

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A”BENCH: BANGALORE**

**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No.1565/Bang/2013
Assessment Year: 2008-09

M/s. Robert Bosch Engineering & Business Solution Ltd. No.123, Industrial Layout Koramangala Hosur Road Bangalore 560 095. PAN NO : AAACR7108R	Vs.	Deputy Commissioner of Income-tax (LTU) Bangalore
APPELLANT		RESPONDENT

IT(TP)A No.1575/Bang/2013
Assessment Year: 2008-09

Deputy Commissioner of Income-tax (LTU) Bangalore	Vs.	M/s. Robert Bosch Engineering & Business Solution Ltd. No.123, Industrial Layout Koramangala Hosur Road Bangalore 560 095.
APPELLANT		RESPONDENT

Appellant by	:	Shri Percy Pardiwala, Sr. A.R.
Respondent by	:	Ms. Neera Malhotra, D.R.

Date of Hearing	:	06.07.2021
Date of Pronouncement	:	01.09.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

These cross appeals are directed against the order dated 23-08-2013 passed by Ld CIT(A), Large Taxpayers Unit, Bangalore and they relate to the assessment year 2008-09.

2. The assessee is engaged in business of development of software, dealing in automotive components, mechanical and electronic designs, translations etc.

REVENUE'S APPEAL

3. We shall first take up the appeal filed by the revenue. The grounds of appeal urged by the revenue read as under:-

1. *"The CIT(A) erred in disallowing the AO's action of excluding in foreign currency of Rs.111,35,86,587/- from the export turnover.*
2. *The CIT(A) erred in allowing the assessee's claim of deduction of telecom charges of Rs.6,24,40,116/- and expenditure incurred in foreign currency of Rs.111,35,86,587/- from the total turnover.*
3. *In the facts and circumstances of the case, the learned CIT(A) erred in holding that M/s. KALS Information Systems Ltd cannot be taken as comparable as the company carries inventories.*
4. *In the facts and circumstances of the case, the Learned CIT(A) erred in holding that M/s. Bodhtree Consulting Ltd. being functionally different, cannot be taken as comparables ignoring the fact that it contracting his own finding that the services offered are in the nature of the ITES services and relying on the website information without giving any finding from the annual report.*
5. *Software Segment: The Learned CIT(A) erred in holding that the size and turnover & RPT of the company are deciding factors for treating a company as a comparable and accordingly erred in excluding the comparables, M/s. Flextronics Ltd., IGate Global Solutions Ltd.,*

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Sasken Communication Technologies Ltd., Tata Elxsi Limited and Wipro Limited in Software development segment on similar issue the department is in further appeal hence further appeal is hereby suggested.

ITES segment: The learned CIT(A) erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable and also RPT (% of sales) filter and accordingly erred in excluding the following comparables.

6. *In the facts and circumstances of the case the Ld. CIT(A) erred in holding that M/s. Accentia Technologies Ltd. had extraordinary circumstances, cannot be taken as comparable.*
7. *In the facts and circumstance of the case the Ld. CIT(A) erred in holding that M/s. Genesys International Corporation Ltd. being functionally different, cannot be taken as comparable.*
8. *ITES Segment: The Learned CIT(A) erred in holding that the turnover and RPT of the company are deciding factors for treating a company as a comparable and accordingly erred in excluding the comparables, Aditya Birla Minacs Worldwide Ltd., Asit C Mehta Financial Services Ltd. (Seg), Caliber Point Business Solutions Ltd., Datamatics Financial Services Ltd. (seg), e4e Healthcare Solutions Ltd. (earlier known Nitanny), Eclerx Services Ltd., Infosys BPO Ltd., I-Service India Pvt. Ltd., Jindal Intellicom Pvt. Ltd., Mold Tek Technologies Ltd., Spanco Ltd. (Seg), Wipro Ltd. (seg), in ITES segment on similar issue the department is in further appeal hence further appeal is hereby suggested.”*

4. The first and second ground relate to deduction claimed u/s 10A of the Act. In the first ground, the revenue is assailing the decision of Ld CIT(A) in directing AO not to exclude expenditure incurred in foreign currency of Rs.111,35,86,857/- from export turnover while computing deduction u/s 10A of the Act. The second ground relate to the direction of Ld CIT(A) to the AO to reduce expenses incurred towards telecom charges and expenditure incurred in foreign currency from both export turnover and total turnover while computing deduction u/s 10A of the Act.

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4.1 So far as the first ground is concerned, the facts are that the assessee incurred expenditure in foreign currency aggregating to Rs.111,35,86,857/- and the same was excluded by the AO from the export turnover while computing deduction u/s 10A of the Act. The assessee challenged the same before Ld CIT(A) submitting that the exclusion of expenditure in foreign currency from export turnover contemplated in clause (iv) of Explanation 2 to sec.10A is applicable only to export turnover from providing technical services outside India and does not apply to export of computer software by the assessee. The Ld CIT(A) noticed that an identical issue is pending before the Tribunal as well as in High Court in the assessee's own case. He also noticed that his predecessor has decided this issue against the assessee in Asst. Year 2007-08. However, he decided this issue in favour of the assessee on the reasoning that the decision of ITAT as on date is in favour of the assessee. The revenue is aggrieved by this decision.

4.2 We notice that an identical issue has been restored to the file of Ld CIT(A) by the co-ordinate bench in the assessee's own case in AY 2009-10 in ITA No.1688/Bang/2017 order dated 28-06-2021. For the sake of convenience, we extract below the discussions made by the co-ordinate bench in Assessment Year 2009-10:-

“10. We heard the parties on this issue and perused the record. We notice that the issue whether the expenditure incurred in foreign currency is required to be excluded from the export turnover or not when the assessee is exporting only software, was examined by the coordinate bench in the assessee's own case in assessment year 2007-08 and the matter was restored to the file of the Ld. CIT(A) with the following observations:

“16. We have considered the rival submissions. It is clear from the decision of the Hyderabad Bench of the ITAT that to exclude expenses incurred in foreign currency from the export turnover, the assessee should have obtained the benefit of [section 10A](#) on income from rendering technical services outside India. The admitted factual position in the present case is that the assessee

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is in the business of exporting computer software and therefore the expenses incurred in foreign exchange cannot be said to be one incurred by the assessee in connection with providing technical services outside India. The assessee does not claim exclusion of telecommunication charges or insurance attributable to the delivery of software outside India. The claim for exclusion from the export turnover is made by the assessee only in respect of expenses incurred in foreign currency in providing technical services outside India. We however do not have the break-up of the item of expenditure incurred in foreign currency outside India. A copy of the agreement between the Assessee and Robert Bosch, Germany titled software project agreement (SPA) has been filed before us. We do not know as to whether the entire export turnover is in relation to this client alone or there were other clients for whom the Assessee rendered computer software development services. A perusal of the SPA filed before us shows that the Assessee agreed to carry out software development work for Robert Bosch Germany at Germany also. The terms of the agreement for rendering services on-site at clauses-5.2 to 5.2.6 of the agreement does not involve rendering of any technical services. The question as to whether the entire expenditure incurred in foreign exchange outside India relates to providing technical services outside India cannot be decided in the absence of the required information as stated above. If the claim of the Assessee that the entire expenditure incurred in foreign exchange outside India does not relate to providing technical services outside India, then the same cannot be excluded from the export turnover. Since the factual verification is required for adjudicating the aforesaid issue, we deem it appropriate to set aside the order of the CIT(A) and remand the issue to him with a direction to decide the issue with regard to Gr.No.2 and 3 raised by the Assessee before him. We accordingly allow the appeal of the assessee for statistical purpose.”

11. *In assessment year 2004-05 also, the coordinate bench restored the issue to the file of the Ld. CIT(A) for examining this issue in the light of decision rendered by Hon'ble jurisdictional High Court in the case of Infosys Ltd. (supra). Consistent with the view taken in the above said two years in the assessee's own case, we set aside the order passed by Ld. CIT(A) on this issue and restore the same to his file for examining it afresh on similar lines.”*

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4.3 Consistent with the view taken by the Tribunal in Asst. Year 2007-08 and 2009-10, we restore this issue to the file of Ld CIT(A) for examining it afresh.

4.4 The second ground relate to exclusion of telecommunication charges from export turnover and total turnover while computing deduction u/s 10A of the Act. The Ld CIT(A), after deciding the issue relating to “expenditure incurred in foreign currency” in favour of the assessee, has held that the telecommunication charges and expenditure incurred in foreign currency should be deducted both from export turnover and total turnover. In any case, it is now settled that the amount reduced from the export turnover has to be reduced from the total turnover also as held by Hon’ble Supreme Court in the case of HCL Technologies Ltd, (404 ITR 179)(SC). Accordingly, the decision rendered by Ld CIT(A) on this issue does not require interference.

SOFTWARE DEVELOPMENT SEGMENT:-

5. Ground Nos. 3 to 5 urged by the revenue relates to the transfer pricing adjustment made in respect of Software development services (IT services). The facts relating thereto are discussed in brief. As per segmental details, the turnover of the assessee for Software development segment was Rs.626.85 crores (However in the list of international transactions, the turnover is mentioned as Rs.606.03 crores). The assessee adopted TNM method as most appropriate method. The Profit level indicator was taken as Operating profit/operating cost.

5.1 The TPO rejected the transfer pricing study of the assessee and selected following 20 comparable companies, whose average margin worked out to 23.65%:-

<i>SI.No.</i>	<i>Name of the company</i>	<i>OP/TC %</i>
1	<i>AvaniCincom Technologies</i>	25.62
2	<i>Bodhtree Consulting Ltd</i>	18.72
3	<i>Celestial Biolabs</i>	87.94
4	<i>e-zest Solutions Ltd</i>	29.81
5	<i>Flextronics(Aricent)</i>	7.86
6	<i>iGate Global solution ltd</i>	13.99
7	<i>Infosys</i>	40.37
8	<i>Kals Information systems ltd(seg)</i>	41.94
9	<i>LGS Global Ltd</i>	27.52
10	<i>Mindtree Ltd(seg)</i>	16.41
11	<i>Persistent Systems Ltd</i>	20.31
12	<i>Quintegra Solution Ltd</i>	21.74
13	<i>R systems International(seg)</i>	15.30
14	<i>R S Software (India) Ltd</i>	7.41
15	<i>Sasken Communication Technologies ltd(seg)</i>	7.58
16	<i>Tata Elxsi(Seg)</i>	18.97
17	<i>Thirdware solution Ltd</i>	19.35
18	<i>Wipro Ltd(Seg)</i>	28.45
19	<i>Softsol India Ltd</i>	17.89
20	<i>Lucid Software Ltd</i>	16.50
	AVERAGE	23.65

After making working capital adjustment, the TPO made transfer pricing adjustment of Rs.48.69 crores.

5.2 Before Ld CIT(A), the assessee insisted for application of turnover filter. In this regard, the assessee placed its reliance on the decision rendered by the Tribunal in the case of Genisys Integrated System (India) P Ltd vs. DCIT (ITA No.1231/Bang/2010). The Ld CIT(A) accepted this contention of the assessee. Since the turnover of the assessee in Software development segment was

Rs.606.03 crores, following the study of Dun & Brads Street, he held that the companies having turnover in the range of 200 crores to 2000 crores alone can be considered as comparable with the assessee.

5.3 The TPO had applied the Related party transaction filter (RPT filter) of 25% and above and accordingly the TPO had rejected the companies with RPT in excess of 25% of operating revenues. The assessee contended before the Ld CIT(A) that the RPT filter may be fixed at 10%. In this regard, the assessee had placed its reliance on the decision rendered by Delhi bench of Tribunal in the case of Sony India Pvt Ltd vs. DCIT (ITA No.1189/Del/2005 and 819 & 820/Del/2007), wherein RPT was range was fixed between 10% to 15%. However, the Ld CIT(A) fixed RPT filter @ 1% of sales.

5.4 Accordingly, applying both Turnover filter and RPT filter, the Ld CIT(A) directed exclusion of following companies:-

	<i>Turnover (Rs in</i>	<i>RPT (% of sales)</i>
<i>ITS Segment</i>		
<i>Flextronics Software</i>	<i>954.42</i>	<i>5.24% (failed)</i>
<i>I-gate Global Solutions Ltd.</i>	<i>781.56</i>	<i>4.44% (-do-)</i>
<i>Infosys Technologies Ltd.</i>	<i>15,672.00 (failed)</i>	<i>5.31% (-do-)</i>
<i>KALS Information Systems Ltd</i>	<i>2.05 (-do-)</i>	<i>-</i>
<i>Persistent System</i>	<i>383.41</i>	<i>8.95% (-do-)</i>
<i>Sasken Communication Tech Ltd.(Seg)</i>	<i>335.80</i>	<i>1.14% (-do-)</i>

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<i>Wipro Ltd .(Seg.,)</i>	<i>11,955.60 (failed)</i>	<i>0.02% (-do-)</i>
<i>LGS Global Ltd.</i>	<i>136.52 (-do-)</i>	<i>4.91% (-do-)</i>
<i>R Systems International (SEG)</i>	<i>144.56 (-do-)</i>	<i>13.01% (-do-)</i>
<i>Third ware Solutions Ltd.</i>	<i>52.28 (-do-)</i>	<i>15.32% (-do-)</i>
<i>Softsol India Ltd.</i>	<i>18.99 (-do-)</i>	<i>18.38% (-do-)</i>
<i>Lucid Software Ltd.</i>	<i>2.35 (-do-)</i>	<i>--</i>

5.5 The Id CIT(A) has observed in paragraph 6 of his order that two companies, viz., Mindtree Ltd and Tata Elxsi Ltd shall remain out of TPO's list, i.e., he has upheld the view of the TPO in respect of above said two companies.

5.6 In ground no.3 to 5 (first part), the revenue is assailing the decision of Ld CIT(A) in respect of following comparable companies:-

- (i) KALS information Systems Ltd
- (ii) Bodhtree Consulting Ltd
- (iii) Flextronics Software
- (iv) iGate Global Solutions Ltd
- (v) Infosys Technologies Ltd
- (vi) Mindtree Consulting Ltd
- (vii) Persistent Systems Ltd
- (viii) Sasken Communication Technologies Ltd
- (ix) Tata Elxsi Ltd
- (x) Wipro Ltd

In total, the revenue is contesting exclusion of ten companies cited above.

5.7 (a) Out of the above said ten companies contested by the revenue, M/s Mindtree Ltd and M/s Tata Elxsi Ltd have been retained by Ld CIT(A), i.e., he has not directed exclusion of these two companies. Hence the ground of the revenue in respect of these two companies is liable to be rejected.

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(b) The Ld CIT(A) has not rendered any decision on M/s Bodhtree Consulting Ltd. Hence the ground of the revenue in respect of this company is liable to be rejected

(c) In respect of application of turnover filter, we notice that the co-ordinate bench has followed the classification of companies on the basis of turnover criteria by the study of Dun & Brads Street, in its decision rendered in the case of Genisys Integrated System (India) P Ltd (supra). Following the same, we hold that the Ld CIT(A) was justified in applying turnover filter. Accordingly, the companies having turnover of below 200 crores and above 2000 crores are liable to be excluded. Accordingly, exclusion of following three companies by Ld CIT(A) is upheld:-

- (i) KALS Information Systems Ltd - 2.05 crores
- (i) Infosys Technologies Ltd - 15,672 crores
- (ii) Wipro Ltd (seg) - 11,955.60 crores

Hence the ground of the revenue in respect of these three companies is liable to be rejected.

(d) The assessee is objecting to the decision of Ld CIT(A) in adopting RPT filter of 1%. We have noticed earlier that the TPO had adopted RPT filter of 25% and the assessee had pleaded before the Ld CIT(A) to adopt 10%. However, the Ld CIT(A) has adopted RPT filter of 1% of sales, which was not the prayer of anyone. In any case, co-ordinate benches have determined the RPT filter @ 15% in many cases. Accordingly, we modify the order of Ld CIT(A) and determine the RPT filter @ 15% of sales. In that case, following companies are liable to be included as comparable companies:-

- (i) Flextronics Software
- (ii) iGate Global Solutions Ltd
- (iii) Persistent Systems Ltd
- (iv) Sasken Communication Technologies Ltd

Hence the decision rendered by Ld CIT(A) in respect of these four companies is liable to be reversed. The Ld A.R, however, submitted that the Ld CIT(A) has excluded these four companies only

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application of RPT filter of 1%. However, some of the above said companies have been held to be not a good comparable on the basis of functions performed, extra ordinary events. In this regard, he placed his reliance on the following decisions rendered by the Tribunal:-

(a) M/s 3DPLM Software Solutions Ltd (IT (TP) A No.1303/Bang/2012)

(b) M/s Mphasis Ltd (ITA No.325/Bang/2014 and ITA No.313/Bang/2014)

(c) DCIT vbs. M/s Verisign Services India P Ltd (IT(TP)A No.1230/Bang/2013)

(d) M/s Hewlett Packard (India) Software Operation P Ltd (IT(TP)A No.1682/Bang/2012)

We have gone through these decisions and we notice that M/s Persistent Systems Ltd has been held to be a not good comparable. We do not find any order in respect of remaining three companies. Accordingly, we direct exclusion of M/s Persistent systems Ltd from the list of comparable companies. Accordingly the remaining three companies are liable to be included as comparable companies. We order accordingly.

ITES SEGMENT:-

6. As per segmental details, the turnover of the assessee in ITES segment was Rs.54.39 crores (However in the list of international transactions, the turnover is mentioned as Rs.53.59 crores). The assessee adopted TNM method as most appropriate method. The Profit level indicator was taken as Operating profit/operating cost.

6.1 The TPO rejected the transfer pricing study of the assessee in respect of ITES services also and selected following 20 comparable companies, whose average margin worked out to 24.75%:-

<i>Sl.No.</i>	<i>Name of the company</i>	<i>OP/TC%</i>
1	<i>Accentia Technologies Ltd (Seg.)</i>	41.77
2	<i>Acropetal Technologies Ltd (Seg.)</i>	35.30
3	<i>Aditya Birla Minacs Worldwide Limited (Earlier known as Transworks Information Services Ltd.)</i>	-4.00
4	<i>Asit C Mehta Financial Services Ltd (Seg.)</i>	9.42
5	<i>Caliber Point Business Solutions Ltd</i>	10.97
6	<i>Coral Hubs Ltd (Earlier known as Vishal Information Technologies Ltd</i>	50.68
7	<i>Cosmic Global Ltd</i>	23.30
8	<i>Crossdomain Solutions Ltd</i>	27.03
9	<i>Datamatics Financial Services Ltd (Seg.)</i>	29.11
10	<i>e4e Healthcare Solutions Ltd (Formerly known as Nittany Outsourcing Services Pvt lid)</i>	18.54
11	<i>Eclerx Services Ltd</i>	58.80
12	<i>Genesys International Corporation Ltd</i>	47.40
13	<i>Infosys BPO Ltd</i>	19.66
14	<i>IServices India Pvt Ltd</i>	10.77
15	<i>Jindal Intellicom Pvt Ltd</i>	-
16	<i>Mold-Tek Technologies Ltd</i>	96.66
17	<i>R Systems International Ltd (Seg.)</i>	4.30
18	<i>Spanco Ltd. (Seg) (Earlier known as SpancoTelesystems& Solutions Ltd.)</i>	8.81
19	<i>Wipro Ltd. (Seg)</i>	30.05
20	<i>Allsec Technologies Limited</i>	-
	AVERAGE	24.75

After making working capital adjustment, the TPO made transfer pricing adjustment of Rs.7.28 crores in ITES segment.

6.2 Before Ld CIT(A), the assessee insisted for application of turnover filter. In this regard, the assessee placed its reliance on the decision rendered by the Tribunal in the case of Genesys Integrated System (India) P Ltd vs. DCIT (ITA No.1231/Bang/2010).

The Ld CIT(A) accepted this contention of the assessee. Since the turnover of the assessee in Software development segment was Rs.53.59 crores, following the study of Dun & Brads Street, he held that the companies having turnover in the range of 1 crore to 200 crores alone can be considered as comparable with the assessee.

6.3 The TPO had applied the Related party transaction filter (RPT filter) of 25% and above and accordingly the TPO had rejected the companies with RPT in excess of 25% of operating revenues. The assessee contended before the Ld CIT(A) that the RPT filter may be fixed at 10%. In this regard, the assessee had placed its reliance on the decision rendered by Delhi bench of Tribunal in the case of Sony India Pvt Ltd vs. DCIT (ITA No.1189/Del/2005 and 819 &820/Del/2007), wherein RPT was range was fixed between 10% to 15%. However, the Ld CIT(A) fixed RPT filter @ 1% of sales.

6.4 Accordingly, applying both Turnover filter and RPT filter of 1%, the ld CIT(A) directed exclusion of following companies:-

<i>ITES Segment</i>		
<i>Company</i>	<i>Turnover (Rs in cr)</i>	<i>RPT (% of sales)</i>
<i>Infosys BPO Ltd.</i>	<i>825.09 (-do-)</i>	<i>7.36%(-do-)</i>
<i>Wipro Ltd. (Seg)</i>	<i>1,157.20 (-do-)</i>	<i>-</i>
<i>Aditya Birla Minacs World Wide Ltd.</i>	<i>176.72</i>	<i>11.16% (-do-)</i>
<i>Asit C Mehta Financial Services Ltd. (Seg)</i>	<i>4.24</i>	<i>19.69% (-do-)</i>
<i>Calibre Point Business Solutions Ltd.</i>	<i>53.14</i>	<i>19.69% (-do-)</i>

<i>Coral Hubs Ltd. (Vishal Info)</i>	38.08	0.29% (-do-)
<i>Datamatics Financial Services Ltd. (seg)</i>	6.06	1.30% (-do-)
<i>e4e Health Care Solutions Ltd.</i>	25.82	2.23% (-do-)
<i>Eclerx Services Ltd.</i>	116.98	11.54% (-do-)
<i>Jindal Intelcom Pvt. Ltd.</i>	19.55	29.94% (-do-)
<i>Mold Tek Technologies Ltd.</i>	17.85	20.45% (-do-)
<i>R Systems International Ltd.(seg)</i>	21.33	7.05% (-do-)
<i>Spanco Ltd.(seg)</i>	41.70	4.39% (-do-)

6.5 In ground no.5 (second part) to 8, the revenue is assailing exclusion of following companies by Ld CIT(A):-

- (i) Accentia Technologies Ltd
- (ii) Genesys International Corporation Ltd
- (iii) Aditya Birla Minacs Worldwide Ltd
- (iv) Asit C Mehta Financial Services Ltd (seg.)
- (v) Calibre Point Business Solutions Ltd
- (vi) Datamatics Financial Services Ltd (seg)
- (vii) e4e Healthcare Solutions Ltd (earlier known Nitanny)
- (viii) Eclerx Services Ltd
- (ix) Infosys BPO Ltd
- (x) I-service India P Ltd
- (xi) Jindal Intellicom P Ltd
- (xii) Mold Tek Technologies Ltd
- (xiii) Spanco Ltd (seg)
- (xiv) Wipro Ltd

In total, the revenue is contesting exclusion of 14 companies.

6.6 While adjudicating issue in respect of Software development segment, we have upheld the adoption of turnover filter and further we have held that the RPT filter should be taken as 15%. We direct to follow the same for ITES segment also.

6.7 (a) Out of the fourteen companies, M/s Accentia Technologies Ltd and M/s Genesys International Corporation Ltd

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have been retained by Ld CIT(A). Hence the ground of the revenue on these two comparable companies is liable to be deleted.

(b) On applying turnover criteria, companies having turnover exceeding Rs.200 crores is liable to be rejected. The turnover of M/s Infosys BPO Ltd and M/s Wipro Ltd exceeds Rs.200 crores. Accordingly the decision of Ld CIT(A) in directing exclusion of these two companies is upheld.

(c) In respect of M/s I service India P Ltd, the Ld CIT(A) has not rendered any decision. Accordingly, the ground of the revenue in respect of this company is liable to be rejected.

(d) The percentage of RPT on sales exceeds the limit of 15% in respect of following companies:-

- (i) Asit C Mehta Financial Services Ltd (19.69%)
- (ii) Calibre Point Business Solutions Ltd (19.69%)
- (iii) Jindal Intelcom P Ltd (29.94%)
- (iv) Mold Tek Technologies Ltd (20.45%)

(e) The Ld CIT(A) has excluded the following five companies applying RPT filter of 1%. Since we have determined the RPT filter at 15%, the decision of Ld CIT(A) in respect of following five companies is liable to be reversed:-

- (i) Aditya Birla Minacs World Wide Ltd
- (ii) Datamatics Financial Services Ltd (seg.)
- (iii) e4e Health Care Solutions Ltd
- (iv) E clerx Services Ltd
- (v) Spanco Ltd (seg.)

The Ld A.R, by placing reliance on the following case laws, submitted that some of the above said companies have been held to be not a good comparable:-

- (a) M/s Mphasis Ltd (ITA No.325/Bang/2014 and ITA No.313/Bang/2014)
- (b) Flextronics Technologies (India) P Ltd (IT(TP)A No.1559/Bang/2012)

- (c) Symphony Marketing Solutions (IT(TP)A
No.1316/Bang/2012)
- (d) Kodiak Networks (India) P Ltd (IT(TP)A
No.1540/Bang/2012)
- (e) Maersk Global Centres (India) P Ltd (ITA
No.7466/Mum/2012)(SB)

We notice that the co-ordinate bench, in the case of Symphony Marketing Solutions (supra) and the special bench of Mumbai Tribunal in the case of Maersk Global Centres (India) P Ltd (supra) have excluded M/s E-clerx Services Ltd (Paragraph 20 to 21) holding it as not a good comparable for a captive service provider. Accordingly, we direct exclusion of M/s E-clerx Services Ltd from the list of comparable companies. We do not find any order in respect of remaining four comparable companies. Accordingly, the remaining four companies shall be included in the list of comparable companies.

ASSESSEE'S APPEAL:-

7. The grounds of appeal urged by the assessee reads as under:-

The grounds hereinafter taken by the appellant are without prejudice to one another.

1. *That the order passed by the learned Commissioner of Income Tax (Appeals) — LTU, Bangalore UCIT (A) - LTU', to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.*

Corporate Tax related Matters (Other than Transfer Pricing)

- a) *That the Learned CIT (A) - LTU erred in holding that the sale proceeds ought to have been received within 6 months by the Software Technology Park (STP) Unit in terms of provisions of Sec 10A(3), although RBI being the competent authority in terms of provisions of said section had vide its Master Circular No/o9/2007-08 dated July 2, 2007, applicable for the period AY 2008-09, permitted STP Units to realise and repatriate the full value of export proceeds within a period of 12 months from the date of export.*
- b) *The Learned CIT (A) - LTU erred in confirming the order of the AO in reducing from the export turnover the **SUM of Rs 7,15,89,738 and Rs 2,14,69,416** as unrealised export turnover.*
- c) *The Learned CIT (A) - LTU erred in confirming the order of the AO in making a disallowance of an amount of Rs 29,04,760 u/s 14A as expenditure attributable to earning exempt income.*
- d) *The Learned CIT (A) - LTU erred in holding that a sum of Rs 10,992 incurred towards language training cost of spouses of employees of the Appellant as not a business expenditure and hence not allowing the said amount"*
- e) *The Learned CIT (A) - LTU ought to have directed the AO to grant TDS credit of a sum of Rs 1,98,67,264 as claimed by the Appellant as against a sum of Rs 1,97,61,981 as granted by the AO.*

Transfer Pricing related

1. *That the learned CIT (A) - LTU erred in upholding the rejection of Transfer Pricing ('TP') documentation by the learned Transfer Pricing Officer ('TPO')/ Assessing Officer ('AO') and in upholding the adjustment to the transfer price of the Appellant in respect of its Information Technology enabled Services ('ITeS').*
2. *That on the facts and in the circumstances of the case, the learned CIT (A) - LTU erred in;*
 - (a) *Upholding the rejection of comparability analysis of the Appellant in the TP documentation and accepting the comparability analysis performed by the learned TPO in the TP Order.*

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- (b) *Not addressing the Appellants grievances in full with respect to the application of additional filters by the TPO*
- (c) *Disregarding application of multiple year/ prior year data as used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year 2007-08) data for companies should be used for comparability.*
- (d) *Upholding the learned TPO's approach of using data as at the time of assessment proceedings, instead of that available as on the date of preparing the TP documentation for comparable companies while determining the arm's length price.*
- (e) *Upholding the approach adopted by the learned TPO of collecting selective information of the companies by exercising power granted to him under section 133(6) of the Income Tax Act, 1961 (Act') that was not available to the Appellant in the public domain.*
- (f) *Arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on rejecting companies that are otherwise functionally comparable to the Appellant and on inclusion of companies that otherwise fail the test of comparability.*
- (g) *Not appreciating the business and commercial realities of the Appellant including the fact that it operates on a Time and Material based billing model (man-month rates).*
- (h) *Not providing any adjustment towards the difference in the risk profile between the Appellant and the entrepreneurial companies selected as comparables while determining the arm's length price.*

2. *That the Learned CIT(A) erred in upholding the charging of interest under sections 234B of the Act.*

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That the appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal.”

8. Ground (a) and (b) urged under the heading “corporate tax matters” relate to rejection of deduction u/s 10A in respect of sale proceeds which have not been realised within a period of six months.

8.1 The AO noticed that the assessee has not realised export proceeds within six months to the extent of Rs.7.15 crores and Rs.2.14 crores in respect of Bangalore and Coimbatore units respectively. Since the assessee did not furnish any certificate from RBI for extension of period for realisation of export proceeds, the AO reduced the above said amounts while computing deduction u/s 10A of the Act. The Ld CIT(A) also confirmed the same.

8.2 In this regard, the Ld. A.R. invited our attention to Master Circular No.9/2007-08 dated 2nd July, 2007 issued by RBI. The Ld. A.R. submitted that the RBI has granted “general permission” to realize the export proceeds within a period of 12 months from the date of export on or after 1st September, 2004. Accordingly, he submitted that the period of realisation should be taken as 12 months and not six months. The Ld D.R, on the contrary, submitted that the extension has to be given by the competent authority, which is RBI.

8.3 We find merit in the submissions of Ld A.R. We notice that the circular issued by RBI allowed a period of 12 months for realisation of export proceeds. Accordingly, we direct the AO to

recompute the deduction u/s 10A of the Act by considering the permitted period of realisation of export proceeds as 12 months.

9. The ground (c) urged by the assessee relates to the disallowance made u/s 14A of the Act. The AO noticed that the assessee has earned exempt dividend income from mutual funds to the tune of Rs.2,51,41,451/-. The assessee did not make any disallowance u/s 14A of the Act. The AO computed disallowance under Rule 8D(2)(iii) @ 0.50% of average value of investments at Rs.29,04,760/- and disallowed the same. The Ld CIT(A) also confirmed the same.

9.1 We heard the parties on this issue. The Ld A.R invited our attention to page 521 of the paper book, wherein the details of investments are given. He submitted that the assessee has made investments only in units of various mutual funds. The aggregate amount of investments made during this year was Rs.90.59 crores. He further submitted the assessee has also invested a sum of Rs.15.00 crores in growth scheme and a sum of Rs.20.26 crores in dividend reinvestment scheme. The assessee has made investments in six schemes only during the year under consideration and it has encashed investments made in the earlier years in four schemes. He submitted that the assessee has not really incurred any expenditure in earning the dividend income. On the contrary, the Ld D.R supported the order passed by Ld CIT(A).

9.2 We heard the parties on this issue and perused the record. We notice that opening balance of investments stood at Rs.25.59 crores in four schemes of mutual funds. During the year under consideration, the above investments have been realised. The assessee has made fresh investments in six schemes of mutual funds during this year, out of which three schemes fall under

Growth/reinvestment schemes. Considering the less number of schemes, in our view, it may not be proper to apply Rule 8D mechanically. Accordingly, we are of the view that the disallowance may be estimated to meet the requirements of sec.14A of the Act. Accordingly, we estimate the disallowance u/s 14A at Rs.2.00 lakhs and in our view, the same would meet the requirements of the provisions of sec.14A of the Act. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to restrict the disallowance u/s 14A to Rs.2.00 lakhs.

10. The ground (d) relates to disallowance of Rs.10,992/- incurred towards foreign language training of spouses of employees. The AO disallowed the above said claim holding that the expenses incurred on spouses of employees for imparting training in foreign language is not for the purposes of business. The Ld CIT(A) also confirmed the same.

10.1 We heard the parties on this issue. The Ld A.R submitted that the above said expenditure on spouses of employees is only a measure of staff welfare. Accordingly, he submitted the same has been incurred for the purposes of business only. On the contrary, the Ld D.R supported the order of Ld CIT(A).

10.2 We notice from the order passed by Ld CIT(A) that the AO has allowed expenditure of Rs.7,20,076/- incurred on employees towards foreign language training. Accordingly, the Ld CIT(A) has held that the payment for language skill enhancement of spouses of employees has got no link with the business of the assessee. In our view, the Ld CIT(A) was justified in holding so, since we also do not find any connection between the expenditure and the business of

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the assessee. Accordingly, we confirm the disallowance made by the AO.

11.0 The ground (e) relates to short credit of TDS amount. It is the plea of the assessee that the AO should have granted TDS credit of Rs.1,98,67,264/- instead of Rs.1,97,61,981/-. Since this issue requires verification of factual aspects, we restore this issue to the file of the AO.

12. The assessee has raised grounds numbered as 1 and 2(a) to 2(h) in respect of transfer pricing issue. These are general in nature and no specific reference has been made to any of the comparable companies. In any case, we have already followed the precedents to exclude some of the companies, while adjudicating the grounds urged by the revenue. Hence these grounds of the assessee do not require any specific adjudication.

13. Other grounds of either general in nature or consequential.

14. In the result, the appeal of the assessee as well as the appeal of the revenue are partly allowed.

Order pronounced in the open court on 1st Sept, 2021

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 1st Sept, 2021.
VG/SPS

Copy to:

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

By order

**Asst. Registrar,
ITAT, Bangalore.**