

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

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

IT(TP)A No.391/Bang/2012
Assessment year : 2005-06

The Asst. Commissioner of Income Tax, Circle 12(3), Bangalore-560 001	Vs.	M/s. Symbol Technologies India Pvt. Ltd., RMZ-Ecospace, Block 3B, Sarjapur Outer Ring Road, Varthur Hobli, Bangalore-560 037. PAN: AAECS 7171H
APPELLANT		RESPONDENT

IT(TP) A No.296/Bang/2012
Assessment year : 2005-06

M/s. Symbol Technologies India Pvt. Ltd., Bangalore-560 037. PAN: AAECS 7171H	Vs.	The Asst. Commissioner of Income Tax, Circle 12(3), Bangalore.
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Revenue by	:	Dr. P.K. Srihari, Addl. CIT (DR)
Assessee by	:	Shri Eric Mehta & Smt. Shilpa S., CAs

Date of hearing	:	19.03.2015
Date of Pronouncement	:	27.03.2015

ORDER

Per N.V. Vasudevan, Judicial Member

IT(TP)A No.391/Bang/2012 is an appeal by the Revenue and IT(TP)A No.296/Bang/2012 is an appeal by the Assessee. Both the appeals are directed against the order dated 5.1.2012 of CIT(Appeals)-IV, Bangalore, relating to assessment year 2005-06.

2. The main issue that arises for consideration in the appeal by the Revenue and by the Assessee are relating to the addition made to the total income consequent to determination of Arm's Length Price (ALP) in respect of international transaction entered into by the Assessee with its Associated Enterprises (AE) u/s.92 of the Income Tax Act, 1961 (Act). The addition made consequent to determination of ALP by the TPO and addition on account of transfer pricing adjustment was a sum of Rs.2,43,93,255. The CIT(A) gave partial relief to the Assessee. Aggrieved by the relief allowed by the CIT(A), the revenue is in appeal before the Tribunal. Apart from the transfer pricing adjustment, the AO also excluded telecommunication expenses and travel expenses from the total turnover without excluding the same from the Export turnover also while computing deduction u/s.10A of the Act. The CIT(A) directed the AO to exclude telecommunication expenses and travel expenses both from the total turnover and export turnover while computing deduction u/s.10A of the Act. The revenue has challenged the said action of the CIT(A) also. Aggrieved

by the order of CIT(A) in not applying certain filters while choosing comparable companies the Assessee has filed appeal before the Tribunal.

3. The assessee is a company incorporated on 12th May, 2000 under the Companies Act, 1956. The Assessee is a wholly owned subsidiary of Symbol Technologies Inc. USA. The Assessee provides software development service to its holding company Symbol Technologies Inc. USA.

4. During the financial year 2004-05 relevant to the assessment year 2005-06, one of the international transaction that took place between the Assessee and Symbol Technologies Inc. USA was provision of software development and support services to the holding company at a price of Rs. 21,61,03,704/-.

5. In support of the assessee's claim that the price charged by it for services rendered to its AE was at arms' length, the assessee filed a report as required by the provisions of section 92E of the Act in Form 3EB together with detailed analysis. The assessee adopted Transaction Net Margin Method (TNMM) as the most appropriate method for determining the ALP. Operating profits to cost was adopted as the Profit Level Indicator ("PLI"). The PLI of the assessee was arrived at as follows:

Operating Revenue	Rs.21,61,03,704
Operating Cost	Rs.19,48,13,252
Operating Profit	Rs. 2,12,90,452
Op.pr/cost%	10.93%

6. The Transfer Pricing Officer (**TPO**) arrived at a final set of 17 comparable companies. The set of 17 comparable companies is given as **Annexure-I to this order.**

7. The assessee raised various objections to the methodology adopted and the reasons assigned by the TPO for rejecting the comparable chosen by the assessee in its TP study. The TPO finally passed an order u/s. 92CA of the Act and on the basis of the profit margins of comparable companies set out in Annexure-I to this order, arrived at arithmetic mean of 23.45% after working capital adjustment and 26.59% before working capital adjustment. The computation of the ALP by the TPO in this regard was as follows:-

“Computation of Arms Length Price:

The arithmetic mean of the Profit Level indicators is taken as the arms length margin. (Please see Annexure B for details of computation of PLI of the comparables). Based on this, the arms length price of the software development services rendered by the taxpayer to its AE(s) is computed as under:

Arithmetic mean PLI	26.59%
Less: Working capital Adjustment (Annexure-C)	<u>3.14%</u>
Adj.Arithmetic mean PLU	23.45%

Arm's Length Price:

Operating Cost	Rs.19,48,13,252/-
Arms Length Margin	23.45% of the operating cost
Arms Length Price (ALP) At 123.45% of operating cost	Rs.24,04,96,960/-

Price received vis-à-vis the Arms Length Price:

The price charged by the tax payer to its Associated Enterprises is compared to the Arms Length Price as under:

Arms Length Price (ALP) At 123.45% of operating cost	Rs.24,04,96,960
Price charged in the international transactions	Rs.21,61,03,704
Shortfall being adjustment u/s.92CA	Rs. 2,43,93,255

The above shortfall of Rs.2,43,93,255/- is treated as transfer pricing adjustment u/s 92CA.”

8. On appeal by the Assessee, the CIT(A) partly allowed the appeal of the Assessee. The following were the key findings of the CIT(A):-

- (i) Out of the 17 companies chosen by the TPO as the final set of comparable companies, the CIT(A) excluded 12 companies for the reason that these companies had related party transaction. The CIT(A) applied the filter of related party transaction by holding that to be chosen as a comparable company, the comparable companies should not have any related party transaction. Therefore even if there is a single related party transaction, the said companies were excluded from the list of comparable companies. By doing so, the CIT(A) could retain only 5 out of the final 17 comparable companies chosen by the TPO, viz., Bodhtree Consulting Ltd., Lanco Global System Ltd., Sankhya Infotech Ltd., Exensys Software Solution Ltd., and Visual Soft Technology Ltd. In coming to the above conclusion, the CIT(A) followed the decisions of this Hon'ble Tribunal in the case

of Mentor Graphics (Noida) (P.) Ltd. vs DCIT (2007] 109 ITD 101 (Del).

- (ii) One company, Exensys Software Solutions Ltd., was excluded because it was in multiple activities including software products, software services and for the reasons that the company was showing super normal profits because of amalgamation of another company by name Holool India Private Limited and such amalgamation had a material/significant impact on the results of Exensys for the financial year ending 31.3.2005.
- (iii) Satyam Computer Services Ltd., and Infosys Technologies Ltd., get excluded by applying the related party transaction filter. Nevertheless, the CIT(A) held that Satyam Computer Services Ltd., has to be excluded from comparable companies for non-reliability of financial data. In doing so, the CIT(A) followed the decision of this Hon'ble Tribunal in Agnity India Technologies v. ITO (ITA 3856/Del/2010) and SAP India Pvt. Ltd v. ITO [ITA No. 398/8/2008]. Likewise Infosys Technologies selected by the TPO, was rejected as a comparable based on high turnover and high risk. In doing so, the CIT(A) followed the decision of this Hon'ble Tribunal in Agnity India Technologies v. ITO and Genisys Integrated Systems (India) Pvt Ltd v. ITO (supra).

The CIT(A) also held that the Assessee would be entitled to 5% standard deduction under the proviso to Sec.92CA(2) of the Act.

9. After giving effect to the findings given above, still there would be a very negligible addition that will be sustained even after the CIT(A)'s order.

10. The Revenue and Assessee are in appeal before against the order of the CIT(A). The Assessee in its grounds of appeal emphasized its stand that some of the filters which the Assessee submitted should be applied in choosing some comparable companies have not been accepted by the CIT(A).

11. The Revenue is in appeal on the following grounds:-

- (1) the decision of the Hon'ble High Court of Karnataka in the case of *TATA Elxsi 349 ITR 98 (Karn)* wherein it was held that whatever is reduced from the export turnover should also be reduced from the total turnover, has been challenged by the Revenue in higher forums;
- (2) the learned CIT(A) erred in holding that the TPO erred in not excluding comparables have any related party transactions;
- (3) The Id.CIT(A) erred in holding that profit on cost of more than 50% of the comparable company(ies) is abnormal without giving reasons how functions discharged, assets deployed and risks assumed of such companies were different from that of the appellant company; and
- (4) The CIT(A) erred in holding that the Assessee is eligible for a standard deduction of 5% from the arm's length price under the proviso to Section 92C(2) of the Income-tax Act, 1961.

12. The grounds raised by the Assessee in its grounds of appeal are:-

- (a) Arbitrarily rejecting filters applied by the Respondent while undertaking the TP Study.

- (b) Modifying 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 for comparability.
- (d) Upholding the learned TPO's approach of using data available at the time of assessment proceedings.
- (e) Upholding the approach adopted by the learned TPO of collecting selecting information of the companies exercising power granted to him under Section 133(6) of the Income Tax Act, 1961 ("Act").
- (f) Not providing appropriate adjustment towards the risk differential between the Respondent and the entrepreneurial companies selected as comparables, while determining the arm's length price.

13. We have heard the rival submissions. As far as the grounds of appeal of the Revenue are concerned, the ground with regard to improper application of the Related Party Transaction (RPT) filter by the CIT(A), it is not in dispute before us that this Tribunal, in the cases of 24/7 Customer Pvt. Ltd. (ITA No.227/Bang/2010), and Sony India Private Ltd. reported in (2009) 315 ITR (80) 150 (Del.) and various other cases has taken a view that comparables having RPT of upto 15% of total revenues can be considered. In view thereof, the Revenue's grievance on this issue as projected in the relevant ground has to be allowed. It is held that the CIT(A) ought to have adopted a threshold limit of 15% of the total revenue attributable to related party transaction as ground for rejecting comparable

companies. Consequently it is held that comparable companies having RPT upto 15% of the total revenues alone can be included.

14. The Ground raised by the Revenue with regard to the action of the CIT(A) in excluding companies with abnormal profits is misconceived and the issue and does not arise out of the order of the CIT(A). As we have already seen the CIT(A) rejected some of the comparable companies chosen by the TPO by applying related party transaction filter. The filter of companies dealing in software products and abnormal profits owing to amalgamation of the companies during the relevant period thereby showing abnormal profits was applied to exclude Exensys Software solutions Ltd., was excluded for reasons of high turnover and high risk profile. Satyam Computer Services Ltd., has to be excluded from the comparable companies for non-reliability of financial data as it was involved in financial scam. In doing so, the CIT(A) followed the decision of this Hon'ble Tribunal in Agnity India Technologies v. ITO (ITA 3856/Del/2010) and SAP India Pvt. Ltd v. ITO [ITA No. 398/8/2008]. Therefore the grievance as projected by the Revenue in ground No.5 is misconceived. On the facts of the present case, we are of the view that the CIT(A) rightly excluded Exensys Software Solutions Ltd., and Satyam Computers Ltd., from the list of comparable companies.

15. As regards the standard deduction of 5% of the arm's length price allowed to the Appellant by the CIT(A), which is challenged in ground No.5

by the Revenue before the Tribunal, it is not in dispute before us that in view of the substitution of the Second proviso to Section 92C(2) of the Income-tax Act by the Finance (No.2) Act, 2009, the second ground of appeal (Ground No.3 in the appeal filed by the Revenue) may have to be allowed. Consequently it is held that if the difference between the arithmetic mean of the profit margins comparable companies ultimately retained and the profit margin of the Assessee is more than 5% than no deduction under the proviso to Sec.92C(2) of the Act could be allowed to an Assessee.

16. In view of the conclusion above that exclusion of comparable companies with RPT of less than zero percent is not valid, and that companies where RPT is less than 15% alone can be considered, then the comparable rejected by the CIT(A) on the basis of the said filter will have to be included along with the four comparable retained by the CIT(A). Although 12 comparable which were rejected on the basis of RPT being more than zero percent, one comparable viz., Four Soft Ltd., will have to be excluded since the RPT is at 19.89% and thus in excess of 15%. Sathyam Computers Ltd., will get excluded for the reason that the financial results are not reliable. The remaining 10 comparable companies which were excluded by the CIT(A) by applying the Related Party Transaction filter of 0% related party transaction will now have to be included. Their comparability with the Assessee in terms of other filters will be discussed in the following paragraphs.

17. The learned counsel for the Assessee also seeks exclusion of one comparable chosen by the TPO as a comparable viz., Sankhya Infotech Limited.

Sankhya Infotech Limited ('Sankhya')

18. It was submitted by the learned counsel for the Assessee that Sankhya is engaged in the business of development of software products & services and training. The company focuses on the development of niche products for the transport and aviation industry. However, segmental information in relation to the above mentioned activities is not available in public domain. Therefore, as Sankhya engages itself in products and services as well as software training, it cannot be considered as a comparable of the Appellant. The products developed and owned by Sankhya are listed below:-

(1) SILICON™ Training Suite of Products: The products are a comprehensive enterprise wide training platform that covers the entire spectrum of training in a paperless environment. It comprises of four products:-

- SILICON™ LMS (Training Management Information
- SILICON™ QT (Online Assessment System)
- SILICON™ LCMS (Learning Content Management System)
- IRMAQ™ : This is an integrated resource planning, management tracking system exclusively developed for Airline operations. It is an end-to-end solution for all Flight Operations.
- Sakai CLE : This is a widely used and popular open source LMS used in many leading educational institutions and corporate. The relevant extract

from the Annual report substantiating that the company also engages in different activities is reproduced below:

“2. Activities

The company as engaged in the business of development of Software Products & Services and training. The production of software is not capable of being expressed in any generic unit and hence it is not possible to give the information as required by certain clauses of paragraphs 3.4C and 4 D of Part II of Schedule VI of the Companies Act, 1956.”

19. The Delhi Tribunal in ITO v. Colt Technology Services India Pvt. Ltd. (judgment dated 23.10.2012 in ITA No. 609/Del/2011 for the assessment year 2005-06) has held that the said company is not a comparable to the assessee therein which was also in the business of software development.

20. The submissions made by the learned counsel for the Assessee are considered. The activities set out above and the decision of the Delhi ITAT rendered in the context of a software development company such as the Assessee makes it amply clear that this company Sankhya cannot be regarded as a comparable. The same is directed to be excluded from the list of comparable companies.

21. The learned counsel for the Assessee submitted before us that two of the comparable companies out of the 12 excluded by the CIT(A) by applying RPT filter and which gets included in the comparable companies because of 15% RPT being adopted as threshold limit for excluding companies for the purpose of comparability, viz., Four Soft Ltd., and Thirdware Solutions Ltd., will have to be excluded as these companies are

not functionally comparable. These companies according to him, will however, have to be excluded as these two companies were held to be not comparable with an Assessee such as the Assessee in the present case providing software development services by the ITAT Hyderabad Bench in the case of CNO IT Services (India) Pvt. Ltd. (Formerly known as Conseco Data Services (India) Pvt. Ltd.) Hyderabad vs. DCIT, Circle 1(2) Hyderabad, in ITA.No.1280/Hyd/2010 Assessment Year 2005-2006 order dated 12.2.2014.

22. We have considered his submission and find that the ITAT Hyderabad Bench on identical facts, held that the aforesaid two companies viz., Four Soft Ltd., and Thirdware Solutions Ltd., are not comparable companies in Software Development Services companies. The following were :-

“15.4. FOURSOFTE LIMITED : This comparable is objected on the same reason as this company is involved in product development and owns products namely 4S eTrans and 4S eLog. These products are used in Sun Microsystems Inc, in an Application Verification Kit Certified for Enterprises and assessee have been investing continuously on product developments. Since assessee is in the product development, having I.P. rights, the same is not comparable.

15.5. THIRDFWARE SOFTWARE SOLUTIONS LIMITED : This company is objected to by the assessee on the reason that the said Thirdware Software Solutions Ltd. is engaged in sale of software licence and related services and not a service provider. Referring to the annual report, it was submitted that this comparable was rejected by the ITAT, Pune in the case of Egain Communications Ltd. This company having revenue from product license and earning extraordinary profit due to intangible owns.

15.6. These three comparable above Flextronics Software Limited, Foursoft Limited and Thirdware Software Solution Limited were analysed by the Coordinate Bench of the Tribunal in the case of Intoto Software Solutions Pvt. Ltd. (supra) wherein it has been held as under :

"23. The other companies which are objected to by the assessee are Flextronics Software Limited, Foursoft Limited and Thirdware Software Solution Limited. As far as these three companies are concerned, the learned Counsel appearing on behalf of the assessee submitted that they are into both software as well as product development. He submitted that the TPO has taken note of the fact these companies are also into product development but has selected these companies as comparables by applying the filter of more than 70% of its revenue being from software development services. The learned Counsel submitted that the functions of these companies are different from the assessee who was into sole activity of software development for its associated enterprise. He submitted that the TPO has allocated the expenditure in the proportion of the revenue of these companies from software services and software products and has adopted the figure as segmental margin of the company and has taken these companies as comparables. He submitted that by taking the proportionate expenditure, the correct financial results would not emerge. He submitted that nothing prevented the Assessing Officer/TPO from obtaining the segmental details from the respective comparable companies before adopting them as comparable companies and before taking the operating margin for arriving at the arms length price. He submitted that wherever the segmental details are not available, then the said companies should not be taken as comparables. For this purpose, he placed reliance upon the decision of the Bangalore Tribunal in the case of First Advantage Offshore Services Pvt. Ltd. vs. The DCIT in ITA.No.1252/Bang/2010 wherein these companies were directed to be excluded from the list of comparables.

24. The learned D.R. however, supported the Orders of the authorities below.

25. Having heard both the parties and having gone through the material on record, we find that the TPO at page 37 of his order has brought out the differences between a product company and a software development services provider. Thus, it is clear that he is aware of the functional dissimilarity between a product company and a software development service provider. Having taken note of the difference between the two functions, the Assessing Officer ought not to have taken the companies which are into both the product development as well as software development service provider as comparables unless the segmental details are available. Even if he has adopted the filter of more than 75% of the revenue from the software services for selecting a comparable company, he ought to have taken the segmental results of the software services only. The percentage of expenditure towards the development of software products may differ from company to company and also it may not be proportionate to the sales from the sale of software products. Under section 133(6) of the I.T. Act, the TPO has the power to call for the necessary details from the comparable companies. It is seen that the Assessing Officer/TPO as exercised this power to call for details with regard to the various companies. As seen from the annual report of Foursoft Limited which is reproduced at page 7 of the TPO's Order, the said company has derived income from software licence also and AMCs.

26. As far as Thirdware Software Solution Limited is concerned, we find from the information furnished by the said company that though the said company is also into product development, there are no software products that the company invoiced during the relevant financial year and the financial results are in respect of services only. Thus, it is clear that there is no sale of software products during the year but the said company might have incurred expenditure towards the development of the software products.

27. As far as Flextronics Software Limited is concerned, we find that at page 90 of his Order, the TPO has also observed that the said company has incurred expenditure for selling of products and has incurred R & D expenditure for development of the products. The above facts clearly demonstrate that there is functional

dissimilarity between the assessee and these companies and without making adjustment for the dissimilarities brought out by the TPO himself, these companies cannot be taken as comparable companies. The method adopted by the TPO to allocate expenditure proportionately to the software development services and software product activity cannot be said to be correct and reasonable. Wherever, the Assessing Officer/TPO cannot make suitable adjustment to the financial results of the comparable companies with the assessee company to bring them on par with the assessee, these companies are to be excluded from the list of comparables. Therefore, we direct the Assessing Officer/TPO to exclude these three companies from the list of comparables".

Respectfully, following the same, we accept the assessee's objections and direct the TPO to exclude the above three companies from the list of comparables."

23. In view of the aforesaid decision rendered on identical facts and circumstances, we are of the view that Foursoft Ltd., and Thirdware Solutions Ltd., should be excluded from the list of comparable companies.

24. The learned counsel for the Assessee submitted before us that TATA Elxsi Ltd., a comparable company out of the 12 excluded by the CIT(A) by applying RPT filter and which gets included in the comparable companies because of 15% RPT being adopted as threshold limit for excluding companies for the purpose of comparability. It was his submission that this company will however, have to be excluded as this company was held to be not comparable with an Assessee such as the Assessee in the present case providing software development services by

the ITAT Hyderabad Bench in the case of CNO IT Services (India) Pvt. Ltd. (Formerly known as Consec Data Services (India) Pvt. Ltd.) Hyderabad vs. DCIT, Circle 1(2) Hyderabad, in ITA.No.1280/Hyd/2010 Assessment Year 2005-2006 order dated 12.2.2014.

25. We have considered his submission and find that the ITAT Hyderabad Bench on identical facts, held on comparability of TATA Elxsi Ltd. as follows:

“15.7. TATA ELXSI LIMITED : The objection of the assessee is that TATA Elxsi operating two segments –system communication services and software development services. The TPO accepted the software development services segment in his T.P. analysis and assessee’s objection is that the software development services segment itself comprises of three sub-services namely (a) product design services (b) design engineering services and (c) visual computing labs. It was submitted that these services are not akin to assessee software services and segmental information of only product design services could have been accepted by the TPO as a comparable but not the entire software development service. Since company’s operations are functionally different as such, the same is not comparable. Further, assessee is also objecting on the basis of intangible scale of operations. The coordinate bench in the case of Intoto (supra) considered the issue as under in para 22.

“22 Tata Elxsi Limited : As regards this company, the learned Counsel appearing on behalf of the assessee, filed before us the reply of Tata Elxsi Limited to the Addl. CIT (Transfer Pricing), Hyderabad, wherein the concerned Officer has been informed that Tata Elxsi Limited is specialised Embedded Software Development Service Provider and that it cannot be compared with any other software development company. It was submitted that because of the specialisation and also because of diverse nature of its business, it is very difficult to scale-up the operations of Tata Elxsi Limited. In view of this, Tata

Elxsi Limited has informed that it is not fair to use its financial numbers to compare it with any other company. The communication dated 25th August, 2009 to the TPO is placed before us. As this communication was not before the TPO at the time of transfer pricing adjustment we deem it fit and proper to remand this issue also to the file of the TPO to reconsider adopting this company as the comparable in the light of observations of this company to the TPO in the case of another assessee. In the result, the Assessing Officer/TPO is directed to reconsider the issue in accordance with law, after affording a reasonable opportunity of being heard to the assessee.”

Keeping the assessee’s objections and the decisions of the Coordinate Bench, prima facie, we are of the view that TATA Elxsi Limited is functionally different and has incomparable size to that of the assessee. Further, we are unable to verify whether the segmental profits adopted by the TPO pertain to entire software development services or pertain to limited service akin to assessee services. Since, these aspects are not clear from the data furnished before us, we direct the TPO to examine and in case, the segmental profits of a particular service is not available, then, to exclude the TATA Elxsi Limited from the list of comparables. Accordingly, this issue is restored to the file of TPO for examination and to decide in accordance with law and facts, after affording reasonable opportunity of being heard to assessee.”

26. Though the issue has been set aside to the AO in the aforesaid decision, the ITAT Hyderabad in the case of NTT Data India Enterprise Application Services Pvt.Ltd., ITA No.1612/Hyd/2010 order dated 23.10.2013 and in a subsequent ruling in the case of Invensys Development Centre (India) Pvt.Ltd., ITA No.1256/Hyd/2010 order dated

28.2.2014, held that TATA Elxsi is not functionally comparable with that of a software development service provider such as the Assessee.

27. In view of the aforesaid decision rendered on identical facts and circumstances, we are of the view that TATA Elxsi Ltd., should be excluded from the list of comparable companies.

28. In the chart filed before us the learned counsel for the Assessee has submitted that Bodhtree Consulting Ltd., should be excluded from the list of comparables because of the RPT being more than 15%. Infosys Technologies Ltd., should be excluded as it has diversified operations and engaged in development of niche products, owns brands, intangibles and has huge scale of operations etc., In this regard, the learned counsel for the Assessee relied on the following observations of the Hyderabad ITAT Bench in the case of IVY Computech P.Ltd. Vs. ACIT ITA No.1558/hyd/2010 for AY 05-06:-

(f) Bodhtree Consulting Ltd.: The learned AR objecting to the aforesaid company being treated as a comparable submitted that the related party transaction of the aforesaid company being more than 25% of its revenue i.e., precisely 34%, it fails the RPT filter of more than 25% adopted by the TPO himself. For this contention the learned AR referred to the observation made by the TPO at page 289 of the Paper Book. The Learned AR submitted that since the aforesaid company fails the RPT filter it cannot be treated as a comparable. The learned DR supported the order of the TPO.

We have considered the submissions of the parties and perused the materials on record. The ground on which the learned AR seeks for exclusion of the aforesaid company is, its related party

transaction as a percentage to the total revenue is 34% which is more than the accept/reject matrix of more than 25% fixed by the TPO. It is to be noted that in final filters adopted by the TPO in para 8.7 of his order he himself has excluded companies having RPT of more than 25%. We, therefore, direct the AO to examine this aspect and exclude it from the list of comparables if the assessee's contention is found to be correct.

In course of hearing the learned DR has contended that the decisions relied upon by the assessee will not apply to the facts of the present case as they relate to different assessment years. However, on perusal of the orders cited before us, we find many of them to be relating to the impugned assessment year. Hence, contention of the learned DR is not acceptable.”

(d) Infosys Technologies Ltd.: The learned AR objected to the aforesaid company being treated as a comparable in view of its extraordinary high turnover of about Rs. 6,859 crores compared to the total turnover of about Rs. 66 crores of the assessee from both the segments and it was contended by the learned AR that under no circumstances Infosys Technologies Ltd. and WIPRO can be treated as comparable to the assessee as it is a giant in the sector of software development and ITES having considerable brand value.

The learned DR, on the other hand, while strongly opposing contention of the assessee, submitted that the assessee itself in its own TP Study had selected Infosys Technologies as a comparable having found it to be functionally similar. Hence, the assessee's contention to exclude companies as comparables would be totally irrelevant.

The learned AR in his rejoinder submitted that though the assessee had selected Infosys Technologies Ltd. as a comparable but it is not estopped from objecting to the company being selected as a comparable if it has been mistakenly considered as a comparable by the assessee. In support of such contention, the learned AR relied upon the decision of the ITAT Special Bench in the case of Quark Systems (38 SOT 207).

We have heard submissions of the parties and perused the materials on record. So far as Infosys Technologies Ltd. is concerned the issue of comparability of the aforesaid company

has been considered by different Benches of the Tribunal including the Hyderabad Benches. It is to be noted that the consistent view of different Benches of the Tribunal is to the effect that Infosys Technologies Ltd. being a big company in all respects including the range of turnover is not a comparable to small companies which are captive service providers having considerably low turnover. In fact, the Hon'ble Delhi Court in a judgement dated 19.7.2013 in the case of Agnity India Ltd. upheld the decision of ITAT Delhi Bench in excluding Infosys Technologies Ltd. as a comparable in view of its size. It is a fact that the assessee in the TP Study had selected Infosys Technologies Ltd. as a comparable. However, as held by ITAT Special Bench in the case of Quark Systems Ltd. (supra) merely because the assessee had selected it as a comparable it cannot operate as an estoppel in raising objections with regard to comparability of the aforesaid company. Therefore, keeping in tune with the consistent view of different Benches of the Tribunal in respect of the aforesaid company, we direct the AO/TPO to exclude the aforesaid company from the list of comparables."

29. Respectfully following the aforesaid decision of the Tribunal which is also in relation to AY 05-06, we direct that Bodhtree Consulting Ltd., and Infosys Technologies Ltd., be excluded from the list of comparable companies for the purpose of determining the ALP.

30. The learned counsel for the Assessee submitted that Geometric Software Solutions Ltd., should be excluded as it has RPT of 22%. In this regard our attention was drawn to the decision of the ITAT Bangalore in the case of EMC Data Storage Systems (India) Pvt. Ltd. IT(TP)A.No.1274/Bang/2010 for AY 06-07. It is seen that the aforesaid decision relates to AY 06-07 and we do not know the details of the RPT in AY 05-06. We therefore deem it fit and proper to remand the question of

excluding this company as a comparable to the TPO. If the RPT is more than 15% of the total revenues than this company should be excluded from the list of comparable companies. We hold and direct accordingly.

31. According to the learned counsel for the Assessee, if the submissions of the assessee are accepted, then the arithmetic mean of the comparables retained would be within the range of +/- 5% of the Assessee's Net Margin. Therefore, the other grounds raised in the memorandum of appeal are not pressed at this stage. He has however sought liberty to urge the said grounds in any future proceeding, appellate or otherwise, and in these proceedings at a future point in time. The prayer sought by the learned counsel for the Assessee in this regard is accepted.

WORKING CAPITAL ADJUSTMENT : [Ground 2 (g)]

32. The Assessee has pointed out that while working out the adjustment to be made to the profit margins on account of working capital adjustment, the TPO did not take into account the advance received by the Assessee from its Associated Enterprise on the ground that these advances were utilized for acquiring fixed assets. The Assessee pointed out before DRP that the advances were provided to the Assessee by the AE to meet its current working capital as well as the future requirements. Accordingly, the Assessee, being a service provider utilizes these funds for carrying out its day to day operations and also to set off against the provision of services (current or future). The Assessee also submitted that the AE can make

advance payments to assist the Assessee in its cash flows. Any advance payment made shall be taken into consideration when settling the final fees. It was also pointed out that the fixed assets were acquired out of the business operations and not out of the advances given by the AE. The TPO as well as the DRP did not consider this claim by examining the details furnished by the Assessee but held that the advances received from the AE were utilized for acquiring fixed assets.

33. Before us, the learned counsel for the Assessee reiterated submissions made before DRP. The learned counsel therefore prayed for inclusion of advances received from AE while computing working capital for arriving at the adjustment to be made to the margins of the Assessee towards working capital adjustment. The learned DR relied on the Directions of the DRP.

34. We have given a careful consideration to the rival submissions. We are of the view that there is no basis for the TPO to come to a conclusion that advances received from AE, as having been utilized for purchase of fixed assets and therefore they need to be ignored while computing working capital adjustment to the profit margin of the Assessee. Having come to this wrong conclusion without any basis, the TPO has proceeded to ignore the advances received from AE while computing working capital adjustment. In our view such an approach cannot be sustained. Besides the above, the DRP has ignored the submissions made by the Assessee

regarding non utilization of the advances received for acquiring fixed capital. Before us the Assessee did not demonstrate regarding the utilization of advances from the AE. In our view the submissions made by the Assessee that the advance received from the AE should be considered while working out the working capital adjustment deserves to be accepted, if the Assessee demonstrates that such advances were not utilized for acquisition of fixed assets. If it is so demonstrated, these advances need to be included for working out the working capital of the Assessee while computing adjustment towards working capital. The issue is accordingly remanded to the AO/TPO and the Assessee is directed to file the necessary details to demonstrate its case regarding advances not having been utilized for acquiring fixed assets. The AO/TPO will afford opportunity of being heard to the Assessee and decide the issue in accordance with law.

35. The AO/TPO is accordingly directed to work out the profit margins and working capital adjustment in the light of the directions given above.

36. The Revenue in the grounds of appeal before the Tribunal (Ground No.2 & 3) has also projected its grievance regarding the action of the learned Dispute Resolution Panel in directing the AO to exclude telecommunication expenses and travel expenses both from total turnover as well as export turnover while computing deduction u/s.10A of the Act. The AO excluded from the export turnover, while computing deduction

u/s.10A of the Act telecommunication expenses and travel expenses on the ground that these expenses are attributable to delivery of software outside India and expenses incurred on rendering technical services outside India. It is the plea of the Assessee that at all times during the relevant previous year, it was engaged in development of computer software and not in rendering any technical services and that telecommunication expenses were incurred not in connection with delivery of computer software outside India. Without prejudice to its contention that the aforesaid sums should not be excluded from the export turnover while computing deduction u/s.10A of the Act, the Assessee has also made an alternate prayer that expenses that are reduced from the export turnover should also be reduced from the total turnover and in this regard has placed reliance on the decision of the Hon'ble Karnataka High Court in the case of *CIT v. Tata Elxsi Ltd [2012] 349 ITR 98 (Karn)*. The alternate claim was accepted by the CIT(A) against which the revenue has raised ground No.2 & 3 before the Tribunal.

37. We have heard the Id. counsel for the assessee and the Id. DR 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 the CIT(A) has rightly directed the AO to exclude telecommunication charges and travel expenses incurred be excluded both from export turnover and total

turnover. The relevant grounds of appeal of the Revenue are accordingly dismissed.

38. In the result the appeal by the Assessee and the Revenue are partly allowed.

Pronounced in the open court on this 27th day of March, 2015.

Sd/-

(JASON P. BOAZ)
Accountant Member

Sd/-

(N.V. VASUDEVAN)
Judicial Member

Bangalore,
Dated, the 27th March, 2015.

/D S/

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.