

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

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER AND SHRI
JASON P. BOAZ, ACCOUNTANT MEMBER**

IT(TP)A No.1208/Bang/2014
Assessment year : 2005-06

M/s. JDA Software Private Limited (‘Erstwhile i2 Technologies India Pvt. Ltd.,) Tower A, Mantri Comercio, Near Sakra World Hospital, Outer Ring Road, Bellandur, Bengaluru-560103. PAN : AAACI7334Q	Vs.	Additional Commissioner of Income Tax, Range 11, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Arvind V. Sonde, Advocate
Revenue by	:	Shri. C. H. Sundar Rao, CIT-DR-I

Date of hearing	:	22.02.2018
Date of Pronouncement	:	23.02.2018

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of the CIT(A), *inter alia*, on following grounds:

I. Transfer Pricing

A. Conceptual Grounds

1 The learned Commissioner of Income-Tax (Appeals) ["CIT(A)"] erred in determining an adjustment to the arm's length price of the Appellant's international transactions with associated enterprises, with respect to the following international transactions of the Appellant With its Associated Enterprises ("AEs") u/s 92CA of the Income Tax Act 1961 ('the Act'):

- Software development services — INR 15,29,27,582; and*
- Information Technology enabled Services ('ITeS') — INR 1,78,98,463.*

2. The learned CIT(A) erred in rejecting the Transfer Pricing ('TP') documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act contending that the

information or data used in the computation of the arm's length price is not reliable or correct. In doing so:

- 2(a) the learned CIT(A) and the learned TPO have failed to appreciate that at the time of preparation of the transfer pricing documentation for March 2005, contemporaneous data for financial year 2004-05 was not available in the data base (Prowess & Capitaline) for some of the companies.*
- 2 (b) the learned CIT(A) erred in rejecting the set of filters applied by the Appellant in the TP documentation and in introducing additional filters for selection/ rejection of companies as comparable to the appellant.*
- 2(c) the learned CIT(A) erred in rejection of comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis based on application of additional filters in determining the arm's length price.*
- 2(d) the learned CIT(A) erred in upholding the action of learned TPO of considering 25 percent as the threshold limit for the related party transactions filter as this number is an arbitrary number and has been adopted without any reasonable basis.*
- 2(e) the learned CIT(A) erred in rejecting companies that are comparable to the appellant while performing the comparability analysis and erred in including companies which do not satisfy the test of comparability.*
- 3. The learned CIT(A) erred in not applying multiple year / prior year data for comparable companies while determining arm's length price.*
- 4. The learned CIT(A) erred in 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 arm's length price.*
- 5. The learned CIT(A) ought to have appreciated the fact that transfer pricing is an anti-avoidance mechanism. In the instant case the Appellant is registered as an entity under the Software Technology Parks of India ("STPI") scheme and has claimed tax benefits under section 10 A of the Act and has no reason to suppress its profit from its operations to manipulate the transfer prices.*
- 6. Having accepted that the Appellant is a limited risk contract service provider rendering software development and ITeS, the learned CIT(A) erred in not providing appropriate adjustment towards the risk differential. when the comparables selected are full- fledged entrepreneurial companies.*
- 7. the learned CIT(A) erred in not granting working capital adjustment for the comparable companies selected by the Appellant.*
- 8. The learned CIT(A) has erred in upholding the contentions of the learned TPO in completely relying on the unaudited data requisitioned and consequently obtained by taking recourse to the provisions of section 133(6) of the Act. The learned CIT(A) has*

failed to understand that the use of information collected through section 133(6) could affect the Appellant in an adverse manner.

9. *The Appellant retains the right to have the benefit of applying the range of +/-5% in determination of the arm's length price.*

B. Software Segment

10. *The learned CIT(A) has erred in considering the companies functionally different from that of the Appellant. Several companies selected by the learned TPO are engaged in development of software products, product engineering, selling and marketing activities (for eg.. Sankhya Infotech limited, Thirdware Solutions Limited, Geometric Software Solutions Limited etc). The learned CIT(A) has upheld the position of the learned TPO without analyzing the functional comparability.*

11. *The learned CIT(A) has been inconsistent in applying the turnover filter criteria in the case of the Appellant. The CIT(A) has applied turnover filter > 200 crores for AY 2003-04 (software segment) and for AY 2005-06 (ITeS segment). The learned CIT(A) has erroneously applied turnover filter > 500 crores for software development segment without giving cogent reasons.*

Hence, the following companies having turnover more than 200 crores ought to be rejected

- *Sasken Communication Technologies Limited;*
- *Flextronics Software Systems Limited;*
- *L&T Infotech Limited;*
- *I-Gate Global Solutions Limited;*
- *Satyam Computers Services Limited; and*
- *Infosys Technologies Limited.*

C. ITeS Segment

12. *The learned CIT(A) has erred in considering the companies which are functionally different from that of the Appellant. The learned CIT(A) without analyzing the functional comparability has blindly upheld the position taken by the learned TPO.*

II. Corporate Tax

1. Denial of deduction under section 10A on interest and miscellaneous income

1.1 *The CIT(A) erred in confirming the denial of deduction under section 10A of the Act on interest and miscellaneous income earned by the Appellant.*

1.2 *The learned CIT(A) failed to appreciate the fact that the interest income had arisen on account of short term investment of surplus funds lying with the Appellant.*

1.3. *The learned CIT(A) has erred in not appreciating the fact that the interest income has a direct nexus with the profits of the business and accordingly is eligible for deduction under the provisions of section 10A of the Act.*

The Appellant craves leave to add, alter and modify the above grounds during the course of the appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.

2. Ground Nos. 10 to 12 relate to the TP issues. As per the facts borne out from the record, assessee has undertaken the international transactions in software segment and ITeS segment for which ALPs were determined by the TPO in response to reference made by the AO. In software segment, there was no dispute with regard to most appropriate method as it was adopted as TNMM and the TPO has selected the following 17 comparables:

1. *Bodhtree Consulting Ltd.,*
2. *Lanco Global Systems Ltd.,*
3. *Exensys Software Solutions Ltd.,*
4. *Sankhya Infotech Ltd.,*
5. *Sasken Network Systems Lt.d,*
6. *Four Soft Ltd.,*
7. *Thirdware Solution Limited*
8. *R S Software (India) Ltd.,*
9. *Geometric Software Solutions Co. Ltd.,*
10. *Tata Elxsi Limited (Seg)*
11. *Visual Soft Technologies Ltd., (Seg)*
12. *Sasken Communication Technologies Ltd., (Seg)*
13. *Igate (Seg.)*
14. *Flextronics (SEg)*
15. *L & T Infotech*
16. *Satyam*
17. *Infosys*

3. Out of these selected comparables, the assessee sought exclusion of certain comparables and the CIT(A), after excluding the same, selected 14 comparables of which list is as under:

1. *Bodhtree Consulting Ltd.,*
2. *Lanco Global Systems Ltd.,*
3. *Exensys Software Solutions Ltd.,*
4. *Sankhya Infotech Ltd.,*
5. *Sasken Network Systems Lt.d,*
6. *Four Soft Ltd.,*
7. *Thirdware Solution Limited*
8. *R S Software (India) Ltd.,*
9. *Geometric Software Solutions Co. Ltd.,*
10. *Tata Elxsi Limited (Seg)*
11. *Visual Soft Technologies Ltd., (Seg)*
12. *Sasken Communication Technologies Ltd., (Seg)*

13. Igate (Seg.)

14. Flextronics (Seg)

4. Still aggrieved with the comparables selected by the CIT(A), the assessee preferred an appeal before the Tribunal and sought further exclusion of the following comparables on the ground that the same comparables were taken by the TPO in the case of Google India Pvt. Ltd., for the same assessment year i.e., 2005-06:

1. Bodhtree Consulting Ltd.,
2. Exensys Software Solutions Ltd.,
3. Sankhya Infotech Ltd.,
4. Four Soft Ltd.,
5. Thirdware Solution Limited
6. Geometric Software Solutions Co. Ltd.,
7. Flextronics (SEg)

5. In the case of Google India Pvt. Ltd., the CIT(A) has rejected 10 comparables and have finally taken 7 comparables i.e., Lanco Global Systems Ltd., Sankhya Infotech Ltd., Sasken Network Systems Lt.d, Four Soft Ltd., R S Software (India) Ltd., Visual Soft Technologies Ltd., (Seg), Sasken Communication Technologies Ltd., (Seg). The assessee preferred an appeal before the Tribunal and sought exclusion of certain comparables and having dealt with the issue in the light of rival contentions, the Tribunal has directed the AO to take the following comparables in the final list of comparables in order to determine the ALP:

1. Lanco Global Systems Ltd.,
2. Sasken Communication Technologies Ltd.,
3. R S Software (India) Ltd.,
4. Visual Soft Technologies Ltd., (Seg)
5. Sasken Communication Technologies Ltd., (Seg)

Copy of the order of the Tribunal is placed on record. The learned Counsel for the assessee has contended that in the instant case there is no dispute with regard to Igate Global Solutions and therefore the same may be included in the list of comparables. It was further contended that the Igate Global Solutions Ltd., was not examined by the Tribunal in the case of Google India Pvt. Ltd.

The learned DR placed the reliance upon the order of the CIT(A).

6. Having carefully examined the orders of the authorities below in the light of rival submissions and the orders of the Tribunal in the case of DCIT Vs. Google India Pvt. Ltd., 1298/Bang/2013 we find it is an undisputed position that in the case of Google India Pvt. Ltd., the TPO has taken the same set of 17 comparables against which in assessee is in appeal. The CIT(A) excluded 10 comparables and finally 7 comparables were taken by him. The matter was therefore brought to the Tribunal and the Tribunal has finally selected 6 comparables. Since the exclusion of the comparables sought by the assessee have already been examined by the Tribunal in the case of Google India Pvt. Ltd., we find no justification to take a contrary view in this appeal. We however for the sake of reference extract the relevant observation fo the Tribunal in the case of Google India Pvt. Ltd., as under:

“12. We therefore are of the view that the issue of ALP adjustment in both the segments be examined independently. We therefore first of all take up the segment of Software Development Services in which the TPO has taken following 17 comparables:

- 1. Bodhtree Consulting Limited*
- 2. Lanco Global Systems Ltd.,*
- 3. Exensys Software Solutions Limited*
- 4. Sankhya Infotech Limited*
- 5. Sasken Networks Systems Limited*
- 6. Four Soft Limited*
- 7. Thirdware Solutions Limited*
- 8. R. S. Software (India) Limited*
- 9. Geometric Software Solutions Limited*
- 10. Tata Elxsi Limited (Seg.)*
- 11. Visualsoft Technologies Limited (Seg.)*
- 12. Sasken Communications Limited (Seg.)*
- 13. Flextronics Software Systems Limited (Seg.)*
- 14. Larsen & Toubro Infotech Limited*
- 15. Satyam Computer Services Limited*
- 16. Infosys Technologies Limited*
- 17. Igate Global Solutions Limited (Seg.)*

Out of these 17 comparables, the CIT(A) has rejected 10 comparables and directed the TPO to take only following 7 comparables to recompute the ALP in Software Development Services:

- 1. Lanco Global Systems Ltd.,*
- 2. Sankhya Infotech Limited*
- 3. Sasken Networks Systems Limited*

4. *Four Soft Limited*
5. *R. S. Software (India) Limited*
6. *Visualsoft Technologies Limited (Seg.)*
7. *Sasken Communications Limited (Seg.)*

13. *The revenue is aggrieved with the rejection of Bodhtree Consulting Limited, Geometric Software Solutions Limited and Tata Elxsi Limited, whereas the assessee is aggrieved for the inclusion of Sankhya Infotech Ltd., and Four Soft Ltd. During the course of hearing, the assessee has filed a chart with the submissions that rejection of Bodhtree Consulting Ltd, Sankhya Infotech Ltd., Four Soft Ltd., Geometric Software Solutions Ltd., and Tata Elxsi Ltd., was covered by the judgment of the Tribunal in the case of ACIT Vs. McAfree Software (India) Pvt. Ltd., in IT(TP)A No. 04/Bang/2012 and DCIT Vs. Kodiak Networks India Ltd., in IT(TP)A No. 532/Bang/2013 in which the Tribunal has held that these comparables are functionally different with the profile of the assessee company. The learned counsel for the assessee further contended that the profile of the assessee is almost similar to the McAfree Software (India) Pvt. Ltd., and Kodiak Networks India Ltd., where the assessee is also engaged in providing software development services to its AE.*

14. *With regard to Bodhtree Consulting Limited, the learned counsel for the assessee has contended that besides functional dissimilarity, this comparable fails on RPT filter as related party transaction in this case is 35%.*

15. *The learned DR however contended that the rejection of this comparable is not proper and therefore can be included in the list of comparables.*

16. *Having carefully examined the functional profile of Bodhtree Consulting Limited and its related party transactions, in the light of judgment of ACIT Vs. McAfree Software (India) Pvt. Ltd., and Kodiak Networks India Ltd., we find that the Tribunal has categorically held in the case of McAfree Software (India) Pvt. Ltd., whose profile is similar to the assessee's profile, that Bodhtree Consulting Limited is functionally different and also fails on RPT filter as it is more than 25%. The relevant observation of the Tribunal in this regard is extracted hereunder:*

"Bodhtree Consulting Ltd.,:

10.3. This company was retained by Ld.CIT(A) but Assessee objects on the basis of functionality. However, as seen from the orders of Co-ordinate Benches in the case of ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (supra) as well as DCIT Vs. Toshiba embedded Software (I) Pvt. Ltd., in IT(TP)A No. 1/Bang/2012 dt. 10-05-2013, Bodhtree Consulting Ltd., was accepted as a comparable. However, in the case of Cordys Software India P. Ltd., in ITA No. 1451/Hyd/2010 dt. 13-06-2014 (Where one of us, AM is the author) has considered in detail and excluded the same for the following reasons:

"1. Bodhtree Consulting Ltd.

The learned counsel submitted that this company should be rejected under the following TPO's filters:

- *Related party transactions filter: As per schedule 4 of the balance sheet, the company has investments in Perigon, LIC, USA and as per the response u/s 133(6); the company has export sales to Perigon LIC, USA of Rs. 133.90 lakhs, being 34.68% of the total turnover.*
- *Functionally different filter: The company in its response to notice u/s 133(6) has stated that it provides e-paper solutions, data cleansing software, website development and other customized software and also state that the e-paper solutions and data cleansing services would come under the category of IT enabled services".*

Considering the above, we direct that the above company has to be excluded on the reason of RPT of more than 25% and functionality."

17. Since the profile of the Bodhtree Consulting Ltd., was examined by the Tribunal in the case of McAfee Software (India) Pvt. Ltd., in AY 2005-06, we find no justification to take a contrary view in the instant case. Accordingly following the same, we hold that Bodhtree Consulting Ltd., is not a good comparable. Therefore, we uphold the order of the CIT(A) who has rightly excluded this comparable from the list of comparables.

18. With regard to Sankhya Infotech Ltd., it was contended that this comparable is functionally dissimilar from the profile of the assessee and more so the segmental data are not available and these aspects were examined by the Tribunal in the case of McAfee Software (India) Pvt. Ltd. Similarly, the profile of Four Soft Ltd., Geometric Software Solutions Limited and Tata Elxsi Ltd., was also examined by the Tribunal in the case of McAfee Software (India) Pvt. Ltd. and Kodiak Networks India Ltd., in which the Tribunal has held that Four Soft Ltd., is functionally dissimilar and RPT is at 19%. With regard to Geometric Software Solutions Limited, it was also held that this comparable is functionally dissimilar. Similar is the position with regard to Tata Elxsi. The relevant observations of the Tribunal in the case of McAfee Software (India) Pvt. Ltd. are extracted hereunder:

"Sankhya Infotech Ltd., Thirdware Solution Ltd., & Tata Elxsi Ltd., :

10.5. These three companies are rejected as comparables on functionality in the case of ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (supra) (paras 19- 20, 22-26, 27-30 restively) and in the case of Cordys Software India P. Ltd., in ITA No. 1451/Hyd/2010 dt. 13-06-2014 (supra) at Para No. 13. The analysis by the Co-ordinate Benches is as under:

"Sankhya Infotech Limited ('Sankhya')

19. It was submitted by the learned counsel for the Assessee that Sankhya is engaged in the business of development of software products & services and training. The company focuses on the development of niche products for the transport and

aviation industry. However, segmental information in relation to the above mentioned activities is not available in public domain. Therefore, as Sankhya engages itself in products and services as well as software training, it cannot be considered as a comparable of the Appellant. The products developed and owned by Sankhya are listed below:

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

- *SILICONTM LMS (Training Management Information*

- *SILICONTM QT (Online Assessment System)*

- *SILICONTM LCMS (Learning Content Management System)*

- *IRMAQTM : This is an integrated resource planning, management tracking system exclusively developed for Airline operations. It is an end-to-end solution for all Flight Operations.*

- *Sakai CLE : This is a widely used and popular open source LMS used in many leading educational institutions and corporate. The relevant extract from the Annual report substantiating that the company also engages in different activities is reproduced below:*

"2. Activities

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

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

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

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

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

15.5. THIRDWORDARE SOFTWARE SOLUTIONS LIMITED :

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

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

"23. The other companies which are objected to by the Assessee are Flextronics Software Limited, Foursoft Limited and Thirdware Software Solution Limited. As far as these three companies are concerned, the learned Counsel appearing on behalf of the Assessee submitted that they are into both software as well as product development. He submitted that the TPO has taken note of the fact these companies are also into product development but has selected these companies as comparables by applying the filter of more than 70% of its revenue being from software development services. The learned Counsel submitted that the functions of these companies are different from the Assessee who was into sole activity of software development for its associated enterprise. He submitted that the TPO has allocated the expenditure in the proportion of the revenue of these IT(TP)A Nos. 04/Bang/2012 & 1388/Bang/2011 companies from software services and software products and has adopted the figure as segmental margin of the company and has taken these companies as comparables. He submitted that by taking the proportionate expenditure, the correct financial results would not emerge. He submitted that nothing prevented the Assessing Officer/TPO from obtaining the segmental details from the respective comparable companies before adopting them as comparable companies and before taking the operating margin for arriving at the arms length price. He submitted that wherever the segmental details are not available, then the said companies should not be taken as comparables. For this purpose, he placed reliance upon the decision of the Bangalore Tribunal in the case of First Advantage Offshore Services Pvt. Ltd. vs. The DCIT in ITA. No. 1252 / Bang/2010 wherein these companies were directed to be excluded from the list of comparables.

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

24. Having heard both the parties and having gone through the material on record, we find that the TPO at page 37of his order has brought out the differences between

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

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

26. As far as Flextronics Software Limited is concerned, we find that at page 90 of his Order, the TPO has also observed that the said company has incurred expenditure for selling of products and has incurred R & D expenditure for development of the products. The above facts clearly demonstrate that there is functional dissimilarity between the Assessee and these companies and without making adjustment for the dissimilarities brought out by the TPO himself, these companies cannot be taken as comparable companies. The method adopted by the TPO to allocate expenditure proportionately to the software development services and software product activity cannot be said to be correct and reasonable. Wherever, the Assessing Officer/TPO cannot make suitable adjustment to the financial results of the comparable companies with the Assessee company to bring them on par with the Assessee, these companies are to be excluded from the list of comparables. Therefore, we direct the Assessing Officer/TPO to exclude these three companies from the list of comparables.

27. The learned counsel for the Assessee submitted before us that TATA Elxsi Ltd., a comparable company out of the 10 excluded by the CIT(A) by applying RPT filter and which gets included in the comparable companies because of 15% RPT being adopted as threshold limit for excluding companies for the purpose of comparability. It was his submission that this company will however, have to be excluded as this company was held to be not comparable with an Assessee such as the Assessee in the present case providing software development services by the ITAT Hyderabad Bench in the case of CNO IT Services (India) Pvt. Ltd. (Formerly known as Consec Data

Services (India) Pvt. Ltd.) Hyderabad vs. DCIT, Circle 1(2) Hyderabad, in ITA.No.1280/Hyd/2010 Assessment Year 2005- 2006 order dated 12.2.2014.

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

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

"22 Tata Elxsi Limited : As regards this company, the learned Counsel appearing on behalf of the Assessee, filed before us the reply of Tata Elxsi Limited to the Addl. CIT (Transfer Pricing), Hyderabad, wherein the concerned IT(TP)A Nos. 04/Bang/2012 & 1388/Bang/2011 Officer has been informed that Tata Elxsi Limited is specialised Embedded Software Development Service Provider and that it cannot be compared with any other software development company. It was submitted that because of the specialisation and also because of diverse nature of its business, it is very difficult to scale-up the operations of Tata Elxsi Limited. In view of this, Tata Elxsi Limited has informed that it is not fair to use its financial numbers to compare it with any other company. The communication dated 25th August, 2009 to the TPO is placed before us. As this communication was not before the TPO at the time of transfer pricing adjustment we deem it fit and proper to remand this issue also to the file of the TPO to reconsider adopting this company as the comparable in the light of observations of this company to the TPO in the case of another Assessee. In the result, the Assessing Officer/TPO is directed to reconsider the issue in accordance with law, after affording a reasonable opportunity of being heard to the Assessee."

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

29. *Though the issue has been set aside to the AO in the aforesaid decision, the ITAT Hyderabad in the case of NTT Data India Enterprise Application Services Pvt.Ltd., ITA No.1612/Hyd/2010 order dated 23.10.2013 and in a subsequent ruling in the case of Invensys Development Centre (India) Pvt.Ltd., ITA No.1256/Hyd/2010 order dated 28.2.2014, held that TATA Elxsi is not functionally comparable with that of a software development service provider such as the Assessee.*

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

"13. Similarly, the other cases, Bodhtree consulting Ltd, Four Soft Ltd, Infosys,., Sankhya Infotech Ltd., Thirdware Solutions Ltd, Tata Elexi (seg) etc, are also to be excluded as they are considered and analysed in various cases relied on about functionality and why the same are not comparable to the companies like Assessee. Bodhtree consulting Ltd also fails RPT filter as contended. In view of this, we are not IT(TP)A Nos. 04/Bang/2012 & 1388/Bang/2011 discussing above comparables in detail, but, suffice to say that Assessee's submissions are valid. The AO is directed to exclude the above comparables and re- work out the arm's length margin accordingly. The ground No.8 and additional ground raised by Assessee are considered as allowed".

In view of the above, the above three companies are to be excluded.

*Sasken Network Systems Ltd.,
R S Software (India) Ltd.,
Visualsoft Technologies Ltd., and
Sasken Communication Technologies Ltd.,*

10.6 Since there is no objection from Assessee and was selected by TPO, the above companies are retained.

Four Soft Ltd.,

10.7. The objection by Assessee is that this company is a product company. was analysed and accepted in the case of ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (supra) para 22. It was held that the said company ahs derived income from software license and AMCs. Since functionality was already analysed, respectfully following the Co-ordinate Benches also, the same was to be excluded.

i. Intoto Software India Pvt. Ltd., ITA No. 1196/Hyd/2010;

ii. Cordys Software India P. Ltd., ITA No. 1451/Hyd/2010

Geometric Software Solutions Company Ltd.,:

10.8. Even though this company was accepted as comparable in *ITO Vs. M/s. Sunquest Information Systems (India) Private Limited*, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (*supra*) and *Cordys Software India P. Ltd.*, in ITA No. 1451/Hyd/2010 dt. 13-06-2014 (*supra*) and was not objected to, we find that the Co-ordinate Bench at Banalore in the case of *DCIT Vs. Toshiba embedded Software (I) Pvt. Ltd.*, in IT(TP)A No. 1/Bang/2012 dt. 10-05-2013 has considered that this is in product development. We have perused the TPO's order. In page 85 and 86 of the order, this comparable was analysed. TPO records that there are product sales to the extent of 18%. Segmental profits are not available. On assumptions, this company was retained. We are of the opinion that being a product based company, the same is not strictly comparable to a service company like Assessee. In the absence of segmental profit of service income, we have to exclude the same. Following the decision in the case of *DCIT Vs. Toshiba embedded Software (I) Pvt. Ltd.*, in IT(TP)A No. 1/Bang/2012 dt. 10-05-2013 (*supra*), this company is accordingly excluded.

19. Since the Tribunal has examined the profile of these comparables in the case of *McAfee Software (India) Pvt. Ltd.*, in the light of other orders of the Tribunal and has categorically held that these comparables are not good comparables for determining the ALP in the case of *McAfee Software (India) Pvt. Ltd.*, and *Kodiak Networks India Ltd.*, whose profile is similar to assessee's profile, we find no justification to re-examine the profile of these comparables again. We therefore hold that *Sankhya Infotech Ltd.*, *Four Soft Ltd.*, *Geometric Software Solutions Ltd.*, and *Tata Elxsi Ltd.*, are not good comparables. Therefore they have to be excluded from the final list of comparables. We accordingly confirm the order of the CIT(A) with respect to exclusion of *Bodhtree Consulting Ltd.*, *Geometric Software Solutions Ltd.*, and *Tata Elxsi Ltd.* Since the CIT(A) has taken *Sankhya* and *Foursoft Ltd.*, in the list of comparables, we set aside the order of the CIT(A) and direct the AO to exclude these comparables from the final list of comparables. After the exclusion of these comparables, left out comparables, *Lanco Global Systems Ltd.*, *Sasken Networks*, *R. S. Software (India) Ltd.*, *Visualsoft Technologies* and *Sasken Communications Ltd.*, be taken in the final list of comparables for determination of the ALP for the software development services provided by the assessee to its AE.”

7. With regard to *Igate Global Solutions*, none of the parties have sought its exclusion from the final list of comparables. Therefore, the *Igate Global Solutions Ltd.*, should also be included in the list of comparables. Accordingly, the final list of comparables should be as under:

1. Lanco Global Systems Ltd.,
2. Sasken Network Systems Ltd.,
3. R S Software (India) Ltd.,
4. Visual Soft Technologies Ltd., (Seg)
5. Sasken Communication Technologies Ltd., (Seg)
6. Igate Global Solutions

8. With regard to other segment i.e., ITeS segment, the TPO has taken the following comparables:

1. Allsec Technologies Ltd.,
2. Saffron Global Ltd.,
3. Vishal Information Tech. Ltd.,
4. Cosmic Global Ltd.,
5. Transworks Information Services Ltd.,
6. Wipro BPO Solutions Ltd.,
7. Ace Software Exports Ltd.,
8. Nucleus Netsoft & GIS Ltd.,
9. Maple E Solutions Ltd.,

The CIT(A), out of the above 9 comparables, has excluded only 1 comparable i.e., Wipro BPO Solutions Ltd., and has taken 8 comparables in the final list of comparables.

9. Aggrieved, assessee has preferred an appeal before the Tribunal and has sought the exclusion of following 5 comparables:

1. Nucleus Netsoft & GIS Ltd.,
2. Vishal Information Tech. Ltd.,
3. Saffron Global Ltd.,
4. Maple E Solutions Ltd.,
5. Cosmic Global Ltd.,

10. During the course of hearing, the learned counsel for the assessee has contended that exclusion of these comparables have been examined by the Tribunal in the following cases:

1. Google India Ltd., Vs. DCIT
2. Oceans Connect (I) (P.) Ltd. Vs. ACIT 57 Taxmann.com 368 (Pune – Trib.)
3. DBOI Global Services Pvt. Ltd., Vs. ACIT 74 Taxmann.com 83.

11. With regard to exclusion of Vishal Information Tech. Ltd., and Nucleus Netsoft & GIS Ltd., the learned Counsel for the assessee has contended that exclusion of these 2 comparables were examined by the Tribunal in the case of Google India Ltd., (Supra) and Tribunal has confirmed the exclusion of these comparables made by the CIT(A) in the light of judgments of Punjab and Haryana High Courts. With regard to Saffron Global Ltd., and

Maple E Solutions, the learned counsel for the assessee has contended that exclusion of these 2 comparables were considered by the Tribunal in the case of Sap Labs India Vs. ADIT 87 Taxmann.com 316 (Bang. Trib.) and ITO Vs. CRM Services India Pvt. Ltd., reported at 14 Taxmann.com 96. The learned counsel for the assessee further contended that Cosmic Global Ltd., is also required to be excluded and its exclusion was examined by the Tribunal in the case of DBOI Global Services Pvt. Ltd., Vs. ACIT 74 Taxmann.com 83. Since the exclusion of all these comparables were examined by the Tribunal in different cases, the same be excluded following the orders of the Tribunal.

12. The learned counsel for the assessee further contended that there is an error in calculation of Allsec Technologies Ltd., as different figures have been picked up. For reference, he placed the reliance upon the order of the Tribunal in the case of Genesis Integrating Systems India Pvt. Ltd., [2016] 66 taxmann.com 20 (Bang.Trib) in which the OC/OP was shown as 26.19% whereas in the instant case it was taken as 29.85%. Therefore, this comparable is required to be re-examined by the TPO.

13. The learned DR on the other hand did not dispute the factual aspects. He however submitted that the Maple E Solutions Ltd., could not be excluded following the order of the Tribunal in other cases on the ground that some of the Directors were involved in some fraud. Maple E Solutions Ltd., was examined by the Tribunal in the case of Acusis Software India Pvt. Ltd., in which the Tribunal has held that fraud was committed by certain Directors during the period 1980 to 1990 and it was respect of business in bicycle parts not connected with the business activities of the company. Taking cognizance of all these facts, the Tribunal has held that this company cannot be excluded on the ground of fraud committed by some Directors long back. Accordingly, the Tribunal held that this company cannot be excluded on this ground. The Tribunal, however, observed that Maple E Solutions Ltd., was acquired by Triton Corporation Ltd., therefore, the extra ordinary events should be verified by the AO/TPO and finally the Tribunal has restored the issue of exclusion of Maple eSolutions to AO/TPO to verify the facts.

14. Having carefully examined the orders of authorities below in the light of rival submissions, we find that the exclusion of Nucleus Netsoft and GIS India Ltd., and Vishal

Information were examined by the Tribunal in the case of Google India Pvt. Ltd. For the sake of reference, we extract the relevant observation of the Tribunal as under:

“With regard to Vishal Information and Nucleus Netsoft & GIS Ltd., of which exclusion was challenged by the revenue, it was submitted that these comparables were examined by the Tribunal in the case of Pr. CIT Vs. IHG IT Services (India) Pvt. Ltd., in ITA 264/2016 and DCIT Vs. Genesis Integrating Systems India Pvt. Ltd., in IT(TP)A 869/Bang/2013. Copy of the order is placed on record. It was also contended that profile of these comparables are similar to the assessee’s profile as they are also engaged in IT enabled services. On perusal of the orders of the Tribunal, we find that Vishal Information Tech Ltd., and Nuclues Netsoft & GIS Ltd., were examined by the Hon’ble Punjab and Haryana High Courts and their exclusion was approved. The relevant decision of the Hon’ble Punjab and Haryana High Court in this regard is extracted hereunder:

“5. As far as Vishal Information Technologies Limited is concerned, there is no difficulty whatsoever for the Tribunal has come to a clear finding of fact that it outsourced about 44.81% of its business. For instance, it was observed that Vishal Information Technologies Limited has a low employee cost of 1.25% of operating revenue. The Tribunal also observed that the TPO had himself referred to the NASSCOM survey that the average wages and salaries to sales ratio of IT/ITES industry in India was 46.1%. The assessee’s wages to sales is 53% which is not comparable to Vishal Information Technologies Ltd., whose wages to sales is 1.25%. This is a finding of fact and there is nothing to indicate that the same is erroneous much less perverse. The exclusion of Vishal Information Technologies Limited is, therefore, justified.

6. The only contention regarding the exclusion of Nucleus Netsoft and GIS (India) Limited is that there is no reasoning. This, however, is not even a ground taken in the appeal filed before us. In any event, we perused the 22nd annual Report for the year 2005-06 of Nucleus Netsoft and GIS (India) Ltd. Schedule 12 furnishes the operating & other expenses. The data processing charges are Rs.1.04 crores out of the total operating & other expenses of about Rs.2.41 crores. Thus, an amount of over 40% is outsourced. The finding of the Tribunal, therefore, cannot be held to be perverse.”

21. These comparables were also examined by the Tribunal in the case of Genesis Integrating Systems India Pvt. Ltd. A copy of order is placed on record at page Nos. 65 to 79 of the compilation in which the Tribunal has examined the profile of Vishal Information Tech Ltd., and Nuclues Netsoft & GIS Ltd. The relevant observations of the Tribunal in this regard are extracted hereunder:

“20. Ground no.3 & 4 challenges the directions of the learned CIT(A) deleting the comparable of M/s Vishal Information Tech. Ltd. selected by the TPO from the list of comparables. We find merit in the submission of the learned counsel that the company is functionally different as this company is engaged in the business of providing call centre services. The Hon’ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. (supra) had distinguished the nature of business between the KPO and ITES as follows:

“34. We have reservations as to the Tribunal's aforesaid view in Maersk Global Centres (India) (P.) Ltd.(supra). As indicated above, the expression BPO and KPO are plainly, understood in the sense that whereas, BPO does not necessarily involve advanced skills and knowledge, KPO, on the other hand, would involve employment of advanced skills and knowledge for providing services. Thus, the expression KPO in common parlance is used to indicate an ITES provider providing a completely different nature of service than any other BPO service provider. A KPO service provider would also be functionally different from other BPO service providers, in as much as the responsibilities undertaken, the activities performed, the quality of resources employed would be materially different. In the circumstances, we are unable to agree that broadly ITES sector can be used for selecting comparables without making a conscious selection as to the quality and nature of the content of services. Rule 10B(2)(a) of the IT Rules, 1962 mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service product characteristics. This factor cannot be undermined by using a broad classification of ITES which takes within its fold various types of services with completely different content and value. Thus, where the tested party is not a KPO service provider, an entry rendering KPO services cannot be considered as a comparable for the purpose of Transfer Pricing analysis. This perception that a BPO service provider may have the ability to move up the value chain by offering KPO services cannot be a ground for assessing the transactions relating to services rendered by the BPO service provider by benchmarking it with the transactions of KPO service providers. The object is to ascertain the ALP of the service rendered and not of a service (higher in value chain) that may possibly be rendered subsequently.

35. As pointed out by the Special Bench of the Tribunal in Maersk Global Centres (Ind.) Pvt. Ltd (supra), there may be cases where an entity may be rendering a mix of services some of which may be functionally comparable to a KPO while other services may not. In such cases, a classification of BPO and KPO may not be feasible. Clearly, no straitjacket formula can be applied. In cases where the categorization of services rendered cannot be defined with certainty, it would be apposite to employ the broad functionality test and then exclude uncontrolled entities, which are found to be materially dissimilar in aspects and features that have a bearing on the profitability of those entities. However, where the controlled transactions are clearly in the nature of lower- end ITES such as call centres etc. for rendering data processing not involving domain knowledge, inclusion of any KPO service provider as a comparable would not be warranted and the transfer pricing

study must take that into account at the threshold".

Furthermore, the company operating margin is 50.68% which is considered to be abnormal, in the line of business it is engaged. Therefore, it cannot be considered as a comparable in the light of the following decisions of the Co-ordinate Benches;

1. *Genesis Integrating Systems (India) (P) Ltd., v. Dy. CIT [2012] 53 SOT 159/20 taxmann.com 715*
2. *Google India (P) Ltd., V. Dy. CIT [2013] 55 SOT 489/29 taxmann.com 412 (Bang – Trib.)*
3. *CRM Services India (P) Ltd. case (supra)*
4. *Fiat India (P) Ltd., v. ACIT 2010-TII-30-ITAT-Mum-TP*
5. *Global Turbine services Inc. V. DDIT (International Taxation) [2013] 38 taxmann.com 220 (Delhi – Trib.)*
6. *Dy. CIT V. Panasonic AVC Networks India Co. Ltd. [2014] 63 SOT 121 (URO)/42 taxmann.com 420 (Delhi – Trib.)*
7. *Dy. CIT V. Petro Araldite (P) Ltd., [2013] 145 ITD 182/35 taxmann.com 590 (Mum. – Trib.)*
8. *Ariston Thermo India Ltd., V. Dy. CIT [2014] 147 ITD 388 [2013] 36 taxmann.com 501 (Pune – Trib.)*
9. *Honeywell Technology Solutions Lab (P.) Ltd. v. Dy. CJT [2014] 61 SOT 61 (RO)/[2013] 35 taxmann.com 144 (Bang. – Trib.)*
10. *Toyota Kirloskar Motors (P.) Ltd V. Asstt. CIT [2012] 28 taxmann.com 293 (Bang.).*

Therefore, we do not find any reason to interfere with the reasoning of the learned CIT(A). Hence, these grounds of appeal filed by the revenue are dismissed.

21. Ground no.5 challenges the directions of the learned CIT(A) to exclude Ms/s Nucleus & GIS Ind. Ltd from the list of comparables selected by the TPO. The CIT(A) deleted this company on the ground that the TPO had not clarified whether this company satisfies the filter of related party transactions. We find that from its annual account it had outsourced a considerable portion of its business, where as assessee company, it carried out the entire operation by itself. It cannot be considered as a comparable on the same reasoning the Co-ordinate Bench of Hyderabad in the case of IVY Coinptech (P) Ltd (supra) deleted this company from the list of comparables by holding as under:

"We have heard the parties. The sole contention of the assessee for excluding the aforesaid company is the employee cost as a percentage of the operating revenue is much lower compared to the assessee. On a perusal of the order passed by the co-ordinate bench in the case of HSBC Electronic Data Processing India Pvt. Ltd. (supra), it is to be noted that the co-ordinate bench while considering the objection of the assessee with regard to the aforesaid company in para-13 accepted assessee's contention that the company outsourced its work and has held that the company cannot

be selected as a comparable on account of its low employee cost. In view of such order of the co-ordinate bench, we direct the AO/TPO to examine this aspect and if there is substantial difference between the assessee the aforesaid company, then this company cannot be treated as a comparable".

Respectfully following the co-ordinate bench decision, we hold that the learned CIT(A) is justified in giving direction to delete M/s Nucleus Netsoft & GIS Ind. Ltd. as a comparable. Hence, this ground of appeal filed by the revenue is dismissed."

22. *Since the Tribunal has examined the profile of these comparables and is of the view that these comparables are not good comparables for computing the ALP, we find no justification to readjudicate the profile of these comparables again. We therefore confirm the order of the CIT(A) who has rightly excluded these comparables. Accordingly, the order of the CIT(A) is confirmed with respect to IT enabled services segment. Accordingly, the AO/TPO is directed to recompute the ALP under software development services segment only."*

15. So far as exclusion of Saffron Global Ltd., and Maple Esolutions are concerned, we find that the exclusion of these 2 comparables were examined by the Tribunal in the case of Oceans Connect India Pvt. Ltd. In the case of Oceans Connect India Pvt. Ltd., the Tribunal has held that Maple Esolutions and Saffron Global Ltd., have holding Triton Corporation Ltd., and they were found to be involved in fraud for which the book results of the company are not reliable. Relying upon the different orders of the Tribunal, the Tribunal has directed the AO/TPO to exclude these comparables from the final list of comparables. This order of the Tribunal was passed on 29.04.2015 by the Pune Bench and thereafter the exclusion of Maple E Solutions Ltd., was examined by the Tribunal in the case of Acusis Vs. ITO 77 Taxmann.com 6 (Bangalore - Trib.) in which the Tribunal has held that fraud in the case of Maple E Solutions was committed during the period of 1980 to 1990 by one of the Directors, therefore for the impugned assessment year 2006-07, the Maple E Solution Ltd., cannot be excluded from the list of comparables as this fraud was committed long back. The Tribunal however restored the matter to the AO/TPO to examine the extraordinary events as the Maple E Solution Ltd., was acquired by Triton Corporation Ltd., to ascertain as to whether the merger affects the profitability of the comparables. In the case of Ocean Connect India Pvt. Ltd., it was observed by the Tribunal that Maple E Solutions Ltd., and Saffron Global Ltd., belong to Triton which were found to be involved in fraud.

With regard to Maple E Solution Ltd., the Tribunal has restored the matter back to the AO/TPO for verification of fact to decide the comparability of this company. Relevant observation in the case of Oceans Connect Ltd., Vs. ACIT is extracted hereunder for the sake of reference:

“15. It is the submission of the Ld. Counsel for the assessee that Maple Esolutions and Saffron Global Ltd. belong to Triton Corporation Ltd. which are found to be involved in fraud for which the book results of the companies are not reliable. Various Benches of the Tribunal have directed to exclude the above 2 companies from the list of comparables because of their involvement in fraudulent practices. Therefore, according to the Ld. Counsel for the assessee, both these companies are to be excluded from the list of comparables and the cost +12% method adopted by the assessee should be accepted. It is also the submission of the Ld. Counsel for the assessee that in the preceding year as well as in subsequent years no adjustment has been made to the international transaction carried out by the assessee and the cost +12% basis adopted by the assessee has been accepted. It is the submission of the Ld. Departmental Representative that the above issues were not brought to the notice of the CIT(A). The decision in the case of Stream International (Services) (P.) Ltd. (supra), relied on by the Ld. Counsel for the assessee relates to A. Y. 2007-08. Therefore, the same cannot be considered for this year. Further, according to the Ld. Departmental Representative, the assessee has not considered any company as comparable. Therefore, according to the Ld. Departmental Representative, the TPO should be given another opportunity to select comparable cases by making further study and adopt suitable comparables.”

16. The reasons for restoring the issue of Maple E Solution Ltd., to AO/TPO in the case of Acusis is also extracted hereunder to understand the controversy:

“iv) Maple eSolutions Ltd.

12.1 The learned Authorised Representative has submitted that financial statement of this company are not reliable as the Directors of this company were found to be involved in some fraud. He has relied upon the decision of this Tribunal in assessee's own case for the Assessment Year 2007-08.

12.2 On the other hand, the ld. DR has forcefully opposed the admission of additional ground and submitted that this comparable company was part of the assessee's TP Analysis then the TPO was not IT(TP)A No.1287/Bang/2010 M/s.Acusis Software India Pvt Ltd having an opportunity to examine the objection raised by the assessee at this stage. The ld. DR has further submitted that the main objection of the assessee is unreliable financial statement whereas the allegation against the Directors of this company relates to a period in long past and also not relating to the business of this company.

12.3 Having considered the rival submissions as well the relevant material on record, we find that the decisions relied upon by the assessee regarding non-reliability of financial statements is not based on any evidence to show that the allegation on the Directors involving any fraud has any connection with the business of this company. Further the said allegations were levied in the past and does not pertain to the business of this company. We find that in the case of Willis Processing Services (I) Pvt. Ltd. Vs. DCIT (supra), an identical issue was examined by this Tribunal in para 51 as under :

" 51 We have considered the rival submissions and relevant material on record. The first objection raised by the assessee is the involvement of the directors of this company in the fraud. The Tribunal in the case of Capital IQ Information (supra) as well as CRM rejected this company as comparable. Undisputedly, the alleged fraud relates back to the period of 1980 to 1990 and it was in respect of business in bicycle parts not connected with the business activity of this company. There was no allegation of any malpractice or fraud in the business of these companies and the allegation of fraud was against the directors in person. Though the Tribunal in the case of Capital IQ Information (supra) and CRM Services (supra) has taken one of the grounds for rejecting this company as a comparable because the director of this company was reportedly involved in the fraud, in our considered opinion the IT(TP)A No.1287/Bang/2010 M/s.Acusis Software India Pvt Ltd said allegation of fraud against the directors and that too in the year 1980 to 1990 would not have influenced the business and margin of these companies when there is no allegation of any malpractice or fraud in connection with the business of these companies. Further, considerable time has passed when these allegations were reported up till the AY under consideration. Therefore, solely on the basis of the allegations of fraud and malpractice against a person in respect of unconnected business activity because the said person happens to be the director of these companies, cannot render these companies as non-comparables. There is no allegation against these companies or business activity of these companies. Therefore, it cannot be considered that the business or results of these companies are in any manner influenced or affected by the allegation of fraud against the directors in respect of other business activity that too more than two decades back.

51.1 So far as the Maple Eolution Ltd ., is concerned, this company was selected by the assessee itself in TP study as comparable; therefore, we are not inclined to accept the objection raised by the assessee before us that the directors of these companies were involved in the fraud.

51.2 However, since Triton Corpn Ltd., acquired by Maple Esolution Ltd., therefore, we are of the view that if extra ordinary events like merger and de- merger or amalgamation took place during the financial year relevant to the Assessment Year under consideration, and because of the merger/de-merger the company became functionally different then the said company should be excluded from the comparables. However, if the merger of the two functionally similar companies took place then the event of merger itself cannot be taken a factor for exclusion of the said comparable.. Accordingly, we direct the AO/TPO to verify this fact and accordingly decide the comparability of this company namely Accentia Technologies Ltd."

17. Since Maple E Solutions and Saffron Global Ltd., belongs to Triton Corporation Ltd., and Maple E Solutions is acquired by the Triton Corporation Ltd., subsequently, it is not clear whether Saffron Global Ltd., was also acquired by Triton Corporation Ltd. Since complete facts are not available before us, we are of the view that let both the companies i.e., Maple E Solutions and Saffron Global Ltd., be re-examined by the AO/TPO in order to verify the facts as to when the fraud was committed in these two comparables, whether it was done by the Directors for these companies or for some other companies and also whether this company was acquired by Triton Corporation Ltd., and what would be the effect of profitability on account of merger and de-merger or amalgamation. Accordingly, the issue of exclusion of these two comparables be re-examined by the AO/TPO after affording opportunity of being heard to the assessee. So far as the exclusion of Cosmic Global Ltd., is concerned, we find that exclusion of this company was examined by the Tribunal, Mumbai Bench in the case of DBOI Global Services Ltd., Vs. ACIT (2016) 74 Taxmann.com 83 and relying upon the other orders of the Tribunal, the Tribunal directed the AO/TPO to exclude this comparable from the list of final comparables. For the sake of reference, we extract the relevant portion of the order of the Tribunal as under:

"7. Objecting to this company, learned Authorised Representative submitted, this company is mainly engaged in translation service. Referring to the Profit & Loss account of the comparable. learned Authorised Representative submitted, it has paid significant translation charges to sub-contractor which works out to 47.12% of its total cost. This implies that the company outsources the translation activities to others, hence, the business model of this company is different from the assessee. Leaniorised Representative referring to the Profit & Loss account of the company at Page-355 of the paper 'cock submitted, the company has incurred expenditure in foreign currencies towards translation charges_ He submitted, for this reason, the company was treated as not comparable in case of Maersk Global Service Centre (India) (P) Ltd. (supra). He also referred to the decision of the Tribunal, Hyderabad

Bench in Capital IQ Information System India Pvt. Ltd. v. Asstt. CIT [2012] 26 taxmann.com 31/[2014] 149 ITD 809.

8. *Learned Departmental Representative relied upon the observations of the learned Commissioner (Appeals) and the Transfer Pricing Officer.*

9. *We have considered the submissions of the parties and perused the material available on record. As could be seen from the Profit & Loss account of this company a copy of which is at Page-355 of the paper book, it has paid substantial amount towards translation charges to entities outside the country. The aforesaid fact signifies that the company has out sourced part of their business activities to others whereas, the assessee has carried out the entire activities itself Thus, there is functional dissimilarity between the two companies. For this reason, it was not considered as a comparable in case of Maersk Global Service Centre (India) (P.) Ltd. (supra) for the very same assessment year 2005-06. As the facts are identical in case of the present assessee also, agreeing with the view expressed by the Tribunal, Mumbai Bench referred to above, we exclude this company as a comparable.”*

18. Since the Tribunal has taken a view in similar set of facts, we find no justification to take a contrary view. Accordingly, following the same, we direct the AO/TPO to exclude the Cosmic Global Ltd., from the final list of comparables. So far as Allsec Technologies Ltd., is concerned, we find there is error in calculations. Therefore, this company should be taken into list of comparables, but its margin (OC/OP) should be recomputed properly. Therefore, the final list of comparables should be of Ace Software, Cosmic Global Ltd., Transworks Information Services Ltd., Allsec Technologies Ltd. The Saffron Global Ltd., and Maple E Solutions requires a proper examination by the AO/TPO while including/excluding from the list of comparables.

19. With regard to corporate tax issue, the learned counsel for the assessee has contended that the assessee has earned the interest income on short term investments of surplus funds lying with the assessee. Since the assessee was 100% export oriented unit, the profits earned on this short term investment is also a business income and eligible for deduction under section 10A of the Act. In support of his contention, he placed reliance upon the judgment of the jurisdictional High Court in the case of CIT Vs. Motorola (2014) 46 Taxmann.com 167 and M/s. Subex Ltd., Vs. ITO in ITA No.46/2009 dated 28.10.2014.

The learned DR placed reliance upon the order of the CIT(A).

20. We have carefully examined the order of the lower authorities in the light of judgments of jurisdictional High Court and we find that in the case of Subex Ltd., the

Hon'ble jurisdictional High Court has examined the provisions of section 10A of the Act and having noted that since the assessee was engaged in 100% export oriented business, earned income though not directly from the export of articles/things in the business, is eligible for deduction under section 10A. Relevant observation of the order of the High Court is extracted hereunder for the sake of reference:

"7. Section 10A (1) and (4) reads as under:-

"10A. Subject to the provisions of this section, a deduction of such profits and the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee.

(4) For the purposes of Sub-sections (1) and (1A), the profits derived from export of articles or things or computer software shall be the amount which bears to, the profits of the business of the undertaking, the same proportion as the export, turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking."

8. As could be seen from the aforesaid provisions, the opening words of Section 10A of the Act assumes importance. It commences with the words "subject to the provisions of this section". The opening words of sub section 4 of the Act clearly state that "for the purposes of sub-sections (1) and (1A), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking". If the assessee is entitled to deduction only profit derived under Section 10A(1) of the Act, the sub section (4) would be redundant. The sub section which came into effect on 01-04-2002 by Finance Act" 2001 recognizes that the profits of the business of the undertaking would be, not only the profits and gains from the exports of articles or things or computer. in addition to that, the undertaking may have some other profits also, which is derived from business of the undertaking.

9. In the instant case, the assessee took the premises on lease. Assessee has paid a sum of Rs.43,38,350/- as rent from April 2002 to March 2003. It is shown 'as 'business expenses', as against the 'expenses incurred'. The assessee has received a sum of - Rs.17,27,385/- as rent receipt for the relevant period. Assessee is not the owner of the said premises. Assessee is carrying on the business of development of Software in Canada. The said premises was taken for the aforesaid business purpose. As a portion of the said premises was not used for business purpose, instead of keeping it vacant and suffering loss, it was rented out. Therefore the said income derived from lease of the said premises

constitutes "income from business". Neither it would be 'income from house property' nor 'income from other sources'. In view of the explanation used in sub Section (4) of Section 10A of the Act for the purpose of Sub section 1, the profit derived from export of articles or things or computer software shall be the amount which bears to the profits of business of the undertaking. Though the said profits are not derived from export of articles r.ir things or computer software, by virtue of sub Section (4) it is deemed to be the profits of the business of the undertaking for the purpose of extending the benefit of exemption of payment of tax under Section 10A of the Act to a newly established undertaking in a free trade zone. In that view of the matter, the order passed by the Tribunal is un-sustainable and contrary to law. Therefore, the first substantial question of law is answered in favour of the assessee as against the revenue.

21. In the instant case, undisputedly, assessee is a 100% export oriented unit and nothing has been brought into record to show that assessee is engaged in domestic transactions. Under these transactions whatever income was earned in short term investment, it is business income of the assessee and assessee is eligible for deduction under section 10A. Accordingly, we direct the AO/TPO to allow the deduction 10A of the Act on this interest income.

22. In the result, appeal of the assessee is partly allowed for statistical purpose.

Pronounced in the open court on 23rd March, 2018.

Sd/-
(JASON P BOAZ)
Accountant Member

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Place : Bangalore
Dated : 23/03/2018
/NS/*

Copy to :

- | | | | |
|---|----------------------|---|------------|
| 1 | Appellant | 2 | Respondent |
| 3 | CIT(A)-II Bangalore | 4 | CIT |
| 5 | DR, ITAT, Bangalore. | 6 | Guard file |

By order

Sr. Private Secretary,
ITAT, Bangalore.