आयकर अपीलीय अधिकरण, 'डी' :यायपीठ, चे ई।

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

ी वी. दुगा राव, **माननीय ाियक सद4** एवं
ी **जी. मंजूनाथा, माननीय** लेखा सद4 **के सम**

BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.2084/Chny/2017**
िनधा´रण वष´ **/Assessment Year: 2013-14**

M/s.Eversendai Construction-Pvt. Ltd., Plot No.1 & 2, The Lords, Block-1, 5th Floor, Thiru-Vi-Ka Industrial Estate, Jawaharlal Nehru Road, Ekkaduthangal, Guindy, Chennai. [**PAN:** AACCE 2174 N] **(**अपीलाथा**/Appellant)**	**v.**	The Dy. Commissioner-of Income Tax, Corporate Circle-2(1), Chennai. **(** :यथा**/Respondent)**

अपीलाथा क ओर से/ Appellant by	:	Mr.S.P.Chidambaram, Adv.
:यथा क ओर से /Respondent by	:	Dr.S.Palanikumar, CIT
सुनवाई क तारीख/Date of Hearing	:	06.09.2022
घोषणा क तारीख /Date of Pronouncement	:	04.11.2022

<u>आदेश / **O R D E R**</u>

<u>PER G. MANJUNATHA, AM</u>:

This appeal filed by the assessee is directed against final Assessment Order passed by the AO u/s.143(3) r.w.s.144C(13) of the Income Tax Act, 1961, dated 30.06.2017, in pursuant to directions of the Dispute Resolution Panel-2, Bengaluru, u/s.144C(5) of the Income Tax Act, 1961 dated 05.05.2017, and pertains to assessment year 2013-14.

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

1. The Final Assessment Order dated 30.06.2017 passed under Section 143(3) r.w.s. 144C (13) of the Income Tax Act, 1961 by the Deputy Commissioner of Income-tax, Corporate Circle 2(1), Chennai ('the Assessing Officer'/'AO') is erroneous and contrary to law, facts and circumstances of the case.

2. Transfer Pricing ground - upward adjustment to arm's length price.

General Ground

2.1 The directions of the Dispute Resolution Panel (DRP) and the consequential transfer pricing order and the final assessment order is erroneous in so far as determining and quantifying a upward adjustment of Rs.85,15,716/- to the value of international transaction of income/ sales as declared by the appellant.

Rejection of comparable companies:

2.2 The AO/DRP has erred in confirming the action of the TPO in including

'Shyama Power India Limited' which is functionally not comparable to that of the Appellant.

2.3 The AO/DRP has erred in confirming the action of the TPO in including 'Sunil Hitech Engineers Limited' which is functionally not comparable to that of the Appellant.

2.4 The AO/DRP has erred in confirming the action of the TPO in including 'Everest Infra Energy- Limited' which is functionally not comparable to that of the Appellant.

2.5 Without prejudice to the ground 2.4 above, the AO/DRP has erred in confirming the action of the TPO by considering the finance charges incurred by 'Everest Infra Energy Limited' as non-operating in nature.

2.6 The AO/DRP has erred in confirming the action of the TPO in rejecting the comparable companies selected by the assesse in the transfer pricing report.

2.7 The AO/DRP erred in confirming the order of the TPO in conducting a fresh search and arbitrarily rejecting the search process adopted by the Appellant with respect to EPC segment.

Foreign exchange fluctuation:

2.8 The AO/DRP erred in confirming the order of the TPO in treating foreign exchange loss suffered by the Appellant as operating expense.

Working Capital Adjustment:

2.9 The AO/DRP erred in confirming the order of the TPO in not providing working capital adjustment while determining the net profit margins of the appellant.

2.10 The AO/DRP erred in confirming the order of the TPO in rejecting the working capital adjustment without appreciating the fact that the TPO failed to take cognizance of the detailed workings provided.

Capacity utilization adjustment:

2.11 The AO/DRP erred in rejecting the capacity utilization adjustment claimed by the Appellant while determining its net profit margins.

2.12 The AO/DRP erred in not appreciating the fact that the fixed cost to sales ratio of the Appellant is 26.62% as against 13.01% of the comparable companies selected in TP Order.

Use of multiple year data:

2.13 The AO/ DRP has erred in law and in facts by confirming the order of the TPO in rejecting the application of multiple year data for the purpose of benchmarking the international transactions entered during the year by the Appellant.

2.14 The AO/DRP erred in appreciating the fact that in an EPC industry the life of the projects would typically be more than a year and hence considering only single year data would resort to distorted results and thereby erred in rejecting the use of multiple year data.

2.15 The AO/DRP failed to appreciate the fact that the current year data would not be available in the public domain to calculate the margins of the comparable companies at the time of preparation of transfer pricing documentation.

Application of Turnover Filter:

2.16 The AO/DRP erred in confirming the order of the TPO in not applying appropriate turnover filters while conducting search for comparable companies.

3. Corporate Tax Grounds

Disallowance u/s.40(a) - Reimbursement of expenses:

3.1 The DRP erred in law and facts of the case in making a suo-moto enhancement of income amounting to Rs.29,05,634/- on account of non-deduction of TDS for reimbursement of expenses paid by the Appellant to its associated enterprises.

3.2 The DRP grossly erred in issuing directions for enhancement without issuing show cause notice to the Appellant.

3.3 The AO/DRP erred in law and facts of the case by concluding that the reimbursement of expenses paid were in the nature of Fees for Technical Services.

3.4 The AO/DRP ought to have appreciated that the reimbursements were on cost to cost basis i.e. without any mark-up and as such there is no income of non-resident AE, which is chargeable to tax in India warranting TDS.

Restriction on claim of depreciation on UPS:

3.5 The AO/DRP erred in restricting the claim of depreciation on UPS.

3.6 The AO/DRP ought to have appreciated the fact the UPS is an integral part of the computer and as such it is eligible for higher rate of depreciation at the rate of 60%.

4. The Appellant craves leave to add, alter, amend, substitute, rescind, modify and/or withdraw in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

3. The brief facts of the case are that the assessee company M/s.Eversendai Construction Private Limited (in short "M/s.ECPL") was incorporated in 2009. The company is a subsidiary of Eversendai

Constructions (s) Pte Ltd, Singapore. The Global Ultimate parent company is Eversendai Corporation, Berhad, Malaysia. The company is engaged in the business of engineering, design, detailing, steel fabrication, development of residential buildings and commercial complexes. The international transactions entered into by M/s.ECPL were segregated into two segments, i.e. Engineering, Procurement & Construction (in short "EPC") Services segment and Engineering & Design Services (in short "EDS") segment for transfer pricing purposes. Transactional Net Margin Method (in short "TNMM") was considered as the most appropriate method and the transactions were aggregated segment-wise and concluded to be at arm's length. Operating margin on Operating cost was selected as the Profit Level Indicator ("PLI") for both the segments. During the course of assessment proceedings, to ascertain ALP of international transaction of the assessee with its AEs, a reference u/s.92CA of the Act, was made to the TPO.

4. During the course of TP proceedings, the TPO noticed that the assessee has adopted TNMM as most appropriate method on both segments i.e. EPC & EDS. The TPO has accepted international transaction with AE to EDS segment at ALP. However, in respect of EPC segment, the TPO has conducted fresh TP study and has rejected three comparables selected by the assessee viz., (i) M/s.TRF Ltd. (ii) M/s.Isgec Covema Ltd. & (iii) M/s.High Quality Steel Ltd., and further included three more comparable companies like (i) M/s.Petron Engineering Construction Ltd., (ii)

M/s.Shyama Power India Ltd., & (iii) M/s.Sunil Hitech Engineers Ltd., and worked out average PLI of 13.82% and then, compared with PLI of the assessee at 8.96% and suggested TP adjustment of Rs.85,15,716/- to international transaction of the assessee with its AEs. The relevant findings of the TPO are as under:

3. Background of the Company:

Eversendai Construction Private Limited (ECPL) was incorporated on 14 August 2009 in Chennai to carry on the business of engineering, design, detailing, steel fabrication, development of residential buildings and commercial complexes.

4. Associated Enterprises & International transactions:

The assessee company has various international transactions during the FY 2012-13 with its AE as detailed below:

Sl.No.	***Description of the transactions***	***Amount (in Rs.)***
1	*Provision of Erection, testing and commissioning services*	*15,68,80,440*
2	*Provision for designing and drawing services*	*5,06,97,615*
3	*Reimbursement of expenses paid*	*29,05,634*
4	*Reimbursement of expenses received*	*36,61,971*
5	*Issue of shares*	*14,60,00,000*
	Total	*36,01,45,660*

5. Examination of TP study conducted by taxpayer:

The taxpayer has carried out the economic analysis and has summarized it as under:

Nature of international transaction	***Amount (in Rs.)***	***MAM***	***PLI***	***Margin of taxpayer***	***Margin of comparables***
Provision of erection, testing and commissioning services	*15,68,80,440*	*TNMM*	*OP/OC*	*3.35%*	*3.09%*
Provision for designing and drawing services	*5,06,97,615*	*TNMM*	*OP/OC*	*18.50%*	*15.08%*
Reimbursement of expenses paid	*29,05,634*	*Other method*			

Reimbursement of received	*36,61,971*		--	--	--
Issue of shares	*14,60,00,000*				
Total	*36,01,45,660*				

The taxpayer has discussed in brief the search procedure adopted by it in-search for comparables in its T.P. documentation. The taxpayer has used Prowess and Capitaline Plus data bases in search for comparable companies. After applying certain filters, the taxpayer has short-listed 6 & 5 comparables and their arithmetic mean PLI (OP/OC) was computed at 3.09% & 15.08% as against the PLI of the taxpayer at 3.35% & 18.50% EPS segment and EDS segment respectively.

6. *The assessee has adopted TNMM as the most appropriate method to determine ALP of its transaction with AE and as far as Reimbursements are concerned the method has been mentioned as Any Other Method. (Page 6 of TP documentation)*

7. ***EPC Segment***

Erection, Testing & Commissioning Segment:

The assessee company has identified 6 companies as comparable companies by adopting certain search criteria (Page 34 of the documentation) with filters like.

(i) Sufficient financial data not available

(ii) Ceased business operations or currently inactive

(iii) Sick companies or companies with negative net worth

(iv) Lack of sufficient descriptive information

(v) Sales less than 1 crore

(vi) Non-comparable activates

(vii) Substantial transactions with related parties

(viii) Unavailability of segmental information

(ix) Persistent loss making

8. *The margin calculation of comparable companies selected based on the above said search criteria are reproduced as follows:*

Sl.No.	***Name of the company***	***Average PLI (%)***
1	*U.B.Engineering Ltd.*	*6.96*
2	*TRF Ltd.*	*5.03*
3	*Isgec Covema Ltd.*	*6.08*
4	*High Quality Steels Ltd.*	*3.01*
5	*Rishi Laser Ltd.*	*6.18*
6	*Everest Infra Energy Ltd.*	*6.38*
	Arithmetic Mean	***5.61%***

9. *As per the provision of rule 10B (4), the assessee company is to mandatorily adopt only the current year data to determine the ALP of its AE transaction. But Assessee Company has failed to do so and has adopted the 3 years weighted average. Even as per the proviso of Rule 10B(4), use of previous year data is applicable only when it is established that usage* *of such data is necessary as it influences the current year profit of the company. The assessee company has not provided any such evidences to prove that the earlier year data have influenced the current year profit of the company. Therefore, the act of the assessee company to use weighted average of 3 years is not compliance of with rule 10B (4).*

***10.** Owing to the above limitation, we decided to adopt the single year data of the comparables given by the assessee. Further an independent search was conducted in Prowess by adopting requisite filters. As a result of search, 8 companies have been selected as comparable companies and their arithmetic mean is 13.82%. The detail is as under:*

Accordingly, a fresh study is carried out for comparable companies by taking the following filters and resulted the under mentioned comparable companies.

1	All industries – manufacturing activities – business of engineering, design, detailing, steel fabrication, development of residential buildings and commercial complexes.
2	Financials not available
3	Sales above 1 crore
4	Consecutive losses
5	RPT < 25%
6	Functionally similar

Sl.No.	Name of the company	Average PLI (%)
1	Everest Infra Energy Ltd.	19.01
2	Petron Engineering Construction Ltd.	3.97
3	Rishi Laser Ltd.	1.80
4	Shyama Power India Ltd.	14.49
5	Sunil Hitech Engineers Ltd.	9.27
6	UB Engineering Ltd.	5.26
7	Zep Infratech Ltd.	29.17
8	Ansal Buildwell Ltd.	27.60
	Arithmetic Mean	**13.82% (OP/OC)**

***11.** Above filter leads to acceptance and rejection of under mentioned assessee's companies:*

Sl.No.	Descriptions	Accepted / Rejected
1	U B Engineering Ltd.	Accepted
2	T R F Ltd.	RPT > 25%
3	Isgec Covema Ltd.	Sale is less than 1 Cr.
4	High Quality Steels Ltd.	No product
5	Rishi Laser Ltd.	Accepted
6	Everest Infra Energy Ltd.	Accepted

Final companies selected by this Office are as under and none of them have segmental details:

Ansal Buildwell Ltd.	27.60
Everest Infra Energy Ltd.	19.01
Petron Engineering Construction Ltd.	3.97
Rishi Laser Ltd.	1.80
Shyama Power India Ltd.	14.49
Sunil Hitech Engineers Ltd.	9.27

U B Engineering Ltd.	5.26
Zep Infratech Ltd.	29.17
Average	**13.82**

12. ALP calculation by this office is as below:

Value of the international transaction = Rs.15,68,80,440

Margin of the assessee company = 3.35 %

Margin of the comparable companies taken by TPO = 13.82%%

Cost	Markup (%)	Sales
100	3.35	103.35
100	13.82	113.82

ALP of the international transaction = 15,68,80,440113.82/103.35= 17,27,73,407

+ 3% range = Rs.15,21,740,268 to Rs 16,15,86,853.

Adjustment to be made is Rs. 1,58,92,967.

13. The assessee was show caused why the ALP of AE transaction of EPC segment should not be determined at Rs. 1,727,73,407 on the sales part of the international transactions.

14. The Assessee had made detailed submissions in reply to the show cause notice

dated 06.10.2016 and claimed Ansal Buildwell Ltd is purely in the business of housing project and Zep Infratech Ltd is a public incorporated on 18.02.1994. Therefore, both are different to the business of the assessee. The contentions of the assessee is considered and both companies have been removed from the selection of comparable companies for calculation of PU.

'Finally selected companies by this office.

Description	OP/OC (%)
Everest Infra Energy Ltd.	19.01
Petron Engineering Construction Ltd.	3.97
Rishi Laser Ltd.	1.80
Shyama Power India Ltd.	14.49
Sunil Hitech Engineers Ltd.	9.27
U B Engineering Ltd.	5.26
Average	**8.96%**

15. Revised ALP calculated by this office is as below:

Value of the international transaction = Rs. 15,68,80,440

Margin of the assessee company = 3.35 %

Margin of the comparable companies taken by TPO = 8.96%%

Cost	Markup (%)	Sales
100	3.35	103.35
100	8.96	108.96

ALP of the international transaction = 15,68,80,440108.96/103.35=16,53,96,156

+3% range = Rs.15,21,740,268 to Rs.16,15,86,853.

Adjustment to be made is Rs.85,15,716

16. *The ALP for the sales calculated on an international transaction of EPC segment*

has not been determined by the assessee company in accordance with section 92C(3). Hence the arm's length price has been calculated as per the provision of sub-sections (1) and (2) of 92C. Hence an adjustment amounting to Rs.85,15,716 is to be made to the sales of the international transactions.

5. Pursuant to the TPO order u/s.92CA(3) of the Act, dated 28.10.2016, the AO has passed draft assessment order u/s.143(3) r.w.s.144C(1) of the Act, on 30.06.2017 and proposed TP adjustment as suggested by the TPO. The AO had also made additions towards disallowance of employee's contribution to PF & ESI for belated remittances under respective Acts and also disallowed excess depreciation claimed on printer, UPS and port switch, etc. Aggrieved by the draft assessment order, the assessee filed objection before the DRP and the DRP vide their order passed u/s.144C(5) of the Act, dated 05.05.2017 rejected the objection filed by the assessee and upheld TP adjustment proposed by the TPO as well as other Corporate Tax additions made by the AO. In pursuant to the DRP directions, the AO has passed final assessment order u/s.143(3) r.w.s.144C(13) of the Act, on 30.06.2017 and determined total income of Rs.1,80,55,800/- by making additions towards TP adjustment, excess depreciation on printer, UPS & port switch, and disallowance of reimbursement of expenses. Aggrieved by the final assessment order, the assessee is in appeal before us.

6. The first issue that came up for our consideration from Ground Nos.2.2 to 2.7 of the assessee's appeal is exclusion of comparable companies. The assessee has raised grounds challenging the action of the TPO in including M/s.Shyama Power India Ltd., M/s.Sunil Hitech Engineers Ltd., and M/s.Everest Infra Energy Ltd., as comparables. Therefore, it is relevant to decide each of the comparables with the findings of the TPO and arguments of the Counsel for the assessee.

M/s.Shyama Power India Ltd.:

6.1.1 The Ld.Counsel for the assessee submitted that M/s.Shyama Power India Ltd., is functionally not comparable to that of the assessee company, because, assessee company is primarily engaged in the business of structural steel design, fabrication for commercial and civil works whereas M/s.Shyama Power India Ltd., is engaged in the business of construction works for power projects which includes survey, design and construction of transmission and distribution lines. The Technology and expertise required for power project is altogether different when compared to simpliciter fabrication and civil construction work. Therefore, M/s.Shyama Power India Ltd., is not a good comparable and needs to be excluded.

6.1.2 The Ld.DR, supporting the order of the DRP, submitted that the TPO as well as the DRP brought out clear facts in light of profile of both the companies and held that M/s.Shyama Power India Ltd., is functionally similar to functions carried out by the assessee and thus, same cannot be excluded.

6.1.3 We have heard both the parties, and perused the materials available on record and after going through the profile of the both the companies, we find that functions carried out by the assessee is altogether different from functions carried out by M/s.Shyama Power India Ltd., which is evident from the nature of work carried out by M/s.Shyama Power India Ltd., on client base, which is predominantly power generation companies. On the other hand, the assessee is providing steel fabrication and construction services to L&T Construction and Samsung which are engaged in commercial and residential work. Therefore, we are of the considered view that M/s.Shyama Power India Ltd., is not a good comparable when it comes to functions carried by the assessee. Therefore, we direct the TPO to exclude M/s.Shyama Power India Ltd., from the list of comparables.

M/s.Sunil Hitech Engineers Ltd.:

6.2.1 The Ld.Counsel for the assessee referring to annual report of M/s.Sunil Hitech Engineers Ltd., submitted that said company is engaged in the business of construction work for power projects which includes fabrication, erection, testing and commissioning of bunkers electro static pre-boilers, turbines and generators in power plants, whereas, the assessee company is in simple steel structural fabrication and erection for commercial or residential works. Therefore, M/s.Sunil Hitech Engineers Ltd., cannot be considered as good comparable.

6.2.2 The Ld.DR, supporting the order of the DRP, submitted that the TPO as well as the DRP brought out clear facts in light of profile of both the companies and held that M/s.Sunil Hitech Engineers Ltd., is functionally similar to functions carried out by the assessee and thus, same cannot be excluded.

6.2.3 We have heard both the parties, perused the materials available on record and gone through various details filed by the assessee including annual report of M/s.Sunil Hitech Engineers Ltd., we find that functions carried out by the assessee and M/s.Sunil Hitech Engineers Ltd., are altogether different and further, M/s.Sunil Hitech Engineers Ltd., is predominantly carrying out construction works for power projects, whereas, the assessee is carrying out steel structural fabrication and erection works for commercial and residential structures. Therefore, we are of the considered view that M/s.Sunil Hitech Engineers Ltd., cannot be a good comparable to the assessee company and thus, we direct the TPO to exclude M/s.Sunil Hitech Engineers Ltd., from the list of comparables.

<u>M/s.Everest Infra Energy Ltd.;</u>

6.3.1 The Ld.Counsel for the assessee submitted that M/s.Everest Infra Energy Ltd., is engaged in the business of design and engineering for small hydel projects and also construction works for railway tracks, roads and bridges. The client base of M/s.Everest Infra Energy Ltd. is predominantly power generation companies and rural electrification corporation. The assessee company is into structural steel design and fabrication works for commercial and residential structures. Therefore, the Ld.Counsel for the assessee submitted that M/s.Everest Infra Energy Ltd., cannot be a good comparable and needs to be excluded.

6.3.2 The Ld.DR, on the other hand, supporting the TP documentation filed by the assessee submitted that the assessee itself has included M/s.Everest Infra Energy Ltd., in the list of comparables on the ground that both companies are into similar line of business and comparable to the profile of the assessee. Therefore, there is no merit in the arguments of the assessee for exclusion of M/s.Everest Infra Energy Ltd.

6.3.3 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. There is no dispute with regard to the fact that assessee itself had included M/s.Everest Infra Energy Ltd., in the TP documentation and considered as a good comparable. The assessee could not explain, as to why and how, at this stage M/s.Everest Infra Energy Ltd., is not a good comparable. Further, functions carried out by the assessee and M/s.Everest Infra Energy Ltd., are broadly similar in nature, although, the client base is different. Therefore, we are of the considered view that there is no error in the reasons given by the TPO and the DRP to include M/s.Everest Infra Energy

Ltd., in the list of comparable and thus, we reject the ground taken by the assessee.

7. The next issue that came up for our consideration from Ground No.2.8 of the assessee's appeal is consideration of foreign exchange loss as operating in nature. The assessee while computing PLI has excluded foreign exchange loss on the ground that it is non-operating in nature and does not have any effect on operating margin of the assessee. The TPO had included foreign exchange loss as operating in nature on the ground that the assessee has mainly incurred foreign exchange loss in connection with debtors and creditors which is having a bearing on operating margin on the assessee.

7.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The question whether foreign exchange loss is operating or non-operating is depending upon the nature of loss incurred by the assessee and treatment of said loss in the books of accounts by the assessee. The assessee has treated foreign exchange loss as other income and further, excluded foreign exchange loss for computing operating margin on the ground that it is non-operating in nature. However, on perusal of details filed by the assessee and also observation of the TPO, we find that the assessee has incurred foreign exchange loss on account of creditors for purchase and debtors for sales and services. In our considered view, said loss is having bearing on operating margin on the assessee. Therefore, we are of the considered view that there is no error in the reasons given by the TPO/DRP to include foreign exchange loss as operating in nature for the purpose of computing PLI and thus, we reject the ground taken by the assessee.

8. The next issue that came up for our consideration from Ground Nos.2.9 & 2.10 of the assessee's appeal is providing working capital adjustment while determining the net profit margin of the assessee. The Ld.Counsel for the assessee submitted that working capital level will have a bearing on operating profit margin of any assessee including the assessee and thus, necessary adjustment needs to be provided while computing the PLI of the assessee when compared to other comparable companies considering the level of working capital employed in the business.

8.1 The Ld.DR, on the other hand, supporting the order of the DRP submitted that working capital adjustment is not automatic and the assessee needs to prove with evidences that there is a gap between working capital employed by the assessee when compared to working capital employed by comparables. Since, the assessee could not justify working capital adjustment, the TPO/DRP rightly rejected the claim of the assessee and their orders should be upheld.

8.2 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. There is no dispute with regard to the fact that the working capital plays an important role in operating margin of any entity including that of the assessee. Therefore, when assessee seeks adjustment for working capital considering the amount of working capital employed in their business consisting of own funds and borrowed funds in light of working capital position of comparable goes, then it is the duty of the TPO to provide necessary working capital adjustment while computing operating margin of the assessee and this position is supported by the decision of ITAT Chennai Benches in the case of M/s. Doosan Power Systems India Pvt. Ltd., v. ACIT (OSD) in IT (TP) A No.83/Chny/2018 dated 31.03.2021, where similar decision has been reiterated by the Tribunal. Therefore, by following the decision of ITAT, we direct the TPO to reconsider the issue of working capital adjustment in light of various averments made by the assessee and also evidences placed on record.

9. The next issue that came up for our consideration from Ground Nos.2.11 & 2.12 of the assessee's appeal is adjustment for underutilization of capacity. The Ld.Counsel for the assessee submitted that the TPO/DRP is not appreciating the fact that the fixed cost to sales ratio to the assessee is 26.62% as against 13.01% of the comparable companies selected in TP order. Therefore, suitable adjustment needs to be provided.

9.1 The Ld.DR, on the other hand, supporting the order of the DRP submitted that the assessee has failed to make out a case for providing capacity utilization adjustment.

9.2 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below and we find that there is no merit in ground taken by the assessee for providing capacity utilization adjustment, because, the assessee has failed to make out a case of underutilization of capacity when compared to comparable companies selected in TPO order, except stating that fixed cost ratio to sales is higher in the case of the assessee when compared to comparable companies. Therefore, we reject the ground taken by the assessee for capacity utilization adjustment.

10. The next issue that came up for our consideration from Ground No.2.13 to 2.15 of the assessee's appeal is use of multiple year data. The assessee has challenged the findings of the TPO in rejecting the application of multiple year data for the purpose of bench marking the international transaction.

10.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below and we find that when the data available in the public domain in respect of comparable companies, the question of going into the multiple year data does not arise and thus, we are of the considered view that there is no error in the reasons given by the TPO / DRP in rejecting application of multiple year data for the purpose of bench marking of international transaction entered during the year.

11. The next issue that came up for our consideration from Ground No.2.16 of the assessee's appeal is application of turn over filters and during the course of hearing, the Counsel for the assessee submitted that the assessee does not want to press the ground and thus, ground No.2.16 of the assessee's appeal is dismissed as not pressed.

12. The next issue that came up for our consideration from Ground Nos.3.1 to 3.4 of the assessee's appeal is disallowance of reimbursement of expenses u/s.40(a)(i) of the Act. The TPO did not make any disallowance for reimbursement of expenditure u/s.40(a)(i) of the Act. But, the DRP in their order, after considering relevant facts and also submissions of the assessee observed that in absence of any details with regard to the claim of reimbursement of expenses and also after considering the nature of expense opined that payment towards reimbursement of expenses is nothing but FTS and was liable for TDS. Since, the assessee failed to deduct TDS on the said payment as required u/s.195 of the Act, DRP has made disallowance u/s.40(a)(i) of the Act.

12.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below.

Admittedly, the issue of disallowance of reimbursement of expenses u/s.40(a)(i) of the Act, is not before the TPO. For the first time, the DRP on the basis of international transaction reported by the assessee in Form No.3CEB, opined that payment towards reimbursement of expenses, is in the nature of FTS. The assessee, although, claimed before the DRP that reimbursement of expenses is on 'cost to cost' basis without any mark-up, but no details or explanation was submitted by the assessee. Therefore, we are of the considered view that the issue needs to go back to the file of the TPO for further verification. Hence, we set aside the issue of disallowance of reimbursement of expenses u/s.40(a)(i) of the Act, and direct the TPO to re-examine the claim of the assessee in accordance with law.

13. The next issue that came up for our consideration from Ground Nos.3.5 & 3.6 of the assessee's appeal is restriction of claim of depreciation on UPS. The assessee had claimed 60% depreciation on UPS, Printers and other accessories. The AO has restricted depreciation on UPS printers @15% which is applicable to normal block of plant & machinery.

13.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below and we find that this issue is covered in favour of the assessee by the decision of ITAT in the case of Sundaram Asset Management Co. Ltd. v. DCIT, LTU, reported in [2013] 37 taxmann.com 278 (Chennai-Trib.), where it has been clearly held that UPS and Printers are part of a computer systems and eligible for higher depreciation of 60%. A similar view has been taken by the Mumbai Tribunal in the case of Macawber Engineering System (India) Pvt. Ltd. v. ACIT reported in [2013] 33 Taxmann.com 587. Therefore, we are of the considered view that the assessee is entitled for 60% depreciation on UPS and Printers and thus, we direct the AO to allow 60% of depreciation on UPS and Printers as claimed by the assessee.

14. In the result, appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on the 04th day of November, 2022, in Chennai.

Sd/-	***Sd/-***
(वी. द ु ग ा राव**)**	**(**जी. मंजूनाथा**)**
(V. DURGA RAO)	**(G. MANJUNATHA)**
:या ियक सद3य**/JUDICIAL MEMBER**	लेखा सद3य**/ACCOUNTANT MEMBER**

चे ई/Chennai,
 दना ंक/Dated: 04th November, 2022.
TLN

आदश क ितिलिप अ ेिषत**/Copy to:**

1. अप ील ाथा/Appellant
2. :यथा/Respondent
3. आयकर आय ुN (अप ील)/CIT(A)
4. आयकर आय ुN/CIT
5. िवभागीय ितिनिध/DR
6. गाड फ ाईल/GF