IN THE INCOME TAX APPELLATE TRIBUNAL
"A'' BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

IT(TP)A No.725/Bang/2017
Assessment Year: 2012-13

M/s. Global E-Business Operations Pvt. Ltd. 2nd Floor Kalyani Platina, Phase-II Building Survey Number 16 & 24 of Kundanahalli Village K.R. Puram, Hobli Bangalore-560 066 **PAN NO : AABCG2843D**	**Vs.**	ACIT Circle-3(1)(2) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri Sarath Rao, A.R.
Respondent by	**:**	Shri Sanjay Kumar, D.R.

Date of Hearing	**:**	01.12.2020
Date of Pronouncement	**:**	04.12.2020

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the assessment order dated 23.01.2017 passed by the assessing officer u/s 143(3) r.w.s 144C of the Income-tax Act,1961 ['the Act' for short] for assessment year 2012-13 in pursuance of directions given by Ld Dispute Resolution Panel (DRP).

2. Though the assessee has raised many grounds, at the time of hearing the Ld A.R pressed the grounds relating to the issue of

(a) Exclusion of two comparable companies viz., M/s Infosys BPO Ltd and M/s TCS E-Serve Limited and

(b) Treatment of foreign exchange gain/loss as operating income/expenses or not.

3. The assessee is a company belonging to M/s. Hewlette Packard (HP) group. The assessee is engaged in ITES services. The assessee undertakes HP's worldwide accounting and transaction processing work, provision of back office operation and customer support services to various associated enterprises. The assessee is being compensated at cost + 8%. The assessee adopted TNMM method to benchmark his transactions and the profit level indicator was taken as operating profit by operating cost (OP/OC). The assessee declared net margin of 19.08%. The TPO recomputed the margin of the assessee by excluding interest income and non-operating income and also reducing the expenditure. Accordingly, he computed the net margin of the assessee at 15.75%.

4. The assessee had selected 11 comparable companies in its transfer pricing study. The TPO rejected the transfer pricing study and he selected following set of comparable companies:

Sl.No.	***Name of the case***	***Operating income***	***Operating cost***	***OP/OC***
1	*Accentia Technologies Ltd.*	*126,38,02,000*	*112,89,16,000*	*11.75*
2	*Universal Print Systems Ltd. (Seg)(BPO)*	*6,17,67,000*	*3,87,49,000*	*52.46*
3	*Informed Technologies India Ltd.*	*1,96,36,431*	*1,82,45,770*	*6.08*
4	*Infosys B P O Ltd.*	*1316,75,11,974*	*962,91,06,964*	*36.30*
5	*Jindal Intellicom Ltd.*	*30,27,51,875*	*30,29,02,990*	*0.05*
6	*Microgenetic Systems Ltd.*	*1,29,93,217*	*1,08,63,390*	*19.61*
7	*T C S E-Serve Ltd.*	*15,78,44,000*	*9,64,28,000*	*63.69*
8	*B N R Udyog Ltd. (Seg)(Medical Transcription)*	*1,47,04,000*	*97,87,000*	*41.58*
9	*Excel Infoways Ltd. (Seg) (IT/BVPO)*	*790,96,95,000*	*559,06,04,000*	*29.79*
10	*E4e Healthcare Services Pvt. Ltd.*	*89,50,04,209*	*74,59,23,078*	*19.85*
	Average PLI			***28.11%***

5. After adding negative working capital adjustment of -0.06%, the adjusted margin was arrived at by the TPO at 28.17%. While working out the margin, the assessing officer treated the foreign exchange gain as non-operating in nature. Accordingly, he made transfer pricing adjustment of Rs.57,69,82,545/-. The Ld. DRP gave partial relief to the assessee which resulted in relief of Rs.45.20 crores. Accordingly, the assessing officer passed the final assessment order.

6. As noticed earlier, the assessee seeks exclusion of M/s Infosys BPO Ltd and M/s TCS E-Serve Limited. The Ld A.R submitted that the co-ordinate bench, vide its order dated 21.04.2017 passed in the assessee's own case in IT(TP)A No.147/Bang/2015 for assessment year 2010-11, has excluded M/s Infosys BPO Ltd. He submitted that the Hon'ble Karnataka High Court did not admit the appeal filed by the revenue challenging the order passed by the Tribunal by observing that no substantial question of law arises, vide its order dated 6th July, 2018 in ITA No.896/2017.

7. With regard to functionality of M/s Infosys BPO Ltd, the assessee submitted as under:-

(a) it is engaged in providing integrated IT and business process outsourcing solutions,

(b) it is also engaged in providing consultancy, management and strategic transformation services

(c) it caters to diverse business segments.

(d) It has got delivery centres in USA, Australia, Czech Republic, Poland, Thailand and Phillippines and also earns 'on site' revenues.

(e) It is a market leader.

Accordingly it was submitted that this company's functions are different from that of the assessee company. It is also submitted that this company owns IPR and brand and incurs advertisement and marketing expenses on brand building. It is backed by M/s Infosys Ltd. It was further submitted that there was an extra ordinary event during the year, i.e., it has acquired Portland Group Pty Ltd, Australia during the year under consideration. The above said company has expertise in Strategic outsourcing and category management services. Further the said acquisition has enhanced the delivery presence in high end sourcing and procurement space in Asia Pacific region. It was submitted that this company has been excluded in various decisions.

8. With regard to functionality of M/s TCS E-Serve Limited, the assessee submitted as under:-

(a) it is engaged in delivering core business processing services, analytics/insights (KPO) and support services for both data and voice processes.

(b) it offers integrated portfolio of service ranging from IT services to BPO services.

Accordingly, it is submitted that this company is providing KPO services and hence functionally different. It is further submitted that the company is backed by M/s TCS Ltd and Tata brand equity. This company did not disclose BPO services as separate segment. It was submitted that major business of TCS E Service is from Citi Group pursuant to prior global arrangement making it a deemed international transaction. Further, Citi has signed an agreement with TCS to provide process outsourcing services to Citi and its affiliates for an aggregate amount of USD 2.5 billion over a period of 9 years during the FY 2008-09. The Ld A.R submitted that this company has also been excluded in many decisions.

9. The Ld D.R submitted that both the assessee and Infosys BPO Ltd fall under the category of companies providing ITES services in the form of business process outsourcing, i.e., both the companies are providing solutions to business processes outsourced to them. Even though M/s Infosys BPO is catering to various types of industries and the assessee is catering to the needs of HP group, yet the functions performed by them remain the same. He submitted that both the companies are operating worldwide. The turnover of both the companies are also comparable, i.e., the turnover of the assessee company was Rs.1130 crores, while the turnover of M/s Infosys BPO Ltd was Rs.1530 crores. the He submitted that the assessee herein is part of Hewlett-Packard Group. Hence both the companies have huge brand presence. Hence it cannot be said that the brand value would affect profitability of the companies. He further submitted that the extra ordinary event, viz., acquisition of Portland group Pty Ltd, Australia has taken place in the last quarter of the financial year and hence the said acquisition would not affect FAR analysis.

10. The Ld D.R further submitted that assessee company also reports all its revenues under single head "Revenue from Data processing and other ITES". Hence there is no material difference in this aspect also. The ld D.R further submitted that various case laws relied upon by the assessee are distinguishable.

11. He submitted that all the above said contentions would apply to TCS e-serve Ltd also. Accordingly he submitted that the Ld DRP was justified in including both the above said comparable companies.

12. The Ld A.R submitted that, under broad classification, both the companies would fall under ITES segment. However, specific

services rendered by both the companies would show that the functions performed by the assessee company is different from the functions performed by M/s Infosys BPO Ltd and M/s TCS E-serve Ltd. While the assessee is providing basic backend services to HP group, both the above said companies are providing multiple services across the globe. He submitted that the assessee is providing services only to its group companies and hence the effect of "brand value" will not be there. While dealing with third parties, "brand value" commands a premium on pricing. Hence both the companies cannot be compared with the assessee company.

13. The Ld A.R submitted that while "Hewlett-packard" may be a known brand, yet it is not known for rendering back-end BPO support services, i.e., it is known for providing hardware and IT solutions to its customers. Hence providing ITES services is not the core business of HP group and hence its brand value of HP cannot be compared with that of M/s Infosys and M/s Tata group. He submitted that M/s Infosys Ltd, the parent company has provided performance guarantee to clients of M/s Infosys BPO Ltd. He submitted that there is close connection between M/s TCS E-serve and Tata Consultancy Services Ltd, which has got high brand value.

14. The Ld D.R submitted that the "service delivery" is more important than the brand value. He further submitted that the annual reports do not show that the revenue growth of both the companies are attributable to its parent companies. The Annual report adduces other reasons for their growth. He submitted that the details of performance guarantee provided by M/s Infosys Ltd are not available and hence it cannot be presumed that such type of guarantee was provided to all the clients. The Ld D.R submitted that the impact of brand value was not examined in any of the earlier decisions rendered by the Tribunal in the assessee's own case. He

further submitted that to perpetuate an error is no heroism as held by Hon'ble Supreme Court in the case of Distributors Baroda Ltd (155 ITR 120). He submitted that the Hon'ble Supreme Court has held in the case of Rameshlal Sanwarmal (122 ITR 162) has held that the error committed in earlier decision could be corrected in a later decision.

15. The Ld A.R, in reply, submitted that, in various decisions rendered by High Courts, it has been held that the brand value plays a significant role. He submitted that M/s Infosys Ltd has given brand value computation at page 70 of its annual report. It is stated that its total profit before interest and tax was Rs.11683 crores, consisted of brand profits of 9969 crores and non-brand income of Rs.1714 crores. He submitted that above consolidated profits also include profits of Infosys BPO Ltd as well.

16. We have heard rival contentions and perused the record. We notice that the main thrust of Ld D.R's contention was that the HP group is also possessing equal brand value, that the turnover of the assessee and that of M/s Infosys Ltd falls under the same bracket, that there is no evidence to show that the comparable companies have capitalised its brand value, that both the companies are rendering ITES services only. With regard to the submission on performance guarantee provided by parent company, the Ld D.R submitted that the relevant details are not available. In respect of acquisition of a new company in Australia by M/s Infosys, the Ld D.R contended that it may not have impact during the year, since the acquisition has taken place in the last quarter of the year.

17. On the contrary, the contention of Ld A.R is that both the comparable companies have been excluded in many cases on the reasoning that they possess huge brand value. One main distinction

brought out by Ld A.R was that the Hewlett-Packard is having brand value for providing hardware and IT solutions to its customers, i.e., it is not known for rendering back-end BPO support services. We appreciate this distinction brought out by Ld A.R. There should not have any doubt that the "brand value" possessed by a company has definite role to play in fixing the pricing of product/services, but it may have effect only in the field, in which it possesses expertise. Hence the brand value held by M/s Hewllett-Packard may be helpful in marketing of hardware and IT solutions, i.e., it cannot be said that their brand value would command a premium in respect of back end BPO support services.

18. The Ld A.R placed his reliance on host of decisions to contend that the companies having huge brand value cannot be considered as comparable company. In the case of Pr. CIT vs. M/s Sanvih Info Group P Ltd (ITA 420/2019 dated 16.05.2019)(Delhi), the Hon'ble Delhi High Court referred "M/s Infosys Ltd" as giant corporation. In the case of Avaya India (P) Ltd vs. ACIT (2019)(108 taxmann.com 222), the Hon'ble Delhi High Court has made following observations with regard to TCS E-Serve Ltd:-

> "**21.** A reference may next be made to the decision in *Evalueserve Sez (Gurgaon) (P.) Ltd.* (*supra*) where a reference is made to the earlier decision to the *BC Management Services (P.) Ltd.* (*supra*). This decision dealt with the exclusion of three specific comparables, which have also involved in the present case namely **M/s. TCS E-Serve Ltd., M/s. TCS E-Serve International Ltd. and M/s. Infosys BPO Ltd. This Court upheld the exclusion of all three comparables and in particular since the entities had "a high brand value and therefore were able to command greater profits; besides they operated on economic upscale."**
>
> **22.** The Revenue's appeal against the same Assessee for AY 2011-2012 against another order of the ITAT excluding TCS E-Serve International Limited, Infosys BPO Limited from comparables met the same fate. In its decision dated 29th August, 2018 the Court referred to the earlier decision dated 26th February,

2018 which again pertained to AY 2010-2011. Reference was again made to the decision in *BC Management Services Ltd*.

23. It appears therefore that this Court has consistently upheld decisions of the ITAT excluding both these very comparables. **The ITAT itself appears to have taken a consistent view in a large number of cases excluding these two comparables and its decisions have been upheld by this Court.** Illustratively reference may be made to the decision of the Tribunal in *Vertex Customer Services India (P.) Ltd.* v. *Dy. CIT* [2017] 88 taxmann.com 286 (Delhi - Tri.), *Stryker Global Technology Centre (P.) Ltd.* v. *Dy. CIT* [2017] 87 taxmann.com 43 (Delhi - Tri.), *Samsung Heavy Industries India (P.) Ltd.* v. *Dy. CIT* [2017] 84 taxmann.com 154 (Delhi - Tri.) and *Equant Solutions India (P.) Ltd.* v. *Dy. CIT* [2016] 66 taxmann.com 192/157 ITD 292 (Delhi - Trib.).

24. All of these decisions pertained to AY 2010-2011. What weighed invariably is the fact that both companies had huge turnovers when compared to the tested entity. **Both entities had close connection of the Tata Group of Companies and TCS E-Serve International had given a huge amount to TCS towards brand equity. Further there was no segmental bifurcation between the transaction processing and technical services. The assets employed by TCS E-Serve along with huge intangibles in the form of brand value were found to have a definite considerable effect on its PLI**. These factors vitiated its comparability under the FAR analysis with the tested company, which could be a capital service provider without much intangible and risks.

25. In this context it requires to be noted that the ITAT also referred to the decision of this Court *CIT* v. *Agnity India Technologies (P.) Ltd.* [2013] 36 taxmann.com 289/219 Taxman 26.

26. The Court may also note that the Karnataka High Court has in *Pr. CIT* v. *Softbrands India (P.) Ltd.* [2018] 94 taxmann.com 426/406 ITR 513 (Kar.) noted as under:

> "48. The Tribunal of course is expected to act fairly, reasonably and rationally and should scrupulously avoid perversity in their Orders. It should reflect due application

of mind when they assign reasons for returning the particular findings.

49. For instance, while dealing with comparables of filters, if unequals like software giant Infosys or Wipro are compared to a newly established small size Company engaged in Software service, it would obviously be wrong and perverse. The very word "comparable" means that the Group of Entities should be in a homogeneous Group. They should not be wildly dissimilar or unlike or poles apart. Such wild comparisons may result in the best judgment assessment going haywire and directionless wild, which may land up the findings of the Tribunal in the realm of perversity attracting interference under section 260-A of the Act."

27. There is merit in the contention of the Assessee that the scale of operations of the comparables with the tested entity is a factor that requires to be kept in view. TCS E-Serve has a turnover of Rs. 1359 crores and has no segmental revenue whereas the Assessee's entire segmental revenue is a mere 24 crores. As observed by this Court in its decision in *Pr. CIT* v. *Actis Global Service (P.) Ltd.* [IT Appeal No. 417 of 2016, dated 5-8-2016]"Size and Scale of TCS's operation makes it an inapposite comparable *vis-a- vis* the Petitioner." As already pointed out earlier there is a closer comparison of TCS E-Serve Limited with Infosys BPO Limited with each of them employing 13,342 and 17,934 employees respectively and making Rs. 37 crores and Rs. 19 crores as contribution towards brand equity. When Rule 10(B)(2) is applied i.e. the FAR analysis, namely, functions performed, assets owned and risks assumed is deployed then brand and high economic upscale would fall within the domain of "assets" and this also would make both these companies as unsuitable comparables.

28. The Director's report of TCS E-Serve Limited bears out the contention of the Assessee that **both entities have been leveraging TCSs scale and large client base to increase their business in a significant way.** The submission that the two comparables offer an illustration of "an identical transaction being conducted in an uncontrolled manner" overlooks the effect of the Tata brand on the performance of the impugned comparables. The question was not merely whether the margins earned by the Tata

> group in providing captive service to the Citi entities were at arm's length. The question was whether they offered a reliable basis to re-calibrate the PLI of the Assessee whose scale of operations was of a much lower order than the two impugned comparables. The mere fact that the transactions were identical was not, in terms of the law explained in the above decisions, either a sole or a reliable yardstick to determine the apposite choice of comparables."

In the above said case, the Hon'ble High Court has considered multiple criteria to hold that M/s TCS E Serve Ltd and M/s Infosys BPO Ltd are not comparable. Further all these decisions pertained to AY 2010-11. We are conscious of the fact that we are dealing with the case relating to AY 2012-

19. In our view, the decision rendered by the Hon'ble High Court and various benches of Tribunal holding that the companies having high brand value cannot be considered as comparable companies can be conveniently applied to the year under consideration also. We have also noticed that M/s Infosys BPO Ltd is being consistently excluded in the assessee's own case in the earlier years.

20. M/s TCS E Serve Ltd was considered by the co-ordinate bench in the case of M/s Arctern Consulting Pvt Ltd (IT(TP)A No.352/Bang/2017 dated 15.10.2019 relating to AY 2012-13) and it was held as under:-

> "10. As far as TCS E Service Ltd., is concerned, the comparability of this company was considered by this Tribunal in the case of Zyme Solutions Ltd., in its order dated 16.11.2018 as follows:-
>
> > "11. TCS E Service Ltd.:
> >
> > This company was selected by the TPO and objected by the assessee for inclusion in the list of comparables on the ground that it is functionally different as it is engaged in the business of BPO, banking, finance, insurance domain. This contention was rejected by the TPO by holding that it is engaged in BPO, business of banking, finance, insurance

domain, which are purely in the nature of ITES. Even the Hon'ble DRP confirmed the findings of the TPO.

11.1 Being aggrieved, the assessee is before us contending that this company is functionally different as it is engaged in diversified business activities of BPO such as banking, finance, insurance. Learned AR of the assessee has also drawn our attention to the Annual Report placed at pages 563 to 563 of the paper book and reliance in this regard was placed on the following decisions:

Turnover Filter:

i. McAfee Software (India) Pvt Ltd US-136-ITAT-2016(Bang)-TP]

ii. Swiss Re Global Business Solutions India (P.) Ltd. FS-307-ITAT- 2017(Bang)

Functionally different filter:

i. XL Health Corporation India (P.) Ltd. (supra)

ii. Baxter India (P.) Ltd. v. ACIT12017185 taxmann.com 285 (Delhi - Trib.)

iii. CGI Information Systems and Management Consultants (P.) Ltd.(supra) IT(TP)A No. 352/Bang/2017

11.2 On the other hand, ld. CIT(DR) opposed its exclusion. He submitted that this company is engaged in KPO services and there is no difference between KPO and ITES.

11.3 We have heard rival submissions and perused material on record. The issue of comparability of this company was considered by the co-ordinate bench of Tribunal in the case of XLHealth Corpn. India (P.) Dd. (supra). The relevant findings of the Tribunal are as under:

> '. . . We have heard the rival submissions and perused the material on record. From the perusal of the Annual Report of this entity placed at page Nos. 583 to 678 of paper book, at page No. 604 it is stated as under.
>
> "2. COMPANY OVERVIEW Your Company, along with its subsidiary companies - TCS e-Serve International Limited and TCS e-Serve America

Inc., is primarily engaged in the business of providing Business Process Services (BPO) for its customers in Banking, Financial Services and Insurance domain.

The Company's operations include delivering core business processing services, analytics & insights (KPO) and support services for both data and voice processes.

Your Company is an integral part of the Tata Consultancy Services' (TCS) strategy to build on its 'Full Services Offerings' that offer global customers an integrated portfolio of services ranging from IT services to BPO services.

The Company provides its services from various processing facilities, backed by a robust and scalable infrastructure network tailored to meet clients' needs. A detailed Business Continuity Plan has also been put in place to ensure the services are provided to the customers without any disruptions."

Thus, this company is also stated to be a Knowledge Process Outsourcing and therefore for the reasons stated by us while dealing with this issue of comparability of the company Infosys BPO Ltd. shall equally hold good and therefore we direct the AO/TPO to exclude this company from the list of comparables.

Since the appellant company is into low end BPO, it cannot be compared with KPO service provider.

11.4 Respectfully following the decision of the co-ordinate bench of Tribunal, we direct for exclusion of this company from the list of comparable."

11. Respectfully following the aforesaid decision, we hold that TCS E Service Ltd., should be excluded from the list of comparable companies."

We notice that M/s TCS E-serve Ltd has been excluded, inter alia, for the reason that it is providing KPO services and further it is explicitly stated that it is an integral part of Tata Consultancy Services strategy to build on its “Full Service offerings” that offer global customers an integrated portfolio of services ranting from IT services to BPO services. It is further observed by the co-ordinate bench that the decision taken in respect of M/s Infosys BPO Ltd would equally apply to M/s TCS E serve Ltd also.

21. We have noticed that the assessee herein is undertaking backend processing of accounting and other transactions, back office operations, customer support services to various Associated Enterprises. Hence they are in the nature of BPO services only, while M/s Infosys BPO Ltd and M/s TCS E serve Ltd are providing variety of other services. Besides both the above said companies are supported by their parent companies, having huge brand value. Accordingly, we hold that both the above said companies cannot be considered as comparable companies. Accordingly, we direct the AO/TPO to exclude both M/s Infosys BPO Ltd and M/s TCS E serve Ltd from final list of comparables.

22. The next issue is whether foreign exchange fluctuation gain/loss shall form part of operating income/loss or not. We notice that an identical issue has been decided by the co-ordinate bench in the case of M/s Arctern Consulting Pvt Ltd (IT(TP)A No.352/Bang/2017 dated 15.10.2019) as under:-

> “12. The next issue that needs to be adjudicated is as to whether foreign exchange fluctuation gain or loss should be considered as part of the operating profit while computing the profit margin of the assessee as well as the comparable companies. The main reason why the DRP considered foreign exchange gain should not be treated as a part of the operating profit was due to the fact that the assessee in the preceding Assessment year did not consider foreign exchange loss as operating in nature. The DRP was of the

view that the assessee has to be consistent in the approach in this regard.

13. At the time of hearing, however, the learned Counsel for the assessee brought to our notice the decision of the ITAT Bangalore Bench in the case of Finastra Software Solutions (India) Pvt. Ltd., Vs. ACIT (2018) 93 taxmann.com 460 (Bangalore - Trib.) wherein this Tribunal considered the very same issue and held as follows:-

> "38. As far the issue treating foreign exchange gain as operating revenue is concerned, it has been held a several decisions of various Benches of ITAT that foreign exchange gain, to the extent it relates to or connected with the business for which ALP is determined, is to be regarded as operating revenue or loss as the case may be. In the case of SAP Labs India (P.) Ltd. v. Asstt. CIT [2010] 8 taxmann.com 207/[2011] 44 SOT 156 (Bang.) and Trilogy E Business Software India (P.) Ltd. v. Dy. CIT [2011] 12 taxmann.com 464/47 SOT 45 (Bang)(URO), which decisions have subsequently been consistervs followed by this Tribunal, lays down the proposition that foreign exchange gain or loss has to be regarded as IT(TP)A No. 352/Bang/2017 operating revenue or loss. The learned DR however brought to our notice a decision of the ITAT Bangalore Bench in the case of Commonscope Networks (India) (P.) Ltd. v. ITO IT(TP: A.No.166 & 181/Bang/2016 order dated 22.2.2017 wherein it was the foreign exchange gain or loss that arises should relate to the concerned AY because what is compared is the profit margin of a particular AY. According to him therefore the TPO/AO should examine the nature of foreign exchange gain or loss in the case of the Assessee and the comparable companies and to the extent it relates to turnover of the relevant AY and the segment for which ALP is being determined, the same should alone be considered as part of the operating revenue or loss. The learned counsel for the Assessee pointed out that it is impossible to carry out such an exercise. The Assessee might be willing to carry out such an exercise but the same cannot be expected from the comparable companies who have to furnish the relevant data. He also pointed out that under rule 10B(3) of the

criteria for comparability is the effect of profit on account of differences. Rule 10B(3) reads thus:

"(3) An uncontrolled transaction shall be comparable to an international 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."

The learned counsel for the Assessee therefore submitted that profit arising from comparable transaction will not be materially affected by adopting the foreign exchange gain as reflected in the accounts of the comparable companies because the terms of credit are almost identical in the line of business of SWD Services and ITES.

39. We have considered the rival submissions and are of the view that in the light of Rule 10B(3) of the Rules and the business cycle in the relevant business, the comparability will not be materially affected if the foreign exchange gain is considered as reflected in the accounts of the comparable companies as available in public domain. To this extent the decision rendered by the Bangalore Bench of ITAT in the case of Commonscope Networks (India) Pvt.Ltd. (supra) is distinguishable. Therefore respectfully following the decision of the ITAT Bangalore in the case of SAP Labs India (P.) Ltd. (supra), we hold that the DRP was justified in directing the AO to IT(TP)A No. 352/Bang/2017 consider the foreign exchange gain or loss as operating in nature. Therefore, in light of the above, this ground of the Revenue is liable to be dismissed."

14. In view of the aforesaid decision, we are of the view that the foreign exchange gain has to be treated as part of the operating profit while computing the profit margin of the assessee as well of the comparable companies. The TPO is directed to compute the

ALP in the light of the directions given above, after affording opportunity of being heard to the assessee. All other issues arising on account of TP adjustments were not argued and therefore treated as not pressed for adjudication."

23. The Ld D.R submitted that the TPO had treated the foreign exchange fluctuation loss incurred by the assessee in the immediately preceding year as non-operating in nature and the assessee did not object to the same. Accordingly he submitted that the assessee cannot change its stand and contend that the foreign exchange gain should be treated as operating income. The Ld A.R submitted that the assessee, in its transfer pricing study, has always been treating foreign exchange loss/gain as operating in nature. In the preceding year, the assessee had incurred foreign exchange fluctuation loss and exclusion of the same resulted in increase of operating margin. Since it was advantageous to the assessee, the action of TPO was not objected to. He submitted that the nature of transaction is more relevant than the stand taken by the assessee.

24. We notice that the Tribunal, in the above said case, has taken the view that the foreign exchange fluctuation gain/loss is operating in nature. Accordingly, following the same, we hold that that foreign exchange fluction gain/loss should be treated as operating profit/loss in nature while computing the profit margin of the assessee as well as of the comparable companies.

25. In view of the foregoing discussions, the ALP of the transactions require to be determined afresh in the light of decisions rendered supra. Accordingly, we restore this matter to the file of the AO/TPO.

26. In the result, the appeal of the assessee is treated as allowed.

Order pronounced in the open court on 4th Dec, 2020

Sd/-	**Sd/-**
(George George K.)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 4th Dec, 2020.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.