

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH : KOLKATA

[Before Hon’ble Shri A.T.Varkey, JM & Hon’ble Shri M.Balaganesh, AM]

I.T.A No. 284/Kol/2016

Assessment Year : 2011-12

Nomura Research Institute Financial Tech.(I) Pvt. Ltd. -vs- DCIT, Circle-2(2), Kolkata
(formerly Anshin Software Pvt. Ltd.)
[PAN: AADCA 8967 A] (Appellant) (Respondent)

I.T.A No. 485/Kol/2016

Assessment Year : 2011-12

DCIT, Circle-2(2), Kolkata -vs- Nomura Research Institute Financial Tech.(I) Pvt. Ltd.
(formerly Anshin Software Pvt. Ltd.)
[PAN: AADCA 8967 A] (Appellant) (Respondent)

For the Appellant : Shri J.P. Khaitan, Senior Advocate

For the Revenue : Shri G. Mallikarjuna, CIT DR

Date of Hearing : 01.08.2018

Date of Pronouncement : 26.10.2018

ORDER

Per M.Balaganesh, AM

1. These cross appeals of the assessee as well as the revenue arise out of the final order passed by the Learned Deputy Commissioner of Income Tax , Circle 2(2), Kolkata [in short the ld AO] under section [in short u/s] 144C read with section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the ‘Act’) dated 29.11.2015 pursuant to the Directions of the Learned Dispute Resolution Panel [in

short the Id DRP] u/s 144C(5) of the Act dated 21.10.2015 for the Assessment Year 2011-12. Both the appeals are taken up together and disposed off by this common order for the sake of convenience.

2. The Ground Nos. 1 & 2 raised by the assessee are with regard to non-consideration of revised return of income filed by the assessee. The brief facts of this issue are that the assessee filed its original return of income for the Asst Year 2011-12 on 17.11.2011 declaring total income of Rs 54,56,160/-. The revised return of income was filed on 29.11.2012 declaring total income of Rs 53,14,323/-. Admittedly this revised return was filed within the time limit prescribed u/s 139(5) of the Act. The Id AO while completing the assessment ought to have taken note of the same and computed the total income of the assessee. Hence we direct the Id AO accordingly. **The Ground Nos. 1 & 2 raised by the assessee are allowed.**

3. The Grounds 3 to 5 raised by the assessee are general in nature and does not require any specific adjudication .

DETERMINATION OF ARM'S LENGTH PRICE

4. The only issue to be decided in these cross appeals is with regard to inclusion and exclusion of certain comparables for the purpose of determining the Arm's Length Price (ALP) of international transactions entered into by the assessee with its Associated Enterprise (AE).

5. The brief facts of this issue are that the assessee is engaged in the business of rendering software development services. The assessee renders services to Anshin Software Corporation , USA incorporated as a company under the laws of California, USA. Infact the assessee is a captive service provider for Anshin Software Corporation, USA. It is not in dispute that the assessee and Anshin Software Corporation , USA are Associated Enterprises (AEs) because of common

shareholding in both the companies by Shri Arnab Debnath and Miss Mausumi Debnath. During the year under consideration, the total turnover of the assessee company was Rs 16,62,87,634/- and out of which Rs 15,88,37,635/- constitutes export turnover. The assessee received a sum of Rs 15,88,37,635/- for rendering software development services from its AE. Thus the entire export turnover constitutes sale to AE in USA. Under the provisions of Section 92 of the Act, any income arising out of an international transaction has to be computed having regard to the Arm's Length Price. Under Section 92F(ii) of the Act, ALP means a price which would be charged between persons if they are not AEs and there are no uncontrolled conditions prevailing with reference to the transactions. It is not in dispute that the provisions of Section 92 of the Act are applicable in respect of the transactions of rendering services of software development services by the assessee to its AE.

5.1. To justify the price received by the assessee as one at Arm's Length, the assessee filed a transfer pricing analysis in which the assessee adopted Operating Profit to Operating Cost (OP /OC) as Profit Level Indicator (PLI) and determined the ALP by applying Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). The functions performed by assessee and its AE are summarized as under:-

Type of Functions	ASPL	Anshinsoft Corp
Strategic Management Function	Yes	No
Corporate Services	Yes	No
Management Information System	Yes	No
Training of Personnel and Management	Yes	No
Product Conceptualization and planning	No	Yes
Research and development	No	Yes
Software programming and documentation	Yes	No
Software services	Yes	No

Quality Control	Yes	Limited
Cost Control	Yes	No
Marketing strategy and Development	No	Yes

5.2. The risk profile of the assessee and its AE in respect of the above mentioned international transaction is as under:-

Type of Functions	ASPL	Anshinsoft Corp
Business risk	Limited	Yes
Product development Risk	No	Yes
Service liability Risk	Yes	No
Utilization risk	Yes	No
Credit and collection risk	Limited	No
Intellectual Property right risk	No	Yes
Foreign exchange risk	Yes	No

5.3. The details of assets employed as on 31.3.2011 by assessee are as under:-

Tangible & Intangible Assets	Amount (INR)
Computer & Allied Equipment	4,031,308
Computer software	1,142,753
Office equipment and others	2,134,494
Furniture and fixtures	3,307,808
Motor car	34,156
Total	10,650,518

5.4. Based on the results of the functional, risk and asset analysis, the assessee concluded that it can be characterized as Software Service Provider bearing limited risks typically borne by captive service provider in IT industries.

5.5. For the international transaction under consideration, ASPL (i.e the assessee) has been chosen as the tested party for the purposes of the Transfer Pricing Study due to the fact that it does not own any significant intangible and its profitability can also be reliably ascertained.

5.6. The parameters adopted by the assessee for rejecting the comparables are as under:-

- a) Companies for which sufficient financial or descriptive information is not available to undertake analysis .
- b) Companies that have been declared sick or have persistent negative net worth.
- c) Companies that have ceased business operations or are currently inactive.
- d) Companies undertaking significantly different functions compared to assessee. This includes companies for which software services income constitutes less than 75% of their company-wide / segmental revenues, wherever applicable.
- e) Companies that do not have significant (less than 25%) foreign exchange earnings.
- f) Companies that have substantial (excess of 25%) transactions with related parties.
- g) Companies which have been incurring persistent operating losses.
- h) Companies that have exceptional year(s) of operations.
- i) Companies that are duplicated in the databases with different names or merged to form another company.

5.7. The assessee on an analysis of similar companies, who are engaged in providing software development services, identified 16 companies as comparable with the assessee. The assessee took the weighted average of operating profit to operating

cost of the 16 comparable companies so selected for three financial years, viz., 2008-09, 2009-10 and 2010-11. By doing so, the assessee arrived at an **unadjusted operating margins at 11.16% on operating cost** of 16 comparable companies. Since the assessee's operating profit/operating cost was 11.95%, the assessee claimed that the transactions with the associated enterprises was at arm's length. The assessee further computed the working capital adjustment in respect of each of the chosen comparables to improve the reliability of the results and make it comparable with the assessee and computed the weighted average of working capital adjusted operating profits on operating costs (%) as under:-

<i>Sl. No.</i>	<i>Name of the company</i>	<i>FY. 2010-11</i>	<i>FY. 2009-10</i>	<i>FY. 2008-09</i>	<i>Weighted average of operating profits on operating costs (%)</i>
1	Akshay Software Technologies Limited	1.00%	-3.14%	12.27%	3.39%
2	Ancent Software International Limited	-16.78%	NA	-4.76%	-11.23%
3	Aztecsoft Limited (Consolidated)	NA	NA	0.28%	0.28%
4	CG-VAK Software & Exports Limited (Segmental)	3.48%	-12.31%	1.01%	-2.45%
5	Goldstone Technologies Limited	-3.15%	-2.46%	-4.58%	-3.52%
6	Helios & Matheson Information Technology Limited	9.74%	NA	NA	9.74%
7	Larsen & Toubro Infotech Limited	15.84%	18.01%	15.22%	16.27%

8	LGS Global Limited	9.52%	5.27%	14.95%	9.42%
9	Maveric Systems Limited	- 11.34%	12.65%	10.13%	0.85%
10	Mindtree Limited (Segmental)	9.17%	19.48%	4.58%	10.49%
11	Persistent Systems Limited	24.57%	28.92%	15.02%	22.64%
12	R S Software (India) Limited	15.91%	9.42%	10.63%	12.15%
13	R Systems International Limited(Segmental)	4.37%	15.49%	8.45%	9.34%
14	Sasken Communication Technologies Limited	26.24%	24.22%	13.77%	20.66%
15	Thinksoft Global Services Limited	0.60%	10.08%	17.48%	10.01%
16	Zylog Systems Limited	21.36%	14.47%	10.48%	15.56%

Arithmetic Mean

7.73%

5.8. The assessee specifically stated in its Transfer Pricing Study Report that the risk profiles of independent companies usually differ from that of assessee , as they may undertake business risks, legal and contractual risks, etc. The effect of these functional and risk differences on profit margins, needs to be factored while determining the arm's length price. However, no adjustments have been made to account for such risk differences between the tested party (i.e assessee) and the comparable companies and assessee reserved the right to undertake an adjustment

for such differences , if any, if warranted. The assessee earned an operating margin of 11.95% on operating cost. Since assessee's operating margin of 11.95% on operating cost was higher than the arithmetic mean of the margins of the comparable companies of 7.73% , the assessee concluded that the international transaction with its AE was at arm's length.

6. The Id AO made a reference u/s. 92CA (1) of the Act to the Learned Transfer Pricing Officer (in short the Id TPO) for determination of arm's length price (in short ALP) in respect of the international transaction between the assessee and its associated enterprises (in short AEs). The Id TPO vide its order dated 22.1.2015 passed u/s 92CA(3) of the Act, firstly accepted the Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining the ALP of the international transaction. He however, rejected the action of the assessee in adopting the weighted average of three financial years operating profit to operating cost to arrive at the profit margins (arithmetic mean) of the comparable companies. He held that multiple year data cannot be used for comparison purpose and it was only the data of the relevant previous year that has to be used in arriving at the arithmetic mean of profit margin of the comparable companies. The Id TPO observed that the assessee had also carried out certain working capital adjustments without explaining its relevancy in the instant case. The Id TPO thereafter rejected various comparables chosen by the assessee on the grounds such as the annual report of the comparable was insufficient in as much as it did not contain details of related party transactions ; companies were having persistent losses ; companies having significant exposure in media business and had incurred expenses on digital processing, movie etc ; companies that are functionally not comparable ; financial period of comparable was different with that of the assessee etc.

6.1. The various filters arrived by the Id TPO for evaluating the comparable companies are as under:-

- a) **Rejecting companies having different financial year ending on whose data does not fall within 12 month period i.e 1.4.2010 to 31.3.2011 for comparability analysis ;**
- b) **Rejecting companies having turnover of less than Rs 1 crore and more than Rs 200 crores ;**
- c) **Rejecting companies having employee cost less than 20% of turnover ;**
- d) **Rejecting companies having related party transactions of more than 20% of sales ;**
- e) **Rejecting companies having service income less than 40% of the turnover.**

The TPO on his own identified certain comparables applying the aforesaid filters and arrived at the operating profit to operating cost of these companies and determined the arms length price of the international taxation as follows :-

6.2. The list of final comparables selected by the Id TPO, along with the margins is as follows :

<u>Sl. No.</u>	<u>Name of the company</u>	<u>PLI = OP/TC</u>
1	8K Miles Software Services Ltd	41.77%
2	Aurum Soft Systems Ltd	19.35%
3	Lucid Software Ltd	41.98%
4	Sagarsoft (India) Ltd	26.79%
5	Spry Resources (India) Pvt Ltd	35.64%
6	Prelude Sys India Ltd	25.14%
7	R S Software Ltd	15.50%
8	Sankhya Infotech Pvt Ltd	29.08%
9	Zylog Systems (India) Ltd	33.21%
10	E-Infochips Bangalore Ltd	26.70%
11	ASM Technologies Ltd	18.52%
12	Onward Technologies Ltd	14.70%
13	Axis IT & T Ltd	26.36%
14	Thirdware Solutions Pvt Ltd	15.03%
15	Acropetal Technologies Ltd (segmented)	49.88%
	Simple Arithmetic Mean	27.96%

Thus the Arm's Length Mean Margin of comparables chosen by the Id TPO was arrived at 27.96%.

<i>Description</i>	<i>Amount (Rs.)</i>
Software Development Service	16,62,87,634/-
Operating Revenues	16,62,90,006/-
Expenses debited to P&L account	14,85,39,128/-
Operating Expenses	14,85,39,128/-
Operating Profit	1,77,50,878/-
OP/TC (PLI)	11.95%
OP/OR	10.67%

6.3. Therefore the calculation of the adjustment in the case of the assessee is as follows:

Average PLI	27.96%
Operating Cost (A)	Rs. 14,85,39,128/-
Arm's Length Mean Margin profit (B)	27.96 % of the Operating Cost
Arm's Length Price (ALP) 127.96% of operating cost	Rs. 19,00,70,668/-
Total Turnover	Rs 16,62,87,634/-
Price received from AE	Rs. 15,88,37,635/-
% of revenue from AE	95.52%
ALP in respect to international transaction With AE (95.52% of Rs 19,00,70,668)	Rs 18,15,55,502/-
Receipt from AE	Rs 15,88,37,635/-
Shortfall to be adjusted upwards	Rs 2,27,17,867/-

Since the adjustment is above than + / - 5% limit, the Id TPO made an upward adjustment of Rs 2,27,17,867/- to the total income of the assessee.

7. Aggrieved by the determination of the arms length price by the Id TPO as above, the assessee filed objections before the Id DRP. The Id DRP upheld the action of the Id TPO with regard to rejection of multiple year data. The Id DRP upheld the various

filters used by the Id TPO for selection of comparables. The Id DRP upheld the action of the Id TPO in not allowing the working capital adjustments on the margins of the comparables for want of information in that regard. The Id DRP held that certain comparables chosen by the Id TPO as well as the assessee needs to be included and excluded as under:-

Inclusion of Comparables by Id DRP

- a. Akshay Software Technologies Limited
- b. Vibrant Digital Limited (formerly LGS Global Ltd)
- c. Acropetal Technologies Ltd
- d. E-Infochips Bangalore Limited
- e. Aurum Soft Systems Limited
- f. Sagarsoft (India) Limited
- g. Spry Resources India Private Limited
- h. Axis IT & T Ltd

Exclusion of Comparables by Id DRP

- a. Ancent Software Technologies Limited
- b. CG-VAK Software & Exports Limited
- c. Goldstone Technologies Limited
- d. Helios & Matheson Information Technology Limited
- e. Larsen & Toubro Infotech Limited
- f. Mindtree Systems Limited
- g. Lucid Software Limited
- h. Sankhya Infotech Private Limited
- i. Prelude Sys India Limited
- j. 8K Miles Software Services Limited

7.1. The assessee submitted before the Id DRP that the Id TPO erred in computing profit margins of certain comparables . The Id DRP directed the Id TPO to verify the computational error if any and adopt the correct profit margins to arrive at the Arm's length margin of comparables. The Id TPO after incorporating the directions of Id DRP arrived at the final list of comparables as under:-

Sl.No.	Comparable	PLI= OP/TC
1	Acropetal Technologies Ltd (segmented)	49.88%
2	Aurum Soft Systems Ltd	19.35%
3	Sagarsoft (India) Ltd	26.79%
4	Spry Resources (India) Pvt Ltd	21.62%
5	R S Software Ltd	15.50%
6	Zylog Systems (India) Ltd	41.60%
7	E-Infochips Bangalore Ltd	26.70%
8	ASM Technologies Ltd	18.36%
9	Onward Technologies Ltd	11.96%
10	Axis IT & T Ltd	25.36%
11	Thirdware Solutions Pvt Ltd	15.03%
12	Akshay Software Technologies Ltd	0.70%
13	Lycos Internet Ltd (previously known as LGS Global and then Vibrant Digital)	13.41%
Simple Arithmetic Mean		22.02%

7.2. Therefore the calculation of the adjustment in the case of the assessee is as follows:

Average PLI	22.02%
Operating Cost (A)	Rs. 14,85,39,128/-
Arm's Length Mean Margin profit (B)	22.02 % of the Operating Cost
Arm's Length Price (ALP) 122.02% of operating cost	Rs. 18,12,47,444/-
Total Turnover	Rs 16,62,87,634/-
Price received from AE	Rs.15,88,37,635/-
% of revenue from AE	95.52%
ALP in respect to international transaction With AE (95.52% of Rs 18,12,47,444)	Rs 17,31,27,559/-
Receipt from AE	Rs 15,88,37,635/-
Shortfall to be adjusted upwards	Rs 1,42,89,924/-

Since the adjustment is above than + / - 5% limit, the Id TPO made an upward adjustment of Rs 1,42,89,924/- to the total income of the assessee.

8. Aggrieved by these actions of the Id TPO / Id AO in the final assessment order passed pursuant to the directions of the Id DRP, apart from the decision rendered in the inclusion and exclusion of certain comparables chosen by the assessee as well as the Id TPO, both the assessee as well as the revenue are in appeal before us.

9. We have heard the rival submissions. We find that the Ground No. 6 raised by the assessee is with regard to use of multiple year data for benchmarking the international transactions of the assessee with its AE to be at arm's length. We find that this issue has already been held against the assessee in its own case by this tribunal for the Asst Year 2010-11 dated 4.10.2017 reported in (2017) 87 taxmann.com 169 (Kolkata Trib.) wherein it was held as under:-

15. As far as ground no. 5 is concerned, the admitted position of law is that multiple data cannot be used in the transfer pricing analysis as per the law as it stood at the relevant point of time in A.Y.2010-11. Rule 10B(4) of the Income Tax Rules, 1962 (Rules) provides that the data to be used in analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction has been entered into. This being the admitted position, we are of the view that there is no merit in ground no. 5 raised by the assessee and we hold that for the purpose of comparability, multiple year data i.e., the weighted average of three financial years of the comparable companies cannot be used in TP Analysis as per the laws that existed for AY 2010-11.

The Id AR also fairly agreed that this ground is to be decided against the assessee. Accordingly, the Ground No. 6 raised by the assessee is dismissed.

9.1. The Ground No. 7 raised by the assessee was stated to be not pressed by the Id AR and the same is reckoned as a statement from the Bar. Accordingly, the Ground No. 7 raised by the assessee is dismissed as not pressed.

9.2. The Ground No. 8 raised by the assessee is with regard to comparables getting rejected solely on the basis of loss making enterprises or having diminishing profits. Since each of the comparable is addressed individually hereinbelow, we treat this ground to be general in nature. Hence we do not deem it necessary to address this Ground No. 8 and accordingly the same is dismissed.

10. The short point that arises for our consideration is the inclusion and exclusion of certain comparables against which both the assessee as well as the revenue are in appeal before us. Let us address the same with regard to each of the comparable as under.

10.1. Acropetal Technologies Limited

The Id. TPO pursuant to the directions of the Id. DRP included this company as a comparable for computing arms' length margin. The assessee stated that it is engaged into simple programming, coding and testing falling within the ambit of software development services. Whereas the said comparable is engaged into IT services, engineering design services and health care services as per their annual report. It was pleaded that IT services included variety of services such as IT life cycle, infrastructure management, cloud services, IT application management which are different from services provided by the assessee such as software development, testing and coding. It was also pleaded that the said comparable is exposed to various risks such as IT security risk, financial risk, computation risk and unlike the assessee which is not exposed to similar risk since it is a captive service provider. It was also pleaded that the said comparable undertakes intensive research and development (R & D in short) and hence exposed to R & D risk unlike the assessee which does not undertake any R & D function. Further the said comparable has intangible in the nature of software application package. The Id. AR vehemently laid emphasis on non-application of employee cost filter by the Id. TPO with regard to this comparable even though one of the parameters/ filters stated by the Id. TPO in his order is to reject companies having employee cost less than 20% of turnover. In the instant case, it is not in dispute that the employee cost percentage of Acropetal is 11.51% of turnover (i.e less than 20% of turnover). The Id. AR has argued that the Id. TPO applied the incorrect operating margin of this comparable. The assessee pleaded that this comparable is functionally different and hence requires to be excluded . It was submitted before the Id. TPO that for the assessment year 2010-11 i.e. immediately preceding year, this comparable, even though was sought to be

included in the show cause notice to the assessee , was later dropped by the Id. TPO himself from the list of comparables by applying the employee cost filter. This point was also brought to the notice of the Id. TPO by the assessee while filing its reply to the show cause notice before the Id. TPO. Even though before the Id. TPO, the assessee had stated that the employee cost was 15.91% of turnover of this comparable and that the same has been reduced to 11.51% of turnover before us, in any case, we find that the total employee cost is less than 20% of turnover in the case of this comparable, which remain undisputed before us. We find that the Id. DR vehemently opposed to various objections raised by the assessee with regard to different functions undertaken by the said comparable, however did not make any submissions for the employee cost filter not applied by the Id. TPO with regard to this comparable. We hold that the Id. TPO having applied the employee cost filter less than 20% turnover to reject the companies, ought to have rejected Acropetal Technologies Limited also in view of the aforesaid facts. Hence we direct the Id. TPO to reject from the list of the comparable. Since this comparable is sought to be excluded on the employee cost filter, no opinion is given herein in respect of other objections raised by the assessee. Accordingly, the Ground No. 9 raised by the assessee is allowed.

10.2. Zylog Systems (India) Ltd

The assessee vide ground no. 13 prayed for exclusion of this comparable while computing arms' length margin. With regard to inclusion of this comparable by the Id. TPO, we find that there is absolutely no discussion in the order of the Id. TPO. From the annual report of the said comparable, we find that the said company provides broadband services and offers full value chain of VOIP and Wi-fi internet based communication services under various business units and the company ranks among top ISP providing wireless internet services to the customers. It is also involved in providing software development and software services to the clients and also penetrates IT enabled services (ITES) in overseas countries. It is also engaged in consulting business i.e. sourcing of manpower for development to IT companies.

The said comparable does not have segmental data and revenue is derived from software development services, consulting services and broadband telecom services. We find that the said comparable has related party transaction of 21.35% of operating revenue [9,73,90,262 / 45,60,85,594 * 100] . The evidences in this regard are enclosed in pages 834 and 839 of the Paper Book volumn IV. We find that the ld. TPO had applied one of the filters for rejecting the comparables where related party transaction are more than 20% of sales. In the instant case, the said comparable is having related party transactions of 21.35% of sales. Hence the same even according to filters applied by the ld. TPO, ought to have been excluded from the final list of comparables. The ld. TPO is hereby directed to exclude the same. All other objections raised by the assessee with regard to this comparable are left open and no opinion is given herein. Accordingly, ground no. 13 raised by the assessee is allowed.

10.3. E-Infochips Bangalore Limited

We find that the ld TPO had included this company in the final list of comparables for computing the arm's length margin. We find that the inclusion of the said company was the subject matter of adjudication by this tribunal in assessee's own case for Asst Year 2010-11 in ITA No. 587/Kol/2015 dated 4.10.2017 wherein it was held as under:-

16. As far as ground no. 6 raised by the assessee is concerned, the same is with regard to the action of the TPO and the DRP in accepting E-Infochips Bangalore Limited and Inteq Software Limited as comparable companies with that of the assessee. As far as the aforesaid companies are concerned the facts are that admittedly the information regarding the financial statement of these two companies were not available in the public domain and the AO obtained the details about the financial results of these two companies by issuing notices u/s. 133(6) of the Act to these two companies. At the time of hearing the ld. Counsel for the assessee brought to our notice that E-Infochips Bangalore Limited was not considered as a comparable company by the Hon'ble ITAT in the case of another software development services company such as the assessee and that order of the tribunal is also in relation to A.Y.2010-11. Our attention was drawn to the decision of ITAT, Kolkata in the case of Labvantage Solution (P.) Ltd. v. Dy. CIT [2016] 76 taxmann.com 152 wherein the tribunal held that this company cannot be compared with a software service provider as this company was into both

the business of Software Development Services (IT) as well as providing Information Technology Enabled Services (ITES) and also for the reason that segmental details of IT and ITES were not available. The following were the relevant observations of the Tribunal:—

'8.3. Exclusion of Infinite Date Systems Pvt. Ltd. (Merged)

We find that this company had reported NCP of 88.25%. It is not in dispute that the assessee is engaged in software development. Hence, comparable should also be in the companies engaged in the similar section. We find that this company is having a different business model and engaged in providing entire gamut of solutions comprising of technical consulting, design and development of software, maintenance, system integration, implementation, testing and infrastructure management services. We find from the paper book that the Revenue is primarily derived from technical support and infrastructure management services. We find that Infinite Date Systems Pvt. Ltd. commenced its operation on 1st January, 2009 and as per segment reporting disclosure, the company's operations predominantly relate to providing software technical consultancy services to its sole customer Fujitsu Services Limited. Further, as per the Annual Report of 2009, at Page 1, it is stated that the Holding Company M/s. Infinite Computer Solutions ((India) Limited signed an agreement (Build, Operate and Transfer - BOT Model) with Fujitsu Services Limited to set up Global Delivery Centers in India to provide offshore delivery capabilities to Fujitsu & Fujitsu's associated companies. We find that these facts have also been acknowledged by the Ld. TPO at page 77 of his order. The Ld. AR stated that it would be worthwhile to note that Infinite Date Systems Pvt. Ltd. completed its three years contract with Fujitsu, post which, the business was transferred to Fujitsu and thus the company has been merged with its Holding Company-Infinite Computer Solutions (India) Ltd. during the financial year 2011-12. We are inclined to agree with the submissions of the Ld. AR that this Comparable Infinite Date Systems Pvt. Ltd. was created for purpose of transfer of business. Hence, the nature of services and business model of assessee company and comparable company are entirely different. Apart from this, we also find that there exist abnormal circumstances in the said comparable. During the last 3 years, variations in margins earned show an abnormal circumstances leading to huge fluctuations and supernormal profit, the margin earned by Infinite is 88.25% which is abnormally high. It was argued that such companies which are making more than twice the arithmetical mean margin as compared by the Ld. TPO should not be considered as comparable. The Ld. AR referred to page 591 of the Paper Book where the details of the fluctuation in the revenue, profit and margins has been provided. It is true that where company in which extraordinary events had taken place during the year like major acquisitions which had impact on profits of company, it could not be selected as comparable to assessee engaged in software development. We place reliance in this regard on the decision of Hyderabad Tribunal in the case of Excellence Data Research (P.) Ltd. v. i reported in [\[2016\] 74 taxmann.com 13 \(Hyd. - Trib.\)](#) dated 12.09.2016 for Asst Year 2010-11, wherein it was held that:

8. Having regard to the rival contentions and the material on record, we find that the DRP has directed the AO to consider whether the extra ordinary event of amalgamation during the year is found to have an impact on the profits of the

company. We find that instead of carrying out the exercise, the AO has simply followed the order of the TPO in holding that the fact of amalgamation on the margin of the said company has no effect on the margin of the said company. This, in our opinion, is not a correct approach of the AO. Where a direction has been given by the DRP to follow a certain procedures, the AO has simply followed the TPO order. Therefore, order of the AO on this issue needs to be set aside. In the case of Hyundai Motors India Engg. (P.) Ltd. (2015) 64 taxmann.com 442 (Hyd. - Trib.), which is also engaged in rendering of ITES to its AEs, the Tribunal has taken note of the same at para 9.1 and 9.3 of its order. Therefore, the decision of the Tribunal in the said case is applicable to the case on hand, more particularly since the comparables adopted by the TPO in the said case are the same in the assessee's case also. In the case of Hyundai Motors India Engg. (P.) Ltd. (supra) at page 20, para 18, the Tribunal has held as under:

"18. As regards M/s. Accentia Technologies Ltd., is concerned, we find that the DRP has directed to exclude this company by placing reliance upon the order of the ITAT in the assessee's own case for the A.Y. 2009-10 by holding that this company operates in a different business strategy of acquiring companies for inorganic growth as its strategy and considering the profit margins of the company and insufficient segmental data, held that his company cannot be selected as a comparable. It was also held by the DRP that on the very same reason of acquisition of various companies, being an extraordinary event, it had an impact on the profit of the company and the said company was directed to be excluded.

18.1 For the relevant A.Y. 2010-11, the Ld. Counsel for the assessee has drawn our attention to the information available on Accentia Technologies Ltd. to demonstrate that the said company is not diversified knowledge process outsourcing activities. It is seen there from that the said company is involved in Healthcare documentation as well as receivables, management services including installation and maintenance of all software, hardware and band width infrastructure required for the same, deployment of man power and service delivery in all these areas. It is also seen that it is engaged in legal process outsourcing. From Schedule-IV showing the fixed assets of the assessee, it is also seen that the said company owns goodwill/brand/IPRS (Intellectual Property Rights). From the notes to the accounts, it is also seen that a subsidiary of the company Asscent Infoserve Pvt. Ltd., has been amalgamated with the company consequent to which, assets and liabilities of the erstwhile company were transferred and vested in the company w.e.f. 1st April, 2008 and the scheme has been given effect to in the accounts of the year. Therefore, it is clear that there is an extraordinary even in the case of Accentia Technologies Ltd., during the relevant financial year particularly since the approval of amalgamation has been given by the Hon'ble High Court of Mumbai vide orders dated 21st August, 2009 and by the Hon'ble Karnataka High Court vide orders dated 6th February, 2010. This event would definitely have an effect on the profit margins of the said company and therefore, has to be excluded from the list of comparables as rightly done by the DRP. Therefore, we do not see any

reason to interfere with the order of the DRP on this company also. Accordingly, ground no. 3 of the Revenue is dismissed."

Since, the order of the Tribunal in the case of Hyundai Motors India Engg. (P) Ltd. (supra) for the same A.Y., we direct the AO/TPO to exclude this company from the final list of comparables.

11. TCS e-Serve International Ltd. As regards the comparability of this company with the assessee, the learned Counsel for the assessee submitted that the TCS international also provides software testing, verification and validation which are different from ITES services providers by the assessee. It is also submitted that the segmental information of TCS international are not available in the annual report. The exceptional circumstances of the company reported in annual report such as acquisition of India based captive business outsourcing arm, resulting in acquisition of an aggregate amount of \$ 2.5 billion over a period of 9.5 years and its impact on the financial implications of the company also brought to our notice. It is submitted that these peculiar circumstances have been considered by the Coordinate Bench of this Tribunal in the case of Hyundai Motors India Engg. (P) Ltd. (supra) for exclusion of the list of comparables.

Respectfully following the decision of the Bench, these two comparables TCS e-serve International Ltd. and TCS e-Serve Ltd. directed to be excluded.

In view of the aforesaid findings and judicial precedent relied upon, we hold that the comparable chosen by Ld. TPO i.e. Infinite Data Systems Pvt. Ltd. (Merged) is functionally not comparable with the assessee company.'

17. Following the aforesaid decision of the Tribunal we are of the view that E-Infochips Bangalore Ltd., should be excluded from the list of comparable companies while working out the arithmetic mean of the comparable companies.

We find that this tribunal had excluded the said company from the list of comparables on the ground that the same is not functionally comparable as the said company was involved in the business of providing IT as well as IT Enabled Services and that segmental details of IT and ITES were not available. We find that the same situation continues for the year under consideration also which remains undisputed before us. Apart from this, we also find that the said comparable has related party transactions of 37.96% of operating revenue (171291331 / 451181724*100) . The evidences in this regard are enclosed in pages 1075 and 1082 of Paper Book Volume II. We find that the ld TPO had applied one of the filters for rejecting the comparables where related party transactions are more than 20% of sales. In the instant case, the said comparable is having related party

transactions of 37.96% of sales. Hence the same even according to filters applied by the Id TPO ought to have been excluded from the final list of comparables. No opinion is hereby given on the other objections raised by the assessee with regard to this comparable except related party transactions filter. Hence we hold that E-Infochips Bangalore Limited should be excluded from the list of comparables for arriving at the arm's length margin. Accordingly, the Ground No. 10(a) raised by the assessee is allowed.

10.4. Sagarsoft (India) Limited

The Ground No. 10(b) raised by the assessee is with regard to erroneous inclusion of Sagarsoft (India) Limited as a comparable while arriving at the arm's length margin. We find that the assessee had objected to the said inclusion on the ground that the same is functionally not comparable and the said comparable failing the related party filter. We find that the said comparable has related party transactions of 56.58% of operating revenue (540.86 lacs / 955.93 lacs*100) . The evidences in this regard are enclosed in pages 1213 and 1240 of Paper Book Volume II. We find that the Id TPO had applied one of the filters for rejecting the comparables where related party transactions are more than 20% of sales. In the instant case, the said comparable is having related party transactions of 56.58% of sales. Hence the same even according to filters applied by the Id TPO ought to have been excluded from the final list of comparables. No opinion is hereby given on the other objections raised by the assessee with regard to this comparable except related party transactions filter. Hence we hold that Sagarsoft (India) Limited should be excluded from the list of comparables for arriving at the arm's length margin. Accordingly, the Ground No. 10(b) raised by the assessee is allowed.

10.5. Aurum Soft Systems Limited

The Ground No. 10(c) raised by the assessee is with regard to erroneous inclusion of Aurum Soft Systems Limited as a comparable while arriving at the arm's length margin. We find that the assessee had objected to the said inclusion on the ground

that the same is functionally not comparable and the said comparable failing the related party filter. We find that the said comparable has related party transactions of 91.38% of operating revenue (1,35,19,378 / 1,47,94,716*100) . The evidences in this regard are enclosed in pages 1117 and 1124 of Paper Book Volume II. We find that the Id TPO had applied one of the filters for rejecting the comparables where related party transactions are more than 20% of sales. In the instant case, the said comparable is having related party transactions of 91.38% of sales. Hence the same even according to filters applied by the Id TPO ought to have been excluded from the final list of comparables. No opinion is hereby given on the other objections raised by the assessee with regard to this comparable except related party transactions filter. Hence we hold that Aurum Soft Sytems Limited should be excluded from the list of comparables for arriving at the arm's length margin. Accordingly, the Ground No. 10(c) raised by the assessee is allowed.

10.6. ASM Technologies Limited

The Ground No. 10(d) raised by the assessee is with regard to erroneous inclusion of ASM Technologies Limited as a comparable while arriving at the arm's length margin. We find that the assessee had objected to the said inclusion on the ground that the same is functionally not comparable and the said comparable failing the related party filter. We find that the said comparable has purchases with related party to the tune of Rs 1196.06 lakhs out of total software development expenses of Rs 4904 lakhs which works out to 24.34% . This is only when the expenses considered separately vis a vis the related parties. But we find that the Id TPO had applied the filter for rejecting companies where the related party transactions are more than 20% of sales. Hence we reject the contention of the Id AR in this regard and accordingly RPT filter cannot be applied in the instant case. With regard to inclusion of this comparable by the Id. TPO, we find that there is absolutely no discussion in the order of the Id. TPO. From the annual report of the said comparable, we find that the said company provides consulting services in Enterprise Solutions for the packaged ERP implementation, Enterprise Product Development , Engineering Services and in

Technology Solutions covering Embedded Systems and System Software to its global clientele. It also offers a broad spectrum of enterprise services such as configuration, implementation, customization , end-user training and documentation, post implementation support and maintenance across leading commercial off-the-shelf products like SAP, Oracle Applications, PeopleSoft, JD Edwards and Microsoft Dynamics. Service offerings include Enterprise Applications, Business Intelligence and Data Warehousing, Business Process Modelling tools , Embedded Technologies etc. The evidences in this regard are enclosed in pages 635 to 645 of Paper Book Volume IV. We find that the revenue is recognized from sale of services and software products as per page 675 of Paper Book Volume IV. But we find that no segmental data is available for the same. The said company was involved in acquisitions during the financial year 2010-11 as per evidence recorded in pages 641 and 652 of Paper Book Volume IV as under:-

Extracts from CEO's letter to the Shareholders of the company which are part of the Annual Report

During the year the company signed a definitive agreement to acquire 100% of Abacus Business Solutions Inc., US Based firm in an all cash deal. The acquisition was through the company's wholly owned subsidiary, Advanced Synergic Pte Ltd, Singapore. Abacus has been in the business for more than a decade assisting large corporations and Fortune 500 Companies with Enterprise Applications, Oracle Applications, Oracle Tools and Technology, E-Commerce, Reporting and Data warehousing. The acquisition has afforded ASM an opportunity to expand its offerings to a larger ERP & Oracle client base in the US and thus broaden its revenue margins.

Extracts from Directors' Report to the Shareholders of the company

Future Outlook

With the Global Economic trend looking positive and good, after two turbulent years, there is a greater learning and changes envisaged in the way the Business / Industries plan and execute their charter. This is good news for the IT industry in particular lending itself to provide solutions for the Growth Phase.

ASM will leverage this phase in consolidating and growing the organization by offering more services to the existing clients across other geographies and new client acquisitions. This growth phase will also set a platform to have

more long term strategic partnerships with the customers moving up the value chain from project mode and center of excellence.

The existing clients will be offered cross solutions across various technologies thus moving from a Technology Competency to Industry Vertical Specialisation relationship thus aligning more deeply with the Client's business. This model will be extended to the new Clients as the relationship progresses.

New client acquisitions will be through addition of specialized sales and delivery professionals across geographies, through new company acquisitions and specializations in more Industry Verticals which offer high growth.

Hence we find that the said comparable was involved in acquisitions during the year under consideration and also in the process of acquiring more companies in future to expand its business horizons thereby making it strictly not comparable with the assessee company herein. Hence in view of these extraordinary factors; in the absence of segmental data with different streams of revenue and especially in the absence of any discussions in the order of the Id TPO with regard to this comparable, we have no hesitation in directing the Id TPO to exclude this company from the list of comparables while arriving at the arm's length margin. Accordingly, the Ground No. 10(d) raised by the assessee is allowed.

10.7. Thirdware Solutions Private Limited

The Id TPO included this company in the list of comparables while arriving at the arm's length margin. The company is engaged into software product sale and R&D functions. For financial year 2009-10 (Asst Year 2010-11), it is reflected in the annual report as under:-

“Thirdware solution Limited is currently developing its own product, which has been currently named as “PAPA”. The development of the product commenced from July 09. This product will be available for sale to the customers during the financial year 2010-11.”

We see from the annual report (page 763 of Paper Book Volume IV) for the financial year 2010-11 (ie. the year under appeal) , it is reflected as under:-

“Thirdware Solution Limited has completed the development of its product, which has been currently named as “PAPA”. The development of the product commenced from July 09 and was completed by Mar 2011. This product is currently available for sale to the customers. Thirdware has shown the demo of the product to its prospective customers during the financial year 2010-11.”

We find that this tribunal in assessee’s own case for the immediately preceding assessment year (i.e Asst Year 2010-11) in ITA No. 587/Kol/2015 dated 4.10.2017 had held that this company to be functionally not comparable, by holding as under:-

21. As far as Gr. No. 8 raised by the Assessee seeking exclusion of Thirdware Solutions Ltd., and Com-U-Learn Tech India Ltd., in the final set of comparables chosen by the TPO is concerned, the plea of the Assessee is that these companies are not functionally comparable with that of the Assessee. It is the plea of the Assessee that this company is in software consultancy, application development services, application management support services, enterprise application space. Our attention was drawn to this companies website extract copies of which are at page 612 of Vol-II paper book filed by the Assessee. Our attention was also drawn to the extract of this companies financials at page 607 paper book-II wherein the fact that it is developing software products from July, 2009 and that the products will be available for sale to the customers during the financial year 2010-11 is clearly spelt out. Our attention was also drawn to the fact that in the profit and loss account there is reference to income from sale of licenses which is not the case normally in the case of companies providing software development services. Finally it was submitted that the segmental information of these companies is not available as the primary segment is based on geographical area. Our attention was also drawn to several cases decided by various benches of the Tribunal on the comparability of this company with a software development service provider such as the Assessee. We deem it appropriate to make mention of onlyh one such decision rendered by the ITAT Ahmedabad Bench in the case of I-Many Software (P.) Ltd. IT (TP) 222/Ahd/2015 order dated 27.10.2016 which is in relation to AY 2010-11 and rendered in the context of a software development service provider such as the Assessee.

22. We have considered the submissions of the learned counsel for the Assessee as well as the learned DR who relied on the directions of the DRP. We find that in the case of I-Many Software (P.) Ltd. (supra) comparability of this company with a software development services company such as the Assessee was considered and it was held that this company is not a good comparable. The following were the relevant observations of the Tribunal.

'10. We have heard the rival contentions and perused the material on record. Solitary" grievance of the assessee through this ground is against the order of Id. ORP for approving the selection of comparable namely Thirdware Solution Ltd. by TPO. We observe that assessee is engaged in the business of providing software development evolution and production of computer software. Assessee also has not outsourced its business activities to third party and operates on the instructions of its associate enterprise. We further

observe that assessee has referred and relied on various decisions of Co-ordinate Bench wherein it has been held that Thirdware Solution is not a good comparable for the purpose of T.P. adjustment with regard to the assessee engaged in the business of software development. We observe that Co-ordinate Bench Delhi in the case of ION Trading India Private Ltd. v. ITO in ITA No. 1 035/0e1/2015 for Asst. Year 2010-11 has held as under :—

"56. We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that the functions of Thirdware are in account with the assessee which only provides software development in the finance domain as per the instruction of its AE. Also, Thirdware has incurred expenses towards import of software services, evidencing outsourcing of software services unlike the assessee. Since it is also engaged in outsourcing its activities as it has incurred expenses towards imports of software services, evidencing outsourcing of software services unlike the appellant company. Hence, it is functionally not comparable and cannot be treated as a comparable to assessee. We order accordingly. "

We further observe that the Co-ordinate Bench, Oeli in the case of Sun Life India Service Centre Pvt. Ltd. v. DCIT (ITA NO. 5799/0e1/2012 for AY 2008-09 has held as under :-

"21. We have perused the Annual report of this company which is available on pages 100 onwards of the paper book. The Profit & Loss Account of this company is at page 107, which shows 'Sales & Other income'. Bifurcation of 'Sales ' is available as per Schedule 12, which comprises of 'Sale of licence' amounting to RS. 39.16 lac, 'Software services' amounting to Rs. 7.67 crore, 'Export from SEZ unit' amounting to Rs. 26,39 crore, 'Export from STPI unit' amounting to RS. 16.88 crore and 'Revenue from subscription' amounting to RS. 92.93 lac. These figures indicate that apart from the revenue from 'Software services' which is only to the tune of Rs. 7.67 crore, this company earned total gross revenue from 'Sales' to the tune of Rs. 52,27 crore including from export from SEZISTPI units. When we consider the figures of this company on an entity level as have been adopted by the TPO for comparison, it becomes vivid that it ceases to be comparable with the assessee's 'Software development and maintenance support services' segment. The reason hardly needs any highlighting, being the income of this company also largely including, revenues from exports from SEZISTPI units apart from sale of licence. These distinguishing features make this company as non comparable. We, therefore, order for the removal of this company from the list of comparables." (Emphasis Supplied by us)

Further the Co-ordinate Bench Delhi in the case of Avaya India (P.) Ltd. v. Addl. CIT (ITA No. 5528/0e1.12011) has observed that Thirdware Solutions has made income from sale of licence to the tune of more than RS. 1 crore, which means the company is into production of software products and therefore, functionally different from contract software developer assessee. The relevant extract of the decision is reproduced below—

"12. 1 . . . (xxv) . . . We have heard both the parties and perused the material available on record. A perusal of the annual report of Thirdware Solutions

Ltd. reveals that the said company has made income from sale of licence to the tune of more than Rs. 1 crore, which means the company is into production of software products which apparently cannot be a comparable to assessee dealing with contract software development and not into sale of any product. Therefore, we direct TPO/AO to exclude this company from the list of comparables." (Emphasis Supplied by us)

13. *Respectfully following the decision of the Co-ordinate Bench referred above in para 10, 11 & 12, we find that the same are squarely applicable to the facts of the assessee to the extent that assessee is also engaged in software development valuation of production works of computer software and operates mainly on the instructions of its associate enterprises whereas the impugned comparable Thirdware Solution is additionally also in the business of enterprises whereas the impugned comparable Thirdware Solution is additionally also in the business of trading of software outsources its activities. We are, therefore, of the view that Thirdware Solution is not a fit comparable in the case of assessee for the purpose of making T.P. adjustment. We allow this ground of assessee.'*

23. Respectfully following the aforesaid decision, we direct exclusion of Thirdware Solution as a comparable by the TPO for arriving at arithmetic mean of comparable companies.

The Id AR argued that there is no change in functions performed by the assessee company during the year under consideration when compared to that of in the immediately preceding assessment year. This point was not disputed by the revenue before us. Hence we hold that the decision rendered by this tribunal in assessee's own case for Asst Year 2010-11 supra on the ground of functionally not comparable would hold good for this year also. Accordingly, we direct the Id TPO to exclude Thirdware Solutions Limited from the list of comparables while arriving at the arm's length margin. We would like to make it clear that this comparable has been directed to be excluded only on the ground of functionally not comparable and no opinion is given on other arguments advanced by the Id AR before us. Accordingly, the Ground No. 10(e) raised by the assessee is allowed.

10.8. Axis IT & T Ltd

The Ground No. 12 raised by the assessee is with regard to erroneous inclusion of Axis IT & T Ltd as a comparable while arriving at the arm's length margin. With

regard to inclusion of this comparable by the Id. TPO, we find that there is absolutely no discussion in the order of the Id. TPO. From the annual report of the said comparable, the Id AR drew our attention that the said company is more focused on engineering design services and had exited from software services in December 2010. We find that the assessee had objected to the said inclusion on the ground that the same is functionally not comparable; that the said comparable failing the related party filter and service income filter fixed by the Id TPO in his order. The Id AR argued that it could be seen from the annual annual report of the said company, more than 90% of the revenue is from engineering CAD services . There is no availability of segmental data and segmental margins in respect of each activity are not available in the annual report. There is no discussion about this comparable in the order of the Id TPO to ascertain whether any information has been gathered by the Id TPO u/s 133(6) of the Act separately from the said company during the course of transfer pricing assessment proceedings. We find that the said comparable has related party transactions of 43.05% of operating revenue (15,99,48,775 / 37,15,60,021*100) . The evidences in this regard are enclosed in pages 738 and 755 of Paper Book Volume II. We find that the Id TPO had applied one of the filters for rejecting the comparables where related party transactions are more than 20% of sales. In the instant case, the said comparable is having related party transactions of 43.05% of sales. Hence the same even according to filters applied by the Id TPO ought to have been excluded from the final list of comparables. No opinion is hereby given on the other objections raised by the assessee with regard to this comparable except related party transactions filter. Hence we hold that Axis IT & T Ltd should be excluded from the list of comparables for arriving at the arm's length margin. Accordingly, the Ground No. 12 raised by the assessee is allowed.

10.9. Spry Resources India Private Limited

The assessee had raised Ground No. 11 before us stating that the Id TPO erred in including Spry Resources India Private Limited as a comparable for arriving at the

arm's length margin eventhough the same is not functionally comparable. The Id AR submitted that the said company is engaged in software consultancy services and sale of software products. He argued that company engaged in provision of software consultancy services is different from company engaged in software development services. We find that the Id TPO had obtained information u/s 133(6) of the Act during the course of transfer pricing assessment proceedings from the said company wherein the said company had replied that it provides software development services. The Id TPO by placing reliance on the same held the said company to be a valid comparable with the assessee for computing the arm's length margin. We also find from the profit and loss account of the said company under the head 'Revenue from Operations', it is clearly mentioned that it had derived income from software development to the tune of Rs 4,30,01,280/- out of total revenue of Rs 4,30,07,534/-. In view of this, we are inclined to dismiss the preliminary argument advanced by the Id AR that this company is not engaged in software development. Accordingly, we hold that the said company is functionally comparable with that of the assessee company. Accordingly, the Ground No. 11 raised by the assessee is dismissed.

11. Ancent Software International Limited (currently known as Nakshatra Infrastructure Limited)

The Ground No. 14 raised by the assessee is with regard to the comparable chosen by the assessee but rejected by the Id TPO in respect of Ancent Software International Limited. The Id TPO rejected this comparable stating that it is a loss making company. The Id AR argued that persistent loss making companies was not one of the filters set by the Id TPO for rejecting a company from the list of comparables. Hence on that ground itself, he argued that the Id TPO ought to have included the same in the list of comparables. We find from the financials of the said company for the last three years enclosed in page 202 of Paper Book Volume I that the said company had made operating profits after depreciation of Rs 6,54,936/- and Rs 1,49,504/- for the years ended 31.3.2008 and 31.3.2009 respectively and had

incurred operating loss after depreciation of Rs 2,63,491/- during the year under consideration only. Hence it cannot be considered as company making persistent losses. Hence the rejection of this company from the list of comparables on this ground of persistent loss making by the Id TPO cannot be accepted. Moreover, the mere fact that it is incurring persistent losses alone could not be a ground for rejecting a comparable. Reliance in this regard had been rightly placed on the decision of the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt Ltd vs DCIT reported in 376 ITR 183 (Del) . Hence we direct the Id TPO to include Ancent Software International Limited (currently known as Nakshatra Infrastructure Limited) as a comparable for determining the arm's length margin. Accordingly, the Ground No. 14 raised by the assessee is allowed.

11.1. Goldstone Technologies Limited

The Ground No. 15 raised by the assessee is with regard to the comparable chosen by the assessee but rejected by the Id TPO in respect of Goldstone Technologies Limited. The Id TPO rejected this comparable stating that it is a loss making company ; that the company has significant exposure in the media business and had incurred expenses on digital processing, movie etc. Thus the company was rejected both on financial parameters and functional compatibility. The Id AR argued that the company is engaged in the business of software services and more than 90% revenue is derived only from IT Services. He argued that as per annual report for the year under consideration, the company has made operating profits of Rs 1,31,24,482/-. It was also pointed out that in the financial years 2008-09 and 2009-10, it had earned operating profits of Rs 1,25,70,603/- and Rs 69,10,523/- respectively. It was also submitted that the break up of revenue from IT and ITES was duly provided to the Id TPO. However segmental margins were not provided for want of segmental data. The Id AR fairly agreed that though this company was treated as functionally comparable by the order of this tribunal in assessee's own case for Asst Year 2010-11, in that year also, there was no availability of segmental data before the Id TPO and that this tribunal did not give any finding on the same.

We have been consistently holding that in the absence of segmental data, the segmental margins related to software services segment could not be identified thereby making it comparable with the related margins of the assessee. Hence we hold that Goldstone Technologies Limited had been rightly rejected by the Id TPO from the list of comparables. Accordingly, the Ground No. 15 raised by the assessee is dismissed.

11.2. CG-VAK Software and Exports Limited

The Ground No. 16 raised by the assessee is with regard to the comparable chosen by the assessee but rejected by the Id TPO in respect of CG-VAL Software and Exports Limited. The Id TPO rejected this comparable stating that it is engaged into medical transcriptions which is different from the assessee and hence not functionally comparable. The Id AR argued that the company is engaged in the business of software services and also into medical transcription and that for the purpose of comparability, the assessee had only used the date for software segment of the said company. He referred to the relevant pages in the annual report of the said company in support of his contentions and pleaded that the same be included in the list of comparables while computing the arm's length margin. We find that in Asst Year 2010-11 in assessee's own case, the Id TPO had accepted the said company as functionally comparable but had finally rejected on the ground that it was incurring persistent losses during the said time. It was also pleaded at that time that if the forex gain is treated as part of operating revenue, then the said company's operating margin would be 5.29% for financial year 2008-09 which argument was rejected by the Id DRP in Asst Year 2010-11. We find that this tribunal had gone deep into the computation mechanism of the operating margins of the said company in Asst Year 2010-11 and had held as under:-

31. We have considered the rival contentions. From a perusal of the order of the TPO it is clear that the claim of the Assessee that this company's operating profit to operating cost of the software development services segment for AY 2009-10, if expenses are allocated on the basis of revenues, is 5.29%. This chart is extracted by the TPO in page-50 of his order (and also in paragraph 27 of this order) and even the TPO does not dispute this plea of the Assessee. The TPO has however proceeded

on the basis that foreign exchange gain should not be regarded as part of the operating profit. Such approach of the TPO has not been accepted by the DRP in its order while dealing with the comparable company Kuliza Technologies Pvt. Ltd. Therefore it appears that the plea of the Assessee that the basis assumption of the TPO and DRP on the comparability of this company that it is a consistent loss making company is erroneous and therefore their orders are set aside. However, the question still remains as to whether the allocation of expenses and the attribution of the foreign exchange gain to the software development services segment of the comparable company CG-VAK software and Exports Ltd., has not been considered by the TPO or DRP. Further it has also to be seen as to what were the reasons for the losses in the case of this comparable company. If all these factors are considered and due adjustment can be given to the operating margins of this company, than the same should be considered as comparable company and added to the list of comparables for determining Arithmetic mean of profits of comparable companies. The TPO is directed to consider the comparability of this company afresh in the light of the aforesaid observations and also taking note of decision rendered on this aspect by Tribunals and Hon'ble High Courts if any.

Both the parties before us fairly agreed that let similar direction be given for the year under consideration also. Accordingly, the Ground No. 16 raised by the assessee is remanded to the file of Id TPO with similar directions that were given for Asst Year 2010-11 by this tribunal. Accordingly, the Ground No. 16 raised by the assessee is allowed for statistical purposes.

11.3. Maveric Systems Limited and Thinksoft Global Services Ltd

We find that the Id TPO had rejected Maveric Systems Ltd on the ground that the services rendered by the said company include software testing services and not software development services and hence not functionally comparable with assessee. Similarly the Id TPO had rejected Thinksoft Global Services Ltd on the ground that the company is primarily engaged into delivering software validation and verification services to the banking and financial services industry. Such services are not in the category of software development services like assessee and hence not functionally comparable with assessee. The Id AR placed on record the order of the Id DRP passed in assessee's own case for the Asst Year 2012-13 (i.e the subsequent year) vide order dated 22.9.2016 wherein it had accepted these two companies as functionally comparable with assessee. He also argued that the same functions were

performed by both the companies in the year under consideration and also in Asst Year 2012-13 (i.e subsequent assessment year). Hence when the same has been accepted as functionally comparable, it should be accepted as functionally comparable in the year under consideration also , when there is no change in functions carried out in both the years in respect of both the companies. He also pointed that the said order of the Id DRP has been accepted by the revenue as final due to the fact that no right of appeal is provided to the revenue to this tribunal as per the statute.

We find that the companies are engaged into software development and testing services similar to that of the assessee. The companies have only one reportable sergment which is software development and testing services. The issue of Maveric Systems Limited incurring loss for the year under consideration would not alter the inclusion of the same as comparable for computing the arm's length margin in view of observations made hereinabove in respect of another comparable. Hence we hold that both these companies as functionally comparable on facts. Accordingly, the Ground No. 17 raised by the assessee for Maveric Systems Limited and Thinksoft Global Services Limited is allowed.

11.4. R Systems International Limited

We find that the assessee vide Ground No. 17 had sought to include this company R Systems International Limited in the list of comparables. But at the time of hearing, no arguments were advanced by the Id AR before us. Hence we do not deem it fit to interfere with the action of the Id TPO in rejecting the said comparable. Accordingly, the Ground No. 17 raised by the assessee in respect of R Systems International Limited is dismissed.

11.5. Helios and Mathesan Information Technology Limited

We find that this company has been rejected by the Id TPO in the list of comparables while computing the arm's length margin for having different financial year with

that of the assessee. We find that this issue has been the subject matter of adjudication by this tribunal in assessee's own case for the Asst Year 2010-11 in ITA No. 587/Kol/2015 dated 4.10.2017 wherein it was set aside to the file of Id TPO with some directions. But during the course of hearing, the Id AR stated that the rejection of this comparable would be in consonance with the filters applied by the Id TPO in his order. We find that the Id TPO had applied one of the filters that companies having different financial years with that of the assessee should be rejected. In order to maintain consistency in the said stand, the Id AR fairly agreed for dismissal of this ground raised by the assessee. Accordingly, the Ground No. 18 raised by the assessee is dismissed.

11.6. Larsen &Toubro Infotech Limited

This company was rejected by the Id TPO from the list of comparables by applying the turnover filter of INR 1 crore to INR 200 crores. The Id AR fairly stated that he is not pressing this ground before us as the same is in consonance with the filters applied by the Id TPO in his order. In order to maintain consistency in the said stand, the Id AR fairly agreed for dismissal of this ground raised by the assessee as not pressed. Accordingly, the Ground No. 19 raised by the assessee is dismissed as not pressed.

12. The Ground No. 20 is raised by the assessee with regard to incorrect computation of margins of (a) Acropetal Technologies Ltd (segmental) ; (b) ASM Technologies Limited ; (c) Spry Resources India Private Limited and (d) Zylog Systems (India) Ltd without prejudice to the exclusion of the same from the list of comparables. We have already held hereinabove that Acropetal Technologies Ltd (segmental) ; ASM Technologies Limited and Zylog Systems Limited to be excluded from the list of comparables while computing the arm's length margin. Hence adjudication of this ground with respect to these companies is infructuous. With regard to Spry Resources India Private Limited, we have held that the said company is to be included in the list of comparables while computing the arm's

length margin. We find that the Id AR drew our attention to page 394 of Paper Book Volume I and Page 997 of Paper Book Volume IV and Page 1379 of Paper Book Volume did file the correct computation of margin in respect of Spry Resources India Private Limited which were also furnished before the Id DRP and was ignored by the Id DRP. Hence we deem it fit and appropriate to remand this issue to the file of Id TPO to verify the said workings of margins computed at 17.94% and then include the said company in the list of comparables for arriving at the arm's length margin.

13. The Ground No. 21 & 22 raised by the assessee are with regard to non-adjustment of net margins by considering the working capital differences and functional and risk differences of the comparables with the assessee company while arriving at the arm's length margins. We find that this issue has already been the subject matter of adjudication by this tribunal in assessee's own case for the Asst Year 2010-11 in ITA No. 587/Kol/2015 dated 4.10.2017 wherein it was held as under:-

41. As far as Gr. No. 15 and 16 are concerned, they project the grievance of the Assessee in the action of the TPO and DRP in not allowing adjustments to the arithmetic mean of profits of the final comparable companies towards working capital and other risks which according to the Assessee are required to be given under the provisions of Rule 10B(1)(e) of the Income Tax Rules, 1962 (Rules).

42. The DRP dealt with this issue as follows:

"Decision:

10.2 The issue has been considered. The Assessee has objected to TPO not allowing working 'capital adjustment to the margins of the comparables as well as in its own case the-claim of working capital adjustment is not automatic the issue of working capital is relevant when there is a situation of inventory remaining tide up or receivables being held up or delay however this situations would not be very relevant to the service providers like the Assessee. While calculating the operating profit margin, the financial expenses and financial income is removed. Thus, the effect of working capital/loans are negated while calculating the OPM and the said balance sheet item does not have any effect on the profit and loss account. In view of the above the decision of the TPO in not allowing working capital adjustment is upheld."

43. Before us the learned counsel for the Assessee has filed a decision of the ITAT Bangalore in the case of Unisys India (P.) Ltd. v. Dy. CIT [\[2015\] 60 taxmann.com 26 \(Bang. - Trib.\)](#). On the need for allowing working adjustment in determining ALP, the ITAT

Mumbai in the case of Capgemini India (P.) Ltd. v. Asstt. CIT [2013] 33 taxmann.com 5/[2014] 147 ITD 330, held as follows:

- "35. *The issue was taken before DRP before whom it was pointed out that the ITAT in its own case in 2007-08 has allowed the working capital Capgemini India Private Limited IT (TP) A 540/Mum/2014 adjustment. The DRP simply sustained the order of the AO on the issue, without referring to the decision of the ITAT in its own case.*
36. *Before us, on the issue of working capital adjustment, the AR submitted that the ITAT in its order had observed, "The assessee has also requested for working capital adjustment. The case of the assessee is that working capital does have an impact on the profitability of the company and more accounts receivable in case of a company would mean relatively lower profit. Therefore, the companies could be considered as fully comparable if they hold the same level of account receivable and account payable. The TPO has, however, rejected the claim of working capital adjustment which has been upheld by the DRP. The reason given by the authorities below is that the assessee had not made any claim for working capital adjustment in its TP study and that it is not possible to make accurate adjustment on this account as it is difficult to find the account receivable/payable at different points of time during the year. The Id. Sr. Counsel has referred OEC D guidelines as per which if the account receivable/payable on the last date do not give a representative level of working capital for the whole year, average may be used if it reflects the better level of working capital over the year. In our view, working capital adjustments are required to be made because these do impact the profitability of the company. Rule 10B (2)(d) also provides that the comparability has to be judged with respect to various factors including the market conditions, geographical conditions, cost of labour and capital in the market. Accounts receivable/payable effect the cost of working capital. A company which has a substantial amount blocked with the debtors for a long period cannot be fully comparable to the case which is able to recover the debt promptly. In our view, the average of opening and closing balance in the account receivable/payable for the relevant year may be adopted which may broadly give the representative level of working capital over the year. Even if there is some difference with respect to the representative level, it will not effect the comparability as the same method will be applied to all cases. Working capital adjustment cannot be denied to the assessee only on the ground that the assessee had not made any claim in the TP study if it is possible to make such adjustment."*
44. *Respectfully following the aforesaid ruling, we direct the TPO to make adjustments on account of working capital to the profit margin of the Assessee as well as the comparables and allow adjustments in accordance with law, after affording opportunity of being heard to the Assessee. We may also add that the DRP in Assessee's own case for AY 2012-13 in its order dated 22.9.2016 allowed claim of the Assessee for adjustment on account of working capital. A copy of the said order is also placed on record.*

The assessee is also directed to furnish the relevant working capital adjustments and adjustments due to risk differences to be made in the final list of comparables as determined pursuant to this tribunal's order, before the Id TPO. The Id TPO is directed to verify the same and give suitable adjustments in the net margins of the final comparables while arriving at the arm's length margin. Accordingly, the Ground Nos. 21 & 22 raised by the assessee are allowed for statistical purposes.

14. Lucid Software Limited

The assessee rejected this company in the list of comparables while benchmarking its international transactions. The Id TPO included this company in the list of comparables while computing the arm's length margin on the ground that the same is functionally comparable with the assessee. This was rejected by the Id DRP on the ground that it is not functionally comparable. Against this, the revenue is in appeal before us. We find that the said company is engaged in production and sale of software products unlike the assessee who is engaged in providing software development services only. From the schedule E to the balance sheet of the said company, it is noticed that it had incurred product development expenditure and had amortised a portion of the same to its profit and loss account during the year and that no additions to product development expenditure were made during the year. It also contained a note in Notes on Accounts that *software products developed in house upto the year ended March 31, 2011 were valued on the basis of costs directly attributable to the development of such software and allocated indirect costs. In respect of each of the product so developed, the total expenditure gets amortised over a period of thirty-six to forty-eight months from the launch date. The un-amortised product development expenditure is shown as a separate line item under Assets till it is fully written off.* We also find from the annual report of the said company that it has work in progress in respect of its projects to the tune of Rs 46,31,175/- as on 31.3.2011 and Net Block of Software (in-house) developed under its Fixed Assets of Rs 22,35,666/- as on 31.3.2011 . We find that the Id AR argued

that the software products developed by the assessee in the earlier year were encashed during the year in the form of receipt of revenues thereon which is evident from the annual report. Hence it could be safely concluded that the said company's main stream of revenue is out of sale of software products and not only software development thereby making it functionally not comparable with the assessee. Hence we hold that the same has been rightly rejected by the Id DRP which in our considered opinion, requires no interference. Accordingly, the Ground No. 2 raised by the revenue in respect of Lucid Software Limited is dismissed.

14.1. Prelude Systems India Limited

The assessee rejected this company in the list of comparables while benchmarking its international transactions. The Id TPO included this company in the list of comparables while computing the arm's length margin without any discussion in his order. This was rejected by the Id DRP on the ground that the company has diverse activities. Against this, the revenue is in appeal before us. We find that the said comparable has related party transactions of 87.20% of operating revenue (11,33,13,326 / 12,99,41,874*100) . The evidences in this regard are enclosed in pages 665 and 696 of Paper Book Volume II. We find that the Id TPO had applied one of the filters for rejecting the comparables where related party transactions are more than 20% of sales. In the instant case, the said comparable is having related party transactions of 87.20% of sales. Hence the same even according to filters applied by the Id TPO ought to have been excluded from the final list of comparables. No opinion is hereby given on the other objections raised by the assessee with regard to this comparable except related party transactions filter. Hence we hold that Prelude Systems India Limited should be excluded from the list of comparables for arriving at the arm's length margin. Accordingly, the Ground No. 2 raised by the revenue in respect of Prelude Systems India Limited is dismissed.

14.2. 8K Miles Software Services Ltd

The assessee rejected this company in the list of comparables while benchmarking its international transactions. The Id TPO included this company in the list of comparables while computing the arm's length margin without any discussion in his order. This was rejected by the Id DRP on the ground that the company has diverse activities. Against this, the revenue is in appeal before us. We find that the said comparable has related party transactions of 23.93% of operating revenue (26,28,500 / 1,09,84,408*100) . The evidences in this regard are enclosed in pages 826 and 834 of Paper Book Volume II. We find that the Id TPO had applied one of the filters for rejecting the comparables where related party transactions are more than 20% of sales. In the instant case, the said comparable is having related party transactions of 23.93% of sales. Hence the same even according to filters applied by the Id TPO ought to have been excluded from the final list of comparables. No opinion is hereby given on the other objections raised by the assessee with regard to this comparable except related party transactions filter. Hence we hold that 8K Miles Software Services Ltd should be excluded from the list of comparables for arriving at the arm's length margin. Accordingly, the Ground No. 2 raised by the revenue in respect of 8K Miles Software Services Ltd is dismissed.

14.3. Ybrant Digital Pvt Ltd (previously LGS Global Ltd and before that Lycos Internet Ltd)

The assessee included this company in the list of comparables while benchmarking its international transactions. The Id TPO rejected this company in the list of comparables while computing the arm's length margin without any discussion in his order. The Id DRP vide para 8.1 of its order directed inclusion of the said company in the list of comparables on the ground that the functions performed, assets employed and risks assumed by the said company are similar to that of the assessee. Against this, the revenue is in appeal before us. We find from the annual report for the financial year ended 31.3.2011 of the said company, that it is engaged in providing software services and even the income from software development is

accounted for on the basis of software developed and billed to clients on acceptance and / or on the basis of man days / man hours as per the terms of contract as per the accounting policy of the said company. We find that the total turnover of the said company for the year ended 31.3.2011 as per their annual report is 298,67,66,057/-. We find that the Id TPO had applied one of the filters for rejecting companies having turnover more than Rs 200 crores. Hence we hold that the Id TPO had rightly rejected this company from the list of comparables. Accordingly, the Ground No. 1 raised by the revenue is allowed.

15. The Ground Nos. 3 & 4 raised by the revenue are general in nature and does not require any specific adjudication.

16. The Ground Nos. 23 & 24 raised by the assessee are with regard to the disallowance u/s 14A of the Act under normal provisions of the Act. In view of the smallness of the amount, the Id AR did not press these grounds. Accordingly, the Ground Nos. 23 & 24 are dismissed as not pressed in view of smallness of the amount involved thereon.

17. The Ground No. 25 raised by the assessee is with regard to disallowance u/s 14A of the Act in the computation of book profits u/s 115JB of the Act. The assessee had earned dividend income of Rs 17,83,937/- from mutual funds. The assessee had made suo moto disallowance u/s 14A of the Act by considering 10% of salary and other allowances of the Finance & Administrative Staff of the assessee and attributed the same as incurred for the purpose of earning exempt income in the form of dividend. The assessee offered Rs 1,59,870/- u/s 14A of the Act in the return of income. The Id AO applied the third limb of Rule 8D(2) of the IT Rules and computed the disallowance u/s 14A of the Act at Rs 2,64,114/- and added the same in the computation of book profits u/s 115JB of the Act. We note that the Special Bench of Delhi Tribunal in the case of ACIT vs Vireet Investment (P) Ltd reported in (2017) 82 taxmann.com 415 (Delhi.Trib.)(SB) has held as under:-

“6.22. In view of above discussion, we answer the question referred to us in favour of assessee by holding that the computation under clause (f) Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income-Tax Rules, 1962.”

Respectfully following the same, we restore the issue to the file of the Id AO to calculate the book profit u/s 115JB of the Act as per the dictum of the Hon'ble Special Bench supra. We hold that the disallowance u/s 14A of the Act should be made based on actual amounts incurred for the purpose of earning exempt income and not by placing reliance on the computation mechanism provided in Rule 8D(2) of the Rules. Therefore, the Id AO shall work out disallowance in terms of the clause (f) to Explanation 1 of Sec. 115JB of the Act independently after considering the expenses debited in the profit & loss account as mandated under the provisions of law. Accordingly, the Ground No. 25 raised by the assessee is allowed for statistical purposes.

18. The Ground No. 26 raised by the assessee is with regard to the action of the Id AO in adding back the disallowance conceived by the Id TPO in the sum of Rs 1,42,89,924/- towards adjustment to ALP in the computation of book profits u/s 115JB of the Act. This issue is now settled in favour of the assessee by the decision of the co-ordinate bench of Delhi Tribunal in the case of M/s Cash Edge India (Pvt) Ltd vs ITO in ITA No. 64/Del/2015 for Asst Year 2010-11 dated 23.9.2015 wherein it was held that :-

“36. We have considered the rival submissions and perused the material on record. It is settled law that except for adjustments provided in Explanation 1 Section 115JB(2) of the Act, no other adjustment can be made to book profits under Section 115JB of the Act. We find that that transfer pricing adjustment is not one of the adjustments contemplated under Explanation 1 Section 115JB(2) of the Act and, therefore, could not have been added back to the book profits under Section 115JB.

37. The case-law relied upon by the Ld. Sr. DR i.e. decision of the Special Bench in the case of the Tribunal in Rain Commodities (supra) does not also advance the case of the Revenue. In that case the Special Bench was considering whether the AO can alter the net profits declared by an assessee. The Special Bench has, following the decision the apex Court in Apollo Tyres and HCL Comnet (supra), inter alia, held that the AO cannot travel beyond the net profits declared by the assessee unless

(a) it is discovered that profit and loss account is not drawn up in accordance with Part II and Part III of Schedule VI of the Companies Act, or (b) the incorrect accounting policies, accounting standards have been adopted for preparing such accounts and the method/rate of depreciation has been incorrectly adopted for preparation of profit and loss account.

38. In the present case there is no allegation is the assessment order much less any finding that either that profit and loss account has not been drawn up in accordance with Part II and Part III of Schedule VI of the Companies Act, or that any incorrect accounting policies, accounting standards has been adopted for preparing such accounts or that the method/rate of depreciation has been incorrectly adopted for preparation of profit and loss account.

39. In view of aforesaid, we hold that the AO erred in adding back the transfer pricing adjustment of the book profits under Section 115JB of the Act. Accordingly, this ground of the appeal raised by the assessee is allowed and the AO is directed to exclude the transfer pricing adjustment, if such adjustment survives, from the book profits computed under Section 115JB of the Act.”

Respectfully following the said decision, we hold that the sum of Rs 1,42,89,924/- being the adjustment made to ALP of international transaction cannot be added back in the computation of book profits u/s 115JB of the Act. Accordingly, the Ground No. 26 raised by the assessee is allowed.

19. In the result, the appeal of the assessee in ITA No. 284/Kol/2016 for Asst Year 2011-12 is partly allowed for statistical purposes and the appeal of the revenue in ITA No. 485/Kol/2016 for Asst Year 2011-12 is partly allowed.

Order pronounced in the Court on 26.10.2018

Sd/-
[Aby. T. Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 26.10.2018

SB, Sr. PS

ITA Nos.284&485/Kol/2016
M/s Nomura Research Institute Financial Tech. (I) Pvt. Ltd.
(formerly Anshin Software Pvt. Ltd.
A.Yr.2011-12

Copy of the order forwarded to:

1. M/s Nomura Research Institute Financial Technologies India Pvt. Ltd.,Globsyn Crystals, Tower-1, 6th Floor, Sector-V, Salt Lake Electronics City, Kolkata-700091.
2. DCIT, Circle-2(2), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, 6th Floor, Kolkata-700069.
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches