

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: '1-2', NEW DELHI**

**BEFORE SHRI P.M.JAGTAP, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER**

ITA No. 6283/Del/2015

AY: 2011-12

NEC Technologies India P Ltd. Unit No.1, 2 nd Floor TDI Centre Commercial Plot no.7 Jasola New Delhi 110 025 PAN: AACCN2062Q	vs.	Dy.CIT, Circle 18(1) New Delhi
---	------------	-----------------------------------

ITA No. 312/Del/2016

AY: 2011-12

Dy.CIT, Circle 18(1) New Delhi	vs.	NEC Technologies India P.Ltd. New Delhi
-----------------------------------	------------	---

(Appellant)

(Respondent)

Assessee by : Sh. Neeraj Jain, Adv. and
Sh. Ramit Katyal, Adv.

Department by : Sh. Sanjay Kumar Yadav, Sr.DR

Date of Hearing : 19.04.2018

Date of Pronouncement: 11.07.2018

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

The present appeals have been filed by assessee as well as revenue against order dated 27/10/15 passed by DCIT, Circle 18 (1), New Delhi under section 143 (3) read with 144C (13) of the

Income Tax Act, 1961 (the Act), for assessment year 2011-12 on the following grounds of appeal:

ITA No. 6283/Del/3015 (Assessee)

General Grounds:

1. That the impugned order of assessment framed by the assessing officer in pursuance of the directions of the Dispute Resolution Panel (hereinafter referred to as 'DRP') under Section 143(3) read with Section 144C of the Income-tax Act, 1961 ('Act'), is bad in law, violative of principles of natural justice and void ab-initio.

2. That assessing officer erred on facts and in law in determining income of the appellant at Rs.6,91,16,570 against the total income returned by the appellant of Rs.2,86,27,959.

Transfer Pricing Matters:

3. That the assessing officer erred on facts and in law in making an addition of Rs. 3,87,23,769 to the income of the appellant, on account of the alleged difference in the arm's length price of the international transactions of rendering software services undertaken during the previous year, on the basis of the order passed under section 92C(3) of the Act by the TPO.

3.1 That the TPO / DRP erred on facts and in law in not appreciating that outsourcing costs, being pass through items, ought to be excluded from the cost base of the of the appellant for the purpose of bench marking analysis, applying TNMM('transactional net margin method').

3.1.1. That the TPO/ DRP erred on facts and in law by not adjudication on the aforesaid ground.

3.2. That the TPO I DRP erred on facts and in law in rejecting the following companies by applying filter of 75% export sales:

(i) Blue Star Infotech Ltd

(ii) Helios & Matheson Information Technology Ltd

(iii) Priya Softweb Solutions Pvt. Ltd.

3.3. *That the TPO/DRP erred on facts and in law in rejecting Maveric Systems Limited from the set of comparable companies allegedly on the basis that the company has incurred higher indirect cost vis-a-vis previous year.*

3.4 *That the TPO/DRP erred on facts and in law by rejecting the following comparable companies for having different financial year:*

- (i) Helios & Matheson Information Technology Ltd.*
- (ii) R Systems International Ltd*

3.5 *That the TPO/DRP erred on facts and in law in rejecting Thinksoft Global Services Ltd as comparable holding that this company is not functionally comparable to the appellant.*

3.6 *That the TPO/DRP erred on facts and in law in considering the following companies in the final set of comparable companies not appreciating that such companies are not functionally comparable to the appellant:*

- (i) Accropetal Technology Ltd*
- (ii) E-Zest Solutions Ltd.*
- (iii) I-gate Global Solutions Ltd.*
- (iv) Wipro Technology Services Limited*

3.7 *That the TPO/DRP have erred on facts and in law in not considering the following companies in the final set of comparable companies even when they are passing the filters proposed by the TPO:*

- (i) Blue Star Infotech Ltd (consolidated)*
- (ii) CG-Vak Software & Exports Ltd (seg)*
- (iii) CAT Technologies Ltd*
- (iv) Cigniti Technologies Ltd (formerly Chakkilam Infotech Ltd.)*
- (v) Goldstone Technologies Ltd*
- (vi) R Systems International Ltd (seg)*
- (vii) Saven Technologies Ltd (consolidated Seg)*
- (viii) Thinksoft Global Services Ltd*

3.8 That the TPO erred on facts and in law in considering incorrect profit margin of the following companies despite a direction from the DRP for taking the correct margin for determining the arm's length price:

Name of the company	Margin considered by TPO (Adjusted OP/OC)	Actual margin
Acropetal Technologies Ltd.	20.75%	17.99%
Persistent Systems & Ltd. [Merged] Ltd.	22.21%	17.90%
Evoke Technologies Pvt Ltd	9.65%	5.59%
Tata Elxsi Ltd. (Segment)	12.75%	8.03%
Zylog Systems Ltd.	26.97%	24.95%

3.9. Without prejudice, that the TPO erred on facts and in law in computing the average margin (OP/OC) of the comparables at 19.64% as against 18.25%.

3.10. That the TPO erred on facts and in law by failing to appreciate that there should be no transfer pricing adjustment in respect of provision for software development services as the appellant's margin at 13.14% falls within +/-5% range after taking into consideration correct margin of the comparable companies at 18.25%.

3.11. That the TPO / DRP erred on facts and in law in not allowing appropriate risk adjustment for the purpose of benchmarking the international transaction of provision of software services undertaken by the appellant allegedly holding that in absence of robust and reliable data risk adjustment could not be considered.

Corporate Tax Matters:

4. That the assessing officer erred on facts and in law in disallowing deduction under section 10A of the Act to the extent of

Rs.17,64,838/- with respect to unbilled revenue of Rs. 95,58,274 recorded by the appellant.

4.1. That the assessing officer erred on facts and in law in reducing the unbilled revenue amounting to Rs. 95,58,274 from export turnover for the purpose of computing deduction under section 10A of the Act.

4.2. Without prejudice that the assessing officer erred on facts and in law in not reducing the unbilled revenue of Rs. 95,58,274 from the total turnover for computing deduction under section 10A of the Act.

4.3. Without prejudice that the assessing officer erred on facts and in law in considering the amount of unbilled revenue of Rs. 95,58,274 as income liable to tax in the relevant previous year.

4.4. Without prejudice, that the A.O./ DRP erred on facts and in law in not allowing deduction u/s 10A in respect of unbilled revenue of AY 2010-11 amounting to Rs 45,99,463 which was earlier disallowed in AY 2010-11 on the basis that the same is billed in AY 2011-12.

5. That the assessing officer erred on facts and in law in excluding miscellaneous income of Rs.7,16,000 from the eligible profit for computing deduction under section 10A of the Act.

6. That the assessing officer erred on facts and in law in levying interest under Section 234B and Section 234C of the Act.

The appellant craves leave to add, amend, alter or vary, any of the aforesaid grounds of appeal before or at the time of hearing of the appeal and consider each of the grounds as without prejudice to the other grounds of appeal.

ITA No. 312/Del/2016 (Rev.)

“1. Whether on the facts and circumstances of the case and in law, the DRP has erred in deleting the addition made u/s 40(a)(i) amounting to Rs.5,64,57,819/- ignoring the fact that the case was not covered by exception carved out by s.9(1)(vii)(b) of the I.T.Act.

2. Whether on the facts and circumstances of the case and in law, the DRP has erred in excluding two comparables considered by the TPO and including a comparable which was rejected by TPO.
3. That the order of Ld.CIT(A) is erroneous and is not tenable on facts and in law.”

2. Brief facts of the case are as under:

Assessee filed its return of income declaring total income of Rs.2,86,27,959/- for the year under consideration on 30/11/11. The case was selected for scrutiny and statutory notices were issued to assessee, in response to which representatives of assessee appeared before Ld.AO.

2.1. Ld.AO during assessment proceedings observed that assessee has undertaken international transactions with its AE's and therefore case was referred to Ld.TPO under section 92CA of the Act. Ld.TPO called for various details and observed that assessee is engaged in the business of providing software development and related services to its Associated Enterprises. It was observed that assessee undertook following international transactions:-

No	Nature of transaction	Approach to taxpayer	Value of transaction
1.	Provision of software development services	TNMM OP/OC	Rs. 56,99,17,912/-
2.	Payment of outsourcing costs	TNMM OP/OC	Rs.5,64,57,819/-
3.	Payment of management services	TNMM NA	Rs.11,24,993/-
4.	Payment of lease rent	TNMM NA	Rs.52,54,085/-

5.	Purchase of fixed assets	TNMM	NA	Rs.2,74,068/-
6.	Reimbursement of expenses to AEs	TNMM	NA	Rs.1,11,32,096/-
7.	Payment of royalty for using brand name	TNMM	NA	Rs.8,81,159/-

Ld.TPO computed Arm's length price with respect to software development services at Rs.63,41,55,955/- and proposed an adjustment of Rs.6,13,66,720/-.

Assessee filed objections before DRP against draft assessment order passed by Ld.AO.

DRP issued directions u/s 144C(5), pursuant to which Ld. DCIT passed final assessment order u/s 143(3) read with Section 144C of the Act, wherein transfer pricing adjustment of Rs.3,87,23,796/- was made along with disallowance u/s 10A amounting to Rs.17,64,838/-.

2.2. Against the final assessment order assessee as well as revenue are in appeal before us.

3. We shall first take up assessee's appeal.

4. ITA No. 6283/Del/2015

Ld. Counsel submitted that **Ground No. 1, 2, 3** are general in nature and accordingly do not require adjudication.

4.1. Ground No. 3.1 and 3.11 are related to transfer pricing issues with respect to adjustment of Rs.3,87,23,769/-.

Ld. Counsel submitted that assessee determined the arm's length price of international transaction by applying TNMM as the most appropriate method and selected 22 comparables by adopting OP/OC as PLI. The average margin in case of comparables was

computed at 13.60% vis-a-vis the margin of assessee that was determined to be 13.14%. Therefore assessee concluded international transaction to be at arm's length. dDissatisfied with comparables selected by assessee, Ld.TPO conducted fresh search on Poweress detabase, selected 19 comparables whose margin was computed at 24.07%.

Assessee raised objections before DRP against the inappropriate selection of comparables by Ld.TPO. DRP issued directions to Ld.TPO to exclude E-Infochips Ltd., and Infosys Technologies, from the set of final comparables and directed to include Calibre Point Business Solutions Ltd., to the final set of comparables. DRP also directed Ld.TPO to recompute margins of comparable, after taking into consideration the foreign exchange fluctuation, bank charges and provision for doubtful debts as operating items.

4.2. Ld.TPO while giving effect to directions of DRP considered 18 comparables, whose margin was computed at 18.25%. But Ld.TPO did not compute margin of assessee by taking foreign exchange fluctuation as an operating income as per the directions of DRP thereby determining adjustment at Rs.3,16,19,096/-.

4.3. Ld.Counsel at the outset submitted that, by considering foreign exchange fluctuation as operating cost would itself increase margin of assessee to 13.41%. He submitted that following issues arise out of transfer pricing adjustment:

- A) consideration of foreign exchange gain or loss as operating income.

B) For exclusion of certain comparables which are functionally different.

C) Ld.TPO considered incorrect profit margin despite DRP directions.

Issue A

4.4. Ld.Counsel submitted that earning from foreign exchange fluctuation has to be treated as operating income of assessee, however, even after directions by DRP, Ld.TPO failed to consider it. He placed reliance upon the decision of *Hon'ble Delhi High Court dated 08/02/16 in the case of DCIT vs. Agilis Information Technologies International Pvt.Ltd., in ITA No. 907/2015*, wherein decision of *DCIT vs. Fiserve India Ltd dated 06/01/16* has been followed. Hon'ble Court refused to admit the appeal of revenue, against order of Coordinate Bench on the issue that foreign exchange fluctuations are operating expenses. Ld.Counsel submitted that this issue is now squarely covered in favour of assessee by decision of jurisdictional High Court.

4.5. Ld. DR, however, placed reliance upon the order of Ld. TPO/DRP.

5. We have considered rival submissions advanced by both sides in light of records placed before us.

5.1. It is observed that in assessee's own case for AY 2009-10 Coordinate Bench of this Tribunal in ITA No. 926/Del/2014 and 2776/Del/2015 has held foreign exchange fluctuation as operating income. Further it is observed that Coordinate Bench while deciding the issue relied upon DRP directions passed for assessment year under consideration before us.

5.2. In our considered view this issue now squarely stands covered in favour of assessee by virtue of decision of *Hon'ble Delhi High Court* in the case of *Principal CIT Vs. Fiserve India Pvt. Ltd*(supra), wherein Hon'ble Court held as under:-

“8. The ITAT has also dealt with the issue of foreign exchange fluctuation as operating income/ expenses and held that this issue is no longer res integra and is in favour of the assessee by the decision of the Coordinate Bench of ITAT in Westfalia Seprator India Pvt. Ltd. Vs. ACIT (ITA No.4446/Del/2002). Accordingly, the AO/TPO was directed to treat the foreign exchange gain/ loss as an operating item. The AO/TPO was directed to compute the ALP of the international transactions entered into by FIPL with its AEs keeping in view the observation made in the order of the ITAT.”

5.3. Therefore, respectfully following decision of Hon'ble Delhi High Court and also for the reason that DRP in the subsequent year has decided the issue in favour of the assessee, we also hold that foreign exchange fluctuation gain earned by assessee is operating income and therefore Ld.TPO/AO is directed to adjust the margin of the assessee by treating foreign exchange gain as operating income of assessee for determining PLI for comparability analysis.

5.4. Issue B:

The next issue is relating to exclusion/inclusion of comparables and considering wrong margins of comparables.

At the outset Ld.Counsel submitted modified ground No. 3.6 which reads as under:

Ground 3.6:

That the TPO/DRP erred on facts and in law in considering the following companies in the final set of comparable companies, not appreciating that such companies are not functionally comparable to the appellant:

- (i) Persistent systems Ltd*
- (ii) Sasken Communication Technologies Ltd.,*
- (iii) Zylog systems Ltd.,*
- (iv) Persistent systems and solutions Ltd*
- (v) Wipro technology services Ltd*

Ld.DR do not object for modified ground to be considered. Accordingly we proceed with the comparability analysis of the disputed comparable with that of assessee. To undertake this task, it is *sine qua non* to understand the Functions performed by assessee, assets involved and Risks assumed by assessee for the year under consideration.

Functions performed

from the TP study place in the paper book at page 14-102, it is observed that assessee is engaged in providing software development services to its group AE, for which assessee is compensated in accordance with the fee schedule set forth in each purchase order.

This broadly assessing performance the following functions:

➤ Marketing and business development

assessee identifies customers and marketing lies with AE group concerns. Assessee has no role to play in the business development efforts of AE however assessee has to participate in

competitive bidding for obtaining contracts for services from its AE's.

➤ Conceptualisation and design of software

assessee has no involvement in specifications/requirement analysis. All such activities are carried out by AE and assessee simply engaged in provision of software-based on requirements/specifications and instructions provided by AE.

➤ Provision of software development services

Assessee works on different projects which involve provision of software services to the NEC group/its customers on the existing software product and solutions owned by NBC group/its customers. The scope of work specifications/requirements, design documents are all provided by the NEC group while assessee is engaged in the provision of Ltd software services pertaining to a product some of the projects undertaken by assessee are:

- testing of the hardware system implemented by NTC hardware design language;
- maintenance of certain software products of NEC group, which consists of bug fixing, small modification to the software for periodic release based on the specifications provided by the NEC group;
- coding and testing of limited functionality modules for existing products of NEC group and
- integration of various modules developed by NEC group with the NEC software products.

Risk analysis

some of the key risk faced by assessee while transacting with entities in relation to software development services are all the assessee renders services only to its AEs, it performs all the sales and marketing related functions as is required to competitively bid for contracts. It is a responsibility of AE for all the sales and marketing efforts and hence their maximum risk since they operate within the competitive software industry. Assessee is remunerated for the services on a lump-sum fee or hardly charge outreach basis. Therefore assessee also bears quite an amount of business risk.

Assessee also has to bear utilisation risk since it is required to undertake competitive bidding and is responsible for ensuring optimal utilisation of its capacity, infrastructure and equipment. The service liability risk is also borne by assessee as an independent service provider though not liable to the end customer however it has to adhere to the requisite quality standards. The re-work risk is also borne by assessee as it is the responsibility of assessee to rework the project/the requisite deliverables upon any kind of failure. Assessee do not bear any credit and collection risk as the payments are received by associated enterprises from the customers directly. It is the AE that enters into contract with its clients and therefore they bear the risk in case of any default in payments by client.

Foreign exchange risk is assumed by assessee as the payment is received from its AE in foreign currency.

Assets employed

the assets employed by assessee are the regular office equipments like computers furniture and fittings software's etc

which are accounted after depreciation as on the date of your ending.

Thus in the TP study report assessee has been categorised as a full-fledged enterprise no real service provider engaged in the business of software development services.

Based upon the above analysis we shall undertake the comparability.

(i) Persistent Systems Ltd

6. Ld. Counsel submitted that this comparable has been included by Ld. AO/TPO. It was submitted by Ld.Counsel that this comparable has already been rejected by Coordinate Bench of this Tribunal in assessee's own case for Assessment Year 2010-11 in ITA No.1102/Del/2015. Ld.Counsel placed reliance upon various other decisions like in case of *Cash Edge India Pvt. Ltd., vs. ITO in ITA No. 279/2016*, wherein *Hon'ble Delhi High Court* observed this company to be dealing in software products and earns income from sale of both software products as well as services. It has also been observed that for the year under consideration this company was having insufficient segmental information.

6.1. Ld. CIT DR placed reliance upon the order of Ld. TPO.

6.2. We have considered the rival submissions advanced by both the sides in the light of records placed before us. From the Transfer Pricing study placed at page 70-103 of paper book, it is observed that revenue generated by this company is from sale of software services and products. From the schedules to the accounts, there is no segmental information in respect of sale of software services and sale of products. This shows that company

is engaged in both software development services, as well as sale of software products. It is very difficult to compare contribution made by sale of software products to the total profits of the company due to non-availability of segmental information.

We therefore exclude this company from the list of comparables.

Sasken Communication Technologies Ltd.

7. Ld.TPO included this company in the set of comparables. Ld.Counsel submitted that this company is engaged in sale of software products and offers IP led products in multimedia, consumers and automotive electronics domain. He submitted that, it owns branded products and has its own IPR and therefore cannot be considered as a captive service provider.

7.1. Ld.Counsel submitted that this comparable has been excluded by Coordinate Bench of this Tribunal in the case of *Saxo India Pvt.Ltd vs. ACIT in ITA No. 6148/Del/2015* for Assessment Year 2011-12. He also submitted that revenue had preferred appeal against the order of this Tribunal before *Hon'ble Delhi High Court, in ITA No. 682/2016*, which has been dismissed.

7.2. Ld. DR submitted that segmental information is available and services rendered by this company is similar to assessee and therefore must be considered as a comparable. He submitted that the branded products amounts to only 10% of the total revenue and therefore will not have much impact.

7.3. We have considered the rival submissions on the basis of records placed before us. From TP study placed at page 135-151 of the paper book, it is observed that revenue generated from sale

of software products are to the tune of Rs.3,7736.22 crores. Further it is observed from the order of Ld.TPO that entity level figures have been considered for purposes of comparison. Though there is a break-up of revenue from software services and software products the operating cost and net operating revenues from 2 segments has not been separately given.

7.4. We therefore, considering the view taken by Coordinate Benches of this Tribunal as well as Hon'ble jurisdictional High Court, direct exclusion of this comparable from the list.

Zylog systems Ltd

8. This company has been included by Ld. TPO. Ld.Counsel submitted that it provides IT services that offers differentiated services in delivering specific business and technology solutions. He submitted that this company is mainly into outsourcing of software development services and maintenance of technology services. It has been submitted that revenue earned by this company is from software services and software products which does not have separate segmental information. Ld.Counsel submitted that products delivered by this company are owned by it and therefore holds intangibles in respect of the same. He thus submitted that it cannot be considered as a captive service provider.

8.1. On the contrary Ld. DR placed reliance upon the order of Ld. TPO/DRP.

8.2. We have perused the submissions on the basis of the records placed before us.

8.3. In our view the company owns brand in respect of the products developed by it. It is also into research and development activities and owns significant intangibles. From the financials placed at page 152-177 it is observed that software development services rendered by it are basically online, and has operations in Wi-Fi place and broadband connectivity. We do not find this company to be comparable functionally, with that of assessee and accordingly direct to exclude the same from the final list of comparables.

9. Persistent Systems and Solutions Ltd

Ld.TPO has included this company in the list of comparables. Ld. Counsel at the outset submitted that it is engaged in software development, licensing of products, sale of software products and maintenance contracts. It is also submitted that segmental data with respect to software development segment is not available in financials for the year under consideration.

9.1. On the contrary Ld.DR placed reliance upon orders of Ld. TPO/DRP.

9.2. We have perused the submissions advanced by both the sides on the basis of the records placed before us.

9.3. Admittedly this company generates revenue under various heads including income from software development services. From the financials placed at page 178/235 of the paper book with specific reference to page 219, 230 and 231, it is observed that this company generates software development revenue to the extent of Rs.18,94,90,457/-. Therefore it is not correct that segmental information in respect of software development is not

available. It is also observed that this company provides services to its holding company to a greater extent.

In our considered opinion this company is functionally comparable with that of assessee and sufficient segmental information are also available to determine the correct margin. Accordingly we direct this company to be included in the final list of comparables.

10. Wipro technology services Ltd

10.1. This Comparable has been included by Ld.TPO. Ld.Counsel objected for inclusion of this company in the list of comparables by arguing that apart from this company being functionally different and availability of insufficient segmental information, there were also significant related party transactions. Ld.TPO did not accept assessee's contention of related party transactions and proceeded to include it in the final set of comparables.

On the contrary, Ld.DR submitted that there is no related party transaction during the year under consideration.

10.2. We have heard the rival submissions of both sides in the light of records placed before us.

Ld. Counsel submitted that Wipro Technology Services Limited (formerly Citi Technology Services Limited) ('the Company') was incorporated on 15 September, 2004. The entire share capital of the Company was held by Citicorp Banking Corporation, a company incorporated under laws of Delaware, USA, upto 20 January, 2009.

It was submitted that Wipro Limited (Wipro) executed agreement with Citigroup Inc. for acquiring all of Citigroup interest in the Company w.e.f. 21 January 2009. On 21 January 2009, Wipro signed master service agreement (MSA) with Citigroup Inc. for delivery of technology infrastructure services, application development and maintenance services. After acquisition by Wipro, name of Company was changed to Wipro Technology Services Limited ('WTS' or 'the Company') on 16 March 2009."

10.3. It is observed from the above that, Wipro Technology Services Ltd., which was earlier Citi Technology Services Ltd., was held by Citi Corp. Banking Corporation, USA upto 20th January, 2009. Wipro Ltd., parent company of which executed agreement with Citi Group Inc., for acquiring Citi Technology Services Ltd., now called Wipro Technology Services Ltd. On 21.1.2009, Wipro Ltd. signed master agreement with Citi Group Inc., for the delivery of technology Infrastructure Services and application development and maintenance services for the period of six years, which also includes the year under consideration. This shows that income from software development support and maintenance services was earned by Wipro Technology Services Ltd., from Citi Group Inc., by means of master service agreement entered into between Wipro Ltd., its parent company and Citi Group Inc., a third person.

It is observed that the issues raised by Ld. CIT DR in respect of comparability of this comparable has been dealt with by

coordinate bench of Delhi tribunal in *Saxo India Pvt.Ltd vs. ACIT (supra)* as under:

“We have noticed above from the language of Rule 10B(1)(e)(ii) that it is the net profit margin realized from a comparable uncontrolled transaction, which is considered for the purposes of benchmarking. The epitome of ‘comparable uncontrolled transaction’ is that the companies or transactions in order to fall within the ambit of sub-clause (ii) of rule 10B(1)(e), should be both comparable as well as uncontrolled. ‘Uncontrolled transaction’ has been defined in Rule 10A(a) to mean: ‘a transaction between enterprises other than associated enterprises, whether resident or non-resident.’ This shows that in order to be called as an uncontrolled transaction, it is necessary that the same should be between enterprises, other than associated enterprises.

Section 92B(2) provides that:

“A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise’.

On going through sub-section (2) of section 92B, it is clearly borne out that a transaction with non-AE shall be deemed to be a transaction entered into between two AEs, if there exists a prior agreement in relation to the relevant transaction between third

person and the AE, or the terms of relevant transaction are determined in substance between the third person and AE. When we consider section 92B(2) in combination with Rule 10A(a), it follows that transaction between non-AEs shall be construed as a transaction between two AEs, if there exists a prior agreement in relation to relevant transaction between third person and AE. If such an agreement exists, third person is also considered as an AE, and transaction with such third person becomes international transaction within the meaning of section 92B. Once there is a transaction between two associated enterprises, it ceases to be an 'uncontrolled transaction' and, thereby, goes out of reckoning under Rule 10B(1)(e)(ii).

Adverting to the facts of the instant case, we find that Wipro Technology Services Ltd. earned revenue from Master services agreement with Citigroup Inc. for the delivery of technology infrastructure services. This agreement was, in fact, executed between the assessee's AE, Wipro Ltd., and Citigroup Inc., a third person. This unfolds that the transaction of earning revenue from software development support and maintenance services by Wipro Technology Services Ltd., is an international transaction because of the application of section 92B(2) i.e., there exists a prior agreement in relation to such transaction between Citigroup Inc. (third person) and Wipro Ltd. (associated enterprise). In the light of this structure of transaction, it ceases to be uncontrolled transaction and, hence, Wipro Technology Services Ltd., disqualifies to become a comparable uncontrolled transaction for the purposes of inclusion in the final list of comparables under

Rule 10B(1)(e)(ii). We, therefore, direct removal of this company from the list of comparables.”

Respectfully following the same we also direct removal of this company from the list of comparables.

11. Corporate tax issue

11.1. Ground No. 4-5 are in respect of the disallowance of deduction under section 10 A of the Act. Ld.Counsel submitted that this ground stands squarely covered by the order of Coordinate Bench of this Tribunal for Assessment Year 2010-11 in ITA No. 1102/Del/2015.

11.2.Ld.Counsel submitted that income pertaining to un billed revenue is derived from export of software services and the same is eligible for deduction under section 10 A (3) of the Act. He placed reliance upon the decision of *Coordinate Bench of Mumbai Tribunal in the case of ACIT vs. Sonata Software Ltd reported in 55 SOT 533.*

11.3. It has been submitted that assessee has provided invoices relating to such unbilled revenue before Ld.AO as well as the date of realisation of such invoices, which not in disputed by authorities below.

11.4. Ld. DR placed reliance upon the orders of authorities below.

11.5. We have perused the submissions advanced by both the sides in the light of the records placed before us.

11.6. It is observed from the assessment order that unbilled revenue of Rs.1,12,52,314 (Rs.95,58, 74+ Rs.6,94,040/-credited to the profit and loss account in respect of STPI unit) and its date

of realisation were filed before Ld.AO. Assessee had also filed copies of FAR evidencing unbilled revenue, pertaining to export turnover have been received within 6 months from the end of the previous year. Ld.Counsel submitted that unbilled revenue pertaining to export turnover of Rs.95,58,274/-, has been realised in April and June 2011, that is upon completion of project. Subsequently export proceeds have been received by assessee in June, July and August 2011. Assessee has therefore offered the unbilled revenue of Rs.1,12,52,314/-under profit and gains from business, which is supported by Form 56F issued by a Chartered Accountant. Ld.Counsel submitted that Competent Authority as specified under section 10 A (3) means, Reserve Bank of India and Reserve Bank of India allowed a period of 12 months from the date of export for STPI unit for purposes of realisation and repatriation of export value. He further submitted that based on the above, recognised unbilled revenue has been recorded mandatorily as per Accounting Standards-9 on a proportionate completion method.

11.7. Ld.AO disallowed claim of assessee on the basis that the unbilled portion of revenue was received by assessee during Financial Year relevant to Assessment Year 2012-13 and the said clause of 10 A ends with assessment year 2011-12, which means assessee cannot claim deduction under section 10 A beyond assessment year 2011-12. In this regard we are of the opinion that RBI had allowed assessee to receive unbilled revenue from the export within a period of 12 months from the date of export. And section 10 A (3) allows the period granted by appropriate authority, in this case being RBI. The agreements entered into by

assessee with the parties with whom export have been effectuated, were placed before Ld.AO for his perusal and Assessing Officer has not disputed the export of goods.

In the light of the above and considering the fact that assessee generally has some amount of unbilled revenue for every Assessment Year which is subsequently received, we allow this ground raised by assessee.

11.8. Ground No. 6 is in respect of levy of interest under section 234B and C of the Act. In our considered opinion these are consequential in nature and therefore do not require any adjudication.

12. In the result appeal filed by assessee stands partly allowed.

13. ITA No. 312/Del/2016

Revenue in its appeal is challenging exclusion of following comparables:

- a) E-Info Chips Ltd
- b) Infosys technologies Ltd

and inclusion of

- a) Clibre Point Business Solution

14. E-Info Chips Ltd

DRP directed exclusion of this comparable from the final list. Ld. CIT,DR submitted that segmental information is available in respect of software development and therefore is an acceptable comparable.

On the other hand, Ld.Counsel submitted that this company is engaged in both IT and ITES segments, as is evident from annual report. The statement does not provide information relating to

these 2 segments separately. He supported exclusion by DRP, because of non-availability of segmental information in respect of software development. Ld.Counsel placed reliance upon decision of *Saxo India Ltd versus ACIT* in ITA No. 6148/Del/2015 for assessment year 2011-12.

14.1. We have perused the submissions advanced in light of records placed before us.

14.2. We have perused annual report of this company which is placed at page 27 to 51 of paper book. The schedule of income reproduced by Ld.TPO reveals that there is no segmental information available in respect of sale of products and revenue from software development segment. As assessee before us is only involved in rendering software development services, in the absence of specific segmental information regarding the same this cannot be considered as a fit comparable.

14.3. We therefore do not find any infirmity in the directions of DRP to exclude this comparable.

15. Infosys Ltd

15.1. This company was directed by DRP to be excluded from final list. Ld. DR submitted that segmental data is available in respect of this company and was also functionally similar to that of assessee. He placed reliance upon the order of Ld. TPO.

15.2. On the contrary Ld.Counsel submitted that Infosys Ltd. has been rejected as a comparable by Coordinate Benches of this Tribunal in various cases like *Alcatel Lucent India Pvt. Ltd.* for Assessment Year 2003-04, 2004-05 and 2011-12. Copies of the respective orders are placed in the case law paper book. The decision by *Hon'ble Delhi High Court* in case of *M/s Agnity India*

Technologies Pvt.Ltd in ITA No. 1204/11, upheld the decision of this Tribunal in ITA No. 3856/Del/2010. It has been submitted that this company has significant R&D expenditure and advertising/sales promotion expenses, brand building expenditure, whereas assessee do not undertake any of these expenditures. In respect of the product development, Ld.Counsel submitted that Infosys develops its own proprietary products and owns intangibles in respect of the same and therefore cannot be considered as functionally similar.

15.3. We have perused the submissions in the light of records placed before us.

15.4. It is observed that this company is involved in integrated services and therefore it is functionally dissimilar. Undisputedly Infosys brand is a huge brand and definitely result of the brand goes into the comparables and therefore results in opening higher profits to the company.

We are therefore of the considered opinion that DRP was correct in excluding this comparable.

16. Calibre Point Business Solutions (SEG):

This company was directed by DRP to be included in the final list of comparables. Ld.AR at the outset submitted that Ld.TPO has already given effect to the DRP direction and considered profits of this company, relating to software development services as segmental information was made available. He has placed before us order passed by JCIT, TPO-II(3), New Delhi by including company into the list of comparables and considering the income in respect of software development services.

16.1. In the light of the above order the ground in respect of this comparable raised by revenue becomes infructuous.

17. In the light of the above discussion we set aside the impugned order of Ld.AO and remit the matter for re computation of ALP of international transaction, of provision of software development services to AO/TPO, to be carried out in conformity with discussions made hereinabove in this order.

Needless to say that assessee will be allowed a reasonable opportunity of hearing.

18. In the result assessee's appeal stands partly allowed and revenue's appeal stands dismissed.

Order pronounced in the Open Court on 11/07/2018.

Sd/-

(P.M.JAGTAP)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 11th July, 2018

Manga

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches