

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 387/Kol/2015

Assessment Year : 2010-11

M/s Data Core (India) Pvt. Ltd. -vs- I.T.O., Ward-2(2), Kolkata
[PAN: AABCD 1188 Q] (Appellant) (Respondent)

I.T.A No. 40/Kol/2016

Assessment Year : 2011-12

I.T.O., Ward-2(2), Kolkata -vs- M/s Data Core (India) Pvt. Ltd.
(Appellant) [PAN: AABCD 1188 Q] (Respondent)

C.O. No. 10/Kol/2016

(Arising out of I.T.A No. 387/Kol/2015)

Assessment Year : 2011-12

M/s Data Core (India) Pvt. Ltd. -vs- I.T.O., Ward-2(2), Kolkata
[PAN: AABCD 1188 Q] (Cross Objector) (Respondent)

For the Department : Shri G. Mallikarjune, CIT DR

For the Assessee : Shri Kamal Sawhney, AR

Date of Hearing : 0.11.2017

Date of Pronouncement : 06 .12.2017

ORDER

Per M.Balaganesh, AM

1. This appeal is directed against the final order passed by the Learned Income Tax Officer, Ward -2(2), Kolkata [in short the Id AO] under section 143(3) /144C of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') dated 20.2.2015, pursuant to the directions of the

Learned Dispute Resolution Panel [in short the Id DRP] under section 144C(5) of the Act dated 31.12.2014 for the Asst Year 2010-11.

2. The assessee had raised the following grounds of appeal before us :-

1. *That on the facts and circumstances of the case, the order of the Transfer Pricing Officer-III (hereinafter referred to as "Ld. TPO") passed u/s 92CA(3) of the Income Tax Act, 1961 (hereinafter referred to as the "Act"), subsequently confirmed in part by the Dispute Resolution Panel (hereinafter referred to as "Ld. Panel") and consequently incorporated by the I.T.O, Ward-2(2), (hereinafter referred to as "Ld. AO") in the assessment order u/s 143(3) r/w.s. 144C(5) of the Act, is erroneous on facts and bad in law.*

2. *That on the facts and circumstances of the case the Ld. Panel and consequently the Ld. AO have erred in rejecting the economic analysis undertaken by the assessee, with respect to international transaction pertaining to rendering of services, in accordance with provisions of the Act read with the Income Tax Rules, 1962 ('the Rules') for the determination of arm's length price (ALP), thereby confirming the adjustment of Rs. 17,388,973/-.*

3. *That on the facts and circumstances of the case the Ld. Panel and consequently the Ld. AO have erred in appreciating the following facts:*

(a) *That the assessee has entered into a composite contract vis a single 'Service Agreement' with its AE for rendering bundled set of information technology based services (including but not limited to software development (SD) services, business process outsourcing (BPO) services etc.);*

(b) *That the compensation received for SD services (of 72% margin) and BPO services (of 8% margin) are part of single composite contract entered into by assessee with its AE and not for a piece-meal-service basis;*

(c) *That the certified copy of segmental financials results as submitted by the assessee should be considered for determining the level of operating profits earned by the assessee from rendering of services to AE under the composite contract.*

4. *Without prejudice to Ground 2 & 3 and on the facts and circumstances of the case the Ld. Panel have erred in application of quantitative filter in an inconsistent manner as under:*

- (a) *Accepting ICRA Online Limited (segment) as a comparable company in spite of having Export Sales to Total Sales ratio of 60.68% vis-à-vis 75% as applied by the Ld. TPO.*
- (b) *Accepting Jeevan Softech Limited (segment) as a comparable company in spite of having relevant segment turnover of INR 1.41 crores vis-à-vis the turnover range of 5 crores to 200 crores as applied by the Ld. TPO.*
- (c) *Rejecting Akshay Software Technologies Ltd. as a comparable company in spite of having Related Party Transaction of 4.10% of sales vis-à-vis 25% as applied by the Ld. TPO.*
- (d) *Rejecting Goldstone Technologies Ltd. as a comparable company in spite of having income for IT division of 92.92% of total income vis-à-vis 75% as applied by the Ld. TPO.*

5. *Without prejudice to ground 2 & 3 and on the facts and circumstances of the case the Ld. Panel have erred in rejecting a comparable company being Indus face Consulting (P) Ltd. engaged in rendering of SD services, thereby not recognizing the fact that assessee is itself engaged in rendering of SD services along with BPO services.*

6. *Without prejudice to ground 2 & 3 and on the facts and circumstances of the case the Ld. Panel have erred in accepting companies which are functionally not comparable to the assessee. The companies are:*

- a) *Accentia Techonologies Ltd.- The company is engaged in development of software produces on its own account*
- (b) *Acropetal Technologies ltd.- (Segment)- The segment of the company is engaged in rendering of engineering design services.*
- (c) *TCSE-Serve International Limited – The company is engaged in rendering of services to its sole customer, Citigroup entities globally, thus a controlled transaction.*
- (d) *Jindal Intellicon Limited-The company is engaged in rendering of voice based call centre services.*

7. *Without prejudice to ground 2 & 3 and on the facts and circumstances of the case the Ld. Panel have erred and contradicted in rejecting a comparable company, E2E Infotech India Pvt. Ltd. on account of diminishing return whereas selecting cosmic Global Ltd. having diminishing return over the same period. Further, diminishing return is not on the basis of a business trend.*

8. *Without prejudice to ground 2 & 3 and on the facts and circumstances of the case the Ld. Panel have erred in calculating the profit level indicator of a comparable company Acropetal Technologies Ltd. (Engineering Design Segment) selected by the Ld. TPO.*

9. Without prejudice to ground 2 & 3 and on the facts and circumstances of the case the Ld. TPO and accordingly the Ld. AO have erred in including companies being Accentia Technologies Ltd. and TCS e-Serve International Ltd. reflecting fluctuating margins due to abnormal business trend.

10. Without prejudice to ground 2 & 3 and on the facts and circumstances of the case the assessee humbly submits that if the earlier grounds are considered either severally or individually the international transactions of the assessee are determined to be at arm's length.

11. That the appellant craves leave to add to and/or amend, alter, modify or rescind the grounds hereinabove before or at the time of hearing of the appeal.

3. The brief facts of this case is that Data Core (India) Private Limited (assessee herein) is a subsidiary of Development Consultants Private Limited. The assessee is engaged in providing routine software development (SD) and back office processing services (BPO), pursuant to a single composite contract, to Data Core Systems Inc. USA for enabling it to service the same to end customers. In addition, the assessee also provides similar services to third parties in its independent capacity. The assessee had entered into following international transactions with its Associated Enterprises (AE) –Data Core Systemes Inc. USA:-

Rendering of Services (SD and BPO services) - Rs 15,85,26,409/-

Recovery of Expenses - Rs 5,20,478/- (Not in dispute)

The assessee submitted the transfer pricing study report before the Id TPO wherein it had described its international transactions with its AEs, undertaken functional, asset and risk analysis with respect to each international transaction and absed on the same had undertaken transactional level economic analysis to determine the Arm's length price for the same. For the transaction pertaining to rendering of services , the assessee has entered into a single 'composite agreement / contract' with its AE to provide information technology based sevices (i.e software development & support services (SD in short) and Back Office Process

Outsourcing (BPO in short) services) on a 'bundled price basis'. Accordingly, the assessee had benchmarked the transaction pertaining to 'rendering of services' using Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) wherein the margin earned by the assessee from 'rendering of services' to AEs was determined to be at 27.50% vis a vis 11.44% earned by the comparable companies. Based on the said analysis, the transaction was determined to be at Arm's Length.

3.1. The Id TPO acknowledged that the TNMM should be considered as MAM to determine the ALP. The Profit Level Indicator (PLI) adopted by the assessee is Operating Profit / Operating Cost [OP / OC]. The assessee submitted the certified copy of segmental details before the Id TPO as under:-

<u>Desc</u>	<u>Ref</u>	<u>Provision of Services to related Parties</u>	<u>Provision of Services to unrelated parties</u>	<u>Total</u>
Operating Revenue (OR)	A	158526409	25645456	184171865
<u>Expenditure</u>				
Salary & Benefits		88356330	17557967	105914297
Purchases		0	2392221	2392221
Rates & Taxes		905	8670	9575
Travelling & Conveyance		4667627	1119705	5787332
Other Expenses		25295834	4611005	29906839
Depreciation		5576986	1423807	7000793
Bank Charges		433172	105982	539154
Exchange Fluctuation		0	1908393	1908393
Operating Expenditure (OE)	B	124330854	29127750	153458604
Operating Profit(+)/ Loss(-) [OP]	C= A-B	34195555	-3482294	30713261
OP / OE (%)	D=C/B*100	27.50%		

This PLI of 27.5% was compared with the comparables PLI which was 11.44% and accordingly the assessee justified the ALP of the international transactions carried out by it with its AEs. The assessee stated it had rendered both IT (SD services) and ITES (BPO

services) to both its AEs as well as to its Non-AEs and the revenues disclosed in the aforesaid segmental details were in respect of both IT and ITES.

3.2. The Id TPO undertook some comparables keeping in mind that the assessee undertakes to provide only ITES and not SD services. The Id TPO applied the following filters or criteria in searching for the comparables :-

- a) Companies whose data is not available for the FY 2009-10 were excluded and the data for the FY 2009-10 has been considered for the period from 1.4.2009 to 31.3.2010.
- b) Companies whose IT enabled service revenue is less than 75% of the total operating revenues were excluded.
- c) Companies who have more than 25% related party transactions (sales as well as expenditure combined) of the operating revenues were excluded.
- d) Companies who have less than 75% of the revenues as export sales were excluded.
- e) Companies who have diminishing revenues / persistent losses for the period under consideration were excluded.
- f) Companies having different financial year ending (i.e not March 31, 2010) or date of the company does not fall within 12 months period i.e 1.4.2009 to 31.3.2010, were rejected.
- g) Companies that are functionally different from that of tax payer or working in peculiar economic circumstances, after giving valid reasons, were excluded.
- h) Companies having turnover less than Rs 5 cr and more than Rs 200 cr were rejected.

3.3. The Id TPO observed that the assessee had worked out the PLI by choosing the Operating Profit to Total Cost as PLI. Operating Profit is defined as profit before financial and non-operating expenses. The Id TPO considered the operating profit to operating expenses / cost as the appropriate PLI. The profit before interest and tax is considered for computing the operating margins. However, the incomes and expenses related to the operations of the relevant financial year alone is considered for the computation of operating margins of the

comparables. For example, the following incomes, which are non-operating in nature and nothing to do with the operations of the company are excluded from the operating revenues :-

- (i) Interest
- (ii) Dividends
- (iii) Provisions no longer required written back
- (iv) Gain on sale of assets / investments
- (v) Income from investments
- (vi) Gain on revaluation of assets
- (vii) Other incomes not pertaining to the operations

Similarly, the following expenses which are non-operating and provisions are excluded from operating expenses :-

- (i) Provisions other than provisions for bad debts
- (ii) Loss on sale of assets / investments
- (iii) Loss on revaluation of assets
- (iv) Foreign Exchange Fluctuation Loss / Gain
- (v) Other expenses not pertaining to the operations

Similarly, extraordinary expenses or income which do not recur every year like donations, preliminary expenses written off are not considered as operating expenses as the comparison of the profits should be of same level for the comparable with that of the taxpayer. No details were filed to prove that the foreign exchange fluctuation arises from operations of the assessee company and accordingly the same is treated as non-operating item for calculation of PLI.

As per the above basis, the Id TPO worked out the PLI of the assessee as under:-

Revenue from services	17,93,92,521/-
Add: Sales	34,30,440/-
Operating Revenue	18,28,22,961/-
Expenses debited to P&L A/c	15,34,58,604/-
Less: Exchange Fluctuation	19,08,393/-
Operating Expenses	15,15,50,211/-

Operating Profit	3,12,72,750/-
OP / OE or TC (PLI)	20.63%
OP / OR	17.10%

3.4. The Id TPO observed from the audited accounts of the assessee company that it has three segments viz BPO, Software Development and Support Sales. The segment result relating to BPO and SD segment are as under:-

<u>Description</u>	<u>BPO</u>	<u>SD</u>
Segment Revenue	10,10,04,780/-	7,83,87,741/-
Segment Result	57,74,968/-	2,65,03,431/-
OP / OC	5.71%	33.81%

Based on the aforesaid workings, the Id TPO found that the profitability from the software segment is at ALP. However, he observed that the profitability of BPO segment is quite low and the comparables for the same needs to be determined.

3.5. Comparables considered by the taxpayer

- (i) AOK In-House BPO Services Ltd
- (ii) Aditya Birla Minacs Worldwide Limited
- (iii) Akshay Software Technologies Ltd
- (iv) Compulink Systems Limited
- (v) Goldstone Technologies Ltd
- (vi) LGS Global Limited
- (vii) Synetairos Technologies Ltd
- (viii) Thinksoft Global Services Ltd
- (ix) Zensar Obt Technologies Ltd
- (x) Omega Healthcare Management Services (P) Ltd
- (xi) In House Productions Ltd (Healthcare Division)
- (xii) Timex Group India Ltd (Timex Global Services)

3.6. The Id TPO rejected the TP documentation done by the assessee by pointing out the following defects found in TP analysis carried on by the assessee:-

- (a) As per Rule 10B(4), it is mandatory to use the current financial year date i.e the financial year in which the international transactions took place (FY 2009-10). But the taxpayer did not consider current year data in many of the comparable companies (7 out of 10 finally selected companies).
- (b) The taxpayer used earlier two years data without justifying how such earlier year data had an influence on pricing for the taxpayer or the comparable companies.
- (c) As discussed above, some of the taxpayer's comparables do not stand scrutiny of FAR analysis.
- (d) The taxpayer selected companies whose turnover is very low or very high as compared to its turnover.
- (e) Many of the otherwise comparable companies were rejected by the taxpayer in its accept reject matrix on various grounds as discussed.

In view of the above defects and others, the information as well as the data used in computation of the ALP is not reliable and correct. The provisions of section 92C(3)(c) are invoked and the TP document is proposed to be rejected. The Id TPO proceeded to determine the ALP by searching on the Prowess Database by mentioning the keyword 'ITES' i.e searching for the comparables only in ITES segment and **finally arrived at the following comparables in ITES segment :-**

- (a) Accentia Technologies Ltd
- (b) Acropetal Technologies Ltd (Seg.)
- (c) Caliber point Business Solutions Ltd
- (d) Cosmic Global Ltd
- (e) Crossdomain Solutions Pvt Ltd
- (f) e4e Healthcare Business Services Pvt Ltd
- (g) Fortune Infotech Ltd
- (h) ICRA Online Ltd (Seg.)
- (i) JeevanSoftech Limited
- (j) Jindal Intellicom Ltd
- (k) T C S E-Serve International Ltd

3.7. Hence the Id TPO determined the ALP of the international transactions entered into by the assessee as under:-

- (a) METHODOLOGY – TNMM as selected by the assessee
- (b) PLI – OP / OC as worked out above
- (c) COMPARABLES – As discussed above
- (d) DATA USED – Data pertaining to FY 2009-10 as mandated under Rule 10B(4)

The Id TPO arrived at the arithmetic mean of the comparables margin at 30.18% . The assessee was showcaused to the aforesaid effect as to why the same should not be adopted for determining the ALP.

3.8. The assessee submitted that the arrangement of services to be rendered by the assessee to its AE is so inter-related that the separate analysis of margin earned by each different category of service (i.e IT and ITES) could not be ascertained as the consideration has been received pursuant to a single composite contract. The assessee submitted that the segmental data of related and unrelated parties should be considered for determining the ALP. The assessee also submitted the certified copy of the said segmented workings before the Id TPO.

3.9. The Id TPO rejected the contention of the assessee that the segmental of related and unrelated party should be used to determine the ALP due to the following reasons :-

- (a) Segmental produced is not part of the audited financial statements adopted by the members.
- (b) Simply producing the certificate for making segmental from auditor without any backing of workings notes of auditor cannot be relied upon.
- (c) Under which provision of which Act the auditor has given a certificate of segment reporting is not clear. The different provisions of different Act has cast a responsibility on chartered accountant. Thus under the Companies (Auditor's Report Order, 2003, as audited by the Companies Auditor's Report Amendment Order, 2004 (together the Order) issued by the Government of India in terms of section 227(4A) of the Companies Act, 1956 , the auditor has audited the financial accounts of company and given his report together with schedules. The auditor has reported only the business segment and has clearly demarcated three segments viz. BPO. Software development & Support activity and sales of computer, accessories, components and spare parts etc. Now the same has been produced by the A/R of the assessee without the authentication of the directors or being adopted in the meeting. Hence, the veracity of the same cannot be relied upon.
- (d) The assessee has not produced the details of project value, total man hour worked by the employee in each project and the total resource utilized, the stages of project development and the employee utilized.
- (e) The assessee has not produced the basis of the allocation of the cost. Moreover, when we calculate the percentage of different cost allocated it is found cost allocated to unrelated party is abnormally high. Some of cost allocation are given as under:-

<u>Particulars</u>	<u>Related</u>	<u>Percentage</u>	<u>Unrelated</u>	<u>Percentage</u>	<u>Total</u>
Total Expenditure	158526409	86.07%	25645456	13.92%	184171865
Salary & Benefits	88356330	55.73%	17557967	68.46%	105914297
Other Expenses	25295834	15.95%	4611005	17.97%	29906839
Depreciation	5576986	3.51%	1423807	5.55%	7000793
Exchange Fluctuation	0	0	1908393	100%	1908393

(f) The purchase of material and foreign exchange loss has entirely been allocated to unrelated party. Hence in view of the above, the segmental provided of related and unrelated party is rejected and the segmental of audited accounts is relied upon for calculation of PLI.

3.10. The Id TPO observed that the contention of the assessee that the services rendered by the assessee to its AE is so interrelated that the separate analysis of margin earned by each different category of service could not be ascertained, is not borne by facts.

3.11. The Id TPO observed that only the current year data i.e FY 2009-10 should be considered for the final comparables chosen for arriving at the arithmetic mean of the margins derived by the comparables.

3.12. The assessee filed its objections to each and every point raised by the Id TPO in his show cause notice by way of detailed para wise submissions with supporting case laws on each of the issues raised thereon and explaining the circumstances in which the assessee had resorted to usage of such date for the comparables margin.

4. The Id TPO finally arrived at the ALP as under:-

A. Final comparables chosen by the Id TPO and its related PLI are as under:-

<u>Sl.No.</u>	<u>Name of the Company</u>	<u>OP / TC</u>
1	Accentia Technologies Ltd	36.78%
2	Acropetal Technologies Ltd (Seg.)	34.25%
3	Cosmic Global Ltd	16.64%
4	Crossdomain Solutions Pvt Ltd	18.05%
5	e4e Healthcare Business Services Pvt Ltd	30.97%
6	Fortune Infotech Ltd	22.77%
7	JeevanSoftech Limited (Seg)	40.62%
8	Jindal Intellicom Ltd	20.95%
9	ICRA Online Ltd (Seg.)	43.39%
10	T C S E-Serve International Ltd	53.80%
	AVERAGE	28.38%

B. The cost is allocated on the basis of turnover in each segment . The cost in the BPO segment is also allocated as under:-

BPO	55.24% of total revenue
SD	42.87% of total revenue
Sales	1.87% of total revenue

Calculation of Cost for BPO Segment

<u>Particulars</u>	<u>Amount</u>
Segment Revenue	101004780

Segment Result	5774968
Segment Cost	95229812
Less: Forex Loss allocated in the ratio of turnover	1054196
Less: Bank charges allocated	297828
Add: Unallocable expenses in the ratio of turnover	1361131
Operating cost of the segment	95238919
Operating Revenue of the segment	101004780
Operating Profit	5765861
OP / OC	5.70%

C. As the assessee has not provided the break up of the revenue for BPO services and Software services from its AEs, the revenue from BPO and Software is proportioned in the ratio of Total revenue from services. Thus out of total revenue of Rs 17,93,92,251/- from services, the revenue from its AE is Rs 15,90,46,887/- which is 88.65% of the revenue from ITES and Software services. Thus 88.65% of Rs 10,10,04,780/- from services is taken as the revenue from BPO services which was provided to the AE. Thus total revenue from BPO services to its AE is calculated at Rs 8,95,40,737/- ($10,10,04,780 * 88.65\%$).

D. Average PLI of Comparables as worked out in A above is 28.38%

Operating Cost	- Rs 9,52,38,919/-
ALP @ 128.38% of Operating Segment	- Rs 12,22,67,724/-
Price Charged by the assessee in the International transactions	- Rs 8,95,40,737/-
Upward adjustment u/s 92CA	- Rs 3,27,26,987/-

5. Though the Id TPO considered the assessee segment to be only ITES, the Id DRP agreed to the contentions of the assessee that the assessee had rendered both SD and ITES services to its AE. The assessee had also chosen mixed set of comparables from both SD and ITES segments. The Id TPO chose the comparables of his choice only from ITES segment. The Id DRP directed the Id TPO to consider the comparables from IT or SD segment also for arriving at the ALP margin. The Id DR argued that the order of the Id DRP is silent on the audited segmental data furnished by the assessee with regard to services rendered to AE and Non-AE for both SD and ITES. He also argued that the order of the Id DRP is also silent on the acceptance of the composite agreement entered into by the assessee with its AE for both IT and ITES segments.

6. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee. The point of dispute between assessee's analysis and analysis of Id TPO are as under:-

- b) Disregarding the 'composite contract' and 'bundled pricing basis' of the assessee with its AE for rendering of information technology based services i.e SD and BPO services.
- c) Rejecting certified profitability statement from rendering of services to AEs and considered segment financial as per AS -17 to determine the adjustment on BPO service segment (to both AEs and Non-AEs_ without considering 'intentional set off' internally.
- d) Rejecting the benchmarking study compiled in the TP study report and undertook a fresh benchmarking study for determination of ALP.

In the instant case, there is no dispute with regard to the TNMM being adopted as the MAM. There is no dispute with regard to OP / OC being adopted as the PLI. We agree with the action

of the Id TPO in adopting the contemporaneous data of FY 2009-10 and do not endorse the usage of multiple year data as was done by the assessee in the instant case. The crucial dispute which needs to be addressed in this case is with regard to the assessee rendering SD and BPO services to its AE pursuant to a single composite contract and consideration not being able to be bifurcated between SD and BPO services thereon. Consequentially the assessee was also not able to identify the margins derived from AE transactions in its SD and BPO segments independently. In this regard, it would be crucial to understand whether the assessee in the instant case had received the consideration based on the single composite contract. For this purpose, the relevant clauses in the agreement entered into with the AE are relevant and the same are reproduced below:-

Data Core Systems Inc. USA – Contractor

Data Core (India) Private Limited – Service Provider

ARTICLE 1 – SCOPE OF SERVICES

Section 1.1. Scope of Services : The Contractor hereby appoints and the Service Provider hereby accepts to carry out certain assignments as may be mutually agreed between the parties and detailed in the respective work orders format as specified in Appendix A attached hereto (collectively referred to as “Services” in this Agreement). In order to carry out the assignments, the Service Provider may appoint Sub-contractors from time to time subject to the approval of the Contractor.

APPENDIX A : SCOPE OF SERVICES

(Refer Sub-Section 1.1. of Article 1 of Services Agreement)

The services to be provided by the Service Provider / Sub-Contractor to the Contractor are as under:-

Routine Business Process Outsourcing (BPO) services and Knowledge Process Outsourcing (KPO) services as per the guidelines of the Contractor.

Software development support services and testing services, for clients operating in various sectors, including both on-site as well as offshore work.

Other related services, as determined by the contractor.

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WORK ORDER FORMAT

The Contractor and the Service Provider shall enter into work orders in relation to individual assignments outsourced to the Service Provider . A work order format shall include the following items :

 Work Order No.:

Work Order Date :

We are pleased to provide this word order for the following services :

Name of Customer :

Description of Services :

Duration of Work :

Volume :

Delivery Schedule :

Rate :

Others (if any) :

Authorised by :

Signature : -----

Date : -----

Section 1.3. – Deployment of Assets

Unless otherwise stated in this Agreement, the machinery, components, service software as well as hardware architecture used by Service Provider will be under mutually agreed terms with Contractor.

Section 1.4 – Manpower training

Contractor may, under mutually agreeable terms, arrange for training of personnel engaged by Service Provider for delivering services to the Contractor. The said training would be provided to the Service Provider without any consideration being payable by the Service Provider to the Contractor, other than reimbursement of actual third party costs incurred by the Contractor, if any. However, the Service Provider acknowledges that the manpower recruitment and development process would solely be its responsibility.

Section 1.6. – Product Liability

The Service Provider will be responsible for the quality and standard of the services provided by it. The Contractor will not be responsible for any or all claims, liabilities, lawsuits, losses, demands, costs and expenses arising solely from the gross negligence or intentional misconduct of the Service Provider and Service Provider's Sub-contractors. Further, the Service Provider would be liable against all or any actions, proceedings, claims, demands and

liabilities arising from the performance of Service Provider's duties under this Agreement, which may be brought or made against or incurred by the Service Provider or Service Provider's Sub-contractors.

ARTICLE 3 – INFORMATION DEVELOPED BY SERVICE PROVIDER

Section 3.1. – Developed Information

"Developed Information" in connection with a specified subject matter shall mean any and all technical information, computer or other apparatus programs, designs, specifications, drawings, records, documentation, works of authorship or other creative works, ideas, knowledge or data, written, oral or otherwise expressed, originated or developed by the Service Provider or by any of the Service Provider's Sub-contractors as a result of work performed under, or in anticipation of, this Agreement.

Section 3.3. – Ownership

The Service Provider agrees that all such Developed Information shall be and always be the property of the Contractor, shall be kept in confidence by the Service Provider and the Service Provider's Sub-contractors, shall be exclusively used only in the performance of Services under this Agreement, and may not be used for other purposes except upon such terms as may be agreed upon to writing by the Contractor.

Section 3.5. Functional Specifications

In performing its functions the Service Provider acknowledges the use of hardware and software architecture as agreed to by the Contractor.

ARTICLE 4 – CONSIDERATION

Section 4.1. – Consideration

In consideration of the Service Provider's performance of Services under this Agreement, the Contractor agrees to pay the Service Provider at the agreed rates as specified in the work order. The consideration shall aim to leave an arm's length return on total costs, over a financial period adequate to compensate for the functions performed, assets employed and risks assumed by the Service Provider and will be determined mutually by the Contractor and the Service Provider in accordance with internationally accepted arm's length standards.

Section 4.2. – Pricing Adjustment

The Contractor and the Service Provider shall annually or more frequently if warranted, review the Service Provider's consideration to ensure that all payments in toto are at the arm's length price. If it is determined that such payments are not at the arm's length price, a compensating payment may be made to the Service Provider. Any adjustment required pursuant to this Section shall be reflected in the Contractor's and the Service Provider's official books and records and the resulting underpayment shall create a receivable of the Service Provider from the Contractor.

Section 4.3. – Arm's Length Price

“Arm’s Length Price” means the consideration which is applied or proposed to be applied in remunerating for same or similar Services as contemplated in this Agreement under conditions that are made or imposed between the parties in their commercial or financial relations which do not differ from those which would be made between independent enterprises under similar circumstances.

Section 4.4. – Invoices

Invoices will be raised by the Service Provider on a periodic basis and the Contractor shall pay the Service Provider promptly. Any fluctuations on account of foreign exchange variation, in relation to the remuneration received by the Service Provider would be borne by the Service Provider.

6.1. At the outset, we find that the assessee indeed had rendered software development services (SD) and Business Process Outsourcing Services (BPO) to its AE among other support services. We also find that the AE had indeed remunerated the assessee for both SD and BPO services based on the composite agreement entered with AE by the assessee. It is well settled that the agreement between the parties should obviously become the starting point of understanding the international transaction carried out by the assessee with its AE and benchmarking done by the assessee thereon, as long as the said agreement is not considered as a sham to evade taxation. In the instant case, the Id TPO had not disputed the fact that the agreement entered into by the assessee with its AE is a genuine agreement. We find that the OECD transfer pricing guidelines for MNEs and tax administration updated via BEPS Action Plan 8-10, 2015 also provides that due recognition should be given to contractual terms of the agreement for undertaking transfer pricing analysis. The relevant OECD guidelines are reproduced below for the sake of convenience :-

D.1.1. The contractual terms of the transaction

“1.42 A transaction is the consequence or expression of the commercial or financial relations between the parties. The controlled transactions may have been formalized in written contracts which may reflect the intention of the parties at the time the contract was concluded in relation to aspects of the transaction covered by the contract, including in typical cases the division of responsibilities, obligations and rights, assumption of identified risks, and pricing arrangements. Where a transaction has been formalized by the associated enterprises through written contractual agreements, those agreements provide the starting point for delineating the

transaction between them and how the responsibilities risks, and anticipated outcomes arising from their interaction were intended to be divided at the time of entering into the contract.”

A.3.1. Evaluation of a taxpayer’s separate and combined transactions

“3.9 Ideally in order to arrive at the most precise approximation of arm’s length conditions, the arm’s length principle should be applied on a transaction by transaction basis. However, there are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separately basis. Examples may include 1. Some long-term contracts for the supply of commodities or services.....

3.10 Another example where a taxpayer’s transactions may be combined is related to portfolio approaches. A portfolio approach is a business strategy consisting of a taxpayer bundling certain transactions for the purpose of earning an appropriating return across the portfolio rather than necessarily on any single product within the portfolio. For instance, some products may be marketed by a taxpayer with a low profit or even at a loss, because they create a demand for other products and/or related services of the same taxpayer that are then sold or provided with high profits (e.g. equipment and captive after market consumables, such as vending coffee machines and coffee capsules, or printers and cartridges)...”

From the above, it could be seen that the OECD TP guidelines also provide for aggregate analysis of transactions encapsulated under a single portfolio. The OECD has also highlighted that under a portfolio approach, the taxpayer’s objective is to earn an appropriate return across the product / service offering in the portfolio rather on any single product / service offering of the portfolio.

6.2. Similarly guidance is also provided by United Nations in 2017 in UN TP Manual which provides as under:-

Identify the accurately delineated transaction

“B.2.3.1.4 The arm’s length price must be established in relation to transactions actually undertaken. Thus, the critical first step in any comparability analysis is to accurately define those transactions by analyzing their economically relevant characteristics, as reflected not only in the contracts between the parties, but also their conduct and any other facts. In this regard, the contractual terms will generally be the starting point for the analysis (as clarified or supplemented by the parties’ conduct); and to the extent that the conduct or other facts are inconsistent with the written

contract, the former should be taken as the best evidence of the transaction(s) actually undertaken.”

“Evaluation of separate and combined transactions

B.2.3.1.10. An important aspect of transfer pricing analysis is whether this analysis has to be carried out with respect to a taxpayer’s individual international controlled transactions or to a group of international controlled transactions having a close economic nexus.

B.2.3.1.11. The transfer pricing analysis should ideally be made on a transaction by transaction basis. However, there are cases where separate transactions are so closely linked that such an approach would not lead to a reliable result. Where transaction are so closely interrelated or continuous that application of the arm’s length principle on a transaction by transaction basis the analysis.

B.2.3.1.12.....

B.2.3.1.13. Another important aspect of combined transactions is the increasing presence of composite contracts and “package deals” in an MNE group. A composite contract and/or package deal may contain a number of elements including leases, sales and licenses all packaged into one deal. Generally, it will be appropriate to consider the deal in its totality to understand how the various elements relate to each other, but the components of the composite contract and/or package deal may or may not, depending on the facts and circumstances of the case, need to be evaluated separately to arrive at the appropriate transfer price.....”

Thus on perusal of the above, the UN TP Manual also acknowledges existence of composite contracts and warrants analyzing the individual element of such contracts on an aggregate basis.

6.3. The Id AR also placed reliance on the guidelines provided in UK Transfer Pricing Guidelines issued by HMRC in the form of International Tax Manuals (INTM) which conforms the OECD approach on composite pricing. The relevant extract of the same is reproduced below:-

“INTM484060

Transfer Pricing: operational guidance: examining transfer pricing reports: OECD methodologies

..... Looking at groups of similar transactions – transactions in aggregate – is appropriate if at arm’s length a trader would do the same. As the OECD Guidelines recognize at paragraph 3.9, there are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis. The OECD cited examples, including some long term contracts for the supply of commodities or services, and the pricing of a range of closely-linked products (e.g. in a product line) where it is impractical to determine pricing for each individual product or transaction.

Business tend to negotiate a price and then use that price until something happens which means it has to be changed. They may also accept some form of basket pricing, which essentially reflects the pragmatic proposition that if a range of products is being sourced from a single supplier, only the overall price matters, not the price for individual products.

Hence, a business may negotiate one composite price for a number of goods.”

We find that further INTM421100 exemplifies the basis of composite / bundled pricing as extracted below:-

“INTM 421100

Transfer Pricing: Methodologies: OECD Guidelines: which Transactions to review

A single company may have many different types of transactions with a single affiliate or a number of affiliates....

..... Essentially this recognizes the fact that under commercial arrangements, parties might accept under or over pricing for certain types of transactions if they were happy with the overall receipts. If a company needs 100 units each of two products from the same supplier and the market price is £1,000 in total, then the company may be indifferent if the price of each product is £5 or the price of product 1 is £1 and the price of product 2 is £9, assuming the market price can be established. Alternatively, two companies might both buy from and sell to each other at the same time. In such circumstances they might agree a package deal covering the pricing of all the transactions.

This example illustrates the need to consider all relevant transactions between the parties. A company may ultimately accept that the price of its purchases from its parent company is too high but argue that this is cancelled out by the fact that other purchases were made at less than market price. In such a case the profits might be at arm’s length overall.”

6.4. We find that the assessee's conduct had been proved pursuant to the aforesaid conditions stipulated in the agreement and understanding with the AE and it is evident from the margins derived and declared by the assessee for various years as under:-

<u>Particulars</u>	<u>FINANCIAL YEARS</u>				
	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>
Arm's length return as per TP Study	11.71%	13.71%	10.25%	13.21%	
Actual return maintained by the assessee		27.50%	18.76%	16.09%	22.60%

6.5. We find that on perusal of the terms of the composite agreement entered into with its AE for totality of services on the basis of 'bundled pricing approach' which has been consistently followed by the assessee and the pricing has been made in such a manner so as to ensure that the same is always at Arm's length. The assessee had defined the roles and responsibilities for both SD and BPO services independently by appointing independent staff for rendering both the services and further the assets employed and risks assumed are the same for both SD and BPO services. In these circumstances, there is nothing wrong in working out the composite remuneration for both SD and BPO services based on a composite agreement. We hold that there is no good reason to disbelieve this pattern of undertaking transactions by the assessee with its AE. In fact the assessee had also tried to justify its transactions with its AE by presenting the segmental profitability statement duly certified by a chartered accountant during the course of TP assessment proceedings by taking into account 'Rendering of both SD and BPO services' to both AE and Non-AE separately. We find that the reliance placed by the Id AR on the Guidance Note issued by the Institute of Chartered Accountants of India (ICAI) on Accountant's Report u/s 92E of the Act also supports the case of the assessee, wherein it was stated as under:-

5.7. The factors referred to above are to be applied cumulatively in selecting the most appropriate method. The reference therein to the terms 'best suited' and 'most reliable

measure' indicates that the most appropriate method will have to be selected after a meticulous appraisal of the facts and circumstances of the international transaction or specified domestic transaction. Further, the selection of the most appropriate method shall be for each particular international transaction or specified domestic transaction. The term 'transaction' itself is defined in Rule 10A(d) to include a number of closely linked transactions. Therefore, though the reference is to apply the most appropriate method to each particular transaction, keeping in view, the definition of the term 'transaction', the most appropriate method may be chosen for a group of closely linked transactions. Two or more transactions could be said to be linked when these transactions emanate from a common source being an order or a contract or an agreement or an arrangement and the nature, characteristics and terms of these transactions are substantially flowing from the said common source. For example, a master purchase order is issued stating the various terms and conditions and subsequently, individual orders are released for specific quantities. The various purchase transactions are closely linked transactions.

5.8. It may be noted that in order to be closely linked transactions, it is not necessary that these transactions need be identical or even similar. For example, a collaboration agreement may provide for import of raw materials, sale of finished goods, provision of technical services and payment of royalty. Different methods may be chosen as the most appropriate methods for each of the above transactions when considered on a standalone basis. However, under particular circumstances, one single method may be chosen as the most appropriate method covering all the above transactions as the same are closely linked.

6.6. We find that the co-ordinate bench of Pune Tribunal in the case of *Cummins India Ltd vs Addl CIT* reported in (2015) 53 taxmann.com 53 (Pune Trib) dated 31.12.2014 had held as under:-

24. The first issue arising in the present appeal is whether in view of the OECD guidelines and the Indian Transfer Pricing provisions, aggregation of transactions could be made or not.

31. In this background, considering the legislative intent manifested by way of Rule 10A(d) read with Rule 10B of the Rules, it clearly emerges that in appropriate circumstances where closely linked transactions exist, the same should be treated as one composite transaction and a common transfer pricing analysis be performed for such transactions by adopting the most appropriate method. In other words, in a given case where a number of closely linked transactions are sought to be aggregated for the purposes of bench marking with comparable uncontrolled transactions, such an approach can be said to be well established in the transfer pricing regulation having regard to Rule 10A(d) of the Rules. Though it is not feasible to define the

parameters in a water tight compartment as to what transactions can be considered as 'closely linked', since the same would depend on facts and circumstances of each case. So however, as per an example noted by the Institute of Chartered Accountants of India (in short the 'ICAI') in its Guidance Notes on transfer pricing in para 13.7, it is stated that two or more transactions can be said to be 'closely linked', if they emanate from a common source, being an order or contract or an agreement or an arrangement, and the nature, characteristic and terms of such transactions substantially flow from the said common source. The following extract from the said Guidance Notes is worthy of notice:-

"13.7.

13.8.

26. In view of the ratio laid down by Pune Bench of the Tribunal in Demag Cranes & Components (India) (P.) Ltd. (supra), it is held that where number of transactions are closely linked transactions, then the same can be aggregated and construed as a single transaction for the purpose of determining the arm's length price. In case, there is close link exists between the different transactions, the same should be treated as composite transaction and appropriate method should be applied to work out the transfer pricing analysis. Where two or more transactions emanate from common source being an order or contract or an agreement or an arrangement, then such transactions could be said to be closely linked as the nature, characteristic and terms of such transaction substantially flow from the said common source.

(Underlining provided by us)

6.7. We find that the co-ordinate bench of Mumbai Tribunal in the case of Boskalis International Dredging International CV reported in TS-215-ITAT-2014 (Mum) TP had held as under:-

"11. We have considered the rival submissions as well as relevant material on record. The limited issue before us is whether the lease rental paid by the assessee to its Associated Enterprises in respect of various dredging equipments taken on lease can be recorded as closely linked or continuous transactions which cannot be evaluated separately on individual basis. If a number of transactions are closely linked or continuous in nature and arising from a continuous transactions of supply of amenity or services the transactions can be permitted as closely linked transactions for the purpose of transfer pricing and in terms of Rule 10A(d). Aggregation and clubbing of the closely linked transaction are permitted under the Rules and it is also supported by OECD transfer pricing guidelines. In order to examine whether the number of transactions are closely linked or continuous so as to aggregate for the purpose of evaluation it is to be considered that one transaction is follow-on of the earlier transaction and then the subsequent transaction is carried out and dependent wholly or substantially on the earlier transaction. It can be vice-versa when the earlier transaction has been entered into between parties by keeping in mind that a continuous transaction of similar nature will be

entered into between the parties thereafter. Therefore, when the transactions are influenced by each other and particularly in determining the price and profit involved in the transactions then those transactions can safely be regarded as closely linked consisting of tax payers bundling certain transaction for the purpose of earning an appropriate return across portfolio rather than single product. For instance some products may be marketed by the tax payer with a low profit or even at loss because they create a demand for other products or related services of the same tax payer that are then sold or provide high profit. Some of the examples given in the OECD guidelines for transfer pricing are the equipment and captive after market consumables such as vending coffee machines and coffee capsules, or printers and cartridges. Thus, portfolio approach is business strategy that may need to be taken into account in comparability analysis. Therefore, if two or more transactions between the same parties i.e. the Assessee and its associate enterprise can be said to be closely linked if the transactions are interlinked and terms and conditions as well as prices between the parties are determined based on the totality of the transactions and not on individual and separate transactions.....”

6.8. We also find that the co-ordinate bench of Delhi Tribunal in the case of Birla Soft Limited reported in TS-285-ITAT-2011 (Del), had held that while there exists one single agreement for provision of varied IT related services from distinct units of the assessee, then it is advisable to consider profitability from all such units by rendering all nature of services in aggregate for transfer pricing purposes. The relevant extracts are reproduced below:-

“11. Learned First Appellate Authority did not accept the approach of TPO or segregating the Margin earned by the assessee in its various STP units. The reasons for not concurring with the TPO are that the assessee had provided software development services, such as, software development services, software maintenance and repair services, quality testing services from its three units. It is an identical services.

12. There is no significant functional difference in the software development and maintenance services to related and unrelated values. The services rendered by the STP Unit were rendered to the same AEs of the assessee, namely, Birla Soft Inc. US and Birla Soft UK on continuing basis.

13. The terms and conditions for rendering such services by each of STP Unit was governed by One single agreement entered into between Birla Soft India and Birla Soft Inc. US. The learned TPO has assumed that functions, assets and risk undertaken by each of the STP Unit are distinct from each other and is comparable with the function, assets and risk undertaken by existing comparables. In other words, learned TPO has totally ignored the unity of the business, administrative control and unity of funds etc. The independent FAR analysis of each

unit with existing comparables is practically not possible because there is a common management, interlacing of the funds etc .

14. Thus, on due consideration of the order of the Learned CIT(Appeals), we are satisfied that learned First Appellate Authority rightly did not concur with the conclusion of the TPO for segregating the each STP Unit and considering the result of each STP Unit as a standalone for purpose of determining the ALP relating to international transaction.”

6.9. Hence we hold that the assessee’s action of entering into composite agreement with its AE for rendering bundled services of IT and ITES thereon cannot be doubted with and the comparisons should be done only with the total services (i.e IT and ITES) rendered by the assessee to its AE and Non-AEs. It is not in dispute that the assessee had also rendered similar services to its Non-AEs also. We hold that the total remuneration received by the assessee from its AE for rendering both IT and ITES are to be considered only on totality basis and no bifurcation of such remuneration should be done. We find that the transactions carried out by the assessee with its AE could be aptly explained by way of a following example :-

A person is providing Buffet Lunch to its AE for Rs 1,000/-. The Buffet Lunch comprises of various items provided as a package deal comprising of soup, varieties of breads, dhal, different sabjis, fried rice, papads, salads, different fruits platter, varieties of sweets and desserts. The composite food is provided based on single agreement at consideration of Rs 1000/-. It would be difficult to bifurcate as to what is the price attributable to desserts , sabjis, fried rice etc alone. In such a case, we hold that in order to understand whether the price charged at Rs 1000 to AE by a person is at Arm’s length or not is to be compared with the composite price charged by the very same person to Non AEs or by the price charged by the others for providing Buffet Lunch. Based on this comparison, decision needs to be taken whether the price charged by the person to its AE is at ALP subject to available tolerance limits as per law.

We hold that the bundling approach based on composite agreement has been duly acknowledged by various decisions as stated supra , OECD guidelines, UN TP Manual and UK TP Guidelines as extracted hereinabove.

6.10. We find that the assessee had done the Segmental Reporting in accordance with Accounting Standard (AS) 17 issued by the Institute of Chartered Accountants of India (ICAI) and had reflected the same in its Annual Report as under:-

<u>Segmental Reporting (By Business Segments)</u>				
<u>Description</u>	<u>BPO</u>	<u>SD</u>	<u>Sales</u>	<u>Total Enterprise</u>
Segment Revenue	119453039	74318020	1343705	195114764
Add Inter Segment Revenue	0	0	0	0
Total Segment Revenue	119453039	74318020	1343705	195114764
Segment Result	8908726	21020208	-851877	29077057
Add: Unallocable Income	0	0	0	2629900
Less: Unallocable Expenses	0	0	0	5925722
Less: Interest	0	0	0	0
Profit before Taxation				25781235
Less: Current Tax				5280000
Deferred Tax				0
Fringe Benefit Tax				0
Profit after Taxation				20501235
Segment Assets	25438016	13293261	0	38731277
Unallocable Assets				85058472
Total Assets				123789749
Segment Liabilities				0
Unallocated Liabilities				47737754

Total Liabilities	47737754
Capital Expenditure	0
Unallocated Capital Expenditure	6043671
Total Capital Expenditure	6043671
Depreciation	0
Unallocated	
Depreciation	7068517
Total Depreciation	7068517

SD stands for Software Development & Support Services
 BPO stands for Business Process Outsourcing Services

Notes :

1. The Business Segments are based on internal reporting structure of the company and comprised of BPO Activity, Software Development & Support Activity and Sales of Computer, Accessories, Components and Spare Parts etc.

2. The Segment – Wise revenue results, assets & liabilities figures relate to the respective amounts directly identifiable to each of the segments. Items appearing under unallocated assets / liabilities, income and expenses pertain mainly to Corporate Office and relate to the Company as a whole

6.11. We find that this segmental reporting done in accordance with the requirements of AS-17 of ICAI has been heavily relied upon by the Id TPO. We find that the segmental data given by the assessee with regard to profitability out of rendering of services to related party and unrelated party has been rejected by the Id TPO on the ground that the assessee had allocated more cost to unrelated party segment. The reporting mandated as per AS-17 issued by ICAI is totally for a different purpose and cannot be used at any stretch of imagination by the Id TPO to determine the segmental profitability of AE and Non-AE transactions. Infact the segment reporting done in AS-17 does not bifurcate between AE and Non-AE transactions. It is done in

the instant case only based on various business segments of the assessee and whereas the TP assessment is based on margins derived on AE and Non-AE transactions. It is not in dispute that the assessee had furnished the segmental workings of profitability of transactions with AE and Non-AE duly certified by a chartered accountant. This we find had been summarily rejected by the Id TPO on the ground that it is not forming part of audited financial statements of the assessee company. In this regard, we hold that the Id TPO had not understood the fact that the audited financial statements are prepared in the format and as per the requirements of the Companies Act, 1956 and has nothing to do with the requirements of transfer pricing assessments and documentation thereon. Hence the action of the Id TPO in placing reliance on AS-17 Segment Reporting in the instant case for comparison of the margins of AE and Non-AE transactions is not tenable in law and is highly unwarranted. We find that the Id TPO had considered the PLI by working out the OP / Turnover instead of working out the same on total costs. We hold that the assessee had derived PLI of 27.50% margin in respect of transactions rendered to its AEs (for both SD and BPO together) which is above the 20% safe harbour rules specified by the CBDT. The comparables average PLI even according to Id TPO was only 28.38%. Hence the same falls within the 5% (+) / (-) tolerance limit and no adjustment to ALP is called for.

6.12. It is also relevant to note that no adjustments to ALP had been made by the Id TPO in the earlier years in assessee's own case pursuant to the same composite contract entered into with effect from 1.4.2008 relevant to Asst Year 2009-10.

6.13. We find that the Id DRP had directed the Id TPO to adopt the comparables from the SD segment also while arriving at the ALP margin. This goes to prove that the Id DRP had accepted the stand that the assessee is rendering both IT and ITES services to its AE emanating from a common source of a composite agreement. Against this direction, the revenue is not in appeal before us. Hence it could be safely concluded that the fact of assessee rendering both IT and ITES services to its AE pursuant to a composite agreement has been accepted by the

revenue and the Id AO had passed the giving effect order u/s 92CA(3) r.w.s. 144C(5) of the Act dated 20.2.2015 wherein the revised ALP of the comparables by taking both IT and ITES segments was arrived at 26.65% and whereas the assessee's margin in respect of its transactions with its AE was 27.50%. Hence even on this count, the transactions made by the assessee with its AE in respect of both IT and ITES segments are at arm's length pursuant to a composite contract. We find that the Id TPO vide his order dated 17.2.2015 (giving effect to DRP directions) compared the revised ALP margin of 26.65% with the BPO margin of 5.8% as already arrived by him earlier. The Id TPO vide order dated 17.2.2015 had suggested an upward adjustment to ALP at Rs 1,73,88,973/-. This BPO margin was worked out by notionally bifurcating the revenue derived by the assessee from its AE into IT and ITES segments by the Id TPO. In our considered opinion, the necessity to get into this workings and the margins arrived by the Id TPO for BPO segment and in respect of the comparables need not be looked into at all, as we have given a finding earlier that the segmented profitability statement in respect of both IT and ITES services rendered to AE and Non-AE which is already on record before the Id TPO, but ignored by the Id TPO earlier, has to be considered by the Id TPO. If the same is considered, the assessee's margin is very much at ALP and hence there is no question of making any adjustment to ALP.

6.14. In view of the aforesaid facts and findings in the facts and circumstances of the case, we hold that there is absolutely no case made out by the revenue for making any adjustment to ALP determined by the assessee. Hence the grounds raised by the assessee for the Asst Year 2010-11 are allowed. In view of this finding, the other arguments advanced by the Id AR on the principles of 'intentional set off' from one segment to another segment under TNMM which has been relied upon by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India (P) Ltd vs CIT reported in (2015) 55 taxmann.com 240 (Delhi) need not be gone into.

7. In the result, the appeal of the assessee for the Asst Year 2010-11 is allowed.

ASST YEAR 2011-12

8. This appeal of the revenue and cross objection of the assessee for the Asst Year 2011-12 is directed against the final order passed by the Learned Income Tax Officer, Ward -2(2), Kolkata [in short the Id AO] under section 143(3) /144C of the Act dated 24.9.2015, pursuant to the directions of the Learned Dispute Resolution Panel [in short the Id DRP] under section 144C(5) of the Act dated 14.8.2015.

9. We find that the revenue had raised the grounds only in respect of exclusion of comparable ICRA Online Ltd and inclusion of comparables Akshay Software Technologies Ltd and Thinksoft Global Services Ltd, while determining the comparables margin and comparing the same with assessee's margin to arrive at the ALP. The Id DR before us filed his submissions in writing wherein he had stated that the Ground No. 1 raised by the revenue is wrong and accordingly not pressed before us. Accordingly, the ground no.1 raised by the revenue is dismissed as not pressed.

9.1. We find that the facts of Asst Year 2011-12 are almost similar to that in Asst Year 2010-11. The assessee earned Rs 17,29,47,372/- from its AE from rendering both IT and ITES services. The assessee as in Asst Year 2010-11 pleaded that this consideration from AE was received pursuant to a composite contract and the revenue received thereon could not be bifurcated. But the Id TPO held that the assessee is engaged only in rendering BPO services and accordingly attributed the entire consideration received from AE towards BPO services. There is no dispute with regard to the TNMM being adopted as the MAM. There is no dispute with regard to OP / OC being adopted as the PLI. The assessee justified its transactions to be at ALP by declaring margin from its AE at 18.76% as against the comparable companies' margin of 10.25%. The Id TPO undertook a fresh benchmarking study to arrive his own set of companies for comparables and determined the ALP margin at 25.16%. The Id TPO made

an upward adjustment of Rs 1,47,69,642/- to the ALP determined by the assessee vide his order dated 27.1.2015.

9.2. For Asst Year 2011-12, we find that the ld DRP accepted the audited segmental reports of the assessee which are enclosed in page 145 of the paper book. The ld DRP held that the assessee had rendered both IT and ITES services to its AE in Asst Year 2011-12 also and hence the finding of the ld TPO in this regard that consideration received is attributable only to BPO segment is not tenable. We find that there is no dispute with regard to aggregation of IT and ITES segemens together with AE vis a vis Non AE. We find that with regard to the comparables chosen by the assessee, the findings of the ld DRP for Ground No. 8 raised before it are as under:-

Ground 8

That on the facts and circumstances of the case the ld TPO and accordingly the ld AO have erred in rejecting the comparable companies that were accepted as comparable to the assessee by the ld DRP during the assessment proceedings of AY 2010-11.

Assessee's Submissions:

With regard to the above, the assessee would humbly like to submit herein that the ld TPO has erred in rejecting the following companies that were considered as comparable companies by the ld DRP in the course of hearing proceedings for AY 2010-11. With respect to AY 2011-12, it has been observed that these companies clear the filter criteria adopted by the ld TPO. However, the same has not been considered as comparable company in determination of arm's length price. The companies are Akshay Software Technologies Ltd and Thinksoft Global Services Ltd. Further, the annual reports / web information of the above companies were pursued and observed that the same are comparable to the functions undertaken by the assessee.

DRP Findings:

The submissions have been considered in this regard and it is seen that the functional profile has not undergone changes to warrant exclusion of these comparables that were directed to be included by the DRP directions for the prior period. The TPO / AO are therefore directed to recomputed ALP upon including these comparables also.

It was also submitted that the operating margin of the assessee works out to be 18.76% and that of comparable companies is 20.41%. Hence, prices of international transactions that achieve OP / TC of 20.41% or more, or is within (+/-) 5% range available as per proviso to section 92C(2) of the Act would meet the arm's length standard required under the Indian Regulations. Basis the submissions, the AO / TPO shall recomputed the ALP and see if the OP/TC falls within the requisite band of (+/-) 5%.

9.3. We hold that it is already well settled by several decisions of this tribunal and other tribunals wherein Akshay Software Technologies Ltd and Thinksoft Global Services Ltd are to be included as comparables in software development segment. For the Asst Year 2011-12, the revenue had not preferred any appeal with regard to the aggregation approach of IT and ITES segments based on composite agreement. The only ground raised is with regard to inclusion of comparables of Akshay Software Technologies Ltd and Thinksoft Global Services Ltd for determination of ALP. We hold that the assessee had already given the segmental profitability statement of rendering both IT and ITES services to AE and Non-AE and the assessee had duly justified the pricing with AE to be at ALP. This issue is not in dispute before us for the Asst Year 2011-12. Even if there is a necessity to get into the comparables chosen, then we hold that Akshay and Thinksoft should both be included as comparables by respectfully following the various decisions of this tribunal and other tribunal decisions in software development segment. There is no dispute for this Asst Year 2011-12 that the assessee is engaged in software development and BPO services and composite consideration has been received from its AE for the same. It is not in dispute that the assessee had chosen the mixed set of comparables from both IT and ITES segments.

9.4. In view of the aforesaid findings, we hold that there is no adjustment to ALP that need to be made in the instant case and we direct the ld AO to delete the adjustment made to ALP. Accordingly, the grounds raised by the revenue are dismissed.

9.5. The Id AR stated that the Cross Objection of the assessee for the Asst Year 2011-12 are only supportive of the order of the Id CITA .

10. In the result, the appeal of the assessee for the Asst Year 2010-11 is allowed, appeal of the revenue for Asst Year 2011-12 is dismissed and cross objection of the assessee for the Asst Year 2011-12 is allowed.

Order pronounced in the Court on 06.12.2017

Sd/-
[A.T. Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 06.12.2017
SB, Sr. PS

Copy of the order forwarded to:

1. I.T.O.Ward-2(2), Aayakar Bhawan P-7, Chowringhee Square, Kolkata-700069
2. M/s Data Core India Pvt. Ltd., DG-4, Plot-IV, Sector-II, Salt Lake City, Kolkata-700091.
3. C.I.T(A)- , Kolkata
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches