

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

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

I.T. (T.P) A. No.1071/Bang/2013
(Assessment Year : 2008-09)

Dy. Commissioner of Income Tax,
Circle 12(1), Bangalore.

.... Appellant.

Vs.

M/s. Misys Software Solutions (India) Pvt. Ltd.,
Eagle Ridge, Embassy Golf Links Business Park,
Off IRR, Domlur, Bangalore-560 071.

..... Respondent.

C.O. No.22/Bang/2016
(In I.T. (T.P) A. No.1071/Bang/2013)
(Assessment Year : 2008-09)
(By Assessee)

Appellant By : Shri Pramod Singh, CIT (D.R)

Respondent By : Shri T. Suryanarayana, Advocate.

Date of Hearing : 08.08.2017.

Date of Pronouncement : 27.09.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M.

This appeal by the revenue and cross objection by the assessee are directed against the order dt.11.4.2013 of Commissioner of Income Tax (Appeals) for the Assessment Year 2008-09.

2. The assessee is a wholly owned subsidiary of Misys International, Luxembourg which is a part of Misys Group based in US. The assessee carried out software development services, IT Enabled Services (ITES) and Marketing Support Services to its Associated Enterprises (AEs). The assessee has entered into international transactions as follows :

Particulars	Amount in Rs
Provision of software development services	94,52,37,458/-
Provision of ITES	1,10,47,711/-
Provision of marketing support services	2,77,01,926/-
Recharge of expenses paid	1,22,52,278/-
Reimbursement of expenses received	1,39,52,326/-

Thus there are three segments in which the assessee has entered into international transactions and benchmark the same by using TNMM as MAM. The TPO selected a fresh set of comparables in each of the segments and accordingly proposed the adjustment under Section 92CA in each of the segment as under :

- i) Provision for software development services : Rs.9,71,97,173.
- ii) Provision for ITES : Rs.10,66,562.
- iii) Provision of marketing support services : Rs.1,89,10,349.

The assessee challenged the action of the Assessing Officer / TPO before the CIT (Appeals). The CIT (Appeals) applied turnover filter and accordingly excluded some of the comparables and retained the balance

comparables selected by the TPO. Thus the assessee as well as revenue are aggrieved by the impugned order of the CIT (Appeals) and raised the following grounds :

Revenue's 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 learned CIT(A) erred in law in directing the AO to exclude the reimbursement of expenses incurred in foreign currency both from the export turnover as well as from total turnover for the purpose of computation of deduction u/s 10A without appreciating the fact that the statute allows exclusion of such expenditure only from export turnover by way of specific definition of export turnover as envisaged by Sub-clause (4) of Explanation 2 below Sub-section (8) of Section 10A and the total turnover has not been defined in this Section.
4. On the facts and in the circumstances of the case the learned CIT(A) erred in directing the AO to compute deduction u/s 10A in the above manner by placing reliance on the decision of Hon'ble High Court of Karnataka in the case of M/s Tata Elxsi Ltd., which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Supreme Court.
5. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable, and accordingly erred in excluding M/s Flextronics Ltd., M/s iGate Global Solutions Ltd., M/s Infosys Technologies Ltd., M/s Mindtree Consulting Ltd., M/s Persistent Systems Ltd., M/s Sasken Communication Technologies Ltd., M/s Tata Elxsi Ltd., and M/s Wipro Ltd. (seg), in Software development segment as comparables.
6. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that M/s Celestial Biolabs Ltd in Software segment should be excluded from the list of comparables because of abnormal high profit margin, without giving reasons how

functions discharged, assets deployed and risks assumed of such companies were different from the assessee company.

7. On the facts and in the circumstances of the case the learned CIT(A) erred in holding that M/s ICC International Agencies (seg) and M/s Priya International Ltd. (seg) in Marketing Support Services segment should be excluded from the list of comparables because of abnormal high profit margin, without giving reasons how functions discharged, assets deployed and risks assumed of such companies were different from the assessee company.
8. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that the TPO was not justified in applying the employee cost filter and directed to include M/s Indus Networks Ltd which was excluded in the software development services segment by using this filter.
9. On the facts and in the circumstances of the case the learned CIT(A) has erred in rejecting the diminishing revenue filter used by the TPO to exclude companies that do not reflect the normal industry trend.
10. On the facts and in the circumstances of the case the learned CIT(A) failed to appreciate that the different year ending filter applied by the TPO is necessary to exclude companies which do not have the same or comparable financial cycle as the tested party.
11. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that M/s Avani Cimcon Technologies, cannot be taken as comparable as the segmental details are not available when the company itself has accepted that it is a pure Software Development Provider .
12. On the facts and in the circumstances of the case the learned CIT(A) has erred in excluding M/s Celestial Biolabs Ltd. from the final list of comparables of Software Segment ignoring the fact that the annual report clearly provides that primary segment of the company has been Software development and it qualifies all the qualitative and quantitative filters applied by the TPO.

13. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that M/s Bodhtree Consulting Ltd. being functionally different, cannot be taken as comparable ignoring the fact that it contradicts Ld CIT(A)'s own finding that the services offered are in the nature of the ITES services and relying on the website information without giving any finding from the annual report
14. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that M/s KALS Information Systems Ltd, cannot be taken as comparable as the company carries inventories relying on website information which is unsupported by the annual report when there is no evidence to indicate sale of software products as well.
15. On the facts and in the circumstances of the case the learned CIT(A) has erred in rejecting the TPO's finding that there is no evidence on record to prove that events in the company had any bearing on the margins earned by the company.
16. On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that M/s Genesys International Corporation Ltd being functionally different, cannot be taken as comparable even though the Ld. CIT(A) has held that services are in nature of ITES services and it is not necessary for the TPO to go into the horizontal & vertical segments of the same sub segment, therefore no comparable can be eliminated on the basis of functional differences.
17. On the facts and in the circumstances of the case the learned CIT(A) has erred in rejecting M/s Genesys International Corporation Ltd as a comparable without identifying any extraordinary variable which would distinguish this company from the assessee in terms of functions performed, assets used and risks undertaken i.e. qualitative and quantitative analysis.
18. 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.
19. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.

C.O. Grounds :

1. “ That the learned CIT(A) erred in upholding the learned TPO’s approach of rejecting the economic analysis undertaken by the Respondent and conducting a fresh economic analysis for determining the arm’s length price.
2. That the learned CIT(A) erred in upholding the learned TPO’s approach of disregarding application of multiple year/ prior year data as used by the Respondent in the TP documentation and holding that current year (i.e. Financial Year 2007-08) data for companies should be used for comparability.
3. That the learned CIT(A) erred in upholding the learned TPO’s approach of using data as at the time of assessment proceedings, instead of that available as on the date of preparing the TP documentation for comparable companies while determining the arm’s length price, ignoring the fact that this data was not available to the Respondent at the time of complying with the TP documentation requirements.
4. That the learned CIT(A) erred in upholding the learned TPO’s approach of collecting selective information of the companies by exercising powers granted to him under section 133(6) of the Act that was not available to the Respondent in the public domain and relying on the same for comparability purposes.
5. That the learned CIT(A) erred in upholding the TPO’s approach of ignoring the limited risk nature of the services provided by the Respondent and in not providing an appropriate adjustment towards the risk differential, even when full-fledged entrepreneurial companies are selected as comparables.
6. That the learned CIT(A) erred in upholding the learned TPO’s approach of using the related party filter greater than 25% filter instead of related party filter > 10% as applied by the Respondent.

Software Development Services:

7. That the learned CIT(A) ought to have held that certain companies (Flextronics Limited, Infosys Technologies Limited, Persistent Systems Limited, Sasken Communication Technologies Limited, Tata Elxsi Limited and Wipro Limited) fail the test of comparability, even apart from having a turnover > INR 200 crores and thus not comparable to the Respondent in respect of its software development services.
8. That the learned CIT(A) erred in upholding the learned TPO’s approach of using the onsite revenue > 75% of export revenue filter for the exclusion of Akshay Software Technologies Limited which is comparable to the Respondent in respect of its software development services.
9. That the learned CIT(A) erred in upholding the learned TPO’s approach of using the export revenue filter for the exclusion of (Melstar Information Technologies Ltd., Powersoft Global Solutions Ltd., Synetairos Technologies Ltd.) which is comparable to the Respondent in respect of its software development services.
10. That the learned CIT(A) erred in confirming the action of the learned TPO of accepting certain companies (Lucid Software Limited, Thirdware Solutions Limited, Quintegra Solution Limited) that fail the test of comparability, as comparable to the Respondent in respect of its software development services.
11. That the learned CIT(A) erred in upholding the inclusion of Softsol India Ltd in the final list of comparables, despite the said company having related party transactions to the extent of 18.38% of its revenues during the assessment year in question.

12. That the learned CIT(A) erred in confirming the action of the learned TPO by not accepting Adithya Birla Minacs IT Services Limited that were selected in the show-cause notice but were incorrectly rejected in the TP order, as comparable to the Respondent in respect of its software development services.
13. That E-zest Solutions Ltd. ought to stand rejected as a comparable as it is functionally dissimilar to the Appellant.

Information Technology Enabled Services:

14. That the learned CIT(A) ought to have held that certain companies (Coral Hub Limited, EclerxServices Ltd., Jindal IntellicomPvt. Ltd., Mold-Tek Technologies Ltd.) fail the test of comparability, even apart from having abnormal profits or losses and thus not comparable to the Respondent in respect of its information technology enabled services.
15. That the learned CIT(A) ought to have held that certain companies (Infosys BPO Limited and Wipro Limited) fail the test of comparability, even apart from having a turnover > INR 200 crores and thus not comparable to the Respondent in respect of its information technology enabled services.
16. That the CIT(A) ought to have held that Accentia Technologies Ltd. fails the test of comparability, even apart from the fact that there were mergers and acquisitions affecting its margins and is thus not comparable to the Respondent.
17. That the learned CIT(A) erred in upholding the learned TPO's approach of using the export revenue filter for the exclusion of (Ask Me Info Hubs Limited, TSR Darashaw Limited, In House Productions Limited (Vans Information)-Healthcare segment, National Securities Depository Limited.-Seg) which is comparable to the Respondent in respect of its information technology enabled services.
18. That the learned CIT(A) erred in confirming the action of the learned TPO of accepting certain companies (Acropetal- Engineering Design Service, Caliber Point Business Solutions, Cosmic Global Ltd, CrossdomainSolution Private Limited, Datamatics Financial Services Limited. Seg - BPO), that fail the test of comparability, as comparable to the Respondent in respect of its information technology enabled services.
19. That the learned CIT(A), having rejected the application of diminishing revenues/persistent losses filter by the TPO, erred in excluding Ace Exports Ltd as a comparable solely on the ground that it had a negative margin.

Marketing Support Services:

20. That the learned TPO erred in re-characterising the services provided by the Respondent as commission agency services, which ought to have been appreciated and adjudicated by the CIT(A).
21. That the learned CIT(A) ought to have held that certain companies (Priya International Limited, ICC International Agencies Limited) fail the test of comparability, even apart from having abnormal profits or losses and thus not comparable to the Respondent in respect of its marketing support services.
22. That the learned CIT(A) erred in confirming the action of the learned TPO of accepting Hartron Informatics Limited that fails the test of comparability, as comparable to the Respondent in respect of its marketing support services.
23. That the learned CIT(A) erred in confirming the action of the learned TPO of rejecting certain companies (Salora International Limited, Khaitan (India) Limited, Competent Automobiles Co Limited, Times Innovative Media Limited) that does not fail the test of comparability, and thus considered as comparable to the Respondent in respect of its marketing support services.

24. That the learned CIT(A) erred in upholding the learned TPO's approach of using the commission revenue filter for the exclusion of Empire Industries Limited which is functionally comparable to the Respondent in respect of its marketing support services.
25. That the learned CIT(A) erred in failing to appreciate that the margins of the comparables and that of the Respondent would need to be recomputed by the AO after including foreign exchange loss / gain for the relevant year, as the case may be, on the basis that such gains or losses are operating in nature.
26. That the contention of the learned AO is bad in law and on facts while stating that the order of the learned CIT(A) is prejudicial to the interest of revenue and is opposed to law and the facts and circumstances of the case.

Claim of Deduction under section 10A of the Act

27. That the learned CIT(A) failed to appreciate that telecommunication expenses/ expenditure in foreign currency incurred in the previous year should not have been reduced from the 'export turnover' in the first place for the purposes of computation of deduction under Section 10A of the Act."

3. Ground No.1 of the Revenue's appeal is general in nature and do not require any specific adjudication.

4. Ground Nos.2 to 4 are regarding exclusion of expenses incurred in foreign currency from export turnover as well as total turnover for the purpose of computing the deduction under Section 10A of the Income Tax Act, 1961 (in short 'the Act').

5. Having considered the rival submissions as well as the material on record, we find that the issue of expenditure incurred in foreign currency is reduced from export turnover an equal amount should also be reduced from total turnover while computing the deduction under section 10A of the Act, is covered in favour of the assessee by the decision of the Hon'ble Karnataka High Court in the case of **CIT Vs. Tata Elxsi Ltd.** 349 ITR 98 (Kar). The decision of Hon'ble jurisdictional High Court is a binding precedent for the Bangalore Bench

of the Tribunal. Hence, this issue is decided against the revenue and in favour of assessee.

6. The rest of the grounds of the revenue's appeal and the grounds raised in the cross objection by the assessee are regarding Transfer Pricing Adjustment and functional comparability of the companies selected by the TPO. Therefore we will deal with these issues each segment-wise.

Software Development Services

7. The TPO selected 20 companies in the set of comparables as under :

Sl. No.	Name of the Company	Mark-up on Total Costs (WC – unadjusted)	Mark-up on Total Costs (WC – adj) as per TPO
1.	AvaniCimcon Technologies	25.62%	28.65%
2.	Bodhtree Consulting Ltd.	18.72%	19.18%
3.	Celestial Biolabs	87.94%	81.69%
4.	e-zest Solutions Ltd.	29.81%	29.69%
5.	Flextronics (Aricent)	7.86%	5.73%
6.	iGate Global Solution Ltd.	13.99%	11.88%
7.	Infosys	40.37%	38.34%
8.	Kals Information Systems Ltd. (Seg)	31.29%	28.68%
9.	LGS Global Ltd.	27.52%	26.28%
10.	Mindtree Ltd. (Seg)	16.41%	15.06%
11.	Persistent Systems Ltd.	20.31%	20.34%
12.	Quintegra Solution Ltd.	21.74%	18.28%

Sl. No.	Name of the Company	Mark-up on Total Costs (WC – unadjusted)	Mark-up on Total Costs (WC – adj) as per TPO
13.	R Systems (India) Ltd.	15.30%	13.07%
14.	R S Software (India) Ltd.	7.41%	8.37%
15.	Sasken Communication Technologies Ltd. (Seg)	7.58%	6.59%
16.	Tata Elxsi (Seg)	18.97%	18.44%
17.	Thirdware solution Ltd.	19.35%	16.57%
18.	Wipro Ltd. (Seg)	28.45%	29.50%
19.	Softsol India Ltd.	17.89%	15.13%
20.	Lucid Software Ltd.	16.50%	17.48%
	Mean (Average)	23.65%	22.45%

8. The CIT (Appeals) rejected 8 companies on the ground of turnover filter and abnormally high profit filter. The companies which were rejected by the CIT (Appeals) on this filter are as under :

- i. Flextronics Ltd.
- ii. iGate Global Solutions Ltd.
- iii. Infosys Technologies Ltd.
- iv. Mindtree Ltd.
- v. Persistent Systems Ltd.
- vi. Sasken Communication Technologies Ltd.
- vii. Tata Elxsi Limited
- viii. Wipro Limited (Seg)

Apart from these 8 companies the CIT (Appeals) has also excluded four companies on functional dissimilarity as under :

- i) Avani Cincom Technologies Ltd.
- ii) Bodhtree Consulting Ltd.
- iii) Celestial Biolabs Ltd.
- iv) Kals Information Systems Ltd.

9. The revenue is now seeking inclusion of these 12 companies in the set of comparables whereas the assessee is seeking exclusion of total 13 companies out of the set of 20 companies selected by the TPO on functional dissimilarity. As regards 8 companies which were excluded by the CIT (Appeals) on turnover filter and high profit margin, the learned Authorised Representative of the assessee has stood at Bar that so far as the filter applied by the CIT (Appeals) as turnover and high profit margin, the assessee has no objection against these grounds of the revenue's appeal and to that extent the grounds of revenue's appeal may be allowed by reversing the order of the CIT (Appeals). However the learned Authorised Representative has submitted that out of these 8 companies the assessee is also seeking exclusion of 4 companies on functional dissimilarities. Therefore in fact the assessee has no objection if these four companies are restored to the set of comparables.

10. In view of the statement of learned Authorised Representative of the assessee when both the assessee as well as revenue are agreed for not applying any turnover filter, the order of the CIT (Appeals) to that extent is set aside. Further the assessee is also not objecting against the

restoration of 4 companies in the set of comparables. Therefore the following 4 companies are restored to the set of comparables.

(i) Flextronics (Aricent)

(ii) i-Gate Global Solution Limited

(iii) Mindtree Limited (Seg.)

(iv) Sasken Communication Technology Limited (Seg.)

Since the rest of the 4 companies out of 8 excluded by the CIT (Appeals) on turnover filter are challenged by the assessee on functional dissimilarity therefore the issue of comparability of those 4 companies in software development services segment will be considered and decided along with the other companies which are sought to be excluded by the assessee in the cross objection. The assessee is seeking exclusion of total 13 companies out of which 8 companies are from the group of 12 companies excluded by the CIT (Appeals) and 5 companies which were retained by the CIT (Appeals). The companies which are challenged by the assessee on functional dissimilarity are as under :

(i) Avanicin Cincom Technologies Ltd.

(ii) Bodhtree Consulting Limited

(iii) Celestial Bio-labs Limited

(iv) e-Zest Solutions Limited

(v) Infosys Limited

(vi) Kals Information Systems Limited (Seg.)

(vii) Persistent Systems Limited

(viii) Quintegra Solution Limited

(ix) Tata Elxsi Limited (Seg.)

(x) Thirdware Solution Limited

(xi) Wipro Limited (Seg.)

(xii) Softsol India Limited

(xiii) Lucid Software Limited.

The learned Authorised Representative of the assessee has submitted that an identical set of 20 comparable companies was selected by the TPO in the case of **Telelogic India (Pvt) Ltd. Vs. DCIT 65 taxmann.com 165** and this Tribunal while considering the functional comparability of the companies selected by the TPO has held vide order dt.8.6.2016 that 12 companies are functionally not comparable and accordingly directed to be excluded. Though one company namely **Bodhtree Consulting Ltd.** was retained by the Tribunal however, the learned Authorised Representative has submitted that the Tribunal did not examine the functional comparability of **Bodhtree Consulting Limited** while passing the said order in the case of **Telelogic India (Pvt) Ltd. Vs. DCIT (supra)**. The Tribunal has dealt with the objections of the assessee only regarding fluctuating margin and not the functional comparability or dissimilarity.

The learned Authorised Representative submitted that the functional comparability of this company has been examined by the Tribunal in the case of Autodesk India Pvt. Ltd. Vs. DCIT in IT(TP)A No.1369/Bang/2014 for the Assessment Year 2009-10. He has referred to the Annual Report of the said company to show that the functions are same for this year as reproduced by the Tribunal for the Assessment Year 2009-10. The learned Authorised Representative has relied upon the decision dt.13.5.2016 of the co-ordinate Bench of this Tribunal in the case of **Autodesk India Pvt. Ltd. Vs. DCIT** in IT(TP)A No.1369/Bang/2014 and submitted that in the said decision the Tribunal examined the functional comparability of the said company and found that this company is not functionally comparable with the assessee which is providing software development services to its AE. Thus he has contended that in view of the decisions of the co-ordinate Bench of this Tribunal (supra), all these 13 companies are to be excluded from the set of comparables.

11. On the other hand, the learned Departmental Representative has submitted that though the functional comparability of these companies are considered by the co-ordinate Bench of this Tribunal, however the decision in the other case cannot be super imposed in the case of the assessee without examining FAR analysis separately and independently. The Id. DR has further contended that Infosys Limited is functionally similar to the assessee as the predominant business activity of this company cannot be treated as functionally different. The learned Departmental Representative has relied upon the orders of authorities

below and contended that apart from the four companies which are restored to the set of comparables, the remaining 8 companies should also be restored to the set of comparables.

12. We have considered the rival submissions as well as the relevant material on record. At the outset, we find that in the case of **Telelogic India (Pvt) Ltd. Vs. DCIT** (supra) the TPO selected an identical set of 20 companies for determining the ALP of the said assessee in software development services segment transactions. Thus when the TPO itself taken the identical set of 20 companies as functionally comparable to the said company namely **Telelogic India (Pvt) Ltd. Vs. DCIT** (supra) then the functional profile of the said company and the assessee before us are treated as identical by the TPO. The Tribunal while considering the functional comparability of all these 13 companies has held in para 10 as under :

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

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

S.No.	Name of the Company
1	AvaniCimcon Technologies Ltd
2	Bodhtree Ltd
3	Celestial Biolabs Ltd

4	E-Zest Solutions Ltd
5	Infosys Technologies Ltd
6	KALS Information Systems Ltd (Seg.)
7	Lucid Software Ltd
8	Persistent Systems Ltd
9	Quintegra Solutions Ltd
10	Softsole India Ltd
11	Tata Elxsi Ltd (Seg.)
12	Thirdware Solutions Ltd (Seg
13	Wipro Ltd (Seg.)

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

"7.0 Avani Cincom Technologies Ltd.

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

7.2 Before us, the learned Authorised Representative reiterated the assessee's objections for the inclusion of this company from the list of comparable companies on the ground that this company is not functionally comparable to the assessee as it is into software products. It is also submitted that the segmental details of this company are not available and the Annual Report available in the public domain is not complete. It was further contended that the information obtained by the TPO under section 133(6) of the Act, on the basis of which the TPO included this company in the final list of comparable companies, has not

been shared with the assessee. In support of this contention, the learned Authorised Representative placed reliance on the following judicial decisions:

(i) *Trilogy E-Business Software India (P.) Ltd. v. DCIT* (ITA No.1054/Bang/2011)

(ii) *Telecordia Technologies India (P.) Ltd. v. ACIT* (ITA No.7821/Mum/2011)

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

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

- (i) The extract from the Website of the company clearly indicates that it is primarily engaged in development of software products. The extract mentions that this company offers customised solutions and services in different areas;
- (ii) The Website of this company evidences that this company develops and sells customizable software solutions like "DX Change, CARMA, etc.

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

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

- (i) The assessee needs to demonstrate that the FAR analysis and other relevant facts of the Trilogy case are equally applicable to the facts of the assessee's case also. Unless the facts and the FAR analysis of Trilogy case is comparable to that of the assessee in the case on hand, comparison between the two is not tenable.
- (ii) After demonstrating the similarity and the comparability between the assessee

and the Triology case, the assessee also needs to demonstrate that the facts applicable to the Assessment Year 2007-08, the year for which the decision in case of *Triology E-Business Software India Pvt. Ltd. (supra)* was rendered are also applicable to the year under consideration i.e. Assessment Year 2008-09.

9.5.3 It is a well settled principle that the assessee is required to perform FAR analysis for each year and it is quite possible that the FAR analysis can be different for each of the years. That being so, the principle applicable to one particular year cannot be extrapolated automatically and made applicable to subsequent years. To do that, it is necessary to first establish that the facts and attendant factors have remained the same so that the factors of comparability are the same. Viewed in that context, the assessee has not discharged the onus upon it to establish that the decision rendered in the case of *Triology E-Business Software India Pvt. Ltd. (supra)* can be applied to the facts of the case and that too of an earlier year i.e. Assessment Year 2007-08. The assessee, in our view, has not demonstrated that the facts of *Triology E-Business Software India Pvt. Ltd. (supra)* are identical to the facts of the case on hand and that the profile of the assessee for the year under consideration is similar to that of the earlier Assessment Year 2007-08. In view of facts as discussed above, we deem it fit to remand the matter back to the file of the Assessing Officer / TPO to examine the comparability of this company afresh by considering the above observations. The TPO is directed to make available to the assessee information obtained under section 133(6) of the Act and to afford the assessee adequate opportunity of being heard and to make its submissions in the matter, which shall be duly considered before passing orders thereon. It is ordered accordingly."

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

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

7.6.1 We have heard both parties and perused and carefully considered the material on record. It is seen from the record that the TPO has included this company in the final set of comparables only on the basis of information obtained under section 133(6) of the Act. In these circumstances, it was the duty of the TPO to have necessarily furnished the information so gathered to the assessee and taken its submissions thereon into consideration before deciding to include this company in its final list of comparables. Non furnishing the information obtained under section 133(6) of the Act to the assessee has vitiated the selection of this company as a comparable.

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

8.0 Bodhtree Consulting Ltd.

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

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

- (ii) The abnormally fluctuating margins indicate that this company bears higher risk in contrast to the assessee who has earned consistent margins over the years, indicating difference in the risk profile between this company and the assessee.
- (iii) This company has registered exponential growth of 67% in terms of revenue and 41% in terms of profits over the immediately preceding year which can be attributed to the development of a software application, MIDAS (Multi Industry Data Anomaly) which was made available for customers as SaaS (Software as a Service).

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

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

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

9. Celestial Biolabs Ltd.

9.1 This comparable was selected by the TPO for inclusion in the final list of comparables. Before the TPO, the assessee had objected to the inclusion of this company in the list of comparables for the reasons that it is functionally different from the assessee and that it fails the employee cost filter. The TPO, however, brushed aside the objections raised by the assessee by stating that the objections of functional dissimilarity has been dealt with in detail in the T.P. order for Assessment Year 2007- 08. As regards the objection raised in respect of the

employee cost filter issue, the TPO rejected the objections by observing that the employee cost filter is only a trigger to know the functionality of the company.

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

- (i) This company is engaged in the development of products in the field of bio-technology, pharmaceuticals, etc. and therefore is not functionally comparable to the assessee;
- (ii) This company has been held to be functionally incomparable to software service providers by the decision of the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 (*supra*);
- (iii) The co-ordinate bench of this Tribunal in its order in the case of *Triology E-Business Software India Pvt. Ltd. (supra)* at para 43 thereof had observed about this company that –

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

- (iv) The rejection/exclusion of this company as a comparable for Assessment Year 2007-08 for software service providers has been upheld by the co-ordinate benches of this Tribunal in the cases of LG Soft India Pvt. Ltd. in ITA No.112/Bang/2011, CSR India Pvt. Ltd. in IT(TP)A No.1119/Bang/2011 and by the ITAT, Delhi Bench in the case of Transwitch India Pvt. Ltd. in ITA No.6083/Del/2010.
- (v) The facts pertaining to this company has not changed from Assessment Year 2007-08 to Assessment Year 2008-09 and therefore this company cannot be considered for the purpose of comparability in the instant case and hence ought to be rejected. In support of this contention, the assessee has also referred to and quoted from various parts of the Annual Report of the company.

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

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

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

10. KALS Information Systems Ltd.

10.1 This is a comparable selected by the TPO. Before the TPO, the assessee had objected to the inclusion of this company in the set of comparables on grounds of functional differences and that the segmental details have not been provided in the Annual Report of the company with respect to software services revenue and software products revenue. The TPO, however, rejected the objections of the assessee observing that the software products and training constitutes only 4.24% of total revenues and the revenue from software development services constitutes

more than 75% of the total operating revenues for the F.Y. 2007-08 and qualifies as a comparable by the service income filter.

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

- (i) This company is functionally different from the software activity of the assessee as it is into software products.
- (ii) This company has been held to be functionally not comparable to software service providers for Assessment Year 2007-08 by the co-ordinate bench of this Tribunal in the assessee's own case. This company has been held to be different from a software development company in the decision of the Tribunal in the case of *Bindview India (P.) Ltd. v. DCIT* in ITA No.1386/PN/2010.
- (iii) The rejection of this company as a comparable has been upheld by co-ordinate benches of the Tribunal in the case of –
 - (a) *Triology E-Business Software India (P.) Ltd.* (ITA No.1054/Bang/2011).
 - (b) *LG Soft India (P.) Ltd.* IT(TP)A No.112/Bang/2011)
 - (c) *CSR India (P.) Ltd.* IT(TP)A No.1119/Bang/2011) and
 - (d) *Transwitch India Pvt. Ltd.* ITA No.6083/Del/2010)
- (iv) The facts pertaining to this company has not changed from Assessment Year 2007-08 to Assessment Year 2008-09 and therefore this company cannot be considered for the purpose of comparability in the case on hand and hence ought to be excluded from the list of comparables. In support of this contention, the learned Authorised Representative drew our attention to various parts of the Annual Report of this company.
- (v) This company is engaged not only in the development of software products but also in the provision of training services as can be seen from the website and the Annual Report of the company for the year ended 31.3.2008.
- (vi) This company has two segments; namely,

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

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

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

"11.0 Infosys Technologies Ltd.

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

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

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

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

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

12. Wipro Ltd.

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

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

- (i) This company owns significant intangibles in the nature of customer related intangibles and technology related intangibles, owns IPRs and has been granted 40 registered patents and has 62 pending applications and its Annual Report confirms that it owns patents and intangibles.
- (ii) the ITAT, Delhi observation in the case of *Agnity India Technologies Pvt. Ltd.* in ITA No.3856(Del)/2010 at para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and a market leader assuming all risks leading to higher profits, cannot be considered as comparable to captive service providers assuming limited risk;
- (iii) the co-ordinate bench of the ITAT, Mumbai in the case of *Telecordia Technologies India Pvt. Ltd.* (ITA No.7821/Mum/2011) has held that Wipro Ltd. is not functionally

comparable to a software service provider.

- (iv) this company has acquired new companies pursuant to a scheme of amalgamation in the last two years.
- (v) Wipro Ltd. is engaged in both software development and product development services. No information is available on the segmental bifurcation of revenue from sale of products and software services.
- (vi) the TPO has adopted consolidated financial statements for comparability purposes and for computing the margins, which is in contradiction to the TPO's own filter of rejecting companies with consolidated financial statements.

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

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

13. Tata Elxsi Ltd.

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

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

- (i) The co-ordinate bench of the Mumbai Tribunal in the case of *Telcordia Technologies (P.) Ltd. (supra)* has held that *Tata Elxsi Ltd.* is not a functionally comparable for a software development service provider.
- (ii) The facts pertaining to *Tata Elxsi Ltd.* have not changed from the earlier year *i.e.* Assessment Year 2007-08 to the period under consideration *i.e.* Assessment Year 2008-09 and therefore this company cannot be considered as a comparable to the assessee in the case on hand.
- (iii) *Tata Elxsi Ltd.* is predominantly engaged in product designing services and is not purely a software development service provider. In the Annual Report of this company the description of the segment 'software development services' relates to design services and are not to software services provided by the assessee.
- (iv) *Tata Elxsi Ltd.* invests substantial funds in research and development activities which has resulted in the 'Embedded Product Design Services Segment' of the company to create a portfolio of reusable software components, ready to deploy frameworks, licensable IPs and products. The learned Authorised Representative pleads that in view of the above reasons, *Tata Elxsi Ltd.* is clearly functionally different/dis-similar from the assessee and therefore ought to be omitted from the list of comparables.

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

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

software development services" relates to design services and are not similar to software development services performed by the assessee.

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

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

As can be seen from the extracts of the Annual Report of this company produced before us, the facts pertaining to Tata Elxsi have not changed from Assessment Year 2007-08 to Assessment Year 2008-09. We, therefore, hold that this company is not to be considered for inclusion in the set of comparables in the case on hand. It is ordered accordingly.

14. E-Zest Solutions Ltd.

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

14.2 Before us, the learned Authorised Representative contended that this company ought to be excluded from the list of comparables on the ground that it is functionally different to the assessee. It is submitted by the learned Authorised Representative that this company is engaged in 'e-Business Consulting Services', consisting of Web Strategy Services, I T design services and in Technology Consulting Services including product development consulting services. These services, the learned Authorised Representative contends, are high end ITES normally categorised as knowledge process Outsourcing ('KPO') services. It is further submitted that this company has not provided segmental data in its Annual Report. The learned Authorised Representative submits that since the Annual Report of the company does not contain detailed descriptive information on the business of the company, the assessee places reliance on the details available on the company's website which should be considered while evaluating the company's functional profile. It is also submitted by the learned Authorised

Representative that KPO services are not comparable to software development services and therefore companies rendering KPO services ought not to be considered as comparable to software development companies and relied on the decision of the co-ordinate bench in the case of *Capital IQ Information Systems (India) (P.) Ltd . v. Dy. CIT (International Taxation)* [2013] 32 taxmann.com 21 (Hyd. -Trib.) and prayed that in view of the above reasons, this company *i.e.* e-Zest software *Ltd.*, ought to be omitted from the list of comparables.

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

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

15. Thirdware Solutions Ltd. (Segment)

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

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

- (ii) In the case of *E-Gain Communications (P.) Ltd. v. ITO* [2009] 118 ITD 243/[2008] 23 SOT 385 (Pune), the Tribunal has directed that this company be omitted as a comparable for software service providers, as its income includes income from sale of licences which has increased the margins of the company.

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

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

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

16. Lucid Software Ltd.

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

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

India (P.) Ltd and *CSR India (P.) Ltd. (supra)* and by the Delhi Bench of the Tribunal in the case of *Transwitch India (P.) Ltd. (supra)*. (ITA No.6083/Del/2010)

- (iv) The factual position and circumstances pertaining to this company has not changed from the earlier Assessment Year 2007-08 to the period under consideration i.e. Assessment Year 2008-09 and therefore on this basis, this company cannot be considered as a comparable in the case on hand.
- (v) The relevant portion of the Annual Report of this company evidences that it is in the business of product development.

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

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

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

17. Persistent Systems Ltd.

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

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

- (i) This company is engaged in software designing services and analytic services and therefore it is not purely a software development service provider as is the assessee in the case on hand.
- (ii) Page 60 of the Annual Report of the company for F.Y. 2007-08 indicates that this company, is predominantly engaged in 'Outsourced software Product Development Services' for independent software vendors and enterprises.
- (iii) Website extracts indicate that this company is in the business of product design services.
- (iv) The ITAT, Mumbai Bench in the case of *Telcordia Technologies India (P.) Ltd. (supra)* while discussing the comparability of another company, namely Lucid Software Ltd. had rendered a finding that in the absence of segmental information, a company be taken into account for comparability analysis. This principle is squarely applicable to the company presently under consideration, which is into product development and product design services and for which the segmental data is not available.

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

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

17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this

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

18. Quintegra Solutions Ltd.

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

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

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

"Leveraging its proven global model, Quintegra provides a full range of custom IT Solution (such as development, testing, maintenance, SAP, product engineering and infrastructure management services), proprietary software products and consultancy services in IT on various platforms and technologies."
- (iii) This company is also engaged in research and development activities which resulted in the creation of Intellectual Proprietary Rights (IPRs) as can be evidenced from the statements made in the Annual Report of the company for the period

under consideration, which is as under :

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

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

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

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

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

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

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

19. Softsol India Ltd.

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

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

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

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

24. As regard the objection of the ld. DR that Quintegra Solution *Ltd.* has been selected by the assessee itself, we notice that the functional comparability of this company has been examined by the Tribunal in the case of *M/s 3DPLM Software Solutions Ltd (supra)* and it was found that the said company is engaged in the

different field of services i.e. product designing and analytic services as well as in proprietary of software product and are in research and development activity which has resulted in creation of its intellectual property rights. Therefore, the said company is not functionally comparable with pure software development service activity. Once the company is found to be a non-comparable company with the assessee, the same is required to be excluded from the set of comparables even if the said company is selected by the assessee itself. This view was taken by the decision of the Special Bench of Chandigarh Tribunal in the case *QUARK SYSTEMS (P.) LTD (supra)*.

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

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

As regards the additional grounds raised by the assessee, the co-ordinate bench of the Tribunal also dealt with an identical issue in para 24 (supra) and therefore when the functional comparability of these two companies have been examined by the Tribunal and it was found that these companies are not comparable with the software development services provider because of different activities as well as engaged in the software products, R&D activities and resulting in creation of Intellectual Property

Rights (IPRs) then, even if these companies are selected by the assessee in its T.P. Analysis the same shall be excluded from the comparables. The comparability of these companies was already tested by this Tribunal, then the same cannot be included in the list of comparables. Accordingly, by following the earlier order of the Tribunal as well as Special Bench decision in the case of *Quark Systems (P.) Ltd. (supra)*. We admit the additional grounds raised by the assessee. In view of the findings of the co-ordinate bench of the Tribunal in the case of *Kodiak Network India Pvt. Ltd. (supra)*, we hold that 12 companies out of 13 sought by the assessee are required to be excluded from the list of comparables where as the company Bodhtree Consulting Ltd. is accepted as a good comparable of software development services provided by the assessee. Accordingly, we direct the TPO/A.O to exclude 12 companies as mentioned in para 25 of the order of the co-ordinate bench (supra) from the set of comparables and recomputed the ALP after considering the claim of risk adjustment as well as the benefit of tolerance range of + / - 5% as per the proviso to section 92C(2).' ò

In view of the findings and decision of the co-ordinate Bench of this Tribunal on the functional comparability of these companies, we direct the TPO/A.O. to exclude 12 companies from the set of comparables. As regards the functional comparability of **Bodhtree Consulting Ltd.**, it is clear from the order of the Tribunal in the case of **Telelogic India (Pvt) Ltd. Vs. DCIT** (supra), the Tribunal has considered the objections of the assessee only on account of fluctuating profit margin of the said company and therefore no other functional aspect was examined by the Tribunal in the said case. Whereas in the case of **Autodesk India Pvt. Ltd. Vs. DCIT** (surpa) an identical issue of functional comparability was considered by the Tribunal in paras 5.1 to 5.3 as under :

“ (i) **Bodhtree Consultancy Ltd.**

5.1 The learned Authorised Representative of the assessee submitted that this company is engaged in the business of development of software product and highly fluctuating margin, this company is also functionally dis-similar to the assessee as it is engaged in providing open and end-to-

end web solution, software consultancy, design and development of solution by using latest technology. Thus this company is engaged in the development of software products. He has referred to the Annexure to the Directors Report and submitted that this company is following the method of revenue recognition from software development based on software developed and billed to client whereas the expenditure is recognized when it is incurred towards software development. Therefore, there is no match between the expenditure and the revenue from software development segment. Thus once this company is in the software development, the same cannot be compared with the assessee being software development services provided to its AEs.

5.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and further submitted that the co-ordinate bench of this Tribunal in the case of Ariba Technologies India Pvt. Ltd. Vs. ITO in IT(TP)A No.441 & 442/Bang/2012 Dt.2.2.2016 has found this company to be comparable with software development service provider.

5.3 We have considered the rival submissions and the relevant material on record. In case of Ariba Technologies India Pvt. Ltd. (supra), the objections against this company was on the ground of extra-ordinary profit and therefore the Tribunal has no occasion to examine the functional comparability of this company except the ground raised by the assessee regarding extra-ordinary profit margin. The learned Authorised Representative of the assessee has referred to the Annexure to the Directors Report wherein segment-wise and product-wise has been reported as under :

ñSegment-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, software consultancy, design and development of solutions, using the latest technology.

Outlook

Given the steady growth in the niche areas like data cleansing and software development, and the new initiatives in the areas of e-publication and e-learning, the management has reason to be optimistic about the future growth.ò

Revenue Recognition

Revenue from software development is recognized based on software developed and billed to clients.

Thus it is clear that this company is having one segment namely software development under which this company is providing software solutions including open and end-to-end web solution, software consultancy, design and development of solution. Further, the company is also providing data cleansing and software development. The activity in which this company engaged includes consultancy design, products like data cleansing. Therefore this company develop the products and own the products. Further this company is following a different revenue recognition policy which does not match with the accounting policy of the assessee. Therefore the financial results of this company are not contemporaneous to the financial result of the assessee. Hence this company cannot be compared with pure software development service provider in the category of captive service provider like the assessee. Accordingly, we direct the A.O./TPO to exclude this company from the list of comparables."

Thus it is clear that in the said order the Tribunal has examined the functional profile of the said company and various segments from which this company is generating revenue and finally come to the conclusion that this company is not functionally comparable with pure software development services provider like assessee. Accordingly following the said decision of the co-ordinate Bench of this Tribunal and by taking note of the fact that there is no difference in the functional profile of the company as we note from the segment-wise and product-wise performance of the said company was given at page No.12 of the Annual Report for the year under consideration. Accordingly, this company is directed to be excluded from the set of comparables. Hence we direct

the TPO/A.O. to exclude all these 13 companies from the set of comparables as under :

- (i) **Avanicin Cincom Technologies Ltd.**
- (ii) **Bodhtree Consutling Limited**
- (iii) **Celestial Bio-labs Limited**
- (iv) **e-Zest Solutions Limited**
- (v) **Infosys Limited**
- (vi) **Kals Information Systems Limited (Seg.)**
- (vii) **Persistent Systems Limited**
- (viii) **Quintegra Solution Limited**
- (ix) **Tata Elxsi Limited (Seg.)**
- (x) **Thirdware Solution Limited**
- (xi) **Wipro Limited (Seg.)**
- (xii) **Softsol India Limited**
- (xiii) **Lucid Software Limited.**

13. The revenue has also challenged the decision of the CIT (Appeals) in respect of the company **Indus Network Limited** which was excluded by the TPO by applying the employee cost filter.

14. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. This company was selected by the assessee in its TP Study but excluded by the TPO on the ground that this company fails the employee cost filter of 25%. As regards the employee cost filter is a proper criteria for selection of the comparable, we find that this Tribunal has taken a consistent view that the employee cost to the total cost is a relevant factor to decide the business model and functional profile of the comparable. Therefore, when the TPO has applied a filter for all the comparable companies then the same cannot be rejected for the purpose of including one company in the set of comparables. We note that the co-ordinate Bench of this Tribunal vide order dt.26.08.2016 in the case of **DCIT VS. PMC Sierra India Pvt. Ltd.** in IT(TP)A No.882/Bang/2013 has considered the issue of inclusion and exclusion of this company on the employee cost filter in para 12 as under :

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

considered as a good comparable of the assessee. Hence we set aside the order of the CIT (Appeals) qua this issue and direct the TPO/A.O to exclude this company from the list of comparables.”

Accordingly, we set aside the impugned order of the CIT (Appeals) qua this issue and upheld the action of the TPO in excluding the said company from the set of comparables. Accordingly, the Ground Nos. 5, 6, 11 & 14 of the revenue’s appeal and Ground Nos.7 to 13 of the assessee's C.O. are disposed off.

ITES Segment

15. The revenue in Ground Nos.15 to 17 has challenged the exclusion of one company namely **Genesys International Corporation Limited**.

16. The assessee challenged the selection of this company by the TPO on the ground that this company was mainly engaged in the area of Geographical Information System (GIS) Services. Even the information provided in response to Notice under Section 133(6), this company stated that it provides high end GIS Services which includes the generation, processing, management and maintenance of data or GIS. Thus the assessee contended that functions performed by this company are not functionally comparable with the assessee which is providing only ITES to its AE. The CIT (Appeals) accepted this contention of the assessee and directed the Assessing Officer to exclude this company from the set of comparables.

17. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. At the outset, we find that the co-ordinate Bench of this Tribunal vide decision dt.14.08.2013 in the case of **Symphony Marketing Solutions India P. Ltd. Vs. ITO** in IT(TP)A No.1316/Bang/2012 for the same assessment year has examined the functional comparability of this company in para 22 and 23 as under :

ñGenesys International Corporation Ltd.

22. This company is listed at Sl. No.12 in the list of comparable companies chosen by the TPO. As far as this company is concerned, the stand of the assessee has been that this company is functionally not comparable and that it has a different employee skill set and that this company performs R&D services and also owns intangibles. This company is a geospatial services content provider specialising in land based technologies. From the notes to accounts of this company, it is seen that this company is engaged in providing geographical information services comprising of photogrammetry, remote sensing cartography, data conversion related computed based services and other related services. Further the business of this company requires skilled manpower and scientists, civil engineers, etc. The assessee is a routine ITES provider who does not require such highly skilled employees. Besides the above, this company also carries out R&D services and own intangibles. The aforesaid facts, in our view, will take this company out of the list of comparables. We may also point out that the objection of the assessee in this regard has been disregarded by the TPO by mere observation that it cannot be rejected on the basis that it is into different functional line within ITES. In this regard, we may refer to the decision of the ITAT Bangalore Bench in the case of *First Advantage Offshore Services Ltd. (supra)*, wherein it was observed as under:-

ñ39. Having heard both the parties and having considered their rival contentions, we find that the assessee had raised elaborate objections to each of the comparables in group 3 before the TPO. The TPO has also reproduced the said objection in his order para 6.5.1. of page 178 of his order. He has rejected the contention of the assessee by holding that every function within BPO sector can be from low end to high end and the activities of the assessee such as accounting, web management, network management are BPO

services using technology but these services are not categorized as KPO. He held that a call centre may offer support services like telemarketing to high end services like technical support services, where not only the level of knowledge, skill required would be high, but the technical knowledge as well would be high. According to him, back office transaction process services may be as remarkable and as complicated as insurance/market transaction processing services. He, therefore, rejected the contention of the assessee and treated the BPO as equivalent to KPO services.

40. We have to now consider whether a BPO and KPO are functionally similar and are comparable to each other. BPO is a subset of outsourcing and involves the contracting of the operations and responsibilities of specific business functions or process to a third party services provider. Often business processes outsourcing are information technology based and referred to as ITES-BPO. KPO is one of the sub-segment of the BPO industry. It involves outsourcing of core information related business activities which are competitively important or form an integral part of a company's value chain. It thus requires advanced analytical and technical skills as well as a high degree of specialist expertise. The KPO services include all kinds of research and information gathering. Thus it can be seen that even though both BPO and KPO are offering information Technology based services, the skill and expertise and may be even the tools required are different which may result in different economic results of both the segments. Thus, in such circumstances, we are of the opinion that they cannot be compared with each other and have to be excluded from the list of comparables.

23. It is thus clear from the aforesaid decision of the Tribunal that among the ITES companies there is a hierarchy in terms of skill required to provide services. It ranges from providing routine services where no skills are required and providing services where highly professionalized skills are required. Depending on the skills required to perform ITES the comparability has to be done. In view of the above, we are of the view that this company cannot be regarded as a comparable and deserves to be excluded from the list of comparables.

Following the earlier orders of this Tribunal, we do not find any error or illegality in the order of CIT (Appeals) directing the TPO/A.O. to exclude this company from the set of comparables. The assessee has not raised any ground in respect of the comparables selected by the TPO in ITES segment except supporting the order of CIT (Appeals) rejecting some of the companies.

MARKETING SUPPORT SERVICE SEGMENT

18. In marketing support service segment, the revenue in its Ground No.7 is seeking inclusion of two companies namely **M/s. ICC International Ltd. (Seg.)** and **M/s. Priya International Limited (Seg.)** which were excluded by the CIT (Appeals) from the set of comparables.

19. We have heard the learned D.R. as well as learned A.R. and considered the relevant material on record. As regards the functional comparability of **M/s. ICC International Agencies (Seg.)**, the co-ordinate Bench of this Tribunal vide order dt.28.2.2013 in the case of **Logica Pvt. Ltd. Vs. ACIT** in IT(TP)A No.1129/Bang/2011 has considered the functional comparability of this company in para 28 as under :

“ 28. We have given a careful consideration to the rival submissions and are of the view that the plea put forth by the assessee deserves to be accepted. As can be seen from the functional profile of ICC International Agencies Ltd. given by the assessee, which is not disputed by the TPO, that it does trading and also acts as commission agent for machineries used textiles industry. As against this, the functional profile of the assessee, as we have already seen, is only giving support services. Keeping in mind the functions and risk analysis, it is not possible to compare the assessee with ICC International Agencies Ltd. If ICC International Agencies Ltd. is not taken as a comparable, then the margin of the assessee would be well within the OP/Cost PLI of the other comparable companies chosen by the TPO. We accordingly hold that in respect of the international transactions of rendering marketing

support services, the price received by the assessee is at arm's length and no adjustment is called for. Ground No.5 raised by the assessee is accordingly allowed."

We find that there is no change in the functional profile of this company for the year under consideration. Accordingly, by following the earlier decision of this Tribunal, we do not find any reason to interfere with the order of the CIT (Appeals) qua this issue.

20. As regards the functional comparability of **Priya International** we find that the co-ordinate Bench of Delhi Tribunal in the case of **Metso Minerals (India) Pvt. Ltd. Vs. DCIT** vide order dt.28.08.2015 in IT(TP)A No.2449/Del/2014 has considered the functional comparability of this company at page 22 of the order as under :

" (ii) Priya International

This company was selected as comparable by the Transfer Pricing Officer. It is seen from the record that the Transfer Pricing Officer included this company in the final set of comparables selected by him. The appellant brought on record substantial factual evidence to establish that this company is functionally dissimilar and different from the appellant and therefore is not comparable. It is evident from page no. 740 to 743 of the paper book that this company is engaged in the provision of commissioning agency and trading of chemicals. This function is totally different from marketing services for the equipment of minerals and therefore, this company should be excluded for the purposes of comparison while determine the arm's length price of the international transaction in question."

21. We have also gone through the Annual Report of this company where two main segments are reported however none of these two segments satisfies the filter of 75% of revenue of total sales. Therefore none of the segments of this company can be considered as a good comparable for the purpose of determining the ALP. Following the decision of Delhi Bench of the Tribunal in the case of **Metso Minerals**

(India) Pvt. Ltd. Vs. DCIT (supra) as well as segmental data of this company, we do not find any error or illegality in the order of the CIT (Appeals) qua this issue.

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

Order pronounced in the open court on 27th Sept., 2017.

Sd/-
(INTURI RAMA RAO)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Bangalore,
Dt.27.09.2017.

*Reddy gp

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Senior Private Secretary
Income Tax Appellate Tribunal
Bangalore.