Transfer Pricing Digest (320 Cases)

(January 2019 to March 2019)

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

http://www.itatonline.org

TRANSFER PRICING DIGEST (320 CASES)

(Pronounced in the period January 2019 to March 2019)

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

INDEX

***assisted by CA Dinesh Kukreja and Sahil Sheth**

Go to Index

Go to Index

Transfer Pricing

a. Applicability of TP Provisions

International Transactions

1. 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

Specified Domestic Transactions

2. 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

3. 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

Go to Index

b. Tested Party

4. 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

c. Most Appropriate Method

Comparable Uncontrolled Price Method

5. 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 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

6. 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

7. 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.

Go to Index

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

8. 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

9. 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

10. 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.

11. 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

Go to Index

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 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

12. 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

Resale Price Method

13. 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

Go to Index

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

14. 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

15. 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

16. 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

Go to Index

Transactional Net Margin Method

17. 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

18. 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

19. 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

20. 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

21. 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

22. 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

23. 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.

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

24. 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

25. 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

26. 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

27. 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

Go to Index

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

28. 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

29. 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

30. 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

31. 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

32. 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

Go to Index

d. Comparability– Inter Industry

Engineering / Designing and related Consultancy services

33. 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

34. 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 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

35. 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

Go to Index

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
- 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

36. 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 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

37. 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

38. 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.

- 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.

Go to Index

- 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

39. 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

ITES Sector / Software Development Services

40. 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

41. 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.

Go to Index

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

42. 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

43. 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

44. 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

Go to Index

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

- 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

46. 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

47. 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.

Go to Index

- 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 where**in** 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 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

48. 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

49. 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.

Go to Index

- 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.

- 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

50. 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

51. 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).

Go to Index

- 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

52. 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

53. 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-

54. 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-

55. 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

56. 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.

Go to Index

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

57. 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

58. 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

59. 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 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

Go to Index

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

60. 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 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

Go to Index

61. 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

62. 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

63. 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

Go to Index

64. 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-

65. 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

Go to Index

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

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

- 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

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

- 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.

Go to Index

- 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

68. 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
    - 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

Go to Index

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

69. 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.

- 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

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

Go to Index

- 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

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

Go to Index

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

72. 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.

- 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.

Go to Index

- 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

73. 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

74. 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

75. 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

76. 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

77. 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

Go to Index

- 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

78. 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

79. 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.

Go to Index

- 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.

- 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

80. 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

Go to Index

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.

- 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

81. 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 t*here was no harm in following learned DRP's order and order of this Tribunal for Vodafone India and a*ccordingly, 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

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

Go to Index

- 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.

- 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

83. 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

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

Go to Index

- Acropetal Technologies Ltd**-** by relying on its decision in assessee's own case for previous year where**in** 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

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

85. 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

86. 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.

Go to Index

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

87. 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
    - 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

88. 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

89. 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

90. 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

91. 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.

Go to Index

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 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

92. 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

93. 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

Investment Advisory Services

94. 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

Go to Index

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 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

95. 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

96. 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

97. 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 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

98. 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.

Go to Index

- 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

99. 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

Manufacturing & Contracting

100. 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**

101. 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

Go to Index

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

102. 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 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

103. 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

Go to Index

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

104. 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

105. 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

106. 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.

Go to Index

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

107. 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

Support Services

108. 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

109. 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

Go to Index

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

110. 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

111. 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

112. 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 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-

Go to Index

113. 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

114. 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

115. The Tribunal held that assessee engaged in providing business support services to its AE could not be compared to

Go to Index

- 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

116. 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

117. 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

118. 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.

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

Go to Index

119. 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

120. 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 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

121. 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

122. 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 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

123. The Tribunal held that assessee engaged in Business Support Services and Marketing Support Serivces could not be compared to

Go to Index

- 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

124. 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

125. 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.

- 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

Go to Index

Distribution

126. 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

Transportation/Frieght/Tours/Travels/Service

127. 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

128. 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

Go to Index

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

129. 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

130. 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

131. 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.,

Go to Index

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

132. 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

133. 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%
- 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

Go to Index

e. Comparability – Intra Industry

Turnover filter

134. 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

135. 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

136. 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

137. 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

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

138. 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

Non-availability of Financial Data

139. 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

140. 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

Go to Index

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

Others

141. 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

142. 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

143. 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

144. 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

Profit Level Indicator

145. 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

146. 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

Go to Index

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

147. 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

148. 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

149. 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

Restrict Adjustment to AE transactions

150. 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

Go to Index

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

151. 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

152. 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

Damco India Pvt Ltd vs. Dy.CIT [TS-241-ITAT-2019(Mum)-TP] IT(TP)A No.1155/Mum/2017 dated 20.03.2019

Risk Adjustment

153. 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

Go to Index

Segments

154. 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

155. 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

156. 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

Go to Index

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

157. 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

158. 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

Working Capital Adjustments

159. 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.

Go to Index

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

160. 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.
Hackett Group (India) Ltd vs Dy CIT [TS-328-ITAT-2019(HYD)-TP] – ITA 2039/Hyd/2017 dated 15-03-2019

161. 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

+ / - 5% adjustment

162. 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

163. 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.

Go to Index

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

164. 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

165. 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

166. 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

167. 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

g. Specific Transactions

Advertisement, Marketing and Promotion Expenses

168. 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

169. 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

170. 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

171. 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

172. 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

Go to Index

173. 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

174. 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

175. 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

176. 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

177. 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

178. 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

179. 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

180. 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

181. 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

182. 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

Go to Index

183. 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

184. 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

185. 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 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

186. 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

Go to Index

187. 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

188. 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

189. 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.
MSD Pharmaceuticals Pvt Ltd vs. Addl.CIT [TS-163-ITAT-2019(DEL)-TP] ITA No.7569/DEL/2018 dated 07.03.2019

190. 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

191. 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

192. 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

193. 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

194. 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 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

195. 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

Receivables

196. 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

197. 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

198. 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

199. 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

200. 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,

Go to Index

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

201. 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

202. 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

203. 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

Go to Index

204. 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

Loans

205. 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

206. 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 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.

Go to Index

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

207. 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

208. 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

209. 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

210. 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

Go to Index

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 had 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

211. 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

212. 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

213. 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

Go to Index

214. 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

215. 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

216. 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

217. 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

218. 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

Corporate Guarantee

219. 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

Go to Index

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

220. 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.

Pr. CIT vs M/s. Aegis Ltd-TS-65-HC-2019(BOM)-TP-ITA No 1248 of 2016 dated 28.01.2019

221. 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

222. 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

223. 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

Go to Index

224. 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

225. 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

226. 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

227. 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

228. 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

Go to Index

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

229. 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 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

230. 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

231. 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

Royalty / Trademark

232. 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

233. 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

234. 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. 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

235. 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

236. 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

237. 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

Management Fees / Intra Group services

238. 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

239. 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

240. 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

241. 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

242. 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

243. 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

244. 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

245. 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

Reimbursements

246. 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 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

247. 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

Go to Index

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

248. 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

249. 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

250. 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

251. 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

252. 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

253. 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.

Go to Index

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

254. 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

Convertible Debentures

255. 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

256. 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

257. 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 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

Share transactions

258. 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

259. 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.

Pr. CIT vs Tops Group Electronics Systems Ltd- TS-114-HC-2019(BOM)-TP-ITA No 1721 of 2016 dated 26.02.2019

260. 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.

Go to Index

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

261. 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

262. 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

Go to Index

263. 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

264. 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

Commission

265. 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

266. 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

Go to Index

267. 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

268. 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

269. 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

Go to Index

270. 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

271. 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

272. 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

273. 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

Go to Index

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 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

274. 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

275. 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.

Go to Index

Sony Pictures Networks India Pvt Ltd vs ITAT-TS-5-HC-2019(Bom)-TP-WP No 3508 of 2018 dated 03.01.2019

276. 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

277. 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

278. 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

279. 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

Go to Index

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

280. 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

281. 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

282. 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

283. 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

284. 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

285. 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

286. 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

287. 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

288. 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

Go to Index

289. 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

290. 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

APA / MAP

291. 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

Go to Index

292. 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

293. 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

294. 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

295. 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 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

296. 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

Go to Index

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

Assessment / Reassessment / Revision / Rectification

297. 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

298. 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)

Go to Index

[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

299. 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

300. 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.
GMM Pfaudler Limited vs. Dy.CIT [TS-165-ITAT-2019(Ahd)-TP] ITA No.: 1370, 951/Ahd/2015 dated 04.03.2019

Go to Index

301. 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

302. 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

303. 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

Go to Index

304. 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

305. 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 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

306. 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

Go to Index

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

307. 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

308. 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

309. 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.

Go to Index

M/s. Brintons Carpets Asia Pvt Ltd vs DCIT-TS-42-ITAT-2019(PUN)-TP-ITA No 261/PUN/2015 dated 28.01.2019

310. 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

Penalty

311. 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

312. 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

313. 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

314. 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

315. 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.

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

316. 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

Go to Index

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 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

317. 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

Section 10A/10B

318. 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 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.

Go to Index

Honeywell Automation India Limited vs. Dy.CIT [TS-146-ITAT-2019(PUN)-TP] ITA No. 473, 446/PUN/2016dated 06.03.2019

Stay

319. 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

320. 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

Go to Index