

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

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

I.T. (T.P) A. No.1614/Bang/2014
(Assessment Year : 2009-10)

M/s. Nett App India Pvt. Ltd.,
3rd Floor, Fairwinds Block, EGL Software Park,
Off. Intermediate Ring Road,
Bangalore-560 071.
PAN AABCN 4063 A

.... Appellant.

Vs.

Dy. Commissioner of Income Tax,
Circle 12(2), Bangalore.

..... Respondent.

I.T.(T.P) A No.1633/Bang/2014
(Assessment Year : 2009-10)
(By Revenue)

Assessee By : Shri Srivastava, Advocate.
Revenue By : Mrs. Neera Malhotra, CIT (D.R)

Date of Hearing : 1.4.2016.

Date of Pronouncement : 11.5.2016.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

These cross appeals are directed against the order dt.16.10.2014 of Commissioner of Income Tax (Appeals)-IV, Bangalore for the Assessment Year 2009-10.

2. First we take up the assessee's appeal wherein the assessee has raised the following grounds :

- “1. That the order passed by the learned Commissioner of Income Tax (Appeals) - IV, Bangalore (CIT (Appeals)'), to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.
2. That the learned CIT (Appeals) erred in not deleting the adjustment to the arm's length price made by the learned Assessing Officer ('AO')/ Transfer Pricing Officer ('TPO') amounting to Rs.257,620,255 in respect of software development services segment and Rs. 8,710,695 in respect of Information Technology enabled services segment of the Appellant.
3. That on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in;
 - (a) Upholding the comparability analysis performed by the learned TPO in the TP Order.
 - (b) Accepting the filters applied by the learned TPO in the TP Order, without providing an opportunity of being heard to the Appellant. ■
 - (c) Disregarding application of multiple year/ prior year data and holding that current year (i.e. Financial Year 2008-09) data for companies should be used for comparability.
 - (d) Upholding the learned TPO's approach of using data as at the time of assessment proceedings.
4. That on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in;
 - (a) Arbitrarily arriving at a set of companies as comparable to the software development and Information Technology enabled services of the Appellant.
 - (b) Arbitrarily including companies that fail the test of comparability analysis
 - (c) Rejecting companies similar to the Appellant while performing the comparability analysis
 - (d) Rejecting otherwise comparable companies merely

on account of working capital adjustment.

5. The learned CIT (Appeals) has erred in upholding the error in computation of working capital adjustment and in limiting the working capital adjustment for software development segment and for IT enabled services segment while determining the arm's length price.
6. The learned CIT(Appeals) has erred in not providing appropriate adjustments towards the risk differential while determining the arm's length price.
7. The learned CIT (Appeals) erred in charging interest under section 234B and 234D of the Act at Rs. 35,869,312 and Rs. 765,434 respectively."

3. The assessee is an Indian Company and is wholly owned subsidiary of Nett App Inc. USA. It is engaged in providing software development services and I T Enabled Services (in short 'ITES') to its Associated Enterprises (in short AEs) The business profile of the company has been reproduced by the TPO in para 2.1.2 & 2.1.3 as under :

"2.1.2 Business Profile of the company

NetApp India undertakes to provide sales support services, software development services, and Technical Support Services (ITES).

As per the agreement with the AE, Network Appliances Inc., USA, the taxpayer is compensated on cost plus mark up of 10% basis in respect of software development services, ITES and technical support services.

As per the commission agency agreement with the AE, Network Appliances BV., Netherlands, the taxpayer is compensated on cost plus 5% basis in respect of marketing support services.

2.1.3 AE Group (NetApp Group)

The NetApp Group is a world-wide leader in enterprise network storage and data management solutions. NetApp Group's network storage solutions and service offering provide data intensive enterprises with consolidated storage, improved data centre operations, economical business continuance and efficient remote data access across the distributed enterprise. NetApp Group employs nearly 8,000 people in its operations in 135 countries."

The assessee has reported the financial results as well as segmental financial results for the year under consideration as under :

" a) Overall Result :

Operating Revenues	220,78,32,277
Operating Expenses	191,67,84,382
Operating (Profit) / Loss	29,10,47,895
Operating Profit on cost %	15.18%

b) Segmental Financials

Description	Software Services (Rs.)	ITES (Rs.)	Marketing Support Services (Rs.)	Technical Support Services (Rs.)
Operating Revenue	224,72,82,164	6,78,59,518	21,33,97,566	7,42,97,456
Operating Cost	204,29,83,785	6,16,90,471	20,32,35,777	6,75,43,142
Operating Profit	20,42,98,379	61,69,047	1,01,61,789	67,54,314
OP/OC	10%	10%	5%	10%"

4. The assessee has reported international transactions as under :

" International Transactions (as mentioned in the 92CE Report)

Description	Amount Received (Rs.)
Receipt for software development services	224,72,82,164
Receipt for IT Enabled Services	6,78,59,518
Receipt for Marketing Support Services.	21,33,97,566
Receipt for Technical Support Services.	7,42,97,456"

As it is clear that there are four segments of international transactions however, the TPO accepted the international transactions in respect of marketing support services and technical support services at arm's length. The TPO proposed to determine the Arm's Length Price (ALP) in respect of two segments i.e. software development services and ITES. We will deal with the issue of Transfer Price Adjustment in these two segments separately.

Software Development Services

5. The assessee is charging cost plus mark up of 10% from its AE. To bench mark its international transactions, the assessee has adopted Transactional Net Margin Method (TNMM) as Most Appropriate Method (MAM) and selected 17 comparable companies with average PLI

(OP/OC) of 13%. The list of comparable companies selected by the assessee is given by the TPO at page 10 of the order as under :

Sl.No.	Name of the Comparable.
1.	Akshay Software Technologies Ltd.
2.	Bodhtree Consutling Ltd.
3.	E2E Infotech Ltd.
4.	FCS Software Solutions Ltd.
5.	ICRA Techno Analytics Ltd.
6.	Indus Networks Ltd.
7.	LGS Global Ltd.
8.	Larsen & Toubro Infotech Ltd.
9.	Mind Tree Ltd.
10.	PSI Data Systems Ltd.
11.	SIP Technologies & Exports Ltd.
12.	Synetairos Technologies Ltd.
13.	eZest Solutions Ltd.
14.	Persistent Systems Ltd.
15.	Computech International Ltd.
16.	H S India Ltd.
17.	Techprocess Solutions Ltd.

6. The assessee used multiple year data which were rejected by the TPO and consequently the T.P. Study analysis was not accepted by the TPO. However, the TPO has accepted 6 of the comparable companies from the list of comparables selected by the assessee and thereby rejected 11 companies selected by the assessee. The TPO then also carried out a fresh search and included 5 more companies in the set of

comparables. Thus the TPO has determined the ALP in respect of software development services segment, international transactions by considering the 11 comparable companies a under :

Sl.No.	Name of the Comparable	Margin
1.	Kals Information Systems Ltd.	13.80 %
2.	Akshay Software Technologies Ltd.	
3.	Bodhtree Consulting Ltd.	62.27%
4.	R S Software (India) Ltd.	9.97%
5.	Tata Elxsi Ltd. (Seg.)	20.28%
6.	Sasken Communication Technologies Ltd.	27.91 %
7.	Persistent Systems Ltd.	41.40 %
8.	Zylog Systems Ltd.	7.81 %
9.	Mindtree Ltd. (Seg.)	5.52 %
10.	Larsen and Toubro Infotech	24.72%
11.	Infosys Ltd.	45.61%
	Average Mean	24.32%

Thus the TPO has arrived at 24.32% mean margin of the comparable companies and after allowing working capital adjustment of 1.71% the adjusted mean margin has been calculated at 22.61%. Accordingly, the TPO proposed the adjustment under Section 92CA of the Income Tax Act, 1961 (in short 'the Act') of Rs.25.76,20,255 being shortfall in the assessee's price in comparison to the ALP in respect of international transactions in software development services segment. The assessee

challenged the action of the TPO before the CIT (Appeals) but could not succeed.

7. Before us, the assessee is seeking exclusion of 3 companies from the final set of the comparable companies considered by the TPO as under :

- (i) Bodhtree Consultancy Ltd.
- (ii) Tata Elxsi Ltd. (Seg.)
- (iii) Infosys Technologies Ltd. (Now Infosys Ltd.)

7.1 **Bodhtree Consultancy Ltd.** :

7.1.1 The learned Authorised Representative of the assessee has submitted that it is a software solution company engaged in providing open and end-to-end solution, off shore data management, data warehousing, software housing designing and development of solution by using latest technology. Thus the learned Authorised Representative has submitted that the functions of this company are entirely different from the software development services provided by the assessee to its AEs and therefore this company is functionally not comparable with that of assessee for determination of ALP. The learned Authorised Representative has further submitted that this company has been considered by the assessee in its T.P. Study, however, he has pleaded

that the company ought to be rejected as the same is not functionally comparable to the assessee. He has pointed out that the functional comparability of this company has been examined by this Tribunal in a series of decisions. He has relied upon various decisions and submitted that in the latest decision of the Tribunal dt.19.2.2016 in the case of M/s. Citrix Research & Development India Pvt. Ltd. Vs. DCIT in ITA No.1289/Bang/2014 this company was held to be functionally not comparable. Hence the learned Authorised Representative has submitted that even if the assessee has wrongly included in the T.P. Study analysis when this company is found to be not comparable then the same should be excluded. He has relied upon the following decisions :-

- (i) Aptean Software India (P.) Ltd. [IT(T.P)A Nos.1285 of 2010 & 208/Bang/2014 for A.Y. 2006-07 & 2009-10]
- (ii) Cisco Systems (India) Pvt. Ltd. [IT(TP)A No.271/Bang/2010, A.Y. 2009-10]
- (iii) Airbus India Operations Pvt. Ltd. [IT(TP)A No.35/Bang/2014, A.Y. 2009-10]

7.1.2 On the other hand, the learned Departmental Representative has submitted that it is assessee's own comparable company selected in the T.P. Analysis. Therefore, when the assessee found this company as

functionally comparable at the time of T. P. Analysys then the assessee cannot be permitted to take different stand. She has further contended that the decision of the Tribunal in the case of M/s. Citrix Research & Development India Pvt. Ltd. (supra) cannot be applied in the case of the assessee when the business profile of the company namely M/s. Citrix Research & Development India Pvt. Ltd. (supra) is not similar to that of the assessee. Further in the said case, the Tribunal has noted that the assessee selected the comparable companies without looking into verticals / horizontals. In the case of the assessee, the assessee has not pointed out all these facts before the TPO and therefore the facts are required to be examined by considering the relevant material.

7.1.3 In a rejoinder the learned Authorised Representative has submitted that M/s. Citrix Research & Development India Pvt. Ltd.(supra) is engaged in software development services and therefore the main activity of the company is only software development. He has further contended that in the financials of Bodhtree Consultancy Ltd., it shows the revenue from the sales and expenditure of sale therefore it indicates that this company is selling software products and no sub-segmental

details are available. Therefore, when the assessee is not in the saleable products, this company cannot be compared with the assessee.

7.1.5 We have heard the rival submissions as well as considered the relevant material on record. The learned Authorised Representative of the assessee has submitted that this company is found to be not comparable with software development services provider by the Tribunal in the series of cases including in the case of M/s. Citrix Research & Development India Pvt. Ltd. (supra). We note that the Tribunal in the case of M/s. Citrix Research & Development India Pvt. Ltd. (supra) has considered the comparability of this company in paras 10 & 13 as under :

“ 10. Vis-à-vis M/s Bodhtre Consulting Ltd, the observation of this Tribunal as it appeared at page no.26.1 of the order in the case of M/s Cisco Systems (Ind.) Pvt.Ltd. read as under;

“26. COMPANIES INCLUDED IN THE FINAL LIST OF COMPARABLES WHICH THE ASSESSEE WANTS TO BE EXCLUDED:-

26.1 Bodhtree Consulting Ltd.:- As far as this company is concerned, it is not in dispute that in the list of comparables chosen by the assessee, this company was also included by the assessee. The assessee, however, submits before us that later on it came to the assessee’s notice that this company is not being considered as a comparable company in the case of companies rendering software development services. In this

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

13. No doubt, in so far in the case of M/s Infosys Tech.Ltd. is concerned, it was one among the many companies chosen by the assessee itself. However, in view of the special Bench decision in the case of CIT Vs M/s Quark Systems Pvt.Ltd.,(2010) 38 SOT 0307, which was

affirmed by the Hon'ble Punjab & Haryana High Court in (2011) 62 DTR 0182, assessee cannot be stopped from raising a plea for exclusion, especially when it had objected to the inclusion before the TPO and DRP. As mentioned at para- five above, assessee had objected to the inclusion of M/s Infosys Tech.Ltd. both before the TPO and DRP. In the normal course, in view of the judgment of the Hon'ble Punjab & Haryana High Court mentioned supra, the issue has to be remitted back to the TPO for considering its comparability. However, Hon'ble Delhi High Court in the case of CIT Vs M/s Agnity India Technologies Pvt. Ltd. (Supra) had affirmed an order of this Tribunal were M/s Infosys Technologies Ltd was directed to be excluded from the list of comparables considering the peculiar features of the said company. Hence, no purpose will be served in remitting the question of comparability of M/s Infosys Tech.Ltd back to the TPO/AO. In view of the above discussion, we direct exclusion of M/s Bodhtree Consulting Ltd., M/s Tata Elxsi Ltd.(Seg.) and M/s Infosys Tech.Ltd from the list of comparables. Ordered accordingly."

Thus it is clear that the Tribunal has simply followed the earlier decisions in the case of CISCO System India Pvt. Ltd. which in turn followed the other decisions of the Tribunal without analyzing the relevant facts, details and financials of the said company. We find from the Annual Report of this company that as per the Directors Report, the segment-wise and product wise performance has been described in the commentary as under :

" Segment-wise and product-wise performance

Bodhtree has only one segment, namely software development. Being a software solutions company, it is engaged in providing open and end-to-end web solutions, off shoring Data Management, Data Warehousing, software consultancy, design and development of solutions, using the latest technologies."

We further note that in the balance sheet as well as in the profit and loss account the company has not shown any inventory or stock as well as

work-in-progress. Therefore from the financial of this company it cannot be said that this company is in the product activity though the description of segment and product shows that this company has declared only one segment namely software development under which it engaged in providing open and end-to-end web solution off shore data management, data warehousing, software consultancy, design and development of solution. Since there is no segmental details in the data provided by this company therefore it is not possible to ascertain whether the revenue earned by this company during the year is from one of these activities or some of these activities or all of these activities. As far as the net work storage and data management solutions are concerned, the assessee is also providing software solutions to its AEs group who are leaders in net work storage and data management solution. Therefore in the facts and circumstances of the case, we are of the view that in the absence of complete information and details of the financials, it is not possible to conclude that this company is engaged in the similar business activity as of the assessee or in a different activity. Accordingly, we set aside this issue of functional comparability of this

company to the record of the Assessing Officer/TPO to examine the same by considering further information as may be called for under Section 133(6) and after affording an opportunity of hearing to the assessee. As regards the objections of learned Departmental Representative that this company was part of T.P. Study analysis of the assessee and therefore the assessee cannot seek the exclusion of the same. It is pertinent to note that if a company is wrongly included in the T.P. Study would become comparable otherwise found dissimilar.

(ii) **Tata Elxsi Ltd. (Seg.)**

8.1 The learned Authorised Representative of the assessee has submitted that the business of this company constitute product design services (design and development of hardware and software), innovation design, engineering (mechanical design & focus of industrial design) and visual computing lab division for animation and special effects. Thus the learned Authorised Representative has submitted that this company is not only engaged in software development services and services of the company includes embedded product design, industrial services and engineering services and visual computing labs and system integration

services. Thus this company is not functionally comparable. He has relied upon various decisions of this Tribunal including the decision of M/s. Citrix R & D India Pvt. Ltd. (supra).

8.2 On the other hand, the learned Departmental Representative has contended that this company is not in a product but only in software development services as per the Annual Report and Directors Report. She has further submitted that this company is providing only software development services and it is functionally comparable with the assessee though the services may be provided in different fields but the main activity is only software development services. She has relied upon the orders of the authorities below.

8.3 We have considered the rival submissions as well as the relevant material on record. We find that this company in its Annual Report reported that it has various diversified functions of embedded systems, product design, industrial services, engineering services and visual computing labs and system integration services and support under these broad features it performs multiple diversified product designing and engineering designing services as well as visual computing services. The

co-ordinate bench of this Tribunal in the case of M/s. Citrix Research & Development India Pvt. Ltd. (supra) has considered the functional comparability of this company in para 11 as under :

11. Observations of the Co-ordinate Bench with regard to M/s Tata Elxsi Ltd. as it appears at para-26.4 of the very same order is re-produced hereunder;

¶26.4 Tata Elxsi Ltd.:- As far as this company is concerned, it is not in dispute before us that in assessee's own case for the A.Y. 2007-08, this company was not regarded as a comparable in its software development services segment in ITA No.1076/Bang/2011, order dated 29.3.2013. Following were the relevant observations of the Tribunal:-

II. UNREASONABLE COMPARABILITY CRITERIA :

19. The learned Chartered Accountant pleaded that out of the six comparables shortlisted above as comparables based on the turnover filter, the following two companies, namely (i) Tata Elxsi Ltd; and (ii) M/s. Flextronics Software Systems Ltd., deserve to be eliminated for the following reasons :

(i) Tata Elxsi Ltd., : The company operates in the segments of software development services which comprises of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment. There is no sub-services break up/information provided in the annual report or the databases based on which the margin from software services activity only could be computed. The company has also in its response to the notice

u/s.133(6) stated that it cannot be considered as comparable to any other software services company because of its complex nature. Hence, Tata Elxsi Ltd., is to be excluded from the list of comparables.

20. On the other hand, the learned DR supported the order of the lower authorities regarding the inclusion of Tata Elxsi and Flextronics Software Systems Ltd., in the list of comparables. He reiterated the contents of para 14.2.25 of the TPO's order. He also read out the following portion from the TPO's order :

"Thus as stated above by the company, the following facts emerge :

- 1. The company's software development and services segment constitutes three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs.*
- 2. The product design services sub-segment is into embedded software development. Thus this segment is into software development services.*
- 3. The contribution of the embedded services segment is to the tune of Rs.230 crores in the total segment revenue of Rs.263 crores. Even if we consider the other two sub-segments pertain to IT enabled services, the 87.45% (>75%) of the segment's revenues is from software development services.*
- 4. This segment qualifies all the filters applied by the TPO."*

Regarding Flextronics Software Systems, the following extract from page 143 of TPO's order was read out by him as his submissions :

"It is very pertinent to mention here that the company was considered by the taxpayer as a comparable for the preceding assessment year i.e., AY 2006-07. When the same was accepted by the TPO as a comparable, the same was not objected to it by the taxpayer. As the facts mentioned by the taxpayer are the same and these were there in the earlier FY 2005-06, there is no reason why the taxpayer is objecting to it. How the company is functionally similar in the earlier FY 2005-06 but the same is not functionally similar for the subsequent FY 2006-07 even when no facts have been changed from the preceding year. Thus the taxpayer is arguing against this comparable as the company was not considered as a comparable by the taxpayer for the present FY 2006-07."

21. We have heard the rival submissions and considered the facts and materials on record. After considering the submissions, we find that Tata Elxsi and Flextronics are functionally different from that of the assessee and hence they deserve to be deleted from the list of six comparables and hence there remains only four companies as comparables, as listed below:"

26.5. Following the aforesaid decision of the Tribunal, we hold that M/S.Tata Elxsi Ltd. should not be regarded as a comparable".

We find that the facts recorded and considered by the Tribunal are emerging from the Annual Report of this company and therefore this company cannot be considered as functionally comparable to that of software development services provided by the assessee to its AEs. Accordingly, we direct the Assessing Officer/TPO to exclude this company from the list of comparables.

(iii) **Infosys Technology Ltd.**

9.1 The learned Authorised Representative of the assessee has submitted that this company is a market leader and having huge brand value. He has further submitted that this company is engaged in the R & D and owns intangibles. He has submitted that the comparability of this company has been examined by this Tribunal in a series of decisions and further Hon'ble Delhi High Court in the case of **Agnity India Technology Ltd.** has confirmed the finding of the Tribunal that this company cannot be considered as a good comparable for a captive service provider.

9.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below.

9.3 We have heard the rival submissions as well as considered the relevant material on record. At the outset, we note that the comparability of this company has been examined by this Tribunal in a series of decisions. In the latest decision of Tribunal in the case of M/s. Citrix Research & Development India Pvt. Ltd. (supra) has considered the comparability of this company in para 12 as under :

“ 12. Observation of the Co-ordinate Bench in the very same order with regard to the comparability of M/s Infosys Ltd appears at para-26.2 of the order which is reproduced here under;

“26.2 Infosys Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered to be functionally different from a company providing simple software development services, as this company owns significant intangibles and has huge revenues from software products. In this regard, we find that the Bangalore Bench of the Tribunal in the case of M/s. TDPLM Software Solutions Ltd. v. DCIT, ITA No.1303/Bang/2012, by order dated 28.11.2013 with regard to this comparable has held as follows:-

“11.0 Infosys Technologies Ltd.

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

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

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

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

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

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

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

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

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

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

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

The decision rendered as aforesaid pertains to A.Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Respectfully following the decision of the Tribunal referred to above, we hold that Infosys Ltd. be excluded from the list of comparable companies". "

In view of the various decisions of this Tribunal as well as the decision of the Hon'ble Delhi High Court in the case of **Agnity India Technology Ltd.** (supra), we direct the Assessing Officer / TPO to exclude this company from the list of comparables.

10. The assessee is also seeking the inclusion of the following companies.

(i) Thinksoft

(ii) FCS Software

11.1 The learned Authorised Representative of the assessee has submitted that the TPO has included these two companies in its show cause notice for inviting the objections from the assessee. However, without giving an opportunity of hearing the TPO finally excluded these two companies from the set of final comparables. He has pointed out that the TPO himself has selected these companies but excluded on the ground of abnormal working capital position. The learned Authorised Representative has submitted that when rules allow the working capital adjustment then this cannot be a reason for rejecting comparable company which was found functionally comparable with the assessee.

11.2 On the other hand, the learned Departmental Representative has submitted that when the TPO himself has carried out a search and in the process of selecting the companies found that a particular company cannot be considered as a good comparable then the assessee cannot raise the objection against the decision of the TPO as it was not the comparable company selected by the assessee and rejected by the TPO.

11.3 We have heard the rival submissions as well as considered the relevant material on record. Undisputedly these companies were considered by the TPO in the search and also included in the show cause notice for inviting objections. Therefore, once these companies were considered for inclusion in the list of comparables and the assessee has not objected against the inclusion then even if the TPO decides to exclude these companies from the final set of comparables, the assessee would have been given an appropriate opportunity of hearing on the reasons and criteria on the basis of which the TPO proposed to exclude these companies. Accordingly, in the facts and circumstances of the case, we set aside this issue to the record of the Assessing Officer / TPO

to reconsider the comparability of these companies after giving an opportunity of hearing to the assessee.

12.1 The next grievance of the assessee is that though the assessee has no objection in the case of **Sasken Communications Technologies Ltd. (Seg.)** to be part of the comparable list of the TPO however, the TPO has considered incorrect expenditure to arrive at the margins of this company and therefore the correct margins of this company is required to be calculated for the purpose of determining the ALP. The learned Authorised Representative has submitted that the actual margin after taking into account unallocable segment expenses would be 13.73% and after adjustment it would be at 10.88%. Therefore the TPO may be directed to compute the correct margins of this company.

12.2 The learned Departmental Representative has objected to the submissions of the learned Authorised Representative and submitted that if there is a mistake in the calculation it is the subject matter of rectification of mistake under Section 154 of the Act.

12.3 Having considered the rival submissions and relevant material on record, we are of the view that the assessee has made out prima facie

case of incorrect computation of margin of this company and therefore we set aside this issue to the record of the Assessing Officer/TPO to consider the objections of the assessee in respect of incorrect computation of margin.

13.1 The next grievance is regarding Working Capital Adjustment. The learned Authorised Representative of the assessee has submitted that the TPO though given a detailed working of working capital adjustment, however, it has restricted the working capital adjustment to 1.70% instead of the actual computation worked out by the TPO in the Annexure C of the order. He has thus contended that the working capital adjustment cannot be restricted artificially and the TPO may be directed to give an appropriate working capital adjustment as per the computation in Annexure C. In support of his contention, he has relied upon the decision of the Tribunal in the case of M/s. Citrix Research & Development India Pvt. Ltd. (supra).

13.2 On the other hand, the learned Departmental Representative has submitted that the TPO has given a detailed working to arrive at the working capital adjustment and therefore when the TPO has considered

the working capital adjustment then in the absence of any contrary working provided by the assessee, the assessee cannot question the working capital granted by the TPO.

13.3 We have heard the rival submissions as well as considered the relevant material on record. We find that in Annexure C to the order passed under Section 92CA of the Act, the TPO has worked out the working capital adjustment in respect of various comparable companies which is much higher than what was finally taken by the TPO at 1.71%.

The co-ordinate bench of this Tribunal in the case of M/s. Citrix Research & Development India Pvt. Ltd. (supra) has observed in para 14 as under :

“ 14. Insofar adjustment of working capital is concerned, we are of the opinion, that the AO cannot force an artificial limitation to the actual working capital adjustment ratio derived from the comparable companies considered for the arm's length study. The restriction of working capital adjustment based on PLR of SBI will be appropriate since it is based on a presumption with all lending or credit are having uniform interest rates as decided by the SBI. We therefore, direct the AO to give working capital adjustment considering the comparable companies after exclusion of the three companies mentioned by us at para thirteen (supra).”

In view of the above facts and circumstances as well as the decision of the co-ordinate bench of this Tribunal in the case of M/s. Citrix Research & Development India Pvt. Ltd. (supra), we direct the Assessing Officer/TPO to give the working capital adjustment after considering the

objections of the assessee as well as after exclusion of the companies as directed by us from the list of comparables.

IT E S Segment

14. The assessee has bench marked its international transactions in ITES segment by selecting 14 comparables having average PLI (OP/OC) at 11%. The TPO rejected 12 companies selected by the assessee and accepted 2 comparable companies from the list of assessee. The TPO carried out a search and included 6 more companies in the list of comparables and accordingly determined the ALP by considering 8 comparables as under :

Sl.No.	Name of the Company	Margin %
1.	Infosys B P O Ltd.	24.41
2.	Aditya Birla Minacs Worldwide Ltd.	23.86
3.	Microland Ltd. (both segments)	1.53
4.	Allsec Technologies Ltd.	- 16.63
5.	Accentia Technologies Ltd.	46.40
6.	Informed Technologies India Ltd.	22.61
7.	Cosmic Global Ltd.	40.61
8.	Eclerx Services Ltd.	57.46
	Average PLI	25.03

Thus, the TPO has computed the average PLI at 25.03% and after giving restricted working capital adjustment at 0.91% the adjusted mean

margin arrived at 24.12%. Accordingly, the TPO proposed an upward adjustment of Rs.87,10,695 under Section 92CA of the Act. The assessee challenged the action of the Assessing Officer/TPO before the CIT (Appeals) but could not succeed.

15. Before us, the learned Authorised Representative submitted that the assessee is seeking exclusion of the following 3 companies :

(i) Accentia Technologies Limited.

(ii) Cosmic Global Limited.

(iii) Eclerx Services Limited.

(i) Accentia Technologies Limited.

16.1 The learned Authorised Representative of the assessee has submitted that during the year under consideration this company has acquired M/s. Oak Technologies Ltd. Inc, a health care back office processing company engaged in the medical transcription activity. **M/s. Oak Technologies Ltd.** is having global work force of over 1000 employees in India and USA. Therefore there was an extra-ordinary event during the year under consideration. Further this company has also invested in 10% equity share holders in trans-service. Apart from

the above, extra-ordinary event, this company is into diversified activity of medical transcription, medical coding, bill & receivable management. This company is engaged in the health care activity and provides BPO services in specified sector. The learned Authorised Representative has submitted that this company is functionally dis-similar to that of the assessee. In support of his contention, he has relied upon various decisions of this Tribunal dt.30.9.2015 in case of Unisys India Pvt. Ltd. Vs. DCIT in ITA Nos.67 & 70/Bang/2015.

16.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that when the amalgamation is in the same segment and business activity then it cannot be considered as an extra-ordinary event. Further the said company is also in the ITES services though the services may be provided in the medical sector.

16.3 We have heard the rival submissions as well as considered the relevant material on record. We note that the functional comparability of this company has been considered and examined by the co-ordinate

bench of this Tribunal in the case of Unisys India Pvt. Ltd. in paras 49 to 51 as under :

“ Accentia Technologies Ltd. :

49. The comparability of this company was again considered by the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions (supra) and it was held by this Tribunal as follows :

"(1) Accentia Technologies Ltd. (Seg.)

10. This was considered as a comparable by the TPO and listed at Sl.No.1 of the comparable companies chosen by the TPO. The Id. counsel for the assessee drew our attention to the fact that there are extra ordinary events that occurred during the previous year in this company. Our attention was draw to the annual report of this company for the A.Y. 2007-08 wherein the fact that this company had acquired Thunga Software Pvt. Ltd., GSR Physicians Billing Services Inc., GSR Systems Inc. and Denmed Inc. is mentioned. Our attention was also drawn to the decision of the Hyderabad ITAT Bench in the case of Capital IQ Information Systems India Pvt. Ltd. v. DCIT [2013] 32 Taxman.com 21 (Hyd. Trib). In the aforesaid decision, the Hyderabad Bench of the Tribunal had to deal with a case of determination of ALP in the case of an assessee who was providing ITES business support services for the A.Y. 2007-08. The TPO had considered Accentia Technologies Ltd. as a comparable. The DRP however held that the said company cannot be compared as a comparable owing to extra ordinary events that took place during the previous year. The Tribunal upheld the order of the DRP observing as follows:-

% Accentia Technologies Ltd.

10. It is the submission of the assessee that this company cannot be treated as a comparable because of uncomparable financial results arising out of amalgamation in the company. In this regard, the assessee has relied upon the order of the DRP for the assessment year 2008-09 in assessee's own case. It is seen that the DRP while considering similar objection placed by the assessee in the case of another company, viz. Mold Tek Technologies Ltd., in the proceedings relating to the assessment year 2008-09, has observed in the following manner-

"17.5. In addition to the above, the Director's Report of accounts of Moldtek Technologies for FY 2007-08 were revised. On a perusal of the annual report it is noticed that Teckmen Tools Pvt. Ltd. and the Plastic Division of the company were demerged and the resulting company was named as Moldtek Plastics Ltd. The KPO business remained with the company. A perusal of the Annual report revealed that to give effect to the merger and demerger, the financial statements were revised and restated after six months from the end of the financial year 31.3. 2008. The assessee filed Form No.21 under the Companies Act with the Registrar of Companies on 26th August, 2008. Thus the effective date of the scheme of merger and demerger was 26th August, 2008. The Annual Report supported the argument of the assessee that there were merger and demerger in the financial year and

it was an exceptional year of performance as financial statements were revised by this company much after the closure of the previous year. The Panel agrees with the contention of the assessee that it is an exceptional year having significant impact on the profitability arising out of merger and demerger."

11. On careful consideration of the matter, we also agree with the aforesaid view of the DRP that extra-ordinary event like merger and demerger will have an effect on the profitability of the company in the financial year in which such event takes place. It is the contention of the assessee that in case of the aforesaid company, there is amalgamation in December, 2006, which has impacted the financial result. This fact has to be verified by the TPO. If it is found upon such verification that the amalgamation in fact has taken place, then the aforesaid comparable has to be excluded.+

50. The learned DR however put forth an argument that the case decided by the Tribunal was in relation to A.Y 2008-09 and there was an amalgamation during the previous year relevant to AY 2008-09 and therefore the aforesaid decision of the Tribunal cannot be applied blindly. In this regard, the learned counsel for the assessee brought to our notice that even during the previous year relevant to AY 2009-10 there was an amalgamation of Acentia Technologies Ltd with another company by name Asscent Infoserve Private Limited. The following Notes to accounts appear in the Annual Report :-

"(B) NOTES TO ACCOUNTS

1. Amalgamation of Asscent Infoserve Private Limited with the Company. Pursuant to the scheme of amalgamation of the erstwhile Asscent Infoserve Private Limited (subsidiary of the company) with the company as approved by the shareholder in the court convened meeting held on the 25th day of April, 2009 and subsequently sanctioned by the honorable high court of Judicature at Mumbai vide order dt 21st August 2009 and Honorable high court of Karnataka at Bangalore vide order dt 6th February 2010, the assets and liabilities of the erstwhile company was transferred and vested in the company with effect from 1st Apr, 2008 and the scheme has been given effect to in the accounts of the year."

It appears to us that the decision rendered by the Tribunal in the case of Symphony Marketing Solutions would be applicable in the present assessment year also. Accordingly, Accentia Technology Ltd is directed to be excluded from the list of comparables.+

We find that the fact of merger and acquisition has not been disputed by the revenue and it has been reported by this company in the Annual Report. Therefore, in view of the findings of the co-ordinate bench of

this Tribunal (supra), we direct the A.O./TPO to exclude this company from the list of comparables.

(ii) Cosmic Global Limited

17.1 The learned Authorised Representative of the assessee has submitted that during the year under consideration, the assessee has paid the charges for translation to third party which is about 57% of the total cost. Therefore this company is engaged in the provision of translations which is different from ITES services provided to its AEs. The revenue from BPO accounts is only 4% of the total revenue and therefore this company cannot be considered as functionally comparable with the assessee. The learned Authorised Representative has relied upon various decisions of this Tribunal wherein functional comparability of this company has been considered including the decision in case of e4e Business Solutions India Pvt. Ltd. Vs. DCIT in IT(T.P)A Nos.1777 & 1845/Bang/2013 Dt.10.11.2015. Thus the learned Authorised Representative has submitted that the Tribunal has given finding on the functional comparability of this company.

17.2 On the other hand, the learned Departmental Representative has submitted that this company was selected by the assessee in its T.P. Study and therefore the assessee cannot seek exclusion of this company from the list of comparables. The TPO has examined the functional comparability of this company and found that this company is comparable with the assessee. She has relied upon the orders of the authorities below.

17.3 We have heard the rival submissions as well as considered the relevant material on record. The Tribunal found that this company is outsourcing its translation work which is the main activity yielding major revenue during the year. We find that the functional comparability of this company has been examined by the co-ordinate bench of this Tribunal in the case of e4e Business Solutions India Pvt. Ltd. (supra) in para 11.4 as under :

“ **11.4 Cosmic Global Ltd.**

The learned AR of the assessee submitted that the assessee raised objection against inclusion of this company in the list of comparables before the TPO on the ground that this company has major revenue from translation services. Therefore, this company is functionally different from the services provided by the assessee to its AE. The learned AR of the assessee has referred to the Annual report of this company and submitted that that out of the total revenue of Rs.7,37,02,584/-, this company has earned revenue from translation charges to the tune of Rs.6,99,35,756/-. Therefore, substantial part of the revenue has been earned from the activity of

translation. The learned AR of the assessee has further pointed out that even otherwise this company is outsourcing the work of translation as it is evident from the profit and loss account of this company that an amount of Rs.3,00,25,326/- has been paid on account of translation charges. Thus, learned AR of the assessee has submitted that this company cannot be considered as functionally comparable with the assessee for the purpose of determining the ALP. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in the case of *Lam Research (India) Pvt. Ltd. vs. DCIT* in ITA No.1437/Bang/2014 dated 30/4/2015.

i) On the other hand, learned Departmental Representative has submitted that the comparability of this company has been examined by the TPO as well as by the DRP. The TPO has rejected the objections raised by the assessee in respect of this company by holding that the translation service are in the nature of ITeS and therefore, it qualifies all the filters applied by the TPO. He has relied upon the orders of the authorities below.

ii) We have considered the rival submissions as well as the relevant material on record. There is no dispute that this company is in the business of providing service of medical transcription and consultancy services, translations services and accounts BPO. The segmental revenue from the operations are given in schedule 8 to the Profit & Loss account which reveals that major revenue of Rs.6,99,35,756/- out of total revenue of Rs.7.37 crores has been earned by this company from the activity of translation services. We further note that the company has debited an expenditure of more than Rs.3 crore on account of translations charges paid. Thus it is clear that this company is outsourcing its services of translation work which is the main activity of this company yielding major revenue earned during the year. Thus it is manifest from the record that this company is in the entirely different nature of activity and cannot be compared with the activity of providing contact centre of the assessee to its AE. In the case of *Lam Research (India) Pvt. Ltd.* (supra) the co-ordinate bench of this Tribunal had occasion to examine the comparability of this company in para. 34 as under:

"34. With respect to Cosmic Global Ltd., Hyderabad bench of ITAT in the case of Capital IQ Information Systems (India) P. Ltd., in para 19 of its order, had held as under

Cosmic Global Ltd.

19. The main objection of assessee with reference to the inclusion of this company is with reference to outsourcing of its main activity. Even though this company is in assessee's TP study, it has raised objection before the TPO that this company's employee cost is less than 21.30% and most of the cost is with reference to the outsourcing charges or translation charges, and as such this is not a comparable company. The TPO, though considered these submissions, rejected the same, on the reason that this does not impact the profit margin of the company. Opposing the view taken by the TPO, it is

submitted that this company cannot be selected as comparable, as M/s. Capital IQ Information systems (India) Pvt. Ltd., Hyderabad similar issue was discussed by the coordinate Bench of the Tribunal(Delhi) in the case of Mercer Consulting (India) P. Ltd. (supra), vide paras 13.2 to 13.3 which read as under-

"13.2. Now coming to the factual matrix of this case, we find from the material on record that outsourcing charges of this case constitute 57.31% of the total operating costs. This does not appear to us to be a valid reason for eliminating this case from the list of comparables. On going through the Annual accounts of Cosmic Global Limited, a copy of which has been placed on record, we find that its total revenue from operations are at Rs. 7.37 crore divided into three segments, namely, Medical transcription and consultancy services at Rs. 9.90 lacs, Translation charges at Rs.6.99 crore and Accounts BPO at Rs.27.76 lac. The Id. AR has made out a case that outsourcing activity carried out by this company constitutes 57% of total expenses. The reason for which we are not agreeable with the Id. AR is that we have to examine the revenue of this case only from Accounts BPO segment and not on the entity level, being also from Medical transcription and Translation charges. When we are examining the results of this company from the Accounts BPO segment alone, there is no need to examine the position under other segments. The entire outsourcing is confined to Translation charges paid at Rs. 3.00 crore, which is strictly in the realm of the Translation segment, revenues from which are to the tune of Rs.6.99 crore. If this segment of Translation is not under consideration for deciding as to whether this case is comparable or not, we cannot take recourse to the figures which are relevant for segments other than accounts BPO. Thus it is held that this case cannot be excluded on the strength of outsourcing activity, which is alien to the relevant segment.

13.3. However, we find this case to incomparable on the alternative argument advanced by the Id. AR to the effect that total revenue of the Accounts BPO segment of Cosmic

Global Limited is very low at Rs.27. 76 lacs. We have discussed this aspect above in the context of CG-VAK's case and held that a captive unit cannot be compared with a giant case and thus excluded CG-VAK with turnover from Accounts BPO segment at Rs.86.10 lacs. As the segmental revenue of BPO segment of Cosmic Global Limited at Rs.27. 76 lac is still on much lower side, the reasons given above would fully apply to hold Cosmic Global Limited as incomparable. This case is, therefore, directed to be excluded from the list of comparables."

In view of the detailed analysis of the coordinate Bench of the Tribunal in the above referred case, in this case also we accept the contentions of assessee and direct the Assessing Officer/TPO to exclude this comparable for the same reasons.

Accordingly, we direct that Cosmic Global Ltd., also be excluded from the list of comparables. "

In view of the above discussion as well as the order of the co-ordinate bench of this Tribunal, we direct the AO/TPO to exclude this company from the list of comparables for the purpose of determining the ALP."

The Tribunal after considering the fact that this company is mainly in the business activity of medical transcription and consultancy services as it is evident that this company has incurred substantial expenditure on translation charges which shows that the outsourcing business of this company is confined to the translation activity. Accordingly, by following the decisions of this Tribunal, we direct the Assessing Officer/TPO to exclude this company from the list of comparables. As regards the objection of the D.R. that this company was part of the T.P. Study, we are of the view that once this company is found to be functionally not

comparable then the inclusion of the same by the assessee in the T.P. Analysis would not preclude the assessee from taking the objection of functional dis-similarity as held by the Special Bench in the case of CIT Vs. Quark Systems P. Ltd. [2010] 38 SOT 307 (Chd.) (SB). which has been upheld by the Hon'ble Punjab & Haryana High Court in 62 DTR 182. Accordingly, we do not accept the objection raised by the learned D.R.

(iii) Eclerx Services

18.1 The learned Authorised Representative of the assessee has submitted that this company is engaged in the high-end niche knowledge process outsourcing services consisting of data analytics and data processing services. It provides complete end-to-end solution to the clients by combining people, process the engineering and automation. Thus this company is dis-similar to the assessee as it engaged in the business of capital market, manufacture, retail, travel, etc. He has pointed out that the functional comparability of this company has been examined by this Tribunal in the series of decisions including the decision in the case of e4e Business Solutions India Pvt. Ltd. (supra).

18.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that when this company is in the business of ITCS then it is functionally comparable with the assessee.

18.3 We have considered the rival submissions as well as the relevant material on record. At the outset, we note that an identical issue has been considered by the co-ordinate bench of this Tribunal in the case of e4e Business Solutions India Pvt. Ltd. (supra) in para 11.2 as under :

" 11.2. Eclerx Services Ltd.

The learned AR of the assessee has submitted that this company is engaged in the high-end services and therefore, this company is basically a KPO and not a BPO. He has referred to Annual Report of this company at page 26 of the paper book -II and submitted that as it is clear from the Annual Report that this company is a knowledge process outsourcing (K. P. O) providing data analytics and data process solutions to global enterprise clients. This company supports core and complex activities for its clients using proprietary processes and a scalable offshore delivery model. This company has access to the capital market and therefore, this company is a public listed KPO company in India. The company is also engaged in consulting services and process outsourcing as well as in the activity of process re-engineering and automation apart from middle office and back office support to capital market. Therefore, keeping in the diversified high-end services, this company cannot be considered as functionally comparable with the assessee. In support of his contention, he has relied upon the decision of the Special Bench of the Mumbai Tribunal in the case of *Maersk Global Services* (147 ITD 83).

i) On the other hand, learned Departmental Representative has submitted that this company is undisputedly in the business of ITeS and therefore, the nomenclature that of KPO will not make it functionally different from the assessee. He has relied upon the orders of the authorities below.

ii) We have considered the rival submissions as well as relevant material on record. We find that the company Eclerx Services Ltd. is engaged in diversified activity of providing services including analytic services and data process solutions to its global clients. The service provided by Eclerx Services Ltd., is in various areas

including capital market and therefore, the services are in the nature of consultancy and end to end support through trade centre including trade confirmation, settlement, transaction, maintenance and analytic and reporting. Thus it is apparent from the nature of the activity of this company that it is not providing a simple service of data processing but it is engaged in the activity of providing high-end services involving decision making analysis which requires thought process and evaluation of various facts and factors. Functional comparability of this company with that of simple BPO's service providing company has been examined by the Special Bench in the case of *Maersk Global Services* (supra) in paras.82 & 83 as under :

"82. In so far as M/s eClerx Services Limited is concerned, the relevant information is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets-financial services and retail and manufacturing. It is claimed to be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality. Keeping in view the nature of services rendered by M/s eClerx Services Pvt. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns.

83. For the reasons given above, we are of the view that if the functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Pvt. Ltd. and Mold-Tec

Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparables for the purpose of determining ALP of the transactions of the assessee company with its AEs. We, therefore, direct that these two entities be excluded from the list of 10 comparables finally taken by the AO/TPO as per the direction of the DRP.

Thus it is clear that the Special Bench found that this company is not comparable with BPO company which are engaged only in low end services of data processing. Accordingly, we direct the AO/TPO to exclude Eclerx Services Ltd. from the list of comparables for the purposes of determining ALP.”

Thus it is clear from the finding of the Tribunal that the functional comparability of this company has been examined by the Special Bench in the case of **Maersk Global Services reported in 147 ITD 83** and it was found that this company is mainly engaged in providing high end services involving specialized knowledge and automation expertise in the field and therefore the same cannot be compared with a low end service provider company.

Following the earlier decisions of this Tribunal, we direct the Assessing Officer/TPO to exclude this company from the list of comparables.

19.1 Next grievance is regarding Working Capital Adjustment. The learned Authorised Representative has submitted that the TPO has restricted the working capital adjustment to 0.09% instead of actual working capital adjustment as worked out by the TPO.

19.2 An identical issue was considered while deciding the objections of the assessee in software development services segment. Accordingly, we direct the Assessing Officer/TPO to reconsider the working capital adjustment by considering the objections of the assessee and after excluding certain companies directed by us.

20. The revenue has raised the following grounds :

- “ 1. The order of the learned CIT(A) is opposed to law and facts of the case..
2. On the facts and in the circumstances of the case, the CIT(A) erred in law in directing the Assessing Officer to reduce the telecommunication expenses incurred in foreign currency, both from the Export turnover as well as total turnover for the purpose of computation of deduction u/s IOA of the IT Act without appreciating the fact that the statute allows exclusion of such expenditure only from the ETO by way of specific definition of export turnover as envisaged by sub-clause (4) of Explanation 2 below sub-section 8 of section 10A. On the other hand, there is no specific provision in section 10A warranting exclusion of the above expenses from the total turnover also.
3. 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.
4. The appellant craves leave to add, alter, amend and/ or delete any of the grounds mentioned above.”

20.1 The only issue arises in the revenue's appeal is regarding exclusion of the telecommunication expenses incurred in foreign currency both from export turnover as well as total turnover.

20.2 We have heard the rival submissions as well as considered the relevant material on record. At the outset we note that this issue is now covered by the judgment of Hon'ble jurisdictional High Court in the case of Tata Elxsi Ltd. reported in 349 ITR 98. We further note that an identical issue has been decided by this Tribunal in assessee's own case for Assessment Year 2006-07 vide order dt.6.3.2015 in ITA No.1480/Bang/2010 in para 31 as under :

" 31. We have heard the ld. Counsel for the assessee and the ld. D.R. on the issues raised in this regard. Taking into consideration the decision rendered by the Hon'ble High Court of Karnataka in the case of CIT V Tata Elxsi Ltd. (2012) 349 ITR 98 (Karn), we are of the view that it would be just and appropriate to direct the Assessing Officer to exclude telecommunication charges and insurance charges incurred be excluded both from export turnover and total turnover, as has been prayed for by the assessee in the alternative. In view of the acceptance of the alternative prayer, we are of the view that no adjudication is required on the ground whether the aforesaid sums are required to be excluded form the export turnover."

In view of the judgment of Hon'ble jurisdictional High Court in the case of Tata Elxsi Ltd. (supra) as well as the decision of the Tribunal in assessee's own case for the Assessment Year 2006-07, we do not find any illegality in the order of CIT (Appeals).

21. In the result, the appeal of assessee is partly allowed and revenue's appeal is dismissed.

Order pronounced in the open court on the 11th day of May, 2016.

Sd/-
(INTURI RAMA RAO)
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.

(True copy)

By Order

Asst. Registrar, ITAT, Bangalore