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

Before **Shri P.M.Jagtap, Vice-President** and
Shri S.S.Godara, Judicial Member

ITA No.89 & 391/Kol/2017
Assessment Year:2007-08

ACIT, Circle-14(1) Aayakar Bhawan Poorva, 110, Shantipally, Kolkata-107 M/s Lexmark International (India) Pvt. Ltd., DLF IT Park, Block-1, 5th Floor, 8, Major Arterial Road, Kolkata-700156	<u>बनाम /</u> **V/s.**	M/s Lexmark International India Pvt. DLF IT Park, Block-1, 5th Floor, 8, Major Arterial Road, Kolkata-156 ACIT, Circle-14(1) Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

ITA No.1208/Kol/2018
Assessment Year:2014-15

M/s Lexmark International (India) Pvt. Ltd., DLF IT Park, Block-1, 5th Floor, 8, Major Arterial Road, Kolkata-700156 [**PAN NO.AAACL 6752 B**]	<u>बनाम /</u> **V/s.**	DCIT, Circle-14(1) Room No. 616, 6th Floor, Aayakar Bhawan, Poorva, 110, Shanti Pally, Kolkata-107
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri Manoneet Dalal & Shri G.P. Srivastav, AR
राजस्व की ओर से/By Revenue	Shri P.K. Srihari, CIT-DR
सुनवाई की तारीख/Date of Hearing	30-11-2018
घोषणा की तारीख/Date of Pronouncement	27-02-2019

<u>आदेश /O R D E R</u>

<u>PER S.S.Godara, Judicial Member:-</u>

This batch of three cases pertains to a single assessee M/s Lexmark International (India) Pvt. Ltd. Former assessment year 2007-08 involves Revenue's and assessee's cross-appeal's No. 89 & 391/Kol/2017 arising against Commissioner of Income Tax (Appeals)-22 Kolkata's order dated 01.11.2016, passed in case No.183/CIT(A)-22/Cir-11/2007-08/2014-15/Kol. involving proceedings u/s 143(3) r.w.s 144C(3) r.w.s. 144C(4) of the Income Tax Act, 1961; in short 'the Act'. Latter assessment year 2014-15 comprises only the taxpayer's appeal ITA No.1208/Kol/2018 directed against the DCIT Circle-14(1) Kolkata's assessment order dated 27.04.2018 framed in furtherance to the DRP-2 New Delhi's direction dated 21.03.2018 in proceedings u/s 144C(5) of the Act.

We proceed assessment year-wise for the sake of convenience and brevity.

Assessment Year: 2007-08.

The Revenue and assessee's cross-appeal ITA No.89/Kol/2017 and 391/Kol/2017.

2. We come to Revenue's appeal 89/Kol/2017 raising various grounds seeking to reverse the CIT(A)'s action *inter alia* deleting gratuity provision write back, obsolete stock written back, warranty written back, provision for warranty of expenditure disallowance(s) involving sums of ₹1.86 lac, ₹62,71,671/-, ₹6,67,157/- & ₹2,99,936/-; respectively made by the Assessing Officer during the course of impugned assessment framed on 28.02.2011. Its further case is that the CIT(A) has erred in law and on facts in deleting the above disallowance(s) after admitting additional evidence in violation of Rule 46A of the Income Tax Rules, 1962 thereby not giving opportunity of hearing to the Assessing Officer.

3. We come to Revenue's first substantive grievance seeking to revive gratuity provision written back disallowance of ₹1.86 lac. The Assessing Officer declined the same quoting assessee's failure in producing the relevant details. The CIT(A) deletes the impugned disallowance vide following detailed discussion:-

> *"08. Ground NO.11 relates to the action of the Ld AO in adding back an amount of Rs.1,86,000/- on grounds that no evidence was produced in regard to the claim for deduction made in the return of income.*
> *09.During the cruse of the appeal proceedings, the Learned. ARs for the appellant-company have submitted as follows:*
> *Disallowance of gratuity provision written back of Rs.186,000.*
> *1. Facts*

1.1 During the AY under consideration, the appellant claimed Rs.186,000 as deduction on account of gratuity provision no longer required written back since the same was offered to tax in the earlier AYs.

1.2 In the order under section 143(3) read with section 144C(1) of the Act, the AO has disallowed the gratuity provision no longer required written back of R s.186,000 by contending that no evidence was produced in regard to claim for deduction made in the return of income without appreciating that the same was offered to tax in the paste AYs and the details of which have already been filed.

2. Submission

2.1 In the return of income for AY 2007-08, an amount of Rs.186,000 has been reduced from the computation of total income on account of gratuity provision no longer required written back. Such provision for gratuity was offered to tax in the following AYs:

Particulars	*Amount (Rs)*	*Reference*
AY 2003-04	*200,000*	*Annexure 1*
AY 2004-05	*450,000*	*Annexure 2*
AY 2005-06	*201,000*	*Annexure 3*
AY 2006-07	*541,000*	*Annexure 4*
Total addition	***1,392,00***	
Less: written back in AY 06-07	*76,000*	*Annexure 4*
Less: written back in AY 07-08	*186,000*	
Balance	***1,1,30,000***	

2.2 During the course of assessment proceedings, the appellant vide letter dated 7 December 2010 submitted that the gratuity provision written back of Rs.186,000 was offered to tax in the past AYs A copy of the letter is enclosed as Annexure 5.

2.3 It may also be noted that similar claim was also made in AY 2006-07, wherein an amount of Rs.76,000 was reduced from the computation of total income on account of gratuity provision no longer required written back. The said claim was allowed in the said AY. Copy of the assessment order passed under section 143(3) read with section 144(13) of the Act for AY 2006-07 is enclosed for your ready reference as Annexure 6.

2.4 It is humbly submitted that the above disallowance lead to double taxation of the same amount in the hands of the appellant company and the same is not permissible under the Act.

3. Prayer

In view of the submission made here-in-above, it is prayed that the addition made by the AO, being grossly erroneous, be deleted.

10. DECISION: Having examined the matter carefully, I find that the Ld AO has recorded that no relevant evidence has been filed by the appellant-assessee during the course of the hearing before him. However form the annexure 1 to 4 filed before this forum [details of which were also available with the Ld AO, as they relate to earlier years] it is seen that the observation of the Ld AO appears to be incorrect. Moreover, the appellant had clearly submitted before th4e Ld. AO that on 7th December, 2010 that the gratuity provision written back of Rs.186,000 was offered to tax in the pat AYs. The said evidence being available at Annexure 5, I find that the add-back by the Ld. AO was not justified, and cannot be sustained in

> *the facts of the case. The same is therefore deleted, and this ground of appeal* ***allowed in favour of the appellant****."*

4. It thus clear that the CIT(A) has nowhere admitted any additional evidence in allowing assessee's gratuity provision written back claim. He has rather referred to the taxpayer's letter dated 07.10.2010 submitted during scrutiny to hold that all the relevant particulars indicating the very sums to have been assessed in preceding assessment years already formed part of assessment record before the Assessing Officer. This clinching fact has gone unrebutted from the Revenue's side during the course of hearing before us. We thus affirm the CIT(A)'s action under challenge deleting the impugned disallowance.

5. Next comes the Revenue's second substantive ground that the CIT(A) has erred in law and on facts in deleting obsolete stock written back disallowance amounting to ₹6,271,671/-. The Assessing Officer held qua this issue as well that the assessee had not placed on record the relevant details of its obsolete stock written back claim. The CIT(A) is of the view that assessee had already filed Annexure 1 to 4 relating to assessment year(s) 2003-04 to 2006-07 indicating respective provisions offered to tax to the extent of ₹9,81,902/-, ₹6,578,199/-, ₹3,438,689/-, ₹1,463,113; aggregating to ₹12,461,903/- as against the impugned sum of ₹6,271,671/- written back in the relevant previous year. We therefore decline Revenue's instant second substantive ground as well in view of the above factual position.

6. The Revenue's third substantive ground seeks to revive the Assessing Officer's action disallowing warrant written back amount of ₹6,67,157/- as deleted in the lower appellate proceedings. The Assessing Officer held qua the assessee's instant claim as well that it did not place on record the relevant particulars during the course of scrutiny. The taxpayer on the other hand placed its letter dated 07.10.2010 addressed to the assessing authority that its corresponding sums of ₹7,11,823/-, ₹33,83,402/- and ₹71,962/- in assessment years 2004-05 to 2006-07; respectively already formed part of record as annexure 9 to 11 and 4. The CIT(A) has deleted the impugned disallowance in these facts and circumstances only. The Revenue fails in its third substantive ground as well therefore.

7. Lastly comes Revenue's fourth and last substantive ground that CIT(A) has erred in law on facts in deleting the warranty provision expenditure of ₹2,99,936/- vide in following detailed discussion:-

> *"17. Ground NO.14, relates to the action of the Ld. AO in the disallowance of provision for warranty expenditure of Rs.2,99,936/-, on grounds that no evidence was procured in regard to the claim for deduction made in the return of income.*
> *18. During the course of the appeal proceedings, the Ld ARs for the app-company have submitted as follows:-*
>
> 'GROUND No. 14
> Disallowance of warranty expenditure of Rs.299,936
> 1. Facts
> 1.1 During the AY under consideration, expenditure on warranty of Rs.299,936 has been claimed separately in the computation of total income since the same was not routed through the profit and loss account.
> 1.2 In the order under section 143(3) read with Section 144C(1) of the Act, the AO has disallowed the same by contending that no evidence was produced in regard to claim for deduction made in the return of income without appreciating that the said expenditure pertains to the AY under consideration and has been incurred exclusively for the purpose of the business.
> 2. Submission
> 2.1 Expenditure on warranty of Rs.299,936 has been claimed separately since the same was not routed through the P&L account. The said expenditure pertains to the AY under consideration and has been incurred exclusively for the purpose of the business.
> 3. Prayer
> In view of the submission made here-in-above, it is prayed that the addition made by the AO, being grossly erroneous, be deleted.
>
> *19. DECISION: In The course of the assessment proceedings, it has been brought to notice by the Ld. ARs that during the subject Assessment Year, the impugned expenditure on warranty of Rs.2,99,936 has been claimed separately in the computation of total income since the same was not routed through the profit and loss account. Therefore, there is merit in such contention as the same has been claimed exclusively for business, and not routed through the P&L account. In the said circumstances, I find that the action of the Ld AO. is not sustainable, and the addition of Rs.2,9,936/- is accordingly ordered to be deleted. The ground therefore stands adjudicated in favour of the appellant-company."*

8. It is crystal clear in view of the above extracted discussion that the Assessing Officer had declined the assessee's instant warranty provision for lack of evidence only. Learned Departmental Representative fails to dispute the basic fact first of all that the assessee had claimed the impugned warranty provision separately in compliance of total income than routing it through profit and loss account. The Assessing Officer himself has been very fair in not disputing the liability of the impugned warranty claim based on past liability followed by scientific estimation allowable as a deduction as per hon'ble apex court's decision in (2009) 314 ITR 62 (SC) *Rotork Controls India P. Ltd. vs. CIT*. We find no merit in Revenue's argument

therefore that impugned warranty provision is required to be disallowed only because the taxpayer has not routed the same through its profit and loss account. The Revenue fails in its instant last substantive ground as well main appeal ITA No.89/Kol/2017.

9. We now come to assessee's cross appeal ITA No.391/Kol/2017. Its pleadings in various substantive grounds seek to delete the upward arm's length price " ALP" adjustment of ₹3,20,66,916/- relating to provision for software services on various facets.

10. We come to the basic relevant facts. This assessee is a company primarily engaged in printers trading business. It also provided for the software development services. The assessee had entered into its international transactions of software development services with its overseas Associate Enterprises "AE" involving to receipts of ₹246,615,444/- in the relevant previous year. The Assessing Officer made sec. 92CA(1) reference for ascertaining "ALP" thereof.

11. The Transfer Pricing Officer (TPO) took up consequential proceedings. He came across assessee's transfer pricing documentation adopting the transactional net margin method "TNMM" whilst declaring profit @ 9.17% as per "operating profit / operating cost OP/OC calculation". Cases file suggests that assessee had taken eight entities M/s Goldstone Technologies Ltd., (2) Lanco Global Systems Ltd, (3) Prithvi Information Solutions Ltd. (4) R. S. Software (India) Ltd., (5) Sasken Communication Technologies Ltd. (6) Tata Elxsi Ltd., (7) VJIL Consulting Ltd., (8) Visualsoft Technologies Ltd. (Merged) (9) Visualsoft Technologies Ltd. for three assessment years 2004-05 to 2006-07 as 10.64%, 8.54%, 8,02%, 11.64%, 12.07%, 9.07%, 21.80%, 7.94% and 14.54%' respectively averaging to 11.54%. It has claimed therefore that its PLI @ 9.17% (supra) fell very well within tolerance margin of ±5%

12. The TPO issued his show-cause notice dated 04.10.2010. He was of the view that the relevant previous year 2006-07 saw main profit and loss in case above nine comparables was @ 19.8% coming to ₹270,549,684/- as against minimum tolerance margin price of ₹257,022,200/- to ₹284,077,168/-.

13. The TPO proceeded further to note that assessee's last comparable entity M/s Visualsoft Technologies Ltd. (supra)'s details were not available in the prowess database. The assessee had turnover of ₹24.65 crores as against its asset base of ₹3.97

crores as per its transfer pricing report. The TPO took into consideration these factors to hold that out of four of the comparable entities M/s Goldstone Technologies Ltd., R.S. Ssoftware (India) Ltd., Sasken Communication Technologies Ltd., Tata Elxsi Ltd., (supra) having turnover of ₹41.03, ₹101.05, ₹306.31 and ₹307.91 with non fixed assets of ₹4.3, ₹97.1, ₹355.34, ₹216.92 and export figure of ₹25.72/, ₹12.85, ₹10.09/- & 24.64 (crores); respectively M/s Goldstone Technologies Ltd., only could be taken as a comparable. He therefore proposed to adopt average profit and loss of M/s Goldstone Technologies Ltd., (supra) @ 25.72% to be the benchmark for ALP at ₹28,39,09,605/-.

14. The assessee filed its reply dated 13.10.2010 before the TPO. It raised manifold submissions *inter alia* pleading therein that it had considered three years data since there was no change in software services business both at its own as well as the industry two M/s Goldstone Technologies Ltd., and Visualsoft Technologies Ltd. (supra) stood already rejected as comparables in preceding assessment year 2006-07, asset bases could not be taken as the relevant criteria for selection of comparables in view of the fact that manpower and technology are the main factors for production of software industries whereas fixed assets are furniture, fixtures and computers the assets are in the nature of plant and machinery, type of assets needed to be annualized before taken as the basis of the comparability and that the turnover ought not to be taken as the foundation for selecting comparable as it may also includes domestic sales.

15. It emerges from a perusal of the case file that assessee's all of the above pleadings failed to convenience the TPO we first of all observed that Rule 10B(4) of the Income Tax Rules, 1962 made it expressly clear that relevant data to be used for analyzing comparability of the international transactions ought to be relating to financial year of the international transactions having taken place followed by the statutory proviso that data relating to a period not too be more than two years prior to the financial year may also be considered if it reveals factors having influence over determination of transfer price in relation to transactions being compared. The TPO thus concluded that above four entities profit and loss (supra) for the financial year 2006-07 only deserved to be considered as per the relevant statutory mechanism.

16. The TPO then come to assessee's plea regarding rejection of M/s Goldstone Technologies Ltd., Visualsoft Technologies Ltd., in assessment year 2006-07. He reiterated that Rule 10B(4) mandates only availability of the very financial year's data. He further observed that a comparable may or may not satisfy fair analyses in each and every assessment year. Coming to turnover aspect, the TPO observed that the turnover filter is an attempt to iron out the difference between the companies having same asset base but involving varying idle capacity. He concluded in view of all these facts that assessee's first comparable M/s Goldstone Technologies Ltd., (supra) satisfies this last turnover filtered in the range of ₹10 to 15 crores as against it's international transactions of ₹24.65 crores in the relevant financial year 2006-07. He accordingly proposed the impugned adjustment in the sec. 92CA(3) order dated 28.10.2010.

The Assessing Officer framed consequent draft assessment order on 28.12.2011 based on the said adjustment.

17. The assessee preferred appeal challenging correctness of the above impugned adjustment raising various contentions. The CIT(A) has declined the same in his lower appellate order as follows:-

"07. DECISION:

1. *I have carefully examined the action of the TPO, and the various arguments advanced by the assessee-company, Ld ARs for the appellant. In the first issue of the appellant regarding non-consideration of the comparable set of the Appellant presented in its Transfer Pricing documentation , it to be stated that the matter is covered against the assessee-appellant by the adjudication for the AY 2008-09, which is discussed in the latter part of this para, when considering the matter relating to the consideration of data relating to multiple years.*
2. *Multiple year data ought to be considered: On this particular issue, I find that the similar matter arose in the case of the assessee-appellant for the AY 2008-09, [the succeeding year of assessment] in Appeal. No.527/CIT(A)-10/Cir-11/2012-13/2014-15*dated 6th October, 2016. In that year, after duly considering the matter, the issue has been held against the appellant. The relevant part of the decision is as under:

1. "Having analysed the action of the TPO and the submissions of the appellant, I find that the Ld. TPO has considered all the submissions made by the appellant, and has finally held that multiple year data cannot be encouraged as a matter of rule and is to be resorted to only in exceptional and well documented circumstances. Moreover, it is absolutely required in law to use the current year's data, something that the assessee has failed to do. Thereafter the Ld. TPO has recorded that the TRO not only has the power, but he is also duty bound to determine the ALP by using the current financial data in the comparability analysis, even of the said data was not available to the assessee in the public

database at the time of preparation of the Transfer Pricing Report. While saying so, the Ld TPO has relied on the decision in the case of CIT Vs. British Paints India Ltd [1991 AIR 1338] [188 ITR 44] [1990 SCR Supl. (3) 525] wherein Hon'ble Apex Court has held that it is not only the right but the duty of the Assessing Officer to act in exercise of his statutory powers, for determining what in his opinion is the correct taxable income. the Ld AO has also relied on the following decisions of the Hon'ble ITAT for furthering the view that the current year's data only is to be considered while determining the ALP.

a. ST Microelectronics Pvt Ltd vs. CIT, New Delhi reported in [2013] 33 taxmann.com 688 (Delhi – Trib.)
b. Deputy Commissioner of Income-tax, Circle-1(2), Hyderabad v. Deloitte Consulting India (P.) Ltd,

2. Having carefully considered the issue, I find that the appellant has not been able to adequately counter the law as it emanated from these decisions and that by merely stating that certain information about current year comparables was not available at the time of preparation of the Transfer Pricing Report, the appellant was not absolved of such mandatory requirement. In my considered view of the matter, the appellant was to use current year's data first, and then only if required he could use the data relating to the two preceding years. I find that while considering such an identical issue in the case of DCIT,. Circle-1(2), Hyderabad v. Deloitte Consulting India (P.) Ltd., reported inn [2010] 12 taxmann.com 500 ((Hyderabad – Trib.), the Hon'ble Bench, by their order dated 22.07.2011, have observed as:

> "Section 92C of the Income-tax Act, 1961, read with rule 10B of the Income-Tax Rules, 1962 –Transfer pricing – Computation of arm's length price – Assessment year 2004-05 whether for purpose of determining ALP, transactions entered into with Associate Enterprises are to be compared with uncontrolled transactions carried on by an entity during same period as that the assessee-company as provided under rule 10B(4) – Held, yet – Whether, therefore, it is mandatory to use current year data first and if any circumstances reveal an influence on determination of ALP in relation to transaction being compared, then other dates for period not more than two years prior to such financial year may be used – Held, yes - Whether tolerance band of 5 per cent provided in proviso to section 92C cannot be taken as a standard deduction – Held, yes – Whether, therefore, if arithmetical mean falls within tolerance band then there should not be any ALP adjustment and, if it exceeds said tolerance band, then ALP adjustment is not required to be computed after allowing deduction at 5 per cent – Held yes – Whether, in view of above, actual working is to be taken for determining ALP without giving deduction of 5 per cent – Held yes – Whether one criterion for selection/rejection of comparables is FAR analysis and, therefore, company whose functions, risks and assets are entirely different, said company cannot be considered as a comparable company for determining ALP – Held, yes [Partly in favour of assessee]
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> Section 10A of the Income -tax Act, 1961 – Free trade zone – Assessment year 2004-05 – Whether telecommunication charges incurred by assessee-company, which had been excluded by Assessing Officer from export turnover, had to be excluded from total turnover also, while computing

admissible deduction under section 10A – Held, yes [Partly in favour of assessee]

3. Similarly, in the case of ST Microelectonics Pvt Ltd. Vs CIT, New Delhi reported in [2013] 333 taxmann.com 688 (Delhi – Trib.), and relied upon by the Learned.TPO, the Hon'ble Delhi Bench of the ITAT, by their order dated 03.06.2011, have observed, in summary as follows:
    1. Section 37(1) of the Income-tax Act, 1961 – Business expenditure – Allowability of – Assessment year 2006-07 – Expenses incurred by assessee for obtaining license to use software were revenue expenditure [In favour of assessee]

The assessee incurred expenditure for acquiring the license to use software for a period of one year or less than two years and claimed same as revenue expenditure. The Assessing Officer held that license for use of software taken by the assessee would give enduring benefit and, hence, it deserved to be treated as capital expenditure. The DRP accepted the proposal of the Assessing Officer.
Held that the assessee had not acquired any ownership in the alleged license and the license's self-life was less than two years. The nature of assessee's business was such that it required computer software. Therefore, the expenses incurred by the assessee for obtaining the license to use the software were to be treated as revenue expenditure.
II. Section 92C of the Income-tax Act, 1961, read with RULE 10B of the Income - Tax Rules, 1962 – Transfer pricing – Computing of arm's length price – Assessment year 2006-07 – For determining ALP, it is mandatory to first use current year data [In favour of revenue]
Rule 10B(4) uses the expression '**shall**' which makes it mandatory to first use the current year data. If certain other circumstances reveal an influence on the determination of transfer pricing in relation to the transaction being compared, then other data for period not more than two years prior to such financial year may be used.
III. Section 92C of the Income-tax Act, 1961, read with RULE 10B of the income-tax Rules, 1962 – Transfer pricing – Computation of arm's length price – Assessment year 2006-07 – If arithmetic mean of comparables falls within range of alleged tolerance band, then there may not be any adjustment under proviso to section 92C
Tolerance band provided in the proviso to section 92C is not to be construed as a standard deed. If arithmetic mean of comparables falls within the range of alleged tolerance band, then three may not be any adjustment but if it exceeds, then ultimate adjustment is not required to be computed after reducing the arithmetic mean by 5 per cent. The actual working is to be taken.
IV. Section 92C of the Income-tax Act, 1961, read with RULE 10B of the Income-Tax Rules, 1962 – Transfer pricing – Computation of arm's length price – Assessment year 2006-07 – TPO is not supposed to r4ecord specific finding before proceeding to select fresh comparables.
The TPO is not supposed to record specific finding before proceeding to select fresh comparables. The idea is to arrive at a reasonable conclusion for identification of comparables which can goad any authority to determine the ALP of any international transaction entered with an AE by an assessee. Every effort should be made within the ambit of procedure provided in the Act as well as rule

10B of the IT Rules. The approach of the ATPO ought to be judicious. The comparability between a controlled transaction and uncontrolled transactions is a comparison of condition which is broader than a mere comparison of price or margin. Where it is found that the conditions were imposed which differ from those which would be made between independent enterprises, transfer pricing adjustments are to be made.

V. Section 92C of the Income-tax Act, 1961, read with RULE 10B of the Income-Tax Rules, 1962 – Transfer pricing –Computation of arm's length price – Assessment year 2006-07 – Where product produced by assessee in itself was of a complex nature, which required skilled work force and it had one of largest design centres out of Europe, Assessing Officer rightly termed assessee as high end performer in field of computer software for purpose of selecting comparables [In favour of revenue]

The assessee was a subsidiary of ST Group and was engaged in producing integrated semi-conductors. In transfer pricing proceedings, while finding out the comparable assessees, who has uncontrolled international transactions of similar nature, the Assessing Officer termed the assessee as high end performer in the field of computer software whereas according to the assessee its activities were of low end as most of the functions in producing integrated semi-conductors were being performed by ST Group and its role was only 2 per cent or 3 per cent in comparison to overall role performed by ST Group.

Held that the role of the assessee in producing semi-conductor (IC) might be limited qua the role performed by ST Group, but that limited role was of no significance. Product produced by the assessee in itself was of a complex, nature, which required skilled work force. The assessee had employed more than 1,600 persons and it had one of the largest design centres out of Europe. The operations carried out by the assessee within India were to be compared with other assessees and not with ST Group. The test which assessee was advocating was not at all relevant for deciding the character of the assessee, whether it was high end performer or a low end performer. The crucial issue which ought to be Explained by the assessee was what was the importance of this 2 per cent role vis-a-vis the role performed by similarly situated companies in an uncontrolled business environment. On facts, the Assessing Officer rightly termed the assessee as high end performer in the field of computer software.

VI. Section 92C of the Income-tax Act, 1961, read with RULE 10B of the Income-Tax Rules, 1962 – Transfer pricing – Computation of arm's length price – Assessment year 2006-07 – Where in every year, assessee was submitting TP report by using different filters for selecting or eliminating comparables in such a way that would give only uniform result, TPO was justified in eliminating comparables selected by assessee and in identifying new comparables [In favour of revenue]

While computing ALP. The TPO excluded the comparables selected by the assessee and selected fresh comparables observing, inter alia, that search strategy of the assessee in identifying the comparables was not scientific; it was not based on any key value driver for the income-tax industry; and that it had selected certain comparables in financial year 2004-05 but those were rejected in financial year 2005-06.

Held that on perusal of TP report submitted by the assessee for three years it was found that in every year by adjusting the financial calculation depending on different aspects effecting any business organization, assessee was submitting a

> TP report which was commensurate to the result declared by it. It used to select different filters for selecting or eliminating the comparables in such a way that would give only uniform result. Therefore, there was no error in the procedure adopted by the TPO for carrying out the fresh search in identifying the new comparables."
>
> 3. As regards the claim about Erroneous selection / rejection of independent comparables by the Learned.TPO by application of arbitrary filters, I find that the Ld. AO has recorded the necessary reason for rejection of the comparables offered by the appellant, and has given the due justification of the turnover filters.
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> 4. In the matter of the claim of the appellant that there was no intention of the Appellant to shift profits outside India, I am not inclined to accept the arguments of the Ld AR in the matter, as the decided view in such matters is that in so far as far arm's length price adjustments are concerned, it is immaterial as to whether or not the income of the assessee was exempted from income tax in the country. It would be relevant to mention the decision of the five Member bench of the Hon'ble ITAT in the case of Aztec Software and Technology Services Ltd Vs Assistant Commissioner of Income-tax (294 ITR AT 32) wherein it has held that, in order to invoke transfer pricing provisions, it is not necessary for the Revenue to establish any tax evasion. It is, therefore, immaterial whether or not the assessee derives any tax advantage by entering into transactions which are not arms length price. As long as the transactions are not at arms length prices, the Assessing Officer cannot be faulted for making transfer pricing adjustments As regards, the determination of the Application of arm' AO, I find that he cannot be faulted in the facts and circumstances emanating in the case.
>
> In summary, the grounds taken by the appellant-company stand dismissed, and the action of the Learned. AO is confirmed."

This is what leaves the assessee agreed against the impugned the ALP adjustment.

18. We have heard rival contentions against and in support of impugned ALP adjustment of ₹37,28,273/- made in the course of assessment an upheld in the lower appellate proceedings. The assessee's first and foremost challenge to lower authorities' action is on the issue of non inclusion of M/s Lanco Global Systems Ltd. and M/s VJIL Consulting Ltd. as comparables. It transpires from page 3 para-6 in the TPO's order that all the relevant details of these two entities including per analyze with PLI for financial year issue were not available either in public domain or power data pages. Learned counsel takes us to paper book pages 145 to 251 containing the said two entities annual reports for financial year 2006-07 relevant to the impugned Assessment Year. He therefore submits that assessee had filed all these particulars before CIT(A) during lower appellate proceedings wherein the said facts were not subjected to factual verification. The Revenue fails to dispute these two entities annual reports sought to be included in the array in comparables primataise satisfy the rigor

of Rule 10B(4) (supra) of the Income Tax Rules since pertaining to financial year in which assessee's international transactions had taken place. We keep in mind all these intervening developments and deem it appropriate to restore the instant issue in light of details of the two companies M/s Lanco Global Systems Ltd., and M/s VIJL Consulting Ltd., is to the TPO for his afresh adjudication / factual verification as per law. We make it clear that we have not expressed any opinion on merits of the issue. Learned counsel at this stage submits that assessee is entitled for working capital adjustment wherein its PLI comes to be more than average margin of three companies M/s Goldstone Technologies Ltd., Lanco Global Systems Ltd., & VJIL Consulting Ltd. (supra). We do not find any merit in assessee's argument at this stage as the TPO is yet to take his final call on the issue after factual verification. We therefore decline assessee's instant latter argument with further clarification that it shall be entitled to raise all factual / legal arguments in consequential proceedings. The assessee's appeal ITA 391/Kol/2017 is accepted for statistical purposes therefore.

Assessment year: 2014-15: **Assessee's appeal ITA No.1208/Kol/2018**

19. It transpires during the course of hearing that the assessee's sole substantive grievance during the course of hearing seeks to delete "ALP" adjustment of ₹5,05,40,448/- in relation to its international transactions in the nature of provision for software development services. Learned counsel's pleads that the Assessing Officer has not granted the mandatory working capital adjustment whilst adopting ALP @ 22.41% as against its TP studying PLI @15.35%. The Revenue invites our attention to para-6 of the assessment order making it clear that taxpayer had not filed all requisites particulars of the impugned working capital adjustment along with annual reports for assessment year 2012-13 & 2013-14 despite the DRP's favourable directions to this effect. Learned counsel submits that the Assessing Officer never put the assessee to notice for filing the said details followed by subsequent time for necessary compliances. Be that as it may, it is sufficiently clear by now that the TPO has to take up the very issue in assessment year 2007-08 in view of our preceding remand direction. We therefore restore this "ALP" as well as working capital

adjustment issue back to him for afresh adjudication as per law. The assessee's latter appeal ITA No.1208/Kol/2018 is also accepted for statistical purposes.

20. The assessee's appeals ITA No.391/Kol/2017 and ITA No.1208/Kol/2018 are accepted for statistical purposes and Revenue's appeal ITA No.89/Kol/2017 is dismissed.

Order pronounced in open court on 27/02/2019

Sd/-	Sd/-
(उपाध्यक्ष)	(न्यायिक सदस्य)
(P.M.Jagtap)	(S.S.Godara)
Vice President	Judicial Member

*Dkp-Sr.PS
दिनांकः- 27/02/2019 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Lexmark International (I) Pvt. Ltd., DLF IT Park, Block-1 5th Fl, 8, Major Arterial Road, Kolkata-156
2. राजस्व/Revenue-DCIT, Circle-14(1), R.No.616, 6th Floor, Aayakar Bhawan, Poorva, 110, Shanti Pally, Kolkata-107/ACIT, Cir-14(1), Aayakar Bhavan, P-7, Chowringhee Square, Kolkta-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।