IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA
आयकर अपीलीय अधीकरण, न्यायपीठ **"C"** कोलकाता,

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.1917/Kol/2018
Assessment Year: 2014-15
&
ITA No. 1816/Kol/2019
Assessment Year : 2015-16

Assistant Commissioner of Income-tax, Circle-2(1), Kolkata.	Vs.	M/s. ITC Infotech India Limited (PAN: AAACI7376Q) Virginia House, 37, J. L. Nehru Road, Kolkata-700071.
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri Manish Kanojia, CIT, DR
Respondent by : Shri J. P. Khaitan, Sr. Counsel & Shri Bikash Chandra, AR

Date of Hearing : 16.08.2022
Date of Pronouncement : 18.10.2022

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Both these appeals filed by the Revenue are against the separate orders of Ld. CIT(A)-22, Kolkata vide Appeal No. 27/CIT(A)-22/14-15/18-19/Kol and 02/CIT(A)-22/15-16/18-19/Kol dated 08.06.2018 and 31.05.2019 passed against the assessment order by the ACIT, Circle-2(1), Kolkata, u/s. 144C/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") dated 23.01.2018 and 28.12.2018 respectively.

2. Revenue has raised the following grounds of appeal in AY 2014-15:

"1. In the facts and circumstances and law point of the case, the order of the Ld. CIT(A) is erroneous for treating the overseas associated enterprises as 'tested party' and deleting the total adjustment.

2. In the facts and circumstances and law point of the case, the order of the Ld. CIT(A) is erroneous because in absence of break-up of the expenditure incurred by the assessee and also without ascertaining the nature / utility of the software, it is simply not possible for the AO to ascertain whether software were useful for the day-to-day purpose or it gives enduring advantage to the assessee.

3. The appellant craves the leave to make any addition, alteration, modification etc. of the grounds either before the appellate proceedings, or in the course of appellate proceedings."

3. Revenue has raised the following grounds of appeal in AY 2015-16:

"1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the adjustment made by the AOITPO' amounting to Rs. 21,25,44,085/- on account of i) export of software services and ii) payment of Account Management charges.

2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in accepting the contention of the assessee that foreign AEs can be considered as the tested parties for establishing arm's length price.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in accepting the foreign AEs as the tested party without appreciating that, the accounts of the AEs are based on the accounting policies of the respective countries which is different from the Indian GAAP.

4. That on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in accepting segmental accounts of the assessee for establishing arm's length price.

5. That on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating that the segmental accounts does not form part of the audited financial statement of the assessee and hence proper verification of the allocation keys needs to be done in· order to arrive at the correct segmental result.

6. That on the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate that, the assessee could not establish the veracity and authenticity of the segmental accounts prepared and the profit margins derived from its segmental.

7. The appellant craves the leave to make any addition, alteration, modification etc. of the grounds either before the appellate proceedings, or in the course of appellate proceedings."

4. From the perusal of above grounds, it is noted that broadly there are following four issues involved in the two appeals before the Tribunal:

(i) Issue relating to selection of tested party as overseas associate enterprises (AE) which is ground no. 1 for AY 2014-15 and ground nos. 2 and 3 for AY 2015-16.

(ii) Treatment of expenses incurred on software as revenue or capital which is vide ground no. 2 for AY 2014-15.

(iii) Acceptance of segmental accounts for establishing arms length price which is vide ground nos. 4, 5 and 6 for AY 2015-16.

(iv) Transfer Pricing Adjustment made in respect of export of software services and payment of Account Management Charges vide ground no. 1 for AY 2015-16.

These issues are dealt hereunder seriatim:

5. Before us Shri J. P. Khaitan, Sr. Advocate and Shri Bikash Chandra, AR represented the assessee and Shri Manish Kanojia, CIT, DR represented the department.

6. Brief facts of the case are that assessee filed its return of income for AY 2014-15 on 20.11.2014 reporting a total income of Rs.163,93,56,650/- and for AY 2015-16, the return was filed on 28.11.2015 reporting total income of Rs.169,46,76,330/-. For both the years. the returns were selected for scrutiny assessment through CASS for which statutory notices were issued and duly served on the assessee and were duly complied in the course of assessment proceedings. The assessee is engaged in the business of information technology and I T consultancy services. Assessee is a wholly owned subsidiary of ITC Ltd. providing software services to its AEs as well as third party clients based in India and overseas.

6.1. Assessee has its software development centers based in Bengaluru, Kolkata, Pune and Trivendrum. Services catered by the assessee include banking and financial sector, consumer package goods, hospitality, media, entertainment, manufacturing, hotels, travel, transportation and logistics etc. Assessee has two subsidiaries in USA and UK viz., ITC Infotech USA (I2A) and ITC Infotech UK (I2B) respectively which were acquired from ITC Ltd. In the Form 3CEB and the Transfer Pricing Study Report filed by the assessee, it was stated that assessee has set up two marketing arms in USA and UK viz. I2A and I2B which assisted the assessee in marketing and administrative support services in their respective geographies. According to the assessee, I2A and I2B identifies customers, submits proposal, understand their requirements, arranges travel and accommodation for the assessee's resources in their country and obtain clients' feedback. These companies performed miscellaneous administrative functions and account management, invoice, bills etc. However, assessee performed all the activities and services under the contract like understanding customers' requirements, developing the course of action to be achieved for the customization of software solution, development of software, implementation at clients premises, coordination with customers, travel, providing complete IT support systems and solutions. Thus, all the core of essential services are provided by the assessee and all the administrative functions are fulfilled by I2A and I2B, as submitted by the assessee.

6.2. Both the assessment years were referred to Transfer Pricing Officer who made transfer pricing adjustments for which the assessee went in appeal before the Ld. CIT(A) who after meritoriously analyzing the facts and circumstances of the case, gave relief to the assessee. For certain relief granted by the ld. CIT(A), the revenue is in appeal before the Tribunal.

7. We now take up the above listed four issues one by one as follows:

8. Issue no. 1 is relating to selection of tested party as overseas associate enterprises (AE) which is ground no. 1 for AY 2014-15 and ground nos. 2 and 3 for AY 2015-16.

8.1. The facts of this issue, which can be stated in brief are as follows. The assessee is engaged in providing a wide range of IT solutions. For the provision of these services, the assessee has set up marketing arms in UK(i.e. ITC Infotech Limited UK - 'I2B') and USA (i.e. ITC Infotech (USA), Inc. - I2A') which assist the assessee in enhancing its marketing capabilities by providing marketing and administrative support services in these respective geographies. As in the case of every multinational group, the assessee also provides centralized management support and inside sales support services to these subsidiaries on a cost plus basis. Thus, during the year, assessee has entered into different transactions with these subsidiaries viz. receipt of marketing and administrative support services and provision of management support services. The assessee has followed a transaction level approach for undertaking benchmarking analysis in its Transfer Pricing Study ('TP Study') wherein all international transactions have been analysed separately and the margin earned by 'least complex entity' has been benchmarked from arm's length perspective. In addition, the assessee had also provided IT services to its other AEs, British American Tobacco Shared Services, Pyxis Solutions LLC and Surya Nepal Private Limited. The benchmarking approach in the TP Study for all the above transactions entails carrying out a detailed functional, asset and risk analysis ('FAR') and economic analysis for each transaction. Based on the FAR analysis and the facts and circumstances of the respective transaction, assessee had benchmarked the profitability of the respective transaction. Thus, the economic

analysis including the selection of tested party is based on the FAR profile of the transacting entities. The determination of margin for the tested party for the purpose of benchmarking analysis, is based on data derived from audited financial statements of the assessee and respective AE.

8.2. ITC Limited is a part of the British American Tobacco (BAT) group and has a diversified presence in product segments ranging from Cigarettes, Hotels, Paperboards & Specialty Papers, Packaging, Agri-business, Packaged Foods & Confectionery, Information Technology, Branded Apparel, Personal care, Stationery, Safety Matches and other FMCG products. In order to capture the opportunities offered by the global information technology (IT) business, ITC Limited restructured its IT division into a wholly owned subsidiary named I3L in October, 2000.

ITC Infotech India Limited (I3L)

8.3. I3L is a wholly owned subsidiary of ITC Limited, which is a part of the BAT group. For the purpose of this analysis, all companies in which BAT has equity/ management interest has been considered as associated enterprise of I3L. This is based on the assumption that in all the BAT companies, the equity participation of BAT directly or indirectly exceeds 26%. Besides these, I3L has wholly owned subsidiaries in United States - ITC Infotech (USA) Inc. (I2A) and in United Kingdom - ITC Infotech (UK) (I2B). I3L and its subsidiaries are engaged in the business of Information Technology (IT) Services. They undertake customized software solution development, IT facilities management and provides professional IT services to several clients across the globe.I3L is headquartered in Kolkata and has software development centers in Bangalore and Kolkata. It is engaged in the business of providing software solutions to customers across the globe including India. It has international transactions with associated enterprises as

well as unrelated parties. Moreover, I3L also have international transactions with its fellow subsidiaries Surya Nepal Private Limited (SNPL), Pyxis Solutions LLC (Pyxis) and Technico Technologies Inc. The development of the arm's length price in TP study analysis recognizes that I3L works as a routine software developer which assumes normal risks associated with carrying out such business. The overseas subsidiaries undertake marketing, distribution activities and certain development work and complement I3L in its business process. I3L bears all the significant business and entrepreneurial risks of product acceptability and performance in the market.

8.4. During the appellate proceedings, ld. CIT(A) accepted the contention of the assessee, that foreign AEs can be considered as the tested party. Aggrieved by the order of ld CIT(A), the Revenue is in appeal before the Tribunal.

8.5. Learned DR for the revenue submitted before us that ld. CIT(A) was not justified in accepting the contention of the assessee, that foreign AEs can be considered as the tested party for establishing arm's length price. In case of foreign AEs, accounting year ending is (January to December) 31st December every calendar year whereas in case of Indian entity, the accounting year ending is (April to March) 31st March every fiscal year. Therefore, it is not possible to compare the financial statements of foreign AEs, with Indian entity. If the foreign AEs are selected as tested party then it becomes difficult to find comparable companies for TP analysis. In case of foreign AEs, the revenue recognition method, expenses recognition method, and inventory valuation and recognition method are different therefore comparison of financial data is not possible, hence the foreign AEs should not be selected as a tested party.

8.6. On the other hand, ld Counsel for the assessee defended the order passed by the ld CIT(A).

9. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials brought on record. Before us, ld. Counsel for the assessee at the outset, submitted that this issue is squarely covered by the order of Co-ordinate Bench of ITAT, Kolkata in assessee's own case in ITA No. 2075/Kol/2017 & Ors. Vide order dated 31.01.2020. Ld. Counsel submitted that there are no changes in the fact pattern in the two years before the Hon'ble tribunal vis-à-vis the years in which the order has already been passed. Also, he submitted that there is no change in the position of law on the issue dealt herein.

10. Ld. CIT, DR when confronted with this submission could not bring anything contrary.

11. The findings given by the Co-ordinate Bench of ITAT, Kolkata in assessee's own case (supra) on this issue are extracted below for ready reference:

> "11. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials brought on record. We note that the selection of the tested party depends on the comparative evaluation of the functions performed, assets employed and risks assumed ("FAR profile") by the parties involved in an international transaction. The entity which is the least complex based on the evaluation is adopted as the 'tested party'. We note that based on a detailed FAR profile conducted by the Assessee, the foreign AEs were selected as the tested party for the purpose of a transfer pricing analysis since their FAR profile as marketing and administrative service provider is least complex as compared to I3L which is an entrepreneurial company.
>
> We note that the Ld. TPO in the TP Order (Pages 4-6 of the Transfer Pricing order) has himself acknowledged the fact that I3L(M/s ITC Infotech India Limited) is performing the major functions and AEs merely act as the face of I3L in the respective countries. These observations are even more pertinent to demonstrate that I3L was performing most of the complex functions and was acting as an entrepreneur, therefore I3L should not be the tested party. At this juncture, it is appropriate to go through the findings of Ld CIT(A), which is given below:

"The next major contention raised by the Assessee is on the selection of foreign AE as the 'tested party'. The concept of 'tested party' is the very base of any transfer pricing analysis and it is a well-established principle (upheld by Indian judiciary and international guidance) that the tested party is the one performing lesser functions and carrying lesser level of risks. The Assessee has placed reliance on the following literatures to substantiate the point that the least complex entity is selected as the tested party:

- *United Nation's Practice Manual on Transfer Pricing for Developing Countries, 2013 (Chapter 10- Country Practices- India); (Para 10,4.1.3)*
- *United Nations Practical Manual on Transfer Pricing for Developing Countries, 2017 (Part D- Country ^Practices- India); (Para D.3.2.3)*
- *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010 (OECD TP Guidelines); (Para 3.18)*
- *US TP Regulations (Section 1.482-5 of the Internal Revenue Service (IRC))*

The Assessee has also produced a compendium of various judgments by the higher authorities which have held that the least complex entity should be the tested party ***(including the Kolkata jurisdiction rulings in case of Development Consultants Limited (ITA No. 1591/KOL/2010) and Landis + Gyr Limited (ITA No. 37 and 1623/Kol/2012)).****While the TPO has rejected the adoption of foreign AEs as the 'tested party' in the instant case, he has not brought any specific findings for coming to this conclusion. The TPO has quoted few case laws to reject the foreign AEs of the Assessee as the tested party. I have discussed on the case relied upon by the Assessee a bit later in this order.*

I have gone through the literatures produced by the Assessee on selection of the 'tested party'. After going through the documents, there seems to be no doubt that the entity with the least complex functions should be adopted as the tested party if reliable data for transfer pricing comparison is available. In the instant case,it is clear that the Assessee is performing the more complex functions when compared with the AEs (the functional profile has been confirmed by the Hon'ble High Court of Calcutta and the Jurisdictional ITATs- as mentioned above) and also the reliable information has been produced by the Assessee which has been used to undertake the transfer pricing analysis. Also out of the literature produced before me, I would like to put a special mention on the United Nations Practical Manual on Transfer Pricing for Developing Countries, 2017 (Part D- Country Practices- India) (Para D.3.2.3) which goes to prove that even the Indian tax authorities acknowledge that the tested party should be the least complex entity.

Further, even the TPO in the TP Order (Pages 4-6 of the Transfer Pricing Order) has himself acknowledged the fact that the Assessee is performing the major functions and AEs merely act as the face of the Assessee in the respective countries. These observations are even more pertinent to demonstrate that the Assessee was performing most of the complex functions and was acting as an entrepreneur; therefore the Assessee cannot be the tested party

Coming to the case laws relied upon by the TPO for rejection of foreign AE as the tested party, ***the Hon'ble Delhi ITAT in the case of Ranbaxy Laboratories Ltd. vs ACIT*** *reported in (2016) 68 taxmann.com 322 (Delhi - Trib.) has overruled the earlier ruling in case of Ranbaxy Laboratories Ltd [[2008] 110 ITD 428 (DELHI)] which was relied upon by the Ld. TPO while rejecting overseas entities as the tested party . Further, the Mumbai tribunal in its case of* ***Tata Motors European Technical Center Pic [2016] 66 taxmann.com 10 (Mumbai - Trib.)*** *has also overturned the rulings pronounced in the case of Onward Technologies Limited [[2013] 26 ITR(T) 734 (Mumbai - Trib.)] and Cybertech Systems & Software Limited [[2013] 144 ITD620 (Mumbai - Trib.)] which was relied upon by the TPO in his TP Order. Combined to this, I am also in receipt of the jurisdictional ITAT ruling in the case of* ***Development Consultants Limited (ITA No. 1591/KOL/2010) and Landis + Gyr Limited (ITA No. 37 and 1623/Kol/2012 (supra)*** *which are in favour of the Assessee.*

Judicial jurisprudence suggest that if there are rulings with different opinions on the same issue, then the jurisdictional authorities ruling should be given weightage, Also, if an earlier ruling is ruled down by a later date ruling on the same issue, the latest ruling will get more weightage.

Further, the jurisdictional Kolkata Tribunal in the case of ***Landis + Gyr (supra)*** *has held that " 5.2.11 the concept of overseas tested parties and foreign comparable companies is well recognized and acknowledged by Indian Revenue as could be seen from India's commentary in United Nations Practice Manual on Transfer Pricing for Developing Countries. and further has taken cognizance of the Hon'ble Delhi Tribunal ruling in the case of* ***Ranbaxy Laboratories (supra)*** *wherein the concept of overseas tested parties and foreign companies for determination of ALP has been accepted. Consequently, the Hon'ble Tribunal held that the Ld. TPO's action of "selecting Assessee as the tested party would result in an abnormal outcome in the TP adjustment" and concluded that 5.2.12 ...with regard to correct application of CPM or TNMM, the Associated Enterprises of the Assessee should be selected as the tested party to the transaction, as being the least complex entity. Subsequently an analysis of gross margin by applying either CPM or TNMM retained by AEs should be undertaken for benchmarking the transactions...".*

Therefore this ruling overrules the findings made in the ruling of onward Technologies (supra) which was relied upon by the TPO in the assessee's case and incidentally was also relied upon by the D.R. in the above case of Landis + Gyrbut did not find any favour with the Hon'ble Kolkata Tribunal.

Therefore, for the reasons stated above, I am in agreement with the analysis of the assessee and conclude that the overseas associated enterprise be accepted as the 'tested party' being the least complex of the transacting entity for the year for comparability analysis of international transactions of the assessee."

Having gone through the order of ld CIT(A), we find that there is no infirmity in the order of ld CIT(A) treating the foreign AEs as a tested party."

11.1. In the same decision, Co-ordinate bench, ITAT, Kolkata also considered the functions performed, asset employed and risk assumed i.e. FAR analysis of the assessee vis-à-vis the foreign AEs. After comprehensive FAR analysis, the Co-ordinate Bench arrived at a conclusion that foreign AEs are least complex entities and, therefore, these should be selected as tested party.

11.2. We also note that Ld. TPO has mentioned in his order u/s. 92CA(3) of the Act stating that the assessee is more complex entity and foreign AEs are least complex entities, as reproduced in the order of Ld. CIT(A). This discussion has also been reproduced in the order of the Co-ordinate Bench of ITAT, Kolkata in assessee's own case in para 13.

The conclusion drawn by the Co-ordinate bench after considering the discussion of TPO is reproduced as under:

> *"It is abundantly clear that ld TPO has also stated that subsidiaries act primarily as marketing arm of the assessee and perform administrative services. It is the assessee which is entrusted with the task of performing the non-administrative, core and essential services. Therefore, the ld TPO has himself accepted that assessee is more complex entity and foreign AEs are least complex entity. Considering the factual position narrated above, it is abundantly clear that foreign AEs are least complex entity therefore foreign AEs should be treated as tested parties. That being so, we decline to interfere with the order of Id. C.I.T.(A) in treating foreign AEs as tested party. His order on this issue is ,therefore, upheld and the grounds of appeal of the Revenue are dismissed.*

12. Considering the factual matrix in the present case, we find that there is no change in fact pattern as demonstrated by the Ld. Counsel vis-à-vis the preceding years for which the Co-ordinate bench of ITAT, Kolkata in assessee's own case has already taken a view in favour of the assessee. Moreover, nothing contrary is brought on record to this effect by the ld. CIT, DR. We respectfully follow the said decision and concur with the findings to hold that foreign AEs are least complex entities and therefore, should be treated as tested parties and thus, no interference is called for with the order of Ld. CIT(A) in treating foreign AEs as tested party. Accordingly, grounds raised by the revenue on this issue for both the assessment years are dismissed.

13. The second issue is relating to treatment of expenses incurred on software as revenue or capital which is vide ground no. 2 for AY 2014-15.

13.1. Brief facts are that assessee had incurred following software related expenses in AY 2014-15.

S. No.	Particulars	Amount(In Rs.)	Remarks
1.	Purchase of System Software's enduring in nature – Capitalised as Fixed Assets by the appellant company	3,10,33,816/-	Capitalised by the Appellant Company under "Capitalised Software" of Note 8 of the Audited Annual Accounts – Annexure 3

	Total amount of Systems Software's capitalized by the Appellant Company	**3,10,33,816/-**	
2.	Software related expenditure towards consumables, maintenance, yearly renewal charges, Annual maintenance contracts etc.	10,11,52,263/-	Revenue expenditure incurred on maintenance of softwares and other related expenditure incurred in the normal course of business-duly allowed by the Assessing officer.
3.	Expenditure towards purchase of Application Software – not extending any enduring benefit and having limited useful life.	1,20,36,864/-	Application software's facilitating appellants conduct of business and having limited useful life
	Total "software related expenditure" debited in the Profit and Loss Account by the Appellant company under Schedule 20 of the Audited Annual Accounts – Annexure 4	11,31,89,127/-	

13.2. From the table above, expenditure incurred on purchase of application software amounting to Rs.1,20,36,864/- was treated as capital expenditure by the ld. AO while concluding the assessment as against the claim of the assessee of treating the same as revenue expenditure. Assessee went in appeal before the Ld. CIT(A) and submitted that expenditure incurred on the purchases of application software have not resulted in any enduring benefit to the assessee and have been charged as revenue expenditure in the P&L Account. It was further submitted that these application software have limited useful life and are used as tools of business like any other component or consumable items used for the purpose of earning revenue. Assessee submitted that it has incurred these expenses to fine tune its business operations to enable the running of its business more effectively, efficiently and profitably. It was also submitted that this issue has already been dealt in the assessee's own case for AY 2005-06 and 2006-07, held in favour of the assessee by the Co-ordinate bench of ITAT, Kolkata in its order dated 09.01.2015. It was also submitted by the

assessee that this issue was also raised in AYs 2007-08 to 2013-14 and was deleted by the erstwhile Ld. CIT(A) in the respective years.

13.3. Considering all the submissions made by the assessee, Ld. CIT(A) examined the details of the software expenses incurred by the assessee and disallowed by the Ld. AO after which it was found by him that four software purchases were in the nature of capital assets, details of which is tabulated as under:

Sl. No.	Vendor	Particulars	Amount (Rs.)
1.	Lepton Software Export & Research P. ltd.	Purchase of Google Maps API Premier License	7,86,520
2.	Rabita Software	Purchase of Tableau Desktop Professional License Software	1,42,610
3.	Siemens Enterprise Communications P. ltd.	Purchase of HDX Multipoint Software License	87,440
4.	Value Point Systems P. Ltd.	Purchase of Geo Trust Multi Domain Certificate	1,03,888
		Total	**11,20,458**

13.4. The finding given by the Ld. CIT(A) on this issue is extracted below:

> *"The issue is exactly covered by my erstwhile order passed for AY 2011-12, AY 2012-13 and AY 2013-14. On the issue pertaining to treatment of software expenditure, I have carefully examined the submissions and perused the judicial precedents cited in support of the assessee's contentions. Though the appellant has relied upon a number of decisions, including appellate order for earlier year, treatment of expenditure on software as capital/revenue is essentially a question of facts, which naturally varies from case to case and even from year to year. Expenditure towards purchase of software can be capital or revenue depending on the facts of the circumstances. With that perspective, the details of the software expenses disallowed were examined. It is seen that the software purchase included following items."*

13.5. Ld. Counsel further submitted that this issue is also squarely covered by the decision of Co-ordinate bench of ITAT in assessee's own case for AY 2010-11 in ITA No. 2075/Kol/207 dated 31.01.2020 the relevant finding given by the Co-ordinate bench is extracted below for ready reference:

> *"27. Expenditure incurred on the purchase of the application softwares used exclusively for the purpose of the business of the assessee company amounting to Rs. 55,16,940/- has been charged as revenue expenditure and debited to the Profit and loss account. These application softwares have not resulted in any enduring benefit to the company. Hence the expenditure is not classified as capital expenditure. These were approximately treated as revenue expenditures and were claimed accordingly for the purpose of Income Tax too. These application software, have had limited useful life and are used as tools of business like any other component or consumable item used for the purpose of earning revenue. The assessee company has incurred these application software expenses to fine tune its business operations thereby, enabling the running of its business more effectively, efficiently and profitably. We note that while disallowing the expenditure incurred on purchase of application softwares the Assessing Officer ignored the fact that Application softwares are used by the assessee for the efficient conduct of its business and do not extend any enduring benefit to the assessee company. After doing critical analysis, the ld CIT(A) noticed that software expenses to the tune of Rs. 15,58,281/- is enduring nature and therefore classified them as capital assests. We do not find any infirmity in the order of ld CIT(A), his order on this issue is hereby accepted and grounds of appeal raised by the Revenue are dismissed."*

13.6. On confrontation of these submissions of the Ld. Counsel to the Ld. CIT, DR, nothing contrary was brought on record. Considering the factual matrix of the present case which are similar to the fact based findings given in the preceding assessment years by the Co-ordinate Bench of ITAT, Kolkata in assessee's own case (supra). So, also by considering the critical analysis done by the Ld. CIT(A) who had figured out the software expenses for Rs.11,20,458/- as capital asset, we do not find any infirmity in the order of Ld. CIT(A) on this issue and accordingly, ground raised by the revenue on this issue for AY 2014-15 is dismissed.

14. Taking up the third issue relating to acceptance of segmental accounts for establishing arms length price which is vide ground nos. 4, 5 and 6 for AY 2015-16.

14.1. Ld. Counsel, at the outset, submitted that grounds raised by the revenue on this issue is also squarely covered by the decision of Co-ordinate bench of ITAT, Kolkata in assessee's own case (supra) and there being no change in the factual matrix and the position of law, covers the issue in the present case and ought to be held in favour of

the assessee. On this issue also nothing contrary was brought on record by the ld. CIT, DR. The relevant extracts from the order of the Co-ordinate bench of ITAT, Kolkata on this issue are extracted below:

"20. Summarized ground No. 3 reads as follows

3.*Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) was justified in accepting the segmented accounts for AE for establishing arm's length price. This ground covers ground no. 3 raised by the revenue in A.Y. 2010-11.*

21. The brief facts qua the issue are that during the TPO proceedings the ld TPO ejected the segmental data of ITC Infotech, (USA), Inc ("I2A) and ITC Infotech Limited, UK ("I2B"), on the following premise:

".the segmented data has admittedly been prepared by the assessee which would in all likelihood suit their needs and requirements... ."

22. Aggrieved by the action of the ld TPO, the assessee carried the matter in appeal before ld CIT(A), who has accepted the segmented data/ segmental report observing the following:

"Having carefully considered the observations of the ld. A.O. / TPO and the submissions of the assessee / ld. A.R. of the assessee company, I find that one of the contentions raised by the assessee and the ld. TPO is on the use of the segmental data of the overseas entities by the Ld. TPO for a transfer pricing analysis. The Ld. TPO had rejected the segmental accounts of the overseas entities used by the Assessee for the transfer pricing analysis mentioning that the segmental data which prepared the Assessee, was not audited either by the statutory auditors or the transfer pricing auditors.

On this issue, the Assessee has produced judicial pronouncements before me, wherein the ratio emerges that the segmental accounts used in a transfer pricing analysis need not be audited. The Hon'ble ITAT in ***Lummus Technology Heat Transfer BV [2014] 162 TTJ 263 (Delhi - Trib.)*** *has held that it is not necessary that a computation should be based on segmental accounts in the books of accounts regularly maintained by the assessee and subjected to audit. The Hon'ble ITAT held that the authorities were in error in rejecting the segmental results on the ground that the segmental accounts were not audited and that these segmental accounts were not maintained in the normal course of business. The Hon'ble ITAT also was unhappy with the action of the Ld. TPO for making vague generalizations to the effect that the accounts are manipulated, that allocation basis of expense is unfair and that these accounts conceal true profitability, since the Hon'ble Tribunal found such observations to lack any merits.*

Further, in the case of ***3i Infotech Limited [[2013] 35 taxmann.com 582 (Chennai - Trib.]****, it has been held that it is not open to the Revenue to reject the working prepared by any assessee on the contention that the same has not been audited. During the course of the hearing, the Assessee in good faith has also produced before me self-certification from its CFO that segmental accounts produced are reliable and are captured separately in the accounting system with utmost precision.*

Upon carefully analysis, I find myself agreeable with the contentions of the assessee that the transfer pricing legislation nowhere mandates that segmental accounts for transfer pricing analysis should be audited, The segmental accounts prepared for a

transfer pricing analysis may not necessarily be same as the segmental accounts prepared for any financial statements. In the absence of any mandate that the segmental for transfer pricing should be audited, I am inclined to accept the contention of the Assessee that till the time the reliability of the segmental account is demonstrated, these can be used for a transfer pricing analysis and need not necessarily be" audited. If it is also to be mentioned that the judicial rulings placed in reliance by the assessee-company support its contentions. The Ld. TPO has not brought out any specific finding to indicate that the segmental data of the Assessee-company are not reliable, and therefore liable for rejection, The Assessee before me explained in length how the segmental accounts are captured and the reliability of the same. Also the certification from the CFO of the Assessee, in my considered view contributes enormously to indicate that the segmental accounts are prepared with reliable accounting system in place. With such view of the matter, I am not inclined to agree with the Ld TPO / AO, and hold that the segmental accounts maintained by the Assessee can be used for the transfer pricing analysis as done in the TP Study.

23. *Aggrieved by the order of ld CIT(A), the Revenue is in appeal before us. We have heard both the parties and perused the material available on record. We note the assessee explained before ld TPO in thread bare detail of functional analysis of the transactions and the Ld. TPO has failed to give due cognizance to the essence of the respective transaction. All the transactions are independent in terms of activities, purpose and through binding agreement. The cost of rendering/ receipt of services are also captured separately in the accounting system. In support of the same, the assessee has provided the segmental data of I2A and I2B for transactions with the assessee, the margin of which was benchmarked from arm's length perspective. We have gone through the findings of ld CIT(A) and do not find any infirmity. That being so, we decline to interfere with the order of Id. C.I. T.(A) in deleting the aforesaid additions. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue are dismissed."*

14.2. From the factual position of the present case, where the segmental data of I2A and I2B for transaction with the assessee are placed on record against which the margin of the assessee has been bench marked for its arms length price, respectfully following the findings given by the Co-ordinate Bench in assessee's own case (supra), we do not find any infirmity with the findings given by the Ld. CIT(A) and accordingly, delete the additions made in this respect. Accordingly, grounds taken by the revenue on this issue for AY 2015-16 are dismissed.

15. Coming to the last issue in respect of Transfer Pricing adjustments made by the Ld. TPO and added by the Ld. AO in the assessment for AY 2015-16 in respect of export of software services and receipt of account management charges. On this issue, it is pertinent to note that Transfer Pricing adjustment has been made of Rs.21,25,44,085/- on account of export of software services and payment of Account Management Charges in AY 2015-16. However, similar Transfer Pricing adjustments

have also been made in AY 2014-15 amounting to Rs.26,50,09,400/- for which the revenue is not in appeal before the Tribunal. Further, the Transfer Pricing Adjustments made for AY 2015-16 by the Ld. TPO was of Rs.25,22,83,378/- which was added by the Ld. AO in the assessment order. Subsequently, a rectification was made in respect of mistake relating to the value of exports which resulted into the Transfer Pricing adjustments of Rs.21,25,44,085/- as against Rs.25,22,83,378/- initially made in the assessment order.

15.1. It is noted from the perusal of the order of Ld. AO that the order of Ld. TPO passed u/s. 92CA(3) read with sec. 92C(3) of the Act forms part of the assessment order. Assessee has undertaken following international transactions which have been considered by the Ld. TPO for the purpose of making Transfer Pricing adjustments which is tabulated as under:

Sl. No.	Name of the AE	Nature of transaction	Amount (in Rs.)	Method followed
1.	ITC Infotech Limited UK	Export of software Services	83,68,07,407	Transactional Net Margin Method (TNMM)
2.	ITC Infotech USA Inc	Export of software services	162,63,58,599	Transactional Net Margin Method (TNMM)
3.	Pysix Solutions LLC	Export of software services	1,50,12,144	Cost Plus Method (CPM)
4.	Surya Nepal Private Limited	Export of software services	5,43,97,230	Cost Plus Method (CPM)
5.	British American Tobacco Shared Services	Export of software services	45,27,22,410	Transactional Net Margin Method (TNMM)
6.	ITC Infotech Limited UK	Receipt of Account management services	33,93,71,718	Transactional Net Margin Method (TNMM)
7.	ITC Infotech USA Inc.	Receipt of Account management services	1,29,26,358	Transactional Net Margin Method (TNMM)

15.2. Views of the ld. TPO on the issue under consideration are summarily listed as below:

> *"2. The Ld. TPO's view of the matter is - The assessee in support of the tested party had re-iterated the functional, asset and risk profile of the assessee, ITC Infotech USA Inc. (I2A)· and ITC Infotech UK (12B) and had relied on multiple jurisprudence and international regulations. However no justification was provided in respect of revenue sharing model with I2A and I2B,*

which twisted the transactions in their favour, in spite of the fact, those two AEs undertakes minimal risk compared to the assessee. The claim in support of profitability in respect of transactions with AEs, do not found any reflection in the assessee's audited account, which sadly shows net profit well below the industry average. Further the assessee received management fee from the AEs, which indicates that it has necessary management control over the AEs, which may influence the revenue sharing agreements termed as Account management charges. In spite of this fact, the assessee allowed the AE to reap maximum benefit from any transaction with unrelated foreign entities, through these two companies, without any satisfactory justification. The assessee also failed to produce any prior pricing study or internal analysis, which may influence the execution and continuance of the revenue sharing agreements with it's AEs, in spite of obvious disadvantages to the assessee in respect of such agreements. The subsidiaries, I2A and 12B, act primarily as the marketing arm of the assessee and perform the administrative services. It is the assessee which is entrusted with the task of performing the non-administrative, core & essential services. Meaning thereby the allegedly main task of marketing which was entrusted to the subsidiaries were being performed by the assessee only, from client interaction, identification, to after sale coordination, placing cold calls and involvement of assessee's top management team were being performed by the assessee. These raised serious concerns on the nature of services being actually rendered by the AEs. The assessee was deeply involved in the marketing & administrative services being performed by 12A & 12B·. The' AEs only acted as the face of the assessee in their respective states.

3. However in the functional analysis this function being performed by the assessee has been conveniently omitted and it has been stated that all marketing activities are performed by 12A & I2B. Similarly for mapping the clients, liasioning with customers, client coordination etc. it has been mentioned that only the AEs are performing these functions whereas inside sale services are being provided by the assessee's call center. Hence, the functional analysis undertaken by the assessee was factually incorrect and contrary to the facts on record.

4. The functional analysis undertaken by the assessee suffers from apparent infirmities. Virtually the entire risk is borne by the assessee. Therefore 25% of the total revenue is on the higher side and deserves to be trimmed down to lower levels. The TPO relied on the decision of Cybertech Systems & Software Limited Vs. Asst. CIT (33 taxmann.com 371). Further, reliance was also placed on Delhi Bench of ITAT in case of. Ranbaxy Lab Ltd Vs Addl, CIT CAY 2004-05) wherein the ITAT rejected the assessee's case since it has taken foreign AEs as 'tested parties' and calculated its ALP.

5. Further the financials of the AE$ were prepared following the US & .UK GAAP. which is very different from the Indian GAAP. The method of accounting, allocation of costs, recognition of revenues etc. are differ drastically. In the circumstances the financials prepared as per foreign accounting guidelines cannot be utilized in Indian context. It is further found that both I2A & I2B have substantial related party transactions and therefore the segmental data used for TP analysis is unreliable. In fact in the audited accounts of the UK subsidiary it is clearly mentioned that the related party transactions are not being furnished in terms of exemption provided in the UK accounting guidelines. Under these circumstances, the TPO was unable to verify the data of US & UK company and hence the analysis adopted by the assessee could not be followed.

6. In view of the above cited decisions and the reasons mentioned above; the TPO concluded that further held that foreign AEs i.e. I2A and I2B cannot be used as a 'tested party' under the Indian TP Legislation."

15.3. From the views of the Ld. TPO as noted above, we find that the Transfer Pricing adjustments are primarily on the basis of issues which have already been dealt in these two present appeals in the above paragraphs relating to selection of tested party as foreign AEs and

acceptance of segmental accounting data vis-à-vis entity level data of the foreign AEs. Ld. TPO has rejected the claim of the assessee of taking the tested party as foreign AEs and resorted to taking comparables from the domestic companies. Also, Ld. TPO resorted to the entity level data of the domestic companies taken by him as comparables for the purpose of bench marking done by him in respect of the transfer pricing adjustments.

15.4. The findings and decision given by the Ld. CIT(A) in respect of the transfer pricing adjustment made by the Ld. TPO are extracted as under:

> *"1. I observe that the issue's exactly similar and covered in favour of the appellant by my erstwhile order for AY 2010-11, AY 2011-12, AY 2012-13, AY 2013-14 & AY 2014-15. The facts of the year in consideration is quite identical to the facts of the AY 2005-06 & AY 2006-07 and hence it is to be stated that the appellant- company is well covered by the orders passed in its own case by the Hon'ble Jurisdictional ITAT, High Court, and my erstwhile orders. The Ld. TPO has stated that the foreign AEs has been receiving top management and marketing services as well as inside sales services from the Appellant to conclude that I3L is performing the entire set of marketing functions and limited functions are performed by the foreign AEs without even acknowledging the fact that these transactions were not undertaken by the appellant - company during AY 2015-16. Further, the Ld. TPO has stated that the appellant-company follows revenue sharing model of 25%/75% even though the appellant-company follows a cost plus approach. Thus, the basis on which the Ld. TPO arrived at the conclusion is itself inaccurate and needs to be dismissed.*
>
> *2. The said matter has also been allowed for the AY 2010-11, AY 2011-12, AY 2012-13, AY 2013-14 and AY 2014-15. Therefore, for the reasons stated above, I am in agreement with the analysis of the Appellant and conclude that the overseas associated enterprise be accepted as the 'tested party' being the least complex of the transacting entity and hence the above mentioned grounds stand allowed in entirety.*
>
> Xxxxx
>
> 1. *On careful examination, I observe that this issue is also exactly similar and covered in favour of the appellant by my erstwhile order passed for the Ay 2010-11, AY 2011-12, AY 2012-13, AY 2013-14 and AY 2014-15. The segmental accounts prepared for a transfer pricing analysis may not necessarily be same as the segmental accounts prepared for any financial statements. In the absence of any mandate that the segmental for transfer pricing should be audited (as has been affirmed in various case laws cited*

by the Appellant), I am inclined to accept the contention of the Appellant that till the time the reliability of the segmental account is demonstrated, these can be used for a transfer pricing analysis and need not necessarily be audited.
2. On the ground and contentions of the Appellant pertaining to the comparability analysis, since the foreign AE is accepted as the "tested party" in my aforementioned decision, this ground requires no specific adjudication.
3. Overall, based on the facts and circumstances, and the law applicable, I am of the considered finding that the Ld. AO/TPO was not justified in making a transfer pricing adjustment of Rs.21,25,44,085 and accordingly the same is ordered to be deleted, and the transfer pricing grounds of appeal are fully allowed."

15.5. From the perusal of the findings given by the Ld. CIT(A) and also as submitted by the ld. Counsel in this respect, we note that this issue has been dealt in assessee's own case in AYs 2005-06 and 2006-07 by the Co-ordinate Bench of ITAT, Kolkata (supra) and also by the Ld. CIT(A) in assessee's own case for AY 2010-11 to AY 2014-15. We have also noted above that Transfer Pricing adjustments on this issue has also been made in AY 2014-15. Revenue is in appeal before us for AY 2014-15, but not on this issue. Further, from the 'feasibility of appeal before ITAT report' placed on record in AY 2014-15, we note that no such ground of appeal has been recommended/approved for the transfer pricing adjustment made to Rs.26,50,09,400/- towards export of software services and payment of account management charges. Further, we have already given our findings in respect of the two issues which formed the basis of adopting tested party as foreign AEs and acceptance of segmental accounting data for the purpose of bench marking, in favour of the assessee and against the revenue. Thus, the premise on which Ld. TPO has made the transfer pricing adjustment itself does not stand and the bench marking exercise adopted by the Ld. TPO cannot be upheld. We also note that Ld. CIT(A) has considered the factual matrix as well as the judicial precedents of the preceding years in assessee's own case which are also on same pattern as in the present case and thus, we do not find any reason to interfere with the findings arrived at by the ld. CIT(A) in deleting the transfer pricing adjustment

made by the Ld. TPO. Accordingly, we uphold the findings of the Ld. CIT(A) and dismiss the ground raised by the revenue on this issue.

16. In the result, appeals of the revenue for both the assessment years are dismissed.

Order is pronounced in the open court on 18th October, 2022

Sd/- Sd/-

(RAJPAL YADAV)
VICE PRESIDENT

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 18.10.2022

JD, Sr. P.S.
Copy to:

1. The Appellant:
2. The Respondent.
3. The CIT(A)-22, Kolkata
4. The CIT , Kolkata.
5. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata