

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I - 2': NEW DELHI**

**BEFORE, SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.6687/Del/2019
(ASSESSMENT YEAR-2015-16)**

M/s. Steria (India) Ltd., Seaview Special Economic Zone, Building No. 4, Plot No.20 & 21, Sector-135, Gautam Budh Nagar, Noida (UP) PAN-AAACX 0385L (Appellant)	Vs.	Add. Commissioner of Income Tax, New Delhi (Respondent)
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Appellant By	Sh. Neeraj Kr. Jain, Adv. Ms. Shaily Gupta, CA
Respondent by	Sh. H.K.Choudhary, CIT-DR
Date of Hearing	07.02.2020
Date of Pronouncement	01.05.2020

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER:

This appeal is preferred by the assessee against the final assessment order passed u/s 144C of the Income Tax Act, 1961 (hereinafter called 'the Act'), subsequent to the directions of the Ld. Dispute Resolution Panel (2), New Delhi {DRP} for the Assessment Year 2015-16.

2.0 As per the records, the brief facts of the case are that the assessee company is a Software Service Company and is a subsidiary

of a company based in the United Kingdom. The company provides systems integration, enterprise solution and software development services to the clients of its Associated Enterprises (AE) and also to independent customers in the United Kingdom, the United State of America and others countries in Europe as well as India. The company also provides Information Technology Enabled Services (ITES) in the nature of back- office process outsourcing and inbound and outbound voice-based services.

2.1 The assessee company filed its return of income declaring an income of Rs.108,61,33,970/-. The case was selected for limited scrutiny through CASS. Since, during the year under consideration, the assessee had undertaken 'international transactions' with its AE and the total transactions in this regard had been shown at Rs.45,44,780,336/-, reference was made to the Ld. Transfer Pricing Officer (TPO) in terms of provisions of Sec.92CA of the Act for determining the Arm's Length Price (ALP) of the international transactions entered into by the assessee with the Associated Enterprises (AE). The details of the international transactions entered into by the assessee company are as under:

S. No.	Nature of International transaction	Method Adopted by Assessee	PLI	Amount in Rs.
1.	Provision of IT services	TNMM	OP/TC	2,775,946,466
2.	Availing of Technical & Consultancy Services	TNMM	OP/TC	18,178,256
3.	Receipt of Marketing Services	TNMM	OP/TC	73,530,916
4.	Cost of sharing IT resources & Infrastructure	TNMM	OP/TC	14,055,016
5.	Receipt of management services	TNMM	OP/TC	95,397,056
6.	Corporate guarantee paid	TNMM	OP/TC	1,926,223
7.	Provision of ITES Services	TNMM	OP/TC	1,407,442,865
8.	Reimbursement of expenses (received)	CUP	NA	29,924,564
9.	Reimbursement of expenses (paid)	CUP	NA	128,378,977

2.2 The segmental results, as per the assessee, by using the method OP/TC was computed at 13.59% for Software Development Services and 13.61% for IT Enabled Services. The assessee had selected 9 comparables in its Transfer Pricing Study (TP Study) and had calculated their average margin at 13.67% thereby arriving at a conclusion that Arm's Length Price in respect of international transaction was within the permitted range of (+-) 3%. However, the Ld. TPO accepted only three of the comparables selected by the assessee and rejected the remaining six. Thereafter, the Ld. TPO introduced six more comparables and computed the average margin at 24.10% with respect to Information Technology Enabled Services and proposed an upward adjustment of Rs.17,60,22,947/-.

2.3 Similarly, with respect to the transactions relating to Software Development Services, the Ld. TPO finally selected 17 comparables and computed average margin at 28.76% and proposed an upward adjustment of Rs. 50,29,61,074/-. Thus the total adjustment proposed by the Ld. TPO amounted to Rs.67,89,84,021/-.

2.4 Apart from this, in the draft assessment order, the Assessing Officer also proposed a disallowance of Rs.10,17,89,369/- on account of disallowance u/s 40(a)(i) of the Act on the ground that no tax was deducted at source for payment made as remuneration for Management Services to Group SCA (Steria France). Apart from this the Assessing Office also proposed a disallowance of Rs.9,28,28,017/- on account of non deduction of tax at source on payments made for purchase of certain software licenses from Steria France by holding that these payments were in the nature of royalty.

2.5 Aggrieved, the assessee filed objections before the Ld. DRP challenging the various proposed adjustments in the draft assessment order. The Ld. DRP given partial relief to the assessee and directed the Assessing Officer to make certain adjustments/allowances in the final assessment order.

2.6 However, still being aggrieved, the assessee is now before this Tribunal and has challenged the final assessment order by raising the following grounds of appeal:

1. *That the assessing officer erred on facts and in law in completing assessment under section 143(3) read with section 144C of the Income-tax Act, 1961 ('the Act') at an income of Rs.1,82,85,79,390 as against the returned income of Rs.1,08,61,33,970 under normal provisions of the Act.*

1.1. *That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed.*

Re: Transfer Pricing adjustment in IT Enabled Service Segment

2. *That the assessing officer erred on facts and in law in making an addition on account of transfer pricing adjustment of Rs.27,05,66,054 on account of the alleged difference in the arm's length price of the 'international transaction' of provision of IT enabled services on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer ('TPO').*

2.1. *That the DRP/TPO erred on facts and in law in resorting to cherry picking and considering following companies in the final set of comparable companies allegedly holding them to be functionally comparable to the appellant:*

- (i) Infosys BPO Limited*
- (ii) Tech Mahindra Business Services Limited*
- (iii) BNR Udyog Ltd*

2.2. *That the DRP/ TPO erred on facts and in law in not appreciating*

that the aforesaid companies do not satisfy the test of comparability as provided in rule 10B(2) of the income tax rules and therefore are liable to be rejected from the set of comparable companies.

2.3. That the DRP/TPO erred on facts and in law in rejecting following comparable companies allegedly holding them to be functionally not comparable to the appellant for the purpose of benchmarking analysis:

- (i) Allsec Technologies Limited*
- (ii) Harton Communications Limited*
- (iii) R Systems International Limited*
- (iv) Informed Technologies India Limited*

2.4. That the TPO erred on facts and in law in rejecting R Systems International Limited as comparable allegedly on account of non-availability of financial data.

2.5. That the TPO erred on facts and in law in rejecting Harton Communications Limited as comparable allegedly on account of failing service income filter of 75% of total income.

2.6. That the TPO erred on facts and in law in rejecting Informed Technologies Limited as comparable allegedly on account of failing service income filter of 75% of total income.

2.7. Without prejudice that the DRP/TPO erred on facts and in law while in considering foreign exchange fluctuation as non-operating item of income/ expenditure while computing operating margins of the comparable companies under IT enabled services segment.

2.8. That the TPO/DRP erred on facts and in law in considering foreign exchange fluctuation income as non-operating item of income, while computing operating profit margin of the appellant.

2.9. That the DRP/TPO erred on facts and in law in not allowing appropriate risk adjustment to establish comparability on account of the appellant being a low-risk-bearing captive service provider as opposed to the comparable companies who were independent IT enabled service provider.

2.10. That on the facts and in the circumstances of the case and in law, the DRP/TPO erred in rejecting the contention of the appellant regarding risk adjustment, allegedly holding that in absence of robust and reliable data, no risk adjustment can be allowed.

2.11. That the DRP/TPO erred on facts and in law in not allowing adjustments to the appellant to account for the differences in the working capital position of the appellant vis-à-vis the comparable companies.

Re: Transfer Pricing adjustment in Software Development Service Segment

3. That the assessing officer erred on facts and in law in making an adjustment of Rs.27,72,61,982 to the arm's length price of the 'international transaction' of provision of software development services on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer ('TPO').

3.1. That the DRP/TPO erred on facts and in law in resorting to cherry picking and considering following companies in the final set of comparable companies allegedly holding them to be functionally comparable to the appellant:

- (i) Cybage Software Private Limited
- (ii) Bhilwara Infotechnology Pvt. Ltd
- (iii) Clogeny Technologies Private Limited
- (iv) Infobeans Technologies Limited
- (v) Larsen & Toubro Infotech Limited

- (vi) *CybercomDatamatics Information Solutions Limited*
- (vii) *Mindtree Limited*
- (viii) *Inteq Software Pvt Ltd*

- 3.2. *That the DRP/ TPO erred on facts and in law in not appreciating that the aforesaid companies do not satisfy the test of comparability as provided in rule 10B(2) of the income tax rules and therefore are liable to be rejected from the set of comparable companies*
- 3.3. *Without prejudice that the TPO erred on facts and in law in considering foreign exchange fluctuation as non-operating item of income/ expenditure while computing operating margins of the comparable companies under Software Development segment.*
- 3.4. *That the TPO/DRP erred on facts and in law in considering foreign exchange fluctuation income as non-operating item of income, while computing operating profit margin of the appellant*
- 3.5. *That the DRP/TPO erred on facts and in law in not allowing appropriate risk adjustment to establish comparability on account of the appellant being a low-risk-bearing captive service provider as opposed to the comparable companies who were independent software service provider.*
- 3.6. *That on the facts and in the circumstances of the case and in law, the DRP/TPO erred in rejecting the contention of the appellant regarding risk adjustment, allegedly holding that in absence of robust and reliable data, no risk adjustment can be allowed.*
4. *That the DRP/TPO erred on facts and in law in not allowing adjustments to the appellant to account for the differences in the working capital position of the appellant vis-à-vis the comparable companies.*

Corporate Tax Issues:

Re: Disallowance of Management Services Fees

5. *That on the facts and in the circumstances of the case and in law, the DRP/ assessing officer erred in disallowing under section 40(a)(i) of the Act, expenditure of Rs.10,17,89,369 incurred on account of management services fees, allegedly on the ground that the appellant failed to deduct tax at source therefrom under section 195 of the Act.*
- 5.1. *That the DRP/assessing officer erred on facts and in law in holding payment made toGroupe Steria SCA ('Steria France') towards management services fees to be in nature of Fees for Technical services ('FTS') in terms of Article 13 of India-France Double Tax Avoidance Agreement ('DTAA') read with Protocol thereto.*
- 5.2. *That the DRP/ assessing officer erred on facts and in law in erroneously relying upon the order of the Authority for Advance Ruling ('AAR') without appreciating that the findings of AAR are perverse in light of the favorable order passed by the jurisdictional Delhi High Court in appellant's own case.*
- 5.3. *That the DRP/assessing officer erred on facts and in law in not appreciating that the Protocol to India-France DTAA is an integral part of the treaty and does not require separate notification to be issued by Government of India for its implementation.*
- 5.4. *That the DRP/assessing officer erred on facts and in law in not appreciating that the payment for managerial services to Steria France is not covered under the term "technical" or "consultancy" services, in terms of Paragraph 7 of the Protocol read with Article 13 of the India-UK DTAA.*

- 5.5. *That the DRP/ assessing officer erred on facts and in law in not appreciating that the said services provided by Steria France does not 'make available' technical knowledge, experience, or skill to the appellant, in order to be taxed as FTS in terms of Paragraph 7 of the Protocol read with Article 13 of the India-UK DTAA.*
- 5.6. *Without prejudice, the DRP/ assessing officer erred on facts and in law in not appreciating that the said transaction could not be held as FTS in terms of performance rule in terms of Paragraph 7 of the Protocol read with Article 13(5) of India – Israel DTAA and Article 12(5) of the India – Finland DTAA.*
- 5.7. *That the DRP / assessing officer erred on facts and in law in not appreciating that there was no involvement of use of technology/ technical services and the said services were provided through telephone, fax, email, etc., without any visit to India by the personnel of Steria France.*
- 5.8. *That the DRP / assessing officer erred on facts and in law in not appreciating that since the payments made to Steria France were not in the nature of FTS and accordingly, not chargeable to tax in India, therefore, the appellant was not liable to obtain certificate under section 195 of the Act for lower or no deduction of tax at source.*

Re: Disallowance of payment made towards Recharge of IT Cost under section 40(a)(i) of the Act

6. *That the DRP/assessing officer erred on facts and in law in making disallowance of payments made to Steria France for purchase of computer software licenses, aggregating to a sum of Rs.9,28,28,017, under section 40(a)(i) of the Act, for non-deduction of taxes at source under the provisions of section 195 of the Act.*
- 6.1. *That the DRP/assessing officer erred on facts and in law in failing*

to appreciate that payment for purchase of software made outside India was not chargeable to tax under the provisions of the Act read with the overriding provisions of the India-France DTAA and therefore, there was no default in not deducting tax at source.

6.2. *Without prejudice to the above, the DRP/ assessing officer failed to appreciate that disallowance under section 40(a)(i) of the Act was, in any case, not warranted, since non-deduction of tax was on account of bona fide view taken by the appellant.*

7. *That the assessing officer erred on facts and in law in levying interest under section 234B 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.

3.0 At the outset, the Ld. Authorized Representative (AR) for the assessee submitted that ground no.1 was general not requiring specific adjudication and that ground No.1.1 alleging that the impugned order passed by the Assessing Officer was barred by limitation had been considered by the ITAT Delhi Bench in the case of Religare Capital Markets Ltd. Vs. ACIT in ITA Nos. 1881/Del/2014, 1583/Del/2015, 753/Del/2016 & 1763/Del/2017 vide order dated 10.10.2019 wherein the Tribunal had held that the provisions contained in Sec.144C of the Act were a self-contained code and cannot be subjected to the time limit prescribed u/s 153 of the Act.

Thus, the Ld. AR fairly accepted that ground No.1.1 of the assessee's appeal was liable to be dismissed in view of binding to the judicial precedent of the Co-ordinate Bench.

3.1 With respect to Ground No.2 challenging the Transfer Pricing Adjustment with respect to IT Enabled Services segment, the Ld. AR submitted that the assessee had considered nine companies for computing the Arms' Length Price in the segment and that in the TP documentation it had computed their average at 13.67% whereas the assessee's average was 13.61%. It was further submitted that since the assessee is a cost-plus entity, the foreign exchange fluctuation had been considered as an operating item by the assessee but the Ld. TPO and the Ld. DRP had treated the foreign exchange fluctuation as non-operating while calculating the average of the comparables finally selected. The Ld. Authorized Representative submitted that the final set of comparables post the Ld. DRP directions was having five comparables and the average margin calculated was 20.11% by taking foreign exchange fluctuation as non-operating whereas if the foreign exchange fluctuation was to be considered as operating, the average margin would come to 18.20%.

3.2 The Ld. AR submitted that the final set of comparables subsequent to the Ld. DRP's directions were as under:

(i) *Jindal Intellicom*

(ii) *Microland Ltd.*

(iii) *Tech Mahindra Business Services Ltd.*

(iv) *BNR Udyog Ltd.*

(v) *Infosys BPO Ltd.*

3.3 The Ld. AR submitted that the assessee was challenging the inclusion of Infosys BPO Ltd., Tech Mahindra Business Services Ltd. and BNR Udyog Ltd. It was further submitted that the assessee was also contesting the incorrect rejection of comparables selected by the assessee viz. Allsec Technologies Ltd., Hartron Communication Ltd., R Systems International Ltd. and. Informed Technologies India Ltd. The arguments advanced by the Ld. AR with respect to the IT Enabled Services segment were as under:

Infosys BPO Ltd.: The Ld. Authorized Representative submitted that this company has been incorrectly held to be functionally comparable to the assessee's company. It was argued that Infosys BPO Ltd. is functionally different, has the benefit of synergies and holds intangibles including goodwill amounting to Rs.19 crores. It was

further submitted that Infosys BPO Ltd. is a part of the Infosys Group, a giant in the field of IT Services and, therefore, it enjoyed benefits such as the use of brand name 'Infosys', availability of skilled manpower and technical know-how etc. It was also submitted that it incurs significant marketing expenses being 3.22% of the gross Revenue whereas in the case of assessee there were Nil marketing expenses. It was submitted that this company is to be excluded on the ground of functional dissimilarity itself because as compared to Infosys BPO the assessee company was a very small services provider. It was submitted that the Hon'ble Delhi High Court in the case of New River Software Services Pvt. Ltd. in ITA No.924/2016 had approved the exclusion of Infosys BPO from the list of comparable companies. Reliance was also placed on the judgment of the Delhi High Court in the case of Pr. CIT Vs. Oracle (OFSS) BPO Services Pvt. Ltd. in ITA No 124/2018 wherein the Hon'ble Delhi High Court had upheld the exclusion of the entity on the basis of significant brand presence and brand value. It was submitted that this order of the Hon'ble Delhi High Court had been upheld by the Hon'ble Apex Court in SLP (CC) No.32469/2018. Reliance was also placed on numerous other judicial precedents for the argument that BPO Infosys Ltd. had to be excluded

on account of its non comparability to a small service provider, on account of this company having a huge turn over and on account of BPO Infosys Ltd. having economies of scale.

3.4 The Ld. AR submitted that foreign exchange fluctuation has to be considered as an operating item in terms of judgment of the Hon'ble Delhi High Court in the case of BC Management Services Pvt. Ltd. in ITA No.1064/2017 and another judgment of Pr. CIT Vs. Ameriprise India Pvt. Ltd. in ITA 2065/2016. The Ld. AR further submitted that if the foreign exchange fluctuation is considered as an operating item and Infosys BPO Ltd. is rejected as a comparable, the operating margin of the remaining four companies i.e., (i) Jindal Intellicom, (ii) Microland Ltd., (iii) Tech Mahindra Business Services Ltd. & (iv) BNR Udyog Ltd. would work out to 16.15% and since the operating margin of assessee was 13.61%, the difference would fall within the (+-) 3% range and, therefore, no transfer pricing adjustment would be warranted in the ITES segment.

3.5 The Ld. AR submitted before the Bench that in case this argument of the assessee is not accepted then the assessee should be granted the liberty to argue on other comparables in the ITES segment.

3.6 With respect to ground No.3 relating to Transfer Pricing Adjustment in the Software Development Service Segment, the Ld. AR submitted that the assessee had selected eleven companies in its list of comparables with the mean of 17.7% whereas the final set of comparables subsequent to the Ld. DRP's directions had 13 comparables with an average of 20.84%. It was submitted that while calculating this average the foreign exchange fluctuation was not considered as an operating item and that further the 35th percentile was calculated at 16.76% and 65th percentile at 28.76%. It was submitted that if the foreign exchange fluctuation is considered as operating item, the operating margin of the assessee would come to 13.59% and that in the final set of comparables, the 35th percentile would come to 11.51% and 65th percentile would come to 25.64%. It was submitted that, thus, the margin of the assessee would lie within the 35th and 65th percentiles and no Transfer Pricing Adjustment would be warranted in the segment.

3.7 It was further submitted that in case this contention of the assessee is accepted, then ground Nos.3.1 to 3.6 and Ground No.4 would become academic. The Ld. AR further submitted that in

case the Bench holds a different view then the assessee should be given an opportunity to argue on these grounds as well.

3.8 With respect to Ground No.5 challenging the action of the Ld. DRP/AO in making the disallowance u/s 40(a)(i) amounting to Rs.10,17,89,369/- incurred on account of management services fees for failure to deduct of tax at source, the Ld. AR submitted that the assessee had entered into a Management Services Agreement with Steria France wherein it was agreed to provide various management services to the assessee with a view to rationalize and standardize the business conducted by the assessee in India in accordance with the international best practices and pursuant to this agreement, the assessee had paid the impugned amount during the year under consideration. It was further submitted that the assessee had filed an application before the Authority for Advance Rulings (AAR) to pronounce a ruling on the issue as to whether this payment made by Steria India to Steria France would not be taxable in India in the hands of Steria France in view of the provisions of India-France Double Taxation Avoidance Agreement (DTAA) and on the aspect as to whether if Steria France was not taxable in India for the managerial services provided to Steria India, whether Steria India will not be

liable to withhold tax as per the provisions of Section 195 of the Act. It was further submitted that the Ld. AAR pronounced a ruling against the assessee holding that the payments made to Steria France were in the nature of Fee for Technology Services (FTS) against which the assessee filed a writ petition before the Hon'ble Delhi High Court. It was further submitted that vide order dated 28.07. 2016 in WP (C) No.4793/2014 and CM Appeal 9551/2014, the Hon'ble Delhi High Court held in favour of the assessee company and held that service rendered by Steria France were managerial in nature and were, therefore, outside the ambit of definition of FTS provided in India- UK DTAA and, therefore, payments made to Steria France were not liable to withholding of tax u/s 195 of the Act. It was submitted that following this order of the Hon'ble Delhi High Court for Assessment Years 2010-11 & 2011-12 in ITA Nos.762/2017 & 380/2017 respectively, the Hon'ble Delhi High Court decided the issue in the assessee's favour. The Ld. AR submitted that the Ld. DRP upheld the disallowance proposed by the Assessing Officer without appreciating that the jurisdictional High Court in assessee's own case had decided in favour of the assessee and, therefore, the impugned disallowance was not sustainable.

3.9 Ground No.6 challenges the action of the Ld. DRP/ Assessing Officer in making disallowance of the payment made to Steria France for purchase of computer software licenses aggregating to a sum of Rs.9,28,28,017/- u/s 40(a)(i) of the Act for the reason of non-deduction of tax at source. The Ld. AR submitted that since the assessee is engaged in the business of providing Information Technology Solutions in India and abroad, which requires various hardware and software from time to time, in order to meet these requirements, the assessee had entered into an intra-group suppliers' agreement with Steria France which in turn negotiated with the external suppliers and made centralized purchases in the interest of all its group affiliates. It was further submitted that under the terms of the agreement Steria France would purchase the material and sell it to the Steria Group Entities without adding a markup or rendering any additional services. It was submitted that these payments were not chargeable to tax in terms of Section 9(1)(vi) of the Act read with Article 13 of the India-France DTAA and, therefore, no tax was required to be deducted at source. It was submitted that under the provisions of Section 195 of the Act, tax is to be deducted at source on payments made to non-residents which is chargeable under the

provisions of the Act and since Steria France's income is not chargeable to tax in India, the provisions relating to deduction of tax at source would not get triggered. It was submitted that Steria France is resident of France with which there exists a DTAA entered into by the Government of India. It was further submitted that section 90(2) of the Act provided that in case where a DTAA exists between India and the country of residence of the non-resident, the provisions of the Act shall be overridden by the provisions of the treaty to the extent the latter are more beneficial to such non-resident. It was submitted that the assessee had purchased hardware and software licenses under the impugned transactions under which the assessee had acquired a non-exclusive non-transferable right to use the software and that further the assessee was prohibited for copying, modifying or further developing the software. It was submitted that this purchase of software in terms of the agreement only resulted in the transfer of the copyrighted article and not the copy right and, therefore, the same was not in the nature of royalty in the hands of Steria France for the purposes of deduction of tax at source. Reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of DCIT Vs. Infra Software Ltd. reported in 220 Taxmann 274 wherein the Hon'ble

Delhi High Court had upheld that order of the Tribunal wherein it was held that the amount received by the assessee under the License Agreement for allowing the use of software would not be royalty under the DTAA since what was transferred was neither the copy right nor the use of the copyright in the software but what was transferred was the right to use the copyrighted material or article which was distinguishable from the rights in the copyright. The Ld. AR also submitted that in this judgment the Hon'ble Delhi High Court had distinguished the ratio laid down of the Hon'ble Karnataka High Court in the case of CIT vs. Samsung Company Ltd. reported in 345 ITR 494 on which reliance had been placed by the Assessing Officer and the Ld. DRP while making the disallowance.

3.10 With respect ground No.7 challenging the levy of interest u/s 234B of the Act, the Ld. AR fairly accepted that this ground was consequential.

4.0 In response to the arguments advanced by the Ld. AR, the Ld. CIT-DR submitted that as far as the issue of foreign exchange fluctuation being treated as an operating item was concerned, there should be consistency in the approach and the option should not be exercised with a view to suit the trading results.

4.1 On the issue of the exclusion of the comparable Infosys BPO Ltd, the Ld. CIT-DR submitted that the assessee was also having a substantial turnover and was a well known company and, therefore, the assessee's prayer for exclusion of Infosys BPO Ltd. was not justified. It was submitted that the TNMM method sought broad comparability and it was not essential that the selected comparable should be an exact replica of the assessee company.

4.2 With respect to the assessee's contention with respect to the comparables and the mean falling between 35th and 65th percentile in the Software Development Services segment, the Ld. CIT-DR submitted that the Ld. TPO should be given an opportunity to verify the computation of the 35th and 65th percentiles and take a decision thereafter.

4.3 In respect on ground Nos.5 & 6 regarding disallowance in respect of deduction of tax at source with respect to fees paid for management services and purchase of Software License respectively, the Ld. CIT-DR placed extensive reliance on the orders of the Ld. TPO and the directions of the Ld. DRP and submitted that the observations and conclusions arrived at by these two authorities should be duly considered while arriving at a decision.

5.0 We have heard the rival submissions and have also perused the material on record as well as the orders of the lower authorities. We now take up the issues one by one for adjudication:-

5.1 Ground No.1.1 agitates the impugned order as being barred by limitation. The Ld. Authorized Representative has fairly conceded that this ground is covered against the assessee by the order of the ITAT, Delhi Bench in the case of Religare Capital Markets Ltd. Vs. ACIT in ITA NO.1881/Del/2014, 1583/Del/2015, 753/Del/2016 & 1763/Del/2017 vide order dated 10.10.2019 wherein the Tribunal has held that the provisions contained in section 144C of the Act are a self contained code and that the same cannot be subjected to the time limit prescribed u/s 153 of the Act. Accordingly, ground No.1.1 is dismissed by respectfully following the ratio of the decision rendered by Co-ordinate Bench of the Tribunal as aforesaid.

5.2 With respect to the Transfer Pricing Adjustment in respect of IT Enabled Segment, although the assessee has challenged selection of comparables as well as rejection of comparables in the grounds of appeal, the Ld. Authorized Representative has argued at length only against the inclusion of Infosys BPO Ltd. in the final set of

comparables on the grounds that this company is functionally different, having ownership of intangibles and enjoys benefit of synergies. The Ld. Authorized Representative has placed reliance on numerous judicial precedents for buttressing the arguments in this regard. The Authorized Representative has also submitted that the assessee has treated foreign exchange fluctuation as an operating item whereas the Revenue has treated the same as non-operating item. The Ld. AR has pleaded that if Infosys BPO Ltd. is excluded from the final set of comparables and foreign exchange fluctuation is treated as operating item, the average margin of the remaining four comparable companies viz. (i) Jindal Intellicom, (ii) Microland Ltd., (iii) Tech Mahindra Business Services Ltd. & (iv) BNR Udyog Ltd. will work out to 16.15% and since the operating margin of the assessee is 13.61%, the mean of the comparables will be within the permitted range and no Transfer Pricing Adjustment would be warranted in respect of ITES segment.

5.3 Having gone through the submissions of the assessee as well as the annual report of BPO Infosys Ltd. and the judicial precedents relied upon by the Ld. Authorized Representative, we are of the considered opinion that Infosys BPO Ltd. cannot be considered

as a comparable to the assessee company for the simple reason that the assessee company is engaged in rendering system integration, enterprise solutions and software development services to the clients of its Associated Enterprises (AE) and also to independent customers in the United Kingdom, the United State of America and others countries in Europe as well as India while being a subsidiary of Steria (UK). On the other hand Infosys BPO Ltd. is a part of the Infosys Group, a giant in the field of Information Technologies Services and being a part of the Infosys Group, 'Infosys', it thus enjoys significant brand presence and brand value plays a significant role in its ability to generate profit. The Hon'ble Delhi High Court in the case of Pr. CIT Vs. Oracle (OFSS) BPO Services Pvt. Ltd. in ITA No.124/2018 upheld the exclusion of entity on the basis of significant brand presence on entity on the basis of significant brand presence and brand value of an entity. This decision of the Hon'ble High Court of Delhi was later upheld by the Hon'ble Apex Court in SLP (CC) No.32469/2018. On identical lines, the Hyderabad Bench of ITAT in the case of Hyundai Motors India Engineering. Vs. ITO in ITA NO.1850/Hyd/2012 directed the exclusion of Infosys BPO Ltd. from the final set of comparables by holding that, "...*'presence of a brand commands premium price and*

the customers would be willing to pay, for the services/produced of the company. Infosys BPO is a established player who is not a only a market lead but also a company employing sheet breath in terms of economies of scale and diversity and geographical dispersion of customers. The presence of the aforesaid factories will take this company out of the list of comparables. We therefore accept the contention of the assessee that this company cannot be regarded as a comparable. Similar view was also taken in case of Symphony Marketing Solution India (Pvt.) Ltd. (supra) by the Bangalore Bench. Therefore, we direct the Assessing Officer/TPO to exclude the same.”

5.4 Accordingly, in view of the judicial precedents cited above we direct the AO/Ld. TPO to exclude BPO Infosys Ltd from the final set of comparables.

5.5 Since the Ld. Authorized Representative has submitted that if Infosys BPO Ltd. is excluded from the final set of comparables, the assessee’s challenge to exclusion of the two comparables of the assessee viz. Allsec Technologies Ltd. and Informed Technologies Ltd, will become academic in nature and the same were also not argued by the Ld. AR, these two comparables will remain to be excluded and the assessee’s challenge to their exclusion is dismissed as not pressed.

5.6 With respect to the ITES Segment, it is the plea of the Ld. Authorized Representative that foreign exchange fluctuation should be treated as an operating item. In this regard reliance has been placed on the judgments of the Hon'ble Delhi High Court in the case of Pr. CIT vs. BC Management Services Pvt. Ltd. in Appeal No.1064/2017 and Pr. CIT Vs. Ameriprise India Pvt. Ltd. in Appeal No.206/2016. The Hon'ble Delhi High Court in the case of Pr. CIT vs. Ameriprise India Pvt. Ltd. (supra) has held that in respect of foreign exchange gains earned by the assessee which is in relation to trading items and emanating from international transactions, direct value derived from it cannot be treated as non-operating losses and gains. Similar view was taken by the Hon'ble Delhi High Court in the case of Pr. CIT Vs. Cashedge India Pvt. Ltd. in Appeal No.279/2016 as well as in case of Pr. CIT vs. BC Management Services Pvt. Ltd. (supra). Therefore, we agree with the contentions of the AR that foreign exchange fluctuations gains/losses should be treated as operating item if the same are in relation to the trading items emanating from the international transactions. It only remains to be verified as to whether the foreign exchange fluctuations incurred by the assessee relate to the trading items emanating from the international

transactions or not. Therefore, for the limited purposes of verifying that the foreign exchange fluctuations of the assessee relate to the trading activities of the assessee, the issue is restored to the file of the Assessing Officer/Ld. TPO to verify the same and if it is found that the foreign exchange fluctuation relate to trading with the associate enterprises the Assessing Officer/Ld. TPO is directed to treat the same as operating item. Thus, this issue stands allowed for statistical purposes.

5.7 With respect to the Transfer Pricing Adjustment in the Software Development Segment, the assessee has agitated inclusion of four comparables by the Ld. TPO. However, the main thrust of the assessee's arguments has been that if the foreign exchange fluctuations are considered as operating item, the margin of the assessee so computed will be 13.59% and the 35th percentile of the comparable companies would come to 11.51% and the 65th percentile would come 25.64% and, therefore, since the margin of the assessee would lie between the 35th and 65th percentile, no Transfer Pricing Adjustment would be required. The Ld. CIT-DR has submitted that the AO/TPO should verify the computation of this 35th and 65th percentile before the Transfer Pricing Adjustment in this segment is to

be deleted. The Ld. Authorized Representative has no objection to the same. Accordingly, the issue of Transfer Pricing Adjustment in the Software Development Segment is restored to the file of the AO/Ld. TPO for the limited purposes of verifying the computation of 35th and 65th percentiles and if the same is found correct then no Transfer Pricing Adjustment would have to be made. The Assessing Officer/Ld. TPO is also directed to verify as to whether the foreign exchange fluctuation in this segment relates to the trading activities with the AEs and if it is so found then the same is to be treated as operating item.

5.8 Since it has been submitted by the Ld. Authorized Representative that the grounds relating to inclusion of other companies as comparables by the Ld. TPO/AO would become academic and no arguments were advanced by the Ld. Authorized Representative on the inclusion of such comparable companies by the Ld. Authorized Representative, the related grounds are dismissed as not pressed.

5.9 Ground No.5 challenges the action of the Assessing Officer in disallowing an amount of Rs.10,17,89,369/- incurred on account of management services fees u/s 40(a)(i) of the Act on the

ground that the assessee had failed to deduct of tax at source in terms of provision of Sec.195 of the Act. The brief facts surrounding this controversy are that the assessee had entered into a management services agreement with Steria France wherein Steria France had agreed to provide certain management services to the assessee and pursuant to this agreement the assessee had paid the impugned amount to Steria France. The assessee had approached the Authority for Advance Rulings and had sought ruling on the issue as to whether the payment made by the assessee for management services to Steria France will not be taxable in India in the hands of Steria France as per the provisions of India-France DTAA and that if Steria France was not taxable in India, whether the assessee was liable to deduct tax at source. The AAR, however, ruled against the assessee and the assessee, being aggrieved, approached the Hon'ble Delhi High Court in a Writ Petition which was disposed of in favour of the assessee wherein the Hon'ble Delhi High Court held that the Protocol of India-France DTAA was in integral part of the treaty and it did not require any notification by the Government of India for its implementation. The Hon'ble Delhi High Court also held that the beneficial provision in the DTAA between India and UK can be automatically incorporated in

India-France DTAA by applying the Most Favoured Nation clause present in the Protocol to India-France (DTAA). It was also held that the services rendered by Steria France were managerial in nature and were, therefore, outside the ambit of definition of fee for technical services and further that the payments made to Steria France were not liable to withholding of tax under the provisions of section 195 of the Act. Thereafter, for Assessment Years 2010-11 and 2011-12, the Hon'ble Delhi High Court went on to decide the issue in favour of the assessee in ITA No.762/2017 and 382/2017 respectively. In assessment year 2011-12, the question framed by the Hon'ble Delhi High Court was:

“whether on facts and in the circumstances of the case, ITAT was correct in law in holding that the assessee was not liable to withhold tax u/s 195 of the Act on payments made by it to Steria France for management services fee and consequently deleting the disallowance made by the Ld. Assessing Officer u/s 40(a) (i) of the Act ?”

5.10 This question was answered against the Revenue and in favour of the assessee. Therefore, in light of the settled judicial precedent in favour of the assessee on the issue by the Hon'ble Delhi High Court in assessee's own case, there is no reason for us to

sustain this disallowance. Accordingly, respectfully following the judgment of the Hon'ble Delhi High Court, as aforementioned, in assessee's own case, we direct the deletion of this disallowance.

5.11 Ground No.6 challenges the action of the Assessing Officer in making disallowance of Rs.9,28,28,017/- being payments made to Steria France for purchase of computer software licenses for the reason of failure to deduct tax at source. It is the contention of the assessee that the payment for purchase of software licenses is not in the nature of royalty and, therefore, no deduction of tax is required. In this regard reliance has been placed on the judgment of the Hon'ble Delhi High Court in the case of DCIT vs. Infrasoftware Ltd., reported in 220 taxaman273. It has also been submitted that although the lower authorities have relied on the judgment of the Hon'ble Karnataka High Court in the case of CIT vs. Samsung Company Ltd. reported in 345 ITR 494 (Karnataka), the same has been distinguished and dissented from by the Hon'ble Delhi Court in the case of Infrasoftware Ltd. (supra). It has been submitted that the assessee is engaged in the business of providing information technology solutions in India and abroad. The assessee requires various hardware(s) and software(s), from time to time. In order to

meet such requirements, in a cost effective manner, the assessee had entered into an Intra-Group Supplier Agreement. Steria France had negotiated with external suppliers and subscribed centralized purchases from them, in the interest of all its group affiliates. The objective for undertaking centralized purchases was to bargain competitive prices for the Steria Group's purchase requirements. Under the terms of the Agreement entered by the assessee, Steria France would purchase material (hardware or software) or services and thereafter resale within the Group entities for subsidiaries' local needs. Such resale, as per the Agreement, is done without rendering additional services and without adding any markup. It has been further submitted that apropos the aforesaid Agreement, the assessee has purchased certain software licenses for a sum aggregating to Rs.9,28,28,017/- from Steria France in the course of the year and the licenses, as per the invoices, are as under:

- Paulo Alto & Wildfire -Software License charge
 - Messaging 360 One
 - Call Windows
 - Antivirus + Tactem
 - Active Directory costs

- Microsoft Maintenance
- One IT Catalogue
- Hermes
- Desktop Services SCCM

5.12 It has been submitted that payments made to Steria France were in respect of software licenses only and, were not towards use of copyright in the software covered within the meaning of 'royalty' under section 9(1)(vi) of the Act.

5.13 It is seen that under Section 195 of Act, an obligation is cast on a person making payment to a non-resident of any sum, which is chargeable under the provisions of the Act, to deduct tax at the rates in force, at the time of payment of such sum or at the time of credit thereof to the account of the payee, whichever is earlier. As per the aforesaid provision, tax is required to be withheld in respect of payment made to a non-resident. [Refer GE India Technology Centre (P) Ltd v. CIT: 327 ITR 456]. Further, if we consider the ambit of definition of 'royalty' as defined in section 9(1)(vi) of the Act, it is seen that clause (v) of explanation to section 9(1)(vi) provides that consideration paid for transfer of *inter alia* all or any rights in

respect of any copyright as falling within the meaning of royalty. In the present case, considering that the issue under consideration is payment made towards software, which is a copyrighted article/asset, it needs to be considered whether the payment made is for obtaining rights in respect of copyright in the software, which is governed by the provisions of Copyright Act, 1957. Further, it would be pertinent to note that the Steria France is a resident of France (TRC and no PE certificates are placed in the paper book). As per section 90(2) of the Act, the provisions of the Act shall be overridden by the provisions of the DTAA, to the extent the latter are more beneficial to a non-resident assessee. In the present case, Article 13 of India - France DTAA deals with taxability of royalty paid by an Indian resident to French resident. The said Article reads as under:

"ARTICLE 13 - Royalties and fees for technical services and payments for the use of equipment -

1. Royalties, fees for technical services and payments for the use of equipment arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.

2. *However, such royalties, fees and payments may also be taxed in the Contracting State, in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of these categories of income, the tax so charged shall not exceed 10 per cent of the gross amount of such royalties, fees and payments.*
3. *The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. ”*

5.14 The definition of royalty under the India-France DTAA is, thus, much narrower in scope than the definition under the Act.

5.15 The Copyright Act, 1957 defines computer programme as a set of instructions expressed in words, codes, schemes, or any other form including a machine readable

medium capable of causing a computer to perform a particular task or achieve a particular result. The Copyright Act further defines the term “literary work” as including computer programmes, table compilation including computer databases.

The term ‘copyright’ in case of a ‘computer program’ has been defined in section 14 of the Copyright Act as an exclusive right to reproduce including storing in any medium by electronic mean, to issue copies of the work to public, to make any adaptation, etc. in relation to a literary work including computer programme. In other words, in terms of the aforesaid section, in order for a person to be considered as having a copyright in a literary work, including computer programme, such person must have an exclusive right to reproduce or to issue copies or to adapt, or to sell or give on commercial rental the computer program. In the present case, the software purchased by the assessee are standardized and not customized products and in terms of the contracts with the external suppliers/ Steria France of such software, the assessee acquires a non-exclusive, non-transferable right to distribute the software and is prohibited from copying, modifying or further development of the software.

Therefore, the purchase of software by the assessee in terms of the Agreement only results in the transfer of a copyrighted article rather than a copyright right and payment received for the same would not be in the nature of royalty in the hands of Steria France.

5.16 We are guided to reach such a finding by relying on the judgment of the Hon'ble Delhi High Court in the case of DIT v. Infrasoftware Ltd.: (220 Taxman 274). In this case, the assessee, an international software marketing and development company of an international group, had claimed that amount received by it under license agreement for allowing use of software was not taxable as royalty. The Hon'ble Delhi High Court upheld the order of the Tribunal wherein it was held that amount received by the assessee under the license agreement for allowing the use of the software would not be royalty under the DTAA since what was transferred was neither the copyright in the software nor the use of the copyright in the software, but what was transferred was the right to use the copyrighted material or article which was distinguishable from the rights in a copyright. Accordingly, payments received by the assessee in

this regard would be taxable as business income. It may also be pertinent to note that the Hon'ble Delhi High Court in the aforesaid decision has distinguished the *ratio decidendi* laid down by the Karnataka High Court in the case of CIT v. Samsung Electronics Co. Ltd. (supra). Accordingly, the reliance placed by the assessing officer on the decision of Samsung Electronics (supra) is misplaced.

5.17 We have also perused the Intra- Group Supplier Agreement entered into between Steria France and the assessee we find that it is provided that the hardware and software purchases by Steria France is re-sold to the assessee without additional services and without any markup. Thus, there is no transfer of any right in respect of the copy of right and it is a case of mere transfer of a copy of righted article. The payment is in the purchase of license or a copy righted article and it represents only the purchase price and the same cannot be considered as royalty either under the Act or under the provisions of DTAA. It will be worthwhile to extract the following observations of the Hon'ble Delhi High Court from the judgment

in the case of DIT vs. Infra Soft Ltd. (Del) (supra) at this juncture:

“96. The amount received by the Assessee under the license agreement for allowing the use of the software is not royalty under the DTAA.

97. What is transferred is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income and would be business income.

98. We are not in agreement with the decision of the Karnataka High Court in the case of Samsung Electronics Co. Ltd (supra) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup copy would amount to copyright work under section 14(1) pf the Copyright Act and the payment made for the grant of the licence for the said purpose would constitute royalty. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use was only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process was necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by the said provision because it is only integral to the use of copyrighted product. The right to make a backup copy purely as a temporary protection

against loss, destruction or damage has been held by the Delhi High Court in Nokia Networks OY (supra) as not amounting to acquiring a copyright in the software.”

5.18 Accordingly, respectfully following the ratio of the judgment of the Hon’ble Delhi High Court in DIT vs. Infra Soft Ltd (supra), we are of the considered the opinion that tax was not required to be deducted at source in respect of the payment made to Steria France for the purchase of computer software license/s and therefore, in view of the above cited judgment we direct the AO/TPO to delete the disallowance.

5.19 Ground No.7 challenging the levy of interest u/s 234B of the Act is consequential and needs no separate adjudication.

6.0 In the final result, the appeal of the assessee stands partly allowed for statistical purposes.

Order pronounced in the Open Court on 01/05/2020.

Sd/-

(R.K.PANDA)

ACCOUNTANT MEMBER

Dated: 01/05/2020

PK/PS

Copy forwarded to:

1. Appellant

Sd/-

(SUDHANSHU SRIVASTAVA)

JUDICIAL MEMBER

2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI