IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(TP)A No.2638/Bang/2017
Assessment Year : 2013-14

M/s. Aptean India Private Limited, (formerly Aptean Software India Pvt. Ltd.,) Level-5 (8th Floor), Golden Heights, No.1/2, 59th C Cross, 4th M Block, Rajajinagar, Bengaluru – 560 010. **PAN : AACCP 7154 M**	Vs.	The Deputy Commissioner of Income Tax, Circle -1(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri. G. S. Prashanth, CA
Respondent by	:	Dr. Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	28.10.2021
Date of Pronouncement	:	09.11.2021

O R D E R

Per N. V. Vasudevan, Vice President:

This is an appeal by the assessee against the final assessment order dated 11.10.2017 of DCIT, Circle 1(1)(2), Bengaluru, passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter called the 'Act') relating to Assessment Year 2013-14.

2. The Assessee in engaged in the business of provision of Software Development Services (SWD services), to its wholly owned holding company. In terms of the provisions of Sec.92-A of the Act, the Assessee and its wholly owned holding company were Associated Enterprises

("AEs"). In terms of Sec.92B(1) of the Act, the transaction of providing SWD Services was an “international transaction” i.e., a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. In terms of Sec.92(1) of the Act, the any income arising from an international transaction shall be computed having regard to the arm’s length price. In this appeal by the Assessee, the dispute is with regard to determination of Arms’ Length Price (ALP) in respect of the international transaction of rendering SWD services to the AE.

3. As far as the provision of Software Development services are concerned, the Assessee filed a Transfer Pricing Study (TP Study) to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining ALP. The Assessee selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for the purpose of comparison of the Assessee’s profit margin with that of the comparable companies. The OP/OC of the Assessee was arrived at 15 % by the Assessee in its TP study. The operating income was Rs. 29,13,01,402/- and the Operating Cost was Rs.24,55,95,246/-. The Operating profit

(Operating income – Operating cost was Rs4,40,96,768/-. Thus the OP/TC was arrived at 15 %. The Assessee chose companies who are engaged in providing similar services such as the Assessee. The Assessee identified 2 companies whose average arithmetic mean of profit margin was 13.37 % and was less and hence comparable with the Operating margin of the Assessee. The Assessee therefore claimed that the price it charged in the international transaction should be considered as at Arm's Length.

4. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/OC. He also selected comparable companies from database. The TPO accepted some companies chosen by the Assessee as comparable companies. The TPO on his own identified some other companies as comparable with the Assessee company and arrived at a set of 7 comparable companies. The PLI was reworked by the TPO at 20.90%. The TPO worked out the average arithmetic mean of their profit margins of the 7 comparable companies as follows:

Sl. No.	**Name of the taxpayer**	**OP/OC**
1	CG-VAK Software Exports	20.54%
2	I C R A Techno Analytics	17.10%
3	Larsen & Toubro Infotech	26.06%
4	Mindtree Ltd. (Seg)	18,19%
5	Persistent Systems Ltd.	28.27%
6	R S Software (India) Pvt Ltd	17.41%
7	Tech Mahindra Ltd (Seg)	18.72%
Unadjusted average margin		**20.90%**

5. The TPO computed the Addition to total income on account of adjustment to ALP as follows:

"15.4.1 The arithmetic mean of the Profit Level indicators is taken as the arm's length margin. Please see Annexure A for details of computation of PLI of the comparables. Based on this, the arm's length price ***of*** *the services rendered by the taxpayer to its AE(s) is computed as under:*

SOFTWARE DEVELOPMENT SERVICES

Arm's Length Mean Margin on cost	*20.90%*
Less: Working Capital Adjustment (As per Annex. B)	*-8.89%*
Adjusted margin	*29.79%*
Operating Cost	*2469,47,032*
Arm's Length Price(ALP) 129.97% of Operating Cost)	*32,05,12,553*
Price Received	*28,55,69,003*
Variation in Price	*3,49,43,550*
3% of price received	*85,67,070*
Shortfall being adjustment	*3,49,43,550*

15.4.2 The above shortfall of ***Rs. 3,49,43,550/-*** *is treated as transfer pricing adjustment u/s 92CA in respect of software development segment of the taxpayer's international transactions."*

6. The assessee filed objections before the Dispute Resolution Panel (DRP) against the draft Assessment Order of the AO incorporating the additions suggested by the TPO in his order to the extent the DRP did not agree with the submissions of the assessee. The assessee is in appeal before the Tribunal. At the time of hearing, learned Counsel for the assessee prayed for adjudication of ground No.4a, 5, 6, 7a and 7b and 8. In addition to the aforesaid grounds, the learned Counsel has also prayed for admission for the following additional ground:

Ground relating to other than transfer pricing matters

1. *That on the facts and in the circumstances of the case and in law, the Learned Assessing Officer (AO) and Learned Commissioner of Income-tax Appeals (CIT(A)) ought to grant deduction under section 37(1) of the Income Tax Act, 1961 for Education Cess and Secondary and Higher Education Cess (collectively referred to as 'Gess') paid by the Appellant on the assessed income along with income-tax and surcharge for the year under appeal.*

   It is prayed that the deduction of Education Cess and Secondary and Higher Education Cess should be allowed to the Appellant as business expenditure under the provisions of the Act.

7. The additional ground is purely a legal ground and can be adjudicated on facts available on record and is therefore admitted for adjudication.

8. We shall first deal with ground Nos.7a and 7b which is a ground seeking exclusion of 5 comparable companies on the ground that the turnover of this company is more than 200 crores and cannot be compared with the assessee whose turnover is only a sum of Rs.29.13 Crores. The assessee seeks exclusion of the following 5 companies by applying the turnover filter:

Comparables selected by Transfer Pricing Officer (TPO)	***Sales (in Rs.)***
Larsen & Toubro Infotech Ltd.	*36,09,32,15,709*
Mindtree Ltd. (Seg)	16,40,80,51,830
Persistent Systems Ltd.	9,96,75,10,000
R S Software (India) Limited	2,93,05,31,000
Tech Mahindra Ltd (Seg)	55,95,70,00,000

9. The admitted position is that the turnover of these companies are more than 200 crores. The relevant provisions of the Act in so far as comparability of international transaction with a transaction of similar nature entered into between unrelated parties, provides as follows:

Determination of arm's length price under section 92C .

10B . (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction **[***or a specified domestic transaction***]** shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :—

(a) to (d)......

(e)transactional net margin method, by which,—

(*i*) the net profit margin realised by the enterprise from an international transaction **[***or a specified domestic transaction***]** entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(*ii*) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(*iii*) the net profit margin referred to in sub-clause (*ii*) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction **[***or the specified domestic transaction***]** and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(*iv*) the net profit margin realised by the enterprise

and referred to in sub-clause (*i*) is established to be the same as the net profit margin referred to in sub-clause (*iii*);

(*v*) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction **[***or the specified domestic transaction***]**;

(f).....

(2) For the purposes of sub-rule (1), the comparability of an international transaction **[***or a specified domestic transaction***]** with an uncontrolled transaction shall be judged with reference to the following, namely:—

(*a*) the specific characteristics of the property transferred or services provided in either transaction;

(*b*) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

(*c*) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(*d*) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

(3) An uncontrolled transaction shall be comparable to an international transaction **[***or a specified domestic transaction***]** if—

(*i*) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or

the profit arising from, such transactions in the open market; or

(*ii*) reasonably accurate adjustments can be made to eliminate the material effects of such differences.

10. A reading of Rule 10B(1)(e)(iii) of the Rules read with Sec.92CA of the Act, would clearly shows that the net profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, which could materially affect the amount of net profit margin in the open market.

11. Chapters I and III of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereafter the "TPG") contain extensive guidance on comparability analyses for transfer pricing purposes. Guidance on comparability adjustments is found in paragraphs 3.47-3.54 and in the Annex to Chapter III of the TPG. A revised version of this guidance was approved by the Council of the OECD on 22 July 2010. In paragraph 2 of these guidelines it has been explained as to what is comparability adjustment. The guideline explains that when applying the arm's length principle, the conditions of a controlled transaction (i.e. a transaction between a taxpayer and an associated enterprise) are generally compared to the conditions of comparable uncontrolled transactions. In this context, to be comparable means that:

- None of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or
- Reasonably accurate adjustments can be made to eliminate the effect of any such differences. These are called "comparability adjustments.

12. The TPO excluded from the list of comparable companies chosen by the Assessee in its TP study companies whose turnover was less than Rs.1 Crore. The contention of the Assessee before the DRP was that while the TPO excluded companies with low turnover, he failed to apply the same yardstick to exclude companies with high turnover compared to the Assessee. The reason for excluding companies with low turnover was that such companies do not reflect the industry trend as their low cost to sales ratio made their results less reliable. The contention of the Assessee was that there would be effect on profitability wherever there is high or low turnover and therefore companies with high turnover should also be excluded from the list of comparable companies. The DRP primarily relied on the decision rendered by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors India Pvt.Ltd Vs. DCIT 82 Taxmann.com 167(Del), wherein it was held that high turnover ipso facto does not lead to the conclusion that a company which is otherwise comparable on FAR analysis can be excluded and that the effect of such high turnover on the margin should be seen. The DRP therefore held that a company which is otherwise functionally comparable cannot be excluded only on the basis of high turnover.

13. On the issue of application of turnover filter, we have heard the rival submissions. The parties relied on several decisions rendered on the above issue by the various decisions of the ITAT Bangalore Benches in favour of the Assessee and in favour of the Revenue, respectively. The ITAT Bangalore Bench in the case of Dell International Services India (P) Ltd. Vs. DCIT (2018) 89 Taxmann.com 44 (Bang-Trib) order dated 13.10.2017, took note of the decision of the ITAT Bangalore Bench in the case of Sysarris

Software Pvt.Ltd. Vs. DCIT (2016) 67 Taxmann.com 243 (Bangalore-Trib) wherein the Tribunal after noticing the decision of the Hon'ble Delhi High Court in the case of Chryscapital (supra) and the decision to the contrary in the case of CIT Vs. Pentair Water India Pvt.Ltd., Tax Appeal No.18 of 2015 dated 16.9.2015 wherein it was held that high turnover is a ground to exclude a company from the list of comparable companies in determining ALP, held that there were contrary views on the issue and hence the view favourable to the Assessee laid down in the case of Pentair Water (supra) should be adopted. The following were the conclusions of the Tribunal in the case of Dell International (supra):

> "41. We have given a very careful consideration to the rival submissions. ITAT Bangalore Bench in the case of *Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010*, relying on Dun and Bradstreet's analysis, held grouping of companies having turnover of Rs. 1 crore to Rs.200 crores as comparable with each other was held to be proper. The following relevant observations were brought to our notice:-
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> > "9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which .ire (sic) making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various

> benches of the Tribunal, when companies which arc loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs.1.00 crore to 200 crores have to be taken as a particular range and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study."

> 42. The Assessee's turnover was around Rs.110 Crores. Therefore the action of the CIT(A) in directing TPO to exclude companies having turnover of more than Rs.200 crores as not comparable with the Assessee was justified. As rightly pointed out by the learned counsel for the Assessee, there are two views expressed by two Hon'ble High Courts of Bombay and Delhi and both are non-jurisdictional High Courts. The view expressed by the Bombay High Court is in favour of the Assessee and therefore following the said view, the action of the CIT(A) excluding companies with turnover of above Rs.200 crores from the list of comparable companies is held to correct and such action does not call for any interference."

14. The Tribunal in the case of Autodesk India Pvt.Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Banglore-Tribunal), took note of all the conflicting decision on the issue and rendered its decision and in paragraph 17.7. of the decision held as that high turnover is a ground for excluding companies as not comparable with a company that has low turnover. The following were the relevant observations:

17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of *obiter dictum*. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of *CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015* judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as

> per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).

15. In view of the aforesaid decision, we hold that companies listed in paragraph 8 of this order, whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies."

16. The next ground to be adjudicated is ground No.6. This ground relates to exclusion of Akshay Software Technologies Ltd. The assessee brought to our notice decision of the Tribunal rendered in the case of Aptean India Pvt. Ltd., Vs. DCIT ITA 2679/Bang/2017 order dated 06.11.2020. In the aforesaid decision which relates to Assessment Year 2013-14 in the case of a software development service provider such as the assessee this Tribunal considered the comparability of Akshay Software Technologies

Ltd. This company was excluded from the list of comparable companies by the DRP. The assessee sought its inclusion before the Tribunal. On the plea for inclusion of this company, the Tribunal remanded the issue to the TPO for fresh consideration with the following observations:

> *"35. It has been submitted that Ld.TPO rejected this comparable on the ground it is functionally different from the activities of the assessee. Ld.TPO from response octane and on issuance of notice under section 133(6) of observed that this company is engaged in providing professional services, procurement, installation, implementation and support & maintenance of ERP products and services. Ld.TPO thus was of the opinion that this comparable is functionally not similar with assessee. Ld.AR submitted that coordinate bench of this Tribunal in case of Autodesk India Pvt. Ltd. vs DCIT reported in (2020) 119 taxmann.com 265 has considered a similar objection by Ld.TPO for assessment year 2013-14. It is also submitted that the functions performed by present assessee and Autodesk India Pvt.Ltd.,(supra) are that of captive software development service provider.*
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> *36. On the contrary, Ld.CIT.DR placed reliance on observations of Ld.TPO/DRP. He submitted that DRP has observed that this company is into product development though the entire revenue of Rs. 19.94 crores has been disclosed under the heading income from software services. It has been submitted that there is no segmental information available in respect of revenue earned from services and product and it is not possible to functionally compare this company under such circumstances.*
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> *37. We have perused submissions advanced by both sides in light of records placed before us.*
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> *38. We note that in case of Autodesk India private limited (supra) this tribunal has remanded the comparable back to learnt TPO/AO by observing as under:*
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> > *"17. We heard the parties on this issue and perused the record. We notice that the TPO has obtained information u/s 133(6) of the Act from M/s Akshay Software Technologies Ltd, as per which*

it is engaged in providing professional services, procurement, installation, implementation and support & maintenance of ERP products and services. In the case of Mercedes-Benz Research & Development India (P.) Ltd. (supra), we notice that the co-ordinate bench has considered the nomenclature of "income from software services" given under the head "Revenue from Operations" , which mentioned that the Income from software services was Rs. 19.83 crores. Now the dispute boils down to the nature of functions performed by this company. It is the responsibility of the assessee to show that both the assessee and the comparable company perform similar functions. Before us, the Ld A.R placed her reliance on the decision rendered by co-ordinate bench in order to contend that this company is comparable. However, TPO has issued notice u/s 133(6) of the Act to the above said company and collected the details of functions performed by it, wherein the nature of activities performed by this company is stated as "providing professional services, procurement, installation, implementation and support & maintenance of ERP products and services". It is pertinent to note that the above said information was given by M/s Akshay Software Technologies Ltd. However, we find that they are general description of the functions performed. Specific functional details have not been furnished. What is required to be found out is whether functions fall under the category of "Software development services", as in the case of the assessee company. Accordingly, we are of the view that this company may also be restored to the file of AO/TPO, so that the assessee would get an opportunity to show that the functions performed by this company and the assessee are similar. Accordingly, we restore this company also to the file of the AO/TPO."

39. As there are no functional differences brought out by revenue between assessee and Autodesk India Pvt Ltd., and that, both these companies have been categorised to be a captive service provider to its respective AEs, we do not find any reason to deviate from the above mentioned view taken by coordinate bench of this Tribunal.

40. Accordingly, respectfully following the same, we remand this comparable to Ld.AO/TPO to analyse the functions performed by this company with that of assessee. In the event it is found to be carrying

out SWD services as that of assessee and segmental details may be considered for computing margin of the international transaction."

17. Respectfully following the aforesaid decision rendered on identical facts and circumstances, we remand the question of determination of comparability of this company to the TPO / AO for fresh consideration after affording opportunity of being heard to the assessee.

18. The next issue raised in ground No.5 is with regard to exclusion of company CG Vak Software Exports Ltd. As far as exclusion of this company is concerned, assessee seeks exclusion of this company for being functionally not similar with that of assessee.

19. Ld.AR submits that assessee seeks exclusion of this comparable for being functionally different with that of assessee. Ld.AR submitted that there are no segmental information available in respect of this company. In support of his argument he placed reliance upon decision of coordinate bench of this tribunal in case of Tavant Technologies India Pvt.Ltd vs DCIT reported in (2020) 120 taxmann.com 122.

20. On the contrary Ld.Sr.DR placed reliance on orders passed by authorities below.

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

22. We note that there is nothing on record placed by revenue to show that Tavent technologies India Pvt Ltd (supra) is not a captive service

provider. Assessee before us is also a captive service provider providing services only to its associated enterprise. We note that under similar circumstances Tribunal in case of Tavent technologies India Pvt Ltd (supra) observed as under:

> *9. Ground No. 5.3 relates to the assessee's plea for exclusion of CG Vak Software Exports Ltd. as a comparable by the TPO which action was confirmed by the DRP. The grounds on which the assessee sought exclusion of this company as a comparable by the TPO was that it was functionally different in the sense that it was engaged in software product development and absence of segmental data. The TPO & DRP took the view that product development was part of software development services.*
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> *10. The ld. counsel for the assessee brought to our notice a decision of ITAT Bangalore in the case of NXP India (P.) Ltd. v. Dy. CIT [2020] 116 taxmann.com 421 (Bang - Trib.) wherein in the case of an assessee for AY 2013-14 engaged in Software development services such as the assessee it was held that CG Vak Software Exports Ltd. was not a good comparable. The following were the relevant observations of the Tribunal:-*
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> > *'III. C G Vax Software & Exports Limited*
> > *24. The learned AR submitted that this company should be excluded for the reason that C G VAX Software & Exports Limited is engaged in software development and sale of products which involves high degree of R & D expenditure and to demonstrate the same, he drew our attention to the paper book page Nos.1018 and 1034 and submitted that the nature of the business of software development involves inbuilt, constant Research and Development as a part of its process of manufacturing (development). The company is developing applications engines, re-usable codes and libraries as a part of its R & D activities. Further, it has intangible assets as shown in the financial statement as on 31-3-2013 at Rs. 3,03,83,536 and it is also engaged in outsource product development, as is evident from the attached notes forming part of the accounts.*
> > *The learned AR also submitted that C G VAK Software & Exports Limited was not considered as a comparable in the case of M/s.*

EPAM Systems India Private Limited (ITA No. 2122/Hyd/2017 for assessment year 20132014). Vide order dated 20-11-2018, the Tribunal held as under:--

> *"16. Having regard to the rival contentions and the material on record, we find that the assessee has raised its objections before the TPO but he held that it is functionally similar. We have gone through the annual reports of CGVAK Software & Exports Ltd and find that the said company is having revenue from both software services and BPO services but there is no segmental data with regard to each of these transactions. Therefore, as held by the Coordinate Bench of the Tribunal in a number of cases (cited supra), we hold that this company cannot be taken as a comparable to the assessee-company. Accordingly, we direct the TPO to exclude this company from the final list of comparables. "*

24.1 Similarly, in the case of M/s. ION Trading India Private Limited v. ITO (ITA No. 1035/Del/2015 for the assessment year 2010-2011). The Tribunal vide its order dated 7-12-2015, held as under:--

> *"21. We have considered the submission of the Id. counsel for the assessee and have considered the argument of the ld. DR that the assessee is not producing any product, however, we find that CG-Vak Software and Exports Limited is not only into computer software but it is a product manufacturer too. Since assessee is not into product manufacturing and the segmental details cannot be bifurcated from the financial details, we find that the assessee and the CG-Vak Software and Exports Limited are not comparables. Therefore, we are inclined to uphold the orders of the authorities below in rejecting this company as a comparable. We direct accordingly. " 24.2 In our opinion, there is force in the argument of the learned AR. M/s. CG VAK Software & Exports Limited is not only engaged in the business of computer software development, but also engaged in product manufacturing process, whereas the present assessee is not in product manufacture activity. M/s. CG VAK Software & Exports Ltd. owns huge intangible assets and also engaged in outsourced product development. In view of the foregoing reasons, we hold that the said company cannot be considered*

for inclusion in the list of comparables. We, therefore, direct the TPO to exclude the said company from the list of comparables.'

11. Following the aforesaid decision, we direct the exclusion of CG Vak Software Exports Ltd. from the list of comparable companies."

23. Respectfully following the same, we direct exclusion of CG Vak software exports Ltd from the final list of comparable companies.

24. The next ground to be adjudicated is ground No.4(a) and this ground is with regard to inclusion of ICRA Techno Analytics Ltd., as a comparable company. As far as comparability of this company is concerned, this Tribunal in assessee's own case in Assessment Year 2010-11 in the decision reported in (2016) 72 taxmann.com 187 (Bang.-Trib.) remanded the question of comparability of this company to the TPO for fresh consideration with the following observations:

"5. Before us, the learned Authorised Representative of the assessee has submitted that out of these 2 companies retained by the DRP, the assessee is seeking exclusion of ICRA Techno Analytics Limited. The learned Authorised Representative has submitted that the comparability of this company with that of software development services provider has been examined by this Tribunal in the case of Dy. CIT v Ikanos Communication India (P.) Ltd. [2015] 64 taxmann.com 436 (Bang. - Trib.). The learned Authorised Representative has submitted that the Tribunal after considering the Annual Report, accounting policy and notes from accounts reported in the Annual Report of this company has held that this company is dealing with in the software development, consultancy, engineering services, web development & hoisting and subsequently diversified itself into the domain of business analytics and business process outsourcing. Thus this company had more than one segment and there is no segmental result separately available in the public domain and also not obtained by the TPO. Therefore this company was directed to be excluded from list of comparables. The learned Authorised

Representative has pleaded that this company may be excluded from the list of comparables.

6. On the other hand; the learned Departmental Representative has submitted that ICRA Techno Analytics Ltd. is assessee's own comparable and part of T.P. Study. The assessee did not raise any objections either before the TPO or before the DRP. Thus the assessee cannot be allowed to raise objection against this company which was selected by the assessee itself without filing the additional ground. The learned Departmental Representative has vehemently objected to the exclusion of this company when this company was common to the list of assessee as well as TPO.

6. *We have heard the rival submissions as well as considered the relevant material on record. There is no dispute that ICRA Techno Analytics Ltd. is common as selected by the assessee as well as by the TPO. It is also not disputed that the assessee did not raise any objection against this company either before the TPO or before the DRP. The assessee has raised this plea before us, on the basis of the finding of this Tribunal in the case of Ikanos Communication India (P.) Ltd. (supra) wherein the Tribunal has considered the functional comparability of this company with that of software development services provider in para 10 as under:—*

> *"10. We have perused the orders and heard the rival contentions. Notes to accounts of ICRA Techno Analytics Ltd forming a part of its audited financial statement of accounts and annual report for year ended 31.03.2010 mentions as under:*
>
> *Significant accounting policies and Notes to Accounts (Page 169 of the Annual Report)*
>
> *Background: The company was incorporated on July 27, 1992 as Computer Exchange Private Limited and subsequently become wholly subsidiary of ICRA limited on August 25, 2005 and was renamed as ICRA Techno Analytics Ltd. The company is engaged in the software development & consultancy, engineering services, web development & hoisting and subsequently diversified itself into the domain of business analytics and business process outsourcing.*
>
> *In the note detailing of the revenue recognition which also form a part of its annual report it has been stated that its revenue stream consisted of software development consultancy, engineering services, web development and hosting. Thus ICRA Techno Analytics had more than one segment. There is no case for the Revenue that the segmental results were separately available in*

public domain or was not obtained by the TPO from the said company, invoking the powers vested on him. In such a situation the DRP, in our opinion, was justified in directing exclusion of ICRA Techno Analytics Ltd from the list of comparables."

Thus it is clear that the co-ordinate bench of this Tribunal vide order dt. 10.11.2015 (supra), one of us Judicial Member is party has held that this company is earning its revenue from diversified activities of software development consultancy, engineering services, development and housing and in the absence of segmental results of software development services activity, it cannot be considered as a good comparable. Though the assessee has not raised the objection against this company before the authorities below however, we are of the view that merely because the assessee has wrongly added in the list of comparables will not bar the assessee to take objection against the functional dis-similarity of a company as held by the Special Bench of this Tribunal in the case of Dy. CIT v. Quark System (P.) Ltd. [2010] 38 SOT 207 (Chd.). Accordingly, we are of the view that the functional comparability of this company is required to be examined. The assessee did not file additional ground to raise this objection therefore in the facts and circumstances of the case and in the interest of justice, we remit this issue of comparability of ICRA Techno Analytics limited to the record pf the A.O/TPO for adjudicating the same after giving an opportunity of hearing to the assessee."

25. Respectfully following the aforesaid decision, we remand the issue to the TPO / AO for consideration afresh as directed by the Tribunal in the aforesaid decision, after affording the assessee opportunity of being heard.

26. The next ground that needs to be adjudicated in ground No.8 in which the Assessee has projected its grievance against the action of the TPO in making negative working capital adjustment. As far as the aforesaid issue is concerned, the TPO in his order in paragraph 12.1 has observed that working capital adjustment is computed as per the formula given in Annexure to the OECD Guidelines, 2009, adopting Average Prime Lending Rate (PLR) of State Bank of India (SBI) and the detailed working is given in Annexure B to the order. No reasons have been given by the TPO as to why he is

adopting negative working capital adjustment. The Assessee did not raise any grounds regarding making negative working capital adjustment before the DRP. We are therefore of the view that issue requires re examination by the TPO/AO. Working capital adjustment is made for the time value of money lost when credit time is given to the customers. It is the plea of the Assessee that it does not bear any risk and has no working capital contingencies and that it has not incurred any expenses for meeting the working capital requirement. It is claimed that the Assessee is running the business without any working capital risk as compared to the comparables. The Assessee does not bear any market risk as the services are provided only to the AE. Therefore, requirement for adjustment of negative working capital does not arise. The Ld.AR placed reliance on decision of coordinate bench of this *Tribunal* reported in *(2020) 120 com 122 and Lam Research India (P.) Ltd. v. Dy. CIT in [IT Appeal Nos. 1473 & 1385 (Beng.) of 2014, dated 30-4-2015], Tivo Tech (P.) Ltd. v. Dy. CIT [2020] 117 taxmann.com 259, and Dy. CIT v. Software AG Bangalore Technologies (P.) Ltd. [IT Appeal No. 1628 of 2014, dated 31-3-2016],* where it has been held that negative working capital adjustment shall not be made.

27. We have considered the rival submissions. We find that in the case of *Lam Research India (P.) Ltd*. (*supra*) and *Software AG Bangalore Technologies (P.) Ltd*. (*supra*) passed by this *Tribunal*, it has been held that negative working capital adjustment shall not be made in case of a captive service provider as there is no risk and it is compensated on a total cost plus basis. Since the issue has not been dealt with by the TPO in proper perspective and since the issue has not been raised before the DRP, we deem

it fit and proper to remand this issue to the TPO/AO for fresh consideration in the light of the law on the issue as laid down in judicial decision.

28. We direct Ld.TPO/AO to compute the ALP in accordance with the directions contained in this order after affording assessee opportunity of being heard.

29. The next ground that requires adjudication is the additional ground of appeal with regard to levy of education cess. The additional ground of appeal being a legal ground which can be adjudicated on the basis of facts already available on record and which has a bearing on the tax liability of the Assessee is admitted for adjudication keeping in mind the ration of Hon'ble Supreme Court in the case of NTPC Ltd. 229 ITR 383 (SC). As far as this issue is concerned, this is again settled by the ITAT, Bengaluru Bench, in the case of Apten India Pvt. Ltd., ITA 2679/Bang/2017 dated 06.11.2020 wherein it was held that education cess and secondary and higher education cess is deductible as business expenditure under section 37 (1) of the Act for determining the assessed income. The view so taken was on the basis of the decisions in the case of Sesa Goa Ltd. vs. Joint Commissioner of Income-tax. 1(2020) 117 taxmann.com 96 (Bombay High Court)] • Reckitt Benckiser (I) Pvt. Ltd. vs. Deputy Commissioner of Income-tax [(2020) 117 taxmann.com 519 (Kolkata Tribunal)] • ITC Limited vs. Assistant Commissioner of Income-tax [I.T.A No. 1267 /Kol/2014(Kolkata Tirbunal)] • The Peerless General Finance & Investment Co. Ltd. vs. Deputy Commissioner of Income-tax [ITA No. 1439/Kol/2018 (Kolkata Tribunal)] • Tata Steel Limited vs. Assistant Commissioner of

Income-tax [ITA No. 5573/Mum/2012 (Mumbai Tribunal) wherein it was held that education cess and secondary and higher education cess is not in the nature of tax which is not deductible expenditure. Following the decisions referred to above, we allow the additional ground of appeal.

30. In the result, appeal by the assessee is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(CHANDRA POOJARI)	**(N. V. VASUDEVAN)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Bangalore,
Dated : 09.11.2021.
/NS/*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.