
[2022] 138 taxmann.com 353 (Mumbai - Trib.)[18-05-2022]

TRANSFER PRICING : Where assessee provided BPO services to its AE for which it charged login hour rate of 10 USD and adopted TNMM as MAM and later assessee submitted quotes showing login hour rates of three companies before DRP and requested 'other method' to be used to determine ALP, since TNMM was adopted as MAM without any basis and quotations submitted by assessee showed that assessee charged higher rate as compared to comparables, assessee was to be allowed to change MAM from TNMM to other method

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[2022] 138 taxmann.com 353 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'K'

First Credit ITES (P.) Ltd.

v.

Additional Commissioner of Income-tax Officer*

VIKAS AWASTHY, JUDICIAL MEMBER

AND PRASHANT MAHARISHI, ACCOUNTANT MEMBER

IT APPEAL NO. 1183 (MUM.) OF 2021

[ASSESSMENT YEAR 2016-17]

MAY 18, 2022

Section 92C of the Income-tax Act, 1961, read with rules 10B and 10C of the Income-tax Rules, 1962 - Transfer pricing - Computation of arm's length price (Methods for determination of - Most appropriate method, determination of) - Assessment year 2016-17 - Assessee provided BPO services to its AE for which it charged login hour rate of USD 10 - Assessee adopted TNMM as MAM and claimed that login hour rate charged to its AE was ALP of international transaction - TPO rejected claim of assessee and accordingly, selected seven comparables to determine ALP - Assessee requested DRP to adopt other method as MAM for benchmarking transactions - However, DRP rejected said request and upheld order of TPO - It was noted that TNMM was adopted by assessee without any basis and TPO also accepted same without testing adoption of MAM - Furthermore, assessee submitted additional evidence before DRP in form of quotes showing login hour rates of three companies and claimed 'other method' should be used to determine

ALP of assessee's international transaction - Whether since three quotations submitted by assessee showed that assessee charged higher rate as compared to rates stated on websites of three comparables, assessee was to be allowed to change MAM from TNMM to other method - Held, yes [Para 13] [In favour of assessee]

FACTS

- The assessee-company was engaged in the business of process outsourcing. The assessee provided call center and BPO services to its AE for which it charged login hour rate of 10 USD. The assessee had adopted TNMM as the most appropriate method (MAM) and claimed that login hour rate charged to its AE was ALP of the international transaction.
- The TPO observed that assessee did not take into account comparability study despite stating that TNMM was the most appropriate method (MAM) and selected seven comparable companies. The TPO determined ALP of international transactions and accordingly, made adjustments.
- The assessee requested the DRP to adopt other method as the MAM for benchmarking transactions. However, DRP rejected said request on ground that assessee chose TNMM and TPO did not disturb the selection of said method. The DRP thus, upheld the order of the TPO and final assessment order was passed by the Assessing Officer.
- On appeal to the Tribunal :

HELD

- According to the terms of agreement, the assessee is remunerated at the rate of USD 10 per productive hour of customer services associates. On looking at the transfer pricing study report, it is found that the assessee did not benchmark this international transactions with any comparability study, but merely stated that as assessee does not provide similar services to third parties and no other service transactions reveals the nature of terms and conditions of services provided, ALP data are not available. Therefore, assessee submitted that login hour rate charged to AEs at USD 10. It computed the net margin at 4.8 per cent and therefore, stated in its TP that transactions are at arm's length. It is found that the TP study report prepared by the assessee does not give any guidance and does not give any idea about the comparability study of the international transaction to hold that same are at arm's-length. Assessee stated that international transaction is at arm's length according to TNMM. The criteria laid down in rule 10B(1)(e)(iii) to (v) are not satisfied at all. Therefore, the TP study report of assessee is bald, devoid of any substance and reasoning. Naturally, it is not prepared in adherence of TP Regulation. The TPO also accepted TNMM as the MAM without any reasoning. When the matter reached before the DRP, assessee submitted that the rate of USD 10 per login hour charged by the assessee should be considered at arm's length. It also submitted additional evidence before the DRP in the form of some website excerpt, wherein similar services are offered and services charged per hour are in the range of USD 5 to USD 9

. It also submitted quotes of three different parties where the quotes are given showing rates of USD 8.5 to USD 10 per login hour. Therefore, assessee submitted that now the quotes are available, instead of TNMM, the sixth method *i.e.* 'other method' should be used for benchmarking and determination of ALP of the abovementioned international transaction. It is found that the claim of the assessee is supported by reasonable evidence for advocating the applicability of 'other method' as the most appropriate method. The adoption of TNMM as most appropriate method by the assessee was without any basis and any comparability study. The TPO also accepted the same without testing adoption of the most appropriate method. After accepting the same, as the most appropriate method the TPO proceeded to comparability study by selection of comparables. Therefore, at the first occasion, before the DRP, assessee requested for change of proper most appropriate method for determination of ALP. There is no *mala fide* attributed to assessee either by the DRP or by the revenue in such change.

- Off course, assessee is contesting adjustment made by the Assessing Officer/TPO, which assessee in all fairness is entitled to. Rule 10C(1) provides that the method to be selected should satisfy two conditions that, firstly it should be the one best suited to the facts and circumstances of each international transaction and it provides the most reliable measure of the arm's length price. Both these conditions are cumulative. Further, according to rule 10C(2), in selecting the most appropriate method, the most important factors shall be availability, coverage and reliability of data necessary for the application of method and the degree of comparability between international transaction and the uncontrolled transaction and between the enterprises involved. For application of TNMM, assessee has no justification and comparable selected by TPO are seriously disputed. In TP analysis where a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method. In the instant case applicability of TNMM is without any basis or comparability analysis. There is no bar in change of method provided it results into better appreciation of facts and more accurate determination of ALP. The DRP has not stated the transactions or quotations shown by the assessee are not reliable. Even otherwise, the three quotations submitted by the assessee are submitted to the service receiver, which shows the comparable rate of USD 8.5 to USD 10. Further, the website quotation also shows that assessee has charged higher rates than stated on the websites. It is not the argument of the revenue that those rates are not proper. In view of these facts, the assessee is allowed to change most appropriate method from TNMM to the 'other method'. This is more so because, the original MAM *i.e.* e-Transactional Net Margin Method adopted by the assessee in its TP study report is without any analysis and TPO accepted the same without proper examination. The DRP rejected only for the reason that now assessee cannot change the method which it has accepted as most appropriate method earlier. In view of this, the assessee can adopt 'other method' prescribed under rule 10AB as the most appropriate method for benchmarking services income received by the assessee from its associated enterprises. [Para 13]

CASES REFERRED TO

Mattel Toys India (P.) Ltd. v. Dy. CIT [2013] 34 taxmann.com 203/144 ITD 76 (Mum.) (para 7),

Asstt. CIT v. Sudarshan Chemical Industries Ltd. [IT Appeal No. 1792 (Pune) of 2013, dated 25-11-2016] (para 7), *Toll Global Forwarding India (P.) Ltd. v. Dy. CIT* [2014] 51 taxmann.com 342/[2015] 152 ITD 283 (Delhi - Trib) (para 8), *Gulf Energy Maritime Services (P.) Ltd. v. ITO* [2016] 67 taxmann.com 17 (Mum.) (para 8) and *Pr. CIT v. Toll Global Forwarding India (P.) Ltd.* [2016] 66 taxmann.com 53/237 Taxman 326/381 ITR 38 (Delhi) (para 13).

Sunil Moti Lala, AR *for the Appellant*. **Tejinder Pal Singh**, DR *for the Respondent*.

ORDER

Prashant Maharishi, Accountant Member. - This appeal is filed by First Credit ITES Pvt. Limited (the appellant/ assessee) for Assessment Year 2016-17 against the assessment order passed under section 143(3) read with section 144C(3) read with section 144B of the income-tax Act, 1961 (the Act) passed by National e-Assessment Centre (the learned Assessing Officer) dated 21st April, 2021 determining the total income of the assessee at Rs. 2,64,40,219/- against the return of income filed at Rs. 43,16,570/- on 30th September, 2016, whereby the adjustment proposed by the learned Transfer Pricing Officer by his order dated 30th October, 2019 under section 92CA(3) of the Act and which is approved by the learned CIT (DRP)-1, Mumbai-3, *vide* direction under section 144C(5) of the Act dated 23rd March, 2021 amounting to Rs. 2,21,23,649/-.

2. The assessee has raised the following grounds of appeal :—

"The Appellant objects to the assessment order dated 21st April 2021 passed under section 143(3) r.w.s. 144C (13) & 144B of the Income-tax Act, by the Assessing Officer (AO) and raises the following grounds, which are mutually exclusive, independent of, and without prejudice to one another.

1. Transfer Pricing addition of INR 2,21,23,649/- on account of services rendered to the Associated Enterprise:

1.1 On the facts and in the circumstances of the case and in law, the DRP/ AO/ Transfer Pricing Officer (TPO) have erred in making an addition of INR 2,21,23,649/- to the value of international transactions in respect of the provision of services to its associated enterprise ('AE'). The Appellant humbly submits that no transfer pricing adjustment is warranted in its case.

1.2 On the facts and circumstances of the case, the DRP/AO/TPO have erred in law by considering the Transactional Net Margin Method (TNMM) as the most appropriate method for benchmarking the international transaction of the provision of services to its Associated Enterprises.

1.3 On the facts and circumstances of the case and in law, the DRP/TPO have erred in not considering the 'Other Method' prescribed under rule 10AB of the Income-tax Act as the most appropriate method for benchmarking the services rendered by the Appellant to its AE.

The DRP/TPO have erred in ignoring the additional evidence in the form of comparable quotes obtained from third-party service providers in support of an hourly rate of USD 10

charged by the Appellant to its Associated Enterprises.

The DRP/TPO have also erred in ignoring the hourly rates payable for similar low-value services available in the public domain submitted by the Appellant during the DRP proceedings.

1.4 The DRP/TPO have erred in considering the following companies as comparable to the Appellant under TNMM though the same are not functionally comparable to the Appellant.

- HCL Global Processing Services Ltd.
- Inteq BPO Services Pvt. Ltd.
- Manipal Digital Systems Pvt. Ltd.
- One Touch Solutions (India) Pvt. Ltd.
- E-Zest Solutions Ltd.

1.5 The DRP/TPO have erred in determining the arm's length margin of 19.81% on costs and in that process has :

- Ignored the factual position of the AE earning only 6.93% margin on its costs at an entity level from the services rendered by it to the third parties.
- Ignored the submissions made by the Appellant that if this addition is sustained the AE would incur a loss of 3.26% from its transactions with the third parties for the Gyms Phase 2 segment.

1.6 The DRP/TPO have erred in rejecting additional evidence submitted by the Appellant during the DRP proceedings on the grounds that 'sufficient opportunity was given during original TP proceedings and the additional evidence and contention raised is merely an after-thought.

1.7 The DRP/TPO have erred in ignoring the additional evidence in the form of AE's segmental profit & loss account in respect of the margins earned from the 'Gyms Phase 2' segment as the Appellant renders services to the AE relating to only the 'Gyms Phase 2' segment.

1.8 The DRP/TPO have erred in ignoring Paddle Point BPO Services Pvt. Ltd as comparable without providing any cogent reasons.

2. Erroneous computation of tax demand by the AO :

The AO has erred in raising demand of INR 2,40,49,100/- in the Demand Computation sheet as against the correct tax demand of INR 1,22,72,391/-. The AO has erred in considering the transfer pricing adjustment of INR 2,21,23,649 twice which has resulted in the total income of the Appellant being computed at INR 85,63,870 as against correct total income at INR 2,64,40,219/-, consequently working out a higher tax demand.

3. Penalty proceedings:

The AO has erred in law in initiating penalty proceedings under section 274 r.w.s. 271AA of the Income-tax Act.

The Appellant craves leave to add to, alter, amend, or withdraw all or any of the foregoing grounds of appeal at any time before or at the time of hearing of the appeal, to enable the Hon'ble Members to decide this appeal according to law."

3. The brief facts of the case shows that the assessee is a company engaged in the business process outsourcing. It has entered into an agreement of provision of call center and BPO services amounting to Rs. 15,68,06,068/-, which was referred by the learned Assessing Officer to the learned Transfer Pricing Officer for determination of arms length price. The assessee has adopted Transactional Net Margin Method [TNMM] as the most appropriate method. The assessee states in its transfer pricing study report that its associated enterprises has outsourced certain call center services to the assessee and except exchange risk, the assessee is a risk from entity. Assessee has charged to its Associated Enterprises on the basis of login hour rate of USD 10. The assessee has incurred the total operating cost of Rs. 14,93,44,560/- against the operating revenue of Rs. 15,68,06,068/- thereby, resulting into operating profit of Rs. 74,61,508/- resulting into a margin (OP/OC) of 4.8%.

4. The learned Transfer Pricing Officer examined the transaction and found that assessee did not take into account comparability study despite stating that Transactional Net Margin Method is the most appropriate method. The Transfer Pricing Officer further noted that the assessee has merely stated that login hour rate charged to its Associated Enterprises of 10 USD can be said to be arm's length price of the transaction. The learned Transfer Pricing Officer stated that rule 10(1)(e) of the Act requires comparability analysis. Therefore, the learned Transfer Pricing Officer carried out fresh search, selected seven comparable companies whose arms length margin was computed at 19.81%. Consequently, Arms Length Price of the international transaction of Rs. 15,68,06,068/- was determined at Rs. 17,89,29,717/- and thus, adjustment of Rs. 2,21,23,649/- was made by order under section 92CA(3) passed on 30th October 2019.

5. Consequently, a draft assessment order was passed and assessee filed objection before the learned Dispute Resolution Panel. The learned Dispute Resolution Panel after considering the objection of the assessee upheld the comparability study made by the learned Transfer Pricing Officer. However, the assessee has requested before the learned Dispute Resolution Panel, the use of 'other method' as the most appropriate method for benchmarking of the transaction. Assessee also filed additional evidences. However, the learned Dispute Resolution Panel rejected the same for the reason that assessee has chosen Transactional Net Margin Method as the most appropriate method and the learned Transfer Pricing Officer did not disturb the selection of most appropriate method. It was further held that in absence of any documentation or information, the learned Transfer Pricing Officer carried out the benchmarking by applying correct filters and identifying suitable comparables by adopting Transactional Net Margin Method and therefore, now other method cannot be used to replace it, just because the results are unfavorable to the assessee. It was further held that it is the onus of the assessee to establish the same. It was further held that there is no contemporaneous documentation and analysis for adopting the other method. The assessee

quoted some man hour rates without undertaking detailed FAR analysis. The learned Dispute Resolution Panel further referred that agreement of the assessee with its Associated Enterprises is not a simple agreement but has various facts and assessee has not shown that comparable rate stated by it adopting other method have similar FAR profile. Hence, it was rejected. On the comparability aspect with respect to the comparable selected of Peddle point BPO services Pvt. Ltd the learned Transfer Pricing Officer was directed to verify certain aspect.

6. Based on the above direction, the learned Assessing Officer passed the final order on 21st April, 2021 making an adjustment of Rs. 2,21,23,649/- to the total income on account of Arm's Length Price of international transaction. Assessee is aggrieved with that and has preferred this appeal.

7. The learned Authorized Representative firstly referred to the Transfer Pricing study report placed at page no. 336 of the Paper Book to show that assessee has exported international calls center services and earned revenue of Rs. 15,68,06,068/-from its Associated Enterprises namely; First Credit Services Incorporation USA. He also referred to the various functions performed by the assessee. He also referred to the agreement placed at page 360 of the Paper Book. He submitted that as per clause no. 2 of the agreement, assessee is required to provide several services namely; customers, debtor records, call center services, training, operations management, reporting, data management and back up and quality assurance. He also referred that minimum 70 fully trained customer services associates (CSA) are required to be employed by the assessee. He referred to clause 2.2 to show that assessee shall receive the services charged of USD 10 per productive hour for fully trained customer service associates. He therefore submitted that assessee receives call center services fees at the rate of 10 USD per login man-hour. He further referred to a outside quotes of synergies outsourcing Pvt. Ltd. dated 28th June, 2020 being quotation to the AE of the assessee wherein, also the login hour rate of 10 USD is provide. He also provided to other different quotations also where the rate is US\$ 8.5 to US\$ 10. He further referred to page no. 476 of the Paper Book which is a letter dated 8th March, 2021, submitted before the learned Dispute Resolution Panel in response to the remand report on the additional evidence submitted with reference to certain website rates. Therefore based on quotations obtained from third party service providers and website rates it is submitted that USD 10 login rate charged by assessee is much higher than the rates charged by other parties. He submitted that all these three websites, which are referred at page 485 of the Paper Book, are ranging from 5 USD to 9 USD per hour. He further stated that the Dispute Resolution Panel was also given 3 quotations of third party service provider in India which quoted per hour login rate of USD 8.5 to 10. He therefore submitted that outside third party quotation and the website rates clearly shows that impugned international transactions are at Arm's Length. He further stated that though assessee in its transfer pricing study report has mentioned the Transactional Net Margin Method as the most appropriate method , however, the assessee can at a later stage substantiate that the 'other method' is the most appropriate method. He submitted that assessee has already stated before the learned Dispute Resolution Panel to adopt 'other method' as the most appropriate method. He referred to the decision of co-ordinate Bench in case of *Mattel Toys India (P.) Ltd. v. Dy. CIT* [2013] 34 taxmann.com 203/144 ITD 76 (Mum.) wherein though assessee adopted resale price method as most appropriate method earlier, but ITAT found that the method may be changed, if changed method produces better or more appropriate Arms Length Price. He further referred to the

decision of co-ordinate Bench in case of *Asstt. CIT v. Sudarshan Chemical Industries Ltd.* [IT Appeal No. 1792 (Pune) of 2013, dated 25-11-2016], where it has been held that assessee is not precluded from changing most appropriate method as there is no bar under the Act or the Rules. He submitted that request of the assessee to change the most appropriate method is for *bona fide* reasons and not in an arbitrary manner. He submitted that now the quotes are available of identical services therefore, it should be applied.

8. He further referred to rule 10AB, where 'other method' is also stated to be acceptable method of transfer pricing analysis. He submitted that the quotations of the work could also be considered as the acceptable comparable prices. He first referred to the decision of co-ordinate Bench in 51 taxmann.com 942 (Del) in case of *Toll Global Forwarding India (P.) Ltd. v. Dy. CIT* [2014] 51 taxmann.com 342/[2015] 152 ITD 283 (Delhi - Trib) wherein it has been held that 'other method' can be applied retrospectively. He also referred to Para no. 20 of that decision to support that the change of method requested is not for diverting the adjustment made but for better determination. He further referred to the decision of co-ordinate bench in case of *Gulf Energy Maritime Services (P.) Ltd. v. ITO* [2016] 67 taxmann.com 17 (Mum.) that quotation etc can also be considered for computing the Arm's Length Price while adopting the 'other method' as most appropriate method. In view of this, he submitted that other method should be adopted as the most appropriate Method. He further referred to the third party quotes and various excerpts of websites to show that these are all call center service quotes and there are no functional dissimilarities involved therein with the functions performed by the assessee. He also submitted that identical nature of services is mentioned therein. He also referred to the various clauses of the agreement to show that assessee does not carry any risk and is rewarded on man-hour rates. He thus, submitted that the rates charged by the assessee is far higher than the rates quoted on various websites and also comparables with third party quotes. In view of this, he submitted that if the other method is allowed as the most appropriate method, then international transaction entered into by the assessee is at arm's length.

9. He also referred to the comparability analysis conducted by the learned Transfer Pricing Officer and submitted that the comparables selected by the learned Transfer Pricing Officer suffers from severe infirmities. However, he submitted that if the assessee succeeds on ground no. 1.3 , ground no. 1.4 onwards becomes redundant and merely academic in nature.

10. The learned Departmental Representative vehemently submitted that assessee has already selected the Transactional Net Margin Method as the most appropriate method and therefore, now assessee does not have any right to change the same. He referred to the transfer pricing study report submitted by the assessee and stated that assessee itself has selected the Transactional Net Margin Method as the most appropriate method. Assessee has eliminated all other methods and has urged that Transactional Net Margin Method is the most appropriate method. Now assessee cannot go on changing the most appropriate method when it does not have any defense against the Arms Length Price determined by the learned Transfer Pricing Officer.

11. The learned Departmental Representative on comparability analysis supported the orders of the lower authorities.

12. We have carefully considered the rival contentions and perused the orders of the lower

authorities. We find that assessee is providing services to its enterprises in terms of agreement dated 1st April 2015. Assessee owns and operates call center having trained customer service associates. It provides the services to its Associated Enterprises on terms and conditions mentioned at Paragraph 2 of that agreement which is as under :—

"2. TERMS AND CONDITIONS OF ENGAGEMENT

2.1 FCS hereby retains FCITES to provide Services in the manner set forth below and FCITES hereby accepts such engagement.

- (a) Customers - FCITES will provide Services in India to FCS Customers as requested by FCS
- (b) Debtor Records - Debtor Records or access there to shall be provided to FCITES by FCS in a manner agreed upon by the Parties.
- (c) Call Centre service - FCITES will utilize the Call Centre located at an Authorized Service Location for delivery of Services The Call Center will be equipped with telephone systems, computer systems, and various FCITES support and call monitoring tools, such as documentation and knowledge bases, to be used in the delivery of the Services FCITES shall bear all expenses of operating the Call Center, including insurance all expenses for equipment and systems necessary to connect to any telecommunications circuits or facilities utilized by FCS to bring calls to the Call Center. FCS shall provide FCITES with a list of the required minimum capabilities that FCITES shall maintain with respect to the Call Centre FCS will facilitate FCITES with various services as like front office service, client service, sales and marketing, lease line, letter service and legal services without additionally charging to it.
- (d) Training - FCITES will not charge to FCS for the time spend on training of CSAs.
- (e) Training by FCITES- The trainers appointed by FCITES shall train CSA's how to perform Services Training shall be subject to FCS's review.
- (f) FCITES Operations Management- FCITES shall be responsible for the operations management of the Services. The operations management of FCITES shall report to FCS management, whether on-site or in the United States as directed by FCS.
- (g) Reporting Requirements - FCITES shall provide FCS with those reports, and in accordance with the time frames, as FCS may proscribe from time to time.
- (h) Data Management and Backup the data shall be managed in the manner described by FCS from time to time. A back-up of all data shall be located at site other than the Call Center, the location of which shall be reasonably satisfactory to FCS.

- (i) Service Commitments FCITES shall render the Services in accordance with the service level commitments set forth by FCS from time to time. In addition, FCITES shall comply with and follow the FCS Code of Business Principles (the "Code") as set forth by FCS from time to time. Any amendments to the Code shall be provided in writing to FCITES whereupon such amendments shall become of equal effect on FCITES as of the date of the receipt of such notice. FCITES shall make all best efforts to comply with such amendments as soon as practicable and in any event no later than fifteen (15) days from the date of receipt of the notice described in the preceding sentence.
- (j) Quality Assurance FCS shall have the right to verify the quality of the Services rendered by FCITES in accordance with the audit rights described in section 2.10 of this Agreement.
- (k) Headcount - The minimum number of CSA's required is 75. FCS shall provide reasonable notice to increase the number of CSA FCS can have the number of CSA rendering Third Party Services, reduced by providing four (4) weeks prior notice, provided that the reduction in CSA may not exceed more than 15 CSA in any thirty (30) day period. The 15 CSA limitation does not apply to nonperforming CSA Notwithstanding the foregoing, if FCS loses a material customer, then FCS can immediately reduce the number of CSA rendering Third Party Services by thirty (30) CSA per month.
- (l) Billable Login Hours - FCITES can bill maximum 160 hours for per FTE's (Full) Time Employee). FTE's count should be more than 60 for every month. This includes CSA's who are moved to floor during the month. FCITES cannot bill for break time, team discussion, absenteeism, preparation for start and finish shift time FCS has agreed that FCITES can recruit more CSAS to cover up floor performance FTE's count may go down beyond 60 with reference to section 21.k

2.2 FCS shall receive all of the revenue generated from the provision of Third Party Services to Customers and shall pay FCITES for Services performed in India the rate of \$10.00 per Productive Hour for fully-trained CSA's only FCITES will take care for Training Services performed in India as and when required FCS shall not be responsible for any costs or expenses, such as supervisory related expenses, that FCITES may incur to monitor and manage the quality of the Third Party Services that it is rendering under this Agreement. FCS shall pay employee incentives or bonuses as determined in FCS's sole discretion. FCS and FCITES shall discuss the payment of revenue based productivity bonuses.

2.3 For FCITES employees performing quality assurance at FCS's request, FCS shall not pay FCITES separately. FCS shall not be responsible for any costs or expenses, such as supervisory-related expenses, that FCITES may incur to monitor and manage the quality of the Third Party Services that it is rendering under this Agreement.

2.4 For FCITES employees performing skip tracing at FCS's request FCS shall not pay

FCITES separately for it.

2.5 FCS can grant special incentives to FCITES on extra ordinary performance during slack periods.

2.6 Taxes:

- (a) The hourly rates described in sections 2.2, 2.3, 2.4 and 2.5 inclusive of all taxes.
- (b) FCS shall be entitled to withhold income tax, if applicable on all payments due to FCITES under this Agreement, as required under the applicable laws and shall make the payments to FCITES subject to such taxes being withheld. FCS shall provide FCITES with the relevant tax withholding certificates in respect of the aforesaid tax deductions. Unless agreed to in writing to the contrary, the payments set forth in sections 2.2, 2.3, 2.4 and 2.5 are the only payments to which FCITES is entitled. All payments shall be made in United States Dollars. The rates in sections 2.2, 2.3 and 2.4 (the "Rates") are based on an exchange rate of sixty two (62) Indian Rupees per one (1) United States Dollar. If there is a material change to the exchange rate, then the Parties shall use their best efforts to renegotiate the Rates.

2.7 Every Month, FCITES shall submit to FCS an invoice detailing the Productive Hours. FCS shall remit payment to FCITES within Sixty (60) days of its receipt of an invoice. Notwithstanding anything in this Agreement to the contrary, FCS shall have the right to offset any payments due to FCITES under this Agreement against amounts due to FCS from FCITES under any other agreement.

2.8 If a customer requires FCITES and FCS to sign an agreement (a "Tri Party Agreement") in order to render Services to said customer, then the Parties shall use their best efforts to negotiate a separate agreement with respect thereto.

2.9. (a) In the event any performance of the Services will be, or contemplated to be undertaken whether directly by FCITES or subcontracted to any third party, at any location other than an Authorized Service Location, FCITES shall obtain the prior written consent of FCS, which consent may be withheld at FCS's sole discretion.

(b) If FCITES provides the Services to FCS in breach of section 2.9(a), then FCS at its sole discretion may (a) immediately terminate this Agreement and recover any damages to which it is entitled; (b) require continuation of the Services entirely within an Authorized Service Location and/or (c) execute a modification to this Agreement to incorporate the newly agreed Authorized Service Location.

2.10 Audit Rights (a) FCS, and/or its authorized representatives ("Auditor"), shall have the right at any time, with notice of at least five (5) business days, to perform an audit with respect to FCITES's rendering of the Services and its performance hereunder. Subject to and without compromise to FCITES's obligations of confidentiality to its other clients, FCITES shall grant the Auditor full and complete access, during normal business hours and upon

reasonable advance notice in writing as aforementioned, to any and all relevant portions of FCITES's books, records and any other information as they relate to this Agreement and the Services. FCITES shall provide the Auditor, such information and assistance as reasonably requested including without limitation, the provision of copies of any of FCITES's books, records and information in connection with its performance of the Services and compliance with this Agreement, in order for the Auditor to perform such audits,

- (b) In order for the Auditor to perform such audits, FCITES shall for the term of this Agreement and for at least two (2) years after the expiry or termination of this Agreement, preserve its books, records and accounts in respect of the exercise of the Services under this Agreement. Such books, records and accounts shall be treated as confidential and the Auditor shall maintain such confidentiality and shall not divulge any information in respect thereof other than for the purposes of conducting the Audit.
- (c) For each audit, the Auditor shall prepare and submit to FCS a written report of the results of such audit ("Audit Report") and thereafter, within fifteen (15) days, FCS shall deliver a copy of the Audit Report to FCITES.
- (d) If the Audit Report indicates that the performance of FCITES is not materially unsatisfactory but could nonetheless be improved in specific ways, the Parties shall mutually agree to and implement such recommendations as soon as commercially feasible without costs to FCS.
- (e) If the Audit Report indicates that the performance of FCITES is materially unsatisfactory in any respect the Parties shall, within ten (10) days of receipt of the Audit Report by FCITES, mutually agree to a plan to improve FCITES's performance to the level deemed acceptable to such audit and implement such plan within the agreed time frames without costs to FCS. Notwithstanding the above, if during the course of such audit, FCS identifies a breach by FCITES under this Agreement, FCS may at its option terminate this Agreement pursuant to article 8 and pursue such remedies available under this Agreement or at law or at equity. Any dispute related to an Audit shall be resolved in accordance with the provisions of section 9.7
- (f) If the Audit Report indicates that FCITES is failing to materially comply with the terms and conditions of this Agreement, FCITES shall reimburse FCS for all the costs and expenses incurred in conducting the Audit.
- (g) During the term of this Agreement, FCITES shall also conduct its own internal or external audit ("FCITES's Audit") to test adequacy of FCITES's internal control environment at least annually and at FCS's request submit a copy of such audit report to FCS."

13. According to the terms of agreement, the assessee is remunerated at the rate of US\$ 10 per productive hour of customer services associates. On looking at the transfer pricing study report,

we find that the assessee did not benchmark this international transactions with any comparability study, but merely stated that as assessee does not provide similar services to third parties and no other service transactions reveals the nature of terms and conditions of services provided, Arm's Length Price data are not available. Therefore, assessee submitted that login hour rate charged to Associated Enterprises at US\$ 10. It computed the Net Margin at 4.8% and therefore, stated in its Transfer Pricing study report that transactions are at Arm's length. We find that the transfer pricing study report prepared by the assessee does not give any guidance and does not give any idea about the comparability study of the international transaction to hold that same are at arm's-length. Assessee stated that International transaction is at arm's length according to TNMM. We do not find that criteria laid down in Rule 10 B (1) (e) (iii) to (v) are satisfied at all. Therefore, the TP study report of assessee is bald, devoid of any substance and reasoning. Naturally, it is not prepared in adherence of TP Regulation. Ld TPO also accepted TNMM as the Most Appropriate method without any reasoning. When the matter reached before the learned Dispute Resolution Panel, assessee *vide* letter dated 16th February 2021 submitted that the rate of US\$ 10 per login hour charged by the assessee should be considered at Arm's Length. It also submitted additional evidence before the learned Dispute Resolution Panel in the form of some website excerpt, wherein similar services are offered and services charged per hour are in the range of \$ 5 to \$9 . It also submitted quotes of three different parties where the quotes are given showing rates of \$ 8.5 to \$ 10 per login hour. Therefore, assessee submitted that now the quotes are available, instead of Transactional Net Margin Method, the sixth method *i.e.* 'other method' should be used for benchmarking and determination of Arm's Length Price of the above-mentioned international transaction. we find that the claim of the assessee is supported by reasonable evidence for advocating the applicability of 'other method' as the most appropriate method. We also note that adoption of Transactional Net Margin Method as most appropriate method by the assessee was without any basis and any comparability study. The learned Transfer Pricing Officer also accepted the same without testing adoption of the most appropriate method. After accepting the same, as the most appropriate method the learned Transfer Pricing Officer proceeded to comparability study by selection of comparables. Therefore, at the first occasion, before the learned DRP, assessee requested for change of proper most appropriate method for determination of Arm's Length Price. There is no *malafide* attributed to assessee either by the learned Dispute Resolution Panel or by the learned Departmental Representative in such change. Off course, assessee is contesting adjustment made by the Id AO/TPO, which assessee in all fairness is entitled to. Rule 10C(1) of IT Rules 1962 (the Rules) provides that the method to be selected should satisfy two conditions that firstly It should be the one best suited to the facts and circumstances of each international transaction and It provides the most reliable measure of the arm's length price. Both these conditions are cumulative. Further, according to rule 10C(2), in selecting the most appropriate method, the most important factors shall be availability, coverage and reliability of data necessary for the application of method and the degree of comparability between international transaction and the uncontrolled transaction and between the enterprises involved. For Application of TNMM, assessee has no justification and comparable selected by TPO are seriously disputed. In TP analysis Where a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method. In the Present case applicability of TNMM is without any basis or comparability analysis. As has been held by the coordinate Bench decisions

in case of Mattel Toys Limited [Supra] & of Sudarashan Chemicals Limited [Supra] that there is no bar in change of method provided it results into better appreciation of facts and more accurate determination of Arm's Length Price. The learned Dispute Resolution Panel has not stated the transactions or quotations shown by the assessee are not reliable. Even otherwise, the three quotations submitted by the assessee are submitted to the service receiver, which shows the comparable rate of \$8.5 to \$ 10. Further, the website quotation also shows that assessee has charged higher rates than stated on the websites. Before us , It is not the argument of the learned Departmental Representative that those rates are not proper. In view of these facts, we see no harm in allowing the assessee to change most appropriate method from TNMM to the 'other method'. This is more so because, the original MAM *i.e.* e Transactional Net Margin Method adopted by the assessee in its Transfer pricing study report is without any analysis and learned Transfer Pricing Officer accepted the same without proper examination. The learned Dispute Resolution Panel rejected only for the reason that now assessee cannot change the method which it has accepted as most appropriate method earlier. Further, whether the quotation can be accepted as benchmarking evidence under Rule 10BA is also supported by the decision of Hon'ble Delhi High court in *Pr. CIT v. Toll Global Forwarding India (P.) Ltd.* [2016] 66 taxmann.com 53/237 Taxman 326/381 ITR 38. In *Toll Global Forwarding India Ltd.'s* case (*supra*) as well as co-ordinate Bench in *Gulf Energy Maritime Services (P.) Ltd. 's* case (*supra*). In view of this, we hold that assessee can adopt 'other method' prescribed under Rule 10AB of the Income-tax Rules as the most appropriate method for benchmarking services income received by the assessee from its associated enterprises.

14. We also find that assessee has submitted additional evidence in the form of comparables quotations from third party service provider in support of r rates charged by the assessee. We find that these evidences are at page no. 463 to 475 of the Paper Book. At page no. 463 of the Paper Book is the rate quoted by Enser Communication Pvt. Ltd to the Associated Enterprises on 6th January 2020, of \$ 10 per login hour. Similarly, at page no. 475 Rhombus on 14th September 2012 has quoted man hour rate of \$ 8.5. Further at page no. 475 Synergies outsourcing Pvt. Ltd. *vide* quotation dated 28th January 2020 has also given the rate of \$ 10 per man-hour. As these quotes are available with the Associated Enterprises for similar services, therefore, the FAR of these quotes are similar with the agreement of the assessee, hence, comparable. However, we hastened to say that website rates could not be accepted without proper examination of FAR and other comparability. But for the reason that As the rates charged by the assessee is higher than the rates quoted by third party suppliers which is permissible in the 'other method', we hold that the international transactions carried out by the assessee is at arm's length. In view of this, we allow ground no. 1.3 of the appeal of the assessee.

15. Ground no. 1.1 is general in nature and ground no. 1.2 is challenging the Transactional Net Margin Method, ground no. 1.4 to 1.8 deals with comparability analysis as per TNMM method, in view of our decision in ground no. 1.3 those ground have become infructuous, hence, dismissed.

16. Ground no. 3 is against initiation of penalty proceedings which is premature and therefore, dismissed.

17. In the result, the appeal of the assessee is partly allowed.

*In favour of assessee.