

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

**BEFORE SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

I.T(T.P) A. No.882/Bang/2013 (Assessment Year : 2008-09)		
Dy. Commissioner of Income Tax, Circle 12(2), Bangalore.	Vs.	M/s. PMC – Sierra India Pvt. Ltd. 5A Block, 2 nd Floor, Pritechpark, SEZ, Bellandur, Bangalore-560 103 PAN AADCP 6802F
Appellant		Respondent.

C.O.No.173/Bang/2015
I.T(T.P) A. No.882/Bang/2013
(Assessment Year : 2008-09)
(By Assessee)

Appellant/C.O. By : Shri T.Suryanarayana, Advocate. Respondent By : Dr.P.K. Srihari, Addl. CIT (D.R.)
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Date of Hearing : 5.7.2016.

Date of Pronouncement : 26.8.2016.

ORDER

Per Shri Vijay Pal Rao, J.M. :

This appeal by the revenue and cross objection by the assessee are directed against the order dt.1.3.2013 of Commissioner of Income Tax (Appeals)-IV, Bangalore for the Assessment Year 2008-09.

2. The revenue has raised the following grounds :

- “1. The order of the learned CITCA) is opposed to law and facts of the case.
2. On the facts and in the circumstances of the case the learned CITCA) erred in law in directing the AO to exclude the reimbursement of expenses incurred in foreign currency both from the export turnover as well as from total turnover for the purpose of computation of deduction u/s. IOA without appreciating the fact that the statute allows exclusion of such expenditure only from export turnover by way of specific definition of export turnover as envisaged by Sub-clause (4) of Explanation 2 below Sub-section (8) of Section IOA and the total turnover has not been defined in this Section.
3. On the facts and in the circumstances of the case the learned CITCA) erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable, and accordingly erred in excluding M/s Celestial Blolabs Ltd., M/s Flextronics Software Ltd. M/s. iGate Global Solutions Ltd., M/s Infosys Technologies Ltd., M/s. Mindtree Consulting Ltd., M/s. Persistent Systems Ltd., M/s. Sasken Communication Technologies Ltd., M/s. Tata Elxsi Ltd. and M/s Wipro Limited as comparables.
4. On the facts and in the circumstances of the case the learned CITCA) erred in rejecting diminishing revenue filter used by the TPO to exclude companies that do not reflect normal industry trend.
5. On the fact and in the circumstances of the case the learned CITCA) has erred in holding that the TPO was not justified in applying the employee cost filter and directed to include M/s. Indus Networks Ltd. ;which was excluded in the software development services segment by using this filter.
6. On the facts and in the circumstances of the case the learned CIT (Appeals) has erred in rejecting the employee cost filter applied by the TPO to select companies which are predominantly into software development services.

8. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that MIs Avani Cimcon Technologies. cannot be taken as comparable.
 9. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that M/s. Celestial Biolabs Ltd., being functionally different, cannot be taken as comparable.
 10. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that M/s. KALS Information Systems, cannot be taken as a comparable.
 11. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.
 12. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.”
3. Ground No.1 is general in nature and does not require any specific adjudication.
4. Ground No.2 is regarding exclusion of expenses incurred in foreign currency from the export turnover while computing the deduction under Section 10A of the Income Tax Act, 1961 (in short 'the Act').
5. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. The revenue is aggrieved by the impugned order of the CIT (Appeals) whereby the Assessing Officer was directed to exclude the expenses incurred in foreign

currency both from export turnover as well as total turnover while computing the deduction under Section 10A of the Act.

6. We have heard the rival submissions as well as considered the relevant material on record. At the outset, we note that this issue is covered by the decision of the Hon'ble jurisdictional High Court of Karnataka in the case of CIT V Tata Elxsi Ltd & Others (2011) 247 CTR 334 (Karnataka) wherein it has been held that while computing the exemption u/s 10A, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded from the total turnover in the denominator. The relevant finding of the Hon'ble jurisdictional High Court reads as follows:-

".....Section 10A is enacted as an incentive to exporters to enable their products to be competitive in the global market and consequently earn precious foreign exchange for the country. This aspect has to be borne in mind. While computing the consideration received from such export turnover, the expenses incurred towards freight, telecommunication charges, or insurance attributable to the delivery of the articles or things or computer software outside India, or expenses if any incurred in foreign exchange, in providing the technical services outside India should not be included. However, the word total turnover is not defined for the purpose of this section. It is because of this omission to define 'total turnover', the word 'total turnover' falls for interpretation by this Court;

.....In section 10A, not only the word 'total turnover' is not defined, there is no clue regarding what is to be excluded while arriving at the total turnover. However, while interpreting the provisions of section 80HHC, the courts have laid down various principles, which are independent of the statutory provisions.

There should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Section 10A is a beneficial section which intends to provide incentives to promote exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of section 80HHC, the export profit is to be derived from the total business income of the assessee, whereas in section 10-A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. To the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. If the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover. The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'total turnover' in section 10A, there is nothing in the said section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. When the statute prescribed a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a component of total turnover, such an interpretation would run counter to the legislative intent and impermissible. Thus, there is no error committed by the Tribunal in following the judgments rendered in the context of section 80HHC in interpreting section 10A when the principle underlying both these provisions is one and the same".

Respectfully following the judgment of Hon'ble jurisdictional High Court,

We do not find any error or illegality in the impugned order of CIT (Appeals) qua this issue.

7. Ground Nos.3 to 10 are regarding the Transfer Pricing Adjustment made by the Transfer Pricing Officer ('TPO') and certain comparables selected by the TPO were excluded by the CIT (Appeals). The assessee is a company incorporated under the provisions of the Companies Act, 1956, and is a wholly owned subsidiary of PMC-Sierra Mauritius Limited which is, in turn, a subsidiary of PMC-Sierra Inc., USA. The assessee is engaged in the business of providing contract software development services as well as contract sales support services to the PMC-Sierra Group. The assessee is compensated with a mark-up on the cost incurred for provision of the software development services. During the year under consideration the assessee has carried out international transactions by the assessee which are reported as under :

Particulars	Amount (In Rs.)	Outcome of Transfer Pricing Order.
Provision of software development services	45,85,80,306.	Adjustment of Rs.4,03,93,704.
Provision of sales support services.	71,81,402	Accepted to be at arm's length.
Reimbursement of expenses paid.	1,77,21,867.	Accepted to be at arm's length.

8. To bench mark its international transactions the assessee has adopted Transactional Net Margin Method ('TNMM') as Most Appropriate Method ('MAM') with OP/ TC as PLI. The assessee selected 16 comparable companies as under :

Sl. No.	Name of the comparable	Mark-up on Total Costs (without adjs) (%)	Mark-up on Total Costs (with adjs) (%)
1.	Akshay Software Technologies Limited	6	5
2.	FCS Software Solutions Ltd	19	14
3.	Goldstone Technologies Limited	13	12
4.	ICRA Techno Analytics Ltd	12	10
5.	Indus Networks Limited	4	-5
6.	Larsen & Toubro Infotech Limited	13	12
7.	Melstar Information Technologies Ltd.	-2	-2
8.	Mindtree Limited	16	14
9.	PSI Data Systems Ltd	3	1
10.	Powersoft Global Solutions Limited	17	15
11.	S I P Technologies and Exports Limited	20	18
12.	Synetarios Technologies Ltd	20	17
13.	Bodhtree Consulting Ltd	26	25
14.	Lanco Global Systems Ltd	11	9
15.	Computech International Ltd	5	5
16.	Karuturi Networks Ltd	3	3
Mean (Average)		12	10

Thus the assessee claimed that its international transactions having operating margin of 13.17% at Arm's Length in comparison to the mean margin of comparables at 10%. The TPO rejected the TP analysis of the assessee and carried out fresh search by applying various filters like revenue from software

development services should not be less than 75%, Related Party Transactions ('RPT') not more than 25%, the export sale not less than 25%, etc. Thus the TPO has selected 20 comparables including 3 companies namely

- (i) Mindtree Ltd.
- (ii) Bodhtree Consultancy Ltd. and
- (iii) Lanco Global Systems Ltd.

from the assessee's set of comparables. The TPO has computed the mean margin of the 20 comparables as under :

Sl. No.	Name of the Company	Mark-up on Total Costs (WC – unadj) (in %)	Mark-up on Total Costs (WC – adj) (in %)
1.	Avani Cimcon Technologies	25.62	29.08
2.	Bodhtree Consulting Ltd.	18.72	19.78
3.	Celestial Biolabs	87.94	81.12
4.	e-zest Solutions Ltd.	29.81	30.09
5.	Flextronics (Aricent)	7.86	6.57
6.	iGate Global Solutions Ltd.	13.99	12.60
7.	Infosys Ltd.	40.37	38.58
8.	Kals Information Systems Ltd. (Seg)	41.94	29.10
9.	LGS Global Ltd.	27.52	26.75
10.	Mindtree Ltd. (Seg)	16.41	15.72
11.	Persistent Systems Ltd.	20.31	20.91
12.	Quintegra Solution Ltd.	21.74	18.89
13.	R Systems (India) Ltd.	15.30	13.77
14.	R S Software (India) Ltd.	7.41	9.16
15.	Sasken Communication Technologies Ltd. (Seg)	7.58	7.41
16.	Tata Elxsi (Seg)	18.97	19.05
17.	Thirdware Solutions Ltd.	19.35	17.21
18.	Wipro Ltd. (Seg)	28.45	29.90
19.	Softsol India Ltd.	17.89	15.79
20.	Lucid Software Ltd.	16.50	18.11
Mean (Average)		23.65	22.98

Thus the TPO has determined the mean margin of the assessee at 23.65% and after working capital adjustment at 22.98%. Accordingly, the TPO proposed an adjustment under Section 92CA of the Act of Rs.4,03,93,704. The assessee challenged the action of the TPO/A.O before the CIT (Appeals) against the

selection of various companies selected by the TPO. The CIT (Appeals) applied a turnover filter with the range of Rs.1 Crore to Rs.200 Crores and consequently excluded 8 companies as under :

1. Flextronics Ltd.
2. iGate Global Solutions Ltd.
3. Infosys Technologies Ltd.
4. Mindtree Ltd.
5. Persistent Systems Ltd.
6. Sasken Communication Technologies Ltd.
7. Tata Elxsi Limited
8. Wipro Limited (Seg)

In addition to exclusion of 8 companies mentioned above, the CIT (Appeals) has also excluded Celestial Biolabs Ltd. on the ground of high profit beyond 50% as well as on functional dis-similarity. Apart from exclusion of the companies by applying turnover filter and high profit margin, the CIT (Appeals) has also excluded 3 more companies on the ground of functional dis-similarity which are as under :

- (i) Avani Cincom Technology Ltd.
- (ii) KALS Information System Ltd.
- (iii) Bodhtree Consultancy Ltd.

The CIT (Appeals) has included one company viz. Indus Network Ltd. from the set of assessee's TP Study which was excluded by the TPO by applying employees cost filter. Thus the CIT (Appeals) has excluded 12 comparable companies selected by the TPO from the set of 20 companies and included one company namely Indus Network Ltd. Accordingly, after exclusion and inclusion of various companies the final set of comparables retained by the CIT (Appeals) is as under :

Sl. No.	Name of the Company	Mark-up on Total Costs (WC-unadj) (in %)	Mark-up on Total Costs (WC – adj) (in %)
1.	e-zest Solutions Ltd.	29.81	30.09
2.	Indus Networks Ltd.	2.92	8.28
3.	LGS Global Ltd.	27.52	26.75
4.	Lucid Software Ltd.	16.50	18.11
5.	Quintegra Solution Ltd.	21.74	18.89
6.	R Systems (India) Ltd.	15.30	13.77
7.	R S Software (India) Ltd.	7.41	9.16
8.	Thirdware Solutions Ltd.	19.35	17.21
9.	Softsol India Ltd.	17.89	15.79
Arithmetical mean		17.60	17.56

Thus the revenue is aggrieved by the exclusion of 12 comparables and inclusion of one company excluded by the TPO whereas the assessee is aggrieved by the

order of the CIT (Appeals) to the extent of not accepting the objection of the assessee against the 4 companies as under :

1. e-Zest Solutions Ltd.
2. Lucid Software Ltd.
3. Quintegra Solutions Ltd.
4. Thirdware Solutions Ltd.

The assessee has raised various grounds in the cross objection, however, at the time of hearing, the learned Authorised Representative has submitted that only Ground Nos.6, 8 and 10 are effective grounds which are pressed by the assessee and remaining grounds may be dismissed as not pressed. Accordingly, the Ground Nos.1 to 5, 7 & 9 of the cross objections of the assessee are dismissed as not pressed. The assessee has also filed an additional ground along with a petition for admission of the additional ground seeking exclusion of E-Zest Solution Ltd. which was selected by the TPO

8.1 We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record on the admissibility of the additional grounds. The learned Authorised Representative has submitted that the functional comparability of the company has been examined by this Tribunal in various cases and it was found that this

company is not a good comparable. The learned Authorised Representative has also relied upon the decision of the Special Bench of ITAT, Chandigarh in the case of Quark Systems Ltd. 38 SOT 307 and submitted that even if the assessee has taken a particular company as comparable in the TP study, the assessee is entitled to point out before this Tribunal that the said enterprise has wrongly been taken as comparable. The learned Authorised Representative has contended that the TPO has not applied the employee cost filter and therefore some of the companies selected by the TPO failed the test of employee cost factor of 25%. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in the case of M/s. Google India Ltd. 29 taxman.com 412 and submitted that the Tribunal has held that the employee cost filter of 25% should be applied in the ITES segment also. As regards the RPT filter of 15%, the learned Authorised Representative has submitted that in a series of decisions the Tribunal has taken a consistent view that the RPT filter should not be more than 15% and therefore the companies which are having more than 15% related party transactions should be excluded from the list of comparables selected by the TPO.

8.2. On the other hand, the learned Departmental Representative has submitted that when the assessee selected these companies as comparables in the TP study, the assessee cannot be permitted to raise the objections against the comparability of those companies. He has further submitted that if the objections raised by the assessee is accepted then it will reverse the entire process of determination of ALP conducted by the TPO. He has further contended that neither the assessee nor the TPO has applied any employee cost filter therefore at this stage, the assessee cannot be allowed to raise such an objection which requires investigation of new facts in respect of the companies selected by the TPO as well as by the assessee. As regards the RPT filter, the learned Departmental Representative has contended that the TPO has applied 25% RPT filter which was not objected by the assessee either before the TPO or before the DRP and therefore at this stage the assessee cannot be allowed to raise fresh objections which were not raised before the authorities below.

8.2. We have considered the rival submissions as well as the relevant material on record. We find that this Tribunal in a series of decisions has examined the issue of employees cost filter, RPT filter as well as functional

comparability of these companies and therefore once it has been held that these companies cannot be regarded as good comparable on these contentions then even if these companies has been selected in the TP Study, the assessee cannot be precluded from raising an objection against these companies which are found to be not comparable. This view is supported by the decision of the Chandigarh Special Bench of this Tribunal in the case of DCIT Vs. Quark Systems Pvt. Ltd. 38 SOT 307 in paras 30 and 38 as under :

“**30.** Learned special counsel for the Revenue Shri Kapila has vehemently argued that "Datamatics" was taken as one of the comparables by the taxpayer and no objection to its inclusion was raised before the TPO or before the learned CIT(A) in appeal. Therefore, the taxpayer should not be permitted to raise additional ground and ask for exclusion of the above enterprise in the determination of the average margins. We are unable to accept above contention. In the first place, these are initial years of implementation of transfer pricing legislation in India and taxpayers as well as tax consultants were not fully conversant with this new branch of law when proceedings were initiated or even at appellate stage. Besides, Revenue authorities, including TPO were required to apply statutory provisions and consider for purposes of comparison functions, assets and risks (turnover), profit and technology employed by the tested party and other enterprises taken as comparable. Statutory duty is cast on them to undertake above exercise. This has not been done in this case. We would only say that *prima facie*, as per the material, to which reference has been drawn by Shri Aggarwal, Datamatics does not appear to be comparable. Even if the taxpayer or its counsel had taken Datamatics as comparable in its T.P. audit, the taxpayer is entitled to point out to the Tribunal that above enterprise has wrongly been taken as comparable. In fact there are vast differences between tested party and the Datamatics. The case of Datamatics is like that of "Imercius Technologies" representing extreme positions. If Imercius Technologies has suffered heavy losses and, therefore, it is not treated as comparable by the tax authorities, they also have to consider that the Datamatics has earned extraordinary profit and has a huge turnover, besides differences in assets and other characteristics referred to by Shri Aggarwal. The Tribunal is a fact-finding body and, therefore, has to take into account all the relevant material and determine the question as per the statutory regulations.”

“**38.** Accordingly, on facts and circumstances of the case, we hold that taxpayer is not estopped from pointing out that Datamatics has wrongly been taken as comparable. While admitting additional ground of appeal raised by the assessee to require us to consider whether or not Datamatics should be included in the comparable, we make no comments on merit except observing that assessee from record has shown its *prima facie*

case. Further claim may be examined by the AO. This course we adopt as objection to the inclusion of Datamatics as comparable has been raised now and not before Revenue authorities. Therefore, we deem it fit and proper to remit the matter to the file of the AO for consideration of claim of the taxpayer and make a *de novo* adjudication of the ALP after providing reasonable opportunity of being heard to the assessee. We order accordingly.”

Thus in view of the matter that the functional comparability has already been examined by this Tribunal, we admit the additional ground raised by the assessee regarding functional comparability of E-Zest Solutions Ltd. for deciding the same on merits.

9. The issue of applying the turnover filter by the CIT (Appeals) in the range of Rs.1 Crore to Rs.200 Crores has been considered by the co-ordinate bench of this Tribunal in the case of ITO Vs. Maxim India Integrated Security Pvt. Ltd. vide order dt.31.3.2016 in IT(TP)A No.28/Bang/2012 in paras 11 & 12 as under :

“ 11. We have heard the Id. DR and carefully considered the relevant material on record. The CIT(A) has directed the AO/TPO to exclude 5 comparable companies on the ground that their turnover exceeds Rs.200 crores. The details of the companies are as under:-

Sr No.	Name of the company	Turnover (Rs. in crores)
1	iGate Solutions Ltd.	406
2	Flextronics Software System Ltd.	457.45
3	L&T Infotech Ltd.	562.45
4	Satyam Computer Services Ltd.	3462.2
5	Infosys Technologies Ltd.	6859.7

12. It is pertinent to note that the CIT(A) has applied turnover slab of Rs.1 crore to Rs.200 crores for excluding these companies, whereas there is an inherent difficulty in applying such a turnover slab of Rs.1 crore to Rs.200 crores because the said classification on the basis of slab of the turnover gives

unrealistic results, as an entity having Rs.1 crore turnover can be compared with any entity having Rs.200 crores turnover, but at the same time an entity having Rs.200 crores turnover cannot be compared with an entity having Rs.201 crores turnover. Thus, as it is clear from the above illustration that it gives ambiguous result as two entities having difference of Rs.1 crore cannot be considered as comparable, whereas on the other hand difference of Rs.199 crores can be considered as comparable company. Therefore, such classification of comparables on the basis of companies selected on turnover basis is not appropriate and acceptable. The turnover, no doubt, is a relevant factor to be taken into account, but there should be some proper and reasonable parameter to apply the difference of turnover between the assessee and the comparable which may be a multiple in the range of 2 times, 3 times, X times or any other number of times which should be applied to all the comparable companies, instead of taking a slab from Rs.1 crore to Rs.200 crores. Thus, if appropriate multiple to say 10 times is applied, then the assessee having turnover of Rs.8.15 crores can be compared with a company which is having a turnover of Rs.81.5 crores. Accordingly, in view of the above facts of the case, we set aside this issue to the record of the AO/TPO to apply appropriate multiple or differential factor regarding the turnover of the comparable and the assessee.”

Both the parties have agreed in principle that an appropriate multiple of 10 times of turnover may be applied while selecting the comparable companies and therefore keeping in view of the turnover of the assessee at Rs.45.85 Crores, the company having turnover upto Rs.458.50 Crores on the higher side and Rs.4.58 Crores at the lower side can be considered in the set of comparables. In view of the above decision of the co-ordinate bench, we direct the TPO/A.O to apply a multiple of 10 times of the assessee's turnover on higher as well as lower side of turnover of the assessee. Even otherwise we

find that the CIT (Appeals) rejected 8 companies by applying the turnover filter in the range of Rs.1 Crore to Rs.200 Crores as under :

Sl.No.	Comparable company	Turnover (Rs. Crores)	OP/TC (%)
1	Celestial Biolabs Ltd.	20.21	87.94
2	Flextronics Ltd.	954.42	7.86
3	iGate Global Solutions Ltd.	781.56	13.99
4	Infosys Technologies Ltd.	15,672.00	40.37
5	Mindtree Consulting Ltd. (Seg.)	572.97	16.41
6	Persistent Systems Ltd.	383.41	20.31
7	Sasken Communication Tech Ltd. (Seg.)	335.80	7.58
8	Tata Elxsi Ltd.	342.86	18.97
9	Wipro Ltd. (Seg.)	1,955.56	28.45

By applying this multiple of 10 to the assessee's turnover, we find that 3 companies namely Sasken Communication Technology Ltd. (Seg.), Persistent Systems Ltd. and Tata Elxsi Ltd. will not be excluded due to high turnover. Therefore except these 3 companies, other 5 companies are required to be excluded from the list of comparables and to that extent we confirm the order of the CIT (Appeals) on this issue. For the remaining companies, the learned Authorised Representative of the assessee has submitted that an identical set of 20 companies was considered by the co-ordinate bench of this Tribunal for the same assessment year 2008-09 in the case of Telelogy India Pvt. Ltd. Vs.

DCIT vide order dt.9.3.2016 in IT(TP)A No.1599/Bang/2012. Thus the learned A.R. has submitted that except the comparability of Indus Network Ltd. which was included by the CIT (Appeals) in the set of comparables the functional comparability of all other companies have been examined by this Tribunal.

10. We have considered the rival submissions as well as the relevant material on record. The Id. D.R. has submitted that the TPO has already examined the functional comparability of these companies and it was found that the main activity of all these companies are software development services and therefore in significant revenue from product and other service is immaterial for the purpose of selecting the comparable company when the TPO had applied the filter of revenue of 75% from the software development services. Thus the Id. D.R. has contended that none of these companies which are excluded by the CIT (Appeals) and four more companies exclusion sought by the assessee have revenue from the software development services less than 75%.

11. At the outset we note that the functional comparability of 12 companies have been considered by the co-ordinate bench in the case of **Telelogic India Pvt. Ltd.** (supra) in para 10 as under :

“ 10. At the outset, we note that all the functional comparability of all these 13 comparables which are sought to be excluded by the assessee were also considered by the co-ordinate bench of this Tribunal in the case of Kodiak Network India Pvt. Ltd. (supra) in paras 21 to 25 as under :

“ 21. We have considered the rival submissions and relevant material available on record. As we have narrated the facts in the foregoing paras that the TPO has determined the ALP by taking into consideration the set of 20 comparables. The assessee has raised objection regarding 13 comparables out of 20 selected by the TPO. The companies against which the assessee raised objections are as under:

S.No.	Name of the Company
1	AvaniCimcon Technologies Ltd
2	Bodhtree Ltd
3	Celestial Biolabs Ltd
4	E-Zest Solutions Ltd
5	Infosys Technologies Ltd
6	KALS Information Systems Ltd (Seg.)
7	Lucid Software Ltd
8	Persistent Systems Ltd
9	Quintegra Solutions Ltd
10	Softsole India Ltd
11	Tata Elxsi Ltd (Seg.)
12	Thirdware Solutions Ltd (Seg
13	Wipro Ltd (Seg.)

22. We note that the comparability of these 13 companies have been examined by this Tribunal in series of decision as referred by the Id. AR. In the case of M/s 3DPLM Software Solutions Ltd (supra), the co-ordinate Bench of this Tribunal has considered the comparability of these companies in paras 7 to 19.3 of the order which have been reproduced below:

“7.0 Avani Cincom Technologies Ltd.

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

7.2 Before us, the learned Authorised Representative reiterated the assessee's objections for the inclusion of this company from the list of comparable companies on the ground that this company is not functionally comparable to the assessee as it is into software products. It is also submitted that the segmental details of this company are

not available and the Annual Report available in the public domain is not complete. It was further contended that the information obtained by the TPO under section 133(6) of the Act, on the basis of which the TPO included this company in the final list of comparable companies, has not been shared with the assessee. In support of this contention, the learned Authorised Representative placed reliance on the following judicial decisions:

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

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

It was also submitted that this company has been held to be functionally not comparable to the assessee by a co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 dt.22.2.2013.

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

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

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

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

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

(i) The assessee needs to demonstrate that the FAR analysis and other relevant facts of the Triology case are equally applicable to the facts of the assessee's case also. Unless the facts and the FAR analysis of Triology case is comparable to that of the assessee in the case on hand, comparison between the two is not tenable. (ii) After demonstrating the similarity and the comparability between the assessee and the Triology case, the assessee also needs to demonstrate that the facts applicable to the Assessment Year 2007-08, the year for which the decision in case of Triology E-Business Software India Pvt. Ltd. (supra) was rendered are also applicable to the year under consideration i.e. Assessment Year 2008-09.

9.5.3 It is a well settled principle that the assessee is required to perform FAR analysis for each year and it is quite possible that the FAR analysis can be different for each of the years. That being so, the principle applicable to one particular year cannot be extrapolated automatically and made applicable to subsequent years. To do that, it is necessary to first establish that the facts and attendant factors have remained the same so that the factors of

comparability are the same. Viewed in that context, the assessee has not discharged the onus upon it to establish that the decision rendered in the case of Triology E-Business Software India Pvt. Ltd. (supra) can be applied to the facts of the case and that too of an earlier year i.e. Assessment Year 2007-08. The assessee, in our view, has not demonstrated that the facts of Triology E-Business Software India Pvt. Ltd. (supra) are identical to the facts of the case on hand and that the profile of the assessee for the year under consideration is similar to that of the earlier Assessment Year 2007-08. In view of facts as discussed above, we deem it fit to remand the matter back to the file of the Assessing Officer / TPO to examine the comparability of this company afresh by considering the above observations. The TPO is directed to make available to the assessee information obtained under section 133(6) of the Act and to afford the assessee adequate opportunity of being heard and to make its submissions in the matter, which shall be duly considered before passing orders thereon. It is ordered accordingly.”

The learned Authorised Representative submits that this company was selected as a comparable by the TPO not by any FAR analysis or as per the search process conducted by the TPO, but only as an additional comparable for the reason that it was selected as a comparable in the earlier year i.e. Assessment Year 2007-08 on the basis of information obtained under section 133(6) of the Act. In this regard, the learned Authorised Representative took us through the relevant portions of the TP order under section 92CA of the Act and the show cause notices for both the earlier year i.e. Assessment Year 2007-08 and for this year and contended that the selection of this company as a comparable violates the principle enunciated in Curram Software International Pvt. Ltd. (supra) that a company can be selected as a comparable only on the basis of FAR analysis conducted for that year and therefore pleaded for its exclusion. The learned Authorised Representative also submitted that he has brought on record sufficient evidence to show that the functional profile of this company remains unchanged from the earlier year and hence the findings rendered by the co-ordinate benches of the Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) and in other cases like Triology E-Business Software India Pvt. Ltd. (supra) are applicable to the year under consideration as well.

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

7.6.1 We have heard both parties and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the final set of comparables only on the basis of information obtained under section

133(6) of the Act. In these circumstances, it was the duty of the TPO to have necessarily furnished the information so gathered to the assessee and taken its submissions thereon into consideration before deciding to include this company in its final list of comparables. Nonfurnishing the information obtained under section 133(6) of the Act to the assessee has vitiated the selection of this company as a comparable.

7.6.2 We also find substantial merit in the contention of the learned Authorised Representative that this company has been selected by the TPO as an additional comparable only on the ground that this company was selected in the earlier year. Even in the earlier year, it is seen that this company was not selected IT(TP)A 1380/Bang/2012 Page 7 of 34 on the basis on any search process carried out by the TPO but only on the basis of information collected under section 133(6) of the Act. Apart from placing reliance on the judicial decision cited above, including the assessee's own case for Assessment Year 2007-08, the assessee has brought on record evidence that this company is functionally dis-similar and different from the assessee and hence is not comparable. Therefore the finding excluding it from the list of comparables rendered in the immediately preceding year is applicable in this year also. Since the functional profile and other parameters by this company have not undergone any change during the year under consideration which fact has been demonstrated by the assessee, following the decisions of the co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 dt.22.2.2013, and in the case of Triology E-Business Software India Pvt. Ltd. (ITA No.1054/Bang/2011), we direct the A.O./TPO to omit this company from the list of comparables.

8.0 Bodhtree Consulting Ltd.

8.1 This company has been selected as a comparable company to the assessee by the TPO; the inclusion of which was not objected to by the assessee before both the TPO and the DRP. The assessee has not objected to the inclusion of this company in the list of comparables, as can be seen from the grounds of appeal raised in Form 36B before this Tribunal. 8.1 However in the course of proceedings before us, the learned Authorised Representative objected to the inclusion of this company as a comparable for the following reasons :

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

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

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

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

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

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

9. Celestial Biolabs Ltd.

9.1 This comparable was selected by the TPO for inclusion in the final list of comparables. Before the TPO, the assessee had objected to the inclusion of this company in the list of comparables for the reasons that it is functionally different from the assessee and that it fails the employee cost filter. The TPO, however, brushed aside the objections raised by the assessee by stating that the objections of functional

dissimilarity has been dealt with in detail in the T.P. order for Assessment Year 2007-08. As regards the objection raised in respect of the employee cost filter issue, the TPO rejected the objections by observing that the employee cost filter is only a trigger to know the functionality of the company.

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

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

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

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

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

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

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

rejected. In support of this contention, the assessee has also referred to and quoted from various parts of the Annual Report of the company.

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

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

9.4.2 Apart from relying on the afore cited judicial decisions in the matter (supra), the assessee has brought on record IT(TP)A 1380/Bang/2012 Page 8 of 34 substantial factual evidence to establish that this company is functionally dis-similar and different from the assessee in the case on hand and is therefore not comparable and also that the findings rendered in the cited decisions for the earlier years i.e. Assessment Year 2007-08 is applicable for this year also. We agree with the submissions of the assessee that this company is functionally different from the assessee. It has also been so held by co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) as well as in the case of Triology E-Business Software India Pvt. Ltd. (supra). In view of the fact that the functional profile of and other parameters of this company have not changed in this year under consideration, which fact has also been demonstrated by the assessee, following the decision of the co-ordinate benches of the Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.845/Bang/2011 and Triology E-Business Software India Pvt. Ltd. in ITA No.1054/Bang/2011, we hold that this company ought to be omitted from the list of comparables. The A.O./TPO are accordingly directed.

10. KALS Information Systems Ltd.

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

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

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

(ii) This company has been held to be functionally not comparable to software service providers for Assessment Year 2007-08 by the co-ordinate bench of this Tribunal in the assessee's own case. This company has been held to be different from a software development company in the decision of the Tribunal in the case of Bindview India Pvt. Ltd. V DCIT in ITA No.1386/PN/2010.

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

- (a) Triology E-Business Software India Pvt. Ltd. (ITA No.1054/Bang/2011).
- (b) LG Soft India Pvt. Ltd.IT(TP)A No.112/Bang/2011)
- (c) CSR India Pvt. Ltd.IT(TP)A No.1119/Bang/2011) and
- (d) Transwitch India Pvt. Ltd.ITA No.6083/Del/2010)

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

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

(vi) This company has two segments; namely,

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

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

10.4 We have heard both parties and perused and carefully considered the material on record. We find from the record that the TPO has drawn conclusions as to the comparability of this company to the assessee based on information obtained u/s.133(6) of the Act. This information which was not in the public domain ought not to have been used by the TPO, more so when the same is contrary to the Annual Report of the company, as pointed out by the learned Authorised Representative. We also find that the co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) and in the case of Triology E-Business Software India Pvt. Ltd. (supra) have held that this company was developing software products and was not purely or mainly a software service provider. Apart from relying of the above cited decisions of coordinate benches of the Tribunal (supra), the assessee has also brought on record evidence from various portions of the company's Annual Report to establish that this company is IT(TP)A 1380/Bang/2012 Page 9 of 34 functionally dis-similar and different form the assessee and that since the findings rendered in the decisions of the coordinate benches of the Tribunal for Assessment Year 2007-08 (cited supra) are applicable for this year i.e. Assessment Year 2008-09 also, this company ought to be excluded from the list of comparables. In this view of the matter, we hold that this company i.e. KALS Information Systems Ltd., is to be omitted from the list of comparable companies. It is ordered accordingly."

“11.0 Infosys Technologies Ltd.

11.1 This was a comparable selected by the TPO. Before the TPO, the assessee objected to the inclusion of the company in the set of comparables, on the grounds of turnover and brand attributable profit margin. The TPO, however, rejected these objections raised by the assessee on the grounds that turnover IT(TP)A 1380/Bang/2012 Page 24 of 34 and brand aspects were not materially relevant in the software development segment.

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

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

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

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

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

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

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

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

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

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

12. Wipro Ltd.

12.1 This company was selected as a comparable by the TPO. Before the TPO, the assessee had objected to the inclusion of this company in the list of comparables on several grounds like functional dis-similarity, brand value, size, etc. The TPO, IT(TP)A 1380/Bang/2012 Page 26 of 34 however, brushed aside the objections of the assessee and included this company in the set of comparables.

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

(i) This company owns significant intangibles in the nature of customer related intangibles and technology related intangibles, owns IPRs and has been granted 40

registered patents and has 62 pending applications and its Annual Report confirms that it owns patents and intangibles.

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

(iii) the co-ordinate bench of the ITAT, Mumbai in the case of Telecordia Technologies India Pvt. Ltd. (ITA No.7821/Mum/2011) has held that Wipro Ltd. is not functionally comparable to a software service provider.

(iv) this company has acquired new companies pursuant to a scheme of amalgamation in the last two years.

(v) Wipro Ltd. is engaged in both software development and product development services. No information is available on the segmental bifurcation of revenue from sale of products and software services.

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

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

12.4.1 We have heard both parties and carefully perused and considered the material on record. We find merit in the contentions of the assessee for exclusion of this company from the set of comparables. It is seen that this company is engaged both in software development and product development services. There is no information on the segmental bifurcation of revenue from sale of product and software services. The TPO appears to have adopted this company as a comparable without demonstrating how the company satisfies the software development sales 75% of the total revenue filter adopted by him. Another major flaw in the comparability analysis carried out by the TPO is that he adopted comparison of the consolidated financial statements of Wipro with the stand alone financials of the assessee; which is not an appropriate comparison. 12.4.2 We also find that this company owns intellectual property in the form of registered patents and several pending applications for grant of patents. In this regard, the coordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (ITA No.227/Bang/2010) has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not

own any such intangible and hence does not have an additional advantage in the market. As the assessee in the case on hand does not own any intangibles, following the aforesaid decision of the co-ordinate bench of the Tribunal i.e. 24/7 Customer.Com Pvt. Ltd. (supra), we hold that this company cannot be considered as a comparable to the assessee. We, therefore, direct the Assessing Officer/TPO to omit this company from the set of comparable companies in the case on hand for the year under consideration."

13. Tata Elxsi Ltd.

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

13.2 Before us it was reiterated by the learned Authorised Representative that this company is not functionally comparable to the assessee as it performs a variety of functions under software development and services segment namely - (a) product design, (b) innovation design engineering and (c) visual computing labs as is reflected in the annual report of the company. The learned Authorised Representative submitted that,

- (i) The co-ordinate bench of the Mumbai Tribunal in the case of *Telcordia Technologies (P.) Ltd. (supra)* has held that *Tata Elxsi Ltd.* is not a functionally comparable for a software development service provider.
- (ii) The facts pertaining to *Tata Elxsi Ltd.* have not changed from the earlier year i.e. Assessment Year 2007-08 to the period under consideration i.e. Assessment Year 2008-09 and therefore this company cannot be considered as a comparable to the assessee in the case on hand.
- (iii) *Tata Elxsi Ltd.* is predominantly engaged in product designing services and is not purely a software development service provider. In the Annual Report of this company the description of the segment 'software development services' relates to design services and are not to software services provided by the assessee.

- (iv) Tata Elxsi *Ltd.* invests substantial funds in research and development activities which has resulted in the 'Embedded Product Design Services Segment' of the company to create a portfolio of reusable software components, ready to deploy frameworks, licensable IPs and products. The learned Authorised Representative pleads that in view of the above reasons, Tata Elxsi *Ltd.* is clearly functionally different/dis-similar from the assessee and therefore ought to be omitted from the list of comparables.

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

13.4 We have heard both parties and carefully perused and considered the material on record. From the details on record, we find that this company is predominantly engaged in product designing services and not purely software development services. The details in the Annual Report show that the segment " software development services" relates to design services and are not similar to software development services performed by the assessee.

13.5 The Hon'ble Mumbai Tribunal in the case of *Telcordia Technologies India (P.) Ltd.* (*supra*) has held that Tata Elxsi *Ltd.* is not a software development service provider and therefore it is not functionally comparable. In this context the relevant portion of this order is extracted and reproduced below :—

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

As can be seen from the extracts of the Annual Report of this company produced before us, the facts pertaining to Tata Elxsi have not changed from Assessment Year 2007-08 to Assessment Year 2008-09. We, therefore, hold

that this company is not to be considered for inclusion in the set of comparables in the case on hand. It is ordered accordingly.

14. E-Zest Solutions Ltd.

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

14.2 Before us, the learned Authorised Representative contended that this company ought to be excluded from the list of comparables on the ground that it is functionally different to the assessee. It is submitted by the learned Authorised Representative that this company is engaged in 'e-Business Consulting Services', consisting of Web Strategy Services, I T design services and in Technology Consulting Services including product development consulting services. These services, the learned Authorised Representative contends, are high end ITES normally categorised as knowledge process Outsourcing ('KPO') services. It is further submitted that this company has not provided segmental data in its Annual Report. The learned Authorised Representative submits that since the Annual Report of the company does not contain detailed descriptive information on the business of the company, the assessee places reliance on the details available on the company's website which should be considered while evaluating the company's functional profile. It is also submitted by the learned Authorised Representative that KPO services are not comparable to software development services and therefore companies rendering KPO services ought not to be considered as comparable to software development companies and relied on the decision of the coordinate bench in the case of *Capital IQ Information Systems (India) (P.) Ltd . v. Dy. CIT (International Taxation)* [2013] 32 taxmann.com 21 (Hyd. - Trib.) and prayed that in view of the above reasons, this company *i.e.* e-Zest software *Ltd.*, ought to be omitted from the list of comparables.

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

14.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the record that the TPO has included this

company in the list of comparables only on the basis of the statement made by the company in its reply to the notice under section 133(6) of the Act. It appears that the TPO has not examined the services rendered by the company to give a finding whether the services performed by this company are similar to the software development services performed by the assessee. From the details on record, we find that while the assessee is into software development services, this company *i.e.* e-Zest software Ltd., is rendering product development services and high end technical services which come under the category of KPO services. It has been held by the co-ordinate bench of this Tribunal in the case of *Capital I-Q Information Systems (India) (P.) Ltd. (supra)* that KPO services are not comparable to software development services and are therefore not comparable. Following the aforesaid decision of the co-ordinate bench of the Hyderabad Tribunal in the aforesaid case, we hold that this company, *i.e.* e-Zest software Ltd., be omitted from the set of comparables for the period under consideration in the case on hand. The A.O./TPO is accordingly directed.

15. Thirdware Solutions Ltd. (Segment)

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

- (i) This company is engaged in product development and earns revenue from sale of licences and subscription. It has been pointed out from the Annual Report that the company has not provided any separate segmental profit and loss account for software development services and product development services.
- (ii) In the case of *E-Gain Communications (P.) Ltd.* v. *ITO* [\[2009\] 118 ITD 243/\[2008\] 23 SOT 385 \(Pune\)](#), 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 (P.) Ltd. (supra)* has directed that since the income of this company includes income from sale of licenses, it ought to be rejected as a comparable for software development services. In the case on hand, the assessee is rendering software development services. In this factual view of the matter and following the afore cited decision of the *Pune Tribunal (supra)*, we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand.

16. Lucid Software Ltd.

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

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

- (iii) The rejection of this company as a comparable to software service providers has been upheld by the co-ordinate benches of this Tribunal in the cases of *LG Soft India (P.) Ltd.* and *CSR India (P.) Ltd. (supra)* and by the Delhi Bench of the Tribunal in the case of *Transwitch India (P.) Ltd. (supra)*.(ITA No.6083/Del/2010)
- (iv) The factual position and circumstances pertaining to this company has not changed from the earlier Assessment Year 2007-08 to the period under consideration i.e. Assessment Year 2008-09 and therefore on this basis, this company cannot be considered as a comparable in the case on hand.
- (v) The relevant portion of the Annual Report of this company evidences that it is in the business of product development.

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

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

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

year *i.e.* Assessment Year 2007-08 to the period under consideration *i.e.* Assessment Year 2008-09. In this factual matrix and following the afore cited decisions of the coordinate benches of this Tribunal and of the ITAT, Mumbai and *Delhi Benches (supra)*, we direct that this company be omitted from the list of comparables for the period under consideration in the case on hand.

17. Persistent Systems Ltd.

17.1 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.

17.2 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 *Telcordia Technologies India (P.) 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 *Telcordia Technologies India (P.) Ltd. (supra)* that in the absence of segmental details/information a company cannot be taken into account for comparability analysis, we hold that this company *i.e.* Persistent Systems *Ltd.* ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.

18. Quintegra SolutionsLtd.

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

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

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

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

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

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

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

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

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

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

18.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details brought on record that this company *i.e.* Quintegra Solutions *Ltd.* is engaged in product engineering services and is not purely a software development service provider as is the assessee in the case on hand. It is also seen that this company is also engaged in proprietary software products and has substantial R&D activity which has resulted in creation of its IPRs. Having applied for trade mark registration of its products, it evidences the fact that this company owns intangible assets. The co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com (P.) *Ltd.* (*supra*) has held that if a company possesses or owns intangibles or IPRs, then it cannot be considered as a comparable company to one that does not own intangibles and requires to be omitted from the list of comparables, as in the case on hand.

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

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

19. Softsol India Ltd.

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

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

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

23. Thus, it is clear from the findings of the Co-ordinate Bench of the Tribunal in the case of M/s 3DPLM Software Solutions Ltd (*supra*) that except Bodhtree Ltd all other 12 companies were found to be not good comparables of the software development services as provided by assessee.

24. As regard the objection of the Id. DR that Quintegra Solution *Ltd.* has been selected by the assessee itself, we notice that the functional comparability of this company has been examined by the Tribunal in the case of M/s 3DPLM Software Solutions Ltd (*supra*) and it was found that the said company is engaged in the different field of services i.e. product designing and analytic services as well as in proprietary of software product and are in research and development activity which has resulted in creation of its intellectual property rights. Therefore, the said company is not functionally comparable with pure software development service activity. Once the company is found to be a non-comparable company with the assessee, the same is required to be excluded from the set of comparables even if the said company is selected by the assessee itself. This view was taken by the decision of the Special Bench of Chandigarh Tribunal in the case QUARK SYSTEMS (P.) LTD (*supra*).

25. Thus, out of 20 comparables 12 companies are required to be excluded from the list of comparables for determining the ALP. Accordingly, we direct the TPO/AO to exclude the following companies from the set of comparables and recomputed the ALP after considering the claim of risk adjustment as well as working capital adjustment:

S.No.	Name of the Company
1	Avani Cimcon Technologies Ltd
2	Celestial Biolabs Ltd
3	E-Zest Solutions Ltd
4	Infosys Technologies Ltd

5	KALS Information Systems Ltd (Seg.)
6	Lucid Software Ltd
7	Persistent Systems Ltd
8	Quintegra Solutions Ltd
9	Softsole India Ltd
10	Tata Elxsi Ltd (Seg.)
11	Thirdware Solutions Ltd (Seg
12	Wipro Ltd (Seg.) "

As regards the additional grounds raised by the assessee, the co-ordinate bench of the Tribunal also dealt with an identical issue in para 24 (supra) and therefore when the functional comparability of these two companies have been examined by the Tribunal and it was found that these companies are not comparable with the software development services provider because of different activities as well as engaged in the software products, R&D activities and resulting in creation of Intellectual Property Rights (IPRs) then, even if these companies are selected by the assessee in its T.P. Analysis the same shall be excluded from the comparables. The comparability of these companies was already tested by this Tribunal, then the same cannot be included in the list of comparables. Accordingly, by following the earlier order of the Tribunal as well as Special Bench decision in the case of **Quark Systems Pvt. Ltd.** (supra). We admit the additional grounds raised by the assessee. In view of the findings of the co-ordinate bench of the Tribunal in the case of Kodiak Network India Pvt. Ltd. (supra), we hold that 12 companies out of 13 sought by the assessee are required to be excluded from the list of comparables where as the company **Bodhtree Consulting Ltd.** is accepted as a good comparable of software development services provided by the assessee. Accordingly, we direct the TPO/A.O to exclude 12 companies as mentioned in para 25 of the order of the co-ordinate bench (supra) from the set of comparables and recomputed the ALP after considering the claim of risk adjustment as well as the benefit of tolerance range of + / - 5% as per the proviso to section 92C(2)."

Accordingly by following the earlier order of this Tribunal for the same assessment year, we direct the TPO/A.O to exclude 12 companies from the list of comparables on functional dis-similarity. Apart from the above 12 companies in which 2 companies namely Infosys Ltd. and Wipro Ltd. are common as also excluded on the ground of high turnover. Therefore the total companies which are directed to be excluded are 15 out of the 20 of the TPO's set of comparables.

12. As regards the inclusion of Indus Network Ltd., we find that employees cost is a relevant factor for selecting the comparables. We note that the TPO applied 25% of employees cost filter while selection of the comparables which shows that the companies which are engaged in providing software development services must be doing its business through their own employees and therefore if the employees cost is less than 25% of the sale then the business model of such company may not be matching with the business mode of the assessee. Even otherwise the software development services sector is an employee intensive activity and having a low employee cost apparently indicate the outsourcing of its business activity by a particular company. Accordingly, in the facts and circumstances of the case when there is no dispute that the Indus

Network Ltd. is having less than 25% employee cost cannot be considered as a good comparable of the assessee. Hence we set aside the order of the CIT (Appeals) qua this issue and direct the TPO/A.O to exclude this company from the list of comparables.

13. The next grievance of the assessee is regarding related party filter at 15% instead of 25% applied by the TPO.

14. We have considered the rival submissions as well as the relevant material on record. We note that this Tribunal has taken a consistent view about the threshold limit of RPT at 15%. A similar view has been taken by this Tribunal in the case of Maxim India Pvt. Ltd. (supra) in para 6 as under :

“ 6. We have heard the Id. DR and considered the relevant material on record. It has been pointed out by the Id. DR that the CIT(Appeals) has directed the TPO to exclude the companies which have Related Party Transactions (RPT) without specifying the exact percentage of RPT to be taken as threshold limit. We find that the TPO has not applied any filter of RPT for selection of comparable companies. The CIT(Appeals) while passing the impugned order held that there is no need for inclusion of the companies which have RPT and accordingly directed the AO to exclude the companies having RPT from the comparables. It is pertinent to note that in the normal circumstances the Tribunal has considered 15% as threshold limit of RPT, when there is no difficulty of finding the comparable companies. Therefore, in view of the fact that the CIT(Appeals) has not fixed any threshold limit of RPT, we modify the impugned order of the CIT(A) and direct the AO/TPO to apply 15% RPT as threshold limit for the purpose of selecting comparables. This ground of the Revenue’s appeal is partly allowed.”

Following the earlier order of the Tribunal, we direct the TPO to apply the RPT filter at 15%.

15. Since we have directed the TPO/A.O to exclude certain comparable companies and reconsider certain companies by applying the RPT filter therefore the ALP is directed to be recomputed by giving effect to this order. Needless to say the benefit of the proviso to section 92C be also considered.

16. In the result, the revenue's appeal as well as C.O. of assessee are partly allowed.

Order pronounced in the open court on 26th day of Aug., 2016.

Sd/-
(ABRAHAM P GEORGE)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

By Order

Asst. Registrar, ITAT, Bangalore