

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH “ B ”**

**BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND  
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

I.T.(T.P) A. No.1230/Bang/2013 (Assessment Year : 2008-09)		
Dy. Commissioner of Income Tax, Circle 12(5), Bangalore.	Vs.	M/s. Verisign Services India Pvt. Ltd., The Summit, No.6/B, 7 <sup>th</sup> Main, 3 <sup>rd</sup> Block, 80 Feet Road, Koramangala Indl. Layout, Bangalore-560 034
Appellant		Respondent.

C.O. No.164/Bang/2015  
(In I.T.(T.P) A. No.1230/Bang/2013)  
(Assessment Year : 2008-09)  
(By Assessee)

Assessee By : S/Shri P.K. Prasad & Umashankar Gautam, Advocates. Revenue By : Ms. Neera Malhotra, CIT (DR) (ITAT)-2, Bengaluru.
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Date of Hearing : 05.09.2017.

Date of Pronouncement : 25.10.2017.

**ORDER**

**Per Shri Vijay Pal Rao, J.M. :**

This appeal by the revenue and cross objection by the assessee are directed against the order dt.09.05.2013 of Commissioner of Income Tax (Appeals)-IV, Bengaluru for the Assessment Year 2008-09.

## 2. The revenue has raised the following grounds :

1. The order of the learned CIT(A) is opposed to law and facts of the case.
2. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to exclude the reimbursement of communication expenses 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.
3. 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. in Software development segment as comparables.
4. 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.
5. 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.

6. 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.
  7. 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.
  8. 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.
  9. 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.
  10. 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.
  11. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.
3. Ground No.1 is general in nature and do not require any specific adjudication.

4. Ground No.2 is regarding exclusion of communication expenses from both export turnover as well as total turnover while computing deduction under section 10A of the Act.

5. Having considered the rival submissions as well as the material on record, we find that the issue of expenditure incurred towards communication charges 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. Ground No.3 is regarding exclusion of certain companies by the CIT (Appeals) on the ground of size and turnover.

7. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. The Id. DR has submitted that the turnover and size of the company are not relevant factors for inclusion or exclusion of the companies in the set of

comparables. She has relied upon the decision of Hon'ble Delhi High Court in the case of **Chryscapital Investment Advisors (India) P. Ltd. Vs. DCIT 376 ITR 183 (Del)**.

8. On the other hand, the learned Authorised Representative has submitted that the assessee is not pressing the turnover and size of the company as a relevant factor for deciding the functional comparability however, the assessee is seeking exclusion of certain companies on the ground of functional dissimilarities as raised in the cross objections filed by the assessee.

9. Having considered the rival submissions as well as the relevant material on record, we note that the assessee has raised the issue of functional dissimilarity in respect of certain companies in the cross objections and therefore, in view of the concession of the learned Authorised Representative that the assessee has no objection to the ground of revenue so far as the size and turnover is not a relevant factor, the exclusion and inclusion of various companies as mentioned in Ground No.3 of revenue's appeal will be decided on the functional comparability and not on the turnover filter. Since this issue is raised by the assessee in the cross objection therefore, the functional comparability of some of these companies will be considered and decided while deciding the cross

objections of the assessee. Accordingly, the Ground No.3 of the revenue's appeal is partly allowed.

10. Ground No.4 is regarding exclusion of **M/s. Celestial Bio-labs Limited** on the reason of high profit margin.

11. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. It is now settled proposition on the point that the high profit or loss alone cannot be the criteria for inclusion or exclusion of an entity/company in the set of comparables however, if there is some extraordinary event or circumstances resulted the abnormal high profit or loss of a particular company then the said extraordinary event can be a relevant factor and ground for exclusion of the company from the set of comparables. Accordingly, to the extent of applying the high profit margin as a factor we decide this issue in favour of the revenue. The functional comparability of this company if required to be considered along with other comparable companies challenged by of the assessee.

12. Ground No.5 is regarding the employee cost filter applied by the TPO was rejected by the CIT (Appeals).

13. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. We find that the employee cost at 25% is very relevant factor and parameter for selecting the comparables to ensure that the business model of the comparable company is similar to the assessee as well as the business practice in the industry. In the service industry employee cost is the main component of the total cost and in case the employee cost is less than 25% of the total cost then it is a clear indication of outsourcing the business activities and therefore the said entity is having a different business model not similar to the general prevailing in the industry and the tested party. Therefore, we find the impugned order of CIT (Appeals) on this issue is erroneous and liable to be set aside. Hence the Ground No.5 is decided in favour of the revenue.

14. Ground Nos.6 & 7 are regarding exclusion of certain companies on the ground of diminishing revenue filter and different financial year.

15. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. The TPO applied the diminishing revenue filter as well as different financial year for rejecting certain companies. The CIT (Appeals) has reversed

the order of the TPO and held that these companies cannot be excluded on these grounds. As regards the different financial year, we find that the Hon'ble Delhi High Court in the case of **Chryscapital Investment Advisors (India) P. Ltd. Vs. DCIT** (supra) has held that if the financial data can reasonably extrapolated to make it contemporaneous to the financial data of the tested parties then comparable company cannot be rejected only on the ground of different financial year. On the issue of diminishing revenue the CIT (Appeals) has given a finding that there is no case of diminishing revenue as alleged by the TPO. The revenue has not brought before us any contrary fact or material to the finding of the CIT (Appeals). Accordingly, the Ground Nos.6 &7 of the revenue's appeal are dismissed.

16. Ground No.8 is regarding rejection of **M/s. Avani Cimcon Technologies Ltd.** as a comparable company.

17. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. The learned Departmental Representative has submitted that the TPO has obtained the information under Section 133(6) of the Act in which the said company has stated that it is in only one segment of software development

service therefore, there is no need of segmental details of this company. The learned Departmental Representative has further submitted that the CIT (Appeals) has rejected this company on the ground that this company is in the diversified activities and segmental details are not available which is contrary to the facts recorded by the TPO.

18. On the other hand, the learned Authorised Representative of the assessee has submitted that the CIT (Appeals) has considered the relevant facts regarding the functions and products of this company such as Dxchange, CARMA, etc as developed by this company. Further this company though claimed that it is pure software service provider however, this company offered software solutions, software development, consultancy and information technology to various clients. He has referred to the Annual Report of this company and submitted that this company derives revenue from various activities which includes software products such as portal builder solutions for destination, association, insurance for travel industry etc. He has relied upon decision dt.23.11.2012 of co-ordinate Bench of this Tribunal in the case of **Triology e-Business Software India Pvt. Ltd. Vs. DCIT** in ITA No.1054/Bang/2011.

19. We have considered the rival submissions as well as the relevant material on record. Though this company in response to Notice under Section 133(6) has stated that it is in the software development services however, from the Annual Report of this company it clear that it has been reported that this company is providing the services of diversified nature. The co-ordinate Bench of this Tribunal in the case of **Triology e-Business Software India Pvt. Ltd. Vs. DCIT** (supra) has considered the functional comparability of this company. We will deal with this issue while considering the cross objection of the assessee.
20. Ground No.9 is regarding **Kals Info Systems Ltd..** This ground is common to the grounds raised by the assessee in Cross Objection therefore, we will deal with this issue along with other grounds of the cross objection of the assessee.
21. Ground Nos.10 & 11 are general in nature and does not require any specific adjudication.
22. In the cross objection, the assessee has raised the following grounds :
- 1) “ That the learned Commissioner of Income Tax (Appeals(‘CIT(A)’) erred in upholding the rejection of the Respondent’s TP documentation on the basis that the data used in the computation of the arm’s length price was not reliable.**(corresponding to original cross objection 1)**
  - 2) That the learned CIT(A) erred in upholding the learned Transfer Pricing Officer’s (‘learned TPO’) approach of using data 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.**(corresponding to original cross objection 2)**

- 3) That the learned CIT(A) erred in upholding the learned TPO's approach of disregarding application of multiple year data/ 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.**(corresponding to original cross objection 3)**
- 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.**(corresponding to original cross objection 4)**
- 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 risk differential, even when the full-fledged entrepreneurial companies are selected as comparables.**(corresponding to original cross objection 5)**
- 6) The Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the approach of rejecting the comparability analysis of the Appellant in the TP Documentation and rejecting the Research and Development Expenses filter applied by the Appellant.**(corresponding to original cross objection 6 and 7)**
- 7) The Commissioner of Income Tax (Appeals) has rightly rejected the application of employee cost filter in directing the **inclusion** of **Indus Networks Ltd.** as a comparable which was earlier excluded by applying the employee cost filter and the same should be upheld rejecting the ground by the revenue. **(corresponding to original cross objection 7)**
- 8) The Commissioner of Income Tax (Appeals) erred in law and on facts by upholding the inclusion of **Softsol India Ltd.** on the grounds that it passes the TPO's filter of related party transactions to sales less than 25%, whereas this comparable **should have been excluded** on the grounds that it fails the Appellant's filter of related party transactions to sales less than 10%. **(corresponding to original cross objection 8)**

- 9) The Commissioner of Income Tax (Appeals) erred in law and on facts by excluding **Avani Cimcon Technologies Ltd.** only on the ground that its segmental details were not available, whereas this comparable **should also have been excluded on further grounds** that it was functionally dissimilar being a product company which was not verifiable merely on the basis of 133(6) information supplied by Avani Cimcon Technologies Ltd. to the transfer pricing officer. **(corresponding to original cross objection 9)**
- 10) The Commissioner of Income Tax (Appeals) **has rightly excluded Celestial Biolabs Ltd.** on the grounds of functional dissimilarity and abnormally high margins and the same should be upheld. **(corresponding to original cross objection 9)**
- 11) The Commissioner of Income Tax (Appeals) erred in law and on facts by excluding **Infosys Technologies Ltd.** only on the ground of application of turnover filter, whereas this comparable **should also have been excluded on further grounds** that it was functionally dissimilar being a product company, has significant R&D intangibles and brand value, and also on the ground that on the basis of relative turnover this was not a comparable. **(corresponding to original cross objection 9)**
- 12) The Commissioner of Income Tax (Appeals) **has rightly excluded Kals Information Systems Limited** on the grounds that the company is functionally dissimilar and also carries inventories and the same should be upheld. Further, on the basis of relative turnover also, it should be excluded from the final list of comparable. **(corresponding to original cross objection 9)**
- 13) The Commissioner of Income Tax (Appeals) erred in law and on facts by excluding **Persistent Systems Ltd.** only on the ground of application of turnover filter, whereas this comparable **should also have been excluded on further grounds** that it was functionally dissimilar being a product company engaged in providing outsourced software product development service. **(corresponding to original cross objection 9)**
- 14) The Commissioner of Income Tax (Appeals) erred in law and on facts by upholding the inclusion of **Quintegra Solutions Ltd.** on the grounds that it was a software development company and fails appellant's filter of research and development expenses to sales less than 3%, whereas this comparable **should have been excluded** on the grounds that it was functionally dissimilar being a company which is into niche area of Information Technology. **(corresponding to original cross objection 9)**

- 15) The Commissioner of Income Tax (Appeals) erred in law and on facts by excluding **Tata Elxsi Ltd.** only on the ground of application of turnover filter, whereas this comparable **should also have been excluded on further grounds** that it was functionally dissimilar being engaged in providing high-end hardware and software development activities.**(corresponding to original cross objection 9)**
- 16) The Commissioner of Income Tax (Appeals) erred in law and on facts by upholding the inclusion of **Thirdware Solutions Ltd.** on the grounds that it was a software development company and fails appellant's filter of research and development expenses to sales less than 3%, whereas this comparable **should have been excluded** on the grounds that it was functionally dissimilar being a company that earns revenue by rendering software development services, sale of user licenses for software applications and also from sale of investments.**(corresponding to original cross objection 9)**
- 17) The Commissioner of Income Tax (Appeals) erred in law and on facts by excluding **Wipro Ltd.** only on the ground of application of turnover filter, whereas this comparable **should also have been excluded on further grounds** that it was functionally dissimilar being a product development company and also on the ground that on the basis of relative turnover this was not a comparable.**(corresponding to original cross objection 9)**
- 18) The Commissioner of Income Tax (Appeals) erred in law and on facts by upholding the inclusion of **Lucid Software Ltd.** on the grounds that it was a software development company and fails appellant's filter of advertising, marketing and distribution expenses to sales less than 3%, whereas this comparable **should have been excluded** on the grounds that it was functionally dissimilar being a product company focusing on Advanced non – destructive Testing ('NDT') Technologies. **(corresponding to original cross objection 9)**
- 19) The Commissioner of Income Tax (Appeals) erred in upholding the adjustment to the payment of interest on external commercial borrowings ("ECB") by INR 561,271.**(corresponding to original cross objection 10)"**
23. The assessee is seeking exclusion of 12 companies, from the set of 20 comparables, which are as under :

**(i) Avani Cimcon Technologies Limited**

- (ii) Celestial Biolabs Ltd.**
- (iii) Infosys Technologies Limited**
- (iv) Kals Info Systems Limited (Seg.)**
- (v) Persistent Systems Limited**
- (vi) Quintegra Solutions Limited**
- (vii) Tata Elxsi Limited (Seg.)**
- (viii) Thirdware Solutions Limited**
- (ix) Wipro Limited (Seg.)**
- (x) Softsol India Limited**
- (xi) Lucid Software Limited**
- (xii) Indus Networks Limited**

24. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. The learned Authorised Representative of the assessee has submitted that out of these 12 companies, the functional comparability of 11 companies has been considered by the co-ordinate Bench of this Tribunal vide order dt.29.4.2015 in the case of **Infor (Bangalore) Pvt. Ltd.** Vs. ACIT in IT(TP)A No.1550/Bang/2012. As regards the company **Softsol India Limited**, the functional comparability of

this company has been considered by the co-ordinate Bench of this Tribunal vide decision dt.22.4.2016 in the case of **M/s. Electronics Imaging India Pvt. Ltd. Vs. DCIT** in IT(TP)A No.227 & 285/Bang/2013.

25. On the other hand, the learned Departmental Representative has relied upon the order of the TPO and submitted that comparability of the companies have to be examined on the basis of FAR Analysis and not by following the precedence in the case of other assessees.

26. Having considered the rival submissions as well as the relevant material on record, at the outset, we note that co-ordinate Bench of this Tribunal in the case of **Infor (Bangalore) P. Ltd. Vs. ACIT** (supra) while considering an identical set of 20 companies selected by the TPO in the said case has held that 11 companies, as disputed before us by the assessee, are not functionally comparable in paras 23 to 36 as under :

*õ 23. What we find is that TPO had considered the assessee here to be a software service provider and the services rendered by 3DPLM Software Solutions Ltd (supra) was also on the very same segment. Accordingly, we are of the opinion that the decision of the coordinate bench in the case of 3DPLM Software Solutions Ltd (supra), can be applied vis-a-vis assessee's arguments for exclusion of some of the companies.*

*24. At para 7.3 of the order in the case of 3DPLM Software Solutions Ltd (supra) it was held by this Tribunal as under with regard to comparability of*

*Avani Cincom Technologies Ltd :*

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

*7.6.2 We also find substantial merit in the contention of the learned Authorised Representative that this company has been selected by the TPO as an additional comparable only on the ground that this company was selected in the earlier year. Even in the earlier year, it is seen that this company was not selected 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.*

25. No doubt in the said case one of the reason why Avani Cincom Technologies was directed to be excluded was non-furnishing of information obtained u/s.133(6) of the Act. However, it is also clearly mentioned at 7.6.2 that the said company was functionally dissimilar. Same view was also taken by the

coordinate bench in the case of Triology E- Business Software India P. Ltd v. DCIT [(2013) 140 ITD 540].

24. Observation of this Tribunal with regard to Celestial Biolabs Ltd, as it appears in the case of 3DPLM Software Solutions Ltd (supra) is reproduced hereunder :

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

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

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

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

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

*“ ..... As explained earlier, it is a diversified company and therefore cannot be considered as comparable functionally with the assessee.*

*There has been no attempt to identify, eliminate and make adjustment of the profit margins so that the difference in functional comparability can be eliminated. By not resorting to such a process of making adjustments, the TPO has rendered this company as not qualifying for comparability. We therefore accept the plea of the assessee in this regard.”*

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

*(v) The facts pertaining to this company has not changed from Assessment Year 2007- 08 to Assessment Year 2008-09 and therefore this company cannot be considered for the purpose of comparability in the instant case and hence ought to be rejected. In support of this contention, the assessee has also referred to and quoted from various parts of the Annual Report of the company.*

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

*9.4.1 We have heard both the parties and perused and carefully considered the material on record. While it is true that the decisions cited and relied on by the assessee were with respect to the immediately previous assessment year, and there cannot be an assumption that it would continue to be applicable for this year as well, the same parity of reasoning is applicable to the TPO as well who seems to have selected this company as a comparable based on the reasoning given in the TPO's order for the earlier year. It is evidently clear from this, that the TPO has not carried out any independent FAR analysis for this*

*company for this year viz. Assessment Year 2008-09. To that extent, in our considered view, the selection process adopted by the TPO for inclusion of this company in the list of comparables is defective and suffers from serious infirmity.*

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

25. Vis-a-vis E-Zest Solutions Ltd, findings of the Tribunal as it appears at para 14.4 of the order in the case of 3DPLM Software Solutions Ltd, (supra), is reproduced hereunder :

*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 Solutions Ltd., is rendering product development services and high end technical services which come under the category of KPO services. It has been held by the co-ordinate bench of this Tribunal in the case of Capital I-Q InformationSystems (India) (P) Ltd. Supra) that KPO services are not comparable to software development services and are therefore not comparable. Following the aforesaid decision of the co-ordinate bench of the Hyderabad Tribunal in the aforesaid case, we hold that this company, i.e. e-Zest Solutions Ltd. be omitted from the set of comparables for the period under consideration in the case on hand. The A.O. / TPO is accordingly directed.*

26. Vis-a-vis Infosys Technologies Ltd, findings of the Tribunal appears at para 11.1 to 11.4 of the order in the case of 3DPLM Software Solutions Ltd, (supra), and this is reproduced hereunder :

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

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

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

*decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee ;*

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

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

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

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

*(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems. In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded 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.*

27. With regard to Kals Information Systems Ltd, (seg) findings of the Tribunal in the above mentioned case of 3DPLM Software Solutions Ltd (supra) appear at para 10.1 to 10.4 of the order which is reproduced hereunder :

*10.1 This is a comparable selected by the TPO. Before the TPO, the assessee had objected to the inclusion of this company in the set of comparables on grounds of functional differences and that the segmental details have not been provided in the Annual Report of the company with respect to software services revenue and software products revenue. The TPO, however, rejected the objections of the assessee observing that the software products and training constitutes only 4.24% of total revenues and the revenue from software development services constitutes more than 75% of the total operating revenues for the F.Y. 2007-08 and qualifies as a comparable by the service income filter. 10.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee and ought to be rejected / excluded from the list of comparables for the following reasons :-*

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

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

*(iii) The rejection of this company as a comparable has been upheld by*

*co-ordinate benches of the Tribunal in the case of –*

*(a) Triology E-Business Software India Pvt. Ltd. (ITA No.1054/Bang/2011).*

*(b) LG Soft India Pvt. Ltd. (IT (TP) A No.112/Bang/2011)*

*(c) CSR India Pvt. Ltd. (IT (TP) A No.1119/Bang/2011) and*

*(d) Transwitch India Pvt. Ltd. (IA No.6083/Del/2010)*

*(iv) The facts pertaining to this company has not changed from Assessment Year 2007- 08 to Assessment Year 2008-09 and therefore this company cannot be considered for the purpose of comparability in the case on hand and hence ought to be excluded from the list of comparables. In support of this contention, the learned Authorised Representative drew our attention to various parts of the Annual Report of this company. (v) This company is engaged not only in the development of software products but also in the provision of training services as can be seen from the website and the Annual Report of the company for the year ended 31.3.2008.*

*(vi) This company has two segments; namely,*

*a) Application Software Segment which includes software product revenues from two products i.e. 'Virtual Insure' and 'La-Vision' and*

*b) The Training segment which does not have any product revenues.*

*10.3 Per contra, the learned Departmental Representative contended that the decision of the co-ordinate bench of the Tribunal in the case of Triology E-Business Software India Pvt. Ltd. (supra) was rendered with respect to F.Y.2006-07 and therefore there cannot be an assumption that it would continue to be applicable to the year under consideration i.e. A.Y. 2008-09. To this, the counter argument of the learned Authorised Representative is that the functional profile of this company continues to remain the same for the year under consideration also and the same is evident from the details culled out from the Annual Report and quoted above (supra). 10.4 We have heard both parties and perused and carefully considered the material on record. We find from the record that*

*the TPO has drawn conclusions as to the comparability of this company to the assessee based on information obtained u/s.133(6) of the Act. This information which was not in the public domain ought not to have been used by the TPO, more so when the same is contrary to the Annual Report of the company, as pointed out by the learned Authorised Representative. We also find that the co-ordinate benches of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra) and in the case of Triology E-Business Software India Pvt. Ltd. (supra) have held that this company was developing software products and was not purely or mainly a software service provider. Apart from relying of the above cited decisions of co-ordinate 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 functionally dis-similar and different form the assessee and that since the findings rendered in the decisions of the co-ordinate 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 form the list of comparable companies. It is ordered accordingly.*

28. With regard to Persistent Systems Ltd, findings of the Tribunal in appears at para 17.1 to 17.3 of the order in the case of 3DPLM Software Solutions Ltd, (supra), and this is reproduced hereunder :

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

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

*(i) This company is engaged in software designing services and analytic services and therefore it is not purely a software development service provider as is the assessee in the case on hand.*

*(ii) Page 60 of the Annual Report of the company for F.Y. 2007-08 indicates that this company, is predominantly engaged in 'Outsourced Software Product Development Services' for independent software vendors and enterprises.*

*(iii) Website extracts indicate that this company is in the business of product design services.*

*(iv) The ITAT, Mumbai Bench in the case of Telecordia Technologies India Pvt. Ltd. (supra) while discussing the comparability of another company, namely Lucid Software Ltd. had rendered a finding that in the absence of segmental information, a company be taken into account for comparability analysis. This principle is squarely applicable to the company presently under consideration, which is into product development and product design services and for which the segmental data is not available. The learned Authorised Representative prays that in view of the above, this company i.e. Persistent Systems Ltd. be omitted from the list of comparables.*

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

*17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company i.e. Persistent Systems Ltd., is engaged in product development and product design services while the assessee is a software development services provider. We find that, as submitted by the assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case*

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

29. As for Quintegra Solutions Ltd, findings of the Tribunal appear at paras 18.1 to 18.3.3 of the order in the case of 3DPLM Software Solutions Ltd, (supra), and this is reproduced hereunder:

*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.*

*18.1.2 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 solutions (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 Solutions 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.*

*18.2 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.*

*18.3.1 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 Pvt. Ltd. (ITA No.227/Bang/2010 dt.9.11.2012) 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.*

*18.3.2 We also find from the Annual Report of Quintegra Solutions 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.*

*18.3.3 Respectfully following the decision of the co-ordinate bench of the Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (supra), we direct that this company i.e. Quintegra Solutions 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.*

30. Vis-a-vis Tata Elxsi Ltd, (seg), findings in the case of 3DPLM Software Solutions Ltd (supra), appear at para 13.1 to 13.4.2 which is reproduced hereunder :

*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 Telecordia Technologies Pvt. 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.*

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

*13.4.2 The Hon'ble Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. V ACIT (ITA No.7821/Mum/2011) has held that Tata Elxsi Ltd. is not a software development service provider and therefore it is not functionally comparable. In this context the relevant portion of this order is extracted and reproduced below :-*

*“ .... Tata Elxsi is engaged in development of niche product and development services which is entirely different from the assessee company. We agree with the contention of the learned Authorised Representative that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we are unable to treat this company as fit for comparability analysis for determining the arm's length price for the assessee, hence, should be excluded from the list of comparable portion.” As can be seen from the extracts of the Annual Report of this company produced before us, the facts pertaining to Tata Elxsi have not changed from Assessment Year 2007-08 to Assessment Year 2008-09. We, therefore, hold that this company is not to be considered for inclusion in the set of comparables in the case on hand. It is ordered accordingly.*

31. Coming to Thirdware Solutions Ltd (seg), findings of the Tribunal in the above mentioned case of 3DPLM Software Solutions Ltd(supra), appear at para nos.15.1 to 15.3 which is reproduced hereunder :

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

*Representative submitted that:-*

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

*(ii) In the case of E-Gain communications Pvt. Ltd. (2008-TII-04-ITAT-PUNE-TP), the Tribunal has directed that this company be omitted as a comparable for software service providers, as its income includes income from sale of licences which has increased the margins of the company. The learned A.R. prayed that in the light of the above facts and in view of the afore cited decision of the Tribunal (supra), this company ought to be omitted from the list of comparables.*

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

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

32. On comparability of Wipro Ltd, in the case of 3DPLM Software Solutions Ltd (supra), findings of the Tribunal appear at para nos.12.1 to 12.4.2 of the order which reads as under :

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 dissimilarity, brand value, size, etc. The TPO, however, brushed aside the objections of the assessee and included this company in the set of comparables.

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

(i) This company owns significant intangibles in the nature of customer related intangibles and technology related intangibles, owns IPRs and has been granted 40 registered patents and has 62 pending applications and its Annual Report confirms that it owns patents and intangibles.

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

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

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

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

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

*consolidated financial statements.*

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

*12.4.1 We have heard both parties and carefully perused and considered the material on record. We find merit in the contentions of the assessee for exclusion of this company from the set of comparables. It is seen that this company is engaged both in software development and product development services. There is no information on the segmental bifurcation of revenue from sale of product and software services. The TPO appears to have adopted this company as a comparable without demonstrating how the company satisfies the software development sales 75% of the total revenue filter adopted by him. Another major flaw in the comparability analysis carried out by the TPO is that he adopted comparison of the consolidated financial statements of Wipro with the stand alone financials of the assessee; which is not an appropriate comparison.*

*12.4.2 We also find that this company owns intellectual property in the form of registered patents and several pending applications for grant of patents. In this regard, the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. (ITA No.227/Bang/2010) has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any such intangible and hence does not have an additional advantage in the market. As the assessee in the case on hand does not own any intangibles, following the aforesaid decision of the co-ordinate bench of the Tribunal i.e. 24/7 Customer.Com Pvt. Ltd. (supra), we hold that this company cannot be considered as a comparable to the assessee. We, therefore, direct the Assessing Officer/TPO to omit this company from the set of comparable companies in the case on hand for the year under consideration.*

33. Coming to Lucid Software Ltd, this has been dealt with at para 16.1 to 16.3 of the order in the case of 3DPLM Software Solutions Ltd, (supra), and this is reproduced hereunder :

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

*(i) This company is engaged in the development of software products.*

*(ii) This company has been held to be functionally different and therefore not comparable to software service providers by the order of a co-ordinate bench of the Tribunal in the assessee's own case for Assessment Year 2007-08 (IT(TP)A No.845/Bang/2011), following the decision of Mumbai Tribunal in the case of Telecordia Technologies India Pvt. 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 Pvt. Ltd. (ITA No.1121/Bang/2011) and CSR India Pvt. Ltd. [ IT(TP)A No.1119/Bang/2011 ] and by the Delhi Bench of the Tribunal in the case of Transwitch India Pvt. Ltd. (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 Pvt. Ltd. (supra), CSR India Pvt. Ltd. (supra); the ITAT, Mumbai Bench in the case of Telecordia Technologies India Pvt. Ltd. (supra) and the Delhi ITAT in the case of Transwitch India Pvt. 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 dissimilar 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 co-ordinate 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.*

34. As for Bodhtree Consulting Ltd, comparability of the said company was an issue which came up before the Mumbai Bench of the Tribunal in the case of Nethawk Networks India P. Ltd (supra). The decision was also for the very same assessment year and the segment considered was again software development services. Comparability of Bodhtree Consulting Ltd, was dealt with at paras 21 to 23 of the said order, which is reproduced herebelow :

*Bodhtree Consulting Limited*

*21. On this comparable, case of the assessee is that the company is not a*

*good comparable in view of the software products produced by the company. As such, no segmental data is adequately available too.*

*22. On the other hand, Ld DR filed a copy of the financial statement and argued vehemently stating that this company is not engaged in the software products. In this regard, Ld DR relied on the note no.3, relating to the relating to the revenue recommendation in Schedule 12, note no.5 relating to the segmental information etc to mention that the company is engaged in the software development only. However, the assessee argued vehemently stating that this company is engaged in the software based products. Further, Ld Counsel mentioned that the said company was already examined and was held as product based company by the TPO in the TP study of other case and the TPO cannot take different stand in this case. In this regard, we have perused the para 29 of the order of the Tribunal in the case of M/s. Wills Processing Services (I) P Ltd (supra) wherein it was mentioned that the TPO described this company is engaged in the business of software products, not the software development services. Relevant portions from the said para 29 of the order of the Tribunal is reproduced here under: —*

*29.1 The Id Sr Counsel for the assessee has submitted that this company is engaged in the software products. He has referred the TPO order and submitted that in the profile of the comparables selected by the TPO itself has mentioned the business of the assessee is in software products. The Id AR has referred the objections raised by the assessee before the TPO at page 286 of the paper book and submitted that the assessee brought this fact that this company is engaged in providing open and end to end web solutions, software consultancy, design and development of software, using the latest technologies. Further, the company has identified only one segment i.e software development. Therefore, the Id AR has submitted that this company is functionally not comparable with the assessee and consequently should be excluded from the comparables.*

*29.2 On the other hand, the Id DR has filed the information collected u/s 133(6) of the I T Act and submitted that as per this information, this company has revenue from ITES activity to the extent of Rs. 2,94,85,528/-. Therefore, this company is a good comparable having functional similarity.*

29.3 .....

30. *We have considered the rival submissions as well as the relevant material on record. The details filed by the Id DR before us has been obtained by the TPO at Hyderabad and not by the TPO of the assessee in the present case. It is stated in the letter dated 5.2.2010 written by the Chartered Accountant of Bodhtree Consulting Ltd to the TPO Hyderabad that the company is providing data cleaning services to clients for whom it had developed the software application.....”*

23. *Considering the above, we are of the opinion that Bodhtree Consulting Limited is not engaged in the software development services and there is no segmental data comparable. Therefore, the FAR analysis goes against the TPO/AO. 14 Accordingly, we dismiss the argument of the Ld DR in this regard. Ex consequenti, the AO/TPO is directed to exclude the same from the list of final comparables for working out the arithmetic mean.*

35. *In view of the above decisions, we are of the opinion that assessee has to succeed in its pleading for exclusion of the following companies :*

1. *Avani cincom Technologies Ltd,*
2. *Bodhtree Consulting Ltd,*
3. *Celestial Biolabs,*
4. *E-Zest Solutions Ltd,*
5. *Infosys*
6. *Kals Information Systems Ltd (seg),*
7. *Persistent Systems Ltd,*
8. *Quintegra Solution Ltd,*
9. *Tata Elxsi (seg),*
10. *Thirdware Solution Ltd,*
11. *Wipro Ltd (seg) and*
12. *Lucid Software Ltd.*

36. *We also find that the above mentioned companies were considered by the Tribunal in assessee's own case for A. Y. 2006-07 in IT(TP)A.589/Bang/2012, dt.10.04.2015] and were directed for exclusion, due to functional incompatibility. Accordingly we direct exclusion of the above companies from the list of comparables. TPO is directed to rework the PLI of the comparables*

*after excluding the above companies and considering the working capital adjustment and proceed in accordance with law. In the result, grounds 10 to 18 of the assessee are treated as partly allowed.”*

Following the earlier decision of the Tribunal, we direct the TPO/A.O. to exclude these 11 companies from the set of comparables.

27. As regards the **Softsol India Ltd.**, the functional comparability has been considered by the co-ordinate Bench of this Tribunal in the case of **M/s. Electronics Imaging India Pvt. Ltd. Vs. DCIT** (supra) in para 19 as under :

“ 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 dissimilar 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.”

Following the earlier decision of the Tribunal, we direct the TPO/A.O. to exclude this company from the set of comparables.

28. Ground No.19 of the C.O. is regarding adjustment on account of interest on ECB.

29. The assessee has taken external commercial borrowing from the AE and paid interest at LIBOR + 3% which is equivalent to 7.22% per annum. The TPO has applied the arm's length interest rate at LIBOR + 138 basis points which is equivalent to 6.08%.

30. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. The assessee has not produced any material to show that the interest paid to AE @LIBOR +3% is arm's length interest. We further note that this Tribunal has taken a consistent view that in the case of interest on ECB, LIBOR +1.5% can be taken as arm's length interest therefore, the TPO applied the arm's length interest at LIBOR +1.38% is within the justified range and we do not find any reason to interfere with the orders of the authorities below on this issue. This ground of the assessee's C.O. is dismissed.

31. In the result, the revenue's appeal and C.O. of the assessee are partly allowed.

Order pronounced in the open court on 25th Oct., 2017.

Sd/-  
**(ARUN KUMAR GARODIA)**  
Accountant Member

Sd/-  
**(VIJAY PAL RAO)**  
Judicial Member

Bangalore,  
Dt.25.10.2017.

\*Reddy gp