

IN THE INCOME TAX APPELLATE TRIBUNAL

‘C’ BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

AND

SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.208/Bang/2016
Assessment Year : 2011-12

M/s Altisource Business Solutions Pvt.Ltd., Pritech Park,Survey number 51 to 64/4,Block Number-12,3 rd Floor A wing,Bellandur village,Sarjapur Marathahalli Outer Ring Road, Bangalore-560103. PAN – AAACO9467A	Vs.	Asst. Commissioner of Income-Tax, Circle -1(1)(1), Bangalore.
APPELLANT		RESPONDENT

IT(TP)A No.209/Bang/2016
Assessment Year : 2011-12

Asst. Commissioner of Income-Tax, Circle -1(1)(1), Bangalore.	Vs.	M/s Altisource Business Solutions Pvt.Ltd., Pritech Park,Survey number 51 to 64/4,Block Number-12,3 rd Floor A wing,Bellandur village,Sarjapur Marathahalli Outer Ring Road, Bangalore-560103. PAN – AAACO9467A
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APPELLANT		RESPONDENT
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Assessee by	:	Shri K.R Vasudevan, Advocate
Revenue by	:	Shri Shishir Srivastava, CIT

Date of Hearing	:	07-04-2021
Date of Pronouncement	:	02-07-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

The present cross appeals have been filed by assessee as well as revenue against order dated 21/12/2015 passed by the Ld.ACIT Circle 1(1)(1) Bangalore under section 143 (3) read with section 144C(5) read with section 144C(13) of the Act, for assessment year 2011-12 on following grounds of appeal:

ITA No.208/B/2016

The learned Assessing Officer ("learned AO"), learned Transfer Pricing Officer ("learned TPO") and the Honourable Dispute Resolution Panel ("Hon'ble DRP") grossly erred in adjusting the transfer price by INR 15,17,38,598/- of the Appellant's international transactions with its Associated Enterprises ("AEs") with respect to the Software Development Services ("IT") and IT Enabled Services ("ITeS") rendered by the tax payer u/s 92CA of the Income- tax Act, 1961.

2. The learned AO/learned TPO/Hon'ble DRP erred in rejecting the TP documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act.

3. The learned AO/learned TPO/Hon'ble DRP erred in rejecting comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis by introducing various filters in determining the ALP.

4. The learned AO/learned TPO/Hon'ble DRP erred in not considering the previous two years financial data of the comparable companies while determining the ALP.

5. The learned AO/learned TPO/Hon'ble DRP erred in using data available at the time of assessment proceedings, instead of the data available at the time of preparing the TP documentation for comparable companies while determining ALP.

6. The learned AO/learned TPO/Hon'ble DRP erred in applying export earning filter of 75% instead of 25% of the total sales, leading to a narrow comparable set.

7. The learned AO/learned TPO/Hon'ble DRP erred in applying related party filter of 25% without giving any cogent reason for doing so.

8. The learned AO/learned TPO/Hon'ble DRP erred in not applying the upper limit on the sales turnover filter while selecting the comparable companies, despite of the fact that the lower limit on the sales turnover filter was applied for comparability analysis.

9. The learned AO/learned TPO/Hon'ble DRP erred in applying different financial year ending filter while selecting the comparable companies.

10. The learned AU/learned TPO/Hon'ble DRP erred in not considering the provision for bad and doubtful debts as extraordinary in nature.

11. The learned AU/learned TPO/Hon'ble DRP erred in applying onsite filter to reject the companies that are comparable to the Appellant.

12. Software Development Services:

12.1 The learned AU/learned TPO/Hon'ble DRP has grossly erred in not adjudicating upon the functional comparability of the Larsen & Toubro Infotech Ltd.

12.2 The learned AU/learned TPO/Hon'ble DRP has grossly erred in not rejecting Persistent Systems & Solutions Ltd as it is functionally different vis-à-vis the Appellant.

12.3 The learned AU/learned TPO/Hon'ble DRP has grossly erred in not rejecting Persistent Systems Ltd. based on functional dissimilarity, non-availability of segmental data, significant research & development activities, owning of significant intangibles and presence of extraordinary events that occurred during the relevant year.

12.4 The learned AU/learned TPO/Hon'ble DRP has grossly erred in not rejecting Sasken Communications Technologies Ltd. on the ground of functional dissimilarity and non-availability of segmental data.

12.5 The learned AU/learned TPO/Hon'ble DRP has grossly erred in rejecting the following companies that ought to have been included as comparables:

- (a)• Akshay Software Technologies Ltd
- (b)• Comp-U-Learn Tech India Ltd.
- (c)• Helios and Matheson Information Technology Ltd.
- (d)• LGS Global Ltd.
- (e)• Maveric Systems Ltd.
- (f) • Thinksoft Global Services Ltd.
- (g) • Silverline Technologies Ltd.
- (h) • Evoke Technologies

(i) • R S Software (India) Ltd.

13. IT Enabled Services

13.1 The learned AO/ learned TPO/ Hon'ble DRP erred in rejecting companies that ought to have been accepted as comparable:

- Cosmic Global Ltd.
- E4e Healthcare Business Services Pvt. Ltd.
- Microgenetics Systems Ltd.
- Omega Healthcare Management Services
 - R Systems International Ltd.
- Caliber Point Business Solutions Ltd.
 - Informed Technologies India Ltd.

13.2 The learned AO/ learned TPO/Hon'ble DRP erred in accepting ICRA Online Ltd. as a comparable that ought to have been rejected.

14. The learned AO/learned TPO/Hon'ble DRP has erred in making the following errors in the computation of working capital adjustment while computing the ALP of international transaction:

a. by not considering the fact that the Appellant does not have any working capital risk, therefore, no negative working capital adjustment should be allowed.

b. in considering the wrong SBI PLR while computing the working capital adjustment.

c. by wrongly computing the working capital adjustment of certain comparable companies.

15. The learned AO/learned TPO/Hon'ble DRP erred in not allowing appropriate adjustment towards to the risk differential between the Appellant vis-à-vis comparable companies.

B. Corporate Tax

1. Re-computation of deduction under section 10A by reducing communication expenses from Export Turnover and Total Turnover

The learned Assessing Officer (AO) and the learned Dispute Resolution Panel ('DRP') have erred in reducing communication expenses from export turnover and total turnover for the purposes of computing deduction under section 10A.

2. Disallowance under section 40(a)(i) for software expenses - Rs. 24,723,240

a) The learned Assessing Officer (AO) and the learned Dispute Resolution Panel ('DRP') have erred in disallowing software expense amounting to Rs. 24,723,240 for non- deduction of tax at source.

b) The learned AO/DRP ought to have observed that on the said expense, no TDS was required to be deducted as per the tax treaty of India with the respective countries of payees.

Notwithstanding and without prejudice to the above,

c) The learned AO/DRP ought to have appreciated that software purchased from Altisource Solutions Inc is in the nature of reimbursement of expenses and hence not subject to withholding.

d) *The learned AO/DRP ought to have appreciated that an expense cannot be disallowed under section 40(a) when TDS liability on such expenses has arisen due to retrospective amendment.*

18. *Disallowance of brought forward business loss and unabsorbed depreciation —INR21,112,859*

The learned AO has erred in disallowing brought forward business loss and unabsorbed depreciation amounting to INR Rs.1,64,07,586 and INR 47,05,273 respectively which is consequential in nature to the appeal of the appellant for AY 2010-11.

19. *Non grant of brought forward MAT credit - INR 2,73,54,274*

The learned AO has erred in giving MAT credit of only INR 52,89,24 1 as against the available credit of INR 3,26,43,5 15 which is consequential in nature to the appeal of the appellant for AY 2010-11

20. *Levy of interest under section 234B - IThR 3,69,46,944*

The learned AO has erred in levying interest under section 234B amounting to INR 3,69,46,944 which is consequential in nature to the above adjustments

21. *Levy of interest under section 234C - INR 1,25,877*

The learned AO has erred in levying interest under section 234C amounting to INR 9,01,239 as against actual interest of INR7,75,362 resulting in excess levy of interest of INR1,25,877

22. *Levy of interest under section 234D - INR 5,51,170*

The learned AO has erred in levying interest under section 234D amounting to INR 5,51,170 which is consequential in nature to the above adjustments

The appellant craves leave to add, alter and modify the above grounds during the course of the appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that the order of the Assessing officer be set aside.

ITA No.209/B/2016

“1. The orders of the Dispute Resolution Panel is opposed to law and the facts and circumstances of the case.

Software development services segment:

2. *The DRP erred in directing the AO/TPO to exclude M/s. Acropetal Technologies Ltd., M/s. Larsen & Toubro Infotech Ltd., and M/s. R.S. Software (India) Ltd., from the list of comparables, holding them to be functionally dissimilar as they are having significant onsite revenues, thereby seeking exact comparability while searching for comparable companies of the assessee under TNMM method, whereas requirement of law and international jurisprudence require seeking similar comparable companies. Also, the nature of activity, ie., software development remains the same, irrespective of the company engaged in providing onsite or offshore services.*

3. *The DRP erred in directing exclusion of M/s. Acropetal Technologies Ltd., M/s. Larsen & Toubro Infotech Ltd., and M/s. R.S. Software (India) Ltd., on the*

ground that they have significant onsite revenue, without appreciating the fact that onsite development of software entails more cost and thereby results in lower profit margins.

- 4. The DRP erred in directing the AD to exclude M/s. Acropetal Technologies Ltd., from the list of final comparables also for the reason that clear segmental information of the employee cost and export earning filter was not available without appreciating that proper segmental information was available on Prowess database as well as audited financials.*
- 5. The DRP erred in directing to exclude E-infochips Ltd., from the list of comparables holding that no segmental information is available and that it fails 75% service revenue filter, by not acknowledging the fact that entire revenue of the company comes from provision of services, and service income being 100% of its sales, the company qualifies the filter.*
- 6. The DRP erred in directing exclusion of M/s. M/s.ICRA Techno Analytics Ltd., from the list of comparables on the ground that it is into diversified activity and no segmental data is available, without appreciating that the basic function of the company is developing software solutions in those and other verticals. The company's business of analysis of statistical data of its clients before providing software solutions does not render the services to be functionally dissimilar.*
- 7. The DRP erred in directing to exclude M/s.E-Zest Solutions Ltd., from the list of comparables holding it to be functionally uncomparable, thereby seeking exact comparability by imposing condition beyond law whereas requirement of law is to acknowledge only those differences that are likely to materially affect the margin. The DRP ought to have appreciated that the comparable qualified all the qualitative and quantitative filters applied by the TPO and in a computer software services, if considered as a sector of business, the 15 different lines prevailing in the business cannot be considered functionally different from each other.*
- 8. The DRP erred in directing exclusion of M/s.Infosys Technologies Ltd., from the list of comparables holding it to be functionally uncomparable, without appreciating that the primary source of income of the comparable is from provision of software development services. Also, the DRP erred in imposing a condition beyond law in seeking exact comparability, whereas requirement of law is to acknowledge only those differences that are likely to materially affect the margin.*
- 9. The DRP erred in disregarding the position of law that there could be differences between the enterprises compared under TNMM method that are not likely to materially affect the price or cost charged or the profits accruing to such enterprises.*
- 10.The DRP erred in directing the AO to exclude M/s. Tata Elxsi Ltd., from the list of comparables, holding it to be functionally uncomparable, without appreciating the fact that the comparable qualified all the qualitative and quantitative filters applied by the TPO and it is a similar comparable company*

and moreover, the requirement of law and international jurisprudence require seeking similar comparable companies while searching for comparable companies under TNMM. The DRP has also not appreciated that there have been no projects in visual computing labs during the relevant previous year.

11.The DRP erred in directing the AO/TPO to exclude M/s. R.S. Software (India) Ltd., from the list of comparables merely to maintain consistency, even in the absence of objection with respect to inclusion of the said comparables in the list.

ITES Segment:

12.The DRP erred in directing the AO/TPO to exclude M/s. Acropetal Technologies Ltd., holding it to be functionally different because it performs engineering design, without appreciating that the company is considered to be a comparable based on the notification No.11521 issued by the CBDT, wherein there is no distinction between a BPO & KPO. The DRP also erred in applying "onsite revenue filter" without appreciating the fact that the function carried out is "Software Development" irrespective of whether onsite or offshore.

13.The DRP erred in excluding M/s.Acropetal Technologies Ltd., on the ground that it has significant onsite revenue without appreciating the fact that onsite development of software entails more cost and thereby results in lower profit margins.

14.The DRP erred in directing the AO/TPO to exclude M/s. Jeevan Scientific Technologies Ltd., holding it to be functionally uncomparable as it fails service income filter, when only the segmental results have been considered for comparability and in such a scenario, the application of service income to total income filter does not arise. Also, seeking exact functional similarity under TNMM is not right as requirement of law and international jurisprudence require seeking similar comparable companies.

15.The DRP erred in directing the AO/TPO to exclude M/s. Accentia Technologies Ltd., holding it to be functionally different thereby insisting on strict comparability under TNMM, which defeats the very purpose of the law relating to determination of ALP under I.T. Act. The DRP has failed to appreciate that the services rendered by the assessee in the healthcare receivable management using electronic medical records, coding, billing etc., to provide a platform for the client to manage their various requirements, are all considered to be primarily engaged in providing ITES to its clients.

16.The DRP erred in directing to exclude M/s.Infosys BPO Ltd., from the list of comparables holding them to be functionally uncomparable, thereby seeking exact comparability by imposing condition beyond law, whereas requirement of law is to acknowledge only those differences that are likely to materially affect the price or cost charged or the profits accruing to such enterprises. The DRP failed to appreciate that the brand name perse does not increase the profitability but may only generate revenue.

17. The DRP erred in directing the AO to exclude M/s. iGate Global Solutions Ltd., from the list of comparables, holding it to be functionally uncomparable in the absence of segmental information without appreciating that the comparable had classified itself to be operating in one segment i.e., provision of ITES and further, insisting on strict comparability under TNMM defeats the very purpose of the law relating to determination of ALP under I.T. Act.

Corporate Issue:

18. The DRP erred in directing the AO to follow the ratio laid down by the Hon'ble Court in the case of Tata Elxsi Limited 349 ITR 98 and exclude telecommunication expenses and travelling expenses incurred in foreign currency from the total turnover also, while computing the deduction u/s 10A of the I.T. Act, without appreciating the fact that there is no provision in section 10A that such expenses should be reduced from the total turnover also, as clause (iv) of the explanation to section 10A provides that such expenses are to be reduced only from the export turnover.

19. The DRP erred in not appreciating the fact that the jurisdictional High Court's decision in the case of Tata Elxsi Limited 349 ITR 98 has not been accepted by the department and an appeal has been filed before the Hon'ble Supreme Court.

20. The DRP erred in allowing the claim of the assessee u/s. 36(1)(va) amounting to Rs. 2,10,42,281/- without appreciating the fact that the assessee has not remitted the employees' contribution towards the provident fund & ESI within the due date and as such, these sums are an income in the hands of the assessee in terms of Section 2(24)(x) r.w.s. 36(1)(va).

21. The DRP failed to appreciate the fact that the employees' contribution to PF/ESI is to be allowed u/s 36(1)(va), if such contributions are remitted within the due dates prescribed under the relevant Acts and the due date referred in Section 43B(b) are not applicable to the employees' contribution.

22. The DRP erred in deleting the disallowance holding that the employees' contribution towards ESI & PF had been remitted well before the due date for filing the return, without appreciating the fact that the Madras HC in the case of CIT v Madras Radiators and Pressings Ltd. [2003] 264 ITR 620 had made a clear demarcation between the employees' contribution and the employer's contribution and that the ITAT, Kolkata in the case of Bengal Chemical and Pharmaceuticals Ltd. [2011] 10 taxman.com 26, after considering the decision of the case of Sabari Enterprises had clarified that the employees' contribution to PF & ESI is not governed by Section 43B and as such the amendment to Section 43B(b) would have no effect on the additions of the sums covered u/s 2(24)(x) r.w.s 36(1)(va).

23. The DRP erred in deleting the disallowance of employees' contribution to PF and ESI Funds without appreciating the clarification brought out by the CBDT at paragraph 5, vide its latest circular No. 22/2015 dated 17.12.2015

24 For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the DRP be reversed and that of the Assessing Officer be restored.

25. The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.”

Brief facts of the case are as under:

2. The assessee is a company and filed its return of income for year under consideration on 30/11/2011 declaring taxable income of Rs.19,17,30,609/-. The assessee filed revised return of income on 29/11/2012 declaring the same income but rectifying the brought forward MAT credit from assessment year 2010-11 return of income. Assessee had a total income of Rs.31,63,01,080/-from business on which assessee had claimed 10A/10AA deduction amounting to Rs.10,36,40,466/- and thereafter claimed set off of brought forward losses amounting to Rs.1,64,07,586/- and unabsorbed depreciation of Rs.47,05,273/- after taking into consideration income from other sources of Rs.1,82,850/-. The case was selected for scrutiny and statutory notices were issued in response to which representative of assessee appeared before Ld.AO and filed requisite details as called for.

3. The Ld.AO observed that, assessee is providing services in SWD and ITES segment and had entered into international transaction with its associated enterprises exceeding Rs.15crores and therefore reference was made to the Transfer Pricing officer.

Upon receipt of reference under 92CA, the Ld.TPO called for economic details of the international transaction entered into by

assessee with its associated enterprises. The Ld.TPO observed that assessee had following international transaction:

International transaction	Methodology adopted	Value(INR)	Margin
Provision of software development services	TNMM	635,010,346	15.10%
Provision of IT Enabled Services	TNMM	1,564,791,412	14.38%

4. It was observed that assessee used TNMM as most appropriate method with OP/OC as PLI thereby computing its margin at 15.10% and 14.38% for SWD and ITeS Segment.

5. The Ld.TPO observed that assessee had selected following 13 comparables with average margin of 13.71% in respect of software development activity and 8 comparables with average margin of 14.38% in respect of IT enabled services the details of which are as under:

SWD segment

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Sl. No.	Company Name	3-year Average Margin on Cost
1	Acropetal Technologies Limited (seg.)	24.74%
2	Akshay Software Technologies Ltd.	3.62%
3	Bodhtree Consulting Ltd.	45.11%
4	Cat Technologies Ltd.	20.79%
5	Comp-U-Learn Tech India Ltd.	21.40%
6	Compulink Systems Ltd. (seg.)	5.82%
7	Helios & Matheson Information Technology Ltd.	16.11%
8	L G S Global Ltd.	14.21%
9	Maveric Software Ltd.	7.98%
10	Quintegra Solutions Ltd.	0.22%
11	R S Software India Ltd.	12.44%
12	Silverline Technologies Ltd.	-10.44%
13	Thinksoft Global Services Ltd.	16.27%
	Arithmetic Mean	13.71%

ITES segment

Sl. No.	Company Name	Unadjusted average margin - 3 years
1	Cosmic Global Ltd.	20.87%
2	Informed Technologies India Ltd.	19.68%
3	Jindal Intellicom Ltd.	8.97%
4	Fortune Infotech Ltd.	22.80%
5	Omega Healthcare Management Services	15.43%
6	Aditya Birla Minacs Worldwide Ltd.	7.15%
7	Caliber Point Business Solutions Ltd.	15.80%
8	R Systems International Ltd.	4.37%
	Arithmetic Mean	14.38%

6. Unhappy with assessee's comparables, the Ld.TPO carried out fresh search and shortlisted following 13 comparables for SWD segment with an average margin of 24.82% and 10 comparables for ITES segment with an average margin of 24.77%:

SWD segment

Sl. No.	Company Name	Margin on Cost (2011)	Adjusted Margin
2	e-zest Solutions	21.03%	19.39%
3	E-infochips Ltd.	56.44%	56.29%
4	Evoke Technologies Ltd.	8.11%	8.49%
5	ICRA Techno Analytics Ltd.	24.83%	23.22%
6	Infosys Ltd.	43.39%	43.71%
7	Larsen & Toubro Infotech Ltd.	19.83%	20.28%
8	Mindtree Ltd. (Seg)	10.66%	9.73%
9	Persistent Systems & Solutions Ltd.	22.12%	21.59%
10	Persistent Systems Ltd.	22.84%	22.02%
11	R S Software India Ltd.	16.37%	16.66%
12	Sasken Communication Technologies Ltd.	24.13%	24.90%
13	Tata Elxsi Ltd. (Seg)	20.91%	19.37%
	Arithmetic Mean	24.82%	24.40%
	Less: Working Capital Adjustment	0.42%	
	Adjusted Arithmetic Mean	24.40%	

ITES segment

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Sl.No.	Company Name	Unadjusted Margins FY 2010-11	Adjustment margins
1	Accentia Technologies Ltd.	28.89%	26.80%
2	Acropetal Technologies	26.86%	23.48%
3	Cosmic Global Ltd.	9.81%	11.22%
4	e4e Healthcare	12.38%	14.62%

7. The Ld.TPO also restricted working capital adjustment at 1.63% and 1.47% for SWD and ITES segment respectively denied risk adjustment. The Ld.TPO thus computed shortfall at Rs.51,322,305/- and Rs.129,984,850/- under SWD services and an ITES segment respectively.

8. On receipt of the Transfer Pricing order, the Ld.AO passed draft assessment order on 17/03/2015, wherein, further disallowances were made as under:

- disallowance of brought forward loss and unabsorbed depreciation- Rs.2,11,12,859/-
- disallowance of excess claim of deduction under section 10 A/10 AA- Rs.40,76,587/-
- disallowance under section 40 (a) (ia) on software purchases- Rs.2,47,23,240/-
- disallowance under section 2 (24) (x) read with section 36 (1) (va)- Rs.2,10,42,281/-

9. Aggrieved by the additions made by Ld.AO, assessee filed objections before the DRP.

10. The DRP excluded certain comparables and directed Ld.AO to compute deduction under section 10A/10AA in accordance with the

decision of *Hon'ble Karnataka High Court* in case of *CIT vs Tata Elxsi Ltd.* reported in 394 ITR 98. All other corporate taxes disallowances were upheld by the DRP.

11. On receipt of the DRP order the Ld.AO passed the final impugned order by computing total income of Rs.38,93,05,310/-.

12. Aggrieved by the order of Ld. AO, assessee as well as revenue are in appeal before us now.

13. In the appeal filed by revenue, only issue is in respect of deduction computed under section 10A/10AA of the Act.

14. Admittedly this issue is *res integra* settled by the decision of *Hon'ble Supreme Court* in case of *Yokogawa India Ltd.*, reported in 391 ITR 274 wherein it has been held as under:

"That from a reading of the relevant provisions of section 10A it is more than clear that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee.

This is also more than clear from the contemporaneous Circular No. 794, dated 9-8-2000.

If the specific provisions of the Act provide [first proviso to sections 10A(1); 10A(1A) and 10A(4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 9-8-2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, "immediately after the stage of determination of its profits and gains.

At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in sections 70, 72 and 74 would be premature for application. The deductions under section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression 'total income of the assessee' in

section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in section 10A as 'total income of the undertaking'.

For the aforesaid reasons it is held that though section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV and not at the stage of computation of the total income under Chapter VI. ”

15. We therefore do not find any infirmity in the view taken by the Ld.AO.

Accordingly the grounds raised by revenue stands dismissed.

16. In the appeal filed by assessee, Ld.AR submitted that assessee wish to argue Grounds 12.2-12.4 and the comparables (h), (j) in ground 12.5. It is submitted by the Ld.AR that, in Ground No.13 assessee seeks inclusion of comparables referred in 13.1 (a) and (b) and seeks exclusion of comparable alleged in Ground No.13.2.

17. The Ld.AR further submitted that, assessee in Ground No.14 alleges that working capital may be granted in actuals and has not pressed ground 14 (a).

18. Before we undertake the comparability analysis, it is *sine qua non* to understand the functions performed the risk assumed and assets owned by assessee under both the segments.

Functions performed:

19. The Ld.TPO has recorded in the Transfer Pricing order that assessee provides contract software service development and IT enabled services including data analysis, compilation and transmission on customised software to overseas AE. It is also been

recorded that assessee has entered into an agreement with its AE in 2009 for rendition of such services.

Assets owned

20. The assets owned by assessee includes employees, property, plant and equipment etc which is required to carry out the day-to-day business of assessee.

Risks assumed

21. In the transfer pricing study, assessee assumes only human resource risk and all other risk are being born by the AE.

Based on the above it can be held that assessee is a pure contract service provider that renders services only to its AE with bare minimum risk or no risk.

22. As Ld.AR has only argued in respect of comparables sought for inclusion/exclusion in the grounds referred to herein above. We therefore restrict our opinion only in respect of these grounds. Remaining grounds are therefore dismissed as not pressed.

Ground No. 12.2-12.4:

23. Assessee seeks exclusion of Persistent Systems and Solutions Ltd., Persistent Systems Ltd., and Sasken Communication Technologies Ltd., on the ground that it is functionally different with that of assessee. It has been submitted that this comparable is excluded by coordinate bench of this *Tribunal* in case of *Applied Materials India Pvt.Ltd vs ACIT* in *IT(TP)A No.17/B/2016* for the very same assessment year under consideration by observing as under:

9.2.1 These two companies were part of the TP Study analysis however the assessee raised objections against these companies before the TPO as well as.

9.2.2 Before us, the learned Authorised Representative of the assessee has submitted that these companies are functionally not comparable to the assessee as these are engaged in diversified activity i.e. rendering of software development services and licensing, royalty of software products. Thus without having the separate segmental details and data these diversified activities cannot be compared with the assessee. He has further pointed out that the company Persistent Systems Ltd. also engaged in developing products and therefore the activities are not comparable with that of the assessee. In support of his contention, he has relied upon the decision of this Tribunal dt.24.2.2016 in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) and submitted that this company was found to be not comparable with the software development services provider. He has further pointed out that in assessee's own case for the Assessment Year 2010-11, the DRP vide its order dt.24.11.2014 has excluded Persistent Systems and Solutions Ltd. from the list of comparables by holding that this company is not comparable to the assessee.

9.2.3 On the other hand, the ld. DR has submitted that the TPO as well as DRP has examined the functional comparability of these companies and found that these companies are comparable with the assessee. These two companies have satisfied all the filters applied by the TPO and DRP therefore the minor variation in the activity would not render these companies non-comparable when a comparable price is considered under TNMM.

9.2.4 We have considered the rival submissions as well as the relevant material on record. At the outset we note that the functional comparability of these two companies have examined by the co-ordinate bench of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) in para 60 and 61 & paras 24 to 26 as under :

Persistent Systems & Solutions Ltd.

60. The assessee has the grievance against rejection of this company by the DRP. The ld. AR has submitted that assessee did not raise any objection against this company, however, the DRP has rejected the said company. Therefore, the said company should be retained in the list of comparables.

61. Having considered the rival submissions as well as relevant material on record, at the outset, we note that the DRP has examined the functional comparability of this company by considering the relevant details as given in the annual report of this company. The DRP has given the finding that the entire revenue has been earned by this company from the sale of software services and products and in the absence of segmental details, it cannot be considered as comparable with software services segment. We find that this company has shown the income from sale of software services and products to the tune of Rs.6.67 crores. We further note that as per Schedule 11, the entire revenue has been shown under one segment i.e., sale of software services and products. Therefore, no separate segment has been given in respect of software services. Accordingly, the composite data of revenue as

well as margins of this company pertaining to the sale of software services and products cannot be considered as comparable with the software development services segment of the assessee. In view of the above facts and circumstances, we do not find any error or illegality in the directions of the DRP in excluding this company from the list of comparables. This ground of CO is dismissed.

(4) Persistent Systems Ltd.

24. We have heard the ld. DR as well as ld. AR and considered the relevant material on record. The assessee raised objections against selection of this company on the ground that this company is functionally not comparable as engaged in the product development. The segmental information for services and product is not available. Further, the assessee has also pointed out that there was an acquisition and restructuring during the year under consideration.

25. The DRP has noted the fact that this company has reported the entire receipt from sales and software services and product. Therefore, no segmental information was found to be available for sale of software services and product. Further, the DRP has noted that as per Note 1 of Schedule 15, this company is predominantly engaged in outsource software development service. Apart from the revenue from software services, it also earns income from licence of products, royalty on sale of products, income from maintenance contract, etc. These facts recorded by the DRP has not been disputed before us.

26. Therefore, when this company is engaged in diversified activities and earning revenue from various activities including licencing of products, royalty on sale of products as well as income from maintenance contract, etc., the same cannot be considered as functionally comparable with the assessee. Further, this company also earns income from outsource product development. In the absence of any segmental data of this company, we do not find any error or illegality in the findings of the DRP that this company cannot be compared with the assessee and the same is directed to be excluded from the set of comparables. We further find from the Annual Report that there is no change in the activity and functions of these companies during the year under consideration in comparison to the Assessment Year 2010-11. Accordingly, following the decisions of the coordinate benches of this Tribunal (supra), we direct the A.O./TPO to exclude these two companies from the set of comparables.

(iv) Sasken Communication Technologies Ltd.

9.3.1 The ld. AR of the assessee has submitted that this company is engaged in the development of software products as it has inventories, intangible assets as well as high expenditure on R&D. Therefore this company is functionally not comparable to the assessee. The ld. AR has referred to the

Annual Report of this company and submitted that it derives income from software products specifically new products launched called Vyaparaseva during F.Y. 2010-11. Thus this company is engaged in product development cannot be compared with the assessee when segmental details are not available. He has relied upon the decision dt.24.2.2016 of the co-ordinate bench of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra).

9.3.2 On the other hand, the learned Departmental Representative has submitted that the inventory shown at page 70 of the report is very negligible. The product launched is for future period and not generated IT(T.P)A Nos.17 & 39/Bang/2016 any revenue during the year under consideration. He has relied upon the orders of authorities below.

9.3.3 We have considered the rival submissions as well as the relevant material on record. The co-ordinate bench of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) has considered the comparability of this company in paras 27 to 29 as under :

(5) Sasken Communication Technologies Ltd.

27. The assessee raised objection that this company has revenue from software services, software products and other services. The DRP has come to the conclusion that this company earned revenue from 3 segments. However, no segmental information is available. Accordingly, the DRP directed the AO to exclude this company from the comparables.

28. We have heard the ld. DR as well as ld. AR and considered the relevant material on record. The DRP has reproduced the break-up of revenue in the impugned order as under:- Amount in Rs. lakhs

Year ended March 31, 2010	March 31, 2019
Software Services 37,736.22	40531.20
Software products 2,041.00 6	146.43
Other services 372.77 1	297.05
Total revenues	40,150.89
	47,974.68

29. Thus, there is no dispute that this company earns revenue from 3 segments. However, the segmental operating margins are not available. Therefore, in the absence of segmental relevant data and particularly operating margins, this composite data cannot be considered as comparable with the assessee for software development services segment. Accordingly, we do not find any error or illegality in the findings of the DRP.

We further note that the DRP has not adjudicated the objections of the assessee whereas for the Assessment Year 2010-11, the DRP rejected this company as comparable. Accordingly, we set aside this issue to record of the A.O./TPO to verify the relevant facts and compare with the facts recorded by

the Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) for the Assessment Year 2010-11 and then decide the issue after giving an opportunity of hearing to the assessee.”

24. We note that the coordinate bench of this *Tribunal* held these companies to be not fit comparable for a captive service provider rendering services only to its associated enterprise before us. Nothing has been brought on record by revenue to establish any distinguishing facts so as to take a different view.

Respectfully following the above view we direct Ld.AO to exclude these comparables from the finalist.

Accordingly Ground No.12.2 stands allowed.

Ground No.12.5 (h)(j):

26. The assessee seeks inclusion of Evoke Technologies and RS Software (India) Ltd.

27. The Ld.AR submitted that, assessee do not have any objections if these companies are restored to the set of comparables as assessee did not raise any objections before the DRP but DRP rejected these companies *suo moto*. In view of the fact that assessee as well as revenue are seeking inclusion of these comparables, we set aside the directions of DRP qua these comparables and restore these companies to the final set of comparables.

Accordingly this ground raised by assessee stands allowed.

Ground 13.1 (a)-(b):

28. The assessee seeks inclusion of Cosmic Global Ltd. and E4e-Healthcare Business Services Pvt Ltd., under I T Enabled services.

It has been submitted that these comparables were excluded by DRP though these were acceptable to the assessee. It has been submitted that the DRP has excluded these comparables for the relevant reason that in case of cosmic global Ltd., expenses to the extent of 41% is on sub contracting/outsourcing and in case of E4e-Healthcare, it has been observed by the DRP that it is engaged in forward contracts, which in turn influence margin inconsistency in accounting etc.

29. The Ld.AR submitted that, these comparables were included by the Ld.TPO after verifying the operating income and operating costs.

30. In view of the fact that assessee as well as revenue are seeking inclusion of these comparables, we set aside the directions of DRP *qua* these comparables and restore these companies to the final set of comparables.

Accordingly this ground raised by assessee stands allowed.

Ground No. 13.2:

31. The assessee seeks exclusion of a ICRA Online Ltd. It has been submitted by Ld.AR that this comparable has been remanded by coordinate bench of this Tribunal in case of Finestra Software Solutions Pvt.Ltd vs.ACIT in IT(TP)A no. 491 & 529/ Bang/2016 by order dated 25/05/2018 by observing as under:

“26. As far as the company ICRA Online Ltd. is concerned, this tribunal in the case of M/S.Zyme solutions Pvt.Ltd. Vs. ACIT IT(TP) A.No.85/Bang/2016 for AY 2011-12 order dated 28.4.2017 in paragraph-26 of its order was pleased to remand to TPO/AO for fresh consideration, the comparability of this company with the Assessee. Following the said

decision, we set aside the order of the AO in this regard and remand to the TPO/AO for fresh consideration the comparability of this company with the Assessee on the lines indicated in the order in the case of M/S.Zyme solutions Pvt.Ltd. (supra)".

Respectfully following the same we direct Ld.AO/TPO to consider this comparable afresh in light of various decisions of this *Tribunal*.

Accordingly this grounds raised stands allowed for statistical purposes.

Ground No. 14 (b)-(c)

32. It has been submitted by the Ld.AR that assessee is seeking working capital adjustment in actual instead of restricting it to 1.63% as done by the Ld.TPO.

33. The Ld.AR submitted that cannot be restricted and has to be computed on actual. It has been submitted that coordinate bench of this *Tribunal* in preceding assessment year in IT(TP)A No.178/Bang/2015 by order dated 11/03/2021 had directed the Ld.AO to compute the working capital adjustment on actual.

34. We have heard both the parties. Respectfully following the ew taken by this Tribunal in assessee's own case in preceeding assessment year, we direct Ld.AO to compute the mean of working capital adjustment in respect of comparables retained after giving effect to this order of the *Tribunal*.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

35. Ground No.16 is in respect of computation of deduction under section 10A by reducing communication expenses from export turnover and total turnover.

36. We have already considered this issue while disposing of the appeal filed by revenue. We have directed Ld.AO to compute the deduction in accordance with the decision of *Hon'ble Supreme Court* in case of *Yukogava*, (supra).

Accordingly this ground raised by assessee stands allowed as indicated hereinabove.

37. Ground No. 17 is in respect of disallowance under section 40(a)(i) forced software expenses amounting to Rs.24,723,240/-.

38. We have heard both sides.

39. We find that that this issue came up for consideration before the Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT*, [2021] 125 taxmann.com 42 (SC) judgment dated 02-03-2021, wherein it was held that transaction relating to software are in the nature of sale and not license, no copyright or part of any copyright is licensed to the assessee. The non-resident owner continues to have proprietary rights in the software and use of software by the Indian company is limited to making back-up copy and redistribution. So payment received for sale of computer software is business income. As such, software purchased is in the nature of purchase and sale of product and no TDS is deductible. Being so, it is allowable as expenditure and there is no question of deduction of any TDS on the same.

40. As we have already allowed the expenses, other grounds raised in respect of this issue becomes academic.

Accordingly this ground raised by assessee stands allowed.

41. All other grounds which is not been discussed hereinabove are not adjudicated for the reason that the same has not been pressed by assessee.

In the result appeal filed by assessee stands allowed partly as indicated hereinabove.

Order pronounced in open court on 2nd July, 2021.

Sd/-

(CHANDRA POOJARI)
Accountant Member
Bangalore,
Dated, the 2nd July, 2021.
/Vms/

Sd/-

(BEENA PILLAI)
Judicial Member

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-7-2021		Sr.PS
3.	Draft proposed & placed before the second member	-7-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-7-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-7-2021		Sr.PS/PS
6.	Kept for pronouncement on	-7-2021		Sr.PS
7.	Date of uploading the order on Website	-7-2021		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-7-2021		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS