

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I-2", NEW DELHI  
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER  
AND  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.6165/Del/2015  
Assessment Year : 2011-12**

Adobe Systems India Pvt. Ltd., Plot No.A5, Sector 132, Noida.	<b>Vs.</b>	ACIT, Circle- 1, Noida.
<b>PAN : AACCA2982J</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA No.6287/Del/2015  
Assessment Year : 2011-12**

DCIT, Circle- 1, Noida.	<b>Vs.</b>	Adobe System India Pvt. Ltd., Plot No.1, 1A, City Centre, Sector- 25A, Noida.
		<b>PAN : AACCA2982J</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri Nageshwar Rao, Adv.  
Department by : Shri H. K. Choudhary, CIR-DR  
Shri Sanjay Kumar Yadav, Sr.DR

Date of hearing : 19-04-2018  
Date of pronouncement : 06-07-2018

**ORDER**

**PER R. K. PANDA, AM :**

These are cross appeals. The first one is filed by the assessee and the second one filed by the Revenue and are directed against the order dated 29.02.2016 passed u/s 154/144C/143(3)/92CA of the I.T. Act, 1961 for

assessment year 2011-12. For the sake of convenience, these were heard together and are being disposed of by this common order.

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of development of software and export thereof. It filed its return of income on 28.11.2011 declaring income of Rs.30,70,17,845/- after claiming exemption u/s 10A of the I.T. Act at Rs.42,06,15,206/-. Since the assessee had undertaken international transaction with its AE, the Assessing Officer referred the matter to the TPO u/s 92CA of the I.T. Act.

3. The TPO observed that the Adobe Systems India Pvt. Ltd. is a software research and development company incorporated in India on 30.07.1997. It functions as a contract services provider and renders service to its group companies. It is primarily engaged in undertaking software development services. Further, the company is engaged in marketing and promoting the products and services of Adobe group. He observed that during the impugned assessment year, the assessee has entered into the following international transactions with its AE M/s Adobe Systems Inc. and Adobe Systems Software Ireland Ltd. :-

<i>S.No.</i>	<i>Name of the associated enterprises</i>	<i>Nature of transaction</i>	<i>Amount received</i>	<i>Method</i>
1.	<i>Adobe systems Inc. California, USA</i>	<i>Provision of software development services</i>	<i>4,39,34,28,313</i>	<i>TNMM</i>
2.	<i>Adobe Systems Software Ireland Limited</i>	<i>Provision of marketing support services</i>	<i>23,36,49,199</i>	<i>TNMM</i>
3.	<i>Adobe Systems Inc. U.S.A. 345 Park Avenue, San Jose California 6951102704 U.S.A.</i>	<i>Payment of Interest on Advance fee for services</i>	<i>70,87,823</i>	
	<i>Total</i>		<i>4,63,41,65,335/-</i>	

4. So far as the provision of software development services segment is concerned, the TPO observed that the assessee has selected 23 companies having arithmetic mean of 9.87%. The operating profit of the assessee company from software development services was declared at 15.01% and provision of marketing supports services was shown at 8.41%. Since the assessee has used multiple year data as against current year data and has used improper filters that led to incorrect choice of comparables and had not correctly analyzed the functions of comparable, the TPO rejected the comparables, selected by the assessee company and proceeded to select fresh comparables. Finally, the TPO selected 20 comparables in the software development services segment with arithmetic mean of the OP/OC at 23.89%. After removing the non-operational item written back and the objection of the assessee, the TPO finally selected the following 20 comparables with arithmetic mean of OP/OC at 24.42% and made adjustment of Rs.35,93,23,898/-, the details of which are as under :-

*“11. Computation of mean margins of comparables for Software Development Services.*

*Based on the above discussion all the contention of the assessee are rejected hereby and the mean operating margin of suitable comparables is computed as under :-*

<i>Sr.No.</i>	<i>Name of the Company</i>	<i>OP/OC (%) (F.Y. 10-11)</i>
1.	<i>Acropetal Technologies Ltd. (Segmental)</i>	<i>34.91%</i>
2.	<i>Akshay Software Technologies Limited</i>	<i>0.86%</i>
3.	<i>Celstream Technologies Pvt. Ltd.</i>	<i>13.20%</i>
4.	<i>Evoke Technologies Pvt. Ltd.</i>	<i>8.11%</i>
5.	<i>E-Zest Solutions</i>	<i>39.98%</i>
6.	<i>E-Infochips Ltd.</i>	<i>56.44%</i>
7.	<i>IGate Global Solutions Ltd.</i>	<i>23.71%</i>
8.	<i>Infosys Ltd.</i>	<i>43.39%</i>
10.	<i>Larsen and toubro Infotech Ltd.</i>	<i>19.19%</i>
11.	<i>Mindtree Ltd. (Segment)</i>	<i>10.29%</i>

12.	<i>Persistent Systems and Solutions Ltd.</i>	22.51%
13.	<i>Persistent Systems Ltd.</i>	23.08%
14.	<i>R S Software (India) Ltd.</i>	16.20%
15.	<i>Sanskhya Infotech Limited (Segment)</i>	26.20%
16.	<i>Sasken Communication Technologies</i>	24.36%
17.	<i>Tata Elxsi Ltd. (Segment)</i>	10.35%
18.	<i>Thirdware solutions (Sol)</i>	18.30%
19.	<i>Wipro Technologies Ltd. (Merged)</i>	54.42%
20.	<i>Zylog Systems Ltd.</i>	28.74%
	<i>Arithmetic mean</i>	24.42%

*Computation of Arm's Length Price of Software Development Services:*

*The arm's length price of the international transaction related to the provision of Software Development services is recalculated as below :-*

a)	<i>Operational Cost</i>	3,81,99,26,227
b)	<i>Arm's Length Price @ 24.42% (a*1.2442)</i>	4,75,24,52,211
c)	<i>Price Received</i>	4,39,34,28,313
d)	<i>Adjustment u/s 92CA(B-C)</i>	35,93,23,898

5. So far as the provision of market support services segment is concerned, the TPO after considering the various objections raised by the assessee selected the following 15 comparables with adjusted OP/OC at 25.39% and made an adjustment of Rs.3,65,91,236/-, the details of which are as under :-

<i>Sr. No.</i>	<i>Name of the company</i>	<i>OP/OC (%) Unadjusted</i>	<i>OP/OC (%) Adjusted</i>
1.	<i>Priya International Ltd. (Segmental)</i>	4.68%	5.67%
2.	<i>Indus Technical Financial consultants Limited</i>	12.05%	13.07%
3.	<i>Cyber Media Research Ltd.</i>	10.60%	12.17%
4.	<i>I C R Management Consulting Services Ltd.</i>	16.14%	12.10%
5.	<i>Info Edge (India) Ltd.</i>	15.53%	53.85%
6.	<i>M M TV Ltd.</i>	32.94%	33.90%
7.	<i>Media Research Users Council</i>	40.53%	72.60%
8.	<i>Power System Operational Corpn. Ltd.</i>	22.52%	21.18%
9.	<i>Quadrant Communications Ltd.</i>	14.58%	21.09%
10.	<i>Apito Ltd.</i>	25.17%	20.01%
11.	<i>Global Procurement Consultants Ltd.</i>	30.86%	32.21%
12.	<i>TSR Darashaw Limited</i>	28.91%	30.83%
13.	<i>Quippo Valuers and Auctioneers Private</i>	7.23%	11.17%

	<i>Limited</i>		
14.	<i>Crystal Hues Ltd.</i>	11.69%	8.17%
15.	<i>ICC International Ltd.</i>	36.77%	32.84%
	<i>Average</i>	22.68%	25.39%

17. *Computation of Arm's Length Price of Market Support Services:  
The arm's length price of the international transaction related to the provision of Software Development services is recalculated as below :-*

a)	<i>Operational Cost</i>	21,55,19,926
b)	<i>Arm's Length Price A*1.2539)</i>	27,02,40,435
c)	<i>Price Received</i>	23,36,49,199
d)	<i>Adjustment u/s 92CA (B-C)</i>	3,65,91,236

*(TP adjustment on account of provision of Market Support Services-Rs.3,65,91,236/-).*

6. The assessee approached the DRP who vide order dated 21.09.2015 directed the TPO to consider the working capital adjustment sought in respect of software development services on the same line as in marketing support services allowed by the TPO and carry out requisite adjustments. So far as certain comparables excluded by the TPO in the software development services segment is concerned, the DRP directed to include Cat Technologies Limited, CG-VAK Software & Exports Limited, Goldstone Technologies Limited, Helios & Matheson Information Technology Limited, Maveric Systems Limited, Seven Technologies Limited, Thinksoft Global Services Limited as these comparables passes the filter. However, the DRP restored the issue to the file of the TPO/Assessing Officer to verify the figure/data in this regard before including.

7. So far as comparables included by the TPO in the software development segment is concerned, the DRP directed the TPO to exclude Infosys Technology

Ltd. from the list of comparables by following the decision of the Hon'ble Delhi High Court in the case of CIT vs. Agnity India Technologies Pvt. Ltd. vide ITA No.1204/2011 order dated 10.07.2013.

8. As regards the rejection of the assessee's comparables by the TPO in marketing support services is concerned, the DRP held that MM TV Limited, Media Research Users Council, Quadrant Communication Limited, Apitco Limited, Global Procurement Consultants Limited, TSR Darashaw Limited are functionally different entity and hence does not make good comparables to the assessee in MSS function. Similarly, they held that Power Systems Operation Corporation Limited being Government of India undertaking has very different economic model and environment and therefore, cannot be compared with the assessee for which they directed the same to be excluded.

9. So far as gains/losses arising out of foreign exchange fluctuations, provision for doubtful debts, bank charges and provisions written back while computing the operating margins of the assessee as well as the comparable companies are concerned, the DRP held that the losses/gains due to foreign exchange fluctuation are part of operating margins. Similarly, bank charges have also to be treated to the extent of direct nexus with business operations of the assessee. Similarly, they held that the provisions of doubtful debts and provisions written back are to be treated as part of operating margins. They also directed the TPO to allow the risk adjustment subject to verification. Based on

the direction of the DRP, the Assessing Officer vide order dated 29.02.2016 passed the order wherein he made addition of Rs.25,94,80,676/- on account of the software development services segment and marketing support services segment.

10. Aggrieved with such order of the Assessing Officer/TPO/DRP, the assessee as well as the Revenue are in appeal before the Tribunal by raising the following grounds of appeal :-

(i) ITA No.6165/Del/2015 (By Assessee) :

*“On the facts and circumstances of the case and in law, the learned Deputy Commissioner of Income-tax, Circle-1, Noida ("AO") has erred in passing the assessment order under Section 143(3) of the Income-tax Act, 1961 ("the Act") after considering the adjustments proposed by the Assistant Commissioner of Income-tax, Transfer Pricing Officer 3(2)(1) ("TPO") in his order passed under Section 92CA(3) of the Act and subsequently confirmed by the Hon'ble Dispute Resolution Panel ("DRP").*

*Each of the ground is referred to separately, which may kindly be considered independent of each other and without prejudice to each other.*

*That on the facts and circumstances of the case and in law,*

*Transfer Pricing grounds:*

1. *The learned AO / TPO / DRP have erred in making an addition of INR 285,083,847 to the total income of the Appellant on account of adjustment in the arm's length price ("ALP") of the international transactions related to software development services and marketing support services entered into by the Appellant with its associated enterprises ("AEs").*
2. *The learned AO / TPO / DRP have erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("the Rules").*
3. *The learned AO / TPO / DRP have erred in making an adjustment under Section 92CA(3) of the Act without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of Section 92C(3) of the Act.*
4. *The learned AO / TPO/ DRP have erred by rejecting certain comparable companies identified by the assessee for having different accounting year (i.e. having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months).*
5. *The learned AO / TPO / DRP have erred in*
  - a. *Using single year data instead of multiple year data*

- b. *Determining the arm's length margins / prices using data pertaining only to FY 2010-11 which was not available to the Appellant at the time of complying with the Transfer Pricing ("TP") documentation requirements.*
6. *The learned AO / TPO / DRP have erred in rejecting certain comparable companies identified by the Appellant using employee cost greater than 25 percent of the total cost as a comparability criterion.*
7. *The learned AO / TPO / DRP have erred in selecting certain companies (which are earning super normal profits) as comparable to the Appellant.*
8. *The learned AO / TPO / DRP have erred in rejecting certain comparable companies identified by the Appellant using "Turnover less than INR 5 Crores" as a comparability criterion for software development services segment and "Turnover less than INR 1 Crore" for marketing support services segment.*
9. *The learned AO / TPO / DRP have erred in rejecting certain comparable companies identified by the Appellant using "Export earnings less than 75 percent of operating revenues" as a comparability criterion.*
10. *The learned AO / TPO have erred in passing an order which has computational errors in the margin of comparable companies used in the determination of the ALP for software development services segment and marketing support services segment.*
11. *The learned AO / TPO have erred in not following the directions issued by the DRP, thereby acting in contravention of provisions of Section 144C(13) of the Act.*
12. *The learned AO / TPO / DRP have erred in rejecting certain companies which are comparable to the Appellant and adding certain functionally dissimilar companies to the final set of comparable companies.*
13. *The learned AO / TPO / DRP have erred by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis comparable companies.*

*The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal. The Appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.*

(ii) ITA No.6287/Del/2015 (By Revenue) :

- “1. *The Dispute Resolution Panel (DRP) has erred in law on facts in rejecting Infosys Technologies Ltd. by placing misplaced Reliance on the judgment of Hon'ble High Court of Delhi in the case of Agnity Technologies Ltd.*
2. *The Dispute Resolution Panel (DRP) has erred in law and on facts in carrying out arbitrary analysis while examining the comparable for market support segment.*
3. *The Dispute Resolution Panel (DRP) has erred in law on facts by directing that Forex Fluctuations, bank charges, provision for doubtful debt and provisions written back should be considered part of operating margin calculations.*
4. *That the appellant craves to leave, add, alter and amend any of the grounds of appeal on or before hearing.*
5. *That the order of the DRP being erroneous in law and on facts deserves to be set aside/cancelled and the order of the Transfer Pricing Officer be restored.”*

**ITA No.6287/Del/2015 (By Revenue) :**

11. In ground of appeal no.1, the Revenue has challenged the order of the DRP in rejecting Infosys Technologies Ltd. as a comparable.

12. Facts of the case, in brief, are that the TPO included Infosys Technologies Ltd. as comparable in the software development services segment on the ground that the company passes all the filters and, therefore, it is a robust comparable. The argument of the assessee before the TPO that Infosys Technologies Ltd. is functionally dissimilar, engaged in significant R&D activities, having significant intangible assets, brand value of Infosys and earning supernormal profits was rejected by the TPO. The DRP directed the TPO to exclude Infosys Technologies Ltd. from the list of comparables on the ground that it is an industrial giant and has to be excluded in view of the decision of the Hon'ble Delhi High Court in the case of Agnity India Technologies Pvt. Ltd. (supra) wherein it has been held that the giant entities which have tremendous economic advantage compared to the assessee like that of the assessee. The ld. DRP further held that the Tribunal in assessee's own case for assessment year 2008-09 had directed Infosys Technologies Ltd. to be excluded from the list of comparables.

13. The ld. DR strongly opposed the order of the DRP directing the TPO to exclude Infosys Technologies Ltd. from the list of comparables. He submitted that the DRP had excluded Infosys Technologies Ltd. from the list of

comparables and, therefore, the Tribunal had no occasion to deal with this comparable during the assessment year 2008-09. The Tribunal relying on the decision of the Hon'ble Delhi High Court in the case of Agnity India Technologies Pvt. Ltd. (supra) directed the TPO to be excluded Infosys Technologies Ltd. from the list of comparables. He submitted that during the assessment year 2009-10, the Tribunal at page 5, para 6 of the order had not made any discussion regarding Infosys Technologies Ltd. When the matter was set-aside by the Hon'ble Allahabad High Court to the file of the Tribunal, the Tribunal vide ITA No.1163/Del/2014 order dated 30.11.2017 thoroughly discussed the issue and held that the Infosys Technologies Ltd. is a comparable. He submitted that during the assessment year 2009-10 for the first time, the TPO held that the patents are originating from India.

14. Referring to the TPO order for assessment year 2009-10, he submitted that the TPO had categorically held that information gathered from independent sources like Website of US Patent Office shows patents have been filed in US with India originating during the year. Referring to page 116 of the Paper Book, he submitted that Adobe Systems Inc. had filed one patent during the year 2007, 4 patents during the year 2008, 5 patents in the year 2009 and 17 patents in the year 2010 with US patents and trademark office. He submitted that these details were not available in earlier years. Further Adobe has no PE in India. It is operating through Adobe India. Therefore, the assessee cannot

say that this company is not incurring any expenditure for patent. He submitted that even if the ownership does not lie with the AE, the same cannot be a ground for saying that it is not developed by the AE. Referring to page 22 of the Paper Book, Volume- 1, Id. DR drew the attention of the Bench to Exhibit- 4 which shows the typical software development life scale (SDLC). He submitted that the scale consists of market research, R&D, software requirement analysis, system analysis and design, code generation, testing and maintenance. He submitted that the assessee is doing all 7 activities and not the last three i.e. code generation, testing and maintenance. He submitted that Infosys Technologies Ltd. also is doing similar function. Therefore, it is functionally same. Referring to page 29 of the Paper Book, Id. DR drew the attention of the Bench to the terms and conditions of the provisions of software development services, according to which, Adobe India provides engineering, research and development services to Adobe US. Further, Adobe India also performs design, development, support improvement and enhancement services for Adobe US products. As per the said terms and conditions, Adobe India is reimbursed by Adobe US all direct, indirect and overhead expenses incurred in rendering services along with a mark up on such costs. Referring to page 31, Volume- 1 of the Paper Book, he submitted that Adobe India undertakes the coding and documentation function with respect to the software modules that it develops. Adobe US plans, supervises and manages the coding and documentation

function performed by Adobe India. Adobe India is only responsible for the development of modules of the software for a product. He submitted that the assessee has technical man power and is capable of developing new software. It has registered 27 patents with the U.S. Govt. department. Referring to page 32 of the Paper Book, he drew the attention of the Bench to para 4.2.3 which is risk analysis. Referring to page 33 of the Paper Book, he submitted that Adobe India is compensated on the basis of a full cost plus mark-up and is assured of the recovery of costs of any underutilized/unutilized resources. Thus, Adobe India is not exposed to any utilization risk and the capacity utilization risk is borne by Adobe US. He submitted that in any service, there is some calculation on the basis of manpower. The assessee also takes some risk. Therefore, it cannot be said that the assessee is not a risk free entity. Referring to page 621 of Volume-2 of the Paper Book, ld. DR drew the attention of the Bench to the agreement for technology, research and development. Referring to para 2.3 at page 622 of the Paper Book, he drew the attention of the Bench to the ownership of the invention. This shows that ownership has not been designed for any patents developed in India. He submitted that the assessee nowhere in the TP study report has declared the patent as going to the AE abroad without any costs. Therefore, it cannot be said that the assessee has not taken any risk. In view of the above, he submitted that the order of the Tribunal in assessment

year 2009-10 should be followed where it has been held that Infosys Technologies Ltd. is a comparable.

15. Ld. counsel for the assessee, on the other hand, strongly supported the order of the DRP. He submitted that the Tribunal in assessee's own case for assessment year 2008-09 has directed Infosys Technologies Ltd. to be excluded from the list of comparables. The DRP during the assessment year 2010-11 has directed that Infosys Technologies Ltd. be excluded from the list of comparables and no appeal has been filed by the Department before the Tribunal. Similarly, no adjustment is made in assessment year 2013-14 on account of Infosys Technologies Ltd. He further submitted that Infosys Technologies Ltd. is engaged in significant R&D activities, it has got significant intangible assets, it has exceptionally high turnover and significant onsite services.

16. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Fiserv India P. Ltd. vide ITA No.602/2016 order dated 07.10.2016, he submitted that Infosys Technologies Ltd. was excluded from the list of comparables on the ground that it is engaged not merely in software development both offsite and onsite and that it receives the substantial revenues on account of onsite software financial development. It also owns brand intangibles – an advantage which the assessee does not possess.

17. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Agnity India Technologies Pvt. Ltd. vide ITA No.1204/2011 order dated 10.07.2013, he submitted that Infosys Technologies Ltd. was excluded from the list of comparables on account of its operating as full-fledge risk taking entrepreneurs has diversified services and develops/owns proprietary products like Finacle, Infosys Actice Desk, Infosys iPrime, Infosys mConnect etc. He submitted that substantial expenditure has been incurred on account of R&D, expenditure on account of advertising/sales promotion and brand building and onsite services by Infosys. He also relied on various other decisions and submitted that Infosys Technologies Ltd. should be excluded from the list of comparables.

18. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer/TPO/DRP and the Paper Book filed on behalf of the assessee. We have also considered the various decisions relied on by both the sides. We find the TPO included Infosys Technologies Ltd. as a comparable in the software services segment on the ground that this company passes all the filters and, therefore, it is robust comparable with that of the assessee company. We find the DRP excluded the above company from the list of comparables by relying on the decision of the Hon'ble Delhi High Court in the case of Agnity India Technologies Pvt. Ltd. (supra) and the decision in assessee's own case for assessment year 2008-09.

19. It is the submission of the ld. DR that in assessment year 2009-10, the Tribunal has thoroughly discussed the issue and has held that Infosys Technologies Ltd. is a comparable case to that of the assessee company.

20. It is the submission of the ld. counsel for the assessee that in assessment year 2010-11, the ld. DRP had directed to exclude Infosys Technologies Ltd. from the list of comparable and no appeal had been filed by the Revenue against the same. However, there is no such finding prior to assessment year 2009-10. The Tribunal in assessment year 2008-09 has directed to exclude Infosys Technologies Ltd. from the list of comparables. Similarly, for assessment year 2007-08, the DRP had excluded Infosys Technologies Ltd. from the list of comparables and no appeal was filed by the Revenue before the Tribunal. We find the Tribunal in assessee's own case for assessment year 2009-10 has directed Infosys Technologies Ltd. to be retained as comparably by observing as under :-

*“6.5.6 We have heard the rival submission and perused the relevant material on record. We find that the ITAT in assessment year 2008-09 has rejected the Infosys as comparable mainly on the ground of functional dissimilarity. The Tribunal held that Infosys Ltd. is a full risk bearing Entrepreneur entity engaged in diversified activity. The Tribunal relying on the decision of Agnity India Technologies Private Limited vs. ITO, ITA No. 3856/Del/2010 (AY 2006-07) order dated 04.11.2010, held that turnover by itself may not be sufficient to accept or reject a company but it could lead to examination of functional differences, if any.*

*6.5.7 But in the case before us, from page 65 of the Annual Report of the company (page 938 of the paper book), we find that during the year the company has shown income from software service and products. Further, on page 80 of the Annual Report (page 953 of the paper book) under the head 'segment reporting', it is reported that the company's operations predominately relate to provide end-to-end business solutions that leverage technology, thereby enabling clients to enhance business*

*performance delivered to customers globally operating various industry segments and accordingly segment information in respect of operation in industries and geographic location has been provided.*

*6.5.8 When we compare the activity of the instant assessee, we find from the transfer pricing study as under:*

*"a) Adobe India provide engineering, research and development services to Adobe US . Adobe India also performs design, development, support improvement in enhancement services for Adobe US products (para-4.2.1 on page 22 of the TP study)*

*b) Adobe India undertakes, the coding and documentation function with respect to the software modules that it develops ( page 24 of the TP study)*

*c) Adobe India is responsible for day-to-day project management and the end deliverables with respect to the models of the software being developed by it.( Page 24 of the TP study)*

*d) Adobe India undertakes quality control procedure with respect to the software modules developed by it. ( Page 24 of the TP study)*

*e) Adobe India also performs unit test for the software modules developed by it.( Page 25 of the TP study). '*

*6.5.9 Though, in the TP study the assessee has furnished that conceptualization and design of the software are being done in the supervision or direction of the 'Adobe US' and the assessee's having limited role in these activities, but, in our opinion, it is evident from the transfer pricing study, as far as development of software modules is concerned, the assessee also plays a dominant role. The learned TPO in the order has brought on record that the assessee has not provided the details of software developed or designed and conceptualizations was done abroad and development work was done in India. He also mentioned that details of software developed completely and description of functions in India and abroad was not provided to him despite numerous opportunities given to the assessee. The assessee has even not brought any such evidences before us.*

*6.5.10 In such circumstances, on the basis of the evidence before us, we conclude that the function of the assessee company becomes similar to the comparable company, who develops products for the client and provide service in respect of those products.*

*6.5.11 As far as argument of the high turnover of the comparable (Rs.20,264 crores) as compared to turnover of the assessee (Rs. 285 crores), is concerned, we place our reliance on the decision of the Hon'ble Delhi High Court in the case of Agnity India Technologies Private Limited Vs. ITO (supra) wherein it is held that turnover by itself may not be sufficient to accept or reject the company until functional differences exist. Since in the instant case, we do not find any functional differences between the assessee and the comparable company, we are not inclined to reject the comparable*

mainly on the basis of the turnover. Further, we note that the learned TPO on page 63 of the order has brought on record that the 'Adobe Systems INC', has filed 5 patents in calendar year 2009 and 17 patents in calendar year 2010 having originated in India. The learned TPO has further given finding on the economic ownership of the intangibles as under:

*"It is seen as per clauses of software Research Agreement dt. 01.09.1997 the legal ownership of R&D intangibles developed by the assessee in India automatically gets transferred to the Associated Enterprises without any compensation i.e. by the application of these clauses of the agreement the associated Enterprises becomes legal owner of the intangibles developed by the assessee in India. It is pertinent to mentioned here that the assessee has developed these intangibles in India and had borne cost and risk and had used its asset. Accordingly, the economic ownership of the intangibles is with the assessee. It is now well accepted principle that local economic ownership of intangible can be created separately & distinctly from the legal ownership of patents, trademarks etc. The assessee claim that the Associated Enterprise is the legal owner of the intangibles may be correct, but the economic ownership of the intangible is with the assessee.*

*That during the period 2008-09 number of patents have been developed with India origin and legal ownership of these patents have been transferred to its AE as per the agreement without any compensation because the compensation model of cost plus 15% is not adequate to compensate the assessee for the functions performed by it because it not include return associated with economic ownership of intangibles."*

6.5.12 We agree with the fact that the assessee has developed these intangibles in India and transferred to the AE, who is registered as legal owner. Thus, though the legally assessee is not owner of the intangibles, but it has carried out all functions to generate intangibles, and thus it becomes functionally similar to the comparable company who has also generated intangibles during the year. The assessee also deserves to be compensated for generation of the intangibles similar to the intangible exploited by the comparable.

6.5.13 Next argument of the learned counsel for rejection of the comparable is on-site filter. The learned counsel submitted that during the year under consideration the comparable earned 49.3% of the revenue from on-site activities. In our opinion, by providing the staff at the site of the client is akin to making the staff available for exclusive work of the client. We find that the assessee also acts as captive service provider for its AE. In both the cases the ultimate function which is carried out is of the software development services. We find that in this manner, the on-site activity of the comparable does not make any functional difference between the assessee and the comparable. 6.5.14 The learned TPO has brought on record in the order that the assessee has employed 1367 employees out of which 1342 employees were engaged in providing software development services. He further submitted that most of the employees were having educational qualification like B Tech/ B. Engg./M Tech/software development professional, MBA etc, and thus the profile of the

*employees showed that ITA No.1163/Del/2014 they were performing high-end services of research and development and not routine services .*

*6.5.15 We find that in the kind of activity carried out by the assessee and the comparable, most of the assets required are human resources and IT infrastructure. The Ld. counsel has not brought out any significant change in the ratio of the human resources or IT infrastructure in terms of the turnover of the assessee and comparable. Similarly, the Ld. counsel has not brought out impact of risks undertaken by the assessee and comparable on the profit level indicator. 6.5.16 Further, the cases relied upon by the assessee are not applicable over the facts of the instant case as the functions carried out and the economic interest in the products developed by the assessee are different as compared to the entities in the cases relied upon by the assessee. Since function of the comparable company and the assessee may differ from year to year, the decision of Tribunal in earlier year, for not treating the company as comparable, cannot be taken as binding precedent.*

*6.5.17 In view of above discussion, we direct the learned TPO to retain M/s Infosys Technologies Ltd. as one of the comparable to the assessee.”*

21. While holding so, the Tribunal has further observed that the assessee has not provided the details of software developed or designed and that conceptualizations was done abroad and development work was done in India. Similarly, the assessee has not provided the details of software developed completely and description of functions in India and abroad either before the TPO or before the Tribunal. Accordingly, it was concluded that the function of the assessee company become similar to the comparable company who develops products for the client and provide service in respect of those products. The Tribunal has further held that the assessee has not brought out any significant change in the ratio of the human resources or IT infrastructure in terms of the turnover of the assessee and comparables. The Tribunal has further held that the functions of the comparable company and the assessee may differ from year

to year and the decision of the Tribunal in earlier year for not treating the company as comparable cannot be taken as binding precedent. In view of the above, we deem it proper to restore the issue to the file of the TPO with a direction to give an opportunity of the assessee to provide further details and substantiate with evidence to his satisfaction that Infosys Technologies Ltd. is functionally different from that of the assessee company for the impugned assessment year in the light of the discussion for assessment year 2009-10. It may be pertinent to mention here that the decision of the Tribunal (supra) is dated 30.07.2011 and the order of the DRP is dated 21.09.2015. Neither the DRP had the benefit of the decision of the Tribunal nor the assessee had the opportunity to meet the observations given in the order of the Tribunal before the TPO/DRP to substantiate that Infosys Technologies Ltd. is functionally different from that of the assessee company and, therefore, to be excluded from the list of comparables. The ground no.1 by the Revenue is accordingly allowed for statistical purposes.

22. In ground no.2, the Revenue has challenged the order of the DRP in excluding certain comparables from the market support segment.

23. Facts of the case, in brief, are that the TPO had included the following companies in the market support services segment on the ground that these are good comparables since the functions of these comparables are similar to that of the assessee company :-

- (i) Info Edge (India) Limited.
- (ii) M M T V Limited.
- (iii) Media Research Users Council.
- (iv) Power Systems Operation Corporation Limited.
- (v) Quadrant Communication Limited.
- (vi) Apitco Limited.
- (vii) Global Procurement Consultant Limited.
- (viii) TSR Darashaw Limited.

24. Before the DRP, the assessee submitted that these companies are functionally dissimilar. Similarly, MMTV Limited, Media Research Users Council, Apitco Limited, Global Procurement Consultants Limited failed export turnover filter. The DRP only upheld the inclusion of Info Edge (India) Limited and directed the TPO to exclude the remaining 7 comparables for which the Revenue is not in appeal before the Tribunal.

25. We have considered the rival arguments made by both the sides and perused the material available on record. So far as MMTV Limited is concerned, the DRP excluded this company from the list of comparables on the ground that this is functionally different entity and does not make a good comparable to the assessee in MSS function. Further, the submission of the assessee that it has significant intangibles could not be converted by the ld. DR.

Since the above company is engaged in the business of television broadcasting and related operations and it has got significant intangibles, therefore, we hold that this company cannot be compared with that of the assessee company. The order of the DRP is accordingly upheld.

26. So far as Media Research Users Council is concerned, we find this company is a council of media companies with members comprising advertisers, publishers, advertising agencies and companies from broadcast and other media and engaged in undertaking surveys, research into the readership, viewership, listenership of various media for advertising. We, therefore, uphold the order of the DRP on this count in holding that Media Research Users Council is a functionally different entity and hence does not make a good comparable to the assessee in MSS function. The order of the DRP is accordingly upheld.

27. So far as Power Systems Operation Corporation Limited is concerned, we find this is a Government of India undertaking and having RPT filter 48.20%. This company is also functionally different and segmental details are not available. Further, it fails export turnover filter being 14.16%. We, therefore, uphold the order of the DRP in excluding this company from the list of comparables.

28. So far as Quadrant Communication Limited is concerned, we find this company is functionally dissimilar since it is a full-service advertising agency

and offers support in providing Direct Marketing, Brand Strategy, Media Solutions, Public Relations, Exhibitions, Retail Solutions, Feature-Film Associations, etc. We, therefore, uphold the order of the DRP in holding that this is a functionally different entity and hence does not make a good comparable in MMS function.

29. So far as Apitco Limited is concerned, we find this company was rejected by the Tribunal in assessee's own case for assessment year 2009-10. Similarly, the DRP has rejected this company from the list of comparables in assessment year 2013-14. Since the company provides technical consultancy services which is evident from the page 27 of the annual report and it fails the export turnover filter having 0.57%, therefore, we uphold the order of the DRP in holding that this is a functionally different entity and hence does not make a good comparable to the assessee in MSS function.

30. So far as Global Procurement Consultants Limited is concerned, we find this company is engaged in procurement related advisory services and financial audit for projects in India and abroad which is evident from page 1, 3, 15 and 16 of the annual report. We further find this company was rejected by the Tribunal in assessee's own case for assessment year 2010-11 and no appeal was filed by the Department before the Tribunal. We, therefore, uphold the order of the DRP in holding that this is a functionally different entity and hence does not make a good comparable in MMS function.

31. So far as TSR Darashaw Limited is concerned, we find this company is engaged in share registry and transfer services, depository services, record management, payroll and provident fund management and corporate fixed deposit management which are in the nature of IT enabled services as evident from page 21 of the annual report. We, therefore, uphold the order of the DRP in holding that this is functionally different entity. Further, this company was rejected by the Tribunal in assessee's own case for assessment year 2009-10 and the DRP in assessee's own case for assessment year 2010-11 and no appeal was filed by the Revenue before the Tribunal. We, therefore, uphold the order of the DRP in excluding the company from list of comparables. The ground no.2 by the Revenue is accordingly dismissed.

32. In ground no.3, the Revenue has challenged the order of the DRP in directing that Forex Fluctuations, bank charges, provision for doubtful debt and provisions written back should be considered part of operating margin calculation.

33. After hearing both the sides, we find the TPO while computing the operating margin of the assessee as well as comparable companies did not consider gains/losses arising out of foreign exchange fluctuation, provision for doubtful debts, bank charges and provision written back. The DRP held that the losses/gains due to foreign fluctuation are part of operating margins in view of plethora of decisions. Similarly, the charges have also to be treated similarly to

the extent of direct nexus with business operation of the assessee. They also held that the provisions for doubtful debts and provision for written back have also to be treated as part of the operating margins. While doing so, the ld. DRP relied on the decision of the Delhi Bench of the Tribunal in the case of First Rain Software Centre Private Limited (ITA No.4006/Del/2010) and Sony India Private Limited reported in 114 ITD 448. We do not find any infirmity in the order of the DRP on this issue. So far as bank charges are concerned, it has been held in various decisions that bank and finance charges are part of the operating expenses and should be treated as such in arriving at the margin. The Delhi Bench of the Tribunal in the case of Cash Edge India Pvt. Ltd. vide ITA No.5848/Del/2012 has held that the Assessing Officer will also take into account the bank and finance charges as part of operating expenses of comparable for arriving at the margin.

34. We further find the DRP in assessee's own case for assessment years 2011-12 and 2012-13 had directed the TPO to treat bank charges as operating in nature. Since bank charges are levied by the banks towards maintenance and allowing various facilities to the taxpayers in respect of maintaining their bank accounts, therefore, such expenses are intrinsically related to business operation of the assessee. We, therefore, find merit in the argument of the ld. counsel for the assessee that such expenses cannot be equated with financing or funding

expenses incurred by a company. We, therefore, hold that bank charges should be treated as operating item.

35. So far as provisions for doubtful debts as non-operating item is concerned, we find the term operating margin has not been defined in Act. However, the same has been interpreted by various benches of the Tribunal. We find the Special Bench of the Tribunal in the case of JCIT vs. Usha Martine Industries Ltd. vide ITA No.1304/Cal/2000 has held that the provisions for doubtful debts, advances and investment are indeed provision for diminution in value of assets as against provision for un-ascertain liability as contended by the Revenue. The Hyderabad Bench of the Tribunal in the case of Alliance Global Services IT India (P) Ltd. vide ITA No.58/Hyd/2014 has held that the provision for bad and doubtful debts should form part of the operating expenses. Similar view has been taken by the Delhi Bench of the Tribunal in the case of Rolls Royce India Private Limited vs. DCIT vide ITA No.1310/Del/2015. In view of the above discussion, we do not find any infirmity in the order of the DRP holding that the losses/gains due to foreign exchange fluctuation as part of the operating margin and the bank charges as part of the operating expenditure of the assessee. Further, the order of the DRP holding the provision for doubtful debts and provision for written back as part of operating margin is also upheld. The ground raised by the Revenue on this issue is accordingly dismissed.

36. The ground no.4 and 5 being general in nature are dismissed.

**ITA No.6165/Del/2015 (By Assessee) :**

37. Although a number of grounds have been raised by the assessee but ld. counsel for the assessee confined his argument to inclusion or exclusion of certain comparables.

38. So far as the order of the DRP in including the Info Edge (India) Limited is concerned, he submitted that the TPO included this comparable in the market support services segment on the ground that its functions are similar to that of the assessee company. He submitted that the DRP upheld the action of the TPO. Referring to page 11, 13, 37, 47, 56, 61 and 70 of the annual report, ld. counsel for the assessee submitted that Info Edge (India) Limited is functionally dissimilar being engaged in business of management of online portal. Further it also earns revenue from subscription fee. Referring to the decision of the Delhi Bench of the Tribunal in the case of Rolls-Royce India Pvt. Ltd. vs. DCIT vide ITA No.6636/Del/2015 for assessment year 2011-12 and in the case of LinkedIn Technology Information Private Limited vide ITA No.706/Del/2016 order dated 23.06.2016, he submitted that Info Edge (India) Limited was excluded from the list of comparables on account of being functionally dissimilar.

39. The ld. DR on the other hand supported the order of the TPO/DRP.

40. After hearing both the sides, we find the Info Edge (India) Limited was included by the TPO holding that it is functionally comparable which has been upheld by the DRP. We find the Tribunal in the case of Rolls-Royce India Pvt.

Ltd. (supra) while directing the TPO to exclude this company as comparable from the market support services segment has observed as under :-

*“21. Regarding Infoedge India Pvt. Ltd we are of the view that this company has been included by the TPO holding that it is functionally comparable. Assessee contended before the ld. TPO as well as DRP that this company is functionally not comparable in view of it engaged in management of online portals and also has major sources of revenue as advertisement income. Both the lower authorities rejected the contention of the assessee. We have carefully considered the rival contentions. It is apparent that the comparable selected by TPO is engaged in online portal activities such as employment website, matrimonial website and its major revenue is advertisement and subscriptions. It has diversified services such as recruitment related, real estate related, matrimonial related services and owns significant Rolls Royce India Private Limited V DCIT ITA No 6636 Del 2015 A.Y. 2011-12 intangibles/websites such as naukri.com, 99 acre.com etc. Therefore this company is functionally different as it is providing an advertisement space as well as online portal based on subscription by the buyer and seller of the services compared to services provided by the assessee of marketing support services . In view of this we direct ld. TPO for exclusion of this comparable.”*

41. Similarly, the Tribunal in the case of LinkedIn Technology Information Private Limited (supra) has directed the TPO to exclude this company from the list of comparable.

42. Following the above two decisions and considering the fact that the functions of Info Edge (India) Limited is different from that of the case of the assessee, we hold that the above company is not a comparable. We accordingly direct the Assessing Officer/TPO to exclude this company from the list of comparables.

43. So far as inclusion of E-Infochips Limited in the list of comparables in the software services segment is concerned, ld. counsel for the assessee submitted that the TPO added the above company on the ground that it passes

all the filters and therefore it is robust comparable. The DRP upheld the action of the TPO on the ground that the TPO has taken segmental figures. Referring to the decision of the Hon'ble Delhi High Court in the case of Chrys Capital Investment Advisors India Private Limited vs. DCIT reported in [2015-TII-13-HC-DEL-TP] and also the decision of the Special Bench of the Tribunal in the case of Maersk (Mumbai) (2014) 43 taxmann.com 100, he held that high profit or supernormal profits do not matter and it is the functional comparability and the FAR assessment that helps in considering a comparable for ALP determination. It is the submission of the ld. counsel for the assessee that E-Infochips Limited is engaged in software development (73.38%), hardware maintenance (15.07%) and information technology consultancy (11.15%). Thus, the Revenue from software development services is less than 75% which is evident from page 2492 of the Paper Book. According to him as per the segment disclosure the company is engaged in software development and IT enabled and products which has been considered as only one segment which is evident from 2466 of the Paper Book. Further, as per annual report of the company, it is engaged in the development and maintenance of computer software and software development consulting and also manufacturing EVM and VDB Electronic Board (Hardware Division) which is evident from page 2471 of the Paper Book. Apart from the above, this company also is an industry giant and has high brand value. Referring to the decision of the Tribunal in the

case of Ness Technologies Private Limited vide ITA No.696/Mum/2016, he submitted that this company was excluded from the list of comparables.

44. The Id. DR on the other hand heavily relied on the order of the TPO/DRP.

45. We have considered the rival arguments made by both the sides and perused the material available on record.

46. A perusal of page 2492 of the Paper Book, shows that as against net operating revenue of 26.64 crores, the revenue from software development is 19.22 crores which comes to 73.38%. Thus, the revenue from software services is less than 75%, the threshold adopted by the TPO. Further from page 2466 of the Paper Book, we find it has been mentioned by the company under the head information about primary segment that company is primary engaged in support segment in IT enabled which is considered only reportable business segment as per the Accounting Standard- 17 "segment report". Thus, no segmental details are available. Further this company is also engaged in the development and maintenance of the computer software and software development consultancy and also manufacturing EVM and VDB Electronic Board (Hardware Division). We find considering all aspects the Co-ordinate Bench of the Tribunal in the case of Ness Technologies Private Limited (supra) has directed to exclude this company from the list of comparables. The relevant observation of the Tribunal from para 4 onwards read as under :-

“8. We have carefully considered the rival submissions. In the context of the objections raised by the assessee, we have perused the ITA No. 696& 1006/Mum/2016 (Assessment Year 2011-12) Annual Report of the said concern, a copy of which has been placed in the Paper Book at pages 418 to 429. A perusal of the same reveals that apart from providing software development services, the said concern is also engaged in selling software products. The Annual Report also reveals that the said concern is also engaged in manufacturing EVM and VDB Electronic Boards, which is a hardware related activity. Notably, the Annual Report reveals that all the activities have been clubbed and considered as single reportable business segment, and segmental data for software services is not available so as to be used for benchmarking the transactions which are being tested. On the contrary, in so far as the activity of the assessee, which is under benchmarking is concerned, it relates to pure software development services and it does not involve sale or development of software products or hardware. It is also quite evident that M/s.E-Infochips Limited is undertaking I.T enabled services, which also is distinct from the software development activities undertaken by the assessee. In fact, at the time of hearing, Ld. Representative for the assessee had relied upon the decision of the Delhi Bench of the Tribunal in the case of Saxo India Pvt. Ltd. vs. ACIT, ITA No.6148/Del/2015 dated 5th February, 2016, wherein under an identical situation, M/s.E-Infochips Limited has been found to be incomparable to a concern engaged in rendering pure software development services. Notably, the Tribunal has referred to the Annual Report of the said concern and made the following observations:-

"10.2 After considering the rival submissions and perusing the relevant material on record, we find that the Annual report of this company is available in the paper book with its Profit and loss account at page 1025, Schedule of Income indicates its operating revenue from software development, hardware maintenance, ITA No. 696& 1006/Mum/2016 (Assessment Year 2011-12) information technology, consultancy etc. Revenue from hardware maintenance stands at Rs.3.92 crore, which has been considered by the Transfer Pricing Officer himself as sale of products. Such sale of products constitutes 15% of total revenue. There is no segmental information available as regards the revenue from sale of products and revenue from software development segment. As the assessee is simply engaged in rendering software development services and there is no sale of any software products, this company, in our considered opinion, ceases to be comparable. It is obvious that from the common pool of income from both the streams of software products and software services, one cannot deduce the revenue from software services and no one knows the impact of revenue from Products on the overall kitty of profit, which may be significant. Since no segmental data of this company is available indicating operating profit from software development services, we order to exclude this company from the list of comparables."

8.1 It is also pertinent to note that the aforesaid observations of our Co-ordinate bench are in relation to the assessment year 2011-12, which is also the assessment year under consideration before us.

8.2 On the basis of the aforesaid discussion, in our view, the said concern cannot be considered as a good comparable and deserves to be excluded from the final set of

*comparables for benchmarking the international transactions of Provision of software development services undertaken by the assessee. Thus, on this aspect we uphold the stand of assessee and Ground of appeal no. 15 is allowed.”*

47. Following the decision of the Tribunal cited (supra) and in view of our above discussion, we hold that the E-Infochips Limited is not a good comparable. We accordingly direct the TPO/Assessing Officer to exclude this company from the list of comparables.

48. So far as Wipro Technology Services Limited is concerned, we find this company was included by the TPO on the ground that it passes all the filters and accordingly it is robust comparable. The DRP upheld the action of the TPO on the ground that it passes the filter and is functionally comparables. It is the submission of the Id. counsel for the assessee that this company is engaged in IT software solutions/maintenance and technology infrastructure support services and has got high brand value. Similarly, it's related party transaction are more than 25%. It is also his submission that this company was rejected by the Tribunal in assessee's own case for assessment year 2010-11 and by the Co-ordinate Bench of the Tribunal in the case of Equant Solutions India Pvt. Ltd. vide ITA No.1202/Del/2015, Ness Technologies Private Limited (supra) and Orange Business Services India Solutions Pvt. Ltd. vide ITA No.869/Del/2016.

49. It is the submission of the Id. DR since this company passes all the filters, therefore, it is a robust comparable and, therefore, it should be reopened as a comparable.

50. We have considered the rival arguments made by both the sides and perused the material available on record. We find the Tribunal in assessee's own case for assessment year 2010-11 vide ITA No.967/Del/2014 at para 6 had directed the TPO to exclude Wipro Technology Services Limited from the list of comparables. While doing so, the Tribunal relied on the decision of the Coordinate Bench of the Tribunal in the case of Agnity India Technologies Pvt. Ltd. (supra) where it has been held that Wipro Technology Services Limited is not a good comparable. Since one of the ground for exclusion of this company from the list of comparable was related party transaction apart from PLI, we therefore, restore this issue to the file of the TPO to find out the RPT and if it is more than 25% to exclude this company from the list of comparables.

51. So far as E-zest Solutions Limited is concerned, the TPO included this company as a comparable on the ground that it passes all the filters and, therefore, it is a robust comparable which has been upheld by the DRP. It is the submission of the Id. counsel for the assessee that the broad portfolio of services which are into KPO services and outsourced product development services and, therefore, cannot be considered as comparable. For the above proposition, he relied on the decision of the Madras Bench of the Tribunal in the case of

Symnatec Software and Services Pvt. Ltd. vide ITA No.614/Mad/2016 for assessment year 2011-12 and the Bangalore Bench of the Tribunal in the case of Electronic Imaging India Pvt. Ltd. vide ITA No.1506/Bang/2015.

52. It is the submission of the ld. DR that since this company passes all the filters, therefore, it is good comparable.

53. In our opinion, the matter needs to go back to the TPO/Assessing Officer on this issue to give an opportunity to the assessee to substantiate as to how this company is functionally different from that of the assessee company. The Assessing Officer/TPO shall decide the issue afresh after giving due opportunity of being heard to the assessee.

54. So far as Igate Global Solutions Ltd. is concerned, the TPO included this company on the ground that it passes all the filters which was upheld by the DRP. It is the submission of the ld. counsel for the assessee that Igate Global Solutions Ltd. is engaged in IT and ITeS services. Referring to various pages from the annual report, he submitted that there is insufficient segmental information and, therefore, the same should be excluded from the list of comparables.

55. It is the submission of the ld. DR that this issue may be set-aside to the extent of verification of segment details.

56. We find merit in the argument of the ld. counsel of the ld. DR that this issue may be set-aside to the file of the TPO/Assessing Officer to the extent of

verification of segmental details. Accordingly, the comparable Igate Global Solutions Ltd. is allowed for statistical purposes.

57. So far as certain companies erroneously rejected by the TPO is concerned, Id. counsel for the assessee challenged the order of the TPO/DRP to the extent of the following comparable.

58. So far as Cat Technologies Limited is concerned, the TPO rejected the same on the ground that it fails RPT filters and it is functionally dissimilar. However, the DRP held that the TPO/Assessing Officer shall verify the submission of the assessee that the comparable passes the filters. Further, it was accepted as comparable by the TPO in assessment year 2010-11 in assessee's own case. It is the submission of the Id. counsel for the assessee that non-disclosure of RPT data does not clearly indicate that it has significant RPT in the absence of supporting evidence thereof. It is also his submission that it is engaged in software development and consultancy activities and more than 75% of operating revenues were derived from comparable activities, as per page 35 of the annual report. Further it passes services revenue filter. In view of the above submission, we find merit in the observation of the DRP that the TPO/Assessing Officer shall verify the submission of the assessee that it passes all the filters. We restore this issue to the file of the Assessing Officer/TPO to verify the details and decide the inclusion of this company as comparable. While doing so, the TPO/Assessing Officer shall also keep in mind the order for

assessment year 2010-11 in assessee's own case. We hold and direct accordingly.

59. So far as Caliber Point Business Solutions Limited is concerned, the TPO rejected the claim of the assessee to include the company as comparable on account of different financial year ending and functionally dissimilar which has been upheld by the DRP. We find the above company was considered by the Tribunal in assessee's own case in the immediately preceding assessment year and the issue was restored to the file of the TPO with certain direction. Following the order of the Tribunal, we restore this issue to the file of the Assessing Officer/TPO to decide the issue afresh in the light of the direction of the Tribunal. While doing so, he shall also keep in mind the decision in the case of McKinsey Knowledge Centre India Pvt. Ltd. vs. CIT vide ITA No.217/2014 and the decision of the Special Bench of the Tribunal in the case of Sun Life India Service Centre Pvt. Ltd. vide ITA No.750/Del/2015. We hold and direct accordingly. This issue is accordingly allowed for statistical purposes.

60. So far as R Systems International Limited is concerned, it was rejected by the TPO on account of different financial year ending which has been upheld by the DRP. It is the submission of the ld. counsel for the assessee that since quarterly results of the company are available in public domain, therefore, margin computation for the period ended on 31.03.2011 is possible. Further it

was accepted by the Tribunal in assessee's own case for assessment year 2010-11.

61. After hearing both the sides, we find the Tribunal in assessee's own case at para 8.11 had directed the TPO to consider the allowability of this company as comparable with certain direction. We, therefore, restore this issue to the file of the TPO with the same direction.

62. So far as Helios & Matheson Information Technology Limited is concerned, the TPO excluded the same from the list of comparables on the ground that it has different financial year ending and fails export turnover filters. The DRP upheld the action of the TPO. It is the submission of the Id. counsel for the assessee the different financial year ending is not an appropriate filter and the company passes export earnings filter of 76.31%. Further, the TPO himself has accepted this company in assessee's own case in assessment year 2007-08 and was accepted by the Tribunal in assessee's own case for assessment year 2010-11.

63. After hearing both the sides, we find this company was considered by the Tribunal in assessee's own case in the immediately preceding assessment year and the Tribunal has restored this issue to the file of the TPO/Assessing Officer with certain direction for inclusion of this company. We, therefore, restore this issue to the file of the TPO/so with a direction to decide the issue afresh in the

light of the direction of the Tribunal in assessee's own case in immediately preceding year. This issue is accordingly allowed for statistical purposes.

64. So far as CG-VAK Software & Exports Limited is concerned, here also the TPO rejected this company from the list of comparables on the ground that it fails turnover filter and persistent operating losses which has been upheld by the DRP. It is the submission of the Id. counsel for the assessee that it is having turnover of 6.33 crores which is more than 5 crores turnover adopted by the TPO and, there is no persistent losses as it has earned profit in financial year 2010-11 and 2008-09, therefore, we restore the issue to the file of the TPO with a direction to verify the same. The TPO shall also keep in mind the order of the Tribunal in assessee's own case for rejection of this company. The TPO shall also keep in mind the functional similarity/dissimilarity while deciding the issue. This company is accordingly allowed for statistical purposes.

65. So far as Goldstone Technologies Limited is concerned, we find the same was rejected by the TPO on the ground that both the companies fails export revenue filter and that segmental information is not available in the case of Goldstone Technologies Ltd. which is engaged in both IT and IT Enabled Services. Similarly, in the case of Maveric Systems Limited it has high indirect cost resulting in negative impact on net margins for which reasonably accurate adjustment cannot be made. It is the submission of the Id. counsel for the assessee that both the companies passes the export earning filters and were

accepted as comparable by the TPO in assessment year 2010-11 in assessee's own case. Since there are certain infirmities pointed out by the Id. DR, therefore, we deem it proper to restore the issue of the above two comparables for deciding the issue afresh after affording due opportunity to the assessee. The grounds raised by the assessee on account of exclusion/inclusion are accordingly allowed for statistical purposes.

66. In the result, the appeals filed by the assessee as well as the Revenue are partly allowed for statistical purposes.

Order pronounced in the open Court on this 06<sup>th</sup> day of July, 2018.

**Sd/-**  
(KULDIP SINGH)  
JUDICIAL MEMBER

**Sd/-**  
(R. K. PANDA)  
ACCOUNTANT MEMBER

Dated: 06-07-2018.

*Sujeet*

*Copy of order to: -*

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The DRP- 2, New Delhi.
- 5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar  
ITAT, New Delhi