

IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'A', BENGALURU

BEFORE SHRI. A. K. GARODIA, ACCOUNTANT MEMBER
AND
SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T(TP)A No.875/Bang/2013
(Assessment Year : 2005-06)

Deputy Commissioner of Income-tax,
Circle -11(3), Bengaluru .. Appellant

v.

M/s. EMC Software and Services (India) P. Ltd,
(Formerly known as EMC Data Storage Systems India P. Ltd)
Bagmane World Technology Center SEZ Mahadevapura,
Doddanekundi village, K. R. Puram Hobli,
Bengaluru 560 048 .. Respondent
PAN : AABCE0989Q

Cross objection No.175/Bang/2018
(In I.T(TP)A No.875/Bang/2013)
(Assessment Year : 2005-06)
(By the Assessee)

Assessee by : Shri. Suryanarayana J. Advocate
Revenue by : Shri. C. H. Sundar Rao, CIT - DR

Heard on : 08.01.2019
Pronounced on : .01.2019

ORDER

PER LALIET KUMAR, JUDICIAL MEMBER :

These are appeal and cross objection by the Revenue and the assessee respectively against the order of the CIT (A)-IV, Bengaluru, dt.13.03.2013, for the assessment year 2005-06.

02. Grounds of appeal filed by the Revenue are as under :

1. The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.
2. The CIT(A) was not justified in directing the AO to recompute the deduction allowable u/s 10A of the I.T. Act after reducing the communication expenses amounting to Rs.22,95,328/- from the total turnover also.
3. The Ld.CIT(A) ought to have appreciated that there is no provision in section 10A which requires the concerned expenses, which are required to be reduced from the export turnover as per clause (iv) of the Explanation to Section 10A to be reduced from the total turnover also.
4. The Ld.CIT(A) ought to have considered the fact that the jurisdictional High Court decision relied upon by him has not been accepted by the department and appeals have been filed before the Hon'ble Supreme Court which is still pending.
5. The learned CIT(A) erred in holding that the size, turnover of the company are deciding factors for treating a company as a comparable, and accordingly erred in excluding solutions, iGate Global Solutions Ltd., L&T Infotech Ltd., Satyam Computers Ltd., M/s Infosys Technology Ltd., M/s Flextronics Software Systems Ltd., as a comparable in the segment.
6. The Ld CIT(A) has rejected companies on the basis of Abnormal profit without defining what constitutes abnormal profit filter and how the same is determined and erred in excluding the comparable companies Exensys Software Solutions Ltd. and Thirdware Solutions Ltd.
7. The Ld. CIT(A) erred in rejecting the diminishing revenue filter used by the TPO, to exclude companies that do not reflect the normal industry trend.
8. The honorable CIT(A) erred in the computation of the margins of M/s Quintegra Solutions Ltd., by determining the same as average of margins of 6.85% and 10.68% for FY ended 30/09/2004 and 30/09/2005 respectively, without appreciating the fact that an average cannot represent the arm's length margin of any comparable company for the purpose of arm's length margin determination, and also since the same is contradictory to CIT(A)'s own decision who has upheld the rejection by the TPO of multiple year's data and use of only current year's data for the purpose of TP analysis.
9. The hon'ble CIT(A) erred in holding that the different accounting year filter, was an inappropriate filter for the purpose of comparability analysis.
10. The learned CIT(A), on the facts and circumstances of the case erred in holding that M/s Tata Elxsi Ltd., cannot be taken as comparable, being functionally different when it satisfies all the qualitative and quantitative filters applied by the TPO.
11. The learned CIT(A), on the facts and circumstances of the case erred in holding that M/s Bodhtree Consulting Ltd., cannot be taken as comparable, when the company qualifies all the qualitative and quantitative filters applied by the TPO in selection of this company as a comparable.
12. The learned CIT(A), on the facts and circumstances of the case erred in holding that M/s Geometric Software Solutions Co. Ltd., cannot be taken as comparable, when the company qualifies all the qualitative and quantitative filters applied by the TPO in selection of this company as a comparable.
13. The learned CIT(A), on the facts and circumstances of the case erred in directing inclusion of M/s VJIL Consulting Ltd., rejecting the TPO's conclusion that the company does not satisfy the qualitative filters applied for the purpose of comparability analysis and therefore is an inappropriate comparable for the purpose of determining the arm's length price.

02. Grounds of appeal filed by the Assessee are as under :

1. That the decision of the learned Commissioner of Income-tax (Appeals) – IV, Bangalore (“learned CIT(A)”) is bad in law and on facts while upholding the rejection of the Respondent’s transfer pricing documentation on the basis that the data used in the computation of the arm’s length price was not reliable.
2. That the decision of the learned CIT(A) is bad in law and on facts while upholding the learned Additional Director of Income-tax (Transfer Pricing) –I, Bangalore (‘learned Transfer Pricing Officer’ or ‘learned TPO’) approach of using data as at the time of assessment proceedings, instead of that available as on the date of preparing the transfer pricing documentation for comparable companies while determining the arm’s length price, ignoring the fact that this data was not available to the Respondent at the time of complying with the transfer pricing documentation requirements. ❄
3. That the decision of the learned CIT(A) is bad in law and on facts while upholding the learned TPO’s approach of disregarding application of multiple year/ prior year data as used by the Respondent in the transfer pricing documentation and holding that current year (i.e. Financial Year 2004-05) data for companies should be used for comparability.
4. That the decision of the learned CIT(A) is bad in law and on facts while upholding the learned TPO’s approach of upholding the rejection of comparable companies similar to the Respondent while performing the comparability analysis.
5. That the decision of the learned CIT(A) is bad in law and on facts while upholding the learned TPO’s approach of collecting selective information of the companies by exercising powers granted to him under section 133(6) of the Act that was not available to the Respondent in the public domain and relying on the same for comparability purposes.
6. That the decision of the learned CIT(A) is bad in law and on facts while upholding the TPO’s approach of ignoring the limited risk nature of the services provided by the Respondent and in not providing an appropriate adjustment towards the risk differential, even when the full- fledged entrepreneurial companies are selected as comparable companies.
7. That the decision of the learned CIT(A) is bad in law and on facts while upholding the learned TPO’s approach of modifying the nil “foreign exchange earnings” filter adopted by the Appellant to accept only those companies whose export revenues contributed at least 25% of its total revenues.
8. That the decision of the learned CIT(A) is bad in law and on facts while upholding the learned TPO’s approach of using the onsite revenue > 75% filter for exclusion of comparable companies.
9. That the learned CIT(A) ought to have held that certain companies (Infosys Technology Limited and Flextronics Software Systems Limited) fail the test of comparability, even apart from having a turnover > INR 200 crores and thus not comparable to the Respondent in respect of its software development service segment.
10. That the learned CIT(A) ought to have held that Satyam Computers Limited has unreliable data and fails the test of comparability, even apart from having a turnover > INR 200 crores and thus not comparable to the Respondent in respect of its software development service segment.
11. That the learned CIT(A) ought to have held that certain companies (Exensys Software Solutions Limited and Thirdware Solutions Limited) fail the test of comparability, even apart from having abnormally high profits and thus not comparable to the Respondent in respect of its software development services.
12. That the learned CIT(A) ought to have held that certain companies (Bodhtree Consulting Ltd and Geometric Software Solutions Co. Ltd) fail the test of comparability on account of having related party transactions > 15%, even apart from being functionally different and thus not comparable to the Respondent in respect of its software development services.
13. That the learned CIT(A) ought to have held that Four Soft Ltd fails the test of comparability on account of having related party transactions > 15% and thus not comparable to the Respondent in respect of its software development services.
14. That the learned CIT(A) ought to have held that Sankhya Infotech Limited fails the test of comparability and thus not comparable to the Respondent in respect of its software development services.
15. That the contentions of the learned Deputy Commissioner of Income-tax, Circle - 11 (3), Bangalore (‘learned Assessing Officer’ or ‘learned AO’) is bad in law and on facts while stating that the deletion of the addition on account of adjustments in arm’s length price of the international transactions and disallowance of expenses are not based on correct facts and circumstances, and established principles of law and procedures in this regard.

IT(TP)A.875/Bang/2013 – By the Revenue :

04. Ground nos.1 to 4 pertains to the direction of the CIT (A) to recomputed the deduction allowable u/s.10A of the Act, after reducing the communication expenses amounting to Rs.22,95,138/- from the total turnover also. The Ld. DR submitted that the CIT (A) was wrong in directing the AO to reduce the expenses deducted both from export turnover as well as from the total turnover for the purpose of computation of deduction u/s.10A of the Act. He further submitted that the CIT (A) had not appreciated the fact that the statute allows exclusion of such expenditure only from export turnover.

05. On the other hand the Ld. AR for the assessee supported the order of the lower authorities.

06. We have heard the rival contentions and perused the material on record. We find that this issue is put to rest by the judgment of the Hon'ble Supreme Court in the matter of CIT v. HCL Technologies Ltd [(2018) 93 taxmann.com 33], wherein the Hon'ble Supreme Court has decided the issue in favour of the assessee holding that the expenses be reduced both from the export turnover as well as from the total turnover. The Hon'ble Supreme Court in paras 20 and 21, held as under :

20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula

unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.

21. On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover.

Respectfully following the above order of the Hon'ble Supreme Court, we direct that the expenses incurred shall be deducted both from the export turnover as well as the total turnover for arriving at the deduction u/s.10A of the Act.

07. Ground no.5 of the Revenue is against the direction of the CIT (A) to exclude the five companies namely, Flextronics Software Systems Ltd, iGate Global Solutions Ltd, L & T Infotech Ltd, Satyam Computers Ltd and M/s. Infosys Technology Ltd, by applying the turnover filter of Rs.100 crore to Rs.200 crores and therefore the Revenue is in appeal before us.

08. Before us, the Ld. DR had submitted that the order of CIT (A) is required to be recalled and the matter is required to be sent back to the CIT (A) in the light of the decision of the Hon'ble Delhi High Court in the matter of Chryscapital Investment Advisors (India) P. Ltd v. DCIT [56 taxmann.com 417, and our attention was drawn to paras 32 to 36, 43 and 44

09. On the other hand, the Ld. AR has drawn our attention to the recent judgment of the Hon'ble jurisdictional High Court in the matter of Pr. CIT v. Softbrands India P. Ltd [94 taxmann.com 426]

and also in the matter of Acusis Software India P. Ltd v. ITO [98 taxmann.com 183], wherein at para 14 and 15, it had approved the filter applied by the Tribunal i.e., the turnover of ten times of both sides of the assessee's turnover.

10. In rebuttal the Ld. DR submitted that the CIT (A) had not examined the functional profile of any of these comparables and had merely excluded them on the basis of turnover filter of 1 to 200 crores. It was also contended that the profile of these companies should be examined by the CIT (A), hence matter is required to be sent back to the file of the CIT (A) with a direction to examine the functional profile of these companies,

11. We have heard the rival submissions and perused the record. The Hon'ble jurisdictional High Court in the matter of Acusis Software India p. Ltd (supra) had approved the order passed by the tribunal wherein it has applied the filter of ten times of both sides of the assessee. As this Tribunal falling within the territorial jurisdiction of the Karnataka High Court, hence it is bound by the judgment passed by High Court of Karnataka, hence we are bound to apply the ratio of Acusis Software India p. Ltd (supra), in the present matter.

12. In view of the above, this ground of the revenue appeal is required to be allowed with respect to the following comparables, namely, iGate Global Solutions Ltd (turnover 406 cr), Flextronics Software Systems Ltd (turnover 457.45 crores) and L & T Infotech Ltd (turnover Rs.562.45 crores) as the turnover of these companies

fall broadly within the range of ten times of the turnover of the assessee company. Accordingly the matter is remanded back to the file of CIT(A) with a direction to examine the functional profile of all the comparables on the touch stone of FAR and decide the comparability of these comparables, as the Ld. CIT (A) had not examined the functional profile of these companies while excluding these comparables.

13. However with respect to Satyam Computer Services (turnover 3464 cr) and Infosys Technology Ltd (turnover 6859 crores) these two companies are required to be excluded being turnover is more than ten times of the assessee. Accordingly these companies are required to be excluded from the list of comparables.

14. In the result the ground of the Revenue is partly allowed.

Ground no.6 of the Revenue and ground no.11 of the Assessee's appeal :

15. This ground raised before us is in respect of applying abnormal profit and in respect of this, our attention was drawn to the order passed by the CIT (A) at pages 33 to 35 of the paper book and also the order passed by the TPO at pages 446 to 448 of the paper book.

14. On the other hand the Ld. AR has submitted that these two companies are required to be excluded as these two companies are having abnormally high-profit. On account of merger of Exensys Software Solutions with another company namely, M/s. Holool India Ltd, and it was pointed out that this company is having

diversified field of activities including software development, products and sale of products. Our attention was also drawn to the financial information, where the segmental information with respect to software development and software products, was not available. Similar submissions were made for the other company namely Thirdware Solutions Ltd. Lastly, the ld. AR relies upon the decision in ITO v. Net Devices India P. Ltd [TS-354-ITAT-2016(Bang)-TP] Sysarris Software P. Ltd v. DCIT [67 taxmann.com 243] and ITO v. Sunquest Information Systems (India) P. Ltd [61 taxmann.com 81], wherein both Exensys Software Solutions Ltd and Thirdware Solutions Ltd. were part of the same booklet and the Tribunal after considering the profile of all these companies directed to exclude these two companies.

15. On the other hand the Ld. DR relied upon the order passed by the lower authorities.

16. We have heard the rival submissions and perused the record. The Tribunal for the same assessment year in the matter of Net Devices India p. Ltd (supra), at para 8.1 to 8.3 and 9.1 to 9.3, held as under :

*8.1 Ground No.4 is regarding exclusion of the companies having more than 50% of profit margin. The learned Departmental Representative has submitted that the CIT (Appeals) has excluded two companies viz. **Accentia Software Solutions Ltd. and Thirdware Solutions Ltd.** on the ground that these companies are having abnormal profits of more than 50%. Thus the learned Departmental Representative contended that high profits or high loss cannot be a reason for exclusion of a company in the list of comparables. He has relied upon the order of the TPO and submitted that the TPO found that these two companies are in the similar business and therefore functionally comparable with the assessee.*

8.2 On the other hand, the learned Authorised Representative of the assessee has submitted that the CIT (Appeals) has excluded these two companies by considering various facts on functional comparability as well as extra-ordinary events during the year under consideration and not merely on the basis of high profit margins. He has further submitted that the company like **Accentia Software Solutions Ltd.** is functionally different and there is an extra ordinary event of amalgamation during the year under consideration with M/s. **Honlool India Ltd.** He has referred the Annual Report of this company in support of his contention. The learned Authorised Representative has further submitted that even otherwise this company is engaged in diversified operation including software products as well as intangible assets, brands which comprise a substantial part of growth of assets. Therefore, this company cannot be considered as comparable to the assessee which is a captive service provider. In support of his contention, the learned Authorised Representative has relied upon a number of decisions of this Tribunal including the following decisions :

- i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.
- ii) MIs. Citrix R&D India Pvt. Ltd. in IT(TP)A Nos.841/Bang/2013 & 172/Bang/2013.
- iii) M/S. Symbol Technologies India Pvt. Ltd. in IT(TP)A No.391/Bang/2012.
- iv) Textron Global Technology Centre Pvt. Ltd. in IT(TP)A No.29/Bang/2012.

8.3 We have considered the rival submissions as well as relevant material on record. We note that though the CIT (Appeals) has finally concluded that this company has abnormal profit and accordingly directed the TPO/A.O to exclude the same from the set of comparables, however, as it is manifest from the Annual Report of the company that during the year under consideration this company entered into a scheme of amalgamation with M/s. **Holoool India Ltd.** The scheme of amalgamation has been sanctioned by the Honble High Court of Andhra Pradesh w.e.f. 1.4.2004 vide order dt.5.9.2005. Therefore, undisputedly there was an extra-ordinary event during the year under consideration in respect of this company. Further we find that the co-ordinate bench of this Tribunal in case of M/s. **Textron Global Technology Centre Pvt. Ltd.** in IT(TP)A No.29/Bang/2012 has considered the comparability of this company in paras 19 & 20 as under:

“Sankhya Infotech Limited (‘Sankhya’)

19. It was submitted by the learned counsel for the Assessee that Sankhya is engaged in the business of development of software products & services and training. The company focuses on the development of niche products for the transport and aviation industry. However, segmental information in relation to the above mentioned activities is not available in public domain. Therefore, as Sankhya engages itself in products and services as well as software training, it cannot be considered as a comparable of the Appellant. The products developed and owned by Sankhya are listed below:

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

- SILICONTM LMS (Training Management Information*
- SILICONTM QT (Online Assessment System)*
- SILICONTM LCMS (Learning Content Management System)*
- IRMAQTM This is an integrated resource planning, management tracking system exclusively developed for Airline operations. It is an end-to- end solution for all Flight Operations.*
- Sakai OLE This is a widely used and popular open source LMS used in many leading educational institutions and corporate. The relevant extract from the Annual report substantiating that the company also engages in different activities is reproduced below:*

"2. Activities

The company as engaged in the business of development of Software Products & Services and training. The production of software is not capable of being expressed in any generic unit and

hence 11 is riot possible to give the information as required by certain clauses of paragraphs 3.40 and 4 D of Part II of Schedule VI of the Companies Act, 1956."

The Delhi Tribunal in /TO v. Colt Technology Services India Pvt. Ltd. (judgment dated 23.10.2012 in ITA No. 6091/Del/201 I for the assessment year 2005-06) has held that the said company is not a comparable to the assessee therein which was also in the business of software development.

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

A similar view has been taken by the Tribunal in the cases as relied upon by the assessee. Accordingly, we find that this company is functionally different from the assessee which is a captive service provider. Hence we concur with the view of the CIT (Appeals) though on a different reason and direct the A.O./TPO to exclude Accentia Software Solutions Ltd. from the list of comparables.

Thirdware Solutions Pvt. Ltd.

9.1 There is no dispute that the high profit margin or loss cannot be a ground for exclusion or inclusion of a particular company in the list of comparables. The learned Authorised Representative of the assessee has submitted that this company is in the diversified activities and derive its income from sale of software license, software products apart from software development services. This company is engaged in the diversified activities of rendering application development, customer relationship management and ERP, software products. He has referred to the Annual Report of this company and submitted that this company is also engaged in the

distribution of software products and providing trunky project which include a bundle of activities such as providing software product combined with implementation and customer services. In support of his contention, he has relied upon the following decisions

i) M/s. McAfee Software (India) Pvt. Ltd. in IT(TP)A Nos.4/Bang/2012 & 1388/Bang/2011.

ii) M/s. Sunquest Information Systems (India) Pvt.Ltd. in IT(TP)A No. 1302/Bang/2012.

iii) M/S. Symbol Technologies India Pvt. Ltd. in IT(TP)A No.391/Bang/2012.

iv) Textron Global Technology Centre Pvt. Ltd. in IT(TP)A No.29/Barig/2012.

9.2 The learned Departmental Representative has submitted that the TPO has analysed the functions of this company and it was found that this company is engaged in the similar activity of providing software development services. He has relied upon the orders of the authorities below.

9.3 We have heard the rival submissions as well as considered the relevant material on record. The learned Authorised Representative of the assessee has contended that this company is having diversified activities including software product as well as trunky project. We find that as per Schedules 12 as well as 14 of the balance sheet of this company, this company has sale of license, purchase of license and purchase of AMC charges. The details of the sales in Schedule 12 and details of purchase in Schedule 14 are as under

SCHEDULE 12 : SALES	
Sale of Licence	27,202,087
Software Services	80,602,781
Export	147,425,780
Revenue from Subscription	35,939,678
SCHEDULE 14 : DETAILS OF PURCHASE	
Purchase of Licence	21,168.657
Clearing and Forwarding charges	835,754
Purchase – AMC Charges	16,893,037
Software Service Charges	17,329,999

<i>Training Expenses</i>	<i>554,296</i>
<i>Purchase others</i>	<i>0</i>

Thus it is clear from the Schedules 12 & 14 of the balance sheet of this company that this company is in trading of licenses and no separate segmental data are available. Therefore, this company cannot be considered as a good comparable to the software development services provider, companies like assessee which is a captive service provider. Accordingly, we direct the A.O./TPO to exclude this company from the list of comparables.

Therefore following the decision of the coordinate bench in ITO v. Net Devices India P. Ltd (supra), we hereby direct the TPO to exclude these two companies. Accordingly the ground raised by the Revenue in this regard is dismissed and that the assessee is allowed.

17. Ground no.7, being academic in nature is not pressed.

Ground no.8

18. In respect of this ground the Ld. DR had submitted that the CIT (A) has included six comparables, on the basis of the average of two years ending on 30.09.2004 and 30.09.2005. It was submitted that the Hon'ble Punjab & Haryana High Court in the matter of Mercer Consulting India P. Ltd [2016] 76 taxmann.com 153 (Punjab & Haryana)/[2017] 390 ITR 615 as under:

31. The Rule does not exclude from consideration the data of an entity merely because its financial year is different from the financial year of the assessee. What the Rule requires is that the data to be used in analyzing the financial results 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. Thus so long as the data relating to the financial year is available, it matters not, if the financial year followed is different. In the case before us the data relating to the relevant financial year of R. Systems International Limited is available.

32. We are, therefore, entirely in agreement with the decision of the Tribunal that if the data relating to the financial year in which the international transaction has been entered into is directly available from the annual accounts of that comparable, then it cannot be held as not passing the test of sub-rule(4) of rule 10B.

On the basis of the above, it was argued by the Ld. DR that if the comparables are following the different accounting year in comparison to assessee then the AO / TPO/ CIT (A) can deduce the corresponding accounts for the accounting year used by the assessee representing different quarter in the same accounting year.

19. It was further submitted that on the basis of rejection of the comparable by the TPO and inclusion by the CIT (A) on account of different accounting year, various other comparables would be available as the said comparable amounts have been rejected by the TPO on the basis of different accounting year.

20. The Ld. AR has relied upon the order passed by the CIT (A).

21. We have heard the rival submissions and perused the record. In our view, the otherwise valid comparables which are matching with the profile of the assessee with respect to FAR should not be rejected on the basis of its using different financial year. The results on quarterly basis are available in public domain and it should be an endeavour on the part of the TPO to recast the accounts after excluding / including the quarters based on the accounting year used by the assessee. For example, if the comparable is using the calendar month instead of financial year 1st April to 31st March then the TPO can exclude the results of the first three months and include the results of the subsequent three months

of the next English calendar year. This is in line with the decision rendered by the Hon'ble Punjab & Haryana High Court in the matter of Mercer Consulting India P. Ltd, (**390 ITR 615**). Therefore respectfully following the judgment of the Hon'ble Punjab & Haryana High Court, we allow ground nos.8 and 9 of the Revenue's appeal and direct the TPO to examine afresh in the light of the observations made above and the TPO may consider other comparables which were excluded by him on account of different accounting year as good comparable, if other parameters are fulfilled. In the result the ground of revenue is allowed for statistical purposes.

22. Ground nos.10,11 and 12 of Revenue pertains to exclusion of Bodhtree Consulting Ltd, Geometric Software Solutions Co. Ltd and Tata Elxsi Ltd.

Bodhtree Consulting Ltd :

23. It was noted hereinabove that the turnover of this comparable is only Rs.3.87 crores which is less than 1/10th of the assessee. In view thereof following the judgment of the Hon'ble jurisdictional High Court in Acusis Software India P. Ltd (supra), this ground raised by the Revenue on wrong exclusion by the CIT (A) is rejected.

Geometric Software Solutions Co. Ltd :

24. It is submitted that it specializes in providing product lifecycle management services which include software applications, component technology, product data management

and collaborative engineering. It is also engaged in the business of reselling software products and in the developing of products and thereafter licensing them. Since there is no segmental break-up available in its Annual Report for FY 2004-05 with respect to the above varied activities, it ought to remain rejected as it is functionally dissimilar to the Assessee. Thus, it is submitted that the CIT(A) rightly excluded it following the decision of this Hon'ble Tribunal in *SAP labs India P Ltd v. ACIT* (judgment dated 30.08.2010 in ITA No. 398/Bang/2008). In any event and as urged in Ground No.12 of the cross-objections, Geometric Ltd. has RPTs in excess of 15% of sales and, therefore, ought to be rejected in view of this Honble Tribunal's decisions in *24/7 Customer Pvt. Ltd.* [ITA No.227/Bang/2010] (para 13) and in the Assessee's own case for AYs 2006-07 (ITA No.1274/Bang/2010) and 2007-08 (ITA No.973/Bang/2010).

25. We have heard the rival contentions of the parties and perused the record. The Tribunal in the matter of *ABB Global Industries P. Ltd* (97 taxmann.com 475) had held as under at para 11.4.1 :

11.4.1 As regards M/s. Geometric Software Solutions Co. Ltd., the learned CIT (Appeals) has rendered a finding that this company is engaged in developing and licensing of products and product life cycle management services which are not similar to the functions of the assessee. The learned CIT (Appeals) has also observed that the revenue break up between products and services is not available and therefore directed exclusion of this company from the set of comparables. This finding of the learned CIT (Appeals) that this company is functionally dissimilar to the assessee, has

not been controverted by the learned Departmental Representative. In this view of the matter, we find no reason to interfere with the decision of the learned CIT (Appeals) in directing exclusion of this company, M/s. Geometric Software Solutions Company Ltd., from the set of comparables.:

Respectfully following the decision of the coordinate bench, we allow the ground of the assessee and reject the ground raised by the Revenue.

M/s. Tata Elxsi Ltd :

26. As regards the exclusion of **Tata Elxsi Ltd.** as being functionally dissimilar to the Assessee, the Assessee submits that the segment selected by the TPO for the purposes of comparability comprises services such as product design, design engineering and visual computing labs which are in the nature of IT enabled services and, thus, not comparable with the software development services provided by the Assessee. The CIT(A) rightly directed its exclusion by following the decision of this Hon'ble Tribunal in *Telcordia Technologies India P. Ltd v. ACIT [ITA No.7821/Mum/2011]*. in the Assessee's own case for assessment year 2006-07 (ITA No.1274/Bang/2010) held that Tata Elxsi Ltd is not functionally comparable to the Assessee. The Assessee further places reliance on the decisions of this Hon'ble Tribunal in ITO *v. Net Devices India Pvt. Ltd.* [TS-354-ITAT-2016(Bang)-TP] (paras 18.4.1 — 18.4.3), *Sysarris Software P. Ltd v. DCIT [(2016) 67 taxmann.com 243 (Bang - Trib.)]* (paras 35-37) and *ITO vs. Sunquest Information Systems (India) P. Ltd.* [(2015) 61 taxmann.com 81 (Bang - Trib.)] (paras 27 to 30) in support of its contention that Tata Elxsi Ltd. ought to remain rejected.

27. We have heard the rival contentions of the parties and perused the record. The Tribunal in the matter of ITO [v. Net Devices India Pvt. Ltd.](#) [TS-354-ITAT-2016 had held as under at para 18.4.3 :

18.4.3 We have heard the rival submissions as well as considered the relevant material on record. At the outset, we note that the functional comparability has been considered by this Tribunal in assessee's own case for the Assessment Year 2006-07 vide order dt.30.6.2015 in ITA No.1485/Bang/2010 in para 13 to 18 as under:

" 13. Having regard to the rival contentions and the material on record, we find that being the very same assessment year viz., 2006-07 in the case of M/s.Ariba Technologies India Pvt. Ltd. this Tribunal had occasion to go into the comparability of these companies with the said company and the Tribunal IT(T.P)A No.1099/Bang/2011 & C.O. No.19/Bang/2012 has held it to be functionally dissimilar from the similar activity of software development service. We find that the Tribunal, at para.12 & 13 of its order, has held as under: "12. The following were the relevant observations of the Tribunal on the aforesaid comparable companies in the case of Trilogy E-Business Software India Pvt.Ltd.(supra):

Xxxxxx Xxxxxx

17. As far as comparable company chosen by the TPO viz., Tata Elxsi Ltd., is concerned, the comparability of the aforesaid company with that of the software service provider such as the Assessee was considered by the Mumbai Bench of this Tribunal in the case of Logica Pvt.Ltd. IT (TP) 1129/Bang/2011 AY 07-08) wherein on the comparability of the aforesaid company, the Tribunal held as follows:-

"14. As far as comparable at Sl.No.6 & 24 are concerned, the comparability of the aforesaid two companies with that of the software service provider was considered by the Mumbai Bench of the Tribunal in the case of Telcordia Technologies India Private Ltd. (supra) wherein on the aforesaid two companies, the Tribunal held as follows:-

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

15. In view of the above, the ld. counsel for the assessee fairly admitted that comparable company at Sl.No.6 viz., Flextronics Software Systems Pvt. Ltd. should be taken as a comparable, while comparable at Sl.No.24 viz., Tata Elxsi Ltd. should be rejected as a comparable."

18. In view of the aforesaid decision, we hold that Tata Elxsi has to be excluded from the list of comparable chosen by the TPO.

Respectfully following the same, we direct the AO to exclude these companies from the final list of comparables."

We find that there is no change in the business activity of this company in the year under consideration in comparison to the Assessment Year 2006-07. We IT(T.P)A No.1099/Bang/2011 & C.O. No.19/Bang/2012 further note that a similar view has been taken by this Tribunal in the other cases as relied upon by the assessee pertaining to the Assessment Year 2005-

Respectfully following the decision of the coordinate bench, we reject the ground raised by the Revenue.

28. Ground no.13 of the Revenue is with respect to exclusion of VJIL consulting Ltd., by the CIT (A). In this regard, it was submitted by the Revenue that the CIT (A) has taken into account the consumable software product as well as the amount

paid by the comparable to VAT Department in UK on sales amounting to Rs.1.2 crores.

29. On the other hand the Ld. AR had submitted that the consumable software products are not in the nature of software products as required to be understood and further the comparable VJIL, in response to 133(6) proceedings had clarified that amount of Rs.1.2 crores was deposited in UK towards the VAT. It was the contention of the assessee that in UK, VAT is leviable on both sale of product as well as on the services and therefore the conclusion drawn by the CIT (A) is correct.

30. In this regard the Ld. AR relied upon the decision of the Delhi Tribunal in Qualcomm India P. Ltd v. ACIT [ITA No.5239/Del/2010, dt.10.06.2013], to support that the order passed by the CIT (A) is correct. Further the Ld. AR relies upon the decision of the Tribunal in the matter of ABB Global Industries P. Ltd (97 taxmann.com 475), to the following effect:

12.2 Per contra, the learned Authorised Representative of the assessee supported the decision of the learned CIT (Appeals) in including this company in the set of comparables and in support of the assessee's contentions placed reliance on the decision of the Delhi Bench of ITAT in the case of Qualcomm India (P.) Ltd. v. Asstt. CIT [2013] 37 taxmann.com 306/[2014] 147 ITD 17.

12.3.1 We have heard the rival contentions, perused and carefully considered the material on record; including the judicial pronouncement cited (supra). The learned CIT (Appeals), in the impugned order, has observed that the TPO, after selecting this company as a comparable in the show cause notice has rejected this company in the final order, without assigning any proper

reasons. The only reason given by the TPO for rejecting this company is that the company has paid substantial amount as VAT, which indicated that this company is not into software development services. The learned CIT (Appeals) held the aforesaid observation of the TPO to be factually incorrect, as the VAT has been paid in UK and not in India. In this view of the matter, the learned CIT (Appeals) has held this company to be a comparable company.

12.3.2 In the decision in the case of Qualcomm India (P.) Ltd. (supra), cited by the learned Authorised Representative, the Delhi Tribunal has rendered a finding that this company i.e. VJIL Consulting Ltd., is predominantly an exporter of software development services. Though this decision is for Assessment Year 2006-07, it does support the findings rendered by the CIT (Appeals) in the case on hand. Before us, Revenue has not brought on record any evidence to controvert the same. In this factual and legal matrix of the case, we find no reason to interfere with or deviate from the decision of the learned CIT (Appeals) in including this company, VJIL Consulting Ltd., in the final set of comparables.

31. We have heard the rival contentions and perused the record. At page 323 of the paper book, the TPO had discussed the matter of VJIL and in Schedule F, under the inventories, the amount of Rs.3,30,69,246/- is mentioned against consumables (computer software). Under the heading 'Administrative & Selling Expenses', VAT on sales is mentioned as Rs.1,19,40,117/-. On the basis of this the TPO has not considered this company as a good comparable, whereas the CIT (A) in para 5.151, at page.49, had rejected the case of TPO by observing that the VAT might indicate sales and there was no evidence of sale of the product.

32. In our view the CIT (A) should have undertaken some elaborate exercise like calling upon the comparable company,

namely VJIL to submit a categorical report to show whether the company is into sale of software product or not. Further we are in agreement with the contention that merely because the VAT is chargeable for sale of product and on services (both) and hence mentioning of VAT on sales, would not reflect the amount was actually paid on sale of product and was only paid on account of services. On both the aspects the necessary response should be sought by the CIT (A) by exercising his power u/s.133(6) of calling upon VJIL to disclose whether it is into sale of product or provider of services. We may point out that the coordinate bench in the matter of ABB Global Industries, had not examined these aspect while passing the order. If on enquiry it is found that it is into sale of product, then this comparable is required to be excluded, otherwise it is to be included. In view of the above, this ground of the Revenue is allowed for statistical purpose.

Assessee's C O :

33. Re. Ground No.14 in the cross objections: The Assessee submits that one company, namely, Sankhya Infotech Limited ('Sankhya' for short), selected by the TPO and retained by the CIT(A), ought to stand rejected as it is not functionally comparable to it. The said company is engaged in the business of development of software products as well as services and training. Further, Sankhya focuses on the development of niche products for the transport and aviation industry. However, segmental information in relation to the above

activities is not available in the public domain. Therefore, as Sankhya engages itself in products and services as well as software training, it cannot be considered as a comparable of the Assessee.

The products developed and owned by Sankhya are Listed below:

SILICONTM Training Suite of Products

The products suite is a comprehensive enterprise wide training platform that covers the entire spectrum of training in a paperless environment. It comprises of four products:

- SILICONTM TMIS (Training Management Information System)
- SILICONTM LMS (Learning Management System)
- SILICONTM QT (Online Assessment System)
- SILICONTM LCMS (Learning Content Management System)

IRMAOTM

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

Sakai CLE

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

2. Activities

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

Further, in support its contention that Sankhya is not functionally comparable, reliance is placed by the Assessee on the decisions of this Hon'ble Tribunal in ITO [v. Net Devices India Pvt. Ltd.](#) [TS-354-ITAT-2016(Bang)-TP] (paras 18.1.1 — 18.1.3 at pages 33-35), *Sysarris Software P. Ltd v. DCIT* [(2016) 67 [taxmann.com](#) 243 (Bang - Trib.)] (paras 22-24 at pages 7-8) and *ITO vs. Sunquest Information Systems (India) P. Ltd.* [(2015) 61 [taxmann.com](#) 81 (Bang - Trib.)] (paras 19- 20 at page 7).

34. The Ld. DR relies upon the order passed by the lower authorities.

35. We have heard the rival contention of the parties and perused the record. This comparable was considered by the Tribunal in the matter of *Net Devices India P. Ltd* [ITA.1099/Bang/2011, dt.25.05.2016 for the same assessment year]. In para 18.1.3 it was held as under :

18.1.3 We have considered the rival submissions as well as relevant material on record. At the outset, we note that the functional comparability of this company has been examined by the Tribunal in a series of the cases as relied upon by the learned Authorised Representative of the assessee. In the case of ITO Vs. M/s. Sunquest Information Systems (India) Pvt. Ltd. (IT(TP)A No.1302/Bang/2011

& 92/Bang/2012), the Tribunal has considered and decided an identical issue in paras 19 & 20 as under :

" *Sankhya Infotech Limited ('Sankhya')*

19. It was submitted by the learned counsel for the Assessee that Sankhya is engaged in the business of development of software products & services and training. The company focuses on the development of niche products for the transport and aviation industry. However, segmental information in relation to the above mentioned activities is not available in public domain. Therefore, as Sankhya engages itself in products and services as well as software training, it cannot be IT(T.P)A No.1099/Bang/2011 & C.O. No.19/Bang/2012 considered as a comparable of the Appellant. The products developed and owned by Sankhya are listed below:

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

SILICONTM LMS (Training Management Information

- *SILICON TM QT (Online Assessment System)*

- *SILICONTM LCMS (Learning Content Management System)*

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

- *Sakai CLE* : This is a widely used and popular open source LMS used in many leading educational institutions and corporate. The relevant extract from the Annual report substantiating that the company also engages in different activities is reproduced below: "2. *Activities* The company as engaged in the business of development of Software Products & Services and training. The production of software is not capable of being expressed in any generic unit and hence 11 is riot possible to give the information as required by certain clauses of paragraphs 3.4C and 4 D of Part II of Schedule VI of the Companies Act, 1956."

The Delhi Tribunal in [*ITO v. Colt Technology Services India Pvt. Ltd.*](#) (judgment dated 23.10.2012 in ITA No. 6091/Del/2011 for the

assessment year 2005-06) has held that the said company is not a comparable to the assessee therein which was also in the business of software development.

20. The submissions made by the learned counsel for the Assessee are considered. The activities set out above and the decision of the Delhi ITAT rendered in the context of a software development company such as the Assessee makes it amply clear that this company Sankhya cannot be regarded as a comparable. The same is directed to be excluded from the list of comparable companies." A similar view has been taken by the Tribunal in the other decisions as relied upon by the ld. A.R. Following the earlier order of the Tribunal where it was found that this company is engaged in the business of development of software products and services as well as training, it cannot be considered as a good comparable of software development services provider. Accordingly, we direct the A.O/TPO to exclude this company from the list of comparables.

Following the decision of the coordinate bench, we direct the TPO to exclude this company from the list of comparables.

36. The assessee has not pressed the ground pertaining to Melstar Information Technology Ltd, Hence this ground is not adjudicated by the Tribunal.

37. Ground no 13 regarding exclusion of foursoft Ltd, on the ground that it fails the RPT filter.

In this regard the Ld. AR brought to our notice the binding decision of the Tribunal in the matter of ACI Worldwide Solutions P. Ltd, to the following effect :

09. We have heard the rival contentions and perused the material on record. Recently this Tribunal in the matter of ACI Worldwide Solutions P. Ltd (IT(TP)A.262/Bang/2015, dt.26.07.2017, has extensively dealt with the issue of RPT filter, to the following effect :

“12. We have heard the rival contentions and perused the record. We would like to bring on record that the assessee has not raised the objection with regard to RPT either at the stage of TPO or before the DRP. Therefore, the DRP did not have the occasion to examine the RPT of L & T Ltd, with its other related parties. Nonetheless, the Tribunal in its order in *Electronics for Imaging India Ltd (supra)*, has not disputed that RPT of L & T Ltd was 18.66% and therefore, in para 65 of the order has directed to apply 15% of RPT in respect of all comparables. 12. Further we notice Bengaluru ITAT in a recent decision in the matter of *SunGard Solutions (India) P. Ltd [IT(TP)A.1041, 1379, 1106/Bang/2011, dt.28.04.2017]* has held in Para 5 as under:

5. RPT filter of 0%:- We have heard the ld. AR as well as ld. DR and considered the relevant material on record. The TPO applied the filter of 25% of RPT while selecting the comparables. Whereas the CIT(A) has applied a filter of 0% RPT. We find that 0% related party transaction is a impossible situation and therefore if the said filter is applied then the comparable companies will not be available for determining the arms length price. Thus to avoid this practical difficulty of selecting the comparable companies this Tribunal in a series of decisions have taken a view that a tolerance range of related party transaction can be considered from 5% to 25% depending upon the facts and circumstances of each case particularly the availability of the comparable companies. In ordinary circumstances when there is no difficulty of selecting the comparable companies the tolerance range of 15% of related party is considered to be proper. Only in extreme and exceptional circumstances when the comparable companies are not easily available or found then this tolerance range is relaxed up to 25%. Therefore in the case of the assessee where neither the TPO nor the assessee has made out a case of exceptional difficulty in searching the comparable companies then the normal tolerance range of 15% shall be taken as proper. Hence we set aside the order of the CIT(A) qua this issue of related party transaction filter and also modify the order of the TPO on this issue and hold that 15% tolerance range of related party is reasonable and proper in the case of the assessee.

13. In our view, the RPT has no where been defined in the IT Act or in the Rules. The Delhi Tribunal, while deciding the RPT filter of 25% has relied upon the definition of associate enterprises, which in view of the Tribunal was akin to RPT (related party transaction) and further relied upon the definition of ‘interested

person' given u/s.40A(2)(b) of the Act. The Transfer Pricing chapter was introduced under the Act, for the purpose of preventing the fiscal evasion or avoidance of tax and is a complete code in itself . As per Rule 10B(2), the FAR (Functions, Assets and Risk assumed) analysis is to carried out for comparable company viz a viz the tested company. If the FAR of the tested party as well as the comparable company are comparable, then only the ALP of the tested party is required to be determined in relation to the international transactions. However, for the purpose of finding a suitable comparable efforts should be made by the TPO to iron-out or minimise the differences if any between the comparable and tested party. It is an admitted position, in some case, that if the transaction is between the two related parties, then the prices can be controlled and the transaction will lose its character of being an uncontrolled transaction.

14. An "Associated Enterprise" is defined u/s.92A under the Income-tax Act, 1961, as under :

(1) For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, associated enterprise, in relation to another enterprise, means an enterprise

(a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise ; or

(b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

(2) For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year,

(a) one enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent. of the voting power in the other enterprise ; or

(b) any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent. of the voting power in each of such enterprises ; or

(c) a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent. of the book value of the total assets of the other enterprise ; or

(d) one enterprise guarantees not less than ten per cent. of the total borrowings of the other enterprise ; or

(e) more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise ; or

(f) more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons ; or

(g) the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights ; or

(h) ninety per cent. or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise ; or

(i) the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise ; or

(j) where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual ; or

(k) where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided

family, or by a relative of a member of such Hindu undivided family, or jointly by such member and his relative ; or

(l) where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent. interest in such firm, association of persons or body of individuals ; or

(m) there exists between the two enterprises, any relationship of mutual interest, as may be prescribed.

15. whereas the "Related Party" is defined u/s.2(76) of the Companies Act, 2013, as under :

(76) "related party", with reference to a company, means-

(i) a director or his relative ;

(ii) a key managerial personnel or his relative ;

(iii) a firm, in which a director, manager or his relative is a partner ;

(iv) a private company in which a director or manager is a member or director ;

(v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. of its paid-up share capital ;

(vi) any body corporate whose board of directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager ;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act :

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity ;

(viii) any company which is-

(A) a holding, subsidiary or an associate company of such company ; or

(B) a subsidiary of a holding company to which it is also a subsidiary ;

(ix) such other person as may be prescribed ;

16. The term “relative” referred in the definition of the term “Related Party” is defined in Section 2(77) of the Companies Act, 2013, as under:

(77) "relative", with reference to any person, means any one who is related to another, if-

(i) they are members of a Hindu Undivided Family ;

(ii) they are husband and wife ; or

(iii) one person is related to the other in such manner as may be prescribed ;

On a perusal of the above definitions, the two enterprises are considered to be associated enterprises if one enterprise holds more than 26% of the shares in the other or one enterprise guarantees not less than 10% of the total borrowings of the other enterprise, or there is a commonality of the board members or board of directors. Thus the concept of an associated enterprise was brought in to address the management control of one enterprise with that of the other enterprise with whom the international transactions are being entered, whereas the term “related party transactions” is of wider import and it is working on transaction level instead of managing control level

Under the Companies Act, 2013, related party transaction requires the mandatory disclosure in the financial statements of the company. Therefore in our view the same parameters of 26% of share holding should not be applied for eliminating the RPT i.e fixing the RPT as 25%.

Therefore, keeping the above said in mind, for many years, the RPT filter had been adopted by the TPOs to exclude the otherwise comparable company from the list of comparables, if the RPT was found to be more than 25%. Theoretically, 0% RPT filter adopted by the DRP is correct, but with a view to appreciate the practical difficulties in finding out the comparable, the RPT filter was relaxed in some matters by the Tribunal to the extent of 25% and in some matters, it was relaxed up to 15%. In our view, a balanced view is required to be adopted and when sufficient number of comparables are available, then the RPT filter should be adopted at 15% otherwise it can be relaxed for 25% . Recently, there is a change in law (CBDT issued in rules on multiyear data and range concept after passing of Finance Act 2014) which requires that there should be a minimum of six comparables available for the purpose of

determining the ALP. Though the said amendment is prospective nature, but taking clue from the wisdom of the legislature, we deem it appropriate if more than six comparables are available, then 15% RPT filter should be applied, but if the comparables after applying the 15% RPT filter is less than six, then the RPT filter should be brought up from 15% to 25%.

In the present case, as most of the comparables taken by the TPO were directed to be deleted by the tribunal, therefore number of comparables available after giving effect to the order of the tribunal would be less than 6, therefore We direct the TPO to apply RPT filter of 25% on all comparable instead of 15% and find out the fresh comparables, which are otherwise functionally comparable with that of the assessee.”

In view of the above the Ld. AR submitted that this matter should be sent back to the TPO for examining afresh in the light of the decision of this Tribunal.

38. Per contra the Ld. DR relied upon the order passed by the lower authorities.

39. We have heard the rival contentions and perused the material on record. In view of the finding recorded by the Tribunal in the matter of ACI Worldwide to the file of the TPO to apply the ratio of the said decision on the facts of the present case after considering the RPT of the comparable. Hence the ground raised by the assessee is partly allowed.

40. No other ground was raised by the revenue in its appeal and similarly grounds raised by the assessee are already been adjudicated while deciding the appeal of revenue, beside those no other ground was raised by the assessee.

41. In the result, appeal of the Revenue is partly allowed and the cross objection of the assessee is partly allowed.

Order pronounced in the open court on ____ day of January, 2019.

(A. K. GARODIA)
ACCOUNTANT MEMBER

(LALIET KUMAR)
JUDICIAL MEMBER

Bengaluru

Dated : 01.2019

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By order

Assistant Registrar
Income Tax Appellate Tribunal,
Bangalore.