tribunal in second round of proceedings pursuant to remand by HC, held that reimbursement received for AMP functions performed by assessee (manufacturer & distributor of liquor with brand name of 'Bacardi') was an international transaction for AY 2011-12. It had earlier remitted the issue of ALP determination in light of Sony Ericsson Mobile Communications Ltd vs CIT (2015) 374 ITR 118 (Del). Consequently, in first round of appeal, the High Court had set aside Tribunal order remanding AMP-issue and had directed Tribunal to decide the issue by itself. The Tribunal in second round noted that due to global decision, assessee's marketing expenses were reimbursed by Bacardi Martini B.V. (AE) who, in spite of having no business of distribution of its product or sale of raw material to the assessee, reimbursed the advertisement expenditure. The Tribunal opined that advertisement expenses reimbursed by Bacardi Martini B.V. was purely for Brand building and marketing intangible of Bacardi Group. It also observed that there was no separate agreement between assessee & AE to ascertain as to what extent AE would reimburse advertisement expenses & further, there were no facts to suggest that the function undertaken under the head advertisement & marketing by assessee could be segregated from function performed by AE. Accordingly, the Tribunal accepted the existence of action in concert in respect of AMP function performed by the assessee for creating marketing intangibles for AE; and distinguished assessee's reliance on Goodyear(ITA 5650/DEL/2011, ITA 6240/DEL/2012 and ITA 916/DEL/2014) ruling as that was a case of pure manufacture whereas in the present case, there was distribution & manufacturing of products bearing AE's brand and assessee had failed to produce any evidence such as agreement, ledger copy etc.
Bacardi India Pvt Ltd vs DCIT [TS-233-ITAT-2019(DEL)-TP] ITA No. 1197/Del/2016 dated 27.03.2019

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457. The Tribunal held that incurrence of AMP-expenditure was an international transaction for AY 2014-15 for assessee (engaged in import and resale of medical equipment). It restored benchmarking back to AO/TPO for fresh decision in line with jurisdictional HC ruling in Sony Ericsson Mobile Communications vs CIT ITA No.16/2014. It observed that the expenses incurred on seminars and conferences by the assessee where the brand name "Olympus" (owned by the AE) was displayed, benefited the AE, in addition to covering the product liability risk which was completely borne by the AE by providing technical awareness of its products to the doctors and hospitals. It distinguished assessee's reliance on PepsiCo India ruling as assessee therein was a full-fledged manufacturer and supplier and bore all associated risks unlike assessee whose function was akin to a distributor. It referred to Sony Ericsson ruling (supra) wherein it was held that AMP-expenses must be compensated in case of distribution companies. It rejected TPO's benchmarking on protective basis by following BLT method and restored issue of adjustment made on substantive basis following Cost Plus Method back to the file of TPO.

Olympus Medical Systems India Pvt. Ltd vs. DCIT [TS-232-ITAT-2019(DEL)-TP] ITA No.7414/Del/2018 Dated 27.03.2019

458. The Tribunal deleted AMP-adjustment made by TPO/AO in case of assessee (engaged in the business of manufacture and sale of alcoholic beverages in India) by applying Bright Line Test (BLT) for AY 2007-08 noting that co-ordinate bench in L.G. Electronics India Pvt. Ltd ITA No. 6253/DEL/2012 (which in turn had relied on HC ruling in case of Sony Ericsson Mobile Communications India 374 ITR 118 and Maruti Suzuki 381 ITR 117) had deleted identical adjustment by stating that BLT had no mandate under the Act and accordingly, the same could not be resorted to for the purpose of ascertaining the existence of international transaction of brand promotion services between the assessee and the AE. It separately noted that the operating margin excluding AMP and selling and distribution expenses of the assessee for the year under consideration was 28.03% whereas that of the comparables was 10.60% which was much much higher and the margin excluding AMP expenses was only 27.04% in the case of the appellant and 6.63% in the case of comparables. Thus, the impugned addition on account of AMP expenditure was uncalled for and was deserved to be deleted.

Pernod Ricard [India] Pvt Ltd [Formerly known as Seagram India Pvt Ltd] vs. Dy.CIT [TS-189-ITAT-2019(DEL)-TP] ITA No. 910/DEL/2015 dated 15.03.2019

459. The Tribunal deleted the adjustment made by the TPO using Bright Line Test (BLT) for AMP expenses incurred by the assessee (engaged in importing, marketing, and distributing orthopedic implants and instruments to customers in India). It noted that in various cases such as Maruti Suzuki, Whirlpool, Bausch & Lomb and others, the High Court had categorically held that the onus is on the Revenue to demonstrate that the AMP spend is an international transaction and BLT had no mandate under the Act for the same. Accordingly, the Tribunal held that since the TPO did not establish existence of an international transaction, the issue of its benchmarking and determination of ALP did not arise.

Zimmer India Private Ltd [TS-630-ITAT-2019(DEL)-TP] - ITA No. 6804/Del/2015 dated 14/06/2019

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460. The Tribunal deleted the adjustment made by the TPO using Bright Line Test (BLT) for AMP expenses incurred by the assessee (engaged in trading of consumer durable and providing representative and marketing support services to group companies worldwide), following co-ordinate bench decision in assessee's own case for an earlier year. The co-ordinate bench had relied on the decision in the case of Sony Ericsson Mobile Communications (Del HC) wherein it was held that AMP adjustment made by applying BLT was unsustainable as it had no statutory mandate.
Toshiba India Pvt Ltd [TS-562-ITAT-2019(DEL)-TP] - ITA No. 1611 /Del/2016&7340 /Del/2018dated 11/06/2019

461. The Tribunal deleted the adjustment made by the TPO using Bright Line Test (BLT) for AMP expenses incurred by the assessee (engaged in import, assembly and sale of premium segment cars in India), following co-ordinate bench decision in assessee's own case for an earlier year. The co-ordinate bench had held that incurring of AMP-expenditure did not give rise to anyinternational transaction and the Revenue also could not establish otherwise, on the basis of some tangible material.
BMW India Pvt Ltd [TS-624-ITAT-2019(DEL)-TP] - ITA No. 1163/Del/2017dated 14/06/2019

462. The Tribunal deleted the adjustment made by the TPO using Bright Line Test (BLT) for AMP expenses incurred by the assessee, following co-ordiante bench ruling in assessee's own case for an earlier year. The co-ordiante bench had held that mere incurring of third-party AMP expenditure, in the absence of any arrangement between the assessee and its AE, could not be termed as international transaction and thus, could not be subjected to determination of ALP.
Synthes Medical Pvt Ltd [TS-536-ITAT-2019(Mum)-TP] - I.T(TP)A. No.2287/Mum/2017 dated 06/06/2019

463. The Tribunal deleted the adjustment made by the TPO using Bright Line Test (BLT) for AMP expenses incurred by the assessee, holding that mere incurring of third-party AMP expenditure, in the absence of any arrangement between the assessee and its AE, could not be termed as international transaction as defined u/s 92B and thus, the question of determination of ALP did not arise at all.
Godrej Consumer Products Ltd [TS-577-ITAT-2019(Mum)-TP] - I.T.A. No.1102&1211/Mum/2015 dated 19.06.2019

464. The Tribunal deleted AMP-adjustment for assessee engaged in manufacture, marketing and sale of cosmetics and cited TPO's failure to establish that there existed any agreement between the assessee and its AE to share or reimburse the AMP expenses. The Tribunal noted assessee's submission that clauses 7 & 8 of the agreement between assessee and AE, providing for right of distribution and responsibility for advertising of the licensed product in the territory (relied on by Revenue to claim that the AMP expenses of assessee were controlled by the AE), did not obligate the assessee to incur any AMP expenses on behalf of its AE so as to promote the brand owned by its AE's and a perusal of the said clauses further revealed that there was no agreement between the assessee and the AE's for sharing the expenses and the payments made by the assessee for the expenses of AMP. Thus, from the facts above and

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relying on co-ordinate bench decisions in assessee's own case for previous AYs the adjustment was deleted.

M/s. L'Oreal India Pvt Ltd vs ACIT-TS-34-ITAT-2019(Mum)-TP-ITA No 1417/Mum/2017 dated 30.01.2019

465. The Tribunal declined to admit Revenue's additional ground for remitting issue of advertisement and publicity (AMP) expenses to TPO for examination from arm's length perspective to ascertain whether some benefit had accrued to the overseas AE. It noted that AO had evaluated the allowability of the expenditure u/s. 37(1) and neither had assessee reported the transaction in Form 3CEB, nor had AO made a reference to TPO for ALP-determination of the said transaction, thus, advertisement and publicity expenditure from the very initial stage itself was never treated as part of international transaction. Thus, the issues relating to Transfer Pricing adjustment had attained finality and if the Department was permitted to rake up the issue relating to ALP-determination of advertisement and publicity expenses, at this stage, it would virtually result in re–opening of the assessment which is prohibited under section 92CA(2C) of the Act. It further observed that co-ordinate bench had dismissed similar additional ground of Revenue in case of assessee for AY 2006-07.

Star India Pvt. Ltd. vs. Addl.CIT [TS-169-ITAT-2019(Mum)-TP] ITA No. 5630/Mum/2009 Date 15.03.2019

466. The Tribunal deleted AMP adjustment of Rs 23.58 crores made by applying Bright Line Test for AY 2012-13. The Tribunal followed coordinate bench ruling in assessee's own case for AY 2011-12 which in turn relied on ruling for previous AY 2010-11 wherein similar AMP adjustment was deleted as there was no condition or even an indication about sharing of AMP expenses in assessee-AE agreements. It also accepted assessee's submission that Bright Line Test was not prescribed under the Act and the Rules and thus it rejected TPO's application of the Bright Line Test to assess AE-benefit and arrive at an arm's length compensation for the same.

India Meditronic Pvt Ltd v. ACIT 10(1)(1), Mumbai, [TS-470-ITAT-2019(Mum)-TP], ITA(TP) No. 2160/Mum/2017, dated May 27, 2019

467. The Tribunal deleted AMP adjustment for assessee engaged in marketing and distribution of a wide range of medical products for AY 2013-14. It followed co-ordinate bench ruling in assessee's own case for AY 2010-11 which in turn relied on Thomas Cook ruling to delete similar AMP-adjustment absent condition or even indication about sharing of AMP expenses in assessee-AE agreements. The Coordinate bench had also rejected TPO's application of the Bright Line Test to assess AE-benefit and arrive at an arm's length compensation for the same as no such method was prescribed under the Act and the Rules.

India Medtronic Pvt Ltd. v. ACIT 10(1)(1), Mumbai, [TS-405-ITAT-2019(Mum)-TP], ITA No.601/Mum/2018, dated May 8, 2019

Receivables

468. The Tribunal restored to CIT(A), the issue of TPO's recharacterization of advance receivable from AE into loan and imputation of interest as per SBI PLR in case of an assessee engaged in

software development services for fresh adjudication. The Tribunal considered assessee's submission that it did not charge interest owing to AE's losses which was put in writing in the addendum to main service agreement entered into between the parties. It further noted that CIT(A) did not take into account the said addendum which mentioned the change in the facts and circumstances leading to non charging of interest. Thus, **it** remitted the matter back to the CIT(A).

M/s. Quark Media House India P Ltd vs DCIT- TS-180-ITAT-2019(CHANDI)-TP-ITA No 94/Chd/2017 dated 28.02.2019

469. The assessee engaged in manufacturing and export of the jewellery requested to allow 90 days credit period (as against 60 days allowed by TPO) for benchmarking interest on AE-receivables. The Tribunal observed that TPO himself in succedding AY had considered receivables beyond 90 days for the purpose of benchmarking. Thus, following the rule of consistency, the Tribunal held that period of 90 days credit was found to be reasonable in the trade of the assessee and accordingly directed the Ld.AO/TPO to compute the transfer pricing adjustment for receivables having delay in receipt of payment more than 90 days.

DCIT vs Bridal Jewellery Mfg Co- TS -252-ITAT-2019(Del)-TP- ITA No 873/Del/2016 dated 28.02.2019

470. The Tribunal deleted the adjustment made on account of interest on outstanding receivables from AE for AY 2010-11, holding that impact of the delayed receivables was already factored in the working capital adjustmentand, therefore, any further adjustment on the outstanding receivables was not required separately. It noted that (i) the assessee was a debt free company(ii) it was not charging interest on overdue debts from the third parties (iii) it had margin of 23.3% on Software Development segment as compared to the margin of 11.42% of comparable companies and (iv) credit period of comparable companies was 147 days as against the creditperiod allowed by the assessee of the 30 days.

Barco Electronic Systems (P) Ltd [TS-655-ITAT-2019(DEL)-TP] - ITA No.1530/Del/2016 dated dated28/06/2019

471. The Tribunal set aside the issue of advisory fee receivable outstanding due to excess credit allowed to AE on sale of services, following HC ruling in case of Cotton Naturals and directed the TPO/AO to verify the 'lending rate' during the year under consideration and compute interest on outstanding receivables beyond a period of 30 days.

ChrysCapital Investment Advisors (India) Pvt.Ltd. v.ACIT Cir. 6(1), New Delhi, [TS-482-ITAT-2019(DEL)-TP] ITA No. 458/Del/2016, dated May 17, 2019

472. The Tribunal 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). The Tribunal relied on assessee's own case for previous AY wherein similar TP-adjustment was deleted, relying on Bechtel India HC-ruling (Revenue's SLP subsequently dismissed by SC) wherein it was held that where assessee was a debt free company, the question of receiving any interest on receivables did not arise. Further, the co-ordinate bench had also relied on Kusum Healthcare HC ruling & co-ordinate bench ruling in Teradata India (which followed Kusum Healthcare ruling) wherein it was

held that no adjustment could be made on account of interest on receivables on credit granted by the Indian subsidiary to its foreign-AE. Thus, the Tribunal following co-ordinate bench ruling concluded that transfer pricing adjustment on account of interest on overdue receivables was to be deleted.

M/s. Kadimi Tool Manufacturing Co Pvt Ltd vs DCIT-TS-483-ITAT-2019(Del)-TP-ITA No 5802/Del/2015 dated 04.04.2019

473. The Tribunal allowed assessee plea and directed AO/TPO to adopt LIBOR of currency of invoice raised plus suitable basis points for benchmarking international transaction of interest on overdue trade receivables and rejected TPO's benchmarking as per SBI PLR rate. The Tribunal relied on jurisdictional Delhi HC's decision in the case of Cotton Naturals (I) Pvt. Ltd wherein it was held that interest rates should be the market determined interest-rate applicable to the currency concerned in which the loan had to be repaid. Thus, the Tribunal directed to adopt LIBOR rate.

M/s. Apollo International Ltd vs DCIT-TS-288-ITAT-2019(Del)-TP-ITA No 9/Del/2015 dated 12.04.2019

474. The Tribunal deleted TP adjustment towards interest on receivables from AE for assessee engaged in provision of data warehousing solutions. The Tribunal noted that DRP directed grant of working capital adjustment and at the same time directed re-computation of interest chargeable on outstanding net receivables by applying LIBOR + 400 bps. The Tribunal observed that jurisdictional HC in case of Kusum Healthcare and co-ordinate bench decision in assessee's own case held that no separate adjustment on account of interest receivable was required when working capital adjustment had already been made to the margins of the comparables while comparing the margin of the assessee under the TNMM. It thus allowed assessee's appeal.

M/s. Teradata India Pvt Ltd vs ACIT-TS-113-ITAT-2019(Del)-TP-ITA No 8054/Del/2018 dated 25.02.2019

475. The Tribunal remitted back the issue of TP-addition of Rs.1.20 lakhs on account of imputing interest on outstanding receivables. The Tribunal directed to assessee to file agreement under which payment was received from AE against services provided by assessee. It clarified that upon analysis of such agreement, assessee shall submit evidences in respect of agreed allowable credit period for making payments by AE to assessee based upon which interest shall be computed.

Autotech India Pvt.Ltd. v. DCIT Cir 1(1), Gurgaon, [TS-506-ITAT-2019(Del)-TP], ITA No. 5939/Del/2017, dated May 31, 2019

476. The Tribunal deleted ad-hoc TP-addition on account of notional interest on outstanding AE-receivables, finding that assessee was granted a working capital adjustment by the DRP, which took into account the impact of outstanding receivables on the profitability and therefore no separate adjustment was warranted on account of overdue outstanding receivables.

Agilent Technologies (International) Pvt. Ltd.v. ACIT Cir. I(I) Gurgaon, [TS-393-ITAT-2019(DEL)-TP], ITA No. 4191/Del/2018, dated May 06, 2019

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477. The Tribunal ruled on TP-adjustment in respect of notional interest on outstanding AE-receivables. It found that TPO had merely stated that substantial amount of AE-receivables remained outstanding for a prolonged period without a mention of the amount and time of delay, nor could the Revenue explain the computation at the time of hearing. Also, TPO had solely based his findings on the retrospective amendment to section 92B. The Tribunal observed that when the TP study report was furnished by the assessee as per the then applicable provision, outstanding receivables were not considered as international transaction. Relying on Bombay HC ruling in case of NGC Networks which in turn relied on Cello Plast ruling it held that an assessee cannot be called upon to perform an impossible act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment. But since the facts were not coming out from the orders of the authorities below, the Tribunal restored the issue to the file of the TPO and directed him to furnish details of substantial amount which, according to him, had been outstanding for a prolonged period keeping in mind the decision of the Bombay High Court in case of NGC Networks.

GE Capital Services India v. DCIT Cir.10(1), New Delhi [TS-431-ITAT-2019(DEL)-TP] ITA No. 2066/DEL/2015, dated May 14, 2019

478. The Tribunal remitted the issue of TP-adjustment on outstanding AE-receivables in case of assessee and found that TPO allowed credit period of 90 days as per agreement and made adjustment wherever assessee allowed credit period beyond 90 days failing to acknowledge that assessee received certain payment within 90 days also. The Tribunal further agreed with assessee and held that overall average credit period should be considered, or it should be compared with the industry average. Thus, the Tribunal stated that the TPO erred in applying 90 days period selectively and remitted the issue directing that in case it was found such collection period was beyond 90 days, then the TPO could make adjustment only to the extent it crossed 90 days.

Netcracker Technology Solutions (India) Pvt Ltd vs ACIT-TS-51-ITAT-2019(HYD)-TP-ITA No 1746/Hyd/2017 dated 31.01.2019

479. The Tribunal remitted the issue of adjustment of interest on outstanding receivables from AE for AY 2014-15, following co-ordinate bench decision in assessee's own case for an earlier year wherein it was held that in view of amendment to section 92B, outstanding trade receivables beyond reasonable period is an international transaction and assessee as well as TPO have to determine what is the reasonable period of outstanding which they can allow to the AEs. The co-ordinate had directed the TPO to determine the industry average or average of collection period adopted by the comparable companies and calculate average collection period of the assesse.

Value Labs Technologies [TS-559-ITAT-2019(HYD)-TP] - ITA No. 1921/Hyd/2018 dated 12/06/2019

480. The Tribunal held that outstanding trade receivables beyond reasonable period would come under international transactions as per amended Section 92B for AY 2013-14, however remitted computation of ALP giving specific guidelines. The Tribunal held that determination of the reasonable period of outstanding which could be allowed to AEs, may be made as per the bilateral agreement or trade practice in the industry or historical average collection period of the

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assessee or reference could be drawn from statutory limits fixed by the legislature in the similar enactment. Accordingly, the Tribunal directed the TPO to determine the industry average or average of collection period adopted by the comparable companies selected for the TP study and calculate average collection period of the assessee during this assessment year. Further, the Tribunal clarified that the collection during the year which were within the industry average should be allowed and only the collection period beyond industrial average alone should be charged with the interest based on the rate of LIBOR since it was international transaction.
Value Labs Technologies vs ITO-TS-262-ITAT-2019(Hyd)-TP-ITA No 1919/Hyd/2017 dated 05.04.2019

481. The Tribunal ruled that interest on receivables was not an international transaction for assessee engaged in development of software and ITeS and noted that while TPO proposed to charge interest @ 14.75% on the outstanding AE receivables, after allowing one-month credit period, DRP restricted interest rate to 5%. The Tribunal observed that though Explanation to Sec. 92B, inserted by Finance Act 2012 (wherein a clarificatory amendment was inserted specifying that interest on outstanding AE-receivables will be included within the definition of 'international transaction') was brought into the statute book w.r.e.f. April 1, 2002, the Tribunal remarked that "the assessee could not be expected to consider such a transaction as an international transaction during the relevant previous year" i.e. AY 2012-13. Thus, the Tribunal held that interest on receivables was not an international transaction prior to the amendment.
Ivy Computech Pvt Ltd vs DCIT-TS-322-ITAT-2019(Hyd)-TP-ITA No 1403/Hyd/2016 dated 21.01.2019

482. The Tribunal held that interest on outstanding receivables was an international transaction for AY 2013-14 relying on Delhi HC ruling in McKinsey Knowledge Centre India wherein it was held that Explanation to Sec 92B inserted vide Finance Act, 2012 was applicable retrospectively and therefore, non-charging or undercharging of interest on the excess period of credit allowed to the AE for the realization of invoices was an international transaction, It noted that TPO had proposed TP-adjustment of Rs.6.68cr by charging interest of 14.45% on delayed payments after allowing 30 days credit period while DRP granted partial relief by reducing the rate of interest to the PLR rate of State Bank of India. It observed that in most cases credit period was below 100 days (though in some cases the period exceeded 600 days), also there was no clause in the inter-company agreement mentioning that only 30 days of credit period was allowed for making payments and therefore TPO's fixing the credit period of 30 days was without any basis. Regarding assessee's objection that the working capital adjustment had already taken care of the impact of the outstanding receivables, the Tribunal observed that there was no working given by TPO in this regard and thus it was unable to give a finding as to whether the interest on outstanding receivables was a factor considered in the working capital adjustment given by the TPO. It also rejected assessee's contention relying on Delhi HC decision in Bechtel India that assessee was a debt free company with no interest expenditure. However, it accepted assessee's contention that since payments were to be made in foreign exchange, interest rate should be charged at LIBOR plus 200 basis points. Thus, it directed AO/TPO to work-out industry average of credit period for outstanding receivables and apply the rate of LIBOR plus 200 basis points after expiry of such credit period from the invoice date.
Open Text Technologies India Private Limited v. DCIT Cir. 16(2) Hyderabad [TS-380-ITAT-

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2019(HYD)-TP], ITA No.2071/Hyd/2017, dated May 03, 2019

483. The Tribunal remitted to TPO the issue of ALP determination for sale of carpets to AEs and interest on overdue AE-sale proceeds and rejected the ALP determination by both the assessee (i.e by comparing by average price of all the carpets sold to AEs and non-AEs) as well as TPO (by cherry picking low price AE-transactions).The Tribunal noted the variation in rate due to differences in the quality and design of the carpets, and stated that to mitigate the scope of the variation, weighted average price must be computed (instead of simple average adopted by assessee) and explained that only if a number of transactions were closely linked or continuous in nature then they can be aggregated and clubbed for the purpose of transfer pricing analysis. Further, it explained that credit period allowed had to be clubbed with the sale transaction and not to be considered as a separate international transaction and upheld CIT(A)'s application of LIBOR (instead of PLR adopted by TPO) for benchmarking overdue sale proceeds which were to be realised in foreign currency. However, the Tribunal rejected CIT(A)'s approach of considering forex gain or loss against the arm's length interest and stated that the effect of forex gain or loss had to be given in computing ALP of sale price and not ALP of interest.
DCIT vs M/s. Jaipur Rugs Company Pvt Ltd-TS-145-ITAT-2019(JPR)-TP-ITA No 738/JP/2012 dated 22.01.2019

484. The Tribunal upheld CIT (A)'s deletion of addition on account of determination of ALP of interest for extended credit period and stated that assessee had delayed making payments towards marketing support services rendered by AE and thus the delay in making payment was from both sides and inferred that there was no loss to the assessee in real terms and no extra benefit was provided to the AEs on account of extended credit facility. The Tribunal also noted that assessee did not charge any interest from both AEs and the third parties towards extended credit period and thus deleted the addition.
WNS Global Services Pvt Ltd vs ITO-TS-278-ITAT-2019(Mum)-TP-ITA No 7378/Mum/2012, 396/Mum/2011 dated 16.01.2019

485. The Tribunal deleted the adjustment made by the TPO on account of interest on outstanding receivables from AE for AY 2011-12, noting that there was complete uniformity in not charging interest from both AE and non-AE for delay in export proceeds. It held that in absence of any findings as to the fact that the assessee had allowed undue benefit to the AE by extending credit period for realisation of sundry debtors and such extension of credit period benefited the AE, no adjustment could be made under the TP provisions of the Act to benchmark interest receivables on hypothetical or notional basis because late realisation of export receivable /sundry debtors could not be considered as advancing loans and advance to the subsidiary or AE.
Mobileum (India) Pvt Ltd (Formerly known as Roamware India Pvt Ltd) [TS-698-ITAT-2019(Mum)-TP] - IT(TP)A NO.945& 2047/Mum/2016 dated 26/06/2019

486. The Tribunal directed adoption of LIBOR plus 0.5% for benchmarking interest on outstanding AE-receivables and noted that TPO/DRP determined the TP-adjustment of Rs.8.90lakhs by applying 6.56% as per Bloomberg database. The Tribunal observed that TPO/DRP had not considered assessee's submission that as per the LIBOR rate the interest chargeable on the outstanding receivable should be LIBOR plus 0.5%. Thus, considering the ruling held in various

precedents that “interest on outstanding receivables had to be charged by applying LIBOR rate as applicable in the country of residence of AE, the Tribunal directed AO to compute the interest chargeable on outstanding receivables at LIBOR plus 0.5%.
Essar Power Ltd vs ACIT-TS-318-ITAT-2019(Mum)-TP-ITA No 7329/Mum/2017 dated 15.04.2019

487. The Tribunal deleted secondary TP-adjustment of interest on outstanding receivables (pursuant to primary TP-adjustment proposed by TPO on account of devaluation of consideration of sale of business unit to AE) for ITeS-provider. The Tribunal confirmed DRP’s deletion of secondary TP-adjustment and noted that DRP followed its predecessor’s view for previous AY 2009-10 which was confirmed by the Tribunal subsequently.
Prudential Process Management Services India Pvt Ltd vs DCIT-TS-36-ITAT-2019(Mum)-TP-ITA No 490/Mum/2015 dated 24.01.2019

488. The Tribunal restored TP adjustments to TPO/FAA on communication/network related services and IT infrastructure charges paid by assessee engaged in the business of development/maintenance of computer software, sale and export of software services and provision of technical consultancy after relying on assessee’s own case for previous AY, wherein also the matter was remitted with the observation that Revenue had failed to appropriately analyze assessee’s submissions and the group IT Service agreement.
M/s. Atos India Pvt Ltd vs DCIT - TS-296-ITAT-2019(Mum)-TP-ITA No 4707/Mum/2015 dated 02.01.2019

489. The Tribunal held that since no interest had been charged on receivables from both AE as well as Non-AE. Thus, there was complete uniformity in act of assessee and AO was not justified in making addition of notional interest.
Suashish Diamonds Ltd. v. Addl. CIT, Range-5(3), [TS-689-ITAT-2019(Mum)-TP], ITA Nos.7508/Mum/2014, dated May 31, 2019

490. The Tribunal deleted the adjustment made on account of notional interest on delayed export receivables from AE noting that assessee had not changed interest onreceivables from both AEs and non-AEs, following ruling in the case of Indo American Jewellery(Bom HC) wherein it was held that since therewas complete uniformity in the act of the assessee in not charging interest from both AE and non-AE debtorsfor delay in realisation of export proceeds, addition of notional interest on outstandingamount of export proceeds was to be deleted.
Frost & Sullivan (India) Private Limited [TS-623-ITAT-2019(Mum)-TP] - I.T.(TP) A. No. 2290/Mum/2017dated dated18/06/2019

491. The Tribunal upheld CIT(A)’s order and deleted TP-adjustment on account of interest on AE-outstanding receivables and noted that all AEs were 100% subsidiaries and assessee was a debt-free company, having large amount of reserves. The Tribunal relied on co-ordinate bench ruling in Mahati Software wherein it was held that no separate benchmark was required on receivables when PLI was comparable.Further, observing that Revenue had not made out a case of undue advantage of allowing credit and was not able to controvert CIT(A)’s finding

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that receivables were received in reasonable period without delay, the Tribunal opined that there was no case for making adjustment of interest on receivables in the assessee's case.
DCIT vs M/s. CCL products (India) Pvt. Ltd-TS-342-ITAT-2019(Viz)-TP-ITA No 348/Viz/2018 dated 03.04.2019

Loans

492. The Court confirmed Tribunal's order and held average rate of interest paid by the assessee at 11.30% on CCDs issued to US based AE to be at ALP. The Court approved Tribunal's rejection of adoption of rate of return for assessee's AE from USD Corporate Bond Rates for determining ALP of INR denominated CCD's and noted that assessee's credit rating was relatively low i.e 'BBB' owing to the inherent risks in its business of identifying companies in financial distress (whose products were otherwise viable) and taking over/ financing of such companies and that assessee was raising funds for such investments through issuance of debentures to its AEs. The Court further noted that Tribunal's observation that the average rate of interest of 11.30% paid by the assessee was not excessive and was in any case lower than the comparable instances and also noted that Tribunal had rejected treatment of foreign-AE as tested party. The Court clarified that its non-consideration of Revenue's appeal in the present case, should not be seen as putting a seal on Tribunal's other observation that identification of "tested party" was imperative while applying other methods for comparison and not while applying CUP method and that such questions were kept open to be examined in an appropriate case.
Pr.CIT vs India Debt Management P Ltd-TS-340-HC-2019(Bom)-TP-ITA No 266 of 2017 dated 15.04.2019

493. The Court dismissed Revenue's appeal against Tribunal'sorder deleting adjustment made with respect to interest received on loan given to AE by accepting interest charged by assessee @ 6% to be ALP. The Court noted that the Tribunal had followed co-ordinate bench ruling in assessee's own case for an earlier year wherein similar adjustment was deleted noting that the assessee had charged higher rate than LIBOR for the given year (3.79%). The Court also noted that it had dismissed Revenue's appeal against Tribunal's order for earlier year, relying on the decisions of Tata Autocomp Systems Limited (Bom) and Aurionpro Solutions Ltd (Bom).
Hinduja Global Solutions Limited [TS-527-HC-2019(BOM)-TP] - INCOME TAX APPEAL NO. 563 OF 2017 dated 04/06/2019

494. The Tribunal ruled on ALP determination in respect of interest on loan given to AE in AY 2008-09,it rejected assessee's plea to accept internal CUP i.e. rate at which assessee had obtained foreign exchange borrowings opining that transaction of obtaining the loan is a different transaction from the lending even if both the loan transactions are in foreign currency. It noted that TPO had adopted foreign AE as tested party (but did not take foreign comparables) and added to LIBOR credit risk at 3.50% and margin @ 0.50% to determine the ALP of the interest. It observed that addition of 3.5% for credit risk in 6 month LIBOR rate represented the difference in the credit rating of AAA Indian companies which was obtained from the CRISIL in response to the notice issued under section 133(6) of the Act vis-a-vis the credit rating of BBB of the AE

which was determined by the TPO on the basis of financial documents of the AE instead of taking report from authorized agency. But the Tribunal relying on JSL Ltd ruling held that the loan was given in foreign currency and was to be repaid in foreign currency only thus there was no need to make any adjustment in the rate of interest on account of risk . It also noted that no adjustment on account of interest rate was made in preceding AY 2007-08, hence addition in the rate of interest on account the credit risk suggested by the TPO was not sustainable. However, the Tribunal upheld TPO's basis of charging 0.50% margin from the AE in respect of interest on loan, considering that the assessee was charging margin of 37.50 bps over LIBOR from the AE which was quite low as even the banks charge from the company having high net worth - a margin of 0.50% over LIBOR. Thus, it upheld the finding of the TPO for charging the margin at 0.50% over and above the 6 month average LIBOR rate. Thus in effect, the rate of interest charged by the assessee from the AE increased by 12.5 bps.

Torrent Pharmaceuticals Ltd., v. Add. CIT, Range – 8, Ahmedabad. [TS-569-ITAT-2019(Ahd) TP], ITA Nos.907/Ahd/2012, 938/Ahd/2012, 1634/Ahd/2012, 1725/Ahd/2012, dated May 15, 2019

495. The Tribunal upheld CIT(A)-order deleting addition made on account of interest expenditure claimed by assessee u/s 36(1)(iii) on loan borrowed by Head Office (HO) for the purchase of the oil rig which was used by assessee in India for AYs 2011-12 & 2012-13. It noted that TPO determined ALP of reimbursement of interest cost as Nil on the ground that there was no loan transferred to the assessee for the purchase of such oil rig. However, CIT(A) deleted the adjustment after noting that HO had not charged interest at rate higher than bank interest and considering that assessee had proved that reimbursement of interest expenses was based on back to back arrangement and interest expenditure was inextricably linked to India operations. While allowing the deduction, ITAT inter alia held that as there was no element of income in the amount of interest reimbursed by the assessee to the HO and thus the question of applying the adjustment under section 92C(3) of the Act treating the same as the international transaction did not arise It further stated that therefore there was no need to carry out any transfer pricing study for benchmarking the transaction of interest.

Black Pearl Services Limited vs. DCIT [TS-237-ITAT-2019(Ahd)-TP] ITA Nos. 2813-2815/AHD/2017 Dated 27.03.2019

496. The Tribunal deleted TP-adjustment on interest on loan taken by assessee engaged in business of cargo handling for AY 2007-08. It accepted assessee's interest rate of LIBOR plus 300 basis points as at arm's length rejecting TPO's ALP determination at LIBOR plus 77 basis points. It rejected TPO's comparable viz. loan taken by Torrent Pharmaceuticals Ltd. ('TPL') citing difference in nature of business activity, risk profile, low debt equity ratio of TPL in comparison to assessee, different credit rating and earning per share ratio, non-availability of information/ clarity as to lender, collateral provided, etc. Further, regarding comparable considered by assessee viz. Chennai Container Terminal Pvt. Ltd.('CCTPL'), it observed that assessee and CCTPL performed similar business activity, however, it recognized need for adjustment due to difference in debt equity ratio, credit rating, collateral furnished by CCTPL against no collateral offered by assessee.CIT (A) had made adjustments on a consolidated basis without adjusting individual factors. However, following ruling in assessee's own case in AY 2006-07, it applied rule of consistency relying on SC decision in Radhasoami Satsang (193 ITR 321) and approved

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assessee's interest rate of LIBOR plus 300 basis points as at arm's length. However, it cautioned that its ruling in assessee's case would not have precedent value.

Mundra International Container Terminal Pvt Ltd vs. DCIT [TS-190-ITAT-2019(Ahd)-TP] ITA No.2849,1457,3473/AHD/2014 date 04.03.2019

497. The assessee had given interest free loan to its AE for purchase of an aircraft, the assessee had given 25% of the cost of the aircraft, the balance 75% was met out of the SBI loan (LIBOR plus 145 bps). The Tribunal restricted interest ALP adjustment on account of interest on loan granted by assessee to AE at 4.14% (LIBOR+145bps) as against TPO's 7.14% (LIBOR+445bps) and stated that when the AE in a separate transaction itself had borrowed the monies from the SBI at LIBOR plus 145 bps, the arm's length price of the borrowings could not be taken as more than 4.14% (LIBOR plus 145 bps). Thus, it restricted the TP adjustment.

DCIT vs Adani Ports & SEZ-TS-171-ITAT-2019(Ahd)-TP-ITA No 3481 & 3482/Ahd/2014 dated 12.02.2019

498. The assessee benchmarked its SDT of payment of interest on intercorporate loan by applying internal CUP and determined it to be at ALP on ground that the interest rate paid by the taxpayer to its domestic related party was less than the interest rate paid to an unrelated lender which was rejected by TPO who compared the interest rate with PLR rate of SBI (external CUP) and accordingly made an enhancement to the income on account of ALP. The Tribunal held that TP adjustment made in respect of SDT payment of interest was not sustainable and set aside the issue to TPO as he had not provided assessee an opportunity of hearing before rejecting its plea under internal CUP

JE Energy Venture Pvt Limited vs ACIT [TS-86-ITAT -2019(Del)-TP] ITA.No.7602/Del./2017 dated 15.01.2019

499. The Tribunal remitted TP-adjustment in respect of interest on loan advanced to foreign AE for AY 2010-11. It noted that assessee had benchmarked the interest on loan by taking average rate of resident foreign currency (RFC) deposits of comparables @ 2.07% to justify that interest rate of 7% charged by assessee from its AE was at ALP. However, TPO adopted average PLR of SBI (11.88%) + mark-up of 300 bps i.e. 14.88% as ALP and proposed TP-adjustment of Rs.16.56cr. The Tribunal relying on co-ordinate bench ruling in assessee's own case in AYs 2008-09 & 2009-10 which in turn relied on AYs 2005-06 & 2007-08 restored the issue to CIT(A) to charge interest at LIBOR plus 300 bps.The Tribunal stated that in the present assessment year also the facts remained the same and there were no distinguishing factors pointed out.

ACIT, Circle-9(2), New Delhi v. Fresenius Kabi Oncology Ltd. [TS-495-ITAT-2019(DEL)-TP], ITA No. 1906/DEL/2016, dated May 28, 2019

500. The Tribunal allowed assessee's prayer and rejected PLR and upheld adoption of Swiss LIBOR to benchmark the interest on loans granted to assessee's Switzerland based wholly owned subsidiary. The Tribunal observed that the assessee had lent money in foreign currency and relied on Delhi HC ruling in case of Cotton Naturals wherein it was held that there was no justification or cogent reason for applying prime lending rate for outbound loan transactions where Indian parent had advanced loan to an associated enterprises abroad. Further, the Tribunal rejected CIT(A)'s adoption of PLR for computation of arm's length rate of interest and

stated that though there was no stipulation about repayment currency in loan agreement it could not be concluded that the loan was required to be repaid in Indian currency. Thus, it upheld Swiss LIBOR for benchmarking.

Dharampal Satyapal Ltd vs DCIT-TS-320-ITAT-2019(Del)-TP-ITA No 3738,3739/Del/2016 dated 18.04.2019

501. The Tribunal deleted TP-adjustment in respect of interest on AE-loan and AE-receivables for assessee engaged in manufacture and sale of oilfield equipment for AY 2013-14. It accepted assessee's interest rate at 5.5% to be at ALP approving its internal-CUP, based on loan taken by assessee at 2.23% (LIBOR plus 2%) from Citibank. It observed that Revenue had accepted assessee's rate for AYs 2008-09 and 2010-11 and for AYs 2011-12 and 2012-13, as CIT(A) had deleted the addition which was not further contested by Revenue. Thus following Rule of consistency Tribunal deleted TP-adjustment on AE-loan. It also deleted TP-adjustment in respect of AE-receivables, observing that once working capital adjusted margin of assessee was more than margins of comparables, the issue of interest on overdue receivables was subsumed under working capital adjustment and no separate adjustment was required. It followed Delhi HC ruling in Kusum Healthcare vs ACIT [170 TTJ 411 (Del.)]. It further noted that no interest was charged from third parties on delay in receipt of payment and further that the transaction of sales was otherwise found to be at ALP.

Parveen Industries P Ltd vs. Addl. CIT [TS-240-ITAT-2019(DEL)-TP] ITA No.6504, 6505/Del/2017

502. The Tribunal deleted TP-adjustment towards interest receivable on loan given to Maurtian AE and accepted assessee's interest rate of LIBOR+300 bps as at arm's length. The Tribunal noted that assessee originally agreed to advance 90 days loan to AE at LIBOR plus 500 bps which was later revised to 7 years loan with interest rate of LIBOR plus 300 bps. It observed that the lower authorities had not commented adversely on the same. Further it remarked that even otherwise, for a longer period, the rate of interest was generally reduced and would have no impact on the genuineness of the agreement between the parties. The Tribunal further rejected TPO's stand of adopting SBI Base rate plus 300 bps as ALP and noted that domestic prime lending rate ha**d** no applicability with respect to foreign currency loan.

M/s Aamby Valley Ltd vs ACIT-TS-399-ITAT-2019(DEL)-TP- ITA No 1148/Del/2017 dated 22.02.2019

503. The Tribunal dismissed Revenue's appeal against CIT(A)'s deletion of TP-adjustment in case of an assessee engaged in manufacture and export of ductile iron pipes on loans advanced to overseas AEs. The Tribunal held that the CIT(A) had precisely followed the Tribunal's earlier years' order in the assessee's own case, which had directed the authorities below to benchmark assessee's international transactions in the nature of loans given to its overseas Associate Enterprises (AEs) at the relevant currency benchmark LIBOR rate prevailing in the relevant previous year(s). The coordinate bench in a detailed discussion had held that the international transactions of loans in the case of AEs had to be benchmarked in the respective foreign currency LIBOR rates rather than the domestic market credit ratings. The Tribunal, in the present appeal further observed that the Revenue's pleadings had nowhere drawn any

distinction on facts in all the assessment years. Thus, the Tribunal dismissed the Revenue's appeal.

M/s. Electrosteel Castings Ltd vs DCIT-TS-132-ITAT-2019(Kol)-TP-ITA No 138 & 139/Kol/2018 dated 28.02.2019

504. The Tribunal deleted notional interest imputed on re-characterisation of the transaction of buyback of equity shares issued to the AE's as deemed loan on account of alleged excess amount paid over and above the FMV of shares calculated based on NAV. Revenue contended that transaction in shares gave rise to income, either in form of business income or capital gains and valuation of shares for buy-back was highly inflated. The Tribunal rejecting such contentions held that Chapter X was not applicable to assessee, relying on M/s Topsgroup Electronic Systems vs. ITO- ITA No.2115/Mum/2015 wherein drawing support from Vodafone India Services (2014) 368 ITR 001 (Bom), it was held that Chapter X is inapplicable to an international transaction on capital account which does not result in income chargeable to tax.

Earnest Towers Private Limited vs. ACIT [TS-161-ITAT-2019(Kol)-TP] I.T.A. No. 2530/Kol/2017 dated 15.03.2019

505. The Tribunal deleted TP-adjustment on interest on loan advanced to AE, which was computed by the TPO at 6.819% following LIBOR + approach and accepted assessee's rate of LIBOR+400 bps as adequate. The Tribunal noted that coordinate bench ruling in assessee's own case for previous AY's had held that floating rate of LIBOR+2% was accepted for benchmarking, as well as various other cases including jurisdictional High Court's rulings in Tata Autocomp and Aurionpro Solutions and Delhi HC's Cotton Natural India ruling wherein similar view was upheld. Thus, the Tribunal held that considering that AE had itself raised finance in foreign country at LIBOR +350 base points which had not been denied by TPO, the Tribunal upheld assessee's adoption of interest rate at LIBOR+400 base points.

M/s. Maugraph India Ltd vs ACIT-TS-91-ITAT-2019(Mum)-TP-ITA No 338/Mum/2017 dated 04.02.2019

506. The Tribunal restored ALP-determination of interest free loan advanced by assesse to AEs for de-novo adjudication and noted that DRP had directed AO to compute interest at LIBOR plus 200 basis points, however, assessee contended that as per internal-CUP available, interest rate could not exceed LIBOR plus 50 basis points. Considering assessee's submission that the foreign AE, had taken a loan from third party in U.K. at LIBOR plus 30 basis points and the AE in Spain had taken loan from an unrelated party in the same period at the interest rate of Euribor plus 127.79 basis points, the Tribunal stated that assessee's contention regarding availability of internal CUP required examination, thus remitted the issue back to AO/TPO following co-ordinate bench ruling in assessee's own case for previous AY wherein similar issue was restored.

Tata Motors Ltd vs DCIT-TS-357-ITAT-2019(Mum)-TP-ITA No 5600/Mum/2011 dated 25.04.2019

507. The TPO had determined ALP of interest charged on ECB loan at USD LIBOR rate plus 143.62bps on the basis of average of 46 companies in Bloomberg Database in case of an assessee in relation to payment of interest on External Commercial Borrowing (ECB) loan to

AE. The Tribunal noted that it was unclear, whether TPO had obtained all the relevant data relating to 46 comparables (such as, the nature of loan, whether secured or unsecured, the period of loan, the purpose for which the loan was granted, etc.) and the said relevant data was also not provided to the assessee.The Tribunal held that in these circumstances, the determination of arm's length price of the interest charged on ECB loan on the basis of 46 comparables appearing in Bloomberg Database could not be said to be valid comparable. Further, observing that TPO had himself noted that while granting permission to the assessee for availing ECB loan, the RBI had fixed the interest rate at 6 months USD LIBOR+350bps, it held that arm's length price of the interest charged to the AE can be more accurately determined by following the rate of interest fixed by the RBI in respect of ECB loan and accordingly directed AO to determine interest ALP of ECB availed from AE at "six months USD LIBOR rate plus 300 basis points.

Firmenich Aromatics India P. Ltd vs DCIT- TS-403-ITAT-2019(Mum)-TP-ITA No 7330/Mum/2017 dated 22.02.2019

508. The Tribunal after relying on coordinate bench decisions in Tricom India and Fire Star International upheld assessee's interest payments to AE at LIBOR plus 200 basis points and rejected RBI ECB interest rate applied by TPO as AEs were located in foreign countries.

Travelex India Pvt Ltd vs DCIT vs DCIT-TS-284-ITAT-2019(Mum)-TP-ITA No 8192/Mum/2010 dated 05.04.2019

509. The Tribunal upheld DRP-order directing AO to charge interest on loan advanced to UAE AE @ 6 months LIBOR+350bps & China AE @ 6 months LIBOR+500bps for assessee engaged in manufacturer of High Pressure Seamless Gas Cylinder. The Tribunal followed the ruling in assessee's own case for previous AYs wherein the co-ordinate bench had directed the AO to compute interest on loan advanced to UAE AE by applying LIBOR+bps and adopted 7% as interest rate for Chinese AE.

Further, the Tribunal upheld DRP-order directing AO to charge guarantee commission @ 1% for UAE AE, 1.25% for China AE and 1.75% for USA AE in respect of corporate guarantee given to banks on behalf of the AEs. The Tribunal relied on ruling in assessee's own case wherein co-ordinate bench had restricted guarantee commission on the corporate guarantees provided to the AEs @ 0.5% which was further upheld by jurisdictional HC.Thus, the Tribunal opined that directions of the DRP with regard to the guarantee commission to be charged on the corporate guarantees provided to the AEs was found to be reasonable, hence, was not required to be interfered with.

ACIT vs Everest Kanto Cylinder Ltd-TS-127-ITAT-2019(Mum)-TP-ITA No 1655/Mum/2016 dated 22.02.2019

510. The Tribunal directed AO to compute ALP of interest on outstanding loan to AE at LIBOR (0.7822%) + 150 bps for AY 2011-12. It noted that while CIT(A) accepted US $ based LIBOR (0.7822%) as appropriate benchmark [as AE-loan was not only advanced, but also returned back in the same currency], CIT(A) enhanced risk margin to 4% (as against TPO's 3%) opining that the risk on loan provided to AE was higher and therefore ALP was determined at 4.7822%. It also noted that though the AE to whom assessee had advanced loan was under liquidation, but during the subject AY, another AE of assessee had taken over the AE under liquidation,as

a result of which, the said A.E. was no longer a company in liquidation. Thus, the risk factor had diminished rather than having increased. Therefore, enhancement of interest rate by 4% on account of risk margin, was held to be improper. Also, neither TPO nor CIT(A) had provided any basis for computing the risk margin @ 3% or 4% respectively.

Thirumalai Chemicals Ltd vs. DCIT [TS-166-ITAT-2019(Mum)-TP] ITA No. 685/Mum/2017 dated 08.03.2019

511. The Tribunal accepted LIBOR+ rate applied by assessee for benchmarking interest receivable on loans given to AE , following decision of jurisdictional HC in case of Aurionpro Solutions ITA No.7872/Mum/2011 and coordinate bench in assessee's own case for AY 2007-08. It rejected TPO's benchmarking of interest based on CRISILs data stating that the AE had a weak financial health.

The Tribunal also deleted TP-adjustment on royalty charged by assessee from its Bangladesh based AE for licensing its trademarks relying on coordinate bench decision for AY 2007-08 wherein TPO's use of controlled transaction (with a UAE based AE) for the purpose of comparability was rejected. Also besides being controlled there were differences in geographical location and brands as well as products licenced. The coordinate bench had noted that the agreement with Bangladesh-AE was entered into with respect of 'Parachute' and sale of edible coconuts oil only whereas the agreement with UAE-AE was entered into with respect of 'Parachute' as well as 'GGN' and sale of hair creams, hair gels etc.

Marico Ltd vs. DCIT [TS-224-ITAT-2019(Mum)-TP] ITA No.1702, 1869/Mum/2015 dated Mar 01, 2019

512. The Tribunal dismissed assessee's miscellaneous application seeking rectification in Tribunal-order rejecting assessee's Nil interest-ALP for stressed AE-loans relying on Instrumentation Corporation ruling for AY 2012-13. The assessee had submitted that Instrumentation Corporation ruling was distinguishable on facts since in that case the assessee was not able to justify the commercial rationale behind non-charging of interest and also no comparables were brought on record for the purpose of benchmarking. However, in assessee's case non-charging of interest by the assessee was at ALP in view of principle of commercial expediency and real-income theory. On perusal of the order, Tribunal noted that while relying on Instrumentation Corporation ruling only a principle had been drawn on the strength of statutory provisions to arrive at a conclusion that so long as the transaction is an international transaction within the framework of law, the computation of income there-from has to be on the basis of arm's length principle". Thus, the submission that the cited decision was factually different and distinguishable, carried no weight.

Laqshya Media Limited [earlier known as Laqshya Media Pvt. Ltd.] vs. ACIT [TS-186-ITAT-2019(Mum)-TP] IT[TP]A No.1984/Mum/2017dated 12.03.2019

513. The Tribunal directed the TPO to compute ALP with respect to interest free loan given to AE by adopting LIBOR+ 200 bps, following co-ordinate bench ruling in assessee's own case for an earlier year. The co-ordinate bench had rejected the adoption of Prime Lending Rate (PLR) by the TPO holding that since the loan was advance to an AE in foreign country, interest on the same was to be computed @ LIBOR + 200 bps.

Piramal Glass Ltd [TS-548-ITAT-2019(Mum)-TP] - IT(TP)A No.3046/Mum./2017dated

07.06.2019

514. The Tribunal deleted the adjustment made by TPO in relation to payment of interest on external commercial borrowings (ECB) loan taken by assesseeby applying USD LIBOR + 143.62 bps and rejecting assessee's rate of USD LIBOR+ 300 bps. It followed the coordinate bench ruling in assessee's own case for an earlier year wherein similar adjustment was deleted, noting that while granting permission to the assessee for availing ECB loan, the RBI had fixed the interest rate at 6 months USD LIBOR+350bps.
Firmenich Aromatics (India) Pvt Ltd [TS-539-ITAT-2019(Mum)-TP] - ITA No. 6081/Mum/2018 dated 07/06/2019

515. The Tribunal determined the ALP of interest rate chargeable on interest free loans advanced by assessee to its foreign AEs at LIBOR +300bps for AY 2009-10 & AY 2010-11, noting that the Tribunal as well the Jurisdictional High Court had in several cases upheld the applicability of interest rate of LIBOR +200 bps to 300 bps and the CIT(A), in AY 2010-11 had adopted rate of LIBOR +200 bps.
Air Works India (Engineering) Pvt Ltd [TS-618-ITAT-2019(Mum)-TP] - I.T.A. No. 6938/Mum/2014&4799/Mum/2015dated 07/06/2019

516. The Tribunal remitted the issue of determination of ALP of interest on foreign currency loan given to AE back to the TPO (who had determined the ALP @ 10% and the same was reduced by the CIT(A) to 8%), following the co-ordinate bench decision in assessee's own case for earlier years wherein also the identical issue was remitted with a direction to determine the ALP by applying interest rate applicable to the currency in which the loan was required to be repaid.
Technocraft Industries India Ltd [TS-594-ITAT-2019(Mum)-TP] -IT(TP)A No.1487/ Mum/ 2017 dated 19.06.2019

Corporate Guarantee

517. The Court dismissed Revenue's appeal against Tribunal's decision deleting TP-adjustment on account of corporate guarantee commission for AY 2008-09. The Court noted that Tribunal had followed co-ordinate bench ruling in assessee's own case for AY 2006-07 wherein similar TP-adjustment was deleted and Revenue's appeal was dismissed holding that the issue did not give rise to any substantial question of law. Thus, the Court held that the Revenue was not been able to point out any distinguishing features in this assessment year which would warrant to take a different view, thus dismissed Revenue's appeal
CIT vs Asian Paints-TS-75-HC-2019(Bom)-TP-ITA No 1564 of 2016 dated 06.02.2019

518. The Court upheld the Tribunal's decision in applying a lower percentage of commission i.e 1% in place of 5% applied by TPO on corporate guarantee and rejected bank guarantee based benchmarking. The Tribunal had relied on the HC decision in Everest Kento wherein it was held that in view of inherent differences between the two lines of guarantee, rate of commission to be charged in each cases would be different.

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Pr. CIT vs M/s. Aegis Ltd-TS-65-HC-2019(BOM)-TP-ITA No 1248 of 2016 dated 28.01.2019

519. The Tribunal ruled on TP-adjustment on account of international transactions of grant of corporate guarantee to AE and deleted TPO's upward adjustment on account of guarantee given by assessee to its AE without any consideration and upheld CIT(A)'s order who followed his own order for prior year which was further upheld by the Tribunal and High Court. The CIT(A) for previous year had deleted the TP-adjustment relying on coordinate bench ruling in case of Micro Ink wherein it was held that, issuance of corporate guarantees was covered by the residuary clause of the definition under section 92B but if such issuance did not have bearing on profits, income, losses or assets, it did not constitute an international transaction. Thus, the Tribunal concluded that issuance of guarantees, without incurring any specific costs, did not constitute an international transaction, and, accordingly, no arm's length price adjustment could be made in respect of issuance of corporate guarantees.
Adani Enterprise Ltd vs ACIT-TS-193-ITAT-2019(Ahd)-TP-ITA Nos 1840/Ahd/12, 3321/Ahd/14 & 2305/Ahd/15 dated 12.02.2019

520. The Tribunal deleted TP-adjustment in respect of corporate guarantee given by assessee engaged in the manufacturing and marketing business of pharmaceuticals on behalf of AEs for AYs 2007-08 and 2008-09. It relied on co-ordinate bench ruling in Micro Ink wherein it was held that guarantee was included in the definition by way of insertion of Explanation to Section 92B i.e. only if it had a "bearing on profits, income, losses or assets". It noted that corporate guarantee in the present case did not have 'bearing on profits, income, losses or assets', and thus such guarantee issued by the assessee was not covered under the definition of section 92B of the Act.
Torrent Pharmaceuticals Ltd., v. Add. CIT, Range – 8, Ahmedabad. [TS-569-ITAT-2019(Ahd) TP], ITA Nos.907/Ahd/2012, 938/Ahd/2012, 1634/Ahd/2012, 1725/Ahd/2012, dated May 15, 2019

521. The Tribunal held that assessee's issuance of corporate guarantee on behalf of AE, without incurring any specific costs, did not constitute an international transaction and noted that TPO determined guarantee fee ALP at 3% which was restricted to 2% by CIT(A). The Tribunal relied on co-ordinate bench ruling in Micro Ink wherein it was held that issuance of corporate guarantees was in the nature of 'shareholder activities' / 'quasi capital' & thus could not be included within ambit of 'international transaction' u/s 92B. Thus, the Tribunal deleted the TP Adjustment.
DCIT vs Adani Ports & SEZ-TS-171-ITAT-2019(Ahd)-TP-ITA No 3481 & 3482/Ahd/2014 dated 12.02.2019

522. The Tribunal directed AO/TPO to restrict TP adjustment in respect of Corporate Guarantee @ 0.50% for AYs 2009-10, 2011-12 & 2012-13. It observed that there was no dispute that the provision of Corporate guarantee to its subsidiary in order to enable it to avail loans would bring benefit to the subsidiary, in which case, it was proper to compensate the assessee for that benefit at Arms length price. It noted that TPO had made an adjustment of 2% by considering the interest benefit @ 4% received by subsidiary due to corporate guarantee given by the assessee and thus half of the same should be attributed to assessee. It relied on Bombay HC

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ruling in the case of Everest Kento Cylinders Ltd wherein it had approved TP adjustment of 0.50% in respect of corporate guarantee issued by holding company for availment of loan by its subsidiary.

Manipal Global Education Services Pvt Ltd. v. DCIT Central Circle-2(2) Bengaluru, [TS-366-ITAT-2019(Bang)-TP], ITA No.236/Bang/2015, ITA Nos.163, 164, 165/Bang/2016, ITA No.388/Bang/2016

523. The Tribunal held that corporate guarantee given by assessee on AE's behalf did not constitute an international transaction and noted that assessee had extended the corporate guarantee as a shareholder activity and the primary objective was to help its AE/subsidiary & protect its interest rather than earning interest income. The Tribunal following plethora of judicial pronouncements including Ahmedabad Tribunal ruling in Micro Ink & Delhi Tribunal ruling in Bharti Airtel, confirmed CIT(A)-order and concluded that the provision of corporate guarantee was not an international transaction

ACIT vs M/s. Emami Ltd-TS-273-ITAT-2019(Kol)-TP-ITA No 1958/Kol/2017 dated 03.04.2019

524. The Tribunal deleted TP-adjustment in respect of corporate guarantee given by assessee on behalf of its AE for AY 2013-14 noting that assessee had extended the corporate guarantee as a shareholder activity and the primary objective was to help its AE/subsidiary & protect its interest rather than earning interest income. It relied on Micro Ink Ltd vs ACIT [TS-568-ITAT-2015] wherein it was held that issuance of corporate guarantees was in the nature of 'quasi capital' and thus being in the nature of shareholder activities it could not be included within ambit of 'international transaction' u/s 92B. Further it relied on Tribunal ruling in Bharti Airtel [I.T.A. No. 5816/Kol/2012] ,wherein while discussing the definition of international transaction in view of the amendments, vide Finance Act, 2012, it was held that provision of corporate guarantee was not an international transaction.

Britannia Industries Ltd. v. DCIT Cir. 7(1), Kolkata, [TS-385-ITAT-2019(Kol)-TP] ITA No.2235/Kol /2017 dated May 03, 2019

525. The Tribunal upheld CIT(A)'s deletion of TP-adjustment in respect of corporate guarantee for assessee by relying on coordinate bench ruling in assessee's own case for previous AY wherein assessee's guarantee fee ALP @ 1% was upheld, against TPO's 2.3%. The co-ordinate bench while deleting TP-adjustment, had held that the corporate guarantee was not 'critical mass' which enabled AE to raise loan as it was only 35% of sanctioned loan.

ACIT vs M/s. Grindwell Norton Ltd-TS-407-ITAT-2019(Mum)-TP-ITA No 347/Mum/2017 dated 12.04.2019

526. The Tribunal restricted ALP of corporate guarantee provided by assessee engaged in the manufacturing and marketing of auto electrical components for original equipment manufacturers, on behalf of its step-down subsidiary (AE) @ 0.50%, as against TPO's 3%, for AY 2011-12 and 2012-13. It relied on HC ruling in Everest Kento Cylinder Ltd and co-ordinate bench ruling in Thomas Cook India Ltd wherein corporate guarantee ALP was determined at 0.5% of the guarantee amount.

PMP Auto Components Pvt. Ltd. v. DCIT Cir.7(3)(2), Mumbai [TS-480-ITAT-2019(Mum)-

TP], ITA (TP) No.587/Mum/2017, dated May 24, 2019

527. The Tribunal ruled on ALP-determination of interest and corporate guarantee provided to the AEs and upheld application of transfer pricing provisions to provision of interest free loan and corporate guarantee to the AE noting that they come within the purview of international transaction u/s. 92B. The Tribunal however, upheld CIT(A)'s partial relief to assessee noting that the loan was advanced to AE in foreign currency and accordingly, directed the AO to charge interest at LIBOR plus 200 basis points instead of PLR rate and adopted corporate guarantee fee @ 0.5%.
DCIT vs Gujrat Glass Ltd-TS-389-ITAT-2019(Mum)-TP-ITA No 4777/Mum/2016 dated 30.04.2019

528. The Tribunal held that corporate guarantee provided by assessee on behalf of AE qualified as an 'international transaction' for AY 2009-10. It rejected assessee's contention that giving of corporate guarantee by an assessee in respect of its subsidiary company cannot be construed as an 'international transaction' and amendment to Sec. 92B to the definition of "International transaction" vide the Finance Act, 2012 was applicable prospectively. It relied on Bombay HC ruling in Everest Kento Cylinders, and rejected the contention of the assessee that Corporate guarantee prior to the retrospective amendment of the definition of "International transaction" vide the Finance Act, 2012 was not an "International transaction". It relied on co-ordinate bench ruling in assessee's own case in AY 2008-09 and directed to charge corporate guarantee commission @ 0.5%.
Piramal Healthcare Limited (Now known as Piramal Enterprises Ltd.) v. DCIT 7(1)Mumbai [TS-395-ITAT-2019(Mum)-TP], ITA No.1257/Mum/2014, dated May 07, 2019

529. The Tribunal held that corporate guarantee given by assessee on behalf of its AEs fell within the ambit of 'international transaction' u/s 92B for AY 2007-08. It rejected assessee's plea that providing of corporate guarantee to its AE within the meaning of Sec. 92A can be taken as international transaction u/s 92B only with effect from AY 2013-14 as the insertion of explanation to Sec. 92B by the Finance Act, 2012 was w.e.f. 01.04.2002, and opined that the explanation inserted to clarify the position that international transaction would include guarantee also was clarificatory in nature. It explained that once corporate guarantees are issued, then the capacity of the issuer to raise further loans from banks, financial institutions etc. will get reduced as the corporate guarantee will certainly lead to higher debt to equity ratio which will lead to reduction in the capacity of issuer to borrow money from Banks, FI etc. which could also lead to higher rate of interests charged by the bankers in case borrower becomes over leveraged due to higher debts including guarantees issued. Thus, it stated that the un-amended provisions of Section 92B duly covered non fund based liability such as corporate guarantee issued by taxpayer in favour of AE. Following catena of rulings of co-ordinate bench, Tribunal held that corporate guarantee transaction was to be benchmarked using CUP method, and also ALP to be computed varied depending upon several internal as well as external factors like period involved, amount involved, state of financial health of borrower, prevailing cost of funds in domestic and international market , state of economy where borrowers are located etc. Further, Tribunal noted that SC had admitted SLP against Bombay HC order in Glenmark Pharmaceuticals Limited for AY 2008-09 which had held that no comparison can be made while

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determining ALP of commission on corporate guarantee with bank guarantee (similar view was upheld in Everest Kento Cylinders Limited). Separately, noting that coordinate bench in several cases including Piramal Glass Limited, Videocon Industries Limited, Zee Entertainment Enterprises Limited & Rolta India Limited had computed ALP@ 0.5%, Tribunal rejected CIT(A)/TPO's 3% p.a. and held that ends of justice will be met if the ALP be determined @ 0.5% p.a. of corporate guarantee issued by assessee in favour of Kansai Paint Company Limited, Japan.

DCIT Cir. 6(2) v. Kansai Nerolac Paints Ltd. [TS-418-ITAT-2019(Mum)-TP], ITA No.6789/Mum/2013, dated May 15, 2019

530. The Tribunal dismissed assessee's appeal challenging TP-adjustment on account of guarantee commission for AY 2012-13 and noted that assessee's APA finalized on January 8, 2019 and settled guarantee commission @ 0.73%. The Tribunal noted that the assessee was stated to have already offered the incremental amount to tax in terms of the modified return of income filed pursuant to the signing of the APA. Thus, the Tribunal held that the TP adjustment on account of "guarantee commission" would no more survive and would resultantly be rendered as infructuous.

Firstsource Solutions Ltd vs DCIT-TS-376-ITAT-2019(Mum)-TP-IT(TP)A No 2258/Mum/2017 dated 12.04.2019

531. The Tribunal restricted guarantee fee ALP at 0.5% in respect of corporate guarantee provided by assessee on behalf of its AE for availing loans and noted that TPO calculated ALP of guarantee fee at 2% while CIT(A) reduced the same to 0.98% following the co-ordinate bench ruling in Glenmark Pharmaceuticals Ltd. The Tribunal held that since the decision of this Tribunal rendered in Everest Kanto Cylinder in estimating the Corporate Guarantee @0.5% had already been affirmed by Hon'ble Bombay High Court, the same would apply in the present case and directed the AO to re-compute the TP-addition.

Virgo Engineers Ltd vs DCIT-TS-7-ITAT-2019(MUM)-TP-IT(TP)A No 3718/Mum/2017 dated 08.01.2019

532. The Tribunal restricted guarantee fee ALP at 0.5% in respect of corporate guarantee provided by assessee to Axis Bank on behalf of its wholly owned subsidiaries and noted that TPO/DRP determined guarantee fee ALP at 1.22% and 1.77% for different AE's. The Tribunal relied on co-ordinate bench ruling in assessee's own case for previous AY which in turn relied on Jurisdictional Bombay HC ruling in Everest Kanto Cylinders wherein 0.5% was adopted as guarantee fee ALP.

Cox & Kings Ltd vs ACIT-TS-3-ITAT-2019(Mum)-TP-IT(TP)A No 2066/Mum/2017 dated 03.01.2019

533. The Tribunal determined guarantee fee ALP at 0.5% in respect of corporate guarantee provided by assessee engaged in the business of manufacturing of conductor,oil and rubber to its Singapore- AE (PSPL) for availing loans and followed the co-ordinate bench ruling in assessee's own case for previous AY which determined guarantee commission ALP at 0.5%.

Apar Industries Ltd vs DCIT-TS-1-ITAT-2019(Mum)-TP-ITA No 2576/Mum/2015 dated 02.01.2019

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534. The Tribunal upheld CIT(A) order which had upheld assessee's guarantee commission @ 0.53% to be at ALP. The Tribunal noted that the CIT(A) had relied on jurisdictional HC ruling in assessee's own case for AY 2008-09 wherein guarantee commission fee at 0.53% in relation to bank loans was accepted, and the Tribunal's ruling in assessee's own case for AY 2009-10 wherein also it was held that 0.53% guarantee commission was at ALP.

ACIT vs M/s. Glenmark Pharmaceuticals Ltd-TS-465-ITAT-2019(Mum)-TP-ITA No 1654/Mum/2016 dated 01.02.2019

535. The Tribunal dismissed assessee's ground and held that corporate guarantee given by assessee on behalf of its AEs fell within the ambit of international transaction u/s 92B. The Tribunal noted the views from various co-ordinate benches that insertion of Explanation to section 92B by the Finance Act, 2012 was prospective in nature and therefore corporate guarantee issued by an entity on behalf of its AEs was not an international transaction. However, it preferred to follow jurisdictional HC ruling in Everest Kento Cylinders stating that the ratio laid down in that ruling was that corporate guarantee was an international transaction which needed to be benchmarked to determine the ALP whether or not the assessee had charged any commission on such guarantee. Further, it rejected TPO's adoption of guarantee fee charged by the commercial bank as benchmark for corporate guarantee ALP, by following jurisdictional HC ruling in Everest Kanto wherein 0.5% was determined as guarantee fee ALP. Accordingly, the Tribunal opined that the Ld. AO as well as the Ld. CIT(A)/DRP erred in adopting 1.04% commission on corporate guarantee issued by the assessee and directed to adopt 0.5% commission on guarantee issued by the assessee on behalf of its AE, a subsidiary company.

IL&FS Technologies Ltd vs ACIT-TS-154-ITAT-2019(Mum)-TP-ITA Nos 4469 & 1551/Mum/2016 dated 27.02.2019

536. The Tribunal restricted guarantee commission rate at 0.50% for assessee engaged in production, broadcasting and content development and delivery via satellite. It relied on co-ordinate bench in assessee's own case wherein following Bombay HC decision in Everest Kento, the Tribunal had rejected TPO's 3% as guarantee fee ALP based on the fees charged by the banks, stating that a commercial bank issuing bank guarantee was incomparable to a corporate guarantee.

Separately, the Tribunal also restricted TP-adjustment on comfort fee (for providing letter of comfort to banks for extending credit facility to its AE) to 0.1% of average facility utilised during the year (as against TPO's 0.6%) and noted assessee's contention that comfort letter did not constitute an indemnity and no liability fell upon assessee on default by AE and further that the letter of comfort was issued not only by assessee but also by another company belonging to the same group. Thus, it restricted the TP Adjustment.

Zee Entertainment Enterprises Ltd vs JCIT-TS-131-ITAT-2019(Mum)-TP-ITA No 1912/Mum/2014 & 774/Mum/2015 dated 28.02.2019

537. For AY 2010-11 the Tribunal allowed the appeal of assessee and deleted TP-adjustment on corporate guarantee commission for AY 2010-11. It directed AO to compute ALP of corporate guarantee at 0.5% relying on HC decision in Everest Kanto Cylinders wherein guarantee commission was charged @ 0.5% and same had been followed by various Tribunal decisions

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including in Rolta India and accordingly, it rejected TPO's ALP-determination at 0.625% based on SBI commercial borrowing rate.

Western Refrigeration Pvt Ltd vs. DCIT [TS-226-ITAT-2019(Mum)-TP] ITA No. 6796/Mum./2014 dated 20.03.2019

538. The Tribunal remitted TP- addition of Rs.4.23 crores in respect of guarantee fee considering the fact that the co-ordinate bench in assessee's own case earlier had remitted back identical issue of guarantee commission rate to the file of TPO, for deciding the same considering the details and documents submitted by the AO and also in light of all judgments available and also after giving fresh opportunity of being heard to the assessee.

Tata Autocomp Systems Ltd vs DCIT [TS-293-ITAT-2019(Mum)-TP] ITA No. 1666/MUM/2015 dated 18.03.2019

539. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s deletion of TP-adjustment in respect of corporate guarantee for AY 2012-13, following co-ordinate bench ruling in assessee's own case in AY 2010-11 wherein similar adjustment was deleted by relying on jurisdictional HC decision in assessee's own case for AY 2007-08 (wherein HC had affirmed ITAT's TP-adjustment deletion by accepting assessee's TP report in determining the ALP @ 0.5% by applying CUP Method). It noted that no material difference was there in facts of this year and earlier years hence pricing adjustment on account of corporate guarantee commission ought to be deleted.

Everest Kanto Cylinder Ltd vs. ACIT (LTU)2 [TS-279-ITAT-2019(Mum)-TP] ITA NO. 5838/ MUM/ 2017 (A.Y: 2012-13) Dated 29.03.2019

540. The Tribunal deleted the adjustment made by the TPO @ 3% p.a. with respect to commission on corporate guarantee given for bank loan taken by the AE, noting that (i) the commission charged by the assessee @ 0.90% p.a. was held to be at ALP by the co-ordinate bench in assessee's own case for earlier years and (ii) similar view was upheld in various cases by different co-ordinate benches as well as by the Apex Court (in the case of Glenmark Pharmaceuticals Ltd wherein it had upheld commission @0.53% in respect of guarantee for bank loan)

Technocraft Industries India Ltd [TS-594-ITAT-2019(Mum)-TP] -IT(TP)A No. 1487/ Mum/ 2017 dated 19.06.2019

541. The Tribunal deleted the adjustment made by the TPO @ 2.08% with respect to commission on corporate guarantee given for a loan taken by the AE, noting that (i) assessee had benchmarked commission @ 0.75% by obtaining a quotation from HSBC India, an external CUP and hence, the method adopted by the assessee could not be faulted with (ii) commission @ 0.75% was held to be at ALP by the co-ordinate bench in assessee's own case for earlier years, relying on ruling of Everest Kento Cylinder(Bom) and (iii) similar view was upheld in various cases by different co-ordinate benches as well as by the jurisdictional High Court acceptingguaranteecommission @0.50% to be at ALP.

Wockhardt Ltd [TS-573-ITAT-2019(Mum)-TP]-IT(TP)A No.1875/Mum./2011 dated 12.06.2019

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542. The Tribunal directed the TPO to make adjustment @ 0.50% with respect to commission on corporate guarantee given for a loan taken by the AE instead of 2.25% adopted by the TPO, following co-ordinate bench ruling in assessee's own case for an earlier year. The co-ordinate bench had noted that the jurisdictional High Court had accepted guarantee commission @ 0.50% to be at ALP.

Piramal Glass Ltd [TS-548-ITAT-2019(Mum)-TP] - IT(TP)A no.3046/Mum./2017dated 07.06.2019

543. The Tribunal directed the AO / TPO to make adjustment @ 0.50% with respect to commission on corporate guarantee given for a loan taken by the Singapore-AE instead of 2.58% adopted by the TPO, following co-ordinate bench ruling in assessee's own case for an earlier year. The co-ordinate bench had adopted commission rate at 0.5% p.a. by relying on ruling of Everest Kanto Cylinders (Bom).

Apar Industries Limited [TS-531-ITAT-2019(Mum)-TP] - I.T.A. (TP) No.4134/Mum/2016dated 03.06.2019

544. The Tribunal deleted TP-adjustment and accepted 0.9% guarantee commission charged by assessee in respect of corporate guarantee provided on behalf of AE as 'reasonable' and relied on co-ordinate bench ruling in assessee's own case for previous AY wherein it was held that charging of corporate guarantee commission @ 0.90% was at ALP. The Tribunal further observed that Revenue did not bring any other decision of superior court supporting the order of AO/DRP.

M/s. GVK Power & Infrastructure Ltd vs ACIT-TS-259-ITAT-2019(Viz)-TP-ITA No 553/Viz/2018 dated 03.04.2019

Royalty / Trademark

545. The Court upheld Tribunal's orderdeleting adjustment made by TPO by determining ALP at 'Nil' in respect of assessee's royalty payment to AE, holding that it was outside the purview of TPO to justify the transaction in the context of the incremental benefit earned by the assessee out of such purchase of know-how instead of carrying out any scientific exercise like applying any specified methods for determining the ALP. It held that TPO could not replace the assessee and question its business decision. It also noted that based on the evidence submitted by the assessee before the CIT(A), the price paid was at arm's length.

SI Group-India Limited [TS-525-HC-2019(BOM)-TP] - ITA No. 447of 2017 dated 03/06/2019

546. The Court disposed of Vodafone Idea's writ petition challenging Tribunal's interim order (passed in second round of proceedings pursuant to High Court's earlier remand) remitting ALP-determination of trademark royalty payments to AE. The Court directed the Tribunal to hear and adjudicate upon the matter on merits after obtaining the remand report from the TPO without being influenced by the observations made in the impugned interim order. The Tribunal in the interim order, had rejected assessee's TP-study terming it as an 'eyewash', on the basis of

selection of wrong database, application of tainted qualitative and quantitative filters and selection of only 1 comparable (agreement between two foreign entities). Further, evaluating the agreement between the foreign entities chosen as comparable and stressing on the relevance of product similarity, the Tribunal had stated that assessee needed to establish that the underlying trademark fees was related to similar products and it had further noted that AO/TPO/DRP had rejected assessee's TP-analysis on mere benefit analysis principles without evaluation thereof and had remitted matter back to TPO for fresh adjudication with a direction to the assessee to submit fresh comparability analysis. Thus, the Court was of the opinion that till the remand directed by the Tribunal was worked out and a report on that aspect was received, the Tribunal's observations in the impugned order, particularly the ones quoted above, or any other observation like them which tend to indicate finality, shall in no way be treated as conclusive of the merits.

Vodafone Idea Ltd vs ACIT-TS-355-HC-2019(Del)-TP-WP No 4467/2019 dated 29.04.2019

547. The Tribunal upheld CIT(A)-order deleting TP-adjustment on account of the international transaction of royalty payment by assessee (engaged in the business of manufacturing and trading in Hitachi Brands of Home Appliances) to its AE. The TPO had determined ALP of royalty payment at 3% (rate being paid by other group entities to that AE) as against rate of 3.75% adopted by assessee; but co-ordinate bench ruling in assessee's own case had deleted such adjustment as effective royalty paid to AE by assessee was 2.3% , which was lower than royalty paid by other group entities (3%). The effective rate paid by assessee was less because other group entities were considering exfactory sale value, without deducting various expenses, such as dealer commission, special commission, warranty etc.

Hitachi Home & Life Solution (India) Ltd vs. DCIT [TS-170-ITAT-2019(Ahd)-TP] ITA No.2339/ Ahd/ 2012, 2286/Ahd/201, 931/Ahd/2016, 860/Ahd/2016 date 04.03.2019

548. The Tribunal deleted TP-adjustment on royalty payment in case of an assessee engaged in manufacture and sales of motor cars and incidental trading. TPO had selected 3 comparable companies which were engaged in the manufacture of automobile components with an average royalty of 5% and concluded that royalty paid on export sales was not at arm's length. The Tribunal relied on co-ordinate bench ruling in assessee's own case wherein it was observed that TPO had herself accepted that high-tech technology was passed on to the assessee company by its Holding Company and after detailed study of 35 licenses, TPO had arrived at a conclusion that the royalty payment of 4.7% was prevalent in the automotive sector. Thus, the Tribunal held that average royalty payment up to the rate of 4.7% on the sales was justified and thus deleted additions made by Revenue and noted that average royalty paid by assessee was only 3.64%.

M/s Hyundai Motor India Ltd vs ACIT- TS-435-ITAT-2019(CHNY)-TP- IT(TP) No 14/CHNY/2018 dated 04.02.2019

549. The Tribunal set aside CIT(A)'s order deleting TP-addition on account of royalty in respect of assessee engaged in manufacturing of auto parts and components. The Tribunal noted that CIT(A) deleted the TP-addition by following coordinate bench decision in assessee's own case for previous year, whereas the coordinate bench in assessee's own case had actually restored the matter back to AO/TPO for fresh determination of the ALP of the international transaction.

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Thus, the Tribunal in the present case also restored the matter to the file of A.O/TPO for determination of ALP.

DCIT vs Progressive Tools & Components Pvt Ltd-TS-147-ITAT-2019(Del)-TP-ITA No 2684/Del/2016 dated 22.02.2019

550. The Tribunal restored benchmarking of royalty, technical fee, design and drawing fees paid by the assessee to TPO (engaged in design and manufacturing of shock absorbers for transport vehicles) to AE for AY 2011-12 and noted that TPO determined ALP of these transactions at Nil on the basis that no tangible benefit had passed on to the assessee. The Tribunal relied on decision in assessee's own case for AY 2010-11 wherein coordinate bench had remitted identical issue back to the TPO following earlier decision for AY 2009-10 wherein noting that the issue of payment or royalty and technical fee by assessee to its AE has already been decided in assessee's favour in AYs 2002-03 and 2004-05 by the Tribunal and the appeal preferred by the Revenue before the High Court had already been dismissed and the Tribunal had directed the TPO to decide the issue in accordance with the decision taken in earlier years in assessee's own case. Thus, following the same, the Tribunal remitted the issue back to TPO for fresh adjudication.

Munjal Showa Ltd vs DCIT-TS-350-ITAT-2019(Del)-TP-ITA No 293/Del/2016 dated 29.04.2019

551. The Tribunal remitted issue of ALP-determination of trademark royalty payments made by assessee engaged in providing cellular mobile telephony services to its AE, for AYs 2009-10 to 2012-13. It rejected assessee's TP study citing selection of wrong database, application of tainted qualitative and quantitative filters and selection of only 1 comparable (agreement between two foreign entities); Further, evaluating the agreement between the foreign entities, chosen as comparable, and stressing on the relevance of product similarity (which was not established in the present case), it stated that assessee had to establish that the underlying trademark fees was related with similar products . It concluded that the transfer pricing study document prepared by the assessee for benchmarking the royalty payment did not inspire any confidence but was merely eyewash. It also noted that AO/TPO/DRP had rejected assessee's comparability analysis and benchmarking methodology merely on benefit analysis principle without evaluation thereof, thus it remitted the issue back to the file of TPO with a direction to the assessee to submit fresh comparability analysis and TPO to examine the same and determine the ALP of the impugned royalty payments.

Vodafone India Limited vs. ACIT [TS-181-ITAT-2019(DEL)-TP] ITA Nos. 1169/DEL/2014, 1073/ DEL/ 2015, 1158/DEL/2015, 994/DEL/2014, 1951/ DEL/ 2014,1071/DEL/2015,1134/DEL/2015., 1167/DEL/ 2014, 1949/ DEL/ 2014, 1021/ DEL/ 2015, 1021/DEL/2015,1135/DELL/2015,0671/DEL/ 2015, 1634/ DEL/ 2015571/ DEL/ 2015,443/DEL/2016 & 922/del/2017 dated 25.03.2019

552. The Tribunal upheld assessee's benchmarking of royalty under CUP Method and deleted TP-adjustment on payment of royalty to AE's, DIC Corporation, Japan (at 3% of net sales) and DIC Asia Pacific Pte Ltd., Singapore (at 2% of net sales). It noted that royalty rates adopted by assessee were within prescribed parameters by SIA & FIPB in respect of the technical collaboration agreements between residents of India and the non- residents under the automatic

route i.e. 5% & 8% in respect of domestic sales & export sales respectively and hence at ALP. It relied on coordinate bench decisions in Dow Agrosciences India and Owens Corning Industries. Further it observed that in none of assessee's past assessment, TPO had questioned ALP of royalty payment nor any material was brought on record to suggest payment was excessive, thus it deleted TP adjustment as there was no change in facts and law.
DCIT, Circle 10(1), Kolkata v. DIC India Ltd. [TS-461-ITAT-2019(Kol)-TP], I.T.A. Nos. 1362& 1363/Kol/2017, dated May 3, 2019

553. The Tribunal deleted TP-adjustment on royalty payment to the AE for use of technical knowhow and noted that TPO rejected assessee's aggregated benchmarking under TNMM of import & purchase of raw material, export of finished goods , payment for technical know-how and commission received transaction primarily for the reason that the payment of royalty not being for the purpose of business had to be disallowed u/s 37. The TPO had allowed 10% of royalty payment as deduction on ad-hoc basis as against full amount of 20.19 crore claimed by the assessee.The Tribunal relied on co-ordinate bench ruling in assessee's own case wherein it was held that no provision under the Act empowered the TPO to determine the ALP on estimation basis, that too, by entertaining doubts with regard to the business expediency of the payment and in the process stepping into the shoes of the AO for making disallowance u/s 37(1). Thus, the Tribunal deleted the adjustment.
Firmenich Aromatics India P. Ltd vs DCIT- TS-403-ITAT-2019(Mum)-TP-ITA No 7330/Mum/2017 dated 22.02.2019

554. The Tribunal deleted the adjustment made with respect to royalty paid to AE, following coordinate bench in assessee's own case for earlier years wherein it was held that royalty payment made by assessee to its AE @ 5% on domestic sales and 8% on export sales was at ALP in view of RBI Circular No. 5 dated 21/7/2003. The coordinate bench had followed the decision of SGS India (Bom) wherein it was held that the rate of royalty approved by the Central Government / RBI constitutes a valid CUP.
Dow Agrosciences Pvt Ltd [TS-568-ITAT-2019(Mum)-TP] - I.T.A. No. 4729/Mum/2016dated 06.06.2019

555. The Tribunal deleted the adjustment made by TPO with respect to payment of royalties for use of technical know how made alleging that the assessee was not required to pay royalties anymore since it was paying since 1997 and the assessee no more needs technical know how from the AE. It followed the co-ordinate bench ruling in assessee's own case for an earlier year wherein similar adjustment was deleted by holding that no provision under the Act empowered the TPO to determine the ALP on estimation basis, that too, by entertaining doubts with regard to the business expediency of the payment and in the process stepping into the shoes of the AO for making disallowance u/s 37(1).
Firmenich Aromatics (India) Pvt Ltd [TS-539-ITAT-2019(Mum)-TP] - ITA No. 6081/Mum/2018 dated 07/06/2019

556. The Tribunal, in second round of proceedings, upheld CIT(A)'s deletion of TP-addition related to assessee's payment of royalty to AE and rejected TPO's Nil ALP determination. The Tribunal noted that TPO rejected assessee's benchmarking for royalty payment stating that assessee

failed to provide the details of cost incurred by the AE for development of technology and further, it failed to furnish the rates of royalty paid by the other group concerns and by also holding that RBI / SIA approvals could not be considered for benchmarking the payment of royalty. The Tribunal rejected TPO's ad-hoc nil ALP determination noting that the TPO neither applied any of the prescribed methods for benchmarking, nor did he assign any reason for nil-determination and stated that firstly TPO had not undertaken the exercise provided under rule 10B(1)(a) for determining ALP under CUP method and secondly that TPO determined the ALP by applying the rate of royalty paid by other group entities which were controlled transactions, while Rule 10B(1)(a) mandated that the price charged for an uncontrolled transaction should be considered as a CUP. The Tribunal further followed precedents and accepted assessee's plea that rate at which payment of royalty was approved by the RBI/SIA could be considered as ALP and noted that coordinate bench in AW Faber Castell (relied on by Revenue) though observed that ALP of royalty needs to be determined in accordance with the TP regulations, it was also observed that if an authority by way of specific approval had allowed a particular rate of payment, it did carry persuasive value and could act as one of the supportive tools for carrying out benchmarking of royalty transaction. Accordingly, the Tribunal upheld CIT(A)'s decision of deleting the TP-adjustment on royalty payments.

ACIT vs Netafim Irrigation India Pvt Ltd-TS-362-ITAT-2019(Mum)-TP-ITA No 3668/Mum/2008 dated 25.04.2019

557. The Tribunal remitted the issue of TP adjustment for royalty payment. It noted that though the TPO made adjustment in respect of royalty payment, no separate addition was made as the assessee itself has disallowed the same u/s. 40(a)(ia) of the Act. Before the Ld. CIT(A), assessee submitted that it had created provision for payment of royalty as per the Mercantile System of Accounting on estimated basis. Since it did not deduct tax at source, it had disallowed the same u/s 40(a)(ia) of the Act. Subsequently, the assessee obtained an opinion from a CA, who gave opinion that no amount was required to be disallowed u/s. 40(a)(ia) of the Act. Thus, CIT(A) had remitted the matter back to AO. Hence, as matter relating to Sec 40(a)(ia) disallowance was restored to AO and if deleted in set aside proceedings, TP-adjustment on royalty would become relevant.

Greaves Cotton Limited vs Asst. CIT[TS-153-ITAT-2019(Mum)-TP] 2482, 2575/Mum/15 dated 15.03.2019

558. The Tribunal remitted the TP-adjustment in respect of royalty payment on trademark by assessee engaged in manufacturing and marketing of malted food and drinks and chocolates to UK-AE for AY 2007-08. It noted that assessee had entered into an agreement with UK-AE for availing itself of the benefits of technical knowhow developed by UK-AE relating to the manufacturing, processing, distributing and marketing of products as well as the benefits of the continuing R&D undertaken by UK-AE. The Tribunal relied on ruling in assessee's own case for AY 2006-07 wherein co-ordinate bench had accepted assessee's payment of royalty on trademark at 1% to UK-AE to be at arm's length (determined by TPO as NIL) noting that the combined royalty of 2.25% paid by the assessee (for both technical know-how and trademark) was lesser than the royalty paid by other comparables and even group companies.

Mondelez India Foods Pvt. Ltd. (formerly known as M/s. Mondelez India Foods Ltd.) v.Addl.CIT Range 5(1),[TS-708-ITAT-2019(Mum) TP], I.T.A. No. 4225/ Mum/ 2014

(Assessment Year 2007-08), dated May 15, 2019

Management Fees / Intra Group Services

559. The Tribunal dismissed assessee's appeal and affirmed CIT(A)'s order upholding TPO's TP-adjustment on payment for intra-group services by assessee engaged in the business of freight forwarding activities to its holding company (AE). The Tribunal cited failure on assessee's part to establish that services were indeed rendered by the holding company and rejected the evidences filed by assessee (such as insurance policy by the parent to cover assessee's operational liabilities, request by parent to banks for issue of performance guarantee on behalf of assessee, Trade Mark registration certificate, Franchisee Agreement, operation flow chart etc.) to conclude that these did not substantiate the nature of services rendered by the holding company to the assessee for which the assessee made the payment. The Tribunal opined that a mere explanation of the process by which the business of assessee was conducted and the placement of holding company in such chart did not establish that services were indeed rendered by the holding company and also noted that mere furnishing of details of consignment without evidence of participation of holding company in procuring those business would not be sufficient to discharge the burden that lay on the assessee. Accordingly, the Tribunal concluded that Revenue's stand that assessee failed to discharge the burden to establish the ALP of the transaction, was justified.
M/s. DRHL India Services P Ltd vs DCIT-TS-31-ITAT-2019(Bang)-TP-ITA No 1030,1031,1032/Bang/2014 dated 04.01.2019

560. The Tribunal remitted the issue of determination of ALP with respect to payments made towards Royalty and fees for intragroupservices by assessee to two AEsback to the TPO, following co-ordinate bench decision in the assessee's own case for an earlier year. TPO had held that assessee had failed to furnish any evidence to substantiate the claim of receipt of services and thus he determined the ALP of payments at Nil. The co-ordinate bench in the earlier year, on identical facts, had remitted the matter back to the TPO with the direction to determine ALP without disputing that services were rendered by AE.
Filtrex Technologies Pvt Ltd [TS-621-ITAT-2019(Bang)-TP] - IT(TP)A No. 2162/ Bang/ 2017&3330/Band/2018 dated 21/06/2019

561. The Tribunal upheld the adjustment made with respect to intra-group services received by assessee, where the TPO/DRP had determined ALP of said services as 'Nil' under CUP-method on the ground that (i) merely description of services did not establish rendition of services and thus there was no proof in support of rendition of services and (ii) considering the evidence filed by assessee in the form of e-mails to prove service receipt, the payments made were not commensurate with services rendered. The Tribunal held that absence of proof of rendition of service had rendered the transaction as sham and such sham transaction squarely fell within the domain of Chapter X of the Act.
Andritz Separation and Pump Technologies India Pvt Ltd [TS-571-ITAT-2019(CHNY)-TP] - I.T.A. No. 2012/CHNY/2017 dated 06.06.2019

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562. The Tribunal deleted the adjustment with respect to corporate management charges paid by the assessee to its AE, relying on coordinate bench ruling in assessee's own case for an earlier year wherein similar adjustment was deleted rejecting TPO's cost-benefit analysis. In the said ruling, it was observed that the assessee had furnished detailed description and other details of the intra-group services rendered by the AE, to substantiate that the assessee actually obtained services from AE and that payments were as per internationally accepted TP-principles and accordingly, reflective of an arm's length charge.
Terex Equipment Pvt Ltd v ACIT [Formerly Terex Vectra Equipment Private Limited] [TS-478-ITAT-2019(DEL)-TP] - ITA No. 4123/DEL/2015 dated 28.01.2019-BS

563. The Tribunal rejected Revenue's plea to disallow amount paid by assesse for availing support services from its AE and held that the assessee had successfully demonstrated the receipt of support services such as tax, legal, finance, HR etc. noting that (i) the AO had just raised suspicion without pointing out that the services were never received (ii) the AE was in operation for 10 years when assessee came into existence and was having fully developed support services functions and since such functions were already housed in the AE entity, the assesseehad entered into a support services agreement for receipt of such services (iii) both AE and assessee were profit making entities and thus there was no tax incentive for the parties to deflate revenues earned by the assesse.
AT &T Global Network Services [India] Pvt Ltd [TS-502-ITAT-2019(DEL)-TP] - ITA No. 4882& 4870/DEL/2013dated 10/06/2019

564. The Tribunal rejected Revenue's allegation that assessee did not satisfy need test with respect to intra-group services received by assessee from its AE, noting that all companies of the group located in different locations had received the said services and hence, such services were required for assessee to remain competitive in its business. However, it remitted the determination of ALP of said services, relying on coordinate bench ruling in case of Deloitte Consulting India (P) Ltd with a direction that the assessee had to demonstrate and satisfy evidence test or rendition test and benefit test, as envisaged u/s 92(2), and also that the services provided by AE were neither duplicative nor shareholder's activity
Aircom International (India) Pvt Ltd [TS-800-ITAT-2019(DEL)-TP] – ITA No. 1956/Del/2015&7682/Del/2017 dated 20/06/2019

565. The Tribunal remitted the issue of ALP determination of second line support (SLS) services provided by AE to assessee back to the TPO, who had made the adjustment opining that most of the functions involved in SLS services were performed by assessee itself and hence payment made to AE was not commensurate to the services actually rendered by the AE. The Tribunal followed co-ordinate bench decision in assessee's own case for an earlier year wherein similar issue was remanded after holding that SLS services were availed on account of business expediency and the AO could not question assessee's prerogative to avail such services for resolving complicated problems. It was also held that assessee was entitled to enter into arrangement with AE to protect business interests and such expenditure could not be disallowed holding that it was not required to be incurred.
Ericsson India Pvt Ltd [TS-601-ITAT-2019(DEL)-TP] - ITA No. 1736/DEL/2015 dated 14.06.2019

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566. The Tribunal deleted TP-addition of Rs.64.45 lacs on account of non-charging of mark-up on support services charges billed to AT&T Global Network Services India Private Limited ('AGNSI'), an affiliate company of the assessee for AY 2014-15. It followed ruling in assessee's own case for AY 2010-11 wherein co-ordinate bench deleted similar addition on domestic transaction of support services provided to local group entity noting that both the entities were profit making entities and there was no tax incentive to deflate revenue.
AT & T Communication Services India Pvt Ltd vs.DCIT [TS-230-ITAT-2019(DEL)-TP] ITA No.6703 /DEL/2018 (A.Y 2014-15) Dated 28.03.2019

567. The Tribunal allowed assessee's appeal and deleted the adjustment by the TPO with respect to payment made to AE for management and other administrative services, following co-ordinate bench decision in assessee's own case for an earlier year. In the earlier year, it had rejected Nil ALP determination by the TPO by holding that assessee had clearly demonstrated that services had resulted in effective costsavings by way of an effective purchase function, technical assistance in relation to certain productsprovided by AE and other ancillary functions like IT management for which the assessee did not have therequisite staff to perform functions
Chryso India Pvt Ltd (Previsously known as The Structural Waterproofing company Pvt. Ltd.) [TS-617-ITAT-2019(Kol)-TP] - dated 19/06/2019

568. The Tribunal deleted TP adjustment for management support services received by assessee. The assessee had entered into Management support service agreement (MSSA) with its parent entity pursuant to which the payment was made.The Tribunal relied on co-ordinate bench ruling in case of assessee for AY 2013-14 which in turn relied on assessee's case for AY 2011-12 wherein ALP-determination of such services at Nil was rejected, as assessee had actually received services and demonstrated benefit.
Philips India Ltd., v. ACIT Cir. 12(2), Kolkata, [TS-443-ITAT-2019(Kol)-TP] ITA No.2600/Kol /2018, ITA No.2600/Kol /2018, dated May 15, 2019

569. The assessee's AE in Germany maintained service centers for a) strategic sales and marketing support b) Personnel support services c) Training and product services d) Accounting, finance and MIS support services all the participants including AE. The TPO was of the view that cost allocated to assessee for marketing expenses ought to be nil in view of the fact that assessee was the distributor of health products and it was the manufacturer who had to bear such costs and further was also of the view that assessee was not able to explain as to how the cost was allocated and accordingly made an ad-hoc disallowance of 25%. The DRP confirmed the TPO's order. The Tribunal deleted the TP adjustment with respect to the marketing services holding that all the participants he companies including the assessee-company were being provided marketing support services, which admittedly included new product pre-marketing activities and training given to the product management team by Abbott Group at global level. The training was imparted on the latest techniques and practices in marketing, the focus and emphasis was on delivering quality products to customers and regular services to them in terms of medical, product literature. Further, the cost shared by participating company were certified by an independent accountant. held that TPO could not make an ad-hoc disallowance of 25% arbitrarily while determining ALP of The Tribunal transaction when the entire cost allocation

was certified by an independent accountant and he had not followed any of the five methods mentioned under the Act. Accordingly, the addition was deleted.
Abbott Healthcare Private Limited vs Addl CIT [TS-120-ITAT -2019(Mum)-TP] ITA No.535/Mum/2012 dated 30 .01.2019

570. The Tribunal restored the issue of ALP determination of management service charges to the file of AO/TPO for examining all the documentary evidences furnished by the assessee and to examine assessee's benchmarking and determine ALP by applying any of the prescribed methods if not satisfied with assessee's submissions. It noted that the TPO had not stated, by adopting which method he had determined the arm's length price of management service charges at nil and further, the evidences filed by assessee were not examined by both TPO and DRP.
Smith & Nephew Healthcare Pvt. Ltd. v. ITO Ward 11(2)(3) Mumbai, [TS-496-ITAT-2019(Mum)-TP], ITA No.2028/Mum./2016, dated May 24, 2019

571. The Tribunal deleted ad-hoc TP-adjustment in respect of intra-group services for assessee engaged in business of equity broking and rejected TPO/DRP's ALP-determination on estimation basis instead of adopting prescribed TP-methods u/s 92C(1). The Tribunal stated that the TPO was bound to make TP adjustment using one of the prescribed TP-methods and accepting assessee's claim the Tribunal opined that any ad-hoc determination of ALP by TPO u/s. 92 de-hors sec. 92C (1) could not be sustained. The Tribunal also held that TPO was not permitted to compute ALP on estimation basis and that TNMM as applied by assessee's could be adopted for benchmarking payment of intra-group services relying on Court ruling in case of Johnson and Johnson and co-ordinate bench decision in Knorr Bremese.
Further, the Tribunal also declined restoring the ALP-determination to TPO and relied on Kodak India Court ruling and stated that since, the TPO did not adhere to the prescribed methods consciously, another innings to rectify the mistake could not be allowed.
M/s. CLSA India Pvt Ltd vs DCIT-TS-17-ITAT-2019(Mum)-TP-ITA No.1182/Mum/2017 dated 16.01.2019

572. The Tribunal restored the issue of ALP-determination in respect of TP-adjustment on intra group services of marketing support services and research support services provided to AE by assessee (stock broker and category-1 merchant banker) for AY 2012-13; relying on coordinate bench decision in assessee's own case in AY 2008-09 to 2011-12 wherein, while restoring the case to AO/TPO in light of evidences filed by assessee, it was held that marketing support service and research support service have to be benchmarked separately and that ALP cannot be determined at nil. It noted that while implementing the directions of the Tribunal in the above years, the TPO had himself revised the nil ALP-determination to 40% of the amount paid and restored the issue to AO for allowing assessee's claim on the basis of evidences filed.
RBS Equities India Ltd vs ACIT [TS-225-ITAT-2019(Mum)-TP] ITA No.2522/Mum./2017 Dated 20.03.2019

573. The Tribunal deleted the adjustment made with respect to payments towards three intra-group services viz., Global Information System (GIC) services, Multinational Client Co-ordination (MNC) services & Management Service Fee (MSF) services, noting that the TPO had failed to

apply any prescribed method while determining the ALP of GIS services at Nil, MSF at 20% of the payment and MNC services at 50% of the payment on adhoc basis. It held that there is no provision in the statute empowering TPO to determine ALP on a particular international transaction on an estimation basis / adhoc basis, rather the TPO is restricted to determine ALP using one of the prescribed methods u/s 92C r.w. Rule 10B.
Lintas India Private Limited [TS-582-ITAT-2019(Mum)-TP] -ITA No.1156&1187 /Mum/2015 dated 12.06.2019

574. The Tribunal allowed assessee's appeal and deleted the adjustment by the TPO with respect to legal and professional services received from the holding company (AE) wherein the TPO had determined the ALP of said services to be Nil. It noted that the payment was made to AE in accordance with the agreement entered with AE and details of emails between parties evidenced the factum of services rendered by AEs, however the lower authorities had determined Nil-ALP based on a subjective opinion that since the services were from the holding company the same should be free of cost or that no benefit accrued to the assessee.
Mubea Automotive India Private Limited (known as Mubea Automotive Components India Pvt Ltd) [TS-650-ITAT-2019(Mum)-TP] – ITA No. 731&6869/Mum/2017 dated 28/06/2019

575. The Tribunal remitted the issue of adjustment in respect of management charges (area management cost/corporate management cost) back to the TPO, following co-ordinate bench decision in the assessee's own case for an earlier year wherein similar adjustment was remitted back with a direction toexamine all the evidence furnished for the first time before DRP considering assessee's explanation thatthere were genuine difficulties preventing the assessee from submission of these details at the assessmentstage and opining that examination of basic evidence at the appellate stage or even before DRP was neitherappropriate nor desirable.
Aker Powergas Pvt Ltd [TS-646-ITAT-2019(Mum)-TP] - ITA (TP) No. 1071/Mum/2015& 957/Mum/2016dated 03/06/2019

576. The Tribunal deleted the adjustment made by the TPO with respect to payment made to AE in accordance with an agreement under which the AE provided certain office accommodation, staff and other ancillary services to the assessee's UK based Branch and relevant expenses were allocated to assessee at cost without mark-up. TPO had determined NilALP for this service and made an adjustment accordingly. The Tribunal held that TPO had not followed any of the prescribed methods to benchmark the transaction and had determined nil-ALP on a presumptive basis which was not permissible under the statutory provisions, It noted that TPO had himself mentioned in his order that assesseehad furnished copies of agreement, debit notes raised by assessee and detailed working of cost allocation and thus all the primary evidence were in fact furnished.
Jardine Lloyed Thompson Pvt Ltd [TS-613-ITAT-2019(Mum)-TP] - ITA no.2181/Mum/2014 dated 12.06.2019

577. The Tribunal deleted the adjustment made with respect to intra-group services of Marketing Services and Global Infrastructure Support Services received by the assessee from its AEs wherein the TPO had determined the ALP of said services at Nil by applying benefit test. It noted that the assessee had submitted a plethora of documentary evidences in form of e-mail

exchanges, presentation on advertising strategy, sample videos of television commercials etc. in support of the fact that the services were actually received and tangible benefits were derived which were disregarded by the TPO in a very light manner, on the basis of mere allegations. The Tribunal also noted that the services were rendered under an agreement which was relevant for earlier two AYs also and in those years, the TPO had accepted it to be at ALP. It thus held that applying the rule of consistency, it could not be questioned in current year.
FCB Ulka Advertising Pvt Ltd (Earlier known as Draft FCB Ulka Advertising P. Ltd.) [TS-600-ITAT-2019(Mum)-TP] - I.T(TP).A. No. 2194/Mum/2017dated 25.06.2019

578. The Tribunal deleted the adjustment made by TPO in relation to availing of information systems (IS)/ software services by applying man hour rate of Rs.8,500 per hour for two man hours a day (not based on any comparable for such estimation), following the co-ordinate bench ruling in assessee's own case for an earlier year wherein identical adjustment was deleted. The co-ordinate bench had noted that the assesse had submitted a KPMG report to support the attribution of software cost by the AEs to 40 group companies globally who were using the said services. It had thus held that TPO could not determine ALP on ad-hoc/ estimate basis and there was no reason not to accept payment to be at ALP in absence of contrary evidence brought on record and by simply applying benefit test.
Firmenich Aromatics (India) Pvt Ltd [TS-539-ITAT-2019(Mum)-TP] - ITA No. 6081/Mum/2018 dated 07/06/2019

579. The Tribunal deleted the adjustment made with respect to intra-group services (Marketing & Administrative Services) received by assessee wherein the TPO had determined the ALP of said services at Nil. It followed the co-odinate bench decision in assessee's own case for an earlier year wherein it was held that when authorities below had not raised any doubt over the genuineness of payments made by assessee to AE, then no adjustment could be made by applying the benefit test.
Rehau Polymers Pvt Ltd [TS-604-ITAT-2019(PUN)-TP] - ITA No.167/PUN/2018dated 24.06.2019
Rehau Polymers Pvt Ltd [TS-565-ITAT-2019(PUN)-TP] - ITA No.378/PUN/2017 dated 07.06.2019

580. The Tribunal held that management support services involving day to day management activities could not be considered as stewardship or shareholder activity, since only activitieshaving 'sole effect' of either protecting the renderer's capital investment in the recipient etc. or facilitating compliance by the renderer with its own reporting, legal, or regulatory requirements" couldbe considered as a shareholder activity.Accordingly, it rejected Revenue's determination of ALP of management service as Nil, noting that TPO did not benchmark the transaction following any of the prescribed methods. Further, noting that fees were paid on an hourly rate determined on the basis of actual cost incurred+5% markup which was in the nature of Cost plus method prescribed under rule 10B(1)(c), the Tribunal held that the transaction was at ALP considering the benefit of +/-5% even if the mark-up at 5% was held to be excessive.
INA Bearings India Pvt Ltd [TS-597-ITAT-2019(PUN)-TP] - ITA No.150 & 282/PUN/2017 dated 24.06.2019

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581. The Tribunal remitted to TPO the issue of professional fee payment and the corresponding availment of services from Chinese-AE under the EPC segment of assessee engaged in provision of engineering, software and technical design services and wastewater treatment of plants and its services. The Tribunal observed that to establish availment of services from the AE, assessee filed evidences in the form of emails which were in Chinese language and did not file the english translated version of the same. The Tribunal concluded that the nature of services availed by the assessee was not clear and clarified that onus was on the assessee to establish receipt of services.Thus, the Tribunal held that the aforesaid transaction of payment of professional fees was to be benchmarked in the hands of assessee subject to the assessee fulfilling its stand of availing services from its associated enterprise in China. It thus directed the assessee to furnish complete information especially English translated documents and directed the TPO to verify the evidences and decide the issue of availment of services.
M/s. Aquatech Systems (Asia) Pvt Ltd vs DCIT- TS-119-ITAT-2019(PUN)-TP-ITA No 610/PUN/2016 dated 28.02.2019

582. The Tribunal deleted the TP-addition on payment of managerial services to AE relying on coordinate bench ruling in assessee's own case for AY 2005-06 wherein upon considering the evidences (in form of emails) Tribunal had inferred that services were actually provided by assessee's group entities in accordance with terms of agreement and rejected Revenue's contention that no tangible benefits were derived by the assessee from such services. It noted that the AO incharge of assessment of the AE had accepted and taxed such income in the hands of service provider and it was held that since management services had actually been rendered, it's ALP could not be taken as Nil.
Sandvik Asia Pvt Ltd vs. Asst.CIT [TS-152-ITAT-2019(PUN)-TP] ITA No.491,533, /PUN/2016 dated 08.03.2019

583. The Tribunal rejected Revenue's Nil-ALP determination for payment of management service fees to its AE, Sandvik AB (ultimate holding company) and noted that Revenue accepted that management services were received by assessee, however, TP-adjustment was made on the ground that the said services were not provided by Sandvik AB [with whom the assessee had entered into agreement] but by Walter AG, Germany, the holding company of assessee. The Tribunal observed that the assessee had entered into agreement with Sandvik AB which stated that the services shall be provided by the "providing parties", which included associates of Sandvik AB and further,Walter AG, Germany was part of Sandvik group of concerns and Sandvik AB was the ultimate holding company which raised the bills on all the entities of Sandvik group, to which it was providing services. Thus,the Tribunal concluded that once the services were provided by Walter AG, Germany, which in turn, was part of Sandvik group of companies, which was headed by Sandvik AB, Germany, there was no merit in the orders of authorities below in holding that no services had been provided by Sandvik AB to whom the management fees had been paid. The Tribunal thus held that where the management services had actually been rendered, may be by Sandvik entity i.e. Walter AG, Germany, then arm's length price of such transaction could not be taken at Nil. Further, the Tribunal considered assessee's alternate plea that payment of management fees to Sandvik AB should be aggregated with transaction of importing tools from AE as the transactions were interlinked resulting in assessee's margin

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of 6.95% being higher than comparables margin at 5.6%. Thus, the Tribunal concluded that no adjustment on account of arm's length price could be made in the hands of assessee on such aggregation of two transactions.

M/s. Walter Tools India Pvt Ltd vs ACIT-TS-384-ITAT-2019(PUN)-TP-ITA No 523/PUN/2016 dated 29.04.2019

584. The Tribunal rejected the 'benefit test' and deleted TP-adjustment on account of management service fees and operational service fees paid to AE by assessee engaged in manufacturing and trading of wires, tubes etc for AY 2012-13 and 2013-14. It relied on co-ordinate bench ruling in case of assessee for AY 2011-12 where rejecting TPO's benefit test, the Tribunal had allowed the claim of assessee on the ground that where the services have been actually rendered, then the ALP cannot be taken at Nil and hence, no TP-addition was warranted in the hands of assessee on account of payment of managerial services. With respect to TP-addition on account of operational service fees, it again rejected the application of benefit test by DRP and Nil ALP determination thereafter, reiterating that Revenue authorities cannot sit in the judgment of decision of businessman to avail services and consequently the benefit test was not to be satisfied by the assessee. It noted that the DRP had discarded the evidences filed by the assessee in the form of e-mail communications by terming them as routine communications which did not establish the benefits accruing to the assessee. It held that the onus was upon assessee to establish that it had availed services but it there was not an onus upon the assessee to fulfil the benefit test, if any. In this case it was not in dispute that services had been availed by the assessee, thus TP adjustment made was uncalled for.

Sandvik Asia Pvt Ltd. v. ACIT, Cir.-10 Pune [TS-397-ITAT-2019(PUN)-TP], ITA Nos. 172 & 3080/PUN/2017, dated May 03, 2019

Reimbursements

585. The High Court upheld Tribunal's order confirming deletion of TP-adjustment on foreign component of seconded employees salaries reimbursed to Australian AE by assessee. The Court noted that 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 CIT(A) had observed that the AO did not doubt the income from rendering business support services by assessee and held that once the receipt of income was accepted as genuine, the AO was duty bound to provide for the deduction on account of the expenses incurred towards earning the same income and further that there was no rational to accept only the local expenditure and deny the expatriate salary paid by the AE and reimbursed by the assessee. The Court upheld the Tribunal's order which in turn upheld the CIT(A) decision. The Court took note of CIT(A)'s order and held that CIT(A) had correctly noted that Revenue could not establish that AE's employee did not work in India and that the AE was compensated for the services of the employee on the roll of the assessee. It further held that the decision of the JV and the assessee clearly constituted a business decision or managerial decision which the Revenue should not have, interfered with holding that the employees of the AE were subjected to secondment, which

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resulted in non-deductible expenditure. Thus, the Court dismissed Revenue's appeal concluding that no substantial question of law arose.

Pr. CIT vs Blue Scope Steel India Pvt Ltd-TS-123-HC-2019(Del)-TP-ITA No 169,170,173/2019 dated 19.02.2019

586. The TPO determined the ALP of reimbursement of travelling costs and general office and salary paid to employees on deputation costs paid by the assessee to its AE who incurred the expenses in relation to certain seconded employees as "NIL" which was confirmed by DRP. On remand by the Tribunal to DRP the Panel held there was no evidence in so far as claim of reimbursement to six persons. In the second round of appeal before the Tribunal, the assessee filed a petition for submission of additional evidences before the Tribunal in the form of Form No.16 and Form No.12BA of seconded employees with regard to reimbursement of salary costs paid by the assessee in relation to certain employees seconded by the A.E. to the assessee and back-up documents/third party invoices with regard to reimbursement of travelling and general office expenses in relation to certain employees seconded by the A.E. to the assessee. The Tribunal rejected the additional evidence sought to be filed before it, doubting its genuiness as it was not authenticated by assessee or any responsible person and also inadequate explanation was offered by assessee as to nature of additional evidence and why was it not produced before lower authorities and accordingly, dismissed assessee's appeal.

CEC International Corporation (India) Private Limited vs DCIT [TS-85-ITAT -2019(Del)-TP] ITA.No.3813/Del./2014 dated 14.01.2019-SD

587. The Tribunal confirmed DRP's stand of upholding AO's power to examine transaction of reimbursement of crew salary despite TPO's acceptance of ALP. It noted that the assessee had received payments against supply of highly skilled personnel to its AE and the AE deduced tax from such payments. The Tribunal upheld lower authorities conclusion that amount received was taxable as income and not mere reimbursement and noted that assessee did not submit ledger account to prove that it was reimbursement. The Tribunal held that the payer had deducted TDS on the payments to the assessee, meaning thereby, the payment so made was the income of the assessee. The Tribunal remitted the matter to AO to examine ledger account to check if receipts were really reimbursement.

Further with respect to reimbursement towards purchase of drillship equipments/spare parts by AE on behalf of assessee, the Tribunal noted that TPO made adjustment on the ground that assessee did not provide documentary evidence to prove its claim that payment was reimbursement. Thus, remitted back matter to AO to examine evidence and re-decide the issue.

Dolphin Drilling Pte Ltd vs ADIT (Intl Taxation)- TS-330-ITAT-2019(Del)-TP- ITA No 355/Del/2012 dated 27.02.2019

588. The Tribunal ruled on TP-adjustment of mark-up of 5% on cost to cost reimbursements by AEs related to expenses incurred by assessee (engaged in business of exploration and production of mineral, petroleum, gas) as a member of and on behalf of an unincorporated JV in terms of the Production Sharing Contracts (PSC). The Tribunal noted that the reimbursement cost was mere recoupment of expenses and did not include provision of any services by the assessee and stated that *the cost was to be treated as a "pass-through cost and not to be included in the profit of the assessee"* and therefore *"no mark-up was required to be added.* Further, the

Tribunal noted assessee's submission that assessee maintained money in advance as a cash call and was acting on behalf of the JV partners and not in its own capacity and thus, the Tribunal remitted the matter to TPO/AO to verify the same.
M/s. Vedanta Ltd vs ACIT-TS-84-ITAT-2019(Del)-TP-ITA No 6937/Del/2017 dated 12.02.2019

589. The Tribunal deleted TP-addition on account of reimbursement of operating expenses (including warranty and advertisement expenses) for AY 2013-14 for assessee engaged in import and distribution of various Sony Products noting that the above amounts had been debited whenever they were incurred and credited to the respective expenditure account at the time of reimbursement by AE, thus making a separate addition will amount to double addition. However, it rejected assessee's claim that the aforementioned reimbursements should be included in operating revenue, stating that these are not the operating revenue of the assessee.
Sony India Private Ltd vs Addl CIT - [TS-338-ITAT-2019(DEL)-TP] - ITA No.6372/Del/2017 dated 08-03-2019

590. The Tribunal deleted TP-addition on account of reimbursement of operating expenses for AY 2013-14 for assessee engaged in distribution of mobiles noting that the above amounts had been debited whenever they were incurred and credited to the respective expenditure account at the time of reimbursement by AE, thus making a separate addition will amount to double addition. It relied on Co ordinate bench ruling in case of assessee's group company - Sony India Private Ltd vs Addl CIT - [TS-338-ITAT-2019(DEL)-TP]
Sony Mobile Communications India Private Ltd vs Addl CIT - [TS-307-ITAT-2019(DEL)-TP] – ITA No.6370/Del/2017 dated 08-03-2019

591. The Tribunal remitted TP-adjustment of 10% mark-up on reimbursement of expenses received from AE by assessee engaged in providing online recruitment services for AY 2012-13. CIT(A) had held that even though reimbursement was not routed through P & L account, these expenses had to be marked up suitably to compensate for the services rendered and therefore determined mark-up of 10% as per CUP method. The Tribunal followed ruling in assessee's own case for AY 2010-11 wherein co-ordinate bench had remitted back identical adjustment (made by charging 27.90% mark-up on reimbursement of expenses received from AE) by relying on Mylan Laboratories (ITA No. 66/Hyd/2013) ruling wherein AO/TPO was directed to exclude reimbursement from computation of mark-up, if they were indeed reimbursements of expenditure and there was no claim by assessee for deduction in the computation of income. Thus, Tribunal remitted the issue back to the AO/TPO to decide the issue in line with the directions of the coordinate bench in the said case.
Monster com (India) Pvt Ltd vs.Dy.CIT [TS-256-ITAT-2019(HYD)-TP] ITA No. 1513/H/17, 1514/H/17, 1530/H/17, 1599/H/17 dated 29.03.2019

592. The Tribunal deleted TP-adjustment on account of Nil ALP determination of reimbursement of administrative expenses to AE by assessee engaged in logistics related to freight forwarding, custom clearance.The Tribunal found that the payments made by assessee to its AE were backed by the Service Agreement which clearly revealed the contractual obligation of the assessee to reimburse, on a monthly basis, its share of costs and expenses that were to be

worked out as per the fixed cost allocation keys and could be held to be a retainer agreement. The Tribunal further relied on Bombay HC decision in Merck Ltd. wherein the Court had approved the Tribunal's observations that in a case of a retainer agreement, the ALP of some of the services not availed by the assessee during the year could not be taken at Nil. Thus, the Tribunal in present case held that TPO/DRP's determination of Nil ALP was unsustainable. Further, the Tribunal held that TPO had accepted reimbursement of administrative expenses was at ALP for previous AY and there being no shift in the facts of the case, it was not permissible for the TPO to have adopted an inconsistent approach in the subject year.

Further, the Tribunal dismissed Revenue's appeal against acceptance of 'additional evidence' by DRP and deleting TP adjustments with respect to reimbursement of certain costs incurred by AE such as freight, insurance, legal expenses, without giving an opportunity to the TPO. The Tribunal noted that DRP suo moto called for the documents which was well within the powers vested to the Panel under Rule 9 of the Income-tax (Dispute Resolution Panel) Rules, 2009 and hence, held that no infirmity arose from the order of the DRP.

UT worldwide India Pvt Ltd vs DCIT-TS-78-ITAT-2019(Mum)-TP-ITA No 1454, 1686/Mum/2014 dated 08.02.2019

593. The Tribunal upheld CIT(A)'s order deleting TP-adjustment in respect of reimbursement to AE towards salary of an expatriate employee for AY 2009-10. It noted that mismatch in expatriate's name in Form No. 16 and other documents, was a mistake which was clarified by the assessee providing supporting evidence in form of PAN, Form 16, etc. For AY 2011-12, the Tribunal deleted TP-adjustment in respect of international transaction of cost allocation towards support services provided by AE upholding assessee's method of allocation using allocation keys such as assets, revenue, employees etc which was based on OECD Guidelines. It observed that TPO's benchmarking using CUP (wherein TPO determined ALP considering man-hour rate of Rs 8,500) was not in consonance with statutory provisions as he failed to bring on record even a single instance of CUP in support. It relied on coordinate bench decision in assessee's own case in AY 2012-13 and AY 2013-14.

Jabil Circuit India Pvt Ltd vs. DCIT [TS-195-ITAT-2019(Mum)-TP] ITA No. 1848, 1963, 3627/Mum./2016 date 20.03.2019

594. The Tribunal dismissed Revenue's TP-ground and deleted TP-addition made on account of mark-up on reimbursement of expenses from AE and followed earlier order in assessee's own case for previous AY which in turn relied on jurisdictional High Court ruling in Kodak India, which had deleted similar adjustment noting that the TP-method adopted by TPO (i.e 10% mark up) for computing ALP was not as per any of the prescribed methods u/s 92C. The coordinate bench had also accepted assessee's submission that it was mere reimbursement of expenses on cost to cost basis, without any element of service, and that the 'other method' u/s. 92C(f) was inapplicable for given AY (i.e 2009-10). The Tribunal thus concluded that the decision rendered hereinabove in the light of the aforesaid facts shall apply mutatis mutandis for the year under consideration also, thereby dismissed Revenue's appeal.

M/s. Wartsila India Pvt Ltd vs DCIT-TS-343-ITAT-2019(Mum)-TP-ITA No 696,1440/Mum/2017 dated 24.04.2019

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595. The Tribunal dismissed Revenue's appeal against DRP's directions deleting adjustment on reimbursement of salary of seconded employee noting that assessee had submitted all the necessary details showing that employee was seconded by AE to assessee and reimbursement was on cost, upon which the TPO had not commented adversely. Further, it remitted the issue of reimbursement of other expenses to the file of AO, noting that (i) the DRP had summarily upheld the adjustment without detailed reasoning and (ii) assessee could not obtain and submit the requisite details in time during the assessment proceedings and the documents that were submitted remained to be examined and appreciated.

Thermo Fisher Scientific India Pvt Ltd [TS-649-ITAT-2019(Mum)-TP] - I.T.A. No. 2701&2177 /Mum/2014 dated 28.6.2019

Convertible Debentures

596. The Tribunal relying on assessee's own case in ITA/1666/AHD/2016 deleted TP-adjustment on account of interest on 0 % OFCD (optionally fully convertible debenture). The assessee in the earlier year had invested 224.93 crores in 0% optionally fully convertible debenture (OFCD) in Sun Pharma Global Inc. BVI. The assessee claimed that it was in the nature of share capital. Therefore it was not an international transaction. Also it had converted the OFCD into equity in subsequent year. But the TPO was of the view that it was in the nature of loan until converted into equity and hence transaction should be benchmarked to the arm's length price. Accordingly, the TPO considered the OFCD as debt and proposed the interest rate at 12-month LIBOR plus markup 4.15% to work out the ALP on such amount. The Tribunal relying on assessee's own case in earlier AY held that revenue has no power to re-characterize the transaction. Chapter X and Transfer Pricing rules do not permit Revenue authorities to step into the shoes of the assessee and decide whether or not a transaction should be entered into. It is for the assessee to take commercial decisions and decide how to conduct and carry on its business. Actual business transactions that are legitimate cannot be restructured.

DCIT vs Sun Pharmaceuticals Industries Ltd [TS-348-ITAT-2019(Ahd)-TP] ITA No.922/Ahd/17 dated 29-03-2019

597. The Tribunal admitted additional evidence in the form of new comparables and restored the issue relating to TP adjustment on international transaction of interest on fully and compulsory convertible debentures issued by the assessee .It noted that TPO had considered all bond issues from Bloomberg Website without applying any filters to ascertain similar bond issues as that of assessee. Also, assessee had submitted additional evidence in the form of fresh analysis on NSDL website to benchmark interest rate using filter criteria such as type of instrument, category of issue, ownership, nature, instrument security status, date of allotment, etc.

Red Fort Shahjahan Properties Pvt vs. ACIT [TS-196-ITAT-2019(DEL)-TP] ITA No. 918/Del/2017 dated 25.03.2019

598. The Tribunal deleted TP-adjustment on account of interest on Fully Compulsory Convertible Debentures (FCCDs) issued by assessee to its AEs. It followed co-ordinate bench ruling in assessee's own case for earlier AY wherein interest rate at SBI PLR plus 300 basis points was

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held as reasonable because FCCD were unsecured and hybrid/ quasi equity capital instruments as compared to plain vanilla loan instruments. Further, co-ordinate bench had observed that since 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, thus TP-adjustment was unwarranted.

Granite Gate Properties Pvt Ltd vs. ACIT [TS-177-ITAT-2019(DEL)-TP] ITA No. 7026 /7027/ DEL/2017 dated 15.03.2019

599. The Tribunal remitted the issue of determining the ALP of interest paid on Fully Compulsarily Convertible Debentures (FCCDs) back to the TPO, following co-ordinate bench decision in the assessee's own case for an earlier year on identical issue. The co-ordinate bench had admitted additional evidence submitted by the assesseein the form of fresh analysis on NSDL website to benchmark interestrate using different filter criteria including type of instrument, category of issue, ownership, nature,instrument security status, date of allotment, etc. and opining that such evidence was of vital importance. Further, the Tribunal in the present case, observed that FCCD is not a traditional debt, but acomplex financial instrument wherein the final repayment is through the issuance of common equity to investors based on fixed conversion rate. Accordingly, it held that the true characterization and quantification of Debt/Equitywould depend on the deeper analysis of its substance over form and comparing the interest payment on FCCD with bond interest rates was fallacious. Further, noting that Safe Harbour Rules apply only to a transaction of loan, the Tribunal rejectedassessee's reliance thereon, as FCCD is amixed transaction of loan and equity.

Red Fort Shahjahan Properties Pvt Ltd [TS-645-ITAT-2019(DEL)-TP] – ITA No. 7239/Del/2018 dated 14/06/2019

Share Transactions

600. The Court upheld Tribunal's order deleting TP-additions on subscription to preference shares and confirmed Tribunal's decision of rejecting TPO's re-characterization of investment in preference shares into loan and charging of notional interest thereon, and opined that nothing was brought on record by Revenue that the transaction was sham and thus TPO could not question the commercial expediency of the transaction entered into by the assessee.

Pr. CIT vs M/s. Aegis Ltd-TS-65-HC-2019(BOM)-TP-ITA No 1248 of 2016 dated 28.01.2019

601. The High Court dismissed Revenue's appeal and upheld Tribunal's order deleting TP-addition on account of alleged excess consideration paid on investment in share capital of wholly owned subsidiary and notional interest on re-characterization of transaction as loan. The Tribunal had confirmed Chapter X inapplicability to an international transaction on capital account which did not result in income chargeable to tax and rejected Revenue's contention that there was scope for potential income arising from subsequent sale of shares by relying on Bombay HC decision in Vodafone India Services.

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Pr. CIT vs Tops Group Electronics Systems Ltd- TS-114-HC-2019(BOM)-TP-ITA No 1721 of 2016 dated 26.02.2019

602. The High Court upheld Tribunal's order deleting TP-adjustment on account of excess money paid to AE (100% subsidiary) for acquiring its shares. The Court noted that Revenue sought to bring the difference between actual investment (Rs. 2.67 cr) & fair market value of shares (Rs.8.13 lakhs) i.e. Rs.2.58 cr to tax without being able to specify under which substantive provision would income arise and the assessee had purchased the shares on capital account. The Court held that the issue stood concluded by the decision of this Court in Vodafone India Services wherein it was held that no income arose on account of purchase of shares if it was on capital account.

The Court further, rejected distinction sought to be made by Revenue on the basis that the current transaction was an outbound investment and not an inbound investment as in the case of Vodafone, and concluded that on principle, if this court had held that Chapter X of the Act was machinery provision and could only be invoked to bring to tax any income arising from an international transaction, then, it was necessary for the Revenue to show that income as defined in the Act did arise from the international transaction and the distinction between inbound and outbound investment was a distinction which did not take the case of Revenue any further.

Thus, the Court concluded that the question as proposed by Revenue did not give rise to any substantial question of law**.**

Pr. CIT vs M/s. PMP Auto Components Pvt Ltd-TS-115-HC-2019(Bom)-TP-ITA No 1685 of 2016 dated 20.02.2019

603. The Tribunal deleted TP-adjustment made by re-characterizing share application money invested in AE as loan. It noted that TPO re-characterized the share application money as a loan simply because during the year the shares had not been allotted. The Tribunal stated that such recharacterization first of all, could not be made unless there was an intention of the parties or there was any arrangement, understanding or action in concert. If any money had been advanced for acquisition of shares which was a capital asset, same could not be treated as capital financing unless the parties had intended or agreed to convert the same. Further, explaining that share application money for subscription of shares was for acquisition of capital asset and money received by the company was a capital receipt, the Tribunal clarified that a capital receipt was not an income under section 2(24) unless it was chargeable to tax as capital gains under Section 45. Further, the Tribunal relied on Bombay HC ruling in Vodafone India Services wherein it was held that Chapter X provisions were not applicable to international transaction of issuance of equity shares and reiterated that investment made in shares or applying for the shares could not be given different colour so as to expand the scope of transfer pricing adjustment by recharacterizing it as interest free loan.

Unitech Ltd vs DCIT- TS-308-ITAT-2019(DEL)-TP- ITA No 6585/Del/2015 dated 12.02.2019

604. The Tribunal deleted TP-adjustment of interest on account of TPO/DRP's treatment of advancement of share application money to AE as an international transaction of loan. The Tribunal relied on Hon'ble Bombay High Court decision in PMP Auto Components wherein it was held that the transaction of purchase of shares of AE could not be treated as a loan and accordingly no interest could be charged (on notional basis) on the same. The Tribunal also

relied on co-ordinate bench ruling in assessee's own case wherein similar TP-adjustment was deleted after opining that the activity of granting interest free advances ultimately to be converted into equity by a holding company to a subsidiary company did not tantamount to an international transaction.
DLF Hotel Holdings Ltd vs DCIT- TS-148-ITAT-2019(Del)-TP-ITA No 1425/Del/2016 dated 28.02.2019

605. The Tribunal upheld CIT (A)-order deleting TP-adjustment in respect of notional interest of on account of re-characterization of transaction of outbound share investment in wholly owned subsidiary into loan. The Tribunal followed co-ordinate bench ruling in assessee's own case for previous AY wherein similar TP-adjustment was deleted after holding that TP-provisions were inapplicable to outbound share investment and since assessee had placed material evidence on record to establish bona-fide nature of transaction, therefore re-characterization of the transaction as loan was not permissible. Thus, the Tribunal dismissed Revenue's appeal.
ITO vs M/s. Topsgroups Electronic Systems Ltd-TS-63-ITAT-2019(Mum)-TP-ITA No 205/Mum/2017 dated 31.01.2019

606. The Tribunal deleted TP-adjustment of computing interest on redemption of preference shares recharacterized as a loan transaction in case of assessee. It noted that there was redemption of preference shares held in AE and no fresh subscription of preference shares took place. The Tribunal followed co-ordinate bench rulings in assessee's own case wherein it was held that subscription and redemption of shares could not be re-characterized as loan and therefore no interest should be charged on the said re-characterized loan. Further, the Co-ordinate benches had also held that commercial expediency of transactions entered into by the assessee with its AE, could not be questioned by the TPO, unless there are evidences and circumstances to doubt and it could not be given different colours so as to expand the scope of TP adjustment by re-characterizing preference shares as interest free loan.
Aegis Ltd vs DCIT-TS-92-ITAT-2019(Mum)-TP-ITA No 7348/Mum/2017 dated 06.02.2019

607. The Tribunal deleted adjustment made on account of notional interest by treating alleged shortfall in equity shares premium (being the difference between the ALP and actual issue price) as deemed loan, following coordinate bench ruling in assessee's own case for an earlier year. In the earlier year, the co-ordinate bench had deleted similar adjustment relying on jurisdictional HC ruling in Vodafone India and Shell India wherein it was held that the difference between the marketprice of equity shares and the face value could not be treated as deemed loan to the AE.
J.P. Morgan Advisors India Pvt. Ltd. [TS-724-ITAT-2019(Mum)-TP] – ITA No. 990& 1754/Mum/2014&1597/Mum/2015 dated 19/06/2019

608. The Tribunal deleted TP-adjustment on account of re-characterisation of investment made in preferential shares held by the assessee (an ITeS provider) with its overseas AE as interest free loan. The Tribunal noted that in assessee's own case for previous AY, the High Court had upheld Tribunal's decision of rejecting TPO's re-characterization of investment in preference shares into loan and charging of notional interest thereon.Thus, applying the principle of consistency, the Tribunal held the re–characterization as invalid and accordingly, deleted the addition made on account of the adjustment.

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Aegis Ltd vs DCIT-TS-378-ITAT-2019(Mum)-TP-ITA No 125/Mum/2019 dated 30.04.2019

609. The Tribunal deleted adjustment on account of interest computed on advances given by assessee to AE for share capital with repect to shares which were allotted, following co-ordinate bench ruling in case of Sterling Oil Resources (Mum) wherein it was held that delay in allotment of sharea by 100% subsidiary is not prejudicial to holding company.

However, with respect to share capital advance agaist which there was no allotment of shares, the Tribunal held that in substance, share capital advances had changed the character and were covered u/s 92B sub-clause (i)(c). Thus, it held that share capital advances which had not been allotted for quite some time could not be kept out of ALP adjustment by merely claiming them to be share capital advance.

KSS Ltd (Formerly known as K Sera Sera Productions Ltd.) [TS-591-ITAT-2019(Mum)-TP] - I.T.A.No. 1818/Mum/2016&1958&7110/Mum/2017 dated 17.06.2019

Commission

610. The Apex Court dismissed Revenue's SLP against High Court order in case of assessee wherein the High Court had upheld the Tribunal's order deleting TP adjustment on overriding commission paid by assessee to AEs after noting that weighted average rate of commission paid by the assessee was 7.84% as against 11% paid to unrelated party. The High Court had concluded that Tribunal's decision demonstrated that the entire issue was based on facts and appreciation of record. Thus, the Apex Court held that the Special Leave Petition was **to be** dismissed on the ground of delay as well as on merits

Pr. CIT vs Sun Pharmaceutical Industries Ltd-TS-96-SC-2019-TP-SLP No 4466/2019 dated 22.02.2019

611. The Tribunal upheld CIT(A)' s order directing TPO/AO to apply turnover filter of Rs. 1 crores to Rs. 50 crores for ALP determination in case of assessee rendering accounting services to AE. The Tribunal observed that CIT(A) in assessee's own case for previous AYs had directed TPO/AO to adopt turnover filter of Rs.1 crores to Rs. 50 crores, which was not objected to by the Revenue. The Tribunal opined principle of consistency should be applied in the given facts and circumstances as there were no change in comparison to the previous assessment year and it upheld CIT(A)'s findings.

DCIT vs M/s. Doshi Accounting Services Pvt Ltd-TS-102-ITAT-2019(Ahd)-TP-ITA No 939 &1255/Ahd/2015 dated 01.02.2019

612. The Tribunal, in second round of proceedings, deleted TP-adjustment in respect of commission paid by the assessee (engaged in ITES, BPO and IT services) to its AE for marketing and co-ordination support services in respect of assessee's largest customer i.e. Aetna. The Tribunal noted that commission was paid at 20% on business generated by AE in favour of the assessee from Aetna w.e.f. April 1, 2002 while prior to that commission rate was 12% and observed that while assessee adopted TNMM as MAM, TPO adopted commission paid by assessee to AE @ 12% in preceding year as internal-CUP and proposed an adjustment. The Tribunal relied on co-

ordinate bench ruling in assessee's own case for previous AYs wherein it was held that only uncontrolled transactions could be used as 'comparable' while determining ALP and TP-addition based on lower rate of commission paid to AE was not sustainable.
DCIT vs Hinduja Ventures Ltd-TS-140-ITAT-2019(Mum)-TP-ITA No 3631/Mum/2015 dated 02.01.2019

Others

613. The Tribunal set aside DRP's cryptic order and remitted the TP-issue of characterisaction of the functions carried out by assessee back to the file of DRP for fresh decision by way of a speaking and reasoned order for AY 2011-12. It allowed Revenue's appeal against DRP's decision in accepting assessee's claim that it was mainly into software development services while it was held by the TPO in his order that assessee's functional profile was recharacterized as "Design & Engineering Service"; It observed that order of the DRP was very cryptic and it was simply stated that in AY 2010-11, the TPO considered the functions of assessee to be software development services and the comparability analysis was also made based on the software development comparables but there was no comment in respect of factual aspects discussed by the TPO in the order of present and earlier years. It noted that both assessee and Revenue had no objection about restoring the issue.
Broadcom Semiconductors India Pvt Ltd (Earlier known as M/s. Netlogic Processors India Pvt. Ltd.) vs. ITO [TS-250- ITAT-2019(Bang)-TP] IT(TP)A No.294,236/Bang/2016 Dated 29.03.2019

614. The Tribunal dismissed Revenue's appeal challenging DRP's decision of deleting TP-adjustment on international transaction of buying services. The Tribunal noted that the TPO made the adjustment on ALP by considering that the Revenue had filed an SLP against Jurisdictional High Court's decision in assessee's own case (wherein similar TP-adjustment was deleted) and the same was admitted but had not reached finality. The Tribunal opined that the approach followed by TPO as such was not acceptable and stated that this approach was fallacious as TPO in the subsequent year had itself accepted the methodology adopted by the assessee which was on identical facts and circumstances as the captioned year and had made no adjustment. Accordingly, the Tribunal concluded that they did not find any merit in the appeal of the AO as it was squarely covered by the decision of the Hon'ble Delhi High Court in favour of the assessee.
ACIT vs Li & Fung (India)Pvt Ltd- TS-324-ITAT-2019(DEL)-TP- ITA No 1740/Del/2016 dated 21.02.2019

615. The Tribunal deleted TP-addition made by holding ALP for internal audit fees paid to AE at Nil, rejecting Revenue's stand that no benefit, directly or indirectly, was received by the assessee by availing the said services. It noted that assessee did not have internal audit department and internal audit on business risk provided certain assurance/comfort to the management that the operations of the assessee were well managed and efficient. Also, key findings and

recommendations under various financial and operational areas of the assessee were made in the internal audit report and implementation of such recommendations by the management had resulted in better control and functioning of the business of the assessee and certain specific benefits were derived by the assessee-company from the internal audit services rendered by its AEs.

Organon (India) Ltd vs Addl. CIT.- TS-423-ITAT-2019 (Kol)- TP – ITA no. 1335/Kol/2010 dated 15-05-2019

616. The Tribunal restored TP adjustments to TPO/FAA on communication/network related services and IT infrastructure charges paid by assessee engaged in the business of development/maintenance of computer software, sale and export of software services and provision of technical consultancy after relying on assessee's own case for previous AY, wherein also the matter was remitted with the observation that Revenue had failed to appropriately analyze assessee's submissions and the group IT Service agreement.

DCIT vs M/s. Atos India Pvt Ltd-TS-296-ITAT-2019(Mum)-TP-ITA No 4707/Mum/2015 dated 02.01.2019

617. The Tribunal deleted TP-adjustment in respect of assessee's payment towards information system services, ALP of which was determined by TPO by applying man-hour rate of Rs.8,500 per hour for 2 man-hours a day & estimating a further sum to be annual fee to the AE as cost of software. The Tribunal noted that the TP-adjustment was made by not following any one of the prescribed TP-methods but on an ad–hoc or estimate basis. Further, the Tribunal relied on co-ordinate bench ruling in assessee's own case wherein similar TP-adjustment was deleted after opining that TPO certainly could not determine ALP on ad-hoc/ estimate basis and there was no reason not to accept payment to be at ALP when there were no contrary evidence brought on record.

Firmenich Aromatics India P. Ltd vs DCIT- TS-403-ITAT-2019(Mum)-TP-ITA No 7330/Mum/2017 dated 22.02.2019

618. The Tribunal rejected Revenue's stand of determining ALP of fees paid to AEs towards technical assistance and project management services at Nil and remitted matter to AO/TPO for fresh ALP-determination. The Tribunal noted that assessee had furnished agreement, e-mails communications evidencing receipt of services and certificate from the AEs certifying service rendition before AO/TPO. The Tribunal rejected TPO's conclusion that the said documents were not in accordance with the requirement of Rule 10D and held that Rule 10D(1) did not limit the documents specified therein to substantiate international transaction and the pricing of the same, Clause (m) of Rule 10D(1) was residuary clause which gave liberty to the assessee to furnish any information, data or documents relating to AE which may be relevant for determining ALP.Further, relying on Delhi HC ruling in EKL Appliances and Mumbai Tribunal ruling in Thyssen Krupp Industries India P Ltd, the Tribunal held that the TPO had got limited jurisdiction to ascertain ALP of the transaction and he could not sit in judgment to ascertain the need for the services. Further, the Tribunal noted that though the assessee had capitalized the relevant expenditure and not claimed any deduction for it during relevant year, it would be claiming depreciation on such capitalized expenditure in subsequent years. The Tribunal upheld TP-applicability even though capital transactions are outside the purview of Transfer Pricing

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mechanism, after relying on Tribunal ruling in Honda Motorcycle and Scooters P Ltd case. Thus, it remitted ALP-determination to TPO while directing assessee to furnish the details of comparable services rendered by the AEs to third parties.
M/s Tata BlueScope Steel Ltd vs DCIT- TS-319-ITAT-2019(PUN)-TP- ITA No 847/PUN/2015 dated 15.02.2019

h. Miscellaneous

Appeal

619. The High Court expressed doubt on whether the Tribunal could give a direction to invoke TP-mechanism while in the appeal filed by the assessee, the sole question was whether the dis-allowance of interest expenditure claimed by the assessee u/s. 36(1)(iii) was correctly made. The Court noted that vide the impugned order, the Tribunal had dismissed assessee's rectification application contending that the Tribunal could not have directed examination of TP mechanism on the issue of disallowance of the interest expenditure when the AO had not invoked the TP provisions on the issue. The Court noted that in view of AO's consequential order passed pursuant to the Tribunal's remand wherein the AO had accepted the assessee's contention on allowability of the interest expenditure and deleted the addition previously made, the Court stated that the entire issue had become academic.
Piramal Glass Pvt Ltd vs DCIT-TS-20-HC-2019(Bom)-TP-WP No 3321 of 2018 dated 11.01.2019

620. The Court allowed assessee's writ petition challenging Tribunal's refusal to rectify its order with respect to non-adjudication of ground regarding TP-adjustment on corporate fee paid to AE. The Court granted assessee's request for rectification of Tribunal order and revived appeal before Tribunal to the limited extent to decide issue of relevant TP-addition and noted that even though the Tribunal admitted additional evidence filed by assessee, it neither disposed of assessee's specific ground nor remitted matter to AO to re-decide the issue. The Court noted that assessee's rectification application was rejected by Tribunal on the ground that the plea fell under the realm of reconsideration of the Tribunal's order and thus held that the power of rectification of the Tribunal flowing from section 254(2) of the Income Tax Act, 1961, howsoever, restricted, would definitely be available in a situation like the present one. Further, the Court clarified that when the Appellant raised a ground and pressed the ground in service, it was the duty of the Tribunal to dispose of such ground and give its opinion thereon. Thus, the Court concluded that a ground which was raised and not given up when remained undecided in the judgment of the Tribunal, gave rise to an error on the face of record, which was rectifiable and accordingly, the Court directed the Tribunal to hear both the sides on this limited issue.
Rolls Royce Marine India Pvt Ltd vs ITAT-TS-333-HC-2019(Bom)-TP-WP No 755 of 2019 dated 18.04.2019

621. The High Court allowed assessee's writ and set aside Tribunal's order rejecting assessee's rectification applicantion against Tribunal order restoring ALP-determination of distribution fees

paid to AEs without deciding on characterization of the said payment as royalty. The Court rejected Revenue's submission that no prejudice was caused to assessee as entire issue was restored to AO, who would consider the character of distribution fee and noted that all facts to decide on the question of law were available.The Court held that the Tribunal ought to have dealt with the issue itself and by not dealing with an issue which was otherwise ripe for consideration and instead remanding to the TPO, the Tribunal had ensured further litigation and continued uncertainty for both the Revenue and the assessee. Thus, the Court concluded that the Tribunal ought to have decided the issue of the character of distribution fees whether it was royalty or not rather than remanding the issue to TPO and further held that non-consideration of the above basic submission made at the hearing as recorded, was clearly a mistake apparent from the record. Thus, the Court sent the issue back to the Tribunal for fresh disposal in accordance with law.

Sony Pictures Networks India Pvt Ltd vs ITAT-TS-5-HC-2019(Bom)-TP-WP No 3508 of 2018 dated 03.01.2019

622. The Court upheld Tribunal's order rejecting AO's appeal against DRP's revised order for pre-2012 objections for AY 2007-08 and rejected Revenue's reliance on Sec 253(2A). The Court observed that assessee's objections (filed on 23.12.2010) against the AO's draft order were rejected by DRP on the ground that the same were defective, however,the Tribunal had held that the reasons for non-considering the objections were incorrect and had remanded the proceedings before the DRP for disposal of the objections on merits. Th Court further observed that by the time the Tribunal passed its order and the DRP disposed of the objections, the legislature, vide Finance Act 2012, inserted Section 253(2A) which granted right of appeal to the Revenue against DRP directions issued u/s 144C(5) in respect of any objections filed on or after 1.7.2012. Thus, the Court confirmed Tribunal's view that Revenue's appeal was not maintainable as the objections were filed long before 1.7.2012 and held that provisions of sub-section (2A) of Section 253 would therefore, not enable the Revenue to file an appeal against the directions of the DRP.

Pr. CIT vs Nomura Services India P Ltd-TS-9-HC-2019(BOM)-TP-ITA No 1060 of 2016 dated 09.01.2019

623. The High Court dismissed Revenue's appeal raising the question whether the Tribunal had erred in deleting TP-addition without considering the fact that assessee failed to submit invoice wise sale and schedule of production of finished materials routed through AE or explaining its pricing system which could not even cover the direct cost associated with the production and that the fact that the assessee was not holding any significant intangibles as found out by DRP as per the OECD guidelines. The Court opined that on the face of the questions it was evident that they referred to questions of fact only and nothing else and no question of law was even remotely suggested.Thus, the Court dismissed Revenue's appeal.

Pr.CIT vs AT&S India Pvt Ltd-TS-255-HC-2019(CAL)-TP-GA No 2881 of 2018 dated 29.01.2019

624. The Court allowed assessee's review petition and recalled its own order for deciding the matter afresh on the issue of characterization of its research and information services as high-end KPO and held that earlier the High Court had held that nature of services provided by assessee were

specialized akin to that of KPO service while for previous AY 2006-07, the High Court had held that nature of assessee's services were back-office operations akin to a BPO. Thus, held that that the main judgment contained errors apparent on the record and therefore the review petition had to be and, accordingly, was allowed.
M/s. Mckinsey Knowledge Centre India Pvt Ltd vs Pr.CIT-TS-356-HC-2019(Del)-TP-Review Pet No 360,359/2018 dated 16.04.2019

625. The Tribunal set aside CIT(A)'s order passed in second round of litigation for three years i.e. AY 2002-03, AY 2003-04 and AY 2004-05, noting that after the matter was remanded by the Tribunal in first round of litigation, TPO reduced adjustments for all three years which was upheld by CIT(A) by simply passing a non-speaking order without considering assessee's submissions. The Tribunal restored the matter for all the three years back to CIT(A) for re-adjudication with a direction to consider the decision of Roadmaster Industries of India P.Ltd. Vs. ACIT [303 ITR 138 (P&H)] propounding why reasons are necessary in support of conclusions of any adjudicating authority.
Atul Limited [TS-625-ITAT-2019(Ahd)-TP] - ITA No.13, 818 &1196/Ahd/2015dated 25.06.2019

626. The Tribunal dismissed assessee's appeal filed directly before the Tribunal against AO's order giving effect to the earlier Tribunal order on the ground that the same was not maintainable. It was noted that in the earlier round of appeal, the Tribunal had remanded back a comparable issue for proper examination after considering facts and assessee's contention but there was no specific direction that would lead to absence of discretion of AO/TPO. However, it allowed the assessee to file an appeal before the CIT(A) and held that the time consumed in filing the appeal before the Tribunal and dismissal thereof should not be considered for computing the delay in filing the appeal before CIT(A).
Essilor Manufacturing (India) Pvt Ltd & Ors v DCIT & Ors [TS-436-ITAT-2019(Bang)-TP] - IT(TP)A Nos. 211, 239 & 1166/Bang/2015 & 2124 & 2125/Bang/2016 dated 25.01.2019-BS

627. The Tribunal allowed assessee's miscellaneous petition noting that (i) though, in the original order, it had remitted to TPO the issue of comparability of non-USA transactions with that of USA transactions to find out similarities of the factors influencing price between USA and non-USA (ii) it had not given any finding in case it was found that there are no similarities or factors fixing the price between USA andnon-USA transactions. Accordingly, the Tribunal held that if it is found that there was no similarity of the factors fixing the price between USA and non-USA transactions,the comparability for non-USA transactions was to be examined by applying various filters after undertakingFAR analysis in accordance with law
Dell International Services India Private Limited [TS-585-ITAT-2019(Bang)-TP] - M.P. Nos. 12 & 13/Bang/2019(in IT(TP)A Nos. 53 & 86/Bang/2014) dated 14.06.2019

628. The Tribunal admitted assessee's additional ground of application of turnover filter, holding that it is a purely legal issue and the relevant facts were available on record i.e. turnover of the tested party and of the comparables.
Broadcom Communications Technologies Private Limited (earlier known as Broadcom India Research Private Limited) [TS-612-ITAT-2019(Bang)-TP] - IT(TP)A No.

1929/Bang/2017 dated 14.06.2019

629. The Tribunal dismissed the Miscellaneous petition filed by the assessee against Tribunal's orginal order wherein the Tribunal had remitted the issue of adjustment on AE-loan & corporate guarantee transactions back to the TPO. With respect to loan advanced to AE, it noted that the issue was remitted observing that no material was brought on record indicating the terms of loan, loan tenure, security offered, etc. and thus held that the issue would be considered afresh by the TPO and all aspects of the issue were left open. The Tribunal had remitted the issue of corporate guarantee with direction to TPO to analyze the transaction and then apply the appropriate rate of commission. The assessee contented that corporate guarantee was not an international transaction and that the Tribunal had overlooked certain judicial pronouncements and that details of corporate guarantee and credit rating were also filed before the Tribunal as well as the revenue authorities. However, the Tribunal held that since the matter was remanded all the contentions could be dealt with thereunder and thus there was no mistake apparent on the fact of record in the order of Tribunal calling for interference u/s 254(2).
Sasken Technologies Ltd [TS-626-ITAT-2019(Bang)-TP] - M.P. No.38/Bang/2019[in IT(TP)A 550/Bang/2016] dated 28.06.2019

630. The Tribunal remanded the adjudication of all TP issuesback to CIT(A) noting that CIT(A) had passed a non-speaking and unreasoned order wherein he had decided the issue in one line by saying that TPO had made correct determination of ALP and thus had confirmed total adjustment.
ARM Embedded Technologies Private Limited [TS-535-ITAT-2019(Bang)-TP] - ITA No. 1554/Bang/2017dated 07/06/2019

631. The Tribunal allowed assessee's miscellaneous petition and recalled original order for the limited purpose of deciding the issue of comparability of AvaniCimcom Technologies Ltd. and Flextronics Software Systems Ltd, noting that the Tribunal had excluded these two companies by mistakenly assuming that they had RPT more than 15% RPT whereas RPT of these two companies were much below 15%.
Synopsys (India) Pvt Ltd [TS-607-ITAT-2019(Bang)-TP] - MP No. 259 & 260/Bang/2017(in IT(TP)A No. 1095 & 1274/Bang/2012) dated 21.06.2019

632. The Tribunal dismissed Revenue's miscellaneous petition against the co-ordiante bench order rejecting Revenue's approach of determining ALP of License fee and Management services as Nil. It rejected Revenue's contention that the co-ordinate benchhad erred in not considering coordinate bench ruling in Volvo India Pvt Ltd wherein Nil-ALP for management fees was upheld as service rendition was unsubstantiated. The Tribunal noted that (i) co-ordinate bench had followed the decision in assessee's own case for an earlier year and (ii) it had also considered the decision of Volvo India Pvt Ltd.
Adcock Ingram Limited [TS-606-ITAT-2019(Bang)-TP] -M.P. No. 26/Bang/2019(in IT(TP)A No. 125/Bang/2017)dated 21.06.2019

633. The Tribunal dismissed assessee's miscellaneous petition (MP) seeking recall of the ex-parte Tribunal order (dated 22.11.2016) and cited delay in filing and lack of reasonable cause under

Rule 24 of ITAT Rules, 1963. The Tribunal noted that there was delay of 497 days in filing the petition and held it to be time-barred as per Sec. 254(2) and inadmissible. It further distinguished the decisions relied on by assessee on facts and relied on Karnataka HC decision in Muninaga Reddy wherein it was held that the Tribunal could not go beyond the provisions of Sec. 254(2) and condone the delay in filing of MP of more than six months from the end of the month in which the Tribunal's order was passed. Further, it also stated that even if the MP was filed in time, it was liable to be dismissed as lacking merits as in the petition, assessee had given no reason for non-appearance of the assessee or his representative on the appointed date of hearing to argue the appeal.

M/s. Karutari Global Ltd vs DCIT-TS-60-ITAT-2019(Bang)-TP-MP No 325/Bang/2018 dated 25.01.2019

634. The Tribunal remitted TP-issue back to DRP for fresh adjudication and observed that DRP, without specifically dealing with the inclusion / exclusion of the comparables in Software Development Services (IT) and ITeS segments, had passed a common order and had merely followed TPO's decision. DRP did not discuss assessee's contentions with regard to non-availability of segmental details, presence of intangibles, failure to satisfy filters adopted by TPO etc. Thus, the Tribunal restored the entire disputed issue to file of the DRP to consider the assessee's submissions and adjudicate afresh and pass a reasoned and speaking order.

M/s. Commscope Connectivity India Pvt Ltd vs DCIT-TS-331-ITAT-2019(Bang)-TP-IT(TP)A No 644/Bang/2016 dated 31.01.2019

635. The Tribunal allowed Revenue's miscellaneous petition against Tribunal order for assessee providing software development and marketing support service. The Tribunal recalled the earlier Tribunal order for limited purpose of adjudicating the inclusion / exclusion of 6 comparables viz. KALS Information Systems Ltd, ICRA Techno Analytics Ltd, Persistent Systems Ltd, Infosys Ltd, Sasken communication Technologies Ltd and Persistent Systems & Solutions Ltd which were not adjudicated upon in the original order and thus directed the registry to post the appeals for hearing in the normal course.

DCIT vs M/s. Autodesk India Pvt Ltd-TS-295-ITAT-2019(Bang)-TP-MP No 359/Bang/2018 dated 14.01.2019

636. The Tribunal allowed assessee's miscellaneous petition seeking rectification of Tribunal's order citing non-consideration of ground relating to treatment of foreign exchange gain as part of the operating profit while benchmarking provision of software development services. The Tribunal considered assessee's reliance on Delhi High court's ruling in Ameriprice India Pvt. Ltd and S.T. Ericsson India Pvt. Ltd wherein foreign exchange gain/ loss resulting from trading items was to be considered as part of the operating profit/loss. Thus, the Tribunal opined that there was an error apparent on the face of the record and directed AO to treat the foreign exchange gain as part of the operating profit and compute the PLI of the assessee accordingly.

M/s. Evolving Systems Network India Pvt Ltd vs ITO- TS-313-ITAT-2019(Bang)-TP-MP No 10/Bang/2019 dated 22.02.2019

637. The Tribunal set aside CIT(A)'s order including 5 comparables (Accentia Technologies Ltd, Accentia Technologies Ltd, E-clerx Services Ltd, ICRA Online Ltd. (Segment) and Infosys BPO

Ltd) and restored the matter back to AO/TPO for fresh adjudication. The Tribunal noted assessee's submission that though no specific grounds for exclusion of these comparables were made before CIT(A), however it did make arguments before it and therefore CIT(A) should have decided this issue. Further, the Tribunal observed that assessee did make submissions for the above comparables in response to TPO's show cause notice through its letter dated 17.01.2014 but due to assessee's clerical mistakes (mentioning wrong TPO details), it did not reach the TPO. Thus, in the interest of justice, the Tribunal opined that the matter should go back to the file of TPO for fresh decision after considering the written submissions filed by the assessee on 17.01.2014 or any further submissions which the assessee may make in course of set aside proceedings and clarified that sufficient opportunities of hearing should be provided by the TPO to assessee.

M/s. IHS Global Private Ltd vs DCIT-TS-94-ITAT-2019(Bang)-TP-ITA No 1921/Bang/2018 dated 15.02.2019

638. The Tribunal allowed assessee's miscellaneous application and recalled Tribunal order for limited purpose of deciding assessee's claim for exclusion of ICRA Online Ltd as comparable. The Tribunal considered assessee's submission that while it had contested 7 comparables before Tribunal (inclusion of 2 comparables and exclusion of 5 comparables), Tribunal had ruled on comparability of 6 comparables but inadvertently not decided on exclusion of ICRA Online Ltd. Thus, the Tribunal opined that this was an apparent mistake in the impugned Tribunal order which should be rectified and accordingly, recalled its order for the limited purpose of adjudicating comparability of ICRA Online Ltd.

M/s. Sitel Operating Corporation India Ltd vs ITO-TS-98-ITAT-2019(Bang)-TP-MPNo 300/Bang/2018 dated 08.02.2019

639. The Tribunal dismissed assessee's second miscellaneous petition (MP) against Tribunal order on TP-issues as time barred being filed with a delay of 362 days. The Tribunal noted that assessee's first MP [filed within prescribed time] was dismissed by Tribunal on the ground that submissions made before it was never put forth before the lower authorities. However, subsequently, High Court [without considering Tribunal's dismissal of first MP as it was not brought to its notice] considered assessee's contention and directed assessee to approach Tribunal for seeking correction by way of a miscellaneous petition.

However, due to absence of any specific direction from High Court regarding condonation of the delay in filing the MP, the Tribunal held that M.P was not admissible.

The Tribunal further clarified that since Hon'ble High Court had directed to consider the M. P. in accordance with law, the law with regard to limitation was also to be considered.Thus, relying on Karnataka HC ruling in Sri Muninaga Reddy, the Tribunal concluded that it could not entertain a M.P. of the assessee filed beyond the time limit permitted u/s 254(2) of IT Act unless specific condonation of delay was granted by Hon'ble Karnataka High Court. Thus, it dismissed assessee's second MP and granted liberty to assessee to seek revival of order of MP if assessee obtained clarification from HC on condonation of delay in filing second MP as well as fate of the first MP.

M/s. Curam Software International P Ltd vs ITO- TS-274-ITAT-2019(Bang)-TP- MP No 387/Bang/2018 dated 22.02.2019

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640. The Tribunal allowed assessee's miscellaneous petition, and recalled Tribunal order dismissing assessee's appeal and noted that Tribunal dismissed assessee's appeal seeking inclusion/exclusion of comparables on account of assessee's failure to file revised Form no. 36B consequent to amalgamation of assessee with Airbus Group India Pvt. Ltd. The Tribunal observed that the assessee did file a copy of Form No.36B in which following description was given, M/s.EADS India Private Limited (now Known as Airbus Group India Private Limited). Thus, the Tribunal opined that since the description of the appellant takes note of the fact of amalgamation and was in the name of the amalgamated company, the order of the Tribunal dismissing this appeal on the ground that the name of the amalgamated entity was not mentioned in Form No.36B was erroneous. Further, the Tribunal recalled its order and directed Registry to fix this appeal for hearing in due course after notice to the parties.
M/s EADS India P Ltd (now known as Airbus Group India P Ltd) vs DCIT- TS-314-ITAT-2019(Bang)-TP- MP No 297/Bang/2017 dated 08.02.2019

641. The Tribunal dismissed assessee's miscellaneous-petitions against Tribunal's orders dismissing assessee's appeal as TP-issues were pending before MAP proceedings. Before the Tribunal the assessee submitted that in case the issues which were covered by MAP were not resolved, then assessee will not have any grouse to agitate such issues before the Tribunal. Noting that the Tribunal had already granted the liberty to revive the appeals in case of its grievance remaining unresolved after MAP proceedings, the Tribunal stated that the order passed by the Tribunal was clear and categorical in so much so the liberty was granted by the Tribunal to both assessee as well as the Revenue to seek revival of the appeals, in case the grievances were not resolved through the MAP mechanism. Thus, the Tribunal concluded that in both the circumstances, the assessee / Revenue could approach the Tribunal for revival of the appeals, hence in view of the above, it did not find any error in the order passed by the Tribunal.
M/s. Molex India Ltd vs DCIT-TS-116-ITAT-2019(Bang)-TP-MP No 133 to 137/Bang/2018 dated 06.02.2019

642. The Tribunal allowed Revenue's Miscellaneous Petition and recalled Tribunal's order excluding comparables failing Rs.200cr turnover filter and considered Revenue's submission that TPO had passed a rectification order correcting the turnover filter as sales above Rs.1 Cr. Only instead of the sales above Rs.1 Cr. and less than Rs.200 Crs. Considering the fact that rectification order passed by the TPO was available with the assessee and yet was not brought to Tribunal's attention when the original hearing took place, the Tribunal stated that the order of the Tribunal was erroneous in so far as the order had been passed based on the erroneous facts. Thus, the Tribunal pointed out that whether this change would affect the findings of the Tribunal could be decided only on hearing of the appeal in detail, thus the Tribunal recalled its order & restored the appeal back to Tribunal and directed the Registry to post the appeal of the Revenue in the regular course for hearing.
ACIT vs M/s. Socomec Innovative Power Solutions P Ltd-TS-286-ITAT-2019(Chny)-TP-MP No 243/Chny/2018 dated 05.04.2019

643. The Tribunal remanded the issue of comparables selection back to CIT(A) for assesse (engaged in the business of rendering software development support services to AE) noting that CIT(A)

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had simply endorsed TPO's view without expressing his independent views on selection of comparables or dealing with assessee's objections.

Trimble Information Technologies India Private Limited [TS-537-ITAT-2019(CHNY)-TP] - I.T (TP) No.16/CHNY/2018 dated 06/06/2019

644. The Tribunal granted stay of outstanding demand to Young Buhmwoo India for a period of 6 months for AY 2012-13; noting that in the first round of proceedings, Tribunal had restored matter to DRP to conduct enquiries on its own, determine the amount of ALP in respect of assessee's international transaction of importing raw materials and semi-finished goods and issue necessary directions to the AO/TPO to make the adjustments. However, in set aside proceedings, DRP observed that Tribunal had no provision under the Act to directly set aside the assessment order back to the DRP. The Tribunal opined that technically, Tribunal had to remit the matter back to the file of the Assessing Officer with further direction to refer the matter to the TPO and DRP as per the provisions of law. However, even a wrong order of this Tribunal is binding on the authorities below and it is always open to the authorities below including DRP to take up the matter before the higher forum in a manner known to law (by way of a miscellaneous petition etc.). Thus, having failed to avail any of the remedies available under the Income-Tax Act, it would not be proper for the DRP to observe that there is no provision under the Income-Tax Act that the Tribunal can directly set aside the assessment order to the file of the DRP.

Young Buhmwoo India Co Pvt. Ltd vs. DCIT [TS-175-ITAT-2019(CHNY)-TP] ITA No.28/ Chny /2019 dated 15.03.2019

645. The Tribunal allowed assessee's appeal for statistical purposes and directed CIT(A) to give one more opportunity of being heard to the assessee and decide the issues afresh in accordance with law. It noted that CIT(A), vide an ex-parte order had confirmed AO's final assessment order incorporating TPO's TP adjustment of Rs 1.82 crores with regard to Management service fee and Rs 49.70 lakhs in respect of import of finished goods from AEs. It observed that on account of death of his father, the counsel representing assessee could not appear before the CIT(A) between 29.11.2018 to 20.12.2018. In order to meet the ends of natural justice, the Tribunal directed CIT(A) to give one more opportunity of being heard to the assessee and decide the issues afresh in accordance with law within six months period. It further clarified that if the ld. Counsel /assessee do not cooperate with the Department, then, the appellate order passed by the ld. CIT(A) would prevail.

Globus Medical India Pvt Ltd. v. ITO, Chennai, Corporate Ward (2(3), [TS-462-ITAT-2019(CHNY)-TP], I.T.(TP)A. No. 34/Chny/2019, dated May 22, 2019

646. The Tribunal dismissed assessee's appeal against the order of DRP in limine as un-admitted for AY 2013-14. It noted that at the time of filing of the appeal by hand, assessee was intimated with the three defects in the appeal viz., the appeal was time barred by 181 days, draft assessment order u/s.144C and assessment order u/s.143(3) were not filed in duplicate. Also, the assessee remained unrepresented on multiple occasions of the appeal being posted and the said defects were not cured. Further, it observed that the assessee had filed the appeal against the order of the DRP and in the letter filed by the assessee he claimed that there was no delay in filing of the appeal as DRP order was received only by mail on 26.06.2018.Thus,

the assessee's appeal was not maintainable as an order passed u/s.144C(5) by the DRP is not an appealable order before the Tribunal, the appealable order is the order passed by the AO u/s.143(3) pursuant to the directions of the DRP i.e. the Assessment Order passed on 19.10.2017.

Gnutti Carlo India Pvt Ltd. DCIT, Corporate Cir. 2(1) Chennai, [TS-396-ITAT-2019(CHNY)-TP], IT (TP) A No.26/Chny/2018, dated May 06, 2019

647. The Tribunal considered the additional evidence under Rule 29 - audited segmental data filed by assessee which was not available during the assessment proceedings. Thus, It remitted back TP-adjustment made on account of provision of coordination and other support services holding that TPO must examine the same and decide the issue afresh after giving a reasonable opportunity of being heard to the assessee.

MSD Pharmaceuticals Pvt Ltd vs. Addl.CIT [TS-163-ITAT-2019(DEL)-TP] ITA No.7569/DEL/2018 dated 07.03.2019

648. The Tribunal remitted all TP issues viz. comparability, working capital adjustment and risk adjustmentback to CIT(A), noting that the CIT(A) had passed a non-speaking order without properly considering assessee's objections/submissions and the Revenue accepted that the issues needed re-examination.

Comverse Network Systems India Pvt Ltd [TS-588-ITAT-2019(DEL)-TP] - IT (TP)A NO. 3463/DEL/2013 dated 19.06.2019

649. The Tribunal dismissed assessee's appeals against CIT(A)-order on TP-adjustment and noted that assessee filed an appeal before the Tribunal and simultaneously requested AO to give effect to CIT(A)'s order.The Tribunal observed that while giving effect to CIT(A)'s direction of excluding certain comparables and allowing the risk adjustment, TPO determined TP-adjustment at Nil for both the AYs. The Tribunal held that the assessee was not having any grievance against the order of the Ld. CIT(A), thus dismissed assessee's appeal as infructuous

M/s. UTStarcom India Telecom Pvt Ltd vs DCIT-TS-372-ITAT-2019(Del)-TP-ITA No 1016,1017/Del/2016 dated 04.04.2019

650. The Tribunal set aside CIT(A)'s order and restored assessee's appeal to CIT(A) for decision after providing reasonable opportunity to assessee for AY 2014-15. It noted that assessee filed appeal to CIT(A)-2 Jaipur, which was subsequently transferred to CIT(A), Ajmer and that assessee became aware of the same only post receipt of order passed ex-parte. It noted that assessee had inter alia challenged addition made by AO/TPO on account of ALP in respect of international transaction in the value of Specified Domestic transaction entered into by the assessee. Though it acknowledged that Revenue's plea that appeals are transferred among CIT(A)s for redistribution of work load as a 'welcome step', it observed that it was essential that the assessee be informed about such jurisdiction changes in a timely manner to make it more efficient and effective.

Sh. Vikas Agarwal vs. ITO [TS-238-ITAT-2019(JPR)-TP] ITA No. 140/JP/2019 Dated 29.03.2019

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651. The Assessee raised an additional ground before the Tribunal challenging validity of order passed u/s 92CA(3). The Tribunal noted that assessee had raised this issue for the first time before the Tribunal and accordingly stated that though, the issue raised in the additional ground was a purely jurisdictional issue going to the root of the matter, hence, required to be admitted. However, following co-ordinate bench ruling in previous AY wherein similar issue was restored while deciding additional grounds, the Tribunal restored the issue to the Assessing Officer to decide the same after considering assessee's submissions

Tata Motors Ltd vs DCIT-TS-357-ITAT-2019(Mum)-TP-ITA No 5600/Mum/2011 dated 25.04.2019

652. The Tribunal dimissedassessee's appeal against determination of ALP of Head Office General & Administrative expenses (eligible to be claimed u/s 44C) at Nil noting that though TPO had determined ALP at Nil, ultimately there was no financial implication on the issue as assessee had not claimed such expenditure as deduction either in the Profit & Loss account or computation of income and accordingly there was no TP-addition. However, it held that the merit of the issue i.e. competency of TPO to determine ALP at Nil was an important legal issue and could be adjudicated for any other years, if it arose.

Niko (NICO) Limited [TS-578-ITAT-2019(Mum)-TP] - ITA no.7452/Mum./2017dated 19.06.2019

653. The Tribunal allowed assessee's miscellaneous petition and modified its original order by removing observations made in the original order with respect to the issue of inclusion of payout income and debiting of payout cost while computing PLI of certain comparables. It accepted assesee's submission that the said issue was not argued either by the assessee or Revenue (on the ground that if the preliminary issue was decided, then margins shown would be within +/- 5% range of mean margins of comparables) and thus an error had crept in the order.

Capstone Securities Analysis Pvt Ltd [TS-603-ITAT-2019(PUN)-TP] - MA No.21/PUN/2019Arising out of ITA No.90/PUN/2016 dated 21.06.2019

654. The Tribunal dismissed assessee's appeal challenging CIT(A)'s-order which had confirmed TPO's determination of ALP under TNMM at cost plus 20.39% as against assessee's cost plus 12%. The Tribunal had fixed hearing on 22-01-2019 and later on 02-04-2019, for which notices were served on assessee, however, it was observed that during the course of the hearing, none appeared on assessee's behalf & no application seeking adjournment was filed. Further, the Tribunal noted that the notice sent through Registered Post had been returned by the postal authorities with the remarks "Company left without address. Thus, the Tribunal opined that it prima facie appeared that the assessee was not interested in prosecution of the appeal.On merits,the Tribunal stated that having gone through the impugned order vis-a -vis the assessment order and the TPO's order, they were satisfied that the addition sustained in the first appeal was in order and did not require any further interference. Thus, it upheld the CIT(A)'s order.

M/s. Oceans Connect Pvt Ltd vs DCIT-TS-236-ITAT-2019(PUN)-TP-ITA NO 162/PUN/2017 dated 03.04.2019

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APA / MAP

655. The Court dismissed Revenue's appeal against Tribunal order determining ALP of non-US based AE transactions on the basis of determination contained in MAP in relation to its US-based AE-transactions observing that there was no distinction between the two. It opined that Prima facie, in absence of any other material on record, it would be doubtful whether the final culmination of the MAP can be projected in the determination of the Arm's Length Price in the mechanism envisaged under the Act, that too, without any other adjustment or consideration. However, it noted that in APA for a subsequent year in case of assessee, CBDT has itself accepted that the consideration for US-based transactions in such MAP would also apply to the non-US based transactions. It rejected Revenue's argument Tribunal could not mechanically accept the conclusions of the MAP in relation to the other similar transactions which were not subject to such procedure. It further rejected Revenue's argument that this was the situation for the later assessment year and cannot be accepted for the present assessment year, concluded that "MAP had been drawn after the consideration of relevant aspects giving rise to transfer pricing adjustment and the CBDT in the later year agreed that such transfer pricing consideration in relation to US based transactions can be safely adopted for the purpose of the assessee's non-US based transactions…therefore, it was wholly inappropriate to allow the revenue to argue to the contrary.

J.P. Morgan Services India Pvt Ltd vs. Pr.CIT [TS-228-HC-2019(BOM)-TP] ITA NO.4, 170 of 2017 Dated 25.03.2019

656. The Court disposed assessee's appeal and writ petition considering the TP-dispute settlement under MAP in respect of royalty paid by assessee for AY 2011-12. It noted assessee's submission of the letter dated 2nd May 2019 received from the office of DCIT in regard to the settlement reached between the assessee and the Department under the Mutual Agreement Procedure (MAP) between the Competent Authority (CA) of India and CA of UK under Article 27 of the India – UK DTAA, dealing with the issue of royalty paid by the assessee during the year in question. Hence, court disposed of assessee's appeal and writ observing that Tribunal's order did not survive on account of the settlement reached under MAP between the Assessee and Revenue.

JCB INDIA LTD. v. DCIT, Cir. 13(1), New Delhi, [TS-442-HC-2019(DEL)-TP], ITA 525/2017, dated May 17, 2019

657. The Tribunal dismissed TP-issues w.r.t. software development & ITeS transactions with Australian AEs for AYs 2007-08 & 2008-09 in view of resolution under MAP. Further, w.r.t. transactions with non-Australian AEs (not covered under MAP), it directed that same rate should be adopted for the transactions as has been agreed with Australian AEs in subject AYs. It followed co-ordinate bench ruling in assessee's own case for AY 2009-10 wherein similar grounds w.r.t. TP Issues in respect of transactions with Australian-AEs were dismissed in view of MAP resolution & in case of non-Australian AE transactions, TPO was directed to adopt same percentage of profit as was agreed under MAP.

DCIT Cir. 11(1), Bengalore v. ANZ Operations & Technology Pvt Ltd [TS-412-ITAT-

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2019(Bang)-TP], IT(TP)A No.432/Bang/2012, IT(TP)A No. 403/Bang/2012, IT(TP)A No. 483/Bang/2013, C.O. No. 130/Bang/2015 (in IT(TP)A No. 483/Bang/2013), dated May 8, 2019

658. The Tribunal remitted the issue of ALP determination of management service charges paid to the AE by assessee for AY 2005-06, noting that (i) the co-ordiante bench had remanded identical issue for AY 2006-0 to the TPO for making adjustment in consonance with the MAP resolution (ii) since roll back scheme of MAP proceedings did not cover the year under consideration, assessee could not file MAP application for AY 2005-06 and (iii) since the authorities did not have the benefit of the resolution, assesseerequested for a remand back to the file of the TPO for fresh examination in the light of the decision under the MAP process
Flowserve India Controls Pvt Ltd [TS-561-ITAT-2019(Bang)-TP] - IT(TP)A No.1218/Bang/2016dated 14.06.2019

659. The Tribunal allowed assessee to withdraw appeal on TP issues in light of resolution under Bilateral APA (BAPA) for AY 2012-13 and considered assessee's submission that it had entered into a BAPA with CBDT on August 31, 2018, which was applicable to five consecutive years commencing from Previous Year 2015-16 to Previous Year 2019-20 (relevant to AYs 2016-17 to 2020-21) and four rollback years commencing from Previous Year 2011-12 to Previous Year 2014-15 (relevant to AYs 2012-13 to 2015-16). The Tribunal held that the issues involved in this appeal were covered under the BAPA and thus dismissed assessee's appeal as not pressed.
M/s. ANZ Support Services India Pvt Ltd vs DCIT-TS-37-ITAT-2019(Bang)-TP-IT(TP)A No 1831/Bang/2016 dated 28.01.2019

660. The Tribunal accepted assessee's plea to apply same margin approved in MAP for transactions with USA/Canada AEs on remaining 16% of transactions with AEs in UK/Australia and relied on JP Morgan Services & CGI Information System and Management Consultants rulings wherein it was held that whatever margin had been applied through MAP with respect to major international transactions, the same should be applied for the remaining transactions. Thus, the Tribunal concluded that ground of appeal of the assessee was allowed.
M/s. Textron India Pvt Ltd vs DCIT-TS-27-ITAT-2019(Bang)-TP-IT(TP) A No 5/Bang/2014 dated 25.01.2019

661. The Tribunal dismissed assessee's appeal w.r.t TP issues viz. inclusion/exclusion of comparables and disallowing working capital adjustment under unilateral APA and considered assessee's letter (dated 13.12.2018) submitted for withdrawal of TP-grounds in light of unilateral APA entered into with CBDT on October 31, 2018.The Tribunal considered assessee's submission that Rule 10RA(4) of the IT Rules required the appeal, to be withdrawn prior to furnishing the mandatory modified return to give effect to rollback provision. Accordingly, the Tribunal held that in view of the assessee's aforesaid letter dated 13.12.2018 withdrawing its appeal, the assessee's appeal was dismissed as withdrawn.
M/s. Sony India Software Centre Pvt Ltd vs DCIT-TS-261-ITAT-2019(Bang)-TP-IT(TP)A No 1745/Bang/2017 dated 23.01.2019

662. The Tribunal in case of an assessee engaged in the business of BPO services held that net profit margin rate agreed upon under MAP in respect of AEs situated in USA and UK should be

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applied for transaction with AEs from other countries and directed an adoption of net margin @ 15.04%. The Tribunal set aside orders of lower authorities noting that there was no material on record to hold that the net margin rate for the non-UK and USA countries should be different from the net margin rate in respect of transactions with USA and UK and noted that the nature of transaction with AEs situated in US and UK were same as the transaction with AEs situated in other countries and TPO had adopted same margin for both segments.

IBM Daksh Business Process Services P Ltd vs DCIT-TS-291-ITAT-2019(DEL)-TP-ITA No 6471/Del/2012 dated 06.02.2019

663. The Tribunal allowed the assessee to withdraw its appeals for AYs 2010-11 and 2011-12 in view of resolution under mutual agreement procedure (MAP) in relation to ALP of royalty paid by assessee to its AE and set aside the appeals for AYs 2009-10 and 2013-14 to file of TPO to determine ALP of international transaction. It considered assessee's submission that Revenue had entered into settlement with assessee under MAP between the Competent Authorities of India and UK under Article 27 of India UK Double Taxation Avoidance Agreement wherein it was agreed that assessee was allowed to withdraw appeals for years under consideration in respect of transaction that stood fully covered by MAP resolution. For AYs 2009-10 & 2013-14, it noted that assessee had transaction with non-UK based AE (Germany), for which there was no MAP resolution thus, relying on Bombay HC ruling in JP Morgan Services India Pvt.Ltd. **T**he Tribunal opined that MAP was drawn with UK authorities only after considering relevant aspects giving rise to transfer pricing adjustment to determine the arm's length price, hence same parameters cannot be applied to determine the arm's length price of transaction with non-UK based AE. Thus, the Tribunal directed the TPO to determine ALP of international transaction entered into by assessee with AE in Germany as per law.

JCB India Ltd. v. ACID Cir. 13(2), New Delhi, [TS-503-ITAT-2019(DEL)-TP], ITA No. 7199/Del/2017, 8311/Del/2018, 1546/Del/2016, 7200/Del/2017, May 29, 2019

664. The Tribunal held that net profit margin rate agreed under MAP in respect of USA and UK business should be applied for business transaction of non-US/UK countries for assessee engaged in the business of BPO services. The Tribunal noted that assessee entered into a MAP with the Department whereby net margin in respect of turnover with USA and UK was agreed upon at 14.99% for AY 2010-11 & 15.01% for AY 2011-12 and further noted that it was not in dispute that the nature of transaction which was entered into with associated enterprises situated in US and UK were same as associated enterprises situated in non-US and UK countries. The Tribunal observed that TPO also applied the same net profit margin rate for turnover of non-US/UK countries as was applied for US/UK countries, thus the Tribunal concluded that they did not find any good reason why the margin rate agreed upon under MAP in respect of USA and UK business could not be applied for business transaction of other countries also and thus directed the AO to adopt net margin @ 14.99% for AY 2010-11 & 15.01% for AY 2011-12.

M/s. Concentrix Daksh Services India Pvt Ltd vs DCIT-TS-97-ITAT-2019(Del)-TP-ITA No 2096/Del/2015 dated 04.02.2019

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665. The Tribunal dismissed assessee's appeal against the adjustment made with respect to royalty payment and management services availed by asessee from AE, noting that the said issue had been resolved under an APA entered into between the assesse and the department.
GIA India Laboratory Pvt Ltd [TS-590-ITAT-2019(Mum)-TP] - I.T.A. (TP) No.2296/Mum/2017 dated 07.06.2019

666. The Tribunal remitted the issue of determination of ALP of management and administrative cost allocation transaction for AY 2009-10 to verify if the APA entered into by the assessee with the CBDT for AY 2008-09 could be applied to the facts of the present year.
Honeywell Turbo Technologies (India) Pvt Ltd (Legal Successor of Honeywell Turbo (India) Pvt. Ltd.) [TS-670-ITAT-2019(PUN)-TP] - ITA No.377& 378/PUN/2014 dated 24.06.2019

Assessment / Reassessment / Revision / Rectification

667. The Apex Court issued notice pursuant to Revenue's SLP against HC-order upholding Tribunal's quashing of assessment framed in the name of non-existent amalgamating company. The Erstwhile entity viz. Suzuki Powertrain India Ltd. amalgamated with Maruti Suzuki India Ltd w.e.f. April 1, 2012 pursuant to approval by Delhi HC vide order dated January 29, 2013, however AO passed assessment order in the name of erstwhile entity. The High Court , following its order in assessee's case for AY 2011-12 had upheld Tribunal's view that the assessment made, in the name of Suzuki Power Train India Limited, was a nullity since the entity was no longer in existence and was subjected to an approved scheme for amalgamation with Maruti Suzuki India. The Apex Court noted that Revenue's SLP in Maruti Suzuki India's own case for AY 2011-12 was dismissed in view of SC ruling in the case of Spice Enfotainment wherein it was held that assessment order made in the name of non-existence entity is void. However, the Apex Court considered Revenue's reliance on Sky Light Hospitality HC ruling (assessee's SLP subsequently dismissed by SC) wherein it was observed that wrong name given in the re-assessment notice was merely a clerical error which could be corrected u/s 292B. Observing that in the present case, the draft & final assessment order made clear reference to the fact that Suzuki Powertrain India Ltd. amalgamated with Maruti Suzuki India Ltd and there was no prejudice to assessee since it was evident to it at all times that the assessment was with respect to the erstwhile business of Suzuki Powertrain India Ltd. The Apex Court directed issue of notice
Pr. CIT vs Maruti Suzuki India Ltd- TS-157-SC-2019-TP-SLP(Civil) No 42732/2018 dated 04.02.2019

668. The Court held that TPO has no jurisdiction to determine ALP of specified domestic transaction (SDT) not reported to him by AO u/s 92CA(1). In the present case, TPO proposed TP-adjustment of Rs.26.55cr towards payment of subscription fees for distribution services (which was reported in Form 3CEB) and TP-adjustment of Rs.57.54cr towards SDT of payment to creditors in demerger process (which was not reported in Form 3CEB, not reported by AO but came to notice of TPO during his assessment). Deeming fiction under sections Sec 92CA(2A)

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[inserted by Finance Act 2011 w.e.f. 1.6.2011] & Sec 92CA(2B) [inserted by Finance Act, 2012 w.r.e.f. 1.6.2002] were introduced by the legislature to expand scope of TPO to examine an 'international transaction' which had either not been reported by AO u/s 92CA(1) or which assessee had omitted to report as required u/s 92E; Thus, the common feature of both these sub-sections is that they take within the sweep only an international transaction. Conspicuous by absence is the reference to any specified domestic transaction. It noted that the legislature, while making amendments in various provisions contained in Chapter X, covering cases of SDT in TP mechanism, did not make any such corresponding changes in Secs 92CA(2A)/(2B), The Court therefore, presumed that the legislature consciously decided not to include a reference to a specified domestic transaction under sub-section (2A) and (2B) of Section 92CA. It further stressed that reference to be made by AO is not an empty formality and legislature requires AO to obtain approval from Pr.CIT/CIT (a senior Revenue Authority) before a reference is made, thus such requirement cannot be jettisoned by the TPO exercising suo motu jurisdiction over the transaction not reported to him and TPO exercising such powers suo motu would be transgressing his jurisdiction and in the process would render the requirement of sub-section (1) of Section 92CA redundant. Also not making a report by the assessee of a SDT would not leave the Revenue without remedy as it is always open for the TPO who notices such transaction during the course of the proceedings before him to call for a reference by the Assessing Officer. Accordingly, the Court concluded that TPO had no jurisdiction to examine transaction of payment to creditors in demerger process and quashed TP-adjustment of Rs.57.54cr. However, it upheld TPO's jurisdiction in relation to TP-adjustment towards subscription fees payment and declined to entertain writ on this ground by opining that even though the petitioner may have certain arguable points, that by itself, would not enable it to bypass the entire statutory scheme of assessment, appeal and revision.

Times Global Broadcasting Company Ltd vs. Union of India & Ors. [TS-178-HC-2019(BOM)-TP] Writ Petition No. 3386 OF 2018Dated 15.03.2019

669. The Court dismissed Revenue's appeal and upheld Tribunal order quashing reassessment proceedings u/s 147/143 (3) for AY 2006-07. The AO had reopened the assessment to disallow advertisement expenses incurred by assessee on behalf of Yamaha Motor Company, Japan (AE). It noted that Tribunal had quashed the reassessment proceedings stating that no new tangible material evidence was brought on record by AO which prompted reopening of completed assessment. It observed that AO had passed the order after issuing a notice to the assessee during original assessment proceedings and raising specific queries on advertisement and sales promotion expenses as well as international transactions to which assessee gave specific replies with evidence. The materials sought to be relied upon by the AO for re-opening the assessment were already available with the AO, thus allowing proceedings under Section 147 of the Act would amount to mere change of opinion by the AO.

Pr. CIT-9, New Delhi v. Yamaha Motor India Sales Pvt Ltd.,[TS-432-HC-2019(DEL)-TP], ITA No.472/2019, dated May 10, 2019

670. While considering assessee's objections for AY 2011-12, the DRP had observed that for earlier AY 2009-10, the DRP had rejected assessee's claim for under-utilization of the asset due to lack of turnover on the ground that the assessee had not furnished the break-up details of the employee cost. Noting that the assessee had provided the relevant details regarding employee

cost for subject AY, the DRP directed the TPO to decide the percentage of adjustment after considering the relevant facts. The final order passed by the AO following the DRP's direction resulted in reduction in adjustment as against draft order. Accordingly, the Revenue filed an appeal before the Tribunal against the final assessment order. The Tribunal held that (i) DRP had no power or authority u/s 144C to direct the AO/TPO to make further enquiries and decide the percentage of adjustment to be calculated and (ii) the DRP at best could have called for remand report from AO/TPO and decide the issue itself by adjudicating the matter. Thus, the Tribunal directed the DRP to decide the issue afresh. On assessee's appeal, the Court noted that the Revenue was in appeal before the Tribunal against the final assessment order passed u/s 144C(13) r.w.s 143(3) and it did not question DRP's jurisdiction. Thus, it held that the Tribunal should have considered the correctness of the final assessment order instead of holding that DRP had exceeded its jurisdiction. Accordingly, it set aside the Tribunal's order and remanded the matter back to the Tribunal.

India Trimmings Pvt Ltd [TS-598-HC-2019(MAD)-TP] - Tax Case No.118 of 2018dated 10.06.2019

671. The High Court admitted Revenue's appeal challenging Tribunal's order in case of assessee and framed the substantial question of law as follows:

"Whether on the facts and in the circumstances of the case, the ITAT was justified in setting aside the order passed by the CIT under Section 263 of the Income Tax Act, 1961, while ignoring the fact that the assessment order passed by the Assessing Authority is in violation of the CBDT instructions issued regarding computation of Transfer Pricing?"

Pr. CIT vs Prakash Chopra-TS-22-HC-2019(Raj)-TP-ITA No 167/2018 dated 07.01.2019

672. The Tribunal upheld the rectification order passed by the AO u/s 154 (incorporating revised adjustment made by TPO) wherein TPO had initiated rectification proceedings after observing that certain mistakes had crept into his original order giving effect to DRP's directions. The Tribunal rejected assessee'scontention that the AO was required to share with the assessee the draft or proposed rectification order so as to enable the assessee to approachthe DRP, holding that once the DRP gives the directions in respect of a particular assessment, it is functus officio and one can not go back to the DRP for grievance against the proper effect not being given to the DRP directions. The Tribunal held that order passed in pursuance of DRP directions or rectification order with respect to the same can be appealed only before the Tribunal.

Talent Anywhere Services Pvt Ltd (formerly known as QSG Resources Management India Pvt Ltd) [TS-549-ITAT-2019(Ahd)-TP] - ITA No.: 3321/Ahd/15 dated 07/06/2019

673. The Tribunal remitted the assessee's ground challenging AO's reference to TPO for AY 2010-11.The value of international transactions was only Rs.8.36cr, thus assessee argued that TPO-reference for ascertainment of ALP was not required to be made as the value of international transactions did not exceed Rs.15 cr and that therefore, AO should have determined ALP on his own rather than refer the matter to TPO. The Tribunal noted that there were merits in assessee's plea in principle but no document was cited showing a threshold limit of Rs 15 crores being in force at the relevant point of time. Thus, matter was remitted to the file of the CIT(A) for adjudication on this short point by way of a speaking order.

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GMM Pfaudler Limited vs. Dy.CIT [TS-165-ITAT-2019(Ahd)-TP] ITA No.: 1370, 951/Ahd/2015 dated 04.03.2019

674. The Tribunal upheld CIT's revisionary proceedings u/s 263 to the extent of default in electronic filing of Form 3CEB as prescribed in IT Rules, 1962 for AY 2013-14. It noted that CIT inter alia had held that AO's order u/s 143(3) was erroneous and prejudicial to the interest of revenue because Form 3CEB was not filed in electronic mode by the assessee and as a result, assessee's case could not be referred to TPO to examine international transactions carried out with related parties. Rule 12(2) mandates that assessee shall furnish Form 3CEB electronically w.e.f. 01-04-2013, however, as assessee had filed Form 3CEB manually on September 30, 2013, it could not be said that assessee had not furnished a report u/s. 92E. But as the issue was not examined by AO and assessee also had not brought on record that why Form 3CEB was not filed electronically, CIT was justified in invoking the provision of section 263 holding that the order passed by the assessing officer as erroneous and prejudicial to the interest of revenue to the extent of non-filing of form 3CEB report.
Summit India Water Treatment & Services Ltd. v. The Pr. CIT, Circle-4, Ahm. [TS-556-ITAT- 2019(Ahd)-TP], ITA No. 1338/Ahd/2018, dated May 27, 2019

675. The Court allowed assessee's appeal against Tribunal order dismissing assessee's miscellaneous petition (MP) for AY 2008-09. The Tribunal had dismissed assessee's MP as defective noting that assessee had filed a single application for rectification of the order even though the original appeals were filed by both assessee and Revenue as cross appeals. The Tribunal held that the minimum requirement of law was that separate application was required to be filed in respect of each appeal. Therefore, before the Court, assessee sought liberty to file another MP as limitation for filing MP was 6 months and Tribunal did not have the power to condone delay and entertain the appeal. In these circumstances, the Court granted liberty to the appellant to file another miscellaneous petition within the period of three weeks and further directed Tribunal to take up the MP without going into the question of limitation.
IDS Software Solutions India Pvt. Ltd. v. DCIT, Circle 3(1)(1), Bengaluru, [TS-533-HC-2019(KAR)-TP], ITA No.58/2018, dated May 28, 2019

676. The Tribunal remanded the issue of adjustment on valuation of shares sold to AE back to DRP noting that though the assesse had made elaborate submissions, DRP had passed a cryptic and non-speaking order which was not clear on many aspects and also the objections were not fully adjudicated.
WevinPvt Ltd [TS-555-ITAT-2019(Bang)-TP]-IT(TP)A No.2710/ Bang/ 2017 dated 12/06/2019

677. The Tribunal quashed the order dated 24.03.2016 passed by AO u/s. 143(3) r.w.s 92CA holding it to be legally null as it was titled as draft assessment order and yet raised a demand and was accompanied by notice of demand u/s. 156 for assessee engaged in business of software development. The Tribunal held that the impugned order though titled as Draft Assessment Order was in form and substance, the regular/final order of assessment considering that in addition to taxable income, the tax payable thereon was determined in the order and demand notice u/s. 156 was issued along with the order (also uploaded on the Department's website)

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besides there was issue of penalty notice u/s. 271(1)(c) which ought not to be issued if the said order was a draft order of assessment. The Tribunal rejected Revenue's contention that the mention of "Draft assessment order" and the issuance of demand notice thereafter was a curable defect, and held that the subsequent order passed on 24.05.2016 was only a cover-up exercise, in a poor attempt, to convert a regular assessment order into a draft order of assessment. The Tribunal held that once a regular order of assessment dated 24.03.2016 for the AY passed, passing of one more order on 24.05.2016 was legally not tenable. Thus, the Tribunal held that the assessment order being directly issued in case of an "eligible assessee" without issue of draft assessment order and without following the procedure mandated in the Act, was invalid.

M/s. Inatech India Pvt Ltd vs ITO-TS-399-ITAT-2019(Bang)-TP-IT(TP)A No 214/Bang/2018 dated 30.04.2019

678. The Tribunal dismissed the appeal and rejected the assessee's contention that AO's order was time barred u/s 153 for AYs 2012-13 and 2013-14. It noted that though AO passed assessment order in terms of Sec.144C(13) within one month from the end of the month in which DRP's direction was received**,** but it was after the time limit time limit prescribed in Sec.153. The assessee contended that provisions of Sec.144C(13) did not extend the time limit prescribed in Sec.153 and accordingly, the assessment order was beyond time limit prescribed in Sec.153. The Tribunal relied on co-ordinate bench ruling in Volvo India P Ltd wherein it was held that the provisions of Sec.144C override Sec.153 and the Act did not contemplate any limitation for passing of draft assessment order, which can be passed within a reasonable time. The consistent view of various benches of Tribunal was that provisions of Sec. 144C(13) gave extension of a further period of one month from the end of the month in which DRP's direction was received even though such directions were received after time limit prescribed u/s 153. Thus the Tribunal rejected assessee's legal ground stating that there was no dispute that the assessing officer had passed the assessment order within one month from the end of the month in which direction of DRP was received.

Acer India Pvt Ltd. DCIT Cir. 1(1)(2), Bengaluru, [TS-416-ITAT-2019(Bang)-TP], IT(TP)A No.502/Bang/2017, dated May 10, 2019

679. The Tribunal admitted assessee's additional ground that AO's order was time barred and hence, liable to be quashed, noting it to be a purely legal issue which did not require any fresh investigation into facts. The Revenue contented that the assessment order was passed within the time limit provided u/s. 144C(13) (i.e., within one month from the end of the month in which DRP's direction was received) while assessee contented that if the non-obstante clause in sections 144C(4)/ 144C(13) is interpreted as allowing the AO additional time over and above the limit provided u/s. 153(1) third proviso, the same would defeat the entire purpose of expediting the dispute resolution process. The Tribunal rejected assessee's claim following coordinate bench decision in case of Honda Trading Corporation wherein it was held that the provisions of section 144C override the provisions of section 153 and the Act does not contemplate any limitation for passing of draft assessment order, which can be passed within a reasonable time. Hence, the assessment order passed within the time limit provided u/s. 144C(13) (i.e., within one month from the end of the month in which DRP's direction was received) even though after time limit provided in third proviso to 153(1) was legally valid.

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Volvo India Pvt Ltd., v. ACIT LTU, Bangalore [TS-391-ITAT-2019(Bang)-TP], IT(TP)A No.1537/Bang/2012, dated May 08, 2019

680. The Tribunal restored the TP-issue of comparables selection in assessee's software development & ITeS segments to the file of DRP and noted that assessee had objected to six comparables, however the DRP had only mentioned four comparables and instead of specifically deciding on assessee's ground with respect to each of the comparables it only decided the functional comparability of Infosys. Accordingly, the Tribunal held that DRP passed a cryptic, stereotyped, non-reasoned order showing total non-application of mind and further noted that they expected the DRP to give a reasoned and cogent finding while dealing with the contention of the assessee with respect to exclusion / inclusion of the comparables. As the order was silent on material aspects, the Tribunal therefore remanded the whole of the TP issue pertaining to inclusion / exclusion to the file of the DRP with a direction to pass a reasoned and speaking order.

Webex Communications India P Ltd vs JCIT-TS-287-ITAT-2019(Bang)-TP-IT(TP)A No 545/Bang/2015 dated 05.04.2019

681. The assessee had filed miscellaneous petition contending that certain grounds were omitted to be adjudicated by the Tribunal. The Tribunal dismissed miscellaneous petition filed by assessee contending that TPO-reference was invalid as it's basis was not communicated to the assessee and no opportunity of being heard was given before making such reference. It dismissed assessee's contention by relying upon Special Bench ruling in Aztec Software vs ACIT 107 ITD141(SB)(Bangalore) and upheld CIT(A)'s order that there was no provision in the Act that mandated giving of such opportunity to the assessee.

Engie Energy and Services India Pvt Ltd (formerly GDF Suez Energy India Pvt. Ltd.) vs. Asst. Comm. of IT [TS-268-ITAT-2019(Bang)-TP] ITA No.984/Bang/2010 dated 15.03.2019

682. The Tribunal ruled in assessee's favour, quashed draft assessment order passed by AO without meeting the mandatory requirements u/s 144C for AY 2014-15. It noted that along with passing a draft assessment order inter alia making adjustment on account of Specified Domestic Transaction, AO also issued demand notice and initiated penalty proceedings thus clearly indicating that the assessment, for all purposes, stood complete on the said date and it was in effect the final assessment order and therefore the mandate of Sec 144C (which required AO to forward draft assessment order to assessee) was not adhered to. It observed that once the special provisions set out in Sections 92 to 92F for computing Arms Length Pricing in relation to international transactions or specified transactions are resorted to, and once the Assessing Officer reaches a conclusion that there need to be variation to the returned income or loss, there can be no doubt that the mandate under Section 144C(1) of the Act has to be followed. Relying on Pune Tribunal's ruling in Eaton Fluid Power DCIT, (2018) 96 taxmann.com 512, it opined that lack of jurisdiction cannot be overcome by pleading acquiescence of the assessee to any subsequent proceedings. It also rejected Revenue's contention that not following the mandate u/s 144C is a curable mistake u/s 292B and held draft assessment order passed by AO to be a 'nullity'

Shri. Chandanmal Nagaraj vs. ACIT [TS-172-ITAT-2019(CHNY)-TP] ITA No.80/CHNY/2018. dated 13.03.2019

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683. The Tribunal remitted TP-issues back to the AO/TPO for determining the ALP in respect of the international transactions undertaken with its AE's and considered assessee's submission that due to floods in Chennai during the month of November and December, 2015, it could not place before AO/TPO the relevant documents demonstrating arm's length nature of the transactions under the manufacturing segment on transaction by transaction basis.The Tribunal also noted that DRP could not consider the additional evidence due to paucity of time, thus the Tribunal remitted the issues back to the AO/TPO to be decided afresh; and directed the assessee to place relevant materials before the A.O./TPO and comply to the requirements of A.O./TPO in accordance with law.

M/s. Valeo Lighting Systems India Pvt Ltd vs ACIT-TS-301-ITAT-2019(Chny)-TP-ITA No 1042/Chny/2017 dated 05.04.2019

684. The Tribunal ruled on validity of draft assessment order passed by AO absent any variation between returned income & assessed income in case of assessee a foreign company. Referring to Sec 144C, the Tribunal opined that it was clear that draft assessment order can be passed by Assessing Officer only in case he proposes variation to the returned income as it was a condition precedent. Further, the Tribunal observed that though assessee filed objections before DRP, he did not object to AO's jurisdiction to pass draft assessment order, the Tribunal also stated that assessee himself also contributed to the wrong course of action adopted by the Assessing Officer *and* also noted that DRP's mechanism was not adverse in nature but intended to provide a mechanism for speedy resolution of disputes and to ensure finality to litigation. The Tribunal stated that the provisions of s.144C did not go to route of the matter as no prejudice was caused to the assessee and in fact, the assessee also participated in the proceedings u/s. 144C of the Act. Therefore, mere passing of draft assessment order which was not required under law did not render the entire proceedings void. The Tribunal relied on Andhra Pradesh HC ruling in Rain Cements which was subsequently followed by Bangalore Tribunal in Himalayan Drug Co wherein it was held that the provisions of s. 144C of the Act did not go to root of jurisdiction and any irregularity can be cured by the appellate authority by remanding the matter back to the stage of irregularity. Accordingly, the Tribunal remitted the matter back to AO to pass assessment order under normal provisions of assessment prescribed under the Act and clarified that issues in the appeal were left open before the AO.

M/s. Ford Global Technologies LLC vs DCIT-TS-546-ITAT-2019(CHNY)-TP-ITA No 1492/Chny/2017 dated 26.04.2019

685. The Tribunal in second round of proceedings, admitted assessee's additional ground seeking to quash final assessment order passed by AO without passing a draft order for AYs 2008-09 & 2009-10. Relying on National Thermal Power Co Ltd vs CIT (229 ITR 383) (SC), it reiterated that Tribunal's power in dealing with appeals is wide and opined that Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner(Appeals) is too narrow a view to take of the powers of the Tribunal. In first round of proceedings, Tribunal had remitted TP-issues back to AO pursuant to which, AO had passed final assessment order directly without a draft order u/s 144C. Relying on various rulings, including Bombay HC rulings in JCB India & Andrew Telecommunications,

Madras HC ruling in Vijay Television etc., Tribunal concluded that when the final assessment order is passed without passing the draft assessment order, it is illegal and without jurisdiction.
Appollo Tyres vs. Asst. CIT [TS-251-ITAT-2019(COCH)-TP] I.T.A. Nos. 247,339,302,249, 268,336 Coch/2018, dated 21.03.2019

686. The Tribunal, in the second round of appeal, dismissed Revenue's appeal against exclusion of 3 comparables for assessee engaged in supply of power, oil & gas pumping systems, part and engines related thereto. The Tribunal noted that in first round of proceedings the TP matter was referred back to AO for fresh decision after giving an opportunity to the assessee, and that AO had passed a fresh order without giving an opportunity to the assessee and without passing draft order u/s 144C, further, the CIT(A) quashed the assessment order terming the non-passing of draft order as a 'non-curable defect.The Tribunal had noted assessee's contention that Revenue's appeal becomes infructuous in the absence of any valid assessment order and was hence, liable to be dismissed. Thus, the Tribunal concluded that since the assessment order itself had become null and void, then the emerging orders becomes void-ab-initio, thus, dismissed Revenue's appeal.
DCIT vs Rolls Royce India Pvt Ltd- TS-345-ITAT-2019(DEL)-TP- ITA No 6800/Del/2015 dated 04.02.2019

687. The Tribunal allowed assessee's additional ground of appeal and quashed assessment as the final assessment order was passed by AO u/s 144C(13) beyond one month from the date of receipt of DRP order for AY 2006-07. It admitted assessee's additional ground contending that assessment order was barred by limitation as it was purely legal ground and facts were already on records. DRP had passed the directions u/s 144C of the Act on 03.06.2010 which were received by the Assessing Officer on 17.06.2010 and the final assessment order u/s. 143 (3) was passed on 27.08.2010 i.e. after the end of one month from the date of receipt of the directions of DRP by AO, thus assessment order was void ab initio. However, as Revenue could not produce assessment records before Tribunal at that point of time, it gave liberty to the Revenue to file miscellaneous application for recalling of this order as per law, in case the Revenue was able to show that the dates given by assessee on the basis of certified copies obtained from the department were contrary to facts on record.
Dentsply India (P) Ltd. v. ITO 10(1), New Delhi, [TS-467-ITAT-2019(DEL)-TP], ITA No.4387/Del/2010, dated May 24, 2019

688. The Tribunal quashed orders of AO and TPO passed in the name of a non-existing amalgamating entity and noted that TPO passed order in the name of "Cairn India" which ceased to exist upon its amalgamation with "Vedanta Ltd." and the AO had incorrectly passed the order in the name of "Vedanta Ltd formerly known as Cairn India Ltd.
The Tribunal clarified that Vedanta Ltd. was never known as Cairn India Ltd and pointed out that "Cairn India Ltd was an amalgamating company, which had seized to exist in the eyes of law pursuant to amalgamation with Vedanta Ltd. The Tribunal observed that DRP had dismissed assessee's objection by directing the AO/TPO to rectify the orders incorporating the correct name and PAN of the assessed entity. The Tribunal relied on HC decisions in cases of Spice Infotainment, Maruti Suzuki India and Dimension Apparels wherein it had been held that assessment on a company, which had been dissolved/amalgamated u/s 391 and 394 of the

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Companies Act 1956 was invalid and that framing assessment on a non-existing entity was a jurisdictional defect which could not be cured u/s 292B of Income Tax Act. Accordingly, the Tribunal concluded that they had no hesitation in holding that the assessment order and the order of the TPO were non est and since the foundation had been removed, the super structure must fall.

Vedanta Ltd [successor to Cairn India Ltd]vs ACIT-TS-67-ITAT-2019(DEL)-TP-ITA No 7684/DEL/2018 dated 04.02.2019

689. The Tribunal set aside revision order by CIT u/s 263 which was made on the premise that AO had not made a reference to TPO for ALP determination of profit on sale of 100% subsidiary (a specified domestic transaction) for AY 2013-14. The Tribunal observed that AO had conducted requisite enquiry / investigation to find out the ALP of the transaction and CIT had not specifically identified the exact error in the assessment order or specified the exact prejudice caused to Revenue. It also rejected CIT's contention that AO did not follow CBDT Instruction Nos. 3/2003 which gave guidelines for reference to TPO opining that it was only in respect to international transactions and not applicable to SDTs and Instruction no. 15/2015 superseding the old Instruction No. 3/2003 was issued after the assessment order was passed. It rejected Revenue's contention that the Instruction should be read into retrospectively, stating that AO at the time of passing the assessment had to see the instructions available at the relevant time when Order was passed. If Revenue's contention was accepted then in wake of each and every subsequent instruction, all the assessment orders can be held to be erroneous and prejudicial to the interest of the revenue, which cannot be permitted under law and equity. It further explained that the CBDT Instructions have been issued to curb blanket reference to TPO without any satisfaction, in a mechanical manner, thus if all the requisite details and Accountant's Report has been filed and AO was satisfied with such report, then he was not supposed to make a reference to the TPO unless the conditions specified for making reference had been satisfied.

ETT Ltd. (formerly known as Indian Express Multimedia Ltd.) vs.CIT [TS-231-ITAT-2019(DEL)-TP] ITA No. 3341/DEL/2018 Dated 26.03.2019

690. The Tribunal dismissed assessee's miscellaneous application seeking rectification of Tribunal order regarding TP-adjustment towards international transaction of software development services for AY 2012-13. It observed that in para 5.2 of the impugned order, Tribunal while remitting back the issue, had clarified that only the segmental results of the assessee and that of the comparables have to be taken into consideration for ALP-determination, thus making it clear that if the comparables did not have segmental results, such comparables cannot be taken into consideration. Thus, there was no requirement to give any further direction and there was no mistake apparent from record, which needed rectification.

Cura Technologies Limited vs. DCIT [TS-173-ITAT-2019(HYD)-TP] ITA No.301/Hyd/2017 dated 0.03.2019

691. The Tribunal admitted assessee's additional ground after relying on various judicial precedents and held that assessment framed on a non-existing entity (owing to amalgamation of erstwhile assessee) was invalid and unsustainable and noted that this aspect goes to the root of the matter and that assessee duly placed on record the relevant details and necessary intimation to the Department. Regarding the legal aspect of impugned assessment, the Tribunal relied on

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coordinate bench decision in Akzo Nobel India Ltd (formerly known as Akzo Nobel Car Refinishes India Pvt Ltd), wherein, taking note of High Court's sanction of assessee's amalgamation and assessee's intimation of the same to the Department, the assessment framed on a non-existing entity was held void ab initio and hence, quashed. Considering no difference in factual position, the Tribunal quashed the impugned assessment framed on a non-existent amalgamated company.

DCIT vs Akzo Nobel Coatings India Ltd-TS-349-ITAT-2019(Kol)-TP-ITA No 334 & 530/Kol/2014 dated 24.04.2019

692. The Tribunal quashed CIT's revision order u/s 263 for assessee [engaged in the business of producing of coal tar pitch] and stated that CIT invoked Sec 263 on the ground that TP-addition though added under normal provisions of the Act were not added in computation of book profits u/s 115JB of the Act. The Tribunal noted that TP-adjustment made u/s 92CA(3) was not an item falling under the list provided in Explanation 1 to Section 115JB(2) and reiterated that A.O was not empowered to make any addition or deletion to the net profit as per Profit & Loss A/c prepared in accordance with Part II & Part III of Schedule VI of Companies Act 1956 and relevant accounting standards thereon, other than those items specifically mentioned in Explanation 1 to section 115JB(2) of the Act. The Tribunal relied on SC ruling in Apollo Tyres wherein it was held that AO only had the power of examining whether the books of account were certified by authorities under the Companies Act as having been properly maintained and AO could not embark upon a fresh enquiry in regard to the entries made in the books of accounts of the company. Further, the Tribunal noted that CIT was informed that Delhi Tribunal in Cash Edge had taken the view that TP-addition was not included in 'book profits' adjustment under MAT, however, he conveniently ignored the same and there was not a whisper about this in his final finding while proceeding to treat AO's order as erroneous and prejudicial to the interest of the Revenue. Thus, the Tribunal held that CIT had not specifically pointed out the exact error committed by AO while framing the assessee but simply directed AO to make detailed and roving enquires through the route of invoking revisional jurisdiction u/s 263. Thus, the Tribual held that the order of the ld. A.O was neither erroneous nor prejudicial to the interest of the Revenue warranting invocation of revisional jurisdiction u/s 263.

M/s. Himadri Chemicals & Industries Ltd vs PCIT-TS-280-ITAT-2019(Kol)-TP-ITA No 819/Kol/2017 dated 05.04.2019

693. The Tribunal allowed assessee's additional ground and held that assessee a limited liability partnership incorporated in Germany could not be termed as an eligible assessee u/s 144C(15)(b) and therefore quashed draft & final assessment order passed by AO. The Tribunal noted that as per section 144C(15)(b), eligible assessee would mean a person in whose case the variation proposed in the draft assessment order arose as a consequence of an order passed by TPO u/s 92CA(3) and if it was a foreign company. The Tribunal stated that AO had neither made any reference to the TPO u/s 92CA(1) nor did the TPO pass any order u/s 92CA(3), thus the variation proposed in the draft assessment order was not as a consequence of any order passed by the TPO and accordingly the first condition of Sec 144C(15)(b) was not satisfied. Further,with respect to second condition as per Sec 144C (15) (b), the Tribunal noted that assessee was classified as a partnership firm as per PAN which covered limited liability partnership u/s 2(23))/ residency certificate issued u/s 10F of the Act and was not a foreign

company u/s 2(23A), thus held that even the second condition was not satisfied. The Tribunal further relied on Gujarat High Court ruling in case of Pankaj Extrusion Ltd. where it was held that unless the assessee was an eligible assessee under section 144C(15)(b) of the Act, the AO could not pass a draft assessment order u/s 144C.Thus, the Tribunal concluded that the draft assessment order passed in case of the assessee for the impugned assessment year was invalid and therefore, all the proceedings consequent thereupon were also invalid.

Maquet Holdings B.V. & Co. KG vs DCIT-TS-294-ITAT-2019(Mum)-TP-ITA No 2572/Mum/2017 dated 12.04.2019

694. The Tribunal quashed the final assessment order passed by AO in set aside proceedings u/s 143(3) r.w.s 92CA(3)& 254 without passing a draft order.In first round of proceedings, the Tribunal had remitted benchmarking of assessee's payment of commission to AE under CUP-method pursuant to which AO had referred the matter to TPO and thereafter passed final assessment order (without first passing a draft order) incorporating TPO's TP-adjustment.The Tribunal held that a statutory obligation was cast on AO to forward a draft order u/s 144C and the same was neither 'merely an idle formality' nor could it have been whimsically dispensed with.

KSB Limited [TS-575-ITAT-2019(Mum)-TP] - ITA Nos 2719 to 2722/Mum/2018 dated 11.06.2019

695. The Tribunal in the second round of proceedings, quashed the assessment order for AY 2003-04 passed on a non-existent entity, i.e. Siemens Building Technologies Private Limited, a company which ceased to exist due to merger with Siemens Limited with effect from 1.10.2003. It found that in first round of proceedings, Tribunal vide order dated 6.10.2010 had remitted the matter back to AO who passed an order on 20.12.2011 in the name of non-existent entity despite the fact that information regarding merger was available with him. CIT(A) had rejected assessee's contention for quashing of order passed on non-existent entity by holding that once the issue was remitted by Tribunal, the current assessment order had merged with original assessment order and since on the date of passing the original order (23.03.2006), no merger had taken place, there was no infirmity in the order. It noted that AO was informed of the said merger vide letter dated 05.04.2006. Thus as information was within the knowledge of the Revenue regarding merger, the consequent assumptions were void ab initio and hence, the said order was liable to be quashed.

Siemens Limited vs ACIT [TS-234-ITAT-2019(Mum)-TP] ITA No. 3296/Mum/2015 Dated 01.03.2019

696. The Tribunal partly allowed assessee's miscellaneous petition seeking rectification of Tribunal's order for AY 2013-14 and recalled order for deciding some TP-grounds afresh.

Regarding comparability of Acropetal Technologies Ltd it noted that Tribunal had directed TPO to compute margin of ITeS Segment instead of healthcare segment (IT) by inadvertently stating that the co-ordinate bench in assessee's own case for AY 2008-09 had directed to compute the margin of the ITeS segment when co-ordinate bench had actually directed AO/TPO to compute PLI by comparing the revenue of healthcare segment (IT) with that of assessee. Thus, Tribunal recalled the order to consider comparability of this comparable afresh, opining that a mistake

apparent from record was there in the order of this Tribunal with relation to adjudication on comparability of this comparable.

Further, it recalled the order regarding comparability of Aspire Systems (India) Private Ltd, observing that the Tribunal did not adjudicate on all arguments put forth by the assessee including no segment details for Software Product, Capital Work in progress etc. and merely included this company on the ground that assessee failed to rebut lower authorities finding that this comparable was into software development.

Further, it dismissed assessee's plea claiming that Tribunal had not considered all its arguments in relation to inclusion of pass through cost while computing the margin earned by assessee. It noted that Tribunal had held that outsourcing cost was directly related to the software development considering that the outsourced work was incorporated in assessee's work in the final software prior to providing the same to the AE it had upheld TPO's treatment of outsourcing cost as operating expense of the assessee. Thus assessee was seeking review of the order of the Tribunal which is not permissible under law.

Lionbridge Technologies Pvt.Ltd. v. ACIT 15(2)(1), Mumbai, [TS-511/509-ITAT-2019(Mum)-TP], I.T.A. No. 7304/Mum/2017, dated May 27, 2019

697. The Tribunal held that incorrect computation of margins of assessee and the comparables by TPO constituted a mistake apparent on the face of record thus TPO's rejection of assessee's application for rectification u/s. 154 was unacceptable. It directed TPO to dispose of the application on merits by correctly computing the margins.

Smith & Nephew Healthcare Pvt. Ltd. v. ITO Ward 11(2)(3) Mumbai, [TS-496-ITAT-2019(Mum)-TP], ITA No.2028/Mum./2016, dated May 24, 2019

698. The Tribunal quashed TP proceedings and assessment framed againstassessee wherein the TPO (while referring to the functional profile of the group entities based in Mauritius, Dubai, Singapore etc.) had held that the control and management of the affairs of assessee group was wholly in India and had consequently rejected the TNMM based benchmarking applied by assessee and invoked the Profit Split Method (PSM), whereby 70% of world profits were added in the hands of assessee. The Tribunal held that no powers u/s 92CA have been bestowed on TPO to decide the situs of control and management of affairs, rather it is the AO who had to come to a finding in this regard. It held that non-exercise of jurisdiction by the AO made the assessment order bad in law and action of TPO being beyondjurisdiction cast u/s 92CA(1) made the entire exercise carried out by the TPO invalid and bad in law.

Sava Healthcare Ltd (earlier known as Anagha Pharma Pvt Ltd) [TS-611-ITAT-2019(PUN)-TP] - ITA Nos.1062 to 1068/PUN/2017dated 27.06.2019

699. The Tribunal quashed the assessment framed in the name of non-existent amalgamating company, noting that the AO had issued notice u/s 143(2) to the assessee in the name of erstwhile company even though assesse had intimated him about merger prior to issue to the said notice. It thus held that the assessment order passed in the name of non-existent amalgamating company was invalid and subsequent proceedings arising therefrom were vitiated.

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Amdocs Development Centre India LLP (as a successor of Amdocs Development Centre India Private Limited) (as a successor of Amdoc [TS-514-ITAT-2019(PUN)-TP] - ITA No. 376& 398/PUN/2017dated 03/06/2019

700. The Tribunal set aside the draft assessment order issued along with notice of demand u/s. 156 and notice of penalty u/s 271(1)(c), following co-ordinate bench decision in assessee's own case wherein it was held that when demand notice u/s 156 is issued and served on the assessee, the same constitutes an assessment order final in all respectsand thus the AO had violated the provisions of section 144C by not making a draft assessment order. It held that since the assessment order was illegal, invalid and without jurisdiction, the proceedings arising therefrom were vitiated.

Skoda Auto India Pvt Ltd [TS-534-ITAT-2019(PUN)-TP] - ITA No.2344/PUN/2012dated 03/06/2019

701. The Tribunal quashed final assessment order passed without draft assessment order, post Tribunal's remand for assessee engaged in manufacturing and exporting of machine made woolen and nylon carpets. The Tribunal held that passing of draft assessment order was mandatory under the provisions of Sec.144C (1) of the Act and final assessment order passed without passing draft assessment order was bad-in-law. The Tribunal further stated that High Court in catena of judgments had time and again held that final assessment order passed u/s 144 C (13) of the Act without passing a draft assessment order u/s 144 C (1) of the Act deserved to be quashed being violative of the provisions of Sec.144C of the Act. Thus, the Tribunal concluded that the assessment order was void ab initio and consequently the proceedings arising there from are also vitiated.

M/s. Brintons Carpets Asia Pvt Ltd vs DCIT-TS-42-ITAT-2019(PUN)-TP-ITA No 261/PUN/2015 dated 28.01.2019

702. The Tribunal allowed assessee's cross objection and quashed AO's final assessment order u/s 143(3) dated 17.06.2013 as time barred for AY 2009-10 and noted that as per Sec 153(1), assessment had to be made u/s 143(3)/144 within 2 years from the end of the relevant AY i.e. 31.03.2012 but if a reference was made to TPO u/s 92CA(1), then as per Sec 153(4), the period available for completion of assessment/ reassessment would be extended by 12 months i.e. 31.03.2013 for subject AY. The Tribunal noted that no addition was proposed by the TPO under section 92CA(3) of the Act and since there was reference made to the TPO, assessment order had to be passed within extended period of 12 months i.e. ending by 31.03.2013", therefore held that the order passed on 17.06.2013 was time barred. Further, it rejected Revenue's contention that since the final order passed by AO was verbatim of the draft assessment order which was passed on 28.03.2013 (within prescribed time), there was nothing prejudicial to the interest of assessee and the Tribunal held that It was not the draft assessment order but the final assessment order, which completes the proceedings against the assessee and there was no merit in the objections so raised. Thus, it held that the final assessment order was null and void.

DCIT vs Persistent Systems Pvt Ltd-TS-297-ITAT-2019(PUN)-TP-ITA No 1458/PUN/2015 dated 25.01.2019

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703. The Tribunal deleted addition in respect of folio maintenance and provision for leave encashment made by AO in the final assessment order however, the same was not proposed in the draft assessment order. The Tribunal referring to Sec 144C, opined that the AO was not permitted to make any addition to matters which were not contained in the draft assessment order and approved by the DRP. The Tribunal concluded that without the proposal in draft assessment order and without the approval of DRP the addition in the final assessment was unauthorized and against the principles of natural justice. Thus, the Tribunal held that the additions made in the final assessment with regard to folio maintenance and leave encashment were unsustainable, accordingly deleted.

M/s. GVK Power & Infrastructure Ltd vs ACIT-TS-259-ITAT-2019(Viz)-TP-ITA No 553/Viz/2018 dated 03.04.2019

Penalty

704. The Court dismissed the writ petition filed by the assessee against the penalty levied by the AO u/s 271(1)(c) with respect to TP adjustment determined under the MAP proceedings on the ground that the assessee had concealed income within the meaning of Explanation 7 to the said section, noting that the MAP resolution was silent on the aspect of penalty imposition. It held that unless a specific provision is made in DTAA in as much as penalty is concerned, the provisions of section 271(1)(c) shall continue to apply and it cannot be said to be ultravires the constitution (as far as levy of penalty subsequent to passing of the order in case of MAP proceedings). The Court further held that onus lies on theassessee to establish that the addition decided by MAP is not due to concealment of income or furnishing of inaccurate particulars and moreover, the computation was made u/s 92C in good faith and with due diligence.

Toyota Kirloskar Motor Private Limited [TS-657-HC-2019(KAR)-TP] – Writ petition No.57865/2015 c/w 56348/2015 (T-IT) dated 11.06.2019

705. The Tribunal allowed assessee's appeal and quashed CIT(A)'s order confirming levy of Sec 271G penalty of Rs.93.67 lakhs levied by TPO for AY 2009-10; as impugned penalty under section 271G was imposed by the Transfer Pricing Officer, vide his order dated 25.06.2012, whereas until the amendment was made to section 271G, vide Finance (No.2) Act 2014, only the Assessing Officer or the CIT(A) had the statutory powers to impose such penalty. Thus, penalty imposed by TPO was held to be unsustainable in law.

ITT Corporation India Pvt. Ltd vs. Dy.CIT [TS-150-ITAT-2019(Ahd)-TP] 1914/Ahd/2014dated 04.03.2019

706. The Tribunal allowed assessee's appeal and deleted penalty levied u/s Sec 271(1)(c) for concealment. It noted that AO had inter alia imposed penalty on TP adjustment of Rs 2.78 crores in respect of assessee's international transaction of sale of chemical products and coordinate bench of the Tribunal in quantum appeal had deleted the addition after accepting assessee's internal-TNMM over TPO's internal-CUP method for benchmarking international transaction. Thus the Tribunal held that where the quantum additions / disallowances / adjustments itself

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had been dislodged, the very edifice for imposition penalty under s.271(1)(c) ceased to exist and did not survive.

Gulbrandsen Chemicals Pvt. Ltd. v. DCIT, Cir.1(1), Baroda, [TS-454-ITAT-2019(Ahd)-TP], ITA No. 916/Ahd/2015May 14,2019

707. The Tribunal restored the issue of penalty levied on assessee u/s 271G to CIT(A) for fresh adjudication The Tribunal noted that the Assessee had made a plea of "reasonable cause before the CIT(A).However, the CIT(A), dealt only on the disputed issue, but there was no finding in respect of reasonable cause as pleaded by the Assessee. Thus, the Tribunal held that CIT(A)'s order was not clear on facts and was non-speaking. Accordingly, it directed the CIT(A) to pass a speaking order after considering assessee's submissions w.r.t the reasonable cause plea.

M/s. Unibic Foods India Pvt Ltd vs DCIT-TS-300-ITAT-2019(Bang)-TP-ITA No 2646/Bang/2017 dated 11.01.2019

708. The Tribunal deleted penalty levied u/s 271(1)(c). During assessment, the AO rejected assessee's claim of being a small turnover company and unavailability of comparables and introduced 11 comparables resulting in TP-adjustment. The Tribunal in quantum appeal restricted TP-adjustment made by TPO. As regarding the levy of penalty, the Tribunal opined that considering provisions of Explanation 7 to Sec 271 which provided that if it was found that assessee's claim was made in good faith with due diligence, then the provisions of Section 271(1)(c) of the Act would not be attracted. Thus, the Tribunal concluded that each and every addition made into income of an assessee did not itself tantamount to the act of furnishing of inaccurate particulars of income or concealment of income, thus deleted the levy of penalty u/s 271(1)(c) of the Act.

M/s. Rakhra Technologies P Ltd vs ACIT-TS-135-ITAT-2019(CHANDI)-TP-ITA No 1053/Chd/2018 dated 19.02.2019

709. The Tribunal deleted penalty levied under section 271BA on account of non-uploading/filing of Form 3CEB electronically by assessee, for AY 2014-15 i.e. first year for electronic filing requirement. It noted assessee's plea of ignorance of the legal requirement and submission that the said form was made available in assessment proceedings before AO and based on the report, no adjustments had been proposed. It also noted that assessee was not a habitual defaulter and that the failure was an unintentional bonafide mistake. It observed that Sec. 271BA contained the words "may" and not "shall", thereby making it clear that levy of penalty was discretionary and not automatic. Further Sec. 273B specifically provided that no penalty "shall" be imposed (in certain cases which included Sec. 271BA) if the assessee proved "that there was reasonable cause for the said failure". Thus, it reversed CIT(A)'s order noting that levy of penalty u/s. 271BA was discretionary and not automatic.

Shree Ram Dass Rice & General Mills vs. DCIT [TS-227-ITAT-2019(CHANDI)-TP] ITA No. 833/CHD/2018 dated 14.03.2019

710. The Tribunal allowed assessee's appeal and deleted Sec 271(1)(c) concealment penalty imposed by AO/CIT(A) consequent to confirmation of TP-adjustments made by the Tribunal in case of assessee.

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The Tribunal noted that assessee had used multiple year data for computing ALP, which, according to AO/TPO was contrary to provisions of the Act and would tantamount to furnishing of inaccurate particulars of income. However, the Tribunal opined that in their understanding of the law, prior to 2007, there was a legal debate as to whether multiple year data could be used or current year data had to be used, thus was a debatable issue at that point when the assessee filed its return of income. The Tribunal further noted that adoption of multiple year data for arriving at ALP was a bonafide exercise and it could not be said that the assessee had not done TP exercise in good faith and with due diligence. Thus, the Tribunal concluded that neither Explanation 1 as applied by the Assessing Officer nor Explanation 7 as applied by the CIT(A) to section 271(1)(c) of the Act would apply and accordingly, directed the AO to delete the penalty.

Gboseiesecke & Devrient India Pvt Ltd vs DCIT-TS-35-ITAT-2019(DEL)-TP-ITA No 3864/DEL/2015 dated 28.01.2019

711. The Tribunal deleted penalty of Rs.69.50 lakhs imposed u/s 271(1)(c) r.w.s. 274 for AY 2009-10. It noted that penalty proceedings u/s 271(1)(c) were initiated in respect of AMP-adjustment of Rs. 4.16cr which was made applying the Bright Line Test (BLT). It further noted that in plethora of cases including Sony Ericsson Mobile Communications India, HC had specifically disapproved and rejected BLT. Merely because assessee did not press its appeal before Tribunal in the quantum proceedings, same did not lead to the inference that the assessee had accepted the Bright Line method and the consequent transfer pricing adjustments in the year under consideration. The Tribunal observed that jurisdictional HC in assessee's own case for subsequent AY 2010-11 had dismissed Revenue's appeal and held that there were no good reasons to treat advertisement and sales expenses as an international transaction. For the subject AY as well, assessee was engaged in marketing and distribution of Mary Kay products in India, thus Tribunal held that HC ruling for AY 2010-11 would apply 'mutatis mutandis'. Further, it stated that even though in the year under consideration, the assessee had accepted the addition in this regard in the quantum proceedings, the fact remained that such addition was not sustainable in view of the observation of the Hon'ble Delhi High Court in assessee's own case that the AMP expenditure was not to be considered as an international transaction. Thus, Tribunal concluded that AMP expenditure could not have been treated as an international transaction and, therefore, the penalty imposed on such transfer pricing adjustment was not sustainable.

Mary Kay Cosmetics Pvt Ltd v. DCIT Cir. 16(1), New Delhi, [TS-469-ITAT-2019(DEL)-TP], ITA No.7333/Del/2018, dated May 24, 2019

712. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s deletion of penalty u/s 271G in case of an assessee engaged in manufacturing and export of cut and polished diamonds and rendering services in connection with re-assortment of diamonds. The Tribunal noted that though assessee explained that it was not practical to identify and bifurcate the stock, cost and revenue between AE and non-AE segments, AO levied penalty on the grounds that assessee had not furnished workings of AE & non-AE segmental profitability, thereby concluding that relevant records under Rule 10D(1)(h)/(g) were not maintained by assessee. Further, the Tribunal relied on co-ordinate bench ruling in the case of Firestone International wherein also the assessee (a diamond trader) had complied with the directions of TPO with respect to

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furnishing of segmental information to the extent the same was practically possible in light of the very nature of its trade .Accordingly, the Tribunal concluded that in the light of above it do not find any infirmity in the order of Ld. CIT(A) deleting the penalty u/s.271G of the Act in the peculiar facts and circumstances of the instant case and clarified that the said decision shall not stand as a precedent for other cases.

DCIT vs M/s Leo Schachter Diamonds Pvt Ltd- TS-191-ITAT-2019(Mum)-TP-ITA No 5931/Mum/2017 dated 28.02.2019

713. The Tribunal deleted the penalty imposed by AO u/s 271AA for non-reporting of receipt of share application money from its holding company (AE) in Form 3CEB for AY 2012-13, noting that as per the (unamended) Form 3CEB filed by the assessee in November 2012 there was no requirement to furnish such information and Form 3CEB was amended only on 1.04.2013 to provide for the same. Accordingly, there was impossibility of performance.

Fremantle India Television Productions Pvt Ltd [TS-693-ITAT-2019(Mum)-TP] - ITA No. 529/Mum/2017 dated 24.06.2019

714. The Tribunal deleted the penalty levied u/s 271(1)(c) with respect to adjustment made in case of assessee engaged in providing marketing support services, noting that the arithmetic mean of the margin of comparables selected by the TPO (after exclusion of Government companies) i.e. 8.32% was approximate to assessee's margin of 9% and the assessee had already considered comparable margins of 8.69% as per its TP study report. It thus held that this was not a case of concealment of income or furnishing of inaccurate particulars. Moreover, the assessee had acted in good faith and with due diligence.

eBay India Private Limited [TS-631-ITAT-2019(Mum)-TP] -ITA No.3638/Mum/2015 dated 26.06.2019

715. The Tribunal upheld CIT(A)'s order deleting the penalty levied u/s 271G on account of assessee's failure to furnish information/ documents in respect of separate profitability of AE and non-AE transaction. It noted that the assessee had submitted segmental working which was based onallocation of all costs in the ratio of sale to AE and Non-AE, however, the TPO opined that such working did not reflect real profitability and could not be accepted for benchmarking. The Tribunal, thus, held that the basic requirement of section 271G, i.e. the assessee had failed to submit the relevant information/document required u/s 92D(3), did not exist since in the present case the necessary information was given but was not acceptable to TPO.

Dauji & Co [TS-602-ITAT-2019(Mum)-TP] -I.T.A. No.2713/Mum/2018 dated 24.06.2019

716. The Tribunal deleted penalty u/s 271G imposed on assessee (diamond trader) on account of failure to maintain documentation as required u/s 92D(3). Noting that the penalty was levied on account inability of the to maintain separate books of accounts for AE and non-AE segments, it followed the co-ordinate bench ruling of Dilipkumar V. Lakhi (Mum) wherein similar Sec 271G penalty was deleted holding that as there were practical difficulties in diamond trade industry for maintenance of segmental details, there was reasonable cause within the ambit of section 273B for assessee not maintaining specific information / documentation as required.

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Blue Star Diamonds Pvt Ltd [TS-586-ITAT-2019(Mum)-TP] -ITA No. 6553/Mum/2017 dated 13.06.2019

717. The Tribunal upheld CIT(A)'s deletion of penalty u/s 271G imposed on assessee (engaged in the business of manufacturing and sale of polished diamond and diamond studded jewellery) for not furnishing segmental profitability of AE/non-AE sales. The Tribunal noted that, in response to TPO's demand of furnishing segment wise details of AE and non-AE sales for application of CUP, assessee expressed the impossibility for a diamond manufacturer & trader to maintain segment wise details of AE and non-AEs sales and that CUP method could not be applied in its case as invoice of sale of AE and non-AE included different types of goods sold at different prices. The Tribunal also considered that in the preceding years, assessee had benchmarked international transaction with AE by applying TNMM which was accepted by the Revenue, thus observed that assessee indeed had maintained a number of information/documents as required under the statutory provisions and that the TPO ultimately accepted assessee's benchmarking under TNMM and no variation/adjustment was made to its ALP. The Tribunal opined that when the statutory provisions conferred enough power on the Transfer Pricing Officer to benchmark the international transaction as per the provisions of the Act, the allegation of the TPO that by non furnishing of documents by the assessee he was prevented from determining the arm's length price under CUP method was unacceptable.Thus, noting that TPO accepted assessee's benchmarking, the Tribunal concluded that imposition of penalty under section 271G to be unsustainable and relied on coordinate bench ruling in Dilipkumar V. Lakhi, Kiran Gems Pvt. Ltd & D. Navinchandra Exports P. Ltd

DCIT vs Ankit Gems-TS-660-ITAT-2019(Mum)-TP-ITA No 4840/Mum/2017 dated 15.04.2019

718. The Tribunal deleted concealment penalty u/s 271(1)(c) on TP-addition arising on account of difference in selection of comparables for software support service provider. The Tribunal opined that there was no concealment of income or filing of inaccurate particulars of income and noted that the comparables chosen by TPO were initially considered by assessee in its TP study but eventually excluded due to some reasons (which stood ratified by the Tribunal holding those companies to be not good comparables).

The Tribunal concluded that it could be safely concluded that there was only a difference of opinion on the inclusion and exclusion of comparables between assessee and the TPO and rejected Revenue's stand that explanation 7 w.r.t deemed concealment of income on the part of the assessee was attracted the moment adjustment to ALP was made and that the levy of penalty thereon was automatic. The Tribunal relied on Delhi HC ruling in Verizon India wherein deleting penalty under similar circumstances, the Court had opined that in absence of any act, which disclosed conscious and material suppression, invocation of Explanation 7 in a blanket manner could be injurious and contrary to its intention.Thus, the Tribunal deleted penalty u/s 271(1)(c).

M/s. QAD India Pvt Ltd vs ACIT-TS-105-ITAT-2019(Mum)-TP-ITANo 341/Mum/2016 dated 22.02.2019

719. The Tribunal upheld CIT (A) order deleting penalty u/s 271G in case of assessee (a diamond merchant) levied for non-furnishing of segmental profitability of AE/non-AE transactions. The

Tribunal noted assessee's reason for not complying with the provisions of Rule 10D(1), that it was unable to ascertain the corresponding cost, when a rough diamond was cut and polished, it lost its individual identity and gets mixed in the lots purchased from AE as well as non AE and hence, it was not possible for the assessee to prepare separate accounts for trading and manufacturing activities so as to compare its international transactions with its AE segment-wise. The Tribunal further considered that Revenue accepted the profit split method (PSM) adopted by the assessee to benchmark its international transaction and no adjustment was made u/s 92C in the present year and also considered assessee's contention that when it was maintaining documentation in respect of PSM it was difficult for the assessee to arrange or produce documents as required by the AO in respect of any other method selected for benchmarking international transactions with its AE (CUP). Thus, the Tribunal concluded that AO / TPO erred in concluding that the assessee did not comply with provisions of Rule 10D(1) and stated that AO erred in levying the penalty u/s. 271G.

DCIT vs Asian Star Company Ltd-TS-365-ITAT-2019(Mum)-TP-ITA No 5876/Mum/2017 dated 10.04.2019

DCIT vs Amore Jewels P Ltd-TS-364-ITAT-2019(Mum)-TP-ITA No 6009/Mum/2017 dated 10.04.2019

Section 10A/10B

720. The Tribunal held that assesse, engaged in providing ITES services,was entitled to deduction u/s 10A on additional income offered on account of suo moto TP-adjustment for AY 2010-11. It relied on the decision in the case of iGate Global (Kar HC), coordinate bench rulings in Approva Systems (Pune) and Sumtotal Systems (Hyd) to hold that first proviso to section 92C(4) (which provides that no deduction u/s 10A or 10B or Chapter VIA is to be allowed in respect of income enhanced after computation of income under the sub-section) is evidently applicable only to situations where adjustment to the ALP is made by the AO/TPO/ DRP and not to the voluntary adjustment made by the assessee itself.

A T Kearney India Pvt Ltd [TS-593-ITAT-2019(DEL)-TP] - ITA NO 2623/DEL/2015 dated 21.06.2019

721. The Tribunal dismissed assesssee's plea that TP-adjustment ought not be made when the assessee was claiming exemption u/s 10B as there was no intention to shift profits outside India and more so when the tax rates in AE country were higher than those prevailing in India. The Tribunal explained that irrespective of situation, the transfer price of the global market and the corporates must be within the band of pricing and tax saving alone could not be a decision making process to restrict any TP adjustment. Thus, the Tribunal concluded that TP-adjustment could not be restricted based on the prevailing tax rate in other countries.

Wissen Infotech Pvt Ltd vs DCIT-TS-449-ITAT-2019(Hyd)-TP-ITA No 2010/Hyd/2017 dated 18.04.2019

722. The Tribunal upheld DRP-order and held that having higher operating margins as compared to the comparables chosen in TP study is not valid ground to invoke Sec 10A(7) and disallow

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profits as being “more than ordinary”. The Tribunal relying on co-ordinate bench ruling in assessee’s own case in AY 2006-07 (ITA No.18/PUN/2011) and Bombay HC ruling in CIT Vs. Schmetz India Pvt. Ltd. (ITA No.1382/2013) held that the mere existence of (i) a close connection between the assessee and the other person; and, (ii) more than ordinary profits is not sufficient to justify invoking of section 80- IA(10) of the Act in the absence of there being any material to say that the course of business between them is “so arranged” to abuse the tax concessions granted u/s 10A of the Act by manipulating profits between associated persons is not sufficient, the same is required to be demonstrated on the basis of a cogent material and evidence.

Honeywell Automation India Limited vs. Dy.CIT [TS-146-ITAT-2019(PUN)-TP] ITA No. 473, 446/PUN/2016dated 06.03.2019

Stay

723. The Apex Court disposed of Revenue’s appeal against High Court order upholding Tribunal’s order extending stay of demand to assessee beyond 365 days. The High Court had relied on co-ordinate bench ruling in Carrier Aircon and other cases, wherein it was held that wherever the appeal was not decided by the Tribunal due to pressure of pendency of cases and delay in the appeal disposal was not attributable to the assessee in any manner, the interim protection could continue beyond 365 days in deserving cases. The Apex Court noted that the Tribunal had already decided the issue of comparables-selection in its main appeal and thus dismissed the petition as having become infructuous

Pr.CIT vs Comverse Network Systems India Pvt Ltd-TS-83-SC-2019-TP-SLP No 1572/2019 dated 15.02.2019

724. The Court directed Revenue not to enforce TP-demands arising pursuant to AMP-adjustment by applying intensity test for assessee and also directed that no adjustment of refund amounts due & payable to assessee, shall be done during the pendency of appeals before the Tribunal. The Court noted that on one hand, assessee was aggrieved by the additions sought to be made by AO on account of TPO’s recommendations and on the other hand, assessee claimed to be entitled to refund of certain amounts, which were pending and payable on its account for previous and other AYs. The Court noted that the appeals were pending before Tribunal and that the most appropriate course left would be to direct that the existing status quo be maintained, (which means that, on the one hand, demands arising out of the assessment years for the concerned AY are not enforced for a limited time and at the same time, the Assessing Officer does not, as a consequence, adjust the refund, available to the credit of the Assessee/Petitioner). Further, the Court directed the Tribunal to complete hearings and render its final orders as expeditiously as possible before 31.03.2019 in order to ensure that there was no undue delay.

Sony Mobile Communications India Pvt Ltd vs ACIT-TS-8-HC-2019(DEL)-TP-WP No 3174,3175/2018 dated 07.01.2019

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Others

725. The Tribunal dismissed assessee's revised ground for AY 2011-12 and AY 2012-13 contending that AO had failed to issue show cause notice u/s 92C(3), opining that in the given case, if AO had not served any notice it can be inferred that the AO is of the opinion that the assessee's case did not fall in any or all the conditions stipulated under the said sub section. Moreover, since the assessee had presented its case through its authorized representative, no prejudice had been caused to the assessee.

CWT India Pvt. Ltd. v. ACIT 9(2)(2), Mumbai, [TS-544-ITAT-2019(Mum)-TP], 23/MUM/2015, 1484/MUM/2016, 1404/MUM/2017, dated May 1, 2019

726. The Tribunal directed TPO to consider fresh benchmarking report submitted by assessee for AY 2010-11 noting that though TPO had requested assessee to submit benchmark analysis report on the basis of royalty research database, assessee could not provide the same during proceedings before TPO but had furnished it before DRP. But DRP rejected the said report on the basis that it was unauthenticated i.e it was unsigned and did not contain seal of the reporting party. The Tribunal observed that a duly signed benchmarking report was submitted by Altus International, containing covering letter with full address and website address of the firm, range of royalty rate, name and phone number of contact persons for any question regarding report and in case of doubt about the authenticity of document, same should have been inquired from the address and phone number mentioned therein. Thus, the Tribunal held that rejection by DRP of the benchmarking report submitted by the assessee was not sustainable. It restored the issue clarifying that it was open for the assessee to canvas other grounds also before TPO in this regard.

Mahindra Heavy Engines Pvt. Ltd. v. DCIT Circle 6(3), Mumbai, [TS-521-ITAT-2019(Mum)-TP] I.T.A. No. 605/Mum/2015 (Assessment Year 2010-11), dated May 31, 2019

727. The Tribunal deleted the addition towards computation of income attributable to assessee, a tax resident of Mauritius in India for AY 2011-12. The assessee was engaged in global broadcasting of sports channel 'Ten Sports' and had appointed its Indian subsidiary as advertising sales agent and exclusive distributor of the TV Channel in India and AO treated the Indian subsidiary as assessee's 'agency PE' and attributed income to the assessee in respect of advertisement revenue. The Tribunal relied on co-ordinate bench ruling in assessee's own case for AYs 2006-07, 2009-10 & 2010-11 wherein, on similar facts, it was held that Indian subsidiary did not constitute an 'agency PE' under India-Mauritius DTAA and since Indian subsidiary was remunerated at ALP in respect of advertisement revenue, no further income/ profit can be said to be attributable to the assessee's PE in India.

Taj TV Ltd. v. DCIT (IT)-4(1)(2), Mumbai, [TS-505-ITAT-2019(Mum)-TP] ITA No. 1313/Mum/2018, date May 22, 2019

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