

IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER  
AND SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

IT(TP)A No.1223/Bang/2013
Assessment year : 2008-09

The Deputy Commissioner of Income Tax, Circle 12(2), Bangalore.	Vs.	M/s. Novell Software Development (India) Pvt. Ltd., “Laurel”, Block-D, 65/2, Bagmane Tech Park, C V Raman Nagar, Byrasandra Post, Bangalore – 560 093. <b>PAN : AAACN 6992K</b>
APPELLANT		RESPONDENT

IT(TP)A Nos.1106/Bang/2013
Assessment year : 2008-09

M/s. Novell Software Development (India) Pvt. Ltd., Bangalore – 560 093. <b>PAN : AAACN 6992K</b>	Vs.	The Deputy Commissioner of Income Tax, Circle 12(2), Bangalore.
APPELLANT		RESPONDENT

Revenue by	:	Shri G.R. Reddy, CIT-I(DR)
Assessee by	:	Shri T. Suryanarayana, Advocate

Date of hearing	:	30.09.2015
Date of Pronouncement	:	30.09.2015

**ORDER**

*Per N.V. Vasudevan, Judicial Member*

These are appeals filed by the Revenue as well as the assessee against the order dated 9.5.2013 of CIT(Appeals)-IV, Bangalore relating to assessment year 2008-09.

2. The issue that arises for consideration in these appeals are relating to the addition made to the total income consequent to determination of Arm's Length Price (ALP) in respect of international transaction entered into by the Assessee with its Associated Enterprises (AE) u/s.92 of the Income Tax Act, 1961 [the Act]. The addition made consequent to determination of ALP by the TPO and addition on account of transfer pricing adjustment was a sum of Rs.7,20,13,370 which was substantially reduced by the CIT(A) in the appeal filed by the assessee. To the extent the transfer pricing adjustment survives pursuant to the impugned order of the CIT(A), the Assessee is in appeal before the Tribunal. The Revenue is in appeal before the Tribunal challenging the reliefs allowed by the CIT(A).

3. The assessee, Novell India, is a subsidiary of Novell, USA and is a captive service provider. It is engaged in the business of providing software development and support services to Novell, USA. During the financial year 2007-08 relevant to the assessment year 2008- 09, the only international transaction that took place between Novell India and Novell US was

provision of software development and support services to Novell US at a price of Rs. 82,78,21,000/-.

4. In support of the assessee's claim that the price charged by it for services rendered to its AE was at arms' length, the assessee filed a report as required by the provisions of section 92E of the Act in Form 3EB together with detailed analysis. The assessee adopted Transaction Net Margin Method (TNMM) as the most appropriate method for determining the ALP. Operating profits to cost was adopted as the Profit Level Indicator ("PLI"). The PLI of the assessee was arrived at as follows:

Operating Revenue	Rs.82,78,21,000
Operating Cost	Rs.74,93,00,000
Operating Profit	Rs.7,85,21,000
Op.pr/cost%	10.48%

5. The Transfer Pricing Officer (**TPO**) arrived at a final set of 20 comparable companies. The set of 20 comparable companies and the arithmetic mean of the profit margins chosen by the TPO were as follows:

Sl. No	Name of company	OP / TC %
1	Avani Cincom Technologies Ltd.	25.62
2	Bodhtree Consulting Ltd.	18.72
3	Celestial Biolabs	87.94
4	e-zest Solutions Ltd.	29.81
5	Flexitronics (Aricent)	7.86
6	iGate Global Solution ltd.	13.99
7	Infosys	40.37
8	Kals Information Systems Ltd. (Seg.)	41.94
9	LGS Global Ltd.	27.52

10	Mindtree Ltd. (Seg)	16.41
11	Persistent Systems Ltd.	20.31
12	Quintegra Solution Ltd.	21.74
13	R Systems International (Seg)	15.30
14	R S Software (India) Ltd.	7.41
15	Sasken Communication Technologies Ltd. (Seg)	7.58
16	Tala Elxsi (Seg)	18.97
17	Thirdware Solution Ltd.	19.35
18	Wipro Ltd. (Seg)	28.45
19	Softsol India Ltd.	17.89
20	Lucid Software Ltd.	16.50
<b>Arithmetic Mean</b>		<b>23.65</b>

6. The TPO computed the ALP and consequent addition to the total income as follows:

#### 4.3 Computation of Arms Length Price:

The arithmetic mean of the Profit Level indicators is taken as the arms length margin. Based on this, the arms length price of the software services rendered by the taxpayer to its AE is computed as under:

Arithmetic mean PLI	23.65%
Less: Working capital	
Adjustment(Annexure-C)	<u>3.56%</u>
Adj.Arithmetic mean PLI	<u>20.09%</u>

Operating Cost	74,93,00,000
Arms Length Margin	120.09% of the operating cost
Arms Length Price (ALP) At 120.09% of operating cost	Rs.89,98,34,370

Price charged in the international transactions	Rs.82,78,21,000
Shortfall being adjustment u/s.92CA	Rs.7,20,13,370

The above shortfall of Rs.7,20,13,370/- is treated as transfer pricing adjustment u/s 92CA in respect of the software development segment of the taxpayer's international transaction.”

7. Aggrieved by the aforesaid order of the AO, the assessee filed appeal before the CIT(Appeals). The CIT(Appeals) accepted some of the contentions put forth by the assessee with regard to the application of turnover filter and excluded 8 companies whose turnover was more than Rs.200 crores. The CIT(A) applied high profit margin criteria and excluded Celestial Bio labs Ltd., as it had profit beyond 50% during the relevant previous year. Two companies viz., Avani Cincom Technologies Ltd., and Kals Information Systems Ltd., were excluded as functionally not comparable. As a result of such exclusion, the following companies alone were retained for the purpose of determining the profit margin (arithmetic mean):-

Sl. No	Name of company	OP on Cost as per OGE to CIT(A) order	Adjusted Margin
1	Bodhtree Consulting Ltd.	19.14%	20.15%
2	e-zest Solutions Ltd.	28.97%	29.22%
3	LGS Global Ltd.	26.66%	25.93%
4	Quintegra Solution Ltd.	23.06%	20.35%
5	R S Software (India) Ltd.	6.46%	7.73%
6	R Systems International Ltd. (Seg.)	16.87%	15.02%
7	Thirdware Solution Ltd.	21.92%	20.11%
8	Softsol India Ltd.	15.16%	13.22%
9	Lucid Software Ltd.	16.88%	16.79%
	<b>Average</b>	<b>19.36%</b>	<b>15.92%</b>

8. On giving effect to the CIT(A)'s order, the Assessee's margin of 10.48% would be within the range of + / - 5% of the working capital adjusted arithmetic mean of the comparables.

9. The grounds primarily urged in the assessee's appeal are as follows:-

- (i) The CIT(A) erred in not rejecting those companies which are functionally dissimilar to the assessee; and
- (ii) Three companies i.e., Infosys Ltd., Tata Elxsi Ltd. and Wipro Ltd. ought not to have been held to be functionally dissimilar even apart from the fact that they had turnover > Rs.200 crores.

10. The grounds in the Revenue's appeals are as follows:-

- (i) The CIT(A) erred in rejecting eight companies on application of turnover filter.
- (ii) The CIT(A) erred in excluding Celestial Biolabs Ltd. on the basis of high profit margin.
- (iii) The CIT(A) erred in rejecting :-
  - Diminishing revenue filter
  - Different year ending filter
  - Employee cost filter
- (iv) The CIT(A) erred in directing exclusion of Avani Cincom Technologies and Kals Information Systems Ltd.

11. We have heard the rival submissions. The Id. counsel for the assessee filed before us a chart showing as to how companies excluded by the CIT(A) was valid and as to how one of the companies E-Zest Solutions

Ltd., a comparable chosen by the TPO which was retained by the CIT(A), has to be excluded. The learned DR relied on the order of the TPO. We shall deal with this argument by taking up individual companies chosen by the TPO and excluded by the CIT(Appeals).

12. As far as Assessee's appeal is concerned, the first grievance is regarding the action of the CIT(A) in not excluding E-Zest Solutions Ltd. The learned counsel for the Assessee pointed out that this tribunal in the case of 3DPLM Software Solutions Ltd. Vs. DCIT (2014) 42 Taxmann.com 333 (Bang.) (ITAT) was pleased to exclude the aforesaid company (For AY 08-09) as a comparable company in software development services segment. The following were the relevant observations of the Tribunal.

“14. **E-Zest Solutions Ltd.**

14.1 This company was selected by the TPO as a comparable. Before the TPO, the assessee had objected to the inclusion of this company as a comparable on the ground that it was functionally different from the assessee. The TPO had rejected the objections raised by the assessee on the ground that as per the information received in response to notice under section 133(6) of the Act, this company is engaged in software development services and satisfies all the filters.

14.2 Before us, the learned Authorised Representative contended that this company ought to be excluded from the list of comparables on the ground that it is functionally different to the assessee. It is submitted by the learned Authorised Representative that this company is engaged in 'e-Business Consulting Services', consisting of Web Strategy Services, I T design services and in Technology Consulting Services including product development consulting services. These services, the learned Authorised Representative contends, are high end ITES

normally categorised as knowledge process Outsourcing ('KPO') services. It is further submitted that this company has not provided segmental data in its Annual Report. The learned Authorised Representative submits that since the Annual Report of the company does not contain detailed descriptive information on the business of the company, the assessee places reliance on the details available on the company's website which should be considered while evaluating the company's functional profile. It is also submitted by the learned Authorised Representative that KPO services are not comparable to software development services and therefore companies rendering KPO services ought not to be considered as comparable to software development companies and relied on the decision of the co-ordinate bench in the case of Capital IQ Information Systems (India) (P) Ltd. in ITA No.1961(Hyd)/2011 dt.23.11.2012 and prayed that in view of the above reasons, this company i.e. e-Zest Solutions Ltd., ought to be omitted from the list of comparables.

14.3 Per contra, the learned Departmental Representative supported the inclusion of this company in the list of comparables by the TPO.

14.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the list of comparables only on the basis of the statement made by the company in its reply to the notice under section 133(6) of the Act. It appears that the TPO has not examined the services rendered by the company to give a finding whether the services performed by this company are similar to the software development services performed by the assessee. From the details on record, we find that while the assessee is into software development services, this company i.e. e-Zest Solutions Ltd., is rendering product development services and high end technical services which come under the category of KPO services. It has been held by the co-ordinate bench of this Tribunal in the case of Capital I-Q Information Systems (India) (P) Ltd. Supra) that KPO services are not comparable to software development services and are therefore not comparable. Following the aforesaid decision of the co-ordinate bench of the Hyderabad Tribunal in the aforesaid case, we hold that this company, i.e. e-Zest Solutions Ltd. be omitted from the set of comparables for the period under

consideration in the case on hand. The A.O. / TPO is accordingly directed.”

13. Respectfully following the aforesaid decision of the Tribunal, we direct the AO/TPO to exclude the aforesaid company from the list of comparable companies chosen by the TPO.

14. As far as the next grievance of the Assessee is concerned, the plea is that Infosys Ltd., Tata Elxsi Ltd., and Wipro Ltd., have been excluded by the CIT(A) from the list of comparable companies based on the fact that their turnover were more than Rs.200 crores and therefore cannot be compared with a company like the Assessee whose turnover is only around Rs.83 crores. According to the Assessee, these three companies have been held to be functionally also not comparable to a software development service provider such as the Assessee in the case of 3DPLM Software Solutions Ltd. (supra) and hence on this ground also, the aforesaid three companies should be excluded.

15. We have considered his submission and find that these three companies have been held to be functionally not comparable with a software development service provider such as the Assessee in the case of 3DPLM Software Solutions Ltd. (supra). The following were the relevant observations of the Tribunal:

“11.0 Infosys Technologies Ltd.

11.1 This was a comparable selected by the TPO. Before the TPO, the assessee objected to the inclusion of the company in the set of comparables, on the grounds of turnover and brand attributable profit margin. The TPO, however, rejected these objections raised by the assessee on the grounds that turnover and brand aspects were not materially relevant in the software development segment.

11.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee in the case on hand. The learned Authorised Representative drew our attention to various parts of the Annual Report of this company to submit that this company commands substantial brand value, owns intellectual property rights and is a market leader in software development activities, whereas the assessee is merely a software service provider operating its business in India and does not possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-

(i) the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee ;

(ii) the observation of the ITAT, Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856 (Del)/2010 at para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and market leader assuming all risks leading to higher profits cannot be considered as comparable to captive service providers assuming limited risk ;

(iii) the company has generated several inventions and filed for many patents in India and USA ;

(iv) the company has substantial revenues from software products and the break up of such revenues is not available ;

(v) the company has incurred huge expenditure for research and development;

(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems.

In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded from the list of comparable companies.

11.3 Per contra, opposing the contentions of the assessee, the learned Departmental Representative submitted that comparability cannot be decided merely on the basis of scale of operations and the brand attributable profit margins of this company have not been extraordinary. In view of this, the learned Departmental Representative supported the decision of the TPO to include this company in the list of comparable companies.

11.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee has brought on record sufficient evidence to establish that this company is functionally dis-similar and different from the assessee and hence is not comparable and the finding rendered in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) for Assessment Year 2007-08 is applicable to this year also. We are inclined to concur with the argument put forth by the assessee that Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It is also seen that the break up of revenue from software services and software products is not available. In this view of the matter, we hold that this company ought to be omitted from the set of comparable companies. It is ordered accordingly.”

“13. **Tata Elxsi Ltd.**

13.1 This company was a comparable selected by the TPO. Before the TPO, the assessee had objected to the inclusion of this company in the set of comparables on several counts like, functional dis-similarity, significant R&D activity, brand value, size, etc. The TPO, however, rejected the contention put forth by the assessee and included this company in the set of comparables.

13.2 Before us it was reiterated by the learned Authorised Representative that this company is not functionally comparable to the assessee as it performs a variety of functions under software development and services segment namely – a) product design, (b) innovation design engineering and (c) visual

computing labs as is reflected in the annual report of the company. The learned Authorised Representative submitted that,

- (i) The co-ordinate bench of the Mumbai Tribunal in the case of Telecordia Technologies Pvt. Ltd. (supra) has held that Tata Elxsi Ltd. is not a functionally comparable for a software development service provider.
- (ii) The facts pertaining to Tata Elxsi Ltd. have not changed from the earlier year i.e. Assessment Year 2007-08 to the period under consideration i.e. Assessment Year 2008-09 and therefore this company cannot be considered as a comparable to the assessee in the case on hand.
- (iii) Tata Elxsi Ltd. is predominantly engaged in product designing services and is not purely a software development service provider. In the Annual Report of this company the description of the segment 'software development services' relates to design services and are not to software services provided by the assessee.
- (iv) Tata Elxsi Ltd. invests substantial funds in research and development activities which has resulted in the 'Embedded Product Design Services Segment' of the company to create a portfolio of reusable software components, ready to deploy frameworks, licensable IPs and products.

The learned Authorised Representative pleads that in view of the above reasons, Tata Elxsi Ltd. is clearly functionally different / dis-similar from the assessee and therefore ought to be omitted from the list of comparables.

13.3 Per contra, the learned Departmental Representative supported the stand of the TPO in including this company in the list of comparables.

13.4 We have heard both parties and carefully perused and considered the material on record. From the details on record, we find that this company is predominantly engaged in product

designing services and not purely software development services. The details in the Annual Report show that the segment “software development services” relates to design services and are not similar to software development services performed by the assessee.

13.5 The Hon'ble Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. V ACIT (ITA No.7821/Mum/2011) has held that Tata Elxsi Ltd. is not a software development service provider and therefore it is not functionally comparable. In this context the relevant portion of this order is extracted and reproduced below :-

*“ .... Tata Elxsi is engaged in development of niche product and development services which is entirely different from the assessee company. We agree with the contention of the learned Authorised Representative that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we are unable to treat this company as fit for comparability analysis for determining the arm's length price for the assessee, hence, should be excluded from the list of comparable portion.”*

As can be seen from the extracts of the Annual Report of this company produced before us, the facts pertaining to Tata Elxsi have not changed from Assessment Year 2007-08 to Assessment Year 2008-09. We, therefore, hold that this company is not to be considered for inclusion in the set of comparables in the case on hand. It is ordered accordingly.”

“Wipro Ltd.: As far as this company is concerned, this Tribunal in the case of *3DPLM Software Solutions Ltd. (supra)* held that this company is not comparable with software development service provider such as the assessee. The relevant observations are as follows:-

“12. **Wipro Ltd.**

12.1 This company was selected as a comparable by the TPO. Before the TPO, the assessee had objected to the inclusion of this company in the list of comparables on several grounds like functional dis-similarity, brand value, size, etc. The TPO, however, brushed aside the objections of the assessee and included this company in the set of comparables.

12.2 Before us, the learned Authorised Representative of the assessee contended that this company i.e. Wipro Ltd., is not functionally comparable to the assessee for the following reasons:-

- (i) This company owns significant intangibles in the nature of customer related intangibles and technology related intangibles, owns IPRs and has been granted 40 registered patents and has 62 pending applications and its Annual Report confirms that it owns patents and intangibles.
- (ii) the ITAT, Delhi observation in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856(Del)/2010 at para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and a market leader assuming all risks leading to higher profits, cannot be considered as comparable to captive service providers assuming limited risk;
- (iii) the co-ordinate bench of the ITAT, Mumbai in the case of Telecordia Technologies India Pvt. Ltd. (ITA No.7821/Mum/2011) has held that Wipro Ltd. is not functionally comparable to a software service provider.
- (iv) this company has acquired new companies pursuant to a scheme of amalgamation in the last two years.
- (v) Wipro Ltd. is engaged in both software development and product development

services. No information is available on the segmental bifurcation of revenue from sale of products and software services.

- (vi) the TPO has adopted consolidated financial statements for comparability purposes and for computing the margins, which is in contradiction to the TPO's own filter of rejecting companies with consolidated financial statements.

12.3 Per contra, the learned Departmental Representative supported the action of the TPO in including this company in the list of comparables.

12.4 We have heard both parties and carefully perused and considered the material on record. We find merit in the contentions of the assessee for exclusion of this company from the set of comparables. It is seen that this company is engaged both in software development and product development services. There is no information on the segmental bifurcation of revenue from sale of product and software services. The TPO appears to have adopted this company as a comparable without demonstrating how the company satisfies the software development sales 75% of the total revenue filter adopted by him. Another major flaw in the comparability analysis carried out by the TPO is that he adopted comparison of the consolidated financial statements of Wipro with the stand alone financials of the assessee; which is not an appropriate comparison.

12.5 We also find that this company owns intellectual property in the form of registered patents and several pending applications for grant of patents. In this regard, the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (ITA No.227/Bang/2010) has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any such intangible and hence does not have an additional advantage in the market. As the assessee in the case on hand does not own any intangibles, following the aforesaid decision of the co-ordinate bench of the Tribunal

i.e. 24/7 Customer.Com Pvt. Ltd. (supra), we hold that this company cannot be considered as a comparable to the assessee. We, therefore, direct the Assessing Officer/TPO to omit this company from the set of comparable companies in the case on hand for the year under consideration.”

16. Respectfully following the aforesaid decision, we direct that the aforesaid three companies be excluded from the list of comparable companies chosen by the TPO on the ground that they are not functionally comparable also.

17. As far as Revenue’s grievance in its appeal are concerned, the first grievance of the Revenue as projected in ground no.2 of its appeal is that the CIT(A) was not right in applying turnover filter and excluding 8 companies chosen as comparable by the TPO. The following were the companies so excluded by the CIT(A):

	<u>Turnover Rs.</u>
(1) Flextronics Software Systems Ltd.	848.66 crores
(2) iGate Global Solutions Ltd.	747.27 crores
(3) Mindtree Ltd.	590.39 crores
(4) Persistent Systems Ltd.	293.74 crores
(5) Sasken Communication Technologies Ltd.	343.57 crores
(6) Tata Elxsi Ltd.	262.58 crores
(7) Wipro Ltd.	961.09 crores.
(8) Infosys Technologies Ltd.	13149 crores

18. The Bangalore Bench of ITAT has been consistently following the decision rendered in the case of *Trilogy e-business Software India Pvt. Ltd.*

*v. DCIT, ITA No.1054/Bang/2011 dated 23.11.2012 wherein a view has been taken that huge turnover makes a company not comparable with a company having smaller turnover. For the sake of reference, we may refer to the decision of this Bench in the case of *Trilogy e-business Software India Pvt. Ltd. v. DCIT, ITA No.1054/Bang/2011 dated 23.11.2012*, the relevant observations therein are as follows:-*

**“(1) Turnover Filter**

11. The ld. counsel for the assessee submitted that the TPO has applied a lower turnover filter of RS. 1 crore, but has not chosen to apply any upper turnover limit. In this regard, it was submitted by him that under rule 10B(3) to the Income-tax Rules, it was necessary for comparing an uncontrolled transaction with an international transaction that there should not be any difference between the transactions compared or the enterprises entering into such transaction, which are likely to materially affect the price or cost charged or paid or profit arising from such transaction in the open market. Further it is also necessary to see that wherever there are some differences such differences should be capable of reasonable accurate adjustment in monetary terms to eliminate the effect of such differences. It was his submission that size was an important facet of the comparability exercise. It was submitted that significant differences in size of the companies would impact comparability. In this regard our attention was drawn to the decision of the Special Bench of the ITAT Chandigarh Bench in the case of *DCIT v. Quark Systems Pvt. Ltd. 38 SOT 207*, wherein the Special Bench had laid down that it is improper to proceed on the basis of lower limit of 1 crore turnover with no higher limit on turnover, as the same was not reasonable classification. Several other decisions were referred to in this regard laying down identical proposition. We are not referring to those decisions as the decision of the Special Bench on this aspect would hold the field. Reference was also made to the OECD TP Guidelines, 2010 wherein it has been observed as follows:-

“Size criteria in terms of Sales, Assets or Number of Employees: The size of the transaction in absolute value or in proportion to the activities of the parties might affect the relative competitive positions of the buyer and seller and therefore comparability.”

12. The ICAI TP Guidelines note on this aspect lay down in para 15.4 that a transaction entered into by a Rs. 1,000 crore company cannot be compared with the transaction entered into by a Rs. 10 crore company. The two most obvious reasons are the size of the two companies and the relative economies of scale under which they operate. The fact that they operate in the same market may not make them comparable enterprises. The relevant extract is as follows [on Rule 10B(3)]:

“Clause (i) lays down that if the differences are not material, the transactions would be comparable. These differences could either be with reference to the transaction or with reference to the enterprise. For instance, a transaction entered into by a Rs 1,000 crore company cannot be compared with the transaction entered into by a Rs 10 crore company. The two most obvious reasons are the size of the two companies and the relative economies of scale under which they operate.”

13. It was further submitted that the TPO’s range (Rs. 1 crore to infinity) has resulted in selection of companies like Infosys which is 277 times bigger than the Assessee (turnover of Rs. 13,149 crores as compared to Rs. 47.47 crores of Assessee). It was submitted that an appropriate turnover range should be applied in selecting comparable uncontrolled companies.

14. Reference was made to the decision of the ITAT Bangalore Bench in the case of *Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010*, wherein relying on Dun and Bradstreet’s analysis, the turnover of RS. 1 crore to RS. 200 crores was held to be proper. The following relevant observations were brought to our notice:-

“9. Having heard both the parties and having considered the rival contentions and also the judicial precedents on the issue, we find that the TPO himself has rejected the companies which .ire (sic)

making losses as comparables. This shows that there is a limit for the lower end for identifying the comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be upper limit is another factor to be considered. We agree with the contention of the learned counsel for the assessee that the size matters in business. A big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. Thus, as held by the various benches of the Tribunal, when companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded. For the purpose of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. Dun & Bradstreet & Bradstreet and NASSCOM have given different ranges. Taking the Indian scenario into consideration, we feel that the classification made by Dun & Bradstreet is more suitable and reasonable. In view of the same, we hold that the turnover filter is very important and the companies having a turnover of Rs.1.00 crore to 200 crores have to be taken as a particular range and the assessee being in that range having turnover of 8.15 crores, the companies which also have turnover of 1.00 to 200.00 crores only should be taken into consideration for the purpose of making TP study.”

15. It was brought to our notice that the above proposition has also been followed by the Honourable Bangalore ITAT in the following cases:

1. M/s Kodiak Networks (India) Private Limited Vs. ACIT (ITA No.1413/Bang/2010)
2. M/s Genesis Microchip (I) Private Limited Vs. DCIT (ITA No.1254/Bang/2010).
3. Electronic for Imaging India Private Limited (ITA No. 1171/Bang/2010).

It was finally submitted that companies having turnover more than Rs. 200 crores ought to be rejected as not comparable with the Assessee.

16. The Id. DR, on the other hand pointed out that even the assessee in its own TP study has taken companies having turnover of more than RS. 200 crores as comparables. In these circumstances, it was submitted by him that the assessee cannot have any grievance in this regard.

17. We have considered the rival submissions. The provisions of the Act and the Rules that are relevant for deciding the issue have to be first seen. Sec.92. of the Act provides that any income arising from an international transaction shall be computed having regard to the arm's length price. Sec.92-B provides that "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. Sec.92-A defines what is an Associated Enterprise. In the present case there is no dispute that the transaction between the Assessee and its AE was an international transaction attracting the provisions of Sec.92 of the Act. Sec.92C provides the manner of computation of Arm's length price in an international transaction and it provides:-

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

- (a) comparable uncontrolled price method;
- (b) resale price method;

- (c) cost plus method;
- (d) profit split method;
- (e) transactional net margin method;
- (f) such other method as may be prescribed by the Board.

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

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

**Provided further** that if the variation between the arm's length price so determined and price at which the international transaction has actually been undertaken does not exceed five per cent of the latter, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price.

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

- (a) the price charged or paid in an international transaction has not been determined in accordance with sub-sections (1) and (2); or
- (b) any information and document relating to an international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or
- (c) the information or data used in computation of the arm's length price is not reliable or correct; or
- (d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,

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

18. Rule 10B of the IT Rules, 1962 prescribes rules for Determination of arm's length price under section 92C:-

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

(a).....

to

(d).....

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

- (i) the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;
- (ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;
- (iii) the net profit margin referred to in sub-clause (i) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;
- (iv) the net profit margin realised by the enterprise and referred to in sub-clause (i)

is established to be the same as the net profit margin referred to in sub-clause (iii);

- (v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction.

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

- (a) the specific characteristics of the property transferred or services provided in either transaction;
- (b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;
- (c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;
- (d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

(3) An uncontrolled transaction shall be comparable to an international transaction if—

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

profit arising from, such transactions in the open market; or

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

(4) The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction has been entered into :

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

19. A reading of the provisions of Rule 10B(2) of the Rules shows that uncontrolled transaction has to be compared with international transaction having regard to the factors set out therein. Before us there is no dispute that the TNMM is the most appropriate method for determining the ALP of the international transaction. The disputes are with regard to the comparability of the comparable relied upon by the TPO.

20. In this regard we find that the provisions of law pointed out by the Id. counsel for the assessee as well as the decisions referred to by the Id. counsel for the assessee clearly lay down the principle that the turnover filter is an important criteria in choosing the comparables. The assessee's turnover is RS. 47,46,66,638. It would therefore fall within the category of companies in the range of turnover between 1 crore and 200 crores (as laid down in the case of *Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT, ITA No.1231/Bang/2010*) . Thus, companies having turnover of more than 200 crores have to be eliminated from the list of comparables as laid down in several decisions referred to by the Id. counsel for the assessee. Applying those tests, the following companies will have to be excluded from the list of 26 comparables drawn by the TPO viz.,

	<u>Turnover Rs.</u>
(1) Flextronics Software Systems Ltd.	848.66 crores
(2) iGate Global Solutions Ltd.	747.27 crores
(3) Mindtree Ltd.	590.39 crores
(4) Persistent Systems Ltd.	293.74 crores
(5) Sasken Communication Technologies Ltd.	343.57 crores
(6) Tata Elxsi Ltd.	262.58 crores
(7) Wipro Ltd.	961.09 crores.
(8) Infosys Technologies Ltd.	13149 crores.”

19. Respectfully following the aforesaid decision, we uphold the order of the CIT(A) excluding the aforesaid companies from the list of comparable companies chosen by the TPO.

20. The next grievance of the revenue projected in ground no.3 of its appeal is exclusion of Celestial Biolabs Ltd., as a comparable company by the CIT(A). On this issue this tribunal has already taken a view (for AY 08-09) that Celestial Biolabs Ltd. is not a comparable company with a software development service provider such as the Assessee in the case of 3DPLM Software Solutions Ltd. (supra). The following were the relevant observations:

“9. Celestial Biolabs Ltd.

9.1 This comparable was selected by the TPO for inclusion in the final list of comparables. Before the TPO, the assessee had objected to the inclusion of this company in the list of comparables for the reasons that it is functionally different from the assessee and that it fails the employee cost filter. The TPO, however, brushed aside the objections raised by the assessee by stating that the objections of functional dissimilarity has been dealt with in detail in the T.P. order for Assessment Year 2007-08. As regards the objection raised in respect of the employee cost filter issue, the TPO rejected the objections by observing

that the employee cost filter is only a trigger to know the functionality of the company.

9.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable, as the company is into bio-informatics software product / services and the segmental break up is not provided. It was submitted that :-

(i) This company is engaged in the development of products in the field of bio-technology, pharmaceuticals, etc. and therefore is not functionally comparable to the assessee;

(ii) This company has been held to be functionally incomparable to software service providers by the decision of the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra);

(iii) The co-ordinate bench of this Tribunal in its order in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) at para 43 thereof had observed about this company that –

“ ..... As explained earlier, it is a diversified company and therefore cannot be considered as comparable functionally with the assessee. There has been no attempt to identify, eliminate and make adjustment of the profit margins so that the difference in functional comparability can be eliminated. By not resorting to such a process of making adjustments, the TPO has rendered this company as not qualifying for comparability. We therefore accept the plea of the assessee in this regard.”

(iv) The rejection / exclusion of this company as a comparable for Assessment Year 2007-08 for software service providers has been upheld by the co-ordinate benches of this Tribunal in the cases of LG Soft India Pvt. Ltd. in ITA No.112/Bang/2011, CSR India Pvt. Ltd. in IT(TP)A No.1119/Bang/2011 and by the ITAT, Delhi Bench in the case of Transwitch India Pvt. Ltd. in ITA No.6083/Del/2010.

(v) The facts pertaining to this company has not changed from Assessment Year 2007-08 to Assessment Year 2008-09 and therefore this company cannot be considered for the purpose of

comparability in the instant case and hence ought to be rejected. In support of this contention, the assessee has also referred to and quoted from various parts of the Annual Report of the company.

9.3 Per contra, the learned Departmental Representative supported the inclusion of this company in the list of comparable companies. The learned Departmental Representative submitted that the decisions cited and relied on by the assessee are for Assessment Year 2007-08 and therefore there cannot be an assumption that it would continue to be applicable for the period under consideration i.e. Assessment Year 2008-09.

9.4.1 We have heard both the parties and perused and carefully considered the material on record. While it is true that the decisions cited and relied on by the assessee were with respect to the immediately previous assessment year, and there cannot be an assumption that it would continue to be applicable for this year as well, the same parity of reasoning is applicable to the TPO as well who seems to have selected this company as a comparable based on the reasoning given in the TPO's order for the earlier year. It is evidently clear from this, that the TPO has not carried out any independent FAR analysis for this company for this year viz. Assessment Year 2008-09. To that extent, in our considered view, the selection process adopted by the TPO for inclusion of this company in the list of comparables is defective and suffers from serious infirmity.

9.4.2 Apart from relying on the afore cited judicial decisions in the matter (supra), the assessee has brought on record substantial factual evidence to establish that this company is functionally dissimilar and different from the assessee in the case on hand and is therefore not comparable and also that the findings rendered in the cited decisions for the earlier years i.e. Assessment Year 2007-08 is applicable for this year also. We agree with the submissions of the assessee that this company is functionally different from the assessee. It has also been so held by co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) as well as in the case of Trilogy E-Business Software India Pvt. Ltd. (supra). In view of the fact that the functional profile of and other parameters of this company have not changed in this year under consideration, which fact has also been demonstrated by the assessee, following the decision of the co-ordinate benches of the Tribunal in the

assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 and Trilogy E-Business Software India Pvt. Ltd. in ITA No.1054/Bang/2011, we hold that this company ought to be omitted from the list of comparables. The A.O./TPO are accordingly directed.”

21. Respectfully following the aforesaid decision, we uphold the order of the CIT(A) excluding the aforesaid companies from the list of comparable companies chosen by the TPO.

22. Grounds No.4 to 6 raised by the revenue do not arise for consideration at all because the CIT(A) did not exclude any of the comparable chosen by the TPO by applying any of the criteria as contended in the aforesaid grounds by the revenue. Hence, these grounds are held to be not arising out of the order of the CIT(A).

23. As far as ground Nos. 7 & 8 raised by the revenue are concerned it projects the grievance of the revenue in the action of the CIT(A) in excluding Avani Cincom Technologies and Kals Information Systems Ltd., from the list of comparable chosen by the TPO. The comparability of these companies with a software development service provider such as the assessee was considered in several decisions of the ITAT. These have been listed in the chart filed by the assessee before us. We, however, find that making a reference to all those decisions will not be of any help and making a reference to one such decision would be sufficient. In the case of *3DPLM Software Solutions Ltd. v. DCIT, IT(TP)A No.1303/Bang/2012 for*

A.Y. 2008-09, order dated 28.11.2013, this Tribunal has held as under on choosing this company as a comparable:-

“7.0 Avani Cincom Technologies Ltd.

7.1 This company was selected by the TPO as a comparable. The assessee objects to the inclusion of this company as a comparable on the ground that this company is not functionally comparable to the assessee as it is into software products whereas the assessee offers software development services to its AEs. The TPO had rejected the objections of the assessee on the ground that this comparable company has categorized itself as a pure software developer, just like the assessee, and hence selected this company as a comparable. For this purpose, the TPO had relied on information submitted by this company in response to enquiries carried out under section 133(6) of the Act for collecting information about the company directly.

7.2 Before us, the learned Authorised Representative reiterated the assessee's objections for the inclusion of this company from the list of comparable companies on the ground that this company is not functionally comparable to the assessee as it is into software products. It is also submitted that the segmental details of this company are not available and the Annual Report available in the public domain is not complete. It was further contended that the information obtained by the TPO under section 133(6) of the Act, on the basis of which the TPO included this company in the final list of comparable companies, has not been shared with the assessee. In support of this contention, the learned Authorised Representative placed reliance on the following judicial decisions :

i) Trilogy E-Business Software India Pvt. Ltd. V DCIT (ITA No.1054/Bang/2011)

ii) Telecordia Technologies India Pvt Ltd V ACIT (ITA No.7821/Mum/2011)

It was also submitted that this company has been held to be functionally not comparable to the assessee by a co-ordinate

bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 dt.22.2.2013.

7.3 The learned Authorised Representative further submitted that the facts pertaining to this company has not changed from the earlier year (i.e. Assessment Year 2007-08) to the period under consideration (i.e. Assessment Year 2008-09). In support of this contention, it was submitted that :-

(i) The extract from the Website of the company clearly indicates that it is primarily engaged in development of software products. The extract mentions that this company offers customised solutions and services in different areas;

(ii) The Website of this company evidences that this company develops and sells customizable software solutions like “DX Change, CARMA, etc.

7.4 The learned Authorised Representative submitted that a co-ordinate bench of the Tribunal in its order in Curram Software International Pvt. Ltd., in its order in ITA No.1280/Bang/2012 dt.31.7.2013 has remanded the matter back to the file of the Assessing Officer / TPO to examine the comparability of this company afresh, by making the following observations at paras 9.5.2 and 9.5.3 thereof :-

*“9.5.2 As regards the submission of the learned Authorised Representative, we are unable to agree that this company has to be deleted from the list of comparables only because it has been deleted from the set of comparables in the case of Trilogy E-Business Software India Pvt. Ltd. (supra). No doubt this company has been deleted as a comparable in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) and this can be a good guidance to decide on the comparability in the case on hand also. This alone, however, will not suffice for the following reasons :-*

*(i) The assessee needs to demonstrate that the FAR analysis and other relevant facts of the Trilogy case are equally applicable to the facts of the assessee's case also. Unless the facts and the FAR analysis of Trilogy case is comparable to that of the assessee in the case on hand, comparison between the two is not tenable.*

*(ii) After demonstrating the similarity and the comparability between the assessee and the Trilogy case,*

*the assessee also needs to demonstrate that the facts applicable to the Assessment Year 2007-08, the year for which the decision in case of Trilogy E-Business Software India Pvt. Ltd. (supra) was rendered are also applicable to the year under consideration i.e. Assessment Year 2008-09.*

*9.5.3 It is a well settled principle that the assessee is required to perform FAR analysis for each year and it is quite possible that the FAR analysis can be different for each of the years. That being so, the principle applicable to one particular year cannot be extrapolated automatically and made applicable to subsequent years. To do that, it is necessary to first establish that the facts and attendant factors have remained the same so that the factors of comparability are the same. Viewed in that context, the assessee has not discharged the onus upon it to establish that the decision rendered in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) can be applied to the facts of the case and that too of an earlier year i.e. Assessment Year 2007-08. The assessee, in our view, has not demonstrated that the facts of Trilogy E-Business Software India Pvt. Ltd. (supra) are identical to the facts of the case on hand and that the profile of the assessee for the year under consideration is similar to that of the earlier Assessment Year 2007-08. In view of facts as discussed above, we deem it fit to remand the matter back to the file of the Assessing Officer / TPO to examine the comparability of this company afresh by considering the above observations. The TPO is directed to make available to the assessee information obtained under section 133(6) of the Act and to afford the assessee adequate opportunity of being heard and to make its submissions in the matter, which shall be duly considered before passing orders thereon. It is ordered accordingly.”*

The learned Authorised Representative submits that this company was selected as a comparable by the TPO not by any FAR analysis or as per the search process conducted by the TPO, but only as an additional comparable for the reason that it was selected as a comparable in the earlier year i.e. Assessment Year 2007-08 on the basis of information obtained under section 133(6) of the Act. In this regard, the learned Authorised Representative took us through the relevant portions of the TP

order under section 92CA of the Act and the show cause notices for both the earlier year i.e. Assessment Year 2007-08 and for this year and contended that the selection of this company as a comparable violates the principle enunciated in Curram Software International Pvt. Ltd. (supra) that a company can be selected as a comparable only on the basis of FAR analysis conducted for that year and therefore pleaded for its exclusion. The learned Authorised Representative also submitted that he has brought on record sufficient evidence to show that the functional profile of this company remains unchanged from the earlier year and hence the findings rendered by the co-ordinate benches of the Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) and in other cases like Trilogy E-Business Software India Pvt. Ltd. (supra) are applicable to the year under consideration as well.

7.5 Per contra, the learned Departmental Representative supported the order of the TPO / DRP for inclusion of this company Avani Cincom Technologies Ltd. in the final set of comparables.

7.6.1 We have heard both parties and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the final set of comparables only on the basis of information obtained under section 133(6) of the Act. In these circumstances, it was the duty of the TPO to have necessarily furnished the information so gathered to the assessee and taken its submissions thereon into consideration before deciding to include this company in its final list of comparables. Non-furnishing the information obtained under section 133(6) of the Act to the assessee has vitiated the selection of this company as a comparable.

7.6.2 We also find substantial merit in the contention of the learned Authorised Representative that this company has been selected by the TPO as an additional comparable only on the ground that this company was selected in the earlier year. Even in the earlier year, it is seen that this company was not selected on the basis on any search process carried out by the TPO but only on the basis of information collected under section 133(6) of the Act. Apart from placing reliance on the judicial decision cited above, including the assessee's own case for Assessment Year 2007-08, the assessee has brought on record evidence that this

company is functionally dis-similar and different from the assessee and hence is not comparable. Therefore the finding excluding it from the list of comparables rendered in the immediately preceding year is applicable in this year also. Since the functional profile and other parameters by this company have not undergone any change during the year under consideration which fact has been demonstrated by the assessee, following the decisions of the co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 dt.22.2.2013, and in the case of Trilogy E-Business Software India Pvt. Ltd. (ITA No.1054/Bang/2011), we direct the A.O./TPO to omit this company from the list of comparables.”

.....

#### 10. KALS Information Systems Ltd.

10.1 This is a comparable selected by the TPO. Before the TPO, the assessee had objected to the inclusion of this company in the set of comparables on grounds of functional differences and that the segmental details have not been provided in the Annual Report of the company with respect to software services revenue and software products revenue. The TPO, however, rejected the objections of the assessee observing that the software products and training constitutes only 4.24% of total revenues and the revenue from software development services constitutes more than 75% of the total operating revenues for the F.Y. 2007-08 and qualifies as a comparable by the service income filter.

10.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee and ought to be rejected / excluded from the list of comparables for the following reasons :-

(i) This company is functionally different from the software activity of the assessee as it is into software products.

(ii) This company has been held to be functionally not comparable to software service providers for Assessment Year 2007-08 by the co-ordinate bench of this Tribunal in the assessee's own case. This company has been held to be different from a software development company in the decision of the

Tribunal in the case of Bindview India Pvt. Ltd. V DCIT in ITA No.1386/PN/2010.

(iii) The rejection of this company as a comparable has been upheld by co-ordinate benches of the Tribunal in the case of –

Trilogy E-Business Software India Pvt. Ltd. (ITA No.1054/Bang/2011).

LG Soft India Pvt. Ltd. (IT (TP) A No.112/Bang/2011)

CSR India Pvt. Ltd. (IT (TP) A No.1119/Bang/2011) and

Transwitch India Pvt. Ltd. (IA No.6083/Del/2010)

(iv) The facts pertaining to this company has not changed from Assessment Year 2007-08 to Assessment Year 2008-09 and therefore this company cannot be considered for the purpose of comparability in the case on hand and hence ought to be excluded from the list of comparables. In support of this contention, the learned Authorised Representative drew our attention to various parts of the Annual Report of this company.

(v) This company is engaged not only in the development of software products but also in the provision of training services as can be seen from the website and the Annual Report of the company for the year ended 31.3.2008.

(vi) This company has two segments; namely,

- a) Application Software Segment which includes software product revenues from two products i.e. 'Virtual Insure' and 'La-Vision' and
- b) The Training segment which does not have any product revenues.

10.3 Per contra, the learned Departmental Representative contended that the decision of the co-ordinate bench of the Tribunal in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) was rendered with respect to F.Y.2006-07 and therefore there cannot be an assumption that it would continue to be applicable to the year under consideration i.e. A.Y. 2008-09. To this, the counter argument of the learned Authorised Representative is that the functional profile of this company

continues to remain the same for the year under consideration also and the same is evident from the details culled out from the Annual Report and quoted above (supra).

10.4 We have heard both parties and perused and carefully considered the material on record. We find from the record that the TPO has drawn conclusions as to the comparability of this company to the assessee based on information obtained u/s.133(6) of the Act. This information which was not in the public domain ought not to have been used by the TPO, more so when the same is contrary to the Annual Report of the company, as pointed out by the learned Authorised Representative. We also find that the co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) and in the case of Trilog E-Business Software India Pvt. Ltd. (supra) have held that this company was developing software products and was not purely or mainly a software service provider. Apart from relying of the above cited decisions of co-ordinate benches of the Tribunal (supra), the assessee has also brought on record evidence from various portions of the company's Annual Report to establish that this company is functionally dis-similar and different from the assessee and that since the findings rendered in the decisions of the co-ordinate benches of the Tribunal for Assessment Year 2007-08 (cited supra) are applicable for this year i.e. Assessment Year 2008-09 also, this company ought to be excluded from the list of comparables. In this view of the matter, we hold that this company i.e. KALS Information Systems Ltd., is to be omitted from the list of comparable companies. It is ordered accordingly.”

24. Respectfully following the aforesaid decision rendered by the coordinate Bench of this Tribunal, we uphold the order of CIT(A) directing exclusion of the aforesaid two companies from the list of comparable companies chosen by the TPO.

25. The TPO/AO is directed to compute the arithmetic mean of the remaining comparable companies and allow adjustment of + / - 5% of the

net margin as contemplated by the provisions of Sec.92C of the Act, if the Assessee is entitled to such adjustment as a result of exclusion of the comparable companies.

26. In the result the appeal by the Assessee is partly allowed while the appeal by the Revenue is dismissed.

Pronounced in the open court on this 30<sup>th</sup> day of September, 2015.

Sd/-

( ABRAHAM P. GEORGE )  
Accountant Member

Sd/-

( N.V. VASUDEVAN )  
Judicial Member

Bangalore,  
Dated, the 30<sup>th</sup> September, 2015.

/D S/

Copy to:

1. Revenue
2. Assessee
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore.