

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH " B "**

**BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND  
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

<b>IT(TP)A No.651/Bang/2012 (Assessment Year : 2002-03)</b>		
M/s. ACI Worldwide Solutions Pvt. Ltd., (Formerly Visual Web Solutions Pvt. Ltd.) No.9, Salarpuria Cambridge Mall, Cambridge Road, Ulsoor, Bangalore-560 008 PAN AAACV 7566R	Vs.	Asst. Commissioner of Income Tax, Circle 12(3), Bangalore.
Appellant		Respondent.

<b>IT(TP)A No.782/Bang/2012 (Assessment Year : 2002-03)</b>		
Dy. Commissioner of Income Tax, Circle 12(3), Bangalore.	Vs.	M/s. ACI Worldwide Solutions Pvt. Ltd., (Formerly Visual Web Solutions Pvt. Ltd.) Bangalore-560 008
Appellant		Respondent.

**Assessee By : Shri Padamchand Khincha, C.A.  
Revenue By : Dr.P.K. Srihari, Addl. CIT (D.R.)**

Date of Hearing : 3.8.2015.

Date of Pronouncement : 05.10.2015.

**O R D E R**

**PER BENCH :**

These are cross appeals, one by the assessee and the other by Revenue, directed against the order of the CIT (Appeals) -IV, Bangalore dt.21.3.2012 for Assessment Year 2002-03.

2. The facts of the case, briefly, are as under :-

2.1 The assessee company, a 100% subsidiary of Visual Web Inc., USA, is engaged in the business of developing and providing software solutions for the banking industry to its Associated Enterprise (AE). For Assessment Year 2002-03, the assessee filed its return of income on 31.10.2002 declaring total income of Rs.11,89,020. The return was processed under Section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and the case was subsequently taken up for scrutiny. Since the assessee reported that in the period under consideration it had entered into international transactions with its AE viz. transactions of rendering software development services, to the extent of Rs.5,95,41,473, the Assessing Officer made a reference under Section 92CA of the Act to the Transfer Pricing Officer ('TPO') for determining the Arm's Length Price ('ALP') of these international transactions, after obtaining approval from the CIT - III, Bangalore.

2.2 In its T.P. Study, the assessee adopted the Cost Plus Method (CPM) to justify the price charged by the assessee to its AE in respect of the international transactions between them. The TPO in the order passed under Section 92CA of the Act dt.30.6.2004, rejected the CPM adopted by the assessee stating that it does not satisfy the principles laid down in Rule 10C of the Income Tax Rules, 1962 ('the Rules'). The TPO adopted the CUP Method as the Most Appropriate Method ('MAM'). The TPO compared the industry average at US \$ 144 per man day based on NASSCOM with the rate charged by the assessee. The ALP was determined at Rs.8,28,77,500 and the T.P. Adjustment was completed as under :-

S.No.	Particulars	Amount (Rs.)
(A)	ALP of the software development services	8,28,77,500
(B)	Amount realized by the assessee from software development services rendered to the AE.	5,95,48,743
	T.P. Adjustment (A-B)	2,33,35,757

2.3 The Assessing Officer completed the assessment under Section 143(3) of the Act vide order dt.30.8.2004 determining the total income of the assessee at Rs.2,45,24,775 which, inter alia, included the T.P. Adjustment.

3.1 Aggrieved by the order of assessment for Assessment Year 2002-03 dt.30.8.2004, the assessee preferred an appeal before the CIT (Appeals) - IV, Bangalore. The learned CIT (Appeals) rejected both the CPM adopted by the assessee and CUP Method adopted by the TPO as the MAM and instead adopted TNMM as the MAM. The Profit Level Indicator ('PLI') was adopted as operating profit to total cost. Applying various filters, the learned CIT (Appeals) proposed 17 companies as comparables to the assessee having an arithmetic mean margin of 29.3%. The list of proposed companies was as under :-

S.No.	Name of the Company	OP/TC %
1.	Lanco Global Systems Ltd.	19.10
2.	Infotech Enterprises Ltd.	43.22
3.	Aviation Software Development Consultancy Ltd.	46.70
4.	Flextronics Software Systems Ltd.	24.06
5.	Geometric Software Solutions Ltd.	19.69
6.	I-Flex Solutions Ltd.	24.13
7.	Infosys Technologies Ltd.	50.79
8.	L&T Infotech Ltd.	15.82
9.	Mphasis Ltd.	30.59
10.	Quinnox Consultancy Services Ltd.	29.75
11.	Satyam Computer Services Ltd.	36.56

12.	Virinchi Technologies Ltd.	22.63
13.	Visualsoft Technologies Ltd.	42.42
14.	Xcel Vision Technologies Ltd.	35.43
15.	Eonour Technologies Ltd.	20.70
16.	Kshema Technologies Ltd.	24.00
17.	Orient Information Technologies Ltd.	12.54
	Arithmetic Mean	29.30

3.2.1 The CIT (Appeals) required the assessee to show cause as to why TNMM should not be taken as the MAM and why the ALP should not be computed adjusting the average margin of 29.30%. In response thereto, the assessee furnished its reply/objections thereto and made a fresh T.P. analysis adopting TNMM and adopting various filters and proposed the following three comparables :-

S.No.	Name of the company	Margin %
1.	Lanco Global Systems Ltd.	17.92
2.	Motherson Sumi Infotech Designs	(-) 10.12
3.	Cherry Soft Technologies Ltd.	3.11
	Average Mean Margin	3.64

The TPO filed a remand report thereon and proposed that the following companies may be taken as comparables.

1. Lanco Global Systems Ltd.
2. Geometric Software Solutions Ltd.
3. Infosys Technologies Ltd.
4. Mphasis BFL Ltd.
5. Visualsoft Technologies Ltd.
6. Kshema Technologies Ltd.

3.2.2 The learned CIT (Appeals) disposed off the assessee's appeal vide order dt.21.3.2012 allowing the assessee partial relief and finally adopted the following companies as comparable to the assessee :-

S.No.	Name of the Company	Margin %
1.	Lanco Global Systems Ltd.	23.01
2.	Xcel Vision Technologies.	36.68
3.	Kshema Technologies Ltd.	23.06
	Average Margin	27.58

3.2.3 In his order, the learned CIT (Appeals) has rendered the following findings :-

(a) Applying the Related Party Transaction ('RPT') filter in excess of 0 %, the learned CIT (Appeals) directed the exclusion of the following companies from the list of comparables :-

S.No.	Name of the Company	RPT %
1.	Geometric Software Solutions Company Ltd.	16.25
2.	Mphasis BFL Ltd.	13.78
3.	Orient Information Technologies Ltd.	3.19
4.	Kshema Technologies Ltd.	0.91
5.	Quinox Consultancy Services Ltd.	88.12
6.	Motherson Sumi Infotech Ltd.	87.51
7.	Aviation Software Devt. Consultancy Ltd.	As per notes in Annual Report

(b) The learned CIT (Appeals) following the decision of the co-ordinate bench in the case of Genisys Integrating Systems (India) Ltd. (ITA No.1231/Bang/2010 dt.5.8.2011) applied the Turnover Filter of Rs.200 Crores and excluded the following companies :-

S.No.	Name of the company	Turnover (Rs. in Crores)
i)	Flextronic Software Systems Ltd.	234.88
ii)	Infosys Technologies Ltd.	2603.59
iii)	L&T Infotech Ltd.	266.69
iv)	Satyam Computer Services Ltd.	1731.94
v)	iFlex Solutions Ltd.	415.03

(c) The learned CIT (Appeals) excluded / rejected the following comparables proposed in the TPO's remand report dt.8.1.2010, based on the assessee's objections to their inclusion :-

S.No.	Name of the Company
1.	Infotech Enterprises Ltd.
2.	Flextronics Software Systems Ltd.
3.	iFlex Solutions Ltd.
4.	Larsen & Toubro Infotech Ltd.
5.	Satyam Computer Services Ltd.
6.	Virinchi Technologies Ltd.
7.	Orient Information Technologies Ltd.

d) The learned CIT (Appeals) rejected/excluded the following companies as under for the following reasons :-

i) Geometric Software Solutions Ltd. - Held to be not comparable as it was engaged in diversified activities.

ii) Visual Soft Technologies Ltd. - Stated to be not comparable as it has substantial on-site revenue.

iii) Ennor Technologies Ltd. - Rejected as a comparable since it has outsourced its operations and its salary expenditure is only 0.19% of turnover.

It may be noticed from the above, that the learned CIT (Appeals) has rejected some of the comparables on more than one ground.

**Revenue's appeal in IT(TP)A No.782/Bang/2012 for A.Y. 2002-03.**

**4.1 Revenue's Grounds of appeal :**

1. *The order of the learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.*
2. *The learned CIT (Appeals) was not justified in allowing relief to the assessee out of the additions made by the Assessing Officer in terms of 92CA of the I.T. Act, 1961, without appreciating the facts and circumstances under which the adjustment was made by the Assessing Officer based on the TPO's order.*
3. *The learned CIT (Appeals) has erred in rejecting seven comparable companies in the transfer pricing study as against nine comparables recommended by the TPO.*
4. *The learned CIT (Appeals) has erred in holding that the size, turnover and brand of the company are deciding factors for treating a company as comparable, and accordingly erred in excluding M/s. Flextronics Software Systems Ltd., M/s. Infosys Technologies Ltd. M/s. L&T Infotech Ltd., M/s. Satyam Computer Services Ltd. and M/s. iFlex Solution Ltd. as a comparable in software development segment.*
5. *The learned CIT (Appeals) has erred in holding that the TPO should not include uncontrolled comparables having any related party transactions even upto 25%.*
6. *The learned CIT (Appeals) has erred in holding that M/s. Geometric Software Solutions Ltd. cannot be taken as comparable, being functionally different.*
7. *The learned CIT (Appeals) has erred in holding that the comparable M/s. Visual Soft Technologies Ltd. is predominantly engaged in the onsite development of software.*
8. *For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT (Appeals) be reversed in so far as the above mentioned issues are concerned and that of the Assessing Officer be restored.*

9. *The appellant craves leave to add, to alter, to amend or to delete any of the grounds that may be urged at the time of hearing of the appeal."*

**Assessee's appeal in IT(TP)A No.651/Bang/2012 for A.Y. 2002-03.**

4.2 Aggrieved by the order of the CIT (Appeals) - IV, Bangalore dt.21.3.2012 for Assessment Year 2002-03, the assessee has preferred this appeal raising the following grounds of appeal :-

1. *The Order of the learned Commissioner of Income Tax (Appeals) – IV to the extent prejudicial to the appellant is bad in law.*
2. *The learned CIT(A) has erred in confirming the Order of the lower authorities although passed disregarding the principle of natural justice.*
3. *The learned Assessing Officer has erred in making a reference to Transfer Pricing Officer for determining arm's length price without demonstrating as to why it was necessary and expedient to do so. The learned Commissioner of Income Tax (Appeals) - IV has erred in confirming the action of the Assessing officer.*
4. *The learned Commissioner of Income Tax (Appeals)-IV has erred in confirming the Order passed by the lower authorities:*
  - a. *without demonstrating that appellant had motive of tax evasion.*
  - b. *not appreciating that the charging or computation provision relating to income under the head "Profits & Gains of Business or Profession" do not refer to or include the amounts computed under Chapter X and therefore addition made under Chapter X is bad in law.*
5. *The learned Commissioner of Income Tax (Appeals) - IV has erred in confirming the Order passed by the lower authorities:*
  - a. *rejecting the Cost Plus Method adopted by the appellant without giving cogent reasons and on unjustifiable grounds.*
  - b. *rejecting comparables selected and transfer pricing analysis of the appellant under Cost Plus Method on unjustifiable grounds.*
6. *The learned Commissioner of Income Tax (Appeals) - IV has erred in:*
  - a. *Performing fresh transfer pricing analysis and adopting inappropriate filters in doing fresh transfer pricing analysis.*
  - b. *selecting TNMM as the most appropriate method.*
  - c. *adopting companies as comparables even though they are not comparable to the appellant.*

- d. *Not appreciating that the law does not compel adopting many (or any minimum) companies as comparables and that the appellant could justify the price paid/charged on the basis of any one comparable only.*
  - e. *not making proper adjustment for enterprise level and transactional level differences between the appellant and the comparable companies.*
  - f. *not making proper adjustment for risk differences between the appellant and the comparable companies.*
7. *The learned Commissioner of Income Tax (Appeals) – IV, while passing the Order, has erred in*
    - a. *changing the filters proposed in his own notice without giving an opportunity of being heard to the appellant.*
    - b. *not appreciating that insignificant related party transaction cannot be held to have significant influence on profitability of comparable companies.*
    - c. *Adopting Kshema Technologies and Xcel Vision Technologies Limited as comparable.*
    - d. *rejecting Cherry Soft Technologies Limited, which was proposed as comparable by the appellant under TNMM, on unjustifiable grounds.*
  8. *Without prejudice to the above, the benefit of the +/-5% range as per the proviso to section 92C (2) should be given.*

PRAYER

9. *On an overall consideration of the facts of the case, and the law applicable, the ALP as determined by the Transfer Pricing Officer, as adopted by the Assessing Officer and as modified by the CIT(A) being not correct is to be quashed and the figures as determined and returned by the appellant being correct are to be accepted.*
10. *The learned Assessing Officer has erred in levying interest under section 234B and section 234D.*

5.0 We have heard the rival contentions and have perused and carefully considered the material on record; including the judicial decisions cited and proceed to dispose off both Revenue's and assessee's appeals together hereunder :-

6.0 The Grounds raised by the assessee at S.Nos.1 to 4 and 9 are general in nature and not being urged before us in this appeal are rendered infructuous and accordingly dismissed.

**TRANSFER PRICING ISSUES (Grounds 5 to 8)**

7.1 In the course of proceedings before us, the learned Authorised Representative for the assessee submitted a chart explaining the assessee's position regarding the acceptability or otherwise of each of the comparables selected by the learned CIT (Appeals) as comparables to the assessee. The learned Authorised Representative also submitted that he would only press grounds on the comparability of individual companies proposed by the learned CIT (Appeals) in the final set of comparables under TNMM and companies proposed by the assessee for inclusion in the set of comparables, which it contends were erroneously rejected by the learned CIT (Appeals). In support of the assessee's contention on comparables and filters adopted, the learned Authorised Representative placed reliance on the decisions of various benches of the Tribunal in the following cases :-

- i. 24/7 Customer.Com (P) Ltd. in ITA No.227/Bang/2010 for Assessment Year 2004-05.
- ii. ACI Worldwide Solutions Pvt. Ltd. in ITA No.1276/Bang/2012 for Assessment Year 2003-04.
- iii. Phillips Software Centre Pvt. Ltd. in ITA No.218/Bang/2008 for Assessment Year 2003-04.

In the light of the above observations, we proceed to examine the grounds raised by the assessee at S.Nos.5 to 8 on T.P. issues.

7.2 Ground No.5(a) & (b) are raised with respect to the rejection of the Cost Plus Method adopted by the assessee in its T.P. Study as the MAM and the rejection of the

T.P. analysis carried out thereunder. As these grounds have not been urged before us, they are rendered infructuous and are accordingly dismissed.

7.3 Ground No.6(1) to (f) are raised with respect to the action of the learned CIT (Appeals) in conducting a fresh T.P. analysis under TNMM and comparables selected thereunder. The assessee, we find, has not disputed before us the selection of TNMM as the MAM. With respect to the assessee's submissions on comparables and risk adjustment, the same are specifically examined and considered later.

7.4 Ground No.7(a) to (d) are raised in respect of the inclusion of certain companies as comparables by the TPO and exclusion of certain other comparables and the application of certain filters. As we will be examining and considering the comparability or otherwise of the individual companies as raised by the assessee before us, the same would address and dispose off this ground.

7.5 Ground No.8 - this ground is raised regarding the non-allowance of benefit of + / - 5% as per the proviso to Section 92C(2) of the Act. This ground is now more of an academic nature, as subsequent to the amendment of the Income Tax Act, 1961 w.r.e.f. 1.4.2002 by the introduction of the clarificatory amendment by way of insertion of Section 92C(2A) by Finance Act, 2012, the assessee is not entitled to the benefit of 5%. In this view of the matter, this ground raised by the assessee is not maintainable and is accordingly dismissed.

## 8. Related Party Filter ('RPT')

8.1 Ground No.7(b) of the assessee's appeal and Ground No.5 of Revenue's appeal challenge the view of the learned CIT (Appeals) in directing the Assessing Officer / TPO to exclude companies from the list of comparables by applying the RPT filter of more than 0 %. The assessee submitted that RPT filter should not be adopted at 0% and revenue has prayed for adoption of the RPT filter at more than 25%.

8.2 As per the details at page 16 of the impugned order, the learned CIT (Appeals) has excluded the following seven companies from the list of comparables by applying the RPT filter at more than 0% :-

S.No.	Name of the Company	RPT %
1.	Geometric Software Solutions Company Ltd.	16.25
2.	Mphasis BFL Ltd.	13.78
3.	Orient Information Technologies Ltd.	3.19
4.	Kshema Technologies Ltd.	0.91
5.	Quinox Consultancy Services Ltd.	88.12
6.	Motherson Sumi Infotech Ltd.	87.51
7.	Aviation Software Devt. Consultancy Ltd.	As per notes in Annual Report

8.3 We have heard both parties and perused and carefully considered the material on record, including the judicial decisions cited and relied upon in the context of the application of the RPT filter. The co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (supra), following the decision of the ITAT, Delhi Bench in the case of Sony India Pvt. Ltd. (2008-TIOL-439-ITAT-Del), held that the companies having

RPT in excess of 15% of the total revenues are to be excluded from the list of comparables. At para 13 of its order, the co-ordinate bench held as under :-

**" 13.0 RELATED PARTY TRANSACTIONS**

*In respect of the ground raised at S.No.1 regarding acceptance of comparable companies having related party transactions as proposed by the TPO, the learned counsel for the assessee argued that the transfer pricing regulations do not stipulate any minimum limit of related party transactions which form the threshold for exclusion as a comparable. In this regard, the learned counsel for the assessee objected to the TPO's setting a limit of 25% on related party transactions. He objected to the inclusion of comparables being related party transactions in excess of 15% of sales / revenue. In support of this proposition, the learned counsel for the assessee placed reliance on the decision of the Hon'ble Bench of the ITAT, Delhi in the case of Sony India (P) Ltd. reported in 2008-TIOL-439-ITAT-Delhi dt.23.12.2008. The learned counsel for the assessee drew our attention to para 115.3 of the order wherein the Tribunal has held that*

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*" ..... We are further of the view that an entity can be taken as uncontrolled if its related party transactions do not exceed 10 to 15% of total revenue. Within the above limit, transactions cannot be held to be significant to influence the profitability of the comparables. For the purpose of comparison what is to be judged is the impact of the related party transactions vis-à-vis sales and not profit since profit of an enterprise is influenced by large number of other factors ...."*

*Respectfully following the decision of the Tribunal in the case of Sony India (P) Ltd (supra), the Assessing Officer / TPO are directed to exclude after due verification those comparables from the list with related party transactions or controlled transactions in excess of 15% of total revenues for the financial year 2003-04."*

8.4 The above decisions holding that companies having RPT in excess of 15% should be rejected from the list of comparables have been followed by various co-ordinate benches of the ITAT, Bangalore, some of which are in the cases of :-

- i) 3DPLM Software Solutions Ltd.; in IT(TP)A No.1303/Bang/2013 dt.28.11.2013.
- ii) Huawei Technologies India Pvt. Ltd. in IT(TP)A No.1338/Bang/2010;
- iii) Logica Pvt. Ltd. (TS-131-ITAT-Bang-TP).

Following the decision of the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (supra) and 3DPLM Software Solutions Ltd. (supra), we hold and direct that RPT filter should be considered at 15% of total revenues and companies having RPT in excess of 15% of total revenues are to be excluded from the list of comparables. In this view of the matter, the order of the learned CIT (Appeals) holding that companies are not to be considered as comparables even if they have a single RPT, i.e. RPT in excess of 0%, is reversed.

8.5 In view of our finding that only companies having RPT in excess of 15% are to be excluded, the following three companies which have RPT of less than 15% are to be included in the list of comparables.

1. Mphasis BFR Ltd. - 13.76%
2. Kshema Technologies Ltd. - 0.91%
3. Orient Information Technologies Ltd. - 3.19%.

8.6 However in respect of the company, Aviation Software Development Consultancy Ltd., the learned CIT (Appeals) has merely observed that the RPT is as per Note in the Annual Report. In that view of the matter, the RPT of this company requires to be verified and on this limited issue its comparability is set aside to the file of the TPO. The TPO shall verify the details of RPT from the Annual Report of this company and if need be call for information under Section 133(6) of the Act so that a decision in this regard can be taken, after affording the assessee adequate opportunity of being heard.

9. **Xcel Vision Technologies (Ground No.7C)**

9.1.1 The contention of the assessee is that this company Xcel Vision Technologies should not have been included in the final list of comparables by the learned CIT (Appeals) as it fails the employee cost filter of 25% applied by the CIT (Appeals) himself. It was submitted that the factual position as per the company's profit and loss account for F.Y. 2001-02 was that the revenue from software service was Rs.2,36,70,748 while the salary cost was Rs.58,48,177 which constituted 24.70% of the turnover and therefore failed the salary cost filter of 25% adopted by the learned CIT (Appeals) himself.

9.1.2 It was submitted that the salary cost of the assessee in the case on hand was more than 60% of turnover and hence a company having 24.70% of salary cost is not comparable and ought to be excluded from the list of comparables. It was submitted that at para 7 of the impugned order, the learned CIT (Appeals) although factually accepting that the company fails the employee cost filter of 25% applied by him, states that it should be accepted as a comparable as salary cost is almost 25%. The learned Authorised Representative submitted that as this company fails the employee cost filter of 25% applied by the learned CIT (Appeals), this company ought to be excluded from the list of comparables.

9.2 Per contra, the learned Departmental Representative supported the orders of the learned CIT (Appeals) in including this company in the list of comparables to the assessee.

9.3.1 We have heard the rival contentions and perused and carefully considered the material on record. On a perusal of the impugned order, we find at page 12 thereof in para

7 of the show cause notice, the filter clearly stated is that 'companies having employee cost to sales less than 25% were excluded.' It is also seen at para 7 on page 22 of the impugned order that the learned CIT (Appeals), inspite of acknowledging that the employee cost in the case on hand is less than 25% of revenues, has chosen to over rule and violate his own filter by including this company in the list of comparables by observing that ".... There is no rationale to exclude the above company merely by application of the employee cost filter as none of the other companies has been excluded by application of the employees cost filter. Further, the employees cost filter is almost 25%, hence the above company is retained as comparable." In our view, the learned CIT (Appeals) once he has applied certain filters like salary cost filter of 25%, RPT filter in excess of 0 %, turnover filter, etc., the filters should be consistently applied. Modifying them, as has been done by the learned CIT (Appeals) in the impugned order with respect to the salary cost filter of 25% of revenues, is arbitrary especially when the salary cost to this company is 24.70% of revenues, which is below the filter of 25% applied by the learned CIT (Appeals) himself. In this factual matrix, the salary cost of this company being 24.70% of revenues which is below the filter of 25% applied by the learned CIT (Appeals), we hold and direct that the company, i.e. Xcel Vision be excluded from the list of comparables to the assessee.

10. **Cherry Soft Technologies Ltd.**

10.1 In the course of proceedings before the CIT (Appeals), the assessee had submitted a fresh T.P. Study taking TNMM as the MAM and proposed the following three companies as comparables to the assessee :-

- (i) Lanco Global Systems Ltd.;
- (ii) Cherry Soft Technologies Ltd. and
- (iii) Motherson Sumi Infotech & Design Ltd.

Out of the above three companies, Lanco Global Systems Ltd. found a place in the comparables selected by the learned CIT (Appeals) and the other two were rejected.

10.2 It is submitted that the learned CIT (Appeals) on the basis of figures in the Annual Report; that the assessee has domestic income to the extent of 23.35% as against total export receipts of Rs.4.31 Crores concluded that the major revenue of this company is from on-site revenue operations and rejected this company as a comparable. The assessee submits that the export revenue of Cherry Soft Technologies Ltd. is in excess of 75%, foreign currency expenses at Rs.2.11 Crores are less than 50% of sales and therefore logically the on-site revenue cannot be more than 75% of sales. In view of this, applying the learned CIT (Appeals)'s on-site revenue filter of 75%, this company ought to be included in the list of comparables.

10.3 Per contra, the learned Departmental Representative supported the order of the learned CIT (Appeals) in rejecting this company as a comparable.

10.4 We have heard the rival contentions and perused and carefully considered the material on record. As seen from the record, the learned CIT (Appeals) applied the on-site revenue filter of 75%. According to the assessee, the company is export oriented and has export turnover in excess of 75% of sales, its foreign currency expenses are less than 50% of sales and therefore the conclusion of the learned CIT (Appeals) to exclude this company by applying the on-site was incorrect. From the record it appears that these submissions/arguments put forth by the assessee have not been examined by the learned CIT (Appeals) and therefore, in the interest of justice and equity, we deem it fit to restore the matter to the file of the learned CIT (Appeals) for examination afresh in the light of the submissions put forth by the assessee and to adjudicate thereon on the comparability of Cherry Soft Technologies Ltd. after affording adequate opportunity to the assessee of being heard and to submit details/submissions in this regard. It is ordered accordingly.

11. **Working Capital and Risk Adjustment.**

11.1 The assessee at Ground No.6(e) and(f) is aggrieved by the impugned order wherein the learned CIT (Appeals) has rejected its claim for working capital adjustment for differences at the enterprise and transactional level and risk adjustment on the ground that the assessee had only a single customer risk and the arithmetic mean margin takes care of the adjustment. It was submitted that during the year under consideration, the assessee's group companies were passing through a difficult phase due to the dot com bubble burst in the year 2000, 9/11 attack in US, the war in Afghanistan etc. and the

whole group made a profit of Rs.25,16,253 only. It was prayed that in view of these factors, adjustment towards working capital and risk should be granted. The assessee further submitted that the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2003-04 in ITA No.1270/Bang/2012 had allowed the assessee adjustment of 2% towards working capital and risk adjustment which atleast ought to be given.

1.2 We have heard the rival contentions and perused and carefully considered the material on record. We find that as submitted by the assessee the co-ordinate bench of the Tribunal in the assessee's own case has granted an adhoc deduction/adjustment of 2% towards working capital and risk differential based on the facts of the case. Keeping in mind the order of the co-ordinate bench of this Tribunal granting the assessee an adhoc 2% adjustment towards working capital and risk differentials, in its order in the assessee's own case for Assessment Year 2003-04, we restore this matter to the file of the Assessing Officer / TPO and direct them to examine and de novo adjudicate on the assessee's claim for grant of working capital and risk adjustment, taking into account the facts of the case for the year under consideration in the light of the Tribunal's order for Assessment Year 2003-04 (supra) after affording the assessee adequate opportunity of being heard and file details/submissions in this regard. It is ordered accordingly.

12. In the result, the assessee's appeal for Assessment Year 2002-03 is partly allowed.

**Revenue's Appeal in IT(TP)A No.782/Bang/2012 for A.Y. 2002-03**

13. The Grounds raised at S.Nos.1 to 3, 8 and 9 are general in nature and not being specifically urged before us, no adjudication is called for thereon.

14. Ground No.4 : Turnover Filter.

14.1 Revenue contends that size, turnover and brand of the company are not deciding factors for treating companies as comparables as they do not follow a definite plan. In this regard, the learned Departmental Representative placed reliance on the decision of Capgemini India Pvt. Ltd. V ACIT in ITA No.786/Bang/2011 and sought the reinstatement of the following companies, which had turnover in excess of Rs.200 Crores, in the list of comparables :-

	<u>Turnover (Rs. in Crores)</u>
(i) M/s. Flextronics Software Systems Ltd.	Rs.234.88
(ii) Infosys Technologies Ltd.	Rs.2,603.59
(iii) L&T Infotech Ltd.	Rs.266.69.
(iv) Satyam Computer Services Ltd.	Rs.1,731.94
(v) iFlex Solutions Ltd.	Rs.415.03.

14.2.1 Per contra, the learned Authorised Representative prayed for adoption of the turnover filter of Rs.1 Crore to Rs.200 Crores, thereby seeking the exclusion of the 5 above mentioned companies and in this regard placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of Genysys Integrating Systems (India) Pvt. Ltd. in ITA No.1231/Bang/2010 wherein relying on Dun and Bradstreet's Analysis, it was held that applying the turnover filter of Rs.1 Crore to Rs.200 Crores was proper. The

learned Authorised Representative submitted that the above proposition, for application of the turnover filter at Rs.1 Crore to Rs.200 Crores was followed by other benches of this Tribunal in many cases including Trilogy E-Business Solutions India Pvt. Ltd. in ITA No.1054/Bang/2011 dt.23.11.2012. It was submitted that the above 5 companies listed at para 14.1 (supra) have turnovers in excess of Rs.200 Crores in the period under consideration and therefore ought to be excluded from the list of comparables.

14.2.2 The learned Authorised Representative for the assessee further pointed out that the Assessing Officer in his remand report has already accepted the objections for exclusion of the following companies from the list of comparables for various reasons :-

- (i) Flextronics Software Systems Ltd.; on the ground that it fails the RPT filter of 25%.
- (ii) iFlex Solutions Ltd.; on the grounds that it fails the RPT filter of 25%;
- (iii) L&T Infotech Ltd., on the ground that it is into and has software products and therefore being functionally different;
- (iv) Satyam Computer Services Ltd.; for the reason that its financials are not reliable.
- (v) Infosys Technologies Ltd.; on the grounds that it is functionally different and dissimilar as it owns IPRs, has brand value attributable to profits etc. whereas the assessee is mere provider of software development services.

14.3.1 We have heard the rival submissions and perused and carefully considered the material on record, including the judicial decisions cited. Following the decision of the coordinate bench in the case of Genesys Integrating Systems (India) Pvt. Ltd. (supra), we hold and direct that the above 5 companies, listed at para 14.1 of this order, having

turnover of more than Rs.200 Crores, should be excluded from the list of comparable companies. Consequently, Ground No.4 raised by Revenue stands dismissed.

15.0 **Ground No.5 - RPT Filter.**

15.1 This Ground already stands disposed off along with the assessee's ground at S.No.7(b) at para 8.3 to 8.5 of this order, wherein the following companies have been excluded from the set of comparable companies as they have RPT in excess of 15%, by following the decision of the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2012 :-

(i) Geometric Software Solutions Ltd.	16.25%.
(ii) Quinnox Consulting Services Ltd.	88.12%
(iii) Motherson Sumi Infotech and Designs Ltd.	87. 51%

Consequently, Revenue's Ground No.5 is partly allowed.

16. **Ground No.6 : Geometric Software Solutions Ltd.**

16.1 In this Ground, Revenue presses for the inclusion of this company as a comparable, contending that the learned CIT (Appeals) has wrongly excluded this company i.e. Geometric Software Solutions Ltd. on grounds of being functionally different from the assessee. It is submitted by the learned Departmental Representative that this company being functionally similar to the assessee, it ought to be included in the list of comparables.

16.2 Per contra, the learned Authorised Representative submitted that the learned CIT (Appeals) has correctly excluded this company from the list of comparables. The learned

Authorised Representative drew the attention of the Bench to the observations of the learned CIT (Appeals) at page 19 of the impugned order; that from the Annual Report it is evident that Geometric Software Solutions Ltd. is a specialist in product life cycle management software solutions for mechanical design manufacturing and industrial markets; which includes software application component technology and development services in the area of CAD/CAM, Computer Aided Engineering, Product Data Management and Collaborative Engineering. It is submitted that from the above observations of the learned CIT (Appeals), it is clear that the activities of this company are diversified and is a software product company and it is not a mere provider of software services as is the assessee in the case on hand. It was also submitted that this company also ought to be excluded from the list of comparables to the assessee for the reason that it has RPT of 16.25% which is in excess of the 15% filter applied and followed by various co-ordinate benches of this Tribunal including 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010.

16.3 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decisions cited. Following the decision of the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2011, we hold and direct that this company, having RPT of 16.25% fails the RPT filter of 15% applied and followed by other co-ordinate benches of this Tribunal, is to be excluded from the list of comparables. Even otherwise from the observations of the learned CIT (Appeals) from the Annual Report of this company as laid out in para 16.2 of this order, it is evident from its diversified activities that this company is functionally

different and dis-similar from the assessee in the case on hand, who is a mere provider of software development services. Consequently, Ground No.6 raised by Revenue is dismissed.

17. **Ground No.7 : Visualsoft Technologies Ltd.**

17.1 In this Ground, Revenue contends that this company ought to be included in the list of comparables as it passes the on-site revenue filter of 75% applied by the learned CIT (Appeals).

17.2 Per contra, the learned Authorised Representative for the assessee supported the impugned order of the learned CIT (Appeals) in rejecting / excluding this company from the list of comparables to the assessee. The learned Authorised Representative drew the attention of the bench to para 3 on page 20 of the impugned order where the learned CIT (Appeals) has observed that since this company has incurred 56% of its expenditure as on-site software development, it is clear that this company, i.e. Visual Soft Technologies Ltd. is predominantly engaged in on-site development of software and also observed that the assessee is also into R&D activities. It was submitted by the learned Authorised Representative that the learned CIT (Appeals) had correctly excluded this company from the list of comparables on the grounds of being functionally different due to on-site development and R & D activities.

17.3 We have heard the rival contentions and perused and carefully considered the material on record; we find from the show cause notice issued by the CIT (Appeals) to the assessee with regard to the proposal for final selection of comparables, and particularly at

para 7 on page 12 of the impugned order, that the learned CIT (Appeals) had applied the on-site filter at 75% of export revenues. It is however seen that the learned CIT (Appeals), without following his own filter, has omitted/excluded this company from the list of comparables by merely noting that its on-site expenses are in the region of 56%. The learned CIT (Appeals), in our view from the facts recorded in the impugned order, has not factually brought out or established that the on-site revenue of this company was in excess of 75% of its revenues. In these circumstances, it cannot be said that the assessee has failed the on-site filter of more than 75% of its on-site revenues being from exports and therefore in our view, in the factual matrix of the case the learned CIT (Appeals) has erroneously excluded this company from the list of comparables when it has passed the on-site filter applied as has been contended by Revenue. We, therefore, restore this company i.e. Visual Soft Technologies Ltd. to the final set of comparable companies to the assessee for computing the ALP of its international transactions. It is ordered accordingly. Consequently, the Ground No.7 raised by Revenue is allowed.

18. In the result, Revenue's appeal is partly allowed.

19. To sum up, both the assessee's appeal and Revenue's appeal for Assessment Year 2002-03 are partly allowed.

Order pronounced in the open court on 5<sup>th</sup> October, 2015.

Sd/-  
**(GEORGE GEORGE K)**  
Judicial Member

Sd/-  
**(JASON P BOAZ)**  
Accountant Member

\*Reddy gp