IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A', BANGALORE

BEFORE SHRI. SUNIL KUMAR YADAV, JUDICIAL MEMBER

AND

SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

I.T(TP).A No.1006/Bang/2011
(Assessment Year : 2007-08)

M/s. SAP Labs India P. Ltd,
No.138, Export Promotion Industrial Park,
Whitefield, Bengaluru 560 066 .. Appellant
PAN : AAFCS3649P

v.

Asst. Commissioner of Income-tax,
Circle- 12(3), Bengaluru .. Respondent

Assessee by : Shri. KanchanKoushal, CA
Revenue by : Shri. Rajesh K. R. Jha, CIT -DR

Heard on : 09.06.2016
Pronounced on : 30.06.2016

O R D E R

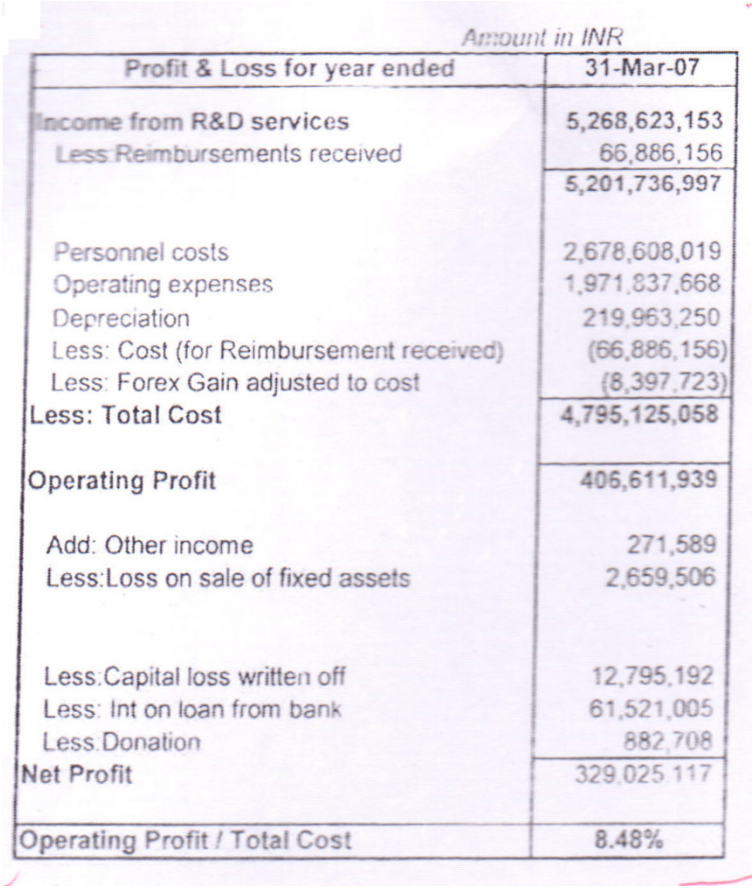
PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

In this appeal filed by assessee, it has altogether taken 13 grounds of which grounds 1, 2 and 13 are general needing no specific adjudication.

Ground 12 is on levy of interest u/s.234B, 234C and 234D of the Income-tax Act, 1961 ('the Act' in short), which is consequential in nature.

02. Grounds 3 to 5 raise issues relating to transfer pricing. Ld. Counsel for the assessee at the outset submitted that if his grounds for exclusion of certain companies from the list of comparables finally selected by the TPO, for the TP study was considered, other grounds relating to TP issues could be treated as not pressed.

03. Facts apropos are that assessee, is a subsidiary of a company called SAP AG, Germany. M/s. SAP AG, Germany was providing software development service to its group companies. Assessee is a captive service provider assisting SAP AG, Germany in research, design and development of new software products, software enhancement and modifying existing software modules. It operates from various units registered with Software Technology Parks (STP) of India. Assessee had international transactions in the nature of software development services rendered to its AE abroad, and receipts from such software development related services came to Rs.5,20,17,36,977/-. Operating margin worked out by assessee for the software development services segment was 8.48% as under :



Amount in INR

Profit & Loss for year ended	31-Mar-07
Income from R&D services	5,268,623,153
Less:Reimbursements received	66,886,156
	5,201,736,997
Personnel costs	2,678,608,019
Operating expenses	1,971,837,668
Depreciation	219,963,250
Less: Cost (for Reimbursement received)	(66,886,156)
Less: Forex Gain adjusted to cost	(8,397,723)
Less: Total Cost	4,795,125,058
Operating Profit	406,611,939
Add: Other income	271,589
Less:Loss on sale of fixed assets	2,659,506
Less:Capital loss written off	12,795,192
Less: Int on loan from bank	61,521,005
Less:Donation	882,708
Net Profit	329,025,117
Operating Profit / Total Cost	8.48%

04. For bench marking the value of its international transactions assessee had in its TP study considered TNM as most appropriate method and for this purpose selected 18 comparables. Comparables selected by assessee and their margin were as under :

Sr. No.	Name of Comparable Company	OP/TC(Based on 3 years data)
1.	Bodhtree Consulting Ltd.	18%
2.	FCS Software Solutions Ltd.	14%
3.	Goldstone Technologies Ltd.	3%
4.	Larsen & Toubro Infotech Ltd.	11%
5.	Melstar information Technologies Ltd.	0%
6.	Orient information Technology Ltd.	-6%
7.	Powersoft Global Solutions Ltd.	19%
8.	SIP Technologies & Exports Ltd.	25%
9.	Sonata Software Ltd.	9%
10.	Synetairos Technologies Ltd.	11%
11.	Trident Info-Tech Corpn. Ltd.	66%
12.	VJIL Consulting Ltd.	7%
13.	Akshay Software Technologies Ltd.	7%
14.	Cambridge Technology Enterprises Ltd.	21%
15.	ICRA Techno Analytics Ltd.	15%
16.	Mindtree Consulting Ltd.	11%
17.	Computech International Ltd.	7%
18.	Karuturi Networks Ltd.	4%
Arithmetic Mean		**13%**
Appellant 's OP/TC		**8.48%**

05. As per the assessee, its margin compared favourably with the arithmetic mean of the PLI of the comparables mentioned above and therefore there was no requirement of any adjustment on account of ALP.

06. When the matter was referred by AO to the TPO, TPO was of the opinion that selection of comparables made by assessee were not appropriate except for two companies, namely SIP Technologies & Exports Ltd, and Mindtree Consulting Ltd. TPO thereafter made his own study of the capitaline, prowess data bases and zeroed in on a set of 26 comparables which inter alia consisted of two companies selected by the assessee and accepted by the TPO. The final set of comparables compiled by the TPO and their operating margin read as under :

Sr. No.	Name of Company	OP/TC (FY 2006-07)
1	Mindtree Ltd	16.90%
2	S I P Technologies & Exports Ltd	13.90%
3	Accel Transmatic Ltd (Seg.)	21.11%
4	Avani Cimcon Technologies Ltd	52.59%
5	Celestial Labs Ltd	58.35%
6	Datamatics Ltd	1.38%
7	E-Zest Solutions Ltd	36.12%
8	Flextronics Software Systems Ltd (Seg.)	25.31%
9	Geometric Ltd (Seg.)	10.71%
10	Helios & Matheson Information Technology Ltd	36.63%
11	IGate Global Solutions Ltd	7.49%

12	Infosys Technologies Ltd	40.30%
13	Ishir Infotech Ltd	30.12%
14	KALS Information Systems Ltd (Seg.)	30.55%
15	LGS Global Ltd (Lanco Global Solutions Ltd)	15.75%
16	Lucid Software Ltd	19.37%
17	Mediasoft Solutiions Ltd	3.66%
18	Megasoft Ltd (Seg.)	60.23 %
19	Persistent Systems Ltd	24.52%
20	Quintegra Solutions Ltd	12.56%
21	R S Software (India) Ltd	13.47%
22	R Systems International Ltd (Seg.)	15.07%
23	Sasken Communication Technologies Ltd (Seg.)	22.16%
24	Tata Elxsi Ltd (Seg.)	13.90%
25	Thirdware Solutions Ltd	25.12%
26	Wipro Ltd (Seg.)	33.65%
Arithmetic Mean		**25.14%**

07. On the arithmetic mean of 25.14% of PLI of the comparables selected by him, TPO allowed a working capital adjustment of 1.55% and arrived at adjusted arithmetic mean PLI of 23.59%. He thereafter worked out the shortfall u/s.92CA of the Act, as under :

Operating Cost *	Rs. 486,20,11,214/-
Arms Length Margin	23.59% of the Operating Cost
Arms Length Price (ALP) @123.59% of operating cost	Rs. 600,89,59,659/-

Arms Length Price @ 123.59% of operating cost	Rs. 600,89,59,659/-
Price charged in the international transactions	Rs. 526,86,23,153/-
Shortfall being adjustment u/s 92CA	Rs. 74,03,36,506/-

* Excluding Interest, donation, loss on sale of asset

08. When a proposal was put by the AO on these lines, assessee chose to move the DRP. However, DRP was not impressed by any of the arguments raised by the assessee against the adjustment recommended by the TPO for the international pricing of the software development services rendered by the assessee to its AE. Except for a minor relief, DRP did not interfere with the order of the TPO. Assessment was completed by making an addition of Rs.72,87,76,037/- u/s.92CA of the Act.

09. Now before us, Ld. AR submitted that assessee was into software development services sector and providing captive service to its AE abroad. As per the Ld. AR, out of the very many comparables considered by the TPO, Megasoft Ltd (seg), Accel Transmatics Ltd (seg), Avani Cimcon Technologies Ltd, Celestial Labs Ltd, E-Zest Solutions Ltd, Flextronics

Software Systems Ltd (seg), Helios & Matheson Information Technology Ltd, Infosys Ltd, Ishir Infotech Ltd, Kals Information Systems Ltd (seg), Lucid Software Ltd, Persistent Systems Ltd, Tata Elxsi Ltd (seg), Thirdware Solutions Ltd, and Wipro Ltd, were to be excluded since these companies were found to be functionally different from a software development service provider, by a coordinate bench of this Tribunal in the case of assessee's own sister concern, viz., M/s. SAP Labs India P. Ltd v. DCIT [ITA No.1118/Bang/2011, dt.23.09.2015. As per the Ld. AR, the very same set of comparables were considered by the TPO in that case also, which was for the very same assessment year. Hence, the same exclusions sought by the assessee and given by the Tribunal in the said case could be considered here as well.

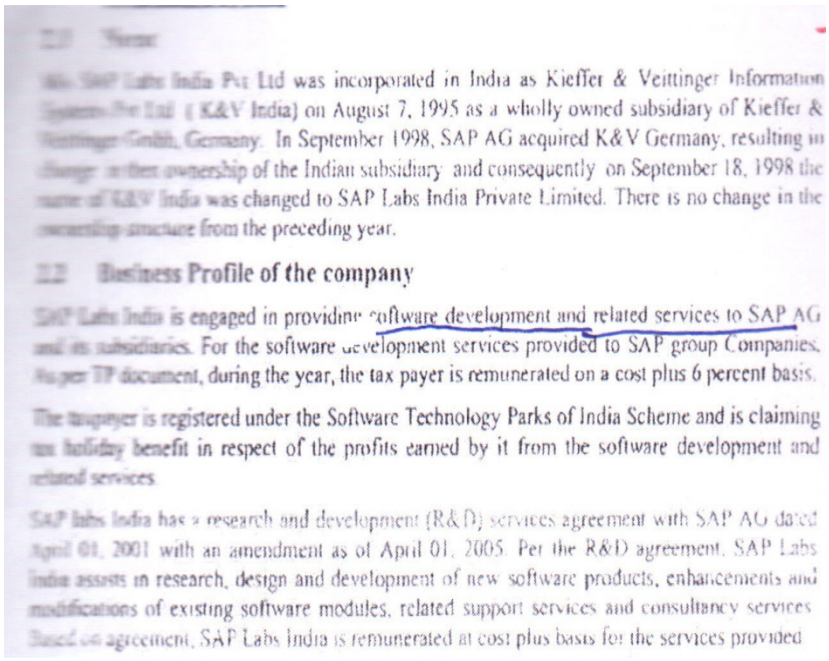
10. Continuing his arguments, Ld. AR submitted that M/s. Megasoft Ltd, one among the comparables was remitted back by the Tribunal in the very same case for consideration of segmental results, based on its Blue Ally segment. Ld. AR also submitted that an additional ground has been filed for exclusion of Accel Transmatic Ltd (seg), E-Zest Solutions Ltd, Helios & Matheson Information Technology Ltd, Persistent Systems Ltd, and Thirdware Solutions Ltd, since assessee had not challenged the

appropriateness of the above comparables before the lower authorities. For admission of the additional ground, Ld. AR relied on the decision of Special Bench of this Tribunal in the case of DCIT v. Quark Systems Pvt. Ltd. [42 DTR 414]. Ld. AR also pointed out that very same set of comparables were also considered by the Tribunal in the case of M/s. Hewlett- Packard (India) Globalsoft P. Ltd v DCIT [ITA.1031/Bang/2011, dt.23.09.2015] also, and this Tribunal following its decision in SAP Labs (supra) had directed the exclusion of the companies assailed here. As per the Ld. AR, if these companies are excluded, the final set of comparables that would remain are Datamatics Ltd, Geometric Ltd (seg), IGate Global Solutions Ltd, LGS Global Ltd, Mediasoft Solutions Ltd, Mindtree Consulting Ltd, Quintegra Solutions Ltd, R S Software (India) Ltd, R Systems International Ltd (seg), Sasken Communication Technologies Ltd (seg), and SIP Technologies & Exports Ltd. As per the Ld. AR, Megasoft Ltd (seg) can be considered as a comparable if proper segmentation of its results were done.

11. Per contra, Ld. DR submitted that the functional similarity of the assessee and the parties in the cases relied on by the assessee could not be established by the Ld. AR. Therefore, according to him the decisions in the

case of SAP Labs P. Ltd (supra) and M/s. Hewlett- Packard (India) Globalsoft P. Ltd (supra) could not be considered as a proper precedence.

12. We have perused the orders and heard the rival contentions. Profile of the assessee as appearing at p.no.2 of TP order is reproduced hereunder :



2.1 Name

[redacted] India Pvt Ltd was incorporated in India as Kieffer & Veittinger Information [redacted] (K&V India) on August 7, 1995 as a wholly owned subsidiary of Kieffer & [redacted] Gmbh, Germany. In September 1998, SAP AG acquired K&V Germany, resulting in [redacted] in the ownership of the Indian subsidiary and consequently on September 18, 1998 the [redacted] of K&V India was changed to SAP Labs India Private Limited. There is no change in the [redacted] structure from the preceding year.

2.2 Business Profile of the company

[redacted] India is engaged in providing software development and related services to SAP AG and its subsidiaries. For the software development services provided to SAP group Companies, as per TP document, during the year, the tax payer is remunerated on a cost plus 6 percent basis.

The taxpayer is registered under the Software Technology Parks of India Scheme and is claiming tax holiday benefit in respect of the profits earned by it from the software development and related services.

SAP labs India has a research and development (R&D) services agreement with SAP AG dated April 01, 2001 with an amendment as of April 01, 2005. Per the R&D agreement, SAP Labs India assists in research, design and development of new software products, enhancements and modifications of existing software modules, related support services and consultancy services. Based on agreement, SAP Labs India is remunerated at cost plus basis for the services provided.

13. TPO himself has given a finding that assessee was providing software services to SAP group of companies abroad. Now coming to the decision of SAP Labs, relied on by the Ld. AR this Tribunal at para 3 has clearly observed that the said company was providing software development services to its AE abroad. The said decision was relied by this Tribunal in the case of M/s. Hewlett- Packard (India) Globalsoft P. Ltd

(supra), where also the profile of the concerned assessee was similar to the assessee here. At para 8 of the Tribunal order in the case of M/s. Hewlett-Packard (India) Globalsoft P. Ltd (supra), profile of the said assessee has been reproduced and such profile clearly shows that the said company was also rendering software development services to them. This decision relied was also for the very same assessment year. Hence, we are of the opinion that these decisions could be considered as a good precedence for adjudicating the exclusions sought by the assessee. What has been held by the coordinate bench at para 23 of its order dt.23.09.2015, in the case of M/s. Hewlett- Packard (India) Globalsoft P. Ltd (supra) is reproduced hereunder :

23. We have perused the orders and heard the rival contentions. In so far as Accel Transmatic Ltd (seg), Avani Cimcon Technologies Ltd, Celestial Labs Ltd, E-Zest Solutions Ltd,, Helios & Matheson Information Technology Ltd, Infosys Technologies Ltd, Ishir Infotech Ltd, Kals Information Systems Ltd (seg), Lucid Software Ltd, Persistent Systems Ltd, Quintegra Solutions Ltd, Tata Elxsi Ltd (seg), Thirdware Solutions Ltd (seg) and Wipro Ltd (seg) are concerned, the issue of comparability of these companies had come up before this Tribunal in the case of NXP Semiconductors India P. Ltd (supra). Analysis done in the said decision was also for software development services segment and the TPO in the said case had also selected the very same set of 26 companies. Said decision being for the very same assessment year 2007-08, we are of the opinion that it can be taken as a good precedence for deciding the issue of

comparability raised by the assessee herein, in so far as these companies are concerned. This Tribunal had observed as under :

> *i) Accel Transmatic Ltd.*
>
> *48. With regard to this company, the complaint of the assessee is that this company is not a pure software development service company. It is further submitted that in a Mumbai Tribunal Decision of Capgemini India (F) Ltd v Ad. CIT 12 Taxman.com 51, the DRP accepted the contention of the assessee that Accel Transmatic should be rejected as comparable. The relevant observations of DRP as extracted by the ITAT in its order are as follows:*
>
> *"In regard to Accel Transmatics Ltd. the assessee submitted the company profile and its annual report for financial year 2005-06 from which the DRP noted that the business activities of the company were as under.*
>
> *(i) Transmatic system - design, development and manufacture of multi function kiosks Queue management system, ticket vending system*
>
> *(ii) Ushus Technologies - offshore development centre for embedded software, net work system, imaging technologies, outsourced product development*
>
> *(iii) Accel IT Academy (the net stop for engineers)- training services in hardware and networking, enterprise system management, embedded system, VLSI designs, CAD/CAM/BPO*
>
> *(iv) Accel Animation Studies software services for 2D/3D animation, special effect, erection, game asset development.*
>
> *4.3 On careful perusal of the business activities of Accel Transmatic Ltd. DRP agreed with the assessee that the*

company was functionally different from the assessee company as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation and therefore assessee's claim that this company was functionally different was accepted. DRP therefore directed the Assessing Officer to exclude ACCEL Transmatic Ltd. from the final list of comparables for the purpose of determining TNMM margin."

49. Besides the above, it was pointed out that this company has related party transactions which is more than the permitted level and therefore should not be taken for comparability purposes. The submission of the ld. counsel for the assessee was that if the above company should not be considered as comparable. The ld. DR, on the other hand, relied on the order of the TPO.

50. We have considered the submissions and are of the view that the plea of the assessee that the aforesaid company should not be treated as comparables was considered by the Tribunal in Capgemini India Ltd (supra) where the assessee was software developer. The Tribunal, in the said decision referred to by the ld. counsel for the assessee, has accepted that this company was not comparable in the case of the assessees engaged in software development services business. Accepting the argument of the ld. counsel for the assessee, we hold that the aforesaid company should be excluded as comparables."

20. Respectfully following the decision of the Tribunal in similar set of facts, these companies are directed to be excluded from the list of comparables."

ii) <u>*Avani Cimcon Technologies Ltd.*</u>

39. As far as this company is concerned, the plea of the Assessee has been that this company is functionally different from the assessee.

Based on the information available in the company's website, which reveals that this company has developed a software product by name "DXchange", it was submitted that this company would have revenue from software product sales apart from rendering of software services and therefore is functionally different from the assessee. It was further submitted that the Mumbai Bench of the Tribunal to the decision in the case of Telcordia Technologies Pvt. Ltd. v. ACIT – ITA No.7821/Mum/2011 wherein the Tribunal accepted the assessee's contention that this company has revenue from software product and observed that in the absence of segmental details, Avani Cincom cannot be considered as comparable to the assessee who was rendering software development services only and it was held as follows:-

"7.8 Avani Cincom Technologies Ltd. ('Avani Cincom'):

Here in this case also the segmental details of operating income of IT services and sale of software products have not been provided so as to see whether the profit ratio of this company can be taken into consideration for comparing the case that of assessee. In absence of any kind of details provided by the TPO, we are unable to persuade ourselves to include it as comparable party. Learned CIT DR has provided a copy of profit loss account which shows that mainly its earning is from software exports, however, the details of percentage of export of products or services have not been given. We, therefore, reject this company also from taking into consideration for comparability analysis."

It was also highlighted that the margin of this company at 52.59% which represents abnormal circumstances and profits. The following figures were placed before us:-

Particulars	*FYs 05-06*	*06-07*	*07-08*	*08-09*
Operating Revenue	*21761611*	*35477523*	*29342809*	*28039851*
Operating Expns.	*16417661*	*23249646*	*23359186*	*31108949*
Operating Profit	*5343950*	*12227877*	*5983623*	*(3069098)*
Operating Margin	*32.55%*	*52.59%*	*25.62%*	*- 9.87%*

40. It was submitted that this company has made unusually high profit during the financial year 06-07. The operating revenues increased 63.03% which indicates that it was an extraordinary year for this company. Even the growth of software industry for the previous year as per NASSCOM was 32%. The growth rate of this company was double the industry average. In view of the above, it was argued that this company ought to have been rejected as a comparable.

41. We have given a careful consideration to the submissions made on behalf of the Assessee and are of the view that the same deserves to be accepted. The reasons given by the Assessee for excluding this company as comparable are found to be acceptable. The decision of ITAT (Mumbai) in the case of Telcordia Technologies Pvt. Ltd. v. ACIT (supra) also supports the plea of the assessee. We therefore accept the plea of the Assessee to reject this company as a comparable.

iii) <u>Celestial Labs Ltd.</u>

42. As far as this company is concerned, the stand of the assessee is that it is absolutely a research & development company. In this regard, the following submissions were made:-

- *In the Director's Report (page 20 of PB-II), it is stated that "the company has applied for Income Tax concession*

for in-house R&D centre expenditure at Hyderabad under section 35(2AB) of the Income Tax Act."

- *As per the Notes to Accounts - Schedule 15, under "Deferred Revenue Expenditure" (page 31 of PB-II), it is mentioned that, "Expenditure incurred on research and development of new products has been treated as deferred revenue expenditure and the same has been written off in 10 years equally yearly installments from the year in which it is incurred."*

An amount of Rs. 11,692,020/- has been debited to the Profit and Loss Account as "Deferred Revenue Expenditure" (page 30 of PB-II). This amounts to nearly ***8.28 percent*** *of the sales of this company.*

It was therefore submitted that the acceptance of this company as a comparable for the reason that it is into pure software development activities and is not engaged in R&D activities is bad in law.

43. Further reference was also made to the decision of the Mumbai Bench of the Tribunal in the case of Teva Pharma Private Ltd. v. Addl. CIT – ITA No.6623/Mum/2011 (for AY 2007-08) in which the comparability of this company for clinical trial research segment. The relevant extract of discussion regarding this company is as follows:

> ***"The learned D.R. however drew our attention to page-389 of the paper book which is an extract from the Directors report which reads as follows:***
>
> *'The Company has developed a de novo drug design tool "CELSUITE" to drug discovery in, finding the lead molecules for drug discovery and protected the IPR by filing under the copy if sic (of) right/patent act. (Apprised and funded by Department of Science and Technology New Delhi) based on our insilico expertise (applying bio-informatics tools). The Company has developed a molecule to treat Leucoderma and multiple cancer and protected the IPR by*

filing the patent. The patent details have been discussed with Patent officials and the response is very favorable. The cloning and purification under wet lab procedures are under progress with our collaborative Institute, Department of Microbiology, Osmania University, Hyderabad. In the industrial biotechnology area, the company has signed the Technology transfer agreement with IMTECH CHANDIGARH (a very reputed CSIR organization) to manufacture and market initially two Enzymes, Alpha Amylase and Alkaline Protease in India and overseas. The company is planning to set up a biotechnology facility to manufacture industrial enzymes. This facility would also include the research laboratories for carrying out further R & D activities to develop new candidates' drug molecules and license them to Interested Pharma and Bio Companies across the GLOBE. The proposed Facility will be set up in Genome Valley at Hyderabad in Andhra Pradesh.'

According to the learned D.R. celestial labs is also in the field of research in pharmaceutical products and should be considered as comparable. As rightly submitted by the learned counsel for the Assessee, the discovery is in relation to a software discovery of new drugs. Moreover the company also is owner of the IPR. There is however a reference to development of a molecule to treat cancer using bio-informatics tools for which patenting process was also being pursued. *As explained earlier it is a diversified company and therefore cannot be considered as comparable functionally with that of the Assessee. There has been no attempt made to identify and 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 adjustment, the TPO has rendered this*

company as not qualifying for comparability. We therefore accept the plea of the Assessee in this regard.' "

44. It was submitted that the learned DR in the above case vehemently argued that this company is into research in pharmaceutical products. The ITAT concluded that this company is owner of IPR, it has software for discovery of new drugs and has developed molecule to treat cancer. In the ultimate analysis, the ITAT did not consider this company as a comparable in clinical trial segment, for the reason that this company has diverse business. It was submitted that, however, from the above extracts it is clear that this company is not into software development activities, accordingly, this company should be rejected as a comparable being functionally different.

45.From the material available on record, it transpires that the TPO has accepted that up to AY 06-07 this company was classified as a Research and Development company. According to the TPO in AY 07-08 this company has been classified as software development service provider in the Capitaline/Prowess database as well as in the annual report of this company. The TPO has relied on the response from this company to a notice u/s.133(6) of the Act in which it has said that it is in the business of providing software development services. The Assessee in reply to the proposal of the AO to treat this as a comparable has pointed out that this company provides software products/services as well as bioinformatics services and that the segmental data for each activity is not available and therefore this company should not be treated as comparable. Besides the above, the Assessee has point out to several references in the annual report for 31.3.2007 highlighting the fact that this company was develops biotechnology products and provides related software development services. The TPO called for segmental data at the entity level from this company. The TPO also called for description of software development process. In response to the request of the TPO this company in its reply dated 29.3.2010 has given details of employees working in software development but it is not clear as to whether any

segmental data was given or not. Besides the above there is no other detail in the TPO's order as to the nature of software development services performed by the Assessee. Celestial labs had come out with a public issue of shares and in that connection issued Draft Red Herring Prospectus (DRHP) in which the business of this company was explained as to clinical research. The TPO wanted to know as to whether the primary business of this company is software development services as indicated in the annual report for FY 06-07 or clinical research and manufacture of bio products and other products as stated in the DRHP. There is no reference to any reply by Celestial labs to the above clarification of the TPO. The TPO without any basis has however concluded that the business mentioned in the DRHP are the services or businesses that would be started by utilizing the funds garnered though the Initial Public Offer (IPO) and thus in no way connected with business operations of the company during FY 06-07. We are of the view that in the light of the submissions made by the Assessee and the fact that this company was basically/admittedly in clinical research and manufacture of bio products and other products, there is no clear basis on which the TPO concluded that this company was mainly in the business of providing software development services. We therefore accept the plea of the Assessee that this company ought not to have been considered as comparable.

iv) 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 carefullyconsidered the material on record. It is seen from the record that the TPO has included this company in the list of comparbales 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 InformationSystems (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.

v) Helios & Matheson Information Technology Ltd & Kals Information Systems Ltd (seg) :

16. The next point made out by the assessee is with regard to the inclusion of items at (9) and (11) namely Helios & Matheson Information Technology Ltd., and KALS Information Solutions Ltd. (Seg). The primary plea raised by the assessee to assail the inclusion of the aforesaid two companies from the list of comparables is to be effect that they are functionally incomparable and therefore, are liable to be excluded. In sum and substance, the plea set up by the assessee is that both the aforesaid concerns are engaged in development and sale of software products which is functionally different from the services undertaken by the assessee in its IT-services segment.

17. As per the discussion in para 6.3.2. of the order of the TPO, the reason advanced for including KALS Information Systems Ltd., is to the effect that the said concern's application software segment is engaged in the development of software which can be considered as comparable to the assessee company. The said concern is engaged in two segments namely application software segment and Training. As per the TPO, the application software segment is functionally comparable to the assessee as the said concern is engaged in software services. The stand of the assessee is that a perusal of the Annual Report of the said concern for F.Y. 2006-07 reveals that the application software segment is engaged in the business of sale of software products and software services. The assessee pointed out this to the

TPO in its written submissions, copy of which is placed in the Paper book at page 420.3 to 420.4. The assessee further pointed out that there was no bifurcation available between the business of sale of software products and the business of software services, and therefore, it was not appropriate to adopt the application software segment of the said concern for the purposes of comparability with the assessee's IT-Services Segment. The TPO however, noticed that though the application software segment of the said concern may be engaged in selling of some of the software products which are developed by it, however, the said concern was not into trading of software products as there were no cost of purchases debited in the Profit & Loss Account. Though the TPO agreed that the quantum of revenue from sale of products was not available as per the financial statements of the said concern, but as the basic function of the said concern was software development, it was includible as it was functionally comparable to the assessee's segment of IT-Services.

18. Before us, apart from reiterating the points raised before the TPO and the DRP, the Ld. Counsel submitted that in the immediately preceeding assessment year of 2006-07, the said concern was evaluated by the assessee and was found functionally incomparable. For the said purpose, our reference has been invited to pages 421 to 542 of the Paper book, which is the copy of the Transfer Pricing study undertaken by the assessee for the A.Y. 2006-07, and in particular, attention was invited to page 454 where the accept reject matrix undertaken by the assessee reflected KALS Information Solutions Ltd. (Seg) as functionally incomparable. The Ld. Counsel pointed out that the aforesaid position has been accepted by the TPO in the earlier A.Y. 2006-07 and therefore, there was no justification for the TPO to consider the said concern as functionally comparable in the instant assessment year.

19. In our considered opinion, the point raised by the assessee is potent in as much as it is quite evident that the said concern has not been found to be functionally comparable with the assessee in the immediately preceding assessment year and in the present year also, on the basis of the Annual

Report, referred to in the written submissions addressed to the lower authorities, the assessee has correctly asserted out that the said concern was inter alia engaged in sale of software products, which was quite distinct from the activity undertaken by the assessee in the IT Services segment. At the time of hearing, neither is there any argument put forth by the Revenue and nor is there any discussion emerging from the orders of the lower authorities as to in what manner the functional profile of the said concern has undergone a change from that in the immediately preceding year. Therefore, having regard to the factual aspects brought out by the assessee, it is correctly asserted that the application software segment of the said concern is not comparable to the assessee's segment of IT services.

20. With regard to the inclusion of Helios & Matheson Information Technology Ltd., the assessee has raised similar arguments as in the case of KALS Information Solutions Ltd. (Seg). We have perused the relevant para of the order of the TPO i.e., 6.3.21, in terms of which the said concern has been included as a comparable concern. The assessee pointed out that as in the case of KALS Information Solutions Ltd. (Seg), in the instant case also for A.Y. 2006-07 the said concern was found functionally incomparable by the assessee in its Transfer pricing study and the said position was not disturbed by the TPO. The relevant portion of the Transfer pricing study, placed at page 432 of the Paper book has been pointed out in support. Considered in the aforesaid light, on the basis of the discussion in relation to KALS Information Solutions Ltd. (Seg), in the instant case also we find that the said concern is liable to be excluded from the list of comparables."

vi) <u>Infosys Technologies Ltd.</u>

12.1 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.

12.2 Before us, the assessee contended that this company is not functionally comparable to the assessee and in this context has cited various portions of the Annual Report of this company to this effect which is as under :-

(i) The company has an Intellectual Property (IP) Cell to guide its employees to leverage the power of IP for their growth. In 2008, this company generated over 102 invention disclosures and filed an aggregate 10 patents in India and the USA. Till date this company has filed an aggregate of 119 patent applications (pending) in India and USA out of which 2 have been granted in the US.

(ii) This company has substantial revenues from software products and the break-up of the software product revenues is not available.

(iii) This company has incurred huge research and development expenditure to the tune of approximately Rs.200 Crores.

(iv) This company has a revenue sharing agreement towards acquisition of IPR in AUTOLAY, a commercial software product used in designing high performance structural systems.

(v) The assessee also placed reliance on the following judicial decisions:-

(a) ITAT, Delhi Bench decision in the case of Agnity India Technologies India Pvt. Ltd. (ITA No.3856/Del/2010) and

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

12.3 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 operating 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.

12.4 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. The argument put forth by assessee's is 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.

vii) & viii) M/S.Ishir Infotech Ltd. And Lucid Software Ltd :

20. As far as comparable companies listed at Sl.No.11 & 14 of the final list of comparable companies chosen by the TPO viz., M/S.Ishir Infotech Ltd. And Lucid Software Ltd., is concerned, this Tribunal in the case of First Advantage Offshore Services Pvt.Ltd. Vs. DCIT IT (TP) No.1086/Bang/2011 for AY 07-08 held that the aforesaid companies are not comparable companies in the case of software development services provider. The nature of services rendered by the Assessee in this appeal and the Assessee in the case of First Advantage Offshore Services Pvt.Ltd.(supra) are one and the same. This fact would be clear from the fact that the very same 26 companies were chosen as comparable in the case of the Assessee as well as in the case of First Advantage Offshore Services Pvt.Ltd.(supra). The following were the relevant observations in the case of First Advantage Offshore Services Pvt.Ltd.(supra):

22. The learned counsel for the assessee submitted that these two companies are also to be excluded from the list of comparables on the basis of the finding of this Tribunal in the case of Mercedes Benz Research & Development India Pvt. Ltd. dt 22.2.2013, wherein at pages 17 and 22 of its order the distinctions as to why these companies should be excluded are brought out. He submitted that the facts of the case before us are similar and, therefore, the said decision is applicable to the assessee's case also.

23. The learned DR however objected to the exclusion of these two companies from the list of comparables. On a careful perusal of the material on record, we find that the Tribunal in the case of Mercedes Benz Research & Development India Pvt. Ltd. (cited supra) has taken a note of dissimilarities between the assessee therein and Lucid Software Ltd. As observed therein Lucid Software Ltd. company is also involved in the development of software as compared to the assessee, which is only into software services. Similarly, as regards Ishir Infotech Ltd., the Tribunal has considered the decision of the Tribunal in the case of 24/7 Co. Pvt. Ltd to hold that Ishir Infotech is also out-sourcing its work and, therefore, has not satisfied the 25% employee cost filter and thus has to be excluded from the list of comparables. As the facts of the case before us are similar, respectfully following the decision of the co-ordinate bench, we hold that these two companies are also to be excluded.

21. Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to exclude the aforesaid companies from the final list of comparable companies for the purpose of determining ALP.

x) 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.

xii) <u>Tata Elxsi Ltd.</u>

14.1 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.

14.2 Before us, it was reiterated that this company is not functionally comparable to the assessee as it performs a variety of functions under the software development and services segment namely

(a) Product design services

(b) Innovation design engineering and

(c) visual computing labs.

In the submissions made the assessee had quoted relevant portions from the Annual Report of the company to this effect. In view of this, the learned Authorised Representative pleaded that this company be excluded from the list of comparables.

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

14.4.1 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.

14.4.2 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."

25. Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to exclude the aforesaid companies from the final list of comparable companies for the purpose of determining ALP.

xiii) 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 afore cited 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."

xiv) Wipro Limited

13.1 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 or 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.

13.2 Before us, the assessee contended that this company is functionally not comparable to the assessee for several reasons, which are as under :

(i) This company owns significant intangibles in the nature of customer related intangibles and technology related intangibles and quoted extracts from the Annual Report of this company in the submissions made.

(ii) The TPO had adopted the consolidated financial statements for comparability purposes and for computing the margins, which contradicts the TPO's own filter of rejecting companies with consolidated financial statements.

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

13.4.1 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.

13.4.2 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.

14. In so far as Flextronics Software Systems Ltd (seg) is concerned, comparability of this company was considered by the Tribunal at para 26 to 28 of its order in the case of M/s. Hewlett- Packard (India) Globalsoft P. Ltd (supra). These paras are reproduced hereunder :

26. Now taking up the question of exclusion of Flextronics Software Systems Ltd (seg), it is true that the decision of Motorola Solutions (India) P. Ltd (supra) also was for the very same year

and also on software development services sector. This Tribunal held as under :

"97.2 For a company to be included in the list of comparables, it is necessary that credible information is available about the company. Unless this basic requirement is fulfilled, the company cannot be taken as a comparable. It is true that ld. TPO is entitled to obtain information us/ 133(6), the object of which is primarily only to supplement the information already available on record, but not, as rightly submitted by ld. Counsel for the assessee, to replace the information. If there is a complete contradiction between the information obtained u/s 133(6) and annual report then the said information cannot be substituted for the information contained in annual report. We, therefore, are in ITA No. 5637/D/2011 149 agreement with ld. counsel for the assessee that this company cannot be included as a comparable in the set of comparables selected by ld. TPO on account of clear contradiction between contents of annual report and information obtained u/s 133(6).

27. Rule 10D(3) specifies the information and documents that are to be maintained by a person who is entering into international transactions. These are official publications, published accounts or those which are in public domain except for agreements and contracts to which assessee is privy. Once the annual report of a company is for a year different from the financial year ending 31st March, then without doubt, it will cease to be a good comparable, unless the information received in pursuance to a notice u/s.133(6) of the Act from such company, is reconciled with the figures available in such annual report.

28. In the case of Flextronics Software Systems Ltd (seg), no doubt the annual report was for the year ending 31.03.2007. However it was only for a nine months period. No reconciliation was attempted by the lower authorities between the figures given in such annual report with the figures which were made available by the said company to the TPO pursuant to notice issued to them u/s.133(6) of the Act. No doubt at page 123 of TP order, TPO has stated that the software development service revenues were more than 75% based on the following figures :

Revenue mix: Customer – activity-wise distribution:

Particulars	2007 (Rs. million)	%	2006 (Rs. Million)	%
Services-related parties	198	2.3	72	1.17
Services – others	7,368	85.51	4,854	78.72
Products-related parties	10	0.12	10	0.17
Products – others	896	10.4	970	15.74
BPO	129	1.5	214	3.47
Goods and others	15	0.17	45	0.73
Total Sales	8,616	100	6,165	100

But how this segmentation was done by the TPO and the reconciliation of the said segmentation with the annual report of the assessee was never attempted or done. In such a situation we are of the opinion that Flextronics Software Solutions Ltd (seg) could not be considered as a proper comparable. We direct exclusion thereof.

We are therefore of the opinion that Flextronics Software Systems Ltd (seg) has to be excluded from the list of comparables.

15. As for the comparability of Megasoft Ltd, observations of the Tribunal in HP Globalsoft (India) P. Ltd(supra), is reproduced hereunder :

Megasoft Ltd. :

24. This company was chosen as a comparable by the TPO. The objection of the assessee is that there are two segments in this company viz., (i) software development segment, and (ii) software product segment. The Assessee is a pure software services provider and not a software product developer. According to the Assessee there is no break up of revenue between software products and software services business on a standalone basis of this comparable. The TPO relied on information which was given by this company in which this company had explained that it has two divisions viz., BLUEALLY DIVISION and XIUS-BCGI DIVISION. Xius-BCGI Division does the business of product software. This company

develops packaged products for the wireless and convergent telecom industry. These products are sold as packaged products to customers. While implementing these standardized products, customers may request the company to customize products or reconfigure products to fit into their business environment. Thereupon the company takes up the job of customizing the packaged software. The company also explained that 30 to 40% of the product software would constitute packaged product and around 50% to 60% would constitute customized capabilities and expenses related to travelling, boarding and lodging expense. Based on the above reply, the TPO proceeded to hold that the comparable company was mainly into customization of software products developed (which was akin to product software) internally and that the portion of the revenue from development of software sold and used for customization was less than 25% of the overall revenues. The TPO therefore held that less than 25% of the revenues of the comparable are from software products and therefore the comparable satisfied TPO's filter of more than 75% of revenues from software development services. The basis on which the TPO arrived at the PLI of 60.23% is given at page-115 and 116 of the order of the TPO. It is clear from the perusal of the same that the TPO has proceeded to determine the PLI at the entity level and not on the basis of segmental data.

25. In the order of the TPO, operating margin was computed for this company at 60.23%. It is the complaint of the assessee that the operating margins have been computed at entity level combining software services and software product segments. It was submitted that the product segment of Megasoft is substantially different from its software service segment. The product segment has employee cost of 27.65% whereas the software service segment has employee cost of 50%. Similarly, the profit margin on cost in product segment is 117.95% and in case of software service segment it is 23.11%. Both the segments are substantially different and therefore comparison at entity level is without basis and would vitiate the comparability (submissions on page 381 to 383 of the PB-I). It was further submitted that Megasoft Limited has provided segmental break-up between the software services segment and software product segment (page 68 of PB-II), which was also adopted by the TPO in his show

cause notice (Page 84 of PB-I). The segmental results i.e., results pertaining to software services segment of this company was:

Segmental Operating Revenues	*Rs.63,71,32,544*
Segmental Operating Expenses	*Rs.51,75,13,211*
Operating Profit	*Rs.11,96,19,333*
OP/TC (PLI)	*23.11%*

26. It was reiterated that in the given circumstances only PLI of software service segment viz., 23.11% ought to have been selected for comparison.

27. It was further submitted that the learned TPO in case of other comparable, similarly placed, had adopted the margins of only the software service segment for comparability purposes. Consistent with such stand, it was submitted that the margins of the software segment only should be adopted in the case of Megasoft also, in contrast to the entity level margins.

28. Computation of the net margin for Mega Soft Ltd. Is therefore remitted to the file of the TPO to compute the correct margin by following the direction of the Tribunal in the case of Trilogy E-Business Software India Pvt.Ltd."

Respectfully following the decision of the Tribunal referred to above, we direct the AO/TPO to compute the correct margin of Mega Soft Ltd., as directed by the Tribunal in the case of First Advantage Offshore Services Pvt.Ltd. (supra).

In line with the above, we hold that Megasoft Ltd (seg), can be considered as a good comparable after proper segmentation is done as directed in the above order.

16. In view of the above discussion, we direct exclusion of Accel Transmatics Ltd (seg), Avani Cimcon Technologies Ltd, Celestial Labs

Ltd, E-Zest Solutions Ltd, Flextronics Software Systems Ltd (seg), Helios & Matheson Information Technology Ltd, Infosys Technologies Ltd, Ishir Infotech Ltd, Kals Information Systems Ltd(seg), Lucid Software Ltd, Persistent Systems Ltd, Tata Elxsi Ltd (seg), Thirdware Solutions Ltd and Wipro Ltd (seg) from the list of cmparables considered by the TPO. We also direct that Megasoft Ltd, shall be considered as a comparable only after effecting proper segmentation of its results as mentioned at para 15 above. TPO/AO is directed to rework the ALP of international transactions of the assessee accordingly. Needless to say that working capital adjustment has to be given to the assessee based on the work- out of such working capital, relating to the final set of comparables left in the list.

17. In the result grounds 3 to 5 and additional ground raised by the assessee are treated as partly allowed.

18. Vide its ground.6, grievance of the assessee is that its claim for deduction u/s.80JJAA of the Act, was not allowed by the lower authorities.

19. Facts apropos are that assessee had claimed deduction of Rs.9,26,66,731/- u/s.80JJAA of the Act. Claim was supported with audit report in form 10DA. As per assessee, software engineers employed by them were workmen under Industrial Disputes Act, 1947. Claim was in

respect of additional wages paid to 976 new workman. Total wages paid to such new workman came to Rs.30,88,89,102/- and at 30% thereof, the amount worked out to Rs.9,26,66,731/-. Unitwise details of the claim were as under :

Particulars	Unit-1	Unit 2 (10A Unit)	Unit 3 (10A Unit)	Unit 4 (10A Unit)	Total
New "Regular Workmen" entitled for deduction u/s.80JJA	383	492	57	44	976
Additional Wages paid to the new "Regular Workmen" during the F.Y.2006-07 (Rs.)	11,93,45,597	15,30,85,757	2,10,37,306	1,54,20,441	30,88,89,102

20. It is to be noted that assessee was claiming exemption u/s.10A on Unit-2, Unit-3 and Unit-4 which were situated in Bengaluru, Gurgaon and Chandigarh respectively. As per AO, assessee was not eligible for such deduction in view of Section 80A(4). As per the AO assessee was hit by the limitation mentioned in Section 80A(4) . He rejected the claim of exemption of Rs.9,26,66,731/-. When a proposal on the above lines was given, assessee chose to move the DRP.

21. Objections of the assessee before the DRP was that there was no scope for invoking sub-section 4 of section 80A. As per the assessee, the said sub-section restricted only a claim which was linked to profit. As per the assessee, deduction u/s.80JJAA was not linked to profit. In any case, as per the assessee, additional wages paid by it during the year consisted of a sum of Rs.11,93,45,597/- to 383 new regular workman employed in Unit-1 which was not claiming deduction u/s.10A of the Act. Thus as per the assessee, prorata deduction u/s.80JJA on the above amount was unjustly rejected. Argument of the assessee before the DRP was that the conditions required to be fulfilled u/s.80JJA of the Act, were met by it. Relying on the coordinate bench decision in the case of ACIT v. Texas Instruments (India) P. Ltd, [115 TTJ 976], Ld. AR submitted that computer engineers who were not in supervisory position were eligible to be considered as workmen. However, DRP was not impressed. According to the DRP, decision in the case of Texas Instruments (supra) was appealed by the Revenue before the jurisdictional High Court and the issue had not reached a finality. Assessment was completed disallowing the claim of deduction u/s.80JJA of the Act.

22. Now before us, strongly assailing the orders of authorities below, Ld. AR submitted that the coordinate bench of this Tribunal in the case of ACIT v. Instruments India P. Ltd [115 TTJ976], had clearly held that newly employed software engineers could be considered as workmen by virtue of notification of Karnataka Government. Reliance was also placed on another coordinate bench decision in the case of DCIT v. Texas Instruments India P. Ltd [ITA No.1358/Bang/2010, dt.29.09.2012]. According to him, it was unjust to deny the deduction for additional wages considering the engineers employed by assessee to be working in supervisory cadre.

23. Per contra, Ld. DR supported the orders of authorities below.

24. We have perused the orders and considered the rival contentions. The claim of assessee with regard to additional wages paid to new workman was denied for a reason that engineers who were newly employed by the assessee were not considered as workers by the lower authorities. However, in a similar situation in the case of Texas Instruments India P. Ltd, (supra), it was held by the coordinate bench at para 6 and 7 of its order, as under :

6. We have heard the rival submissions and carefully perused the records. Considering the factual position after referring to the various documents filed by the assessee, the learned CIT(A) held as under :

"According to the AO if an employee or workman is getting a salary of more than Rs. 1,600 per month he is not covered by the definition of workman. However as per cl. (iv) of s. 2(s) of the Industrial. Disputes Act a worker, employed in supervisory capacity and getting a salary of more than Rs. 1,600 per month only be excluded from the definition of workman. In appellant's case the software engineers in respect of whom deduction under s. 80JJAA has been claimed have not been employed in a supervisory capacity even though they may be getting a salary of more than Rs. 1,600 per month. As the software engineers were not employed in supervisory capacity they cannot be excluded from the definition of workman. Further as per the notification of the Karnataka Government, the appellant company engaged in the development of software is covered by the Industrial Disputes Act. As such, I am of the considered opinion that the appellant has satisfied all the conditions for claiming relief under s. 80JJAA. However, I find that the appellant has claimed deduction of Rs. 2,55,81,220 with reference to the additional wages of Rs. 8,52,70,736 which included the wages of Rs. 4,87,64,029 in respect of the new workmen employed during the year ended 31st March, 2000 relevant to the asst. yr. 2000-01. As there was no claim for relief under s. 80JJAA for the asst. yr. 2000-01, the relief in respect of the workers employed in asst. yr. 2000-01 cannot be considered for relief under s. 80JJAA in the asst. yr. 2001-02. As such the appellant will be entitled for relief under s. 80JJAA of Rs. 1,09,52,012 being 30 per cent of the additional wages of Rs. 3,65,06,707 (Rs. 8,52,70,736 Rs. 4,87,64,029) in respect of the new workmen employed during the previous year relevant to the asst. yr. 2001-02. Similarly, for asst. yr. 2002-03 the appellant has claimed deduction of Rs. 4,78,05,176 being 30 per cent of the wages of Rs. 1,59,30,588 which also included the wages of Rs. 4,38,68,182 pertaining to the new workers employed in the previous year 1999-2000. For the reasons mentioned above the appellant is not entitled for relief under s. 80JJAA in respect of the wages pertaining to the workers employed in the previous year 1999-2000. As such the appellant would be eligible for relief of Rs. 3,46,44,722 being 30 per cent of the additional wages of Rs. 11,54,82,406 (Rs. 15,93,50,588 Rs.

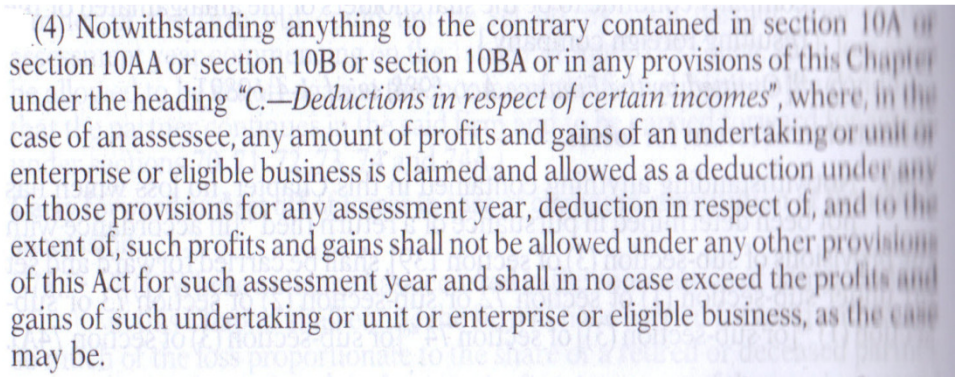
4,38,68,182) in respect of the workmen employed in previous years 2000-01 and 2001-02. The learned Authorised Representatives of the appellant vide order-sheet noting dt. 24th Aug., 2004 agreed that the relief under s. 80JJAA in respect of the employees who joined in the previous year relevant to the asst. yr. 2001-02 onwards only may be considered and in respect of the employees who joined in earlier years the appellant is not pressing for relief under s. 80JJAA. In the circumstances, the AO is directed to allow the relief under s. 80JJAA of Rs. 1,09,52,012 and Rs. 3,46,44,722 for asst. yrs. 2001-02 and 2002-03 respectively."

7. As stated earlier the assessee had filed the details of the software engineers employed during the years under consideration containing the names of the employees, designation and date of joining. Further, in the same list the details of total number of employees joined during both the assessment years, number of employees without supervisory roles, workmen joined, number of supervisors joined and workmen joined and relieved during the years under consideration. A cursory perusal of this list shows that the assessee had claimed deduction in respect of employees, who had joined as engineers in their respective field such as systems engineer, test engineer, software design engineer, IC design engineer, lead engineer etc. A cursory perusal of those lists establishes that the assessee had claimed deduction in respect of the engineers employed not in the category of supervisory control. All these details were filed before the AO during assessment proceedings. These facts were not properly considered by the AO. Further, from the order of the CIT(A), it is seen that he had taken note of the notification issued by the Government of Karnataka and concluded that as per the notification issued, the assessee company engaged in the development of software is covered by the Industrial Disputes Act, 1947. Further it is not the case of the Revenue that the assessee did not fulfil the conditions extracted elsewhere in this order. Considering all those factual matters we do not find any infirmity in the order of CIT(A) according relief to the assessee. In fact he had clarified the relevant portions related to Industrial Disputes Act, 1947 and IT Act while granting relief to the asssessee which are extracted at pp. 5 and 6 of this order. After carefully considering the same, we are inclined to accept the reasons shown by the learned CIT(A). The learned CIT-Departmental Representative could not assail the finding

reached by the learned CIT(A) by bringing in any valid materials. The order of the CIT(A) is confirmed. It is ordered accordingly.

There is no case for the Revenue that assessee had failed to file details of software engineers employed by it. In our opinion software engineers newly employed by it fell within the meaning of the word 'workmen'.

25. However coming to the second limb of the reasoning given by the lower authorities, which is section 80A(4), the said section is reproduced hereunder :



(4) Notwithstanding anything to the contrary contained in section 10A or section 10AA or section 10B or section 10BA or in any provisions of this Chapter under the heading *"C.—Deductions in respect of certain incomes"*, where, in the case of an assessee, any amount of profits and gains of an undertaking or unit or enterprise or eligible business is claimed and allowed as a deduction under any of those provisions for any assessment year, deduction in respect of, and to the extent of, such profits and gains shall not be allowed under any other provisions of this Act for such assessment year and shall in no case exceed the profits and gains of such undertaking or unit or enterprise or eligible business, as the case may be.

26. A reading of the above section would show that once an assessee's claim is allowed under section 10A, 10AA, 10B or 10BA, then to the extent such deduction has been allowed, no other deduction could be allowed under any other provision of the Act. Assessee had claimed deduction of its income u/s.10A of the Act in respect of its units 2, 3 and 4.

As per the assessee even if deduction under section 10A of the Act is allowed for these units, a further deduction u/s.80JJA of the Act, is also allowable. Argument of the assessee's counsel is that the limitation put in by Section 80A(4) of the Act, would apply only to profit linked deductions. There can be no dispute that deduction under Section 10A of the Act, is profit linked. In so far as deduction u/s.80JJA is concerned, a look at sub-section (1) of the said section is required, which is reproduced below :

> *80JJAA(1) : Where the gross total income of an assessee, being an Indian company, includes any profits and gains derived from any industrial undertaking engaged in the manufacture of production of article or thing, there shall, subject to the conditions specified in sub-section (2)m be allowed a deduction of an amount equal to thirty per cent of additional wages paid to the new regular workmen employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided.*

27. A reading of the above sub-section would clearly show that the deduction is given on profits and gains derived from industrial undertaking engaged in manufacture of production of article or thing. It is only for quantification of the amount that 30% is applied. In our opinion the deduction is very much linked to the profits of the undertaking. We are therefore unable to accept this line of argument taken by the counsel. In the result, we hold that assessee is not eligible for deduction u/s.80JJAA of

the Act, in respect of its units 2 , 3 and 4. However, denial of such claim in respect of unit-1, where it was not claiming any deduction, in our opinion is incorrect. We, therefore set aside the orders of authorities below for the limited purpose of quantifying the eligible deduction u/s.80JJA in respect of Unit-1. In the result, ground no.6 is treated as partly allowed for statistical purpose.

28. Vide its ground 7 grievance raised by the assessee is interest of Rs.597,06,982/- which related to its non 10A unit was allocated to other software units, thereby depressing its claim of exempt income from 10A units and prorata increasing the income of the non-10A unit.

29. Facts apropos are that assessee had claimed deduction under section 10A of the Act, in respect of its Salarpuria, Gurgaon and Chandigarh units. The claims were for Rs.12,96,59,506/-, Rs.2,93,22,892/- and Rs.8,39,936/- respectively. Profits of these units against which the above deductions were claimed as under :

Bangalore Salarpuria Unit	Rs.13,05,55,108
Gurgaon Unit	Rs. 3,19,13,546
Chandigarh Unit	Rs. 8,39,906

30. AO noted that assessee had charged interest of Rs.18,14,023/- on the above three units whereas on unit-1, where there was no claim u/s.10A of the Act, there was a charge of interest of Rs.5,97,06,982/-. Assessee was queried as to why such huge interest was charged to the non-10A unit, reply of the assessee was that there was an unsecured loan of Rs.69 crores which was taken during the relevant year and used for rolling over a loan earlier taken for campus construction which housed unit-1. As per the assessee loan was utilised in unit-1 which was a 10A unit. Therefore, interest on such loan was charged to the said unit-1.

31. However, AO verified and found that assesse's unit-1 was situated at 138, EPIP, Whitefield in a land of more than 20 acres which housed the corporate office as well. Unit-2 which was claiming deduction u/s.10A of the Act, was also situated in Whitefield. Turnover of unit-1 and unit-2 came to Rs.260 crores and Rs.221 crores respectively, whereas for the other two units, it was only Rs.40 crores. AO also noted that the building was constructed at a cost of Rs.56.8 crores which was lower than the borrowed fund. As per the AO assessee itself had admitted that part of the funds were utilised for working capital as well as other business needs. AO also noted that funds acquired for purchase of plant and machinery could

not be bifurcated between unit-1 and unit-2. As per the AO, common facilities were also housed in the corporate office. Thus according to him, apportionment of interest of Rs.5,97,06,922/- entirely to unit-1 was incorrect. He therefore reallocated such interest in the proportion of the turnover of unit-1 and unit-2. Result was that from the profit of unit-2, where assessee was claiming deduction 10A of the Act, went down by Rs.2,74,32,938/- whereas profit of unit-1 on which assessee was not claiming any deduction went up by a corresponding amount. Deduction u/s.10A of the Act was recomputed based on the above figures.

30. When a proposal on the above line was put before the assessee, it chose to move the DRP. Argument of the assessee before the DRP was that it had raised the loan facility of Rs.69 crores on 31.07.2006 and this loan was entirely utilised for rolling over an earlier loan taken for construction of the campus where unit-1 was functioning. According to the assessee, reallocation made by the AO was not justified. Assessee also argued that its unit-2 at whitefield had commenced production only in April 1st, 2005. Therefore, as per the assessee it could not be stated that the campus construction was intended for the said unit. However the DRP was not impressed. DRP held that AO was justified in reallocating the cost.

33. Now before us, Ld. AR strongly assailing the orders of authorities below submitted that the loan was not at all utilised for unit-2. According to him, it was demonstrated that loan of Rs.66 crores was utilised for rolling over the earlier loan taken for the purpose of financing the campus construction where unit-1 was housed. According to the Ld. AR, accounts of each unit were separately kept. Hence the reallocation attempted was incorrect and unjustified.

34. Per contra, Ld. DR supported the orders of lower authorities.

35. We have perused the orders and heard the rival contentions. Claim of the assessee is that unit-2 started production only in April, 2005 and the unit-1 and unit-2 were housed separately. As per the assessee Unit-2 was not utilising the campus facility, where unit-1 was situated. We find that both unit-1 and unit-2 were situated in Whitefield, Bangalore. It might be true that the loans were earlier taken for the purpose of construction of unit-1. However, it is an admitted position that unit-1 and corporate office of the assessee were situated in the very same campus. Assessee could not produce any records to show that unit-2 was totally independent and was not at all functioning or utilising the campus facility at 138, EPIP, Whitfield, Bengaluru. Just because the loan was taken for rolling over an earlier loan would not mean

that interest incurred in relation to such loan cannot be allocated to unit-2 which was also functioning from the very same area and utilising the services given by the head office, which was functioning from the building constructed utilising the loan. In our opinion, AO was justified in making reallocation of the interest in between unit-1 and unit-2. Evidence produced by the assessee, which is in the nature of resolution passed by its board of directors and letter to the concerned bank does not in any way show that the loans were utilised only for construction of campus and the campus never catered to unit-2. In any case, assessee itself had mentioned that a part of the loan was unsed for financing the working capital and business needs. In such a situation, we do not find any reason to interfere with the orders of lower authorities in this regard. Ground 7 is dismissed.

36. Vide its grounds 8 and 9 assessee is aggrieved on deduction of its travelling expenditure, support expenses, telecommunication expenditure and other expenditure of Rs.126,238,582/-, Rs.27,71,10,751/-, 27,04,556/-, Rs.29,000,627/- from export turnover while computing the deduction available to it u/s.10A of the Act. Alternative pleading taken by the assessee is that if these amounts are deducted from export turnover, it needs

to be reduced from the total turnover also while computing the deduction u/s.10A of the Act.

37. We have heard the rival contentions on the above two grounds. As regards pleading of the assessee that the above expenditures ought not be deducted from the export turnover, we are unable to accede. This is because the definition of the term 'export turnover' in Explanation (iv) to Section 10A of the Act, does not give room for such an interpretation as sought by the assessee. However, in so far as its alternate ground that items which are deducted from export turnover have to be reduced from total turnover also while computing deduction u/s.10A of the Act, we are inclined to accept, in view of the judgment of Hon'ble jurisdictional High Court in the case of Tata Elxsi Ltd v. CIT [349 ITR 98]. Accordingly, we direct the AO to rework the deduction u/s.10A of the Act, after reducing the amounts which are deducted from export turnover from total turnover also. Ground.8 of the assessee is dismissed whereas ground 9 is allowed.

38. Vide its ground 10, grievance raised by the assessee is that it was not allowed deduction of Rs.8,39,905/- u/s.10A of the Act, in respect of its business undertaking located in Chandigarh, registered with STP authorities.

39. Facts apropos are that the Chandigarh unit in which assessee was claiming deduction u/s.10A of the Act was purchased on a slump sale basis from a company called M/s. Virsa Systems P. Ltd (in short 'Virsa'). As per the assessee deduction u/s.10A was specific to the undertaking. Just because the undertaking came under a new ownership, the deduction cpi;d not be denied. However, the AO was not impressed. According to him, one of the conditions for giving deduction u/s.10A was that the undertaking on which such deduction was claimed should not be formed by transfer of plant and machinery previously used. As per the AO, assessee's undertaking in Chandigarh was formed by transfer of plant and machinery which were earlier used by M/s. Virsa. Further as per AO the Chandigarh unit was formed on slump sale of assets earlier used by another person. Just because the liabilities were also transferred, as per the AO, it could not be considered that the plant and machinery were not earlier used. Thus as per the AO assessee's plea that change of ownership would not take away the benefit, attached to an undertaking, could not be accepted. He denied the claim. When a proposal on the above lines was put before the assessee, it chose to move the DRP.

40. Contention of the assessee before the DRP was that it was not a new undertaking. Said undertaking came into the ownership of the assessee through a slump sale. As per the assessee, deduction under Section 10A of the Act could not be denied when an unit which was enjoying the benefit of deduction u/s.10A of the Act, was transferred to a new ownership through a slump sale. However, DRP was not impressed by the above arguments. As per the DRP decision of coordinate bench in the case of DCIT v. LG Soft India India P. Ltd [ITA.623 & 847/Bang/2010, dt. 19.05.2010] was on different set of facts and not acceptable. They upheld the order of AO denying the deduction claimed u/s.10A of the Act, in respect of the Chandigarh unit.

41. Ld. AR strongly assailing the orders of lower authorities submitted that deduction u/s.10A of the Act was undertaking specific and not owner specific. According to him, Chandigarh unit came to the assessee through a slump sale was not disputed by any of the lower authorities. Ld. AR submitted that a slump sale could not be considered as a reconstruction of business, where there was transfer of plant and machinery. In this regard reliance was placed on the judgment of Hon'ble Bombay High Court in the

case of CIT v. Sonata Software Ltd, [343 ITR 397]. Per contra Ld. DR supported the orders of the authorities below.

42. We have perused the orders and heard the rival contentions. It is not disputed that the Chandigarh unit came to the assessee through a slump sale. M/s. Virsa had given this undertaking to the assessee as a going concern. That such transaction was a slump sale has not been disputed by any of the lower authorities. It is also not disputed that the said M/s. Virsa was eligible for deduction u/s.10A of the Act and was claiming such deduction in the earlier years for such unit. Hon'ble Bombay High Court in the case of Sonata Software Ltd, (supra) in a similar situation had held as under :

> *8. The issue before the court is whether the two requirements, cast in negative terms, have been fulfilled. Clause (ii) of sub-section (1) of section 10A stipulates that the industrial undertaking must not be formed by splitting up or reconstruction of a business already in existence. In other words, the test in law is as to whether the undertaking is formed by splitting up or reconstruction of a business already in existence. In CIT v. Gaekwar Foam and Rubber Co. Ltd. [1959] 35 ITR 662 (Bom) a Division Bench of this court construed the provisions of section 15C of the Indian Income-tax Act, 1922, section 15C(2)(i) contained a similar provision that the section would apply to an industrial undertaking which is not formed by the splitting up or the reconstruction of a business already in existence or by the transfer to a new business of building, machinery or plant used in a business which was being carried on before April 1, 1948. In that case, there was a*

partnership firm and its assets and goodwill were taken over by the assessee for a stated consideration and against the allotment of shares to the three partners in the assessee-company. The Assessing Officer had rejected the claim of exemption under section 15C on the ground that the assessee was formed by the reconstruction of the business already in existence. The Appellate Commissioner took a different view which was affirmed by the Tribunal. The Division Bench of this court held that the reconstruction of a business connotes that the original business is not to cease functioning and the undertaking must continue to carry on the same business in an altered form. On the other hand, if the ownership of a business or an undertaking is transferred that would not constitute a reconstruction. The Division Bench held as follows (page 669) :

"The reconstruction of a business or an industrial undertaking must necessarily involve the concept that the original business or undertaking is not to cease functioning, and its identity is not to be lost or abandoned. The concept essentially rests on changes but the changes must be constructive and not destructive. There must be something positive about the whole matter as opposed to negative. The underlying idea of a reconstruction evidently must be—and this is brought out by the section itself—of a 'business already in exist ence'. There must be a continuation of the activities and business of the same industrial undertaking. The undertaking must continue to carry on the same business though in some altered or varied form. If the alterations and changes are substantial, there would be little scope for describing what emerges as a reconstruction of the business. Thus, for instance, if the ownership of a business or an undertaking changes hands not ostensibly but in reality and effectively, that would not be reconstruction or if the very nature of the business is changed, that again would not be reconstruction. On the other hand, reorganization of the business on sounder lines or alter ations in the mode or method or scope of the activities of the business or in its personnel or infusion of new blood in the management or control of the business which may even be by some changes in the constitution of persons interested in the undertaking would certainly be no more than reconstruction of the business if it

is substantially the same business carried on by substantially the same persons."

Reconstruction, the Division Bench held, means that substantially the same business is carried on and substantially the same persons carry it on (page 671) :

"The emphasis, it will be noticed, is on two things—when substantially the same business was carried on and substantially the same persons were carrying it on. It is also to be noticed that the learned judge draws a clear distinction between a reconstruction and a sale of an undertaking. In the case of a sale, there can be no ques tion of reconstruction. Now, in these matters, we have to look at the substance of the transaction and not the form. If looking at the substance of the transaction, it is a sale, then the concept of recon struction must be ruled out for in such a case there is no scope for speaking about any reconstruction of an existing business."

9. The judgment of the Division Bench of this court in Gaekwar Foam [1959] 35 ITR 662 (Bom) was approved by the Supreme Court in a judgment in Textile Machinery Corporation Ltd. v. CIT [1977] 107 ITR 195 (SC). The Supreme Court, in that case, dealt with the issue as to whether within the meaning of section 15C(2)(i) of the Indian Income-tax Act, 1922, the industrial undertakings which consisted of a steel foundry division and jute mill division were not formed by the reconstruction of a business already in existence. The Supreme Court observed that in order to be entitled to the benefit of section 15C the following facts would have to be established by the assessee (page 206) :

"(1) investment of substantial fresh capital in the industrial under taking set up ;

(2) employment of requisite labour therein ;

(3) manufacture or production of articles in the said undertaking ;

(4) earning of profits clearly attributable to the said new under taking ; and

(5) above all, a separate and distinct identity of the industrial unit set up."

10. The Supreme Court was of the view that the new undertaking must not be substantially the same old existing business. Even if a new business is carried on but by piercing the veil of the new business it is found that there is employment of the assets of the old business, the benefit will not be available. From this perspective the court held that a substantial investment of new capital is imperative.

11. The Tribunal, in the present case, has come to the conclusion that where a running business is transferred lock, stock and barrel by one assessee to another assessee the principle of reconstruction, splitting up and transfer of plant and machinery cannot be applied. According to the Tribunal, the benefit of section 10A attaches to the undertaking and not to the assessee which owns the undertaking. The benefit of section 10A was held to have attached itself to the STP unit of the software division which was owned by IOCL till October 19, 1994, and it was owned by the assessee subsequent to that date. What is material, according to the Tribunal, is not who owns the undertaking but whether the undertaking is entitled to the benefit available under section 10A. As regards the issue of transfer by IOCL to the assessee, the Tribunal noted that section 10A(9) was substituted by the Finance Act, 2000, with effect from April 1, 2002. Section 10A(9) provided that where during any previous year the ownership or beneficial interest in an undertaking of the business is transferred by any means, the deduction under sub-section (1) shall not be allowed to the assessee for the assessment year relevant to such previous year and the subsequent years. The Tribunal noted that if a transfer between IOCL and the assessee were to be effected after April 1, 2001, that would result in the undertaking being disentitled to the benefit under section 10A. This was a pointer to the fact that prior to the substitution a transfer of ownership or beneficial interest in the undertaking would not disentitle an assessee to the benefit of section 10A. (As a matter of fact it may also be noted that the provisions of section 10A(9) were omitted by the Finance Act, 2003, with effect from April 1, 2004).

43. Thus it has been held by the Hon'ble Bombay High Court that slump sale could not be considered as a reconstruction of business. Similar view was also taken by the coordinate bench in the case of LG Soft India P. Ltd (supra). We are therefore of the opinion that assessee was eligible for claiming deduction u/s.10A of the Act, for its Chandigarh unit for the balance sheet for the period of availability of deduction u/s.10A of the Act. We therefore set aside the orders of lower authorities in this regard and remit the issue back to the AO for consideration afresh in accordance with law for verifying whether the claim for deduction u/s.10A of the Act, on Chandigarh unit is within the total period for which such deduction is available under the said section. Ground 10 of the assessee is allowed for statistical purpose.

44. In its ground.11 grievance raised by the assessee is that foreign tax credit of Rs.2,42,205/- was not granted to it though it was claimed in the return of income

45. Facts before us does not show whether assessee was eligible for the claim of foreign tax credit of Rs.2,42,205/-. It might be true that it had claimed such credit in the return of income. In all fairness we feel that this matter requires a fresh look by the AO. If the assessee is eligible for

foreign tax credit and if the amount claimed by the assessee is correct, AO shall give such credit. Ground.11 is allowed for statistical purpose.

46. In the result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 30th day of June, 2016.

Sd/- Sd/-

(SUNIL KUMAR YADAV) (ABRAHAM P GEORGE)
JUDICIAL MEMBER ACCOUNTANT MEMBER

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar