

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

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ , ACCOUNTANT MEMBER

IT(TP)A No.1567/Bang/2012
Assessment year : 2008-09

M/s. Sonus Networks India Private Limited, Crescent-IV, 12 th Floor, Prestige Shantiniketan – Business Precinct, Whitefield Road, Bangalore – 560 048. PAN : AALCS5706P	Vs.	The Assistant Commissioner of Income Tax, Circle 12(3), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, Advocate
Respondent by	:	Shri Farahat Hussain Qureshi, CIT-II(DR)

Date of hearing	:	23.04.2015
Date of Pronouncement	:	14.05.2015

ORDER

Per N.V. Vasudevan, Judicial Member

This is an appeal by the assessee against the order dated 28.9.2010 the Asst. Commissioner of Income Tax , Ward 12(3), Bangalore passed u/s. 143(3) r.w.s. 144C of the Income Tax Act, 1961 (Act), in relation to A.Y.2008-09.

2. Ground No.A sub-ground No.1 to 7 raised by the Assessee in the original grounds of appeal filed before the Tribunal and the additional ground No.8 & 9 in Ground No.A filed by the Assessee before the Tribunal project the grievance of the Assessee regarding the action of the learned Assessing Officer and Honorable Dispute Resolution Panel making an addition to the total income by way of adjustment to the Arms' Length Price ("ALP") to an international transaction carried out by the assessee u/s. 92CA of the Act. As far as additional ground sought to be raised by the Assessee in its application for raising additional grounds are concerned, they project the grievance of the Assessee in the action of the Revenue authorities in regarding Lucid Software Ltd., and Bodhtree Consulting Ltd., as comparable companies in determining the ALP. These two companies had been chosen as comparable by the Assessee in its TP study and were not objected to by the Assessee in the proceedings before the TPO or the DRP from being chosen as a comparable company. The Assessee has now raised the additional ground seeking to exclude the said companies as comparable companies as these two companies have been found to be functionally not comparable with a company providing software development services such as the Assessee. We are of the view that the Assessee is not precluded from raising such an objection for the first time before the Tribunal and the additional ground sought to be raised is admitted for adjudication.

3. At the time of hearing of the appeal it was submitted that the comparable companies chosen by the TPO and the addition made by the AO in the draft assessment order which was confirmed by the DRP are identical to the case decided by the Tribunal in ITA No.1054/Bang/2011 for AY 07-08 in M/S.Trilogy E-Business Software India Pvt.Ltd. Vs. DCIT, Circle 12(4), Bangalore and 3DPLM Software Solutions Ltd. Vs. DCIT 42 taxmann.com 333 (Bang-Trib). It was also submitted that the business profile of the Assessee and that of the Assessee in the case of 3DPLM Software Solutions Ltd. (supra) and Trilogy E-Business (supra) were also identical. This submission was found to be correct at the time of hearing. With this background we will now consider the factual basis of the present case and the decision rendered referred to by the learned counsel for the Assessee before us.

4. The assessee is a company. It rendered software development Services to its Associated Enterprise(AE). There is no dispute that the said transaction was an international transaction with an AE and therefore the price receive by the Assessee for rendering such services has to pass the Arm's Length price (ALP) test as laid down in Sec.92 of the Act. During the financial year 2006-07, the assessee provided software development services to its AE and was remunerated on a 'cost plus' basis. The total value of international transaction with respect to the provision of software development services by the assessee to its AE was Rs. 34,27,11,543.

5. 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 13.79%. The Assessee in its Transfer Pricing Analysis had selected 18 comparable companies and arrived at arithmetic mean of the profit margin of the said comparable companies at 16.00% and claimed that the price it charged was at Arm's Length.

6. The TPO arrived at a final set of 20 comparable. The set of 20 comparable and their profit margin are given as **Annexure-1 to this order.**

7. The assessee raised various objections to the methodology adopted and the reasons assigned by the TPO for rejecting the comparables chosen by the assessee in its TP study. The TPO finally passed an order u/s. 92CA of the Act and on the basis of the comparables set out in **Annexure-1** to this order, arrived at arithmetic mean of 23.65%. The computation of the ALP by the TPO in this regard was as follows:-

"5.4 Computation of Arms Length Price:

The arithmetic mean of the Profit Level indicators is taken as the arms length margin. (Please see Annexure B For details of computation of PLI of the comparables). Based on this, the arms

length price of the software development services rendered by you is computed as under:

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

Operating Cost	Rs.30,11,58,365
Arms Length Margin	23.65% of the operating cost
Arms Length Price (ALP) At 123.65% of operating cost	Rs.37,23,82,318
Price Received	Rs.34,27,11,543
Shortfall being adjustment u/s.92CA	Rs.2,96,70,775

The above shortfall of Rs.2,96,70,775/- is being treated as an adjustment to the price shown by the tax payer in its books of account.”

8. Against the said adjustment proposed by the TPO which was incorporated in the draft assessment order by the AO, the assessee filed objections before the DRP. The DRP rejected those objections and confirmed the transfer pricing adjustment suggested by the TPO. The adjustment confirmed by the DRP was added to the total income of the assessee by the AO in the fair order of assessment. Against the said order of the Assessing Officer, the assessee has preferred the present appeal before the Tribunal.

9. The Id. counsel for the assessee brought to our notice that out of the 20 comparable companies chosen by the TPO, 12 companies as listed below have to be excluded as not comparable with the Assessee company as laid down by this Tribunal in the case of *3 DPLM Software Solutions Ltd.* (*supra*).

1. Avani Cincon
2. Bodhtree Ltd.
3. Celestial Biolabs
4. E-Zest Ltd.
5. Infosys Technologies Ltd.
6. Persistent Systems Ltd.
7. Quintegra Solutions Ltd.
8. Tata Elxsi Ltd.
9. Thirdware Solutions
10. Wipro Limited
11. Softsol India Ltd.
12. Lucid Software Ltd.

10. The following were the relevant observations of the tribunal on the 12 comparable companies in the aforesaid decision:-

"Companies incorrectly adopted as comparables by the TPO as per the contention of the assessee.

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.

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 dis-similar 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.

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 -

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

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

- (c) CSR India Pvt. Ltd. (IT (TP) A No.1119/Bang/2011) and
- (d) 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 Trilogy 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 form 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 form the list of comparable companies. It is ordered accordingly.

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.

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.

12.4.1 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.

12.4.2 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.

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.

13.4.1 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.

13.4.2 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.

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.

15. **Thirdware Solutions Ltd. (Segment)**

15.1 This company was proposed for inclusion in the list of comparables by the TPO. Before the TPO, the assessee objected to the inclusion of this company in the list of comparables on the ground that its turnover was in excess of Rs.500 Crores. Before us, the assessee has objected to the inclusion of this company as a comparable for the reason that apart from software development services, it is in the business of product development and trading in software and giving licenses for use of software. In this regard, the learned Authorised Representative submitted that :-

(i) This company is engaged in product development and earns revenue from sale of licences and subscription. It has been pointed out from the Annual Report that the company has not provided any separate segmental profit and loss account for software development services and product development services.

(ii) In the case of E-Gain communications Pvt. Ltd. (2008-TII-04-ITAT-PUNE-TP), the Tribunal has directed that this company be omitted as a comparable for software service providers, as its income includes income from sale of licences which has increased the margins of the company.

The learned A.R. prayed that in the light of the above facts and in view of the aforesaid decision of the Tribunal (supra), this company ought to be omitted from the list of comparables.

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

15.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the material on record that the company is engaged in product development and earns revenue from sale of licenses and subscription. However, the segmental profit and loss accounts for software development services and product development are not given separately. Further, as pointed out by the learned Authorised Representative, the Pune Bench of the Tribunal in the case of E-Gain Communications Pvt. Ltd. (supra) has directed that since the income of this company includes income from sale of licenses, it ought to be rejected as a comparable for software development services. In the case on hand, the assessee is rendering software development services. In this factual view of the matter and following the afore cited decision of the Pune Tribunal (supra), we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand.

16. Lucid Software Ltd.

16.1 This company was selected as a comparable by the TPO. Before us, the assessee has objected to the inclusion of this company as a comparable on the grounds that it is into software product development and therefore functionally different from the assessee. In this regard, the learned Authorised Representative submitted that -

(i) This company is engaged in the development of software products.

(ii) This company has been held to be functionally different and therefore not comparable to software service providers by the order of a co-ordinate bench of the Tribunal in the assessee's own case for Assessment Year 2007-08 (IT(TP)A No.845/Bang/2011), following the decision of Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. (ITA No.7821/Mum/2011).

(iii) The rejection of this company as a comparable to software service providers has been upheld by the co-ordinate benches of this Tribunal in the cases of LG Soft India Pvt. Ltd. (ITA No.1121/Bang/2011) and CSR India Pvt. Ltd. [IT(TP)A No.1119/Bang/2011] and by the Delhi Bench of the Tribunal in the case of Transwitch India Pvt. Ltd. (ITA No.6083/Del/2010).

(iv) The factual position and circumstances pertaining to this company has not changed from the earlier Assessment Year 2007-08 to the period under consideration i.e. Assessment Year 2008-09 and therefore on this basis, this company cannot be considered as a comparable in the case on hand.

(v) The relevant portion of the Annual Report of this company evidences that it is in the business of product development.

The learned Authorised Representative prays that in view of the factual position as laid out above and the decisions of the co-ordinate benches of the Tribunal in the assessee's own case for Assessment Year 2007-08 and other cases cited above, it is clear that this company being into product development cannot be considered as a comparable to the assessee in the case on hand who is a software service provider and therefore this company i.e. Lucid Software Ltd., ought to be omitted from the list of comparables.

16.2 per contra, the learned Departmental Representative supported the action and finding of the TPO in including this company in the list of comparables.

16.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that the company i.e. Lucid Software Ltd., is engaged in the development of software products whereas the assessee, in the case on hand, is in the business of providing software development services. We also find that, co-ordinate benches of the Tribunal in the assessee's own case for Assessment Year 2007-08 (IT(TP)A No.845/Bang/2011), LG Soft India Pvt. Ltd. (supra), CSR India Pvt. Ltd. (supra); the ITAT, Mumbai Bench in the case of Telecordia Technologies India Pvt. Ltd. (supra) and the Delhi ITAT in the case of Transwitch India Pvt. Ltd. (supra) have held, that since this company, is engaged in the software product development and not software development services, it is functionally different and dissimilar and is therefore to be omitted from the list of comparables for software development service providers. The assessee has also brought on record details to demonstrate that the factual and other circumstances pertaining to this company have not changed materially from the earlier year i.e. Assessment Year 2007-08 to the period under consideration i.e. Assessment Year 2008-09. In this factual matrix and following the afore cited decisions of the

co-ordinate benches of this Tribunal and of the ITAT, Mumbai and Delhi Benches (supra), we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand.

17. Persistent Systems Ltd.

17.1.1 This company was selected by the TPO as a comparable. The assessee objected to the inclusion of this company as a comparable for the reasons that this company being engaged in software product designing and analytic services, it is functionally different and further that segmental results are not available. The TPO rejected the assessee's objections on the ground that as per the Annual Report for the company for Financial Year 2007-08, it is mainly a software development company and as per the details furnished in reply to the notice under section 133(6) of the Act, software development constitutes 96% of its revenues. In this view of the matter, the Assessing Officer included this company i.e. Persistent Systems Ltd., in the list of comparables as it qualified the functionality criterion.

17.1.2 Before us, the assessee objected to the inclusion of this company as a comparable submitting that this company is functionally different and also that there are several other factors on which this company cannot be taken as a comparable. In this regard, the learned Authorised Representative submitted that :

(i) This company is engaged in software designing services and analytic services and therefore it is not purely a software development service provider as is the assessee in the case on hand.

(ii) Page 60 of the Annual Report of the company for F.Y. 2007-08 indicates that this company, is predominantly engaged in 'Outsourced Software Product Development Services' for independent software vendors and enterprises.

(iii) Website extracts indicate that this company is in the business of product design services.

(iv) The ITAT, Mumbai Bench in the case of Telecordia Technologies India Pvt. Ltd. (supra) while discussing the comparability of another company, namely Lucid Software Ltd. had rendered a finding that in the absence of segmental information, a company be taken into account for comparability analysis. This principle is squarely applicable to the company presently under consideration, which is into product development and product design services and for which the segmental data is not available.

The learned Authorised Representative prays that in view of the above, this company i.e. Persistent Systems Ltd. be omitted from the list of comparables.

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

17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company i.e. Persistent Systems Ltd., is engaged in product development and product design services while the assessee is a software development services provider. We find that, as submitted by the assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. (supra) that in the absence of segmental details / information a company cannot be taken into account for comparability analysis, we hold that this company i.e. Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.

18. Quintegra Solutions Ltd.

18.1 This case was selected by the TPO as a comparable. Before the TPO, the assessee objected to the inclusion of this company in the set of comparables on the ground that this company is functionally different and also that there were peculiar economic circumstances in the form of acquisitions made during the year. The TPO rejected the assessee's objections holding that this company qualifies all the filters applied by the TPO. On the issue of acquisitions, the TPO rejected the assessee's objections observing that the assessee has not adduced any evidence as to how this event had an any influence on the pricing or the margin earned.

18.1.2 Before us, the assessee objected to the inclusion of this company for the reason that it is functionally different and also that there are other factors for which this company cannot be considered as a comparable. It was submitted that,

(i) Quintegra solutions Ltd., the company under consideration, is engaged in product engineering services and not in purely software development services. The Annual Report of this company also states that it is engaged in preparatory software products and is therefore not similar to the assessee in the case on hand.

(ii) In its Annual Report, the services rendered by the company are described as under :

" Leveraging its proven global model, Quintegra provides a full range of custom IT solutions (such as development, testing, maintenance, SAP, product engineering and infrastructure management services), proprietary software products and consultancy services in IT on various platforms and technologies."

(iii) This company is also engaged in research and development activities which resulted in the creation of Intellectual Proprietary Rights (IPRs) as can be evidenced from the statements made in the Annual Report of the company for the period under consideration, which is as under :

" Quintegra has taken various measures to preserve its intellectual property. Accordingly, some of the products developed by the company have been covered by the patent rights. The company has also applied for trade mark registration for one of its products, viz. Investor Protection Index Fund (IPIF). These measures will help the company enhance its products value and also mitigate risks."

(iv) The TPO has applied the filter of excluding companies having peculiar economic circumstances. Quintegra fails the TPO's own filter since there have been acquisitions in this case, as is evidenced from the company's Annual Report for F.Y. 2007-08, the period under consideration.

The learned Authorised Representative prays that in view of the submissions made above, it is clear that inter alia, this company i.e. Quintegra Solutions Ltd. being functionally different and possessing its own intangibles / IPRs, it cannot be considered as a comparable to the assessee in the case on hand and therefore ought to be excluded from the list of comparables for the period under consideration.

18.2 Per contra, the learned Departmental Representative supported the action of the TPO in including this company in the set of comparables to the assessee for the period under consideration.

18.3.1 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from

the details brought on record that this company i.e. Quintegra Solutions Ltd. is engaged in product engineering services and is not purely a software development service provider as is the assessee in the case on hand. It is also seen that this company is also engaged in proprietary software products and has substantial R&D activity which has resulted in creation of its IPRs. Having applied for trade mark registration of its products, it evidences the fact that this company owns intangible assets. The co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (ITA No.227/Bang/2010 dt.9.11.2012) has held that if a company possesses or owns intangibles or IPRs, then it cannot be considered as a comparable company to one that does not own intangibles and requires to be omitted from the list of comparables, as in the case on hand.

18.3.2 We also find from the Annual Report of Quintegra Solutions Ltd. that there have been acquisitions made by it in the period under consideration. It is settled principle that where extraordinary events have taken place, which has an effect on the performance of the company, then that company shall be removed from the list of comparables.

18.3.3 Respectfully following the decision of the co-ordinate bench of the Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (supra), we direct that this company i.e. Quintegra Solutions Ltd. be excluded from the list of comparables in the case on hand since it is engaged in proprietary software products and owns its own intangibles unlike the assessee in the case on hand who is a software service provider.

19. **Softsol India Ltd.**

19.1 This company was selected by the TPO as a comparable. The assessee objected to the inclusion of this company as a comparable on the grounds that this company is

functionally different and dis-similar from it. The TPO rejected the assessee's objections on the ground that as per the company's reply to the notice under section 133(6) of the Act, the company has categorized itself as a pure software developer and therefore included this company as a comparable as the assessee was also a provider of software development services. Before us, in addition to the plea that the company was functionally different, the assessee submitted that this company was excluded from the list of comparables by the order of the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 (ITA No.845/Bang/2011) on the ground that the 'Related Party Transactions ('RPT') is in excess of 15%. The learned Authorised Representative submitted that for the current period under consideration, the RPT is 18.3% and therefore this company requires to be omitted from the list of comparables.

19.2 Per contra, the learned Departmental Representative supported the action of the TPO in including this company in the list of comparables as this company was a pure software development service provider like the assessee.

19.3 We have heard both parties and perused and carefully considered the material on record. We find that the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 has excluded this company from the set of comparables for the reason that RPT is in excess of 15% following the decision of another bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2011. As the facts for this year are similar and material on record also indicates that RPT is 18.3%, following the afore cited decisions of the co-ordinate benches (supra), we hold that this company is to be omitted from the list of comparables to the assessee in the case on hand."

11. As far as the comparable chosen by the TPO viz., Bodhtree Consulting Ltd. is concerned, the learned counsel for the Assessee submitted that in the case of Nethawk Networks Pvt.Ltd. ITA No.7633/Mum/2012 and ITAT Bangalore in the case of *Cisco Systems (India) Pvt.Ltd. ITA No.271/Bang/2014*, this company was regarded as not comparable with a software development service provider such as the Assessee. The following were the relevant observations of the Tribunal in the case of *Cisco Systems(India) Ltd.*:

“26.1 Bodhtree Consulting Ltd.:- As far as this company is concerned, it is not in dispute that in the list of comparables chosen by the assessee, this company was also included by the assessee. The assessee, however, submits before us that later on it came to the assessee’s notice that this company is not being considered as a comparable company in the case of companies rendering software development services. In this regard, the ld. counsel for the assessee has brought to our notice the decision of the Mumbai Bench of the Tribunal in the case of *Nethawk Networks Pvt. Ltd. v. ITO, ITA No.7633/Mum/2012, order dated 6.11.2013*. In this case, the Tribunal followed the decision rendered by the Mumbai Bench of the Tribunal in the case of *Wills Processing Services (I) P. Ltd., ITA No.4547/Mum/2012*. In the aforesaid decisions, the Tribunal has taken the view that Bodhtree Consulting Ltd. is in the business of software products and was engaged in providing open & end to end web solutions software consultancy and design & development of software using latest technology. The decision rendered by the Mumbai Bench of the Tribunal in the case of *Nethawk Networks Pvt. Ltd. (supra)* is in relation to A.Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Following the aforesaid decision of the Mumbai Bench of the Tribunal, we hold that Bodhtree Consulting Ltd. cannot be regarded as a comparable. In this regards, the fact that the assessee had itself proposed this company as comparable, in our opinion, should not be the basis on which the said company should be retained as a

comparable, when factually it is shown that the said company is a software product company and not a software development services company.”

12. The learned DR however pointed out that in the case of 3 DPLM (supra) this tribunal has held that Bodhtree Ltd. is a comparable company in the case of software service provider. The following were the relevant observations of the Tribunal pointed out by him:

8.0 Bodhtree Consulting Ltd.

8.1 This company has been selected as a comparable company to the assessee by the TPO; the inclusion of which was not objected to by the assessee before both the TPO and the DRP. The assessee has not objected to the inclusion of this company in the list of comparables, as can be seen from the grounds of appeal raised in Form 36B before this Tribunal.

8.1 However in the course of proceedings before us, the learned Authorised Representative objected to the inclusion of this company as a comparable for the following reasons :

(i) This company has reported abnormally fluctuating margins in the period from 2005 to 2011, which indicate abnormal business factors and abnormal profit margins and hence should not be considered as comparable to the assessee.

(ii) The abnormally fluctuating margins indicate that this company bears higher risk in contrast to the assessee who has earned consistent margins over the years, indicating difference in the risk profile between this company and the assessee.

(iii) This company has registered exponential growth of 67% in terms of revenue and 41% in terms of profits over the immediately preceding year which can be attributed to the development of a software application, MIDAS (Multi Industry Data Anomaly) which was made available for customers as SaaS (Software as a Service).

8.3 Per contra, the learned Departmental Representative opposed the exclusion of this company from the list of comparable companies. The learned Departmental Representative contended that since the assessee had accepted the TPO's proposal for inclusion of this company in the set of comparables and had not objected to its inclusion even before the DRP, the objections raised by the assessee in this regard, at this stage, ought to be rejected.

8.4.1 We have heard both parties and perused and carefully considered the material on record. Admittedly, there is no disputing the fact that the assessee had never objected to the inclusion of this company in the set of comparables in earlier proceedings before the TPO and the DRP. It is also seen that even in the grounds of appeal raised before us, the assessee has not raised any grounds challenging the inclusion of this company in the list of comparables. In fact in the assessee's own case for Assessment Year 2007-08, this company was selected as a comparable by the assessee itself. We, therefore, find no merit in the contentions raised by the learned Authorised Representative of the assessee in respect of this company at this stage of proceedings.

8.4.2 It is also seen from the submissions made before us that the assessee has only pointed out fluctuating margins in the results of this company over the years. This, in itself, cannot be reason enough to establish differences in functional profile or any clinching factual reason warranting the exclusion of this company from the list of comparables. In this view of the matter, the contentions of the assessee are rejected and this company is held to be comparable to the assessee and its inclusion in the list of comparable companies is upheld."

13. The learned DR further submitted that WIPRO Ltd., was regarded as not comparable on the ground of functional dissimilarity in the case of

3DPLM (supra) as it was not only in rendering software development services but also software products. The learned DR pointed out that the TPO in this case has applied only the segmental results of Wipro Ltd. and therefore the decision relied upon by the learned counsel for the Assessee will not be applicable.

14. The learned counsel for the Assessee submitted before us that if the aforesaid comparable companies are excluded from the list of 20 comparable companies chosen by the TPO then the profit margin of the Assessee would be well within the (+) (-) 5% range of the arithmetic mean of the remaining comparable companies and therefore the price received by the Assessee would be considered as at Arms Length. He prayed for a limited direction to the TPO on the lines set out above and determine the ALP. It also submitted that the other issues raised by the Assessee in the grounds of appeal need not be gone into.

15. We are of the view that the prayer sought for by the learned counsel for the Assessee is acceptable and accordingly, the TPO is directed to compute ALP after excluding the comparable companies dealt with in this order.

16. Ground No.6 raised by the Assessee is with regard to method of computation of deduction u/s.10A of the Act. The Assessee was entitled to claim deduction u/s.10A of the Act. While computing deduction u/s.10A of the Act, the AO excluded certain expenses from export turnover on the

ground that these expenses are incurred in rendering technical services rendered to clients outside India and therefore to be excluded from the export turnover while computing deduction under section 10A. The Assessee prayed that the aforesaid expenditure are not of the nature set out in Explanation 2(iv) to Sec.10A of the Act which defines "Export Turnover". The Assessee also made an alternate prayer that expenses that are reduced from the export turnover should also be reduced from the total turnover and in this regard has placed reliance on the decision of the Hon'ble Karnataka High Court in the case of *CIT v. Tata Elxsi Ltd [2012] 349 ITR 98 (Karn)* wherein the Hon'ble Court held that whatever is excluded from the export turnover should also be excluded from the total turnover for the purpose of computing deduction u/s.10A of the Act. The main prayer as well as the alternate prayer was rejected by the AO as well as DRP.

17. We have heard the Id. counsel for the assessee and the Id. DR on the issues raised in ground Nos.6. Taking into consideration the decision rendered by the Hon'ble High Court of Karnataka in the case of *CIT v. Tata Elxsi Ltd [2012] 349 ITR 98 (Karn)*, we are of the view that it would be just and appropriate to direct the Assessing Officer to exclude telecommunication charges and traveling expenses of Rs.6,57,92,778/- incurred in foreign currency both from export turnover and total turnover, as has been prayed for in the alternative by the assessee in ground No.6. In view of the acceptance of the alternative prayer in ground No.6, we are of

the view that no adjudication is required on other issues raised in ground No.6 as to whether the sums in question should be excluded from the export turnover or not.

18. In the result, the appeal by the Assessee is partly allowed.

Pronounced in the open court on this 14th day of May, 2015.

Sd/-

(JASON P. BOAZ)
Accountant Member

Sd/-

(N.V. VASUDEVAN)
Judicial Member

Encl: Annexure-I

Bangalore,
Dated, the 14th May, 2015.

/D S/

Copy to:

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

By order

Assistant Registrar /
Senior Private Secretary
ITAT, Bangalore.