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RESERVED ON : 02.04.2026
PRONOUNCED ON: 28.08.2026

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF AUGUST, 2026

PRESENT

THE HON'BLE MR. JUSTICE S.G.PANDIT

AND

THE HON'BLE MR. JUSTICE K. V. ARAVIND

INCOME TAX APPEAL No.10 OF 2011

C/W

INCOME TAX APPEAL No.23 OF 2011

INCOME TAX APPEAL No.24 OF 2011

INCOME TAX APPEAL No.44 OF 2015

INCOME TAX APPEAL No.128 OF 2015

INCOME TAX APPEAL No.469 OF 2015

INCOME TAX APPEAL No.492 OF 2016

INCOME TAX APPEAL No.514 OF 2016

INCOME TAX APPEAL No.884 OF 2017

INCOME TAX APPEAL No.955 OF 2017

INCOME TAX APPEAL No.956 OF 2017

I.T APPEAL CROSS OBJECTION No.1 OF 2018

IN ITA No. 10/2011

BETWEEN:

1. SAP LABS INDIA PRIVATE LIMITED
   HAVING ITS OFFICE AT No.138,
   EXPORT PROMOTION INDUSTRIAL PARK,

WHITEFIELD ROAD, WHITEFIELD,
BANGALORE - 66.

...APPELLANT

(BY SRI. D.D. NAGESHWAR RAO, ADVOCATE)

AND:

1. THE INCOME TAX OFFICER
WARD-12(2), 14/3, 4TH FLOOR,
RASHTOTHANA BHAVAN (OPP. RBI)
NRUPATHUNGA ROAD, BANGALORE- 01

...RESPONDENT

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W.
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 30-08-2010 PASSED IN ITA No.398/BANG/2008, FOR THE ASSESSMENT YEAR 2003-2004, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE IN ITA No.398/BANG/2008, DATED 30-08-2010 (ANNEXURE-A), TO THE EXTENT PRAYED FOR, IN THE INTEREST OF JUSTICE AND EQUITY.

IN ITA No.23/2011

BETWEEN:

1. COMMISSIONER OF INCOME TAX
C R BUILDINGS, (CENTRAL) QUEENS ROAD,
BANGALORE - 560 001

2. ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE 12(3), BANGALORE

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

AND:

1. M/S SAP INDIA PVT LTD
No.138, EXPORT PROMOTION
INDUSTRIAL PARK,
WHITE FIELD,
BANGALORE – 560 066

...RESPONDENT

(BY SRI. D.D. NAGESHWAR RAO, ADVOCATE)

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 30/08/2010 PASSED IN ITA No.418/BANG/2008, FOR THE ASSESSMENT YEAR 2003-04, (ANNEXURE-A) PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, SET ASIDE THE APPELLATE ORDER DATED 30/08/2010 PASSED BY THE ITAT, 'A' BENCH, BANGALORE, IN APPEAL PROCEEDINGS ITA No.418/BANG/2008 (ANNEXURE-A), AS SOUGHT FOR IN THIS APPEAL, IN THE INTEREST OF JUSTICE AND EQUITY.

IN ITA No.24/2011

BETWEEN:

1. COMMISSIONER OF INCOME TAX
C R BUILDINGS, (CENTRAL)
QUEENS ROAD
BANGALORE 560 001

2. ASSISTANT COMMISSIONER
OF INCOME TAX
CIRCLE 12(3), BANGALORE

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W.
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

AND:

1. M/S SAP INDIA PVT LTD
No.138, EXPORT PROMOTION

INDUSTRIAL PARK,
WHITE FIELD,
BANGALORE – 560 066

...RESPONDENT

(BY SRI. D.D. NAGESHWAR RAO, ADVOCATE)

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 30/08/2010 PASSED IN ITA No.398/BANG/2008, FOR THE ASSESSMENT YEAR 2003-04 (ANNEXURE-A), PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, SET ASIDE THE APPELLATE ORDER DATED 30/08/2010 PASSED BY THE ITAT, 'A' BENCH, BANGALORE, IN APPEAL PROCEEDINGS ITA No.398/BANG/2008 (ANNEXURE-A), AS SOUGHT FOR IN THIS APPEAL, IN THE INTEREST OF JUSTICE AND EQUITY.

IN ITA No.44/2015

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX
C R BUILDING, QUEENS ROAD,
BANGALORE – 560 001

2. THE DEPUTY COMMISSIONER
OF INCOME TAX, CIRCLE-11(2)
BANGALORE.

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W.
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

AND:

1. M/S. BEARINGPOINT PROPERTY
SERVICES PRIVATE LIMITED,
(FORMERLY KNOWN AS
BEARINGPOINT BUSINESS
CONSULTING PRIVATE LTD)
SECOND FLOOR, EMBASSY
ICON ANNEX, No.2/1,
INFANTRY ROAD, BANGALORE – 560 001

PAN AACCB9758R

...RESPONDENT

(BY SRI. K.K. CHYTHANYA, SENIOR ADVOCATE FOR
SRI. S SHARATH, ADVOCATE)

THIS ITA / INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 21.08.2014 PASSED IN ITA No.1380/BANG/2012, FOR THE ASSESSMENT YEAR 2008-09 (ANNEXURE-A) PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND / OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT. SET ASIDE THE APPELLATE ORDER DATED 21.08.2014 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL 'B' BENCH, BENGALURU, IN APPEAL PROCEEDINGS No.ITA.No.1380/BANG/2012 FOR ASSESSMENT YEAR 2008-09 ANNEXURE-A AS SOUGHT FOR IN THIS APPEAL AND TO GRANT SUCH OTHER RELIEF AS DEEMED FIT, IN THE INTEREST OF JUSTICE.

IN ITA No.128/2015

BETWEEN:

1. THE COMMISSIONER OF
INCOME TAX-II,
C R BUILDINGS, BANGALORE.

2. THE DEPUTY COMMISSIONER
OF INCOME TAX,
CIRCEL-11(2),
BANGALORE.

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W.
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

AND:

1. M/S. BEARINGPOINT PROPERTY
SERVICES PRIVATE LIMITED
(FORMERLY KNOWN AS

BEARING POINT BUSINESS
CONSULTING PRIVATE LTD.)
SECOND FLOOR, EMBASSY
ICON ANNEX, NO.2/1,
INFANTRY ROAD
BANGALORE 560 001
PAN: AACCB9758R

...RESPONDENT

(BY SRI. K.K. CHYTHANYA, SENIOR ADVOCATE FOR
SRI S. SHARATH, ADVOCATE)

THIS ITA / INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 28/11/2014 PASSED IN ITA No.1380/BANG/2012, FOR THE ASSESSMENT YEAR-2008-09. PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND / OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT. SET ASIDE THE APPELLATE ORDER DATED 28/11/2014 PASSED IN M.P.No.40/BANG/2014 IN IT(TP)A No. 1380/BANG/2012 FOR ASSESSMENT YEAR-2008-09 ANNEXURE-A, BY THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH, BANGALORE AS SOUGHT FOR, IN THE ABOVE CASE.

IN ITA No.469/2015

BETWEEN:

1. PRINCIPAL COMMISSIONER OF
INCOME TAX,
C.R. BUILDING, QUEENS ROAD,
BANGALORE - 560 001.

2. THE DEPUTY COMMISSIONER
OF INCOME TAX, CIRCLE-2(1),
BANGALORE.

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W.
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

AND:

1. M/S. MSOURCE (INDIA) PVT. LTD.,
6TH FLOOR, A BLOCK, BAGMANE,
BAGMANE TECHNOLOGY PARK,
BYRASANDRA, C.V. RAMAN NAGAR,
BANGALORE - 560 093.
PAN: AACCM 2097G.

...RESPONDENT

(BY SRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA / INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:17/04/2015 PASSED IN ITA No.1482/BANG/2010, FOR THE ASSESSMENT YEAR 2006-2007 ANNEXURE-A, PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND / OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT. SET ASIDE THE APPELLATE ORDER DATED: 17/04/2015 PASSED BY THE ITAT, 'B' BENCH, BENGALURU, IN APPEAL PROCEEDINGS No. ITA No. 1482/BANG/2010 FOR ASSESSMENT YEAR 2006-07 ANNEXURE-A, AS SOUGHT FOR IN THIS APPEAL.

IN ITA No.492/2016

BETWEEN:

1. PR COMMISSIONER
OF INCOME TAX-VI,
CENTRAL REVENUE BUILDINGS
QUEENS ROAD,
BANGALORE 560 001

2. ADDITIONAL COMMISSIONER
OF INCOME TAX, RANGE 12,
BENGALURU

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W.
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

<u>AND:</u>

1. M/S. SUBEX LTD
RMZ ECOWORLD
DEVARABISANAHALLI,
OUTER RING ROAD,
BANGALORE 560037
PAN AABCS 9255R

...RESPONDENT

(BY SRI. K.K. CHYTHANYA, SENIOR ADVOCATE FOR
SRI S. SHARATH, ADVOCATE)

THIS ITA / INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 16/03/2016 PASSED IN ITA No.223/BANG/2014, FOR THE ASSESSMENT YEAR 2009-2010 ANNEXURE-A PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND / OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDERS DATED:16/03/2016 THE ITAT, 'B' BENCH, BENGALURU, IN ITA No. 223/BANG/2014 FOR ASSESSMENT YEAR 2009-2010 ANNEXURE-A.

<u>IN ITA No.514/2016</u>

<u>BETWEEN:</u>

1. PR. COMMISSIONER OF INCOME TAX-5
BMTC COMPLEX,
KORAMANGALA, BANGALORE.

2. THE DEPUTY COMMISSIONER OF
INCOME TAX,
CIRCLE-12(2) BENGALURU.

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

<u>AND:</u>

1. M/S. NETT APP INDIA PVT. LTD.,
3RD FLOOR, FAIRWINDS BLOCK
EGL SOFTWARE PARK,
OFF. INTERMEDIATE RING ROAD,

BANGALORE - 560 071
PAN:AABCN, 4063 A

...RESPONDENT

(BY SRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA / INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:11/05/2016 PASSED IN IT(TP)A No.1614/BANG/2014, FOR THE ASSESSMENT YEAR 2009-2010 PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND / OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDER DATED:11/05/2016 PASSED BY THE ITAT, 'B' BENCH, BENGALURU, AS SOUGHT FOR, IN THE RESPONDENT-ASSESSEE'S CASE, IN APPEAL PROCEEDINGS No. IT(TP)A No.1614/BANG/2014.

IN ITA No.884/2017

BETWEEN:

1. PR. COMMISSIONER
OF INCOME TAX (CENTRAL)
C.R. BUILDING, QUEENS ROAD,
BENGALURU-560001

2. DY. COMMISSIONER OF INCOME TAX
CIRCLE-6(1)(2), BMTC COMPLEX,
KORAMANGALA, BENGALURU

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

AND:

1. M/S. SWISS RE GLOBAL
BUSINESS SOLUTIONS INDIA
PRIVATE LIMITED,
(FORMERLY KNOWN AS SWISS
RE SHARED SERVICES (INDIA)
PRIVATE LIMITED)
VASAWANI CENTROPOLIS,
2ND TO 6TH FLOOR, No.21,
LANGFORD ROAD, LANGFORD TOWN,
BANGALORE-560027

...RESPONDENT

(BY SRI. K. MALLAHAR RAO, ADVOCATE)

THIS ITA / INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:13/04/2017 PASSED IN ITA No.2315/BANG/2016, FOR THE ASSESSMENT YEAR 2012-2013 PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND / OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDER DATED:13/04/2017 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH, BENGALURU, IN APPEAL PROCEEDINGS No. ITA No. 2315/BANG/2016 FOR ASSESSMENT YEAR 2012-13, AS SOUGHT FOR IN THIS APPEAL.

IN ITA No.955/2017

BETWEEN:

1. PR. COMMISSIONER OF INCOME TAX-7,
C.R. BUILDINGS,
QUEENS ROAD,
BANGALORE-560 001.

2. DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-12(4)
BANGALORE

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W.
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

AND:

1. M/S. TAVANT TECHNOLOGIES INDIA PVT LTD
No.12, CSRIE-II
GUAVA GARDEN
5TH BLOCK, KORAMANGALA
BANGALORE-560095.
PAN:AABCT3261E.

...RESPONDENT

(BY SRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA / INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:31/05/2017 PASSED IN IT(TP)A No.292/BANG/2014, FOR THE ASSESSMENT YEAR 2007-2008 ANNEXURE-A PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND / OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDER DATED: 31/05/2017 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH, BENGALURU, IN APPEAL PROCEEDINGS IN IT(TP)A No. 292/BANG/2014 FOR ASSESSMENT YEAR 2007-08 VIDE ANNEXURE-A, AS SOUGHT FOR IN THIS APPEAL.

IN ITA No.956/2017

BETWEEN:

1. PR. COMMISSIONER OF
INCOME TAX-7
C.R. BUILDINGS, QUEENS ROAD,
BANGALORE 560 001.

2. DEPUTY COMMISSIONER
OF INCOME TAX,
CIRCLE-12(4), BANGALORE.

...APPELLANTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

AND:

1. M/S. TAVANT TECHNOLOGIES INDIA PVT LTD
No.12, CSRIE-II, GUAVA GARDEN,
5TH BLOCK, KORAMANGALA,
BANGALORE 560095
PAN: AABCT3261E

...RESPONDENT

(BY SRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA / INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 31.05.2017 PASSED IN IT(TP)A No. 1592/BANG/2012, FOR THE ASSESSMENT YEAR 2008-2009, VIDE ANNEXURE-A, PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDER DATED 31.05.2017 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH, BANGALORE, IN APPEAL PROCEEDINGS IN IT[TP]A No.1592/BANG/2012 FOR ASSESSMENT YEAR 2008-2009, VIDE ANNEXURE-A, AS SOUGHT FOR IN THIS APPEAL.

IN ITA.CROB No.1/2018

BETWEEN:

1. M/S. SWISS RE GLOBAL BUSINESS SOLUTIONS
INDIA PRIVATE LIMITED
(FORMERLY KNOWN AS SWISS RE SHARED SERVICES (INDIA) PRIVATE LIMITED),
VASAWANI CENTROPOLIS,
2ND TO 6TH FLOOR,
No.21, LANGFORD ROAD,
BANGALORE - 560027.

...CROSS OBJECTOR

(BY SRI. K. MALLAHAR RAO, ADVOCATE)

AND:

1. PR. COMMISSIONER OF INCOME TAX (CENTRAL)
C.R. BULIDING, QUEENS ROAD,
BENGALURU - 560001.

2. DY. COMMISSIONER OF INCOME TAX
CIRCLE 6(1)(2)
BMTC BUILDING, KORMANGALA,
BENGALURU-560001.

...RESPONDENTS

(BY SRI. N. VENKATARAMAN, ASG A/W
SRI. E. I. SANMATHI, SENIOR STANDING COUNSEL A/W.
SRI. SUSHAL TIWARI & SRI. M. DILIP, STANDING COUNSEL)

THIS ITA.CROB IS FILED UNDER ORDER 41 RULE 22 OF THE CPC, ARISING OUT OF ORDER DATED: 13.04.2017 PASSED IN IT[TP]A NOS. 2315/BANG/2016, FOR THE ASSESSMENT YEAR 2012-2013, VIDE ANNEXURE-A, PRAYING TO DISMISS THE APPEAL FILED BY REVENUE TO ANSWER THE SUBSTANTIAL QUESTION OF LAW IN FAVOUR OF APPELLANT/CROSS OBJECTOR; ALTERNATIVELY ADMIT PRESENT CROSS OBJECTION AND UPHOLD EXCLUSION OF COMPANIES AS COMPARABLES AS HELD THE IMPUGNED ORDER AT ANNEXURE-'A' PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL DATED: 13.04.2017 IN IT(TP)A NOS. 2315/BANG/2016 FOR ASSESSMENT YEAR: 2012-2013 KEEPING IN VIEW ENTIRETY OF FACTS AND LAW ETC.

THESE APPEALS AND CROSS OBJECTION HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, ***K.V. ARAVIND J.,*** DELIVERED THE FOLLOWING:-

CORAM: HON'BLE MR. JUSTICE S.G.PANDIT
and
HON'BLE MR. JUSTICE K. V. ARAVIND

C.A.V. JUDGMENT

(PER: HON'BLE MR. JUSTICE K.V. ARAVIND)

Heard Sri K.K. Chythanya, learned Senior Counsel for Sri S. Sharath, learned counsel; Sri T. Suryanarayana, learned Senior Counsel for Smt. Tanmayee Rajkumar, learned counsel; Sri K.K. Mallahar Rao, learned counsel; Sri D.D. Nageswar Rao, learned counsel for the respective assesses; also heard Sri N. Venkataraman, learned Additional Solicitor General of India (ASG) along with Sri E.I. Sanmathi, learned Senior Standing Counsel along with Sri Sushal Tiwari and Sri M. Dilip, learned Standing Counsel for the revenue.

2. These appeals are filed under Section 260-A of the Income Tax Act, 1961 (for short, 'the Act'). These appeals were admitted to consider the following substantial questions of law:

In ITA No.10/2011

"20.5 Whether the Hon'ble ITAT was right in law in excluding comparable companies with negative margins while holding companies with super normal profits as not comparable with the Appellant? Hinuja & Aftek

20.6 Whether the Hon'ble ITAT was correct in law, in allowing benefit of ± 5 per cent under the proviso to Section 92C(2) by adding 5 per cent to the profit margin of the Appellant instead of applying the same to the arithmetic mean of ALP?

20.7 Whether the Hon'ble ITAT was right in law in excluding comparable companies having margin below 6 per cent and in holding that Function, Assets and Risk analysis does not make out compatibility for comparison?

20.8 Whether the Hon'ble ITAT ought to have made suitable adjustments to the ALP for differences in the risk profile of the comparable companies vis-à-vis the Appellant?

20.9 Whether the Hon'ble ITAT was right in accepting Satyam Computers Limited ("Satyam") as a comparable, despite public knowledge of unreliability and falsification of its audited financial statements?

20.10 Whether the Hon'ble ITAT was right in treating donations as operating in nature and adding the same to the operating cost, and excluding income tax refund from the operating income for the purpose of computing the net margin of the Appellant?"

<u>In ITA No.23/2011 and ITA No.24/2011</u>

"a. "Whether under the facts and circumstances of the case, the tribunal is justified in law in including foreign exchange gain as part of operating revenues even though foreign exchange gain is not releted to the business operations of the company and is dependent on external factors like money supply, inflation, Govt. policy etc.,?

b. "Whether under the facts and circumstances of the case, the tribunal is justified in law in equating business income / sales with operating revenues and thus concluding that foreign exchange gain forms part of operating revenues even when the same is not permissible under law"?

c. "Whether on the facts and circumstances of the case the tribunal is justified in law in concluding that the assessee company is a risk mitigated entity without appreciating the facts of the case that the assessee company is also assuming risks like single customer risk and political country risks, which otherwise are not assumed by the comparable companies selected by the TPO / AO.

d. "Whether on the facts and circumstances of the case tribunal is justified in law in rejecting Hinduja TMT Ltd., and Aftek Infosys Ltd., as a comparable stating that these companies earned super profits without mentioning the bench marked for profitability above which a company can be considered as earning super profits in the software services industry in which the taxpayer is operating"?.

e. "Whether the tribunal is justified in law in rejecting Hinduja TMT Ltd. and Aftek Infosys Pvt. Ltd., as a comparable stating that these companies earned super profits without mentioning any peculiar economic circumstances that resulted so called high / super profits"?

f. "Whether tribunal is right in law in holding that arm's length price adjustment is to be made only after allowing +/-5% from the arithmetic mean price as per the proviso to section 92C(2) even when the price charged by the assessee falls beyond +/-5% from the arithmetic mean price"?.

g. "Whether tribunal is right in law in holding that arm's length price adjustment is to be made only after allowing +/-5% from the arithmetic mean price as per the proviso to section 92C(2) even when they said proviso is amended to clarify the position as it was"?.

h. "Whether the tribunal is right in law in holding that the amended proviso to Section 92C(2) is not applicable to the A.Y.2003-04 as the amendment is made effective from 01-10-2009 even though it is a clarificatory amendment as evidenced by Memorandum to the Finance Bill (2) of 2009"?.

i. "Whether the tribunal erred in rejecting Geometric Software Solutions Co. Ltd., as a comparable, without giving any valid reasons and also when the company is functionally similar to the assessee"?."

ITA No.44/2015

"(1) "Whether, the Tribunal, on the facts and in the circumstances of the case was right in excluding Lucid Software Ltd.. Celestial Labs Ltd., and KALS Information Systems Ltd.. Avani Cincom Technology Ltd., Thirdwor Solutions Ltd., Persistent Systems Ltd., Quintegra Solutions Ltd., Softsel India Ltd., Tata Elxsi Ltd.. Infosys Ltd and Wipro Ltd from the list of comparables holding that they are functionally different without appreciating that the comparables satisfy all the qualitative and quantitative filters applied by the TPO and that selection of comparables in a case depends on assessee specific FAR analysis?"

(2) "Whether, the Tribunal, on the facts and in the circumstances of the case was right in excluding Lucid Software Ltd., Celestial Labs Ltd., and KALS Information Systems Ltd., Avani Cincom Technology Ltd., Thirdware Solutions Ltd., Persistent Systems Ltd., Quintegra Solutions Ltd., Softsel India Ltd., Tata Elxsi Ltd., Infosys Ltd and Wipro Ltd by relying on the decision of the Bangalore Tribunal in the case of 3DPLM Software solutions Ltd., and not deciding the selection of the comparables on the basis of specific facts brought on record by the TPO?"

3) "Whether the Hon'ble Tribunal is justified in directing the AO to recomputed the deduction under section 10A after reducing an amount of Rs.1,26,19,649/- incurred on telecommunication expenses, insurance and traveling expenses incurred in foreign currency from the total turnover also, without appreciating that there is no provision in section 10A that such expenses should be reduced from the total turnover, as clause (iv) of the Explanation to section 10A provides that such expenses are to be reduced only from the export turnover ?"

(4) "Whether the Tribunal was justified, on the facts and in the circumstances of the case, in allowing relief to the assessee relying on the decision of the Hon'ble High Court, which has not reached its finality and a SLP has been filed against such order on this issue in the case of Tata Elxsi Ltd 349 ITR 98?""

ITA No.128/2015

"(1) "Whether, the Tribunal, on the facts and in the circumstances of the case was right in excluding M/s.e-Zest Solutions Ltd., from the list of comparables holding that this company is functionally different without appreciating that the comparable satisfy all the qualitative and quantitative filters applied by the TPO and that selection of comparable in a case depends on assessee specific FAR analysis?"

(2) "Whether, the Tribunal, on the facts and in the circumstances of the case was right in excluding M/s. e-Zest Solutions Ltd., by relying on the decision of the Bangalore Tribunal in the case of 3DPLM Software Solutions Ltd., and not deciding the selection of the comparable on the basis of specific facts brought on record by the TPO?"

(3) "Whether, the Tribunal, on the facts and in the circumstances of the case was right in holding that foreign exchange loss / gain is operating in nature without ascertaining the nexus of the forex gain / loss with the business activity of the taxpayer and without appreciating that such loss /gain though attributable to the operating activity is not derived from the operating activity" and;

(4) "Whether, the Tribunal, on the facts and in the circumstances of the case was right in concluding that forex gain / loss are to be treated as operating in nature without appreciating that though they may be incidental to the operating activity, they cannot be deemed as operating in nature since, they are not critical to operational activities of the business conducted by the taxpayer?"."

In ITA No.469/2015

“(2)"Whether on the facts and circumstances of the case, the Tribunal has erred in directing to include forex gain / loss as part of operating revenue without ascertaining the nexus with the business activity of the taxpayer?"”

In ITA No.492/2016

“(1)"Whether on the facts and in the circumstances of the case, the is right in directing the assessing authority to include the foreign exchange fluctuation loss or gain as part of the operating income / loss without ascertaining the nexus with the business activity and even when the same cannot be deemed as operating in nature, since they are not critical to operationally activities of the business conducted by the assessee?"

(2) "Whether on the facts and in the circumstances of the case, the Tribunal is right in directing the TPO to exclude both M/s.Bodhtree Consulting Ltd and Infosys Ltd., as comparables by holding that the said companies are functionally different from the assessee - company even when the said comparables satisfy all the qualitative and quantitative filters applied by the TPO and the Tribunal has selectively applied the modified qualitative filter to only few comparables challenged by the assessee?"

(3) "Whether on the facts and in the circumstances of the case, the Tribunal is right in allowing the market loss in respect of assessee's SEZ units by erroneously holding that the market loss is neither speculative nor contingent in nature when the said market loss is not allowable as per CBDT Instruction No.3/2010 dated: 20-03-2010 as actual losses are allowable as non-speculative only if the transactions qualify as eligible derivative transactions under clause (d) of proviso to section 43(5) of the Act?"

(4) "Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that the assessee's claim for loss on account of forward contracts in Forex derivatives of Rs.5,88,66,157/- and

setting it off against forex gain from the other component is allowable when the assessee is not falling under the category of 'engaged in eligible transactions' in respect of trading in derivatives as envisaged in clause (ac) of section 2 of the Securities Contracts (Regulations) Act, 1965, carried out in recognised Stock Exchange and further the transaction does not fall under the definition 'speculative transaction' provided in section 43(5) of the Act?"

(5) "Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that section 10A is an exemption section although sections 10A and 10B as substituted by Finance Act, 2000, provide for 'deduction' of the profits and gains derived from the export of articles, eventhough it is placed in Chapter III, section 10A begins with sentence' subject to the provisions of this section, the deduction ......'?"

In ITA No.514/2016

"(2) "Whether on the facts and in the circumstances of the case, the Tribunal was right in excluding comparables such as Accentia Technologies Ltd, Cosmic Global Ltd and Eclerx Services as comparables by following its earlier decisions eventhough the said companies are functionally similar and the decisions relied upon by the Tribunal have not reached finality?"

(3) "Whether on the facts and in the circumstances of the case, the Tribunal was right in excluding comparables such as Tata Elaxy Ltd, Infosys Technologies Ltd, as comparables by following its earlier decisions eventhough the Transfer Pricing Officer has properly chosen the comparables since all the required tests are satisfied in the case of the assessee ?"

(4) "Whether on the facts and in the circumstances of the case, the Tribunal was right in directing the AO / TPO to give working capital adjustments after considering the adjustments of the assessee as well as after exclusion of the companies as directed by it by following the decisions in the case of M/s.Citrix Research and Development India Pvt. Ltd., even though the said decision has not reached finality ?""

In ITA No.884/2017 c/w. ITA Crob.1/2018

""Whether on the facts and in the circumstances of the case, the Tribunal was right in excluding comparable's namely, M/s, Universal Print Systems Ltd, Informed Technologies India Ltd, Infosys BPO Ltd, M/s.Microgenetics Systems Ltd, TCS E-Serve Ltd and BNR Udyog Ltd contrary to its own earlier decisions in cases of M/s. Societe General Global Solution Centre Pvt.Ltd and also in case of Vmoksha Technologies Pvt.Ltd and all the required tests were satisfied in case of the comparable's chosen by TPO"?"

<u>ITA Crob.1/2018</u>

"a) Whether Hon'ble Tribunal order can be said to be perverse to the extent it does not adjudicate upon functional comparability and other objections raised with respect to the exclusion of Universal Print System Limited (segmental), Infosys BPO Limited, TCS E-Serve Limited and BNR Udyog Ltd from final list of comparables,?

b) Whether Hon'ble Tribunal erred in not adjudicating upon exclusion of Excel Infoways Limited (segmental) from final list of comparables on the basis of functional dissimilarity, exceptional year of operations and failing filter applied by the Ld. TPO himself?"

<u>In ITA No.955/2017 and In ITA No.956/2017</u>

"1)"Whether on the facts and in the circumstances of the case, the Tribunal is right in law in directing the assessing authority or TPO The Tribunal also gives relief to assessee by directing assessing authority/transfer pricing officer to adopt RPT filter of 15%"?.

(2) "Whether on the facts and in the circumstances of the case, the Tribunal is right in law in excluding certain comparables on the basis of functional dissimilarity even when the assessing authority has

applied qualitative and quantitative tests and the Tribunal failed to appreciate the FAR analysis brought on record by the TPO?"”

A. <u>GENESIS OF THE DISPUTE:</u>

3. The assessee filed the return of income, and the same was selected for scrutiny assessment based on the disclosures made by the assessee and the transfer pricing study furnished by the assessee in respect of the transactions with the Associated Enterprises (AE). The Assessing Officer (AO) referred the matter to the Transfer Pricing Officer (TPO) for determination of the Arm's Length Price (ALP). The TPO, upon considering the transfer pricing study and determining the ALP by applying various prescribed filters, made adjustments to the ALP.

3.1 The AO, giving effect to the ALP determined by the TPO, passed a draft assessment order. The draft assessment order was forwarded to the assessee incorporating the adjustments made by the TPO. The assessee had the option either to accept the draft assessment order or to file objections before the Dispute Resolution Panel (DRP). If the draft assessment order was accepted, the assessee had the remedy of filing an appeal before the Commissioner of Income Tax (Appeals). Where objections were filed, the DRP, upon considering the objections, issued necessary directions to the AO. The directions included variations in the transfer pricing study and the determination of the ALP. The AO, by giving effect to the directions issued by the DRP, passed the final assessment order in conformity with the said directions.

3.2 Against the directions of the DRP, the determination of the ALP by the TPO, and the final assessment order, the assessee exercised the remedy of filing an appeal before the Tribunal. The Tribunal determined the correctness or otherwise of the ALP and also directed appropriate adjustments. Against the order passed by the Tribunal, an appeal is provided under Section 260-A of the Act at the instance of either the Revenue or the assessee.

3.3 The assessee and the Revenue preferred appeals before this Court. These appeals were decided by this Court on:

SL. NO.	CASE NO.	DECIDED ON
1.	ITA 10/2011	09.07.2018

2.	ITA 23/2011	09.07.2018
3.	ITA 24/2011	09.07.2018
4.	ITA 44/2015	16.07.2018
5.	ITA 128/2015	16.07.2018
6.	ITA 469/2015	19.07.2018
7.	ITA 492/2016	01.10.2021
8.	ITA 514/2016	28.06.2018
9.	ITA 884/2017 c/w. ITA Crob.1/2018	26.06.2018 / 14.08.2018
10.	ITA 955/2017	28.08.2018
11.	ITA 956/2017	28.08.2018

3.4 The said judgments were carried in appeal by the assessee/Revenue before the Hon'ble Supreme Court. The Hon'ble Supreme Court, in the case of ***SAP Labs India (P) Ltd. v. Income Tax Officer (and other appeals)***, ***[2023] 454 ITR 121 (SC) / [2023] 149 taxmann.com 327 (SC)***, remitted the matters to the High Court for fresh consideration with a direction to decide and dispose of the appeals afresh in the light of the observations made therein.

3.5 The Hon'ble Supreme Court directed the High Court to examine, in each case, whether, while determining the Arm's Length Price, the provisions of the Act and the Rules governing transfer pricing had been duly followed and whether the findings recorded by the Tribunal in determining the ALP were perverse. For the sake of convenience, the relevant paragraphs of the judgment are extracted below:

> *"… Therefore, the short question which is posed for the consideration of this Court is, whether in every case where the Tribunal determines the arm's length price, the same shall attain finality and the High Court is precluded from considering the determination of the arm's length price determined by the Tribunal, in exercise of powers under section 260A of the Act?*
>
> ***6**. While determining the aforesaid issue, the relevant provisions for determining the arm's length price under the IT Act are required to be referred to.*
>
> *Section 92-C which is relevant, for the purpose of determining ALP inter alia, reads as follows:*
>
> > *"92C. (1) The arm's length price in relation to an international transaction [or specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely : —*
> >
> > *(a) comparable uncontrolled price method;*
> > *(b) resale price method;*
> > *(c) cost plus method;*
> > *(d) profit split method;*
> > *(e) transactional net margin method;*
> > *(f) such other method as may be prescribed by the Board.*
> >
> > *(2) The most appropriate method referred to in sub section (1) shall be applied, for determination*

of arm's length price, in the manner as may be prescribed:

***Provided** that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:*

** ** **

(3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—

(a) the price charged or paid in an international transaction [or specified domestic transaction] has not been determined in accordance with sub-sections (1) and (2); or

(b) any information and document relating to an international transaction [or specified domestic transaction] have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or

(c) the information or data used in computation of the arm's length price is not reliable or correct; or

(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub section (3) of section 92D, the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction [or specified domestic transaction] in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:

***Provided** that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's* *length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer."*

20. Section 92C(1) thus visualizes determination of the "arms-length price" (ALP) by any of five enumerated methods, "being the most appropriate method", having regard to the "nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the board may prescribe, namely (a) comparable uncontrolled price method, (b) resale price method, (c) cost + method, (d) profit split method, (e) transactional net margin method, (f) any such other method as may be prescribed by the board. Where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be arithmetical mean of such prices."

21. Rule 10B of the Rules prescribes the determination of arm's length price under section 92C. The first step in all methods is evaluation of differences between the international transaction undertaken with the "unrelated enterprise performing the comparable functions" in similar circumstances. Rule 10B of the Income-tax Rules inter alia, provides for various methods for determination of the arm's length price. Rule 10B(1)(e) prescribes the "transactional net margin method" (TNMM) with which the present case is concerned. Rule 10B(1)(e) (i) is as under:

> *"10B. (1) Determination of arm's length price under section 92C:—*
> ** ** **
>
> *(e) transactional net margin method, by which,—*
> *(i) the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed*

by the enterprise or having regard to any other relevant base."

***7**. Therefore, while determining the arm's length price, the Tribunal has to follow the guidelines stipulated under Chapter X of the IT Act, namely, Sections 92, 92A to 92CA, 92D, 92E and 92F of the Act and Rules 10A to 10E of the Rules. Any determination of the arm's length price under Chapter X de hors the relevant provisions of the guidelines, referred to hereinabove, can be considered as perverse and it may be considered as a substantial question of law as perversity itself can be said to be a substantial question of law. Therefore, there cannot be any absolute proposition of law that in all cases where the Tribunal has determined the arm's length price the same is final and cannot be the subject matter of scrutiny by the High Court in an appeal under section 260A of the IT Act. When the determination of the arm's length price is challenged before the High Court, it is always open for the High Court to consider and examine whether the arm's length price has been determined while taking into consideration the relevant guidelines under the Act and the Rules. Even the High Court can also examine the question of comparability of two companies or selection of filters and examine whether the same is done judiciously and on the basis of the relevant material/evidence on record. The High Court can also examine whether the comparable transactions have been taken into consideration properly or not, i.e., to the extent non-comparable transactions are considered as comparable transactions or not. Therefore, the view taken by the Karnataka High Court in the case of Softbrands India (P.) Ltd. that in the transfer pricing matters, the determination of the arm's length price by the Tribunal is final and cannot be subject matter of scrutiny under section 260A of the IT Act cannot be accepted.*

***8**. Thus, in each case, the High Court should examine whether the guidelines laid down in the Act and the Rules are followed while determining the arm's length price. Therefore, we are of the opinion that the absolute proposition of law laid down by the Karnataka High Court in the case of Softbrands India (P.) ltd. (supra) that in the matter of transfer pricing, determination of the arm's length price by the Tribunal shall be final and* *cannot be subject matter of scrutiny and the High Court is precluded from examining the correctness of the determination of the arm's length price by the Tribunal in an appeal under section 260A of the IT Act on the ground that it cannot be said to be raising a substantial question of law cannot be accepted. As observed hereinabove, within the parameters of section 260A of the IT Act in an appeal challenging the determination of the arm's length price, it is always open for the High Court to examine in each case whether while determining the arm's length price, the guidelines laid down under the Act and the Rules, referred to hereinabove, are followed or not and whether the determination of the arm's length price and the findings recorded by the Tribunal while determining the arm's length price are perverse or not.*

***9**. In view of the above, the impugned judgments and orders passed by the High Court dismissing the Revenue's appeals and even the appeals preferred by the assessees are required to be quashed and set aside and the matters are required to be remitted back to the concerned High Courts to decide and dispose of the respective appeals afresh in light of the observations made hereinabove and examine in each and every case whether the guidelines laid down under the Act and the Rules, referred to hereinabove, are followed while determining the arm's length price by the Tribunal or not and to that extent whether the findings recorded by the Tribunal while determining the arm's length price are perverse or not.*

***10**. In view of the above and for the reasons stated above, all these appeals are allowed. The impugned judgments and orders passed by the respective High Courts are hereby quashed and set aside. The matters are remitted back to the respective High Courts to decide and dispose of the appeals afresh in light of the observations made hereinabove and to examine whether in each case while determining the arm's length price the guidelines laid down under the Act and the Rules, referred to hereinabove, are followed or not and whether the findings recorded by the Tribunal while determining the arm's length price are perverse or not. The aforesaid exercise be completed, preferable within a period of nine months from the date of receipt of the* *present order by the respective High Courts. It is specifically observed that we have not entered into the merits of the cases at all and we have not expressed anything on the determination of the arm's length price in case of respective assessees, either in favour of the assessees or in favour of the Revenue. It is ultimately for the concerned High Court to take a fresh decision, as observed hereinabove."*

3.6 In the consequence of the remand, these appeals are before us. The issues involved in all these appeals largely pertain to the determination of the Arm's Length Price by the Transfer Pricing Officer.

B. <u>THE RIVAL CONTENTIONS:</u>

4. Sri N. Venkataraman, learned Additional Solicitor General of India (ASG), appearing for the Revenue, made the following submissions:

4.1 The concept of transfer pricing was introduced to curb tax avoidance arising from the increasing participation of multinational groups in economic activities, which gave rise to complex issues relating to transactions between two or more enterprises belonging to the same multinational group. The transfer pricing regime became necessary on account of the control exercised over the business activities of such enterprises by multinational groups, which could manipulate the prices charged and paid in intra-group transactions, thereby leading to erosion of tax revenues.

4.2 With reference to the provisions of Chapter X of the Act, the primary onus of preparing and furnishing the transfer pricing study, based on the characterization of the assessee, a fair presentation of Functions, Assets and Risks (FAR) analysis, and a truthful preparation of segmental margins, rests upon the assessee. The burden is on the assessee to furnish the transfer pricing study report based on correct facts after conducting a proper and quality transfer pricing analysis. The obligation to maintain the requisite data and to justify the correctness of the analysis is on the assessee and cannot, under any circumstances, shift to the Revenue, as held by the Tribunal.

4.3 Where the transfer pricing study and the determination of the ALP are found to be inconsistent with the methodology prescribed under the Act and Rule 10B of the Income Tax Rules, 1962 (for short 'the Rules'), it is incumbent upon the TPO to undertake a fresh transfer pricing analysis in accordance with the prescribed provisions. For the purpose of determining the ALP, the comparability analysis may appropriately be carried out at the entity or enterprise level wherever the facts and circumstances so warrant.

4.4 In consonance with Rule 10D of the Rules, the assessee is required to maintain the prescribed information and documents in respect of international transactions entered into by it, and that the transfer pricing study must conform to such information and documents. Maintenance of such information and documents is of paramount importance since the entire transfer pricing study is data-driven. The transfer pricing study prepared by the assessee should strictly comply with all the requirements contemplated under Rule 10D.

4.5 With reference to Rule 10E of the Rules, particulars not disclosed in Form No. 3CEB as prescribed under the Rules cannot subsequently be altered. Unless the transfer pricing study conforms to the statutory provisions and the Rules, the interference by the TPO in undertaking an independent transfer pricing analysis on the basis of the available data is fully justified.

4.6 The amendment introduced by the Finance Act, 2012, by insertion of sub-section (2A) to Section 92C, is retrospective in nature and is applicable to all pending cases.

4.7 In the case of international transactions, foreign exchange gain or loss cannot be treated as a relevant factor for determining the ALP unless such gain or loss is inextricably linked to the international transaction itself. With reference to Rule 10B, the operating expenses or losses arising on account of foreign exchange fluctuation, as well as operating revenue arising on account of foreign currency fluctuation, are liable to be excluded from the operating cost or operating revenue, as the case may be. It is submitted that the character of foreign exchange gain or loss, whether operating or non-operating, depends upon its functional nexus with the business activity.

4.8 The working capital adjustment is permissible only for neutralizing the impact of differences in the working capital levels between the tested party and the comparable uncontrolled companies and only to the extent contemplated under Rule 10B(3). The burden lies upon the assessee to establish the necessity for such adjustment by demonstrating the existence of material differences in working capital levels, the direct and quantifiable impact of such differences on the operating margins, and that the proposed adjustment is based on reliable data.

4.9 With reference to the distinction between controlled and uncontrolled transactions, the Related Party Transaction Filter is merely a preliminary screening tool intended to reduce a large universe of potential comparables to a smaller and manageable set. The determination of whether an enterprise is controlled or uncontrolled is an independent exercise to be undertaken by both the assessee and the TPO with reference to the tests prescribed under Section 92A of the Act. The application of a rigid 15% RPT Filter is incorrect and that the filter should be applied in a flexible and pragmatic manner.

4.10 While selecting comparables, once the requirements of Rule 10B are satisfied, the size or turnover of the comparable company does not, by itself, alter the profit margin and, therefore, the turnover of the comparable company becomes immaterial.

4.11 The Tribunal cannot permit the assessee to introduce new comparables or seek inclusion or exclusion of comparables in the absence of the relevant particulars having been disclosed in Form No. 3CEB, as such a course would deprive the TPO of the opportunity to examine the same.

4.12 While directing inclusion or exclusion of any comparable, the Tribunal must satisfy itself that the prescribed statutory requirements governing the selection of comparables are fulfilled, failing which the mandate of Rule 10B would remain unfulfilled. The determination of the ALP is based upon the financial data of the comparable companies for the relevant previous year. If the inclusion or exclusion of any comparable by the Tribunal, whether in the case of the assessee or in any other case, results in an outcome contrary to the requirements of Rule 10B, the same would lead to an absurd result.

4.13 Any procedural infirmity in the consideration of inclusion or exclusion of comparables by the Tribunal, or any violation of the statutory provisions governing such exercise, would render the findings of fact perverse, thereby giving rise to a substantial question of law. Once perversity is demonstrable from the order of the Tribunal, the specific pleadings or independent demonstration of perversity become unnecessary, as this Court is empowered to frame such substantial question of law in exercise of its jurisdiction under Section 260-A of the Act.

5. Sri K.K. Chythanya, learned Senior Counsel appearing for the assessee, made the following submissions:

5.1 The selection of comparables and the choice of filters are essentially fact-based exercises and do not give rise to a substantial question of law unless perversity is pleaded and established. In the absence of the Revenue specifically contending that the findings recorded by the Tribunal are perverse and demonstrating the same, the findings of the Tribunal continue to remain findings of fact. The questions raised by the Revenue do not even remotely plead perversity so as to constitute a substantial question of law.

5.2 As held by the Hon'ble Supreme Court in ***SAP Labs India (P) Ltd.*** (*supra*), the High Court is required to examine whether the provisions of the Act and the Rules governing transfer pricing have been followed and whether the findings recorded by the Tribunal are perverse. In the present appeals filed by the Revenue, the substantial questions of law do not even suggest any violation of the provisions of the Act or the Rules in the course of selection of comparables or application of filters. Mere bald assertions that the findings recorded by the Tribunal are incorrect, are insufficient to give rise to a substantial question of law on the ground of perversity.

5.3 The concept of transfer pricing is to determine the notional profit in the hands of the assessee. Therefore, where the Revenue seeks to disturb the transfer pricing study undertaken by the assessee, it must exercise greater caution and strictly adhere to the provisions of the Act and the Rules while undertaking such exercise through the TPO. Transfer pricing is not an exact science but is a fact-based exercise involving estimation. In such a data-driven exercise, a reasonable degree of tolerance is implicit and ought to be recognised. The object of transfer pricing is only to benchmark the price charged by the assessee to its Associated Enterprises (AE) with the ALP.

5.4 There is no estoppel preventing the assessee from introducing new comparables before the Tribunal. The selection of comparables by the assessee is initially based upon the database then available. However, at a later stage, either before the TPO or before the Tribunal, better comparables may become available on account of updated data. Such availability of better and updated data should not preclude the inclusion or exclusion of comparables at the appellate stage, having regard to the object of transfer pricing, namely, benchmarking the price. Whenever new comparables are sought to be included or excluded before the Tribunal, the Tribunal either decides the issue based on precedent relating to such comparables or remands the matter to the TPO for fresh determination of the ALP. In either event, no prejudice is caused to the Revenue.

5.5 With reference to the proviso to Rule 10B(5), the Rule permits the TPO to use subsequent data which was not available as on the date of filing of the return, and the same principle should equally enure to the benefit of the assessee. In the absence of such flexibility, it would result in collection of tax otherwise than in accordance with law, contrary to Article 265 of the Constitution of India.

5.6 Section 92C mandates determination of the ALP by the TPO based on the transfer pricing study furnished by the assessee. Sub-section (3) of Section 92C empowers the TPO to reject the ALP determined by the assessee and undertake a fresh transfer pricing analysis. During such exercise, it is equally permissible for the assessee to seek exclusion of companies selected by the TPO. Where the transfer pricing study prepared by the assessee is under consideration, the burden is undoubtedly on the assessee to establish its correctness before the TPO or the Tribunal. However, once the transfer pricing study of the assessee is rejected and a fresh transfer pricing analysis is undertaken by the TPO, the burden shifts to the TPO to justify such analysis. The Revenue has incorrectly understood the Tribunal's findings as placing the entire burden upon the Revenue. Since the transfer pricing analysis undertaken by the TPO is itself under challenge before the Tribunal, the burden necessarily remains upon the Revenue to justify its correctness.

5.7 The exercise of determining comparability commences with a proper Functional, Assets and Risks (FAR) analysis. Once the threshold of a proper FAR analysis is crossed and a company is found either suitable or unsuitable as a comparable, the findings recorded in another case relating to the same comparable can legitimately be applied, since the qualitative characteristics of such comparable company ordinarily remain unchanged even if examined in different cases.

5.8 The transfer pricing study undertaken by the assessee is often disturbed by the TPO by adopting a standard set of comparables across different assessees without carrying out an independent FAR analysis. Year after year, the same set of companies engaged in software development services is adopted across different assessees merely to alter the ALP determined by the assessee, which demonstrates non-application of mind by the TPO. Such adoption of a standard set of comparables, without an independent comparability analysis, is contrary to Rule 10B of the Rules.

5.9 The foreign exchange gain or loss, where directly linked to business operations, constitutes an operating item. Foreign exchange gain or loss arising from export or import transactions, having a direct nexus with the business operations, is incidental to such operations and therefore forms part of the operating revenue or operating expenditure, as the case may be. Once such gain or loss is inextricably linked with the business operations, it is "derived from" the business and cannot merely be regarded as "attributable to" the business.

5.10 The Safe Harbour Rules do not override the provisions of Rule 10B of the Rules.

5.11 With regard to the Related Party Transaction (RPT) Filter, different thresholds may be applied depending upon the availability of reliable comparables. Where a sufficient number of reliable comparables are available by applying a 15% RPT Filter, adoption of a higher threshold would be inappropriate. A lower RPT threshold provides a better benchmark since the influence of related party transactions on the profitability of the comparable companies is comparatively lower. A 25% RPT Filter may be resorted to only where an adequate number of comparables satisfying a lower RPT threshold are not available.

5.12 Large companies possess significant brand value, greater bargaining power, valuable Intellectual Property Rights (IPRs), and the ability to command higher margins, all of which materially influence their profitability. Therefore, the size of the comparable company assumes considerable significance in comparability analysis, as larger companies enjoy several advantages, including economies of scale, competitive pricing capabilities, a larger workforce, and comparatively lower vulnerability to market competition and fluctuations. The size of the comparable company should therefore remain within reasonable tolerance limits. The Tribunal rightly adopted an upper turnover filter of Rs.200 crores while considering companies having turnover between Rs.1 crore and Rs.200 crores. The said turnover filter is based on a rational and logical classification evolved by the expert Tribunal. In the absence of any statutory prohibition, such a view cannot be characterised as perverse so as to give rise to a substantial question of law.

6. Sri T. Suryanarayana, learned Senior Counsel, in addition to the submissions advanced by Sri K.K. Chythanya, learned Senior Counsel for the assessee, made the following submissions:

6.1 The computation of the ALP, the selection of uncontrolled comparables, the application of appropriate filters where exact comparables are not available, the determination of the ALP, and the computation of the arithmetic mean are all matters of estimation based on data. Consequently, the findings recorded by the Tribunal on such issues remain findings of fact unless a specific violation of any provision of the Act or the Rules is pleaded and demonstrated so as to give rise to a substantial question of law for consideration by this Court.

6.2 In the absence of any demonstrated violation of the provisions of the Act or the Rules in the process of selection of comparables, whether by inclusion or exclusion, application of filters, determination of the ALP, or consideration of various business segments, the order of the Tribunal cannot be said to be perverse so as to give rise to a substantial question of law requiring consideration by this Court.

6.3 The determination of the ALP is essentially a fact and data-driven exercise and not one governed by any scientific formula. Therefore, no uniform or standard yardstick can be prescribed by this Court for such determination.

7. Sri D.D. Nageshwar Rao, learned counsel appearing for the assessee, made the following submissions:

7.1 When the findings recorded by the Tribunal are fact-based, and the Tribunal is the final fact-finding authority, every erroneous finding of fact does not amount to perversity unless the same is specifically pleaded and demonstrated before the Court. In the appeals filed by the Revenue, there is no such pleading, nor has any perversity been demonstrated by the Revenue.

7.2 Even as per the judgment of the Coordinate Bench of this Court in ***Pr. CIT v. Softbrands India (P.) Ltd. [(2018) 406 ITR 513 (Kar)]***, the High Court is required to examine whether the provisions of the Act and the Rules governing transfer pricing have been complied with. Unless any violation of the provisions of the Act or the Rules is demonstrated, the substantial questions of law raised by the Revenue in the memorandum of appeal continue to remain questions of fact. A mere error in a finding of fact is insufficient to give rise to a substantial question of law warranting interference by this Court.

7.3 No further guidelines are required to be laid down, as the issues have already been considered by other High Courts and, in any event, are essentially fact-based.

7.4 Once the TPO rejects the transfer pricing study furnished by the assessee, the TPO is required to undertake an independent and fair analysis. Since the TPO substitutes the transfer pricing study prepared by the assessee with his own analysis, the TPO also assumes the corresponding responsibility of maintaining and relying upon the information and documentation forming the basis of the transfer pricing analysis undertaken by him.

8. We have heard the learned counsel for the respective parties and perused the material placed on record.

C. THE LEGISLATIVE SCHEME

9. Before proceeding to examine the questions arising in the individual appeals, this Court finds it necessary to examine the scope and ambit of the provisions contained in Chapter X of the Income-tax Act, 1961, namely, Sections 92, 92A to 92CA, 92D, 92E, and 92F of the Act, together with Rules 10A to 10E of the

Income-tax Rules, 1962. For the sake of convenience, the relevant provisions are extracted below:

*"[**Computation of income from international transaction having regard to arm's length price.***

***92.** (1) Any income arising from an international transaction shall be computed having regard to the arm's length price.*

Explanation.—For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.

*(2) Where in an international transaction **[**or specified domestic transaction**]**, two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.*

The following sub-section (2A) shall be inserted after sub-section (2) of section 92 by the Finance Act, 2012, w.e.f. 1-4-2013 :

(2A) Any allowance for an expenditure or interest or allocation of any cost or expense or any income in relation to the specified domestic transaction shall be computed having regard to the arm's length price.

*(3) The provisions of this section shall not apply in a case where the computation of income under sub-section (1) **[**or sub-section (2A)**]** or the determination of the*

*allowance for any expense or interest under **[**that sub-section**]**, or the determination of any cost or expense allocated or apportioned, or, as the case may be, contributed under sub-section (2) **[**or sub-section (2A)**]**, has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction **[**or specified domestic transaction**]** was entered into.]*

Computation of arm's length price*.*

92C. *(1) The arm's length price in relation to an international transaction **[**or specified domestic transaction**]** shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :—*

(a) comparable uncontrolled price method;

(b) resale price method;

(c) cost plus method;

(d) profit split method;

(e) transactional net margin method;

(f) such other method as may be prescribed by the Board.

(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed :

*[**Provided** that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:*

Provided further *that if the variation between the arm's length price so determined and price at which the international transaction **[**or specified domestic transaction**]** has actually been undertaken **[**does not* *exceed [such percentage of the latter, as may be notified**]** by the Central Government in the Official Gazette in this behalf], the price at which the international transaction **[**or specified domestic transaction**]** has actually been undertaken shall be deemed to be the arm's length price.]*

[**Explanation.—For the removal of doubts, it is hereby clarified that the provisions of the second proviso shall also be applicable to all assessment or reassessment proceedings pending before an Assessing Officer as on the 1st day of October, 2009.**]

[**(2A) Where the first proviso to sub-section (2) as it stood before its amendment by the Finance (No. 2) Act, 2009 (33 of 2009), is applicable in respect of an international transaction for an assessment year and the variation between the arithmetical mean referred to in the said proviso and the price at which such transaction has actually been undertaken exceeds five per cent of the arithmetical mean, then, the assessee shall not be entitled to exercise the option as referred to in the said proviso.**]

[**(2B) Nothing contained in sub-section (2A) shall empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154 for any assessment year the proceedings of which have been completed before the 1st day of October, 2009.**]

(3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—

*(a) the price charged or paid in an international transaction **[**or specified domestic transaction**]** has not been determined in accordance with sub-sections (1) and (2); or*

(b) any information and document relating to an international transaction ***[****or specified domestic transaction****]*** *have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or*

(c) the information or data used in computation of the arm's length price is not reliable or correct; or

(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,

the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction ***[****or specified domestic transaction****]*** *in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:*

Provided *that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer.*

(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined :

Provided *that no deduction under section 10A [or section 10AA] or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by* *which the total income of the assessee is enhanced after computation of income under this sub-section :*

Provided further *that where the total income of an associated enterprise is computed under this sub-section on determination of the arm's length price paid to another associated enterprise from which tax has been deducted [or was deductible] under the provisions of Chapter XVIIB, the income of the other associated enterprise shall not be recomputed by reason of such determination of arm's length price in the case of the first mentioned enterprise.*

[Reference to Transfer Pricing Officer.

92CA. *(1) Where any person, being the assessee, has entered into an international transaction* ***[****or specified domestic transaction****]*** *in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction* ***[****or specified domestic transaction****]*** *under section 92C to the Transfer Pricing Officer.*

(2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction ***[****or specified domestic transaction****]*** *referred to in sub-section (1).*

[(2A) Where any other international transaction [other than an international transaction referred under sub-section (1)], comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, the provisions of this Chapter shall apply as if such other international transaction is an international transaction referred to him under sub-section (1).]

[*(2B) Where in respect of an international transaction, the assessee has not furnished the report under section 92E and such transaction comes to the notice of the Transfer Pricing Officer during the course of the proceeding before him, the provisions of this Chapter shall apply as if such transaction is an international transaction referred to him under sub-section (1).****]***

[*(2C) Nothing contained in sub-section (2B) shall empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year, proceedings for which have been completed before the 1st day of July, 2012.****]***

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction ***[****or specified domestic transaction****]*** *in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.*

[(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires.]

[(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer.]

(5) With a view to rectifying any mistake apparent from the record, the Transfer Pricing Officer may amend any order passed by him under sub-section (3), and the provisions of section 154 shall, so far as may be, apply accordingly.

(6) Where any amendment is made by the Transfer Pricing Officer under sub-section (5), he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

(7) The Transfer Pricing Officer may, for the purposes of determining the arm's length price under this section, exercise all or any of the powers specified in clauses (a) to (d) of sub-section (1) of section 131 or sub-section (6) of section 133 [or section 133A].

Explanation.—For the purposes of this section, "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorised by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons.]

Maintenance and keeping of information and document by persons entering into an international transaction [or specified domestic transaction].

***92D.** (1) Every person who has entered into an international transaction **[**or specified domestic transaction**]** shall keep and maintain such information and document in respect thereof, as may be prescribed.*

(2) Without prejudice to the provisions contained in sub-section (1), the Board may prescribe the period for which the information and document shall be kept and maintained under that sub-section.

*(3) The Assessing Officer or the Commissioner (Appeals) may, in the course of any proceeding under this Act, require any person who has entered into an international transaction **[**or specified domestic transaction**]** to furnish any information or document in respect thereof, as may be prescribed under sub-section (1), within a period of thirty days from the date of receipt of a notice issued in this regard :*

***Provided** that the Assessing Officer or the Commissioner (Appeals) may, on an application made by such person, extend the period of thirty days by a further period not exceeding thirty days.*

Report from an accountant to be furnished by persons entering into international transaction [or specified domestic transaction].

***92E.** Every person who has entered into an international transaction **[**or specified domestic transaction**]** during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed.”*

<u>Rule 10B:</u>

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

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

(a) comparable uncontrolled price method, by which,—

(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;

(ii) such price is adjusted to account for differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;

(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction [or the specified domestic transaction] ;

(b) resale price method, by which,—

(i) the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified;

(ii) such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;

(iii) the price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;

(iv)the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;

(v)the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise;

(c) cost plus method, by which,—

(i) the direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined;

(ii)the amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled transaction, or a number of such transactions, is determined;

(iii)the normal gross profit mark-up referred to in sub-clause (ii) is adjusted to take into account the functional and other differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such

transactions, which could materially affect such profit mark-up in the open market;

(iv)the costs referred to in sub-clause (i) are increased by the adjusted profit mark-up arrived at under sub-clause (iii);

(v)the sum so arrived at is taken to be an arm's length price in relation to the supply of the property or provision of services by the enterprise;

(d) profit split method, which may be applicable mainly in international transactions [or specified domestic transactions] involving transfer of unique intangibles or in multiple international transactions [or specified domestic transactions] which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction, by which—

(i) the combined net profit of the associated enterprises arising from the international transaction [or the specified domestic transaction] in which they are engaged, is determined;

(ii)the relative contribution made by each of the associated enterprises to the earning of such combined net profit, is then evaluated on the basis of the functions performed, assets employed or to be employed and risks assumed by each enterprise and on the basis of reliable external market data which indicates how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances;

(iii)the combined net profit is then split amongst the enterprises in proportion to their relative contributions, as evaluated under sub-clause (ii);

(iv) the profit thus apportioned to the assessee is taken into account to arrive at an arm's length price in relation to the international transaction [or the specified domestic transaction] :

***Provided** that the combined net profit referred to in sub-clause (i) may, in the first instance, be partially allocated to each enterprise so as to provide it with a basic return appropriate for the type of international transaction [or specified domestic transaction] in which it is engaged, with reference to market returns achieved for similar types of transactions by independent enterprises, and thereafter, the residual net profit remaining after such allocation may be split amongst the enterprises in proportion to their relative contribution in the manner specified under sub-clauses (ii) and (iii), and in such a case the aggregate of the net profit allocated to the enterprise in the first instance together with the residual net profit apportioned to that enterprise on the basis of its relative contribution shall be taken to be the net profit arising to that enterprise from the international transaction [or the specified domestic transaction] ;*

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

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

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

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

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

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

[(f) any other method as provided in rule 10AB.]

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

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

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

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

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

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

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

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

(4) The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction [or a specified domestic transaction] shall be the data relating to the financial year [(hereafter in this rule and in rule 10CA referred to as the 'current year')] in which the international transaction [or the specified domestic transaction] has been entered into:

***Provided** that data relating to a period not being more than two years prior to [the current year] may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared:*

*[**Provided** further that the first proviso shall not apply while analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction, entered into on or after the 1st day of April, 2014.]*

[(5) In a case where the most appropriate method for determination of the arm's length price of an international transaction or a specified domestic transaction, entered into on or after the 1st day of April, 2014, is the method specified in clause (b), clause (c) or clause (e) of sub-section (1) of section 92C, then, notwithstanding anything contained in sub-rule (4), the data to be used for analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction shall be,—

(i) the data relating to the current year ; or

(ii) the data relating to the financial year immediately preceding the current year, if the data relating to the current year is not available at the time of furnishing the return of income by the assessee, for the assessment year relevant to the current year:

***Provided** that where the data relating to the current year is subsequently available at the time of determination of arm's length price of an international transaction or a specified domestic transaction during the course of any assessment proceeding for the assessment year relevant to the current year, then, such data shall be used for such determination irrespective of the fact that the data was not available at the time of furnishing the return of income of the relevant assessment year."*

9.1 Section 92 provides for the determination of income arising from an international transaction having regard to the Arm's Length Price. It applies to transactions involving two or more associated enterprises which have entered into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service, or facility provided or to be provided to any one or more of such enterprises. The cost or expense so allocated, apportioned, or contributed is required to be determined having regard to the Arm's Length Price of such benefit, service, or facility.

9.2 Section 92A defines the expression "associated enterprise" for the purposes of Sections 92 to 92F. Section 92B defines the expression "international transaction" for the purposes of the aforesaid provisions. Section 92BA defines "specified domestic transaction."

9.3 Section 92C provides the statutory mechanism for determination of the Arm's Length Price by applying the most appropriate method. The process commences with the selection of the most appropriate method, followed by identification of comparable uncontrolled transactions and determination of the Arm's Length Price. The statute prescribes six recognised methods for determining the Arm's Length Price, and the selection of the most appropriate method depends upon the facts and circumstances of each case. Where more than one price is determined by applying the most appropriate method, the arithmetical mean of such prices is required to be adopted as the Arm's Length Price in accordance with the statutory framework and compared with the actual transaction price. If the variation between the Arm's Length Price so determined and the actual transaction price exceeds the permissible tolerance range prescribed under the Act, the necessary adjustment is required to be made.

9.4 Where the TPO finds that the Arm's Length Price determined by the taxpayer is not in accordance with law, Section 92C(3) empowers the TPO to determine the Arm's Length Price afresh. Such determination is to be made by the TPO in exercise of the powers conferred under Section 92CA(3). However, before disputing the Arm's Length Price determined by the taxpayer, the Assessing Officer or the TPO must satisfy one or more of the conditions stipulated in clauses (a) to (d) of sub-section (3) of Section 92C.

9.5 The aforesaid statutory mandate has been explained by the High Court of Delhi in ***American Express Banking Corporation (India Branch) vs. Assistant Director of Income-tax, International Taxation, [2025] 174***

taxmann.com 595 (Delhi)/[2025] 476 ITR 752 (Delhi), wherein it has been held that unless the conditions specified under Section 92C(3) are satisfied, the TPO cannot proceed to make any adjustment. The same principle was reiterated by the High Court of Delhi in ***Li and Fung India (P.) Ltd. vs. Commissioner of Income-tax, [2014] 223 Taxman 368 (Delhi)/[2014] 361 ITR 85 (Delhi)***, wherein Section 92C was analysed in the following terms:

> ***"26.*** *Chapter X opens with Section 92 which provides that the income arising from "international transactions" shall be calculated having regard to the ALP. The explanation to Section 92 clarifies that allowance for any expense or interest arising from an international transaction shall also be determined having regard to the ALP. Section 92A defines as to which the enterprises would, for the purposes of the provisions of Chapter X, come within the purview of an AE. Section 92A (1) generally defines an AE as one, which is, directly or indirectly, managed and controlled by another. The one appropriate mode, amongst the several, through which control can be exercised by one enterprise on the other is provided in sub-section (2) of Section 92A. In the eventuality of an enterprise fulfilling any of the attributes provided in sub-clause (a) to clause (m), the two enterprises under Section 92A(2) is deemed to be AE. Section 92B defines as to what would be construed as an "international transaction". In order to appreciate the full width, amplitude of an "international transaction" the meaning of which is provided in section 92B one would have to in addition read the definition of "transaction" given in Section 92F(v).*

27. *Section 92C is the provision enabling determination of ALP. Section 92C (1) states that ALP in relation to an "international transaction could be determined by any of the methods provided in the said sub-section which is "most appropriate" having regard to the nature of transactions or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors which may be prescribed by the Board. The methods provided being (a) comparable uncontrolled price method; (b) resale price method; (c) cost plus method; (d) profit split method; (e) transactional net margin method and; (f) such other method as may be prescribed by the Board. In determining the most appropriate method, regard is to be had to Rules 10A and 10B of the IT Rules, 1962. Section92C(3) casts the obligation of computing the ALP on the assessee, at the first instance. The AO then would proceed to determine the ALP in relation to an "international transaction" in accordance with Section 92C (1) and (2) only if he is of the opinion that any of the circumstances as indicated in Section 92Cs (3)(a) to sub-clause (d) of sub-Section (3) of Section 92C prevails. These circumstances are that the price charged or paid for international transaction has not been determined as prescribed under sub- section (1) and (2) of section 92C or, the assessee has not kept information and documents of its international transactions in the form prescribed under Section 92D (1) and the Rules made in that regard or, the information or data used by the assessee in computing the ALP is not reliable or correct or, that the assessee, failed to furnish, within the specified time the information sought pursuant to a notice issued under Section 92D (3). The first proviso to Section 92 (3) mandates that before the AO proceeds to determine the ALP on the basis of the material or information or document available with him he shall give an opportunity by serving upon the assessee a show-cause notice fixing thereby a date and time for the said purpose. Under Section 92C (4) the Assessing Officer is empowered to compute the total income of the assessee only after the ALP has been determined by the Assessing Officer in terms of the provision of sub-section (3) of Section 92C.*

> ***28.*** *Under Section 92CA (inserted w.e.f 1.6.2002), the AO is empowered to refer the computation of ALP, in relation to, an "international transaction" under Section 92C to the TPO, if he considers it "necessary" or "expedient" to do so with the prior approval of the Commissioner. It is only after a reference is made under Section 92CA(1) that the TPO gets a mandate to approach upon the assessee by issuing him a notice calling upon him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the ALP. Section 92CA(3) provides that the TPO, by an order in writing, will determine the ALP in relation to an "international transaction" in accordance with Section 92C (3) after hearing such evidence as the assessee may produce including any information or documents referred to in Section 92D(3), after considering such evidence as the TPO may require on any specified points, and after taking into account all relevant material which the TPO has gathered. The TPO has to send a copy of the order, by which a determination of ALP is made both to the Assessing Officer and the assessee. Section 92CA(3A) provides the time frame within which the TPO has to pass an order under Section 92CA (3)."*

9.6 It is also relevant to refer to the judgment of the High Court of Delhi in ***Maruti Suzuki India Ltd. v. Additional Commissioner of Income-tax, Transfer Pricing Officer, [2010] 192 Taxman 317 (Delhi) / [2010] 328 ITR 210 (Delhi)***, wherein it was held as under:

> *"41. Under the new provision, the primary onus is on the taxpayer to determine an arm's length price in accordance with the rules and to substantiate the same with prescribed documentation. Where such onus is discharged by the assessee and the data used for determining the arm's length price is reliable and correct, there should normally be no intervention by the Assessing Officer. Ordinarily, it is only where the*

assessee has not discharged the onus placed on him or he has not determined the price of the international transaction in question in terms of sub-sections (1) and (2) of section 92 of the Act or the data used by him is not reliable, correct or appropriate or the TPO finds evidence which discredits the data used by the assessee or the methodology applied by him in arriving at arm's length price of the international transaction in question, that the arm's length price declared by the assessee should be rejected and re-determined in terms of section 92C of the Act."

9.7 Section 92CA empowers the Assessing Officer, with the previous approval of the Commissioner, to make a reference to the Transfer Pricing Officer (TPO) for determination of the Arm's Length Price.

9.8 Section 92CB provides for the Safe Harbour Rules to be notified by the Board. Section 92D mandates that every person entering into an international transaction shall keep and maintain such information and documents as may be prescribed in relation to such transactions. The said provision further imposes an obligation upon every such person to furnish the prescribed information and documents to the Assessing Officer whenever required.

9.9 Section 92D imposes a mandate upon the taxpayer to maintain such information and documents as may be prescribed.

9.10 Section 92E requires every person entering into an international transaction to obtain a report from an accountant and furnish the same, in the prescribed form and manner, on or before the specified date, duly signed and verified, setting forth the prescribed particulars. Correspondingly, Rule 10E prescribes Form No. 3CEB for the said purpose. Section 92F defines certain expressions used in Chapter X.

9.11 Rule 10A defines certain expressions used in the Rules.

9.12 Rule 10B prescribes the complete mechanism for determination of the Arm's Length Price under Section 92C. Sub-rule (1) prescribes the appropriate methods for determination of the Arm's Length Price.

9.13 Sub-rule (2) sets out the factors relevant for comparability analysis. It mandates that the comparability of an international transaction with an uncontrolled transaction shall be examined with reference to the specific characteristics of the property transferred or services provided, the functions performed, assets employed and risks assumed by the respective parties, the contractual terms governing the allocation of responsibilities, risks and benefits between the parties to the transaction, and the prevailing market conditions, including geographical location, size of the markets, the laws, government orders, cost of labour and capital in the respective markets, overall economic conditions, and the level of competition.

9.14 Sub-rule (3) provides that an uncontrolled transaction shall be considered comparable where none of the differences, if any, materially affects the price, cost, or profit arising from such transaction. However, where material differences exist, reasonable adjustments are required to be made to eliminate the effect of such differences.

9.15 Sub-rule (4) mandates the use of data relating to the financial year in which the international transaction has been entered into. The exception permits the use of data relating to a period not exceeding two years prior to the relevant financial year, subject to the conditions stipulated therein. Such prior years' data may be used only where it reveals facts which could have an influence on the determination of the transfer price in relation to the international transaction entered into after the 1st day of April, 2014.

9.16 Sub-rule (5) governs the use of current year data. Where the current year data is not available at the time of furnishing the return of income, the proviso to sub-rule (5) permits the use of such data if it becomes available subsequently during the course of determination of the ALP in the assessment proceedings. In such a case, the current year data shall be used for determining the ALP notwithstanding that the same was not available at the time of furnishing the return of income for the relevant assessment year.

9.17 Rule 10C provides for the selection of the most appropriate method for the purposes of Section 92C(1). The factors relevant for such selection include the nature and class of the international transaction, the class of the associated enterprises, the results of the functional analysis, the availability and reliability of comparable data, the degree of comparability, the extent to which reliable and accurate adjustments can be made to eliminate material differences, and the nature, extent and reliability of the assumptions required to be made in applying the selected method.

9.18 Rule 10CA lays down the mechanism for computing the Arm's Length Price where application of the most appropriate method results in more than one comparable price and also contains illustrations for its application.

9.19 Rule 10CB provides for computation of interest income pursuant to secondary adjustments for the purposes of Section 92CE. Rule 10D, in conformity with Section 92D, prescribes the information and documentation to be maintained by every person in relation to an international transaction and comprehensively sets out the documentation requirements applicable to every taxpayer.

9.20 Likewise, Rule 10DA, in conformity with Section 92D, requires the maintenance and furnishing of information and documents by certain persons constituting an international group and exhaustively prescribes the information required to be maintained. Rule 10E, in conformity with Section 92E, prescribes Form No. 3CEB and the particulars and verification required therein.

D. <u>ANALYSIS:</u>

10. In the appeals before us, there is no dispute with regard to the selection of the most appropriate method. Broadly, the disputes relate to:

I. The correctness of the selection of comparables;
II. Turnover Filter;
III. Related Party Transactions (RPT);
IV. Foreign Exchange Gain or Loss;
V. Burden of proof;
VI. Inclusion or Exclusion of Comparables at the Appellate Stage;
VII. Plus or Minus 5% Variation;
VIII. Working capital adjustment; and
IX. Correctness of Tribunal following earlier decisions.

I. <u>Selection Of Comparables</u>:

11. The correctness of the inclusion or exclusion of comparables by the taxpayer, the TPO, and the Tribunal is in question.

11.1 Insofar as the transfer pricing study undertaken by the taxpayer is concerned, the same is required to be in compliance with Section 92C of the Act and Rule 10B of the Rules by applying appropriate filters so as to eliminate the material effect of differences. As held by the High Court of Delhi in the judgments referred to *supra*, the transfer pricing study undertaken by the taxpayer can be disturbed only if any of the circumstances contemplated under clauses (a) to (d) of sub-section (3) of Section 92C are attracted. In other words, the conditions specified in Section 92C(3) must exist before the ALP determined by the taxpayer can be rejected.

11.2 If the reasons assigned by the TPO for rejecting the comparables selected by the taxpayer are examined, it is evident that such rejection is not founded upon any of the grounds enumerated in clauses (a) to (d) of sub-section (3) of Section 92C. It is contended by the learned counsel appearing for the assessees that the comparables selected by the taxpayers have been rejected only for the purpose of substituting them with a standard set of comparables uniformly adopted by the TPO across the Department. On an examination of the appeals before us, such contention is not amenable to outright rejection.

11.3 We find that the TPO has adopted a standard set of comparables in respect of different segments, namely, software development services and Information Technology Enabled Services (ITES). The reasons assigned for rejecting the comparables selected by the taxpayer and substituting them with the comparables selected by the TPO do not satisfy the requirements or fall within the parameters of clauses (a) to (d) of sub-section (3) of Section 92C.

11.4 Further, the comparables selected by the TPO are also required to satisfy the requirements of Rule 10B(2) of the Rules. We find that the set of comparables adopted by the TPO has been selected from a standard list of comparables applied across different assessees and does not reflect the exercise contemplated under Rule 10B(2). The said anomaly has been corrected by the Tribunal in exercise of its jurisdiction as the final fact-finding authority.

11.5 Moreover, the process of inclusion or exclusion of comparables is essentially a data-driven factual exercise. Such findings ordinarily remain findings of fact unless the exercise is shown to be perverse. Perversity, when properly pleaded and established, may give rise to a substantial question of law. However, in the present batch of appeals, we find that neither has perversity been specifically pleaded nor has the same been demonstrated insofar as the inclusion or exclusion of comparables is concerned.

II. Turnover Filter:

12. The comparables included or selected by the TPO are companies having higher turnover. The contention of the Revenue that, since the relevant consideration is the profit margin, the size of the comparable company is not a relevant criterion, cannot be accepted. If such a principle were to be applied on the premise that only the profit ratio is relevant, there would be no justification for rejecting the application of a lower turnover filter, which has been done by the TPO.

12.1 The size of the comparable company is one of the relevant factors contemplated under Rule 10B(2). Undoubtedly, companies having higher turnover enjoy advantages such as established brand value, greater bargaining power, ownership of valuable Intellectual Property Rights (IPRs), and economies of scale. These advantages are ordinarily unavailable to companies having comparatively lower turnover. The size of a company has a direct bearing on its pricing power, competitiveness, vulnerability to market conditions, and other commercial factors.

12.2 Although clause (d) of sub-rule (2) of Rule 10B refers to market conditions, including the size of the markets, the factors specified in clause (b), namely, the assets employed and the risks assumed, also play a significant role in benchmarking profits and determining comparability.

12.3 In the absence of any statutory prescription fixing either a lower or an upper turnover limit, the adoption by the Tribunal of an upper turnover filter of Rs.200 crores cannot be said to be arbitrary. On the contrary, the said criterion is founded on a rational and logical basis. Such a determination, being essentially a finding of fact, cannot be interfered with unless perversity is specifically pleaded and demonstrated.

12.4 Ultimately, the entire exercise of transfer pricing is intended to determine the Arm's Length Price in controlled transactions between associated enterprises. Such an exercise does not admit of any precise scientific formula. Since the upper turnover filter of Rs.200 crores adopted by the Tribunal is found to be rational and logical, this Court finds no reason to interfere with the same.

III. Related Party Transaction (RPT) Filter :

13. The Related Party Transaction (RPT) Filter is applied while selecting comparable companies for benchmarking the ALP so as to eliminate, as far as possible, the influence of related party transactions on the profitability of comparable companies. The object of the filter is to ensure that uncontrolled transactions are selected as comparables and that companies having significant controlled transactions are excluded, except where the availability of comparable companies is limited.

13.1 In the present batch of appeals, the TPO has applied an RPT Filter of 25%, whereas the taxpayer as well as the Tribunal have adopted an RPT Filter of 15%.

13.2 Undoubtedly, uncontrolled comparable transactions are to be preferred in order to eliminate the influence of related party transactions on profitability. At the same time, insisting upon comparables having absolutely no related party transactions may not always be practicable. The RPT Filter, therefore, operates as a permissible tolerance while selecting comparable companies. Ideally, the percentage of the RPT Filter should be the lowest possible among the available comparable companies.

13.3 Where the taxpayer has selected comparable companies by applying a 15% RPT Filter and there is no finding that such comparables fail to satisfy the requirements of the Act or the Rules, there is no rational basis for increasing the RPT threshold to 25%. Where comparable companies with a lower percentage of related party transactions are available, adoption of a lower RPT Filter results in a narrower tolerance and correspondingly reduces the influence of related party transactions on the profitability of the comparable companies. In such circumstances, adoption of a 25% RPT Filter would be without any rational basis.

13.4 At the same time, an RPT Filter of 25% cannot be rejected as impermissible in all cases. Where either the taxpayer or the TPO demonstrates that an adequate number of comparable companies satisfying a lower RPT threshold are not available, there can be no objection to adopting a higher RPT Filter. The enhancement of the RPT threshold up to 20% or 25% must, however, be founded upon a specific finding regarding the non-availability of sufficient comparable companies satisfying a lower RPT threshold. In the absence of such a finding, adoption of a 25% RPT Filter merely as a standard upper tolerance limit is without any rational basis.

13.5 The exercise of determining the appropriate RPT Filter is necessarily fact-based and depends upon the availability of comparable companies in each case. Except for the contention that interference with the application of a 25% RPT Filter by the Tribunal is erroneous, the Revenue has neither pleaded nor demonstrated any violation of the provisions of the Act or the Rules, nor any perversity in the findings recorded by the Tribunal. Consequently, the adoption of a 15% RPT Filter by the Tribunal cannot be held to be arbitrary or without basis.

13.6 However, it is necessary to clarify that where comparable companies satisfying a 15% RPT Filter are not available, there is no legal bar to adopting a higher RPT threshold, such as 20% or 25%, provided the TPO records a specific finding regarding the non-availability of sufficient comparable companies satisfying the lower RPT threshold.

IV. <u>Foreign Exchange Gain Or Loss:</u>

14. It is the contention of the Revenue that foreign exchange gain or loss is not dependent upon the operations carried out by the company and, therefore, cannot be treated as part of the operating revenue or operating cost. It is submitted that, for the purpose of determination of the ALP, only the international transactions entered into with the Associated Enterprises (AE) are relevant. Accordingly, foreign exchange gain or loss arising on account of the date of realization of proceeds from the AE is liable to be excluded from the operating revenue or operating cost.

14.1 The learned ASG, however, submitted that where the foreign exchange gain or loss has a direct nexus with the international transaction, such gain or loss may appropriately be treated as part of the operating revenue or operating cost.

14.2 On the other hand, it is the contention of the taxpayer that where the foreign exchange gain or loss is linked to, or is derived from, the business operations, it should be classified as operating or non-operating depending upon its direct nexus with the operating activity. It is submitted that gain or loss arising on account of fluctuation in foreign exchange during the execution of export or import contracts is merely incidental to the business operations and, therefore, is required to be treated as an operating item.

14.3 There can be no dispute that the international transactions entered into by the taxpayer with its Associated Enterprises constitute the basis for determination of the ALP and that foreign exchange fluctuation is an external factor. However, where the international transaction with the Associated Enterprise is intrinsically linked with foreign exchange fluctuation, the resultant gain or loss forms an integral part of the international transaction and is liable to be treated as operating revenue or operating cost, as the case may be.

14.4 Whether foreign exchange gain or loss constitutes an operating item necessarily depends upon the nature of the transaction and the factual matrix of each case. No uniform or standardized rule can be laid down in that regard. Where the assessee seeks to treat foreign exchange gain or loss as an operating item, the burden lies upon the assessee to establish a direct nexus between such gain or loss and the international transaction and to demonstrate that the same is derived from the international transaction. In contradistinction, where the foreign exchange gain or loss has no nexus with the international transaction and merely arises on account of fluctuation in foreign exchange, it cannot be regarded as forming part of the operating revenue or operating cost.

14.5 Where the consideration arising from an international transaction is external to the value of the transaction itself, any gain or loss arising on account of foreign exchange fluctuation remains merely attributable to the business and cannot be said to be derived from the international transaction.

V. <u>Burden of Proof:</u>

15. The provisions of Chapter X, particularly Rule 10B, Rule 10D and Section 92D of the Act, impose a mandate upon every

person entering into an international transaction to keep and maintain the prescribed information and documents. Section 92C places the initial burden upon the taxpayer to determine the ALP. Section 92CA empowers the TPO to re-determine the ALP where he does not agree with the determination made by the taxpayer.

15.1 In the process of determination of the ALP, whether by the taxpayer or by the TPO, one of the fundamental exercises is the inclusion or exclusion of comparables. Where the assessee seeks inclusion or exclusion of any comparable, the burden lies upon the assessee to furnish the information and documentation necessary to support such determination. Sub-section (3) of Section 92CA authorises the TPO to determine the ALP in relation to an international transaction by rejecting the ALP determined by the taxpayer. Such re-determination may involve either inclusion or exclusion of comparables. Once the TPO undertakes such re-determination, the burden, to that extent, shifts upon the TPO to justify the comparables selected or rejected by him.

15.2 There cannot be a universal rule regarding the burden of proof either upon the taxpayer or upon the TPO. The burden necessarily depends upon the party seeking inclusion or exclusion of a comparable. Where inclusion of a comparable by the TPO is challenged before the Tribunal, the burden undoubtedly remains upon the TPO to justify such inclusion. Conversely, where exclusion of a comparable is sought by the taxpayer before the Tribunal, or where the taxpayer seeks inclusion of a new comparable, the burden of maintaining and producing the information and documentation contemplated under Section 92D and Rule 10D continues to remain upon the taxpayer. Thus, the question of burden of proof is essentially fact-dependent and varies according to the nature of the challenge raised in each case.

VI. <u>Inclusion or Exclusion of Comparables at the Appellate Stage:</u>

16. The Revenue has vehemently contended that once the ALP is determined by the TPO, either on the basis of the transfer pricing study submitted by the taxpayer or on the basis of an independent analysis undertaken by the TPO, no further

inclusion or exclusion of comparables should be permitted at a subsequent stage. The said contention cannot be accepted.

16.1 Selection of comparables constitutes the foundational step in determining the ALP. Comparability is necessarily required to be examined with reference to the transactions of comparable companies relating to the relevant assessment year. At the stage of filing the return of income, the taxpayer prepares the transfer pricing study on the basis of the data then available in respect of comparable companies. Subsequently, during the assessment proceedings or appellate proceedings, more comprehensive and reliable data may become available, revealing better comparables than those originally selected. Merely because the transfer pricing study has already been furnished, the taxpayer cannot be precluded from seeking inclusion or exclusion of comparables on the basis of such subsequently available data.

16.2 The considerable time gap between the preparation of the transfer pricing study by the taxpayer, the determination of the ALP by the TPO, and the availability of improved financial data cannot be ignored. Indeed, the TPO himself derives the benefit of more comprehensive and updated information while rejecting or re-determining the ALP proposed by the taxpayer. If the taxpayer is permitted to determine the ALP only on the basis of the limited data available at the time of filing the return, fairness requires that the taxpayer should equally be permitted to rely upon subsequently available data where such data facilitates selection of more appropriate comparables and thereby advances the object of transfer pricing provisions.

16.3 For the very same reasons, where further reliable data becomes available during the pendency of the appeals before the Tribunal, there can be no absolute bar against inclusion or exclusion of comparables, provided such subsequently identified comparables are demonstrably better comparables than those originally selected.

16.4 At the same time, such permission cannot be granted as a matter of course. The newly proposed comparables must satisfy the mandatory requirements prescribed under Section 92C of the Act and Rule 10B of the Rules. Whenever such a plea is raised before the Tribunal, it is open to the Tribunal either to undertake the exercise itself, where sufficient material is available on record, or to remand the matter to the TPO or the Assessing Officer for fresh determination of the ALP after considering the proposed inclusion or exclusion of comparables.

16.5 In this regard, the proviso to sub-rule (5) of Rule 10B expressly permits the use of subsequently available current year data at the stage of determination of the ALP, notwithstanding that such data was not available at the time of furnishing the return of income for the relevant assessment year. Having regard to the object underlying the said proviso, this Court finds no statutory prohibition against permitting inclusion or exclusion of comparables at the appellate stage before the Tribunal on the basis of subsequently available data.

16.6 It is, however, made clear that the use of subsequently available data and the consequent inclusion or exclusion of comparables must strictly satisfy the requirements of the Act and the Rules governing the selection of comparables.

VII. Plus or Minus 5% Variation:

17. The Revenue contends that where the arithmetic mean is determined in terms of the first proviso to Section 92C(2), and

the variation between the ALP so determined and the price at which the international transaction has actually been undertaken does not exceed 5%, the price at which the international transaction has been undertaken is deemed to be the ALP. It is submitted that the Tribunal has erroneously treated the 5% variation as a standard deduction and, after deducting the said percentage, examined whether the remaining variation exceeded 5%, which is contrary to the scheme of Section 92C(2).

17.1 On the other hand, the assessee contends that the 5% variation is liable to be excluded while determining the adjustment. The Tribunal has accepted the said contention and has treated the 5% variation as a standard deduction before computing the difference.

17.2 On a plain reading of Section 92C, the aforesaid interpretation does not commend acceptance. The first proviso to Section 92C(2) provides that where more than one price is determined by applying the most appropriate method, the ALP shall be taken to be the arithmetic mean of such prices. The ALP so determined is thereafter required to be compared with the price at which the international transaction has actually been undertaken. If the variation between the two does not exceed 5%, the price at which the international transaction has been undertaken is deemed to be the ALP. It is only where the variation exceeds the prescribed tolerance range that transfer pricing adjustment becomes necessary.

17.3 The above legal position emerges upon the amendment introduced by the Finance (No. 2) Act, 2009, with effect from 1-10-2009. Prior thereto, under the proviso substituted by the Finance Act, 2002, with effect from 1-4-2002, where more than one price was determined by applying the most appropriate method, the ALP was to be taken as the arithmetic mean of such prices or, at the option of the assessee, a price varying from such arithmetic mean by an amount not exceeding 5% of the arithmetic mean. Though the proviso substituted by the Finance (No. 2) Act, 2009, was made effective from 01-10-2009, the controversy regarding the applicability of the pre-amended proviso continued.

17.4 The Finance Act, 2012 inserted sub-section (2A) to Section 92C with retrospective effect from 1-4-2002, thereby disentitling the assessee from claiming the benefit of the option available under the proviso as it existed prior to its substitution by the Finance (No. 2) Act, 2009. The further issue as to whether sub-section (2A) operates retrospectively has been authoritatively answered by the High Court of Delhi in ***Marubeni India (P.) Ltd. vs. Director of Income-tax, [2013] 33 taxmann.com 100 (Delhi)/ [2013] 354 ITR 638 (Delhi)***, wherein it has been held that sub-section (2A) operates retrospectively from Assessment Year 2002-03. Consequently, the issue regarding the retrospective operation of sub-section (2A) is no longer *res integra*.

17.5 Insofar as the contention that the 5% variation should be treated as a standard deduction is concerned, Section 92C(2) merely provides a tolerance range within which no transfer pricing adjustment is required where the variation between the arithmetic mean and the price of the international transaction falls within the prescribed limit. On a plain and literal interpretation, the provision does not contemplate the grant of a standard deduction of 5% before determining whether the variation falls within the permissible range.

17.6 The object of prescribing a tolerance range of 5%, which now stands reduced to 3% by the Finance Act, 2012, was not to confer a deduction but to avoid transfer pricing adjustments on account of marginal pricing differences. Acceptance of the view adopted by the Tribunal would not only defeat the object of the provision but would also amount to rewriting the statutory scheme by extending the tolerance range beyond what has been provided by the Legislature.

17.7 In view of the above, we hold that the tolerance range of 5% provided under the proviso to Section 92C(2), both prior to and after the amendment introduced by the Finance (No. 2) Act, 2009, is not in the nature of a standard deduction. We further hold that sub-section (2A) of Section 92C operates retrospectively with effect from 1-4-2002 and is accordingly applicable from Assessment Year 2002-03.

17.8 We may also refer to the judgment of the High Court of Delhi in ***Sony Ericsson Mobile Communications India (P.) Ltd. v. Commissioner of Income-tax-III, [2015] 231 Taxman 113 (Delhi) / [2015] 374 ITR 118 (Delhi)***, wherein the retrospective operation of sub-section (2A) of

Section 92C has also been considered. The relevant observations are extracted below:

> *"76. It must be stated that transfer pricing is not an exact science but a method of legitimate quantification which requires exercise of judgment on the part of the tax administration and the taxpayer. It is method and formula based and, therefore, is rational and scientific. However, not being perfect or infallible, first and the second proviso to sub-section (2) along with stipulations in Sub-section (2A) and 2(B) of section 92C posit a 'getaway' clause when the arm's length price so determined and the controlled price does not exceed 5%(reduced to 3% w.e.f. 1st April, 2012). In such cases the actual price paid or received by the assessed from the foreign AE is not disturbed. In other cases, the transaction price gets substituted with the arm's length price so determined. Sub-section 2A to Section 92C was inserted by the Finance Act, 2012 with retrospective effect from 1st April, 2002. It states that where the arm's length price determined under sub-section (1) exceeds the arm's length price as declared by 5%, the assessee would not be entitled to exercise the option under first proviso to sub-section (2) as it stood before its amendment by the Finance (No.2) Act, 2009. The "gateway" of 5% or 3%, as the case may be, can be applied if the variation in arm's length price and transaction/controlled price does not exceed the specified percentage. Sub-section (2A), therefore, stipulates that where the difference exceeds the prescribed percentage, the assessee would not be entitled to exercise the option under the first proviso to sub-section (2) to Section 92C and claim reduction. Similarly, the first proviso to Section 92C stipulates that where more than one price is determined by most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices*."

17.9 The aforesaid observations also support our view that the tolerance range of 5% is not in the nature of a standard deduction.

VIII. <u>Working Capital Adjustment</u>:

18. Working Capital Adjustment (WCA) is one of the comparability adjustments undertaken while determining the ALP to neutralize differences in financing costs arising from variations in the levels of receivables, payables, and inventory between the tested party and comparable uncontrolled enterprises. Though Working Capital Adjustment is not a filter for the selection of comparables, Rule 10B(3) contemplates making reasonably accurate adjustments to eliminate material differences affecting the price or profit margin.

18.1 The necessity for Working Capital Adjustment arises having regard to the levels of current assets and current liabilities. Trade receivables, trade payables, inventory, and other relevant financial parameters constitute the principal components for determining such adjustment. The object of the adjustment is to eliminate material differences in working capital that have a bearing on the operating profit margin or other commercial terms governing the transactions of the taxpayer or the tested party. Factors such as borrowing costs and the period of credit, whether in respect of receivables or payables, may materially influence the price or profit margin.

18.2 There can be no fixed or scientific formula for granting Working Capital Adjustment, as the exercise necessarily depends upon the facts and circumstances of each case. The determination of such adjustment is essentially data-driven, and the manner as well as the extent of the adjustment are not specifically prescribed either under the Act or the Rules. Consequently, the grant or denial of Working Capital Adjustment invariably involves an appreciation of facts.

18.3 Unless it is demonstrated that the determination suffers from a violation of the provisions of the Act or the Rules, or that the findings recorded by the Tribunal are perverse, the conclusions reached by the Tribunal on Working Capital Adjustment remain findings of fact and, by themselves, do not give rise to any substantial question of law.

IX. **Correctness of Tribunal following earlier decisions:**

19. One of the principal grievances raised by the Revenue is that the Tribunal has excluded or included comparables by

placing reliance on its decisions rendered in other cases, including cases relating to the same assessee. It is contended that once the Tribunal interferes with the findings of the TPO regarding the inclusion or exclusion of comparables, it is required to undertake an independent exercise in accordance with Section 92C of the Act and Rule 10B of the Rules.

19.1 The said contention cannot be accepted. Once the Tribunal, in the case of any taxpayer, records findings regarding the functions performed, assets employed, or risks assumed and, on that basis, finds justification to include or exclude a comparable, there can be no prohibition in following such decision where it relates to the same assessment year or to the preceding years, as permissible under Rule 10B, provided the relevant facts and circumstances remain identical. If the functional analysis and other relevant factors continue to be the same, and the issue has already been adjudicated by the Tribunal, no fault can be found with the Tribunal following its earlier decision instead of undertaking a repetitive exercise. Merely because the Tribunal has relied upon its earlier decision, it cannot be said that its findings are not in conformity with Section 92C of the Act and Rule 10B of the Rules.

19.2 However, it is always open to the Revenue or the assessee to demonstrate that the inclusion or exclusion of a particular comparable in the earlier decision was incorrect or that the facts of the present case are distinguishable so as to warrant a different conclusion.

E. CONCLUSION

(i) The Court concludes that Chapter X of the Income-tax Act, 1961 constitutes a self-contained code governing transfer pricing, providing a complete statutory framework for determination of the Arm's Length Price (ALP), maintenance of documentation, and assessment of international transactions.

(ii) The initial burden of determining the ALP and maintaining the prescribed documentation rests upon the taxpayer, while the Transfer Pricing Officer can interfere with the taxpayer's determination only upon satisfaction of the conditions stipulated under Section 92C(3) of the Act.

(iii) The selection or exclusion of comparables is essentially a factual and data-driven exercise, and the TPO cannot reject the taxpayer's comparables merely to substitute them with a standard departmental set. Such determination must strictly conform to the requirements of Rule 10B of the Rules.

(iv) The Tribunal's adoption of an upper turnover filter of Rs.200 crores is rational and legally sustainable, as turnover, brand value, economies of scale, bargaining power and ownership of intangibles materially influence comparability and profitability.

(v) An RPT filter of 15% is ordinarily preferable, though a higher threshold of 20% or 25% may be adopted only upon recording a specific finding that sufficient comparable companies satisfying the lower threshold are unavailable.

(vi) Foreign exchange gain or loss can be treated as an operating item only when it has a direct nexus with the international transaction. Where such nexus is absent, it cannot form part of the operating revenue or operating cost.

(vii) The burden of proof varies according to the nature of the dispute. While the taxpayer bears the initial burden of substantiating the ALP, once the TPO rejects the taxpayer's determination and substitutes comparables, the burden shifts to the TPO to justify such inclusion or exclusion.

(viii) There is no legal prohibition against inclusion or exclusion of comparables at the appellate stage, provided the subsequently relied upon data is reliable and the proposed comparables satisfy the requirements of the Act and the Rules.

(ix) The tolerance of ±5% prescribed under Section 92C of the Act is merely a permissible variation and not a standard deduction, and transfer pricing adjustment becomes necessary whenever the variation exceeds the prescribed statutory limit.

(x) Working Capital Adjustment is a comparability adjustment and not a selection filter, and its grant depends entirely upon the facts of each case. Findings on such adjustment, like the selection of comparables, ordinarily remain findings of fact and do not warrant interference unless shown to be contrary to the Act or vitiated by perversity.

F. APPLICATION OF THE AFORESAID LEGAL PRINCIPLES TO THE FACTS

20. Though other issues may arise in the appeals below, in the remand proceedings, we are concerned only with the issues to the extent directed by the Hon'ble Supreme Court in ***SAP Labs India (P.) Ltd.***, (*supra*).

(1) ITA No.956/2017:

SQL No.1:

21. The issue relates to the direction issued by the Tribunal to adopt a Related Party Transactions (RPT) filter of 15%. The Tribunal has recorded a finding that the normal tolerance limit for the RPT filter should not exceed 15%.

21.1 This Court has already discussed the issue in detail and has held that an RPT filter of up to 25% may be adopted only where sufficient comparable companies satisfying the qualitative and quantitative parameters are not available, and only upon recording a specific finding to that effect. In the absence of such a finding, the normal benchmark of 15% is required to be applied.

21.2 In the present case, it is not the contention of the Revenue that sufficient comparable companies satisfying the 15% RPT filter were unavailable. The issue of the RPT filter largely falls within the realm of factual exercise, unless perversity is established. In the absence of any such pleading or material to substantiate the same, the direction issued by the Tribunal to adopt an RPT filter of 15% does not warrant interference.

21.3 Accordingly, we hold that no substantial question of law arises for consideration on this issue.

<u>SQL No.2:</u>

21.4 Question No. 2 relates to the exclusion of certain comparables on the ground of functional dissimilarity.

21.5 In the foregoing discussion, we have held that the selection or exclusion of comparables is essentially a factual exercise based on the material and data available on record. The findings recorded by the Tribunal in this regard can be interfered with only if the inclusion or exclusion of comparables is shown to be contrary to the provisions of Section 92C of the Act and Rule 10B of the Rules. The scope of re-examination by this Court, pursuant to the order of the Hon'ble Supreme Court, is confined to that extent.

21.6 In the present case, there is neither any specific plea of perversity nor any material placed on record to demonstrate that the findings of the Tribunal excluding the comparables are perverse or contrary to the statutory provisions. The findings recorded by the Tribunal, therefore, remain pure findings of fact and do not give rise to any substantial question of law warranting interference by this Court.

(2) ITA No.128/2015:

SQL Nos.1 and 2:

22. The Revenue has questioned the exclusion of M/s. e-Zest Solutions Limited as a comparable by placing reliance on the decision of the Tribunal in ***3DPLM Software Solutions Limited vs. DCIT***, ***IT (TP) A.No.1303/Bang/2012***. In the said decision, the Tribunal, after examining the functional profile of the company, found it to be functionally dissimilar and

directed its exclusion as a comparable. Both the assessment year involved in the present case and the assessment year considered in the said decision are 2008-09.

22.1 The correctness of the finding recorded by the Tribunal has neither been pleaded nor demonstrated to be contrary to any provision of the Act or the Rules. Likewise, no plea of perversity has been raised or established in relation to the exclusion of the said comparable. The Tribunal has followed its earlier decision based on an analysis of the functional profile of the company, and it is not shown that the factual matrix in the present case is materially different so as to warrant a different conclusion.

22.2 In the above circumstances, we are of the view that no substantial question of law arises from the order of the Tribunal on this issue.

SQL Nos.3 and 4:

22.3 In the discussion made hereinabove, we have held that foreign exchange gain or loss cannot be treated as operating in nature unless it is derived from the international transaction, with the underlying contracts having a direct nexus to such international transaction.

22.4 Though the Revenue has contended that foreign exchange gain or loss is merely attributable to the operating activity and is not derived from the operating activity, and therefore cannot be treated as an operating item, in the light of the discussion made above, it is open to the Transfer Pricing Officer to verify, on the facts of each case, whether the foreign exchange gain or loss is derived from the international transaction. Such determination shall necessarily depend upon the existence of a direct nexus between the foreign exchange gain or loss and the international transaction. To undertake the above exercise, the issue stands remitted to the TPO.

22.5 Subject to the above observations, we do not find that any substantial question of law arises for consideration on this issue.

(3) ITA No.469/2015:

23. Substantial Question of Law No. 2 arises for consideration. However, in view of our findings in ITA No. 128/2015 while answering Substantial Questions of Law Nos. 3

and 4, the said question does not survive for independent consideration, except to the extent of the observations made therein. As held in ITA No.128/2015, this issue stands remitted to the TPO to undertake the exercise as directed.

(4) ITA No.955/2017:

SQL No.1:

24. In the light of our answer to Question No. 1 in ITA No. 956/2017, no substantial question of law arises for consideration by this Court.

SQL No.2:

24.1 In view of the findings recorded while answering Substantial Question of Law No. 2 in ITA No. 956/2017, no substantial question of law arises for consideration by this Court.

(5) ITA No.44/2015:

25. The Substantial Questions of Law that arise for consideration are Question Nos. 1 and 2.

25.1 The dispute raised by the Revenue relates to the correctness of the exclusion of certain comparables. The

Tribunal has directed such exclusion by placing reliance on its earlier decision in ***3DPLM Software Solutions Limited*** (*supra*). While answering Substantial Question of Law Nos. 1 and 2 in ITA No. 128/2015, we have held that no fault can be found with the exclusion of comparables where the earlier decision records functional dissimilarity and such functional dissimilarity continues to exist in the present case.

25.2 Having regard to the said findings, and further considering that the findings recorded by the Tribunal are in conformity with the provisions of Section 92C of the Act and Rule 10B of the Rules, we find no reason to interfere. The Revenue has neither pleaded nor demonstrated that the findings of the Tribunal excluding the comparables suffer from perversity. In the absence of any demonstrated perversity, the findings recorded by the Tribunal remain findings of fact and do not give rise to any substantial question of law.

25.3 Accordingly, we hold that Substantial Question of Law Nos. 1 and 2 do not arise for consideration.

(6) ITA Nos.23/2011 and 24/2011:

SQL Nos.(a) and (b):

26. The issue relates to the treatment of foreign exchange gain or loss. The said issue has already been answered by this Court in ITA No. 128/2015. The findings recorded while answering Substantial Question of Law Nos. 3 and 4 in ITA No. 128/2015 shall equally govern the present case, subject to the observations, findings, and the liberty reserved to the Transfer Pricing Officer therein. To undertake the above exercise, the issue stands remitted to the TPO.

26.1 Accordingly, we hold that no substantial question of law arises for consideration on this issue.

SQL Nos.(d) and (e):

26.2 The above Substantial Questions of Law relate to the exclusion of certain comparables on the ground of supernormal profits. The principal dispute concerns the correctness of the exclusion of such comparables. As directed by the Hon'ble Supreme Court in ***SAP Labs India (P.) Ltd.*** (*supra*), this Court is required to examine whether the selection or exclusion of comparables is in conformity with the provisions of Section 92C of the Act and Rule 10B of the Rules.

26.3 While directing the exclusion of certain comparables, the Tribunal has placed reliance on its earlier decisions. Insofar as the exclusion of Hinduja TMT Limited and Aftek Infosys Limited is concerned, the exclusion was based on the benefit available under the proviso to Section 92C(2). The said proviso underwent amendment by the Finance (No. 2) Act, 2009, and by virtue of sub-section (2A) of Section 92C, the benefit available under the pre-amended proviso stood withdrawn with retrospective effect from 1-4-2002. As held by us hereinabove, sub-section (2A) of Section 92C operates retrospectively from Assessment Year 2002-03.

26.4 In the light of the aforesaid finding, the correctness of the exclusion of Hinduja TMT Limited and Aftek Infosys Limited as comparables requires reconsideration by the Tribunal in accordance with law.

26.5 Accordingly, Substantial Question of Law Nos. (d) and (e) are left unanswered to the aforesaid extent. The order of the Tribunal, insofar as it relates to the exclusion of the said comparables, is set aside, and the matter is remitted to the Tribunal for fresh consideration in accordance with law.

Insofar as SQL (c) and (i):

26.6 The Tribunal has excluded Geometric Software Company Limited from the list of comparables selected by the TPO on the ground of functional dissimilarity as well as the absence of segmental financial information. The findings recorded by the Tribunal cannot be said to be contrary to the provisions of Section 92C of the Act or Rule 10B of the Rules.

26.7 The Revenue has neither pleaded nor established that the findings of the Tribunal suffer from perversity. In the absence of any demonstrated perversity, no substantial question of law arises from such findings of fact. The conclusions recorded by the Tribunal, being pure findings of fact, do not warrant interference by this Court.

26.8 Accordingly, we hold that no substantial question of law arises for consideration on this issue.

SQL Nos.(f), (g) and (h):

26.9 In the preceding paragraphs, we have held that the tolerance range of ±5% is not in the nature of a standard deduction. It merely prescribes the permissible range within which no further transfer pricing adjustment is required. The approach adopted by the Tribunal in granting a 5% standard deduction before examining whether the variation falls within the tolerance range is, therefore, held to be legally unsustainable.

26.10 We have also held that sub-section (2A) of Section 92C, inserted by the Finance Act, 2012 with retrospective effect from 1-4-2002, is applicable retrospectively from Assessment Year 2002-03 onwards. Since the assessment year involved in the present case is 2003-04, the said amendment squarely applies.

26.11 Accordingly, the findings recorded by the Tribunal on this issue are set aside, and the matter is remitted to the TPO for fresh determination in the light of the observations made hereinabove.

26.12 All the three Substantial Questions of Law are, accordingly, answered in favour of the Revenue and against the assessee.

(7) ITA No.492/2016:

27. During the course of hearing, it was submitted that only substantial question of law Nos. 1 and 2 arise for consideration in the present appeal.

SQL No.1:

27.1 The issue relating to the treatment of foreign exchange gain or loss has already been considered by this Court while answering Substantial Question of Law Nos. 3 and 4 in ITA No. 128/2015. Subject to the findings recorded therein, and the directions issued and liberty reserved to the Transfer Pricing Officer, we hold that no substantial question of law arises for consideration by this Court on this issue. To undertake the above exercise, the issue stands remitted to the TPO.

SQL No.2:

27.2 The Tribunal has directed the exclusion of M/s. Bodhtree Consulting Limited and Infosys Limited from the list of comparables on the ground of functional dissimilarity. The Tribunal has recorded a finding that the said companies exhibited drastic variations in their profit margins, warranting their exclusion from the list of comparables.

27.3 The findings recorded by the Tribunal are in conformity with the provisions of Section 92C of the Act and Rule 10B of the Rules. Where the profit margins of a comparable exhibit significant fluctuations, such comparable may not provide a reliable basis for determining a fair ALP.

27.4 Though the Revenue has questioned the correctness of the exclusion of the said comparables, it has neither pointed out any violation of the provisions of the Act or the Rules nor pleaded or demonstrated that the findings recorded by the Tribunal suffer from perversity. Unless the findings are shown to be contrary to the statutory provisions or the Rules, or are demonstrated to be perverse on the basis of the material available on record, the conclusions recorded by the Tribunal remain findings of fact.

27.5 Accordingly, we hold that no substantial question of law arises for consideration by this Court on this issue.

(8) ITA No.514/2016:

SQL Nos.2 and 3:

28. The Revenue has preferred the present appeal questioning the exclusion of Accentia Technologies Limited**,**

Cosmic Global Limited**,** Eclerx Services Limited**,** Tata Elxsi Limited**,** and Infosys Technologies Limited from the list of comparables by the Tribunal.

28.1 While directing the exclusion of Accentia Technologies Limited, the Tribunal followed its earlier decision in ***Unisys India Private Limited***, ***ITA Nos. 67 & 70/Bang/2015***, dated 30.09.2015, and recorded a finding that the company had undergone extraordinary events during the relevant previous year on account of amalgamations. The Tribunal noted that, consequent to the merger and demerger, the financial statements of the company were revised and restated after six months from the end of the relevant financial year, thereby affecting its comparability.

28.2 Similarly, while excluding Cosmic Global Limited, the Tribunal relied upon its earlier decision in ***e4e Business Solutions India Private Limited vs. DCIT, IT (TP) A Nos. 1777 & 1845/Bang/2013***, dated 10.11.2015 and held that the company derived substantial revenue from translation services and outsourced a significant portion of its translation work. Having regard to the nature of its activities, the Tribunal concluded that the company was functionally dissimilar and, therefore, not comparable.

28.3 Insofar as Eclerx Services Limited is concerned, the Tribunal again followed its earlier decision in ***e4e Business Solutions India Private Limited*** (*supra*) and held that the company was functionally different, being engaged in providing high-end knowledge process outsourcing services involving specialised domain knowledge and automation expertise.

28.4 While directing the exclusion of Tata Elxsi Limited, the Tribunal, upon examining its annual report, recorded a finding that the company was engaged in diversified activities, including embedded systems, product design, industrial design services, engineering services, visual computing laboratories, and system integration and support services. Under these broad segments, the company was found to be carrying on multiple diversified product design, engineering design, and visual computing activities. On that basis, the Tribunal concluded that the company was functionally dissimilar to the assessee and, therefore, not comparable.

28.5 Similarly, while excluding Infosys Technologies Limited, the Tribunal recorded that the company is a market leader possessing significant brand value, substantial research and development activities, and valuable intangible assets. Placing reliance upon the judgment of the High Court of Delhi in the case of ***Commissioner of Income-tax vs. Agnity India Technologies (P.) Ltd., [2013] 219 Taxman 26 (Delhi)***, the Tribunal held that Infosys Technologies Limited could not be regarded as a suitable comparable.

28.6 We find that the findings recorded by the Tribunal are in conformity with the provisions of Section 92C of the Act and Rule 10B of the Rules. The Revenue has neither pleaded nor demonstrated that the said findings suffer from perversity. In the absence of any demonstrated perversity, the findings recorded by the Tribunal remain findings of fact and do not give rise to any substantial question of law.

28.7 Accordingly, we hold that no substantial questions of law arises for consideration by this Court on this issue.

SQL No.4:

28.8 We have held that Working Capital Adjustment is one of the comparability adjustments intended to eliminate the material effects of differences impacting the profit margin and to make reasonably accurate adjustments, as contemplated under Rule 10B(3) of the Rules.

28.9 In the light of the aforesaid findings, we are of the view that no substantial question of law arises for further consideration on this issue.

28.10 Substantial Question of Law No. 1 does not arise for consideration in view of the order of remand passed by the Hon'ble Supreme Court.

(9) ITA No.884/2017:

29. The Revenue has raised a substantial question of law regarding the exclusion of certain comparables based on the earlier decisions of the Tribunal. The Tribunal directed the exclusion of six comparables on the ground of high turnover. The Tribunal has consistently adopted a turnover benchmark of Rs.200 crores, which we have held to be justified. The turnover of the comparable companies is 23 times that of the tested

party. On that ground, the Tribunal was justified in directing their exclusion. In the absence of any violation of the provisions of the Act or the Rules, the same cannot be held to be impermissible. Further, the Revenue has neither pleaded nor demonstrated perversity in the findings of the Tribunal. In the absence of any demonstrated perversity, the findings of the Tribunal remain findings of fact, giving rise to no substantial question of law.

29.1 Accordingly, we hold that no substantial question of law arises for consideration by this Court.

(10) ITA Crob.No.1/2018 in ITA No.884/2017:

30. The assessee has preferred the cross-objection questioning the exclusion of certain comparables by the Tribunal.

30.1 The Co-ordinate Bench of this Court, in the case of ***Smt. Jyothi Kumari v. Assistant Commissioner of Income-tax (Inv.) Circle–2***, ***[2012] 20 taxmann.com 236 (Kar.)***, has held that a cross-objection is not maintainable in an appeal under Section 260A of the Act. In view of the above judgment, the cross-objection is hereby ***dismissed***.

(11) ITA No.10/2011:

SQL No.20.6:

31. We have held that, by virtue of sub-section (2A) of Section 92C, inserted by the Finance Act, 2012 with retrospective effect from 01.04.2002, the proviso to Section 92C, as it existed prior to its amendment by the Finance (No. 2) Act, 2009, is inapplicable. We have further held that the 2012 amendment operates retrospectively from Assessment Year 2002-03. For the reasons assigned by us while answering Substantial Question of Law No. 1 in ITA Nos. 23/2011 and 24/2011, we are inclined to answer this question in favour of the Revenue and against the assessee.

SQL No.20.5:

31.1 The Tribunal excluded M/s. RS Software Private Limited as a comparable on the ground that it had a negative profit margin of (-16.33%), and M/s. Hinduja TMT Limited and M/s. Aftek Infotech Limited on the ground that they had earned abnormally high profits, thereby impairing the reliability of the statistical results. The Tribunal recorded a finding that companies having either abnormal losses or abnormal profits cannot be regarded as suitable comparables. On the basis of the profit margin data available on record, the Tribunal directed the exclusion of the said comparables.

31.2 While considering the challenge by the Revenue to the exclusion of comparables on the ground of abnormal profit margins, which includes one of the comparables involved in the present case, we have held that companies earning abnormal profits or incurring abnormal losses cannot be regarded as reliable comparables for benchmarking or determining the ALP. The Tribunal has also assigned detailed reasons for such exclusion, which we find to be in conformity with the provisions of the Act and the Rules.

31.3 In the absence of any demonstrated violation of the provisions of the Act or the Rules, or any plea and proof of perversity, the findings of fact recorded by the Tribunal cannot be examined as a substantial question of law.

31.4 Accordingly, we hold that no substantial question of law arises for consideration by this Court.

SQL Nos.20.7 and 20.8:

31.5 The Tribunal directed the exclusion of comparable companies having a profit margin of less than 6%. The assessee had entered into a contract with its German

Associated Enterprise and was operating in a risk-mitigated environment. The Tribunal further found that the assessee had agreed to undertake the work on a cost plus 6% basis. Having regard to the profit level indicator of 6%, the Tribunal directed the exclusion of comparables having a margin below 6%.

31.6 In the peculiar facts of the present case, where the contract itself is on a cost plus 6% basis, this Court does not find any infirmity or error in the approach adopted by the Tribunal warranting interference. The determination of the ALP requires comparison with companies that are comparable in terms of functions performed, assets employed, risks assumed, and the nature of the contractual arrangement.

31.7 In that view, we hold that the Tribunal has not acted in violation of any provision of the Act or the Rules. The findings recorded by the Tribunal are based on the facts of the case and the settled principles governing transfer pricing. Accordingly, no substantial question of law arises for consideration by this Court.

SQL No.20.9:

31.8 This question relates to the acceptance of Satyam Computers Limited as a comparable, despite the contention that its audited financial statements were unreliable on account of alleged falsification.

31.9 The Tribunal considered ten comparable companies with profit margins ranging from 6.09% to 40.96%. The profit margin of Satyam Computers Limited was 30.86%. ADCC Research and Computing Center Limited had a profit margin of 40.96%, while Xcel Vision Technologies Limited had a profit margin of 35.88%.

31.10 Though it is contended that the financial statements of Satyam Computers Limited were unreliable due to falsification, no *prima facie* material has been placed on record to establish such falsification, except a reference to certain proceedings initiated against its Managing Director. Moreover, Satyam Computers Limited is only one among the ten comparables considered by the Tribunal. The assessee has not questioned the inclusion of comparable companies having profit margins of 40.96% and 35.88%. There are, therefore, other comparable companies with profit margins close to that of Satyam Computers Limited.

31.11 In the above circumstances, this Court finds no reason to exclude Satyam Computers Limited from the list of comparables merely on the ground urged by the assessee, particularly when its profit margin falls within the range of the other comparables considered by the Tribunal.

31.12 Accordingly, we hold that no substantial question of law arises for consideration by this Court.

SQL No.20.10:

31.13 This question relates to the treatment of donations as operating income and the exclusion of income-tax refund from the operating income for the purpose of computing the net margin. The present appeal has been remitted for reconsideration only on issues relating to transfer pricing adjustments. We do not find it necessary to adjudicate this question, as it does not fall within the ambit of the directions issued by the Hon'ble Supreme Court while remanding the matter for reconsideration by this Court.

32. The appeals stand ***disposed of*** in view of the observations made hereinabove.

Pending I.As., if any, stand disposed of.

We place on record our appreciation for the able assistance rendered by Sriyuths Sri Damodar M. Nayak, Amaregouda Kellur and Sri Harshith A., Research Assistants.

Sd/-
(S.G.PANDIT)
JUDGE

Sd/-
(K. V. ARAVIND)
JUDGE

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